



POLICY & ACTION FROM CONSUMER REPORTS

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Before the

**Subcommittee on Consumer Protection, Product Safety, Insurance, and
Data Security**

**Committee on Commerce, Science, and Transportation
United States Senate**

On

**STAKEHOLDER PERSPECTIVES:
REFORM PROPOSALS TO IMPROVE FAIRNESS,
INNOVATION, AND CONSUMER WELFARE**

September 26, 2017

Chairman Moran, Ranking Member Blumenthal, and Members of the Subcommittee, thank you for the opportunity to be here today on behalf of Consumer Reports and our policy and mobilization division, Consumers Union (hereinafter “Consumers Union”), to discuss the important work of the Federal Trade Commission.¹ Consumers Union has been a strong and longtime supporter of the FTC’s work and mission.

I arrived at Consumers Union in May of this year. Before that, I spent 26 years working in the FTC’s Bureau of Consumer Protection, the last four as its Director of Consumer Protection. My tenure at the FTC spanned several Democratic and Republican Administrations, and I am equally proud of the work I did under all of them. For me, moving to Consumer Reports, a strong, nonpartisan advocate for U.S. consumers, was a natural continuation of the work I have pursued throughout my professional life.

We – and I mean “we” at Consumers Union – have always regarded the FTC as a leader in ensuring that consumers are protected in the marketplace, and that they have the accurate information needed to make informed decisions. Every year, the FTC returns millions of dollars to consumers and saves billions more through its law enforcement efforts. Every year, it halts ongoing fraud and deception, and helps legitimate companies that offer consumers valuable products and services compete on a level playing field. Every year, it educates the public through consumer and business education, public workshops, and policy reports. And it does so on a shoestring, compared with the budgets of many other federal agencies, and without many of the tools and remedies that other agencies routinely employ.

So that the FTC can continue to perform these important functions, the agency needs to be strong and independent, and have the resources and authority needed to

¹ Consumers Union is the policy and mobilization division of Consumer Reports. Consumers Union is an expert, independent, nonprofit organization whose mission is to work for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves. Its work focuses on auto and product safety, financial services, healthcare, food safety, privacy and technology, and many other areas. Consumer Reports is the world’s largest independent product-testing organization. Using its more than 50 labs, auto test center, and survey research center, the nonprofit organization rates thousands of products and services annually. Founded in 1936, Consumer Reports has over 7 million subscribers to its magazine, website, and other publications.

pursue its vital mission. Indeed, given the enormous challenges that consumers face in today's marketplace, the FTC needs more authority—not less—to fulfill its fundamental consumer protection role.

Our support for the FTC in recent years has included efforts to strengthen its authority in a number of ways. To name just a few:

- We supported the FTC's implementation of the Do Not Call Registry, and its continuing work to protect consumers from the harassment of unwanted telemarketing calls.
- We supported the FTC's implementation of the Children's Online Privacy Protection Act, one of the seminal privacy laws passed in this country.
- We supported the clarification and strengthening of consumer disclosures required under the Used Car Rule.
- We supported the recently enacted Consumer Review Fairness Act, clarifying the FTC's authority to protect consumers against being forced to surrender their right to provide others with honest reviews about shoddy products, services, and treatment in the marketplace.
- We supported enactment of the Contact Lens Rule to ensure that consumers get their own copy of the prescription so they can shop around for their lenses, as well as the recent rulemakings to clarify that rule and its counterpart, the Eyeglass Rule.
- And right now, we are supporting efforts to preserve the FTC's authority to protect consumers from being victimized by deceptive pyramid schemes.

We also commend the FTC for the many law enforcement actions it has successfully pursued to obtain significant benefits for consumers. Some examples from the last few years include:

- *Cancer Fund of America* (halted fraudulent cancer charity that bilked over \$187 million from consumers).²
- *Western Union* (\$586 million to remedy long-standing use of money transfer system to facilitate fraud).³
- *T-Mobile and AT&T* (at least \$178 million for consumers who had unauthorized third party charges “crammed” onto their phone bills).⁴
- *Herbalife* (\$200 million for consumers who lost money in allegedly deceptive multi-level marketing operation, and significant reforms to company operations).⁵
- *Warner Bros.* (barring undisclosed payments to social media “influencers” for supposedly objective, positive product reviews).⁶
- *Craig Brittain* (ban on website operator who posted nude images of women online without their consent and tried to extract payment to remove them).⁷
- *AMG Services* (\$1.3 billion court judgment against fraudulent payday lending scheme that charged consumers multiple undisclosed and inflated fees).⁸

²<https://www.ftc.gov/news-events/press-releases/2015/05/ftc-all-50-states-dc-charge-four-cancer-charities-bilking-over> (with State Attorneys General).

³<https://www.ftc.gov/news-events/press-releases/2017/01/western-union-admits-anti-money-laundering-violations-settles> (with Department of Justice).

⁴<https://www.ftc.gov/news-events/press-releases/2014/12/t-mobile-pay-least-90-million-including-full-consumer-refunds>; <https://www.ftc.gov/news-events/press-releases/2016/12/ftc-providing-over-88-million-refunds-att-customers-who-were> (with FCC and State Attorneys General).

⁵<https://www.ftc.gov/news-events/press-releases/2016/07/herbalife-will-restructure-its-multi-level-marketing-operations>.

⁶<https://www.ftc.gov/news-events/press-releases/2016/07/warner-bros-settles-ftc-charges-it-failed-adequately-disclose-it>.

⁷<https://www.ftc.gov/news-events/press-releases/2015/01/website-operator-banned-revenge-porn-business-after-ftc-charges>.

⁸<https://www.ftc.gov/news-events/press-releases/2016/10/us-court-finds-ftcs-favor-imposes-record-13-billion-judgment>.

- *Ashley Madison* (\$1.6 million for alleged failure of online dating service to provide reasonable protections for highly sensitive personal data, and for posting fake member profiles to lure in new customers).⁹
- *Volkswagen* (over \$11 billion to consumers to remedy deceptive sales of cars marketed as “clean diesel,” but that contained secret software designed to evade pollution emissions tests).¹⁰

Notably, the FTC brought these actions—which address topics ranging from pyramid schemes and charity fraud, to phony reviews and data breaches—as a bipartisan group of President-appointed and Senate-confirmed Commissioners. These actions, like all significant FTC activity, required formal consideration and approval by a majority of Commissioners. And while concurring and dissenting statements in some FTC cases reveal that the Commissioners disagree on occasion, the vast majority of Commission votes over the years have been unanimous. For example, when Commissioner Joshua Wright ended his tenure at the FTC, he noted that he had dissented on approximately 4% of Commission votes, and issued a written dissent in just *half-a-percent* of consumer protection motions—all during a period in which he was in the minority.¹¹

In creating the FTC more than a century ago, Congress vested it with broad jurisdiction under the Federal Trade Commission Act so that it could reach “unfair or deceptive” practices wherever they occur. Congress deliberately provided the FTC with broad and flexible authority to ensure that it could address a wide range of practices across the marketplace,¹² and that has proven to be a wise decision. The

⁹<https://www.ftc.gov/news-events/press-releases/2016/12/operators-ashleymadisoncom-settle-ftc-state-charges-resulting> (with State Attorneys General).

¹⁰<https://www.ftc.gov/news-events/press-releases/2017/05/federal-judge-approves-ftc-order-owners-certain-volkswagen-audi> (with Department of Justice and State of California).

¹¹ <https://twitter.com/ProfWrightGMU/status/634778695727755264>.

¹² See, e.g., *FTC v. Sperry & Hutchinson Trading Stamp Co.*, 405 U.S. 233, 240 (1972), quoting Senate Report No. 597, 63d Cong., 2d Sess., (1914), p. 13: “The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it would, by a general declaration condemning unfair practices, leave it to the Commission to determine what practices were unfair. It concluded that the latter course would be the better, for the reason, as stated by one of the representatives of the Illinois Manufacturers’ Association, that there were too

FTC is the only “general purpose” consumer protection agency at the federal level, so it plays a critical role in promoting fairness and truthfulness across many industry sectors. In addition, companies introduce many new products, services, and features into the marketplace every day, but this progress and growth has also created new opportunities for scams and harms that once would have been unimaginable.

Who could have anticipated in 1914, when the FTC Act was passed, that there would be spyware, spam, massive data breaches, or tech support scams? And who knew that cars would someday be able to drive themselves, or that your refrigerator or your children’s toys would connect to a network of computers in your home, creating risks to personal data and documents that consumers reasonably believe they are storing safely?

The flexibility in the FTC Act also enables the agency to protect, not just individual consumers, but also small businesses that have been preyed upon by other companies peddling fraudulent business services.¹³

But despite the breadth of the FTC Act, the agency’s effectiveness is limited by certain restrictions on its authority. Notably, for historical reasons that no longer make sense, the FTC lacks authority to address unfair or deceptive practices by “common carriers” and nonprofit entities. It has very limited rulemaking authority. And it can only seek penalties for law violations in very specific instances.

In my experience, the FTC is very careful about how it pursues its mission and how it treats all affected parties. The FTC’s Commissioners and staff take great pride in being fair and evenhanded and, given the agency’s relatively small size, have no choice but to focus the FTC’s resources strategically and deliberately. The agency also takes appropriate care not to interfere with or disrupt legitimate business activity. This care is taken not only at the Commissioner level, but throughout the decision-making process in the Bureaus.

many unfair practices to define, and, after writing 20 of them into the law, it would be quite possible to invent others. . .”).

¹³ See <https://www.ftc.gov/about-ftc/bureaus-offices/bureau-consumer-protection/small-business>.

For example, many companies are given an opportunity to negotiate a consent order prior to the staff recommending an enforcement action to the Commission. If a company chooses not to enter into a consent, it has the opportunity to meet with the Director of the Bureau of Consumer Protection and, subsequently, all of the Commissioners prior to any decision about whether to issue a complaint.

In addition, to assist companies seeking to comply with the law, the Commission provides online business guidance on a wide range of topics, including data security,¹⁴ endorsements and testimonials,¹⁵ environmental claims,¹⁶ jewelry claims,¹⁷ native advertising,¹⁸ and how to make clear and conspicuous online disclosures.¹⁹

The Commission also regularly holds public workshops, enlisting a range of stakeholders from the industry, advocacy, academic, and tech communities to discuss emerging issues and possible solutions.²⁰ And the FTC employs dozens of economists in its Bureau of Economics, whose role is to consider the effects of potential Commission actions on consumers, businesses, and the marketplace as a whole, and to advise the Bureaus and the Commission on whether to take such actions.

In addition, the FTC recently created an Office of Technology Research and Investigations, and has appointed a series of Chief Technologists, to ensure that the Commission thoroughly understands new and emerging technologies as it seeks to address consumer protection issues in our increasingly connected world.

¹⁴<https://www.ftc.gov/tips-advice/business-center/guidance/start-security-guide-business>.

¹⁵ <https://www.ftc.gov/news-events/media-resources/truth-advertising/advertisement-endorsements>.

¹⁶<https://www.ftc.gov/news-events/media-resources/truth-advertising/green-guides>.

¹⁷<https://www.ftc.gov/news-events/media-resources/tools-consumers/jewelry-guides>.

¹⁸<https://www.ftc.gov/tips-advice/business-center/guidance/native-advertising-guide-businesses>.

¹⁹<https://www.ftc.gov/news-events/press-releases/2013/03/ftc-staff-revises-online-advertising-disclosure-guidelines>.

²⁰ <https://www.ftc.gov/news-events/audio-video/ftc-events/workshops>. Recent topics include military consumers, connected cars, identity theft, artificial intelligence and blockchain technologies, drones, ransomware, charity fraud, and new technologies and research affecting privacy (“PrivacyCon”).

Understandably, individuals and companies may not like being the focus of an investigation, even in those instances when the investigation is ultimately closed without Commission action. However, in my experience, the FTC's actions are appropriately measured, well-considered, and grounded in the law and in the FTC's fundamental mission to protect U.S. consumers. Some in the consumer advocacy community, including my organization, have at times wished that the FTC could and would do more.²¹ Nevertheless, we consider the agency one of our champions.

Thanks to the FTC, and to Congress' wisdom in establishing it, consumers enjoy a far more fair, dependable, and consumer-friendly marketplace than otherwise would exist. Moreover, businesses operating fairly and honestly are rewarded with a more level playing field, where bad actors cannot count on getting away with and profiting off of their illegal activity.

We appreciate the interest in the FTC that this Subcommittee is taking as part of its oversight responsibilities. I am aware of a number of proposals that have been put forward to change the way the FTC operates, some of which may be discussed here today.

We wrote letters to the House Energy and Commerce Committee last year expressing concern about a number of proposals being considered there that would have altered, restricted, or encumbered the FTC's investigation and enforcement procedures.²² Those letters were sent before I arrived, but I agree with the concerns they raise. While some of the Committee's proposals would have strengthened the FTC's ability to protect consumers—and indeed, a couple of them were ultimately

²¹<https://consumersunion.org/research/joint-comments-to-the-ftc-on-proposed-settlements-with-used-car-dealers-under-the-carmax-asbury-and-west-herr-brands-about-recalled-cars-advertised-as-safe/> (FTC should do more to stop dealer deception regarding cars with open recalls).

²²<https://consumersunion.org/research/consumers-union-and-partners-urge-u-s-house-committee-in-letter-to-protect-the-ftc/>.

signed into law²³—some would have severely hampered the FTC’s ability to protect consumers in today’s exciting, but highly challenging consumer marketplace.²⁴

I am also aware that this Subcommittee is reviewing January 2017 recommendations from the American Bar Association (ABA) Section of Antitrust Law, some of which address processes and practices related to the FTC’s consumer protection mission. While we share the goals of the ABA and this Subcommittee to ensure fairness, balance, and transparency in the FTC’s operations, we do not support a number of the recommendations as currently framed. Some of them would limit the FTC’s effectiveness in protecting consumers, which remains—and should always remain—the paramount mission of the FTC. And some appear to rely on single anecdotes that do not reflect my longtime experience at the FTC.

Consumers face enormous challenges navigating today’s marketplace, making it harder than ever to avoid fraud, deception, and other harms. Every day, they face 24-hour data collection and advertising, phishing attempts, imposter scams, massive data breaches, highly sophisticated frauds, and confusion about who they can trust. In this environment, the FTC needs more authority to protect consumers, not less, including stronger tools to protect consumers from privacy and security threats; broader jurisdiction over common carriers and other entities currently shielded from liability; stronger remedies to hold wrongdoers accountable; and greater resources to address consumer harms across the entire marketplace.

Because my first-hand experience at the FTC informs how the many proposals under consideration would affect the FTC’s work, I am pleased to have been invited here today to assist the Subcommittee in its deliberations. Although the FTC is not perfect, my experience is that it employs procedures appropriate to its responsibilities, that it uses them fairly and evenhandedly, and that it pursues its mission with dedication, even as it observes the limits of its authority. I and my

²³ See Consumer Review Fairness Act of 2016, <https://www.congress.gov/bill/114th-congress/house-bill/5111>; BOTS Act of 2016, <https://www.congress.gov/bill/114th-congress/senate-bill/3183>.

²⁴ For example, we opposed the proposal to cap the length of FTC consent decrees to eight years, and to require the FTC to justify continuing non-fraud decrees for more than five years, because such requirements would undermine the FTC’s ability to prevent repeat offenses.

colleagues at Consumers Union stand ready to assist this Subcommittee in evaluating these proposals, and to take a careful look at any other recommendations that the Subcommittee believes may have merit.

Thank you again for the opportunity to testify.