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United States of America
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

JUL 16 2014

Re: FOIA-2014-01046
QFRs

This is in response to your request dated June 15, 2014 under the Freedom of Information Act seeking access to all Questions for the Record (QFRs) and subsequent responses, since January 1, 2009. In accordance with the FOIA and agency policy, we have searched our records, as of June 20, 2014, the date we received your request in our FOIA office.

We have located 487 pages of responsive records. You are granted full access to the responsive records, which are enclosed.

Based on the fee provisions of the FOIA, 5 U.S.C. § 552(a)(4)(A), and the Commission's Rules of Practice, 16 CFR § 4.8 et seq., as amended, I am also enclosing an invoice for the charges we incurred for this partial response to your request. Failure to pay this bill promptly will result in our refusal to provide copies of accessible documents in response to future requests. If not paid within 30 days, this bill will accrue interest penalties as provided by Federal Claims Collection Standards, 31 C.F.R. § 900-904, as amended.

Please make checks payable to U.S. Treasury and send payment to:

Financial Management Office, H-790
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

If you are not satisfied with this response to your request, you may appeal by writing to Freedom of Information Act Appeal, Office of the General Counsel, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington D.C. 20580 or by facsimile at (202) 326-2477, within 30 days of the date of this letter. Please enclose a copy of your original request and a copy of this response.

If you have any questions about the way we are handling your request or about the FOIA regulations or procedures, please contact Andrea Kelly at (202) 326-2836.

Sincerely,

Sarah Mackey
Associate General Counsel

Response to Questions from the Honorable Bobby Rush
Following Up on May 5, 2009 Hearing on HR 2221:
Data Accountability and Protection Act

1. **The definition of personal information in the Data Accountability and Trust Act is very narrow. It covers a person's name or address or phone number in combination with any one or more of: Social Security number; Driver's License number or other State ID number; financial account number or credit or debit card number and any code necessary to access that account. That definition applies to both the information security requirements and the data breach notification requirements. While such a narrow definition of personal information may be appropriate for the data breach provisions to avoid over-notification, it may be too narrow for information security requirements. Do you believe that it would be appropriate to expand the definition of personal information for the security provisions of the Act? What should the definition of personal information be for that provision? Would it be appropriate to provide the FTC with rulemaking authority to modify or expand the definition of personal information for the information security provisions beyond the limited rulemaking authority already in the bill?**

As you note, HR 2221 imposes data security requirements on entities that maintain "personal information." The definition of "personal information" in HR 2221 as introduced covered only information that included Social Security numbers, other identifying numbers, or account numbers. Thus, for example, a company that owned a database containing only consumers' names, along with their sensitive health information, would not have been required to maintain the security of its database. Indeed, such a company may not have been subject to *any* federal requirement to maintain the security of the sensitive health information it held.[1]

Rather than expanding the definition of "personal information" in the bill itself to address specific scenarios, the Commission staff had recommended to Congressional staff that the Commission be given authority to conduct a rulemaking to expand the definition. A rulemaking proceeding would allow the Commission to seek input about what types of personal information companies collect, and the costs and benefits associated with maintaining the security of such information. We are extremely pleased that your Subcommittee adopted this suggested change.

On a related issue, staff suggests not limiting breach notification to situations in which there is a "reasonable risk of identity theft, fraud, or other unlawful conduct" as is currently proposed in HR 2221. This formulation does not capture other harms associated with unauthorized

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[1] The security requirements of the Health Insurance Portability and Accountability Act ("HIPAA") would not necessarily apply to such a company; they apply only to health care providers that conduct certain transactions in electronic form, health care clearinghouses (which provide certain data processing services for health information), health plans, or business associates of such entities.

disclosure of information, such as the embarrassment associated with the release of sensitive health information. Thus, staff suggests that the breach notification provisions should apply when there is a "reasonable risk of identity theft, fraud, or other harmful conduct," and that the bill should require the FTC to conduct a rulemaking to determine what constitutes "harmful" conduct.

2. **Section 4(c) of H.R. 2221 provides that it will be an affirmative defense to a law enforcement action brought under the Act's data breach notification provisions that all of the information that was subject to the breach was information acquired from public records. Thus, if a database is compromised that is made up exclusively of public records such as bankruptcy documents, criminal histories, property records, court filings, and other documents with sensitive personal information consumers will not be notified. If the same or even less information is in another database, consumer would receive notice. Does this distinction based on the original source of the information make sense? What are the benefits of this affirmative defense?**

The Commission staff does not support an affirmative defense for breaches of public record databases. In many cases, information brokers compile detailed dossiers on individuals, consisting solely of public record information. This information may be extremely sensitive and, when collected and compiled together in one place, could do significant harm to consumers if breached.[2] For example, such dossiers may contain Social Security numbers (which are not always redacted in public records) and/or enough detailed history about the consumer that an unauthorized person could perpetrate identity theft, thus posing substantial harm to the consumer.[3] An unauthorized user also could gain enough information to engage in "pretexting," the practice of posing as another person in order to obtain financial records or other private information. Finally, unauthorized users could use information in these records to blackmail, stalk, harass, or otherwise threaten consumers.

If an unauthorized user accesses these dossiers about individual consumers, staff believes that the consumers would want to know. In addition, notice would allow the consumers to take steps, when possible, to limit the harm from the disclosure. For these reasons, Commission staff suggests deleting this affirmative defense.

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[2] Although public record data is already accessible in public files elsewhere, it is scattered among many different places, and thus difficult for any one person to find on his or her own. Information brokers compile this data together, thus making it a treasure trove for those seeking to do harm.

[3] For example, for authentication purposes, businesses often ask consumers personal questions that presumably only the consumers themselves know the answers to. An identity thief may be able to gather enough information about a particular consumer to answer these questions.

ONE HUNDRED ELEVENTH CONGRESS

Congress of the United States

House of Representatives

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July 13, 2009

The Honorable Pamela Jones Harbour
Commissioner
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, D.C. 20580

Dear Madam Commissioner:

Thank you for appearing before the Subcommittee on Health on June 11, 2009, at the hearing entitled "Emerging Health Care Issues: Follow-on Biologic Drug Competition".

Pursuant to the Committee's Rules, attached are written questions for the record directed to you from certain Members of the Committee. In preparing your answers, please address your response to the Member who submitted the questions and include the text of the question with your response, using separate pages for responses to each Member.

Please provide your responses by July 27, to Earley Green, Chief Clerk, in Room 2125 of the Rayburn House Office Building and via e-mail to Earley.Green@mail.house.gov. Please contact Earley Green or Jennifer Berenholz at (202) 225-2927 if you have any questions.

Sincerely,

Henry A. Waxman
Chairman

Attachment

The Honorable Joseph Pitts

1. The European Medicines Agency (EMA) has indicated through guidance that it will not approve a biosimilar referencing immune globulin and blood clotting factors - both plasma-derived and recombinant - unless the applicant submits a complete application. Do you anticipate FDA making the same determination for these product classes? If not, since there is already significant brand to brand competition among the products already in these classes, wouldn't non-patent exclusivity of 12-14 years be even more critical to this niche sector for continued innovation for treating rare diseases, including a recently approved Factor I blood clotting factor that treats only 300 people in the US?

Questions for the Record
Committee on Energy and Commerce, Subcommittee on Health Hearing,
"Emerging Health Care Issues: Follow-On Biologic Drug Competition,"
with Federal Trade Commissioner Pamela Jones Harbour
(June 11, 2009)

Commissioner Pamela Jones Harbour's* Response to Questions from the Honorable Joseph Pitts

Q: The European Medicines Agency (EMA) has indicated through guidance that it will not approve a biosimilar referencing immune globulin and blood clotting factors - both plasma-derived and recombinant - unless the applicant submits a complete application. Do you anticipate FDA making the same determination for these product classes? If not, since there is already significant brand to brand competition among the products already in these classes, wouldn't non-patent exclusivity of 12-14 years be even more critical to this niche sector for continued innovation for treating rare diseases, including a recently approved Factor I blood clotting factor that treats only 300 people in the US?

A. In response to the first part of this question, I note that it is beyond the expertise of the Federal Trade Commission ("FTC") to comment on the specific clinical requirements for the approval of follow-on biologics ("FOBs"). As explained in the FTC's recent report on FOB competition ("FTC FOB Report"),[1] the Food and Drug Administration ("FDA") – and, by analogy, the EMEA in Europe – is the appropriate agency to determine the preclinical and clinical requirements for FOB applicant approval. Based on current technology, however, the FTC FOB Report did anticipate that the clinical requirements for FOB drugs would be substantially similar to the requirements for pioneer biologic drugs.[2]

In response to the second part of the question, I can draw upon FTC experience from a recent investigation of the plasma protein industry, including immunoglobulin products. In June 2009, the FTC initiated a lawsuit to enjoin the now-abandoned CSL-Talecris merger.[3] The

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* This response expresses my personal views. It does not necessarily represent the position of the Federal Trade Commission or any other individual Commissioner.

[1] *See* FEDERAL TRADE COMMISSION, EMERGING HEALTH CARE ISSUES: FOLLOW-ON BIOLOGIC DRUG COMPETITION, *available at* http://www.ftc.gov/os/2009/06/P083901biologicsreport.pdf [hereinafter FTC FOB REPORT].

[2] *See* FTC FOB REPORT, Executive Summary at ii-iii. The Report states that the technical and regulatory entry barriers for FOB entrants would remain substantial, taking an average of eight to ten years, and costing each FOB entrant hundreds of millions of dollars to obtain FDA approval. *Id.* at 9 n. 23.

[3] *See* FTC News Release, *FTC Authorizes Suit To Stop CSL's Proposed $3.1 Billion Acquisition of Talecris Biotherapeutics* (May 27,2009), *available at* http://www.ftc.gov/opa/2009/05/talecris.shtm; FTC Dkt. No. 9337, In the Matter of CSL Limited, a corporation, and Cerberus-Plasma Holdings, LLC, a limited liability company, *available at* http://www.ftc.gov/os/adjpro/d9337/index.shtm (Part 3 administrative docket); FTC v. CSL, Ltd. and

FTC's decision to challenge the transaction was motivated by significant consolidation within the plasma protein industry. As Richard Feinstein, the Director of the FTC's Bureau of Competition, explained:

> Now more than ever, it is critical that consumers benefit from vigorous competition in the health care sector – both to ensure competitive prices and to drive further innovation. . . . Substantial consolidation has already occurred in the plasma protein industry, and these highly concentrated markets are already exhibiting troubling signs of coordinated behavior. The proposed acquisition would further consolidate the industry and increase the likelihood of collusion.[4]

As alleged in the FTC's complaint, these markets already are highly concentrated due to intense industry consolidation[5] and high barriers to entry[6] – leading to tighter supply, higher prices, and a recognition by remaining industry participants "that they are operating in an oligopoly in which they are better off avoiding competition, restricting supply, and raising prices."[7] Based on the FTC's findings regarding the plasma protein industry, I respectfully suggest that erecting additional entry barriers through the addition of twelve to fourteen years of non-patent exclusivity for existing market participants likely would result in even greater consumer harm.

Speaking more generally, the FTC FOB Report concludes that patents and market-based pricing incentivize innovation. It does not appear that an additional period of non-patent exclusivity is necessary to promote innovation in any biologic market. To the contrary, the high entry barrier posed by twelve to fourteen years of non-patent exclusivity likely would stifle innovation.

Prior FTC investigations in the pharmaceutical and biotech industries reveal that pioneer biologic manufacturers engage in a race to screen, patent, and develop their products. Typically, their parallel research and development ("R&D") efforts are motivated by a new medical threat, as well as by scientific advances that suggest a new line of therapy. But of course, these firms also are propelled by the threat of competition. The lure of patent protection, combined with the

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Cerberus-Plasma Holdings, LLC, Case 1:09-cv-01000-CKK (D.D.C.) (complaint filed June 6, 2009) (redacted version), *available at* http://www2.ftc.gov/os/caselist/0810255/090602cslcmpt.pdf, [hereinafter CSL Complaint]. I was recused from participating in the matter. All information is derived from publically available sources.

[4] *See* FTC News Release, *supra* note 3 (statement of Richard Feinstein, Director, FTC Bureau of Competition).

[5] *See, e.g.*, CSL Complaint, *supra* note 3, at ¶¶ 29-33.

[6] *See, e.g., id.* at ¶¶ 80-85.

[7] *Id.* at ¶ 33.

rewards of market-based pricing, creates incentives to increase the pace and scope of innovation, which benefits consumers.[8]

Studies indicate that a short head start for a first-in-class drug product does not dampen R&D incentives. In fact, a short period of exclusivity may be optimal for rewarding past innovation while still allowing competition to incentivize future innovation.[9] With respect to FOBs, as the FTC's FOB Report concluded, the competitive impact of FOB entry – including effects on innovation – is likely to be similar to entry by another branded competitor. The highly competitive race among innovators – *including* biosimilar entrants – is likely to spur cures for unmet medical needs, such as blood coagulation disorders. Conversely, additional non-patent exclusivity likely will slow the pace and scope of innovation by blocking entry of competing products.

Your question notes the small size of certain blood clotting factor markets. The FTC's FOB Report identifies the Orphan Drug Act as one way to incentivize innovation in situations where the market and the patent system fail to provide adequate incentives.[10] The FTC Report concludes that existing statutory provisions, including orphan drug exclusivity, are sufficient to promote innovation. Publically-available information indicates that CSL's Factor I product (which treats a small patient population) already benefits from seven years of marketing exclusivity under the Orphan Drug Act, which illustrates how existing exclusivity periods are, in fact, promoting innovation in the manner intended by that statute.[11]

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[8] *See* FTC FOB REPORT at 26-27.

[9] *See id.* at 27-29, n. 98 & 99; *see also* Joseph DiMasi & Cherie Paquette, *The Economics of Follow-on Drug Research and Development*, 22 PHARMACOECONOMICS SUPP 2:1-14, 10 (2004); F.M. Scherer, *Markets and Uncertainty in Pharmaceutical Development* 13 (FACULTY RESEARCH WORKING PAPERS SER., HARV. U. JOHN F. KENNEDY SCHOOL OF GOV'T, 2007).

[10] *See* FTC FOB REPORT at 25 n. 92.

[11] *See id.* at 29; *see also* CSL website, *available at* http://www.cslbehring.com/s1/cs/enco/1151517263302/news/1229961371088/prdetail.htm ("CSL Behring announced today that the U.S. Food and Drug Administration (FDA) has granted marketing approval for RiaSTAP™, the first and only treatment of acute bleeding episodes in patients with congenital fibrinogen deficiency ...an estimated prevalence in the U.S. of approximately 300 patients. ...RiaSTAP was granted orphan status in March 2008....").

Witness Questions
Commerce, Trade, and Consumer Protection Subcommittee Hearing
Questions for Chairman Jon Leibowitz of the Federal Trade Commission

Questions from Chairman Rush

Q1. In your testimony, you discussed the potential impact that the creation of this new agency could have on FTC's ability to do its job. You noted that many of FTC's cases that have nothing to do with traditional financial products or services often involve those statutes that may be moved to CFPA. As an example, you said that FTC's enforcement against fraudulent telemarketers may implicate financial data processors. Whereas FTC now can enforce against both companies involved in the fraud, if this proposal were to become law, FTC could not pursue on its own authority a case against a data processor. If the proposed legislation become law, what impact would it have on FTC's ability to bring actions against non-financial frauds? Are you concerned that FTC's ability to protect consumers in areas unrelated to traditional financial products and services will be harmed?

A1. Although there may be some areas of the legislative draft that need adjustment to make sure that consumers are well protected, I agree with the fundamental objective of the proposal: to improve the effectiveness of the current governmental system for protecting consumers of financial services.

In our experience, it is often most efficient and effective, in situations such as those described in your question, to act simultaneously against non-financial companies that are engaged in fraud and the providers of financial services who facilitate or assist the fraud. If the FTC were required to refer the case against the facilitator to the CFPA, depending on how the referral is handled, it could result in separate actions brought at separate times against perpetrators that are implicated in the same fraud. I recommend that this provision of the legislation be amended to ensure that the FTC's ability to protect consumers is not hampered.

Q2. According to the Administration's proposal, FTC could enforce the FTC Act and would have backstop authority to enforce the statutes and rules being transferred from FTC to the new agency. Would there be value in having FTC enforce the new agency's rules? If FTC is to be a backstop enforcer, should it not have all possible remedies available to it?

A2. There is great value in having the FTC enforce all financial consumer protection laws and rules, regardless of when or by whom they are promulgated. The FTC is an independent agency with a strong record of success, and can provide the most value if it can concurrently enforce laws and rules that protect consumers of financial products and services. In my view, there are significant benefits to having multiple enforcers in

maximizing the overall resources applied to protecting consumers, establishing a healthy competition amongst enforcers, and avoiding "agency capture" by regulated industries. A backstop role could result in less effective protection for consumers.

Regardless of whether the FTC is given concurrent authority with the CFPA or assigned a backstop role, I agree that allowing the FTC to enforce the CFPA's rules would benefit consumers. The FTC has decades of experience in enforcing rules that cover, among others, non-bank financial entities, and I believe that permitting FTC enforcement over such entities would increase the likelihood that violators would be identified and prosecuted. In addition, enabling the FTC to enforce the CFPA rules would often result in more efficient enforcement. Although the FTC might be able to address the violations through enforcement of the FTC Act, where the CFPA has promulgated a rule governing unfair or deceptive practices the FTC could simply enforce the rule without having to prove the underlying unfairness or deception. I would note that, under the Administration's proposal, the states would have authority to enforce the CFPA's rules; not providing this same authority to the FTC, with its vast experience and record of success in this area would be anomalous.

Q3. According to the Administration's proposal, CFPA would be authorized to enforce against unfair, deceptive, or abusive practices. The FTC Act gives FTC the authority to enforce against unfair or deceptive practices. What value does the word "abusive" add? What additional practices, if any, could FTC enforce against if it had this additional authority?

A3. Several consumer protection statutes that the FTC enforces include the term "abusive." The term generally allows the Commission and other enforcement agencies to address wrongful practices that do not fit neatly within the legal definitions of unfairness or deception. For example, in addition to its specific prohibition on debt collector conduct that is "deceptive" or "unfair," the Fair Debt Collection Practices Act also prohibits conduct that is "abusive," specifically declaring as "abusive" the use of obscene, profane, or abusive language. In addition, the Telemarketing and Consumer Fraud and Abuse Act of 1994 directed the Commission to include rule provisions relating to specific "abusive" practices, such as restrictions on the time of day telemarketers may make unsolicited calls to consumers. These statutes shed some light on how the addition of "abusive" to the list of prohibited practices over which the CFPA would have authority might be applied in the financial activities context.

Q4. In your testimony, you request that the FTC Act be amended to give FTC independent litigating authority, thereby enabling FTC to bring actions seeking civil penalties in federal court without the involvement of the Department of Justice. The Administration's proposed legislation grants this authority to CFPA, but not to FTC. The proposed legislation also gives CFPA examination authority over the institutions that it regulates. FTC has not been granted this authority. Would FTC benefit from having examination authority? How could FTC use examination authority to improve consumer protections?

A4. The Commission appreciates the Administration's recognition of the FTC's role as the nation's consumer protection agency, and agrees that the agency's ability to protect consumers would be enhanced by the additional resources and authority recommended by the Administration. As you note, the Commission also believes that it should be granted independent litigating authority in cases in which it seeks civil penalties. This authority would allow the Commission – the agency with the greatest expertise in enforcing the FTC Act – to bring cases more efficiently, while retaining the option of referring appropriate matters to the Department of Justice. I see no legitimate basis why the FTC should not have the same ability to bring cases in its own name as the Securities and Exchange Commission and the Commodity Futures Trading Commission have, and that the CFPA would have under the Administration's proposal.

With respect to the question of examination authority, I believe that, to protect consumers effectively, the federal government must engage in careful and comprehensive oversight of the financial services industry, backed by vigorous law enforcement. Although I believe that more oversight of financial practices is needed, conducting examinations may not be the best means of increasing such scrutiny for most of the types of entities within the FTC's jurisdiction. The FTC has jurisdiction over many thousands of small financial entities, and the examination model may be more useful and practical for larger financial institutions. In any event, the FTC will continue to increase its oversight of the entities within its jurisdiction through vigorous law enforcement.

Q5. FTC serves as the Federal government's leading agency in the areas of consumer privacy, data security and identity theft. This includes financial privacy. Under the Administration's proposal, CFPA would assume responsibility for financial privacy once the FTC's responsibilities under the Fair Credit Reporting Act and Gramm-Leach Bliley Act Privacy Rule are transferred to CFPA. The proposed Act transfers all matters relating to financial privacy to CFPA but leaves information security with FTC. Would this transfer of responsibility under the FCRA and the Gramm-Leach-Bliley Act impact FTC's general consumer privacy program? Are you concerned that the transfer of resources and expertise in the areas of financial privacy would impact FTC's ability to regulate and bring enforcement actions in the area of consumer privacy?

A5. I agree that to date, the FTC has been the leading federal voice on privacy. Among other things, we have brought dozens of enforcement actions against companies that have failed to protect consumer data; conducted workshops and surveys on new and emerging privacy issues; testified before Congress in support of various legislative proposals; disseminated educational materials to consumers and businesses; and called for stronger self-regulatory efforts in areas such as behavioral advertising. Although we hope to continue to provide leadership as we move into the future, the CFPA proposal puts our role in some doubt. In particular, it seems to contemplate that essentially all issues relating to financial privacy (with some minor carve-outs) be transferred to the new agency, with other issues to remain with the FTC. If so, the FTC's role in formulating federal privacy policy would be reduced. Of course, the precise effect on the FTC's program will depend on the scope of the transfer to the new agency.

Q6. Some have suggested that Congress expeditiously pass H.R. 2309 as it considers this proposal. That way, FTC would have the tools it needs to better help consumers now even if these rules eventually migrate to the new agency. Do you support such an effort?

A6. I support the passage of H.R. 2309, the Consumer Credit and Debt Protection Act. This bill would allow the FTC to use streamlined and expeditious APA notice and comment rulemaking procedures, instead of the cumbersome and time-consuming procedures currently required under Section 18 of the FTC Act, to promulgate rules prohibiting or restricting unfair or deceptive acts and practices relating to consumer credit. Even though any rules that the FTC promulgates using this authority may ultimately be transferred to the CFPA, I believe that it is important for the FTC to have this authority as soon as possible so that there is no gap in consumer protection before the CFPA is able to promulgate these types of rules on its own.

Questions from Representative Dingell

Q1: Section 1053 of the Administration's bill authorizes CFPA to enforce compliance with any "Federal law that the [CFPA] is authorized to enforce [...] and any regulations or orders prescribed thereunder, unless such Federal law specifically limits the Agency from conducting a hearing or adjudication proceeding [...]." Since section 1061(a)(5) of the bill gives CFPA "all powers and duties" vested in the Federal Trade Commission (FTC) "relating to consumer financial protection functions," does this mean that CFPA could technically enforce the entire FTC Act and all regulations and orders issued thereunder? Similarly, under the Administration's proposal, what authorities are left with FTC?

A1: The Administration's proposed bill creating the CFPA appears to provide the CFPA with the power to enforce the FTC Act, as well as orders and regulations issued pursuant thereto, relating to consumer financial protection.

With regard to the FTC's continuing role, the bill is not entirely clear. As you note, proposed section 1061(a)(5) (in subtitle F) would transfer all of the FTC's "powers and duties ... relating to consumer financial protection functions" to the CFPA. There is a concern that the breadth of the bill's definitions of financial activities, financial products or services, credit, and consumer financial protection functions could be read to apply to a broad swath of commercial transactions involving credit or other kinds of payment arrangements.

Section 1061(b) of the proposal provides that the transfer of consumer financial protection functions would not affect the authority of the FTC to engage in enforcement pursuant to section 1022(e)(3), the "backstop" enforcement provision. Under that provision, the FTC could enforce specific financial consumer protection laws that it now implements (such as the Truth in Lending Act), but only after submitting a matter to the CFPA and waiting up to 120 days for the CFPA to decide whether to bring the action itself. I believe that the FTC should have concurrent authority, because allowing us to put an immediate halt to harmful practices is critical in protecting consumers.

The CFPA apparently would have sole rulemaking power to promulgate rules under the enumerated statutes and promulgate any financial services-related rules under the FTC Act. The FTC apparently would have enforcement authority under the enumerated statutes (subject to a referral requirement) but would not have the authority to enforce CFPA-issued rules.

With respect to the FTC Act and other consumer protection laws not enumerated for transfer, the bill appears to envision that the FTC would continue to exercise some authority over financial services. I believe that the intent of the Administration's proposal is to continue the FTC's authority, while coordinating appropriately with the CFPA where it relates to consumer financial services or products. The bill's proposed amendments to the FTC Act are consistent with that interpretation, but the transfer of functions language should he revised to explicitly state that the FTC would retain such

abilities as bringing cases, holding workshops, writing reports, and giving guidance under the FTC Act in areas related to financial activity.

I would be happy to have FTC staff work with the Subcommittee to clarify the legislation in these areas and ensure that the FTC continues to have an effective enforcement role.

Q2: Section 1022(d) of the bill provides that "[...] to the extent that a Federal law authorizes [CFPA] and another Federal agency to issue regulations or guidance, conduct examinations, or require reports under that law for purposes of assuring compliance with this title, any enumerated or consumer law, the laws for which authorities were transferred under subtitles F and H, and any regulations thereunder, [CFPA] shall have the exclusive authority to prescribe rules, issue guidance, conduct examinations, require reports, or issue exemptions with regard to any person subject to that law." Do you believe this provision will prohibit FTC from issuing antitrust guidance, for example? Would it not also prohibit FTC's efforts to do studies, hold workshops, issue reports, and give guidance with respect to consumer protection?

A2: I do not believe that the Administration intended to cover competition law, but one possible reading of the bill would limit the FTC's competition authority as well as its consumer protection authority: the definition in section 1061(d) of "consumer financial protection functions" ("research, rulemaking, issuance of orders or guidance,... relating to the provision of consumer financial products or services") could be read broadly enough to encompass matters of competition in the provision of consumer financial products or services. The drafters may not have intended to include the FTC's competition authority in the provision, and clarifying language would help to correct any misinterpretation.

With respect to the FTC's expertise in consumer protection studies, workshops, reports, and guidance, under the bill, it appears that the FTC would lose those functions with respect to financial consumer protection. While I support having a consistent approach to financial consumer protection, the FTC's deep experience of collecting and analyzing information and assisting consumers and businesses with best practices relating to all kinds of consumer protection should be preserved and fully utilized, and the bill should be amended as necessary to accomplish this goal.

Q3. The Administration's bill would preserve a so-called "backstop authority" for the FTC, whereby FTC may initiate an enforcement proceeding if CFPA does not do so after 120 days. Currently, FTC may refer civil penalty matters to the Department of Justice, and if the Attorney General does not commence an action within 45 days of this referral, the FTC may do so. Historically, FTC has initiated very few of these proceedings. Given this analogy between the backstop authority in the Administration's bill and the existing referral process between FTC and DOJ, do you reasonably expect that FTC will take advantage of the backstop authority?

A3. The FTC generally would use its backstop authority in cases that the CFPA declines to

initiate following an FTC referral. This process is similar to the existing statutory scheme for civil penalty actions, whereby the FTC may file the action only if the Department of Justice fails to do so within 45 days of a referral. Historically, the FTC has initiated relatively few civil penalty actions in its own name, because in the vast majority of instances the Department of Justice accepts the referral and files the action itself. We cannot know at this time whether the CFPA would similarly accept most referrals and initiate actions itself, nor how often or under what circumstances the CFPA might decline an FTC referral. In cases involving significant consumer injury, including those involving fraud, any waiting time is problematic, and a requirement that we wait up to four months before bringing any kind of consumer protection case is, in our view, problematic. Thus, the referral period could significantly hamper the effectiveness of backstop enforcement.

Q4. Similarly, one assumes that if the Consumer Financial Protection Act is enacted, FTC would lose valuable consumer financial protection staff. Do you believe this will affect FTC's ability to exercise the backstop authority it is given under the Consumer Financial Protection Act?

A4. Section 1061(a)(5) of the proposed bill, when read in conjunction with 5 U.S.C. § 3503, appears to require that FTC staff engaged in activities "relating to consumer protection financial protection functions" be transferred automatically to the CFPA. Certainly, the transfer of all FTC staff with experience in financial service matters to the CFPA would significantly impair the FTC's ability to serve as a backstop.

Q5: The Administration's bill appropriates to the Consumer Financial Protection Agency "such sums as may be necessary" for its operation. Do you have an estimate of what this amount may be? Further, can you estimate the number of staff the CFPA will employ?

A5: The goal of improving the overall regulatory, supervisory, and enforcement system for protecting consumers of financial services is a worthy one. Under the bill, the CFPA's mission would be broad and considerably more expansive than the FTC's current consumer financial protection activities. The bill would give the CFPA jurisdiction over financial entities such as banks that are not now subject to the FTC Act, and it would give the CFPA duties the FTC does not have, including examining and supervising both currently supervised financial entities such as banks and a very much greater range and number of "covered entities" not currently subject to such examination and supervision. It would be important for the CFPA, if established, to have sufficient resources, in terms of both financial support and personnel, to carry out effectively the functions assigned to it. I defer to the Administration and Congress, however, to determine the necessary staffing and resources.

Q6: The Administration's proposal would populate the Consumer Protection Financial Agency with five commissioners, but it includes no requirement that a proportion of these commissioners be from different political parties. Do you believe this will weaken CFPA's

ability to be bi-partisan and limit any continuity that might arise out of shared leadership? Further, what rationale does the Administration have for not requiring commissioners come from different parties?

A6: Since its founding nearly a century ago, the FTC has functioned by law as a bipartisan agency. I believe this has served the agency well, by enhancing the diversity of views that formulate public policy and by providing greater predictability and stability to agency decision-making. I defer to the Administration to describe its rationale for the proposed approach.

Q7: The Administration's proposal establishes the Consumer Financial Protection Agency as an "independent executive agency." As you know, independent agencies and executive agencies differ in that independent agencies, such as FTC, exercise executive functions outside of an executive department. This being the case, I am confused about the designation "independent executive agency" as it applies to the proposed CFPA. Please provide clarification vis-à-vis CFPA's relationship to the executive branch.

A7: The current version of the CFPA Act is not entirely clear about the nature of the relationship between the CFPA and the President. Four members of the Board would, like FTC Commissioners, be appointed for specified terms and be removable only for inefficiency, neglect of duty, or malfeasance in office. This arrangement would provide a level of independence. The fifth Board member, however, would be the director of the agency that regulates national banks, and while I have not seen the legislation for that agency, the current regulator of national banks, the Office of the Comptroller of the Currency, is part of the Treasury Department. Also, the express designation of the CFPA as "an independent agency in the Executive branch" may indicate an intent that, like some other agencies similarly designated such as the Federal Emergency Management Agency and the Social Security Administration, the CFPA would be subject to Administration policy decisions. In addition, as the FTC's experience has borne out, bi-partisanship is a traditional hallmark of independence; the proposal does not require that for the CFPA, as you note, and the five year term for appointed Board members increases the chance that all members at a given time will be from a single political party. I defer to the Administration to clarify its intention with respect to this issue.

Q8. How would you characterize the level of engagement from the Department of the Treasury with FTC in drafting the Consumer Financial Protection Agency Act of 2009? Was it, for example, minimal, or was FTC more intimately involved in designing this proposal?

A8. The FTC played no role in the drafting of the legislative proposal for the CFPA and transfer of functions, nor did the FTC have access to the proposal before it was sent to Congress. There were brief, informal discussions between FTC and Treasury staff prior to the public unveiling of the Treasury Department's proposal, but those were general discussions that were not tied to any specific legislative proposal.

Q9. In the interim between enactment of the Consumer Financial Protection Agency Act of 2009 and the inception of CFPA, how will the Federal government ensure adequate consumer financial protections? Will, for example, the FTC retain its consumer financial protection authorities during this time?

A9. As I understand the proposed legislation, the FTC would retain its existing authority until the designated transfer date, when the CFPA becomes operational. It is important for the FTC to retain its authority during the interim period to ensure that there is no gap in the protection of consumers, as well as during any subsequent period in which the CFPA is not yet fully operational.

I want to assure you that the FTC is continuing to protect consumers of financial services and, if permitted to do so, will maintain its efforts during any transition period until the CFPA, if it is created, is able to take on front line consumer protection responsibility. The Commission has committed substantial resources for this purpose.

Q10: Rule X of the House of Representatives designates that the Committee on Energy and Commerce shall have jurisdiction over matters related to consumer protection. Should the Consumer Financial Protection Agency Act of 2009 be enacted, do you believe the Committee on Energy and Commerce would have jurisdiction over CFPA, or do you believe this authority would be given exclusively to another committee, for example the Committee on Financial Services?

A10: I believe it is for the House of Representatives to determine what Committee or Committees would exercise jurisdiction and oversight of the CFPA.

Questions from Representative Gonzalez

Q1. Estimates vary, but the financial services industry accounted for nearly one-third of our GDP in recent years. Considering the size of the industry, it is surprising to see the suggestion that we reduce the number of agencies keeping track of such a significant sector of that industry. The proposal wisely encourages the states to monitor financial products alongside the proposed CFPA. Why not similarly increase the number of overseers at the federal level? One of the principal arguments suggested by the testimony is that the FTC may not regulate banks, while the CFPA can. Would it not be wiser to expand FTC's jurisdiction, adding the valuable oversight of FTC's proven investigators, rather than removing their current oversight?

A1. As the Commission testified, it agrees with the fundamental objective of the proposal to improve the effectiveness of the current governmental system for protecting consumers of financial services. The Commission has further asked Congress to increase FTC resources to prosecute financial scams. I believe that the Administration's initiative, which enhances resources and authority for the FTC and which creates the CFPA, would be a step forward, especially if it includes the kinds of revisions discussed in the testimony and these answers.

There are many possible ways to achieve enhanced protection for consumers of financial products and services, including expanding the authority of existing agencies like the FTC, or establishing across-the-board authority in a single agency like the CFPA. Although the FTC does not have experience in the types of supervision and examination activities that are currently conducted by the federal banking agencies (and that would constitute a significant part of the CFPA's responsibilities), the FTC does have extensive experience in enforcing consumer protection standards against the many thousands of non-bank entities in the financial sector. If Congress decides to create the CFPA, I believe that the FTC should have a robust, concurrent role.

Q2. Much was made at the hearing of the fact that the various regulators whose functions would be taken on by the Consumer Financial Protection Agency were unable or unwilling to provide the regulations and oversight of the varied financial products we might desire. There is no sensible argument against that. But the suggestion that this is necessarily proof or a result of a superfluity of regulators does not logically follow from that fact. For the past eight years, the leadership of the Executive Branch embraced a *laissez faire* system that discouraged strict regulation of these financial products. The Bush Administration brought not a single antitrust case during those eight years and, indeed, dismissed pending cases inherited from Clinton Administration. That was not because anticompetitive practices had vanished from American business, and a majority of the Antitrust Division's staff in 2001 were the same staff as in 2000. The change was the wishes of the leadership. Why should we presume that the CFPA would fare any differently? Whether you have one bus or four, if the dispatcher directs the drivers to Cleveland, they won't end up in New York.

A2. I certainly agree that every organization, including government agencies, needs strong and effective leadership to carry out its mandate. Thus, should the CFPA be created, it will be important that its leaders be selected carefully to ensure that consumers of financial services are appropriately protected. Given the President's commitment to creating and funding an agency that elevates the level of protection for consumers of financial services, I am confident that he would select experienced, talented, and motivated leaders for the CFPA.

Q3. The enthusiasm and energy of the regulators of the financial services industry will depend on which President oversees them. This is a fact of our system that we must recognize and accept if we hope to make efficient reform of our regulatory structure. Regulators who wish to regulate are able do so. Our problem has been, instead, regulators who did not believe in regulation. What we might need, instead, is a new set of eyes, wholly non-partisan and completely apolitical, whose sole purpose is to represent the interests of consumers. Such a set of watchdogs could alert existing regulators to problems they might have missed, but they could also alert the Congress, and the public, to problems to which the regulators had failed to respond, allowing the American people to pressure the regulators as appropriate. Would this not support the creation of a board or commission of consumer-representatives, such as, e.g., the Class B and Class C members of the Board of Directors of the NY Federal Reserve Bank are supposed to be?

A3. I agree that we need to elevate the level of protection for consumers of financial services and that hearing from a diverse array of viewpoints, including consumers, improves the quality of the decisions that consumer protection officials make. At the FTC, there are a number of mechanisms to solicit and receive this kind of input and feedback, including public workshops and conferences, outreach to stakeholders, public comment on proposed law enforcement actions and regulatory initiatives, petitions, consumer complaints, and many others. Some of these mechanisms are mandatory, others have been established by the Commission voluntarily. Creating a more formal and permanent mechanism for the CFPA to obtain such input, including the FTC's views based on its extensive consumer protection experience, is an idea that warrants consideration. This is especially important as the FTC would not have a representative on the governing board of the CFPA. At this time, I am not sufficiently knowledgeable about the New York Federal Reserve Bank's approach and experience to recommend that the CFPA replicate it.

Questions from Representative Radanovich

Q1. The FTC has a unique perspective of managing two missions – competition and consumer protection. In your experience, if we limit competition through regulatory burdens, what is the effect on product diversity and price? Does the consumer benefit when competition is stifled? Are consumers squeezed out of the market when there are fewer products that can be tailored to their circumstances?

A1. In general, competition among sellers of products and services leads to lower prices and greater diversity of choices for consumers. Accordingly, government or private sector burdens or restraints on competition can limit consumer choice and/or result in higher prices. On the other hand, restrictions on the sale of products or serviees in many cases further important public policy objectives, such as consumer health and safety. Therefore, in evaluating the merits of a particular restriction, it is critical to weigh the potential benefits to consumers from that restriction against the potential costs.

Q2. In your written testimony you highlighted some of the recent successes the FTC has bad in improving the climate of consumer protection in the financial industry. Given the FTC's long history of consumer protection, and prior knowledge of the field, would it be better for consumers to instead give the FTC the CFPA's proposed authority, as opposed to transferring massive authorities to an entirely untested and inexperienced new agency?

A2. There are many ways to achieve the important goals of elevating consumer protection and establishing a more effective financial regulatory system. The FTC has extensive experience enforcing consumer credit laws and a wide variety of other consumer protection statutes and rules against non-bank providers of financial services and other entities within its jurisdiction, as well as working successfully with other federal and state law enforcers and regulators. Therefore, should the CFPA be created, I believe Congress should allow the FTC to have concurrent authority to enforce the consumer protection statutes and rules that it currently enforces, as well as to give guidance, perform research, hold workshops, and write reports. At the same time, the FTC does not have experience in the types of supervision and examination activities that are at present conducted by the federal banking agencies, among others, and that would constitute a significant part of the CFPA's responsibilities.

Q3. In your testimony you mentioned that the FTC is currently involved in issuing a number of rules and guidelines to make the financial services sector safer for consumers. This includes rules being promulgated regarding mortgages with the new rule-making authority recently granted by Congress. Could this sudden transfer of authority and powers interrupt that work and extend the time that consumers are exposed to unacceptable risks and practices?

A3. The FTC is working as quickly as possible to promulgate new rules regarding mortgage lending practices under the authority recently granted by Congress. The Commission issued two related Advance Notices of Proposed Rulemaking on June 1 of this year and

is in the process of reviewing public comments received. While it is important to recognize that developing an effective oversight and enforcement program cannot be done overnight and that the transitional period may be protracted, should the CFPA be established and given exclusive rule making authority in this area, the Commission would do everything in its power to ensure that any transfer does not adversely impact on the protection of consumers.

Q4. Unlike the proposed CFPA, the Federal Trade Commission is required to have bipartisan membership. What benefits does that bipartisan structure provide the FTC, and how might the lack of those benefits prevent the new CFPA from being as effective as the FTC in protecting consumers in the area of financial services?

A4. Since its founding nearly a century ago, the FTC has functioned by law as a bipartisan agency. I believe this has served the agency and the American public well, by enhancing the diversity of views that formulate public policy, and by providing greater predictability and stability to agency decision-making.

Q5. In your testimony you cited numerous actions that the FTC has taken to protect consumers within the realm of consumer finance. It seems that the FTC has been diligent in carrying out its role of consumer protection in this area. Do you believe that the new CFPA will do a better job than the FTC in this area? Please explain.

A5. The FTC acts vigorously to protect consumers from unfair and deceptive practices involving mortgage foreclosure rescue, loan modification, advance fee credit cards, credit repair, and many other financial products and services. The agency's expertise in consumer protection is unparalleled. For example, within the parameters of its authority, the FTC protects consumers at every stage of the credit life-cycle: from the unfair or deceptive practices of brokers, lenders, and others who advertise and offer credit; to the unlawful conduct of creditors and mortgage servicers who collect payments from consumers; to the violations of debt collectors, credit repair companies, debt relief firms, and mortgage loan modification and foreclosure scam artists, who prey on consumers who are delinquent or in default on their debts.

Many of the functions of the CFPA would be the same as those that the FTC currently performs with respect to entities under its jurisdiction, including law enforcement and rule making. As I understand the intent of the bill, the CFPA and FTC would have concurrent authority to enforce the FTC Act with respect to financial activities. The FTC remains ready to work with Congress to clarify the legislative language to better reflect the intent of the bill. Additionally, the CFPA would have primary responsibility for enforcement of other financially-related consumer protection statutes, with the FTC serving a "backstop" role. I believe that rather than having "backstop" authority, the FTC should have concurrent jurisdiction over financially-related consumer protection statutes. The range of entities and practices at issue is so great that having additional effective "cops on the beat" like the FTC to enforce the laws promptly, without a 120-day referral period, would be useful and important. The FTC has a history of working

collaboratively with other law enforcement; in the past year alone, we have coordinated with the state attorneys general to bring more than 400 cases relating to financial consumer protection and the economic downturn.

The CFPA also would have a number of additional powers and responsibilities. It would reach a broader range of financial entities than the FTC now reaches, and thus would be able to establish across-the-board standards for consumer protection in those instances where uniform standards are appropriate. It would also take over the task of examining depository institutions regarding consumer protection from the federal banking agencies and would extend it to other entities, including those currently under the FTC's jurisdiction.

Should the CFPA be created, I would hope that it develops into an effective consumer protection agency, but it is difficult to predict whether it ultimately would be more or less effective than the FTC.

Q6. Many rules were broken and much fraud was committed with regard to mortgages. This includes application fraud by borrowers.

a. Has the FTC brought any cases against borrowers for lying on their mortgage applications?
b. Is it a violation of the Truth in Lending Act to knowingly provide false information?
c. Has any other Federal or state agency brought action against any consumers for violating Federal lending laws (and were not part of a premeditated scam)? Please explain.

A6. To respond to your questions:

(a) The FTC has not brought any cases against borrowers for lying on their mortgage applications. The Federal Trade Commission Act and other consumer protection statutes generally are designed to protect consumers from harmful practices by businesses and other for-profit entities.

(b) It is not a violation of the Truth in Lending Act to knowingly provide false information on a loan application, but doing so may be a violation of a federal criminal law that the Department of Justice enforces. *See* 18 U.S.C. § 1001 *et seq.*

(c) Consumers may participate in premeditated lending scams by, for example, acting as "straw" buyers or borrowers (allowing others to use their credit to purchase or obtain a loan for a home they do not intend to use or control). I am not aware of any agency that has taken legal action under federal consumer lending laws against any individual that was not a part of the scam. As noted above, however, there are criminal statutes that apply to fraud by consumers during the lending process. These statutes generally are investigated and enforced by the Department of Housing and Urban Development and the

Department of Justice.

Q7. The FTC developed a simplified disclosure statement which we discussed at the previous hearing in the Subcommittee. The document was much easier for consumers to understand. Wouldn't it be more effective to take the approach of the FTC and institute changes we can mandate quickly rather than spend lengthy time debating and creating a new Federal entity from scratch? What obstacles are preventing the adoption of the model disclosure form that require a legislative solution?

A7. The prototype disclosure statement discussed at the previous hearing was developed by the FTC's Bureau of Economics for an empirical study and published in a staff report. The staff's research suggests that consumers would benefit most from a comprehensive effort to reform federal mortgage disclosures.

Under current law, the Real Estate Settlement Procedures Act requires the Department of Housing and Urban Development to establish a disclosure statement for settlement costs, and the Truth in Lending Act requires the Federal Reserve Board to establish a separate disclosure of certain loan costs. I believe Congress should consider legislation that would consolidate these two disclosures into a single, comprehensive, and comprehensible document, and would authorize the appropriate federal agency to carry out this task. I would recommend granting the designated agency the discretion to determine what information consumers need to make good choices when shopping for mortgage loans.

Q8. Aside from the impact that this proposal would have on companies that offer credit, and particularly on small businesses, this proposal would also have a dramatic effect on the whole rest of the economy by dramatically expanding the FTC's authority. Specifically, the Commission would have almost unlimited ability to quickly pass rules under the APA banning almost any practice that they deemed "unfair," and then they could immediately turn around and seek civil penalties for the violation of that regulation, and the only review authority the courts would have would be whether the FTC abused their discretion. What restraints on the Commission's authority will exist if this law passes?

A8. In considering whether to vest an independent agency with regulatory authority, Congress must balance the agency's need for flexibility in responding to emerging problems against its interest in determining in the first instance whether and how to address those problems. Reasonable people may disagree about how to strike that balance. I support giving support giving the FTC broad APA rulemaking authority. The APA rulemaking procedures are more streamlined and expeditious than the Magnuson-Moss rulemaking requirements that the Commission currently must follow. This does not mean, however, that the APA rulemaking process lacks rigor. Even under the APA procedures, rulemaking proceedings are thorough and take several months at a minimum and ordinarily take longer. Moreover, rules issued under the APA are subject to judicial review.

The APA notice and comment procedures the Commission would use to promulgate rules under the proposal are the same procedures that govern rulemaking by most other federal agencies. First, Section 553(b) of the APA requires that the agency publish a notice with either the terms or substance of the proposed rule or a description of subjects to be covered, and Section 553(c) mandates that the agency in most cases provide at least 30 days for the public to comment on any proposed rule.

Second, any rulemaking based on the FTC Act would have to be consistent with the FTC's deception or unfairness authority, both of which are circumscribed by statutory language and/or case law. For example, Section 5(n) of the FTC defines "unfairness" to mean practices that cause or are likely to cause substantial injury to consumers that is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. A rulemaking based on unfairness would have to include findings that the covered practices met the Section 5(n) definition.

Third, if the Commission decides whether to issue a rule after considering public comments, Section 553(c) of the APA requires that the agency publish the rules and a concise statement of the basis and purpose for the rules. Under Section 706(b) of the APA, once rules are issued they are subject to judicial review, and a court may hold them to be unlawful and set them aside if, among other things, they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

I would note that the FTC has promulgated a number of rules under statutes other than the FTC Act, in many cases as specifically directed by Congress, using APA procedures. These include, among many others, the Telemarketing Sales Rule and numerous rules under the Fair and Accurate Credit Transactions Act of 2003. These rules typically have been issued with extensive public input, have been based on strong and comprehensive records, and have proven to be well-supported and effective.

Should the Commission obtain the authority to promulgate rules under the APA, it would still be subject to the existing requirements of Section 5(m)(1)(A) of the FTC Act if it attempted to obtain civil penalties against a violator of a rule. Specifically, to obtain penalties for rule violations, the FTC must prove in court that the defendant engaged in conduct that violated the rule "with actual knowledge or knowledge fairly implied on the basis of objective circumstances" that such act is unfair or deceptive and is prohibited by such rule. In addition, to determine the amount of civil penalties, a court must "take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such matters as justice may require." FTC Act, Section 5(m)(1)(C). These requirements ensure that courts consider relevant information before imposing civil penalties on a defendant.

Q9. The proposed legislation also provides the Commission with the ability to seek civil penalties for anything the Commission deems to be an unfair or deceptive act or practice – even when there is no rule governing that behavior. If the Commission didn't have the ability to write rules, there may be a better argument to needing general civil penalty

authority. But if the Commission gets APA rulemaking authority, doesn't that provide the ability to write the rules the Commission wants and obviate the need for general civil penalty authority?

A9. As a practical matter, the FTC cannot write rules to address every potential deceptive or unfair act or practice that has occurred or might occur in the United States. If Congress provides the FTC with civil penalty authority, the FTC would issue and enforce rules implementing Section 5 of the FTC Act where warranted, but it also would continue to use its general authority to bring law enforcement actions against those who violate Section 5.

Having the ability to obtain civil penalties in cases involving violations of the FTC Act as well as rules pursuant to the FTC Act would be an important deterrent to violators and enhance consumer protection. First, many FTC cases alleging a defendant engaged in unfair or deceptive acts and practices involve hard-core fraud. If these cases are not prosecuted criminally, civil penalties may be needed to deter these actors from engaging in conduct that causes serious harm to consumers.

Second, civil penalties are an especially important deterrent in cases in which other forms of monetary relief may not be available or practicable. Consumer redress may be difficult to obtain in cases in which consumers did not purchase a product from defendants but otherwise were harmed by defendants' practices, or in which it is difficult to quantify consumer injury. Disgorgement of ill-gotten gains also may be difficult to obtain in cases in which the defendants did not obtain significant profits from their violations. For example, in a case in which a defendant failed to take adequate measures to protect the security of information and a data breach has occurred, consumer redress often is unavailable because consumers may have not purchased a product or service from the defendant. Disgorgement also is not practicable because the defendant likely did not profit from its failure to protect the information; rather, the identity thief who stole the information likely profited.

Relatedly, although the bill does not include a provision to give the FTC independent litigating authority when it seeks civil penalties, consumers would benefit if the FTC could file cases in its own name. Currently, the FTC must first present cases to the Department of Justice ("DOJ") to allow it to decide whether to file an action. Independent litigating authority would allow the Commission – the agency with the greatest expertise in enforcing the FTC Act – to bring cases more efficiently while retaining the option of referring appropriate matters to the DOJ.

Because the FTC cannot anticipate the future categories of law violations for which redress or disgorgement may not he available or practicable, allowing the FTC directly to seek civil penalties for violations of the FTC Act would allow the Commission to respond promptly and effectively to these types of violations. Most if not all state attorneys general can seek civil penalties for violations of their state consumer protection laws.

Q10. Did you or your staff assist or consult in the drafting of this legislation? If so, in what capacity and what were your recommendations?

A10. The FTC played no role in the drafting of the legislative proposal for the CFPA and transfer of functions, nor did the FTC have access to the proposal before it was sent to Congress. There were brief, informal discussions between FTC and Treasury staff prior to the public unveiling of the Treasury Department's proposal, but those were general discussions that were not tied to any specific legislative proposal.

QFR's

From Senator Olympia Snowe
Contact: Matthew Hussey, matthew_hussey@snowe.senate.gov

Questions for FTC Commissioners

Question 1 - Phishing

The FTC has stated that "phishing is a criminal endeavor that is best suited for criminal law enforcement." However, the FTC actively pursues and enforces activities such as SPAM, identity theft, spyware, data security breaches, and even pretexting. Clearly, phishing is directly related to SPAM and identity theft, it [spear phishing] also attributes to security breaches of companies' networks, and even phishing mirrors pretexting, which is obtaining telephone records using false pretenses.

So why would phishing fall outside the purview and enforcement of the FTC when it is so closely tied to these other FTC related areas?

Phishing continues to be one of the most vexing problems facing consumers, but it is difficult to address through FTC enforcement for several reasons. First, the architecture of the email system creates significant investigative hurdles for the FTC to identify those responsible for sending phishing messages. The Internet protocol for email, known as SMTP, does not require the transmission of accurate routing information. The only piece of information that must be accurate in an email is the recipient's address. Phishers exploit this flaw in SMTP, thereby making it virtually impossible to trace the source of a phishing email using the email message's header information. And because phishers are not generally delivering a product to a consumer or using their own account information for financial transactions that we can trace, there are few civil investigative tools we can use to find the phishers.

In addition, the nature of the illegal act also makes phishing better suited for criminal than civil enforcement. Indeed, in the phishing cases that the FTC has filed, the perpetrators of the schemes have been identified only with the considerable assistance of criminal investigative agencies and federal prosecutors. Their efforts have included obtaining ISPs' records, most of which the FTC is prohibited from seeking by the Electronic Communications Privacy Act, and conducting stakeouts of addresses where items purchased by the phishers are being delivered. Moreover, because phishing involves the brazen theft of consumers' personal financial information, it is doubtful that a civil injunction will provide appropriate deterrence.

More specifically, phishing often differs from four of the areas that you mention:

Spam: Spammers making deceptive claims to sell products are generally more amenable to FTC enforcement tools than phishers. In cases involving deceptive spam, we often have civil investigative avenues that we do not have in phishing cases; there is often a product being delivered or a money trail that can be followed. These investigative avenues have enabled the

FTC to bring a significant number of cases against deceptive spammers.[1]

Data Security: The FTC can also use its enforcement tools effectively in the data security area. The Commission's investigative targets in these cases are the companies that failed to take reasonable precautions to prevent breaches, not the identity thieves who could take advantage of their failures. Targets in our data security cases are concerned about their reputation in the marketplace; they often cooperate in FTC investigations and comply with FTC injunctions.

Pretexting: While phishers hide behind the SMTP protocol's cloak of anonymity and are engaged in outright theft, pretexters often operate in the open. Although they may provide their services to those who intend to do harm to others, they also may provide services to legitimate entities such as investigative firms, media, or even attorneys, and they operate from a physical location. Moreover, in addition to engaging in pretexting, many pretexters may also offer legitimate legal investigative services. Thus, we have been able to locate the pretexters that have been the subject of our law enforcement.

Spyware: Spyware can have characteristics of phishing as well as spam. The most egregious forms of spyware, such as keyloggers, share the same attributes as phishing: the perpetrators are extremely difficult to track down and are, at their core, nothing more than thieves. FTC enforcement against such spyware purveyors would likewise be futile. Other types of spyware, however, are more akin to the fraudulent and deceptive business practices that the FTC has traditionally tackled. For example, the FTC has successfully prosecuted a number of software developers and distributors who installed spyware on consumers' computers for the purpose of displaying advertising, or collecting data on consumers' Internet habits.[2] The FTC has also sued a number of software developers for using deceptive advertising designed to frighten or intimidate consumers into purchasing their products.[3] In these types of cases, the defendants openly and directly interacted with consumers, and operated as a business (e.g., employing programmers, maintaining a corporate entity and corporate bank accounts, paying taxes on profits, etc.). Although these defendants caused massive consumer harm, they were not high-tech bank robbers (like phishers) but rather high-tech con men operating a fraudulent business. As a result, the FTC was able to leverage its investigative resources to locate and prosecute these defendants, and was able to deter future misconduct through injunctive relief and disgorgement.

Identity Theft: Phishing is more like identity theft, a clearly criminal act that the FTC does not prosecute. Although the FTC plays a significant role in keeping data out of the hands of identity

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[1]In some cases, spam can be used for phishing or to disseminate spyware. In many of these cases, civil law enforcement is more difficult for the reasons described in the text.

[2]*See, e.g.,* In the Matter of DirectRevenue, LLC, FTC File No. 052 3131 (Jun. 26, 2007); In the Matter of Zango, Inc., FTC File No. 052 3130 (Mar. 7, 2007).

[3]*See, e.g.,* FTC v. Trustsoft, No. H 05-1905 (S.D. Tex. 2005); FTC v. MaxTheater, No. 05-CV-0069-LRS (E.D. Wash. 2005).

thieves by, among other things, enforcing data security laws and conducting aggressive outreach and education, strong criminal enforcement is the best approach to effectively punish and deter identity thieves.

Although civil law enforcement may not be the most effective tool against phishers, the FTC has taken aggressive steps to curb the impact of phishing by encouraging industry to adopt anti-phishing technologies and by providing significant consumer education. Since 2004, the FTC has been urging ISPs and businesses that operate their own email servers to adopt domain-level authentication technologies. With domain-level authentication, an ISP or other operator of an e-mail server will be able to verify that a message actually comes from the domain appearing in the "from" address. The FTC is encouraged by the rapid adoption of domain-level authentication technologies that is now taking place. Combined with other anti-spam technologies, domain-level authentication should reduce the likelihood that phishing emails will enter consumers' inboxes. And, as explained below, the FTC has an ambitious consumer and business education program aimed at combating phishing.

So why wouldn't the FTC want to ramp up its efforts and allocate more resources toward phishing since phishing scams are one of the top threats facing consumers?

Although the FTC does not plan to ramp up enforcement efforts for the reasons described above, it continues to devote resources to phishing. Consumer education is a key tool for helping to reduce the number of consumers who fall victim to phishing scams. The FTC has long engaged in phishing education through consumer alerts and its OnGuardOnline.gov computer education website, which includes information on phishing.

On April 1, the Commission held a workshop with approximately 60 experts from business, government, the technology sector, the consumer advocacy community, and academia to discuss strategies to reach and teach consumers about phishing. Several new initiatives for phishing education emerged from the workshop. First, the FTC launched new 30-second phishing education videos, and several participants agreed to place the videos on their websites and other channels. Second, the National Cyber Security Alliance announced that it is forming a Task Force on phishing education, and FTC staff plans to participate. Third, several participants supported the idea of using a landing page to educate consumers about phishing. Landing pages are web pages that ISPs and other entities would use to redirect consumers from sites identified as phishing sites to educational sites. Specifically, the Anti-Phishing Working Group will continue to develop informational phishing landing pages and will translate them into various languages for use by domestic – as well as foreign – ISPs.

Question 2 – Cyber Security Education

At the FTC's recent phishing education roundtable, one aspect that was addressed was the need for greater Internet safety and cyber security education in the K-12 school systems. Some research has shown that few school systems are teaching about these issues and as a result, teenagers and young adults are more susceptible to identity fraud because they're less likely to take the necessary precautions to protection themselves from various types of

identity theft.

Can Congress do more to assist the States to incorporate more school-based education on computer and cyber security? Would you support effective legislative efforts on this issue?

We agree that more school-based education on computer security, cyber safety, and cyberethics would be beneficial. Several participants at our phishing workshop pointed to the Virginia school system's legislatively-mandated Internet safety education program as a potential model program. *See* http://www.doe.virginia.gov/VDOE/Technology/OET/internet-safety-guidelines.shtm. The Commission has not taken a position on the respective roles of Congress and the states in directing education.

Question 3 – Network Neutrality

Last fall, evidence surfaced that a broadband provider was blocking or, at the very least, slowing down a very popular peer-to-peer application. The provider had stated prior to this practice coming to light that it "does not block access to any applications."

In addition, the operator seemed to employ questionable practices in its traffic management of this application such as "spoofing" IP packets—inserting reset packets that purported being from the downloading P2P computer instead of from the operator—and may have infringed upon consumer privacy by inspecting IP packet headers and payloads to determine what was P2P traffic.

Has the FTC looked into this matter, since on the surface these actions (lack of disclosure and spoofing) may constitute a violation of Section 5—with respect to deceptive acts and practices to both commerce and competition?

Although the FTC cannot comment on the existence of a specific investigation, if an Internet service provider (ISP) misrepresents, or fails to disclose, material aspects of its services in advertising or marketing to consumers, it may be liable for violating Section 5 of the FTC Act.

For over a decade, the FTC has enforced the consumer protection and antitrust laws in numerous matters involving Internet access. In particular, the FTC has investigated and brought enforcement actions against ISPs for allegedly deceptive marketing, advertising, and billing of Internet access services.[4] The FTC has addressed Internet access and related issues in a number

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[4]*See, e.g.*, Am. Online, Inc. & CompuServe Interactive Servs., Inc., FTC Dkt. No. C-4105 (Jan. 28, 2004) (consent order), *available at* http://www.ftc.gov/os/caselist/0023000/0023000aol.shtm; Juno Online Servs., Inc., FTC Dkt. No. C-4016 (June 25, 2001) (consent order), *available at* http://www.ftc.gov/os/caselist/c4016.shtm; Am. Online, Inc., FTC Dkt. No. C-3787 (Mar. 16, 1998) (consent order), *available at* http://www.ftc.gov/os/1997/05/ameronli.pdf; CompuServe, Inc., 125 F.T.C. 451 (1998) (consent order); Prodigy, Inc., 125 F.T.C. 430 (1998) (consent order).

of merger investigations as well.[5] As increasing numbers of U.S. consumers have chosen to subscribe to broadband services, the FTC has been monitoring the claims made by broadband providers in marketing their services to consumers. In February 2007, the Commission held a workshop on broadband competition that focused on net neutrality questions, including questions of disclosure by Internet service providers.[6] In June 2007, Commission staff released a report on broadband connectivity competition policy.[7] The FTC has devoted and will continue to devote significant resources to protecting competition and consumers in the important area of Internet access.

Has the FTC received any formal complaints on broadband carriers blocking Internet applications?

The FTC receives complaints directly from consumers and from other agencies regarding a host of consumer protection issues. During the three calendar years 2005 through 2007, we received over 2.8 million consumer complaints, and over 60,000 of those complaints involved Internet access services. In an effort to locate consumer complaints that related specifically to broadband carriers blocking Internet applications, Commission staff searched the Internet access complaints for key words and combinations of words such as "application," "bandwidth," "block," "broadband," "discriminate," "Internet," "net," and "network." Staff found thousands of complaints containing these key words. Staff reviewed a small number of these complaints and found that they were unrelated to broadband carriers blocking Internet applications. It further refined the searches for complaints that included the word "neutrality," and found less than ten complaints, and for complaints that included the key word "block" with either the word "application" or the word "content." This search resulted in approximately 100 complaints from the past three calendar years. Staff reviewed the comments in each of these complaints and found that approximately ten complaints may be related to the issue of blocked Internet

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[5] *See, e.g.*, Am. Online, Inc. & Time Warner, Inc., FTC Dkt. No. C-3989 (Apr. 17, 2001) (consent order), *available at* http://www.ftc.gov/os/2001/04/aoltwdo.pdf; Cablevision Sys. Corp., 125 F.T.C. 813 (1998) (consent order); Summit Commun. Group, 120 F.T.C. 846 (1995) (consent order).

[6] The agenda for the workshop including presentations made at the workshop and the public comments filed in response to the workshop are available at http://www.ftc.gov/opp/workshops/broadband/index.shtml.

[7] *See* FTC, Broadband Connectivity Competition Policy (6/27/2007), *available at* http://www.ftc.gov/opa/2007/06/broadband.shtm; *see also* Concurring Statement of Commissioner Jon Leibowitz Regarding the Staff Report: "Broadband Connectivity Competition Policy," *available at* http://www.ftc.gov/speeches/leibowitz/V070000statement.pdf (noting the importance of transparency and disclosure for consumer rights on the Internet).

applications.[8]

In addition to receiving consumer complaints, the FTC at times receives more formal petitions from parties requesting the FTC to investigate potential violations of the FTC Act. The FTC has not, however, received a formal petition alleging the blocking of an Internet application by a broadband ISP. The FTC nonetheless remains vigilant to any ISP conduct that may violate the antitrust or consumer protection laws.

Question for FTC Commissioner Leibowitz

Question 4 - WHOIS

Commissioner Leibowitz gave a speech to ICANN, back in June 2006, and stated that the WHOIS databases, which provide contact information of a domain name/website owner, are critical to the agency's consumer protection mission. He further mentioned that the FTC is concerned that any attempt to limit WHOIS would pnt its ability to protect consumers and their privacy in peril.

Can you elaborate on the concerns the Commission has about WHOIS?

FTC staff has been using Whois databases for the past decade. As the Commission has noted, "Whois databases often are one of the first tools FTC investigators use to identify wrongdoers. Indeed, it is difficult to overstate the importance of quickly accessible Whois data to FTC investigations."[9]

When Whois information is available and accurate, it can provide us with a tremendous amount of information. For example, in our cases enforcing the CAN-SPAM Act and, in particular, the Adult Labeling Rule, accurate Whois information helped us identify the operators of pornographic websites that were promoted via illegal spam messages. In the recent *Media Motor* spyware case,[10] FTC staff used domain name registration information from Whois

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[8]The Commission staff replies orally or in writing to complaints it receives. In our responses, we explain that the Commission acts in the interests of all consumers, and therefore does not generally intervene in individual disputes. We also advise the consumers that the information they provide would be recorded in the FTC's complaint retention system and made available to numerous law enforcement agencies.

[9]Prepared Statement of the Federal Trade Commission Before the Internet Corporation for Assigned Names and Numbers Meeting Concerning Whois Databases, Marrakech, Morocco, June 2006.

[10]FTC Press Release, *FTC Permanently Halts Media Motor Spyware Scam; Trojan Program Downloaded Spyware, Adware, Porno Pop-Ups to Consumers' Computers* (Oct. 1, 2007), available at http://www.ftc.gov/opa/2007/10/motorspyware.shtm.

databases to identify the website operators who infected more than 15 million computers with destructive, intrusive spyware. In that case, the FTC charged that the defendants tricked consumers into downloading malware that changed consumers' home pages, tracked their Internet activity, altered browser settings, degraded computer performance, and disabled anti-spyware and anti-virus software. The Whois information was crucial to the FTC's efforts to locate – and ultimately stop – this sophisticated and expansive spyware operation.

Key to the utility of the Whois databases is our ability to access it in real time. The alternative to real-time access, compulsory process, is not always a viable option for three reasons. It is often too slow in the context of fast-moving Internet fraud; it risks disclosing the existence of an undercover investigation; and it may not be available or practical when the domain name registrar is located in a foreign jurisdiction.[11]

Although Whois databases continue to yield critical information in our investigations, their utility has been hampered by lack of real-time access to Whois records due to proxy registrations and due to inaccurate information.[12]

Has the FTC ever been hindered in its investigations due to the lack of accurate information or not having quick access to that information due to proxy services?

Yes. Proxy registration services shield the identity of a website operator. This layer of anonymity has posed an obstacle in our investigations.

For example, in one FTC investigation, FTC staff encountered at least six websites that had proxy registrations, including one registered to a proxy service of a domestic domain name registrar and two others registered to proxies for foreign domain name registrars. Our inquiry into these websites was stalled by the need for compulsory process and, indeed, most of the websites closed down before we could pursue an alternative route. In the *Media Motor* case described above, the Whois results for a number of target websites identified a proxy service in place of the registrant's name. To identify the registrant, the FTC had to contact the registrar

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[11]Although the US SAFE WEB Act gives the FTC tools to address problems of obtaining information from foreign sources, using these tools would still take additional time and resources. Particularly in the online world, any such delay could lead to frustration of an investigation.

[12]Some have expressed concern that public access to Whois databases compromises the privacy of domain name registrants. The Commission has recognized that non-commercial registrants may require some privacy protection from public access to their contact information, and that these registrants can be provided such protection without compromising real-time access by law enforcement agencies. *See* Prepared Statement of the Federal Trade Commission on Internet Governance: The Future of ICANN Before the Subcommittee on Trade, Tourism, and Economic Development of the Senate Committee on Commerce, Science, and Transportation, Washington, D.C., Sept. 20, 2006.

that operates the proxy service. This extra step lengthened the time it took for FTC staff to identify the true registrant and initiate law enforcement action to stop the ongoing spyware operation.

Even where access is not stymied by proxy registrations, much of the information in the Whois databases continues to be inaccurate or incomplete. FTC investigators can cite numerous instances where the Whois data has turned up domain names with facially false addresses and contact information, including websites registered to "God," and "Mickey Mouse," addresses listed as "XXXXXXX," and obviously fake telephone numbers, such as 111-111-1111. FTC investigators have had to spend many hours tracking down perpetrators of Internet fraud because of inaccurate Whois data – hours that could have been spent pursuing other targets.

Several law enforcement agencies have serious concerns about domain name registrars offering proxy or privacy services to domain name registrants, and NTIA even enforced the prohibition of proxy services for the .us TLD.

What is the FTC's position on proxy services that are utilized by commercial websites?

The FTC has recognized that registrants of non-commercial websites might require some privacy protection from *public* access to their contact information, without compromising appropriate real-time access by law enforcement agencies. However, the FTC does not believe commercial websites have similar legitimate privacy concerns or a legitimate purpose to operate under a shroud of anonymity. As explained above, proxy registrations can either slow down or completely frustrate FTC investigations into the activities of commercial websites.

Question for the Record from Senator. Ensign

Chairman Kovacic, in December 2006, ten of the country's leading jewelry industry trade associations petitioned the FTC to address the practice of marketing laboratory-created diamonds as "cultured diamonds" to consumers. It is my understanding that the term "cultured" has traditionally been used in the jewelry industry only to refer to organically produced materials, like pearls. These industry associations strongly believe that the FTC's Guidelines for the jewelry industry must be amended to protect consumers from deceptive or unfair business practices. It has been nearly one and a half years since that petition was filed and the petitioners have not yet received a response. Can you give us an update on the status of the FTC's response to this petition?

The FTC staff is currently reviewing the petition requesting that the Commission amend its Guides for the Jewelry, Precious Metals, or Pewter Industries to address the use of the term "cultured" to describe laboratory-created diamonds. The FTC staff's review includes a thorough analysis of the petition and the consumer perception data submitted in support of the petition, to determine whether the use of the term "cultured" to market laboratory-created diamonds constitutes an unfair or deceptive trade practice in violation of Section 5 of the FTC Act. In addition, the staff is considering how its proposed recommendation might affect domestic and international commerce. Following this analysis, the staff will recommend to the Commission a proposed response. The FTC's review will be completed as quickly as possible consistent with the serious attention the petition deserves.

Questions for Richard Feinstein, Director, Bureau of Competition at the Federal Trade Commission

1. Mr. Feinstein, thank you for being here today. In your testimony you mention the recent case brought by the FTC against CVS/Caremark regarding the security of sensitive medical and financial information. In addition to the matter that was settled by the FTC, I understand that there have been recent complaints about Caremark's "Maintenance Choice" program causing customers to pay higher prices if they fill their long-term maintenance prescriptions at pharmacies other than CVS. Is the FTC looking into this matter?

The Commission's commitment to protecting competition in pharmaceutical markets, through law enforcement and by other means, is vigorous and ongoing. The FTC takes complaints about PBM practices seriously and we consider all information obtained in a thorough and careful manner. It is a matter of public record that the Commission has received complaints about Caremark's "Maintenance Choice" program. I am, however, restricted from either confirming or denying any ongoing nonpublic law enforcement investigations.

As evidence of the Commission's commitment, pharmacy benefit managers (PBMs) have been subjects of considerable attention in FTC hearings on health care competition,[1] a 2004 report based on those hearings,[2] the Commission's "Conflict of Interest Study" regarding PBM practices and the resultant 2005 report,[3] and several merger investigations.[4] Ongoing Commission scrutiny of competitive issues in the PBM area is essential to maintaining the benefits of competition for consumers.

2. In 2008, the Federal Trade Commission filed a complaint against Cephalon Inc. in response to its anti-competitive behavior for its sleep disorder treatment, Provigil. According to the FTC complaint, Cephalon is paying four generic drug makers to refrain from selling generic versions of Provigil until 2012. This is certainly not the first time we have seen a pharmaceutical company engage in this type of practice.

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[1] *See* Hearings on Health Care and Competition Law and Policy, June 26, 2003, *available at* http://www.ftc.gov/ogc/healthcarehearings/030626ftctrans.pdf. ("Health Care Hearings") *See also* http://www.ftc.gov/ogc/healthcarehearings/03062526agenda.htm.

[2] *See* Federal Trade Commission and Department of Justice, IMPROVING HEALTH CARE: A DOSE OF COMPETITION (2004), *available at* http://www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf (Chapter 7, especially, "Industry Snapshot and Competition Law: Pharmaceuticals").

[3] *See generally* Federal Trade Commission, PHARMACY BENEFIT MANAGERS: OWNERSHIP OF MAIL-ORDER PHARMACIES (Aug. 2005) ("PBM STUDY"), *available at* http://www.ftc.gov/reports/pharmbenefit05/050906pharmbenefitrpt.pdf.

[4] *See, e.g., In the Matter of Caremark Rx, Inc./AdvancePCS*, File No. 0310239 n. 6 (Feb. 11, 2004) (statement of the Commission), *available at* http://www.ftc.gov/os/caselist/0310239/040211ftcstatement0310239.pdf.

- **Why is there not more competition within the pharmaceutical industry?**
- **What can be done to encourage greater price competition between brand-name pharmaceutical products, generic products, and Over-the-Counter (OTC) products?**
- **Within those pharmaceutical market segments where there is competition, or attempts at competition, why are the full benefits of competition not being realized?**
- **What role do Pharmacy Benefit Managers play in increasing or decreasing competition?**

The biggest barrier to more competition in the pharmaceutical industry has been the rise of agreements between pharmaceutical companies to pay to keep low-cost generic drugs off the market. In recent years, however, several court decisions have permitted "pay-for-delay settlements" between branded and generic pharmaceutical manufacturers, which deprive consumers of the benefits of generic entry, often for several years. Indeed, the chief executive officer of Cephalon, the case mentioned above, is quoted as stating when announcing settlements with four generic drug makers that kept the generic versions of Provigil off the market until 2012 (by paying roughly $200 million to the generic firms), he stated: "We were able to get six more years of patent protection. That's $4 billion in sales that no one expected."[5]

These anticompetitive deals not only delay price competition and the substantial cost savings that generic drugs can provide, but also reduce the important role that competition from generic drugs plays in stimulating further innovation. As the Department of Justice has observed, settlements of patent cases in which the branded drug firm pays its would-be generic rival, and the generic agrees to abandon its patent challenge and delay entry, should be treated as presumptively unlawful under the Sherman Act.[6]

FTC staff economists have estimated, using a conservative methodology, that these anticompetitive deals cost American consumers approximately $3.5 billion per year. And considering that the federal government pays about one-third of the nation's $235 billion annual prescription drug bill, these anticompetitive settlements agreements cost taxpayers enormous sums annually.

To combat these anticompetitive agreements, legislation should be enacted to prohibit these agreements. The Commission supports legislation (S. 369) to prohibit pay-for-delay settlements. Indeed, the House Energy and Commerce Committee recently

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[5] John George, *Hurdles Ahead for Cephalon*, PHILADELPHIA BUSINESS JOURNAL, March 17, 2006 (quoting Cephalon CEO Frank Baldino).

[6] Brief for the United States in Response to the Court's Invitation, Arkansas Carpenters Health and Welfare Fund v. Bayer, AG, 05-2851-cv(L) (2d Cir. 2009).

approved similar legislation as an amendment to H.R. 3200, America's Affordable Health Choices Act of 2009.

The Commission also believes that Congress could encourage greater competition in the pharmaceutical area by enacting legislation to establish an abbreviated FDA approval process for follow-on biologic ("FOBs") drugs once patents on branded biologic drugs expire. Biologic drugs are protein-based and derived from living matter or manufactured in living cells using recombinant biotechnologies. Such an approval process is likely to be an efficient way to bring price and innovation competition for high-priced biologic drug products. The Hatch-Waxman Act approval processes do not apply to these drugs.[7]

The Commission's June 2009 report on FOBs cautioned against establishing new regulatory barriers that insulated both pioneer and FOB drug products from competition, such as a marketing exclusivity period for interchangeable FOBs.[8] Market based pricing and patent protection are likely to continue to incentivize innovation and to encourage FOB manufacturers to bring products to market in a timely manner.

In particular, the Commission explained that consumers are likely to be harmed if such legislation permitted branded and FOB manufacturers to create a bottleneck that prevented entry by subsequent interchangeable FOB drugs products. Experience with pay-for-delay settlements described above shows that marketing exclusivity periods can harm consumers when brand and generic firms agree not to compete and deny the entry of additional generic competitors.

With respect to the sub-question about PBMs and competition, PBMs can harness the benefits of competition among drug manufacturers by helping health care plans manage the cost and quality of the prescription drug benefits they provide to their enrollees. To varying degrees, PBMs negotiate rebates from pharmaceutical manufacturers; provide access to mail-order pharmacies for health plan enrollees; develop drug formularies[9] and help plan sponsors craft incentives to use lower priced drugs; provide drug utilization reviews; and provide disease management services.

The FTC is mindful of the potential harm from aggregations of market power by purchasers in the health care sector. In 2004, the FTC conducted a thorough investigation

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[7] Follow-on biologic drugs are akin to generic drugs, however, current technology does not yet allow for the creation of an exact replica of a branded drug product. As such, the term follow-on biologic is used this difference.

[8] Federal Trade Commission, EMERGING HEALTH CARE ISSUES: FOLLOW-ON BIOLOGIC DRUG COMPETITION (June 2009) *available at* http://www.ftc.gov/os/2009/06/P083901biologicsreport.pdf.

[9] A formulary is a list of plan sponsor-approved drugs for treating various diseases and conditions. This list will often be broken down into "tiers," which correspond to different co-payment levels for enrollees. For instance, a three-tier formulary may consist of a generic tier, a preferred brand tier, and a non-preferred brand tier. Whether a brand is preferred may depend on whether a generic alternative is available and also upon the financial terms available to the PBM on drugs in the same therapeutic class.

of Caremark Rx's acquisition of Advance PCS, two large national PBM firms. As part of its analysis, the agency carefully considered whether the proposed acquisition would be likely to create monopsony power with regard to PBM negotiations with retail pharmacies and ultimately determined it would not. The Commission closed the investigation because it concluded that the transaction was unlikely to reduce competition.[10]

Finally, the Commission remains vigilant in this area, scrutinizing proposed mergers and conduct that raises anticompetitive concerns. Maintaining competition in pharmaceuticals markets – innovation, manufacturing, marketing, and distribution – has been at the heart of the FTC's enforcement mission in the health care industry. Competitive pharmaceutical markets are important not only to health of American citizens, but to federal and state governments, which spend substantial sums on prescription drugs each year.

The Commission currently has three pending law enforcement actions against anticompetitive conduct in the pharmaceutical industry. In addition to the charges against Cephalon mentioned above, the Commission is challenging another "pay-for-delay" settlement, this one against Watson Pharmaceuticals and three other drug companies, to delay generic competition for the branded testosterone-replacement drug AndroGel.[11] The FTC also recently charged Ovation Pharmaceuticals with illegally monopolizing the market for drugs that treat a life-threatening heart condition in premature infants (conduct that Senator Klobuchar brought to the agency's attention).[12]

The Commission also has an active merger enforcement program in the pharmaceutical industry. For example, it recently challenged a proposed merger between CSL Limited and Cerberus-Plasma Holdings, LLC charging that the proposed acquisition would substantially lessen competition in the U.S. markets for four plasma-derivative protein therapies. The parties abandoned the transaction in light of the Commission's action.[13]

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[10] *In the Matter of Caremark Rx, Inc./AdvancePCS*, File No. 0310239 n. 6 (Feb. 11, 2004) (statement of the Commission), *available at* http://www.ftc.gov/os/caselist/0310239/040211ftcstatement0310239.pdf.

[11] Federal Trade Commission, et al. v. Watson Pharmaceuticals, Inc., et al., CV-09-00598 (civil complaint filed in U.S. District Court for the Central District of California, January 27, 2009), FTC File No. 0710060 (http://www.ftc.gov/os/caselist/0710060/index.shtm). The FTC, joined by the State of California, filed a civil complaint in U.S. district court against Watson Pharmaceuticals, Inc., Par Pharmaceutical Companies, Inc., Paddock Laboratories, Inc., and Solvay Pharmaceuticals, Inc.

[12] Ovation Pharmaceuticals, Inc, FTC File No. 0810156 (complaint filed December 16, 2008, in U.S. District Court for District of Minnesota).

[13] CSL Limited and Cerberus-Plasma Holdings, LLC, D. 9337, FTC File No. 0812255(administrative complaint issued May 27, 2009) (http://www.ftc.gov/os/adjpro/d9337/index.shtm); Case No. 09-cv-1000-CKK (D.D.C. May 29, 2009) (motion for preliminary injunction filed) (http://www.ftc.gov/os/caselist/0810225/index.shtm); (CSL announced that it will not proceed with the proposed acquisition, June 8, 2009)(http://www.ftc.gov/opa/2009/06/csl.shtm).

3. There are currently 5 million diabetics in the U.S. who use insulin to control their condition. Cnrrently, the market for home-use syringes is dominated by Becton, Dickinson, and Co. (BD). BD has a 90 percent or greater market share in insnlin syringes, which it protects through exclnsive contracts with Pharmacy Benefit Managers (PBM). UtilMed, a Minneapolis, Minnesota based company that makes lower-cost syringes, in safe disposable packages, cannot get into the market becanse of BD's market sbare. It appears that the relationship between some medical device companies and PBM's is reducing competition in this market. Is this a sitnation that the FTC should be investigating?

While I am restricted from either confirming or denying any ongoing nonpublic law enforcement investigation, the Commission is committed to protecting competition in medical device markets, just as it is in pharmaceutical markets. Over the past several years, the Commission has taken a number of actions to preserve competition among medical device manufacturers. For example, the Commission on July 30, 2009, authorized a lawsuit to block Thoratec Corporation's proposed acquisition of rival medical device maker HeartWare International, Inc., charging that the transaction would substantially reduce competition in the U.S. market for left ventricular devices, a life-sustaining treatment for patients with advanced heart failure.[14] Following the Commission's approval of the lawsuit to block the transaction, Thoratec abandoned the proposed acquisition. In another action, the Commission challenged the merger of Boston Scientific and Guidant, alleging that it would have harmed competition in several coronary medical device markets.[15] In settling the matter, the Commission obtained a consent order resolving the competitive concerns by requiring Guidant to divest itself of intellectual property, plants, manufacturing technology, and other assets that raised competitive concerns.[16]

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[14] *In the Matter of Thoratec Corporation, and HeartWare International, Inc.*, Docket No. 9339, FTC File No. 091 0064.

[15] In the Matter of Boston Scientific Corp. and Guidant Corp., FTC Dkt. No. C-4164 (complaint) (Apr. 20, 2006), *available at* http://www.ftc.gov/os/caselist/0610046/0610046cmp060420.pdf.

[16] In the Matter of Boston Scientific Corp. and Guidant Corp., FTC Dkt. No. C-4164 (decision and order) (Jul. 21, 2006), *available at* http://www.ftc.gov/os/caselist/0610046/060725do0610046.pdf.

Questions for the Record
Chairman Leibowitz
February 4, 2010 Hearing on Financial Services and Products: The Role of the FTC in Protecting Consumers

From Senator McCaskill:

Q#1: **One financial product that I have raised repeated concerns about is the reverse mortgage. As you know, a reverse mortgage is secured with a senior's home. The lender extends a lump sum or monthly payment to the borrower (who must be over 62). The loan must be repaid when the borrower moves or dies, usually from the proceeds of selling the house. I have concerns about the program because the federal government insures these loans and is on the hook for any losses. But I am also concerned about the way they are being marketed and sold to seniors. There are advertisements that imply a government endorsement of the product for all seniors. Sometimes they imply that a reverse mortgage is an entitlement like Social Security or Medicare. Reverse mortgages are expensive, with big upfront fees and interest costs that can dwarf the amount the borrower receives over the life of the loan. Despite legislation Congress enacted in 2008 that preveut reverse mortgage lenders from cross-selling other insurance or financial products along with reverse mortgages, there are reports that insurance agents and financial advisors are now selling reverse mortgages. The FTC has a very helpful page on its website that explains reverse mortgages to seniors.**

Under the 2009 Omnibus bill, the FTC has been granted Administrative Procedures Act (APA) authority to issue rules regarding addressing unfair or deceptive acts or practices by mortgage lenders.

Are you planning to address reverse mortgages? What is the FTC doing to crack down on aggressive marketing practices? How has it pursued financial advisors who peddle these products inappropriately?

A. The FTC shares your concern about possible unfair or deceptive practices in the promotion and sale of reverse mortgages, and the risk these practices pose for elderly consumers. Reverse mortgages are complex financial products with high fees. A reverse mortgage entails a lien on an elderly consumer's home, frequently the consumer's most valuable asset. Some elderly consumers may not understand these complex products and the fees associated with them, or may be deceived by claims lenders make about them. Accordingly, the FTC has taken a number of steps to protect consumers from unfair or deceptive reverse mortgage practices.

First, pursuant to the Omnibus Appropriations Act of 2009, as clarified by the Credit Card Accountability Responsibility and Disclosure Act of 2009, the Commission in

June 2009 issued an Advance Notice of Proposed Rulemaking ("ANPR") focusing on unfair and deceptive mortgage practices. The ANPR specifically sought comment on possible unlawful practices in the promotion and sale of reverse mortgages. The FTC hopes to publish a Notice of Proposed Rulemaking ("NPR") in this proceeding in the near future.

Second, the FTC continues to monitor the reverse mortgage market, as well as consumer complaints received by our Consumer Response Center. The Commission is prepared to initiate law enforcement actions in appropriate cases where reverse mortgage lenders are engaged in unfair or deceptive practices or are violating the Truth-in-Lending Act. In particular, the agency on an ongoing basis scrutinizes reverse mortgage advertising for deceptive claims about the terms and consequences of the loans, as well as the lender's purported affiliation with government agencies or programs. It should be noted, however, that many lenders that offer reverse mortgages, including banks, thrifts, and federal credit unions, are outside the Commission's authority.

Third, the FTC has spearheaded federal-state efforts to coordinate and cooperate on reverse mortgage issues. In the fall of 2008, the Commission organized the Federal-State Reverse Mortgage Law Enforcement Working Group to strengthen the ability of law enforcers to take rapid, effective, and coordinated action against instances of reverse mortgage fraud. The Working Group, which meets on a regular basis, is comprised of over one hundred representatives from 40 states, the District of Columbia, and Puerto Rico, as well as several other federal agencies, including the Department of Housing and Urban Development ("HUD") and the Department of Justice ("DOJ").

Fourth, the Commission has provided assistance to federal and state agencies in developing and implementing standards of appropriate conduct for providers of reverse mortgages. In late 2009, the Federal Financial Institutions Examination Council ("FFIEC")[1] published proposed guidance on reverse mortgages, covering, among other topics, the importance of avoiding deceptive claims. Earlier this month, the FTC staff filed a comment with FFIEC supporting its efforts to prevent deception and assist consumers in making better-informed decisions about reverse mortgages.

Fifth, as you mention, the Commission is reaching out to elderly consumers to educate them about the risks and benefits of reverse mortgages. The Commission's most recent brochure, "Reverse Mortgages: Get the Facts Before Cashing in on Your Home's Equity," is available at http://www.ftc.gov/bcp/edu/pubs/consumer/homes/rea13.shtm. The FTC also has a new pamphlet for reverse mortgage housing counselors on how to spot and report

[1] FFIEC is comprised of the federal bank regulatory agencies, the National Credit Union Administration, and three associations of state supervisors of financial institutions.

potentially deceptive claims or other unlawful conduct. The pamphlet can be accessed at http://www.ftc.gov/bcp/edu/pubs/business/alerts/alt158.shtm. The Commission has distributed this pamphlet throughout HUD's network of housing counselors.

Finally, your question refers to reports that insurance agents and financial advisors are selling reverse mortgages, even though Congress enacted legislation in 2008 prohibiting those who sell reverse mortgages from cross-selling insurance or other financial products. The Housing and Economic Recovery Act of 2008 ("HERA") prohibits cross-selling insurance and other financial products in connection with reverse mortgages offered under the Home Equity Conversion Mortgage program, administered by HUD. HUD, rather than the FTC, enforces HERA's prohibition on cross-selling.

Q#2(a): **As you know, there are conflicting viewpoints about whether Congress should expand APA rulemaking authority to the FTC, which would grant the Commission civil penalty authority and other expanded tools. One of my chief concerns in addressing consumer protections, whether it be in financial services or elsewhere, is finding the most efficient ways to do so with little or no overlap between competing agencies and in a manner where agency authority is properly utilized. In addition, I have some concerns about whether the FTC would be able to take on expanded authority given the staff reductions that have occurred over the years.**

What do you feel are the most effective tools and practices that the FTC currently has to address bad actors? What do you feel is working?

A. The FTC has a number of effective consumer protection tools. Most notably, the Commission can file and litigate cases against those who engage in practices that are unfair or deceptive, or violate other statutes or rules enforced by the FTC. In addition, the Commission's education and outreach programs help empower consumers with information and tools they can use to avoid scams, and help achieve compliance by providing guidance to businesses about their obligations under the law.

Under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), the Commission is empowered to file and litigate actions in federal district court whenever a defendant "is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission" including rules under those laws. These laws include the FTC Act, which prohibits unfair or deceptive practices. The Commission can seek temporary restraining orders and other types of preliminary relief to halt ongoing violations and preserve the status quo pending a full adjudication of the case (including freezing a defendant's assets in appropriate cases). Remedies available to the FTC in such actions include monetary redress for consumers who incurred injury as a result of a defendant's violations, as well as other equitable remedies such as

rescission of victims' contracts and disgorgement of defendants' ill-gotten gains. In the past decade, the Commission has brought over 600 consumer protection law enforcement actions using Section 13(b), most of which sought consumer redress; through these cases, courts have ordered approximately $3 billion in redress for injured consumers.[2]

The Commission's authority to issue rules using APA procedures under a number of specific laws, such as the telemarketing law, has itself been a crucial tool for clearly identifying and halting a variety of harmful practices, providing standards and clarity for businesses, the agency, and the courts.[3] The Commission's authority to issue APA rules relating to home mortgages under the Omnibus Appropriations Act of 2009, such as with respect to third-party mortgage assistance relief providers, has the potential to he such a powerful tool for consumers.

In addition, the FTC's consumer education efforts have been highly successful in reaching consumers with the information and advice they need to recognize and avoid fraud. Among many other examples, in response to the recent economic downturn, the FTC developed several outreach initiatives to help people manage their financial resources and spot traditional and emerging scams. We share our consumer education materials with a multitude of federal, state, and local government agencies, and frequently partner with private and nonprofit organizations to increase the "reach" of our educational efforts.

The FTC's robust business education efforts are very helpful in fostering compliance with the various laws the Commission enforces. These efforts, which come in many different forms and are disseminated through many types of media, provide practical, straightforward, and often industry-specific information and guidance.

Finally, the Commission's authority to conduct workshops, research and studies,

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[2] The Commission also has, of course, authority to conduct administrative adjudications, and uses it for consumer protection matters particularly where it believes its own expert determination is important to help develop and clarify the law. However, given the availability of monetary redress remedies and penalties only through a court action, the Commission more commonly brings its consumer protection actions in court.

[3] Since the promulgation in 1996 of the Telemarketing Sales Rule ("TSR"), which for the past several years has included the National Do Not Call Registry, the Commission has filed 271 telemarketing cases aimed at halting various telemarketing frauds, including the unauthorized debiting of consumers' financial accounts, as well as the deceptive marketing of such goods and services as fraudulent work-at-home opportunities; advance-fee credit cards; phony government grants, and sweepstakes and prize promotions. Many of these cases have targeted not only fraudulent telemarketers, but also the third-parties that assist them, as specifically authorized by the TSR.

often involving its broad consumer protection, competition, and economic expertise, is an essential part of developing appropriate approaches to problems. The information developed through such activities assists in focusing enforcement efforts, identifying successful remedies, and formulating appropriate standards, as well as providing broader knowledge for the business and consumer communities and for policymakers. For example, the Commission staff recently held a series of three public roundtable discussions on the consumer protection problems existing in the system whereby debt collection cases are litigated and arbitrated. The information we obtained in those discussions will be extremely useful in determining law enforcement strategies going forward, and in formulating recommendations on actions that government and the private sector can take to ensure that the litigation and arbitration processes function more fairly for consumers.

Q#2(b): What do you feel is not working?

A. Although the Commission has a number of effective tools for stopping bad actors, certain holes in our authority make it more difficult – unnecessarily, in my opinion – to carry out our mission. The following four enhancements to the agency's authority would help substantially to fill those holes.

- APA Rulemaking: Because the Commission may not use the ordinary Administrative Procedures Act ("APA") notice-and-comment rulemaking procedures that most of our sister agencies use, the Commission must do one of two things to promulgate a rule: either obtain from Congress a specific grant of APA rulemaking authority for a particular issue or use the cumbersome and time-consuming Magnuson-Moss procedures. In my view, either option is an inefficient and uncertain process for addressing serious problems in a timely fashion, especially those that can arise from emerging technologies or new marketing practices. The Commission needs APA-style rulemaking authority to be able to issue rules, when needed, in a reasonable time and with a reasonable expenditure of resources.

- Civil Penalty Authority: The FTC currently lacks the authority to seek civil penalties for violations of the FTC Act itself. Although the Commission currently may seek penalties – through DOJ – in certain specified situations (*e.g.*, for a defendant's violations of an existing enforcement order or of certain FTC rules), the ability to seek civil penalties for knowing violations of the FTC Act itself would give the agency an important tool for deterring unfair or deceptive practices. This is especially important for cases in which obtaining equitable remedies such as consumer restitution, rescission, or disgorgement is impossible or impractical – because, for example, victims cannot be identified or consumer injury and wrongful profits cannot be quantified.

- Aiding and Abetting: The absence, outside of the telemarketing context, of explicit authority to hold liable those who aid and abet law violators hampers the Commission's ability to take action against entities that do not themselves deceive

consumers, but supply knowing and substantial support to those who do. In many cases, the aiders and abettors, by providing essential services that the primary fraudsters could not efficiently provide themselves, allow frauds to occur on a much broader scale than would otherwise be possible.

- Independent Litigating Authority for Civil Penalty Actions: It is anomalous that while the FTC is authorized to try its own cases for a wide swath of remedies, including consumer redress and disgorgement, it may not do so when seeking penalties. Instead, the agency must refer cases to DOJ, wait up to 45 days for DOJ to determine whether to take a case, and allow DOJ staff time to learn the case and prepare. This requirement thus entails duplication of efforts and slower enforcement. In addition, it results at times in the agency having to choose between obtaining early injunctive relief (for example, to halt the violative practices and preserve assets for eventual redress) or seeking penalties. Having the authority to litigate civil penalty actions independently would allow cases to be brought more quickly and effectively, without the disadvantages occasioned by the referral obligation.

Q#2(c): If you had more resources could you issue rules under the current Magnuson-Moss procedures?

A. While more staff on a rulemaking may help, most of the built-in time lags involved in Magnuson-Moss rulemaking cannot be eliminated by additional staffing. There are numerous steps that must be taken to issue a rule under Magnuson-Moss procedures.

- prepare an ANPR describing the area of inquiry under consideration, the objectives the FTC seeks to achieve, and possible regulatory alternatives under consideration;
- submit the ANPR to House and Senate oversight committees;
- publish the ANPR in the Federal Register for public comment;
- receive public comments on the ANPR for 30 days or longer;
- analyze comments received in response to the ANPR;
- determine that the acts or practices at issue appear to be widespread and prevalent;
- prepare an initial NPR that (a) summarizes and addresses the comments, (b) sets forth specific proposed rule text, (c) explains the legal and factual basis for the proposed rule provisions, (d) includes, if applicable, an initial analysis under the Regulatory Flexibility Act ("Reg Flex") based on the anticipated effects of the rule on small entities and an analysis under the Paperwork Reduction Act ("PRA") of any disclosure, reporting, or recordkeeping requirements the rule would impose, and (e) sets forth a preliminary Regulatory Analysis of anticipated effects of the rule, both positive and negative;
- submit the NPR to House and Senate oversight committees 30 days before publishing it;
- publish the NPR in the Federal Register for public comment;
- receive public comments on the NPR, usually for 60 days or more;
- provide an opportunity for a public oral hearing before a presiding officer, and if

any member of the public requests such hearing,[4]

- appoint a presiding officer;
- designate disputed issues of fact to be addressed at the hearing;
- decide petitions to designate fact issues as disputed for the hearing;
- accord to (potentially numerous) interested persons rights to examine, rebut, and cross-examine witnesses;
- determine which among those persons have similar interests;
- allow each group of persons with similar interests to choose a representative;
- appoint a representative if the group cannot choose one;
- decide appeals from determinations on which persons have similar interests;
- prepare and publish a second NPR addressing all these issues;
- hold the hearings;
- make complete transcripts of all testimony and cross-examinations available to the public;

- analyze the record amassed, and prepare a staff report that summarizes and analyzes the record and sets forth the final rule text recommended for adoption by the Commission;
- if hearings have been held, the Presiding Officer must prepare a report with his or her summary and analysis of the record amassed and recommendations as to adoption of final rule provisions;
- publish a Federal Register notice seeking comments on the staff report and on the Presiding Officer's report, if any;
- receive public comments for 60 days or more;
- obtain OMB approval for any disclosure, reporting, or recordkeeping requirement;
- prepare a Final Rule and Statement of Basis and Purpose that sets forth a summary and analysis of the record, sets forth the text of the recommended final rule, explains that the practices addressed by the recommended final rule are prevalent, explains the legal and evidentiary basis for each provision, includes a Final Regulatory Analysis, includes a Final Reg Flex, if applicable, and sets forth an effective date;
- publish the Final Rule and Statement of Basis and Purpose in the Federal Register;
- submit a notification to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act ("SBREFA"), initiating a period during which

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[4] In some instances, the FTC has conducted public workshops for interested parties and the public at large to discuss those issues arising from the written comments about which there are varying or conflicting points of view. This does not substitute for providing the hearing opportunity described with its attendant requirements. However, in some less controversial matters interested persons participating in such a workshop have not sought the oral hearing available under the statute.

Congress can invalidate the rule by legislation.
- issue compliance guides if required under SBREFA.[5]

Magnuson-Moss rulemaking has frequently taken eight or more years.

Because most of these steps must be taken sequentially in a specified order, even additional resources would not allow the Commission to utilize existing Magnuson-Moss rulemaking authority effectively.

Q#2(d): Or with APA authority?

A. APA rulemaking requires significantly fewer resources and less time than Magnuson-Moss rulemaking. Still, the Commission needs more resources. Today, the Commission has only about 1,100 full-time equivalents ("FTEs"). This is considerably fewer than it had at its peak in 1979, when the Commission had nearly 1,800 FTEs. But in the past decades, the demands placed on the agency have continued to grow with the advent of the Internet and e-commerce, and a variety of significant new laws and regulations that the FTC is charged, at least in part, with implementing and enforcing, such as the CAN-SPAM Act, the Fair and Accurate Credit Transactions Act, the Do Not Call provisions of the TSR, the Children's Online Privacy Protection Act, and the Gramm-Leach-Bliley Act ("GLB"). In 1979, when the Commission's FTEs were at their peak, the U.S. population was approximately 225 million. It is now 30 percent greater, and although the agency is always striving to do more with less, the size of the agency has not kept pace with the growth in the population and the sophistication of the marketplace.

Q#3(a): To follow up, what enforcement and regulation of financial services activities currently work best at the FTC?

A. As described in the answer to Question 2 above, the Commission has used its existing authority as effectively as possible to protect consumers of financial services. The available tools include law enforcement under the FTC Act and several other financial statutes, consumer and business education, and rulemaking in those instances in which Congress has mandated or authorized the FTC to use APA procedures.

The Commission has a long history of protecting consumers at every stage of their relationship with financial services companies. The FTC is primarily a law enforcement agency, and it has used its authority aggressively to seek temporary restraining orders, asset freeze orders, and other immediate relief to stop financial scams in their tracks and preserve assets, and then to obtain permanent relief and

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[5] SBREFA requires compliance guides for small businesses for certain rules; the FTC typically issues compliance guides, for both small and large businesses, for other rules as well.

provide redress to victims. Over the past five years, the FTC has filed over 100 actions against providers of financial services, and in the past ten years, the Commission has obtained nearly half a billion dollars in redress for consumers of financial services.

Most recently, the Commission's highest priority has been targeting frauds that prey on consumers made vulnerable by the economic crisis. For example, the FTC launched an aggressive, coordinated enforcement crackdown on mortgage loan modification scams and foreclosure rescue scams perpetrated on homeowners having difficulty making their mortgage payments. The purveyors of these schemes purport to assist consumers in avoiding foreclosure or renegotiating mortgage terms with the consumers' lenders or servicers, but frequently fail to deliver what they promise. In the past year, the FTC has brought 17 cases against more than 90 defendants charging that they were involved in foreclosure rescue and mortgage modification frauds; and we have partnered with state and federal law enforcement agencies that have brought scores of additional cases under their own statutes. The FTC also is actively targeting other practices that prey on consumers in financial distress, including debt relief services, credit repair, advance fee and subprime credit card scams, payday loans, and abusive debt collection practices.

Commission rulemaking activities, pursuant to specific statutes authorizing APA procedures, have resulted in a number of valuable consumer protection rules relating to financial practices, including a rule under GLB on the safeguarding of sensitive consumer financial data; a number of rules under the Fair Credit Reporting Act that, among other things, provide consumers with greater protections against identity theft and enable them to correct mistakes in their credit reports; and rules of broader scope that apply to both financial and nonfinancial firms, such as the TSR.

The Commission augments its law enforcement with far-reaching consumer and business education campaigns that help consumers manage their financial resources and avoid fraudulent and deceptive schemes and help businesses comply with the law. For example, the FTC recently has undertaken a major consumer education initiative related to mortgage loan modification and foreclosure rescue scams, including the release of a suite of mortgage-related resources for homeowners. These resources are featured on a new web page, www.ftc.gov/MoneyMatters. The FTC encourages wide circulation of this information: consumer groups and nonprofit organizations distribute FTC materials directly to homeowners, while some mortgage servicers are communicating the information on their websites, with billing statements, and over the telephone.

Finally, the Commission's research and policy development work fosters dialogue on important consumer issues and frequently informs and improves the agency's ability to protect consumers through law enforcement and rulemaking. For example, a series of landmark studies conducted by the FTC's Bureau of Economics on mortgage transactions showed that the disclosures that lenders currently are required to make to

borrowers about the terms of a loan are generally ineffective and may even be counterproductive. The findings of these studies have not only helped the Commission formulate its enforcement strategies, but also have influenced other federal agencies in their efforts to make the mortgage origination process more "consumer-friendly."

Q#3(b): Conversely, what types of financial services regulation and enforcement do you struggle with?

A. As noted above, the Commission has had a great deal of success in its efforts to stop deceptive and unfair practices in the segments of the financial services industry as to which it has jurisdiction. And, we have worked cooperatively and productively with the federal bank regulatory agencies, with whom we share jurisdiction in the financial services sector, to achieve consistent approaches to problems arising in both bank and nonbank sectors of the industry.

Certain limitations on our authority have made our job of protecting consumers more difficult, however. First, the lack of APA authority for FTC Act rules has, as a practical matter, made it impossible for the FTC to issue consistent and binding standards for the financial entities over which it has jurisdiction, except in the limited situations where Congress has authorized or mandated specific APA authority. Moreover, the Commission lacks general authority to promulgate rules under some of the financial statutes it enforces, such as the Fair Debt Collection Practices Act and Fair Credit Reporting Act, in some cases despite the fact that the agencies with which the FTC shares enforcement responsibilities do have such authority. Furthermore, the Commission's inability to obtain civil penalties for FTC Act violations, or to bring its own civil penalty cases in those situations where it does have civil penalty authority, makes it more difficult in some cases to protect consumers from ongoing harm or to achieve adequate deterrence. Finally, uncertainties in the Commission's authority to prosecute aiders and abettors of financial fraud or deception can lead to difficulties in some cases in getting to the "root" of a problem.

Q#3(c): Would it be better to have the latter overseen in another agency?

A. I do not believe that any of the Commission's current duties for financial services regulation and enforcement would be better overseen by another agency. Indeed, I believe that limiting the Commission's current authority over financial services would result in decreased consumer protection activity in many areas, broad-ranging jurisdictional disputes and litigation, and more complicated and potentially conflicting regulation of marketing practices that span financial and nonfinancial sectors alike. Accordingly, I believe that the Commission should continue to have at least concurrent authority over the financial entities now within its jurisdiction.

From Senator Dorgan:

Q#1: **In the FTC bill I introduced last Congress, we added 501(c) (3) non-profit entities to the FTC's jurisdiction. I know the FTC issued a proposed rule last summer to address the sale of debt relief services. I understand that eighty-eight percent of the debt relief industry, which advertises, markets, sells and enrolls consumers into Debt Management Plans (DMPs), consists of non-profit providers. These eutities generate millions of dollars in fees from consumers by selling debt relief services. As we consider FTC Reauthorization in the coutext of financial reform, do you believe the FTC Act should be updated so that the FTC has the appropriate authority to regulate nonprofit entities, like those that offer debt relief services?**

A. Currently, the FTC lacks jurisdiction under the FTC Act over entities that do not carry on business for their own profit or that of their members. The Commission can, however, reach "sham" non-profits, such as shell non-profit corporations that funnel profits to their owner, officers, or others or for-profit entities falsely claiming to be affiliated with charitable organizations. Further, the Commission has jurisdiction over organizations such as trade associations that engage in activities that "provide [] substantial economic benefit to its for-profit members," for example, by providing advice and other arrangements on insurance and business matters or engaging in lobbying activities. The Commission also has jurisdiction over non-profits under certain consumer financial statutes, such as the Truth in Lending Act and the Equal Credit Opportunity Act.

In April 2008, the Commission testified in support of legislation to extend its jurisdiction to certain non-profit entities, and I continue to agree with that position. In health care, an area in which the Commission takes the lead to maintain competition, the agency's inability to reach conduct of various non-profit entities has prevented the Commission from stopping anticompetitive conduct of non-profits engaged in business. Also, many major data security breaches have involved non-profit entities outside of the Commission's jurisdiction; Commission authority in such circumstances may be valuable.

With respect to the debt relief industry, as you note, there are both for-profit and non-profit entities. Consistent with the FTC's current jurisdiction, the proposed amendments to the TSR for the debt relief industry would not cover true non-profits. Should Congress grant the Commission authority over non-profits, we would certainly want to consider whether the TSR amendment should cover those entities as well.

Questions for the Record
Chairman Leibowitz
February 4, 2010 Hearing on Financial Services and Products: The Role of the FTC in Protecting Consumers

- A number of questions raised by the committee touch upon the differences between the Magnuson-Moss and Administrative Procedures Act ("APA") rulemaking processes. Before I address the Committee's specific questions, I would like to provide an overview of those two processes.

- **Magnuson-Moss Rulemaking:** There are numerous steps that must be taken to issue a rule under Magnuson-Moss procedures, including the following:
    - prepare an Advance Notice of Proposed Rulemaking ("ANPR") describing the area of inquiry under consideration, the objectives the FTC seeks to achieve, and possible regulatory alternatives under consideration;
    - submit the ANPR to House and Senate oversight committees;
    - publish the ANPR in the Federal Register for public comment;
    - receive puhlic comments on the ANPR for 30 days or longer;
    - analyze comments received in response to the ANPR;
    - determine that the acts or practices at issue appear to be widespread and prevalent;
    - prepare an initial Notice of Proposed Rulemaking ("NPR") that (a) summarizes and addresses the comments, (b) sets forth specific proposed rule text, (c) explains the legal and factual basis for the proposed rule provisions, (d) includes, if applicable, an initial analysis under the Regulatory Flexibility Act ("Reg Flex") based on the anticipated effects of the rule on small entities and an analysis under the Paperwork Reduction Act ("PRA") of any disclosure, reporting, or recordkeeping requirements the rule would impose, and (e) sets forth a preliminary Regulatory Analysis of anticipated effects of the rule, both positive and negative;
    - submit the NPR to House and Senate oversight committees 30 days before publishing it;
    - publish the NPR in the Federal Register for public comment;
    - receive public comments on the NPR, usually for 60 days or more;
    - provide an opportunity for a public oral hearing before a presiding officer,[1] and if any member of the public requests such hearing:
        - appoint a presiding officer;

[1] In some instances, the FTC has conducted public workshops for interested parties and the public at large to discuss those issues arising from the written comments about which there are varying or conflicting points of view. This does not substitute for providing the hearing opportunity described with its attendant requirements. However, in some less controversial matters interested persons participating in such a workshop have not sought the oral hearing available under the statute.

    - designate disputed issues of fact to be addressed at the hearing;
    - decide petitions to designate fact issues as disputed for the hearing;
    - accord to (potentially numerous) interested persons rights to examine, rebut, and cross-examine witnesses;
    - determine which among those persons have similar interests;
    - allow each group of persons with similar interests to choose a representative;
    - appoint a representative if the group cannot choose one;
    - decide appeals from determinations on which persons have similar interests;
    - prepare and publish a second NPR addressing all these issues;
    - hold the hearings;
    - make complete transcripts of all testimony and cross-examinations available to the public;
  - analyze the record amassed, and prepare a staff report that summarizes and analyzes the record and sets forth the final rule text recommended for adoption by the Commission;
  - if hearings have been held, the Presiding Officer must prepare a report with his or her summary and analysis of the record amassed and recommendations as to adoption of final rule provisions;
  - publish a Federal Register notice seeking comments on the staff report and on the Presiding Officer's report, if any;
  - receive public comments for 60 days or more;
  - obtain OMB approval for any disclosure, reporting, or recordkeeping requirement;
  - prepare a Final Rule and Statement of Basis and Purpose that sets forth a summary and analysis of the record, sets forth the text of the recommended final rule, explains that the practices addressed by the recommended final rule are prevalent, explains the legal and evidentiary basis for each provision, includes a Final Regulatory Analysis, includes a Final Reg Flex, if applicable, and sets forth an effective date;
  - publish the Final Rule and Statement of Basis and Purpose in the Federal Register;
  - submit a notification to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act ("SBREFA"), initiating a period during which Congress can invalidate the rule by legislation.
  - issue compliance guides if required under SBREFA.[2]

  Magnuson-Moss rulemaking has frequently taken eight or more years. (*See* table page 13, *infra*).

- **APA Rulemaking:** Although APA rulemaking is certainly less laborious and time-consuming than the cumbersome and complex Magnuson-Moss procedures, it still mandates a set of rigorous procedures that are designed to ensure that interested parties have early

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[2] SBREFA requires compliance guides for small businesses for certain rules; the FTC typically issues compliance guides, for both small and large businesses, for other rules as well.

notice of the proceeding and ample opportunity to have their views considered, as well as to create a comprehensive record for judicial review.

Specifically, APA rulemaking must proceed through the following steps:

- The rulemaking agency must prepare and publish in the Federal Register an NPR that (a) sets forth either the terms or substance of the proposed rule or a description of the subjects and issues involved;"[3] (b) explains the legal and factual basis for the proposed rule provisions; and (c) includes, if applicable, a Reg Flex analysis based on the anticipated effects of the rule on small entities, and an analysis under the PRA of any disclosure, reporting, or recordkeeping requirements the rule would impose. In addition, the proposed legislation would retain the current FTC Act requirement that, for rules under the Act, the NPR also must set forth a preliminary Regulatory Analysis of anticipated effects of the rule, both positive and negative.
- The agency then must accept public comments on the NPR for a period of 30 days or more.
- The agency must also obtain OMB approval of any disclosure, reporting, or recordkeeping requirements in the rule.
- After considering the comments, the agency then must prepare and publish in the Federal Register a Statement of Basis and Purpose, setting forth the final rule provisions and "a concise general statement of their basis and purpose." This statement provides a summary and analysis of the record; an explanation of the legal and evidentiary basis for the rule provisions adopted; a final Reg Flex Analysis, if applicable; and an effective date for the rule. Also, under the current FTC Act requirement that would be retained by the proposed legislation, the Statement of Basis and Purpose of rules must set forth a final Regulatory Analysis.
- Subsequently, the agency submits a notification to Congress pursuant to the SBREFA, initiating a period during which Congress can invalidate the rule by legislation. The agency also commonly issues compliance guides.
- The final rule can be challenged in federal court and will be set aside if the court determines that the Commission's findings are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

The FTC has often implemented additional procedural safeguards and opportunities for public input when Congress has given it APA authority in specific areas.

- First, in many instances, the Commission has published an ANPR, providing even earlier notice of the proceeding and opportunity to comment. *See, e.g.,* http://www.ftc.gov/opa/2009/05/decepmortgage.shtm (ANPR issued by the Commission initiating its mortgage practices rulemakings). Although they increase the time it takes to promulgate the ultimate rule, ANPRs have proven

[3] As a matter of practice, the NPRs issued by the FTC routinely propose actual rule text.

useful in situations where the Commission lacks sufficient experience or knowledge in a particular area to formulate a proposed rule.

- Second, in some cases, the FTC has held public workshops during the course of the rulemaking proceeding, enriching the record and providing additional opportunities for those who might be affected by the rule to express their views, provide data, and address the assertions of other participants. *See, e.g.*, http://www.ftc.gov/opa/2009/08/tsrforum.shtm (announcing public forum to discuss proposed debt relief amendments to the Commission's Telemarketing Sales Rule.)
- Third, to further ensure that its decisions are fully informed, the Commission often has conducted informal, but extensive, outreach to affected parties. For example, the FTC participated in or conducted a number of rulemakings as required by the FACT Act. For most of these rules, the FTC (with its sister agencies in some cases) solicited data and opinions in addition to the formal request for comments, and often on multiple occasions, from industry groups, legal practitioners, consumer advocates, and others.
- Fourth, the Commission has an ongoing program of reviewing all of its rules periodically, seeking public comment on them, and revising or repealing them as appropriate.

In sum, the legal requirements of the APA, enhanced where appropriate by these additional FTC practices, accomplish the same goals as the more cumbersome and time consuming Magnuson-Moss procedures, without those procedures' built-in time lags and myriad opportunities to slow down a proceeding.

Finally, there have been substantial changes in the regulatory picture since Congress originally enacted FTC-specific rulemaking procedures in the Magnuson-Moss Act; these changes would provide further assurance that FTC rulemaking under the APA would be carefully tailored to minimize unnecessary burdens, especially on small businesses. These changes include:

- further refinements in the deception and unfairness standards, including the Commission's policy statement defining "deceptive" acts and practices and a statutory definition of "unfair" practices added as Section 5(n) of the FTC Act;
- the preliminary and final Regulatory Analyses for FTC Act rules;
- the preliminary and, where appropriate, final Reg Flex analyses;
- the public comment and OMB review of relevant provisions under the PRA; and
- the SBREFA provisions for notice to Congress and opportunity for it to invalidate a rule.

- **Standard for review:** The standard of review for a rule developed using either procedure is the same. In *Consumers Union of U.S. v. FTC*, 801 F.2d 417, 422 (D.C. Cir. 1986), the court (opinion by then-Judge Scalia) held that the FTC Act's "substantial evidence" standard for judicial review of a Magnuson-Moss rule does not call for a more intensive review than the "arbitrary and capricious" standard for notice-and-comment rules under the APA, but rather requires the same degree of evidentiary support. That view stands today; *see, e.g., Eagle Broadcasting Group, Ltd. v. FCC*, 563 F.3d 543, 551 (D.C. Cir. 2009) (explaining that the

"substantial evidence" standard for review of "formal" rulemaking under the APA – the same language adopted by Magnuson-Moss – is the same as the "arbitrary and capricious" standard for notice-and-comment rules). If a rule's factual underpinnings are not supported by substantial evidence, it is arbitrary.

From Senator Thune:

Q#1: **Chairman Leihowitz, in yonr testimony yon mentioned that the FTC would benefit from the ability to use APA-style rulemaking rather than the Magnuson-Moss rulemaking process that it is currently required to use. Is this still a priority for the FTC when the CFPA proposals wonld take over a significant portion of consnmer protection rulemaking?**

A: Having the ability to issue rules in a reasonable time with a reasonable expenditure of resources would greatly improve the Commission's ability to address common consumer protection problems. New scams continually emerge that exploit technological advances and marketplace developments. For example, in the past year or two, frauds targeting financially-distressed consumers have blossomed, including mortgage rescue fraud, job scams, and phony government grants. The dozens of enforcement actions we have brought are making an impact. Nevertheless, for some types of fraudulent, deceptive or unfair practices, bringing case after case may not be as useful as promulgating a rule, which would allow the Commission to establish clear standards for industry while making enforcement more efficient and effective. The current requirement to use Magnuson-Moss procedures effectively precludes the Commission from issuing such rules.

Furthermore, the CFPA's authority would reach only financial activities and entities. The Commission needs to be able to issue rules in a reasonable time and with a reasonable expenditure of resources – that is, APA-style rulemaking – across the broader spectrum of commercial activities that fall within its jurisdiction, including practices that are not financial activities (such as negative option marketing[4]), practices of any entities that may be specifically excluded from the CFPA's authority (such as the exclusion in the House bill, H.R. 4173, of the practices of retailers and auto dealers), and practices involving both nonfinancial and financial aspects or entities (such as the Commission's Funeral Rule).

Authority to use APA rulemaking rather than the much more cumbersome and time-consuming Magnuson-Moss procedures would enhance the FTC's ability to fulfill its statutory responsibilities more effectively.

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[4] "Negative option marketing" refers to a category of commercial transactions in which customers are charged for goods or services if they do not take an affirmative action to reject an offer or cancel an agreement.

Q#2: If the FTC was forced to defer to the CFPA for 120-days before litigating any consumer financial protection cases, how would that affect the FTC's current enforcement efforts? Would this undercut the FTC's ability to quickly respond to certain deceptive practices and fraud in areas currently under its jurisdiction?

A: For many FTC cases, particularly those involving fraud, rapid action is often necessary to obtain preliminary relief to stop the practices quickly and limit the harm, as well as to preserve assets for possible return to consumers. Having to wait 120 days for a CFPA decision before filing a case not only would allow the violations to continue an extra four months, resulting in additional consumer injury, but could seriously hamper the Commission's ability to obtain preliminary relief, thus weakening our ability to protect consumers in these circumstances. The approach taken in H.R. 4173, essentially providing the FTC with concurrent enforcement authority, would ensure that the Commission's law enforcement efforts to protect consumers remain effective.

Q#3: Do you believe that the CFPA and FTC can concurrently manage consumer protection or do you believe that there will be inherent conflicts with this structure?

A: Based on our many years of experience in sharing jurisdiction with numerous other federal agencies with respect to large portions of the Commission's jurisdiction, I am confident that the FTC, should it have concurrent enforcement authority, would work cooperatively and effectively with the CFPA.

The FTC, for example, has concurrent authority for stopping unfair or deceptive practices with respect to the marketing of foods, drugs, devices, alcoholic beverages, and pesticides (with the Food and Drug Administration; Department of Agriculture; Bureau of Alcohol, Tobacco, and Firearms; and Environmental Protection Agency); the securities industry (with the Securities and Exchange Commission); mail fraud (with the U.S. Postal Inspection Service); mortgage-related activities (with the Department of Housing and Urban Development); certain financial entities (with the federal bank regulatory agencies); and a host of others. With respect to its antitrust mission, the Commission's authority is almost completely co-extensive with that of the Department of Justice.

In each of these instances, the Commission and its sister agencies have developed effective methods of coordination tailored to the individual circumstances. For example, the concurrent jurisdiction of the FTC and FDA with respect to the marketing of foods, OTC drugs, and devices is handled through a formal Memorandum of Understanding that, among other things, makes the FDA primarily responsible for overseeing product labeling and the FTC primarily responsible for non-label advertising. In some cases, the FTC defers to another agency, such as the SEC, when that agency has specialized expertise relevant to the matter. In other

situations, the Commission and other agencies coordinate through less formal means, including ongoing consultation, as circumstances dictate.

From Senator Ensign:

Mr. Chairman, in your testimony, you mentioned several ways in which you are asking for Congressional approval to expand the FTC's authority. Specifically, you mentioned replacing the Magnuson-Moss rules process with one using the Administrative Procedures Act (APA); explicit authority to pursue enforcement action against parties that "aided or abetted" a violation of the FTC Act; the authority to collect civil penalties for violations of the FTC Act; and independent litigating authority. Congress chose to place those limits, and others, on the FTC to ensure there are proper checks and balances on the agency's enforcement and rulemaking power, and I am concerned that these new powers would result in an overly burdensome regulatory regime for all industries, financial or otherwise, that fall within the FTC's especially broad consumer protection mandate.

A number of concerns have been raised with respect to the potential over-regulatory impact on our economy by a new Consumer Financial Protection Agency (CFPA), and the corresponding effect it could have on stifling innovation and costing American jobs. These concerns are particularly important to me given that the unemployment rate in Nevada is among the highest in the country.

Q#1(a): In what ways would the FTC's new powers, as you've proposed, differ from those proposed for the CFPA?

A: The powers sought for the FTC also would be granted to the CFPA in both the Administration proposal and H.R. 4173. These powers would enhance the FTC's ability to fulfill its longstanding statutory responsibility to prevent unfair and deceptive commercial practices, and would be exercised within the framework of nearly a hundred years of jurisprudence. Unlike the CFPA, the FTC would *not* be authorized to exercise these powers with respect to "abusive" practices, but would continue to operate within the established, carefully-defined parameters of unfair or deceptive practices.[5] Also, the FTC would not be authorized to exercise these powers within a supervisory/examiner regulatory role such as that anticipated for the CFPA.

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[5] Under Section 5 of the FTC Act, 15 U.S.C. § 45, an act or practice (usually an express or implied representation or omission) is *deceptive* if it is (1) likely to mislead consumers who are (2) acting reasonably under the circumstances (3) about a material fact. An act or practice is material if it is likely to affect consumers' conduct or decisions with respect to the product or service at issue. FTC Policy Statement on Deception, *appended to Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174 (1984). An act or practice is *unfair* if it causes or is likely to cause injury to consumers that (1) is substantial; (2) is not outweighed by countervailing benefits to consumers or to competition; and (3) is not reasonably avoidable by consumers themselves. 15 U.S.C. § 45(n).

Q#1(b): How would your proposals to increase the FTC's powers in similar ways to the CFPA avoid or mitigate these same concerns about the potential negative impact on our economy?

A: In answering this question, it is important to provide context about the function and role of the FTC. The FTC is the only federal agency with jurisdiction over the financial sector whose sole mission is protecting consumers. Moreover, the FTC is unique in its combination of consumer protection and competition missions, informed by its economic expertise. These missions work in tandem to protect consumer sovereignty within our competitive market system. Thus, the Commission has long-standing experience and expertise in weighing the impacts of its enforcement and regulatory actions on our economy, and it would bring that expertise to bear in employing the four enhancements of authority it seeks.

Aiding and abetting: The proposal to grant aiding and abetting authority to the FTC is subject to important constraints. Specifically, aiders and abettors would be liable only if they provided *substantial* assistance to a wrongdoer, and only then if they *actually knew that, or acted with reckless disregard for whether,* the practices they were assisting violated the FTC Act. The proposed provision would give the FTC comparable authority to that long held by the SEC and the Commodity Futures Trading Commission over aiding and abetting of violations.

Civil penalties: The proposed authority to seek civil penalties for violations of the FTC Act also would be constrained. The Commission could obtain such penalties only if it proved to a federal court that the defendant engaged in unfair or deceptive practices *with actual knowledge or knowledge fairly implied on the basis of objective circumstances* that the conduct violated the law. This is the same standard that the Commission must satisfy currently in bringing an action for civil penalties for violation of an FTC trade regulation rule. In addition, the FTC Act directs a court determining the amount of any such civil penalty to take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

APA rulemaking authority: It is important at the outset to dispel any misimpression that the APA procedures are in any sense truncated or expedited; in fact, the APA provides for numerous procedural and substantive safeguards and requirements, with ample opportunity for all stakeholders to participate and be heard. (Please see the discussion of APA Rulemaking on pages 2 to 4, *supra*). Over the last two decades the Commission has promulgated numerous rules using APA procedures pursuant to statutes other than the FTC Act. Finally, it is worth noting that many other federal agencies have authority to issue under APA procedures rules implementing broadly stated standards that have substantial and widespread effects on major economic sectors, including the SEC, CFTC, Federal Communications Commission and the federal bank regulatory agencies (three of which may issue APA rules applying the FTC Act's own deception and unfairness standards).

Independent litigating authority: The proposed authority would fill a problematic gap in the FTC's long-held, independent litigating authority. The FTC currently has, and routinely exercises, the power to initiate litigation in the federal courts in its own name and with its own attorneys to pursue violations of all the laws it is charged with enforcing. The FTC has this power to carry out its most basic and essential consumer protection functions under the FTC Act: to obtain injunctive and other relief, including consumer redress for violations of the FTC Act. The FTC has used this power appropriately and effectively. Only if it seeks civil penalties may the FTC not bring suit independently. Other independent law enforcement agencies, such as the SEC, currently have the power to obtain civil penalties on their own in federal district court.

Q#2: **You are proposing a drastic expansion of the FTC's authority. In fact, former FTC Chairman Timothy Muris has said your proposals represent "the most significant expansion of the FTC since its inception." Further, former FTC Chairman Jim Miller has said the proposals are "like putting the FTC on steroids." This is certainly not a small request you are asking of Congress.**

Q#2(a): **Given the breadth of your agency's jurisdiction and the significance of the proposed changes, what specifically has the FTC done to get input from businesses that could be impacted by the new authority?**

A: The FTC maintains a continuous and comprehensive dialogue on matters that affect its stakeholders who might be impacted by FTC actions, including the business community, consumer advocates, the private bar, and sister federal and state enforcement agencies. The Commission conducts outreach, provides guidance, and seeks input through a variety of informal channels (such as speeches at conferences, business and consumer education, and responses to queries and requests for advice), as well as through more formal processes (such as public comment periods on regulatory proposals and public, FTC-sponsored workshops and forums examining specific consumer protection issues). In addition, although not legally required to do so, the Commission frequently seeks public comment on proposals for enforcement policy statements and other types of nonregulatory guidance it issues.

With respect to the current proposals, FTC officials at every level have communicated with business representatives and other interested parties to hear their views and engage in dialogue. It should be noted that the Commission has recommended iterations of all four proposals in Congressional testimony and elsewhere since at least 2008.

Q#2(b): **With a more streamlined approach under APA rulemaking, I worry that the parties affected by the rule would not have a proper opportunity to voice their concerns. Should Congress agree with your proposals, what steps would you take to ensure that does not happen?**

A: Please see the discussion of APA Rulemaking on pages 2 to 4, *supra*.

From Senator Wicker:

Rulemaking

Q#1: If you were granted APA rulemaking authority today, what rulemaking would you initiate?

A: The Commission's record for more than two decades demonstrates that it views rulemaking as a tool to be used very judiciously and only where there are clear indications that other remedial approaches are not effective. The Commission has not made any decisions about any particular rulemaking it would undertake.

One area I think might be appropriate for rulemaking under APA procedures is the use of negative option marketing in Internet sales. Despite the many Commission law enforcement actions targeting schemes that unfairly or deceptively exploit this sales technique, abuses persist. It may be possible to benefit both consumers and industry by developing bright-line standards for how to use this technique fairly and without deception. Such rules should enable consumers to more easily identify and avoid sellers that make unscrupulous use of the technique.

For another, in a 2009 report on debt collection, the Commission recommended that Congress grant it APA rulemaking authority under the Fair Debt Collection Practices Act. I continue to believe that a debt collection rulemaking would be useful.

Q#1(a): If there are any rules you would initiate immediately under APA rulemaking, please include evidence of your rationale for expedited rulemaking, including any action taken against bad actors.

A: Let me note initially that notice-and-comment APA rulemaking is the standard government rulemaking procedure, rather than expedited rulemaking.[6] The APA mandates a set of rigorous procedures that are designed to ensure that interested parties have early notice of the proceeding and ample opportunity to have their views considered, as well as to create a comprehensive record to afford thorough judicial review. Please see the discussion of APA Rulemaking on pages 2 to 4, *supra*.

As noted above, the Commission has not made any decision about what rulemakings it would conduct in the event of the elimination of the cumbersome Magnuson-Moss rulemaking procedures. I would consider discretionary rulemaking only where unfair or deceptive practices cause significant harm to consumers, where setting standards

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[6] Although the APA does provide for expedited rulemaking without notice and comment when an agency for good cause finds that such a procedure is "impracticable, unnecessary, or contrary to the public interest," the courts have construed this exception narrowly. The Commission has only engaged in such rulemaking to fix minor errors in a rule or make very non-substantive, technical, or non-discretionary amendments.

would likely improve industry practices (particularly where law enforcement efforts have not provided adequate guidance or prevented the practices and where malfeasance is common), where remedies could be crafted within the framework of FTC jurisprudence, and where the anticipated burdens are reasonable in light of the anticipated benefits of the rule.

Q#1(b): You discussed a few instances where APA rulemaking authority would have benefitted the FTC's ability to protect consumers. Did the FTC request from Congress the specific authority to use expedited rulemakiug for these instauces?

A: Yes. For example, in a 2009 report on debt collection, the Commission recommended that Congress grant it APA rulemaking authority under the Fair Debt Collection Practices Act.

A major problem with needing to seek statutory authority for APA rulemaking for each specific need is that business practices change constantly and quite rapidly in response to technological advances and market innovation. Both consumers and industry members can often benefit from the establishment of standards that can be revised as needed to keep current and effective. If a rule is no longer needed, it can similarly be withdrawn after notice and comment under such a flexible regime. This process is more responsive to a dynamic economy than enacting new legislation.

Q#1(c): Please detail any requests the Commission made to Congress for expedited rulemaking on specific rules since 1990.

A: When Congress is considering directing the Commission to conduct rulemaking, FTC staff routinely suggest that any statute provide expressly for APA rulemaking authority. Unlike Magnuson-Moss rulemaking, APA rulemaking is an efficient and effective means to conduct rulemaking proceedings. Examples of legislation that then provided APA rulemaking authority include:

- Telephone Disclosure and Dispute Resolution Act of 1992
- Telemarketing and Consumer Fraud and Abuse Prevention Act
- The Children's Online Privacy Protection Act
- Fairness to Contact Lens Consumers Act
- Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003
- Omnibus Appropriations Act, 2009

In addition, in a 2009 report on debt collection, the Commission recommended that Congress grant it APA rulemaking authority under the Fair Debt Collection Practices Act.

Q#2: Can you please provide data from the Commission related to the staffing associated with the following stages of rules, for each rule promulgated under your current rulemaking authority:

- **staff detailed to assist in the preparation of the advanced notice,**

- **staff assigned to review comments from the advance notice of proposed rulemaking,**
- **staff assigned to formulate the determination that unfair or deceptive acts or practices are prevalent,**
- **staff assigned to draft the notice of proposed rulemaking, and**
- **staff assigned to draft the staff report required under Commission Rule 1.13.**

A: All of the trade regulation rule making proceedings using the Magnuson-Moss procedures to create new rules were conducted over 25 years ago.[7] Also, all of the rules were initiated prior to the 1980 amendment to the FTC Act requiring an advanced notice of proposed rulemaking and a determination that the practice addressed is prevalent.

The records available do not include information sufficient to respond to the request in full. Staff has gleaned from some of the post-hearing staff reports illustrative staffing information:

- Mobile Homes: At least 13 staff members worked on the post-hearing staff report.
- Used Cars: More than 14 staff members worked on the post-hearing staff report.
- Funeral Industry: At least 16 staff members worked on the post-hearing staff report.

These numbers do not include the Presiding Officer (who was obligated to produce a separate report) or his staff, Bureau management reviewers, Office of General Counsel advisors, or the Commissioners' offices. Staff familiar with the rulemaking proceedings inform me that these staffing levels were typical.

Q#3: Please provide the timing associated with informal hearings held under §57a(c), by each rule.

A: Staff attempted to identify Magnuson-Moss rulemaking proceedings to promulgate new rules that included hearings held under § 57a(c). The table below sets forth those identified, together with the number of days of hearings themselves; the time taken by all of the steps associated with the hearing process, and the length of the proceeding from ANPR or initial NPR until promulgation of a rule or the closing of the proceeding.

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[7] Eight Magnuson-Moss rules have been amended, also using Magnuson-Moss procedures. Building on existing rules, amendment proceedings involved fewer issues than did the original promulgations and they were typically more lightly staffed. Generally, interested parties did not demand hearings to deliver their oral presentations – although most, if not all, amendment proceedings involved one or more public workshops to develop a full record.

Rule	Year Initiated	Number of Hearing Days	Time Associated with Hearing Process*	Length of Rulemaking Proceeding
Vocational Schools	1974	44	2 years, 1 month	4 years, 4 months**
Food Advertising (nutrition)	1974	48	3 years, 1 month	8 years, 1 month**
Mobile Homes	1975	40	5 years	11 years, 11 months**
Credit Practices	1975	51	5 years	8 years, 10 months
Hearing Aids	1975	58	2 years	10 years, 3 months**
Funeral Services	1975	52	2 years, 4 months	7 years, 1 month
Protein Supplements	1975	26	3 years, 9 months	over 9 years**
Health Spas	1975	30	3 years, 6 months	over 10 years**
OTC Drugs	1975	23	3 years, 4 months	5 years, 5 months**
Ophthalmic Practices	1975	32	1 year, 2 months	2 years, 7 months
Used Cars	1975	35	2 years, 8 months	8 years, 10 months
OTC Antacids	1976	23	3 years, 5 months	8 years, 8 months**
Insulation (R-Value)	1977	17	7 months	1 year, 9 months
Children's Advertising	1978	30***	N/A	3 years, 5 months**
Development/Use of Standards and Certification	1978	57	N/A****	2 years, 2 months**

* The time periods associated with the hearing process start when the Commission either issued an NPR or first extended the initial comment period for comments on hearing-related matters, and end when the Presiding Officer or the staff released a report.

The numerous hearing-related steps include: comment period extensions relating to designating disputed factual issues to be addressed at the hearing or to determination of similar interests of interested persons; designating the disputed issues; grouping interested persons with similar interests; allowing each group to appoint a representative; appointing a representative if a group cannot agree; resolving petitions about disputed issues or representation; preparing and publishing a final NPR or other notice addressing all these issues and scheduling hearings; holding hearings, which include examination and cross-examination by interested persons or their representatives; making transcripts of all testimony and cross-examinations available to the public; digesting, summarizing, and analyzing the record amassed at the hearings; and preparing a staff report and a Presiding Officer report containing those summaries and analyses.

** Closed without promulgating a rule.

*** This number represents the first round of hearings, which did not include examination by interested parties. A second round of hearings for examination by interested parties was planned but had not yet taken place when the Commission suspended and then closed the rulemaking proceeding.

****The staff report and the Presiding Officer's report had not been completed when the Magnuson-Moss (unfair or deceptive practices) aspect of the proceeding was closed pursuant to the 1980 amendments to the FTC Act.

Q#4: I nnderstand that several steps associated with the Commission's rnlemaking authority are required under the Commission's Rnles. Can yon please provide the history of adoption of these rules?

A: The Commission adopted rules of practice implementing the requirements of the Magnuson-Moss Act shortly after the law was enacted in 1975. The Commission issued further rules in 1980 and 1981 after the passage of the FTC Improvements Act of 1980. There have also been several revisions of discrete provisions in the late 1970s and in 1989 and 1998. Most of the provisions in the rules are required by these laws.

In addition to the statutory requirements, the rules provide that FTC staff shall make recommendations to the Commission in a report on the rulemaking record, and that the public have an opportunity to comment on both the staff report and the Presiding Officer's report. The staff report requirement ensures that the staff's expertise is provided to the Presiding Officer, the Commission, and the public.

Another provision in the Commission's rules not required by the statutes establishes a procedure for oral presentations to the Commission after the close of the hearing record. This procedure is optional and the Commission, in its discretion, may determine that "such presentations would not significantly assist it in its deliberations." The Commission adopted these provisions in 1977 in response to public comments that there should be a procedure for direct access to the Commission.

Q#4(a): Also, can you please detail the process the Commission must initiate to amend these rules?

A: The Commission's procedural rules implementing the statutory requirements are rules of agency practice. Under the Administrative Procedure Act, an agency may issue rules of practice and any amendments thereto by publication in the Federal Register; a comment period is not required. See 5 U.S.C. 553(a)(2).

Q#4(b): What steps has the Commission taken to streamline Commission Rules related to the rnlemaking process?

A: The statutory requirements limit the Commission's ability to streamline the procedural steps in its rules. The statutory provisions allowed some minor streamlining in 1981 that had little effect on burden or time.

Q#5: Would additional resources allow you the opportunity to effectively ntilize your existing rulemaking anthority? If so, has the FTC made this clear in your recent budget proposals?

A: While more staff on a rulemaking may help, most of the built-in time lags involved in Magnuson-Moss rulemaking cannot be eliminated by additional staffing. There are

numerous steps that must be taken to issue a rule under Magnuson-Moss procedures. Please see the discussion of Magnuson-Moss Rulemaking on pages 1 to 2, *supra*. Because most of these steps must be taken sequentially in a specified order, even additional resources would not allow the Commission to utilize existing Magnuson-Moss rulemaking authority effectively.

Q#6: Do you believe the evidential hearings and opportunity to cross examine is an unnecessary step in the formal rulemaking process?

A: Input from parties impacted by a proposed rulemaking is essential in developing a full record and ensuring fairness and transparency. All FTC rules, whether conducted pursuant to Magnuson-Moss or APA procedures, have been based on comprehensive records developed through open and impartial processes that provided ample opportunities for any interested parties to communicate information or opinions. The creation of such a record both leads to an informed decisional process and is integral to satisfying the courts that the agency fulfilled its responsibilities.

In some cases, it may be useful to supplement the written record by providing an opportunity for stakeholders to transmit their views orally. Doing so may be helpful in resolving difficult or contentious issues that would benefit from having opposing positions discussed and debated in a public setting. That is why the FTC frequently solicits oral input during APA rulemakings, either through workshops or outreach by FTC staff to knowledgeable parties. Indeed, in many of the Congressionally-mandated APA rulemakings, staff has affirmatively reached out to stakeholders who for whatever reason did not avail themselves of the opportunities to provide written comments.

Nevertheless, I do not believe that requiring formal "hearings" with a hearing examiner and cross-examination is generally necessary or beneficial. It is a formal, time-consuming, and rigid proceeding that delays completion of the rulemaking and may not be conducive to the free-flowing discussion that may be what is most useful in a particular case. Less formal mechanisms often are more efficient and helpful.

Q#7: Given the Commission's broad authorities, regulatory action should be limited to only those areas where substantial evidence can support the action. The existing FTC rulemaking authority required proof of substantial evidence in support of the Commission's action, and this requirement is consistent with the heightened burden of substantial evidence proof required under judicial review.

Q#7(a): Is it your intent that the Commission also adopt the less burdensome arbitrary and capricious standard of review if provided across-the-board APA rulemaking authority?

A: The standard for judicial review under the two formulations is the same. Please see the discussion of the standard for review on page 4, *supra*.

<u>Independent Litigation Authority</u>

Q#1: **Have you consulted with the Department of Justice (DOJ) regarding your desire to litigate independently of them? If so, have they formally supported your proposal?**

A: There have been informal discussions, but to our knowledge DOJ has taken no position on the issue.

Q#2: **The Commission has the authority to seek an injunction immediately, on its own behalf, to stop the bad acts. Also, should the Commission choose to collect civil penalties, the law requires a 45-day window in which the DOJ can decide whether to act on behalf of the FTC. If the DOJ chooses not to, then the FTC can file in its own name. In your testimony you mentioned that you may not be able to pursue the injunction on your own behalf while working with the DOJ to pursue civil penalties.**

Q#2(a): **Can you please explain why you are unable to seek an injunction to stop the bad acts immediately, while working through the DOJ process to collect civil penalties?**

A: The FTC Act does not currently permit the FTC to commence an action to seek preliminary injunctive relief, including a temporary restraining order, if the action will ultimately involve a civil penalty. The FTC may file for injunctive relief for a claim only if it is not seeking any civil penalty for it.

Q#2(b): **Can you also provide the following information?**

- **The number of times the FTC notified the DOJ of interest in collecting civil penalties over the past decade?**

A: From FY 2000 through FY 2010 to date, the Commission has notified DOJ of 171 matters in which the Commission wished to obtain civil penalties. This includes both instances in which the Commission staff had negotiated a settlement calling for payment of civil penalties prior to issuance of a complaint, as well as instances in which no settlement was reached but a complaint was approved by the Commission for referral and filing by DOJ in order to obtain civil penalties.

- **Of these notifications, how often did the DOJ decide to pursue the action within the 45-day period?**

A: From FY 2000 through FY 2010 to date, the DOJ decided to file referred complaints approved by the Commission in all but two instances.

- **When the DOJ chose not to pursue action, how often did the FTC initiate action?**

A: In both of the cases when DOJ declined a referred complaint, the FTC initiated action.

- **If the DOJ chooses to pursue the action, do they cover the costs related to the action?**

A: Yes, generally. However, much of the work that underlies a civil penalty action is conducted prior to a referral to DOJ, and then, after a referral, FTC staff often provides substantial litigation support and assistance at the FTC's expense.

From Senator Hutchison:

Q#1: The FTC has current authority to impose penalties on fraudulent or deceptive practices when an entity violates a rule or consent order, yet you are advocating for more expansive authority to impose civil penalties.

Q#1(a): If granted this new authority, in what specific areas or types of cases would the Commission attempt to collect civil penalties that it currently cannot?

A: In many cases involving fraud, the equitable remedies of redress and disgorgement allow the FTC to reach the defendant's assets and thus provide some deterrent effect. In other cases, disgorgement or redress remedies are not practicable. For example, in many privacy-related cases, including those involving malware/spyware, data security, and telephone records pretexting, both the harm to consumers and the ill-gotten gains received by defendants may be difficult to measure, thus making it difficult or impossible to obtain meaningful redress or disgorgement. Thus, an appropriately large award of civil penalties may be the only effective deterrent for these kinds of misconduct. In still other cases, profits for disgorgement are hard to calculate because lawful and unlawful conduct is mixed.

Q#1(a)(I): Has the FTC approached Congress and asked for authority to collect civil penalties for these specific types of cases?

A: Yes, on a number of occasions, including:

- Prepared Statement of the Federal Trade Commission, "Federal Trade Commission Reauthorization," Before the Senate Commerce, Science, and Transportation Committee, 110th Cong., April 8, 2008 ("As the Commission has previously testified, however, in certain categories of cases restitution or disgorgement may not be appropriate or sufficient remedies. These categories of cases, where civil penalties could enable the Commission to better achieve the law enforcement goal of deterrence, include malware (spyware), data security, and telephone records pretexting.")

- Prepared Statement of the Federal Trade Commission, "Federal Trade Commission Reauthorization," Before the Senate Commerce, Science, and Transportation Committee, 110th Cong., April 10, 2007 ("We believe the Commission's ability to protect consumers from unfair or deceptive acts or practices would be substantially improved by legislation, all of which is currently under consideration by Congress, to provide the Commission with civil penalty authority in the areas of data security, telephone pretexting and spyware.")

- Prepared Statement of the Federal Trade Commission, "Data Breaches and Identity Theft," Before the Senate Commerce, Science, and Transportation Committee,

109th Cong., June 16, 2005 ("The FTC also would seek civil penalty authority for its enforcement of these [data security] provisions. A civil penalty is often the most appropriate remedy in cases where consumer redress is impracticable and where it is difficult to compute an ill-gotten gain that should be disgorged from a defendant.")

Q#2: **The FTC currently has the ability to take enforcement action against entities that aid or abet violations in very narrow circumstances. One of the concerns expressed regarding the possible expansion of this authority to the Commission's entire jurisdiction is confusion about the level of knowledge necessary to support a charge for aiding and abetting.**

Q#2(a): **What is the level of knowledge that would have to be met for the aiding/abetting provision to apply? How would the FTC define the following: "substantial assistance," "knowing," and "consciously avoiding?"**

A: Proposed section 5(o) of the FTC Act would establish liability for an FTC Act violation for anyone who "knowingly or recklessly . . . provide[s] substantial assistance" to another who violates the FTC Act or any other act enforced by the Commission relating to unfair or deceptive acts or practices. This standard derives from similar aiding and abetting authority provided to the SEC under its statute. *See* 15 U.S.C. § 78t(e). The application of the proposed standard requires a careful examination of the facts of each specific case. Over many years, the courts have developed a significant body of case law to address the substantial assistance and state of mind requirements imposed under securities law, and the Commission would anticipate tapping into that case law as guidance for any case that the Commission might bring in the future under its new aiding and abetting authority. Similarly, the Commission would look to its Telemarketing Sales Rule, which prohibits any person from providing "substantial assistance or support" to a seller or telemarketer when the person "knows or consciously avoids knowing" that the seller or telemarketer is violating certain provisions of the rule standards. These standards draw from SEC law and from tort liability.

Q#2(b): **You state in your testimony that the FTC is able to work around the Supreme Court decision *Central Bank of Denver v. First Interstate Bank of Denver*, to penalize those who provide "knowing assistance" to violators. How does the FTC do this, and why is this ability not sufficient to support the Commission in targeting individuals and entities that provide affirmative assistance to those engaged in fraud and deceptive acts?**

A: Notwithstanding *Central Bank of Denver*, there are instances in which the Commission can directly or indirectly allege that those who assist scammers have violated section 5 of the FTC Act. For example, the Commission is able to take action against those who knowingly assist telemarketing scammers. In the Telemarketing and Consumer Fraud and Abuse Prevention Act, Congress gave the Commission explicit aiding and abetting authority with respect to telemarketing. This authority has proven very useful in prosecuting numerous bad actors, but it does not allow the Commission to reach those

who knowingly assist scammers defrauding consumers over the internet or through the mail or other means that do not involve telemarketing.

In some instances, facts permit the Commission to allege that the assistor provided the scammer with the "means and instrumentalities" of the fraud scheme. Under the "means and instrumentalities" theory, a person or entity that places in the hands of another a means of consummating a fraud has directly violated the FTC Act. This occurs, for instance, when the assistor provides the scammer with counterfeit products to be sold as genuine goods. The means and instrumentalities theory is, however, generally limited to instances in which the fraud assistor has provided an inherently deceptive thing that is then used to deceive consumers.

In other instances, facts permit the Commission to allege that the assistor engaged in "unfair" conduct by assisting the scammer. An act or practice is "unfair" if it is proven to (1) cause substantial injury to consumers, (2) that they cannot reasonably avoid themselves, and (3) is not outweighed by countervailing benefits to consumers or competition. In a case that is currently on appeal by the defendants to the Ninth Circuit, the Commission alleged that the defendant's payment processing business made unauthorized debits to consumers' bank accounts on behalf of a scammer. While we believe that it is appropriate in this instance, the use of the Commission's unfairness authority in this fashion does not have the long jurisprudential history associated with the concept of aiding and abetting and involves proving the unfairness elements described above rather than focusing on the assistor's relationship with and knowledge of the fraudster's activities.

Finally, in some instances, facts permit the Commission to allege that an entity is part of a common enterprise with the scammer. A common enterprise exists where factors such as commingling of assets, common ownership, shared locations, and other considerations, demonstrate that apparently independent companies are part of the same enterprise. It is not necessary or even typical, however, for assistors to be so closely affiliated with scam perpetrators.

Q#2(c): How would industries such as the media be affected by an aiding and abetting provision? Could a newspaper or magazine be held liable if the FTC determined it had run a fraudulent advertisement?

A: The purpose of seeking the aiding and abetting provision is not to pursue the media for disseminating deceptive advertising. Proposed section 5(o) of the FTC Act would establish liability for anyone who "knowingly or recklessly . . . provide[s] substantial assistance" to another who violates the FTC Act or any other act enforced by the Commission relating to unfair or deceptive acts or practices. This provision (like other provisions of the FTC Act, *cf.* section 12 regarding disseminating or causing the dissemination of false advertising relating to food, drugs, devices, cosmetics, or services) could arguably apply to a media outlet such as a newspaper or magazine, depending on the circumstances. The Commission, however, is mindful of First Amendment concerns and has never imposed a general duty upon newspapers, magazines, or other media to screen advertising. Commission staff has worked with

members of the media to encourage voluntary media screening of facially deceptive advertisements and published several guidance documents to assist the media. *See, e.g.*, http://www.ftc.gov/bcp/edu/pubs/business/adv/bus36.shtm.

Q#2(c)(I): There is a clear distinction between having active knowledge of a fraudulent and misleadiug advertisement, for example, aud choosing to run it anyway and running an advertisement you have no reason to expect is fraudulent or deceptive. Do you believe newspapers, and to an extent Internet sites, have an obligation to investigate the veracity of claims made in advertising that they make available in their papers/sites before publishing them?

A: As you say, there is indeed a distinction between a media outlet running an ad that it actively knows to be fraudulent or misleading, and running one that it has no reason to believe is deceptive. Media outlets can play an important role in protecting consumers from deception by preventing the dissemination of fraudulent ads in the first place. However, I do not believe that proposed section 5(o) would impose a general obligation on media outlets to investigate the veracity of claims that they disseminate.

Q#2(c)(ii): Would failure to affirmatively investigate and verify claims made in advertising represent "consciously avoiding" knowledge?

A: No, section 5(o) would not impose a general duty on media outlets to investigate the veracity of claims that they disseminate. Media outlets, however, can play an important role in protecting consumers from deception by preventing the dissemination of fraudulent ads in the first place.

From Senator Vitter:

Chairman Leibowitz, your letter to the House Energy & Commerce Committee in October 2009 noted that most people regard your agency as an effective consumer protection agency. I would agree that we should work to ensure that assertion remains true and that any areas in which the commission is currently hindered in protecting consumers should be closely considered. With that mind, I have some questions about current requirements of the FTC under the Magnuson-Moss rulemaking procedures and proposals to change how the FTC functions.

Q#1: Do you believe that public advanced notice of proposed rulemakings, which provide congressional committees with an appropriate view into the FTC's agenda, do not serve a positive function?

A: I believe that ANPRs do serve a useful purpose in some cases. When the agency lacks sufficient law enforcement experience and expertise in the subject matter of the prospective rule, it often makes sense to publish an ANPR, without any proposed rule text, to obtain general input and information about the need for a rule and, if so, what provisions it should include. Thus, with respect to several of the FTC's rules promulgated pursuant to specific Congressional grants of APA authority, the Commission issued ANPRs to commence the proceeding. In other situations, the FTC

has convened public workshops or conducted informal outreach in lieu of an ANPR to gain the requisite knowledge and expertise.

Although ANPRs are appropriate and useful in some circumstances, often the Commission already has the experience and expertise it needs to draft a proposed rule. In these cases, proceeding with an ANPR first is unnecessary and duplicative, resulting in what can be a several-month delay in completing the rule. Of course, whether or not it issues an ANPR, the Commission's practice is to ensure that stakeholders have meaningful notice and opportunities to provide information and express their views for consideration, both formally during the comment period on the proposed rule and through other means.

Q#2: **Do you believe that providing the text of the proposed rule iu notice of proposed rulemaking does not provide value to the public? Doesu't the inclusion of the text of the proposed rule and any alternatives provide the public with an opportunity to prepare for compliance with the new rule, as well as to provide input regarding its potential effects, possible improvements, and other concerns through the process and in public meetings?**

A: Generally speaking, I think there is great value in providing proposed rule text when publishing an NPR. Indeed, the FTC routinely includes the text of the proposed rule in its NPRs, including for APA rulemakings where it is not required. I would anticipate that we would continue to do so.

Q#3: **Particularly in the current economic situation with many busiuesses struggling to keep their employees employed, should all businesses across the U.S. be burdened with the cost of specific regulation to prevent unfair or deceptive practices that are not prevalent or that are very rare in the marketplace?**

A: I cannot imagine a situation in which the Commission would promulgate a rule addressing practices that are very rare, and I do not believe it has ever done so. We recognize the importance of using our rulemaking authority very judiciously, and in a manner that minimizes compliance costs, to tackle persistent and common problems for which individual case enforcement may be ineffective or inefficient. My concern, however, is with the concept of "prevalence," a finding of which is required for Magnuson-Moss rulemaking. The threshold at which a practice becomes "prevalent" is undefined in the statute or, to my knowledge, in any case law. Thus, the Commission is faced with the choice of exhaustively cataloguing the incidence of the challenged practice, at significant cost in time and resources, or building a less exhaustive record and risking that the rule would be overturned if challenged in court.

Q#4: **I know we all want to protect consumers effectively. With that in mind, please explain the details of any situations where you feel the FTC has been unable to act effectively because of the current requirements for the FTC's procedures. Please also highlight if you have seen specific types of harm that the FTC has been unable to address under its current authority and procedural requirements.**

A: There are many instances in which the FTC has been hindered in its ability to protect consumers due to the absence of the four enhancements to the agency's authority that we are seeking.

The inability to promulgate a rule under the FTC Act without complying with the unwieldy and burdensome Magnuson-Moss procedures – procedures that typically lead to 8-10 year proceedings – as a practical matter has resulted in a virtual absence of FTC rulemaking except in specific areas in which Congress has authorized or mandated a rule using APA procedures. Thus, for example, the Commission continues to attack the problem of deceptive negative option marketing on a case-by-case basis, rather than through a rule that would establish common standards and ease our enforcement burden. Moreover, as new forms of illegal practices quickly become common, it is simply not useful to initiate an 8-10 year rulemaking proceeding; by the time the rule would become effective, the illegal practice may have disappeared, only to be replaced by a new one.

The absence of civil penalty authority in cases involving violations of the FTC Act has limited the Commission's ability to establish effective deterrence in certain areas. For example, the FTC has brought numerous cases against companies that failed to undertake reasonable measures to protect consumers' sensitive personal information from possible identity thieves. In these cases, consumer redress generally is not a practicable remedy, because identifying injured consumers and determining their loss is frequently impossible. Similarly, disgorgement of illicit profits may be an unavailable remedy as the defendant may not have profited from its negligence or profits may not be calculable. Similar problems arise in cases involving illegal spyware and malware – the impracticality of obtaining consumer redress or disgorgement, in the absence of civil penalty authority, has weakened the FTC's ability to prevent future violations.

The inability of the Commission to litigate its own civil penalty cases has in some instances limited its effectiveness in stopping ongoing fraud. For example, in cases where effective consumer protection depends on obtaining preliminary relief halting ongoing violations and/or preserving assets for consumers, the Commission may have to forgo seeking civil penalties in order to avoid the delay caused by the 45-day referral period to DOJ.

Finally, the lack of clear "aiding and abetting" authority has forced the Commission in some cases either to forgo prosecution of certain entities, such as credit card processors or billing aggregators, or undertake the complex and uncertain task of proving that the entities' practices meet the "unfairness" standard in Section 5(n) of the FTC Act.

Supplemental Information for the Record
Chairman Leibowitz
Febrnary 4, 2010 Hearing on Financial Services and Products: The Role of the FTC in Protecting Consumers

p. 22 **Senator Johanns: But one thing I would be very interested in is what you would like to do to help consumers, you know, maybe just a list of items that you can't do today or you feel you can't do today, that might aid us on this Committee in trying to figure out next steps... Maybe supply the Committee with some additional thoughts.**

Supplemental Response

- Although the Commission has a number of effective tools for stopping bad actors, certain holes in our authority make it more difficult – unnecessarily, in my opinion – to carry out our mission. The following four enhancements to the agency's authority would help substantially to fill those holes.

  - APA Rulemaking: Because the Commission may not use the ordinary Administrative Procedures Act ("APA") notice-and-comment rulemaking procedures that most of our sister agencies use, the Commission must do one of two things to promulgate a rule: either obtain from Congress a specific grant of APA rulemaking authority for a particular issue or use the cumbersome and time-consuming Magnuson-Moss procedures. In my view, either option is an inefficient and uncertain process for addressing serious problems in a timely fashion, especially those that can arise from emerging technologies or new marketing practices. The Commission needs APA-style rulemaking authority to be able to issue rules, when needed, in a reasonable time and with a reasonable expenditure of resources.

  - Civil Penalty Authority: The FTC currently lacks the authority to seek civil penalties for violations of the FTC Act itself. Although the Commission currently may seek penalties – through DOJ – in certain specified situations (*e.g.*, for a defendant's violations of an existing enforcement order or of certain FTC rules), the ability to seek civil penalties for knowing violations of the FTC Act itself would give the agency an important tool for deterring unfair or deceptive practices. This is especially important for cases in which obtaining equitable remedies such as consumer restitution, rescission, or disgorgement is impossible or impractical – because, for example, victims cannot be identified or consumer injury and wrongful profits cannot be quantified.

  - Aiding and Abetting: The absence, outside of the telemarketing context, of explicit authority to hold liable those who aid and abet law violators hampers the Commission's ability to take action against entities that do not themselves

deceive consumers, but supply knowing and substantial support to those who do. In many cases, the aiders and abettors, by providing essential services that the primary fraudsters could not efficiently provide themselves, allow frauds to occur on a much broader scale than would otherwise be possible.

- Independent Litigating Authority for Civil Penalty Actions: It is anomalous that while the FTC is authorized to try its own cases for a wide swath of remedies, including consumer redress and disgorgement, it may not do so when seeking penalties. Instead, the agency must refer cases to DOJ, wait up to 45 days for DOJ to determine whether to take a case, and allow DOJ staff time to learn the case and prepare. This requirement thus entails duplication of efforts and slower enforcement. In addition, it results at times in the agency having to choose between obtaining early injunctive relief (for example, to halt the violative practices and preserve assets for eventual redress) or seeking penalties. Having the authority to litigate civil penalty actions independently would allow cases to be brought more quickly and effectively, without the disadvantages occasioned by the referral obligation.

p. 26-28 **Senator Begich: ... These folks that you are able to collect fines from...is there a list of these companies...?**

Mr. Leibowitz: You mean as sort of a black list...?

Mr. Leibowitz: Well, when we have a settlement or when we bring a case it goes up on our website.

Mr. Leibowitz: No, no, no. And I -- let me go back and let us think about that. It's a really -- it's an interesting idea. You know, I'd have to talk to the other Commissioners about it.

Senator Begich: Could you get back to at least me and maybe the Committee just so --

Supplemental Response

- You asked whether there is a list on the FTC's website of all the companies and individuals against whom the Commission has taken action that consumers could utilize in deciding with whom to do business. First, consumers can pull up on the website our extensive alphabetical list of all FTC cases since 1996. A second, and easier, way for consumers to locate relevant information is to search for the name of any company with which they are considering doing business. For example, if a consumer was considering hiring Hope Now Modifications to do a loan modification, he or she could quite easily put the phrase "Hope Now" into our search function at www.ftc.gov, and the first link that appears is a press release titled "Court Halts Bogus Mortgage Loan Modification Operations." We are considering additional ways to post the names of defendants in FTC

actions.

I would caution, however, against the description of our case list as a blacklist. Most FTC cases are settled, with no admission of liability on the part of the defendant and no formal finding of wrongdoing by the Commission or a court. Also, there are legitimate companies that the FTC has charged with violating the law in some respect, but that subsequently change their business practices to comply with the law.

The best strategy to warn consumers about bad actors is through consumer education about bad business practices. That is why the FTC's multi-media consumer education campaigns give consumers the tools and information they need so that they can independently assess each company's marketing practices, spot red flags, and stop before paying a bad actor for any promised service that may not be provided.

p. 32 **Mr. Leibowitz: By the way, on the issue of the rulemaking . . . we're keeping an open mind. We have a proposed rule. We're taking comments for 45 days that would prohibit advance[] fees.**

What I was struck by was that . . . almost no one disagreed with this approach. And in fact I think even the American Bankers Association, I'll go back and check this and get back to you, called for a ban on advance[] fees.

Supplemental Response

- The American Bankers Association ("ABA") submitted a comment that was supportive of the proposed Mortgage Assistance Relief Services rule. On review of the record, however, it appears that the ABA did not expressly state a position with respect to a ban on advanced fees. The only concern raised by the ABA was that "the rules [the FTC] promulgates must be drawn so that they do not restrict the legitimate loss mitigation efforts of financial institutions and their affiliated mortgage servicers."

  The following commenters expressly supported the ban on advanced fees: American Financial Services Association; California Reinvestment Coalition; Consumer Mortgage Coalition; Chase Home Finance, LLC; Housing Policy Counsel; Massachusetts Office of the Attorney General; National Association of Attorneys General; National Consumer Law Center; National Council of La Raza; New York City Department of Consumer Affairs; Office of the Minnesota Attorney General; Ohio Attorney General; and Sargent Shriver National Center on Poverty Law.

p. 33 **Senator Dorgan:...we look at E-commerce as a growing area for potential consumer harm and some of that exists. The question for us is what tools does the FTC need to be able to combat online fraud? What I would like you to do...would be snbmit to this Committee tbe kinds of tools you think are necessary.**

Supplemental Response

- Since the emergence of the Internet as a channel of commerce, the Commission has conducted a vigorous and aggressive law enforcement program against online scams. The Commission shares your concern about the abundant and novel opportunities E-commerce presents for fraud. The Commission has targeted a broad spectrum of bad actors that use the Internet to victimize consumers. It has brought scores of cases against Internet scams, including on-line pyramid schemes, bogus "government grant" schemes, employment scams, and rogue internet service providers whose primary activity was to provide an Internet portal for overseas fraud operators, pornographers, and identity thieves. Using both Section 5 and the CAN-SPAM Act, the FTC has pursued numerous deceptive spammers. This developing sector of the nation's economy remains a high priority for the Commission in its enforcement and consumer and business education efforts.

  The following tools would assist in fighting online fraud:

  - APA Rulemaking: Because the Commission may not use the ordinary Administrative Procedures Act ("APA") notice-and-comment rulemaking procedures that most of our sister agencies use, the Commission must do one of two things to promulgate a rule: either obtain from Congress a specific grant of APA rulemaking authority for a particular issue or use the cumbersome and time-consuming Magnuson-Moss procedures. In my view, either option is an inefficient and uncertain process for addressing serious problems in a timely fashion, especially those that can arise from emerging technologies or new marketing practices. The Commission needs APA-style rulemaking authority to he ahle to issue rules, when needed, in a reasonable time and with a reasonahle expenditure of resources.

  - Civil Penalty Authority: The FTC currently lacks the authority to seek civil penalties for violations of the FTC Act itself. Although the Commission currently may seek penalties – through DOJ – in certain specified situations (*e.g.*, for a defendant's violations of an existing enforcement order or of certain FTC rules), the ability to seek civil penalties for knowing violations of the FTC Act itself would give the agency an important tool for deterring unfair or deceptive practices. This is especially important for cases in which obtaining equitable remedies such as consumer restitution, rescission, or disgorgement is impossible or impractical – because, for example, victims cannot be identified or consumer injury and wrongful profits cannot he quantified.

- Aiding and Abetting: The absence, outside of the telemarketing context, of explicit authority to hold liable those who aid and abet law violators hampers the Commission's ability to take action against entities that do not themselves deceive consumers, hut supply knowing and suhstantial support to those who do. In many cases, the aiders and ahettors, by providing essential services that the primary fraudsters could not efficiently provide themselves, allow frauds to occur on a much broader scale than would otherwise be possible. Online scams often have multiple players playing discrete roles – *e.g.*, advertisers, affiliate networks, affiliates, and search consultants – most of whom have no direct contact or dealings with the victims of the scam, but without whom the fraud could not happen. Aiding and abetting authority would enable the Commission to reach key players in these schemes who provide knowing and substantial assistance.

- Independent Litigating Authority for Civil Penalty Actions: It is anomalous that while the FTC is authorized to try its own cases for a wide swath of remedies, including consumer redress and disgorgement, it may not do so when seeking penalties. Instead, the agency must refer cases to DOJ, wait up to 45 days for DOJ to determine whether to take a case, and allow DOJ staff time to learn the case and prepare. This requirement thus entails duplication of efforts and slower enforcement. In addition, it results at times in the agency having to choose between obtaining early injunctive relief (for example, to halt the violative practices and preserve assets for eventual redress) or seeking penalties. Having the authority to litigate civil penalty actions independently would allow cases to he brought more quickly and effectively, without the disadvantages occasioned by the referral obligation.

p. 51 **Senator Wicker: And with regard to your rulemaking you want under the Administrative Procednres Act. And what that does is take you out from the requirement of proof of substantial evidence and support of the Commission's action. Is that correct?**

Supplemental Response

- Should we be fortunate enough to obtain relief from Magnuson Moss's burdensome procedures, the Commission's fact finding in rulemaking must remain subject to thorough judicial review, and I would be happy to discuss with members of the Committee the appropriate standard of review for FTC rules.

- Under the APA, a court can invalidate a rule if it finds that it is arbitrary and capricious. Under Magnuson-Moss, a court can invalidate a rule if it finds that it is not supported by substantial evidence. Some courts have interpreted the standards for review of APA rulemaking and Magnuson-Moss rulemaking similarly. In *Consumers Union of U.S. v. FTC*, 801 F.2d 417, 422 (D.C. Cir. 1986), the court (opinion by then-Judge Scalia) held that the FTC Act's "substantial evidence" standard for judicial review of a Magnuson-

Moss rule does not call for a more intensive review than the "arbitrary and capricious" standard for notice-and-comment rules under the APA, but rather requires the same degree of evidentiary support; *see also, e.g., Eagle Broadcasting Group, Ltd. v. FCC*, 563 F.3d 543, 551 (D.C. Cir. 2009) (explaining that the "substantial evidence" standard for review of "formal" rulemaking under the APA – the same language adopted by Magnuson-Moss – is the same as the "arbitrary and capricious" standard for notice-and-comment rules). Thus, some have posited that if a rule's factual underpinnings are not supported by substantial evidence, it is arbitrary.

- On the other hand, many who were present at the enactment of the Magnuson-Moss Act believe the substantial evidence standard should be higher.

p. 55-56 **Mr. Leibowitz:...And I just think for the things that you want us to do in terms of protecting consumers, some relief from Magnuson-Moss and something like APA rulemaking would be very, very helpful.**

Senator Wicker: On the record, sir, would you supply us with examples of rules that took too long to make it?

Mr. Leibowitz: Yes, I can.

Senator Wicker: And give us some historic data on the staff devoted to the rulemaking effort.

Supplemental Response

- Three examples of Magnuson-Moss rules that took too long are the Credit Practices Rule and the Used Car Rules, each of which took almost nine years, and the Funeral Services Rule, which took more than seven years.

  Other rulemakings that did not ultimately result in rules but nonetheless went on for many years include: Mobile Homes (almost 12 years); Hearing Aids (over 10 years); Health Spas (over 10 years); Protein Supplements (almost 9 years); OTC Antacids (over 8½ years); and Food Advertising (over 8 years).

  With respect to the number of staff devoted to Magnuson-Moss rulemakings, all of the rulemakings using those procedures to create new rules were conducted more than 25 years ago.[1] Also, all of the rules were initiated prior to the 1980 amendment to the FTC

[1] Eight Magnuson-Moss rules have been amended, also using Magnuson-Moss procedures. Building on existing rules, amendment proceedings involved fewer issues than did the original promulgations, and they were typically more lightly staffed. In these eight instances, interested parties generally did not demand hearings to deliver their oral presentations – although most, if not all, amendment proceedings involved one or more public workshops to develop a

Act requiring an advanced notice of proposed rulemaking and a determination that the practice addressed is prevalent. Staff has gleaned from some of the post-hearing staff reports illustrative staffing information:

- Mobile Homes: At least 13 staff members worked on the post-hearing staff report.
- Used Cars: More than 14 staff members worked on the post-hearing staff report.
- Funeral Industry: At least 16 staff members worked on the post-hearing staff report.

These numbers do not include the Presiding Officer (who was obligated to produce a separate report) or his staff, Bureau of Consumer Protection management reviewers, Office of General Counsel advisors, or the Commissioners' offices. Staff familiar with the rulemaking proceedings inform me that these staffing levels were typical.

p. 59-61 **Senator Klobuchar:... I recognize that absent direct statutory authority to go after these aiders and abettors, the FTC has developed alternative assistance legal theories to reach secondary actors. Can you discuss the success and shortcomings of these alternatives theories...? How would specific statutory authority improve the FTC's law enforcement in this area?**

Senator Klobuchar: Thank you. I'll await the answers about the specific examples...

Supplemental Response

- There are instances in which the Commission can allege that those who assist scammers have violated section 5 of the FTC Act. For example, the Commission is able to take action against those who knowingly assist telemarketing scammers. In the Telemarketing and Consumer Fraud and Abuse Prevention Act, Congress gave the Commission explicit aiding and abetting authority with respect to telemarketing. This authority has proven very useful in prosecuting numerous bad actors, but it does not allow the Commission to reach those who knowingly assist scammers defrauding consumers over the Internet or through the mail or other means that do not involve telemarketing.

  In some instances, the facts permit the Commission to allege that the assistor provided the scammer with the "means and instrumentalities" of the fraud scheme. Under the "means and instrumentalities" theory, a person or entity that places in the hands of another a means of consummating a fraud has directly violated the FTC Act. This occurs, for instance, when the assistor provides the scammer with counterfeit products to be sold as genuine goods. The means and instrumentalities theory is, however, generally

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full record.

limited to instances in which the fraud assistor has provided an inherently deceptive thing that is then used to deceive consumers.

In other instances, the facts permit the Commission to allege that the assistor engaged in "unfair" conduct by assisting the scammer. An act or practice is "unfair" if it is proven to (1) cause substantial injury to consumers, (2) that they cannot reasonably avoid themselves, and (3) is not outweighed by countervailing benefits to consumers or competition. In a case that is currently on appeal, the Commission alleged that the defendant's payment processing business made unauthorized debits to consumers' bank accounts on behalf of a scammer. While we believe that it is appropriate in this instance, the use of the Commission's unfairness authority in this fashion does not have the long jurisprudential history associated with the concept of aiding and abetting and involves proving the unfairness elements described above rather than focusing on the assistor's relationship with and knowledge of the fraudster's activities.

Furthermore, in some instances, facts permit the Commission to allege that an entity is part of a common enterprise with the scammer. A common enterprise exists where factors such as commingling of assets, common ownership, shared locations, and other considerations demonstrate that apparently independent companies are part of the same enterprise. It is not necessary or even typical, however, for assistors to be so closely affiliated with scam perpetrators.

Financial Services and Products: The Role of the Federal Trade Commission in Protecting Consumers, Part 2

Question for the Record from Senator Tom Udall

Outreach to Native American and Rural Communities

Question: **Mr. Rosch, Native American and rural communities face different, hut no less important, challenges in fighting consumer fraud. How would you describe the quality of the FTC's outreach to Native American and rural communities, especially regarding the current economic crisis?**

Are there areas for improvement?
If so, what are your plans for implementing these improvements?

Answer: The agency has done a significant amount of outreach to Native American and rural communities, but we can and will do more.

For several years, the FTC – particularly through our Regional Offices – has partnered with the United States Department of the Interior's Indian Arts and Crafts Board to undertake outreach activities at various Native American and Alaska Native arts and crafts events where we have provided a wide range of consumer protection materials. Additionally, one of our Regional Offices has partnered with state law enforcement and the AARP in Montana to do outreach in rural parts of that state. Another Regional Office has done significant outreach in Oklahoma, meeting with dignitaries of several nations and with an Indian Legal Aid office in Oklahoma.

There is more that we can and will do in this area. One project we are preparing to initiate in the near future is the development of a database of tribal newsletters and newspapers so that we can send them our consumer protection educational materials. Additionally, in the next few months, FTC staff will be doing more outreach in this area.

The FTC is always looking for more partners, including partners with connections to Indian Country, and would welcome additional suggestions and ideas on ways to improve our outreach efforts.

In addition, the FTC produces, promotes, and disseminates educational messages and materials to the widest possible audience through multi-faceted communications and outreach programs, and we have focused extensively on issues relating to the current economic crisis.[1] These efforts involve the use of

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[1]In March 2009, the FTC launched ftc.gov/MoneyMatters with information to help people dealing with challenging economic times. MoneyMatters offers short, practical tips,

print, broadcast, and electronic media, the Internet, special events, and partnerships with other government agencies, consumer groups, trade organizations, businesses, and other organizations. Additionally, our Office of Congressional Relations supports individual Members of Congress who are holding town halls on consumer issues and encourages them to put the FTC's consumer education materials on their websites.

Given the size of our agency and our limited resources, our strategy is to be "wholesalers" of information, rather than "retailers." We work with an informal network of about 10,000 community-based and special interest groups that distribute our information to their members, clients and constituents. Most of the 10 million print publications we distribute each year then are "re-distributed" through this network of local partners. In addition to providing these groups with free publications, we encourage them to reprint our materials in their newsletters, websites or other communications channels.

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videos and links to reliable resources for more information on topics like credit repair, debt collection, job-hunting and job scams, vehicle repossession, managing mortgage payments and recognizing foreclosure rescue scams.

Qnestions for the Record
Commissioner Rosch
Financial Services and Products: The Role of the FTC in Protecting Consumers Part II
March 17, 2010

From Senator Wicker:

1) Please provide a chronological breakdown of each step in a rulemaking for a rule promulgated under the Magnuson-Moss process that is required of the FTC under current law (with references for each step to its specific location in statute).

A chronological breakdown of each step in the Mag-Moss rulemaking process was submitted in response to the Questions for the Record ("post-hearing questions") sent to Chairman Leibowitz (see pages 1-2 of his response). For your convenience (and because it was submitted pursuant to an extension which meant that it was submitted shortly before the hearing), it is reproduced here with references to the statute (or the implementing regulations, if applicable). By my count, there are approximately 29 sequential steps in the Mag-Moss rulemaking process.

	Description of Step	**Reference**
1	Prepare an Advance Notice of Proposed Rulemaking ("ANPR") describing the area of inquiry under consideration, the objectives the FTC seeks to achieve, and possible regulatory alternatives under consideration	15 U.S.C. § 57a(b)(2)(A)
2	Submit the ANPR to House and Senate oversight committees	15 U.S.C. § 57a(b)(2)(B)
3	Publish the ANPR in the Federal Register for public comment	15 U.S.C. § 57a(b)(2)(A)
4	Receive public comments on the ANPR	15 U.S.C. § 57a(b)(2)(A)(ii)
5	Determine that there is reason to believe that the unfair or deceptive acts or practices at issue appear are "prevalent," on the basis either of cease and desist orders it has issued regarding such acts or practices, or if "any other information available to the Commission indicates a widespread pattern" of such acts or practices	15 U.S.C. § 57a(b)(3)
6	Analyze comments received in response to the ANPR	15 U.S.C. § 57a(b)

	Description of Step	Reference
7	Prepare an initial Notice of Proposed Rulemaking ("NPR") that: > Summarizes and addresses the ANPR comments; > Sets forth specific proposed rule text and any alternatives under consideration; > Explains the legal and factual basis for the proposed rule; > Invites interested parties to participate in the rulemaking through submission of written data, views, or arguments; > Invites interested parties to propose issues; > Includes, if applicable, an initial analysis under the Regulatory Flexibility Act ("Reg Flex") based on the anticipated effects of the rule on small entities and an analysis under the Paperwork Reduction Act ("PRA") of any disclosure, reporting, or record keeping requirements the rule would impose; and > Sets forth a preliminary Regulatory Analysis of anticipated effects of the rule, both positive and negative	15 U.S.C. § 57a; 5 U.S.C. § 553(c) 15 U.S.C. § 57a(e)(3)(A) 15 U.S.C. § 57a(b)(1)(A) 15 U.S.C. § 57a(e)(3)(A) 15 U.S.C. § 57a(b)(1)(B) 5 U.S.C. §§ 601,603; 44 U.S.C. § 3506(c)(2) 15 U.S.C. 57b-3(b)
8	Submit the NPR to House and Senate oversight committees 30 days before publishing it	15 U.S.C. § 57a(b)(2)(B)
9	Publish the NPR in the Federal Register for public comment	15 U.S.C. § 57a(b)(1)(b); 5 U.S.C. § 553(c)
10	Receive public comments on the NPR, usually for 60 days or more	15 U.S.C. § 57a(b)(1)(b); 5 U.S.C. § 553(c)
	Provide an opportunity for a public oral hearing before a presiding officer, and if any member of the public requests such hearing:	15 U.S.C. § 57a(b)(1)(c); 15 U.S.C. § 57a(c)
11	Appoint a presiding officer	15 U.S.C. § 57a(c)(1)(A)
12	Designate disputed issues of fact to be addressed at the hearing	15 U.S.C. § 57a(c)(2)(B)
13	Decide petitions to designate fact issues as disputed for the hearing	
14	Accord to (potentially numerous) interested persons, rights to examine, rebut, and cross-examine witnesses	15 U.S.C. § 57a(c)(4)(A)
15	Determine which among those interested persons have similar interests	15 U.S.C. § 57a(c)(4)
16	Allow each group of persons with similar interests to choose a representative	15 U.S.C. § 57a(c)(4)
17	Appoint a representative if the group cannot choose one	15 U.S.C. § 57a(c)(4)
18	Decide appeals from determinations on which persons have similar interests	15 U.S.C. § 57a(c)(4)(B)

	Description of Step	Reference
19	Prepare and publish a second NPR addressing all these issues	15 C.F.R. § 1.12;
20	Conduct the hearings	15 U.S.C. § 57a(c)
21	Make complete transcripts of all testimony and cross-examinations available to the public	15 U.S.C. § 57a(c)(5)
22	Analyze the record amassed, and prepare a staff report that summarizes and analyzes the record and sets forth the final rule text recommended for adoption by the Commission	15 C.F.R.§ 1.13(f)
23	If hearings have been held, the Presiding Officer must prepare a report with a summary and analysis of the record amassed and recommendations as to adoption of final rule provisions	15 U.S.C. § 57a(c)(1)(B) 15 C.F.R. § 1.13(g)
24	Publish a Federal Register notice announcing issuance of the Staff Report and seeking comments on it and on the Presiding Officer's report, if any	15 C.F.R. § 1.13(h)
25	Receive public comments on Staff Report and Presiding Officer's Report for 60 days or more	15 C.F.R.§ 1.13(h)
26	Obtain OMB approval for any disclosure, reporting, or record keeping requirement	44 U.S.C. § 3506(c)(2) 44 U.S.C. § 3507(a)(2)
27	Prepare a Final Rule and Statement of Basis and Purpose ("SBP") that sets forth: > A summary and analysis of the record; > The text of the recommended final rule; > A determination that the practices addressed by the recommended final rule are prevalent; > An explanation of the legal and evidentiary basis for each provision; > A Final Regulatory Analysis, includes a Final Reg Flex, if applicable; and > An effective date not earlier than 30 days after publication in the Federal Register	15 U.S.C. § 57a(d); 5 U.S.C. § 553(c) 15 U.S.C. § 57a(e)(3)(a) 5 U.S.C. § 706(2)(a) 15 U.S.C. § 57a(d)(1)(A) 15 U.S.C. § 57a(e)(3)(a) 5 U.S.C. § 706(2)(a); 15 U.S.C. § 57a(d)(1)(C) 5 U.S.C. § 553(d)
28	Publish the Final Rule and SBP in the Federal Register	15 U.S.C. §§ 57a(b)(1)(D) 15 U.S.C. § 57a(d)
29	Submit a notification to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act ("SBREFA"), initiating a period during which Congress can invalidate the rule by legislation and issue compliance guides if required under SBREFA	5 U.S.C. § 801; Section 212 of SBREFA, P.L. 104-121, Mar. 29, 1996 (As Amended by P.L. 110-28, May 25, 2007)

a. Include the average amount of time that each step in the process takes based on historical rulemaking data. If sufficient historical data to determine the average amount of time is not available, please estimate how long it would take and provide an explanation of how the estimate was determined.

I cannot submit "historical rulemaking data" respecting the average amount of time spent on each step in the process because, except for the instances described below, no new Mag-Moss rules have been proposed for more than 30 years and because task-based timekeeping records are no longer retained.

Based on my experience respecting the seriousness with which the Bureau of Consumer Protection ("BCP") staff took its responsibilities when I was Director of that Bureau (from 1973-1975), I estimate that steps 1-6 would have taken an average of approximately two years. Based on my experience as an antitrust defense trial lawyer for nearly 40 years (from 1965-1973 and from 1976-2006), and on the hearing-related steps that resemble pre-trial or post-trial steps, including motions practice and appeals,[1] I estimate that steps 11-25 would take an average of approximately three years, taking into account petitions, and interlocutory appeals on them, as well as continuances, holidays, travel schedules and the extraordinary amount of pre-hearing preparation and post-trial work required by steps 11-25. Based on my experience with Administrative Procedure Act ("APA") rulemaking since my return to the Commission as a Commissioner (2006-present), I estimate that steps 7-9, and steps 26-29 (which largely duplicate APA rulemaking requirements) would take an average of approximately two years, for a total of 7 years on average.

As I testified at the hearing, the Mag-Moss hearing process alone (not including the extraordinary pre-hearing and post-hearing work) consumed an average of 38 nonconsecutive days (566 days divided by 15 rules) with the longest hearing lasting 58 nonconsecutive days and 6 of the hearings lasting 40 or more nonconsecutive days.[2] The Mag-Moss rulemaking process in its entirety consumed an average of seven years (102 years divided by 15 rules) with the longest proceeding lasting more than 11 years and nine of the proceedings lasting more than eight years.

2) Please provide a chronological breakdown of any additional requirements that are performed during a Magnuson-Moss rulemaking that result from FTC created rules and/or guidelines.

As stated on page 14 of Chairman Leibowitz's responses to the post-hearing questions

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[1] The Mag-Moss hearing process is an adversarial process that can be very similar to a multi-party trial. Determinations that would help control the process are themselves subject to interlocutory Commission review and/or to judicial review with the potential for reopening the matter.

[2] *See* Chairman Leibowitz's response at 12-13 and accompanying chart.

submitted to him, "[i]n addition to the statutory requirements, the implementing rules provide that FTC staff shall make recommendations to the Commission in a report on the rulemaking record" (referring to steps 22 and 24-25 of the 29 sequential steps), that "the public have an opportunity to comment on both the staff report and the Presiding Officer's report" (speaking to step 25 of the 29 sequential steps), and that "a procedure for oral presentations to the Commission after the close of the hearing record" be established (referring also to step 25 of the 29 sequential steps). The most time-consuming of these is the staff report, which marshals and analyzes the voluminous record that results from the hearing process; while not specifically mandated by statute, such a report was considered essential to the Commission's consideration of the record.

a. Identify when in the sequence of requirements outlined in your response to question 1 each of these FTC created rnles and/or gnidelines occurs.

As I testified, each of these additional implementing rules was considered at the time to be necessary to carry out Congressional intent under the Mag-Moss Act. The sequence of these requirements in the Mag-Moss rulemaking process is described in the description of the 29 total steps in the Mag-Moss rulemaking process set forth in response to Question 1.

b. Include the average amonnt of time that each of these FTC created rules and/or guidelines take based on historical data. If sufficient historical data to determine the average amount of time is not availahle, please estimate how long it wonld take and provide an explanation of how the estimate was determined.

The average amount of time that each of these FTC-created rules and/or guidelines took, based on historical data, is not available for the reasons described in my response to Question 1. Based on my experience respecting the seriousness with which BCP staff took its responsibilities when I was Director of that Bureau, I estimate that it would have taken an average of 18 months to complete these three tasks.

3) Please repeat questions 1 and 2 for the Commission's rulemaking process when a rule is promulgated nnder APA anthority.

A chronological breakdown of each step in the APA rulemaking process was submitted in response to the post-hearing questions sent to Chairman Leibowitz (pages 3-4 of his response). For your convenience (and because the responses were submitted pursuant to an extension which meant that it was submitted shortly before the hearing), it is reproduced here with references to the statute (or as supplemented by FTC practice):

1. The rulemaking agency must prepare and publish in the Federal Register a Notice of Proposed Rulemaking (NPR) that (a) sets forth either the terms or substance of the proposed rule or a description of the subjects and issues involved; (b) explains the legal and factual basis for the proposed rule provisions; and (c) includes, if applicable, a Regulatory Flexihility (Reg Flex) analysis based on the anticipated

effects of the rule on small entities, and an analysis under the Paperwork Reduction Act (PRA) of any disclosure, reporting, or record keeping requirements the rule would impose. In addition, the proposed legislation would retain the current FTC Act requirement that, for rules under the Act, the NPR also must set forth a preliminary Regulatory Analysis of anticipated effects of the rule, both positive and negative. 5 U.S.C. § 553(b); 5 U.S.C. § 603; 44 U.S.C. § 3506(c)(2).

2. The agency then must accept public comments on the NPR for a period of 30 days or more. 5 U.S.C. §§ 553(c) & (d).

3. The agency must also obtain OMB approval of any disclosure, reporting, or recordkeeping requirements in the rule under the PRA. 44 U.S.C. § 3507(a)(2).

4. After considering the comments, the agency then must prepare and publish in the Federal Register a Statement of Basis and Purpose, setting forth the final rule provisions and "a concise general statement of their basis and purpose." This statement provides a summary and analysis of the record; an explanation of the legal and evidentiary basis for the rule provisions adopted; a final Reg Flex Analysis, if applicable; and an effective date for the rule. Also, under the current FTC Act requirement that would be retained by the proposed legislation, the Statement of Basis and Purpose of rules must set forth a final Regulatory Analysis. 5 U.S.C. § 553(c); 5 U.S.C. § 604.

5. Subsequently, the agency submits a notification to Congress pursuant to the Small Business Regulatory Enforcement Act (SBREFA), initiating a period during which Congress can invalidate the rule by legislation. The agency also commonly issues compliance guides. 5 U.S.C. § 801(a)(1).

6. The final rule can be challenged in federal court and will be set aside if the court determines that the Commission's findings are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

By my count, and as set forth in the Chairman's response to post-hearing questions, the APA statutory process requires six sequential steps, with no required hearing, and the Commission, as a matter of practice, has added four additional steps in some instances:

1. First, in many instances, the Commission has published an Advanced Notice of Proposed Rulemaking (ANPR), providing even earlier notice of the proceeding and opportunity to comment. *See, e.g.*, http://www.ftc.gov/opa/2009/05/decepmortgage.shtm (ANPR issued by the Commission initiating its mortgage practices rulemakings). Although they increase the time it takes to promulgate the ultimate rule, ANPRs have proven useful in situations where the Commission lacks sufficient experience or knowledge in a particular area to formulate a proposed rule.

2. Second, in some cases, the FTC has held public worksbops during tbe course of the rulemaking proceeding, enriching the record and providing additional opportunities for those who might be affected by the rule to express their views, provide data, and address the assertions of other participants in a practical manner and forum. *See, e.g.,* http://www.ftc.gov/opa/2009/08/tsrforum.shtm (announcing public forum to discuss proposed debt relief amendments to the Commission's Telemarketing Sales Rule.)

3. Third, to further ensure that its decisions are fully informed, the Commission routinely has conducted informal, but extensive, outreach to affected parties. For example, the FTC participated in or conducted a number of rulemakings as required by the FACT Act. For most of these rules, the FTC (with its sister agencies in some cases) solicited data and opinions in addition to the formal request for comments, and often on multiple occasions, from industry groups, legal practitioners, consumer advocates, and others.

4. Fourth, the Commission has an ongoing program of reviewing all of its rules periodically, seeking public comment on them, and revising or repealing them as appropriate.

I do not have "historical rulemaking data" respecting the average time spent on each of these steps in the APA process. Based on my experience with APA rulemaking since my return to the Commission (which represents the totality of my experience with APA rulemaking), I estimate that those six sequential steps would take approximately two years or less to complete.

I should add several caveats. First, the dates submitted and my estimates describe only the rulemaking requirements imposed by the APA, as supplemented by the Commission's APA rulemaking practices. They do not, in other words, describe the rulemaking that has occurred at other agencies (like the SEC) that are authorized to conduct APA rulemaking.

Second, the Commission has engaged in APA rulemaking in a number of instances. Some examples of APA rulemaking (as supplemented by the Commission's practices) are described on page 11 of Chairman Leibowitz's response: (1) APA rulemaking pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992; (2) APA rulemaking pursuant to the Telemarketing and Consumer Fraud and Abuse Prevention Act (including the Do Not Call Amendments); (3) APA rulemaking pursuant to the Children's Online Privacy Protection Act of 1998; (4) APA rulemaking pursuant to the Fairness to Contact Lens Consumers Act; (5) APA rulemaking pursuant to the Controlling the Assault of Non-Solicited Poruography and Marketing Act of 2003; and (6) APA rulemaking pursuant to the Omnibus Appropriations Act, 2009 (mortgage practices draft rule). APA rulemaking has also been conducted pursuant to the Fair and Accurate Credit Transactions Act of 2003 and the Gramm-Leach Bliley Act.

By my estimate, APA rulemaking respecting those rules (excepting the most recent mortgage practices rule, which has not been completed) has taken an average of zero (0) hearing time and the proceedings have taken less than 2 years. Where there have been statutory

deadlines for completing APA rules – sometimes deadlines of a year or less – the FTC has met those deadlines in every instance.

4) **For every proposed rule since 1970 (under both Magnuson-Moss and APA procedures), please identify each step in the processes ontlined in question 1 and 2, or 3 (as appropriate) that was taken. In the description, please include the amount of time that was spent on each step and the number of staff that were a part of completing that step.**

With respect to "historical rulemaking data" for the number of staff members working on each step in the process, Chairman Leibowitz's response to the prior post-hearing questions stated at page 12:

> The records available do not include information sufficient to respond to the request in full. Staff has gleaned from some of the post-hearing staff reports illustrative staffing information:
>
> - Mobile Homes: At least 13 staff members worked on the post-hearing staff report.
> - Used Cars: More than 14 staff members worked on the post-hearing staff report.
> - Funeral Industry: At least 16 staff members worked on the post-hearing staff report.
>
> These numbers do not include the Presiding Officer (who was obligated to produce a separate report) or his staff, Bureau management reviewers, Office of General Counsel advisors, or the Commissioners' offices.

I have no reason to doubt the above statement.

I cannot submit additional "historical rulemaking data" for the time spent on each step in the Mag-Moss rulemaking process for the reasons described in response to Questions 1 and 2. I do not have "historical rulemaking data" for the time spent on each step of the APA rulemaking process. I have instead provided my best estimates of the time spent on those tasks.

Based on my experience respecting the seriousness with which the BCP took its responsibilities when I was Director of that Bureau, I estimate that at least 13-16 staff members would have participated in the tasks described in steps 1-6 of the 29 sequential steps of the Mag-Moss procedures. Based on my experience as an antitrust defense trial lawyer described in response to Question 1, I estimate that the hearing officer and his staff, the stenographer, the staff members responsible for preparing the proposed rule, and cross examining opponents of the rule, as well as the staff members involved during the pre-hearing and post-hearing phases would have been required to participate in steps 11-25 of the 29 sequential steps of the Mag-Moss procedures. Again, based on my experience respecting the seriousness with which the BCP staff took their responsibilities, I estimate that for the tasks described in steps 11-25 at least 20 staff members would have been necessary.

Based on my familiarity with the APA rulemaking since I have returned to the Commission as a Commissioner, I estimate that approximately 7-10 BCP staff members would have participated in the 6 steps in the APA rulemaking process, as supplemented by the Commission's practices.

a. For each rule, please provide details on whether or not the rule was completed. If not completed, please state what the final outcome of the rulemaking was and why that decision was made. Please also provide a summation of the total amount of time spent working on each rulemaking by the Commission.

Of the 15 Mag-Moss rules proposed, 5 were finalized; the Credit Practices Rule, the Funeral Industry Practices Rule, the Ophthalmic Practices Rule, the Used Car Rule and the Home Insulation Rule. In addition, Magnuson-Moss procedures were used to complete or modify some rules that had been issued or begun pre-Mag Moss.[3] The other ten Mag-Moss rule proceedings were closed.

As you state in Question 14, former Chairman Muris has testified that the reason for that was because there was a "change in enforcement philosophy." I have no reason to doubt his testimony. After the change in Administration in 1980, former Chairman Muris was appointed Director of BCP and I have no doubt that the issuance of Mag-Moss rules was contrary to his "enforcement philosophy" and hence that he recommended closing those pending rulemaking proceedings. However, the Congress created the FTC as an independent agency, providing that no more than three of its members should come from the same political party, in order to avoid just such shifts in "enforcement philosophy" upon a change in Administration. Thus, the explanation for closing the ten Mag-Moss rule proceedings proffered by former Chairman Muris would describe the sort of "independent" agency capture by an Administration that Congress intended to prevent.

Furthermore, former Chairman Muris' view that this "change in enforcement philosophy," not the time-consuming and burdensome nature of the Mag-Moss rulemaking

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[3] It appears to me that the Mail Order Merchandise Rule was initially proposed in 1971 under Section 6(g) of the FTC Act, but completed at the end of 1975 after the Mag-Moss Act was enacted by Congress. Similarly, it appears that the Franchise Rule was initially proposed in 1971, but completed over 7 years later in 1978 as a Mag-Moss rule. That makes sense to me. Prior to the Mag-Moss Act, the FTC had the authority to challenge practices under Section 5 of the FTC Act and to enact rules respecting those practices but did not have the power to seek civil penalties for violations of either Section 5 or a rule unless and until a respondent was held in contempt of a Commission order respecting the same. Thus, a respondent effectively got "two bites of the apple" (the first one being a violation of Section 5 or a rule, for which there was no monetary penalty). One of the purposes of the Mag-Moss Act was to enable the Commission to make rules that were enforceable by civil penalties, thus giving a respondent only "one bite at the apple."

process, "killed FTC rulemaking" (see Question 15) does not accord with the views of other BCP Directors. As previously stated, I was the BCP Director in 1975, when most of the 15 Mag-Moss rules were proposed. At the outset, I felt the Mag-Moss process was workable. However, after all of those rules had already been in process for 3 or more years, and 12 of them for over 5 years, and before the change in enforcement policy referred to, I became convinced that my initial view was wrong. Instead, I came to realize that Mag-Moss rulemaking proceedings were not viable. Also, two subsequent Bureau Directors, for example, told me (when they were BCP Directors) that they shared that view, and that was the reason for the absence of Mag-Moss rulemaking.

Moreover, former Chairman Muris has acknowledged that when he was Chairman, his "enforcement philosophy" did not prevent him from championing the Do Not Call Rule. He further acknowledged that that rule was promulgated using APA, instead of Mag-Moss, rulemaking procedures. Although he claims that a Mag-Moss rule would not have taken any more time to issue, his assertion is unsupported and contrary to the way the Commission in fact proceeded.

b. For hearings, please note how long each hearing took and how long was spent after the hearing reviewing the record. Please identify the number of staff members who reviewed the hearing records.

There are zero (0) hearings required in the APA rulemaking process. For my estimate of the time and staff resources spent on average in reviewing the hearing record in a Mag-Moss proceeding (see step 22), based on my experience as a BCP Director and my personal knowledge respecting the seriousness with which the BCP staff performed their responsibilities, I estimate the role of staff involved would accord with the number of staff reported to have worked on that task in connection with the Mobile Homes, Used Cars, and Funeral Industry proceedings (13-15 staff members), and the time needed to perform that task would have taken, on average, approximately 18 months.

5) Please identify which specific requirements under the FTC's Magnuson-Moss rulemaking process you believe are unnecessary or overly burdensome.

a. For each requirement identified, please explain why you believe that requirement is unnecessary or overly burdensome.

I consider all hut the 6 steps of the Mag-Moss rulemaking process that are also required by APA rulemaking (*i.e.*, publication of the prescribed NPR; acceptance of public comments; obtaining OMB approval of any disclosure, reporting or record keeping requirements in the rule; publication of the prescribed Statement of Basis and Purpose; notification to Congress pursuant to the SBREFA; and defending against challenges) to be duplicative, unnecessary and burdensome. The Commission has demonstrated repeatedly that it can fashion responsible rules using the APA procedures, without engaging in the numerous other time-consuming and burdensome steps required under Mag-Moss procedures. A number of other agencies (including hut not limited to the SEC) have also demonstrated that APA rulemaking is sufficient to ensure

due process and fairness. Indeed, Congress itself does not generally require hearings and proceedings that are as burdensome and time-consuming as Mag-Moss rulemaking procedures before adopting important legislation (such as the Patriot Act).

The justifications that have been proffered for such burdensome and time-consuming Mag-Moss procedures do not stand up to serious examination. It is said, for example, that Mag-Moss rules are necessary because otherwise the FTC's broad jurisdiction would make it "the second most powerful legislature in Washington."[4] Indeed, the opposite is true. Each of the 15 Mag-Moss rules sought to define specific "rules of the road" for businesses that otherwise would be governed by a broad statute (Section 5 of the FTC Act). Similarly, it has been said that rulemaking diverts the staff from doing what it should be doing, which is to bring cases.[5] I am a big fan of bringing cases. But I am also a big fan of giving the businesses advance notice of the specific "rules of the road" before they are sued.

6) With a Notice of Proposed Rulemaking, the APA process removes the explicit requirement to provide the text and purpose for a proposed rule, which is present under the Magnuson-Moss proceedings and has helped ensure the FTC designates the issues it is pursuing at the outset of a rulemaking. Do you believe this identification of issues is an unnecessary step in the FTC's rulemaking process?

This question says that the APA process "removes the explicit requirement to provide the text and purpose for a proposed rule, which is present under the Magnuson-Moss proceedings and has helped ensure the FTC designates the issues it is pursuing at the outset of a rulemaking." That is not how I read or interpret the APA. The APA process specifically requires that the Notice of Proposed Rulemaking ("NPR") sets forth either the terms or substance of the proposed rule or a description of the subjects and issues involved; explains the legal and factual basis for the proposed rule provisions; and includes, if applicable, a Regulatory Flexibility analysis based on the anticipated effects of the rule on small entities, and an analysis under the Paperwork Reduction Act of any disclosure, reporting, or record keeping requirements the rule would impose. These are all necessary steps occurring at the outset of the APA rulemaking process, and I believe they adequately identify the issues. In any event, however, the Commission's long standing practice in its APA rulemaking is to include the text of the proposed rule in its NPR, and I do not foresee any change in this practice.

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[4] Testimony of Timothy F. Muris before the U.S. Senate Committee on Commerce, Science, and Transportation, at 12-14 (July 14, 2009).

[5] *Id.* at 14.

7) Do you believe it is beneficial to require a demonstration of prevalence at the outset of a rulemaking to ensure there is sufficient reason to pursue an industry wide rule?

a. At what point in a rulemaking do you believe the Commission should be required to demonstrate the prevalence of a deceptive act or practice on which it intends to enunciate a rule?

Requiring a demonstration of prevalence "at the outset" of a rulemaking proceeding to ensure that there is sufficient reason to issue an industry-wide rule seems to me to put the cart before the horse. A primary purpose of a rulemaking proceeding is to determine if there is a sufficient reason to issue an industry-wide rule; requiring that to be determined "at the outset" would oblige the FTC to prejudge that key issue. Moreover, requiring a demonstration of "prevalence" to be shown at any point in the proceeding seems to me to be imprudent for two additional reasons. First, "prevalence" is largely in the eye of the heholder in that it is not defined in either the statute or the case law. Second, requiring a demonstration of "prevalence" is contrary to the sage adage that even if bad apples do not predominate, they may spoil an entire barrel: more specifically, a rule that condemns specific "deceptive or unfair" business practices protects not only consumers but also legitimate businesses that must compete with the husinesses engaging in those practices; indeed, that is why the FTC's consumer protection mission is symbiotic with its mission to protect against unfair competition. This is not to say I would favor issuing a rule to address a small number of isolated problems; business education and, if needed, enforcement action ordinarily would be the appropriate answer to that situation.

8) You stated the hearings usually take 38 days to complete. Why do you believe that the removal of this relatively short requirement (in the context of a multi-year rulemaking) will significantly decrease the time the Commission spends on a rulemaking?

I do not consider 38 days of hearings to be a "relatively short" requirement in the context of a multi-year proceeding. As I testified, for nearly 40 years, I was an antitrust litigator for defendants in the federal courts. Many of the antitrust cases in which I participated were "multi-year" proceedings. Yet, I never participated in a trial that was as long as the average Mag-Moss hearing (the closest I came was a 37 day jury trial in Chicago in the early 2000s). And, the average 38 day Mag-Moss hearing time omits the extensive time spent in preparing for, and analyzing the results of, the hearing, which are integral parts of the hearing process. Judged by other metrics – *i.e.*, as previously discussed, the APA rulemaking proceedings (which involve 0 hearing time) conducted by both the FTC and other agencies, this is an inordinately long period of time. Nor can the time-consuming and hurdensome nature of the Mag-Moss rulemaking process be justified by the breadth or the importance of the rule proposed. As previously discussed, each of the proposed Mag-Moss rules actually defined with specificity the applicable "rules of the road" under a broad statute; and those "rules of the road" were not any more important than the subject matter of APA rules proposed by the FTC and other like agencies, much less than legislation enacted by Congress.

9) Under Magnuson-Moss procedures, the hearing allows every party to suggest disputed issues of fact. Do you believe that allowing all parties to do so is unnecessary?

a. If the Commission is given full APA authority for all rulemakings, how can we he sure that this and future Commissions will ensure that the concerns of all parties related to potentially disputed issues of fact are heard and considered?

Based on my experience as an antitrust litigator described in response to Question 1, I believe requiring the FTC to consider the disputed issues submitted by all parties is unnecessary. Rule 26 of the Federal Rules of Civil Procedure, governing pre-trial proceedings in federal courts, does not require a federal judge to consider the issues submitted by all parties even though many of the antitrust cases in which I participated were multi-party proceedings with potential binding effects on the parties outside the scope of the particular case. Moreover, these submissions cannot be viewed in isolation; they are a prelude to cross-examination respecting each issue at the hearing. Thus, this requirement has the potential to make the hearing process extremely time-consuming and hurdensome. Indeed, I know of no other agency that faces such a requirement. The APA requirement compelling an agency to consider all comments submitted, and to defend any rule in the courts, has proved to ensure that the legitimate concerns of all parties related to potentially disputed issues of fact are heard and considered.

10) In testimony, you referenced a recent attempt hy the Commission to carve out business opportunities from the Franchise Rule as the only proposed rule under Magnuson-Moss requirements since 1978. Please explain what occurred with that rulemaking, including the ultimate result.

a. Do you think the Magnuson-Moss procedures were too burdensome in that case?

b. Why or why not?

In 1995, the Commission conducted a regulatory rule review of the Franchise Rule to ensure that it was continuing to serve a useful purpose. In that review the Commission explored the issue of how the Franchise Rule was applied to the sale of business opportunities. At the conclusion of the rule review, the Commission determined to retain the Franchise Rule with modifications but also decided to seek additional comment on whether to address the sale of business opportunities through a separate, narrowly tailored rule. To that end, under Mag-Moss rulemaking procedures, in 1997 the Commission published an ANPR, which jointly considered Franchise Rule modifications as well as the bifurcation of the sale of business opportunities from the Franchise Rule. In addition to soliciting written comments, the Commission staff held 3 public workshops – held in Chicago, Dallas and Washington, DC – specifically addressing business opportunity sales issues.

In October 1999, the Commission announced its intention to conduct a separate rulemaking to address business opportunity sales, but proceeded to modify the Franchise Rule under Mag-Moss rulemaking procedures first. As the Franchise Rule proceeding began to wind down (the final rule was published in January 2007), the Commission began Mag-Moss

rulemaking proceedings relating to the sale of business opportunities. In April 2006, the Commission published an NPR, which included proposed language for the new Business Opportunity Rule.[6] The comment periods for the NPR ultimately concluded at the end of September 2006. The Commission received over 17,000 comments and rebuttal comments.

In March 2008, still proceeding under the Mag-Moss rulemaking steps, the Commission issued a revised NPR, which proposed a more narrowly-focused Business Opportunity Rule. The comment periods for this NPR concluded in July 2008, and the Commission received 115 comments and rebuttal comments. A public comment period relating to the Paperwork Reduction Act was conducted that October. The Commission held a day-long workshop on June 1, 2009 to explore proposed changes to the Business Opportunity Rule and the comment period for that hearing closed at the end of June 2009. A Staff Report is currently being drafted on the proposed Business Opportunity Rule and the Commission anticipates seeking comment on that Report later this year.

The rulemaking proceedings described above illustrate the problems that I believe are inherent to the Mag-Moss rulemaking process. The proceeding to amend the Franchise Rule and bifurcate a separate rule for business opportunity sales began in 1995 and has still not been completed. Although not all of the delay in the Franchise Rule/Business Opportunity rulemakings has been due to Mag-Moss rulemaking procedures, I believe that much, if not most, of that delay has been.

There are too many unnecessary steps in the Mag-Moss rulemaking process. For example, although the interested parties in the Business Opportunity rulemaking waived a hearing, thereby eliminating the time and resources required to conduct a hearing (as well as the pre-hearing and post-hearing steps integral to such a hearing), four workshops - 3 in 1997 and one in 2009 – were conducted as an alternative. Furthermore, Commission staff must still prepare a Staff Report and seek comment (with the requisite comment period) on that Report.

In addition, Mag-Moss procedures require an unwieldy method of amending rules such as the Franchise Rule. The primary reason behind amending that Rule was to conform disclosure requirements with those of the Uniform Franchise Offering Circular. This modification would reduce costs on the business side of franchise sales by streamlining certain requirements. Because it took almost 12 years to amend the Franchise Rule, businesses lost out on 12 years of potentially reduced costs, most of which arguably were passed on to purchasers of those franchises.

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[6] The initial comment period was 60 days, and was extended for an additional month. The rebuttal period was extended twice – first to accommodate the extension of the initial comment period, and then extended an additional 6 weeks to allow more time for rebuttal comments.

11) In testimony, you stated that you believe the Commission should allow oral submissions during rulemakings. If the Commission were given full APA authority, would you support adding this as an additional requirement in statute?

I stated in my testimony that the FTC as a matter of practice allowed oral submissions in some APA rulemaking proceedings. See my response to Question 4. I do not recall testifying that the Commission should allow such submissions in all APA proceedings, and I do not consider that necessary. I do think it is advisable when a rule is unusually novel or complex. However, I do not support adding that requirement to the statute. It should be the exception, not the rule.

12) In testimony, you stated that too strict a prevalence requirement on rulemakings would hurt legitimate business. Please explain why you believe this to be true.

See my prior response to Question 7 respecting a "prevalence" requirement above.

13) Former Chairman Muris stated that the FTC's rulemaking process has taken so long not because of the Magnuson-Moss procedures, but because many times the FTC did not have a clear idea of what it wanted to accomplish with a particular rule. Do you agree or disagree with this statement? Please explain your response.

I respectfully disagree with my good friend former Chairman Muris. It is not correct to assert that "many times the FTC did not have a clear idea of what it wanted to accomplish with a particular rule." Before any Mag-Moss rule was proposed, it was the subject of extensive investigation by the staff; vetting by the Bureau of Consumer Protection management; recommendation by the staff, the Bureau management and other interested offices at the agency (like the Office of Policy Planning and Evaluation ("OPPE") and the Bureau of Economics); and review and adoption by the Commissioners. This was *in addition* to the 29 sequential steps of the Mag-Moss procedures. So in the case of each of the 15 proposed rules, both the agency staff and the Commission had a very "clear idea of what [the Commission] wanted to accomplish" with respect to the rule.

Second, with respect, I was in a better position than former Chairman Muris to speak to whether the Commission had a clear idea about what it wanted to accomplish with the Mag-Moss rules it proposed in 1975. As previously stated, I was the Director of BCP at the time and, as such, I was involved in the investigation, vetting and recommendation processes I have described for each of the Mag-Moss rules proposed. By contrast, former Chairman Muris was a junior member of OPPE when the rules were proposed: as he acknowledged in his testimony last July, "one of the first jobs I had out of law school was that as a staffer at the Federal Trade Commission."[7] Finally, I do not recall any instance in which OPPE opposed any of the Mag-

[7] Transcript of Hearing of the Consumer Protection, Product Safety, and Insurance Subcommittee of the Senate Commerce, Science, and Transportation Committee, at 20 (July 14, 2009).

Moss rulemaking proposals recommended by BCP in 1975. To the contrary, OPPE enthusiastically supported a number of Mag-Moss rulemaking proposals in 1975, including at least one that the Commission rejected.

14) **In his testimony, Mr. Muris stated that Magnuson-Moss did not kill FTC rulemaking. A change in enforcement philosophy slowed FTC rulemaking efforts. Do you agree or disagree with this statement? Please explain your response.**

See my prior response to Question 4.

15) **In her testimony, Ms. Woolley expressed concern that providing the FTC with full APA authority, and the resultant removal of Magnuson-Moss's procedural safeguards, creates a threat of new regulatory burdens that would limit market innovation and reduce the number of jobs the business community is able to create. Do you agree or disagree with this statement? Please explain your response.**

I respectfully disagree with Ms. Woolley. She did not explain how or why innovation or the number of jobs in the business community would be threatened. Nor did she link the FTC's use of APA rulemaking procedures with any of these effects. Thus, I am at a loss about what she had in mind.

Questions for the Record
Commissioner Rosch
Financial Services and Products: The Role of the FTC in Protecting Consumers Part II
March 17, 2010

From Senator Vitter:

The FTC is asking Congress to change a process enacted three decades ago, specifically the rulemaking procedures created by the Magnusson-Moss Act. In reviewing the prior testimony of Chairman Leibowitz before this Committee, there is little documentation on the record of the specific problems the Commission incurred over the past several decades in exercising its current rule-making powers. Likewise, there are no recommeuded proposals offered by the FTC to fix any specific problems with the procedures. We simply have the FTC's proposal to replace the current process with APA authority for all the FTC's rulemakings.

- **On what specific grounds is the FTC asking Congress to completely change the process required in one of the key statutes that guides the Commission's actions?**
- **Is there any documented evidence that the FTC can offer us today supporting this complete change in procedure for the Commission?**
- **If specific problems can he identified with the procedures of the Magnusson-Moss Act that have prevented the FTC from carrying out its mission, can the FTC document those so that this Committee can work on addressing those specific concerns with those procedures?**

I respectfully submit that the ongoing experience respecting the Mag-Moss rulemaking process (which is described in the responses to post-hearing questions that Chairman Leibowitz and I have submitted) speaks for itself. Mag-Moss rulemaking has 29 sequential steps and it has resulted in hearings that have *averaged* 38 days in length and proceedings that have *averaged* seven years in length. With the exception of the proposed Business Opportunity Rule, there has been *no* new Mag-Moss rule proposed since 1978. That is more than *30* years in which not only have consumers been without the protections afforded by a rule, but also bad businesses in the barrel have had two bites at the apple in most cases. Moreover, since a Mag-Moss rule is essential to the agency obtaining civil penalties in most cases, the good businesses have not only gone without "rules of the road" afforded by a rule, but have not had the protection against unfair competition provided by rules. Additionally, the FTC and numerous other agencies have demonstrated that APA rulemaking not only is an extremely valuable and responsible tool, but also that the APA procedures are more than adequate to ensure due process and fairness.

Businesses need greater certainty in order to have the confidence to invest iu growth and new jobs. The proposed expansion of FTC powers creates a significant amount of uncertainty about how the FTC may use these new powers to regulate businesses across the entire economy. Before we take such a significant step, which may be difficult to reverse, it seems prudent to understand at least the poteutial economic impact that each of the FTC's proposed provisions could have on our economy.

- **Has the Federal Trade Commission completed an economic analysis or impact report that it can share with the members of this Committee?**
- **If not, does the FTC plan to conduct a cost-benefit analysis or otherwise assess what impact this proposal may have on our economy?**

To be sure, businesses need as much certainty as possible. That is why rules are essential and the delay that has occurred is intolerable. As I testified, the Commission has routinely prepared and included in the Statement of Basis and Purpose of each rule a consideration of the costs and benefits associated with that rule, which can and will be shared with the Committee.

Questions for the Record from U.S. Senator Mark Pryor

A Reexamination of COPPA

- **Do you think the age limit in COPPA is appropriate? And if so, why?**

A: After looking closely at whether adolescents should be covered for purposes of the COPPA statute, Congress chose to define a "child" as an individual under age 13. This choice was based in part on the sense that most young children do not possess the level of knowledge or judgment to determine whether to divulge personal information over the Internet. The FTC supported this assessment at the time the COPPA statute was introduced.* The staff anticipates it will receive comments on this issue during the FTC's COPPA Rule review.

* See September 23, 1998 Testimony of the Federal Trade Commission before the Subcommittee on Communications, Senate Committee on Commerce, Science & Transportation, available at http://www.ftc.gov/os/1998/09/priva998.htm.

- **Do you think COPPA should be strengthened?**

A: The FTC currently is reviewing the COPPA Rule in its entirety in light of significant changes in the online environment, including the rise of social networking and the proliferation of interactive technologies, and the increasing use of the mobile web and interactive gaming. Through the FTC's March 2010 request for written public comment, as well as its June 2 roundtable, the agency intends to explore what's working optimally, and where changes might be warranted. Once we have completed the public roundtable and the comment period has closed, the Commission will carefully evaluate whether any modifications to the Rule are warranted.

- **Should the FTC reexamine what constitutes "personal information" in its review of COPPA? Or do you believe that the online space and the definition of personal information should remain the same as it was when the law was created over 10 years ago?**

A: The FTC is reexamining whether the Rule's current definition of "personal information" needs to be revised, consistent with the COPPA statute (*i.e.*, permitting the physical or online contacting of a specific individual), to include, for example, other types of information such as user or screen names and/or passwords, zip code, date of birth, gender, persistent IP addresses, mobile geo-location information, or information collected in connection with online behavioral advertising. The FTC has asked for written comments on this issue and the FTC staff has dedicated a panel at the June 2 COPPA roundtable to the question (see agenda, at http://www.ftc.gov/bcp/workshops/coppa/Agenda_2010COPPARoundtable.pdf). At this time, it would be premature to conclude whether the FTC is likely to amend the Rule's current definition of personal information.

Questions for the Record from U.S. Senator Mark Pryor

- **In your opinion, what is the biggest threat to children's privacy and safety in today's online world?**

A: For many young people, socializing and communicating online can be a rewarding experience, but those activities come with risks, including:

- Inappropriate conduct, including online harassment, cyberbullying, and sexting. The online world can feel anonymous. Young people sometime forget that they are still accountable for their actions and do not realize that they may lose the ability to control the dissemination of information and photos once they are shared online.
- Inappropriate contact. Some people online have bad intentions, including bullies, predators, hackers, and scammers.
- Inappropriate content. Young people may find pornography, violence, or hate speech online.

It is difficult to determine what the "biggest threat" might be, because every child has unique circumstances that affect his or her personal risk profile. The FTC is closely following research conducted by the Pew Internet & American Life Project and the Crimes Against Children Research Center, among others, so that we may better understand the interplay between children's experiences and the risks they face online. Such research helps us craft useful advice for parents and children, such as the advice for parents in our recent publication, *Net Cetera: Chatting with Kids About Being Online.*

- **What do you think is the most urgent update to COPPA needed?**

A: As stated above, the FTC currently is reviewing the COPPA Rule in its entirety. Through the FTC's Rule review process, the agency intends to take a careful and comprehensive look at the Rule, with input from many sources. The agency is keeping an open mind, therefore, on what the most pressing modifications, if any, might be to the Commission's Rule or to the underlying statute.

- **In your opinion, what would constitute the most appropriate definition of "sensitive data" in the context of children's online privacy?**

A: The COPPA statute does not define or use the term "sensitive data." However, the statute does contain an enumeration of what type of individually identifiable information is considered to be "personal," the collection of which requires an operator to obtain prior verifiable parental consent. "Personal information" is defined as:

> individually identifiable information about an individual collected online, including – (A) a first and last name; (B) a home or other physical address including street name and name of a city or town; (C) an e-mail address; (D) a

telephone number; (E) a Social Security number; (F) any other identifier that the Commission determines permits the physical or online contacting of a specific individual; or (G) information concerning the child or the parents of that child that the website collects online from the child and combines with an identifier described in this paragraph.

In promulgating the COPPA Rule in 1999, the FTC used the open-ended authority granted under subpart F of the definition of personal information to add "other online contact information, including but not limited to an instant messaging user identifier, or a screen name that reveals an individual's e-mail address." The Commission also added to the definition "a persistent identifier, such as a customer number held in a cookie or a processor serial number, where such identifier is associated with individually identifiable information; or a combination of a last name or photograph of the individual with other information such that the combination permits physical or online contacting." Since promulgating the COPPA Rule, the FTC has not further expanded upon the definition of personal information. However, as noted in our response to the previous question, the FTC is reexamining the definition of "personal information" as part of its overall Rule review.

- **You mentioned major tenets of children's privacy the FTC will consider in its reexamination of the effectiveness of COPPA. Specifically, you address "whether the Rule's definition of 'Internet' adequately encompasses [certain] technologies" like mobile communications. Will the FTC consider in its review the impact of data and location tracking devices, such as GPS systems, on children's safety?**

A: Yes. The FTC's March 2010 request for public comment seeks input on whether the Rule's current definition of personal information needs to be revised, consistent with the COPPA statute (*i.e.*, permitting the physical or online contacting of a specific individual), to include mobile geo-location information, among other things.

- **How does the Commission enforce whether operators have "actual knowledge" that their sites are used by children under 13? Is this scienter requirement an issue that merits additional scrutiny in your opinion?**

A: As explained in the Statement of Basis and Purpose accompanying the COPPA Rule, actual knowledge will be present where the operator obtains direct information about a child's age or grade, for example, from a child's registration at a website or from a concerned parent who has learned that the child is participating at the site. In addition, the FTC has explained that it will examine closely websites that do not directly ask age or grade, hut instead ask "age identifying" questions, such as "what type of school do you go to: (a) elementary; (b) middle); (c) high school; (d) college" and that through such questions, operators may acquire actual knowledge that they are dealing with a child under age 13.

Questions for the Record from U.S. Senator Mark Pryor

The FTC has stated that the COPPA statute's actual knowledge standard does not require operators of general audience sites to investigate the ages of their website's visitors or to monitor their chat rooms. However, an operator may be considered to have actual knowledge with respect to a specific child if someone from the operator's organization views a revealing post, or if someone alerts the operator to such a post (*e.g.*, a concerned parent who learns that his child is participating on the site).

Thus far, all of the FTC's COPPA cases involving "actual knowledge" center on an operator's direct receipt of information about a child's age input during the registration process.

The FTC staff has dedicated a panel at its June 2 COPPA roundtable to exploring the COPPA statute's actual knowledge standard.

FTC Enforcement

- **Are there any restrictions on state AGs enforcing compliance with the COPPA rule?**

A: The COPPA statute permits state attorneys general to file civil actions on behalf of their residents in U.S. District Court to enjoin an operator's practices, enforce compliance with the FTC's COPPA Rule, obtain damages, restitution, or other compensation on behalf of their residents, or to obtain such other relief as the court deems appropriate. The statute places several minor limitations on a state attorney general's right to enforce COPPA. First, unless it would be infeasible to do so, an attorney general intending to enforce COPPA must provide the FTC with written notice and a copy of the complaint prior to filing the state action. Upon receipt of notice of a state's intent to enforce COPPA, the FTC has the right to intervene, to be heard, and to file a petition for appeal in the action. The statute also provides that any person or organization that has been approved by the FTC as a COPPA safe harbor program and whose guidelines are relied upon by a defendant as a defense may file as amicus curiae in a state COPPA proceeding.

To date, only one state – Texas – has provided notice to the FTC of its intention to enforce COPPA. In December 2007, Texas filed two COPPA actions, one against The Doll Palace Corp., and the other against Future US, Inc. (a/k/a gamesradar.com). Information about the Texas actions can be found at http://www.oag.state.tx.us/oagNews/release.php?id=2288.

Education Efforts

- **How is the Net Cetera distribution and education campaign working? Have the materials and the FTC's efforts to reach out to teachers and parents been effective?**

A: The FTC issued a report to Congress about the *Net Cetera* campaign in March 2010, available at http://www.ftc.gov/os/2010/03/100331netcetera-rpt.pdf. This report discusses the creation of *Net Cetera*, how the FTC is getting the word out about the guide, and distribution highlights.

Questions for the Record from U.S. Senator Mark Pryor

The *Net Cetera* education campaign continues to be a success. Since October 2009, the FTC has received orders for the *Net Cetera* guide from every state in the nation, for a total of over 3 million copies ordered in English and Spanish. Other outreach highlights include:

- Prince George's County Public Schools – the 2nd largest school district in Maryland and 18th largest in the nation – distributed approximately 150,000 copies of *Net Cetera.*
- Public and school libraries across Massachusetts have received copies of the guide and are now placing orders, and every member of the Young Adult Library Services Association (YALSA) has received a copy.
- The National Association of School Nurses will distribute the guide to attendees at their upcoming annual conference.
- FTC staff are attending and speaking at conferences this summer to promote *Net Cetera*, including the widely-attended International Society for Technology in Education Annual Conference and the National School Public Relations Association National Seminar.
- Schools, police departments, and organizations in Arkansas have ordered over 34,000 copies of the guide.

Law Enforcement

- **You mention 14 cases brought by the Commission over the past 10 years alleging COPPA violations. From your perspective, have those cases served to deter repeat violations or additional COPPA violations?**

A: The FTC has been strategic in bringing cases that illustrate different core requirements. We have garnered widespread interest and significant leverage from each COPPA enforcement action addressing a particular type of violation. The FTC's early COPPA enforcement actions focused on children's sites that collected extensive amounts of personal information without providing notice to parents and obtaining their consent. Most recently, the FTC has focused on operators of both general audience and child-directed social networking sites and sites with interactive features that permit children to publicly divulge their personal information online.

Although law enforcement is a critical part of the Commission's COPPA program, the FTC's COPPA program is comprised of several effective integrated components – rulemaking, self-regulation, routine outreach to businesses and consumers, and law enforcement – that work in tandem to enhance overall COPPA compliance. The FTC believes that this integrated approach has served to deter repeat or additional violations.

Policy Recommendations

Questions for the Record from U.S. Senator Mark Pryor

- **What should the FTC or Congress do to strengthen children's safety and privacy online in conjunction with advanced technologies and mobile devices?**

A: The COPPA statute applies to operators of commercial "websites located on the Internet" and "online services" that collect, maintain or disclose children's personal information on the Internet. Where children connect to websites or online services through mobile devices, the statute clearly applies. Where children are not connecting to or through websites or online services, COPPA may not apply. Thus, many, but not all, mobile communications may be covered by the statute. The FTC's Rule review will examine how the definitions of Internet, websites, and online services may affect COPPA's application to different mobile and other technological uses.

- **[Do you agree with the direction the FTC is taking as it reexamines the implementation and effectiveness of COPPA?]**

A: N/A

- **How do you propose to improve parental supervision and control of children's online activity to prevent the inappropriate or illegal collection and use of their information?**

A: The FTC will continue to focus on educating parents, through tools such as *Net Cetera* and the agency's online safety portal, OnGuardOnline.gov, about the rights and protections provided by COPPA, and about children's online privacy and safety more generally.

- **If you support a regime granting rules of the road for adolescents' privacy, how do you envision this sort of regime working? How would you propose it be structured? If you do not support a regime governing adolescents' privacy, please explain your reasoning.**

A: The FTC's current review is focused on the COPPA Rule, and on the online privacy of individuals defined as children under that statute. The FTC has not yet had the opportunity to formulate an opinion on a possible regime to protect adolescents' privacy. The agency looks forward, however, to reviewing any proposals that may be put forward. In addition, last year, the agency released a set of principles relating to online behavioral advertising. Moreover, the Commission currently is examining privacy more broadly and hopes to develop a general privacy framework in the coming months.

Senate Appropriations Subcommittee on
Financial Services and General Government

Hearing on the Fiscal Year 2011 Budget Request
for the Federal Trade Commission

Responses to Questions for the Record for Chairman Leibowitz

Questions for the Record From Senator Richard J. Durbin, Chairman

Q1. The Energy Independence and Security Act of 2007 gave the Federal Trade Commission (FTC) authority to issue regulations prohibiting market manipulation involving wholesale transactions of crude oil, gasoline, and petroleum distillates. The FTC issued the Final Rule in August 2009 and provided guidelines to industry for compliance.

- **How does the "market manipulation" rule change, expand, or enhance the FTC's jurisdiction and enforcement authorities?**

A1. The market manipulation rule (MMR) is a fraud-based rule. The MMR prohibits persons from knowingly engaging in fraudulent or deceptive conduct connected with wholesale transactions of petroleum products. The MMR also prohibits persons from intentionally omitting material facts in statements whenever the omission can be expected to distort wholesale petroleum markets. Thus, in addition to the FTC's traditional enforcement program focused on anticompetitive conduct, including anticompetitive mergers and unfair business practices that result in a sustained diminution of competition, the MMR enables the Commission to prevent specific instances of fraudulent or deceptive conduct, even when that conduct does not have durable competitive consequences.

- **How will the FTC monitor compliance with the new rule?**

  The Commission has established a dedicated e-mail and telephone MMR "hotline" to receive complaints from anyone who has information about conduct prohibited by the MMR. The Bureau of Competition also has a litigating section of approximately 25 attorneys who specialize in energy matters that will have the primary responsibility for bringing appropriate cases under the MMR. In addition, staff from both the Bureau of Competition and the Bureau of Economics regularly monitors the petroleum industry to discern any anomalous price movements that need further investigation to determine whether they are caused by shifts in market conditions or wrongful behavior.

- **The FTC puhlished an investigation of the increases in gas prices occurring in 2006, concluding that rising gas prices could be explained entirely by market forces and not illegal anticompetitive behavior. Will the new market manipulation rule change the standard for how the FTC will evaluate and reach conclusions on behavior in the petroleum market?**

As noted above, the MMR targets fraudulent or deceptive practices that might not otherwise be reachable by Section 5 of the FTC Act. However, it does not alter the FTC's standard for evaluating behavior in the petroleum industry under either Section 5 or Section 7 of the Clayton Act. The FTC's long-established enforcement aim is to protect consumers from unfair methods of competition or unfair or deceptive business practices. The issuance of the MMR does not change that mission; rather it provides the Commission with an additional tool to fulfill it.

Q2. **The FTC shares concurrent jurisdictiou with other ageucies such as the Commodity Futures Trading Commission, the Securities and Exchange Commission, the Department of Justice, and the Food and Drug Administration.**

- **Please describe the FTC's concurrent jurisdiction with these aud other agencies and how such jurisdiction is either complementary or duplicative.**

A2. The FTC has concurrent authority with many agencies to a greater or lesser extent. The concurrence is broadly complementary; for example, the agencies may have generally consistent but different missions or goals (*e.g.*, FTC with FDA, EPA, SEC, CFTC, CPSC), or divide up primary responsibility (*e.g.*, FTC with FDA, FCC), or share enforcement over a very substantial number of entities or acts while arranging to avoid duplication (*e.g.* FTC with DOJ Antitrust Division), or aid each other with special expertise in certain areas (*e.g.* FTC with FDA, EPA, FCC), or can apply different remedies to the same or similar conduct, such as civil vs. criminal, injunction and restitution vs. seizing product (*e.g.*, DOJ, US Postal Inspector, EPA, FDA). Attached is a brief summary of the FTC's primary areas of coordination with various federal agencies.

Q3. To curb fraudulent practices in the mortgage industry, the FTC plans to issue a rule banning upfront fees for mortgage modification or foreclosure rescue assistance. The FTC is also contemplating rules ou advertising mortgages.

- **How would new rules related to mortgage advertising practices strengthen the FTC's authorities in the mortgage arena?**

A3. The Commission currently enforces mortgage advertising requirements under the FTC Act, the Truth in Lending Act (TILA), including the Home Ownership and Equity Protection Act (HOEPA), and Regulation Z rules written by the Federal Reserve Board (Board). The Commission lacks authority to obtain civil penalties for violations of these

statutes and rules, with the exception of certain Regulation Z rules promulgated pursuant to HOEPA.

The Commission has not published a proposed or final mortgage advertising rule, so I cannot discuss the specific conduct that a final rule might prohibit or restrict. Generally, however, enacting new rules in this area would enable the Commission to protect prospective borrowers more effectively by establishing clearer standards for mortgage advertisers and giving the Commission more effective tools to stop and deter violations. As you know, the Commission is conducting the mortgage advertising rulemaking using the authority Congress granted to it in the Omnibus Appropriations Act of 2009, as clarified by the Credit Card Accountability Responsibility and Disclosure Act of 2009. Those laws authorize the Commission to enact rules with respect to unfair or deceptive mortgage practices, and to enforce those rules, with the states, through a variety of remedies including civil penalties.

- **The proposed rule prohibiting upfront fees for mortgage modifications is being implemented around the same time as the rule prohibiting upfront fees for debt settlement. Does the FTC plan to prohibit upfront fees for other financial services, given that these fees have been a key tactic for deceiving consumers?**

The Commission's amendments to the Telemarketing Rule governing debt relief services include a ban on the collection of advance fees. The FTC proposed rule on mortgage assistance relief services also would ban advance fees, but that rule is not yet final. With respect to the Telemarketing Rule's debt relief amendments, the Commission concluded that the collection of advance fees by debt relief providers, which often takes place in the context of transactions involving telemarketing that are permeated with deception, is an abusive practice under the Telemarketing Act. The record in the debt relief proceeding – including the public comments, a study by the Government Accountability Office, information gathered at a public forum, consumer complaints, and the law enforcement experience of the Commission and state enforcers – demonstrated widespread deception and substantial consumer injury in the provision of debt relief services. Consumers in the midst of financial distress suffer monetary harm – often in the hundreds or thousands of dollars – when, following sales pitches frequently characterized by high pressure and deception, they use their scarce funds to pay in advance for promised results that, in most cases, never materialize. In finding this practice abusive, the Commission applied the test for an unfair practice in section 5(n) of the Federal Trade Commission Act. The Commission found that the practice (1) causes or is likely to cause substantial injury to consumers, that (2) is not outweighed by countervailing benefits to consumers or competition, and (3) is not reasonably avoidable. The Commission relied on a similar analysis in prohibiting under the Telemarketing Rule the collection of advance fees for credit repair services, recovery services, and offers for certain loans.

At present, there are no other rulemaking proceedings in which the Commission has proposed or issued an advance fee ban. The determination of whether an advance fee ban

is appropriate is very much dependent on the specific circumstances, including the extent to which the transactions at issue take place in the context of widespread deception.

Q4. **The FTC reports that Identity Theft was the #1 consumer complaint during 2009. Consumers are worried that in an increasingly high-tech world, their personal data is being collected improperly and stored insecurely.**

- **What responsibilities do Facebook and other companies have to their users to disclose their websites' privacy policy? What about changes to that policy over time?**

A4. Although there is no generally applicable requirement for social networking companies to disclose their privacy practices, they still must satisfy certain responsibilities with respect to privacy policy disclosures. First, any claims they make must be truthful. The Commission has brought one case against a social networking site – Twitter – for making a misrepresentation about the level of security provided. *See In the Matter of Twitter, Inc.*, FTC File No. 092 3093 (June 24, 2010) (consent order approved for public comment). Second, if websites collect information from children, they must provide parents with notice and an opportunity to consent. The Commission has brought several cases against companies for violating the Children's Online Privacy Protection Act by not securing the required parental consent before collecting information from children through social networking websites. *See United States v. Xanga.com, Inc.*, No. 06-CIV-6853(SHS) (S.D.N.Y.) (final order Sept. 11, 2006); *United States v. Industrious Kid, Inc.*, No. 08-CV-0639 (N.D. Cal.) (final order Mar. 6, 2008); *United States v. Sony BMG Music Entm't*, No. 08-CV-10730 (S.D.N.Y.) (final order Dec. 15, 2008); *United States v. Iconix Brand Group, Inc.*, No. 09-CV-8864 (S.D.N.Y.) (final order Nov. 5, 2009). Third, if companies change their privacy policies in a way that materially affects data that consumers have already provided, they must provide clear notice and the opportunity for the consumers to provide their affirmative express consent to the change. *See In the Matter of Gateway Learning Corp.*, FTC Docket No. C-4120 (Sept. 10, 2004) (consent order).

- **If users decide to cancel or restrict their accounts on Facebook, photo storage sites, or other sites where they have stored personal information, what assurances do they have that their personal information is completely removed and deleted from storage?**

Several companies make specific disclosures to consumers about what happens to their data once they leave a site. If the disclosures are false, the FTC can bring an enforcement action under Section 5 of the FTC Act. In addition, if a website does not honor requests from parents to delete information being stored about their children, the FTC can bring an enforcement action under the Children's Online Privacy Protection Act.

We have also examined the issue of data retention as part of a series of roundtables we

hosted on consumer privacy over the last several months. A number of roundtable participants and commenters emphasized the value of businesses' retaining data only as long as necessary to fulfill a specific business purpose. The Commission staff will make recommendations on this issue as part of an upcoming report on privacy, to be released later this year.

Q5. Net Cetera is a guide published by the FTC to assist parents in talking to their children about the internet.

- **How has the FTC distributed the Net Cetera guide?**
- **What feedback has FTC received on the guide?**

A5. The FTC is working with outside groups to promote and distribute the booklet. For groups and individuals who want to share it with their families, friends, and communities, Net Cetera is available at OnGuardOnline.gov and in Spanish at AlertaenLínea.gov. People also can order free copies through the FTC's bulk order site, bulkorder.ftc.gov. Like all the FTC's consumer materials, Net Cetera is free and in the public domain. The FTC encourages groups and individuals to order as many copies as they can use, include sections of it in their newsletters and blogs, and grab the web button from OnGuardOnline.gov for use on their own websites.

Many schools use OnGuardOnline.gov and Net Cetera as part of their online safety programs. Because so much computer and other media use takes place in the home, pairing teachers and parents in these efforts more fully encourages safe and responsible online behavior, and reinforces consistent messaging.

Net Cetera has been available to the public since October 21, 2009. To date, the FTC has distributed more than 3,700,000 copies of the guide in English and more than 350,000 copies in Spanish. Distribution highlights include:

- Schools or school systems in all 50 states and DC have ordered copies of Net Cetera. This includes large orders by the Prince George's County (MD) Public Schools (~150,000), the Cobb County School District (~120,000), and the Cleveland Metropolitan School District (~50,000).

- Illinois schools, police departments, and community groups have ordered over 100,000 copies of the guide.

- Members in both Chambers signed and circulated letters about Net Cetera to their Hill colleagues, encouraging them to use the guide in their districts and to link to it from their websites. The FTC sent copies of the booklet to district offices as well, and will continue to work with Congress to spread the word about online safety.

- Companies including Facebook, MySpace, and Sprint are linking to Net

Cetera from their safety or resources pages.

- Nonprofits such as the Boys and Girls Clubs of America and the Internet Keep Safe Coalition distributed the guide at events across the country.

As the order numbers illustrate, Net Cetera has been very well received by parents, educators, police officers, and online safety experts. The Online Safety and Technology Working Group highlighted Net Cetera as an "outstanding" project that should be promoted as an opportunity for public-private partnerships in online risk prevention. Also, the FTC has secured opportunities to speak about Net Cetera at conferences for groups including the International Society for Technology in Education and the National Association of School Resource Officers.

Q6. **To stop advertisements from deceiving consumers into paying for so-called "free" credit reports, the FTC implemented a rule requiring that these advertisements contain a clear disclosnre that the only authorized free credit report is available at AnnualCreditReport.com.**

- **How is the FTC enforcing the new rule requiring that a disclosure is displayed on all commercial "free credit report" websites?**

A6. To determine compliance with the rule, the FTC monitors websites offering free credit reports. The FTC recently sent letters to 18 websites offering free credit reports, warning them that they must clearly disclose that a free report is available under federal law. This campaign appears to have been effective: several of the websites have changed their practices. The Commission anticipates follow up law enforcement action against those companies that do not come into compliance.

- **What other measnres have been taken to inform consumers of AnnualCreditReport.com, and how effective bave those measures been?**

The Commission has made extensive outreach efforts to educate consumers about their right to a free credit report through the authorized source, AnnualCreditReport.com. When the free annual credit report program initially took effect in 2004, the FTC issued press advisories and radio public service announcements informing consumers of their new rights, and published a "how to" guide on ordering the federally-mandated free reports. The Commission also has issued public warnings about "imposter" sites that pose as the official free report site, AnnualCreditReport.com. In addition, the FTC has created videos that highlight the differences between AnnualCreditReport.com and other sites that claim to provide "free" credit reports. Moreover, each time the FTC announces an enforcement action or new rule in the credit reporting area, it publicizes the AnnualCreditReport.com website. Most recently, it did so when it announced the warning letters described above. We believe these measures have been quite effective. Since 2004, consumers have obtained over 150 million free credit reports from the nationwide CRAs.

- **Experian, the company that ran "Free Credit Report.com" has now shifted its strategy and set up "Free Credit Score.com." Is the FTC continuing to monitor these companies to make sure they are complying with the new rule? Is there a plan to create a truly free credit score website similar to AnnualCreditReport.com?**

The FTC generally monitors consumer reporting agencies and other companies for their compliance with the provisions of the FCRA and other applicable rules. The Free Credit Report Rule does not apply to credit scores and consumers do not have a general right to a free credit score under the FCRA. Instead, the FCRA provides consumers a right to purchase a credit score from consumer reporting agencies and to obtain a free credit score in specified circumstances, such as when they apply for certain home loans. In addition, under the Risk-Based Pricing Rules which take effect on January 1, 2011, creditors can provide a free credit score, along with information about that score, to all consumers, instead of providing risk-based pricing notices to specific consumers. Finally, the Consumer Financial Protection Act of 2010 will allow consumers turned down for credit or offered less favorable terms because of their credit report or score to get a free credit score disclosure with their adverse action notice. The FTC oversees compliance with all of these FCRA requirements for entities under its jurisdiction to ensure that consumers are able to obtain their credit scores as required by law.

Q7. In April 2010, the FTC launched "Admongo," an online video game where kids explore a virtual world filled with commercial messages to teach them to think critically about advertisements.

- **What was the cost of developing Admongo?**
- **How does the FTC plan to evaluate the program's effectiveness?**
- **Are there ongoing costs associated with operating the online game?**

A7. The Federal Trade Commission has developed an interactive campaign to give kids the skills they need to understand how advertising works and to interpret the information that ads contain. The campaign, targeted to tweens (kids ages 8 to 12), is based on the website Admongo.gov, which teaches core ad literacy concepts and critical thinking skills through game play. Other elements of the campaign include in-school lesson plans, developed in cooperation with Scholastic, Inc., that are tied to state standards of learning for grades 5-6; sample ads that can be used at home and in the classroom; and teacher training videos.

Advertising literacy funding was approved for up to $2.2 million per year for up to four years; the full amount was budgeted in the first year, hut two subsequent years have seen funding set at $2 million. Through June 2010, at the end of the second year of funding,

the cost of creating the website, all related lesson plans and materials, and the promotion of the site was approximately $4.2 million. The ongoing costs to operate the game will include FTC staff time, web hosting fees, and occasional technical support from experts in web programming, as needed. The amount of money involved should be minimal.

Plans are underway now to evaluate the effectiveness of Admongo. FTC staff are initiating the Paperwork Reduction Act (PRA) approval process to conduct a study of student and teacher use of campaign resources. This will supplement the ongoing feedback we receive from teachers via the mailbox at admongo@ftc.gov and through conferences and meetings.

Q8. The FTC anticipates reaching 200 million numbers on the Do Not Call List by this summer.

- **Has the FTC received complaints about unwanted text messages? Does the FTC need specific authority to create a "Do Not Text" list or can it bar messages under the Do Not Call List?**

A8. Since January 1, 2010, the Commission has received approximately 1,300 consumer complaints that primarily concern text messaging practices, including unsolicited text messages. In addition, approximately 5,600 of the more than one million Do Not Call complaints received during this period mention text messaging and may relate to unsolicited text messages. Including both groups, the total number of complaints concerning text messaging practices represents less than one percent of all complaints received by the Commission since the start of the year.

The Commission has not taken the position that sending an unsolicited text message violates the Telemarketing Sales Rule, which prohibits initiating an "outbound telephone call" to a person whose telephone number has been entered on the National Do Not Call Registry ("DNC Registry"). Moreover, it is not clear whether the rulemaking authority provided to the Commission under the Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act"),[1] which was the basis for the DNC Registry, extends to text messages.[2]

[1] Pub. L. No. 103-297, 108 Stat. 1545 (1994). The Act defines telemarketing to mean "a plan, program, or campaign which is conducted to induce purchases of goods or services by use of one or more telephones and which involves more than one interstate telephone call." Telemarketing and Consumer Fraud and Abuse Prevention Act, § 7, Pub. L. No. 103-297, 108 Stat. 1545 (1994).

[2] The Commission could seek to promulgate a rule establishing a "Do Not Text" registry under the rulemaking procedures of Section 18 of the Federal Trade Commission Act. Section 18 would be an impractical tool for addressing a Do Not Text registry, however, as it

The question whether a text message may fall within the provisions of the Telemarketing Act is muddied, among other reasons, by the facts that text messages typically lack an audio component, and that their dissemination can take many forms.[3] Although some unsolicited text messages are sent from one phone to another, others are sent over the Internet to an email address that has been automatically assigned to the subscriber's account by his or her mobile carrier.[4] For these reasons, the FTC's authority under the Telemarketing Act to address text messages is uncertain.[5]

Some tools already exist that may minimize concerns about unsolicited text messages. Unlike telephone calls, text messages are not covered under common carrier regulations and therefore can be filtered by mobile carriers, which state that they block hundreds of

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includes numerous burdensome and time-consuming requirements that typically have required from three to ten years to complete. *See* Prepared Statement of the Federal Trade Commission on "Consumer Credit and Debit: The Role of the Federal Trade Commission in Protecting the Public" before the House Comm. on Energy and Commerce, Suhcomm. on Commerce, Energy, and Consumer Protection at 21–23 (Mar. 24, 2009), *available at* http://www.ftc.gov/os/2009/03/P064814consumercreditdebt.pdf.

[3] The Commission has previously considered the limitations of its authority under the Telemarketing Act. For example, when creating the Telemarketing Sales Rule ("TSR"), the Commission considered a definition of "telemarketing" that would have covered campaigns involving fax machines, modems, or "any other telephonic medium." This was rejected, however, upon the Commission's conclusion that a narrower definition would "follow[] more closely the statutory definition set forth by Congress in the Telemarketing Act." 60 Fed. Reg. 30411 (June 8, 1995). Instead, the statutory definition of telemarketing was incorporated almost verbatim into the TSR.

[4] Because an effective "Do Not Text" registry might involve the collection of email addresses, the creation of such a registry would raise a number of the same concerns the Commission highlighted in its report to Congress regarding a National Do Not Email Registry. Federal Trade Commission, Report to Congress, *National Do Not Email Registry* (June 2004) (detailing security and privacy concerns, including the likelihood that an email registry would be misused hy spammers, thereby increasing rather than reducing the volume of spam emails).

[5] We note that the Federal Communications Commission has asserted that a text message is a "call" within the meaning of the Telephone Consumer Protection Act ("TCPA"), and thereby concluded that the TCPA prohibits the use of an automated dialer to send commercial text messages to a cellular telephone number without the prior consent of the recipient. *See* Federal Communications Commission, Rule and Regulations Implementing the Telephone Consumer Protection Act of 1991, 69 Fed. Reg. 55765, 55767 (Sept. 16, 2004). The FCC's interpretation of the TCPA, however, does not resolve the separate issue of the FTC's authority under the Telemarketing Act.

millions of unsolicited messages every month.[6] Consumers can also work with many carriers to block text messages entirely or just those messages from a particular unwanted source.[7] In addition, consumers who have received certain types of unsolicited text messages may seek damages through a private right of action under the Telephone Consumer Protection Act.[8]

Moreover, to the extent the sending of unsolicited text messages is an unfair or deceptive practice, Section 5 of the Federal Trade Commission Act provides the agency with a flexible tool for addressing commercial practices that are unfair or deceptive. The Commission has pursued a vigorous law enforcement program against unfair or deceptive unsolicited commercial messages in a variety of contexts[9] and will continue to bring the same resolve to the issue as more of this activity migrates to the arena of text messaging.

In short, while the DNC Registry has proven to be extremely effective in curbing unwanted telemarketing calls, it is not clear at this point that adopting a similar program for unsolicited text messages would be advisable. However, should the Congress determine that a Do Not Text registry would help consumers, we will be happy to assist you with legislative language.

Questions for the Record From Senator Frank R. Lautenberg

Q1. Manufacturers and retailers of electronic cigarettes (e-cigarettes) claim that they are safe, and even that these products can help smokers quit traditional smoking. However, there have been no clinical studies to prove these products are effective in helping smokers quit, nor have any studies verified the safety of these products or their long-term health effects. The World Health Organization (WHO) has stated that it has no scientific evidence to confirm the products' safety and efficacy.

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[6] Federal Trade Commission, Staff Report, *Beyond Voice: Mapping the Mobile Marketplace* (Apr. 2009).

[7] *Id.*

[8] *See, e.g., Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946 (9th Cir. 2009).

[9] *E.g., FTC v. Spear Systems, Inc.*, No. 07-5597 (N.D. Ill. 2007) ($3.7 million judgment obtained against key players in an international spam ring); *United States v. ValueClick, Inc.*, No. 08-1711 (C.D. Cal. 2008) ($2.9 million civil penalty).

- **What is the FTC doing to police health claims made in e-cigarette advertisements?**

A1. Electronic cigarettes are battery-powered devices that usually contain cartridges filled with nicotine and other chemicals. The devices are designed to convert the nicotine and other chemicals into a vapor to be inhaled by the user.

Electronic cigarettes are currently the subject of federal court litigation, stemming from the Food and Drug Administration's ("FDA") detention of certain of these products at ports of entry to the United States. Specifically, upon reviewing a number of electronic cigarettes, FDA determined that they qualified as both a drug and device under the Federal Food, Drug, and Cosmetic Act ("FDCA"), and that agency approval was therefore needed before the products could be marketed in the United States. Because such approval had not been obtained, FDA determined that their sale would violate the FDCA and denied them entry into the country.

In April 2009, a lawsuit challenging FDA's jurisdiction over electronic cigarettes was filed in federal district court. In January 2010, the district court granted the plaintiff's motion for a preliminary injunction enjoining FDA from detaining or refusing admission into the United States of the plaintiff's electronic cigarette products on the ground that those products are unapproved drugs, devices, or drug-device combinations. *Smoking Everywhere, Inc., v. FDA,* 680 F. Supp. 2d 62 (D.D.C. 2010). The Department of Health and Human Services and the Food and Drug Administration appealed the court's order, and oral argument before the U.S. Court of Appeals for the D.C. Circuit is scheduled for September 2010.

Under the FTC Act, the Commission has jurisdiction over deceptive or unfair claims made in the marketing of most products, including electronic cigarettes, and the Commission has a strong record of exercising its enforcement authority to protect the health and safety of consumers. If the district court's ruling that FDA lacks jurisdiction over electronic cigarettes is sustained on appeal, FTC monitoring of the marketing claims made for these products would be appropriate. However, if FDA's assertion of jurisdiction over electronic cigarettes is ultimately upheld by the courts, sale (and, therefore, marketing) of these products will be prohibited pending agency approval under the FDCA.

Q2. In 2003, the FTC recommended that the alcohol industry abide by a voluntary standard that required alcohol advertisements to be placed only in media in which at least seventy percent of the audience for each advertisement consisted of adults 21 and over. Since then, several reports have indicated that youth exposure to alcohol advertising is increasing.

Despite the reported increase in youth exposure to advertising, the FTC's 2008 report entitled "Self-Regulation in the Alcohol Industry" did not increase the advertising standard. I am concerned that the report based this conclusion on premises that are not supported by research or the public health community, or are contradictory to previous statements by the Commission.

- **Will you commit to reviewing the FTC's 2008 report, the process by which it was created, and any contradictions between the premises upon which the Commission relied and its earlier statements and those of the public health community?**

- **How will you evaluate whether the industry should increase its advertising standards to reduce advertising exposure to those who are not legally permitted to purchase alcohol?**

A2. Underage drinking is a critical public health issue, contributing to risky behavior, injury, and an intolerable 5,000 deaths per year. Fortunately, reliable data show long-term, gradual declines in underage drinking. According to the Monitoring the Future survey, past 30-day alcohol use by 8th, 10th, and 12th graders, combined, has fallen by 27 percent over the past 14 years.[10]

Nonetheless, too many teens still drink. Federal, state, and local governments all play a role in reducing teen drinking. The FTC is a member of the Interagency Coordinating Committee to Prevent Underage Drinking. We have particular responsibility over alcohol marketing, and also engage in consumer education designed to help reduce teen access to alcohol, as further described below.

The FTC addresses issues related to underage appeal of alcohol ads by pressing for effective industry self-regulation, through studies and ongoing monitoring. Our 2008 Alcohol Report evaluated industry compliance with the 70% standard. It showed that 92.5% of ads placed during the study period complied with the 70% placement standard, and that when all audiences for all ads were aggregated, more than 85% of the audience consisted of adults 21 and older.

The 2008 Alcohol Report made a number of recommendations for improvement of the industry's voluntary standards. Among other things, it announced that industry had

[10] Johnston, L.D., et al., *Monitoring the Future National Results on Adolescent Drug Use: Overview of Key Findings, 2009* (NIH Publication No. 10-7583), Table 3.

agreed to adopt a 70% standard, with buying guidelines, for Internet advertising; it recommended that the beer and wine industries apply a 70% standard to sports sponsorships (the spirits industry already had done so); it recommended application of the 70% standard to product placements in movies; and it recommended that industry consider the need to maintain an 85% aggregate audience composition when making placements. Although it did not recommend an immediate change in the baseline standard, the 2008 Alcohol Report placed the industry on notice that it will be necessary to do so when the 2010 census data are released.

Since 2008, the Commission has continued to press for additional changes in the self-regulatory standards. The staff has advised the industry that the baseline placement standard should he raised to 75%. Additionally, the staff has advised industry members that ads on sites that have registered users, such as Facebook, MySpace, and YouTube, should be delivered *only* to persons who have registered as being 21 and older.

This January, the Commission will begin the process of seeking Office of Management and Budget approval, under the Paperwork Reduction Act, to conduct another major study of alcohol marketing and self-regulation.[11] The study will evaluate the advertising practices of the major alcohol suppliers and consider the appropriateness of the placement standard. In the course of this study, the Commission will review the FTC's 2008 Alcohol Report, the process by which it was created, and the other issues you raise. Our analysis will be based on the record as a whole, including but not limited to public health concerns, any comments received during the study, the available placement data, and the potential costs and benefits of a modified standard.

The Commission also knows that education is an important consumer protection tool. Data show that most teens who drink alcohol obtain it from social sources, such as older family members and friends. Accordingly, we developed a consumer education program to help parents protect their children from alcohol-related harm. The message of the "We Don't Serve Teens" ("WDST") program is, "Don't Serve Alcohol to Teens. It's unsafe. It's illegal. It's irresponsible." Components of the WDST program include a website, www.DontServeTeens.gov; radio ads; and signs. WDST signage is used nationwide by alcohol retailers, police departments, schools, and mental health organizations.

[11] OMB approval under the PRA is required in cases where the Commission sends identical information requests to ten or more entities. *See* 44 U.S.C. § 3502.

Attachment for Sen. Durbin's question 2:

Brief summary of the FTC's primary areas of coordination with various federal agencies:

FDA: concurrent jurisdiction with respect to labeling and marketing of foods, OTC drugs, and devices; under a Memorandum of Agreement the FDA has primary responsibility for overseeing product labeling and the FTC has primary responsibility for non-label advertising; the agencies cooperate closely and frequently.

FCC: (1) broadly concurrent jurisdiction with respect to telemarketing; the agencies consulted on rulemaking, developed consistent rules; coordinate on enforcement; (2) concurrent jurisdiction with respect to advertising in broadcast media; under a liaison agreement the FTC has primary responsible for unfair or deceptive advertising in media and provides that the FCC will take false and misleading advertising into account in licensing and other decisions; in this and other areas, the agencies consult and coordinate as applicable.

DOJ: nearly complete concurrent jurisdiction on antitrust matters; under a clearance agreement the agencies determine which one will examine any particular matter; FTC issues premerger review rules with DOJ concurrence; the agencies cooperate closely on these and other issues.

EPA: concurrent jurisdiction with respect to unfair or deceptive practices involving the environment, *e.g.*, pesticides; the agencies consult and coordinate on scientific issues, such as those involved in the FTC Green Guides and business education and in amending the FTC Care Labeling Rule, and on enforcement as applicable.

SEC: concurrent jurisdiction with respect to unfair or deceptive practices involving securities and investment advice; FTC generally defers to SEC where securities expertise is needed; agencies coordinate on enforcement as applicable.

CFTC: some concurrent jurisdiction with respect to unfair or deceptive practices involving commodities futures; agencies consult as applicable, such as in the FTC's petroleum market manipulation rulemaking.

Postal Service/DOJ: concurrent jurisdiction with respect to mail fraud; agencies cooperate closely on enforcement, sometimes including parallel investigations and criminal referrals.

BATF: concurrent jurisdiction with respect to unfair or deceptive practices involving alcohol, tobacco, and firearms; agencies consult on matters as applicable.

CPSC: some concurrent jurisdiction with respect to unfair or deceptive practices involving product safety; agencies consult and coordinate on enforcement as applicable.

Depository institution regulators: parallel jurisdiction, and limited concurrent jurisdiction, with respect to unfair or deceptive practices and a number of consumer financial laws; agencies consult on rulemaking, and some has been conducted jointly or in coordination; agencies consult or coordinate on enforcement as applicable.

The new Consumer Finaucial Protection Bureau: concurrent jurisdiction with respect to some financial practices and entities; the statute provides for consultation and coordination on rulemaking, enforcement, and other matters.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Chairman

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Leahy:

I am pleased to respond to the written questions from Members of the Committee on the Judiciary, following up on my June 9, 2010 testimony before the Subcommittee on Antitrust, Competition Policy and Consumer Rights on "Oversight of the Enforcement of the Antitrust Laws."[1]

Questions from the Honorable Herb Kohl

Question 1: From time to time, we hear calls that the old rules of antitrust don't apply to the so-called "new economy," especially with respect to high-tech industries. Some argue that antitrust law is outmoded and retards innovation. Supporters of antitrust enforcement, on the other hand, argue that antitrust has proven time and again to be just as crucial to competition today as yesterday. They argue that antitrust principles remain sound, and are flexible enough to take into account conditions in new industries. What's your view? Are the concerns of those in the high tech industry regarding what they view as overzealous antitrust enforcement chilling innovation warranted? Do new high tech industries require a different framework of antitrust enforcement or are the existing antitrust doctrines sufficient?

Answer 1: The antitrust laws have the flexibility to be applied in all industries and in all market settings, including "high tech" industries and markets. The antitrust statutes themselves simply set out standards, for example, prohibitions against unreasonable restraints of trade, anticompetitive conduct leading to monopoly, and acquisitions that may substantially lessen competition. These general prohibitions are applied only after fact-intensive investigation tailored to the particular characteristics of the markets implicated by the conduct being assessed, whether the markets are in industries of long standing or new and high tech. The Commission

[1] As with my responses to the Committee's questions at the hearing, these answers present my personal views and do not necessarily represent the views of the Federal Trade Commission or of any other Commissioner.

has been in the forefront in considering the application of the antitrust laws to high tech industries. Among other activities, the Commission, under former Chairman Pitofsky, held a series of workshops that carefully assessed the applicability of antitrust principles to new industries.[2] The resulting report concluded that high tech industries do not require a different antitrust enforcement framework. Nor have I seen any evidence that antitrust enforcement in high tech industries has been "overzealous" or chilled innovation. To the contrary, antitrust enforcement recognizes the importance of and seeks to promote innovation.

Question 2: Google has attracted increased antitrust scrutiny in recent years. It has grown to become a dominant player in Internet search and Internet search advertising. For a majority of consumers the key point of access to the Internet is to perform a Google search. This gives Google enormous power over the entire Internet economy. Some commentators are concerned whether Google searches are truly neutral, and there have been accusations that Google's search algorithm favors its own e-commerce sites as well as Google's other niche sites and services. Is there a basis for the Antitrust Division and FTC to ensure "search neutrality" under antitrust law, especially considering the massive amount of information and multi-billion dollars of e-commerce that flow through the Internet? Or should we just trust Google's promise to operate a purely neutral search engine? More generally, how will you scrutinize allegations of anti-competitive behavior by Google in the Internet sector in the future?

Answer 2: We are aware of allegations regarding Google's search algorithm. Although I cannot comment on any specific allegations, I want to assure you that because of the importance of the Internet, the Commission has devoted considerable resources to both competition and consumer protection issues raised in Internet-related industries. With regard to search engine neutrality and Internet advertising in particular, the Commission recently investigated two proposed mergers involving Google, *Google/DoubleClick*[3] and *Google/AdMob*.[4] In each instance, after intensive investigation, the Commission closed its investigation after concluding that the facts ascertained by staff did not provide reason to believe that the transaction would be likely to injure competition.

Internet-related markets evolve quickly, so we continue to closely monitor this sector, and we will investigate any circumstances that threaten competitive harm and take enforcement action as appropriate.

Question 3: We've also recently heard concerns expressed about Apple, and its growing share of mobile devices such as the IPhone and IPad. Apple is now placing new requirements on

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[2] Anticipating the 21st Century: Competition Policy in the New High-Tech, Glohal Marketplace (May 1996).

[3] Statement of the Federal Trade Commission Concerning Google/DoubleClick, FTC File No. 071-0170 (Dec. 20, 2007), *available at* http://www.ftc.gov/os/caselist/0710170/071220statement.pdf.

[4] Statement of the Federal Trade Commission Concerning Google/AdMob, FTC File No. 101-0031 (May 21, 2010), *available at* http://www.ftc.gov/os/closings/100521google-admobstmt.pdf.

applications developers for these developers that restrict the use of tools which allow developers to write apps to different devices. To some these restrictions resemble the conduct that Microsoft engaged in during the 1990s to exclude competitors from its platform. Do you have any concerns about the competitive implications of Apple's new restrictions on applications developers?

Answer 3: Consumers have come to depend on mobile devices to meet their communication and other needs, thus competition in mobile device markets is very important for consumers. Although I cannot comment on any specific allegations, I can assure you that the FTC recognizes the great importance of competition in these markets, and will carefully examine any credible allegations of exclusionary conduct that harm these markets.

Question 4: One issue that has long concerned us on the Antitrust Subcommittee is the state of competition in the cable and pay TV industry. Each year for the last decade and a half, consumers have suffered from continual annual cable rate increases at a rate of nearly triple the rate of inflation. These rate increases are occurring when the prices consumers pay for most other telecommunications services – such as local phone service and Internet access – has hardly increased at all. Are these cable TV rate increases a "red flag" showing us that there is a failure of competition in the cable TV industry?

Answer 4: Price increases alone are not necessarily indicative of a competitive problem. For example, during this period, cable offerings also have evolved, with number of channels, available services, and quality also often increasing. Moreover, basic cable rates are regulated by local franchising authorities. Further, while many consumers have access to only one cable provider, increasing competition from broadband video content providers increasingly offers consumers additional high-quality viewing options. In addition, the increasing availability of high-definition programming via broadcast TV has drawn some consumers back to broadcast TV. Certainly, if we see indications of anticompetitive mergers or conduct, we would vigorously pursue them.

Question 5(a): Recently we have been studying the emergence of video over the Internet. Millions of consumers now watch a wide variety of TV programming using broadband Internet connections. Some consumers – known as "cord cutters" – have dropped their pay TV subscriptions entirely and view TV programming over the Internet. The number of cord cutters today is estimated to be 800,000 and growing. Do you agree with me that video over the Internet has the possibility to develop into a strong competitive rival to traditional pay TV services such as cable and satellite? And how can antitrust enforcement ensure that competition flourishes and these new entrants are not stifled are retarded by the dominant pay TV players who might view this competition as a threat?

5(b): We have recently heard reports that cable companies were demanding that programmers keep programming off the Internet as a condition of the cable company carrying that programming. Programmers – who need cable distribution of their programming – have no choice but to comply. Does this concern you? And, more generally, would you be concerned by obstacles placed by pay TV companies to prevent Internet distribution of programming?

Answer 5: Consumers have choices for the delivery of their favorite programming – but for that to be most meaningful, programmers need access to those delivery vehicles so that they can reach consumers. Video over the Internet is emerging and may become an effective rival to cable and satellite television and other delivery systems. Enforcement of the antitrust laws will be an important means of ensuring that consumers have access to all of these technologies at competitive prices.

Although I cannot comment on any specific allegation, the FTC would be concerned about any situation in which a cable operator with market power threatened to deny or denied programmers access to its system as part of an effort to reduce the value of alternative delivery systems, and we would welcome additional specific information about any such conduct.

Question 6: During last February's Winter Olympics, NBC showed thousands of hours of Olympics events, much of it live, on its Internet Web site, NBCOlympics.com. But to view much of that content, a viewer first had to have a subscription to cable or satellite pay TV services. On February 27th, I wrote to NBC CEO Jeff Zucker stating "it is our view that video over the Internet has the potential to become a significant competitive alternative to traditional pay TV subscriptions, and it appears policies such as [NBC's] may have the effect of limiting the prospects of such competition."

> Does this type of policy of requiring consumers to purchase pay TV subscriptions in order to view programming on the Internet concern you? If widely adopted, could such policies prevent the Internet from being a true competitive alternative to traditional pay TV services?

Answer 6: The Internet supports a broad range of business models, and consumers can purchase premium content via many platforms, including over the Internet. Innovators with new technologies often charge premiums for access to those technologies, but that standing alone does not necessarily indicate that an antitrust law violation has occurred. In the absence of anticompetitive conduct, competition is likely to continue to push providers to reach consumers with new and exciting programming/platform.

Question 7: The Antitrust Division and the Federal Trade Commission share responsibility for government enforcement of the federal antitrust laws. Sometimes this leads to unfortunate conflicts regarding which agency will review a merger, what is known as the "clearance process." In some cases, the agencies take a long time, sometimes nearly the entire length of the thirty day pre-merger waiting period, to decide which one will investigate a merger. This unnecessarily delays resolution of the merger investigation, and imposes unnecessary burdens on the merging parties.

> What are your agencies doing to resolve clearance disputes in a more effective way? Are you, as the Antitrust Modernization Commission suggested in 2007, developing a new merger clearance agreement, or do you believe Congress should act in this area, revising the Hart-Scott-Rodino Act to require more effective resolution of clearance disputes?

Answer 7: The vast majority of matters resolved through the clearance process are handled in a

timely and efficient manner and, to the best of my knowledge, concerns about clearance problems by the antitrust defense bar appear to be a thing of the past. In most instances, one or the other agency will have the greater expertise in the industry of potential concern, and clearance is quickly given to that agency. Nevertheless, the agencies continue to work to update clearance procedures and policies to be more efficient and effective. For example, the agencies have reduced the layers of review to which a contested matter is subjected. As a result of this and other reforms, matters are more readily resolved without resource-intensive high-level review, and remaining contested matters are brought to the ultimate decision-makers more quickly and efficiently.

There is always room for improvement, of course. We are in discussions with DOJ to further streamline clearance procedures by eliminating those that have proven ineffective, and to implement improvements to reduce disagreements and delays even further. We believe that procedural improvements to the Clearance Agreement are best implemented through such negotiations, rather than through statutory means.

Question 8: In April, the Justice Department and FTC jointly published for public comment a comprehensive revision of the Horizontal Merger Guidelines, a document that guides the agencies in reviewing mergers, and guides private parties in determining whether and how to structure mergers so that they are more likely to pass government scrutiny. Among other things, the proposed new Guidelines downplay the focus on market shares, concentration, and market definition. The proposed new Guidelines also increase the HHI thresholds – a measure of market share -- that might suggest a merger could be problematic, and omit the reference to a two-year standard for "timely" entry into a market.

> Do these revisions signal a change in enforcement policy at the agencies? Should merging companies and the lawyers who advise them now feel as if there is an even larger safe harbor in merger enforcement?

Answer 8: The proposed revised Guidelines that we made public last April are still undergoing revision in response to public comments, thus the final product of this important effort to bring the Guidelines up to date is not yet available. However, I can assure you that the revised Guidelines will not signal a change in enforcement policy. The agencies' goal in revising the Guidelines is simply to make the Guidelines better reflect actual agency practice. The current Guidelines do not provide a "safe harbor" for mergers that may be likely to injure competition, and the revised Guidelines similarly will not provide any such safe harbor. We dropped the two year standard because some judges saw it as a virtual safe harbor.

Question 9: The proposed revised Horizontal Merger Guidelines released in April states that "these Guidelines reflect the Congressional intent that merger enforcement should interdict competitive problems in their incipiency and that certainty about anticompetitive effect is seldom possible and not required for a merger to be illegal." Should these Guidelines be adopted, how will you interpret them so that they address competitive problems "in their incipiency"?

Answer 9: The Guidelines have always reflected the Congressional intent that competitive problems be addressed in their incipiency, and the revised Guidelines will continue to reflect that

intent. Mergers that likely will injure competition should be prevented or undone without waiting for competitive harm to be fully realized. Indeed, the agencies devote substantial resources to preventing the consummation of mergers that may substantially injure competition, even though that competitive harm may occur at some time in the future.

Question 10: Recent events have highlighted the importance of technology companies acting responsibly to ensure the privacy of users. Among other things, breaches of user privacy surrounding the collection of wi-fi data have generated a lot of interest from regulators around the world. One alternative to address this issue is through regulation, hut some believe that competition policy and assuring a competitive market is preferable to regulation as a mechanism to address some or all of these concerns. Competition in these markets can incentivize firms to compete more on privacy protections. Does the FTC consider whether the lack of adequate privacy protections is a symptom of a lack of competition in search or other online markets? Is this something you can address?

Answer 10: The FTC previously has noted that competition and consumer protection policies reinforce one another with respect to securing personal privacy.[5] The quality of seller privacy protections may influence consumer choice among competing products and services. As a result, sellers may be induced to compete in tailoring their privacy practices to satisfy, and thereby attract and retain, consumers. Consequently, anticompetitive conduct could in some instances reduce sellers' incentives to maintain or enhance privacy protections. In investigating potential anticompetitive conduct, we are alert to that possibility.

Online privacy has been one of the agency's highest consumer protection priorities for more than a decade. Our primary tool to protect consumer privacy online is enforcement: we have initiated almost 30 law enforcement cases challenging business practices that failed to adequately secure consumers' personal information. We also educate consumers and businesses about privacy and online security, and promote privacy and security initiatives here and abroad. Over the past nine months, the FTC hosted a series of roundtables on privacy[6] with a wide variety of stakeholders, and we plan to publish privacy proposals later this year for public comment.

Question 11: Some competition advocates believe that consolidation in the retail sector has led to monopsony or oligopsony buying power among food retailers, and that this in turn drives concentration in the meatpacking and food processing sectors. What is your view? Do you believe retailer concentration and buying power may be playing a role in driving the consolidation of agricultural markets? And, if you believe this is a concern, is there anything antitrust enforcement agencies can do to make the retail market more competitive?

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[5] FTC Comment Before the Department of Commerce National Telecommunications and Information Administration Concerning Information Privacy and Innovation in the Internet Economy (June 2010), availahle at http://www.ftc.gov/os/2010/06/100623ntiacomments.pdf

[6] More information about the Privacy Roundtables can be found at http://www.ftc.govlbcp/workshops/privacyroundtables/ .

Answer 11: The FTC has taken numerous actions to ensure that consolidation in the food retail sector does not create or facilitate the use of market power, for example by preventing or undoing supermarket mergers that are likely to injure competition. In 2007, for example, we sued to block Whole Foods' acquisition of Wild Oats, its competitor in premium natural and organic supermarket markets. Ultimately we obtained divestitures of stores and intellectual property to maintain competition in this sector. The FTC has also taken numerous enforcement actions to preserve competition in a variety of food and beverage manufacturing markets.

The FTC has not studied consolidation in agricultural markets. We note that the Antitrust Division of the Department of Justice and the Department of Agriculture are holding public workshops to explore competition issues affecting these markets, including questions relating to buyer power (monopsony). We will carefully assess any new information pertaining to food retailers and manufacturers and take action as appropriate to protect competition in these industries.

Question 12: As you know, for many years the Antitrust Subcommittee has investigated the activities of hospital group purchasing organizations (GPOs) over allegations that their contracting practices exclude competitive medical device manufacturers from the hospital supply market. Although many of the nation's largest GPOs agreed to issue voluntary codes of conduct intended to forbid anti-competitive business practices, the Subcommittee continues to receive allegations from device manufacturers alleging that anti-competitive practices continue. More than 15 years ago, the FTC and Justice Department promulgated joint Health Care Guidelines enacted an "antitrust safety zone" protecting from governmental antitrust scrutiny much GPO conduct in Statement 7 of these Guidelines. Some believe that this "antitrust safety zone" should he re-examined and perhaps repealed. What is your view? Will you commit to reviewing the antitrust safety zone in light of current market conditions?

Answer 12: The FTC and the Department of Justice reviewed the antitrust safety zone set forth in Statement 7 during hearings convened in 2003. The agencies' 2004 report, *Improving Health Care: A Dose of Competition,* explains that this safety zone does not shield anticompetitive contracting practices by GPOs; rather, the safety zone addresses only *the formation* of joint purchasing arrangement among health care providers.[7] With regard to the conduct of a GPO, the report expressly states that Statement 7 "does not preclude Agency action challenging anticompetitive conduct – such as anticompetitive contracting practices – that happens to occur in connection with GPOs." Any such practices, the report explains, will be assessed on a case-by-case basis.[8] Thus, the safety zone does not in any way preclude antitrust enforcement against anticompetitive conduct by GPOs, and we continue to monitor this, and other aspects of health care markets, to prevent injury to competition.

We are considering a workshop on GPOs next year at which these issues can be revisited.

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[7] Report by the Federal Trade Commission and the Department of Justice, *Improving Health Care: A Dose of Competition* (2004) at IV:46, available at http://www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf.

[8] *Id.*

Questions from the Honorable Russell D. Feingold

Question 1: Many companies seeking approval of a merger argue that delay in approving the merger will result in jobs being lost. Do you think this is a legitimate concern? In your experience, don't most mergers, especially between competing companies, result in lay-offs in the short to medium term?

Answer 1: Antitrust analysis of proposed mergers focuses on the likelihood that adverse price, quality, or other effects in a relevant market may arise if the merger goes forward. Employment concerns typically are outside of the scope of antitrust review. As you suggest, employment reductions may be a short-term consequence of any given merger; however, I know of no evidence supporting the contention that the length of the merger review process results in lost jobs. The Commission adheres closely to the deadlines imposed for premerger review by Congress in the Hart-Scott-Rodino Act, and at all times the agency performs its review as expeditiously as practical. We certainly have a very good record in deciding merger review cases in a timely manner.

Question 2: The Department of Justice recently reached a settlement that allowed the Ticketmaster and Live Nation merger to go forward. The settlement contains conditions that prohibit retaliation, forbid anticompetitive bundling, establish ticketing firewalls, and permit portability of customer information. Does the FTC also have a role in ensuring that the company is living up to these terms? Are there dedicated staff at the FTC that are focused on this issue and improving competition in the ticketing and concert industry? Are you aware of any claims of retaliation or anticompetitive behavior following the settlement?

Answer 2: The Department of Justice, rather than the FTC, is authorized to enforce the final judgment against Ticketmaster, including the provisions designed to promote competition after its merger with Live Nation. If the FTC were to obtain information suggesting that Ticketmaster was violating the terms of the final judgment, FTC staff would pass that information on to the Antitrust Division, as we do with all other information that we believe that the Department of Justice should review.

The FTC has, however, issued its own order against Ticketmaster to settle charges that Ticketmaster and its affiliates used deceptive bait-and-switch tactics to sell event tickets to consumers. Ticketmaster has agreed to pay refunds to consumers who bought tickets for 14 Bruce Springsteen concerts in 2009 through its ticket resale Web site TicketsNow.com, and has also agreed to other order provisions designed to protect consumers. For example, the order prohibits Ticketmaster from failing to disclose that a consumer is being redirected to a resale Web site or that the tickets on the resale Web site often exceed the original ticket price, and from misrepresenting the status of tickets on a resale Web site (i.e., if the ticket is in-hand and ready for delivery or whether the reseller is making an offer to procure the ticket for the consumer). The FTC will take action to enforce this order if needed, and to protect consumers in the ticketing and concert market against unfair or deceptive acts and practices. To that end, FTC staff has sent warning letters to a number of other ticket resale companies discussing the Ticketmaster settlement and the FTC's concerns about specific ticketing practices. In the letter the FTC strongly recommends "that you review your own company's Web site to ensure that

you are not making any misleading statements or failing to provide material information to prospective purchasers of tickets listed on your site."

Question 3: Over the past several years, there has been significant controversy over the potential for Internet providers to prioritize their own or an affiliated company's content. This concern about "net neutrality" has led the FCC to propose some open Internet principles and issue a notice of proposed rulemaking. To what degree can the FTC using the antitrust laws also constrain this kind of discriminatory behavior? Is the FTC looking at this issue?

Answer 3: The FTC has long been interested in the privacy and content policies of Internet service providers. In 2006, the FTC set up an Internet Access Task Force to develop guiding principles for our consumer protection and competition work in this area.

When FTC staff completed its report, *Broadband Connectivity Competition Policy* in 2007, I agreed with the bulk of the analysis, but highlighted two continuing concerns.[9] The first is that a broadband provider with monopoly power in a local market might use that power to block or degrade some applications or content, and that a 'rule of reason' antitrust analysis would prove to be inadequate for stopping this type of conduct after the fact. My second concern is that broadband providers, as 'gatekeepers,' could impose unreasonably high prices for developers to reach customers with their new content – the very thing that makes the Internet such an exciting platform for consumers.

I still have those concerns about Internet access and discriminatory service. As long as there are areas in the country with only one or two choices for broadband Internet service, the FTC will be concerned about the freedom of consumers to access content they like and the freedom of content developers to reach those consumers with new and exciting content, and we will continue to be active in this area.

Questions from the Honorable Orrin G. Hatch (for both Chairman Leibowitz and Assistant Attorney General Varney)

Question 1: Today we expect hospitals and healthcare providers to work more closely to improve upon efficiency and quality in delivering healthcare and in doing so, lower the cost of care both to patients and to the federal government. However, according to many care providers, a lack of clarity in the administration and enforcement of our antitrust laws has created confusion that has prevented greater clinical integration.

In the 1990s, the FTC and the Justice Department produced the "Statement of Antitrust Enforcement Policy in Health Care" and, at that time, acknowledged that further

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[9] Concurring Statement of Commissioner Jon Leibowitz Regarding the Staff Report: "Broadband Connectivity Competition Policy," (June 27, 2007) *available at* http://www.ftc.gov/speeches/leibowitz/V070000statement.pdf

guidance would be necessary as health care continued to evolve. More than a decade has passed and providers are still waiting on that further guidance so that they can more effectively collaborate to improve the delivery and provide a real reduction in health care costs.

Do you intend to produce user-friendly guidance on clinical integration? If so, is there an expected timetable? If not, can you please explain why not?

Answer 1: We appreciate the desire for further guidance on clinical integration. I have met with the American Medical Association and the American Hospital Association to hear their views, and FTC staff is continuing to discuss issues surrounding antitrust and clinical integration with various interested parties and to explore ways in which we might expand and improve our existing guidance. As I recently announced in a speech to the American Medical Association, the FTC will convene a puhlic workshop this fall to address antitrust policy as it relates to new models for delivering high quality, cost-effective health care. This workshop will examine arrangements known as "accountable care organizations," which will involve clinical integration among providers of care.[10]

Let me emphasize that our existing guidance concerning antitrust analysis and clinical integration is by no means limited to the 1996 *Statements of Antitrust Enforcement Policy in Health Care*. Since the Statements were issued, the FTC has provided further guidance in several other forms, including four advisory opinions, a 2004 report following public hearings, and a 2008 workshop, as well as various speeches by agency staff.[11] In addition, Commission statements in connection with various antitrust enforcement actions also address how the FTC

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[10] http://www.ftc.gov/speeches/leibowitz/100614amaspeech.pdf.

[11] *See, e.g.*, Letter from Jeffrey W. Brennan, Assistant Director, Bureau of Competition, Federal Trade Commission, to John J. Miles (February 19, 2002) (MedSouth, Inc.) (available at http://www.ftc.gov/bc/adops/medsouth.htm); letter from David R. Pender, Acting Assistant Director, Bureau of Competition, to Clifton E. Johnson (March 28, 2006) (Suburban Health Organization), available at http://www.ftc.gov/os/2006/03/SuburbanHealthOrganizationStaffAdvisoryOpinion 03282006.pdf); Letter from Markus H. Meier, Assistant Director, Bureau of Competition, Federal Trade Commission, to Christi J. Braun and John J. Miles (September 17, 2007) (Greater Rochester Independent Practice Association, Inc.) (available at http://www.ftc.gov/bc/adops/gripa.pdf); Letter from Markus H. Meier, Assistant Director, Bureau of Competition, Federal Trade Commission, to Christi J. Braun (April 13, 2009) (TriState Health Partners, Inc.) (available at http://www.ftc.gov/os/closings/staff/090413tristateaoletter.pdf); Report by the Federal Trade Commission and the Department of Justice, *Improving Health Care: A Dose of Competition* (2004) at II:36-41, available at http://www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf. ; *Clinical Integration in Health Care: A Check-Up* (May 29, 2008), available at http://www.ftc.gov/bc/healthcare/checkup/.

considers clinical integration claims by parties.[12] We will continue to explore additional ways in which we can provide useful guidance regarding clinical integration and will work with the Department of Justice as we consider these issues.

Question 2: As you may know, I have had a keen interest in our domestic and international intellectual property laws. On May 26th, the FTC, the Department of Justice, and the Patent and Trademark Office held a workshop to discuss the interface between antitrust, intellectual property, and standards. This week, at the Organization for Economic Co-operation and Development meetings, it is my understanding that the member nations will examine many of these same issues. Further, the World Intellectual Property Organization recently held a workshop on this same subject matter and has plans to continue to explore them going forward.

Given the emphasis the U.S. government has placed on protecting intellectual property rights around the world, and given the challenges we face in China and other countries where foreign governments have been known to try to force outside innovators – including American innovators – to transfer their intellectual property on non-commercial terms, how are you managing the dialogue on these critical issues at home and abroad? For example, when U.S. antitrust officials make statements that "patent hold ups" and "royalty stacking" are widespread problems without citing empirical evidence, doesn't this invite or provide cover to foreign governments to use their own antitrust laws and remedies to restrict intellectual property rights, potentially disadvantage American inventors and innovators – not to mention American jobs – and ultimately undermine U.S. efforts to get foreign governments to protect intellectual property rights?

Answer 2: The FTC has consistently highlighted the importance of strong intellectual property protection in working with foreign jurisdictions. The 2007 joint FTC-Department of Justice Report on "Antitrust Enforcement and Intellectual Property Rights" ("2007 IP Report"), widely cited in speeches to foreign audiences, emphasizes, at page 1 and in later discussion, that the intellectual property laws share with the antitrust laws "the same fundamental goals of enhancing consumer welfare and promoting innovation."[13] This positive portrayal of intellectual property rights is echoed in later papers presented by the FTC and the Justice Department to the Competition Committee of the OECD. For example, the agencies' 2010 OECD Submission explained that "the collaborative standard setting process can produce substantial benefits" and that "competition that centers on a particular standard may be very socially beneficial and this reflects the general nature of standard setting in the United States" (paragraph 9). While acknowledging the possibility of after-the-fact "hold ups" by firms engaging in anticompetitive manipulation of standard setting, that submission described in detail "policy guidance [provided by the FTC and the Justice Department] *to the private sector* regarding actions firms engaged in standard setting might take *ex ante* to avoid competitive problems associated with hold ups" (paragraph 25). The agencies will continue to stress the importance of strong intellectual

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[12] *See, e.g., In re North Texas Specialty Physicians*, D. 9312 (November 29, 2005), http://www.ftc.gov/os/adjpro/d9312/index.htm, *aff'd sub nom. North Texas Specialty Physicians v. FTC*, 528 F.3d 346 (5th Cir.2008).

[13] *Available at* http://www.justice.gov/atr/public/hearing/ip/222655.pdf.

property rights protection in presentations overseas.

Question 3: The Internet has obviously become a core part of the nation's infrastructure, driving growth, innovation, and information flow. I am interested in learning more about any concerns your agencies have with regard to any potential anti-competitive activity online. During the past few years, we've seen multiple investigations into the search and online advertising markets. As you know, the online search market is continually becoming the primary navigation tool for online consumers and an important channel for the distribution of content and information. Obviously, there are very few significant competitors in this market. Many have argued that this will have a negative impact on consumers.

> What, in your view, is the state of competition in these markets? Are you concerned with anything that you are seeing in terms of anti-competitive activity or dominant players that could harm competition online? What do you think the focus of policy-makers should be in order to preserve competition and limit barriers to entry of the online markets?

Answer 3: The Commission scrutinizes conduct in dynamic, fast-paced markets with the same level of antitrust scrutiny as conduct in other markets, taking into account changing facts that can occur during the course of the investigation. For instance, the Commission recently completed a six-month investigation of Google's acquisition of AdMob.[14] The Commission noted that Google and AdMob currently compete in this market, and that the competition has spurred innovation and benefitted both consumers and mobile publishers who create new applications and content delivered over mobile devices. But the Commission also observed that due to the recent launch of its iAd service, Apple is poised to become a strong competitor in the mobile advertising market, and that a number of other firms appear to be developing or acquiring smartphone platforms to better compete against Apple's iPhone and Google's Android. After assessing all the evidence, the Commission did not challenge the acquisition, but committed to continue to monitor the mobile marketplace to ensure a competitive environment and protect consumers.

The Commission also investigated a range of competitive issues when Google purchased DoubleClick in 2007, examining both horizontal and vertical theories of harm raised by the deal. Although we concluded that the acquisition was unlikely to harm competition, I issued a concurring statement noting that the merger presented important and complex questions about potentially anticompetitive vertical behavior by Google.[15] That statement reflects my more general concerns about Internet services and related markets, and the Commission will continue to actively monitor those markets carefully, using the traditional core antitrust concepts of preventing/remedying collusive anticompetitive behavior, exclusionary conduct, and mergers that substantially lessen competition.

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[14] Statement of the Federal Trade Commission Concerning Google/AdMob, May 21, 2010, available at http://www.ftc.gov/os/closings/100521google-admobstmt.pdf_

[15] Concurring Statement of Commission Jon Leibowitz concerning Google/DoubleClick, December 20, 2007, available at http://www.ftc.gov/os/caselist/0710170/071220leib.pdf

Questions from the Honorable Charles E. Grassley

Question 1: In 2005, I joined Senators Rockefeller and Leahy in requesting that the Federal Trade Commission look into the practice of authorized generics. We asked that the Federal Trade Commission study the impact of authorized generics on competition in the drug market and on the price of drugs, as well as on the viability of the generic drug industry. We still have not received the FTC findings on this important matter.

1(a): What is the status of this study?

1(b): When can we expect to receive the study and any recommendations you may have on this issue?

Answer 1: Although many factors contributed to the delay of our Report, including delays in OMB approving subpoenas, I share your concern about the unacceptable delay. Shortly after I became Chairman, in June 2009, the Commission released an interim report, presenting the first set of results from our study of the effects of authorized generic ("AG") drugs on competition in the prescription drug marketplace.[16] The Interim Report provides factual information and economic analysis of the short-term effects of AGs on competition during the 180 days of marketing exclusivity that a generic may be awarded in certain circumstances under the Hatch-Waxman Act. Our initial analysis suggests that consumers benefit, and the healthcare system saves money, during the 180-day exclusivity period when an AG enters the market, because additional competition from the AG leads to greater discounting by the generic. Additionally, the data indicate that AG entry significantly decreases the revenues of a first-filer generic company during its 180-day exclusivity period.

The FTC staff is continuing to perform an extensive analysis of data relevant to the long-term competitive effects of AGs. The agency hopes to complete its analysis and issue a final report as soon as possible.

Question 2: As you are well aware, Senator Kohl and I have been concerned about settlement agreements between brand name and generic drug manufacturers that result in a payment to the generic manufacturer and a delay in market entry of the generic drug. These "pay for delay" or "reverse payment" agreements result in consumers having to pay higher costs for their drugs. We have introduced a bill, the Preserve Access to Affordable Generics Act (S. 369), that would help put a stop to these anti-competitive agreements and ensure that lower priced generic drugs enter the market as soon as possible.

2(a): Do you agree that these "pay for delay" agreements harm consumers?

2(b): Are these kinds of agreements still a problem?

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[16] "Authorized Generics: An Interim Report," FTC Report (June 2009), *available at* http://www.ftc.gov/os/2009/06/P062105authorizedgenericsreport.pdf.

2(c): Do you believe that the Kohl/Grassley legislation would help preserve generic drug competition and ensure that more affordable drugs get to consumers as soon as possible?

Answer 2: Absolutely. Agreements in which brand drug companies pay generic drug companies to delay market entry of generic drug products deprive consumers of the ability to choose lower cost medications – often for many years – and impose enormous costs on consumers. FTC economists analyzed data from settlements reported to the FTC during FY 2004-2008 and calculated, using conservative assumptions, that pay-for-delay patent litigation settlements cost drug purchasers roughly $3.5 billion a year.[17]

Entry into these agreements have become a common industry strategy. FTC staff's analysis of settlements of Hatch-Waxman patent litigation shows a steady increase in the number of agreements containing both a restriction on market entry by the generic drug maker and compensation from the branded drug firm to the generic drug company – from zero in FY 2004 to 19 in FY 2009.[18] These agreements currently protect at least $20 billion in sales of branded drugs from generic competition.

By declaring that pay-for-delay arrangements are presumed illegal and requiring clear and convincing evidence to overcome that presumption, the Kohl/Grassley bill should help to deter drug companies from entering into anticompetitive patent settlements. I greatly appreciate the work that members of the Judiciary Committee have done to advance this legislation and hope that the Senate will approve it this year.

Questions from the Honorable John Cornyn

Question 1: Are there any cases that the FTC has brought under the other provisions of Antitrust law over the past decade that could not have been brought under Section 5?

Answer 1: No, all Commission non-merger antitrust cases are brought under Section 5 of the FTC Act because the Commission does not have authority to enforce the Sherman Act.[19] However, any conduct that violates Sherman Act principles also violates Section 5.[20] Most Commission nonmerger antitrust cases, though filed under Section 5 of the FTC Act, allege conduct that would violate either Section 1 or Section 2 of the Sherman Act, and rely on Sherman Act principles and precedent.

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[17] Federal Trade Commission Staff, *Pay for Delay: How Drug Company Pay-Offs Cost Consumers Billions* (January 2010) at 8-10.

[18] *Id.* at 1.

[19] In merger cases, the FTC brings actions under Section 7 of the Clayton Act.

[20] *See* FTC v. Indiana Federation of Dentists, 476 U.S. 447, 454 (1986) (Section 5 "encompass[es] . . . practices that violate the Sherman Act and the other antitrust laws").

Question 2; If Section 5 exists to reach conduct beyond that conduct prohibited by other provisions of Antitrust law, would the FTC ever bring a case under Section 5 alone?

Answer 2: As you know, Congress enacted Section 5 to be broader than the antitrust laws; that is to reach anticompetitive conduct that is outside the ambit of the other antitrust laws, and the Commission has brought several cases under Section 5 in recent years against conduct that would not have violated the Sherman Act. For example, over the past twenty years the Commission has investigated at least seven situations in which one firm invited a competitor to join it in an illegal price-fixing agreement. These "invitations to collude" did not technically violate the Sherman Act, because the Sherman Act does not prohibit unsuccessful attempts to collude.[21] So the short answer to your question is: yes.

Question 3: Has the FTC brought any cases over the past decade under the other provisions of Antitrust law that, in your view, should have alleged a violation of Section 5 but did not?

Answer 3: As noted above, all of our cases are brought under Section 5. There are, however, some cases that I believe should have been reached by Section 5 theory, even though the conduct challenged might have been deemed lawful under the Sherman Act. This situation may arise where there has been clearly anticompetitive conduct and consumer harm, but where there is also a potential weakness in a primary Sherman Act theory. A prominent recent case of this sort was the Commission's case against *Rambus*.[22]

The *Rambus* case involved a technology firm that allegedly deceived a standard-setting organization about the patents it held, with the result that the organization unwittingly adopted a technical standard that exposed the entire industry to demands for patent royalties. The FTC complaint alleged three violations – monopolization, attempted monopolization, and unfair methods of competition. However, FTC staff only litigated the Sherman Act principles during the trial before the administrative law judge. I disagreed with that omission, and wrote a separate concurrence to point out the benefits of expanding the theory of liability to include unfair methods of competition for future actions.[23] Eventually the D.C. Circuit reversed the Commission's finding of monopolization and held that Rambus's conduct, even if deceptive, did not diminish competition.[24] I do not agree with that conclusion and reasoning but, in any event, I believe that this undesirable outcome could have been averted if the Commission had challenged Rambus's deceptive conduct solely as a form of unfair competition without restricting itself to proving each of the Sherman Act elements.

Question 4: Are there any cases that the FTC did not bring over the past decade on the grounds

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[21] *See* U-Haul International. The case documents are available at http://www.ftc.gov/opa/2010/06/uhaul.shtm. *See also* Valassis Communications (FTC Dkt. No. C-4160) (Mar. 14, 2006); Quality Trailer Products Corp., 115 F.T.C. 944, 945 (1992).

[22] Rambus, Inc., Dkt. No. 9302 (Aug. 2, 2006).

[23] *Available at* http://www.ftc.gov/os/adjpro/d9302/060802rambusconcurringopinionofcommissionerleibowitz.pdf.

[24] Rambus v. FTC, 522 F.3d 456 (D.C. Cir. 2008).

that the alleged conduct involved did not violate other provisions of Antitrust law, but that could have been brought under Section 5?

Answer 4: I am not aware of any case in which the Commission's investigations uncovered conduct that we believed to be anticompetitive where we refrained from bringing a case because the conduct would have violated Section 5 but not any other provision of the antitrust laws.

Question 5: What objective criteria are used by the FTC to determine whether or not to file suit under Section 5?

Answer 5: The Supreme Court has described the general criteria for an action under Section 5.[25] Although it has long been confirmed that Section 5's bar on unfair methods of competition extends beyond the reach of the Sherman and Clayton Act, cases under Section 5 also would involve harm to competition.

Section 5 cases would look to factors considered by courts in assessing Sherman Act cases such as the likelihood of anticompetitive harm and the potential for procompetitive efficiencies. The Commission has held a public workshop to discuss the standards and applications of Section 5.[26] We are planning to issue a report on the workshop with our conclusions and supply further guidance through that vehicle.

Question 6: Will the FTC consider issuing Section 5 guidelines so that companies can conform their conduct to Section 5's requirements?

Answer 6: As noted above, the Commission has held a public workshop to discuss the standards and applications of Section 5. We are planning to issue a report on the workshop with our conclusions, and that report will certainly provide additional guidance to companies seeking to conform their conduct to the law. But importantly, substantial guidance is available now, including the case law listed in my response to the previous question and statements hy various Commissioners, such as my own concurrence in *Rambus,* as well as the floor debate from the FTC Act in 1914[27] and, most importantly, the plain language of the statute ("unfair methods of competition").

Question 7: Has any Commissioner argued that Section 2 was insufficient to reach Intel's alleged conduct?

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[25] FTC v. Indiana Federation of Dentists, 476 U.S. 447, 454 (1986).

[26] *See* "Section 5 of the FTC Act as a Competition Statute," *available at* http://www.ftc.gov/bc/workshops?section5/index.shtml.

[27] The legislative history of the FTC Act clearly shows that Section 5 was not enacted merely to mirror the Sherman Act. Rather, as Senator Cummins, one of the bill's main proponents, squarely stated on the Senate floor; "[t]hat is the only purpose of Section 5 – to make some things punishable, to prevent some things, that can not be punished or prevented under the antitrust law." 51 CONG. REC. 12,454 (1914).

Answer 7: Because a complaint has been issued in *Intel*, I will confine my response here to statements that are already a part of the public record.[28] At the time of the complaint, Commissioner Rosch and I issued a joint explanatory statement, which discussed our views of the Section 5 counts and their relationship to other antitrust principles in the following terms:

> Despite the long history of Section 5, until recently the Commission has not pursued free-standing unfair method of competition claims outside of the most well accepted areas, partly because the antitrust laws themselves have in the past proved flexible and capable of reaching most anticompetitive conduct. However, concern over class actions, treble damages awards, and costly jury trials have caused many courts in recent decades to limit the reach of antitrust. The result has been that some conduct harmful to consumers may be given a "free pass" under antitrust jurisprudence, not because the conduct is benign but out of a fear that the harm might be outweighed by the collateral consequences created by private enforcement. For this reason, we have seen an increasing amount of potentially anticompetitive conduct that is not easily reached under the antitrust laws, and it is more important than ever that the Commission actively consider whether it may be appropriate to exercise its full Congressional authority under Section 5. It has been understood for many years that Section 5 extends beyond the borders of the antitrust laws, and its broad reach is beyond dispute. Indeed, that broad authority is woven into the very framework of the Commission itself. When Congress passed the Federal Trade Commission Act in 1914, it specifically decided to create an agency that has broad jurisdiction to stop unfair methods of competition, and it balanced that broad authority by limiting the remedies available to the Commission.[29]

Thus, we did not express an opinion on the application of the two statutes, but did express a belief that it would be appropriate to consider both.

Question 8: You mentioned an alleged agreement between U-Haul and Budget to fix prices as an example of the sort of conduct that requires the FTC to exercise its Section 5 power. If there were an agreement to fix prices, why couldn't the other provisions of antitrust law reach that alleged behavior?

Answer 8: Our complaint and consent with U-Haul illustrates the value of Section 5, because it addressed conduct that was an *invitation* to collude, as distinct from an actual completed collusive agreement.[30] Had U-Haul and Budget actually agreed to fix prices, that would have violated the Sherman Act, as you suggest.

Question 9: While I recognize that this hearing is about antitrust enforcement, not privacy, I am interested in your views on whether there is a possible nexus between a company having

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[28] The Intel matter has been withdrawn from the Commission Part III calendar for consideration of a settlement.

[29] Available at http://www.ftc.gov/os/adjpro/d9341/091216intelchairstatement.pdf.

[30] *See* http://www.ftc.gov/opa/2010/06/uhaulshtm#content.

dominant market power in search and related Internet markets and the appropriate level of scrutiny that such a company's privacy policies should receive. Those who oppose privacy legislation often argue that we should rely on the market to gauge the right level of online privacy and correct missteps in individual cases. But if a company has dominant market power, it could arguably adopt abusive privacy policies without a meaningful market check. Does the Commission believe that distinct privacy oversight might be necessary for dominant firms on the Internet? Does the Commission believe it has the necessary legal authority to engage in such oversight?

Answer 9: Firms can compete over a number of areas that are important to consumers, including both price and nonprice factors. One area of rivalry could be over privacy, and a monopolist would not face that competition. The Commission would certainly take that into consideration. Under the FTC Act, the Commission guards against unfairness and deception by enforcing companies' privacy promises about how they collect, use, and secure consumers' personal information. Under the Gramm-Leach-Bliley Act, the Commission has implemented rules concerning financial privacy notices and the administrative, technical, and physical safeguarding of personal information, and it aggressively enforces the law to prevent pretexting. The Commission also protects consumer privacy under the Fair Credit Reporting Act and the Children's Online Privacy Protection Act. In addition, the FTC uses education and outreach as cost-effective methods to prevent consumer injury, increase business compliance, and leverage its law enforcement program.

Although large or dominant firms have the same obligations as other firms to safeguard consumer privacy, large and dominant firms are likely to attract public attention more often because of the scope of their businesses, and their leadership will be needed to establish policies that protect consumers online. The Commission has moved to encourage best practices from them. For instance, BCP Director David Vladeck recently sent a letter to Google[31] addressing privacy concerns related to Google's plans to digitize millions of books. The letter requested that Google disclose how it will use the personal information it collects when it offers books online and delivers targeted advertising to consumers. In addition, it urges Google to commit to complying with the FTC's self-regulatory principles for online behavioral advertising.[32] This initiative is an example of how the Commission is focusing on this important issue.

Question 10: You testified that so-called "pay-for-delay" settlements are the FTC's "top competition priority" and that they are "on all counts [] a bad outcome." Wouldn't you agree that, at least in some cases, these settlements can lead to a generic drug being available on the market sooner than if the lawsuit had not settled and the brand pharmaceutical company's patent were upheld in court? In cases in which the brand pharmaceutical company would ultimately prevail in the patent litigation, don't the settlements benefit consumers by accelerating entry of generic drug competition into the market before the expiration date of the patent?

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[31] Letter to Jane Horvath, Global Privacy Counsel, Google, Inc., dated September 2, 2009, available at http://www.ftc.gov/os/closings/090903horvathletter.pdf

[32] *FTC Staff Revises Online Behavioral Advertising Principles,* news release dated February 12, 2009 available at http://www.ftc.gov/opa/2009/02/behavad.shtm

Answer 10: We frequently hear claims from the pharmaceutical industry that brand payments to induce generic drug firms to abandon their patent challenges result in earlier generic entry, so I appreciate the opportunity to address the question you raise. First, that claim assumes that the patent holder would ultimately have prevailed in the infringement suit. But it is widely acknowledged that pay-for-delay settlements are most likely to be used to protect the weakest patents (that is, those patents most likely not to be upheld).[33] Second, it assumes that the parties would only settle if the brand paid off the generic. But the evidence shows that parties can and do find ways to settle without exclusion payments.

Moreover, even assuming that a given pay-for-delay settlement enables the settling generic producer to enter the market earlier than it otherwise would have, consumer welfare is not necessarily enhanced. For example, pay-for-delay settlements with so-called "first filer" generic applicants – by far the most common scenario – typically obstruct entry by subsequent generic applicants, including applicants that may have stronger patent claims than the first filer. This result occurs because the Hatch-Waxman Act grants the first generic company to seek FDA approval under "paragraph IV" 180 days of marketing exclusivity, i.e. the first filer is the only generic in the market for 180 days. A first filer usually keeps this exclusivity even when it settles, which means that other generic applicants cannot obtain FDA approval to enter the market until 180 days after the first filer begins selling its product. If the first filer litigates and loses the patent infringement litigation, however, it loses its claim to the 180-day exclusivity period. The first filer's loss thus clears the way for other generics, because the FDA is no longer prevented from giving final approval to other generic applicants seeking to compete.

Qnestion 11: Given the FTC's poor record in litigation challenging patent settlements between brand and generic pharmaceutical companies, and given that the FTC appears to believe that a change in the law is necessary in order to prevail in these lawsuits more frequently, do you think that it is an efficient use of the Commission's limited resources to make these suits the Commission's "top competition priority"?

Answer 11: Challenging pay-for delay settlements is a Commission priority for two reasons: First, the Commission, along with many others, believes that the permissive approach to pay-for-delay settlements taken by some courts is incorrect, and despite setbacks in three circuit courts of appeals, antitrust law in this area is far from settled. Indeed, in one of these circuits, a panel of judges recently invited the plaintiffs to request the full court to reconsider the permissive rule

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[33] Indeed, courts upholding the legality of such settlements have expressly noted this fact. *See, e.g., In re Tamoxifen Citrate Antitrust Litigation*, 466 F.3d 187, 212 (2d Cir. 2006) (acknowledging that permitting settlements in which branded and generic rivals agree to avoid competition and share the resulting profits would protect patents that are "fatally weak"); *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 363 F. Supp. 2d 514, 534 (E.D.N.Y. 2005) ("the patents most likely to be the subject of exclusion payments would be precisely those patents that have the most questionable validity").

adopted in an earlier case.[34] Second, these deals impose enormous costs on consumers – and on the federal government and others who pay the costs of prescription drugs. In its most recent analysis, CBO calculated that stopping these anticompetitive deals will save the federal government approximately $2.68 billion over 10 years. A recent FTC staff report noted that, if not stopped, pay-for-delay deals will, conservatively, cost consumers $3.5 billion a year.[35]

A legislative solution to the problem of pay-for-delay settlements could provide quicker and more comprehensive relief for consumers than antitrust litigation. I therefore look forward to working with the Congress to stop these harmful deals. But in the meantime, the FTC has an obligation to pursue investigations and litigation to protect consumers from conduct that is both anticompetitive and extremely costly to consumers.

Let me also take issue with the notion that we have a "poor record." In fact, in addition to the Second Circuit's extraordinary step of questioning its own standard in the *Tamoxifen* case referenced above, in March 2010, a federal district court judge in Philadelphia denied a defense motion to dismiss the Commission's case against Cephalon

Question 12: The proposed revised Merger Guidelines and the FTC's new emphasis on Section 5 both appear to increase the FTC's discretion to apply its own judgment that behavior is anticompetitive, unconstrained by the objective limits of settled antitrust law. Do you agree that, in general, the FTC's limited enforcement resources are better spent aggressively pursuing violations of settled antitrust law rather than pushing for extensions of the law?

Answer 12: The proposed revised Guidelines that we made public last April are still undergoing revision in response to public comments, so the final product of this important effort to bring the Guidelines up to date is not yet available. Nonetheless, I want to emphasize that the final product will not signal a change in enforcement policy. The agencies' goal in bringing the Guidelines up to date is simply to make the Guidelines better reflect actual agency practice. In this regard, actual agency merger enforcement practice has always focused on, and will continue to focus on, those mergers that are likely to harm consumers. This is the same focus found in the case law. An objective of the revised Guidelines is to make clear that, in our enforcement deliberation, specific, pertinent facts developed during a merger review – not a rigid "check the box" analysis – will govern our assessment. The new Guidelines will not promote unbounded agency discretion, instead we must conclude, based on thorough analysis of all relevant facts, that a merger may substantially lessen competition before we will challenge a transaction.

Similarly, Section 5 actions – which are appealable to a Circuit Court of Appeals and ultimately to the Supreme Court – must be predicated on a finding of anticompetitive harm. The Commission is careful to bring cases based on sound economic and legal reasoning. As noted above, the Commission is planning to issue a report that will provide additional guidance on

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[34] *Arkansas Carpenters Health and Welfare Fund v. Bayer AG*, 604 F.3d 98, 110 (2d Cir. 2010) (per curiam) ("we believe there are compelling reasons to revisit *Tamoxifen*").

[35] Pay-for-Delay: How Drug Company Pay-Offs Cost Consumers Billions, FTC Staff Study (Jan. 2010), *available at* www.ftc.gov/os/2010/01/100112payfordelayrpt.pdf.

when it will bring a Section 5 case.

Question 13: Are the Antitrust Division and the FTC concerned about the potential ability of companies with market power in the Internet search market to use that market power to steer consumers toward their own products or favored products in other markets, or otherwise to foreclose competition?

Answer 13: The FTC staff is aware of such allegations, but I cannot comment on any specific allegations at this time. However, I can assure you that because of the importance of the Internet and Internet advertising, the Commission has devoted considerable resources to both competition and consumer protection issues raised by Internet-related industries. For example, FTC staff wrote extensively about them – including "net neutrality" – in the wake of our Broadhand Competition workshop on this topic in 2007.[36] And the Commission and its staff have continued to follow these issues as Internet markets, and our understanding of them, have evolved. And with regard to search engine neutrality and Internet advertising in particular, the Commission recently investigated two proposed mergers involving Google, *Google/DoubleClick*[37] and *Google/AdMob*.[38] In each instance, after intensive investigation, the Commission closed its investigation after concluding that the facts uncovered did not provide reason to believe that the transaction would be likely to injure competition.

Internet-related markets evolve quickly, so we continue to closely monitor this sector, and we will investigate any circumstances that threaten competitive harm and take enforcement action as appropriate.

Qnestion 14: It seems that both the Antitrust Division and the FTC have played a role in investigating transactions and activities in the Search and Search Advertising markets. The FTC has looked at Google acquisitions of DoubleClick, YouTube, and AdMob, along with the overlapping director issue, while the DOJ has examined the Google/Yahoo and Microsoft/Yahoo deals, as well as the proposed settlement of the Google Books litigation. How have the Antitrust Division and the FTC addressed clearance with respect to these investigations?

Answer 14: The agencies' clearance procedures are based on expertise in the product markets to be investigated. There are some markets, however, in which hoth agencies have relevant expertise and the clearance procedure seeks to allocate investigative responsibility for specific

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[36] *See, e.g.,* Broadband Connectivity Competition Policy, workshop web page *available at* http://www.ftc.gov/opp/workshops/broadband/index.shtml; FTC, Broadband Connectivity Competition Policy: FTC Staff Report (June 2007), *available at* http://www.ftc.gov/reports/broadband/v070000report.pdf.

[37] Statement of the Federal Trade Commission Concerning Google/DoubleClick, FTC File No. 071-0170 (Dec. 20, 2007), *available at* http://www.ftc.gov/os/caselist/0710170/071220statement.pdf.

[38] Statement of the Federal Trade Commission Concerning Google/AdMob, FTC File No. 101-0031 (May 21, 2010), *available at* http://www.ftc.gov/os/closings/100521google-admobstmt.pdf.

investigations. Both agencies have expertise in various Internet services markets, and thus it will not be uncommon for the agencies to investigate the activities of a single firm in different, but possibility adjacent, markets.

Question 15: There are reports that the European Commission may be investigating the state of competition in Internet search, search advertising, and related markets, and that numerous companies have raised concerns about a wide variety of issues. Are the Antitrust Division and the FTC coordinating their investigations of these issues with the European Commission?

Answer 15: The European Commission issued a press release on February 24, 2010, acknowledging that it had received and is examining three complaints against Google.[39] The FTC is aware of these complaints and FTC and EC staff have discussed issues raised by these complaints, as they did under the terms of the 1991 U.S-EC cooperation agreement during their respective investigations of Google's acquisition of DoubleClick in 2007-08. As provided in Article IV of that agreement, the FTC and the EC coordinate their respective investigations where it is appropriate and in their respective interests to do so.

Question 16: Wouldn't you agree that minimum resale price agreements can foster competition in at least some situations? For example, hypothesize a market for blue jeans that is robustly competitive with regard to price, quality, and prestige. In this market, there are both low price brands that compete primarily on price and prestige brands that compete primarily on prestige. If a new market entrant wanted to establish itself as a an option between the two poles of a bargain brand and a prestige brand, it could mandate, through resale price maintenance agreements with its retailers, that its jeans be sold at a price point at or above the median price in the market. If the new entrant's marketing strategy succeeds, then consumers would gain a new option. For some price-conscious consumers, the new entrant could provide a prestige brand that was within their budget. For some prestige-conscious consumers, the new entrant could provide a cheaper prestige brand. For all consumers, there would be more options and more competition in the blue jean market. Wouldn't this hypothetical new market entrant's marketing strategy be pro-competitive?

Answer 16: Economic research suggests that, under certain circumstances, resale price maintenance may enhance interbrand competition, and this hypothetical may he one of those instances. However, this is not the kind of scenario in which the FTC would likely bring a resale price maintenance case. I am not aware of any case in which the FTC challenged a new entrant's use of resale price maintenance to break into a market. Our cases tend to be focused on established manufacturers or retailers using resale price maintenance to facilitate collusive behavior. The Commission continues to believe that there may be circumstances in which RPM may raise prices and reduce choices for consumers.

Question 17: If, at least in some cases, a minimum resale price agreement can be pro-

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[39] (Press release available at: http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/10/47&format=HTML&aged=0&language=EN&guiLanguage=en).

competitive, then why isn't a rule of reason approach that evaluates the pro- and anti-competitive effects of a particular resale price maintenance agreement preferable to a per se rule that bans pro- and anti-competitive resale price maintenance agreements alike?

Answer 17: My concern is that resale price maintenance can also facilitate collusion at the manufacturing level, the retail level, or both. I agree with Justice Breyer's analysis of the relevant empirical evidence in his *Leegin* dissent, where he cites several studies, including an FTC Bureau of Economics Staff Report, showing that resale price maintenance tends to produce higher prices than would otherwise he the case.[40] Justice Breyer further states that although "economics can, and should, inform antitrust law, [ ] antitrust law cannot, and should not, precisely replicate economists' (sometimes conflicting) views."[41] I agree with that sentiment, and for these reasons believe that *Dr. Miles* should not have been overturned. I agree with you that, post *Leegin*, the current standard of bringing an RPM case cannot be one of *per se* illegality.

Question 18: Assistant Attorney General Varney has advocated a "structured rule of reason" for analyzing minimum resale price agreements. Do you support such an approach? Do you think such an approach is preferable to a per se rule? Why or why not?

Answer 18: As I stated above, I do not think the empirical evidence on resale price maintenance supported a change in the long standing *per se* law. However, the Commission, of course, follows the law as the Supreme Court has interpreted it. My response to the decision in *Leegin* is that we must apply any test carefully. AAG Varney's approach is one way to do so. In so doing, it is imperative that the analysis take great care to make sure that the facts actually and concretely support any contentions that a given exercise of RPM is made necessary by so-called "free rider" problems or is otherwise procompetitive, for example, because it promotes interbrand competition. I believe that the proper enforcement rule is generally to look closely at resale price maintenance arrangements unless the specific facts of a given matter compel a different conclusion.

Question 19: The ABA Section on Antitrust has published a comment criticizing the proposed changes to the merger guidelines. Specifically, the Antitrust Section is concerned that ""the Proposed Guidelines unduly downplay tbe role of market definition." I agree with this criticism.

> The Clayton Act targets mergers that substantially lessen competition "in any line of commerce or in any activity affecting commerce in any section of the country." I read this language as requiring that tbe merger affects a specific product or geographic market. The binding Supreme Court case *Brown Shoe v. US* held that anti-competitiveness "can be determined only in terms of the market affected."
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> **19(a):** If the agencies hope for a Clayton Act challenge to a merger to be upheld in court, must they not first define the market in which competition will be affected?

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[40] *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S.Ct. 2705, 2728 (2007).
[41] *Leegin* at 2729.

19(b): Do you agree with the ABA Section on Antitrust that "it would be more consistent...to make clear that market definition remains a necessary element of merger analysis"?

19(c): Can you commit to revising the proposed guidelines to require the definition of markets as a necessary step in merger analysis?

Answer 19: The ABA submission is generally supportive of the agencies' efforts to revise the guidelines. In terms of this specific issue, I do believe that market definition plays an important role in merger analysis. First, it specifies the line of commerce and the section of the country in which a competitive concern may arise. Second, market definition allows the agencies to identify market participants and measure market shares and market concentration, both of which can be useful in illuminating a merger's likely competitive effects. The determination of "likely competitive effects" remains the ultimate touchstone of any merger analysis, and at times the relevant market can he evidenced through careful assessment of those effects. For example, in looking at a consummated merger, anticompetitive effects may be directly observable from post-merger evidence, and the relevant market properly may be defined as the product (or service) and geographic area in which those anticompetitive effects are present. I expect that the revised Horizontal Merger Guidelines will clarify this. The agencies will take this and all other comments into careful consideration for the final guidelines.

Questiou 20: The 1992 Guidelines stated that the Antitrust Division and the FTC should begin analysis and evaluation of mergers by defining the relevant market. The Agencies would then, in the following order, examine: market concentration, potential competitive effects, possible entry, efficiencies, and, if relevant, the failing firm defense.

> This clearly defined and relatively objective framework functioned like a roadmap for businesses and antitrust practitioners, by which private actors could analyze their own conduct in the same manner in which the conduct would be analyzed by the agencies. The proposed revisions appear to dispense with this objective framework, allowing the agencies to holistically consider other "relevant factors" before defining the market and proceeding with a step-by-step analysis.
>
> I understand that the revised guidelines are intended to present a more accurate picture of the manner in which lawyers and economists in the agencies actually analyze mergers. And I understand that the subjective experience of analyzing a merger did not always necessarily conform to the formal structure of the 1992 guidelines. But I fear that by dispensing with the objective step-by-step analysis and replacing it with a relatively subjective holistic analysis of factors, the new guidelines make it more difficult for private actors to conform their behavior to comply with the agencies' interpretation of antitrust law. Do you agree? Why or why not? Can you commit to revising the proposed guidelines to encompass a more rigorous statement of the objective findings that an agency must make before challenging a merger?

Answer 20: The agencies have never followed a fixed, unbending order of analysis when reviewing mergers. As the FTC and DOJ explained in our 2006 Commentary on the Horizontal Merger Guidelines, "the Agencies do not apply the Guidelines as a linear, step-by-step progression that

invariably starts with market definition and ends with efficiencies or failing assets." Rather, "the Agencies' analysis of proposed mergers . . . is part of an integrated approach." This "integrated process is a tool that allows the Agency to answer the ultimate inquiry in merger analysis: whether the merger is likely to create or enhance market power or facilitate its exercise." Commentary at 2. There is a hroad consensus that the 1992 Guidelines have functioned well in assisting the antitrust bar and the husiness community to understand how the agencies evaluate mergers. I can assure you that a goal of any revisions to the Guidelines will be to maintain that high level of assistance, and that the rigorous analysis that the agencies historically have brought to bear in analysis of mergers is continuing and will continue following revision of the Guidelines.

QUESTIONS FROM CHAIRMAN GUTIERREZ

Q1. Mr. Vladeck, when the FTC issued its 2007 report on credit-based insurance scores and its impacts on consumers of automobile insurance, Commissioner Pamela Jones Harbour dissented from the report since she disagreed with the methodology yon used. The FTC is still in the process of gathering information for its long-overdue report on credit-based insnrance scores and its impacts on homeowners insurance. Have you taken steps to take into account the specific concerns of Commissioner Jones Harhour as yon prepare the report on homeowners insurance? Please explain.

A. Yes. According to staff from the FTC's Bureau of Economics, we have taken substantial steps to address Commissioner Harbour's concerns. It is my understanding that her primary concern with the 2007 report was that it relied, in large part, on a database of automobile insurance policies that had been submitted voluntarily by five anonymous insurance groups. In her dissent, Commissioner Harbour stated that the Commission should have chosen which insurance firms were to provide data and used its authority under section 6(b) of the FTC Act to compel those firms to provide data directly to the Commission. Others, including Congressmen Frank, Gutierrez, and Watt, expressed the same sentiment in a letter to then-Chairman Majoras. In the current study we addressed Commissioner Harbour's concerns by issuing 6(b) orders to compel the provision of data from the nine largest homeowners insurance groups. I believe this will also give others greater confidence in the current study as well. The insurance groups have provided information about all of their owner-occupied, single-family homeowners policies for a three year period directly to the Commission; this data will form the basis of the Commission's study of homeowners' insurance.

Q2. Please explain the difficulties the FTC has encountered with the insurance companies as in the process of gathering information for its report on homeowners insurance. Is the FTC satisfied with the extent and accnracy of the information collected from the insurance companies? Please describe the next steps the FTC will take in preparing this report and when we should expect the report to be completed.

A. It has taken some time to gather the data from the insurance companies because first, we needed to determine what information would be most useful for the study and second, we had to negotiate how the insurance groups would produce their data to the FTC. For a period of time, it appeared the FTC would have to take the insurance groups to court to compel compliance with the 6(b) orders, but fortunately we avoided court proceedings and the substantial delays that would have accompanied such proceedings. Also, there have been a few technical difficulties in the process of receiving information, but this is to be expected in an undertaking as large and complex as this one.

The FTC is using its 6(b) authority to compel the nine largest insurance groups to provide the data it needs for the study. After a period of notice and comment relating to what the Commission would require the insurance groups to produce under its 6(b) Orders, the Commission issued Orders to File Special a Special Report in December 2008. The Commission issued Subsequent Modified Orders in March 2009. The Modified Orders

addressed some technical issues with the original orders, including eliminating certain subsidiaries to some of the insurance companies that the Commission had not intended to cover with the initial orders. The Modified Orders also addressed concerns both the FTC and the insurance groups had about the amount of personally identifiable information (PII) that would he transmitted for the study. A large portion of the negotiations for producing data covered how the insurance groups and the FTC would protect consumers' PII. The Modified Orders codified that negotiated procedure.

As of Octoher 2009, all nine groups had suhmitted the data requested by the Orders, with the exception of the PII. This consists of detailed data on approximately 47 million policies and 15 million price quotations and applications. Commission staff have completed an initial review of the data to check for gross errors in the compilation or transmission of the data. The same staff are now undertaking a detailed analysis of the data for errors, inconsistencies, or other problems that would need to be addressed before the data can be used for analysis.

It will take several more months for the Commission staff to complete their review of the data and select a sample from the 47 million policies. The PII of the sample will then need to be transmitted to our contractors, who will match the PII to their databases and provide us with credit-based insurance scores, credit history information, and race, ethnicity, and other information. The FTC will then promptly analyze the data and prepare our report.

Q3. Some consnmer advocates – such as Mr. Evan Hendricks who testified at the March 24th hearing – have complained that the puhlic doesn't even know how many credit hureaus there are. They recommend that all credit reporting agencies, regardless of size, should register with the FTC and that the FTC should then publish an update a list [sic] of operating credit reporting agencies. Do you support this proposal?

A. The Commission has not taken a position on this proposal. I agree that, beyond the three nationwide credit bureaus, the public is not well-aware of what consumer reporting agencies (CRAs) exist. The Commission has brought enforcement actions against a numher of such "non-traditional" CRAs, in part to highlight the hreadth of entities covered by the FCRA. This is a question that we will continue to explore.

Q4. Even with recent rules providing for greater transparency and accuracy, are you satisfied that yonr agency has done enough to educate consnmers abont misleading ads like "FreeCreditReport.com" which appear to provide "free" credit reports when, in fact, they are not free if the consumer tries to obtain them through such sites?

A. Since the issuance of the Free Credit Report Rule, the FTC has made extensive efforts to address the proliferation of confusing advertising regarding where consumers can obtain their free annual credit reports. First, the Commission has released extensive consumer education materials on this subject. Second, the Commission has issued public warnings

about "imposter" sites that pose as the official free report site, AnnualCreditReport.com. Third, we have created videos that highlight the differences between the official site and other sites that claim to offer "free" reports. These videos are available at ftc.gov/freereports and on our YouTube channel.

In addition, the Commission's recent amendment to the Free Credit Report Rule will require prominent disclosures on all commercial offers of free credit reports designed to prevent consumers from confusing these "free" offers with the federally mandated free annual file disclosure available through the official site. This amendment should significantly help to educate consumers about their rights. Moreover, the FTC will monitor and evaluate the effectiveness of the disclosure required under the final Rule and will consider additional changes as necessary to ensure that the disclosure is prominent and understandable.

Finally, the FTC has brought enforcement actions to combat misleading advertisements related to free credit reports. The Commission will continue to scrutinize offers for free credit repots on a case-by-case basis to determine whether such offers are unfair or deceptive under section 5 of the FTC Act.

QUESTIONS FROM REP. CAROLYN MCCARTHY

Q. How will the rules being used in early summer, streamline the dispute process for consumers so that it is more efficient and timely?

A. Under the new Direct Dispute Rule, which will take effect on June 1, 2010, consumers will have the right to dispute information directly with the furnisher that provided that information to the CRA. Currently, the FCRA only gives them the right to dispute information with CRAs. Under the new Rule, once a furnisher receives a dispute from a consumer, the furnisher will have 30 days to complete the investigation and report the results back to the consumer. In many circumstances, this should be the quickest way to resolve a dispute, because the consumer can communicate information and any supporting documentation directly to the furnisher, and the furnisher will respond directly back to the consumer.

Q. Under current rules, when an individual is disputing an item, is there a code or anything else added to their credit file/report to indicate they are going through the dispute process, and if not, is this something that will he included in the new rules being issued?

A. If a consumer disputes information with a furnisher, the FCRA requires the furnisher to note the dispute when reporting that information to a CRA. The FCRA further requires the CRA that receives the information with the note of dispute to indicate on the consumer's report that the information is disputed. The future rules will not change either of these obligations.

QUESTION FROM REP. JACKIE SPEIER

Below is a follow up response in writing to the question asked by Representative Speier at page 108 of the transcript.
[the question was "To you, Mr. Vladeck, I do not think there is any teeth in the re-investigation requirements under the FACT Act or the original Act. Do you concur in that and if you do, what should we do to make sure re-investigation does take place?"]

A. I understand that some consumers may experience difficulties in disputing information on their credit reports and obtaining the right results. The FTC expects the Furnisher Rules, which take effect on July 1, 2010, will have a substantial impact on the ability of consumers to dispute information in their credit reports effectively. Consumers will have the ability to dispute information in their credit reports directly with furnisher, and will continue to be able to dispute information through the CRAs as well.

In addition, the Commission has taken several enforcement actions to ensure that CRAs and furnishers are complying with their accuracy and dispute-related responsibilities under the FCRA. For example, this past March, the Commission settled an action against a nationwide debt collector that, among other things, failed to investigate disputes referred by CRAs and failed to inform CRAs that consumers had disputed debts.

The Commission will continue to monitor the performance of the dispute process to explore possible improvements in the system and will bring law enforcement actions when warranted.

QUESTION FROM REP. KILROY

Below is a follow up response in writing to the question asked by Representative Kilroy
[the question was " When you take a look at the scoring systems that the various credit reporting agencies use in order to determine whether or not they are using a proxy that would have a discriminatory impact, have you taken a look at such issues as whether or not everyone in a particular Census track is penalized with their credit scores based on the number of foreclosures in the area, or looked at other kind of micro-targeting issues that a credit scoring company might utilize as many direct mail and other kind of marketers do? Even politicians use micro-targeting these days.]

A: I am not aware of any credit scoring models that use geographic information as described in your question.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

October 29, 2010

The Honorable Henry "Hank" C. Johnson, Jr.
Chairman
Subcommittee on Courts and Competition Policy
Committee on the Judiciary
United States House of Representatives
Washington, D.C. 20515

Dear Chairman Johnson:

Attached are the responses for the record from Mr. Richard Feinstein, Director, Bureau of Competition, from the September 16, 2010 hearing on "Competition in the Evolving Digital Marketplace."

Sincerely,

Donald S. Clark

Donald S. Clark
Secretary of the Commission

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

Questions submitted to Mr. Richard Feinstein, Director, Bureau of Competition, Federal Trade Commission, by Representative Charles A. Gonzalez, Member of the Subcommittee on Courts and Competition Policy.

1. Google recently confirmed reports that the office of Texas Attorney General Greg Abbott "is conducting an antitrust review of Google." The Associated Press reports that the Attorney General's office confirmed that there is an investigation "focused on whether Google is manipulating its search results to stifle competition." As Google executives concede, accusations of fairness in the order the site returns search results are nothing new. Indeed, they were repeated and disputed at our hearing.

a. Would the manipulation of Google's search results be a subject into which the Federal Trade Commission's Bureau of Competition should be looking? Would the fact that Google's search algorithms lie at the heart of the search engine have any effect on the nature of an FTC investigation or the potential remedies that might be sought if the commission should find evidence supporting the accusations?

Answer: We are aware of allegations regarding Google's search algorithm. Although I cannot comment on any specific allegations, I want to assure you that because of the importance of the Internet, the Commission has devoted considerable resources to both competition and consumer protection issues raised in Internet-related industries. With regard to search engine neutrality and Internet advertising in particular, the Commission recently investigated two proposed mergers involving Google (Google/DoubleClick and Google/AdMob.) In each instance, after intensive investigation, the Commission closed its investigation after concluding that the facts ascertained by staff did not provide reason to believe that the transaction would be likely to injure competition.

In general, the Commission would be concerned if there were evidence that a firm with market power acted to stifle competition from existing or emerging competitors. In some circumstances, such conduct can harm competition and consumers. For instance, last year, the Commission charged Intel Corporation, the world's leading chip maker, with using anticompetitive tactics to cut off rivals' access to the marketplace in violation of Section 5 of the FTC Act.[1] To settle those charges, Intel has agreed to stop (1) using certain pricing practices that could allow it to exclude competitors while maintaining high prices to consumers; (2) creating predatory designs that disadvantage competing products without providing a performance benefit to its product; and (3) employing deceptive tactics related to its product road maps, its compilers, and product benchmarking to distort the competitive dynamic and harm consumers.[2]

Internet-related markets evolve quickly and we will continue to monitor this sector so that we are able to act quickly if we find any circumstances that threaten competitive harm.

[1] "FTC Challenges Intel's Dominance of Worldwide Microprocessor Markets," news release dated December 16, 2009, *available at* http://www.ftc.gov/opa/2009/12/intel.shtm.

[2] Analysis to Aid Public Comment, In the Matter of Intel Corp, Dkt. No. 9341, *available at* http://www.ftc.gov/os/adjpro/d9341/100804intelanal.pdf.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

Questions submitted to Mr. Richard Feinstein, Director, Bureau of Competition, Federal Trade Commission, by Representative Gregg Harper, Member of the Subcommittee on Courts and Competition Policy.

1. In your opinion, what steps could the FTC take to promote a more competitive wireless device market?

Historically, the Antitrust Division has handled antitrust oversight of wireless device markets, so the Commission has not developed any particular expertise from which to assess the competitiveness of this market. However, as I discussed in my testimony before the Subcommittee, antitrust enforcement can be particularly important in markets subject to rapid technological change in order to encourage innovation, spur economic growth, and sweep away impediments to competition.

2. From the perspective of small and medium-sized wireless carrier or a new entrant to the wireless carrier market, what impact do exclusive device contracts have on the wireless device market?

The use of exclusive contracts by a firm with market power can violate the antitrust laws if the effect is to keep rivals out of the market or prevent new products from reaching consumers – for example, if such deals are used to lock-up a significant portion of the sales outlets or sources of supply that are necessary for competitors to offer their products. If the Commission becomes aware of this type of activity it will take steps to address it. It did so recently, when the Commission challenged the use of exclusive dealing contracts by Transitions Optical Inc., the leading supplier of photochromic lens treatments for eyeglasses.[1] According to the Commission, Transitions used its monopoly position to strong-arm key distributors into exclusive agreements, which had the effect of unfairly boxing out rivals so that they could not use these distributors. Transitions' exclusionary tactics kept rivals out of approximately 85 percent of the lens caster market, and partially or completely locked out rivals from up to 40 percent or more of the retailer and wholesale lab market. The Commission alleged that these practices violated Section 5 of the FTC Act. To settle these charges, Transitions agreed to limit its use of exclusive contracts, which should pave the way for new competitors to enter the market.

[1] "FTC Bars Transitions Optical, Inc. from Using Anticompetitive Tactics to Maintain its Monopoly in Darkening Treatments for Eyeglass Lenses," news release dated March 3, 2010, *available at* http://www.ftc.gov/opa/2010/03/optical.shtm.

In general, exclusive contracts are lawful when they improve competition among competing product lines and give consumers more or better choices. From the perspective of a wireless carrier, exclusive device contracts can be beneficial because they may ensure a steady supply of the device. Also, they may be important as a way to limit the risk of offering the product. For instance, the wireless carrier may need to invest in specialized service upgrades or marketing efforts to promote the new device, such as improved broadband capability, advertising, training for salespeople, an inventory of products on hand, or fast warranty service. These resources will likely be allocated to the development and promotion of the new device before the carrier knows what the consumer response will be; often, accordingly, carriers may attempt to enter into exclusive deals with the device maker to share some of these costs and help the carrier spread some of the risk of its investment -- which makes that investment more likely in the first place.

In addition, exclusive device contracts can make it less risky for a new manufacturer to enter a market or offer a new product or because the manufacturer knows that it has guaranteed sales outlets. The contracts often reduce contracting costs and the exclusivity may encourage dealers to promote the new product with consumers. So from the perspective of a company wanting to introduce a new wireless device, exclusive contracts can make new products more likely.

Finally, exclusive device contracts may result in lower purchase prices to consumers for new must-have devices. Typically, consumers are also required to sign up for the wireless service of the exclusive dealer for a certain amount of time. This arrangement has the effect of spreading the actual cost of the new device out over time. For example, if a manufacturer has decided that it wants to earn $100 in revenue for a new phone, it may offer the product for $50, but require that the customer sign up for 12 months of service, which will generate an additional $50 in revenue for the manufacturer. This may be better for the consumer than if the manufacturer just charged $100 up front with no service requirement.

Responses to Questions for the Record from U.S. Senator Mark Pryor
Legislative Hearing on S.3742, the Data Security and Breach Notification Act of 2010
September 22, 2010

Q. What is the risk that a data hreach poses to consumers in today's economy?

Data breaches pose many risks to consumers, including the risk of stalking, identity theft, or other unlawful practices such as fraud.[1] For certain kinds of information, such as health information, data breaches may also cause reputational harm. For companies, data breaches can cause consumers to lose confidence in them.

Q. Are consumers concerned about identity theft these days?

Yes. Unfortunately, identity theft remains a major concern for consumers. The Commission estimates that as many as 9 million Americans have their identities stolen each year. Indeed, the Commission has received more consumer complaints about identity theft than any other category of complaints every year since 2002.

Identity theft has serious repercussions for victims. While some identity theft victims can resolve their problems quickly, others spend hundreds of dollars and many days repairing damage to their good name and credit record. Some consumers victimized by identity theft may lose out on job opportunities, or be denied loans for education, housing, or cars because of negative information on their credit reports. In rare cases, they may even be arrested for crimes they did not commit.

Q. What is the average cost per incident of a data breach in the United States?

According to an annual study conducted by the Ponemon Institute, the average cost of a data breach to companies was $204 per compromised customer record in 2009. The study indicates that the average total cost to companies of a data breach incident rose from $6.65 million in 2008 to $6.75 million in 2009. These costs may include expenses for detection of the breach, engaging forensic experts, notification of consumers, free credit monitoring subscriptions, the economic impact of lost or diminished customer trust, and legal defense.[2]

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[1] There is limited data regarding the incidence of these harms. However, the FTC is aware that some identity theft is caused by data breaches. According to a survey conducted on behalf of the FTC in 2006, about 11 percent of identity theft victims reported that they knew their information was stolen from a company. *See* Federal Trade Commission, *2006 Identity Theft Survey Report* (Nov. 2007), *available at* http://www.ftc.gov/os/2007/11/SynovateFinalReportIDTheft2006.pdf.

[2] Ponemon Institute, *2009 Annual Study: Cost of a Data Breach* (Jan. 2010), *available at* http://www.ponemon.org/local/upload/fckjail/generalcontent/18/file/US_Ponemon_CODB_09_012209_sec.pdf.

Q. Do you believe that companies should be required to maintain appropriate safeguards protecting sensitive consumer data?

Yes. If companies do not maintain appropriate safeguards to protect the personal information they collect and store, that information could fall into the wrong hands, resulting in fraud and other harm, and consumers could lose confidence in the marketplace. Accordingly, the Commission has undertaken substantial efforts to promote data security in the private sector through law enforcement, education, and policy initiatives. For example, on the law enforcement front, the Commission has brought 29 enforcement actions since 2001 against businesses that fail to implement reasonable security measures to protect consumer data.

Q. What are the most necessary provisions of this legislation? Currently, how well are consumers protected against identity theft, fraud and other harm?

The Commission believes that several provisions of the legislation are important. First, the Commission supports the requirement that a broad array of entities implement reasonable security policies and procedures, including both commercial enterprises and nonprofits. Problems with data security and breaches affect businesses and nonprofit organizations alike. Thus, requiring that this broad array of entities have reasonable security policies and procedures is a goal that the Commission strongly supports.

Second, the Commission supports the breach notification provisions of the bill. Indeed, various states have already passed data breach notification laws which require entities to notify affected consumers in the event of a data breach. Notice to consumers may help them avoid or mitigate injury by allowing them to take appropriate protective actions, such as placing a fraud alert on their credit file or monitoring their accounts. In addition, breach notification laws have further increased public awareness of data security issues and related harms, as well as data security issues at specific companies.[3] Breach notification at the federal level would extend notification nationwide and accomplish similar goals.

Third, the Commission supports the legislation's robust enforcement provisions, which would (1) give the FTC the authority to obtain civil penalties for violations[4] and (2) give state

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[3] *See, e.g.*, Samuelson Law, Technology, & Public Policy Clinic, University of California-Berkeley School of Law, *Security Breach Notification Laws: Views from Chief Security Officers* (Dec. 2007), *available at* http://www.law.berkeley.edu/files/cso_study.pdf; Federal Trade Commission Report, *Security in Numbers: SSNs and ID Theft* (Dec. 2008), *available at* http://www.ftc.gov/os/2008/12/P075414ssnreport.pdf.

[4] This recommendation is consistent with prior Commission recommendations. *See* Prepared Statement of the Federal Trade Commission Before the S. Comm. on Commerce, Science, and Transportation, 109th Cong. (Jun. 16, 2005), *available at* http://www.ftc.gov/os/2005/06/050616databreaches.pdf; Prepared Statement of the Federal Trade Commission Before the S. Comm. on Commerce, Trade, and Consumer Protection, 111th Cong. (May 5, 2009), *available at* http://www.ftc.gov/os/2009/05/P064504peertopeertestimony.

attorneys general concurrent enforcement authority.[5]

With respect to current protections, the Commission enforces several laws and rules imposing data security requirements, including the Commission's Safeguards Rule under the Gramm-Leach-Bliley Act ("GLB"), the Fair Credit Reporting Act, and the FTC Act. However, at present, in most of the cases the Commission brings, it cannot obtain civil penalties. I believe the provision allowing FTC to seek civil penalties for violations of S. 3742 would have a significant additional deterrent effect.

Q. Which provisions in my bill do you support most strongly?

As noted above, the Commission supports the legislation's effort to require a broad array of entities to implement reasonable security policies and procedures, the creation of a breach notification requirement at the federal level, and the legislation's robust enforcement provisions. Of all the provisions, perhaps the most beneficial is the provision giving the FTC the authority to enforce civil penalties against entities that do not maintain reasonable security. Such penalties would provide a strong incentive for companies to maintain adequate data security.

Q. I understand that the Commission in the past has publicly supported and even recommended to Congress the enactment of federal legislation enhancing data security across private industry. Do you also support applying data security requirements to other covered entities - such as non-profits, as covered in my bill - that also maintain sensitive consumer data?

Yes. It is important that non-profits that collect consumers' personal information are covered by the bill because problems with data security and breaches affect businesses and nonprofit organizations alike. Indeed, many of the breaches that have been reported in recent

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pdf; Prepared Statement of the Federal Trade Commission Before the Subcomm. on Interstate Commerce, Trade, and Tourism of the S. Comm. on Commerce, Science, and Transportation Committee, 110th Cong. (Sep. 12, 2007), *available at* http://www.ftc.gov/os/testimony/070912reauthorizationtestimony.pdf; Prepared Statement of the Federal Trade Commission Before the S. Comm. on Commerce, Science, and Transportation, 110th Cong. (Apr. 10, 2007), *available at* http://www.ftc.gov/os/testimony/P040101FY2008BudgetandOngoingConsumerProtectionandCompetitionProgramsTestimonySenate04102007.pdf. These recommendations also were made in an April 2007 report released by the President's Identity Theft Task Force, which was co-chaired by the Attorney General and the FTC Chairman, as well as in a report on Social Security numbers released in December 2008. *See* The President's Identity Theft Task Force Report, Sep. 2008, *available at* http://idtheft.gov/reports/IDTReport2008.pdf; FTC Report, "Recommendations on Social Security Number Use in the Private Sector," (Dec. 2008), *available at* http://www.ftc.gov/opa/2008/12/ssnreport.shtm.

[5] This recommendation is consistent with prior Commission recommendations. *See* The President's Identity Theft Task Force, "Combating Identity Theft: A Strategic Plan," (Apr. 2007), *available at* http://www.idtheft.gov/reports/StrategicPlan.pdf.

years have involved nonprofit universities, for example. From consumers' perspective, the harm from a breach is the same whether their information was disclosed by a nonprofit or a commercial entity. Requiring reasonable security policies and procedures of this broad array of entities is a goal that the Commission strongly supports.

Q. Have there been instances in which non-profits leaked consumers' information, making those consumers vulnerable to subsequent fraud or identity theft?

Yes. A number of sources publicly report data breaches that have occurred at non-profits. For example, the Identity Theft Resource Center[6] and Privacy Rights Clearinghouse[7] both list incidents of recent data breaches that include numerous non-profit organizations.

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[6] *See* http://www.idtheftcenter.org/artman2/publish/lib_survey/ITRC_2008_Breach_List.shtml.

[7] *See* http://www.privacyrights.org/data-breach#CP.

The Honorable Ed Whitfield

Q1. Your testimony indicates 850 complaints were filed with the FTC relating to coins and precious metals since 2005. Your testimony indicates there have been approximately 100 complaints so far this year regarding coins and precious metals companies. How many total complaints that have been filed with the Commission this year?

a. Would this indicate a widespread and pervasive problem?

b. Where would these complaints rank in the cousumer Sentinel database relative to all other complaiuts in terms of number of complaints?

c. Where would the number of complaints rank as an issue the Commission would establisb as a priority for action?

A1. There were approximately 1 million complaints filed with the Commission between January and September 2010. During this time period, the Commission received approximately 180 complaints relating to precious metals and coins. By contrast, in calendar year 2009, the Commission received 278,078 identity theft complaints. While the complaints relating to precious metals and coins account for less than one percent of all complaints received by the Commission each year for the past five years, they reflect that the individual dollar loss to consumers in some cases is critically high. The Commission does not determine its enforcement priorities based solely on the number of complaints. Consumer complaints are one factor, of many, considered in determining whether a particular act or practice warrants enforcement or other action by the Commission.

Q2. Your testimony states the Commission has filed or been involved in over 230 cases since April 2009.

a. What criteria does the Commission use to decide which cases to bring?

b. Have you brought any cases against Goldline or other coin or precious metal sellers in this time period? Why or why not?

A2. As you know, the Commission has been directed by Congress to act in the interest of all consumers to prevent deceptive and unfair acts or practices, pursuant to the Federal Trade Commission Act, 15 U.S.C. §§ 41-58. An act or practice is *deceptive* if (1) it is likely to mislead consumers acting reasonably under the circumstances, and (2) it is material; that is, likely to affect a consumer's purchase decision.[1] An act or practice is unfair if it causes or is likely to

[1] *Novartis Corp.*, 127 F.T.C. 580, 679 (1999), *aff'd and enforced*, 223 F.3d 783 (D.C. Cir. 2000); *Stouffer Foods Corp.*, 118 F.T.C. 746, 798 (1994); *Kraft, Inc.*, 114 F.T.C. 40, 120 (1991), *aff'd and enforced*, 970 F.2d 311 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1254 (1993); *Removatron Int'l Corp.*, 111 F.T.C. 206, 308-09 (1988), *citing, e.g., Southwest Sunsites, Inc. v. FTC*, 785 F.2d 1431,1436 (9th Cir.), *cert. denied*, 107 S. Ct. 109 (1986); *International Harvester Co.*, 104 F.T.C. 949, 1056 (1984); *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 164-65 (1984); *see generally Federal Trade Commission Policy Statement on Deception, appended to Cliffdale Assocs., Inc.*, 103 F.T.C. at 174-83.

cause substantial injury to consumers that is not reasonably avoidable by consumers themselves and is not outweighed by countervailing benefits to consumers or to competition.[2] In determining whether a particular act or practice satisfies these standards and warrants enforcement or other action, the Commission may consider a number of factors – including the type of violation alleged; the nature and amount of consumer injury at issue and the number of consumers affected; and the likelihood of preventing future unlawful conduct.

In this time period, the Commission has not filed an enforcement action against Goldline or other coin or precious metal sellers. Commission staff are, however, actively pursuing investigative leads in this industry.

Q3. You state recent complaints lodged with the FTC indicate that scam artists are luring consumers with three types of precious metal or coin scams.

a. Is this an increase in the number or frequency of complaints or rather the type of complaint?

b. How many complaints has the FTC received ou precious metals and coins this year?

c. How do the number of complaints this year compare to the same time period last year?

A3. The Commission received approximately 180 complaints relating to precious metals and coins between January and September 2010. During the same time period last year, the Commission received approximately 130 complaints.

Q4. Section 2 (a) (3) provides the Commission authority to determine such other informatiou that would have to be disclosed to the cousumer. Cau you provide examples of what additional disclosures the Commission might require that is not already required to be disclosed?

A4. If the legislation were enacted, the Commission would require such other disclosures that the rulemaking record indicates are warranted. For example, if warranted by the record, we might require disclosure of any refund or return policy.

Q5. You state that collectible coins have been the subject of consumer complaints and therefore you do not want them excluded from the disclosure regime under the exemption in Section 6 of the legislation.

a. Do you believe a coin can qualify for the exemption because its value is not affected at all by the precious metal content? Aren't all coins' value affected at least a little by the precious metal conteut?

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[2] Section 5(n) of the FTC Act, 15 U.S.C. § 45(n); *see generally Orkin Exterminating Company,* 108 F.T.C. 263, 362 (1986); *Federal Trade Commission Policy Statement on Unfairness, appended to International Harvester Co.,* 104 F.T.C. at 1070-76.

b. How many coins could qualify for the exemption?

c. Can an exemption be crafted to provide relief to the small legitimate shops while still allowing you to pursue complaints about collectible coins?

A5. As currently drafted, the proposed bill would exempt from its coverage coins whose value is not chiefly attributable to their precious metal content and whose value is not affected by an increase or decline in the value of such metals. The Commission believes that this exemption may exclude from the bill's coverage certain collectible coins that have been the subject of consumer complaints. Coins whose value is largely determined by their collectability do not always have a significant precious metal content. Moreover, the value of these coins is based on their condition, rarity, and historical value, and not on their precious metal content. The grading of historic coins can be subjective, leading to artificial distinctions in the collectible value of the coins. As past Commission enforcement actions have shown, unscrupulous sellers have taken advantage of the subjectivity inherent in the collectible market by making false grading claims or false value claims when selling purported historic coins.

The Commission does not have specific statistics on the number of coins that would qualify for the exemption hut believes eliminating the exemption would serve the public interest by providing important disclosures that would combat consumer confusion. If the Committee believes an exemption is warranted, Commission staff would be happy to continue to work with Committee staff on the language of such an exemption.

Q6. Do you have any reason to believe that Goldline misrepresents the value of hullion coins, or for that matter, sells bullion coins disguised as numismatic?

A6. The rules of the Commission prevent the disclosure of the existence or contours of any nonpublic Commission investigation. However, Commission staff is carefully considering the information that Congress and consumers have provided to the Commission.

Q7. I understand the Commission supports the goals of the legislation, but it is unclear to me whether the FTC can act on its own if problems in the industry are identified. Presently, does the FTC have the authority under the Telemarketing Sales Rule to write rules to solve prohlems the legislation is designed to fix?

A7. If the Commission identifies practices that are unfair or deceptive in violation of Section 5 of the FTC Act, it can take enforcement action regardless of whether the proposed legislation were enacted. The Commission also may issue trade regulation rules which define specific acts or practices that are unfair or deceptive. 15 U.S.C. § 57(a)(1)(B). I note, however, that these rulemaking proceedings are complex and cumbersome, and have resulted in rulemaking proceedings lasting many years.

Regarding the Commission's rulemaking authority in the area of telemarketing, the Telemarketing Sales Rule ("TSR") does not authorize the Commission to write rules requiring disclosures as set forth in the proposed legislation. The TSR does, however, require a seller or telemarketer of any item to disclose truthfully, in a clear and conspicuous matter, the total costs to purchase, any material restrictions, and refund policies. *See generally* 16 C.F.R. § 310.3. Although the TSR exempts from coverage certain telephone calls initiated by customers in

response to an advertisement or direct mail solicitation, the exemption does not apply to customer-initiated calls in response to advertisements or direct mail solicitations relating to investment opportunities. *See* 16 C.F.R. §§ 310.6(b)(5)-(6). Consequently, some of the disclosures currently required by the legislation also are required by the TSR.

Q8. According to experts, Chinese imitations pose an increasing risk to consumers in the gold, silver, and precious metals marketplace. Can you please explain the FTC's role in preventing fraud at this level; especially with increasing international sales as the price of the products continue to rise.

A8. In general, the Commission seeks to protect consumers through a combination of educational materials and enforcement actions. In the area of consumer education, the Commission recently issued three consumer education pieces concerning investment in gold and precious metals. These educational pieces include a glossary of terms that consumers need to understand in order to knowledgeably consider precious metal and coin investments, and describe various historic coin scams such as investments involving false coin grading claims, misrepresentations regarding the value of purported historic coins, and bogus buy back options. They also provide consumers with important information about additional resources that they can utilize when making such investment decisions. These educational materials are available for free in the Consumer Information Section of our website, at http://ftc.gov/bcp/consumer.shtm. In addition, the Commission's Website entitled "Money Matters" provides consumers with a one-stop resource to help them spot and avoid financial scams. The Commission also encourages consumers who suspect or are victims of fraud to report it to the Commission – either online through the FTC Complaint Assistant, at www.ftccomplaintassistant.gov – or by calling our toll-free hotline, at 1-877-FTC-HELP.

In the area of enforcement, in just two sweeps over the past year, the Commission and its federal and state partners filed 189 civil and criminal actions against fraudulent operations that fleeced consumers with promises of income or monetary savings. With respect to problems involving imitation coins, the Commission has several enforcement tools available to combat the problem, including the FTC Act, the Hobby Protection Act and Rule, and where applicable, the Telemarketing Sales Rule.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Competition
Office of the Director

February 4, 2011

The Honorable Henry "Hank" C. Johnson, Jr.
Chairman
Subcommittee on Courts and Competition Policy
Committee on the Judiciary
United States House of Representatives
Washington, D.C. 20515

Dear Chairman Johnson:

Attached are my responses for the record from the December 1, 2010 hearing on "Antitrust Laws and Their Effects of Healthcare Providers, Insurers and Patients."

Sincerely,

Richard A. Feinstein

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Competition
Office of the Director

1. Representative Bob Goodlatte, Member of the Subcommittee on Courts and Competition Policy, asked Mr. Richard Feinstein, Director, Bureau of Competition, Federal Trade Commission, to provide the average amount of time it takes for Federal Trade Commission to provide a staff advisory opinion on health-care issues.

You have requested that the Federal Trade Commission provide you with information regarding the time it takes to receive an FTC staff advisory opinion regarding health-care issues. By way of background, each year a number of different types of health-care provider organizations request advice from the FTC in the form of either an advisory opinion or informal guidance prior to engaging in a particular course of action. In fact, many more seek informal guidance than ultimately request an advisory opinion. Indeed, it is important to note that an advisory opinion from the Commission or its staff is not a prerequisite to doing business, and the vast majority of health-care providers implement their programs on the basis of private opinions of counsel or informal guidance from FTC staff, or based on previously issued advisory opinion without going through the process of seeking a written advisory opinion.

Our best estimate is that issuance of such opinions generally takes, on average, between four and six months after all the necessary information has been submitted to staff by the parties requesting the advisory opinions. However, as described in more detail below, it is difficult to provide precise information regarding the length of time it takes to issue a written advisory opinion, because different types of advisory opinions require different amounts of time. The length of time depends on a number of factors that vary markedly from request to request, including: (1) the subject matter of the request, and the number and complexity of the legal and factual issues it raises; (2) the completeness, clarity, and specificity of the information submitted in the request; (3) the time it takes the requester to provide additional information necessary for staff to evaluate the request; (4) the clarity of the law regarding the subject of the request and the issues it raises; and (5) the number of advisory opinion requests that are under consideration at any given time, and, relatedly, the agency resources available to analyze the requests and draft the responses. Most of these factors are beyond the control of FTC staff, and because there are so many varying factors it is difficult to provide an accurate or meaningful average.

Some advisory opinions raise simpler issues, and we can issue them more quickly. For example, more than half of the FTC staff advisory letters issued by the Health Care Division since 2000 have involved questions about the applicability of Nonprofit Institutions Act exemption to the Robinson-Patman Act. Typically, these requests raise only a single issue, the applicable legal standard is relatively clear, there is well-developed case law, and the requests involve generally similar factual circumstances. Advisory opinions in a variety of other areas – such as information gathering and information-sharing arrangements among health-care providers, or provider network arrangements that did not involve competitor pricing agreements – have likewise been issued relatively quickly from health-care providers.

The one area where it has taken Commission staff considerably more time to issue advisory opinions is for physician and other health-care provider network arrangements that involve price agreements among competing providers and the collective negotiation of contracts with health-care payers. These requests involve conduct that in other contexts would constitute *per se* illegal price fixing, and the staff must scrutinize them very carefully to ensure that the proposed conduct would not increase health care costs to consumers. In most cases, the requesters claim that the proposed pricing arrangements are justified under the antitrust laws because they are reasonably necessary to facilitate the achievement of efficiencies – specifically, through "clinical integration" among the providers. These advisory opinions typically have taken longer to issue for a variety of reasons, including the following:

1. The initial request for an advisory opinion is often incomplete, and it takes time for staff to carefully review the initial request and identify the additional information needed to properly evaluate it. It also generally takes requesters a substantial amount of time to provide sufficient additional information for staff to be able to understand the operation of the proposed program and do the necessary factual and legal analyses. The time that requesters have taken to respond to requests for additional information has varied markedly, often taking many months. And, in some cases, multiple follow-ups have been required.

2. These are very complex factual and legal assessments. There is little clear legal precedent directly applicable to such arrangements, and because joint pricing by competitors can create significant harm to competition and to consumers, the staff must take care to correctly apply existing joint venture law to the specific, and often unique, factual circumstances of the proposed program. In considering the level of caution warranted when evaluating such requests, it is instructive to bear in mind that the Commission and the Department of Justice have brought many antitrust enforcement actions against provider network joint ventures that appear similar to those being reviewed. These are arrangements that require the staff to make difficult judgments regarding the participants' degree of efficiency-enhancing integration, the potential and likelihood of achieving substantial integrative efficiency benefits, the need for, or "ancillarity" of, the arrangement's competitive restraints to the achievement of its efficiency benefits, and an assessment of whether the proposed conduct will allow the participants to increase or exercise market power.

3. These opinions are widely viewed as a barometer of Commission enforcement policy. Although the primary purpose of an advisory opinion is to respond to the specific request at issue, these opinions also are closely read by other health-care providers (and their counsel), who may be contemplating similar arrangements. Consequently, staff must ensure that its analysis is not only sufficiently clear and detailed to serve the needs of this wider audience, but also consistent with broader competition policy goals. Accordingly, the advisory opinions that have been issued in this area have been considerably longer

and more detailed than those issued regarding other subject areas. For example, the most recent such letter was 37 pages.

In order to help health-care providers understand and engage in the Commission's advisory opinion process, and to facilitate the review and issuance of advisory opinions, FTC staff have developed a detailed guide entitled "Guidance from Staff of the Bureau of Competition's Health Care Division on Requesting and Obtaining an Advisory Opinion." This document fully explains the process and provides information to help expedite it. This guide can be found at http://www.ftc.gov/bc/healthcare/industryguide/adv-opinionguidance.pdf.

Although the complexity of these requests and factors beyond the control of staff (such as the receipt of complete information) in large part dictate the timing of advisory opinions, we are reviewing the process to see if advisory opinions on health-care provider networks can be issued more quickly without sacrificing the careful analysis needed to ensure the arrangements do not violate antitrust law.

Office of the Secretary

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QFRs to Chairman Leibowitz and Responses From Chairman Leibowitz Arising From the March 16, 2011 Privacy Hearing

Author:
Senator Mark Begich
Senator Mark Pryor
Senator Kay Bailey Hutchison

Representing:

Copies of Response To:

Deadline:
04/19/11

Copies of Correspondence To:

Organization Assigned:
Office of the Director (BCP)

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EXPEDITE

Questions for the Record from Senator Mark Pryor

March 16 Senate Commerce Committee Hearing on Consumer Online Privacy

Panel I

General Privacy Questions

Questions to FTC Chairman Leibowitz:

- **Based on the FTC's December staff report, could you please highlight for the Committee where you see the most harm posed to consumers due to a need for better online privacy protections? Where do you think are the greatest risks to consumer privacy?**

The Commission staff continues to be concerned about harms that can result from unauthorized disclosure of consumers' information, including financial harm such as identity theft; physical harm such as stalking; unwarranted intrusions into consumers' time, such as unwanted telemarketing calls and spam; and harms that result from the denial of employment, insurance, and other goods and services.

In addition, consumers suffer harm simply from having their information used without their informed consent. Consumers that provide information believing it is private will lose trust in a company if the company makes that information public without the consumer's consent. Consumers believing they are simply searching for information about a health condition online will lose trust in a company that sells information about them without their knowledge. More broadly, consumer trust in online services generally is damaged if companies collect and use data in ways that consumers do not expect. The loss of consumer trust in online services would harm both consumers and business by chilling consumers' willingness to participate in online activities and electronic commerce.

The preliminary staff report asked for comment on several recommendations to address these harms. For example, to address the problem of data falling into the wrong hands – such as identity thieves and stalkers, the report recommends that companies not collect unnecessary data, maintain better data security for the data they maintain, and dispose of the data when they no longer have a legitimate business need for it. To avoid collection and use of consumers' data without their informed consent, the report makes recommendations on how companies can improve transparency and obtain more informed choices.

- **How can consumers be better educated about privacy risks and steps they can take to protect themselves? Do consumers have the tools necessary to adequately protect themselves in today's world?**

The Commission runs educational campaigns to teach consumers how to protect their valuable personal information and make thoughtful decisions about when it is shared and used. For example, the Commission manages the interagency OnGuardOnline.gov campaign, which helps computers users

Questions for the Record from Senator Begich

March 16 Senate Commerce Committee Hearing on Consumer Online Privacy

What steps should the industry take to assist citizens with knowing what their digital life is like?

The Preliminary Staff Privacy Report contained a number of recommendations for industry to help people understand how their personal information is collected and used. In particular, the Report recommended simplifying choices for consumers and increasing transparency.

Recognizing that the current model of lengthy privacy policies was ineffective in informing consumers about information practices, the Staff Report recommended that businesses simplify choices provided to consumers. For example, the staff report indicated that companies do not need to provide choice before collecting and using consumers' data for commonly accepted practices, such as product fulfillment. For practices requiring choice, companies should offer the choice at a time and in a context in which the consumer is making a decision about his or her data. This will allow the consumer to focus on the choices that matter and make more informed decisions.

The Staff Report also recommended that companies increase the transparency of their data practices, by, for example, making privacy notices clearer, shorter, and more standardized, to enable better comprehension and comparison of privacy practices. The Report also recommended that companies consider providing reasonable access to the consumer data they maintain, proportionate to the sensitivity of the data and the nature of its use.

Questions for the Record
March 16, 2011
The State of Online Consumer Privacy
Questions for Chairman Leibowitz from Sen. Hutchison

- **Chairman Leibowitz, in his concurring statement to the FTC report, Commissioner Kovacic expresses the concern that a Do Not Track mechanism on the Internet could inherently reduce the quality of content provided, by lowering the revenue currently derived from advertising and possibly even forcing some online content providers to deny free access to those who opt out of tracking.**
    - **Has the Commission examined what the ramifications of do not track could be on the quality of content provided online, particularly of content that is currently provided for free?**
    - **Will you commit to ensuring that this type of analysis will be part of the Commission's analysis before the final report comes out?**

The Commission recognizes the need for an appropriate balance between consumer choice about online tracking and ensuring continued innovation in this area. As the Preliminary Staff Privacy Report noted, online advertising helps to support much of the content available to consumers on the Internet. Although the Commission is continuing to evaluate the comments received on its staff report, evidence suggests a Do Not Track mechanism for exercising choice about behavioral advertising would have minimal impact on the free content available on the Internet and on innovation. First, the Preliminary Staff Privacy Report noted that certain advertising, such as first party marketing and contextual advertising, would not be affected by a Do Not Track mechanism. Thus, this type of advertising would continue to serve as a source of revenue for content providers.

Second, recent research from an organization working with the advertising industry suggests that if companies provide adequate transparency and consumer choice, consumers will choose not to opt out in great numbers, because they have a greater degree of trust in companies' stewardship of their information. *See* Evidon (formerly Better Advertising), Research: consumers feel better about brands that give them transparency and control over ads, http://blog.evidon.com/2010/11/10/research-consumers-feel-better-about-brands-that-give-them-transparency-and-control-over-ads/ (Nov. 10, 2010).

Finally, key industry stakeholders have responded very positively to the request for development of a simple, easy to use Do Not Track system. Leading browser companies have offered changes to their browsers to implement Do Not Track. Mozilla, for example, has implemented a Do Not Track header for use by consumers when they browse the web, and Microsoft has rolled out a Tracking Protection List feature that allows consumers to block the collection of information by specified third parties. Apple has announced a do not track tool in a test version of its browser. The advertising industry itself also appears to recognize the value of offering simplified choice to consumers and has ramped up its effort to provide clearer disclosures and choice mechanisms after release of our preliminary staff report. Indeed, most recently, several of the leading advertising industry trade associations have agreed to work closely with Mozilla to determine how to incorporate Mozilla's Do Not Track feature into its

industry self-regulatory effort. I believe these efforts demonstrate that improved consumer choice can be consistent with innovation.

As these developments take place, the Commission is continuing to analyze the comments received on the Preliminary Staff Privacy Report, including those regarding the potential effects of a Do Not Track mechanism on innovation and the availability of free Internet content. The Commission also will continue to evaluate information about the costs and benefits of any such mechanism.

- **The Commission's report calls for a "privacy by design" model that includes the recommendation for companies to only collect information needed for a specific business purpose. Some comments submitted on the report expressed concern that implementing such a restriction could become so specific that it limits innovation on new and potentially beneficial uses of data.**
    - **How do you envision such a restriction being implemented in a way that will allow for the continued innovation of new products and services necessary to keep American companies as leaders in the global online world?**

The goal of privacy by design is to guide and motivate businesses to develop best practices for incorporating privacy into their products and services during the early stages of their development. Best practices that ensure that privacy solutions are compatible with business needs should not restrict innovation and will likely be more flexible than government rules. To be clear, the principle of privacy by design contemplates that businesses can and should collect information for their legitimate business purposes; however, as discussed in the Preliminary Staff Privacy Report, the concept of privacy by design also means the amount of data collected and duration for which such data is retained should be limited by those legitimate business needs. This reflects concerns that collected data may be retained by companies indefinitely, increasing the risk that the data may be compromised through a security vulnerability or put to use in ways that consumers never would have expected and to which they would object. Staff's recommendation that companies implement a privacy by design approach is designed to encourage businesses simply to think through the privacy and security risks associated with collecting more information than is currently needed from consumers and retaining it for longer than necessary. The Commission has recognized these concerns in its enforcement program. For example, we have brought data security cases against companies that kept shoppers' credit card information, long after they had a business need to do so. *See e.g., In the Matter of BJ's Wholesale Club, Inc.*, Docket No. C-4148 (Sept. 23, 2005) (final consent order). In these cases, the credit card information was obtained by hackers. Had the companies taken more care in disposing of information they no longer needed, consumer harm could have been avoided. Similarly, last year Google collected personal information through its Street View cars – the company claims to have inadvertently collected that information without any intention of using it. Under the Privacy by Design approach recommended in our staff report, Google would have tested its systems to ensure that it did not collect data it did not need.

As these examples demonstrate, companies should assess privacy and security risks as part of the innovation process and work to address them appropriately. For example, although

they may determine that continued collection of personal data is necessary, they could try to anonymize such data to reduce privacy and security risks.

We have received many comments on the concept of collecting and retaining data for a "specific business purpose," which we plan to address in the final report in a way that furthers consumer privacy interests without impeding innovation.

Chairman Leibowitz, FTC Commisioner Rosch has expressed "serious reservations" about the new privacy proposal advanced in the FTC's staff report. He claims that the current "harm" model of FTC enforcement has served the Commission well. If the FTC is correctly enforcing its statutory responsibilities to ensure disclosure of "material" privacy policies and to hold companies accountable for those policies, consumers already have information to make informed decisions about their online privacy.

- **If that's the case, why is it necessary to adopt a new, broader regulatory framework for online privacy?**
- **If privacy policies are too opaque for consumers to understand and if the FTC is concerned that consumers may be misled, why wouldn't rigorous enforcement of the FTC's Section 5 deceptive trade practices authority improve the clarity of privacy policies by companies seeking to avoid enforcement actions?**

First, I note that the report does not propose a new regulatory framework – it simply provides a framework for industry best practices and potentially, for legislation, if Congress chooses to enact it.

Second, I agree with you that robust enforcement of Section 5 is critical. We have recently brought cases against companies like Google, Twitter, and Chitika, an online advertising network, alleging that their practices were deceptive. We have additional cases in the pipeline.

Third, Section 5 does not generally require companies to disclose their information practices. If they choose to make statements about privacy, and those statements are deceptive, the Commission may take action under Section 5. However, not every long or opaque disclosure will be deceptive under Commission precedent. Regardless of the threshold for Commission law enforcement actions, we believe that stakeholders should work together to improve transparency. Indeed, many companies recognize that providing clear disclosures to their consumers about their information practices helps them maintain a positive relationship with their customers. Companies have an interest in promoting that relationship regardless of the prospect of enforcement action by the FTC. The Preliminary Staff Privacy Report provides businesses with proposals for ways to simplify and improve disclosures, and we think those steps would work well in this area while we continue to take action against plainly deceptive practices.

Questions for the Record from Senator Mark Begich

March 16 Senate Commerce Committee Hearing on Consumer Online Privacy

Question to all panelists (Panel 1 & 2):

- What steps should the industry take to assist citizens with knowing what their digital life is like?

Questions for the Record
March 16, 2011
The State of Online Consumer Privacy
Questions for Chairman Leibowitz

- Chairman Leibowitz, in his concurring statement to the FTC report, Commissioner Kovacic expresses the concern that a Do Not Track mechanism on the Internet could inherently reduce the quality of content provided, by lowering the revenue currently derived from advertising and possibly even forcing some online content providers to deny free access to those who opt out of tracking.
    - Has the Commission examined what the ramifications of do not track could be on the quality of content provided online, particularly of content that is currently provided for free?
    - Will you commit to ensuring that this type of analysis will be part of the Commission's analysis before the final report comes out?

- The Commission's report calls for a "privacy by design" model that includes the recommendation for companies to only collect information needed for a specific business purpose. Some comments submitted on the report expressed concern that implementing such a restriction could become so specific that it limits innovation on new and potentially beneficial uses of data.
    - How do you envision such a restriction being implemented in a way that will allow for the continued innovation of new products and services necessary to keep American companies as leaders in the global online world?

- Chairman Leibowitz, FTC Commisioner Rosch has expressed "serious reservations" about the new privacy proposal advanced in the FTC's staff report. He claims that the current "harm" model of FTC enforcement has served the Commission well. If the FTC is correctly enforcing its statutory responsibilities to ensure disclosure of "material" privacy policies and to hold companies accountable for those policies, consumers already have information to make informed decisions about their online privacy.
    - If that's the case, why is it necessary to adopt a new, broader regulatory framework for online privacy?
    - If privacy policies are too opaque for consumers to understand and if the FTC is concerned that consumers may be misled, why wouldn't rigorous enforcement of the FTC's Section 5 deceptive trade practices authority improve the clarity of privacy policies by companies seeking to avoid enforcement actions?

Questions for the Record from Senator Mark Pryor

March 16 Senate Commerce Committee Hearing on Consumer Online Privacy

Panel I

General Privacy Questions

Questions to FTC Chairman Leibowitz:

- Based on the FTC's December staff report, could you please highlight for the Committee where you see the most harm posed to consumers due to a need for better online privacy protections?

- Where do you think are the greatest risks to consumer privacy?

- How can consumers be better educated about privacy risks and steps they can take to protect themselves? Do consumers have the tools necessary to adequately protect themselves in today's world?

- What do you think FTC oversight would provide that self-regulation by the industry could not?

avoid fraud, protect their privacy and stay safe online. The OnGuardOnline.gov site has information to help parents talk to their kids about the value of their personal information and how to make responsible choices about where and how to share it. The Commission's identity theft information for consumers (FTC.gov/idtheft) also provides tips and advice about how to protect sensitive information online and off. A wide variety of consumer educational materials, including many in Spanish, help consumers deter, detect, and defend against identity theft. For example, the FTC publishes a victim recovery guide – Take Charge: Fighting Back Against Identity Theft – that explains the immediate steps identity theft victims should take to address the crime.

However, the Staff Report noted that companies' privacy practices—including the collection, use, and transfer of consumer information—are often not transparent to consumers; therefore collection or use of consumer information may occur without their knowledge or consent. In such situations, consumer education is not adequate to protect consumer privacy, which is why the Preliminary Staff Privacy Report highlights the need for some of the burden surrounding privacy protection to shift from the consumer to businesses. Thus, the Report asked whether industry can do more to help consumers better understand how their information is collected and used. As outlined in the Report, industry could incorporate privacy protections such as data security, sound retention practices, and data accuracy into products and services; offer simplified consumer choice; and inject greater transparency about data collection and use into business practices.

- **What do you think FTC oversight would provide that self-regulation by the industry could not?**

As an initial matter, the staff report does not take a position on whether its recommendations should be implemented through legislation or self-regulation. It is intended to provide guidance to industry, Congress, and policymakers as they develop rules of the road in this area.

That said, whether or not legislation gets enacted, self-regulation will always play an important role in protecting consumer privacy. The Commission staff has supported self-regulation in the past and continues to believe that self-regulation can be an effective tool, as long as it is comprehensive, robust, effective and enforceable. And under Section 5 of the Federal Trade Commission Act, the Commission can take enforcement action against companies that break their promises to abide by self-regulatory codes of conduct. This is an important component of ensuring accountability for self-regulatory programs.

(1) The Federal Trade Commission (FTC) has been at the forefront of educating the public about protecting their identities. You have also put agencies on notice about eliminating the unnecessary use and display of SSNs. What trends are you seeing with respect to ID theft and the use of SSNs in those thefts? Are things getting better or worse?

In 2010, as in prior years, identity theft was the leading complaint category that the Commission received from consumers. Government documents/benefits fraud (19%) was the most common form of reported identity theft in 2010, followed by credit card fraud (15%), phone or utilities fraud (14%), and employment fraud (11%). Government documents/benefits fraud increased 4% since 2008, while identity theft-related credit card fraud declined 5% during the same period. Our complaint data does not specifically track the use of SSNs in those identity thefts. Moreover, in many instances identity theft victims cannot determine with precision the specific personal information that led to the crime. As a result, we are not able to assess trends regarding the use of SSNs specifically in identity theft.

(2) The President's Identity Theft Task Force referred to identity theft as "a problem with no single cause and no single solution" in its 2007 Strategic Plan. Please give us an update on what has improved since 2007 and what you see as the remaining challenges in preventing ID theft. Which public agencies, either Federal, State or local, expose the greatest number of Americans to ID theft and fraud by continuing to publicly use SSNs? Have you or your agency spoken with any of these agencies? Is there legislation that was recommended by the task force that has not been enacted but should be? Please provide a status report on the recommendations relating to authentication.

Since 2007, coordination among federal agencies on the issue of identity theft has vastly improved. An interagency Task Force, consisting of staff from DOJ, FTC, FBI, IRS, HHS and others meets bi-monthly to discuss emerging trends and issues. FTC staff regularly speaks with staff from these other government agencies regarding a variety of identity theft-related topics, including continued use of SSNs by government agencies. In addition, the Commission and other Task Force agencies have conducted extensive consumer and business education on identity theft prevention and recovery, and data protection. Many of the published educational materials discuss SSNs specifically. The Commission has not, however, surveyed which agencies at which levels of government have exposed the most consumer SSNs.

In its written testimony, the Commission cited two legislative recommendations to address the risks posed by the use of SSNs in the private sector – improved consumer authentication and standards to reduce the public display and transmission of SSNs. To date, neither of these recommendations has been enacted.

As to the authentication recommendations, the Commission believes that improved authentication can be achieved by encouraging or requiring all private sector business that have consumer accounts to adopt appropriate risk-based consumer authentication

systems that do not rely on an individual's SSN alone. Accordingly, the Commission recommends that Congress consider establishing national consumer authentication standards to verify that consumers are who they purport to be.

(3) K-12 schools continue to collect students' SSNs and use them as authenticators. Would you provide an update on this practice? How can we encourage school systems to stop this practice?

The Commission staff is currently examining the practice of schools using SSNs as authenticators. On July 12, 2011, the FTC and the Department of Justice's Office for Victims of Crime will host "Stolen Futures: A Forum on Child Identity Theft." (See www.ftc.gov/bcp/workshops/stolenfutures). One of the panels at the forum will focus on securing children's data in the educational system, especially in the K-12 arena. At the forum, leaders in the field will provide an update on current practices and explore ways to encourage school systems to better safeguard student information, including SSNs as authenticators and alternatives.

(4) I appreciate the work that the Federal Trade Commission has done to address the problems of ID theft, especially ID theft among children and foster children. I hope that you will continue to address these issues. In terms of ID theft among foster children, how widespread is the problem and why are foster youth particularly vulnerable to identity theft?

Foster children are particularly vulnerable to identity theft because their personal information is easily accessible by many people, including relatives, foster parents, and state employees. Moreover, since foster children often lack a strong familial or social safety net, they tend to have fewer resources to help them once they become victims. Finally, the consequences of identity theft may be more severe for foster children because once they are emancipated from foster care, establishing good credit is essential in their process to establishing a strong start to adulthood. At the upcoming forum on child identity theft, a panel will focus on these challenging issues, as well as discuss enacted and proposed state and federal legislation related to foster children and identity theft.

(5) What types of actions is the Commission taking to assist child welfare agencies in preventing ID theft and helping victimized youth recovery their identities?

The July 12th forum on child identity theft will include a panel on the issue of identity theft in the foster care context. One of the panelists, Howard Davidson of the ABA's Commission on Children and the Law, will explore what child welfare agencies can do to help prevent identity theft. We plan to work with Mr. Davidson and other panelists after the forum to continue to collaborate on foster child identity theft issues.

(6) Are there any policy recommendations that you would make to Congress to reduce the number of foster children who are victims of ID theft?

FTC staff is currently examining the issue of identity theft in the context of foster care. Although the July 12 forum is focused on developing and disseminating outreach

messages to prevent identity theft and assist victims, the Commission staff will be sure to offer any policy recommendations as appropriate.

(7) In your written testimony, you say that the Commission recommends eliminating the unnecessary display of SSNs, including on identification cards. Does the Commission recommend ending the use of the SSN as an identifier for foster children?

As explained above, this is an issue that staff will be exploring at the July 12 forum. Based upon what staff learns, policy recommendations may be provided at a later date.

(8) Do you believe that we are winning or losing the battle against ID theft?

Identity theft continues to be a significant problem, which the Commission is trying hard to address in several ways, as described in its written testimony. Commission staff believes that its robust data security enforcement program has encouraged companies to invest in better data security to avoid having consumers' information fall into the hands of identity thieves. The Commission has also worked hard to educate consumers in how to better protect themselves from identity theft. It has disseminated millions of copies of its consumer education materials. Of course, much work remains to be done, and the Commission continues to devote resources to this important issue.

(9) How has ID theft changed over the last several years? Is it more widespread, sophisticated and harder to stop? What are the trends with respect to organized crime or state sponsored ID theft?

(10) What is the most common cause of ID theft? Is it lost or stolen Social Security cards, death records that are sold with SSNs, or via some public listing or even the internet? Are there some trends you can discuss?

[Answer to questions 9 and 10] In response to question 1, we have provided information about some trends relating to consumer complaints that the FTC has received over the past several years. However, we do not want to suggest that the unverified complaints we receive are indicative of broader trends in identity theft. The number and types of complaints we receive vary with press stories about identity theft and other unrelated factors. Because the Commission has never attempted to conduct year-to-year surveys or analyses of general trends in identity theft, we cannot speak to issues such as the level of sophistication of identity thieves or what percentage of identity theft is state-sponsored.

That said, we do know that there are many causes of identity theft including high-tech (e.g., hacking, phishing, malware, spyware and keystroke logging) and low-tech causes (e.g. dumpster diving, stealing workplace records, stealing mail or wallets, and accessing public records containing SSNs). Some thieves fabricate SSNs that correspond to active SSNs that have been issued previously to individuals, especially children. Identity theft

can also occur when an individual uses someone else's personal information, including their SSN, to obtain employment, file tax returns, or obtain other government benefits.

(11) Can you tell us what burdens may occur by removing 'unnecessary' display of SSNs? Is there a way to encourage proper use of SSNs while minimizing those burdens?

The challenge in combating the misuse of SSNs is to find the proper balance between the need to keep SSNs out of the hands of identity thieves and the need to give businesses and government entities sufficient means to attribute information to the correct person. Business and governments use SSNs to ensure accurate matching of consumers with their information. SSN databases are also used to fight identity theft – for example, to confirm that a SSN provided by a loan applicant does not, in fact, belong to someone who is deceased. To encourage proper use of SSNs while minimizing burdens of removing SSNs, the Commission has identified two key legislative recommendations – improved consumer authentication and standards to reduce the public display and transmission of SSN. In terms of the second recommendation, the Commission recommends eliminating the unnecessary display of SSNs on publicly-available documents and identification cards and limiting how SSNs can be transmitted. Such steps would reduce the availability of SSNs to thieves, without hindering the use of SSNs for legitimate identification and matching purposes.

(12) One of the interesting parts of Mr. O'Carroll's testimony is the story of Dr. Martinez, which thankfully has been successfully resolved through the arrest of his ID thief. However, Dr. Martinez had yearly audits from the IRS, even through they knew after the first contact that his wages were falsely reported due to ID fraud. Are there good examples of private or public sector entities doing more to recognize what has happened to a victim and in some way "certify" his or her experience so he or she can move on with his or her life and not be repeatedly questioned about who they are?

Some states offer identity theft victims a "passport" that the victim can carry to prove who they are. The passport – which typically may be obtained through a state's Office of Attorney General – may be useful in the event that an identity theft victim is confused with an actual or suspected criminal. In addition, the Commission staff recommends that identity theft victims obtain a detailed police report that will help to prove their innocence and enable them to clear their name, especially if new accounts are opened.[1] The Commission also recommends that Congress consider creating national standards for the public display and transmission of SSNs.

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[1] A police report, coupled with an identity theft affidavit, creates an ID Theft Report, which enables victims to exercise certain federal rights to clear their name. Among other things, an ID Theft Report enables victims to place an extended fraud alert on their credit files for seven years, to block erroneous information on their credit files, and obtain documents underlying the crime that can be used to prove their innocence.

(13) What can individuals do to protect themselves through any public or private institutions before SSN fraud starts?

To protect themselves from SSN fraud, consumers should avoid carrying their SSN in their wallets or purses. They should be wary about giving out their SSN to any public or private institution unless it is clear why that institution needs the SSN. Consumers should also regularly check their credit reports and financial statements. Consumers may get free annual credit reports from the three credit reporting agencies through www.annualcreditreport.com.

(14) What are three things that everyone can do to prevent becoming a victim of ID theft?

Although there are no iron-clad methods for preventing identity theft, everyone should: (1) check their bank statements and credit card statements monthly, and credit report at least annually; (2) secure their personal information – if it is paper, lock it and/or shred it; if it is online, use secure Internet connections and regularly update anti-virus software; and (3) not give out their personal information in person, on the phone, through the mail, or over the Internet unless they know who they are dealing with.

(15) Federal, state and local governments still display, or sometimes truncate, SSNs on public documents. To what extent does the public display of SSNs contribute to ID theft? What findings do you have on the display of SSNs by government at all levels and what are your recommendations?

As a result of the President's Task Force on Identity Theft, many federal agencies have eliminated or reduced their collection and display of SSNs. Further, OPM has issued guidelines to federal agencies on the appropriate and inappropriate use of SSNs in federal employee records. Most recently, the Department of Defense recently announced its elimination of SSNs as an identifier. As noted above, the Commission has supported legislation to minimize public display and transmission of SSNs.

(16) The latest trend in credit cards is to use smart phones to make credit card purchases. Given the recent agency and congressional concerns about data security and tracking through the phones, do you have any concerns about SSNs and credit card use by smart phones?

The Commission staff is analyzing the developments in the mobile marketplace, including how new services and technologies offered through smart phones treat personal information – such as SSNs and credit cards data. The use of mobile phones as payment mechanisms is still evolving. To address emerging issues in the mobile arena, the Commission has established a Bureau-wide team working extensively on issues related to the mobile marketplace, examining both privacy and data security issues. We have several active mobile investigations focusing on the collection of consumer data in

general and we will continue to closely watch the security of data collected by -- and through -- mobile devices.

(17) Can you give us any recommendations on how to prevent the growing ID theft problems with children and even unborn children? What should parents do to protect their children's financial record? Are there any policy changes we can make to help parents resolve ID theft issues on behalf of their children?

At the July 12th Forum, panelists from the government, the private sector, and advocacy and non-profit organizations will explore existing and potential solutions to child ID theft. The panelists specifically will explore solutions, as well as the best advice for parents to prevent and remedy child ID theft. Armed with this information, the Commission staff will be better able to advise parents on how to safeguard their children's personal information and resolve identity theft issues.

Federal Trade Commission

Responses to Questions for the Record to David Vladeck,

from Chairman Mary Bono Mack

Subcommittee on Commerce, Manufacturing and Trade Hearing Entitled "The Threat of Data Theft to American Consumers,"

May 4, 2011

1. Is there an industry standard for data minimization, retention, and protection?

With respect to the protection of data (i.e., data security), there are standards that are widely accepted by experts in the field of information security, and such standards should be adopted by industry. With respect to data minimization and retention limits, we are not aware of any similar industry-wide standards. For example, in the search engine industry, the major industry players adhere to differing anonymization and retention schedules. FTC staff have recommended that companies collect only the data needed for a specific business purpose and retain such data only as long as necessary to fulfill that purpose.

2. Without a data security law in place, what actions can the FTC take in response to a data breach?

Under the FTC Act, the Commission can challenge unfair or deceptive acts or practices in cases where a business makes false or misleading claims about its data security, or where its failure to employ reasonable security measures causes or is likely to cause substantial consumer injury not outweighed by other benefits. In such cases, the Commission issues orders containing strong injunctive relief, including requirements to maintain reasonable data security going forward and to conduct third-party audits of data security practices. The Commission cannot obtain a civil penalty for violations of Section 5, however, and the Commission's traditional equitable remedies – such as disgorgement and restitution – generally are not practicable in data security cases. So absent an independent statutory basis, in most data security cases the Commission's orders do not include monetary relief.

3. What are "principles of privacy by design"? Are businesses moving in that direction?

"Privacy by design" is the concept that privacy should be built into a company's everyday business practices and throughout the product life cycle from the very first stages of development. FTC staff has recommended that, under these principles, a company should provide reasonable security for consumer data, collect only the data needed for a specific business purpose, retain data only as long as necessary to fulfill that purpose, safely dispose of data no longer being used, and implement reasonable procedures to promote data accuracy. In addition, companies should assign personnel to oversee privacy issues, train employees on privacy issues, and conduct privacy reviews when developing new products and services. Many companies increasingly recognize the importance of privacy by design, but many others do not take adequate steps to manage the personal information they collect or to avoid collecting information they do not need.

4. In the data security bill that processed through the Committee on Energy and

Commerce and the House of Representatives in the 111th Congress, companies were required to notify consumers no later than 60 days. The timeframe of 60 days came in technical comments from the FTC.

a. Why did the FTC recommend 60 days? Is there harm in immediately informing consumers their information may have been breached so they can protect themselves, even if it later turns out their information was not breached?

FTC staff had proposed 60 days as an outer limit, with notice being provided as soon as practicable and without unreasonable delay. This is the standard used in our health breach notification rule, which applies to certain entities collecting health information. We are not wedded to that time frame, however, and would be happy to work with the Committee to discuss an appropriate time frame.

b. Is there harm in over-notification?

Certainly, over notification should be a consideration and consumers should not receive so many notices that they become confused or tune out the notices they receive. But when the trigger for notification is calibrated to the type of information breached and the degree of harm, notification is very beneficial and effective for consumers in allowing them to make informed decisions and mitigate potential harm.

c. If the timeframe for notice is shortened, is there a risk of many companies over-notifying consumers?

Although it is important for consumers to receive timely notice, companies need a reasonable amount of time to assess the extent of a breach and identify the consumers whose information was breached. In addition, there are times when a company may reasonably delay notification – for example, when the company is in the process of restoring the integrity of its systems. As mentioned above, the 60 day proposal was an outer limit, and notice should be provided as soon as practicable and without unreasonable delay. It is possible that this time frame could be shortened without a high risk of over-notification, and FTC staff would be happy to work with the Committee on what legislation should provide as an appropriate time frame.

d. What is the proper balance to consider between timely notice to consumer and effective notification to the affected consumers?

In order for notice to be most effective, a company must identify the consumers whose information was breached and the categories of information subject to the breach. Companies should be given a reasonable amount of time to assess these facts in order to provide effective notice, but notice should be provided as soon as practicable and without unreasonable delay.

5. Your testimony references your workshops on this issue and recommends that business mitigate risk by only holding data that is necessary.

a. Should consumers also be able to mitigate their risk by requesting a company no longer hold certain pieces of consumer's personal information after the business relationship is terminated?

In its preliminary staff report proposing a new privacy framework, FTC staff recommended that

companies retain consumer personal information for only as long as necessary to fulfill a specific business purpose. Staff solicited public comment on those proposals and is expecting to release a final report later this year. In its data security cases, the Commission has challenged companies' retention of data that was no longer necessary for a business purpose. *See, e.g., Ceridian Corp.*, FTC File No. 1023160 (May 3, 2011) (consent order); *In re CardSystems Solutions, Inc.*, FTC Docket No. C-4168 (Sept. 5, 2006) (consent order); *In re DSW, Inc.*, FTC Docket No. C-4157 (Mar. 7, 2006) (consent order). In the case where a business relationship is terminated, a company may no longer have a business purpose for retaining data unless it needs to maintain it to, for example, comply with statutory requirements. When information need no longer be maintained, the company should safely dispose of such data, whether at the request of the consumer or independently of any such request.

b. What information do you think should be outside the scope of retention for legitimate business needs?

The answer would vary depending on the nature of the business and the data retained, and other factors. Some businesses, such as banks, may need to maintain information such as name and address, along with detailed transaction information, for tax reporting purposes. Other businesses with the same type of information, such as online financial information aggregators, may be able to destroy the same type of information as soon as the customer terminates the relationship.

c. How would you recommend a business relationship be defined in this context? Is the definition of a business relationship in the context of telemarketing mail or calls instructive in this context?

Under the Telemarketing Sales Rule, the "established business relationship" exception allows a seller to contact a consumer for an 18 month period after the consumer's last financial transaction with the seller, or within three months of a consumer's inquiry regarding a seller's goods or services, regardless of whether the consumer is listed in the National Do Not Call Registry. In this context, the use of the information by the seller is limited to a very specific purpose: telemarketing. By contrast, with respect to a company's general data minimization and retention policies, the company may be retaining data for many different reasons. Thus, while the Telemarketing Sales Rule's definition of an "established business relationship" may provide a useful point of reference, there are broader issues that must be addressed in the context of general data minimization and retention policies. FTC staff would be happy to work with the Committee on these issues.

d. How long should a consumer's data be retained after the termination of a business relationship?

As mentioned above, FTC staff has recommended that companies retain consumer personal information for only as long as necessary to fulfill a specific business purpose. The answer would vary depending on the nature of the business and the information. A drug store, for example, might need to keep detailed records of a pharmacy transaction involving controlled substances for more than a year to comply with state or federal law, while other businesses would have no reason to retain customer data after the termination of the business relationship and should safely dispose of such data as soon as possible.

6. The FTC is already active on data security issues. Would a Federal data security law make the FTC's job easier? How would it affect what the Commission currently does?

Data security legislation would help consumers in several ways. First, the Commission has recommended legislation requiring all companies that hold sensitive consumer data -- not just companies within the FTC's jurisdiction -- to take reasonable measures to safeguard it and to notify consumers when the security of their information is breached. Under current federal law, many businesses outside FTC jurisdiction have no obligation to secure the consumer information they maintain, and the vast majority of businesses are not required to give notice of a breach. Legislation would also give the Commission authority to seek civil penalties in data security cases, which would increase the deterrent value of our orders, as equitable remedies such as disgorgement and redress are often inadequate in these cases. Moreover, Congressional legislation would send a clear signal that implementing reasonable protections for consumer information is part of doing business, while establishing clear standards for those companies to meet.

7. How would the FTC write rules that are flexible enough for a dynamic, technology-driven environment?

I agree that rules regarding data security must be flexible so that they can be adapted as technology and business practices evolve. The Commission has taken this flexible approach in its GLB Act Safeguards Rule, which provides a good roadmap for companies as to the procedures and basic elements necessary to develop a sound security program. Companies should perform a thorough risk assessment of their security practices for managing personal information and then design a security program to control and limit these risks. Although the Safeguards Rule applies only to financial companies, it provides helpful guidance to other companies as well.

8. How does the FTC keep enforcement by State Attorneys General in sync with Federal policy on these rapidly changing issues?

The FTC has a history of working well with state attorneys general on enforcement actions in many types of cases. Our privacy and data security staff coordinate with state enforcers on issues of shared interest – for example, in the LifeLock matter, 35 states joined the Commission in challenging deceptive conduct, together obtaining an $11 million settlement.

9. Some of the FTC's recent settlement agreements provide for 20 years of audits. Is that now the norm for post-breach audits? How does the FTC determine what is a reasonable length of time for post-breach audit?

FTC orders sunset in 20 years, so many FTC data security orders require that companies implement comprehensive security plans and obtain biennial audits over the life of the order. While the Commission invariably requires companies to implement comprehensive security plans for the full term of the order, in rare cases the Commission has varied the term of the audit provision based on the facts and circumstances of a particular case.

10. The Administration's proposal does not include a specific provision addressing data brokers. Do you believe it is no longer necessary to include provisions specific to data

brokers in Federal legislation?

In the past, the Commission has supported legislative provisions that would given consumers the ability to access certain information that data brokers have about them, and in appropriate cases, to correct or suppress such data. In addition, in December, the FTC Staff issued a preliminary report seeking comment on a new framework for privacy protection. In that report, Staff proposed providing consumers with reasonable access to the data that companies maintain about them, particularly for companies that do not interact with consumers directly, such as data brokers. Because of the significant costs associated with access, staff proposed that the extent of access should be proportional to both the sensitivity of the data and its intended use. Staff is reviewing the comments received and expects to prepare a final report by the end of this year.

Responses by David C. Vladeck, Director, Bureau of Consumer Protection, Federal Trade Commission, to Questions For The Record Received from Senator Kerry from May 19, 2011 Hearing on Mobile Privacy

What is your general impression of the legislation on privacy that has been introduced in Congress thus far?

Although the Commission has not taken a position on general privacy or Do Not Track legislation, legislation introduced to date, including the Commercial Privacy Bill of Rights, the Do Not Track Act of 2011, and the Do Not Track Kids Act of 2011, all represent significant progress in addressing important privacy concerns while ensuring continued robust development and growth of new services. I support the fundamental goals of each of these pieces of legislation, respectively, to improve transparency and consumer choice over information collection, use, and sharing practices, to provide transparency and consumer choice regarding tracking, and to provide privacy protections for children and teens.

Your answer to this question is important for helping us frame the debate and how you view it. For the record, when a company or organization collects someone's information, do you believe that the information is at that point the collector's or is the collector simply a steward of people's information and that the people on whom information is collected should retain some rights and authority over that information?

The courts have not spoken on the issue of who owns this data. But regardless of who legally owns the data, we believe it is in both consumers' and business's interest for companies to maintain privacy-protective practices. Maintaining privacy protection can help build consumer trust in the marketplace. To achieve this goal, companies should not collect data unless they have a legitimate business need to do so; safeguard the data they maintain, in order to keep it from falling into the wrong hands; and dispose of it once they no longer have a legitimate business need to keep up. In addition, they should provide consumers with simple ways to exercise choices about privacy and make sure that their information collection and use practices are transparent.

Responses to Questions for the Record to Com. Ramirez
June 15, 2011 Subcommittee on Commerce, Manufacturing, and Trade Hearing

1. **H.R. __ , the SAFE Data Act, requires notice to the FTC and consumers of an electronic data breach only if the person engaged in interstate commerce that owns or possesses data in electronic form containing personal information related to that commercial activity has affirmatively determined that the breach "presents a reasonable risk of identity theft, fraud, or other unlawful conduct." At the Subcommittee hearing on June 15, 2011, you indicated support for a notification standard based on "reasonable risk." In technical comments provided to the Subcommittee, FTC staff suggests that a "'reasonable risk' standard has not been applied in this context under existing law" because many state laws focus on whether there was a breach rather than the degree and type of risk to consumers. Therefore, the FTC would likely need to clarify by rulemaking what constitutes "reasonable risk."**

   a. **Please explain why you believe "reasonable risk" is the appropriate notification trigger and why it is preferable compared to other triggers - for example, one based solely on whether there was a breach (taking into account presumptions or exemptions from notification) or one based on "significant risk."**

A reasonableness standard strikes a proper balance: it requires companies to give consumers the notice they need to protect themselves when there is a risk, while reducing the likelihood that consumers will get too many notices and easing the burden that may be imposed on companies. By contrast, the other standards that are referenced may result in over-notification or under-notification. For example, requiring notification any time there has been unauthorized access to data could result in hundreds of notices to consumers when there is no risk of harm, and could lead consumers to ignore notices when they are at risk. While a trigger based solely on the occurrence of a breach could result in over-notification, one founded on a "significant risk" standard could lead to inadequate notice to consumers. This higher standard would not require notices in circumstances where a risk of harm exists but it is not deemed to be "significant" – thus depriving consumers of the opportunity to take steps to minimize the risk and avoid harm. I would expect a "significant risk" standard to result in many fewer notifications than are currently required under state law and too little protection for consumers.

   b. **Do you believe this bill should require breach notification to consumers when types of harm other than "identity theft, fraud, or other unlawful conduct" occur? If so, please explain in what ways consumers can suffer harm from the breach of their information even when they are not at risk of "identity theft, fraud, or other unlawful conduct"?**

Although the phrase "identity theft, fraud, or other unlawful conduct" encompasses a wide array

of harms, there are other harms that could result from a data breach that ought to he protected. For example, as discussed at the hearing, exposure of information regarding a consumer's medical history may not fall within the bill's harm standard, but could lead to other serious consequences, such as affecting the consumer's employment. The Commission's case against Eli Lilly and Company (*available at* http://www.ftc.gov/os/caselist/0123214/0123214.shtm), which involved exposure of consumers' use of the anti-depressant medication Prozac, highlights the need to protect against such breaches. Similarly, the disclosure of non-public communications – such as emails or the private tweets at issue in the Commission's data security case against Twitter (*available at* http://www.ftc.gov/opa/2010/06/twitter.shtm) – could also affect, among other things, consumers' employment.

2. **Under H.R. 2221, the Data Accountability and Trust Act of the 111th Congress, there was a presumption of breach notification, and to be relieved of the obligation to notify, the burdeu was on the company to demonstrate that there was *no risk of harm* to consumers. H.R. __ , the SAFE Data Act, however, states that a company must provide notice if it *affirmatively* determines *there is a risk* to consumers. According to comments from the Center for Democracy and Technology, this distinction is "significant." CDT suggests a notice trigger based on an affirmative finding *of risk* provides an incentive to not thoroughly assess a breach for fear of finding information suggesting risk, whereas requiring a determination of *no risk* provides a greater incentive to investigate because the company can avoid notification based on the information uncovered. Do you agree or disagree that this is a significant distinction? Please explain why.**

I agree that it is preferable to require a finding of no risk rather than a finding of risk. As CDT suggests, a presumption of notification creates more incentives for companies to investigate thoroughly. By contrast, a presumption of non-notification would leave consumers in the dark in circumstances where a company has failed to conduct a reasonable investigation or where the facts are not fully known immediately but quick action by consumers (such as by placing a fraud alert) could prevent considerable harm down the road. I believe that the presumption should be to provide notice when there is a breach, unless the breached entity makes a reasonable determination that notice is not necessary based on its risk assessment. I am therefore pleased to see that the current version of the SAFE DATA Act, like H.R. 2221, requires companies to notify consumers of a breach unless they affirmatively determine that there is no reasonable risk of harm.[1]

3. **Under H.R. __ , the SAFE Data Act, the term "personal information" means an individual's first name or initial and last name, or address, or phone number, in combination with anyone or more of the following data elements for that individual:**

[1] As originally introduced, the SAFE Data Act did provide that a company must provide notice if it affirmatively determines there is a risk, but it has since been amended.

a. Social Security number.

b. Driver's license number, passport number, military identification number, or other similar number issued on a government document used to verify identity.

c. Financial account number, or credit or debit card number, and any required security code, access code, or password that is necessary to permit access to an individual's financial account.

i. You acknowledged at the hearing that this definition was "too narrow." You mentioned the possibility of including health information in the definition. Can you be more specific regarding what you mean by health information that should be included in the definition and what other types of information should be considered "personal information?"

Failing to include health information in the bill would leave a gap in statutory protection of health information such as information about an individual's physical condition or mental health. For example, the Health Insurance Portability and Accountability Act requires data security and breach notification for health information maintained by medical providers, pharmacies, and similar entities, while the Health Information Technology for Economic and Clinical Health Act requires breach notification for information maintained in electronic personal health records. The same types of information about an individual's health that are protected by these laws, however, are not specifically protected when collected and stored by medical information websites such as WebMD, and companies may not have an obligation to give consumers notice of a breach involving that information.

The definition of personal information should also be expanded in other ways. For example, Social Security numbers alone can be used for identity theft and fraud, even when not combined with other information. In addition, information such as a user name and password that can be used to access an account – whether a financial account or another type of account – is sensitive information and should be protected, especially since passwords are frequently reused across many websites. The definition should also include such information as biometric data and geolocation data, as well as non-public emails and other confidential user-generated content.

Accordingly, I recommend that the definition of "personal information" include the following information that is sensitive in nature:

(i) Social Security number.

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(iii) Financial account number, credit or debit card number, or any required security code, access code, or password that is necessary to permit access to an individual's financial account.

(iv) Unique biometric data such as a finger print, voice print, a retina or iris image, or any other unique physical representation.

(v) Information that could be used to access an individual's account, such as user name and password or email address and password.

(vi) An individual's first and last name, first initial and last name, or other unique identifier in combination with:

(1) the individual's month, day, and year of birth or mother's maiden name.

(2) the individual's precise geolocation.

(3) information that relates to the individual's past, present or future physical or mental health or condition, or to the provision of health care to the individual.

(4) the individual's non-public communications or other user-created content such as emails or photographs.

ii. The scope of "personal information" subject to the data security requirements and the breach notification requirement in the draft bill is the same. Do you believe that the scope of "personal information" subject to data security requirements should be the same as that subject to a breach notification requirement? Please explain why you believe the scope of "personal information" subject to data security requirements should be the same as that subject to a notification requirement, or why you believe the scope should be broader, if that is the case.

I believe the scope should be the same for both data security and breach notification, provided "personal information" is defined in a way that is sufficiently protective of consumers. The proposed definition of "personal information" discussed above, includes the most sensitive types of consumer information. Entities should be required to give consumers notice of breaches involving these sensitive types of consumer information so that affected consumers will know that their information has been exposed and can take appropriate measures to mitigate harm. Breach notification can also serve a signaling purpose: if one company experiences a number of breaches, consumers may conclude that the company does not take the security of customer

information seriously and take their business elsewhere. These same categories of personal information should also be incorporated into the substantive data security requirements so that the Commission can enforce the law to ensure that companies take appropriate measures to protect this sensitive information even if there has not been a breach.

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I do not read the bill as authorizing FTC rulemaking to create additional requirements for information brokers such as requiring them to submit security policies for FTC review, obtain audits of their security practices if they experience breaches, or provide certain access and correction rights to consumers. If Congress intends to give the FTC authority to promulgate rules relating to information brokers' practices, the bill should grant the FTC specific authority to do so.

Responses to Questions for the Record to Com. Ramirez
June 15, 2011 Subcommittee on Commerce, Manufacturing, and Trade Hearing

Field Code Changed

1. **H.R. __ , the SAFE Data Act, requires notice to the FTC and consumers of an electronic data breach only if the person engaged in interstate commerce that owns or possesses data in electronic form containing personal information related to that commercial activity has affirmatively determined that the breach "presents a reasonable risk of identity theft, fraud, or other unlawful conduct." At the Subcommittee hearing on June 15, 2011, you indicated support for a notification standard based on "reasonable risk." In technical comments provided to the Subcommittee, FTC staff suggests that a '"reasonable risk' standard has not been applied in this context under existing law" because many state laws focus on whether there was a breach rather than the degree and type of risk to consumers. Therefore, the FTC would likely need to clarify by rulemaking what constitutes "reasonable risk."**

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A reasonableness standard strikes a proper balance: it requires companies to give consumers the notice they need to protect themselves when there is a risk, while reducing the likelihood that consumers will get too many notices and easing the burden that may be imposed on companies. By contrast, the other standards that are referenced may result in over-notification or under-notification. For example, requiring notification any time there has been unauthorized access to data could result in hundreds of notices to consumers when there is no risk of harm, and could lead consumers to ignore notices when they are at risk. While a trigger based solely on the occurrence of a breach could result in over-notification, one founded on a "significant risk" standard could lead to inadequate notice to consumers. This higher standard would not require notices in circumstances where a risk of harm exists but it is not deemed to be "significant" – thus depriving consumers of the opportunity to take steps to minimize the risk and avoid harm. I wonld expect a "significant risk" standard to result in many fewer notifications than are currently reqnired nnder state law and too little protection for consumers.

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Office of the Secretary

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08/05/11

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Subject of Correspondence:
QFRs for Commissioner Ramirez

Author:
Representative Mary Bono Mack

Representing:

Copies of Response To:

Deadline:
08/17/11

Copies of Correspondence To:

Organization Assigned:

ACTION LOG

Date Received	FTC Org Code	Assignment To:	Date Assigned	Action Required
		Laura J. DeMartino		

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ONE HUNDRED TWELFTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON ENERGY AND COMMERCE

2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6115

Majority (202) 225–2927
Minority (202) 225–3641

August 3, 2011

The Honorable Edith Ramirez
Commissioner
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dear Commissioner Ramirez:

Thank you for appearing before the Subcommittee on Commerce, Manufacturing, and Trade on Wednesday, June 15, 2011, to testify at the hearing that focused on "the Discussion Draft of H.R. ___, a bill to require greater protection for sensitive consumer data and timely notification in case of breach."

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for 10 business days to permit Members to submit additional questions to witnesses, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and then (3) your answer to that question in plain text.

To facilitate the printing of the hearing record, please respond to these questions by the close of business on Wednesday, August 17, 2011. Your responses should be e-mailed to the Legislative Clerk, in Word or PDF format, at Allison.Busbee@mail.house.gov.

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,

Mary Bono Mack
Chairman
Subcommittee on Commerce, Manufacturing, and Trade

cc: G.K. Butterfield, Ranking Member,
Subcommittee on Commerce, Manufacturing, and Trade

Attachment

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ii. The scope of "personal information" subject to the data security requirements and the breach notification requirement in the draft bill is the same. Do you believe that the scope of "personal information" subject to data security requirements should be the same as that subject to a breach notification requirement? Please explain why you believe the scope of "personal information" subject to data security requirements should be the same as that subject to a notification requirement, or why you believe the scope should be broader, if that is the case.

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The Honorable G.K. Butterfield

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   a. Please explain why you believe "reasonable risk" is the appropriate notification trigger and why it is preferable compared to other triggers – for example, one based solely on whether there was a breach (taking into account presumptions or exemptions from notification) or one based on "significant risk."

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Rockefeller Questions for the Record

Questions for Commissioner Brill

- Commissioner Brill, last month I asked David Vladeck why a year after the comment period had closed, the FTC had still not completed its review of the Children's Online Privacy Protection Act or COPPA rule. Subsequent to the hearing, I was concerned to hear Chairman Leibowitz say that the FTC's COPPA proposal will not be out until the fall. I cannot understand what is taking so long. We are talking about protecting the most vulnerable Americans – kids under 13.

- Can you tell me why the review has not been completed?

Answer: Since we commenced our review last year, Commission staff has been diligently analyzing the public comments in connection with the review. This work involves a wide range of complex issues, and requires thorough consideration of technical topics and privacy concerns. At the same time, we have continued to enforce the existing Rule, most recently announcing a $3 million settlement with Playdom, Inc., and we will announce several additional COPPA settlements shortly. The internal work on the COPPA Rule is nearly complete, and I expect that the Commission will publicly release the findings soon.

- Will you commit to me that you will work with the other Commissioners to update the rule as quickly as possible?

Answer: Yes, of course. I am committed to our work in this area, and the privacy issues affecting our children have my full attention. I will continue to work with the other Commissioners and Commission staff to release the findings and update the Rule as quickly as possible.

Sen. Claire McCaskill --Privacy and Data Security Policies Questions for the Record

1. **To the FCC and the FTC:**

The United States may need a national framework to ensure that personal data remains secure in an increasingly electronic world and to mitigate harm in the event of a breach. As we consider legislation, it is important that we do not end up with a patchwork of federal data security laws, with multiple regulations from multiple federal agencies. That doesn't help consumers and could create competitive disparities that could distort the marketplace and create confusion. Do you agree that it is not productive to have multiple agencies with authority over the same parties, creating possible duplication of efforts and confusion and disparities for consumers and businesses?

Answer: I certainly agree that strong Federal data security and breach notification legislative requirements are critical. The Commission has testified before Congress in support of such legislation. Overlapping regulations from multiple federal agencies could create confusion and we would be pleased to work with Committee staff to reduce or eliminate any such overlap.

As Congress continues to consider legislation, we will continue—as we have done in the past—to work cooperatively with our sister agencies to avoid duplicative or redundant oversight. For example, the FTC and FCC cooperated successfully several years ago in "pretexting"cases. These cases involved individuals who pretended to be the owners of telephone accounts. Under these false pretenses, they obtained the calling records for these accounts from telephone companies and sold the records to others. The FTC took action against entities involved in such pretexting, and the FCC focused on ensuring that telephone carriers had ample security in place for calling records. Our collective goal in these collaborative efforts is to ensure that there are no gaps that would leave consumers unprotected.

Sen. John Kerry Questions for the Witnesses

Panel I

The Honorable Julie Brill, Commissioner, Federal Trade Commission

- **Question:** Commissioner Brill, can you describe the nature of the harm that consumers experience due to the insufficiency of the privacy frameworks currently in place in the United States?

Answer: The insufficiency of the privacy frameworks currently employed in the United States have resulted in considerable harms that may have been avoided had certain privacy protections, as outlined in the FTC's staff privacy report been in place.

For example, in 2002, the Commission entered into a consent order with Eli Lilly and Company resolving allegations that it publicly disclosed email addresses of subscribers to an email reminder service relating to an anti-depressant drug manufactured by the company. Certain privacy protections, including an emphasis on privacy by design (as recommended in the FTC staff privacy report), may have avoided this incident, which unquestionably harmed consumers by publicly disclosing sensitive health-related information.

More recently, the Commission entered into a consent order with Google Inc., resolving allegations that, in connection with the launch of its social media product, Google Buzz, the private contacts of consumers were made public by default in certain cases. By disclosing private email contacts, Google Buzz may have revealed the identities of those individuals and organizations that consumers were in contact with, including attorneys, health providers, professional recruiters, etc. The disclosure of this type of information could lead to certain conclusions being drawn by others that can negatively impact consumers. For example, the fact that a consumer is in contact with a particular medical provider could suggest that he is suffering from a sensitive medical condition. Similarly, the fact that a consumer is communicating with a professional recruiter may lead others to conclude he is job hunting. Again, as in the incident involving Eli Lilly and Company, had Google built certain privacy protections into its operations, this type of harm may have been avoided.

Both of these cases involved allegations of deception under section 5 of the FTC Act, because the companies had made certain promises to consumers about their information practices. Had the companies not made these claims, however, we may not have been able to address these incidents. Moreover, currently there is no general legal requirement for companies to disclose their privacy practices, and recent evidence exists that companies in the rapidly expanding mobile application field, for example, do not. The Future of Privacy Forum think tank analyzed the top 30 paid applications at the end of May 2011, and discovered that 22 of them lacked even a basic privacy policy.

Another recent example of unexpected and potentially harmful information use involves efforts by insurance companies to use data collected online to predict disease and insurance risk. Media reports indicate that this may occur without the consumer's knowledge or an opportunity to

contest the findings. Basic privacy protections, such as clear disclosure and adequate choice up front, would allow consumers to protect themselves in these situations.

The potential for harm exists with other types of information as well. For example, consumers have historically relied on state and federal law protections governing disclosure of the books they check out of the library and their video rental history, but these protections may not reach all the reading or viewing activities of consumers as they simply browse the web. If this information were linked to individual consumers, it could be used to make judgments about political affiliation, sexual orientation, or other sensitive issues. Another example of harm we explored in our privacy roundtables involves "sucker lists." Consumers can find themselves on marketing lists targeted to sensitive medical conditions or impulsive purchasing behavior. These lists can facilitate efforts to take advantage of vulnerable consumers.

- Commissioner Brill, technology is far more powerful and capable of data collection and distribution than it was even ten years ago.

- **Question:** How do technological advances such as context awareness (devices being able to tell what you are doing and who you are with) and data aggregation impact the framework of existing privacy models?

Answer: As we learned in our series of public roundtables, existing privacy models have not kept up with these types of changes in technology. For example, a pure notice-and-choice model that relies on lengthy privacy policies has proved unworkable and now, in an era of small screens, even less feasible. Consumers should not have to scroll through dozens or hundreds of screens to understand how companies collect, use, and share their data.

Similarly, a model that only addresses quantifiable harms associated with misuse of data may not address the full range of consumers' privacy concerns. For example, as you point out, advances in technology have enhanced companies' ability to store and aggregate consumers' data and use it in ways not understood, intended, or disclosed at the time of collection. Moreover, context aware devices may allow companies and others to draw conclusions about consumers that were not previously possible. Entities that can track the location of an individual using a smartphone could discern, for example, that the individual spends considerable time at an address catering to addiction treatment, or in the vicinity of a municipal building that houses the probation office.

Commissioner Brill, some critics of both the recommendations the FTC has made to industry and the legislation that I and other members have introduced is that we do not know enough about collection practices and uses to make privacy standards necessary. I believe that we know what constitutes fair information practice principles and we know that a significant portion of collectors of information do not comply with them. I think we should have a law that requires them to do so and have proposed one.

- **Question:** How do you respond to the criticism that neither the FTC nor Congress knows enough to establish baseline rules for how people's information is collected, used, and distributed?

Answer: I don't agree with this criticism. I believe that policymakers have sufficient knowledge of industry practices to encourage certain bedrock principles. The Commission has been examining the issues surrounding online privacy for years—since at least the mid-1990s. During the three Commission privacy roundtables held in 2009-2010, we heard from hundreds of participants from academia, consumer groups, industry, trade associations and others. I believe we have a considerable understanding of how industry is collecting, using and disclosing information about consumers. Because industry will continue to innovate, my goal is to develop universal principles that will continue to be relevant regardless of how industry progresses. These principles, including privacy by design, simplified choice and improved transparency, are ones that can be applicable in nearly all situations, and there appears to be widespread agreement that companies should be implementing these principles.

Commissioner Brill, data brokers deal in the acquisition of information from an original source of collection to share with other unrelated entities who might want to use that information.

I have two questions for you as it relates to data brokers and their practices:

- **Question:** Should companies be able to buy from and sell data to data brokers, without the consent of the consumers that are the subject of that data?

Answer: The Commission staff's report supported the idea that companies should provide consumers with meaningful choice before sharing their data with third parties, including data brokers. Our staff report also supported the idea that consumers should have reasonable access to information data brokers maintain about them, and in appropriate cases, the right to correct this information or have it suppressed. Further, the report noted the extent of access and the consumers' ability to correct or suppress information should be scalable to the sensitivity of the data and the nature of its use. I fully support these proposals.

- **Question:** If consumers did not consent to collection by a data broker and do not have access to or the right of correction regarding erroneous data gathered about them without their permission, how can the government help data brokers eliminate erroneous data and protect consumers?

Answer: If data brokers sell information for credit, employment, insurance, housing or other similar purposes, they must provide certain protections under the Fair Credit Reporting Act ("FCRA"). For example, they must take reasonable steps to ensure accuracy of the information they sell and they must inform purchasers of their obligation to provide adverse action notices to consumers. Even when the FCRA is not applicable, the FTC staff report proposed that data

brokers provide consumers with reasonable access to information maintained about them, and in appropriate cases, the right to correct this information. I support this proposal.

Commissioner Brill, the FTC made its first call for comprehensive privacy protection under a Democratic majority in 1999. This FTC issued a draft report calling for privacy by design, simpler more streamlined choices for consumers, and transparency in data collection practices and uses last year. As you know, we modeled our legislation on that report and witnesses on the next panel will speak directly to the legislation.

- **Question:** Do you have a sense of the proportion of collectors of information that are not today incorporating privacy protections into the design of their services or meeting the other baseline fair information practices you lay out?

Answer: Although we do not have statistical information of that nature, based on our investigations and general policy initiatives, it is evident that many companies are still lagging in incorporating basic data security standards in their everyday practices. We have also seen evidence that privacy disclosures are not being used by a substantial numbers of mobile applications ("apps"). Recently, the Future of Privacy Forum think tank analyzed the top 30 paid apps and discovered that 22 of them lacked even a basic privacy policy. It is clear that work remains to be done in order to achieve widespread compliance with basic privacy protections.

- **Question:** Have you had a chance to review the legislation and in your analysis, to what extent does it meet the three recommendations for policymakers included in the draft report?

Answer: I am pleased to see that basic privacy protections like those laid out in our FTC staff report—such as privacy by design, improved notices, and increased transparency—are incorporated into the draft legislation. I believe it would be useful for Commission staff to continue to discuss the draft legislation with your staff.

In our legislation, we are calling for comprehensive protections that allow people to opt out of having their information collected for uses they should not have to expect and beyond that, we arguing that we also need other rules, like the ability to have consumers ask firms to cease using their information if they lose trust in that company as well as the knowledge that companies are required to have accountability and security measures in place before they collect people's information.

You have said that prior approaches to privacy protection focused solely on threats to harm after the harm has occurred or relied on simple notice of collection, and that efforts to offer choice of whether or not to have that information secured have fallen short.

- **Question:** If you believe that the "no harm, no foul" and simple notice and choice solutions are inadequate as I do, would you not agree that we need a new comprehensive privacy law?

Answer: I agree that we need a new approach to consumer privacy. The Commission staff embarked on its privacy reassessment and issued its preliminary privacy report in recognition of the inadequacies of existing approaches to consumer privacy. I also agree that companies should follow basic privacy principles like those laid out in the staff report. As you know, however, the Commission has not yet taken a position on legislation.

➢ Commissioner Brill, in a May 4 speech you gave, you responded to the criticism that a Do Not Track option would dry up advertising revenue. You said that "As the Commission learned during our discussions and research prior to issuing our report, when given an informed and more granular choice, most consumers, including myself, want to receive tailored ads – and will choose to share information for that purpose."

I agree with that, which is why although we require collectors to give consumers a choice about whether their information is collected or not, we did not make a universal choice mechanism the centerpiece of our legislation.

- **Question:** Given that you think most people will not opt-out of having their information collected, are not the other fair information practice principles – security of information, clear and specific notice, ability to access data or call for cessation of its use, and the requirement that data be collected and held only as long as necessary, to name a few – just as important or more important than whether or not we can secure a universal do not track choice?

Answer: I agree that comprehensive privacy protections are very important. The protections that are reflected in your bill, including data security, privacy by design, and clear notices, are critical to ensuring basic privacy protections. Do Not Track can be a very effective tool for consumers to exercise choices about the growing industry practice of behavioral advertising. Do Not Track will not address other current privacy concerns.

➢ Commissioner Brill, the FTC report calls for different treatment for first party collectors of information and third party collectors. It is a concept we adopted in our legislation as well because we believe a first party interaction is known to the consumer and some degree of trust is implicit.

- **Question:** Could you explain the difference in your mind and why different treatment is warranted?

Answer: The Commission staff report recognizes that the relationship that consumers have with first parties is different from the relationship they have with third parties. When a consumer goes directly to a retailer's website to obtain a product or service, the consumer inherently understands that she is sharing information with that retailer. However, when visiting that retailer's website, the consumer does not understand or expect that the retailer will be sharing her information with other companies ("third parties"). That is why our staff report recommended that consumers be given clear notice and choice about such information sharing with third parties. This distinction, however, must be drawn carefully. If first parties are defined broadly to include Internet Service Providers ("ISPs") or other companies that have access to almost all consumers' browsing behavior, then consumers would likely have a different expectation about the use of their data by those companies than they would a typical retailer. Consumers would undoubtedly be surprised, and may in fact be concerned, to learn that ISPs or similarly situated companies could use all of their browsing behavior without their consent. For this reason, the staff report noted that enhanced consent or even more heightened restrictions would likely be warranted for practices such as ISPs' use of Deep Packet Inspection to create marketing profiles.

Senator Barbara Boxer

Questions for the Record on Privacy and Data Security:
Protecting Consumers in a Modern World
July 12, 2011
To Hon. Julie Brill, Commissioner, Federal Trade Commission

Question 1

In your written testimony, you note that the FTC has brought 34 data security cases during the past 15 years. During this same period of time, state Attorneys General have been free to file cases under state law to protect their citizens. What has been your working relationship with state Attorneys General on data security matters, and has their ability to prosecute state laws ever conflicted or hindered the FTC's prosecution of its cases?

Question 2

Have the efforts of state Attorneys General assisted the FTC in its enforcement of consumer privacy and data security laws?

Answer 1 & 2: The FTC has a history of working well with state Attorneys General on enforcement actions in many types of cases. Having served for many years in state attorneys general offices, I can say from experience that the Commission has worked well with the state AGs. The agency's continued commitment to this cooperation is among my top priorities.

Commission staff engaged in privacy and data security-related investigations regularly interact with staff from the state AGs and enforcement actions are coordinated when appropriate. For example, in the enforcement action involving LifeLock—a company that provided an identity theft prevention service—35 states joined the Commission, together obtaining a $12 million settlement involving charges that it used false claims to promote its services.

As we do with our sister federal agencies, we work closely with state AGs to prevent any conflicting or duplicative enforcement actions.

Question 3

I am concerned about the effect of the data breach bill's preemption of California law. As you may know, California law requires a company to notify consumers of a breach if there is a reasonable belief that personal information was accessed without authorization. Do you have an opinion on whether it is best for data breach notification to be triggered on whether there has been unauthorized access to data, or whether notification should be triggered on a company's determination as to whether there is a risk of harm?

Answer: There may be a risk that requiring notification any time there has been unauthorized access to data could result in over-notification to consumers, causing them to ignore the important notices. Therefore, generally, it may be useful to have companies make an objective

reasonable determination as to whether the breach will not pose a reasonable risk of harm. In such cases, a notice would not be required.

At the same time, however, for certain sensitive data, unauthorized access to such data may create a presumption of harm. For example, in the Commission's Health Breach Notification Rule, the Commission stated that, because of the sensitivity of health information, unauthorized access would be presumed to create a risk of harm.

Question 4

In *AT&T v. Concepcion*, the U.S. Supreme Court ruled that federal arbitration law preempts California law banning the use of class action waivers in consumer agreements. Some professors and consumer advocates in California have expressed concern that this decision could have an effect on state data breach laws, such as the strong law in effect in California. Do you believe the Supreme Court's decision could have an impact on states' ability to pass strong consumer protection laws, particularly in the data breach/notification area?

Answer: I note that the California state data breach law contains a private right of action. Cal. Civ. Code § 1798.84. Under the decision in *AT&T v. Concepcion*, it appears that companies handling consumer data could mandate in their consumer agreements that consumers address any problem related to data security and notification through individual arbitration.

TO: SENATE COMMERCE COMMITTEE STAFF

FROM: SENATOR MARK BEGICH

CC: MEAGAN FOSTER AND CHRIS BIRDSALL

SUBJECT: Questions for the Record for Commerce Data Breach Hearing

DATE: 7/28/2011

Questions:

For all panel I

- Besides passing legislation is there anything else that can be done to assist consumers' digital education so they have a better understanding of the consequences of their online and offline data profiles?

Answer: As we mentioned in the December 2010 preliminary staff privacy report, we believe that all stakeholders should work to educate consumers on privacy issues, particularly in the digital world. For its part, the FTC has a very active program to educate families about steps people can take to protect their data online, and understand how companies may track their online activity. Many school systems have ordered materials from the FTC, or adapted them for their own use. We encourage schools that aren't yet using these materials to consider sharing them with teachers, parents and students.

Since October 2009, the FTC has distributed over eight million copies of the guide for parents, "Net Cetera: Chatting with Kids About Being Online." Approximately 20,000 schools, school systems, law enforcers and other community organizations have placed orders. The Net Cetera guide helps adults lead a conversation with kids about online privacy and safety, rather than taking a lecturing approach.

Recently, OnGuardOnline.gov released a new publication designed to educate consumers about mobile apps, "Understanding Mobile Apps: Questions and Answers." The guide explains what apps are, the types of data they can collect and share, and why some apps collect geolocation information. The FTC issued the guide to help consumers better understand the privacy and security implications of using mobile apps before downloading them.

In September 2011, the FTC will release a revamped OnGuardOnline.gov site, in coordination with the Department of Homeland Security's Stop Think Connect campaign. The site, which will feature a blog, will continue to be the federal government's site to help users be safe, secure and responsible online.

Senator Kelly Ayotte
Questions for the Record
Senate Committee on Commerce, Science and Transportation
Privacy and Data Security: Protecting Consumers in the Modern World
June 19, 2011

Commissioner Brill:

- In a May 2011 interview, Chairman Leibowitz stated that "one of the commission's priorities is to find a pure section five case under unfair methods of competition. Everyone acknowledges that Congress gave us much more jurisdiction than just antitrust." However, in 2009, the U.S. Chamber of Commerce published an article that casts doubt on the FTC's authority to expand its jurisdiction under Section 5. The Chamber stated, "The character of many of these proposals, as well as their scope and diversity, highlights key disadvantages of extending Section 5 beyond the range of the existing antitrust laws." Do you agree with the Chamber's views that we should look with skepticism at the expansion of Section 5? If not, why not?

Congress established the Commission as a bi-partisan independent agency with a mandate to protect the public from unfair methods of competition. Congress intended that the Commission play a unique role in the economic life of the nation. As the Supreme Court explained in *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239 (1972), in which it thoroughly examined the legislative history of the FTC Act, Congress intended for the Commission to proscribe unfair business practices that are not condemned under the letter of the antitrust laws. Senator Cummins (R. Iowa), one of the main sponsors of the bill establishing the FTC, squarely stated on the Senate floor: "|t|hat is the only purpose of Section 5 to make some things punishable, to prevent some things, that can not be punished or prevented under the antitrust law." 51 Cong. Rec. 12,454 (1914). While the vast majority of our antitrust enforcement actions involve conduct that falls within the prohibitions of the Sherman or Clayton Acts, the Commission has a broader mandate, which it discharges by challenging, under Section 5, conduct that is likely to result in demonstrated harm to consumers or to the competitive process.

Indeed, Section 5 may be the only practicable means to stop harmful conduct that cannot be reached under the antitrust laws. The Commission's recent use of Section 5 demonstrates that the Commission is committed to using that authority in predictable ways that enhance consumer welfare. For instance, the Commission used Section 5 in the recent U-Haul settlement to prevent "invitations to collude" by fixing prices. A competitor's invitation to its nominal rival to fix prices does not violate the Sherman Act, but it serves no lawful purpose and creates an intolerable risk that price fixing will result. And even if an invitation to collude is rejected, it can undermine the process by which prices are set by independent competitors and lead to tacit coordination. In the article you mention, the Chamber of Commerce "acknowledge|s| that there are certain, limited forms of anticompetitive conduct that may not be covered by the antitrust laws," including invitations to collude.

Congress chose to give the Commission its broad mandate rather than handing the Commission a list of specific acts to be condemned as unfair because it knew that no such list could be, or long remain, sufficiently complete to protect competition and consumers. To address concerns about the fairness of not doing so, Congress limited the remedies available for violations of Section 5. The Commission is limited to certain remedies, such as cease and desist orders, to stop harmful conduct; the agency cannot seek a fine or civil penalty as a result of a Section 5 violation. Moreover, Section 5 of the FTC Act does not provide for a private right of action, and no party may obtain treble damages under the FTC Act.

Because of the limited consequences of Section 5 enforcement, the Commission uses its Section 5 authority not to punish the wrongdoer, but to fairly eliminate the conduct that is likely to injure competition and consumers, allowing honest and competitive markets to further consumer welfare.

- The Association for Competitive Technology represents a number of tech companies including Microsoft, Oracle, and VeriSign. ACT has blogged about Chairman Leibowitz's desire to expand the FTC's Section 5 authority. It wrote that Chairman Leibowitz "is arguing that requiring actual economic analysis of alleged 'harms to competition' is too high a bar for his agency. They need to be able to prevent business practices they believe are harmful to competition and consumers, even if the economic analysis suggests otherwise. And in this new regime, companies will have little guidance as to what the FTC will consider legal vs. illegal." This doesn't seem to be the right policy for the agency to be pursuing. Why is the FTC doing so?

The Commission will not bring a case where the evidence shows no actual or likely harm to competition or consumers. As the Chairman explained in his testimony **before the Senate Judiciary Committee last summer, "Of course, in using our Section 5 authority the Commission will focus on bringing cases where there is clear harm to the competitive process and to consumers." That is, any case the Commission brings under the broader authority of Section 5 will be based on demonstrable harm to consumers or competition. As the Second Circuit held in the *Ethyl* case[1], there must be some "indicia of oppressiveness" before the FTC can bring an enforcement action under Section 5. We have adhered to this standard in our cases. For instance, in the recent** Intel case, **the Commission alleged that Intel's behavior harmed consumers and the competitive process in a number of ways, such as raising the price of computers; limiting consumer choice; inhibiting competition from non-Intel chip makers; reducing innovation by computer makers; and reducing the quality of industry benchmarking. Commission staff was prepared to offer proof of these harmful effects to establish that Intel violated Section 5, as well as Section 2 of the Sherman Act. Intel offered to settle the case, resulting in a Commission order eliminating the harmful conduct.**

Prior to Google's announcement of an FTC investigation into its competitive practices there were a lot of news stories about the battle between the FTC and the DoJ over which agency would get to investigate the company. In fact, Assistant Attorney General for Antitrust Christine

[1] E.I du Pont de Nemours & Co. v. FTC, 729 F.2d 128 (2d Cir. 1984) ("Ethyl").

Varney questioned whether two agencies should have antitrust review powers. She stated, "I would leave to Congress how they would like to resolve the overlapping and sometimes inconsistent jurisdiction between the agencies... I think what business does need is clarity, certainty and understanding of the legal framework within which their deals will be evaluated." Do you think that the overlapping jurisdictions of the FTC and Department of Justice - and the fights that they produce - are a good thing for American businesses and consumers? If not, how would you propose to fix it?

I believe the FTC and the Department of Justice work well together to promote and protect competition and the interests of American consumers and businesses. Both agencies have areas of expertise, and the differences in their organizational structures are quite deliberate and provide certain benefits. For example, the FTC was created by Congress as an independent agency with expertise in both consumer protection and antitrust. One of the principal benefits of the FTC is that it is bi-partisan and our decisions require consultation and consensus. That means that our enforcement efforts remain relatively consistent as we go from administration to administration. Further, because Congress wisely charged the Commission with competition and consumer protection enforcement, we have a broad perspective that enhances our work. The FTC also was chartered by Congress to employ non-enforcement tools, such as issuing reports, performing empirical studies, and advocating for pro-competition reforms with other government agencies, to support and strengthen the agency's competition and consumer protection missions.

This year, the agencies worked closely together on several joint policy projects to provide transparency and predictability for businesses subject to the antitrust laws. Last August, FTC and DOJ issued revised Horizontal Merger Guidelines, a core document that provides businesses with a clear view into how the agencies conduct antitrust merger reviews. This year, the agencies also jointly developed a Proposed Antitrust Enforcement Policy relating to cooperation among health care providers organizing Accountable Care Organizations under the new Patient Protection and Affordable Care Act. These joint statements reflect a high level of consensus and cooperation, and serve as models for competition agencies throughout the world.

It is true that there are occasional clearance disputes over which agency is in the better position to investigate a matter. In most instances, one or the other agency has greater expertise in the industry of potential concern due to a previous investigation, and clearance is given to that agency right away. But in grey areas, such as where neither agency has conducted an investigation in the past, both agencies can make a claim that a related investigation gives them a head start on the facts and issues that are likely to arise. The FTC and DOJ have a process in place to resolve clearance disputes, which helps resolve the issue quickly, so that one agency can get started on the investigation and minimize any burden on the parties. Recently, clearance disputes have been rare and are handled quickly.

U.S. House of Representatives
"Oversight of Antitrust Enforcement Agencies"
Hearing December 7, 2011
FTC Responses to Questions for the Record

The Honorable Steve Chabot

Q1: ***Medical Anti-trust***

1 am disturbed by the recent trend of FTC intervention into the state-based regulation of medicine and dentistry.

As you surely know state medical boards are official agencies made up of health care professionals entrusted to utilize their expertise to ensure patient safety. These men and women are experts in their fields and they are the professionals we should be looking to for health policy recommendations.

And when the FTC disapproves of a state medical board's decision they are interjecting themselves into a discussion which is not only outside their jurisdiction, bnt clearly outside their realm of expertise, and I believe that this intervention may very well compromise patient safety.

It's my understanding that the FTC is primarily staffed with lawyers, economists, and bureancrats, and in my view, we shonld not be yielding patient safety decisions to anyone but medical experts.

Mr. Chairman, please explain to me who at the FTC knows more than medical experts about the most appropriate and effective methods of treating patients. Please explain to me why the FTC is involving itself in the delivery of health care in the first place.

A: I appreciate the concerns that you have raised. The work the FTC does to protect and promote competition in health care markets is important and we always want to make sure that we are getting it right. In fact, agency staff members are in the midst of discussions with physician organizations, and I have met with the American Medical Association, to discuss similar issues. The FTC is committed to ensuring that competition brings down health care costs for all Americans. I welcome the dialogue with these groups and expect it will be productive.

The Commission's expertise is in competition and consumer protection matters. Indeed, it has over three decades of experience investigating competition in health care markets. I can assure you, however, that the FTC does not claim expertise in patient care or patient safety, nor does it seek to usurp the role of the states in determining such matters.

The FTC has long been committed to maintaining competitive health care markets, because competition can yield substantial benefits for consumers—including greater access to quality care at lower prices. Most of these efforts are law enforcement actions that challenge price-fixing, other anticompetitive conduct, and anticompetitive mergers. The agency also has a competition advocacy program, which is designed to assist federal and state regulators by bringing attention to the potential impact on competition of proposed laws and regulations. The advocacy program is a bipartisan effort, expanded in recent years by Chairman Timothy Muris. Almost all of the Commission's votes on the advocacy efforts have been unanimous.

It is well understood that the creation or maintenance of unnecessary statutory or regulatory barriers to competition in health care delivery can reduce access to and efficiency and quality of care, and increase its cost. Thus, when asked to comment on state legislative or regulatory proposals, FTC staff encourages policymakers to incorporate competition considerations into their analysis. For example, some comments have observed that the effect of the proposed regulation might be to reduce access to or raise costs of health care for underserved or uniquely vulnerable populations such as children, seniors, and members of rural communities. At the same time, we recognize the role that considerations of patient safety play in the decisions that state legislators and regulators make regarding the delivery of health care. In all of these efforts, the FTC's goal is to provide information and analysis to assist policymakers in their decisions.

Q2: ***Anti-trust Oversight - Unclear regulation***

Mr. Leibowitz, I believe Section 5 of the FTC Act which prohibits entities from engaging in unfair or deceptive acts or practices in interstate commerce is a necessary check on anticompetitive practices in this country. However, I think that the guidelines need to be more transparent and they need to be enforced consistently. It is this kind of government regulation that is making it difficult for companies to conduct business and plan for the future.

Chairman Leibowitz, don't you agree that it would improve the clarity and predictability of the law if the FTC provided advance guidance about the bounds of Section 5 before investigating or proceeding against businesses on the sole basis of your Section 5 authority?

Chairman Leibowitz, in the past the FTC has promised to promulgate a Section 5 report clarifying the bounds of your Section 5 authority. Why haven't you provided such a report yet, and when can we expect one?

A: We agree that businesses and consumers benefit whenever we are able to improve the clarity and predictability of the laws we enforce, including Section 5 of the FTC Act. My fellow Commissioners and I continue to consider the best way to further clarify the bounds of our Section 5 authority, be it through a report, a

policy statement, or some other approach. This will remain a high priority, and a bipartisan one, during the remainder of my term as Chairman.

It should also be noted that Supreme Court case law and our past complaints and consent agreements identify the types of conduct to which the FTC has applied its stand-alone Section 5 authority in the past. Recent cases, including *Intel*, *U-Haul*, and *N-Data*, further illuminate the types of conduct the Commission has challenged as unfair methods of competition under Section 5.

Of course, even though the Commission has broad authority under Section 5, the Commission is well aware of its duty to enforce Section 5 responsibly. We take seriously our mandate to find a violation of Section 5 only when it is proven that the conduct at issue has not only been unfair to rivals in the market but, more important, is likely to harm consumers, taking into account any efficiency justifications for the conduct in question. Although Section 5 is clearly broader than the antitrust laws, it is not without boundaries, and the Commission has used its Section 5 authority judiciously in the recent past, consistent with the concerns you have raised regarding the desire of businesses for clarity and predictability. The absence of any private right of action or treble damages remedy also limits the effective reach of Section 5. We have also had and will continue with bipartisan discussions with state Attorneys General regarding the scope of Section 5 and its state law analogues, including Ohio Attorney General Mike DeWine.

Responses to Questions for the Record to Commissioner Ramirez
July 14, 2011 "Internet Privacy: The Views of the FTC, the FCC, and NTIA" Hearing

Responses to Questions for the Record from Ranking Member G.K. Butterfield

1. **Section 5(9) of H.R. 2577, the Secure and Fortify Electronic Data Act ("SAFE Data Act"), defines a "service provider" as "a person that provides electronic data transmission, routing, intermediate and transient storage, or connections to its system or network, where the person providing such services does not select or modify the content of the electronic data, is not the sender or the intended recipient of the data, and does not differentiate personal information from other information that such person transmits, routes, or stores, or for which such person provides connections."**

   Section 2(c) exempts a "service provider" from the data security requirements in the bill. Section 3(b)(2) requires a "service provider" that becomes aware of a breach of security of data in electronic form containing personal information that is owned or possessed by another person engaged in interstate commerce that connects to or uses the service provider's system or network to transmit, route or intermediately or transiently store that data in connection with that commercial activity to notify: (1) law enforcement, and (2) the person that initiated the connection, transmission, routing, or storage, if that person can reasonably be identified.

   a. **Do you believe that a direct-to-consumer cloud provider could argue that it is a "service provider," and therefore not obligated to meet the data security requirements in the bill? Please explain why or why not.**

      A direct-to-consumer cloud provider might argue that it is a "service provider," as currently defined in the bill, and, as such, that it is exempt from the bill's data security requirements. For example, a cloud-based email provider may contend that it provides electronic data transmission, does not select or modify the content of the electronic data, is not the sender or the intended recipient of the data, and does not differentiate personal information from other information that it transmits. At the same time, a strong counter-argument could be made that a direct-to-consumer cloud provider does not fall within the service provider exemption because it: (1) is actually providing permanent rather than "intermediate and transient storage," and (2) is not providing the service to a "third party" but rather to the very individual who engaged the provider for such service. Direct-to-consumer cloud providers, such as e-mail providers, often have highly sensitive information including passwords and financial information. In addition, technology is evolving in such a way that increasing amounts of personal information are stored in the cloud. It is therefore critical to ensure that cloud-based providers are covered by the bill.

   b. **Do you believe the definition of "service provider," as drafted, is overly broad? If so, what types of direct-to-consumer Internet services, cloud or otherwise, could exploit the definition to skirt the bill's data security requirements? In addition,**

please provide any comments, guidance or legislative language that would narrow the definition to what you believe is a more appropriate scope.

Yes, I am concerned that many existing types of cloud-based providers might argue that they satisfy the definition of "service provider," including, for example, email providers and storage providers that enable consumers to store documents, photos, and other content in the cloud. As more companies move to the cloud, they may argue that the exception applies to new types of cloud models that may develop. Other Internet-based businesses, such as email providers that transmit but do not store information, may make similar arguments. To avoid any potential ambiguity about the scope of protection afforded to consumers, the bill should explicitly cover direct-to-consumer cloud providers.

c. Assuming that a direct-to-consumer cloud provider is NOT a "service provider":

i. Do you believe such a provider could nonetheless argue that it is not obligated to meet the data security or breach notification requirements in the bill because the provider generally does not know the contents of data in its custody, and in particular whether that data contains "personal information," as defined in the bill? Please explain.

Direct-to-consumer cloud providers may well argue in an investigation or litigation that, because they do not know the specific content of the information put in the cloud, they cannot be held responsible for "owning or possessing" personal information under the bill. Moreover, they may claim that, without knowing whether the cloud contains personal information or its nature, they cannot develop reasonable data security procedures tailored to the nature of that information. Given consumers' increasing use of cloud providers to store information, including sensitive data, it is important that cloud providers take reasonable measures to secure consumer data and inform them if there is a breach, regardless of whether the provider knows which types of data have been accessed. To foreclose such arguments, the bill could include a presumption that entities that provide data storage services to individuals own or possess data containing personal information and are therefore subject to the bill's requirements.

ii. Do you believe such a provider could argue that it does not "own or possess" the data containing personal information as required for the bill to apply? Please explain.

Under the bill as currently drafted, direct-to-consumer cloud providers may argue they are not subject to the bill's data security requirements regardless of whether they know that the information that consumers put in the cloud contains personal information. This is because the bill applies to entities engaged in commerce that own or possess data containing personal information "related to that commercial activity." Cloud providers might argue that the information placed in the cloud by

consumers is not "related to that commercial activity" of providing the cloud service itself. To avoid potential ambiguity about the scope of protection afforded to consumers, the bill should explicitly cover direct-to-consumer cloud providers.

d. Do you believe direct-to-consumer cloud providers should be more clearly brought within the scope of the bill, regardless of their awareness of the contents of the data in their custody? Please explain why or why not. If so, please also provide comments, guidance or legislative language to bring such services within the bill's reach.

Yes. I believe that all companies that hold sensitive consumer data – including direct-to-consumer cloud providers – should be required to take reasonable measures to safeguard such information. If cloud providers fail to maintain reasonable security, consumers could lose trust in the electronic marketplace. As noted above, one way to ensure that cloud providers are covered by the scope of the bill is to include a provision stating that if any person provides data storage services to individuals, there shall be a presumption that such person owns or possesses data containing personal information and they are subject to the bill.

2. I understand that the FTC has brought enforcement actions against 36 companies under its Federal Trade Commission Act (FTCA) authority to prevent "unfair or deceptive acts or practices in or affecting commerce" for their failure to adequately secure consumers' personal information. H.R. 2577 would provide FTC with a specific grant of authority to pursue data security cases and to seek civil penalties.

Among the types of personal information these 36 companies failed to adequately protect were: payroll information, employer histories, health information, mortgage information, email addresses, income histories, book and music purchase histories, and tax returns. H.R. 2577 only requires that businesses secure an individual's name, or address, or phone number, *IN COMBINATION WITH* an identifying number such as Social Security number or driver's license number; or a financial account number *WITH* any required security code or password.

a. Do you believe that FTC's authority to bring some of these 36 cases would have been limited had H.R. 2577 - as reported by the Subcommittee on Commerce, Manufacturing, and Trade on July 20, 2011 - been law? If so, how many of these cases and/or claims within cases would FTC have been prevented from pursuing? Please briefly describe those cases and why FTC would have been unable to pursue and bring them to a close. Also, please discuss why you believe those were important cases for FTC to be able to pursue.

The majority of the FTC's 36 data security enforcement actions involved types of personal information that would fall, or arguably fall, outside the bill as currently drafted. Although the bill does not explicitly limit the FTC Act's applicability to data security, and the FTC would continue to bring cases under Section 5 of the FTC Act, I am concerned that a court might interpret the bill as implicitly limiting the FTC Act's scope

due to the bill's narrow definition of "personal information." Twenty-two of the Commission's data security cases involved some types of information that would not be covered under the bill's current definition of personal information. While some of these cases involved financial information such as Social Security numbers ("SSNs") that are included in the definition of personal information, such information was not always kept in databases together with identifying information and thus would not be covered under the personal information definition. SSNs or account numbers alone can be used for identity theft and fraud, even when not combined with other information. In addition, a number of our data security cases involved "consumer reports," as defined in the Fair Credit Reporting Act. While some consumer reports, particularly credit reports, contain SSNs and thus would be considered personal information if not truncated, other types of consumer reports such as check cashing reports, landlord rental histories, and the like may not contain SSNs or account numbers and would not be deemed personal information under the hill's current definition.

The definition of "personal information" also does not include health information, even though breaches of health information can cause harm. In both the *CVS* and the *Rite Aid* cases (*available at* http://www.ftc.gov/os/caselist/0723119/index.shtm and http://www.ftc.gov/os/caselist/0723121/index.shtm), the Commission charged that pill bottles and other prescription information were left in open dumpsters, potentially revealing consumers' sensitive medical conditions and prescriptions. One of the Commission's very first data security cases was against Eli Lilly and Company (*available at* http://www.ftc.gov/os/caselist/0123214/0123214.shtm). In that case, the Commission charged that the company failed to train its employees, one of whom sent a blast email revealing the names of people who were on Prozac. I think many consumers would find these types of breaches of their medications and medical conditions harmful and would want this data to be protected from exposure.

There are also other types of sensitive data not included in the bill's definition of "personal information" that should be protected. The definition, for instance, does not include geolocation data or information such as user name and password that can be used to access an account. Account access information such as user name and password is sensitive information and should be protected, especially since passwords are frequently reused across many websites. Breach of location information can result in physical harm.

Accordingly, in order to ensure that sensitive consumer data is appropriately protected, I recommend that the definition of "personal information" include the following information that is sensitive in nature:

(i) Social Security number.

(ii) Driver's license number, passport number, military identification number, or other similar number issued on a government document used to verify identity.

(iii) Financial account number, credit or debit card number, or any required security code, access code, or password that is necessary to permit access to an individual's financial account.

(iv) Unique biometric data such as a finger print, voice print, a retina or iris image, or any other unique physical representation.

(v) Information that could be used to access an individual's account, such as user name and password or email address and password.

(vi) An individual's first and last name, first initial and last name, or other unique identifier in combination with:

(1) the individual's month, day, and year of birth or mother's maiden name.

(2) the individual's precise geolocation.

(3) information that relates to the individual's past, present or future physical or mental health or condition, or to the provision of health care to the individual.

(4) the individual's non-public communications or other user-created content such as emails or photographs.

b. Given the choice between continuing to pursue data security cases under its current FTCA authority or under H.R. 2577, as reported by the Subcommittee on July 20, which would be more preferable to FTC and why?

In prior testimony, the Commission has announced its support for legislation requiring all companies that hold sensitive consumer data – not just companies within the FTC's jurisdiction – to take reasonable measures to safeguard it and to notify consumers when the security of their information is breached. Under current federal law, many businesses outside FTC jurisdiction have no obligation to secure the consumer information they maintain, and the vast majority of businesses are not required to give notice of a breach. Legislation would also give the Commission authority to seek civil penalties in data security cases, which would increase the deterrent value of our orders, as equitable remedies such as disgorgement and redress are often inadequate in these cases. However, the Commission already has a robust data security program, requiring companies to implement reasonable and appropriate measures to protect sensitive consumer data. In my view, it is critical that new legislation not potentially narrow the scope of the Commission's existing program, either expressly or by implication. In particular I am concerned that the definition of "personal information" does not include sensitive data, such as SSNs and financial account numbers alone, health information, and geolocation data, emails or user names and passwords, the release of which could result in significant consumer harm. In order to ensure that sensitive consumer data is appropriately

protected both under this legislation and the FTC Act, I believe the scope of this definition should be expanded to include the types of information discussed above. I look forward to working with members of Congress on this and other issues.

Responses to Questions for the Record from Rep. Joe Barton

1. **I'm troubled by the fact that the FTC - the principal federal agency charged with protecting consumers - accepted nothing more than verbal assurances of improved behavior from a company with a very spotty track record of protecting consumer privacy. When it comes to protecting privacy, I don't think verbal reassurances cut it, especially when there's a clearly established pattern of violating privacy.**

   Of course I'm referring to the manner in which the FTC handled the unprecedented privacy breach that resulted when Google utilized its Street View mapping service to amass an unthinkable volume of private, personal information about consumers. This debacle became known as SpyFi.

   On June 19, 2009, Nicole Wong, Deputy General Counsel for Google, testified before this committee and stated "Because user trust is so critical to us, we've ensured that privacy considerations are deeply embedded in our culture ... For example, our team ... works ... from the beginning of product development to ensure that our products protect our users' privacy." I ask to enter into the hearing record her testimony from that June 19, 2009.

   Yet, in May 2010, almost 12 months after Mrs. Wong testified to our Committee that privacy is "deeply embedded" into Google's culture, it became clear that SpyFi was occurring at the same time she testified. Her verbal reassurances to this Committee were clearly inadequate. Moreover, one thing that is not tolerated by our Committee - regardless of which party occupies the chairman's seat - is being deceived by the witnesses that we call to testify. Now, I'm not saying that Ms. Wong deliberately misled us when she testified here in 2009, but one thing is clear: her testimony has since been directly contradicted by internal actions her company was taking at the time she testified.

   For these reasons, I want to know why you settled only for Google's verbal assurances that it would hire another director of privacy, provide privacy training for engineers, and add a privacy review process for products. I request that the FTC's letter dated October 27, 2010, which outlines the FTC's bases for closing its SpyFi investigation, also be entered into the record.

   Google's data collection through its Street View vehicles involved the invisible and massive collection of consumer data without consent – including data that was personally identifiable. I am unquestionably concerned about the collection of private consumer information without consent.

In light of what transpired, Commission staff conducted a thorough investigation of Google's conduct to determine whether Google violated any law enforced by the FTC and specifically Section 5 of the FTC Act, our principal statutory authority, which prohibits deceptive or unfair acts or practices in or affecting commerce. Under Section 5, a representation or omission is deceptive if it contains a misrepresentation or omission that is likely to mislead consumers acting reasonably under the circumstances to their detriment. Deceptive claims or omissions are actionable if they are material, *i.e.*, they would affect a consumer's decision or conduct with respect to a product or service. An act or practice is unfair if it causes or is likely to cause substantial consumer injury that is not reasonably avoidable by consumers themselves and is not outweighed by countervailing benefits to consumers or competition.

Following our review of the evidence obtained in our investigation into this matter and after receiving a commitment from Google that there would be no recurrence of this episode, we determined to close the investigation. As noted in a letter from Bureau Director David Vladeck sent to Google on October 27, 2010, which is available on the FTC's website (*available at* http://www.ftc.gov/os/closings/101027googleletter.pdf), Google confirmed that it had not used the payload data (*i.e.*, contents of communications over unsecured wireless networks) obtained from its Street View cars in any Google product or service. In addition, FTC staff received significant commitments from Google that it would not do so in the future and would delete the data as soon as possible. Moreover, at our urging, Google implemented a number of measures to prevent privacy violations in the future. Many of these measures build privacy into product development and ensure that Google engineers and managers receive core privacy training. These measures are summarized in Mr. Vladeck's letter.

Although I cannot provide any more detail concerning the investigation of Google Street View, I would like to note that in March the Commission announced a major enforcement action against Google arising from the February 2010 launch of its Buzz social network (*available at* http://www.ftc.gov/os/caselist/1023136/index.shtm). The proposed Google Buzz order, among other things, prohibits Google from misrepresenting the extent to which it maintains and protects the privacy and confidentiality of information from or about consumers. The order also requires the company to institute a comprehensive privacy program for all information Google collects from or about an individual in connection with any of Google's many products or services – including the types of WiFi communications collected by its Street View vehicles – and to obtain independent audits of that privacy program on a biennial basis for 20 years. I believe that, as a result of the Google Buzz order, Google is required to provide meaningful privacy protection for all consumers from whom it collects information.

2. I recently introduced H.R. 1895, the Do Not Track Kids Act of 2011 with Mr. Markey. Has your agency taken a position on this bill? If so, what is your position?

Although the Commission has not taken a position on general privacy or Do Not

Track legislation, in my view legislation introduced to date, including the Do Not Track Kids Act of 2011, represents significant progress in addressing important privacy concerns while ensuring continued robust development and growth of new services. I support the fundamental goal of this piece of legislation – to provide privacy protections for children and teens.

(1) The Federal Trade Commission (FTC) has been at the forefront of educating the public about protecting their identities. You have also put agencies on notice about eliminating the unnecessary use and display of SSNs. What trends are you seeing with respect to ID theft and the use of SSNs in those thefts? Are things getting better or worse?

In 2010, as in prior years, identity theft was the leading complaint category that the Commission received from consumers. Government documents/benefits fraud (19%) was the most common form of reported identity theft in 2010, followed by credit card fraud (15%), phone or utilities fraud (14%), and employment fraud (11%). Government documents/benefits fraud increased 4% since 2008, while identity theft-related credit card fraud declined 5% during the same period. Our complaint data does not specifically track the use of SSNs in those identity thefts. Moreover, in many instances identity theft victims cannot determine with precision the specific personal information that led to the crime. As a result, we are not able to assess trends regarding the use of SSNs specifically in identity theft.

(2) The President's Identity Theft Task Force referred to identity theft as "a problem with no single cause and no single solution" in its 2007 Strategic Plan. Please give us an update on what has improved since 2007 and what you see as the remaining challenges in preventing ID theft. Which public agencies, either Federal, State or local, expose the greatest number of Americans to ID theft and fraud by continuing to publicly use SSNs? Have you or your agency spoken with any of these agencies? Is there legislation that was recommended by the task force that has not been enacted but should be? Please provide a status report on the recommendations relating to authentication.

Since 2007, coordination among federal agencies on the issue of identity theft has vastly improved. An interagency Task Force, consisting of staff from DOJ, FTC, FBI, IRS, HHS and others meets bi-monthly to discuss emerging trends and issues. FTC staff regularly speaks with staff from these other government agencies regarding a variety of identity theft-related topics, including continued use of SSNs by government agencies. In addition, the Commission and other Task Force agencies have conducted extensive consumer and business education on identity theft prevention and recovery, and data protection. Many of the published educational materials discuss SSNs specifically. The Commission has not, however, surveyed which agencies at which levels of government have exposed the most consumer SSNs.

In its written testimony, the Commission cited two legislative recommendations to address the risks posed by the use of SSNs in the private sector – improved consumer authentication and standards to reduce the public display and transmission of SSNs. To date, neither of these recommendations has been enacted.

As to the authentication recommendations, the Commission believes that improved authentication can be achieved by encouraging or requiring all private sector business that have consumer accounts to adopt appropriate risk-based consumer authentication

systems that do not rely on an individual's SSN alone. Accordingly, the Commission recommends that Congress consider establishing national consumer authentication standards to verify that consumers are who they purport to be.

(3) K-12 schools continue to collect students' SSNs and use them as authenticators. Would you provide an update on this practice? How can we encourage school systems to stop this practice?

The Commission staff is currently examining the practice of schools using SSNs as authenticators. On July 12, 2011, the FTC and the Department of Justice's Office for Victims of Crime will host "Stolen Futures: A Forum on Child Identity Theft." (See www.ftc.gov/bcp/workshops/stolenfutures). One of the panels at the forum will focus on securing children's data in the educational system, especially in the K-12 arena. At the forum, leaders in the field will provide an update on current practices and explore ways to encourage school systems to better safeguard student information, including SSNs as authenticators and alternatives.

(4) I appreciate the work that the Federal Trade Commission has done to address the problems of ID theft, especially ID theft among children and foster children. I hope that you will continue to address these issues. In terms of ID theft among foster children, how widespread is the problem and why are foster youth particularly vulnerable to identity theft?

Foster children are particularly vulnerable to identity theft because their personal information is easily accessible by many people, including relatives, foster parents, and state employees. Moreover, since foster children often lack a strong familial or social safety net, they tend to have fewer resources to help them once they become victims. Finally, the consequences of identity theft may be more severe for foster children because once they are emancipated from foster care, establishing good credit is essential in their process to establishing a strong start to adulthood. At the upcoming forum on child identity theft, a panel will focus on these challenging issues, as well as discuss enacted and proposed state and federal legislation related to foster children and identity theft.

(5) What types of actions is the Commission taking to assist child welfare agencies in preventing ID theft and helping victimized youth recovery their identities?

The July 12th forum on child identity theft will include a panel on the issue of identity theft in the foster care context. One of the panelists, Howard Davidson of the ABA's Commission on Children and the Law, will explore what child welfare agencies can do to help prevent identity theft. We plan to work with Mr. Davidson and other panelists after the forum to continue to collaborate on foster child identity theft issues.

(6) Are there any policy recommendations that you would make to Congress to reduce the number of foster children who are victims of ID theft?

FTC staff is currently examining the issue of identity theft in the context of foster care. Although the July 12 forum is focused on developing and disseminating outreach

messages to prevent identity theft and assist victims, the Commission staff will be sure to offer any policy recommendations as appropriate.

(7) In your written testimony, you say that the Commission recommends eliminating the unnecessary display of SSNs, including on identification cards. Does the Commission recommend ending the use of the SSN as an identifier for foster children?

As explained above, this is an issue that staff will be exploring at the July 12 forum. Based upon what staff learns, policy recommendations may be provided at a later date.

(8) Do you believe that we are winning or losing the battle against ID theft?

Identity theft continues to be a significant problem, which the Commission is trying hard to address in several ways, as described in its written testimony. Commission staff believes that its robust data security enforcement program has encouraged companies to invest in better data security to avoid having consumers' information fall into the hands of identity thieves. The Commission has also worked hard to educate consumers in how to better protect themselves from identity theft. It has disseminated millions of copies of its consumer education materials. Of course, much work remains to be done, and the Commission continues to devote resources to this important issue.

(9) How has ID theft changed over the last several years? Is it more widespread, sophisticated and harder to stop? What are the trends with respect to organized crime or state sponsored ID theft?

(10) What is the most common cause of ID theft? Is it lost or stolen Social Security cards, death records that are sold with SSNs, or via some public listing or even the internet? Are there some trends you can discuss?

[Answer to questions 9 and 10] In response to question 1, we have provided information about some trends relating to consumer complaints that the FTC has received over the past several years. However, we do not want to suggest that the unverified complaints we receive are indicative of broader trends in identity theft. The number and types of complaints we receive vary with press stories about identity theft and other unrelated factors. Because the Commission has never attempted to conduct year-to-year surveys or analyses of general trends in identity theft, we cannot speak to issues such as the level of sophistication of identity thieves or what percentage of identity theft is state-sponsored.

That said, we do know that there are many causes of identity theft including high-tech (e.g., hacking, phishing, malware, spyware and keystroke logging) and low-tech causes (e.g. dumpster diving, stealing workplace records, stealing mail or wallets, and accessing public records containing SSNs). Some thieves fabricate SSNs that correspond to active SSNs that have been issued previously to individuals, especially children. Identity theft

can also occur when an individual uses someone else's personal information, including their SSN, to obtain employment, file tax returns, or obtain other government benefits.

(11) Can you tell us what burdens may occur by removing 'unnecessary' display of SSNs? Is there a way to encourage proper use of SSNs while minimizing those burdens?

The challenge in combating the misuse of SSNs is to find the proper balance between the need to keep SSNs out of the hands of identity thieves and the need to give businesses and government entities sufficient means to attribute information to the correct person. Business and governments use SSNs to ensure accurate matching of consumers with their information. SSN databases are also used to fight identity theft – for example, to confirm that a SSN provided by a loan applicant does not, in fact, belong to someone who is deceased. To encourage proper use of SSNs while minimizing burdens of removing SSNs, the Commission has identified two key legislative recommendations – improved consumer authentication and standards to reduce the public display and transmission of SSN. In terms of the second recommendation, the Commission recommends eliminating the unnecessary display of SSNs on publicly-available documents and identification cards and limiting how SSNs can be transmitted. Such steps would reduce the availability of SSNs to thieves, without hindering the use of SSNs for legitimate identification and matching purposes.

(12) One of the interesting parts of Mr. O'Carroll's testimony is the story of Dr. Martinez, which thankfully has been successfully resolved through the arrest of his ID thief. However, Dr. Martinez had yearly audits from the IRS, even through they knew after the first contact that his wages were falsely reported due to ID fraud. Are there good examples of private or public sector entities doing more to recognize what has happened to a victim and in some way "certify" his or her experience so he or she can move on with his or her life and not be repeatedly questioned about who they are?

Some states offer identity theft victims a "passport" that the victim can carry to prove who they are. The passport – which typically may be obtained through a state's Office of Attorney General – may be useful in the event that an identity theft victim is confused with an actual or suspected criminal. In addition, the Commission staff recommends that identity theft victims obtain a detailed police report that will help to prove their innocence and enable them to clear their name, especially if new accounts are opened.[1] The Commission also recommends that Congress consider creating national standards for the public display and transmission of SSNs.

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[1] A police report, coupled with an identity theft affidavit, creates an ID Theft Report, which enables victims to exercise certain federal rights to clear their name. Among other things, an ID Theft Report enables victims to place an extended fraud alert on their credit files for seven years, to block erroneous information on their credit files, and obtain documents underlying the crime that can be used to prove their innocence.

(13) What can individuals do to protect themselves through any public or private institutions before SSN fraud starts?

To protect themselves from SSN fraud, consumers should avoid carrying their SSN in their wallets or purses. They should be wary about giving out their SSN to any public or private institution unless it is clear why that institution needs the SSN. Consumers should also regularly check their credit reports and financial statements. Consumers may get free annual credit reports from the three credit reporting agencies through www.annualcreditreport.com.

(14) What are three things that everyone can do to prevent becoming a victim of ID theft?

Although there are no iron-clad methods for preventing identity theft, everyone should: (1) check their bank statements and credit card statements monthly, and credit report at least annually; (2) secure their personal information – if it is paper, lock it and/or shred it; if it is online, use secure Internet connections and regularly update anti-virus software; and (3) not give out their personal information in person, on the phone, through the mail, or over the Internet unless they know who they are dealing with.

(15) Federal, state and local governments still display, or sometimes truncate, SSNs on public documents. To what extent does the public display of SSNs contribute to ID theft? What findings do you have on the display of SSNs by government at all levels and what are your recommendations?

As a result of the President's Task Force on Identity Theft, many federal agencies have eliminated or reduced their collection and display of SSNs. Further, OPM has issued guidelines to federal agencies on the appropriate and inappropriate use of SSNs in federal employee records. Most recently, the Department of Defense recently announced its elimination of SSNs as an identifier. As noted above, the Commission has supported legislation to minimize public display and transmission of SSNs.

(16) The latest trend in credit cards is to use smart phones to make credit card purchases. Given the recent agency and congressional concerns about data security and tracking through the phones, do you have any concerns about SSNs and credit card use by smart phones?

The Commission staff is analyzing the developments in the mobile marketplace, including how new services and technologies offered through smart phones treat personal information – such as SSNs and credit cards data. The use of mobile phones as payment mechanisms is still evolving. To address emerging issues in the mobile arena, the Commission has established a Bureau-wide team working extensively on issues related to the mobile marketplace, examining both privacy and data security issues. We have several active mobile investigations focusing on the collection of consumer data in

general and we will continue to closely watch the security of data collected by -- and through -- mobile devices.

(17) Can you give us any recommendations on how to prevent the growing ID theft problems with children and even unborn children? What should parents do to protect their children's financial record? Are there any policy changes we can make to help parents resolve ID theft issues on behalf of their children?

At the July 12th Forum, panelists from the government, the private sector, and advocacy and non-profit organizations will explore existing and potential solutions to child ID theft. The panelists specifically will explore solutions, as well as the best advice for parents to prevent and remedy child ID theft. Armed with this information, the Commission staff will be better able to advise parents on how to safeguard their children's personal information and resolve identity theft issues.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Director
Bureau of Consumer Protection

November 22, 2011

Chairman Mary Bono Mack
Subcommittee on Commerce,
Manufacturing, and Trade
Committee on Energy and Commerce

Chairman Joseph R. Pitts
Subcommittee on Health
Committee on Energy and Commerce
United States House of Representatives
Washington, DC 20515

Dear Chairmen Bono Mack and Pitts:

Thank you for your October 31, 2011 letter setting out additional questions for the record on the October 12, 2011 joint hearing on the Interagency Working Group on Food Marketed to Children ("IWG"). My specific responses to the questions are set out below. At the outset, however, I would like to clarify a few points about the nature of the IWG report to Congress and about the IWG's process.

First, I think it is important to stress again that the IWG's report to Congress will lay out recommendations for voluntary action – not legislation or regulations. The FTC has always been an advocate of a self-regulatory approach to food marketing to children. As I stated in my testimony, the FTC and the other IWG agencies are committed to finding an approach that plays a role in improving children's health and is workable for industry. The IWG recognizes that it cannot ask more of food marketers than they can reasonably deliver if it expects their continued cooperation in this effort. As with past reports to Congress from the FTC and the Department of Health and Human Services ("HHS") on this topic, industry may choose to embrace some recommendations and decline to adopt others.

Second, it seems that some in the food industry may have misinterpreted the IWG's April 28, 2011 "Request for Comments" as the issuance of standards directly to industry or as an effort to circumvent the requested report to Congress. In fact, the April 28, 2011 release was not the IWG's final product, but an interim step in developing and refining recommendations for the report to Congress. The FTC felt that it was important to solicit formal input from industry and other stakeholders on the feasibility and impact of the proposal before finalizing the report, as we often do when we intend to issue a report or make recommendations.

Third, and perhaps most importantly, many of the questions posed in your letter relate to the IWG's preliminary proposal, but not to the IWG's revised recommendations. In response to stakeholder comments, and in recognition of a new and significant self-regulatory initiative by the Children's Food and Beverage Advertising Initiative ("CFBAI"), the FTC is substantially reworking the structure and substance of its recommendations with respect to the scope of children's marketing to which the nutrition principles would apply. In fact, the FTC is using the uniform principles issued in July 2011 by the CFBAI as the template for its revised recommendations. As a result, we anticipate that our final recommendations will be much closer to the marketing definitions that the food companies have already determined are reasonable and attainable goals for self-regulation.

I appreciate that members of the Committee and Subcommittee have a number of concerns about the IWG's actions and I have tried to respond to the enumerated questions as fully and specifically as possible. To the extent that some questions relate to nutrition science and policy falling outside the FTC's expertise, I defer to other IWG agencies to provide more detailed responses.

Questions from the Honorable Joseph R. Pitts

1. Will you commit to providing answers to the following questions before finalizing your next submission to Congress?

Yes. The IWG has not yet submitted its report to Congress.

2. On September 12, 2011, members of the Energy and Commerce Committee sent you a letter asking ten questions about the work of the IWG (attached). Your response to that letter did not answer these questions. Therefore we restate them as follows:

The IWG's initial response to the September 12, 2011 letter was not meant to be our only response to the specific questions. The letter was a preliminary response to give the Committee basic information about the status and direction of the IWG's efforts; the FTC's Office of Congressional Relations simultaneously offered to provide an in-person briefing on the specific questions. The FTC staff provided a briefing for committee and subcommittee staff on October 6, 2011. I apologize for any misunderstanding about our intent to respond fully to the Committee's earlier letter.

a. When does the IWG intend to complete the study called for by Congress? How will the IWG take account of the study in formulating its recommendations?

The IWG has completed a deliberate and thorough study of relevant marketing research, nutrition research, and self-regulatory programs governing food marketed to children. The sources reviewed are detailed in the IWG's April 28, 2011 Request for Comments on the preliminary proposed principles. On marketing issues, key sources included the Institute of Medicine's (IOM) 2006 report on food marketing to children and youth, the FTC's 2008 study on food marketing expenditures and activities directed to children, and data compiled by the

FTC for a follow-up study.[1] On the nutrition side, the IWG relied primarily on the most current nutrition research supporting the 2010 Dietary Guidelines for Americans ("2010 DGA"). In addition, the IWG solicited public comment on its preliminary proposal, including 30 specific questions on marketing, nutrition, and economic impact (costs and benefits). The IWG is considering the 29,000 comments submitted by stakeholders as it revises its recommendations.

Based on an initial meeting in 2009 with the staff of both Senator Harkin and then Senator Brownback, the authors of the Congressional mandate creating the IWG, and based on subsequent meetings with Senator Harkin's staff, the IWG believes it has fully met the directive to conduct the study called for by Congress.

b. How did the IWG derive the precise levels of the nutrients to limit per Principle B? Why did the IWG deviate from existing federal nutrition standards?

The basis for each of the precise nutrient levels in the preliminary principles was set out in the IWG's April 28, 2011 Request for Comments. The FTC staff defers to the U.S. Department of Agriculture ("USDA") on whether and how the IWG revised recommendations may differ from other federal nutrition standards.

c. What evidence exists to show that the proposed Nutrition Principles are achievable for most types of food? What evidence exists to show the proposed phase-in periods are adequate?

The FTC staff defers to the USDA on the revised nutrition recommendations. However, to the extent the IWG's revised recommendations are much closer to the CFBAI approach, they should be achievable for most foods. In addition, because they are voluntary, companies can choose to embrace all, some, or none of the IWG recommendations.

d. What evidence exists to show that childhood obesity is related to advertising of food that doesn't comply with the proposed Nutrition Principles? Are there examples of advertising restrictions elsewhere that have led to reductions in childhood obesity?

In its 2006 report, the IOM found strong evidence that television advertising influences the food and beverage preferences, purchase requests, and short-term consumption of children 2 to 11 years. The IOM also concluded that, even if the extent of the influence of advertising on obesity proves to be small, the health consequences aggregated for the entire population of

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[1] Institute of Medicine, *Food Marketing to Children and Youth: Threat or Opportunity?* (National Academies Press 2006) (2006 IOM Report); Federal Trade Commission, *Marketing Food to Children and Adolescents: A Review of Industry Expenditures, Activities, and Self-Regulation*, A Report to Congress (July 2008) (2008 FTC Report), *available at* http://www.ftc.gov/os/2008/07/P064504foodmktingreport.pdf.

American children and youth would be "consequential."[2] Ultimately, the panel of experts that prepared the IOM report decided the evidence was sufficient to form the basis for strong recommendations related to food marketing to children.

Given the complexity of the obesity issue and the many efforts simultaneously underway to combat it, it may never be possible to definitively attribute reductions in obesity rates to any one specific effort.

Regardless of whether and to what extent food marketing has contributed to the problem of childhood obesity, however, it can still be part of the solution. The FTC has long been an advocate of encouraging food marketers to harness their tremendous marketing power and creative know-how to persuade children to make better food choices.

e. What costs would be involved in reformulating food on a widespread scale to meet the proposed Nutrition Principles? How would such costs affect the price of food?

The FTC staff defers to the USDA on the question of costs involved in reformulating foods.

f. If manufacturers cannot successfully reformulate foods to comply with the proposed Nutrition Principles and comply instead with the 'voluntary' marketing restrictions, how would the economy be affected? Has the IWG determined the likely impact on advertising revenues? What is the likely impact on television programming, particularly programming intended for children and families? What impact on employment do you expect the proposed Nutrition Principles to have?

Manufacturers do not necessarily need to reformulate foods to comply. The IWG's revised recommendations more closely track the new CFBAI principles; thus, there are many foods currently marketed to children that would not require reformulation or would require only minor reformulation. Companies also have the option of substituting healthier products from their portfolio in children's advertising or continuing to market a food in general audience media, thus minimizing the impact on advertising revenues overall. Even if industry chose to discontinue children's advertising for all foods that did not meet the IWG revised recommendations, the impact on children's programming should be relatively small.[3]

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[2] *See* 2006 IOM Report at 307-8. The report looked only at television advertising and did not take into account the additional impact of the many other ways food is marketed to children, such as on the Internet, by cell phone and other digital means, and through tie-ins with popular children's movies.

[3] As one example, Nickelodeon has indicated in previous testimony before Congress that only 20 percent of its ad revenue is for food products and that nearly all of those ads (80 to 90 percent) are placed by companies that have already pledged to comply with the new CFBAI principles. That means that, at most, only 2 to 4 percent of ads currently on Nickelodeon would potentially be affected.

The FTC staff does not believe that the dire economic reports submitted during the comment period withstand scrutiny. One study in particular, issued by IHS Consulting, predicts a loss of 74,000 jobs, but provides no explanation of methodology or supporting analysis. The IHS estimate on job impact is based on a particularly implausible starting supposition that advertising spending would drop by $1.9 billion in the first year alone. That figure represents an amount larger than the FTC's own estimates of the entire amount spent annually on food marketing to children and adolescents.[4]

g. What alternatives to the current proposal has the IWG considered? In particular, what does the IWG expect would happen if the industry is allowed to continue its self-regulatory efforts without "voluntary" government guidelines?

As indicated above, based on the progress the CFBAI has made in developing a stronger uniform set of principles, the IWG is substantially revising its recommendations to more closely follow the new CFBAI approach.

h. Has the IWG determined the secondary economic impacts of the proposed marketing restrictions on American communities and schools, such as reduced financial sponsorships for athletic teams?

The FTC staff is sensitive to the funding needs of community and athletic programs and, as indicated in my written testimony, the FTC has recommended that the IWG revised recommendations exempt these activities from the scope of covered media.

i. How does the IWG reach consensus on its recommendations? How does it address differences of opinion?

The four agencies have been able to work successfully through any differences of views by discussion and debate to reach a consensus.

j. Does the IWG interpret its mandate as giving it flexibility to recommend against adopting food standards or marketing restrictions, either for children generally or for some age groups, if it concludes that is the best course? Or does it interpret the mandate as requiring it to recommend some types of standards and restrictions, even if the costs substantially outweigh the benefits?

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[4] *See* 2008 FTC Report at 7. The IHS study was fully critiqued in testimony before the House Energy and Commerce Committee by Dr. John Irons of the Economic Policy Institute. Dr. Irons' detailed analysis concludes that the IHS report "rests on shaky, unsupported assumptions and misses key considerations necessary to provide an adequate overall assessment of the job impact of the proposed guidelines."

The IWG has viewed its mandate as developing recommendations that will promote children's health and also be feasible for industry to implement. The agencies are, in fact, making a number of recommendations to narrow the scope of covered marketing to achieve that balance. For instance, the revised recommendations now contemplate that, with the exception of certain in-school marketing activities, marketing to adolescents ages 12 to 17 would not be covered.

3. I am concerned with the IWG's proposal's potential impact on the confectionery industry, a major manufacturing presence and employer in Pennsylvania, as it relates to seasonal shaped and seasonally wrapped products. By limiting the ability to use packaging and point of purchase displays, the current guidelines would impact the ability of candy companies to use traditional as well as innovative shapes, figures, and packaging. Specifically, the proposal would prohibit seasonal products related to every major holiday including Valentine's Day, Halloween, Easter, and the winter holidays. Products that could be restricted include chocolate and candy bunnies, chicks, pumpkins, cats, hearts, snowmen, Santas, and angels. As you know, seasonal shapes and seasonal packaging are traditions currently enjoyed by the entire family, not just children and adolescents. Considering almost half of all candy is sold around the holiday seasons, limits on the way these products are shaped, packaged, and displayed in stores would severely impact confectionery businesses. Does the FTC agree that such seasonally shaped and seasonally packaged products should not be a prohibited marketing practice under the IWG proposal?

As I indicated in my testimony, the FTC has recommended to the IWG that in-store displays and packaging of seasonal or holiday confections not fall within the scope of covered media because they are not marketing directed primarily to children, but rather are marketing to parents or other adults. We expect that the IWG's final report will make clear that such packaging and in-store displays are not covered.

4. In your testimony, you stated that the FTC wants kids to eat "healthier" food, like "yogurt, peanut butter, [and] Cheerios," which would seem to suggest that these foods all meet the nutrition standards set out in the IWG's proposal. Yet, comments submitted on the IWG's proposal suggest that these foods do not meet IWG's nutrition standards. Please explain your basis for asserting that these foods fit within IWG's proposal, including an assessment of how these foods stack up against the IWG's proposed 2021 standards. Because yogurts and peanut butter have variations from product to product, please conduct your analyses using five to ten market-leading products advertised to kids for each product type.

The FTC does not have the nutritional data to conduct this analysis and will defer to the USDA for a more detailed response to this question. My statement at the hearing was based on a series of detailed nutritional analyses or "food runs" conducted for the IWG by USDA staff during the development of the IWG's initial proposal and its revised recommendations. Those food runs indicate that Cheerios as well as some brands of peanut butter and yogurt will meet the IWG's revised recommendations.

5. In its memorandum accompanying the release of the IWG's proposed standards in April 2011, the FTC described the goal of the effort as steering children away from "foods of little or no nutritional value." With respect to the products in the preceding question that fail the IWG's 2021 standards proposed last April, which products in the FTC's opinion constitute foods of "little or no nutritional value?" What evidence do you have that cereal and foods the FDA has deemed "healthy" are foods of "little or no nutritional value?"

As indicated above, the IWG initial proposal and its revised recommendations would permit the marketing of many brands of the products in the preceding question. There are many foods currently marketed to children that contain meaningful amounts of the food groups that the 2010 DGA encourage, such as whole grain, fruits, vegetables, and low-fat dairy. There are also some foods, such as soft drinks, candy, and cookies, that contain little or no meaningful positive contribution from any of these food groups. These same foods are sometimes high in added sugars, saturated fat, or sodium. These are the types of products the FTC was referring to in its statement.

6. If a competitor of a manufacturer of a breakfast cereal (like Cheerios or Special K) or a yogurt (such as Stonyfield Farm 0% Fat Yogurt) or a whole-wheat bread (such as Arnold 100% whole wheat bread) claimed, in an advertisement, that these products (all of which would appear to fail the IWG's proposed 2021 standards) are "foods of little or no nutritional value" and that their consumption would contribute to obesity or poor nutrition intakes, could such statement by a competitor be deemed to be false or misleading advertising in violation of the FTC Act? Could such a statement legally be made without evidence to substantiate it? If so, is the FTC justified in making essentially the same statements in its memorandum? On what basis?

The FTC's statement was not intended to suggest that all foods currently marketed to children are of little or no nutritional value, or that the foods your question refers to are of little or no nutritional value. The FTC defers to the USDA to confirm that the products you refer to would meet the IWG's revised recommendations.

7. You stated that many cereals are "healthy foods that make meaningful contributions to the diet." How do you explain the fact that virtually all ready-to-eat cereals, including those that meet the FDA's "healthy" definition, actually do not meet the IWG's proposed 2021 nutrition standards.

The only 2021 nutrient level that the IWG suggested in its preliminary proposal was for further sodium reductions. The IWG is making substantial revisions to its recommendations, including to proposed sodium levels. The FTC defers to the USDA to respond with respect to whether ready-to-eat cereals marketed to children meet the IWG's revised recommendations.

8. Throughout your testimony, you repeatedly stated that the FTC's focus has been on "marketing, not nutrition," deferring nutrition-related questions to "my colleagues who work for the nutrition agencies"; "How the FDA and USDA categorize foods, that's not the

FTC's expertise, and I would defer to my colleagues; "[Health analysis of foods] is not our area of expertise." The record shows, however, that in at least one memorandum (July 15, 2010 Memorandum from Michelle Rusk and Carol Jennings to David Vladeck ("FTC Memorandum"), which is attached and was called to your attention at the hearing), the FTC staff specifically questioned the USDA on its proposed nutrition standards. Please detail exactly what role the FTC played in determining the nutritional standards in the IWG's proposal, specifically commenting on whether or not the FTC considered or commented on what foods should or should not fit within those standards.

This memo is not inconsistent with my characterization of the FTC's primarily role. The FTC's primary role in the IWG effort has been to coordinate meetings, discussion, and drafting of documents among the IWG participants and also to share its substantive expertise on marketing and industry self-regulatory efforts. The FTC took tbe lead on drafting the revised recommendations related to marketing, and the USDA, with assistance from FDA and CDC, took the lead on drafting the revised recommendations related to nutrition. The FTC has deferred to the other member agencies on recommended levels of nutrients. The issues raised in the FTC staff memo relate to the scope of foods that would be covered by the USDA alternative proposal and how the proposal compared to existing industry self-regulatory pledges. The discussion is based on FTC's knowledge of the CFBAI self-regulatory initiative and individual member pledges, and on the Commission's knowledge of the types of foods marketed to children from its 2008 marketing study.

9. Regarding the FTC Memorandum, referred to above, you testified at the hearing that you were not certain that this memorandum was ever shared outside of the FTC. Have you now been able to determine that this document was, in fact, shared with USDA?

At the time of the hearing, I did not recall that this unsigned draft had been shared with anyone outside this agency; however, I am now able to confirm that this unsigned draft memo was, in fact, shared with USDA and the other IWG agencies.

10. In explaining the IWG's delay in issuing its final report, you mentioned that "part of the delay has been occasioned by our effort to engage closely with stakeholders." Please expand on what speeific efforts the FTC has undertaken to work with stakeholders, and how those efforts occasioned the delay that you describe. What stakeholders are these?

The FTC has made it a point to listen to all interested parties who requested meetings and has met with stakeholders from industry and the public health community on a number of occasions. These included meetings with CFBAI pledge companies and other food manufacturers, media companies, consumer and public health advocates, and Congressional staff. In addition, the IWG provided a formal comment period for all interested parties to provide their input. The IWG issued its preliminary proposal with a Request for Comments on April 28, 2011. The IWG extended that comment period from 45 days to 75 days at the request of the CFBAI and other industry groups. Finally, the IWG held a public forum on May 24, 2011 to provide additional opportunity for interested parties to make oral statements.

11. When asked the question of whether FTC considered the impact of the food and marketing restrictions on the price of food, you stated that that was the "kind[] of issue[] that we tried to discuss" but that "[t]his was not an issue that was raised by any of the 29,000 commenters that commented on the preliminary draft." In its Comment, the Chamber of Commerce submitted a detailed report by Georgetown Economic Services entitled "An Analysis of the Economic Impact of the Dietary Specifications of the Interagency Working Group on Food Marketed to Children" that comprehensively addressed this issue. This report concluded that a full adoption of the IWG diet (i.e., a diet consisting solely of foods that meet the IWG's proposed 2021 standards) would conservatively result in a 60.3% increase in the cost of a 2,000 calorie daily diet. Has the FTC fully considered this report? Who conducted this review and when? If the FTC disagrees with any of the conclusions drawn in this report, please present the FTC's contrary analysis, including all documents addressing this report.

I should correct my statement to acknowledge that, although the vast majority of comments (over 28,000 of the 29,000) were supportive of the IWG proposal, some industry comments raised concerns about the cost to industry and consumers. As I have noted, however, these are only voluntary recommendations and, given the substantial revisions the IWG is making to its proposal, I believe any concerns about the economic impact should be alleviated.

The Georgetown Economic Services (GES) report was submitted during the IWG's comment period, and reviewed by the FTC staff and other IWG member agency staff as part of their comment review. The FTC has not done a formal written analysis and believes that the GES report is flawed on its face. The report, for instance, reflects a fundamental misunderstanding of the scope and purpose of the IWG recommendations. The IWG recommendations address only those food products marketed directly to children and make recommendations only as to the marketing of those products, not their sale or consumption. Rather than basing its analysis on foods most commonly marketed directly to children, however, the GES analysis is based on the 100 foods most consumed by the general population, including coffee, tea, beer, and other items that are never marketed directly to children. In addition, the GES cost estimates are premised on an assumption that all Americans would switch from their current diet to a diet only of foods meeting the IWG principles. It is completely implausible that this would be the effect of voluntary recommendations related only to marketing activities directed to children.

12. In January, President Obama issued an Executive Order cautioning that regulations must be "consistent" with each other and "promote predictability." Do you believe that it is consistent to have a set of FDA regulations that encourages certain foods to be labeled as "healthy," have the U.S. Dietary Guidelines (published by HHS and USDA) promote foods like whole grain products as foods that should be eaten more often, at the same time propose marketing standards that seek to restrict the consumption of these same foods?

With respect to the Executive Order, the FTC staff believes that the order governs regulatory actions and does not extend to agency reports requested by Congress. The IWG report to Congress will provide recommendations to guide voluntary industry action and is not a

regulatory proposal. The staff does, however, agree with the underlying premise that nutrition policy should be consistent. The IWG's earlier proposal and the revised recommendations, as already noted, were based primarily on the most recent nutrition policy and research that was the basis for the 2010 DGA. The IWG tailored its recommendations to fit the specific concerns behind the Congressional directive – improving the nutritional profile of foods marketed directly to children in an effort to improve children's diets and reduce childhood obesity.

I defer to USDA to respond to your question about whether the IWG revised voluntary recommendations are consistent with nutrition labeling regulations and the 2010 DGA.

13. How is it "consistent" to publish marketing standards that declare many foods – including foods that the FDA defines as "healthy" – as foods "of little or no nutritional value" as the FTC has done here in its memo accompanying the release of the guidelines?

The April 28 Request for Comments on the IWG preliminary proposal was a solicitation of stakeholder input to help the IWG refine its recommendations and prepare its report to Congress. It was not the publication of marketing standards. As noted in my response to question 5 above, the FTC statement was referring to foods, such as soft drinks, candy, and cookies, that would not be consistent with recommendations in the 2010 DGA.

14. How does the IWG proposal promote "economic growth, innovation, and job creation," as the President directed in his Executive Order? Did you assess the impact of your proposal on jobs? Where is your assessment of the impact of your proposal on jobs?

Congress directed the IWG to submit a report making only recommendations to Congress. It did not direct the agencies to issue a regulatory proposal or to take any action that would be within the scope of the Executive Order. The IWG was not asked to assess the impact of its proposal on jobs. That said, the IWG did seek public comment on the impact of its proposal on industry members. The IWG is now revising its recommendations in response to the comments received, and it is making them closer to the new CFBAI standards. Because the IWG recommendations will be voluntary and industry response is not yet known, it is very difficult to assess the overall impact of the recommendations.

15. Dr. Dietz testified that IWG has not yet analyzed the impact of your food marketing restrictions on charitable organizations, including food banks. Any such effects would clearly weigh in the costs and benefits of the proposal. When you have finished evaluating the impact would you please provide the Committee with the analysis?

As I indicated in my testimony, the FTC is recommending that the current draft proposal not cover philanthropic activities, charitable events, or community programs. Thus, there should be no impact on charitable organizations, including food banks.

16. Dr. Dietz testified that IWG has not yet analyzed the impact of your food marketing restrictions on jobs in the food industry. Any such effects would clearly weigh in the costs

and benefits of the proposal. When you have finished evaluating the impact, would you please provide the Committee with the analysis?

The IWG is not issuing restrictions on food marketing but recommendations for voluntary self-regulatory principles. As detailed above, the IWG could not reliably do such an analysis given the voluntary nature of its recommendations and the variety of approaches industry could take to implement them. The IWG sought comment on the impact of its proposal on industry and is making changes in response to the comments received. The IWG's revised recommendations will be much closer to the food industry's CFBAI program standards. Given that many members of the food industry have already agreed to the new CFBAI standards, the IWG does not believe its recommendations will have a negative impact on the industry.

17. Dr. Dietz testified that IWG has not yet analyzed the impact of your food marketing restrictions on jobs in the cable and broadcasting industry. Any such effects would clearly weigh in the costs and benefits of the proposal. When you have finished evaluating the impact would you please provide the Committee with the analysis.

Please refer to the response to Question 16.

18. Dr. Dietz testified that the proposal would result in no lost jobs in the advertising industry. Please provide us with the analysis that forms the basis for Dr. Dietz conclusion, as well as any additional analysis on job effects the IWG has performed.

The FTC cannot respond as to the specific basis for Dr. Dietz's statement.

19. Your proposal would prevent food retailers from using certain kinds of in-store displays. Why? What evidence have you presented that links in-store displays to obesity? What evidence have you presented that restricting such marketing would reduce obesity?

As I indicated in my testimony, the FTC staff has recommended a number of revisions to the scope of marketing activities that would be covered by the IWG's recommendations and anticipates that there will be revisions related to in-store displays in the final Report to Congress.

20. Have you been able to review the purported impact of advertising over the past 50 years as Rep. Latta suggested, and to contrast those purported impacts with changes in the amount of physical activity?

The IWG has not reviewed the impact of advertising in contrast with the impact of physical activity over the past 50 years. The IWG recognizes that obesity is a complex issue involving many factors and that any solution to this problem will need to include efforts on many different fronts, including both physical activity and improving children's diets. The Congressional mandate establishing the IWG did not ask the IWG to isolate the causes, or assess the relative contributions of various factors to, childhood obesity.

21. What consideration was given, in formulating the IWG's proposal, to the FTC Bureau of Economics report from 2007 establishing that child-directed television food advertising had declined by around 9% between 1977 and 2004? How precisely was the IWG able to conclude, despite that analysis, that the rise in obesity (which was pronounced in the same period) was attributable to advertising?

The IWG was directed by Congress to develop nutritional standards for the marketing of foods to children and that has been the focus of its efforts. The IWG has not made any specific conclusions about the causal relationship between advertising and obesity. The IOM conducted a thorough review of the evidence on the relationship between advertising and childhood obesity as part of its 2006 report. The FTC staff also notes that the Bureau of Economics study considered only television advertising and not other forms of marketing.

22. In an article you posted on the FTC website on July 1, 2011 entitled "What's On The Table," you stated that "it doesn't really matter whether you're convinced food marketing has played a role in childbood obesity," that tbe IWG proposal can still be a solution to the problem. You echoed this remark in your opening statement at the hearing. Did Congress not instruct the IWG to conduct a "study" of the impact of food marketing on childhood obesity? Does this really not matter? Why not? What evidence do you havc, if any, that marketing does or does not play a role in childhood obesity?

Congress did not direct the IWG to conduct a study on the impact of food marketing on childhood obesity. The Congressional directive was founded on the recommendations made by the IOM in December 2005 as set out in its 2006 report.

As Senator Harkin, the co-author of the IWG's congressional mandate, noted in his July 13, 2011 letter to the IWG agencies, the IOM panel of experts concluded that "food and beverage marketing influences the diets and health prospects of children and youth" and that "food and beverage marketing practices geared to children and youth are out of balance with healthful diets and contribute to an environment that puts their health at risk." It was the IOM recommendations that led directly to the 2009 Omnibus Appropriations Act language establishing the IWG. That language directed the IWG to specifically consider two issues in conducting its study: "1) the positive and negative contributions of nutrients, ingredients, and foods ... to the diets of children; and 2) evidence concerning the role of consumption of nutrients, ingredients, and food in preventing or promoting the development of obesity among children." Congress did not direct the IWG to conduct any other study and there is no indication that Senator Harkin or others intended the IWG to revisit the conclusions of the IOM. In fact, Senator Harkin's letter confirms that the IWG did what was intended. He states that "in response to this clear Congressional intent, the IWG has produced voluntary standards that are scientifically sound and support existing nutrition guidelines."[5]

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[5] Letter from Senator Tom Harkin and Representative Rosa L. DeLauro to FTC Chairman Jon Leibowitz, USDA Secretary Tom Vilsack, CDC Director Thomas Frieden, and FDA Commissioner Margaret Hamburg (July 13, 2011)(Harkin/DeLauro Letter).

My statement in the July 1 web site posting, and in my opening remarks, reflects the long-standing position of the FTC. For example, in 2005 then-FTC Chairman Deborah Majoras noted that, although "we might not ever have the studies that will definitively answer" the questions about the many factors that contribute to childhood obesity, everyone "should still be able to agree that advertising can be part of the solution. Advertising and marketing of healthier foods to both kids and parents can be part of the effort to address the problem of overweight and poor nutrition among our nation's children."[6]

Questions from the Honorable Mike Pompeo

1. Where specifically in the FY2009 report language did Congress direct the Interagency Working Group to develop and issue "preliminary proposed nutrition principles to guide industry self-regulatory efforts" directly to the food and beverage industry, advertisers and marketers, broadcast and cable providers, and the general public?

2. Did the FY2009 report language include Congressional direction for this activity to occur before submitting the findings of the study in a report to Congress? If so, where?

The directive from Congress, as set forth in the accompanying statement to the 2009 Omnibus Appropriations Act (H.R. 1105), reads as follows:

> The FTC, together with the Commissioner of the Food and Drug Administration, the Director of the Centers for Disease Control and Prevention, and the Secretary of Agriculture, who have expertise and experience in child nutrition, child health, psychology, education, marketing, and other fields relevant to food and beverage marketing and child nutrition standards shall establish the Interagency Working Group on Food Marketed to Children (Working Group). The Working Group is directed to conduct a study and develop recommendations for standards for the marketing of food when such marketing targets children who are 17 years old or younger or when such food represents a significant component of the diets of children. In developing such standards, the Working Group is directed to consider (1) positive and negative contributions of nutrients, ingredients, and food (including calories, portion size, saturated fat, *trans* fat, sodium, added sugars, and the presence of nutrients, fruits, vegetables, and whole grains) to the diets of such children; and (2) evidence concerning the role of consumption of nutrients, ingredients, and foods in preventing or promoting the development of obesity among such children. The Working Group will determine the scope of the media to which such standards should apply. The Working Group shall submit to

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[6] *See* Remarks of Chairman Deborah Platt Majoras, "The FTC: Fostering Positive Marketing Initiatives to Combat Obesity," Obesity Liability Conference, Chicago, IL (May 11, 2005) *available at* http://www.ftc.gov/speeches/majoras/050511obesityliability.pdf.

> Congress, not later than July 15, 2010, a report containing the findings and recommendations of the Working Group.

The language was not specific with respect to the type of "recommendations for standards for the marketing of food" that was contemplated – that is, whether the recommendations should be for legislative or regulatory action or not. In subsequent briefing sessions with staff members from the offices of both Senator Harkin and then Senator Brownback, Senate staff confirmed that the directive would be satisfied by recommendations for self-regulation, rather than for regulation or legislation. Senate staff briefing sessions occurred periodically, at their request, as the IWG moved forward with its task.

Early in their discussions, the members of the IWG concluded that public input was important to the process of developing recommendations. Input from all stakeholders, including food and media industry members, as well as members of the nutrition science and medical communities, would help to ensure that the recommendations ultimately developed would be both scientifically sound and feasible to implement. Therefore, the preliminary proposal was published as a request for comment on April 28, 2011. This step was not required by the Congressional directive. The IWG members assumed, correctly, that the preliminary proposal would undergo revisions, based on the public comments, before being finalized into a report to Congress. During that comment period, Senator Harkin and Congresswoman Rosa DeLauro submitted a letter commending the collective work of the IWG.[7]

3. Where specifically in the FY2009 report language did Congress direct the Interagency Working Group to develop a proposal directed at industry with very precise nutrition standards accompanied by specific implementation dates for compliance?

The accompanying statement to the 2009 Omnibus Appropriations Act charged the IWG as follows:

> The Working Group is directed to conduct a study and develop recommendations for standards for the marketing of food when such marketing targets children who are 17 years old or younger or when such food represents a significant component of the diets of children. In developing such standards, the Working Group is directed to consider (1) positive and negative contributions of nutrients, ingredients, and food (including calories, portion size, saturated fat, *trans* fat, sodium, added sugars, and the presence of nutrients, fruits, vegetables, and whole grains) to the diets of such children; and (2) evidence concerning the role of consumption of nutrients, ingredients, and foods in preventing or promoting the development of obesity among such children.

The IWG interpreted this language as a mandate to recommend a set of specific nutrition standards that could be applied by members of the food and media industries in selecting those

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[7] Harkin/DeLauro Letter, *supra* note 5.

foods to be promoted directly to children. Members of the Children's Food and Beverage Advertising Initiative had expressed some concerns about the time that would be needed to implement the recommendations of the IWG, pointing out that the reformulation of foods can take a considerable amount of time. Therefore, the IWG concluded that it would be appropriate to suggest a timetable for implementation of the recommended principles. The IWG wished to make it clear that industry members that chose to reformulate certain foods marketed to children could phase in the changes over time.

* * *

I appreciate your interest in this important endeavor. The FTC and IWG will carefully weigh the concerns raised by members of the Committee and Subcommittees as we work to finalize our report to Congress. Please let us know if we can be of further assistance.

Sincerely,

David C. Vladeck
Director
Bureau of Consumer Protection

Office of the Secretary

Correspondence Referral

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Action: Chairman's Signature

Subject of Correspondence:
QFRs from December 7, 2011 Congressional Hearing

Author:
Representative Bob Goodlatte

Representing:

Copies of Response To:

Deadline:
03/12/12

Copies of Correspondence To:

Organization Assigned:
Policy and Coordination - BC

ACTION LOG

Date Received	FTC Org Code	Assignment To:	Date Assigned	Action Required
	1039	Alan J. Friedman		

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Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

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February 29, 2012

Mr. Jon Leibowitz
Chairman
Federal Trade Commission
600 Pennsylvania Avenue N.W.
Washington, D.C. 20580

Dear Mr. Leibowitz,

The Judiciary Committee's Subcommittee on Intellectual Property, Competition and the Internet held a hearing on "Oversight of the Antitrust Enforcement Agencies" on Wednesday, December 7, 2011 at 10:00 a.m. in room 2141 of the Rayburn House Office Building. Thank you for your testimony.

Questions for the record have been submitted to the subcommittee within five legislative days of the hearing. The questions addressed to you are attached. We will appreciate a full and complete response as they will be included in the official hearing record.

Please submit your written answers to Olivia Lee at olivia.lee@mail.house.gov by March 14, 2012. If you have any further questions or concerns, please contact Holt Lackey at holt.lackey@mail.house.gov.

Thank you again for your participation in the hearing.

Sincerely,

Bob Goodlatte

Bob Goodlatte
Subcommittee Chairman

United States House of Representatives
Committee on the Judiciary
Subcommittee on Intellectual Property, Competition and the Internet

Questions for the Record for Chairman Jon Leibowitz

Hearing on:
"Oversight of Antitrust Enforcement Agencies"

Wednesday, December 7, 2011
10:00 a.m.
2141 Rayburn House Office Building

Representative Steve Chabot

Medical Anti-Trust

Chairman Leibowitz,

I am disturbed by the recent trend of FTC intervention into the state-based regulation of medicine and dentistry.

As you surely know state medical boards are official agencies made up of health care professionals entrusted to utilize their expertise to ensure patient safety. These men and women are experts in their fields and they are the professionals we should be looking to for health policy recommendations.

And when the FTC disapproves of a state medical board's decision they are interjecting themselves into a discussion which is not only outside their jurisdiction, but clearly outside their realm of expertise, and I believe that this intervention may very well compromise patient safety.

It's my understanding that the FTC is primarily staffed with lawyers, economists, and bureaucrats, and in my view, we should not be yielding patient safety decisions to anyone but medical experts.

Mr. Chairman, please explain to me who at the FTC knows more than medical experts about the most appropriate and effective methods of treating patients. Please explain to me why the FTC is involving itself in the delivery of health care in the first place.

Anti-trust Oversight- Unclear regulation

Mr. Leibowitz, I believe Section 5 of the FTC Act which prohibits entities from engaging in unfair or deceptive acts or practices in interstate commerce is a necessary check on anticompetitive practices in this country. However, I think that the guidelines need to be more transparent and they need to be enforced consistently. It is this kind of government regulation that is making it difficult for companies to conduct business and plan for the future.

Chairman Leibowitz, don't you agree that it would improve the clarity and predictability of the law if the FTC provided advance guidance about the bounds of Section 5 before investigating or proceeding against businesses on the sole basis of your Section 5 authority?

Chairman Leibowitz, in the past the FTC has promised to promulgate a Section 5 report clarifying the bounds of your Section 5 authority. Why haven't you provided such a report yet, and when can we expect one?

The Honorable Mary Bono Mack

1. The Framework indicates the consumer privacy bill of rights does not replace existing privacy law, but to the extent it provides additional rights or protections, does that alter existing privacy laws you enforce? Do existing laws need to be amended if Congress were to statutorily define a privacy bill of rights?

Answer: In the final privacy report, the Commission was careful to note the limitations on its framework. The report states that "[t]o the extent that the framework goes beyond existing legal requirements, the framework is not intended to serve as a template for law enforcement actions or regulations under laws currently enforced by the FTC." Thus, the final privacy report did not alter existing privacy laws. Should Congress decide to statutorily define a privacy bill of rights, Congress would determine at that point the extent to which the bill of rights would supplant existing statutes or would, alternatively, fill in gaps that existing statutes do not address.

2. You repeated your call for a more robust "Do Not Track" function that is persistent, covers all parties that track consumers, and opts them out of any behavioral data collection beyond the context of the interaction.

    a. What does "context of the interaction" mean (the Administration's Framework also incorporates this concept)? Does context mean data can only be used for those purposes that are obvious to the consumer – i.e., a consumer provides a retailer her address to mail a purchase? What if information is collected for the purpose of driving advertisements?

Answer: The context of the interaction standard is intended to encompass uses of data that are consistent with the context of a particular transaction or with the consumer's relationship with the business. For example, if a consumer is purchasing a book on an online retailer's website, the consumer would understand from the context of that transaction that the retailer would use and potentially share the consumer's address to deliver the book. The consumer would also anticipate that the retailer would use the consumer's information to offer similar products to market back to the consumer. Similarly, a consumer would understand that an online retailer would need to use information about its customers to (1) protect against fraud and security breaches and (2) improve its website, as long as such improvements don't involve sharing information with third parties.

When we used this phrase in connection with the Do Not Track discussion, we were referring to a few basic activities that are important and necessary to the proper functioning of businesses, such as preventing click fraud or using de-identified data for analytics purposes. The context of the interaction does not, however, include general, undefined activities that would create broad carve outs to Do Not Track and allow third parties to drive additional advertisements without offering consumer choice.

    b. Who is collecting data for purposes outside of advertising?

Answer: As we discussed in our privacy report, the information broker industry is largely opaque, and a detailed analysis of the activities of all information brokers is challenging. We do know, however, that there are companies collecting information from a variety of sources and using it or selling it for

purposes other than advertising. Our recent case against Spokeo is a good example. The FTC alleged that Spokeo collected information about consumers from hundreds of online and offline sources, including social networks. It created profiles and sold those profiles to human resource professionals, job recruiters and others for employment purposes. The FTC charged that this violated the Fair Credit Reporting Act and reached a settlement with the company requiring it to pay $800,000 and submit to significant injunctive provisions. Although many consumers may be aware of the activities of the three major consumer reporting agencies, it is unlikely that many consumers have ever heard of Spokeo, or any of the other information brokers that may be operating behind the scenes and using data for non-advertising purposes.

c. What data are they collecting that is personally identifiable that the consumer does not give them freely?

Answer: It is very unlikely that consumers willingly provided Spokeo with their personal data – including name, address, email address, hobbies, ethnicity, religion, social networking information, and photos – because most consumers did not realize that Spokeo existed.

It is equally unlikely that any of the women whose location was obtained and published by a recent controversial mobile application marketed to people interested in a "one-night stand" knew that their "check-ins" on foursquare and Facebook were being collected, re-packaged, and sold for other purposes. *See, e.g.*, Nick Bilton, N.Y. Times BITS Blog, *Girls Around Me: An App Takes Creepy to a New Level* (Mar. 30, 2012), *at* http://bits.blogs.nytimes.com/2012/03/30/girls-around-me-ios-app-takes-creepy-to-a-new-level/.

Our recent cases against Facebook and Myspace offer additional examples of sharing of personally identifiable information without authorization. In both those cases, we alleged that the companies promised consumers they would not share personally identifiable information with advertisers and yet the companies did just that, sharing with advertisers information about the users maintained on their social networking profiles.

d. Why are the current Do-Not-Track browser mechanisms insufficient?

Answer: Some browsers have implemented a setting that can send a Do Not Track signal to websites consumers visit. Currently, there is no browser setting that is universally honored. The Digital Advertising Alliance (DAA) has agreed to honor browser Do Not Track settings by the end of the year, but not all trackers are members of the DAA. The W3C has brought together a broader set of stakeholders to set a standard for what a company should do when it receives a Do Not Track browser signal. Once stakeholders achieve consensus, we are confident that consumers will have an effective Do Not Track mechanism.

e. How do you envision the implementation of a universal "Do Not Track" system in practicality? Would the "Do Not Track" system consist of a technological solution that actually prevents tracking if an individual invokes it or a legal solution that requires each individual site to honor an individual's request?

Answer: We have stated that consumers should be able to exercise meaningful choice and control about the collection of their data. The W3C is currently working on a standard for Do Not Track that would define how it will operate in practice. At this point, we do not believe that Do Not Track will operate as a technological block on tracking or collection. Instead, Do Not Track will specify a protocol for the transmission of a user's preference not to be tracked and for websites and other companies to respond to and honor that preference.

f. How do the recent DAA rules that block secondary uses of data and commitment to honor persistence affect the Commission's opinion regarding Do Not Track?

Answer: The DAA's commitments to honor persistence and to address some secondary uses of collected data are very important commitments by the advertising industry. We will watch closely to see how these commitments are implemented. At the same time, DAA members are making very important contributions to the discussions taking place in the W3C, and we are optimistic that industry participants and other stakeholders can reach consensus on a Do Not Track standard through the W3C.

3. One of the chief concerns from all parties is whether the Administration's multi-stakeholder process can yield results. The FTC hosted a number of stakeholder forums where participants discussed views from across the spectrum. Based on this experience and knowledge, what is your confidence level in what are essentially stakeholder negotiations?

Answer: I am optimistic that the Administration's multi-stakeholder processes can yield results. Although there was vigorous debate on key issues at our privacy roundtables, we also saw significant agreement on a number of key issues, such as the need for improved transparency and consumer choice about online tracking.

4. The term "harm" in the privacy context does not have universal meaning. When one person feels their privacy has been invaded is different from when another person feels his or her privacy has been invaded because the harm depends on one's personal attitude about privacy. When there is no universal meaning to what harm is in the privacy context, how can the FTC define harm?

Answer: For purposes of enforcing the FTC Act, we are bound by Section 5, which prohibits deceptive and unfair acts or practices. The question of harm arises in our unfairness cases. Section 5 sets forth a three-part test we must apply in order to find a particular practice unfair: 1) there must be a likelihood of substantial injury, 2) not reasonably avoidable by consumers, and 3) not offset by countervailing benefits. The cases we have brought alleging unfairness have all involved injury that is clear. We will continue to follow the dictates of Section 5 in future enforcement actions.

In our privacy report, we acknowledged that the concept of harm may extend beyond financial or physical impacts or unwanted intrusions and may include, for example, the unexpected revelation of private information, including both sensitive information (*e.g.*, health information, precise geolocation information) and less sensitive information (*e.g.*, purchase history, employment history) to unauthorized third parties. As one example, in the Commission's case against Google, the complaint alleged that Google used the information of consumers who signed up for Gmail to populate a new social network, Google Buzz. The creation of that social network in some cases revealed previously private information about Gmail users' most frequent email contacts.

Similarly, the Commission's complaint against Facebook alleged that Facebook's sharing of users' personal information beyond their privacy settings was harmful.

We acknowledge that these concerns may be viewed or weighed differently by different consumers and that's why we proposed that companies implement best practices for increased transparency and consumer choice and for scalable access to the information maintained about them. Consumers should understand and have a choice about when their data is collected, and when private information may be shared or used in ways they did not expect when they first provided the information. This allows those consumers who care about the misuse of their personal data to be aware of and exercise a choice about it.

5. One of the practices you recommend in your most recent privacy report is providing simpler and more streamlined choices to consumers. Google recently simplified and streamlined its privacy policies, and some people immediately criticized the policy as not explaining the company's practices in enough detail. What is your view on Google's effort to simplify and streamline its privacy policies?

Answer: Although I should not comment on a particular company's practices, I can say that we encourage companies to engage in creative ways to simplify and streamline their privacy policies. We have long maintained that the traditional model of lengthy privacy policies is not an effective way to let consumers know what a company is doing with consumers' personal data and what choices they have with respect to those practices. Instead, for example, our privacy report encourages companies to develop simpler, more streamlined notices to consumers that are easy to understand, and to provide just in time choices to consumers so that they can make informed decisions about their data.

The Honorable Cliff Stearns

1. At the hearing we heard that allowing all consumers to access whatever data companies have about them presents significant technical challenges and could actually increase risk to consumers. But what about a narrower bill that would allow consumers to ask companies for categories of information that companies have on them. Wouldn't this alleviate the risk of harm to the consumer and burden on the company while at the same time help educate consumers ou data collection?

Answer: Our privacy report called on companies to provide reasonable access to the data they maintain; the extent of access should be proportionate to the sensitivity of the data and the nature of its use. For example, access and correction rights are extremely important when data is used for an eligibility decision, such as employment or insurance purposes. It is less critical when the data is used purely for marketing purposes where, as you suggest, consumers could ask companies for categories of information the companies have about them and have the option to suppress data for future marketing use. Some companies that use data for marketing purposes have adopted the practice of giving consumers access to the categories of information about them, and we think this is a positive step for industry.

2. Are you familiar with my bill, H.R. 1528, the Consumer Privacy Protection Act of 2011? This bill calls for clear, easy to understand privacy policy statements and provides for the FTC to approve a five-year self-regulatory program. Would you support this bill advancing through the Subcommittee?

Answer: Although the Commission has not taken a position on H.R. 1528, we support the goals of this bill, and we are happy to work with you and your staff on this legislation.

The Honorable Jim Matheson

1. Chairman, recently the FTC released their long awaited report on privacy, entitled Protecting Consumer Privacy in an Era of Rapid Change. As in your preliminary report, Do Not Track is a key focus and the report consistently calls on industry to provide consumers access to Do Not Track mechanisms that offer consumers a universal, one-stop choice mechanism for online behavioral tracking. Do Not Track has been a very hotly debated issue since you first mentioned it at a Senate Commerce Committee hearing in 2009. There has also been concern from those within the security community that a Do Not Track mechanism could impede the ability of companies to monitor and prevent fraud and abuse on their sites. Can you speak to this concern?

Answer: We agree that it is important that companies be able to monitor and prevent fraud and abuse on their sites. However, we believe that an effective Do Not Track mechanism can be developed and implemented in a manner that would not undercut companies' abilities to engage in security and fraud detection. In particular, we know that security and fraud detection are receiving significant attention in the discussions currently taking place through the W3C standards-setting group. We expect that any standard developed by the W3C will take into account these very important concerns.

Office of the Secretary

Correspondence Referral

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Action: Chairman's Signature

Subject of Correspondence:

QFRs for March 29th hearing: Balancing Privacy and Innovation"

Author:
Representative Mary Bono Mack
Representative Clifford Stearns
Representative Jim Matheson

Representing:

Copies of Response To:

Deadline:
06/29/12

Copies of Correspondence To:

Organization Assigned:

ACTION LOG

Date Received	FTC Org Code	Assignment To:	Date Assigned	Action Required
		Laura J. DeMartino		

EXPEDITE

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14006487

June 15, 2012

The Honorable Jon Leibowitz
Chairman
Federal Trade Commission
600 Pennsylvania Avenue
Washington, D.C. 20580

Dear Chairman Leibowitz,

Thank you for appearing before the Subcommittee on Commerce, Manufacturing, and Trade on Thursday, March 29, 2012, to testify at the hearing entitled "Balancing Privacy and Innovation: Does the President's Proposal Tip the Scale?"

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for 10 business days to permit Members to submit additional questions to witnesses, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and then (3) your answer to that question in plain text.

To facilitate the printing of the hearing record, please respond to these questions by the close of business on Friday, June 29, 2012. Your responses should be e-mailed to the Legislative Clerk, in Word or PDF format, at Kirby.Howard@mail.house.gov.

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,

Mary Bono Mack

Mary Bono Mack
Chairman
Subcommittee on Commerce,
Manufacturing, and Trade

cc: G.K. Butterfield, Ranking Member, Subcommittee on Commerce, Manufacturing, and Trade

Attachment

The Honorable Mary Bono Mack

1. The Framework indicates the consumer privacy bill of rights does not replace existing privacy law, but to the extent it provides additional rights or protections, does that alter existing privacy laws you enforce? Do existing laws need to be amended if Congress were to statutorily define a privacy bill of rights?

2. You repeated your call for a more robust "Do Not Track" function that is persistent, covers all parties that track consumers, and opts them out of any behavioral data collection beyond the context of the interaction.

    a. What does "context of the interaction" mean (the Administration's Framework also incorporates this concept)? Does context mean data can only be used for those purposes that are obvious to the consumer – i.e., a consumer provides a retailer her address to mail a purchase? What if information is collected for the purpose of driving advertisements?

    b. Who is collecting data for purposes outside of advertising?

    c. What data are they collecting that is personally identifiable that the consumer does not give them freely?

    d. Why are the current Do-Not-Track browser mechanisms insufficient?

    e. How do you envision the implementation of a universal "Do Not Track" system in practicality? Would the "Do Not Track" system consist of a technological solution that actually prevents tracking if an individual invokes it or a legal solution that requires each individual site to honor an individual's request?

    f. How do the recent DAA rules that block secondary uses of data and commitment to honor persistence affect the Commission's opinion regarding Do Not Track?

3. One of the chief concerns from all parties is whether the Administration's multi-stakeholder process can yield results. The FTC hosted a number of stakeholder forums where participants discussed views from across the spectrum. Based on this experience and knowledge, what is your confidence level in what are essentially stakeholder negotiations?

4. The term "harm" in the privacy context does not have universal meaning. When one person feels their privacy has been invaded is different from when another person feels his or her privacy has been invaded because the harm depends on one's personal attitude about privacy. When there is no universal meaning to what harm is in the privacy context, how can the FTC define harm?

5. One of the practices you recommend in your most recent privacy report is providing simpler and more streamlined choices to consumers. Google recently simplified and streamlined its privacy policies, and some people immediately criticized the policy as not explaining the company's practices in enough detail. What is your view on Google's effort to simplify and streamline its privacy policies?

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1. At the hearing we heard that allowing all consumers to access whatever data companies have about them present's significant technical challenges and could actually increase risk to consumers. But what about a narrower bill that would allow consumers to ask companies for categories of information that companies have on them. Wouldn't this alleviate the risk of harm to the consumer and burden on the company while at the same time help educate consumers on data collection?

2. Are you familiar with my bill, H.R. 1528, the Consumer Privacy Protection Act of 2011? This bill calls for clear, easy to understand privacy policy statements and provides for the FTC to approve a five-year self-regulatory program. Would you support this bill advancing through the Subcommittee?

The Honorable Jim Matheson

1. Chairman, recently the FTC released their long awaited report on privacy, entitled Protecting Consumer Privacy in an Era of Rapid Change. As in your preliminary report, Do Not Track is a key focus and the report consistently calls on industry to provide consumers access to Do Not Track mechanisms that offer consumers a universal, one-stop choice mechanism for online behavioral tracking. Do Not Track has been a very hotly debated issue since you first mentioned it at a Senate Commerce Committee hearing in 2009. There has also been concern from those within the security community that a Do Not Track mechanism could impede the ability of companies to monitor and prevent fraud and abuse on their sites. Can you speak to this concern?

FTC Chairman Jon D. Leibowitz
Senate Commerce Committee Hearing
Consumer Online Privacy
Senator John Kerry
May 9, 2012

Questions for the Record

Principles that Require Protection

According to a survey from Consumer Reports, 71 percent of respondents from a recent survey said that they had concerns about companies distributing their information without permission, while 56 percent said they had similar concerns about companies that hold onto data "even when the companies don't need it anymore." Cases brought to date on privacy rely on the FTC's ability to protect people from deception. That is, a company cannot do something with your information that they told you they would not do. That is insufficient in the minds of many Americans as reflected in this poll since fighting deception is not a requirement for consent for collection or distribution and it does not place any limits on data retention. Deception is also silent on the other fair information practice principles including the right to access.

> **Question for Chairman Leibowitz and General Counsel Kerry:** Can you talk about why the other privacy principles like data retention limits and purpose specification are necessary and not simply a regime of notice and choice?

> **Answer**: Our report notes that "privacy by design" should include providing reasonable security for consumer data, collecting only the data needed for a specific business purpose, retaining data only as long as necessary to fulfill that purpose, safely disposing of data no longer in use, and implementing reasonable procedures to promote data accuracy. By implementing these principles, companies can shift the burden away from consumers who would otherwise have to seek out privacy protective practices and technologies. For example, in a pure "notice and choice" regime, consumers would have to sift through privacy policies to determine which companies maintain reasonable data security, and exercise choice by only doing business with those companies. Consumers should not bear this burden; instead, companies should make reasonable security the default.

Tracking and Your Property

For a company to track an individual's behavior and activities on the Internet, it has to put a tracking technology on a person's computer or smartphone.

> **Question for all the Witnesses:** Do you believe it is the right of the collectors of information to place such tracking devices on a person's property and collect information without that person's knowledge or participation or collect information that has nothing to do with the service being provided and if not, what in the law stops that from happening today?

Answer: Online tracking is a ubiquitous practice that is largely invisible to consumers, and numerous surveys show some level of consumer discomfort with online tracking. A person's computer or smartphone is his property, and consumers need to have the ability to learn what information is being collected and how it is used and shared – especially with respect to invisible data collection.

A majority of the Commission continues to call for the implementation of a Do Not Track mechanism that would give consumers a choice about whether to be tracked. Although we have asked Congress to consider enacting general privacy legislation to set baseline standards, we have not called for Do Not Track legislation specifically, in part because industry has responded to our call and is making progress. I am optimistic that, by the end of the year, industry will have developed a Do Not Track mechanism that meets five criteria: it should be implemented universally; it should be easy to use; any choices offered should be persistent and should not be deleted if, for example, consumers clear their cookies or update their browsers; an effective Do Not Track system would opt them out of collection of tracking data, with some narrow exceptions like fraud detection; and a Do Not Track system should be effective and enforceable.

Who is Authorized to Share Your Data?

A Wall Street Journal examination of 100 of the most popular Facebook apps found that some seek the email addresses, current location and sexual preference, among other details, not only of app users but also of their Facebook friends.

Question for all the Witnesses: Should consumers expect that things they share with a group of friends they choose on social networking sites in turn makes those friends authorized distributors of access to them and their information? Does that raise any concerns for you?

Answer: We share your concern about the privacy of information collected through applications, particularly personal data such as photos and videos, address books, and location information. Many consumers are not aware of the extent of data being collected through apps and how that data is being used. In our case against Facebook, for example, we challenged the company's failure to disclose that a user's privacy settings did not prevent apps used by their friends from accessing personal information. Recent reports also highlight apps access and sharing practices – for example, a recent FTC staff report about children's mobile applications revealed that consumers are provided with very little information about applications' data collection and sharing practices. As a result, consumers are increasingly uneasy about the privacy of such information.

The lack of transparency and choice in the app marketplace is an example of why the FTC believes that Congress should consider baseline privacy legislation that includes increased transparency, simpler choice, and privacy by design. In the meantime, we will continue to encourage everyone – stores, developers, and third parties – to step up their privacy efforts and provide meaningful privacy protections for consumers.

At the same time, if consumers choose to share their information with hundreds of friends, they should be aware that those friends could actively further share their information, through oral conversations, emails, tweets, and the like. We have tried to educate consumers on safe social networking, and have developed materials for consumers, parents, teens, kids, and educators. Among other things, we tell consumers to be careful what they post online, because they may not be able to take it back.

Communication over Open Wi Fi

The FTC, the FCC, and the Department of Commerce concluded that Google violated no laws when it collected private communications transmitted over unencrypted Wi Fi connections.

- **Question for all the Witnesses:** Should collectors respect fair information practice principles if that information is transmitted over a Wi Fi network or is that not necessary in this context?

  Answer: As a general matter, our privacy report recommends that companies implement privacy by design as part of best practices – which includes reasonable limits on data collection as well as implementing data security for the information that is collected.

  Section 5 of the FTC Act is a broad statute that allows us to accomplish a great deal, but we can only use it to challenge practices that are deceptive or unfair. We cannot use it for everything – for instance, in most circumstances we cannot mandate privacy policies under Section 5. This is why we believe Congress should enact data security legislation and consider implementing general privacy legislation to give baseline protections for all consumers.

Inconsistencies in Law

Today, we have laws governing privacy when a bank is collecting your information or when a doctor or hospital is collecting your information. We also have laws governing telephone companies tapping your communications or cahle companies tracking your watching habits.

- **Question for all the Witnesses:** Isn't similar or identical information collected and used without a governing framework on the Internet every day and what makes that disparity in law rational?

  Answer: Presently, there is some existing sector-specific legislation that already imposes privacy protections and security requirements through legal obligations. However, these laws do not necessarily apply to all business or all personal information, and as a result consumers may be vulnerable both online and offline. Because of these legislative gaps, our privacy report calls for Congress to consider general privacy legislation and sets forth a framework to encourage best practices by providing an important baseline for entities not subject to sector-specific laws. We believe that by implementing privacy by design,

increased transparency, and better control, companies can promote consumer privacy and build trust in the marketplace.

The European Privacy Standard

- **Question for all the Witnesses:** What is your understanding of where the European privacy protection legal framework update stands and how does it compare to what your agencies have proposed?

  Answer: The European Commission proposed its revised privacy framework on January 25 of this year. The EU Parliament and the EU member states are currently reviewing that proposal. Part of the proposal is for a regulation to cover commercial and civil regulatory activities. The FTC has followed that part of the proposal very closely. FTC staff has shared views with European Commission counterparts, both before the proposed regulation's release in January and since, and our most senior officials have maintained an open dialogue with the various European stakeholders on a variety of privacy issues.

  As to how the European Commission proposal compares to the frameworks proposed by the Administration and the FTC, we are largely pursuing the same ultimate goals on both sides of the Atlantic. In fact, the frameworks show many similarities. These include promoting privacy-by-design, improving transparency, providing rights to access and rectify information, promoting the development of industry codes of conduct, strengthening data security, protecting children's privacy, and exploring the idea of giving consumers the ability to erase certain personal information that they have previously put on the Internet.

  Another point of comparison is the issue of comprehensive privacy legislation, which the Europeans have and which has been proposed for the United States commercial sector. We view such legislation as important for privacy protection in the U.S. that, in addition to protecting U.S. consumers, also helps to build an internationally interoperable framework for data transfers that both protect people and also encourage the free flow of information. The goal is not complete harmonization with the EU, but rather interoperability between different systems based on larger shared values and based on practical solutions to bridge differences in our respective regimes.

  Of course, we think there is also room for improvement in the proposed EU regulation. For example, we have discussed with our European colleagues the available mechanisms for commercial cross-border data transfers between the EU and the U.S. We are also discussing the issue of cooperation between regulatory authorities, especially on enforcement matters. Our concern is to ensure that transfer restrictions on data in the proposed regulation do not unduly interfere with legitimate information exchanges and cooperation between regulatory authorities like the FTC and its counterparts.

FTC Commissioner Maureen K. Ohlhausen
Senate Commerce Committee Hearing
Consumer Online Privacy
Senator John Kerry
May 9, 2012

Questions for the Record

Principles that Require Protection

According to a survey from Consumer Reports, 71 percent of respondents from a recent survey said that they had concerns about companies distributing their information without permission, while 56 percent said they had similar concerns about companies that hold onto data "even when the companies don't need it anymore." Cases brought to date on privacy rely on the FTC's ability to protect people from deception. That is, a company cannot do something with your information that they told you they would not do. That is insufficient in the minds of many Americans as reflected in this poll since fighting deception is not a requirement for consent for collection or distribution and it does not place any limits on data retention. Deception is also silent on the other fair information practice principles including the right to access.

Question for Commissioner Ohlhausen: In your testimony, you state, "I firmly believe that consumers should have the tools to protect their personal information through transparency and choices."

In light of the clear evidence that there are numerous collectors of information that provide the people on whom they are collecting information with neither transparency nor clear choices, would you support a law requiring the tools you believe consumers should have?

Although a substantial portion of the FTC's privacy enforcement has been based on deception as your question indicates, there are other legal avenues available to the FTC in this area. Thus, if there is consumer harm occurring from sharing data with third parties, I would first consider whether we should make fuller use of existing FTC statutory authority. For instance, the Commission has routinely used its unfairness authority to reach conduct that did not involve a deceptive statement but caused substantial harm that is not outweighed by any countervailing benefits to consumers or competition, and that consumers themselves could not have avoided reasonably. A number of these cases involve the sharing of consumer information with third parties in a way that risked substantial consumer harm. For example, in 2004 the FTC used its unfairness authority to obtain a settlement from Gateway Learning Corporation for renting personal information provided by consumers on the Gateway Learning Website without seeking or receiving the consumers' consent.[1] The FTC has also used its unfairness authority on multiple

[1] Decision and Order, In re Gateway Learning Corp., 138 F.T.C. 443 (Sept. 10, 2004). In this case, the FTC claimed that the material revisions Gateway made to its privacy policy, and the retroactive application of those revisions to information it had previously collected from consumers constituted an unfair act or practice because the conduct

occasions to target companies that failed to use reasonable security measures to protect sensitive consumer data.[2] The FTC also has actively enforced other statutes that prohibit sharing sensitive consumer data with third parties under certain circumstances, such as the Children's Online Privacy Protection Act (COPPA), the Fair Credit Reporting Act (FCRA), and the Gramm-Leach-Bliley Act (GLB).

I am aware of concerns about data brokers that monetize and sell consumer data to other companies in ways that may be invisible to consumers. The FTC's recent Privacy Report, which issued before I arrived at the Commission, described three types of data brokers: 1) those whose products and services are used for eligibility decisions, such as credit, employment or insurance and whose practices are already covered by the FCRA; 2) data brokers who collect and sell consumer data for marketing purposes; and 3) data brokers whose products are used for purposes other than marketing and FCRA-regulated eligibility purposes. Some of these uses include fraud prevention or risk management to verify the identity of consumers.

When developing an appropriate approach to the regulation of third party data collection, it is important to protect consumers from harmful practices while still permitting beneficial uses, such as fraud prevention and, in many cases, marketing. Several data security bills have included provisions that seek to provide consumers transparency and choice about information practices, and I will evaluate these proposals carefully.

How would you apply your commitment to transparency and choices in the case of companies that do not collect information directly from the consumer but buy it from other collectors or harvest it from publicly available information?

As stated above, if there is consumer harm occurring from sharing data with third parties, I would explore whether we should undertake enforcement using existing FTC deception and unfairness authority, as well as other statutes such as COPPA, the FCRA, HIPAA, and Gramm-Leach-Bliley. I would also evaluate current industry practices of third party data collectors, including any self-regulatory programs. Finally, I will consider whether there is consumer harm occurring that cannot be reached by current enforcement and self-regulatory programs to determine if additional protections are necessary.

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caused substantial injury to consumers that was not outweighed by countervailing benefits to consumers or competition. The Complaint also alleged that the revisions were false and misleading.

[2] *See* Complaint, In re BJ's Wholesale Club, Inc., FTC File No. 0423160 (Sept. 20, 2005) (The FTC alleged that BJ's Wholesale's failure to take appropriate security measures to protect its consumers' sensitive information constituted an unfair practice. The Complaint argued that BJ's security failures allowed unauthorized persons to access sensitive consumer information, and use that information to make fraudulent purchases.); Complaint, In re DSW, Inc., FTC File No. 0523096 (Dec. 1, 2005) (The FTC alleged that DSW's failure to take reasonable security measures to protect sensitive consumer data was an unfair practice. According to the Complaint, DSW's data-security failures allowed hackers access to consumer's credit card, debit card, and checking account information.); Complaint, In re CardSystems Solutions Inc., FTC File No. 0523148 (Feb. 23, 2006) (The FTC alleged that CardSystem's failure to take appropriate security measures to protect sensitive information of its consumers constituted an unfair practice. The Complaint claimed that due to the security failures, a hacker was able to gain access to sensitive consumer information that enabled him to counterfeit cards to make fraudulent purchases.)

Tracking and Your Property

For a company to track an individual's behavior and activities on the Internet, it has to put a tracking technology on a person's computer or smartphone.

Question for all the Witnesses: Do you believe it is the right of the collectors of information to place such tracking devices on a person's property and collect information without that person's knowledge or participation or collect information that has nothing to do with the service being provided and if not, what in the law stops that from happening today?

It is my understanding that tracking for online behavioral advertising is typically done through the placement of a cookie on a device (such as a computer, tablet, or smartphone) to collect information about sites visited by a user. I believe that sites and services that place such cookies should provide consumers clear notice of this practice. Consumers should have the right to decline to accept such cookies for marketing purposes. I also understand that many sites and browsers provide consumers with a variety of tools that allow them to express their preferences regarding tracking mechanisms. The FTC has brought enforcement actions against entities that have failed to honor such consumer choices. For instance, in 2011 the FTC obtained settlements from two online behavioral advertising networks, challenging the companies' privacy policies that allegedly deceptively tracked online activities, even after consumers opted out of such tracking.[3] It is my further understanding that several self-regulatory organizations offer consumers a blanket opt-out from receiving targeted ads for marketing purposes.

Data Security vs. Data Privacy

Commissioner Ohlhausen, in your testimony, you support enactment of data security legislation, stating "the legislation should empower the FTC to promulgate regulations for the protection of personal data from unauthorized access."

Question for Commissioner Ohlhausen: If that is appropriate, and I agree that it is, why shouldn't the FTC have authority to promulgate regulations to protect personal data from unauthorized acquisition from the individual in question in the first place, an authority it does not have today and one you state it should only have after a risk to harm is exposed?

I believe that it is necessary to strike the right balance in regulating the collection and use of consumer information by legitimate actors, and focusing on consumer harm is an important part of this balance. There is an important distinction between a data breach and the collection and use of consumer information by a first party, as the FTC's Self-Regulatory Principles for Online Behavioral Advertising from 2009 and recent privacy report recognize. In the case of a data

[3] *See* Complaint, In re Chitika, Inc., FTC File No, 1023087 (March 14, 2011) (alleging that Chitika's opt-out mechanism in its privacy policy, which allowed consumers to "opt-out" of having cookies placed on their browsers and receiving targeted ads but only lasted for 10 days, was deceptive); Complaint, In re ScanScout, Inc., FTC File No. 1023185 (Nov. 8, 2011) (alleging that ScanScout's claim that consumers could opt-out of receiving targeted ads by changing their computer's web browser settings was deceptive because ScanScout used Flash cookies, which could not be blocked by browser settings).

breach, there are no benefits to consumers or legitimate businesses or to competition from allowing data to be stolen and possibly used for fraudulent purposes. Requiring reasonable precautions against such breaches will enhance consumer welfare. By contrast, as the FTC has recognized in the guidance it has issued, consumers generally expect that first parties will collect and use their data. They also understand that they may receive benefits from the sharing of their data, such as free content or personalized services. Although there may be inappropriate sharing of information with third parties in some circumstances, there are also beneficial uses such as fraud prevention, risk management to verify the identity of consumers, and marketing. Because prohibiting these beneficial uses may reduce consumer welfare and harm competition, we should evaluate whether certain practices are causing consumer harm and whether consumers would be, on balance, better off if these practices were prohibited.

Question for Commissioner Ohlhausen: Is it your position that the breach of personal data on a company's database should not be illegal if the information does not pose a provable economic harm? For example, should data breach legislation cover the hacking of a database of magazine subscriptions that would expose a person's sexual orientation or religious affiliation, or does that fail to meet the harm prerequisite?

If an entity that collects consumers' personal information has promised to protect such information and fails to take reasonable precautions resulting in a breach, that failure is actionable under the FTC's current deception authority regardless of resulting economic harm. As for the FTC's unfairness authority, which includes a harm standard, the FTC has long recognized that harm to consumers is not limited solely to economic consequences and may include other factors, such as health and safety risks. It may also include a broader class of sensitive personal information. For instance, in 2007 the district court affirmed the FTC's action against *Accusearch* alleging the unauthorized disclosure of consumers' phone records was likely to cause substantial injury, including unwarranted risk to their health and safety, from stalkers and abusers, and was unfair.[4]

However, not every breach of data can be given the same weight, and the FTC has required companies to take reasonable precautions based on the sensitivity of the data the entity holds. Protecting against all breaches is close to impossible. Thus, in determining what breaches should be a law violation, the breadth of consumer harm must be considered in light of the costs of preventing a breach. I support the goals of data security legislation proposed by members of this Committee.

Who is Authorized to Share Your Data?

A Wall Street Journal examination of 100 of the most popular Facebook apps found that some seek the email addresses, current location and sexual preference, among other details, not only of app users but also of their Facebook friends.

[4] *FTC v Accusearch, Inc.* No. 06-CV-105-D, 2007 U.S. Dist. LEXIS 74905 (D. Wyo. Sept. 28, 2007), aff'd 570 F.3d 1187 (10th Cir. 2009).

Question for all the Witnesses: Should consumers expect that things they share with a group of friends they choose on social networking sites in turn makes those friends authorized distributors of access to them and their information? Does that raise any concerns for you?

Social networking is increasingly popular and it is clear that many consumers feel comfortable freely sharing their personal information and preferences with a large group of friends and acquaintances. As social networking becomes the norm in our society, I think consumers need to be aware that the information they share on these sites can be easily passed on by their friends and acquaintances. Educating consumers so that they are aware of the risks as well as the benefits of sharing information of social networking sites allows consumers to make informed choices that reflect their preferences. The FTC has an active consumer education program and has created and widely disseminated a Net Cetera guide for youth online behavior. Also, as you know, the FTC has brought several enforcement cases (Google, Facebook and Twitter) in the social network arena to ensure that consumer preferences are respected.

Communication over Open Wi Fi

The FTC, the FCC, and the Department of Commerce concluded that Google violated no laws when it collected private communications transmitted over unencrypted Wi Fi connections.

Question for all the Witnesses: Should collectors respect fair information practice principles if that information is transmitted over a Wi Fi network or is that not necessary in this context?

As suggested in the FTC's letter to Google closing the wireless network investigation, a company collecting data in any fashion, including when transmitted through a Wi Fi network, is in a better position to ensure the privacy and security of that data when it follows best practices, such as collecting only the information necessary to fulfill a business purpose and disposing of the information that is no longer necessary to accomplish that purpose. Additionally, it is advisable that any company collecting data institute adequate internal review processes to identify risks to consumer privacy resulting from the collection and use of information that is personally identifiable or reasonably related to a specific consumer. Because there was no misrepresentation and Google did not use the information it collected and promised to destroy it, it would have been difficult to meet the deception or harm requirements for a violation of the FTC Act.

Inconsistencies in Law

Today, we have laws governing privacy when a bank is collecting your information or when a doctor or hospital is collecting your information. We also have laws governing telephone companies tapping your communications or cable companies tracking your watching habits.

Question for all the Witnesses: Isn't similar or identical information collected and used without a governing framework on the Internet every day and what makes that disparity in law rational?

There are a variety of statutes, such as HIPAA, the FCRA, and Gramm-Leach-Bliley,that govern the collection and use of consumers' financial and medical information in many circumstances, including over the Internet. The FTC has also brought a variety of enforcement actions under its deception and unfairness authority to protect consumers' financial, medical, and other sensitive information from unauthorized release or usage both online and offline. If there is harm occurring from sharing consumers' financial or medical data or the content of their online communications without their knowledge or consent, I would explore whether we should undertake enforcement using existing FTC deception and unfairness authority, as well as other statutes such as COPPA, the FCRA, HIPAA, and Gramm-Leach-Bliley. I would also evaluate the current industry practices of third party data collectors, including any self-regulatory programs. Finally, I will also consider whether there is consumer harm occurring that cannot be reached by current enforcement and self-regulatory programs to determine whether additional protections are necessary.

The European Privacy Standard

Question for all the Witnesses: What is your understanding of where the European privacy protection legal framework update stands and how does it compare to what your agencies have proposed?

Regarding the question of where the European privacy legal framework update stands, I agree with Chairman Leibowitz's response relating to the status of the EU's privacy update.

With response to the second part of the question, I was not on the Commission during the release of the FTC's Privacy Report and am in the process of educating myself about the extent of the EU Privacy and Electronic Communications Directive update's interoperability with the U.S. privacy framework.

Office of the Secretary

Correspondence Referral

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Action: Chairman's Signature

Subject of Correspondence:

QFRs from Senate Commerce Committee Hearing on Consumer Online Privacy (Chairman Leibowitz and Commissioner Ohlhausen)

Author:
Senator John Kerry

Representing:

Copies of Response To:

Deadline:
07/11/12

Copies of Correspondence To:

Organization Assigned:

ACTION LOG

Date Received	FTC Org Code	Assignment To:	Date Assigned	Action Required
		Laura J. DeMartino		

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1400567

Senate Commerce Committee Hearing
Consumer Online Privacy
Senator John Kerry
May 9, 2012

Questions for the Record

Principles that Require Protection

According to a survey from Consumer Reports, 71 percent of respondents from a recent survey said that they had concerns about companies distributing their information without permission, while 56 percent said they had similar concerns about companies that hold onto data "even when the companies don't need it anymore." Cases brought to date on privacy rely on the FTC's ability to protect people from deception. That is, a company cannot do something with your information that they told you they would not do. That is insufficient in the minds of many Americans as reflected in this poll since fighting deception is not a requirement for consent for collection or distribution and it does not place any limits on data retention. Deception is also silent on the other fair information practice principles including the right to access.

> **Question for Chairman Leibowitz and General Counsel Kerry:** Can you talk about why the other privacy principles like data retention limits and purpose specification are necessary and not simply a regime of notice and choice?

Tracking and Your Property

For a company to track an individual's behavior and activities on the Internet, it has to put a tracking technology on a person's computer or smartphone.

> **Question for all the Witnesses:** Do you believe it is the right of the collectors of information to place such tracking devices on a person's property and collect information without that person's knowledge or participation or collect information that has nothing to do with the service being provided and if not, what in the law stops that from happening today?

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Question for Commissioner Ohlhausen: In your testimony, you state, "I firmly believe that consumers should have the tools to protect their personal information through transparency and choices."

- In light of the clear evidence that there are numerous collectors of information that provide the people on whom they are collecting information with neither transparency nor clear choices, would you support a law requiring the tools you believe consumers should have?

- How would you apply your commitment to transparency and choices in the case of companies that do not collect information directly from the consumer but buy it from other collectors or harvest it from publicly available information?

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Commissioner Ohlhausen, in your testimony, you support enactment of data security legislation, stating "the legislation should empower the FTC to promulgate regulations for the protection of personal data from unauthorized access."

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Questions for the Record for Chairman Leibowitz

Committee on Commerce, Science, and Transportation

Hearing: "Privacy and Data Security: Protecting Consumers in the Modern World"
May 9, 2012

From Senator Rubio:

1. The FTC has endorsed the concept of Do Not Track (DNT), and this feature has been implemented by some browsers and social network services. As you probably are aware, many stakeholders have pointed out that implementing DNT could be difficult and disrupt website operations. My concern is the potential unintended consequences if a DNT mechanism or policy is drafted or implemented poorly, or does not take fully into consideration how the mechanism works. We know that some social networks and service providers utilize tracking functions and collect data to track child predators or prevent underage children from joining a site or service. In these cases, data collection and tracking are being used in an effective way, hence the concern if DNT is implemented poorly or prevents all data collection. Is the FTC taking these concerns into consideration? Is the FTC concerned about unintended harm if a broad DNT policy is implemented poorly?

   Answer: The Commission continues to support Do Not Track and believes an effective model with limited exceptions can be implemented successfully. As the Commission developed the Do Not Track recommendation, it was certainly cognizant of unintended consequences and crafted an approach designed to address concerns like those you identify. For example, in the scenario you describe about a social network collecting information about its own users for public safety or criminal purposes, our framework would likely consider this practice to be an acceptable first party practice that is not within the scope of a Do Not Track mechanism. Do Not Track is not intended to prevent or address legitimate data collection and use by first parties with direct relationships with consumers but is designed to address data collection activities by third parties.

   With respect to third party tracking, we have stated that any Do Not Track mechanism should be universal, easy, persistent, enforceable, and cover most collection, with some narrow exceptions like fraud detection. Industry has responded to our call for Do Not Track and is making great progress. There are currently broad-based discussions taking place on implementation of Do Not Track to ensure that the implementation is effective and not overbroad. We plan to closely monitor these discussions and are optimistic that an effective Do Not Track mechanism will be in place by the end of the year.

2. As a father of four young children, I am concerned about their safety online, and I want to ensure that children are protected when they use the Internet and new technologies. I understand that the FTC is currently engaged in another review of the Children's Online

Privacy Protection Act. Can you update me on the status of that review? At this point, do you believe that Congress needs to update that Act?

Answer: Children's privacy is a top priority for the Commission. We received over 350 comments in response to our proposed changes to the COPPA Rule and are working through them. There are many complicated issues, and we want to be sure we get it right. We hope to have the Rule finalized by the end of the year.

3. In the FTC's Privacy Report there is a section on the articulation of privacy harms. In it, the FTC ultimately concludes that the "range of privacy-related harms is more expansive than economic or physical harms or unwarranted intrusions and that any privacy framework should recognize additional harms that might arise from unanticipated uses of data." (p.8)

   - Is the FTC implying or concluding that any unanticipated use of data is wrong?
   - Is the FTC implying or advocating for the ability to take enforcement actions against harms that "might arise"?
   - Or is the FTC already doing this?
   - Do you think the FTC has blanket authority to regulate all uses of data?

   Answer: The Commission's Final Privacy Report did not conclude that any unanticipated use of data was wrong or that the FTC had authority to regulate all uses of data. Rather, the report noted the concern that some unanticipated data uses could cause harm. The report described harms arising from the unexpected and unconsented to revelation of previously-private information, including both sensitive information (*e.g.*, health, financial, children's information, precise geolocation information) and less sensitive information (*e.g.*, purchase history, employment history) to unauthorized third parties. As one example, in the Commission's case (and consent) against Google, the complaint alleged that Google used the information of consumers who signed up for Gmail to populate a new social network, Google Buzz. The creation of that social network in some cases revealed previously private information about Gmail users' most frequent email contacts. Similarly, the Commission's complaint against Facebook (and proposed consent) alleged that Facebook's sharing of users' personal information beyond their privacy settings was harmful.

   Another harm the report identified is the erosion of consumer trust in the marketplace. Businesses frequently acknowledge the importance of consumer trust to the growth of digital commerce, and surveys support this view. For example, in the online behavioral advertising area, survey results show that consumers feel better about brands that give them transparency and control over advertisements. Companies offering consumers information about behavioral advertising and the tools to opt out of it have also found increased customer engagement. In its comment to the Commission's Draft Privacy Report, Google noted that visitors to its Ads Preference Manager are far more likely to edit their interest settings and remain opted in rather than to opt out. Similarly, Intuit conducted a study showing that making its customers aware of its privacy and data security principles – including restricting the sharing of customer data, increasing the

transparency of data practices, and providing access to the consumer data it maintains – significantly increased customer trust in its company.

Ultimately, the value consumers place on not being tracked online or the costs to them of potential embarrassment or harm arising from unknown or unanticipated uses of information cannot be easily determined. What we do know is that businesses and consumers alike support increased transparency of data collection and sharing practices. Increased transparency will benefit both consumers and industry by increasing consumer confidence in the marketplace.

Finally, nothing in the report changes our existing authority to enforce the FTC Act. We can only bring actions involving unfair or deceptive practices. A practice is deceptive if (1) it is likely to mislead consumers acting reasonably under the circumstances, and (2) it is material, that is, likely to affect consumers' conduct or decisions regarding the product at issue. A practice is unfair if it causes or is likely to cause harm to consumers that: (1) is substantial; (2) is not outweighed by countervailing benefits to consumers or to competition; and (3) is not reasonably avoidable by consumers themselves. In order to prevail in a case under the FTC Act, we must demonstrate to a judge that the case meets these rigorous standards.

4. As you are aware, over the last year, members of the Commerce Committee have asked numerous times about the scope of the FTC's Section 5 authority. With respect to Sec. 5, in follow up answers you provided to the Committee after your last appearance here you said:

> While the vast majority of [the FTC's] antitrust enforcement actions involve conduct that falls within the prohibitions of the Sherman or Clayton Acts, the Commission has a broader mandate, which it discharges by challenging, under Section 5, conduct that is likely to result in harm to consumers or to the competitive process... The Commission's recent use of Section 5 demonstrates that the Commission is committed to using that authority in predictable ways that enhance consumer welfare.

You say that you are "committed to using that authority in predictable ways." However, I would note that while the Commission has held workshops on the scope of its Section 5 authority in recent years, it has never issued a formal report or guidelines from those workshops that would give clear direction to the business community about the types of cases that the Commission will pursue outside the traditional Sherman Act constraints. Do you plan on issuing such formal guidelines? If so, when can we expect to see those guidelines? If not, why?

Answer: I agree that businesses and consumers benefit whenever we are able to improve the clarity and predictability of the laws we enforce, including Section 5. It is worth noting that Congress, in formulating the antitrust laws and Section 5, decided that common law development of competition law was preferable to trying to produce a list of specific violations, recognizing that no such list could be adequate over varying times and

circumstances. Congress consciously opted for a measure of flexibility in competition law.

However, sources of guidance do exist. Although the Supreme Court has never squarely articulated the precise boundaries of our Section 5 authority, the case law, complaints, and consent agreements identify the types of conduct to which the FTC has applied its stand-alone Section 5 authority in the past. Recent cases, including *Intel*, *U-Haul*, and *N-Data*, further illuminate the kinds of conduct the Commission has challenged as unfair methods of competition under Section 5. In addition, a wealth of information is contained in the transcripts and submissions from our October 2008 workshop on the use of Section 5 as a competition statute.

The scope of our Section 5 enforcement authority is inherently broad, in keeping with Congressional intent to create an agency that would couple expansive jurisdiction with more limited remedies, and it is firmly tethered to the protection of competition. The FTC has used its Section 5 authority judiciously in the recent past. We will not hesitate, however, to use Section 5 to combat unfair methods of competition that are within the scope of our jurisdiction.

My fellow Commissioners and I continue to consider the best way to further clarify the bounds of our Section 5 authority, be it a report, guidelines, or some other approach. This will remain a priority during the remainder of my term as Chairman.

5. In your written testimony you state that privacy legislation would provide "businesses with the certainty they need to understand their obligations." Putting the legislation aside, I like that you are advocating for providing certainty for businesses. But in looking at the Privacy Report, I am concerned that the Commission is embracing an expanded definition of harm under Section 5 to include "reputational harm," or "the fear of being monitored," or "other intangible privacy interests." These seem like vague concepts – and I think this expanded harm-based approach would only create more uncertainty. Your testimony and the report appear to be in contrast in this instance. Do you agree? Why or why not?

Answer: We do not believe the harms we identify in the report and describe in the context of our recent enforcement actions are vague or uncertain. The backlash that followed Google's rollout of its Buzz social network and the Facebook changes that were the subject of our consent orders was immediate. Consumers clearly understood the likelihood of harm arising from these changes, and the companies should not have been surprised by the reaction. Thus, we do not believe our continuing use of Section 5 of the FTC Act, even without baseline legislation, will lead to uncertainty or confusion. We are obligated to consider certain specific factors in determining whether a violation of Section 5 exists and will continue to do so in our enforcement actions. Nevertheless, we believe that businesses can benefit from having clear rules of the road for commercial data practices that would provide even more certainty as to their obligations.

Questions for the Record for Chairman Leibowitz
"The Need for Privacy Protections: Perspectives from the Administration and the Federal Trade Commission"
U.S. Senate Committee on Commerce, Science, & Transportation
Wednesday, May 9, 2012

From Senator Thune:

Problems with Empowering State Attorneys General to Enforce Federal Law with Regard To Privacy

1) Mr. Leibowitz, one of the provisions proposed in various pieces of privacy legislation deals with state attorneys general being empowered to enforce federal law with regard to data security. A likely result if such a provision were to be enacted into law is that state attorneys general would delegate their federal enforcement power to private contingency fee lawyers. I believe the problem with this approach is that the goals of plaintiffs' lawyers might conflict with a state official's duty to protect the public interest. Plaintiffs' lawyers will be motivated to maximize fees at the expense of the taxpayer. There have also been troubling instances of state attorneys general hiring favored contingency fee lawyers rather than having a transparent and competitive bidding process. Litigation brought by state attorneys general should be motivated by the public good, not by private profit.

Question: Mr. Leibowitz, with respect to proposed data privacy legislation empowering state attorneys general to enforce federal law, do you believe that the legislation should ensure there is adequate supervision of state attorneys general at the federal level to assure consistent enforcement of federal law throughout the United States?

Follow-on: Do you believe that state attorneys general empowered to enforce federal law regarding data security should be restricted from delegating this power to contingency fee lawyers? If not, do you believe that if contingency fees lawyers are employed, the process to hire them should take place in a transparent manner with competitive bidding?

Answer: We support the ability of state attorneys general to enforce any federal privacy laws, but the Commission has not taken a position on the methods by which the states use their enforcement authority.

The FTC often collaborates with the states in our privacy and data security investigations. For example, in our case against Lifelock the company agreed to pay $11 million to the FTC and $1 million to a group of 35 state attorneys general to settle charges that the company used false claims to promote its identity theft protection services. This joint settlement is just one example of our strong

cooperative efforts with the states, and we look forward to working with them on future efforts in the areas of privacy and data security. This sort of collaboration helps ensure that enforcement actions are complementary and consistent. Another means of ensuring consistent enforcement of federal law is carefully crafting the standards in any legislation to minimize the potential for inconsistent interpretations. We would be happy to work with the Committee on any such proposed legislation.

While I support the ability of state attorneys general to enforce any federal data security laws, the Commission has not taken a position on the methods by which the states use their enforcement authority.

Definition of Data Broker

2) Mr. Leibowitz, the FTC Privacy Report released a few months ago applauded the Digital Advertising Alliance's self-regulatory privacy program. However, the FTC's Privacy Report also calls for legislation to regulate data brokers, but offers no guidance for what constitutes a data broker. As it stands, nearly all of industry engages in business or practices that might constitute data brokerage, and legislation would have a sweeping impact on many, if not all companies.

Question: Mr. Leibowitz, how would you define what a data broker is? I'd like to hear your answer here today, but would also like to have your written answer for the record.

Answer: We would be happy to work with this Committee as it considers legislation concerning data brokers to determine a consensus definition of data brokers. When we developed our privacy report, we considered data brokers to be companies that monetize and sell consumer data to other companies in ways that are often invisible to consumers. Our report described three types of data brokers. First, there are those whose products and services are used for eligibility decisions, such as credit, employment or insurance; these companies' practices are covered by the Fair Credit Reporting Act (FCRA). Second, there are data brokers who collect and sell consumer data for marketing purposes. Finally, there are data brokers whose products are used for purposes other than marketing and FCRA-regulated eligibility purposes. Some of these uses include fraud prevention or risk management to verify the identity of consumers.

Follow-on: Mr. Leibowitz, why do you believe legislation is necessary despite the success of industry's self-regulatory program?

Answer: I believe that industry is making progress on self-regulation in *some* areas. For example, industry has made great strides in implementing a Do Not Track mechanism, but more work remains to be done. But there clearly are other areas that deserve more attention. The data broker industry is an example of an area where self-regulatory efforts have lagged. As our Privacy Report notes, there have been no

successful self-regulatory efforts by the data broker industry since the 1990s – despite the highly-publicized ChoicePoint breach and growing public concerns. Given the fact that data brokers are largely invisible to consumers yet can have a dramatic impact on their lives, we have called for targeted legislation to give consumers reasonable access to the data such entities maintain about them, and we are working with data brokers to explore creating a centralized website to increase transparency about their practices and give consumers choices.

The mobile industry is another area where self-regulation is lagging. As detailed in a recent FTC staff report about children's mobile applications ("apps"), consumers are provided with very little information about applications' data collection and sharing practices. Our report found that in virtually all cases, neither app stores nor app developers provide disclosures that tell parents what data apps collect from children, how apps share it, and with whom.

FTC Privacy Report and Cost-Benefit Analysis

3) The section of the FTC Privacy Report discussing the cost-benefit analysis of privacy regulation is disturbingly thin. The report acknowledges that "imposing new privacy protections will not be costless" but makes no attempt to determine what those costs are. Moreover, the proposed benefits to companies are unquantified and anecdotal at best. Businesses are better able to determine and maintain the value of consumer trust in the marketplace than is the FTC. Under the Regulatory Impact Analysis of the Office of Management and Budget, agencies are supposed to consider the qualitative and quantitative costs and benefits of a proposed regulation and any alternatives. That seems particularly important, given that Internet advertising alone directly employs 1.2 million Americans.

Question: How do we ensure a comprehensive cost/benefit analysis of privacy regulation or enforcement activity given that the FTC doesn't seem to have done that here?

Answer: As we noted in our report, we agree that it is important to consider costs and benefits associated with our recommendations. However, empirical, quantitative analyses are particularly challenging in this area. The value consumers place on not being tracked as they use the Internet or the costs to them of potential embarrassment or harm arising from unknown or unanticipated uses of information cannot be easily calculated.

It is important to note, however, that the Commission's Final Privacy Report did not and was not intended to set forth a new regulation or serve as a template for law enforcement. Instead, it focused on articulating best practices for companies that collect and use consumer data. The best practice recommendations in the report are designed to be flexible to permit and encourage innovation. Companies can implement the privacy protections recommended in the report in a manner

proportional to the nature, sensitivity, and amount of data collected as well as to the size of the business at issue.

In addition, many companies have already implemented many of these practices, and we plan to work with industry to facilitate even broader adoption in the future. Further, it is noteworthy that a number of leading companies have also asked Congress to consider enacting baseline privacy legislation to provide legal certainty to industry and to build trust with consumers. To the extent that Congress decides to move forward on baseline privacy legislation, the Commission notes that the best practices it recommends in the final report can inform the deliberations.

Risk of Stifling the Internet Economy

4) A report commissioned by Interactive Advertising Bureau recently concluded that the Internet accounted for 15% of total US GDP growth. If the Internet were a national economy, by 2016 it would rank as the fifth largest economy in the world. The advertisement supported Internet contributes $300 billion to the U.S. economy and has created about 3 million U.S. jobs. At a time of sustained, grim economic news, the Internet has remained one of the bright spots of the United States economy and that trend is continuing. I'm worried that if we try to rush a quick-fix on the issue of privacy, rather than thoughtfully and carefully dealing with the issue, we'll stifle that important economic advantage we have here in America.

Question: How do we make sure that we don't stifle the Internet economy, but still protect consumers? How do you balance these interests?

Answer: Our report articulates best practices for companies that collect and use consumer data. We also recommend – in part in response to calls from leading companies – that Congress consider enacting baseline privacy legislation to provide more legal certainty to industry and to build trust with consumers. All of these recommendations are the result of our extensive work with all stakeholders, and we look forward to working with Congress to make sure that we appropriately balance these interests.

We believe that companies will still be free to innovate – for example, they can find new ways to target ads without tracking or with less tracking, and consumers can continue to receive targeted ads if they so choose. Our recommendations simply seek to give consumers clear, understandable, relevant choices about their information. This conversation will build more confidence in the marketplace and encourage growth.

Questions for the Record for Commissioner Ohlhausen
"The Need for Privacy Protections: Perspectives from the Administration and the Federal Trade Commission"
U.S. Senate Committee on Commerce, Science, & Transportation
Wednesday, May 9, 2012 at 2:30 p.m.

From Senator Thune:

Problems with Empowering State Attorneys General to Enforce Federal Law with Regard To Privacy

1) **Ms. Ohlhausen, one of the provisions proposed in various pieces of privacy legislation deals with state attorneys general being empowered to enforce federal law with regard to data security. A likely result if such a provision were to be enacted into law is that state attorneys general would delegate their federal enforcement power to private contingency fee lawyers. I believe the problem with this approach is that the goals of plaintiffs' lawyers might conflict with a state official's duty to protect the public interest. Plaintiffs' lawyers will be motivated to maximize fees at the expense of the taxpayer. There have also been troubling instances of state attorneys general hiring favored contingency fee lawyers rather than having a transparent and competitive bidding process. Litigation brought by state attorneys general should be motivated by the public good, not by private profit.**

   Question: Ms. Ohlhausen, with respect to proposed data privacy legislation empowering state attorneys general to enforce federal law, do you believe that the legislation should ensure there is adequate supervision of state attorneys general at the federal level to assure consistent enforcement of federal law throughout the United States?

   I support data security legislation and believe that state attorneys general should have enforcement authority. However, as you suggest, the legislation must be carefully crafted to ensure that there are clear statutory guidelines by which companies can implement their data security systems and federal supervision of the efforts of the state AGs. The FTC works frequently and effectively with many state AGs and that model of cooperation to benefit consumers should apply here as well.

   Follow-on: Do you believe that state attorneys general empowered to enforce federal law regarding data security should be restricted from delegating this power to contingency fee lawyers? If not, do you believe that if contingency fees lawyers are employed, the process to hire them should take place in a transparent manner with competitive bidding?

All law enforcement should be motivated by the public good, considering consumer harm, appropriate allocation of scare resources, and litigation costs, and among other factors. Transparency is also an important public goal, as is fostering competition in the procurement of goods and services for government use. Any federal legislation should encourage transparency and competition at all levels of government but should also avoid being overly prescriptive regarding how states may conduct their legitimate functions.

Definition of Data Broker

2) **The FTC Privacy Report released a few months ago applauded the Digital Advertising Alliance's self-regulatory privacy program. However, the FTC's Privacy Report also calls for legislation to regulate data brokers, but offers no guidance for what constitutes a data broker. As it stands, nearly all of industry engages in business or practices that might constitute data brokerage, and legislation would have a sweeping impact on many, if not all companies.**

Question: How would you define what a data broker is? I'd like to hear your answer here today, but would also like to have your written answer for the record.

The FTC's recent Privacy Report, which issued before I arrived at the Commission, considered data brokers to be companies that monetize and sell consumer data to other companies in ways that may be invisible to consumers. The Privacy Report described three types of data brokers: 1) those whose products and services are used for eligibility decisions, such as credit, employment or insurance and whose practices are covered by the Fair Credit Reporting Act (FCRA); 2) data brokers who collect and sell consumer data for marketing purposes; and 3) data brokers whose products are used for purposes other than marketing and FCRA-regulated eligibility purposes. Some of these uses include fraud prevention or risk management to verify the identity of consumers. When developing an appropriate definition of a data broker, it is important to protect consumers' personal information from harmful uses while still permitting beneficial uses, such as fraud prevention.

Follow-on: Why do you believe legislation is necessary despite the success of industry's self-regulatory program?

I believe that data security and breach notification legislation would be appropriate to protect against the unauthorized access of consumer information but I have not endorsed the Privacy Report's call for general privacy legislation. I think that the best way to safeguard consumer privacy is to give consumers the tools they need to protect their personal information through transparency and choices. The self-regulatory programs appear to have made considerable strides in giving consumers control over who accesses their information and how it is

used for marketing purposes. The proposed self-regulation, however, is not aimed at protecting against the unauthorized access of personal data by parties, such as hackers, and thus would not address the types of harms that data security legislation seeks to prevent.

FTC Privacy Report and Cost-Benefit Analysis

3) **The section of the FTC Privacy Report discussing the cost-benefit analysis of privacy regulation is disturbingly thin. The report acknowledges that "imposing new privacy protections will not be costless" but makes no attempt to determine what those costs are. Moreover, the proposed benefits to companies are unquantified and anecdotal at best. Businesses are better able to determine and maintain the value of consumer trust in the marketplace than is the FTC. Under the Regulatory Impact Analysis of the Office of Management and Budget, agencies are supposed to consider the qualitative and quantitative costs and benefits of a proposed regulation and any alternatives. That seems particularly important given that Internet advertising alone directly employs 1.2 million Americans.**

Question: How do we ensure a comprehensive cost/benefit analysis of privacy regulation or enforcement activity given that the FTC doesn't seem to have done that here?

With privacy, as with all public policy issues within the FTC's jurisdiction, to produce the best result for consumers we should conduct a careful analysis of the likely costs and benefits of any proposed regulation. The Privacy Report, which was issued before I started at the Commission, discusses costs and benefits in general terms but does not contain a cost/benefit analysis. I believe that a review of what consumers and competition are likely to lose and gain from any new regulation would be helpful to ensuring the best outcome for consumers. For example, in the case of advertising, the FTC has consistently recognized the crucial role that truthful non-misleading information contained in advertising plays not just in informing consumers but also in fostering competition between current participants in the market and lowering entry barriers for new competitors. I believe that we should consider factors regarding the possible effects of reducing information available in market for consumers and competitors when analyzing the likely effects of new privacy regulations.

Risk of Stifling the Internet Economy

4) **A report commissioned by Interactive Advertising Bureau recently concluded that the Internet accounted for 15% of total US GDP growth. If the Internet were a national economy, by 2016 it would rank as the fifth largest economy in the world. The advertisement supported Internet**

contributes $300 billion to the U.S. economy and has created about 3 million U.S. jobs. At a time of sustained, grim economic news, the Internet has remained one of the bright spots of the United States economy and that trend is continuing. I'm worried that if we try to rush a quick-fix on the issue of privacy, rather than thoughtfully and carefully dealing with the issue, we'll stifle that important economic advantage we have here in America.

Question: **How do we make sure that we don't stifle the Internet economy, but still protect consumers? How do you balance these interests?**

The best way to ensure a proper balance of the interests in the Internet economy and consumer protection is for the FTC to continue its carefully targeted enforcement against deceptive and unfair acts and practices on the Internet while proceeding cautiously in exploring the need for additional generally privacy legislation and promoting self-regulatory efforts aimed at providing access and choice to consumers. For example, I support a careful analysis of consumer harms that are not currently being addressed by enforcement or self-regulation before recommending any additional privacy legislation.

From Senator Rubio:

1) **The Internet has had a transformative impact on society, both in America and around the world. One of the great things about the Internet and something that has contributed to its success is the fact that many of the most popular services and sites that consumers use are free, and they have remained free because of online advertising, including behavior based advertising. More and more in our economy, the ability to tailor services to more efficiently and effectively meet consumers' needs is driven by the collection of data and the delivery of tailored ads. And these industries create jobs and contribute greatly to our economy. Do you agree that the FTC should balance these considerations when implementing privacy policies? How is the FTC doing this?**

   Yes, I agree that the FTC should balance these considerations. Because the FTC's ultimate goal is to optimize consumer welfare, when implementing privacy policies, close attention needs to be paid to potential outcomes and whether agency activity is actually improving consumer welfare. Consumer data can help firms to better understand the needs of their customers and to develop new and innovative products and services. The FTC has also recognized the crucial role that truthful non-misleading advertising plays in fostering competition between current participants in the market and lowering entry barriers for new competitors, resulting in overall benefits for consumers. Therefore, any potential competitive effects resulting from new privacy restrictions, such as a firms' ability to efficiently and effectively meet consumers' needs, should be considered against the benefit that consumers may derive from these policies. It is important to balance the actual privacy-enhancing benefits with the costs of such proposals in order to ensure the best outcome for consumers.

2) **As you know, certain telecommunications providers are subject to dual regulation by both the FTC and FCC. And depending on the service and technology, companies may be subject to multiple sections of the Telecommunications Act, or none at all. Do you think this dual regulation leads to confusion or negatively impacts some providers? Do you think that the Congress should look at eliminating dual regulation?**

   Generally, confusion can be avoided by making narrowly tailored, well-defined regulations that retain the focus of the agencies' missions. In the instances where dual regulation is contradictory, overly broad, or no longer represents industry conditions, eliminating dual regulation may be beneficial. For example, I support eliminating the FTC's common carrier exemption, which was based on the existence of a pervasively regulated, monopoly telecommunications industry that no longer reflects the state of the industry.

Responses to Qnestions for the Record to Commissioner Ramirez
July 11, 2012 "Oversight of the Impact on Competition of Exclusion Orders to Enforce Standard-Essential Patents" Hearing

Responses to Questions for the Record from Chairman Patrick Leahy

1. **The Department of Justice and Federal Trade Commission have both expressed concern about the potential anti-competitive effects that may result when a patent holder that has committed to license its standard-essential patents (SEPs) on reasonable and non-discriminatory (RAND) terms seeks an exclusion order at the ITC, instead of dispnting the reasonable terms of the license in court. What is the significance of the RAND commitment in the context of SEPs?**

   A: A RAND commitment is significant because it reflects a commitment by a patent holder to license its intellectual property on RAND terms, which would include a duty to negotiate in good faith. In the standard setting context, prior to the adoption of a standard, alternative technologies compete to be included in the standard on the basis of features, quality, or price. Often there are a number of technologies with similar attributes available for inclusion in the standard; and, while it may be possible for standard setting organization (SSO) members to negotiate licenses for SEPs before a standard is adopted, this is not a realistic option for many firms. These negotiations may take a significant amount of time, and the people who build the technical standard are often not the same people who negotiate licenses.[1] Instead, SSO members more often delay this decision and require that the owner of the technology agree to license SEPs on RAND terms as a *quid pro quo* for the inclusion of their patents in a standard. RAND commitments are thus designed to mitigate the risk that a patent holder will exploit market power it acquires when its technology is embedded in a standard by providing assurances that if an implementer needs a license to the SEP at a later date, a license will be available on reasonable and non-discriminatory terms.

2. **If the ITC were to find that issuing a traditional exclusion order would have a harmful effect on competitive conditions in the U.S. economy or harm American consumers, in yonr view are there other potential actions that the ITC could consider consistent with its statutory obligations?**

   A: Yes, I believe the ITC has a range of remedies available to it to give effect to its statutory obligation to consider "competitive conditions in the United States economy . . . and United States consumers[,]"[2] and to refrain from imposing Section 337 remedies in conflict with the public interest. For example, the ITC could find that Section 337's public interest factors support denial of an exclusion order if the holder of the RAND-encumbered SEP has not complied with its RAND obligations, which would include a duty to negotiate with potential licensees in good faith. Alternatively, the ITC could delay the effective date of its

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[1] *See* Doug Lichtman, *Understanding the RAND Commitment*, 47 Houston L.R. 1023, 1028 (2010) ("Standard-setting is a process run by engineers, not lawyers. . . . The RAND commitment thus simplifies the conversation, allowing the engineers alone to run the show until the technical details are fully selected and documented.").

[2] 19 U.S.C. §§ 1337(d)(1), (f)(1).

Section 337 remedies until the parties mediate in good faith for damages for past infringement and/or an ongoing royalty for future licensed use, with the parties facing the respective risks that the exclusion order would (i) eventually go into effect if the implementer refuses a reasonable offer or (ii) be vacated if the ITC finds that the patent holder has refused to accept a reasonable offer.

3. **Some suggest that, given the potential for anticompetitive abuse, the authority of the ITC to issue exclusion orders should be limited in cases involving SEPs that holders have committed to license on RAND terms. Even if a blanket rule is not appropriate, are there steps that should be taken to clarify when it is appropriate for the ITC to issue an exclusion order in a case involving an SEP?**

   A: I think that Section 337 gives the ITC sufficient flexibility to consider how an exclusion order can cause hold-up, raise prices, and decrease innovation as the basis for denial of an exclusion order. ITC investigations are highly fact specific, and I believe the ITC is well positioned to consider these economic issues as part of its public interest analysis.

4. **Could the concerus you have described about the potential auti-competitive effects of exclusion orders in the context of SEPs also arise in non-SEP cases where a patent holder seeks an exclusion order to enforce a patent that it has previously committed to license on RAND terms?**

   A: Yes. There may be other situations where a patent owner acquires bargaining power based solely on an implementer's investments in complementary technologies, even where a technology standard is not at issue. For example, the threat of injunctive relief for infringement of a patent covering a minor technology embedded in a complex multicomponent product can give the patent owner undeserved leverage in licensing negotiations. Hold-up outside of the standard setting context also raises risks for competition, innovation, and consumers. While seeking injunctive relief in the face of a RAND promise to an SSO raises particularly strong risks to competition and innovation, the Commission is concerned about all situations where the threat of an injunction permits an infringer to exploit market power based on the complementary investments of others.

5. **I have worked hard to ensure that our patent and antitrust laws are strong aud provide for companies and individual inventors to feel secure in their investments. Where patent laws grant limited monopolies, the antitrust laws work to prevent monopolistic behavior. One of the ways that the Leahy-Smith America Invents Act modernized our country's patent system was to deter patent trolls. Unfortunately, we coutinue to see patent troll activity in Vermont, which deters investment and innovation. Do you see a way to further discourage patent trolls through the competition laws? Put another way: Because patent trolls often function by seeking to extend their monopoly rights beyoud the limited contours of the patent, is it possible that a patent troll's use of frivolous lawsuits to extend its monopoly violates the antitrust laws?**

   A: The increased litigation activity of what we call "patent assertion entities" (PAEs) raises a number of difficult questions. Because the PAE business model has the potential to exacerbate the risks associated with patent hold-up, I share your concern. But while certain conduct by PAEs may implicate the antitrust laws, the solutions to the problem of patent

hold-up need to go beyond antitrust. For example, in our 2011 Report, "The Evolving IP Marketplace,"[3] the Commission proposed a number of flexible reforms to the patent rules, and the way they are applied, that are aimed at reducing the incentives for PAEs, and all marketplace participants, to engage in patent hold-up. These include, among others, the recommendation that courts should ensure that damage awards reward the economic contribution of the technology at issue and not its hold-up value. We appreciate your leadership in the area of patent reform and would be pleased to work with you to explore these and other possible solutions to your concerns.

Responses to Questions for the Record from Ranking Member Charles E. Grassley

1. **In yonr opinion, does the International Trade Commission have sufficient statntory anthority to stay the imposition of an exclnsion order contingent on an infringing party's commitment to abide by an arbitrator's determination of tbe fair value of a license? If it does, do yon believe that the International Trade Commission is using that anthority appropriately?**

   A: Yes, I believe the ITC has the authority to stay for a certain period of time the imposition of an exclusion order contingent on an infringing party's commitment to abide by an arbitrator's determination of the RAND value of a license. I see this as inherent in the ITC's authority to withhold an injunction order that would be contrary to the public interest. I note also that the ITC has previously exercised discretion in staying the imposition of exclusion orders based on competitive conditions in the United States, such as when it delayed the effective date of an exclusion order for four months after finding that HTC had infringed valid Apple patents.[4] The circumstances in the example you cite are different, but the core principle is tbat the ITC has the autbority to stay its exclusion orders.

2. **Some are concerned that a broad denial of remedies in disputes involving standard-essential patents in Section 337 proceedings would produce adverse and unintended consequences. Do yon agree? For example, some are concerned that a no-injunction, no-exclusion order policy would result in giving a potential licensee little incentive to bargain in good faith, because by litigating the case it can avoid payment of royalties until the litigation is over, if not longer. Do you agree with these concerns? Why or why not?**

   A: As noted in its prepared testimony, the Commission does not advocate a blanket "no-injunction/no-exclusion order" rule. Rather, a majority of my fellow Commissioners and I are of the view that the ITC should take RAND commitments made by patent owners into account when deciding whether an exclusion order is in the public interest. We think federal district courts should do the same under the *eBay* test when determining whether to award patent holders an injunction. I believe our position strikes an appropriate balance between

[3] *See generally* Fed. Trade Comm'n, *The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition*, available at http://www.ftc.gov/os/2011/03/110307patentreport.pdf.

[4] *Certain Personal Data and Mobile Communications Devices and Related Software*, Notice of the Comm'n's Final Determination Finding a Violation of Section 337 at 3 (Dec. 2011).

the strong public interest in enforcing IP rights on one hand and the equally strong public interest in promoting competition on the other.

3. **I'm also told that patent holders would be less likely to participate in the standard-setting process if, by doing so, they are forced to give up certain legal remedies for their patents. Do you agree?**

   A: I am not convinced that this would happen to any appreciable degree. Let me first note that a patent holder makes a RAND commitment voluntarily, and it does so in exchange for having its technology included in a standard. As a general matter, I think it is important that patent holders who make such commitments abide by them. It is possible that some patent holders could decide to stay out of SSOs and thereby avoid having to give a RAND commitment that could limit their right to injunctive (or exclusion order) relief. But we have little basis for determining whether this will occur frequently or whether standard-setting will be harmed. SSO participation yields considerable benefits to patent holders – not the least of which is the ability to effectively sponsor a firm's own technology – and it is by no means clear that withdrawals will be frequent. While critics argue that if withdrawals do occur, standard-setting activities will be undermined, standard setting efforts may well be threatened if RAND protections covering SEPs are breached.

4. **Do yon believe that standard-setting organizations should be able to write their own IPR policies and, witb their members, decide to include or exclude RAND commitments, as well as waive or not waive injunctive relief? Do you agree that the government should not be directing these activities, and rather the market will help determine wbat policies a standard-setting organization will adopt?**

   A: I do believe that SSOs should be able to write their own IPR policies. SSOs deal with diverse technologies and serve a variety of businesses with a broad range of business models. One size of IPR policy will not necessarily fit all, and SSOs should be able to tailor their policies to their particular needs.

   That said, it is not necessarily in the interest of SSO members to protect consumers from the effects of patent hold-up. To the extent that SSO members covering an entire industry all incur high royalties associated with hold-up and simply pass them on to their customers, SSO members will lack full incentives to guard against hold-up. If private protections are continually left vague and incomplete, government may have a role.

5. **How do you ensure that your enforcement activities with respect to standard-essential patents do not end up as price setting? How do you avoid using your enforcement anthority to favor one business model over another, or avoid picking winners and losers among standards?**

   A: Commission law enforcement actions thus far have been limited to instances where a patent holder has allegedly engaged in deceptive conduct or has reneged on a prior commitment in order to foster an opportunity for hold-up. Actions of this nature do not favor any particular non-deceptive business model or pick winners or losers among standards. Relief following a finding of a violation in these circumstances is designed to restore the

competition that otherwise would have prevailed or honor a pricing commitment that was previously made. Similarly, advocacy or enforcement activity linked to violation of a RAND commitment would be grounded in the bedrock of what the patent holder has already agreed to do.

6. **Exclusion orders are especially important to U.S. innovators whose standard-essential patents are being infringed by foreign manufacturers with no legally sufficient presence in the U.S. to warrant federal court jurisdiction. Isn't it appropriate for standard-essential patent holders to be able to seek exclusionary relief against foreign infringers? Wouldn't we just be weakening important trade enforcement remedies if we completely took away the ability of U.S. companies to seek such relief at the International Trade Commission?**

   A: As I stated at the hearing, while I believe that injunctive relief in most cases should be unavailable for infringement of a SEP covered by a RAND commitment, neither I nor the majority of my fellow FTC Commissioners believes that there should be a blanket rule that applies in all cases. One likely exception would cover foreign manufacturers with an insufficient presence in the United States to support federal court jurisdiction. In that instance, a foreign infringer could not be pursued for damages in a U.S. district court, and an ITC exclusionary order might be warranted.

   I do note, however, that recent controversies involving ITC exclusion orders and RAND-encumbered SEPs have involved respondents with substantial business ties to the United States. If a respondent is subject to the jurisdiction of U.S. courts, then a patent holder has recourse beyond an ITC exclusion order. More broadly, I do not believe that denying an exclusion order when the holder of a RAND-encumbered SEP has not complied with its RAND obligations weakens trade-enforcement remedies. Those remedies are already designed to protect the public interest, and consideration of the harm that could flow from hold-up should he an important element of that analysis.

7. **What are the possible consequences of Congress requiring the International Trade Commission to consider the traditional four-factor equitable test for injunctive relief in deciding whether to grant an exclusion order for a patent law-based Section 337 violation? Is there any reason why the International Trade Commission should not be subject to the same standard for injunctive relief as the federal courts that was articulated in the U.S. Supreme Court's *eBay v. MercExchange* opinion?**

   A: The Commission has not taken the position that the *eBay* test as such ought to be imported into the ITC's public interest analysis. In *Spansion v. ITC*, 629 F.3d 1331 (Fed. Cir. 2010), the Federal Circuit noted that the statutory underpinnings for relief in Section 337 actions are different from those in federal district court suits for patent infringement, and, for that reason, held that *eBay* does not apply to ITC remedy determinations. I do not disagree with the Federal Circuit's holding. Rather, I believe that the ITC currently has the authority and obligation to take RAND commitments, and patent hold-up concerns more generally, into account as part of its public interest analysis, specifically in its consideration of the impact of an exclusion order on the competitive conditions in the U.S. economy and on U.S. consumers.

Responses to Questions for the Record from Senator John Cornyn

1. **Does the Department of Justice (DOJ) or Federal Trade Commission (FTC) support changes to the International Trade Commission's 337 process, where standard-essential patents (SEPs) are concerned? Why or why not? If DOJ or FTC supports changes, what are they?**

   A: The Commission believes that the ITC, under its current Section 337 authority, has the ability to consider the potential harm to competition associated with exclusion orders for infringement of standard essential patents. Specifically, Section 337 allows the ITC to consider "competitive conditions in the United States economy" and "United States consumers" in deciding whether to grant an exclusion order. In our view, this allows the ITC to weigh whether an exclusion order is likely to harm competition by allowing a patent holder to evade its RAND commitment and exploit market power earned solely through the standard setting process. However, if the ITC determines that its public interest authority is not flexible enough to allow this analysis, then Congress should consider amending Section 337 to give the ITC the flexibility to take these important competitive issues into account.

2. **Some take the position that making ITC exclusion orders unavailable to SEP holders that make "RAND" commitments would leave them open to infringement by foreign manufacturers outside the jurisdiction of U.S. district courts. Are you aware of instances of that occurring? If so, please detail them.**

   A: As the Commission stated in its prepared testimony, we believe that injunctive relief in most cases should be unavailable for infringement of a SEP covered by a RAND commitment. However, a majority of my fellow Commissioners and I do not take the position that there should be a blanket rule denying exclusion orders in all cases involving SEPs. One likely exception would cover foreign manufacturers with an insufficient presence in the United States to support federal court jurisdiction. In that instance, a foreign infringer could not be pursued for damages in a U.S. district court, and an ITC exclusionary order might be warranted.

   But I do note that recent controversies involving ITC exclusion orders and RAND-encumbered SEPs have involved respondents with substantial business ties to the United States. If a respondent is subject to the jurisdiction of U.S. courts, then a patent holder has recourse beyond an ITC exclusion order. More generally, I do not believe that denying an exclusion order when the holder of a RAND-encumbered SEP has not complied with its RAND obligations weakens trade-enforcement remedies. Those remedies are already designed to protect the public interest, and consideration of the harm that could flow from hold-up should be an important element of that analysis.

3. **The Wall Street Journal reported recently on the spread so-called "patent troll" litigation tactics, including licensing of patents by technology companies for the**

apparent purpose of litigation. Does the FTC or DOJ view this as a problem? Why or why not?

A: The Commission is continuing to study the activities of what we call patent assertion entities, or "PAEs." Because the PAE business model has the potential to exacerbate the risks associated with patent hold-up, we are concerned about reports of increased litigation by PAEs. In our 2011 Report, "The Evolving IP Marketplace,"[5] the Commission proposed a number of reforms to the patent rules, and the way they are applied, that are aimed at reducing the incentives for PAEs, and all marketplace participants, to engage in patent hold-up. Among the recommendations we made is that, in awarding damages in patent infringement actions, courts should ensure that damages reward the economic contribution of the technology that is at issue and not its hold-up value.

4. **In its 2011 report, "The Evolving IP Marketplace," the FTC suggests that the ITC interpret its "domestic industry" standing requirement to exclude "ex post" licensing activity directed primarily at extracting rents. To the best of your knowledge, has the ITC taken this recommendation into account?**

A: The ITC appears to be grappling with the application of its domestic injury requirement to pure licensing activities. It is my understanding that the ITC has suggested on two separate occasions in the last two years that two types of licensing activities might "exploit" a patent sufficiently to support a finding of domestic industry: (1) licensing activities that encourage technology transfer; and (2) licensing activities that are solely revenue-driven.[6] More recently, however, the ITC explained that, "[a]lthough [Section 337] requires us to consider all 'licensing' activities [for purposes of the domestic industry requirement], we give [complainant's] revenue-driven licensing activities less weight."[7]

Our 2011 Report recommended that the ITC should consider whether only those licensing activities that make productive use of the patent, such as those that promote technology transfer, should be deemed to satisfy the domestic industry requirement. By revisiting the scope of the domestic industry requirement, the ITC may lessen the risk that an ITC exclusion order could generate hold-up by a patent assertion entity whose activities are directed solely towards extracting rents. I am pleased to see that the ITC appears to be looking closely at this issue.

5. **In its 2011 report, the FTC states that the ITC could utilize the public interest factor to incorporate concerns about patent hold-up. As the report notes, as of publication the ITC had only employed that factor to bar an injunction on three occasions. Since the report, has the ITC taken the FTC's suggestion into account; and how?**

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[5] *See generally* Fed. Trade Comm'n, *The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition*, available at http://www.ftc.gov/os/2011/03/110307patentreport.pdf.

[6] *See Certain Video Game Systems and Controllers*, 337-TA-743, Comm'n Op. at 9 (Apr. 14, 2011); *Certain Coaxial Cable Connectors*, Inv. No. 337-TA-650, Comm'n Op. at 49-50 (Apr. 14, 2010).

[7] *Certain Multimedia Display and Navigation Devices and Systems*, Inv. No. 337-TA-694, Comm'n Op. at 25 (July 22, 2011).

A: Yes. The ITC has recently confirmed that it is examining concerns about patent hold-up in the context of RAND-encumbered SEPs as part of its public interest analysis. In late June, the ITC issued a Notice of Review in an investigation involving Apple products in which it sought briefing from the parties on eight RAND-related topics, including whether: (1) "the mere existence of a RAND obligation preclude[s] issuance of an exclusion order[;]" (2) a patent owner that has refused to offer or negotiate a license on RAND terms should be able to obtain an exclusion order; and (3) a patent owner should be able to obtain an exclusion order if it has offered a RAND license, and that license has been rejected by the alleged infringer.[8] It therefore appears that the ITC is looking carefully at these important issues.

Responses to Questions for the Record from Senator Amy Klobuchar

1. ***Role of Agencies* – How can the Justice Department and FTC use tools already at their disposal to help ensure that standard-essential patents are treated appropriately in order to balance the objectives of protecting patent holders, promoting innovation and providing the best products and services to consnmers?**

   A: Particularly in the information technology sector, standards are critical to ensuring interoperability between products and technologies, which spurs both competition and innovation. But, as we have seeu over the years, the standard setting process can be manipulated in various anticompetitive ways. We are continuing to monitor developments in the standard setting area to protect against harm to competition and the competitive process. For example, the Commission has over 15 years of experience challenging abuses in the standard setting arena. The Commission has also devoted significant policy resources to understanding how to maximize the procompetitive benefits of standards while mitigating the anticompetitive potential for hold-up. The Commission will continue to rely on its enforcement and policy expertise to eusure that standard setting serves the interests of consumers.

2. ***Negotiating RAND Terms* – Questions have been raised as to whether or not bilateral negotiations to arrive at RAND terms and conditions are the most effective way to manage standard-essential patents.**

   What is your view on this issue? In your opinion, are there alternative approaches that could work to ensnre both access to these patented technologies and fair compensation to the patent holders?

   A: RAND commitments are designed to mitigate the risk of patent hold-up and encourage investment in standardized technology.[9] After a RAND commitment is made, the patent

[8] *In re Certain Wireless Communication Devices*, Inv. No. 337-TA-745, Notice of Commission Decision to Review in Part a Final Initial Determination Finding a Violation of Section 337 at 4-5 (June 2012).

[9] See U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Enforcement and Intellectual Property Rights Promoting Innovation and Competition* at 46-47, available at http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf.

holder and the company that wants to implement the technology will typically negotiate a royalty, or, in the event they are unable to agree, they may seek judicial determination of a reasonable rate. But, as your question recognizes, even though RAND commitments are intended to reduce hold-up, they can sometimes be manipulated in various ways that may lead to inefficiencies or the lessening of competition.

The Commission is examining policies that would ensure access to standardized technologies and fair compensation to patent holders. For example, in our 2011 Report, "The Evolving IP Marketplace," [10] the Commission recommended flexible reforms to the patent system aimed at reducing the incentives for firms to engage in patent hold-up, including in the standard setting context. The Commission's June 2011 workshop, "IP Rights in Standard Setting: Tools to Prevent Patent 'Hold-up,'" addressed licensing strategies following the implementation of a standard, including the significance of commitments to license patents on RAND terms.

While there are no easy answers to the questions you raise, the Commission is committed to continuing to maximize the procompetitive benefits of standard setting and standardized technology, and we look forward to continued dialogue on this issue.

Responses to Questions for the Record from Senator Michael S. Lee

1. **Your testimony suggests that your agency has concerns about the availability of ITC exclusion orders for standard essential patent ("SEP") holders who make and subsequently violate a commitment to license their SEP on reasonable and non-discriminatory (RAND) terms. Would legislative reform of 19 U.S.C. § 1337 limiting or eliminating the ITC's authority to grant an exclusion order of an SEP-infringing product when the SEP holder has violated its RAND commitment properly enforce this principle? Under what circumstances, if any, might such statutory language he inappropriate?**

   A: Yes, the Commission is concerned that a patentee might make a RAND commitment as part of the standard setting process and then escape that obligation by seeking an exclusion order for infringement of the RAND-encumbered SEP. But we do not believe legislative reform of the ITC's statutory scheme is necessary. In our view, the ITC currently has authority under Section 337 to prevent a SEP owner from using the ITC process to avoid its RAND obligations. Section 337 allows the ITC to consider the public interest, and specifically "competitive conditions in the United States economy" and "United States consumers," in deciding whether to grant an exclusion order. This allows the ITC to consider how an exclusion order can lead to patent hold-up and associated harms to competition, innovation, and ultimately consumers. However, if the ITC determines that it cannot take these considerations into account under its public interest authority, then

[10] *See generally* Fed. Trade Comm'n, *The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition*, available at http://www.ftc.gov/os/2011/03/110307patentreport.pdf.

Congress should consider whether to amend Section 337 to give the ITC more flexible authority.

2. **In your testimony, you said you did not support a bright-line rule that exclusion orders shonld never be available for an SEP-holder who has violated a RAND commitment. Could you briefly ontline a sitnation where an SEP-holder, in violation of a RAND commitment, would be entitled to an exclusion order without raising competition concerns?**

   A: ITC investigations are highly fact-specific, and though likely rare, there may be circumstances where an exclusion order is appropriate in matters involving RAND-encumbered SEPs. For example, an exclusion order may be appropriate where the implementing firm has refused to engage in good faith negotiations with the patentee, or where a foreign infringer is not subject to district court jurisdiction. Barring an exclusion order under those circumstances would impose restrictions on the patentee's exercise of its rights that go beyond the scope of its voluntary RAND commitment.

3. **Some American innovators have expressed that limiting exclusion orders will devalue SEPs by incentivizing licensees to negotiate in bad faith and rely on lengthy federal court litigation to determine a reasonable royalty. These industry members believe that, *ex ante*, this will lower investment in innovation and industry standards. In your testimony you seem to have suggested that you do not think limiting the availability of exclusion orders will devalue SEPs because RAND commitments have already been made. How do you respond to innovators who claim that limiting SEP holders' ability to enforce their patents at the ITC will cause innovators to he less aggressive in developing new technologies that benefit the standard?**

   A: Although limiting the availability of exclusion orders for RAND-encumbered SEPs could have some effects at the margin on licensing conduct, I believe many aspects of patent damages law will encourage implementers to seek reasonable licenses in a timely manner. An implementer that fails to negotiate a license faces the very considerable expense of litigation. It also risks paying higher damages after a patent has been determined to be valid and infringed than would have been negotiated while the patent rights remained in dispute, and it may be exposed to claims for an increased damage award for willful infringement. The argument also fails to account for the fact that SSO participation yields considerable benefits to a patent holder, including the ability to effectively promote its own technology for incorporation into the standard. Firms that have their technology embedded in a standard typically face many more licensing opportunities than firms with technologies that are not selected for a standard. Given these benefits, and tbe fact that the patentee has agreed to monetize its IP througb broad licensing, I am not convinced that limiting exclusion orders will deter firms from either innovating or willingly contributing technology to standards.

4. **A variety of patent holders argue that RAND commitments have been over-simplified, and that this commitment traditionally involves reciprocity—meaning that both patent holders and potential licensees agree to negotiate in good faith.**

a. Is this your nnderstanding of RAND?

A: Yes. I believe that when negotiating toward RAND royalties, both the potential licensor and the potential licensee have a duty to negotiate in good faith.

b. What remedies shonld be available to SEP holders if an infringing product's producer is not negotiating in good faith?

A: In the event that they are unable to agree, the parties may seek judicial determination of a reasonable royalty rate. In rare circumstances, it may be appropriate to obtain an injunction from a district court or an exclusion order from the ITC. In the case of a district court, *eBay*'s equitable test provides a framework for deciding whether an injunction would be appropriate. I believe the ITC can perform a similar analysis under its public interest authority.

5. Some American innovators argue that federal district court actions alone are insufficient to address patent infringement claims, becanse the parties can only litigate a relatively small number of patents in one action and litigation often takes many years to resolve. Patent holders note that, by contrast, the ITC provides relatively quick resolution that brings parties to the negotiating table to work ont the terms of broad cross-licensing agreements.

a. In your view are the remedies available in federal district court sufficient to incentivize firms to avoid litigation and privately negotiate cross-licensing deals?

A: It is important to remember that both parties to a lawsuit have an incentive to settle disputes to avoid litigation costs. In my view, the remedies available in federal court and the ITC impact not just the likelihood of settlement, but also the terms. My concern is that where SEPs are at issue, the threat of injunctive relief gives the patentee the leverage to extract royalty terms that reflect market power acquired solely through the standard setting process rather than the economic contribution of the technology. I believe the position the Commission has taken—that both the ITC and district courts should take patent hold-up into account when they are evaluating the propriety of awarding injunctive relief—strikes the right balance between the protection of IP rights and competition.

Office of the Secretary

Correspondence Referral

Remember to Designate FOIA Status

Today's Date: 07/30/12

Reference Number: 14006828

Type of Response (or) Action:
Complaint

Date Forwarded:
07/30/12

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Subject of Correspondence:
QFRs for Commissioner Ramirez Re Exclusion Orders to Enforce Standard - Essential Patents

Author:
Senator Patrick Leahy

Representing:

Copies of Response To:

Deadline:
08/02/12

Copies of Correspondence To:

Organization Assigned:

ACTION LOG

Date Received	FTC Org Code	Assignment To:	Date Assigned	Action Required
		Suzanne Munck		

EXPEDITE

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

July 19, 2012

The Honorable Edith Ramirez
Commissioner
Federal Trade Commission
Washington, DC

Dear Commissioner Ramirez:

Thank you for your testimony at the Senate Committee on the Judiciary hearing entitled "Oversight of the Impact on Competition of Exclusion Orders to Enforce Standard-Essential Patents" on July 11, 2012. Attached are written questions from Committee members. We look forward to including your answers to these questions, along with your hearing testimony, in the formal Committee record.

Please help us complete a timely and accurate hearing record by sending an electronic version of your responses to Halley Ross, Hearing Clerk, Senate Judiciary Committee, at Halley_Ross@judiciary-dem.senate.gov, no later than **August 2, 2012**.

Where circumstances make it impossible to comply with the two-week period provided for submission of answers, witnesses may explain in writing and request an extension of time to reply.

Again, thank you for your participation. If you have any questions, please contact Halley at (202) 224-7703.

Sincerely,

Patrick Leahy

PATRICK LEAHY
Chairman

14006828

Questions for the Record of Senator Patrick Leahy (D-VT),
Chairman, Senate Judiciary Committee
Hearing on "Oversight of the Impact on Competition of Exclusion Orders to Enforce Standard-Essential Patents"
July 11, 2012

1. The Department of Justice and Federal Trade Commission have both expressed concern about the potential anti-competitive effects that may result when a patent holder that has committed to license its standard-essential patents (SEPs) on reasonable and non-discriminatory (RAND) terms seeks an exclusion order at the ITC, instead of disputing the reasonable terms of the license in court. What is the significance of the RAND commitment in the context of SEPs?

2. If the ITC were to find that issuing a traditional exclusion order would have a harmful effect on competitive conditions in the U.S. economy or harm American consumers, in your view are there other potential actions that the ITC could consider consistent with its statutory obligations?

3. Some suggest that, given the potential for anticompetitive abuse, the authority of the ITC to issue exclusion orders should be limited in cases involving SEPs that holders have committed to license on RAND terms. Even if a blanket rule is not appropriate, are there steps that should be taken to clarify when it is appropriate for the ITC to issue an exclusion order in a case involving an SEP?

4. Could the concerns you have described about the potential anti-competitive effects of exclusion orders in the context of SEPs also arise in non-SEP cases where a patent holder seeks an exclusion order to enforce a patent that it has previously committed to license on RAND terms?

5. I have worked hard to ensure that our patent and antitrust laws are strong and provide for companies and individual inventors to feel secure in their investments. Where patent laws grant limited monopolies, the antitrust laws work to prevent monopolistic behavior. One of the ways that the Leahy-Smith America Invents Act modernized our country's patent system was to deter patent trolls. Unfortunately, we continue to see patent troll activity in Vermont, which deters investment and innovation. Do you see a way to further discourage patent trolls through the competition laws? Put another way: Because patent trolls often function by seeking to extend their monopoly rights beyond the limited contours of the patent, is it possible that a patent troll's use of frivolous lawsuits to extend its monopoly violates the antitrust laws?

Senator Grassley's Written Questions for Senate Judiciary Committee Hearing "Oversight of the Impact on Competition of Exclusion Orders to Enforce Standard-Essential Patents," July 11, 2012

Edith Ramirez (FTC)

1. In your opinion, does the International Trade Commission have sufficient statutory authority to stay the imposition of an exclusion order contingent on an infringing party's commitment to abide by an arbitrator's determination of the fair value of a license? If it does, do you believe that the International Trade Commission is using that authority appropriately?

2. Some are concerned that a broad denial of remedies in disputes involving standard-essential patents in Section 337 proceedings would produce adverse and unintended consequences. Do you agree? For example, some are concerned that a no-injunction, no-exclusion order policy would result in giving a potential licensee little incentive to bargain in good faith, because by litigating the case it can avoid payment of royalties until the litigation is over, if not longer. Do you agree with these concerns? Why or why not?

3. I'm also told that patent holders would be less likely to participate in the standard-setting process if, by doing so, they are forced to give up certain legal remedies for their patents. Do you agree?

4. Do you believe that standard-setting organizations should be able to write their own IPR policies and, with their members, decide to include or exclude RAND commitments, as well as waive or not waive injunctive relief? Do you agree that the government should not be directing these activities, and rather the market will help determine what policies a standard-setting organization will adopt?

5. How do you ensure that your enforcement activities with respect to standard-essential patents do not end up as price setting? How do you avoid using your enforcement authority to favor one business model over another, or avoid picking winners and losers among standards?

6. Exclusion orders are especially important to U.S. innovators whose standard-essential patents are being infringed by foreign manufacturers with no legally sufficient presence in the U.S. to warrant federal court jurisdiction. Isn't it appropriate for standard-essential patent holders to be able to seek exclusionary relief against foreign infringers? Wouldn't we just be weakening important trade enforcement remedies if we completely took away the ability of U.S. companies to seek such relief at the International Trade Commission?

7. What are the possible consequences of Congress requiring the International Trade Commission to consider the traditional four-factor equitable test for injunctive relief in deciding whether to grant an exclusion order for a patent law-based Section 337 violation? Is there any reason why the International Trade Commission should not be subject to the

QUESTIONS FOR THE RECORD

Senate Judiciary Committee
"Oversight of the Impact on Competition
of Exclusion Orders to Enforce Standard-Essential Patents"
July 11, 2012
Senator Amy Klobuchar

Questions for Edith Ramirez.

1. *Role of Agencies* – How can the Justice Department and FTC use tools already at their disposal to help ensure that standard-essential patents are treated appropriately in order to balance the objectives of protecting patent holders, promoting innovation and providing the best products and services to consumers?

2. *Negotiating RAND Terms* – Questions have been raised as to whether or not bilateral negotiations to arrive at RAND terms and conditions are the most effective way to manage standard-essential patents.

   What is your view on this issue? In your opinion, are there alternative approaches that could work to ensure both access to these patented technologies and fair compensation to the patent holders?

Questions for the Record
Standard Essential Patents
Senator Lee

FTC Commissioner Edith Ramirez

1. Your testimony suggests that your agency has concerns about the availability of ITC exclusion orders for standard essential patent ("SEP") holders who make and subsequently violate a commitment to license their SEP on reasonable and non-discriminatory (RAND) terms. Would legislative reform of 19 U.S.C. § 1337 limiting or eliminating the ITC's authority to grant an exclusion order of an SEP-infringing product when the SEP holder has violated its RAND commitment properly enforce this principle? Under what circumstances, if any, might such statutory language be inappropriate?

2. In your testimony, you said you did not support a bright-line rule that exclusion orders should never be available for an SEP-holder who has violated a RAND commitment. Could you briefly outline a situation where an SEP-holder, in violation of a RAND commitment, would be entitled to an exclusion order without raising competition concerns?

3. Some American innovators have expressed that limiting exclusion orders will devalue SEPs by incentivizing licensees to negotiate in bad faith and rely on lengthy federal court litigation to determine a reasonable royalty. These industry members believe that, *ex ante*, this will lower investment in innovation and industry standards. In your testimony you seem to have suggested that you do not think limiting the availability of exclusion orders will devalue SEPs because RAND commitments have already been made. How do you respond to innovators who claim that limiting SEP holders' ability to enforce their patents at the ITC will cause innovators to be less aggressive in developing new technologies that benefit the standard?

4. A variety of patent holders argue that RAND commitments have been over-simplified, and that this commitment traditionally involves reciprocity—meaning that both patent holders and potential licensees agree to negotiate in good faith.
    a. Is this your understanding of RAND?
    b. What remedies should be available to SEP holders if an infringing product's producer is not negotiating in good faith?

5. Some American innovators argue that federal district court actions alone are insufficient to address patent infringement claims, because the parties can only litigate a relatively small number of patents in one action and litigation often takes many years to resolve. Patent holders note that, by contrast, the ITC provides relatively quick resolution that brings parties to the negotiating table to work out the terms of broad cross-licensing agreements.

Senator John Cornyn
Questions for the Record for Joseph Wayland, Acting Assistant Attorney General, and the Honorable Edith Ramirez, Commissioner, Federal Trade Commission
Committee on the Judiciary
July 11, 2012 Hearing on "Oversight of the Impact on Competition of Exclusion Orders to Enforce Standard-Essential Patents"

For both witnesses:

- Does the Department of Justice (DOJ) or Federal Trade Commission (FTC) support changes to the International Trade Commission's 337 process, where standard-essential patents (SEPs) are concerned? Why or why not? If DOJ or FTC supports changes, what are they?

- Some take the position that making ITC exclusion orders unavailable to SEP holders that make "RAND" commitments would leave them open to infringement by foreign manufacturers outside the jurisdiction of U.S. district courts. Are you aware of instances of that occurring? If so, please detail them.

- The Wall Street Journal reported recently on the spread so-called "patent troll" litigation tactics, including licensing of patents by technology companies for the apparent purpose of litigation. Does the FTC or DOJ view this as a problem? Why or why not?

For Commissioner Ramirez:

- In its 2011 report, "The Evolving IP Marketplace," the FTC suggests that the ITC interpret its "domestic industry" standing requirement to exclude "ex post" licensing activity directed primarily at extracting rents. To the best of your knowledge, has the ITC taken this recommendation into account?

- In its 2011 report, the FTC states that the ITC could utilize the public interest factor to incorporate concerns about patent hold-up. As the report notes, as of publication the ITC had only employed that factor to bar an injunction on three occasions. Since the report, has the ITC taken the FTC's suggestion into account; and how?

Senate Judiciary Committee
Subcommittee on Privacy, Technology and the Law
Hearing on "What Facial Recognition Technology Means for Privacy and Civil Liberties"
July 18, 2012

Questions for the Record from U.S. Senator Al Franken for Ms. Maneesha Mithal

1. **Is there currently anything in federal law that would require a company to get someone's consent before that company generates a faceprint for that person?**

I am not aware of any federal laws currently in effect that specifically require a company to obtain an individual's consent before generating a faceprint for that individual. However, Section 5 of the Federal Trade Commission Act ("FTC Act") prohibits unfair or deceptive acts or practices. 15. U.S.C. § 45 *et seq.* In certain instances, a company's generation of an individual's faceprint without consent may be unfair or deceptive, such that the Federal Trade Commission ("FTC" or "Commission") could bring an action under the FTC Act. For example, if a company represents to consumers that it will not generate faceprints from the images that consumers provide to the company, and then subsequently begins generating faceprints from the previously provided images without obtaining the consent of those users, this may be deceptive under Section 5. If a company generates a faceprint in a way that causes or is likely to cause substantial injury that is not outweighed by countervailing benefits to consumers or to competition and is not reasonably avoidable by consumers, this would be an unfair practice under Section 5. We would examine these issues on a case-by-case basis.

2. **Both Facebook and Google are under either final or proposed settlement orders with the Commission that require those companies to protect their customers' data in particular ways. These orders also subject those companies to 20 years of Commission privacy audits.**

Do these settlement orders cover these companies' use of facial recognition data like faceprints, and if so, how do they protect that data?

Both the final order in the Google matter, as well as the proposed consent order in the Facebook matter, define the information covered by various provisions of the orders ("covered information") broadly. The Google order defines covered information as, "information respondent collects from or about an individual..." Similarly, the proposed Facebook consent order defines covered information as, "information from or about an individual consumer..." Because faceprints, as well as the consumer images they are derived from, are "from or about an individual" they fall under the definition of covered information in both orders.

The orders require the companies to protect covered information in a number of ways. For example, it would be a violation of both the Google order and the proposed Facebook order for the companies to misrepresent the extent to which they protect consumers' faceprints. Further, if either company were to have or launch a facial recognition feature without conducting a review to assess and address the privacy risks associated with that feature, this conduct would violate the provision of the orders that require the companies to implement a comprehensive privacy program.

Additionally, the proposed Facebook order requires that the company obtain users' affirmative express consent before sharing information that is restricted by a privacy setting with any third party in a way that materially exceeds that privacy setting. Thus, once the order is finalized, if Facebook did not obtain users' affirmative express consent before implementing a facial recognition feature that overrode users' privacy settings, this conduct would violate the order. A similar prohibition applies in the case of Google.

The FTC can obtain civil penalties of up to $16,000 per violation per day for violations of final orders.

Office of the Secretary

Correspondence Referral

Remember to Designate FOIA Status

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Type of Response (or) Action:
Complaint

Date Forwarded:
07/26/12

Action: Bureau Director's Signature

Subject of Correspondence:

QFRs on hearing entitled "What Facial Recognition Technology Means for Privacy and Civil Liberties"

Author:
Senator Patrick Leahy

Representing:

Copies of Response To:

Deadline:
08/09/12

Copies of Correspondence To:

Organization Assigned:

ACTION LOG

Date Received	FTC Org Code	Assignment To:	Date Assigned	Action Required
		Maneesha Mithal		

EXPEDITE

14006812

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

July 26, 2012

Maneesha Mithal
Associate Director
Division of Privacy and Identity Protection
Bureau of Consumer Protection
Federal Trade Commission
Washington, DC

Dear Ms. Mithal:

Thank you for your testimony at the Senate Committee on the Judiciary, Subcommittee on Privacy, Technology and the Law, hearing entitled "What Facial Recognition Technology Means for Privacy and Civil Liberties" on July 18, 2012. Attached are written questions from Committee members. We look forward to including your answers to these questions, along with your hearing testimony, in the formal Committee record.

Please help us complete a timely and accurate hearing record by sending an electronic version of your responses to Halley Ross, Hearing Clerk, Senate Judiciary Committee, at Halley_Ross@judiciary-dem.senate.gov, no later than **August 9, 2012.**

Where circumstances make it impossible to comply with the two-week period provided for submission of answers, witnesses may explain in writing and request an extension of time to reply.

Again, thank you for your participation. If you have any questions, please contact Halley at (202) 224-7703.

Sincerely,

Patrick Leahy

PATRICK LEAHY
Chairman

Senate Judiciary Committee
Subcommittee on Privacy, Technology and the Law
Hearing on "What Facial Recognition Technology Means for Privacy aud Civil Liberties"
July 18, 2012

Questions for the Record from U.S. Senator Al Franken
for Ms. Maneesha Mithal

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2. **Both Facebook and Google are under either final or proposed settlement orders with the Commission that require those companies to protect their customers' data in particular ways. These orders also subject those companies to 20 years of Commission privacy audits.**

   Do these settlement orders cover these companies' use of facial recognition data like faceprints, and if so, how do they protect that data?

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Division of Privacy and Identity Protection

October 19, 2012

The Honorable Keith Ellison
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Jim Renacci
U.S. House of Representatives
Washington, D.C. 20515

Re: Responses to Questions for the Record for the hearing held September 13, 2012 before the Committee on Financial Services entitled "Examining the Uses of Consumer Credit Data"

Dear Representatives Ellison and Renacci:

Thank you for the opportunity to appear before the Subcommittee on Financial Institutions and Consumer Credit on September 13, 2012, and to respond to the questions for the record set forth in your correspondence of October 2, 2012.

My responses to your questions are set forth below. I would also like to take this opportunity to correct a misstatement I made during my testimony on September 13, 2012. In response to your question, Representative Ellison, I stated that I believed employers use consumer credit scores. In fact, to the best of my knowledge, while employers sometimes obtain consumer reports concerning job applicants, they do not use credit scores. It is my understanding that consumer reporting agencies will not sell credit scores to be used for employment purposes. When I answered the question, I mistakenly thought it referred to consumer reports rather than credit scores. I apologize for the confusion.

Responses to Questions for the Record

Question 1: No score better than a low score

During the hearing, Ms. Wu from the National Consumer Law Center (NCLC) asserted that no credit score was better than a low score. Can you respond to this assertion? From your experience, do consumers with a low credit score enjoy greater access to credit and employment than do consumers without credit scores? Do consumers with low credit scores pay less for insurance than consumers with no credit scores? Do consumers with low credit scores have greater or less access to employment than people with no credit scores?

A: Although I do not have data on this point, it is my understanding that there may be circumstances under which no credit score or no credit history may be preferable to a low credit score or negative credit history. For example, it is my understanding that some states

permit or require that insurance companies treat consumers with "thin" or no credit histories as having "neutral" credit histories. This may result in a consumer with no credit score paying less for home or automobile insurance than a consumer with a low score. Also, although credit scores are not provided to employers, it is my understanding that some employers use credit reports as a negative factor in hiring decisions, i.e., only to "screen out" applicants. Under these circumstances, no credit history would likely be preferable than the presence of negative information in a job applicant's credit report.

Question 2: Requiring financial institutions and others to analyze alternative data when provided by a consumer

NCLC suggests that consumers ask to have all of their credit information included in any request for credit or other purposes where credit would be considered in determining access and/or price. Mr. Ellison asked you if there was such a law that required financial institutions and/or others such as insurance or employers to consider alternative credit history. Some assert that the Equal Credit Opportunity Act (Section 1002.6/formerly Section 202.6 (b)(5)(6)) provides this right. Is there such a requirement? If so, how is it enforced?

A: Although nothing prohibits a creditor from taking into account alternative credit histories when determining creditworthiness, Regulation B, the implementing regulation of the Equal Credit Opportunity Act ("ECOA"), does not require a creditor to do so. To the extent that a creditor considers credit history in evaluating an applicant's application, Regulation B provides that the creditor shall consider: (i) the credit history, when available, of accounts designated as accounts that the applicant and the applicant's spouse are permitted to use or for which both are contractually liable; (ii) on the applicant's request, any information the applicant may present that tends to indicate the credit history being considered by the creditor does not accurately reflect the applicant's creditworthiness; and (iii) on the applicant's request, the credit history, when available, of any account reported in the name of the applicant's spouse or former spouse that the applicant can demonstrate accurately reflects the applicant's creditworthiness. 12 C.F.R § 1002.6(B)(6).

As the Official Commentary further explains, a creditor may restrict the types of credit history and references that it will consider as long as the restrictions are applied to all applicants without regard to race, gender, or any other prohibited basis. 12 C.F.R. Pt. 1002, Supp. I, Comment 6(b)(6)-1. However, an applicant may request that a creditor consider credit information not reported through a credit bureau only if that information relates to the same types of credit references and history the creditor would consider if reported through the credit bureau. *Id.* Therefore, if a creditor does not consider alternative credit histories, it does not violate the ECOA by failing to do so unless the applicant makes a request, and the alternative history pertains to the same type of information reported through a credit bureau that the creditor normally relies upon when evaluating applications for credit. The Consumer Financial Protection Bureau ("CFPB") now has the authority to issue regulations and interpretations of the ECOA for all covered entities.

The ECOA is enforced in either administrative or federal court proceedings by the Federal Trade Commission ("Commission"), the CFPB, the bank and credit union regulators, the Department of Justice, and certain other agencies with respect to entities within each agency's jurisdiction. In addition, the CFPB has supervisory authority with respect to ECOA compliance over depository institutions and credit unions with total assets of more than $10 billion and their affiliates, and with respect to certain nonbanks, including certain large consumer reporting agencies, mortgage lenders and servicers, and payday lenders. The bank and credit union regulators have supervisory authority with respect to smaller institutions within each agency's jurisdiction. Although the Commission does not have supervisory authority to examine non-bank creditors for ECOA compliance, the agency may investigate for suspected wrongdoings and bring enforcement actions where appropriate.

Question 3: National Consumer and Telecom Utility Exchange

During the second panel, NCLC asserted that late utility payments were not being reported to credit reporting agencies. It is our understanding that 80% of consumers' utility and telecom payment histories are reported to the National Consumer Telecom & Utilities Exchange (NCTUE). Could you confirm if NCTUE is receiving late utility payment information for 80% of U.S. consumers? You stated that you believe NCTUE is complying with the Fair Credit Reporting Act. Can you clarify how consumers learn that their late payments were reported and what the effect was on their rates or services they receive? How do consumers with late payments reported to NCTUE receive adverse action notices?

A: I do not know what percentage of consumers' utility and telecommunications payment histories are reported to NCTUE. The Fair Credit Reporting Act ("FCRA") allows a consumer to request a copy of his or her file from NCTUE to learn whether his or her payment history has been reported. The FCRA does not require a company that reports information about a consumer to a consumer reporting agency such as NCTUE to inform the consumer that it is doing so.

As a general matter, consumer reports are used to make decisions about the availability and cost of various consumer products and services, including credit, insurance, employment, and housing. The presence of negative payment information in a consumer report provided by NCTUE presumably affects the rates and services the user of the report will offer to the consumer that is the subject of the report, but the extent of the impact of this information is determined by the user of the report. If the user of a consumer report from NCTUE or any other consumer reporting agency denies the consumer services based on information contained in the report, it must provide the consumer with an adverse action notice. 15 U.S.C. § 1681m(a). This notice must contain the name, address, and telephone number of the consumer reporting agency from whom the creditor obtained the report and entitles the consumer to a free copy of his or her credit report. If a credit score was used in order to make the adverse decision, the adverse action notice must also include that credit score.

Consumers that apply for credit but, based in whole or in part on information contained in their consumer reports, are offered less favorable material terms are entitled to a risk-based pricing notice and a free copy of their credit report. 15 U.S.C. § 1681m(h). It is my understanding that, in the case of telecommunications and other utility services, which extend credit to consumers since consumers do not pay until after they use the service, consumer reports are most often used to determine whether a consumer will be required to pay a deposit. Consumers that, based in whole or in part on their consumer reports, are required to pay a deposit should receive a risk-based pricing notice. The risk-based pricing notice contains a statement informing the consumer that he or she may be receiving less favorable terms than other consumers, general information about consumer reports, and information about how to obtain his or her consumer report and dispute any inaccurate information. If a credit score was used to make the decision, the risk-based pricing notice must include that credit score.

I should note that I did not mean for my testimony to imply that I believe NCTUE is, in fact, complying with the FCRA. I meant only to state that I have no reason to believe it is not in compliance with the statute.

Question 4: Marketing

The NCLC asserted that previously invisible consumers would receive predatory credit offers once they received a credit score. Is there evidence that would substantiate that claim? Is there any restriction of using credit information for marketing purposes? Do you have any evidence that those without credit scores, but who have real credit needs, are not acting to secure credit already through high cost channels such as pay day lenders and pawn shops. If, as we suspect, they are having their credit needs met by high cost lenders like check cashing service providers, how would this group be harmed—in the context of the credit market—by having a low score?

A: The FCRA provides that consumer reports may only be sold and used for permissible purposes. Marketing is not a permissible purpose under the FCRA. However, the FCRA permits consumer reporting agencies to sell "prescrcened" lists for purposes of making a "firm offer of insurance or credit." 15 U.S.C. § 1681b(c)(1)(B). A prescreened list is a type of consumer report and is based on information in consumer files. Prescreened lists are typically compiled in one of two ways: (1) a creditor or insurer establishes criteria, like a credit score range, and asks a consumer reporting company for a list of people in the company's database who meet the criteria; or (2) a creditor or insurer provides a list of potential customers to a consumer reporting company and asks the company to identify people on the list who meet certain criteria. The criteria used to compile a prescreened list will depend on the type of product a creditor or insurer seeks to offer and to whom. Under the FCRA, consumers may elect to be excluded from prescreened lists by calling 1-888-5-OPT-OUT (1-888-567-8688) or visiting www.optoutprescreen.com.

As I understand NCLC's concerns, prescreening may provide an example of a circumstance under which no credit score may be preferable to a low credit score. Consumers with thin or

no credit histories are not likely to be targeted with prescreened offers because consumer reporting agencies are unable to ascertain whether they meet the criteria established by the creditor or insurer. Consumers with low credit scores, however, may be included in prescreened lists sold to creditors or insurers offering subprime products, engaging in predatory practices, or otherwise seeking consumers with poor credit histories.[1]

As noted in the Commission's 2004 report,[2] traditional creditors are reluctant to extend credit to consumers with little or no credit history because they find it difficult to predict performance. Although I do not have any data on the point, it appears that at least some consumers with no or thin credit histories that are in need of credit will seek it from high cost channels, such as payday lenders, because traditional credit products are not available to them. I do not know, however, what the practical effect would be, in the credit context, if such "no credit score" consumers became "low credit score" consumers. This may depend on the type of lender from whom the consumer seeks credit.

Question 5: Scope of the bill

NCLC asserted that the language we drafted to provide affirmative permission for reporting on time payment would gut the Fair Credit Reporting Act (FCRA). It was our intention in drafting the bill that it not make changes to the FCRA beyond allowing on-time payments to be reported in order to build or rebuild credit scores. From your reading of the bill, does it meet our narrow goal? We appreciate your technical advice.

A: Nothing in the FCRA or its current rules limits the furnishing of accurate on-time payment information. Although the bill aims to encourage the reporting of this information to help consumers build their credit histories, it may have other effects as well.

First, the bill apparently would eliminate the authority of the CFPB to promulgate rules under the FCRA that would restrict the furnishing of information to consumer reporting agencies. As the bill applies broadly to all types of transaction and experience information (not just lease, subscription, and utility information described in paragraph (f)(1)(D) of the bill's new FCRA

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[1] *See, e.g., United States v. Direct Lending Source, Inc.*, No. CV 3:12-cv-02441 (S.D. Cal. filed Oct. 11, 2012) (stipulated final judgment and order), *available at* http://www.ftc.gov/opa/2012/10/equifaxdirect.shtm. The Commission's complaint alleged that the defendants purchased prescreened lists of consumers that were late on their mortgages and resold the lists to marketers of products aimed at financially distressed consumers, including loan modification and debt relief services.

[2] FTC, *Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003*, at 78 (Dec. 2004), *available at* http://www.ftc.gov/reports/facta/041209factarpt.pdf.

subsection) as well as to all public record information, and includes negative information, the scope of this impact could be significant. In addition, although the bill expressly addresses only the furnishing of information, given that the purpose of the bill is to allow the furnished information to be included in consumer reports, it might affect restrictions the FCRA places on reporting. Specifically, limits on the reporting of information, such as provisions restricting the reporting of obsolete information (15 U.S.C. § 1681c(a)), might be viewed as inconsistent with the new express statutory protection for furnishing the information, and thus implicitly repealed. For the same reason, the bill might also preclude any future FCRA rule from limiting the reporting of information covered by the bill. Further, the bill might result in preemption of state statutes that limit the furnishing or reporting of the types of information described in the bill. Such state laws may be viewed as inconsistent with the proposed new subsection, which would be preempted under 15 U.S.C. § 1681t(a), or as imposing prohibitions related to a subject matter regulated under 15 U.S.C. § 1681s-2 (the location of the bill's proposed new subsection), which would be preempted under 15 U.S.C. § 1681t(b)(F).

We would be happy to discuss these issues in detail with staff.

Thank you again for the opportunity to testify and for your questions. I would be happy to answer any additional questions you or staff may have.

Sincerely,

Robert Schoshinski
Assistant Director
Division of Privacy and Identity Protection

Questions for the Record for Chairwoman Edith Ramirez
Senator Patrick Leahy
Chairman, Senate Judiciary Committee

Hearing before the Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights
"Oversight of the Enforcement of the Antitrust Laws"
April 16, 2013

1. **In 2012, the Government Accountability Office (GAO) issued a report concerning Federal oversight and self-regulation of Group Purchasing Organizations (GPOs). This area has long been of interest to the Judiciary Committee. After I raised concerns about the potential impact on patient costs of GPO contracting practices with the Justice Department in 2000, and the Department of Health and Human Services in 2001, the Antitrust Subcommittee held a series of hearings on GPO practices that culminated in a joint report by the Department of Justice and Federal Trade Commission in 2004. During the hearings, many expressed concern that fees paid by vendors to GPOs distort demand, resulting in higher prices for hospitals and consumers.**

   Although the Department of Justice and FTC have investigated complaints against various GPOs, since 2004 the Department has filed only one lawsuit against a GPO under the antitrust laws, and the FTC has filed none. The GAO's 2012 report observed: "While the oversight of GPOs is conducted through the exercise of investigatory authorities of HHS, DOJ, and FTC... this oversight does not address other key questions that have previously been raised about GPOs' activities. For example, inasmuch as the collection of contract administrative fees is permitted under the safe harbor provision to the Anti-Kickback statute and safe harbor regulation, this oversight cannot address whether or to what extent these fees create a financial incentive that is inconsistent with GPOs obtaining the lowest prices for their customers."

   Do you believe that the current legislative framework is sufficient to address the risk of undesirable conduct by GPOs that increases prices for consumers? Do you agree that the legal framework could be strengthened through other measures, such as revisiting the safe harbor for GPOs provided in the Anti-Kickback Statute?

   The FTC has authority to take action against GPOs if they were to engage in anticompetitive conduct in violation of the antitrust laws. For example, Commission staff have investigated allegations by medical device manufacturers that GPO contracting practices unreasonably foreclosed competition among rival manufacturers, which may discourage innovation and create a disincentive for GPOs to negotiate the lowest prices. The FTC will continue to review GPO conduct on a case-by-case basis as part of our mission to promote competition in health care markets and take action when the factual circumstances warrant it.

As your question acknowledges, some concerns raised by various parties regarding GPOs fall outside of the scope of the antitrust laws, including the role of the safe harbor in the Anti-Kickback statute. As you know, these concerns often center on the potential for "agency problems" and corporate governance issues, whereby GPO management may be enticed to enter into contracts that are not in the best interests of their members, as distinct from the antitrust issues that are the Commission's focus.

2. **Last year, I asked then-Commissioner Ramirez and the Acting Assistant Attorney General for Antitrust, Joseph Wayland, whether "patent trolling" behavior by certain patent-assertion entities could constitute an antitrust violation. Mr. Wayland responded: "Any effort by a patent owner to harm competition by improperly extending the exclusionary scope of its patent . . . may violate the antitrust laws, and allegations of such actions merit investigation." I was pleased that your agencies recently held a joint workshop to further investigate this question. How do your agencies intend to follow up on the workshop?**

The FTC and Department of Justice received almost 70 puhlic comments in connection with our Patent Assertion Entities (PAE) workshop. We have been actively considering those comments and applying our learning from the workshop to evaluate potential next steps. If the FTC finds potentially anticompetitive conduct, we will investigate it using our authority under Section 5 of the FTC Act. In addition, PAE activity may be a suitable focus for Commission policy studies and competition advocacy. For example, patent system issues related to notice and remedies may promote PAE harms. The FTC will continue to recommend improvements to the system of patent notice and remedies, as well as other appropriate reform to the patent system, to address these issues going forward.

3. **In your testimony, you stated that the FTC has heard reports of patent assertion entities making unsubstantiated claims relative to small businesses. Unfortunately, I continue to hear frequently about this problem from small businesses in Vermont and across the country. What steps can the FTC take to address this conduct through its consumer protection authority? Will you agree to monitor such activity and take appropriate action to address abusive behavior by patent trolls?**

Yes, the FTC will continue to monitor PAE activity and, when appropriate, we will use our competition and consumer protection enforcement authority to prevent harmful practices by PAEs.

4. **Earlier this year, the FTC concluded its investigation of Google's search engine practices. A majority of Commissioners found that certain practices used by Google**

threatened competition and innovation, yet the FTC relied on voluntary commitments from Google to end those practices, instead of a consent order.

a. **In your testimony, you expressed concern about the use of voluntary commitments to address anticompetitive violations. Can you please elaborate on that? What actions does the FTC intend to take to enforce Google's commitments?**

The voluntary commitments made by Google should not be considered a precedent, but were a good outcome for consumers under the specific circumstances of that case.

Our policy long has been – and under my leadership, will continue to be – that when a majority of Commissioners finds reason to believe that a law we enforce has been violated and enforcement would be in the public interest, any remedy should be embodied in a formal consent order or adjudicated order.

In the Google matter, three of the Commissioners – myself included – were concerned that some of Google's conduct had the potential to restrict competition. A Commission majority did not, however, support an enforcement action on any of the allegations under investigation. Therefore, the Commission was not in a position to accept a formal consent agreement.

In a public letter to then-Chairman Leibowitz, Google responded to the concerns of some Commissioners with voluntary commitments. We expect Google to honor its commitments. Google has stated publicly that material violations of its commitments would be actionable under the FTC Act, and Google will submit periodic compliance reports to the Commission. We will use this and other information to monitor Google's activities.

b. **In discussing potential remedies, some commentators noted the challenges involved in overseeiug a techuologically complex busiuess practice that is constantly being updated, such as a search engine algorithm. How is the Commission responding to the challenges of enforcement in an online world?**

As the Commission has demonstrated throughout its almost 100-year history, antitrust analysis is sufficiently flexible to accommodate the complexities of technological change in dynamic markets. To support our highly fact-based approach to antitrust enforcement, the Commission and its staff constantly strive to enhance our understanding of rapidly evolving technology markets. Staff's expertise deepens case-by-case, just as in other important markets. In addition, in 2010 the agency created a Chief Technologist position, which thus far has been filled by two notable academics with significant real-world experience. We also hire technical experts to work on staff or as consultants when needed.

c. In your testimony, you said that the FTC concluded that certain changes made by Google to its search engine algorithm were "pro-competitive" because they were "designed to improve the overall search experience for the user," even though they had the effect of negatively impacting rivals. Would your analysis have come out differently if the FTC had focused on the harm experienced by Google's other "users"; namely, the advertisers who pay to post ads on its site? How did the FTC determine its framework of analysis in assessing the procompetitive justifications of Google's conduct?

Our analysis focused on the impact of Google's conduct on both consumers and advertisers because they are so closely intertwined. While Google focuses its search product on the search needs and buying preferences of consumers, it does so in order to attract advertisers. As discussed in the Commission's statement, we carefully considered the potential long-term effects of Google's conduct on so-called "vertical" websites, which might be viewed as current or potential rivals in markets for search and search advertising.

d. In light of the recent reports of action by your European counterpart authorities, is the FTC taking any further action in these matters?

We have worked closely with the EC's Directorate General for Competition ("DG Comp") for many years, and our staffs cooperated extensively throughout the Google investigation as well. We do not anticipate any further FTC action on the Google search matter.

Questions for the Record for Chairwoman Edith Ramirez
Senator Chuck Grassley
Senate Judiciary Committee

Hearing before the Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights
"Oversight of the Enforcement of the Antitrust Laws"
April 16, 2013

1. **As you know, I've been concerned about settlement agreements between brand name and generic drug manufacturers that result in a payment to the generic manufacturer and a delay in market entry of the generic drug. These "pay for delay" or "reverse payment" agreements result in consumers having to pay higher costs for their drugs. Senator Klobuchar and I have introduced a bill, the Preserve Access to Affordable Generics Act, that would help put a stop to these anti-competitive agreements and ensure that lower priced generic drugs enter the market as soon as possible. Former Chairman Jon Leibowitz was very supportive of our efforts to address this anti-competitive practice.**

   a. **Do you agree that these "pay for delay" agreements harm consumers?**

      Yes, pay-for-delay agreements pose a substantial threat to consumers. Agreements in which generic drug companies are paid to delay market entry of their products deprive consumers of the ability to choose lower cost medications – often for many years – and impose considerable costs on consumers and the government. FTC economists analyzed data from settlements reported to the FTC during 2004-2009 and calculated, using conservative assumptions, that pay-for-delay patent litigation settlements cost drug purchasers roughly $3.5 billion a year.[1]

   b. **Do you agree that these kinds of agreements are still a problem?**

      I do, and it seems the agreements are a growing problem. FTC staff analyzed settlements filed pursuant to the provisions of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA). The results show a steady increase in the number of agreements containing both a restriction on market entry by the generic drug manufacturer and compensation from the branded drug firm to the generic drug company, from zero in FY 2004 to forty in FY 2012.[2]

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[1] Federal Trade Commission Staff, *Pay for Delay: How Drug Company Pay-Offs Cost Consumers Billions* (January 2010), at 8-10.

[2] Federal Trade Commission Staff, *Agreements Filed with the Federal Trade Commission under the Medicare Prescription Drug, Improvement, and Modernization Act* (FY 2012), http://www.ftc.gov/os/2013/01/130117mmareport.pdf.

c. What is the FTC doing to prevent these kinds of agreements?

The FTC currently has two law enforcement actions challenging pay-for-delay agreements. *FTC v. Actavis* is currently pending before the U.S. Supreme Court, with a decision expected to issue by the end of June. In the *Cephalon* case, the U.S. District Court for the Eastern District of Pennsylvania is awaiting the Supreme Court decision in *Actavis* before moving forward. Additionally, FTC staff continue to review every agreement reported to the agency pursuant to the MMA and have opened additional non-public investigations.

d. Do you believe that the Klobuchar/Grassley legislation would help preserve generic drug competition and ensure that more affordable drugs get to consumers as expeditiously as possible?

I do, and I strongly support this legislation. By declaring that pay-for-delay arrangements are presumptively illegal and requiring clear and convincing evidence to overcome that presumption, the Klobuchar/Grassley bill should help to protect consumers by deterring drug companies from entering into anticompetitive patent settlements.

Questions for the Record for Chairwoman Edith Ramirez
Senator Amy Klobuchar
Senate Judiciary Committee

Hearing before the Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights
"Oversight of the Enforcement of the Antitrust Laws"
April 16, 2013

1. **In these tough budget times, we're asking every agency to do more with less. Can you explain to us the value that you think antitrust enforcement brings to consumers and the economy as a whole?**

   Vigorous competition is a fundamental organizing principle of the U.S. economy. During financially troubled times, conscientious antitrust enforcement remains a good investment for the American people because it helps to support and strengthen our economy. Competitive markets yield lower prices, improved quality, and other benefits for consumers, including both individuals and businesses. Competition also promotes innovation, providing incentives and opportunities for the development of new goods and services.

   The Commission, with its highly professional and dedicated staff, strives to be a good steward of the resources entrusted to us. As one example of the value we deliver to consumers, in FY 2012 the FTC's efforts to prevent anticompetitive mergers saved consumers approximately thirteen times the amount of resources devoted to the agency's merger enforcement program.[3]

2. **The Antitrust Division and the Federal Trade Commission share responsibility for government enforcement of the federal antitrust laws. Sometimes this leads to conflicts regarding which agency will review a merger, what is known as the "clearance process." In some cases, the agencies take a long time, sometimes nearly the entire length of the thirty day pre-merger waiting period, to decide which one will investigate a merger. This unnecessarily delays resolution of the merger investigation, and imposes unnecessary burdens on the merging parties.**

   a. **What is your agency doing to resolve clearance disputes in a more effective way? Are you working with the Antitrust Division/FTC, as the Antitrust Modernization Commission suggested in 2007, to develop a new merger clearance agreement?**

      Clearance disputes are rare, and there is a process in place to resolve, in a timely and professional way, the few that arise. Staff at both agencies are alert to the

[3] Federal Trade Commission, Performance and Accountability Report, FY 2012, at 14, *available at* http://www.ftc.gov/opp/gpra/2012parreport.pdf.

time-sensitivity of clearance and HSR review. We are all working to minimize clearance disputes and associated delays, and the recent ABA Antitrust Section Transition Report released in February finds that "delays due to clearance battles have been reduced."[4] Nonetheless, we can always do better, and Assistant Attorney General Bill Baer and I have agreed that we will both make this issue a priority.

3. **Recently, standard essential patents have been the subject of several cases filed at the International Trade Commission (ITC). We can all agree that standardization of technology and standard essential patents have been critical to the development of a competitive market for smartphones and tablets. But recently, concerns have been raised about the practice of bringing standard essential patents cases to the ITC seeking an exclusion order to prevent products with the patents from being imported into the U.S. Some worry that the ITC exclusion orders related to standard essential patents could gravely harm competition.**

   a. **What sorts of negative effects might the use of exclusion orders regarding standard essential patents have on competition and consumer welfare in general?**

   I am concerned that a patentee might voluntarily commit to license its intellectual property on fair, reasonable, and non-discriminatory (FRAND) terms as part of the standard-setting process, and then escape that licensing obligation by seeking an exclusion order for infringement of the FRAND-encumbered standard essential patent (SEP). The threat of the exclusion order undercuts the procompetitive goals of the FRAND commitment and the standard-setting process. A potential licensee is likely to accept an unreasonable royalty demand if the alternative is an order that blocks its products from the market. Even a relatively small risk of that disruptive outcome can force an implementer to accept licensing terms that far exceed what it would have paid to license the patent before the standard was adopted.

   More broadly, unexpectedly high costs undermine the competitive value of the standard-setting process. And the uncertainty associated with the threat of an injunction can have the long-term impact of discouraging firms from investing to implement the standard, or to invest in standard-compliant products more generally.

[4] American Bar Association, Section of Antitrust Law, *Presidential Transition Report: The State of Antitrust Enforcement 2012* (Feb. 2013), at 12, *available at* http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_presidential_201302.authcheckdam.pdf.

b. Is there any justification for the use of exclusion orders in the context of standard essential patents?

While injunctive relief in most cases should be unavailable for infringement of a SEP covered by a FRAND commitment, this should not be a blanket rule in all cases. One likely exception would cover foreign manufacturers with an insufficient presence in the United States to support federal court jurisdiction. In that instance, a patent holder could not obtain damages for infringement of a valid patent in a U.S. district court, and an ITC exclusion order might be warranted.

Questions for the Record for Chairwoman Edith Ramirez
Senator Michael S. Lee
Senate Judiciary Committee

Hearing before the Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights
"Oversight of the Enforcement of the Antitrust Laws"
April 16, 2013

1. **In 2008, the Department of Justice released a report on Section 2 of the Sherman Act. The report was later withdrawn. That report provided the bnsiness commnnity with guidance on applicable principles in Section 2 enforcement actions.**

   a. **Do you agree with tbe 2008 report's findings and conclusions?**

   b. **If not, with which specific findings and conclnsions do yon disagree?**

   c. **Do you agree that it would he helpful for the business community to have formal guidance on the enforcement agencies' approach to Section 2 enforcement?**

   d. **Will you commit to work with Mr. Baer to develop and publish formal gnidance on Section 2 enforcement?**

   The Commission did not join or endorse the Section 2 Report when it was released hy the Department of Justice, and various Commissioners issued statements explaining their concerns. I was not a Commissioner at the time, but I share the concerns of the Commissioners who declined to endorse the Report.

   The two agencies' extensive joint hearings that provided the foundation for the Report, along with the statements of the then-Commissioners, made an important contribution to the development of antitrust law. The hearings hrought together experts with a wide range of views to discuss important doctrinal and policy questions related to single firm conduct. The record of these hearings (available on the FTC website) and several posted FTC staff working papers continue to provide guidance for businesses and their counsel on various types of conduct.

   In addition, as Assistant Attorney General Bill Baer testified at the hearing, a series of U.S. Supreme Court and D.C. Circuit court opinions provide valuable guidance about how to apply Section 2. As courts continue to apply these analytical approaches to different sets of facts, the law will continue to evolve.

   The antitrust laws should not be applied in ways that might impose liability on firms for achieving marketplace success as a result of their superior products, services, or business models. Likewise, we should not tolerate market power

achieved or maintained via conduct that does not reflect competition on the merits and impairs competition or the competitive process.

Striking the appropriate balance, based on specific factual circumstances and sound economic theory, will help to ensure that markets operate efficiently, that innovation is promoted, and that all firms are encouraged to compete on the merits. We can most effectively satisfy these goals by continuing on our present course: first, to develop sound and predictable principles through case-by-case enforcement; and second, to engage in advocacy (such as amicus briefs) to support competition on the merits and oppose conduct that poses a significant threat of harm to competition or the competitive process.

2. **The Federal Trade Commission, particularly under the previous Chairman, has been in the practice of reaching settlements in cases brought under Section 5 of the FTC Act. These settlements are not subsequently reviewed by a court to establish a clear record of Section 5 enforcement boundaries. At the same time, the Commission has yet to provide definitive guidance as to how Section 5 can be used to enforce unfair methods of competition beyond the traditional scope of antitrust laws.**

   a. **Do you plan to continue the practice of enforcing Section 5 by means of settlements outside of court review?**

   b. **How do you think a practice of open-ended enforcement might be perceived in foreign jurisdictions where basic rule of law principles are often lacking?**

   c. **What formal guidance will you provide the business community regarding Section 5 enforcement?**

   As with the Sherman Act and the Clayton Act, Section 5 of the FTC Act has been developed over time, case-by-case, in the manner of common law. These precedents provide the Commission and the business community with important guidance regarding the appropriate scope and use of the FTC's Section 5 authority.

   For various reasons, including resource constraints, the Commission may – and often does – decide that it is in the public interest to settle a case, in exchange for a binding agreement to stop the allegedly harmful conduct. Parties before the agency, too, often prefer to settle cases for a variety of business reasons. Importantly, the possibility of settlement does not affect the rigor that we apply in choosing appropriate Section 5 enforcement actions, and the documents typically made public at the time of settlement provide significant guidance regarding the Commission's theory of harm.

3. **At our Subcommittee's hearing last week, in response to a question regarding Section 5 of the FTC Act, you stated that you believe the Commission "has been using its Section 5 authority very rigorously and very judiciously," and that the agency is providing some measure of guidance through the pattern of its decisions.**

   a. **If the Commission is applying Section 5 "cautiously" and wishes to provide useful enforcement guidance, why are you resistant to provide such guidance in a more comprehensive, published form upon which the business community and others can meaningfully rely?**

   Case-specific guidance, grounded in detailed facts and sound economic theory, is likely the most useful form of guidance for the business community and lawyers advising the business community. Due to the fact-based nature of antitrust cases, as well as our need to retain flexibility to use Section 5 to protect competition and consumers as markets and economic learning evolve, any non-case-specific guidance document would necessarily be far more general, and thus less useful.

   However, we can always strive to be more transparent regarding our enforcement philosophy and case selection priorities. I will continue to engage in a dialogue with my fellow Commissioners and the business community in pursuit of that goal.

4. **Some have expressed concern that the Commission's approach to Section 5 enforcement has left many in the business community confused and uncertain as the contours of that provision and the breadth of possible enforcement actions.**

   a. **Do you believe that the Commission may use Section 5 to create convergence with U.S. antitrust doctrine and that of international jurisdictions?**

   b. **Do you believe the Commission may use Section 5 to place additional emphasis within U.S. competition policy on consumer choice as a touchstone of antitrust law?**

   c. **Do you believe the Commission may use Section 5 to bring actions that increasingly incorporate analysis and assumptions based on behavioral economics?**

   In my view, the Agency's work on international convergence should focus on the promotion of fair processes and transparency in all jurisdictions, along with efforts to develop and share rigorous analytical tools and common approaches to difficult antitrust issues. As we already have seen in recent years, continued international convergence generates substantial benefits for businesses and consumers. While convergence may tend to lead to similar outcomes, convergence neither contemplates nor requires identical rules of decision or identical outcomes. I do not intend to use Section 5 as a mechanism to create

international convergence with respect to substantive outcomes. The FTC will continue to enforce U.S. laws, applying U.S. legal standards.

In our application of Section 5, as in our application of the antitrust laws generally, we work to use, but not go beyond, state-of the-art economic techniques that are rigorous and well-accepted for identifying competitive effects and efficiencies. The range of recognized harms and benefits from mergers or other competitive conduct may of course include non-price effects, such as those related to product quality or innovation.

5. **At our Subcommittee's hearing last week, you stated that you believe the standards used by the FTC and the DOJ for obtaining a prelimiuary injuuction are "quite similar" and that "as a practical matter what each agency needs to do is go before a judge and show and provide evidence that backs up the charges that are being made." You further stated that you "believe it would be difficult to point to a specific situation where...a case would have led to a different outcome had it been handled by a different agency."**

   a. **In its 2007 Report and Recommendations, the Antitrust Modernization Commission wrote that the "FTC's ability to continue a merger case in administrative litigation also may lead companies whose transactions are investigated by the FTC to feel greater pressure to settle a matter than if they had been investigated by the DOJ."**

      i. **Should companies face greater pressure to settle if their mergers are reviewed by the FTC rather than the DOJ?**

      ii. **Do you agree that even the perception of a more lenient standard for FTC cases than those brought by the DOJ could resnlt in a practical difference for litigants who must weigh litigation risk?.**

   b. **The 2007 Report further states that differences in the preliminary injunction standards faced by the FTC and the DOJ, whether real or perceived, "can undermine the public's confidence that the antitrust agencies are reviewing mergers efficiently and fairly and that it does not matter which agency reviews a given merger."**

      i. **Do you agree that public confidence is important and can be affected by public perception of differing standards applied to identical issues?**

      ii. **Do you agree that it would be problematic if the identity of the reviewing agency led to different outcomes dne to the parties' perception that the FTC and the DOJ face different standards for obtaining a preliminary injunction?**

iii. **What measures do you believe appropriate to remedy any perceived or real inconsistency in the preliminary injunction standards faced by the agencies?**

Although some in the antitrust community perceive that the FTC and Department of Justice Antitrust Division face different preliminary injunction standards to enjoin pending mergers, as Assistant Attorney General Baer and I both testified, this has not been our experience. While the wording may differ, there appears to be no evidence that the substantive standard varies, or that any perceived difference has influenced the outcome of any specific case.

Public confidence in the agency is important, and the FTC has sought to address the perception that any procedural differences between the two agencies could affect outcomes. Since the Antitrust Modernization Commission issued its 2007 report, the Commission has revised its administrative adjudicative process to, among other things, impose significantly shorter deadlines. As a result, while the litigation process may differ between the two agencies, the time frames from complaint to final resolution in merger matters are now, on average, about the same for a federal district court decision in an Antitrust Division matter and an FTC adjudicative decision. Furthermore, the same substantive Clayton Act Section 7 legal standards apply regardless of whether the adjudicator is the Commission or a federal district court.

c. **In *FTC v. CCC Holdings*, the district court granted the FTC's request for a preliminary injunction. The judge noted that although the defendants' arguments might "ultimately win the day," under Section 13(b) the trial court needed only to determine that "the FTC had raised questions that are so 'serious, substantial, difficult and doubtful' that they are 'fair ground for thorough investigation, study, deliberation and determination by the FTC'" to conclude that a preliminary injunction should issue. Commentators have written that "[t]he importance of the CCC Holdings decision therefore is not merely academic, and the resulting agency divergence is not merely procedural. It may be outcome determinative in some cases."[5]**

i. **Do you believe the standard applied by the district court in *FTC v. CCC Holdings* was the same as the preliminary injunction standard applicable to the DOJ in a merger case?**

ii. **Do you agree that application of that lower standard may have had an impact on the outcome of the case, in the sense that the outcome may have been different if the DOJ standard had been applied?**

[5] Peter Love & Ryan C. Thomas, *FTC v. CCC Holdings: Message Received*, GCP (April 2009), at 10.

d. In the *Whole Foods* litigation, the FTC argued on appeal before the D.C. Circuit: "This Court has recognized, in keeping with the intent of Congress in creating the Commission and in enacting Section 13(b), that the Commission is not required to 'prove' any aspect of its case in order to secure a preliminary injunction in aid of its own adjudicative and remedial powers; rather, it need only show 'serious, substantial' questions requiring plenary administrative consideration. The district court's contrary approach ignores the statutory scheme, and effectively usurps the adjudicative role of the Commission."[6]

i. Do you contend the standard the Commission advanced in the *Whole Foods* appeal was the same standard DOJ has to meet in order to obtain a preliminary injunction in a merger case?

e. *FTC v. Libbey, Inc.*, 211 F. Supp.2d 34 (D.D.C. 2002), is another case in which a court applied a lower preliminary injunction standard to an FTC merger challenge than would have been applied if DOJ had brought the case.

i. Do you agree that the standard applied in that instance may have had an impact on the outcome of the case?

Although various courts considering the appropriate standard have stated it in different ways, the core focus of the preliminary injunction standard for both agencies is the same: a strong evidentiary presentation by the agency, which a defendant fails to rebut. *See, e.g., FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714 (D.C. Cir. 2001) (recognizing that government agencies hear a different preliminary injunction burden than private parties when enforcing federal laws). In addition, as the joint Horizontal Merger Guidelines indicate, the two agencies apply the same analytical framework to merger review. Any differences in merger challenge outcomes are a consequence of specific underlying facts and the strength of the evidence in individual cases. They do not result from a difference (real or perceived) in preliminary injunction standards, and they are not agency-dependent.

With regard to the specific cases you raise, I do not believe that the courts applied a more lenient preliminary injunction standard or that outcomes were affected as a result. For example, in *FTC v. CCC Holdings*, the court relied on *Heinz* for the relevant standard applicable to a FTC preliminary injunction, *i.e.*, that governmental plaintiffs like the FTC face a lower standard than private parties, and emphasized that "ultimate success" requires a showing that the effect of a merger "may be substantially to lessen competition, or tend to create a monopoly" – the same test that applies to the Antitrust Division. 605 F. Supp. 2d 26, 30 (D.D.C. 2009).

[6] http://www.ftc.gov/os/caselist/0710114/080114ftcwholefoodsproofbrief.pdf at 27.

It is also important to recognize that the language used in *CCC Holdings* regarding the sufficiency of showing a likelihood of success by raising serious, substantial questions is a formulation adopted by many courts beginning in the late 1970s. See, *e.g.*, *FTC v. Beatrice Foods Co.*, 587 F.2d 1225, 1229 (D.C. Cir. 1978) (statement of Judges MacKinnon and Robb); *FTC v. Nat'l Tea Co.*, 603 F.2d 694, 698 (8th Cir. 1979); *FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1162 (9th Cir. 1984); *FTC v. Univ. Health*, 938 F.2d 1206, 1218 (11th Cir. 1991); *Heinz*, 246 F.3d at 714-15. In all of these cases, the FTC was required to make a persuasive evidentiary showing of a prima facie case that withstood the defendant's rebuttal. Where the FTC has not made such a showing, the agency's motion for a preliminary injunction has been denied. See, *e.g.*, *FTC v. Laboratory Corp. of Am.*, No. SACV 10-1873 AG, 2011 WL 3100372 (C.D. Cal. Mar. 11, 2011); *FTC v. Foster*, No. CIV 07-352 JBACT, 2007 WL 1793441 (D.N.M. May 29, 2007); *FTC v. ArchCoal Corp.*, 329 F. Supp. 2d 109 (D.D.C. 2004). With regard to the language you quote from the FTC's brief in the *Whole Foods* appeal, the FTC was merely clarifying that the court should not impose, in evaluating a preliminary injunction request, a requirement that the FTC prove the ultimate success of its case, which is the proper standard for a *permanent*, not a *preliminary*, injunction.

f. In February 2013, the Section of Antitrust Law of the American Bar Association issued a report entitled *Presidential Transition Report: The State of Antitrust Enforcement 2012*. The report commented that some circuits have relaxed the standard imposed on the FTC from the standard applicable to the DOJ. The Section noted that the standards applied in cases brought by the FTC differ from those in DOJ cases in other ways as well. The Section urged the FTC to adopt procedures "that will ensure that in merger cases it will seek injunctions only under the same equitable standard for a preliminary injunction as that applied to Division injunction cases." Absent such procedures, the report urged the Administration "to seek legislative changes to Section 13(b) of the Federal Trade Commission Act that will make it consistent with traditional equitable standards for injunctive relief."

i. Will you commit to adopt procedures to ensure that the Commission only seeks preliminary injunctions under the same equitable standards that apply to DOJ actions?

ii. Would you support legislation to clarify that the FTC and the DOJ must satisfy identical standards to obtain a preliminary injunction?

iii. If yon remain convinced that the differing standards applied to FTC and DOJ actions are "quite similar" and as a practical matter lead to little if any difference in outcome, what would be the harm in

clarifying that the applicable standard is in fact the same or in establishing a unified standard?

In light of the fact that courts already apply what amounts to the same legal standard to preliminary injunction requests by both FTC and Antitrust Division, I do not believe the FTC needs to change its procedures. For the same reason, I do not believe there is any need for legislation altering the FTC standard.

6. **At our Subcommittee's hearing last week, you expressed concern that an acceptance by the Commission of voluntary commitments, as opposed to a consent order, would create confnsion over its settlement practices. You snggested that the Commission's acceptance of voluntary commitments by Google should not be considered precedent. Yet, other companies under investigation may believe they need not enter into binding consent decrees, instead asking to be treated by the Commission in the same manner as Google. In addition to an appearance of favoritism the Google agreement may create, I am concerned about informal and illegitimate regulatory creep when the Commission seeks to secure voluntary commitments from private companies. If a majority of commissioners finds a violation there should be a formal consent order. If a majority does not find a violation, the Commission has no authority to interfere in the market and should not pursue any enforcement action, whether voluntary or not.**

   a. **Now that the Commission has in fact negotiated and accepted a volnntary commitment in lieu of consent order, what specifically do you plan to do to correct perceptions and assumptions about future enforcement actions?**

   b. **If the Commission does not plan to follow the standard of settlement practices used in this case ever again, how will you respond to assertions that Google received special treatment from the Commission?**

The voluntary commitments made by Google should not be considered a precedent, but were a good outcome for consumers under the specific circumstances of that case.

Our policy long has been – and under my leadership, will continue to be – that when a majority of Commissioners finds reason to believe a law we enforce has been violated, and enforcement would he in the public interest, any remedy should be embodied in a formal consent order or adjudicated order.

In the Google search matter, three of the Commissioners – myself included – were concerned that some of Google's conduct had the potential to restrict competition. A Commission majority did not, however, support an enforcement action on any of the allegations under investigation. Therefore, the Commission was not in a position to accept a formal consent agreement. Google received no special

treatment. Indeed, Google faced an extremely comprehensive inquiry as the Commission and its staff collected and analyzed a broad and complex set of facts under the reason to believe standard. Ultimately, in a letter to then-Chairman Leibowitz, Google responded to concerns about some of their business practices with voluntary commitments, a step that will likely benefit consumers.

7. At our Subcommittee's hearing last week, you seemed to agree with me that voluntary commitments are an illegitimate approach for the Commission to use in seeking to resolve antitrust violations.

a. Under your leadership, will the Commission move to correct this misstep and seek to embody Google's voluntary commitments in a formal consent order?

Whenever a Commission majority finds reason to believe that violation of the law has occurred, and an enforcement action is in the public interest, I will make every effort to pursue formal agency action. Formal action through an enforcement proceeding or a consent decree is the most effective way for the Commission to enforce the antitrust laws. As noted above, however, the Commission was not in a position to accept a formal consent in the Google matter.

We nonetheless expect Google to honor its commitments. Google has stated publicly that material violations of its commitments would be actionable under the FTC Act, and Google will submit periodic compliance reports to the Commission. We will use this and other information to monitor Google's activities, and will take appropriate action if Google does not abide by its commitments.

8. At our Subcommittee's hearing last week, you stated that if Google does not uphold and complete its voluntary commitments from the settlement, the Commission will take "appropriate action."

a. Given that there is no Commission precedent for dealing with this type of voluntary commitment, what specifically would that appropriate action entail?

b. Would such action require the Commission to undergo another complex and lengthy investigative proceeding, which could allow harmful business practices to continue undeterred until there is a formal settlement?

As part of its commitments, Google not only agreed to stop the troubling conduct, but also stated publicly that material violations of tbe commitments would be actionable under the FTC Act for a period of at least five years. The Commission will make every effort to hold Google to those commitments.

9. The Commission's closing statement in the Google matter concluded: "Challenging Google's product design decisions in this case would require the Commission – or court – to second-gness a firm's prodnct design decisions where plausible procompetitive justifications have been offered, and where those justifications are supported by ample evidence." Similarly, Chairman Leibowitz's opening remarks stated: "Google's primary reason for changing the look and feel of its search results to highlight its own prodncts was to improve the user experience."

a. This approach appears to differ from the standard set forth in the Microsoft case and the standard that you said the Commission used to evaluate Google's conduct. Under the Microsoft decision, the Commission, or a court, must examine whether "the anticompetitive effect of the challenged action outweighs [any proffered justification for the product design change]." United States v. Microsoft Corp, 253 F.3d 34, 67 (D.C. Cir. 2001). It would have reqnired the Commission to apply a balancing test rather than concluding its analysis simply upon a finding that Google put forth a plausible business justification, as suggested by the Commission's closing statement and Chairman Leibowitz's remarks. Please explain this apparent inconsistency.

b. What standard will the Commission apply in the future to similar circumstances?

The Commission's Google investigation was guided by the precedent established in the D.C. Circuit's *Microsoft* decision, along with the existing, well-developed body of federal case law governing monopolization and product design. We carefully investigated whether Google's conduct harmed the competitive process. A majority of the Commission concluded, based on ample evidence, that Google's design changes were procompetitive because they improved the overall search experience for the user – even though the conduct also had some negative impact on competing search engines.

The Commission will continue to follow *Microsoft* and related case law when assessing allegations of harm from unilateral conduct. The Commission will carefully review and assess any actual or probable harm to competition and the competitive process, on the one hand, and the likely consumer benefits of the challenged conduct, on the other. In my view, a monopolist cannot escape antitrust liability simply by putting forward any plausible explanation for its exclusionary conduct.

10. Several states have ongoing investigations of Google's condnct.

a. Did the Commission coordinate its legal and factual analysis with these states?

h. Did the Commission attempt to work with these states to obtain a coordinated settlement?

The Commission frequently coordinates its investigations with state enforcers, sharing resources and information, and we did so during our investigation of Google's conduct. Among other things, state enforcement personnel attended investigational hearings with Google executives and participated in conference calls and meetings where complainants provided us with information. FTC staff also regularly briefed state personnel on the progress and direction of our investigation, and these discussions enhanced the Commission's review.

In many cases, our cooperation with state enforcers culminates in a coordinated settlement that resolves both Commission and states' concerns. In the end, however, each public enforcer must make its own enforcement and settlement decisions. As a matter of prosecutorial discretion, and in the interest of conserving scarce investigative resources, the Commission unanimously determined to close our investigation.

11. Google's practice of negotiating exclusionary syndication and distribntion agreements was not addressed in the Commission's decision.

a. Did the Commission review this conduct?

h. If so, why was it not included in the Commission's final decision?

The Commission extensively investigated these issues, but in the end determined an enforcement action was not warranted. The Commission does not routinely comment publicly on decisions to close investigations. In this case, the Commission determined that a closing statement focused mainly on the search bias allegations would provide useful transparency and guidance to the public and the antitrust har, due to the novel nature of the claims and the exceptionally high level of public interest.

12. The Commission and the Department of Justice share enforcement of the antitrust laws, both in mergers and conduct investigations. It is not always clear to the parties involved who will review a transaction or business practice. In June 2011, then-Chairman Leibowitz told the Senate Commerce Committee: "It is true that there are occasional clearance disputes over which agency is in the better position to investigate a matter . . . . The FTC and DOJ have a process in place to resolve clearance disputes, which helps resolve the issue quickly." Please provide the Subcommittee:

a. The precise process(es) for resolving these disputes;

b. Examples of the types of agreements that the Commission and the Department have reached in merger and non-merger clearance disputes, including how the parties determine which agency will review a subsequent transaction involving the same company or industry and the duration of such agreements; and

c. The number of such disputes since January 2009 and the average length of time such disputes lasted.

Due to the shared antitrust jurisdiction of the FTC and the Department of Justice Antitrust Division, all proposed merger and conduct investigations are formally submitted to the other agency as a "clearance request" through a shared database. Until the other agency approves or "clears" the request, no formal investigation may commence and no parties or third parties may be contacted. Most investigations are submitted and cleared within two business days. When both agencies make a request to investigate the same merger transaction or conduct, this is called a "contested matter."

I understand that since January 2009, there have been 90 instances in which both the Antitrust Division and the FTC were interested in reviewing the same Hart-Scott-Rodino notified transaction. In those instances, it took an average of five business days for the agencies to agree which agency should handle the investigation.

Most of the time, clearance contests are resolved through an informal exchange of information regarding each agency's expertise. This is done by the designated Clearance Officers at each agency, working with investigative staff, by e-mail or telephone. The Clearance Officers are career staff with knowledge of the agency's work. If the Clearance Officers cannot resolve a matter informally, each agency prepares a clearance "claim," a memorandum explaining why it has the better expertise, gained from past investigations, to investigate the particular matter.

If clearance cannot be resolved by the agencies' Clearance Officers, it is escalated to the Deputy Director of the Bureau of Competition at the FTC and the Director of Civil Enforcement at the Antitrust Division for resolution, and if still unresolved, to the heads of the agencies. This level of escalation is extremely rare.

We are all working to minimize clearance disputes and associated delays. The recent ABA Antitrust Section Transition Report released in February found that "delays due to clearance battles have been reduced." Nonetheless, we can always do better. Assistant Attorney General Bill Baer and I have spoken about this issue

recently, and we both agree that one of our priorities is to continue to minimize such disputes to ensure that the clearance process is both fair and efficient.

13. The Commission has issned two recent orders that address the meaning of commitments to license on fair, reasonable, and non-discriminatory (FRAND) terms. In *Bosch*, the Commission embraced an order and remedy that many believe represented progress on this issue. A month later, the Commission adopted a more complicated order and remedy in the Google matter, criticized by some as being weak and riddled with loopholes.

a. Why did the Commission seek sncb a complicated (and potentially weakened) remedy in the Google matter?

The FTC's *Bosch* and *Google* consent orders continue the Commission's longstanding commitment to safeguard the integrity of the standard-setting process. Standard setting can deliver substantial benefits to American consumers, promoting innovation, competition, and consumer choice. But standard setting by its nature also creates the risk of harm to the competitive process and to consumers. Because standard setting often displaces the normal competitive process with the collective decision-making of competitors, preserving the integrity of the standard-setting process is central to ensuring that standard setting works to the benefit of, rather than against, consumers.

Although the proposed Google order differs from the Bosch order, I respectfully disagree with those who believe that the relief is weak or unduly complicated. Consent orders remedy violations arising out of specific factual situations, reflecting the Commission's assessment of the market and the conduct involved, and each is by nature different. The Google order is not yet final, and is still under consideration by the Commission. However, in January, I voted to issue the proposed order because I believed it remedied Google's alleged anticompetitive conduct resulting from breaches by Google and its subsidiary Motorola of Motorola's commitments to license its standard essential patents (SEPs) on FRAND terms.

b. Please explain your view of the *Bosch* decision.

As alleged in the Complaint, before its acquisition by Robert Bosch GmbH ("Bosch"), SPX Services ("SPX") reneged on a licensing commitment made to two standard-setting bodies to license its SEPs on FRAND terms, by seeking injunctions against willing licensees of those SEPs. Together with a majority of the Commission, I had reason to believe that this conduct tended to impair competition in the market for automobile air conditioning servicing devices.

i. Are you concerned about using a merger review process to require relief on unrelated condnct as a condition for clearing the deal?

I would be concerned about using the FTC's merger review process to require relief that was not reasonably related to an underlying violation of law, but that was not the case in the Commission's agreement with *Bosch*. If a party decides to settle an adjudicative challenge, then the FTC will consider various settlement options, including the potential to settle merger and conduct challenges concurrently.

14. In the debate over standard essential patents and FRAND commitments, much discussion has focused on the willingness of potential licensees to engage in negotiations.

a. In your view, what does it mean to be a willing licensee?

In this context, a willing licensee is a potential licensee who is engaged in good-faith negotiation to obtain a FRAND license to a standard essential patent and is capable of complying with the terms of a license.

b. Is a licensee unwilling simply because it refuses to accept a stated demand as FRAND or demands that the party demonstrate that its portfolio is composed of valid and infringed patents that have some value apart from its inclusion in the standard?

A potential licensee is not unwilling simply because it refuses to accept a stated demand as FRAND. When negotiating FRAND royalties, both the potential licensor and the potential licensee have a duty to negotiate in good faith.

c. There has been comparatively little focus on the willingness of SEP holders to engage in good faith negotiations—that is, whether the SEP holder is a willing licensor. Would you agree that there is a burden on the SEP holder to demonstrate the value of its SEP portfolio, a bnrden that is generally not discharged by merely quoting a rate, particularly when the rate clearly exceeds traditional industry benchmarks?

In my view, the potential licensor of a FRAND-encumbered SEP does not discharge its duty to negotiate in good faith by merely quoting a rate.

15. The Commission statement accompanying its decision relating to Google's ahnse of certain standard essential patents indicated that "Google's settlement with the Commission requires Google to withdraw its claims for injunctive relief on FRAND encumbered patents around the world."

a. How many of those claims for injunctive relief have been withdrawn and how many are still open?

b. What is the Commission doing to ensure compliance with its Order?

Under the terms of the order, Google cannot seek any new injunctions on FRAND-encumbered standard essential patents unless and until it follows the processes set out in the order. In addition, the order prohibits Google from obtaining or enforcing any injunctions in current actions without first following the processes set out in the order. Since the proposed order was accepted for public comment, Google has not obtained or enforced any injunctions on standard essential patents and many of those actions have been resolved. To our knowledge, Google is currently complying with the terms of the order, even though at this point the order is not final. When the order becomes final, the Commission will monitor and enforce the order as it does any other order.

16. In testimony before our Committee last July, you expressed concerns about anticompetitive abuse of standard essential patents and stated that the Commission "believes that the ITC has the authority under its public interest obligations . . . to deny an exclusion order if the holder of the FRAND-encumbered SEP has not complied with its FRAND obligation." You also suggested that if the ITC did not act appropriately, Congress should consider giving the ITC more flexibility to deny exclusion orders in such cases.

a. In your view, has the ITC responded to the concerns you raised?

Yes. The ITC issued Notices of Review in several investigations involving FRAND-encumbered SEPs in which it sought briefing from the public and the parties on a wide range of FRAND topics. For example, in an investigation involving Apple products, it asked the parties whether: (1) "the mere existence of a [F]RAND obligation preclude[s] issuance of an exclusion order[;]" (2) a patent owner that has refused to offer or negotiate a license on [F]RAND terms should be able to obtain an exclusion order; and (3) a patent owner should be able to obtain an exclusion order if it has offered a [F]RAND license, and that license has been rejected by the alleged infringer.[7] The ITC's actions demonstrate that it is taking seriously competitive concerns about exclusion orders for FRAND-encumbered SEPs.

b. Do you worry about ITC decisions in cases involving FRAND-encumbered SEPs, given that the only available ITC remedy is an exclusion order?

Yes. I am concerned that a patentee might voluntarily commit to license its intellectual property on FRAND terms as part of the standard-setting process, and then escape that licensing obligation by seeking an exclusion order for

[7] *In re Certain Wireless Communication Devices*, Inv. No. 337-TA-745, Notice of Commission Decision to Review in Part a Final Initial Determination Finding a Violation of Section 337 at 4-5 (June 2012).

infringement of the FRAND-encumbered SEP. The threat of the exclusion order undercuts the pro-competitive goals of the FRAND commitment. A potential licensee is likely to accept an unreasonable royalty demand if the alternative is an order that blocks its products from the market. Even a relatively small risk of that disruptive outcome can force an implementer to accept licensing terms that far exceed what it would have paid to license the patent before the standard was adopted. More broadly, unexpectedly high costs undermine the competitive value of the standard-setting process. And the uncertainty associated with the threat of an injunction can discourage firms from investing to implement the standard.

c. Do you believe that enforcement action based on anticompetitive abuse of FRAND-encumbered SEPs could and should be pnrsued nnder Section 2 of the Sherman Act?

The FTC does not have direct authority to enforce the provisions of Section 2 of the Sherman Act. Section 5 of the FTC Act, however, is understood to incorporate conduct that violates Section 2, and it can reach more broadly. Enforcement actions based on anticompetitive abuses of FRAND-encumbered SEPs are highly fact-specific and the FTC will use all of its enforcement tools to address these abuses, where appropriate.

17. At onr Subcommittee's hearing last week, there was mnch discnssion of legislation that wonld impose a presnmption that all patent settlements between innovator pharmaceutical companies and generic companies are anticompetitive. By statute, the Commission is already entitled to receive notice of snch settlements, so it has ample opportnnity to review snch settlements for any anticompetitive problems. Both federal statute and Supreme Court case law state that patents are presumed to be valid. 35 U.S.C. § 282; *Microsoft Corp. v. i4i Limited Partnership*, 131 S.Ct. 2238 (2011). Indeed, patent invalidity must be proved by the elevated standard of clear and convincing evidence. *Microsoft*, 131 S.Ct. at 2252. In addition, it is well-settled law that settlements of litigation are highly favored. Yet, your position on patent settlements legislation seems to contradict quite squarely these two well-settled, time-tested principles.

a. How can you reconcile your position with these principles, particularly when the settlement occurs within the term of the patent?

b. Do you really believe that all snch settlements are necessarily anticompetitive?

c. Under what conditions might such a settlement be procompetitive in its effect?

I do not understand the bill introduced by Senators Klobuchar and Grassley to impose the broad presumption you describe. Instead, the proposed legislation

addresses what are known as "pay-for-delay" agreements, in which the brand-name-drug firm pays its would-be generic rival and the generic drug firm agrees to abandon its Hatch-Waxman patent challenge and forgo entry for a period of time, often several years. The vast majority of brand-generic settlements do not involve compensation to the generic patent challenger.[8] Thus, most Hatch-Waxman patent settlements would not be affected by the bill.

I do not believe that all patent settlements between brand-name drug manufacturers and generic drug companies should be treated as presumptively anticompetitive or that all such settlements are necessarily anticompetitive. I do believe, however, that treating pay-for-delay agreements as presumptively anticompetitive is sound antitrust policy. As the Commission's brief to the Supreme Court in *FTC v. Actavis* explains, a settlement in which the brand-name drug firm pays the generic patent challenger and the generic agrees to refrain from competing inherently aligns the generic firm's interest with the brand's interest in extending its monopoly. This aligning of the parties' incentives means the generic will accept a later entry date than it otherwise would accept based on its expectations about the likely outcome of the patent suit. As a result, the parties share a pool of profits that is made larger by their agreement not to compete. Such treaties between competitors, actual or potential, are at the core of what the antitrust laws proscribe. In contrast, the other ways that drug companies settle patent suits, such as with royalty payments by the allegedly infringing generic or waivers of accrued damage claims, do not have this inherent tendency to harm competition and consumers.

A legal rule that recognizes the inherent risk of harm from pay-for-delay agreements does not conflict with the statutory presumption of validity. The Supreme Court has never suggested that the presumption of validity gives the patent holder the right to share monopoly profits to induce potential competitors to abandon their efforts to compete. Moreover, the rationale for treating pay-for-delay settlements as presumptively anticompetitive does not rest on any assumption that the patent at issue is necessarily invalid or not infringed. Rather, such agreements are problematic because it is the payment, not the strength of the patent, which thwarts the competitive process that would otherwise operate to protect consumers.

The public policy favoring settlements is important, but it does not trump the important public values embodied in the antitrust laws. Were the law otherwise, private parties could use settlements to shield a wide range of anticompetitive activity. No one, however, suggests that parties who chose to settle their litigation by means of a price fixing agreement could avoid liability on the ground that public policy favors settlement. Moreover, arguments that limiting the use of payments will make it impossible to settle Hatch-Waxman patent cases are not

[8] *2012 Annual Report* at 2 (noting that more than 70% of brand-generic settlements are resolved without compensation to the generic).

borne out by the evidence noted above, which shows the vast majority of such settlements do not involve payment to the generic.

Under a legal rule that treats pay-for-delay settlements as presumptively anticompetitive, defendants may seek to rebut the presumption. The Commission's brief to the Supreme Court describes some general ways that parties might do so: showing that the compensation to the generic firm was for something other than delay; showing that the payment merely reflected litigation costs avoided by the settlement; or identifying some unusual business circumstance such that the payment creates an offsetting competitive benefit. As the brief notes, however, lower courts have had little opportunity to date to consider possible countervailing procompetitive justifications and evidence supporting any such rebuttals is likely to be in the possession of the defendants. Consequently, the specific conditions under which a presumptively anticompetitive settlement might be deemed on balance procompetitive would be a subject for further development in the courts.

18. The Commission's estimated cost savings associated with legislation providing the FTC with additional authorities to prevent parties from settling Hatch-Waxman patent litigation appears to differ from both Office of Management and Budget (OMB) numbers in the President's FY 2014 proposal and previous Congressional Budget Office (CBO) cost savings figures. In fact, there appear to be three entirely different estimates of what, if any, savings there may be.

a. In light of these discrepancies, what effort has the Commission taken to coordinate information sharing of studies, proposals, or assumptions with OMB and CBO to determine the accuracy and validity of estimated cost savings?

FTC staff have had numerous discussions with OMB and CBO about various estimates of the financial impact of pay-for-delay settlements (as noted in response to Question 17, the proposed legislation would not prevent parties from settling Hatch-Waxman patent litigation without compensation). While we cannot be certain of the exact methodology underlying the CBO and OMB estimates, it appears that the discrepancies are largely due to differing objectives. The FTC staff focused on predicting the harm to consumers from existing and anticipated future anticompetitive settlements that delay the entry of lower cost generic drugs.

CBO has produced estimates of the likely budgetary impact of several pieces of legislation related to these settlements. These estimates were prospective, generally predicting the amount of future harm that a law prohibiting pay-for-delay settlements could prevent. The FTC's studies have been retrospective, assessing the current and ongoing costs of settlements that already have been reached. A second difference is that CBO's primary goal was to estimate the

impact of proposed legislation on government expenditures, whereas the FTC's estimate was of the cost to all drug purchasers, private and public.

Like CBO, OMB also estimated the impact on government spending from future pay-for-delay settlements that would be prevented by legislation. But unlike CBO, this estimate included spending both on small molecule (or chemical) and large molecule (or biologic) drugs. Due to data limitations, the FTC's analysis was limited to small molecule drugs.

Consistent with the FTC's analysis, however, both CBO and OMB concluded that these agreements delay competition and significantly harm consumers.

b. What information related to patent settlements has the Commission received from either CBO or OMB?

We have had informal discussions with both CBO and OMB about techniques to estimate the impact of these settlements, but have not received any specific information from them related to patent settlements.

c. Has the Commission received any data or information from other public or private organization on patent settlements upon which it has relied in making assumptions about savings from patent settlements? If so, which entities?

The FTC staff's analysis relied on information from a variety of sources. The most important data came from our review of the settlements themselves, which companies are required to file with the FTC and the Antitrust Division under a provision of the MMA. The settlement data was supplemented with information from the FDA about Paragraph IV challenges by potential generic competitors, and information on the patents covered by the settlements, which is publicly available. The FTC also licensed commercially available sales data from IMS Health on the timing and market consequences of generic entry, as well as the level of expenditures impacted by the settlements.[9]

19. Many in the IP community are concerued by the growing number of instances in which established operating companies transfer their patents to patent assertion entities (PAEs), so that these entities can target the established company's competitors. Some reports suggest that the operating companies often retain a revenue interest in the assertion of the transferred patents, which have included patents that are subject to commitments to license on FRAND terms. Last week, the Commission's directors of both economics and competition said that they support the issuance of a Section 6(b) order to investigate the PAE industry.

[9] *See, e.g.*, C. Scott Hemphill & Bhaven Sampat, *Drug Patents in the Supreme Court*, 339 SCIENCE 1386 (2013) (reporting results of study of the adverse consequences of pay-for-delay settlements).

a. Wonld yon support such an order? If not, why not?

The Commission's Section 6(b) authority is an investigative tool that allows the FTC to conduct studies to support our enforcement and policy missions. The increased litigation activity of PAEs raises a number of difficult questions and a well-designed 6(b) study may be a useful mechanism to explore the harms and efficiencies of PAE activity.

This is an important issue and one that I will be considering and discussing with my fellow Commissioners.

20. Both China and India have draft guidelines or policies that wonld make it an abuse of intellectual property rights for a dominant company unconditionally and unilaterally to refuse to license its critical intellectual property rights to a competitor who needs access to those rights to compete and innovate. These initiatives are clearly inconsistent with the DOJ's and FTC's Antitrust Gnidelines for the Licensing of Intellectual Property, as well as U.S. case law, and could significantly harm innovative American companies operating overseas by undermining their intellectual property.

a. What is the Commission doing about these broad intellectual property abuse policies that are emerging in key foreign jurisdictions?

b. Because uuconditioual refusals to license strike at the heart of intellectual property rights, are you also working with USTR and the PTO to develop a holistic approach for influencing activities overseas?

c. Are you concerned that open-ended tests for abuse may allow foreign governments to use antitrust policy as a backdoor means for usurping the intellectual property rights of U.S. companies?

The Commission regularly engages with our counterpart agencies in both India (the Competition Commission of India) and China (MOFCOM, NDRC, and SAIC) on antitrust policy and implementation matters, including with regard to intellectual property-related antitrust issues. In our dialogues with the Chinese and Indian agencies, we have regularly emphasized the importance of intellectual property rights to innovation, competition, and consumer welfare, and encouraged them to avoid applying antitrust law as a tool to constrain the legitimate exercise of intellectual property rights.

Intellectual property laws and antitrust laws can work together to promote innovation. We have been advancing this message through a number of mechanisms. The FTC, along with the Department of Justice Antitrust Division, entered into a Memorandum of Understanding with the three Chinese antitrust agencies in 2011 and with India's agency (as well as its parent Ministry) in 2012.

These MOUs confirm our joint commitment to an ongoing dialogue on antitrust matters as well as other cooperative activities related to antitrust enforcement and competition policy, such as the provision of technical assistance. We expect that the MOUs will provide for increased opportunities for engagement on issues involving intellectual property and antitrust.

We, along with the Antitrust Division, have conducted numerous technical assistance workshops in both China and India on antitrust matters, including workshops for China's agencies in 2010 and 2012 on how the United States antitrust agencies apply U.S. antitrust law to conduct involving intellectual property. In addition, we have commented on draft competition laws and regulations in both countries, including those relating to the application of antitrust law to intellectual property.

The FTC also participates regularly in U.S. government inter-agency dialogues involving the USTR and the PTO, as well as the Department of Commerce, the State Department, and others, providing our input and experience regarding competition and intellectual property issues and helping to build a coordinated U.S. government position on intellectual property and antitrust issues in other countries.

21. Some have expressed concern about consumer harm in the prescription eyeglass and contact lens industry. Requiring consumers to obtain a prescription prior to purchasing a product impedes free market forces. Circumstances in which the prescriber is also the retailer of the prescribed product presents a conflict of interest that may lead to anticompetitive behavior. This is especially true when the product is prescribed by brand, locking a consumer into purchasing the hrand selected by the prescriber. The Commission has historically taken steps to promote consumer choice in such markets, such as by promulgating the Eye Glass Rule in the late 1970s and the Contact Lens Rule, which implemented the Fairness to Contact Lens Consumers Act, nearly a decade ago. Both of these rules guarantee that upon completion of an eye exam, a consumer has the automatic right to receive copies of his prescriptions without having to make a request, pay a fee, or sign a waiver. These rules provide consumers with the opportunity to exercise that choice when buying contact lenses or eyeglasses.

a. Despite the requirement that patients receive eyeglass prescriptions including all "written specifications. . . necessary to obtain lenses for eyeglasses,"[10] pupillary distance (P/D) measurement is instead typically taken at the store where the eyeglasses are purchased. Now that eyeglasses are available online, it is important that P/D is included in prescriptions given consumers—as required by law—allowing them freedom to purchase eyeglasses where they want, whether at a brick-and-mortar store or online. To help ensure that consumers have this choice, will the Commission issue

[10] 16 CFR 456.1(g).

guidance reminding prescribers of their legal obligation to include on prescriptions all parameters necessary to prodnce lenses, including the P/D?

I agree that prescription portability gives consumers the ability to comparison shop for optical goods, thereby promoting competition and helping to make markets more responsive to consumer needs and preferences. We remain committed to protecting optical goods consumers by enforcing the Eyeglass Rule, the Fairness to Contact Lens Consumers Act (FCLCA), the Contact Lens Rule, and the FTC Act.

We continue to monitor compliance with these laws and regulations, and to educate businesses and consumers about prescriber obligations and consumer rights, including the requirement that prescriptions include all of the information and parameters necessary to obtain the right lenses. While a substantial amount of guidance already exists regarding the optical goods rules, we will consider the need for additional guidance, especially as the optical goods marketplace evolves and online sales continue to grow.

22. **Under your predecessor, the Commission showed leadership in supporting the development of transparency and procedural fairness norms internationally. That work has been done in the OECD and is now being conducted in the ICN. It has also beeu incorporated into the Trans-Pacific Partnership and there will be an opportunity to do so in the US-EU Transatlantic Trade and Investment Partnership.**

    a. **What do you think about tbe need for increased transparency and due process in autitrust proceediugs globally?**

    b. **Do you plan to continue to work in a similar vein as your predecessors in bringing these issues to forefront of the international antitrust policy debate?**

Transparency and due process are essential elements of antitrust agencies' investigative processes. There is increasing recognition at the international level that fair, predictable, and transparent processes facilitate effective agency enforcement. Recognizing the concerns regarding the levels of transparency and due process internationally, promoting the discussion of these issues among antitrust agencies is a priority for the FTC. We will continue to play a key role in supporting and advancing opportunities for such dialogue in our bilateral and multilateral work.

In 2010 and 2011, the OECD's Competition Committee held three roundtable discussions on transparency and procedural fairness. The FTC, together with the Antitrust Division, made written submissions and contributed to the discussions. The OECD summary of the key points from the discussions highlighted examples

of steps that many countries have taken to improve transparency and procedural fairness.

In 2012, the International Competition Network initiated a multi-year project on competition agencies' investigative processes. The FTC, along with the Directorate General for Competition of the European Commission, co-chairs the project, which involves agencies from over 40 jurisdictions along with leading representatives of the business community. The investigative process project addresses: the investigative tools that agencies use to obtain evidence; transparency and predictability; the ability of parties to present evidence and views during an investigation; agencies' internal checks and balances; the role of third parties; and confidentiality and legal privileges. Through this project, ICN member agencies and non-governmental advisors share experiences regarding agency powers and investigational procedures, with an eye towards developing guidance or recommendations. In 2013, the project delivered reports on investigative tools and transparency practices, highlighting common principles and effective practices across many jurisdictions. The FTC led a panel discussion of agency transparency practices at the recent ICN annual conference.

The FTC believes that transparent, predictable, and fair processes are not only beneficial to parties but also lead to better enforcement, informed by substantive input from parties. We will continue to promote the values of fairness, open dialogue with parties, and sound decision-making with our international counterparts and to keep these issues at the forefront of the international antitrust policy agenda.

23. Competition policy advocacy has traditionally been an important part of the Commission's role. As part of this function, the Commission recently sent comments to the Colorado PUC to discourage potential taxi regulations that would have had a negative impact on apps like Uber. You recently said that you hope to make the Commission's "research functiou" a priority during your term as Chair.

a. Will you commit to devote the Commission's research and advocacy functions to support the development of new entrants to markets that bring competition to consumers and generally lower prices?

Pursuant to our authority under Sections 6(a) and (f) of the FTC Act, the Commission regularly gathers and compiles information concerning certain business activity in order to better promote competition. One of the Commission's primary activities in this area is competition advocacy. This advocacy takes the form of submitting filings in support of competition principles to state legislatures, regulatory boards, and officials; state and federal courts; other federal agencies; and professional organizations. The Commission also organizes public workshops and issues reports on current competition topics.

This kind of research and advocacy is a critical component of the Commission's competition mission, and one that I support.

Office of the Secretary

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Subject of Correspondence:

QFRs from hearing entitled "Oversight of the Enforcement of Antitrust Laws"

Author:

Senator Patrick Leahy

Representing:

Copies of Response To:

Deadline:

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Office of Congressional Relations - (0309)

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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

April 30, 2013

The Honorable Edith Ramirez
Chairwoman
Federal Trade Commission
Washington, DC

Dear Ms. Edith Ramirez:

Thank you for your testimony at the Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights, hearing entitled "Oversight of the Enforcement of the Antitrust Laws" on April 16, 2013. Attached are written questions from Committee members. We look forward to including your answers to these questions, along with your hearing testimony, in the formal Committee record.

Please help us complete a timely and accurate hearing record by sending an electronic version of your responses to Melanie Kartzmer, Hearing Clerk, Senate Judiciary Committee, at Melanie_Kartzmer@judiciary-dem.senate.gov, no later than **May 14, 2013**.

Where circumstances make it impossible to comply with the two-week period provided for submission of answers, witnesses may explain in writing and request an extension of time to reply.

Again, thank you for your participation. If you have any questions, please contact Melanie at (202) 224-7703.

Sincerely,

Patrick Leahy

PATRICK LEAHY
Chairman

Questions for the Record Of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee
Hearing before the Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights
on "Oversight of the Enforcement of the Antitrust Laws"
April 16, 2013

Questions for Chairwoman Ramirez

1) In 2012, the Government Accountability Office (GAO) issued a report concerning Federal oversight and self-regulation of Group Purchasing Organizations (GPOs). This area has long been of interest to the Judiciary Committee. After I raised concerns about the potential impact on patient costs of GPO contracting practices with the Justice Department in 2000, and the Department of Health and Human Services in 2001, the Antitrust Subcommittee held a series of hearings on GPO practices that culminated in a joint report by the Department of Justice and Federal Trade Commission in 2004. During the hearings, many expressed concern that fees paid by vendors to GPOs distort demand, resulting in higher prices for hospitals and consumers.

Although the Department of Justice and FTC have investigated complaints against various GPOs, since 2004 the Department has filed only one lawsuit against a GPO under the antitrust laws, and the FTC has filed none. The GAO's 2012 report observed: "While the oversight of GPOs is conducted through the exercise of investigatory authorities of HHS, DOJ, and FTC… this oversight does not address other key questions that have previously been raised about GPOs' activities. For example, inasmuch as the collection of contract administrative fees is permitted under the safe harbor provision to the Anti-Kickback statute and safe harbor regulation, this oversight cannot address whether or to what extent these fees create a financial incentive that is inconsistent with GPOs obtaining the lowest prices for their customers."

Do you believe that the current legislative framework is sufficient to address the risk of undesirable conduct by GPOs that increases prices for consumers? Do you agree that the legal framework could be strengthened through other measures, such as revisiting the safe harbor for GPOs provided in the Anti-Kickback Statute?

2) Last year, I asked then-Commissioner Ramirez and the Acting Assistant Attorney General for Antitrust, Joseph Wayland, whether "patent trolling" behavior by certain patent-assertion entities could constitute an antitrust violation. Mr. Wayland responded: "Any effort by a patent owner to harm competition by improperly extending the exclusionary scope of its patent . . . may violate the antitrust laws, and allegations of such actions merit investigation." I was pleased that your agencies recently held a joint workshop to further investigate this question. How do your agencies intend to follow up on the workshop?

3) In your testimony, you stated that the FTC has heard reports of patent assertion entities making unsubstantiated claims relative to small businesses. Unfortunately, I continue to hear frequently about this problem from small businesses in Vermont and across the country. What steps can the FTC take to address this conduct through its consumer protection authority? Will

you agree to monitor such activity and take appropriate action to address abusive behavior by patent trolls?

4) Earlier this year, the FTC concluded its investigation of Google's search engine practices. A majority of Commissioners found that certain practices used by Google threatened competition and innovation, yet the FTC relied on voluntary commitments from Google to end those practices, instead of a consent order.

a. In your testimony, you expressed concern about the use of voluntary commitments to address anticompetitive violations. Can you please elaborate on that? What actions does the FTC intend to take to enforce Google's commitments?

b. In discussing potential remedies, some commentators noted the challenges involved in overseeing a technologically complex business practice that is constantly being updated, such as a search engine algorithm. How is the Commission responding to the challenges of enforcement in an online world?

c. In your testimony, you said that the FTC concluded that certain changes made by Google to its search engine algorithm were "pro-competitive" because they were "designed to improve the overall search experience for the user," even though they had the effect of negatively impacting rivals. Would your analysis have come out differently if the FTC had focused on the harm experienced by Google's other "users"; namely, the advertisers who pay to post ads on its site? How did the FTC determine its framework of analysis in assessing the procompetitive justifications of Google's conduct?

d. In light of the recent reports of action by your European counterpart authorities, is the FTC taking any further action in these matters?

Senator Klobuchar's Questions for the Record
Subcommittee on Antitrust, Competition Policy and Consumer Rights
"Oversight of the Enforcement of the Antitrust Laws"

For Chairwoman Ramirez:

1. In these tough budget times, we're asking every agency to do more with less. Can you explain to us the value that you think antitrust enforcement brings to consumers and the economy as a whole?

2. The Antitrust Division and the Federal Trade Commission share responsibility for government enforcement of the federal antitrust laws. Sometimes this leads to conflicts regarding which agency will review a merger, what is known as the "clearance process." In some cases, the agencies take a long time, sometimes nearly the entire length of the thirty day pre-merger waiting period, to decide which one will investigate a merger. This unnecessarily delays resolution of the merger investigation, and imposes unnecessary burdens on the merging parties.

    - What is your agency doing to resolve clearance disputes in a more effective way? Are you working with the Antitrust Division/FTC, as the Antitrust Modernization Commission suggested in 2007, to develop a new merger clearance agreement?

3. Recently, standard essential patents have been the subject of several cases filed at the International Trade Commission (ITC). We can all agree that standardization of technology and standard essential patents have been critical to the development of a competitive market for smartphones and tablets. But recently, concerns have been raised about the practice of bringing standard essential patents cases to the ITC seeking an exclusion order to prevent products with the patents from being imported into the U.S. Some worry that the ITC exclusion orders related to standard essential patents could gravely harm competition.

    - What sorts of negative effects might the use of exclusion orders regarding standard essential patents have on competition and consumer welfare in general?

    - Is there any justification for the use of exclusion orders in the context of standard essential patents?

Written Questions of Senator Chuck Grassley for Judiciary Antitrust Subcommittee Hearing "Oversight of the Enforcement of the Antitrust Laws", April 16, 2013

Questions for Federal Trade Commission Chairwoman Ramirez

1. As you know, I've been concerned about settlement agreements between brand name and generic drug manufacturers that result in a payment to the generic manufacturer and a delay in market entry of the generic drug. These "pay for delay" or "reverse payment" agreements result in consumers having to pay higher costs for their drugs. Senator Kolbuchar and I have introduced a bill, the Preserve Access to Affordable Generics Act, that would help put a stop to these anti-competitive agreements and ensure that lower priced generic drugs enter the market as soon as possible. Former Chairman Jon Leibowitz was very supportive of our efforts to address this anti-competitive practice.

    a. Do you agree that these "pay for delay" agreements harm consumers?

    b. Do you agree that these kinds of agreements still a problem?

    c. What is the FTC doing to prevent these kinds of agreements?

    d. Do you believe that the Klobuchar/Grassley legislation would help preserve generic drug competition and ensure that more affordable drugs get to consumers as expeditiously as possible?

"Oversight of the Enforcement of the Antitrust Laws"
Senate Antitrust Subcommittee Hearing
April 16, 2013

Written Questions
Senator Michael S. Lee

Questions for Chairwoman Ramirez

1. In 2008, the Department of Justice released a report on Section 2 of the Sherman Act. The report was later withdrawn. That report provided the business community with guidance on applicable principles in Section 2 enforcement actions.

    a. Do you agree with the 2008 report's findings and conclusions?

    b. If not, with which specific findings and conclusions do you disagree?

    c. Do you agree that it would be helpful for the business community to have formal guidance on the enforcement agencies' approach to Section 2 enforcement?

    d. Will you commit to work with Mr. Baer to develop and publish formal guidance on Section 2 enforcement?

2. The Federal Trade Commission, particularly under the previous Chairman, has been in the practice of reaching settlements in cases brought under Section 5 of the FTC Act. These settlements are not subsequently reviewed by a court to establish a clear record of Section 5 enforcement boundaries. At the same time, the Commission has yet to provide definitive guidance as to how Section 5 can be used to enforce unfair methods of competition beyond the traditional scope of antitrust laws.

    a. Do you plan to continue the practice of enforcing Section 5 by means of settlements outside of court review?

    b. How do you think a practice of open-ended enforcement might be perceived in foreign jurisdictions where basic rule of law principles are often lacking?

    c. What formal guidance will you provide the business community regarding Section 5 enforcement?

3. At our Subcommittee's hearing last week, in response to a question regarding Section 5 of the FTC Act, you stated that you believe the Commission "has been using its Section 5 authority very rigorously and very judiciously," and that the agency is providing some measure of guidance through the pattern of its decisions.

    a. If the Commission is applying Section 5 "cautiously" and wishes to provide useful enforcement guidance, why are you resistant to provide such guidance in a more comprehensive, published form upon which the business community and others can meaningfully rely?

4. Some have expressed concern that the Commission's approach to Section 5 enforcement has left many in the business community confused and uncertain as the contours of that provision and the breadth of possible enforcement actions.

    a. Do you believe that the Commission may use Section 5 to create convergence with U.S. antitrust doctrine and that of international jurisdictions?

    b. Do you believe the Commission may use Section 5 to place additional emphasis within U.S. competition policy on consumer choice as a touchstone of antitrust law?

    c. Do you believe the Commission may use Section 5 to bring actions that increasingly incorporate analysis and assumptions based on behavioral economics?

5. At our Subcommittee's hearing last week, you stated that you believe the standards used by the FTC and the DOJ for obtaining a preliminary injunction are "quite similar" and that "as a practical matter what each agency needs to do is go before a judge and show and provide evidence that backs up the charges that are being made." You further stated that you "believe it would be difficult to point to a specific situation where…a case would have led to a different outcome had it been handled by a different agency."

    a. In its 2007 Report and Recommendations, the Antitrust Modernization Commission wrote that the "FTC's ability to continue a merger case in administrative litigation also may lead companies whose transactions are investigated by the FTC to feel greater pressure to settle a matter than if they had been investigated by the DOJ."

        i. Should companies face greater pressure to settle if their mergers are reviewed by the FTC rather than the DOJ?

        ii. Do you agree that even the perception of a more lenient standard for FTC cases than those brought by the DOJ could result in a practical difference for litigants who must weigh litigation risk?

    b. The 2007 Report further states that differences in the preliminary injunction standards faced by the FTC and the DOJ, whether real or perceived, "can undermine the public's confidence that the antitrust agencies are reviewing mergers efficiently and fairly and that it does not matter which agency reviews a given merger."

        i. Do you agree that public confidence is important and can be affected by public perception of differing standards applied to identical issues?

        ii. Do you agree that it would be problematic if the identity of the reviewing agency led to different outcomes due to the parties' perception that the FTC and the DOJ face different standards for obtaining a preliminary injunction?

        iii. What measures do you believe appropriate to remedy any perceived or real inconsistency in the preliminary injunction standards faced by the agencies?

    c. In *FTC v. CCC Holdings*, the district court granted the FTC's request for a

preliminary injunction. The judge noted that although the defendants' arguments might "ultimately win the day," under Section 13(b) the trial court needed only to determine that "the FTC had raised questions that are so 'serious, substantial, difficult and doubtful' that they are 'fair ground for thorough investigation, study, deliberation and determination by the FTC'" to conclude that a preliminary injunction should issue. Commentators have written that "[t]he importance of the CCC Holdings decision therefore is not merely academic, and the resulting agency divergence is not merely procedural. It may be outcome determinative in some cases."[1]

i. Do you believe the standard applied by the district court in *FTC v. CCC Holdings* was the same as the preliminary injunction standard applicable to the DOJ in a merger case?

ii. Do you agree that application of that lower standard may have had an impact on the outcome of the case, in the sense that the outcome may have been different if the DOJ standard had been applied?

d. In the *Whole Foods* litigation, the FTC argued on appeal before the D.C. Circuit: "This Court has recognized, in keeping with the intent of Congress in creating the Commission and in enacting Section 13(b), that the Commission is not required to 'prove' any aspect of its case in order to secure a preliminary injunction in aid of its own adjudicative and remedial powers; rather, it need only show 'serious, substantial' questions requiring plenary administrative consideration. The district court's contrary approach ignores the statutory scheme, and effectively usurps the adjudicative role of the Commission."[2]

i. Do you contend the standard the Commission advanced in the *Whole Foods* appeal was the same standard DOJ has to meet in order to obtain a preliminary injunction in a merger case?

e. *FTC v. Libbey, Inc.*, 211 F. Supp.2d 34 (D.D.C. 2002), is another case in which a court applied a lower preliminary injunction standard to an FTC merger challenge than would have been applied if DOJ had brought the case.

i. Do you agree that the standard applied in that instance may have had an impact on the outcome of the case?

f. In February 2013, the Section of Antitrust Law of the American Bar Association issued a report entitled *Presidential Transition Report: The State of Antitrust Enforcement 2012*. The report commented that some circuits have relaxed the standard imposed on the FTC from the standard applicable to the DOJ. The Section noted that the standards applied in cases brought by the FTC differ from those in DOJ cases in other ways as well. The Section urged the FTC to adopt procedures "that will ensure that in merger cases it will seek injunctions only under the same equitable

[1] Peter Love and Ryan C. Thomas, *FTC v. CCC Holdings: Message Received*, GCP (April 2009) at 10.
[2] http://www.ftc.gov/os/caselist/0710114/080114ftcwholefoodsproofbrief.pdf at 27.

standard for a preliminary injunction as that applied to Division injunction cases." Absent such procedures, the report urged the Administration "to seek legislative changes to Section 13(b) of the Federal Trade Commission Act that will make it consistent with traditional equitable standards for injunctive relief."

i. Will you commit to adopt procedures to ensure that the Commission only seeks preliminary injunctions under the same equitable standards that apply to DOJ actions?

ii. Would you support legislation to clarify that the FTC and the DOJ must satisfy identical standards to obtain a preliminary injunction?

iii. If you remain convinced that the differing standards applied to FTC and DOJ actions are "quite similar" and as a practical matter lead to little if any difference in outcome, what would be the harm in clarifying that the applicable standard is in fact the same or in establishing a unified standard?

6. At our Subcommittee's hearing last week, you expressed concern that an acceptance by the Commission of voluntary commitments, as opposed to a consent order, would create confusion over its settlement practices. You suggested that the Commission's acceptance of voluntary commitments by Google should not be considered precedent. Yet, other companies under investigation may believe they need not enter into binding consent decrees, instead asking to be treated by the Commission in the same manner as Google. In addition to an appearance of favoritism the Google agreement may create, I am concerned about informal and illegitimate regulatory creep when the Commission seeks to secure voluntary commitments from private companies. If a majority of commissioners finds a violation there should be a formal consent order. If a majority does not find a violation, the Commission has no authority to interfere in the market and should not pursue any enforcement action, whether voluntary or not.

   a. Now that the Commission has in fact negotiated and accepted a voluntary commitment in lieu of consent order, what specifically do you plan to do to correct perceptions and assumptions about future enforcement actions?

   b. If the Commission does not plan to follow the standard of settlement practices used in this case ever again, how will you respond to assertions that Google received special treatment from the Commission?

7. At our Subcommittee's hearing last week, you seemed to agree with me that voluntary commitments are an illegitimate approach for the Commission to use in seeking to resolve antitrust violations.

   a. Under your leadership, will the Commission move to correct this misstep and seek to embody Google's voluntary commitments in a formal consent order?

8. At our Subcommittee's hearing last week, you stated that if Google does not uphold and complete its voluntary commitments from the settlement, the Commission will take "appropriate action."

a. Given that there is no Commission precedent for dealing with this type of voluntary commitment, what specifically would that appropriate action entail?

b. Would such action require the Commission to undergo another complex and lengthy investigative proceeding, which could allow harmful business practices to continue undeterred until there is a formal settlement?

9. The Commission's closing statement in the Google matter concluded: "Challenging Google's product design decisions in this case would require the Commission – or court – to second-guess a firm's product design decisions where plausible procompetitive justifications have been offered, and where those justifications are supported by ample evidence." Similarly, Chairman Leibowitz's opening remarks stated: "Google's primary reason for changing the look and feel of its search results to highlight its own products was to improve the user experience."

   a. This approach appears to differ from the standard set forth in the Microsoft case and the standard that you said the Commission used to evaluate Google's conduct. Under the Microsoft decision, the Commission, or a court, must examine whether "the anticompetitive effect of the challenged action outweighs [any proffered justification for the product design change]." United States v. Microsoft Corp, 253 F.3d 34, 67 (D.C. Cir. 2001). It would have required the Commission to apply a balancing test rather than concluding its analysis simply upon a finding that Google put forth a plausible business justification, as suggested by the Commission's closing statement and Chairman Leibowitz's remarks. Please explain this apparent inconsistency.

   b. What standard will the Commission apply in the future to similar circumstances?

10. Several states have ongoing investigations of Google's conduct.

    a. Did the Commission coordinate its legal and factual analysis with these states?

    b. Did the Commission attempt to work with these states to obtain a coordinated settlement?

11. Google's practice of negotiating exclusionary syndication and distribution agreements was not addressed in the Commission's decision.

    a. Did the Commission review this conduct?

    b. If so, why was it not included in the Commission's final decision?

12. The Commission and the Department of Justice share enforcement of the antitrust laws, both in mergers and conduct investigations. It is not always clear to the parties involved who will review a transaction or business practice. In June 2011, then-Chairman Leibowitz told the Senate Commerce Committee: "It is true that there are occasional clearance disputes over which agency is in the better position to investigate a matter . . . . The FTC and DOJ have a process in place to resolve clearance disputes, which helps resolve the issue quickly." Please provide the Subcommittee:

a. The precise process(es) for resolving these disputes;

b. Examples of the types of agreements that the Commission and the Department have reached in merger and non-merger clearance disputes, including how the parties determine which agency will review a subsequent transaction involving the same company or industry and the duration of such agreements; and

c. The number of such disputes since January 2009 and the average length of time such disputes lasted.

13. The Commission has issued two recent orders that address the meaning of commitments to license on fair, reasonable, and non-discriminatory (FRAND) terms. In *Bosch*, the Commission embraced an order and remedy that many believe represented progress on this issue. A month later, the Commission adopted a more complicated order and remedy in the Google matter, criticized by some as being weak and riddled with loopholes.

    a. Why did the Commission seek such a complicated (and potentially weakened) remedy in the Google matter?

    b. Please explain your view of the *Bosch* decision.

        i. Are you concerned about using a merger review process to require relief on unrelated conduct as a condition for clearing the deal?

14. In the debate over standard essential patents and FRAND commitments, much discussion has focused on the willingness of potential licensees to engage in negotiations.

    a. In your view, what does it mean to be a willing licensee?

    b. Is a licensee unwilling simply because it refuses to accept a stated demand as FRAND or demands that the party demonstrate that its portfolio is composed of valid and infringed patents that have some value apart from its inclusion in the standard?

    c. There has been comparatively little focus on the willingness of SEP holders to engage in good faith negotiations—that is, whether the SEP holder is a willing licensor. Would you agree that there is a burden on the SEP holder to demonstrate the value of its SEP portfolio, a burden that is generally not discharged by merely quoting a rate, particularly when the rate clearly exceeds traditional industry benchmarks?

15. The Commission statement accompanying its decision relating to Google's abuse of certain standard essential patents indicated that "Google's settlement with the Commission requires Google to withdraw its claims for injunctive relief on FRAND encumbered patents around the world."

    a. How many of those claims for injunctive relief have been withdrawn and how many are still open?

    b. What is the Commission doing to ensure compliance with its Order?

16. In testimony before our Committee last July, you expressed concerns about anticompetitive abuse of standard essential patents and stated that the Commission "believes that the ITC has the authority under its public interest obligations . . . to deny an exclusion order if the holder of the FRAND-encumbered SEP has not complied with its FRAND obligation." You also suggested that if the ITC did not act appropriately, Congress should consider giving the ITC more flexibility to deny exclusion orders in such cases.

    a. In your view, has the ITC responded to the concerns you raised?

    b. Do you worry about ITC decisions in cases involving FRAND-encumbered SEPs, given that the only available ITC remedy is an exclusion order?

    c. Do you believe that enforcement action based on anticompetitive abuse of FRAND-encumbered SEPs could and should be pursued under Section 2 of the Sherman Act?

17. At our Subcommittee's hearing last week, there was much discussion of legislation that would impose a presumption that all patent settlements between innovator pharmaceutical companies and generic companies are anticompetitive. By statute, the Commission is already entitled to receive notice of such settlements, so it has ample opportunity to review such settlements for any anticompetitive problems. Both federal statute and Supreme Court case law state that patents are presumed to be valid. 35 U.S.C. § 282; *Microsoft Corp. v. i4i Limited Partnership*, 131 S.Ct. 2238 (2011). Indeed, patent invalidity must be proved by the elevated standard of clear and convincing evidence. *Microsoft*, 131 S.Ct. at 2252. In addition, it is well-settled law that settlements of litigation are highly favored. Yet, your position on patent settlements legislation seems to contradict quite squarely these two well-settled, time-tested principles.

    a. How can you reconcile your position with these principles, particularly when the settlement occurs within the term of the patent?

    b. Do you really believe that all such settlements are necessarily anticompetitive?

    c. Under what conditions might such a settlement be procompetitive in its effect?

18. The Commission's estimated cost savings associated with legislation providing the FTC with additional authorities to prevent parties from settling Hatch-Waxman patent litigation appears to differ from both Office of Management and Budget (OMB) numbers in the President's FY 2014 proposal and previous Congressional Budget Office (CBO) cost savings figures. In fact, there appear to be three entirely different estimates of what, if any, savings there may be.

    a. In light of these discrepancies, what effort has the Commission taken to coordinate information sharing of studies, proposals, or assumptions with OMB and CBO to determine the accuracy and validity of estimated cost savings?

    b. What information related to patent settlements has the Commission received from either CBO or OMB?

c. Has the Commission received any data or information from other public or private organization on patent settlements upon which it has relied in making assumptions about savings from patent settlements? If so, which entities?

19. Many in the IP community are concerned by the growing number of instances in which established operating companies transfer their patents to patent assertion entities (PAEs), so that these entities can target the established company's competitors. Some reports suggest that the operating companies often retain a revenue interest in the assertion of the transferred patents, which have included patents that are subject to commitments to license on FRAND terms. Last week, the Commission's directors of both economics and competition said that they support the issuance of a Section 6(b) order to investigate the PAE industry.

    a. Would you support such an order? If not, why not?

20. Both China and India have draft guidelines or policies that would make it an abuse of intellectual property rights for a dominant company unconditionally and unilaterally to refuse to license its critical intellectual property rights to a competitor who needs access to those rights to compete and innovate. These initiatives are clearly inconsistent with the DOJ's and FTC's Antitrust Guidelines for the Licensing of Intellectual Property, as well as U.S. case law, and could significantly harm innovative American companies operating overseas by undermining their intellectual property.

    a. What is the Commission doing about these broad intellectual property abuse policies that are emerging in key foreign jurisdictions?

    b. Because unconditional refusals to license strike at the heart of intellectual property rights, are you also working with USTR and the PTO to develop a holistic approach for influencing activities overseas?

    c. Are you concerned that open-ended tests for abuse may allow foreign governments to use antitrust policy as a backdoor means for usurping the intellectual property rights of U.S. companies?

21. Some have expressed concern about consumer harm in the prescription eyeglass and contact lens industry. Requiring consumers to obtain a prescription prior to purchasing a product impedes free market forces. Circumstances in which the prescriber is also the retailer of the prescribed product presents a conflict of interest that may lead to anticompetitive behavior. This is especially true when the product is prescribed by brand, locking a consumer into purchasing the brand selected by the prescriber. The Commission has historically taken steps to promote consumer choice in such markets, such as by promulgating the Eye Glass Rule in the late 1970s and the Contact Lens Rule, which implemented the Fairness to Contact Lens Consumers Act, nearly a decade ago. Both of these rules guarantee that upon completion of an eye exam, a consumer has the automatic right to receive copies of his prescriptions without having to make a request, pay a fee, or sign a waiver. These rules provide consumers with the opportunity to exercise that choice when buying contact lenses or eyeglasses.

a. Despite the requirement that patients receive eyeglass prescriptions including all "written specifications. . . necessary to obtain lenses for eyeglasses,"[3] pupillary distance (P/D) measurement is instead typically taken at the store where the eyeglasses are purchased. Now that eyeglasses are available online, it is important that P/D is included in prescriptions given consumers—as required by law—allowing them freedom to purchase eyeglasses where they want, whether at a brick-and-mortar store or online. To help ensure that consumers have this choice, will the Commission issue guidance reminding prescribers of their legal obligation to include on prescriptions all parameters necessary to produce lenses, including the P/D?

22. Under your predecessor, the Commission showed leadership in supporting the development of transparency and procedural fairness norms internationally. That work has been done in the OECD and is now being conducted in the ICN. It has also been incorporated into the Trans-Pacific Partnership and there will be an opportunity to do so in the US-EU Transatlantic Trade and Investment Partnership.

    a. What do you think about the need for increased transparency and due process in antitrust proceedings globally?

    b. Do you plan to continue to work in a similar vein as your predecessors in bringing these issues to forefront of the international antitrust policy debate?

23. Competition policy advocacy has traditionally been an important part of the Commission's role. As part of this function, the Commission recently sent comments to the Colorado PUC to discourage potential taxi regulations that would have had a negative impact on apps like Uber. You recently said that you hope to make the Commission's "research function" a priority during your term as Chair.

    a. Will you commit to devote the Commission's research and advocacy functions to support the development of new entrants to markets that bring competition to consumers and generally lower prices?

[3] 16 CFR 456.1(g).

UNITED STATES OF AMERICA
Federal Trade Commission
Washington, D.C. 20580

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Maneesha Mithal
Division of Privacy and Identity Protection
Phone: (202) 326-2771
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June 11, 2012

Senator Claire McCaskill
United States Senate
Washington, D.C. 20515

Senator Bill Nelson
United States Senate
Washington, D.C. 20515

Re: Responses to Questions for the Record for the hearing held May 7, 2013 before the Senate Committee on Commerce, Science, and Transportation entitled "Credit Reports: What Accuracy and Errors Mean for Consumers."

Dear Senators McCaskill and Nelson:

Thank you for the opportunity to appear before the Subcommittee on Consumer Protection, Product Safety, and Insurance on May 7, 2013 and to respond to your questions for the record. My responses are set forth below.

Responses to Questions For the Record

For the Federal Trade Commission and the Consumer Financial Protection Bureau

1. The stories we heard from Ms. Thomas and that of Ms. Campbell were both beyond belief. Both of these women have what to me seem like obvious errors: someone else's information was in their credit files. Yet these women filed dispute after dispute, sending every type of paperwork imaginable, and nothing happened. They both ultimately had to hire lawyers and have spent years dealing with these issues, all the while living with the effects of these errors. Under the Fair Credit Reporting Act (FCRA), consumer reporting agencies are supposed to have "reasonable procedures to assure maximum possible accuracy" and are supposed to "conduct a reasonable reinvestigation" to determine whether disputed information is accurate. Yet from Ms. Thomas and Ms. Campbell's examples, it does not appear that the measures used by Equifax, Experian, and TransUnion meet such a reasonableness standard.

Q: Do the experiences of Ms. Thomas, Ms. Campbell, and what we saw in the *60 Minutes* report meet the FCRA's legal requirements for accuracy and dispute procedures?

A: I am deeply disturbed to hear stories like that of Ms. Thomas and Ms. Campbell, which demonstrate that inaccurate credit report information can take an extreme toll on people trying to go about their daily lives. I recognize that it is impossible for credit reporting agencies ("CRAs") to guarantee 100% accuracy of all credit reports, and given the amount of information being handled certain amounts of errors are inevitable. That being said, the law requires CRAs have reasonable procedures to assure maximum possible accuracy. A critical aspect of this standard is that the system for responding to consumer disputes must be easily accessible and effective. The CRAs should be sure that the dispute system is easy to use and that consumers who file disputes are getting a reasonable investigation of their claims. If the CRAs' dispute systems consistently fail to meet that standard, then they are not meeting the FCRA's requirements.

Q: How are your agencies ensuring that these credit reporting agencies are living up to the accuracy and dispute obligations under the FCRA?

A: The FTC has always considered the accuracy of credit reports a vitally important issue and has done many things to improve the quality of information in the credit reporting system. For example, the Commission recently brought an action against Asset Acceptance, a large debt buyer, alleging that it failed to ensure that information it provided to the CRAs was accurate. The Commission obtained a $2.5 million civil penalty against the company. The Commission also recently settled an action against a CRA, HireRight, for failing to maintain reasonable procedures to ensure accuracy of consumer reports. The Commission obtained a $2.6 million civil penalty in this case.

The Commission has also put a large emphasis on educating consumers about the importance of reviewing their credit reports to ensure that they are accurate. Improving the accuracy of the credit reporting system is complicated by the sheer bulk of information involved and by the number of participants in the system. The FTC study discussed in my May 7 testimony was an important step in quantifying the number of errors in the system and will serve as an important tool for our future efforts. In addition, Commission staff have and will continue to work with the CFPB, who has supervisory powers over larger CRAs, to continue to improve credit report accuracy. Commission staff will also continue to coordinate with the CFPB to avoid duplication of our efforts.

2. It was shocking to learn that the consumer reporting agencies have not used consumers' supporting documentation in any meaningful way when it comes to disputes. When the consumer reporting agencies send a consumer's dispute on to a furnisher for investigation, those companies typically do not forward that supporting documentation along to the furnisher as well. During the hearing, Mr. Pratt confirmed that later this year, technology will enable the nationwide consumer reporting agencies to give furnishers the supporting documents submitted by consumers.

Under the FCRA, consumer reporting agencies are supposed to send the furnisher "all relevant information regarding the dispute that the agency has received from the consumer." However, for some time now, consumers like Judy Thomas have carefully compiled documents demonstrating the inaccuracy of information in their files, and this information has been ignored and replaced by a two- or three-digit code.

Q: Do the consumer reporting agencies' practices – specifically, the failure to forward consumers' supporting documentation to furnishers along with their disputes – meet the obligations set forth in the FCRA? Shouldn't "all relevant information regarding the dispute" necessarily include the supporting documentation that consumers submit to the consumer reporting agencies?

A: As you note, the FCRA requires CRAs to provide "all relevant information regarding the dispute that is received by" the CRAs from the consumer. In some simple disputes, the preexisting codes you describe may be sufficient to provide "all relevant information regarding the dispute." In disputes involving unusual or complicated facts, however, this system may fail to provide the relevant information. In these cases, it may be necessary for the CRA to use some other method to provide the information to the furnisher. It is our understanding that the three nationwide CRAs will soon be implementing a system that will enable documents supplied by consumers to be provided to furnishers for disputes. This will hopefully provide a more complete picture of consumers' disputes and will better serve consumers with difficult or complex cases. Commission staff will continue to monitor CRAs' actions in this area.

3. Several years ago, advertisers flooded the market with offers of "free credit reports" that were anything but free. These companies signed people up for "credit monitoring services" and other costly products for which they had no interest. The FTC and Congress both acted and, in 2010, the FTC issued a rule requiring any company offering such "free credit reports" to clearly disclose the existence of the federal, truly free website, www.annualcreditreport.com.

However, it appears that these companies are still engaging in questionable advertising and marketing practices while skirting the intent of Congress. Now, advertisements for "free credit scores" and "$1 credit reports" are on the rise. These products appear to have the same flaws as "free credit reports" – consumers who order them also unwittingly sign up for "monitoring services" and other products that they do not want.

Q: Do the advertising and marketing practices for these "free credit scores" and "$1 credit reports" violate the Rule and/or Section 5 of the FTC Act?

A: Section 612(g) of the Fair Credit Reporting Act and the Free Credit Report Rule apply only to advertisements that offer "free credit reports." In my view, if an advertisement offers only "free credit scores" or "$1 credit reports" without offering "free credit reports" then the Rule is not violated by a failure to include the disclosure. If, however, the advertisement is otherwise deceptive, such as by failing to properly inform consumers

that they are subscribing to a monthly service, then it may violate Section 5. Such advertisements need to be evaluated on a case-by-case basis to determine whether they are deceptive to consumers.

In any event, regardless of whether there is a violation of the law, I share your concern about potential consumer confusion in this marketplace. For this reason, Commission staff are exploring the creation of new consumer education materials on the topic of credit scores.

Q: Is Congressional action needed to stop these deceptive advertisements?

A: Any blanket prohibition on such advertisements or specific requirements regarding disclosures would likely require Congressional action. In the absence of such action, the Commission will continue to scrutinize offers for credit reports or scores on a case-by-case basis to determine whether such offers are unfair or deceptive under section 5 of the FTC Act.

For FTC, CFPB, Mr. Pratt, Dr. Beales

1. While access to their credit report is important information for consumers to have, we know the consumer's credit score is an important tool used by creditors in determining a consumer's creditworthiness.

   Q: Should consumers be entitled to receive a free credit score along with their free credit report? Why or why not?

A: Because credit scores play an important role in many credit transactions, providing consumers with more information about their scores could be beneficial, giving them an idea of how they are viewed by lenders and an opportunity to address any issues with their scores. However, the industry uses many different credit scores and it is not clear which score a CRA or other entity would be required to provide. When a consumer purchases a score from a CRA, it will most likely not be the score that a lender would obtain on the consumer, because there are many scores available from various sources, with different scoring models designed for specific types of lenders. Instead, consumers get scores known as "educational scores," which give them a general sense of their creditworthiness.

There are concerns that, while these scores certainly provide some information to consumers about how they are viewed by potential creditors, a score that gives a consumer a substantially different impression of her credit risk than a score that a lender would use could confuse and possibly disadvantage consumers. Therefore, any requirement that consumers receive free credit scores will need to take these issues into account so that consumers get information that will be of use to them.

Under current law, consumers are sometimes entitled to obtain free credit scores when a particular score is used in a decision about their credit. Under the FCRA, a consumer that

is denied credit based on information contained in a consumer report must be provided an adverse action notice. If a credit score was used in order to make the adverse decision, the adverse action notice must include that credit score. Additionally, consumers that apply for credit at a specific rate, but, based in whole or in part on information contained in their consumer reports, are offered credit at a higher (worse) rate, are entitled to a risk-based pricing notice and a free copy of their credit report. If a credit score was used to make the decision, the risk-based pricing notice must include that credit score. Finally, consumers applying for a mortgage are also generally required to receive copies of any credit scores obtained by the mortgage lender or broker for purposes of their application. In these cases, consumers receive the same score that was used by the lender, ensuring that they are receiving relevant and useful information.

Q: Should Congress consider legislation that would require companies that generate credit scores to provide a free annual credit score to consumers similar to the requirement in place for free credit reports? Why or why not?

A: As discussed above, credit scores play an important role in today's credit system and allowing consumers' free access to their credit scores could be beneficial, giving them important information about their creditworthiness. There are many credit scores available, however, and any legislation that requires the generation of a free credit score will need to address the issue of exactly what score should be provided to consumers. A general score similar to the "educational scores" sold by the CRAs today might give consumers useful information, but if it does not match the scores provided to lenders then it may mislead consumers. Commission staff would be happy to discuss any proposed legislation with you or your staff.

Q: If there is no single credit score, should consumer reporting agencies be allowed to market and sell consumers "their" credit score? Do those practices violate Section 5?

A: The "educational scores" provided by CRAs may be useful to provide consumers with a general sense of their creditworthiness, even if they are not the same scores provided to lenders.

If, however, educational scores are substantially different from ones provided to lenders, then consumers may be misled about the likelihood that they will be approved for credit. If their educational scores are significantly higher than those provided to lenders, then consumers may believe that they will obtain rates that they are not likely to receive. Consumers that receive scores lower than those that would be provided to potential creditors may fail to even apply for credit because of a misbelief that they do not qualify. Therefore, a company that markets a score that is consistently and significantly different from those provided to lenders and that fails to inform consumers of this fact, could be violating Section 5, and Commission staff would examine this issue on a case-by-case basis.

For Ms. Maneesha Mithal, Associate Director for the Division of Privacy and Identity Protection

As we discussed during the hearing, short sales, which are encouraged by the government and are an increasingly common choice for underwater borrowers are different transactions than foreclosures. Yet, they are being coded as foreclosures on people's credit reports.

- Why are short sales being coded the same as a foreclosure in consumer credit reports?

A: Based on conversations Commission staff has had with industry, we understand that there is currently a code used to report completed foreclosures and another code stating that a mortgage has been "settled for less than the full amount," which is used to report short sales. While these codes are all technically accurate, it seems that some underwriting systems have difficulty interpreting the codes. This inability to interpret the codes and differentiate between short sales and foreclosures on credit reports can have a detrimental effect on consumers who have undergone short sales in the past and are seeking to reenter the housing market.

- Why is the FTC allowing short sales to be coded the same as foreclosures on consumer credit reports?

A: Staff has discussed the issue with industry and the Consumer Financial Protection Bureau ("CFPB"), and believes that finding and implementing the solution to this problem will require the cooperation of consumer reporting agencies and underwriters. Staff is encouraging all parties to work on ways to solve the interpretation issues, and will support these efforts in any way we can.

In the interim, Commission staff is working to prepare consumer education materials for consumers who have undergone a short sale. The education materials will highlight the potential issues consumers might face, and provide some concrete steps they can take to ensure that their previous short sales do not unduly hinder their future attempts to purchase a home.

Commission staff would be happy to discuss these issues in detail with you or your staff.

Thank you again for the opportunity to testify and for your questions. I would be happy to answer any additional questions you or your staff may have.

Sincerely,

Maneesha Mithal
Associate Director
Division of Privacy and Identity Protection

Office of the Secretary

Correspondence Referral

Remember to Designate FOIA Status

Today's Date: 06/17/13

Reference Number: 14008431

Type of Response (or) Action:
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Date Forwarded:
06/17/13

Action: Chairman's Signature

Subject of Correspondence:
QFRs re Credit Reports hearing - 5/7/13

Author:
Senator Claire Mccaskill
Senator Bill Nelson

Representing:

Copies of Response To:

Deadline:
06/17/13

Copies of Correspondence To:

Organization Assigned:

ACTION LOG

Date Received	FTC Org. Code	Assignment To:	Date Assigned	Action Required
		Laura J. DeMartino		

EXPEDITE

QUESTIONS FOR THE RECORD
SENATOR CLAIRE MCCASKILL

Subcommittee on Consumer Protection, Product Safety, and Insurance
U.S. Senate Committee on Commerce, Science, and Transportation
"Credit Reports: What Accuracy and Errors Mean for Consumers"
May 7, 2013

For the Federal Trade Commission and the Consumer Financial Protection Bureau

1. The stories we heard from Ms. Thomas and that of Ms. Campbell were both beyond belief. Both of these women have what to me seem like obvious errors: someone else's information was in their credit files. Yet these women filed dispute after dispute, sending every type of paperwork imaginable, and nothing happened. They both ultimately had to hire lawyers and have spent years dealing with these issues, all the while living with the effects of these errors. Under the Fair Credit Reporting Act (FCRA), consumer reporting agencies are supposed to have "reasonable procedures to assure maximum possible accuracy" and are supposed to "conduct a reasonable reinvestigation" to determine whether disputed information is accurate. Yet from Ms. Thomas and Ms. Campbell's examples, it does not appear that the measures used by Equifax, Experian, and TransUnion meet such a reasonableness standard.

   Q: Do the experiences of Ms. Thomas, Ms. Campbell, and what we saw in the *60 Minutes* report meet the FCRA's legal requirements for accuracy and dispute procedures?

   Q: How are your agencies ensuring that these credit reporting agencies are living up to the accuracy and dispute obligations under the FCRA?

2. It was shocking to learn that the consumer reporting agencies have not used consumers' supporting documentation in any meaningful way when it comes to disputes. When the consumer reporting agencies send a consumer's dispute on to a furnisher for investigation, those companies typically do not forward that supporting documentation along to the furnisher as well. During the hearing, Mr. Pratt confirmed that later this year, technology will enable the nationwide consumer reporting agencies to give furnishers the supporting documents submitted by consumers.

   Under the FCRA, consumer reporting agencies are supposed to send the furnisher "all relevant information regarding the dispute that the agency has received from the consumer." However, for some time now, consumers like Judy Thomas have carefully compiled documents demonstrating the inaccuracy of information in their files, and this information has been ignored and replaced by a two- or three-digit code.

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3. Several years ago, advertisers flooded the market with offers of "free credit reports" that were anything but free. These companies signed people up for "credit monitoring services" and other costly products for which they had no interest. The FTC and Congress both acted and, in 2010, the FTC issued a rule requiring any company offering such "free credit reports" to clearly disclose the existence of the federal, truly free website, www.annualcreditreport.com.

   However, it appears that these companies are still engaging in questionable advertising and marketing practices while skirting the intent of Congress. Now, advertisements for "free credit scores" and "$1 credit reports" are on the rise. These products appear to have the same flaws as "free credit reports" – consumers who order them also unwittingly sign up for "monitoring services" and other products that they do not want.

   Q: Do the advertising and marketing practices for these "free credit scores" and "$1 credit reports" violate the Rule and/or Section 5 of the FTC Act?

   Q: Is Congressional action needed to stop these deceptive advertisements?

For FTC, CFPB, Mr. Pratt, Dr. Beales

1. While access to their credit report is important information for consumers to have, we know the consumer's credit score is an important tool used by creditors in determining a consumer's creditworthiness.

   Q: Should consumers be entitled to receive a free credit score along with their free credit report? Why or why not?

   Q: Should Congress consider legislation that would require companies that generate credit scores to provide a free annual credit score to consumers similar to the requirement in place for free credit reports? Why or why not?

   Q: If there is no single credit score, should consumer reporting agencies be allowed to market and sell consumers "their" credit score? Do those practices violate Section 5?

Questions for the Record
Senator Bill Nelson
Senate Commerce Subcommittee on Consumer Protection, Product Safety, and Insurance
"Credit Reports: What Accuracy and Errors Mean for Consumers"
May 7, 2013

For Ms. Maneesha Mithal, Associate Director for the Division of Privacy and Identity Protection

As we discussed during the hearing, short sales, which are encouraged by the government and are an increasingly common choice for underwater borrowers are different transactions than foreclosures. Yet, they are being coded as foreclosures on people's credit reports.

- Why are short sales being coded the same as a foreclosure in consumer credit reports?

- Why is the FTC are allowing short sales to be coded the same as foreclosures on consumer credit reports?

Office of the Secretary

Correspondence Referral

Remember to Designate FOIA Status

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Author:
Representative Lee Terry

Representing:

Copies of Response To:

Deadline:
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ACTION LOG

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		Laura J. DeMartino		

Additional Questions for the Record

14008973

The Honorable Jan Schakowsky

1. **Under current law, if FTC wants to seek civil penalties in an enforcement action, it must first refer the case to the Department of Justice. DOJ has 45 days to decide whether it will bring the case on FTC's behalf. FTC can only litigate the case if, at the end of 45 days, DOJ decides not to take action.**

   As FTC officials point out, this creates a difficult choice for the agency. It can file a case quickly to stop ongoing harm, but give up the possibility of civil penalties. Or it can seek civil penalties but wait weeks before it can file a case to stop conduct that is harming consumers.

   I am concerned that FTC is forced to choose between securing an injunction and seeking civil penalties. Can you give us examples of cases, perhaps targeting seniors, where the FTC had to make this choice? In these cases, what was the choice, and why did FTC have to make a choice?

Answer:

Although there may be occasions in which the FTC needs to choose between seeking preliminary relief and seeking civil penalties, fortunately, the Commission has not been faced with this issue in cases involving fraud targeting seniors. The Commission's primary goal in such cases is to stop the fraud and return money to consumers. Scammers engaged in such fraud schemes typically do not have enough money to compensate victims fully and also pay a civil penalty.

2. **Data breaches have become increasingly common recently, severely compromising the financial well-being of individuals whose personal information can be exploited to commit fraud. According to one report, there were more than 2,600 known data breaches in 2012 that exposed over 267 million records.**

   A wide array of entities have been compromised, including data hrokers, retail companies, financial institutions, and government departments and agencies. An equally wide array of factors have caused these breaches, including hacking, lost or stolen laptops and tapes, dishonest insiders, and simple negligence.

   The FTC has, in the past, supported Congress passing a new law that would require persons that possess data with personal information to establish security measures to protect the data from unauthorized use.

   How would legislation like this help seniors, and can you explain why there should be special requirements on data brokers?

Answer:

Data security is of critical importance to all consumers. If companies do not protect the personal information they collect and store, that information could fall into the wrong hands, resulting in fraud, identity theft, and other harm. Accordingly, the Commission has undertaken substantial efforts to promote data security in the private sector through law enforcement, education, and policy initiatives. As you note, the Commission has testified in support of federal legislation on this issue.

Data security is particularly important to protect seniors' information. Most seniors' Medicare cards list their Social Security numbers; these cards must be presented to, and stored and transmitted by, businesses that provide health care-related services. In addition, personal information such as identification documents and financial account information may be vulnerable in settings outside the home such as hospitals, nursing homes, and other care facilities. Older adults can be attractive targets for thieves because they may have built up significant savings for retirement, or equity in their homes. Some older adults may have a physical disability, health problems, or cognitive issues that make it more difficult for them to monitor their accounts.

Federal legislation would help address these issues. First, it could require companies to reasonably safeguard this data so that it does not fall into the hands of identity thieves. Second, it could require companies to notify seniors and others in case of a security breach so that they can take steps to help themselves.

With respect to data brokers, many of their uses of data bring tangible benefits to consumers and businesses alike. At the same time, the ability of data brokers to create huge dossiers of consumer information poses challenges from a security perspective. As Chairwoman Ramirez pointed out in a recent speech, the larger the concentration of personal data, the more attractive a database is to criminals, both inside and outside the company. Further, the risk of consumer injury from a breach or other unauthorized use of the data increases as the volume and sensitivity of the data grows.[1] The Chairwoman stated that, "with big data comes big responsibility. Firms that acquire and maintain large sets of consumer data must be responsible stewards of that information."[2] While the agency has and will continue to bring actions under Section 5 of the FTC Act challenging companies' unreasonable security practices, there should be incentives, including civil penalties, to push firms to safeguard big data.[3] In addition to security safeguards, the FTC has recommended legislation that would give consumers access to information data brokers have about them, in order to increase the transparency of their often invisible practices.

3. In today's global economy, information is paramount. Companies collect vast amounts of information about consumers through countless different methods, mechanisms, and media channels. Data is collected, aggregated, analyzed, used, and disseminated for a

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[1] *See* Edith Ramirez, Chairwoman, Fed. Trade Comm'n, The Privacy Challenges of Big Data: A View from the Lifeguard's Chair at the Aspen Forum Technology Policy Institute (Aug. 19, 2013), http://www.ftc.gov/speeches/ramirez/130819bigdataaspen.pdf.

[2] *Id.*

[3] *See, e.g.*, Fed. Trade Comm'n, *Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers* (2012) at 12 & n.65, http://www.ftc.gov/os/2012/03/120326privacyreport.pdf.

wide range of commercial practices.

The website NextMark offers 60,000 customer lists for sale on topics that range from mundane and innocuous issues to more sensitive topics. There are consumer lists for sale that target people with addictions, mental illness, reproductive concerns, weight-loss issues, and dozens of other physical and mental health conditions. There are lists categorized by past purchase history, including so-called impulse purchases.

a. **As advances in technology make data collection and retention easier and less costly, is there a line that should not be crossed? For instance, should data brokers be prohibited from selling a list of little old ladies in Pennsylvania, over the age of 85, who gave money to veterans' charities or who entered the sweepstakes? This is just an example, but in all seriousness, where is the line? Should there be categories of information, such as health conditions, sexual preferences, or age that just should not be collected?**

Answer:

At a minimum, companies should not collect sensitive information, such as health information, without first obtaining consumers' affirmative express consent (opt-in consent).[4] Consumers, moreover, should be fully informed how such sensitive data will be used, including whether it will be shared with data brokers or other third parties.

Your question also underscores that even less sensitive data about consumers could be misused to deceive. For that reason among others, the Commission has advocated legislation to give consumers the ability to access their data in the possession of data brokers and to opt out of the use of their data for marketing purposes.

b. **Do you support parameters being set in this area and if so, what are your suggestions?**

Answer:

The Commission agrees that consumers are often unaware of the existence of data brokers, as well as the purposes for which they use and sell consumer data. To address this issue, as noted, the Commission has advocated legislation that would give consumers the ability to access the data that data brokers have about them, and to opt out of the use of their data for marketing purposes.

In addition, the Commission is currently engaged in a study of nine data brokers. As part of the study, we are seeking details about the sources of the consumer information they collect; how they use, maintain, and disseminate the information; and the extent to which they allow consumers to access and correct information about them or to opt out of having their information sold. The Commission intends to issue a report and make

[4] *See id.* at 47-48.

recommendations as to whether, and how, the data broker industry could improve its privacy practices.

4. **Companies charge different customers different prices. Perhaps that is not a shock when you are purchasing something of limited quantity, such as an airline tickets. As seats fill up or as you get closer to the date of flight, the price could rise. But it is also possible when two people, sitting side-by-side on two different computers, are offered different prices for the same book or pair of shoes.**

   Companies collect vast amounts of information about consumers, and sell and share that information. Just as it is easy for a seller to figure out whether you enjoy fishing and target you with fishing advertisements, the seller can find out that you are, hypothetically, 85 years old and not very savvy online.

   What protections are in place to ensure that sellers do not price discriminate based on age, and if there aren't any, should there be? What should those protections look like?

Answer:

The Equal Credit Opportunity Act prohibits companies from considering age in granting credit or deciding the terms of credit, with a few limited exceptions, unless it is to consider applicants more favorably (e.g., to offer seniors a more favorable deal because of their age). This is the only consumer protection statute the FTC enforces that expressly prohibits price discrimination based on age.

Of course, numerous commercial activities are not covered by ECOA. Nevertheless, the Commission could take action if such price discrimination based on consumer-specific data is an unfair or deceptive act or practice in violation of the FTC Act.

5. **The Pew Research Center reports that, as of April 2012, 53% of Americans age 65 and older use the Internet or email, and as of February 2012, 34% use social networking sites such as Facebook. This level of online participation by seniors means greater access to family members and vital resources, but also presents new challenges, particularly as seniors interact with software.**

   Can you tell us about how seniors might be more susceptible to deceptive offers during the installation of software – for example, when a user installs a piece of software they affirmatively sought, and is automatically opted into a third-party piece of software they never intended to download? Are there measures Congress should consider to protect the public from such deception?

Answer:

Many consumers, not just seniors, fall prey to tech scams, which might include deceptive installation of software (spyware or malware) or phony offers to "fix" supposedly infected computers. The scams are often quite convincing and many consumers have

been persuaded to rely on the ostensible expertise of a con-artist to differentiate an innocuous file from a hazardous one or to rely on such apparent expertise to get rid of unwanted or malicious software. Most recently, the Commission brought six cases against telemarketers who cold-called consumers and attempted to gain remote access to their computers. Invariably, the telemarketers purported to identify a "virus" and requested hundreds of dollars to fix the computer. Consumers who are active on their computers and home during business hours, as many older Americans are, are more likely to have heard the deceptive sales pitch.

6. **Total losses for Americans over 65 as a result of fraud were estimated at more than $2.9 billion in 2010, and the Federal Trade Commission (FTC) estimates that 1 in 5 seniors fall victim to fraud nationwide. Our country's seniors are particularly targeted by fraudulent lotteries, sweepstakes, and other prize promotion scams that take a staggering toll on their hard-earned personal finances.**

   A 2011 study by AARP found that victims of lottery fraud are more likely to be women, over the age of 70, divorced or widowed, and have less formal education, lower income, and cognitive impairments.

   a. **I understand that FTC and the AARP Foundation have partnered on a successful peer counseling program for senior victims of certain frauds, including prize promotion. Do the two parties intend to continue and expand this initiative?**

   Answer:

   This innovative partnership enables the FTC to refer to AARP for individual peer counseling older Americans who have called the FTC's Consumer Response Center to complain that they have been victims of certain frauds.[5] The one-on-one advice and guidance the peer counselors have provided to these consumers has helped to make them less susceptible to scams they may encounter in the future. We expect to continue this effective program and always are exploring ways to expand and enhance the program's efficacy.

   b. **Fraudulent transactions like these often begin with a telemarketing call. Technological changes are affecting the way scammers target and reach their victims. The FTC estimates that fewer than 10% of fraud schemes now come through the mail, but nearly 7 in 10 incidents involve the telephone or Internet. Access to technology such as a phone and the Internet is a critical part of seniors' independence. Could you explain how the Bureau of Consumer Protection is adapting to technological changes in meeting its obligation to consumers?**

   Answer:

   The FTC is committed to staying abreast of emerging and evolving technologies that

[5] FTC Testimony: Elder Fraud and Consumer Protection Issues (May 16, 2013), http://www.ftc.gov/os/testimony/113hearings/130516elderfraudhouse.pdf.

affect consumers to ensure that consumer protections keep pace.

Internet and Mobile Devices

The FTC has continued to update its investigative capabilities as the Internet and mobile technologies have transformed how consumers participate in the marketplace. First, we have equipped our Internet lab with untraceable computers that FTC staff uses to monitor the Internet for potential consumer fraud schemes and to collect evidence in support law enforcement actions. Second, the FTC has assembled a Mobile Technology Unit that conducts research, monitors the various mobile platforms, app stores, and applications, and trains FTC staff on mobile commerce issues. Through this Unit, the Commission is ensuring that it has the necessary technical expertise and tools to monitor, investigate, and prosecute deceptive and unfair practices in the mobile marketplace.

An important part of our consumer protection mission is identifying and sharing information on emerging issues, which the FTC frequently does through public workshops. For instance, this past June, we held a public forum on "Mobile Security – Potential Threats and Solutions" which focused on potential threats to US consumers and possible solutions to those threats. Unauthorized third-party charges on mobile phone bills have also plagued consumers, and in May, we held a roundtable to examine this "mobile cramming."

Looking ahead, on November 19, the FTC will host a workshop on "The Internet of Things," which will focus on devices that can communicate with consumers, transmit data back to companies, and compile data for third parties.

Telemarketing

The FTC is always working to identify ways to make the Telemarketing Sales Rule (TSR) more flexible and adaptable to changes in technology, including changes that bring new payment methods to the marketplace. For example, the FTC recently proposed new anti-fraud amendments to the TSR that would ban telemarketers from collecting payment through cash to cash money transfers (like Western Union or Money Gram), cash reload mechanisms (like GreenDot Corporation's MoneyPak; Blackhawk Network's REloadit; and InComm's Vanilla Reload Network) and from dipping directly into a consumer's bank account through remotely created checks and remotely created payment orders. In commenting on the notice of proposed rulemaking, AARP observed that, "The Telemarketing Sales Rule Proposed changes are vitally needed to help combat fraud targeted disproportionately at older people." (see http://ftc.gov/os/comments/tsrantifraudnprm/00038-86303.pdf).

7. **Work-from-home advertisements may be found in the classified sections of local newspapers, in national tabloids, on the Internet, or mailed directly to one's home. While some of these ads are legitimate, many are not. Illegitimate "work-at-home" schemes typically give vague details on work such as envelope stuffing, putting together crafts, or medical billing, then require a consumer to pay a fee or to purchase expensive**

equipment before beginning work for companies that do not exist or that do not hire workers for the job that was advertised. Seniors are often targeted as victims of these schemes because many rely on a fixed income that they are often looking to supplement, making them uniquely susceptible to work-from-home scams.

Legislation has been proposed to address fraud like the work-from-home scheme I have described that disproportionately affects seniors. Specifically, H.R.1953 would establish an advisory office within the Bureau of Consumer Protection of the FTC to address issues of elder fraud and abuse.

What is your position on H.R. 1953? Do you think an office focused on seniors would prove an asset to FTC?

Answer:

I support the goals of the bill: ensuring consumer protection law enforcement and education efforts adequately address the needs of older Americans. The FTC has made delivery of consumer protection services to seniors a priority. We meet regularly with senior advocates; participate in senior-oriented law enforcement and outreach efforts; and, through ongoing talks with activities directors and other professionals in facilities where older Americans live and visit, the FTC is obtaining guidance on improving its outreach to senior consumers, including the kinds of information they find useful, the messengers they trust, and the delivery mechanisms they are likely to rely on. The FTC also produces a wealth of information for widespread distribution to media, midlife and older groups, and community-based partners in education and outreach (like local law enforcers and libraries), and the FTC reaches out to the senior community directly by providing in-person training on consumer protection issues of particular interest to senior citizens and legal services providers. The Federal Trade Commission has numerous staff members who are knowledgeable about the types of fraud and other threats that target seniors. Given the wide range of issues confronting senior consumers and the relatively small size of the Commission, it is efficient to have this expertise dispersed throughout the Commission's Bureau of Consumer Protection.

8. **Since its passage, the Affordable Care Act has been a mainstay in the news. Unfortunately, scams often follow the news and scammers know that whenever there's discussion about possible changes in government programs or policy, the time is ripe to capitalize on consumers' misperceptions. For example, after passage of the Medicare Modernization Act in 2003, we saw a rise in scams and, almost immediately after the Supreme Court ruled on the Affordable Care Act, scam artists began posing as federal employees, using the Affordable Care Act as a hook to obtain personal and financial information needed for identity theft. Seniors are often targets of these scams because they're more likely to be home to answer the phone and they tend to have accumulated a larger amount of wealth that scammers hope to access. Days after the Affordable Care Act was upheld, the FTC published a consumer alert warning consumers of scams stemming from the passage of the Affordable Care Act and providing ways to file a complaint with the FTC.**

Can you please describe in more detail these efforts and any additional efforts taken at the FTC to address scams related to the passage of the Affordable Care Act and its upcoming changes? Are there additional actions the FTC plans to take as provisions of the Act come into effect?

Answer:

The FTC is taking its usual two-pronged approach of enforcement and education to address consumer fraud related to the Affordable Care Act (ACA). We are engaged in multiple activities to ensure that we receive the information we need to bring cases that will put a stop to deceptive or fraudulent practices against consumers, and to educate consumers about avoiding and reporting scams.

The FTC stands ready to prosecute individuals and companies engaged in fraud. Along with the Department of Justice, we are coordinating with federal and state law enforcement agencies across the country to identify emerging scams, refer fraud to the appropriate law enforcement entities, and notify the group of current investigations so as to avoid unnecessary duplication of efforts. The FTC is regularly monitoring all complaints that come into the Consumer Sentinel database for scams related to the ACA. In addition, the FTC has worked with the Centers for Medicare and Medicaid Services (CMS) to create a referral system under which consumers calling the CMS customer service center with complaints of consumer fraud are transferred directly to the FTC's complaint line and to set up a link on the healthcare.gov website to the FTC's online complaint form. We hope to establish a similar referral system and online complaint link with every state-based exchange.

On the consumer education side, we have provided materials, complementing the information released by CMS, and posted blog entries to help consumers understand the marketplace, and we have published consumer education with tips on how to avoid scams and report them to the FTC. Furthermore, on September 19, we held a half-day conference entitled "Consumer Protection and the Healthcare Marketplace." The conference, which was also available via webcast, was targeted at consumers, legal services organizations, law enforcement agencies, consumer advocates, and any others looking for information about how to help consumers avoid scammers trying to use the healthcare marketplaces as their lure. Presenters included representatives from Health and Human Services, the DC Health Benefit Exchange Authority, AARP, and the Department of Justice. A recording is currently available through the event workshop page.[6]

The FTC will continue these efforts as the ACA is implemented, with the goal of halting scams related to the ACA and educating consumers on how to protect themselves as they learn to navigate the new healthcare marketplaces.

[6] *See* http://www.ftc.gov/bcp/workshops/acaconsumerprotection/.

9. **There are a number of federal agencies whose mission is in some way to address elder financial fraud and exploitation. President Obama established the Financial Fraud Enforcement Task Force 2009. In 2010, Congress established the Elder Justice Coordinating Council (EJCC) which includes officials from 11 federal agencies and coordinates activities related to elder abuse, neglect, and exploitation across the federal government. And there are other coordinating efforts ongoing. These all have different but overlapping goals.**

   The FTC and CFPB recently collaborated with several other agencies to conduct a Senior Identity Theft Workshop to discuss and provide financial protection information for seniors. Please comment on the workshop and any benefits of your recent collaboration of efforts. Are there certain types of fraud whose prevention lends itself to collaboration more than others? If so, can you identity those types and why they are ripe for collaboration?

Answer:

The FTC's May 7th Senior Identity Theft Forum brought together partners from federal and state agencies, private industry, legal services, and other non-profits to discuss a variety of types of identity theft that affect senior consumers. The forum also explored the best consumer education and outreach techniques for reaching seniors. The forum was beneficial not only in raising awareness about these issues but also in fostering connections that enable ongoing collaboration.

Each type of identity theft fraud addressed at the forum – tax identity theft, medical identity theft, and long-term care identity theft – lends itself to, and is ripe for, collaboration.

- Tax identity theft: 43.4% of all identity theft complaints the FTC received in 2012 involved tax identity theft. To address this issue, the FTC plans to host Tax Identity Theft Awareness Week during the week of January 13, 2014, in collaboration with the IRS, AARP, and others.
- Medical identity theft: In the area of medical identity theft, as discussed in response to question #8, the FTC recently hosted a panel on the ACA, with speakers from HHS, DOJ, and local government discussing how to prevent fraud associated with the ACA. This issue is ripe for collaboration because the ACA took effect October 1st and agencies are poised to stop scam artists who try to take advantage of consumers' confusion about the new law.
- Long-term care identity theft: In the long-term care arena, FTC staff is working with HHS to provide trainings to Senior Medicare Patrol volunteers and long-term care staff both at their annual conferences and in the field. This area is ripe for collaboration because agencies recognize the need to share expertise to protect senior consumers.

In addition to the collaboration resulting from the Senior Identity Theft Forum, the FTC continues to be actively involved in the Financial Fraud Enforcement Taskforce (FFETF) and the EJCC. For example, this summer, members of the FFETF worked together to provide a joint DOJ-FTC identity theft training webinar to legal services attorneys.

Similarly, as part of the EJCC, the FTC has helped formulate the nine proposals of the working group, focusing on the two proposals that most relate to elder financial exploitation: (1) creating a public awareness campaign; and (2) combating financial exploitation. To that end, on September 24th, the FTC, along with numerous other federal agencies, issued Interagency Guidance on Privacy Laws and Reporting Financial Abuse of Older Adults. The FTC intends to continue collaborating with other government agencies through the EJCC, FFETF, and informal collaboration in order to combat fraud affecting elderly consumers.

FRED UPTON, MICHIGAN
CHAIRMAN

HENRY A. WAXMAN, CALIFORNIA
RANKING MEMBER

ONE HUNDRED THIRTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON ENERGY AND COMMERCE

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Minority (202) 225–3641

September 25, 2013

Mr. Charles Harwood
Acting Director
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dear Mr. Harwood,

Thank you for appearing before the Subcommittee on Commerce, Manufacturing, and Trade on Thursday, May 16, 2013 to testify at the hearing entitled "Fraud on the Elderly: a Growing Concern for a Growing Population."

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for ten business days to permit Members to submit additional questions for the record, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and (3) your answer to that question in plain text.

To facilitate the printing of the hearing record, please respond to these questions by the close of business on Wednesday, October 9, 2013. Your responses should be e-mailed to the Legislative Clerk in Word format at **Kirby.Howard@mail.house.gov** and mailed to Kirby Howard, Legislative Clerk, Committee on Energy and Commerce, 2125 Rayburn House Office Building, Washington, D.C. 20515.

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,

Lee Terry
Chairman
Subcommittee on Commerce,
Manufacturing, and Trade

cc: Jan Schakowsky, Ranking Member, Subcommittee on Commerce, Manufacturing, and Trade
Attachment

Additional Questions for the Record

The Honorable Jan Schakowsky

1. Under current law, if FTC wants to seek civil penalties in an enforcement action, it must first refer the case to the Department of Justice. DOJ has 45 days to decide whether it will bring the case on FTC's behalf. FTC can only litigate the case if, at the end of 45 days, DOJ decides not to take action.

   As FTC officials point out, this creates a difficult choice for the agency. It can file a case quickly to stop ongoing harm, but give up the possibility of civil penalties. Or it can seek civil penalties but wait weeks before it can file a case to stop conduct that is harming consumers.

   I am concerned that FTC is forced to choose between securing an injunction and seeking civil penalties. Can you give us examples of cases, perhaps targeting seniors, where the FTC had to make this choice? In these cases, what was the choice, and why did FTC have to make a choice?

2. Data breaches have become increasingly common recently, severely compromising the financial well-being of individuals whose personal information can be exploited to commit fraud. According to one report, there were more than 2,600 known data breaches in 2012 that exposed over 267 million records.

   A wide array of entities have been compromised, including data brokers, retail companies, financial institutions, and government departments and agencies. An equally wide array of factors have caused these breaches, including hacking, lost or stolen laptops and tapes, dishonest insiders, and simple negligence.

   The FTC has, in the past, supported Congress passing a new law that would require persons that possess data with personal information to establish security measures to protect the data from unauthorized use.

   How would legislation like this help seniors, and can you explain why there should be special requirements on data brokers?

3. In today's global economy, information is paramount. Companies collect vast amounts of information about consumers through countless different methods, mechanisms, and media channels. Data is collected, aggregated, analyzed, used, and disseminated for a wide range of commercial practices.

   The website NextMark offers 60,000 customer lists for sale on topics that range from mundane and innocuous issues to more sensitive topics. There are consumer lists for sale that target people with addictions, mental illness, reproductive concerns, weight-loss issues, and dozens of other physical and mental health conditions. There are lists categorized by past purchase history, including so-called impulse purchases.

a. As advances in technology make data collection and retention easier and less costly, is there a line that should not be crossed? For instance, should data brokers be prohibited from selling a list of little old ladies in Pennsylvania, over the age of 85, who gave money to veterans' charities or who entered the sweepstakes? This is just an example, but in all seriousness, where is the line? Should there be categories of information, such as health conditions, sexual preferences, or age that just should not be collected?

b. Do you support parameters being set in this area and if so, what are your suggestions?

4. Companies charge different customers different prices. Perhaps that is not a shock when you are purchasing something of limited quantity, such as an airline tickets. As seats fill up or as you get closer to the date of flight, the price could rise. But it is also possible when two people, sitting side-by-side on two different computers, are offered different prices for the same book or pair of shoes.

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   What protections are in place to ensure that sellers do not price discriminate based on age, and if there aren't any, should there be? What should those protections look like?

5. The Pew Research Center reports that, as of April 2012, 53% of Americans age 65 and older use the Internet or email, and as of February 2012, 34% use social networking sites such as Facebook. This level of online participation by seniors means greater access to family members and vital resources, but also presents new challenges, particularly as seniors interact with software.

   Can you tell us about how seniors might be more susceptible to deceptive offers during the installation of software – for example, when a user installs a piece of software they affirmatively sought, and is automatically opted into a third-party piece of software they never intended to download? Are there measures Congress should consider to protect the public from such deception?

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   A 2011 study by AARP found that victims of lottery fraud are more likely to be women, over the age of 70, divorced or widowed, and have less formal education, lower income, and cognitive impairments.

   a. I understand that FTC and the AARP Foundation have partnered on a successful peer counseling program for senior victims of certain frauds, including prize promotion. Do the two parties intend to continue and expand this initiative?

b. Fraudulent transactions like these often begin with a telemarketing call. Technological changes are affecting the way scammers target and reach their victims. The FTC estimates that fewer than 10% of fraud schemes now come through the mail, but nearly 7 in 10 incidents involve the telephone or Internet. Access to technology such as a phone and the Internet is a critical part of seniors' independence. Could you explain how the Bureau of Consumer Protection is adapting to technological changes in meeting its obligation to consumers?

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   Legislation has been proposed to address fraud like the work-from-home scheme I have described that disproportionately affects seniors. Specifically, H.R.1953 would establish an advisory office within the Bureau of Consumer Protection of the FTC to address issues of elder fraud and abuse.

   What is your position on H.R. 1953? Do you think an office focused on seniors would prove an asset to FTC?

8. Since its passage, the Affordable Care Act has been a mainstay in the news. Unfortunately, scams often follow the news and scammers know that whenever there's discussion about possible changes in government programs or policy, the time is ripe to capitalize on consumers' misperceptions. For example, after passage of the Medicare Modernization Act in 2003, we saw a rise in scams and, almost immediately after the Supreme Court ruled on the Affordable Care Act, scam artists began posing as federal employees, using the Affordable Care Act as a hook to obtain personal and financial information needed for identity theft. Seniors are often targets of these scams because they're more likely to be home to answer the phone and they tend to have accumulated a larger amount of wealth that scammers hope to access. Days after the Affordable Care Act was upheld, the FTC published a consumer alert warning consumers of scams stemming from the passage of the Affordable Care Act and providing ways to file a complaint with the FTC.

   Can you please describe in more detail these efforts and any additional efforts taken at the FTC to address scams related to the passage of the Affordable Care Act and its upcoming changes? Are there additional actions the FTC plans to take as provisions of the Act come into effect?

9. There are a number of federal agencies whose mission is in some way to address elder financial fraud and exploitation. President Obama established the Financial Fraud Enforcement Task Force 2009. In 2010, Congress established the Elder Justice Coordinating

Council (EJCC) which includes officials from 11 federal agencies and coordinates activities related to elder abuse, neglect, and exploitation across the federal government. And there are other coordinating efforts ongoing. These all have different but overlapping goals.

The FTC and CFPB recently collaborated with several other agencies to conduct a Senior Identity Theft Workshop to discuss and provide financial protection information for seniors. Please comment on the workshop and any benefits of your recent collaboration of efforts. Are there certain types of fraud whose prevention lends itself to collaboration more than others? If so, can you identity those types and why they are ripe for collaboration?

QUESTIONS FOR THE RECORD
SENATOR CLAIRE MCCASKILL
SUBCOMMITTEE ON CONSUMER PROTECTION, PRODUCT SAFETY, AND INSURANCE
SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION
"STOPPING FRAUDULENT ROBOCALL SCAMS: CAN MORE BE DONE?"
JULY 10, 2013

For Ms. Lois Greisman, Federal Trade Commission

Ms. Greisman, the FTC has essentially placed a call for help with robocalls. Then-FTC Chairman Jon Leibowitz noted last year at a summit on the issue, "Law enforcement alone can't stop the robocalls." No matter how many cases the FTC brings, the agency says there is not much more it can do from an enforcement perspective to abolish illegal robocalls. As a result, the Commission held a public competition to find a viable technological solution that could provide some level of defense against robocalls.

Q: Why do you think a technological solution is the best answer to this problem?

I do not believe there is one best answer to this problem; rather, the FTC must simultaneously pursue multiple strategies to fight illegal robocalls. We launched the Robocall Challenge because technological advances caused the explosion in illegal robocalls, and we believe it is important to encourage technological solutions that can counteract the proliferation of illegal robocalls. But the agency's other efforts – including law enforcement, coordination with experts, and consumer education – continue.

As one example, we continue our aggressive and strategic law enforcement, and the actions we have brought in federal court have shut down entities responsible for *billions* of illegal robocalls. For instance, the FTC put a robocall operation out of the telemarketing business and recovered approximately $3 million under a settlement resolving FTC charges that the defendants bombarded consumers with more than two billion robocalls, including the ubiquitous "Rachel from cardholder services" calls, sometimes using false Caller ID names, such as "SALES DEPT." *See FTC v. Asia Pacific Telecom, Inc.*, available at http://www.ftc.gov/opa/2012/03/asiapacific.shtm.

Q: The FTC selected three winners in its robocall challenge. Why were those three entrants chosen as winners? What about their submissions, compared to the rest, does the FTC believe will best limit fraudulent robocalls for America's consumers?

The Robocall Challenge submissions were judged by Steve Bellovin (Chief Technologist from the FTC), Henning Schulzrinne (Chief Technology Officer at the Federal Communications Commission), and Kara Swisher (co-Executive Editor of *All Things Digital*). The judges reviewed hundreds of entries to find submissions that best met all three of the judging criteria: 1) Does it work?; 2) Is it easy to use?; and 3) Can it be

rolled out? What follows is a more detailed explanation of the criteria, which was publicly posted at http://robocall.challenge.gov/details/criteria:

Does it work? (weighted at 50%)

- How successful is the proposed solution likely to be in blocking illegal robocalls? Will it block wanted calls? An ideal solution blocks all illegal robocalls and no calls that are legally permitted. (For example, automated calls by political parties, charities, and health care providers, as well as reverse 911 calls, are not illegal robocalls.)
- How many consumer phones can be protected? What types of phones? Mobile phones? Traditional wired lines? Voice over Internet Protocol ("VoIP") land lines? Proposals that will work for all phones will be more heavily weighted.
- What evidence do you already have to support your idea? Running code? Experiments? Peer-reviewed publications?
- How easy might it be for robocallers to adapt and counter your scheme? How flexible is your scheme to adapt to new calling techniques? How have you validated these points? Remember that the real test of a security system is not whether or not you can break it; it's whether or not other people can.

Is it easy to use? (weighted at 25%)

- How difficult would it be for a consumer to learn to use your solution?
- How efficient would it be to use your solution, from a consumer's perspective?
- Are there mistakes consumers might make in using your solution, and how severe would they be?
- How satisfying would it be to use your solution?
- Would your solution be accessible to people with disabilities?

Can it be rolled out? (weighted at 25%)

- What has to be changed for your idea to work? Can it function in today's marketplace? (E.g., Does it require changes to all phone switches world-wide, and require active cooperation by all of the world's phone companies and VoIP gateways, or can it work with limited adoption?) Solutions that are deployable at once will be more heavily weighted, as will solutions that give immediate benefits with even small-scale deployment.
- Is deployment economically realistic?
- How rapidly can your idea be put into production?

The judges selected the winners from among the contestants' many informed, creative, and intelligent submissions, based on the criteria laid out above.

While I cannot speak for the judges, I believe the winning solutions contain promising ideas about how to address difficult realities such as the limitations of the telecommunications infrastructure and the prevalence of caller ID spoofing. For example, one of the winners, Aaron Foss, proposed an innovative method of deploying a filter, via a cloud-based service that consumers could access using a simultaneous ring feature on their current telephones. The other two winners tackled the problem of caller

ID spoofing in novel ways; they each designed their own mechanisms that can help determine whether an incoming call's caller ID information is authentic or not. I believe the three winning solutions represent real breakthroughs compared with what is currently available in the marketplace.

The United States Telecom Association, at the hearing, said its member companies work with various law enforcement agencies, including the FTC, to prosecute individuals and entities responsible for fraudulent robocalls.

Q: Would this be an accurate assessment of the industry from the FTC's point of view?

Many of the members of the United States Telecom Association do assist us with investigations of those responsible for illegal robocalls, and we greatly appreciate this assistance. As I stated in my testimony, I do believe that carriers could be more proactive in identifying suspicious activities on their networks that could be indicative of illegal robocalling.

Q: What percent of the FTC's investigations into potential violations of your telemarketing and robocall rules are initiated by information voluntarily submitted by industry to your agency? Since the establisbment of the National Do Not Call Registry, how many times have telecommunications providers alerted the FTC to potential violations of either your telemarketing rules or robocall rnles?

Generally speaking, industry players have not proactively alerted the FTC to potential violations of our rules. The more common scenario is that our attorneys or investigators contact a carrier about a potential rule violation, and the carrier then assists us in obtaining available information about that particular call campaign.

The FTC and the FCC have clear rules establishing what is, and what is not, allowable when it comes to robocalls, and both agencies have taken enforcement actions to stop illegal robocalls. Yet despite all of these efforts, intrusive and fraudulent robocalls have proliferated. Technological solutions may very well provide the American public with relief, but I also think that there is no substitute for strong law enforcement. As such, I am interested in learning further about the FTC's and the FCC's efforts and what more can be done to stop illegal robocalls.

Q: What are the limitations your agency faces in bringing more enforcement cases? Is there a need for legislation to assist yonr efforts?

We do face challenges related to law enforcement against illegal robocallers. Given automated dialing technology, inexpensive long distance calling rates, and the ability to move internationally and employ cheap labor, robocalling has become an attractive marketing channel to fraudsters. And new technologies make it easy for robocallers to hide their identities hy spoofing and regularly changing caller ID information, as well as

by allowing them to generate calls from any location in the world where they have access to an internet connection. In addition, a single call now traverses the networks of many different service providers and no single entity knows the entire path of a call; the result is that every entity must timely provide data in order for law enforcers to successfully trace a call. These factors, among others, make investigation and enforcement increasingly difficult and time-consuming.

Separate from these challenges, and as I stated in my testimony, I believe the common carrier exemption is outdated and unnecessary. The telecommunications industry has become much more complex and diversified, and the line between what is and is not a carrier has blurred significantly. Currently, numerous entities participate in delivering the robocall, including the associated caller ID information, and not all of their functions fit squarely into the categories of carrier or non-carrier. It would be far more efficient if the FTC could address illegal telemarketers and those who facilitate their activities without having to determine which of the entities that participated in a single call campaign might be considered common carriers. In other words, the exemption creates an obstacle to effective law enforcement efforts against robocallers. For these reasons and in this context, I support elimination of the common carrier exemption.

Senate Commerce Committee
Subcommittee on Consumer Protection, Product Safety, and Insurance
"Stopping Frandulent Robocall Scams: Can More Be Done?"
July 10, 2013

Questions for the Record
Senator Amy Klobnchar

Q: I want to applaud the FTC for undertaking the "Robocall challenge" as an innovative way for government to work with the private sector and software engineers to find solutions.

- **Ms. Greisman, can you discuss the process for the challenge and how you chose the awardees? What is the next step for the FTC in encouraging getting these products to market and helping to fight fraud?**

  The Robocall Challenge was the FTC's first public contest under the America COMPETES Reauthorization Act of 2010. One of our first steps involved choosing three experts to judge the challenge. Two of our judges were the Chief Technologists from the FTC and the Federal Communications Commission – Steve Bellovin and Henning Schulzrinne – who both have extensive technical backgrounds in telecommunications, Voice over Internet Protocol ("VoIP") technology, and security. The third judge was Kara Swisher, one of the co-founders of *All Things Digital* and someone who has broad expertise regarding consumer technology products and the consumer experience. The judges helped determine the judging criteria, which were: 1) Does it work? (50%); 2) Is it easy to use? (25%); and 3) Can it be rolled out? (25%). For more information regarding these criteria, please visit this website: http://robocall.challenge.gov/details/criteria.

  We publicly announced the Robocall Challenge on October 18, 2012, and submissions were due by January 17, 2013. We received 798 eligible submissions. Pursuant to the official rules, an internal panel screened these submissions to determine, in accordance with the judging criteria, which suhmissions warranted further review by the judges. The internal panel identified 266 submissions that were then reviewed by the expert judging panel. Following numerous meetings and discussions, the judges chose seven finalists and assigned numerical scores to each. Two engineers from Google won the nonmonetary award in the large organization category. The judges found a tie within the category of individuals and small organizations; thus, the two winners split the $50,000 prize.

  The goal of the challenge was to stimulate the marketplace and encourage the development of new ideas. The FTC does not take an active role in bringing the winning solutions to the market and does not endorse particular consumer products. To identify and reward the challenge winners and promote the challenge as a tool to spur innovation in the marketplace, we held a press conference and produced videos about the challenge. Through these means and related efforts, we think we have helped to encourage

innovators to focus their talents on developing a technical solution to the problem of illegal robocalls.

Q: Ms. Greisman and Mr. Bash, we know that technology will continue to evolve. How are the FTC and the FCC working to keep up with these evolutions in communications to protect consumers from future scamming operations?

We issued the Robocall Challenge to spur technological innovations that would complement our law enforcement efforts to protect consumers from scammers. As we looked at the marketplace in the context of email spam, we saw numerous experts deploying technological solutions to protect consumers against spammers and fraudsters, but relatively little focus on robocalls. Through the challenge, we sought to bring more attention to illegal robocalls and prompt rich and vital initiatives to address the problem. I believe that the challenge accomplished this goal and that the winners' sophisticated filters and other similar products can significantly enhance consumer protection. Notably, none of the four technology experts who created the winning solutions had ever worked on the robocall problem before. I will add that while the challenge spurred nearly 800 innovators to submit proposals, it also prompted others to go to the drawing table. We have heard that the FTC's recent robocall initiatives gave other entrepreneurs new connections and ideas to fight illegal robocalls, which is an important ripple effect. We hope this will help stimulate the market to develop technology that will combat telephone spam, similar to efforts to develop technology to reduce email spam.

In addition, we work to ensure that our internal team at the FTC keeps up with the ongoing evolution of communications technology. For example, we regularly speak to and work with technical experts who can help us understand evolving technology, including academics, industry insiders, and entrepreneurs. We partner with internationally renowned technological associations – such as the Messaging, Malware and Mobile Anti-Abuse Working Group and the Internet Engineering Task Force – to work toward a longer-term goal of changing the telephone network protocols to allow for authenticated telephone calls. We also use our evolving knowledge to innovate with respect to our own law enforcement investigations and targeting. As one public example, last October we announced our new robocall honeypot, which is a group of phone numbers that allows the FTC to receive robocalls directly and helps the agency gather evidence and take quick action.

Senator Mark Warner
Senate Committee on Commerce, Science, and Transportation Subcommittee on Consumer Protection, Product Safety, and Insurance
"Stopping Fraudulent Robocall Scams: Can More Be Done?" Questions for the Record
July 10, 2013

For all witnesses:

1. **Over the past year or so, my office has seen a marked increase in calls and letters regarding possible abuses by some telemarketers. Since January 2013, my office has heard from more than 300 people requesting assistance with the Do Not Call List, and since taking office in 2009, my office has heard from over 1200 people on this issue. A small sampling of some of the concerns we have received are also included in this document for the record.***

   As a supporter of the Do Not Call Act, I sympathize with the frustration of my constituents. I recognize that the same technology that is allowing telephone service providers to more efficiently manage networks is also enabling disreputable callers to abuse the system.

   Still, it seems to me that if we can't find a technical solution to abusive telemarketing calls, that raises many serious questions as well. I encourage you to think more creatively about possible solutions, and about any legislative authorities that would better enable the FTC to keep pace with technology. For instance, have similar problems occurred in other countries? If so, are there any solutions adopted in other markets that might be applicable in the U.S.?

   Yes, the same problems are occurring in other countries. We have undertaken a global search for solutions, and we did identify the "Telemarketing Guard" by Primus Telecommunications Canada, whose Chief Technology Officer Matthew Stein testified on July 10 after also appearing at our Robocall Summit the previous fall. We have actively encouraged carriers and others to bring Telemarketing Guard or a similar solution to consumers in the United States. Telemarketing Guard is currently only availahle to approximately one million Canadian consumers.

   Unfortunately, we are unaware of successful solutions that have been more broadly adopted in other countries. Instead, the FTC is actively participating in a joint search for such solutions. Our Office of International Affairs ("OIA") coordinates with our international counterparts on related issues. For example, our OIA participates in several multinational networks that coordinate on broad strategic matters related to illegal telemarketing, including through the London Action Plan ("LAP") on international spam enforcement cooperation and the Centre of Operations Linked to Telemarketing. Through our involvement in the LAP's Do Not Call Working Group, we are actively engaged with the multinational organization's initiatives to develop an international strategy related to caller ID spoofing. One example is the LAP's upcoming October meeting, which is heing held in coordination with the Messaging, Malware and Mobile

Anti-Abuse Working Group. The FTC, with the Canadian Radio-television and Telecommunications Commission and the Australian Communications and Media Authority, will lead a discussion of proposed solutions – technological, policy and enforcement – that can be considered for global telecommunications systems. Also at that meeting, we are leading a panel on telephony abuse, which includes caller ID spoofing.

We are also fully engaged with international communities of technical experts that are working to address this problem, such as the Internet Engineering Task Force. In addition, we have collaborated with foreign law enforcement authorities on particular cases, for example working closely with Canadian law enforcement on *FTC v. Direct Financial Management, Inc.*, No. 10 C 7194 (N.D. Ill. Feb. 8, 2012), and *FTC v. Economic Relief Technologies, LLC*, No. 1:09-cv-03347 (N.D. Ga. Jul. 22, 2010).

2. **In 2012, the Federal Trade Commission (FTC) challenged innovators to come up with a solution that would block illegal commercial robocalls on landlines and mobile phones. One of the proposed solutions creates a filtering system, similar to an email spam filter, that intercepts and filters out illegal robocalls using a technology that "blacklists" and "whitelists" phone numbers. The proposal envisions a consumer-facing system, however, others have suggested that a network-based system might be more efficient and less burdensome for consumers.**

   Do you believe that a filtering system would be effective? If so, do you believe it should be implemented by networks or by consumers? If not, do you have ideas for a better solution?

   I believe effective solutions for blocking illegal robocalls could be based on any number of possible technical approaches. An effective solution might, for example, be based on filtering, and could be designed to be implemented by networks, consumers, or otherwise. However, it is important to consider not only whether the proposed solutions would be effective to block illegal robocalls, but also whether they would be easy to use, and whether they could be rolled out in a timely manner. For example, a network-based solution could require extensive investment and active participation by carriers, which might make such a solution more difficult to roll out than a solution that consumers could implement on their own, with little or no reliance on carriers. In any event, the FTC actively encourages carriers to pursue all efforts to curb illegal robocalls, regardless of the specific technical approach or approaches adopted.

<u>*Selected Constituent Robocall Concerns</u>

"It is an invasion of our privacy, and it ties up our phones and disrupts our lives to get as many as 15 calls every single day when we have been on the donotcall list since day 1. Anything you can do about this issue will be greatly appreciated."

- Constituent from Arlington, VA 5/26/2012

"I am registered on the "Do Not Call" list for my home phone (not cellphone) and I am still getting many solicitation "robo calls" for lower credit card rates, car warranties, and other commercial products. Some callers block caller ID. I systematically report these callers via the "report a violator" process on the Registry web site. I have been on the do-not-call registry since it's inception, and I have verified this on the Registry site. I also put my elderly mother's home phone number on the DNC Registry several years ago. She also gets many solicitation calls. I am well versed on the types of calls that the DNC system is supposed to address, and the kinds of calls that are excepted. I am astonished at the number of calls I am getting even as I am on the DNC list."

- Constituent from Fairfax, VA 05/04/2012

"xxx-xxx-xxxx [redacted]. This number continues to call with impunity, even though they are on my FTC Do Not Call Registry, and several other residents I'm friends with. They are scam artists, trying to mine personal information, and the FTC hasn't responded to my concerns. Are you game for going after this group of obvious scammers, because a lot of vulnerable citizens, could be prey for their scam which involves lowering debt. They call themselves [redacted], and they are a company I and others have never done business with. Thank you kindly."

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"Over the last couple of months, I've been getting an increasing number of robo-dialer/recorded commercial calls in violation of the Do-Not-Call registry. Many have been from the same 'crook', often "Credit Card Services." I've reported most of them on the FTC's DoNotCall registry. (That is not counting the growing number of political calls, which unfortunately are not violations of DoNotCall)."

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"Senator - Please have someone on your staff Google (xxx)xxx-xxxx [redacted] and you will see several websites dedicated to complaints about harassing phone calls from this number asking if we want to refinance our VA loan. We have been on the Do Not Call list since 2006 and have asked them to stop calling us 6-8 times a day. They pointedly refuse to stop. This is not about freedom of speech, it is invasion of privacy. I, on behalf of many, many people request my Federal government figure a way to make these people stop calling over and over again."

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"My name is [redacted] and I reside in Charlottesville, VA. I am in the fourth grade. I am writing to ask that you help by intervening in the issue of unsolicited phone calls. Our number is on tbe Do Not Call list. In tbe last two days we've received three such calls."

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QUESTIONS FOR THE RECORD
SENATOR CLAIRE MCCASKILL
SUBCOMMITTEE ON CONSUMER PROTECTION, PRODUCT SAFETY, AND INSURANCE
SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION
"STOPPING FRAUDULENT ROBOCALL SCAMS: CAN MORE BE DONE?"
JUNE 10, 2013

For Ms. Lois Greisman, Federal Trade Commission

Ms. Greisman, the FTC has essentially placed a call for help with robocalls. Then-FTC Chairman Jon Leibowitz noted last year at a summit on the issue, "Law enforcement alone can't stop the robocalls." No matter how many cases the FTC brings, the agency says there is not much more it can do from an enforcement perspective to abolish illegal robocalls. As a result, the Commission held a public competition to find a viable technological solution that could provide some level of defense against robocalls.

Q: Why do you think a technological solution is the best answer to this problem?

Q: The FTC selected three winners in its robocall challenge. Why were those three entrants chosen as winners? What about their submissions, compared to the rest, does the FTC believe will best limit fraudulent robocalls for America's consumers?

The United States Telecom Association, at the hearing, said its member companies work with various law enforcement agencies, including the FTC, to prosecute individuals and entities responsible for fraudulent robocalls.

Q: Would this be an accurate assessment of the industry from the FTC's point of view?

Q: What percent of the FTC's investigations into potential violations of your telemarketing and robocall rules are initiated by information voluntarily submitted by industry to your agency? Since the establishment of the National Do Not Call Registry, how many times have telecommunications providers alerted the FTC to potential violations of either your telemarketing rules or robocall rules?

The FTC and the FCC have clear rules establishing what is, and what is not, allowable when it comes to robocalls, and both agencies have taken enforcement actions to stop illegal robocalls. Yet despite all of these efforts, intrusive and fraudulent robocalls have proliferated. Technological solutions may very well provide the American public with relief, but I also think that there is no substitute for strong law enforcement. As such, I am interested in learning further about the FTC's and the FCC's efforts and what more can be done to stop illegal robocalls.

Q: What are the limitations your agency faces in bringing more enforcement cases? Is there a need for legislation to assist your efforts?

Senate Commerce Committee
Subcommittee on Consumer Protection, Product Safety, and Insurance
"Stopping Frandulent Robocall Scams: Can More Be Done?"
July 10, 2013

Questions for the Record
Senator Amy Klobuchar

Q: I want to applaud the FTC for undertaking the "Robocall challenge" as an innovative way for government to work with the private sector and software engineers to find solutions.

- Ms. Greisman, can you discuss the process for the challenge and how you chose the awardees? What is the next step for the FTC in encouraging getting these products to market and helping to fight fraud?

Q: Ms. Greisman and Mr. Bash, we know that technology will continue to evolve. How are the FTC and the FCC working to keep up with these evolutions in communications to protect consumers from future scamming operations?

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"Stopping Fraudulent Robocall Scams: Can More Be Done?" Questions for the Record
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2. In 2012, the Federal Trade Commission (FTC) challenged innovators to come up with a solution that would block illegal commercial robocalls on landlines and mobile phones. One of the proposed solutions creates a filtering system, similar to an email spam filter, that intercepts and filters out illegal robocalls using a technology that "blacklists" and "whitelists" phone numbers. The proposal envisions a consumer-facing system, however, others have suggested that a network-based system might be more efficient and less burdensome for consumers.

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Questions for Mr. Reilly Dolan, Acting Associate Director, Division of Financial Practices, Federal Trade Commission from Senator Toomey:

- States play an active role in regulating the consumer debt industry. The states' licensing system, the Nationwide Mortgage Licensing System (NMLS), allows the states to track licensees of all types from state-to-state on a nationwide basis. State regulators have begun using NMLS as the licensing platform for all types of non-depository financial service providers, including the Pennsylvania Department of Banking and Securities, which uses NMLS for licensing debt management companies.

I have co-sponsored legislation to enhance confidentiality and privilege for information shared among regulators in this system. Would it be beneficial to extend the privilege and confidentiality protections for mortgage-related information contained in the NMLS and which is shared hy state and federal regulators to information in the NMLS relating to all types of nonbanks?

Answer: I am not familiar with the specific confidentiality provisions in the NMLS or how state regulators are using the information. I agree, however, that regulators generally should properly safeguard any confidential information they receive, thereby promoting confidence by industry and ensuring public trust. With respect to the FTC's practices in that regard, as a general matter, when the FTC requests and obtains information from targets and third parties pursuant to Civil Investigative Demands, it handles the information consistent with its published policies and procedures for handling non-public information. Disclosure is permitted only pursuant to procedures for use set forth in the Commission's Rules of Practice or as set forth by statute. See 15 U.S.C. §§46 and 57b-2, and 16 C.F.R. §§4.9 – 4.11. The Commission generally does not require targets to produce privileged information. *See* 16 C.F.R. §2.11.

- I understand that the CFPB and the FTC have formed a debt collection working group to coordinate the respective activities between your agencies. Can you tell me more about this working group? Is this group considering how to pursue the bad actors without burdening legitimate businesses with undue regulatory requirements?

Answer: The FTC is primarily a law enforcement agency that takes legal action when the Commission has reason to believe that an entity has been engaging in deceptive or unfair acts or practices.

To coordinate such law enforcement efforts against debt collectors with the CFPB, which has concurrent law enforcement jurisdiction, staff-level FTC and CFPB attorneys have formed an informal working group. Staffs from the two agencies meet regularly to discuss matters related to the agencies' debt collection enforcement actions and the CFPB's examination authority, including current or upcoming investigations and examinations, enforcement actions, and enforcement or examination-related activities. These discussions generally are confined to ensuring the agencies do not engage in unduly duplicate investigations and examinations and to ensuring the staffs are consistent

in how we interpret existing laws. The working group generally does not discuss new regulatory requirements.

Apart from the two agencies' efforts to coordinate our law enforcement and supervision missions through the working group, the CFPB recently announced it intends to issue an Advance Notice of Proposed Rulemaking to implement the Fair Debt Collection Practices Act ("FDCPA"). Although the FTC has not had rulemaking authority to implement the FDCPA since its enactment in 1977, the FTC has a long history of enforcing the FDCPA and hosting informative workshops discussing hot debt collection topics. The FTC is likely to share its FDCPA enforcement experiences with the CFPB during the rulemaking process and comment on any regulatory proposals. In doing so, the FTC is likely to consider whether the proposals address problematic conduct without imposing undue regulatory burdens by considering whether they target unfair or deceptive acts or practices. It is well established that an act or practice is unfair if it causes or is likely to cause substantial consumer injury that is not reasonably avoidable by consumers and that is not outweighed by countervailing benefits to consumers or to competition. Likewise, an act or practice is deceptive if it is likely to mislead a consumer acting reasonably under the circumstances and the act or practice is material.

Senator Grassley's Written Questions for Judiciary Antitrust Committee Hearing "Standard Essential Patent Disputes and Antitrust Law," July 30, 2013

Questions for Ms. Munck

1. In a recent speech on patent assertion entities (PAEs) at the American Antitrust Institute, Chairwoman Ramirez stated that PAE patent demands can raise antitrust issues, "especially if the PAE is effectively acting as a clandestine surrogate for competitors." She also stated that "this emerging strategy allows operating companies to exploit the lack of transparency in patent ownership to win a tactical advantage in the marketplace that could not be gained with a direct attack." Do you share the Chairwoman's concerns about privateering, and would you expect the FTC to look more closely at privateering and its impact on licensing commitments? What further can the FTC do to curb the actions of patent trolls?

Yes, I believe that the FTC will continue to monitor Patent Assertion Entity activity, including potential privateering activity. When appropriate, the FTC will use its competition and consumer protection enforcement authority to address harmful PAE activity.

In addition, PAE activity is a suitable focus for Commission policy studies and competition advocacy. For example, patent system issues related to notice and remedies may facilitate PAE harms. The FTC will continue to recommend improvements to patent notice and remedies, together with other appropriate patent system reform, to address these issues going forward.

2. How do you ensure that FTC enforcement activities with respect to standard essential patents steer clear of price setting? How does the FTC avoid using its enforcement authority to favor one business model over another, or avoid picking winners and losers among standards?

The FTC uses its enforcement authority only when a majority of the Commission finds reason to believe there has been a violation of a law that the FTC enforces, and where an enforcement action is in the public interest. An enforcement action is in the public interest when there has been harm to competition or harm to consumers. By encouraging standard-setting organizations and firms to establish

independent third-party means to resolve FRAND disputes, the Commission can steer clear of price setting or favoring one competitor over another.

Senator Klobuchar's Questions for the Record
"Standard Essential Patent Disputes and Antitrust Law"

For Ms. Munck:

1) Some observers in the industry have suggested that standard setting organizations' IP policies should mandate some form of alternative dispute resolution for FRAND disputes, such as mandatory binding arbitration, before an injunction or an exclusion order can be sought. In other words, injunctions and exclusions orders should be reserved only for a truly unwilling licensee and, in the case of an exclusion order, for a party that can't be reached through the U.S. court system. What are your views on this suggestion?

I agree that a process that outlines independent third-party resolution of FRAND disputes, before an injunction or an exclusion order can be sought, is a useful tool to mitigate patent hold-up. The Commission outlined a similar process in the recent *In re Matter of Motorola Mobility, LLC* consent. There, the consent only allowed Google to seek injunctive relief or exclusion orders in the following narrowly defined circumstances: "(1) when the potential licensee is not subject to United States jurisdiction; (2) the potential licensee has stated in writing or in sworn testimony that it will not accept a license for Google's []RAND-encumbered SEPs on any terms; (3) the potential licensee refuses to enter a license agreement for Google's []RAND-encumbered SEPs on terms set for the parties by a court or through binding arbitration; or (4) the potential licensee fails to assure Google that it is willing to accept a license on []RAND terms."[1]

2) At the hearing, we discussed the patent holdup problem in context with individual SEP holders. I have heard concerns from a Minnesota company about similar patent holdup problems in the context of patent pools where FRAND commitments were made. Would this type of patent holdup raise antitrust concerns? Has the FTC reviewed current activities of patent pools and how they affect competition?

Patent pools are often formed when multiple patented technologies are needed to produce a standard product. As the FTC and DOJ recognized in our joint 2007 Report, patent pools can be an efficient way to minimize transaction costs for patent licenses.[2] Patent pools can also raise competitive concerns. For example, pools composed of pure substitute patents, (*i.e.* patents covering technologies that compete with each other) are more likely to harm consumers than pools composed of complementary patents (*i.e.* non-competing patents that cover separate

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[1] Analysis of Proposed Consent Order to Aid Public Comment, *In the Matter of Motorola Mobility LLC and Google Inc.*, F.T.C. File No. 121-0120 7 (January 3, 2013), available at http://www.ftc.gov/os/caselist/1210120/130103googlemotorolaanalysis.pdf.

[2] Fed. Trade Comm'n & U.S. Dep't of Justice, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* 64-66 (2007), *available at* http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf

aspects of a given technology).[3] I would be concerned if a patentee engaged in hold-up with respect to FRAND-encumbered patents in a patent pool because this behavior could undermine the pro-competitive value of patent pools. However, the antitrust risks associated with conduct by pool participants necessarily depend on the facts at issue, including the presence or absence of market power.

I believe that the Commission will continue to analyze competitive issues involving patent pools with these efficiencies and harms in mind.

[3] *Id.* at 66.

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Questions for the Record from
Judiciary Committee Ranking Member John Conyers, Jr.

15. **In closing its investigation earlier this year into allegations that Google engaged in anticompetitive conduct, the FTC concluded that there was at least some evidence that Google engaged in anticompetitive behavior - including, in this case, misappropriating or "scraping" content from rival websites and placing certain restrictions on advertisers. Notwithstanding this conclusion, the FTC accepted a set of non-binding and non-enforceable promises from Google to change its business practices.**

- **Why did the FTC choose to accept non-binding commitments from Google in this case?**

- **Generally speaking, what are the circumstances that would justify entering such an agreement as opposed to pursuing a consent order?**

The voluntary commitments made by Google should not be considered a precedent, but they were a good outcome for consumers under the specific circumstances of that case.

Our policy long has been – and under my leadership, will continue to be – that when a majority of Commissioners finds reason to believe that a law we enforce has been violated and enforcement would be in the public interest, any remedy should be embodied in a formal consent or adjudicated order.

In the Google matter, three of the Commissioners – myself included – were concerned that some of Google's conduct had the potential to restrict competition. A Commission majority did not, however, support an enforcement action on any of the allegations under investigation. Therefore, the Commission was not in a position to accept a formal consent agreement.

Questions for the Record from
Chairman Spencer Bachus
for the Hearing on "Oversight Hearing for the Antitrust Enforcement Agencies"

November 15, 2013

Questions for Chairwoman Ramirez

1. **In your letter responding to a number of leading Republicans on both the House and Senate Judiciary Committees calling for Section 5 guidance, you stated that the business community can gain sufficient guidance from the pleadings and settlements surrounding standalone Section 5 prosecutions. What is the basis for your confidence in this position, particularly since these lawsuits rarely reach the federal judiciary and often result in settlements?**

Even when the parties agree to settle "standalone" Section 5 charges, Federal Trade Commission documents associated with the settlement identify the conduct of concern and disclose the Commission's analysis of the relevant legal standard and its application to the facts. For instance, last June, the Commission issued a final order against Bosley, Inc., the nation's largest manager of medical and surgical hair restoration procedures, settling charges that it illegally exchanged competitively sensitive, nonpublic information about its business practices with one of its competitors, HC (USA), Inc.[1] From the public documents associated with that order, businesses could learn about the type of information exchanged between the competitors that created the competitive concern and the likely harm to competition caused by this conduct. As important, the Commission's order contains restrictions on Bosley's conduct needed to remedy the law violation, but specifically does not interfere with Respondent's ability to compete or prevent participation in legitimate industry practices, such as ordinary trade association or medical society activity. The Commission's statements and enforcement documents in each of our recent settlements of standalone Section 5 claims provide similar factually-grounded guidance as to how businesses can adjust their own behavior to comply with the law.[2]

2. **The FTC issued guidance on its authority regarding "consumer unfairness." Why wouldn't issuing Section 5 "unfair methods of competition" guidance be consistent with this precedent?**

The Commission has defined the contours of its Section 5 unfair methods of competition authority through its enforcement actions. Antitrust doctrine has always evolved through a common-law approach, particularly in complex areas where it is difficult to predict in advance the particular form that anticompetitive conduct may take.

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[1] *Bosley, Inc.*, No. C-4404 (F.T.C. June 5, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2013/06/130605aderansregisdo.pdf

[2] *See, e.g.*, *Motorola Mobility LLC*, No. C- 4410 (F.T.C. July 24, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2013/07/130724googlemotorolado.pdf; *Negotiated Data Solutions LLC*, No. C-4234 (F.T.C Sept. 23, 2008), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2008/09/080923ndsdo.pdf.

Under these circumstances, case-specific guidance, grounded in facts and sound economic theory, is the most useful form of guidance for the business community and its lawyers that is consistent with our mandate to protect consumers from unfair methods of competition. This common law approach is also consistent with the development of doctrine under other broad antitrust statutes such as the Sherman Act.

3. **Why did the FTC accept a non-binding agreement in the Google search case, in what circumstances will it accept such an agreement in the future, and does the deviation from customary practice have a precedential impact on future negotiations with parties?**

The voluntary commitments made by Google should not be considered a precedent, but were a good outcome for consumers under the specific circumstances of that case.

Our policy long has been – and under my leadership, will continue to be – that when a majority of Commissioners finds reason to believe that a law we enforce has been violated and enforcement would be in the public interest, any remedy should be embodied in a formal consent adjudicated order.

In the Google matter, three of the Commissioners – myself included – were concerned that some of Google's conduct had the potential to restrict competition. A Commission majority did not, however, support an enforcement action on any of the allegations under investigation. Therefore, the Commission was not in a position to accept a formal consent agreement.

4. **The number of independent physician practices is declining. Has the FTC examined whether this decline is associated with anti-competitive behavior occurring in the health care marketplace?**

There have been a number of physician practice consolidations in recent years, including acquisitions of independent physician practices. Such acquisitions can be procompetitive in certain instances and may result in cost efficiencies from, among other things, increased scale and risk sharing arrangements. In addition, certain physician practice acquisitions may improve quality of care – something that the Commission takes seriously when analyzing physician acquisitions. However, in some markets, acquisitions of physician practices can be anticompetitive. If a physician acquisition results in increased market power, for instance, by giving the new group undue leverage vis-à-vis health plans, the acquisition may increase prices to health care consumers.

The Commission has challenged acquisitions of providers where evidence demonstrated that the combination was likely to substantially lessen competition. For example, in August 2012, the Commission challenged Renown Health's acquisition of the two largest cardiology practices in the Reno, Nevada area. To settle FTC charges that the acquisitions reduced competition for adult cardiology services in the area, Renown agreed to release its staff cardiologists from "non-compete" contract clauses, allowing up to 10 of them to join competing cardiology practices. Similarly, just last week in a case brought by the Commission and the Idaho Attorney General, the District Court of Idaho

granted a permanent injunction to block St. Luke's Health System, Ltd.'s acquisition of Idaho's largest independent, multi-specialty physician practice group, Saltzer Medical Group P.A. According to the court, the combination of St. Luke's and Saltzer made St. Luke's the dominant provider in the Nampa area for primary care, giving it significant bargaining leverage to demand higher rates for health care services from health insurance plans. The Commission will continue to be vigilant, consistent with its mission, to prevent acquisitions among health care providers that threaten competition.

5. **As part of the FTC's Section 6(b) study of patent assertion entities and their impact on innovation and competition, will the Commission look into entities that offer litigation protection against patent assertion entities? Such companies seek a fee for membership with the promise that they will license patents to members and essentially protect them from litigation brought by patent assertion entities. Does the Commission plan to look into any potential business relationship between patent assertion entities and companies that offer "protection" against such entities?**

In September 2013, the Commission unanimously voted to issue a Federal Register Notice seeking public comment on a proposed study of PAE activity pursuant to the Commission's authority under Section 6(b) of the FTC Act. The Commission proposed this study, in part, because numerous studies demonstrate that PAEs are playing an increasing role in litigation. Litigation, however, is only part of the picture. Understanding what happens outside the courtroom, and inside PAE activity, would contribute substantially to the empirical landscape. The Commission received almost 70 comments in response to the Federal Register Notice. We are using these comments and our understanding of PAE activity to determine the appropriate subjects for the study. The Commission has not decided on the specific subjects of its 6(b) study, but is considering relevant aspects of patent assertion entity (PAE) activity.

6. **Recently, there have been a number of cases initiated against companies that fall below the Hart-Scott-Rodino statutory thresholds. How does the FTC determine whether to pursue below-threshold transactions, and how do you obtain information regarding the transactions?**

In passing the HSR Act, Congress determined not to require premerger notification for all mergers, believing that the burden of complying with the file-and-wait requirements was not justified for small deals or small parties. Nevertheless, even transactions that are not subject to the HSR reporting requirement can raise meaningful competitive concerns. HSR filing thresholds do not operate as an exemption from Section 7 of the Clayton Act, and both the FTC and the Department of Justice continue to identify and challenge unreported acquisitions that harm competition.

For non-reportable transactions, Commission staff learns of potentially problematic transactions through avenues such as media reports and customer and competitor complaints. The Commission has the tools it needs, including the power to issue subpoenas and CIDs, to investigate whether those transactions violate the antitrust laws, much as we learn of and investigate other kinds of conduct that may violate the laws we enforce.

7. **Is the FTC examining the competitive impacts of hospital "group purchasing organizations" or "GPOs"? Has the FTC examined whether there are any anticompetitive incentives created by GPOs being paid by suppliers and manufacturers?**

While I cannot discuss the details of any non-public investigations, the Commission is well aware of the concerns raised about the conduct of GPOs and has on a number of occasions examined complaints about GPO conduct. Determining whether any specific conduct is anticompetitive is a fact-specific inquiry requiring a careful examination of market circumstances. To date, the Commission has not charged a GPO with a violation of the laws we enforce.

As I noted during my testimony, certain complaints about conduct by GPOs appear to present problems that are not antitrust issues, such as concerns about possible conflicts of interest and the adequacy of the "anti-kickback" laws.

8. **Does the FTC intend to reevaluate the joint FTC/DOJ guidelines with respect to GPOs, since these guidelines were first issued nearly two decades ago? In particular, does the FTC intend to examine whether the "antitrust safety zone" created by the guidelines requires reevaluation?**

The FTC/DOJ Health Care Statements articulate and apply well-established principles developed by courts for the assessment of various types of conduct by competitors, principles that remain in force today. The antitrust safety zone contained in Statement 7 on Joint Purchasing Arrangements addresses only the formation of joint purchasing arrangements among health care providers. It does not prevent the FTC or DOJ from challenging anticompetitive conduct – such as exclusionary contracting practices – should they occur in connection with GPOs.

9. **On November 28, 2013, the Wall Street Journal published an article entitled "Strassel: Piano Sonata in FTC Minor" discussing the FTC's enforcement action against a group of piano teachers. How did the FTC prioritization of its enforcement actions result in the pursuit of an action against a group of piano teachers with few resources and ostensibly little impact on the overall economy? Have there been other actions instituted against similarly situated entities?**

On December 16, 2013, the Commission unanimously accepted for public comment consent agreements with two professional associations to address provisions in their code of ethics that inhibited competition among their members. The FTC has a long history of challenging these types of agreements among competitors that restrain trade and can lead to higher prices and reduced quality and choice.[3]

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[3] *See, e.g., Inst. of Store Planners*, No. C-4080 (F.T.C. May 30, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2003/05/ispcomplaint.pdf (challenging restraints on price competition); *Nat'l Acad. of Arbitrators*, No. C-4070 (F.T.C. May 30, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2003/05/ispdo.pdf (restraints on solicitation and advertising); *Am. Inst. for Conservation of Historic & Artistic Works*, No. C-4065 (F.T.C Nov. 1, 2002), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2002/11/aicdo.pdf (restraints on price competition); *Cmty.*

The Music Teachers National Association (MTNA) is an association that represents over 20,000 music teachers nationwide. The Commission charged that the MTNA and its members restrained competition through a code provision that made it an ethical violation for members to solicit students from rival music teachers. The MTNA did not provide the Commission with any credible evidence that the restriction had any offsetting procompetitive or efficiency enhancing value. The Commission's proposed order requires the association to stop restricting competition for students by declaring it unethical for its members to solicit teaching work from other music teachers. The order also requires the association to maintain an antitrust compliance program, and to stop affiliating with any association that it knows is restricting solicitation, advertising, or price-related competition among its members.

The second settlement was with the California Association of Legal Support Professionals (CALSPro), a professional association that represents 350 companies and individuals that provide legal support services in California. The Commission alleged that the CALSPro code of ethics contained provisions that unreasonably restrained competition by, among other things, prohibiting its members from offering discounted rates to rivals' clients, engaging in certain comparative advertising, and recruiting employees of competitors without first notifying the competitor. The proposed order requires that CALSPro cease and desist from restraining its members from engaging in price competition, solicitation of employees, or advertising, remove any statements inconsistent with the order from its organizational documents and implement an antitrust compliance program.

As with all Commission enforcement activity, our goal in these actions was to remedy any anticompetitive effects associated with the challenged behavior and to provide antitrust guidance in order to deter other professional trade organizations from imposing unjustified limits on competition. The Commission recognizes that professional associations like MTNA and CALSPro serve many important and procompetitive functions, including adopting rules governing the conduct of their members that benefit competition and consumers. But because trade organizations are pervasive throughout our economy, and are by their nature collaborations among competitors, the Commission believes enforcement activity in this area is important for consumers. The Commission will continue to be concerned with anticompetitive restraints imposed by such organizations under the guise of codes of ethical conduct.

Ass'ns Inst., 117 F.T.C. 787 (1994) (restraints on solicitation); *Nat'l Soc'y of Prof'l Eng'rs*, 116 F.T.C. 787 (1993) (restraints on advertising); *Nat'l Ass'n of Social Workers*, 116 F.T.C. 140 (1993) (restraints on solicitation and advertising); *Am. Psychological Ass'n*, 115 F.T.C. 993 (1992) (same).

Questions for the Record from
Ranking Member Steve Cohen

10. **There is increasing concern about the use of consumer data by data brokers, especially given that consumers typically have no direct interaction with these companies. Data brokers are compiling profiles with detailed personal information for specific, identifiable individuals – and some have expressed concern that these profiles could be used to deny consumers insurance, financial credit, educational opportunities, or jobs based on what could be inaccurate or incomplete data. Currently, the Commission is studying the data broker industry through its 6(b) authority. When can we expect the results of this study, and does the Commission have the resources it needs to continue focusing on this industry?**

The Commission has deployed significant resources to address privacy issues raised by the data broker industry, which operates with minimal consumer awareness. In recent years, we have brought enforcement actions against data brokers[4] and issued a privacy report advocating a range of best practices by the data broker industry. In our report, we also urged Congress to enact legislation to improve the transparency of data broker practices, including, for example, by ensuring that consumers can opt out of having data brokers sell their information for marketing purposes.[5]

As you note, we are also conducting a study of the data broker industry. Pursuant to our authority under Section 6(b) of the FTC Act, the Commission issued orders requiring nine data brokers to provide information regarding the nature and sources of consumer data they collect, how they use, maintain, and disseminate the information, and the extent to which the data brokers allow consumers to access and correct their information or to opt out of having their personal information sold. The Commission is working on completing its report; we expect to release it in the coming months.

11. **In discussing standard essential patents, you noted the dangers of exclusion orders from the International Trade Commission (ITC) for infringement of a RAND-encumbered standard essential patent (SEP). Are you concerned that the ITC may not share your view and the view of Justice Department and the Patent and Trademark Office that unreasonable licensing terms for SEPs harm competition? While the President can overturn an exclusion order, should there be additional checks? If so, what should Congress do to address the situation?**

As the Commission has testified in the past, the threat of an ITC exclusion order for infringement of a standard-essential patent can lead to patent hold-up, which distorts incentives to innovate and compete in markets for standard-compliant products and

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[4] *See, e.g.*, *Equifax Info. Servs. LLC*, No. C-4387 (F.T.C. Mar. 15, 2013) (consent order); *United States v. Spokeo, Inc.*, No. CV12-05001 (C.D. Cal. June 12, 2012) (stipulated final order); *United States Search, Inc.*, No. C-4317 (F.T.C. Mar. 14, 2011) (consent order).

[5] *See* FED. TRADE COMM'N, PROTECTING CONSUMERS IN AN ERA OF RAPID CHANGE 64-70 (Mar. 2012), *available at* http://www.ftc.gov/os/2012/03/120326privacyreport.pdf.

technologies.[6] Consequently, I do not believe an exclusion order is appropriate for infringement of a F/RAND-encumbered patent except in limited circumstances, such as where the putative licensee is unwilling or unable to accept a F/RAND license.

Last June, the ITC issued a limited exclusion order and a cease and desist order against Apple for infringement of a Samsung F/RAND-encumbered SEP without first finding that Apple was an unwilling licensee. Over Commissioner Dean Pinkert's dissent, the ITC concluded that an exclusion order was not contrary to the public interest and was instead required by statute and relevant precedent given the factual record. In August, the USTR, acting as the President's designee, overturned the ITC's decision based on policy considerations related to "competitive conditions in the U.S. economy and the effect on U.S. consumers."

I believe that the USTR's decision serves the interests of competition and consumers. I also continue to believe that the ITC can use its public interest authority to deny exclusion orders for SEPs in appropriate circumstances. In light of the recent USTR veto, I expect the ITC will give this issue serious additional consideration going forward. But if the ITC continues to conclude that it does not have the flexibility to apply the appropriate analysis, Congress may wish to consider whether legislation to provide that flexibility is warranted.

12. **What role does the FTC play with respect to international harmonization of antitrust law and policy?**

The FTC plays a leading role in promoting convergence towards international best practices in antitrust law enforcement and policy. Approximately 130 jurisdictions enforce a variety of competition laws, and the FTC works closely with our foreign counterparts in multilateral fora to promote cooperation and convergence on sound competition policy across jurisdictions. Consistency of approaches to competition law, policy, and procedures increases the predictability and the effectiveness of antitrust enforcement and lowers the costs of doing business in the global economy. The FTC uses all available opportunities to facilitate dialogue and convergence toward sound, economically-based competition policy and enforcement.

Bilaterally, the FTC promotes convergence through formal and informal bilateral working arrangements, high-level consultations, and our technical assistance program. In FY 2013, the FTC provided policy advice to foreign competition agencies and in multilateral fora in over 100 instances through consultations, written submissions, or comments. The FTC's policy advice is highly regarded and sought after by new and more experienced competition agencies. We also held bilateral consultations with senior officials from several competition agencies during the past year and will hold a trilateral meeting with the heads of the Canadian and Mexican agencies in mid-February.

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[6] *See* Prepared Statement of the FTC, *Oversight of the Impact on Competition of Exclusion Orders to Enforce Standard-Essential Patents: Hearing before the S. Comm. On the Judiciary,* 112th Cong. (July 11, 2012), *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-concerning-oversight-impact-competition-exclusion-orders/120711standardpatents.pdf.

Cooperation on cases under concurrent review not only reduces the cost and uncertainty of global enforcement for business, it provides the agencies with additional opportunities to move towards convergence on key policy and procedural issues.

The FTC also has developed working relationships with important new competition agencies in countries such as China and India. Early this year I participated in a high-level meeting with China's three competition agencies as part of a joint FTC and DOJ delegation, at which we addressed antitrust policy and practice issues, including transparency and procedural fairness in antitrust investigations, merger review timing and remedies, and antitrust issues that involve intellectual property rights. We plan to follow up with additional exchanges, visits, and seminars with our Chinese counterparts. Recognizing that differences in the economic and legal contexts impact the extent to which we can achieve convergence, we stress the value of independent competition enforcement based on consumer welfare rather than other social and industrial policies. The FTC conducts its competition work in China in consultation with other interested U.S. agencies.

Similarly, in November 2013, I joined FTC and DOJ staff for a bilateral meeting with the Competition Commission of India and representatives of the Ministry of Corporate Affairs. We also met with members of the local bar and the Indian Institute for Corporate Affairs, among others. Officials and the local competition community are very interested in learning more about how the U.S. antitrust agencies apply U.S. antitrust laws and in furthering the development of sound antitrust laws and enforcement in India. FTC staff also conducted a training session on analyzing competition in high tech sectors for the CCI as well as a workshop with the Indian Institute for Corporate Affairs in December, and expects to hold additional workshops later this year.

The FTC's work toward international convergence benefits American consumers and businesses through more effective and efficient competition law enforcement, both domestically and abroad. The FTC remains committed to working towards even greater convergence of competition law and policies.

13. **According to a GAO study on group purchasing organizations (GPOs), "in 2007, the six largest GPOs by reported purchasing volume together accounted for almost 90 percent of all hospital purchases nationwide made through GPO contracts." Allegations have been raised regarding GPOs engaging in anticompetitive conduct that has prevented innovative medical device technologies from accessing the market, harmed competition, and increased prices for medical technology. Commentators have expressed concerns that the fact that GPOs are paid by the suppliers and manufacturers create an inherent conflict of interest in which GPOs are incentivized to contract with the largest suppliers who will pay them the largest fees, rather than contracting for the best products at the lowest price.**

What is your view of the competitive effects of hospital GPOs? Do you agree with those who believe that their practices often harm competition by making it difficult for innovative, non-incumbent hospital suppliers and manufacturers to enter the market? Are you concerned with the potential conflict of interest created by GPOs

being paid by suppliers and manufacturers? Do the joint FTC/DOJ healthcare guidelines need reexamination with respect to GPOs?

The Commission is well aware of the concerns raised about the conduct of GPOs and has on a number of occasions examined complaints about their conduct. Determining whether any specific conduct is anticompetitive is a fact-specific inquiry requiring a careful examination of market circumstances. To date, the Commission has not charged a GPO with a violation of the laws we enforce.

As I noted in my testimony, certain complaints about conduct by GPOs appear to present problems that are not antitrust issues, such as concerns about potential conflicts of interest and the adequacy of the "anti-kickback" laws.

The FTC/DOJ Health Care Statements articulate and apply well-established principles developed by courts for the assessment of various types of conduct by competitors, principles that remain in force today. The antitrust safety zone contained in Statement 7 on Joint Purchasing Arrangements addresses only the formation of joint purchasing arrangements among health care providers. It does not prevent the FTC or DOJ from challenging anticompetitive conduct – such as exclusionary contracting practices – should they occur in connection with GPOs.

14. **My colleague, Representative Chris Van Hollen, has raised concern that the proposed $1.4 billion merger between Steward Enterprises - the Nation's largest funeral home chain - and Service Corporation International (SCI) - the second largest - may threaten to eliminate competition in the funeral services market in the Washington, D.C. area. He is particularly concerned that the impact on the Greater Washington Jewish community could be devastating because the combined company would control all Jewish funeral businesses in the area except one.**

SCI, which charges $6,256 on average for funerals excluding casket and cemetery plot, owns Jewish funeral homes Danzansky-Goldberg Memorial Chapel and Sagel Funeral Direction. Stewart Enterprises owns Hines Rinaldi Funeral Home, which provides the only price competition to the SCI homes. The Silver Spring, MD-based Hines Rinaldi has a contract with the Jewish Funeral Practices Committee of Greater Washington, a group composed of 48 local synagogues, pursuant to which it provides traditional Jewish funerals for less than $2,000. There is concern that a merger between these two funeral home owners will result in no low-priced alternative for Jewish funerals in the Washington area.

Some have proposed that one option would be to require the divestment of the Hines Rinaldi home as part of the merger in order to preserve competition and consumer choice.

The proposed merger may seriously harm Representative Van Hollen's constituents. While I understand that the FTC's review of the proposed merger is ongoing, would such divestment be a reasonable possibility?

On December 23, 2013, the Commission voted unanimously to accept a proposed consent order requiring SCI to divest 53 funeral homes and 38 cemeteries to resolve concerns that its proposed acquisition of Stewart is likely to substantially lessen competition for funeral and cemetery services in 59 communities. As part of its investigation, the Commission also examined whether, in certain local markets, funeral homes and cemetery-service locations cater to specific populations by focusing on the customs and rituals of a particular religious, ethnic, or cultural heritage group, such that the provision of funeral or cemetery services targeted to such populations would constitute a distinct market. As one example, the Commission found that the provision of funeral home services to Jewish families in the Washington D.C./Maryland suburbs was one such local market, and the proposed order requires SCI to divest funeral home assets to preserve competition in this market.

Under the terms of the proposed consent agreement, SCI is required to hold separate the assets to be divested and maintain the viability of those assets as competitive operations until each facility is transferred to a Commission-approved buyer. The proposed order also contains a number of provisions to ensure that competition continues until a new buyer takes over the operations and can quickly and fully replicate the competition that would have been eliminated by the merger.

Office of the Secretary

Correspondence Referral

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Today's Date: 02/10/14

Reference Number: 14009670

Type of Response (or) Action:

Request for Information

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Action: Other

Subject of Correspondence:

QFRs from November 15, 2013 Antitrust Oversight Hearing

Author:

Representative John Conyers

Representative Spencer Bachus

Representative Steve Cohen

Representing:

Copies of Response To:

Deadline:

02/10/14

Copies of Correspondence To:

Organization Assigned:

ACTION LOG

Date Received	FTC Org. Code	Assignment To:	Date Assigned	Action Required
		Edith Ramirez		

Written Questions Submitted by Senator Kelly Ayotte to Jessica Rich

Question 1. Earlier this year, FTC Commissioner Julie Brill called upon state AGs to take a more active role in investigating and holding accountable data brokers for violations of the Fair Credit Reporting Act. Can you talk about the role of state law enforcement officials in this field? Does your agency work closely with your state law enforcement counterparts on pursing privacy and marketing complaints?

Answer: The FTC has consistently treated the Fair Credit Reporting Act (FCRA) as an enforcement priority. It has brought almost 100 cases alleging violations of the FCRA, obtaining in excess of $30 million in civil penalties. State attorneys general (AG) also have a role to play in enforcing the FCRA. Under section 621 of the FCRA, state AGs can bring an FCRA enforcement action, so long as they provide the FTC and the Consumer Financial Protection Bureau with advance notice; the FTC has the right to intervene in such matters. This provision ensures that states coordinate their FCRA enforcement efforts with the appropriate federal regulators. In addition, we work very closely with the states to educate identity theft victims of their rights under the FCRA. Our Tax Identity Theft Awareness week, involving multiple outreach events across the country, is a good example of our collaborative efforts with states to protect consumers in this area. ***See*** **ftc.gov/taxidtheft.**

Outside the FCRA, the FTC and state AGs cooperate often on privacy and security and related marketing investigations. One notable example is the action the FTC brought with 35 state AGs against LifeLock for deceptive claims about the effectiveness of LifeLock's identity theft services and its security measures. This 2010 action is one of the largest FTC-state coordinated privacy-related settlements on record. The FTC has also pursued several Do Not Call privacy cases with state AGs serving as co-plaintiffs, including enforcement actions brought against Dish Network, LLC, United States Benefits, LLC and Worldwide Info Services, Inc. In addition, the FTC participates in monthly telephone conferences with members of the National Association of Attorneys General's Do Not Call working group. The FTC continues to coordinate with state AGs on a variety of law enforcement investigations involving privacy and security in order to avoid duplication of efforts and ensure appropriate and responsible allocation of enforcement resources.

Question 2. When we look at current federal law governing data brokers, we have Fair Credit Reporting Act, Graham-Leach-Bliley, HIPPA, Children's Online Privacy Protection Act, and Electronic Communications Privacy Act. Plus there are 50 AGs policing behavior and activity. In addition to that, we have brokers touting their aggressive self-regulatory policies. Can you address specifically what more legislation, mandates or regulations you think we need? Some have argued that before we add more laws and/or regulations to the books, we should enforce the ones we have.

Answer: While these statutes all provide important protections for consumer data, they have limitations. Gramm-Leach-Bliley, for example, applies only to financial institutions; HIPAA covers only medical records maintained by specifically defined medical providers; the Children's Online Privacy Protection Act does not cover data collection or use for

individuals age 13 and over; and the Electronic Communications Privacy Act is focused on government access to electronic data. Similarly, as we explained in our March 2012 report *Protecting Consumer Privacy in an Era of Rapid Change; Recommendations for Businesses and Policymakers* (Privacy Report), the Fair Credit Reporting Act covers only some data broker activities. The FCRA generally does not cover brokers that maintain data for marketing purposes and for other non-marketing purposes, such as to locate people or detect fraud.

The Commission agrees that self-regulation can be an effective way to protect consumer interests while promoting innovation. The Commission has long supported robust, enforceable self-regulatory mechanisms established by industry to protect consumers. As we noted in our Privacy Report, however, self-regulatory efforts hy the data broker industry have lagged. The Commission has monitored data brokers since the 1990's. In 1997, the Commission held a workshop to examine database services used to locate, identify, or verify the identity of individuals, referred to at the time as "individual reference services." The workshop prompted industry members to form the self-regulatory Individual Reference Services Group (IRSG). The Commission subsequently issued a report on the workshop and the IRSG in which it commended the progress made by the industry's self-regulatory programs, but noted that the industry's efforts did not adequately address the lack of transparency of data broker practices. Although iudustry ultimately terminated the IRSG, a series of public breaches – including one involving ChoicePoint – led to renewed scrutiny of the practices of data brokers. The Privacy Report noted that the industry has continued to operate since then with a lack of transparency. To address this concern, the Privacy Report expressed support for legislation that would give consumers access to information held by data brokers.

Subcommittee on National Security and International Trade and Finance
Safeguarding Consumers' Financial Data
February 3, 2014

Questions for Ms. Jessica Rich, Director, Bureau of Consumer Protection, Federal Trade Commission, from Senator Kirk:

1. **Banks are bound by regulations (the Graham-Leach-Bliley Act and Reg. E to name a few) regarding how to store consumer data, and are regularly examined by federal regulators to ensure ongoing and accurate compliance. Regulators have a number of enforcement mechanisms in place to deal with banks found to be non-compliant, such as requiring prompt corrective action for material violations—even before a breach occurs. What are the rules binding merchants to protect consumer information? How are they monitored and enforced?**

The FTC enforces Section 5 of the FTC, which Act prohibits unfair or deceptive acts or practices. A company acts deceptively if it makes materially misleading statements or omissions about data security, and such statements or omissions are likely to mislead reasonable consumers. Further, a company engages in unfair acts or practices if its data security practices cause or are likely to cause substantial injury to consumers that is neither reasonably avoidable by consumers nor outweighed by countervailing benefits to consumers or to competition. The FTC can bring an enforcement action against a company engaged in deceptive or unfair practices, either through administrative adjudication or in federal district court. Through these mechanisms, the FTC can obtain injunctive relief, such as prohibitions on misrepresentations, additional disclosures, implementation of comprehensive data security programs, and outside third party audits. .

Merchants may also be subject to other federal laws that contain data security requirements. For example, the Fair Credit Reporting Act ("FCRA") imposes safe disposal obligations on any entity that maintains consumer report information. The FTC's Safeguards Rule, which implements the Gramm-Leach-Bliley Act, requires certain non-bank financial institutions to implement a comprehensive information security program. And, the Children's Online Privacy Protection Act ("COPPA") requires reasonable security for children's information collected online. In addition to the injunctive relief discussed above, the FTC can also seek civil penalties against merchants violating the FCRA and COPPA. To date, the Commission has settled 50 data security cases using its authority.

Beyond federal laws, state data security and breach notification laws may place additional requirements on merchants. And, merchants may also be subject to self-regulatory standards that place additional security requirements on data they maintain.

2. There has been a 30 percent increase in data breaches from 2012 to 2013. Clearly, these criminals are getting more sophisticated—but because the majority of these breaches are occurring within the healthcare space and with retailers, is there reason to believe more should be done in these spaces to protect consumers?

Yes – companies should ensure that they have sound information security practices. They can start by doing a thorough risk assessment of their security practices for managing personal information and then designing a security program to control and limit these risks. This should be done in all areas of a company's operations and not just its computer networks. Many breaches we have seen have not involved high-tech hacking or other sophisticated techniques. Some occurred because companies did not do background checks on employees with access to personal information, did not manage the termination of an employee well, or did not properly secure or dispose of paper records. In other cases, companies have failed to implement basic technical security measures such as requiring strong passwords, encrypting sensitive information, or updating security patches.

The Commission's Safeguards Rule under the Gramm-Leach-Bliley Act provides a good roadmap as to the procedures and basic elements necessary to develop a sound security program. Although it applies only to non-bank financial institutions, we believe it provides helpful guidance to other companies as well.

Finally, as discussed in more detail below, enacting a federal data security and data breach notification law would help to ensure better data security practices, primarily by imposing civil penalties against companies that do not maintain reasonable security or do not send appropriate breach notices to consumers. Civil penalties can help further deter lax data security and breach notification practices.

3. What additional authorities—such as additional monitoring, increased penalties for non-compliance, etc. - should we give to the FTC have to be more effective?

The FTC supports federal legislation that would (1) strengthen its existing authority governing data security standards on companies and (2) require companies, in appropriate circumstances, to provide notification to consumers when there is a security breach. Legislation in both areas – data security and breach notification – should give the FTC the ability to seek civil penalties to help deter unlawful conduct, rulemaking authority under the Administrative Procedure Act, and jurisdiction over non-profits. Under current laws, the FTC only has the authority to seek civil penalties for data security violations with regard to children's online information under COPPA or credit report information under the FCRA. To help ensure effective deterrence, we urge Congress to allow the FTC to seek civil penalties for all data security and breach notice violations in appropriate circumstances. Likewise, enabling the FTC to bring cases against non-profits, such as universities and health systems, would help ensure that

whenever personal information is collected from consumers, entities that maintain such data adequately protect it. Finally, rulemaking authority under the Administrative Procedure Act would enable the FTC to respond to changes in technology in implementing the legislation.

4. **Do you feel that having a Merchant ISAC would be helpful in ensuring information about malware is quickly communicated to retail groups and others so that additional precautions can be taken?**

In light of the recent data breaches at a number of large retailers, this is a particularly appropriate time to evaluate whether more can be done to secure consumers' information. Better information sharing, such as through ISACs, can be part of the solution. ISACs enable companies to pool information about security threats and defenses so that they can prepare for new attacks and quickly address potential vulnerabilities. This kind of information is valuable, and we are committed to working with retail businesses and associations to discuss these issues and to explore the formation of a Merchant ISAC, or similar organization.

Subcommittee on National Security and International Trade and Finance
Safeguarding Consumers' Financial Data
February 3, 2014

Questions for Ms. Jessica Rich, Director, Bureau of Consumer Protection, Federal Trade Commission, from Senator Kirk:

1. Banks are bound by regulations (the Graham-Leach-Bliley Act and Reg. E to name a few) regarding how to store consumer data, and are regularly examined by federal regulators to ensure ongoing and accurate compliance. Regulators have a number of enforcement mechanisms in place to deal with banks found to be non-compliant, such as requiring prompt corrective action for material violations—even before a breach occurs. What are the rules binding merchants to protect consumer information? How are they monitored and enforced?

2. There has been a 30 percent increase in data breaches from 2012 to 2013. Clearly, these criminals are getting more sophisticated—but because the majority of these breaches are occurring within the healthcare space and with retailers, is there reason to believe more should be done in these spaces to protect consumers?

3. What additional authorities—such as additional monitoring, increased penalties for non-compliance, etc. - should we give to the FTC have to be more effective?

4. Do you feel that having a Merchant ISAC would be helpful in ensuring information about malware is quickly communicated to retail groups and others so that additional precautions can be taken?

Office of the Secretary

Correspondence Referral

Remember to Designate FOIA Status

Today's Date: 03/06/14

Reference Number: 14009783

Type of Response (or) Action:
Request for Information

Date Forwarded:
03/06/14

Action: Information (No action required)

Subject of Correspondence:

Responses to and Incoming QFRs from Chairman Tim Johnson, Arising from Feb 3 Hearing

Author:
Senator Tim Johnson

Representing:

Copies of Response To:
Office of Public Affairs (Press Office)
Office of Congressional Relations - (0309)
Office of the Secretary

Copies of Correspondence To:
Office of the Chairman
Office of Commissioner Ohlhausen
Office of Commissioner Wright
Office of Commissioner Brill
Office of the Executive Director
Office of the General Counsel

Deadline:
03/06/14

Organization Assigned:

ACTION LOG

Date Received	FTC Org. Code	Assignment To:	Date Assigned	Action Required
		Jessica L. Rich		

EXPEDITE

United States Senate

COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS

WASHINGTON, DC 20510-6075

February 10, 2014

Ms. Jessica Rich
Director
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580

Dear Ms. Rich:

Thank you for testifying before the Committee on Banking, Housing, and Urban Affairs Subcommittee on National Security and International Trade and Finance at our hearing on February 3, 2014 entitled *"Safeguarding Consumers' Financial Data."* In order to complete the hearing record, we would appreciate your answers to the enclosed questions as soon as possible. When formatting your response, please repeat the question, then your answer, single spacing both question and answer. Please do not use all capitals.

Send your reply to Ms. Dawn L. Ratliff, the Committee's Chief Clerk. She will transmit copies to the appropriate offices, including the Committee's publications office. Due to current procedures regarding Senate mail, it is recommended that you send replies via e-mail in a MS Word, WordPerfect or .pdf attachment to Dawn_Ratliff@banking.senate.gov.

If you have any questions about this letter, please contact Ms. Ratliff at (202)224-3043.

Sincerely,

Tim Johnson
Chairman

TJ/dr

14010274

SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION
"PROTECTING PERSONAL CONSUMER INFORMATION FROM CYBER ATTACKS AND DATA BREACHES"
MARCH 26, 2014

QUESTIONS FOR THE RECORD
CHAIRMAN JOHN D. ROCKEFELLER IV

QUESTIONS FOR CHAIRWOMAN EDITH RAMIREZ:

Question 1. Senators Feinstein, Pryor, Nelson, and I have introduced S. 1976, the Data Security and Breach Notification Act of 2014. The bill would, among other things, require entities that maintain personal information on consumers to establish protocols that secure information. The FTC would be tasked with issuing regulations that detail the statutory scope of this mandate.

The FTC has a long history of using its existing authority under Section 5 of the FTC Act to pursue companies that fail to adequately protect consumers' personal information. The agency has also called for data security legislation.

> *Question 1a.* Given its success with using Section 5, please explain why the agency sees the need for data security legislation such as S. 1976.

The FTC supports federal legislation such as S. 1976 that would (1) strengthen its existing authority governing data security standards on companies and (2) require companies, in appropriate circumstances, to provide notification to consumers when there is a security breach. While the majority of states have data breach notification laws, few have specific laws requiring general data security policies and procedures. Breach notification and data security standards at the federal level would extend notifications to all citizens nationwide and create a strong and consistent national standard that would simplify compliance by businesses while ensuring that all American consumers are protected.

Specifically, the FTC supports legislation that would give the Commission the authority to seek civil penalties to help deter unlawful conduct, jurisdiction over non-profits, and rulemaking under the Administrative Procedure Act. We have urged Congress to allow the FTC to seek civil penalties for all data security and breach notice violations in appropriate circumstances to help ensure effective deterrence. In addition, enabling the FTC to bring cases against non-profits – such as educational institutions and health facilities, which have been the subject of a number of breaches – would help ensure that consumer data is adequately protected regardless of what type of entity collects or maintains it.

Finally, rulemaking authority under the Administrative Procedure Act would enable the FTC to respond to changes in technology when implementing the legislation. For example, whereas a decade ago it would be both difficult and expensive for a company to track an individual's precise geolocation, the explosion of mobile devices has made such information readily available. As technology and business models change and new forms

of consumer data can be used to perpetrate identity theft, fraud, and other types of harm, APA rulemaking authority would help ensure that the law is kept up to date.

Questions for the Record -- Ranking Member Thune
Hearing: Protecting Personal Consumer Information
From Cyber Attacks and Data Breaches
March 26, 2014

To Chairwoman Ramirez:

Question 1:

In your testimony, you reference "geolocation information" as a rapidly emerging technology. The FTC has also referred previously to "precise geolocation data," for instance in a 2012 Commission report, proposing to protect the privacy of sensitive data including "precise geolocation data."

In the 2012 report, the FTC recommended that, before any firm could collect, store or use such data, it would be required to "provide prominent disclosures and obtain affirmative express consent before using data in a manner materially different than claimed at the time of collection." This sounds reasonable in certain circumstances. However, the Commission did not define the term "precise geolocation data." The Commission does advise that geolocation data that cannot be reasonably linked to a specific consumer would not trigger a need to provide a consumer protection mechanism, and further advises that if a firm takes steps to de-identify data, it would not need to provide this mechanism. However, because the FTC does not define relevant terms, I have heard that there is some concern for how practitioners in the mapping and surveying fields can comply with the guidance. Specifically, some stakeholders are concerned that a private firm would need to get a citizen's approval before developing mapping for an E-911 and emergency response management system.

A. What does the FTC consider to be "precise geolocation data"?

Precise geolocation data includes any information that can be used to pinpoint a consumer's physical location. For example, many mobile applications ("apps") collect a user's longitude and latitude coordinates, which allows them to translate a user's exact location on a map. It does not include general location data, such as a consumer's zip code, city, or town. In the context of the Children's Online Privacy Protection Act (COPPA), the statute and the Commission's COPPA Rule require parental consent for the collection of geolocation information sufficient to identify street name and name of city or town.

B. When mapping for an E-911 or emergency response management system, what level of de-identification is needed? Does a company need to secure everyone's prior approval, or else redact from the map every citizen for whom they did not get prior consent, when mapping for an E-911 or emergency response management system?

In its 2012 Privacy Report, the Commission set forth a privacy framework that calls on companies to incorporate privacy by design, simplified consumer choice, and increased transparency into their business operations. It is important to note that the framework

is a voluntary set of best practices designed to assist companies as they operationalize privacy and data security practices within their businesses. It neither imposes new legal obligations, nor is it intended as a template for law enforcement.

The framework calls on companies to offer an effective consumer choice mechanism unless the data practice is consistent with the "context of the interaction" between the consumer and the company. Under this approach, whether a company should provide choice "turns on the extent to which the practice is consistent with the context of the transaction or the consumer's existing relationship with the business, or is required or specifically authorized by law."[1] Mapping for an E-911 or emergency response management system would generally fall within the context of the interaction, and therefore companies that collect and use of geolocation information for these purposes do not need to provide a consumer choice mechanism.

C. I understand the Commission received significant public comment on this issue from engineers, architects, planners, surveyors, mappers and the Federal Geographic Data Committee, which represents federal mapping agencies. Can you tell me what the FTC's thinking is on this issue, and what its plans are to address the stakeholders' concerns?

When members of the geospatial industry collect addresses, parcel information, or other geolocation or survey data that is tied to public land records, this practice would generally fall within the "context of the interaction" standard. As any consumer who has purchased a house knows, public land record data is collected, used, and linked to specific consumers as a matter of course in connection with real estate transactions as well as property tax assessments and similar purposes. Accordingly, companies that collect and use this data for these purposes would generally not need to provide a consumer choice mechanism.

[1] FEDERAL TRADE COMMISSION, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE 38-39 (Mar. 2012).

Questions for the Record – Senator Ayotte
Hearing: Protecting Personal Consumer Information
From Cyber Attacks and Data Breaches
March 26, 2014

To Chairwoman Ramirez:

Question 1:

Earlier this year, the FTC testified before the Senate Banking Committee on safeguarding consumers when there is a security breach. What precisely triggers notification? There are 46 different state laws. In your opinion, what should be the threshold warranting a notification? Since the combination of certain types of personal information is more sensitive than each piece individually, what type of information being breached should warrant a notification to consumers?

It is important for both consumers and businesses that the trigger for breach notification is balanced. We want to ensure that consumers learn about breaches that could result in identity theft, fraud, or other harm so they can take steps to help protect themselves, but we do not want to notify consumers when the risk of harm is negligible, as over-notification could cause consumers to become confused or to become numb to the notices they receive.

Consumers should be given notice when information is breached that could be misused to harm consumers. At a minimum, companies should notify consumers of a breach of Social Security numbers because this information can be used to commit identity theft, even if not paired with an individual's name and address. Similarly, an account username and password can be used to gain access to an account, even if the thief does not have the name of the account holder. Additionally, in the event of changing technology or business models, the FTC should be able to exercise rulemaking authority to modify the definition of personal information.

I am happy to work with the Committee as it considers legislation on this important matter.

Question 2:

You testified regarding your important work in civil law enforcement against unfair or deceptive acts in data security practices. Is it safe to assume that you believe the Commission has existing authority to pursue enforcement actions against private businesses that fail to adopt reasonable data security practices?

Yes. The Commission has authority to challenge companies' data security practices that are unfair or deceptive under Section 5 of the FTC Act, and we have used this authority to settle 52 data security cases to date. In addition, Congress has given the FTC authority to bring data security enforcement actions against non-bank

financial institutions under the Gramm-Leach-Bliley Act, against consumer credit reporting agencies under the Fair Credit Reporting Act, and against websites and online services directed at children under the Children's Online Privacy Protection Act.

The Commission has called for data security legislation that would strengthen its existing authority. For example, we currently lack authority under Section 5 to obtain civil penalties, an important remedy for deterring violations. Likewise, enabling the FTC to bring cases against non-profits, which have been the source of a number of breaches, would help ensure that whenever personal information is collected from consumers, entities that maintain such data take reasonable measures to protect it.

Question 3:

What additional tools do law enforcement need to share information about ongoing threats and attacks with the private sector?

Information sharing is an important part of the fight against those who attempt to exploit consumers' personal information. Information exchanges such as Information Sharing and Analysis Centers (ISAC) enable companies to pool information about security threats and defenses so that they can prepare for new kinds of attacks and quickly address potential vulnerabilities. ISACs may also share information with law enforcement agencies, and vice-versa. The FTC is considering, at the request of members of Congress, the formation of an ISAC to enable retailers to share information. We have begun consulting with other ISACs and industry groups to explore the formation of such a group.

Questions for the Record – Senator Fischer
Hearing: Protecting Personal Consumer Information
From Cyber Attacks and Data Breaches
March 26, 2014

To Chairwoman Ramirez:

Question 1:

In your testimony, you state that "having a strong and consistent national requirement would simplify compliance by businesses while ensuring that all consumers are protected." Do you believe preempting state laws in favor of a strong national requirement would benefit, not harm, consumers?

I support a federal data security and breach notification law that would preempt state law, but only if such a standard is sufficiently strong and the states are given the ability to enforce the law. If a consistent nationwide standard came at the expense of weakening existing state legal protections for consumers' information, I would not support the law.

Question 2:

Would a uniform federal data breach notification law enforced by the Commission, as well as states attorneys general, provide a significantly greater level of protection for consumers than currently exists?

While the majority of states have data breach notification laws, few have specific laws requiring general data security policies and procedures. Breach notification and data security standards at the federal level would extend notifications to all consumers nationwide and create a level playing field so that businesses operating in numerous states can apply one standard. A federal law could create uniform protections for all American consumers.

Question 3:

Many different players in the Internet ecosystem increasingly collect and store the same or similar information. Should they all be subject to the same standards for data security?

All companies that collect and handle sensitive consumer information should be required to implement reasonable data security measures. We believe that reasonableness is the appropriate standard because it allows a company flexibility to develop a data security program based on factors such as the sensitivity and volume of consumer information it holds; the size and complexity of its data operations; and the cost of available tools to improve security and reduce vulnerabilities. The

Commission has emphasized a process-based approach to data security that includes designating an individual or individuals responsible for data security; conducting risk assessments; designing a security program to address risks, including administrative, physical, and technical safeguards; and adjusting the program to address changes.

Question 4:

In your written testimony, you express concern about data security legislation's ability to keep pace with technology. Would a "reasonableness" standard help address that concern because what is reasonable today may not be reasonable tomorrow as technology evolves?

That is correct. The Commission's reasonableness standard and emphasis on a process-based approach to data security encourages companies to reevaluate and adjust their programs periodically in light of changes to the types of information they collect as well as changes in the marketplace, including changes in technology.

Additionally, we support federal data security and breach notification legislation that would, among other things, authorize rulemaking under the Administrative Procedure Act to give the Commission the flexibility to implement the statute by making changes when appropriate. For example, this authority should include the authority to modify the definition of personal information in response to changes in technology and changing threats.

Question 5:

You mention in your testimony that the data security provisions of both the Fair Credit Reporting Act and the Children's Online Privacy Protection Act rely on a "reasonableness" standard. Should comprehensive federal data security legislation also be subject to a reasonableness standard?

Yes. A reasonableness standard would ensure that companies have strong protections in place to protect consumer information as well as flexibility when developing and implementing any data security program.

Office of the Secretary

Correspondence Referral

Remember to Designate FOIA Status

Today's Date: 05/14/14

Reference Number: 14010224

Type of Response (or) Action:
Complaint

Date Forwarded:
05/14/14

Action: Other

Subject of Correspondence:

QFRs: March 26, 2014 Hearing: Cyber Attacks and Data Breaches

Author:
Senator John Rockefeller
Senator John Thune
Senator Kelly Ayotte
Senator Deb Fischer

Representing:

Copies of Response To:

Deadline:
05/14/14

Copies of Correspondence To:

Organization Assigned:

ACTION LOG

Date Received	FTC Org. Code	Assignment To:	Date Assigned	Action Required
		Laura J. DeMartino		

SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION
"PROTECTING PERSONAL CONSUMER INFORMATION FROM CYBER ATTACKS AND DATA BREACHES"
MARCH 26, 2014

QUESTIONS FOR THE RECORD
CHAIRMAN JOHN D. ROCKEFELLER IV

QUESTIONS FOR CHAIRWOMAN EDITH RAMIREZ:

Question 1. Senators Feinstein, Pryor, Nelson, and I have introduced S. 1976, the Data Security and Breach Notification Act of 2014. The bill would, among other things, require entities that maintain personal information on consumers to establish protocols that secure information. The FTC would be tasked with issuing regulations that detail the statutory scope of this mandate.

The FTC has a long history of using its existing authority under Section 5 of the FTC Act to pursue companies that fail to adequately protect consumers' personal information. The agency has also called for data security legislation.

> *Question 1a.* Given its success with using Section 5, please explain why the agency sees the need for data security legislation such as S. 1976.

The FTC supports federal legislation such as S. 1976 that would (1) strengthen its existing authority governing data security standards on companies and (2) require companies, in appropriate circumstances, to provide notification to consumers when there is a security breach. While the majority of states have data breach notification laws, few have specific laws requiring general data security policies and procedures. Breach notification and data security standards at the federal level would extend notifications to all citizens nationwide and create a strong and consistent national standard that would simplify compliance by businesses while ensuring that all American consumers are protected.

Specifically, the FTC supports legislation that would give the Commission the authority to seek civil penalties to help deter unlawful conduct, jurisdiction over non-profits, and rulemaking under the Administrative Procedure Act. We have urged Congress to allow the FTC to seek civil penalties for all data security and breach notice violations in appropriate circumstances to help ensure effective deterrence. In addition, enabling the FTC to bring cases against non-profits – such as educational institutions and health facilities, which have been the subject of a number of breaches – would help ensure that consumer data is adequately protected regardless of what type of entity collects or maintains it.

Finally, rulemaking authority under the Administrative Procedure Act would enable the FTC to respond to changes in technology when implementing the legislation. For example, whereas a decade ago it would be both difficult and expensive for a company to track an individual's precise geolocation, the explosion of mobile devices has made such information readily available. As technology and business models change and new forms

of consumer data can be used to perpetrate identity theft, fraud, and other types of harm, APA rulemaking authority would help ensure that the law is kept up to date.

Office of the Secretary

Correspondence Referral

Remember to Designate FOIA Status

Today's Date: 04/23/14

Reference Number: 14010066

Type of Response (or) Action:
Request for Information

Date Forwarded:
04/23/14

Action: Chairman's Signature

Subject of Correspondence:

Follow-up questions re 4/2/14 Hearing - Data Breach on the Rise

Author:
Senator Thomas Carper
Senator Tom Coburn

Representing:

Copies of Response To:

Deadline:
05/21/14

Copies of Correspondence To:

Organization Assigned:

ACTION LOG

Date Received	FTC Org. Code	Assignment To:	Date Assigned	Action Required
		Laura J. DeMartino		

United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
WASHINGTON, DC 20510-6250

April 22, 2014

140/0066

Via Email (kvandecar@ftc.gov)

The Honorable Edith Ramirez
Chairman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Attention: Kim Vandecar

Dear Chairman Ramirez:

Enclosed are post-hearing questions that have been directed to you and submitted for the official record from the hearing that was held on April 2, 2014, titled "Data Breach on the Rise: Protecting Personal Information From Harm."

In order to ensure a complete hearing record, please include each question in full before each response and return your written response on or before May 23, 2014, via email to the committee's chief clerk, Laura Kilbride, at *laura_kilbride@hsgac.senate.gov.*

If you have any questions, please contact Laura Kilbride, Chief Clerk, at 202-224-9586. Thank you for your prompt attention to this request.

Sincerely,

Thomas R. Carper

Thomas R. Carper
Chairman

TRC:lwk

Enclosure

Post-Hearing Questions for the Record
Submitted to The Honorable Edith Ramirez
From Senator Tom Coburn

"Data Breach on the Rise: Protecting Personal Information from Harm"
April 2, 2014

1. Are you concerned that private companies will be unwilling to report data breaches to the federal government for fear of being prosecuted?

2. Is it reasonable to hold private companies to an arguably higher standard than government agencies, especially given the recent IG and GAO reports detailing the lapses in government agency's cyber security?

3. In your written testimony you state that a strong national breach notification law is preferable to state notification laws. Why do you believe this is so and of what do you think a strong national requirement should consist?

4. Do you agree there should be a delay in any breach notification by a company to afford the company the opportunity to identify the nature of the breach, to discern what information has been compromised, and to provide law enforcement an opportunity to investigate, if necessary?

5. Under a national breach notification law, how long do you believe a company should have before they are required to notify customers of a breach?

6. How do the FTC and USSS work together when confronting major data breaches, such as those that recently occurred at Target, Neiman Marcus and Michaels?

7. Most of the recent legislation on data breach addresses what private entities should be required to do when confronted with a security breach. However, the federal government holds an enormous amount of Americans' personal information. Before we proscribe standards by which the private sector must abide, in what areas do you believe Congress should require additional data security standards for federal agencies?

    a. Could you provide an example from your agency in which additional standards would be helpful in protecting the personal information your agency maintains?

Post-Hearing Questions for the Record
Submitted to The Honorable Edith Ramirez
From Senator Tom Coburn

"Data Breach on the Rise: Protecting Personal Information from Harm"
April 2, 2014

1. Are you concerned that private companies will be unwilling to report data breaches to the federal government for fear of being prosecuted?

   Information sharing is an important part of the fight against those who attempt to exploit consumers' personal information, and one key consideration is how best to encourage industry participation. For example, a number of industries have established Information Sharing and Analysis Centers (ISAC) to enable industry members to pool information about security threats, defenses so that they can prepare for new kinds of attacks, and quickly address potential vulnerabilities. To be most effective, ISACs may receive information from, and share information with, relevant government agencies. The FTC has been exploring, at the request of members of Congress, the formation of an ISAC for the retail industry, and the Retail Industry Leaders Association recently announced the launch of such a program to allow retailers to share threat information with other retailers, government agencies including law enforcement agencies, and financial institutions.

   We also would expect companies to comply with requirements, whether under existing state laws in the majority of states or under a federal statute, to report data breaches despite the potential for legal action by banks, individual consumers, or government agencies, such as the FTC or state attorneys general.

2. Is it reasonable to hold private companies to an arguably higher standard than government agencies, especially given the recent IG and GAO reports detailing the lapses in government agency's cyber security?

   Federal agencies are generally subject to data security standards similar to those required for the private sector. Under the Federal Information Security Management Act (FISMA), agencies must have policies that consider "the risk and magnitude of the harm" that would result from unauthorized access or use. OMB and DHS oversee agencies' implementation of these standards. NIST also develops technical data security standards and guidelines for government information systems.

   OMB guidance also requires agencies to have plans to determine whether to notify individuals if there is a breach of their personal information. One of the primary criteria is whether there is a "reasonable risk of harm." In addition, under federal law (FISMA) and OMB guidance, agencies must report cybersecurity incidents to US-CERT at DHS in accordance with DHS guidance.

3. In your written testimony you state that a strong national breach notification law is preferable to state notification laws. Why do you believe this is so and of what do you think a strong national requirement should consist?

The FTC supports federal legislation that would (1) strengthen its existing data security tools and (2) require companies, in appropriate circumstances, to provide notification to consumers when there is a security breach.

While a majority of states have data breach notification laws, few have specific laws requiring general data security policies and procedures. Breach notification and data security standards at the federal level would extend notifications to all citizens nationwide and ensure a strong and consistent national standard that would simplify compliance by businesses while protecting all American consumers.

4. Do you agree there should be a delay in any breach notification by a company to afford the company the opportunity to identify the nature of the breach, to discern what information has been compromised, and to provide law enforcement an opportunity to investigate, if necessary?

Prior to giving notice, companies that suffer a data breach should have an opportunity to determine the scope of the breach aud identify those cousumers whose iuformation may have been compromised. In light of the harms that consumers may suffer from such an incident, however, this should be done without unreasonable delay so that companies can provide consumers notice as soon as practicable so that they can take action to protect themselves.

5. Under a national breach notification law, how long do you believe a company should have before they are required to notify customers of a breach?

Notice should be provided as soon as practicable and without unreasonable delay. We also support the inclusion of an outer limit for notification, such as 30 or 60 days.

6. How do the FTC and USSS work together when confronting major data breaches, such as those that recently occurred at Target, Neiman Marcus and Michaels?

The FTC works with federal criminal agencies, including USSS, when investigating data breaches. For example, in some instances, criminal law enforcement agencies have asked us to delay our investigation so as not to impede a criminal investigation, and we have honored such requests.

The goals of the FTC and criminal agencies are complementary. FTC actions send a message that businesses need to protect their customers' data on the front end, and actions by criminal agencies send a message to identity thieves that their efforts to victimize consumers will be punished. This approach to data security leverages government resources and best serves the interests of consumers.

For example, in its case against retailer TJX, the Commission alleged that the company's failure to use basic security measures resulted in a hacker obtaining tens of millions of credit and debit payment cards, as well as the personal information of approximately 455,000 consumers who returned merchandise to the stores. Banks also

claimed that tens of millions of dollars in fraudulent charges were made, and cancelled and reissued millions of cards. At the same time, the Justice Department successfully prosecuted a hacker behind the TJX breach.

7. Most of the recent legislation on data breach addresses what private entities should be required to do when confronted with a security breach. However, the federal government holds an enormous amount of Americans' personal information. Before we proscribe standards by which the private sector must abide, in what areas do you believe Congress should require additional data security standards for federal agencies?

As discussed above, federal agencies are subject to data security standards similar to those required for the private sector. OMB and DHS oversee implementation of FISMA, which requires agencies to have policies that consider "the risk and magnitude of the harm" that would result from unauthorized access or use. To meet these standards, agencies must tailor their policies based on a number of factors, such as the type and sensitivity of the data in question. OMB guidance also requires agencies to have plans to determine whether to notify individuals if there is a breach of their personal information. And, under FISMA and OMB guidance, agencies must report cybersecurity incidents to the US Computer Emergency Readiness Team (US-CERT) at DHS in accordance with DHS guidance.

   a. Could you provide an example from your agency in which additional standards would be helpful in protecting the personal information your agency maintains?

Existing federal standards provide the FTC with sufficient ability to protect personal information that it maintains. The FTC has policies and procedures in place for safeguarding the confidentiality, privacy, and security of FTC records, information, and data, whether maintained in electronic format on FTC IT systems or media or in paper format. These policies and procedures are tailored to the type and sensitivity of the data in question.

Office of the Secretary

Correspondence Referral

Remember to Designate FOIA Status

Today's Date: 06/03/14

Reference Number: 14010331

Type of Response (or) Action:
Complaint

Date Forwarded:
06/03/14

Action: Necessary Response

Subject of Correspondence:

QFRs Re May 15th Hearing Online Advertising and Hidden Hazards to Consumer Security and Data Privacy

Author:
Senator John McCain
Senator Carl Levin

Representing:

Copies of Response To:

Deadline:
06/13/14

Copies of Correspondence To:

Organization Assigned:

ACTION LOG

Date Received	FTC Org. Code	Assignment To:	Date Assigned	Action Required
		Maneesha Mithal		

EXPEDITE

United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
WASHINGTON, DC 20510-6250

May 22, 2014

VIA U.S. MAIL & EMAIL (kvandecar@ftc.gov)

Ms. Maneesha Mithal
Associate Director
Division of Privacy and Identity Protection
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Ms. Mithal:

The Permanent Subcommittee on Investigations would like to thank you for appearing before the Subcommittee at the May 15th hearing, *Online Advertising and Hidden Hazards to Consumer Security and Data Privacy*. We appreciate your hearing testimony and the cooperation that the Federal Trade Commission has provided to our investigation.

Attached are follow-up questions which, along with your responses, may be included in the hearing record. The responses should be submitted to the Subcommittee by June 13, 2014. Please email responses to Mary Robertson, Chief Clerk, Permanent Subcommittee on Investigations, at mary_robertson@hsgac.senate.gov.

The Subcommittee will be sending you a copy of the final hearing record when it becomes available. If you or your staff have any questions or would like additional information, please contact Dan Goshorn (Senator Levin) at 202/224-9505 or Jack Thorlin (Senator McCain) at 202/224-3721.

Sincerely,

John McCain
Ranking Minority Member
Permanent Subcommittee on Investigations

Carl Levin
Chairman
Permanent Subcommittee on Investigations

14010331

Attachment

SUPPLEMENTAL QUESTIONS FOR THE RECORD
from
SENATOR CARL LEVIN
for
MANEESHA MITHAL
Associate Director, Division of Privacy & and Identity Protection
Federal Trade Commission

PERMANENT SUBCOMMITTEE ON INVESTIGATIONS
Hearing On
Online Advertising and Hidden Hazards to Consumer Security and Data Privacy

May 15, 2014

Please provide the responses to the following questions by June 13, 2014:

1. In your testimony before the Subcommittee you stated, "the Commission continues to reiterate its longstanding bipartisan call for enactment of a strong Federal data security and breach notification law." Please provide recommendations that address these concerns, as well as any recommendation to promote greater privacy and consumer choice in Internet advertising.

# # #

PLEASE RETURN COMPLETED QUESTIONS TO:
Mary D. Robertson, Chief Clerk, Permanent Subcommittee on Investigations 199 Russell Senate Office Building, Washington, D.C. 20510 202/224-9868 – mary_robertson@hsgac.senate.gov

SUPPLEMENTAL QUESTIONS FOR THE RECORD
from
SENATOR JOHN McCAIN
for
MANEESHA MITHAL
Associate Director, Division of Privacy & and Identity Protection
Federal Trade Commission

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1. Do you believe that additional legislative authority is required for the FTC to adequately protect consumers' security and privacy online?

2. What recommendations can the FTC offer regarding changes or additions to the 2011 Kerry-McCain privacy bill (official title: *Commercial Privacy Bill of Rights Act of 2011*) in order to protect consumers' privacy and security online?

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1. How many employees does the FTC currently have dedicated to cybersecurity? What about online advertising security?

2. According to the Interactive Advertising Bureau, companies spent $42.3 billion on online advertising in 2013. How would civil penalties from the FTC serve as a greater incentive for protecting consumers from malvertising than this enormous loss in revenue?

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Please provide the responses to the following questions by June 13, 2014:

1. As a former Attorney General, I am always concerned about coordination between law enforcement agencies. Can you discuss how you coordinate with other agencies? What is your relationship like with state and local authorities when it comes to combating malware and online identity theft?

2. In 2012, Senator Pryor and I introduced and passed legislation that reauthorized the SAFEWEB Act, which renewed the FTC's authority to combat cross-border spam, spyware and fraud for an additional 7 years, through 2020. This is a very important tool for law enforcement. Can you talk about how it has been used to work with your international counterparts to combat malicious actors in online advertising who seek to steal identities and compromise security?

3. This report claims that malvertising has increased over 200% last year and there were 209,000 incidents generating over 12.4 billion malicious ad impressions. Has the FTC been able to keep up with this growing problem? How has your approach to this problem evolved over the past few years as this problem has gotten worse?

4. The FTC should be focusing on enforcement and consumer education in regards to identity theft. For the past 14 years, identity theft has been the number one complaint to the FTC, including nearly 300,000 complaints this year. What is the FTC doing to focus on identity theft?

5. Does law enforcement have sufficient resources to investigate and enforce against criminals distributing malicious software? What agencies have primary authority?

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6. This report states that the FTC's authority under Section 5 to address deceptive practices has not been effective in going after malware criminals. However, Commissioner Ohlhausen said this week "FTC has brought over 100 spam and spyware cases and over 40 data security cases under Section 5."

   Question: Does this suggest to you that FTC has ample authority it needs to be an effective law enforcement presence? Given this, how do you justify the need for more regulations at the FTC to address the problem of consumers being attacked by malware?

# # #

Additional Questions for the Record
Hearing on H.R.__, a bill to enhance federal and state enforcement of fraudulent demand letters
May 22, 2014

The Honorable Lee Terry

1. At the request of the Federal Trade Commission, the discussion draft included language to cover both someone who states and someone who implies that another has infringed a patent. Stakeholders in the regulated community are concerned that this is a vague concept. What does "imply" look like in this context?

The principles that the Commission applies when considering implied claims are discussed in the FTC Policy Statement on Deception, 103 F.T.C. 110, 174 (1984), and in many decisions of the Commission. In evaluating whether a written communication conveys an implied claim, the Commission considers the impression that the communication, considered as a whole, would make on the ordinary reader. Where a communication is directed to a specific audience, the Commission will consider the communication in light of the sophistication of that audience.

There are a number of ways in which an individual who holds or purports to hold a patent might imply infringement without expressly using the words "you are infringing the patent," such as, for example, by referring to a business's use of a method or process that is allegedly patented or by stating that the business lacks a license for the patent.

2. You referenced that there is existing case law regarding false threats of litigation under other FTC-enforced statutes. How do you prove an individual's threats to sue are false?

The truth or falsity of a particular claim always turns on the specific representations made, which may involve, for example, a representation that suit will definitely be filed, that suit will be filed imminently, or that suit will be filed within a specified time period. In considering the truth or falsity of a threat of legal action, courts have considered, depending on the specific representations made, whether the party issuing the threat has actually made a determination to take legal action, whether it has followed through on similar threats in the past, whether it has taken preparatory steps consistent with an intent to follow through on the present threat (such as conducting an appropriate legal review, obtaining necessary counsel, authorizing counsel to proceed, etc.), and whether it has in fact followed through on the present threat.

3. To violate the Act as drafted, an individual must engage in a "pattern or practice" of sending letters in bad faith that are false or deceptive. The FTC enforces violations in other contexts – such as violations of the Fair Credit Reporting Act or of the Telemarketing Sales Rule – where the Commission may obtain civil penalties for a knowing violation that constitutes a pattern or practice. Has the FTC had any difficulties proving a pattern or practice in its enforcement cases in these other contexts? Is there any reason why that standard would cause problems in this context?

To begin, a point of clarification: although the standard to obtain civil penalties under the Fair Credit Reporting Act requires "a knowing violation, which constitutes a pattern or practice of violations," the same standard does not apply to obtain civil penalties for violations of the Telemarketing Sales Rule, or for violations of other rules or statutes enforced by the Commission. *Compare* 15 U.S.C.

§ 1681(s)(a)(2) (civil penalties for FCRA violations) *with* 15 U.S.C. § 45(m)(1)(A) (civil penalties for violations of FTC rules).

The FCRA standard differs in certain key respects from the use of similar language in the Discussion Draft. Under the FCRA, a showing of the defendant's knowledge and the existence of a "pattern or practice" of violations is not required to establish a violation; such a showing is relevant only to establishing liability for civil penalties. In the Discussion Draft, by contrast, such showings would be required to establish a violation of the proposed Act.

As a practical matter, this means that while the Commission can obtain injunctive relief to halt violations of FCRA without any showing of the defendant's knowledge or a "pattern or practice," the Commission would not be able to obtain injunctive relief to halt violations of the proposed Act without making these additional showings.

While the inclusion of the "pattern or practice" language does create an additional hurdle to enforcement, in the specific context of deceptive demand letters and in the context of the current version of the Discussion Draft, Commission staff believes that the hurdle would not be significant. In the FCRA context, the Commission has a successful record of obtaining civil penalties for conduct that involves a pattern or practice of violations.[1]

As noted in its written testimony, however, the Commission has concerns about the proposed requirement of a showing of "knowledge" to establish a violation of the proposed Act. Consumers can be harmed misrepresentations regardless whether the party making the representations knows them to be false. For this reason, when enforcing Section 5 of the FTC Act, the Commission can obtain injunctions to halt deceptive conduct without regard to the defendant's knowledge or intentions. Commission staff does not perceive a compelling reason why consumers should be entitled to less protection in the context of deceptive demand letters than in other contexts, and would strongly recommend removing the "knowledge" requirement.

The Honorable Jan Schakowsky

1. Some stakeholders have expressed concerns that the definitions in the draft are too narrow, and therefore fail to adequately include those who may be the targets of unfair and deceptive demand letters, or those who engage in unfair or deceptive acts or practices with regard to patent demand letters. We have also heard that some of the definitions may cause uncertainty that would affect the ability of the FTC and state attorneys general to enforce the law.

    a. For example, FTC staff has mentioned a concern with defining "consumer." Please elaborate on that concern. Do you have any concerns that including a definition of "consumer" in the bill would set a bad precedent or could have negative repercussions in any way for the Commission's enforcement authority? Does the specific definition used in the draft bill pose any potential problems for the Commission's enforcement authority? If so, please discuss them.

As explained below in response to part (b), Commission staff has concerns about the term "consumer" as defined and used in the Discussion Draft, as well as the terms "end user" and "systems integrator." In addition to the concerns identified in response to part (b), we are concerned

[1] *See, e.g., United States v. Instant Checkmate, Inc.*, No. 14-675 (S.D. Cal. Apr. 1, 2014) (consent order providing for payment of $525,000 civil penalty); *United States v. TeleCheck Servs., Inc.*, No. 14-62 (D.D.C. Jan. 17, 2014) (stipulated final order providing for $3.5 million civil penalty).

that the inclusion of a limited definition of "consumer" in the proposed Act could encourage arguments that, despite the savings clause, similar limitations should apply in the context of enforcement of Section 5 of the FTC Act, which could curtail our ability to effectively prevent unfair and deceptive acts and practices. Because the use of the term is problematic and, in the view of Commission staff, unnecessary, Commission staff recommends removing the term from the proposed Act.

b. FTC staff mentioned the draft's limitations on who is defined as a target of these abusive letters. Please elahorate on that concern. The draft limits those who may be the targets or victims of these unfair or deceptive acts or practices to consumers, end users, and systems integrators, a group which is even further limited by the draft bill's definitions of "consumer," "end user," "systems integrator," or "recipient." Would these definitions in any way pose potential problems for the Commission's authority or ability to bring enforcement actions under this proposed law?

Commission staff believes that the proposed Act would be stronger and clearer if the terms "consumer," "end user," and "systems integrator" were removed from the Discussion Draft. Commission staff believes that the terms are under-inclusive and likely to complicate litigation.

Commission staff is concerned that the definitions used in the Discussion Draft may be under-inclusive in various respects. For example, the definitions do not clearly protect an individual or business from deceptive representations made in connection with the assertion of a method or process patent. A letter may assert a patent that purportedly covers a process that involves the use of at least two products in combination, such as, for example, a credit card reader and a computer network. Although the letter recipient may think of itself as an "end user" of the process, it is likely that the patent asserter will argue that, because the letter recipient has not "purchase[d] or contract[ed] for purchase" the process in question, the recipient is not a "consumer" or "end user" within the proposed Act's definitions, nor is it a "systems integrator," as that definition focuses on software development.

The proposed definitions may compromise effective enforcement of the proposed Act because any patent asserter charged with making deceptive representations will seek to argue that deceived parties did not fall within one of the proposed Act's protected definitions. In any actions brought to enforce the proposed Act, significant time and effort may be expended on litigating the meaning and application of these terms instead of the truth or falsity of the allegedly deceptive representations.

c. FTC staff has mentioned a concern with the definition of "recipient." Please elaborate on that concern. A recipient under the definition in the draft bill is considered not have an "established business relationship with the sender." Could this language be interpreted in problematic ways? If so, how might it affect the Commission's ability to enforce the law?

The definition of "recipient" in the Discussion Draft relies on the terms "consumer," "end user," and "systems integrator." For the reasons noted above, Commission staff believes these terms are problematic and unnecessary. The definition of "recipient" also excludes from coverage those who have an "established business relationship" with the "sender." Commission staff does not perceive a reason to allow deceptive communications to be targeted at those who have an established business relationship with the sender. Moreover, the term "sender" is defined in a

manner that could make the proposed Act more complicated and difficult to enforce.[2] Because the ordinary meanings of "recipient" and "sender" are sufficient for purposes of the proposed Act, Commission staff would recommend removing the Discussion Draft's definitions of those terms.

[2] "Sender" is defined as "a person who has the right to license or enforce the patent at the time the communication is sent, or a person who represents such person, or both."

Questions for Senator Franken for Ms. Rich

1. Ms. RICH, the FTC has issued best practices for app developers. One of the key best practices you have is that app developers should always get affirmative express consent before collecting or sharing sensitive information like geolocation data. It's not enough for apps to do it and then let users opt-out.

My bill also sets up an opt-in rule for collection or sharing of location data. Why did you set this standard where you did – and is there precedent for it?

The Commission supports the LPPA's requirement that covered entities obtain affirmative express consent from consumers before knowingly collecting or disclosing geolocation information. As yon note, this approach mirrors guidance in onr 2013 staff report on mobile privacy disclosnres, in which we discussed the importance of transparency in the mobile space through just-in-time disclosures and obtaining opt-in consent before allowing access to sensitive information like geolocation.[1] Moreover, the FTC's 2012 Privacy Report addressed the heightened privacy concerns presented with the collection and nse of sensitive personal information, such as geolocation information, and why robust privacy controls like affirmative express consent are warranted for this kind of information.[2]

Geolocation information is sensitive because it can reveal a consumer's movements in real time and over time. Geolocation may also expose other types of sensitive information, snch as health or financial information. For instance, geolocation information can disclose if a consumer has gone to an AIDS clinic or cancer treatment center and how often he or she has gone. It can provide information about where a person lives, works, shops, and goes out to eat. It can disclose a child's route to and from school. As discussed in our Privacy Report, when sensitive information is involved, the likelihood that data misuse could lead to discrimination or other harms is increased. Thus, the Commission has recommended the companies obtain opt-in consent from consumers before collecting sensitive information for either first-party or third-party uses.

The Commission's recommendations are in line with a number of self-regulatory frameworks in which industry agrees that geolocation data is sensitive and should be handled with care.[3] But, inconsistencies in the application of self-regulatory codes can

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[1] FTC Staff Report, *Mobile Privacy Disclosures: Building Trust Through Transparency* (Feb. 2013) at 15-16, *available at* http://www.ftc.gov/sites/default/files/documents/reports/mobile-privacy-disclosures-building-trust-through-transparency-federal-trade-commission-staff-report/130201mobileprivacyreport.pdf.

[2] Federal Trade Commission, *Protecting Consumers in an Era of Rapid Change: Recommendations for Businesses and Policymakers* (Mar. 2012) at 59, *available at* http://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf.

[3] *See, e.g.*, Future of Privacy Forum and Center for Democracy & Technology, *Best Practices for Mobile Application Developers* (July 2012) at 7, *available at* http://www.futureofprivacy.org/best-practices-for-mobile-app-developers (stating that app developers should obtain clear, opt-in permission before accessing precise location data); Network Advertising Initiative, *2013 NAI Mobile Application Code,* at 2, *available at* http://www.networkadvertising.org/code-enforcement/mobile (mandating that use of precise location data for advertising delivered across apps, based on the preferences or interests of a user, shall

make it challenging for an entity to know exactly what it should do when collecting or using geolocation data. And membership in a self-regulatory body is voluntary. The LPPA provides much-needed rules of the road that can help industry compliance and provide enforcement tools to ensure that consumers are protected.

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require the user's opt-in consent); Direct Marketing Association, *Direct Marketing Association Guidelines for Ethical Business Practice* (May 2011), at 40, *available at* https://thedma.org/wp-content/uploads/DMA-Ethics-Guidelines.pdf (stating that location information may not be shared with third-party marketers unless the consumer has given prior express consent for the disclosure).

Questions for the Record for Ranking Member Dean Heller
Consumer Protection Subcommittee Hearing: "Protecting Consumers from False and Deceptive Advertising of Weight-Loss Products"
June 17, 2014

For Ms. Engle:

1. In your testimony before the Committee, you state that "in the case of weight loss claims, in particular, based on the factors we consider and in consultation with experts, we have determined that randomized controlled clinical studies are needed in order to substantiate a claim that a given product will cause weight loss." This statement appears to be inconsistent with existing Commission guidance that states, with respect to health claims, "[t]here is no fixed formula for the number or type of studies required." What is the Federal Trade Commission's position on what constitutes "competent and reliable scientific evidence" needed to substantiate weight loss claims?

2. In your testimony, you state that the adequate and well-controlled human studies the FTC requires to substantiate weight-loss claims are "not particularly expensive relative to the amount of money that can be made for these products." Please provide the basis for this assertion.

3. Some observers have stated that the FTC's requirement of two well-controlled human studies will create a very high barrier to entry that will preclude small businesses from entering the marketplace and stifle innovation on products Americans want. Has the Commission's Bureau of Economics been consulted for its view on potential competitive effects of such a requirement?

4. The FTC's current guidance, *Dietary Supplements: An Advertising Guide for Industry*, states that animal and *in vitro* studies are appropriate "particularly where they are widely considered to be acceptable substitutes for human research or where human research is infeasible." Yet in its recent consent decrees, the Commission has imposed language requiring human clinical studies.

   A. With respect to health-benefit claims, including weight-loss claims, how does the Commission determine whether human research is infeasible?
   B. How does the Commission determine whether animal, in vitro, or other studies are acceptable substitutes for human research?
   C. Are human clinical trials practical for all health-benefit claims, including weight loss claims?

5. Once the FTC Act enters into a consent decree with a company regarding unsubstantiated weight-loss claims, the FTC has required that the company possess at least two adequate and well-controlled human clinical studies to substantiate future weight-loss claims. In other words, the FTC is imposing a requirement of a higher degree of certainty, even though the claims may be otherwise truthful and substantiated.

   A. Why are results from one study insufficient, even if they are fully controlled and independent?

B. When the FTC applies this heightened substantiation requirement in a consent order, is it permissible for the Commission to prohibit (or "fence in") conduct beyond the scope of the alleged violation?
C. How does the FTC determine the scope of products and claims to which the "two adequate and well-controlled human clinical study" requirement should apply?

6. Your statement to the Committee that multiple studies are needed "given the level of fraud that we have seen in this area ," appears to justify the Commission's application of heightened substantiation requirements on grounds that weight-loss-related fraud is particularly high; however, health care claims (wbich include, *inter alia*, weight-loss scams) rank relatively low among the types of complaints received by the FTC, falling outside the top-ten consumer complaints and comprise about two percent of total complaints received, according to the most-recent *Consumer Sentinel Network Data Book.* Because weight-loss claims are reported as a subset of the complaint category, it would appear weight-loss claims on their own rank even lower. Is it the practice of the Commission to impose heightened requirements in accordance with the level of fraud in a particular area?

7. The FTC's recent enforcement actions, both with respect to weight-loss claims and other health claims, are being closely watched by marketers and advertisers. The Commission now includes as standard language in its consent decrees the requirement that "competent and reliable scientific evidence" consist of "at least two adequate and well-controlled human clinical studies. . . conducted by different researchers, independently of each other, that conform to acceptable designs and protocols and whose results, when considered in light of the entire body of relevant and reliable scientific evidence, are sufficient to substantiate that the representation is true."

A. How are other companies looking at these consent orders supposed to interpret what level of substantiation is now required of them?
B. Is it reasonable for a company, not yet subject to a consent order, to assume that weight loss or other health claim substantiation that does not include two independent studies will be viewed by the Commission as inadequate?
C. How will the Commission ensure that its application of this standard does not have a chilling effect on other firms with regard to otherwise truthful and substantiated claims?

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   The FTC supports federal legislation that would (1) strengthen its existing tools with regard to data secnrity requirements for companies and (2) require companies, in appropriate circumstances, to provide notification to consumers when there is a security breach. We have recommended that legislation in both areas – data security and breach notification – should give the FTC the ability to seek civil penalties to help deter nnlawfnl conduct, jurisdiction over non-profits, and rulemaking authority under the Administrative Procedure Act.

   Under current laws, the FTC only has the authority to seek civil penalties for data security violations with regard to children's online information under the Children's Online Privacy Protection Act (COPPA) or credit report information under the Fair Credit Reporting Act (FCRA).[1] To help ensure effective deterrence, we urge Congress to allow the FTC to seek civil penalties for all data security and breach notice violations in appropriate circumstances. Likewise, enabling the FTC to bring cases against non-profits would help ensure that whenever personal information is collected from consumers, entities that maintain such data adequately protect it.[2]

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[1] The FTC can also seek civil penalties for violations of administrative orders. 15 U.S.C. § 45(*l*).

[2] A substantial number of reported breaches have involved non-profit universities and health systems. *See* Privacy Rights Clearinghouse Chronology of Data Breaches (listing breaches including breaches at non-profits, educational institutions, and health facilities), *available at* http://www.privacyrights.org/data-breach/new.

Finally, rulemaking authority under the Administrative Procedure Act would enable the FTC in implementing the legislation to respond to changes in technology. For example, whereas a decade ago it would be very difficult and expensive for a company to track an individual's precise geolocation, the explosion of mobile devices has made such information readily available. Rulemaking authority would allow the Commission to ensure that as technology changes and the risks from the use of certain types of information evolve, companies would be required to adeqnately protect such data.

With respect to your question regarding privacy in Internet advertising, the Commission has recently recommended legislation that would improve the transparency of data broker practices, including the practice of delivering online advertising to consumers based on their offline purchases.

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Please provide the responses to the following questions by June 13, 2014:

1. Do you believe that additional legislative authority is required for the FTC to adequately protect consumers' security and privacy online?

   Yes. Although the FTC makes effective use of its existing tools to protect security and privacy of consumer data, the FTC has urged Congress to pass data security and breach notice legislation; legislation providing greater transparency of data broker practices; and baseline privacy legislation.

   With regard to data security, a unanimous Commission has reiterated its longstanding call for federal legislation that would (1) strengthen its existing tools with regard to data security requirements for companies and (2) require companies, in appropriate circumstances, to provide notification to consumers when there is a security breach. As described in detail above, such legislation should give the FTC the ability to seek civil penalties to help deter unlawful conduct, jurisdiction over non-profits, and rulemaking authority under the Administrative Procedure Act.

   To help rectify a lack of transparency about data broker practices, as explained in a recent Commission report, the Commission has encouraged Congress to consider enacting legislation that would enable consumers to learn of the existence and activities of data brokers and provide consumers with reasonable access to information about them held by these entities. More specifically, the Commission urged Congress to consider enacting legislation to require data brokers to, among other things, create a centralized mechanism, such as an Internet portal, where data brokers can identify themselves and provide links to access tools and opt-outs; give consumers access to their data at a reasonable level of detail; and disclose the names and/or categories of data sources. In addition, the Commission advocated that such legislation require consumer-facing entities – such as retailers – to provide prominent notice to consumers when they share information with data brokers, along with the ability to opt-out of such sharing, and to obtain affirmative express

consent from consumers before sharing sensitive data (such as health information) with data brokers.[1]

In addition, as set forth in the March 2012 report *Protecting Privacy in Era of Rapid Change: Recommendations for Policymakers and Businesses* ("Privacy Report"), the Commission has urged Congress to consider enacting baseline privacy legislation that is technologically neutral, sufficiently flexible to allow companies to continue to innovate, and that authorizes the Commission to seek civil penalties to deter statutory violations.[2] Such legislation, which could be informed by the Commission's Privacy Report, would provide businesses with the certainty they need to understand their obligations as well as the incentive to meet those obligations, while also assuring consumers that companies will respect their privacy.

2. What recommendations can the FTC offer regarding changes or additions to the 2011 Kerry-McCain privacy bill (official title: *Commercial Privacy Bill of Rights Act of 2011*) in order to protect consumers' privacy and security online?

The Commission supports the goals of protecting consumer privacy, and we appreciate your leadership on this important topic. As discussed above, the Commission, as set forth in its 2012 Privacy Report, called for baseline privacy legislation. There are some provisions of the 2011 Kerry-McCain privacy bill that FTC staff believes could be revised in order to ensure that the Commission has the tools it needs to best protect consumer privacy in the marketplace. For example, the bill contained a broad exception to its notice and choice requirements, if a company engages in first-party marketing. This might result in, for example, an ISP, browser, or operating system being able to track consumers' every click online for marketing purposes simply because they have a first-party relationship with the consumer in order to serve as a gateway to the Internet. Such a relationship does not imply consent to be tracked across the Internet. The Commission stated in its 2012 Privacy Report that it has strong concerns about such comprehensive tracking for purposes inconsistent with a company's interaction with a consumer, without express affirmative consent or more robust protection.[3]

Additionally, although the bill authorized the Commission to conduct rulemaking in some areas, it did not give the FTC general APA rulemaking authority or otherwise allow it to modify definitions, such as the definition of personal information, in the Act. General rulemaking authority would allow the Commission to ensure that, as technology changes and the risks from the use of certain types of information evolve,

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[1] *See* Fed. Trade Comm., *Data Brokers: A Call For Transparency and Accountability: A Report of the Federal Trade Commission* 49-54 (May 2014), *available at* http://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf.
[2] *See* Fed. Trade Comm., *Protecting Privacy in an Era of Rapid Change: Recommendations for Policymakers and Businesses* 13 (2012), *available at* http://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf.
[3] *Id.* at 56.

companies would be required to give adequate protection to such data. We would be happy to work with your staff on this legislation.

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1. How many employees does the FTC currently have dedicated to cybersecurity? What about online advertising?

   The Commission has three divisions responsible for examining a variety of data security, advertising, and malware issues. The Division of Privacy and Identity Protection consists of approximately 40 staff with expertise in privacy, data security, and identity theft. The Division of Advertising Practices, which protects consumers from unfair or deceptive advertising practices, employs approximately 40 individuals. The Division of Marketing Practices consists of approximately 40 employees charged with responding to ever-evolving problems of consumer fraud – including malware – in the marketplace. In addition, the agency also has regional office employees who work on privacy and security matters on an occasional basis.

2. According to the Interactive Advertising Bureau, companies spent $42.3 billion on online advertising in 2013. How would civil penalties from the FTC serve as a greater incentive for protecting consumers from malvertising than this enormous loss in revenue?

   Malvertising affects individual consumers or businesses whose computers are infected by malware disseminated through the ad system. In most cases, victims have no way to know that the malware ended up on the computer because of a malicious advertisement, and no way to know which of the many companies in the advertising chain -- many operating behind the scenes -- might have been responsible for inserting the malicious ad into the system. Victims of ideutity theft often would not know that the harm done to them was even related to malware in the first place. For these reasons, individual players in the advertising ecosystem may not be held to account if they do not have reasonable procedures to prevent malware. In such cases, allowing the Commission to seek civil penalties would serve as an important deterrent.

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May 15, 2014

Please provide the responses to the following questions by June 13, 2014:

1. As a former Attorney General, I am always concerned about coordination between law enforcement agencies. Can you discuss how you coordinate with other agencies? What is your relationship like with state and local authorities when it comes to combating malware and online identity theft?

   Cooperating with other state and federal agencies helps the FTC to effectively leverage its resources for the benefit of consumers. With that goal in mind, the FTC works closely with law enforcement agencies and coordinates with them on a regular basis. This is true throughout the FTC's work to protect consumers, including the data security and identity theft arena. For example, the FTC coordinated its data security investigation of the TJX Companies, Inc. with 39 state attorneys general. This cooperative effort contributed to an FTC action alleging that TJX's failure to use reasonable and appropriate security measures resulted in a hacker obtaining tens of millions of consumers' payment card data, and a settlement of those charges. The 39 states, which settled separately with TJX, made similar allegations in their subsequent action. At the federal level, criminal law enforcement authorities investigated and prosecuted some of the hackers involved in the TJX and other data breaches. As the TJX matter illustrates well, in the data security context, the goals of FTC and federal criminal agencies are complementary: FTC actions send a message that businesses need to protect their customers' data on the front end while actions by criminal agencies send a message to identity thieves that their efforts to victimize consumers will be punished.

   More generally, the FTC's Criminal Liaison Unit (CLU) partners with prosecutors to bring criminal consumer fraud cases. Since CLU's launch in 2003, prosecutors have indicted more than 550 FTC defendants and their associates. In fiscal year 2013 alone, prosecutors initiated 76 indictments or complaints against FTC defendants and their associates and obtained 65 convictions or guilty pleas with an average sentence of more than 40 months.

2. In 2012, Senator Pryor and I introduced and passed legislation that reauthorized the SAFEWEB Act, which renewed the FTC's authority to combat cross-border spam, spyware and fraud for an additional 7 years, through 2020. This is a very important tool for law enforcement. Can you talk about how it has been used to work with your international counterparts to combat malicious actors in online advertising who seek to steal identities and compromise security?

Thank you, Senator Ayotte, for your leadership in passing legislation to reauthorize the SAFE WEB Act, a critical tool to enhance FTC enforcement against cross-border fraud threatening American consumers in the global marketplace. The Act arms the FTC with key enforcement tools to combat Internet scams, fraudulent telemarketing, spam, spyware, and other cross-border misconduct that harms our consumers.

We have used the SAFE WEB Act for information sharing in cases involving scareware, spyware, and other types of malware. For example, in our case against Innovative Marketing, the FTC used the SAFE WEB Act to work with the Canadian Competition Bureau to target a company promoting fake security scans. The FTC alleged that the defendants used elaborate and technologically sophisticated Internet advertisements that they placed with advertising networks and many popular commercial websites. These ads displayed to consumers a "system scan" that falsely claimed to detect viruses, spyware, and illegal pornography on consumers' computers and would then urge consumers to buy the defendants' software for $40 to $60 to clean off the malware. As part of the settlement, the defendants are prohibited from making further deceptive claims and paid $8 million.

3. This report claims that malvertising has increased over 200% last year and there were 209,000 incidents generating over 12.4 billion malicious ad impressions. Has the FTC been able to keep up with this growing problem? How has your approach to this problem evolved over the past few years as this problem has gotten worse?

The Commission shares this Committee's concerns about the use of online ads to deliver malware onto consumers' computers. This practice implicates the FTC's considerable enforcement and education efforts in three areas: privacy, malware, and data security. First, with respect to privacy, we have brought many enforcement cases against online advertising networks, such as our cases against Chitika and Google. Second, the Commission has brought several cases under Section 5 of the FTC Act against entities that unfairly downloaded malware onto consumers' computers without their knowledge (for example, the FTC's cases against Seismic Entertainment Inc., Enternet Media, Inc., and CyberSpy Software LLC), and also has made consumer education on malware issues a priority. Finally, while going after the malware purveyors is important, it is also critical that ad networks aud other companies take reasonable steps to ensure that they are not inadvertently enabling third parties to place malware on consumers' computers. To

this end, online ad networks should maintain reasonable safeguards to ensure that they are not showing ads containing malware.

We will continue to actively monitor this problem. We also encourage several additional steps to protect consumers in this area, including enactment of a strong federal data security and breach notification law that would give the Commission the authority to seek civil penalties for violations; more widespread consumer education; and meaningful industry self-regulation.

4. The FTC should be focusing on enforcement and consumer education in regards to identity theft. For the past 14 years, identity theft has been the number one complaint to the FTC, including nearly 300,000 complaints this year. What is the FTC doing to focus on identity theft?

The Commission has used its existing authority and resources to implement a comprehensive program to combat identity theft, on three fronts: law enforcement, data collection, and consumer and business education. The Commission has brought 53 law enforcement actions challenging businesses that failed to reasonably protect sensitive consumer information that they maintained, including matters that resulted in identity theft. For example, in one of the best-known FTC data security cases – the 2006 action against ChoicePoint, Inc. – a data broker allegedly sold sensitive information (including Social Security numbers in some instances) concerning more than 160,000 consumers to data thieves posing as ChoicePoint clients. In many instances, the thieves used that information to steal the consumers' identities. In settling the case, ChoicePoint agreed to pay $10 million in civil penalties for violations of the FCRA and $5 million in consumer redress for identity theft victims, and agreed to undertake comprehensive data security measures.

Also a primary focus for the Commission has been child identity theft. In 2011, the Commission hosted a public forum to discuss the growing problem of child identity theft, which brought to light that a child's Social Security number alone can be combined with another person's information, such as name or date of birth, in order to commit identity theft.

In addition to law enforcement, the Commission collects and analyzes identity theft complaint data in order to target its education efforts and assist criminal law enforcement authorities. Identity theft victims can provide information to Consumer Sentinel, the FTC's consumer complaint database, via an online complaint form or by calling a toll-free hotline and speaking with a trained counselor. The Commission makes this and other data available to thousands of international, federal, state, and local law enforcement agencies who have signed confidentiality and data security agreements.

Finally, the FTC makes available a wide variety of consnmer educational materials, including many in Spanish, to help consumers deter, detect, and defend against identity theft. For example, the FTC has long published a victim recovery guide –

Take Charge: Fighting Back Against Identity Theft **– that explains the immediate steps identity theft victims should take to address the crime; how to obtain a credit report and correct fraudulent information in credit reports; how to file a police report; and how to protect personal information. And, the Commission recently held a number of events as part of Tax Identity Theft Awareness Week to raise awareness about tax identity theft and provide consumers with tips on how to protect themselves, and what to do if they become victims.**

5. Does law enforcement have sufficient resources to investigate and enforce against distributing malicious software? What agencies have primary authority?

   On the civil side, the FTC has authority to combat spyware and other malware using Section 5 of the FTC Act, which prohibits unfair or deceptive acts or practices, as do the state attorneys general. Intentionally distributing spyware and other malware may also violate criminal laws enforced by the Department of Justice and state attorneys general.

   The FTC's Section 5 cases to combat the installation of spyware and other malware reaffirm three key principles. First, a consumer's computer belongs to him or her, not to the software distributor, and it must be the consumer's choice whether or not to install software. Second, burying material information in a disclosure, such as an End User License Agreement, will not shield a malware purveyor from Section 5 liability. Third, if a distributor puts a program on a computer that the consumer does not want, the consumer should be able to uninstall or disable it. And, we will continue to challenge harmful practices involving spyware and other malware. Finally, to provide further deterrence, the Commission has also recommended that Congress enact legislation giving it the authority to seek civil penalties against purveyors of malware.

6. This report states that the FTC's authority under Section 5 to address deceptive practices has not been effective in going after malware criminals. However, Commissioner Ohlhausen said this week "FTC has brought over 100 spam and spyware cases and over 40 data security cases under Section 5."

   Question: Does this suggest to you that the FTC has ample authority it needs to be an effective law enforcement presence? Given this, how do you justify the need for more regulations at the FTC to address the problem of consumers being attacked by malware?

   The Commission has effectively used its existing authority uuder Section 5 of the FTC Act, which prohibits deceptive and unfair commercial practices, to combat malware, unreasonable data security practices, and email and text message spam. While these cases have helped to protect consumers, the Commission believes that additional legislation is needed to (1) strengthen its existing tools with respect to data security requirements on companies and (2) require companies, in appropriate circumstances, to provide notification to consumers when there is a security breach. Currently, the FTC lacks authority in most data security cases to obtain civil

penalties, an important remedy for deterring violations. Also, the FTC currently lacks authority over non-profits, which have been the source of many breaches.