

ONE HUNDRED SEVENTEENTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
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August 16, 2021

The Honorable Christine Wilson
Commissioner
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Hon. Wilson:

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.

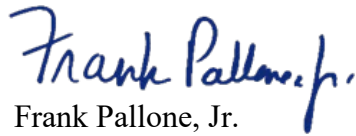
To facilitate the printing of the hearing record, please submit your responses to these questions no later than the close of business on Friday, August 27, 2021. As previously noted, this transmittal letter and your responses, as well as the responses from the other witnesses appearing at the hearing,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

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." in a cursive style.

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 Christine Wilson, 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: Issues within the right to repair arena almost certainly will overlap with legal and policy issues in a variety of other arenas. It is not uncommon for the work of the Commission to intersect with the work of other federal agencies, including the Department of Justice, Consumer Financial Protection Bureau, U.S. Food and Drug Administration, United States Patent and Trademark Office, and Federal Energy Regulatory Commission. Traditionally, where the Commission’s work has implicated laws and regulations falling within the jurisdiction of other federal agencies, the FTC has consulted closely with those agencies. Issues arising in the right to repair space warrant the same kind of consultation with sister agencies – including the Environmental Protection Agency (“EPA”) – whose mandates intersect with the mission of the FTC to advance competition and consumer protection. As we continue our work on right to repair issues, I will encourage the Commission to consult closely with the EPA and other relevant agencies whose directives intersect with ours.

- 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?**

RESPONSE: As noted in response to Question #1, issues within the right to repair arena almost certainly will overlap with legal and policy issues in a variety of other arenas. One important area of intersection concerns intellectual property (“IP”).

The FTC has spent significant time and effort examining the intersection between IP and antitrust. I had the honor of serving as Chief of Staff to FTC Chairman Tim Muris when we launched the Hearings on Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy.¹ In announcing the hearings, Chairman Muris explained a fundamental principle: properly understood, both IP law and antitrust law seek to promote innovation and enhance consumer welfare. IP law, properly applied, preserves incentives for innovation. And innovation (i) benefits consumers through the development of new and improved goods and services and (ii) spurs economic growth. Similarly, antitrust law, properly applied, promotes innovation and economic growth by combatting anticompetitive arrangements and monopolization that deter vigorous economic activity.

A full exploration of manufacturers’ IP rights fell outside the scope of the *Nixing the Fix* report. That said, the report acknowledges that IP rights foster innovation by protecting significant investments in research and development.² And while the report observed that the misuse of IP rights may create barriers to independent repair, staff explicitly noted that the “assertion of IP rights does not appear to be a significant impediment to independent repair.”³

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 IP rights. As stated in the *Policy Statement of the Federal Trade Commission on Repair Restrictions Imposed by Manufacturers and Sellers* voted out at the July 21, 2021 open Commission meeting, the Commission should pursue only the *unlawful* and *overbroad* assertion of IP rights.⁴ During the investigation and analysis of right to repair restrictions, the Commission should give due consideration

¹ Timothy J. Muris, Former Chairman, Fed. Trade Comm’n, Remarks before the American Bar Association, Antitrust Section Fall Forum (Nov. 15, 2001), <https://www.ftc.gov/public-statements/2001/11/competition-and-intellectual-property-policy-way-ahead>.

² FED. TRADE COMM’N, NIXING THE FIX: AN FTC REPORT TO CONGRESS ON REPAIR RESTRICTIONS 22 (May 2021), https://www.ftc.gov/system/files/documents/reports/nixing-fix-ftc-report-congress-repairrestrictions/nixing_the_fix_report_final_5521_630pm-508_002.pdf.

³ *Id.* at 24. *See also Id.* at 26 (“Nonetheless, while it is clear that manufacturers’ assertion of intellectual property rights can impede repairs by individuals and independent repair shops, in many instances intellectual property rights do not appear to present an insurmountable obstacle to repair... Thus, it is not clear that manufacturers are readily turning to patent law to prevent independent repair shops from obtaining spare parts.”).

⁴ *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.

to a company's explanation for repair restrictions, including the protection of IP. Although assertions regarding IP rights may not ultimately carry the day, we should not dismiss those proffered justifications lightly.