

## **Oral Statement of Commissioner Christine S. Wilson, FTC**

As Prepared for Delivery

Before the  
U.S. House Committee on Energy and Commerce  
Subcommittee on Consumer Protection and Commerce

July 28, 2021

### **Introduction**

Chairman Pallone, Ranking Member McMorris Rodgers, Chairwoman Schakowsky, Ranking Member Bilirakis, and distinguished members of the Subcommittee, thank you for the opportunity to testify. It is an honor to appear before you today.

I will address three areas in my opening remarks. First, I would like to address some process issues that have arisen recently at the Commission because those process issues impact my view of the 16 bills we will discuss today. Second, I will discuss clarification of the FTC's authority under Section 13(b) of the FTC Act. Third, I will discuss the need for federal privacy legislation.

### **FTC Process**

I am blessed to be serving my third stint at the FTC.<sup>1</sup> I have great respect for the agency's devoted personnel, who work tirelessly to promote competition and protect consumers even under highly suboptimal circumstances. I am perennially amazed at how much good the FTC can accomplish in so many different sectors of our economy despite our small budget and just over

I understand that elections have consequences. Substantively, President Biden and his appointees may choose to pursue competition and consumer protection policies that differ from those of their predecessors. But the *process* used to implement those policy changes matters. Congressman Frank Pallone stated in 2016 during a hearing on proposed FTC legislation: “I am a big proponent of regular order. To me that means engaging in real deliberation, not just having a ‘check-the-box’ hearing.”<sup>2</sup> I applaud Representative Pallone’s observation and believe it applies equally to the smooth functioning of the FTC.

As a political appointee nominated by the White House and confirmed by the Senate, I am obligated to exercise due oversight of Commission business. Commission actions traditionally have been the product of robust dialogue and considerable analysis supported by thorough briefings and memoranda from our staff. Established procedures facilitate a flow of information among Commissioners and between Commissioners and our experienced staff; they permit us to engage transparently with each other and to listen carefully to stakeholders. When we adhere to these traditions and norms, I am able to fulfill my oversight function.

In recent weeks, though, these traditions and norms have been jettisoned. While time does not permit me to discuss events in detail, I have memorialized my concerns elsewhere<sup>3</sup> and would be happy to answer questions. For purposes of these opening remarks, I will merely observe that practitioners, academics, and former enforcers across the political spectrum have

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<sup>2</sup> Frank Pallone, Jr., Ranking Member, H. Comm. on Energy and Com., Remarks before the H. Subcomm. on Com., Mfg., and Trade of the H. Comm. on Energy and Com. on Legislative Hearing on 17 FTC Bills (May 24, 2016), <https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/FTC%2017%20Bills%20CMT%20Leg%20Hearing%205.24.16.pdf>.

<sup>3</sup> *See*

expressed concern about the agency's abrupt departure from regular order and that I share these concerns.

result in stifled competition and innovation to the detriment of American consumers, U.S. industries, and our economy.

**Section 13(b) of the FTC Act**

The second topic I would like to address concerns Section 13(b). As this Committee is aware, the Supreme Court decision in *AMG*<sup>6</sup> held that Section 13(b) does not permit the FTC to obtain equitable monetary relief in federal district court. I appreciate the leadership this Committee

or service despite the deception. This approach has support in the case law<sup>8</sup> and could assuage those concerns.

The bottom line is that the legitimate concerns of stakeholders can be addressed while also restoring the ability of the FTC to use Section 13(b) to pursue wrongdoers.

### **Privacy Legislation**

The third topic I would like to cover is federal privacy legislation. As members of this Committee know, FTC Commissioners, on a bipartisan basis, have urged Congress to pass federal privacy legislation for years.

Businesses need clarity and certainty regarding the rules of the road in this important area. Privacy statutes in California, Virginia, and Colorado, compounded by initiatives in other states and varying regimes in other countries, have created confusion and uncertainty in the business community. Even more importantly, consumers need clarity regarding how their data is collected, used, shared, and monetized. Without this transparency, consumers cannot make informed choices about the costs and benefits of using various websites, apps, and devices. Unfortunately, the pandemic has exacerbated concerns regarding data collection and usage as millions of people moved online for work and school and apps were deployed for contact tracing

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<sup>8</sup> See, e.g., *FTC v. Com. Planet, Inc.*, 878 F. Supp. 1048 (C.D. Cal. 2012), *aff'd*, 815 F.3d 593, 603 (9th Cir. 2016) (affirming the district court decision that “relied on the testimony in question to *reduce* the award from \$36.4 million to \$18.2 million”); *FTC v. Lane Labs-USA, Inc.*, 2014 WL 268642, \*2 (D.N.J. 2014) (explaining that the court has discretion in determining how to compensate consumers for the violations, was not constrained to total revenues, [https://www.ftc.gov/pft/ftc/2014/03/20140313-ftc-v-lane-labs-usa-inc-030611e3-0722501d69-ftc-026wt-n382p1.27\(b\)-d2\(\(2](#)

and other health-related purposes.<sup>9</sup> Notably, concerns are not limited to commercial data collection and use; the ability of the government to access or purchase commercial data creates serious implications for our civil liberties and our protections under the Fourth Amendment – concerns that have also intensified during the last 18 months.<sup>10</sup>

The first and best option would be for Congress to enact privacy legislation. Congress is comprised of elected representatives empowered to represent the will of the American people. Consequently, it is this body that is uniquely situated to make the important value judgments inherent in privacy legislation. And the FTC stands ready to assist with the implementation of that legislation – ideally through narrowly tailored rulemaking processes and vigorous enforcement of that new authority.

Critics have lambasted the FTC for not doing enough to protect consumer privacy. But as other Commissioners and I repeatedly have noted, our jurisdiction and tools are limited.<sup>11</sup> President Biden, in his recent executive order,<sup>12</sup> asked that the FTC consider a privacy rulemaking. Rulemaking under Section 18 of the FTC Act – known colloquially as Magnuson-

Moss rulemaking<sup>13</sup> – is within our authority. In recent months, I had become more receptive to a Mag-Moss rulemaking on privacy to address the information asymmetry between the providers of goods and services and their users.<sup>14</sup> But the Commission recently voted along party lines to pare back procedural safeguards and limit opportunities for public input during agency rulemakings.<sup>15</sup> Given these changes, I am less