



# COMMITTEE ON ENERGY & COMMERCE

CHAIRMAN FRANK PALLONE, JR.

## MEMORANDUM

July 26, 2021

**To: Subcommittee on Consumer Protection and Commerce Members and Staff**

**Fr: Committee on Energy and Commerce Staff**

**Re: Legislative Hearing on “Transforming the FTC: Legislation to Modernize Consumer Protection”**

On Wednesday, July 28, 2021, at 10:30 a.m., in the John D. Dingell Room, 2123 of the Rayburn House Office Building, and via Cisco WebEx online video conferencing, the Subcommittee on Consumer Protection and Commerce will hold a d hearing entitled, “Transforming the FTC: Legislation to Modernize Consumer Protection.”

### **I. BACKGROUND**

The Federal Trade Commission (FTC) is the premier federal consumer protection agency, tasked with the dual mission of protecting consumers and promoting competition.<sup>1</sup> The Commission upholds this mission through law enforcement, administrative adjudication, advocacy, data collection, education, and limited rulemaking.<sup>2</sup> Its primary consumer protection mandate stems from section 5 of the FTC Act, which states that “unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”<sup>3</sup>

Despite its broad mandate, the FTC is a relatively small agency having a significantly smaller budget and fewer staff than similar regulators.<sup>4</sup> The FTC has more than 600 fewer full-time staff today than it did at the beginning of the Reagan Administration.<sup>5</sup> Along with its

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<sup>1</sup> Federal Trade Commission, *About the Federal Trade Commission* ([www.ftc.gov/about-ftc](http://www.ftc.gov/about-ftc)) (accessed July 20, 2021).

<sup>2</sup> Federal Trade Commission, *A Brief Overview of the Federal Trade Commission’s Investigative and Law Enforcement Authority* (July 2008) ([ftc.gov/ogc/brfovrw.shtm](http://ftc.gov/ogc/brfovrw.shtm)).

<sup>3</sup> 15 U.S.C. § 45(a)(1).

<sup>4</sup> *FTC Lags International Counterparts in Staffing for Privacy Enforcement*, FTC Watch (Apr. 23, 2018).

<sup>5</sup> Federal Trade Commission, *FTC Appropriation and Full-Time Equivalent (FTE) History* ([www.ftc.gov/about-ftc/bureaus-offices/office-executive-director/financial-management-office/ftc-appropriation](http://www.ftc.gov/about-ftc/bureaus-offices/office-executive-director/financial-management-office/ftc-appropriation)) (accessed July 20, 2021).

disproportionately lower resources, the FTC's legal and administrative authorities have generally remained stagnant, which leaves the Commission in need of more effective tools to regulate today's increasingly innovative and dynamic marketplace.<sup>6</sup>

## II. LEGISLATION

### A. H.R. 3067, the "Online Consumer Protection Act"

H.R. 3067, the "Online Consumer Protection Act", introduced by Subcommittee on Consumer Protection and Commerce Chair Schakowsky (D-IL) and Rep. Castor (D-FL), would require social media platforms and online marketplaces to establish, maintain, and disclose written terms of service and create consumer protection programs to ensure compliance with applicable consumer protection laws. The bill requires implementation through rulemaking under the Administrative Procedure Act (APA) and provides for enforcement by the FTC and state attorneys general and allows them to seek civil penalties. It also allows for individuals to sue when harmed by violations of the Online Consumer Protection Act and invalidates forced arbitration agreements.

The bill also expressly states that section 230 of the Communications Decency Act (section 230) does not limit liability with respect to violations of the bill. Furthermore, the bill would amend section 230 to clarify that it does not apply to FTC enforcement actions.

### B. H.R. 4447, the "21<sup>st</sup> Century FTC Act"

H.R. 4447, the "21<sup>st</sup> Century FTC Act", introduced by Rep. Castor, would provide the FTC with rulemaking authority under the APA and the authority to obtain civil penalties for initial violations of section 5 of the FTC Act with regard to unfair or deceptive acts or practices.

### C. H.R. 4488, the "FTC Autonomy Act"

H.R. 4488, the "FTC Autonomy Act", introduced by Chair Schakowsky, would provide the FTC with independent litigating authority to initiate enforcement actions seeking civil penalties without coordination with the Department of Justice.

### D. H.R. 3918, a bill to amend the Federal Trade Commission Act to permit the Federal Trade Commission to enforce such Act against certain tax-exempt organizations"

H.R. 3918, a bill to amend the Federal Trade Commission Act to permit the Federal Trade Commission to enforce such Act against certain tax-exempt organizations, introduced by Rep. Rush (D-IL), would give the FTC authority over non-profit organizations exempt from taxation under section 501(c)(3) of the Internal Revenue Code.

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<sup>6</sup> See generally Terrell McSweeney, *FTC 2.0: Keeping Pace with Online Platforms*, Berkeley Technology Law Journal (May 2018).

**E. H.R. 4475, the “Protecting Consumers in Commerce Act of 2021”**

H.R. 4475, the “Protecting Consumers in Commerce Act of 2021”, introduced by Rep. McNerney (D-CA), would give the FTC authority over certain common carriers, including the ability to bring enforcement actions for unfair or deceptive acts or practices.

**F. H.R. 2677, the “Technological Innovation through Modernizing Enforcement (TIME) Act”**

H.R. 2677, the TIME Act”, introduced by Rep. Burgess (R-TX), would place an eight-year cap on consent decrees ordered in FTC enforcement actions. The bill would also require review of all FTC consent decrees five years after the decree is entered into, unless a particular case is related to alleged fraud and the FTC determines that the decree should last longer based on consideration of the impact on technological progress and risk of future violations of the decree. FTC consent decrees are generally in place for 20 years under current practice.

**G. H.R. 2702, the “Statement on Unfairness Reinforcement and Emphasis (SURE) Act”**

H.R. 2702, the SURE Act”, introduced by Rep. Mullin (R-OK), would prohibit FTC from declaring an act or practice unfair unless the act or practice is likely to cause substantial injury not reasonably avoidable by consumers and not outweighed by countervailing benefits to consumers, competition, or society generally. Under the bill, an act or practice does not cause substantial injury if the resulting harm is trivial or merely speculative. Acts or practices are not unfair unless found to be injurious in net effect, requiring the FTC consider various “costs” for consumer remedies including increased paperwork, regulatory burden, and reduced incentives to capital formation. The bill mirrors select language in FTC’s policy statement on unfairness written in 1980.

**H. H.R. 2671, the “Solidifying Habitual and Institutional Explanations of Liability and Defenses (SHIELD) Act”**

H.R. 2671, the “SHIELD Act”, introduced by Rep. Armstrong (R-ND), would prohibit FTC from basing an enforcement action on guidelines, policy statements, or other guidance rather than statutory provisions enforced by the FTC. However, the bill allows for compliance with FTC guidelines, policy statements, or other guidance to be used by companies as evidence of compliance with a statute in any FTC enforcement action.

**I. H.R. 4483, the “Veterans and Servicemember Consumer Protection Act of 2021”**

H.R. 4483, the “Veterans and Servicemember Consumer Protection Act of 2021”, introduced by Reps. Rice (D-NY) and Upton (R-MI), would establish a coordinator within the FTC to prevent fraud and scams targeting or adversely affecting military veterans and servicemembers. The coordinator shall consult with other applicable federal agencies to educate military veterans and servicemembers on schemes targeting them and disseminate information

for reporting such schemes to the FTC. The coordinator must also maintain a website to provide resources to military veterans and servicemembers and coordinate the FTC's establishment of procedures to receive complaints made by military veterans and servicemembers.

**J. H.R. 4460, the “Consumer Equity Protection Act”**

H.R. 4460, the “Consumer Equity Protection Act”, introduced by Rep. Kelly (D-IL), would establish a task force within the FTC to advise on equity issues and prevent unfair and deceptive acts or practices that target or affect consumers on the basis of race, color, religion, sex, national origin, sexual orientation, disability, age, or other protected characteristics. The task force is directed to consult with other applicable federal agencies to educate the public through information on and how to report schemes targeting or affecting specific consumer groups. The task force must also maintain a website to provide resources to the public and coordinate the FTC's establishment of procedures to receive relevant complaints.

**K. H.R. 4530, the “Federal Trade Commission Technologists Act of 2021”**

H.R. 4530, the “Federal Trade Commission Technologists Act of 2021”, introduced by Rep. McNerney, would require the FTC to establish an office of technologists within 180 days after enactment that would advise the FTC on technological matters including FTC use of technology, technical aspects of enforcement, and technology policy. The bill mandates at least 25 technologists be appointed and authorizes appropriations to carry out the bill's requirements.

**L. H.R. 2672, the “FTC Robust Elderly Protections and Organizational Requirements to Track Scams (FTC REPORTS) Act”**

H.R. 2672, the “FTC REPORTS Act”, introduced by Rep. Bilirakis (R-FL), would require FTC to publish an annual plan for the next year of its projected activities, including policy priorities; planned rulemakings and guidance documents; planned commission or working group restructurings; planned workshops, conferences, and reports; and projected timelines for these activities. The bill would also require a separate report on enforcement actions involving elder fraud for the previous calendar year.

**M. H.R. 2676, the “Revealing Economic Conclusions for Suggestions (RECS) Act”**

H.R. 2676, the “RECS Act”, introduced by Rep. Bucshon (R-IN), would require the 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.

**N. H.R. 2690, the “Clarifying Legality and Enforcement Action Reasoning (CLEAR) Act”**

H.R. 2690, the “CLEAR Act”, introduced by Rep. Guthrie (R-KY), would require FTC to submit an annual report to Congress that includes the number of investigations begun, number of investigations closed with no official action, the disposition of investigations that have resulted in official action, and for each investigation that closed without action, an explanation of the legal analysis supporting the agency’s decision to close the investigation.

**O.     H.R. 4551, the “Reporting Attacks from Nations Selected for Oversight and Monitoring Web Attacks and Ransomware from Enemies (RANSOME) Act”**

H.R. 4551, the “RANSOME Act”, introduced by Rep. Bilirakis, would amend the U.S. SAFE WEB Act of 2006 (SAFE WEB Act) to require the FTC to report to Congress, on a recurring basis, on cross-border complaints received by the FTC and how it used the authorities granted by the U.S. SAFE WEB Act in response. The bill amends the existing report requirements to specifically address cross-border incidents that involve ransomware and other cyberattacks from foreign actors.

The bill also requires the FTC to report to the House Energy and Commerce Committee and the Senate Commerce, Science, and Transportation Committee, on a recurring basis, on cross-border complaints on incidents, including those related to ransomware and cyberattacks, committed by certain foreign actors from Russia, China, Iran, and North Korea. The report would also include any recommendations for legislation to advance the security of the United States and U.S. companies against ransomware and other cyberattacks as well as recommendations for best practices to mitigate against ransomware

**P.     H.R. 4564, the “Federal Trade Commission Transparency Act”**

H.R. 4564, the “Federal Trade Commission Transparency Act”, introduced by Rep. Guthrie, would prevent the FTC from adopting any order, decision, report, or action by Commission vote at a Commission meeting unless the text is published on the FTC’s website 30 days before the date of vote. The bill would allow exceptions for existing non-disclosure provisions of federal law as well as emergencies and other exigent circumstances as determined by the Chair.

**III.    WITNESSES**

The following witnesses have been invited to testify:

**Panel 1**

**The Honorable Lina Khan**  
Chair  
Federal Trade Commission

**The Honorable Noah Joshua Phillips**  
Commissioner  
Federal Trade Commission

**The Honorable Rohit Chopra**  
Commissioner  
Federal Trade Commission

**The Honorable Rebecca K. Slaughter**  
Commissioner  
Federal Trade Commission

**The Honorable Christine S. Wilson**  
Commissioner  
Federal Trade Commission

**Panel 2**

**David Vladeck**  
Professor of Law  
Georgetown University Law Center

**Sally Greenberg**  
Executive Director  
National Consumers League

**Graham Dufault**  
Senior Director for Public Policy  
ACT | The App Association  
Washington, DC