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Testimony of

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Chairman Burgess, Ranking Member Schakowsky, and members of the committee, I appreciate the opportunity to appear before you to discuss a number of legislative proposals to make the Federal Trade Commission (FTC) a more modern and innovation-friendly regulatory agency. I am the vice president of the Information Technology and Innovation Foundation (ITIF). ITIF is a nonpartisan think tank whose mission is to formulate and promote public policies to advance technological innovation and productivity. I am also the director of the Center for Data Innovation, an ITIF-affiliated nonprofit research institute focusing on the intersection of data, technology, and public policy.

In my testimony today, I would like to discuss the opportunity Congress has to reform certain aspects of the FTC so that it can better pursue its mission of protecting consumers from unfair and deceptive business practices without imposing unnecessary restrictions on the private sector or limiting innovation.

THE FTC PROVIDES VALUABLE OVERSIGHT AND CONSUMER PROTECTION, BUT IT CAN BE IMPROVED

As an independent U.S. regulatory and enforcement agency, the FTC provides an important function in protecting consumers and ensuring competition in many areas of the U.S. economy. In addition to having authority to investigate and combat unfair and deceptive practices, the FTC enforces a number of sector specific laws, such as the CAN-SPAM Act, the Children's Online Privacy Act, the Truth in Lending Act, the Equal Credit Opportunity Act, and the Fair Credit Reporting Act. While the FTC, through the leadership and dedication of its commissioners and staff, have achieved some important successes in recent years, there are many opportunities to modernize an institution that is over 100 years old so that it is able to provide the oversight needed to protect consumers while at the same time encouraging innovation in today's digital economy.

CONGRESS SHOULD MAKE THE FTC MORE INNOVATION FRIENDLY

There are a number of actions Congress can take to make the FTC more innovation friendly and reduce unnecessary regulatory costs. These include limiting FTC enforcement to cases where there is concrete consumer harm, requiring the FTC to use fair and consistent processes for rulemaking, requiring the FTC to be more transparent about it priorities and investigations, requiring the FTC to prioritize actions that result in actual consumer harm, and avoiding lengthy investigations and consent decrees.

The FTC Should Limit Its Enforcement Actions to Cases Where There Is Concrete Consumer Harm

Congress should take steps to ensure that FTC enforcement actions do not limit or discourage innovation. The FTC's actions send important signals to the private sector about how it should allocate its resources so as to comply with federal regulations. In theory, these signals should be encouraging businesses to take actions that protect consumers and discouraging businesses from taking actions that harm consumers, all while not discouraging companies from taking risks that might result in innovation beneficial to consumers. Unfortunately, that is not always the case.

For example, in 2014, the FTC entered into a consent decree with Apple over a complaint that the company had charged consumers millions of dollars for charges incurred by their children without their parent's consent.[1] The key fact in the case was that Apple did not inform customers that once they entered their passwords they opened a 15-minute window during which further charges could be made without additional verification from the account holder. As part of the consent decree, Apple agreed to stop this practice and require consumers to provide their express, informed consent prior to in-app charges.

In effect, the consent decree outlaws what was a feature, not a bug, in the system.[2] For many users, the ability to make multiple in-app purchases seamlessly was desirable as it eliminated the need to repeatedly re-enter passwords. Moreover, of all the consumers who used this feature, only a tiny fraction were children making purchases without their parent's permission. Thus, on balance, it is unlikely that there was a net harm. It is even possible that the FTC's actions have made consumers worse off. For example, if consumers are forced to enter passwords too frequently, they may choose to use simpler, and thus weaker, passwords, thereby increasing the risk of a data breach. Ultimately, this agreement puts the government, rather than the designers and developers working daily on these technological innovations, in charge of the final product. In the absence of evidence of net harm, the FTC should not be second-guessing the design decisions of the private sector.

Or consider the case the FTC brought against Nomi Technologies, a company that provides in-store retail analytics. Nomi is one of a handful of companies that have pioneered an innovative technique of using the wireless signals emitted by consumers' phones to take a digital headcount of shoppers in retail stores. The company uses this information to offer insights to retailers about consumer traffic patterns, such as the duration of visits, number of repeat customers, and the percentage of consumers who passed by the store without entering it.[3] Retailers then use these insights to measure the effectiveness of product offerings, promotions, displays and the set-up of their stores. Consumers benefit because retailers use these insights to create better and more efficient shopping experiences.

The FTC's complaint stated that Nomi included a partially incorrect statement in its privacy policy about how consumers could opt out of data collection at retail locations—an option that Nomi was under no legal obligation to provide. Nomi collected information about approximately nine million unique mobile devices between January 2013 and September 2013.[4] During that time, its privacy policy stated, "Nomi pledges to… always allow consumers to opt out of Nomi's service on its website as well as *at any retailer using Nomi's technology*" (emphasis added).[5] Nomi's privacy policy clearly contained an error because while it offered consumers the ability to opt out of data collection on its website from all of its retail partners, none of its retailers offered consumers a separate, in-store, opt-out mechanism. To be clear, the FTC did not object to the tracking itself, only the incorrect statement about the existence of a secondary opt-out mechanism.

Importantly, the FTC provided absolutely no evidence that any consumers were even affected, let alone harmed. At the time, Chairwoman Ramirez and Commissioners McSweeny and Brill argued that some consumers interested in opting out may have visited Nomi's website but chose not to do so. They postulated that this group was made up of consumers who found it inconvenient to opt-out online, wanted to see if stores they patronized used this technology, or wanted to "vote with their feet" by not patronizing stores that used the technology rather than opting out.[6]

However, the population of potentially affected consumers was miniscule. Only 3,840 consumers even downloaded Nomi's privacy policy.[7] Of that group, how many read the relevant portion of the policy, chose not to opt-out of all tracking using the website, visited at least one retail partner, carried a mobile phone, and wanted to opt-out at a particular store? While some at the FTC offered an interesting theory, they did not actually identify any consumers who fit this profile. Indeed, such a consumer may never have even existed. Moreover, even if there were one or two consumers who met these criteria, the worst thing that could happen to them is that they were tracked without being notified—a practice that is entirely legal. Therefore, the FTC ultimately chose to use its regulatory authority to take action against a company for what was possibly a lawyer's mistake in drafting Nomi's privacy policy despite no evidence that any consumers were actually harmed.

While the FTC did not impose any civil penalties, by formally taking action when there was no injury to consumers, the FTC will likely encourage companies to spend more time on corporate lawyers and less time delivering value to consumers, including through developing privacy-enhancing technologies. After all, companies like Nomi would be better off providing no privacy guarantees to their consumers; that way they will not fall victim to gotcha-style regulatory enforcement actions. Rather than encouraging companies to invest more in protecting consumers from harm, the takeaway for most companies will be: If you do not want the FTC to come after you, do the bare minimum on privacy.

Innovation, by its very nature, involves risks and mistakes. Companies publish written policies describing their products and services, but due to the rapid pace of change, these descriptions can fall out of sync with the latest versions.[8] While companies should strive to keep these updated, in the race to innovate, it is not surprising that occasionally something gets overlooked. Certainly, companies should not face punitive measures for actions that were taken in good faith and did not cause consumer harm. This would create perverse incentives for companies to slow down the pace of innovation.[9]

The FTC should consider the potential unintended consequences of its enforcement actions so as to avoid perverse outcomes. Rather than bringing a case and settlement against Nomi, the FTC should have shown some regulatory restraint by simply notifying the company of the problem and verifying that it had been corrected. It was a waste of valuable agency resources that could have better been spent pursuing cases involving actual consumer harm.[10]

The FTC can use its regulatory authority to encourage consumer-friendly innovations, but only if it exercises discretion in when it chooses to take action. If the FTC brings action against a company that made a fairly insignificant mistake where there was no evidence of consumer harm, it is signaling to companies that they should direct limited resources away from other innovations and toward corporate lawyers. Instead, the FTC should focus its resources on cases where there is direct and tangible consumer harm so that companies prioritize internal actions that prevent consumer harm.[11] A step in this direction is H.R. 5115, the SURE Act, introduced by Rep. Markwayne Mullin (R-OK), which would clarify the conditions under which the FTC can declare an act or practice unfair. Specifically, it notes that an act or practice is unlikely to cause substantial injury if it is "trivial or merely speculative" and requires the FTC to consider the "net effects."[12] Had this standard been in place for the Nomi case, the FTC would likely have not brought an enforcement action. If the FTC does not adjust its approach to consumer protection, compliance may become either a check-the-box activity, or worse, interfere with business practices that would make consumers better off and increase innovation in the U.S. economy.

The FTC Should Use Fair and Consistent Processes to Establish Clear Rules for Businesses

The FTC can and should issue guidance to businesses about how to protect consumers from harm, such as by providing best practices for data privacy and security. Many small businesses, for example, may not have the level of in-house expertise that the FTC can provide, and they would benefit from learning about best practices. Moreover, guidance can help companies more efficiently comply with laws. Businesses who adhere to FTC guidance should be able to use this adherence as evidence of compliance with related laws. However, this type of informal guidance should not be used by the FTC to prove that a company has acted unlawfully, unless they violate an official regulation or provision of law.

Regulatory uncertainty can raise costs for businesses and consumers and discourage investment in new business models and technologies. H.R. 5118, the SHIELD Act, sponsored by Rep. Mike Pompeo (R-KS), would clarify that companies do not need to comply with informal guidance. Clarifying the role of informal guidance would ensure that the FTC can still provide swift assistance to the private sector, while not allowing informal guidelines to serve as a backdoor to official rulemaking. It would also encourage businesses to more freely participate in developing and sharing best practices without fear that these guidelines would later be used to take action against them. Moreover, following official rulemaking processes ensures that final laws and regulations are created in a fair, open, and democratic process.

The FTC Should Be More Transparent About Its Priorities and Investigations

Congress should also require the FTC to be more transparent in its consumer protection investigations. The FTC initiates many investigations that do not result in official agency action. It is important for the private sector to understand why the FTC chooses to launch an investigation and when it decides to not pursue an investigation. Publicly disclosing this information would allow the FTC to better signal to the private sector about how it is enforcing its policies and allow businesses to better understand how to comply with the law. For example, if businesses understand that an investigation on data security was closed because a company implemented certain controls, this would reinforce the value of implementing certain security measures and encourage better information security. However, keeping this information private, as the FTC does today, may unintentionally result in misleading or confusing messages to industry since the private sector only sees which investigations result in agency enforcement actions. Moreover, these investigations consume valuable time and resources for both the government and the companies involved, and public reporting of this activity will better hold the FTC accountable for its actions. H.R. 5109, the CLEAR Act, sponsored by Rep. Brett Guthrie (R-KY) would require the FTC to provide an annual report on these consumer protection investigations, including the number of investigations closed with no official action and a description of the legal analysis supporting the FTC's decision not to continue the investigation.

The FTC Should Prioritize Actions That Can Prevent Actual Consumer Harm

Congress should ensure that the FTC prioritizes its activities, including its enforcement actions, so as to address the most salient consumer harms and complaints. Since 1997, the FTC has collected data on consumer harms through the Consumer Sentinel Network (CSN), a secure online database of consumer complaints received by a variety of organizations, including the FTC, state law enforcement agencies, and nongovernmental organizations such as the Council of Better Business Bureaus. However, this data does not seem to guide the FTC's activities.

For example, last year, the CSN received approximately 3 million complaints, excluding do-not-call complaints, with the top three complaint categories being for debt collection (29 percent), identity theft (16 percent), and impostor scams (11 percent).[13] Yet of the three major policy workshops the FTC's Consumer Protection Bureau organized in 2015, none of them addressed these subjects. Instead, the FTC held workshops on advertising of homeopathic medicine, lead generation, and cross-device tracking.[14] Of the three major staff reports published in 2015, only one—a follow-up study on credit report accuracy—addressed these top consumer complaints. The other two focused on competition in pet medication and the Internet of Things.[15] While the FTC should certainly be exploring many of these other important issues, including pet medication competition, and it has taken other actions to address consumer concerns about fraud, identity theft, and debt collection (such as its successful Every Community Initiative), there still appears to be a misalignment between the FTC's efforts and the harms suffered by consumers.[16]

One step Congress can take to ensure that the FTC realigns its efforts to meet the most pressing consumer harms is to require the FTC to publish an annual plan of projected activities. H.R. 5098, the FTC REPORTS Act introduced by Rep. Gus Bilirakis (R-FL), would be a step in the right direction by requiring the FTC to submit to Congress an annual report listing policy priorities, projected rulemakings, and any guidelines, workshops, conferences, reports, or similar initiatives it plans to pursue in the following year. Providing this information to Congress would allow members of Congress to ensure the FTC remains focused on key initiatives of concern to consumers. In addition, by making these plans public, businesses affected by the FTC's proposed activities would have more time to prepare. Better preparation would allow for more participation and collaboration with the private sector.

Another step that Congress can take is to require that the FTC's recommendations for legislative or regulatory changes be accompanied by economic analysis. H.R. 5136, the RECS Act, introduced by Rep. Mike Pompeo (R-KS), would codify this requirement. As former FTC Commissioner Wright has explained, the FTC consistently fails to conduct serious cost-benefit analysis of its policy recommendations.[17] In particular, the FTC's work on data-privacy related issues focuses disproportionately on potential harms, especially speculative concerns, while ignoring the tangible benefits available to consumers and businesses and the costs of overly restrictive regulations.[18] For example, the FTC staff report on the Internet of Things called for broad-based privacy legislation without actually conducting a serious economic analysis to justify intervention.[19] By omitting serious economic analyses, the FTC is missing an opportunity to provide Congress with evidence-based policy recommendations.

The FTC Should Avoid Unnecessarily Lengthy Investigations and Consent Decrees

FTC investigations and enforcement actions should be limited in duration to only what is necessary and terminated once they are no longer needed so as to minimize costs for both taxpayers (who pay the costs for government) and consumers (who pay the costs for businesses).

Congress should establish time limits for both investigations and consent decrees. First, to ensure that FTC investigations do not languish indefinitely, H.R. 5097, the STALL Act, sponsored by Rep. Susan Brooks (R-IN) would terminate investigations that are inactive for six months unless the FTC decides to keep them open. This requirement would not limit the FTC's ability to pursue investigations, but it would provide some level of assurance to businesses that they will not be subject to unnecessarily lengthy investigations.

Establishing a time limit for inactive investigations should also reduce unnecessary costs for businesses who retain outside counsel for the duration of an FTC investigation. Second, to ensure that consent decrees do not pose unnecessary costs on businesses, H.R. 5093, the TIME Act, sponsored by Rep. Michael Burgess (R-TX), would cap the length of consent orders to eight years, unless the case involves certain conditions necessitating a longer term. Shorter time limits for consent decrees would avoid imposing unnecessary costs on businesses once they have addressed the issue of concern. The FTC has an unfortunate history of using unnecessarily long terms for its consent decrees. Many major technology companies, including Google, Facebook, Sony, Twitter, Oracle, Myspace, and Snapchat, are all under 20-year consent decrees. There does not appear to be any rationale for the FTC's decision to use 20-year agreements. By almost any standard this is an extraordinary amount of time—most states do not even require sex offenders to register for this long.[20] But this lengthy term is even more egregious considering the rapid rate at which businesses and technology evolve in the Internet era. Consider that 20 years ago most of the tech companies listed above did not even exist. These agreements are likely to be outdated before they expire.

Moreover, these lengthy agreements often impose conditions on these companies that go far beyond the transgressions identified in the initial FTC complaint. For example, after Myspace misrepresented how certain unique user identifiers were shared with advertisers, the FTC brought a complaint against the company that resulted in a 2012 settlement requiring the company to implement a comprehensive privacy program and conduct biennial privacy audits for 20 years.[21]

In some cases, the lengthy terms of these agreements may even create unfairly favorable conditions for the company involved. For example, the FTC's recent settlement with Wyndham resulted in a 20-year consent decree in which the FTC agreed that the company would be found to be compliant with its security program as long as it submits to the FTC a positive assessment from its annual external security review.[22] Considering that most major companies already conduct these types of reviews as a standard part of business, the FTC has effectively given Wyndham a pass for any security breach over the next 20 years. This is a deal that many companies would be happy to take.

CONGRESS SHOULD GIVE THE FTC ADDITIONAL AUTHORITY TO PROTECT CONSUMER INTERESTS

In some cases, the FTC should be provided additional authority to protect consumer interests. In particular, Congress should authorize the FTC to take action against companies that use non-disparagement clauses to unfairly silence consumers, eliminate the common carrier exemption in the FTC Act, and give the FTC authority to hold informal bipartisan meetings without triggering complex open meeting requirements.

Congress Should Authorize the FTC to Protect Consumers' Right to Review

Markets work best when both parties—the buyer and the seller—have accurate information and can make more informed choices. One way consumers get information is through online reviews. Pioneering online services such as Amazon, TripAdvisor, and Yelp, as well as many other websites, empower consumers to make more informed decisions by presenting user reviews alongside the merchants own descriptions of their products and services. This feedback is especially important when consumers are making purchases online, since they will not always have had the opportunity to evaluate products or sellers in person.

Unfortunately, some businesses are inserting non-disparagement clauses into standard contracts that prohibit consumers from making negative statements about these companies and their products and services. Most consumers sign these agreements without noticing the non-disparagement clauses, and only later, if at all, realize what they have agreed to. For example, one party rental company included the following terms in its standard contract: "By signing this contract, you are agreeing that you will not make or encourage any disparaging comments about [the vendor] ever in any form verbal or written."[23] This problem has been well-documented in a variety of industries, including health care, retail, and hospitality.[24]

To address this problem, Congress should move forward with legislation that would prohibit non-disparagement clauses in consumer contracts. H.R. 5111, the Consumer Review Fairness Act, would void anti-disparagement clauses in consumer contracts if they restrict consumers from publicly reviewing products or businesses in good faith and authorize the FTC to take action against businesses that insert these provisions into their contracts for engaging in unfair and deceptive practices. Notably, this legislation takes a narrow approach to address a very specific consumer harm. The legislation would not apply to non-disparagement clauses found in voluntarily negotiated agreements, such as employment agreements or divorce settlements, where parties may have a legitimate interest in agreeing to certain terms.

Congress Should Eliminate the Common Carrier Exemption in the FTC Act

The decision by the Federal Communication Commission (FCC) to reclassify broadband as a Title II common carrier service has eroded the FTC's historic oversight of Internet service providers (ISPs) because the FTC Act exempts common carriers from FTC oversight when they are engaged in common carrier activity.[25] Although the FTC and the FCC have signed a memorandum of understanding (MOU) stating their intention to avoid duplicative, redundant, and inconsistent oversight by coordinating oversight of common carriers, the MOU does not establish a single set of rules and practices across both agencies.[26] As a result, different businesses faces different sets of rules on the Internet, such as for rules on data privacy and security, creating unfair disadvantages for some companies and unnecessary government interference in the market.[27]

Congress should eliminate this conflict so as to make the regulatory process more efficient, better protect consumers, and create a level playing field.[28] Specifically, Congress should eliminate the common carrier exemption in the FTC Act so that the FTC can continue its historic oversight of ISPs and provide clear and consistent consumer protections rules for all companies involved in the Internet ecosystem. However, Congress should not make this change unless it also makes clear that the FCC is not authorized to engage in rulemaking in areas where the FTC has jurisdiction. By eliminating these regulatory conflicts and overlapping jurisdictions, Congress can streamline and modernize oversight of an important part of the U.S. economy.

The FTC is well-equipped to provide oversight of ISPs' consumer practices.[29] The FTC's record of protecting consumer interests in this area goes back to the late 1990s when the FTC used its Section 5 authority to bring actions against major Internet service providers, including AOL, CompuServe, and Prodigy, for deceptive practices related to their free trials. In addition, in 2000, the FTC used its antitrust authority to condition its approval of the AOL and Time Warner Inc. merger on the company not giving preferential treatment to its own ISP.

Congress Should Give the FTC Authority to Hold Informal Bipartisan Meetings

One small, but important, change proposed by Rep. Pete Olson (R-TX) is H.R. 5116, the FREE Act, which would better allow FTC commissioners to meet informally under certain conditions when there are empty seats in the five-member commission. The Sunshine Act generally requires that all meetings where a quorum of commissioners is present to be considered an official meeting which must follow certain procedures, such as making the meeting open to the public and posting a public notice of the meeting at least one week prior to the meeting date.[30] Since the FTC only has three commissioners at the moment, this effectively means that any time two commissioners wish to confer on an issue, they will trigger this requirement. The net impact is that the agency is made less efficient. The FREE Act would allow commissioners to meet provided that certain conditions are met, such as ensuring that no vote or official agency action is taken at the meeting, the meeting is attended by an attorney from the Office of the General Counsel, and the FTC publicly discloses information about the meeting within two days of its occurrence.

CONCLUSION

The FTC has long provided valuable oversight and consumer protection, however there are many areas for improvement. Congress should seize this opportunity to modernize the FTC so that it better protects consumers from harm while minimizing the regulatory costs and better enables robust innovation in the U.S. economy.

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