



COMMITTEE ON
ENERGY & COMMERCE

CHAIRMAN FRANK PALLONE, JR.

MEMORANDUM

May 3, 2019

To: Subcommittee on Consumer Protection and Commerce Members and Staff

Fr: Committee on Energy and Commerce Staff

Re: Hearing on “Oversight of the Federal Trade Commission: Strengthening Protections for Americans’ Privacy and Data Security”

On Wednesday, May 8, 2019, at 10:30 a.m. in the John D. Dingell Room, 2123 of the Rayburn House Office Building, the Subcommittee on Consumer Protection and Commerce will hold a hearing entitled, “Oversight of the Federal Trade Commission: Strengthening Protections for Americans’ Privacy and Data Security.”

I. BACKGROUND

The Federal Trade Commission (FTC) is an independent civil law enforcement agency with the dual mission of “[p]rotecting consumers and competition by preventing anticompetitive, deceptive and unfair business practices through law enforcement, advocacy, and education without unduly burdening legitimate business activity.”¹ The FTC carries out this mission through law enforcement, advocacy, data collection, education, and rulemaking.²

The FTC enforces a variety of antitrust and consumer protection laws affecting broad sectors of the economy.³ Its primary consumer protection mandate stems from Section 5 of the FTC Act, which states that “unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”⁴ The FTC has used the FTC Act to address concerns relating to privacy and data security, deceptive claims in advertising and marketing, protecting consumers in the financial marketplace, robocall scams, internet fraud, and fraudulent schemes against veterans, seniors, and small businesses, among other things.⁵

In addition to its general “unfair or deceptive acts or practices” authority under Section 5 of the FTC Act, the FTC enforces a variety of more specific laws related to its consumer protection

¹ Federal Trade Commission, *About the FTC* (www.ftc.gov/about-ftc) (accessed Apr. 22, 2019).

² Federal Trade Commission, *A Brief Overview of the Federal Trade Commission’s Investigative and Law Enforcement Authority* (July 2008) (www.ftc.gov/about-ftc/what-we-do/enforcement-authority).

³ Federal Trade Commission, *What the FTC Does* (www.ftc.gov/news-events/media-resources/what-ftc-does) (accessed Apr. 22, 2019).

⁴ 15 U.S.C. § 45.

⁵ See Federal Trade Commission, *Fiscal Year 2020 Congressional Budget Justification* (Mar. 11, 2019).

mission, including the Children’s Online Privacy Protection Act of 1998 (COPPA),⁶ the Fair Credit Reporting Act (FCRA),⁷ and the Gramm-Leach-Bliley Act (GLB).⁸ In total, its enforcement and administrative responsibilities derive from more than 70 laws.⁹

II. LIMITATIONS ON FTC’S AUTHORITIES

Unlike most other agencies, the FTC’s general rulemaking authority is limited by the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, which added steps to FTC’s rulemaking procedures, including requirements that the FTC show “substantial evidence in the rulemaking record” that a practice is “prevalent” or “widespread” before it can be declared an unfair and deceptive act or practice.¹⁰ Since passage of that Act in 1975, the FTC has rarely issued regulations under its general rulemaking authority. Instead, the FTC has issued regulations when Congress has granted rulemaking authority under the Administrative Procedure Act for specific issues, such as under COPPA or FCRA.¹¹

The FTC also does not have authority to obtain civil penalties for initial violations for most unfair or deceptive acts or practices.¹² For a first violation, the FTC may generally only obtain injunctive relief and an order prohibiting the challenged conduct.¹³ Only after the FTC has obtained a final order can it pursue civil penalties for violations of the order.¹⁴

Congress limited the FTC’s jurisdiction to exclude certain types of companies, including common carriers, banks, and air carriers.¹⁵ Also, the FTC Act only applies to a corporation “organized to carry on business for its own profit or that of its members.”¹⁶ This limitation has made it more difficult for the FTC to pursue non-profit organizations engaged in unfair or deceptive practices. Recently, Chairman Simons expressed his support for privacy and data security legislation that would provide the FTC with APA rulemaking authority, civil penalty authority, and jurisdiction over common carriers and non-profits.¹⁷

⁶ 15 U.S.C. § 6501 *et seq.*

⁷ 15 U.S.C. § 1681 *et seq.*

⁸ Public Law 106-10 (1999) (codified as amended in scattered sections of 12 and 15 U.S.C.).

⁹ Federal Trade Commission, *Statutes Enforced or Administered by the Commission* (www.ftc.gov/enforcement/statutes) (accessed Apr. 22, 2019).

¹⁰ 15 U.S.C. § 57a(b)-(c); (e).

¹¹ *See, e.g.*, Children’s Online Privacy Protection Rule, 16 C.F.R. Part 312.

¹² *See* Government Accountability Office, *Internet Privacy: Additional Federal Authority Could Enhance Consumer Protection and Provide Flexibility* (Jan. 2019) (GAO-19-52) at 10.

¹³ *Id.*

¹⁴ 15 U.S.C. § 45(m)(1)(B).

¹⁵ 15 U.S.C. § 45(a)(2).

¹⁶ 15 U.S.C. § 44.

¹⁷ Letter from Hon. Joseph J. Simons, Chairman, Federal Trade Commission, to Rep. Frank Pallone, Jr., Chairman, House Committee on Energy and Commerce (Apr. 1, 2019).

III. FISCAL YEAR 2020 BUDGET REQUEST

The FTC has requested \$312 million for Fiscal Year 2020, which would be a \$6 million increase from the \$306 million enacted for FY 2019.¹⁸ The consumer protection and competition allocations in FY 2020 are \$172 million and \$140 million, respectively. The budget request assumes offsetting collections from Hart-Scott-Rodino Act pre-merger notification filing fees in the amount of \$136 million and Do-Not-Call fees in the amount of \$15 million. The \$6 million increase would be for agency critical investments in IT infrastructure, increased costs related to the Consumer Sentinel Network (an online database of consumer complaints available to law enforcement), and expert witnesses required for complex litigation in the Bureau of Competition.

IV. NOTABLE TOPICS SUBJECT TO OVERSIGHT

A. Facebook/Cambridge Analytica

In March 2018, the FTC announced an investigation into Facebook's privacy practices¹⁹ after Facebook disclosed that Cambridge Analytica, a political consulting firm, had improperly obtained access to the personal information of more than 87 million Facebook users.²⁰ Facebook is already subject to a 2011 consent decree settling charges that Facebook had deceived consumers by failing to disclose when information its users designated as private was made public and by failing to inform users of how their personal information could be used by third-party applications.²¹ As a result, Facebook could face significant civil penalties if the FTC determines that Facebook's conduct violated the 2011 order.

News reports have described a series of other privacy and security failures at Facebook, including a security breach in which attackers stole personal information of more than 50 million Facebook users;²² a security vulnerability that allowed third-party applications to view the private

¹⁸ See note 5.

¹⁹ Federal Trade Commission, *Statement by the Acting Director of FTC's Bureau of Consumer Protection Regarding Reported Concerns About Facebook's Privacy Practices* (Mar. 26, 2018) (press release).

²⁰ See Facebook, *Suspending Cambridge Analytica and SCL Group from Facebook* (Mar. 16, 2018) (press release). See also Memorandum from Democratic Staff to Democratic Members of the House Committee on Energy and Commerce, Hearing on "Facebook: Transparency and Use of Consumer Data" (Apr. 9, 2018).

²¹ Federal Trade Commission, *Facebook Settles FTC Charges That It Deceived Consumers by Failing to Keep Privacy Promises* (Nov. 29, 2011) (press release).

²² *Facebook Security Breach Exposes Accounts of 50 Million Users*, New York Times (Sept. 28, 2018).

photos of up to 6.8 million Facebook users;²³ and a secret sharing agreement with large tech companies like Netflix and Spotify that granted access to Facebook users' private messages.²⁴

B. Data Security

In April 2019, the FTC settled two data security matters with commercial website operators that failed to provide reasonably security over sensitive personal information.²⁵ In both cases, the FTC ordered the companies to establish a data security program and obtain biennial third-party assessments. The orders included new provisions that added required elements of a data security program and required annual certifications of compliance from a corporate officer in charge of security.²⁶

The FTC's investigation of the Equifax data breach, which the agency publicly disclosed in September 2017, remains ongoing.²⁷ Although the details of that investigation remain nonpublic, Equifax's recent filings with the Securities and Exchange Commission indicate that the company expects the FTC to seek damages arising from the company's security failures.²⁸

C. FTC's Limited Resources and Lack of Technological Expertise

The FTC recently reported that it has only 40 full-time staff devoted to privacy and data security, far fewer than many foreign data protection authorities despite the larger population of the United States.²⁹ For example, the U.K. Information Commissioners' Office has about 500 employees and the Irish Data Protection Commissioner has about 110 employees.³⁰ The FTC has said it could hire 160 new full time employees with \$50 million of additional funding, which would allow the agency to substantially increase its monitoring and enforcement activities.³¹ Although privacy and security investigations often require significant technical expertise, the agency only has five full-time employees classified as technologists.³² Chairman Simons, unlike other recent administrations, has not appointed a Chief Technologist. Critics have raised concerns about the agency's lack of

²³ *Facebook Exposed 6.8 Million Users' Photos to Cap Off a Terrible 2018*, Wired (Dec. 14, 2018) (www.wired.com/story/facebook-photo-api-bug-millions-users-exposed).

²⁴ *As Facebook Raised a Privacy Wall, It Carved an Opening for Tech Giants*, New York Times (Dec. 18, 2018).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *The FTC Is Investigating the Equifax Breach. Here's Why That's a Big Deal.*, Washington Post (Sept. 14, 2017).

²⁸ *Equifax Says US Regulators Seek Damages Related to 2017 Breach*, Reuters (Feb. 22, 2019).

²⁹ *See* note 17.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

technology expertise, particularly in light of the significant privacy and security matters currently before the Commission.³³

D. FTC's Hearings on Competition and Consumer Protection in the 21st Century

At the last oversight hearing during the 115th Congress, Chairman Simons stated that the FTC intended to evaluate its practices in both competition and consumer protection through a series of hearings in 2018 and 2019.³⁴ Since then, the FTC has held more than 13 hearings on topics including privacy and data security, artificial intelligence, and big data, but has not yet issued any statement about how these hearings will affect the agency's actions going forward.³⁵

V. WITNESSES

The following witnesses have been invited to testify:

Hon. Joseph J. Simons

Chairman
Federal Trade Commission

Hon. Noah Joshua Phillips

Commissioner
Federal Trade Commission

Hon. Rohit Chopra

Commissioner
Federal Trade Commission

Hon. Rebecca Kelly Slaughter

Commissioner
Federal Trade Commission

Hon. Christine S. Wilson

Commissioner
Federal Trade Commission

³³ *Facebook Data Scandals Stoke Criticism That a Privacy Watchdog Too Rarely Bites*, New York Times (Dec. 30, 2018).

³⁴ House Committee on Energy and Commerce, *Hearing on Oversight of the Federal Trade Commission*, 115th Cong. (July 18, 2018).

³⁵ Federal Trade Commission, *Hearings on Competition and Consumer Protection in the 21st Century* (www.ftc.gov/policy/hearings-competition-consumer-protection) (accessed Apr. 25, 2019).