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In the Matter of

The “Sharing” Economy: Issues Facing Platforms, Participants, and Regulators
A Federal Trade Commission Workshop

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We commend the Federal Trade Commission for holding this workshop,³ and for its recent advocacy of ride-sharing services like Uber, Lyft and Sidecar with transportation regulators in the District of Columbia, Chicago, Colorado and Alaska.⁴ Such efforts represent the FTC at its best, advocating on behalf of consumers against laws that protect monopolies and the politically powerful by choking new entrants into traditionally stagnant markets. If anything, we believe that the FTC should do far more “advocacy” work — and that the “sharing economy” is, indeed, the lowest fruit to pick – the best cluster of issues around which to build a revived, and sustainable long-term advocacy program.

Sharing Economy Services

“Sharing economy” services offer not only potentially lower prices and innovative features, but also a far more efficient allocation of limited resources compared to existing platforms and technological solutions to seemingly intractable consumer protection problems. Uber, for example, has applied the two-sided rating system pioneered by sites like eBay in the 1990s to the previously anonymous relationship between driver and passenger, giving both an incentive to behave better, and allowing both to get a sense of the reliability and/or trustworthiness of the other. This seemingly small feature alone has profound social justice implications, most notably for young black men in urban areas, who have long found it difficult or impossible to hail taxi cabs, especially at night. On Uber, they are judged not on the “color of their skin,” but on the “content of their character” — or at least, the next best thing: their history of past interactions

³ Fed. Trade Comm’n, *Press Release: FTC to Examine Competition, Consumer Protection, and Economic Issues Raised by the Sharing Economy at June Workshop* (Apr. 17, 2015), available at <https://www.ftc.gov/news-events/press-releases/2015/04/ftc-examine-competition-consumer-protection-economic-issues>; see also Fed Trade Comm’n, *The “Sharing” Economy: Issues Facing Platforms, Participants, and Regulators; A Federal Trade Commission Workshop* (June 9, 2015) [hereinafter “Request for Comment” or “RFC”], available at <https://www.ftc.gov/system/files/attachments/press-releases/ftc-examine-competition-consumer-protection-economic-issues-raised-sharing-economy-june-workshop/150416economyworkshop.pdf>.

⁴ See Fed. Trade Comm’n, *Staff Comments Before the District of Columbia Taxicab Commission Regarding Second Proposed Rulemakings Regarding Chs. 12, 14, & 16 of Title 31* (June 7, 2013), available at <http://www.ftc.gov/policy/policy-actions/advocacy-filings/2013/06/ftc-staffcomments-district-columbia-taxicab>; Fed. Trade Comm’n, *Letter to Mr. Brendan Reilly, Alderman – 42nd Ward, City Council of Chicago, Illinois, Regarding Proposed Ordinance O2014-1367* (Apr. 15, 2014), available at https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-honorable-brendan-reilly-concerning-chicago-proposed-ordinance-02014-1367/140421chicagoridesharing.pdf; Fed. Trade Comm’n, *Letter to The Honorable Debbie Ossiander - Assembly Member, Seat A, Municipality of Anchorage, Regarding AO NO. 2013-36* (Apr. 19, 2013), available at https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-anchorage-assembly-member-debbie-ossiander-concerning-ao-no.2013-36-proposing-changes-regulatory-framework-licensing-and-permitting-taxicabs-limousines-and/130426anchoragecomment.pdf; Fed. Trade Comm’n, *Staff Comments Before the Colorado Public Utilities Commission In The Matter of The Proposed Rules Regulating Transportation By Motor Vehicle, 4 Code of Colorado Regulations 723-6, Docket No. 13R-0009TR* (Mar. 6, 2013), available at https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-colorado-public-utilities-commission-concerning-proposed-rulemaking-passenger/130703coloradopublicutilities.pdf.

with other Uber drivers.⁵ This is just one example of the potential of Sharing Economy services to improve the human condition.

For all these reasons, and many more related to a host of other creative new business models, sharing economy services promise to create enormous increases in consumer welfare. But these gains often come at the expense of entrenched incumbents, who typically seek out protectionist measures from local and state governments to prevent their markets from being disrupted by “sharing economy” services. The FTC can play a vital role as a counterweight to such regulatory capture.

The FTC’s Advocacy around Internet/Sharing Services Has Been Limited

We must note, however, how limited the FTC’s Internet-related competition advocacy efforts have been in the last decade — and how late the Commission is to the “sharing economy” party. AirBnB was founded in 2008,⁶ and the FTC has done nothing to advocate on behalf of such services against efforts by incumbent hotels to stifle their entry and growth. Uber was founded in March 2009 and launched its app in June 2010.⁷ These and other sharing companies began battling with local regulators almost immediately upon the launch of their products. Yet not until 2013 did the FTC begin competition work in this area — and its work has been extremely sparse, totaling a mere 4 filings, by our count. By comparison, for example, since 2009, the FTC has brought 55 privacy consumer protection cases, 56 data security cases, and 105 online advertising and marketing cases.⁸ The FTC has plenty of time and resources to sue, it seems (including against a great many practices that are, at worst, ambiguous in their net effects, and where it is not clear that FTC intervention will do consumers more good than harm) but very little to advocate against regulation that clearly hurts consumers.

In fact, it is difficult to identify what the FTC has actually done in advocacy related to the “sharing economy” or the Internet more generally, because the FTC’s website offers nothing more than a list of all its competition advocacy outputs, with a keyword filter tool that appears only to search the title of each document — rendering it effectively useless.⁹ FTC.gov helpfully breaks

⁵ Latoya Peterson, *Uber: when cabs whiz by, it’s a pick me up*, WASHINGTON POST BLOG (Sept. 8, 2012), http://www.washingtonpost.com/blogs/therootdc/post/uber-when-cabs-whiz-by-its-a-pick-me-up/2012/09/28/06a41f0c-082f-11e2-858a-5311df86abo4_blog.html.

⁶ See *About Us*, AIRBNB (last visited May 26, 2015), <https://www.airbnb.com/about/about-us>.

⁷ See Travis Kalanick, *Uber’s Founding*, UBER (Dec. 22, 2010), <http://blog.uber.com/2010/12/22/ubers-founding/>.

⁸ See Fed. Trade Comm’n, *Cases and Proceedings: Advanced Search* (enter “January 1, 2009” into “Updated Date: Start Date” and chosen category in “Consumer Protection Topics”) (last visited May 26, 2015) <https://www.ftc.gov/enforcement/cases-proceedings/advanced-search>.

⁹ See *Advocacy Filings*, FTC (last visited May 26, 2015), <https://www.ftc.gov/policy/advocacy/advocacy-filings>. Notably,

down the enforcement work of both the Bureau of Competition and the Bureau of Consumer Protection into conceptual categories, with thematic descriptions for each,¹⁰ but offers no such breakdown for its advocacy work. The landing page for the FTC's advocacy work offers a mere four sentences of description, which we reprint here in their entirety to convey just how little attention the FTC's website gives to the FTC's advocacy role:

When courts, government offices, or other organizations consider cases or policy decisions that affect consumers or competition, the FTC may offer insight through amicus briefs or advocacy letters. In these matters, the FTC provides its expertise and advocates for policies that protect consumers and promote competition.

In addition, companies, industry groups, consumer organizations, and others petition the FTC to approve merger remedies, and to revise rule-makings, initiate investigations, or take other action.

The Office of Policy Planning helps to guide the agency's advocacy and policy work and the Office of General Counsel's amicus briefs provide the courts with the agency's perspective on various issues.¹¹

That four-sentence description is essentially all the FTC has to say about its advocacy work *in general* (not even particular to Internet issues) on the website — at least, all that most readers will ever find, unless they take the time to dig into the FTC's advocacy filings. This brevity speaks volumes, we fear, about the relative importance of advocacy inside the FTC.

Understanding the FTC's Past Advocacy Efforts

So who at the FTC actually *does* advocacy work? That's not clear either. Because the FTC's budget requests do not clearly break out competition advocacy as a separate category, it is difficult to tell how much of the FTC's resources go to this area, but the percentage appears to be in the very low single digits, and possibly less than 1%.¹² The Office of Policy Planning (OPP)

FTC.gov's index page for enforcement actions, <https://www.ftc.gov/enforcement/cases-proceedings>, offers an advanced search tool, <https://www.ftc.gov/enforcement/cases-proceedings/advanced-search>, while the FTC's index pages of advocacy filings offers no such tool.

¹⁰ See, e.g., Fed. Trade Comm'n, *Enforcing Privacy Promises* (last visited May 26, 2015), <https://www.ftc.gov/news-events/media-resources/protecting-consumer-privacy/enforcing-privacy-promises>

¹¹ Fed. Trade Comm'n, *Policy: Advocacy* (last visited May 26, 2015), <https://www.ftc.gov/policy/advocacy>.

¹² See Fed. Trade Comm'n, *Fiscal Year 2016 Congressional Budget Justification* (Feb. 2, 2015), available at <https://www.ftc.gov/system/files/documents/reports/fy-2016-congressional-budget-justification/2016-cbj.pdf>. The FTC breaks

apparently has a staff of just fifteen: three directors, eleven attorney advisors, and one support staffer.¹³ The Bureau of Consumer Protection has as many internal administrative groupings — eight divisions and seven field offices — as OPP has staffers.

What we *can* measure is the FTC's outputs in this area, which have been few and far between since 2004, at least related to the Internet or emerging technologies. During the first Bush Administration, under Chairman Timothy Muris, the FTC created the Internet Task Force, which pursued a concerted strategy¹⁴ to advocate against barriers to e-commerce at the state level in a variety of industries, most notably online sales of contact lenses,¹⁵ direct-to-home shipments

down its work into two major objectives: Protect Consumers (638 FTEs and \$165,879,000 or 53.65% of the FTC's total budget request of \$309,206,000) and Maintain Competition (538 FTEs and \$127,121,000 or 43.36%). Each of these objectives is broken into three sub-objectives. Competition advocacy presumably falls into Objective 2.2: ("Engage in effective research and stakeholder outreach to promote competition, advance its understanding, and create awareness of its benefits to consumers"), for which the FTC requested 47 FTEs and 11,861,000. (3.87% of the total budget). The budget request breaks down work in a chart with objectives in columns and functions in rows, listing "Antitrust Policy Analysis" and "Other Direct," each with 4 FTEs under Objective 2.2. "Competition advocacy" is included under "Other Direct," along with seven other functions. Together, these functions have 20 FTEs and \$3,451,000 (1.11% of the total budget). "Economic Support of Competition Advocacy" is included under "Antitrust Policy Analysis," and merits a one-sentence description, along with "Economic Studies of Competition in Markets," which merits four (much longer) sentences. Together, these functions have 7 FTEs and a budget of \$1,151,000 (0.37% of the total budget). See *id.* at 2, 38, 143.

¹³ Fed. Trade Comm'n, *Office of Policy Planning Organizational Chart* (Feb. 1, 2015), available at https://www.ftc.gov/system/files/attachments/office-policy-planning/opp-org-chart_1.pdf.

¹⁴ See, e.g., FED. TRADE COMM'N OFFICE OF POL'Y PLANNING, REPORT OF THE STATE ACTION TASK FORCE 66-73 (Sept. 2003), available at https://www.ftc.gov/sites/default/files/documents/advocacy_documents/report-state-action-task-force/stateactionreport.pdf.

¹⁵ See FED. TRADE COMM'N, THE STRENGTH OF COMPETITION IN THE SALE OF RX CONTACT LENSES: AN FTC STUDY (Feb. 2005), available at https://www.ftc.gov/sites/default/files/documents/advocacy_documents/strength-competition-sale-rx-contact-lenses-ftc-study/050214contactlensrpt.pdf; FED. TRADE COMM'N, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: CONTACT LENSES (Mar. 2004), available at https://www.ftc.gov/sites/default/files/documents/advocacy_documents/possible-anticompetitive-barriers-e-commerce-contact-lenses-report-staff-ftc/040329clreportfinal.pdf; Fed. Trade Comm'n, *Letter to Representative Doug Matayo Regarding Arkansas HB 2286* (Oct. 4, 2004), available at https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-honorable-doug-matayo-concerning-arkansas-h.b.2286-and-fairness-contact-lens-consumers-act-and-contact-lens-rule/041008matayocomment.pdf; Comments of the Staff of the Federal Trade Commission, Intervenor, *in Re: Declaratory Ruling Proceeding on the Interpretation and Applicability of Various Statutes and Regulation Concerning the Sale of Contact Lenses* (Mar. 27, 2002), available at https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-connecticut-board-examiners-opticians-intervenor-re-declaratory-ruling-proceeding/v020007.pdf.

of wine,¹⁶ and various limitations on legal advice that implicated the provision of online legal forms.¹⁷

The successor group, the Internet Access Task Force, produced two excellent documents about municipal Wi-Fi¹⁸ and Net Neutrality,¹⁹ but appears to have done little else. And, as mentioned above, the FTC has not engaged in Internet-related competition advocacy in recent years either through reports or letters and comments, aside from (as far as we can tell) the recent letters in support of greater competition in transportation from ride-sharing applications²⁰ and a single set of comments regarding online contact lens sales (in North Carolina) — a throwback to the Internet Task Force’s aggressive efforts against state laws restricting such sales in the 2001–04 period.²¹

¹⁶ FED. TRADE COMM’N, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: WINE (Jul. 2003), available at https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-report-concerning-possible-anticompetitive-barriers-e-commerce-wine/winereport2.pdf; Alan E. Wiseman & Jerry Ellig, *How Many Bottles Make a Case Against Prohibition? Online Wine and Virginia’s Direct Shipment Ban* (Working Paper, Mar. 2003), available at https://www.ftc.gov/sites/default/files/documents/reports/how-many-bottles-makes-case-against-prohibition-online-wine-and-virginias-direct-shipment-ban/wp258_o.pdf; Fed. Trade Comm’n, *Letter to Senator Dockery Regarding Florida SB 202* (Apr. 10, 2006), available at https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-honorable-paula-dockery-concerning-florida-senate-bill-282-bill-allow-direct/vo60013ftcstaffcommentrefloridasenatebill282.pdf; Fed. Trade Comm’n, *Letter to Senator Eric D. Fingerhut Regarding Ohio SB 179* (Mar. 22, 2006), available at https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-honorable-eric-d.fingerhut-concerning-ohio-s.b.179-allow-direct-shipment-wine-ohio-consumers/vo60010commentreohiosb179directshipmentofwine.pdf; Fed. Trade Comm’n, *Letter to Chairmen Magee and Kuhl, and Deputy Majority Leader Skelos Regarding New York Assembly bill 9560- A, and Senate bills 6060-A and 1192* (Mar. 29, 2004), available at https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-honorable-william-magee-et-al.concerning-new-york.b.9560-s.b.606-and-s.b.1192-allow-out-state-vendors-ship-wine-directly-new-york-consumers/vo40012.pdf.

¹⁷ See, e.g., Fed. Trade Comm’n, *Letter to Mr. W. John Glancy, Chairman, Professional Ethics Committee for the State of Texas, Regarding Comments on a Request for Ethics Opinion Regarding Online Attorney Matching Programs* (May 26, 2006), available at https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-professional-ethics-committee-state-bar-texas-concerning-online-attorney-matching/vo60017commentsonarequestforanethicsopinionimage.pdf; See, e.g., Fed. Trade Comm’n, *Letter to Unauthorized Practice of Law Committee Indiana State Bar Association, Regarding Comments On Draft Proposed Amendment To Indiana Supreme Court Admissions & Discipline Rule 24* (Oct. 1, 2003), available at https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-and-department-justice-comment-indiana-state-bar-association-concerning-unauthorized-practice/uplindiana.pdf; Fed. Trade Comm’n, *Letter to E. Fitzgerald Parnell III, President, North Carolina State Bar, Regarding Proposed North Carolina State Bar Opinions Concerning Non-Attorneys’ Involvement In Real Estate Transaction* (Jul. 11, 2002), available at https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-and-department-justice-comment-north-carolina-state-bar-concerning-proposed-state-bar-opinions/nonattorneyinvolvement.pdf.

¹⁸ Fed. Trade Comm’n, *Staff Report: Municipal Provision of Wireless Internet* (Sept. 2006), available at https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-report-concerning-municipal-provision-wireless-internet/vo60021municipalprovwirelessinternet.pdf.

¹⁹ Fed. Trade Comm’n, *Staff Report: Broadband Connectivity Competition Policy* (June 2007), available at <https://www.ftc.gov/sites/default/files/documents/reports/broadband-connectivity-competition-policy/vo70000report.pdf>.

²⁰ *Supra* note **Error! Bookmark not defined.**

²¹ See Fed. Trade Comm’n, *Letter to Sue M. Kornegay, North Carolina State Board of Opticians* (Jan. 13, 2011), available at

And what have been the results of the FTC’s advocacy efforts? The FTC’s 2009 “FTC at 100” staff report emphasized the importance of tracking outcomes rather than outputs.²² As Commissioner Maureen Ohlhausen (one of the report’s principle authors during her time at OPP) recently summarized the report: “the Commission must pay close attention to outcomes, rather than simply tallying outputs, and to examine whether agency activity is actually improving consumer welfare and whether it can be done more effectively.”²³ The 2009 report summarizes the glowing endorsements of the FTC’s advocacy efforts from scholars and experts across the political spectrum,²⁴ yet notes the methodological difficulty in measuring the actual effects of such efforts.²⁵ The same difficulties remain today, yet that need not prevent the FTC from retrospective analysis of its past advocacy efforts; even if rigorous quantitative assessment is impossible, it should be possible to describe some of the impact the FTC’s past advocacy efforts have had. We believe any such retrospective would show that these efforts have achieved large benefits for consumers relative to their cost — probably at a ratio significantly higher than time spent on enforcement actions. Such a study would thus suggest that the FTC should increase the relative share of its limited resources spent on such efforts.

Why this imbalance? Simply put, the FTC has never made advocacy an institutional priority; it has always taken a back seat to the FTC’s enforcement functions — but especially since 2009. If there was ever a fork in the road, it was in early 2004, when the Internet Task Force was allowed to fade away. At a minimum, Chairman Majoras could have continued the Internet Task Force — or her three successors could have revived it. The Task Force’s portfolio could have evolved over time to handle new Internet issues as they emerged. Sharing economy companies would have been a natural fit. But even better would have been to make such Internet-related advocacy

https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-north-carolina-state-board-opticians-concerning-proposed-regulations-optical-goods/1101ncopticiansletter.pdf.

²² Report by William E. Kovacic, Chairman, Fed. Trade Comm’n, *The Federal Trade Commission at 100: Into Our 2nd Century — The Continuing Pursuit of Better Practices* (Jan. 2009), available at https://www.ftc.gov/sites/default/files/documents/public_statements/federal-trade-commission-100-our-second-century/ftc100rpt.pdf.

²³ Maureen K. Ohlhausen, *The Federal Trade Commission at 100: Recommendations for Improving Agency Performance* (Sept. 10, 2014), available at https://www.ftc.gov/system/files/documents/public_statements/581651/140910kovacictribute.pdf.

²⁴ *Id.* at 122–24.

²⁵ *Id.* at 153 (“Directly measuring the change in consumer welfare due to research and advocacy is likely to be even more difficult than measuring the full impact of enforcement actions. These important FTC tools affect consumer welfare in subtle ways, and often in diffuse markets. For example, past research on optometric business practices and the real estate brokerage industry likely has influenced state laws regulating these industries. To capture fully the welfare effects of this research, however, would require isolating both the marginal impact of FTC research on state regulation and the impact of positive regulatory changes on price and output in the relevant markets. Further, as with enforcement actions, research and advocacy are likely to have spillover deterrent effects in related markets. For example, successful advocacy in one state may prevent other state regulatory bodies from entertaining similar restrictions on competition, and research often can have applications beyond the industry on which it is focused.”).

part of the portfolio of a larger, standing advocacy program with dedicated staff, a clear institutional identity, budget line and web presence — perhaps an Office of Advocacy. Until the FTC puts its advocacy program on a permanent footing, any renewed competition advocacy effort is likely to be short-lived, and subject to the changes that inevitably come with new chairmen, directors, Presidents, etc. The need for effective FTC advocacy effort will never disappear: there will *always* be counter-productive state and local laws that restrict new ways of serving consumers. So, too, should the FTC’s advocacy program be permanent — and planned for the long-term.

Specific Suggestions for Any New Advocacy Campaign

We urge the FTC to focus this workshop in substantial part on the institutional structure necessary to support sustained competition advocacy campaigns. Specifically, that means asking questions like:

- What can the FTC learn from its past competition advocacy efforts?
- Why did the Internet Task Force cease operations? What did the Internet Access Task Force do? What has the FTC done since?
- Why does the FTC not have at least an office dedicated to competition advocacy?
- Why has the FTC never reconstituted the Internet Task Force?
- How many staffers actually work on competition advocacy? Where are they in the FTC? How do they coordinate?
- What is the FTC’s long-term plan for effective advocacy?
- How could the FTC measure the outcomes of its advocacy work? How has it done so in the past?
- How much does the FTC actually spend on advocacy now? Should it spend more? How does the FTC make budget decisions as between advocacy and enforcement activities?
- Why has the FTC never created a standing institutional structure for its advocacy work? What would such a structure look like? What would it take to make it
- Why has the FTC never followed through on the suggestion made at its 2008 Boston workshop by Harvard law professor Einer Elhauge that the FTC “reconsider its invitation-only approach to advocacy, by which it typically issues advocacies only in response to invitations by other policymakers?”²⁶ Does it not seem likely that the regulators who most need to hear from the FTC are those who do not ask for the FTC’s opinion? Indeed, if the most anti-consumer regulations are driven by regulatory capture by incumbents,

²⁶ FTC at 100 Report, *supra* note 22, at 124, n. 558 (quoting Einer Elhauge) The FTC’s website does not make the Boston Transcript available.

isn't it logical to expect that these captured regulatory bodies would do everything they could to avoid the FTC's attention? Therefore, doesn't the FTC's invitation-only approach bias its work away from where it is most needed?

Cautions about Advocacy Work on the Sharing Economy

Finally, we end on three notes of caution. First, while research and analysis are one of the FTC's core competencies, and something we would very much like to see more of, we recognize that the more work the FTC does in a particular area, even in the name of competition advocacy, the more likely the FTC may be to also bring enforcement actions in that area. This is, of course, not entirely bad. Sharing economy services definitely should *not* be immune from the antitrust laws or Section 5's consumer protection provisions. But they *should* be approached with an appropriate degree of restraint — greater, frankly, than the FTC has shown in its recent enforcement actions regarding product design or consumer protection actions brought against small and early-stage companies.²⁷ In short, a revival of the FTC's competition advocacy program for the Internet should be accompanied by a commitment to regulatory humility.

Second, any FTC regulation in the area of the sharing economy is likely to occur by stealth: through unadjudicated settlements rather than by formal regulation through Magnuson-Moss — the FTC's forgotten Section 5 rulemaking power — or through adjudicated decisions in which courts, not the FTC, decide how to apply the law. We have raised our concerns about the FTC's "common law of consent decrees" elsewhere.²⁸ Here, it suffices to say that, with a limited number of major players in the Sharing Economy, the FTC could easily impose *de facto* regulation on the entire sector by subjecting just a few major players to consent decrees. Once subject to a consent decree for any conduct, Uber, for instance, might feel compelled (lest it be held liable for civil penalties for violating its consent decree) to coordinate closely with the FTC

²⁷ See, e.g., Fed. Trade Comm'n, *Snapchat Settles FTC Charges That Promises of Disappearing Messages Were False* (May 8, 2014), available at <https://www.ftc.gov/news-events/press-releases/2014/05/snapchat-settles-ftc-charges-promises-disappearing-messages-were>; Fed. Trade Comm'n, *FTC Accepts Final Settlement with Twitter for Failure to Safeguard Personal Information* (March 11, 2011), available at <https://www.ftc.gov/news-events/press-releases/2011/03/ftc-accepts-final-settlement-twitter-failure-safeguard-personal-0>; Fed. Trade Comm'n, *In the Matter of LabMD, Inc.*, <https://www.ftc.gov/enforcement/cases-proceedings/102-3099/labmd-inc-matter>; Fed. Trade Comm'n, *Retail Tracking Firm Settles FTC Charges it Misled Consumers About Opt Out Choices* (Apr. 23, 2015), available at <https://www.ftc.gov/news-events/press-releases/2015/04/retail-tracking-firm-settles-ftc-charges-it-misled-consumers>. On the problems raised by such interventions, see for example, Geoffrey A. Manne, *Federal Intrusion: Too Many Apps for That*, WALL STREET JOURNAL (Sept. 16, 2014), <http://www.wsj.com/articles/geoffrey-manne-federal-intrusion-too-many-apps-for-that-1410908397>.

²⁸ See, e.g., Comments of the International Center for Law and Economics & TechFreedom, *In the Matter of Nomi Technologies, Inc.*, File No. 1323251 (May 26, 2015), available at http://laweconcenter.org/images/articles/icle_tf_nomi_comments_20150526.pdf; FTC: Technology & Reform Project, *Consumer Protection & Competition Regulation in a High-Tech World: Discussing the Future of the Federal Trade Commission* (Dec. 2013), available at http://docs.techfreedom.org/FTC_Tech_Reform_Report.pdf.

over decisions about product design or how it configures its controversial surge pricing algorithm, for example. “Regulation” could come without anyone quite realizing it had happened.

Third, and finally, any FTC regulation in this area, by whatever means, risks treading on Section 230, the bedrock legislation that ensures that online intermediaries are not responsible for content created by third parties.²⁹ The courts have already begun to grapple with how to apply such intermediary immunity to sharing economy services. Judges, not the FTC, should decide what Section 230 immunity might be enjoyed by sharing economy operators — who, after all, function primarily as little more than platforms for coordinating more efficient transactions between buyers and sellers of resources from rides to rooms and beyond.

²⁹ 47 U.S.C. § 230.