

**BEFORE THE SENATE COMMITTEE ON COMMERCE,  
SCIENCE AND TRANSPORTATION**

**HEARING ON PROTECTING CONSUMER PRIVACY**

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Chair Cantwell, Ranking Member Wicker, and members of the Committee, I am David C. Vladeck, a professor at Georgetown University Law Center, former Director of the Federal Trade Commission’s Bureau of Consumer Protection, and co-founder and faculty director of Georgetown Law’s Center on Privacy & Technology.

I am here to explain why I strongly support the proposed legislation before the Committee today, which will provide funding for the Federal Trade Commission (“FTC”) to create a new technology-centered Bureau that will focus on safeguarding your constituents’ privacy and data security, and combatting other digital harms. This proposal builds on the Chair’s 2019 privacy bill, which called for a new privacy, data security and technology bureau within the FTC.<sup>1</sup>

\* *First*, the proposed legislation will ameliorate, but not resolve, the chronic under-funding and under-staffing of the FTC. Even though the United States’ gross domestic product (“GDP”) has grown at least four-fold since 1980,<sup>2</sup> and even though the FTC now enforces eighty statutes in addition to the FTC Act, the FTC is significantly smaller today – in both funding and staffing – than it was in 1980. Passage of this legislation will be an urgently needed boost to the FTC’s ability to fend off and punish privacy violations and other digital harms – from internet scams

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<sup>1</sup> See Senate Bill No. 2968, 116<sup>th</sup> Congress, 1<sup>st</sup> Sess. § 301 (2019).

<sup>2</sup> See, e.g., <https://www.statista.com/statistics/263601/gross-domestic-product-gdp-per-capita-in-the-united-states/>.

and data breaches to dark pattern manipulation and ransom-ware attacks – that threaten businesses, government entities, and your constituents.<sup>3</sup>

\* *Second*, the reality is that the FTC does not have adequate resources to safeguard online privacy and fight digital threats, notwithstanding the fact that the FTC remains the most effective enforcement agency in the world. The proposed legislation will help close the resource gap between the FTC and its sister law enforcement agencies. One measure of the resource gap is to compare the FTC's resources to those of its domestic and international counterparts. In every head-to-head comparison, whether it is with domestic agencies like the Securities and Exchange Commission and the Consumer Financial Protection Bureau, or foreign counterparts like the Irish, British, or French Data Protection authorities, the FTC loses, generally by a wide margin. Without more resources, the FTC will not be able to stem the growing tide of attacks on privacy and other digital harms, and the cost to the United States will continue to vastly exceed the sums proposed in this legislation.

\* *Third*, the FTC can create a new Bureau to focus on privacy and other digital threats without undermining the Bureau of Consumer Protection's ability to do its job of protecting consumers in the marketplace. My view (and I emphasize that I am not speaking for the FTC) is that the FTC would benefit from the creation of a new Bureau that would focus on safeguarding privacy and fighting digital harms. The

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<sup>3</sup> See Federal Trade Commission, *FTC Appropriation and Full-Time Equivalent (FTE) History* (last visited Sept. 24, 2021), <https://www.ftc.gov/about-ftc/bureaus-offices/office-executive-director/financial-management-office/ftc-appropriation>.

funding authorized in this legislation would allow the FTC to hire and retain a critical mass of technologists, user experience designers, engineers, and other technical staff. The FTC has never had a cohort of technologists, a vacuum that has hindered the Commission's ability effectively to regulate the major tech companies. To round out a new Bureau, the FTC could transfer the Division of Privacy and Identity Protection (DPIP), which at present has 61 full time employees, almost all lawyers.<sup>4</sup> The new Bureau would also need to bring in experts from the Divisions of Marketing Practices, Financial Practices and Enforcement, and work closely with other components of the Bureau of Consumer Protection, including the Division of Litigation Technology and Analysis.

My point here is modest: There is plainly a path forward for the FTC to create a new Bureau that focuses on protecting privacy and combatting other digital harms, without undermining the Bureau of Consumer Protection's ability to do its job. Many senior FTC staff have advocated for the creation of a Bureau to focus on technology-related threats for some time, but given resource constraints, the FTC has been wary about doing so. The enactment of this legislation will give the FTC the tools to reorganize and devote greater resources to fighting digital harms.

### **I. The FTC Is Under-Funded and Under-Resourced.**

The FTC's ever-growing statutory responsibilities, along with the growth of the economy, have long outstripped the Commission's ability to fully tackle the many

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<sup>4</sup> FTC, *Fiscal Year 2021 Congressional Budget Justification*, at 121 (available at [https://www.ftc.gov/system/files/documents/reports/fy-2021-congressional-budget-justification/fy\\_2021\\_cbj\\_final.pdf](https://www.ftc.gov/system/files/documents/reports/fy-2021-congressional-budget-justification/fy_2021_cbj_final.pdf)).

missions Congress has assigned to it. This erosion started in the 1980s. Since then, the Commission's budget and staffing allocations shrank by nearly half. At the same time, the emergence of today's tech-driven economy has made the FTC's work far more complex, and issues relating to technology now dominate the Commission's docket.

Notwithstanding these challenges, the FTC's domestic and international counterparts are better funded and staffed, especially when measured by their mission and scope. The proposed legislation, if enacted, will begin to address forty years of underfunding and understaffing, and thus help empower the FTC better to protect consumers in the digital age.

The hard fact is that the FTC has never recouped from severe budget and staffing constrictions imposed throughout the 1980s. At its peak in 1980, the FTC had a staff of 1,719 full-time equivalent ("FTE") employees to enforce approximately thirty statutes.<sup>5</sup> 1981 marked the beginning of a steady decline in the Commission's resources. In a seven-year span, the Commission's budget stalled out at \$66 million, with its staff whittled down by almost half to a mere 894 FTEs by 1989.<sup>6</sup> Although there has been some growth in the last decade, the FTC still operated with only a

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<sup>5</sup> See Federal Trade Commission, *FTC Appropriation and Full-Time Equivalent (FTE) History* (last visited Sept. 24, 2021), <https://www.ftc.gov/about-ftc/bureaus-offices/office-executive-director/financial-management-office/ftc-appropriation>.

<sup>6</sup> See Federal Trade Commission, *FTC Appropriation and Full-Time Equivalent (FTE) History* (last visited Sept. 24, 2021), <https://www.ftc.gov/about-ftc/bureaus-offices/office-executive-director/financial-management-office/ftc-appropriation>.

\$331 million budget and only 1,128 FTEs in Fiscal Year 2020 (“FY20”).<sup>7</sup> This is less than two-thirds of the manpower and only a thirty percent greater budget than the Commission enjoyed forty years ago, yet today’s FTC is charged with a much broader and complex mission than its predecessors. Prior budget increases have been modest, largely covering mandatory increases in staff compensation and infrastructure costs, not desperately needed improvements like hiring technologists and modernizing the Commission’s technology.<sup>8</sup>

While resources have been constrained, the Commission’s responsibilities have expanded and continue to do so. Today’s Commission has the responsibility of enforcing significantly more statutes than it did in 1980. In fact, since 1980, Congress has enacted more than fifty statutes that require the FTC to take action.<sup>9</sup> The FTC currently enforces eighty-one antitrust and consumer protection laws, as well as the Federal Trade Commission Act.<sup>10</sup> At the end of 2020 alone, three new statutes were enacted tasking the Commission with additional administrative and enforcement

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<sup>7</sup> *See id.*

<sup>8</sup> *See* Federal Trade Commission, *Prepared Statement Before the Committee on Appropriations, U.S. House of Representatives* (Sept. 25, 2019), available at [https://www.ftc.gov/system/files/documents/public\\_statements/1545285/appropriations\\_committee\\_testimony\\_092519.pdf](https://www.ftc.gov/system/files/documents/public_statements/1545285/appropriations_committee_testimony_092519.pdf); Federal Trade Commission, *Fiscal Year 2020 Congressional Budget Justification 3*, available at [https://www.ftc.gov/system/files/documents/reports/fy-2020-congressional-budget-justification/fy\\_2020\\_cbj.pdf](https://www.ftc.gov/system/files/documents/reports/fy-2020-congressional-budget-justification/fy_2020_cbj.pdf) (requesting budget increase of \$5.98 million, about 73% of which would go toward infrastructure improvements and mandatory compensation increases).

<sup>9</sup> Federal Trade Commission, *Statutes Enforced or Administered by the Commission*, available at <https://www.ftc.gov/enforcement/statutes>.

<sup>10</sup> *Id.*

duties.<sup>11</sup>

Not surprisingly, most of the responsibilities Congress has assigned to the Commission relate to privacy and data protection. A number of the post-1980 FTC statutes include important privacy laws such as the Children’s Online Privacy Protection Act (“COPPA”), the Gramm-Leach-Bliley Act, and the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (“CAN-SPAM Act”).<sup>12</sup> The FTC’s privacy-related enforcement matters have accounted for more than 130 spam and spyware cases, over 80 cases alleging privacy violations, more than 100 cases under the Fair Credit Reporting Act, and dozens of cases under Gramm-Leach-Bliley, the COPPA, and other related privacy-protective statutes.<sup>13</sup>

Not only have the Commission’s statutory responsibilities expanded, but the U.S. economy has also grown exponentially. In 1980, the U.S. GDP totaled just under \$3 trillion in today’s dollars.<sup>14</sup> Today, it totals about \$21 trillion.<sup>15</sup> And, with the exception of the recession years of 2008 and 2009 and the pandemic year of 2020, the

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<sup>11</sup> Federal Trade Commission, *Statutes Enforced or Administered by the Commission*, available at <https://www.ftc.gov/enforcement/statutes> (The COVID-19 Consumer Protection Act, the Horseracing Integrity and Safety Act, and the No Surprises Act).

<sup>12</sup> New America, *Revamped FTC or New Agency*, available at <https://www.newamerica.org/oti/reports/does-data-privacy-need-its-own-agency/revamped-ftc-or-new-agency/>

<sup>13</sup> Federal Trade Commission, *2020 Privacy and Data Security Update*, (May 24, 2021), [https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-2020-privacy-data-security-update/20210524\\_privacy\\_and\\_data\\_security\\_annual\\_update.pdf](https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-2020-privacy-data-security-update/20210524_privacy_and_data_security_annual_update.pdf)

<sup>14</sup> World Bank, *GDP (current US\$) - United States* (last visited Sept. 23, 2021), <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?end=2020&locations=US&start=1978&view=chart>.

<sup>15</sup> *See id.*

American economy has reliably grown each year.<sup>16</sup> Though we are still in the throes of our battle against COVID-19, both the Federal Reserve and the OECD project a 6% GDP growth rate for 2021, thanks in large part to Congressional interventions like the American Rescue Plan.<sup>17</sup>

The booming technology sector, where FTC expertise and regulatory oversight are crucial, has contributed much to America's economic growth since the 1980s. Employment in the technology sector increased by 36% from 1990-2000, and by 20% from 2010-2015, nearly double total private sector expansion in the same window of time.<sup>18</sup> Today, high-tech industries account for about 10% of all U.S. jobs and over 18% of U.S. output, with growth expected to continue at a faster rate than the overall occupational average.<sup>19</sup>

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<sup>16</sup> World Bank, *GDP Growth (annual %) - United States* (last visited Sept. 23, 2021), <https://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG?end=2020&locations=US&start=1978&view=chart>.

<sup>17</sup> See Organization for Economic Co-Operation and Development, *Keeping the Recovery on Track*, Interim Report (Sept. 2021), <https://doi.org/10.1787/490d4832-en>; Tim Smart, *Fed Holds Steady on Interest Rates but Shaves 2021 Economic Forecast*, U.S. News (Sept. 22, 2021), <https://www.usnews.com/news/economy/articles/2021-09-22/fed-holds-steady-on-interest-rates-but-shaves-2021-economic-forecast>.

<sup>18</sup> Charles S. Gascon & Evan Karson, *Growth in Tech Sector Returns to Glory Days of the 1990s*, St. Louis Federal Reserve (July 25, 2017), <https://www.stlouisfed.org/publications/regional-economist/second-quarter-2017/growth-in-tech-sector-returns-to-glory-days-of-the-1990s>.

<sup>19</sup> See Brian Roberts & Michael Wolf, *High-Tech Industries: An Analysis of Employment, Wages, and Output*, Bureau of Labor Statistics (May 2018), [https://www.bls.gov/opub/btn/volume-7/high-tech-industries-an-analysis-of-employment-wages-and-output.htm?view\\_full](https://www.bls.gov/opub/btn/volume-7/high-tech-industries-an-analysis-of-employment-wages-and-output.htm?view_full); Bureau of Labor Statistics, *Occupational Outlook Handbook: Computer and Information Technology Occupations*, (last visited Sept. 23, 2021), <https://www.bls.gov/ooh/computer-and-information-technology/home.htm>.



As the tech sector grows, so too does the velocity of the integration of technology into our daily lives, underscoring the need not only for a well-resourced FTC, but for an FTC with specific and deep expertise in technology. The advance of laptops, tablets, smartphones, and other internet-connected devices, along with the near ubiquitous participation in social media, have resulted in the generation of unprecedented amounts of sensitive personal data – including geolocation data, information about political affiliations, product preferences, and attitudes about virtually everything. Much of this personal data is constantly harvested, packaged, and sold and often resold. The commodification of sensitive personal data is a clear threat to consumer privacy and threatens other digital harms.<sup>20</sup>

To be sure, technologies like videoconferencing have sustained our personal, professional, and academic lives through the pandemic, keeping us connected and “keeping the white-collar economy alive.”<sup>21</sup> But the FTC’s enforcement action against Zoom underscores that threats to privacy and data security are ever-present, even with what seem to be innocuous technologies.<sup>22</sup> The FTC faces a crucial and ever-increasing mission of keeping Americans safe from those who wish to exploit technology for harm or fail to take essential measures to safeguard data. The

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<sup>20</sup> See Tuan C. Nguyen, *The Brief History of Smartphones*, ThoughtCo (Jan. 30, 2021), <https://www.thoughtco.com/history-of-smartphones-4096585>.

<sup>21</sup> See Matthew Yglesias, *The Tech Sector is Finally Delivering On Its Promise*, Vox (Apr. 7, 2020), <https://www.vox.com/2020/4/7/21209605/solow-paradox-coronavirus-technology>.

<sup>22</sup> See FTC, *In the Matter of Zoom Video Communications, Inc.*, <https://www.ftc.gov/system/files/documents/cases/1923167zoomcomplaint.pdf>.

Committee’s proposal would be a critical first step to ensure the FTC possesses sufficient capabilities to protect consumers as technologies continue to evolve.

## **II. Comparing the FTC to its Counterpart Agencies Demonstrates the Depth of the Resource Gap.**

It is hard to showcase the depth of the FTC’s resource deficit in isolation. To drive the point home, consider the asymmetry between the FTC’s mission and budget when compared to federal agencies with similar, and in some cases narrower, statutory authority. Consider the Securities and Exchange Commission (“SEC”), for example, which oversees securities trading on U.S. equity markets and enforces federal securities law. To be sure, the SEC has a vital mission to perform, and I am not suggesting that its appropriation is too generous. But the SEC’s annual budget is almost \$2 billion and it has a staff of approximately 4,700 FTEs – that is, nearly six times the FTC’s budget and four times the FTC’s allocation of FTEs.<sup>23</sup> The SEC’s enforcement budget, standing alone, is nearly double that of the entire FTC.<sup>24</sup> Even the Consumer Financial Protection Bureau (“CFPB”), which has regulatory authority over certain consumer financial products and services, had a FY21 budget that exceeded the FTC’s budget by almost \$250 million and by nearly four hundred FTEs.<sup>25</sup>

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<sup>23</sup> See Securities and Exchange Commission, Fiscal Year 2022 Congressional Budget Justification and Annual Performance Plan and Fiscal Year 2020 Annual Performance Report 2 (2021), available at <https://www.sec.gov/cj>.

<sup>24</sup> *Id.* at 23.

<sup>25</sup> Bureau Of Consumer Financial Protection, Annual Performance Plan and Report, and Budget Overview 10 (2021), available at [https://files.consumerfinance.gov/f/documents/cfpb\\_performance-plan-and-report\\_fy21.pdf](https://files.consumerfinance.gov/f/documents/cfpb_performance-plan-and-report_fy21.pdf).

There is also a significant salary gap between the FTC and other agencies that oversee financial regulation that jeopardizes the FTC's ability to retain top talent. FTC employees do not qualify for enhanced compensation under the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"). As a result, their salaries are not on par with similarly situated federal employees working in financial regulation even though the FTC also works on complex investigations of and litigation against the world's largest corporations.<sup>26</sup> And salaries at these corporations and the law firms that represent them dwarf those in government, which has helped tech giants, like Google, Facebook, Amazon and others, poach FTC staffers at a remarkable rate.<sup>27</sup> Leveling FTC employees' salaries with their government counterparts would restore parity within government and help the FTC retain top talent, including technologists and engineers.

The FTC's resources also pale in comparison to its international counterparts. Many of our European allies have created agencies to enforce privacy and data security protections – just a part of what the FTC does.<sup>28</sup> For example, Ireland's Data Protection Commission ("DPC") has 145 staff members, for a nation with a population

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<sup>26</sup> Paul H. Kupiec, *The Money in Banking: Comparing Salaries of Bank and Bank Regulatory Employees*, American Enterprise Institute for Public Policy Research 7-10 (April 2014).

<sup>27</sup> See Alex Kantrowitz, "It's Ridiculous." *Underfunded FTC and DOJ Can't Keep Fighting the Tech Giants Like This*, Big Technology Newsletter (Sep. 17, 2020), <https://bigtechnology.substack.com/p/its-ridiculous-underfunded-us-regulators>.

<sup>28</sup> The GDPR explicitly requires that the member states' Data Protection Supervisory Authorities are provided with the financial and human resources, premises, and infrastructure necessary for the effective performance of their tasks. Commission Regulation 2016/679, General Data Protection Regulation, art. 1, 2016 O.J. (L 119) 1, 22.

around 5 million.<sup>29</sup> DPC Commissioner Helen Dixon said these resources are “vital for the DPC to continue to build its capacity as an internationally respected and effective supervisory authority.”<sup>30</sup> If the FTC had comparable staff proportional to the U.S. population of over 333 million, it would have over 9,600 staff dedicated just to privacy. The British Information Commissioner’s Office (“OIC”) has more than 500 staff members.<sup>31</sup> France’s data protection authority (“CNIL”) has 255 staff members to protect a population of about 65 million, and it is backed up by its sister agency, Inria (the French National Institute for Research in Digital Science and Technology), which has nearly 4,000 engineers on staff.<sup>32</sup> That’s a drastic difference given only 61 FTC staffers are dedicated to protecting the privacy of more than 333 million Americans. The resources of our foreign counterparts continue to grow in proportion to the need for privacy regulations while the FTC’s resources remain static.

Increasing the FTC’s budget is absolutely necessary. Even with its limited funding and staffing, the FTC continues to operate at a high level, as demonstrated by its recent order enforcement case against Facebook, which resulted in the strictest consent decree ever entered anywhere, as well as a record-breaking \$5 billion penalty,

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<sup>29</sup> <https://www.dataprotection.ie/en/news-media/press-releases/data-protection-commission-publishes-2020-annual-report>;  
<https://www.dataprotection.ie/sites/default/files/uploads/2021-05/DPC%202020%20Annual%20Report%20%28English%29.pdf>

<sup>30</sup> <https://www.dataprotection.ie/en/news-media/press-releases/data-protection-commission-statement-funding-2021-budget>.

<sup>31</sup> <https://ico.org.uk/about-the-ico/our-information/history-of-the-ico/>.

<sup>32</sup> [https://www.cnil.fr/sites/default/files/atoms/files/the\\_cn timer\\_in\\_a\\_nutshell\\_2021.pdf](https://www.cnil.fr/sites/default/files/atoms/files/the_cn timer_in_a_nutshell_2021.pdf).  
*See also* <https://www.inria.fr/en/inria-ecosystem>.

and a steady stream of enforcement cases. But meeting the challenges of protecting consumers from privacy violations, data breaches, identity theft, and other digital harms requires an infusion of funding and staff. The FY22 President's budget proposal is insufficient; its increase to \$389 million and 1,250 FTEs is a start, but still wholly inadequate. On the other hand, the proposed infusion of \$1 billion for a new Bureau that focuses on digital privacy and cybersecurity can be a game-changer. I support this proposal because it will align the FTC's budget with the realities of today's tech-based economy, help restore the FTC to parity with its domestic and international counterparts, and better enable the FTC to perform its important mission of protecting consumers.

### **III. Funding Will Enable the FTC to Create a Bureau Focusing on Fighting Digital Harms.**

There is no question that if Congress enacts the pending legislative proposal the FTC will be able to create a new Bureau devoted to fighting against digital harms without hollowing out the Bureau of Consumer Protection ("BCP"). After all, there is plenty of work for a new Bureau to focus on technology and digital harms and BCP will still have an avalanche of consumer protection work to keep it fully engaged. I recognize that for government veterans, the word "reorganization" is justifiably greeted with skepticism, alarm, or worse. But there is a difference where, as would be the case here, reorganization takes the form of adding substantial resources rather than simply re-allocating existing resources.

In my view, the first and most important measure the FTC should take in standing up a new Bureau is to recruit and hire a critical mass of top-notch

technologists. As far as I know, the FTC has never been able to have more than ten technologists on staff at any given time (and probably far fewer), and the small cohort has made it difficult for the FTC to retain technologists. The FTC likely needs several multiples of ten to ensure that the FTC has the expertise to regulate the major tech companies. And a critical mass of technologists is essential for several reasons, including instilling camaraderie and information sharing, enabling the Bureau to engage in multiple investigations simultaneously, helping staff with Section 6(b)<sup>33</sup> investigations, and giving the technologists time to keep up with emerging technologies and to conduct and publish research.<sup>34</sup>

To fully staff the new Bureau, the 61 staff currently assigned to BCP's Division of Privacy and Identity Protection would be transferred to the new Bureau. The new Bureau would also need to recruit a few experienced lawyers from several BCP Divisions, including Marketing Practices, Financial Practices, Enforcement, and Litigation Technology and Analysis. I assume that those Division would be able to replace lost staff.

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<sup>33</sup> 15 U.S.C. 46(b).

<sup>34</sup> Having in-house experts would substantially bolster the effectiveness of the FTC's enforcement cases, regardless of whether the cases are brought before the Administrative Law Judge or a federal court. For instance, in *FTC v. Commerce Planet*, a case that spanned 18 trial days, the FTC retained an expert on human computer interaction (in other words, user experience) to testify that the company's disclosures were designed to be obscured and were misleading. In ruling for the FTC, the District Court Judge said that "the Court finds the expert testimony of Jennifer King to be on-point and persuasive," sealing the FTC's win. *FTC v. Commerce Planet*, 878 F. Supp. 2d 1048, 1068 (C.D. Cal. 2012), *aff'd*, 815 F.3d 593 (9th Cir. 2016). Because of the expense of hiring outside experts, the FTC rarely does so in consumer protection cases.

A fully staffed new Bureau could also make critical changes to the way the FTC enforces the law. For one thing, the new Bureau could engage in real-time oversight of the tech companies to understand what they are actually doing in the marketplace, enabling the new Bureau to be pro-active in ways the FTC cannot undertake today. For another, having an in-house complement of technologists would enable the FTC to undertake simultaneously multiple investigations that require technical assistance, especially in investigations into data breaches, spyware, the Internet of Things, and the misuse of personal information. For yet another, the new Bureau could take over the responsibility of monitoring existing consent decrees involving tech companies, to ensure that the companies adhere to the requirements of the decrees, and if there are defaults, to help decide whether the FTC should launch an investigation or pursue an enforcement action.

And last, but hardly least, the new Bureau will have the authority, subject to Commission approval, to significantly modify the FTC's orders against tech companies. Due to resource constraints, FTC privacy orders require the company to hire a third-party assessor to conduct periodic audits. Section VIII of the FTC's 2019 Order Modifying Prior Decision and Order for Facebook lays out what is now the standard practice of requiring the company to hire an assessor, subject to the FTC's approval, to submit an initial assessment within six months, and thereafter submit biennial assessments.<sup>35</sup> But the FTC adopted the practice of using outside assessors

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<https://www.ftc.gov/system/files/documents/cases/c4365facebookmodifyingorder.pdf>.

in privacy cases mainly because of the resource constraints I have catalogued above. The new Bureau may choose to play a far more active, direct role in overseeing tech companies subject to FTC orders, and may, for example, require more frequent and robust exchanges between the FTC and the company so the FTC, in real-time, can assess whether the company is in fact in compliance with the FTC's order.<sup>36</sup>

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Let me end by making a few additional points that are not part of the pending legislation but are issues Congress must tackle if the FTC is going to fulfill its mission of safeguarding consumer privacy.

*First*, the FTC needs ordinary notice and comment rulemaking authority under Section 553 of the Administrative Procedure Act; without it, the FTC has no choice but to make policy through enforcement cases, a process that is slow, resource-intensive, and does not necessarily yield clear-cut standards.<sup>37</sup>

*Second*, the FTC needs initial fining authority, especially in cases involving digital harms. Companies should not get a free pass on privacy violations. Under

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<sup>36</sup> I should acknowledge that I was the Director of the FTC's Bureau of Consumer Protection when the Commission was crafting the initial orders in the Facebook and Google cases. Because of resource constraints, there was no discussion that the FTC should take on the front-line role of assessing the companies' ongoing compliance with the orders. For that reason, the FTC relied on third-party independent assessments; the utility of those assessments is subject to debate. There is no question that the assessments have worked reasonably well in the seventy or so data breach cases the FTC has brought.

<sup>37</sup> I recently testified in favor of House Bill 4447 before the House Committee on Energy and Commerce, Subcommittee on Consumer Protection and Commerce, which would restore to the FTC notice and comment rulemaking authority. See [https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Witness Testimony\\_Vladeck\\_CPC\\_2021.07.28.pdf](https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Witness%20Testimony_Vladeck_CPC_2021.07.28.pdf).



existing law, however, the only remedy for a first violation is a consent order, not a fine, and not redress, not just because of the Supreme Court’s ruling in *AMG v. FTC*, but because the currency in privacy violations is the misuse of sensitive personal data, which, unlike money, cannot be refunded or restored.

*Third*, the statutory tools the FTC has available are not sufficient to provide robust protection for consumers against digital harms, including privacy harms. The commands of Section 5 the FTC Act – that the FTC “prevent” “unfair and deceptive practices” in the marketplace – are not, in themselves, sufficient to create a meaningful legal regime that safeguards consumers. To be sure, the Act provides substantial ammunition for the Commission to bring enforcement cases for many kinds of egregious privacy harms; ammunition that the Commission has used against most of the major technology companies. But Section 5 cannot restrain more insidious practices that go beyond unfairness and deception, and Congress needs to enact a comprehensive privacy law or delegate greater power to the FTC to combat digital harms.<sup>38</sup>

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<sup>38</sup> I would like to acknowledge the exceptional assistance in preparing this testimony provided by Georgetown Law Center’s Communications and Technology Law clinic, including the clinic’s director, Professor Laura Moy, staff attorneys Victoria Tang and Daniel Jellins, and students Liliana Fiorenti, Anna Butel, Pariss Briggs and Philip Robins.