

**Testimony of Abigail Slater
General Counsel, the Internet Association
House Energy & Commerce Committee
Subcommittee on Commerce, Manufacturing, and Trade
Legislative Hearing on 17 FTC Bills**

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Chairman Burgess, Ranking Member Schakowsky and members of the subcommittee, thank you for the opportunity to testify before you today.

My name is Abigail Slater and I am the General Counsel at the Internet Association. The Internet Association represents almost 40 of the world's leading Internet companies. Our mission is to foster innovation, promote economic growth, and empower people through the free and open Internet. As the voice of the world's leading Internet companies, our job is to ensure that all stakeholders understand the benefits the Internet brings to our economy.

Today, I have addressed my testimony in four parts:

1. The Federal Trade Commission (FTC) is an important and respected agency at the Internet Association; however, we commend efforts to modernize the agency to the benefit of all stakeholders.
2. The Internet marketplace is dynamic, and the current framework for FTC consent orders should recognize the rapid evolution of this marketplace. The TIME Act strikes a fair balance between consumer protection and innovation in FTC consent orders.
3. Further legislative efforts to modernize the FTC and to increase transparency at the agency should be seen in a constructive light by all stakeholders.
4. The Consumer Review Fairness Act will protect consumers nationwide from meritless attempts to silence free speech, in addition to bolstering the growing online economy.

1. The Federal Trade Commission is an Important Agency for the Internet Association and We Commend Efforts to Modernize the Agency to the Benefit of All Stakeholders

The FTC is an important and respected agency for the Internet Association and its member companies. Through its dual mission to protect consumers and promote competition, the FTC intersects with the Internet in myriad ways - from the agency's privacy and data security enforcement actions to its cutting-edge policy research into the sharing economy. The FTC also plays an important role internationally in

the consumer protection arena. Under Chairwoman Ramirez's leadership, the agency was essential to the extensive negotiations around the U.S.-EU Privacy Shield (formerly known as the Safe Harbor). The FTC's well-deserved credibility in the privacy arena - as a robust law enforcer and privacy policy thought leader - was key to a successful conclusion to these negotiations.

Although FTC substantive law and policy commands the spotlight, in many ways Commission procedure and process can be equally important to stakeholders.

I spent ten years working at the FTC from 2004 until 2014. During that time, I was privileged to see Commission process from different perspectives, first as a staff attorney in the Bureau of Competition where I worked on several litigated cases and, later on, as attorney advisor to Commissioner Julie Brill. My experience at the FTC - both as an enforcement attorney and as an attorney advisor to a Commissioner - affords me a unique perspective to speak to several of the FTC bills before the committee today.

2. Internet Association Members Operate in Highly Dynamic Marketplaces, and the Framework for FTC Consent Orders Should Recognize This Reality

Although the Internet Association recognizes the FTC for the important work that it does on behalf of American consumers, we submit that there is always room for modernization and increased transparency at a 100 year-old agency.

One FTC bill in particular, the TIME Act, resonated with Internet Association members. The TIME Act would create an eight-year cap on consent orders the FTC enters into. Under current agency practice, consent orders expire after twenty years. While this limit may have made sense in a brick and mortar era, it is not well suited to the fast moving high-tech marketplaces that Internet Association members operate in.

To put twenty years in context for Internet companies, it might be helpful for the committee first to cast their memories back to the year 1996, and then to fast forward to the year 2036.

In 1996, AOL and CompuServe were the largest Internet platforms in the world; Facebook founder Mark Zuckerberg was twelve years old; and Google was still just a research project for two Stanford graduate students. In 1996, there was no such thing as a 'smart' mobile phone and even the 'dumb' mobile phone was not yet widely sold.

By 2036, it will be hard to even begin to predict the ways in which we will use the Internet. But if past is prologue, then it is safe to say that it will likeliest be in ways as yet unimagined (perhaps even by future Internet Association member companies yet to be founded).

This time travel exercise is a light-hearted way of illustrating that the Internet changes a lot in twenty years. Yet, while Internet markets are highly dynamic, the FTC consent orders applied to them are static. This matters because twenty-year consent orders serve to slow down the pace of innovation at the companies involved and are often outstripped by marketplace developments. Interestingly, the FTC's sister agency, the Consumer Financial Protection Bureau, seems to understand this tension. Earlier this year, the CFPB negotiated a consent decree with an online payments company settling charges that the company had failed to adhere to correct data security practices.¹ However, unlike the FTC, the CFPB consent in that case will last only five years, even though the data security violations alleged in the CFPB consent are similar in nature and scope to those described in FTC consents.

This is where the TIME Act could play an important role.

Under the TIME Act, any consent order entered into by the Commission shall include a presumptive termination clause sun setting the order no later than eight years after it is entered into. Additionally, should the Commission see the need for a consent order to remain in force longer than eight years, the TIME Act requires that the Commission consider a list of factors in making this determination. The first factor listed is “the impact of technological progress on the continuing relevance of the consent.” This factor is particularly significant for Internet Association members and the committee is to be commended for recognizing the difference between the market conditions in which they operate when compared to analog companies.

3. Further Legislative Efforts to Modernize and Increase Transparency at the FTC Could Strengthen the Agency

Reviewing the suite of process bills before the committee today, two pervasive themes come to mind: the first is modernization and the second is transparency.

Within the modernization “bucket”, in addition to the TIME Act, are the bills that seek to inject more economic analysis into consumer protection cases and policy development undertaken by the FTC. Included here is H.R. 5115 the Statement on Unfairness Reinforcement and Emphasis (SURE) Act.

As an antitrust attorney, it has been my first-hand experience that economic analysis increasingly is the cornerstone of decision-making at the FTC. As antitrust enforcement attorneys, the first question we were asked by our higher ups when making a recommendation to them was “what does the Bureau of Economics think?” It was sometimes even the case that the economists played a dispositive role in investigations because they were able to collect and use data from companies under investigation that pointed clearly in a particular direction. Cases were brought and

¹ *In re Dwolla, Inc.*, File No. 2016- CFPB.
http://files.consumerfinance.gov/f/201603_cfpb_consent-order-dwolla-inc.pdf

cases were closed depending on the Bureau of Economics data analysis. Within the antitrust bar, the output from this process is often referred to as “modern antitrust.”

Although the FTC’s economists perform a role in consumer protection cases, this role can be muted when compared to their antitrust counterparts. To be sure, for cases involving fraud, there can be little need for economic analysis: after all, fraud is fraud. It’s also possible that there are investigations in which data simply is not available or lacks the robustness needed to do rigorous economic analysis. But there is still a sound argument to be made that the FTC’s economists could play a greater role in FTC unfairness cases in particular.

The SURE Act seeks to place economics on a firmer footing within the FTC’s consumer protection mission.

Under the SURE Act, the current unfairness standard under the FTC Act² is amended to include more cost benefit analysis³ of the kind done by economists as well as other economic elements of proof such as evidence of concrete harm as opposed to harm that is trivial or merely speculative. This latter distinction is something that the FTC’s Chief Administrative Law Judge wrote about in his opinion⁴ in last year’s LabMD case, which was a data security unfairness case decided under the current standard. In his opinion, Judge Chappell dismissed the FTC staff complaint, explaining that they had produced insufficient evidence of consumer harm to meet their burden of proof. In reaching his conclusion, Judge Chappell made several findings, all of which seemed to point to the need for increased input from economists in unfairness cases. These conclusions were:

- First, that evidence of likely consumer “embarrassment and emotional harm” is not enough to bring an unfairness case since these harms are “only subjective or emotional” and taken along cannot be “substantial injury” within the meaning of the FTC statute.⁵
- Second, evidence of likely identity theft-related harm is not sufficient to bring

² Section 5(n) of the FTC Act states that “[t]he Commission shall have no authority to declare unlawful an act or practice on the grounds that such act or practice is unfair unless [1] the act or practice causes or is likely to cause substantial injury to consumers [2] which is not reasonably avoidable by consumers themselves and [3] not outweighed by countervailing benefits to consumers or to competition.” 15 U.S.C. § 45(n).

³ Cost benefit analysis is a bipartisan concept given executive order status by the Clinton Administration in 1993 when the White House issued EO 12866 on Regulatory Planning and Review, https://www.whitehouse.gov/sites/default/files/omb/inforeg/EO12866/EO12866_10041993.pdf

⁴ In Re LabMD, FTC Docket Number 9357, Initial Decision, November 13, 2015, https://www.ftc.gov/system/files/documents/cases/151113labmd_decision.pdf

⁵ *Id.* at 13.

an unfairness case since this is “an unspecified and theoretical “risk”” and would require “unacceptable speculation and would vitiate the statutory requirement of “likely” substantial consumer injury.”⁶

The SURE Act codifies several of the principles outlined by Judge Chappell in his LabMD opinion. In other words, both the committee and Judge Chappell want the FTC to succeed in its work, but they also want the FTC to modernize its approach to economics in consumer protection cases. As an FTC veteran, I am confident that the agency can adapt to do just that. However, this may require additional resources since, according to FTC data, there are currently more than twice as many economists dedicated to antitrust work versus consumer protection work at the agency.⁷

Finally, the second theme in the FTC process bills before the committee is transparency. For example, the Clarifying Legality and Enforcement Action Reasoning (CLEAR) Act would provide to Congress – its most important external stakeholder – an annual report mapping out certain information regarding its consumer protection investigations. Again, as an FTC veteran I am confident that the FTC can produce this information in a systematic, timely, and transparent manner.

4. The Consumer Review Fairness Act Will Protect Consumers Nationwide From Meritless Attempts to Silence Free Speech, in Addition to Bolstering the Growing Online Economy

The Internet has brought significant benefits to our economy and, in particular, to American consumers. In 2015, the Internet Association published a report on the economic impact of the Internet in the United States.⁸ It was the first of its kind undertaken in the U.S. and it showed that the Internet accounted for 6 per cent of real GDP in 2014 (which was over \$900 billion).⁹ Our report also discussed the significant economic surplus that the Internet delivers to U.S. consumers’ pocketbooks. This so-called “consumer surplus” exists because the Internet empowers consumers to make smarter and quicker choices about how and where they spend their money, and it is calculated to be valued at billions of dollars per

⁶ *Id.*

⁷ FTC Bureau of Economics Biographies, <https://www.ftc.gov/about-ftc/bureaus-offices/bureau-economics/biographies>.

⁸ Measuring the U.S. Internet Sector, Stephen Siwek, <http://internetassociation.org/wp-content/uploads/2015/12/Internet-Association-Measuring-the-US-Internet-Sector-12-10-15.pdf>

⁹ *Id.*

year.¹⁰ Internet Association members are deservedly proud of the role they play in delivering these benefits to consumers.

A great example of the Internet consumer surplus in action is consumer reviews. In today's digital economy, nearly 70 percent of consumers now rely on online consumer reviews for information on where to eat, shop, travel, and more.¹¹ Every day, Internet platforms like Amazon, TripAdvisor, and Yelp democratize purchasing and access to information by crowdsourcing the experiences of others in consumer reviews. With access to millions of consumer reviews in seconds, our ability to make informed purchasing decisions is no longer constrained to what products our friends and family previously purchased, or where one's local travel agent thinks you should stay on vacation. As a result, American consumers can make significantly more informed decisions about how to spend their hard-earned money.

However, although most businesses have come to accept – and even embrace – this shift in consumers' knowledge, a minority of holdouts refuse to let consumers share their experiences. While consumer reviews have become so ubiquitous that many Americans won't make a significant buying decision without first researching those opinions, we know that some unscrupulous businesses don't like the transparency that online reviews have brought to the world. Some bully or intimidate consumers as a means to get critical reviews removed or to stop them from even being submitted. Others seek the same result by hiding small print in contracts stipulating that any negative reviews will incur a hefty fine, or assigning the intellectual property in any review to the business.

Consumers usually have no idea that they are signing-up for such agreements, which are usually only provided in small print at the moment of check-in or purchase, and even those who actually read these types of clauses lack the leverage to have the non-negotiable clauses removed while standing at the check-in desk with their family in tow and their well-earned vacation hanging in the balance.

While the intent behind such clauses is always the same (namely, to gag any negative opinions), the exact language can vary. Examples of language that Internet Association member TripAdvisor has received from travelers include:

"Guest agrees that no negative comment will ever be initiated ... on any site on the Internet ... that damages the reputation of the hotel and staff..."

¹⁰ Hal Varian, The value of the Internet now and in the future, The Economist (Mar. 10, 2013, 3:49PM), <http://www.economist.com/blogs/freeexchange/2013/03/technology-1>; Shane Greenstein, Measuring consumer surplus online, The Economist (Mar. 11, 2013, 3:20PM), <http://www.economist.com/blogs/freeexchange/2013/03/technology-2>.

¹¹ American Lifestyles 2015: The Connected Consumer – Seeking Validation from the Online Collective – US 2015, Mintel (June 3, 2015) <http://www.mintel.com/press-centre/social-and-lifestyle/seven-in-10-americans-look-out-opinions-beforemaking-purchases>

“Since bad reviews are detrimental to our business, we place a fine for unwarranted reviews under the terms of property... [I]f the hotel receives a poor review and is out of context and or control of the hotel management, then a fine of \$300 will be charged on the credit card on file.”

“[I] any actual opinions and/or publications are created which, at the sole opinion of [business owner], tends directly to injure him in respect to his trade or business . . . then those remarks will entitle [business owner] . . . damages from me in the amount of \$5,000,000 (five million dollars) plus a \$50,000 (fifty-thousand dollar) daily penalty for each day for each posting of the derogatory publication appears or is available in any format.”

Placing a muzzle on one’s customers with contractual boilerplate goes against a core American value: speech. Just as a consumer can tell her friends and family about her experience with a business in the “offline world,” she also has a right to share that experience and opinion online, allowing businesses and other customers to learn and benefit.

A patchwork of state laws, court decisions, and federal agency actions have attempted to protect consumers subject to non-disparagement clauses. However, we must address the issue on a national level to ensure the protection of all consumers online. The right to free speech – including online reviews and comments from customers – is critical to our rights as Americans and should not be curtailed.

When a business includes a “gag order” in its agreements with its customers, everyone is harmed. The consumer is improperly censored. The consuming public at-large is less informed than it otherwise would be about the quality of service – or lack thereof – at a given business. Even the business doing the silencing is harmed, as it loses the opportunity to learn from the experiences of its customers.

The Consumer Review Fairness Act, which would prohibit the use of unfair non-disparagement clauses, will protect consumers nationwide from these meritless attempts to silence free speech. The Internet Association strongly supports this legislation’s effort to protect online reviewers of goods and services from clauses that inhibit honest reviews and commends the committee for examining this issue during today’s hearing.

The Consumer Review Fairness Act is narrowly tailored to non-disparagement clauses in form contracts that do not allow individuals a meaningful chance to negotiate a contract, and provides the necessary protections for businesses, including for medical, trade secrets, and confidential information.

In conclusion, the Internet Association looks forward to working with you and the entire committee to ensure that American consumers are not prevented from

openly sharing their opinions and experiences with other potential customers, whether it is done in-person or via the Internet.

I welcome your questions on these important topics.