

July 16, 2018

TO: Members, Subcommittee on Digital Commerce and Consumer Protection

FROM: Committee Majority Staff

RE: Hearing entitled “Oversight of the Federal Trade Commission”

I. INTRODUCTION

The Subcommittee on Digital Commerce and Consumer Protection will hold a hearing on Wednesday, July 18, 2018, at 9:15 a.m. in 2123 Rayburn House Office Building. The hearing is entitled “Oversight of the Federal Trade Commission.”

II. WITNESSES

- The Honorable Joseph Simons, Chairman, Federal Trade Commission;
- The Honorable Maureen Ohlhausen, Commissioner, Federal Trade Commission;
- The Honorable Noah Phillips, Commissioner, Federal Trade Commission;
- The Honorable Rohit Chopra, Commissioner, Federal Trade Commission; and,
- The Honorable Rebecca Slaughter, Commissioner, Federal Trade Commission.

III. BACKGROUND

The Federal Trade Commission (FTC or Commission) is an independent agency established by Congress in 1914, through the Federal Trade Commission Act of 1914 (FTC Act).¹ As the successor to the Bureau of Corporations, the agency’s original mission was to prevent “[u]nfair methods of competition,”² and subsequently expanded in 1938 to include “unfair or deceptive acts or practices in or affecting commerce.”³

The FTC performs its dual mission to promote competition and protect consumers by preventing anti-competitive, deceptive, and unfair business practices through civil law enforcement, injunctive relief, investigations, advocacy, and education without unduly burdening legitimate business activity. The Commission enforces a wide variety of laws in addition to the FTC Act, including the Fair Credit Reporting Act, the Clayton Act, the Gramm-Leach-Bliley Act (GLBA), the Children’s Online Privacy Protection Act, the Controlling the Assault of Non-

¹ Federal Trade Act of 1914, *as amended*, 38 Stat. 717, 15 U.S.C. § 41 (2018).

² 15 U.S.C. § 45(a)(1) (2018).

³ *Id.*

Solicited Pornography and Marketing Act, the Do-Not-Call Implementation Act, and the Dodd-Frank Wall Street Reform and Consumer Protection Act. In total, the FTC has administrative and enforcement responsibilities under more than 70 laws (over 50 of which have a consumer protection purpose).⁴ The FTC also enforces various rules issued pursuant to the FTC Act or the aforementioned laws, including the GLBA Safeguards Rule and Telemarketing Sales Rule.

The FTC is headed by a five-member Commission, nominated by the President, and confirmed by the United States Senate, each member serving a staggered seven-year term.⁵ Not more than three Commissioners may be affiliated with the same political party. The President designates one Commissioner to serve as Chairman of the Commission. The activities and actions of the FTC are carried out by the Bureaus of Competition, Consumer Protection, and Economics, and supported by various offices and eight regional offices across the country.⁶

Budget Request for Fiscal Year 2019

The FTC's Fiscal Year 2019 budget request has a program level of \$309.7 million and 1,140 full-time equivalents (FTEs).⁷ The request is roughly in line with both the Fiscal Year 2018 budget request and the continuing resolution level under which the Commission is currently operating, as well as the 10-Fiscal Year average for FTEs.⁸ The consumer protection and competition allocations in Fiscal Year 2019 are \$171.1 million and \$138.5 million, respectively. The budget request assumes offsetting collections from Hart-Scott-Rodino (HSR) Act pre-merger notification filing fees in the amount of \$125.4 million and Do-Not-Call fees in the amount of \$15 million. The \$169.3 million difference between offsetting collections and the \$309.7 million request will be funded through a direct appropriation.

Promoting Competition

The Federal Trade Commission's current mission is focused on the prohibition of anti-competitive business practices and the promotion of competitive markets, including in the areas of healthcare, technology, energy, consumer goods and services, and manufacturing.⁹ The Bureau of Competition is the FTC's antitrust arm that enforces the Clayton Act, FTC Act, and other competition-related statutes.¹⁰ In general, the Commission may challenge business

⁴ Statutes Enforced or Administered by the Federal Trade Commission, at <https://www.ftc.gov/enforcement/statutes>.

⁵ <https://www.ftc.gov/about-ftc/commissioners>

⁶ <https://www.ftc.gov/about-ftc/bureaus-offices>

⁷ Fiscal Year 2019 Congressional Budget Justification for the Federal Trade Commission (February 12, 2018), p. 2-5, at <https://www.ftc.gov/reports/fy-2019-congressional-budget-justification>.

⁸ The Commission is requesting an additional \$3.4 million in FY 2019 to engage expert witnesses, which Chairman Joseph Simons indicated was a "growing need in light of increased numbers of complex investigations and litigation in both competition and consumer protection matters." Prepared Statement of the Federal Trade Commission Before the Committee on Appropriations, Subcommittee on Financial Services and General Government, U.S. Senate (May 17, 2018), at <https://www.appropriations.senate.gov/imo/media/doc/051618%20-%20FTC%20Simons%20Testimony1.pdf>.

⁹ Fiscal Year 2019 Congressional Budget Justification for the FTC, p. 22.

¹⁰ Statutes Enforced or Administered by the FTC, at <https://www.ftc.gov/enforcement/statutes>.

practices that are likely to reduce consumer choices, raise prices, limit competition, or provide inferior service.

The Commission's antitrust authority was modified by the Hart-Scott-Rodino Antitrust Amendments of 1976, and further amended in 2001.¹¹ Under the HSR amendments, companies involved in a merger or acquisition of a certain size, unless exempt, must notify both the FTC and the Antitrust Division of the Department of Justice (DOJ) prior to a merger. Either the FTC or DOJ will then investigate the proposed merger and determine whether the merger is likely to restrict competition or otherwise be anti-competitive.

If either agency conducting the review believes the merger will harm competition, it can go to court to enjoin it. The FTC also has authority to seek a preliminary injunction in court and then consider the merger in an administrative proceeding. In addition to the pre-merger review authority the FTC shares with the DOJ, it also has enforcement authority under Section 5 of the FTC Act to prevent "unfair methods of competition in or affecting commerce."

In Fiscal Year 2017, the Commission brought 32 new competition law enforcement actions (23 merger enforcement actions and nine anti-competitive conduct challenges), hosted several workshops, published reports, and pursued advocacy opportunities to promote competition and educate stakeholders about its benefits.¹² The FTC also continued to monitor and enforce compliance with various consent orders as well as with merger and acquisition reporting obligations under the HSR Act, receiving notice of over 2,000 acquisitions, and bringing three civil penalty actions totaling nearly \$2 million against firms who failed to meet their HSR filing obligations.¹³

Protecting Consumers

The Federal Trade Commission's mission also includes a charge to protect U.S. consumers from unfair and deceptive practices in the marketplace. Congress recognized that "unfair and deceptive practices could distort a competitive marketplace as much as unfair methods of competition," and in 1938, Congress amended the FTC Act and mandated the FTC to prohibit "unfair or deceptive acts or practices in or affecting commerce"¹⁴ through its Section 5 authority. Congress drafted this provision broadly to provide sufficient flexibility to address unanticipated changes in the marketplace and unfair or deceptive acts and practices. Recently, the FTC has used that jurisdiction to address concerns relating to 1) privacy and data security, 2) deceptive claims in advertising and marketing, 3) protecting consumers in the financial marketplace, and 4) fraud targeting specific populations.¹⁵

¹¹ <https://www.ftc.gov/enforcement/statutes/hart-scott-rodino-antitrust-improvements-act-1976>;
<https://www.ftc.gov/news-events/press-releases/2001/01/major-changes-hart-scott-rodino-premerger-notification>

¹² Fiscal Year 2019 Congressional Budget Justification for the FTC, p. 22.

¹³ *Id.*

¹⁴ 15 U.S.C. § 45(a)(1) (2018).

¹⁵ Additional information on significant FTC cases, actions and initiatives can be in the FTC's FY 2019 Congressional Budget Justification on pp. 7-22 at <https://www.ftc.gov/reports/fy-2019-congressional-budget-justification>.

The FTC also has broad authority to enforce Section 5 of the Act against all persons, partnerships, or corporations in commerce, although the FTC Act does enumerate specific exceptions relating to banks and other financial services entities as well as common carriers,¹⁶ and the FTC shares consumer protection jurisdiction with the Consumer Financial Protection Bureau following the enactment of the Dodd-Frank Act in 2010.¹⁷

According to the FTC Act, any “representation, omission, or practice” is deceptive if “it is likely to mislead the consumer acting reasonably in the circumstances, to the consumer’s detriment.”¹⁸ Any act or practice may be found to be unfair where it “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.”¹⁹ In the FTC’s Policy Statement of Unfairness, the Commission reported to Congress:

By 1964 enough cases had been decided to enable the Commission to identify three factors that it considered when applying the prohibition against consumer unfairness. These were: (1) whether the practice injures consumers; (2) whether it violates established public policy; (3) whether it is unethical or unscrupulous. These factors were later quoted with apparent approval by the Supreme Court in the 1972 case of *Sperry & Hutchinson*. Since then the Commission has continued to refine the standard of unfairness in its cases and rules, and it has now reached a more detailed sense of both the definition and the limits of these criteria (footnotes omitted).²⁰

The FTC’s consumer protection mandate to enjoin “unfair or deceptive acts or practices in or affecting commerce”²¹ is a flexible framework that has allowed these technologies to progress without prior regulatory permission. However, the FTC settles most of its consumer protection cases,²² especially in areas involving newer technologies such as data security.²³ Settling a high percentage of cases avoids costly litigation, but carries risks in terms of ensuring appropriate cost-benefit analysis and certainty to industry for investment and innovation.²⁴

¹⁶ 15 U.S.C. § 45(a)(2) (2018). It is important to note State authorities have primary responsibility for enforcing State statutes against unfair or deceptive acts or practices.

¹⁷ Pub.L. 111-203, 124 Stat. 1376.

¹⁸ FTC Policy Statement on Deception (October 14, 1983), at https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.

¹⁹ 15 U.S.C § 45(n) (2018).

²⁰ Letter from the Federal Trade Commission to the Committee on Commerce, Science, and Transportation regarding Commission Statement of Policy on the Scope of the Consumer Unfairness Jurisdiction (Policy Statement on Unfairness), December 17, 1980, at <https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness>.

²¹ 15 U.S.C. § 45(a)(1).

²² <https://www.ftc.gov/enforcement/cases-proceedings>

²³ See <https://www.ftc.gov/enforcement/cases-proceedings/terms/249>.

²⁴ See Gerard Stegmaier & Wendell Bartnick, *Essay: Psychics, Russian Roulette, and Data Security: The FTC’s Hidden Data-Security Requirements*, 20 GEO. MASON L. REV. 673, 693 (2013) (“It is unclear whether nonparties to the investigation should attempt to follow the complaint, the consent order, or both when complying with Section 5, or whether the failure to implement some or all of the measures would result in a prohibited unfair practice.”).

An act or practice that is unfair or deceptive in relation to Section 5 may also violate other Federal or State statutes; in other circumstances, an act or practice may violate Section 5 even though the violator is technically compliant with other applicable laws, such as fair lending and consumer protection laws.²⁵

The FTC has investigative authority as well as enforcement authority. All FTC investigations are non-public, and the Commission does not discuss complaints about specific persons or organizations nor the status of on-going investigations.

Following an investigation, the Commission may initiate an enforcement action. The FTC has civil penalty authority to enforce against violations of a rule or order; however, if there is no existing rule or preexisting order regarding a particular act or practice, it may seek injunctive relief in the first instance. Once an injunction (also known as a consent order) is in place, the Commission then may seek maximum civil penalties of \$41,484 per violation (recently adjusted pursuant to Federal Civil Penalties Inflation Adjustment Act Improvements Act).²⁶ The FTC may promulgate rules using procedures prescribed by the Magnuson-Moss Warranty Act–Federal Trade Commission Improvement Act of 1974. Congress imposed these additional rulemaking steps—famously known as “Mag-Moss” procedures—because the “potentially pervasive and deep effect of rules defining what constitutes unfair or deceptive acts or practices” demanded greater procedural safeguards.

The Bureau of Consumer Protection has eight divisions to support its consumer protection mission: 1) Advertising Practices; 2) Consumer and Business Education; 3) Consumer Response and Operations; 4) Enforcement; 5) Financial Practices; 6) Litigation Technology and Analysis; 7) Marketing Practices; and, 8) Privacy and Identity Protection.²⁷ In Fiscal Year 2017, the FTC filed 54 new complaints in Federal court and obtained 104 permanent injunctions and orders requiring defendants to pay nearly \$17 billion in consumer redress or disgorgement.²⁸ This is a unique tool that the FTC has to make consumers whole. Defendants also were required to pay nearly \$19 million under four civil contempt orders.²⁹ In addition, cases referred to DOJ resulted in 19 court judgments imposing civil penalties of approximately \$175 million.³⁰ Furthermore, the FTC issued 21 new administrative complaints and entered 15 final administrative orders.³¹ Finally, in Fiscal Year 2017, the Commission also issued ten reports and released 11 new consumer and business education publications. In December 2017, the FTC issued the agency’s first Office of Claims and Refunds Annual Report.³²

²⁵ <https://www.federalreserve.gov/boarddocs/supmanual/cch/ftca.pdf>

²⁶ <https://www.ftc.gov/news-events/press-releases/2018/01/ftc-publishes-inflation-adjusted-civil-penalty-amounts>; https://www.ftc.gov/system/files/documents/federal_register_notices/2018/01/civil_penalty_adj_published_frn_1-22-18.pdf

²⁷ https://www.ftc.gov/system/files/attachments/bureau-consumer-protection-organization-chart/bureau_of_consumer_protection_org_chart_7-2-18.pdf

²⁸ Fiscal Year 2019 Congressional Budget Justification for the FTC, p. 7.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

When possible, money collected pursuant to the Commission's orders and complaints is returned to the Americans harmed. According to Chairman Simon, "the agency returned over \$543 million in redress to consumers and deposited \$94 million into the U.S. Treasury, reflecting collections in both consumer protection and competition matters," and he noted that "FTC orders in the *Volkswagen*, *Amazon*, and *Net Spend* matters required defendants to self-administer consumer refund programs worth more than \$11.5 billion" (footnotes omitted).³³ Finally, the agency "saved consumers over \$3.7 billion through its competition enforcement efforts and over \$1.29 billion through its consumer protection enforcement actions" and it "saved consumers over 12 times the amount of resources devoted to the consumer protection program; over 55 times the amount of resources devoted to the merger program; and more than 39 times the amount of resources devoted to the nonmerger antitrust enforcement program."³⁴

To ensure the FTC's enforcement, education, and advocacy efforts are well-targeted and measured and its financial and human resources are properly allocated, the Bureau of Consumer Protection works with the Bureau of Economics to leverage various online complaint tracking tools, including:

- Consumer Response Center (CRC):³⁵ During Fiscal Year 2017, the CRC handled more than 40,000 inquiries and complaints from consumers and businesses each week, totaling two million complaints and inquiries.
- Consumer Sentinel Network (CSN):³⁶ Nearly ten million fraud, identity theft, financial, and Do-Not-Call complaints were added to the CSN database in Fiscal Year 2017. Over 2,000 law enforcement agencies worldwide access CSN.
- National Do Not Call Registry:³⁷ During Fiscal Year 2017, the number of Do-Not-Call telephone numbers added to the Registry exceeded 229 million.

Data Security and FTC

Recent data breaches from Equifax, Uber, Facebook, and other entities raise continued concerns about the privacy and security of consumer information in a data-driven economy. Breaches involving personal and financial information increase exposure to potential harms for U.S. consumers and the U.S. economy. During the 115th Congress, the Subcommittee on Digital Commerce and Consumer Protection has held four hearings directly regarding data security and the use of consumer data and numerous others discussing these issues in the context of disruptive

³³ Prepared Statement of the Federal Trade Commission Before the Committee on Appropriations, Subcommittee on Financial Services and General Government, U.S. Senate (May 17, 2018).

³⁴ *Id.*

³⁵ The CRC responds to consumer complaints and inquiries received by the toll-free consumer complaint lines, 877-FTC-HELP and 877-ID-THEFT, the FTC's Internet complaint forms at www.ftc.gov, and postal mail.

³⁶ The CNS is the FTC's secure website populated with over 30 million consumer fraud, identity theft, financial, and Do-Not-Call Registry complaints collected during the past five years. Each year the FTC publishes a report of the top consumer complaints received, including a break out of complaint data on a state-by-state basis.

³⁷ Via the Registry, consumers can elect to avoid receiving telephone solicitations; telemarketers are required to remove any telephone numbers included in the Registry from their calling lists.

technologies.³⁸ In those hearings, it was repeatedly highlighted that the FTC is the primary enforcer of online consumer privacy and data security. The first online privacy case against GeoCities was brought by the FTC in 1998. Since then, the FTC has brought more than 500 privacy and security enforcement actions and held more than 20 workshops and events on privacy and data security topics. As recently as August 2015, in *FTC v. Wyndham*, the U.S. Court of Appeals for the Third Circuit affirmed FTC's jurisdiction over data security (*Federal Trade Commission v. Wyndham Worldwide Corporation*, No. 14–3514, (3rd Cir. Aug. 24, 2015)).

In April, the FTC settled with mobile phone manufacturer BLU Products, Inc. and its co-owner regarding allegations that the company allowed a China-based third-party service provider to collect detailed personal information about consumers, such as text message contents and real-time location information, without their knowledge or consent despite promises by the company that it would keep such information secure and private. In February, the 9th Circuit Court of Appeals affirmed the ability of the FTC to take action against a company providing mobile Internet access, even though the provider is a “common carrier,” after it was accused of “throttling” customers’ broadband data speed (*FTC v AT&T Mobility LLC*, No. 15-16585, (9th Cir. Feb. 26, 2018)).

The FTC has also reviewed mergers involving ISPs and online content, such as AOL/Time-Warner, and brought consumer protection cases against companies like Apple, AT&T, Dish, Facebook, Google, T-Mobile, and many others under its Section 5 jurisdiction to protect consumers from anti-competitive behavior (15 U.S.C. § 45(a)). In the past, the FTC monitored the behavior of the early on-ramps to the Internet and brought cases against AOL, CompuServe, Juno, and Prodigy for deceiving consumers about their services.³⁹

Privacy Shield and FTC

The Subcommittee on Digital Commerce and Consumer Protection held a hearing on digital trade and cross-border data flows in October 2017.⁴⁰ At the hearing, Members and witnesses discussed trade negotiations and dialogues, including the EU-U.S. Privacy Shield. The Privacy Shield framework provides companies on both sides of the Atlantic Ocean with a data privacy mechanism to comply with data protection requirements. The Privacy Shield was finalized in July 2016, and today, it is used by over 3,200 companies to facilitate the

³⁸ <https://energycommerce.house.gov/hearings/oversight-equifax-data-breach-answers-consumers/>; <https://energycommerce.house.gov/hearings/securing-consumers-credit-data-age-digital-commerce/>; <https://energycommerce.house.gov/hearings/algorithms-companies-decisions-data-content-impact-consumers/>; <https://energycommerce.house.gov/hearings/understanding-the-digital-advertising-ecosystem/>

³⁹ *America Online, Inc.*, 125 F.T.C. 403 (1998) (FTC Dkt. C-3787); *Prodigy Services Corp., Inc.*, 125 F.T.C. 430 (1998) (FTC Dkt. C-3788); *CompuServe, Inc.*, 125 F.T.C. 451 (1998) (FTC Dkt. C-3789); *Juno Online Servs., Inc.*, FTC Dkt. No. C-4016 (Jun. 25, 2001); *America Online, Inc. & CompuServe Interactive Servs., Inc.*, FTC Dkt. No. C-4105 (Jan. 28, 2004).

⁴⁰ <https://energycommerce.house.gov/hearings/21st-century-trade-barriers-protectionist-cross-border-data-flow-policies-impact-u-s-jobs/>

transmission of personal data between the U.S. and EU.⁴¹ More data moves between the two regions than anywhere else in the world.

In October 2017, the European Commission concluded its first annual review of the Privacy Shield to ensure it was functioning effectively and providing sufficient safeguards of the EU privacy rules. The FTC, working in concert with the Departments of Commerce and State as well as other Federal agencies, endeavored at the time to demonstrate the strength of data protections in the U.S. as well as the robust data economy that had developed and supported the large trade relationship between the U.S. and EU. As the leading privacy enforcement agency, the FTC has brought multiple enforcement actions to enforce the Privacy Shield and continues to police program participants that fail to meet their legal obligations.⁴² The European Commission is expected to initiate its second annual review of the Privacy Shield and publish its findings this fall.

IV. ISSUES

The following issues may be examined at the hearing:

- The Federal Trade Commission's current budget, mission, performance, and authorities.
- The FTC's priorities and efforts with respect to issues including robocalls, data security, and privacy.
- The FTC's role in the upcoming Privacy Shield review with the European Union.

V. STAFF CONTACTS

If you have any questions regarding this hearing, please contact Melissa Froelich or Paul Jackson of the Committee staff at (202) 225-2927.

⁴¹ <https://www.privacyshield.gov/>

⁴² Press Release, "Three Companies Agree to Settle FTC Charges They Falsely Claimed Participation in EU-US Privacy Shield Framework," (September 8, 2017), at <https://www.ftc.gov/news-events/press-releases/2017/09/three-companies-agree-settle-ftc-charges-they-falsely-claimed>; see also Press Release, "California Company Settles FTC Charges Related to Privacy Shield Participation," (July 2, 2018), at <https://www.ftc.gov/news-events/press-releases/2018/07/california-company-settles-ftc-charges-related-privacy-shield>.