United States Senate
WASHINGTON, DC 20510

May 14, 2018

The Honorable Joseph J. Simons
Chair
Federal Trade Commission
600 Pennsylvania Ave. NW
Washington, DC 20580

Dear Chair Simons:

This week, you will reportedly move to appoint Andrew M. Smith as head of the Federal Trade Commission's (FTC) Bureau of Consumer Protection.[1] Mr. Smith is well known in Washington for his representation of Equifax, Facebook, Uber, and other companies that have been accused of some of the worst abuses of consumers – a record that leaves him unfit and unable to function as the FTC's top consumer advocate. Given this record, we write to request additional information on Mr. Smith and to ask that you delay his appointment and a vote by the Commissioners on his appointment until these questions can be answered.

The role of the FTC's Bureau of Consumer Protection is to "sto[p] unfair, deceptive and fraudulent business practices by ... developing rules to maintain a fair marketplace, and educating consumers and businesses about their rights and responsibilities."[2] But Mr. Smith has a voluminous record of defending companies accused of engaging in illegal or unethical practices. Most recently, he represented the Consumer Data Industry Association and defended Equifax before Congress in the wake of the company's massive data breach that exposed the personal information of more than 145 million Americans.[3] Just last month, Equifax acknowledged in federal filings that the company is currently under investigation by the FTC.[4]

Mr. Smith has every right to represent corporations that have harmed consumers, and those companies have every right to be represented by Mr. Smith or the counsel of their choice. But the FTC can choose among any number of qualified individuals to lead its Bureau of Consumer Protection, and it is impossible to believe that the best candidate is someone with a long record of representing companies that have been accused of hurting consumers. Mr. Smith's record leaves numerous questions about whether he is qualified for the position.

In addition, Mr. Smith's representation of and entanglement with Equifax, Facebook, Uber, and other targets of some of the FTC's biggest and most important investigations may require him to

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[1] New York Times, "Industry Lawyer Expected to Head F.T.C. Consumer Protection," Jack Nicas, May 11, 2018, https://www.nytimes.com/2018/05/11/technology/ftc-consumer-protection-chief.html
[2] Federal Trade Commission, "Bureau of Consumer Protection," https://www.ftc.gov/about-ftc/bureaus-offices/bureau-consumer-protection.
[3] Written Testimony of Andrew Smith to the U.S. Senate Committee on Banking, Housing, and Urban Affairs, October 27, 2017, https://www.banking.senate.gov/imo/media/doc/Smith%20Testimony%2010-17-17.pdf.
[4] Equifax Inc. 10-Q, April 26, 2018, https://otp.tools.investis.com/clients/us/equifax/SEC/sec-show.aspx?Type=page&FilingId=12705077-171142-189869&CIK=0000033185&Index=12000

recuse himself from these matters – and many more in the future. Executive Order 13770 prohibits executive branch employees from participating "in any particular matter involving specific parties that is directly and substantially related to [a] former employer or former clients" for a period of two years.[5]

Furthermore, under federal ethics law, executive branch employees should "not participate" in any particular matter involving specific parties if the employee "knows that a person with whom he has a covered relationship is…a party to such matter." [6] The law defines "covered relationship" to include "[a]ny person for whom the employee has, within the last year, served as … attorney, consultant, contractor or employee."[7] This federal ethics recusal standard also applies to particular matters involving specific parties "where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter" without first receiving approval from relevant Department officials. [8]

These recusal requirements should force Mr. Smith to recuse himself from multiple cases at the FTC, meaning that in addition to the questions raised about Mr. Smith's qualifications to head the Bureau of Consumer Protection based on his lengthy record of defending corporations accused of violating federal consumer protection laws, there are additional questions about whether he will be able to do the job because of these required recusals.

In light of Mr. Smith's record and the extent of his likely recusals, we urge you to delay any appointment and vote by the Commissioners on Mr. Smith until questions about his qualifications and conflicts of interest are answered fully. We ask that you answer the following questions by May 25, 2018:

1. Please provide a list of all of Mr. Smith's employers and clients in the past two years, and the cases or circumstances in which he has represented them.

2. Please provide all financial disclosure documents Mr. Smith has completed, including Office of Government Ethics Form 278.

3. Mr. Smith is currently a partner at Covington & Burling LLP ("Covington"). Please list all FTC investigations and other specific matters before the FTC in which Covington currently serves as counsel, including all companies under investigation by, or in litigation against, the FTC currently represented by Covington.

4. By law, Mr. Smith must recuse himself from all cases related, directly or indirectly, to his past employers and clients, including Equifax, Facebook, and Uber. Can you commit that he will not be waived from these recusal requirements?

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[5] Executive Order 13770, Ethics Commitments by Executive Branch Appointees, February 3, 2017, https://www.oge.gov/web/oge.nsf/Executive%20Orders/A43C4DBAB9EC4DC7852580BC006FBA83/$FILE/Exec%20Order%2013770.pdf?open

[6] C.F.R. 2635.502, Standards of Ethical Conduct for Employees of the Executive Branch, https://www.ecfr.gov/cgi-bin/text-idx?SID=586f964556e7ca7afb28547c42346a8b&mc=true&node=pt5.3.2635&rgn=div5#se5.3.2635_1502

[7] *Id.*

[8] *Id.*

5. Will Mr. Smith recuse himself from any and all rulemakings that could affect, directly or indirectly, his past clients and employers?

6. Has the FTC conducted an analysis of how Mr. Smith's anticipated recusals would impact the efficacy of the FTC's Consumer Protection Bureau? If so, please provide a copy of any and all materials related to that analysis. If not, please provide an explanation of why this analysis was not conducted.

7. Does Mr. Smith intend to seek any waivers from recusal requirements or any other ethics requirements?

Sincerely,

Elizabeth Warren
United States Senator

Richard Blumenthal
United States Senator

Brian Schatz
United States Senator

CC: Mr. Christian S. White, Deputy General Counsel & Designated Agency Ethics Official, Federal Trade Commission