

Additional Questions for the Record

The Honorable Michael C. Burgess

1. Under the FTC's current authority, the Commission must obtain a consent order before it can obtain civil penalties for unfair or deceptive data security practices. Do you believe that consent orders are a strong incentive for industry to implement data security verses civil penalties?

As you note, the Commission's data security consent orders allow for the imposition of civil penalties for order violations, and may also provide additional requirements, such as auditing and compliance obligations. These orders send an important message to the marketplace about reasonable data security. Nonetheless, we believe the impact of our orders would be stronger if we had the authority to seek civil penalties in appropriate cases for initial violations of Section 5 of the Federal Trade Commission Act. Civil penalties are an important tool to deter unlawful conduct. Accordingly, the Commission supports the provision of H.R. 1770 that gives us the ability to seek civil penalties.

Under current laws, the Commission only has the authority to seek civil penalties for data security violations with regard to children's online information under the Children's Online Privacy Protection Act, or credit report information under the Fair Credit Reporting Act. Allowing the FTC to seek civil penalties for *all* data security and breach notice violations in appropriate circumstances will help to provide better incentives for companies to maintain reasonable data security.

2. Does section 6(d) of H.R. 1770 preserve the FTC's Section 5 authority to bring unfair or deceptive acts or practices claims? Does the draft legislation preserve the FTC's Section 5 authority to bring claims for unfair or deceptive privacy practices?

Yes, I believe that section 6(d) of H.R. 1770 makes clear that the FTC's existing Section 5 authority will not be limited by H.R. 1770. We appreciate the Committee's efforts to preserve the Commission's authority to challenge unfair or deceptive acts or practices in the marketplace.

3. What factors are statutorily required for the FTC to consider when determining a penalty amount under its existing authority?

Under Section 5 of the FTC Act, the Commission has authority to obtain civil penalties for knowing violations of rules and cease and desist orders respecting unfair or deceptive acts or practices. *See* 15 U.S.C. § 45(m). When asking a court to impose a civil penalty for a proven violation, we look at a variety of statutory factors in determining the appropriate level of civil penalties to request, including the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require. *See* 15 U.S.C. §45(m)(1)(C). Ultimately, a federal judge would determine the penalty amount.