

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

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Introduction

Chairman Schakowsky, Ranking Member Rodgers, and distinguished members of the Subcommittee, thank you for the opportunity to testify. It is an honor to appear before you for the first time since I joined the Commission eight months ago.

Today, I would like to highlight three areas where I respectfully believe the U.S. Congress could assist the Federal Trade Commission in fulfilling its mission to protect consumers. First, enactment of privacy legislation; second, clarification of the FTC's authority under Section 13(b) of the FTC Act; and third, passage of REMS legislation. I would like to briefly discuss these three areas.

Privacy Legislation

With respect to privacy legislation, I agree with Chairman Simons' opening statement on this topic. I, too, encourage Congress to enact privacy legislation that would be enforced by the FTC. Businesses need clarity and certainty regarding rules of the road in this important area. The passage of the California Consumer Privacy Act and the prospect of bills in at least a dozen states have created confusion and uncertainty in the business community. This confusion is particularly acute because provisions in various state bills may contradict each other. Given these contradictions, and in light of the fact that online commerce is not just national but international, I encourage Congress to include preemption in any federal privacy legislation.

Even more importantly, consumers need clarity regarding how their data is collected, used, and shared. Privacy legislation should address these concerns and could help build public trust around data collection and use.

Privacy legislation also is necessary to address the emerging gaps in sector-specific approaches created by evolving technologies. For example, HIPAA applies to certain doctors' offices, hospitals, and insurance companies, but not generally to cash practices, wearables, apps, or websites like WebMD. Data protections should be based on the sensitivity of the data, not the entity or mechanism through which it is collected.

While privacy is important, so is competition. Federal privacy legislation must be carefully crafted to maintain competition and foster innovation. GDPR may have lessons to teach us in this regard. Preliminary research indicates that GDPR may have created unintended consequences, including a decrease in venture capital investment and entrenchment of dominant players in the digital advertising market.¹ Reports also indicate that compliance with GDPR is costly and difficult for small businesses and new entrants. U.S. legislation should seek to avoid these negative consequences. The FTC, with its dual mission in competition and consumer protection, is uniquely situated to provide technical assistance to Congress as it seeks to protect privacy while maintaining competition.

There are three other elements that I believe should be included in federal privacy legislation:

- Civil monetary penalties, which Congress has provided for in other statutes enforced by the FTC, including COPPA and the Telemarketing Sales Rule;

¹ See Jian Jia, Ginger Zhe Jin & Liad Wagman, The Short-Run Effects of GDPR on Technology Venture Investment (Nat'l Bureau of Econ. Research, Working Paper 25248, 2018), <https://www.nber.org/papers/w25248.pdf>; GDPR - What happened?, WHOTRACKSME BLOG (2018), <https://whotracks.me/blog/gdpr-what-happened.html>.

- Jurisdiction over non-profits and common carriers, which collect significant volumes of sensitive information; and
- Targeted APA rulemaking authority so that the FTC can enact rules both to supplement legislation and to permit adjustments in response to technological developments.

Finally, and on a related note, I also encourage Congress to enact data security and data breach notification legislation.

Section 13(b) of the FTC Act

The second area where Congress could provide assistance is through a clarification of the FTC's authority under Section 13(b) of our statute.² Decades of cases have established two key principles. First, the FTC may bring actions in federal district court to obtain injunctive relief. Second, the authority to grant injunctive relief confers upon courts the full panoply of equitable remedies, including equitable monetary relief.³

Our ability to protect consumers relies heavily on this authority. For decades, the FTC has used Section 13(b) to halt unfair and deceptive practices that have caused billions of dollars

² 15 U.S.C. § 53(b).

³ See *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 598 (9th Cir. 2016); *FTC v. Ross*, 743 F.3d 886, 890-892 (4th Cir. 2014); *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 365 (2d Cir. 2011); *FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 15 (1st Cir. 2010); *FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1202 n.6 (10th Cir. 2005); *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 468-470 (11th Cir. 1996); *FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1316 (8th Cir. 1991); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 571-572 (7th Cir. 1989); *FTC v. H. N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982).

in consumer injury. In 2018 alone, consumers received over \$1.6 billion in redress stemming from FTC enforcement actions.⁴

In 1994, Congress expressly affirmed that Section 13(b) authorizes the FTC to file suit to enjoin any violation of laws enforced by the FTC, to seek *ex parte* relief (including asset freezes), and to obtain consumer redress.⁵ But recent decisions have raised questions about our authority that conflict with the clear intent of Congress and long-established case law.

A case in the Third Circuit held, in February 2019, that the FTC cannot seek injunctive relief when the challenged conduct is not “ongoing or imminent.”⁶ But fraudsters frequently cease their unlawful conduct when they learn of an impending law enforcement action. Similarly, companies often suspend dubious advertising claims or anticompetitive conduct during the pendency of an FTC investigation. The Third Circuit standard could prevent us from seeking injunctive or equitable monetary relief in these circumstances even if we can show that the conduct is likely to recur based on past practices. This outcome is contrary to both Congressional intent and the vast majority of Section 13(b) case law.

Another concerning development arose in a recent Ninth Circuit case.⁷ There, one of the judges questioned the FTC’s authority to obtain equitable monetary relief under Section 13(b). Courts have long held that by granting the FTC authority to seek injunctive relief, Section 13(b)

⁴ 2018 Annual Highlights at 25, <https://www.ftc.gov/reports/annual-highlights-2018>.

⁵ 108 Stat. 1691, 1790-91 (1994).

⁶ *FTC v. Shire Viropharma Inc.*, No. 17-131-RGA, 2018 WL 1401329 (D. Del. Mar. 20, 2018); *aff’d*, 917 F.3d 147 (3d Cir. 2019).

⁷ *FTC v. AMG Servs., Inc.*, No. 2:12-cv-00536-GMN-VCF, 2016 WL 5791416, at *13 (D. Nev. Sept. 30, 2016), *aff’d*, 910 F.3d 417 (9th Cir. 2018).

gives courts the authority to grant the full range of equitable relief.⁸ We believe this interpretation more accurately reflects Congressional intent.

For these reasons, I urge Congress to clarify Section 13(b) of the FTC Act.

REMs

The third area where I believe legislation would be beneficial concerns abuses of Risk Evaluation and Mitigation Strategies, or “REMS,” in the pharmaceutical industry. Concerns arise when branded pharmaceutical manufacturers subvert laws and regulations designed to protect consumer health and safety and instead use them to protect themselves from competition. I am grateful that members of the Committee share these concerns and have approved legislation to preserve competition in this important area of our economy.

Conclusion

In closing, the FTC would welcome the opportunity to provide technical assistance to Congress on these legislative issues. Thank you for your assistance in strengthening the FTC’s ability to fulfill its mission.

I am happy to answer any questions you may have.

⁸ See *supra* n.3.