GEORGETOWN LAW

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Michael C. Burgess, M.D., Chairman
Jan Schakowsky, Ranking Member
Subcommittee on Commerce,
Manufacturing and Trade
Committee on Energy and Commerce
House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Burgess and Ranking Member Schakowsky:

This letter responds to a request I received from the Subcommittee dated September 12, 2016, to respond to questions for the record posed by Ranking Member Schakowsky. I very much appreciate the opportunity to assist the Subcommittee. Set out below are the questions posed and my answers:

Question 1: In 1980, the FTC issued a statement on the scope of it unfairness jurisdiction in response to an inquiry from Congress. That statement spells out the FTC's policy on unfairness in detail, giving consumers and business important information on how the Commission applies its unfairness jurisdiction. H.R. 5115 incorporates selected portions of the unfairness statement focusing on injuries suffered by consumers. Can you detail how the bill is different from the FTC statement and how codifying selected portions of the unfairness statement would damage the FTC authority? What kinds of cases may be affected or not be able to be brought because of this bill?

<u>Answer</u>: As the question itself makes clear, H.R. 5115 does not purport to codify the FTC's Unfairness Statement. Nor does H.R. 5115 appear to recognize that Congress has *already* codified the key elements of the Unfairness Statement. In 1994, Congress amended the FTC Act to add a provision to Section 5 of the Act, 15 U.S.C. 45, that provides that the "Commission shall have no authority" under the FTC Act "to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice [1] causes or is likely to cause substantial injury to consumers [2] which is not reasonably avoidable by consumers themselves and [3] not outweighed by countervailing benefits to consumers or competition." 15 U.S.C. 45(n), FTC Act Amendments of 1994, Pub. L. 103-312, § 9, 108 Stat. 1691, 1695 (Bracketed information added for clarity).

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H.R. 5115, if enacted into law, would narrow considerably the existing statutory standard for unfairness by codifying selected portions of the Commission's Unfairness Statement. And instead of trying to reflect the entire Unfairness Statement, H.R. 5115 appears to focus FTC enforcement actions on cases where there is demonstrable "substantial harm" with an emphasis on financial harm to the apparent exclusion of other forms, often far more damaging, of harms to individuals. This proposal suffers from two flaws.

First, H.R. 5115 would make it difficult for the Commission to bring cases to avert harm, a result that not only contradicts Congress's 100 year-old statutory directive that the Commission act to "prevent" harm,15 U.S.C. § 45, but also needlessly jeopardizes consumers by exposing them to preventable harm.

Second, and equally important, H.R. 5115 calls into question the Commission's authority to bring cases where the harm is palpable and serious, but unrelated to economic loss or health and safety. This focus is myopic as a matter of policy. Congress charged the FTC with the mission of preventing unfair practice because it understood prevention is more important than trying to remedy harm after-the-fact.

As noted, often the most serious harms to consumers are non-economic ones, such as serious invasions of privacy, thefts of personal information that can be sold to and used by identity thieves, and revelations of embarrassing personal information. The FTC's cases challenging these practices are in keeping with "established public policies," unquestionably challenge practices that meet the current statutory definition of unfairness, are supported by Commissioners on a bi-partisan basis, and are aimed at preventing consumers from having to suffer the worst sort of harm – harm that money cannot repair.

Consider the *DesignerWare* and *Aarons'* cases, which involved rent-to-own computers that had cameras that could be, and were, remotely activated to take photographs. These cameras were in fact used to take pictures of children, household visitors, individuals not fully clothed, and couples engaged in intimate activities. The computers also contained keystroke logs that that could be could be accessed by the rental companies, jeopardizing personal information renters thought was private. These cases were brought and resolved, with bi-partisan support, on unfairness grounds. The FTC's action in these cases was vital to put a stop to a practice that was surely "unfair." Whether a similar case could be brought under H.R. 5115 is open to question, and it is hard to imagine why Congress would want to strip the FTC of the authority to stop deplorable practices like the ones in these cases simply because the remedy is not financial.

2. Currently, evidence that a company under FTC jurisdiction complied with FTC guidance is permitted to be used as evidence of the company's good faith. H.R. 5118 would allow companies to use evidence of compliance with guidance as evidence of compliance with law. How would this bill constrain FTC's enforcement abilities? How would creating such an affirmative defense shift the burden of proof back to the FTC?

<u>Answer</u>: This proposal threatens to stand the law upside down, and will, if implemented, paradoxically cause serious harm to businesses by making the Commission reluctant to provide guidance. Under existing law, the Commission does not and may not rely on guidance documents in an enforcement action. Indeed, the law is crystal clear that guidance documents do not have the force or law, nor do they create enforceable obligations. *See, e.g., Center for Auto*

Safety v. National Highway Traffic Safety Administration, 452 F.2d 798 (D.C. Cir. 2006). To prove a violation, the burden of proof lies with the Commission to show that the respondent actually violated the law.

In defense to a FTC enforcement action, a business may claim good faith by pointing to Commission guidance documents and that evidence is generally admissible *on the question of good faith* but not on the ultimate legal question, namely whether respondent complied with the law. That is only fair. But the proposal goes well beyond that point.

Under the proposal, a guidance document – even though it may be outdated, inapplicable or superseded – would be admissible *as evidence of compliance with the law*. No consideration is given to the fact that guidance documents are general statements of Commission *policy* and are not intended to be definitive statements of law.

Adding to the confusion, the proposal turns on the supposition that there is a shared definition of what constitutes a “guidance document.” But the term “guidance document” has no clear legal definition. “Guidance” is commonly associated with a varied set of regulatory materials such as agency interpretations of existing rules, statements outlining how an agency will regulate an evolving area, policy papers, training manuals, and statements by an agency’s senior staff – for the FTC, that group would include Commissioners, Bureau Directors and other Commission leaders. But there is no accepted definition of the term that could be used in applying H.R. 5118. *See generally* Exec. Order No. 13,422, 72 Fed. Reg. 2763, 2763-65 (Jan. 23, 2007).

Admissibility of guidance documents to prove compliance with the law also raises a serious asymmetry problem. On one hand, the Commission cannot use the violation of a guidance document as proof of an illegal act. But on the other hand, under this proposal respondents could use a guidance document as an affirmative defense, thereby giving binding legal status to a guidance document that, by definition, has none. In other words, the proposal goes well beyond existing law by substituting *compliance with a guidance* document (that might be outdated, superseded or inapplicable) with *compliance with the law*.

That is not right. This rule would be unique to the FTC. And the consequences will be severe. The FTC will undoubtedly scale back producing guidance documents for fear that at some point the document might be used against the Commission in an enforcement action. Businesses will be deprived of guidance that helps them comply with the law. And Americans will see law-breaking companies escape liability because they may be able to point to a stray statement the Commission made years earlier. That is not justice.

The problems posed by H.R. 5118 are made even 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 the proposal, all it need do is to point to a guidance document with the FTC’s name on it. The lack of such a requirement will encourage every law-breaking company to search through all of the agency’s guidance documents to find any isolated remark that might assist in its defense. This kind of *post hoc* justification for wrongful action should be discouraged, not encouraged, but it is inevitable under H.R. 5118.

3. H.R. 5098 would require the FTC to annually submit to Congress a report with all of the Commission's planned activities for the next year, including plans to public guidance for industry, plans to hold workshops or conferences, and a number of things?

a. How would that bill limit the FTC's flexibility.

b. I have heard concerns that the bill would actually hold back the agency from being able to respond to emerging consumer issues. Do you share the concern. Would the FTC feel locked into doing what was in their annual plan?

c. How much time and resources does it take to produce this kind of report? Would it take resources away from other activities of the Commission.

Answer: I am mystified by this proposal. As you know, agencies – even independent Commissions like the FTC – are required on a semi-annual basis to publish their regulatory agendas in the Federal Register. This proposal goes well beyond that requirement and asks the Commission to plan every detail of its upcoming year in advance.

To require the FTC to engage in this detailed planning process is to misunderstand the nature of consumer protection. The FTC work is a dynamic process influenced largely by evolving market forces, and even the best plans fall apart in the face of changing circumstances. I took over the helm of the Bureau of Consumer Protection on June 1, 2009, just as the body blow of the economic downturn battered the nation. As Americans lost their jobs or became financially insecure, scam artists started preying on the economically vulnerable. The Commission had to immediately re-orient it priorities to protect vulnerable consumers from these scams and resources were re-allocated from other areas to bring enforcement actions against debt and mortgage relief scams, business opportunity frauds, fake work-at-home schemes, and many other threats to consumers fueled the downturn. At the same time, tech companies started introducing mobile apps for kids that tracked their location without parental consent, and other apps that pulled down sensitive information. These too were issues that had to be addressed immediately, not put on an agenda to submit to Congress for the next year.

Compelling the Commission to plan a year or more ahead would waste considerable resources and would hobble the Commission's ability to remain nimble – to pivot quickly and respond to emerging threats to consumers. There is no reason to tie the Commission down to a plan as exacting as the one contemplated by H.R. 5098.

4. H.R. 5093 would limit consent decrees in most cases to eight years, instead of the typical 20 years. How could that bill constrain the Commission? How would it ultimately harm consumers?

H.R. 5093 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 decree and requires a time limit longer than 8 years based on the factors described in this section." Moreover, the bill proposes that the Commission be required to review all non-fraud related consent decrees five years after entry 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.

There are, in fact, several problems with this proposal apart from burden. First, the proposal aims to solve a non-existent problem. To the extent that the bill seeks to avoid consent decrees that might stifle innovation, the FTC's consent decrees are designed with that goal in mind. The FTC's goal is to avoid raising barriers to innovation, and that goal is reflected in its consent orders. If one looks at the consent decrees that FTC has entered with the nation's most important, innovative technology companies, it is clear that the agency has avoided prescriptive decrees that might hamper innovation. Having participated in the drafting of the agency's decrees against Internet giants like *Google, Facebook*, and small start-ups like *Frostwire* and *Chitika* and other high-tech companies, I think the record clearly establishes that FTC consent decrees, even those with twenty-year durations, have not hindered innovation and will not do so in the future. The decrees require compliance with the law, and require periodic audits to show that the company is taking compliance seriously. That's it. Equally important, if a company can make a credible case that a decree would, in fact, impair innovation, there are ample, existing means to demonstrate to the agency that the decree should be lifted or modified. The Commission, has, when appropriate, done just that. Instead, the proposal shifts the burden to the agency to justify the continuation of the decree; that shift is unwarranted.

Second, the proposal would have serious unintended consequences. Most critically, the bill would greatly undermine the deterrent effect that FTC enforcement actions have, not only in terms of specific deterrence against the target company, but general deterrence as well.

The need for extended injunctive relief is especially acute in FTC cases. In the administrative 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. Keep that the FTC has virtually no authority to impose civil penalties against first-time offenders in such cases; therefore the only remedy available to the agency is injunctive relief. That relief serves two distinct, but equally 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 stands as a warning to other companies that violations of the law have consequences.

But under H.R. 5093, a company could cause massive harm to millions of consumers and be subject only to injunctive relief. In such a case – and there are many – an eight year order would seem like a slap on the wrist. And to make matters worse, after eight years, the company could again cause massive harm to consumers and still be subject only to injunctive relief.

Consider one class of cases that H.R. 5093 would presumably apply to – cases involving data security. Thus far, the agency has brought about sixty of these cases based on theories developed during the tenure of President Bush's FTC Chairman, Tim Muris. Most were resolved with twenty-year consent decrees, as was the FTC's recent successful action global computer company ASUSTek. In that case, the ASUS failed to adequately test the security of consumers' routers, timely address vulnerabilities, and notify consumers about the availability of security updates, resulting in critical security flaws in its routers that put the home networks of thousands of consumers at risk. The complaint also alleged that the routers' insecure "cloud" services led to the compromise of thousands of consumers' connected storage devices, exposing their sensitive personal data – including financial data – on the internet.

Under the proposal, in just five years the agency will be required to consider whether the consent order entered in ASUS serves its initial purposes, and do so based solely on the criteria set out in H.R. 5093. Nothing in the proposal limits judicial review of the agency's determination. ASUS might therefore be able to argue that the agency's decision not to terminate the decree was arbitrary or capricious under the Administrative Procedure Act, *see* 5 U.S.C. § 706(2), a far less rigorous standard that the one courts employ in determining whether to vacate or modify an injunction. The idea that in only five years a company that showed stunning disregard for the security of consumers' home networks could shed its obligations under the decree is unfathomable, but that is a possibility under H.R. 5093, which is why it should never become law.

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Please let me know if the Committee requires any additional information.

Respectfully,

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