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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
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**Prepared Oral Statement of
FTC Commissioner Noah Joshua Phillips
Before the
House Committee on Energy and Commerce
Subcommittee on Consumer Protection and Commerce**

Hearing on “Transforming the FTC: Legislation to Modernize Consumer Protection”

July 28, 2021

Chair Schakowsky, Ranking Member Bilirakis, Members of the Subcommittee, thank you for the opportunity to appear before you. I’m honored to testify with my fellow Commissioners about the important work we do at the FTC.¹ I am glad the Subcommittee has decided to solicit a range of views on agency reform.

[I’d also like to take a moment to thank the staff of the Edgartown Public Library for providing me with a quiet space and internet access so that I can participate today. I will be masked today to adhere to library policy.]

The thoughtful proposals Members have made on agency reform deserve attention, in particular those, such as the REPORTS Act, designed to increase transparency into the Commission. In the last few weeks, the Commission has repeatedly changed policy direction without giving the public any real notice or right to be heard and, without any serious consideration, removed guidance from the public and the business community alike. And, by

¹ My comments today are my own and do not necessarily reflect the views of the Commission or my fellow Commissioners.

removing Commission oversight from antitrust and other investigations—as we recently did—we have reduced transparency within the agency. We can do better.

As you consider agency reforms, I urge you to consider other ways in which the agency is changing course.

The first big change is the Commission pivoting, without Congress, to regulate a great deal of the economy. Over the last few years, my colleagues have called for a bevy of new rules, mostly under the authorities we have.² The President’s recent executive order contemplates our issuing major regulations concerning, among other things, pharmaceuticals, technology, labor, retail, and devices.³ Not all of the proposals in the executive order are bad, to be clear; but much of it would replace consumer-driven market forces with government-supervised regulation, the opposite of the competition. And much of that appears to be based on authority we simply do not possess. The Commission, however, is in a hurry to regulate. On July 1st, without input from the public, we adopted rules to enable us to promulgate regulations with less objectivity, less oversight, and less public input. The Commission majority is reducing what it calls “red tape” on the Commission—to impose more real red tape on American businesses, large and small.

Well-crafted regulations can help consumers and businesses, but poor regulatory design can raise prices, stifle innovation, and reduce consumer choice. This was a lesson America learned the hard way decades ago. And when it comes to policy questions of great economic and

² See, e.g., Rohit Chopra and Lina M. Khan, *The Case for “Unfair Methods of Competition” Rulemaking*, 86 *University of Chicago Law Review* 357 (2020), available at https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/ChopraKhan_Rulemaking_87UCLR357.pdf; Keynote Remarks of FTC Acting Chairwoman Rebecca Kelly Slaughter at the Consumer Federation of America’s Virtual Consumer Assembly (May 4, 2021), available at https://www.ftc.gov/system/files/documents/public_statements/1589607/keynote-remarks-acting-chairwoman-rebecca-kelly-slaughter-cfa-virtual-consumer-assembly.pdf.

³ Executive Order on Promoting Competition in the American Economy (July 9, 2021), available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

political importance, my basic philosophy is that Congress—not the FTC—is the place to answer them. I believe the law reflects that fact. Privacy is a good example of a major policy question, and I commend Committee Ranking Member McMorris Rodgers and Subcommittee Ranking Member Bilirakis on their recent letter calling for privacy legislation and for the Administration to make it a priority.

In adopting regulations, I hope we address clearly-defined problems, fashion rules designed to address them, and minimize the negative impacts on consumers and businesses. I hope we base our decisions on empirical evidence and input from all stakeholders, which is why I also support the goal of the RECS Act introduced by Congressman Bucshon [BOO-Shon], to ensure that our recommendations to Congress reflect similar analytical rigor.

Another change I fear is moving away from the Commission’s historical commitment to combat fraud.

Just a few weeks ago, this Subcommittee considered amendments to Section 13(b), following the Supreme Court’s decision in *AMG Capital Management, LLC v. FTC*.⁴ As our testimony detailed, the fraud program has for decades done essential work to return money to victims of fraud. Companies, large and small, that engage in fraud can cost consumers their life savings, cumulatively billions of dollars in losses.⁵ In the past 5 years, the FTC returned \$11.2

⁴ See *AMG Capital Mgmt., LLC v. FTC*, No. 19-508, 593 U.S. ___, slip op. (Apr. 22, 2021), https://www.supremecourt.gov/opinions/20pdf/19-508_l6gn.pdf. *AMG* was an appeal by defendants from a 2018 Ninth Circuit ruling in which the court re-affirmed its precedent interpreting Section 13(b) to allow the FTC to obtain monetary relief, a judgment that the Supreme Court reversed. See *FTC v. AMG Capital Mgmt., LLC*, 910 F.3d 417 (9th Cir. 2018).

⁵ In 2020 consumers reported losing over \$3.3 billion to fraud. Consumer Sentinel Data Book 2020 at 4, available at https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-2020/csn_annual_data_book_2020.pdf.

billion in refunds to consumers that were victims of fraud.⁶ I am heartened that Congress has appropriated funds and passed laws to strengthen the fraud program, like the recent Covid-19 Consumer Protection Act.⁷ I support efforts like HR 4483 to protect veterans and service members from fraud. Count me among those who believe that a well-crafted amendment to Section 13(b), with guardrails, will help serve consumers.

Over the last few years, some of my colleagues have made comments to suggest that we should focus only on large companies.⁸ The Chair’s first public statement used the phrase “corporate abuse”.⁹ The fact is that many of the frauds we see are not perpetrated by large corporations. I hope these comments do not indicate a desire to turn away from fraud enforcement. Where big corporations violate the law, we absolutely should hold them to account. But, again, some of the wrongdoers that hurt Americans most happen not to be large corporations. We cannot lose sight of them. While enforcement against the robocallers, COVID-19 scammers, and others like these may not generate headlines, it generates results, for consumers. While Section 19 is an imperfect tool, today it enables us to return money lost to fraudsters. I believe that the Commission should continue to commit resources to combatting practices, like fraud, that cause the most harm. I welcome legislation—like updating Section 13(b)—that will further those efforts.

Thank you, and I look forward to addressing your questions.

⁶ See https://public.tableau.com/profile/federal.trade.commission#!/vizhome/Refunds_15797958402020/RefundsbyCase.

⁷ Pub. L. No. 116-260, 134 Stat. 1182, Division FF, Title XIV, § 1401(b)(1).

⁸ See, e.g., Prepared Opening Statement of Commissioner Rohit Chopra Before the United States Senate Committee on Commerce, Science, and Transportation, Hearing on “Strengthening the Federal Trade Commission’s Authority to Protect Consumers,” (April 20, 2021), available at https://www.ftc.gov/system/files/documents/public-statements/1589172/final_chopra_opening_statement_for_senate_commerce_committee_20210420.pdf.

⁹ See, Lina Khan Sworn in as Chair of the FTC (June 15, 2021) available at <https://www.ftc.gov/news-events/press-releases/2021/06/lina-khan-sworn-chair-ftc>.