

## **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

July 28, 2021

### **Introduction**

Chairman Pallone, Ranking Member McMorris Rodgers, Chairwoman Schakowsky, Ranking Member Bilirakis, and distinguished members of the Subcommittee, thank you for the opportunity to testify. It is an honor to appear before you today.

I will address three areas in my opening remarks. First, I would like to address some process issues that have arisen recently at the Commission because those process issues impact my view of the 16 bills we will discuss today. Second, I will discuss clarification of the FTC's authority under Section 13(b) of the FTC Act. Third, I will discuss the need for federal privacy legislation.

### **FTC Process**

I am blessed to be serving my third stint at the FTC.<sup>1</sup> I have great respect for the agency's devoted personnel, who work tirelessly to promote competition and protect consumers even under highly suboptimal circumstances. I am perennially amazed at how much good the FTC can accomplish in so many different sectors of our economy despite our small budget and just over 1,100 FTEs. And I am proud of our agency's long history of collegiality and bipartisanship.

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<sup>1</sup> During law school, I worked as a law clerk in the Bureau of Competition. In the early 2000s, I served as Chief of Staff to FTC Chairman Tim Muris.

I understand that elections have consequences. Substantively, President Biden and his appointees may choose to pursue competition and consumer protection policies that differ from those of their predecessors. But the *process* used to implement those policy changes matters. Congressman Frank Pallone stated in 2016 during a hearing on proposed FTC legislation: “I am a big proponent of regular order. To me that means engaging in real deliberation, not just having a ‘check-the-box’ hearing.”<sup>2</sup> I applaud Representative Pallone’s observation and believe it applies equally to the smooth functioning of the FTC.

As a political appointee nominated by the White House and confirmed by the Senate, I am obligated to exercise due oversight of Commission business. Commission actions traditionally have been the product of robust dialogue and considerable analysis supported by thorough briefings and memoranda from our staff. Established procedures facilitate a flow of information among Commissioners and between Commissioners and our experienced staff; they permit us to engage transparently with each other and to listen carefully to stakeholders. When we adhere to these traditions and norms, I am able to fulfill my oversight function.

In recent weeks, though, these traditions and norms have been jettisoned. While time does not permit me to discuss events in detail, I have memorialized my concerns elsewhere<sup>3</sup> and would be happy to answer questions. For purposes of these opening remarks, I will merely observe that practitioners, academics, and former enforcers across the political spectrum have

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<sup>2</sup> Frank Pallone, Jr., Ranking Member, H. Comm. on Energy and Com., Remarks before the H. Subcomm. on Com., Mfg., and Trade of the H. Comm. on Energy and Com. on Legislative Hearing on 17 FTC Bills (May 24, 2016), <https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/FTC%2017%20Bills%20CMT%20Leg%20Hearing%205.24.16.pdf>.

<sup>3</sup> See Dissenting Statement of Commissioner Christine S. Wilson, Open Commission Meeting on July 1, 2021; [https://www.ftc.gov/system/files/documents/public\\_statements/1591554/p210100wilsoncommnmeetingdissent.pdf](https://www.ftc.gov/system/files/documents/public_statements/1591554/p210100wilsoncommnmeetingdissent.pdf); Oral Remarks of Commissioner Christine S. Wilson, Open Commission Meeting on July 21, 2021; [https://www.ftc.gov/system/files/documents/public\\_statements/1592366/commissioner\\_christine\\_s\\_wilson\\_oral\\_remarks\\_at\\_open\\_comm\\_mtg\\_final.pdf](https://www.ftc.gov/system/files/documents/public_statements/1592366/commissioner_christine_s_wilson_oral_remarks_at_open_comm_mtg_final.pdf).

expressed concern about the agency’s abrupt departure from regular order and that I share these concerns.

The purpose of today’s hearing is to discuss 16 pieces of proposed legislation. Some of the bills we will discuss today seek to impose additional procedural safeguards within, and Congressional oversight over, the Commission. Particularly given the recent shift away from regular order, I support the goals of those bills. Other bills seek to vest the FTC with significant additional authority. If we could ensure that the Commission’s leadership – both now and in the future – would use this authority prudently, perhaps my view of those bills would be different. Given the FTC’s conduct in the 1970s,<sup>4</sup> though, I have long been concerned about the possibility of agency overreach; recent actions by Commission leadership<sup>5</sup> have deepened those concerns. Consequently, I fear that some of the bills would give authority to the FTC that ultimately would

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<sup>4</sup> See Dissenting Statement of Commissioners Christine S. Wilson and Noah Joshua Phillips, Regarding the Commission Statement On the Adoption of Revised Section 18 Rulemaking Procedures (July 9, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1591702/p210100\\_wilsonphillips\\_joint\\_statement\\_-\\_rules\\_of\\_practice.pdf](https://www.ftc.gov/system/files/documents/public_statements/1591702/p210100_wilsonphillips_joint_statement_-_rules_of_practice.pdf); Dissenting Statement of Commissioner Christine S. Wilson, Open Commission Meeting on July 1, 2021; [https://www.ftc.gov/system/files/documents/public\\_statements/1591554/p210100wilsoncommnmeetingdissent.pdf](https://www.ftc.gov/system/files/documents/public_statements/1591554/p210100wilsoncommnmeetingdissent.pdf).

<sup>5</sup> See Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson on the “Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding ‘Unfair Methods of Competition’ Under Section 5 of the FTC Act” (July 9, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1591554/p210100wilsoncommnmeetingdissent.pdf](https://www.ftc.gov/system/files/documents/public_statements/1591554/p210100wilsoncommnmeetingdissent.pdf) (with little notice to minority Commissioners and no opportunity for public notice and comment, the majority rescinded the Statement of Enforcement Principles Regarding ‘Unfair Methods of Competition’ Under Section 5 of the FTC Act (2015)); Oral Remarks of Commissioner Christine S. Wilson, Open Commission Meeting on July 21, 2021, [https://www.ftc.gov/system/files/documents/public\\_statements/1592366/commissioner\\_christine\\_s\\_wilson\\_oral\\_remarks\\_at\\_open\\_comm\\_mtg\\_final.pdf](https://www.ftc.gov/system/files/documents/public_statements/1592366/commissioner_christine_s_wilson_oral_remarks_at_open_comm_mtg_final.pdf) (with little notice to minority Commissioners and no opportunity for public notice and comment, the majority rescinded the 1995 Policy Statement on Prior Approval and Prior Notice Provisions in Merger Cases); Dissenting Statement of Commissioners Christine S. Wilson and Noah Joshua Phillips Regarding the Commission Statement On the Adoption of Revised Section 18 Rulemaking Procedures (July 9, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1591702/p210100\\_wilsonphillips\\_joint\\_statement\\_-\\_rules\\_of\\_practice.pdf](https://www.ftc.gov/system/files/documents/public_statements/1591702/p210100_wilsonphillips_joint_statement_-_rules_of_practice.pdf) (with no opportunity for public notice and comment, the majority revised agency Rules of Practice so as to eliminate the objective management of, and opportunities for public participation during, Section 18 rulemaking processes). These sweeping policy changes have removed important guardrails for the agency.

result in stifled competition and innovation to the detriment of American consumers, U.S. industries, and our economy.

### **Section 13(b) of the FTC Act**

The second topic I would like to address concerns Section 13(b). As this Committee is aware, the Supreme Court decision in *AMG*<sup>6</sup> held that Section 13(b) does not permit the FTC to obtain equitable monetary relief in federal district court. I appreciate the leadership this Committee has demonstrated and the attention it has devoted to this issue in the wake of that decision.

To be clear, I support the Commission's ability to seek equitable monetary relief in appropriate cases and to challenge conduct that wrongdoers have halted.<sup>7</sup> At the same time, though, I am mindful of concerns that stakeholders have expressed regarding the application of Section 13(b) in certain scenarios. Some are concerned about the absence of a statute of limitations; I support including one in legislative revisions to 13(b). Others are concerned about the unbounded use of 13(b) to achieve disgorgement in antitrust cases. I believe that guiding principles on when the FTC will seek disgorgement, perhaps as detailed in the FTC's now-rescinded 2003 Policy Statement on Monetary Equitable Remedies in Competition Cases, would provide appropriate guardrails. And yet others have expressed concern about the application of Section 13(b) in consumer protection cases that involve not fraud, but legitimate companies selling legitimate products, albeit with deceptive claims. Congress could set forth a framework in 13(b) under which courts must evaluate the value consumers may have retained from the product

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<sup>6</sup> *AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021).

<sup>7</sup> Letter from Joe Simons, Chairman, Fed. Trade Comm'n et al., to Frank Pallone, Jr., Chairman, H. Comm. on Energy and Com., et al. (Oct. 22, 2020), <https://www.adlawaccess.com/wp-content/uploads/sites/793/2020/10/2020.10.22-FTC-Letter-Section-13b-of-the-FTC-Act.pdf>.

or service despite the deception. This approach has support in the case law<sup>8</sup> and could assuage those concerns.

The bottom line is that the legitimate concerns of stakeholders can be addressed while also restoring the ability of the FTC to use Section 13(b) to pursue wrongdoers.

### **Privacy Legislation**

The third topic I would like to cover is federal privacy legislation. As members of this Committee know, FTC Commissioners, on a bipartisan basis, have urged Congress to pass federal privacy legislation for years.

Businesses need clarity and certainty regarding the rules of the road in this important area. Privacy statutes in California, Virginia, and Colorado, compounded by initiatives in other states and varying regimes in other countries, have created confusion and uncertainty in the business community. Even more importantly, consumers need clarity regarding how their data is collected, used, shared, and monetized. Without this transparency, consumers cannot make informed choices about the costs and benefits of using various websites, apps, and devices. Unfortunately, the pandemic has exacerbated concerns regarding data collection and usage as millions of people moved online for work and school and apps were deployed for contact tracing

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<sup>8</sup> See, e.g., *FTC v. Com. Planet, Inc.*, 878 F. Supp. 1048 (C.D. Cal. 2012), *aff'd*, 815 F.3d 593, 603 (9th Cir. 2016) (affirming the district court decision that “relied on the testimony in question to *reduce* the award from \$36.4 million to \$18.2 million”); *FTC v. Lane Labs-USA, Inc.*, 2014 WL 268642, \*2 (D.N.J. 2014) (explaining that the court has discretion in determining how to compensate consumers for the violations, was not constrained to total revenues, and could consider an award of the premium Defendants charged for the product over comparable products during the relevant period as well as Defendants’ profits traced to only the offending advertisements); *FTC v. Bronson Partners, LLC*, 674 F. Supp. 2d 373, 384 (D. Conn. 2009) (explaining that “[t]he formula for calculating redress for consumer injury is straightforward: (1) calculate the gross receipts received from all consumers subjected to the contumacious acts of the defendants, (2) offset gross receipts to the extent the defendants prove that consumers either received refunds or were satisfied with their purchases, [and] (3) order the liable defendants to pay the resulting amount. . . .”) (citation omitted); *FTC v. Kuykendall*, 371 F.3d 745, 766 (10<sup>th</sup> Cir 2004) (describing the calculation of consumer loss and explaining that “defendants might be able to show that some customers received full refunds of their payments or that others were wholly satisfied with their purchases and thus suffered no damages.”).

and other health-related purposes.<sup>9</sup> Notably, concerns are not limited to commercial data collection and use; the ability of the government to access or purchase commercial data creates serious implications for our civil liberties and our protections under the Fourth Amendment – concerns that have also intensified during the last 18 months.<sup>10</sup>

The first and best option would be for Congress to enact privacy legislation. Congress is comprised of elected representatives empowered to represent the will of the American people. Consequently, it is this body that is uniquely situated to make the important value judgments inherent in privacy legislation. And the FTC stands ready to assist with the implementation of that legislation – ideally through narrowly tailored rulemaking processes and vigorous enforcement of that new authority.

Critics have lambasted the FTC for not doing enough to protect consumer privacy. But as other Commissioners and I repeatedly have noted, our jurisdiction and tools are limited.<sup>11</sup> President Biden, in his recent executive order,<sup>12</sup> asked that the FTC consider a privacy rulemaking. Rulemaking under Section 18 of the FTC Act – known colloquially as Magnuson-

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<sup>9</sup> For a longer discussion of these issues, see, Christine Wilson, *Covid-19 Underscores Need for Comprehensive Privacy Legislation*, MLEX (May 18, 2020), [https://www.ftc.gov/system/files/documents/public\\_statements/1576490/wilson\\_-\\_mlex\\_op-ed\\_5-18-20.pdf](https://www.ftc.gov/system/files/documents/public_statements/1576490/wilson_-_mlex_op-ed_5-18-20.pdf); Christine Wilson, *Coronavirus Demands a Privacy Law*, WALL ST. J. (May 13, 2020), <https://www.wsj.com/articles/congress-needs-to-pass-a-coronavirus-privacy-law-11589410686>; Christine S. Wilson, Comm’r, Fed. Trade Comm’n, Keynote Remarks at Privacy + Security Academy: Privacy and Public/Private Partnerships in a Pandemic (May 7, 2020), [https://www.ftc.gov/system/files/documents/public\\_statements/1574938/wilson\\_-\\_remarks\\_at\\_privacy\\_security\\_academy\\_5-7-20.pdf](https://www.ftc.gov/system/files/documents/public_statements/1574938/wilson_-_remarks_at_privacy_security_academy_5-7-20.pdf).

<sup>10</sup> Letter from Christine S. Wilson, Comm’r, Fed. Trade Comm’n to Senator Ron Wyden on the Fourth Amendment is Not For Sale Act (May 21, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1590440/wilson-fourth-amendment-wyden.pdf](https://www.ftc.gov/system/files/documents/public_statements/1590440/wilson-fourth-amendment-wyden.pdf).

<sup>11</sup> Christine S. Wilson, Commissioner, Fed. Trade Comm’n, Prepared Remarks of Commissioner Christine S. Wilson, Facebook., Inc. Press Event (July 24, 2019), [https://www.ftc.gov/system/files/documents/public\\_statements/1537163/wilson\\_-\\_prepared\\_remarks\\_at\\_ftc\\_facebook\\_press\\_conference\\_7-24-19\\_0.pdf](https://www.ftc.gov/system/files/documents/public_statements/1537163/wilson_-_prepared_remarks_at_ftc_facebook_press_conference_7-24-19_0.pdf)

<sup>12</sup> See Exec. Order No. 14036, 86 Fed. Reg. 36987 (July 14, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-07-14/pdf/2021-15069.pdf>.

Moss rulemaking<sup>13</sup> – is within our authority. In recent months, I had become more receptive to a Mag-Moss rulemaking on privacy to address the information asymmetry between the providers of goods and services and their users.<sup>14</sup> But the Commission recently voted along party lines to pare back procedural safeguards and limit opportunities for public input during agency rulemakings.<sup>15</sup> Given these changes, I am less inclined to support a Mag-Moss rulemaking on privacy. Federal privacy legislation remains the optimal solution.

### **Conclusion**

In closing, I thank this Committee for your assistance in strengthening the FTC’s ability to fulfill its mission. I am happy to answer any questions you may have.

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<sup>13</sup> 15 U.S.C § 57a (2012).

<sup>14</sup> See Statement of Commissioner Christine S. Wilson Before the U.S. Senate Committee on Commerce, Science and Transportation (April 20, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1589180/opening\\_statement\\_final\\_for\\_postingrevd.pdf](https://www.ftc.gov/system/files/documents/public_statements/1589180/opening_statement_final_for_postingrevd.pdf).

<sup>15</sup> See Dissenting Statement of Commissioners Christine S. Wilson and Noah Joshua Phillips Regarding the Commission Statement On the Adoption of Revised Section 18 Rulemaking Procedures (July 9, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1591702/p210100\\_wilsonphillips\\_joint\\_statement\\_-\\_rules\\_of\\_practice.pdf](https://www.ftc.gov/system/files/documents/public_statements/1591702/p210100_wilsonphillips_joint_statement_-_rules_of_practice.pdf); Dissenting Statement of Commissioner Christine S. Wilson, Open Commission Meeting on July 1, 2021; [https://www.ftc.gov/system/files/documents/public\\_statements/1591554/p210100wilsoncommnmeetingdissent.pdf](https://www.ftc.gov/system/files/documents/public_statements/1591554/p210100wilsoncommnmeetingdissent.pdf).