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BEFORE THE HOUSE COMMITTEE ON ENERGY AND COMMERCE

SUBCOMMITTEE ON CONSUMER PROTECTION AND COMMERCE

LEGISLATIVE HEARING ON 16 FTC BILLS

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Good morning Chair Schakowsky, Ranking Member Bilirakis, and members of the Subcommittee. I am David C. Vladeck, A.B. Chettle, Jr., Professor of Law, Georgetown University Law Center. I served as Director of the Bureau of Consumer Protection, Federal Trade Commission, from 2009 to 2012. I appreciate the invitation to testify this morning on the sixteen bills that are pending before the Subcommittee.

Let me begin by making a comment that frames my views on the proposals before the Subcommittee. The Subcommittee should evaluate each proposal by asking one question: If enacted into law, would the legislation assist or hinder the FTC in carrying out its consumer protection mission? That, in my view, is the one salient question, and only if the answer is unmistakably "yes" should the Subcommittee move the proposal forward.

Congress has long recognized that the FTC is a high functioning agency that serves the American people remarkably well. For more than 100 years, the FTC has been the nation's leading consumer protection agency. To carry out its mission, Congress enacted the Federal Trade Commission Act, which charges the Commission to "prevent" unfair, deceptive and anti-competitive acts and practices in the marketplace. And in recognition of the agency's professionalism and success, Congress has repeatedly turned to the FTC to enforce more than seventy other consumer protection statutes.

The FTC has succeeded because it has stayed focused on its mission. The FTC's job is to go after companies and individuals that break the law and harm or

threaten to harm your constituents. The FTC brings enforcement actions against scam artists who try to take the last dollars out of the wallets of the poor and elderly. It goes after companies making false advertising claims, resulting in consumers wasting money on products that don't deliver as promised and harming businesses that play fair. It brings enforcement cases against companies that misuse personal data or invade consumers' privacy. And it files competition cases to ensure that consumers have choices in the marketplace and that all companies, including new entrants, can compete on a level playing field.

But today the FTC is facing multiple challenges that Congress needs to address. As I see it, the key priorities are:

* Restoring the FTC's authority to force lawbreakers to return money to scammed consumers and disgorge ill-gotten gains;

* Providing adequate funding and staff so the FTC, which has barely two-thirds of the personnel it had in the early 1980s, can meet the challenges of protecting consumers in today's complex marketplace;

* Modernizing the FTC's enforcement mission by providing the FTC rulemaking authority under the Administrative Procedure Act and jurisdiction over common carriers and non-profit organizations; and

* Bolstering the technological resources available to the FTC and giving the FTC broader authority to hold the platforms and social media companies accountable for deceptive acts and practices.

I realize that this Committee has moved forward on reversing the FTC's loss in *AMG v. FTC*, but today's hearing underscores that Congress needs to do much more to put the FTC on sound legislative footing.

One point that I want to drive home is that the FTC has a long and enviable history of working on a non-partisan basis. The FTC's tradition of bi-partisanship

yields value to the American people. Every year the FTC returns tens or hundreds of millions of dollars to consumers and saves consumers billions of more dollars through its enforcement efforts – amounts that exceed tenfold or more the agency's annual budget. If the FTC were a company, we would all want to buy its stock. Congress's first priority should be to strengthen the Commission so it can do its work more effectively.

Many of the proposals before the Subcommittee today do just that; they propose ways of clarifying and strengthening the agency's authority. I will start with proposals that would retool the FTC's jurisdiction to authorize the Commission to better safeguard American consumers. Then I will turn to a number of proposals, doubtlessly well-intentioned, that if enacted might hinder the Commission's ability to protect our nation's consumers.

A. Proposals That Would Strengthen the FTC's Ability to Safeguard Consumers.

Eight bills propose to amend the Federal Trade Commission Act (FTC Act) in ways consistent with the Commission's longstanding, bi-partisan approach to statutory reforms. I will discuss these proposals by category: Two of them, H.R. 4475 (Protecting Consumers in Commerce Act), and H.R. 3918, propose amendments to the Commission's existing jurisdiction. I will address those proposals first. Next, four other bills provide the Commission with better tools to do its work: H.R. 4447 (21st Century FTC Act), H.R. 4488 (FTC Autonomy Act), H.R. 4530 (FTC Technologists Act of 2021), and H.R. 3067 (Online Consumer Protection Act). Last, but hardly least, two bills seek additional protection for certain classes

of consumers: H.R. 4460 (the Consumer Equity Protection Act of 2021) proposes that the FTC ensure that protected classes are not subject to or targeted by deceptive or unfair acts or practices. And H.R. 4483 (Veterans and Servicemember Consumer Protection Act of 2021) proposes to establish a coordinator within the FTC to ensure the protection of military veterans and servicemembers. Each of these proposals has merit and should be enacted into law.

I. Needed Reforms to the FTC's Existing Jurisdiction.

H.R. 4475. The Protecting Consumers in Commerce Act would amend the FTC Act to strike the archaic common carrier exemption, which arguably places off-limits certain conduct by telecommunications companies. Section 5(a)(2) of the FTC Act, 15 U.S.C. 45(a)(2), carves out FTC jurisdiction over, among other entities, "common carriers subject to the Acts to regulate commerce." And Section 4 of the FTC Act, 15 U.S.C. 44, defines "Acts to regulate commerce" to include not only common carriers engaged in interstate transportation (railroads, interstate trucking, and pipelines), but also "title 49 and the Communications Act of 1934 and all Acts amendatory thereof and supplementary thereto." To translate this statutory language into English, these provisions arguably exclude communication common carriers, such as AT&T, Comcast, and Verizon, from the FTC's jurisdiction, even when they are engaged in consumer-facing activity. There is no reason for that gap in the FTC's authority, and the gap continues to cause mischief.

The FTC has long asked Congress to repeal this exemption, which was based on the premise that the Federal Communications Commission (FCC) would

comprehensively regulate all activities of monopolist telecommunications carriers. Given today's dynamic market for telecommunications services, and the substantial de-regulation of the industry, the boundaries between common carriage and other telecommunications services has been obliterated. The FTC has actively engaged in enforcement efforts to protect consumers against unfair and deceptive acts and practices by carriers, including lawsuits against AT&T and TracFone for "throttling" service to customers. But with the FCC's Title II reclassification of internet service as "common carriage," the FTC's jurisdiction in this area is now in doubt.[1]

Congress should make clear that the FTC has authority to bring consumer protection cases against the carriers, especially in matters in which the FTC has considerable expertise, including cases involving false or deceptive advertising, bogus marketing claims, illegal billing practices (like "cramming" – *i.e.*, placing unauthorized charges on bills as shown in the Commission's case against T-Mobile), privacy, and data security. After all, the FTC is an enforcement agency while the

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[1] It is no answer to suggest that the FCC can adequately protect consumers in these kinds of cases. To be sure, the FCC can impose fines and require structural relief against the common carriers it regulates. But it has no authority to make consumers whole for their loses. For instance, shortly after my tenure as Bureau Director, the FTC filed suit against AT&T Mobility claiming that it "throttled" or reduced the customers' broadband speech without regard to actual network congestion. AT&T's defense was not on the merits. Instead, AT&T argued that the common carrier exemption barred the FTC from bringing the case at all. Although the FTC finally prevailed in an *en banc* ruling from the Ninth Circuit, *FTC v. AT&T Mobility LLC*, 883 F.3d 848 (9th Cir. 2018), the issue has not been definitively resolved and continues to cast a shadow on the FTC's authority. Fortunately, the FTC's action against AT&T succeeded and resulted in a $60 million redress order. *See* https://www.ftc.gov/enforcement/cases-proceedings/122-3253/att-mobility-llc-mobile-data-service.

FCC is a regulatory agency focused on a discrete set of corporate actors. The difference for consumers is striking. In enforcement cases, the FTC puts money back in consumers' wallets and enjoins future wrongdoing, while the FCC imposes fines but has no authority to engage in redress or restitution. Consumers deserve better. The Subcommittee should move forward with H.R. 4475.

H.R. 3918. This bill would permit the FTC to enforce the FTC Act against certain tax-exempt organizations. The FTC has long struggled with the exemption for non-profit corporations because all too often fraudulent charities, bogus insurers, and fake health care providers, hide behind the veil of non-profit status. Piercing that veil can be difficult. During my first year as Bureau Director, the Commission, along with 61 Attorneys General, Secretaries of State, and other law enforcers of 49 states brought 76 law enforcement actions against 32 fundraising companies, and 22 non-profits or purported non-profits on whose behalf funds were solicited. Virtually all of the non-profits fought against FTC participation because, they claimed, they were bona fide non-profits.[2]

More recently, the Commission sued a company engaged in selling dietary supplements as cancer cures but had to expend substantial resources proving that the purported non-profit religious institution, Daniel Chapter One, was simply a for-profit business.[3] Fake charity schemes also continue apace.

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[2] *See* FTC Press Release, *FTC Announces False Charity Law Enforcement Sweep* (May 20, 2009), available here: https://www.ftc.gov/news-events/press-releases/2009/05/ftc-announces-operation-false-charity-law-enforcement-sweep.

[3] *See, e.g., U.S. v. Daniel Chapter One,* 793 F.Supp.2d 157 (D.D.C. 2011).

Hospitals, universities and colleges generally sheltered by the non-profit exemption as well. These institutions also experience serious data breaches, but even when they misrepresent their data security practices or have unreasonably lax security, they are immune from FTC action. Millions of consumers have no choice but to entrust personal data to these institutions. They ought to be held accountable if they fail to take reasonable precautions to safeguard the vast quantities of sensitive data they hold.

II. Needed Reforms to Augment FTC Authority.

H.R. 4488. The FTC Autonomy Act would amend the FTC Act to permit the Commission's own lawyers to bring order violation cases, rather than having to enlist the assistance of the Attorney General. Under current law, 15 U.S.C. 45(*l*), when a company or an individual "violates an order of the Commission after it has become final, and while such order is in effect, [the offender] shall forfeit and pay to the United States a civil penalty . . . which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States."

The practice of requiring the FTC to refer order violation cases to the Attorney General is outdated, cumbersome, time-consuming, and serves no discernable purpose. FTC lawyers generally prepare the papers that are submitted to the court, handle the lion's share of the litigation, and, because the FTC obtained the underlying order, have expertise in the case and the subject matter. As a result, there is inevitably a wasteful duplication of effort by both the FTC and DOJ.

There is another reason to end this practice. Unlike the Department of Justice, the FTC is an independent Commission that neither reports to nor takes orders from the Executive Branch. The FTC's independence is a virtue, and requiring the FTC to seek the Justice Department's participation to enforce FTC orders undermines Congress's intent to create the FTC as an independent Commission. I urge the Committee to approve this important bill.

H.R. 4447. The 21st Century FTC Act would restore the Commission's pre-1975 authority to use the standard rulemaking tool, *i.e.*, notice and comment rulemaking authorized by the Administrative Procedure Act (APA), 5 U.S.C. 553, to develop legally enforceable rules defining unfair or deceptive acts and practices. At present, the FTC is subject to hybrid (or Mag-Moss) rulemaking; it is permitted to use APA rulemaking but must also clear several extra hurdles. The FTC must also:

> (A) publish a notice of proposed rulemaking stating with particularity the text of the rule, including any alternatives, which the Commission proposes to promulgate, and the reason for the proposed rule; (B) allow interested persons to submit written data, views, and arguments, and make all such submissions publicly available; (C) provide an opportunity for an informal hearing in accordance with subsection(c); and (D) promulgate, if appropriate, a final rule based on the matter in the rulemaking record (as defined in subsection (e)(1)(B)), together with a statement of basis and purpose.

15 U.S.C. 51a(b)(1). And that's not all. The FTC must determine, on a factual record, that the practices subject to the rulemaking are "prevalent," and must also hold an "informal" hearing that in practice is a regulatory trial, with examination and cross-examination of witnesses. *See id.* 51a(c).

This process is unworkable. As a result, the FTC has largely abandoned rulemaking as an option, except where Congress gives the FTC APA rulemaking. *See*, *e.g.*, The Report of the Administrative Conference of the United States (available at: https://www.acus.gov/report/project-report-recommendation-80-1) (highlighting the obstacles for FTC rulemaking). Congress has at times conferred Section 553 rulemaking authority on the Commission to carry congressional priorities. *See*, *e.g.*, 15 U.S.C. 6102 (providing APA rulemaking authority to enable the FTC to issue the Telemarketing Sales Rule). But the time has come to permit the FTC to promulgate rules under 5 U.S.C. 553.

The need here is palpable. In the absence of substantive rules, the FTC has had to develop a "common law" of what constitutes "deceptive" or "unfair practices" through case-by-case enforcement and guidance documents. That "common law" provides the regulated community considerable guidance, but arguably does not produce the specific and clear standards businesses would prefer. And that "common law" binds only the FTC. As a result, the FTC is left to bring cookie-cutter cases one-by-one, to shut down individual scams, return to consumers whatever money the FTC can find, and then take on the next, essentially identical case. Enforcement under the FTC Act as it exists today is a game of whack-a-mole for the Commission; the FTC is forced to carry out enforcement in retail, not wholesale. This archaic reality, coupled with the FTC's chronic resource constraints, forces the FTC to forego too many cases, thus jeopardizing the well-being of your constituents.

What is especially frustrating is that we know that enforceable rules are effective deterrents. Consider an example from my tenure as Bureau Director. During the last economic downturn, "debt settlement" and "debt relief" companies badgered financially distressed consumers, many trying to stave off bankruptcy, into allowing the company to "settle" their debts. The companies made extravagant and baseless claims of likely success. Millions of consumers put their dwindling savings in the hands of these companies, only to see their money go to pay the companies' fees, not to creditors. Many ended up in bankruptcy. To stem the tide, the FTC brought enforcement actions against the largest and worst actors and shut many of them down. But the scam was so profitable that for every company the FTC shut down, a raft of new ones would open.

Fortunately, Congress had authorized the FTC to use APA rulemaking to promulgate rules relating to abusive telemarketing. The debt settlement companies depended on telemarketing to troll for new clients. Relying on that authority, in less than a year, the FTC completed a notice and comment rulemaking and issued a comprehensive rule strictly regulating debt relief services.[4] The rule prohibits advanced fees, requires substantial disclosures, strictly regulates the advertising claims the companies may make, and threatens violators with restitution or disgorgement *and* substantial civil penalties. The rule is enforceable not just by the FTC, but also by State Attorneys General. Within a few months, we saw a mass

[4] *See* https://www.ftc.gov/news-events/press-releases/2010/07/ftc-issues-final-rule-protect-consumers-credit-card-debt.

exodus from the “debt relief” industry, and a rise in non-profit credit counseling organizations that provided free and helpful advice to those in financial distress. The FTC could replicate this success many times over if Congress gives it standard rulemaking authority.

Equally important to the success of the debt settlement rule was the fact that the debt settlement companies understood that the FTC could seek not just restitute, but also civil penalties against violators. H.R. 4447 would authorize the FTC to promulgate rules laying out specific and clear standards as to what constitutes unfair or deceptive acts and practices, and in so doing create enforceable norms that would enable the FTC to seek civil penalties from violators. Congress has already empowered the FTC to seek penalties for violations of substantive rules. And like existing law, H.R. 4447 does *not* delegate civil penalty authority directly to the Commission. Rather, it amends Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. 45(m)(1)(A), to authorize courts to impose civil penalties.

This reform is critically needed. As I said earlier, the FTC is under-resourced and under-staffed, but tasked with a formidable responsibility: safeguarding your constituents in a vast, complex, and at times hostile marketplace. Giving the FTC tools that almost every other agency has will better enable the FTC to perform its mission, and it would restore the FTC to parity with its enforcement counterparts.

H.R. 4530. The FTC Technologists Act of 2021 would require the Commission to establish an “Office of Technologists” with 25 technologists to “advise the

Commission on technology matters, including the use of technology, technical aspects of law enforcement actions, and technology policy recommendations."

I applaud any recommendation that would increase funding to expand the FTC's staff of technologists. But I offer one cautionary note. The FTC budget is so paltry that creating an office with a staff of 25 technologists, without a substantial increase in appropriations, would be pointless, or worse. It might drain technological resources from both the Bureau of Consumer Protection and the Bureau of Competition, hindering their ability to investigate and staff enforcement cases. I recognize that the proposal contains an authorization, but absent an appropriation, this proposal could be counterproductive by requiring a rededication of the FTC's technological resources.

H.R. 3067. The Online Consumer Protection Act is an ambitious effort to hold social media platforms accountable. The Act seeks to ensure that platforms bear legal responsibility for violations of the FTC Act and promises made, but broken, in Terms of Service or other communications with consumers. The proposal ensures that the broad immunity provided by the Communications Decency Act, 47 U.S.C. 230, does not inhibit FTC enforcement. The Act also bars the platforms from insisting that users bring legal claims against them through forced arbitration.[5]

I support this measure. My own view is that the original sin was Section 230's grant of sweeping immunity. Although Congress has conferred "immunities"

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[5] For my views regarding forced arbitration, *see Contracting (Out) Rights*, 36 Ford. Urban L. J. 803 (2009) (with Professor Kathryn A. Sabbeth).

in other legislation (*e.g.*, to firearms,[6] and nuclear power[7]), no industry is more effectively shielded from liability – and thus responsibility – than the social media platforms. I do not suggest that Congress should scrap Section 230; doing so would create an anti-competitive barrier to entry. But H.R. 3067 provides a concrete way to reassert accountability.

I also applaud the proposal's position on mandatory arbitration. Secrecy is a hallmark of arbitration. But as Louis Brandeis, the architect of the FTC Act (and later a Supreme Court Justice), famously said, "sunlight is the best disinfectant." Public lawsuits place a spotlight on alleged wrongdoing, and it is important that the platforms be held to account when they break promises made to consumers. I agree with the goals of the Online Consumer Protection Act and urge this Committee to approve it.

III. Proposals Regarding Equity.

H.R. 4460. The Consumer Equity Protection Act of 2021 proposes that the Commission appoint a task force to help guard protected classes against deceptive or unfair acts or practices. I support this measure. I would point out, however, that the FTC has, at least since my tenure if not before, carried out many of the tasks the bill calls for, including oversight of markets to detect targeting of, or discrimination against, certain populations, monitoring complaints through the Sentinel system, consumer education, broad dissemination of FTC materials, regular meetings with legal services providers, and coordination with other law

[6] *See, e.g.*, Protection of Lawful Commerce in Arms Act, 15 U.S.C. 7901–7903.

[7] *See*, *e.g.*, The Price-Anderson Act, 42 U.S.C. 2011-2281.

enforcement agencies. As is always the case, however, more could be done. And I understand this proposal to ask for exactly that, namely more aggressive oversight of the market to prevent unlawful discrimination.

H.R. 4483. This proposal bears some similarity to the prior proposal; neither asks for changes to the FTC's statutory authority, but both urge greater emphasis by the FTC on the protection of historically vulnerable populations, here, former and present servicemembers. I support this measure, but with the same point I made about H.R. 4460, namely that much of what the provisions call for are tasks the FTC already performs.

B. Proposals That Might Weaken the FTC's Ability to Safeguard Consumers.

I. Proposed Substantive Changes to the FTC Act.

Several well-intentioned proposals are pending before the Subcommittee that are aimed at relieving burdens on businesses subject to FTC investigations or consent orders. I do not support these proposals because I am concerned that they would impose substantial burdens on the FTC without clear, discernable benefits, hinder the FTC's enforcement abilities in ways that could put consumers at risk, and inhibit the FTC's ability to prevent lawbreakers from becoming recidivists.

H.R. 2671. The Shield Act contains two new mandates: one would *prohibit* the FTC from relying on guidelines or guidance documents in proving violations of law; the second would *permit* targets of FTC enforcement actions to rely on Commission guidance or guidelines "as evidence of compliance with the provision of law under which the guidelines, general statements of policy, or guidance was

issued." The Shield Act does not explain the basis for this asymmetry, nor is any justification evident.

The first mandate is unobjectionable. It simply restates existing law. A basic principle of administrative law is that guidance, guidelines, and other forms of informal agency advice do not have the force of "law," and thus are not binding on regulated parties and cannot serve as the basis for an enforcement proceeding.[8] And given the breadth of the definition of guidance documents, virtually every public communication the Commission issues – including guides, blog posts, reports, workshops, oral communications with counsel, press releases, emails, twitter posts by Commissioners or senior staff, and on and on – could qualify under H.R. 2671 as "guidelines, general statements of policy, or similar guidance."

The proposal's second mandate threatens to stand the law upside down, and will, if implemented, seriously harm businesses by making the Commission reluctant to provide guidance. Under existing law, the Commission may not rely on guidance documents in an enforcement action; it must instead make out a violation of law by proving that the alleged wrongdoing is deceptive or unfair or violates one of the seventy statutes the FTC enforces. In defense, a business may claim good faith by introducing evidence that the business actually relied on Commission guidance documents. That's only fair. But the proposal goes well beyond that by substituting *compliance with a guidance document* (that might be outdated, superseded or inapplicable) with *compliance with the law*. That is not right. And the

[8] *See, e.g., Center for Auto Safety v. National Highway Traffic Safety Administration*, 452 F.2d 798 (D.C. Cir. 2006). *See also Trudeau v. FTC*, 456 F.3d 178 (D.C. Cir. 2009).

consequences will be severe. Businesses will be deprived of guidance that helps them comply with the law, and the American people will see law-breaking companies escape liability because they may be able to point to a stray statement an FTC staffer made years earlier.[9]

The problems posed by H.R. 2671 are made more acute because of the absence of any requirement that the business show that it relied on, or was even aware of, the guidance it claims justified its conduct at the time it violated the law. Under existing law, a business would have to demonstrate *actual* reliance to have a defense, albeit not an affirmative defense. Under this proposal, pointing to any guidance document that is arguably exculpatory might be sufficient. The absence of a requirement of proof of actual reliance will encourage every law-breaking company to search through all of the agency's guidance to find any isolated remark that might assist in its defense. After-the-fact justifications for illegal action should be barred, not sanctioned, but it is inevitable under H.R. 2671.

H.R. 2677, the Technological Innovation through Modernizing Enforcement Act (TIME Act), proposes to put an eight-year time limit on FTC consent decrees, except for those that relate "to alleged fraud by the entity subject to the consent order and requires a time limit longer than 8 years based on the factors described in

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[9] This proposal stretches the boundaries of existing law well beyond the breaking point. In general, compliance with substantive agency regulations – regulations that have the force of law – is a *defense* to liability, but not an *affirmative* defense. Where regulatory compliance is asserted by a defendant, the defendant may argue to the trier of fact that compliance with the agency's regulations negates any theory of liability, but the trier of fact is free to disagree. *See generally* Robert L. Rabin, *Reassessing Regulatory Compliance*, 88 Geo. L.J. 2049 (2000). H.R. 2671 cuts the defense loose from its moorings and permits an absolute defense based on compliance with non-binding guidance, even if the business cannot prove it relied on that guidance.

this subsection." The impetus for this proposal is apparently the view that longer-lasting orders may impede innovation. The bill also proposes that the Commission review all non-fraud related consent decrees five years after entry of the order to determine whether the decree continues to serve the purposes described in the bill. Given the hundreds of consent decrees the FTC oversees, the burdens imposed by this proposal are considerable, and outweigh any benefits it might provide. And in any event, the provision as drafted is unworkable because FTC cases do not "allege[] fraud by the entity" and thus all consent decrees would be subject to review after just five years.[10]

There are several problems with this proposal aside from burden and definitions. First, the proposal aims to solve a non-existent problem. To the extent that the bill seeks to shorten consent decrees that might impede innovation, the FTC's consent decrees are *designed* to avoid stifling innovation. If one looks at the consent decrees that FTC has entered into with the nation's largest and most important technology companies, it is clear that the agency has avoided prescriptive

[10] There is a serious definitional issue with the framing of the proposal. The dividing line drawn in the proposal is that the FTC need not engage in the 5 year initial review for consent decrees that relate "to alleged fraud by the entity subject to the consent order." That exception would be the null set. The FTC does not bring "fraud" cases and does not allege "fraud" in the complaints it files. There is no requirement in Section 5 of the Act, or in any other of the major statutes the FTC enforces, including, for instance, the Fair Credit Reporting Act, the Fair Debt Collection Act, the Equal Credit Opportunity Act, and so on, that the FTC allege fraud. Nor does the FTC have to prove "fraud" in any of the cases it brings. The only reference in the entire FTC Act to "fraud" comes in Section 19(a) of the Act, 15 U.S.C. 57b(a), which permits the FTC to seek damages when a "reasonable man would have known under the circumstances [that the alleged wrongdoing] was dishonest or fraudulent." But even when Section 19(a) is alleged in a complaint, the FTC does not allege scienter or fraud – the FTC does not need to show dishonesty or fraud to win its case. I am thus unaware of any consent decree that speaks in terms of "fraud," or a way of drawing that line.

decrees that might hamper innovation. Having participated in the drafting of the Commission's consent decrees against Internet giants including Google, Facebook, Intel, Twitter, Amazon and Apple, as well as tiny start-ups like Frostwire and Chitika, I think the record establishes that FTC consent decrees, even those with twenty-year durations, have not hindered innovation and will not do so in the future. If there is evidence that FTC decrees stifle innovation, I would like to see it.

Equally important, if a company can make a credible case that a decree would impair innovation, the Commission could lift or modify the decree. The Commission, has, on occasion, done just that.[11] Instead, the proposal shifts the burden to the Commission to justify the continuation of *every non-fraud decree* (assuming that there is way to distinguish non-fraud decrees) after only five years; that shift is unwarranted.

Second, the proposal would have serious unintended consequences. Most critically, the bill would undermine the deterrent impact of FTC enforcement actions. In most cases, injunctions (consent decrees are injunctions) entered by federal courts are *permanent*, not time-limited, let alone limited to only eight years. That practice guarantees that there are coercive tools available to prevent a repeat of the illegal behavior that gave rise to the decree. To be sure, injunctions may be modified or vacated, but only if the court finds, after a hearing, that the need for an

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[11] Consider one prominent example. In 2009, the FTC and Sears entered into a consent decree relating to Sears's tracking of consumers online, without adequate notice that Sears was harvesting all of the data consumers shared online. Years later, Sears claimed that the consent decree was stifling its ability to serve its customers online. The Commission considered Sears's argument and substantially modified the decree as Sears proposed. *See* https://www.ftc.gov/enforcement/cases-proceedings/082-3099-c-4264/sears-holdings-management-corporation-corporation.

injunction has dissipated or that a change in circumstances warrants a modification. *See, e.g., Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992).

The need for extended injunctive relief is especially acute in FTC cases. In the cases that would be covered by the proposal, the *only* remedy the FTC has, even if the violation is egregious, willful, and causes massive consumer injury, is a consent decree and the ongoing requirements it imposes. That relief serves two distinct, but important, values. First, the decree sets out norms that the company must adhere to during the pendency of the injunction, which prevents recidivism. And second, the decree warns other companies that violations of the law have consequences.

To drive home my concerns, consider just one class of cases that H.R. 2677 would presumably apply to – cases involving data security. Thus far, the agency has brought about seventy of these cases based on theories developed during the tenure of President Bush's FTC Chairman, Tim Muris.[12] Most of these cases were resolved with twenty-year consent decrees, as was the FTC's successful action against Wyndham for multiple, egregious failures to take reasonable precautions to protect credit card information that left over 600,000 credit card files in the hands of the Russian Mafia.[13]

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[12] *See, e.g., In re Eli Lilly & Co.*, FTC No. C-4047, Decision and Order (May 8, 2002) (entering 20-year order), available here: https://www.ftc.gov/sites/default/files/documents/cases/2002/05/elilillydo.htm.

[13] *See FTC v. Wyndham Worldwide Corporation*, No. 2:13-cv-01887-ES-JAD (D. N.J. Dec. 11, 2015), Stipulated Order for Injunction (entering 20-year order), available at https://www.ftc.gov/enforcement/cases-proceedings/1023142-x120032/wyndham-worldwide-corporation. Prior to the entry of the consent decree, Wyndham had challenged the FTC's

Under the proposed Shield Act, the Commission would already have been required to re-consider whether the consent order entered in *Wyndham* still served its initial purposes and do so based solely on the criteria set out in H.R. 2677. Nothing in the proposal limits judicial review of the Commission's determination.[14] Assume that after five years, the FTC thought that the consent decree should remain in force. Wyndham would likely argue that the Commission's decision to maintain the decree constitutes "final agency action" reviewable under the APA and seek judicial review. In that case, the Commission's decision to retain the decree would be judged under the "arbitrary and capricious" standard, *see* 5 U.S.C. 706(2), not the more rigorous standard courts employ to determine whether to vacate or modify an injunction. *See Rufo, supra.* The idea that in only five years a company that showed stunning disregard for the safety of its customers' credit information could shed its obligations under the decree is unfathomable, but that is a serious possibility under H.R. 2677.

In my view, Congress should work to strengthen the FTC's authority over data security, not weaken it. Data breaches like those Wyndham experienced are responsible for the meteoric rise of identity theft in the United States, and they are the predictable debris of an Internet economy that places too little value on data

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authority to pursue data security cases under the agency's "unfairness" authority and lost. *See FTC v. Wyndham Worldwide Corporation*, 799 F.3d 236 (3d Cir. 2015).

[14] In the absence of a clear Congressional mandate that agency action may not be subject to judicial review, "the strong presumption that Congress intends judicial review of administrative action" controls. *Smith v. Berryhill*, 139 S. Ct. 1765, 1776 (2019) (quoting *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986)).

security. In 2020, nearly 1.4 million individuals filed identity theft complaints with the FTC, and these complaints are just the tip of a much larger iceberg.[15] And identity theft is big business: According to the most recent Department of Justice statistics, financial losses from identity theft in 2018 totaled $15.1 billion.[16]

We need tougher laws on data security. But H.R. 2677 would undermine the threat of FTC enforcement actions, not just in data security cases, by dramatically reducing the impact of FTC consent decrees to the enforcement equivalent of a slap on the wrist. I urge the Subcommittee to reject this proposal.

H.R. 2702, the Statement on Unfairness Reinforcement and Emphasis Act (SURE Act), seeks to reformulate the statutory unfairness standard, but does so in ways that would undercut, not clarify, the Commission's authority. H.R. 2702 would narrow the existing statutory standard for unfairness by focusing FTC enforcement actions on cases where there is demonstrable "substantial harm."

This proposal suffers from two flaws. First, H.R. 2702's requirement of "substantial harm" could make it difficult for the Commission to bring cases to *avert* harm, a result that would contradict Congress's 100 year-old statutory directive that the Commission act to "prevent" harm, 15 U.S.C. 45, and needlessly expose consumers to avoidable harm.

Second, H.R. 2702 casts doubt on the Commission's authority to bring cases where the harm is palpable and serious, but unrelated to economic loss or health

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[15] *See* https://www.ftc.gov/news-events/press-releases/2021/02/new-data-shows-ftc-received-2-2-million-fraud-reports-consumers.

[16] *See* https://bjs.ojp.gov/content/pub/pdf/vit18.pdf.

and safety. This focus is myopic as a matter of policy. Congress charged the FTC with the mission of *preventing* unfair practices because it understood that prevention is far more important than trying to remedy harm after-the-fact. After all, the most consequential harms to consumers are often non-economic injuries, such as a serious invasion of privacy, theft of personal information that can be sold to and used by identity thieves, and revelations of embarrassing information, as happened with the Ashley Madison data breach,[17] which resulted in broken marriages and suicides.

Consider also the *DesignerWare* case, which involved rent-to-own computers that had cameras that could be remotely activated to take pictures. These cameras were used to take pictures of children, household visitors, individuals not fully clothed, and couples engaged in intimate activities.[18] The case was brought and resolved, with bi-partisan support, mainly on unfairness grounds. Whether a similar case could be brought under H.R. 2702 is uncertain.

Equally problematic is the vagueness in the statutory language. The proposal tasks the FTC with weighing whether an act or practice is unfair based on its "net effects," taking into account a number of nebulous, ill-defined, and often impossible to quantify, factors, including "the various costs for a remedy, including the costs to the parties directly before the Commission," "burdens on society in general in the form of increased paperwork, increased regulatory burdens on the flow of

[17] *See* https://www.ftc.gov/news-events/press-releases/2016/12/operators-ashleymadisoncom-settle-ftc-state-charges-resulting.

[18] *See In re DesignerWare*, FTC No. 112-3151 (Apr. 15, 2013), available at: https://www.ftc.gov/enforcement/cases-proceedings/112-3151/designerware-llc-matter.

information, reduced incentives to innovation and capital formation, and other similar matters." How would those factors have applied in *DesignerWare*? Having served as Bureau Director, I would not have a clue what impact an enforcement case might have on "incentives to innovation" or "capital formation." And trying to demonstrate these "net effects" in the mine run of enforcement cases would be highly problematic and would quickly drain the Bureau's resources. Under no circumstances should the Commission's authority to bring these kinds of cases be undermined.

H.R. 2676, the Revealing Economic Conclusions for Suggestions Act (RECS Act), would require a detailed economic analysis, prepared by the FTC's Bureau of Economics (BE), as a precondition to the Commission making recommendations for legislative or regulatory action. This requirement would essentially prohibit the Commission from making recommendations until BE produced an economic analysis of the costs and benefits of such actions, as well an analysis of the ability of other "private markets or public institutions" to address the issue. The costs of this proposal are disproportionate to any benefit that might result, meaning, of course, that this proposal could not withstand cost-benefit analysis.

Indeed, the burdens that would result from H.R. 2676 are so substantial that the impact of this proposal, intentionally or not, would be to silence the FTC on all but a small handful of important issues. It would, among other things, discourage the FTC from making recommendations to Congress, helping other agencies resolve regulatory problems, advising state and local governments on consumer protection

and competition issues, and helping our foreign counterparts weigh similar issues. I see no reason why Congress would want to mute the voice of an independent, bi-partisan, expert Commission, especially when the recipients are free to disregard the Commission's advice.

II. PROPOSED TRANSPARENCY PROVISIONS.

H.R. 2672, H.R. 2690 and H.R. 4564 are nominally transparency provisions. Two require the Commission to create new reports to be provided annually to Congress. Whether assessed individually or collectively, these proposals would add considerable burdens on the Commission without yielding a discernable payoff. And the third would require the FTC to post the full text of any order, decision or action to be discussed at a Sunshine Act meeting a month in advance. This proposal is at odds with the Sunshine Act, and the month-in-advance requirement would hinder the Commission's ability to address time-sensitive matters.

H.R. 2672, the Robust Elderly Protection and Organizational Requirements to Track Scams Act, would require annual reporting to Congress on "the Commission's enforcement actions involving allegations of fraud targeting individuals who are 65 years of age or older during the previous calendar year." This requirement would add to the Commission's already considerable reporting burden and duplicate a number of reports that the agency issues annually, especially its annual Congressional Budget Justification and Strategic Plan under the Government Performance and Results Acts.

In addition, this provision needs clarification. Does the phrase “targeting individuals” 65 and older restrict the scope of the provision to frauds aimed *only* at the elderly, or does it include frauds that target individuals 65 and older *as well as other groups*? This question is highly consequential. To be clear, older people are not necessarily more vulnerable to fraud than younger cohorts. The FTC’s most recent (2017) detailed fraud survey results show that consumers aged 35 to 54 were more likely to be victims of fraud compared to consumers in other age categories, and the elderly were less likely than other age cohorts to fall victim to fraud, except for computer repair fraud.[19]

There are also problems with statistics. Assume (counterfactually) that FTC’s report on consumer fraud shows that those between the ages of 55 and 74 were at the greatest risk of being victimized by fraudulent prize promotion schemes, though those between 55 and 64 were actually at *higher risk* than their elders.[20] Are prize promotion schemes “targeting individuals who are 65 years of age or older” within the meaning of the proposal? The answer is not clear, but if the answer is “yes,” than the burden on the agency is quite substantial, because most, but not all, of the fraud-type cases the Commission deals with could be said to target those 65 and older. Before the Subcommittee pursues this proposal, I urge it to take a hard look

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[19] *See* FTC, *Consumer Fraud in the United States, 2017 Report*, at vi, 66 (2017) https://www.ftc.gov/system/files/documents/reports/mass-market-consumer-fraud-united-states-2017-update/p105502massmarketconsumerfraud2017report.pdf.

[20] This hypothetical is based on the data set forth in the 2011 FTC Fraud Report. FTC, *Consumer Fraud in the United States, 2011 – The Third FTC Survey* (2013), available here: https://www.ftc.gov/sites/default/files/documents/reports/consumer-fraud-united-states-2011-third-ftc-survey/130419fraudsurvey_0.pdf.

at the FTC's fraud surveys, which comprehensively address the risks of fraud to all age groups. *See* n.19, *supra.*

H.R. 2690, the Clarifying Legality and Enforcement Action Reasoning Act (Clear Act), would require the FTC to provide Congress with an annual report on its consumer protection investigations, not simply those that result in agency action – which are publicized by the FTC – but also investigations that are closed. There are two difficulties with this proposal. First, summarizing the legal basis for the investigation and its closure, and identifying the sector in which the company under investigated operated, imposes information-dissemination and record-keeping requirements beyond those the FTC already undertakes. Nor would the report give regulated parties an added insight into the Commission's thinking. The cases that the FTC brings, not the ones it closes, provide the most reliable indication of the Commission's thinking.

Second, and perhaps more importantly, the proposal envisions a process that could expose the identities of companies and individuals who had been subject to an investigation that ended with no Commission action, causing serious and perhaps irreparable injury to those companies or individuals. To be sure, the provision contemplates that the privacy of these companies would be respected. But a sector-specific public report, which provides a legal analysis correlated to each closed investigation, inferring identities may be possible, and at times easy, especially in those sectors with few participants.

H.R. 4564, the FTC Transparency Act, would require the Commission to post on the Commission's website any matter that might result in an "order, decision, report, or action by vote of the Commission," as well as the text of these documents, "not later than 30 days before the date on which the vote is to occur." There is an exemption for the posting requirement where the Commission Chair determines that there are "emergency or exigent circumstances" requiring publication beyond the 30 day requirement.

It is hard to discern the rationale for this proposal. Most of the "orders, decisions, reports, or action" voted on by the Commission would not take place in an open Sunshine meeting; all of those actions are covered by Sections 5 U.S.C. 552b(c) and (f), which permit agencies to close meetings involving sensitive issues relating to enforcement matters. Nor is the proposal consistent with the Sunshine Act's determination that notice of a meeting need be posted one week in advance of open meetings. *Id*. at b(e)(1). And the proposal greatly expands the obligations imposed on the FTC; not only by requiring a month's advance notice of the Commission's agenda, but also mandating the posting of the full texts of the orders, decisions, or actions the Commission will discuss at the meeting. As far as I can tell, no other agency is subject to this requirement.

There are good reasons why the Sunshine Act does not impose the obligations laid out in the Transparency Act. Limiting meetings to matters that arise more than a month prior to a meeting would hobble the Commission's ability to consider time-sensitive matters that arise days or weeks before a scheduled meeting.

Because the Sunshine Act *prohibits* Commissioners from meeting without compliance with Sunshine Act, Sunshine Act meetings are the only venue where the full Commission can meet to discuss and resolve issues, many of which cannot wait for a month or more to resolve. The process outlined in the Transparency Act would likely put sand in the gears that move the Commission along. I urge the Subcommittee to reject this proposal.

C. A Proposal That Needs Fine-Tuning.

H.R. 4551, the Ransomware Act, proposes that Congress amend the Safe Web Act to require the FTC to closely monitor, and periodically report to Congress, on ransomware and other cyber-related attacks initiated by foreign actors or those with ties to foreign countries. I agree that there is a compelling need to monitor these attacks; to take enforcement action if the FTC or other law enforcement agencies can identify the culprits (which unfortunately is rare); and to provide businesses best practices to harden their defenses against these attacks.

There are, however, issues embedded in the draft that need to be clarified. As one example, the contemplated report would touch on sensitive issues of national security, especially where attacks are state-initiated, and that raises a number of questions. Should the report, or portions of it, be classified, and if so, at what level of classification? Should Congress require the law enforcement agencies that have authority relating to these attacks to share information, and if so, by what means? And there are other questions about law enforcement agencies interacting with the intelligence community.

There are also questions relating to the content of the report the bill contemplates. Subsections 3(a)(2) and (3) require the report to include information about the companies and entities that have been involved with ransomware or cyber-attacks, including information by, among other things, "type of company." That requirement is not problematic if there are many companies of a "type." But where a company occupies a unique niche, or is one of a small number of companies, the reporting risks jeopardizing what a company might rightly see as confidential information. Again, there are questions that need to be answered about the protection of entities that have suffered these attacks.

My point here is not to catalogue the issues that need to be fine-tuned. It is only to say that the proposal rightly seeks to address critical issues about how the United States can better deal with the tsunami of cyber-attacks that it is facing but it needs fine-tuning before this Subcommittee acts.