



## GEORGETOWN LAW

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*Via Email*

The Honorable Frank Pallone Jr.  
The Honorable Janet D. Schakowsky  
Committee on Energy and Commerce  
Subcommittee on Consumer Protection and Commerce  
U.S. House of Representatives  
2125 Rayburn House Office Building  
Washington, D.C. 20515

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

Dear Chairman Pallone and Chair Schakowsky:

Set forth in the attachment to this letter are my answers to questions for the record. Please let me know if I can assist the Committee or Subcommittee in any way.

Respectfully submitted,

David C. Vladeck

Attachment

**The Honorable Janice D. Schakowsky (D-IL)**

1. The central theme of last month's hearing was ensuring the FTC has the tools it needs to protect consumers in the modern marketplace and into the future. In practice, this often means adapting to an online, interconnected world.
  - a. How has the shift to online commerce, the proliferation of social media, and the general dependence on the internet changed the consumer experience?

**RESPONSE:**

**The internet has changed every facet of commerce in the United States. The volume of sales made online has skyrocketed and increases every year. See, e.g., <https://www.digitalcommerce360.com/article/us-ecommerce-sales/>. The internet has become a safe haven for criminals and scam artists who hide behind the anonymity of internet transactions. Identity theft has become a feature of modern life, the predictable debris of an economy that doesn't take seriously the need to safeguard sensitive personal information. Most enforcement cases brought by the FTC and State Attorneys General emanate from or have a direct relationship to the internet. And social media platforms fine-tune their algorithms to ensure that users maximize the time they spend on platforms, even though doing so encourages extremism.**

- b. Are certain groups particularly vulnerable to online harms?

**RESPONSE:**

**This is a complicated question. If the question is focused on internet scams, the answer is that everyone – regardless of age, gender, race, educational status – is vulnerable. See, FTC, *Consumer Fraud in the United States* (2017).**

**If the question is focused on discrimination based on race, gender, and age, the answer to that question is yes, there are**

vulnerable populations who are subject to exploitation and discrimination on internet platforms. Much of that bias is due to using algorithms to make consequential decisions about credit, price, and access to goods and services. Algorithmic bias is deeply engrained, difficult to prove (given that one can't really interrogate an algorithm), and difficult to root out. There are serious concerns that internet transactions mask discrimination against racial minorities, women, and the elderly, especially in financial services, but in other economic sectors as well. And, of course, major platforms have fostered, and no doubt still foster, bias through advertising targeted at selected populations.

- c. What are the most important steps Congress can take to make sure that the Federal Trade Commission can fulfill its duty to protect consumers from unfair, deceptive, and anticompetitive behavior?

**RESPONSE:**

*First*, and foremost, the FTC needs more resources. The FTC enforces not only the FTC Act, but seventy plus other statutes, and yet it is barely two-thirds the size (in terms of personnel and budget) than it was in 1981.

*Second*, the FTC's staff is underpaid in comparison with staff at the Securities and Exchange Commission, the Consumer Financial Protection Bureau, the Commodities Future Trade Commission, and other consumer protection agencies and commissions. There is no reason for the pay disparity, it trivializes the FTC's central role in consumer protection, and the FTC often loses key personnel to sister agencies simply because of that disparity.

*Third*, as I emphasized in my testimony, the FTC needs standard Administrative Procedure Act rulemaking authority under 5 U.S.C. § 553. This authority was withdrawn from the Commission in 1980 because it had the temerity to seek to protect children in the market place. And contrary to the folklore that the business community has encouraged, the fact is that the American people strongly favored the FTC's proposed action; it took a concerted campaign by the business community to kill off the FTC's proposal. *See, e.g.,* Luke D. Herrine, *The Folklore of Unfairness*, 96 N.Y.U. Law Review, 431 (2020) (recounting the history of "kid-vid").

The withdrawal of rulemaking authority has had a crippling impact on the FTC. Prior to 1980, the FTC extensively engaged in

rulemaking – setting clear and enforceable norms through a transparent process and robust industry participation. The business community says it wants clear and specific standards. That’s only fair. But the only way for an agency or commission to set clear and specific standards is through rulemaking. Do not let the business community stifle this important initiative; it would be hypocritical for the business community to, on one hand, urge the FTC to set clear and specific standards, and on the other hand to oppose giving the Commission rulemaking authority to do just that. After all, why should the FTC alone lack rulemaking authority, especially since rules are subject to searching judicial review?

*Fourth*, Congress should repeal the antiquated “common carrier” and “non-profit” carve-outs to the FTC’s jurisdiction. I won’t repeat here what I said in my written testimony (at pp. 4-7) , but these carve-outs leave an intolerable vacuum in the nation’s consumer protection safety net, and these carve-outs continue to hamper the FTC’s ability to protect consumers in the marketplace.

*Fifth*, Congress should fine-tune and enact the Online Consumer Protection Act. At a minimum, the Act ought to make clear that Section 230 of the Communications Decency Act does not impede in any way the FTC’s authority to enforce the FTC Act. The Online Consumer Protection Act ought to specify that any failure by a platform to adhere to its own “terms of service” agreements can constitute a deceptive or unfair act or practice actionable by the FTC. And the Act should prohibit internet providers from insisting that disputes between users and providers be resolved by arbitration rather than litigation. Congress should also expressly provide that users may band together to bring class actions against platforms in cases alleging a breach of the terms of service; thus avoiding the prospect that the platforms could outlaw collective or class actions in their terms of service. *Cf. AT&T Mobility v. Conception*, 563 U.S. 333 (2011) (upholding a service contract that forbid collective actions).

Some of the issues relating to the proposed Act were the subject of a recent National Academies of Arts and Sciences workshop entitled *Section 230 Protections: Can Legal Revisions or Novel Technologies Limit Online Misinformation and Abuse?* The report is available here: <https://www.nap.edu/download/26280>.

**The Honorable Lori Trahan (D-MA)**

1. Bad actors use platforms popular within the Spanish speaking community to target fraudulent advertising and scams. In fact, during the pandemic bad actors used WhatsApp and Facebook to send messages offering money to people who need it through grants, coupons for food support, or other giveaways. The fake offers looked like they were coming from trusted brands but were actually phishing scams to collect personal information and possibly install malware.<sup>1</sup> Most recently, as part of the FTC's Operation Income Illusion sweep the Commission found that Moda Latina BZ Inc., Esther Virginia Fernandez Aguirre, and Marco Cesar Zarate Quiroz specifically targeted Latina consumers in Spanish-language ads on TV with false promises of earning large profits selling luxury goods from their living room.<sup>2</sup> Given the FTC's limited resources both in personnel and funds, and their limited ability to seek civil penalties, are you concerned about more fraudulent advertisements being targeted at Spanish-speakers? What else could the FTC do to combat the problem?

**RESPONSE:**

**During my tenure at the FTC the Bureau of Consumer Protection started holding “common ground” conferences around the country to bring together community organizations, state Attorneys General, other consumer protection agencies, and non-profit organizations like La Raza, and of course, the FTC to discuss the threats to vulnerable communities and to act collectively to combat those threats. Directors of the FTC's regional offices were tasked with helping to organize the conferences and cement relationships with community groups.**

**Those conferences were essential in providing the FTC actionable leads on newly emerging scams. For instance, the Bureau first learned of a series of phantom debt collection scams that were taking a serious toll on minority groups, including the Spanish-speaking community, through a common ground conference. Working with community organizations, we were able to build enforcement cases, shut down the scams, and I believe we also referred some of the scammers to the Department of Justice for criminal prosecution.**

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<sup>1</sup> Diana Shiller, *Those free COVID-19 money offers on WhatsApp and Facebook are scams*, FTC Blog (Aug. 28, 2020) ([www.consumer.ftc.gov/blog/2020/08/those-free-covid-19-money-offers-whatsapp-and-facebook-are-scams](http://www.consumer.ftc.gov/blog/2020/08/those-free-covid-19-money-offers-whatsapp-and-facebook-are-scams)).

<sup>2</sup> FTC, *Operators of Bogus Income Scam Targeting Latinas Face FTC Settlement* (Mar. 2, 2021) ([www.ftc.gov/news-events/press-releases/2021/03/operators-bogus-income-scam-targeting-latinas-face-ftc-settlement](http://www.ftc.gov/news-events/press-releases/2021/03/operators-bogus-income-scam-targeting-latinas-face-ftc-settlement)).

**Outreach to community groups was an essential job for the Bureau during my tenure. My understanding is that commitment has waned over time. I would urge the Committee to ensure that the FTC has the resources and will to actively re-engage with community organizations. Those organizations often provide an early-warning signal about new and highly problematic scams, such as the phishing scam discussed in your question. But make no mistake, the FTC is severely under-resourced, and these common ground conferences require resources, especially the time it takes to plan the conferences (we were generally able to hold the conferences at universities and law schools, and thus saved money on facilities) and the expenses for Bureau personnel to attend and follow up with community groups.**

2. The pandemic has been a challenge for families across the country. In addition to the public health impact, the pandemic has opened the door for bad actors to prey on the most vulnerable through scams and consumer abuse. In March, then Acting Chairwoman Slaughter and CFPB Acting Director Uejio issued a joint statement which included: “Staff at both agencies will be monitoring and investigating eviction practices, particularly by major multistate landlords, eviction management services, and private equity firms, to ensure that they are complying with the law. Evicting tenants in violation of the CDC, state, or local moratoria, or evicting or threatening to evict them without apprising them of their legal rights under such moratoria, may violate prohibitions against deceptive and unfair practices, including under the Fair Debt Collection Practices Act and the Federal Trade Commission Act.”<sup>3</sup>

- a. Can you explain why the prohibitions against deceptive and unfair practices under the FTC Act have been so crucial during the pandemic?

**RESPONSE:**

**This question reflects the importance of both prongs of the FTC’s authority under Section 5 of the FTC Act. There have been a tsunami of *deceptive* acts and practices during the ongoing pandemic – from selling bogus treatments and cures, to bogus test kits, swabs, masks, and on and on. And there were many *unfair* acts and practices relating to threats of eviction and other acts that violate**

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<sup>3</sup> Federal Trade Commission, *JOINT STATEMENT OF CFPB ACTING DIRECTOR DAVE UEJIO AND FTC ACTING CHAIRWOMAN REBECCA SLAUGHTER* (Mar. 29, 2021) ([files.consumerfinance.gov/f/documents/cfpb\\_ftc-joint-statement\\_03-2021.pdf](https://files.consumerfinance.gov/f/documents/cfpb_ftc-joint-statement_03-2021.pdf)).

the FTC Act.

- b. Do you believe the FTC is sufficiently equipped to respond to major crises?

**RESPONSE:**

**The short answer is “no,” and that was true when I served as Bureau Director during the economic crisis of 2008-2012, and it is equally true today. I often thought of my job as a Bureau Director as a triage nurse; the FTC lacked the resources to take on all of the enforcement cases we needed to bring, and as a result, too many scams persisted for too long, all to the detriment of consumers. Nothing has changed since then. Although I think that the FTC has done as well as it could, given its resources, during the ongoing pandemic, major crises like the 2008 downturn or the pandemic drive home the insufficiency of the FTC’s resources. The failing here is not the FTC’s. It is Congress that has long underfunded and under-resourced the FTC.**

3. The CDC moratorium on evictions will eventually come to an end. This will leave Millions of families in need of safe long-term housing and particularly vulnerable to scams and other consumer abuses. We have already seen a tremendous amount of “pandemic profiteering” from bad actors seeking to take advantage of our most vulnerable during this crisis.<sup>4</sup> Can you speak to the potential for housing scams and how Congress may best help the FTC be prepared to fight them?

**RESPONSE:**

**The Federal moratorium has ended, and while some states are extending the moratorium, there is almost certain to be the “pandemic profiteering” your question anticipates. To be sure, profiteers will try to squeeze the last dollar out of recently evicted or soon-to-evicted tenants, and many of those scams will involve violations of the FTC Act. To be effective, the FTC will need to partner with community groups on the ground, so FTC interventions are timely, that is, when enforcement cases, or even threatened enforcement cases, might deter some profiteers and could take those who are engaging in profiteering off the table.**

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<sup>4</sup> Emily Wu, *Need rental assistance? Check out these tenant assistance services*, FTC Blog (Aug. 5, 2021) ([www.consumer.ftc.gov/blog/2021/08/need-rental-assistance-check-out-these-tenant-assistance-services](http://www.consumer.ftc.gov/blog/2021/08/need-rental-assistance-check-out-these-tenant-assistance-services)).

**There is, of course, the nagging question of whether the threat of an FTC enforcement action has much currency these days. One serious problem the FTC faces is that, at present, its power to bring an enforcement action is not much of a threat; the FTC cannot even force a scam artist to return ill-gotten gains to the scammed. Until *AMG* is overturned by Congress, FTC enforcement cases result in, at most, a slap on the wrist, and that emboldens scam artists. It is a travesty that Congress has yet to fill the gap left in *AMG*, and it is your constituents who will pay for Congress's inaction.**

4. Unfortunately, organizations purporting to be nonprofits can be the first to take advantage of the most vulnerable, including the unhoused. How would eliminating the exemption for nonprofits from the FTC's jurisdiction allow the Commission to ensure vulnerable populations are better protected in times of crisis?

**RESPONSE:**

**I agree with the premise of your question – bogus non-profit groups are keen to take advantage of the gap in the FTC's authority for non-profit organizations. My testimony tries to drive home the point that the FTC often has to spend significant resources to prove that an organization that claims to be non-profit, is not, in fact a bona fide non-profit organization. As a result, bogus non-profits often get away with scams aimed at vulnerable populations, and the FTC at times has to forego enforcement proceedings because of resource constraints or an inability to prove to a court that an entity is not a bona fide non-profit.**