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Dr. Burgess, Ranking Member Schakowsky, and members of the Subcommittee, I am David C. Vladeck, Professor of Law, Georgetown University Law Center. I served as Director of the Bureau of Consumer Protection, Federal Trade Commission, from 2009 until 2012. I appreciate the invitation to testify before you this morning on the many bills that are pending before the Subcommittee. I will comment on most, but not all, of the bills in this statement.

Let me begin by making a general comment that frames my views on the legislative proposals before the Subcommittee. The Subcommittee should evaluate each of these proposals by asking one question: Whether the bill, if enacted into law, would 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.

After all, Congress has long recognized that the FTC is a high functioning agency that serves the American people remarkably well. The FTC is the nation's leading consumer protection agency, and Congress gave the Commission that mission more than 100 years ago. The FTC Act confers on the Commission broad authority 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 dozens of other consumer protection statutes.

The FTC has succeeded because it stays 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 that make false advertising claims that cause consumers to waste money on products that don't deliver on their promises and harms businesses that play fair. It brings cases against companies that design and sell consumer goods that can take photographs of you and your loved ones, in your homes, without your knowledge or consent. And it brings competition cases to ensure that all companies compete on a level playing field.

The FTC also has a long and enviable history of working on a non-partisan basis. Of the hundreds of enforcement cases the Commission brought during my tenure, I do not believe that the Commission split on partisan lines in any of them. Every year the FTC returns tens or hundreds of millions of dollars to consumers and saves consumers billions of dollars more 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. The American people benefit tremendously from the agency's work and Congress's first priority should be to strengthen the agency so it can do its work even more effectively.

Many of the proposals before the Subcommittee today do just that; they propose ways of clarifying and strengthening the agency's authority. But I will begin with a number of proposals, doubtlessly well-intentioned, that would have the effect of hindering the agency's ability to protect our nation's consumers. Then I will turn to several proposals that would clarify the FTC's jurisdiction and permit the agency to better safeguard American consumers.

I. Proposals That Would Weaken the FTC's Ability to Safeguard Consumers.

A. H.R. 5093 and H.R. 5097

Two of the proposals pending before the Subcommittee were no doubt intended to relieve burdens on businesses that are subject to FTC investigations or consent orders. H.R. 5093, the Technological Innovation through Modernizing Enforcement Act, proposes to place an eight year time limit on most FTC consent orders, apparently based on the view that longer orders may impede innovation. And H.R. 5097, the Start Taking Action on Lingering Liabilities Act, would require the FTC to keep companies updated on the status of pending investigations. In my view, neither bill would serve the interests it seeks to achieve. Both bills are likely to have serious, but plainly unintended consequences. And most importantly, neither bill serves the interest of the American people.

H.R. 5093 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 decree and requires a time limit longer than 8 years based on the factors described in this section." The bill also proposes that the Commission be required to review all non-fraud related consent decrees five years after entry 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.

There are, in fact, several problems with this proposal apart from burden. First, the proposal aims to solve a non-existent problem. To the extent that the bill seeks to avoid stifling innovation, the FTC's consent decrees are designed with that goal in mind. If one looks at the consent decrees that FTC has entered with the nation's most important, innovative technology companies, it is clear that the agency has avoided prescriptive decrees that might hamper innovation. Having participated in the drafting of the agency's decrees against Internet giants like Google, Facebook, and small start-ups like Frostwire and Chitika and other high-tech companies, I think the record clearly establishes that FTC consent decrees, even those with twenty-year durations, have not hindered innovation and will not do so in the future. Equally important, if a company can make a credible case that a decree would, in fact, impair innovation, there are ample, existing means to demonstrate to the agency that the decree should be lifted or modified. The Commission, has, when appropriate, done just that. Instead, the proposal shifts the burden to the agency to justify the continuation of the decree; that shift is unwarranted.

Second, the proposal would have serious unintended consequences. Most critically, the bill would greatly undermine the deterrent effect that FTC enforcement actions have, not only in terms of specific deterrence against the target company, but general deterrence as well. In most cases, injunctions (consent decrees are injunctions) entered by federal courts are *permanent*, that is, they are not time-limited. That practice guarantees that there are coercive tools available to ensure that the illegal behavior that gave rise to the decree is not repeated. To be sure, injunctions may be modified or vacated, but only if the court, after full consideration of the facts, finds that the need for an injunction has dissipated or disappeared 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, which is why the Commission has for decades generally insisted on twenty year orders. In the administrative cases that would be covered by the proposal, the *only* remedy the FTC has, even when the violation is egregious, willful, and causes massive consumer injury, is a consent decree and the ongoing requirements it imposes.[1] Recall that the FTC has virtually no authority to impose civil penalties against first-time offenders in such cases; therefore the only remedy available to the agency is injunctive relief. That relief serves two distinct, but equally important,

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[1] The coverage of this bill is less than clear. Although the bill says that it covers "[a]ny consent decree entered into by the Commission," and thus would reach consent decrees entered in federal court, it also provides that, if, on review, the "Commission determines that the consent decree no longer serves its purposes, the Commission shall terminate the consent decree," suggesting that it covers only administrative orders that the Commission, on its own, could terminate.

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 stands as a warning to other companies that violations of the law have consequences.

Consider one class of cases that H.R. 5093 would presumably apply to – cases involving data security. Thus far, the agency has brought about sixty of these cases based on theories developed during the tenure of President Bush's FTC Chairman, Tim Muris.[2] Most were resolved with twenty-year consent decrees, as was the FTC's recent successful action global computer company ASUSTek. In that case, ASUS failed to adequately test the security of consumers' routers, timely address vulnerabilities, and notify consumers about the availability of security updates, resulting in critical security flaws in its routers that put the home networks of thousands of consumers at risk.[3] The complaint also alleged that the routers' insecure "cloud" services led to the compromise of thousands of consumers' connected storage devices, exposing their sensitive personal data – including financial data – on the internet.

Under the proposal, in just five years the agency will be required to consider whether the consent order entered in *ASUS* serves its initial purposes, and do so

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[2] *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.

[3] *ASUSTek Computer Inc.*, FTC No. 142 3125 (Feb. 23, 2016) (proposed consent), available here https://www.ftc.gov/enforcement/cases-proceedings/142-3156/asustek-computer-inc-matter.

based solely on the criteria set out in H.R. 5093. Nothing in the proposal limits judicial review of the agency's determination. ASUS might therefore be able to argue that the agency's decision to keep the decree in place was arbitrary or capricious under the Administrative Procedure Act, *see* 5 U.S.C. § 706(2), a far less rigorous standard that the one courts employ in determining whether to vacate or modify an injunction. The idea that in only five years a company that showed stunning disregard for the security of consumers' home networks could shed its obligations under the decree is unfathomable, but that is a possibility under H.R. 5093.

In my view, Congress should work to strengthen the FTC's authority over data security, not weaken it. Data breaches like the three breaches the Wyndham hotel chain experienced, with more than 600,000 credit card files ending up in the hands of the Russian Mafia, are responsible for the growing scourge of identity theft in the United States, and they are the predictable debris of an Internet economy that places too little value on data security.[4] In 2015, over 490,200 individuals filed identity theft complaints with the FTC, and these complaints are just the tip of a much larger iceberg.[5] The Department of Justice estimates that "17.6 million persons, or about 7 percent of U.S. residents age 16 or older, were victims of at least

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[4] *See FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236 (3d Cir. 2105) (case involving a worldwide hotel chain that experienced three breaches in the span of 18 months as a result of extraordinarily lax security measures that resulted in over 600,000 credit card files ending up with Russian organized crime).

[5] *See* 2105 CONSUMER SENTINEL NETWORK DATA BOOK, available https://www.ftc.gov/reports/consumer-sentinel-network-data-book-january-december-2015.

one incident of identity theft in 2014."[6] And identity theft is big business: According to the most recent Department of Justice statistics, in 2012, identity theft cost the U.S. economy $24 billion dollars, $10 billion more than all of the losses attributable to property crimes during the same time period.[7] As the Rand Corporation has reported in several studies, there are insufficient economic incentives to push companies like ASUS and Wyndham to provide reasonable security measures for consumer data.[8] We need tougher data security laws. H.R. 5093 would move us in the wrong direction.

H.R. 5097 would require the FTC to terminate an investigation if the agency fails to send the investigation's target a written communication every six months, unless the Commission votes to extend the investigation, presumably before the six month deadline. Again, it is hard to see what problem this proposal is intended to solve. In my years as Bureau Director, the only time I had an inquiry about timing came from a lawyer who asked that we accelerate our investigation because of an impending acquisition. The Bureau accommodated that request. I did not receive a single comment about agency investigative delays. Commission investigations

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[6] Press Release, Bureau of Justice Statistics, *17.6 Million U.S. Residents Experienced Identity Theft in 2014* (Sept. 27, 2015), http://www.bjs.gov/content/pub/press/vit14pr.cfm.

[7] Erika Harrell & Lynn Langton, *Victims of Identity Theft, 2012,* at 6 (Dec. 2013), http://www.bjs.gov/content/pub/pdf/vit12.pdf.

[8] See, e.g., Sasha Romanosky, *Examining the Costs of Cyber Incidents* (FTC PrivacyCon. Jan. 14, 2016), available at https://www.ftc.gov/system/files/documents/public_comments/2015/10/00027-97671.pdf; Sasha Romanosky, *et al., Empirical Analysis of Data Breach Litigation*, 11 J. Empirical Legal Stud. 74, 75 (2014).

proceed as swiftly as the process allows, but investigations are often slowed by the *target* in producing information requested by the agency or negotiating with the agency over the scope of the Commission's document request.

On the other hand, H.R. 5097 poses real and unjustified risks to the Commission and to the public. If by oversight, extreme weather, government shutdown, or any other unanticipated interruption in communications, the agency misses a deadline, the proposal says quite categorically that the investigation "shall terminate" – a result wholly disproportionate to a single missed deadline and plainly injurious to the American people. Had such a problem arisen during the Commission's investigation of Countrywide, tens of thousands of Americans would have been deprived of over $130 million in compensation obtained by the FTC through consent decrees.[9] That cannot be allowed to happen.

B. H.R. 5115 and H.R. 5136

These two proposals are aimed at amending or adding to the standards on which the agency bases enforcement actions. H.R. 5115, the Statement on Unfairness Reinforcement and Emphasis Act, seeks to reformulate the statutory unfairness standard by codifying selected portions of the Commission's Unfairness Statement, but does so in ways that would undercut, not clarify, the Commission's authority. And H.R. 5136, the Revealing Economic Conclusions for Suggestions Act, would require a detailed economic analysis as a precondition to the Commission

[9] *See FTC v. Countrywide*, CV-10-4193, Supplemental Order and Judgment (C.D. Cal. Feb. 9, 2012), available at: https://www.ftc.gov/enforcement/cases-proceedings/082-3205/countrywide-home-loans-inc-bac-home-loans-servicing-lp.

making recommendations for legislative or regulatory action. Neither of these proposals should move forward.

H.R. 5115 would narrow considerably the existing statutory standard for unfairness by codifying portions of the Commission's Unfairness Statement to focus FTC enforcement actions on cases where there is demonstrable "substantial harm." This proposal suffers from two flaws. First, H.R. 5115 make it difficult for the Commission to bring cases to *avert* harm, a result that not only contradicts Congress's 100 year-old statutory directive that the Commission act to "prevent" harm,15 U.S.C. § 45, but also needlessly jeopardizes consumers by exposing them to preventable harm. Second, and equally important, H.R. 5115 calls into question the Commission's authority to bring cases where the harm is palpable and serious, but unrelated to economic loss or health and safety. Consider the *DesignerWare* case, which involved rent-to-own computers that had cameras that could be, and were, remotely activated to take photographs. These cameras were used to take pictures of children, household visitors, individuals not fully clothed, and couples engaged in intimate activities.[10] The case was brought and resolved, with bi-partisan support, on unfairness grounds. Whether a similar case could be brought under H.R. 5115 is open to question. Under no circumstances should the Commission's authority to bring these kinds of cases be undermined.

H.R. 5136 would prohibit the Commission from recommending legislative or regulatory action until the Commission's Bureau of Economics (BE) produced an

[10] *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.

economic analysis of the costs and benefits of such actions, as well the ability of other private and public institutions to address the issue. The costs and burdens of this proposal are disproportionate to any benefit that might result (meaning, of course, that the proposal itself could not withstand a cost/benefit analysis). Indeed, the burdens that would result from H.R. 5136 are so substantial that the certain impact of this proposal would be to silence the FTC on all but a small handful of 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 agency, especially since Congress and regulatory agencies are free to ignore or disagree with the advice given by the Commission.

To the extent that the proposal is based on the assumption that BE is not consulted on legislative or regulatory matters, that assumption is off-target. BE participates in every facet of the agency's work: it works hand-in-hand with the Bureaus on all enforcement matters; it is involved in the development of all guidance and policy statements the agency disseminates; and it advises Commissioners on every matter that comes before them.

C. H.R. 5098, H.R. 5109 and H.R. 5118

These three proposals are all nominally transparency provisions. Two require the Commission to create new reports to be provided to Congress annually;

a third addresses the use of agency guidance in enforcement cases. Whether assessed individually or collectively, these proposals add considerable burdens on the Commission without yielding any discernable payoff, and H.R. 5118 would create new and wholly unwarranted opportunities for law-breakers to escape accountability. These proposals should not move forward.

H.R. 5098, the Robust Elderly Protection and Organizational Requirements to Track Scams Act, requires 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 burdens 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 other words, little added transparency but a good deal of burden.

The other concern is that the provision is ambiguous and needs clarification. Does the phrase "targeting individuals" 65 and older restrict the scope of the provision to frauds aimed *only* at this age group, or does it include frauds that target individuals 65 and older *as well as other groups*? This question is highly consequential. For example, the FTC's most recent 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.[11] Are prize promotion schemes "targeting individuals who are 65 years of age or older" within the meaning of the proposal? The answer is far from clear, but if the answer is "yes," than the burden on the agency is even more substantial, because many, but not all, of the fraud-type cases the Commission deals with could be said to "target" those 65 and older.

H.R. 5109 would require the agency 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 Commission – but also investigations that are closed. There are two difficulties with this proposal. First, and foremost, given the literally hundreds of investigations that are closed each year, summarizing the legal basis for each investigation and its closure, and identifying the sector in which the company under investigated operated, imposes substantial information-dissemination and record-keeping requirements beyond those already undertaken by the agency. Nor would H.R. 5109 benefit regulated parties because the Commission already takes pains to keep industry up-to-date on what it believes to be unfair or deceptive acts or practice – the Commission provides guidance, holds workshops, issues reports, has an extensive (and really funny) business blog, and, in some cases, it publishes "closing letters" as a way of providing advice to industry.

Second, and more importantly, the proposal envisions a process that would be rife with the risk that the identities of the companies and individuals who were

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[11] 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.

subject to an investigation, but the Commission took no action, may be revealed, causing serious and perhaps irreparable injury to the company or individual. To be sure, the provision contemplates that the privacy of these companies would be respected. But with the circulation of a sector-specific report, which provides a legal analysis correlated to each closed investigation, inferring identities may be possible, especially in those sectors with few participants.

H.R. 5118 contains two new mandates – one prohibits the Commission from relying on guidelines or guidance documents in proving violations of law; the second permits targets of Commission 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 provision does not explain the basis for this asymmetry, nor is any justification evident.

The first mandate is unobjectionable, although it simply restates existing law. It is a basic principle of administrative law that guidance, guidelines, and other forms of informal agency advice are not "law," are not binding on regulated parties, and cannot serve as the basis for an enforcement proceeding.[12] Not that guidance and guidelines are unimportant. The Commission dutifully puts out guidance documents to help businesses. In fact, the two major guidance documents

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[12] *See, e.g., Center for Auto Safety v. National Highway Traffic Safety Administration*, 452 F.2d 798 (D.C. Cir. 2006) (finding agency guidance document unreviewable because it lacked the force of law). *See also Trudeau v. FTC*, 456 F.3d 178 (D.C. Cir. 2009) (unsuccessfully arguing that an FTC press release publicizing a Commission action against a habitual scammer was unlawful and seeking to challenge the release under the First Amendment and the Administrative Procedure Act).

produced during my tenure – the Endorsement Guide and the "Green Guide" for environmental claims – were done so at the behest of interested businesses. And given the breadth of the definition of guidance documents, virtually every public communication the Commission issues – including guides, blog posts, reports, workshops, communications with counsel, press releases, emails, twitter posts, and on and on – could qualify under H.R. 5118 as "guidelines, general statements of policy, or similar guidance."

This proposal threatens to stand the law upside down, and will, if implemented, cause serious harm to businesses by making the Commission reluctant to provide guidance. Under existing law, the Commission may not rely on guidance documents in an enforcement action but must instead prove a violation of law. In defense, the business may claim good faith by pointing to Commission guidance documents and that evidence may well be admissible.[13] 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. This rule would be unique to the FTC. And the 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

[13] Indeed, this proposal stretches the boundaries of existing law well beyond the breaking point. In general, compliance with substantive agency regulations – regulations that actually have the force of law – is a *defense* to liability, but not an *affirmative* defense. Where regulatory compliance is asserted a defendant can argue to the trier of fact that compliance 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). Here, H.R. 5118 cuts the defense loose from its moorings and permits an absolute defense based on compliance with non-binding guidance.

companies escape liability only because they may be able to point to a stray statement the Commission, or even a low-level Commission employee, made years earlier.

The problems posed by H.R. 5118 are made even 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. The lack of such a requirement guarantees that every law-breaking company will search through all of the agency's guidance documents to find any isolated remark by any Commission staff that might provide it an absolute defense to liability. This kind of *post hoc* justification for illegal action should be discouraged, not encouraged, but it is inevitable under H.R. 5118.

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

In addition to the bills discussed above, there are three other pending bills that warrant brief discussion. Two bills, H.R. 5239 and H.R. 5255, propose to amend the Federal Trade Commission Act by repealing the Act's current limitations on the Commission's authority over common carriers and non-profit organizations. These reforms are long overdue, will clarify vexing issues over the scope of the Commission's jurisdiction, and will serve to better protect American consumers. The third proposal, H.R. 5111, the Consumer Review Fairness Act, would prevent companies from using obscure contract provisions to forbid consumers from posting truthful but negative reviews of the company's products or services. This reform too is important and should be endorsed by the Subcommittee.

H.R. 5239 would amend the Federal Trade Commission Act to strike the archaic common carrier exemption, which places off-limits certain conduct by telecommunications companies. The FTC has long asked Congress to repeal this exception, which was predicated on the now outdated premise that all of the activities of monopolist telecommunications carriers (AT&T and local phone companies) would be comprehensively regulated by the Federal Communications Commission (FCC). Given today's dynamic marketplace for telecommunications services, and the substantial de-regulation of the industry, the line setting the boundary between common carriage and other telecommunications services has long been obliterated. The Commission has nonetheless 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.[14]

Congress should make clear that the FTC continues to have the power to bring consumer protection cases against common carriers in matters in which the FTC has enormous expertise and experience, including cases involving false or

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[14] For a broad and incisive overview of this issue, *see* Hon. Maureen K. Ohlhausen, *The FCC's Knowledge Problem: How to Protect Consumers Online,* 67 Federal Communications Law Journal 203 (2015), available at: https://www.ftc.gov/about-ftc/biographies/maureen-k-ohlhausen/speeches-articles-testimonies?field_date_value[value]&field_public_statement_type_tid=All&page=1.

deceptive advertising, marketing claims, billing (especially "cramming," that is, placing unauthorized charges on bills as was true in the Commission's case against T-Mobile), privacy and data security. After all, the FTC is at its core an enforcement agency while the FCC is a regulatory agency focused on a discrete set of corporate actors. The difference for consumers is striking: in enforcement case the FTC seeks consumer redress and puts money back in consumers' wallets, while the FCC seeks fines. Consumers who get cheated deserve better. The Subcommittee should move forward with H.R. 5239.

The same is true with respect to non-profits. 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 under the veil of non-profit status. 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.[15] 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

[15] *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.

Chapter One, was simply a for-profit business being run by its owner.[16] Fake charity schemes continue apace.[17]

Non-profit hospitals, universities and colleges also take advantage of the non-profit exemption to the Act. These institutions often experience serious data breaches, but even when they misrepresent their data security practices or have unreasonably lax security, they are immune from FTC action, and more generally, from any regulation. Millions of consumers have no choice but to entrust personal health and educational 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.

H.R. 5111 addresses a growing problem – the common practice by companies to put "gag" clauses in form contracts to prevent consumers from sharing truthful, but critical, information about the company. The bill provides that these clauses are void as a matter of law and empowers the Commission to seek civil penalties for violations. These are welcome steps forward.

Two point are critically important about this proposal. First, it does not protect deliberately made false statements of fact; subsection (b)(2)(B) makes clear that false statements made to harm or malign businesses remain unprotected by

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[16] For an overview of the extensive litigation in this case, see the FTC's enforcement page that recounts each step in the three year process: https://www.ftc.gov/enforcement/cases-proceedings/082-3085/daniel-chapter-one-james-feijo-individually-officer-daniel.

[17] *See, e.g., FTC v. Cancer Fund of America*, No. CV15-844 (D. Az. May 19, 2015), available here: https://www.ftc.gov/enforcement/cases-proceedings/122-3005-x150042/cancer-fund-america-inc.

the proposal, leaving intact common law rights of action for defamation, libel or slander. Any suggestion that this bill will open the floodgates to unfair, false, or malicious criticisms of businesses is therefore unfounded. Second, on the other hand, the proposal preserves the basic right that Americans historically have had to speak the truth about their experiences with products and services – whether their experience was positive or negative. Congress should not allow the American people to be muzzled by one-sided contracts.

The FTC has sought to void a gag provision in at least one case, involving *Roca Labs*, a company that threatened to sue customers who shared their criticisms of the company's products online. Thus far, the FTC has obtained a preliminary injunction barring the company from continuing to enforce anti-disparagement clauses in its form contracts.[18] But legislation is vastly preferable to piecemeal FTC litigation, and the Subcommittee should move ahead with H.R. 5111.

[18] *See FTC v. Roca Labs*, No. 8:15-civ02231, preliminary injunction order (M.D. Fla. Sept. 28, 2015), available at: https://www.ftc.gov/enforcement/cases-proceedings/142-3255/roca-labs-inc.