

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

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

August 16, 2021

The Honorable Rebecca Slaughter
Commissioner
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Hon. Slaughter:

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.

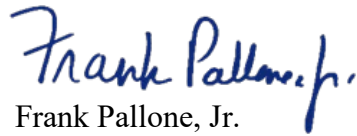
To facilitate the printing of the hearing record, please submit your responses to these questions no later than the close of business on Friday, August 27, 2021. As previously noted, this transmittal letter and your responses, as well as the responses from the other witnesses appearing at the hearing, 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 Rebecca Slaughter

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, cursive script.

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 Rebecca Slaughter, Commissioner, Federal Trade Commission

The Honorable Lori Trahan (D-MA)

1. On April 29, 2021, under your leadership, the FTC hosted the “Bringing Dark Patterns to Light” workshop.¹ What steps can the FTC take to combat dark patterns and manipulative design today? What actions by Congress would assist with these efforts?

RESPONSE: I’m extremely concerned about dark patterns and the ways companies design user interfaces to manipulate customers into taking unintended actions against their interests. That can mean manipulating people into giving up their personal data, forcing people to navigate a maze of options to cancel negative option subscription plans, hiding material contract terms, or sneaking items into their shopping carts.

The FTC has sued companies for using dark patterns to manipulate consumers in this way (*ABCmouse, Progressive Leasing, AH Media Group*), and I believe we should continue to go after companies that use deceptive, unfair, or otherwise unlawful design tactics. But, when combating these kinds of prevalent market practices where one-off litigation is unlikely to change industry-wide behavior, the FTC should use additional tools at its disposal like guidance, policy statements, and its rulemaking authority to make it clear to all market participants that these practices are unlawful.

Congress can aid the Commission in these efforts in a number of ways. We have testified about the resource crunch at the agency and additional staff and other resources to pursue consumer protection cases like these is essential. If the Commission pursues a rulemaking to prohibit these practices it will also greatly benefit from additional staff to manage our complicated Section 18 process. And if Congress were to grant the agency either general APA rulemaking authority or targeted authority to address these and other practices in online commerce the agency could be even more responsive in its mission to protect consumers from these unlawful practices.

¹ FTC, *Bringing Dark Patterns to Light: An FTC Workshop* (April 29, 2021) (www.ftc.gov/news-events/events-calendar/bringing-dark-patterns-light-ftc-workshop).

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: We recognize that the right to repair may overlap with a number of different policy and legal issues. In the right to repair arena, as in other areas where the Commission’s work implicates laws and regulations outside of the agency’s expertise, we will seek input from the relevant stakeholders, including sister agencies like the EPA.

Prior to the July 2019 Nixing the Fix workshop (the “Workshop”), the Commission issued a call for empirical research and sought comments from any interested parties and stakeholders. Following the Workshop, the Commission accepted comments into September 2019 and staff continues to meet with stakeholders and interested parties. While the FTC’s report to Congress on repair restrictions² (“Report”) briefly discusses emissions control equipment, it does so in the context of a study submitted to the record that focused on modifications to such equipment.³ The study applied to off-road vehicles and, as noted in the Report, is inapposite as it concerned equipment that was modified rather than repaired. By contrast, the Commission’s right to repair work, including the Workshop and Report, focuses on the benefits of expanding consumers’ repair options. We have not considered whether consumers should have an unfettered right to modify their products and we recognize that the analysis of repair restrictions in the Report may not readily translate to an analysis of modification restrictions.

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

² Federal Trade Commission, *Nixing the Fix: An FTC Report to Congress on Repair Restrictions* (May 2021), https://www.ftc.gov/system/files/documents/reports/nixing-fix-ftc-report-congress-repair-restrictions/nixing_the_fix_report_final_5521_630pm-508_002.pdf.

³ Equipment Dealers Association & Association of Equipment Manufacturers, *Research Title: Modifications to Safety and Emissions Features in Off-Road Equipment*, <https://www.regulations.gov/document/FTC-2019-0013-0017>.

RESPONSE: We recognize that the right to repair issue may overlap with a number of different policy and legal issues.

As we noted in the Report, any action by industry or regulators to enable independent repair should seek input from relevant stakeholders, including the US Patent and Trademark Office and the US Copyright Office, in order to be mindful of existing law and policy supporting intellectual property protections.⁴

But firms must also abide by antitrust standards, including in the way that they assert IP rights. While patents are vital for promoting innovation, they are also routinely abused, to weaken rivals as well as to stunt development to protect and defend monopoly positions. For instance, in the Commission report on repair restrictions, Commission staff uncovered evidence that manufacturers and sellers may be restricting competition for repair services in a number of ways, including by asserting patent rights and enforcement of trademarks in an unlawful, overbroad manner. While efforts by dominant firms to restrict repair markets are not new, changes in technology and more prevalent use of software has created fresh opportunities for companies to limit independent repair. I believe the Commission must use its full range of tools to ensure that manufacturers and sellers are not relying on overbroad assertions of intellectual property rights as a pretext for monopolistic or exclusionary conduct.

⁴ *Id.* at 53-54.