

August 20, 2018

Federal Trade Commission  
Office of the Secretary  
600 Pennsylvania Avenue NW  
Suite CC-5610 (Annex C)  
Washington, District of Columbia 20580

**Comments of ACT | The App Association to the Federal Trade Commission on Competition and Consumer Protection in the 21st Century (Question 11: “The agency’s investigation, enforcement, and remedial processes”)**

**I. Introduction and Statement of Interest**

ACT | The App Association (App Association) appreciates the opportunity to provide its views to the Federal Trade Commission’s (FTC) to inform its hearings on whether broad-based changes in the economy, evolving business practices, new technologies, or international developments might require adjustments to competition and consumer protection enforcement law, enforcement priorities, and policy,<sup>1</sup> specifically regarding “the agency’s investigation, enforcement, and remedial processes.”

The App Association represents thousands of small business software application development companies and technology firms that create the software apps used on mobile devices and in enterprise systems around the globe. Today, the ecosystem the App Association represents – which we call the app economy – is valued at approximately \$950 billion and is responsible for 4.7 million American jobs. Alongside the world’s rapid embrace of mobile technology, our members have been creating innovative solutions that power the internet of things (IoT) across modalities and segments of the economy. The FTC’s approach to competition and consumer protection enforcement law, enforcement priorities, and policy directly impacts each of the App Association’s members.

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<sup>1</sup> Federal Trade Commission, *Hearings on Competition and Consumer Protection in the 21st Century*, Notice of Hearings and Request for Comments, 83 FR 38307 (August 6, 2018).

## II. Whether the agency’s investigative process can be improved without diminishing the ability of the Commission to identify and prosecute prohibited conduct

### a. Oversight of compulsory information demands

The FTC often relies on its authority to issue civil investigative demands (CIDs) in order to conduct investigations of a single target.<sup>2</sup> This statutory authority provides that FTC staff may issue CIDs with the approval of a Commissioner “acting pursuant to a Commission resolution.”<sup>3</sup> Of the three types of resolutions that authorize CIDs—omnibus, blanket, and special—only special resolutions apply solely to a single target.<sup>4</sup> However, omnibus resolutions authorize the investigation of single targets that are part of particular industries. For example, as the Operating Manual notes, an omnibus resolution could authorize investigations of “Widget Industry, Various Members of.”<sup>5</sup> This structure provides a robust framework to ensure the impetus for investigations is proper and related to the FTC’s consumer protection and competition missions.

However, enhanced oversight from commissioners and Congress would help bolster the integrity of the process. For example, the public may benefit from knowing how many CIDs are issued, pursuant to which resolutions, or even which categories of resolutions. Moreover, the FTC is not necessarily held to account for investigations that are open but never result in official FTC action (e.g., closing out the investigation or issuing a complaint). The FTC could consider reporting to the Committees of jurisdiction the types of investigations it undertakes, the official dispositions of those investigations, and their start and end dates (without disclosing the parties where appropriate). Additionally, the FTC could adopt the practice of officially closing out investigations that have languished for a certain period of time. Both approaches could help hold the FTC accountable for disposing of investigations instead of leaving them to languish, costing the investigation targets precious resources to respond or potentially respond to investigations.

Small businesses in particular encounter difficulty with responding to CIDs. An FTC enforcement action would, of course, have a devastating impact on small software developers like App Association members. But even an FTC investigation all by itself--regardless of whether it leads to an enforcement action or not--could drive one of our members out of business because of the resources it takes to respond to CIDs. The FTC is generally judicious with its investigatory authority, but reporting would go some distance toward assuring the public that outlier examples<sup>6</sup> are prevented in the future.

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<sup>2</sup> 15 U.S.C. Sec. 57b-1.

<sup>3</sup> *Id.* at 57b-1(i).

<sup>4</sup> See FTC Operating Manual, Ch. 3.3.6.7.4.2, *available at* [https://www.ftc.gov/sites/default/files/attachments/ftc-administrative-staff-manuals/ch03investigations\\_0.pdf](https://www.ftc.gov/sites/default/files/attachments/ftc-administrative-staff-manuals/ch03investigations_0.pdf) (last visited Aug. 18, 2018).

<sup>5</sup> *Id.* at 3.3.6.7.4.2.

<sup>6</sup> See *LabMD v. Fed. Trade Comm’n*, No. 16-16270 (11th Cir. Jun 6, 2018) (in this case, the investigation was commenced in part based on dubious findings from cybersecurity research firm Tiversa).

### III. Efficacy of Commission's current use of its remedial authority

#### a. *Habit of Entering Consent Orders*

Notwithstanding the puzzling outcome of the *LabMD* case in the 11<sup>th</sup> Circuit, in which the Court appeared to interpret the unfairness balancing test to require a public policy consideration,<sup>7</sup> the mission of the FTC could be served best by more court review of the FTC's interpretation of its own authority. In fact, the 11<sup>th</sup> Circuit's odd interpretation may make further court review even more necessary than it was before.<sup>8</sup> More often than not, the FTC settles cases, entering a consent order with the investigation target under which the target is subject to a series of requirements and/or audits that last 20 years.<sup>9</sup> In fact, almost all cases involving consumer protection complaints related to tech-driven products and services result in consent orders, which do not involve the independent third-party analysis of the courts—and do not involve any admission of liability under Section 5 of the FTC Act.<sup>10</sup> These orders also have the disadvantage of only binding the parties to the agreement, and notably, they do not serve as legally binding precedent as a court decision or FTC rulemaking would. This state of affairs creates a risk whereby the FTC's application of the FTC Act could continue on a path that an independent third party would block. The FTC should reevaluate its habit of seeking cases that are likely to settle and consider putting more resources into major cases that it should win in court. This would help establish more concrete guidelines for businesses while creating a stronger, court-approved basis for its own authority, especially in tech-driven markets.

#### b. *Rethinking Restitution*

Restitution is an important enforcement tool for the FTC because it enables the agency to separate ill-gotten gains from bad actors and make consumers whole. The primary basis for the FTC's restitution authority is Section 13(b) of the FTC Act, which does not explicitly authorize the agency to seek monetary remedies such as restitution.<sup>11</sup> However, federal courts have interpreted the authority to seek permanent injunctions under 13(b)—which are equitable remedies—to mean that courts can also grant

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<sup>7</sup> *Id.* at 12-13 (although the balancing test the Court describes limits the extent to which public policy considerations may play a role in the FTC's determination that an act or practice is "unfair," the Court in this instance appears to interpret the statute to require that a public policy basis exist for such a finding).

<sup>8</sup> *Id.*

<sup>9</sup> See Testimony of Berin Szoka, President, TechFreedom, at 4 n.17, Hearing before the Subcommittee on Consumer Protection, Product Safety, Insurance, & Data Security of the U.S. Senate Committee on Commerce, Science, & Transportation (Sep. 26, 2017), available at [http://docs.techfreedom.org/Szoka\\_FTC\\_Reform\\_Testimony\\_9-26-17.pdf](http://docs.techfreedom.org/Szoka_FTC_Reform_Testimony_9-26-17.pdf).

<sup>10</sup> *Id.*

<sup>11</sup> 15 U.S.C. Sec. 53(b).

ancillary equitable remedies such as restitution.<sup>12</sup> As a result, the specific authority to seek restitution under 13(b) rests more on court cases than in statutory text. This may provide solid legal footing, and it has stood up to court challenge—but as Congress considers process reforms to the FTC and its reauthorization, it should also consider codifying the FTC’s ability to seek restitution, consistent with its 13(b) authority as interpreted by the courts.

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<sup>12</sup> 15 U.S.C. Sec. 53(b); *Fed Trade Comm’n v. Bronson Partners, LLC*, 654 F.3d 359 (2d Cir. 2011).

#### IV. Conclusion

The App Association commends the FTC for policing the world's most dynamic tech-driven industries for harms to competition and consumers. The investigative discretion the FTC exercises on a daily basis represents, on the whole, a carefully balanced approach. However, we hope the FTC considers the potential improvements discussed in this comment to assure the public that its investigations are rooted in good cause and that its wide-ranging authority to prevent unfair or deceptive acts or practices is put to its best use.

Sincerely,



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