STATEMENT

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BEFORE THE

SUBCOMMITTEE ON COMMERCE, MANUFACTURING, AND TRADE
COMMITTEE ON ENERGY AND COMMERCE
UNITED STATES HOUSE OF REPRESENTATIVES

"LEGISLATIVE HEARING ON 17 FTC BILLS"

WASHINGTON, D.C.
MAY 24, 2016

Chairman Burgess, Ranking Member Schakowsky, and Members of the Subcommittee, thank you for the opportunity to appear before you today, and in particular to discuss those proposed bills aimed at improving the Federal Trade Commission's processes and consumer protection enforcement. My name is Joshua Wright and I am a University Professor of Law at the Antonin Scalia Law School at George Mason University and Senior Of Counsel at Wilson Sonsini Goodrich & Rosati. Until August 2015, I was a Commissioner of the Federal Trade Commission ("FTC"). During my career as both an economist and a lawyer, I have been fortunate enough to enjoy four separate positions at the Federal Trade Commission, ranging from intern in the Bureau of Economics to Commissioner. Before diving into the subject of today's hearing, I want to make clear that the views I express here today are my own.

The key institutional challenge facing the FTC in its consumer protection mission, in my view, is more deeply integrating economic analysis at all levels of decision-making, from the enforcement staff to the Commission. With this in mind, I will begin with a brief discussion of the role of economics at the FTC in general, and in consumer protection specifically, before turning to some discussion of several individual bills.

I. The Role of Economics and Economists at the FTC

As both an economist and a lawyer, I appreciate the FTC's unique structure and the role its organization plays in enhancing its ability to protect consumers. As you know, the FTC has three Bureaus: Competition, Consumer Protection, and Economics. The Bureau of Competition endeavors to promote and protect free markets and vigorous competition, and the Bureau of Consumer Protection works to prevent fraud, deception, and unfair business practices in the marketplace. The FTC's dual missions complement each other in promoting consumer welfare—encouraging the disclosure of accurate information to consumers in the marketplace, which in turn facilitates free and healthy competition. What is sometimes lost in that discussion, however, is the vital role of the Bureau of Economics in achieving both of these missions.

The Bureau of Economics provides guidance and support to the agency's antitrust and consumer protection activities. It is a separate unit from the Bureaus of Competition and Consumer Protection and thus, provides independent economic advice to the Commissioners. Working with the Bureaus of Competition and Consumer Protection, the Bureau of Economics participates in the investigation of mergers and alleged anticompetitive, deceptive, and unfair acts or practices. The Bureau of Economics ("BE") also integrates economic analysis into enforcement proceedings and works with the other Bureaus to devise appropriate remedies. It also conducts rigorous economic analyses of various markets and industries. Some recent examples involving BE's work touching upon the FTC's consumer protection efforts include the FTC

Consumer Fraud Survey and analysis of particular government regulations, such as the Children's Online Privacy Protection Rule. Similarly, pursuant to the FTC's regulatory review program applying cost-benefit analysis to existing rules and regulations, the Commission has rescinded 13 trade rules and 24 guides and updated dozens of others since the early 1990s.

Prioritizing independent economic analysis and its integration into its enforcement missions have been critical drivers of the FTC's success. The comparative advantage the FTC has over many other regulatory agencies is attributable in large part to its (1) flexible enforcement authority that allows it to adapt quickly to changes in technology and business practices; (2) commitment to integrating *independent* economic analysis to guide the use of that enforcement authority as well as policymaking; and (3) the remarkably high quality of its staff of Ph.D. economists in the Bureau of Economics. I have written elsewhere, I think it worth repeating here, that the economists assembled within the Bureau of Economics are the best team in any regulatory agency in the United States.

Where the FTC has followed this recipe of being mindful of integrating economic thinking and research into its new enforcement and policy endeavors, it has performed very well. Historically, when the agency's enforcement priorities have become untethered from economic analysis, it has faltered and been the subject of significant criticism. As technology evolves, and the FTC's consumer protection mission shifts into digital markets, privacy regulation, the Internet of Things, and the world of "Big Data," it is more important than ever that rigorous economic analysis anchors the FTC's activities.[1] With that in mind, I want to specifically acknowledge Chairwoman Ramirez for her leadership on these issues. The Chairwoman not only cares deeply about economic issues in her own assessment of the FTC matters, but also recently demonstrated the importance of these issues by appointing a consumer protection (rather than a competition) economist, Ginger Jin, as the new Director of the Bureau of Economics. Chairwoman Ramirez has clearly indicated that, as the agency's consumer protection efforts move into these new and complex issues, economic analysis should remain a priority for the agency.

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[1] *See*, *e.g.*, Joshua D. Wright and John Yun, *Stop Chug-a-lug-a-lugin 5 Miles an Hour on Your International Harvester: How Modern Economics Brings the FTC's Unfairness Analysis Up to Speed with Digital Platforms*, 83 GEO. WASH. L. REV. 2130 (2015); Joshua D. Wright, Comm'r, Fed. Trade Comm'n, The Economics of Digital Consumer Protection: One Commissioner's View, Remarks at TechFreedom and International Center for Law and Economics, Washington D.C. (July 31, 2014), *available at* https://www.ftc.gov/system/files/documents/public_statements/573061/010731techfreedom.pdf; Joshua D. Wright, The FTC and Privacy Regulation: The Missing Role of Economics, Remarks at George Mason University School of Law Center for Privacy Economics Briefing on *Nomi*, *Spokeo*, and Privacy Harms, Arlington, Virginia (Nov. 12, 2015) *available at* http://masonlec.org/site/rte_uploads/files/Wright_PRIVACYSPEECH_FINALv2_PRINT.pdf.

II. FTC's Unfairness Authority – SURE Act

The ''Statement on Unfairness Reinforcement and Emphasis Act'' or the ''SURE Act'' amends 15 U.S.C. § 45(n) to include language from the Commission's Unfairness Statement.[2] Section 45(n) sets forth the FTC's unfairness authority:

> "The Commission shall have no authority under this section to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition"

The Unfairness Statement is the lodestar of the FTC's application of § 45(n). To the extent the SURE Act tightens the link between 45(n) and the Unfairness Policy Statement, and thus between application of the FTC's unfairness authority and the economic framework established in the Statement, it is a welcome development.

However, the potential for economically unsound unfairness analysis is not, in my view, that the FTC ignores either the statute or the Unfairness Statement. To the

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[2] Fed Trade Comm'n, Commission Statement Of Policy On The Scope Of The Consumer Unfairness Jurisdiction (1980), reprinted in Int'l Harvester Co., 104 F.T.C. 949, 1070 (1984). A copy of the Unfairness Statement can also be found at https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness.

contrary, the FTC has largely followed the principles laid out in the Unfairness Statement and the authority to bring enforcement actions against unfair trade practices is an important tool in the FTC's Consumer Protection arsenal. For example, the FTC used its unfairness authority in the so-called *Cupcake Party* case, the Commission alleged that John Zuccarini, a cyber scammer, used more than 5,500 copycat or misspelled web addresses to divert internet users from their intended internet destinations to one of his sites, and then hold them captive while he pelted their screens with a barrage of ads.[3] The Commission's complaint alleged two unfairness counts – one for Zuccarini's practice of diverting consumers to his websites, and a second count for his practice of obstructing consumers from subsequently leaving those websites.[4] The case illustrates the importance of cost-benefit analysis is reinforcing the Commission's unfairness authority. First, the aberrant code resulted in substantial tangible injury to consumers – consumers lost work product when their computers crashed, and they were deprived of the use of their computers during these incidents. Second, this injury also was not reasonably avoidable – the defendants specifically targeted unwary misspellers, who were unaware of the misery that was about to befall them. Importantly, there was no evidence that the consumer injury was outweighed by countervailing benefits to consumers or to competition.

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[3] *See* FTC v. John Zuccarini, Civ. Action No. 201-CV-04854-BMS (E.D. Pa. 2007).

[4] *Id*.

The potential for economically unsound application of the FTC's unfairness authority arise for one of two reasons: (1) the Commission staff does not perform an economic analysis sufficient to provide the basis for the Commission's decision; or (2) the Bureau of Economics does perform such an analysis but it is ignored or does not influence Commission-level decision-making. In my experience, the former is unlikely to be a problem. When it does arise, it is usually because the Bureau of Economics is understaffed. The primary challenge facing the agency is one of providing incentives within the institution to integrate economic thinking more deeply into decision-making. I should note that the Commission has generally, but not always, applied its unfairness authority in an appropriate manner in recent years. In either case, importing into the statutory authority additional language from the Unfairness Statement does not appear to address the fundamental issue.

Consider the Commission's application of its unfairness authority in its recent action against Apple. The Commission issued an administrative complaint alleging that that Apple engaged in "unfair acts or practices" by billing parents and other iTunes account holders for the activities of children who were engaging with software apps likely to be used by children that had been downloaded onto Apple mobile devices.[5] Because Apple did not expressly inform account holders that the entry of a password

[5] Complaint, In the Matter of Apple, Inc., FTC File No. 1123108 (Jan. 15, 2014).

upon the first transaction triggered the fifteen-minute window during which users could make additional purchases without once again entering the password, the Commission's complaint alleged that Apple billed parents and other iTunes account holders for the activities of children without obtaining express informed consent.[6]

Apple's product design choices, including the nature of these disclosures and its choice to integrate the fifteen-minute window, are a product of considerable investment and innovation, and provide substantial benefits for consumers who do not want to experience excessive disclosures or to enter passwords every time they make a purchase.[7] The unfairness standard places upon the Commission the burden of showing that the harms from Apple's choices outweigh the benefits. But the Commission offered no such evidence. The injury in this case was limited to an extremely small – and arguably, diminishing – subset of consumers. Given the apparent and obvious benefits to many consumers and to competition from Apple's allegedly unfair practices, a finding of liability required the Commission to find, based upon rigorous analysis, that injury to this small group of consumers justified the

[6] *Id*.

[7] Dissenting Statement of Commissioner Joshua D. Wright, In the Matter of Apple, Inc., FTC File No. 1123108, 14 (Jan. 15, 2014), *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/dissenting-statement-commissioner-joshua-d.wright/140115applestatementwright.pdf.

finding of unfairness and the imposition of a remedy which essentially amounted to a redesign of certain features of Apple's products.[8]

To be clear, while cases like *Apple* are relatively rare, they are the exception to the rule at the agency. I view the key challenge facing the FTC in applying its unfairness authority to be ensuring that economic analysis is incorporated at every level of decision-making at the FTC. Rigorous economic analysis is the FTC's best tool to protect consumers against the risk of erroneously condemning business practices that benefit consumers.[9]

I offer a suggestion to the Subcommittee designed to facilitate greater incorporation of economic analysis into Commission decision-making. Specifically, I propose that the Subcommittee consider amending the SURE Act to mandate that the Bureau of Economics publish a separate explanation of the economic analysis of the costs and benefits of the Commission's action when it enters into consent decrees.[10] Requiring BE to make public its economic rationale for supporting or rejecting an

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[8] *Id*.

[9] *See supra* note 1 at 2141.

[10] Joshua D. Wright, Comm'r, Fed. Trade Comm'n, Statement of Commissioner Joshua D. Wright

On the FTC's Bureau of Economics, Independence, and Agency Performance (Aug. 6, 2015) *available at* https://www.ftc.gov/system/files/documents/public_statements/695241/150806bestmtwright.pdf.

unfairness decision could offer a number of consumer benefits at little cost. First, it offers BE an avenue to communicate its findings to the public and make transparent the analytical underpinnings of the Commission's decision. Second, it reinforces the independent nature of the recommendation that BE offers. Third, it breaks the agency monopoly the FTC lawyers currently enjoy in terms of framing a particular matter to the public. Most importantly, the internal leverage BE would gain from the ability to publish such a document may increase conflict between bureaus on the margin in close cases, but it will also provide BE a greater role in BCP unfairness enforcement actions and a mechanism to reject cases that are not supported by sound economics. In a similar vein, the Subcommittee has recognized the importance of applying and disclosing the economic analysis underlying FTC reports and recommendations in the Revealing Economic Conclusions for Suggestions (RECS) Act.[11]

III. Consent Decrees and Timetables – TIME Act

I would like to briefly offer a few observations on the TIME Act. I applaud this Subcommittee's attention to time horizons for FTC consent decrees. The FTC does most of its enforcement work by entering consent decrees and it is important that the FTC constantly reflect upon and analyze the features of consent decrees, including their

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[11] Revealing Economic Conclusions for Suggestions Act, H.R. 5116, 114th Cong. (2016), *available at* https://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/documents/114/letters/20160428-RECS.pdf.

duration, to best serve consumers. As the Subcommittee knows, FTC consent decrees typically sunset after 20 years. Some have argued that a 20 year consent decree for most consumer protection violations is simply too long in some types of cases and, in particular, consumer protection cases arising in the digital economy. The TIME Act proposes an eight-year sunset for FTC consent decrees. I agree a 20-year consent decree is not well calibrated to many targets of modern consumer protection enforcement. Thus, I view the TIME Act as a step in the right direction in terms of reducing the relevant sunset time horizon and aligning agency consent decrees with current market realities.

A reduction in the default horizon time for Commission consent decrees is particularly warranted in the high-tech industries that are increasingly implicated by the FTC's consumer protection enforcement efforts. While it is difficult to determine precisely the appropriate default sunset period, I commend the Subcommittee's approach. The proposed eight-year horizon time more accurately reflects market realities in the high tech sector than the current 20-year default rule. For example, S&P 500 data show the entire lifespan of the average company on the index is itself 20 years. While existing law allows firms to petition the Commission to modify consent orders, the FTC should change the default time horizon to make economic sense in high-tech industries. Consider the amount of technological change that is likely to occur in these industries over a 20-year consent decree. Moore's Law says that the number of transistors in a dense, integrated circuit doubles approximately every two years, radically changing what can be accomplished in products like handheld devices. In short, a 20-year horizon time for Commission consent orders threatens to unduly constrain competitors' ability to innovate in industries where technological advancement is progressing so rapidly.

A shorter sunset period makes legal, technological, and economic sense. How much shorter is an open question. One possibility the Subcommittee might consider is to instruct the FTC to open a notice and comment period concerning shorter consent decrees and to carry out a rigorous economic and legal analysis of various sunset lengths.

IV. The Freeing Responsible and Effective Exchanges Act – FREE Act

As a former FTC Commissioner, I am well aware of the constraints that the Sunshine Act can impose on dialogue among Commissioners. I applaud the Subcommittee for its thoughtful consideration of this issue. For its various virtues, the constraints imposed on nonpublic in-person deliberation by the Sunshine Act[12] also

[12] 5 U.S.C. § 552b.

often tax productive communication among Commissioners and negatively affect agency performance.[13]

The Sunshine Act, in general, restricts actions by a quorum of sitting Commissioners. Those limits normally apply, when the FTC has its full five-person complement of Commissioners, to communications of three or more Commissioners. In cases of vacancies or recusals, the limits of the Sunshine Act are triggered by communications between any two members. By preventing spontaneous exchange about most FTC matters involving more than two members of the Commission, the Sunshine Act channels communication about agency business into a series of bilateral communications between Commissioners, or for the Commissioners' advisors to meet as a group to discuss Commission business. Many have raised serious questions about whether these particular constraints imposed by the Sunshine Act are preventing the FTC from achieving the benefits of the collaborative decision-making process, which is one of the fundamental rationales for the agency's design. The constraints imposed by the Sunshine Act on collegial decision-making at the FTC led one former FTC Chairman to observe, "it is not evidence how the benefits of collective governance that appeared

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[13] *See* Prepared Statement of the Federal Trade Commission Presented by Stephen Calkins, Gen. Counsel, Fed. Trade Comm'n, Before the Special Committee to Review the Government in the Sunshine Act, Administrative Conference of the United States (Sept. 12, 1995), *available at* http://www.ftc.gov/speeches/other/suntest.shtm.

to animate the creation of the FTC can be realized if the existing limits of the Sunshine Act are unchanged."[14]

The FREE Act addresses these issues by allowing nonpublic, non-voting, collaborative discussions when they involve a bipartisan majority of Commissioners, so long as an attorney from the Office of the General Counsel of the Commission is present and the FTC discloses the meeting.[15] Based upon my own experience as a Commissioner, and one who believes reducing the barriers to bipartisan group discussions at the FTC would improve its performance, I would urge the Subcommittee to consider two amendments to the FREE Act. The first would be to redefine a "bipartisan majority" not as "a group of 3 or more Commissioners," as the bill currently reads, but rather as "any bipartisan combination of Commissioners." It is often the case that, because of vacancies or recusals, the Sunshine Act's restrictions apply even to one-on-one conversations between Commissioners. This is a significant tax on efficient, collegial decision-making. With this amendment, the FREE Act would allow one-on-one, bipartisan discussions to occur in the common case when recusals or vacancies reduce the quorum to fewer than three Commissioners.

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[14] William E. Kovacic, The Federal Trade Commission at 100: Into Our 2nd Century The Continuing Pursuit of Better Practices 27 (Jan. 2009), *available at* https://www.ftc.gov/sites/default/files/documents/public_statements/federal-trade-commission-100-our-second-century/ftc100rpt.pdf.

[15] Freeing Responsible and Effective Exchanges Act, H.R. 5116, 114th Cong. (2016), *available at* http://docs.house.gov/meetings/IF/IF17/20160524/104976/BILLS-114HR5116ih.pdf

The second amendment I would urge the Subcommittee to consider is to delete the requirement that a member of the Office of the General Counsel be present for the nonpublic collaborative discussion contemplated by the bill. This requirement would, in my view, significantly increase barriers to the type of spontaneous conversations and discussions needed to encourage collegial decision-making.

Thank you for your time. I am happy to answer any questions.