

ONE HUNDRED SEVENTEENTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6115

Majority (202) 225-2927
Minority (202) 225-3641

August 16, 2021

The Honorable Noah Phillips
Commissioner
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Hon. Phillips:

Thank you for appearing before the Subcommittee on Consumer Protection and Commerce on Wednesday, July 28, 2021, at the hearing entitled “Transforming the FTC: Legislation to Modernize Consumer Protection.” I appreciate the time and effort you gave as a witness before the Committee on Energy and Commerce.

Pursuant to Rule 3 of the Committee on Energy and Commerce, members are permitted to submit additional questions to the witnesses for their responses, which will be included in the hearing record. Attached are questions directed to you from certain members of the Committee. In preparing your answers to these questions, please address your response to the member who has submitted the questions in the space provided.

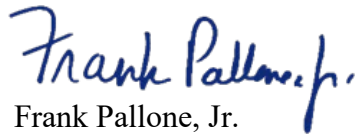
To facilitate the printing of the hearing record, please submit your responses to these questions no later than the close of business on Friday, August 27, 2021. As previously noted, this transmittal letter and your responses, as well as the responses from the other witnesses appearing at the hearing, will all be included in the hearing record. Your written responses should be transmitted by e-mail in the Word document provided to Ed Kaczmariski, Policy Analyst, at ed.kaczmariski@mail.house.gov. To help in maintaining the proper format for hearing records, please use the document provided to complete your responses.

The Honorable Noah Phillips

Page 2

Thank you for your prompt attention to this request. If you need additional information or have other questions, please contact Ed Kaczmariski with the Committee staff at (202) 225-2927.

Sincerely,

A handwritten signature in blue ink that reads "Frank Pallone, Jr." with a stylized flourish at the end.

Frank Pallone, Jr.
Chairman

Attachment

cc: The Honorable Cathy McMorris Rodgers
Ranking Member
Committee on Energy and Commerce

The Honorable Jan Schakowsky
Chair
Subcommittee on Consumer Protection and Commerce

The Honorable Gus Bilirakis
Ranking Member
Subcommittee on Consumer Protection and Commerce

Attachment—Additional Questions for the Record
Subcommittee on Consumer Protection and Commerce
Hearing on
“Transforming the FTC: Legislation to Modernize Consumer Protection”
July 28, 2021

The Honorable Noah Phillips, Commissioner, Federal Trade Commission

The Honorable Kelly Armstrong (R-ND)

1. In “Nixing the Fix: An FTC Report to Congress on Repair Restrictions”, the Commission mentions stakeholder concerns regarding modifications to remove, impair, or disable federally-required emissions control equipment. Putting aside considerations of whether such activity would be classified as a modification or repair in specific circumstances, does the Commission plan to consult with the Environmental Protection Agency to fully understand whether providing access to embedded software would affect the regulation of federally-required emissions control equipment?

RESPONSE:

I believe that the Commission should consult with other relevant agencies before taking action relating to right to repair, including consulting with the Environmental Protection Agency (“EPA”) to determine whether and how providing access to embedded software would affect the regulation of federally-required emissions control equipment. At the July 21, 2021 open Commission meeting, the Commission unanimously voted out a *Policy Statement of the Federal Trade Commission on Repair Restrictions Imposed by Manufacturers and Sellers* (“Policy Statement on Repair Restrictions”),¹ which, among other things, states the Commission’s intention to coordinate closely with state law enforcement and policymakers. This commitment should extend to federal regulatory agencies such as the EPA.

2. In “Nixing the Fix: An FTC Report to Congress on Repair Restrictions”, footnote 18 states that “Commissioner Wilson and Commissioner Phillips note that the report excludes from the scope of its coverage an analysis of manufacturers’ intellectual property rights, which may provide legitimate justification for some repair

¹ *Policy Statement of the Federal Trade Commission on Repair Restrictions Imposed by Manufacturers and Sellers* (July 21, 2021), available at https://www.ftc.gov/system/files/documents/public_statements/1592330/p194400repairrestrictionspolicystatement.pdf.

restrictions.” How will the Commission address such legitimate assertions of intellectual property rights?

RESPONSE:

When the Commission analyzes whether particular repair restrictions violate any of the laws that it enforces, it must consider whether the restriction is due to a legitimate assertion of intellectual property rights. As stated in the Policy Statement on Repair Restrictions, the Commission should only pursue the *unlawful* and *overbroad* assertion of IP rights.² While IP rights cannot provide a blanket justification for any repair restriction, they are an important federal mechanism for stoking innovation and must be taken into account. Determining whether to bring an action against a company requires extensive fact-finding and rigorous analysis. Any investigation of a company’s repair restrictions must give serious consideration to the company’s explanation for its policies, including the protection of IP.

² Id.