NEW PHOENIX CENTER STUDY FINDS ANALYTICAL PROBLEMS WITH FTC’S ADVANCE NOTICE OF PROPOSED RULEMAKING ON “COMMERCIAL SERVICE AND DATA SECURITY”

Given the unmanageable scope of the inquiry, it seems likely that the FTC may have bitten off more than it can chew.

WASHINGTON, D.C. — Long-frustrated with a perceived lack of success with case-by-case antitrust enforcement, it is no secret that Federal Trade Commission Chair Lina Khan wants to reinvigorate the Commission’s dormant rulemaking powers. To this end, on August 11, 2022, the Commission released an Advance Notice of Proposed Rulemaking (“ANPR”) pursuant to Section 18 of the Federal Trade Commission Act to start the process to implement a sweeping set of rules to govern “Commercial Surveillance and Data Security.” Rather that focus on a discrete set of subjects manageable under any reasonable estimate of Chair Khan’s expected tenure, however, the ANPR asks some ninety-five questions on a wide range of issues, producing a document that, as FTC Commissioner Noah Phillips astutely noted, “addresses too many topics to be coherent.” As a result, given the ambitious and unmanageable scope of the inquiry, several parts of the ANPR are likely to pose serious problems with the FTC’s regulatory effort.

In a new analysis released today entitled Biting Off More Than It Can Chew? Some Thoughts On The FTC’s Advance Notice Of Proposed Rulemaking On “Commercial Surveillance And Data Security”, Phoenix Center President Lawrence J. Spiwak reviews some of the legal and economic shortcomings with the ANPR. Mr. Spiwak begins his analysis by detailing the applicable statutory requirements for FTC rulemaking. Next, Mr. Spiwak highlights several concerns with the FTC’s ambitious ANPR, including the lack of cost/benefit analysis, problems with adequate notice, a disregard of the FTC’s 1980 Policy Statement on Unfairness without explanation, a disregard of both substantive and jurisdictional statutory constraints, and no consideration of the “major questions” doctrine.

“Chair Kahn plainly wants to transform the FTC but the ANPR’s broad and poorly-specified agenda may stand in her way. A more targeted approach—choosing a few issues that may have bipartisan support, might be more productive and a better use of FTC resources,” says study author Phoenix Center President Lawrence J. Spiwak. “Whether Chair Kahn has bit off more than she can chew remains an open question, but one thing is certainly clear: Chair Khan’s appetite for regulation is insatiable, and the ANPR represents one big bite towards this end.”

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The Phoenix Center is a non-profit 501(c)(3) organization that studies broad public-policy issues related to governance, social and economic conditions, with a particular emphasis on the law and economics of the digital age.