



Oral Testimony of

TechFreedom

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**FTC Stakeholder Perspectives: Reform Proposals to
Improve Fairness, Innovation, and Consumer Welfare**

*Hearing before the Subcommittee on Consumer Protection, Product Safety, Insurance,
& Data Security of the U.S. Senate Committee on Commerce, Science, & Transportation*

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Chairman Moran, Ranking Member Blumenthal, thank you for inviting me to testify today. I am not only President of TechFreedom, a non-partisan technology policy think tank, but also co-chair of the “FTC: Technology & Reform Project,” an independent scholarly effort launched in 2013 to study how the Federal Trade Commission operates.²

I’ve been referring to the FTC as the Federal *Technology* Commission for years³ — and the name has stuck. Even former Chairwoman Ramirez has embraced it.⁴ This isn’t necessarily good or bad; it’s just a convenient shorthand for an important truth: more than any other government agency in the world, the FTC wrestles with a wide range of questions about how to protect consumers as technology changes, without strangling or stifling innovation.

What I said in my 2012 testimony to this Committee⁵ remains true today: what the FTC calls its “common law of settlements” in privacy and data security lacks the key elements of *real* common law. First is the analytical rigor of adversarial litigation: the two sides argue their case before a neutral, independent judge, who then delivers a written and binding decision premised on a carefully reasoned analysis of the law. Second is the clear, authoritative guidance of judicial precedent. Antitrust law offers a fine example of how the FTC can be effective, indeed often aggressive, in protecting consumers *without* being judge, jury, and executioner. Consumer protection shouldn’t be inconsistent with the fundamentals of the rule of law.

The FTC’s Bureau of Consumer Protection could, and *should*, work more like its Bureau of Competition. I summarize reforms Congress should consider in my written testimony, and provide more detail in the attached testimony I co-authored for last year’s House hearing on FTC reform.⁶ Key reforms can be broken down into seven categories:

1. Ensuring the FTC has the **jurisdiction** it needs — especially over non-common carrier services provided by common carriers.
2. Further codifying the **Unfairness Policy Statement**, and ensuring that the FTC’s assessment of the “reasonableness” of practices, including data security, satisfies the cost-benefit test Congress codified in 1994.

² See, e.g., Consumer Protection & Competition Regulation in a High-Tech World: Discussing the Future of the Federal Trade Commission, Report 1.0 of the FTC: Technology & Reform Project, 3 (Dec. 2013), *available at* <https://goo.gl/52G4nL>.

³ Berin Szóka & Geoffrey Manne, The Second Century of the Federal Trade Commission, TECHDIRT (Sept. 26, 2013, 8:05 pm), *available at* <https://goo.gl/26Hi3Y>.

⁴ Kai Ryssdal, The FTC is Dealing with More High Tech Issues, MARKETPLACE (Mar. 7, 2016) *available at* <https://goo.gl/e6PqNm>.

⁵ Berin Szóka, The Need for Privacy Protections: Is Industry Self-Regulation Adequate?, Test. before the Senate Commerce Committee (Jun. 28, 2012), *available at* <https://goo.gl/YyuidZ>.

⁶ Berin Szóka & Geoffrey Manne, THE FEDERAL TRADE COMMISSION: RESTORING CONGRESSIONAL OVERSIGHT OF THE SECOND NATIONAL LEGISLATURE, 57-60 (2016), *available at* <https://goo.gl/36K7hM>.

3. Codifying and further clarifying the 1980 **Deception Policy Statement**, especially to ensure that the FTC focuses on claims that are actually material to consumers.
4. Increasing the **role of economists** in investigations, complaints, settlements, reports, and rulemaking.
5. Increasing the **role of Commissioners** in overseeing what the Chairman and staff do.
6. Removing **disincentives against litigation**, so that courts will play more of a role in shaping consumer protection law.
7. Requiring or encouraging the FTC to produce **clearer and more empirically grounded guidance**.

These last two reforms are crucial. Perhaps the greatest reason companies have settled essentially all data security and privacy cases is the reputational cost. Consider Equifax's recent data breach: its stock dropped 30% and today, its CEO resigned. That's the reputation market at work. The FTC leverages such forces to coerce settlements simply by dragging companies through the investigative or administrative enforcement processes. Congress can modify both without hampering the FTC's ability to protect consumers, by requiring greater Commissioner oversight of investigations, keeping them confidential until a complaint is filed, filing most complaints in federal court, and explaining charges with greater specificity.

Consumer protection law probably won't ever work quite like antitrust law. The courts will probably always play less of a role, but they should play *some* role.

Regardless of what Congress does, the FTC must provide more and better guidance on how companies can comply with the law. This will both avoid arbitrary enforcement and also ensure that consumers are protected by good data security and fair privacy practices. Since 2010, the FTC has issued a flurry of reports asserting what companies *should* do but without any substantial analysis of *why*, or *how* to strike the right balance. Acting Chairman Ohlhausen should be commended for convening a workshop in December on how to define "informational injuries." This is a golden opportunity for the FTC to take a more empirically grounded approach to data security and privacy — just as it did with environmental marketing claims through the Green Guides the FTC has updated regularly since 1992.

Not since 1994 has Congress made significant reforms to the FTC's processes. Such course corrections should have happened in biennial reauthorization of the agency, but that has not happened since 1996. How the FTC and Congress handle seemingly arcane procedural matters could be even more important in determining how consumer protection works in 2117 than any grand legislative enactments.

I look forward to helping the Committee ensure that the Federal Technology Commission remains focused on serving consumers in the century to come.