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TRANSFORMING THE FTC: LEGISLATION TO MODERNIZE CONSUMER PROTECTION

HYBRID HEARING

BEFORE THE

SUBCOMMITTEE ON CONSUMER PROTECTION AND COMMERCE

OF THE

COMMITTEE ON ENERGY AND COMMERCE
HOUSE OF REPRESENTATIVES

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[1] The Federal Trade Commission witnesses submitted one joint prepared statement.

[2] The legislation has been retained in committee files and is available at https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=113972.

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TRANSFORMING THE FTC: LEGISLATION TO MODERNIZE CONSUMER PROTECTION

WEDNESDAY, JULY 28, 2021

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CONSUMER PROTECTION AND COMMERCE,
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC.

The subcommittee met, pursuant to call, at 10:33 a.m., in Room 2123, Rayburn House Office Building, Hon. Jan Schakowsky (chair of the subcommittee) presiding.

Members present: Representatives Schakowsky, Rush, Castor, Trahan, McNerney, Clarke, Cárdenas, Dingell, Kelly, Soto, Rice, Craig, Fletcher, Pallone (ex officio), Bilirakis (subcommittee ranking member), Upton, Latta, Guthrie, Bucshon, Dunn, Pence, Lesko, Armstrong, and Rodgers (ex officio).

Also present: Representative Burgess.

Staff present: Jeffrey C. Carroll, Staff Director; Katherine Durkin, Policy Coordinator; Lisa Goldman, Senior Counsel; Waverly Gordon, General Counsel; Tiffany Guarascio, Deputy Staff Director; Ed Kaczmarski, Policy Analyst; Zach Kahan, Deputy Director, Outreach and Member Service; Mackenzie Kuhl, Digital Assistant; David Miller, Counsel; Kaitlyn Peel, Digital Director; Chloe Rodriguez, Clerk; Andrew Souvall, Director of Communications, Outreach, and Member Services; Caroline Wood, Staff Assistant; Anna Yu, Professional Staff Member; Sarah Burke, Minority Deputy Staff Director; Michael Cameron, Minority Policy Analyst, Consumer Protection and Commerce, Energy, Environment; Nate Hodson, Minority Staff Director; Peter Kielty, Minority General Counsel; Emily King, Minority Member Services Director; Tim Kurth, Minority Chief Counsel, Consumer Protection and Commerce; Brannon Rains, Minority Professional Staff Member, Consumer Protection and Commerce; Michael Taggart, Minority Policy Director.

Ms. SCHAKOWSKY. Welcome, everyone. The Subcommittee on Consumer Protection and Commerce will now come to order.

Today we will be holding a hearing entitled "Transforming the FTC"—the Federal Trade Commission—"Legislation to Modernize Consumer Protection."

Due to the COVID–19 public health emergency, Members can participate in today's hearing, either in person or remotely.

The online—via video conference. Members are—and witnesses who are participating in person—these are the new guidelines—must wear a mask, and Members and witnesses who are not vac-

cinated must also be socially distant. Such Members and witnesses may remove their masks when they are under recognition and speakers from—and speaking from a microphone. Staff and press who are present in the committee room must wear a mask at all times, and staff and press who are not vaccinated must be socially distant.

Too bad that we had to move to different guidelines, I might say, but here we are.

To be clear, mask wearing is now required, regardless of vaccination status.

For Members participating remotely, your microphones will be set on mute for the purpose of eliminating inadvertent background noise. Members participating remotely will need to unmute yourselves, and your microphones, when you are—each time that you wish to speak.

Please note that, once you unmask, that once you unmute your microphone, anything that is said in Webex will be heard over the loudspeaker in the committee room, and subject to be heard by the live stream and C–SPAN. So, you know, watch what you are saying into the microphone if you are not muted.

Since Members are participating from different locations at today's hearing, all recognition of Members, such as for questions, will be in the order of the subcommittee seniority.

Documents for the record can be sent to Ed Kaczmarski at the email address that we have provided to staff. All documents will be entered into the record at the conclusion of the hearing.

So the Chair now recognizes herself for 5 minutes.

OPENING STATEMENT OF HON. JAN SCHAKOWSKY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

We—today we are considering 16 pieces of legislation intended to modernize the Federal Trade Commission's ability to pursue the—its consumer protection mission.

For over 100 years the FTC has been the premier Federal consumer protection agency. But despite its broad mandate to protect consumers and to promote competition, the Commission has been sorely underresourced for decades now. Today it has a smaller staff and fewer resources than other consumer protection regulators. And—however, it is a new era for the Federal Trade Commission now.

In a breath of fresh air, the Commission held two open meetings this month. These public, accessible meetings increased transparency and public input on important topics, like the Made in USA Rule and Right to Repair. It is time to recommit to restoring the cultural—the culture and the—of the FTC to put consumers first.

Many of the 16 bills that we are considering today will help them to accomplish this mission. These include the Online Consumer Protection Act, which I have introduced, and—with Representative Castor. This legislation will hold technology platforms accountable for failure to live up to the promises that they made with their—made to consumers in their terms of service.

The 21st Century FTC Act, sponsored by Representative Castor, and my own FTC Autonomy Act, will provide the Commission with

additional enforcement tools, including rulemaking, civic—civil penalties, and independent litigation authority.

Legislation from our colleagues, Representatives Rush and McNerney, will give the Commission authority over consumer protection violations by nonprofit organizations and telecommunications—communications carriers.

A few of the bills that are being considered today will also—will allow the FTC to more efficiently—scams that target vulnerable groups. This includes bipartisan legislation from Representatives Rice and Upton focusing on fraud affecting military veterans and service members.

And legislation from Representative Kelly would establish a task force to bolster the communications work—the Commission's work on equity issues and would inform the public about scams targeted specifically to other groups.

Representative McNerney has legislation that would create the office of technologists to provide additional technical assistance to the Commission, and update in—every technology consideration.

Today these bills will force—will forge a new path forward for the Federal Trade Commission.

I am going to ask my ranking member for permission to go over time. As you can see, I do have some reading issues that are hampering me in some ways. It is a physical thing that I have got. OK, thank you very much.

So today these bills will forge a new path forward for the Federal Trade Commission. They strengthen the Commission's consumer protection capacity and provide the tools necessary to guide today's increased innovation and dynamic marketplace. It is essential that the Commission have the tools it needs to hold technology platforms accountable.

The era of self-regulation is over. Self-regulation has threatened our democracy and now threatens our health and our very lives, as vaccine misinformation continues to spread across social media. Consent decrees and fines have proven ineffective in improving the behavior of technology companies. Violation after violation underscores that stronger enforcement today—enforcement tools are urgently needed.

The American people deserve a 21st-century consumer protection agency that meets 21st-century threats, and I am looking forward to hearing from the witnesses that are here today on how more—how modernizing the Federal Trade Commission and protecting consumers can happen.

I want to say a special thank you to our witnesses. I am so grateful to the Commissioners who are all here today: three virtually and two in person. Thank you so much.

And also from our experts that we will hear—for the second panel.

[The prepared statement of Ms. Schakowsky follows:]

PREPARED STATEMENT OF HON. JAN SCHAKOWSKY

Today we will consider 16 pieces of legislation intended to modernize the Federal Trade Commission's ability to pursue its consumer protection mission.

For over 100 years the FTC has been the premier federal consumer protection agency.

Despite its broad mandate to protect consumers and promote competition, the Commission has been for decades sorely under-resourced.

Today, it has a smaller staff and less funding than other consumer protection regulators.

However, it is a new era at the Federal Trade Commission.

In a breath of fresh air, the Commission held two open meetings this month.

These publicly accessible meetings increased transparency and public input on important topics like the Made in USA rule and right to repair.

It's time to recommit to restoring a culture at the FTC of putting consumers first.

Many of the 16 bills we are considering today will help them live up to that commitment.

These include the Online Consumer Protection Act which I have introduced with Representative Castor.

This legislation will hold technology platforms accountable for failing to live up to the promises they make to consumers in their terms of service.

The 21st Century FTC Act, sponsored by my colleague Representative Castor and my own bill, the FTC Autonomy Act, will provide the Commission with additional enforcement tools, including notice and comment rulemaking, civil penalty, and independent litigating authorities.

Legislation from my colleagues Representatives Rush and McNerney will give the Commission authority over consumer protection violations by non-profit organizations and certain common carriers.

A few of the bills we are considering today will allow the FTC to more efficiently police scams targeting vulnerable groups.

This includes bipartisan legislation from Representatives Rice and Upton focusing on fraud affecting military veterans and service members, and legislation from Representative Kelly that would establish a task force to bolster the Commission's work on equity issues and would inform the public about scams targeting specific consumer groups.

Representative McNerney's legislation would create an office of technologists to provide additional technological expertise to keep the Commission up to date in an ever-changing consumer landscape.

Together, these bills will forge a new path forward for the Federal Trade Commission.

They strengthen the Commission's consumer protection capabilities and provide the tools necessary to regulate today's increasingly innovative and dynamic marketplace.

It is essential that the Commission have the tools it needs to hold technology platforms accountable.

The era of self-regulation is over.

Self-regulation has threatened our democracy and now threatens our health and our very lives as vaccine misinformation continues to spread indiscriminately across social media.

Consent tools have proven ineffective at improving the behavior of technology companies.

Violation after violation underscore that stronger enforcement tools are urgently needed.

The American people deserve a 21st century consumer protection agency that meets 21st century threats.

I am looking forward to hearing from the witnesses here today on how to modernize the Federal Trade Commission and protect consumers.

Thank you to the witnesses for joining us today. I now recognize Mr. Bilirakis for 5 minutes.

Ms. SCHAKOWSKY. The Chair—thanks for the indulgence. I am practicing on how to use my new disability to speak more properly. But here we are.

And the chairman now recognizes Mr. Bilirakis, the ranking member of our subcommittee, for 5 minutes.

OPENING STATEMENT OF HON. GUS M. BILIRAKIS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. BILIRAKIS. Thank you so much, Madam Chair. I appreciate it. Thank you for holding this important hearing. And to both panels appearing today, we really appreciate it very much. I would like

to welcome all five of our FTC Commissioners—I guess, three virtually and two in person—in front of our subcommittee, where we can not only examine the legislation before us but also conduct overdue oversight of the Commission.

Chair Khan, congratulations on your recent confirmation as Commissioner and Chair of the FTC. This is a very important agency, as you know, and I am eager to learn how you will continue leading on its important work, especially in the protection of our constituents from fraud and scams, and how you can enforce a national privacy standard we want to enact. It is critical we get the ball rolling on that effort.

I am also interested in learning how the FTC can assist with protecting Americans from ransomware and other cyber attacks. I recently introduced H.R. 4551, the RANSOMWARE Act, which would amend the Safe Web Act to focus on such attacks. The FTC can play an important role in securing our Nation from ransomware. So I hope today's conversation may assist in fine-tuning my legislation to best accomplish this goal.

Given the majority scheduled this as an oversight hearing, as well, I would be remiss if I did not inquire about recent changes at the FTC.

Chair Khan, I understand that change comes when a new team is in charge, and we will have our policy differences here in DC, but that should not stop you from working with your fellow Commissioners in a collegial manner. So you must understand why I am concerned when we hear reports of individuals inside the FTC being silenced and your other Commissioners being shut out of the process. We must take these allegations extremely seriously. It is concerning, the recent changes in FTC processes took place without acknowledging the consideration of all Commissioners and of FTC experts, some of whom have lifetimes of experience within the subject matter.

To those staff, I hope you are watching today so you may know this Commission cares—again, this committee definitely cares about the FTC process remaining open and transparent, and that your voice and expertise play an important role. We will begin a process to review these allegations. And with that, I would like to announce for the FTC staff listening that, if you have any issues, we have created a whistleblower email. It is ecgop.whistleblower@mail.house.gov. Again: ecgop.whistleblower@mail.house.gov.

As you are aware, with other bills on the docket, Republican members of this committee introduced legislation to ensure guardrails are included in any FTC decision-making process. I am glad to see these bills are on the docket, and I appreciate it, Madam Chair, that you placed them on the docket. Thanks for following through. They will bring much-needed transparency, in my opinion, require proper notice and input from key experts at the FTC, like from the Bureau of Economics, something I wish was included in H.R. 2668, the legislation that expands section 13(b).

As I have said before, Republicans support providing the FTC with the tools they need to pursue bad actors and to sufficiently enforce privacy standards. So I ask that the Democrat—Democratic proposals in front of us be considered in that context. I hope my

Democratic colleagues' engagement on these issues will also mean seriously engaging on putting in place a national privacy standard.

Madam Chair, thank you again for holding this hearing. We have a lot to get through today, so I wanted to be as brief as I could. I am eager to learn how we, as the committee of jurisdiction, can bring much-needed transparency to the FTC and how the legislation before us may do just that. And I thank you very much, and I yield back.

[The prepared statement of Mr. Bilirakis follows:]

PREPARED STATEMENT OF HON. GUS M. BILIRAKIS

Good morning Chair Schakowsky, thank you for holding this important hearing, and to both panels appearing today. I'd like to welcome all five of our FTC Commissioners in front of our Subcommittee where we can not only examine the legislation before us, but also conduct overdue oversight of the Commission.

Chair Khan, congratulations on your recent confirmation as Commissioner, and Chair of the FTC. This is a very important agency, and I am eager to learn how you will continue leading on its important work—especially in the protection of our constituents from fraud and scams, and how you can enforce a national privacy standard we want to enact. It is critical we get the ball rolling on that effort.

I am also interested in learning how the FTC can assist with protecting Americans from ransomware and other cyber-attacks. I recently introduced H.R. 4551, the RANSOMWARE Act which would amend the SAFE Web Act to focus on such attacks. The FTC can play an important role in securing our nation from ransomware, so I hope today's conversation may assist in fine tuning my legislation to best accomplish this goal.

Given the majority scheduled this as an oversight hearing as well, I would be remiss if I did not inquire about recent changes at the FTC. Chair Khan, I understand that change comes when a new team is in charge, and we all have our policy differences here in DC, but that should not stop you from working with your fellow Commissioners in a collegial manner. So you must understand why I am concerned when we hear reports of individuals inside the FTC being silenced and your other Commissioners being shut out of the process. We must take these allegations very seriously.

It's concerning the recent changes in FTC processes took place without acknowledging the consideration of all Commissioners and of FTC experts, some of whom have lifetimes of experience within the subject matter. To those staff, I hope you are watching today so you may know this Committee cares about the FTC process remaining open and transparent, and that your voice and expertise play an important role. We will begin a process to review these allegations, and with that I would like to announce for the FTC staff listening that if you have issues, we have created a whistleblower email ECGOP.whistleblower@mail.house.gov.

As you aware with the other bills on the hearing, Republican members of this Committee introduced legislation to ensure guardrails are included in any FTC decision making process. I am glad to see these bills on the docket today. They will bring much needed transparency, require proper notice, and input from key experts at the FTC, like from the Bureau of Economics—something I wish was included in H.R. 2668, the legislation that expands Section 13(b).

As I have said before, Republicans support providing the FTC with the tools they need to pursue bad actors and to sufficiently enforce privacy standards, so I ask that the Democratic proposals in front of us be considered in that context. I hope my Democratic colleagues' engagement on these issues will also mean seriously engaging on putting in place a national privacy standard.

Madam Chair, thank you again for holding this hearing, we have a lot to get through today. I am eager to learn how we as the Committee of jurisdiction can bring much needed transparency to the FTC and how the legislation before us may do just that.

Thank you, and I yield back.

Ms. SCHAKOWSKY. The gentleman yields back, and the chairman now recognizes Mr. Pallone, chairman of the full committee, for 5 minutes.

OPENING STATEMENT OF HON. FRANK PALLONE, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Mr. PALLONE. Thank you, Chairwoman Schakowsky. Today we are continuing this committee's important work on putting consumers first.

For the past few months, this subcommittee, and then the full committee, pushed forward the Consumer Protection and Recovery Act to restore the FTC's basic authority to get stolen money back to consumers. That urgently needed legislation passed the House last week, and I urge the Senate to take up the bill without delay.

With House passage of the Consumer Protection and Recovery Act, we must take the next step, not just fixing what was broken but improving the Nation's foremost consumer protection agency and putting consumers first. The FTC initially addressed only unfair competition, which led to unjust results for consumers. But then, in 1938, Congress met the moment, enacting the FTC's now core section 5 authority to enforce against unfair or deceptive acts or practices. By granting the power to stop consumer harms, the FTC's consumer protection mission was born at that time.

And over time, the FTC needed more authority to execute its mission. In 1973 Congress met that moment by granting the FTC the authority to go into Federal court and seek relief for consumers, including under Section 13(b) of the FTC Act. And these changes led to billions in relief for consumers and a more efficient way to deter illegal conduct. And the legislation that passed the House last week would restore this critical authority after it had been seriously undermined earlier this year by the Supreme Court.

We are now facing another seminal moment for consumer protection. The digital age has fundamentally changed the consumer experience, but the FTC's mission to protect consumers and honest businesses remains the same. Congress must meet the moment again. It is time to bring the FTC into the modern era, to give it the tools and resources to keep up with changes in the market. And much of the legislation before us today would do just that.

The legislation that would improve general rulemaking authority under the Administrative Procedures Act would remove uniquely onerous burdens so the FTC can more efficiently provide clear rules of the road to businesses and consumers. Legislative proposals would also give the FTC civil penalty authority, which is critical to impose meaningful consequences on wrongdoers and deter other bad actors. Those reforms help industry and individuals, and are essential to maximize the FTC's limited resources.

There is also legislation that ends exemptions on nonprofits and telecommunications common carriers from FTC jurisdiction that also helps consumers and businesses.

Consumer protection enforcement should be based on the activity, not the entity.

Unfortunately, on the other hand, some proposals before us today would hinder the FTC and ultimately harm consumers. I am concerned by the proposals that would burden staff and drain resources with needless processing reports that effectively obstruct information exchanges between the FTC and other regulators and lawmakers. The bills that I am talking about would undermine the

FTC's ability to prevent potential harms or react to unusual, unfair, and deceptive practices.

Some of these bills would hurt companies by potentially forcing the FTC to reveal confidential investigations before the FTC has determined whether illegal acts have taken place or whether it will take action against the subjects of the investigations. And I believe these proposals would put the FTC on the wrong track.

Now, my Republican committee colleagues have routinely emphasized the need for comprehensive consumer privacy legislation, and I agree, and that is why the committee remains hard at work on privacy. But at the same time, the legislation would effectively gut the FTC's ability to protect consumer privacy. And I believe that, across the board, deregulation and a strong Federal privacy regime cannot coexist.

[The prepared statement of Mr. Pallone follows:]

PREPARED STATEMENT OF HON. FRANK PALLONE, JR.

Today, we are continuing this Committee's important work on putting consumers first. For the past few months, this Subcommittee and then the full Committee pushed forward the Consumer Protection and Recovery Act to restore the Federal Trade Commission's (FTC) basic authority to get stolen money back to consumers. That urgently needed legislation passed the House last week, and I urge the Senate to take up the bill without delay.

With House passage of the Consumer Protection and Recovery Act, we must take the next step—not just fixing what was broken but improving the nation's foremost consumer protection agency and putting consumers first.

Congress established the FTC in 1914 in response to rapid industrial change. As Teddy Roosevelt said in support of the new agency, a consensus had emerged that federal law was "not adequate to meet the situation" created by "modern business conditions."

The FTC initially addressed only unfair competition, which led to unjust results for consumers. In 1938, Congress met the moment, enacting the FTC's now-core section 5 authority to enforce against "unfair or deceptive acts or practices." By granting the power to stop consumer harms, the FTC's consumer protection mission was born.

Over time, the FTC needed more authority to execute its mission. In 1973, Congress met that moment by granting the FTC the authority to go into federal court and seek relief for consumers, including under section 13(b) of the FTC Act. These changes led to billions in relief for consumers and a more efficient way to deter illegal conduct. And the legislation passed in the House last week would restore this critical authority after it had been seriously undermined earlier this year by the Supreme Court.

We are now facing another seminal moment for consumer protection. The digital age has fundamentally changed the consumer experience, but the FTC's mission to protect consumers and honest businesses remains the same.

Congress must meet the moment again. It's time to bring the FTC into the modern era, to give it the tools and resources to keep up with changes in the market. Much of the legislation before us today would do just that.

Legislation that would provide general rulemaking authority under the Administrative Procedure Act would remove uniquely onerous burdens so the FTC can more efficiently provide clear rules of the road to businesses and consumers. Legislative proposals would also give the FTC civil penalty authority, which is critical to impose meaningful consequences on wrongdoers and deter other bad actors. These reforms help industry and individuals and are essential to maximize the FTC's limited resources.

Legislation that ends exemptions on nonprofits and telecommunications common carriers from FTC jurisdiction also helps consumers and businesses. Consumer protection enforcement should be based on the activity, not the entity. As former FTC Chairman William Kovacic told this Subcommittee in February, these "embarrassing anachronisms" no longer make sense, and only diminish the FTC's ability to do its job.

Unfortunately, on the other hand, some proposals before us today would hinder the FTC and ultimately harm consumers. I am concerned by the proposals that

would burden staff and drain resources with needless process and reports and effectively obstruct information exchanges between the FTC and other regulators and lawmakers. The bills would undermine the FTC's ability to prevent potential harms or react to unusual, unfair, and deceptive practices. Some of these bills would hurt companies by potentially forcing the FTC to reveal confidential investigations before the FTC has determined whether illegal acts have taken place or whether it will take action against the subjects of the investigations. I believe these proposals would put the FTC on the wrong track.

My Republican Committee colleagues routinely emphasize the need for comprehensive consumer privacy legislation. I agree, and that is why the Committee remains hard at work on privacy. At the same time, however, their legislation would effectively gut the FTC's ability to protect consumers' privacy. Across the board deregulation and a strong federal privacy regime cannot coexist. I can only hope that despite their legislation put forth today, my Republican colleagues share my commitment to a federal privacy law that would actually protect Americans' privacy.

I thank all five Commissioners for appearing before us to help us determine the right path forward for the FTC and for consumers. I also look forward to hearing from our expert witnesses on how to modernize the FTC to best protect consumers and honest businesses.

Mr. PALLONE. So I thank all five Commissioners for appearing before us. I also look forward to hearing from our expert witnesses, and I yield the balance of my time to the gentlewoman from Florida, Ms. Castor.

Ms. CASTOR. Well, thank you, Chair Pallone. This is a critical hearing because the Federal Trade Commission is absolutely vital to protecting our neighbors back home, protecting consumers, and then fostering competition across the economy. We have got to give the FTC all of the tools it needs to help protect consumers from fraudsters and scam artists, predatory companies.

My neighbors back home in Florida, which just is rife with, unfortunately, with scam artists, they really need the FTC at work, at full force. They have got—the FTC—a lot of folks don't really understand. You all help recoup money. You help hold these fly-by-night operations accountable. You, in essence, restore the dignity to folks who have been scammed and you penalize these bad actors.

So welcome, Chair Khan, welcome, Commissioners. We look forward to working with you and look forward to hearing you today, along with our expert panel.

And I really appreciate, Chair Schakowsky, you including my 21st Century FTC Act in this hearing today.

So thank you, I yield back my time.

Ms. SCHAKOWSKY. The gentleman has yielded back his time. And now let me recognize Mrs. Rodgers, the ranking member of the full committee, for her 5 minutes for an opening statement.

OPENING STATEMENT OF HON. CATHY McMORRIS RODGERS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WASHINGTON

Mrs. RODGERS. Thank you, Madam Chair. Welcome, Chair Khan, our distinguished members of the Federal Trade Commission, as well as our second panel of experts.

This past year has been difficult. COVID–19 has not only altered our daily lives, it has refocused the way we conduct our business in Congress. Over the past year it has been essential that we work together in a bipartisan way to protect seniors and other vulnerable populations. Thanks to our work with Chair Schakowsky, we

have been able to expand the FTC's authority to go after COVID–19 fraudsters and scammers.

Yet I am concerned today that we are now prioritizing politics over protecting Americans. Just last week we saw a very partisan 13(b) legislation narrowly pass the House floor. What makes this worse is that, just a couple of weeks prior, during a committee markup, Representative Bilirakis introduced an amendment to this bill that received bipartisan support. But it was shut out by the majority once the bill moved to the floor. A colloquy on the House floor between committee Democrats tried to clarify the intent of the underlying bill. The concerns raised during the colloquy would have been clearly addressed by Bilirakis's compromise.

This begs the question: If our compromise amendment was considered on the floor, would it have passed? I believe that the answer is yes.

Sadly, the partisan process for 13(b) was also a missed opportunity to enact a national Federal privacy standard, something we desperately need to ensure that people's personal information is protected online. America's data and personal information does not end with State lines. Neither should privacy protections, considering proposals on the agenda today were part of the bipartisan privacy negotiations last Congress.

I will be listening for ways that these bills being considered can be adapted into a national privacy standard, which would be a landmark achievement for this committee and for the protection of America's data. I certainly hope they don't move alone—stand alone.

In the past, even when we disagreed on certain approaches to policymaking, we were able to come together and work in a bipartisan manner. This was the case when Chairman Pallone led on attacking robocalls and enacted the landmark TRACED Act. That was Congress at its best, and I hope that we return to that, because what we have now is a set of really bad examples for agencies and departments under our oversight.

We have heard reports on shifts at the FTC to shorten notice of actions, limit consultation, and reduced economic analysis. This trend is crippling the thoughtful process at the FTC and jeopardizing fraud protections for Americans who need them. It is a disservice to Americans.

Your mission is to protect. By neglecting your duty to follow a process that allows for proper deliberation and import—input from experts is a disservice. I implore you to resist the urge to take your focus off of consumer protections. Engage with the public to find out what alarms them most. Listen to people at regional workshops about their top concerns. I would be surprised if you didn't hear stories about unwanted calls for scam real estate leads, car warranties, even fake IRS bills. These are the kinds of things that should guide your efforts. The FTC is an independent agency that should not have your agenda dictated by the White House.

The time to establish a strong and uniform data protection for all Americans is now, and I look forward to hearing from you.

[The prepared statement of Mrs. Rodgers follows:]

PREPARED STATEMENT OF HON. CATHY MCMORRIS RODGERS

Thank you, Madam Chair. Welcome Chair Khan, our distinguished members of the Federal Trade Commission (FTC), as well as our second panel of experts.

The past year has been tumultuous. COVID–19 has not only altered our daily lives, it has refocused the way we conduct our business in Congress. Over the past year, it has been essential that we worked together in a bipartisan way to protect seniors and other vulnerable populations. Thanks to our work with Chair Schakowsky, we have been able to expand the FTC's authority to go after COVID–19 fraudsters and scammers.

Yet I'm concerned we're now prioritizing politics over protecting Americans. Just last week we saw partisan 13(b) legislation narrowly pass the House floor. What makes this worse is that—just a couple of weeks prior during a committee markup Rep. Bilirakis introduced an amendment to this bill that received bipartisan support, but it was shut out by the Democrats once the bill moved to the floor.

A colloquy on the House floor between Committee Democrats tried to clarify the intent of the underlying bill. The concerns raised during that colloquy would have been clearly addressed by the Bilirakis compromise. This begs the question—if our compromise amendment was considered on the floor, would it have passed? I believe the answer is yes.

Sadly, the partisan process on 13(b) was also a missed opportunity to enact a national privacy standard—something we desperately need to ensure people's personal information is protected online. Americans' data and personal information does not end with state lines, why should their privacy protections?

Considering proposals on the agenda today were part of our bipartisan privacy negotiations last Congress, I'll be listening for ways the bills being considered can be adapted into a national privacy standard which would be a landmark accomplishment for this committee and for the protection of Americans' data. They certainly shouldn't move as stand-alones. In the past, even when we disagreed on certain approaches to policymaking, we'd still be able to come together and work in a bipartisan manner. This was the case when Chairman Pallone led on attacking robocalls, and enacted the landmark TRACED Act.

That was Congress at its best and I hope we return to that because what we have now sets a bad example for the agencies and departments under our oversight. We have heard reports on shifts at the FTC to shorten notice of actions, limit consultation, and reduce economic analysis.

This trend is crippling the thoughtful process at the FTC and jeopardizing fraud protections for Americans who need them. It's a disservice to Americans your mission is to protect by neglecting your duty to follow a process that allows for proper deliberation and input from experts.

I implore you to resist the urge to take your focus off consumer protections. You should instead engage with the public to find out what most alarms them. Listen to people at your regional workshops about their top concerns.

I'd be surprised if you didn't hear stories about unwanted calls for scam real estate leads, car warranties, even fake IRS bills. These are the kinds of things that should guide your efforts. You are an independent agency that should not have your agenda dictated by the White House. The time to establish strong and uniform data protections for Americans is now. I look forward to hearing from you. Thank you, I yield back.

Mrs. RODGERS. I yield back, Madam Chair.

Ms. SCHAKOWSKY. The gentlelady yields back.

The Chair would like to remind Members that, pursuant to committee rules, all Members' written opening statements shall be made part of the record.

I now would like to introduce our witnesses for our first—from our first panel at today's hearing: the Honorable Lina Khan, Chairwoman—Chairman of the Federal Trade Commission; the Honorable Noah—we have them on—OK—the Honorable Noah Joseph Phillips, Commissioner with the Federal Trade Commission; the Honorable Rohit Chopra, Commissioner, the FTC; the Honorable Rebecca K. Slaughter, Commissioner at the FTC; and the Honorable Christina Wilson—I am sorry, it is Christine, excuse me—Wilson, the Commissioner at the FTC.

At this time the Chair will recognize each witness for 5 minutes to provide their opening statement.

Before I do, I think most of you are already familiar with the lights, but let me explain that system. In front of our witnesses is a series of lights. The lights will initially be green. The light will turn yellow when there is 1 minute left. And please begin to wrap up at that point. The light will turn red when the 5 minutes have expired.

So Chair Khan, it is a pleasure to welcome you and to recognize you for 5 minutes.

STATEMENTS OF LINA KHAN, CHAIR, AND NOAH JOSHUA PHILLIPS, ROHIT CHOPRA, REBECCA KELLY SLAUGHTER, AND CHRISTINE S. WILSON, COMMISSIONERS, FEDERAL TRADE COMMISSION

STATEMENT OF LINA KHAN

Ms. KHAN. Thanks so much, Chair Schakowsky, Ranking Member Bilirakis, and members of the subcommittee. I am pleased to appear before you today to discuss the 16 bills under consideration by the subcommittee. Thank you for this important work, and I look forward to working with you all.

My testimony today will identify several key issues currently facing the Commission, and share initial views on some of the bills currently being considered.

Congress created the Federal Trade Commission to serve as a guardian for fair competition and to protect consumers, workers, and honest businesses from unfair or deceptive trade practices. This statutory charge has never been more important, yet the Commission faces today notable challenges in carrying out its mission. I will briefly describe three problems that are currently shaping the agency's work.

First, as this subcommittee is well aware, the Supreme Court's decision last year in AMG dealt a serious blow to the FTC's ability to seek refunds for defrauded victims and to discourage ill-gotten gains. Across the Commission's work, the loss of section 13(b) is leading to windfalls for lawbreakers.

For example, after a major pharmaceutical company engaged in a multiyear scheme to keep drug prices high by choking off generics, a court ordered it to return $448 million to victims. The Supreme Court's interpretation of section 13(b) has meant that the pharmaceutical company was later, instead, allowed to pocket these illegal profits. All together, AMG has jeopardized over $2 billion in potential relief to victims in pending cases.

Beyond monetary relief, the FTC now also faces challenges in seeking an injunction to halt wrongdoing, curtailing the Commission's ability to challenge past abuses.

I am committed to using the full range of the FTC's tools to crack down on unlawful conduct. But restoring our full section 13(b) authority is critical, and I am grateful that the full House has already acted on Congressman Cárdenas's bill to re-arm the Commission against these growing threats.

Second, Americans have been subjected to a massive increase in fraud over the last year, with the number of complaints up more

than 20 percent. While the FTC has focused on shutting down COVID-related schemes, from bogus treatments to government impostors, fraud has continued to surge. One reason is that fraud today is supercharged by digital platforms, where this conduct is tolerated and even promoted, by some of the world's largest companies. Business models singularly focused on skill and engagement, coupled with microtargeting, have allowed these platforms to become finely tuned instruments for bad actors, who often target the most vulnerable.

Although digital platforms profit off of the tools that are being weaponized against Americans, these companies often claim special immunity under the law. The Commission will continue to aggressively pursue those that exploit this crisis to target American families. But, ultimately, systematically rooting out fraudulent schemes will require focusing on the warped incentives and legal privileges that allow major firms to profit from predation.

Third, even as the agency tackles the proliferation of unfair or deceptive practices, the current merger boom threatens to make them worse. Significant market consolidation deprives consumers, workers, and independent businesses of choice, further enabling dominant firms to engage in unfair practices. As the wave of privacy abuses in recent years has shown, market dominance often allows companies to renege on commitments, evade the law, and repeatedly violate Commission orders. We are seeing rapid consolidation across industries. Through the first three-quarters of this fiscal year, antitrust agencies have processed over 2,400 merger filings, a level of activity that is already the highest in 2 decades.

Although the FTC is working to review many of these deals, the sheer volume of transactions is significantly straining Commission resources. I am deeply concerned that the current merger boom will further exacerbate deep asymmetries of power across our economy, further enabling abuses.

This subcommittee is considering several bills that would boost the Commission's ability to confront these challenges. Both the FTC Autonomy Act and the 21st Century FTC Act would help the Commission seek civil penalties against lawbreakers. This would mark an important change, guaranteeing the public greater protections.

Those that would end special protections for select industries would also strengthen our law enforcement. For example, the online Consumer Protection Act would clarify that platforms cannot claim special privileges when facing an FTC enforcement action. Meanwhile, the Protecting Consumers and Commerce Act and Removing Nonprofit Exemption Act would allow the FTC to challenge abuses by common carriers and nonprofit entities.

Finally, several bills focus efforts on communities that are offering particular targets of predation, including older Americans, service members, and consumers. These bills are a critical reminder of the importance of the FTC's work in ensuring that our government works for all Americans.

I look forward to working with the subcommittee to meet the challenges that we face, and I welcome the opportunity to answer any questions.

[The joint prepared statement of Ms. Khan and the FTC Commissioners follows:]

"Transforming the FTC: Legislation to Modernize Consumer Protection"
Testimony Before the House Energy and Commerce Committee
Subcommittee on Consumer Protection and Commerce

Chair Schakowsky, Ranking Member Bilirakis, and members of the Subcommittee, we appreciate the opportunity to present the Commission's testimony on the 16 bills to modify the FTC's authority and address other pressing issues, and to describe briefly some of the Commission's work and the challenges we face.[1] The Commission is thankful for the Subcommittee's continued commitment to protecting the American public from unfair and deceptive practices and unfair methods of competition.

The FTC plays a critical role in ensuring that markets are fair for families and honest businesses, but today we face many challenges. The global pandemic has devastated families across the United States, and bad actors are seeking to prey on their pain. A surge in corporate mergers threatens more transactions that may substantially lessen competition. And the Commission's ability to tackle key challenges – from COVID fraud to anticompetitive conduct – has been substantially diminished after the Supreme Court's recent decision in *AMG*, which barred the Commission from seeking monetary relief under Section 13(b) of the FTC Act.

In spite of these challenges, the FTC has worked vigorously to ensure that its critical work can continue. Since the beginning of the pandemic, thanks in part to the civil penalty authority provided by this Subcommittee in the COVID-19 Consumer Protection Act,[2] the Commission has successfully halted dozens of COVID-related scams. For example, the agency has sued entities for allegedly breaking promises to quickly ship personal protective equipment and

[1] This written statement presents the views of the Federal Trade Commission. The oral statements and responses to questions reflect our own views and do not necessarily reflect the views of the Commission or any other Commissioner.

[2] Pub. L. No. 116-260, 134 Stat. 1182, Division FF, Title XIV, § 1401(b)(1).

cleaning products, tricking consumers into paying for sanitizing products that were never delivered, falsely claiming that their products could treat and/or prevent COVID-19, and making deceptive claims regarding stimulus benefits. We complement these efforts by reaching out to communities most affected by fraud, and by alerting the public to the threats posed by scams and those who facilitate them.[3]

We are grateful to this Subcommittee for all it is doing to ensure our critical work can continue. Of particular importance is the work this Committee has done to restore the Commission's ability to secure monetary relief from those that violate the law. As you know, until the Supreme Court's recent decision in *AMG*, the Commission relied on Section 13(b) of the FTC Act to return billions of dollars to defrauded Americans, and to ensure that lawbreaking companies could not pocket their ill-gotten gains. For example, pending cases today involve $2 billion in potential relief to victims, which is not available after *AMG*. Unless the agency has clear authority to obtain monetary relief, this decision will continue to impede our ability to provide refunds to Americans harmed by deceptive, unfair, or anticompetitive conduct.

The Commission also now faces challenges in obtaining injunctive relief. In *FTC v. Shire ViroPharma, Inc*., the Third Circuit held that the language in Section 13(b) of the FTC Act describing a company that "is engaged in, or is about to engage in" illegal conduct means the FTC can initiate enforcement actions only when a violation is either ongoing or "impending" at the time the suit is filed.[4] This decision limits the Commission's ability to hold accountable

[3] *See, e.g.,* Press Release, FED. TRADE COMM'N, Scams starting on social media proliferate in early 2020 (Oct. 12, 2020), https://www.ftc.gov/news-events/blogs/data-spotlight/2020/10/scams-starting-social-media-proliferate-early-2020, Press Release, FED. TRADE COMM'N, Income scams: big promises, big losses (Dec. 10, 2020), https://www.ftc.gov/news-events/blogs/data-spotlight/2020/12/income-scams-big-promises-big-losses.

[4] *FTC v. Shire ViroPharma, Inc.*, 917 F.3d 147 (3d Cir. 2019).

entities who engaged in illegal conduct that occurred entirely in the past. The district court's recent dismissal of the FTC's antitrust complaint against Facebook cited the *ViroPharma* opinion in concluding that the Commission could not use Section 13(b) to address Facebook's alleged past anticompetitive conduct.[5] Restoring the FTC's power to seek injunctions and monetary relief is critical to our work to protect Americans from unlawful business conduct.

In addition, the Commission is currently facing extremely severe resource constraints. Global mergers and acquisitions have soared to new records, putting heavy stress on our ability to effectively investigate and challenge unlawful transactions.[6] The pandemic has also led to large numbers of complaints to the FTC about marketplace abuses. The Commission believes that additional resources are necessary to help it effectively achieve its mission.

We are grateful that this Subcommittee is working to craft reforms to assist the agency in meeting its mission to protect consumers. We will not attempt to discuss each of the many measures in this testimony, but we are of course happy to provide technical assistance and other feedback on any of them. We appreciate that many of the measures give the Commission a much-needed boost in some critical areas where enforcement tools are needed.

Several of the reform bills are among those that have had longstanding bipartisan support at the Commission. [7] For example, the FTC has long called for the repeal of the

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[5] *FTC v. Facebook, Inc.*, Case No. 1:20-cv-03590, --- F.Supp.3d ----, 2021 WL 2643627 (D.D.C. June 28, 2021).

[6] Through the first three quarters of this fiscal year (FY 2021), the antitrust agencies have processed over 2,400 transactions reportable under the HSR Act. This level of activity is already higher than the *total* number of reportable transactions received in any fiscal year since the HSR thresholds were adjusted in 2000. *See Premerger Notification Program*, FED. TRADE COMM'N, https://www.ftc.gov/enforcement/premerger-notification-program, (last visited on July 23, 2021).

[7] Additionally, several of the bills highlight areas of critical importance to the Commission. For example, the Veterans and Servicemember Consumer Protection Act of 2021 directs the Commission's Bureau of Consumer Protection to establish a coordinator within the FTC's Bureau of Consumer Protection to focus on the prevention of fraud and other scams targeting or adversely affecting United States military veterans and servicemembers. H.R. 4481, 117th Cong. (2021), https://docs.house.gov/meetings/IF/IF17/20210728/113972/BILLS-1174483ih.pdf. The FTC supports the goals of this legislation, which builds upon the FTC's longstanding commitment to addressing the unique challenges affecting military consumers. Similarly, Section 101(c)(2) of the Elder Abuse Prevention and

telecommunications common carrier exemption,[8] which has impeded the FTC's enforcement initiatives, such as tackling illegal telemarketing. Other reform bills – including legislation that would subject nonprofits to the FTC Act[9] and in certain contexts give the Commission rulemaking and civil penalty authority[10] – have also received broad support, although some Commissioners would support such measures in more limited ways.

We would like to thank the Subcommittee for its efforts to strengthen and hone the FTC's tools. Your continued support for the agency's work to address COVID, the 13(b) legislation, and the additional resources given last year to bolster the agency are all critical in the FTC's mission to protect Americans from unlawful business practices. The Commission stands ready to assist you with these bills, should you ask, and with any other matters you believe we should prioritize. We look forward to your questions.

Prosecution Act of 2017 requires the Commission to issue an annual report describing its enforcement efforts against fraud targeting seniors. Pub. L. 115–70, 115th Cong. (enacted Oct. 18, 2017). The FTC currently issues an annual report highlighting its work targeting elder fraud, and stands ready to work with the Committee to continue to prioritize this important issue. *See Report of the Federal Trade Commission, Protecting Older Consumers 2019-2020* (Oct. 18, 2020), https://www.ftc.gov/system/files/documents/reports/protecting-older-consumers-2019-2020-report-federal-trade-commission/p144400_protecting_older_adults_report_2020.pdf.

[8] 15 U.S.C. § 45(a)(2) excepts from the FTC Act "common carriers subject to the Acts to regulate commerce." 15 U.S.C. § 44 defines the "Acts to regulate commerce" as "subtitle IV of title 49 [interstate transportation] and the Communications Act of 1934" and all amendments thereto.

[9] H.R. 3918, To amend the Federal Trade Commission Act to permit the Federal Trade Commission to enforce such Act against certain tax-exempt organizations, 117th Cong. (2021), https://docs.house.gov/meetings/IF/IF17/20210728/113972/BILLS-1173918ih.pdf.

[10] H.R. 4447, The 21st Century FTC Act, 117th Cong., https://docs.house.gov/meetings/IF/IF17/20210728/113972/BILLS-1174447ih.pdf .

Ms. SCHAKOWSKY. Thank you very much.

And now, Commissioner Phillips, you are recognized for 5 minutes.

STATEMENT OF NOAH JOSHUA PHILLIPS

Mr. PHILLIPS. Thank you, Madam Chair. Chair Schakowsky, Ranking Member Bilirakis, members of the subcommittee, thank you for the opportunity to appear before you. I am honored to testify with my fellow Commissioners about the important work we do at the FTC. I am glad the subcommittee has decided to solicit a range of views on agency reform.

I would also like to take a moment to thank the staff at the Edgartown Public Library for providing me with a private, quiet place to testify. I will be masked, in adherence to library policy.

The thoughtful proposals Members have made on agency reform deserve attention—in particular, those designed to increase transparency into the Commission, like the FTC Reports Act, sponsored by Congressman Bilirakis, and Mr. Guthrie's FTC Transparency Act.

In the last few weeks, the Commission has repeatedly changed policy directions without giving the public any real notice or right to be heard and, without serious consideration, removed guidance from the public and business community alike. And by removing Commission oversight from antitrust and other investigations, as we recently did, we have reduced transparency within the agency. We must do better.

As you consider agency reforms, I urge you to think about the other ways in which the agency is changing course.

The first change is the Commission pivoting, without Congress, to regulate a great deal of the economy. Over the last few years, my colleagues have called for a bevy of new rules, mostly under authorities that we have. The President's recent Executive order contemplates our issuing major regulations concerning, among other things, pharmaceuticals, technology, labor, retail, and devices. Not all of the proposals in the Executive order are bad, to be clear. But much of it would replace consumer-driven market forces with government-supervised regulation, the opposite of competition. And much of that appears to be based on authority we simply do not possess.

The Commission, however, is in a hurry to regulate. For example, on July 1st, without input from the public, we adopted rules to enable us to promulgate regulations with less objectivity, less oversight, and less public input. The Commission majority is reducing what it calls red tape on the Commission, to impose more real red tape on American businesses, large and small.

Well-crafted regulations can help consumers and businesses, but poor regulatory design can raise prices, stifle innovation, and reduce consumer choice. This was a lesson America learned the hard way decades ago.

And when it comes to policy questions of great economic and political importance, my basic philosophy is that Congress, not the FTC, is the place to answer them. I believe the law reflects that fact. Privacy is a good example, and I commend Committee Ranking Member Rodgers and subcommittee member—Ranking Member

Bilirakis on their recent letter calling for privacy legislation and for the administration to make it a priority.

In adopting regulations, I hope we address clearly defined problems, fashion rules designed to address them, and minimize unintended consequences. I hope we base our decisions on empirical evidence and input from all stakeholders, which is why I also support the goals of the RECS Act, introduced by Congressman Bucshon, to ensure that we approach Congress with analytical rigor.

Another change, I fear, is moving away from the Commission's historical commitment to combating fraud. Just a few weeks ago, this subcommittee considered amendments to section 13(b), following the Supreme Court's AMG decision. As we detailed in testimony, a fraud program has, for decades, done essential work to return money to victims of fraud. Companies large and small that engage in fraud can cost consumers their life savings. In the past 5 years we have returned $11.2 billion in refunds to consumers who are victims of fraud. I am heartened that Congress has appropriated funds and passed laws to strengthen the fraud program, and count me among those who believe that a well-crafted amendment to 13(b), with guardrails, will help serve consumers.

Of late, some of my colleagues have made comments to suggest that we should focus only on large companies. The fact is that many of the frauds we see are not perpetrated by those kinds of companies, and I hope these comments do not indicate a desire to turn away from the fraud program. Where big corporations violate the law, we absolutely should hold them to account. But some of the wrongdoers that hurt Americans the most happen not to be large corporations. We should focus on harm to consumers, not the identities of defendants.

While enforcement against robocallers, COVID–19 scammers, and others may not generate as many headlines, it generates results for consumers. While section 19 is not a perfect tool, it enables us to turn—return money to them. We should continue to commit resources to combating practices like fraud that cause the most harm, and I welcome legislation like updating 13(b) that will help with that.

Thank you, and I look forward to your questions.

[Mr. Phillips submitted a joint prepared statement with the other FTC witnesses.]

Ms. SCHAKOWSKY. Thank you.

And now, Commissioner Chopra, you are recognized for 5 minutes.

STATEMENT OF ROHIT CHOPRA

Mr. CHOPRA. Chair Schakowsky, Ranking Member Bilirakis, and members of the subcommittee, thank you for holding this hearing today. My name is Rohit Chopra, and it is an honor to be here with you and my fellow Commissioners.

The pandemic created the conditions for a wide range of market abuses that harmed so many Americans, including millions of small businesses. Many small businesses in America didn't just find their financial futures in peril; they also found themselves completely under siege against—by unfair, deceptive, and anticompetitive practices by—firms.

Local restaurant owners were worried about food delivery apps that coerced them into paying extraordinary fees. Local franchisees faced new onerous requirements that franchisors were imposing on them, even as they struggled to stay afloat. Independent pharmacists, who played a critical role in the response to the pandemic, found themselves at the mercy of middlemen using tactics that are driving many of these independent clinics out of business. And the same goes with small retailers and small banks, and the list goes on and on and on. It was crystal clear that small businesses across the country needed the FTC's help, but many felt completely ignored.

I appreciate your work to increase the effectiveness of the Federal Trade Commission. And as you pursue these efforts, I would also encourage you to consider other reforms to ensure that the FTC is more responsive to small businesses and less slanted in the favor of larger ones. We need to look at laws related to ethics and financial conflicts of interest and more. Small businesses have expressed concern that the FTC routinely gives favorable treatment to large, powerful firms, such as Big Tech and Big Pharma giants, while ignoring pleas for action to address practices harming small players.

When Big Tech companies egregiously violate privacy and the law, the FTC has shown across multiple administrations that it is more than willing to be lax and forgiving. But when small businesses violate these laws, the FTC brings down the hammer on them, wiping out revenues and often shutting them down. This two-tier approach does not make sense.

Congress should explore whether our laws need to be amended to reduce favoritism toward these dominant players, crack down on financial conflicts of interest, and increase responsiveness to local businesses and upstarts.

First, Congress should examine whether to revisit laws regarding postemployment restrictions for senior FTC officials. While senior officials cannot immediately represent clients in front of the agency, many are able to work quietly behind the scenes, leveraging their intimate knowledge of nonpublic agency deliberations on law and policy. This gives them an enormous advantage on how to help large firms escape meaningful accountability when they break the law and how to advise them on how to get the FTC to take specific actions. Small businesses don't have the resources or the ability to hire former FTC Commissioners and bureau directors who regularly appear before the agency on behalf of dominant firms. This creates an unlevel playing field for small businesses engaging with the FTC, seeking action or a fair resolution.

Congress should also assess whether existing postemployment restrictions and other standards regarding financial conflicts of interest in our laws are adequate. While some argue that tougher restrictions will deter some from considering government service, our experience at the FTC reveals a different story, with many of our most talented officials devoting the vast majority of their career to working in public service.

In addition, Congress should also determine whether existing law regarding so-called sponsored travel needs to be updated. Under existing law, senior government officials can be sponsored by non-

Federal sources to travel to conferences and retreats, largely attended by and indirectly paid for by those representing dominant firms, especially Big Tech. These events sometimes include closed-door panel discussions that are not open to the media or the public, giving conference organizers and their patrons a chance to gather intelligence about emerging policies and priorities.

This nonpublic information can be exploited by investment funds that trade on this information. Small businesses and the general public can't easily access these private panel junkets and don't have the resources to organize them on their own. To ensure equal access and fairness, it will be important to examine whether laws and regulations need to be amended to guard against real or perceived conflicts of interest when it comes to sponsored travel by non-Federal sources.

In closing, it is clear that honest businesses need the FTC more than ever. I am confident that we can work together to fairly administer the law and promote a marketplace free of fraud and anti-competitive abuses.

Thank you, and I look forward to your questions.

[Mr. Chopra submitted a joint prepared statement with the other FTC witnesses.]

Ms. SCHAKOWSKY. Thank you, Commissioner.

And now I recognize Commissioner Slaughter for 5 minutes for an opening statement.

STATEMENT OF REBECCA KELLY SLAUGHTER

Ms. SLAUGHTER. Thank you, Chair Schakowsky, Ranking Member Bilirakis, and members of this subcommittee. I am pleased to appear before you today, and I appreciate the opportunity to appear remotely. With four children too young to be vaccinated at home, I am being extra cautious about COVID exposure.

I want to start by thanking this committee for its incredibly hard work to pass the Consumer Protection Recovery Act, what we refer to as the 13(b) fix, through the House earlier this month. I am grateful for your appreciation of the challenges the recent Supreme Court decision posed for the Commission, for your hard work to arm us with the tools we need to protect your constituents. I am eager for us to continue to partner with Congress and this committee.

While I am happy to discuss the bills before the committee today, I also want to encourage you to continue work on a meaningful, comprehensive, legislative approach to data abuses. Yesterday the FTC held its sixth annual PrivacyCon conference, with presenters covering topics including algorithmic bias, issues around consent, misinformation during the pandemic, and special concerns related to kids and teens. That broad agenda reflected our understanding that data issues have moved past the narrow framework of who has access to your personal data.

This understanding is why I prefer the term "data abuses" to the narrower language of "privacy." Thinking in terms of abuses reflects the fact that rampant data collection, sharing, and exploitation harms consumers and competition in ways that affect nearly every aspect of our lives.

I know this topic is front of mind for members of this committee and that you are actively considering how best to craft legislation to address—to directly address the harms faced by consumers, workers, and small businesses in our data-driven economy.

I also understand that doing this well takes time and thought, and I encourage you to focus on approaches that not only address the full panoply of harms that stem from indiscriminate data collection, including civil rights violations, abuse of market power, economic exclusion, and exploitation of children, but also provide meaningful solutions that root out damaging and dangerous business models and market practices.

When it comes to questions about personal data, I respectfully suggest we move past outdated notice and content models that put untenable burdens on users. Instead, we should turn our focus to changing the underlying incentives that fuel data-driven business models, such as behavioral advertising.

One approach to consider is data minimization, a principle that would ensure companies can collect only the information necessary to provide consumers with the service on offer and use the data they collect only to provide that service. That minimization could be coupled with further use, purpose, sharing, and security requirements to ensure that the information companies collect isn't used to build tools or services that imperil people's civil rights, economic opportunities, and personal autonomy, or facilitate corporate self-dealing. We have to recognize that, as long as key digital markets are controlled by just a few large, data-hungry, online platforms, both consumers and prospective entrants are at their mercy.

As Congress continues to debate these issues, I believe it is incumbent upon the Commission to act within the full scope of our existing authority to target pernicious data practices with both aggressive enforcement and rulemaking.

A quick note about rulemaking, which I know can generate big reactions. Congress specifically delegated to the FTC the authority, albeit with a burdensome process, to write rules that prohibit or regulate any unfair or deceptive act or practice that is prevalent in interstate commerce. In other words, if we can already sue someone for committing an unfair or deceptive practice in violation of section 5 of the FTC Act and that practice is prevalent, then we can also write a rule that clarifies for the markets that the conduct is prohibited.

That means rulemaking can only target conduct that is already illegal. Rules are developed using a participatory process with substantial stakeholder engagement and, when finalized, provide notice and certainty to the market about what conduct is outside the scope of our 100-year-old statute.

As I said before, I believe it is past time for the FTC to begin a rulemaking process on data abuses. Among other benefits, this process can have a clarifying effect for the congressional debate, as well. Participating in the rulemaking process means businesses, advocates, consumers, workers, researchers, and other interested parties all have the opportunity to make their opinions known, out in the open, and with specificity in the public record. An open record can provide substantiation of the types of consumer protection and competition harms people are experiencing in digital mar-

kets and illuminate how we can act decisively to stamp out these abuses.

I look forward to working with my fellow Commissioners and with Congress to advance these efforts, and I welcome your questions.

[Ms. Slaughter submitted a joint prepared statement with the other FTC witnesses.]

Ms. SCHAKOWSKY. Thank you.

And Commissioner Wilson, you are now recognized.

STATEMENT OF CHRISTINE S. WILSON

Ms. WILSON. Thank you. Chairman Pallone, Ranking Member McMorris Rodgers, Chair Schakowsky, Ranking Member Bilirakis, and distinguished members of the subcommittee, thank you for the opportunity to testify. In my remarks I will address section 13(b), Federal privacy legislation, and process issues that have arisen recently at the Commission because those process issues impact my view of the 16 bills we will discuss today.

I am blessed to be serving my third stint at the Federal Trade Commission. I have great respect for the agency's devoted personnel, and I remain amazed at how much we accomplish in so many different industry sectors despite our small budget. And I am proud of our agency's history of collegiality and bipartisanship.

I understand that elections have consequences. The Biden administration may choose to pursue different policies than its predecessors, but the process used to implement those changes matters. Congressman Pallone stated in 2016 during a hearing on FTC legislation, "I am a big proponent of regular order. That means engaging in real deliberation, not just checking the boxes." I agree with that sentiment, and I believe it applies equally to the Federal Trade Commission.

As a political appointee nominated by the White House and confirmed by the Senate, I am obligated to exercise due oversight of Commission business. FTC actions traditionally have been the product of robust dialogue and analysis, supported by briefings and staff memoranda. These procedures facilitate a healthy flow of information among Commissioners and staff and enable us to arrive at reasoned conclusions. When we adhere to these traditions, I am able to fulfill my oversight function.

But in recent weeks, longstanding norms and procedures have been jettisoned. Practitioners, academics, and former enforcers across the political spectrum have expressed concern about the agency's abrupt departure from regular order. I share these concerns, and they impact my view of the bills we will discuss today.

Some bills establish additional procedural safeguards and augmented oversight. Given the shift away from regular order, those bills are more important now than ever. Other bills give the FTC additional authority. Given the FTC's conduct in the 1970s, I have long been concerned about the possibility of agency overreach, and recent actions by Commission leadership have deepened those concerns. I am wary of more power without appropriate guardrails.

Turning to section 13(b), I appreciate this committee's attention to this issue. I support Commission authority to seek equitable monetary relief in appropriate cases and to challenge conduct that

wrongdoers have halted. But I understand the concerns that have been raised.

Some are concerned about disgorgement in antitrust cases. Guiding principles on when the FTC will seek disgorgement, like those in the FTC's 2003 disgorgement policy statement, would provide appropriate guardrails.

Others are concerned about using 13(b) in consumer protection cases that involve not fraud but legitimate companies selling legitimate products, albeit with deceptive claims. Congress can include a framework in 13(b) under which courts must evaluate the value consumers have retained from the product or service despite the deception.

The bottom line: With proper guardrails, legitimate concerns can be addressed while also enabling the FTC to pursue wrongdoers in appropriate cases.

And finally, I would like to address Federal privacy legislation. Businesses need clarity regarding the rules of the road in this important area. But, more importantly, consumers need clarity regarding how their data is collected, shared, and monetized. Without this information, consumers cannot make informed choices about the costs and benefits of using various websites, apps, and devices.

The events of the last 18 months have exacerbated privacy concerns, but they have also underscored that our civil liberties, including Fourth Amendment protections, are at stake and the FTC's existing jurisdiction and tools are limited. I thank the members of this committee, in particular Ranking Member McMorris Rodgers and Ranking Member Bilirakis, for their recognition of this important issue. And I encourage the committee to continue working on privacy legislation. As the elected representatives of the American people, you are best situated to make the important value judgments inherent in privacy legislation.

President Biden's recent EO asked the FTC to consider a privacy rulemaking. I recently have become more receptive to a privacy rulemaking as a stopgap measure until Congress could act. But the Commission recently voted along party lines to erase procedural safeguards and limit opportunities for public input during our rulemakings. Consequently, I am now much less receptive to an FTC rulemaking. Federal privacy legislation remains the optimal solution, so I encourage you to act.

In closing, I thank this committee for your time and support of the FTC's mission. I am happy to answer any questions you may have.

[Ms. Wilson submitted a joint prepared statement with the other FTC witnesses.]

Ms. SCHAKOWSKY. Thank you. We have concluded witnesses' opening statements, and at this time we will move to—I am sorry? Oh, I am sorry, there is a vote on the floor, so we are going to recess.

How many votes are there? Just one. Can we have people just vote? Do we have to recess? We have to recess?

OK, yes, since the time of voting actually has gotten pretty strict, we are going to recess. But come back as soon as you can so that we can get to our question period. And I—not exactly apologize to

the witnesses, this is our life here, but we will be back as soon as we can to get to questions. Thank you.

[Recess.]

Ms. SCHAKOWSKY. OK, we are going to come back to order. Thank you. And once again, these are situations beyond our control, and I appreciate your patience.

So we are going to begin with the questions from our Members, and I want to begin with 5 minutes of questioning.

I want to talk about holding Big Tech accountability online, consumer protection, et cetera, and there is no doubt that, especially during this pandemic, that more and more Americans are increasingly online, and the importance of holding the technology companies accountable is more and more important, I believe.

And there is absolutely no reason for internet platforms to not hold to the same accountability standards as—for harming consumers as offline businesses. And so, you know, what is illegal offline ought to be, in my view, illegal online, as well.

So let me start with you, Chairman, Chair Khan. I am going to assume that the—you believe that the FTC can do more to protect consumers from online harms, right?

Ms. KHAN. Yes, Congresswoman.

Ms. SCHAKOWSKY. Thank you. In your view, is it unfair or deceptive when social media platforms or online platforms fail to follow their own terms of service?

Ms. KHAN. Chairwoman, I would say, as a general matter, there is a lot of concern around the opacity of their policies and procedures. And so sometimes it can be difficult to know when they are or are not following their own policies because of that opacity. And so I think those information asymmetries create—can create a lot of problems.

Ms. SCHAKOWSKY. So are the—just say are—do you think that the FTC existing authority is sufficient to enforce against violations that we see to absolutely deter further violations?

Ms. KHAN. Congresswoman, I think there is certainly more we could be doing under our existing authority. I do think that there are areas where the courts have scaled back our authority. There are cases where the platforms are able to claim particular privileges under the law that can create defenses that we have to then argue against. So I think there is room for more work, but there are certainly challenges, as well.

Ms. SCHAKOWSKY. Well, if you could talk a little bit about that, and I want to ask Commissioner Chopra the same thing. What are the kinds of things that you envision?

And the other Commissioners would be welcome after those two. Go ahead.

Ms. KHAN. So I think some of the types of provisions that you have proposed, including, you know, civil penalty authority, specifically for some of these types of—being able to go after some of these types of practices, enabling other enforcers to also be enforcing some of these provisions, like the State AGs, I think that could also help with deterrence.

But overall, I think figuring out how we create some of that parity between online and offline is going to be very important.

Ms. SCHAKOWSKY. Now, also, Commissioner Chopra, if you could also talk about resources, whether or not, even if you want to, what capabilities do the—does the Commission have, not having enough resources?

Mr. CHOPRA. Yes, I think this is a huge issue right now. Right now we are facing a massive merger surge. It is stretching capacity to the limit, and the rubber band is snapping.

And at the same time, in order to prosecute certain cases, we have to go up against well-financed defendants who can claim section 230 immunity with impunity. They use it for almost every single thing when it comes to platform-related conduct. This immunity is abused, and Congress absolutely needs to fix it because it is an impediment to protecting consumers and small businesses online.

Ms. SCHAKOWSKY. So, you know, we have had bipartisan discussions about 230, and one of the bills that has been introduced also would begin to address the 230. I am just wondering if any of the other Commissioners—are you still here, by the way—would want to comment on—what can the and should the Commission be doing to protect consumers and—more efficiently?

Ms. SLAUGHTER. I am happy to jump in, Madam Chair, and thank you for the question. I want to echo the comments that my colleagues have offered, in thanking you for your leadership in calling attention to some of the problems that 230, in particular, has posed for enforcement. I am especially worried about the areas where 230 provides protection for platforms for illegal conduct, and the way that they [audio malfunction] or facilitate illegal conduct on their platforms.

I also think the resource question can't be overstated. Not only do we have to go into litigation, we have to go into litigation with companies that are not willing to make meaningful changes that will actually get to the root of the problems in the settlement. So we are forced to sue, and that is expensive and it is time consuming. So figuring out how to fix those asymmetries, as the Chair said, would be very helpful.

Ms. SCHAKOWSKY. Thank you so much. My time is expired. And now I call on the ranking member for 5 minutes of questions.

Mr. BILIRAKIS. Thank you, Madam Chair, I appreciate it very much.

During Joseph Simons' confirmation hearing to be FTC Chair, Senators had the opportunity to ask him whether he would commit to running the FTC in a bipartisan manner. He, of course, agreed. Considering one of your colleagues is expected to be confirmed to another position, the FTC may soon be in a two-two split. And so it would be even more imperative that the FTC proceeds on a consensus bipartisan approach.

So Chair Khan, since the Senate did not have the opportunity to ask you will you run the FTC—again, will you commit to doing it in a bipartisan fashion, where you will consult and coordinate with all Commissioners and ensure they have the resources of the Commission available to them on all pending business? Please answer yes or no.

Ms. KHAN. Certainly, Congressman, I think this is a really fascinating moment for a new emerging bipartisan consensus, especially around some of the concerns relating to concentration of eco-

nomic power in the digital markets. And I am always keen to find areas of shared agreement with my colleagues.

Mr. BILIRAKIS. Thank you. Our committee has worked extensively in a bipartisan manner to protect consumers from fraud and scams. Mr. Carter's Combating Pandemic Scams Act was enacted at the beginning of the year, thanks to all of our leadership here. Representative Blunt Rochester's Fraud and Scam Reduction Act as well as Representative Kelly's Protecting Seniors from Emergency Scams Act both cleared our Chamber with bipartisan support this year. My bill, H.R. 2672, the FTC Reports Act, would require the FTC to report on fraud against our seniors.

Commissioner Phillips, how important is the work the FTC staff does to protect Americans from scams?

Mr. PHILLIPS. Congressman, thank you for your question. The work we do to protect American consumers against frauds and scams is our bread and butter as an agency. There is no work that makes me feel better as a Commissioner than we watch our ability to find bad guys who are taking money from American consumers, dipping into their life savings, and get that money back to them.

So the work that you have done on the committee to provide funding and to provide tools for us to go after scam artists is critical, and I think that needs to continue at the agency.

Mr. BILIRAKIS. Thank you.

And Chair Khan, again, as you pursue other initiatives, will any staff and resources be shifted away from the fraud program, which is so essential in preventing bad actors from harming our constituents? That is the question, please.

Ms. KHAN. Sorry, could you repeat the question? Using—when should resources——

Mr. BILIRAKIS. Yes, of course. As you pursue other initiatives, will any staff and resources be shifted away from your fraud program, which is so essential in preventing bad actors from harming our constituents?

Ms. KHAN. Well, of course, we are always limited by the appropriations bills when it comes to thinking through how we are delegating resources across the agency. In certain instances I think there are exigent needs that can arise in certain aspects——

Mr. BILIRAKIS. But you don't anticipate moving money from the fraud program, is that correct?

Ms. KHAN. Not especially. I mean, I think overall we are trying to look through the prism of managerial efficiency and trying to understand how we can best use our resources, especially given some of the exigent circumstances. And so we will be continuing to make those determinations.

Mr. BILIRAKIS. I suggest that you not, because this is such a very important program.

Commissioner Wilson, can you elaborate on why the FTC Reports Act would also prove beneficial to increasing much-needed transparency and the flow of information within the Commission?

Ms. WILSON. Thank you very much for the question——

Mr. BILIRAKIS. Thank you.

Ms. WILSON [continuing]. Ranking Member Bilirakis. As I explained in my opening remarks, there have been significant concerns regarding procedural irregularities and abnormalities in re-

cent weeks. These are abnormalities that we did not experience under Republican Chair Joe Simons or under Democrat Acting Chair Rebecca Slaughter. We can agree to disagree. We can disagree without being disagreeable. But process matters.

And so, to the extent there are ongoing procedural irregularities at the Federal Trade Commission, I think that even more transparency will enable Congress to exercise its even more important oversight now, regarding the actions of the agency.

Ms. SCHAKOWSKY. Guess what? There is a vote, another motion to adjourn. I don't know what to say. I know that Commissioner Slaughter has a hard stop, and I don't know about the rest of you.

I think we need to vote, and then come back as quickly as we can. If you are here, we will appreciate it. This is very frustrating.

Did you want to say something?

Ms. KHAN. We are happy to stay.

Ms. SCHAKOWSKY. All right, we are going to go vote.

[Recess.]

Ms. SCHAKOWSKY. OK. Next for questions is Congresswoman Castor.

You are recognized for 5 minutes of questions.

Ms. CASTOR. Well, thank you, Chair Schakowsky, for calling this hearing and for following through on working with me on a bill to give FTC APA rulemaking authority and first-offense civil penalty authority in our—in my 21st Century FTC Act. It is H.R. 4447.

But before I ask questions—a question on that bill, I would like to first discuss a top priority for me, and that is children's online privacy. On July 9th President Biden issued an Executive order that directed the FTC to use its statutory rulemaking authority to address unfair data collection and surveillance practices that may damage competition, consumer autonomy, and consumer privacy.

The FTC should follow through. They should follow through on President Biden's direction to use its powers to protect consumers' privacy. But while doing so, it should make protecting children's privacy a priority. And it is not just me that believes this should be a priority. I helped secure language in the financial services appropriations bill we are voting on this week that urges the FTC to prioritize investigations into potential violations of the COPPA Rule as well as requiring the FTC to submit a report on its enforcement of the COPPA Rule.

So, Chair Khan, will you commit to prioritizing enforcement of the COPPA Rule and submitting this report in a timely fashion?

Ms. KHAN. Thank you, Congresswoman. I think ensuring robust privacy protections for children, in particular, is paramount, and I certainly hope the agency will be able to commit its resources to focus on this important issue, especially during the pandemic, when so many children have become even more reliant on EdTech services.

Ms. CASTOR. So can you give us an update on the status of the COPPA Rule?

Ms. KHAN. Of the COPPA Rule?

Ms. CASTOR. Yes.

Ms. KHAN. I understand a review has been initiated. I am not precisely sure where we are, exactly, in that process. I know there have been concerns relating to whether any revision would be

stronger than what we already have in place, as opposed to weakening it.

From my perspective, I think COPPA needs to be the floor, not the ceiling, and we need to question whether the type of notice and consent framework that informs them of the prior privacy rules are still adequate, especially when parents don't really have a choice as to whether their children are even using some of these technologies.

But I am happy to follow up with your office on the specific—where we are in the process.

Ms. CASTOR. Thank you very much. And Commissioner Chopra, you have been a leader here on—when it comes to children's online privacy. What is your view for the agency, going forward?

Mr. CHOPRA. Yes, it is very clear that many of these firms, whether it be TikTok or YouTube, are wanting the data of teenagers and children desperately, so that they can monetize them and target them for the rest of their lives.

I think the Commission learned a hard lesson in its YouTube settlement, which essentially allowed YouTube to pay a fine but to keep the algorithms that were illegally enhanced by their spying on children and, essentially, did nothing to fix the underlying business model that YouTube relies on to, essentially, target children.

So we need to look, as Chair Khan said, at the underlying business model that is promoting so much of these privacy abuses. And I really agree with what you said, it has to be a priority. And we also need our State attorneys general joining with us to prosecute more of these cases.

Ms. CASTOR. And stay tuned. I think the Congress is poised to have more legislation to consider very soon.

So switching to my 21st Century FTC Act, which gives the FTC APA rulemaking authority and first-offense civil penalty authority, I would like to ask two quick yes-or-no questions to each of you.

One, should the FTC have more statutory authority to pursue civil penalties, yes or no?

Ms. KHAN. Yes, Congresswoman. I think it can help with deterrence, significantly.

Mr. CHOPRA. Yes.

Ms. CASTOR. And number two, should the FTC have more—a more streamlined and less cumbersome rulemaking process?

Ms. KHAN. Yes.

Mr. CHOPRA. Yes, that would be more equivalent to almost every other agency that polices against these abuses.

Ms. CASTOR. I think that is important for my colleagues to understand, that the FTC is different.

Who—I am going to ask one other followup question, Chair Khan. Who wouldn't want the FTC to have this kind of first-offense civil penalty authority?

Ms. KHAN. Frankly, it would be the lawbreakers who would not be disincentivized to not pursue these actions in the first place.

Ms. CASTOR. Do you agree, Commissioner Chopra?

Mr. CHOPRA. Yes. I think a big problem with the FTC, as it currently is composed, is that we cannot penalize some of this egregious conduct. We just, hopefully, can get money back. But there has to be a disincentive to do that misconduct in the first——

Ms. CASTOR. In the first place.

Mr. PHILLIPS. Congresswoman, could I add something?

Ms. CASTOR. Thank you very much. I have run out of time, so I yield back. Thank you.

Ms. SCHAKOWSKY. I just want to remind Members that there are other Commissioners, I think, that are still on, virtually, with us, I hope.

And now let me call on Representative Latta for his 5 minutes of questioning.

Mr. LATTA. Well, thank you very much, Madam Chair, and thanks to the Commissioners for being with us today.

You know, in recent weeks the FTC has held two open meetings. While I am glad to see that the FTC intends to increase transparency, the reality has fallen short. Any change in policy should not be rushed. It should be well communicated in advance to the public and ensure input is sought and considered ahead of any Commission votes. Most importantly, having open, transparent meetings will allow the FTC to better serve the public interest.

Similarly, in 2017, Chairman Pai increased the transparency of the FCC by publicly releasing documents weeks in advance of the open meetings, and Acting Chair Rosenworcel has continued this practice.

Chairwoman Khan, will you agree to conduct future meetings and policy deliberations in a truly transparent manner?

Ms. KHAN. Thanks for the question, Congressman. Let me just say up front I am so thrilled that we have been able to really start opening up our Commission meetings. I think it can really help with democratizing the agency and enhancing public participation. And I am so grateful both to the agency staff that have enabled us to do this in quick order and my fellow Commissioners.

Of course, you know, we are still very early in the process, and so are always thinking about ways that we can improve our processes going forward.

Mr. LATTA. So you—but you will make sure that they are open process, and there is transparency.

Ms. KHAN. Certainly, I think——

Mr. LATTA. I am going to take that as a yes.

Ms. KHAN. Certainly, yes. We——

Mr. LATTA. Thank you, thank you.

Ms. KHAN [continuing]. Want to focus on clear notice for all market participants and the public.

Mr. LATTA. Thank you.

Commissioner Phillips, the FTC recently voted along party lines to rescind two policy statements that have been relied on under previous administrations of both parties. Were you consulted by the Chair prior to the notice of the open meetings on this, or what could go into their place?

Mr. PHILLIPS. Thank you for the question, Congressman. I would say the level of consultation was as low as I have seen at the agency, and it is important to note that, in terms of transparency, we didn't make transparent what our policies would be.

I think Congressman Guthrie's act, putting out the policies 30 days in advance, giving the public a real opportunity for input, is a very important thing that could—you know, to follow on the

words of the Chair—really democratize the process. Let the public know what we are going to do, allow for consultation with the public, allow for consultation within the Commission. That is how you have a thoughtful process.

Mr. LATTA. Thank you.

Chairman Wilson, same question.

Ms. WILSON. I completely agree with the comments of my colleague, Commissioner Phillips, and I would note that, in terms of transparency and democratization, we actually—the Republicans on the Commission offered motions that would require the recision of these important policy statements to be put out for notice and comment so that we could receive the input of all stakeholders before these important policy statements were rescinded. And in fact, the three Democrats voted against the—against receiving input from the public on these important issues.

Moreover, I would note that, while it is wonderful to hear from the public in these new open Commission meetings, we are hearing from them after votes are taken. And so they are not actually having an opportunity to weigh in on the proposals that we are considering.

Mr. LATTA. Well, thank you.

Madam Chair, I would like to enter into the record the July 9 dissenting statement from Commissioners Phillips and Wilson regarding unfair methods of competition.

Ms. SCHAKOWSKY. Without objection.

[The information appears at the conclusion of the hearing.]

Mr. LATTA. Thank you, Madam Chair.

Commissioner Wilson, it goes without saying that our Nation needs a privacy law. The longer Congress waits to enact bipartisan legislation, the more States decide to create their own laws. I am concerned about this patchwork of State laws that breeds confusion and leaves gaps in consumer protection.

It is clear to me that we need a Federal privacy standard to better protect consumers and streamline compliance. It is not realistic for small and mid-sized companies to follow 50 different, obviously, laws. It might also be unconstitutional.

Would you expound on why it is important for Congress to create a national privacy standard?

Ms. WILSON. Absolutely. I think this is an incredibly important issue and one that all of us at the Commission have spent a great deal of time talking about it. And I know, in fact, this is an area of bipartisan consensus at the Commission, and Commissioners Slaughter and Chopra and I have had extensive discussions about the need for Federal privacy legislation.

It is very difficult for businesses to understand the rules of the road, operating in 50 different jurisdictions, with 50 different State laws, not to mention all of the international regimes.

And with respect to citizens, privacy rights and transmission of data doesn't stop at State boundaries, let alone national boundaries. And so I would love to see the U.S. step up to the plate, take a seat at the table internationally, by enacting Federal privacy legislation that provides not just privacy for our consumers here at home but also protection for important civil rights that are being eroded as we speak.

Mr. LATTA. Well, thank you very much.

And Madam Chair, my time has expired, and I yield back.

Ms. SCHAKOWSKY. I now recognize the chairman of the full committee, Mr. Pallone.

Mr. PALLONE. I thank the chairwoman. I wanted to ask Chairwoman Khan about enforcement.

Why is it so essential that Congress update the FTC's enforcement tools to maximize the Commission's limited resources?

Ms. KHAN. Thank you. Thank you, Chairman Pallone. The agency is severely underresourced. There—we have less staff than we did back in 1980. Of course, the size of the economy has dramatically expanded since then, and we simply have not been able to keep pace.

As I mentioned in my opening remarks, we are currently living through a huge wave of mergers and acquisitions. And I think there is a particular concern that, unless we are able to closely scrutinized these deals, that our economy could end up becoming even more concentrated than it currently has, and—harming consumers, workers, honest businesses.

Mr. PALLONE. And then we have heard concerns from some on the other side of the aisle that providing the FTC with new authorities and tools, such as civil penalty authority, APA rulemaking might result in overreach that would put well-intended businesses at risk of unfair enforcement actions.

But I wanted to you—to give you a chance to respond to that concern. And particularly, do you believe that a more flexible and dynamic FTC actually benefits honest businesses, and how so?

Ms. KHAN. Absolutely. You know, there are ways in which rules can provide additional clarity for businesses. The Commission recently voted out Made in USA rules that would enable the FTC to penalize companies that are lying about their products being made in the USA. That is an example of a rule that is not imposing any new burdens but is simply creating clarity and ensuring that the FTC can deter this type of conduct.

Mr. PALLONE. All right, thank you. And then let me ask Commissioner Slaughter—I think you said everybody is still here, right? OK.

Commissioner Slaughter, we have heard many times from the minority—I should say from the Republicans—that we need to move quickly to enact a Federal consumer privacy standard with the FTC in charge of enforcement. That—in my view, some of the bills that Republican Members are proposing today would actually hinder the FTC's privacy enforcement.

So my two questions: Do you believe that any of the bills under consideration today, like the TIME Act or the SURE Act, would hinder the Commission's efforts on privacy and data security? And if so, how?

And then, secondly, what changes to the FTC authority do you believe are critical to ensure consumer privacy is effectively protected, if you will?

Ms. SLAUGHTER. Thank you, Mr. Chairman. Yes, I agree with the principle that we need to be on top of this important area of the economy, and I really appreciate this committee's attention to mak-

ing sure we are adequately resourced, both funding and authority to do that work.

I also share the view that some of the bills before consideration, while well-intentioned—before this committee for consideration, while well-intentioned, may have some problematic, unintended consequences, in terms of ensuring our enforcement can be effective.

So, for example, I was concerned about limitations on the duration of our consent decrees. I think we need to make sure that we are tailoring case-specific resolutions that really ensure violations do not recur and that we are doing that with the flexibility so that we can revisit those orders as circumstances require.

I am also concerned, for example, about the SURE Act that might embolden large companies engaged in abuses to argue that any perceived injury from, for example, a free service cannot be unfair, or that it might encourage judges to take an overly narrow view of unfairness. Our enforcement burden to demonstrate unfairness is already extraordinarily high, and the cost to consumers and—from that is felt every day.

And then the last point I will make is that I am very sympathetic to the calls for transparency, for example, with reports. But I actually very much worry that any reporting requirement that isn't coupled with additional resourcing means that we are taking energy away from, and staff attention away from, protecting your constituents, and putting it instead into paperwork.

And so, in terms of what tools we need, I absolutely agree with my colleagues that APA rulemaking authority would be helpful, civil penalty authority would be helpful. And I think fixing 13(b) would be very important, and adequately resourcing the agency to make sure that we can keep pace with the large companies across the table from us is critically important.

Mr. PALLONE. Thank you so much.

I yield back, Madam Chair.

Ms. SCHAKOWSKY. I now recognize the ranking member of the full committee, Mrs. Rodgers, for 5 minutes.

Mrs. RODGERS. Thank you, Madam Chair. I recognize it has been a long day. I appreciate you all sticking with us and believe that this is a very important hearing today, as we think through the FTC and the many issues before the FTC.

Last month we saw that the FTC went through some dramatic changes, including when it recently voted on a 3–2 party-line vote for structural change in its compulsory process. And this will provide de facto control by one person to issue subpoenas in competition cases without consultation with other FTC Commissioners or bureaus. I don't believe that that is a new era to celebrate.

These changes seem to be a clear attempt by the new Chair in the Biden-Harris administration to consolidate power in order to pursue an agenda that will completely reshape our economy.

I continue to hear that the FTC needs additional funding, staff, authorities. Some of the bills have been proposed today by the majority. But if decisions are being made behind the scenes unilaterally, it really makes it hard to justify such a request.

So I wanted to start with Commissioner Phillips. Should this compulsory process be at the discretion of one person?

And can you briefly explain why it is important to have collaboration with experts and Commissioners when issuing a subpoena under this authority?

Mr. PHILLIPS. Thank you, Congresswoman. So we do use single-Commissioner-authorized compulsory process for a lot of the kind of bread-and-butter scams and frauds. But for the larger investigations, the antitrust investigations, all Commissioners have—until just weeks ago, had the opportunity to look at what was going on, to ask staff questions, to try to make sure that the resources that we ask for from Congress are being used in a sound way.

Mrs. RODGERS. Thank you.

Mr. PHILLIPS. These investigations are very costly.

Mrs. RODGERS. Thank you——

Mr. PHILLIPS. Yes.

Mrs. RODGERS. Thank you, Commissioner. I am trying to get through a lot here.

Commissioner Wilson, would you briefly elaborate on it?

Ms. WILSON. I completely agree with Commissioner Phillips. The issue here is that there is a consolidation of power that removes authority from the other Commissioners to weigh in on important investigations, including the theories of harm being pursued, and the scope of those investigations.

At the same time, we have removed a lot of—we have lost a window into what staff is doing. And so, because we are no longer getting compulsory process memos, we are unable to understand the——

Mrs. RODGERS. OK.

Ms. WILSON [continuing]. Theories of harm being pursued in investigations.

Mrs. RODGERS. Great, OK, thank you.

So Chair Khan, I just would—I know you have expressed that the change of policy was to increase efficiency, but it seems communication and collaboration are lost in this efficiency. And the greatest effect is going to be the consolidation of power in your office.

Can you commit to sharing all information related to the FTC compulsory process with your Republican Commissioners?

Ms. KHAN. Thank you for the question, Congresswoman. I should note that these types of omnibus resolutions have been routinely used on the consumer protection side for investigations into diet pills or massive privacy violations. And so we really were creating some symmetry between what is routinely done on the consumer protection side with the competition side.

Mrs. RODGERS. Well, what about——

Ms. KHAN. And I think this type of empowering staff can really make sure we are able to move forward on full gears and full speed.

Mrs. RODGERS. What about communication with other Commissioners?

Ms. KHAN. Oh, absolutely, Congresswoman. Staff is always available to Commissioners to provide analysis and assessment. And Commissioners are routinely requesting that type of analysis and assessment from staff, and staff is providing it.

So from that perspective, I think we are, you know, doing the best we can to make sure that information is available, while dealing seriously with the severe——

Mrs. RODGERS. OK, thank you.

Ms. KHAN [continuing]. Resource limits we have.

Mrs. RODGERS. You are the Chair. You are the Chair. You set the tone. And it appears that there is an effort to consolidate power and decision making into your hands. That is not the way that it has worked in the past, and I don't believe that that is the way that is going to lead to the best outcomes.

I do want to ask you on privacy, because I believe it is so important that we move forward on a national privacy standard, and we have seen how Big Tech can trample protections for all Americans. So to the Chair, Chair Khan, would you be willing to support a privacy proposal from Congress that includes APA rulemaking authority, sufficient enforcement, continued coordination with State AGs, and additional staff and resources that is preemptive?

Ms. KHAN. Congresswoman, certainly, I think we need robust privacy protections, and I think direction from Congress on this front would be helpful.

I think, on the preemption question, there are always tradeoffs, depending on the specific context. I know, in some cases, we want to ensure that, insofar as States are providing additional protections, we always want to be wary of the Federal Government stepping in and overriding States' efforts to protect their own constituency. So I think we want to keep some of those considerations in mind, as well.

Mrs. RODGERS. I look forward to further conversations with you, because I am concerned about rumors of the FTC acting outside of Congress and issuing a rule on privacy.

And with that I will yield back.

Ms. SCHAKOWSKY. Did she say she yields back?

Oh, Congresswoman Trahan, it is your 5 minutes.

Mrs. TRAHAN. Thank you, Madam Chair, and Chair Khan, fellow Commissioners, thank you for your patience, and for being here today to discuss how an essential agency can better protect our consumers.

President Biden's most recent Executive order promoting competition in the American economy encouraged the Commission to exercise the FTC's statutory rulemaking authority in regards to—and I quote—"unfair data collection and surveillance practices that may damage competition, consumer autonomy, and consumer privacy."

Now, in October 2020, Google Ads updated its policy to restrict the serving of high fat, sugar, salt food and/or nonalcoholic beverages advertising for minors under 18 in the United Kingdom and in the European Union but has refused to make similar changes here in the United States. A recent policy change by Facebook is a step in the right direction, but it is far from perfect when you consider that a May 2021 study by the Tech Transparency Project found that Facebook allows advertisers to target ads for electronic cigarettes, pill parties, and extreme weight-loss products to children as young as 13 across the U.S.

Plainly, Facebook and Google are using troves of personal data belonging to teens and adults to target harmful advertisements in ways that are not transparent to users. So, Chair Khan, would you consider these examples of the types of surveillance practices that may damage consumer autonomy and consumer privacy?

Ms. KHAN. Absolutely, Congresswoman.

Mrs. TRAHAN. Thank you for that.

And Commissioner Slaughter, if the Commission were to begin rulemaking today to protect consumers, including our children, from surveillance advertising, what would be the process under the Commission's existing Mag-Moss authority?

And would the Commission face difficulties? If you could speak to that, it would be great.

Ms. SLAUGHTER. Thank you, Congresswoman. It is a great question. And I want to start by responding to suggestions from the ranking member of the committee that the Commission might act without Congress or outside of congressionally delegated authority. I want to be very clear. The Commission cannot, should not, and will not, with my support, act outside of congressionally delegated authority.

But we absolutely should look at the authority Congress has delegated to us, and it has specifically delegated to us rulemaking authority under section 18 of the FTC Act, which is referred to as Mag-Moss, to promulgate rules to—unfair and deceptive acts or practices that are prevalent in interstate commerce. And so data abuses fall very much into that category.

To rulemaking under section 18, to answer your question briefly, looks like APA rulemaking, but with much, much more process. So we can't begin with a notice of proposed rulemaking. We have to begin with an advance notice of proposed rulemaking that asks questions about the issues that we will consider. We have to notify Congress before we do that. We have to then, in a notice of proposed rulemaking, identify any issues of material fact that are disputed and, again, notify Congress. And if there are issues of material fact, the statute requires us to have an informal hearing to adjudicate them.

So it is a very process-intensive statute that requires lots of—and provides opportunity for lots of participation. It is absolutely burdensome to the Commission to do it. I think it is worth it for us to try, but we should make no mistake that it would not be a quick or fast effort.

Mrs. TRAHAN. I appreciate that. And it is—you know, to note, it is unique to the FTC.

If Congress were to provide the FTC with rulemaking authority under Administrative Procedure Act, how would that change the Commission's ability to protect consumers from harms associated with the surveillance advertising business model?

Ms. SLAUGHTER. Well, what it would not change is it would not prevent participation in the rulemaking process. It would not allow the Commission to act outside the scope of the law, as congressionally designated, any statute. So if it is just FTC Act law, we would still have to be looking at rules that target practices that are unfair or deceptive. We could not promulgate a rule that made illegal conduct that wasn't otherwise illegal, but we could do it with much

more efficiency and fewer burdens so that we can really get to material harms that are affecting people throughout our economy.

Focused on children, that is an issue that is near and dear to my heart, but it is not just kids, it is competition, it is small businesses, it is civil rights issues, which Commissioner Wilson mentioned. So I think it is a really, really important area for attention.

Mrs. TRAHAN. OK——

Ms. SLAUGHTER. And the last point that I will make is that rules also provide clarity to businesses about what is prohibited. That allows and facilitates compliance. It doesn't prohibit it.

Mrs. TRAHAN. Thank you for that.

I yield back.

Ms. SCHAKOWSKY. Mr. Guthrie, you are recognized for 5 minutes.

Mr. GUTHRIE. Thank you, Madam Chair, and I thank Ranking Member Bilirakis, for holding this meeting, and thanks to the Chair and all the Commissioners for being with us today.

The Federal Trade Commission has a commitment to protect the American public from unfair and deceptive practices and unfair methods of competition. With that responsibility comes proper oversight and adequate transparency. However, recent activity by the FTC did not permit for adequate time for vetting and input from consumers.

Before us today are two bills that I introduced, H.R. 4564, the FTC Transparency Act, and H.R. 2690, the CLEAR Act, both of which would allow for more transparency and accountability at the FTC.

Some of this was brought up by my colleague, Mr. Latta, and answered by Commissioner Phillips, but Commissioner Phillips, I want to talk specifically about my bill. My bill, the FTC Transparency Act, would require the FTC to publicly publish documents to be considered by the Commission on the Federal agencies website at least 30 days before a vote.

In your experience, Commissioner Phillips, how would a 30-day notice be helpful to your daily work and productivity amongst your colleagues at monthly Commission meetings?

And in your experience, how would a 30-day notice increase accountability and transparency at the FTC for American consumers?

Mr. PHILLIPS. Congressman, thank you for your question, and thank you for your leadership on this issue.

A 30-day time period, where the public could see what we are doing and we could hear from the public, from the consumers that are affected by the harms from the businesses that have to work under the potential regulation, we can hear about the impact of the policies. It would inform what we are doing, and require us to take into account what we are hearing from the public, both the business community and consumers.

That will create accountability. We are forced to listen to what people have to say, and take into account what they say. So I think that would be an essential reform.

Mr. GUTHRIE. OK, thank you. And I would ask—like to ask each—the Chair and each Commissioner, would you—do you support the language, my language in the bill, to bring transparency to the FTC?

Ms. KHAN. Congressman——

Mr. PHILLIPS. I do.

Ms. KHAN [continuing]. Certainly, we want to be thinking through how we can increase transparency and public participation, and I am so glad we have been able to do that.

We will still—we are still early in our thinking of how to continue doing that, but always happy to take feedback and continue improving our processes.

Mr. GUTHRIE. So you like—the bill, you are for the bill, or—the language of the bill?

Ms. KHAN. Well, I want to make sure that it is not conflicting with other statutory obligations. For example, some of those outlined in the Sunshine Act. And happy to follow up with you on——

Mr. GUTHRIE. But you don't have a philosophical issue with the 30-day requirement, then.

Ms. KHAN. I think with the general idea of providing notice, that is great, and we are happy to continue thinking about how to do that.

Mr. GUTHRIE. Thanks. So then I guess I got another question. I will just—oh, if the others would—the other Commissioners would just state their support, or——

Mr. CHOPRA. Sure. I totally appreciate, you know, the philosophical part of this, because the FTC, for too long, has been notoriously secretive. Most of what the Commission does is it votes in secret by email, you know, not even consulting anybody. That has been standard practice under Republicans and Democrats, and it has to stop.

We need to actually be listening to people rather than just gathering in private and making secret decisions. I am so glad we have moved to an open meeting concept. I think it is an important reform. And I think other reforms, too, to make us more transparent and accountable, are worthwhile. I am happy to look more at your bill, and talk——

Mr. GUTHRIE. OK, thank you. I am going to have to move on so I can get to the next question. Thank you for those comments.

And then, Chair Khan, in light of the FTC's recent vote on the revised section 18, which altered FTC's approach to prescribing new rules for unfair or deceptive business practices, how can you ensure that increasing efficiency by streamlining the rulemaking process will not result in a reduction of sharing information, transparency, oversight, and input from pertinent experts?

Ms. KHAN. Congressman, the current procedures that govern those rules go, as Commissioner Slaughter mentioned, far above and beyond what is traditionally required under the Administrative Procedure Act. So, even under the more streamlined procedures, there would be ample opportunity for notice and comment and for us to make sure we are really doing our homework before we issue any rules.

Mr. CHOPRA. And Congressman, the proceedings are public.

Mr. GUTHRIE. So you are—you think these—the increasing efficiencies is going—that you are looking for is going to ensure people have access to the information——

Mr. CHOPRA. So the procedures that are currently in place continue to require extensive public input, and including public proceedings.

Mr. GUTHRIE. OK, thank you. And I am running low on time, so I will just leave it there.

So, Chair Schakowsky, I have a—I would like to submit for the record Commissioners Phillips's and Wilson's dissenting statement on the adoption of a revised section 18 rulemaking procedures.

Ms. SCHAKOWSKY. Without objection, so ordered.

[The information appears at the conclusion of the hearing.]

Mr. GUTHRIE. Thank you, and I yield back. Thank you.

Ms. SCHAKOWSKY. I understand my colleague Mr. Rush is online. And you are now recognized for 5 minutes.

Mr. RUSH. Thank you, Madam Chair, for convening this extraordinary hearing. You——

Ms. SCHAKOWSKY. Bobby, if you could speak up, that would be helpful.

Mr. RUSH. You, along with the ranking member, I want to thank you for convening this extraordinary hearing.

Commissioner Chopra, as you know, earlier in this year the FTC, along with 38 States and the District of Columbia, shut down a massive fraudulent charity operation that bilked over $100 million from the American consumer.

Under current law, the FTC must prove an organization is a fraudulent entity before being able to engage in enforcement actions. My bill, H.R. 3918, will make it easier for the FTC to go after these fake charities by finally giving you the authority over all 501(c)(3), tax-exempt organizations.

If my bill becomes law, how will this benefit consumers?

Mr. CHOPRA. So, Congressman, there is no question that we have so many bad actors parading as nonprofits organized as 501(c)(3)s. They take in money, and the principals of these nonprofits siphon them away. But they can block FTC enforcement by saying that they are organized as a 501(c)(3). For years and years, Commissioners of both parties have supported a change to the FTC Act that would eliminate the nonprofit exemption so that we can go after this with more clarity, and also address other anticompetitive practices by nonprofits.

Mr. RUSH. Do you foresee any—that may be a hindrance to those not-for-profits who don't have the sophistication and the finances to negotiate your oversight authorities in the FTC? How would you deal with that problem?

Mr. CHOPRA. Well, I think where the issue is, is when the nonprofit is engaged in egregious fraud.

Mr. RUSH. Right.

Mr. CHOPRA. It is pretty clear that they have engaged sometimes in even criminal activities.

Mr. RUSH. Right.

Mr. CHOPRA. So, you know, with respect to those fraudsters, I don't think many nonprofits are going to have a tough time complying with that, because most nonprofits are trying to do the right thing.

So I am happy to have further discussions on this, but I do believe that, when we allow a nonprofit exemption, we create a loophole for bad actors to be able to figure out a way around law enforcement. And it is something that is just not good for an honest marketplace out there.

Mr. RUSH. Yes, I am particularly interested in the—whether or not this will have a chilling effect. I know it is needed. This is a necessary action, and we need to give the FTC the power. But I am also—understand that in the real world that we live in, that this may have a chilling effect on faith-based not-for-profits and other not-for-profits. So I want to work with you to make sure that we send the right kind of signal, that this is not going to be onerous to those not-for-profits who are doing good, honest, much-needed work—well-being of our citizens.

Chair Khan, the FTC recently released a report and subsequent policy statement supporting legislation that would enable consumers to access—generated by their motor vehicles for repair and maintenance purposes. Restriction on this access places a financial burden on too many hard-working Americans. And as the FTC report notes, this is particularly true for communities of color, such as in my district. I am [audio malfunction].

Mr. CHOPRA. Congressman, we lost your audio.

[Pause.]

Ms. SCHAKOWSKY. We can't hear you now, right this second, Bobby.

Mr. RUSH. All right. I am—can you hear me now?

Ms. SCHAKOWSKY. Yes.

Mr. RUSH. I am pleased to report that I am currently drafting legislation to address this very problem, by requiring that vehicle owners have access to their repair and maintenance—allowing them to choose how and where they want to repair their cars.

Can you discuss why legislation like this is needed, and what limitations does the FTC currently place under section 5 authority under the FTC Act?

Ms. KHAN. Thanks so much for the question, Congressman.

Certainly, undue restrictions on repair have a very harmful effect on communities of color and marginalized communities, in particular. And I think the type of legislation that you are talking about could go a long way in ensuring that manufacturers are not able to unduly control the data in ways that limit our ability to repair our own cars. And I would be happy and eager to work with your office in thinking through what that type of legislation could look like.

Ms. SCHAKOWSKY. The gentleman's time has expired. And now I call on Congressman Bucshon for his 5 minutes.

Mr. BUCSHON. Thank you, Madam Chairwoman.

Commissioners, thank you for taking the time to be here before the committee today.

Commissioner Chopra, you have been appointed as the head of the Consumer Financial Protection Bureau, or CFPB. Senator Toomey and the ranking member of the Senate Finance Committee has sent you a letter, which I don't think you have answered to this point, asking for details on the recent personnel changes at the organization.

And so I am going to take the opportunity to ask you some of those questions. And now that you are in front of the committee, would you want to have the opportunity to answer these?

Maybe—are you aware of whether the CFPB has taken any steps between January 20th, 2021, and the present to push out, replace, or encourage any career CFPB employees to leave their positions?

Mr. CHOPRA. Senator, I—or Congressman, I have absolutely no involvement. I am not aware, did not direct, and have no participation with respect to activities related to the CFPB. I am currently an FTC Commissioner with a busy docket.

As I understand, the CFPB has replied to those letters to explain that I have not been involved. Those are decisions that involve human resources issues subject to very significant Privacy Act and other requirements. But I am currently full time at the FTC until, if I am so fortunate, to be confirmed as Director of the CFPB.

Mr. BUCSHON. Fair enough. I won't ask you the remaining questions, then. I will just point out—I will just say that there are reliable information that people have been offered substantial separation packages. People have been put under investigation to try to force them out. And also that people have been put on administrative leave if they are not in the correct political party. And, you know, at Federal agencies these are people who are career people. All our Federal agency people work very hard, regardless of their political leanings. And I would hope that the things that Senator Toomey is concerned about are not true.

So I am going to ask you this, then. While still—while you are at the FTC, you have raised concerns about rebate walls and other conduct acting as barriers to effective competition, stunting the cost savings and innovation expected in an unconstrained marketplace. In a statement you warned that rebate bundling is, undoubtedly, a fixture of the competitive environment in immunology, that such practices are suspicious and might act as a barrier to entry and expansion for drug makers with less bargaining leverage. Could you comment on that?

Mr. CHOPRA. Yes. I am very concerned that drug makers often engage in complex rebating strategies in ways that prevent new drug makers from entering and challenging their dominance. The net effect of this is that we could have less innovation and less competition for lifesaving drugs.

I am worried that these rebate walls may also constitute violations of the law in certain circumstances, and I think it is important not just for the FTC but also State attorneys general and others to really look at this.

The Trump administration also sought certain policies to crack down on this, and it is one we have to really take seriously if we want there to be affordable drugs.

Mr. BUCSHON. Sure. As the—and again, sorry to focus just on you—as the FTC continues to monitor for anticompetitive practices that make lifesaving biosimilars more expensive for people from Indiana, Hoosiers, it would make sense to perform a cost benefit analysis on FTC recommendations to project impacts on markets.

Would you support performing a cost-benefit analysis of measures to address this important issue, to ensure that policy changes will accomplish what they are designed to do?

Mr. CHOPRA. So during the past 3 years at the FTC, I have been a strong advocate for more analytical rigor. I am very concerned that the quality of rigor that is used to make decisions across the

government is far too low. We should be incorporating information from the life sciences industry, quantitative information and qualitative information from our pharmacists and others in the medical supply chain.

So being—having that full range of evidence and being rigorous—of course, economics is one part of that, but we can't—we need a full range of data and evidence to make sure that anything we do actually benefits competition and doesn't make things worse off for patients.

Mr. BUCSHON. Fair enough. Thank you.

So I have introduced H.R. 2676, which would require FTC's Bureau of Economics to conduct a cost-benefit analysis for any legislative, regulatory, or enforcement recommendations, including a rationale for the FTC's determination that private markets or public institutions could not adequately address the issue that is the subject of the recommendation.

So my feeling is, if we let the market work, most of the time it does. But occasionally, we do need the Federal Government, like the FTC, to make sure that that is happening.

So thank you for your answers, and I yield back.

Ms. SCHAKOWSKY. Mr. McNerney?

Mr. BUCSHON. Madam Chairman, can I—I forgot to—can I ask unanimous consent to introduce Senator Toomey's letter into the record?

Ms. SCHAKOWSKY. Without objection.

[The information appears at the conclusion of the hearing.]

Mr. BUCSHON. Sorry about that. Thank you very much.

Ms. SCHAKOWSKY. Mr. McNerney, you are recognized for 5 minutes.

Mr. MCNERNEY. Well, I thank the Chair for recognizing me, and I thank the Commission for testifying today. And congratulations, Chair Khan.

One of the bills——

Ms. SCHAKOWSKY. If I could just interrupt for a second, I just want to inform everyone that Commissioner Slaughter did have to leave. The others are here.

Ms. SLAUGHTER. I was just—yes, I was just going to say I really am so sorry, and I thank you for your time and would be happy to answer any questions the committee has, promptly, in writing. So I appreciate your indulgence.

Ms. SCHAKOWSKY. Thank you.

Excuse me, Mr. McNerney. Go ahead.

Mr. MCNERNEY. Thank you. One of the bills we are considering today is H.R. 4530, legislation that I authored, which would establish an office of technologists at the FTC. As an engineer, I think it is critically important that the agency has that sort of expertise.

Chair Khan, can you discuss the importance of having technologists at the agency and how having more technology on staff can help you carry out your mission?

I know you are going to follow up on what Commissioner Chopra just said, but thank you.

Ms. KHAN. Thanks so much for raising this, Congressman. It is imperative that the agency be fully equipped with a whole range of skill sets. I think ensuring that we have technologists on board

is paramount, especially as we confront all types of new business practices and digital markets.

I am so thrilled that I was recently able to announce a chief technologist at the agency, and she is helping oversee our expansion on this front. So I definitely plan to bring on more technologists.

Mr. MCNERNEY. Very good.

Commissioner Chopra, following up on that question, how would this legislation be helpful for the agency in carrying out its work, as it relates to artificial intelligence and how that is impacting consumers?

Mr. CHOPRA. Yes, so artificial intelligence is really changing the way so many different types of businesses operate, in terms of making decisions when it comes to offering products or services.

And one of the things we have to worry about is who is accountable when those AI machines break the law. How do we audit them? How do we know what is actually behind that?

And without technologists and people with real skills related to data, data aggregation and analysis, we won't be able to do it. And I think this is critical that we muscle up when it comes to tech talent.

Mr. MCNERNEY. Very good. What about privacy and data security?

Mr. CHOPRA. Yes, I mean, the recent breaches that we have been seeing, as well as ransomware attacks, are really a reminder that the FTC is behind the eight ball when it comes to catching up and making sure that we are securing the infrastructure of our country. This is not just about protecting consumers, it is about protecting our national security, as well. And we need engineers and experts who can help us inform the right types of interventions and policies.

Mr. MCNERNEY. Thank you. And lastly, what about protecting consumers against the new kinds of scams that are happening online?

Mr. CHOPRA. Yes, you know, Chair Khan mentioned that a lot of the scams and frauds are being amplified by Big Tech platforms, algorithmically targeting individuals who are likely to be susceptible. If we are not able to dig in and understand how that targeting works, how those algorithms work, we will not be able to hold them accountable when they are amplifying fraud. We must—we can't just go after fraudsters one by one, we need to look at the gatekeepers and those who profit from amplifying them, as well.

Mr. MCNERNEY. Thank you. I also authored H.R. 4475, Protecting Consumers in Commerce Act. This bill would give the FTC authority over certain common carriers.

Commissioner Chopra, if enacted, would this legislation—what would this mean for consumers, especially in a district like mine, which is an economically hard-hit district?

Mr. CHOPRA. Yes, you know, when it comes to telecommunications common carriers, they are completely exempt, in many ways, from the FTC's jurisdiction. That makes it harder to go after robocallers. That makes it harder to go after some of the ways in which companies target the elderly.

We have tried to do our best when it comes to going after voice-over IP providers and others, but the big carriers have a big role

in all of these issues, and there is an uneven playing field when they are completely exempt.

Mr. MCNERNEY. Thank you.

Chair Khan, do you have anything to add to that?

Ms. KHAN. I would echo that and note that I think that type of exemption would really ensure that we can robustly enforce in a more symmetrical way across industries.

Mr. MCNERNEY. Thank you. Chair Khan, I also am cochair of the House Artificial Intelligence Caucus. And a key priority for me is to develop policies that help promote opportunities in artificial intelligence while tamping down the—whatever problems might arise as a result of artificial intelligence.

What potential risks are you concerned about with respect to artificial intelligence, and what steps do you think the FTC should be taking?

Ms. KHAN. Well, I think there are a whole range of opportunities but also potential risks as this technology becomes more widely adopted. I know there have been a whole set of civil rights groups that have raised concerns about how this technology could exacerbate discrimination.

For the FTC, I think, foremost, the FTC needs to be making sure that we are fully understanding this technology. Congress really designed the agency to be a watchdog across the economy and closely study new business practices, new technologies to make sure we can keep pace. And I very much hope that we will be doing that in this area.

Mr. MCNERNEY. And that goes back to my H.R. 4530, to create an office of technologists. Thank you.

I yield back.

Ms. SCHAKOWSKY. Now I am happy to call on and recognize the always-here congressman, Congresswoman Lesko.

Mrs. LESKO. Thank you, Madam Chairman, and thank you to all of the witnesses, whether here in person or virtually.

I am going to read a couple statements from the dissenting statement of Commissioner Christine Wilson on the open Commission meeting on July 1st and then just ask a couple of questions related to it. So it is just excerpts from that. She said, "I only learned last Thursday of the Chair's intention to hold this meeting. At the same time, I was informed of her intention to hold votes to rescind the section 5 policy statement and to pass several omnibus resolutions that would remove from Commission oversight large swaths of Commission business."

Chairman Khan, the decision to hold open meetings can only be applauded if people know about it in advance, so it gives them enough time to prepare and actually show up to the meetings. So it was concerning to me that it seemed like there was not a lot of advance notice on the July 1st meeting, and that people couldn't prepare that—why did you do that?

And what do you plan on doing in the future so that the public has sufficient time to prepare for the FTC open meetings and can have public input, because don't we want public input?

Ms. KHAN. Absolutely, Congresswoman, and I am so thrilled that we have been able to switch to this open Commission format to pro-

vide more accountability and insight into the Commission's work. This is new for the agency.

As my colleague mentioned, we have a history of doing all of this behind closed doors. And so, as we adapt to this new format, we will be thinking through how we can continuously improve our processes and always appreciate feedback on that front, as well.

Mrs. LESKO. Well, and thank you for that answer, although it seems in contrast to what one of your other Commissioners is saying. Again, I am going to read excerpts from Commissioner Wilson and then, if I have time, give her an opportunity to speak. It says, "Unfortunately, the format the Chair has chosen for this meeting omits our knowledgeable staff and precludes a dialogue among the Commissioners."

And then, in another portion, in another page, it says, "Following our rulemaking spree in the 1970s, the FTC was stripped of funding, stripped of legal authorities, and required to institute new and substantial rulemaking steps to foster public trust on our trade rules. Recognizing that this agency was on the brink of being shuttered, our rules of practice adopted a number of rulemaking procedures that provided for additional public comment periods, publication of a staff report, and multiple opportunities for the public to weigh in on disputed issues of material fact."

And she goes on to say that, "The FTC has built transparency into our rules of practice by requiring that rulemaking staff publish a staff report containing that—their analysis of the rulemaking record, and recommendations as to the form of the final rule. But the new rules eliminate the staff report requirement."

So my second question to you, Chairwoman Khan, is actually a question she put in here, and it says, "In what ways will the public's understanding of any final rules suffer because the Commission will no longer publish a report from an expert FTC staff highlighting key issues and formulating recommendations based on the record?"

Why would you change this longstanding—staff being able to do this staff report?

Ms. KHAN. Well, Congresswoman, staff analyses and input is embedded throughout our various processes. There have been instances, frankly, when the Commission has handicapped itself by imposing on itself procedures and processes that Congress did not require.

And so, frankly, some of our initial efforts have been to ensure that the FTC is abiding by instructions received from Congress and make sure we are in close alignment with the instructions that we are receiving——

Mrs. LESKO. And with the last 31 seconds left, Commissioner Wilson, would you like to respond?

Ms. WILSON. Thank you very much, Congresswoman, yes. I think it is important to recognize that the FTC is set apart from other Federal agencies with respect to the Magnuson-Moss Act and these special rulemaking requirements, but it is set apart precisely because of the breadth of our jurisdiction and the discretion that we have.

We have authority to regulate across the entire economy. We are a generalist agency. We are not like the EPA or the Department

of Transportation that has relatively narrow authority for a single sector. And with that broad power and that broad discretion, we need to have sufficient guardrails to ensure that we are receiving input, that we understand what the evidence is with respect to impacts and possible unintended consequences of our actions.

And so the safeguards in rulemaking that were abolished by the majority at the Commission, unfortunately, are going to diminish the quality of that decision making and, I am afraid, stifle innovation, harm competition, and hurt consumers.

Mrs. LESKO. Thank you, and I yield back.

Ms. SCHAKOWSKY. I recognize now Congresswoman Dingell for 5 minutes.

Mrs. DINGELL. Thank you, Madam Chair, for holding this hearing, and to all of you who are testifying today. And I am sorry you are all still having to be here in the craziness of our day on Capitol Hill.

First off, there has been some discussion regarding process concerns at the FTC. Commissioner Chopra, when Democrats were in the minority, did you have access to all the information you wanted access to?

Mr. CHOPRA. No. I was routinely denied the ability to participate in major decisions around second requests on mergers, the scope of subpoenas for major privacy investigations. This—these functions are—were routinely denied to me.

Mrs. DINGELL. Thank you. Chairwoman Khan, in my view, a number of bills we are discussing today could have detrimental effects on the FTC's ability to carry out its essential consumer protection mission, which is what the job of the FTC is supposed to be, to protect consumers.

H.R. 2702, the SURE Act, codifies select portions of the FTC's statement on unfairness. The bill focuses on portions of the statement that discuss substantial injury but ignores other portions of the statement, including a discussion of circumstances in which public policy concerns will independently support action by the FTC.

Chairman Khan, can you tell us about some cases in which the Commission relied on the public policy standard?

Ms. KHAN. Congresswoman, thanks for the question. I think, as a general matter, ensuring that we are able to take into account some of those public policy considerations is always important, especially when we are encountering new contexts and new fact patterns.

I think, with that bill in particular, there is some concern that importing that substantial harm standard could make it more difficult for us to go after companies that are enabling data breaches, that are engaging in privacy violations. In those types of cases it can be many years, sometimes, before which that harm is concretized. And so I think we want to be mindful about some of those potential tradeoffs, as well.

Mrs. DINGELL. So I am going to ask you for a short answer, because I want to get to another bill. But if this bill becomes law, could the Commission be able to bring those types of cases in the future?

Ms. KHAN. I think it would make it significantly more difficult.

Mrs. DINGELL. Thank you. Another bill I want to address is H.R. 2677, the TIME Act, which would limit consent orders to 8 years and require review and termination of consent decrees after 5 years in some circumstances. Instead of the company proving that a consent decree is no longer necessary, the burden would be on the FTC to prove that it is still necessary.

Chairman Khan, how long are consent orders usually in place for, and why is that the case?

Ms. KHAN. There is a range, depending on the consent decree. In some cases it has been, you know, somewhere between a decade to two decades. I will say, overall, you know, there have been cases where firms have violated consent decrees well over a decade after we entered into them. And so I think, from that perspective, there would be serious concerns about reducing the default length of some of these decrees.

Mrs. DINGELL. I have heard concerns that the 5-year requirement in this bill would effectively limit consent decrees to 5 years. Is it possible that this bill would force inappropriately short consent orders?

Ms. KHAN. I think that is certainly a significant concern.

Mrs. DINGELL. In most cases the FTC can only collect civil penalties and entities that are under order. Can you talk about how this bill could insulate repeat offenders from having to pay fines for wrongdoing?

Ms. KHAN. Certainly, the agency has, in several cases, encountered recidivism and has had a difficult time ensuring that actors that are violating the law are deterred from doing so again. And so I think, with any type of reform, we want to be mindful about that dynamic.

Mrs. DINGELL. OK, I am going to go to another bill. H.R. 261, the SHIELD Act, prohibits the FTC from taking enforcement action based on noncompliance with agency-issued guidance. Chairwoman Khan, does the FTC do that now?

Are enforcement actions brought based on a company's failure to follow guidance?

Ms. KHAN. No, Congresswoman, guidance does not carry the force of law. And so we are not permitted to do that.

Mrs. DINGELL. But, in contrast, under the SHIELD Act, companies can use adherence to agency guidance to prove that they did not commit an unfair or deceptive act or practice.

Chairman Khan, what if the guidance was outdated?

How could this bill make it harder for the Commission to bring cases against bad actors?

And would this add another burden on the FTC by requiring it to prove why the guidance isn't relevant?

Ms. KHAN. Certainly, I think there would be some concerns around that, especially if we are in a world where guidance cannot be used as a basis for finding legal violations.

But then, if it is instead being used as a way to shield companies from legal violations, I do think that there would be an asymmetry there that would be a little bit difficult to make sense of. So I think we would want to be consistent across the board there.

Mrs. DINGELL. Thank you, Chairman Khan. I am out of time, so I yield back.

Ms. SCHAKOWSKY. I now recognize Mr. Pence for 5 minutes.

Mr. PENCE. Well, thank you, Chairman Schakowsky and Ranking Member Bilirakis, for holding this hearing. Thank you to the Commissioners for being here today.

My question is going to focus on the ownership of telematic, or equipment-produced information—that is my word, not a technical word. I will use one example to define my concern. While this is a specific example, I believe that it represents an enormous and growing IP ownership issue. And let me begin.

As the crossroads of America, Indiana plays an important role in the transportation industry. Our interstate highways connect regional hubs that are critical to the delivery of goods across the Midwest and the rest of the country. Leading the—transportation companies such as Honda, Toyota, and Cummins Engine Company have footprints in my district to take advantage of local manufacturing expertise.

Considering the president—the presence of the auto industry, I have a particular interest in the Commission's recent actions on the alleged repair restrictions—and I say alleged—that may be imposed by original equipment manufacturers, or OEMs. I have heard from several Hoosiers, both repair shops and OEMs, regarding access to repairs for telematic data and software on next-generation vehicles, and I think this may apply to any type of relationship between the owner of a piece of equipment and the manufacturer.

I understand the concerns of manufacturers, the need to protect the privacy of drivers, and mitigate cybersecurity vulnerabilities of the vehicle. I also understand the concerns of auto repair shops that provide a valuable service to an industry out in the local economy. The auto repair industry itself supports over 17 jobs in my district, and 7.5 billion in economic activity every year.

Our rural Hoosiers that live prohibitively far from dealerships have to use third-party repair shops. That may be their only option, especially if the vehicle breaks down and they can't get to, say, the dealership, if you will.

Chairman Khan, I understand that your Commission recently issued a policy statement that seeks to address potential concerns with limiting or restricting third-party access to telematic information. Can you walk us through the process that you use, that the Commission uses, to determine that this policy statement was necessary?

And where are you really kind of going with this, as it would apply to much more than dealerships and auto repair shops?

Ms. KHAN. Certainly, Congressman. So this policy statement followed a whole range of work that the Commission had been pursuing in this area. The Commission held a workshop on some of these repair restrictions and, under my predecessor, Acting Chairwoman Slaughter, issued a report identifying its findings and, as a general matter, noting that, in many cases, some of these repair restrictions are overbroad and are being used in ways that harm individuals who are owning products, harming independent businesses that might otherwise have opportunity in these repair markets, and that the FTC really needs to scrutinize some of these practices more closely.

I was pleased that we were able to adopt a policy statement unanimously at our last open Commission meeting with an eye to addressing some of these restrictions using a whole range of tools, including our Mag-Moss authority, looking at them under the unfair and deceptive acts or practices provision, as well as scrutinizing these for potential antitrust violations.

So that is the path forward that we have laid out, with a commitment to really devoting more enforcement in this area.

Mr. CHOPRA. If I can just add, Congressman, the——

Mr. PENCE. Sure.

Mr. CHOPRA [continuing]. The existing law that has been on the books for about 40 years restricts the ability for manufacturers and sellers to condition a warranty based on using certain types of repair services, or there is an antitying provision.

Mr. PENCE. Right.

Mr. CHOPRA. So I think there is a perception that maybe we have not allocated enough enforcement resources to address those. It is becoming very difficult for many people to repair phones, tractors, so many other things which may be covered by that warranty. That is existing law that Congress passed. It is one of many laws that the FTC just hasn't really enforced that Congress has told us to. And I think it is appropriate that, if Congress has told us to enforce a law, that we do it.

Mr. PENCE. So—and I will kind of get a lot more into this as time goes by. But, you know, when I—let's say when I buy a car—and my time is running short—I sign away that information back to the manufacturer. And there's many things that we click on, and we give somebody else our information. And then, when we need it—repair or whatever—we don't have that information.

So, if you would kind of keep looking at that and find an equitable way to protect the customer in that area, thank you.

Madam Chair, I yield back.

Ms. SCHAKOWSKY. Congresswoman Kelly, you are recognized for 5 minutes.

Ms. KELLY. Thank you to Chair Khan and all of the Commissioners for testifying today before the committee. I know that this past year has been particularly trying for the Federal Trade Commission.

I also want to thank Chair Schakowsky and Ranking Member Bilirakis for holding this legislative hearing and for including my bill, H.R. 4460, the Consumer Equity Protection Act.

This bill would establish a task force within the Federal Trade Commission to advise on issues in the protection of consumers and to prevent unfair and deceptive practices targeted—targeting consumers on the basis of race, color, religion, and other protected characteristics.

This legislation is urgently needed, since minority communities are disproportionately found to be victims of fraud. For example, African Americans are three times more likely to experience debt-related fraud than non-Hispanic White. Often this is the result of information not reaching vulnerable communities, or victims not knowing how to prevent being victims of fraud or abuse.

Chair Khan, how would forming a task force within the FTC assist you with protecting minorities in America from fraud and abuse?

Ms. KHAN. Congresswoman, let me say up front I am just so glad and grateful to you for drawing attention to this issue. The FTC has confronted numerous instances in which companies have been violating civil right protections like ECOA. And I worry that the methods of discrimination are becoming even more sophisticated and subtle, as some of these technological tools are enabling discrimination and targeting. So I think this type of focus, and bringing this lens to our work, is going to be imperative.

Ms. KELLY. Thank you. Commissioner Chopra, do you have anything else to add?

Mr. CHOPRA. No. I would just add, Congresswoman Kelly, that, you know, we had a previous question from Mr. McNerney about artificial intelligence and algorithms. You know, the more and more that large firms, especially the tech platforms, can systematically engage in, essentially, biased practices—Secretary Carson, when he was HUD Secretary, issued a complaint against Facebook regarding its practices on discriminating in housing. And I think we have to really wake up to the fact that a lot of these subtle forms of discrimination are done algorithmically, and they must be held accountable, particularly when it comes to the largest and most powerful tech firms.

Ms. KELLY. Yes, my former colleague, Will Hurd, and I did a year's study on artificial intelligence, and that was one of the things that we looked at.

In 2016 the FTC released the "Combating Fraud in African American and Latino Communities: The FTC's Comprehensive Strategic Plan." In the report it highlighted that the FTC would work to build networks with community organizations and visit areas with low rates of consumer fraud reporting.

Chair Khan, how do you plan to improve communicating consumer protection issues to hard-to-reach communities?

Ms. KHAN. Congresswoman, this is such an essential issue, and I think we need to think hard about how we can improve on this front.

One priority for me is really focusing on building out our regional presence. We already have a whole set of regional offices, and I think they can provide a really great way to directly connect with communities that might otherwise not be directly hearing the work and listening to the work that we are doing. And so I think it is incumbent on us to make sure we are directly reaching out to those communities and making sure that we are helping all Americans.

Ms. KELLY. Thank you. I think that all of us here would agree that the FTC is underresourced, and the role of the FTC is only likely to increase in coming years. So Chair Khan, do you think more resources are needed for the technology enforcement division, given the public's attention on competition, generally?

How would you utilize additional resources for addressing privacy and data security?

Ms. KHAN. Certainly, I think more resources would be important for our ability to be able to do this work in a more comprehensive and effective way.

In terms of where the specific needs are, I think hiring more technologists, hiring more data analysts, hiring more financial analysts, really making sure that we are equipped with the skill sets and tools that are allowing us to, at the very least, understand these business practices is going to be imperative.

And so I think that will be an important step forward as we figure out how we can make our enforcement in these markets more effective.

Ms. KELLY. Thank you much.

And Madam Chair, I will yield back 10 seconds.

Ms. SCHAKOWSKY. Mr. Armstrong, I recognize you for 5 minutes.

Mr. ARMSTRONG. Thank you, Madam Chair.

Commissioner Phillips, you and I have previously discussed your hesitation in using data privacy indicators during an antitrust analysis. Yet, as we know, the consumer welfare standard—and that might be a little up in the air right now, which, if I get time at the end, I would like to ask a question—is not solely about price.

In fact, we—I mean, oftentimes when you see some of the large tech companies' attorneys testify, they dance around this question pretty well. We were lucky enough to have the CEOs in this committee testifying, and they were a little more brutally honest, which I appreciated. But it is not solely about price. It can be applied to nonprice determinants like quality, variety, and innovation, although it is more difficult to assign any kind of quantitative value to those indicators.

That is a challenging aspect of the current antitrust scrutiny on large technology firms, many of which provide services free to their users. And this is assuming we apply the consumer welfare standard to the user of the tech service. It is even more complex when we understand that the user is almost always not the customer. The user is the product, or alternatively, their data is the product.

So ultimately, Mr. Phillips, who—I mean, who is the consumer in this analysis, or is it both, and you have price and nonprice price competition coexist?

[Pause.]

Mr. ARMSTRONG. Did we lose him?

VOICE. Noah, are you on mute?

Mr. PHILLIPS. Forgive me, Congressman. Sorry about that. I was saying——

Mr. ARMSTRONG. No problem.

Mr. PHILLIPS. I appreciate it.

Mr. ARMSTRONG. I am sure it was really, really smart.

Mr. PHILLIPS. I don't know about that. I think you hit on two really important areas of complexity.

So one area has to do with what consumer we are looking out for. And where you have two-sided markets—let's say I provide you a free, online product, and I make my money on the other side, selling ads to companies that want to sell ads. We, under certain circumstances, are compelled to take into account both—just in the initial part of the case that is under prevailing law today. But at the end of the day, we absolutely do need to think about the costs and the benefits of the conduct in question.

With respect to privacy and consumer welfare, privacy can be an aspect of competition, and the consumer welfare standard abso-

lutely can reach it. But privacy is a little more complicated for two reasons, in particular.

The first is that people have different tastes for privacy. If you walk by a Starbucks and get an ad—because you are physically close to Starbucks—for a latte, you might respond and say, "Wow, that is creepy. They knew I was here." Or you might say, "Hey, great, I got this ad." And because different people assimilate that experience differently, we have to look with more of a fine-tooth comb to understand how the consumer is being affected.

The second thing has to do with the fact that there are things that consumers absolutely do prefer. They do prefer a lower price, for example. They do prefer more choice. I mean, I just think we have to look with a great deal of care.

Mr. ARMSTRONG. I think there is a couple other issues with privacy, maybe a little more fundamental, which in my experience is, every time one of these companies increases your privacy, which I think we all appreciate, it often has the benefit of increasing their market share, as well. And those—and, listen, we have had these conversations a lot. That is the difference between Energy and Commerce sometimes, and antitrust. Sometimes what we are trying to do on one level is not always going to be consistent with the other level.

So—and I think that is particularly true with the consumer welfare standard. I have concerns about the 2015 removal—policy statement that articulated antitrust principles that guided the Commission's authority, which included the 2015—which included the consumer welfare standard, which has been established as jurisprudence for decades, and the rule of reason, which has been established for over a century.

And I will admit, and I think I—I am guessing you will all agree with me, that some of the tech platform issues that we face in these areas are very, very unique. And part of the reason is who is the consumer, who is the customer.

But are—I am concerned by the fact that the Commission did not replace the 2015 statement with a new policy that would at least provide notice on the Commission's plan and antitrust enforcement action. And without such a replacement policy, what restrictions, if any, are placed on the consumers antitrust enforcement practice right now?

But my question for Mr. Phillips, and then, if we have time for one more—and this will probably be my last one, because I am rambling—do we have concerns about antitrust legislation that looks different for certain economic sectors?

Mr. PHILLIPS. Thank you, Congressman.

Mr. ARMSTRONG. Do you think there is challenges to platforms that are different than other areas of antitrust?

Mr. PHILLIPS. There sometimes are. Some of the platforms have network effects that are a kind of efficiency, if you will. But basically, the more people use it, the more popular it is for the users. And they can have indirect network effects. The more popular it is for me as the user, the better it is for you as an advertiser.

And there are some aspects of these markets that are a little bit different. On the other hand, they are hardly the first markets like

these. So telephone networks, railroads, these are just a couple of examples in American history where we have seen these effects.

But I think your point, that sometimes when people do things in the name of privacy it can hurt competition, underscores the point that it is not as simple as saying, "This conduct increases privacy, ergo it is good." When we are doing competition law, what we need to look at is, what is the effect on competition?

Mr. CHOPRA. Congressman, could I just add? I think the—you raised concerns—yes, the Commission did rescind the Obama FTC's policy. The Obama FTC policy statement was unmoored from what Congress specified in the law and has essentially rendered it dead letter. I think the Obama FTC policy statement has undermined our ability to scrutinize some of these tech platform issues.

And you are right, we need to be able to communicate how that will be applied. And I know, as the Chair has said in the past, we will be doing so in the future. But we cannot just relegate that policy statement to, essentially, veto the law. It is not the Federal Trade Commission's ability—we are not supposed to veto or repeal laws. That is what you guys do.

Mr. ARMSTRONG. The order in which you communicate and regulate gets important. Thank you both.

I am sorry for going over.

Ms. SCHAKOWSKY. Congresswoman Rice, I am recognizing you for 5 minutes.

Miss RICE. Thank you, Madam Chair. The FTC has a long history of protecting our military veterans and service members from fraud. That is partly because protecting vulnerable consumers is the FTC's main mission, but also because military veterans and service members, despite making the biggest sacrifice for our country, also have a long history of being targets of fraud and scams.

To assist the FTC with its mission and to protect our military veterans and service members, I introduced the Veterans and Service Member Consumer Protection Act of 2021 with my friend, Congressman Fred Upton. The bill would establish a coordinator within the FTC to educate military veterans and service members on schemes particularly targeted at them, and teach them how to react to and report these schemes to the FTC.

It would also require the coordinator to maintain a public-facing website with resources for military veterans and service members, and establish a procedure for receiving complaints made by military veterans and service members at the FTC.

So I would ask all three of the witnesses who are left, if you could talk about the importance of having a coordinator for military veterans and service members, and why would centralizing this position be helpful?

Mr. CHOPRA. So, Congresswoman, you are totally right. Service members and veterans actually report, for example, identity theft at a much higher rate than the general public. There is a whole host of schemes that target the military community.

You know, I have been disappointed. I think the Commission—Congress gave us jurisdiction to enforce the Military Lending Act of 2013. We have not brought a single action. I think that needs to change, and we need to sharpen our focus on how we work with, for example, the Undersecretary for Personnel and Readiness at

the Pentagon, who helps, you know, broadcast where people should be on alert.

So just as we have an elder justice coordinator, I think you are right, that we need to really make sure we are focusing and centralizing some of our work when it comes to policing against abuses targeting service members and veterans.

Miss RICE. Chair Khan?

Ms. KHAN. I would echo that and note that, you know, as you stated up front, we have seen in our work that military members and service members are particularly targeted, including by for-profit schools and payday lenders. And so making sure that we are squarely focused on these harms to some of the most vulnerable members in society is imperative.

Miss RICE. And is Mr. Phillips, who is——

Mr. PHILLIPS. Congresswoman, yes, it is.

Miss RICE. Thanks.

Mr. PHILLIPS. And thank you for your leadership on this issue. I think it is really important.

I think having a coordinator not only helps to focus us, but it puts a lot of emphasis on something that you mentioned, and that is the consumer education that we—teaching service members and their families how to deal with some of the scams that they see.

There is a lot of important work that we do enforcing the law and in penalizing those who violate it. But teaching people how to fend for themselves is a very important complement to that. So I really appreciate your leadership on this and your focus on that critical area.

Miss RICE. Great. I was glad to see that President Biden's recent Executive order on economic competition urged the FTC to ban or limit noncompete agreements. This action will go a long way to help workers. Today it is estimated that 1 in 5 workers without a college degree are subject to noncompete agreements, and 30 to 40 percent are not asked to sign these agreements until after they have accepted the position.

But we have seen that competition and labor markets actually empowers workers to demand higher wages and can increase innovation, as well. So I am very supportive of my colleague from San Diego and a member of this committee, Congressman Scott Peters' bill, the Workforce Mobility Act, which would place strong limits on noncompete agreements.

So I would put this to Chair Khan: To what extent would a clear expression of congressional intent, such as the passage of the Workforce Mobility Act, help to shape the FTC's policy and enforcement agenda with regard to noncompete reform?

Ms. KHAN. Congresswoman, I think clarifications from Congress are always helpful, especially in cases where we would be using, say, certain types of rulemaking authorities that the agency has neglected over recent decades. And so those types of express authority are always a helpful way to boost our work.

Miss RICE. Would you agree, Mr. Chopra?

Mr. CHOPRA. Yes. I think these noncompete agreements, it is not just low-wage workers, it is even doctors and medical providers who are trapped and are being essentially forced to move to entirely different metropolitan area to continue their profession. This

is bad for economic growth. It is bad for our society. And we need to take a close look. And I am glad Congress is looking too.

Miss RICE. Thank you, and I am out of time, so I don't think I am going to get to Mr. Phillips, unless the Chair will let him respond. Thank you.

Mr. PHILLIPS. Thank you, Congresswoman. Two points. The first is I do think, when it comes to rulemaking, it is very important that we have a congressional directive. I think that the focus on labor mobility in the EO, the Executive order, from the President on noncompetes, on occupational licensing is a great focus.

Allowing people to move around gives them bargaining leverage in their job and helps allocate labor resources in a way that also helps businesses.

Ms. WILSON. And this is Commissioner Wilson. I am still on, as well. And for the sake of time, I will just echo the remarks that Commissioner Phillips made.

Ms. SCHAKOWSKY. Now I recognize Congressman Soto for 5 minutes.

Mr. SOTO. Thank you so much, Madam Chair. And to our FTC Commissioners, thank you for your patience. We have been through a bunch of unnecessary motions to adjourn today, and we respect your time, so I wish things were a little smoother. Thank you for sticking with us.

We know we just passed a key bill to help out with restoring your restitution authority, the Consumer Protection and Recovery Act, and allowing the FTC to get fraudsters—allowing you to get ill-gotten gains from con artists and—even though a recent Supreme Court case sadly took it away.

We know COVID has only increased the scams throughout this pandemic. I mean, everything from stimulus check scams, to paycheck protection loan scams, to vaccine scams. In Florida we even had a miracle mineral solution scam to sell a solution primarily made up of bleach out of Miami, Florida. They sold tens of thousands of bottles and made over a million dollars.

It is critical that we give you all the tools you can use to handle this. And the 10-year statute of limitations is an important clarification, with the compromise. And we applaud you on some major victories, including the Volkswagen and DeVry cases that would have exceeded the 5-year statute of limitations, if that was what we ended up getting.

So to our Commissioners—and it would be great to hear from each of you—does the current budget give you enough resources to be able to enforce the Consumer Protection Recovery Act when it becomes law?

Ms. KHAN. Thanks——

Mr. SOTO. We will start with—yes, please continue.

Ms. KHAN. Thanks, Congressman. As a general matter, the agency is significantly underresourced, and additional resources to be able to boost our enforcement across these areas is essential.

I think there are questions about how we can be more effective in our enforcement, especially when it comes to the types of frauds and scams that you mentioned. So this is certainly something that we will be thinking about.

Mr. SOTO. And Commissioner Phillips?

Mr. PHILLIPS. Thank you, Congressman. I would just start with the fact that, when I began, our budget was about 309 million, I think something like that, and the latest congressional budget justification has us at 389. So there has been a substantial increase in the ask, including some funding from Congress. So I think it is important to track how those resources are used, but I do think we can do more with more. That is certainly a true thing. But I think it is important to take care on how we spend what we have.

Mr. SOTO. Thank you.

Commissioner Chopra?

Mr. CHOPRA. Sir, I think I know every agency says that they need more resources, but just looking at the data, we are stretched completely to capacity, and the rubber band is snapping. And if we need to effectively enforce the law, we need the resources.

There are so many laws that Congress has recently passed, whether it relates to opioids or so many other topics, that the FTC has not brought a single law enforcement action on. That is not just resources, that is also Commissioner accountability. But resources will certainly help.

Mr. SOTO. Commissioner Slaughter?

Ms. WILSON. So Commissioner Slaughter had to leave, but Commissioner Wilson is here.

Mr. SOTO. OK, Commissioner Wilson.

Ms. WILSON. And I would say that our hard-working staff have been even harder-working during the last 18 months. They are teleworking, but they are working incredibly hard to stay on top of the increase in mergers as well as the increase in COVID scams.

And I agree with Commissioner Phillips, it is important to understand how we are spending additional appropriations, but I also know that there are many different areas of the economy where Congress has expressed interest in our being very active and aggressive, and it is difficult to do that unless we have the appropriate resources to do that.

Mr. SOTO. Thank you, Commissioner. And as a practicing civil law attorney for many years, I know how important restitution can be to make victims whole. So this is a fundamental function that we need to restore and make sure there is ample statutory authority.

I want to end with a question to Chair Khan. We have the Blockchain Innovation Act that recently passed the House, going to the Senate, that would have you all do reports on cryptocurrency and the importance of consumer protections. Is that something that you all are prepared to be able to report on?

Ms. KHAN. Thanks, Congressman. I think any time we are, you know, given another slice of the economy to be looking at and studying, we want to make sure that we have the resources to be able to do that faithfully and discharge our statutory obligations. But certainly, the Commission was designed by Congress to be a watchdog across the economy and stay up to date on different economic trends and business practices.

So, you know, I think there is always a question about which regulator or which enforcement body is best positioned to oversee particular areas, so those types of considerations always need to be

top of mind. But of course, if Congress asks us to do something, we are obliged to do so.

Mr. SOTO. Sure. Thank you so much, and my time has expired.

Ms. SCHAKOWSKY. Congresswoman Fletcher, you are recognized for 5 minutes, and I believe that is the last questioner.

Mrs. FLETCHER. Terrific. Well, thank you so much, Chairwoman Schakowsky, and thanks to you and Ranking Member Bilirakis for today's hearing. Thank you so much to our FTC Commissioners here and virtually, and Chair Khan, for the time that you have spent with us today. It has been a long day. I join my colleagues in apologizing for the interruptions, but this has been really important and useful information for us. So I appreciate you sticking with us, and your insights on the issues facing the agency and the country at this time.

There has been a lot of useful discussion about how to modernize the consumer protection capabilities, how to address funding and resources and tools to protect consumers in what is, clearly, a complex and ever-changing marketplace. Mr. Soto was just talking about blockchain, and his legislation related to that. There is so much coming at us so quickly right now. And I think, you know, what is clear from this hearing is that you all need the resources, and more resources to accomplish the many, many tasks we have put before you.

In my district we talk all the time about wanting government to be efficient, effective, and ethical. And certainly, we know how effective the FTC can be and has been. But we need to make sure that we are giving you the resources and the tools that you need to be able to do that absolutely vital and effective work. And that was one of the reasons I was really glad to cosponsor the legislation to restore the FTC's 13(b) authority, and to see it pass the House. Like Mr. Soto, I was also a lawyer in private practice, and know how important it is to have those remedies available to you. And so we are working very hard to continue to respond and move that forward as quickly as possible.

I do want to take the—about 3 minutes I have left to put—follow up on one issue, and then maybe, since I am the last person, put it out for any other questions that—or any other things that you didn't get to share.

But Mr. McNerney was talking earlier about ransomware and other cyber-related attacks. And, you know, in my home State of Texas, we saw, just in 2019 alone, there were 22 different municipalities that were hit with ransomware attacks, and really crippled core government services for days. Certainly, the entire country was following, as—the Colonial Pipeline incident a couple of months ago. And we have really seen the challenges that these ransomware attacks present to people across every sector, whether it is, you know, companies, schools, and local governments, hospitals, critical infrastructure. It really needs to be a concern to all of us.

So, Chair Khan, can you explain the FTC's role in protecting consumers and small businesses—and really, all businesses—against ransomware attacks?

And then, rather than taking a break to answer the question, I will also ask you to tell us whether the FTC has sufficient re-

sources to follow up on all the ransomware complaints it receives. How more resources can be helpful?

And any thoughts you may have on H.R. 4551 requiring reporting to Congress, with kind of the time we have left.

Ms. KHAN. Thanks so much, Congresswoman. I think it is difficult to overstate the importance of addressing, head on, some of these really predatory practices and the kind of ransomware attacks that we have seen that have really crippled our critical infrastructure, as well as targeting businesses both big and small.

With regards to the FTC, we, of course, do use our unfair or deceptive acts or practices authority to scrutinize data security practices. And I think it is incumbent on us to make sure that companies are not being reckless and are really doing their due diligence when it comes to protecting consumers and protecting businesses from these types of attacks.

I think there are also really interesting questions to be asked about the ways in which consolidation and concentration of data also render certain companies more susceptible to these types of attacks. It means that these types of attacks have cascading effects, in terms of exposing millions and millions of consumers, millions and millions of businesses to these types of breaches.

So I think, both on the consumer protection side and also, frankly, on the competition side, we need to be thinking about how some of these incentives are working.

Mrs. FLETCHER. That is really helpful. If I can just follow up on that with a question, and then I have a couple more questions I will for the record at the conclusion of the hearing.

But you know, there is a bill—I think it is part of this hearing—requiring the FTC to report to Congress on a recurring basis about cross-border incidents that involve ransomware and other cyber attacks, to make recommendations both for legislation to us, and also best practices.

Does the FTC have the resources to do this, and does it have the information or have the ability to get the information that we are asking for?

Ms. KHAN. Certainly, these types of information asymmetries are vast, and sometimes it is hugely burdensome on the agency to be able to do these types of regular followups. So I think additional resources on that front are always very helpful.

Mr. CHOPRA. Congresswoman, if I could just add with respect to ransomware attacks, and—you know, you mentioned being in Houston, an energy area. There is—energy infrastructure is—obviously, Colonial Pipeline was a reminder of this, about how these are just unbelievable targets by state and nonstate actors.

In 2005 George W. Bush signed into law, with a bipartisan majority in Congress, the ability for the FTC to put in some data safeguards when it comes to energy and utilities. You know, Commissioners of both parties declined to actually implement what Congress asked.

So part of what we also have to do is look at all the authorities you have previously given us, see where they might solve some of the problems, and ask for resources to actually do them. But we have to just stop ignoring these authorities that you are giving us.

Mrs. FLETCHER. Terrific. Thank you so much, Commissioner Chopra.

I see I went over my time. I appreciate the Chairwoman permitting me to get those complete answers. And again, I thank you all for your time today, and for all the work you are doing on behalf of people across the country. Thank you so much.

And I will yield back.

Ms. SCHAKOWSKY. Well, that does conclude our first panel. I know that you had planned to be here until 20 to 4 in the afternoon, anyway, but I really want to thank you for your patience. It was—this conclusion is a long time in coming, but thank you so much for those of you who are here, our Members that are here, as well, online or in person, but especially the Commissioners for being here.

And we look forward—the subcommittee looks forward to working with you on many issues in a bipartisan way, as time goes on. So thank you very, very much. I appreciate you.

Mr. PHILLIPS. Thank you, Madam Chair.

Ms. SCHAKOWSKY. I am going to——

Mr. BILIRAKIS. Thank you so much.

Ms. SCHAKOWSKY. OK.

VOICE. We need a couple of minutes.

Ms. SCHAKOWSKY. Yes, we are going to need just about 2 minutes or so to set up for our next panel. And I will then introduce them. Thank you.

Ms. WILSON. Thank you, Madam Chair.

[Pause.]

Ms. SCHAKOWSKY. Before I introduce the panelists for panel 2, I just want to thank you so much. I know this has been such a long day, and you are still here, and I appreciate it.

And you know, we may not have too many Members, but I want you to know—and you, I think, all do know—that everything is on the record, and we will be here forever, and so we just appreciate that. And I am sure others will show up online, as well.

So I am happy to introduce the witnesses today. We have David Vladeck, professor of law at Georgetown University Law Center. We have—Graham Dufault—am I saying it correctly? Yes? Oh, good—who is the senior director for public policy at the App Association. And Sally Greenberg, who is the executive director of the National Consumers League.

And at this time, the Chair will recognize each of the witnesses for 5 minutes.

I know that you are probably pretty familiar with this, but I will just say it, because it is in my notes to say. Make sure that you remember that you have got the series of lights. Green will remain until—for 4 minutes, and then yellow will show up for the 1-minute sign. And red means that we hope you will be able to conclude.

So, Mr. Vladeck, you are now recognized for 5 minutes.

STATEMENT OF DAVID C. VLADECK, PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTER; GRAHAM DUFAULT, SENIOR DIRECTOR FOR PUBLIC POLICY, ACT, THE APP ASSOCIATION; AND SALLY GREENBERG, EXECUTIVE DIRECTOR, NATIONAL CONSUMERS LEAGUE

STATEMENT OF DAVID C. VLADECK

Mr. VLADECK. Well, thank you, Chair Schakowsky, Ranking Member Bilirakis, and members of the subcommittee. Thank you for your invitation to come before you today to give you my views on the 16 FTC bills pending before the subcommittee. What I would like to do is highlight two proposals that I think are of paramount importance to the FTC.

First, I think it is imperative that Congress enact H.R. 4447, the 21st Century Act, and restore to the FTC the standard rulemaking authority that it had prior to [inaudible]. This should not be a heavy lift. Virtually every other agency has this power.

Now, restoration of FTC rulemaking would authorize the Commission to set clear and specific rules on what acts and practices are deceptive and unfair. Doing so would provide the certainty the business community claims it wants and enable the FTC to develop binding, enforceable norms that will both deter violations and permit efficient and effective enforcement.

And with rulemaking, the FTC would no longer have to rely on the archaic and resource-wasting enforcement regime that exists today. We bring cookie-cutter cases, one by one, shutting down one scam and then moving on to the next essentially identical scam. That is what the FTC had to do during the tsunami of debt relief scams at the beginning of 2019. We brought a lot of cases, but we didn't make much headway. Once the FTC promulgated a regulation using its authority under the Telemarketing and Consumer Fraud and Abuse Act, we were able to chase out all of the bad actors. Why? Because they were all in violation of the new rule, and they were worried about redress and civil penalties. With rulemaking, the FTC could replicate this success many times over, and make enforcement so much more efficient.

Now, the only argument against restoring rulemaking authority is the old canard that the FTC might abuse it. Of course, that could be said of every agency. And here there are strong safeguards in place to guard against that.

First, the bipartisan nature of the Commission is a real bulwark against overreaching. Why? Because if the agency—if the Commission breaks 3 to 2, a reviewing court is going to be skeptical that this is a really good rule.

There is also some judicial review. And if there is a real—you know, if the FTC does overreach, then there is the Congressional Review Act. So there are lots of guardrails that already exist.

In addition, the FTC should ensure that the—Congress should ensure that the FTC has jurisdiction over the telecommunication common carriers and nonprofit entities. The rationale for the common carrier exemption—namely, that the FCC comprehensively regulates all activities of monopolist carriers—no longer exists. The line between common carriers and the other telecommunications services has been obliterated, and consumers face real risks of

things like bill cramming, throttling of service, false claims about internet speed, and other unfair, deceptive acts by the carriers. There is nothing that the Federal—communications can do to keep consumers safe in this space.

And Congress ought to repeal the carve-out for nonprofit entities. Too often fraudulent charities, bogus insurers, and fake healthcare providers hide behind the veil of nonprofit status. Piercing that veil is always difficult, and at times impossible, leaving consumers unprotected.

So those are the things that I would urge this subcommittee to take on, along with the point that everyone has made all day, which is the FTC is resource scarce. The SEC has four times the number of employees and a $2 billion budget. The CFPB has 500 more employees than the FTC does and a substantially greater budget. It is time that the FTC got its reasonable share. Thanks so much.

[The prepared statement of Mr. Vladeck follows:]

TESTIMONY OF DAVID C. VLADECK
A.B. CHETTLE, JR., PROFESSOR OF LAW
GEORGETOWN UNIVERSITY LAW CENTER

BEFORE THE HOUSE COMMITTEE ON
ENERGY AND COMMERCE

SUBCOMMITTEE ON CONSUMER PROTECTION
AND COMMERCE

LEGISLATIVE HEARING ON 16 FTC BILLS

JULY 28, 2021

Good morning Chair Schakowsky, Ranking Member Bilirakis, and members of the Subcommittee. I am David C. Vladeck, A.B. Chettle, Jr., Professor of Law, Georgetown University Law Center. I served as Director of the Bureau of Consumer Protection, Federal Trade Commission, from 2009 to 2012. I appreciate the invitation to testify this morning on the sixteen bills that are pending before the Subcommittee.

Let me begin by making a comment that frames my views on the proposals before the Subcommittee. The Subcommittee should evaluate each proposal by asking one question: If enacted into law, would the legislation assist or hinder the FTC in carrying out its consumer protection mission? That, in my view, is the one salient question, and only if the answer is unmistakably "yes" should the Subcommittee move the proposal forward.

Congress has long recognized that the FTC is a high functioning agency that serves the American people remarkably well. For more than 100 years, the FTC has been the nation's leading consumer protection agency. To carry out its mission, Congress enacted the Federal Trade Commission Act, which charges the Commission to "prevent" unfair, deceptive and anti-competitive acts and practices in the marketplace. And in recognition of the agency's professionalism and success, Congress has repeatedly turned to the FTC to enforce more than seventy other consumer protection statutes.

The FTC has succeeded because it has stayed focused on its mission. The FTC's job is to go after companies and individuals that break the law and harm or

threaten to harm your constituents. The FTC brings enforcement actions against scam artists who try to take the last dollars out of the wallets of the poor and elderly. It goes after companies making false advertising claims, resulting in consumers wasting money on products that don't deliver as promised and harming businesses that play fair. It brings enforcement cases against companies that misuse personal data or invade consumers' privacy. And it files competition cases to ensure that consumers have choices in the marketplace and that all companies, including new entrants, can compete on a level playing field.

But today the FTC is facing multiple challenges that Congress needs to address. As I see it, the key priorities are:

* Restoring the FTC's authority to force lawbreakers to return money to scammed consumers and disgorge ill-gotten gains;

* Providing adequate funding and staff so the FTC, which has barely two-thirds of the personnel it had in the early 1980s, can meet the challenges of protecting consumers in today's complex marketplace;

* Modernizing the FTC's enforcement mission by providing the FTC rulemaking authority under the Administrative Procedure Act and jurisdiction over common carriers and non-profit organizations; and

* Bolstering the technological resources available to the FTC and giving the FTC broader authority to hold the platforms and social media companies accountable for deceptive acts and practices.

I realize that this Committee has moved forward on reversing the FTC's loss in *AMG v. FTC*, but today's hearing underscores that Congress needs to do much more to put the FTC on sound legislative footing.

One point that I want to drive home is that the FTC has a long and enviable history of working on a non-partisan basis. The FTC's tradition of bi-partisanship

yields value to the American people. Every year the FTC returns tens or hundreds of millions of dollars to consumers and saves consumers billions of more dollars through its enforcement efforts – amounts that exceed tenfold or more the agency's annual budget. If the FTC were a company, we would all want to buy its stock. Congress's first priority should be to strengthen the Commission so it can do its work more effectively.

Many of the proposals before the Subcommittee today do just that; they propose ways of clarifying and strengthening the agency's authority. I will start with proposals that would retool the FTC's jurisdiction to authorize the Commission to better safeguard American consumers. Then I will turn to a number of proposals, doubtlessly well-intentioned, that if enacted might hinder the Commission's ability to protect our nation's consumers.

A. Proposals That Would Strengthen the FTC's Ability to Safeguard Consumers.

Eight bills propose to amend the Federal Trade Commission Act (FTC Act) in ways consistent with the Commission's longstanding, bi-partisan approach to statutory reforms. I will discuss these proposals by category: Two of them, H.R. 4475 (Protecting Consumers in Commerce Act), and H.R. 3918, propose amendments to the Commission's existing jurisdiction. I will address those proposals first. Next, four other bills provide the Commission with better tools to do its work: H.R. 4447 (21st Century FTC Act), H.R. 4488 (FTC Autonomy Act), H.R. 4530 (FTC Technologists Act of 2021), and H.R. 3067 (Online Consumer Protection Act). Last, but hardly least, two bills seek additional protection for certain classes

of consumers: H.R. 4460 (the Consumer Equity Protection Act of 2021) proposes that the FTC ensure that protected classes are not subject to or targeted by deceptive or unfair acts or practices. And H.R. 4483 (Veterans and Servicemember Consumer Protection Act of 2021) proposes to establish a coordinator within the FTC to ensure the protection of military veterans and servicemembers. Each of these proposals has merit and should be enacted into law.

I. Needed Reforms to the FTC's Existing Jurisdiction.

H.R. 4475. The Protecting Consumers in Commerce Act would amend the FTC Act to strike the archaic common carrier exemption, which arguably places off-limits certain conduct by telecommunications companies. Section 5(a)(2) of the FTC Act, 15 U.S.C. 45(a)(2), carves out FTC jurisdiction over, among other entities, "common carriers subject to the Acts to regulate commerce." And Section 4 of the FTC Act, 15 U.S.C. 44, defines "Acts to regulate commerce" to include not only common carriers engaged in interstate transportation (railroads, interstate trucking, and pipelines), but also "title 49 and the Communications Act of 1934 and all Acts amendatory thereof and supplementary thereto." To translate this statutory language into English, these provisions arguably exclude communication common carriers, such as AT&T, Comcast, and Verizon, from the FTC's jurisdiction, even when they are engaged in consumer-facing activity. There is no reason for that gap in the FTC's authority, and the gap continues to cause mischief.

The FTC has long asked Congress to repeal this exemption, which was based on the premise that the Federal Communications Commission (FCC) would

comprehensively regulate all activities of monopolist telecommunications carriers. Given today's dynamic market for telecommunications services, and the substantial de-regulation of the industry, the boundaries between common carriage and other telecommunications services has been obliterated. The FTC has actively engaged in enforcement efforts to protect consumers against unfair and deceptive acts and practices by carriers, including lawsuits against AT&T and TracFone for "throttling" service to customers. But with the FCC's Title II reclassification of internet service as "common carriage," the FTC's jurisdiction in this area is now in doubt.[1]

Congress should make clear that the FTC has authority to bring consumer protection cases against the carriers, especially in matters in which the FTC has considerable expertise, including cases involving false or deceptive advertising, bogus marketing claims, illegal billing practices (like "cramming" – *i.e.*, placing unauthorized charges on bills as shown in the Commission's case against T-Mobile), privacy, and data security. After all, the FTC is an enforcement agency while the

[1] It is no answer to suggest that the FCC can adequately protect consumers in these kinds of cases. To be sure, the FCC can impose fines and require structural relief against the common carriers it regulates. But it has no authority to make consumers whole for their loses. For instance, shortly after my tenure as Bureau Director, the FTC filed suit against AT&T Mobility claiming that it "throttled" or reduced the customers' broadband speech without regard to actual network congestion. AT&T's defense was not on the merits. Instead, AT&T argued that the common carrier exemption barred the FTC from bringing the case at all. Although the FTC finally prevailed in an *en banc* ruling from the Ninth Circuit, *FTC v. AT&T Mobility LLC*, 883 F.3d 848 (9th Cir. 2018), the issue has not been definitively resolved and continues to cast a shadow on the FTC's authority. Fortunately, the FTC's action against AT&T succeeded and resulted in a $60 million redress order. *See* https://www.ftc.gov/enforcement/cases-proceedings/122-3253/att-mobility-llc-mobile-data-service.

FCC is a regulatory agency focused on a discrete set of corporate actors. The difference for consumers is striking. In enforcement cases, the FTC puts money back in consumers' wallets and enjoins future wrongdoing, while the FCC imposes fines but has no authority to engage in redress or restitution. Consumers deserve better. The Subcommittee should move forward with H.R. 4475.

H.R. 3918. This bill would permit the FTC to enforce the FTC Act against certain tax-exempt organizations. The FTC has long struggled with the exemption for non-profit corporations because all too often fraudulent charities, bogus insurers, and fake health care providers, hide behind the veil of non-profit status. Piercing that veil can be difficult. During my first year as Bureau Director, the Commission, along with 61 Attorneys General, Secretaries of State, and other law enforcers of 49 states brought 76 law enforcement actions against 32 fundraising companies, and 22 non-profits or purported non-profits on whose behalf funds were solicited. Virtually all of the non-profits fought against FTC participation because, they claimed, they were bona fide non-profits.[2]

More recently, the Commission sued a company engaged in selling dietary supplements as cancer cures but had to expend substantial resources proving that the purported non-profit religious institution, Daniel Chapter One, was simply a for-profit business.[3] Fake charity schemes also continue apace.

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[2] *See* FTC Press Release, *FTC Announces False Charity Law Enforcement Sweep* (May 20, 2009), available here: https://www.ftc.gov/news-events/press-releases/2009/05/ftc-announces-operation-false-charity-law-enforcement-sweep.

[3] *See, e.g., U.S. v. Daniel Chapter One*, 793 F.Supp.2d 157 (D.D.C. 2011).

Hospitals, universities and colleges generally sheltered by the non-profit exemption as well. These institutions also experience serious data breaches, but even when they misrepresent their data security practices or have unreasonably lax security, they are immune from FTC action. Millions of consumers have no choice but to entrust personal data to these institutions. They ought to be held accountable if they fail to take reasonable precautions to safeguard the vast quantities of sensitive data they hold.

II. Needed Reforms to Augment FTC Authority.

H.R. 4488. The FTC Autonomy Act would amend the FTC Act to permit the Commission's own lawyers to bring order violation cases, rather than having to enlist the assistance of the Attorney General. Under current law, 15 U.S.C. 45(*l*), when a company or an individual "violates an order of the Commission after it has become final, and while such order is in effect, [the offender] shall forfeit and pay to the United States a civil penalty . . . which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States."

The practice of requiring the FTC to refer order violation cases to the Attorney General is outdated, cumbersome, time-consuming, and serves no discernable purpose. FTC lawyers generally prepare the papers that are submitted to the court, handle the lion's share of the litigation, and, because the FTC obtained the underlying order, have expertise in the case and the subject matter. As a result, there is inevitably a wasteful duplication of effort by both the FTC and DOJ.

There is another reason to end this practice. Unlike the Department of Justice, the FTC is an independent Commission that neither reports to nor takes orders from the Executive Branch. The FTC's independence is a virtue, and requiring the FTC to seek the Justice Department's participation to enforce FTC orders undermines Congress's intent to create the FTC as an independent Commission. I urge the Committee to approve this important bill.

H.R. 4447. The 21st Century FTC Act would restore the Commission's pre-1975 authority to use the standard rulemaking tool, *i.e.*, notice and comment rulemaking authorized by the Administrative Procedure Act (APA), 5 U.S.C. 553, to develop legally enforceable rules defining unfair or deceptive acts and practices. At present, the FTC is subject to hybrid (or Mag-Moss) rulemaking; it is permitted to use APA rulemaking but must also clear several extra hurdles. The FTC must also:

> (A) publish a notice of proposed rulemaking stating with particularity the text of the rule, including any alternatives, which the Commission proposes to promulgate, and the reason for the proposed rule; (B) allow interested persons to submit written data, views, and arguments, and make all such submissions publicly available; (C) provide an opportunity for an informal hearing in accordance with subsection(c); and (D) promulgate, if appropriate, a final rule based on the matter in the rulemaking record (as defined in subsection (e)(1)(B)), together with a statement of basis and purpose.

15 U.S.C. 51a(b)(1). And that's not all. The FTC must determine, on a factual record, that the practices subject to the rulemaking are "prevalent," and must also hold an "informal" hearing that in practice is a regulatory trial, with examination and cross-examination of witnesses. *See id.* 51a(c).

This process is unworkable. As a result, the FTC has largely abandoned rulemaking as an option, except where Congress gives the FTC APA rulemaking. *See*, *e.g.*, The Report of the Administrative Conference of the United States (available at: https://www.acus.gov/report/project-report-recommendation-80-1) (highlighting the obstacles for FTC rulemaking). Congress has at times conferred Section 553 rulemaking authority on the Commission to carry congressional priorities. *See*, *e.g.*, 15 U.S.C. 6102 (providing APA rulemaking authority to enable the FTC to issue the Telemarketing Sales Rule). But the time has come to permit the FTC to promulgate rules under 5 U.S.C. 553.

The need here is palpable. In the absence of substantive rules, the FTC has had to develop a "common law" of what constitutes "deceptive" or "unfair practices" through case-by-case enforcement and guidance documents. That "common law" provides the regulated community considerable guidance, but arguably does not produce the specific and clear standards businesses would prefer. And that "common law" binds only the FTC. As a result, the FTC is left to bring cookie-cutter cases one-by-one, to shut down individual scams, return to consumers whatever money the FTC can find, and then take on the next, essentially identical case. Enforcement under the FTC Act as it exists today is a game of whack-a-mole for the Commission; the FTC is forced to carry out enforcement in retail, not wholesale. This archaic reality, coupled with the FTC's chronic resource constraints, forces the FTC to forego too many cases, thus jeopardizing the well-being of your constituents.

What is especially frustrating is that we know that enforceable rules are effective deterrents. Consider an example from my tenure as Bureau Director. During the last economic downturn, "debt settlement" and "debt relief" companies badgered financially distressed consumers, many trying to stave off bankruptcy, into allowing the company to "settle" their debts. The companies made extravagant and baseless claims of likely success. Millions of consumers put their dwindling savings in the hands of these companies, only to see their money go to pay the companies' fees, not to creditors. Many ended up in bankruptcy. To stem the tide, the FTC brought enforcement actions against the largest and worst actors and shut many of them down. But the scam was so profitable that for every company the FTC shut down, a raft of new ones would open.

Fortunately, Congress had authorized the FTC to use APA rulemaking to promulgate rules relating to abusive telemarketing. The debt settlement companies depended on telemarketing to troll for new clients. Relying on that authority, in less than a year, the FTC completed a notice and comment rulemaking and issued a comprehensive rule strictly regulating debt relief services.[4] The rule prohibits advanced fees, requires substantial disclosures, strictly regulates the advertising claims the companies may make, and threatens violators with restitution or disgorgement *and* substantial civil penalties. The rule is enforceable not just by the FTC, but also by State Attorneys General. Within a few months, we saw a mass

[4] *See* https://www.ftc.gov/news-events/press-releases/2010/07/ftc-issues-final-rule-protect-consumers-credit-card-debt.

exodus from the "debt relief" industry, and a rise in non-profit credit counseling organizations that provided free and helpful advice to those in financial distress. The FTC could replicate this success many times over if Congress gives it standard rulemaking authority.

Equally important to the success of the debt settlement rule was the fact that the debt settlement companies understood that the FTC could seek not just restitute, but also civil penalties against violators. H.R. 4447 would authorize the FTC to promulgate rules laying out specific and clear standards as to what constitutes unfair or deceptive acts and practices, and in so doing create enforceable norms that would enable the FTC to seek civil penalties from violators. Congress has already empowered the FTC to seek penalties for violations of substantive rules. And like existing law, H.R. 4447 does *not* delegate civil penalty authority directly to the Commission. Rather, it amends Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. 45(m)(1)(A), to authorize courts to impose civil penalties.

This reform is critically needed. As I said earlier, the FTC is under-resourced and under-staffed, but tasked with a formidable responsibility: safeguarding your constituents in a vast, complex, and at times hostile marketplace. Giving the FTC tools that almost every other agency has will better enable the FTC to perform its mission, and it would restore the FTC to parity with its enforcement counterparts.

H.R. 4530. The FTC Technologists Act of 2021 would require the Commission to establish an "Office of Technologists" with 25 technologists to "advise the

Commission on technology matters, including the use of technology, technical aspects of law enforcement actions, and technology policy recommendations."

I applaud any recommendation that would increase funding to expand the FTC's staff of technologists. But I offer one cautionary note. The FTC budget is so paltry that creating an office with a staff of 25 technologists, without a substantial increase in appropriations, would be pointless, or worse. It might drain technological resources from both the Bureau of Consumer Protection and the Bureau of Competition, hindering their ability to investigate and staff enforcement cases. I recognize that the proposal contains an authorization, but absent an appropriation, this proposal could be counterproductive by requiring a rededication of the FTC's technological resources.

H.R. 3067. The Online Consumer Protection Act is an ambitious effort to hold social media platforms accountable. The Act seeks to ensure that platforms bear legal responsibility for violations of the FTC Act and promises made, but broken, in Terms of Service or other communications with consumers. The proposal ensures that the broad immunity provided by the Communications Decency Act, 47 U.S.C. 230, does not inhibit FTC enforcement. The Act also bars the platforms from insisting that users bring legal claims against them through forced arbitration.[5]

I support this measure. My own view is that the original sin was Section 230's grant of sweeping immunity. Although Congress has conferred "immunities"

[5] For my views regarding forced arbitration, *see Contracting (Out) Rights*, 36 Ford. Urban L. J. 803 (2009) (with Professor Kathryn A. Sabbeth).

in other legislation (*e.g.*, to firearms,[6] and nuclear power[7]), no industry is more effectively shielded from liability – and thus responsibility – than the social media platforms. I do not suggest that Congress should scrap Section 230; doing so would create an anti-competitive barrier to entry. But H.R. 3067 provides a concrete way to reassert accountability.

I also applaud the proposal's position on mandatory arbitration. Secrecy is a hallmark of arbitration. But as Louis Brandeis, the architect of the FTC Act (and later a Supreme Court Justice), famously said, "sunlight is the best disinfectant." Public lawsuits place a spotlight on alleged wrongdoing, and it is important that the platforms be held to account when they break promises made to consumers. I agree with the goals of the Online Consumer Protection Act and urge this Committee to approve it.

III. Proposals Regarding Equity.

H.R. 4460. The Consumer Equity Protection Act of 2021 proposes that the Commission appoint a task force to help guard protected classes against deceptive or unfair acts or practices. I support this measure. I would point out, however, that the FTC has, at least since my tenure if not before, carried out many of the tasks the bill calls for, including oversight of markets to detect targeting of, or discrimination against, certain populations, monitoring complaints through the Sentinel system, consumer education, broad dissemination of FTC materials, regular meetings with legal services providers, and coordination with other law

[6] *See, e.g.*, Protection of Lawful Commerce in Arms Act, 15 U.S.C. 7901–7903.

[7] *See, e.g.*, The Price-Anderson Act, 42 U.S.C. 2011-2281.

enforcement agencies. As is always the case, however, more could be done. And I understand this proposal to ask for exactly that, namely more aggressive oversight of the market to prevent unlawful discrimination.

H.R. 4483. This proposal bears some similarity to the prior proposal; neither asks for changes to the FTC's statutory authority, but both urge greater emphasis by the FTC on the protection of historically vulnerable populations, here, former and present servicemembers. I support this measure, but with the same point I made about H.R. 4460, namely that much of what the provisions call for are tasks the FTC already performs.

B. Proposals That Might Weaken the FTC's Ability to Safeguard Consumers.

I. Proposed Substantive Changes to the FTC Act.

Several well-intentioned proposals are pending before the Subcommittee that are aimed at relieving burdens on businesses subject to FTC investigations or consent orders. I do not support these proposals because I am concerned that they would impose substantial burdens on the FTC without clear, discernable benefits, hinder the FTC's enforcement abilities in ways that could put consumers at risk, and inhibit the FTC's ability to prevent lawbreakers from becoming recidivists.

H.R. 2671. The Shield Act contains two new mandates: one would *prohibit* the FTC from relying on guidelines or guidance documents in proving violations of law; the second would *permit* targets of FTC enforcement actions to rely on Commission guidance or guidelines "as evidence of compliance with the provision of law under which the guidelines, general statements of policy, or guidance was

issued." The Shield Act does not explain the basis for this asymmetry, nor is any justification evident.

The first mandate is unobjectionable. It simply restates existing law. A basic principle of administrative law is that guidance, guidelines, and other forms of informal agency advice do not have the force of "law," and thus are not binding on regulated parties and cannot serve as the basis for an enforcement proceeding.[8] And given the breadth of the definition of guidance documents, virtually every public communication the Commission issues – including guides, blog posts, reports, workshops, oral communications with counsel, press releases, emails, twitter posts by Commissioners or senior staff, and on and on – could qualify under H.R. 2671 as "guidelines, general statements of policy, or similar guidance."

The proposal's second mandate threatens to stand the law upside down, and will, if implemented, seriously harm businesses by making the Commission reluctant to provide guidance. Under existing law, the Commission may not rely on guidance documents in an enforcement action; it must instead make out a violation of law by proving that the alleged wrongdoing is deceptive or unfair or violates one of the seventy statutes the FTC enforces. In defense, a business may claim good faith by introducing evidence that the business actually relied on Commission guidance documents. That's only fair. But the proposal goes well beyond that by substituting *compliance with a guidance document* (that might be outdated, superseded or inapplicable) with *compliance with the law*. That is not right. And the

[8] *See, e.g., Center for Auto Safety v. National Highway Traffic Safety Administration*, 452 F.2d 798 (D.C. Cir. 2006). *See also Trudeau v. FTC*, 456 F.3d 178 (D.C. Cir. 2009).

consequences will be severe. Businesses will be deprived of guidance that helps them comply with the law, and the American people will see law-breaking companies escape liability because they may be able to point to a stray statement an FTC staffer made years earlier.[9]

The problems posed by H.R. 2671 are made more acute because of the absence of any requirement that the business show that it relied on, or was even aware of, the guidance it claims justified its conduct at the time it violated the law. Under existing law, a business would have to demonstrate *actual* reliance to have a defense, albeit not an affirmative defense. Under this proposal, pointing to any guidance document that is arguably exculpatory might be sufficient. The absence of a requirement of proof of actual reliance will encourage every law-breaking company to search through all of the agency's guidance to find any isolated remark that might assist in its defense. After-the-fact justifications for illegal action should be barred, not sanctioned, but it is inevitable under H.R. 2671.

H.R. 2677, the Technological Innovation through Modernizing Enforcement Act (TIME Act), proposes to put an eight-year time limit on FTC consent decrees, except for those that relate "to alleged fraud by the entity subject to the consent order and requires a time limit longer than 8 years based on the factors described in

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[9] This proposal stretches the boundaries of existing law well beyond the breaking point. In general, compliance with substantive agency regulations – regulations that have the force of law – is a *defense* to liability, but not an *affirmative* defense. Where regulatory compliance is asserted by a defendant, the defendant may argue to the trier of fact that compliance with the agency's regulations negates any theory of liability, but the trier of fact is free to disagree. *See generally* Robert L. Rabin, *Reassessing Regulatory Compliance*, 88 Geo. L.J. 2049 (2000). H.R. 2671 cuts the defense loose from its moorings and permits an absolute defense based on compliance with non-binding guidance, even if the business cannot prove it relied on that guidance.

this subsection." The impetus for this proposal is apparently the view that longer-lasting orders may impede innovation. The bill also proposes that the Commission review all non-fraud related consent decrees five years after entry of the order to determine whether the decree continues to serve the purposes described in the bill. Given the hundreds of consent decrees the FTC oversees, the burdens imposed by this proposal are considerable, and outweigh any benefits it might provide. And in any event, the provision as drafted is unworkable because FTC cases do not "allege[] fraud by the entity" and thus all consent decrees would be subject to review after just five years.[10]

There are several problems with this proposal aside from burden and definitions. First, the proposal aims to solve a non-existent problem. To the extent that the bill seeks to shorten consent decrees that might impede innovation, the FTC's consent decrees are *designed* to avoid stifling innovation. If one looks at the consent decrees that FTC has entered into with the nation's largest and most important technology companies, it is clear that the agency has avoided prescriptive

[10] There is a serious definitional issue with the framing of the proposal. The dividing line drawn in the proposal is that the FTC need not engage in the 5 year initial review for consent decrees that relate "to alleged fraud by the entity subject to the consent order." That exception would be the null set. The FTC does not bring "fraud" cases and does not allege "fraud" in the complaints it files. There is no requirement in Section 5 of the Act, or in any other of the major statutes the FTC enforces, including, for instance, the Fair Credit Reporting Act, the Fair Debt Collection Act, the Equal Credit Opportunity Act, and so on, that the FTC allege fraud. Nor does the FTC have to prove "fraud" in any of the cases it brings. The only reference in the entire FTC Act to "fraud" comes in Section 19(a) of the Act, 15 U.S.C. 57b(a), which permits the FTC to seek damages when a "reasonable man would have known under the circumstances [that the alleged wrongdoing] was dishonest or fraudulent." But even when Section 19(a) is alleged in a complaint, the FTC does not allege scienter or fraud – the FTC does not need to show dishonesty or fraud to win its case. I am thus unaware of any consent decree that speaks in terms of "fraud," or a way of drawing that line.

decrees that might hamper innovation. Having participated in the drafting of the Commission's consent decrees against Internet giants including Google, Facebook, Intel, Twitter, Amazon and Apple, as well as tiny start-ups like Frostwire and Chitika, I think the record establishes that FTC consent decrees, even those with twenty-year durations, have not hindered innovation and will not do so in the future. If there is evidence that FTC decrees stifle innovation, I would like to see it.

Equally important, if a company can make a credible case that a decree would impair innovation, the Commission could lift or modify the decree. The Commission, has, on occasion, done just that.[11] Instead, the proposal shifts the burden to the Commission to justify the continuation of *every non-fraud decree* (assuming that there is way to distinguish non-fraud decrees) after only five years; that shift is unwarranted.

Second, the proposal would have serious unintended consequences. Most critically, the bill would undermine the deterrent impact of FTC enforcement actions. In most cases, injunctions (consent decrees are injunctions) entered by federal courts are *permanent*, not time-limited, let alone limited to only eight years. That practice guarantees that there are coercive tools available to prevent a repeat of the illegal behavior that gave rise to the decree. To be sure, injunctions may be modified or vacated, but only if the court finds, after a hearing, that the need for an

[11] Consider one prominent example. In 2009, the FTC and Sears entered into a consent decree relating to Sears's tracking of consumers online, without adequate notice that Sears was harvesting all of the data consumers shared online. Years later, Sears claimed that the consent decree was stifling its ability to serve its customers online. The Commission considered Sears's argument and substantially modified the decree as Sears proposed. *See* https://www.ftc.gov/enforcement/cases-proceedings/082-3099-c-4264/sears-holdings-management-corporation-corporation.

injunction has dissipated or that a change in circumstances warrants a modification. *See, e.g., Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992).

The need for extended injunctive relief is especially acute in FTC cases. In the cases that would be covered by the proposal, the *only* remedy the FTC has, even if the violation is egregious, willful, and causes massive consumer injury, is a consent decree and the ongoing requirements it imposes. That relief serves two distinct, but important, values. First, the decree sets out norms that the company must adhere to during the pendency of the injunction, which prevents recidivism. And second, the decree warns other companies that violations of the law have consequences.

To drive home my concerns, consider just one class of cases that H.R. 2677 would presumably apply to – cases involving data security. Thus far, the agency has brought about seventy of these cases based on theories developed during the tenure of President Bush's FTC Chairman, Tim Muris.[12] Most of these cases were resolved with twenty-year consent decrees, as was the FTC's successful action against Wyndham for multiple, egregious failures to take reasonable precautions to protect credit card information that left over 600,000 credit card files in the hands of the Russian Mafia.[13]

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[12] *See, e.g., In re Eli Lilly & Co.*, FTC No. C-4047, Decision and Order (May 8, 2002) (entering 20-year order), available here: https://www.ftc.gov/sites/default/files/documents/cases/2002/05/elililly do.htm.

[13] *See FTC v. Wyndham Worldwide Corporation*, No. 2:13-cv-01887-ES-JAD (D. N.J. Dec. 11, 2015), Stipulated Order for Injunction (entering 20-year order), available at https://www.ftc.gov/enforcement/cases-proceedings/1023142-x120032/wyndham-worldwide-corporation. Prior to the entry of the consent decree, Wyndham had challenged the FTC's

Under the proposed Shield Act, the Commission would already have been required to re-consider whether the consent order entered in *Wyndham* still served its initial purposes and do so based solely on the criteria set out in H.R. 2677. Nothing in the proposal limits judicial review of the Commission's determination.[14] Assume that after five years, the FTC thought that the consent decree should remain in force. Wyndham would likely argue that the Commission's decision to maintain the decree constitutes "final agency action" reviewable under the APA and seek judicial review. In that case, the Commission's decision to retain the decree would be judged under the "arbitrary and capricious" standard, *see* 5 U.S.C. 706(2), not the more rigorous standard courts employ to determine whether to vacate or modify an injunction. *See Rufo, supra.* The idea that in only five years a company that showed stunning disregard for the safety of its customers' credit information could shed its obligations under the decree is unfathomable, but that is a serious possibility under H.R. 2677.

In my view, Congress should work to strengthen the FTC's authority over data security, not weaken it. Data breaches like those Wyndham experienced are responsible for the meteoric rise of identity theft in the United States, and they are the predictable debris of an Internet economy that places too little value on data

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authority to pursue data security cases under the agency's "unfairness" authority and lost. *See FTC v. Wyndham Worldwide Corporation,* 799 F.3d 236 (3d Cir. 2015).

[14] In the absence of a clear Congressional mandate that agency action may not be subject to judicial review, "the strong presumption that Congress intends judicial review of administrative action" controls. *Smith v. Berryhill,* 139 S. Ct. 1765, 1776 (2019) (quoting *Bowen v. Michigan Academy of Family Physicians,* 476 U.S. 667, 670 (1986)).

security. In 2020, nearly 1.4 million individuals filed identity theft complaints with the FTC, and these complaints are just the tip of a much larger iceberg.[15] And identity theft is big business: According to the most recent Department of Justice statistics, financial losses from identity theft in 2018 totaled $15.1 billion.[16]

We need tougher laws on data security. But H.R. 2677 would undermine the threat of FTC enforcement actions, not just in data security cases, by dramatically reducing the impact of FTC consent decrees to the enforcement equivalent of a slap on the wrist. I urge the Subcommittee to reject this proposal.

H.R. 2702, the Statement on Unfairness Reinforcement and Emphasis Act (SURE Act), seeks to reformulate the statutory unfairness standard, but does so in ways that would undercut, not clarify, the Commission's authority. H.R. 2702 would narrow the existing statutory standard for unfairness by focusing FTC enforcement actions on cases where there is demonstrable "substantial harm."

This proposal suffers from two flaws. First, H.R. 2702's requirement of "substantial harm" could make it difficult for the Commission to bring cases to *avert* harm, a result that would contradict Congress's 100 year-old statutory directive that the Commission act to "prevent" harm, 15 U.S.C. 45, and needlessly expose consumers to avoidable harm.

Second, H.R. 2702 casts doubt on the Commission's authority to bring cases where the harm is palpable and serious, but unrelated to economic loss or health

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[15] *See* https://www.ftc.gov/news-events/press-releases/2021/02/new-data-shows-ftc-received-2-2-million-fraud-reports-consumers.

[16] *See* https://bjs.ojp.gov/content/pub/pdf/vit18.pdf.

and safety. This focus is myopic as a matter of policy. Congress charged the FTC with the mission of *preventing* unfair practices because it understood that prevention is far more important than trying to remedy harm after-the-fact. After all, the most consequential harms to consumers are often non-economic injuries, such as a serious invasion of privacy, theft of personal information that can be sold to and used by identity thieves, and revelations of embarrassing information, as happened with the Ashley Madison data breach,[17] which resulted in broken marriages and suicides.

Consider also the *DesignerWare* case, which involved rent-to-own computers that had cameras that could be remotely activated to take pictures. These cameras were used to take pictures of children, household visitors, individuals not fully clothed, and couples engaged in intimate activities.[18] The case was brought and resolved, with bi-partisan support, mainly on unfairness grounds. Whether a similar case could be brought under H.R. 2702 is uncertain.

Equally problematic is the vagueness in the statutory language. The proposal tasks the FTC with weighing whether an act or practice is unfair based on its "net effects," taking into account a number of nebulous, ill-defined, and often impossible to quantify, factors, including "the various costs for a remedy, including the costs to the parties directly before the Commission," "burdens on society in general in the form of increased paperwork, increased regulatory burdens on the flow of

[17] *See* https://www.ftc.gov/news-events/press-releases/2016/12/operators-ashleymadisoncom-settle-ftc-state-charges-resulting.

[18] *See In re DesignerWare,* FTC No. 112-3151 (Apr. 15, 2013), available at: https://www.ftc.gov/enforcement/cases-proceedings/112-3151/designerware-llc-matter.

information, reduced incentives to innovation and capital formation, and other similar matters." How would those factors have applied in *DesignerWare*? Having served as Bureau Director, I would not have a clue what impact an enforcement case might have on "incentives to innovation" or "capital formation." And trying to demonstrate these "net effects" in the mine run of enforcement cases would be highly problematic and would quickly drain the Bureau's resources. Under no circumstances should the Commission's authority to bring these kinds of cases be undermined.

H.R. 2676, the Revealing Economic Conclusions for Suggestions Act (RECS Act), would require a detailed economic analysis, prepared by the FTC's Bureau of Economics (BE), as a precondition to the Commission making recommendations for legislative or regulatory action. This requirement would essentially prohibit the Commission from making recommendations until BE produced an economic analysis of the costs and benefits of such actions, as well an analysis of the ability of other "private markets or public institutions" to address the issue. The costs of this proposal are disproportionate to any benefit that might result, meaning, of course, that this proposal could not withstand cost-benefit analysis.

Indeed, the burdens that would result from H.R. 2676 are so substantial that the impact of this proposal, intentionally or not, would be to silence the FTC on all but a small handful of important issues. It would, among other things, discourage the FTC from making recommendations to Congress, helping other agencies resolve regulatory problems, advising state and local governments on consumer protection

and competition issues, and helping our foreign counterparts weigh similar issues. I see no reason why Congress would want to mute the voice of an independent, bi-partisan, expert Commission, especially when the recipients are free to disregard the Commission's advice.

II. PROPOSED TRANSPARENCY PROVISIONS.

H.R. 2672, H.R. 2690 and H.R. 4564 are nominally transparency provisions. Two require the Commission to create new reports to be provided annually to Congress. Whether assessed individually or collectively, these proposals would add considerable burdens on the Commission without yielding a discernable payoff. And the third would require the FTC to post the full text of any order, decision or action to be discussed at a Sunshine Act meeting a month in advance. This proposal is at odds with the Sunshine Act, and the month-in-advance requirement would hinder the Commission's ability to address time-sensitive matters.

H.R. 2672, the Robust Elderly Protection and Organizational Requirements to Track Scams Act, would require annual reporting to Congress on "the Commission's enforcement actions involving allegations of fraud targeting individuals who are 65 years of age or older during the previous calendar year." This requirement would add to the Commission's already considerable reporting burden and duplicate a number of reports that the agency issues annually, especially its annual Congressional Budget Justification and Strategic Plan under the Government Performance and Results Acts.

In addition, this provision needs clarification. Does the phrase "targeting individuals" 65 and older restrict the scope of the provision to frauds aimed *only* at the elderly, or does it include frauds that target individuals 65 and older *as well as other groups*? This question is highly consequential. To be clear, older people are not necessarily more vulnerable to fraud than younger cohorts. The FTC's most recent (2017) detailed fraud survey results show that consumers aged 35 to 54 were more likely to be victims of fraud compared to consumers in other age categories, and the elderly were less likely than other age cohorts to fall victim to fraud, except for computer repair fraud.[19]

There are also problems with statistics. Assume (counterfactually) that FTC's report on consumer fraud shows that those between the ages of 55 and 74 were at the greatest risk of being victimized by fraudulent prize promotion schemes, though those between 55 and 64 were actually at *higher risk* than their elders.[20] Are prize promotion schemes "targeting individuals who are 65 years of age or older" within the meaning of the proposal? The answer is not clear, but if the answer is "yes," than the burden on the agency is quite substantial, because most, but not all, of the fraud-type cases the Commission deals with could be said to target those 65 and older. Before the Subcommittee pursues this proposal, I urge it to take a hard look

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[19] *See* FTC, *Consumer Fraud in the United States, 2017 Report*, at vi, 66 (2017) https://www.ftc.gov/system/files/documents/reports/mass-market-consumer-fraud-united-states-2017-update/p105502massmarketconsumerfraud2017report.pdf.

[20] This hypothetical is based on the data set forth in the 2011 FTC Fraud Report. FTC, *Consumer Fraud in the United States, 2011 – The Third FTC Survey* (2013), available here: https://www.ftc.gov/sites/default/files/documents/reports/consumer-fraud-united-states-2011-third-ftc-survey/130419fraudsurvey_0.pdf.

at the FTC's fraud surveys, which comprehensively address the risks of fraud to all age groups. *See* n.19, *supra*.

H.R. 2690, the Clarifying Legality and Enforcement Action Reasoning Act (Clear Act), would require the FTC to provide Congress with an annual report on its consumer protection investigations, not simply those that result in agency action – which are publicized by the FTC – but also investigations that are closed. There are two difficulties with this proposal. First, summarizing the legal basis for the investigation and its closure, and identifying the sector in which the company under investigated operated, imposes information-dissemination and record-keeping requirements beyond those the FTC already undertakes. Nor would the report give regulated parties an added insight into the Commission's thinking. The cases that the FTC brings, not the ones it closes, provide the most reliable indication of the Commission's thinking.

Second, and perhaps more importantly, the proposal envisions a process that could expose the identities of companies and individuals who had been subject to an investigation that ended with no Commission action, causing serious and perhaps irreparable injury to those companies or individuals. To be sure, the provision contemplates that the privacy of these companies would be respected. But a sector-specific public report, which provides a legal analysis correlated to each closed investigation, inferring identities may be possible, and at times easy, especially in those sectors with few participants.

H.R. 4564, the FTC Transparency Act, would require the Commission to post on the Commission's website any matter that might result in an "order, decision, report, or action by vote of the Commission," as well as the text of these documents, "not later than 30 days before the date on which the vote is to occur." There is an exemption for the posting requirement where the Commission Chair determines that there are "emergency or exigent circumstances" requiring publication beyond the 30 day requirement.

It is hard to discern the rationale for this proposal. Most of the "orders, decisions, reports, or action" voted on by the Commission would not take place in an open Sunshine meeting; all of those actions are covered by Sections 5 U.S.C. 552b(c) and (f), which permit agencies to close meetings involving sensitive issues relating to enforcement matters. Nor is the proposal consistent with the Sunshine Act's determination that notice of a meeting need be posted one week in advance of open meetings. *Id.* at b(e)(1). And the proposal greatly expands the obligations imposed on the FTC; not only by requiring a month's advance notice of the Commission's agenda, but also mandating the posting of the full texts of the orders, decisions, or actions the Commission will discuss at the meeting. As far as I can tell, no other agency is subject to this requirement.

There are good reasons why the Sunshine Act does not impose the obligations laid out in the Transparency Act. Limiting meetings to matters that arise more than a month prior to a meeting would hobble the Commission's ability to consider time-sensitive matters that arise days or weeks before a scheduled meeting.

Because the Sunshine Act *prohibits* Commissioners from meeting without compliance with Sunshine Act, Sunshine Act meetings are the only venue where the full Commission can meet to discuss and resolve issues, many of which cannot wait for a month or more to resolve. The process outlined in the Transparency Act would likely put sand in the gears that move the Commission along. I urge the Subcommittee to reject this proposal.

C. A Proposal That Needs Fine-Tuning.

H.R. 4551, the Ransomware Act, proposes that Congress amend the Safe Web Act to require the FTC to closely monitor, and periodically report to Congress, on ransomware and other cyber-related attacks initiated by foreign actors or those with ties to foreign countries. I agree that there is a compelling need to monitor these attacks; to take enforcement action if the FTC or other law enforcement agencies can identify the culprits (which unfortunately is rare); and to provide businesses best practices to harden their defenses against these attacks.

There are, however, issues embedded in the draft that need to be clarified. As one example, the contemplated report would touch on sensitive issues of national security, especially where attacks are state-initiated, and that raises a number of questions. Should the report, or portions of it, be classified, and if so, at what level of classification? Should Congress require the law enforcement agencies that have authority relating to these attacks to share information, and if so, by what means? And there are other questions about law enforcement agencies interacting with the intelligence community.

There are also questions relating to the content of the report the bill contemplates. Subsections 3(a)(2) and (3) require the report to include information about the companies and entities that have been involved with ransomware or cyber-attacks, including information by, among other things, "type of company." That requirement is not problematic if there are many companies of a "type." But where a company occupies a unique niche, or is one of a small number of companies, the reporting risks jeopardizing what a company might rightly see as confidential information. Again, there are questions that need to be answered about the protection of entities that have suffered these attacks.

My point here is not to catalogue the issues that need to be fine-tuned. It is only to say that the proposal rightly seeks to address critical issues about how the United States can better deal with the tsunami of cyber-attacks that it is facing but it needs fine-tuning before this Subcommittee acts.

Ms. SCHAKOWSKY. Thank you so much.
And now, Mr. Dufault, you are recognized for 5 minutes.

STATEMENT OF GRAHAM DUFAULT

Mr. DUFAULT. Thank you, Chairwoman Schakowsky, Ranking Member Bilirakis, and members of the subcommittee. My name is Graham Default, and I am senior director for public policy at the App Association. The App Association is the leading trade group representing small, connected device and mobile software companies in the app economy. It is a $1.7 trillion sector that is global and that supports 5.9 million jobs in the U.S. I am here to share the perspectives of App Association members, many of which are in your districts, on the several measures you consider today to modernize the FTC.

In the Chicago area Tom Gorczynski cofounded Devscale, a custom app development company focused on a transparent development cycle. In the Tampa area Ann and Jon Adair founded Thinkamingo, an app that helps students develop writing skills. A narrow focus on how many billions of dollars a fine needs to be to deter social media giants from privacy violations ignores the impacts of FTC reform on our member companies. Our hope is that the subcommittee just carefully considers any proposal's impact on companies like Thinkamingo and Devscale, even though the primary impetus might involve much larger companies.

The last time Congress reauthorized the FTC was in 1996, so the subcommittee is right to consider updating the statute. Some argue that the FTC must be more transparent in its processes and accountable to Congress and constituents. Others point to the inadequacy of FTC authority to pursue consumer protection harms. There is merit to both views, and we applaud the subcommittee for its review of legislation to better equip the FTC and to improve clarity around its authority.

The proposals you consider today fall into three related categories.

Number one, expanding the FTC's enforcement and regulatory capabilities. We agree with the intent behind these measures to enhance the FTC's ability to punish and deter consumer protection harms. However, we recommend that rulemaking authority and civil penalties be tied to clearly defined privacy and data security requirements. Congress needs to set guardrails in order to avoid 180-degree shifts from administration to administration and to ensure the agency carries out Congress's intent.

Number two, clarifying the contours of FTC authority. The SURE Act, for example, would codify more of the FTC's own unfairness statement and require the Bureau of Economics to be consulted in cases brought under the FTC's unfairness prong, although economic considerations are never the only relevant ones that are important, especially for small companies with small compliance and legal budgets.

The CLEAR act would also help covered entities better understand what the FTC views as legal conduct under an otherwise intentionally vague statute.

Bills like these should be coupled with more authority to better—and better enforcement tools for the FTC to pursue privacy and data security harms, with direction from Congress.

Number three, reporting and transparency requirements. Many of these are welcome measures to enhance the subcommittee's oversight efforts and the FTC's own enforcement planning. The Consumer Equity Protection Act would help ensure the Commission develops a meaningful record on harmful activities targeting protected characteristics like sexual orientation, race, disability, and others. FTC reports would also give the subcommittee a better sense of the Commission's plans and would help the Commission make informed decisions on how to prioritize enforcement acts against schemes targeting older Americans.

The subcommittee should provide more resources for the FTC to fund these reporting and transparency requirements.

On the competition side of the FTC, withdrawal of the unfair methods of competition statement has sparked understandable concerns. There is an opportunity for the Commission to clarify the applicability of its UMC authority to standard essential patents, or SEPs. Anticompetitive SEP abuse harms consumers and competition alike. This is an example of where FTC guidance can help.

On the consumer protection side of the FTC, establishing strong national privacy rules is especially important to App Association members. We want to help Congress work toward a bipartisan agreement. In February we sent a letter to this committee urging action on privacy in the wake of the FTC settlement with Flo, a fertility and period tracking app. The settlement highlighted the lack of available tools at the FTC's disposal to stop and prevent privacy harms.

As the creation and transfer of health data outside the HIPAA umbrella proliferates, the FTC needs better privacy tools based on the risks data processing activities pose to consumers. In doing so, Congress should set forth the overarching purposes and specify the limits of FTC rules.

We hope the discussion today helps carve a path toward a modernized FTC that can better meet the challenges of the 21st century. Thank you for the opportunity to share our views, and I look forward to your questions.

[The prepared statement of Mr. Dufault follows:]

ACT | The App Association

Transforming the FTC: Legislation to Modernize Consumer Protection

Testimony of

Graham Dufault
Senior Director for Public Policy
ACT | The App Association

Before the

U.S. House of Representatives
Energy and Commerce Committee
Subcommittee on Consumer Protection and Commerce



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Executive Summary

ACT | The App Association (the App Association) is the leading trade group representing small mobile software and connected device companies in the app economy, a $1.7 trillion ecosystem led by U.S. companies and employing 205,360 people in Illinois and 237,090 in Florida.[1] Our member companies create the software that brings your smart devices to life. They also make the connected devices that are revolutionizing healthcare, education, public safety, and virtually all industry verticals. They propel the data-driven evolution of these industries and compete with each other and larger firms in a variety of ways, including on privacy and security protections.

We applaud this Subcommittee for examining measures to strengthen the capabilities and enhance the accountability mechanisms for the Federal Trade Commission (FTC or Commission). The FTC is the main privacy enforcer at the federal level and has its hands full in recent years with the proliferation of privacy, security, and other consumer protection harms. The legislation the Subcommittee considers in this hearing falls into three main buckets:

- Regulatory and enforcement expansion.
    - For example, H.R. 4447, the 21st Century FTC Act would authorize the FTC to make rules using the processes outlined in the Administrative Procedure Act (APA) and enable the Commission to seek civil penalties for first-time offenses of any provision of the FTC Act. While we recognize the need to equip the Commission with better enforcement tools, we would recommend more direction from Congress and guardrails around enhanced capabilities like APA rulemaking and civil penalties. For example, we would support legislation establishing a strong set of federal privacy requirements that preempt state laws and that enable the FTC to obtain civil penalties and conduct limited rulemakings.
- Clarifications of the FTC's authority.
    - The Statement on Unfairness Reinforcement and Emphasis (SURE) Act (H.R. 2702) would enact into statute elements of the FTC's policy guidance describing its own authority to bring cases under the "unfairness" prong of its consumer protection jurisdiction. This measure would help provide clarity as to the types of harms the FTC should target and how the Commission should conduct the unfairness balancing test, from one Administration to the next.
- Reporting requirements to aid with enforcement and oversight priorities.
    - For example, the Consumer Equity Protection Act of 2021 (H.R. 4460) would create a task force to examine unfair or deceptive acts or practices targeting or affecting consumers on the basis of race, color, religion, sex, national origin, sexual orientation, and other protected characteristics. It would also help guide oversight and enforcement with a report on related enforcement actions and conduct consumer education and outreach on schemes that target these protected characteristics.

[1] ACT | THE APP ASSOCIATION, STATE OF THE U.S. APP ECONOMY: 2020 (7th Ed.), *available at* https://actonline.org/wp-content/uploads/2020-App-economy-Report.pdf.

I. Regulatory and Enforcement Expansion

We support enhancing the enforcement capabilities and resources for the FTC to stop and prevent consumer protection harms. The FTC needs sharper teeth to stop consumer harms resulting from privacy and data security lapses in particular, as those problems have proliferated and continue to generate headlines and stoke constituent outrage. We understand the intent behind these proposals, and they are emblematic of why we oppose efforts in the House Judiciary Committee to outlaw software platform (app store / operating system combination) activities designed to protect privacy.[2] For example, the American Choice and Innovation Online Act (H.R. 3816) would prohibit actions by certain software platforms to advantage their own offerings, including by restricting access by other platform participants (including bad actors) to consumer data. Similarly, the Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act of 2021 (H.R. 3849) would require covered software platforms to enable access to consumer data by open application programming interface (API) as a default rule. The FTC is a long-time champion of the idea of privacy by design,[3] which runs diametrically counter to these requirements. Although the nation's largest companies may be able to comply with these requirements, the downstream impacts on the app economy in the form of undermined consumer trust in offerings on the platforms would be substantial. For this reason, we are pleased this Subcommittee is focused on enhancing consumer protection capabilities, including in the privacy and data security context.

We support authorizing the FTC to obtain monetary remedies and conduct limited rulemakings as part of a general privacy bill. In February, we wrote a letter to this Committee in the wake of the FTC's settlement with Flo, a fertility and period tracking app, urging bipartisan agreement on federal privacy requirements.[4] That settlement shined a spotlight on the limitations in the Commission's current authority to pursue *privacy* as opposed to data security harms. As the Commission debates whether to enforce the FTC's Health Data Breach Rule in future cases like *Flo*, the fact remains that a data breach law is an odd fit for the transfer and processing of data that companies engage in under color of authorization from the consumer (as opposed to whether the company timely notified consumers of unauthorized access to data). Nonetheless, these are the tools the FTC currently has, and we believe Congress should better equip the Commission to prevent these harms, including consumer rights to access, correction, and deletion of personally identifiable information; reasonable limits on processing activities; a preemption provision; and more stringent requirements on sensitive personal information. As more healthcare data originates and transfers outside of Health Insurance Portability and Accountability Act (HIPAA) jurisdiction, risks to consumers are propagating and a privacy regime calibrated to address heightened risks associated with sensitive personal information would address these developments. We outline our priorities for a privacy bill in more detail in our comments on this

[2] *See* Letter from Morgan W. Reed, President, ACT | The App Association, to the Honorable David Cicilline and the Honorable Ken Buck, re: Markup of Six Antitrust Bills (Jun. 22, 2021), *available at* https://actonline.org/wp-content/uploads/062221_ACT_HouseAntitrustBills_FTR.pdf.

[3] Remarks of Comm'r Edith Ramirez, "Privacy by Design and the New Privacy Framework of the U.S. Fed. Trade Comm'n," Privacy by Design Conf. (Jun. 13, 2012), *available at* https://www.ftc.gov/sites/default/files/documents/public_statements/privacy-design-and-new-privacy-framework-u.s.federal-trade-commission/120613privacydesign.pdf.

[4] Letter from Morgan W. Reed, president, ACT | The App Association, to the Honorable Frank Pallone, Chairman, United States House of Representatives Committee on Energy and Commerce and the Honorable Cathy McMorris Rodgers, Ranking Member, United States House of Representatives Committee on Energy and Commerce (Feb. 17, 2021).

Committee's bipartisan staff consumer privacy draft[5] and our background materials for new Members of Congress.[6]

Although we appreciate the intent behind the proposals to expand the FTC's regulatory and enforcement powers across the board, we continue to have concerns with granting the Commission general, undirected rulemaking authority to regulate privacy harms. The same concerns extend to even more general rulemaking authority to police all consumer protection harms under the FTC's purview, as the 21st Century FTC Act (H.R. 4447) would do. For example, in a letter to Representatives Anna Eshoo and Zoe Lofgren regarding their draft privacy legislation establishing a new agency with broad rulemaking authority, we wrote, "we also recommend providing only narrow rulemaking authority on the issue of privacy. . . . The swath of the economy and range of economic activities a new privacy regulator would oversee is too broad for it to promulgate generally applicable rules that successfully balance the finer conflicts of purpose in the many sectors that would be subject to those requirements."[7] A general grant of rulemaking authority to define unfair or deceptive acts or practices in or affecting commerce would completely delegate the exercise of defining limits to the Commission's own powers to the agency itself—a task better suited to Congress. In 1980, a Democratic Congress imposed additional procedural hurdles on the Commission's rulemaking authority—including requirements that the agency notify this Committee throughout the rulemaking process[8]—for just this reason. The sheer breadth of its purview was better adapted for an adjudicative approach and invited overreach with rulemaking.

Aside from potential overreach and its relative unsuitability in policing the dynamic markets the FTC oversees, general rulemaking also creates substantial uncertainty and potential instability. For example, an FTC controlled by one party might construct a carefully segmented regulatory regime, categorizing consumer protection harms by industry. The next Administration might have a completely different regulatory philosophy and scrap the framework entirely. Without guardrails in the statute, challenges to such a complete deletion of regulations might fail—according to jurisprudence evaluating federal agency decision-making, the courts grant "*Chevron* deference" to those interpretations.[9] The less there is for an agency to interpret, the more leeway an agency might have to define its own goals and decisions.[10] The result could be massive swings in consumer protection regulation from one administration to the next (mainly unchecked by the courts), and in all likelihood, a more purposeful focus on political aims and headlines rather than targeting practices that are net harmful to consumers. Even the Communications Act, which experts generally view as granting broad rulemaking authority to interpret its provisions, categorizes the kinds of services under the Federal Communications Commission's (FCC's) jurisdiction and sets forth more explicit goals for each. And yet, unfortunately, the recent changes in Administration brought fundamental shifts in the FCC's regulatory approach to internet service, despite the Communications Act's guardrails on FCC discretion. That is why we have advocated for Congress to establish statutory network neutrality requirements: to avoid their complete deletion by regulation, on the one hand, and the reclassification

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[5] Comments of ACT | The App Association, House Committee on Energy and Commerce Draft Framework of *Online Privacy Act of 2019* (Jan. 24, 2019).
[6] ACT | THE APP ASSOCIATION, PROTECTING CONSUMER PRIVACY, GROWING SMALL BUSINESS, *available at* https://actonline.org/wp-content/uploads/Privacy_MOC_20_21.pdf.
[7] Letter from Graham Dufault and Madeline Zick to the Honorable Anna Eshoo and the Honorable Zoe Lofgren, Members of Congress, re: Draft Framework of Online Privacy Act of 2019 (Jul. 18, 2019).
[8] *See* the Federal Trade Commission Improvements Act of 1980 (H.R. 2313, 96th Cong.).
[9] *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Astrue v. Capato*, 566 U.S. 541 (2012).
[10] *Id.*

of internet as a Title II service in order to impose such requirements, on the other.[11] Even where Congress has explicitly outlined regulatory goals and purposes, shifts in Administration have brought uncertainty, especially to more dynamic markets. An approach that delegates the development of those purposes almost entirely would likely create even more uncertainty from one Administration to the next.

As Rob Coons, chief revenue officer of App Association member Walker Tracker—a platform for people to compete with each other on step challenges and similar wellness activities—points out, regulatory uncertainty falls heavily on small companies like his. For example, as states and governments overseas enact new and different general consumer privacy laws, Walker Tracker had to go back to the drawing board on its data processing agreements with employer clients. In turn, Walker Tracker now declines contracts under a certain dollar threshold with smaller companies because the costs of uncertainty are too high to justify working on smaller contracts. Further privacy shifts at the state level coupled with regulatory pirouetting at the federal level would only worsen the situation for Walker Tracker and other App Association members.

We have similar concerns with granting the Commission broad civil penalty authority for any violation of the FTC Act. Although we support granting the Commission civil penalty authority for specific kinds of offenses, including as part of a general privacy bill, civil penalties for cases of first impression would chill innovation that has a net positive effect on consumer welfare. For example, when the Commission first encountered social media influencers, it quickly developed guidance outlining proper disclosures for influencers who receive compensation for endorsing products and services.[12] A fast-developing business that blurred the lines between personal networking and advertising, "influencing" cried out for FTC clarity on when it crosses the line into deception. If the FTC had civil penalty authority—providing up to $44,000 per violation—in cases where market participants have little notice as to where the line is for social media influencing, the cost of those potential penalties might have discouraged the practice altogether. Although influencing may have gained an unserious reputation,[13] its emergence created legitimate livelihoods where none previously existed. And while authorizing civil penalties for first offenses—under the broad prohibitions in Section 5—would not necessarily cause the FTC to shoot first and ask questions later, it certainly could allow for such an enforcement approach.

The risk of such a regime is particularly serious for small companies like App Association members. Marc Fischer, chief executive officer of App Association member Dogtown Media, says the prospect of civil penalties in undefined cases could cause longer timelines for product and service development and higher insurance costs. Dogtown Media is a mobile media development firm that has created more than 200 apps on behalf of clients in a wide variety of industries, and like many of its peers, buys business risk insurance. As Marc points out, the costs would likely increase with the prospect of monetary penalties for first-time offenses, and the additional money he spends on those premiums should instead go toward hiring and business development.
The concerns are especially acute where companies, like Dogtown Media, are forging cutting edge uses for advanced technologies like artificial intelligence (AI). Publicly traded firms with high-powered attorneys may be able to pay heavy fines and move on, but those fines could deal a devastating financial blow to small companies like App Association members.

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[11] Graham Dufault, "Net Neutrality is Good and so is Sponsored Data," ACT | THE APP ASSOCIATION BLOG (Apr. 6, 2021), *available at* https://actonline.org/2021/04/06/net-neutrality-is-good-and-so-is-sponsored-data/.
[12] DISCLOSURES 101 FOR SOCIAL MEDIA INFLUENCERS, FED. TRADE COMM'N (Nov. 2019), *available at* https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf.
[13] Influencers in the Wild, @influencersinthewild, INSTAGRAM, https://www.instagram.com/influencersinthewild/?hl=en (last visited Jul. 25, 2021).

Other proposals that would enhance the FTC's authority raise similar concerns for our member companies, although we would support these limited expansions in some forms in the context of a general privacy bill. For example, H.R. 3918 would expand the FTC's jurisdiction to cover non-profit entities and H.R. 4475 would expand FTC jurisdiction to cover common carriers under the Communications Act (telecommunications and wireless carriers, for example). It may make sense to clarify that the FTC has activity-based enforcement jurisdiction over these kinds of entities in a more limited context like a general privacy bill, but we would be concerned about redundantly adding breadth to the FTC's purview generally. For Communications Act common carriers and non-profit entities, we have seen provisions in privacy bills that would place both categories into FTC jurisdiction—while carving those common carriers out of Communications Act jurisdiction—for the purposes of the privacy law and regulations promulgated under it.[14] The FTC is a more experienced privacy enforcer than the FCC, so it makes sense to task the FTC with monitoring privacy practices of wireless carriers instead of the FCC and doing so would promote an even playing field between similarly situated competitors. The targeted treatment of telecommunications common carriers also avoids overlapping privacy regulation of certain entities by multiple federal agencies. App Association members demand high quality services at the lowest possible costs from internet service providers and understand that subjecting them to duplicative regulatory compliance and penalties from multiple federal agencies could increase costs and diminish service quality.

II. Clarifications of FTC Authority

Several measures the Subcommittee is considering would clarify in statute the limits and applicability of FTC authority. For example, the Clarifying Legality and Enforcement Action Reasoning (CLEAR) Act (H.R. 2690) would require the FTC to disclose the legal reasoning behind its decision to close investigations without bringing a claim. It appears the idea behind this bill is to provide to entities under the FTC's jurisdiction with a better sense of what the FTC views as legal activity, as evidenced by its enforcement decisions. The FTC has a good track record when it comes to keeping entities apprised of its thinking on unfair or deceptive acts or practices. This additional requirement should complement its work and add clarity for market participants. On the competition side of the Commission, we have concerns with the removal of the unfair methods of competition (UMC) policy statement. However, the Commission could still clarify its authority on antitrust in specific contexts. For example, where patent owners have their intellectual property declared as essential to a technical standard (like 5G or WiFi), the Commission could clarify the kinds of licensing practices involving standard-essential patents (SEPs) that are likely anticompetitive and could draw enforcement actions. Anticompetitive SEP licensing conduct harms small business innovators like App Association members as well as consumers, and we urge the Commission to focus on this conduct.

A similar measure, the Statement on Unfairness Reinforcement and Emphasis (SURE) Act (H.R. 2702) would add more clarity to the kinds of acts or practices that meet the definition of "unfair" under the FTC's consumer protection jurisdiction. Congress already enacted the "balancing test" for unfairness cases in the FTC Act in 1994,[15] and this bill would add more of the policy statement the balancing test is drawn from to the statute. The bill would also require the Commission to consider the Bureau of Economics' analysis as it decides whether to bring such a case. Similarly, the Revealing Economic Conclusions for Suggestions (RECS) Act (H.R. 2676) would require the FTC to include a cost-benefit analysis along with any recommendations it makes to Congress to increase its own authority. The proposal is consistent with the regulatory processes the executive branch uses

[14] *See, e.g.*, SAFE DATA Act (S. 4626, 116th Cong.).
[15] 15 U.S.C. Sec. 45(n).

generally, which hold that the costs of government intervention generally should not exceed its projected benefits.[16] The costs and benefits of enforcement decisions and recommendations are relevant information, and the bills require the FTC to do its homework as it enforces a purposely undefined statute or suggests legislative additions to its authority. However, we also think it is important that requirements for the FTC to undertake more rigorous analysis be coupled with additional authorities to pursue and prevent privacy and data security harms. To the extent privacy and data security harms have no cognizable economic or health impacts at all, they may still be injurious enough for the FTC—with direction from Congress—to stop them. A general federal privacy regime is necessary to clearly prohibit these kinds of practices.

III. Reporting Requirements

Reporting can help Congress conduct more rigorous and effective oversight while helping the Commission shape its own agenda. The FTC Robust Elderly Protections and Organizational Requirements to Track Scams (FTC REPORTS) Act (H.R. 2672), for example, would require a fulsome report of the FTC's plans for the upcoming year as well as its enforcement activities around elder fraud. This requirement would help the FTC and this Subcommittee better evaluate the Commission's priorities and adjust as necessary. Similarly, the Consumer Equity Protection Act of 2021 (H.R. 4460) would convene a task force to focus on harms that specifically target or affect protected characteristics like race, sex, color, religion, sexual orientation, and others. The task force would report on enforcement actions taken that would target these harms as well as on complaints the Commission receives detailing such acts and practices. A better awareness of how fraud and other unfair or deceptive acts or practices are impacting certain communities would help the Commission better adjust its enforcement agenda to ensure it can effectively address inequitable outcomes. Reporting is not costless, however, and Congress should accompany measures like FTC REPORTS and the Consumer Equity Protection Act (and the RECS Act and CLEAR Act for that matter) with additional resources. The FTC's mission is far too important for it to remain chronically underfunded and overtasked.

IV. Conclusion

We appreciate that the Subcommittee seeks our views on these bills to reform the FTC to address consumer protection harms more effectively in the wide variety of industries it oversees and in which App Association members compete. The FTC is overdue for an update to meet the challenges of the 21st century. App Association member companies want stronger federal privacy requirements in particular, including a single set of national rules governing authorized data processing activities and data security practices to prevent unauthorized access. This Subcommittee has made unprecedented bipartisan progress toward agreement on a national privacy law, and we urge that this hearing and further Subcommittee activities help inform that process along with some of the important updates we consider in this hearing.

[16] *See* Office of Management and Budget, Circular A-4, Sec. E (requiring executive agencies to measure costs and benefits of proposed rules), *available at* https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4/#e.

Appendix: App Economy Innovators in Your Districts

Majority

Rep. Jan Schakowsky, Chair (IL-09)
Company: Devscale
Founded in 2016, Devscale is a custom app development company with a focus on product strategy. With clients that range anywhere from small to large, Devscale helps their clients through problems in their digital strategy with a trained eye on unique user experiences and a transparent development cycle.

Rep. Bobby Rush (IL-01)
Company: Rentroster
Founded in 1990 as a real estate agency, Rentroster is an online platform that connects homeowners, home buyers, renters, and real estate agents. In 2013, the company saw an opportunity to build out a digital presence and created their Rentroster platform, which provides search features and criteria to help those looking for a home, while providing a back end that makes the application process simple and easy for the homeowner or agent to monitor.

Rep. Kathy Castor (FL-14)
Company: Homee, Inc
Located in Tampa, Homee is an online platform and mobile app that connects insurance carriers with adjusters, policyholders, and service providers throughout the claims process. Additionally, Homee's app connects homeowners and insurers to on-demand contractors and handymen to quickly and efficiently address construction issues related to any claims submitted through the Homee platform.

Rep. Lori Trahan (MA-03)
Company: Atlantis Technology
Atlantis Technology is a software development company that provides their clients with software developers and engineers who are embedded into their client's team for the duration of the project. Their service includes providing staff on site who build out the digital products they've been hired to create and then remain to help problem solve, troubleshoot, and train their client's staff, allowing for a seamless transition after the product goes live.

Rep. Jerry McNerney (CA-09)
Company: Funoon Tech
Funoon Tech is an end-to-end software design company with a focus on mobile and web development. Utilizing a variety of coding languages, Funoon Tech works with their clients to bring an idea to a final product including the development and implementation of a digital marketing and social media strategy.

Rep. Yvette Clarke (NY-09)
Company: Cityblock Health
Cityblock Health is a digital health platform and app that connects patients to in-home, community-based, and virtual care options. The company works with care and insurance providers to fill gaps in care and treatment plans. The app focuses on addressing features in home and community life that either improve or hinder adherence to care, ensuring improved patient and community health outcomes.

Rep. Tony Cárdenas (CA-29)
Company: FloQast
FloQuast is an automated accounting workflow platform created by accountants, that streamlines traditional accounting workflows by connecting a company's existing accounting toolsets like Excel and ERP workbooks through APIs. Founded in 2013 in Sherman Oaks, their platform also creates a streamlined documentation process that speeds up reporting and data analysis for companies of every size.

Rep. Debbie Dingell (MI-12)
Company: Workit Health
Workit Health is a women owned digital therapeutics company based in Ann Arbor that is focused on treating addiction. Their Workit Health app connects patients with clinicians and a community, allowing individuals to receive the communal support necessary for addiction treatment, and routine contact with mental health and clinical care givers in the discreet privacy and safety of their home or preferred treatment site.

Rep. Robin Kelly (IL-02)
Company: Branded Visions
Branded Visions is a web and mobile design firm focused on building digital products and services for local Illinois and Indiana businesses that are traditionally brick and mortar firms. Their mission is to help boost local economies by providing a web and digital presence for the businesses to connect to more customers in their hometown and other small towns.

Rep. Darren Soto (FL-09)
Company: Yac
Yac is a voice messaging platform for remote teams. Their mission is to reduce daily meetings and scheduled calls while enhancing communication and collaboration. Yac's products all center around the theory of "asynchronous" communication through voice notes. The mission is to replicate the ability to "yell across the cubicle" you often see in in-person work environments for virtual or remote teams so you can have the same sort of informal but productive communication.

Rep. Kathleen Rice (NY-04)
Company: Fat Guy Media
Located in Mineola, Fat Guy Media is a web design and digital marketing agency. Their focus is to rebuild their client's web and digital presence and to enhance their overall visibility on the internet through improved search engine optimization (SEO) as a part of their back-end service, a consistent digital brand and related marketing identity, and a focused email marketing strategy.

Rep. Angie Craig (MN-02)
Company: Avionte Staffing and Recruiting Software
Avionte Staffing and Recruiting Software, located in Eagan, provides solutions for payroll, attendance, billing, as well as customer relationship management, new job applications, and onboarding capabilities. Since opening their doors in 2005, they have served more than 900 customers and nearly 25,000 users across the United States and Canada.

Rep. Lizzie Fletcher (TX-07)
Company: For All Abilities
For All Abilities is a software platform that helps companies address and provide for their employees with disabilities. The platform assesses employees and then prescribes and trains them to use individualizes supports and accommodations that meet ADA requirements.

Rep. Frank Pallone, *Ex officio* (NJ-06)
Company: Kidz Learn
Kidz Learn makes educational apps for kids. Their apps range from K-9 math and science to basic coding skills and are available across platforms. Kidz Learn recently adapted their apps for multiple countries and languages, including Hindi and Chinese.

Minority

Rep. Gus Bilirakis, Ranking Member (FL-12)
Company: Thinkamingo
Founded in 2011, Thinkamingo is an educational app company focused on getting kids excited about writing. Their app, Story Dice, helps give kids ideas for stories, while their apps Lists for Writers and Story Spark help kids lay out their story, build out their characters and plot points, and give them the tools they need to improve their overall writing and story structure.

Rep. Fred Upton (MI-06)
Company: SPARK Business Works
Founded in 2017, SPARK Business Works is a custom web and mobile app development firm with an office based in Kalamazoo. They also provide custom dashboards for their clients that give them tailored data collection and analysis tools so their clients can better understand the efficacy of their online presence and streamline their data analysis processes.

Rep. Bob Latta (OH-05)
Company: Spoke Design LLC
Founded in 2009, Spoke is a full-scale branding, design, and web agency. They help their customers utilize digital products and solutions to improve their overall marketing and branding strategy including services like app development and web design. The company also provides consulting services between their clients and IT partners, including cloud services and web hosting services.

Rep. Brett Guthrie (KY-02)
Company: ABR Systems Group
ABR Systems Group is an IT consulting firm helping small businesses around Kentucky make the right technology decisions for their business. From cloud providers to web hosts, cybersecurity software and network integrations, ABR Systems Group helps their clients build out the IT infrastructure they need to grow their businesses.

Rep. Larry Bucshon (IN-08)
Company: InGen Technologies, Inc.
InGen Technologies, Inc., is a software consultancy company focused on improving customer experience for their clients and improving data collection and analysis tools to improve their clients' use and understanding of data analytics. The company's mission is to unite all aspects of their clients' digital presence from apps to the web in order to improve overall digital marketing and cohesiveness.

Rep. Neal Dunn (FL-02)
Company: Execu/Tech Systems, Inc.
Execu/Tech Systems, Inc., is a hotel management software company. They create unique booking engines, point of sale systems, inventory management databases and more for their clients. Each product Execu/Tech Systems builds is scalable, so as a hotel grows, their software can grow with them. Execu/Tech Systems also trains hotel employees on their software solutions and provides troubleshooting and digital maintenance services for each of their clients.

Rep. Debbie Lesko (AZ-08)
Company: Devsoft Group
Devsoft Group is a one-man custom development firm founded in 2010. Focused on clients in manufacturing and energy, Devsoft Group works closely with their clients, building web, cloud, SaaS, and mobile and database solutions that meet the unique needs of each client's projects and business needs.

Rep. Greg Pence (IN-06)
Company: Space Tech Corp
Located in Indianapolis and founded in 2006, SpaceTech Corp is a full-service development company. SpaceTech works with their clients to build custom cloud solutions, content management system, SEO, and ecommerce solutions. Their website designs take a user-first approach with a focus on using improved user experience to help their clients reach more customers.

Rep. Kelly Armstrong (ND-AL)
Company: Bushel
Founded in 2017 and headquartered in Fargo, Bushel is an agricultural technology company that provides a subscription-based web and mobile application specifically designed to harness reliable data for every level of the grain supply chain. The Bushel platform has more than 1,000 grain facilities that are active users including producers, retailers, and processors of grain. The platform covers contracts between grain facilities and their producers with an included e-signature capability to handle business on their app – all with no paper required.

Rep. Cathy McMorris Rodgers, *Ex officio* (WA-05)
Company: Mighty Call
Located in Spokane, Mighty Call is a cloud-based communications and customer service platform founded in 1999. Their virtual phone system is designed specifically for small businesses and remote teams making it easy for teams to connect from anywhere through mobile and desktop apps. Their apps provide unique features like call availability windows, scheduling services, and the ability to mask personal cell numbers, given that privacy is a core pillar of Mighty Call's service.

Ms. SCHAKOWSKY. Thank you, Mr. Dufault, and now I welcome Ms. Greenberg for 5 minutes.

[Pause.]

Ms. SCHAKOWSKY. Your microphone.

Ms. GREENBERG. Oh, sorry.

STATEMENT OF SALLY GREENBERG

Ms. GREENBERG. Good afternoon, Chairwoman Schakowsky, Ranking Member Bilirakis, and members of the subcommittee. My name is Sally Greenberg. I am executive director of the National Consumers League, which was founded in 1899 and is America's pioneering consumer and worker advocacy organization.

Today NCL works, via our fraud.org campaign, to educate consumers about scams and rip-offs. For more than a century, the FTC has enforced laws that protect competition and prohibit unfair or deceptive practices.

The Commission is responsible for enforcing or administering more than 70 laws, ranging from labeling of wool products to protecting online privacy and data security. It is with this unique consumer protection charge in mind that I am pleased to offer NCL's support for many of the FTC reform bills currently before the subcommittee. While my remarks won't cover all of the proposed bills, I would like to discuss why we are supporting the proposals that would give the FTC what it needs most: more authority and more capacity to execute on its broad mandate to protect consumers.

First, authority. Faced with an onslaught of fraud and misinformation threats, consumers need a nimble FTC that can address new industry uses and hold wrongdoers accountable. If we want the threat of enforcement to truly deter criminals in the marketplace, we need an FTC that can do more than simply try to recover ill-gotten gains, as important as that authority is. Even this central function of the agency was significantly hamstrung by the Supreme Court's recent decision in AMG Capital Management.

It is for these reasons that NCL strongly supports Congresswoman Castor's 21st Century FTC Act, which would give the Commission Administrative Procedure Act rulemaking authority and first-offense civil penalty authority.

We are also pleased to support Chairwoman Schakowsky's FTC Autonomy Act, which would allow the Commission more freedom to seek civil penalties by eliminating burdensome regulations that can delay enforcement activity.

I would like to turn now to the reforms needed to expand the Commission's capacity. Expecting the FTC to adequately police the technology industry with its current staff resources is akin to bringing a water gun to a thermonuclear war. The Commission is being asked to consider extremely detailed regulation and enforcement in the ad tech, privacy, application store, and data security spaces with what can only be described as a skeleton crew.

To oversee and rein in the tech sector's refusal to police its own platforms, the FTC must have highly qualified expertise on staff to do the detailed analysis necessary to produce effective enforcement and regulatory policies.

That is why we are pleased to support Congressman McNerney's Federal Trade Commission Technologists Act. This much-needed

bill would authorize the FTC to establish an office of technologists staffed with more than two dozen experts on information technology, cybersecurity, computer science, and related fields.

I also want to address the need for more FTC action to combat disinformation. The deluge of misinformation and disinformation online, particularly on social media platforms, is a constant threat to consumers. While most platforms prohibit such disinformation in their terms of service, their willingness to enforce their terms has often been far too lax. This allows fraudulent schemes that cost consumers billions of dollars to proliferate. It fuels vaccine hesitancy that is costing lives every day. And perhaps most troubling, it enables some of the vilest elements of our society—Holocaust deniers, White supremacists, extremists, and other online trolls who threatened our very democracy on January 6th—to proliferate.

Reducing the ability of purveyors of disinformation, falsehoods, and conspiracy theories to abuse social media tools must be a pressing national priority. To the extent that current laws make it hard to protect consumers for disinformation online, Congress should consider reforming those laws. The Online Consumer Protection Act should serve as a catalyst for Congress to engage in more robust debate.

In conclusion, my remarks have focused on specific proposals that would help the Commission better protect consumers. Consumers do not need new laws that burden the Commission with needless red tape. What consumers need today is, instead, a robust Commission, empowered to go after truly bad actors in the marketplace.

Chairwoman Schakowsky, Ranking Member Bilirakis, and members of the subcommittee, thank you for including the consumer perspective in today's hearing.

[The prepared statement of Ms. Greenberg follows:]



Testimony of

Sally Greenberg

Executive Director

National Consumers League

on

Transforming the FTC:

Legislation to Modernize Consumer Protection

Before the

United States House of Representatives

Committee on Energy and Commerce

Subcommittee on Consumer Protection and Commerce

July 28, 2020

Summary

The Federal Trade Commission (FTC) is the nation's oldest federal consumer protection agency. It is charged with enforcing the laws that prohibit anticompetitive business practices and unfair or deceptive conduct by companies, without impeding legitimate marketplace activity.

As Congress has given more responsibilities to the Commission, it has not, however, expanded the FTC's the authority or given it the resources needed to robustly execute on its mission. The Commission has seen its funding stagnate in nominal terms and its staff cut in half, despite the expanded scope of its investigation and litigation activities.[1] Before us today are legislative proposals to give the Commission the teeth it needs to combat a rapidly-evolving landscape of unfair and deceptive practices. The bills the subcommittee is considering will allow the Commission to initiate rulemakings more efficiently, hold accountable businesses that engage in abusive consumer practices and better protect vulnerable communities.

Consumers need a robust FTC that is empowered to hold wrongdoers to account, not a milquetoast enforcer weighed down by burdensome procedural requirements.

[1] Federal Trade Commission. "Remarks of Commissioner Rebecca Kelly Slaughter" Online: https://www.ftc.gov/system/files/documents/public_statements/1520570/slaughter_-_hospital_speech_5-14-19.pdf

Introduction

The National Consumers League ("NCL") appreciates the opportunity to provide the subcommittee with our views about the value of the Federal Trade Commission's ("FTC" or "Commission") consumer protection and competition work and provide recommendations on ways to strengthen the FTC's authority in these areas.

Founded in 1899, the National Consumers League ("NCL") is the nation's pioneering consumer and worker advocacy organization. Our non-profit mission is to advocate on behalf of consumers and workers in the United States and abroad.[1] For more than twenty years, NCL has worked, via our Fraud.org campaign, to educate consumers about the warning signs of fraudulent schemes and protect the American public from scams and rip-offs. .

The FTC needs authority commensurate with its responsibilities

The Federal Trade Commission (FTC) is the nation's oldest federal consumer protection agency. It is charged with enforcing the laws that prohibit anticompetitive business practices and unfair or deceptive conduct by companies, without impeding legitimate marketplace activity. As the universe of threats against consumers has grown in concert with the rapidly expanding digital economy, the Commission's mission has never been more vital. Today, the FTC is responsible for enforcing or administering more than 70 laws, ranging from labeling of wool products to promoting competition and protecting privacy and data security in a multi-trillion-dollar Big Tech industry.

[1] For more information, visit www.nclnet.org.

Congress has given more responsibilities to the Commission but it has not expanded the FTC's authority or given it the resources needed to robustly execute on its mission. Before us today are legislative proposals to give the Commission the teeth it needs in the fight against an ever-evolving landscape of unfair and deceptive practices. The bills the subcommittee is considering will enable the Commission to initiate rulemakings more efficiently, hold accountable businesses that engage in abusive consumer practices and better protect vulnerable communities. Congressional action is critical to the FTC's ability to protect consumers. The Supreme Court's recent decision in *AMG Capital Management* removed a key enforcement tool from the FTC's toolbox, making it even more difficult for the Commission to fight corporate misconduct. [2]

In the aftermath of *AMG Capital Management*, we appreciate that the full House, with leadership from consumer champions like Chairman Pallone, Chairwoman Schakowsky, and Vice Chairman Cardenas recently approved the Consumer Protection and Recovery Act, which will restore the FTC's 13(b) authority.[3] Should that bill become law, however, it would simply reestablish the pre-*AMG* status quo, enabling the Commission to recover ill-gotten gains when companies engage in abusive practices. It would not address long-standing statutory deficiencies that hamper the FTC's ability to protect the public from unfair and deceptive acts and practices.

The FTC's case against AMG Capital Management is an example of the Commission using its authority to hold accountable companies that exploit consumers. This predatory lender robbed consumers of over $1 billion, using deceptive practices

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[2] Federal Trade Commission. "Statement by FTC Acting Chairwoman Rebecca Kelly Slaughter on the U.S. Supreme Court Ruling in AMG Capital Management LLC vs. FTC." Press release. Aril 22, 2021. Online: https://www.ftc.gov/news-events/press-releases/2021/04/statement-ftc-acting-chairwoman-rebecca-kelly-slaughter-us

[3] House Committee on Energy & Commerce. "PALLONE AND SCHAKOWSKY ON HOUSE PASSAGE OF LEGISLATION RESTORING FTC'S 13(B) CONSUMER PROTECTION POWERS." Press release. July 20, 2021. Online: https://energycommerce.house.gov/newsroom/press-releases/pallone-schakowsky-on-house-passage-of-legislation-restoring-ftc-s-13b

that confused and exploited its victims. Over the course of 16 years, AMG targeted more than 4 million consumers, charging them with triple digit interest rates that skyrocketed to 700 percent.[6]

In another case, the FTC again used its authority to shut down Associated Community Services, a robocall operation masquerading as a charity that defrauded victims of over $110 million. The scheme targeted 67 million consumers across the country with a litany of fake causes such as children with cancer, homeless veterans and victims of fire. Generous Americans reached into their pockets to help, only to have their money paid to fraudsters. Action by the FTC brought a stop to an operation that often targeted the elderly, seized the assets of the scammers responsible and worked to get refunds to victims.[7]

It was to help victims of schemes like these that NCL joined with consumer colleagues in supporting Congresswoman Castor's 21st Century FTC Act, which would give the Commission Administrative Procedure Act rulemaking authority and first offense civil penalty authority.[4] We are also pleased to support Chairwoman Schakowsky's FTC Autonomy Act, which would allow the Commission more freedom to seek civil penalties by eliminating burdensome regulations that can delay enforcement activity.[5]

What consumers *do not* need are new statutes that force the Commission to go through more red tape – economic analyses of each and every recommendation, periodic reviews of consent decrees, annual reports on the statuses of investigations, or heightened standards of unfairness – in order to execute on its

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[6] Reuters. "U.S. returns $505 million to victims of giant payday lending scheme" Online: https://www.reuters.com/article/us-usa-paydaylending/u-s-returns-505-million-to-victims-of-giant-payday-lending-scheme-idUSKCN1M72BX

[7] PC. FTC Shuts Down Massive Robocall Charity Scam. Online: https://www.pcmag.com/news/ftc-shuts-down-massive-robocall-charity-scam

[4] U.S. Representative Kathy Castor. "Rep. Castor Introduces 21st Century FTC Act," Press release. July 16, 2021. Online: https://castor.house.gov/news/documentsingle.aspx?DocumentID=403667

[5] Online: https://www.congress.gov/bill/117th-congress/house-bill/4488?q=%7B%22search%22%3A%5B%22hr+4488%22%5D%7D&r=1&s=4

mission. What consumers *do* need in the current fraud threat landscape is a robust Commission that is empowered to go after wrongdoing, not a milquetoast enforcer weighed down by its own burdensome procedural requirements.

The FTC needs more tools to fight online misinformation and disinformation and to protect consumers on online marketplaces

The deluge of misinformation and disinformation online, particularly on social media platforms, is a constant threat to consumers. While most platforms prohibit such disinformation in their terms of service, their willingness to enforce their terms has often been far too lax. This allows fraudulent schemes that cost consumers billions of dollars to proliferate. It fuels vaccine hesitancy that is costing lives every day. And, perhaps most troubling, it enables some of the vilest elements of our society – Holocaust deniers, white supremacists, extremists and other online trolls– who threatened our very democracy on January 6, 2021. Reducing the ability of purveyors of disinformation, falsehoods, and conspiracy theories to abuse social media tools must be a pressing national priority.

The indictments of those that participated in the insurrection have shed light on the harmful effects of the disinformation spreading like wildfire online. Defendants have even pointed to it in defense of their actions on January 6th.[6] For months, far right extremists were able to coordinate on Facebook and other social media platforms, systematically planning to take over the Capitol and murder top U.S. officials. From the narrative that the election was stolen, to the conspiracy theory that the Capitol

[6] Klepper, David. "Defense for some Capitol rioters: election misinformation," Associated Press. May 29, 2021. Online: https://apnews.com/article/dc-wire-donald-trump-health-coronavirus-pandemic-election-2020-b7e929bb8d49b77d0922eae7ad3794b7

insurrection was the work of Antifa, the lies spread online have distorted the public's ability to process recent events and determine fact from fiction.[9]

This phenomenon is having a disastrous and deadly effect on the nation's ongoing struggle to defeat COVID-19. As the Delta variant continues to roil its way throughout the U.S., the country is struggling to increase the vaccination rate. Experts are pointing to the way misinformation online is costing lives and prolonging the pandemic. The Kaiser Family Fund survey found that 54% of Americans could not determine whether a common COVID vaccine myth was fact or fiction.[10]

The troubling reality is that social media platforms have been too lax in enforcing their own terms of service. This has allowed bad actors to use these platforms to amplify popular anti-vaccine content rather than accurate information. Researchers have concluded that much of anti-vaccine misinformation circulating on line can be traced back to just 12 people.[11] The founding director of the Center for Emerging Infectious Diseases at Boston University recently pointed to the outsized role that misinformation on social media is playing in preventing people from getting vaccinated, resulting in more preventable deaths.[11]

Over the past 16 months, the COVID-19 pandemic has highlighted the critical role that online sales platforms play in connecting consumers to the marketplace. As consumers have flocked to these online marketplaces, the need for these platforms

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[9] West, Darrell. "The role of misinformation in Trump's insurrection," Brookings Institute. January 11, 2021. Online: https://www.brookings.edu/blog/techtank/2021/01/11/the-role-of-misinformation-in-trumps-insurrection/

[10] Kaiser Family Fund. "KFF COVID-19 Vaccine Monitor: In Their Own Words, Six Months Later" Online: https://www.kff.org/coronavirus-covid-19/poll-finding/kff-covid-19-vaccine-monitor-in-their-own-words-six-months-later/

[11] NPR. Just 12 People Are Behind Most Vaccine Hoaxes On Social Media, Research Shows" Online: https://www.npr.org/2021/05/13/996570855/disinformation-dozen-test-facebooks-twitters-ability-to-curb-vaccine-hoaxes

[11] CNBC. "Infectious disease expert says Covid vaccine misinformation is 'killing people'" Online: https://www.cnbc.com/2021/07/16/infectious-disease-expert-says-covid-vaccine-misinformation-is-killing-people.html

to better address product recalls, counterfeiting, and the policing of third-party sellers has become ever more urgent. Platforms need to be far more aggressive in enforcing their terms of service and blocking access to their sites by scammers and rip-off artists. That requires clear and understandable disclosure of platforms' terms of service and consumer protection policies to help consumers and sellers better understand their rights and responsibilities. However, better disclosure is no substitute for robust enforcement.

The Commission, as the foremost consumer protection agency with authority over these platforms, must have the tools it needs to robustly investigate policies that enable misinformation and disinformation or which otherwise harm consumers and small businesses. Given the size and scale of modern social media and online sales platforms, the FTC's enforcement resources must also be supplemented by state attorneys general and private litigants.

To the extent that current laws, such as Section 230 of the Communications Decency Act, make efforts to protect consumers from misinformation, disinformation and abusive businesses practices by online platforms more difficult, Congress should reform to those laws. We understand that reforms need to be carefully considered, with flexibility built into the effort to ensure platforms not only have clear terms of service but also robustly enforce them. Congress should also take into account the needs of small businesses to ensure that any litigation taken pursuant to legislation is appropriate and not overreaching.

Bills such as Chairwoman Schakowsky's Online Consumer Protection Act[7] should serve as a catalyst for Congress to engage in a robust debate about new solutions that better protect consumers from the harms outlined above while protecting the vibrancy and value to consumers of the Internet.

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[7] Online: https://www.congress.gov/bill/117th-congress/house-bill/3067?q=%7B%22search%22%3A%5B%22online+consumer+protection+act%22%5D%7D&r=2&s=5

Support for H.R. 4483 to address scams targeting vulnerable populations

Consumers are more likely to trust someone who comes from a group with which they identify. Fraudsters know this, and have historically preyed on such trust to run affinity-based scams. By targeting members of a particular racial or ethnic group or members of the military and veterans communities, scammers know their chances of successfully defrauding their victims increase. Given this fact, it makes sense that the FTC should devote particular attention to providing support to those targeted communities through consumer education and stepped up enforcement.

According to the Commission, members of the military community who are victims of fraud reported a median fraud loss of $500-578, compared to $311 in median losses for the public at large.[8] We are therefore pleased to support Representative Rice and Upton's H.R. 4483, bipartisan legislation that would, for the first time, appoint an official within the FTC's Bureau of Consumer Protection with specific responsibility to advise the Commission on how to better protect veterans, active-duty military members, and their families.[9] Our service members put their lives on the line for us. They should have confidence that their government is doing everything it can to protect them from scammers.

To augment its capacity to fight affinity fraud, the Commission should also give special attention to scams targeting consumers based on their race, ethnicity, religion, sexual identity, or other protected class. For example, while the Commission does ask consumers who file complaints at ReportFraud.FTC.gov about their military status, it does not ask them to identify whether they fall in to another

[8] Federal Trade Commission. *Consumer Sentinel Data Book 2020.* (pgs. 5, 17) February 2021. Online: https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-2020/csn_annual_data_book_2020.pdf
[9] Online: https://www.congress.gov/bill/117th-congress/house-bill/4483?r=2&s=3

of these protected classes. We believe this could be addressed by an expanded FTC data collection process that would help the Commission better understand who is getting scammed, whether they are in vulnerable groups and how best to address the problem. It for this reason that we strongly support Congresswoman Kelly's Consumer Equity Protection Act, which would establish a task force to advise the Commission on ways to better protect members of protected classes from unfair and deceptive practices in the marketplace.[10]

Non-profit organizations should not be exempted from FTC oversight

The FTC has authority to police unfair and deceptive practices across vast swaths of the American marketplace. However, non-profit organizations are exempt from this oversight. NCL supports ending this exemption, as proposed by Congressman Rush in H.R. 3918.[11]

As a non-profit organization ourselves, NCL well understands the unique value and richness that non-profits can provide to Americans. However, we also recognize that unscrupulous actors often hide behind the veil of being a "non-profit" to operate money-making schemes that enrich the schemes' operators at the expense of the Americans they purport to serve. Unfortunately, when the FTC identifies such fraud it must execute costly and time-consuming two-step during litigation. It must prove not only that the entity it is investigating in engaged in an unfair or deceptive practice. It must also prove that the entity is not an actual non-profit organization, and thus exempt from Commission oversight. The non-profit exemption has thus

[10] Congresswoman Robin Kelly. "Congresswoman Robin Kelly Introduces Bill to Protect Consumers from Discrimination." Press release. July 16, 2021. Online: https://robinkelly.house.gov/media-center/press-releases/congresswoman-robin-kelly-introduces-bill-to-protect-consumers-from
[11] Online: https://www.congress.gov/bill/117th-congress/house-bill/3918?q=%7B%22search%22%3A%5B%22hr+3918%22%5D%7D&s=1&r=1

allowed organizations masquerading as charities or other non-profit entities greater freedom to defraud consumers of hundreds of millions of dollars.[12]

The FTC needs expertise to put it on par with Big Tech

Expecting the FTC to take an ever-larger role in policing unfair and deceptive practices in the technology industry with its current staff resources is akin to bringing a water gun to a thermonuclear war. In today's Big Tech-dominated economic environment, the Commission is being asked to consider extremely detailed regulation and enforcement in the ad tech, privacy, application store, and data security spaces with what can only be described as a skeleton crew of hard-working and talented technology experts. Because of this imbalance of resources and highly trained professionals, the U.S. is effectively ceding control of the global regulatory agenda regarding Big Tech to agencies in Europe and elsewhere.

To reassert America's leadership in overseeing and reining in the tech sector's excesses, such as its failure to adequately police its own platforms, the FTC must have highly qualified expertise on staff to do the detailed analyses necessary to produce effective enforcement and regulatory policies. That is why we are pleased to support Congressman McNerney's Federal Trade Commission Technologists Act of 2021 (H.R. 4530).[13] This much needed bill would authorize the FTC to establish an Office of Technologists, staffed with more than two dozen experts on information technology, cybersecurity, computer science and related fields.

Conclusion

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[12] *See, e.g.;* Federal Trade Commission. "FTC, 38 States, and D.C. Act to Shut Down Massive Charity Fraud Telefunding Operation." Press release. March 4, 2021. Online: https://www.ftc.gov/news-events/press-releases/2021/03/ftc-38-states-dc-act-shut-down-massive-charity-fraud-telefunding

[13] Online: https://www.congress.gov/bill/117th-congress/house-bill/4530/text?q=%7B%22search%22%3A%5B%22hr+4530%22%5D%7D&r=1&s=8

Chairwoman Schakowsky, Chairman Pallone, Vice Chair Cardenas, ranking members McMorris Rogers and Bilirakis, and the members of the subcommittee, we thank you for your continuing work to protect consumers and for holding this hearing. On behalf of the National Consumers League, thank you for including the consumer perspective as you consider these important issues.

Ms. SCHAKOWSKY. I thank our witnesses so much, and we have concluded with the witness opening statements now.

And at this time we will move to Member questions. Each Member will have 5 minutes to ask questions of our witnesses, and I will recognize myself at this time.

So we have heard a lot about ways that the FTC can update the authorities that it has, the resources that it has, in order to do the job to protect consumers that we expect. And that is why I introduced the FTC Autonomy Act. And that bill would allow the FTC to bring enforcement actions seeking civil penalties without having to first consult with the Department of Justice.

Professor Vladeck, how would independent litigation authorities for the FTC benefit consumers?

Mr. VLADECK. Well, you know, it would shorten the time that the FTC has in order to get a civil penalty from a defendant that has already been found to be a violator, has violated a rule.

And so the current practice is that the FTC has to make a referral to the Department of Justice. The Department of Justice must agree to take the referral. The FTC does most of the drafting of the legal documents that need to be filed in court. But ultimately, the Justice Department will do that. And so in cases, for example, that need to go to trial, there is an enormous duplication of work. Lawyers do the first cut, then the Justice Department lawyers review it. It is just an incredible waste of resources on both the FTC's part and the Department of Justice's part.

But there is another concern, which is the FTC was designed to be an independent agency, bipartisan, not beholden to the President through the executive branch. But if the FTC has to rely on the Justice Department to enforce its own orders, well, that independence sometimes can be compromised. And so I think this is an important step forward. The FTC has long asked Congress to give us that kind of independent litigation authority. And I would urge that the subcommittee focus this bill——

Ms. SCHAKOWSKY. Thank you so much. I wanted to ask the same—around the same question, so we know—to Ms. Greenberg.

And we know that some stakeholders are critical of the idea that we are talking about now, of giving the FTC this authority—you said you support the legislation—arguing that it could lead to the FTC—the FTC to overreach and unfairly harm businesses. And I am wondering how you would respond to those concerns that have been raised, because it seems to me that we want to empower the FTC in the ways that we just heard the professor mention.

Ms. GREENBERG. Yes, and the FTC is a critically important consumer protection agency. I think it punches above its weight. We need to give it the power and the authority it needs to hold bad actors accountable, and the authority that it would provide the FTC in your legislation, I think, will be ultimately more protective of consumers.

And the FTC, unfortunately, is hamstrung by the processes and procedures which other agencies do not have to confront.

Ms. SCHAKOWSKY. How would you respond to the critics, Professor Vladeck?

Mr. VLADECK. I—the criticism doesn't make any sense. The court is going to do the right thing, and it is going to base its decision

on the facts and on the law. The fact that the Department of Justice lawyer is standing before the court or an FTC lawyer is standing before the court doesn't really matter.

And to be clear, it is rare that the Department of Justice disagrees with the FTC. It is not a question that there is a clash between the two enforcement agencies. It is just an incredible duplication of effort by underresourced organizations. It just doesn't make any sense.

Ms. SCHAKOWSKY. Thank you. I am going to state my last question, but I think I am going to have to get it for the record.

The theme of today's hearing is ensuring that the FTC has the tools that it needs to protect consumers in the modern marketplace and into the future and practice. This often means adapting our online, interconnected world.

What I am going to ask—and put—submit for the record—is how has this shift to online commerce, the proliferation of social media, and the general dependence on the Internet changed consumers' expectations?

I think this is a really important area for us to explore.

But I will yield back and recognize Mr. Bilirakis, the ranking member of the subcommittee.

Mr. BILIRAKIS. Thank you, Madam Chair. Madam Chair, I don't mind if the witnesses want to answer that question. I know how important it is, but I know we are running a little late today. So whatever you feel, but——

Ms. SCHAKOWSKY. Well, if—you know, brief answers, or at least outlines, and then we can get more in writing, as well.

Ms. GREENBERG. Well, I think we have seen an uptick in our fraud center over the last several years, about—with cases of fraud through social media platforms and internet fraud. And it has resulted in, at the FTC, needing more resources to go after these fraudsters. And we really need to properly resource this agency, because consumers rely on it.

And we have heard several witnesses say it is underresourced, is underresourced now. And we—they are—far fewer employees than they need to address the, really, explosion of consumer fraud and bad actors out there.

Ms. SCHAKOWSKY. And I think the technologists will also be very helpful among the things that we need to add.

Ms. GREENBERG. Yes, we really need to ramp up the technology side, because, certainly, the industry is very well equipped to, on their end, to defend against concerns about fraud and disinformation and misinformation on the—on platforms.

Ms. SCHAKOWSKY. Thank you. And thank you, Mr. Ranking Member.

Mr. BILIRAKIS. I appreciate it. Very good, thank you.

Well, first of all, thank you. I want to thank the witnesses for their testimony today. And I want to thank you for your patience.

So according to a paper published by the Regulatory Transparency Project, State and local data privacy laws run into constitutional problems in at least three ways: first, the dormant commerce clause; second, the First Amendment; and third, conflicts with existing Federal law. The article goes on to say that policy-

makers should carefully consider consequences of a patchwork of State laws.

So the first question for Mr. Dufault: Can you speak to this growing patchwork of State laws and how they may be impacting the dormant commerce clause?

Mr. DUFAULT. Thank you, Congressman Bilirakis. That is right. I think that the dormant commerce clause really just upholds that, even where Congress has not legislated, that there is an area of regulation or an area of government activity that is sort of reserved for the Federal Government rather than for the States. And what the courts usually look at is whether or not a State law unduly burdens interstate commerce or whether it discriminates against a business or commercial activity that occurs in other States.

And so, in this context, what you would look at is whether or not the law enacted in California—or let's say there was a privacy law enacted in Florida—unreasonably discriminates against commerce that is occurring in other States. And so that is an open question, and I think it is going to be a question of growing importance as more and more States jump in.

You have got a law in California that has been already amended. You have got—you have also got a law, general applicability, general privacy law now in Colorado and in Virginia. It was a close call also in Florida and Connecticut. And so more and more States are going to be legislating in the coming years.

And so, unless we have a single set of Federal privacy requirements that preempt State laws while avoiding preempting, necessarily, laws that just deal with consumer protection generally, like many FTC Acts—I don't think necessarily that is what we are looking for.

But just to your point, you know, that is going to be a question going forward, and it does leave open the question whether or not some of those State laws could run into that constitutional question.

Mr. BILIRAKIS. Thank you very much. I know it is a real concern.

Mr. Vladeck, do you believe multiple State laws are at risk of the dormant commerce clause?

Mr. VLADECK. I do. I think it is a fair concern. I don't think we are quite there yet, given the absence of a Federal law. The dormant commerce clause really looks not just to the factors Mr. Dufault mentioned but to the question about whether these acts are so different that compliance with multiple laws would be possible. I don't think we are there yet.

And I think Mr. Dufault made the point that, as new States enact new laws that may be very different from the California law, yes, I think the possibility of a Federal court invalidating State privacy laws will grow. And I think that is one of many good reasons Congress ought to finally enact a comprehensive privacy and data security——

Mr. BILIRAKIS. Agreed. Mr. Dufault, the next question, in your testimony you referred to H.R. 4447, the 21st Century FTC Act, which would authorize the FTC to issue APA rulings and enable the Commission to seek civil penalties for first-time offenses of any provision of the FTC Act. I have very serious concerns about grant-

ing unchecked powers to the FTC, something my colleagues—some of my colleagues—seem to agree with.

What are the consequences that may arise as a result of passing this legislation? Specifically, I am concerned about our honest small businesses. If you could elaborate on that, I would appreciate it.

Mr. DUFAULT. Congressman Bilirakis, the problem that we see with general APA rulemaking authority and the general ability to seek civil penalties for first-time offenses of unfair or deceptive acts or practices is just that the law is intentionally very broad, and it is an intentional—intentionally fairly ambiguous. What is an unfair or deceptive act or practice in X, Y, or Z case?

Because the FTC has such broad jurisdiction, I think that is probably why the Congress initially made the decision not to give the Commission first-time civil penalty offense authority. And you don't—what we don't want to see is a situation that invites innovations on new theories of liability along with civil penalty, which can have the effect of having a, I think, a chilling effect on innovation in the market, because now small businesses are wondering whether or not and to what extent they are going to be liable for up to $44,000 per violation, per-person civil penalties, when they are considering going into something that is somewhat novel, because now they are sort of building that into their budgets, and that causes—whether they have investors, or just the company leadership, as they are looking at their 18-month plan, setting aside a lot more money for compliance and legal liability, and probably paying more in business insurance rather than looking at going into new markets or expanding and hiring new people.

Mr. BILIRAKIS. Thank you very much.

Madam Chair, I have introduced H.R. 2672, the FTC Reports Act. I am going to submit my questions for the record, but I would like to hear from the—not right now, but if you could answer my questions to elaborate, and give me your opinion on this particular bill.

Again, FTC Reports Act, H.R. 2672, has to do with protecting our elders.

And I will yield back, Madam Chair, thank you.

Ms. SCHAKOWSKY. Congresswoman Castor, you are recognized for 5 minutes.

Ms. CASTOR. Well, thank you, Madam Chair, and thanks to our witnesses for lending your opinions and expertise on these legislative proposals.

Professor Vladeck and Ms. Greenberg, you have examined and testified in support of my bill, H.R. 4447, the 21st Century FTC Act. You say that it will benefit consumers by giving the FTC APA rulemaking authority and first-offense civil penalty authority, really help the FTC hold back—bad actors accountable.

And Professor, you have—in your testimony today you said this bill is imperative. I just heard my good friend from Florida say that this would allow—that APA rulemaking would promote unchecked powers. Do you agree with that?

Everything I know about the very detailed APA rulemaking, that doesn't jibe with me. What about you?

Mr. VLADECK. That is just not correct. APA rulemaking is a very deliberative process. The agency has to promulgate a proposed regulation, it has to have notice and comment.

In response to Mr. Dufault's point, there are—small businesses may be affected. SBREFA, the Federal Small Business Act, requires all sorts of additional protections before an agency can finalize a rule. Once a rule is adopted by an agency, it is often subject to intense judicial review. If a Commission were divided on the—of a regulation, that would be a signal to a court to look at the regulation very carefully.

So, you know, the business community has long argued that the FTC fails to give it adequate guidance so they have clear and specific standards. Well, that is what rulemaking does. But it is a transparent, open process. Every record that is used by the agency in formulating the rule has to be available. And so there is no more clear and transparent process in formulating policy that is binding than our APA rulemaking.

Ms. CASTOR. And Professor, you cited an example today when you went through the bill. Can you provide a little more detail on that case, or maybe some other examples to really help us understand what this would mean for the consumer and carrying out the FTC's mission?

Mr. VLADECK. Sure. So take robocalls. I mean, it is a violation of an FTC rule for a telemarketer to call someone whose phone number is listed on the national registry. That person risks a civil penalty. Why? Because the rulemaking is public, the rule is crystal clear, and violators are subject to a very substantial civil penalty.

The fact of the matter is all FTC rules are enforceable by civil penalties. So there is nothing new about that aspect of your proposal. That is just the way things work. The rulemaking is that, if you care about transparency, public participation, judicial review, scrutiny, and real attention to the needs of small business, rulemaking is your best option.

Ms. CASTOR. Ms. Greenberg, who would oppose this? Who would oppose the FTC—21st Century FTC Act to give them the APA rulemaking authority and first-offense civil penalty authority?

Ms. GREENBERG. The example of legislation last year, the COVID–19 Consumer Protection Act, really laid the groundwork, I think, very nicely for APA rulemaking authority and first-offense civil penalty authority for the—and it worked beautifully, and it wasn't abused, I think, or wasn't an overreach by Commission.

Who would oppose? I suppose those who don't want to see the Commission be a strong consumer protection agency.

Ms. CASTOR. So the scam artists of the world?

Ms. GREENBERG. I am sure the scam artists of the world would be right up there——

Ms. CASTOR. The fraudsters of the world?

Ms. GREENBERG [continuing]. As opposing——

Ms. CASTOR. Those telemarketers that the professor referenced?

Ms. GREENBERG. Yes. And, you know, the vast majority of businesses are honest, but there are those who are not, and they do not want to get in the crosshairs of the FTC.

Ms. CASTOR. Thank you very much.

Madam Chair, I yield back.

Ms. SCHAKOWSKY. We have the vice chair of the full committee, and I recognize—I mean the—not vice chair, the ranking member of full committee, and now I recognize the ranking member for 5 minutes, Mrs. Rodgers.

Mrs. RODGERS. Thank you, Madam Chair.

Mr. Vladeck, you have significant historic knowledge on the Commission. How important is it for the FTC Commissioners to engage with staff and seek their input, especially from the Commission bureaus?

Mr. VLADECK. When I was a bureau director, there was a robust discussion within the Commission, including staff of BE, the Bureau of Economics, on any policy issue. And the discussion was robust. And a lot of it bubbled up from the staff, not top down but bottom up.

Mrs. RODGERS. Thank you. Ms. Greenberg, have you been able to work with all the Commissioner offices, and do you believe it is important for the FTC to work in a bipartisan manner?

Ms. GREENBERG. Yes, I think one of the hallmarks of the FTC has been its bipartisan working relationships among Commissioners. And yes, we do go talk with all the Commissioners over time about consumer protection issues.

Mrs. RODGERS. Great. Mr. Dufault, as you know, Republicans are very committed to enacting a Federal privacy framework this Congress. Would you speak to how important, and just explain what a national framework would mean for small businesses?

Mr. DUFAULT. Absolutely, Congresswoman. A national framework should be very strong, and should have—it should contain consumer rights, so the rights to access correction and deletion of information about themselves. There should be data minimization provisions, and it should be a single set of strong national rules. And that is really important for our member companies, because they are trying to figure out how to comply with privacy requirements simultaneously across several different States, and a growing number of States.

The State of Washington considered privacy legislation in the last couple of legislative sessions in the State, in the State of Florida, as well, and now multiple other States are really considering jumping in and regulating privacy, generally.

And so, for our member companies, what they want to be able to do is comply with a strong set of requirements. And I always think of the one example one of our member companies described coming into compliance with GDPR. It cost them about $100,000 to come into compliance. They were able to compete in Europe. What sets GDPR apart from the situation in the United States is that GDPR applies across the continent. Here in the United States, it is unclear what the new privacy requirements are going to be with each year that passes right now in the current environment.

And so compliance is not necessarily just a matter of paying $100,000 to come up into compliance. It is just unclear how much it will cost in the coming years.

Mrs. RODGERS. If—thank you.

Mr. DUFAULT. Yes.

Mrs. RODGERS. If Congress fails to pass a privacy law, would you elaborate on what impact data privacy rules solely offered by the

FTC would mean for small businesses and their ability to comply with such rules

Mr. DUFAULT. Yes, Congresswoman. So if the FTC went ahead and conducted a rulemaking on privacy on its own, I think the concern for us would just be that, with each administration, you might see a completely different approach. So you might see all of the rules sort of scrapped.

I know that there is judicial review for changes that the new administration would make to those rules. But we would feel a little bit better if there were guardrails from Congress that the—would make those rules that come from the FTC, frankly, stronger because they have the statutory backing, and they would have—they would be less mutable, from—depending on who inhabits the FTC.

Mrs. RODGERS. One of the reasons I think a national privacy standard is so important is because it would—otherwise, there is confusion by a patchwork of laws that are being developed at the State level. There is confusion for consumers and for businesses. Obviously, they need the certainty across State lines.

If—would you speak to the potential of FTC writing a rule, and how much they would be able to address?

How much—do you—how much would they be able to accomplish, versus what Congress would be able to do?

Mr. DUFAULT. Yes, Congresswoman, there would be a number of things that the FTC could try to accomplish on its own. Using Magnuson-Moss rulemaking authority, it would take a little bit longer. I think it would take longer than if they had APA rulemaking authority granted by Congress. And that is why we were supportive of measures that would also authorize the FTC to make use of APA rulemaking procedures in narrow circumstances.

You know, to the extent that Congress can set guardrails and specify exactly what they want the Commission to accomplish, the better off we are going to be. And it leaves less of the question to the courts. As we saw with the AMG decision, there is some risk that the courts will go a little bit too far in removing the authority of the FTC, and we would rather have Congress imbue the FTC with that authority.

Mrs. RODGERS. Thank you all. I yield back.

Ms. SCHAKOWSKY. The gentlewoman yields back. And now I recognize Mr. McNerney for 5 minutes.

Mr. MCNERNEY. I thank the chairwoman, and I thank the panelists for being here today and being patient.

As I noted in the last panel, one of the bills we are considering today is H.R. 4530, legislation that I authored, which would establish an office of technologists at the Commission. As an engineer, I think this is critically important. Ms. Greenberg already voiced support of that bill.

Professor Vladeck, would you agree that empowering the agency with the necessary technical expertise and having more technologists on staff would help the agency carry out its mission?

Mr. VLADECK. Well, it is essential. And, you know, I hired the first technologists in the FTC in 2009. We did not have a single one on staff.

And, you know, there—let me just make two quick points: one is we need more technologists, the other is we need to be able to retain them.

And one of the problems is there is just enormous competition for, you know, top-of-the-line technologists. And one of the things I would urge this committee to think about is whether there should be different GS scales for paying technologists. Attracting, you know, top-tier technologists to the FTC would be a challenge. And so I applaud your bill. I hope it is enacted, and I hope it is authorized, the money is appropriated for it.

But there is a broader problem in government in terms of attracting and keeping top-line technologists, and I think that is an issue that needs to be really addressed.

Mr. MCNERNEY. Well, thank you, Professor.

Ms. Greenberg, in your testimony you discuss why this legislation is important with respect to our role, as a nation, in driving the global regulatory agenda. Could you explain that a little?

Ms. GREENBERG. I am sorry, your question was about the——

Mr. MCNERNEY. The——

Ms. GREENBERG. Would you mind repeating the question?

Mr. MCNERNEY. The office of technologists at the Commission——

Ms. GREENBERG. In terms of—yes, well, we made the observation that we need to compete globally as well as with companies that are based here in the United States. And we need to really ramp up our level of expertise in the technology area.

And as Professor Vladeck pointed out, we need to figure out how to not just hire technologists but retain them, as well. Though I do think there is a certain personality type that likes public service, and we can probably never compete with some of the salaries that we are going to see at the big tech companies, but I think a competitive salary and an opportunity to do—to go toe-to-toe with some of these companies is a very attractive job possibility for people with expertise.

But we just can't—now we cannot compete. So I think your bill is essential, and it is essential for our ability to compete globally as well as across the United States.

Mr. MCNERNEY. Thank you. Again, Professor Vladeck, what potential risks do you see with respect to artificial intelligence, and what can be—what steps can be taken at the agency to help address these risks?

Mr. VLADECK. Oh, the risks are enormous. You know, there are risks of algorithmic bias. There are pricing decisions that may be based on personal characteristics. And, you know, the FTC has been looking at this issue since 2010.

But it is—you know, there are challenges. And part of the challenges are that the FTC does not have the—technology. And so, you know, unless your legislation gets through, we may be behind the curve in trying to figure out how to harness all the good things that algorithms and AI bring us but not really understand some of the risks that are attached to it.

And there are just enormous strides being made at MIT and Caltech about the use of algorithms in government regulation, not just outside the government. And so we really need to get the re-

sources to understand the benefits and the risks of AI, and I am not sure we are anywhere near there.

Mr. MCNERNEY. Well, thank you, I am going to yield back at this point.

Ms. SCHAKOWSKY. The gentleman yields back. And Mr. Armstrong, your staying power pays off, and I recognize you for 5 minutes.

Mr. ARMSTRONG. Thank you, Chair Schakowsky.

I recently introduced H.R. 2671, the SHIELD Act. And the bill essentially contains two provisions. The first provision prohibits the FTC from relying on guidelines for similar documents to prove a violation of law. This is simple. The Commission should only bring enforcement actions for violations of law.

Now, Mr. Vladeck, I know you have some concerns with the second portion of this bill, but your testimony generally agrees with the first provision, which, essentially, reaffirms that the FTC guidance on provisions of law do not carry the force of law, correct?

Mr. VLADECK. That is correct.

Mr. ARMSTRONG. Now, the second——

Mr. VLADECK. Sorry, I didn't——

Mr. ARMSTRONG. OK, thank you, thank you. The second provision clarifies that a defendant may offer, as evidence of compliance with a provision of law, any guidelines, general statements of policy, et cetera. And your objection to this—you do object to this provision in your testimony. You raise concerns that a guidance document—offered as evidence of compliance with the law, even though it is outdated or superseded.

If a guidance is outdated or superseded, it would no longer be useful. And I would argue that the burden should be on the Commission to remove outdated or superseded guidance to provide the public with relevant information. Is there anything that prevents the Commission from removing outdated or superseding—superseded guidance?

Mr. VLADECK. Yes, there is a tremendous amount. I mean, a guidance document under the law is almost anything anyone at the FTC says, assuming that they are a reasonably senior person. So a tweet is a guidance document. A speech taking a position is a guidance document. And in order to—for the Commission to sort of pull back on guidance, they would have to really just sort of rewrite its own history by deleting speeches, tweets, you know, other——

Mr. ARMSTRONG. Well, statements from a Commissioner and guidance from the Commission aren't the same thing. Like, the defendant may offer as evidence of compliance these types of guidance documents. The bill doesn't provide that offering these guidance documents is an affirmative defense, which would negate a defendant's liability. The defendant would have to demonstrate that the guidance supports its compliance with the provision of law.

Your concern that pointing to any guidance document is arguably exculpatory might be sufficient as a defense. That is not how evidence works, and it is not what the bill says. The defendants can't simply claim a document provides absolution. A guidance document is only useful as evidence of compliance when it tends to prove that there is a matter asserted.

Mr. Dufault, is there any objection to allowing a defendant to simply offer Commission guidance as evidence of compliance with the provision of a law enforced by the Commission?

Mr. DUFAULT. No, it seems to us to be a reasonable provision, that it simply completes the circle when it comes to—you know, this is a statement as to the Commission's understanding of its own determination as to what is legal under its broad purview over unfair or deceptive acts or practices. And so that interpretation is meant to be relied upon.

So this is just a statement that says, if you are relying upon that guidance, then it is evidence. And like you said, it is not definitive. And there are different weights that you can assign to evidence, right? And so that—merely having it be evidence does not negate liability, as you said.

Mr. ARMSTRONG. And I think I can give a little real-world relevant example of how outdated or superseded language isn't always very persuasive. There is a 2015 version of this bill that, while similar, had some cumbersome and ambiguous language.

And Mr. Vladeck, you testified against that bill, and raised similar objections in 2016. The problem is, your testimony today quotes the 2015 bill language that was amended prior to the introduction of H.R. 2617.

And with that, I will yield back.

Ms. SCHAKOWSKY. The gentleman yields back, and now I yield 5 minutes to Mr. Soto.

Mr. SOTO. Thank you, Madam Chair. You know, last term we had put forward a working draft for privacy, something that I applaud you, Madam Chairwoman, for starting the ball rolling on. Sadly, here we are a year or two later because of partisan bickering over this stuff. And we still see another year or two wasted, gone by, where we could be protecting privacy.

And so I am committing to you, Madam Chair, that we will keep up the fight together and try to bridge gaps with my—our colleagues across the aisle, including the great ranking member here, my dear friend, Representative Bilirakis, my fellow Floridian, who I get to work with all the time on a lot of these issues.

You know, the American people rely on the FTC to protect them from fraud, scams, false advertising, and unfair and deceptive trade practices, often without even knowing the agency exists. In the first panel we heard from Commissioners about just some of the things the FTC is doing on behalf of American consumers. But we also heard about some of the constraints and need for resources to improve the FTC's ability to protect consumers.

Ms. Greenberg, would you agree that the FTC faces unique burdens that other consumer protection agencies do not?

Ms. GREENBERG. Yes, Congressman. I—the FTC is hampered by onerous obstacles that it must jump through to do its really important work of protecting consumers.

Mr. SOTO. And for years we have advocated for giving the FTC certain authorities, such as civil penalty authority and APA rulemaking. Ms. Greenberg, how would these tools improve the FTC's ability to fulfill its consumer protection mission?

Ms. GREENBERG. Well, APA rulemaking is a transparent process that—it is a very democratic process, because it opens up the rule-

making process to comment, notice and comment, and final rules, and a final rules can be challenged judicially. But it is an open process. It is a somewhat time-consuming process. But it does take in all perspectives, and certainly civil penalties are really important deterrents to the bad guys, the bad actors in the—in our marketplace. And I think you just improve the agency's ability to protect consumers by providing both of those, so civil penalty and APA rulemaking authority.

Mr. SOTO. Thank you, Ms. Greenberg.

Mr. Vladeck, we know technology has increased the ways for scams to happen. Internet, cell phones, social media all provide new opportunities for scammers. I know privacy is a key concern for both you and I and others on the committee. What role can artificial intelligence assist in spotting scams and protecting privacy, if used by the FTC?

Mr. VLADECK. So there is a lot of work being done by technologists, academic technologists, on exactly that question. And, you know, my hope is that AI will help control the boundaries of the internet, and alert agencies like the FTC, law enforcement agencies, when there is something that looks like a scam that is afoot so we can get—you know, we can sort of get an enforcement case, move quickly, before too many people are injured. So I think AI, as a tool, may, you know, be a great bolster for law enforcement agencies for just detection. And that is an important aspect of this.

So I do have expectations that, within this Commission, you will start seeing these kinds of tools, as there are tools for content moderation.

Mr. SOTO. And when we are talking about all the commerce on the Internet, all the information and different transactions conducted, really, would you argue that artificial intelligence is essential, in order to accurately be able to identify scams on the internet?

Mr. VLADECK. Yes. I mean, the internet is the crook's best friend. It is the best thing that ever happened to scam artists. And, you know, the volume of—you know, simply the sheer volume of what is going on on the internet makes it impossible for individuals to control, which is why AI is going to be a key tool to law enforcement, I hope, soon, because it is really needed.

Mr. SOTO. Well, thank you, Mr. Vladeck. With deep fakes, with using code words, with going into the dark web, among so many other abilities to push for scams, we are going to have to also use technology to help out the good guys at the FTC.

And I yield back, Madam Chair.

Ms. SCHAKOWSKY. The gentleman yields back, and now I just want to thank our witnesses. And I really, really appreciate all—the three of you being here, but especially the two that were here pretty much all day.

Professor, you, as well. I don't know if you were waiting around for us, but I just want to thank you so much for your participation.

And are there—there are? OK, so now I—well, let me first see if you want to say anything.

Mr. BILIRAKIS. I don't want to delay things. We got it done, and I appreciate your patience, the witnesses' patience and the Mem-

bers', and particularly our chair. So thank you very much for a very informative hearing.

Ms. SCHAKOWSKY. I want to remind the witnesses—and we will convey that also—oh, before we adjourn, I request unanimous consent to enter the following documents into the record.

But I—actually, let me say to the witnesses that the Members will have 10 business days to submit additional questions for the record, and we are asking you to respond in a timely way to that.

I wanted to say that before I read all this—because I think it is fair enough to say that you don't have to stick around for this—but I am going to read all the communications that we received. So thank you so very much.

We have a letter from Senator Toomey to Commissioner Chopra dated June 17, 2001, a letter from Senator Toomey to Commissioner Chopra dated July 13th, 2021, a—I don't know what this——

VOICE. A dissenting statement.

Ms. SCHAKOWSKY. Oh, a dissenting statement from Commissioner Phillips and Wilson regarding withdrawing of section 5, a statement of enforcement principles; we have a dissenting statement of Commissioner Phillips and Wilson regarding revision—no, revised section 18; a letter from Secretary—no, I am sorry, from Security Industry Association; a letter from the Committee for Justice; and a letter from the Chamber of Commerce.

That wraps it up.

[The information appears at the conclusion of the hearing.]

Ms. SCHAKOWSKY. So with that, the Subcommittee on Consumer Protection is adjourned.

[Whereupon, at 4:50 p.m., the subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]



July 28, 2021

The Honorable Janice D. Schakowsky
U.S. House of Representatives
Chair
House Committee on Energy & Commerce,
Subcommittee on Consumer Protection
& Commerce
2123 Rayburn House Office Building
Washington, DC 20515

The Honorable Gus M. Bilirakis
U.S. House of Representatives
Ranking Member
House Committee on Energy & Commerce,
Subcommittee on Consumer Protection
& Commerce
2123 Rayburn House Office Building
Washington, DC 20515

Dear Chair Schakowsky and Ranking Member Bilirakis:

On behalf of the Security Industry Association (SIA), thank you for holding today's legislative hearing focused on how legislation can modernize and improve the Federal Trade Commission (FTC). SIA represents over 1,200 innovative companies that provide safety and security technology solutions essential to public safety and the protection of lives, property, information, and critical infrastructure. SIA members include companies that provide advanced security solutions that are integral to the larger, digital ecosystem – e.g., "smart cities," the Internet of Things, and artificial intelligence – and our members strive to develop and field such technologies in ways that benefit society.

SIA supports initiatives that foster American innovation, safeguard consumer data, and ensure the FTC is well equipped to protect American consumers.

In the recently issued Executive Order on Promoting Competition in the American Economy, the FTC is encouraged to look for ways to limit restrictions on third party or self-repairs of equipment and devices. "Right to repair," if construed broadly, could require our member companies and original equipment manufacturers (OEMs) of security equipment to disclose proprietary source code, diagnostic, and repair information to unauthorized, independent repair providers. The inner workings of security and life safety equipment is closely guarded, and for good reason. In the wrong hands, a manual describing how security and / or life safety equipment can be disarmed, silenced, or signals rerouted could have unimaginable consequences.

Currently, repair and service of security and life safety equipment is handled, by and large, by teams of individuals with specialized training, who often must undergo criminal background checks before gaining access to proprietary equipment and procedures. Those that rely on these systems for their protection, as well as those companies monitoring these devices trust that the equipment has been serviced by properly trained technicians, and the equipment will respond as is should if an emergency occurs.

Simple malfunctions can cause real, physical harm, and forcing the disclosure of repair information to unauthorized repair providers undermines the extensive training OEMs provide to third-party repair providers that are certified by the OEMs. In the case of security and life safety equipment and services,

consumer safety outweighs any potential savings that might be incurred by forcing security manufacturers to make public information about how their systems operate.

SIA maintains that competition in the security industry fosters innovation and spurs increased investment in R&D projects that solve critical problems to protect the general public. Broad "right to repair" requirements unduly burden small-to-medium sized manufacturers and certified repair providers that have dedicated significant resources to educating themselves on how to properly fix defected security equipment to prevent future harm to the customer and their family.

We thank you again for holding today's timely hearing. SIA and its members stand ready to assist on relevant legislative priorities under the Committee's jurisdiction.

Sincerely,



Don Erickson
CEO – Security Industry Association

Cc: Members of the House Energy & Commerce Committee

For more information, please contact Joe Hoellerer, SIA Senior Manager of Government Relations, at jhoellerer@securityindusry.org

Committee For Justice
Holding Judges and Politicians Accountable to the Constitution

July 28, 2021

The Honorable Frank Pallone
Chairman, House Committee on Energy and Commerce

The Honorable Cathy McMorris Rodgers
Ranking Member, House Committee on Energy and Commerce

The Honorable Janice D. Schakowsky
Chair, House Committee on Energy and Commerce
Subcommittee on Consumer Protection and Commerce

The Honorable Gus M. Bilirakis
Ranking Member, House Committee on Energy and Commerce
Subcommittee on Consumer Protection and Commerce

RE: HEARING ON 'TRANSFORMING THE FTC: LEGISLATION TO MODERNIZE CONSUMER PROTECTION'

Dear Representatives Pallone, Rodgers, Schakowsky, and Bilirakis:

We at the Committee for Justice write today to provide you with comments for inclusion in the record of the Subcommittee's July 28th hearing, "Transforming the FTC: Legislation to Modernize Consumer Protection."

Founded in 2002, CFJ is a non-profit legal and policy organization that educates the public and policymakers about the rule of law and promotes constitutionally limited government. CFJ has a long history of leadership on Supreme Court and federal judicial nominations in the Senate and has recently focused on issues at the intersection of constitutional law and technology. Consistent with that mission, our latest efforts have encompassed areas such as data privacy policy, administrative law, and antitrust law.

By way of background, on July 1, 2021, the Federal Trade Commission (FTC), after allowing six days for public comment, voted to rescind the 2015 Statement of Enforcement Principles Regarding "Unfair Methods of Competition" (UMC) Under Section 5 of the FTC Act. Prior to the FTC's meeting, comments were submitted by Ashley Baker of the Committee for Justice and Daren Bakst of The Heritage Foundation, on behalf of a group of 20 legal experts, conservative advocates, former FTC officials, and economists.

On July 21, 2021, the FTC voted to rescind its bipartisan 1995 Policy Statement on Prior Approval and Prior Notice Provisions in merger cases. Relevant comments were once again provided. Notably, both of these actions – along with other significant changes – were effected along party lines, with limited opportunity for public input, and without dialogue among the Commissioners.

Since today's hearing will consider a wide array of reforms, many of which are relevant to the level of discretion and enforcement principles under FTC Act § 5 and to the broader capabilities and mandate of the Commission, we attach to this letter the two recent comments to take into consideration in your discussion of the FTC's legal and administrative authorities.

We thank you for your oversight of this important issue and ask that this letter be included on the Committee or Subcommittee's website and repository. Please feel free to contact us should you have any questions or requests for additional input from signatories. We welcome the opportunity to further discuss these views and relevant proposals or congressional assessment with the Committee.

Respectfully,

Ashley Baker
Director of Public Policy, The Committee for Justice
Founder, The Alliance on Antitrust

Attachments:

1. Comments In Re: Rescission of 2015 Statement of Enforcement Principles On Unfair Methods of Competition Under FTC Act § 5
2. Comments In Re: Rescission of 1995 Policy Statement on Prior Approval and Prior Notice Provisions in Merger Cases

Submitted: June 30, 2021

Lina Khan
Chair, Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

COMMENTS TO THE FEDERAL TRADE COMMISSION CONCERNING THE JULY 1, 2021 OPEN MEETING AGENDA

In Re: Rescission of 2015 Statement of Enforcement Principles On Unfair Methods of Competition Under FTC Act § 5

Dear Chair Khan and Commissioners Phillips, Chopra, Slaughter, and Wilson:

We, the undersigned, appreciate this opportunity to provide comments regarding the possible rescission of the Commission's 2015 Statement of Enforcement Principles Regarding Unfair Methods of Competition (UMC) Under Federal Trade Commission Act § 5 (2015 statement).

While we applaud the Commission's broader goal of bringing transparency through a series of monthly open meetings, allowing only six days for public comment on significant agenda items that will drastically affect enforcement policy decisions is a deterrent to substantive public input.[1] As Commissioner Noah Phillips stated, "a mere week's notice on matters requiring serious deliberation, and a number of the policies themselves, undermine that very goal" of transparency.[2] To allow for both transparency and substantive public participating in these proceedings, the Commission should allow for a standard of 30 days of public input.

More troubling still is the fact that the Commission will be considering a significant shift in enforcement policy as the open meeting agenda will include this sudden push to revoke the 2015 statement. This policy statement provides a bipartisan framework that lays out widely agreed upon core principles regarding antitrust law and the Commission's Section 5 enforcement. Among these principles is "the promotion of consumer welfare" and focusing enforcement on acts or practices that "must cause, or be likely to cause, harm to competition or the competitive process."

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[1] See "FTC Announces Agenda for July 1 Open Commission Meeting." The Federal Trade Commission. (June 24, 2021), available at: https://www.ftc.gov/news-events/press-releases/2021/06/ftc-announces-agenda-july-1-open-commission-meeting.

[2] Commissioner Noah J. Phillips. @FTC Phillips, Twitter. (June 25, 2021), available at: https://twitter.com/FTCPhillips/status/1408459407134973955.

As the Commission explained when issuing its 2015 statement: "In describing the principles and overarching analytical framework that guide the Commission's application of Section 5, our statement affirms that Section 5 is aligned with the other antitrust laws, which have evolved over time and are guided by the goal of promoting consumer welfare and informed by economic analysis."[3]

The rescission of the 2015 statement would untether the Commission's enforcement decisions from concerns over harms to consumers and to the competitive process. Consumer welfare is appropriately prioritized in the 2015 statement and remains the goal of antitrust as recognized and reaffirmed in existing case law.

Additionally, the Commission's recent Notice of the open meeting did not even state an objective justification for the quick removal of the 2015 policy, nor did it indicate whether it would be replaced by new guidance.

Abandoning the 2015 statement's framework would remove important guardrails that established predictability and guidance in enforcement actions. The lack of predictability resulting from the FTC's re-expanded discretion in invoking broad Section 5 authority on a case-by-case basis would create uncertainty for businesses of all sizes and across all industries. The Commission's misadventure into UMC expansionism would generate unwarranted confusion, and eventually courts would have to grapple with questions of interpreting the outer boundaries of Section 5 authority that were previously cabined by the 2015 statement.

Above all, we are concerned that the Commission's sudden rush to revoke the 2015 statement foreshadows a broader agenda to radically change antitrust law by greatly expanding the Commission's enforcement discretion.

These concerns have been echoed by others such as Senator Mike Lee (R-UT), who stated that "[s]hould the FTC rescind the statement, it will replace clarity with ambiguity in the midst of a fragile economic recovery. Rescinding the statement would also signal that the Commission rejects the idea that there are any limits to its power or regulatory reach, and that it intends to use Section 5 to address non-economic harms outside the agency's purview or expertise."[4]

Proposals to change well-functioning policies deserve serious deliberation and an opportunity for meaningful input from the public and from all stakeholders. We encourage the Commission to adopt a more open process and transparent approach that allows for proper notice and

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[3] "Statement of the Federal Trade Commission On the Issuance of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act." The Federal Trade Commission. (August 13, 2015), available at: https://www.ftc.gov/system/files/documents/public_statements/735381/150813commissionstatementsection5.pdf.

[4] See "Sen. Lee Expresses Concerns about Possible Revocation of FTC 2015 Statement of Section 5 Enforcement Principles." (June 24, 2021), available at: https://www.lee.senate.gov/public/index.cfm/press-releases?ID=88C0AA07-BB92-427C-8EEC-63B92E8E6A26.

consideration of proposals. We welcome the opportunity to further discuss these views and stand ready to provide additional input.

Sincerely,

Ashley Baker
Director of Public Policy,
The Committee for Justice

Daren Bakst
Senior Research Fellow in Regulatory Policy Studies
The Heritage Foundation

Asheesh Agarwal
Former Assistant Director
FTC Office of Policy Planning

Robert H. Bork, Jr.
President
Antitrust Education Project

Dan Caprio
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The Lares Institute

James Edwards
Executive Director
Conservatives for Property Rights

Richard A. Epstein
The Laurence A. Tisch Professor of Law,
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The Peter and Kirsten Bedford Senior Fellow,
The Hoover Institution
The James Parker Hall Distinguished Service Professor of Law Emeritus and Senior Lecturer,
The University of Chicago

Theodore A. Gebhard
Former Senior Attorney
FTC Office of Policy and Coordination

Douglas Holtz-Eakin
President
American Action Forum

Tom Hebert
Executive Director
Open Competition Center

Jennifer Huddleston
Director of Technology and Innovation Policy
American Action Forum

Thomas A. Lambert
Wall Family Chair and Professor of Law
University of Missouri Law School

Curt Levey
President
The Committee for Justice

Katie McAuliffe
Executive Director
Digital Liberty

Doug McCullough
Director
Lone Star Policy Institute

Grover Norquist
President
Americans for Tax Reform

Timothy Sandefur
Vice President for Litigation
The Goldwater Institute

Thomas A. Schatz
President
Citizens Against Government Waste

NOTE: Organizations and affiliations are listed for identification purposes only.

Submitted: July 18, 2021

Lina Khan
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600 Pennsylvania Avenue, NW
Washington, DC 20580

COMMENTS TO THE FEDERAL TRADE COMMISSION CONCERNING THE JULY 21, 2021 OPEN MEETING AGENDA

In Re: Rescission of 1995 Policy Statement on Prior Approval and Prior Notice Provisions in Merger Cases

Dear Chair Khan and Commissioners Phillips, Chopra, Slaughter, and Wilson:

On behalf of the Committee for Justice, please consider this comment concerning the July 21, 2021, open meeting agenda.[5] We appreciate this opportunity to provide comments regarding the possible rescission of the Commission's 1995 Policy Statement on Prior Approval and Prior Notice Provisions in Merger Cases (1995 statement).[6]

The Commission claims to have a broader goal of bringing transparency through a series of monthly open meetings. The July 1 meeting fell short of this goal on all accounts.[7] The July 21 meeting does not seem to be an improvement.

The public was given a mere four business days to comment on the proceedings. Allowing only several days for public comment on significant agenda items that will drastically affect the merger approval process is a deterrent to substantive public input. To allow for both transparency and public participation in these proceedings, the Commission should allow for a standard of 30 days of public input.

With this in mind, it is troubling that the Commission will be considering a significant shift in

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[5] *See* "FTC Announces Agenda for July 21 Open Commission Meeting." The Federal Trade Commission. (June 12, 2021), available at: https://www.ftc.gov/news-events/press-releases/2021/07/ftc-announces-agenda-july-21-open-commission-meeting.

[6] "Statement of FTC Policy Concerning Prior Approval and Prior Notice Provisions." The Federal Trade Commission. (June 21, 1995) (hereafter "1995 Statement"), available at: https://www.ftc.gov/system/files/documents/public_statements/410471/frnpriorapproval.pdf.

[7] *See, e.g.,* "Comments In Re: Rescission of 2015 FTC Statement on Unfair Methods of Competition." The Alliance on Antitrust. (June 30, 2020), available at: https://www.allianceonantitrust.org/blog/ftc-july-open-meeting.

policy as the open meeting agenda will include this sudden push to revoke the 1995 statement. Of particular concern is the rejection of the prior approval provision.

With the adoption of the 1995 statement, the Commission accepted the Hart-Scott-Rodino (HSR) Act[8] framework as adequate for handling mergers and thereby determined that prior approval of future acquisitions by a respondent should no longer be required as a routine matter.[9]

As the Commission explained when issuing its 1995 policy statement: "In light of its now extensive experience with the HSR Act, the Commission has reassessed whether it needs to continue regularly to impose prior approval requirements. Although prior approval requirements in some cases may save the Commission the costs of re-litigating issues that already have been resolved, prior approval provisions also may impose costs on a company subject to such a requirement. Moreover, the HSR Act has proven to be an effective means of investigating and challenging most anticompetitive transactions before they occur."[10]

The rescission of the 1995 statement is another step in the direction of rejecting the HSR regime which, in the words of Peter W. Rodino, Jr on the 25th anniversary of the Act, "absolutely has transformed merger enforcement. Competition, as well as the consumer, has benefitted."[11]

By requiring agency approval when there is no proof of harm, the Commission is essentially shifting the burden to companies to justify deals within the same market. Congress has considered, but has failed to pass, similar proposals. Furthermore, a bright-line rule that prohibits transactions is not only burdensome, but also unnecessary when agency professionals are more than capable of reviewing these deals.

The Commission's recent notice of the open meeting did not even state an objective justification for the quick removal of the 1995 policy. But whatever the justifications may be, the likely outcome of rescinding the 1995 statement will be much more litigation over mergers rather than economizing resources and saving law enforcement dollars.

Notably, the decision to consider whether to rescind the 1995 statement regarding prior-approval requirements comes in the immediate wake of President Biden's signing of the Executive Order on Promoting Competition in the American Economy, which encourages the FTC and DOJ to

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[8] Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 18a.

[9] *See* 1995 Statement. ("The Commission believes that in most such situations the availability of HSR premerger notification and waiting period requirements will adequately protect the public interest in effective merger enforcement, without being unduly burdensome.")

[10] *Id.*

[11] Bruno, M. R., "Hart-Scott-Rodino at 25." The Federal Trade Commission. (June 13, 2002), available at: https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/pno-news-archive/statement-peter-w-rodino.

revise the vertical and horizontal merger guidelines.[12] The Executive Order also affirms the government's authority to challenge consummated mergers, which could have significant implications for merger review. These changes, along with other proposals, appear to act in tandem and will create uncertainty for businesses of all sizes and across all industries.

Above all, we are concerned that the Commission's sudden rush to revoke the 1995 statement, combined with other recent actions, foreshadows a broader agenda to radically change antitrust law by shifting towards ex ante control and away from the HSR regime while insulating itself from Congress and from public participation.

Proposals to change well-functioning policies deserve serious deliberation and an opportunity for meaningful input from the public and from all stakeholders. As Commissioner Christine Wilson stated in dissent to the Commission's July 1, 2021, meeting: "American consumers are best served when policy decisions are made with input from a variety of stakeholders. The FTC has a laudable history of seeking this input by issuing for notice and comment draft policy statements and other initiatives; holding workshops and hearings on policy issues; and preparing thoughtful and thorough reports."[13]

We encourage the Commission to adopt a more open process and transparent approach that allows for proper notice and consideration of proposals. We welcome the opportunity to further discuss these views and stand ready to provide additional input.

Sincerely,

Ashley Baker
Director of Public Policy, The Committee for Justice
Founder, The Alliance on Antitrust

[12] "Executive Order on Promoting Competition in the American Economy." The White House. (July 9, 2021), available at: https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.
[13] *See* Wilson, Christine S., "Dissenting Statement of Commissioner Wilson - July 1 Open Commission Meeting." (July 1, 2021), available at: https://www.ftc.gov/system/files/documents/public_statements/1591554/p210100wilsoncommnmeetingdissent.pdf.

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

NEIL L. BRADLEY
EXECUTIVE VICE PRESIDENT &
CHIEF POLICY OFFICER

1615 H STREET, NW
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July 28, 2021

The Honorable Jan Schakowsky
Chair
Consumer Protection & Commerce
Subcommittee
U.S. House of Representatives
Washington, DC 20515

The Honorable Gus Bilirakis
Ranking Member
Consumer Protection & Commerce
Subcommittee
U.S. House of Representatives
Washington, DC 20515

Dear Chair Schakowsky and Ranking Member Bilirakis:

The U.S. Chamber of Commerce appreciates the opportunity to provide our perspective to the House Energy and Commerce Committee's Subcommittee on Consumer Protection and Commerce, in advance of the hearing, "Transforming the FTC: Legislation to Modernize Consumer Protection." We have significant concerns about the Federal Trade Commission's current approach and wish to provide our feedback on current FTC activity for this oversight hearing and on legislation the committee will be considering during the July 28 hearing.

The Chamber supports efforts to provide meaningful transparency to the Commission as it makes sweeping policy decisions, but the business community is concerned about the FTC's current "take votes now, talk policy later" approach. This is particularly disturbing in light of the recent Supreme Court decision *AMG Capital Management, LLC v. FTC* in which the Court held that the Commission had long exceeded its statutory enforcement authority.

The Chamber finds it troubling that an agency which has already been willing to exceed its enforcement authority has now voted to expedite its rulemaking authority. The FTC is now using this approach to change bipartisan FTC policy without enabling the public to see its proposals or provide meaningful comment before decisions are made.

The Chamber supports H.R. 4564, which would provide needed transparency to the FTC's operations. This bill would enable the public to see the text of FTC orders and decisions online a month before meetings. This good policymaking practice has been adopted on a bipartisan basis at the Federal Communications Commission, which posts the proposed text of orders and proposed rulemakings three weeks in advance of open meetings. An FTC Open Meeting does not provide transparency unless it provides the public with meaningful notice and opportunity to comment. Such meaningful notice and comment were not afforded by the FTC during its two open meetings held in July.

The Chamber has significant concerns with other bills the committee is considering, such as H.R. 3067 and H.R. 4447. These bills would remove guardrails required of the Commission when making rules concerning unfair and deceptive trade practices. The Federal Trade Commission, first and foremost, was established to serve as an enforcement authority that examined conduct on a case-by-case basis. Such legislation would empower the FTC with broad rulemaking authority over "unfair and deceptive trade practices." Removing safeguards around rulemakings based on a vague mandate while the Commission seeks to expand its enforcement authority creates disturbing precedent. The FTC would be allowed to effectively legislate and enforce cases with little public input.

The recent partisan vote at the July 1 Open Meeting that stripped the FTC's administrative law judges of their role of presiding officers in rulemaking hearings only adds to our concerns. That authority is handed over to the Chair which has the potential to erode the independence of the lead FTC rulemaking arbiter. The lead arbiter determines which issues in a rulemaking are up for debate and who may publicly participate in a hearing.

Although the business community feels it is vital that the FTC has the tools it needs to address actual harm to consumers, Congress should work on defining harm and protecting consumers. This should be pursued through vehicles like federal privacy legislation. Congress should also provide greater oversight over the direction that Commission has taken to lessen transparency.

Sincerely,



Neil L. Bradley

cc: Members of the House Energy and Commerce Committee's Subcommittee on Consumer Protection & Commerce

SHERROD BROWN, OHIO, CHAIRMAN
JACK REED, RHODE ISLAND
ROBERT MENENDEZ, NEW JERSEY
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United States Senate
COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS
WASHINGTON, DC 20510–6075

June 17, 2021

The Honorable Rohit Chopra
Commissioner
Federal Trade Commission
600 Pennsylvania Ave NW
Washington, DC 20580

Dear Commissioner Chopra:

According to press reports, the political leadership of the Consumer Financial Protection Bureau (CFPB) under the Biden administration has been taking unusual and possibly unlawful actions to push out top-level career civil servants at the CFPB in order to fill those civil service positions with hand-picked loyalists.[1] Such actions reportedly include offering employees extraordinary separation incentives to leave their posts and placing employees on administrative leave after opening up frivolous investigations against them—allegations that, if true, may violate employment and other laws.[2] Moreover, the CFPB notably declined to deny any of the detailed allegations in the report.[3]

In light of the seriousness of the allegations in this report, as well as the implication that these actions may have been undertaken to provide you with the opportunity to hire a hand-picked team of loyalists in the event that you are confirmed as Director of CFPB, I request that you provide complete answers to the following questions by no later than 10 a.m. on June 21, 2021:

1. Are you aware of whether the CFPB has taken any steps between January 20, 2021, and the present to push out, replace, or encourage any career CFPB employees to leave their positions?

    a. If so, what specific steps are you aware of to push out, replace, or encourage career CFPB employees to leave their positions, and at whose direction were they taken?

    b. When were you first made aware that the CFPB was attempting to push out, replace, or encourage any career CFPB employees to leave their positions?

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[1] Eric Katz, *Biden Employs Aggressive Strategy to Sideline Top Career Officials at Consumer Protection Bureau*, Government Executive (Jun. 14, 2021), https://www.govexec.com/management/2021/06/biden-employs-aggressive-strategy-sideline-top-career-officials-consumer-protection-bureau/174711/.
[2] *Id.*
[3] *Id.*

c. Have you discussed any plan or decision to push out, replace, or encourage any career CFPB employees to leave their positions, and if so, with whom did you discuss this plan or decision?

2. Are you aware of whether the CFPB between January 20, 2021, and the present offered any career CFPB employees separation incentives to leave their positions?

   a. If so, please provide a list of all career CFPB employees offered separation incentives to leave their positions (identified by their position title) and the specific terms of the separation incentives they were offered.

   b. When were you first made aware that the CFPB had offered, or was intending to offer, any career CFPB employees separation incentives to leave their positions?

   c. Have you discussed any plan or decision to offer career CFPB employees separation incentives to leave their positions, and if so, with whom did you discuss this plan or decision?

3. Are you aware of whether the CFPB between January 20, 2021, and the present opened an investigation into any career CFPB employee at the Associate Director or Assistant Director level?

   a. If so, please provide a list of all such individuals (identified by their titles) and the reason for opening the investigation.

   b. When were you first made aware that the CFPB had opened, or was intending to open, an investigation into any career CFPB employee at the Associate Director or Assistant Director level?

   c. Have you discussed any plan or decision to open an investigation into any career CFPB employees at the Associate Director or Assistant Director level, and if so, with whom did you this discuss this plan or decision?

4. Are you aware of whether the CFPB between January 20, 2021, and the present placed any career CFPB employees at the Associate Director or Assistant Director level on administrative leave?

   a. If so, please provide a list of all such individuals (identified by their titles) and the reason for placing them on administrative leave.

   b. When were you first made aware that the CFPB had placed, or was intending to place, any career CFPB employee at the Associate Director or Assistant Director level on administrative leave?

c. Have you discussed any plan or decision to place any career CFPB employees at the Associate Director or Assistant Director level on administrative leave, and if so, with whom did you discuss this plan or decision?

Thank you for your attention to this matter.

Sincerely,



Pat Toomey
Ranking Member

cc: The Honorable Sherrod Brown, Chairman, Senate Committee on Banking, Housing, and Urban Affairs

SHERROD BROWN, OHIO, CHAIRMAN
JACK REED, RHODE ISLAND
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United States Senate
COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS
WASHINGTON, DC 20510–6075

July 13, 2021

The Honorable Rohit Chopra
Commissioner
Federal Trade Commission
600 Pennsylvania Ave NW
Washington, DC 20580

Dear Commissioner Chopra:

We are concerned with your refusal to respond to a congressional request seeking information about potential violations of law at the Consumer Financial Protection Bureau (CFPB).

As you know, you received a Senate Banking Committee letter[1] on June 17th seeking basic answers about your knowledge of allegations detailed in recent press reports[2] over the improper treatment of employees at the CFPB. According to the allegations in the press reports, political leadership at the CFPB under the Biden administration has taken questionable and possibly unlawful actions to push out top-level CFPB career civil servants in order to fill those civil service positions with hand-picked loyalists.[3] Such actions reportedly include offering employees extraordinary separation incentives to leave their posts and placing employees on administrative leave after opening up frivolous investigations against them. These allegations, if true, may violate employment and other laws.[4]

Notwithstanding the gravity of these allegations and the fact that the you were asked to provide answers to straightforward questions by no later than June 21st, to date you have provided no response to the letter and have also ignored every inquiry into whether you intend to respond.[5]

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[1] Letter from Sen. Pat Toomey, Ranking Member, Committee on Banking, Housing, and Urban Affairs, to Rohit Chopra, Commissioner, Federal Trade Commission (Jun. 17, 2021), *available at* https://www.banking.senate.gov/imo/media/doc/letter_to_chopra.pdf.

[2] Eric Katz, *Biden Employs Aggressive Strategy to Sideline Top Career Officials at Consumer Protection Bureau*, Government Executive (Jun. 14, 2021), https://www.govexec.com/management/2021/06/biden-employs-aggressive-strategy-sideline-top-career-officials-consumer-protection-bureau/174711/.

[3] *Id.*

[4] *Id.*

[5] Although a member of your Federal Trade Commission (FTC) staff acknowledged receipt of the Ranking Member's letter and FTC staff have confirmed to the Ranking Member's Committee staff that you were aware of the request for information, your staff have subsequently ignored multiple inquiries from Committee staff regarding whether you intend to respond to the letter. Moreover, in addition to ignoring inquiries from the Ranking Member and Committee staff about the serious allegations contained in these press reports, you also appear to be ignoring press inquiries about this matter. *See, e.g.*, Katy O'Donnell, *Toomey accuses CFPB nominee Chopra of Stonewalling, questions 'fitness to serve,'* Politico Pro (Jun. 24, 2021) ("[Mr.] Chopra did not immediately respond to a request for comment. The CFPB said it is working on its response to Toomey.").

Your refusal to answer basic questions about whether you were privy to the troubling and possibly unlawful actions described in the press is unacceptable from a federal nominee and in our view should disqualify you from consideration as CFPB Director. As you know, the questions in the letter of June 17th focused on whether you were or were not aware of the allegations described in the press reports. These were primarily "yes" or "no" questions. In this context, your refusal to simply deny such knowledge creates the appearance that you are attempting to conceal what you knew about this matter.

Any individual nominated to lead a federal agency should be expected to provide truthful and clear answers to fair and basic questions from Congress. Any nominee who refuses to do so during their nomination has not earned the right to be confirmed. Indeed, if you are refusing even to respond to congressional inquiries while your nomination is pending before the Senate, there is little doubt about how you will treat such inquiries if confirmed. While providing these answers is not a sufficient basis for earning confirmation to a senior position in the federal government, we view it as a necessary prerequisite.

Accordingly, we call on you to promptly and completely answer the questions contained in the Senate Banking Committee letter of June 17th.

Thank you for your attention to this matter.

Sincerely,

Pat Toomey
U.S. Senator

Richard Shelby
U.S. Senator

Mike Crapo
U.S. Senator

Tim Scott
U.S. Senator

M. Michael Rounds
U.S. Senator

Thom Tillis
U.S. Senator

John Kennedy
U.S. Senator

Bill Hagerty
U.S. Senator

Cynthia Lummis
U.S. Senator

Jerry Moran
U.S. Senator

Kevin Cramer
U.S. Senator

Steve Daines
U.S. Senator

cc: The Honorable Sherrod Brown, Chairman, Senate Committee on Banking, Housing, and Urban Affairs

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

Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson on the "Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act"

July 9, 2021

I. Introduction

The statement regarding "unfair methods of competition" under Section 5 of the FTC Act adopted today by the Commission majority ("2021 UMC Statement") spends seven pages explaining their view that legal precedents do not bind us and not a word explaining what limits to our authority they recognize, if any. Last week, with next to no notice or public input, the majority withdrew the Commission's 2015 *Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act* ("Bipartisan 2015 UMC Statement"), adopted on a bipartisan basis during the Obama Administration.[1] In so doing, the majority removed clarity for honest businesses that seek to follow the law, which today's statement addresses only with vague promises that, later, it will "consider" new guidance or rules. Hinting at the prospect of dramatic new liability without any guide regarding what the law permits or proscribes is bad for consumers and bad for our economy—the opposite of what Congress intended when it created the FTC.

We dissent from issuing the 2021 UMC Statement as a Commission statement for three reasons. First, rescinding the Bipartisan 2015 UMC Statement – absent any new guidance about the how the Commission interprets its authority – reduces clarity in the application of the law and threatens to unleash terrific regulatory power never intended by Congress to be exercised by a bare majority of unelected individuals at the FTC. Second, contrary to the claims made in today's statement, the Bipartisan 2015 UMC Statement is consistent with Section 5 of the FTC

[1] Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf [hereinafter "Bipartisan 2015 UMC Statement"].

Act; unbounded authority is not. Third, the Bipartisan 2015 UMC Statement reflected several core principles of mainstream antitrust enforcement, and withdrawing it runs contrary to sound competition law and policy.

II. The Majority Abandon Clarity and Augur the Exertion of Unchecked Regulatory Power

Rescinding the Bipartisan 2015 UMC Statement removes clarity for honest businesses that seek to follow the law. That statement was based on legal precedent that established modest limits on the use of Section 5.[2] In particular, the Bipartisan 2015 UMC Statement provides that (1) the Commission will be guided by the public policy of promoting consumer welfare; (2) conduct will be evaluated under a framework similar to the rule of reason, considering both likely harm to competition and procompetitive justifications; and (3) a standalone Section 5 case would be less likely when the competitive harm could be addressed by the Sherman and Clayton Acts.[3]

The principles embodied in the Bipartisan 2015 UMC Statement have long provided a solid foundation for sound antitrust enforcement. Businesses had guidance about future challenges to conduct under Section 5 of the FTC Act. Today, they are left to wonder, because the Commission failed to enunciate new principles regarding its interpretation of "unfair methods of competition." The 2021 UMC Statement does not describe the principles or parameters that will guide the Commission going forward. While the majority criticize the Bipartisan 2015 UMC Statement for the absence of clear enforcement principles, the 2021 UMC Statement offers even less.

That silence speaks volumes. The majority could have waited to rescind the Bipartisan 2015 UMC Statement until they had something with which to replace it – and the public could then evaluate their view against the text, structure, and history of the FTC Act – but it appears they prefer unbridled authority to condemn business practices. That is not what Congress intended.[4] The majority deride the Bipartisan 2015 UMC Statement as an "abrogat[ion]" of "the Commission's congressionally mandated duty to use its expertise[.]"[5] It did no such thing, nor do

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[2] *See, e.g.,* Statement of the Federal Trade Commission On the Issuance of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act, at 2 (August 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735381/150813commissionstatementsection5.pdf, ("There has been much thoughtful dialogue inside and outside of the agency over the course of the last century about the precise contours of Section 5's prohibition against unfair methods of competition. We have benefited greatly from this ongoing dialogue and from judicial insights through the process of judicial review, and we believe that the principles we have set forth in our Section 5 statement are ones on which there is broad consensus."); Address by FTC Chairwoman Edith Ramirez, Competition Law Center, George Washington University Law School (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735411/150813section5speech.pdf.

[3] *See* Bipartisan 2015 UMC Statement.

[4] *See infra* Section III.

[5] 2021 UMC Statement at 1.

they cite any sound basis to support their apparent proposition that Congress intended to give a few unelected commissioners of a federal agency limitless authority to enjoin business practices.

Nor did Congress vest the Commission with broad authority to regulate the economy without an intelligible principle.[6] The majority have repeatedly stated their desire to step outside the Commission's congressional mandate to bring and adjudicate cases and instead fashion antitrust regulations.[7]

In addition to being legally dubious,[8] this is a bad idea.[9] The 2021 UMC Statement portends Section 5 rulemaking that prohibits conduct that courts currently find legal under the rule of reason, which demands a consideration of business justifications and procompetitive benefits and analyzes effects. Rulemaking should not prohibit procompetitive, efficient conduct that benefits consumers. Neither should rulemaking prohibit conduct that does not cause anticompetitive harm. Regulation should address market failures. To claim authority to fashion regulations while explicitly ignoring the good things they would prevent – looking only at the purported benefits of regulation, and not the costs – is perverse, not to mention inconsistent with American administrative law and sound public policy.

The majority try to assuage the public's concerns of unchecked regulatory power by pointing out the Commission's lack of criminal jurisdiction and the ability to collect treble damages.[10] These observations are red herrings. If they promulgate regulations, the Commission will have the authority to impose massive civil penalties for violations. Threatening precisely those sanctions, the Commission offers no guidance whatsoever on legality, but instead encourages the public to "trust us." That is not good enough.

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[6] *Cf.* Gundy v. United States, 139 S. Ct. 2116 (2019) (Gorsuch, N., dissenting); Paul v. United States, 140 S. Ct. 342. (2019) (Kavanaugh, B., statement respecting the denial of cert.). We have serious doubts about our legal authority to fashion antitrust rules in the first place. *See*, *e.g.*, Christine S. Wilson, Commissioner, Fed. Trade Comm'n, Remarks at the NetChoice "Defining the Digital Market" Event 9-13 (April 27, 2021), https://www.ftc.gov/public-statements/2021/04/remarks-commissioner-christine-s-wilson-netchoice-defining-digital-market; Noah Joshua Phillips, Commissioner, Fed. Trade Comm'n, Prepared Remarks at the FTC's Workshop on Non-Compete Clauses in the Workplace 5-7 (Jan. 9, 2020), https://www.ftc.gov/system/files/documents/public_statements/1561697/phillips_-_remarks_at_ftc_nca_workshop_1-9-20.pdf.

[7] *See* 2021 UMC Statement at 7 (criticizing the Bipartisan 2015 UMC Statement for assuming a case-by-case approach to Section 5 and suggesting "the possibility of the Commission adopting rules to clarify the legal limits that apply to market participants."). *See also Reviving Competition, Part 3: Strengthening the Laws to Address Monopoly Power*: *Hearing Before the H. Comm. on the Judiciary*, 117th Cong. 7 (statement of Rebecca Kelly Slaughter, Acting Chairwoman, Fed. Trade Comm'n).

[8] *See supra* note 6.

[9] Christine S. Wilson & Keith Klovers, *The Growing Nostalgia for Past Regulatory Misadventures and the Risk of Repeating These Mistakes with Big Tech*, 8 J. ANTITRUST ENFORCEMENT 10 (2020); Christine S. Wilson, Commissioner, Fed. Trade Comm'n, Remarks at the Federalist Society "The Future of Rulemaking at the FTC" Event (June 9, 2021) https://www.ftc.gov/public-statements/2021/06/wilson-statement-warnings-competition-rulemaking-ftc.

[10] 2021 UMC Statement at 3.

III. The Bipartisan 2015 UMC Statement is Consistent with Section 5

The Bipartisan 2015 UMC Statement is consistent with Section 5. By its terms, Section 5 concerns "unfair methods of *competition*" (emphasis added). Interpreting those words in light of how the courts have analyzed competition – including in Section 5 cases – takes the text seriously. Providing flexibility – which Section 5 does – is not the same as letting the FTC do whatever it wants.

The 2021 UMC Statement incorrectly claims that the Bipartisan 2015 UMC Statement "negates the Commission's core legislative mandate[.]" The majority spill much ink to make a simple point: Section 5 reaches beyond the Sherman Act and the Clayton Act.[11] On this, there is no disagreement between us and the majority; or, for that matter, between the majority and the Bipartisan 2015 UMC Statement. That statement clearly says that "Section 5's ban on unfair methods of competition encompasses not only those acts and practices that violate the Sherman or Clayton Act, but also those that contravene the spirit of the antitrust laws and those that, if allowed to mature or complete, could violate the Sherman or Clayton Act."[12] Thus, when the majority fault the Bipartisan 2015 UMC Statement for "tethering Section 5 to the Sherman and Clayton Acts[,]" they are attacking a strawman.[13] The question, which the majority fail to answer, is not whether Section 5 reaches beyond Sherman and Clayton Acts, but how far beyond.

The 2021 UMC Statement provides a blinkered history lesson based largely on snippets of legislative history that paint an incomplete – and, as legislative history often does, unreliable – picture. While the majority get some things right – *e.g.*, that Congress intended Section 5's prohibition of "unfair methods of competition" to go beyond the Sherman Act as interpreted in 1914 – they ignore those parts of the legislative debate that discuss the law's limits.[14] Faced with

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[11] 2021 UMC Statement, at 2-4.

[12] Bipartisan 2015 UMC Statement. The 2021 UMC Statement also brushes aside the FTC's standalone Section 5 enforcement of invitations to collude as a seemingly meaningless development unworthy of serious recognition. The Bipartisan 2015 UMC Statement respects this expansion of the Sherman Act by requiring evaluation "similar to" the rule of reason. Joshua D. Wright & Angela M. Diveley, *Unfair Methods of Competition After the 2015 Commission Statement 8*, THE ANTITRUST SOURCE (Oct. 2015), https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/oct15_wright_10_19f.authcheckdam.pdf ("The Statement's 'similar to' is intended to preserve the Commission's ability to reach invitations to collude and, importantly, to provide an analytical framework that includes consideration of this type of expected harm to competition."). The now well-known prohibition on invitations to collude likely prevents countless overtures to engage in per se illegal conduct, an impact that should not be underestimated.

[13] 2021 UMC Statement at 2. If their criticism refers to the Bipartisan 2015 UMC Statement's guidance that "the Commission is less likely to challenge an act or practice as an unfair method of competition on a standalone basis if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm arising from the act or practice," no reasonable reading of that language supports the conclusion that the Bipartisan 2015 UMC Statement tethered or otherwise confined Section 5's scope to those other statutes. If anything, it clearly suggests otherwise by acknowledging a role for Section 5 when the Sherman and Clayton Acts are insufficient.

[14] In so doing, the majority succumb to the well-known mistake of treating legislative history like "a crowded cocktail party and looking over the heads of the guests for one's friends." Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (paraphrasing Judge Harold Leventhal).

a standard as vague and potentially unbounded as "unfairness," Democrat and Republican lawmakers alike were rightfully concerned about giving the FTC too *much* power. For example, one senator warned that the term "unfair competition" could give the FTC "the absolute power . . . of arbitrarily determining whether any act submitted to it is or is not unfair competition[.]"[15] Another questioned the constitutionality of the proposed law, as it provided no "guide of law" to determine unfairness and "substitute[d] for a government of law the government of a board of five men."[16] Lawmakers also worried that the FTC would apply Section 5 to protect some competitors from their more efficient rivals, to the detriment of consumers.[17]

Section 5's defenders responded with reassurances that fairness was about protecting competition and the public, not competitors. Senator Cummins, cited by the majority, stated that Section 5 is concerned "not merely with unfairness to the rival or competitor", but with "unfairness to the public"; and "[n]o sane, sensible man ever suggested that mere underselling constitutes unfair competition."[18] As at least one commentator has argued, this back-and-forth indicates that Section 5's proscription of "unfair methods of competition" should reach only those methods that are likely to exclude equally or more efficient competitors from a market.[19] By failing to grapple with – indeed, by completely ignoring – this inconvenient part of the legislative history, the 2021 UMC Statement presents a distorted view of what Congress envisioned for Section 5.

IV. Withdrawing the Bipartisan 2015 UMC Statement Is Contrary to Sound Competition Law and Policy

Although broader in scope than the Sherman and Clayton Acts, Section 5's prohibition of unfair methods of competition is no different from the other antitrust laws in its singular focus: competition.[20] Turning away from established mechanisms, like the rule of reason, for evaluating competition is the wrong move, and it will hurt consumers.

Applying a framework similar to the rule of reason, as the Bipartisan 2015 UMC Statement did, means that the Commission will look carefully at the facts to determine the effect of a company's

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[15] 51 Cong. Rec. 11,103 (1914) (remarks of Sen. Charles Thomas).

[16] *Id.* at 11,114 (remarks of Sen. James Reed).

[17] *See*, *e.g.*, *id.* at 11,601 (remarks of Sen. William Borah) ("Would a commission say that that was unfair competition—that because a large business could afford . . . to sell at the lower price it was unfair for them to sell at the lower price simply because smaller concerns could not afford to sell for that price?"). The proposals in The House Judiciary Committee's Majority Staff Report raise precisely these concerns. *See infra* note 25.

[18] *Id.* at 11,105, 12,815.

[19] William Kolasky, *"Unfair Methods of Competition": The Legislative History Underlying Section 5 of the FTC Act* 2 (Washington Legal Foundation Working Paper, Paper No. 189, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2524362.

[20] Nothing in the 2021 UMC Statement suggests that the majority claim otherwise. If they do, we would hope that they would make their position clear to the public as quickly as possible, and explain what else "unfair methods of competition" captures.

conduct. Despite the majority's description of the rule of reason as "unwieldy" and "unadministrable,"[21] that has been the law for over a century.[22] Justice Louis Brandeis endorsed it in 1918 in his famed decision in *Chicago Board of Trade*,[23] and a unanimous Supreme Court reiterated it just days ago when it handed deserving college athletes a victory in *Nat'l Collegiate Athletic Ass'n v. Alston*.[24]

We are concerned that the majority's hostility to the rule of reason signals a desire to exclude consideration of business justifications and efficiencies when assessing the legality of scrutinized conduct. Failing to take into account the benefits of conduct to consumers (and denying businesses the opportunity to defend themselves) opens the door to condemning procompetitive conduct to the detriment of everyday Americans. Were that the law, the FTC would be free to condemn a better product or lower price that hurts no one but competitors—the very essence of competition.[25] Divorcing "unfair methods of competition" from the need to examine the facts regarding the conduct at issue is a dangerous step in the direction of potentially subjecting all conduct not captured by the Sherman or Clayton Acts, but disliked by a majority of commissioners, to per se illegality.

Rejecting the Bipartisan 2015 UMC Statement's embrace of the consumer welfare standard and decades of antitrust jurisprudence is likewise misguided.[26] The consumer welfare standard has

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[21] 2021 UMC Statement at 5.

[22] *See* Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 62 (1911).

[23] Bd. of Trade of City of Chicago v. United States, 246 U.S. 231 (1918).

[24] 141 S. Ct. 2141 (2021). The majority took some liberties in the 2021 UMC Statement in citing purported criticisms of the rule of reason by prominent legal thinkers. *See* 2021 UMC Statement at 5 n. 31. The language quoted from Justice Breyer's dissent in *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.* was limited to the challenges of applying the rule of reason to resale price maintenance specifically, and not about the rule of reason generally. 551 U.S. 877, 916 (2007). And the article by then-Professor Richard Posner criticizes the rule of reason as formulated in 1977. And what solution did Professor Posner recommend in that same article? For a start, that courts "adopt Professor [Robert] Bork's position that the essential spirit of the Rule [of Reason] is to condemn only those practices that are, on balance, inefficient in the economic sense." Richard A. Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. CHI. L. REV. 1, 16 (1977).

[25] The House Judiciary Committee's Majority Staff Report – published last fall after the committee's investigation of the GAFA companies – proposes this approach by removing the recoupment prong from predatory pricing test and banning product improvements that benefit consumers at the inconvenience of rivals. *See* MAJORITY STAFF OF H. COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGIT. MKTS. 397-398 (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf ("Courts, however, have introduced a 'recoupment' requirement, necessitating that plaintiffs prove that the losses incurred through below-cost pricing subsequently were or could be recouped. Although dominant digital markets can recoup these losses through various means over the long term, recoupment is difficult for plaintiffs to prove in the short term. Since the recoupment requirement was introduced, successful predatory pricing cases have plummeted. The Subcommittee recommends clarifying that proof of recoupment is not necessary to prove predatory pricing or predatory buying, overriding the Supreme Court's decisions[.]") (citations omitted); *id.* at 398 ("recommending that Congress consider whether making a design change that excludes competitors or otherwise undermines competition should be a violation of Section 2.").

[26] The abandonment of the consumer welfare standard suggested by the withdrawal of the Bipartisan 2015 UMC Statement is reaffirmed by the Commission's simultaneous change to Section 0 of the Commission's Rules of

long been the lodestar of our antitrust laws, embraced and explained by courts and the antitrust enforcement agencies alike.[27] And for good reason: it is administrable and promotes predictable outcomes that seek to permit procompetitive (and condemn anticompetitive) conduct.[28]

Some argue that antitrust should jettison the consumer welfare standard so that it can promote other interests like protecting competitors and jobs, or reducing income inequality.[29] To some extent, this critique is simply misplaced, based on a caricature of consumer welfare as based wholly on price. In reality, the standard is not narrowly focused on price to the exclusion of other factors that benefit consumers. Antitrust enforcement based on consumer welfare considers product quality, product variety, service, and innovation.[30]

But leaving that aside, just as the Commission today declines to explain precisely its view of the standards for Section 5, critics of the consumer welfare standard offer no guidance on the full array of competing interests they believe antitrust should vindicate, or how to weigh those interests. Their vision is a farrago of vague and competing values that will undermine the law's predictability, credibility, and administrability, while facilitating politicized outcomes. Agencies and courts alike will serve (at least) two masters, and thus none. Worst of all, consumers will be denied the benefits of competition.[31] But even though we (and the public) remain in the dark, we

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Practice. There, the Commission struck language that the Bureau of Competition's "activities seek to ensure price competition, quality products and services and efficient operation of the national economy." See 16 CFR § 0.16 (2000).

[27] *See*, *e.g.*, 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 114 (5th ed. 2020); Christine S. Wilson, Thomas J. Klotz & Jeremy A. Sandford, *Recalibrating the Dialogue on Welfare Standards: Reinserting the Total Welfare Standard into the Debate*, 26 GEO. MASON L. REV. 1435 (2019); Noah Joshua Phillips, Commissioner, Fed. Trade Comm'n, Post Hoc, Ergo Propter Hoc 1 (Oct. 17, 2018), https://www.ftc.gov/system/files/documents/public_statements/1416803/phillips_-_us_chamber_of_commerce_10-17-18_0.pdf.

[28] 1 AREEDA & HOVENKAMP, *supra* note 27, at ¶ 110; Wilson et al., *supra* note 27, at 1443-52.

[29] *See*, *e.g.*, BARRY C. LYNN, CORNERED: THE NEW MONOPOLY CAPITALISM AND THE ECONOMICS OF DESTRUCTION (2010); SENATE DEMOCRATS, A BETTER DEAL: CRACKING DOWN ON CORPORATE MONOPOLIES 2 (2017) [hereinafter A BETTER DEAL], *available at* https://www.democrats.senate.gov/imo/media/doc/2017/07/A-Better-Deal-on-Competition-and-Costs-1.pdf (proposing new merger standards that "will prevent not only mergers that unfairly increase prices but also those that unfairly reduce competition" and "will ensure that regulators carefully scrutinize whether mergers reduce wages, cut jobs, lower product quality, limit access to services, stifle innovation, or hinder the ability of small businesses and entrepreneurs to compete").

[30] *See, e.g.,* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 2 (2010), https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf (effects considered in merger analysis "can also be manifested in non-price terms and conditions that adversely affect customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation"). *See also* Wilson et al., *supra* note 27, at 1447.

[31] *See* 1 AREEDA & HOVENKAMP, *supra* note 27, at ¶ 111; Wilson et al., *supra* note 27, at 1453-55; Noah Joshua Phillips, Commissioner, Fed. Trade Comm'n, Should We Block This Merger? Some Thoughts on Converging Antitrust and Privacy 11-16 (Jan. 30, 2020), https://www.ftc.gov/system/files/documents/public_statements/1565039/phillips_-_stanford_speech_10-30-20.pdf; Noah Joshua Phillips, Commissioner, Fed. Trade Comm'n, Remarks at the Mentor Group Paris Forum 11-17 (Sept. 13, 2019), https://www.ftc.gov/system/files/documents/public_statements/1546405/phillips_-_paris_forum_9-13-2019.pdf.

have little doubt that efforts to distance Section 5 from the consumer welfare standard are a recipe for bad policy and adverse court decisions.

The 2021 UMC Statement hints at an original meaning of "unfair methods of competition" that it fails to describe, but suggests is a law without limit. We are not so sure. First, while early Sherman Act decisions like *Standard Oil* surely animated Congress in adopting the FTC Act, as one of the articles cited in the 2021 UMC Statement notes, Section 5 has played a small role in developing competition policy in the U.S. precisely because "the Sherman Act proved to be a far more flexible tool for setting antitrust rules than Congress expected in the early 20th century."[32] Interpretations from the judiciary, including multiple Supreme Court cases, "suggested that the Sherman Act would reach an especially wide range of business behavior."[33] Over 100 years later, "the courts recognize the Sherman Act's expanded reach, with extensive precedent developed through actions by the antitrust enforcement authorities, including the FTC, and private parties."[34] In our tenure, for example, the FTC has brought a substantial number of monopolization cases in industries ranging from gene sequencing and pharmaceuticals to high technology.[35]

Second, unlike those in academia, the FTC will have to defend its interpretation of Section 5 in court, where it should expect a hostile reception if it cannot offer clear limiting principles. (Another reason still that removing guidance while failing to replace it is a bad idea.) Since the Supreme Court last articulated the scope of Section 5, the Commission has failed successfully to

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[32] William E. Kovacic & Marc Winerman, *Competition Policy & the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 934 (2010) ("Several factors explain why Section 5 has played so small a role in the development of U.S. competition policy principles. Probably the most important is that the Sherman Act proved to be a far more flexible tool for setting antitrust rules than Congress expected in the early 20th century.").

[33] *Id.*

[34] Maureen K. Ohlhausen, Commissioner, Fed. Trade Comm'n, Remarks on Section 5: Principles of Navigation 4 (July 25, 2013), https://www.ftc.gov/sites/default/files/documents/public_statements/section-5-principles-navigation/130725section5speech.pdf.

[35] *See*, *e.g.*, FTC Press Release, FTC Charges Broadcom with Illegal Monopolization and Orders the Semiconductor Supplier to Cease its Anticompetitive Conduct (July 2, 2021), https://www.ftc.gov/news-events/press-releases/2021/07/ftc-charges-broadcom-illegal-monopolization-orders-semiconductor; FTC Press Release, FTC and NY Attorney General Charge Vyera Pharmaceuticals, Martin Shkreli, and Other Defendants with Anticompetitive Scheme to Protect a List-Price Increase of More Than 4,000 Percent for Life Saving Drug Daraprim (Jan. 27, 2020), https://www.ftc.gov/news-events/press-releases/2020/01/ftc-ny-attorney-general-charge-vyera-pharmaceuticals-martin; FTC Press Release, FTC Challenges Illumina's Proposed Acquisition of PacBio (Dec. 17, 2019), https://www.ftc.gov/news-events/press-releases/2019/12/ftc-challenges-illuminas-proposed-acquisition-pacbio; FTC Press Release, Reckitt Benckiser Group plc to Pay $50 Million to Consumers, Settling FTC Charges that the Company Illegally Maintained a Monopoly over the Opioid Addiction Treatment Suboxone (July 11, 2019), https://www.ftc.gov/news-events/press-releases/2019/07/reckitt-benckiser-group-plc-pay-50-million-consumers-settling-ftc; FTC Press Release, FTC Charges Surescripts with Illegal Monopolization of E-Prescription Markets (Apr. 24, 2019), https://www.ftc.gov/news-events/press-releases/2019/04/ftc-charges-surescripts-illegal-monopolization-e-prescription.

litigate a standalone Section 5 case.[36] As Bill Kovacic and Marc Winerman explain, a successful use of Section 5 "ha[s] not been for lack of trying. In the 1970s the Commission premised several cases on distinctive Section 5 theories. Three of these matters – *Boise Cascade*,[37] *Official Airline Guides*,[38] and *Ethyl*[39] – resulted in court of appeals decisions. All were adverse to the agency."[40] The FTC also brought the *Abbott Laboratories* case in the 1990s, but again lost, this time before the district court.[41] When discussing the Commission's track record, Kovacic and Winerman observe, "[i]n each instance, the tribunal recognized that Section 5 allows the FTC to challenge behavior beyond the reach of the other antitrust laws. In each instance, the court found that the Commission had failed to make a compelling case for condemning the conduct in question."[42] The 2021 UMC Statement laments that the FTC has used Section 5 only once since the Bipartisan 2015 UMC Statement was issued.[43] Tellingly, the majority fail to note that in the one case involving a standalone Section 5 claim issued following the Bipartisan 2015 UMC Statement, *Qualcomm Inc. v. FTC*, the Commission lost on appeal.[44]

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Today, we lament the majority's rejection of longstanding antitrust foundations that have provided the basis for administrable, predictable, and credible enforcement, including the rule of reason and the consumer welfare standard. Going forward, we fear a rash of cases and rulemakings untethered from sound law and economics and hostile to procompetitive conduct. Consumers will lose the benefits of competition, and honest businesses will lose clarity regarding the boundaries of lawful conduct. The only winners of the Commission's rescission of the Bipartisan 2015 UMC Statement are inefficient rivals and those who seek to politicize antitrust.

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[36] We acknowledge the successful use of Section 5 in the 1960s. *See* FTC v. Texaco, Inc., 393 U.S. 223 (1968); Atl. Refining Co. v. FTC, 381 U.S. 357 (1965); and FTC v. Brown Shoe Co., 384 U.S. 316 (1966).

[37] Boise Cascade Corp. v. FTC, 637 F.2d 573 (9th Cir. 1980).

[38] Off. Airline Guides, Inc. v. FTC, 630 F.2d 920 (2d Cir. 1980).

[39] E.I. du Pont de Nemours & Co. v. FTC, 729 F.2d 128 (2d Cir. 1984).

[40] Kovacic & Winerman, *supra* note 32, at 1014.

[41] *See* FTC v. Abbott Labs., 853 F. Supp. 526 (D.D.C. 1994).

[42] Kovacic & Winerman, *supra* note 32 at 942.

[43] 2021 UMC Statement at 5.

[44] FTC v. Qualcomm Inc., 969 F.3d 974 (9th Cir. 2020).

Dissenting Statement of Commissioners Christine S. Wilson and Noah Joshua Phillips
Regarding the Commission Statement
On the Adoption of Revised Section 18 Rulemaking Procedures

July 9, 2021

Regulations, even well-intentioned ones, frequently displace competition, stifle innovation, raise the costs of doing business, limit consumer choice, and increase the prices that consumers must pay. Poorly conceived regulations impose these harms and simultaneously undermine America's global competitiveness.[1] For these reasons, rulemaking authority should be employed judiciously, and for the narrow purpose of addressing market failures.

During the past few years, our colleagues have advocated for regulation upon regulation, in industry after industry.[2] Recasting the Federal Trade Commission as a regulator of last resort is not a new idea, and history shows it is not a good one.[3] But our colleagues leave little doubt that regulation, not competition, is the goal. Lest there be any quibble about that, the revisions to the Rules of Practice we adopted last week strike the following sentences from the description of the FTC's Bureau of Competition:

> "The Bureau's work aims to preserve the free market system and assure the unfettered operation of the forces of supply and demand. Its activities seek to ensure price competition, quality products and services and efficient operation of the national economy."

The deletion of this description makes clear the majority's intention to embark on a sweeping campaign to replace the free market system with its own enlightened views of how companies should operate, and to replace the goals of price competition, quality, and efficiency with subjective and as-yet-unstated goals that are ripe for political manipulation. The revisions thus confirm the suggestion elsewhere that the majority intends to jettison the consumer welfare

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[1] *See, e.g., Regulatory Review of Safeguards Rule*, Dissenting Statement of Commissioner Noah Joshua Phillips and Commissioner Christine S. Wilson (Mar. 5, 2019), *available at* https://www.ftc.gov/system/files/documents/public_statements/1466705/reg_review_of_safeguards_rule_cmr_phillips_wilson_dissent.pdf; *Notice of Proposed Rulemaking: Energy Labeling Rule*, Dissenting Statement of Christine S. Wilson (Dec. 10, 2018), *available at* https://www.ftc.gov/system/files/documents/public_statements/1433166/2018-12-7_statement_of_c_wilson_energy_labeling.pdf. *See also* Christine S. Wilson, Prepared Remarks at the Federalist Society The Future of Rulemaking at the FTC, Hey, I've Seen This One: Warnings for Competition Rulemaking at the FTC (June 9, 2021), *available https://www.ftc.gov/system/files/documents/public_statements/1591666/wilson_statement_back_to_the_future_of_rulemaking.pdf*.

[2] *See, e.g.*, Rohit Chopra and Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 86 University of Chicago Law Review 357 (2020), *available at* https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/ChopraKhan_Rulemaking_87UCLR357.pdf; Keynote Remarks of FTC Acting Chairwoman Rebecca Kelly Slaughter at the Consumer Federation of America's Virtual Consumer Assembly (May 4, 2021), *available at* https://www.ftc.gov/system/files/documents/public_statements/1589607/keynote-remarks-acting-chairwoman-rebecca-kelly-slaughter-cfa-virtual-consumer-assembly.pdf.

[3] As children of the 1970s, we leave for another day the discussion of why there is enthusiasm in any camp for reviving the economic policies of that decade. American consumers derived little benefit from higher prices, constrained supply, and less choice, while American companies lost ground to overseas competitors.

standard that has guided antitrust enforcement under both Democrat and Republican administrations for decades.[4]

Better regulation—which is not the same as *more* regulation—ought to be the goal. By reducing transparency and objectivity in the rulemaking process, the revisions to our Section 18 procedures move us away from that goal and toward more—and *worse*—regulation.

Although Congress empowered the FTC to issue trade regulations when it passed the Magnuson-Moss Act,[5] it imposed significant procedural obligations on the Commission to cabin its discretion.[6] Despite those congressional efforts, the agency engaged in a flurry of rulemaking activity that sought to regulate broad swaths of the economy in the wake of Magnuson-Moss.[7] This period of hyperactivity famously included an effort aimed at children's advertising (the so-called "Kid-Vid" rulemaking) that sought, among other things, to ban all advertising on television programs for children under 8 years of age. The negative reaction from businesses and many in Congress was swift.[8] The Washington Post accused the agency of attempting to serve as the "national nanny."[9] A Senate Report found that the agency's rulemaking efforts were filled with "excessive ambiguity, confusion, and uncertainty."[10] Backlash from the agency's sweeping regulatory efforts culminated in the Federal Trade Commission Improvements Act of 1980, which imposed additional procedural obligations on Section 18 rulemaking efforts.[11] Yet again,

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[4] Dissenting Statement of Commissioners Christine S. Wilson and Noah Joshua Phillips on the New "Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' under Section 5 of the FTC Act" (July 9, 2021).

[5] Magnuson-Moss Warranty Act, Pub. L. No. 93-637, 88 Stat. 2183.

[6] Barry B. Boyer, Executive Summary of Barry B. Boyer Report. Trade Regulation Rulemaking Procedures of the Federal Trade Commission, Report in Support of ACUS Recommendation 79-1, *in* ADMINISTRATIVE CONFERENCE OF THE UNITED STATES: RECOMMENDATIONS AND REPORTS 41, 43 (1979) ("[T]he statutory standard governing the FTC's consumer protection activity provided few real limits…As a result, the feeling was apparently widespread among the members of the congressional committees considering the Magnuson-Moss Act that some means had to be found to control this broad discretion. The limits which Congress considered and ultimately enacted were predominantly procedural rather than substantive; the broad rulemaking delegation was retained, but the procedures for promulgating the rules were elaborated and formalized.").

[7] Commissioner Wilson has described some of these rulemaking initiatives in recent statements. *See, e.g., Notice of Proposed Rulemaking for the Energy Labeling Rule*, Dissenting Statement of Commissioner Christine S. Wilson (Dec. 22, 2020), *available at* https://www.ftc.gov/system/files/documents/public_statements/1585242/commission_wilson_dissenting_statement_energy_labeling_rule_final12-22-2020revd2.pdf; *Advance Notice of Proposed Rulemaking for Regulatory Review of the Amplifier Rule*, Concurring Statement of Commissioner Christine S. Wilson (Dec. 17, 2020), *available at* https://www.ftc.gov/system/files/documents/public_statements/1585038/p974222amplifierrulewilsonstatement.pdf.

[8] Supporters of the Magnuson-Moss Act and the FTC Improvements Act of 1980 included then-Senator Joe Biden, who also voted to abolish the Interstate Commerce Commission and the Civil Aeronautics Board because of the recognition of the negative impact that those massive regulatory regimes had on consumers.

[9] *The FTC as National Nanny*, The WASH. POST (Mar. 1, 1978), https://www.washingtonpost.com/archive/politics/1978/03/01/the-ftc-as-national-nanny/69f778f5-8407-4df0-b0e9-7f1f8e826b3b/.

[10] S. REP. NO. 96-500, at 3 (1979).

[11] Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374. Our colleagues characterize the law as "instituting some lasting revisions around the edges of FTC rulemaking." But the changes were significant. Congress required the FTC to issue an Advance Notice of Proposed Rulemaking (ANPRM) and to prepare regulatory analyses of proposed and final rules (justifying the cost and the regulatory framework); restrained

Congress cabined the agency's discretion—a rebuke to the agency's regulatory enthusiasm that Ernest Gellhorn characterized as "The Wages of Zealotry."[12]

The majority asserts that the revisions to Section 18 procedures are designed to "streamline" rulemaking and reduce "red tape."[13] (To be clear, the red tape in question helps avoid the ill-advised application of red tape to American businesses.) What the changes – adopted without public input – in fact do is fast-track regulation at the expense of public input, objectivity, and a full evidentiary record. We see no need for bulldozing procedural safeguards in our Section 18 rulemaking Rules of Practice and are concerned in particular that the reforms undercut the independence of those charged with conducting evidentiary hearings, limit valuable input from the public, and reverse decades of practice regarding agency transparency. Accordingly, we respectfully dissent.[14]

Corruption of the Fact-Finding Process

Effective regulation should be based on solid evidence, which is why the Magnuson-Moss Act provides for a comprehensive fact-finding process in advance of promulgating rules. Section 18 trade regulation rules have considerable force, setting the table for high stakes in Section 18 rulemaking proceedings. For example, Section 18 rules substantially increase the penalties for rule violations.[15] An independent hearing process is essential to crafting rules that address actual market failures rather than pet projects of a majority of unelected Commissioners.

The role of a Presiding Officer is to oversee the fair conduct of the hearing process and make independent recommendations to the Commission based on relevant and material evidence. During the 1970s rulemaking spree, the Presiding Officer was viewed as a puppet of agency

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the Commission's authority relating to voluntary standards and certification activities, children's advertising, and funeral industry practices; and required regular oversight hearings on Commission activities. Driven by concerns that the FTC was overregulating, the Act also allowed Congress to veto future FTC rules, although courts subsequently overturned this provision as unconstitutional. Timothy J. Muris, *Rules Without Reason*, AEI J. ON GOV'T AND SOC'Y (Sept/Oct. 1982) (describing failed FTC rulemaking proceedings), available at https://www.cato.org/sites/cato.org/files/serials/files/regulation/1982/9/v6n5- 4.pdf; Teresa Schwartz, Regulating Unfair Practices Under The FTC Act: The Need For a Legal Standard of Unfairness, 11 AKRON L. REV. 1 (1978) (explaining that the judicial reversals of FTC regulations resulted from a failure to establish an adequate legal basis for the regulations), available at https://ideaexchange.uakron.edu/akronlawreview/vol11/iss1/1/.

[12] Ernest Gellhorn, *The Wages of Zealotry: The FTC Under Siege*, 4 REGULATION 33 (1980).

[13] Statement of Commissioner Rebecca Kelly Slaughter Joined by Chair Lina Khan and Commissioner Rohit Chopra *Regarding Adoption of Revised section 18 Rulemaking Procedures* (July 1, 2021), *available at* https://www.ftc.gov/system/files/documents/public_statements/1591522/joint_rules_of_practice-statement_final_7121_1131am.pdf.

[14] A statement of the Commission differs from a majority statement. A Commission Statement is binding on the Commission, remains in place until it is repealed or superseded, and can be cited as the opinion of the Commission.

[15] A knowing violation of a trade regulation rule can result in civil penalties of up to $43,792 per day, and these penalties begin to accrue as soon as the violation takes place. The Commission can also seek broad equitable remedies for consumers injured as a result of trade regulation rule violations.

management, leading to the perception that outcomes were biased and predetermined.[16] To address this issue and build trust in the rulemaking process, Congress adopted laws to ensure the independence of the Presiding Officer, which the Commission augmented in the Rules of Practice.[17] The revisions cut in the opposite direction.

Naming of the Presiding Officer

The newly-instituted rules remove selection of the Presiding Officer from an independent judge and assign that role to the Chair. The Commission, heeding Congressional concerns regarding independence, previously required the Chief Administrative Law Judge ("ALJ") to serve as the Chief Presiding Officer and empowered the ALJ to pick the person who would oversee the rulemaking hearing process. That person, in turn, conducts the hearing, compiles the hearing record, resolves disputes, and makes recommendations to the Commission. The hearing helps determine the facts on which the Commission bases its policy calls. By relying on an independent judge to select the hearing officer, the process thrown out by the majority last Thursday gave the public some assurance that the proceedings would be unbiased and that all points of view would be heard and considered. The revisions enable the Chair to hand pick the presiding officer, opening the door for a fact-finding process gerrymandered to fit the agenda of a majority of commissioners.

Hearing format

The revisions also strip the Presiding Officer of significant control over the hearing process. The majority characterizes these changes as "providing the Commission with greater accountability and control over Section 18 rulemaking." Under the Commission's new rules, the Commission, not the Presiding Officer or the public, will set the agenda for the hearing, choose which issues will be discussed, and select which parties will be permitted to testify, conduct cross-examination, and offer rebuttal evidence. Simply put, a majority of the Commission will now have a greater ability to control which facts make it into the record, laying the groundwork for skewed rulemakings designed not to benefit the consumer but instead to satisfy the Commission majority.

Designation of disputed issues of material fact

The revisions narrow opportunities for the public to help determine which factual issues are in dispute. Section 18 rulemakings afford those affected by the proposed rules the right to a hearing, which sometimes includes the right to cross-examine witnesses and present evidence

[16] *See Oversight to Examine the Enforcement and Administrative Authority of the FTC to Regulate Unfair and Deceptive Trade Practices: Hearings Before the Subcomm. for Consumers, S. Comm. on Commerce, Science, and Transportation*, 96th Cong. (1979) (capturing testimony from businesses, including but not limited to The Association of Physical Fitness Centers, The National Fire Protection Association, U.S. Chamber of Commerce, and the American Plywood Association, expressing concern about the independence of the Presiding Officer) https://books.google.com/books?id=lSuF0giWSiEC.

[17] Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374.

rebutting claims about the need for rules, their costs, and how to craft them. But the hearing is confined to "disputed issues of material fact" that are "necessary to resolve."

Until last Thursday, the universe of disputed issues of material fact was not finalized by the Presiding Officer until there had been ample opportunity for public comment. Now, the Commission will declare the list of disputed issues of material fact earlier in the rulemaking process, and finalize it with more limited public input.

What all this means is that a majority of the Commission can more easily ignore contradictory views by omitting disputed issues from the NPRM and the initial hearing notice. Replacing independent and objective analysis of controversial issues in the agency's rulemaking proceedings with a "majority rules" regime not only makes it less likely that the resulting regulations will benefit consumers, but also less likely that trade regulation rules will survive legal scrutiny.[18]

Procedural Limitations Diminish Public Input and Understanding

The majority declined to seek public comment on the revisions.[19] Had they done so, the public might have noticed that the revisions reduce opportunities for public input and render far less transparent our proposed actions. The majority claims these changes remove "extraneous and onerous procedures that serve only to delay Commission Business." Transparency and public input can be time consuming, but they are still good. The revisions abolish a staff report that analyzes the rulemaking record and makes recommendations as to the form of the final rule; and remove comment periods on the staff report and the Presiding Officer's recommended decision.[20]

Our old Rules of Practice wove transparency into the rulemaking process by requiring staff to publish a report containing their comprehensive analysis of the rulemaking record. Both we and the public derive great value from the thoughtful assessments of record evidence by expert staff. The traditional staff report also provided a vehicle for expert recommendations regarding the proposed form of the final rule. It allowed the public to check our work. Moreover, public input on the proposed form of the final rule proved valuable, particularly with respect to unintended consequences that might otherwise escape the Commission's consideration, given that final rules

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[18] Section 18 makes clear that agency action can be reversed for procedural error and specifies that FTC rulings limiting cross-examination and rebuttal may constitute reversible error when they have "precluded disclosure of disputed material facts which was necessary for a fair determination by the Commission of the rulemaking proceedings taken as a whole." 15 U.S.C. § 57a(e)(3)(B). If a majority of the Commission precludes the analysis of material, controversial facts, the reviewing court may set aside the rule in question and require the Commission to begin anew the time-consuming and resource-intensive rulemaking process.

[19] FTC Press Release, *Open Commission Meeting – July 1, 2021* (July 1, 2021), https://www.ftc.gov/news-events/events-calendar/open-commission-meeting-july-1-2021.

[20] The majority is choosing to silence interested parties as key areas of dispute are funneled into conclusions from expert staff and the Presiding Officer. We fear such a change will omit critical opportunities to hear about potentially unintended consequences of rules as they begin to crystalize but before they are enacted.

sometimes differ from initially proposed rules. While the benefits of the staff report are great, the time and resources required are not unreasonable – it should take no longer to draft a staff report than it takes to draft the customary final recommendation to the Commission that precedes any Commission action.[21]

Conclusion

The revisions to our Rules of Practice adopted by the majority last Thursday, without public input, undermine the goals of participation and transparency that Congress sought to advance when it enacted and amended Section 18. These changes will facilitate more rules, but not better ones. These changes will also provide additional opportunities for legal challenges in federal court, given that new rules will be formulated pursuant to an agenda-driven process that limits public input and facilitates a biased evidentiary record. When Section 18 was adopted, the FTC suffered from a loss of public trust and was on the brink of being shuttered.[22] The majority would do well to heed lessons from this history, because those who fail to learn from the past are doomed to repeat it.

[21] Opportunity for staff to weigh in on important policy issues, however, is no longer guaranteed. During the July 1, 2021 Open Meeting, Chair Khan omitted staff from the dialogue.

[22] *Id. See also* J. Howard Beales III, *The Federal Trade Commission's Use of Unfairness Authority: Its Rise, Fall, and Resurrection*, 22 J. PUB. POL'Y & MKTG. 192 (2003).

Attachment—Additional Questions for the Record

Subcommittee on Consumer Protection and Commerce
Hearing on
"Transforming the FTC: Legislation to Modernize Consumer Protection"
July 28, 2021

The Honorable Lina Khan, Chair, Federal Trade Commission

The Honorable Janice D. Schakowsky (D-IL)

1. **The Cambridge Analytica scandal was a major privacy violation and merited a strong response by the Federal Trade Commission (FTC). I've heard concerns that Facebook is using its consent order with the FTC as a sword to block researchers and competitors. Protecting consumer privacy is sometimes at odds with the need for meaningful transparency with respect to other consumer protection and competition interests. Going forward, how will the FTC balance consumer privacy concerns against transparency?**

   RESPONSE: I fully support good-faith research in the public interest, provided it is done in a privacy-protective manner. I also believe it is possible for data related to digital advertising to be made available to researchers in a way that protects users' privacy.

The Honorable Lori Trahan (D-MA)

1. **Facebook recently announced it had disabled accounts belonging to researchers at NYU, saying it took the step to "protect people's privacy" and comply with a settlement it struck with the FTC over allegations that NYU's Ad Observatory violated users' privacy.[1] The FTC clarified that their settlement agreement with Facebook did not necessitate that Facebook cease collaboration with researchers.[2] Do you believe data related to digital advertising can be made available to researchers in a way that preserves the privacy of internet users?**

   RESPONSE: I fully support good-faith research in the public interest, provided it is done in a privacy-protective manner. I also believe it is possible for data related to digital advertising to be made available to researchers in a way that protects users' privacy.

2. **As for other social media data such as those listed in (c)(4)(C)(i) of H.R. 3451, the "Social Media DATA Act",[3] has the FTC considered ways to protect academic independence while respecting the privacy of internet users? If the FTC had more resources, how would they tackle this issue?**

   RESPONSE: The FTC values academic independence and seeks to ensure its work is informed by rigorous research. In the past, the FTC has testified against provisions of legislation that would have restricted access to data for academic researchers, noting that prohibiting access to data for research purposes could be detrimental to privacy, security, and safety.

   With additional resources, the FTC would build on this approach by hiring individuals with knowledge and expertise to help the agency tackle these issues. The types of professional experience that could be useful include product development, supply chain management, data privacy and analytics, biometric privacy, information security, and other related fields as necessary.

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[1] Facebook, *Research cannot be the Justification for Compromising People's Privacy* (August 2021) (about.fb.com/news/2021/08/research-cannot-be-the-justification-for-compromising-peoples-privacy/).

[2] Letter from Acting Director of the Bureau of Consumer Protection Samuel Levine to Facebook (Aug. 5, 2021) (www.ftc.gov/news-events/blogs/consumer-blog/2021/08/letter-acting-director-bureau-consumer-protection-samuel)

[3] H.R. 3451, the "Social Media DATA Act of 2021", 117th Cong., § 1 (2021).

The Honorable Robin Kelly (D-IL)

1. **With regard to the FTC's Right to Repair work, have you, or do you plan to, solicited input from the EPA on the issue of engine emissions control tampering, and specifically, how it could be used to override emissions controls and impact air quality and public health?**

   RESPONSE: The FTC issued a call for empirical research and comments from any interested parties and stakeholders prior to the Nixing the Fix workshop held in July of 2019. Following the workshop, the Commission accepted comments into September 2019, and the FTC staff continues to meet with stakeholders and interested parties. The FTC has not solicited input specifically from the EPA outside of these general efforts.

   The Commission's right to repair work, including the Workshop and related report to Congress,[4] has focused on the various mechanisms that manufacturers use to limit consumers' repair options and the ways that these restrictions harm users. The FTC has not studied the prevalence or effects of restrictions that limit users' ability to modify their products.

   In instances where the Commission's work implicates laws and regulations outside of the agency's expertise, we will seek input from our government partners, including peer agencies like the EPA.

2. **Can you clarify whether the FTC is actively monitoring direct-to-consumer medical products from a consumer protection perspective and how the FTC is approaching this issue given the FTC's action filing amicus briefs from an antitrust perspective?**

   RESPONSE: The FTC receives millions of reports from consumers each year covering a range of products and marketing practices, including direct-to-consumer medical products. Staff mines such complaint data to identify law enforcement targets; we can also use the data to inform the agency's policy and advocacy work.

[4] Federal Trade Commission, *Nixing the Fix: An FTC Report to Congress on Repair Restrictions* (May 2021), https://www.ftc.gov/system/files/documents/reports/nixing-fix-ftc-report-congress-repair-restrictions/nixing_the_fix_report_final_5521_630pm-508_002.pdf.

The Honorable Gus Bilirakis (R-FL)

1. **Chair Khan, can you confirm you endorsed the use of effective behavioral remedies to address competition concerns? For example, doesn't the 2020 House Judiciary Committee's Investigative Report promote government regulation of natural monopolies, and in cases where a dominant vertical merger partner controls "critical input," a requirement that the dominant partner provide competitors with "easy access" to the critical input on a non-discriminatory basis? What will your policy be on mergers moving forward and will it follow similarly?**

   RESPONSE: I believe that the Commission should have no tolerance for unlawful mergers, and I am skeptical about the efficacy of behavioral remedies. Research and experience suggest that behavioral remedies pose significant administrability problems and have often failed to prevent the merged entity from engaging in anticompetitive tactics enabled by the transaction. While the antitrust agencies have at times relied on behavioral remedies, both the Commission and the Department of Justice have a stated preference for structural remedies, even for vertical mergers. I believe this preference is consistent with what Congress expects. Courts have also widely acknowledged that divestiture is the presumptive remedy for an acquisition found to be illegal under Section 7 of the Clayton Act.

   While structural remedies generally have a stronger track record than behavioral remedies, studies show that divestitures, too, may prove inadequate in the face of an unlawful merger. In light of this, I believe the antitrust agencies should more frequently consider opposing problematic deals outright.

2. **A Chinese company, BGI Group, is competing with American genetic sequencing companies like Illumina. Can you confirm the Chinese company is not behind efforts to block Illumina's merger with GRAIL, which would accelerate the early detection of cancer through a simple blood test? Can you explain how the FTC through its actions would not tie the hands of American companies and play into the hands of the Chinese Communist Party?**

   RESPONSE: Although I cannot comment on any pending adjudicative proceeding, the sole objective of Commission actions that seek to block mergers is to protect Americans from unlawful transactions, in accordance with our statutory obligations.

   a. **Can you explain how China would not gain most from the FTC blocking mergers such as the merger of Illumina and GRAIL?**

      RESPONSE: The Commission issued a complaint to cease the merger because it had reason to believe that the deal would substantially lessen competition, undermining innovation and raising prices. The case currently is pending before the ALJ and eventually could come before the Commission as

an adjudicative body. Accordingly, it would be inappropriate for me to comment on the matter further at this time.

3. **Preserving U.S. leadership in healthcare technology is critical, and the last thing we need is our own government acting as a headwind to innovation, especially when other countries like China are innovating at record speed with the full support of their government. I'm concerned that the FTC is using administrative hoops to slow down deals that could put American companies ahead of their Chinese competitors. Is it true that the FTC recently refused to even meet with healthcare company Illumina to discuss a merger that would advance cancer screening technology that has the potential to save millions of lives?**

   RESPONSE: Although I cannot comment on any pending adjudicative proceeding, I can assure you that as a general matter, the FTC provides target companies ample opportunities to convey their view. However, once litigation has begun and for as long as it is pending, Commission's ex-parte rules prevent communications with the Commission or its staff except as part of that litigation.

   a. **Can you explain why isn't the FTC doing everything in its power to facilitate innovation in a breakthrough area like this?**

      RESPONSE: The Commission prioritizes antitrust enforcement in health care markets precisely because competition can significantly drive innovation. Incumbent companies that do not face competition have few incentives to bring new products to market, depriving Americans of new advances.

4. **Where a merger is being reviewed in multiple jurisdictions, is it the FTC's policy to defer to the process in the other jurisdiction, rather than litigating the merger in the United States?**

   RESPONSE: The Commission makes its own law enforcement decisions based on its analysis of U.S. laws. In order to take advantage of the benefits of premerger review, the Commission must evaluate when closing is likely to occur. If the merger is still subject to other closing conditions, such as regulatory approval or review by a foreign enforcer, the Commission may take such delay into account in deciding when to initiate an enforcement action.

5. **Does the FTC prefer to litigate mergers in its own administrative tribunal rather than allowing federal courts to address merger issues?**

   RESPONSE: The Commission's primary forum for determining violations of Section 7 of the Clayton Act is its administrative proceedings. The Commission also has the authority to ask a federal court to issue a preliminary injunction preventing the consummation of a proposed transaction pending an administrative trial on the merits.

The agency's approach is guided not by the preferences of the Commission, but instead by the statutory text and institutional design crafted by Congress.

6. **If H.R. 4447 were enacted into the law, could we have a problem where the rules constantly change based on the whims of each administration's FTC? How could this impact the small businesses who are affected by these constantly changing rules?**

RESPONSE: Currently, the FTC is required to use the more cumbersome procedures in Section 18 of the FTC Act to promulgate trade regulation rules relating to unfair or deceptive acts or practices. H.R. 4447 would allow the FTC to use the same notice-and-comment procedures used by most other agencies under the Administrative Procedure Act (APA), enabling the Commission to promulgate rules in a timely and efficient manner. Under the APA, agencies are required to provide notice of the proposed changes in the Federal Register, provide a reasoned explanation for the proposed changes, receive comments from the public, and respond to significant issues raised in the public comments before making any decision. These requirements apply to proposals to issue new rules, as well as to proposals to substantively amend existing rules or repeal them.

With respect to small businesses specifically, I understand H.R. 4447 does not affect the existing requirements in the Regulatory Flexibility Act or the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).[5]

7. **With the notice-and-comment rulemaking proposed by H.R. 4447, if one administration's FTC wants to change or repeal the rules of a previous administration's FTC, do those changes face any sort of heightened judicial review?**

RESPONSE: Rule promulgations as well as amendments or repeals are all subject to the same standard of review. "Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change."[6] At a minimum, the agency must "display awareness that it is changing position."[7] In providing the required reasoned explanation for an amendment or repeal of a rule, the agency may have to address any reliance interests that the existing rule has engendered, as failing to do so could be arbitrary and capricious.[8]

   a. **What standard of review would apply to Section 18 rulemaking?**

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[5] *See* 5 U.S.C. § 603. The Regulatory Flexibility Act requires that agencies consider ways to minimize potential impacts on small businesses when engaging in rulemaking. Among other things, SBREFA requires that agencies publish a final regulatory flexibility analysis with each rule describing the steps the agency has taken to minimize the significant economic impact on small entities, publish a compliance guide to assist small entities in complying with the rule, and provide informal guidance to small entities where appropriate.
[6] Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125 (2016).
[7] FCC v. Fox Television Stations, 556 U.S. 502, 515 (2009).
[8] *See id.*

RESPONSE: Under H.R. 4447, a reviewing court could set aside a Section 18 rule on any of the grounds in 5 U.S.C. § 706(2)(A)-(D) – e.g., if the rule was arbitrary and capricious, contrary to constitutional right, in excess of statutory authority, or without observance of procedure required by law – or if the court found that the Commission's action was not supported by substantial evidence in the rulemaking record taken as a whole.

b. Can the FTC ignore public comment or results of any review and enact their own agenda into a new rule?

RESPONSE: No. To avoid being arbitrary or capricious under the APA, the agency must adequately explain its result and respond to relevant and significant public comments.[9]

8. For the FTC Improvements Act of 1980, S. Rpt. 96-500 states with respect to the presiding officer, "This section is intended to ensure that the independence of presiding officers is maintained. Presiding officers were originally a part of the Bureau of Consumer Protection, the FTC organization responsible for the development of rules. In response to the concern that this structure created an appearance of impropriety, the Commission last year moved the presiding officers to the Office of the General Counsel, which has no program responsibilities in rulemaking. The Committee believes, however, that the independent role of presiding officers can best be maintained if they are organizationally independent, reporting solely to a chief presiding officer, who in turn will not report to any other staff member."

a. Is it true that during the July 1 FTC meeting the FTC voted to install the FTC Chair as the chief presiding officer?

RESPONSE: Section 18(c)(1) of the FTC Act, 15 U.S.C. § 57a(c)(1), provides for two different roles: (1) the presiding officer, who conducts any informal hearings, makes a recommended decision based upon his or her findings and conclusions, must not engage in ex parte communications except as authorized by law, and "shall be responsible to a chief presiding officer"; and (2) the chief presiding officer, "who shall not be responsible to any other officer or employee of the Commission." The statute does not specify any other organizational requirements for the presiding officer, nor does it prescribe any other responsibilities for the chief presiding officer.

The rule amendments approved by the Commission on July 1, published at 86 Fed. Reg. 38542, are consistent with these statutory requirements. The powers of the presiding officers are described in revised 16 C.F.R. § 1.13(a), including the requirement that the presiding officers be "responsible to the chief presiding officer who must not be responsible to any other officer or employee of the Commission." The Chair of the FTC meets the statutory

[9] *See, e.g.*, Pub. Citizen, Inc. v. FAA, 988 F.2d 186 (D.C Cir. 1993).

requirement, so revised 16 C.F.R. § 0.8 provides that the Chair may serve as the chief presiding officer or "may appoint another person to serve as Chief Presiding Officer who is not responsible to any other official or employee of the Commission."

Whoever is serving as the chief presiding officer will appoint the presiding officer for each rulemaking, and presiding officers are responsible to the chief presiding officer in the performance of their rulemaking functions.[10] Otherwise, the statute and rules do not prescribe any specific responsibilities for the chief presiding officer.

b. Previously, the Chief Administrative Law Judge—who is generally perceived as independent—was the chief presiding officer. Even if this move is technically legal, can you explain how this move does not clearly violate congressional intent of the FTC Improvements Act of 1980 and compromise the independence of presiding officers?

RESPONSE: As noted above, the FTC Improvements Act of 1980 provided for the independence of presiding officers by specifying that they "shall be responsible to a chief presiding officer who shall not be responsible to any other officer or employee of the Commission."[11] The revised rules mirror this requirement.[12]

As explained in the Commission's statement accompanying the rule revisions, having the Chief ALJ serve as the chief presiding officer reinforced the myth that Section 18 rulemakings require elaborate, interminable judicial processes instead of straightforward public participation.[13] The streamlined procedural rules implement the statutory requirements for presiding officers and also provide significant transparency, process, and opportunity to be heard.

9. There are eighteen mentions of "copyright" in the FTC's "Nixing the Fix" report. Yet during the commission's open meeting discussion of Repair Restrictions Imposed by Manufacturers and Sellers, none of the Commissioners referenced copyright protection. Only one Commissioner (Wilson) mentioned intellectual property (IP) protection. How will the FTC's new initiatives on Repair Restrictions comply with and defer to federal laws protecting intellectual property and copyrights?

RESPONSE: While patents can play a key role in promoting innovation, they are also routinely abused, to weaken rivals as well as to stunt development to protect monopoly positions. For instance, in the recent Commission report on repair restrictions, Commission staff uncovered evidence that manufacturers and sellers may

[10] 16 C.F.R. § 1.13(a)(1), (4).
[11] 15 U.S.C. § 57a(c)(1)(A).
[12] *See* 16 C.F.R. §§ 0.8, 1.13(a)(4).
[13] *See* 86 Fed. Reg. 38542, 38551 (2021).

be restricting competition for repair services in a number of ways, including by asserting patent rights and enforcement of trademarks in an unlawful, overbroad manner.[14]

While efforts by dominant firms to restrict repair markets are not new, changes in technology and more prevalent use of software has created fresh opportunities for companies to limit independent repair. As both the FTC's work and public reporting have documented, companies routinely use a whole set of practices, including limiting the availability of parts and tools, using exclusionary designs and product decisions that make independent repairs less safe, and making assertions of patent and trademark rights that are unlawfully over-broad. These types of restrictions can significantly raise costs for consumers, stifle innovation, close off business opportunity for independent repair shops, create unnecessary electronic waste, delay timely repairs, and undermine resiliency.

10. **Intellectual property protection has fueled American innovation. IP has led to countless technologies and manufacturing advancements that have made the United States the most prosperous nation in the world. What assurances can you provide that the FTC respects IP protection and will not pursue actions that would undermine IP protection laws?**

RESPONSE: In general, patents can play a key role in promoting innovation. However, misuses of intellectual property rights may create barriers to entry for other innovative firms, thereby depriving Americans of critical advances. Moreover, claims that anticompetitive conduct is justified to protect intellectual property rights will be closely scrutinized and should be rejected if found to be a mere pretext for anticompetitive conduct.

[14] Federal Trade Commission. Nixing the Fix: An FTC Report to Congress on Repair Restrictions at 8 (May 2021) https://www.ftc.gov/system/files/documents/reports/nixing-fix-ftc-report-congress-repairrestrictions/nixing_the_fix_report_final_5521_630pm-508_002.pdf.

The Honorable Michael C. Burgess, M.D. (R-TX)

1. **Chairwoman Khan, in the Federal Trade Commission's (FTC) testimony, you state that global mergers and acquisitions are putting stress on the FTC's ability to effectively investigate and challenge unlawful transactions.**

   As you are aware, Illumina, Inc. has filed to reacquire GRAIL, Inc., a company it founded before becoming a minority shareholder. Illumina and GRAIL's products and services work together to provide and analyze a blood test that can screen for more than 50 types of cancer, 45 of which currently have no screening test available.

   Unfortunately, the FTC pursued a preliminary injunction and then withdrew its motion upon the initiation of a European Commission investigation.

   a. **Can you explain what anticompetitive concerns the FTC has for Illumina's reacquisition of GRAIL?**

      RESPONSE: Although I cannot comment on any pending administrative proceeding, I have attached the public redacted version of the administrative complaint and related Commission press releases about this matter that explain the Commission's allegations about the likely competitive harm from this proposed acquisition.

   b. **Do you believe the limited resources you highlight in your testimony will result in the FTC seeking to block mergers more often than conducting a full investigation?**

      RESPONSE: I believe the Commission must carefully marshal its limited resources to achieve the best outcomes for consumers, workers, and entrepreneurs who would otherwise bear the cost of illegal mergers.

The Honorable Neal Dunn (R-FL)

1. **I represent a large, rural district in North Florida & many of my constituents shop at independent or small chain grocery stores. I'm concerned by reports that large superstores are unfairly leveraging their buying power and overbuying many products in an effort to keep them out of the hands of their smaller competitors.**

    a. **Is the FTC aware of these allegations, and if so, what are they doing to facilitate better competition in the grocery market?**

    RESPONSE: I share your concern that decades of consolidation may have enabled large grocery store chains and superstores to squeeze their suppliers for greater margins, harming independent grocery chains. I have asked Commission staff to look into conduct by large food retailers that may unlawfully harm market participants.

The Honorable Debbie Lesko (R-AZ)

1. **What legal basis does the FTC have for rulemaking authority when it comes to Section 5 of its statute? Do you agree the agency does not possess legislative style or Administrative Procedure Act rulemaking authority under Section 5, but instead it only has congressionally granted Magnusson-Moss rulemaking for unfair and deceptive practices and can only issue guidance under its unfair methods of competition authority?**

   RESPONSE: Section 6(g) of the FTC Act provides that the Commission may issue rules "for the purpose of carrying out this Act."[15] As a result, the plain text of Section 6(g) makes clear that the FTC can issue rules to carry out its powers under the FTC Act as a whole. In 1975, Section 18 of the FTC Act became the Commission's exclusive authority for issuing rules with respect to unfair or deceptive acts or practices under the FTC Act.[16] However, the text of Section 18 expressly preserved the "authority of the Commission to prescribe rules (including interpretive rules), and general statements of policy, with respect to unfair methods of competition in or affecting commerce."[17] In 1973, the D.C. Circuit concluded that Section 6(g) provides the Commission authority to issue legislative, not just procedural, rules.[18] *Petroleum Refiners* remains operative precedent and has been cited multiple times by courts in finding legislative rulemaking authority when evaluating similar grants of rulemaking authority to other federal agencies.

2. **One of the significant changes made to Section 18 rulemaking in the July 1st order was to replace the authority of administrative law judges with the Chair in terms of who is acting as Chief Presiding Officer over rulemakings. The Chief Presiding Officer has responsibility for fairly determining which issues are in dispute and what can be addressed in Magnusson-Moss hearings. Can you explain why you have made this change? For an agency which already has prosecutorial powers, isn't it better to have an independent arbiter in rulemakings?**

   RESPONSE: Section 18(c) of the FTC Act specifies that the Commission will determine whether there are disputed issues to be resolved at an informal hearing.[19] However, Section 18(d)(2)(A) recognizes that the Commission may need to delegate its responsibilities.[20] For many years, the Commission's rules allowed either the Commission or the presiding officer to designate disputed issues.[21] Under the revised

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[15] *See* 15 U.S.C. § 46(g).
[16] *See* 15 U.S.C. § 57a(a)(2).
[17] *Id.*
[18] *See* Nat'l Petroleum Refiners Ass'n, 482 F.2d 672, 693 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974).
[19] *See* 15 U.S.C. § 57a(c)(2)(B) (creating rights of cross-examination and rebuttal "if the Commission determines that there are disputed issue of material fact it is necessary to resolve").
[20] *See* 15 U.S.C. § 57(d)(2)(A) ("The term 'Commission' as used in this subsection and subsections (b) and (c) of this section includes any person authorized to act in behalf of the Commission in any part of the rulemaking proceeding.").
[21] *See* 16 C.F.R. § 1.13(b)(2)(ii), (d)(1)-(2) (2020).

rules, the Commission will invite public input on potential disputed issues and then publish a final list of disputed issues to be resolved during the informal hearing; the presiding officer can also add or modify disputed issues.[22]

Section 18(c)(1)(B) specifies that the presiding officer will make a recommended decision based upon the presiding officer's findings and conclusions.[23] However, the decision about whether to promulgate a final rule belongs to the Commission, not the presiding officer.[24] The Commission is required to consider the entire rulemaking record when deciding whether to issue, modify, or decline to issue the rule.[25]

3. **Recently the Supreme Court unanimously held that the FTC has been operating beyond its authority for more than 50 years – and that it used that authority to collect billions of dollars from private companies. Given this long, and just recently acknowledged overstep of authority, if the Senate doesn't pass H.R. 2668, what guidelines should be in place to make sure this situation doesn't occur again?**

RESPONSE: For four decades prior to the Supreme Court's decision in *AMG Capital Management, LLC v. FTC*,[26] courts routinely awarded the Commission equitable monetary relief pursuant to Section 13(b) of the FTC Act. The Commission used these monetary relief awards to provide billions of dollars of refunds to consumers who lost money due to anticompetitive, unfair, deceptive, and fraudulent practices in a wide variety of cases. Beginning in the 1980s, seven of the twelve courts of appeals, relying on longstanding Supreme Court precedent, interpreted the language in Section 13(b) to authorize district courts to award the full panoply of equitable remedies necessary to provide complete relief for consumers, including disgorgement and restitution of money. For decades, no court held to the contrary. In 1994, Congress directly ratified the FTC's reliance on Section 13(b) by expanding its venue and service of process provisions without placing any limitations on the types of relief to which Section 13(b) applies. It did so knowing that the Commission had relied on Section 13(b) to obtain monetary remedies, as the legislative history of the 1994 amendments make clear.[27]

The Commission is committed to enforcing the law consistent with its statutory mandates and legal authorities, and clear statutory directives can assist in furthering that goal. To that end, the enactment of H.R. 2668 would restore one of the FTC's critical law enforcement tools.

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[22] *See* 16 C.F.R. §§ 1.11(e)(3), 1.12(a)(3), 1.13(b)(1)(ii).
[23] *See* 15 U.S.C. § 57a(c)(1)(B).
[24] *See* 15 U.S.C. § 57a(b)(1)(D); 16 C.F.R. § 1.14(a).
[25] *See* 15 U.S.C. § 57a(b)(1)(D), (e)(1)(B); 16 C.F.R. §§ 1.14(a), 1.18(a).
[26] *AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021).
[27] *See* S. Rep. No. 103-130, at 15-16 (1993) (noting under Section 13(b), the Commission could "go into court ex parte to obtain an order freezing assets, and . . . obtain consumer redress" and that the amendments would "assist the FTC in its overall efforts" at enforcement).

4. **It is my understanding that proposed legislation (H.R. 2668) does not define when the FTC may seek restitution. Will you agree to adding a requirement that the FTC may seek restitution when it can prove the specific amount that individual customers were allegedly harmed? Or when it can prove that individual customers were harmed?**

   RESPONSE: H.R. 2668 provides that the FTC may seek restitution for losses that arise from "the violation that gives rise to the suit." Thus, the language already requires that restitution awards be based on proof that the defendant's violation of the law caused consumer losses.

5. **It is my understanding that the FTC can currently seek monetary relief under Section 19 of the FTC Act. It requires the FTC to do more work and it ensures defendants receive clear notice of what exactly the FTC believes is illegal.**

   a. **Why is Section 19 not enough to ensure that the FTC can police bad actors?**

      RESPONSE: Section 19 of the FTC Act allows the FTC to initiate federal court actions in certain circumstances to obtain monetary judgments, including monetary redress to compensate harmed consumers. Section 19 has several limitations.

      First, in cases that do not involve alleged violations of certain FTC rules, Section 19 allows federal court lawsuits only after the Commission has completed an entire administrative proceeding, including through all levels of appeal. That process involves multiple steps; in past cases in which the Commission has utilized this pathway, the process has taken many years.

      Second, the inefficiencies of Section 19 are even worse in cases involving hardcore frauds and scams. Defendants in such cases are highly likely to dissipate assets[28] or destroy evidence[29] once they learn that the Commission has undertaken an enforcement action against them, and the process for imposing a receivership and asset freeze can be lengthy and complex.

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[28] *See, e.g., FTC v. Am. Fin. Benefits Ctr.,* No. 4:18-cv-00806-SBA (N.D. Cal. 2018) (within hours of receiving notice of the FTC's action, individual defendant transferred $400,000 from corporate bank accounts to himself, his family, and one of his attorneys); *FTC v. E.M.A. Nationwide, Inc.*, No. 1:12-CV-2394 (N.D. Ohio 2012) (after FTC request for an asset freeze was denied and individual defendants received notice of the FTC's complaint, they withdrew more than $152,000 from a corporate bank account); *FTC v. Lakhany*, No. 8:12-337-CJC (C.D. Cal. 2012) (individual defendant withdrew $204,000 from corporate bank accounts in violation of the asset freeze).

[29] *See, e.g.*, *FTC v. Elite IT Partners, Inc.*, No. 2:19-cv-125-RJS (D. Utah 2019) (after receiving notice of the FTC's action, defendant secretly removed a hard drive from the premises that contained evidence inculpating the defendant and his companies in scam); *FTC v. Dayton Family Productions, Inc.*, No. 2:97-cv-00750 (D. Nev. 2013) (within hours of receiving notice of FTC action, employee permanently erased a computer hard drive); *FTC v. Asia Pacific Telecom, Inc.*, No. 10-cv-3168 (N.D. Ill. 2010) (after receiving notice of the FTC's action, defendant deleted an email account used to conduct many of the illegal practices at issue in the FTC's complaint).

Third, Section 19 is not available for every case that the Commission can bring under Section 13(b). Significantly, Section 19 does not apply to antitrust violations and therefore cannot be used to provide redress to consumers that have been harmed solely by unfair methods of competition. Prior to *AMG*, the Commission had obtained monetary relief awards under Section 13(b) in several cases involving anticompetitive practices in the pharmaceutical industry that led to higher drug prices for consumers.[30]

Fourth, even in certain consumer protection cases under Section 19, a court can award monetary relief only if the Commission establishes that the unfair or deceptive conduct at issue is conduct that a "reasonable man would have known under the circumstances was dishonest or fraudulent."[31] The Commission cannot meet this heightened requirement in every case. As a result, there will be cases in which the Commission has proven that the defendant violated the law by engaging in an unfair or deceptive act or practice, but the Commission will not be able to provide refunds to consumers who lost money as a result of those violations because the Commission could not satisfy the heightened requirement. In those cases, the defendant who violated the law keeps the money earned from breaking the law.

Finally, Section 19 has a three-year statute of limitations. In many cases, however, the FTC does not learn about the unlawful conduct until more than three years have passed, suggesting that a three-year statute of limitation period is far too short.

6. **Why is it necessary for the FTC to be able to go back and prosecute advertisements and business practices that ended ten years earlier?**

RESPONSE: I am unaware of any FTC enforcement action that addressed conduct that was more than ten years old and was no longer causing harm. Under well-established legal principles, the FTC cannot obtain an injunction under Section 13(b) unless it can prove that the unlawful conduct at issue is likely to recur. If unlawful

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[30] *See, e.g.*, Press Release, Federal Trade Commission, *Reckitt Benckiser Group plc to Pay $50 Million to Consumers, Settling FTC Charges that the Company Illegally Maintained a Monopoly over the Opioid Addiction Treatment Suboxone* (July 11, 2019), https://www.ftc.gov/news-events/press-releases/2019/07/reckitt-benckiser-group-plc-pay-50-million-consumers-settling-ftc; Press Release, Federal Trade Commission, *Mallinckrodt Will Pay $100 Million to Settle FTC, State Charges It Illegally Maintained its Monopoly of Specialty Drug Used to Treat Infants* (Jan. 19, 2017), https://www.ftc.gov/news-events/press-releases/2017/01/mallinckrodt-will-pay-100-million-settle-ftc-state-charges-it; Press Release, Federal Trade Commission, *FTC Settlement of Cephalon Pay for Delay Case Ensures $1.2 Billion in Ill-Gotten Gains Relinquished; Refunds Will Go To Purchasers Affected By Anticompetitive Tactics* (May 28, 2015), https://www.ftc.gov/news-events/press-releases/2015/05/ftc-settlement-cephalon-pay-delay-case-ensures-12-billion-ill; Press Release, Federal Trade Commission, *Generic Drug Marketers Settle FTC Charges* (Aug. 12, 2004), https://www.ftc.gov/news-events/press-releases/2004/08/generic-drug-marketers-settle-ftc-charges (generic manufacturers agreed to disgorge $6.25M in illegal profits).

[31] 15 U.S.C. § 57b(a)(2).

conduct occurred ten years prior to suit and is no longer causing harm, the FTC will have a difficult time convincing a court that the unlawful conduct is likely to recur. Accordingly, it is highly unlikely that the FTC would seek a federal court injunction to address conduct that has not caused harm in the past ten or more years.

Based on an informal review of consumer protection cases that the FTC has brought since 2014, FTC staff were unable to identify any FTC case in which a court awarded monetary relief for violations that occurred ten or more years prior to the filing of the FTC's complaint. Some of our recent cases involved compensation for consumer losses suffered eight years prior to the filing of the FTC complaint; most sought monetary relief going back five years.

a. Is there a legitimate scenario where it would take the FTC ten years after the practice has ceased to bring a complaint?

RESPONSE: See prior response.

b. Why is the three-year limitations period for Section 19 not a better guide here?

RESPONSE: A three-year statute of limitation period is far too short to effectively protect Americans. Many Commission actions involve schemes that have been operating undetected for many years, and it often takes several years for such schemes to come to the Commission's attention. In such cases, by the time the Commission commences and completes its investigation and files suit, more than three years have elapsed from the time the unlawful conduct first began. A three-year limitation period for monetary relief leads to inequitable outcomes because it prevents consumers who lost money in the early days of a scheme from recovering anything at all, even though they suffered the same harm as consumers who lost money more recently.

One example of the shortcomings of a three-year statute of limitation for monetary relief is the Commission's 2016 case against Volkswagen (VW). The FTC alleged that, from 2008 to 2015, VW sold "clean" diesel vehicles that the company claimed had been shown in government tests to have reduced emissions. In reality, the vehicles did not have lower emissions because they were equipped with a defeat device that could detect government testing and artificially lower emissions in response. VW stopped using defeat devices in 2015 after the EPA and California began investigating. The FTC brought suit shortly thereafter in 2016, securing nearly $10 billion in compensation in the form of vehicle buy-backs or repairs for consumers who purchased "clean" diesel vehicles that had lost significant value due to the defeat devices. If a three-year statute of limitation applied, however, the FTC only would have been able to secure a fraction of this relief.

c. Would a ten-year statute of limitations incentivize the Commission to go back and pick on big targets when the political composition of the Commission or public opinion shifts?

RESPONSE: No. For conduct that has not occurred for the past ten or more years and is no longer causing harm, it is unlikely that the Commission could prove the legally required likelihood of recurrence necessary to obtain a federal court injunction. Historically there has been no statute of limitation applicable to claims under Section 13(b). Despite the absence of a statute of limitation, FTC staff has been unable to identify any case that the Commission has brought since Section 13(b) was enacted in 1973 that challenged conduct that was more than ten years old and was no longer causing harm.

7. The proposed legislation (H.R. 2668) applies retroactively to "any action or proceeding that is pending on, or commenced on or after, the date of the enactment of this Act" (Section 2(c)).

a. Can you point me to any other similar statute allowing a federal agency to seek monetary penalties in actions already pending in federal court?

RESPONSE: H.R. 2668 addresses only equitable remedies, not penalties. The language in Section 2(c) of the bill is nearly identical to a statutory provision in a federal statute enacted in January 2021 concerning the remedial authority of the Securities & Exchange Commission. That statute, which amends the Securities Exchange Act of 1934 to expressly authorize the SEC to seek disgorgement in federal court, provides that the amendments "shall apply with respect to any action or proceeding that is pending on, or commenced on or after, the date of enactment of this Act."

The Honorable Kelly Armstrong (R-ND)

1. **In "Nixing the Fix: An FTC Report to Congress on Repair Restrictions", the Commission mentions stakeholder concerns regarding modifications to remove, impair, or disable federally-required emissions control equipment. Putting aside considerations of whether such activity would be classified as a modification or repair in specific circumstances, does the Commission plan to consult with the Environmental Protection Agency to fully understand whether providing access to embedded software would affect the regulation of federally-required emissions control equipment?**

   RESPONSE: We recognize that the right to repair may overlap with a number of different policy and legal issues. In the right to repair arena, as in other areas where the Commission's work implicates laws and regulations outside of the agency's expertise, we will seek input from the relevant stakeholders, including agencies like the EPA.

2. **In "Nixing the Fix: An FTC Report to Congress on Repair Restrictions", footnote 18 states that "Commissioner Wilson and Commissioner Phillips note that the report excludes from the scope of its coverage an analysis of manufacturers' intellectual property rights, which may provide legitimate justification for some repair restrictions." How will the Commission address such legitimate assertions of intellectual property rights?**

   RESPONSE: We recognize that the right to repair issue may overlap with a number of different policy and legal issues, including intellectual property. As we noted in the Report, actions to enable independent repair should seek input from relevant stakeholders, including government partners, in order to be mindful of existing law and policy.[32]

   Market participants must also abide by antitrust laws, including in the way that they assert IP rights. While patents can play a critical role in promoting innovation, they are also routinely abused, to weaken rivals as well as to stunt development to protect and defend monopoly positions. For instance, in the Commission report on repair restrictions, Commission staff uncovered evidence that manufacturers and sellers may be restricting competition for repair services in a number of ways, including by asserting patent rights and enforcement of trademarks in an unlawful, overbroad manner.

[32] *Id.* at 53-54.

Attachment—Additional Questions for the Record

Subcommittee on Consumer Protection and Commerce
Hearing on
"Transforming the FTC: Legislation to Modernize Consumer Protection"
July 28, 2021

The Honorable Lina Khan, Chair, Federal Trade Commission

The Honorable Yvette Clarke (D-NY)

1. **Intellectual property protection has fueled American innovation. IP has led to countless technologies and manufacturing advancements that have made the United States the most prosperous nation in the world. What assurances can you provide that the FTC respects IP protection and will not pursue actions that would undermine IP protection laws?**

   RESPONSE: Patents can play a key role in promoting innovation, and the FTC respects lawful claims of intellectual property rights. Misuse of intellectual property rights, however, may deprive Americans of critical advances. Claims that anticompetitive conduct is justified to protect intellectual property rights will be closely scrutinized and should be rejected if found to be a mere pretext for anticompetitive conduct.

2. **The FTC's Nixing the Fix report mentions copyright eighteen times, but during the commission's open meeting discussion of Repair Restrictions Imposed by Manufacturers and Sellers, none of the Commissioners referenced copyright protection. Only one Commissioner mentioned intellectual property protection. How will the FTC's new initiatives on Repair Restrictions comply with and defer to federal laws protecting intellectual property and copyrights?**

   RESPONSE: Intellectual property rights can play a key role in promoting innovation but can also be abused to impede free and fair competition. For instance, as noted in the recent Commission report on repair restrictions, Commission staff uncovered evidence that manufacturers and sellers may be restricting fair competition for repair services in a number of ways, including through the anticompetitive assertion of patent rights and enforcement of trademarks.[1]

   While efforts by dominant firms to restrict competition in repair markets are not new, changes in technology and more prevalent use of software has created fresh opportunities for companies to limit independent repair. As both the FTC's work and public reporting have documented, companies routinely use a whole set of practices, including limiting

[1] FED. TRADE COMM'N, NIXING THE FIX: AN FTC REPORT TO CONGRESS ON REPAIR RESTRICTIONS at 10 (May 2021), https://www.ftc.gov/system/files/documents/reports/nixing-fix-ftc-report-congress-repair-restrictions/nixing_the_fix_report_final_5521_630pm-508_002.pdf.

the availability of parts and tools and using exclusionary designs and product decisions that make independent repairs less safe. These types of restrictions can significantly raise costs for consumers, stifle innovation, close off business opportunity for independent repair shops, create unnecessary electronic waste, delay timely repairs, and undermine resiliency.

3. **How will the FTC enforce "right to repair" policies, while at the same time protect intellectual property and copyright laws that drive the creativity and innovation for other U.S. business sectors?**

   RESPONSE: Right to repair may overlap with a number of different policy and legal issues, including intellectual property. As noted in the recent Commission report, efforts to enable independent repair would benefit from engagement with government partners to account for concerns relating to laws and policies outside of our jurisdiction.[2]

4. **Some states force auto manufacturers to sell their vehicles through franchise dealerships, so interested car buyers have no other choice but to go to a dealership. Are dealership protection laws in the best interest of the consumer?**

   RESPONSE: The prevalence of the direct-to-consumer business model where permitted suggests that consumers may prefer buying direct when purchasing a new or used car. Laws that restrict the retail distribution of automobiles may forestall innovation in automobile retail sales.

5. **How can Congress help provide American consumers with more options for buying cars other than having to go to a franchised auto dealer?**

   RESPONSE: Although the Commission is not currently supporting any specific proposal in this area, the agency stands ready to work with lawmakers, either at the federal or state level, to ensure fair competition in automobile retailing.

   The Commission's enforcement of the various statutes under its jurisdiction can also help protect Americans seeking to purchase a car.[3] Last year, FTC staff released a report that highlights some of the challenges Americans face when buying and financing an automobile.[4]

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[2] *Id.* at 53-54.

[3] *See* FED. TRADE COMM'N: THE AUTO MARKETPLACE, https://www.ftc.gov/news-events/media-resources/consumer-finance/auto-marketplace. For example, the FTC can take action when car dealers and others make deceptive advertising claims or falsely promise to reduce auto loan payments, or when telemarketers pitch bogus auto "warranties" that are actually extended service contracts. The FTC also enforces the Used Car Rule, which requires posting of the familiar Buyer's Guide that appears on used cars and gives consumers key information about who will pay for repairs if something goes wrong with the car they buy. Used Motor Vehicle Trade Regulation Rule, 16 C.F.R. pt. 455 (2021), https://www.ftc.gov/enforcement/rules/rulemaking-regulatory-reform-proceedings/used-car-rule.

[4] FED. TRADE COMM'N BUREAU OF CONSUMER PROTECTION STAFF, BUCKLE UP: NAVIGATING AUTO SALES AND FINANCING (Jul. 2020), https://www.ftc.gov/system/files/documents/reports/buckle-navigating-auto-sales-financing/bcpstaffreportautofinancing_0.pdf.

6. **In 2015, FTC Staff wrote a letter to a Michigan Legislator supporting his bill that would have allowed manufacturers of autocycles (three-wheeled vehicles and enclosed motorcycles) to sell their products directly to consumers, instead of forcing their distribution through franchised dealers. The letter stated that the bill "would enhance competition in a new product category and would provide tangible benefits for Michigan consumers." Many bills like this are being introduced around the country now. In addition to the competition benefits, could you please elaborate on what the other "tangible benefits" the direct sales model could provide consumers?**

   RESPONSE: Although I was not at the Commission when staff submitted comments in connection with a proposed bill in Michigan relating to the sale and servicing of automobiles,[5] the direct sales model in some instances may provide greater options to Americans seeking to purchase a car.

[5] Comment from FTC Staff to Senator Darwin L. Booher, State Senate of Michigan (May 7, 2015), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-regarding-michigan-senate-bill-268-which-would-create-limited-exception-current/150511michiganautocycle.pdf.

Attachment—Additional Questions for the Record

Subcommittee on Consumer Protection and Commerce
Hearing on
"Transforming the FTC: Legislation to Modernize Consumer Protection"
July 28, 2021

The Honorable Noah Phillips, Commissioner, Federal Trade Commission

The Honorable Kelly Armstrong (R-ND)

1. In "Nixing the Fix: An FTC Report to Congress on Repair Restrictions", the Commission mentions stakeholder concerns regarding modifications to remove, impair, or disable federally-required emissions control equipment. Putting aside considerations of whether such activity would be classified as a modification or repair in specific circumstances, does the Commission plan to consult with the Environmental Protection Agency to fully understand whether providing access to embedded software would affect the regulation of federally-required emissions control equipment?

   RESPONSE:

   I believe that the Commission should consult with other relevant agencies before taking action relating to right to repair, including consulting with the Environmental Protection Agency ("EPA") to determine whether and how providing access to embedded software would affect the regulation of federally-required emissions control equipment. At the July 21, 2021 open Commission meeting, the Commission unanimously voted out a *Policy Statement of the Federal Trade Commission on Repair Restrictions Imposed by Manufacturers and Sellers* ("Policy Statement on Repair Restrictions"),[1] which, among other things, states the Commission's intention to coordinate closely with state law enforcement and policymakers. This commitment should extend to federal regulatory agencies such as the EPA.

2. In "Nixing the Fix: An FTC Report to Congress on Repair Restrictions", footnote 18 states that "Commissioner Wilson and Commissioner Phillips note that the report excludes from the scope of its coverage an analysis of manufacturers' intellectual property rights, which may provide legitimate justification for some repair

[1] *Policy Statement of the Federal Trade Commission on Repair Restrictions Imposed by Manufacturers and Sellers* (July 21, 2021), *available at* https://www.ftc.gov/system/files/documents/public_statements/1592330/p194400repairrestrictionspolicystatement.pdf.

restrictions." How will the Commission address such legitimate assertions of intellectual property rights?

RESPONSE:

When the Commission analyzes whether particular repair restrictions violate any of the laws that it enforces, it must consider whether the restriction is due to a legitimate assertion of intellectual property rights. As stated in the Policy Statement on Repair Restrictions, the Commission should only pursue the *unlawful* and *overbroad* assertion of IP rights.[2] While IP rights cannot provide a blanket justification for any repair restriction, they are an important federal mechanism for stoking innovation and must be taken into account. Determining whether to bring an action against a company requires extensive fact-finding and rigorous analysis. Any investigation of a company's repair restrictions must give serious consideration to the company's explanation for its policies, including the protection of IP.

[2] Id.

Attachment—Additional Questions for the Record

Subcommittee on Consumer Protection and Commerce
Hearing on
"Transforming the FTC: Legislation to Modernize Consumer Protection"
July 28, 2021

The Honorable Rohit Chopra, Commissioner, Federal Trade Commission

The Honorable Larry Bucshon (R-IN)

1. Credit repair organizations market their services to consumers by promising to "clean up their credit report" by disputing information that is deemed harmful to the consumer's credit profile. These companies charge consumers fees for sending letters to creditor and filing direct disputes with credit reporting agencies. All of these services could be done by consumers at a fraction of the cost.

    a. What is the Commission doing to encourage or educate consumers on how to take these steps on their own instead of potentially wasting money on fees?

    RESPONSE: While many people associate credit checks with applications for credit, it is becoming increasingly common for landlords, employers, and others to request a consumer's credit report.

    The Commission makes available consumer education materials to assist the public when it comes to credit repair. These materials are available online, and printed versions can be requested free of charge. (See, for example, https://www.consumer.ftc.gov/articles/0058-credit-repair-how-help-yourself)

2. Credit repair organizations may encourage consumers to utilize identity theft claims in order dispute credit report tradeline information, sometimes even when it is accurate and correct, this leads to a larger number of false identity theft claims which can detract from the ability of consumers who are legitimately suffering identify theft to access resources and attention to help their claims.

    a. What controls are in place to prevent these false identity theft claims from making it harder for real victims of identity theft from using of the various direct dispute or complaint portals offered by the Commission or the CFPB?

    RESPONSE: As a general matter, the Commission does not require comprehensive identity verification by individuals filing as identity theft victims. Because victims' identities have been stolen, designing controls can be challenging. It is important that our law enforcement complaints and related portals be accessible, but it is worthwhile for the Commission to routinely

assess how these portals can be misused by bad actors and take appropriate steps to mitigate the impacts of this misconduct.

The Honorable Kelly Armstrong (R-ND)

1. In "Nixing the Fix: An FTC Report to Congress on Repair Restrictions", the Commission mentions stakeholder concerns regarding modifications to remove, impair, or disable federally-required emissions control equipment. Putting aside considerations of whether such activity would be classified as a modification or repair in specific circumstances, does the Commission plan to consult with the Environmental Protection Agency to fully understand whether providing access to embedded software would affect the regulation of federally-required emissions control equipment?

   RESPONSE: Americans face repair restrictions on a broad range of devices and equipment. In many cases, other agencies have unique expertise on these devices and equipment. For example, the FTC has worked with the National Highway Traffic Safety Administration on consumer issues related to automobiles. I appreciate your suggestion on coordinating with the Environmental Protection Agency – the Commission would benefit from discussions with the EPA on the issues you have raised.

2. In "Nixing the Fix: An FTC Report to Congress on Repair Restrictions", footnote 18 states that "Commissioner Wilson and Commissioner Phillips note that the report excludes from the scope of its coverage an analysis of manufacturers' intellectual property rights, which may provide legitimate justification for some repair restrictions." How will the Commission address such legitimate assertions of intellectual property rights?

   RESPONSE: The Magnuson-Moss Act prohibits certain tying arrangements when a manufacturer offers a warranty. In other words, manufacturers cannot force consumers to pay for a specific service in transactions covered by the Act. Legitimate assertions of intellectual property rights do not trigger liability under the laws enforced by the Commission. For instance, in the Commission report on repair restrictions, Commission staff uncovered evidence that manufacturers and sellers may be restricting competition for repair services in a number of ways, including by asserting patent rights and enforcement of trademarks in an unlawful, overbroad manner.

   While efforts by dominant firms to restrict repair markets are not new, changes in technology and more prevalent use of software has created fresh opportunities for companies to limit independent repair. I believe the Commission must use its full range of tools to ensure that manufacturers and sellers are not relying on overbroad

assertions of intellectual property rights as a pretext for monopolistic or exclusionary conduct.

Attachment—Additional Questions for the Record

Subcommittee on Consumer Protection and Commerce
Hearing on
"Transforming the FTC: Legislation to Modernize Consumer Protection"
July 28, 2021

The Honorable Rebecca Slaughter, Commissioner, Federal Trade Commission

The Honorable Lori Trahan (D-MA)

1. On April 29, 2021, under your leadership, the FTC hosted the "Bringing Dark Patterns to Light" workshop.[1] What steps can the FTC take to combat dark patterns and manipulative design today? What actions by Congress would assist with these efforts?

   RESPONSE: I'm extremely concerned about dark patterns and the ways companies design user interfaces to manipulate customers into taking unintended actions against their interests. That can mean manipulating people into giving up their personal data, forcing people to navigate a maze of options to cancel negative option subscription plans, hiding material contract terms, or sneaking items into their shopping carts.

   The FTC has sued companies for using dark patterns to manipulate consumers in this way (*ABCMouse, Progressive Leasing, AH Media Group)*, and I believe we should continue to go after companies that use deceptive, unfair, or otherwise unlawful design tactics. But, when combating these kinds of prevalent market practices where one-off litigation is unlikely to change industry-wide behavior, the FTC should use additional tools at its disposal like guidance, policy statements, and its rulemaking authority to make it clear to all market participants that these practices are unlawful.

   Congress can aid the Commission in these efforts in a number of ways. We have testified about the resource crunch at the agency and additional staff and other resources to pursue consumer protection cases like these is essential. If the Commission pursues a rulemaking to prohibit these practices it will also greatly benefit from additional staff to manage our complicated Section 18 process. And if Congress were to grant the agency either general APA rulemaking authority or targeted authority to address these and other practices in online commerce the agency could be even more responsive in its mission to protect consumers from these unlawful practices.

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[1] FTC, *Bringing Dark Patterns to Light: An FTC Workshop* (April 29,2021) (www.ftc.gov/news-events/events-calendar/bringing-dark-patterns-light-ftc-workshop).

The Honorable Kelly Armstrong (R-ND)

1. **In "Nixing the Fix: An FTC Report to Congress on Repair Restrictions", the Commission mentions stakeholder concerns regarding modifications to remove, impair, or disable federally-required emissions control equipment. Putting aside considerations of whether such activity would be classified as a modification or repair in specific circumstances, does the Commission plan to consult with the Environmental Protection Agency to fully understand whether providing access to embedded software would affect the regulation of federally-required emissions control equipment?**

   RESPONSE: We recognize that the right to repair may overlap with a number of different policy and legal issues. In the right to repair arena, as in other areas where the Commission's work implicates laws and regulations outside of the agency's expertise, we will seek input from the relevant stakeholders, including sister agencies like the EPA.

   Prior to the July 2019 Nixing the Fix workshop (the "Workshop"), the Commission issued a call for empirical research and sought comments from any interested parties and stakeholders. Following the Workshop, the Commission accepted comments into September 2019 and staff continues to meet with stakeholders and interested parties. While the FTC's report to Congress on repair restrictions[2] ("Report") briefly discusses emissions control equipment, it does so in the context of a study submitted to the record that focused on modifications to such equipment.[3] The study applied to off-road vehicles and, as noted in the Report, is inapposite as it concerned equipment that was modified rather than repaired. By contrast, the Commission's right to repair work, including the Workshop and Report, focuses on the benefits of expanding consumers' repair options. We have not considered whether consumers should have an unfettered right to modify their products and we recognize that the analysis of repair restrictions in the Report may not readily translate to an analysis of modification restrictions.

2. **In "Nixing the Fix: An FTC Report to Congress on Repair Restrictions", footnote 18 states that "Commissioner Wilson and Commissioner Phillips note that the report excludes from the scope of its coverage an analysis of manufacturers' intellectual property rights, which may provide legitimate justification for some repair restrictions." How will the Commission address such legitimate assertions of intellectual property rights?**

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[2] Federal Trade Commission, *Nixing the Fix: An FTC Report to Congress on Repair Restrictions* (May 2021), https://www.ftc.gov/system/files/documents/reports/nixing-fix-ftc-report-congress-repair-restrictions/nixing_the_fix_report_final_5521_630pm-508_002.pdf.

[3] Equipment Dealers Association & Association of Equipment Manufacturers, *Research Title: Modifications to Safety and Emissions Features in Off-Road Equipment*, https://www.regulations.gov/document/FTC-2019-0013-0017.

RESPONSE: We recognize that the right to repair issue may overlap with a number of different policy and legal issues.

As we noted in the Report, any action by industry or regulators to enable independent repair should seek input from relevant stakeholders, including the US Patent and Trademark Office and the US Copyright Office, in order to be mindful of existing law and policy supporting intellectual property protections.[4]

But firms must also abide by antitrust standards, including in the way that they assert IP rights. While patents are vital for promoting innovation, they are also routinely abused, to weaken rivals as well as to stunt development to protect and defend monopoly positions. For instance, in the Commission report on repair restrictions, Commission staff uncovered evidence that manufacturers and sellers may be restricting competition for repair services in a number of ways, including by asserting patent rights and enforcement of trademarks in an unlawful, overbroad manner. While efforts by dominant firms to restrict repair markets are not new, changes in technology and more prevalent use of software has created fresh opportunities for companies to limit independent repair. I believe the Commission must use its full range of tools to ensure that manufacturers and sellers are not relying on overbroad assertions of intellectual property rights as a pretext for monopolistic or exclusionary conduct.

[4] *Id.* at 53-54.

Attachment—Additional Questions for the Record

Subcommittee on Consumer Protection and Commerce
Hearing on
"Transforming the FTC: Legislation to Modernize Consumer Protection"
July 28, 2021

The Honorable Christine Wilson, Commissioner, Federal Trade Commission

The Honorable Kelly Armstrong (R-ND)

1. **In "Nixing the Fix: An FTC Report to Congress on Repair Restrictions", the Commission mentions stakeholder concerns regarding modifications to remove, impair, or disable federally-required emissions control equipment. Putting aside considerations of whether such activity would be classified as a modification or repair in specific circumstances, does the Commission plan to consult with the Environmental Protection Agency to fully understand whether providing access to embedded software would affect the regulation of federally-required emissions control equipment?**

   RESPONSE: Issues within the right to repair arena almost certainly will overlap with legal and policy issues in a variety of other arenas. It is not uncommon for the work of the Commission to intersect with the work of other federal agencies, including the Department of Justice, Consumer Financial Protection Bureau, U.S. Food and Drug Administration, United States Patent and Trademark Office, and Federal Energy Regulatory Commission. Traditionally, where the Commission's work has implicated laws and regulations falling within the jurisdiction of other federal agencies, the FTC has consulted closely with those agencies. Issues arising in the right to repair space warrant the same kind of consultation with sister agencies – including the Environmental Protection Agency ("EPA") – whose mandates intersect with the mission of the FTC to advance competition and consumer protection. As we continue our work on right to repair issues, I will encourage the Commission to consult closely with the EPA and other relevant agencies whose directives intersect with ours.

2. **In "Nixing the Fix: An FTC Report to Congress on Repair Restrictions", footnote 18 states that "Commissioner Wilson and Commissioner Phillips note that the report excludes from the scope of its coverage an analysis of manufacturers' intellectual property rights, which may provide legitimate justification for some repair restrictions." How will the Commission address such legitimate assertions of intellectual property rights?**

RESPONSE: As noted in response to Question #1, issues within the right to repair arena almost certainly will overlap with legal and policy issues in a variety of other arenas. One important area of intersection concerns intellectual property ("IP").

The FTC has spent significant time and effort examining the intersection between IP and antitrust. I had the honor of serving as Chief of Staff to FTC Chairman Tim Muris when we launched the Hearings on Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy.[1] In announcing the hearings, Chairman Muris explained a fundamental principle: properly understood, both IP law and antitrust law seek to promote innovation and enhance consumer welfare. IP law, properly applied, preserves incentives for innovation. And innovation (i) benefits consumers through the development of new and improved goods and services and (ii) spurs economic growth. Similarly, antitrust law, properly applied, promotes innovation and economic growth by combatting anticompetitive arrangements and monopolization that deter vigorous economic activity.

A full exploration of manufacturers' IP rights fell outside the scope of the *Nixing the Fix* report. That said, the report acknowledges that IP rights foster innovation by protecting significant investments in research and development.[2] And while the report observed that the misuse of IP rights may create barriers to independent repair, staff explicitly noted that the "assertion of IP rights does not appear to be a significant impediment to independent repair."[3]

When the Commission analyzes whether particular repair restrictions violate any of the laws that it enforces, it must consider whether the restriction is due to a legitimate assertion of IP rights. As stated in the *Policy Statement of the Federal Trade Commission on Repair Restrictions Imposed by Manufacturers and Sellers* voted out at the July 21, 2021 open Commission meeting, the Commission should pursue only the *unlawful* and *overbroad* assertion of IP rights.[4] During the investigation and analysis of right to repair restrictions, the Commission should give due consideration

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[1] Timothy J. Muris, Former Chairman, Fed. Trade Comm'n, Remarks before the American Bar Association, Antitrust Section Fall Forum (Nov. 15, 2001), https://www.ftc.gov/public-statements/2001/11/competition-and-intellectual-property-policy-way-ahead.

[2] FED. TRADE COMM'N, NIXING THE FIX: AN FTC REPORT TO CONGRESS ON REPAIR RESTRICTIONS 22 (May 2021), https://www.ftc.gov/system/files/documents/reports/nixing-fix-ftc-report-congress-repairrestrictions/nixing_the_fix_report_final_5521_630pm-508_002.pdf.

[3] *Id.* at 24. *See also Id.* at 26 ("Nonetheless, while it is clear that manufacturers' assertion of intellectual property rights can impede repairs by individuals and independent repair shops, in many instances intellectual property rights do not appear to present an insurmountable obstacle to repair…Thus, it is not clear that manufacturers are readily turning to patent law to prevent independent repair shops from obtaining spare parts.").

[4] *Policy Statement of the Federal Trade Commission on Repair Restrictions Imposed by Manufacturers and Sellers* (July 21, 2021), *available at* https://www.ftc.gov/system/files/documents/public_statements/1592330/p194400repairrestrictionspolicystatement.pdf.

to a company's explanation for repair restrictions, including the protection of IP. Although assertions regarding IP rights may not ultimately carry the day, we should not dismiss those proffered justifications lightly.

GEORGETOWN LAW

David C. Vladeck
.B. Chettle, Jr., Professor of Law

August 31, 2021

Via Email

The Honorable Frank Pallone Jr.
The Honorable Janet D. Schakowsky
Committee on Energy and Commerce
Subcommittee on Consumer Protection and Commerce
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, D.C. 20515

Re: Hearing on "Transforming the FTC: Legislation to Modernize Consumer Protection"

Dear Chairman Pallone and Chair Schakowsky:

Set forth in the attachment to this letter are my answers to questions for the record. Please let me know if I can assist the Committee or Subcommittee in any way.

Respectfully submitted,

David C. Vladeck

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Attachment

The Honorable Janice D. Schakowsky (D-IL)

1. The central theme of last month's hearing was ensuring the FTC has the tools it needs to protect consumers in the modern marketplace and into the future. In practice, this often means adapting to an online, interconnected world.

    a. How has the shift to online commerce, the proliferation of social media, and the general dependence on the internet changed the consumer experience?

    RESPONSE:

The internet has changed every facet of commerce in the United States. The volume of sales made online has skyrocketed and increases every year. See, e.g., https://www.digitalcommerce360.com/article/us-ecommerce-sales/. The internet has become a safe haven for criminals and scam artists who hide behind the anonymity of internet transactions. Identity theft has become a feature of modern life, the predictable debris of an economy that doesn't take seriously the need to safeguard sensitive personal information. Most enforcement cases brought by the FTC and State Attorneys General emanate from or have a direct relationship to the internet. And social media platforms fine-tune their algorithms to ensure that users maximize the time they spend on platforms, even though doing so encourages extremism.

    b. Are certain groups particularly vulnerable to online harms?

    RESPONSE:

This is a complicated question. If the question is focused on internet scams, the answer is that everyone – regardless of age, gender, race, educational status – is vulnerable. *See*, FTC, *Consumer Fraud in the United States* (2017).

If the question is focused on discrimination based on race, gender, and age, the answer to that question is yes, there are

vulnerable populations who are subject to exploitation and discrimination on internet platforms. Much of that bias is due to using algorithms to make consequential decisions about credit, price, and access to goods and services. Algorithmic bias is deeply engrained, difficult to prove (given that one can't really interrogate an algorithm), and difficult to root out. There are serious concerns that internet transactions mask discrimination again racial minorities, women, and the elderly, especially in financial services, but in other economic sectors as well. And, of course, major platforms have fostered, and no doubt still foster, bias through advertising targeted at selected populations.

c. What are the most important steps Congress can take to make sure that the Federal Trade Commission can fulfill its duty to protect consumers from unfair, deceptive, and anticompetitive behavior?

RESPONSE:

***First*, and foremost, the FTC needs more resources. The FTC enforces not only the FTC Act, but seventy plus other statutes, and yet it is barely two-thirds the size (in terms of personnel and budget) than it was in 1981.**

***Second*, the FTC's staff is underpaid in comparison with staff at the Securities and Exchange Commission, the Consumer Financial Protection Bureau, the Commodities Future Trade Commission, and other consumer protection agencies and commissions. There is no reason for the pay disparity, it trivializes the FTC's central role in consumer protection, and the FTC often loses key personnel to sister agencies simply because of that disparity.**

***Third*, as I emphasized in my testimony, the FTC needs standard Administrative Procedure Act rulemaking authority under 5 U.S.C. § 553. This authority was withdrawn from the Commission in 1980 because it had the temerity to seek to protect children in the market place. And contrary to the folklore that the business community has encouraged, the fact is that the American people strongly favored the FTC's proposed action; it took a concerted campaign by the business community to kill off the FTC's proposal. *See*, *e.g.*, Luke D. Herrine, *The Folklore of Unfairness*, 96 N.Y.U. Law Review, 431 (2020) (recounting the history of "kid-vid").**

The withdrawal of rulemaking authority has had a crippling impact on the FTC. Prior to 1980, the FTC extensively engaged in

rulemaking – setting clear and enforceable norms through a transparent process and robust industry participation. The business community says it wants clear and specific standards. That's only fair. But the only way for an agency or commission to set clear and specific standards is through rulemaking. Do not let the business community stifle this important initiative; it would be hypocritical for the business community to, on one hand, urge the FTC to set clear and specific standards, and on the other hand to oppose giving the Commission rulemaking authority to do just that. After all, why should the FTC alone lack rulemaking authority, especially since rules are subject to searching judicial review?

***Fourth*, Congress should repeal the antiquated "common carrier" and "non-profit" carve-outs to the FTC's jurisdiction. I won't repeat here what I said in my written testimony (at pp. 4-7) , but these carve-outs leave an intolerable vacuum in the nation's consumer protection safety net, and these carve-outs continue to hamper the FTC's ability to protect consumers in the marketplace.**

***Fifth*, Congress should fine-tune and enact the Online Consumer Protection Act. At a minimum, the Act ought to make clear that Section 230 of the Communications Decency Act does not impede in any way the FTC's authority to enforce the FTC Act. The Online Consumer Protection Act ought to specify that any failure by a platform to adhere to its own "terms of service" agreements can constitute a deceptive or unfair act or practice actionable by the FTC. And the Act should prohibit internet providers from insisting that disputes between users and providers be resolved by arbitration rather than litigation. Congress should also expressly provide that users may band together to bring class actions against platforms in cases alleging a breach of the terms of service; thus avoiding the prospect that the platforms could outlaw collective or class actions in their terms of service. *Cf. AT&T Mobility v. Conception*, 563 U.S. 333 (2011) (upholding a service contract that forbid collective actions).**

Some of the issues relating to the proposed Act were the subject of a recent National Academies of Arts and Sciences workshop entitled *Section 230 Protections: Can Legal Revisions or Novel Technologies Limit Online Misinformation and Abuse*? The report is available here: https://www.nap.edu/download/26280.

The Honorable Lori Trahan (D-MA)

1. Bad actors use platforms popular within the Spanish speaking community to target fraudulent advertising and scams. In fact, during the pandemic bad actors used WhatsApp and Facebook to send messages offering money to people who need it through grants, coupons for food support, or other giveaways. The fake offers looked like they were coming from trusted brands but were actually phishing scams to collect personal information and possibly install malware.[1] Most recently, as part of the FTC's Operation Income Illusion sweep the Commission found that Moda Latina BZ Inc., Esther Virginia Fernandez Aguirre, and Marco Cesar Zarate Quíroz specifically targeted Latina consumers in Spanish-language ads on TV with false promises of earning large profits selling luxury goods from their living room.[2] Given the FTC's limited resources both in personnel and funds, and their limited ability to seek civil penalties, are you concerned about more fraudulent advertisements being targeted at Spanish-speakers? What else could the FTC do to combat the problem?

   RESPONSE:

   During my tenure at the FTC the Bureau of Consumer Protection started holding "common ground" conferences around the country to bring together community organizations, state Attorneys General, other consumer protection agencies, and non-profit organizations like La Raza, and of course, the FTC to discuss the threats to vulnerable communities and to act collectively to combat those threats. Directors of the FTC's regional offices were tasked with helping to organize the conferences and cement relationships with community groups.

   Those conferences were essential in providing the FTC actionable leads on newly emerging scams. For instance, the Bureau first learned of a series of phantom debt collection scams that were taking a serious toll on minority groups, including the Spanish-speaking community, through a common ground conference. Working with community organizations, we were able to build enforcement cases, shut down the scams, and I believe we also referred some of the scammers to the Department of Justice for criminal prosecution.

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[1] Diana Shiller, *Those free COVID-19 money offers on WhatsApp and Facebook ae scams*, FTC Blog (Aug. 28, 2020) (www.consumer.ftc.gov/blog/2020/08/those-free-covid-19-money-offers-whatsapp-and-facebook-are-scams).

[2] FTC, *Operators of Bogus Income Scam Targeting Latinas Face FTC Settlement* (Mar. 2, 2021) (www.ftc.gov/news-events/press-releases/2021/03/operators-bogus-income-scam-targeting-latinas-face-ftc-settlement).

Outreach to community groups was an essential job for the Bureau during my tenure. My understanding is that commitment has waned over time. I would urge the Committee to ensure that the FTC has the resources and will to actively re-engage with community organizations. Those organizations often provide an early-warning signal about new and highly problematic scams, such as the phishing scam discussed in your question. But make no mistake, the FTC is severely under-resourced, and these common ground conferences require resources, especially the time it takes to plan the conferences (we were generally able to hold the conferences at universities and law schools, and thus saved money on facilities) and the expenses for Bureau personnel to attend and follow up with community groups.

2. The pandemic has been a challenge for families across the country. In addition to the public health impact, the pandemic has opened the door for bad actors to prey on the most vulnerable through scams and consumer abuse. In March, then Acting Chairwoman Slaughter and CFPB Acting Director Uejio issued a joint statement which included: "Staff at both agencies will be monitoring and investigating eviction practices, particularly by major multistate landlords, eviction management services, and private equity firms, to ensure that they are complying with the law. Evicting tenants in violation of the CDC, state, or local moratoria, or evicting or threatening to evict them without apprising them of their legal rights under such moratoria, may violate prohibitions against deceptive and unfair practices, including under the Fair Debt Collection Practices Act and the Federal Trade Commission Act."[3]

    a. Can you explain why the prohibitions against deceptive and unfair practices under the FTC Act have been so crucial during the pandemic?

    RESPONSE:

This question reflects the importance of both prongs of the FTC's authority under Section 5 of the FTC Act. There have been a tsunami of *deceptive* acts and practices during the ongoing pandemic – from selling bogus treatments and cures, to bogus test kits, swabs, masks, and on and on. And there were many *unfair* acts and practices relating to threats of eviction and other acts that violate

[3] Federal Trade Commission, *JOINT STATEMENT OF CFPB ACTING DIRECTOR DAVE UEJIO AND FTC ACTING CHAIRWOMAN REBECCA SLAUGHTER* (Mar. 29, 2021) (files.consumerfinance.gov/f/documents/cfpb_ftc-joint-statement_03-2021.pdf).

the FTC Act.

b. Do you believe the FTC is sufficiently equipped to respond to major crises?

RESPONSE:

The short answer is "no," and that was true when I served as Bureau Director during the economic crisis of 2008-2012, and it is equally true today. I often thought of my job as a Bureau Director as a triage nurse; the FTC lacked the resources to take on all of the enforcement cases we needed to bring, and as a result, too many scams persisted for too long, all to the detriment of consumers. Nothing has changed since then. Although I think that the FTC has done as well as it could, given its resources, during the ongoing pandemic, major crises like the 2008 downturn or the pandemic drive home the insufficiency of the FTC's resources. The failing here is not the FTC's. It is Congress that has long underfunded and under-resourced the FTC.

3. The CDC moratorium on evictions will eventually come to an end. This will leave Millions of families in need of safe long-term housing and particularly vulnerable to scams and other consumer abuses. We have already seen a tremendous amount of "pandemic profiteering" from bad actors seeking to take advantage of our most vulnerable during this crisis.[4] Can you speak to the potential for housing scams and how Congress may best help the FTC be prepared to fight them?

RESPONSE:

The Federal moratorium has ended, and while some states are extending the moratorium, there is almost certain to be the "pandemic profiteering" your question anticipates. To be sure, profiteers will try to squeeze the last dollar out of recently evicted or soon-to-evicted tenants, and many of those scams will involve violations of the FTC Act. To be effective, the FTC will need to partner with community groups on the ground, so FTC interventions are timely, that is, when enforcement cases, or even threatened enforcement cases, might deter some profiteers and could take those who are engaging in profiteering off the table.

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[4] Emily Wu, *Need rental assistance? Check out these tenant assistance services*, FTC Blog (Aug. 5, 2021) (www.consumer.ftc.gov/blog/2021/08/need-rental-assistance-check-out-these-tenant-assistance-services).

There is, of course, the nagging question of whether the threat of an FTC enforcement action has much currency these days. One serious problem the FTC faces is that, at present, its power to bring an enforcement action is not much of a threat; the FTC cannot even force a scam artist to return ill-gotten gains to the scammed. Until *AMG* is overturned by Congress, FTC enforcement cases result in, at most, a slap on the wrist, and that emboldens scam artists. It is a travesty that Congress has yet to fill the gap left in *AMG*, and it is your constituents who will pay for Congress's inaction.

4. Unfortunately, organizations purporting to be nonprofits can be the first to take advantage of the most vulnerable, including the unhoused. How would eliminating the exemption for nonprofits from the FTC's jurisdiction allow the Commission to ensure vulnerable populations are better protected in times of crisis?

RESPONSE:

I agree with the premise of your question – bogus non-profit groups are keen to take advantage of the gap in the FTC's authority for non-profit organizations. My testimony tries to drive home the point that the FTC often has to spend significant resources to prove that an organization that claims to be non-profit, is not, in fact a bona fide non-profit organization. As a result, bogus non-profits often get away with scams aimed at vulnerable populations, and the FTC at times has to forego enforcement proceedings because of resource constraints or an inability to prove to a court that an entity is not a bona fide non-profit.

Additional Questions for the Record
Subcommittee on Consumer Protection and Commerce
Hearing on
"Transforming the FTC: Legislation to Modernize Consumer Protection"
July 28, 2021

Graham Dufault, Senior Director for Public Policy, ACT | The App Association

The Honorable Janice D. Schakowsky (D-IL)

1. The central theme of last month's hearing was ensuring the FTC has the tools it needs to protect consumers in the modern marketplace and into the future. In practice, this often means adapting to an online, interconnected world.

    a. How has the shift to online commerce, the proliferation of social media, and the general dependence on the internet changed the consumer experience?

    RESPONSE:

Online Commerce. For App Association members, one of the most significant developments that shifted commerce into the online space was the introduction of the smartphone and the entry of the software platform distribution model to the marketplace. In the early and mid-2000s, independent companies that sold software faced uphill battles to reach their addressable markets.[1] For consumers, downloading software from an unfamiliar developer was a gamble: often, bad actors took advantage of the availability of software on the open internet, posing as legitimate companies to plant malware on personal computers (PCs). The smartphone and software platforms (app stores bundled with mobile operating systems) changed this dynamic in ways that have undeniably benefited small software companies and consumers alike.

First, the entry of software platforms brought with it a greater variety of choices, lower prices, and higher quality products and services for consumers.[2] From the time they first carried software made by independent companies like App Association members, the major app stores performed vetting functions, approving and denying third-party apps.

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[1] *See* ACT | THE APP ASSOCIATION, THE SYMBIOTIC RELATIONSHIP BETWEEN APP DEVELOPERS AND PLATFORMS: A TEN-YEAR RETROSPECTIVE (2018), *available at* https://actonline.org/wp-content/uploads/2018_ACT-App-Store-Ten-Year-Retro-Doc.pdf.

[2] *See* Hearing on "Competition in Digital Technology Markets: Examining Self-Preferencing by Digital Platforms," before the United States Senate Judiciary Committee Subcommittee on Antitrust, Competition Policy, and Consumer Rights (116th Cong., 2d Sess.), statement of Morgan Reed, president, ACT | The App Association (Mar. 10, 2020), *available at* https://actonline.org/wp-content/uploads/2020-03-07-ACT-Testimony-Senate-Judic-Antitrust-Sub-Hrng-FINAL.pdf.

The process they use has improved over the years[3] and complements the operating system features software platforms employ to prevent access to consumer data and device features by bad actors. Together, these platform functions created and maintain a trusted marketplace for consumers to conduct online commerce in all of its various and evolving forms. Second, software platforms provide a bundle of developer services that include worldwide distribution, developer tools, assistance with intellectual property protections, and most importantly, the ability to leverage a trusted marketplace to sell software and other products and services ancillary to an app.[4] Before software platforms developed this bundle of services, independent software companies cobbled them together at higher costs to reach their intended markets. The cultivation of trust in the software company's brand alone often took years to establish. These overhead costs combined with generally smaller addressable consumer and business markets, resulting in less attractive prospects for developers and far fewer choices and higher costs for consumers and clients. A key litmus test for our member companies is whether consumers are willing to download software from a company they had never heard of previously. Under current circumstances on software platforms, consumers are able to download such software confidently because they know platforms actively bar and remove apps with malware and other harmful content. Many App Association members sell products and services on the open internet as well and it can be a substitute for software platform distribution. But without software platforms, far fewer app makers would be able to scale up quickly enough and become competitive, and consumer choice would suffer as a result.

The Federal Trade Commission (FTC) has rightfully focused on potential consumer harms accruing from intentional bad actors or from otherwise unintentional unfair or deceptive practices on the app stores. Software platforms play a key role in managing an app ecosystem that offers consumers a wide variety of options, while minimizing financial, safety, and privacy risks. These management functions form the core of the bundle of developer services described above, without which consumer trust would begin to collapse. Some proposals in Congress, like the Open App Markets Act (H.R. 5017 / S. 2710) and the American Choice and Innovation Online Act (H.R. 3816) would prohibit these management functions, ostensibly to address complaints from competitors with alternative products and services on the platform. While the bills would benefit some large competitors like Epic Games and Spotify, they would harm small app makers like App Association members as well as consumers because they would erode the trust consumers have in being able to conduct digital commerce in the app marketplaces. Both H.R. 5017 and H.R. 3816 would create a presumption that important software platform privacy and security features are illegal. The bills essentially allow platforms to overcome that presumption only by showing that any measure they take was "narrowly tailored, could not be achieved through a less discriminatory means,

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[3] Anna Bosch, "A Brief History of Time: The App Stores," ACT | The App Association Blog (Apr. 7, 2021) *available at* https://actonline.org/2021/04/07/a-brief-history-of-time-the-app-stores/.
[44] *See* ACT | THE APP ASSOCIATION, THE SYMBIOTIC RELATIONSHIP BETWEEN APP DEVELOPERS AND PLATFORMS: A TEN-YEAR RETROSPECTIVE 3 (2018), *available at* https://actonline.org/wp-content/uploads/2018_ACT-App-Store-Ten-Year-Retro-Doc.pdf.

was nonpretextual, and was necessary"[5] to provide privacy. The House Energy and Commerce Committee should oppose measures like these as moving federal policy in the opposite direction from where it should be heading. Congress should not *prohibit* privacy controls that are proven to work; instead, it should *require* companies to adopt privacy protections. Otherwise, federal law would undo the privacy-protective developments that enable online commerce, forcing consumers to accept a single, more open approach to security, or even worse, back to an early 2000s online experience with fewer options, less meaningful privacy protections, and diminished security.

Proliferation of social media. App maker interests largely center on software, rather than social media, platforms. However, to the extent that social media platforms have introduced and rapidly expanded the use of large data sets about their users, app makers have equities at stake. Many of our member companies rely on the ability to conduct analytics that draw on individuals' online activities, including how they use the software products and services that our member companies design. They also place ads using ad networks that target ads to certain kinds of consumers or in certain contexts in order to acquire new customers and clients. However, the tendency for the ad-driven "free to the consumer" model to lead to uses of data to which a consumer never consented, or that otherwise push the boundaries of activities conducted under color of authorization, has harmed App Association members. In some instances, small app companies used software development kits (SDKs) from large social media platforms that suggest they are not collecting data but turn out to be doing just that, in order to feed ad networks. While an inflexible notice-and-consent privacy regime is not a workable solution, companies should use data only in ways that comport with the consumer's reasonable expectations given the context of their relationship with the company. The House Energy and Commerce Committee's staff draft privacy legislation includes a provision that is consistent with this approach, providing that affirmative consent is not required and consent implied "to the extent the processing is consistent with the reasonable consumer expectations within the context of the interaction between the covered entity and the individual . . .."[6] The consumer experience with social media platforms underscores why a strong privacy law should bar processing and collection activities that are inconsistent with consumer expectations. Allowing this activity to go unchecked directly erodes the trust consumers have in the app ecosystem and in online services generally, which is central to the survival and success of App Association members.

General dependence on the internet. In the past year, digital transactions increased 42 percent and 60 percent of those transactions were mobile.[7] Our increased reliance on online products and services permeates virtually all aspects of our daily lives, from how we get lunch to how we access healthcare. Privacy and security risks attend any online service, interaction, or transaction. Bad actors are redoubling their attacks on

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[5] American Choice and Innovation Online Act, Sec. 2(c)(1)(B) (H.R. 3816, 117th).
[6] House Energy and Commerce Committee staff draft privacy legislation, ___ Act of 2019, Sec. 6(b)(1) (H.R. ___, 116th).
[7] LEXISNEXIS RISK SOLUTIONS, FRAUD TRENDS TO WATCH IN 2021 (2021), *available at* https://risk.lexisnexis.com/insights-resources/infographic/fraud-trends-to-watch-in-2021.

smart devices in particular, as mobile device fraud attacks increased by 48 percent.[8] More demand for App Association member products and services has benefitted the app economy, but it also increases the need for better cybersecurity awareness and tools. Our member companies must be able to employ strong technical protection measures like encryption and benefit from and participate in real-time cybersecurity threat sharing. Similarly, our inevitable reliance on online services underscores again the importance of allowing software platforms to cultivate a dependable marketplace and of Congress' important role in imposing a single set of strong, federal privacy requirements to improve protections and trust in the online marketplace.

b. Are certain groups particularly vulnerable to online harms?

RESPONSE:

Small businesses are especially vulnerable to cyberattacks, as 60 percent of small companies go out of business within six months of a breach.[9] As I described in testimony before the House Small Business Committee, small businesses are not as well equipped as they should be to thwart these attacks.[10] A single set of requirements at the federal level for data security would help prevent the devastating effects of these attacks by making small businesses less attractive targets and less vulnerable to scams. Similarly, this Committee is right to explore options to better position federal enforcers to investigate cybercrime and punish perpetrators. The Reporting Attacks from Nations Selected for Oversight and Monitoring Web Attacks and Ransomware from Enemies (RANSOMWARE) Act (H.R. 4551) would also help policymakers sharpen enforcement against ransomware attackers overseas.

As far as certain demographics that are especially vulnerable to online harms, statistics suggest that consumers under 25 and over 75 are also more vulnerable to online harms, especially those that result from bad actors through social engineering.[11] The FTC's own data points to fewer reports of dollar losses by older consumers but higher median losses per attack.[12] The evidence here supports action by the Committee to direct the FTC's focus on elder fraud and the FTC Robust Elderly Protections and Organizational Requirements to Track Scams (FTC REPORTS) Act (H.R. 2672) would help in this regard. Similarly, recent FTC data also indicates that members of the military community reported higher median losses due to fraud than the public at

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[8] *Id.*
[9] PURPLESEC, CYBER SECURITY TRENDS IN 2021 (Apr. 29, 2021), *available at* https://purplesec.us/resources/cyber-security-statistics/.
[10] Hearing on "Strengthening the Cybersecurity Posture of America's Small Business Community," before the House Small Business Committee (117th Cong., 1st Sess.), statement of Graham Dufault, Senior Dir. for Pub. Policy, ACT | The App Association (Jul. 20, 2021), *available at* https://smallbusiness.house.gov/uploadedfiles/07-20-21_mr._dufault_testimony.pdf.
[11] "Cybercrime report finds young adults and adults over 75 most vulnerable to fraud attacks," SECURITY MAGAZINE (Feb. 25, 2021), *available at* https://www.securitymagazine.com/articles/94684-cybercrime-report-finds-young-adults-and-adults-over-75-most-vulnerable-to-fraud-attacks.
[12] FED. TRADE COMM'N, CONSUMER SENTINEL NETWORK DATA BOOK 2020 13 (Feb. 2021), *available at* https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-2020/csn_annual_data_book_2020.pdf.

large.[13] Therefore, the Veterans and Servicemember Consumer Protection Act of 2021 (H.R. 4483) is also a welcome measure to ensure the FTC focuses its enforcement efforts on fraud schemes tailored to the military community. Lastly, as fellow witness Sally Greenberg of National Consumers League pointed out, "affinity fraud" threatens a variety of demographics, as fraudsters are known to target consumers based on their sexual identity, ethnicity, religion, race, and other protected characteristics.[14] The Consumer Equity Protection Act (H.R. 4460) is therefore a welcome measure to help direct the FTC's efforts to combat fraud schemes specifically targeting these communities.

Since fraudsters are ramping up their attacks on vulnerable populations and businesses in the mobile space, it is more important than ever for policymakers to enable strong countermeasures protecting smart devices. For this reason, Congress should reject efforts to require software platforms to allow side loading of unvetted and potentially dangerous software. In particular, we urge the Committee to oppose the Open App Markets Act (H.R. 5017 / S. 2710) and the American Choice and Innovation Online Act (H.R. 3816), which would generally prohibit software platform gating functions that prevent side loading of malware, apps that pirate content and ad revenue,[15] and other bad actors.

c. What are the most important steps Congress can take to make sure that the Federal Trade Commission can fulfill its duty to protect consumers from unfair, deceptive, and anticompetitive behavior?

RESPONSE:

Unfair and deceptive acts or practices. We urge Congress to enact a federal privacy law that preempts analogous state laws with substantially the same scope.[16] A federal privacy law should better equip the FTC to pursue privacy harms as well as impose a set of federal data security requirements.

Anticompetitive behavior. Congress should consider clarifying the applicability of the FTC Act's prohibition on unfair methods of competition (UMC) to cases involving standard-essential patent (SEP) licensing. As part of the process of voluntarily declaring patents as essential to standards, patent holders generally agree to license SEPs on

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[13] *Id.* at 17.
[14] Hearing on "Transforming the FTC: Legislation to Modernize Consumer Protection," before the House Committee on Energy and Commerce, Subcommittee on Consumer Protection and Commerce (117th, 1st Sess.), statement of Sally Greenberg, Exec. Dir., Nat'l Consumers League (Jul. 28, 2021), *available at* https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Witness%20Testimony_Greenberg_CPC_2021.07.28.pdf.
[15] Graham Dufault, "Proliferation of Ad Piracy Means Platform Protections are More Important than Ever," ACT | THE APP ASSOCIATION BLOG (Aug. 13, 2021), *available at* https://actonline.org/2021/08/13/proliferation-of-ad-piracy-means-platform-protections-are-more-important-than-ever/.
[16] *See* ACT | THE APP ASSOCIATION, PROTECTING CONSUMER PRIVACY, GROWING SMALL BUSINESS (2021), *available at* https://actonline.org/wp-content/uploads/Privacy_MOC_20_21.pdf.

terms that are fair, reasonable, and non-discriminatory. Unfortunately, while federal law and policy generally prohibit anticompetitive licensing activities by SEP holders—especially those practices that violate SEP holder commitments to make licenses available on a fair, reasonable, and non-discriminatory basis (FRAND)—aggressive licensors continue to take advantage of gray areas in the law to gouge consumers, resulting in fewer choices, less innovation, and lower quality in the market.[17] As small mobile software and connected device companies, App Association members depend on a strong, private sector-led standards-setting system that maximizes innovation on top of foundational technologies like technical standards (such as Wi-Fi, 4G, and 5G). Congress should consider clarifying that certain SEP licensing practices constitute UMC.

[17] Brian J. Love, Yassine Lefouili, and Christian Helmers, *Do Standard-Essential Patent Owners Behave Opportunistically? Evidence from U.S. District Court Dockets* (Nov. 8, 2020), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3727085.

The Honorable Gus Bilirakis (R-FL)

1. Mr. Dufault, I introduced H.R. 2672, the "FTC REPORTS Act," which would require the FTC to publish and submit to Congress an annual report on the FTC's enforcement actions involving allegations of elder fraud. As you know, this Committee has a rich history of passing bipartisan legislation to go after fraudsters, including giving the FTC authority to do so. Can you speak to how important it is for the FTC to have sufficient resources dedicated to combatting fraud?

RESPONSE:

As far as certain demographics that are especially vulnerable to online harms, statistics suggest that consumers under 25 and over 75 are also more vulnerable to online harms, especially those that result from bad actors through social engineering.[18] The FTC's own data points to fewer reports of dollar losses by older consumers but higher median losses per attack.[19] The evidence here supports action by the Committee to direct the FTC's focus on elder fraud and the FTC Robust Elderly Protections and Organizational Requirements to Track Scams (FTC REPORTS) Act (H.R. 2672) would help in this regard. Similarly, recent FTC data also indicates that members of the military community reported higher median losses due to fraud than the public at large.[20] Therefore, the Veterans and Servicemember Consumer Protection Act of 2021 (H.R. 4483) is also a welcome measure to ensure the FTC focuses its enforcement efforts on fraud schemes tailored to the military community. Lastly, as fellow witness Sally Greenberg of National Consumers League pointed out, "affinity fraud" threatens a variety of demographics, as fraudsters are known to target consumers based on their sexual identity, ethnicity, religion, race, and other protected characteristics.[21] The Consumer Equity Protection Act (H.R. 4460) is therefore a welcome measure to help direct the FTC's efforts to combat fraud schemes specifically targeting these communities.

Since fraudsters are ramping up their attacks on vulnerable populations and businesses in the mobile space,[22] it is more important than ever for policymakers to enable strong countermeasures protecting smart devices. For this reason, Congress should reject

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[18] "Cybercrime report finds young adults and adults over 75 most vulnerable to fraud attacks," SECURITY MAGAZINE (Feb. 25, 2021), *available at* https://www.securitymagazine.com/articles/94684-cybercrime-report-finds-young-adults-and-adults-over-75-most-vulnerable-to-fraud-attacks.

[19] FED. TRADE COMM'N, CONSUMER SENTINEL NETWORK DATA BOOK 2020 13 (Feb. 2021), *available at* https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-2020/csn_annual_data_book_2020.pdf.

[20] *Id.* at 17.

[21] Hearing on "Transforming the FTC: Legislation to Modernize Consumer Protection," before the House Committee on Energy and Commerce, Subcommittee on Consumer Protection and Commerce (117th, 1st Sess.), statement of Sally Greenberg, Exec. Dir., Nat'l Consumers League (Jul. 28, 2021), *available at* https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Witness%20Testimony_Greenberg_CPC_2021.07.28.pdf.

[22] LEXISNEXIS RISK SOLUTIONS, FRAUD TRENDS TO WATCH IN 2021 (2021), *available at* https://risk.lexisnexis.com/insights-resources/infographic/fraud-trends-to-watch-in-2021 (indicating that attacks in the mobile space increased 48 percent in 2020).

efforts to require software platforms to allow side loading of unvetted and potentially dangerous software. In particular, we urge the Committee to oppose the Open App Markets Act (H.R. 5017 / S. 2710) and the American Choice and Innovation Online Act (H.R. 3816), which would generally prohibit software platform gating functions that prevent side loading of malware, apps that pirate content and ad revenue,[23] and other bad actors.

[23] Graham Dufault, "Proliferation of Ad Piracy Means Platform Protections are More Important than Ever," ACT | THE APP ASSOCIATION BLOG (Aug. 13, 2021), *available at* https://actonline.org/2021/08/13/proliferation-of-ad-piracy-means-platform-protections-are-more-important-than-ever/.

Attachment—Additional Questions for the Record

Subcommittee on Consumer Protection and Commerce
Hearing on
"Transforming the FTC: Legislation to Modernize Consumer Protection"
July 28, 2021

Ms. Sally Greenberg, Executive Director, National Consumers League

The Honorable Janice D. Schakowsky (D-IL)

1. The central theme of last month's hearing was ensuring the FTC has the tools it needs to protect consumers in the modern marketplace and into the future. In practice, this often means adapting to an online, interconnected world.

    a. How has the shift to online commerce, the proliferation of social media, and the general dependence on the internet changed the consumer experience?

    RESPONSE: The Internet has revolutionized the way consumers interact with the marketplace. This has had both positive and negative implications for consumers' shopping experience. While consumers have access to millions of products and services at the touch of a button, it has also given scammers a practically limitless universe of potential victims for a dizzying array of frauds. While social media has allowed consumers to easily tap into the wisdom of their social networks to do things like evaluate particular products, it has also allowed disinformation and misinformation to distort the marketplace. The current wave of disinformation regarding COVID-19 vaccines and treatments, powered in no small part by social media, is a perfect example. And while online commerce has enabled consumers to vastly expand the number of merchants they interact with, policing marketplaces for things like unsafe and counterfeit products remains an ongoing challenge.

    b. Are certain groups particularly vulnerable to online harms?

    RESPONSE: All Internet users, regardless of age, income, race or degree of tech-savviness are vulnerable to online harms. The range of potential harms means that all consumers should educate themselves to help reduce the risk of being scammed online. However, consumer education alone will not adequately address the problem. It is incumbent on companies that are collecting billions of dollars in profits from consumers' use of the Internet to take a bigger role in protecting those users. It is for this reason that NCL supports comprehensive data security standards legislation that would require that companies that collect consumer data to take reasonable data security measures to protect that data.

While all consumers are vulnerable to online harms, we are particularly concerned about risks to seniors and children. It is for this reason that NCL supports the H.R. 1215, the Fraud and Scam Reduction Act,[1] which would enhance the FTC's ability to educate seniors about how to identify and prevent scams. NCL also supports bills such as Senator Markey and Cassidy's Children and Teens' Online Privacy Protection Act of 2021 (S. 1628),[2] which would strengthen privacy and security protections for children's data.

c. What are the most important steps Congress can take to make sure that the Federal Trade Commission can fulfill its duty to protect consumers from unfair, deceptive, and anticompetitive behavior?

RESPONSE: Consumers must be able to rely on a Federal Trade Commission that is empowered to hold the companies that power the Internet accountable when they engage in unfair or deceptive practices. Unfortunately, the agency is both resource-constrained and, thanks to the Supreme Court's decision in *AMG Capital Management*, legally limited in its ability to protect consumers in the vast and every-changing online marketplace.

To address these challenges, Congress should pass Congressman Cardenas' Consumer Protection and Recovery Act (H.R. 2668),[3] which would restore the FTC's ability to claw back ill-gotten gains from companies – both online and offline – that abuse consumers. We applaud the House for passing this important bill in July and we urge the Senate to move expeditiously to approve this important bill.

Another important priority for Congress must be to adequately fund the FTC. In recent decades, Congress has continually asked to FTC to expand the scope of its consumer protection and antitrust activities. However, the agency's full-time employee headcount is roughly 50% less than it was at the beginning of the Reagan Administration.[4] Congress should dramatically increase the FTC's funding so that it can adequately execute on its growing mission.

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[1] Online: https://www.congress.gov/117/bills/hr1215/BILLS-117hr1215eh.pdf
[2] Online: https://www.congress.gov/117/bills/s1628/BILLS-117s1628is.pdf
[3] Online: https://www.congress.gov/117/bills/hr2668/BILLS-117hr2668eh.pdf
[4] See Fed. Trade Comm'n, FTC Appropriation and Full-Time Equivalent (FTE) History, https://www.ftc.gov/about-ftc/bureaus-offices/office-executive-director/financial-management-office/ftc-appropriation

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