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Federal Trade Commission
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**Prepared Opening Remarks of
Federal Trade Commissioner
Rohit Chopra**

**Before the House Energy and Commerce Committee
Subcommittee on Consumer Protection and Commerce
“Oversight of the Federal Trade Commission”**

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Chair Schakowsky, Ranking Member Rodgers, and Members of the Subcommittee, thank you for holding this hearing to examine the Federal Trade Commission’s role in policing digital markets against misuse and abuse of data.

Today, I want to talk about a market failure affecting families, businesses, and the labor force: terms of service, the contracts that we theoretically read and evaluate online. The FTC and Congress need to confront take-it-or-leave-it contracts, particularly when it comes to unfair terms.

Many terms of service consist of thousands and thousands of words written in legal jargon. According to some estimates, if Americans had to read all of their digital contracts, it would take approximately 250 hours per year. Studies overwhelmingly confirm that we don’t read these terms of service, and we’re now becoming numb to companies imposing regulations that make us cede our rights and even our property.

For example, terms of service for streaming music apps have given companies access to your contacts and photos. To use certain “free” photo sharing apps, the maker of the app reserves the right to “use your name, likeness and image” for commercial purposes. Other terms of service slip in language that says the company will ignore Do-Not-Track settings in your browser. These non-negotiable contracts are even giving companies the right to fingerprint your device, often allowing them to create a digital dossier on you even if you don’t register for an account. These contracts aren’t just claiming the right to monetize your personal information and property, they also revoke many of your legal rights and can even allow firms to change terms at any time.

Contracts are and should be a critical foundation of commerce. They help parties bargain and put their promises on paper. But when contracts are not negotiated, they become riddled with one-sided terms, and both dominant players and unscrupulous firms can exploit their position to the detriment of fair competition.

The FTC has a strong tradition of restricting unfair contract terms. In the 1980s, the FTC banned a slew of terms in consumer credit contracts, including “confessions of judgment,” where consumers waived all of their defenses in court if they were sued. The FTC found that terms like these were the product of an unequal bargain where consumers could not protect their interests.

More recently, both the FTC and Congress have cracked down on gag clauses on a bipartisan basis. Non-disparagement provisions in take-it-or-leave-it contracts that forbid us from posting truthful reviews online for products and services are now banned (though they are still allowed for those working in the gig economy). This ban is a boon for consumers and competition. Buyers will be able to find out what others have experienced with a product, and sellers that invest in quality and customer service will be rewarded.

It’s time for us to own up to the fact that today’s digital contracts have led to a race to the bottom. In addition to making use of the FTC’s existing authorities, Congress should also look for more ways to stop companies from exploiting their bargaining position. For example, we can look to reforms enacted by other developed countries, such as the 2010 law in Australia, that allow consumer protection and competition authorities to enforce laws on unfair contract terms.

I would suggest that there are two aspects that warrant scrutiny. First, we need to look at the circumstances under which these contracts are imposed and whether one side has more power, information, or leverage. Second, we need to look at the terms themselves, particularly any one-sided terms that unreasonably favor the drafting party. It is also especially critical to closely scrutinize the terms imposed on entrepreneurs and small businesses, like app developers and online merchants, especially when take-it-or-leave-it contracts take away their data and rights or otherwise impede fair competition.

Thank you and I look forward to your questions.