

Written Testimony of

Aaron Burstein
Partner, Wilkinson Barker Knauer, LLP

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Hearing on

“Reauthorizing Brand USA and the U.S. SAFE WEB Act”

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I. INTRODUCTION

Chairwoman Schakowsky, Ranking Member McMorris Rodgers, and members of the Subcommittee, thank you for the opportunity to testify today. My name is Aaron Burstein, and I am a partner at Wilkinson Barker Knauer in Washington, DC. Before joining Wilkinson Barker in 2016, I was an attorney at the Federal Trade Commission (“FTC” or “Commission”), where I served as a legal advisor to former Commissioner Julie Brill on consumer protection matters. My perspective on SAFE WEB is informed by my experiences at the FTC and in private practice. However, my testimony represents my own views, not those of Wilkinson Barker or any of its clients.

The Undertaking Spam, Spyware, And Fraud Enforcement With Enforcers Beyond Borders Act of 2006 (“U.S. SAFE WEB Act,” “SAFE WEB Act,” or “Act”)¹ provides the FTC with important tools to protect U.S. consumers and enforce standards that responsible companies strive to meet. The Act also bolsters the FTC’s ability to work with its foreign counterparts, which in turn supports the FTC’s international leadership and standing. Reauthorizing the SAFE WEB Act would keep these essential tools in place and send a strong signal of support for the FTC’s consumer protection mission and its role as an international leader in this arena. I support reauthorization of the Act through H.R. 4779.

II. THE FTC’S USE OF THE U.S. SAFE WEB ACT

H.R. 4779 would leave the core provisions of the SAFE WEB Act unchanged. As enacted in 2006 and reauthorized in 2012, the Act advances the international aspects of the FTC’s consumer protection mission in several important ways. I would like to highlight how the

¹ See Pub. L. 109-455 (codified as amended by Pub. L. 112-203 in scattered sections of 15 U.S.C. and 12 U.S.C. § 3412(e)).

SAFE WEB Act has been helpful in four areas: (1) stating a clear grant of extraterritorial authority; (2) providing investigative assistance to foreign law enforcement agencies; (3) obtaining investigative assistance from foreign law enforcement agencies; and (4) facilitating relationships with the FTC’s counterparts overseas.

Affirming Extraterritorial Authority. A core purpose of the SAFE WEB Act is to help protect U.S. consumers from cross-border scams and fraud in a globalized, networked world. Consistent with this purpose, the Act amended the FTC Act to cover acts or practices involving foreign commerce that “cause or are likely to cause reasonably foreseeable injury within the United States” or “involve material conduct occurring within the United States.”² As one court recently held, this amendment provides a “clear, affirmative indication” that the FTC may pursue foreign-based unfair or deceptive conduct, provided that the conduct meets either the foreseeability or materiality standard.³ Consequently, in appropriate cases, the FTC may be able to reach the operations and assets of fraud operations outside the United States that harm U.S. consumers.

Providing Investigative Assistance. The FTC has built an impressive record of sharing information and providing investigative assistance to its foreign counterparts under the SAFE WEB Act. According to FTC testimony in 2018, the FTC has issued more than 110 civil investigative demands (“CIDs”) in connection with more than 50 foreign law enforcement

² SAFE WEB Act § 3, 15 U.S.C. § 45(a)(4).

³ See Order Denying Motion to Dismiss, *FTC v. Apex Capital Group*, Case No. CV-18-9573 (C.D. Cal. Sept. 16, 2019), at 12-13.

investigations under the SAFE WEB Act.⁴ In addition, the FTC has responded to more than 125 information sharing requests that were made through SAFE WEB procedures.⁵

The Act requires the FTC to carefully evaluate assistance requests. Specifically, the Commission must consider “all relevant factors” in deciding whether to provide assistance, including reciprocity with the requesting agency, any potential negative impact of assistance on U.S. public interest, and the number of persons affected by the acts or practices being investigated.⁶ In addition, the assistance processes under the SAFE WEB Act provide strong measures for accountability at the Commission and at the foreign law enforcement agencies that receive its assistance.

These measures add to the general processes that the FTC has in place governing how it conducts investigations. In my experience, the FTC generally makes careful decisions about opening investigations and how to conduct them. For example, the civil investigative demands (CIDs) that the agency issues in consumer protection cases go through several layers of review before they are signed by a Commissioner. These review processes provide an opportunity to review the substantive scope and relevant time period of each CID before it is issued.

Obtaining Assistance for FTC Investigations. Importantly, the SAFE WEB Act assures that the FTC’s assistance is not a one-way street. As noted above, one factor the FTC must consider is a foreign agency’s willingness to reciprocate as part of its assistance decisions. The FTC’s public statements indicate that it obtains real and meaningful assistance from foreign counterparts as a result of the powers granted by the SAFE WEB Act. For instance, in the past

⁴ Fed. Trade Comm’n, Prepared Statement on “Oversight of the Federal Trade Commission” Before the Committee on Energy and Commerce Subcommittee on Digital Commerce and Consumer Protection, U.S. House of Representatives (July 18, 2018), at 19-20.

⁵ *Id.*

⁶ *See* SAFE WEB Act § 4(b), 15 U.S.C. § 46(j)(3).

few years, the FTC has credited the Act for securing assistance and cooperation in cases involving large-scale data breaches, children’s privacy violations, and a sweepstakes scam that led to the recovery of \$30 million.⁷ This record builds on several other enforcement actions in which the FTC acknowledged the role of the Act, including cases in which the Commission obtained orders shutting down spam operations and lottery scams.⁸

Facilitating Staff Exchanges. Finally, the SAFE WEB Act fosters relationships between the FTC and its foreign counterparts. Under the Act’s authority to conduct staff exchanges, the FTC hosts foreign agency officials as visiting international fellows or interns.⁹ These kinds of exchanges are an effective way to provide officials from other countries with a better understanding of the laws that the FTC enforces, how it conducts investigations, and how it operates as an agency. As a result, fellows and interns return to their countries with a clear picture of how the FTC operates, as well as having developed personal contacts within the

⁷ See Fed. Trade Comm’n, FTC Sues Cambridge Analytica, Settles with Former CEO and App Developer (July 24, 2019), <https://www.ftc.gov/news-events/press-releases/2019/07/ftc-sues-cambridge-analytica-settles-former-ceo-app-developer>; Press Release, Fed. Trade Comm’n, Operators of Sweepstakes Scam Will Forfeit \$30 Million to Settle FTC Charges (Mar. 7, 2019), <https://www.ftc.gov/news-events/press-releases/2019/03/operators-sweepstakes-scam-will-forfeit-30-million-settle-ftc>; Press Release, Fed. Trade Comm’n, Electronic Toy Maker VTech Settles FTC Allegations That it Violated Children’s Privacy Law and the FTC Act (Jan. 8, 2018), <https://www.ftc.gov/news-events/press-releases/2018/01/electronic-toy-maker-vtech-settles-ftc-allegations-it-violated>; Press Release, Fed. Trade Comm’n, Operators of AshleyMadison.com Settle FTC, State Charges Resulting From 2015 Data Breach that Exposed 36 Million Users’ Profile Information (Dec. 14, 2016), <https://www.ftc.gov/news-events/press-releases/2016/12/operators-ashleymadisoncom-settle-ftc-state-charges-resulting>.

⁸ See, e.g., Press Release, Fed. Trade Comm’n, Defendants in International Spam Operation Settle FTC Charges; New Canadian Defendants Identified (July 15, 2008), <https://www.ftc.gov/news-events/press-releases/2008/07/defendants-international-spam-operation-settle-ftc-charges-new>; Press Release, Fed. Trade Comm’n, Court Halts Bogus Check Scam Targeting Lottery Winners; Money Transfers Used to Defraud Consumers (Nov. 19, 2007), <https://www.ftc.gov/news-events/press-releases/2007/11/court-halts-bogus-check-scam-targeting-lottery-winners-money>.

⁹ See SAFE WEB Act § 9, 15 U.S.C. § 57c-1 (authorizing the FTC to “retain or employ officers or employees of foreign government agencies on a temporary basis as employees of the Commission”). The FTC is also authorized to detail FTC personnel “on a temporary basis for appropriate foreign government agencies.” *Id.*

agency. These relationships can bolster trust, promote future enforcement cooperation, and facilitate communications between the FTC and its counterparts. These outcomes generally benefit U.S. consumers and companies.

III. CONCLUSION

The FTC has used its SAFE WEB Act authority effectively in its own investigations and to work with and assist its counterparts abroad. The Subcommittee should endorse H.R. 4779 to ensure that the FTC can continue its international engagement under the SAFE WEB Act.