that in an
adjudicatory setting?

While the shortness of time allowed by the 30-day comment period allows only
these brief preliminary comments, I do want to make the following points:

(1) 30 days is too brief for comments on a proposal that would make such drastic
changes in the administrative process at the FTC. Why such a rush? Why foreclose
the opportunity for considered comments by antitrust scholars, practitioners and
organizations, and for reasoned consideration by the Commission of these
comments? In this election year, the truncated timing of the comment period
suggests a rush to resolve this matter before a change of administrations and in the
membership of the Commission. Hopefully, this result was unintended, but
nonetheless the perception of an unseemly rush to change the long-established
rules does not serve the Commission well.

(2) A rigid time frame for the commencement of an administrative hearing is a one-
size-fits-all solution for diverse situations that can better be managed by an
experienced ALJ who can impartially assess the needs of a particular case, including
the amount of time necessary for the respondent to have a fair opportunity to
prepare its defense. This is exactly the kind of nitty gritty hands-on function that
ALJs perform so well.

(3) Continuing to entrust the ALJs with responsibility for pretrial motions keeps
responsibility for case management centered in the hands of the FTC official with the
closest and best view of the case in the pretrial and administrative trial phases, as
well as some independence from the initial decision to vote out a complaint. Absent
a factual showing of disabling deficiencies in this process, which has served the
Commission and litigants well for many years, this long-established practice should
not be abandoned. The appearance of the Commission reaching to micromanage
and control pretrial proceedings marks a profound change in the administrative
process. As a young antitrust lawyer, I recall marveling at the strangeness of the
Commission voting out a complaint as prosecutors and then

putting on judge's hats
and sitting in judgment on the case that they initiated: it is useful for all of us to
continue to appreciate what a curious system this is. I came to think of the time that
the case was in the hands of the ALJ as a sort of cooling off period, where others
could work up the facts and assess the theories and bring considered work product
back for the consideration of the Commission in its adjudicatory role: why mandate
Commissioner intrusion into this phase too?

Respectfully submitted,
Linda Blumkin

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

R. BRUCE JOSTEN
EXECUTIVE VICE PRESIDENT
Government Affairs

1615 H STREET, N.W.
WASHINGTON, D.C. 20062-2000
202/463-5310

November 6, 2008

The Honorable William Kovacic
Chairman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Re: Parts 3 and 4 Rules of Practice Rulemaking—P072104

Dear Chairman Kovacic

The U.S. Chamber of Commerce, the world's largest business federation representing more than three million businesses and organizations of every size, sector, and region, appreciates the opportunity to comment on this proposed rule, which would make significant changes to Parts 3 and 4 of the Federal Trade Commission's (FTC's) Rules of Practice. However, the Chamber is concerned with the limited length of the comment period for such significant changes, and at a minimum request that it be reopened and extended.

The Chamber appreciates that the stated goals of the proposed rule changes are to "expedite [the FTC's] adjudicative proceedings [and] improve the quality of adjudicative decision making." However, the Chamber is concerned that while the additional changes may speed up certain parts of the process in certain circumstances, they should not be undertaken at the expense of companies' due process rights. Indeed, it appears that the proposed changes are being rushed into place and for the purpose of giving the FTC material, tactical, and procedural advantage in litigating those matters that it decides to bring.

In addition, concerns within the U.S. business community are mounting with respect to the international practices of competition authorities around the globe. A critical element of those concerns is whether proceedings undertaken in foreign jurisdictions afford due process to the non-governmental participants. As the FTC and the Department of Justice Antitrust Division look to substantively influence the economic and legal thinking of these jurisdictions, both agencies have a fiduciary responsibility to adhere to and set the benchmark for the highest due process best practices, procedures, and standards. The proposed changes in this rule send the wrong signal to foreign jurisdictions regarding the importance of due process and certainly hurt the credibility of the FTC when it comments to foreign agencies.

Removing from the ALJ Critical Powers to Manage the Case Removes a Critical Check on the Potential Unfairness Stemming from the FTC's Dual Role of Prosecutor and Judge.

The FTC's proposed regulations work to effectively eliminate the role of the independent Administrative Law Judge (ALJ) to manage and prepare an initial decision for a case. This results in the elimination of a vital check on potential unfairness inherent in the FTC's administrative procedure. Under the FTC's process, the Commissioners act as both prosecutor and judge in administrative trials.[1] Thus, the same individuals who decide to issue the complaint also decide the final appeal of the administrative trial. With such a clear potential for unfairness or conflict of interest at the forefront of FTC administrative adjudication, it is necessary to preserve some sort of fairness check.

This necessary check has historically been present in the form of the trial examiner, predecessor to today's ALJ. The Supreme Court has recognized the value of independent ALJs to the reform of administrative litigation.[2] The 1941 Final Report of the Attorney General's Committee on Administrative Procedure, which prompted the Administrative Procedure Act, echoed this sentiment and concluded that the most important device to avoid unfairness and public distrust in this structure was through the creation of these empowered, independent hearing officers.[3] The Attorney General's Final Report envisioned the ALJs as independent individuals who would preside at hearings and make findings of fact and conclusions of law (such findings not to be disturbed "unless error is clearly shown").[4] The FTC's proposed regulations, by stripping the ALJ of significant powers to manage and initially decide the case, represent a serious about-face and march back towards the structure which the Attorney General's Final Report found so troubling.

Whatever power the FTC has under the Administrative Procedure Act to appoint itself or an individual commissioner to preside over hearings should not be extended to countenance the à la carte approach to the altered powers of the ALJ reflected in the proposed regulations. If, as it should, the FTC chooses to utilize ALJs to oversee hearings on merger challenges, the ALJs should be truly independent with full power and authority to oversee and initially decide all aspects of the administrative litigation. Otherwise, the appearance of independent fact finding is illusory.

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1 This dual role has long been criticized. *See, e.g.*, AMERICAN BAR ASSN SECTION OF ANTITRUST LAW, THE FTC AS AN ANTITRUST ENFORCEMENT AGENCY: ITS STRUCTURE, POWERS AND PROCEDURES, VOLUME II, 67-68 & nn. 252-54 (1981).

2 Universal Camera Corp. v. NLRB, 340 U.S. 474, 494 (1951), *hereinafter Universal Camera*. (Legislative history of the Administrative Procedure Act confirms "that enhancement of the status and function of the trial examiner was one of the important purposes of the movement for administrative reform.").

3 Attorney General's Committee on Administrative Procedure, Final Report (1941), *hereinafter Attorney General's Final Report.*

4 *Id.*, 51.

The FTC's Proposed Regulations Will Put Businesses at a Serious Disadvantage When Litigating Against the FTC.

An alarming disadvantage stems from the FTC's desire to remove power from the ALJ in Proposed Regulation 3.22. The FTC proposes to give itself the power to preside over discovery and other prehearing proceedings—which can often be outcome-determinative—before transferring the matter to the ALJ for the evidentiary hearing. This runs totally counter to the Attorney General's recommendation that all discovery powers be lodged in the hearing officer as a critical dimension of independence. That the FTC proposes to strip the ALJ of his or her ability to rule on dispositive motions, such as motions to dismiss and motions for summary decision, also removes the independent filter that the Attorney General's Committee felt was so important to the integrity of the FTC's decisional process. By arrogating to itself such critical aspects of the administrative process, the FTC reduces the role of the ALJ to a caricature, stripped of the powers necessary to support a true independent decision-making role.

The FTC's Proposal Overturns Its Policy Statement on Whether to Proceed With Administrative Challenges to Mergers After It Has Been Denied a Preliminary Injunction in Federal Court, Contrary to Its Own Position Statement and the Recommendations of the Antitrust Modernization Commission.

In 1995 the FTC issued a formal statement of its policy on whether to proceed with administrative litigation following denial of a preliminary injunction in merger cases.[5] The FTC declared that the decision to continue "is not, and cannot be, either automatic or indiscriminate," but would instead be based on five factors.[6] The FTC's proposed regulation now furtively advises the world that its former Policy Statement is null and void and that "the norm should be that the Part 3 case can proceed even if a court denies preliminary relief."

Contrary to the FTC's assertion, the new policy has never been the "norm." Former FTC Chairman Muris stated that under the Policy Statement the FTC should decide not to proceed with administrative adjudication "in almost all cases" after losing a preliminary injunction trial,[7]

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5 60 Fed. Reg. 39,741 (Aug. 3, 1995).

6 *Id*, 39,743. The five factors were: ("(i) the factual findings and legal conclusions of the district court or any appellate court, (ii) any new evidence developed during the course of the preliminary injunction proceeding, (iii) whether the transaction raises important issues of fact, law, or merger policy that need resolution in administrative litigation, (iv) an overall assessment of the costs and benefits of further proceedings , and (v) any other matter that bears on whether it would be in the public interest to proceed with the merger challenge."

7 "Assessing Part III Administrative Litigation: Interview with Timothy J. Muris," *Antitrust* 6, 9 (2006).

and in the fifteen years prior to 2007 the FTC never pursued a full administrative trial after the denial of a preliminary injunction.[8]

The FTC's new policy also flouts the 2007 Report of the bipartisan Antitrust Modernization Commission (AMC), which recommends that the FTC should not litigate its merger cases administratively following an injunction proceeding in federal court and in fact should be denied the power to do so.[9] Among the reasons cited by the AMC was to eliminate the disparity between the process followed by the FTC and the Department of Justice Antitrust Division ("DOJ"), which was undermining public trust in the merger enforcement process.[10] The FTC has now decided on two occasions since the AMC Report to ignore the AMC's recommendation and proceed with administrative adjudication after being denied a preliminary injunction.[11] If there should be any regulatory change to reform the administrative litigation process, it should be change that will implement, rather than ignore, the AMC recommendations and minimize, rather than exacerbate, the differences between FTC and DOJ merger enforcement. As with U.S. businesses, it is unlikely that foreign agencies understand this discrepancy in process and it certainly raises credibility issues when U.S. agencies make process recommendations to them.

<u>There is No Justification for the FTC's Proposed Rule Changes.</u>

A particularly troubling concern about the FTC's proposal is the lack of any apparent rationale for these consequential proposed rules.

A. Abandonment of Transactions

The FTC offers no evidence that shortening the process to the length contemplated by the proposals will make it any less likely that parties will abandon transactions. The FTC has had in effect for more than ten years a "fast track" procedure providing for a final FTC decision in 13 months. The FTC's current proposal, even under the most optimistic assumption about the length of time required for its own appellate opinion, would take nearly 18 months. If transactions are being abandoned despite a 13-month "fast" track, it is unlikely they will not be abandoned under an 18-month decision track. Whether 13 or 18 months, parties will abandon at times because both are long and they will think the odds are stacked against them. This means they will need to appeal, which typically takes a significant amount of time. Many of the time limitations, while laudable to make this go more quickly, should not be up to the FTC. The FTC

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8 Antitrust Modernization Commission: Report and Recommendations 139-40 (2007) *hereinafter AMC Report*.

9 *Id*. at 139-140.

10 *Id.*

11 The FTC has pursued Part III adjudication in Equitable Resources, Inc., Dkt. No. 9322 (transaction abandoned by the parties) and Whole Foods Market, Inc., Dkt. 9324 (Order Rescinding Stay of Administrative Proceeding, Aug. 8, 2008).

will have had sufficient time of discovery in the second request process. If the parties think they need more discovery time or a longer trial, they should be able to make that argument to the ALJ and let the ALJ decide. In addition, the FTC has not placed a deadline or time improvement on the one portion of the process that they control completely—the time for a decision by the Commissioners, which is very often a source of substantial delay. The average time from initial ALJ decision to a final FTC decision is about 20 months, and these regulations do not propose to set a timeline on this important matter.

B. Eliminating "Non-Essential Discovery and Motion Practice"

The FTC also contends that its proposed regulations will eliminate "non-essential" motions and discovery. The changes are unnecessary as the concern is another non-issue. If discovery and motions are "non-essential," the ALJ has the power and discretion to—and should—deny them under the current rules. This is the fair and proper way to deal with the issue, rather than to simply crowd out what may be essential discovery by an arbitrary five-month deadline.

C. "Justice Delayed Is Justice Denied"

This slogan, invoked but not elaborated by the FTC, is no substitute for factual and logical analysis of the trade-off between efficiency and fairness, which the FTC does not attempt to perform in its Notice. The FTC's interest in remedying anticompetitive mergers in a timely fashion is best served by utilizing "high quality decision-making."[12] Moreover, the failure of the FTC to impose any definitive deadlines or timeframes on its own issuance of a final opinion makes such proclamations ring hollow.

<u>Given the Significant Changes Made in this Proposed Rule, the Time Allowed for Public Comment is Inadequate.</u>

Public comments have been requested to be submitted no later than November 6. Thirty days simply do not provide adequate time for the public to consider and comment intelligently on the serious impact of the FTC's proposals. The last time the FTC made significant changes to the adjudicative rules (in 1996) the FTC allowed 60 days for public comment, and the changes at issue at that time were less controversial than those in the present proposal.[13] Considering that the public comment period for far less significant amendments is often double or triple the length of time, the inadequacy of 30 days for the present proposals becomes apparent. An additional comment period of 60-90 days should be granted in order to encourage the production of thoughtful, high-quality public comment by all those impacted by the proposed changes.

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12 73 Fed. Reg. 58,833 (October 7, 2008).

13 61 Fed. Reg. 50,640 (September 26, 1996).

Conclusion.

The Chamber opposes the adoption of the FTC's proposed regulations in its current form. The Chamber appreciates all attempts to make the process more efficient and effective, but feel these changes infringe on due process rights and are not a proper approach.

Sincerely,

R. Bruce Josten

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Hallberg, Richard #538311-00003

This is a Comment on the **Federal Trade Commission** (FTC) Proposed Rule: **Rules of Practice**

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Comment

First off, WHAT IS YOUR HURRY!

30 days in a legal battle is UNREASONABLE, much less when you're the 800 pound
gorilla in the room!

Secondly, I bought Whole Foods stock because they bring me access to the food
items that I prefer at reasonable prices. I still shop at Kroger, Wal-Mart and Publix,
along with other small specialty markets. I see no signs that Whole Foods is a
monopoly or that other well-run competitors are being run out of business.

Your job, as I see it, is to protect me from abuse of power, not promote your own.

Please throttle your aggressive impulses and focus on a real problem.

Comment Period Closed
Nov 6 2008, at 11:59 PM ET

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GA

Organization Name:
Retired Private Citizen / Ad Hoc Committee for FTC Fair Play

EXHIBIT

29

UNITED STATES DISTRICT COURT.
FOR THE DISTRICT OF NEW JERSEY
Civil 13-1887 ES

FEDERAL TRADE COMMISSION,

Plaintiff, MOTIONS TO DISMISS

V.

WYNDHAM WORLDWIDE CORPORATION, ET AL,

DEFENDANTS.

- -

NEWARK, NEW JERSEY
NOVEMBER 7, 2012

B E F O R E: HONORABLE ESTHER SALAS,
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

KEVIN HYLAND MORIARTY, ESQ.
KRISTIN KRAUSE COHEN, ESQ.
JONATHAN ELI ZIMMERMAN, ESQ.
FOR THE FEDERAL TRADE COMMISSION.

GIBBONS
BY: JUSTIN T. QUINN, ESQ.
AND
KIRKLAND & ELLIS
BY: EUGENE ASSAF, ESQ.
AND: K. WINN ALLEN, ESQ.
For the Defendants.

Pursuant to Section 753 Title 28 United States Code, the following transcript is certified to be an accurate record as taken stenographically in the above-entitled proceedings.

S/LYNNE JOHNSON

- -

LYNNE JOHNSON, CSR, CM, CRR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
P.O. BOX 6822
LAWRENCEVILLE, NEW JERSEY 08648
CHJLAW@AOL.COM

THE COURT: Good morning to everyone. Please be seated.

We are on the record in the matter of Federal Trade Commission versus Wyndham Worldwide Corporation et al, civil 13-1887. Let me have appearances by counsel.

MR. MORIARTY: Kevin Moriarty on behalf of the Federal Trade Commission.

MR. ZIMMERMAN: Jonathan Zimmerman on behalf of the Federal Trade Commission.

MS. COHEN: Kristin Cohen for the FTC.

MR. QUINN: Justin Quinn for the defendants. Along with me at counsel table is Eugene Assaf, K. Winn Allen and Douglas Meal. Also with me are representatives from Wyndham, Marcus Banks and Korin Neff.

Mr. Assaf will be arguing the authority question. Mr. Allen will be answering any questions with respect to the common enterprise and if your Honor has any questions on the motion to stay, I will be addressing those.

THE COURT: Perfect. Be seated.

Let me tell you the order we are going to go today. We are going to start with whether Section 5, unfair authority extends to data security and if so,

MR. MORIARTY: We are pretty squarely within the fair notices category there. I think there are a lot of answers to that question, the principal one being that Wyndham in its privacy policy tells the consumers that they are going to take commercially reasonable steps to adequately protect their data. So you know, it is an objective standard, reasonableness, and for them to claim that it is now kind of a meaningless standard, it sort of rings hollow.

But as far as advisory opinions, there are not advisory opinions. But the way companies determine what is reasonable and what is not reasonable is the same way companies Act in any other legal context. The entire foundation of the common law negligence is requiring companies to Act reasonably under the circumstances. For example, in the context of data privacy they should evaluate the size and complexity of their network, evaluate the type of consumer data they are collecting and storing. They should evaluate industry standards. There are industry standards out there that are not associated with the FTC. There are experts out there that consult with companies routinely about the data security.

THE COURT: I am sorry to interrupt you,

counsel.

Does the FTC sort of endorse any particular industry standards that are out there? Are they published? How is that information disseminated in terms of what the industry standard should be?

MR. MORIARTY: Industry standards are well known. There are industry standards that specifically apply to the collection and transmission of credit card data. The FTC does not endorse any standards, particular standards. There is a Third Circuit case called Vogel which talked about whether a reasonableness standard should be pinned to industry standards. The Third Circuit said no, it should evaluate other reasonable things that companies in that position should look at.

The other thing I wanted to mention about FTC guidance is we have these books that we issue, guidance books. Also the adjudications are very valuable.

In this case in particular, I think it is that at page 19 of our brief, we identify a good number of the other, there is, at the time we wrote the brief, there were 19 unfairness cases. I think there is two more that are public. But we identified the particular types of things that companies should

be looking for in order to evaluate whether their data security is reasonable.

Now, we don't say here is how you should set up your router. We don't say you should have, you know, white lists and black lists for IP addresses. We are not tech support. We do say to them, companies, these are the types of things the FCC is looking at, you should make sure your house is in order on these things. The FTC provides guidance through these opinions, through these consent decrees.

THE COURT: Thank you. I will let you address any points you want to address after counsel argues with respect to whether the FTC has provided fair notice.

MR. MORIARTY: Thank you, your Honor.

THE COURT: Thank you. Mr. Assaf.

MR. ASSAF: May I have permission to make two reply points?

THE COURT: Sure.

MR. ASSAF: First of all, with respect to the FTC's point that Graham-Leach-Bliley, COPPA, that these were all cases in which Congress enacted them in order to avoid the FTC having to prove injury. That was kind of how they reconcile these cases. First of all, that is not in their brief. In fact, on page 12

section, your Honor, that Graham-Leach-Bliley, the Fair Credit Reporting Act, and COPPA, they have authority to publish rules. But under Section 57 (a) they also have the authority to prescribe rules and general statements of policy, and they have not done that for data security. There is no dispute about that.

This is where again it is not just Wyndham. I would suggest there is academic commentary saying the nature, format and content of the agency's data security related pronouncements raise equitable considerations that create serious due process concerns, what I call fair notice.

So what are the arguments?

Now, I understand, your Honor, I am going to get to the agency's arguments, and I understand that these are requests for admissions, but I think they actually filed them in this Court. And again, there is not any dispute here. The FTC has not published public information about what security software should be used by a company. Admitted.

And the FTC has not published any substantive rules or regulations pursuant to their statutory authority explaining what data security protections an individual or entity must employ to be in compliance.

unreasonable security practices. We are in court, I will make this argument. The FTC he will never ever worry about a motion to dismiss under their view. All they have to say is we alleged unreasonable security practices. Let's go forward with discovery. That is all they have to allege, no matter what the violation is.

So your Honor, I have no way, as a defendant, to know what I need to do to stay out of the FTC's aim, or more importantly what I can do in front of an Article III Judge to say, here re the regulations with ascertainable certainty, and my client abided by those regulations. Right now, I can't do either. And I think that is inconsistent with the Third Circuit law. Then we get to deception.

So I am happy to answer any questions, your Honor, but that is the outline of my argument. Again, I don't think there is going to be any dispute that there are rules or regulations, there are none out there.

Thank you, your Honor.

THE COURT: Okay. I will hear from counsel for the FTC.

Do you concede there are no rules and regulations that are currently available?

MR. MORIARTY: Regarding FTC Act liability, no, there aren't for data security. There are for GLB, which counsel pointed out. Graham-Leach-Bliley regulations were issued by the SEC, which goes back to the expertise.

I actually would like to touch on the guidelines from GLB for just a second. Those are the guidelines that if a company violates those guidelines they can be held liable under the FTC Act without injury.

The guidelines, if you look at them, require companies, I mean there are several, I think there are four different steps, but sort of the linchpin of the guidelines is that companies must take steps that are reasonably designed to protect consumer data. And this idea that through the GLB guidelines the FTC has created very elaborate technological regimes where companies can know precisely how to protect their data is inaccurate.

Just to step back for a second, I think the basic premise of Wyndham's fair notice argument is that they don't know how to comply with the reasonableness standard when it comes to protecting consumer information. The argument is problematic. First Wyndham states in its privacy policy it is going

time.

So the last point that I want to make is with these consent decrees, there are consent decrees and then there are also complaints. And the idea that they are not binding on this Court, we don't argue that they are binding on this Court. It is a red herring.

What we argued, the purpose of decrees is to provide parties with notice about the application of the FTC Act and about the types of things that the FTC evaluates when determining whether a company is engaged in reasonable practices with regards to consumer data.

THE COURT: So you say, counsel is arguing that they are not binding, and you never submitted that they are binding. But what you are saying, the real issue here is do these consent decrees provide notice to businesses as to what you need to be doing, and if you are not doing, there is danger.

And so you say that by -- counsel, I don't know whether it was in, it is probably in the reply brief, one of the things they say is all these consent decrees are very -- they are a case that deals directly with this particular company. And it is very difficult for us to say, well, based on those facts

are we in danger? And that they don't provide, you know, adequate warning or adequate notice as to what they need to be doing. And you would say what to that?

MR. MORIARTY: So the answer is that they do provide a lot of information, but we are not exclusively leaning on those adjudications, those consent decrees and complaints as the only source of fair notice. Nor would industry, I believe, accept it if the FTC stated we are the sole arbiter of what is reasonableness.

Reasonableness is an objective standard. It is not the FTC's reasonableness and Wyndham's reasonableness. Reasonableness is objective. There are a lot of sources companies can look to. There is no single answer. That is what happens all the time in the law.

So if a company is trying to figure out, if the grocery store is trying to avoid slip and fall accidents, the common law that they might look at won't be exactly their grocery store, you know, circumstances won't be the same, the type of threats to consumers might not be the same, but they can still make reasonable judgments based on previous cases and a variety of industry standards and just the general

EXHIBIT

3

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Edith Ramirez, Chairwoman**
Julie Brill
Maureen K. Ohlhausen
Joshua D. Wright

In the Matter of	)	**PUBLIC**
LabMD, Inc., a corporation, Respondent.	)	Docket No. 9357

COMPLAINT COUNSEL'S RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS COMPLAINT WITH PREJUDICE AND TO STAY ADMINISTRATIVE PROCEEDINGS

Alain Sheer
Laura Riposo VanDruff
Megan Cox
Margaret Lassack
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Complaint Counsel

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INTRODUCTION

LabMD engaged in fundamental, systemic security failures that put at risk consumers' sensitive personal and health information. Compl. ¶¶ 6-11, 17-21. As a result of LabMD's failures—which continued unabated for years—a file containing the sensitive personal information of approximately 9,300 consumers was shared to a public file sharing network without being detected by LabMD. *Id.* ¶¶ 10(g), 17-20. The sensitive information included consumers' names, dates of birth, Social Security numbers, information relating to laboratory tests conducted, and health insurance policy numbers. Id. ¶ 19. As alleged in the Complaint, these are exactly the kinds of personal data used to perpetrate identity theft. *Id.* ¶¶ 6-7, 9, 12, 21. Indeed, LabMD documents containing consumers' sensitive personal information were found in the possession of identity thieves in Sacramento, California. *Id.* ¶ 21. LabMD's failure to adopt reasonable and appropriate measures to protect consumers' sensitive personal information caused or is likely to cause substantial consumer injury that is not reasonably avoidable by consumers and is not outweighed by countervailing benefits to consumers or competition. Compl. ¶ 22; *see* 15 U.S.C. § 45(n).

Respondent's Motion to Dismiss argues that, even if the Commission were to accept the Complaint's allegations as true—which the Commission must do when considering a Motion to Dismiss—the Commission should nonetheless dismiss the Complaint because: (1) Congress authorized the Department of Health and Human Services to regulate sensitive personal health information; (2) the FTC lacks jurisdiction to protect consumers from businesses' unfair data security practices; and (3) LabMD could not have known that it was required to act reasonably in securing consumers' sensitive personal information. In the alternative, Respondent asserts that the Commission should grant its Motion to Dismiss because the acts and practices alleged in the

Complaint do not affect interstate commerce, and because the Complaint does not comply with the Commission's pleading requirements. These arguments are *all* without merit, and the Commission should deny Respondent's Motion to Dismiss.

This matter fits squarely within the Federal Trade Commission's ("FTC") broad mandate under Section 5 of the Federal Trade Commission Act ("FTC Act") to protect consumers from "unfair or deceptive acts or practices," including unfair data security practices. 15 U.S.C. § 45(a). LabMD misconstrues legal precedent in an attempt to read into the Act exceptions to the Commission's unfairness authority that do not exist and run counter to the Commission's charge to protect consumers from a wide range of existing and developing threats. Indeed, Respondent's position would jeopardize the very purpose of the FTC Act, which Congress designed to empower the Commission to protect consumers from a broad array of unfair and deceptive practices in the marketplace.

The FTC's unremarkable position that companies should engage in "reasonable" practices to prevent unauthorized access to personal information (Compl. ¶ 22) is premised on Congress's mandate that the Commission find a likelihood of substantial consumer injury and consider the countervailing benefits before exercising its unfairness authority. 15 U.S.C § 45(n). The FTC pursues unfairness actions where the likelihood of substantial consumer injury, which is not reasonably avoidable, is not outweighed by countervailing benefits to consumers or to competition. *Id.* In pursuing its mandate to protect consumers from unfair information security practices, the Commission has been consistent and clear about how it enforces Section 5 of the FTC Act in data security matters: It applies Section 5's cost-benefit analysis, pursuing cases where the likelihood of consumer injury resulting from a firm's poor data security practices is not outweighed by the countervailing benefits of forgoing improved security practices.

Because the Complaint pleads specific facts, which, if proven, establish that LabMD is liable for committing an unfair practice under Section 5, the Complaint survives Respondent's Motion to Dismiss, and the Commission should permit this action to move forward in the public interest of protecting consumers and their sensitive personal information.

LEGAL STANDARD

Respondent's Motion to Dismiss is brought pursuant to Commission Rule 3.22(a), 16 C.F.R. §3.22(a). Resp. Mot. 1. Respondent's Motion should be regarded as a motion to dismiss for failure to state a claim, and the Commission should apply the standard of Rule 12(b)(6) of the Federal Rules of Civil Procedure. *In re S.C. State Bd. of Dentistry*, Docket No. 9311, 2004 WL 1814165, at *3 (F.T.C. July 28, 2004) (citation omitted). This standard requires Respondent to "show that Complaint Counsel can prove no set of facts that would entitle them to relief." *Id.* Moreover, in "evaluating whether a complaint withstands a motion to dismiss, the Commission must accept as true all of the complaint's well-pled factual allegations and must construe all inferences in the light most favorable to Complaint Counsel." *Id.* (citation omitted). The Commission should thus deny Respondent's Motion to Dismiss.

ARGUMENT

The Complaint pleads facts sufficient to state a claim that Respondent engaged in unfair practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 45. Specifically, the Complaint alleges that Respondent failed to employ reasonable and appropriate measures to prevent unauthorized access to consumers' personal information. Compl. ¶¶ 8, 10-11, 13-20, 22. Respondent's conduct in this regard caused or is likely to cause substantial injury to consumers. *Id.* ¶¶ 6-7, 9, 12, 17-20, 22; *see also* ¶ 21. This harm to consumers is neither reasonably avoidable, *id.* ¶¶ 12, 22, nor outweighed by countervailing benefits to consumers or competition, *id.* ¶¶ 11, 20, 22. The Commission's consideration of Respondent's Motion to Dismiss should

thus end here. *See In re S.C. State Bd. Of Dentistry*, 2004 WL 1814165, at *3.

I. SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT PROTECTS CONSUMERS AGAINST UNFAIR DATA SECURITY PRACTICES AFFECTING CONSUMERS' PERSONAL INFORMATION

Neither sector-specific statutes applicable to Respondent nor statutes applicable to other industries abrogate the FTC's data security jurisdiction under the FTC Act. Likewise, the Commission's past attempt to extend a different statute to attorneys is irrelevant to its general unfairness authority.

A. FTC and HHS Have Concurrent and Complementary Jurisdiction to Protect Consumers' Personal Information

Neither the Health Insurance Portability and Accountability Act ("HIPAA") nor the Health Information Technology for Economic and Clinical Health Act ("HITECH") provide the Department of Health and Human Services ("HHS"), as Respondent contends, with exclusive authority over the security of consumers' sensitive personal health information. Rather, the statutory framework provides the FTC and HHS with concurrent and complementary jurisdiction to protect consumers' sensitive heath information.

Congress charged HHS with improving "the efficiency and effectiveness of the health care system by, among other things, establishing "standards with respect to the privacy of individually identifiable health information." 42 U.S.C. § 1320d; HIPAA, Pub. L 104-191, 1996 HR 3103, §§ 261, 264. The FTC has a broader but complementary mandate to prevent deceptive or unfair practices, including the failure to provide reasonable and appropriate security for personal information. *See* 15 U.S.C. § 45(a). The two agencies also have complementary remedies. The FTC may seek equitable monetary and injunctive relief under Section 5, *see* 15 U.S.C. §§ 45(b), 53(b), while HHS has the authority to seek civil penalties under HIPAA and the regulations promulgated thereunder, *see* 42 U.S.C. § 1320d-5; 45 C.F.R. § 160, Subpart D.

The FTC and HHS each have prosecutorial discretion to determine when to bring an enforcement action. Exercising that discretion, the two agencies have coordinated enforcement actions that involve the failure to protect sensitive personal health information covered by HIPAA. *See In re Rite Aid Corp.*, FTC File No. 072-3121 (July 27, 2010) (settlement agreement resolving coordinated FTC-HHS information security investigations); *In re CVS Caremark Corp.*, FTC File No. 072-3119 (Feb. 18, 2009) (same).

1. Canons of Construction Do Not Strip FTC of Jurisdiction

Respondent's argument that HHS has exclusive jurisdiction to secure consumers' sensitive personal health information relies on a misinterpretation of a canon of statutory construction, in which Respondent suggests that specific statutes necessarily repeal general ones. Resp. Mot. 10-11. As explained in *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, the canon applies when necessary to avoid contradiction or superfluity, neither of which Respondent can identify here. 132 S. Ct. 2065, 2071 (2012). By contrast, "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974); s*ee also Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976) ("The statutory provisions at issue here cannot be said to be in 'irreconcilable conflict' in the sense that there is a positive repugnancy between them or that they cannot mutually coexist. It is not enough to show that the two statutes produce differing results when applied to the same factual situation, for that no more than states the problem"). HIPAA does not conflict, irreconcilably or otherwise, with the consumer protection mandate of the FTC Act, and therefore both statutes should be regarded as effective.

HIPAA and the HITECH Act provide HHS with tools and methods that complement the FTC's authority to protect consumers' personal information, such as APA rulemaking authority,[1] the ability to seek civil penalties,[2] and the ability to pursue these actions without needing to establish the likelihood of "substantial injury" under the FTC Act. The application of Section 5 of the FTC Act does not render HIPAA and the HITECH Act superfluous.

2. Neither HIPAA nor HITECH Preempt or Repeal FTC Act by Implication

Respondent fails to point to any provision of HIPAA or HITECH that would divest the FTC of its unfairness authority over practices affecting consumers' personal information.[3] The FTC's authority to protect consumers from unfair practices predates the enactment of HIPAA and HITECH. Therefore, Congress's intent to preempt or repeal the FTC's unfairness authority in this regard would have needed to be "clear and manifest." *Nat'l Assoc. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) (citation omitted). Neither HIPAA nor HITECH contains an express or implied repeal of Section 5, so Respondent's argument fails.

HIPAA and HITECH in no way diminish the FTC's authority to protect consumers' personal information. Congress enacted HIPAA in 1996 to, among other things, improve "the efficiency and effectiveness of the health care system" by establishing "standards and requirements for the electronic transmission of certain health information," including

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[1] 42 U.S.C. § 1320d-2(d).
[2] 42 U.S.C. § 1320d-5.
[3] The only provision to which Respondent cites, Pub. L. 111-5 § 13422(b)(1) (Resp. Mot. 12) , does not appear in the text of the cited statute. Complaint Counsel presumes that Respondent intended to cite Pub. L. 111-5 § 13424, which directs the FTC and HHS to study issues related to applying HIPAA's privacy and security requirements to entities that are not subject to HIPAA. Nothing in this or any other statutory provision affects the FTC's authority to protect consumers from unfair practices.

requirements to protect the privacy and security of personal health information. Pub. L. 104–191, § 261. To effectuate this intent, Congress gave HHS the authority to conduct APA rulemaking and to obtain civil penalties for violations. *See* 42 U.S.C. § 1320d-2(d); 42 U.S.C. § 1320d-5. HITECH, enacted in 2009, strengthens HIPAA's privacy and security protections by, among other things, widening the scope of entities subject to civil penalties. *See* Pub. L. 111-5, §§ 13400-11, 123 Stat. 115, 258-276 (2009). The FTC Act confers general authority to the Commission to seek equitable remedies to prevent unfair trade practices that are likely to injure consumers. 15 U.S.C. § 45. Nothing in HIPAA or HITECH conflicts with the FTC's authority in this regard.[4]

Respondent seems to argue that the well-established repeal by implication analysis, *e.g.*, *Kremer v. Chem. Const. Corp.*, 456 U.S. 461, 468 (1982) ("repeals by implication are not favored, . . . and whenever possible, statutes should be read consistently") (citation omitted), is somehow trumped by what it calls "the *Billing* doctrine." Resp. Mot. 13-14. In *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264 (2007), an opinion limited expressly to conflicts between the antitrust and securities laws, the Supreme Court held that the securities laws implicitly repeal the application of the antitrust laws to "underwriters' efforts to jointly promote and sell newly issued securities" because the securities laws are "clearly incompatible" with the application of the antitrust laws in that context. *Id.* at 276, 285. Because this test is limited to conflicts between antitrust and securities laws, it is not applicable here. Rather, the established

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[4] Indeed, Congress enacted HITECH *after* the Commission had brought a half-dozen unfairness cases relating to data security. *See* n.9, *infra* (identifying data security cases alleging unfairness). In approving HITECH, Congress could have "clear[ly] and manifest[ly]" limited the Commission's unfairness authority. *Nat'l Assoc. of Home Builders,* 551 U.S. at 662 (2007). It did not.

law of repeal by implication governs this case.[5] Even if the Commission were to apply the *Billing* Court's analysis to this case, which it should not, Respondent has failed to show that the FTC Act's unfairness authority is "clearly incompatible" with HIPAA and HITECH.

B. Other Statutes Neither Abrogate FTC Act Nor Suggest a Prior Lack of Authority

In addition to contending that HIPAA and HITECH somehow operate to limit the FTC's jurisdiction, Respondent also advances two arguments that are without support in law or fact: (1) that Congress must expressly grant authority to the FTC to pursue particular practices; and (2) that Congress has expressly limited the FTC's authority in this field. *See* Resp. Mot. 14-20. In fact, Congress has delegated broad authority to the FTC to protect consumers against unfair business practices that are likely to injury consumers, and this matter falls squarely within this statutory authority.

1. Complementary Data Security Statutes Give the Commission Additional Means of Pursuing Data Security Practices

The fact that Congress gave the FTC additional tools and methods to pursue data security cases does not abrogate Section 5. Respondent points to several other statutes that provide the FTC with authority to pursue data security practices under the FTC Act—namely, the Fair Credit Reporting Act ("FCRA"), the Gramm-Leach-Bliley Act ("GLBA"), and the Children's Online Privacy Protection Act ("COPPA")—and argues that these statutes abrogate Section 5. Resp. Mot. 14-16. This argument has two fatal flaws: First, the fundamental purpose of the FTC Act is to empower the Commission to protect consumers against unfair or deceptive acts or practices

[5] The Supreme Court's opinion in *Nat'l Assoc. of Home Builders*, which was issued one week after the *Billing* opinion, reiterated the principle that "repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal [is] clear and manifest." 551 U.S. at 662 (internal quotation and citation omitted).

in the *absence* of enumerated practices. Second, the statutes identified by Respondent provide the FTC with tools and methods to supplement the Commission's already-existing authority over data security practices.

a. FTC Act delegates broad power to the Commission.

The statutory text of the FTC Act confers broad power to the Commission to protect consumers from "unfair or deceptive acts or practices." 15 U.S.C. § 45. Congress exempted from this broad grant of authority enumerated areas of commerce. *See id.* § 45(a)(2) (exempting banks, common carriers, air carriers, and other industries). Respondent's Motion asks the Commission to read into its authorizing statute an exemption for data security that does not exist. Resp. Mot. 14-20.

Congress deliberately delegated broad power to the FTC under Section 5 of the FTC Act to address unanticipated practices in a changing economy. *See FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239-40 (1972) ("Congress . . . explicitly considered, and rejected, the notion that it reduce the ambiguity of the phrase 'unfair methods of competition' by tying the concept of unfairness to a common-law or statutory standard or by enumerating the particular practices to which it was intended to apply"). The legislative history of the FTC Act reflects Congress's concerns about attempting to enumerate specific acts and practices. *See* S. Rep. No. 63-597, at 13 (1914) ("[t]here were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others") (attached hereto as **Exhibit A**); H.R. Rep. No. 63-1142, at 19 (1914) (Conf. Rep) ("It is impossible to frame definitions which embrace all unfair practices") (attached hereto as **Exhibit B**).

Indeed, while it is true that the statute does not specifically mention data security, it also does not mention any of the other established uses of its unfairness authority, including online check drafting and delivery (*see FTC v. Neovi, Inc.*, 604 F.3d 1150 (9th Cir. 2010)); sale of

telephone records (*see FTC v. Accusearch, Inc.*, 570 F.3d 1187 (10th Cir. 2009)); unilateral breach of contracts (*see Orkin Exterminating Co. v. FTC*, 849 F.2d 1354 (11th Cir. 1988)); telephone billing practices (*see FTC v. Verity Int'l*, 335 F. Supp. 2d 479 (S.D.N.Y. 2004)); unsafe farm equipment (*see In re Int'l Harvester Co.*, 104 F.T.C. 949 (1984)); or many other practices affecting commerce, all of which courts routinely find to be subject to Section 5 of the FTC Act. Respondent's argument proves too much: If the FTC could not act without Congress first identifying the practice, the Commission could not have brought these, or any other, unfairness actions.

b. Sector-specific data security laws add new powers.

Sector-specific data security laws enforced by the FTC provide the agency with tools and methods to supplement the Commission's already-existing authority over data security practices. Respondent incorrectly argues that the FTC's application of the FTC Act renders sector-specific laws, like the FCRA, GLBA, and COPPA, superfluous. Resp. Mot. 14-16. This argument fails for at least two reasons: First, these statutes do, in fact, provide tools for the FTC. For example, all three provide for APA rulemaking authority,[6] and the FCRA and COPPA also permit the FTC to pursue civil penalties, not just equitable relief.[7] Second, all three statutes permit the FTC to bring actions irrespective of substantial consumer injury.[8]

Respondent anticipates the argument that the FCRA, GLBA, and COPPA are different because they provide additional tools, such as civil penalties or rulemaking authority, but it

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[6] 15 U.S.C. § 1681s(a)(1) (FCRA); 15 U.S.C. § 6804(a)(1) (GLBA); 15 U.S.C. § 6502(b) (COPPA).
[7] 15 U.S.C. § 1681s(a)(2) (FCRA); 15 U.S.C. § 6505(d), 15 U.S.C. § 45(m)(1)(a) (COPPA).
[8] *See* 15 U.S.C. § 1681s(a) (FCRA); 15 U.S.C. §§ 6801(b), 6805(a)(7) (GLBA); 15 U.S.C. § 6505(d) (COPPA).

claims this argument "fails, for these statutes explicitly authorize the Commission to set substantive standards and to enforce those standards under the FTCA." Resp. Mot. 15 (citations omitted). Respondent's counterargument does not grasp the significance of civil penalties: When the FTC enforces the FTC Act alone, it can seek only equitable relief. 15 U.S.C. § 45(b). By contrast, when the FTC enforces the FCRA or COPPA, substantial civil penalties are available. *See, e.g.*, *United States v. Choicepoint*, No. 06-0198 (N.D. Ga. Feb 15, 2006), Stipulated Final Judgment and Order for Civil Penalties, Permanent Injunction, and Other Equitable Relief, at 4 (ordering, in an FCRA matter relating to data security practices, payment of civil penalty of $10,000,000 pursuant to Section 621 of the FCRA, as enforced under Section 5 of the FTC Act); *United States v. Path, Inc.*, No. 13-0448 (N.D. Cal. Feb. 8, 2013), Consent Decree and Order for Civil Penalties, Permanent Injunction and Other Relief, at 11 (ordering, in a COPPA matter relating to the collection of personal information through mobile devices, payment of a civil penalty of $800,000, pursuant to Sections 1303(c) and 1306(d) of COPPA, as enforced under Section 5 of the FTC Act). Thus, even though, as Respondent correctly notes, rule violations are enforced as "an unfair or deceptive act or practice in commerce, in violation of section 5(a)," significant additional remedies are available under the FCRA and COPPA.

The fact that violations of the FCRA, GLBA, and COPPA also constitute violations of Section 5 is significant because it permits the FTC to bring an action without having to establish deception or likelihood of substantial injury under 15 U.S.C. § 45(n). By omitting the likelihood of substantial injury requirement for credit reporting agencies (FCRA), financial institutions (GLBA), and companies that handle children's data (COPPA), Congress enhanced the FTC's ability to bring data security actions against companies in specific sectors, or who trade in