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United States Senate

COMMITTEE ON COMMERCE, SCIENCE,
AND TRANSPORTATION

WASHINGTON, DC 20510-6125

WEB SITE: <http://commerce.senate.gov>

July 23, 2014

The Honorable Darrell E. Issa
Chairman
U.S. House Committee on Oversight and Government Reform
2157 Rayburn House Office Building
Washington, D.C. 20515

Chairman Issa,
Dear Chairman Issa:

I am troubled by the impropriety of your ongoing interference with an administrative trial regarding allegations that the medical testing company LabMD, Inc. (LabMD) violated the security and privacy of almost 10,000 consumers. The trial is the result of an enforcement action brought by the Federal Trade Commission (FTC) against LabMD for lax data-security practices after discovering that consumers' sensitive personal and health information was available through a "peer-to-peer" sharing application and was being used by criminals to commit identity theft. Your interference in this legal matter is apparently going to be the subject of an upcoming hearing on July 24 in the House Committee on Oversight and Government Reform.

You purport to be concerned about allegations that a third-party company provided untruthful testimony to the FTC with regard to the LabMD breach. This allegation would be more properly raised by LabMD's defense counsel to the administrative law judge presiding over this trial. The trial process provides defense counsel with ample opportunity to impugn the veracity or integrity of a witness or evidence. It is not the job of Congress to serve as an advocate for one particular side and attempt to sway a judge who makes determinations of fact based on evidence formally presented under well-established rules and procedures.

Instead of allowing the parties in this trial to present evidence and to argue their positions before an independent fact finder, you are instead using heavy-handed, bullying tactics to undermine due process and to inappropriately assist the defendant, LabMD. As a result of your interference – including a June 11, 2014, letter to Chairwoman Edith Ramirez stating that your Committee may "immunize certain future testimony under 18 U.S.C. § 6005" – the administrative law judge presiding over this case has suspended the trial indefinitely. This delay is completely unnecessary; it needlessly forestalls resolution of this important consumer-protection case.

While Congress obviously has an important role in government oversight, I believe you have overstepped your bounds in this instance. It is not appropriate for Congress to intervene in the midst of a trial and to adversely affect its proceedings, as you have done. The inappropriate

timing and nature of your investigation are buttressed by the revelation that LabMD is being represented by a former member of your Committee staff. This raises the question of whether LabMD directly sought your help and intervention in the legal process rather than take the risk of losing on the merits at trial.

Another apparent purpose of your hearing is to express skepticism about the FTC's long-standing and well-established legal authority under Section 5 of the FTC Act to bring an action against companies like LabMD for negligent data-security practices. This skepticism is unfounded, and your public position was recently rejected by a federal judge in the FTC's data security case against Wyndham Corporation. Over the past 13 years, the Commission has initiated dozens of administrative adjudicatory proceedings and cases in federal court challenging practices that compromised the security of consumers' data and that resulted in improper disclosures of personal information collected from consumers.

Indeed, Congress has mandated that the FTC effectively use its authority to protect consumers from "unfair or deceptive acts or practices in or affecting interstate commerce" – the very issues at the heart of the LabMD case. The legislative history of the FTC Act confirms that Congress intended to delegate broad authority "to the [C]ommission to determine what practices were unfair," rather than "enumerating the particular practices to which [the term 'unfair'] was intended to apply... There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again." Against this backdrop, one must conclude that your upcoming hearing and current investigation are nothing more or less than an effort to weaken one of our nation's most important consumer-protection laws, a law that has protected generations of American consumers from scams and rip-offs.

Lastly, it is worth noting that due to Congress's repeated failure to pass strong data-security and breach notification legislation, the FTC stands as the primary federal entity protecting American consumers from harmful data breaches. Recent high-profile, large-scale data breaches – most notably at Target – have once again raised public awareness about the need for companies to adequately secure consumer information. Because Congress remains incapable of passing meaningful data-security legislation that provides American consumers with strong protections, we must continue to rely on the FTC and its organic authority under the FTC Act to bring enforcement actions against companies that break the law. Rather than continuing to pursue your current course of interference, I would urge you to instead work to pass meaningful data-security legislation. I would welcome your assistance.

As Chairman of the Senate Committee on Commerce, Science, and Transportation, I regard the FTC as the premier consumer-protection agency in the nation. The Commission consistently seeks to carry out its mission of protecting consumers and competition, and the agency and its employees serve as an important watchdog for corporate wrongdoing. If the Commission acted improperly or otherwise relied on faulty testimony or evidence in its case against LabMD, a judge would be the proper arbiter of such an allegation at trial, not Members

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of Congress. I urge you to reconsider your actions and to allow for the American legal system and the rule of law – not political theater – to resolve this case.

Sincerely,

A handwritten signature in blue ink, appearing to read "John D. Rockefeller IV", with a long horizontal flourish extending to the right.

John D. Rockefeller IV
Chairman

cc: The Honorable Elijah E. Cummings, Ranking Member