



Office of Commissioner
Andrew N. Ferguson

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Concurring Statement of Commissioner Andrew N. Ferguson

Surveillance Pricing Intermediaries
Matter Number P246202
July 23, 2024

All Americans generate tremendous amounts of personal data online. These data often include information that reflects, or from which can be gleaned, some of our most intimate details—our identities, interests, locations, credit histories, medical conditions, sexual interests, and religious and political views. Consumers are generally unaware that merchants and brokers are gathering those data. And those who are aware generally have no idea how and to whom those data are packaged and sold, or how they are used.

Today, the Commission issues orders pursuant to Section 6(b) of the Federal Trade Commission Act¹ to find the answers to those questions, at least in part. We have ordered companies to turn over documents and information on how consumers' private data are used to engage in personalized pricing, which the orders describe as “surveillance pricing.”² This practice involves the use of personal data to charge different consumers different prices for the same product. This practice is ancient and commonplace for many products and services. The prices of insurance policies or of credit, for example, necessarily turn on a consumer's personal details because the price must reflect the risk of providing the good or service to the consumer. But the massive trove of personal data we generate online has made it possible for merchants to personalize prices for goods that Americans would not usually expect to vary from person to person. That is what the 6(b) orders will allow us to examine.

These orders are not an enforcement action, and it does not matter whether the 6(b) study reveals illegal conduct. One of the most important duties with which Congress has entrusted us is studying markets and industries and reporting to the public and Congress what we learn. “The primary purpose of these general investigations is to reveal, rather than to remedy”³ These studies may inform future Commission enforcement actions, but they need not. Our 6(b) studies

¹ 15 U.S.C. § 46(b).

² Calling the practice of personalized pricing “surveillance pricing” is an unfortunate exercise in question begging. It suggests something nefarious is afoot, which is precisely what we are issuing the 6(b) orders to discover. But this unnecessary exercise in political signaling should not stop us from investigating the practice.

³ Paul Rand Dixon, *The Federal Trade Commission: Its Fact Finding Responsibilities and Powers*, 46 Marq. L. Rev. 17, 19 (1962).

have proven useful to state and federal policymakers in the past even when they did not reveal any illegal activity.⁴

I agree with Commissioner Holyoak that the Commission must swiftly bring to a conclusion the ongoing 6(b) study into the business practices of PBMs,⁵ and I have urged the Commission to go to court if the recipients of those 6(b) orders are unlawfully delaying compliance.⁶ But neither the PBM 6(b) study nor today's personalized pricing 6(b) study are, in my view, a drain on our resources. That is the sort of thing Congress has told us to do. The drain is the incredible volume of rulemaking the majority has undertaken.⁷ Many of these rules are unlawful,⁸ and the pace of rulemaking is quickening as we approach the presidential election. I do not believe, however, that the majority's misplaced focus on rulemaking should distract us from the important duties that Congress has conferred on us in Section 6(b).

Technology moves faster than government. There is no time to delay a study on personalized pricing if we hope to investigate the practice at its nascency—or, if the practice is already pervasive, to catch up on it. Congress and the American people should be made aware of whether and how consumers' private data may be used to affect their pocketbooks. Even if this practice does not violate any existing law, consumers may well see personalized pricing as unfair or even manipulative, and it may undermine their trust in the digital marketplace. Similarly, Congress and state legislatures will value the results of this study as they consider changes to our privacy laws.

I therefore concur in the 6(b) orders.

⁴ For example, the Commission's Report on the Meatpacking Industry led to the enactment of the Packers and Stockyard Act of 1921, the Chain Stores Report ultimately led to the Robinson-Patman Act of 1936, and the 1977 Prescription Drug Study aided comment on draft legislation and support for an investigation into and successful challenges to state drug substitution laws. Office of Policy Planning, Fed. Trade Comm'n, History of Section 6 Report-Writing at the Federal Trade Commission at 7, 8, 63–64 (April 1981); see also Dixon, *supra* note 3, at 19 (discussing legislation enacted in the wake of Commission investigations, including the Packers and Stockyards Act, the Grain Futures Act, the Radio Act of 1927, and the Communications Act of 1934).

⁵ Melissa Holyoak, Comm'r, Fed. Trade Comm'n, Concurring Statement Regarding Surveillance Pricing Intermediaries, Matter Number P246202 (July 19, 2024).

⁶ Andrew N. Ferguson, Comm'r, Fed. Trade Comm'n, Concurring Statement Regarding the Pharmacy Benefit Managers Interim Staff Report, Matter Number P221200 at 3–4 (July 9, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/Ferguson-Statement-Pharmacy-Benefit-Managers-Report.pdf.

⁷ See, e.g., *id.* at 4.

⁸ Andrew N. Ferguson, Comm'r, Fed. Trade Comm'n, Joined by Melissa Holyoak, Comm'r, Fed. Trade Comm'n, Dissenting Statement In the Matter of the Non-Compete Clause Rule, Matter Number P201200 (June 28, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-noncompete-dissent.pdf; Melissa Holyoak, Comm'r, Fed. Trade Comm'n, Joined by Andrew N. Ferguson, Comm'r, Fed. Trade Comm'n, Dissenting Statement In the Matter of the Non-Compete Clause Rule, Matter Number P201200 (June 28, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/2024-6-28-commissioner-holyoak-nc.pdf; Melissa Holyoak, Comm'r, Fed. Trade Comm'n, Joined by Andrew N. Ferguson, Comm'r, Fed. Trade Comm'n, Dissenting Statement Regarding Health Breach Notification Rule, Matter Number P205405 (Apr. 26, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/p205405_hbmr_mhstmt_0.pdf.