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Committee on Commerce, Science, and Transportation

**Hearing Before the Subcommittee on Consumer Protection, Product Safety,
and Data Security**

**Curbing COVID Cons: Warning Consumers about Pandemic Frauds, Scams,
and Swindles**

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Introduction

I thank the Subcommittee and its leadership for the invitation to participate in these proceedings.

The COVID-19 crisis has provided the occasion for the latest iteration of a grim phenomenon in human experience. Calamity creates conditions in which serious fraud flourishes. Amid catastrophe occasioned by natural disaster, economic collapse, or disease, craven individuals and organizations prey upon victims with false promises to alleviate misery. The desperation of victims to gain relief renders them especially vulnerable to malicious conduct.

The COVID Pandemic has administered a merciless stress test to our government institutions. Our public institutions have responded admirably to this test. Congress has strived to create new capabilities to challenge and deter serious fraud. The adoption of the COVID-19 Consumer Protection Act is but one illustration.² The Federal Trade Commission (FTC) and its partners at the state and local level have confronted COVID-related fraud with extraordinary dedication. The commitment, drive, and ingenuity of these institutions is inspiring to behold. With their offices

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² Pub. L. No. 116-260, 134 Stat. 1182, Division FF, Title XIV, § 1401(b)(1).

shuttered and staff working remotely, our consumer protection agencies have devised creative methods to challenge fraudulent, oppressive commercial conduct that has followed in COVID-19's wake.

The pandemic stress test also has illuminated weaknesses in the framework through which the United States and other countries address supplier misconduct amid crisis conditions. My testimony derives lessons from this experience to suggest how Congress and the regulatory community at home and abroad might improve the existing consumer protection framework. I also identify how the regulators since early 2000 have strengthened operational techniques and devised new approaches for the exercise of law enforcement and related policy duties. I recommend that agencies make recent, positive policymaking innovations lasting elements of agency practice.

Most of my suggestions deal with authority that the FTC can apply directly, or could apply, with an enhanced mandate from Congress. I offer an initial cautionary note about the effectiveness of the civil enforcement tools at the FTC's disposal. I believe the only way to deter the most serious fraudulent schemes we have observed is to subject violators to criminal punishment. Severe civil sanctions, including the imposition of monetary penalties and orders mandating restitution or disgorgement, are unlikely to deter truly corrupt individuals or malign enterprises, which often are adept at hiding or squandering assets to render them judgment proof in civil actions.

The FTC has a Criminal Liaison Unit which works with criminal prosecutors at the federal, state, and local levels to assist in the development of criminal cases against participants in serious fraud.³ I see an urgent priority to be the expansion of this effort to ensure that a greater number of malicious behaviors uncovered during the COVID-19 crisis, and in other settings, be punished through criminal proceedings. I doubt that we can approach desired levels of deterrence if potential wrongdoers do not face a growing possibility that fraud will cost them their freedom.

My testimony is guided partly by experience in serving as a Non-executive Director of the United Kingdom's Competition and Markets Authority (CMA). In today's proceedings I do not speak on CMA's behalf, but my comments are informed by the CMA's work in addressing problems related to COVID-19.

³ The functions of this group are described in Federal Trade Commission, Criminal Liaison Unit, at <https://www.ftc.gov/enforcement/criminal-liaison-unit>.

Filling Gaps and Correcting Vulnerabilities: Priorities for New Legislation or Deliberations that Could Yield New Legislation

In the following areas, new legislation would improve the effectiveness of the US consumer protection regime.

Federal Trade Commission Remedial Powers

Last Friday, the Supreme Court ruled that the FTC lacks authority under Section 1(b) of the Federal Trade Commission Act to obtain restitution and similar forms of equitable relief in antitrust and consumer protection cases.⁴ The ability to obtain equitable monetary relief (restitution and disgorgement) in actions filed directly in federal district court is vital element of the FTC's anti-fraud program. I endorse efforts by Congress to amend the FTC Act to give the FTC express authority to obtain the full range of equitable remedies, including monetary recoveries, for consumer protection violations. The ability to deprive wrongdoers of the financial gains from misconduct provides compensation for victims and increases deterrence by diminishing the returns to fraud and other forms of oppressive behavior.

I also suggest that Congress conduct deliberations concerning the Commission's ability to recover monetary remedies for antitrust violations. I believe there is a useful role for civil monetary relief in FTC antitrust enforcement, and I endorse the approach the Commission set out in a 2003 policy statement to seek such remedies in "exceptional cases" involving clear violations of the antitrust laws.⁵ The consideration of equitable monetary relief as a remedy in FTC actions filed in federal district court should be part of a larger discussion about what Congress believes to be the agency's role in developing competition law standards through, respectively, administrative adjudication and litigation in the federal district courts.

Another enhancement of the FTC's remedial authority I recommend for the Committee's consideration would be to establish a US replica of the markets regime now implemented in the United Kingdom by the Competition and Markets

⁴ AMG Capital Management, LLC. v. Federal Trade Commission, No. 19-508 (S.Ct., Apr. 22, 2021).

⁵ Federal Trade Commission, Policy Statement on Monetary Equitable Remedies in Competition Cases, 68 Fed. Reg. 45821 (2003). The Commission withdrew this policy statement in 2012. Federal Trade Commission, Withdrawal of the Commission Policy Statement on Monetary Equitable Remedies in Competition Cases, 77 Fed. Reg. 47071 (2012).

Authority.⁶ Part 4 of the Enterprise Act 2002⁷ enables the CMA to investigate markets where it appears that the structure of the market or the conduct of suppliers or customers in the market is harming competition and, where problems are identified, to impose remedies (including price caps) and make proposals to legislators to correct observed problems. This would enable the FTC to study sectoral or economy-wide phenomena and to order remedies regardless of whether the conditions or practices in question violate existing consumer protection laws.

Federal Trade Commission Jurisdictional Limitations

Congress should eliminate statutory exemptions that deny the FTC jurisdiction over common carriers, not-for-profit institutions, the business of insurance, and banks.⁸ Most of these jurisdictional limitations date back to the agency's creation. Some exemptions may have made sense when established; the economy and the affected fields of activity were much different. Today, the exemptions are embarrassing anachronisms that diminish the FTC's capability to perform the competition policy role that Congress set out in 1914 and to carry out the consumer protection and privacy responsibilities that now are key elements of the agency's law enforcement portfolio. On many occasions over the past two decades, the FTC has pled with the Congress to revisit and eliminate – or at least curtail – the jurisdictional exemptions.

Federal Trade Commission Budget and Compensation Levels for Employees

There is a grave mismatch between the duties Congress has assigned the FTC and the resources it has given the agency to carry out its mandate. There is a serious need to raise the FTC's budget, but not simply to build a larger staff by hiring more people. Reforms to the federal compensation system are necessary to attract and retain a larger number of elite personnel. I do not see how the FTC or many other public agencies can recruit and retain necessary personnel without a significant increase in the salaries paid to managers and staff.

Consider two possibilities for compensation reform. The first is to align FTC salaries with the highest scale paid to the various US financial service regulators. One model would be the compensation scale used to pay employees of the banking regulatory

⁶ William E. Kovacic, *Market structure and market studies*, in COMPETITION LAW AND ECONOMICS 30 (Jay Pil Choi, Wonhyuk Lim & Sang-Hyop Lee eds., 2020).

⁷ Enterprise Act 200, c.40, Section 4 ("Market Investigations").

⁸ See David A Hyman & William E. Kovacic, *Implementing Privacy Policy: Who Should Do What?*, 29 FORD. INTELL. PROP. MEDIA & ENT. L.J. 1119, 1133 (2019).

agencies; the salary scale for these bodies exceeds the General Schedule (GS) federal civil service wage scale by roughly twenty percent.⁹

In adopting the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010,¹⁰ Congress concluded that the importance of the mission of the new Consumer Financial Protection Bureau (CFPB) warranted higher salaries for the agency's personnel. If the higher salary scale made sense for the CFPB, I see no good reason why a more generous compensation schedule is not appropriate for what is the nation's leading consumer protection agency (and its leading federal data protection authority).¹¹

A second, more ambitious alternative would be to triple the FTC's existing budget of about \$330 million per year and use the increase mainly to raise salaries and partly to add more employees. This experiment might be carried out for a decade to test whether a major hike in pay would increase the agency's ability to recruit the best talent, retain the talent for a significant time, and apply that talent with greater success in a program that involves prosecuting numerous ambitious cases and devising other significant policy initiatives.

A major increase in compensation, either by adopting the CFPB model or trying our my more ambitious proposal, is a crucial test of our national commitment to improve the foundations for effective consumer protection enforcement. The nation should spend what it takes to get the best possible personnel to run the difficult cases (and carry out other measures, such as the promulgation of trade regulation rules) that will be the pillars of a new, expanded enforcement program. Such steps will become even more important if new political leadership seeks to close the revolving door, which has operated as a mechanism to encourage attorneys and economists to accept lower salaries in federal service in the expectation of receiving much higher compensation in the private sector at a later time.

⁹ See Paul H. Kupiec, *The Money in Banking: Comparing Salaries of Bank and Bank Regulatory Employees* (American Enterprise Institute, April 2014), https://www.aei.org/wp-content/uploads/2014/04/-the-money-in-banking-comparing-salaries-of-bank-and-banking-regulatory-employees_17170372690.pdf.

¹⁰ Pub. L. No. 111-203, 124 Stat. 1376 (2010).

¹¹ As a member of the FTC, I observed firsthand how the disparity in salaries between the CFPB and the FTC resulted in a significant migration after 2010 of the Commission's elite consumer protection attorneys and economists to the CFPB. Many of these individuals were major contributors to the FTC's consumer protection programs because they combined outstanding intellectual skills with decades of experience (much of it in middle-level and senior management positions) at the Commission. It was impossible to replace them with individuals of comparable skill and experience, and the FTC's performance suffered as a consequence.

Federal Trade Commission Administrative Process

I propose two legislative changes to the FTC's administrative framework to enable the Commission to carry out the full range of its duties, including consumer protection, more effectively. The first is to relax the limits that the Government in the Sunshine Act¹² imposes on the ability of commissioners to deliberate together privately to discuss matters of strategy and tactics. Among other consequences, the Sunshine Act severely limits the ability of a quorum of commissioners to deliberate over matters of agency policy except in meetings open to the public.¹³ Policy planning, strategy-setting, and case selection functions cannot be executed at the highest level of effectiveness without this reform. A central reason to entrust governance to a multimember body, rather than to govern an agency with a single executive, is to gain the benefits of deliberation. Collective decision making, and the informal collaborative discussions that surround it, are deemed useful to improve the agency's ability to make wise choices when setting priorities, formulate strategies for litigation and nonlitigation programs, and selecting projects. As now written and interpreted, the Sunshine Act severely reduces the FTC's ability to realize the theoretical advantages of collective governance. I know of no jurisdiction abroad that relies on an administrative commission to implement consumer protection law and encumbers the enforcement with so many restrictions on collegial decision making.¹⁴ In numerous conversations, officials with consumer protection agencies in other jurisdictions with multi-member commissions express disbelief that the United States created an administrative mechanism with enormous potential and then chose to undermine its implementation so severely.

To serve the accountability and transparency aims that motivated the adoption of the Sunshine Act, Congress could press the FTC to use other disclosure techniques. Here, as well, experience in foreign jurisdiction suggests a superior alternative path. A number of jurisdictions achieve desired transparency through measures that require their competition authorities to publish an annual statement of priorities, to issue their prioritization criteria, to provide explanations of the decision to prosecute and not to prosecute in individual cases, and to issue annual reports that discuss the

¹² P.L. 94-409, 90 Stat. 1241 (1976).

¹³ The Sunshine Act and its requirements are analyzed in Reeve T. Bull, *The Government in the Sunshine Act in the 21st Century* (Mar. 10, 2014) (report prepared for the Administrative Conference of the United States), <https://acus.gov/report/final-sunshine-act-report>.

¹⁴ My experience as a non-executive director of the CMA has highlighted how the FTC is largely foreclosed from using policy planning and prioritization techniques that are commonly employed to great advantage in other jurisdictions.

agency's progress in realizing its goals.¹⁵ In many instances, documents that set out priorities, case selection criteria, and results achieved are issued first in draft form for public comment. In addition to these measures, agency officials make regular appearances before legislative committees and in public fora to discuss the work of their institutions. These techniques can be supplemented with a program of ex post evaluation that tests, through actual experience, the assumptions that guided agency decisions in specific cases and supplies an additional basis for public debate about the agency's policymaking. Experience with the disclosure mechanisms described here suggests that other jurisdictions achieve informative public disclosure, and rigorous agency accountability, without the limits imposed by the Sunshine Act.

A second legislative measure is to enable the FTC to recruit and hire competition and consumer protection specialists to serve as administrative law judges.¹⁶ The administrative adjudication of cases was a crucial basis for the establishment of the Commission in 1914. Several pillars of the institution were designed solely, or principally, to support administrative adjudication: the multi-member governance configuration (with the board performing the functions of deciding to prosecute and of hearing appeals from administrative cases), the broad, scalable mandate of Section 5 of the FTC Act,¹⁷ and special information gathering powers to inform the development of legal standards to meet evolving commercial conditions. All of these characteristics put administrative adjudication at the center of the agency's work. There was little point in Congress designing the agency as it did except to create a platform for administrative adjudication and norms creation.

The proceedings before the administrative law judge (ALJ) are the vital first step of the FTC's administrative process. The administrative hearing collects and analyzes evidence and applies the law. It is the foundation for subsequent deliberation by the Commission sitting as a plenum in appeals. At present, the Commission has no ability to insist that ALJ appointees have significant prior experience in competition law or consumer protection law. The ALJ selection process is controlled by government-wide processes that accord no weight to the FTC's institutional

¹⁵ For example, it is sensible for the FTC to emulate the practice of many foreign authorities issue closing statements after the agency has conducted an investigation but decided not to intervene. The triggering event in the United States might be matters in which the agency has used compulsory process to conduct an inquiry.

¹⁶ See William E. Kovacic, Chairman, U.S. Federal Trade Commission, *THE FEDERAL TRADE COMMISSION AT 100: INTO OUR SECOND CENTURY* 42-45 (2009)

¹⁷ As amended by the Wheeler-Lea Act, Section 5 of the Federal Trade Commission Act prohibits "unfair methods of competition" and proscribes "unfair or deceptive acts or practices." 15 U.S.C. §45.

considerations. Congress can correct this deficiency by amending the government's ALJ selection process to use competition and consumer protection expertise as a key criterion in the choice of FTC ALJs.

Priorities for Future Legislative Oversight and Policy Discussion

In this section I identify possible focal points for congressional oversight and policy discussions.

Preserving and Extending Recent Operational Innovation and Identifying Other Areas to Improve FTC Capacity

I suggest that the Subcommittee convene formal proceedings or conduct informal discussions with the FTC to ask the agency to describe what new measures it devised to deal with the COVID crisis and how it adapted existing procedures and policy tools to detect and attack fraudulent schemes and to provide information to consumers. It appears that the Commission used a number of innovative methods to provide additional information to consumers and to expedite, as much as possible, the investigations and cases involving fraud. The Subcommittee might engage with the Commission in an ongoing conversation about what worked well and ought to be continued in more normal times.

The COVID stress test undoubtedly identified for the Commission areas in which greater expenditures and changes to operations are necessary for the future. This might be an ideal moment for the Subcommittee and the Commission to consider what type of capital investment might be needed to upgrade the agency's Consumer Sentinel system or the create net information networks to join up the FTC more closely with other public agencies with consumer protection duties and with civic bodies that monitor problems affecting consumers.

This would also be an appropriate time for a stocktaking exercise in which the Subcommittee and Commission reflect upon ways that, based on the experience of the past year, the pandemic has changed the commercial environment for the longer term – in some instances, creating conditions that pose greater hazards for consumers but in other cases inspiring commercial innovations that benefit consumers. In short, the Subcommittee might use its policy making deliberations to assess, with the FTC and other consumer protection bodies, how COVID has altered the commercial landscape in ways that dictate adjustments in consumer protection policy.

To my view, the FTC has the world's best consumer protection complaint database (the Consumer Sentinel Network) and the world's best program of consumer and business education. During the COVID-19 pandemic, the Commission has made excellent, creative use of these tools.

The Consumer Sentinel Network and the FTC's consumer and business education programs are the product of decades of farsighted investments in building a superior team of professionals and in creating an administrative infrastructure to support them. The formation of these capabilities is a genuine success story in modern public administration. As the nation emerges from the harshest period of the pandemic and returns to greater health and economic prosperity, there is an opportunity to use recent experience to consider how these efforts might be enhanced. The FTC and its many partners no doubt have learned about ways in which these systems can be improved. The Senate Commerce Committee might convene proceedings to discuss what these enhancements might be and to identify the resources needed to accomplish them.

I suspect one significant focal point for an enhancement of the FTC's capacity will be to strengthen its data analytics team. International experience suggests a way forward on this score. One of the most important policy innovations undertaken by the UK's CMA in recent years has been the creation of a Data, Technology and Analytics (DaTA) unit. Formed in 2018, the group now numbers over forty professionals, many with professional training and experience in fields such as computer science and engineering. The CMA formed the DaTA group out of recognition that a major enhancement of its scientific capabilities was necessary to enable the agency to meet the challenges, in its capacity as a competition agency and a consumer protection body, presented by developments in highly dynamic, high technology commercial sectors. It would no longer be possible to rely chiefly, or exclusively, on attorneys and economists to staff relevant projects.

The CMA DaTA team has proved to be an extremely valuable asset during the pandemic. Among other contributions, the DaTA unit played a vital role in the analysis of consumer complaints related to COVID. The unit's analytics group enabled the CMA to identify trends almost in real time and to publish weekly updates about trends in complaints. The results of the data analysis, in turn, enabled the CMA to focus its law enforcement efforts and related publicity work immediately upon areas of greatest urgency and to give valuable guidance (informed by reliable data) to other government bodies. I urge the Subcommittee to encourage the FTC to develop a comparable capability and to urge Congress to fund its development.

Larger questions about configuration of US Consumer Protection System

The remedies issues mentioned at the beginning of my testimony are only one set of developments that, I expect, will force a reconsideration of the institutional arrangements through which the federal government and its state and local partners implement consumer protection policy. We may see in the next year the adoption of long-awaited national privacy legislation. Should this come to pass, Congress must choose a mechanism for its enforcement. Should it give the new mandate to the FTC, create a standalone federal privacy agency, or devise other enforcement and policymaking frameworks? Whatever choice is made will have a major impact on the future operations of the FTC.

We also may see the courts revisit the basic question of whether the president may remove the members of the independent federal regulatory agencies without cause. My own interpretation of recent cases, such as the Supreme Court's decision in 2020 in *Seila Law LLC v. Consumer Financial Protection Bureau*,¹⁸ is that the Court may be minded to come back on the issue of the removal power in future cases and, perhaps, to alter fundamentally a key pillar of the modern regulatory state. There have been rumblings in the lower courts, as well, in the form of opinions that openly express doubts about the soundness of the FTC's administrative adjudication system.¹⁹

All of these developments suggest that we may be on the threshold of a basic reassessment, driven by the rulings of the federal courts, about the proper structure and allocation of authority to the regulatory bodies on which Congress has relied heavily for over a century to regulate commerce and protect consumers. This seems an increasingly urgent topic for consideration by the Subcommittee and agencies, such as the FTC, subject to its oversight.

FTC Rulemaking Authority

This is an ideal time for the Subcommittee to reflect upon what adjustments it might wish to make, beyond measures already adopted recently in COVID-related legislation, to clarify and augment the FTC's powers to issue trade regulation rules governing consumer protection and competition matters. In hearings and other policy deliberations, the Subcommittee might consider what mix of instruments it wishes the Commission to exercise (and what remedies to apply) in the future: the

¹⁸ 591 U.S. ____ (2020).

¹⁹ *Axon Enterprise v. Federal Trade Commission*, 2021 U.S. App. LEXIS 2374 (9th Cir., Jan. 28, 2021).

Magnuson-Moss rulemaking process, more generic Administrative Procedure Act rulemaking authority, or sector-specific grants of rulemaking powers. In doing so, I think it is sensible for the Subcommittee to be guided by the awareness that the federal judiciary today is unlikely to embrace statutory interpretation approaches that courts have used in the past to infer broad grants of rulemaking authority to the Commission for various purposes.²⁰ In my view, this reassessment grows more urgent in light of the Supreme Court's decision last Friday in the *AMG Capital Management* case, mentioned above.

Interagency Cooperation

The US consumer protection regime is a decentralized system that distributes policymaking and law enforcement power across numerous agencies at the federal, state, and local levels. Federal statutes coexist with myriad state laws mandates, some with powerful enforcement mechanisms.

The extraordinary decentralization and multiplicity of enforcement mechanisms supply valuable possibilities for experimentation and provide safeguards in case any single enforcement agent is disabled (*e.g.*, due to capture, resource austerity, or corruption).²¹ Among public agencies, there is also the possibility that federal and state government institutions, while preserving the benefits of experimentation and redundancy, could improve performance through cooperation that allows them to perform tasks collectively that each could accomplish with great difficulty, or not at all, if they act in isolation. Congress should use its oversight powers to encourage the FTC and the states to adopt collaborative approaches that preserve the multiplicity of actors in the existing U.S. regime but also promise to improve the performance of the entire system through better inter-agency cooperation – to integrate operations more fully “by contract” rather than a formal consolidation of functions in a smaller number of institutions.

For models of successful interagency cooperation, one might study the successful policy integration that has taken place through the work of the United Kingdom Competition Network and the European Competition Network. In both examples one can see the mix of organizational structures and personal leadership that enabled

²⁰ One case whose analytical foundations might be seen by some judges as worthy of a rethink is *National Petroleum Refiners Ass'n v. Federal Trade Commission*, 482 F.2d 632 (D.C. Cir. 1973).

²¹ David A. Hyman and William E. Kovacic, *State Enforcement in a Polycentric World*, 2019 B.Y.U. L REV. 1447.

agencies collectively to accomplish policy results that would have been unattainable through the work of single agencies operating in isolation. The United States has no equivalent to these institutions, which have served valuable policy formation and coordination functions abroad. The development by US consumer protection bodies of such networks could provide a useful way to replicate the success achieved in other jurisdictions. Other useful measures would include the creation of a regular program of secondments in which the leading agencies in the United States – federal and state bodies, alike – would swap personnel to build familiarity with the partner institutions and help create the trust and understanding that improve cooperation.

The Subcommittee's oversight activities can be a valuable means for guiding the FTC and other consumer protection bodies agencies to cooperate more extensively in ways that pool experience and knowledge and enable federal and state officials to get the greatest value from their consumer protection expenditures and respond more quickly and effectively to fraud and patterns of misconduct. The Subcommittee might help foster the expansion and formalization of interagency contacts through secondments, the formation of working groups, and the creation of U.S. equivalents of the ECN and the UKCN.

Promoting agency efforts to expand their existing impact evaluation programs – especially common evaluation exercises performed by federal, state, and local agencies, could be one part of a broader effort by Congress to support efforts to evaluate the effects of past antitrust cases – especially those with significance for the digital marketplace. Committee hearings could provide a regular forum in which agency officials, practitioners, and academics examine the effects of completed matters. Committees could cooperate with universities and think tanks to hold programs that study past experience. One step in this direction might be for consumer protection agencies to convene an event that focuses on lessons learned for consumer protection policy from the pandemic experience.

I also would note that during the crisis the FTC has formed closer alliances with its competition and consumer protection agencies overseas. By reason of desperate necessity, the FTC and its foreign counterparts have recognized, in a highly practical way, the benefits that can flow from pooling knowledge and accounting from policy experiments taking place in real time in other jurisdictions. I expect a favorable result of the crisis to be that the habit of deeper cooperation born out of the crisis will persist and improve policymaking in the future.