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

May 27, 2020

Re: FOIA-2020-00830

This is in response to your request dated May 23, 2020 under the Freedom of Information Act seeking access to copy of the Questions For the Record (QFR) and agency QFR responses to Congress responding to QFRs during calendar years 2017, 2018, 2019 and 2020 to date, for the FTC. In accordance with the FOIA and agency policy, we have searched our records, on May 26, 2020.

We have located 524 pages of responsive records. You are granted full access to the responsive records, which are enclosed.

If you have any questions about the way we are handling your request or about the FOIA regulations or procedures, please contact Chip Taylor at 202-326-3258.

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 via email at FOIAAppeal@ftc.gov, within 90 days of the date of this letter. Please enclose a copy of your original request and a copy of this response.

You also may seek dispute resolution services from the FTC FOIA Public Liaison Richard Gold via telephone at 202-326-3355 or via e-mail at rgold@ftc.gov; or from the Office of Government Information Services via email at ogis@nara.gov, via fax at 202-741-5769, or via mail at Office of Government Information Services (OGIS), National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740. Please note that the FOIA Public Liaison's role relates to comments, questions or concerns that a FOIA Requester may have with or about the FOIA Response. The FOIA Public Liaison's role does not relate to taking action in matters of private controversy nor can he resolve individual complaints.

Sincerely,

Dione J. Stearns

Dione J. Stearns
Assistant General Counsel

Statements for the Small Business Committee Record

Congressman Adriano Espaillat (NY-13)

March 8, 2017

Thank you Chairman Steve Chabot and Ranking Member Nydia Velazquez for holding this timely briefing before our committee.

I have the distinguished honor of also sitting on the Foreign Affairs Committee, where this week, we will be discussing Russia's interference in the U.S. election, as well as their use of propaganda and fake news to influence policy. So, you will imagine, it came as no surprise to me when I read that in its 2011 report, the Office of the National Counter Intelligence Executive conveyed that "tens of billions of dollars in trade secrets, intellectual property, and technology are stolen each year from computer systems in the federal government, corporations, and academic institutions" – and they identified China and Russia as the two largest participants in cyber espionage.

1. Should Congress have a separate independent investigation of Russia, solely focused on cyberattacks, and their impacts on American businesses? If so, what additional information do you think we will learn?

I defer to my colleagues in the national security and criminal law enforcement communities on this issue. The FTC's main role in cybersecurity is to encourage businesses to shore up their defenses to protect against attacks, educate consumers on good security practices, and mitigate any harms.

Small businesses in my District often struggle just to install Wi-Fi, and I imagine that like business across the country, the costs of cybersecurity attacks are often more costly.

So my questions are for the panel:

1. What can the federal government do to help offset some of these cost burdens?

We can help small businesses by providing them with resources on how to protect themselves and their customers from cybersecurity threats. In today's world, consumers and small businesses are at risk of a variety of harms from cyberattacks. For example, there are increasing concerns about ransomware, where a malicious actor can hold a company's data and hardware hostage in exchange for payment. Because the costs of a successful attack can be exorbitant, it makes sense for companies to invest in reasonable cybersecurity protection on the front end, to reduce the chances of such an attack in the first place. Many of the most basic but sometimes neglected steps are cost-effective.

The FTC has developed free, user-friendly education materials to help companies of all sizes improve their security practices. For example, the FTC offers guidance to assist businesses in designing and implementing information security programs, as well as

guidance describing immediate steps companies should take when they experience a data breach. The FTC has also educated businesses about threats like ransomware and phishing, and developed guidance for specific industries such as the Internet of Things device manufacturers and mobile app developers. All of these materials are available on our website. We encourage Members of Congress to link to these materials and further distribute them to their constituents.

2. How can the federal government best balance civil liberties protections with information sharing, and the ability to help protect small businesses from cyber-attacks?

I believe there should be coordinated information sharing on cybersecurity between government and industry, and among industry participants, to identify risks, threat vectors, and actual incidents. Such sharing provides stakeholders with valuable information so that they can adjust their security programs in light of known risks. To this end, I have supported the creation of industry-specific Information Sharing and Analysis Centers (ISACs) to enable industry members to pool information about security threats and 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. Because some private entities may have been hesitant to share information with competitors due to antitrust concerns, the FTC and DOJ issued an Antitrust Policy Statement on Sharing of Cybersecurity Information in 2014, which noted that antitrust law should not be a "roadblock to legitimate cybersecurity information sharing." https://www.ftc.gov/system/files/documents/public_statements/297681/140410ftcdojcyberthreatstmt.pdf. I continue to believe that this kind of information sharing is valuable, and support ISACs and other tools to assist small businesses in identifying and responding to cyber risks.

Chairman John Thune
Questions for the Record
Subcommittee on Consumer Protection, Product Safety, Insurance & Data Security
"Staying a Step Ahead: Fighting Back Against Scams Used to Defraud Americans"
March 21, 2017

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1. **You have stated your interest in combating scams as a top priority for the FTC's Bureau of Consumer Protection. What specific practices do you intend to target? Can we expect to see increased FTC enforcement activity in this area?**

Fighting fraud is at the core of the FTC's consumer protection mission. Our anti-fraud program tracks down and stops some of the most pernicious frauds that prey on U.S. consumers, often on those who can least afford to lose money. The Commission will target the most egregious scams that cause significant economic injury to consumers, including imposter scams, such as government and business imposters; tech support scams which may disproportionately impact the elderly; robocall and other telemarketing scams; fake debt relief services and phantom debt collection schemes; and miracle cure scams. The agency also will work to combat scams that defraud small businesses, such as fake business directory services, as well as scams that deceive aspiring entrepreneurs, including business opportunity scams. I also will increase our efforts to fight scams that target members of the military and veterans.

2. **At the hearing, you testified that the annual macroeconomic cost of scams to the U.S. economy is "billions and billions of dollars." Apparently, you based this figure on the redress FTC received in 2016, which included a settlement order the Commission secured against Volkswagen Group of America in excess of $10 billion. Presumably, however, this redress represents only a small fraction of the total cost of scams to the economy.**
    a. **Has the Commission's Bureau of Economics examined these costs? If so, what conclusions did it reach?**

Over the last 15 years, the Bureau of Economics has conducted three surveys to study the degree to which consumers are affected by consumer fraud. Because of the limitations of the data available to the Bureau and other resources constraints, these studies researched the number of consumers affected by fraud, but did not address the question of the total costs such frauds impose on the economy.

The most recent survey, which was conducted in 2011, asked about 15 specific types of fraud, as well as two more general types.[1] The types of fraud included in the survey are among the most common frauds perpetrated by mass-market fraudsters, based on information gathered from consumer complaints submitted to the Commission's Consumer Sentinel database and Commission enforcement actions.

The 2011 survey found that 10.8 percent of U.S. consumers polled – which translates to

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[1] *Consumer Fraud in the United States, 2011: The Third FTC Survey* (March 2013), *available at* https://www.ftc.gov/sites/default/files/documents/reports/consumer-fraud-united-states-2011-third-ftc-survey/130419fraudsurvey_0.pdf.

an estimated 25.6 million American adults – had been victims of one of the frauds about which the survey asked.[2] The most frequently experienced of these frauds were weight loss products that were marketed as making it easy for consumers to lose weight or as enabling weight loss without diet or exercise, and that did not deliver what consumers had expected. An estimated 2.1 percent of American adults had purchased such weight loss products during 2011. Fraudulent prize promotions – a situation where a consumer paid money, purchased a product, or attended a sales promotion to obtain a promised prize and then did not receive the prize or found that the prize was not what they thought they had been promised – was the second most prevalent of the studied frauds, having been experienced by an estimated 1.0 percent of U.S. consumers.

b. Do you believe it is important to establish a baseline of the economic impact of scams to assess the effectiveness of FTC's enforcement and education efforts?

To fulfill its goal of protecting consumers, the FTC must identify consumer protection problems and trends in the fast-changing, increasingly global marketplace. The agency strives to understand the issues affecting consumers, including any newly emerging methods of fraud or deceit, so that it can target its enforcement, education, and advocacy on those areas where consumers suffer the most harm or where there will be the greatest impact. I am committed to continuing to improve the effectiveness of the FTC's enforcement and education efforts, including by setting appropriate baselines against which to measure those efforts.

A number of external factors pose significant obstacles to establishing a baseline of the economic impact of scams. For example, many injured consumers do not report when they have been harmed, whether out of embarrassment or for other reasons, and some consumers may not even realize that they have been victimized.

Nevertheless, I do believe it is important for the Commission to attempt to measure the economic impact that its enforcement and education efforts have on consumers and the economy, and the agency does set performance goals that can be used as a proxy for consumer harm. For example, in the FTC's current strategic plan, the agency has set baselines from past performance, as well as goals designed to improve that performance. These baselines and goals apply several different measures, including the percentage of the FTC's consumer protection law enforcement actions that targeted the subject of consumer complaints to the FTC; the total estimated consumer savings compared to the amount of FTC resources allocated to consumer protection law enforcement; and the amount of money the FTC returned to consumers or forwarded to the U.S. Treasury. The agency also has set performance measures for providing the public with knowledge and tools to prevent harm to consumers. For example, the agency has set performance goals for the rate of consumer satisfaction with FTC consumer education websites; the number of federal, state, local, international, and private partnerships to maximize the reach of consumer and business education campaigns; the number of workshops and conferences the

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[2] In at least some cases, the figures that result from the FTC's survey likely understate the prevalence of fraud. This is because fraud here involves paying for a product or service that the consumer had not agreed to purchase. This could occur, for example, if a consumer was deceptively offered a free trial of some service – perhaps a buyers' club – and the seller then converted the free-trial to a regular paid subscription if the consumer did not cancel the membership during the free-trial period. (These types of offerings are often referred to as "negative option" offers.) However, if the charges just appear on consumers' credit card or telephone bills and consumers do not realize that the charges are unauthorized, they will not be able to correctly report that they have been victimized.

FTC convened that address consumer protection problems; and the number of consumer protection reports the FTC released.

3. **In April 2016, the American Medical Association adopted a resolution supporting a "requirement that attorney advertising, which may cause patients to discontinue medically necessary medications have appropriate and conspicuous warnings that patients should not discontinue medications without seeking the advice of their physician." Could attorney advertising, which induces a patient to stop taking a prescribed medicine, be actionable under Section 5 of the FTC Act? Has the Commission examined any recent cases involving such advertising, and has Commission staff been in contact with the American Medical Association and the American Bar Association regarding this matter?**

Section 5 of the FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. §45(a). Whether the advertising that you describe would constitute an unfair or deceptive act or practice is a factual question that can only be answered on a case-by-case basis. However, I am happy to provide a general overview of the factors the Commission would consider in making such a determination.

The Commission has explained that a deceptive act or practice is a representation, omission, or practice that is likely to mislead a consumer acting reasonably under the circumstances and that is material.[3] If a representation, omission, or practice targets a particular group, the Commission will examine reasonableness from the perspective of that group. Further, a representation, omission, or practice is material if it "is likely to affect the consumer's conduct or decision with regard to a product or service."[4] Pursuant to Section 5(n) of the Act, an act or practice may be deemed unfair if (1) it "causes or is likely to cause substantial injury to consumers"; (2) the injury "is not reasonably avoidable by consumers themselves"; and (3) the injury is "not outweighed by countervailing benefits to consumers or competition." 15 U.S.C. § 45(n).[5]

The first element of unfairness is that the act causes or is likely to cause substantial injury to consumers. Accordingly, an inquiry would consider how likely is it that a particular ad would cause consumers to discontinue their medication and what consequences would likely follow if that happened, in order to obtain an overall understanding of the level of risk and harm to which consumers are exposed in a particular case. These factors would likely vary depending on the particular claims made in the ad, as well as the type of medication at issue.

The next element asks whether the injury would be reasonably avoidable by consumers themselves. Again, the answer to this question would likely depend on the claims made in the advertising, the medication involved, and the condition at issue.

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[3] *FTC Policy Statement on Deception* (Oct. 14, 1983) (appended to *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174 (1984)) ("Deception Policy Statement"), *available at* https://www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception.

[4] *Id.*

[5] *See also FTC Policy Statement on Unfairness* (Dec. 17, 1980) (appended to *Int'l Harvester Co.*, 104 F.T.C. 949 (1984)) ("Unfairness Statement"), *available at* https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness.

The final element is whether the consumer injury is outweighed by countervailing benefits to consumers or competition. Attorney advertising advising consumers who might have suffered injury to seek legal consultation can serve an important public purpose. Moreover, required disclosures impose at least some cost on advertisers. However, when there is a substantial injury to health, or the likelihood of such injury, that is not reasonably avoidable by consumers, a cost-benefit analysis will generally favor disclosure, if such disclosure will mitigate the injury.

At this point in time, no specific cases involving patients discontinuing medically necessary medication in response to attorney advertising have been brought to our attention. We plan to contact the AMA to request additional information.

4. **Under Democrat leadership, the FTC sought to introduce novel harms into its "substantial injury" analysis, for example recognizing intangible harm as the basis for unfairness cases. A prime example of this is in the FTC's *LabMD* enforcement, which you supported. Previously, the Commission tended to find substantial injury in cases of actual or likely economic harm, and in other instances, where physical health and safety is threatened.**
    a. **Do you agree that the Commission should consider intangible harm as part of its unfairness analysis?**

In order to effectively and efficiently protect consumers, the FTC must focus its enforcement efforts on stopping conduct that causes or is likely to cause substantial consumer harm. Public exposure of sensitive information of the type frequently used to facilitate identity theft can be likely to cause substantial economic injury. And it may create a significant risk of a concrete harm, which the Commission has also long considered to constitute substantial injury.[6] Furthermore, the Commission's longstanding view has been that an invasion of a consumer's highly sensitive medical information can itself constitute an actual, concrete consumer harm under the FTC Act.[7]

I do believe, however, that the FTC needs to examine more rigorously what constitutes substantial injury in privacy cases. This is one of the reasons I have asked the FTC's Bureau of Economics to study the economics of privacy and data security. I expect that this work will help ensure our data security and privacy program stands on a strong policy foundation.

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[6] Unfairness Statement n.12.

[7] The Commission's very first data security case, in 2002, addressed lax data security procedures that caused disclosure of the email addresses of Prozac users. *See Eli Lilly & Co.*, No. C-4047 (May 10, 2002), *available at* https://www.ftc.gov/enforcement/cases-proceedings/012-3214/eli-lilly-company-matter. More recently, the Commission has brought cases against a company that disclosed notes of medical examinations on the internet, *GMR Transcription Servs., Inc.*, No. C-4482 (Aug. 14, 2014), *available at* https://www.ftc.gov/enforcement/cases-proceedings/122-3095/gmr-transcription-services-inc-matter, and a company that solicited consumer healthcare reviews without indicating that the reviews would be publicly posted on the internet, *Practice Fusion, Inc.,* No. C-4591 (Aug. 16, 2016), *available at* https://www.ftc.gov/enforcement/cases-proceedings/142-3039/practice-fusion-inc-matter.

b. If economic or physical harm is not required, what is the predictable limiting factor on the types of harm that will result in enforcement?

As required by the first prong of Section 5(n) of the FTC Act and noted in the Unfairness Statement, the harm in question must constitute a substantial injury. Trivial, speculative, or certain subjective harms, such as those that offend the tastes or social beliefs of particular consumers, do not meet the first prong of Section 5(n). Unfairness Statement, 104 F.T.C. at 1073. In addition, for there to be a violation that may result in enforcement, the other prongs of Section 5(n) must also be satisfied, *i.e.*, the harm must not be reasonably avoidable by consumers or outweighed by countervailing benefits to consumers or competition.

5. In the FTC's recent enforcement action in the matter of *Vizio, Inc.*, you supported Count II of the complaint, alleging that Vizio deceptively omitted information about its data collection and sharing program, stating that "[e]vidence shows that consumers do not expect televisions to collect and share information about what they watch." On this basis, you found that the company's omission to be material, because "[c]onsumers who are aware of such practices may choose a different television or change the television's settings to reflect their preferences." Could, and if so, should, the FTC apply a similar theory of deception to data collection and sharing in other contexts – for instance by internet service providers, websites, or applications – where consumer may have lower expectations about the treatment of their data?

Any determination of whether a specific act or practice is deceptive is a factual question that must be made on a case-by-case basis. As noted above, a deceptive representation, omission, or practice is one that is material and likely to mislead a consumer acting reasonably under the circumstances. A representation is material if it is likely to affect the consumer's conduct or decision with respect to the product or service. As explained in the Commission's Deception Policy Statement, in making such a determination, the Commission will analyze the "net impression" of the representation being made from the perspective of a reasonable consumer.

The Commission has previously challenged deceptive omissions in other contexts involving data collection and sharing. For example, in *Goldenshores Technologies*,[8] the FTC alleged that the makers of a popular free flashlight app deceived consumers about how their geolocation information would be shared with advertising networks and other third parties. While the company's privacy policy told consumers that any information collected by their Brightest Flashlight app would be used by the company, it deceptively failed to disclose that the app transmitted users' precise location and unique device identifier to third parties, including advertising networks. Likewise, in its case against *Epic Marketplace*,[9] the FTC settled charges that the online advertising company used "history sniffing" to secretly and illegally gather data

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[8] Press Release, *FTC Approves Final Order Settling Charges Against Flashlight App Creator* (April 9, 2014) *available at* https://www.ftc.gov/news-events/press-releases/2014/04/ftc-approves-final-order-settling-charges-against-flashlight-app.

[9] Press Release, *FTC Approves Final Order Settling Charges Against Epic Marketplace, Inc.* (March 19, 2013) *available at* https://www.ftc.gov/news-events/press-releases/2013/03/ftc-approves-final-order-settling-charges-against-epic.

from millions of consumers about their interest in sensitive medical and financial issues ranging from fertility and incontinence to debt relief and personal bankruptcy. According to the complaint, while Epic did disclose its privacy and behavioral advertising practices, it deceptively omitted that it engaged in history sniffing. Finally, in *Sears Management Corp.*,[10] the FTC settled allegations that the company failed to disclose adequately the scope of consumers' personal information it collected via a downloadable software application. Sears allegedly represented to consumers that the software would track their "online browsing," but only disclosed the full extent of the tracking in a lengthy user license agreement, available to consumers at the end of a multi-step registration process. According to the FTC, the software would also monitor consumers' online secure sessions – including sessions on third parties' websites – and collect information transmitted in those sessions, such as the contents of shopping carts, online bank statements, drug prescription records, video rental records, library borrowing histories, and the sender, recipient, subject, and size for web-based e-mails.

6. **On December 14, 2016, the Consumer Review Fairness Act became the law of the land. This legislation, which I introduced in the Senate, addresses so-called "gag clauses" in form contracts that are designed to stop consumers from providing public feedback that criticizes a company, even when that feedback is an honest reflection of the customer experience. Among other things, this law provides for enforcement by the FTC, and set a deadline of February 12, 2017, for the FTC to begin education and outreach for business to provide them with non-binding best practices for compliance with the law. Please provide an update with respect to the Commission's activities under this new authority.**

In February 2017, the FTC issued "Consumer Review Fairness Act: What Businesses Need to Know," a guidance document that informs businesses of the conduct prohibited by the statute and provides information on how to comply with the law.[11] The FTC and states can enforce the law as to contracts in place on or after December 14, 2017.

7. **This hearing included discussion of the Commission's role with respect to promoting motor vehicle safety. In a recent panel discussing regulatory and policy issues facing the Commission, you stated your interest in the "safety benefits" of autonomous vehicles and connected cars.[12] Earlier this month, FTC announced a joint workshop with the National Highway Traffic Safety Agency (NHTSA), seeking stakeholder input on modern motor vehicle technologies that "promote safety."[13]**

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[10] Press Release, *FTC Approves Final Consent Order Requiring Sears to Disclose the Installation of Tracking Software Placed on Consumers Computers; FTC Approves Final Consent Order in Matter Concerning Enhanced Vision Systems, Inc.* (September 9, 2009) *available at* https://www.ftc.gov/news-events/press-releases/2009/09/ftc-approves-final-consent-order-requiring-sears-disclose.

[11] The guidance is available at https://www.ftc.gov/tips-advice/business-center/guidance/consumer-review-fairness-act-what-businesses-need-know.

[12] Maureen Ohlhausen, Comm'r, Fed. Trade Comm'n, Remarks at the CES 2017 FTC Commissioner Roundtable (Jan. 5, 2017).

[13] Press Release, *FTC and NHTSA Seek Input on Benefits and Privacy and Security Issues Associated with Current and Future Motor Vehicles* (March 20, 2017) *available at* https://www.ftc.gov/news-events/press-releases/2017/03/ftc-nhtsa-conduct-workshop-june-28-privacy-security-issues.

a. Should the Commission defer to the expert federal agencies, such as NHTSA and the National Transportation Safety Board, on the issue of motor vehicle safety?

The FTC would generally defer to federal agencies such as NHTSA and the National Transportation Safety Board (NTSB) regarding motor vehicle safety. At the same time, however, the line between issues of safety and non-safety are not necessarily clear. For example, a data security vulnerability may both expose consumers' personal information, as well as raise vehicle safety concerns. The Commission brings much experience to bear on the former. For example, on the privacy side, several automakers have voluntarily made commitments to adhere to industry privacy principles, and we have unique experience in enforcing self-regulatory codes. On the security side, the Commission has significant expertise in examining software security issues, such as failure to test for the presence of reasonably foreseeable vulnerabilities.[14]

Nonetheless, I share your concern and I am committed to working with other federal agencies to ensure that the FTC not impose duplicative, overlapping, or conflicting requirements on car companies.

b. Does the Commission have jurisdiction over motor vehicle safety under its unfairness authority, which recognizes that "[u]nwarranted health and safety risks may also support a finding of unfairness," or would such actions rely primarily on public policy considerations?

It is possible that, in certain contexts, the FTC's Section 5 unfairness jurisdiction could apply where a motor vehicle presented unreasonable health and safety risks to consumers. As noted above, I remain committed to working with other federal agencies to ensure that the FTC not impose duplicative, overlapping, or conflicting requirements on automotive companies.

8. The Senate Commerce Committee has also focused its attention on the issue of the marketing of anti-concussion sports equipment. Does the Commission have sufficient authority under the FTC Act, 15 U.S.C. §§ 41-58, to pursue enforcement actions against companies that engage in false or misleading advertising with respect to these products?

Section 5 of the FTC Act, 15 U.S.C. § 45(a), prohibits false or misleading advertising, including false or misleading advertising of the anti-concussion benefits of sports equipment. I

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[14] *See, e.g.*, *ASUSTeK Computer Inc.*, No. C-4587 (July 28, 2016), *available at* https://www.ftc.gov/enforcement/cases-proceedings/142-3156/asustek-computer-inc-matter (alleging that critical security flaws in computer hardware company ASUS' routers put the home networks of hundreds of thousands of consumers at risk); *Credit Karma, Inc.*, No. C-4480 (Aug. 13, 2014), *available at* https://www.ftc.gov/enforcement/cases-proceedings/132-3091/credit-karma-inc (alleging mobile app disabled a critical default process necessary to ensure that apps' communications were secure); *Fandango, LLC*, No. C-4481 (Aug. 13, 2014), *available at* https://www.ftc.gov/enforcement/cases-proceedings/132-3089/fandango-llc (same); *TRENDnet, Inc.*, No. C-4426 (Jan. 16, 2014), *available at* http://www.ftc.gov/enforcement/cases-proceedings/122-3090/trendnet-inc-matter (alleging that, due to the company's failure to properly secure its IP cameras, hackers were able to access and then post hundreds of online private video and even audio feeds); *HTC America, Inc.*, No. C-4406 (June 25, 2013), *available at* https://www.ftc.gov/enforcement/cases-proceedings/122-3049/htc-america-inc-matter (mobile device manufacturer HTC for failing to secure its mobile devices).

believe this authority is sufficient to allow the Commission to pursue enforcement actions against companies that engage in false or misleading advertising with respect to these products.

9. **In the FTC's written testimony, the Commission noted scams targeting small commercial trucking businesses wherein scammers impersonate government agencies to solicit payment for federal motor carrier registration. Small, family-owned trucking companies are an important part of the South Dakota transportation sector. These companies, along with their larger counterparts, must register with the U.S. Department of Transportation (DOT) and re-register periodically. As part of this process, registrant contact information is routinely made available online where it can be accessed by anyone, including scammers. I have heard from South Dakota trucking companies who are concerned about the illegitimate requests for payment and other solicitations for unnecessary services they receive. Sometimes, these requests and solicitations come from companies with official-sounding websites such as "DOTcompliance.com" and "ExpressDOTService.com." Particularly for smaller companies, it is difficult to discern legitimate requests from illegitimate ones.**

    a. **What steps has the FTC taken to combat this fraudulent behavior? How will the Commission address future incidents?**

    b. **To what extent has the FTC worked with DOT to address these scams?**

The FTC is concerned about this possible misconduct and has been working with the U.S. Department of Transportation (USDOT) to address it. In 2015, USDOT approached the FTC about the deceptive marketing of registration services by companies pretending to be affiliated with government agencies to small, family-owned trucking companies. Since then, the FTC has offered guidance to USDOT on consumer warnings and education measures to combat government-imposter registration solicitations. In addition, USDOT and the FTC worked together to identify and investigate relevant consumer complaints. As a result, this past Fall, the FTC filed an action alleging that several interrelated companies, including DOTAuthority.com, Inc., deceived small commercial trucking businesses into paying them for federal and state motor carrier registrations by impersonating government transportation agencies. Our complaint alleges that the defendants have taken in more than $17 million from thousands of small businesses by sending misleading robocalls, emails, and text messages that create and reinforce the false impression that they are, or are affiliated with, the USDOT, the Unified Carrier Registration system, or another government agency. As alleged in the complaint, the defendants used official-sounding names, official-looking websites, warnings of civil penalties or fines for non-compliance, and threats of imminent law enforcement to trick companies into using their registration services instead of using official government website services. The USDOT submitted two declarations in support of the FTC's complaint. The court has entered a preliminary injunction against the defendants and the litigation in this case is on-going.[15]

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[15] *See* FTC Press Release, *FTC Charges Operators of Scheme That Used Fake Government Affiliation to Sell Commercial Trucking Registration Services,* (Oct. 17, 2016) *available at* https://www.ftc.gov/news-events/press-releases/2016/10/ftc-charges-operators-scheme-used-fake-government-affiliation.

Senator Deb Fischer
Questions for the Record
Subcommittee on Consumer Protection, Product Safety, Insurance & Data Security
"Staying a Step Ahead: Fighting Back Against Scams Used to Defraud Americans"
March 21, 2017

1. **Acting Chairman Ohlhausen, in both this Congress and the last, I introduced the Spoofing Prevention Act with Ranking Member Nelson and Senators Blunt and Klobuchar. That bill would take steps to close loopholes in the Truth in Caller ID Act so we can better combat spoofing scams against seniors, law enforcement, and members of our military. What do you see as the Federal Trade Commission's role in eliminating spoofing, and what more needs to be done to fix this problem?**

The FTC uses every tool at its disposal to combat illegal spoofing and fraudulent and deceptive calls to consumers, including aggressive law enforcement, initiatives to spur technological solutions, and robust consumer education. We have brought more than 130 law enforcement actions shutting down operations responsible for billions of illegal calls, as well as numerous enforcement actions targeting fraudulent "impostors." Many of our law enforcement actions specifically target defendants that engage in illegal spoofing.[16]

In addition to continuous law enforcement in this area, the FTC is committed to working with industry to encourage and facilitate the development and deployment of network-level technological solutions to illegal spoofing. The FTC provided input to support the industry-led Robocall Strike Force, which is working to deliver comprehensive solutions to filter unwanted robocalls and to prevent illegal spoofing. The Robocall Strike Force highlighted two technological solutions that have been underway that will help thwart illegal spoofing: (1) a "do-not-originate" list and (2) Caller ID authentication standards.[17] A "do-not-originate" list allows the owner of a number to specify that it should only be used to accept incoming calls and never to place outgoing ones. In furtherance of the development of a "do-not-originate" list, the FTC worked with a major carrier and federal law enforcement partners to help block IRS scam calls that were spoofing well-known IRS telephone numbers.

The FTC also engages with technical experts, academics, and others through industry groups, such as the Messaging, Malware and Mobile Anti-Abuse Working Group ("M^{3}AAWG") and the Voice and Telephony Abuse Special Interest Group ("VTA SIG"). The FTC serves in a

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[16] *See, e.g., United States v. KFJ Marketing, LLC et al.,* 2:16-cv-01643 (C.D. Cal. Mar. 20, 2016)*; FTC et al., v. All Us Marketing LLC, et al.*, 6:15CV1016-0RL-28GJK (M.D. Fla. June 29, 2015) ; *FTC et al. v. Lifewatch Inc. et al.*, 1:15-cv-05781 (N.D. Ill. June 20, 2015); *FTC et al., v. Caribbean Cruise, Inc. et al.,* 0:15-cv-60423 (S.D. Fla. Mar. 4, 2015). Each of these actions sought relief for the defendants' use of illegal spoofing and failure to provide legitimate Caller ID information in violation of the Telemarketing Sales Rule, 16 C.F.R. § 310.4(a)(8).

[17] Caller ID authentication refers to standards to verify and authenticate caller identification for calls carried over an Internet Protocol (IP) network. These standards are known as SHAKEN (Signature-based Handling of Asserted information using toKENs) and STIR (Secure Telephony Identity Revisited). Wide-spread adoption of Caller ID authentication standards would enable blocking and/or flagging of calls attempting to transmit unverified Caller ID information. *See* the October 21, 2016 Robocall Strikeforce Report *available at* https://transition.fcc.gov/cgb/Robocall-Strike-Force-Final-Report.pdf.

leadership role in VTA SIG, which currently works to support various initiatives that tackle voice spam, including Caller ID authentication standards.

We also arm consumers with the tools and information they need to protect themselves against fraudulent calls that often use spoofed numbers. The FTC provides consumer information in English and Spanish in many forms including print and online articles, fact sheets, blog posts, brochures and videos with tips for avoiding scams and unwanted calls. One of our most popular features is a "Scam Alert" page that is frequently updated with blog posts about new scams.[18] We also remind consumers in our guidance that they need to be wary of scammers using fake Caller ID information.[19]

2. **Acting Chairman Ohlhausen, as you may know, there have been many recent reports of travel company booking scams. These involve fraudulent companies imitating the websites of hotels or airlines to attract bookings and trick consumers into paying fees for services they do not receive. I have one such account from a hotel in Kearney, Nebraska, that I entered into the hearing record. Last fall, Senator Klobuchar and I sent you a letter regarding this fraudulent practice. Does the FTC frequently hear about these types of complaints? If so, what would be an appropriate response?**

The FTC has a strong interest in protecting consumer confidence in the online marketplace for travel and other services. The FTC has received complaints about websites that mimic those of well-known travel companies from Members of Congress, industry associations, and consumers. The Consumer Sentinel complaint database, which includes complaints received directly by the FTC as well as complaints contributed by the Better Business Bureau and other agencies, contains approximately 60 complaints since 2012 indicating that consumers had booked a hotel through a third-party site when they thought they were booking directly with a hotel.

In July 2015, the FTC issued consumer education cautioning consumers about third-party websites that may deceptively mimic hotel websites. We also have met with Members of Congress to discuss the issue of deceptive travel sites and have provided technical assistance and comments on proposed legislation. Although the existence and details of investigations are non-public, I can assure you that the FTC staff has taken these complaints seriously and will take law enforcement action if appropriate.

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[18] *See* Scam Alerts: What to know and do about scams in the news, *available at* https://www.consumer.ftc.gov/scam-alerts.

[19] *See Scammers can fake caller ID info* (May 4, 2016), *available at* https://www.consumer.ftc.gov/blog/scammers-can-fake-caller-id-info.

Senator Jerry Moran
Questions for the Record
Subcommittee on Consumer Protection, Product Safety, Insurance & Data Security
"Staying a Step Ahead: Fighting Back Against Scams Used to Defraud Americans"
March 21, 2017

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1) **During the hearing, one of the issues raised by both panel members and witnesses was the rise of ransomware, especially targeted at small business owners. One of the devious ways that hackers can gain access to a computer is by baiting Internet users with the prospect of free movies, TV shows or music. Recent studies have found that 1 in 3 so-called pirate websites expose consumers to malware. Given the rise of piracy as a means to bait and infect computers, and increase in ransomware, what is the FTC doing to warn consumers about the connection between piracy and malware?**

I share your concerns about malware on consumers' computers and the potential harm such malware may cause consumers. Related to the specific practice you have highlighted, last week, the Commission issued a consumer education blog post warning consumers that downloading pirated content is illegal and websites offering such content often hide malware that can bombard them with ads, take over their computers, or steal their personal information.[20]

Consumer education is a central part of the FTC's mission. Our outreach includes publications, online resources, workshops, and social media. These outreach efforts cover many topics, including malware, tech support scams, spyware, phishing, peer-to-peer file sharing, and social networking. We work closely with local, state, and federal government entities, industry representatives, and consumer groups to maximize the impact of these efforts.

The FTC has many consumer education resources that provide additional information to consumers about dangers associated with malware. For example, the Commission has published blog posts and videos on ransomware[21] and identity theft.[22] In addition, our *Net Cetera* publication helps parents, teachers, and other adults talk to children about how to be safe, secure, and responsible online.[23]

Relevant resources also include education materials relating to individual enforcement actions the Commission has taken. For example, last year the Commission settled an action with ASUSTeK Computer, Inc. in which the Commission alleged that the company's routers had

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[20] *Free movies, costly malware* (Apr. 12, 2017), *available at* https://www.consumer.ftc.gov/blog/free-movies-costly-malware.
[21] *How to Defend Against Ransomware* (Nov. 10, 2016), *available at* https://www.consumer.ftc.gov/blog/how-defend-against-ransomware.
[22] *See* FTC Consumer Information, Identity Theft, *available at* https://www.consumer.ftc.gov/topics/identity-theft.
[23] *Netcetera: Chatting with Kids About Being Online* (Jan. 2014), *available at* https://www.onguardonline.gov/articles/pdf-0001-netcetera.pdf.

security bugs that allowed malware to commandeer consumers' web traffic.[24] In connection with this settlement, the Commission published a blog post with tips on router security.[25]

2) **Another theme of the hearing was the economic loss caused by scams. A recent investigation by security company RiskIQ found that hackers are paying pirate website operators $70 million a year to infect computers. What role should the FTC play in warning consumers and encouraging those who facilitate online activity – such as domain sellers, hosting companies, search engine companies and payment processors – in combatting these piracy/malware operators? For example, should the FTC post warnings on their website, produce public service announcements or work with digital platforms to raise awareness and combat this new threat?**

The FTC's robust law enforcement and consumer education platforms combat online threats, such as the unwanted installation of malware and other software. Last Fall, the FTC held a workshop with numerous industry participants to discuss the ransomware threat, including how consumers can avoid—and respond to—ransomware.[26] And, as noted in response to the previous question , the FTC recently published a blog post on its website entitled "Free movies, costly malware" to educate consumers about the possibility that pirate websites will infect their computers and devices with malware if they download copyrighted content.[27]

In addition, the Commission has brought several enforcement actions to stop companies from installing malware and other unwanted software on consumers' computers and devices.[28] The Commission will continue to use its investigative, legal, and public outreach tools to protect consumers from unwanted and harmful software. Moreover, the Commission will continue, as it has done in the past, to work with high tech companies, service providers, and industry participants to combat online threats.

3) **In the FTC's prepared testimony, the agency discusses the challenges associated with offshore scammers, including international telemarketing fraud rings. The Committee is also aware that so-called Jamaican lottery scams have proliferated in recent years. One tool available to FTC is the U.S. SAFE WEB Act, which allows the Commission to address consumer protection matters, particularly those with an**

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[24] *ASUSTeK Computer, Inc.*, No. C-4587 (July 28, 2016), *available at* https://www.ftc.gov/enforcement/cases-proceedings/142-3156/asustek-computer-inc-matter.

[25] *Got an ASUS router at home? Read this.* (Feb. 2016), *available at* https://www.consumer.ftc.gov/blog/got-asus-router-home-read.

[26] Event Description, *Fall Technology Series: Ransomware* (Sept. 7, 2016), *available at* www.ftc.gov/news-events/events-calendar/2016/09/fall-technology-series-ransomware.

[27] Blog Post, *Free movies, costly malware* (Apr. 12, 2017), *available at* www.consumer.ftc.gov/blog/free-movies-costly-malware.

[28] *See, e.g.*, Press Release, *FTC Charges Tech Support Companies With Using Deceptive Pop-Up Ads to Scare Consumers Into Purchasing Unneeded Services* (Oct. 12, 2016), *available at* www.ftc.gov/news-events/press-releases/2016/10/ftc-charges-tech-support-companies-using-deceptive-pop-ads-scare; Press Release, *Tech Company Settles FTC Charges It Unfairly Installed Apps on Android Mobile Devices Without Users' Permission* (Feb. 5, 2016), *available at* www.ftc.gov/news-events/press-releases/2016/02/tech-company-settles-ftc-charges-it-unfairly-installed-apps; Press Release, *FTC Permanently Shuts Down Notorious Rogue Internet Service Provider* (May 19, 2010), *available at* www.ftc.gov/news-events/press-releases/2010/05/ftc-permanently-shuts-down-notorious-rogue-internet-service.

international dimension, providing for increased cooperation with foreign law enforcement authorities, confidential information sharing and investigative assistance.

a. How has FTC used the SAFE WEB Act in its fight against scams?

The FTC has used the Act's powers extensively in cross-border fraud cases and other matters to protect Americans. Between FY2012 and FY2016, for example, the FTC used the Act to share information in response to almost 65 requests from foreign agencies, and issued nearly 65 civil investigative demands to aid 28 foreign investigations. These efforts have enabled foreign counterparts to investigate conduct that directly harms American consumers, and, in many instances, also helped to advance FTC investigations. Here are a few examples since Congress reauthorized the Act in 2012:

The FTC used its SAFE WEB powers to work with Canadian law enforcement to stop a telemarketing scam that targeted senior citizens. On the U.S. side, the FTC obtained an order for more than $10 million in consumer redress and the Justice Department charged some of the defendants criminally. On the Canadian side, the Royal Canadian Mounted Police (RCMP) brought its own case, arresting the Canadian-based defendants and seizing evidence.[29]

The FTC used its SAFE WEB powers to obtain evidence for the Toronto Police Service's investigation of a sham business that scammed $93 million from consumers by purporting to sell banner ads for websites. The scheme had thousands of victims worldwide, including in the United States. Canadian law enforcement broke up the scam and arrested two of its leaders.[30]

The agency used its SAFE WEB authority in another telemarketing scam to repatriate, with Justice Department help, nearly $2 million of the defendant's assets from Canadian bank accounts frozen by the RCMP; the FTC has now sent redress checks to 1,630 victims totaling $1.8 million.[31]

The FTC has used SAFE WEB in a number of business directory scams that prey on small businesses, non-profits, and churches to share evidence with counterparts in Canada and other jurisdictions. This has led to several FTC judgments and law enforcement actions in Canada.[32]

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[29] *See,* Press Release, *Court Orders Ringleader of Scam Targeting Seniors Banned From Telemarketing* (Mar. 12, 2015), *available at* https://www.ftc.gov/news-events/press-releases/2015/03/court-orders-ringleader-scam-targeting-seniors-banned.

[30] *See,* Press Release, *$126M Banners Broker pyramid scheme dismantled by Toronto police* (Dec 02, 2015) *available at http://www.cbc.ca/news/canada/toronto/pyramid-scheme-toronto-1.3356905.*

[31] *See,* Press Release, *FTC Returns $1.87 Million to Consumers Harmed by Debt Relief Scam* (May 09, 2016), *available at* https://www.ftc.gov/news-events/press-releases/2016/05/ftc-returns-187-million-consumers-harmed-debt-relief-scam.

[32] *See, e.g.,* Press Release, *FTC Halts Online 'Yellow Pages' Scammers* (Dec. 02, 2015), *available at* https://www.ftc.gov/news-events/press-releases/2015/12/ftc-halts-online-yellow-pages-scammers; Press Release, *FTC and Florida Halt Internet 'Yellow Pages' Scammers* (July 17, 2014), *available at* https://www.ftc.gov/news-events/press-releases/2014/07/ftc-florida-halt-internet-yellow-pages-scammers.

SAFE WEB also allowed the FTC to exchange information with Canadian law enforcement about a company that put unauthorized charges on consumers' phone bills using phony virus-scan scareware and led to law enforcement actions involving that conduct on both sides of the border.[33]

Apart from scams, the Act also supports FTC enforcement of the EU-U.S. Privacy Shield Framework, which enables transatlantic data flows for many U.S. companies. The FTC's SAFE WEB powers provide for stronger cooperation with European data protection authorities on investigations and enforcement against possible Privacy Shield violations, a point cited in the European Commission's Privacy Shield adequacy decision.

b. This legislation is scheduled to sunset in 2020. Do you support its reauthorization? Will you commit to provide technical assistance to the Committee, including any modifications to improve the FTC's ability to go after international scammers?

I strongly support SAFE WEB reauthorization and commit to providing technical assistance to the Committee for that process. FTC staff worked closely with the Committee to develop the original legislation passed in 2006, and to support reauthorization in 2012. We would be pleased to work with the Committee to continue strengthening our ability to go after international scammers. We in particular suggest repealing the sunset provision entirely: greater certainty for the agency and our international partners about the FTC's enforcement tools going forward improves our ability to develop enduring cooperation agreements and enforcement projects with foreign counterparts. Congress granted the Securities and Exchange Commission and the Commodities and Futures Trading Commission similar enforcement powers over 25 years ago, without a sunset provision. Their positive enforcement cooperation experience, and the FTC's successful experience with SAFE WEB over the past decade, confirms the value of this legislation to our enforcement mission.

4) The FTC's prepared statement for the hearing raised concerns with the controversial "common carrier" exception from Title II of the Communications Act and its impact on the FTC's efforts to protect consumers from unfair or deceptive acts or practices. Could you please elaborate on how this provision is harming the FTC's mission? Additionally, how did the Court of Appeals for the Ninth Circuit's recent decision holding that the "common carrier" exception is "status based" affect the FTC's ability to protect consumers?

Section 5 of the FTC Act prohibits "unfair or deceptive acts or practices" in or affecting commerce and directs the FTC to prevent such conduct. 15 U.S.C. § 45(a). Section 5, however, excepts from FTC enforcement authority "common carriers subject to the Acts to regulate

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[33] *See,e.g.,* Press Release, *Jesta Digital Settles FTC Complaint it Crammed Charges on Consumers' Mobile Bills Through 'Scareware' and Misuse of Novel Billing Method* (Aug 21, 2013), *available at* https://www.ftc.gov/news-events/press-releases/2013/08/jesta-digital-settles-ftc-complaint-it-crammed-charges-consumers; Press Release, *Telus customers to receive $7.34 million in rebates as part of Competition Bureau agreement* (Dec 30, 2015), *available at* http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04017.html.

commerce."[34] The FTC has long interpreted this exception to be "activity based" – that is, a company that engaged in both common carriage and non-common carriage activities would still be within the FTC's enforcement authority with regards to the non-common carriage activities. Even with this limiting interpretation, however, the FTC, on a bipartisan basis, has for many years called for repeal of the exception as outdated, unnecessary, and a hindrance to consumer protection efforts.

The common carrier exception poses several obstacles to the FTC effectively carrying out its consumer protection mission. For example, some companies have objected to an FTC enforcement action on the basis of the common carrier exception.[35] Even when such objections are meritless, the FTC is forced to litigate this issue in the court systems, which diverts FTC resources from other consumer protection efforts and can delay redress to fraud victims.

Furthermore, consumers should be protected from unfair or deceptive acts or practices in the entire marketplace. But the common carrier exception effectively excludes a subset of consumers' activities in the marketplace from this protection. This problem has been put into sharper focus as a result of the Federal Communications Commission's action in 2015 reclassifying the provision of broadband internet service as a common carrier activity. Prior to this action, provision of internet services was considered a non-common carrier activity and the FTC was able to enforce consumer protection laws against internet service providers, even in the early days of the internet. For example, in 1998, the FTC brought an action against AOL and other ISPs for allegedly deceptive "free" trial periods.[36] However, the FCC's reclassification created an enforcement gap in which the FTC may now be unable to protect consumers from unfair or deceptive practices by ISPs.

The Ninth Circuit's recent decision has further exacerbated the problem by applying a "status based" interpretation to the common carrier exception. Under this interpretation, if a company has the status of common carrier, all of its activities, even those not related to common carriage, could be immune from FTC enforcement authority. This would further weaken consumer protection efforts, including in areas in which the FTC has taken significant law enforcement actions in the past. For example, the agency sued AT&T and T-Mobile in 2013 for placing unauthorized charges for purported third-party services on consumers' mobile phone bills.[37] Those and similar cases have recovered hundreds of millions of dollars for injured

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[34] In 1914 when the FTC Act was passed, Section 4 of the Act defined "Acts to regulate commerce" as the Interstate Commerce Act; Congress later added the Communications Act. *See* 15 U.S.C. § 44.

[35] *See, e.g., FTC v. Verity Int'l, Ltd.*, 443 F.3d 48 (2d Cir. 2006).

[36] *See, e.g., America Online, Inc.*, 125 F.T.C. 403 (1998); *CompuServe, Inc.* 125 F.T.C. 451 (1998); *Prodigy, Inc.*, 125 F.T.C. 430 (1998).

[37] *See FTC Alleges T-Mobile Crammed Bogus Charges onto Customers' Phone Bills* (July 1, 2014), *available at* https://www.ftc.gov/news-events/press-releases/2014/07/ftc-alleges-t-mobile-crammed-bogus-charges-customers-phone-bills; *AT&T to Pay $80 Million to FTC for Consumer Refunds in Mobile Cramming Case* (Oct. 8, 2014), *available at* https://www.ftc.gov/news-events/press-releases/2014/10/att-pay-80-million-ftc-consumer-refunds-mobile-cramming-case.

consumers. The Ninth Circuit decision calls into question the agency's ability to take similar actions in the future.

Senator Dean Heller
Questions for the Record
Subcommittee on Consumer Protection, Product Safety, Insurance & Data Security
"Staying a Step Ahead: Fighting Back Against Scams Used to Defraud Americans"
March 21, 2017

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1. **Last Congress, Microsoft came before the Senate Aging Committee and told us about partnerships they had with states to combat tech scams. For Nevadans, consumer protection is a top issue, especially because of the impact that scams can have on an individual's finances or even their privacy.**

   Are there any FTC initiatives in coordination with State Attorneys General that are models for protecting consumers from scams?

The Commission has robust, collaborative relationships with state law enforcers, including through the National Association of Attorneys General. The FTC's collaboration with its state partners takes many forms, including sharing information and targets, assisting with investigations, and working collaboratively on long-term policy initiatives.

Over the last two years, the FTC has collaborated with its state partners on dozens of investigations and numerous joint enforcement actions, including investigations and enforcement actions concerning tech support scams,[38] robocalls,[39] charity scams,[40] and debt collection practices,[41] among other deceptive and unfair practices. The FTC also leads law enforcement "sweeps"—coordinated, simultaneous law enforcement actions—in conjunction with state and local partners.[42] To supplement its law enforcement efforts, the FTC and its state partners also

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[38] *See, e.g.*, Press Release, *Telemarketing Defendants Charged by FTC in Tech Support Scheme Will Pay $10 Million for Consumer Redress* (Dec. 22, 2016), *available at* www.ftc.gov/news-events/press-releases/2016/12/telemarketing-defendants-charged-ftc-tech-support-scheme-will-pay (case brought by FTC and the Florida Attorney General); Press Release, *FTC and Florida Charge Tech Support Operation with Tricking Consumers into Paying Millions for Bogus Services* (July 8, 2016), *available at* www.ftc.gov/news-events/press-releases/2016/07/ftc-florida-charge-tech-support-operation-tricking-consumers; Press Release, *Tech Support Operators Settle FTC, State of Florida Charges They Misled Consumers* (Feb. 12, 2016), *available at* www.ftc.gov/news-events/press-releases/2016/02/tech-support-operators-settle-ftc-state-florida-charges-they.

[39] *See, e.g.*, Press Release, *FTC, Florida Attorney General Take Action Against Illegal Robocall Operation* (June 14, 2016), *available at* www.ftc.gov/news-events/press-releases/2016/06/ftc-florida-attorney-general-take-action-against-illegal-robocall; Press Release, *FTC and Ten State Attorneys General Take Action Against Political Survey Robocallers Pitching Cruise Line Vacations to the Bahamas* (Mar. 4, 2015), *available at* www.ftc.gov/news-events/press-releases/2015/03/ftc-ten-state-attorneys-general-take-action-against-political.

[40] *See* Press Release, *FTC, All 50 States and D.C. Charge Four Cancer Charities With Bilking Over $187 Million from Consumers* (May 19, 2015), *available at* www.ftc.gov/news-events/press-releases/2015/05/ftc-all-50-states-dc-charge-four-cancer-charities-bilking-over.

[41] *See, e.g.*, Press Release, *FTC and Illinois Attorney General Halt Chicago-Area Operation Charged with Collecting and Selling Phantom Payday Loan Debts* (Mar. 30, 2016), *available at* www.ftc.gov/news-events/press-releases/2016/03/ftc-illinois-attorney-general-halt-chicago-area-operation-charged.

[42] *See, e.g.*, Press Release, *FTC and Federal, State and Local Law Enforcement Partners Announce Nationwide Crackdown Against Abusive Debt Collectors* (Nov. 4, 2015), *available at* www.ftc.gov/news-events/press-releases/2015/11/ftc-federal-state-local-law-enforcement-partners-announce; Press Release, *FTC, Multiple Law Enforcement Partners Announce Crackdown on Deception, Fraud in Auto Sales, Financing and Leasing* (Mar. 26, 2015), *available at* www.ftc.gov/news-events/press-releases/2015/03/ftc-multiple-law-enforcement-partners-announce-crackdown; Press Release, *FTC and Dozens of Law Enforcement Partners Halt Travel and Timeshare*

co-host consumer protection conferences and workshops designed to protect consumers from fraud and provide guidance on how to identify and avoid scams.[43]

Resale Scams in Multinational Effort (June 6, 2013), *available at* www.ftc.gov/news-events/press-releases/2013/06/ftc-dozens-law-enforcement-partners-halt-travel-timeshare-resale; Press Release, *FTC Leads Joint Law Enforcement Effort Against Companies that Allegedly Made Deceptive "Cardholder Services" Robocalls* (Nov. 1, 2012), *available at* www.ftc.gov/news-events/press-releases/2012/11/ftc-leads-joint-law-enforcement-effort-against-companies.

[43] *See, e.g.*, Events Calendar, *FTC & NASCO Host a Conference Exploring Consumer Protection Issues and Charitable Solicitations* (Mar. 21, 2017), *available at* www.ftc.gov/news-events/events-calendar/2017/03/give-take-consumers-contributions-charity; Events Calendar, *Working Together to Protect Midwest Consumers: A Common Ground Conference* (Oct. 25, 2016), *available at* www.ftc.gov/news-events/events-calendar/2016/10/working-together-protect-midwest-consumers-common-ground; Events Calendar, *Working Together to Protect Michigan Consumers: A Common Ground Conference* (July 13, 2016), *available at* www.ftc.gov/news-events/events-calendar/2016/07/working-together-protect-michigan-consumers-common-ground; Events Calendar, *Utah Consumer Protection Summit* (Oct. 22, 2015), *available at* www.ftc.gov/news-events/events-calendar/2015/10/utah-consumer-protection-summit.

Senator Todd Young
Questions for the Record
Subcommittee on Consumer Protection, Product Safety, Insurance & Data Security
"Staying a Step Ahead: Fighting Back Against Scams Used to Defraud Americans"
March 21, 2017

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1. **Acting Chairman Ohlhausen and Commissioner McSweeny, has the FTC focused on the issue of travel booking scams beyond issuing consumer alerts?**

As you note, in July 2015, the FTC issued consumer education cautioning consumers about third-party websites that may deceptively mimic hotel websites.[44] In addition, we have met with Members of Congress to discuss the issue of deceptive travel sites and have proposed technical assistance and comments on proposed legislation. Because the existence and details of investigations are non-public, we cannot comment on any specific matters. However, the FTC will take law enforcement action in appropriate cases.

2. **Acting Chairman Ohlhausen and Commissioner McSweeny, what plans does the FTC have to notify and coordinate with State Attorney Generals prior to peak travel season this year, including summer, Thanksgiving, and the Christmas holidays?**

The FTC has worked closely with the State Attorneys General on many issues, including most recently during National Consumer Protection week. The FTC will explore whether there are opportunities to coordinate with the states to protect consumers from scams that affect them during these peak travel periods.

3. **Acting Chairman Ohlhausen: In your testimony, you noted that military consumers are often attractive targets of fraudsters in part because they receive a regular paycheck and move relatively frequently. As a former Marine myself, I can imagine there is also a certain amount embarrassment among our service men and women when they are taken advantage of and therefore there might be even be lower reporting from victims in this community.**

I agree. In addition to the points you raise, some fraudsters have customized their scams to play on the particular fears of military consumers, such as threatening action under the Uniform Code of Military Justice, which may also lead to under-reporting by this community.

4. **Acting Chairman Ohlhausen, in looking at this particular community, do you need additional authority from Congress to work with our service branches to protect military members from potential scams?**

At this time, the Commission has not asked for any specific additional legislation for protecting military members from potential scams. We would, however, be happy to review and provide assistance on any specific piece of proposed legislation.

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[44] *See Did you book that night at the hotel's site?* (July 14, 2015), *available at* https://www.consumer.ftc.gov/blog/did-you-book-night-hotels-site.

We have used our existing tools, including the FTC Act, the Fair Debt Collection Practices Act,[45] the Telemarketing Sales Rule,[46] and the Mortgage Assistance Relief Services Rule,[47] to protect military consumers, and we will continue to do so. For example, earlier this year, the Commission announced settlements with two online high schools that claimed their diplomas could be used to join the military and that their programs conformed to the Department of Defense's SCORM standards for the training of military and civilian personnel.[48] The FTC alleged that these diploma mills violated the FTC Act by failing to provide the promised valid high school equivalency degrees. As part of our investigation, we worked with DoD to provide evidence that the program was not SCORM-conformant.

In other instances, the FTC has brought actions against scammers that target the general population but tailor their practices to deceive military consumers. In one recent case against a fraudulent debt collector, we talked to a consumer whose family was harassed while he was on active duty, and who was threatened with action under the Uniform Code of Military Justice, all about a debt he did not actually owe.[49] The FTC was able to obtain a court order banning these collectors from the debt collection industry and imposing monetary judgments against them. In another case, the FTC brought an action alleging that a sham non-profit claimed it would provide legal representation to struggling homeowners trying to avoid foreclosure but failed to provide the promised services.[50] One consumer we talked to was an elderly veteran amputee who had paid almost $10,000 to the scammers to obtain a mortgage loan modification and received nothing of value in return. The FTC obtained an order banning the scammers from the mortgage and debt relief industries and returned approximately $3 million to alleged victims of the scam.

5. Acting Chairman Ohlhausen, what specific efforts has the FTC undertaken with our service branches to help protect our service men and women?

Protecting military consumers through law enforcement and education is a top priority of the Commission, and we work closely with military partners to help the military community avoid frauds. Military Consumer is the FTC's longstanding campaign to reach service members and their families. The FTC website I mentioned in my testimony, Military.Consumer.gov, is a joint initiative with Department of Defense, the CFPB's Office of Servicemember Affairs, Military Saves, FINRA Investor Education Foundation, the National Military Family Association and other partners to empower active duty and retired servicemembers, military families,

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[45] 15 U.S.C. § 801 *et seq.*
[46] 16 C.F.R. Part 310.
[47] 16 C.F.R. Part 322.
[48] Press Release, *Operators of Online 'High Schools' Settle FTC Charges That They Misled Tens of Thousands Consumers with Fake Diplomas* (Feb. 10, 2017), *available at* https://www.ftc.gov/news-events/press-releases/2017/02/operators-online-high-schools-settle-ftc-charges-they-misled-tens.
[49] Press Release, *Court Halts Debt Collector's Operations, Freezes Assets* (July 21, 2014), *available at* https://www.ftc.gov/news-events/press-releases/2014/07/court-halts-debt-collectors-operations-freezes-assets.
[50] *See* Press Release, *FTC Mails Refund Checks Totaling Nearly $3 Million to Consumers Victimized by Alleged Mortgage Relief Scam* (May 28, 2014), *available at* https://www.ftc.gov/news-events/press-releases/2014/05/ftc-mails-refund-checks-totaling-nearly-3-million-consumers.

veterans, and civilians in the military community. The site's Military Consumer Toolkit offers free materials on topics that allow personal financial managers, counselors, command, and others in the military community to share practical financial readiness tips.

While Military Consumer is a year-round campaign, each July the FTC hosts the Month of the Military Consumer with the Department of Defense to bring additional focus to consumer issues affecting servicemembers and military families. This year, the FTC will be hosting a free workshop on July 19, 2017, to examine financial issues and scams that can affect military consumers, including active duty servicemembers in all branches and veterans. Topics of discussion at the daylong event will include auto purchasing , financing, and leasing; student and other lending; information security issues; financial literacy and capability, including identity theft; and avoiding scams.[51] We are working closely with our military partners in planning this event that will bring together all service branches, military consumer advocates, military legal services, government representatives, and industry representatives.

The agency regularly disseminates short tips through social media and hosts periodic Twitter chats with federal, state, and military partners. In addition to our online materials, the FTC also has presented webinars and made presentations for personal financial managers in conjunction with the Army, the Navy, the Department of Veterans Affairs, Military One Source, the Military Family Learning Network (and USDA Cooperative Extension), and military contractors serving as counselors to military families.

The Commission will continue to work with our military partners to protect our service men and women from unfair and deceptive acts and practices.

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[51] Press Release, *FTC Announces 2017 Military Consumer Financial Workshop: Protecting Those Who Protect Our Nation* (Apr. 12, 2017), *available at* https://www.ftc.gov/news-events/press-releases/2017/04/ftc-announces-2017-military-consumer-financial-workshop.

U.S. SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

SUBCOMMITTEE ON CONSUMER PROTECTION,
PRODUCT SAFETY, INSURANCE, AND DATA SECURITY

"STAYING A STEP AHEAD: FIGHTING BACK AGAINST SCAMS USED TO DEFRAUD AMERICANS"

MARCH 21, 2017

QUESTIONS FOR THE RECORD
RANKING MEMBER BILL NELSON

Question. **The FTC already operates on a tight budget. It is a small agency with a huge mandate: to police the American economy and enforce against "unfair or deceptive acts or practices." The Trump Administration has proposed irresponsible cuts to virtually every aspect of the government that helps the average American. While we have yet to see a specific budget proposal for the FTC, the "skinny" budget did reference a vague 9.8 percent cut to "other agencies" that were not specifically mentioned. It seems safe to say that funding cuts may well be coming to the FTC.**

How would a possible budget cut – say, along the lines of a 9.8 percent cut – affect the FTC's ability to protect American consumers from scams and fraud?

We are currently working with OMB to determine what the President's 2018 budget will recommend for the Commission and we are optimistic that it will not propose a significant cut for the agency. However, if the FTC faced a significant budgetary cut, we would strive to minimize its effect on the Commission's ability to enforce consumer protection and competition laws, though it would likely have some impact.

QUESTIONS FOR THE RECORD
SENATOR RICHARD BLUMENTHAL

Question 1. **In March, the DOJ indicted four individuals, including two Russian spies, for hacking into Yahoo's systems in 2014 and obtaining access to at least 500 million Yahoo accounts. According to the indictment, defendants spied on U.S. government officials and private-sector employees of financial companies, among others. One defendant also exploited the data for financial gain. He searched user e-mail accounts for gift card numbers, redirected Yahoo search traffic so he could make commissions, and stole the contacts of at least 30 million Yahoo accounts to conduct a spam marketing scheme.**

What are the chances of the United States taking these Russian spies into custody for their crimes?

The FTC does not have criminal law enforcement authority, but it works closely with its criminal and foreign law enforcement partners to achieve a broader impact and further its mission of protecting consumers. For example, as noted during the March 21, 2017, hearing before this Subcommittee, the Commission created the Criminal Liaison Unit in 2003, and FTC prosecution referrals have led to hundreds of fraudsters facing criminal charges and prison time.

While the FTC encourages criminal authorities to pursue hackers, we also believe it is important for companies to shore up the security of their systems, so that they can help protect against unauthorized access to, and misuse of, consumer data. Unfortunately, reports of data breaches like the one you cite affect millions of Americans. The Commission is deeply concerned about the risk of fraud, identity theft, and other harm that consumers face as a result of such breaches, which is why promoting data security has long been, and will continue to be, a priority.

The Commission enforces several civil statutes and rules that impose security obligations upon businesses that collect and maintain consumer data. The Commission's Safeguards Rule, which implements the Gramm-Leach-Bliley Act, for example, provides data security requirements for financial institutions within the Commission's jurisdiction.[1] The Fair Credit Reporting Act ("FCRA") requires consumer reporting agencies to use reasonable procedures to ensure that the entities to which they disclose sensitive consumer information have a permissible purpose for receiving that information,[2] and imposes safe disposal obligations on entities that maintain consumer report information.[3] The Children's Online Privacy Protection Act ("COPPA") requires reasonable security for children's information collected online.[4] In addition, the Commission enforces Section 5 of the FTC Act, which prohibits unfair or deceptive acts or practices, such as businesses making false or misleading claims about their data security procedures, or failing to employ reasonable security measures and, as a result, causing or likely

[1] 16 C.F.R. Part 314, implementing 15 U.S.C. § 6801(b).
[2] 15 U.S.C. § 1681e.
[3] *Id.* at § 1681w. The FTC's implementing rule is at 16 C.F.R. Part 682.
[4] 15 U.S.C. §§ 6501-6506; *see also* 16 C.F.R. Part 312 ("COPPA Rule").

causing substantial consumer injury.[5] Since 2001, the Commission has used its authority under these laws to take enforcement action and obtain settlements in approximately 60 cases against businesses that it charged with failing to provide reasonable and appropriate protections for consumers' personal information.[6]

In addition to bringing enforcement actions, the Commission engages in significant educational efforts discussed in more detail below. In all of its efforts, the Commission looks forward to continued cooperation and collaboration with its law enforcement partners, and with private industry, to protect the security of consumers' data.

Question 2. **So, despite our country and the Department of Justice's best efforts, our country remains vulnerable to outside threats seeking to infiltrate our systems and prey on our consumers. The *New York Times* has also reported that despite DOJ's indictment against the individuals responsible for these attacks, one billion Yahoo accounts – stolen in another attack on the company a year earlier – continue to be found for sale on underground hacker forums as recently as last Friday, for $200K. This is a stark reminder that while federal prosecutors are taking steps they can to hold the criminals and perpetrators accountable, private consumer information is still available and vulnerable for abuse.**

Do you think Yahoo has implemented reasonable security standards to protect its customers?

The Commission can only determine whether a company's practices are reasonable after conducting an investigation. Because Yahoo has made our investigation public in a filing with the Securities and Exchange Commission, I can confirm that we are investigating the company. But Commission rules prevent me from making any further comments about the details of our investigation.

More generally, through its enforcement actions and education materials,[7] the Commission has publicly provided the core principles that it applies when looking at a company's data security practices. For example, the Commission does not require perfect data security and the mere fact that a breach occurred does not mean that a company has violated the law. Rather, a company's security must be reasonable under the circumstances. There is no one-size-fits-all approach to what constitutes reasonable data security and what is reasonable will

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[5] 15 U.S.C. § 45(a). If a company makes materially misleading statements or omissions about a matter, including data security, and such statements or omissions are likely to mislead reasonable consumers, they can be found to be deceptive in violation of Section 5. Further, if a company's 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, those practices can be found to be unfair and violate Section 5.

[6] *See generally* FTC Business Center, Legal Resources *available at* http://www.ftc.gov/tips-advice/business-center/legal-resources?type=case&field_consumer_protection_topics_tid=249.

[7] *See, e.g., Start with Security: A Guide for Business* (June 2015), *available at* https://www.ftc.gov/tips-advice/business-center/guidance/start-security-guide-business; *Start with Security: Free Resources for Any Business* (Feb. 2016), *available at* https://www.ftc.gov/news-events/audio-video/business; *Protecting Personal Information: A Guide for Business* (Oct. 2016), *available at* https://www.ftc.gov/tips-advice/business-center/guidance/protecting-personal-information-guide-business; *Data Breach Response: A Guide for Business* (Oct. 2016), *available at* https://www.ftc.gov/tips-advice/business-center/guidance/data-breach-response-guide-business.

vary, depending on the size and complexity of a company's operations, the amount and sensitivity of the data it collects, and the availability of low-cost tools to mitigate threats. Thus, a large company collecting vast amounts of sensitive data will need to have different measures in place than a company collecting small amounts of non-sensitive data. Reasonable security should also include a continuous process of assessing and addressing risks.

The FTC will continue to apply these principles as it uses its civil law enforcement authority to promote data security in the private sector.

Question 3. **According to a recent study, one out of three content theft sites expose consumers to malware, leading to compromised bank accounts, identity theft, and "ransomware" that locks a consumer out of their data until they pay the criminals the required ransom. This study showed that 45% of malware was delivered by "drive-by-downloads," which invisibly download to a user's computer without requiring them to click on a link.**

What is the FTC doing to inform and educate consumers about the link between content theft sites and malware?

I share your concerns about malware on consumers' computers and the potential harm such malware may cause consumers. Related to the specific practice you have highlighted, last week the Commission issued a consumer education blog post warning consumers that downloading pirated content is illegal and cautioning that websites offering such content often hide malware that can bombard them with ads, take over their computers, or steal their personal information.[8]

Consumer education is a central part of the FTC's mission. Our outreach includes publications, online resources, workshops, and social media. These outreach efforts cover many topics, including malware, tech support scams, spyware, phishing, peer-to-peer file sharing, and social networking. We work closely with local, state, and federal government entities, industry representatives, and consumer groups to maximize the impact of these efforts.

The FTC has many consumer education resources that provide additional information to consumers about dangers associated with malware. For example, the Commission has published blog posts and videos on ransomware[9] and identity theft.[10] In addition, our *Net Cetera* publication helps parents, teachers, and other adults talk to children about how to be safe, secure, and responsible online.[11]

Relevant resources also include education materials relating to individual enforcement actions the Commission has taken. For example, last year the Commission settled an action with

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[8] *Free movies, costly malware* (Apr. 12, 2017), *available at* https://www.consumer.ftc.gov/blog/free-movies-costly-malware.

[9] *How to Defend Against Ransomware* (Nov. 10, 2016), *available at* https://www.consumer.ftc.gov/blog/how-defend-against-ransomware.

[10] *See* FTC Consumer Information, Identity Theft, *available at* https://www.consumer.ftc.gov/topics/identity-theft.

[11] *Netcetera: Chatting with Kids About Being Online* (Jan. 2014), *available at* https://www.onguardonline.gov/articles/pdf-0001-netcetera.pdf.

ASUSTeK Computer, Inc. in which the Commission alleged that the company's routers had security bugs that allowed malware to commandeer consumers' web traffic.[12] In connection with this settlement, the Commission published a blog post with tips on router security.[13]

[12] *ASUSTeK Computer, Inc.*, No. C-4587 (July 28, 2016), *available at* https://www.ftc.gov/enforcement/cases-proceedings/142-3156/asustek-computer-inc-matter.
[13] *Got an ASUS router at home? Read this.* (Feb. 2016), *available at* https://www.consumer.ftc.gov/blog/got-asus-router-home-read.

QUESTIONS FOR THE RECORD
SENATOR AMY KLOBUCHAR

Question. **Malware that gives fraudsters access to consumers' computers can be a powerful tool for scams. In one model, websites that offer pirated content, bogus coupons, or fake products are paid to infect computers with malware. Sometimes just visiting one of these websites – without even clicking on anything – can be enough to infect your computer with malware. Scammers can then use the infected computers to access financial information, launch cyberattacks, or even take over the computer's camera.**

Chairman Ohlhausen, what is the FTC doing to educate consumers about the danger of websites designed to infect their computers with malware?

I share your concerns about malware on consumers' computers and the potential harm such malware may cause consumers. Related to the specific practice you have highlighted, last week, the Commission issued a consumer education blog post warning consumers that downloading pirated content is illegal and websites offering such content often hide malware that can bombard them with ads, take over their computers, or steal their personal information.[14]

Consumer education is a central part of the FTC's mission. Our outreach includes publications, online resources, workshops, and social media. These outreach efforts cover many topics, including malware, tech support scams, spyware, phishing, peer-to-peer file sharing, and social networking. We work closely with local, state, and federal government entities, industry representatives, and consumer groups to maximize the impact of these efforts.

The FTC has many consumer education resources that provide additional information to consumers about dangers associated with malware. For example, the Commission has published blog posts and videos on ransomware[15] and identity theft.[16] In addition, our *Net Cetera* publication helps parents, teachers, and other adults talk to children about how to be safe, secure, and responsible online.[17]

Relevant resources also include education materials relating to individual enforcement actions the Commission has taken. For example, last year the Commission settled an action with ASUSTeK Computer, Inc. in which the Commission alleged that the company's routers had security bugs that allowed malware to commandeer consumers' web traffic.[18] In connection with this settlement, the Commission published a blog post with tips on router security.[19]

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[14] *Free movies, costly malware* (Apr. 12, 2017), *available at* https://www.consumer.ftc.gov/blog/free-movies-costly-malware.
[15] *How to Defend Against Ransomware* (Nov. 10, 2016), *available at* https://www.consumer.ftc.gov/blog/how-defend-against-ransomware.
[16] *See* FTC Consumer Information, Identity Theft, *available at* https://www.consumer.ftc.gov/topics/identity-theft.
[17] *Netcetera: Chatting with Kids About Being Online* (Jan. 2014), *available at* https://www.onguardonline.gov/articles/pdf-0001-netcetera.pdf.
[18] *ASUSTeK Computer, Inc.*, No. C-4587 (July 28, 2016), *available at* https://www.ftc.gov/enforcement/cases-proceedings/142-3156/asustek-computer-inc-matter.
[19] *Got an ASUS router at home? Read this.* (Feb. 2016), *available at* https://www.consumer.ftc.gov/blog/got-asus-router-home-read.

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United States Senate
Committee on Commerce, Science, and Transportation
Washington, D.C. 20510-6125

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MEMORANDUM

Date: April 7, 2017

To: Commissioner Terrell McSweeny

Date of Hearing: March 21, 2017

Hearing: Staying a Step Ahead: Fighting Back Against Scams Used to Defraud Americans

Thank you for your recent testimony before the Senate Committee on Commerce, Science, and Transportation. The testimony you provided was greatly appreciated.

Attached are **post-hearing questions** pertaining to the above-mentioned hearing. Your responses can be e-mailed to Andrew_Timm@commerce.senate.gov and docs@commerce.senate.gov.

Should the Committee not receive your response within the time frame mentioned below or if the Committee staffer assigned to the hearing is not notified of any delay, the Committee reserves the right to print the posed questions in the formal hearing record noting your response was not received at the time the record was published.

Committee staffer assigned to the hearing: Andrew Timm
Phone: (202) 224-1251
Date material should be returned: April 21, 2017.

Thank you for your assistance and, again, thank you for your testimony.

Senator Jerry Moran
Questions for the Record
Subcommittee on Consumer Protection, Product Safety, Insurance & Data Security
"Staying a Step Ahead: Fighting Back Against Scams Used to Defraud Americans"
March 21, 2017

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1. **During the hearing, one of the issues raised by both panel members and witnesses was the rise of ransomware, especially targeted at small business owners. One of the devious ways that hackers can gain access to a computer is by baiting Internet users with the prospect of free movies, TV shows or music. Recent studies have found that 1 in 3 so-called pirate websites expose consumers to malware. Given the rise of piracy as a means to bait and infect computers, and increase in ransomware, what is the FTC doing to warn consumers about the connection between piracy and malware?**

The Commission recently published a blog post on the FTC's website entitled "Free movies, costly malware" to educate consumers about the possibility that pirate websites will infect their computers and devices with malware if they download copyrighted content.[1] We also have posted the blog to military.consumer.gov. The FTC will continue to warn consumers about the risks associated with downloading content from pirate websites, as appropriate. I am very concerned about ransomware and fear the danger to businesses and consumers will only grow. This is an issue that the FTC, Congress, and law enforcement at every level must collaborate on to provide better solutions to American consumers and businesses.

2. **Another theme of the hearing was the economic loss caused by scams. A recent investigation by security company RiskIQ found that hackers are paying pirate website operators $70 million a year to infect computers. What role should the FTC play in warning consumers and encouraging those who facilitate online activity – such as domain sellers, hosting companies, search engine companies and payment processors – in combatting these piracy/malware operators? For example, should the FTC post warnings on their website, produce public service announcements or work with digital platforms to raise awareness and combat this new threat?**

The FTC has a robust law enforcement and consumer education platform designed to combat online threats, such as the unwanted installation of malware and other software. For instance, last fall, the FTC held a workshop with numerous industry participants to educate consumers about how to avoid—and respond to—ransomware.[2] And, as noted in response to the previous question , the FTC recently published a blog post on the its website entitled "Free movies, costly malware" to educate consumers about the possibility that pirate websites will infect their computers and devices with malware if they download copyrighted content.[3] The

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[1] Blog Post, *Free movies, costly malware* (April 12, 2017), *available at* www.consumer.ftc.gov/blog/free-movies-costly-malware.
[2] Event Description, *Fall Technology Series: Ransomware* (Sept. 7, 2016), *available at* www.ftc.gov/news-events/events-calendar/2016/09/fall-technology-series-ransomware.
[3] Blog Post, *Free movies, costly malware* (April 12, 2017), *available at* www.consumer.ftc.gov/blog/free-movies-costly-malware.

FTC also produced a consumer education video about how to avoid, detect, and remove malware.[4]

In addition, the Commission has brought several enforcement actions to stop companies from installing malware and other unwanted software on consumers' computers and devices.[5] The Commission will continue to use its investigative, legal, and public outreach tools to protect consumers from unwanted and harmful software. Moreover, the Commission will continue, as it has done in the past, to work with high tech companies, service providers, and industry participants to combat online threats.

3. In the FTC's prepared testimony, the agency discusses the challenges associated with offshore scammers, including international telemarketing fraud rings. The Committee is also aware that so-called Jamaican lottery scams have proliferated in recent years. One tool available to FTC is the U.S. SAFE WEB Act, which allows the Commission to address consumer protection matters, particularly those with an international dimension, providing for increased cooperation with foreign law enforcement authorities, confidential information sharing and investigative assistance.

a. How has FTC used the SAFE WEB Act in its fight against scams?

The FTC has used the Act's powers extensively in cross-border fraud cases and other matters to protect Americans from cross-border fraud. Between FY2012 and FY2016, for example, the FTC used the Act to share information in response to almost 65 requests from foreign agencies, and issued nearly 65 civil investigative demands to aid 28 foreign investigations. These efforts have enabled foreign counterparts to investigate conduct that directly harms American consumers, and also helped to advance FTC investigations in many instances. Here are a few examples since Congress reauthorized the Act in 2012:

The FTC used its SAFE WEB powers to work with Canadian law enforcement to stop a telemarketing scam that targeted senior citizens. On the U.S. side, the FTC obtained an order for more than $10 million in consumer redress and the Justice Department charged some of the defendants criminally. On the Canadian side, the Royal Canadian Mounted Police (RCMP) brought its own case, arresting the Canadian-based defendants and seizing evidence.FTC v. First Consumers)[6]

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[4] Video & Media, *Protect Your Computer from Malware*, (Oct. 3, 2012) *available at* www.consumer.ftc.gov/media/video-0056-protect-your-computer-malware.

[5] *See, e.g.,* Press Release, *FTC Charges Tech Support Companies With Using Deceptive Pop-Up Ads to Scare Consumers Into Purchasing Unneeded Services* (Oct. 12, 2016), *available at* www.ftc.gov/news-events/press-releases/2016/10/ftc-charges-tech-support-companies-using-deceptive-pop-ads-scare; Press Release, *Tech Company Settles FTC Charges It Unfairly Installed Apps on Android Mobile Devices Without Users' Permission* (Feb. 5, 2016), *available at* www.ftc.gov/news-events/press-releases/2016/02/tech-company-settles-ftc-charges-it-unfairly-installed-apps; Press Release, *FTC Permanently Shuts Down Notorious Rogue Internet Service Provider* (May 19, 2010), *available at* www.ftc.gov/news-events/press-releases/2010/05/ftc-permanently-shuts-down-notorious-rogue-internet-service.

[6] *See,* Press Release, *Court Orders Ringleader of Scam Targeting Seniors Banned From Telemarketing* (March 12, 2015), *available at* https://www.ftc.gov/news-events/press-releases/2015/03/court-orders-ringleader-scam-targeting-seniors-banned

The FTC used its SAFE WEB powers to obtain evidence for the Toronto Police Service's investigation of a sham business that scammed $93 million from consumers by purporting to sell banner ads for websites. The scheme had thousands of victims worldwide, including in the United States. Canadian law enforcement broke up the scam and arrested two of its leaders. (RCMP action against Banners' Broker)[7]

The agency used its SAFE WEB authority in another telemarketing scam to repatriate, with Justice Department help, nearly $2 million of the defendant's assets from Canadian bank accounts frozen by the RCMP; the FTC has now sent redress checks to 1,630 victims totaling $1.8 million. (FTC v. Expense Management of America)[8]

The FTC has used SAFE WEB in a number of business directory scams that prey on small businesses, non-profits and churches to share evidence with counterparts in Canada and other jurisdictions. This has led to several FTC judgments and law enforcement actions in Canada. (E.g., FTC v. Medical Yellow Directories, FTC v. Modern Technology)[9]

SAFE WEB also allowed the FTC to exchange information with Canadian law enforcement about a company that put unauthorized charges on consumers' phone bills using phony virus-scan scareware and led to law enforcement actions involving that conduct on both sides of the border. (FTC v. Jesta Mobile Media, Competition Bureau Canada action against Telus)[10]

Apart from scams, the Act also supports FTC enforcement of the EU-U.S. Privacy Shield Framework, which enables transatlantic data flows for many U.S. companies. The FTC's SAFE WEB powers provide for stronger cooperation with European data protection authorities on investigations and enforcement against possible Privacy Shield violations, a point cited in the European Commission's Privacy Shield adequacy decision.

b. This legislation is scheduled to sunset in 2020. Do you support its reauthorization? Will you commit to provide technical assistance to the Committee, including any modifications to improve the FTC's ability to go after international scammers?

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[7] *See,* Press Release, *$126M Banners Broker pyramid scheme dismantled by Toronto police*)Dec 02, 2015) *available at* *http://www.cbc.ca/news/canada/toronto/pyramid-scheme-toronto-1.3356905*

[8] *See,* Press Release, *FTC Returns $1.87 Million to Consumers Harmed by Debt Relief Scam* (May 09, 2016), *available at* https://www.ftc.gov/news-events/press-releases/2016/05/ftc-returns-187-million-consumers-harmed-debt-relief-scam

[9] *See, e.g.,* Press Release, *FTC Halts Online 'Yellow Pages' Scammers* (Dec 02, 2015), *available at* https://www.ftc.gov/news-events/press-releases/2015/12/ftc-halts-online-yellow-pages-scammers; Press Release, *FTC and Florida Halt Internet 'Yellow Pages' Scammers* (July 17, 2014), *available at* https://www.ftc.gov/news-events/press-releases/2014/07/ftc-florida-halt-internet-yellow-pages-scammers

[10] *See,e.g.,* Press Release, *Jesta Digital Settles FTC Complaint it Crammed Charges on Consumers' Mobile Bills Through 'Scareware' and Misuse of Novel Billing Method* (Aug 21, 2013), *available at* https://www.ftc.gov/news-events/press-releases/2013/08/jesta-digital-settles-ftc-complaint-it-crammed-charges-consumers; Press Release, *Telus customers to receive $7.34 million in rebates as part of Competition Bureau agreement* (Dec 30, 2015), *available at* http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04017.html

I strongly support SAFE WEB reauthorization and commit to providing technical assistance to the Committee for that process. FTC staff worked closely with the Committee to develop the original legislation passed in 2006, and to support reauthorization in 2012. We would be pleased to work with the Committee to continue strengthening our ability to go after international scammers. We in particular suggest repealing the sunset provision entirely: greater certainty for the agency and our international partners about the FTC's enforcement tools going forward improves our ability to develop enduring cooperation agreements and enforcement projects with foreign counterparts. Congress granted the SEC and the CFTC similar enforcement powers over 25 years ago, without a sunset provision. Their positive enforcement cooperation experience, and the FTC's successful experience with SAFE WEB over the past decade, confirms the value of this legislation to our enforcement mission.

Senator Dean Heller
Questions for the Record
Subcommittee on Consumer Protection, Product Safety, Insurance & Data Security
"Staying a Step Ahead: Fighting Back Against Scams Used to Defraud Americans"
March 21, 2017

1. Last Congress, Microsoft came before the Senate Aging Committee and told us about partnerships they had with states to combat tech scams. For Nevadans, consumer protection is a top issue, especially because of the impact that scams can have on an individual's finances or even their privacy.

Are there any FTC initiatives in coordination with State Attorneys General that are models for protecting consumers from scams?

The Commission has robust, collaborative relationships with state law enforcers, including through the National Association of Attorneys General. The FTC's collaboration with its state partners takes many forms, including sharing information and targets, assisting with investigations, and working collaboratively on long-term policy initiatives.

Over the last two years, the FTC has collaborated with its state partners on dozens of investigations and numerous joint enforcement actions, including investigations and enforcement actions concerning tech support scams,[11] robocalls,[12] charity scams,[13] and debt collection practices,[14] among other deceptive and unfair practices. The FTC also leads law enforcement "sweeps"—coordinated, simultaneous law enforcement actions—in conjunction with state and local partners.[15] To supplement its law enforcement efforts, the FTC and its state partners also

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[11] *See, e.g.*, Press Release, *Telemarketing Defendants Charged by FTC in Tech Support Scheme Will Pay $10 Million for Consumer Redress* (Dec. 22, 2016), *available at* www.ftc.gov/news-events/press-releases/2016/12/telemarketing-defendants-charged-ftc-tech-support-scheme-will-pay (case brought by FTC and the Florida Attorney General); Press Release, *FTC and Florida Charge Tech Support Operation with Tricking Consumers into Paying Millions for Bogus Services* (July 8, 2016), *available at* www.ftc.gov/news-events/press-releases/2016/07/ftc-florida-charge-tech-support-operation-tricking-consumers; Press Release, *Tech Support Operators Settle FTC, State of Florida Charges They Misled Consumers* (Feb. 12, 2016), *available at* www.ftc.gov/news-events/press-releases/2016/02/tech-support-operators-settle-ftc-state-florida-charges-they.

[12] *See, e.g.*, Press Release, *FTC, Florida Attorney General Take Action Against Illegal Robocall Operation* (June 14, 2016), *available at* www.ftc.gov/news-events/press-releases/2016/06/ftc-florida-attorney-general-take-action-against-illegal-robocall; Press Release, *FTC and Ten State Attorneys General Take Action Against Political Survey Robocallers Pitching Cruise Line Vacations to the Bahamas* (March 4, 2015), *available at* www.ftc.gov/news-events/press-releases/2015/03/ftc-ten-state-attorneys-general-take-action-against-political.

[13] *See* Press Release, *FTC, All 50 States and D.C. Charge Four Cancer Charities With Bilking Over $187 Million from Consumers* (May 19, 2015), *available at* www.ftc.gov/news-events/press-releases/2015/05/ftc-all-50-states-dc-charge-four-cancer-charities-bilking-over.

[14] *See, e.g.*, Press Release, *FTC and Illinois Attorney General Halt Chicago-Area Operation Charged with Collecting and Selling Phantom Payday Loan Debts* (Mar. 30, 2016), *available at* www.ftc.gov/news-events/press-releases/2016/03/ftc-illinois-attorney-general-halt-chicago-area-operation-charged.

[15] *See, e.g.*, Press Release, *FTC and Federal, State and Local Law Enforcement Partners Announce Nationwide Crackdown Against Abusive Debt Collectors* (Nov. 4, 2015), *available at* www.ftc.gov/news-events/press-releases/2015/11/ftc-federal-state-local-law-enforcement-partners-announce; Press Release, *FTC, Multiple Law Enforcement Partners Announce Crackdown on Deception, Fraud in Auto Sales, Financing and Leasing* (March 26,

co-host consumer protection conferences and workshops designed to protect consumers from fraud and provide guidance on how to identify and avoid scams.[16]

2015), *available at* www.ftc.gov/news-events/press-releases/2015/03/ftc-multiple-law-enforcement-partners-announce-crackdown; Press Release, *FTC and Dozens of Law Enforcement Partners Halt Travel and Timeshare Resale Scams in Multinational Effort* (June 6, 2013), *available at* www.ftc.gov/news-events/press-releases/2013/06/ftc-dozens-law-enforcement-partners-halt-travel-timeshare-resale; Press Release, *FTC Leads Joint Law Enforcement Effort Against Companies that Allegedly Made Deceptive "Cardholder Services" Robocalls* (Nov. 1, 2012), *available at* www.ftc.gov/news-events/press-releases/2012/11/ftc-leads-joint-law-enforcement-effort-against-companies.

[16] *See, e.g.*, Events Calendar, *FTC & NASCO Host a Conference Exploring Consumer Protection Issues and Charitable Solicitations* (March 21, 2017), *available at* www.ftc.gov/news-events/events-calendar/2017/03/give-take-consumers-contributions-charity; Events Calendar, *Working Together to Protect Midwest Consumers: A Common Ground Conference* (Oct. 25, 2016), *available at* www.ftc.gov/news-events/events-calendar/2016/10/working-together-protect-midwest-consumers-common-ground; Events Calendar, *Working Together to Protect Michigan Consumers: A Common Ground Conference* (July 13, 2016), *available at* www.ftc.gov/news-events/events-calendar/2016/07/working-together-protect-michigan-consumers-common-ground; Events Calendar, *Utah Consumer Protection Summit* (Oct. 22, 2015), *available at* www.ftc.gov/news-events/events-calendar/2015/10/utah-consumer-protection-summit.

Senator Todd Young
Questions for the Record
Subcommittee on Consumer Protection, Product Safety, Insurance & Data Security
"Staying a Step Ahead: Fighting Back Against Scams Used to Defraud Americans"
March 21, 2017

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1. **Commissioner McSweeny, has the FTC focused on the issue of travel booking scams beyond issuing consumer alerts?**

As you note, in July 2015, the FTC issued consumer education cautioning consumers about third-party websites that may deceptively mimic hotel websites. In addition, we have met with members of Congress to discuss the issue of deceptive travel sites and have proposed technical assistance and comments on proposed legislation. Because the existence and details of investigations are non-public, we cannot comment on any specific matters. However, the FTC will take law enforcement action in appropriate cases.

2. **Commissioner McSweeny, what plans does the FTC have to notify and coordinate with State Attorney Generals prior to peak travel season this year, including summer, Thanksgiving, and the Christmas holidays?**

The FTC has worked closely with the State Attorneys General on many issues, including most recently during National Consumer Protection week. The FTC will explore whether there are opportunities to coordinate with the states to protect consumers from scams that affect them during these peak travel periods.

U.S. SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

SUBCOMMITTEE ON CONSUMER PROTECTION,
PRODUCT SAFETY, INSURANCE, AND DATA SECURITY

"STAYING A STEP AHEAD: FIGHTING BACK AGAINST SCAMS USED TO DEFRAUD AMERICANS"

MARCH 21, 2017

QUESTIONS FOR THE RECORD
RANKING MEMBER BILL NELSON

Question. **The FTC already operates on a tight budget. It is a small agency with a huge mandate: to police the American economy and enforce against "unfair or deceptive acts or practices." The Trump Administration has proposed irresponsible cuts to virtually every aspect of the government that helps the average American. While we have yet to see a specific budget proposal for the FTC, the "skinny" budget did reference a vague 9.8 percent cut to "other agencies" that were not specifically mentioned. It seems safe to say that funding cuts may well be coming to the FTC.**

How would a possible budget cut – say, along the lines of a 9.8 percent cut – affect the FTC's ability to protect American consumers from scams and fraud?

The FTC is still working with OMB to determine what the President's budget will recommend for us in 2018. We are optimistic that the budget will not propose a significant cut for the Commission. To respond to your question, however, were the FTC's appropriation to be cut by 9.8%, this could significantly affect the Commission's ability to enforce consumer protection and competition laws.

QUESTIONS FOR THE RECORD
SENATOR RICHARD BLUMENTHAL

Question 1. **Last year, the FTC successfully finalized settlements with two remaining sham cancer charities—out of four—that had siphoned more than $187 million from donors. This marked the largest joint enforcement effort ever by the FTC and state charity regulators. These fraudulent charities – named "Cancer Fund of America" and "Cancer Support Services," claimed to help cancer patients.**

However, the overwhelming majority of donations were lavishly spent on the fake charities' operators and their families and friends, as well as on fundraisers who shamelessly spent donations on cars, trips, luxury cruises, college tuition, gym memberships, Jet Ski outings, sporting event and concert tickets, and dating site memberships. According to the 2015 FTC complaint, this misappropriation of consumer donations dated back to 2008.

How were these sham charities able to rob donors of so much money and for so long?

As you note, in March 2016, the FTC, all 50 states and the District of Columbia resolved litigation against the remaining defendants in Cancer Fund of America, resulting in, among other things, a dissolution of the sham charities and a ban on the companies president's ability to profit from any charity fundraising in the future.[1] These sham outfits were quite adept at masking their charade. For example, they hid their wrongdoing by manipulating their financial reporting and using deceptive and invalid accounting techniques to claim huge donations of gifts-in-kind. This allowed them to inflate their reported revenue and program spending by $223 million, which allowed the organizations to appear both larger and more efficient with donors' money than they really were. It was not obvious from their public financial reports to the IRS or the states that less than 3% of donated cash was being spent on any program services (collectively).

In addition, charity fraud is easy to miss and underreported. The average donation to the sham cancer charities was less than $30, and the vast majority of those donations were made in response to telephone solicitations. Consumers who gave in response to the promise that their donation would help cancer patients never knew that their money did not go to that cause—and thus did not complain. Further, based on our experience, we believe that few donors take the time to research a $20 to $30 donation before giving, and in this case, the sham charities' false reporting would have hidden any red flags from even the most diligent consumers.

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[1] *See* Press Release, FTC, *FTC, States Settle Claims Against Two Entities Claiming to Be Cancer Charities; Orders Require Entities to Be Dissolved and Ban Leader from Working for Non-Profits* (March 30, 2016) *available at* https://www.ftc.gov/news-events/press-releases/2016/03/ftc-states-settle-claims-against-two-entities-claiming-be-cancer.

Question 2. **In what way has the nonprofit exemption in the FTC Act hamstrung the Commission's ability to act swiftly to prevent or stop illegal conduct in the nonprofit sector?**

Since nonprofit entities fall outside of the FTC's jurisdiction, we cannot take action when a "legitimate" charity crosses the line and engages in deceptive or unfair acts and practices. Instead, we can only reach illegal conduct if we can establish that the charity is a "sham." A sham charity is one that operates primarily to profit individuals and private interests over its beneficiaries. Proving that a charity is a sham requires significant probing into the internal operations of the organization, including detailed review and analysis of bank records and other financial records, board meeting minutes, and employment practices among other things. Not surprisingly, making this threshold proof is difficult, and in some cases impossible -- leaving some charitable entities that engage in deceptive practices beyond our reach.

Question 3. **According to a recent study, one out of three content theft sites expose consumers to malware, leading to compromised bank accounts, identity theft, and "ransomware" that locks a consumer out of their data until they pay the criminals the required ransom. This study showed that 45% of malware was delivered by "drive-by-downloads," which invisibly download to a user's computer without requiring them to click on a link.**

What is the FTC doing to inform and educate consumers about the link between content theft sites and malware?

I share your concerns about malware on consumers' computers, which can lead to anything from nuisance adware that delivers pop-up ads, to software that causes sluggish computer performance, to keystroke loggers that capture sensitive information. The Commission will soon issue a blog post warning consumers that websites offering free content often hide malware that can bombard them with ads, take over their computers, or steal their personal information. More generally, the FTC uses a variety of methods to provide consumers with information about the privacy and security implications of new and existing technologies, and how to avoid and detect malicious software.

Our outreach includes publications, online resources, workshops, and social media. Among the many topics we cover are malware, tech support scams, spyware, phishing, peer-to-peer file sharing, and social networking. Among the resources we have that may be useful are a blog post and video describing the nature of the ransomware threat, how to defend against ransomware, and essential steps for victims to take.[2]

[2] FTC Consumer Blog, *How to Defend Against Ransomware* (Nov. 10, 2016), *available at* https://www.consumer.ftc.gov/blog/how-defend-against-ransomware.

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

Office of Commissioner
Terrell McSweeny

January 2, 2018

Andrea Woodard
6240 O'Neill Federal Office Building
Washington, DC, 20024
Andrea.Lindsey@mail.house.gov

Dear Andrea,

On Wednesday, November 1, 2017, I testified at a hearing on "Net Neutrality and the Role of Antitrust" held by the House Committee on the Judiciary's Subcommittee on Regulatory Reform, Commercial and Antitrust Law. On December 6, 2017, Chairman Goodlatte relayed questions submitted for the record from Subcommittee Chairman Marino.

I have attached my written responses.

Sincerely,

Terrell McSweeny
Commissioner, Federal Trade Commission

Enclosure

Responses to Questions Submitted for the Record from Subcommittee Chairman Marino

1. Critics of antitrust law, such as yourself, assert that litigation can be expensive and that a resolution can take too long relative to the dispute at issue. How would you compare that to the expense of an FCC action, or litigation under the "Open Internet" Order, and the potential time it takes for the FCC or courts to reach a resolution under the Order?

I am a strong proponent of antitrust law. I am a realist, however, about the limitations of after-the-fact antitrust enforcement relative to prospective rules, particularly in highly concentrated markets where vertically integrated incumbents possess both the ability and incentive to discriminate against downstream rivals. In these markets, it is well established that appropriately tailored regulation may be more effective than antitrust law in deterring anticompetitive conduct.[1]

Rules are generally both quicker and less costly to administer than standards. As Judge Richard Posner has explained:

> There is a "distinction, fundamental in law, between a rule and a standard. A rule singles out one or a few facts and makes it or them legally determinative. A standard allows a more open-ended inquiry. Rules are generally simpler and cheaper to enforce than standards and provide clearer guidance both to the people subject to them and to the courts that administer them. But they are often either underinclusive or overinclusive, and sometimes they are both at the same time."[2]

Before it was eliminated, the FCC's Open Internet Order established clear, prospective rules. Antitrust enforcement related to data discrimination, on the other hand, would proceed under case-specific application of the rule of reason standard.

The central question in an FCC proceeding under the 2015 Open Internet Order would be whether or not an ISP engaged in data discrimination. In an FTC action under the rule of reason, the FTC would have to show not only that an ISP engaged in data discrimination, but also that the conduct was likely to harm competition. The second question – which the FTC uniquely would have to address – would entail a fact-specific inquiry into the potential for competitive harm as weighed against claimed procompetitive benefits, as well as a potential further inquiry into whether the conduct at issue was "reasonable necessary" to achieve the claimed benefits. These additional questions would occupy the vast majority of the time and expense associated with FTC investigation and litigation. Moreover, because FTC enforcement action would

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[1] For example, last year FTC staff submitted a comment to the Federal Energy Regulatory Commission, voicing support for clear *ex ante* regulation to safeguard the competitiveness of power generation markets. Staff underscored the limitations of *ex post* enforcement by noting that "it could be costly, difficult, and time-consuming to detect and document" certain forms of anticompetitive discrimination by transmission system owners regarding interconnection to the electric grid. Comment of the Staff of the Federal Trade Commission, FERC Docket No. RM17-8-000, at 3-4 (Apr. 10, 2017) , https://www.ftc.gov/system/files/documents/advocacy_documents/comment-staff-federal-trade-commission-federal-energy-regulatory-commission-concerning-reform/v170004_ferc_interconnection_ftc_staff_comment.pdf.

[2] RICHARD A. POSNER, ANTITRUST LAW 39 (2nd ed. 2001)

necessarily take place after an extensive investigation and, potentially, prolonged litigation, harm to competitors and innovators may be particularly hard to remedy under antitrust law.

2. There are estimates that 5G deployment will drive $500 billion of economic growth and create 3 million jobs. In a submission by Peter Rysavy, he asserts that future 5G technologies such as intelligent highways to smart-grid monitoring will depend on a flexible system that allows for certain types of prioritization. Why should the United States risk being a leader in these innovations, the jobs they will create, and the significant benefits to consumers by continuing to apply the rigid "one size fits all" regulations imposed under the 2015 Net Neutrality Order?

The effect of Open Internet rules on innovation and infrastructure investment is an important question, and one that the FCC considered closely. I agree that the United States should not adopt policies that jeopardize its leadership in innovation at the edge or in broadband infrastructure. But the weight of the evidence says that it is the elimination of an open internet that creates that risk.

The FCC spent years studying the open internet issue. It gathered data and input from market participants, academics, and the public. Based on that record, the FCC concluded that rules were necessary to protect internet openness, which in turn promotes a "virtuous cycle," which leads to more internet content, more innovation, better quality, and more investment in broadband infrastructure.[3]

The D.C. Circuit Court of Appeals upheld the FCC's findings with respect to this virtuous cycle, noting that the Commission's finding that internet openness drives innovation and investment in broadband infrastructure was "reasonable and grounded in substantial evidence," and that the Commission's reasoning "finds ample support in the economic literature on which the Commission relied."[4] The D.C. Circuit went so far as to observe that "[t]he Commission's emphasis on this connection between edge-provider innovation and infrastructure development is uncontroversial."[5]

With respect to 5G, specifically, I agree that there may be certain specialized services, such as intelligent highways and smart-grid monitoring, for which prioritization might be beneficial. The FCC's Open Internet Order did not stand in the way of innovations related to these types of specialized services. Indeed, the FCC's 2010 and 2015 Open Internet Orders *exempted* specialized services from the agency's net neutrality regulations:

> **Non-Broadband Internet Access Service Data Services.** The 2010 rules included an exception for "specialized services." This Order likewise recognizes that some data services—like facilities-based VoIP offerings, heart monitors, or energy consumption sensors—may be offered by a broadband provider but do not

[3] *See* FCC 2010 Open Internet Order ¶¶ 13-14 (Dec. 21, 2010), https://apps.fcc.gov/edocs_public/attachmatch/FCC-10-201A1_Rcd.pdf.

[4] *Verizon v. FCC*, 740 F.3d 623, 645 (D.C. Cir. 2014).

[5] *Id.* at 644.

> provide access to the Internet generally. . . . IP-services that do not travel over broadband Internet access service, like the facilities-based VoIP services used by many cable customers, are not within the scope of the open Internet rules, which protect access or use of broadband Internet access service. . . .[6]

Because specialty services would not be subject to net neutrality regulations, there is little support for concern that the FCC's 2015 Open Internet Order would threaten jobs or consumer benefits related to innovations for these types of applications.

3. If the FCC's 2015 Order is rolled back, why is it still important to repeal the FTC Act's "common carrier" exemption? How would such repeal impact the FTC's ability to regulate competition and consumer protection?

Repealing the FTC Act's "common carrier" exemption would enable the FTC to better carry out its competition and consumer protection missions regardless of the status of the FCC's 2015 Open Internet Order.

Currently, the Federal Trade Commission Act exempts common carriers. The scope of this exemption is the subject of pending litigation.[7] Even if the FCC reclassifies ISPs as information service providers, the major providers will continue to provide common carrier services, such as voice telephone service, and will therefore remain common carriers.[8] Unless Congress repeals the common carrier exemption in the FTC Act, the FTC could continue to face challenges to its authority over common carriers. The FCC, by reclassifying broadband internet access services, has effectively disclaimed authority to regulate crucial aspects of the delivery of broadband internet access to Americans and punted to the FTC on these issues. The FTC is unable to offer the same protections to consumers and edge providers as the FCC. But if the common carrier exemption is not repealed, there is a risk that the FTC might be unable to offer any meaningful protection or oversight whatsoever in this space.

Exemptions and carve-outs from the FTC's consumer protection authority lead to gaps in enforcement. I urge Congress to repeal the common carrier exemption. And I also urge Congress to take a close look at eliminating a number of other exemptions, such as McCarran-Ferguson, the FTC's non-profit exemption, and antitrust exemptions in the freight rail and agriculture industries. The concerns that motivated many of these exemptions are very much antiquated, and yet they present a very real barrier to our enforcement on behalf of consumers.

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[6] FCC 2015 Open Internet Order ¶ 35 (Feb. 26, 2015), https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A1.pdf.

[7] *See* FTC v. AT&T Mobility, L.L.C., 835 F.3d 993, 2016 U.S. App. LEXIS 15913 (9th Cir. 2016), *rehearing en banc granted*, 2017 U.S. App. LEXIS 8236 (9th Cir. 2017).

[8] Telecommunications Act of 1996 § 3.

November 6, 2018

Senate Committee on the Judiciary
"Oversight of the Enforcement of the Antitrust Laws"
October 3, 2018
Questions for Joseph Simons, Chairman, Federal Trade Commission

The Honorable Mike Lee

1. **The Supreme Court hasn't issued a decision on a merger challenge since 1974. It's been more than 50 years since the Court specifically addressed whether efficiencies resulting from a merger can be considered when judging its legality. In the meantime, antitrust analysis has evolved considerably, and now embraces an approach that is grounded in economics. In analyzing non-merger antitrust issues, the Supreme Court has followed this modern economic approach. However, while the trend among lower courts has been to entertain merging parties' efficiency claims, no court has ever held that an otherwise illegal merger could proceed given the likely large efficiencies.**

   The legitimacy of an efficiencies defense in the courts was recently an issue in the Antitrust Division's effort to block Anthem's merger with Humana. In that case, the majority opinion for the DC Circuit Court of Appeals criticized a dissent for embracing the proffered efficiencies defense, stating that "it is not at all clear that [efficiencies] offer a viable legal defense to illegality under Section 7."

   a) **Do you believe that language in some earlier Supreme Court decisions on efficiencies is dicta or is it Supreme Court precedent that efficiencies cannot be considered a defense to an otherwise illegal merger?**

   Response: I have no opinion as to whether the Supreme Court language is dicta, but note that the antitrust agencies have long considered efficiencies in both merger and non-merger cases. Section 10 of the *Horizontal Merger Guidelines* explains the agencies' efficiencies analysis.[1] Under Section 10, efficiencies must meet several criteria to be credited. First, they must be merger-specific in that they could not likely be accomplished in the absence of the merger. Second, they must not be vague or speculative, and must enhance the merged firm's ability and incentive to compete. Finally, they must be cognizable, which means the efficiencies are verified and do not arise from anticompetitive reductions in output.

   The agencies' 2006 *Commentary on the Merger Guidelines* offers further guidance on how the agencies consider efficiencies when reviewing a merger.[2] For example, the Commentary provides several examples of cases in which the agencies assessed whether proffered

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[1] *U.S. Dep't of Justice & Fed. Trade Comm'n Horizontal Merger Guidelines* § 10 (2010), https://www.ftc.gov/public-statements/2010/08/horizontal-merger-guidelines-united-states-department-justice-federal.

[2] *U.S. Dep't of Justice & Fed. Trade Comm'n Commentary on the Horizontal Merger Guidelines* (2006) https://www.ftc.gov/sites/default/files/attachments/merger-review/commentaryonthehorizontalmergerguidelinesmarch2006.pdf.

efficiencies were verifiable, cognizable, and merger-specific, including cases in which the agency determined not to challenge the merger.[3]

I also believe that focusing solely on litigated cases may not provide a complete picture of how the agencies evaluate merger efficiency claims. The agencies challenge only a very small number of mergers that we investigate each year, and those challenged mergers tend to involve very high levels of concentration. For the more marginal cases, efficiencies can play and have played a role in persuading the agencies not to challenge a merger.

b) At the hearing, you indicated that you would like to give more thought to whether the efficiencies defense should be codified. Should an efficiencies defense be codified, particularly given the apparent confusion in the courts about whether such a defense may be unlawful under Supreme Court precedent?

Response: I am still considering whether a codified efficiencies defense would improve the predictability of merger outcomes. I believe the agencies' *Horizontal Merger Guidelines*, 2006 *Commentary*, and various speeches and other statements over the years provide valuable information to the antitrust community on how to present efficiencies claims to the agencies and the courts.

2. Unlike the agencies' joint *Horizontal Merger Guidelines*, which have gone through several revisions over the past thirty years, no formal effort has been made to update the agencies' guidance on their approach to vertical merger enforcement.

a) Would the business community, the agencies, and the courts all benefit from a formal revision to the non-horizontal merger guidelines?

Response: Guidelines could be beneficial if they reflect current thinking on vertical merger enforcement and are based on the practical learning and experience of past merger challenges and investigations. Over the years, the agencies have provided substantial insight on vertical merger analysis through speeches and other policy work,[4] and through rigorous case selection.[5] Today, the Commission is considering whether the agencies should publish formal vertical merger guidelines as part of its ambitious program of *Hearings on Competition and Consumer Protection in the 21st Century*.[6] Two panel discussions on vertical mergers were held on November 1st, and the Commission has invited public

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[3] *Id.* at 50-59.

[4] *See, e.g.*, Bruce Hoffman, *Vertical Merger Enforcement at the FTC*, Remarks at Credit Suisse 2018 Washington Perspectives Conference (Jan. 10, 2018), https://www.ftc.gov/public-statements/2018/01/vertical-merger-enforcement-ftc (explaining the FTC's current analysis of proposed vertical mergers and highlighting the extent to which that analysis has moved beyond the 1984 Non-Horizontal Merger Guidelines).

[5] The Commission, for example, recently challenged a vertical merger between Northrop Grumman, a leading provider of missile systems to the Department of Defense, and Orbital ATK, a key supplier of solid rocket motors. *In re Northrop Grumman*, Dkt. C-4652 (June 5, 2018), https://www.ftc.gov/enforcement/cases-proceedings/181-0005-c-4652/northrop-grumman-orbital-atk.

[6] FTC, *Hearings on Competition and Consumer Protection in the 21st Century*, https://www.ftc.gov/policy/hearings-competition-consumer-protection; *see also* FTC Workshop, *FTC Hearing #5: Competition and Consumer Protection in the 21st Century*, https://www.ftc.gov/news-events/events-calendar/ftc-hearing-5-competition-consumer-protection-21st-century.

commentary on the topic. We will keep you apprised of any vertical merger initiatives that come out of our hearings project.

b) Is there a risk that formal vertical merger guidelines would lead to over-enforcement, and if so, why?

Response: In principle, there should be no reason that guidelines would lead to over- or under-enforcement. Thoughtful, practical, and well-explained guidelines should be helpful both to antitrust enforcers and to the business community, supplementing guidance from court decisions and informal agency guidance. Merger analysis is very fact-specific, and any form of guidance may still leave open questions relevant to analyzing the likely effects of any particular merger.

3. Some markets, particularly those characterized by strong network effects, can be subject to winner-take-all scenarios in which a company reaches a point where it is temporarily secure from competition, at least until a new technology develops. In such situations, competition often is not simply within the market but for the market itself.

a) In markets subject to winner-take-all dynamics, should we be concerned about the leading firm acquiring a start-up or small firm that could develop into a potential competitor?

Response: We should always be concerned when a dominant firm, particularly in a market characterized by strong network effects, acquires a potential competitor. But we need to be cautious about intervening without evidence that the merger is likely to lead to anticompetitive effects. In a fast-growing market with network effects, we expect to see first-movers, often technological innovators, with large market shares. We want to be careful not to short-circuit competitive market forces and risk slowing the discovery and implementation of new technologies.

That said, the possibility that large firms buying start-ups might foreclose the development of emerging rivals that might ultimately unseat them is a legitimate and real theory of competitive harm (and not unique to the technology industry). In fact, this issue was a driving concern behind the Commission's recent decision to challenge the merger of two auto dealer software platforms, CDK Global, Inc. and Auto/Mate, Inc.[7] According to the complaint, Auto/Mate, the firm being acquired, had a small share of the market, but was having an outsized impact on competition with other platforms, especially CDK. It also was poised to become an even more effective competitor in the near future. The proposed merger would have eliminated that nascent competition, which played a role in the Commission's decision to file a complaint to block the merger.[8]

b) What information would lead you to challenge this kind of acquisition?

[7] *In re CDK Global, Inc.,* Dkt. 9382 (Mar. 20, 2018), https://www.ftc.gov/enforcement/cases-proceedings/171-0156/cdk-global-automate-matter.

[8] Shortly after the Commission issued its administrative complaint, the parties abandoned the merger.

Response: In analyzing this type of acquisition, the FTC would be especially attentive to evidence that the acquired firm has been a particularly innovative or disruptive competitor, and that entry or repositioning would be unlikely to restore the competition lost due to the merger.

4. **Concerns have been raised that foreign competition authorities are using their antitrust laws as a form of industry policy to benefit national champions.**

   a) **Is this a concern you share? If so, what is your agency doing to address this kind of abuse?**

   Response: This is a very important issue for the FTC. We have long advocated internationally that the goal of competition law is to maximize consumer welfare and that enforcement decisions should be made in a non-discriminatory manner. We advocate for these principles directly with our foreign agency counterparts through speeches, and in multilateral bodies such as the International Competition Network and the OECD. Using competition law for protectionist purposes or to advance a country's industrial policies undermines the consumer benefits from competition law enforcement as well as the legitimacy of the competition law system globally.

   b) **What more could Congress do to prevent foreign countries from using their antitrust policies to advantage national champions rather than ensure competitive markets?**

   Response: It can be difficult to determine whether particular enforcement actions are motivated by protectionist concerns as opposed to legitimate competition policies. When the FTC suspects that a foreign competition agency is using its antitrust laws to benefit national champions, we raise this with the foreign agency and engage with other U.S. agencies to address the concern as appropriate.

   We appreciate the support from Congress for the FTC's international engagement, including our ongoing efforts to address these issues.

5. **The Economic Liberty Task Force recently released a report on interstate portability of occupational licenses. As you know, irrational and over-burdensome occupational licensing have been identified by economists and politicians on both sides of the aisle as a barrier to competition, innovation, and economic opportunity.**

   a) **Do you expect to support the work of the Economic Liberty Task Force on this critical issue?**

   Response: I support the important work of the Economic Liberty Task Force to promote enhanced interstate portability of occupational licenses, and I pledge my continued support of the Task Force more generally. American workers, employers, consumers, and our economy as a whole will benefit from eliminating overbroad licensing requirements that impose costs

and unduly limit competition, but are not needed to protect consumer health and safety.

b) Do you view restrictive occupational licensing regimes principally as an antitrust problem or a regulatory problem?

Response: Excessive occupational licensing can be an antitrust problem, in addition to a regulatory problem. Occupational licensing can offer important benefits, especially when it protects consumers from credible health and safety risks. But some occupational licensing may not be warranted, and certain restrictions may yield more harms than benefits. Antitrust law and competition policy may be implicated when licensing restrictions impede competition and create barriers to entry and mobility for workers while offering few, if any, significant consumer benefits. Occupational licensing can be particularly problematic when regulatory authority is delegated to incumbent market participants, who stand to benefit from overly restrictive licensing requirements that exclude rivals and raise prices.

Historically, the FTC has addressed these concerns in two ways. First, as part of the FTC's competition advocacy program, FTC staff respond to calls for public comment and invitations from legislatures and regulators, who ask staff to identify and analyze specific restrictions that may harm competition without offering countervailing consumer benefits. Second, the FTC has used its enforcement authority to challenge anticompetitive conduct by regulatory boards that falls outside of the scope of the state action doctrine.[9] Through these efforts, the agency's research and analyses have focused on the potential competitive effects of specific licensing restrictions, rather than the broader question of whether the U.S. economy is characterized by excessive occupational licensing.

6. As we discussed at the hearing, the SMARTER Act would require the FTC to litigate the merits of a non-consummated merger challenge in federal district court rather than before an FTC administrative law judge.

a) Do you agree that passage of the SMARTER Act would avoid duplicative litigation and lower the cost to taxpayers of antitrust enforcement, particularly in avoiding situations where the FTC can proceed to administrative litigation without filing for a preliminary injunction in federal court due to the merging parties' inability to close their transaction while they await regulatory approval in other jurisdictions?

Response: There are significant benefits to the Commission's administrative litigation path, including providing the Commission an opportunity to develop important aspects of competition law. But if the FTC is denied a preliminary injunction in a merger matter, I do not believe the Commission should pursue that matter in administrative litigation. The Commission has not pursued an administrative proceeding following the denial of a

[9] *See, e.g.*, N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101 (2015) (ruling that the conduct of a state regulatory board controlled by practicing members of the occupation may violate the antitrust laws unless it is actively supervised by the state itself). Previous Commission testimony provides additional details on the history and scope of the state action exemption. *See* License to Compete: Occupational Licensing and the State Action Doctrine, Hearing Before the S. Comm. on the Judiciary, Subcomm. on Antitrust, Competition Policy and Consumer Rights, 114th Cong. (Feb. 2, 2016), https://www.ftc.gov/system/files/documents/public_statements/912743/160202occupationallicensing.pdf.

preliminary injunction in federal court for over twenty years. I agree with this approach.

Many transactions are subject to multijurisdictional reviews, whether by foreign competition authorities or state regulators. Under current law (and the proposed SMARTER Act), both the FTC and Department of Justice can delay commencing an injunction action in federal court until other review processes are completed and the merger is imminent.

It is not clear to me whether it would be beneficial to include a prohibition on the FTC from conducting an administrative proceeding while the parties to a merger remain unable to close their transaction for a significant period of time. In the *Tronox* case, the FTC was able to complete an administrative trial while the parties waited for foreign approvals. Once those approvals were granted and the parties would soon be able to close their transaction, the FTC filed suit in federal court seeking a preliminary injunction. The existence of the administrative record from the FTC administrative proceeding allowed the parties to avoid a substantial discovery period in the federal proceeding, enabled the district court judge to substantially expedite the preliminary injunction hearing, and very likely reduced the overall time for the court to reach a decision. In this case, the injunction was granted. If the injunction had not been granted, the parties likely would have been able to close their transaction faster than if there had been no FTC administrative proceeding. To the extent there was duplication between the two proceedings, it appears to have been minor, and the matter was very likely resolved faster as a result. Certainly, it reduced cost and resource burdens on the federal district court.

7. Several panelists at the recent FTC hearings have recommended that the agencies produce merger retrospectives to help refine and improve their understanding and analysis of antitrust issues relating to mergers.

a) What are your thoughts on your agency creating merger retrospectives?

Response: I agree with the panelists that evaluation of our past choices can provide valuable guidance for our future decisions. For that reason, FTC staff have conducted a number of merger retrospective studies over the years in a variety of industries, most notably petroleum, consumer products, and hospitals.[10] FTC staff also evaluated fixes for problematic mergers with retrospective studies of divestitures in 1999[11] and merger remedies in 2017.[12]

Staff in the Bureau of Economics have analyzed the effects of a number of other consummated mergers, but their ability to do so is subject to data availability and resource

[10] For a summary of many of these studies, *see* Joseph Farrell et al., *Economics at the FTC: Retrospective Merger Analysis with a Focus on Hospitals* (2009), https://www.ftc.gov/sites/default/files/documents/reports/economics-ftc-retrospective-merger-analysis-focus-hospitals/farrelletal_rio2009.pdf.

[11] FTC STAFF REPORT, A STUDY OF THE COMMISSION'S DIVESTITURE PROCESS (1999), https://www.ftc.gov/reports/study-commissions-divestiture-process.

[12] FTC STAFF Report, THE FTC'S MERGER REMEDIES 2006-2012: A REPORT OF THE BUREAUS OF COMPETITION AND ECONOMICS (2017), https://www.ftc.gov/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics.

constraints.[13] I believe we have obtained valuable knowledge from this research, and I support continuing and expanding this research agenda.

b) If you support creating such retrospectives, what resources would be required to do so?

Response: Unless we receive additional funding to hire more economists and acquire market data, conducting merger retrospectives could consume resources that would otherwise be available for enforcement and other important work of the Commission. We are exploring ways to leverage our resources through the use of outside researchers to minimize the burden on our internal resources.

[13] *See, e.g.*, Thomas Koch & Shawn W. Ulrick, *Price Effects of a Merger: Evidence from a Physicians' Market* (2017) (Bureau of Economics Working Paper No. 333), https://www.ftc.gov/system/files/documents/reports/price-effects-merger-evidence-physicians-market/working_paper_333.pdf (physicians); Daniel Hosken et al., *Do Retail Mergers Affect Competition? Evidence from Grocery Retailing* (2012) (Bureau of Economics Working Paper No. 313), https://www.ftc.gov/sites/default/files/documents/reports/do-retail-mergers-affect-competition%C2%A0-evidence-grocery-retailing/wp313.pdf (grocery stores); Steven Tenn & John M. Yun, *The Success of Divestitures in Merger Enforcement: Evidence from the J&J – Pfizer Transaction* (2009) (Bureau of Economics Working Paper No. 296) https://www.ftc.gov/sites/default/files/documents/reports/success-divestitures-merger-enforcement%C2%A0-evidence-jampj-pfizer-transaction/wp296_0.pdf (consumer health products).

The Honorable Chuck Grassley

1. **There is uniform consensus that drug prices are unnecessarily high, often as a result of anticompetitive practices by both brand and generic companies. I'm a lead sponsor on both the Creating and Restoring Equal Access to Equivalent Samples (CREATES) Act and the Preserve Access to Affordable Generics Act. Earlier this year, this Committee approved the CREATES Act, which currently has thirty cosponsors, split evenly between Democrats and Republicans. What has been the FTC's ability to curb abuses of the REMS system? Would the CREATES Act help?**

   Response: The Commission is concerned about Risk Evaluation Mitigation Strategies ("REMS") abuse by branded pharmaceutical firms that unreasonably impede generic competition.[14] When drug companies use such tactics to delay generic entry, American consumers pay higher prices for prescription drugs.

   As you know, branded firms have invoked REMS-mandated distribution restrictions or voluntarily adopted closed distribution systems to deny would-be generic competitors the samples they need to conduct bioequivalence tests, even when the drug is sold on commercial terms to others. Without samples, a generic firm cannot complete the bioequivalency testing required by the FDA to obtain approval for a generic drug product.

   Even if a generic firm overcomes this hurdle, another opportunity for delay arises later in the FDA approval process because the statute governing REMS drugs requires a single, shared REMS distribution system. If the branded and generic firms cannot reach agreement over the terms of the shared REMS system, the generic cannot be approved unless the FDA grants a waiver allowing the generic firm to establish its own REMS distribution system. In practice, the FDA has rarely granted a waiver of the shared REMS requirement. Branded drug firms have an apparent incentive to refuse to cooperate with the generic applicant, since lack of cooperation can delay generic entry.

   The FTC filed two amicus briefs in private antitrust litigation arguing that the denial of samples for testing undermines the careful balance created by the Hatch-Waxman Act to encourage generic entry, and may amount to illegal monopolization.[15] In addition, the FTC filed comments with the Department of Health and Human Services in July 2018, in response to their call for public comments on the Blueprint to Lower Drug Prices and Reduce Out-of-

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[14] *See* Markus H. Meier, Prepared Statement Before the U.S. House of Representatives, Judiciary Committee, Subcommittee on Regulatory Reform, Commercial and Antitrust Law on "Antitrust Concerns and the FDA Approval Process" (Jul. 27, 2017), https://www.ftc.gov/public-statements/2017/07/prepared-statement-federal-trade-commission-antitrust-concerns-fda.

[15] Brief of the Fed. Trade Comm'n as Amicus Curiae, *Mylan Pharms. v. Celgene Corp.*, No. 2:14-cv-2094 (D. N.J. June 17, 2014), https://www.ftc.gov/policy/advocacy/amicus-briefs/2014/06/mylan-pharmaceuticals-inc-v-celgene-corporation; Brief of the Fed. Trade Comm'n as Amicus Curiae, *Actelion Pharms. Ltd. v. Apotex Inc.*, No. 1:12-cv-05743 (D. N.J. Mar. 11, 2013), https://www.ftc.gov/policy/advocacy/amicus-briefs/2013/03/actelion-pharmaceuticals-ltd-et-al-v-apotex-inc.

Pocket Costs.[16] The comments identified how branded pharmaceutical manufacturers' misuse of REMS may impede pharmaceutical competition, and supported regulatory and legislative action to correct REMS misuse.

Antitrust enforcement is an imperfect tool to address the problem of anticompetitive misuse of restricted distribution programs. Generally, the antitrust laws do not impose a duty on firms to cooperate or share resources with competitors.[17] Under some circumstances, courts have found firms with market power liable under the antitrust laws for refusing to deal with competitors, such as when a monopolist refuses to sell a product to a competitor that it makes available to others. This is an unsettled area of law, however, which limits the ability of antitrust enforcement to address these situations. We note that at least one court has dismissed allegations that a branded firm violated the antitrust laws by failing to cooperate with generic firms seeking to distribute their product in a shared REMS.[18] In that court's view, recent Supreme Court decisions support a distinction between a refusal to supply samples—which can violate the antitrust laws—and a refusal to cooperate in a shared REMS—which the court thought likely would not violate the antitrust laws. The court relied on the technical existence of a regulatory option for the generic firms to obtain a waiver from the FDA, which would allow them to establish their own shared REMS program.

Given the limits of antitrust law, Congressional action to curb misuse of REMS would be helpful. I believe the CREATES Act would help protect the competitive process by eliminating incentives for branded manufacturers to engage in manipulation of the REMS process to delay generic entry. I greatly appreciate your work to obtain effective legislation in this important area.

2. **I've heard complaints from Iowans about potentially anticompetitive behavior in the drug supply chain, including pharmacy benefit managers, or "PBMs". In August I sent you a letter, requesting scrutiny and feedback on the behaviors of this industry.**

   a) Can you tell me what the FTC is doing to combat rising drug prices and is there anything Congress can do to assist you?

   Response: I appreciate your concern. As discussed below, the FTC maintains a robust program to identify and investigate potential anticompetitive conduct in the pharmaceutical

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[16] Press Release, FTC Submits Statement to HHS on Its Blueprint to Lower Drug Prices (Jul. 17, 2018), https://www.ftc.gov/news-events/press-releases/2018/07/ftc-submits-statement-hhs-its-blueprint-lower-drug-prices.

[17] *See Verizon Comm. Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 408 (2009) ("[A]s a general matter, the Sherman Act does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." (internal citations and quotation marks omitted); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 600 (1985) ("[E]ven a firm with monopoly power has no general duty to engage in a joint marketing program with a competitor.").

[18] *In re Suboxone Antitrust Litig.*, 64 F. Supp. 3d 665, 685-88 (E.D. Pa. 2014). Relying on *Trinko* and *Pacific Bell Telephone v. linkLine Comm.*, Inc., 555 U.S. 438 (2009), the court determined that the "antitrust laws do not create a duty for competitors to work together. Statutes and regulations requiring cooperation between rivals do not alter this analysis; in fact, regulation indicates that antitrust scrutiny is not necessary or prudent."

industry.[19] The FTC also reviews mergers between pharmaceutical companies to ensure that they do not result in elimination of a competitor or a potential competitor for any product on the market or in development. There are limits, however, on the FTC's ability to counter rising drug prices. The FTC is not a sector regulator; our authority is limited to trying to stop or prevent certain business practices that harm competition. Charging high prices, even exorbitant prices, for a drug, without more, is not a violation of any law the FTC enforces. With respect to what Congress can do to assist the FTC in combating rising drug prices, I appreciate your work to address REMS abuses and the recently enacted measure to require that certain agreements involving biologics drugs be filed with the antitrust agencies.

The FTC can use its antitrust authority to prevent anticompetitive conduct or mergers, and has pursued numerous enforcement actions involving both branded and generic pharmaceutical firms. For example, for over twenty years and on a bipartisan basis, the FTC has prioritized ending anticompetitive reverse payment agreements in which a brand-name drug firm pays its potential generic rival to give up its patent challenge and agree not to launch a lower cost generic product. Following the U.S. Supreme Court's 2013 decision in *FTC v. Actavis, Inc.*,[20] the FTC is in a much stronger position to challenge agreements of this type; recently, the district court on remand denied the defendants' motion for summary judgment in that case, clearing it for trial.[21] In addition, since *Actavis*, the FTC obtained a landmark $1.2 billion settlement from the maker of sleep disorder drug Provigil,[22] and other manufacturers have agreed to abandon anticompetitive agreements of this type.[23]

The FTC has brought enforcement actions against drug companies that have abused the patent and regulatory process. The FTC recently had a major victory when a federal court ruled that AbbVie Inc. filed baseless patent infringement lawsuits against potential generic competitors to illegally maintain its monopoly over the testosterone replacement drug AndroGel, and ordered $493.7 million in monetary relief to those who were overcharged for AndroGel as a result of Abbvie's conduct.[24] The FTC's pending case against Shire ViroPharma Inc. alleges that the company engaged in a series of filings before the Food and Drug Administration as a means of preventing generic entry and maintaining a monopoly.[25]

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[19] For a summary of the FTC's antitrust actions in the pharmaceutical industry, *see* FED. TRADE COMM'N HEALTH CARE DIV. STAFF, OVERVIEW OF FTC ACTIONS IN PHARM. PRODS. AND DISTRIB. (Aug. 2018), https://www.ftc.gov/system/files/attachments/competition-policy-guidance/overview_pharma_august_2018.pdf.

[20] 570 U.S. 756 (2013).

[21] *FTC v. Actavis, Inc.*, No. 1:09-MD-2084 (N.D. Ga. Jun. 14, 2018).

[22] Press Release, FTC Settlement of Cephalon Pay for Delay Case Ensures $1.2 Billion in Ill-Gotten Gains Relinquished; Refunds Will Go To Purchasers Affected by Anticompetitive Tactics (May 28, 2015), https://www.ftc.gov/news-events/press-releases/2015/05/ftc-settlement-cephalon-pay-delay-case-ensures-12-billion-ill.

[23] Joint Mot. for Entry of Stipulated Order for Permanent Inj., *FTC v. Allergan plc*, No. 17-cv-00312 (N.D. Cal. Jan. 23, 2017), https://www.ftc.gov/enforcement/cases-proceedings/141-0004/allergan-plc-watson-laboratories-inc-et-al; Stipulated Order for Permanent Inj., *FTC v. Teikoku Pharma USA, Inc.*, No. 16-cv-01440 (E.D. Pa. Apr. 6, 2016), https://www.ftc.gov/enforcement/cases-proceedings/141-0004/endo-pharmaceuticals-impax-labs.

[24] Statement of FTC Chairman Joe Simons Regarding Federal Court Ruling in FTC v. AbbVie (June 29, 2018), https://www.ftc.gov/news-events/press-releases/2018/06/statement-ftc-chairman-joe-simons-regarding-federal-court-ruling.

[25] *FTC v. Shire ViroPharma Inc.*, No. 17-cv-00131 (D. Del. Feb. 7, 2017), https://www.ftc.gov/enforcement/cases-proceedings/121-0062/shire-viropharma.

The district court ruled that Shire ViroPharma's conduct was not shielded as legitimate petitioning activity under the *Noerr-Pennington* doctrine, but nonetheless dismissed the complaint because the alleged violation ended before the FTC sued.[26] The court held that the FTC cannot bring suit in federal court under Section 13(b) of the FTC Act absent allegations that the defendant's unlawful conduct is ongoing or imminent at the time the complaint is filed. The agency has appealed this ruling to the Third Circuit.[27]

In addition to our active litigations, the FTC continues to monitor private actions involving possible pay-for-delay deals and other anticompetitive agreements. These can provide opportunities for the Commission to file amicus briefs on a variety of issues raised by pay-for-delay settlements, REMS abuse, and other issues.

The FTC reviews mergers between pharmaceutical companies to ensure that they do not eliminate a competitor or potential competitor for any product on the market or in development. For instance, in the last two years, the Commission required divestitures in six pharmaceutical mergers to preserve competition, including the FTC's largest divestiture order ever in Teva/Allergan, which required the divestiture of 79 drugs.[28]

In addition to its enforcement work, the Commission has devoted significant resources to examining the health care industry by sponsoring workshops and studies on topics such as generic drug entry prior to patent expiration, the impact of authorized generic drugs, and the proper role of competition in addressing challenges in health care markets.[29] Most recently, in 2017, the FTC collaborated with the FDA on two public events: one examining regulatory barriers in pharmaceutical markets,[30] and the other on the role of intermediaries in the distribution of pharmaceuticals.[31]

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[26] The *Noerr-Pennington* doctrine is a judicially created limitation on the reach of the Sherman Act and is grounded in the right to petition government protected by the First Amendment. *E.R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

[27] Brief of the Fed. Trade Comm'n and Appendix Vol. 1, *FTC v. Shire ViroPharma Inc.*, No. 18-1807 (3d Cir. June 19, 2018), https://www.ftc.gov/system/files/documents/cases/shire_viropharma_inc_ftc_opening_brief_and_appendix_vol_1_6-19-18.pdf.

[28] *In re Teva Pharm. Indus. Ltd.*, Dkt. No. C-4589 (Sept. 15, 2016), https://www.ftc.gov/enforcement/cases-proceedings/151-0196/teva-allergan-matter.

[29] *See, e.g.*, U.S. Dep't of Justice & Fed. Trade Comm'n Workshop Series, *Examining Health Care Competition* (Mar. 20-21, 2014 & Feb. 24-25, 2015), https://www.ftc.gov/news-events/events-calendar/2014/03/examining-health-care-competition, https://www.ftc.gov/news-events/events-calendar/2015/02/examining-health-care-competition.

[30] FDA, Public Meeting, The Hatch-Waxman Amendments: Ensuring a Balance Between Innovation and Access (Jul. 18, 2017), https://www.gpo.gov/fdsys/pkg/FR-2017-06-22/pdf/2017-12641.pdf.

[31] FTC Workshop, *Understanding Competition in Prescription Drug Markets: Entry and Supply Chain Dynamics* (Nov. 8, 2017), https://www.ftc.gov/news-events/events-calendar/2017/11/understanding-competition-prescription-drug-markets-entry-supply. As explained by former Acting Chairman Ohlhausen during her opening remarks at this event, "[c]ompetition is key to containing prescription drug prices . . . . In light of concerns about rising drug prices, it's critical we identify barriers that may prevent drugs from entering the market, even after applicable patent protections have expired."

b) Do you have concerns about consolidation in the health care industry and whether such consolidation could lead to leverage that can be abused to negotiate anticompetitive agreements?

Response: I appreciate your concerns about consolidation and the potential for anticompetitive conduct in the health care industry, and I share those concerns. As I stated at the October 3rd hearing, the best place to look for anticompetitive conduct is where there is likely to be significant market power. This is where we will first look for anticompetitive conduct, and we will continue to assess health care mergers carefully for all potential harms, including whether the merger may lead to increased market power or monopsony purchasing power in a given relevant market.

c) How do you respond to anticompetitive concerns that have been voiced by many consumers and the press regarding the behavior of PBMs?

Response: Scrutiny of competitive issues relating to PBMs is part of the FTC's ongoing mission to promote competition in health care. The FTC has examined the conduct of PBMs in various contexts, including during merger investigations, and as part of broad-based hearings on health care competition. As mentioned above, last fall the FTC hosted a workshop with the FDA to examine pharmaceutical distribution practices, including the role of intermediaries such as PBMs and Group Purchasing Organizations. We held the workshop to deepen our understanding of various players in the pharmaceutical industry. In addition to presentations by experts in health care policy and economics, we also received over 300 public comments as part of the workshop, which identified additional areas of concern. Materials related to the workshop can be found on the FTC's website.[32]

We understand that there are concerns about PBM practices. We are exploring the feasibility of conducting merger retrospectives of a number of industries, including PBMs, and we are committed to bringing enforcement actions against any company, including a PBM, that violates the laws we enforce.

3. **I've heard concerns regarding data privacy, specifically with respect to social media and technology companies. In other industries, if a customer does not like the policies of one product, they substitute it with another.**

a) Do you have concerns that there is not enough competition in the social media and technology market to allow customers to choose the data privacy policy they want?

Response: The widespread use of technology and data is not only changing the way we live, but also the way firms operate. While many of these changes offer consumer benefits, they also raise complex and sometimes novel competition issues. Given the important role that technology companies play in the American economy, it is critical that the Commission—in furthering its mission to protect consumers and promote competition—understand the current and developing business models and scrutinize incumbents' conduct to ensure that they abide by the same competition rules that apply to any other company. When appropriate, the

[32] *Id.*

Commission will take action to counter the harmful effects of coordinated or unilateral conduct by technology firms.

In June, I announced a new public hearings project—*Hearings on Competition and Consumer Protection in the 21st Century*—to consider whether broad-based changes in the economy, evolving business practices, new technologies, and international developments warrant adjustments to competition and consumer protection law, enforcement priorities, and policy.[33] One of the topics to be discussed at these hearings is the unique competition and consumer protection issues associated with internet and online commerce. We are also inviting public comment on this and other issues related to communication, information, and media technology networks. Through the upcoming series of hearings, the Commission will devote significant resources to refresh and, if warranted, renew its thinking on a wide range of cutting-edge competition and consumer protection issues.

b) Do we need to set a minimum standard for data privacy policies or is there another solution?

Response: Companies should be transparent about their privacy practices. Some surveys suggest that consumers are willing to share their information with companies to personalize experiences as long as companies are transparent about their information practices.[34] In other surveys, respondents report a willingness to leave brands that use their personal data without their knowledge.[35] Regardless of the impact of privacy policies on consumers, a disclosure-oriented approach also provides an important accountability function. Within an organization, drafting privacy policies helps companies understand their information practices. Outside the organization, disclosures give the press, advocacy organizations, and regulators information about a company's practices and enable them to hold companies to their promises.

c) What would be the impact if we set a too stringent standard?

Response: Although the collection and use of consumer data poses risks, any approach to privacy must also consider how consumer data fuels innovation and competition. The digital economy has provided enormous benefits for consumers in all aspects of their lives. For example, health apps and wearables allow for better health outcomes,[36] and big data analytics allow for better

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[33] FTC, *Hearings on Competition and Consumer Protection in the 21st Century*, https://www.ftc.gov/policy/hearings-competition-consumer-protection; *see also* Press Release, FTC Announces Hearings On Competition and Consumer Protection in the 21st Century (June 20, 2018), https://www.ftc.gov/news-events/press-releases/2018/06/ftc-announces-hearings-competition-consumer-protection-21st.

[34] John Hall, *What You Should Know About Privacy That Will Help Consumers Trust Your Brand*, Forbes, Apr. 4, 2018, https://www.forbes.com/sites/johnhall/2018/04/25/what-you-should-know-about-privacy-that-will-help-consumers-trust-your-brand/#472a4bf3135a (describing research).

[35] Kevin Cochrane, *To Regain Consumers' Trust, Marketers Need Transparent Data Practices*, Harvard Business Review, June 13, 2018, https://hbr.org/2018/06/to-regain-consumers-trust-marketers-need-transparent-data-practices (describing research showing that 79% of consumers will leave a brand if their personal data is used without their knowledge).

[36] Peter H. Diamandis, M.D., *Three Huge Ways Tech Is Overhauling Healthcare*, SINGULARITY HUB, July 6, 2018, https://singularityhub.com/2018/07/06/three-huge-ways-tech-is-overhauling-healthcare/. Indeed, despite potential

traffic, weather, and emergency response information. If privacy standards focus too much on the potential harm from data-driven practices, consumers might lose out on the benefits from innovation and competition. Thus, any approach to privacy must balance the very real harms that arise from the misuse of consumer data with the benefits of data and use on the economy as a whole.

patient privacy risks that collecting health data on wearable devices could pose, the number of U.S. consumers tracking their health data with wearables has more than doubled since 2013. *See* Fred Donovan, *Despite Patient Privacy Risks, More People Use Wearables for Health*, HEALTH IT SECURITY, Oct. 1, 2018, https://healthitsecurity.com/news/despite-patient-privacy-risks-more-people-use-wearables-for-health.

The Honorable Orrin Hatch

1. **Under Former Commissioner Ohlhausen, one focus of the FTC was examining occupational licensing issues. The FTC's work advocating against unnecessary and anticompetitive occupational licensing requirements has been an important step towards greater freedom in the marketplace and benefits the American people. Will this continue to be a priority of the Commission going forward?**

   Response: I appreciate your concerns and can assure you that occupational licensing issues will continue to be a priority of the Commission.

2. **Antitrust experts have raised concerns that some foreign competition authorities are using their antitrust laws to protect home companies and markets from foreign competition rather than applying those laws in a non-discriminatory manner. For example, a March 2017 report found that, "[c]ertain of our major trading partners appear to have used their laws to actually harm competition by U.S. companies, protecting their own markets from foreign competition, promoting national champions, forcing technology transfers and, in some cases, denying U.S. companies fundamental due process." When concerns are raised that a foreign competition authority is using antitrust laws to protect domestic companies from foreign competition or to advance an industrial or trade policy, how does the FTC address the issue?**

   Response: This is a very important issue for the FTC. Using competition law for protectionist purposes or to advance a country's industrial policies undermines the consumer benefits from competition law enforcement as well as the legitimacy of the competition law system globally. Internationally, the FTC has long advocated that competition law should be focused on maximizing consumer welfare and applied in a non-discriminatory manner. We have also been a leading advocate for due process in competition enforcement around the world; we engage on this issue directly with our foreign agency counterparts through speeches, and in multilateral bodies such as the International Competition Network and the OECD. Notably, the FTC led an ICN project that resulted in the adoption of standards for fair investigative procedures, which are the only internationally adopted benchmarks in this sensitive area, and we remain actively engaged in promoting implementation of these standards.

   It can be difficult to determine whether particular enforcement actions are motivated by protectionist concerns as opposed to legitimate competition policies. When the FTC suspects that a foreign competition agency is using its antitrust laws to protect home markets and competitors, we raise this with the foreign agency and engage with other U.S. agencies to address the concern as appropriate.

The Honorable Thom Tillis

1. **The Department of Justice and the Federal Trade Commission have overlapping jurisdiction when it comes to enforcement of the antitrust laws. I am concerned that differing views of the meaning of the antitrust laws among those two agencies can create confusion in the marketplace, stifle innovation and delay marketplace improvements to the consumer.**

   a) **Do you agree that it is essential for FTC and DOJ to have consistent interpretations of the antitrust laws? What steps can you take to assure innovators that DOJ and FTC's views of the application of antitrust are in accord?**

   Response: Consistent interpretations of the antitrust laws can promote consistency in enforcement, legal precedents, and the ability of businesses to comply with the antitrust laws. This has been true for more than 100 years, since Congress created the FTC to be an additional enforcer of the federal antitrust laws. At the same time, debate and discussion between the agencies and in the antitrust bar, particularly regarding novel or evolving issues, can be helpful to work towards consensus understandings of antitrust law and enforcement practices.

   Agency research, joint guidance statements, public workshops on current topics, and periodic self-assessment can promote a consensus understanding of the antitrust laws, where appropriate, and identify additional areas for future consideration.

2. **Many antitrust experts expressed concern that during the last Administration the FTC brought several overbroad enforcement actions under its standalone Section 5 unfair methods of competition authority, particularly against companies exercising their intellectual property rights. Mr. Simons, what are you doing to review ongoing FTC cases brought by the previous Administration to ensure they do not carry forward overly expansive theories of Section 5 liability?**

   Response: As Chairman, I continually review all ongoing Commission cases. Aside from one case in which I am recused and thus cannot comment, I am confident that none of our current cases rely on overly expansive theories of Section 5 liability.

3. **Mr. Simons in your opening remarks at the FTC's hearings on competition and consumer protection you said you approach calls to change mainstream antitrust law with an open mind. Can you explain in more detail what you mean by that?**

   a) **Are you implying you would support changing the consumer welfare standard to some new standard that incorporates other factors, such as labor issues or political power, into antitrust analysis?**

   Response: The consumer welfare standard works well in antitrust. It is well established in Supreme Court precedent and has bipartisan support in the antitrust bar. There is a strong

consensus in both law and economics that focusing on consumer welfare makes for efficient and effective antitrust enforcement.

That said, a number of recent critiques of the consumer welfare standard have raised important issues. As I noted at the October 3, 2018 hearing, "one of the most serious concerns about those proposals . . . at least in a broad sense is that they are difficult to administer, and to some extent inconsistent with each other. But this is a different time, and perhaps there are different facts, there are different arguments, and there's different evidence, and that's what we want to see." The FTC will continue to examine the role of the consumer welfare standard as part of its *Hearings on Competition and Consumer Protection in the 21st Century*, and has invited public comment on this issue.[37]

4. **I know there are some companies that are worried foreign competition authorities are using their antitrust laws to benefit national champions. Likewise, I know some companies believe these global antitrust regulations are necessary for a modern economy. Can you talk very briefly about international antitrust issues, specifically the increased regulation from foreign competition authorities?**

Response: International antitrust has been one of the most dynamic areas of antitrust law over the past three decades. During this period, over 130 jurisdictions have adopted or expanded competition legislation, often with U.S. encouragement and assistance. Properly applied, competition laws can promote open markets, enhance consumer welfare, and prevent conduct that impedes competition. Given the multiplicity of competition enforcers, it is crucial that antitrust agencies work together to ensure that the international competition law system functions coherently and effectively. The FTC has developed strong relations with our foreign counterparts, and works through multilateral organizations to promote cooperation and convergence toward sound competition policy. In particular, we focus on promoting substantive enforcement standards that seek to advance consumer welfare based on sound economics, procedural fairness, transparency, and non-discriminatory treatment of parties.

We are aware of concerns that some foreign competition agencies use their antitrust laws to benefit national champions. Using competition law for protectionist purposes or to advance a country's industrial policies undermines the consumer benefits from competition law enforcement, as well as the legitimacy of the competition law system globally. When the FTC suspects that this is occurring, we raise this with the foreign agency and engage with other U.S. agencies to address the concern as appropriate.

[37] *See* FTC Workshop, *FTC Hearing #5: Competition and Consumer Protection in the 21st Century* (Nov. 1, 2018), https://www.ftc.gov/news-events/events-calendar/ftc-hearing-5-competition-consumer-protection-21st-century.

The Honorable Amy Klobuchar

1. **Your agency's budget has remained flat for the past several years despite the significant rise in merger filings and other increasing demands on your agency's resources. If additional resources were made available to your agency, how would you deploy those resources to advance its mission?**

   Response: We appreciate your attention to the agency's resource needs. As I mentioned in my October 3rd testimony, the FTC is committed to maximizing its resources to enhance its effectiveness in protecting consumers and promoting competition, to anticipate and respond to changes in the marketplace, and to meet current and future challenges. In the past, we have requested additional resources for experts, information technology, and more full-time employees in support of our mission to protect consumers and promote competition. These continue to be critical areas of need for our agency. If we were to receive additional resources, they likely would be applied to these areas as needed.

The Honorable Richard Blumenthal

1. **I am concerned that our antitrust laws simply are not working for workers. Increasingly powerful companies are able to force workers to accept lower wages and poor working standards. One way this happens is through noncompete clauses. According to the Economic Policy Institute, roughly 30 million workers – including one in six workers without a college degree – are now covered by noncompete clauses. As FTC Commissioner Chopra has said, these clauses "deter workers from switching employers, weakening workers' credible threat of exit and diminishing their bargaining power." Workers subject to noncompete clauses are typically barred by arbitration provisions from challenging their contracts in court. Since workers cannot act on their own, the FTC should act on their behalf.**

   a) **Mr. Simons: What could the FTC be doing in order to protect workers from the harms of noncompete clauses?**

   Response: The Commission takes very seriously the potential for monopsony power among employers to affect workers' wages and mobility. If we find or are presented with evidence that a firm within our jurisdiction is engaging in conduct that harms competition and may violate the antitrust laws, we will review that information for potential law enforcement action.

   In addition to enforcement, the Commission's advocacy program provides written comments regarding competition and consumer protection policies in response to specific requests from federal, state, and local policymakers and other open comment opportunities. To the extent there may be opportunities to provide useful, well-researched comments about labor issues as they relate to competition or consumer protection, FTC staff will respond appropriately.

   b) **Mr. Simons: More generally, what principles does the FTC use for defining the relevant labor market when challenging anticompetitive conduct in labor markets?**

   Response: In defining a labor market, we would evaluate an employee's ability and willingness to substitute from one employer to another in response to a change in wages or another term or condition of employment (such as a change in benefits). The responsive actions of employers also would be important in this analysis. This is a fact-specific inquiry, and highly skilled workers or those in remote locations may face fewer options for employment.

2. **American workers are looking to you, our antitrust enforcers, to protect them from powerful companies colluding to keep down their wages. I am concerned that our antitrust enforcers are not imposing stiff enough penalties when they discover wrongdoing by employers. In July of this year, the FTC entered into a consent order with Your Therapy Source and other therapist staffing companies in Texas that prevented them from further colluding to keep wages down for the therapists that they employed. This settlement did not require the companies to provide any restitution to**

affected employees, nor did it require the employers to admit facts or liability.

a) Mr. Simons: When the FTC finds that employers have colluded to keep workers' wages down, shouldn't those employers have to compensate affected workers?

Response: Regarding the *Your Therapy Source* matter, Respondents are small business owners of two therapist staffing companies. They operate in the Dallas/Fort Worth area where there are many other therapist staffing companies who did not participate in the agreement, and where it is common for therapists to choose among and contract with multiple staffing companies. Although the evidence showed that there was distortion of the normal competitive process through the alleged per se illegal agreement, the evidence did not show that wages were, in fact, reduced below competitive levels.

As you highlight, the Commission has a duty to enforce the antitrust laws and to seek remedies commensurate with the level of harm and injury. With respect to equitable monetary remedies—including disgorgement and restitution—the Commission may, and does, seek such relief to compensate victims for losses resulting from unlawful conduct. As stated above, the Commission takes very seriously the potential for monopsony power among employers to affect workers' wages and mobility. We will continue to investigate this type of behavior and, where appropriate, will seek equitable monetary remedies in such cases.

4. I was encouraged to hear Chairman Simons state that FTC staff have been instructed to "look for potential effects on the labor market with every merger they review." It is vital that both the DOJ and FTC examine the labor markets effect of any merger.

a) How do DOJ and FTC staff define the labor market when conducting merger review? What methods do they use and how did they select these methods?

Response: As explained in Section 4 of the Horizontal Merger Guidelines, "[m]arket definition focuses solely on demand substitution factors; i.e., on customers' ability and willingness to substitute away from one product to another in response to a price increase or a corresponding non-price change such as a reduction in product quality or service. The responsive actions of suppliers are also important in competitive analysis."[38]

In defining a labor market, we would apply these same principles. Thus, we would evaluate an employee's ability and willingness to substitute from one employer to another in response to a change in wages or another term or condition of employment (such as a change in benefits). The responsive actions of employers also would be important in this analysis.

b) What resources, including labor market specialists, does the DOJ and FTC currently have to analyze the labor market effects of mergers? What additional

[38] *U.S. Dep't of Justice & Fed. Trade Comm'n Horizontal Merger Guidelines* § 4 (2010), https://www.ftc.gov/system/files/documents/public_statements/804291/100819hmg.pdf.

resources does the DOJ or FTC require?

Response: We appreciate your attention to the agency's resource needs. From a competition perspective, the FTC generally views labor services as we would any other product or service. Thus, as in all merger reviews, the Commission relies on its expert staff of attorneys, economists, and other professionals to investigate a merger and assess its likely competitive effects.

The FTC's Bureau of Economics has historically hired economists from a broad range of subfields of microeconomics, and continues to do so. This approach provides two main benefits. First, by not focusing on a narrow field such as industrial organization, the Bureau can recruit from a larger talent pool. Second, by employing microeconomists with diverse backgrounds, the Bureau can provide analysis informed by the knowledge and methodologies developed in the various fields of microeconomics that are best suited to the issues at hand.

The Bureau of Economics already employs many economists with labor economics backgrounds, and we believe we benefit from their perspective. For example, Bureau economists, some with labor economics backgrounds, have applied their experience evaluating marketplace competition, as well as their study of labor markets, to assess the recent research on labor market concentration.

One area of concern, however, is the increased number of complex investigations and litigations in competition matters, which are resource-intensive. In the past, we have requested additional resources for experts, information technology, and full-time employment in support of our mission to protect consumers and promote competition. These continue to be critical areas of need for our agency. If we were to receive additional resources, they would likely be applied to these areas as needed.

c) It is common practice for antitrust officials to review the effect of a merger on both the price and output (i.e. quantity) of a given product. When DOJ and FTC staff look at the labor market effects of a merger, do they consider the effect that a merger will have on hiring (i.e. quantity effects) in the relevant market?

Response: In examining whether a merger threatens substantially to lessen competition in a labor market, we generally would consider all potential harms, including whether the merger may lead to monopsony purchasing power in that market and thereby potentially harm competition among employers in hiring workers. At the October 3rd hearing, I provided this relatively simple example: a merger between the only two auto manufacturing facilities proximately located in a rural area, but competing in a broader geographic market that includes auto manufacturers located in other areas of the country. Although the auto manufacturers' merger might not affect competition in the output market for the sale of automobiles, it may nonetheless substantially lessen competition in the input market for labor services, if the two firms' employees would have few post-merger employment opportunities should the merged firm seek to reduce their wages post-merger.

d) In which merger reviews to date have FTC staff considered the effects of the merger on labor markets?

Response: I am unaware of any instance in which the FTC has challenged a merger specifically over concerns relating to labor market competition. I also cannot comment on nonpublic merger investigations. But I can assure you that, as a routine part of our merger investigations, we continually look for instances in which monopsony power might be used to drive down input prices. For example, the FTC recently required global health care company Grifols S.A. to divest blood plasma collection centers in three U.S. cities, among other conditions, to resolve charges that Grifols' acquisition of Biotest US Corporation would be anticompetitive.[39] The FTC's administrative complaint alleged that Grifols and Biotest were the only two buyers of human source plasma in three U.S. cities, and that these three cities constituted relevant geographic markets because plasma donors typically do not travel more than 25 minutes to donate plasma. Without the divestitures, Grifols likely would have been able to exercise market power by unilaterally decreasing the donor fees in the three cities.

In addition to the Grifols/Biotest merger, the FTC has successfully blocked other mergers based on product or service market overlaps, and thereby likely has preserved competition in labor markets as well. In particular, in a number of hospital merger cases, blocking the deal likely prevented adverse effects in associated labor markets for doctors, nurses, and other health care professionals in those geographic areas.

Prior FTC actions also have addressed labor market competition. For example, the FTC previously secured a settlement with a trade association that represented most of the nation's best-known fashion designers and an organization that produced the two major fashion shows for the industry each year. The Commission's consent order prohibited the two groups from attempting to fix or reduce modeling fees, and required them to take steps to educate fashion designers that price-fixing is illegal. The Commission thus made it clear that antitrust laws prohibiting price fixing apply to modeling services just as they do to other products or services.[40]

e) Is the DOJ or FTC reviewing past mergers for ex-post harms to competition in the labor markets?

Response: We are exploring the feasibility of conducting merger retrospectives in a number of industries, and are committed to bringing enforcement actions against any company that violates the laws that we enforce. Staff in the Bureau of Economics have analyzed the effects of a number of consummated mergers, but their ability to do so is subject to research time and available data.[41] To date, Bureau of Economics staff have not found a good candidate

[39] *In re Grifols, S.A.*, Dkt. No. C-4654 (Sept. 17, 2018), https://www.ftc.gov/enforcement/cases-proceedings/181-0081/grifols-sa-grifols-shared-services-north-america-inc-matter.

[40] Press Release, FYI: FTC Approves Consent Agreement with The Council of Fashion Designers of America and 7th on Sixth, Inc. (Oct. 20, 1995), https://www.ftc.gov/news-events/press-releases/1995/10/fyi-ftc-approves-consent-agreement-council-fashion-designers.

[41] *See, e.g.*, Thomas Koch & Shawn W. Ulrick, *Price Effects of a Merger: Evidence from a Physicians' Market* (2017) (Bureau of Economics Working Paper No. 333), https://www.ftc.gov/system/files/documents/reports/price-

merger that we previously reviewed with data robust enough to enable a retrospective evaluation of the labor market effects.

6. **The level of economic inequality in America today is reaching crisis proportions. At the same time, a small number of private corporations have a huge amount of market share. An equal, democratic society requires a more equal and democratic distribution of power. Taking on corporate power will require reexamining many areas of the law – our labor laws, our tax code, our housing laws, our healthcare laws, and our environmental protections.**

   One area that may need to be rethought is antitrust. Millions of Americans – workers, consumers, and ordinary families – do not feel our antitrust laws are working for them. There has been particular attention to the question of whether the "consumer welfare" standard is still up to the task of protecting Americans from corporate concentration. I believe any effective antitrust regime should account for a few different factors, and I would like to know if you agree.

   a) **Should antitrust enforcement be concerned with prices and output?**

   Response: Yes, antitrust enforcement should be concerned with prices and output. Recognizing this, the antitrust agencies and courts have long analyzed likely effects on price and output in deciding whether to challenge a transaction. The agencies have challenged transactions that would provide the merging firms the ability and incentive to raise price, reduce output, reduce innovation, or otherwise harm customers. The Horizontal Merger Guidelines describe how the agencies analyze transactions, and discuss the analysis in terms of price and non-price effects.[42]

   b) **Should antitrust enforcement be concerned with innovation**?

   Response: Yes, antitrust enforcement should be concerned with innovation. Many innovations benefit consumers even more than incremental reductions in price and expansions of output. For example, the smartphone, and related software applications, allowed consumers to perform numerous tasks while mobile, which in many instances may have benefitted consumers beyond incremental improvements in more traditional forms of cellular or wireline telephone service.

   The importance of innovation in merger analysis is set forth in Section 6.4 of the Horizontal Merger Guidelines, which state: "Competition often spurs firms to innovate. The Agencies

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effects-merger-evidence-physicians-market/working_paper_333.pdf (physicians); Daniel Hosken et al., *Do Retail Mergers Affect Competition? Evidence from Grocery Retailing* (2012) (Bureau of Economics Working Paper No. 313), https://www.ftc.gov/sites/default/files/documents/reports/do-retail-mergers-affect-competition%C2%A0-evidence-grocery-retailing/wp313.pdf (grocery stores); and Steven Tenn & John M. Yun, *The Success of Divestitures in Merger Enforcement: Evidence from the J&J – Pfizer Transaction* (2009) (Bureau of Economics Working Paper No. 296) https://www.ftc.gov/sites/default/files/documents/reports/success-divestitures-merger-enforcement%C2%A0-evidence-jampj-pfizer-transaction/wp296_0.pdf (consumer health products).

[42] *U.S. Dep't of Justice & Fed. Trade Comm'n Horizontal Merger Guidelines* (2010), https://www.ftc.gov/public-statements/2010/08/horizontal-merger-guidelines-united-states-department-justice-federal.

may consider whether a merger is likely to diminish innovation competition by encouraging the merged firm to curtail its innovative efforts below the level that would prevail in the absence of the merger."[43]

c) **In practice, do you believe the "consumer welfare" standard accounts for threats to innovation?**

Response: Yes, I believe the consumer welfare standard accounts for threats to innovation. As noted above, consumers tend to benefit from innovative products and services that come about as a result of the competitive process. Thus, issues regarding innovation, including threats to innovation, are incorporated into the concept of consumer welfare.

The FTC is presently studying issues relating to innovation and its implication for competition and consumers. The Commission has long been committed to self-examination, and there has been increasing interest in examining the efficacy of antitrust oversight and enforcement in certain sectors, including labor markets. To that end, I announced in June that the Commission would engage in an extensive program of public hearings designed to seek input on whether broad-based changes in the economy, business practices, and technology, as well as international developments, require any adjustments to competition and consumer protection enforcement and policy.

As part of our *Hearings on Competition and Consumer Protection in the 21st Century* initiative ("*21st Century Hearings*"), the Commission is inviting public comment on a wide range of antitrust and consumer protection topics, including this topic.[44] The hearings began earlier this fall, and we have been soliciting a diverse group of academics, consumer group representatives, business leaders, legal and economic practitioners, and technologists to participate in our moderated panels and discussions.

d) **Should antitrust enforcement be concerned with labor market effects, such as monopsony power and its impact on wages and working conditions?**

Response: Yes, antitrust enforcement should be concerned with labor market effects, in addition to markets for goods and services. Monopsony power and its impact on wages and working conditions can have anticompetitive effects. Antitrust enforcement protects the competitive process in labor markets, as it does for other markets. The Commission is continuing to study issues relating to monopsony power as part of our *21st Century Hearings*.

e) **In practice, do you believe the "consumer welfare" standard accounts for labor market concerns?**

Response: Yes. Antitrust enforcement protects the competitive process, which benefits consumers, in labor markets as it does for other markets.

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[43] *Id.* at § 6.4.

[44] Press Release, FTC Announces Hearings on Competition and Consumer Protection in the 21st Century (June 20, 2018), https://www.ftc.gov/news-events/press-releases/2018/06/ftc-announces-hearings-competition-consumer-protection-21st.

f) **Should antitrust enforcement be concerned with rising wealth and growing inequality?**

Response: The competitive process, which antitrust law enforcement protects, tends to make new, better, and less expensive products and services more attainable to a greater number of consumers over time. For example, many innovative products, such as personal computers and smartphones, which were relatively expensive for many consumers around the time of their introduction, are now widely affordable to the broad public. Protecting the competitive process through vigorous antitrust enforcement tends to promote such economic benefits to consumers across a wide range of socioeconomic backgrounds. Many products and services that were once cutting edge are now commonplace.

Antitrust law enforcement practice and controlling case precedent has generally focused on competition between particular businesses, operating in particular product and geographic markets, and identifiable, legally cognizable effects on consumers, such as effects relating to prices, output, quality, service, and innovation. Absolute and relative levels of wealth are not factors that the courts have recognized as being protected by the antitrust laws.

Antitrust enforcement, as a law enforcement activity, is easiest to administer when it is directed at specific competitive issues in a "relevant market." Going beyond this focus potentially raises challenges regarding the need to balance multiple inconsistent goals, agency administrability, legal predictability, and the ability to secure enforceable remedies. These are some of the issues under consideration at our hearings.

g) **In practice, do you believe the "consumer welfare" standard accounts for wealth and inequality?**

Response: As noted above, the competitive process, which antitrust law enforcement protects, tends to promote economic benefits to consumers across a wide range of socioeconomic backgrounds. Furthermore, the consumer welfare standard does protect consumers and competition from the risk that accumulated wealth may be used collusively to transfer assets from consumers in the form of higher prices and reduced output. Broad issues of wealth and inequality, however, are not factors that the courts have recognized as being protected by the antitrust laws.

7. **Most Favored Nations clauses require that providers offer their goods and services to all buyers on the same terms. For example, sometimes doctors and dentists might want to charge some of their patients lower fees but are prevented from doing so by Most Favored Nations clauses in their contracts with insurance companies. While Most Favored Nations clauses sometimes encourage a more efficient marketplace, an emerging body of literature has highlighted that these contract provisions can harm competition and raise overall prices. A 2012 workshop by the DOJ and FTC found that Most Favored Nations clauses can be anticompetitive because they help distributors collude to stifle innovation and increase prices.**

a) Do you believe one-sided Most Favored Nations clauses pose a risk to competition in the healthcare industry?

Response: Most Favored Nation causes are contract terms found in a variety of industries and used by large companies and smaller rivals. In many cases, MFNs are competitively benign because they offer pricing protection—reducing uncertainty about potential price fluctuation—and may reduce transaction costs. Nonetheless, as you note, MFNs can harm competition in some specific situations by excluding rivals or facilitating coordination.

The FTC has previously challenged the use of MFNs in the health care industry. In *RxCare of Tennessee, Inc.*, the FTC negotiated a consent order with RxCare, a dominant pharmacy group that included nearly all pharmacies in Tennessee and provided the pharmacy network for more than 50 percent of Tennessee residents with third-party pharmacy benefits.[45] The FTC alleged that because of RxCare's clause and its market power, some pharmacies in RxCare's network were unwilling to accept lower reimbursement rates for prescriptions they filled for patients covered by other health plans. In addition, some third-party payers paid higher pharmacy reimbursement rates in Tennessee than other states, and other firms were unable to establish lower-priced pharmacy networks in Tennessee. The Commission's consent order prohibited RxCare from maintaining or enforcing an MFN clause, and required RxCare to remove the clause from its existing contracts.

Anticompetitive conduct in the health care industry remains a significant priority, and we will continue to look to firms with significant market power for evidence of anticompetitive activity, including enforcement of MFN clauses.

8. Too often, drug companies find ways to prolong the lives of their patents and keep generic drugs out of the market. This allows them to push their profit margins higher and higher. Take the example of Gleevec, a leukemia cancer drug. Gleevec's price has risen from $26,000 per year in 2001 to $140,000 per year in 2017.

The patent for this drug is owned by Novartis. A case before the First Circuit alleges that Novartis fraudulently obtained a patent from the patent office. A key question at issue in the case is whether an obscure legal doctrine – the *Noerr-Pennington* doctrine – protects fraudulent filings before the Patent and Trademark Office. Mr. Simons spoke about some of his actions to protect health care consumers in his own opening remarks.

a) Without commenting on the merits of pending litigation, what are you doing to prevent drug companies from fraudulently obtaining patents?

Response: The FTC has actively sought to protect the application of the antitrust laws against expansive interpretations of the *Noerr-Pennington* doctrine that do not comport with the doctrine's foundational principles.[46] (The *Noerr-Pennington* doctrine is a judicially created

[45] 121 F.T.C. 762 (1996).

[46] *See generally* FED. TRADE COMM'N, ENFORCEMENT PERSPECTIVES ON THE *NOERR-PENNINGTON DOCTRINE: AN FTC STAFF REPORT* (2006), https://www.ftc.gov/sites/default/files/documents/reports/ftc-staff-report-concerning-enforcement-perspectives-noerr-pennington-doctrine/p013518enfperspectnoerr-penningtondoctrine.pdf.

limitation on the reach of the Sherman Act and is grounded in the protected First Amendment right to petition government.) The FTC also has brought enforcement actions against drug companies that have abused the patent and regulatory process. The FTC recently had a major victory when a federal court ruled that AbbVie Inc. filed baseless patent infringement lawsuits against potential generic competitors to illegally maintain its monopoly over the testosterone replacement drug AndroGel, and ordered $493.7 million in monetary relief to those who were overcharged for AndroGel as a result of Abbvie's conduct.[47] The FTC's pending case against Shire ViroPharma Inc. alleges that the company engaged in a series of filings before the Food and Drug Administration as a means of preventing generic entry and maintaining a monopoly.[48] The district court ruled that Shire ViroPharma's conduct was not shielded by the *Noerr-Pennington* doctrine, but nonetheless dismissed the complaint because the alleged violation ended before the FTC sued. The court held that the FTC cannot bring suit in federal court under Section 13(b) of the FTC Act absent allegations that the defendant's unlawful conduct is ongoing or imminent at the time the complaint is filed. The agency has appealed this ruling to the Third Circuit.[49] Finally, the FTC expressed concerns about the abuse of the patent and FDA regulatory systems in a 2015 amicus brief addressing the possible antitrust implications of "product hopping," whereby a branded pharmaceutical company allegedly obtains patents on insignificant reformulations of a drug to maintain its monopoly and suppress generic competition.[50]

b) Is there anything Congress could be doing to assist in this area?

Response: I do not have any particular suggestions for Congress at this time.

9. Over-concentration in the airline industry is harming consumers. Airline prices are higher today than they would otherwise be if there were greater competition in the sector. Recent studies indicate that airlines do not pass on price savings to consumers when oil prices decline, instead using their market power to protect their profits. Furthermore, customer service remains consistently poor in the airline industry. Unfortunately, I am concerned that our antitrust enforcers are being lax in policing the airline industry.

a) What steps are you currently taking, or will you be taking, to address concentration in the airline industry?

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[47] Statement of FTC Chairman Joe Simons Regarding Federal Court Ruling in FTC v. AbbVie (June 29, 2018), https://www.ftc.gov/news-events/press-releases/2018/06/statement-ftc-chairman-joe-simons-regarding-federal-court-ruling.

[48] *FTC v. Shire ViroPharma Inc.*, No. 17-cv-131 (D. Del. Feb. 7, 2017), https://www.ftc.gov/enforcement/cases-proceedings/121-0062/shire-viropharma.

[49] Brief of the Fed. Trade Comm'n and Appendix Vol. 1, *FTC v. Shire ViroPharma Inc.*, No. 18-1807 (3d Cir. June 19, 2018), https://www.ftc.gov/system/files/documents/cases/shire_viropharma_inc_ftc_opening_brief_and_appendix_vol_1_6-19-18.pdf.

[50] Brief of the Fed. Trade Comm'n as Amicus Curiae, *Mylan Pharms., Inc. v. Warner Chilcott plc.*, No. 2:12-cv-03824-PD (3d Cir. Sept. 30, 2015), https://www.ftc.gov/policy/advocacy/amicus-briefs/2015/09/mylan-pharmaceuticals-inc-v-warner-chilcott-plc-et-al.

Response: By statute, the FTC lacks jurisdiction over airlines, and thus would refer any information regarding anticompetitive conduct in that industry to the Department of Justice.

10. On October 3, 2018, both Mr. Simons and Mr. Delrahim indicated that they were unsure whether the FTC or the DOJ's Antitrust Division had been consulted prior to the Federal Communications Commission's (FCC) decision to roll back its net neutrality rules. Both Mr. Simons and Mr. Delrahim promised that they would report back to the Committee on this point.

a) Was either the FTC or the DOJ's Antitrust Division consulted prior to the FCC's decision to undo its net neutrality rules? If so, what input did you provide to the FCC?

Response: In response to the FCC's Notice of Proposed Rulemaking on Restoring Internet Freedom, the FTC's Bureau of Consumer Protection, Bureau of Competition, and Bureau of Economics submitted a joint comment. Then-Acting Chairman Maureen Ohlhausen and then-Commissioner Terrell McSweeny submitted separate comments.[51]

b) Was either the FTC or the DOJ's Antitrust Division consulted before the DOJ initiated legal action to block California's net neutrality rules? If so, what input did you provide?

Response: Neither the staff of the Bureau of Consumer Protection nor the staff of the Bureau of Competition were consulted before the Department of Justice filed its Complaint and Motion for a Preliminary Injunction in the Eastern District of California. I was not aware prior to filing.

11. A vibrant internet requires an innovative internet. But that innovation is at risk because of the ways that powerful companies like Amazon and Facebook are able to monitor their users' behavior and identify potential competition. These large companies buy up potential competitors before they pose a real risk. For example, according to the Wall Street Journal, in 2016, Facebook employees used their access to data on user activity to monitor the popularity of their rival Snapchat. Based on this data, Facebook knew that Snapchat's growth had slowed months before the fact was publicly disclosed.

b) How can you ensure that technology platforms do not use customers' data to identify and buy out or kill early stage competition?

Response: We consider all potential theories of harm in our merger reviews. If we find evidence that data is being used anticompetitively in violation of the antitrust laws, we will take enforcement action.

c) Do the DOJ and the FTC have the appropriate resources to keep up with the way

[51] Available at https://www.ftc.gov/news-events/press-releases/2017/07/ftc-staff-offers-comment-fccs-network-neutrality-proceeding

our economy is being changed by technology?

Response: We appreciate your support in ensuring the FTC has the resources to effectively pursue its mission. In recent years, technology has facilitated the development of new products and services, and new ways of doing business. We are aware of concerns about the size and reach of large technology companies and their growing importance in consumers' daily lives. The emergence of new and disruptive business models, however, is not a novel phenomenon. The antitrust laws are sufficiently flexible to address anticompetitive conduct in these new and dynamic markets, and effective enforcement of the antitrust laws can ensure that market incumbents compete on the merits.

Earlier this fall, the Commission launched the *21st Century Hearings* to consider whether the FTC's enforcement and policy efforts are keeping pace with changes in the economy, including advancements in technology and new business models made possible by those developments. Although we expect we already have the resources necessary to evaluate and challenge technology mergers and conduct by technology firms, these hearings should help inform our assessment of our future resource needs.

12. **Even though the mergers that tend to make headlines are those that raise antitrust concerns on a national level, many smaller mergers that do not make news still have significant monopoly effects on the local level. For example, in 2012, the Connecticut Attorney General worked with the FTC to review the merger of two hospitals in Connecticut. These sorts of merger reviews can be labor and resource intensive. Still, they are vital to preserving free and efficient local markets.**

    a) **Do federal antitrust enforcement agencies have the necessary resources to adequately review mergers that only affect state or local markets?**

Response: Additional resources would always be helpful to monitor local markets. For example, some local mergers may be too small to require Hart-Scott-Rodino premerger notification, but may still have anticompetitive effects. The state Attorneys General may have advantages in investigating certain mergers in local markets by being more familiar with potential witnesses, proximately located to the markets under investigation, and generally closer to the available evidence. The FTC does, however, have jurisdiction over any anticompetitive merger in "any section of the country," and we do not hesitate to bring enforcement actions where appropriate.

    b) **What can Congress do to better support coordination between federal and state antitrust officials, or otherwise support state antitrust officials in their work?**

Response: The FTC works cooperatively with state antitrust officials, and we consult regularly to ensure our respective efforts are efficient and successful.

13. **In addition to federal and state antitrust officials, private consumers are able to bring antitrust actions. Private consumers successfully initiated antitrust actions against the four major airlines, for example. However, because mandatory arbitration**

agreements often prevent private litigation, many consumers cannot stand up for their rights on their own.

a) Do you agree with me that private antitrust actions play a vital role in policing the anticompetitive effects of mergers and the unfair practices of companies?

Response: Yes. Private actions play a key role in finding and policing anticompetitive actions. The use of private damages, tripled under the antitrust laws, has a substantial deterrent effect on unlawful conduct.

The Honorable Cory Booker

1. **When employers don't face competition for labor, people looking for work have to simply accept whatever terms are offered—fair or not. Employers with monopsony power can generate higher profits by employing fewer workers and paying them less, effectively converting the value of their labor into cash for its shareholders.**

   Recent studies suggest that declining competition for workers among dominant firms has helped create a labor market in which fewer workers are able to bid up their own wages.

   This isn't the first time in our history when we've seen large firms use their dominance to squeeze workers and suppliers. In response to the "trusts" that dominated many industries back at the turn of the century, Congress passed an ambitious set of antitrust laws—the same ones that still protect us today.

   As a legal matter, these antitrust laws apply to reductions in competition for employees as a result of mergers as readily as they do to reductions in product market competition. But at some point in the years since Congress created these protections, I'm concerned that the antitrust agencies in charge of enforcing these laws—your agencies—have forgotten about this part of their mandate. That's been true for too long, under Democratic and Republican administrations.

   In a response to my November 2017 letter to the FTC and DOJ on this topic, then-Acting Chair Maureen Ohlhausen noted that "the Commission seeks to prevent mergers that would substantially lessen competition among buyers of labor services, and to stop collusion and exclusionary conduct by buyers in labor markets."

   a) **In analyzing proposed mergers and acquisitions, does the FTC regularly consider the prospective impacts on wages and other terms of employment, or the bargaining position of workers employed in the affected labor markets or supply chains?**

   Response: Yes. The staff has been specifically instructed to look at each merger for potential anticompetitive impacts on labor.

   b) **As far as I can tell, your agencies have never challenged a merger specifically over concerns relating to labor market competition. Is that correct?**

   Response: I am unaware of any instance in which the FTC has challenged a merger specifically over concerns relating to labor market competition. But we continually look for instances in which monopsony power may be used to drive down input prices.

   For example, the FTC recently required global health care company Grifols S.A. to divest blood plasma collection centers in three U.S. cities, among other conditions, to resolve

charges that Grifols' acquisition of Biotest US Corporation would be anticompetitive.[52] The FTC's administrative complaint alleged that Grifols and Biotest were the only two buyers of human source plasma in three U.S. cities, and that these three cities constituted relevant geographic markets because plasma donors typically do not travel more than 25 minutes to donate plasma. Without the divestitures, Grifols likely would have been able to exercise market power by unilaterally decreasing donor fees in the three cities.

In addition to the Grifols/Biotest merger, the FTC has successfully blocked other mergers based on product or service market overlaps, and thereby likely has preserved competition in labor markets as well. In particular, in a number of hospital merger cases, blocking the deal likely prevented adverse effects in associated labor markets for doctors, nurses, and other health care professionals in those geographic areas.

Prior FTC actions also have addressed labor market competition. For example, the FTC previously secured a settlement with a trade association that represented most of the nation's best-known fashion designers and an organization that produced the two major fashion shows for the industry each year. The Commission's consent order prohibited the two groups from attempting to fix or reduce modeling fees, and required them to take steps to educate fashion designers that price-fixing is illegal. The Commission thus made it clear that antitrust laws prohibiting price fixing apply to modeling services just as they do to other products or services.[53]

c) Beyond budgetary resources (which I consistently fight for), are there any legal or administrative authorities that you lack that will allow you to better consider labor market impact in merger review and potential enforcement action?

Response: I am not aware of any particular legal or administrative authorities that will allow the FTC to better consider labor market impact (or other monopsony issues) in merger review and potential enforcement action. The Commission, however, is currently considering the antitrust evaluation of labor markets as part of its *Hearings on Competition and Consumer Protection in the 21st Century*.[54] Panel discussions on economic evidence of labor market monopsony, and labor markets and antitrust policy, were held on October 16, and the Commission has invited public comments on these and other labor market-related topics.[55] We will keep you apprised if we determine that we require additional authority to investigate and challenge mergers that substantially lessen competition in labor markets.

2. Recent data privacy scandals are reflective of a much more pervasive set of problems

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[52] *In re Grifols, S.A.*, Dkt. No. C-4654 (Sept. 17, 2018), https://www.ftc.gov/enforcement/cases-proceedings/181-0081/grifols-sa-grifols-shared-services-north-america-inc-matter.

[53] Press Release, FYI: FTC Approves Consent Agreement with The Council of Fashion Designers of America and 7th on Sixth, Inc. (Oct. 20, 1995), https://www.ftc.gov/news-events/press-releases/1995/10/fyi-ftc-approves-consent-agreement-council-fashion-designers.

[54] FTC, *Hearings on Competition and Consumer Protection in the 21st Century*, https://www.ftc.gov/policy/hearings-competition-consumer-protection.

[55] FTC Workshop, *FTC Hearing #3: Competition and Consumer Protection in the 21st Century*, https://www.ftc.gov/news-events/events-calendar/2018/10/ftc-hearing-3-competition-consumer-protection-21st-century.

social media and other online services present—the manipulation and misuse of user information, the distribution of misleading or even illegal content, and the ability to engage in criminal activity with relative anonymity, to name just a few.

a) Access to data is increasingly become essential to companies' market position, particularly in the tech industry. Given this reality, do you believe that a company's privacy standards, including the protection of personal data and data security, should be a factor when evaluating that company for the purpose of determining how competitive a market is? If so, should the FTC develop guidance on this?

Response: Consumer privacy is a very serious issue, and the FTC devotes significant resources to protecting consumer privacy as part of its consumer protection mission. Ideally, competition and consumer protection policies and enforcement practices should complement and reinforce each other, as more firms compete to provide better privacy protections. As I stated at the October 3rd hearing, however, we must take steps to ensure that new privacy laws strike a proper balance for consumers and competition.

Consumer preferences, including privacy, may depend on the particular tradeoffs with price, quality, or other competitive factors. Effective antitrust policy should account for such variances.

Accounting for the dynamic nature of an industry requires solid grounding in facts and the careful application of tested antitrust analysis.[56] We will continue to closely follow privacy issues and act quickly in the case of any anticompetitive conduct.

b) The Children's Online Privacy Protection Act of 1998 (COPPA) is supposed to prevent the personal data of children under 13 from falling into the wrong hands. But a number of recent reports, including an analysis published a few weeks ago in the *New York Times*, have found that many apps intended for children track and share data with outside companies. What is the FTC doing to ensure that COPPA is duly enforced, and that children's privacy is protected, when young kids are using apps on phones and tablets?

Response: Since Congress enacted COPPA in 1998, the FTC has vigorously enforced the law and the COPPA Rule that implements it. To date, the Commission has brought 28 COPPA cases against a wide variety of commercial entities, which include over $10 million in civil penalties as well as strong injunctive relief. Several of these cases involved the improper collection of children's personal information through mobile apps. For example, in 2016 the Commission sued InMobi, a mobile advertising company that allegedly collected geolocation data from users of child-directed apps without obtaining the necessary parental consent.[57] The FTC also sued two developers of child-directed apps—Retro Dreamer and LAI

[56] *See* FTC, Statement of the Federal Trade Commission Concerning Google/DoubleClick (Dec. 20, 2017), https://www.ftc.gov/public-statements/2007/12/statement-federal-trade-commission-concerning-googledoubleclick (explaining the agency's antitrust review of the proposed acquisition, which included investigating whether the proposed acquisition would adversely affect non-price attributes of competition, such as consumer privacy).
[57] *United States v. InMobi Pte. Ltd.*, Case No. 3:16-CV-3474 (N.D. Cal. June 22, 2016) (COPPA Consent Decree).

Systems—for allegedly allowing third parties to collect personal information, in the form of persistent identifiers used to deliver targeted advertising, from users without complying with COPPA's notice and consent requirements.[58] The Commission has also brought actions against the online review site Yelp and the app developer TinyCo, alleging COPPA violations related to each company's mobile apps.[59] Most recently, the Commission brought its first COPPA action involving connected toys against VTech (including collection through an app),[60] and sent warning letters to two foreign companies that marketed smart watches and companion apps that appeared to collect children's geolocation information without obtaining parental consent.[61]

The Commission also takes steps to ensure that the Rule keeps pace with changing technology and business models. In 2013, the Commission updated and strengthened the Rule by expanding the definition of personal information to include persistent identifiers used for behavioral advertising as well as photographs, video, or audio files containing a child's image or voice.[62] The 2013 amendments also extended COPPA liability to third parties, such as network advertisers, that knowingly collect personal information from users of first-party child-directed websites and online services.[63] Indeed, the Commission enforced these new requirements in the RetroDreamer, LAI Systems, and VTech cases, as well as in the third-party context against InMobi, cited above.

3. An estimated 30 million workers are limited in their ability to switch jobs by what are known as "noncompete" agreements. These are contractual provisions that forbid employees from leaving their job, and working for a competitor or starting their own business. One in seven American workers earning under $40,000 a year reports having signed a noncompete agreement.

These agreements have been shown to reduce employee motivation, entrepreneurship, and sharing of knowledge, which are all critical to fostering innovation and growth. More fundamentally, they often serve to keep lower-wage workers from pursuing higher-paying jobs.

a) What enforcement, rulemaking, or advocacy does the FTC intend to do around this important issue?

Response: The Commission takes very seriously the potential for monopsony power among employers to affect workers' wages and mobility. If we find or are presented with evidence

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[58] *United States v. Retro Dreamer,* Case No. 5:15-CV-2529 (C.D. Cal. Dec. 17, 2015) (COPPA Consent Decree); *United States v. LAI Systems*, Case No. 2:15-CV-9691 (C.D. Ca. Dec. 17, 2015) (COPPA Consent Decree).
[59] *United States v. Yelp Inc.*, Case No. 3:14-CV-04163 (N.D. Cal. Sept. 17, 2014) (COPPA Consent Decree); *United States v. TinyCo, Inc.*, Case No. 3:14-CV-04164 (N.D. Cal. Sept. 17, 2014) (COPPA Consent Decree).
[60] *United States v. VTech Electronics Limited,* Case No. 1:18-cv-00114 (N.D. Ill. Jan. 8, 2018) (COPPA Consent Decree).
[61] *See* Press Release, FTC Warns Gator Group, Tinitell that Online Services Might Violate COPPA (April 27, 2018), https://www.ftc.gov/news-events/press-releases/2018/04/ftc-warns-gator-group-tinitell-online-services-might-violate.
[62] 16 C.F.R. § 312.2.
[63] *Id.*

that a firm within our jurisdiction is engaging in conduct that harms competition and may violate the antitrust laws, we will review that information for potential law enforcement action.

Beyond enforcement, the FTC's advocacy program provides written comments regarding competition and consumer protection policies in response to specific requests from federal, state, and local policymakers and other open comment opportunities. To the extent there may be opportunities to provide useful, well-researched comments about labor issues as they relate to competition or consumer protection, FTC staff will respond appropriately.

b) I'm sure you are familiar with how Jimmy John's, the sandwich chain, used to include noncompete clauses in the contracts of workers who were making $8.15 an hour. Jimmy John's finally started dropping these provisions a couple of years ago. These clauses keep American workers from pursuing a better-paying job somewhere else. They hold wages down and keep Americans from getting ahead. They make labor markets *less* competitive, not more competitive. In your view, what possible pro-competitive purpose do noncompete agreements serve?

Response: In certain circumstances, narrowly tailored noncompete clauses can benefit competition. For example, noncompete clauses can protect against the disclosure or use of competitively sensitive information outside of an employer's organization. Noncompete clauses also can encourage organizations to invest in employee training by reducing the risk that employees will take their new skills to a competitor. That said, several private suits have alleged that overly broad employee restrictions can violate the antitrust laws. In addition, agreements among competitors not to compete for workers, or not to solicit one another's employees, can be clear violations of the antitrust laws.[64]

c) Noncompete agreements seem to *restrain* competition in the labor market for lower-wage workers, without a clear business justification. We're talking about home health aides, janitors, cleaners, cooks, hotel employees, cleaners, and many, many other kinds of jobs. Why aren't more enforcement actions warranted to ensure that large corporations aren't overusing, misusing, or even abusing noncompete agreements for lower-wage workers?

Response: An employment noncompete agreement may be challenged as an unreasonable vertical restraint under the antitrust laws. Relevant factors include the type of employment, the scope and duration of the restrictions, as well as whether the employer possesses market power, when assessing whether to bring an enforcement action.

4. A recent study by Princeton economists found that 58% of major franchisors' franchise agreements include a no-poach provision that prohibits their franchisees from hiring or

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[64] *See, e.g.*, *In re Tecnica Group SpA*, Dkt. No. C-4475 (July 3, 2014), https://www.ftc.gov/enforcement/cases-proceedings/121-0004/tecnica-group-matter (consent order settling FTC charges that Tecnica and Marker Volkhl illegally agreed not to compete for one another's ski endorsers or employees; *In re Marker Volkl (Int'l) GmbH*, Dkt. No. C-4476 (July 3, 2014), https://www.ftc.gov/enforcement/cases-proceedings/121-0004/marker-volkl-matter (same).

recruiting each other's workers. Use of these provisions is up 20% from two decades ago, and now covers approximately 340,000 franchise units and millions of low-wage workers. In effect, the provisions allow employers to collude to restrict worker mobility, suppress wages, and generally constrain the labor market.

Senator Warren and I have introduced legislation prohibiting no-poach language in franchise agreements, and, in the last several months, dozens of large companies including McDonald's, H&R Block, and others, announced they will remove these restrictive clauses from their contracts.

a) **There is a very strong case to be made that no-poaching agreements are unfair trade practices in violation of Section 5 of the FTC Act. Has the commission considered issuing a rule banning these agreements?**

Response: In October 2016, the FTC and Department of Justice released joint Antitrust Guidance for Human Resource Professionals.[65] This guidance explains that the Department of Justice intends to criminally investigate companies that enter into no-poaching agreements that prevent companies from recruiting each other's employees. The guidance also explains that agreements that do not constitute criminal violations may still lead to civil liability under statutes enforced by both agencies. I believe this guidance is sufficiently clear that rulemaking is not required at this time.

5. **In a speech last month, you said that one of your interests at the FTC will be on the mergers between high-tech platforms and nascent competitors, noting that these types of transactions are difficult to review because "the acquired firm is by definition not a full-fledged competitor, and the likely level of future competition with the acquiring firm often is not apparent. But the harm to competition can nonetheless be significant. We are going to be spending some time and resources thinking about these difficult and important issues."**

It appears both you and Mr. Delrahim acknowledge that limiting the consumer welfare standard to only consider price effects will cause us to miss current and future anticompetitive harm.

a) **Many have suggested replacing the consumer welfare standard by amending the Sherman and Clayton Acts to *explicitly* detail the competitive standard in ways that account for additional stakeholders and values (labor, privacy, innovation, etc.). Is a legislative fix necessary?**

Response: I do not believe legislative change is necessary. The consumer welfare standard works well in antitrust. It is well-established in Supreme Court precedent and has bipartisan support in the antitrust bar. There is a strong consensus in both law and economics that

[65] U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidance for Human Resource Professionals* (Oct. 2016), https://www.ftc.gov/public-statements/2016/10/antitrust-guidance-human-resource-professionals-department-justice. The agencies also published a list of red flags for employment practices to help identify potential antitrust law violations.

focusing on consumer welfare makes for efficient and effective antitrust enforcement.

That said, a number of recent critiques of the consumer welfare standard have raised important issues. This agency routinely reconsiders the basis of all of our enforcement activities and the consumer welfare standard is no exception. As I stated at the October 3rd hearing, "one of the most serious concerns about those proposals . . . at least in a broad sense is that they are difficult to administer, and to some extent inconsistent with each other. But this is a different time, and perhaps there are different facts, there are different arguments, and there's different evidence, and that's what we want to see." The Commission will continue to examine the role of the consumer welfare standard as part of our *Hearings on Competition and Consumer Protection in the 21st Century* and has invited public comment on this issue.[66]

6. You have previously said that "substantially increased expert costs" are causing budget difficulties at the Commission.

a) What types of hard choices do you have to make when deciding whether to bring litigation?

Response: When the available evidence gives the Commission reason to believe that a business practice is or would likely be anticompetitive, the Commission intervenes. I am not aware of any instance in which the Commission has declined to bring an enforcement action due to costs or resource constraints. The agency's high level of enforcement activity, however, has brought us closer to potentially having to confront such a decision. More resources would be helpful.

b) Does the FTC need more funding in order to effectively achieve its mission to protect consumers and promote competition?

Response: We appreciate your attention to the agency's resource needs. As I mentioned in my October 3rd testimony, the FTC is committed to maximizing its resources to enhance its effectiveness in protecting consumers and promoting competition, to anticipate and respond to changes in the marketplace, and to meet current and future challenges. In the past, we have requested additional resources for experts, information technology, and more full-time employees in support of our mission to protect consumers and promote competition. These continue to be critical areas of need for our agency. If we were to receive additional resources, they likely would be applied to these areas as needed.

7. At the first day of the FTC Hearings on Competition and Consumer Protection in the 21st Century, David Vladeck, the former Director of the Bureau of Consumer Protection, called for the FTC to hire more technologists, perhaps through a new Bureau of Technology.

a) Would having more technologists on staff help the FTC move more quickly on

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[66] *See* FTC Workshop, *FTC Hearing #5: Competition and Consumer Protection in the 21st Century* (Nov. 1, 2018), https://www.ftc.gov/news-events/events-calendar/ftc-hearing-5-competition-consumer-protection-21st-century.

investigations relating to new technologies?

Response: Much of the FTC's work intersects with technology. Having additional technologists on staff would assist the agency in fulfilling its mission. The FTC's existing technologists play a critical role in helping FTC attorneys and economists understand technical issues relevant to their investigations, and in interpreting technical information provided by companies. Our technologists also assist in identifying, improving, or developing tools that allow FTC staff to more effectively investigate cases and capture evidence. Additional technological staff would support a larger number of investigations and assist the FTC in protecting consumers and promoting competition in an increasingly tech-centric economy.

8. **Historically, EU regulators have been much tougher with enforcing anticompetitive practices than U.S. regulators. For example, last year the EU fined Google $2.7 billion for search engine abuses. Meanwhile, in 2013, the FTC closed a similar investigation into Google's search engine without levying any financial penalties.**

   a) **What accounts for this vast difference in regulatory approach?**

   Response: I was not in office when the Commission considered the Google matter to which you refer, but refer you to the Commission's unanimous statement accompanying the closure of the investigation, available at https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commission-regarding-googles-search-practices/130103brillgooglesearchstmt.pdf.

   More generally, while the U.S. and EU approaches to competition have converged in many areas of competition law and policy, there are differences in our approaches to single firm conduct, driven by differences in our statutes, jurisprudence, history, and perspectives. For example, unlawful acquisition of monopoly power and attempted monopolization violate Section 2 of the Sherman Act but are not covered by the EU's Article 102, which prohibits abusive conduct by dominant firms. On the other hand, excessive pricing and other exploitative abuses violate Article 102 but not the Sherman Act. The European courts have also mandated a more expansive definition of illegal anticompetitive conduct than is recognized by U.S. courts. Regarding historical background, EU competition law was designed to help break down trade barriers, discipline state monopolies, and promote integration in postwar Europe, while the U.S. regime evolved to serve different objectives. Fortunately, we maintain a strong cooperative relationship with the European Commission, which enables us to reach consistent outcomes in the vast majority of trans-Atlantic matters under concurrent review. We engage in regular dialogue aimed at understanding and narrowing our remaining differences.

   b) **Does the FTC, under its current budget, have enough resources to effectively regulate markets and investigate anticompetitive, deceptive, or unfair business practices?**

   Response: As noted above, it is critical that the FTC have sufficient resources to support

expert work in competition and consumer protection litigation cases. More resources would be helpful, and once again I appreciate your attention to the agency's needs.

The Honorable Dianne Feinstein

I intend to introduce legislation that would enable the Federal Trade Commission to crack down on the growing nuisance of illegal robocalling. The legislation does so by carving telecoms out of the common carrier exemption in the FTC Act.

1. **How would eliminating the common carrier exemption, either in part or as a whole, improve the FTC's enforcement ability, both with respect to illegal robocalling and other illegal activity?**

   Response: The FTC has long advocated for the repeal of the common carrier exemption. The exemption prevents effective enforcement in three areas:

   - *Illegal robocall traffic.* Eliminating the common carrier exemption would assist the Commission in combatting illegal robocall traffic at its source: the VoIP providers that bring the illegal robocalls into the telecommunications network. The vast majority of illegal robocalls are dialed using VoIP telephony services. Many VoIP carriers advertise that they offer "dialer/short duration termination." This is a euphemism for carrying robocalls.

     Uncertainty about the FTC's ability to sue and regulate VoIP providers has impaired the FTC's ability to counter fraudulent and abusive robocalls. In a recent case, the FTC sued an individual who knowingly assisted billions of illegal robocalls. He provided this assistance through three companies: a VoIP provider, a software licensing company, and a server hosting company. The FTC did not sue the VoIP provider because of the legal uncertainty surrounding application of the common carrier exemption.[67]

   - *Privacy and data security.* The common carrier exemption prevents the FTC from enforcing a level playing field for entities that are not subject to our jurisdiction. For example, providers of wireline and wireless telephone services collect and maintain sensitive consumer information, including names, addresses, SSNs, customer proprietary network information (i.e., call information, charges, usage data, services). For example, in August 2018, T-Mobile reported a breach of 2 million customers' names, billing zip codes, and account numbers.[68] The common carrier exemption prevents the FTC from investigating this and similar breaches.

   - *National advertising.* Consumers often buy telecommunications access as a "bundle" that includes common carrier phone service as well as non-common carrier services such as broadband Internet (for example, a bundle of phone, Internet, and TV). Whether for residential or mobile use, these bundles are often the most prominently advertised offerings on a carrier's site, and are appealing to consumers because they offer more

[67] *See FTC v. Christiano et al.*, No. 8:18-cv-00936 (C.D. Cal., filed May 31, 2018). Links to pleadings and a press release are available at: https://www.ftc.gov/enforcement/cases-proceedings/162-3124/james-christiano-et-al-netdotsolutions-inc.

[68] Jennifer Calfas, *T-Mobile Says a Data Breach Is Affecting Millions of Its Customers. Here's What You Need to Know*, TIME, Aug. 24, 2018, http://time.com/money/5377773/tmobile-data-breach-august-2018/.

value for their money. The common carrier exemption creates legal uncertainty about the FTC's jurisdiction or practical ability to challenge potentially deceptive advertising claims for these bundles, for example regarding price.

2. What types of investigations and cases could you bring that you can't currently bring with the common carrier exemption in place?

Response: As noted above in response to Question 1, without the common carrier exemption, the FTC could use its authority under the Telemarketing Sales Rule to investigate and bring enforcement actions against telecommunications carriers that assist illegal robocallers. The FTC would also be able to investigate the privacy and data security practices of wireless and wireline telephone service providers. Finally, elimination of the common carrier exemption would eliminate legal uncertainty surrounding the FTC's jurisdiction or practical ability to challenge potentially deceptive advertising claims for service bundles that include phone service, for example regarding price.

3. How would you respond to arguments that eliminating the common carrier exemption with respect to telecoms would now subject telecoms to a dual enforcement regime (FTC and the FCC)?

Response: As an agency with broad general jurisdiction, the FTC often must coordinate with other regulatory agencies to avoid creating a dual enforcement regime, and has been highly successful in doing so. For example, we have long worked successfully with the FDA pursuant to our MOU regarding the marketing and advertising of dietary supplements, and with the Department of Justice through the clearance process for mergers and other antitrust matters. We do not anticipate any difficulty engaging in similar coordination with the FCC, especially given the long history of successful cooperation between our agencies.

In your testimony, you mentioned that you have instructed Bureau of Competition staff to consider labor impact in every merger investigation. I am aware that labor effects have not always been prioritized in antitrust analysis, or worse, the elimination of labor and lowering of wages have been credited as "efficiencies" that weigh in favor of merger approval. I commend your leadership in encouraging staff to carefully examine this issue in every merger.

Recent scholarship by labor economists suggests that traditional antitrust enforcement, dominated by industrial organization economists, has missed the harmful effects of market consolidation on labor.

4. In what ways would the Commission's analyses of mergers and anticompetitive behavior benefit from the hiring of a) labor economists and b) behavioral economists into the Bureau of Economics?

Response: The Bureau of Economics has historically hired economists from a broad range of subfields of microeconomics, and continues to do so. This approach provides two main benefits. First, by not focusing on a narrow field such as industrial organization, the Bureau

can recruit from a larger talent pool. Second, by employing microeconomists with diverse backgrounds, the Bureau can provide analysis informed by the knowledge and methodologies developed in the various fields of microeconomics that are best suited to the issues at hand.

To answer your question more directly, the Bureau already employs many economists with labor economics and behavioral economics backgrounds, and we believe we benefit from their perspective. For example, Bureau economists, some with labor economics backgrounds, have applied their experience evaluating marketplace competition, as well as their study of labor markets to assess the recent research on labor market concentration.

5. Please list the merger challenges in the past 20 years in which the FTC has pled a labor harm.

Response: I am unaware of any instance where the FTC has challenged a merger specifically over concerns relating to labor market competition. But we continually look for instances in which monopsony power may be used to drive down input prices.

For example, the FTC recently required global health care company Grifols S.A. to divest blood plasma collection centers in three U.S. cities, among other conditions, to resolve charges that Grifols' acquisition of Biotest US Corporation would be anticompetitive.[69] The FTC's administrative complaint alleged that Grifols and Biotest were the only two buyers of human source plasma in three U.S. cities, and that these three cities constituted relevant geographic markets because plasma donors typically do not travel more than 25 minutes to donate plasma. Without the divestitures, Grifols likely would have been able to exercise market power by unilaterally decreasing donor fees in the three cities.

In addition to the Grifols/Biotest merger, the FTC has successfully blocked other mergers based on product or service market overlaps, and thereby likely has preserved competition in labor markets as well. In particular, in a number of hospital merger cases, blocking the deal likely prevented adverse effects in associated labor markets for doctors, nurses, and other health care professionals in those geographic areas.

Prior FTC actions also have addressed labor market competition. For example, the FTC previously secured a settlement with a trade association that represented most of the nation's best-known fashion designers and an organization that produced the two major fashion shows for the industry each year. The Commission's consent order prohibited the two groups from attempting to fix or reduce modeling fees and required them to take steps to educate fashion designers that price-fixing is illegal. The Commission thus made it clear that antitrust laws prohibiting price fixing apply to the fashion industry just as they do to other products or services.[70]

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[69] *In re Grifols, S.A.*, Dkt. No. C-4654 (Sept. 17, 2018), https://www.ftc.gov/enforcement/cases-proceedings/181-0081/grifols-sa-grifols-shared-services-north-america-inc-matter.

[70] Press Release, FYI: FTC Approves Consent Agreement with The Council of Fashion Designers of America and 7th on Sixth, Inc. (Oct. 20, 1995) https://www.ftc.gov/news-events/press-releases/1995/10/fyi-ftc-approves-consent-agreement-council-fashion-designers.

The Honorable Dick Durbin

1. **I want to discuss the FTC's consumer protection role when it comes to protecting students from unscrupulous for-profit colleges.**

   It is very important that prospective students not be tricked or deceived into taking out loans or giving their precious federal student aid dollars to an unscrupulous for-profit college. These schools enroll just 9 percent of all post-secondary students, but account for 34 percent of all student loan defaults.

   In 2016, the FTC reached a landmark $100 million settlement with DeVry over deceptive ads. But misleading and deceptive advertising seems to be the standard in the for-profit college industry with schools like those owned by Dream Center Education Holdings, Bridgepoint Education, Center for Excellence in Higher Education, and others being accused of similar practices.

   a) **Without naming names, dose the FTC currently have any open investigations into for-profit colleges?**

   Response: Although we do not comment on our nonpublic law enforcement efforts, it has been made public elsewhere that the Commission is investigating the conduct of other for-profit post-secondary schools. We will continue to monitor this marketplace for unlawful conduct that harms consumers.

   b) **When students or prospective students at for-profit colleges think they are being subjected to unfair or deceptive practices by these companies, can they turn to the FTC to blow the whistle on these practices?**

   Response: Yes. We encourage any consumers who believe they have been subjected to deceptive or otherwise unlawful practices to submit a complaint to the Commission—either at our website (https://www.ftccomplaintassistant.gov/) or toll-free number (1-877-FTC-HELP or 1-877-382-4357). The FTC compiles complaint data that it receives, along with data from other agencies and organizations, into a database called Consumer Sentinel. This complaint information can help the FTC and other agencies in our efforts to investigate and, when necessary, take enforcement actions against companies engaged in deceptive or unfair conduct.

   c) **Will the FTC commit to vigorously protect students from deceptions and abuses by this industry?**

   Response: Yes. The FTC has been active in this area and plans to continue its work to protect consumers seeking post-secondary education and other related products and services, both by bringing enforcement actions where needed and by seeking additional opportunities to engage in relevant outreach and education. For example, just last month, we brought an action against Sunkey Publishing, a lead generation operation that falsely claimed to be affiliated with the military and promised to use consumers' information only for military

recruitment purposes. Instead, we alleged that this operation used the information it collected to make millions of illegal telemarketing calls and sold the information to post-secondary schools.[71]

Furthermore, we obtained a $100 million order against DeVry and have already sent 173,000 refund checks totaling more than $49 million to students. Additionally, in 2015, the Commission brought an action against Ashworth College for allegedly making misrepresentations about its career training programs and the transferability of credits. We also issued a final order against Victory Media earlier this year, resolving our allegations that the company's materials and tools deceptively promoted specific schools to military consumers without disclosing that the schools had paid the company for those promotions.

Beyond our work curbing deceptive claims by post-secondary schools and related marketers, we have also aggressively pursued outright frauds, like student loan debt relief scams, that target consumers in the education marketplace. Late last year, for example, the Commission announced "Operation Game of Loans," a federal-state law enforcement sweep that included 36 enforcement actions against these sorts of scams.

2. Earlier this year, we learned that Facebook was collecting and sharing data about children through the Facebook Messenger Kids app. This troubles me, because kids don't understand how every click they make helps create a data profile of them that could last a lifetime.

In introduced a bill, the Clean Slate for Kids Online Act, to give Americans the ability to request a clean slate for the online activities they engaged in before they were old enough to appreciate how using the internet leaves a trail of data.

My bill would modify the Children's Online Privacy Protection Act (COPPA), a law that governs the collection of children's personal information by operators or internet websites and online services. My bill would amend COPPA to give every American the right to request the deletion of online information collected from them or about them before they turned 13.

My bill would task the FTC to issue a new regulation, similar to the FTC's existing COPPA regulation, to require internet companies to post a notice on how people can request the deletion of such information, and to promptly delete the information when requested.

Chairman Simons, I hope to work with you and your team at the FTC to advance this important issue of allowing Americans to get a clean slate for their childhood online activity. Will you commit to work with me on this issue?

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[71] *See* Press Release, FTC Takes Action Against the Operators of Copycat Military Websites (Sept. 6, 2018), *available at* https://www.ftc.gov/news-events/press-releases/2018/09/ftc-takes-action-against-operators-copycat-military-websites.

Response: I am happy to work with you on ways to ensure that children's privacy is protected. As you recognize, COPPA currently provides parents with an opportunity to review personal information that has been collected from their children, and companies must delete such information upon request.[72] In addition to these parental rights, companies have an independent obligation to dispose of personal information collected from a child if it is no longer reasonably necessary to fulfill the purpose for which the information was collected.[73]

Your proposed legislation would provide the individual herself—not just the parent—with the right to delete information provided by the individual when she was under 13. It also extends the deletion right to information *about* the individual when she was under 13, even if someone else posted it. This approach thus expands the protections for children's information in significant ways, while at the same time introducing new issues, such as how to balance the speech rights of the poster of the information—which could include a parent, relative, school, or classmate—with the privacy rights of the child requesting deletion. I appreciate your efforts to address children's privacy issues, and the FTC would be happy to provide advice as you move forward.

3. **What is the FTC doing to ensure that Visa and MasterCard are not using their dominant position in the electronic payments industry to impose anticompetitive restraints in the standard-setting process?**

Response: As you know, the FTC shares jurisdiction over enforcement of the antitrust laws with the Department of Justice. The agencies coordinate investigative and enforcement activities to avoid costly and inefficient overlaps. Over the years, each agency has developed expertise in certain industries. The Department of Justice has pursued important and effective antitrust enforcement for many years in the payment card industry, and the FTC would refer any evidence of anticompetitive conduct involving these firms to our sister agency.

4. **Each year, the pharmaceutical industry spends $6 billion in direct-to-consumer (DTC) prescription drug advertising—resulting in the average American seeing an average of nine such ads each day. Pharmaceutical manufacturers engage in DTC advertising because patients are more likely to ask their doctor for a specific drug (and are more likely to receive a prescription for it) when they have seen an advertisement for it—regardless of whether they need that medication or not, or if a generic may be available. This pads the profit margins of pharmaceutical companies while unnecessarily driving up health care costs. The American Medical Association has said that, "DTC advertising inflates demand for new and more expensive drugs, even when those drugs may not be appropriate." That's why most countries have banned DTC prescription drug advertising—only the United States and New Zealand permit this practice.**

With billions in targeted spending on drug advertisements, patients are bombarded with all sorts of information in these ads (such as side effects), but are kept in the dark on one crucial factor—price. Too often, when a patient sees an advertisement for a

[72] 16 C.F.R. § 312.6.
[73] 16 C.F.R. § 312.10.

drug like Xarelto, and his or her doctor writes a prescription for it, the "moment of truth" about what the medication actually costs does not occur until the patient is checking out at the pharmacy.

Senator Grassley and I have worked on legislation to require drug companies to simply level with the American public and put a price tag on these ads. It's a simple step for transparency and consumer empowerment so patients and their doctors can make informed health care choices.

Our measure passed the Senate unanimously, as part of the FY 19 Labor-HHS/DoD appropriations package. It was supported by President Trump, Department of Health and Human Services (HHS), Secretary Azar, AARP, the American Hospital Association, the American Medical Association, and 76 percent of Americans. Unfortunately, the provision as stripped from the final package. However, HHS is moving ahead, and will be issuing regulations to require price disclosure in direct-to-consumer drug ads.

a) **Chairman Simons, do you believe price transparency is an important principle in health care decisionmaking for consumers?**

Response: In general, I support laws (such as those that exist in many states) that increase consumer access to relevant, actionable information about health care products and services they may buy. But laws that require the public disclosure of competitively sensitive information, including information related to price and cost, may chill competition by facilitating or increasing the likelihood of unlawful collusion among competitors, without actually giving consumers useful information to guide their purchasing decisions.[74] In addition, disclosure laws may undermine the effectiveness of selective contracting by health plans, an approach that generally reduces health care costs and improves overall value in the delivery of health care. The competitive risks are especially great if information is available to competing health care providers, especially in highly concentrated markets where competition among providers is already limited.

b) **Do you support bipartisan efforts to require a form of price disclosure in direct-to-consumer prescription drug advertising? How can FTC work with Congress and other federal agencies to accomplish this common-sense policy goal?**

Response: I am a strong proponent of finding ways to allow market forces to work better in the pharmaceutical sector. I believe that markets work best when buyers can fully assess their options, including an awareness of the associated costs, when selecting the option that best suits their needs. Patients typically do not know how much a drug will cost them when their doctor first prescribes it. This makes it very difficult for a patient to have an informed conversation with her doctor about the recommended drug and any lower-cost alternative

[74] *See* FTC Staff Comment Regarding Amendments to the Minnesota Government Data Practices Act Regarding Health Care Contract Data, Which Would Classify Health Plan Provider Contracts as Public Data (June 29, 2015), https://www.ftc.gov/policy/advocacy/advocacy-filings/2015/06/ftc-staff-comment-regarding-amendments-minnesota-government.

treatments. I would support policies, business practices, and consumer education efforts that would give patients useful and actionable information regarding health and financial consequences of a particular drug choice, particularly out-of-pocket costs.

c) What additional policy recommendations do you have for how FTC could help lower prescription drug costs and spending for patients, as well as local, state, and federal government?

Response: I applaud the recently enacted measure to require that certain agreements involving biologics drugs be filed with the antitrust agencies. Health care competition has long been a Commission priority because of its critical importance to consumers and the economy. In particular, the FTC has engaged in aggressive enforcement, study, and advocacy to promote competition in drug markets. For example, the FTC maintains a robust program to identify and investigate potential anticompetitive conduct in the pharmaceutical industry. The FTC also reviews mergers between pharmaceutical companies to ensure that they do not result in elimination of a competitor or a potential competitor for any product on the market or in development. There are limits, however, on the FTC's ability to counter rising drug prices. The FTC is not a sector regulator; our authority is limited to trying to stop or prevent certain business practices that harm competition. Charging high prices, even exorbitant prices, for a drug, without more, is not a violation of any law the FTC enforces.

House Committee on the Judiciary
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
"Oversight of the Antitrust Enforcement Agencies"
December 4, 2018

The Honorable David Cicilline

Questions for Chairman Joseph J. Simons

Merger Retrospective Program and Hearings

1. **What is the current status of the merger retrospective program?**

Response: The Commission's merger retrospective program is an ongoing effort to evaluate the competitive effects of past mergers and acquisitions. The Commission's Bureau of Economics ("BE") regularly performs these retrospective analyses. In the ten years between March 2008 and July 2018, BE staff completed and released twenty merger retrospective studies. These retrospectives are often published in peer-reviewed economic journals after initially being released as BE working papers.[1] BE continues to conduct these merger retrospectives.

On February 13, 2019, the Commission announced that it would hold a public hearing on merger retrospectives in conjunction with the *Hearings on Competition and Consumer Protection in the 21st Century*.[2] The hearing will be held on April 12 in the FTC's Headquarters building and is open to the public. The agenda and participants, along with questions for public comment, are available on the FTC's website.

Additionally, Commission staff recently undertook a review of the success of the Commission's merger divestiture orders. In January 2015, staff from the Bureaus of Competition and Economics jointly initiated a study of the effectiveness of the Commission's orders in merger cases where it required a divestiture or other remedy. The study focused on 90 merger orders issued by the Commission between 2006 and 2012. Their staff report, *The FTC's Merger Remedies 2006-2012*, was released in January 2017.[3]

The Commission's ability to conduct significantly more merger retrospectives is largely dependent on the Commission's resources. Investigations of prospective (and recently consummated, unreportable) mergers already take up most of the resources available for merger work in the Bureaus of Competition and Economics.

2. **What metrics will you use to determine whether the program is successful?**

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[1] The Bureau of Economics' working paper series is available at https://www.ftc.gov/policy/reports/policy-reports/economics-research/working-papers.

[2] Press Release, FTC Announces New Sessions of its Hearings on Competition and Consumer Protection in the 21st Century, February 13, 2019, https://www.ftc.gov/news-events/press-releases/2019/02/ftc-announces-new-sessions-its-hearings-competition-consumer.

[3] Fed. Trade Comm'n, The FTC's Merger Remedies 2006-2012 (Jan. 2017), https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf.

Response: The Commission's merger retrospective program is already an important and successful component of the Commission's merger investigation and enforcement efforts, and we expect that it will continue as long as it is useful to inform the Commission's future investigation and enforcement decisions. We are not aware of external studies that contradict staff's conclusions or question the methodology staff has used in its retrospectives. It is possible that the merger retrospective program could exhibit diminishing returns if significantly larger numbers of merger retrospectives were undertaken, but in light of current resource constraints, that is very unlikely.

3. **How do you plan to focus the merger retrospective program? Are there particular areas or markets that the Commission plans to examine?**

The Commission's merger retrospective program historically has focused on markets where the Commission has devoted a substantial portion of its investigatory resources and where U.S. consumers expend substantial financial resources. Commission staff have conducted the majority of retrospectives in the health care and energy industries, and in consumer product markets. The purpose of the upcoming hearing is to gather information from experts outside the Commission to help guide the FTC's future merger retrospective research program; in part, we are interested in whether and how the Commission should change or expand its historical focus.

4. **What metric will you use to determine whether the Commission's hearings are successful?**

Response: I announced the hearings in June 2018 to consider whether broad-based changes in the economy, evolving business practices, new technologies, and international developments warrant adjustments to competition and consumer protection law, enforcement priorities, and policy. Commission staff is devoting significant resources to this effort to refresh and, if warranted, renew our thinking on current and anticipated competition and consumer protection issues. It was my intention that the hearings would stimulate internal and external evaluation of and commentary on the Commission's best use of its resources. I hoped the hearings would lead to an effective advancement of the Commission's competition and consumer protection mission in those areas that I believe are most significant for U.S consumers. Although not yet complete, the hearings have already done this, and I expect future hearings to have the same impact.

More broadly, I have previously noted that the antitrust consensus that has existed within the antitrust community in relatively stable form for the last twenty-five years is currently facing significant criticism and debate. Law enforcement decisions and regulatory policies that are consistent and understandable have greater credibility than those that change with a change in Presidential administrations, electoral fortunes, or Commission leadership. Thus, it is important to me that we re-establish a consensus on the proper role and direction of antitrust law and policy for the next twenty to twenty-five years. The hearings—through our public sessions and public comment—are an important component of that effort.

5. **Do you anticipate working with the Congress to develop legislative solutions to antitrust harms identified during the hearings?**

Response: I do not want to prejudge the outcome of the hearing sessions. I have said in prior testimony before the House and the Senate that, if there are areas where I believe more resources or law enforcement authority would be useful or necessary to strengthen the Commission's mission, I will work together with the Congress to obtain those resources and authorities. The hearings are an important component of our efforts to identify whether and where additional resources and enforcement authority are needed or would otherwise support the Commission's mission.

Conflicts of Interest and Transparency

6. **Some commentators have raised concerns that undisclosed conflicts of interest by some panelists at the FTC hearings may undermine the integrity of this process.**

- **Are you concerned that undisclosed conflicts or a lack of transparency around client interests may undermine the integrity of this review?**

- **What steps has the Commission pursued to ensure disclosure and remediation of apparent conflicts of interest by panelists at the FTC's hearings?**

Response: I am not concerned for several reasons.

First and foremost, we have taken significant steps to ensure that a wide variety of views are reflected during the hearings. We have invited legal and economic academics, legal and economic consultants, public interest groups, public advocacy groups, and representatives of businesses and industries to our hearing sessions. By the time the hearings conclude, we will have hosted well over 300 unique non-FTC participants for nearly 25 days of public hearings

Second, we have sought public input and, to the greatest extent possible, facilitated informed comments from a wide range of interested parties. For example, prior to each hearing, we have released an agenda, list of participants, and a list of specific questions we are interested in receiving comments on. The public comment period has been open before each hearing, allowing commenters to raise issues for discussion at the public session. The comment period has also extended well beyond the date of each specific hearing, to allow interested parties to comment on the discussion at the public session. We stream each hearing session live, and place a video of the hearing session on our website for those who could not attend or watch live. We also release a transcript of each hearing shortly after conclusion of a session. We have, to date, received over 800 unique comments on our hearings topics. The FTC posts all germane comments on our website shortly after we received them, allowing the public to comment on points raised in the public comments. The public comments submitted will receive the same review, scrutiny, and consideration as the comments and discussion at our hearings. There are no restrictions on who can comment, and I believe the public written comments are as important and valuable as the commentary at our hearing sessions.

Finally, it is worth noting that the Commission and its staff regularly review arguments and advocacy of parties, persons, and interest groups who appear before us on enforcement and policy matters. Often, they do not disclose their source of funding, their direct or indirect interest in the matter they bring before us, or how they (or their clients or funders) might benefit from the outcome they seek. In those situations, we carefully evaluate the information and arguments on the merits. We will do the same here.

7. **The nonprofit watchdog group Public Citizen recently reported that the Director of the Bureau of Consumer Protection, Andrew Smith, cannot participate in any matter involving 120 companies that he previous represented as a corporate attorney, including several investigations involving particularly egregious corporate misconduct.**

- **Who in the chain of command is responsible for leading investigations that Mr. Smith is recused from participating in?**

Response: Any Bureau of Consumer Protection matters where Director Smith is recused are overseen by one of the two career Deputy Directors in the Bureau, Daniel Kaufman and Serena Viswanathan. Both Deputy Directors have been at the Commission for approximately two decades.

Enforcement

8. **The Commission frequently seeks disgorgement in consumer protection cases and in pharmaceutical antitrust cases. How important is disgorgement to alleviating consumer harm and deterring violations of the FTC Act?**

9. **In SEC v. Kokesh, the Supreme Court held that a five year statute of limitations applies to the Securities Exchange Commission when it seeks disgorgement. But some have argued based on the *dicta* in the case and the oral argument that the FTC lacks authority to seek disgorgement.**

- **If the Supreme Court were to accept this argument that the FTC cannot seek disgorgement, would it cripple the Commission's ability to effectively enforce the FTC Act, particularly in consumer protection cases or pharmaceutical antitrust cases?**

Response to 8 and 9: The goal of FTC law enforcement actions is to halt illegal practices and, whenever possible, return money to the consumers who have been harmed by those practices, such as elderly Americans swindled by fraud or victims of an anticompetitive scheme that unlawfully inflated prices. Disgorgement—like other forms of equitable monetary relief sought by the Commission—is an important tool that helps the agency accomplish this goal. For example, last year in our consumer protection cases, the agency mailed refund checks totaling $122 million to 1.28 million consumers.[4] That amount was funded through disgorgement and other equitable monetary relief awards that the Commission obtained through its enforcement actions.

[4] FTC Staff Report, *2018 FTC Annual Report on Refunds to Consumers* (Feb. 2019), https://www.ftc.gov/reports/2018-annual-report-refunds-consumers

We do not believe that a correct reading of *Kokesh* limits the ability of the FTC to seek disgorgement, and the agency is continuing to seek disgorgement wherever appropriate to remedy violations of the FTC Act. Nonetheless, some judges have suggested in dicta that *Kokesh* calls into question the long-established precedent that the FTC Act authorizes the agency to obtain disgorgement or any other form of equitable monetary relief (e.g., restitution). To date, most courts have agreed with our interpretation of the *Kokesh* ruling, but we continue to see growing judicial skepticism over the agency's ability to obtain equitable monetary remedies. Should the courts ultimately restrict our ability to seek disgorgement or other equitable monetary remedies in the future, it would significantly weaken the FTC's ability to provide redress to consumers harmed by violations of the FTC Act.

Labor Market Competition

10. **During your testimony, you noted that the Commission is only examining the use of non-competes in employment contracts by firms that possess market power. There appears to be evidence, however, that the use of non-compete agreements in employment contracts is occurring on a widespread basis, has the same effect on workers irrespective of the market in which the non-compete applies, and may be direct evidence of a firm's ability to harm competition even in markets that may not be highly concentrated.**

- **Why is the imposition of such a restrictive agreement without compensation not direct evidence of market power in itself? Why is indirect evidence of market power, such as market concentration, necessary when direct evidence exists?**

Response: Current law does not support the proposition that the existence of a non-compete agreement, without more, would establish market power or constitute actionable, direct evidence of anticompetitive effects. Firms compete to varying degrees for the employees they hire. When a firm faces a large number of viable competitors for the employees it hires, the firm likely does not possess market power in that labor market, regardless of any specific terms of employment. In order to prove a case, we would need to evaluate market conditions and present findings showing that a firm faces very little competition for employees.

The FTC takes labor market competition issues seriously. We evaluate potential acquisitions for both upstream labor market problems and downstream pricing problems. Where we identify violations of law, we will not hesitate to take appropriate action. As noted in my testimony, I share the Committee's concern about the broader use of non-compete agreements across the economy, even in situations where such agreements are not reachable by the antitrust laws.

11. **You noted in your testimony that you have requested that the Commission review mergers for their effect on labor markets. How many labor economists—professionals with advanced degrees in labor economics and whose primary field is in labor economics or who have published papers in peer-reviewed labor economics field journals—does the Bureau of Economics currently employ, and how many are currently working to assess potential anticompetitive effects of mergers under review by the Commission?**

    Response: Of the 83 Ph.D. economists in the FTC's Bureau of Economics, thirteen had labor economics as a major field and six had it as a minor field. Furthermore, three of the six economists we hired in the last year had a labor major, and one had it as a minor. Our main goal in recruiting is to hire economists who can analyze virtually any type of market because our casework spans such a broad variety of industries; we have found that good labor economists demonstrate that flexibility.

Questions for Makan Delrahim, Assistant Attorney General, U.S. Department of Justice

Most Favored Nation (MFN) Clauses

1. Professors Jonathon Baker and Fiona Scott Morton have noted that most favored nation (MFN) clauses "generally harm competition, except in narrow circumstances in which freeriding concerns are especially strong." They explained that these clauses, when employed by dominant platforms, can both harm consumers and stifle innovation. One example highlighted by this study is the online travel industry, but MFNs are widely used in other concentrated markets.

    - Do you believe MFNs can be used by dominant market participants to have anticompetitive effects?

    - If so, under what conditions would a most favored nation clauses, when used by dominant platforms, violate the antitrust laws?

Amicus Program

2. Through the Clayton Act, Congress enacted a broad private right of action for parties injured by antitrust violations. Private lawsuits by consumers and businesses are an essential part of the American antitrust enforcement system. In Apple v. Pepper, the Ninth Circuit, applying the rules announced by the Supreme Court in Illinois Brick and Hanover Shoe, held that iPhone owners have the right to seek antitrust damages from Apple for allegedly monopolizing the sale of iPhone apps.

    - Why did the Division file briefs in the Supreme Court in support of Apple at both the cert and merits stages and favor limiting consumers' ability to obtain damages for anticompetitive conduct?

    - What policy goal does this activity advance?

3. Given autonomy accorded to the states under state action immunity, should the Division file amicus briefs challenging laws passed by states and municipalities, as it did in U.S. Chamber of Commerce v. Seattle?

4. These challenges are arguably different from those targeting actions by state licensing boards and other entities vulnerable to capture, as they invite federal enforcers to second-guess actions by democratically elected state legislators who are accountable to their electorate.

   - Why should federal enforcers offer positions that would usurp local control?

5. The power of monopolists and other dominant firms in today's economy is well documented. The rise of monopolization across the economy is due in part to recent Supreme Court curtailing anti-monopoly law. For example, in Verizon v. Trinko and Pacific Bell v. LinkLine, the Supreme Court gave monopolists expansive autonomy to exclude and marginalize rivals by refusing to deal with them. Drawing on these decisions, then-Judge Gorsuch's 2013 opinion in Novell v. Microsoft further expanded a monopolist's right to engage in exclusionary refusal to deals and held that only refusals to deal entailing a "profit sacrifice" are actionable under the Sherman Act.

   - Why did the Division, in its amicus brief in Viamedia v. Comcast, advocate for the Novell test that establishes further barriers to challenges by the government and other plaintiffs involving anticompetitive refusals to deal?

6. Some expansive readings of the dormant commerce clause threaten state and local laws and regulations that advance the public interest. Through the dormant commerce clause, judges can substitute their policy preferences for those embodied in laws and other rules enacted by democratically accountable state and local officials.

   - Given these risks from an unduly broad dormant commerce clause, why did the DOJ file a brief endorsing the dormant commerce clause suit in *LSP Transmission Holdings v. Lange*?

Paramount Decrees

7. The most significant challenge to a merger in this administration is the challenge to the AT&T-Time Warner vertical deal. You said that you opposed that deal because of the "vertical" nature of the tie up, between a corporation designed to distribute news and entertainment and a corporation designed to produce news and entertainment. More recently, however, you announced plans to review the "Paramount Decrees," enacted in 1948 to halt vertical integration and anticompetitive behavior in the movie industry.

   - Please explain your thinking on vertical integration in the content industry.

Merger Control

8. A recent study suggests that the proposed acquisition of Sprint by T-Mobile may result in earnings declines for the retail workers who work for those companies and their wireless competitors.

- How will the Division ensure that this type of data is included in your review of the transaction to accurately assess the labor market impact of the proposed transaction?

9. The Division recently withdrew the 2011 Merger Remedies Guidelines. You have indicated a strong preference for structural remedies in merger cases. In a speech last November, you cited the 2004 Remedies Guidelines and stated, "[C]onduct remedies generally are not favored in merger cases because they tend to entangle the Division and the courts in the operation of a market on an ongoing basis and impose direct, frequently substantial, costs upon the government and public that structural remedies can avoid."

   - What are next steps in developing new guidelines on merger remedies?

   - Will your new guidelines endorse structural remedies for all types of mergers?

   - Will you coordinate with the FTC in developing these guidelines and otherwise solicit public input?

10. The Division has also reportedly begun a process to revise the 1984 Non-Horizontal Merger Guidelines.

   - Is the Division working with the FTC on this process? If so, please explain how. Will you commit to an open, deliberative process with participation by the FTC and public input as the Division considers this matter?

11. The Open Markets Institute recently compiled statistics concerning concentration of sectors of the economy. For example, according to this report, 2 companies make 63% of all diapers; 4 companies control 72% of all flights; 2 companies make 61% of all mattresses; and 2 companies make 75% of all coffins.

   - With these statistics in mind, are you concerned about rising levels of concentration in the American economy?

Private Enforcement

12. The Division has previously raised concerns regarding the effect of pre-dispute mandatory arbitration on private antitrust enforcement.

   - What effect have forced arbitration clauses had on private enforcement of the antitrust laws and the overall state of competition?

13. Private attorneys general have long played a central role in enforcing the American antitrust laws. Research has found that private enforcement is at least as important as public enforcement in deterring antitrust violations.

   - Given the DOJ's approach in limiting the private rights of action in Apple vs Pepper, what role do you see for private antitrust enforcement going forward?

The Honorable Val B. Demings

Questions for Chairman Joseph J. Simons

1. **Chairman Simons, in your testimony you stated that you consider a number of factors with regards to labor competition when evaluating a merger, including consideration of geographical factors, the relative location of facilities of production or business to each other, the labor markets in these areas and how the proposed merger may affect them, and the existence of certain language in employee documents which may restrict labor competition. In your consideration of these and other factors, do you have a set of metrics to determine when labor competition issues will be substantial enough to stop a proposed merger? Are these decisions purely subjective or is there an objective standard? Do you employ any type of system in your evaluation, such as an algorithm or equation with ranked factors?**

   Response: Antitrust law and economics are based on a very well-developed analytical framework for predicting the likelihood of anticompetitive effects. Although product/service markets and labor markets operate differently, similar analytical tools can be used to analyze competitive dynamics. There are no hard-and-fast metrics, but we do apply certain objective standards within the context of a market-specific, fact-intensive inquiry.

   In general, when there are few competitors in a product or service market, and new firms are unlikely to enter, the incumbent firms may have the ability and incentive to raise downstream prices to their customers, decrease the quality of the goods or services they sell, or reduce innovation. In these circumstances, we can and do intervene to protect competition and consumers. Similarly, a lack of competition may allow firms to depress the prices they pay for critical upstream inputs, including labor. Just as consumers deserve competitive markets for the goods and services they buy, they also deserve competitive markets for the labor they sell. When we identify issues of concern, we do not hesitate to take action.

2. **Chairman Simons, in your opinion, what are the biggest threats to labor competition now and in the future? What steps are you taking as the Chairman of the Federal Trade Commission to account for those threats in your antitrust enforcement and merger evaluation? What steps are you taking to ensure a robust labor market is maintained and workers have choice and are not exploited by anti-labor practices due to monopsony power?**

   Response: As I said at the hearing, I have asked FTC staff to pay particular attention to potential upstream labor monopsony issues when reviewing proposed mergers. We also continue to take appropriate action in conduct cases affecting labor markets. For example, the FTC recently settled allegations that two employers colluded to reduce pay rates for home health aides. Just as competing companies cannot conspire to jointly set prices for the goods they sell, they are also prohibited from jointly determining the wages they will pay their employees.

Of course, each labor market we look at will have different characteristics. The market for long-haul truck drivers likely will look very different than the market for highly skilled IT workers. FTC staff are particularly skilled at understanding these dynamics, to ensure that our intervention in a particular market is based on sound evidence and is likely to improve competition. Our approach is always guided by the contours of existing case law, because ultimately the courts determine whether a particular practice or transaction should be prohibited.

Questions for Makan Delrahim, Assistant Attorney General, Justice Department

1. Assistant Attorney General Delrahim, in your testimony you spoke of the rise of monopsony power and the consideration you place on labor competition when evaluating a merger. How does labor competition factor into your consideration relative to other concerns, such as price effects or reductions in output?

2. Assistant Attorney General Delrahim, in your opinion, what are the biggest threats to labor competition now and in the future? What steps are you taking to address these concerns? What steps are you taking to ensure a robust labor market is maintained and workers have choice and are not exploited by anti-labor practices due to monopsony power?

The Honorable Tom Marino

Question for Makan Delrahim, Assistant Attorney General, U.S. Department of Justice

Commodities Markets

1. At the hearing, Congressman Buck raised concerns related to the issue of pricing within the aluminum marketplace. I have also heard concerns from my constituents regarding price fluctuations in several commodity markets, including aluminum, steel, and lumber. While tariffs may have had an effect, prices appear to be much higher than what the tariffs should account for. You indicated that the Antitrust Division is conducting an inquiry into these pricing concerns. Will you commit that you are giving these concerns your utmost attention?

Questions for Chairman Joseph J. Simons

FTC Investigative Processes

1. **When the FTC issues a Civil Investigative Demand, it can be the beginning of a drawn out process with civil litigation proceedings simultaneous to the investigation. This allows civil plaintiffs to inform judges and juries of the pending FTC investigation to support their cause in their civil case, even if the investigation ends in a dismissal. Should the existence of an ongoing/not yet concluded FTC investigation be allowed to be used as evidence of wrongdoing in civil litigation? If not, how can that be avoided?**

   Response: Not every matter that the FTC investigates ultimately leads to an enforcement action. For this reason, a pending, unresolved FTC investigation is not evidence of actual wrongdoing or violation of law, nor should it be construed as such—either by the public or in parallel legal proceedings.

   Having said that, the agency employs a thorough process before issuing Civil Investigative Demands ("CIDs") and similar forms of compulsory process. In a typical competition case, for example, the civil investigative process usually begins with initial inquiries and interviews, as well as seeking and reviewing salient documents, on a voluntary basis. At the conclusion of this initial inquiry, if the staff determines that a "full-phase" investigation would be appropriate, staff must submit to the Commission a formal written recommendation seeking authority to use compulsory process. Staff will justify its request by synthesizing its initial findings, laying out a potential case theory, and outlining the planned scope of the investigation. Compulsory process authority is only granted upon an affirmative vote by a majority of the Commissioners. In addition, assuming the Commission has authorized compulsory process, each individual CID must still be signed by a Commissioner throughout the investigation, based on a further justification that the specific CID is necessary to the investigation. In other words, issuance of a CID indicates that substantial work already has been completed, and that senior management and the Commissioners themselves have endorsed a full investigation as being in the public interest.

2. **The Committee is concerned about unnecessarily protracted investigations. Delays can impact the reputation or financial value of targets that are required to disclose even "confidential" FTC inquiries to potential investors, merger partners and business partners because the inquiries are generally considered "material" under our investor protection laws. Can you**

explain how you plan to reduce the backlog of pending civil investigations? Should the agency have formal timetables for anticompetitive practices investigations, much like the agency has statutory timetables under the Hart-Scott-Rodino Act for merger investigations?

Response: We understand that no company wants to be under investigation by the FTC or any other part of the government any longer than is absolutely necessary. Furthermore, as a small agency with very limited resources, we share your interest in resolving matters promptly, so we can redeploy resources elsewhere to promote competition and protect consumers. For these reasons, we constantly monitor our civil conduct docket to ensure that active cases do not linger unnecessarily.

It is important to note, however, that the parties control to a significant degree the speed with which FTC civil conduct investigation are completed. Targets and third parties often seek substantial extensions in production of requested documents and testimony to the agency. These discovery delays can meaningfully lengthen the agency's civil conduct investigations.

I do not believe we have a "backlog" that requires a different approach to our pending investigations. Our goal is always to balance the immediate burden on the parties against the need for expeditious resolution, on a case-by-case basis. I would urge caution in developing hard-and-fast rules that might limit our flexibility and create a new and different set of burdens on parties.

3. **What recourse does a company have for agency staff investigations that run on without formal timetables or processes for resolution?**

Response: As a public agency, we have a responsibility to treat everyone we deal with fairly and appropriately. That responsibility extends to firms involved in a pending investigation by the agency, and it is something our senior management team takes very seriously. If a company has concerns about the proper conduct of one of our investigations, including undue delays in resolution, I would urge them to contact the senior management of the relevant bureau.

Competition in the Tech Sector

4. **If an online platform presented itself to consumers as neutral in content moderation, display algorithms or other respects relevant to consumers, but was in fact biased, could the FTC investigate it for deceptive trade practices?**

Response: To determine whether such a practice were deceptive under the FTC Act, we would first need to determine how consumers understood the representations made by the platform. Then, we would have to determine whether the claims were in fact false or misleading. Finally, we would have to determine if these claims were material to consumers' choices in the marketplace.

5. **A December 20, 2018 article in *Forbes* magazine entitled, *The FTC Must Join The Fight Against Patent Bullies*, raises concerns that dominant companies can use patent litigation to raise rivals' costs. As an example, the article relates that Nielsen Holdings PLC sued an upstart rival, Sorenson Media, into bankruptcy before discovery was even completed. How does the FTC look at the strategic use of IP litigation when the anticompetitive effects may result before the legitimacy of the litigation can be established?**

Response: The FTC has authority to challenge certain unilateral conduct by a firm that impedes rivals from competing on the merits and that enables the firm to maintain or attain a monopoly position. That said, patent holders have a right to sue for patent infringement, and the exercise of this right is generally exempt from antitrust review. There are limited exceptions to this exemption. For example, a patent holder who enforces a fraudulently procured patent may violate the antitrust laws. Also, so-called "sham" litigation may violate the antitrust laws. The FTC would be unlikely to challenge a legitimate patent infringement suit as a violation of the antitrust laws.

Additional Questions for the Record

Subcommittee on Consumer Protection and Commerce
Hearing on
"Oversight of the Federal Trade Commission: Strengthening Protections for Americans' Privacy and Data Security"
May 8, 2019

The Honorable Joseph J. Simons, Chairman
The Federal Trade Commission

The Honorable Jan Schakowsky (D-IL)

1. **Expert witnesses play an integral role in the Federal Trade Commission's (FTC) enforcement of both competition and consumer protection laws, particularly in complex mergers or technical matters concerning privacy and data security. The FTC's FY2020 Budget Justification states that the Commission faces significant resource challenges due to the rising costs of expert witnesses' contracts.**

    a. **On average, how much does the FTC spend on expert witnesses in an individual case?**

    b. **How much does the FTC spend on expert witnesses per year?**

    c. **By how much have the costs of expert witnesses increased during the past 10 years?**

    d. **Has the FTC ever chosen not to pursue an enforcement action due to the prohibitive costs of expert witnesses?**

Thank you for your attention to this important issue. There are some complexities associated with our expert witness engagements, which we would like to clarify for the Subcommittee. We caution that reliance on average numbers over time may present a somewhat inaccurate view of the facts on the ground, given that our enforcement work may result in wide year-to-year variances in spending. Given some significant differences between competition and consumer protection cases, this response breaks out information separately for each of our two enforcement missions.

Competition Cases

When a competition case goes to litigation (versus settlement or closing), expert witness costs typically increase exponentially for that matter. As a result, the agency's annual expert witness costs for competition matters in a given fiscal year are largely a function of the number and types of competition cases the Commission must litigate during the course of that year. Since each additional litigated case may lead to millions of dollars in additional expert fees, even very small changes in the total number of competition cases per year can have a dramatic impact on the

agency's overall spending on expert fees. Although most of our cases ultimately settle, the total number of litigated cases can vary widely year to year.

Unfortunately, the agency has a limited ability to control this primary driver of our expert costs. This is particularly true with respect to merger matters, where outside parties dictate the volume, nature, and timing of their deals. The Commission votes out a complaint when it has reason to believe that a competition enforcement action is in the public interest. Post-vote, the course of litigation (and possible settlement) is determined in large part by the defendants and, of course, the judge or judges. Among other factors, defendants may choose to retain one or more experts of their own, which can affect our expert strategy.

In general, we have observed that the kinds of experts qualified for this kind of work are becoming more expensive. In an increasingly data-rich world, each case requires more of an expert's time, and more support resources to process data and increasingly large volumes of documents. Our expert budget is depleted not only by higher prices per hour worked, but also by the need for experts to spend more time preparing for each case, and the need for more support resources to manage each case.

On the competition side, we have determined that the range of total expert costs for cases that are fully litigated (meaning a preliminary injunction, administrative hearing on the merits or both) in the last five years is $583,100 - $6.90 million.

The remaining, requested data points for our competition cases are as follows:

Fiscal Year	Expert Spending*
2008	$3.05 million
2009	$3.40 million
2010	$3.16 million
2011	$2.97 million
2012	$2.09 million
2013	$2.98 million
2014	$4.84 million
2015	$10.03 million
2016	$12.21 million
2017	$11.46 million
2018	$15.80 million
**Some years' expenditures may change due to ongoing work*	

To date, the Commission has managed allocated funds to pay the expert witness fees needed to pursue vigorous competition enforcement on behalf of consumers. We are, however, increasingly concerned about our ability to continue to do so.

Consumer Protection Cases

Average expert cost per case: Between FY16 and FY18, the Commission filed an average of 71 consumer protection cases (mostly in federal court) per year, spending approximately $30,000 per case on expert witness contracts. The Commission uses experts in approximately 44 consumer protection matters per year, spending an average of approximately $49,000 on expert witness contracts in each of those cases.

Total yearly expert costs: Between FY16 and FY18, the Commission spent approximately $2.16 million on expert witness contracts for consumer protection cases per year, and is on track to obligate $2.28 million during FY19.

Expert spending over past 10 years: The Commission's expert spending on consumer protection cases has remained steady over the past 10 years. In FY 2008, the Commission expended approximately $2.07 million on expert contracts in consumer protection cases, and is on track to obligate $2.28 million during FY19.

2. **Since announcing the Hearing on Competition and Consumer Protection in the 21st Century, the FTC has held 13 hearings examining topics ranging from the FTC's vertical merger policies to privacy and data security. Some critics have observed that many of the panelists at these hearings, particularly economists, have significant financial ties to large corporations that are regulated by FTC, including Facebook, Google, and Amazon. One report suggests that more than a third of the scholars participating in the FTC's hearings have financial ties to Google. I am concerned by these criticisms because it suggests that the FTC is not hearing from unbiased points of view at these hearings.**

    a. **Does the FTC require panelists before appearing as an expert at FTC hearings or workshops to disclose financial ties to industry? If so, what are those requirements?**

    b. **How many panelists at the FTC's Hearings on Competition and Consumer Protection in the 21st Century disclosed financial ties to entities within the FTC's jurisdiction?**

    c. **Did the FTC publicize any such financial ties before the hearings, and, if not, why not?**

The FTC has taken significant steps to feature a wide variety of perspectives during the hearings. We have invited legal and economic academics, legal and economic consultants, public interest groups, public advocacy groups, and representatives of businesses and industries to our hearing sessions. By the time the hearings conclude on June 12, we will have hosted 393 unique non-FTC participants for 23 days of public hearings.

During hearings and workshops, the FTC generally asked panelists the following two questions:

1. Whether any third party funded or otherwise provided financial assistance for the research/analysis/commentary you will present at the hearing? If yes, who?

2. Whether any third party will compensate you for your participation at the hearing or otherwise provide financial assistance for your participation (e.g., reimburse your travel expenses)? If yes, who?

If a panelist answers yes to either question, we include that information and the name of the third party within the bios that we publish for each hearing. In addition, if a panelist is currently working for a corporation, we include that information in their bio as well. Bios and information are available on our website.

We have sought public input and, to the greatest extent possible, facilitated informed comments from a wide range of interested parties. For example, before each hearing, we have released an agenda, list of participants, and a list of specific questions designed to solicit comments. The public comment period has been open before each hearing, allowing commenters to raise issues for discussion at the public session. The comment period has also extended well beyond the date of each specific hearing, to allow interested parties to comment on the discussion at the public session. We stream each hearing session live, and place a video of the hearing session on our website for those who could not attend or watch live. We also release a transcript of each hearing shortly after conclusion of a session. We have, to date, received close to 900 unique comments on our hearings topics. The FTC posts all germane comments online shortly after we receive them, allowing the public to comment on points raised in the public comments. The public comments will receive the same review, scrutiny, and consideration as the comments and discussion at our hearings. There are no restrictions on who can comment, and I believe the public written comments are as important and valuable as the commentary at our hearing sessions. We have also consulted the substantial body of academic literature available on each topic we have taken testimony on, in preparation for each hearing.

The Commission and its staff regularly review arguments and advocacy of parties, persons, and interest groups who appear before us on enforcement and policy matters. Often, they do not disclose their source of funding, their direct or indirect interest in the matter they bring before us, or how they (or their clients or funders) might benefit from the outcome they seek. In those situations, we carefully evaluate the information and arguments on the merits. We will do the same here.

3. **The FTC's Bureau of Economics plays an important role in both the FTC's competition and consumer protection enforcement. But reports indicate that the Bureau of Economics approaches privacy and data security cases with skepticism, based on a view that few privacy or data security practices cause injury, or that consumers do not meaningfully engage with privacy policies (and therefore cannot be deceived by them).**

    a. **How does the Bureau of Economics participate in the FTC's privacy and data security matters? To what extent does the Bureau of Economics influence whether a privacy or data security investigation continues?**

    b. **Has the Bureau of Economics dissented from or otherwise opposed any of the FTC's privacy enforcement matters in the past 5 years and, if so, how many?**

The Bureau of Economics supports the FTC's privacy and data security work by providing high quality, up-to-date economic analysis and advice. The Bureau of Economics provides the Commission with independent economic analysis of the harms and potential harms stemming from alleged Section 5 violations. The Bureau of Economics continues to develop innovative solutions to deal with the known difficulties of measuring the harm associated with privacy and data security practices.

The Bureau of Economics reviews every complaint or settlement recommendation that the Bureau of Consumer Protection makes on privacy and data security matters, as they do in all enforcement matters. The Bureaus discuss these matters at the staff and management level. In some instances, the Bureau of Economics may persuade the Bureau of Consumer Protection to modify, add, or drop certain complaint allegations or theories of liability. The Bureau of Consumer Protection then presents its final recommendation to the Commission, and the Bureau of Economics provides a separate recommendation memorandum to the Commission.

In the past five years, the Bureau of Economics has disagreed with three of the Bureau of Consumer Protection's privacy and data security case recommendations (out of approximately 60 total recommendations). In a few other cases, the Bureau of Economics has supported BCP's recommended action, but raised issues about particular proposed complaint allegations.

4. **On June 11, 2019, the FTC will hold a workshop on online event tickets. I have heard reports of a number of consumer protection issues concerning online event tickets that raise serious concerns and I hope the FTC will consider addressing these issues during its workshop. For example, I have heard concerns that primary ticket platforms have begun forcing purchasers to disclose personally identifiable information by creating an account with the primary ticket seller to use a ticket, even when tickets are resold on a secondary market. I have also heard complaints about primary ticket sellers that hold tickets back from the market pursuant to agreements with venues, artists, or other partners. In addition, I have received complaints about primary ticket vendors putting technological restrictions on the transfer of tickets, which can prevent ticket holders from reselling or giving away tickets if they cannot attend the event.**

    a. **Will the FTC examine these issues at its upcoming hearing on online event tickets?**

Yes, the June 11 Online Event Ticketing Workshop will examine the issues that you raise and their possible impact on consumers in the online event tickets marketplace.

    b. **Has the FTC received similar complaints from consumers?**

The most common consumer complaints we receive about online event ticketing concern either hidden or inadequately disclosed ticketing fees in the primary and secondary markets, or reports that ticket resellers misled consumers to believe they were purchasing tickets from the venue or authorized seller at face value (when in fact they were purchasing tickets from resellers at a significant markup). The Commission has also received several thousands of consumer comments in connection with the upcoming ticketing workshop. Those comments

overwhelmingly concern hidden or inadequately disclosed ticketing fees and/or the high cost of such fees. While the FTC may also have received consumer complaints or comments regarding the practices you outline, they do not appear to be as prevalent.

c. Do you agree that, if true, these practices raise concerns about unfair or deceptive practices in the market for online event tickets?

These practices may raise questions about transparency and consumer understanding in the online event tickets marketplace; however, it is unclear whether requiring ticket buyers to provide personally identifying information, holding back tickets for later sale, or restricting the transfer of tickets would be unfair or deceptive acts or practices under Section 5 of the FTC Act.

The Honorable Bobby L. Rush (D-IL)

1. **In 2014, the Federal Trade Commission (FTC) published a report called "Data Brokers: A Call for Transparency and Accountability" that shed light on the secretive world of data brokers that buy and sell vast amounts of consumer personal information, often entirely behind the scenes. The FTC's report called on Congress to pass legislation that would require data brokers to be more transparent and give consumers the right to opt-out, among other things.**

    a. Do you still agree that Congress should pass legislation addressing data brokers?

The current Commission has not taken a position on data broker legislation. I support federal privacy and data security legislation that would give the Commission authority to seek civil penalties for first-time privacy and data security violations; conduct targeted APA rulemaking; and exercise jurisdiction over common carriers and non-profit entities.

2. **While innovation in the tech industry is having a tremendous impact on our economy and the lives of everyday Americans, it is also creating new challenges in protecting consumers and competitive markets. I have heard reports of certain online platforms giving their subsidiary businesses preferential treatment over their competitors.**

    a. Are you looking into anti-consumer and anti-competitive behaviors of this nature?

    b. In your opinion, does the FTC currently have the authority and capacity to curtail this behavior?

As more and more of the nation's commerce takes place on online platforms, the operation of these platforms has received increased scrutiny by both the public and the antitrust agencies. I believe the FTC has many of the tools it needs to protect consumers online, although I have called for Congress to give the FTC the authority to seek civil penalties for initial privacy violations, which would create an important deterrent effect. Moreover, I believe consumers

would benefit if the FTC had broader enforcement authority to take action against common carriers and non-profits, which it cannot currently do under the FTC Act. That said, the FTC is vigilant in its oversight of the internet economy, and we will not hesitate to take strong and appropriate action against any act or practice that violates any statute we enforce.

The Bureau of Competition recently announced the creation of a Technology Task Force ("TTF") that will enhance the Commission's antitrust focus on technology-related ecosystems, including technology platforms as well as markets for online advertising, social networking, mobile operating systems, and apps. The TTF will monitor competition in U.S. technology markets, investigate any conduct in these markets that may harm competition, and, when warranted, take actions to ensure that consumers benefit from free and fair competition.

The FTC does not publicly comment on pending law enforcement investigations. However, I can provide some guidance as to the applicable legal standards under current law.

As a threshold matter, it is important to appreciate that there are no special antitrust rules for online platforms. The same core antitrust laws and principles that apply generally across the economy apply to online platforms as well. This includes the laws relating to monopolization. Whether a firm is an online platform or a company that operates brick-and-mortar stores, if the firm has monopoly power or a dangerous probability of acquiring such power, the firm is subject to the same prohibitions under the U.S. antitrust laws: it cannot engage in anticompetitive conduct that tends to contribute to the acquisition or maintenance of monopoly power and lacks a procompetitive efficiency justification.

If FTC staff were to analyze an allegation that an online platform had violated the antitrust laws by discriminating against competitors, FTC would apply the test described above. To evaluate whether an online platform might have monopoly power, we would consider the online platform's share of the relevant market (or markets) in which it competes, as well as other factors (such as the existence and magnitude of barriers to entry). If a platform with monopoly power were to extend some form of preferential treatment to its own business units in a way that was alleged to contribute to the improper acquisition or maintenance of monopoly power, that conduct would be analyzed through a careful and fact-specific inquiry that considered the nature of the conduct, the extent to which it excluded competition, and any efficiency justifications.

As with most antitrust analysis, the conduct you describe would be neither automatically legal or automatically illegal; the specific nature of the conduct, and its positive and negative effects on competition and consumers, would matter very much. The U.S. antitrust laws do not impose a universal duty to deal with one's competitors on the same terms as with other divisions of one's own company. The antitrust laws do, however, recognize that certain forms of adverse treatment of competitors can, under appropriate circumstances, give rise to antitrust liability when the conduct contributes to the wrongful acquisition or maintenance of monopoly, and thereby harms competition. The FTC's talented and hard-working staff invest considerable time and energy to identify conduct that unlawfully harms competition and consumers in all areas of the economy, including online platforms, and will continue to do so.

3. **As all of you know, robocalls are extremely burdensome on consumers and every effort needs to be taken to ensure that consumers are not being taken advantage of by these unscrupulous actors. I am also concerned by the reports I have heard that robocalls are now being used by online contact lens retailers to usurp the verification of contact lens prescriptions, placing consumers at an even greater risk of receiving the wrong Class II or III medical devices.**

    a. **Do you agree that efforts need to be taken to update the passive verification process?**

When Congress enacted the Fairness to Contact Lens Consumers Act ("FCLCA"), it determined that passive verification was necessary to balance the interests of prescription portability and consumer health. Congress was aware that, in some instances, passive verification could allow sellers to sell contact lenses based on an invalid or inaccurate prescription, and that this could potentially lead to health risks. In the May 28, 2019 Supplemental Notice of Proposed Rulemaking ("SNPRM"), the Commission proposed several changes to improve the passive verification process. The Commission proposed that sellers who use automated telephone verification messages would have to: (1) record the entire call and preserve the complete recording; (2) begin the call by identifying it as a prescription verification request made in accordance with the Contact Lens Rule; (3) deliver the verification message in a slow and deliberate manner and at a reasonably understandable volume; and (4) make the message repeatable at the prescriber's option. This proposal would enable prescribers to better fulfill their role as protectors of patients' eye health because prescribers cannot correct and police invalid, inaccurate, and expired prescriptions if they cannot comprehend a seller's verification request.

Additionally, the Commission proposed changes that would increase patients' access to their prescriptions, maintain patient choice and flexibility, and potentially reduce the number of verification requests. Under the proposal, a prescriber, with the patient's verifiable affirmative consent, has the option to provide the patient with a digital copy of the prescription in lieu of a paper copy. Moreover, although the Rule has always required that prescribers, upon request, provide any person designated to act on behalf of the patient with a copy of the patient's valid contact lens prescription, the Rule did not prescribe a time limit within which this copy had to be provided. The Commission proposed requiring that a prescriber respond to requests for an additional copy of a prescription within forty business hours. To facilitate patients' ability to use their prescriptions, another proposed change would require sellers to provide a mechanism that would allow patients to present their prescriptions directly to sellers.

Finally, the Commission proposed amending the prohibition on seller alteration of prescriptions to address concerns about the misuse of passive verification to substitute a different brand and manufacturer of lenses. The proposal requires a seller who makes an alteration to provide a verification request to the prescriber that includes the name of a manufacturer or brand other than that specified by the patient's prescriber. There is a proposed exception if the patient entered that manufacturer or brand on the seller's order form or the patient orally requested it from the seller.

The Commission will consider comments received in response to the SNPRM and, if appropriate, make changes before issuing a final rule.

b. Do you agree that robocalls need to be eliminated from use within the passive verification system?

No, I do not agree with categorically eliminating the role of automated technology within the passive verification system. An effective verification process enables prescribers, when necessary, to prevent improper sales and allows sellers to provide consumers with their prescribed contact lenses without delay. The FCLCA expressly permits telephone communication for verification. It would be contrary to Congressional intent to prohibit the use of automated technology for the purpose of prescription verification. The Commission does not have empirical data showing the frequency of incomplete or incomprehensible automated telephone messages, or supporting a claim that a phone call with an automated message is necessarily less reliable than one with a live person. Rather, the evidence suggests that these calls can be an efficient method of verification. The Commission recognizes, however, the burden on prescribers and potential health risk to patients from incomplete or incomprehensible automated telephone messages. As described in response to question 3.a, the Commission has proposed changes to automated telephone messages that would improve the verification process.

c. Could you support updating the Fairness to Contact Lens Consumers Act to eliminate robocalls and update the passive verification system to include secured emails and patient portals to verify and document contact lens prescription verification?

I would not support categorically eliminating the role of automated phone call technology within the passive verification system. I do support clarifying that emails and portals would be acceptable mechanisms for prescription verification. Under the current Rule, a "seller may sell contact lenses only in accordance with a contact lens prescription for the patient that is: (1) Presented to the seller by the patient or prescriber directly or by facsimile; or (2) Verified by direct communication." 16 C.F.R. § 315.5(a). Because the Rule's definition of direct communication already includes electronic mail, a seller and a prescriber currently could use email during the verification process. In the December 7, 2016 Notice of Proposed Rulemaking ("NPRM"), the Commission made an initial determination that a portal could be used by a prescriber or a patient to "directly" present a contact lens prescription to a seller. The Commission will consider comments received in response to this initial determination and, if appropriate, make changes before issuing a final rule.

4. In December 2016, the FTC issued a Notice of Proposed Rulemaking to update the Contact Lens Rule. As a part of this process, providers and manufacturers of contact lenses urged the FTC to require common-sense changes to the current contact lens market, including quantity limits and ways to update methods of communication under the passive verification process. The FTC responded by stating that there was insufficient evidence that consumers are buying excessive quantities of contact lenses and that it did not have the statutory authority to update the passive verification process.

a. Do you support efforts to ensure patient safety regarding the current proposed rulemaking process that will include patients only receiving contact lenses as prescribed under the valid prescription?

The Commission does not believe patients should be able to purchase contacts without a valid prescription. The SNPRM's proposed changes improve patient access to contact lens prescriptions and address concerns with the passive verification requests and alterations by sellers.

5. Last May, Rep. Michael Burgess (R-TX) and I led a letter to the FTC that laid out several concerns we have regarding the FTC rulemaking process around the Fairness to Contact Lens Consumers Act. In total, over 50 members of Congress signed this letter where we discussed the lack of enforcement action by the FTC to address the illegal sales of contact lenses and the burdensome new requirements on eye care providers.

a. Has the FTC investigated or independently audited any online sellers to determine the number of lenses provided to patients?

The Commission has not audited online sellers to determine the number of lenses provided to patients.

b. What enforcement mechanisms has the FTC used to ensure that sellers are not enabling the circumvention of state laws governing prescription renewal or harming patients by providing excessive numbers of contact lenses?

In the NPRM, the Commission considered the issue of patients purchasing excessive quantities of contact lenses. Although concerned with anecdotal reports, the Commission concluded that the evidence did not show that the sale of excessive amounts of contact lenses is a widespread problem.[1] Furthermore, a prescriber who receives a verification request for an excessive amount of lenses can contact the seller to prevent the sale from being completed. Staff has investigated specific complaints of illegal sales related to excessive quantities. We will continue to monitor the marketplace, taking action against violations as appropriate.

c. How often has the FTC acted on this important safety issue?

As discussed in the response to question 5.b, the Commission does not believe that the evidence shows that excessive sale of contact lenses is a widespread problem. The Commission does, of course, recognize the importance of patient safety. Staff will continue to monitor the marketplace and, if appropriate, take action.

6. Many businesses are increasingly dependent on digital platforms that they do not own or operate to connect with customers.

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[1] NPRM at 88549-50; *see also* Vision Council, U.S. Optical Market Eyewear Overview 13 (2018), https://www.ftc.gov/sites/default/files/filefield_paths/steve_kodey_ppt_presentation.pdf (noting that 82% of contact lens users had an eye exam within the last 12 months and over 95% had an exam within the last two years).

a. **With current statutory authorities in mind, what can be done to protect consumers if companies that operate these platforms offer subsidiary business products and restrict or disadvantage competitors with similar businesses on these platforms? What is the FTC doing to curtail it?**

b. **One example of how a platform operator might harm consumers is by prohibiting businesses from communicating with their customers through that platform. Do you believe that this sort of behavior must be addressed and, if so, does the FTC currently have the statutory authority to do so?**

Please see the answer to question 2.

7. **It has been brought to my attention that the leading internet browser has been considering a major change in what type of information is available to consumers in their product, reducing the available information that consumers use to defend themselves against a host of online threats like phishing and content spoofing.**

    a. **As the agency charged with protecting our nation's consumers and enforcing our data privacy laws, do you have concerns about what this practice means for consumers and their data privacy and security?**

    b. **Have you discussed this issue with the browsers or asked them to explain their changes and how they will impact consumer safety online? If not, do you intend to?**

I understand your question to refer to how browsers display certain digital certificates in their user interface. When properly validated, digital certificates serve as proof that consumers are communicating with an authentic website and not an imposter. They also serve to encrypt traffic between a consumer's browser and a site's web server.

In May 2018, Google announced that it would change its user interface in its Chrome browser to remove certain indicators of the presence of an expensive digital certificate – called an extended validation certificate – such as green text and a padlock icon. I have not discussed these changes with Google. Consumers' secure online experiences depend on many factors, and the ecosystem continues to evolve quickly. I do not believe that the Commission should promote one type of certificate over another, or prescribe how certificates should be displayed in user interfaces.

The Commission is committed to promoting consumer safety online. In addition to our enforcement work, detailed in the Commission's written testimony, we engage in extensive consumer education, examples of which you may find here: https://www.consumer.ftc.gov/articles/0009-computer-security.

The Honorable Cathy McMorris Rodgers (R-WA)

1. **Chairman Simons, the FTC has existing rulemaking authority but is now asking Congress for additional APA rulemaking authority. Please answer the following questions about the Commission's existing rulemaking authority:**

    a. **When was the most recent opened rulemaking proceeding initiated? Please include the statutory authority permitting or directing the rulemaking.**

    b. **When was the most recent completed rulemaking proceeding completed? Please includes the statutory authority permitting or directing the rulemaking.**

The FTC opened its most recent proceeding to promulgate a new substantive rule in November 2018.[2] The 2018 Economic Growth, Regulatory Relief, and Consumer Protection Act, among other things, required that nationwide consumer reporting agencies provide free electronic credit monitoring services to active duty military consumers. It also required the FTC to issue regulations clarifying the meaning of certain terms used in the Act, as well as clarifying what constitutes appropriate proof that an individual is an active duty military consumer.[3]

In addition, the FTC reviews all of its existing rules periodically to seek information about their costs and benefits and their regulatory and economic impact. Most recently, in March 2019 the FTC announced a regulatory review of, and invited public comment on, the Franchise Rule.[4] The Franchise Rule makes it an unfair or deceptive act or practice for franchisors to fail to give prospective franchisees a Franchise Disclosure Document providing specified information about the franchisor, the franchise business, and the terms of the franchise agreement; it also prohibits related misrepresentations by franchise sellers. The Commission issued the original Franchise Rule in 1978 pursuant to its authority under Section 5 of the Federal Trade Commission Act to proscribe unfair or deceptive acts or practices.

In terms of completed new rules (as opposed to amendments of existing rules), the most recent new substantive rule issued by the Commission was the Business Opportunity Rule.[5] The Business Opportunity Rule governs disclosure requirements and prohibitions for business opportunities. The legal basis for the rule is Section 18 of the FTC Act, 15 U.S.C. § 57a, which authorizes the Commission to promulgate, modify, and repeal trade regulation rules that define with specificity acts or practices in or affecting commerce that are unfair or deceptive within the meaning of Section 5 of the FTC Act.

In the first half of 2019, the FTC completed its regulatory review for a number of rules and closed out those rulemaking proceedings. For example, the FTC amended its trade regulation rule concerning the labeling and advertising of home insulation to clarify, streamline, and

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[2] *See* 83 Fed. Reg. 57693 (Nov. 16, 2018).
[3] *See* Pub. L. No. 115-174, § 302(d).
[4] *See* 84 Fed. Reg. 9051 (Mar. 13, 2019).
[5] *See* 72 Fed. Reg. 76815 (Dec. 8, 2011).

improve existing requirements; retained without modification the trade regulation rule concerning preservation of consumers' claims and defenses; and retained without modification its rule implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act ("CAN-SPAM").[6] Both of the trade regulation rules were issued under Section 18 of the Federal Trade Commission Act, 15 U.S.C. § 57a. The CAN-SPAM rule was issued under 15 U.S.C. §§ 7701-7713, which provides for both mandatory rulemaking and discretionary regulations concerning certain statutory definitions and provisions.

2. **Chairman Simons, currently, does the Commission utilize an expert witness for data privacy enforcement actions?**

    a. **If yes, please detail the average cost of an expert witness used for data privacy enforcement actions, including any factors that could change the cost.**

3. **Chairman Simons, currently, does the Commission utilize an expert witness for data security enforcement actions?**

    a. **If yes, please detail the average cost of an expert witness used for data security enforcement actions, including any factors that could change the cost.**

In answer to questions 2 and 3, the Commission currently employs five technologists, three of whom work full time on privacy and data security matters. These technologists provide expert assistance on privacy and data security cases, for example, by helping attorneys draft discovery requests, participating in meetings with opposing parties, assisting staff in better understanding technical issues, and reviewing pleadings for technical accuracy. In addition, the Commission currently employs a consulting expert on data security, who provides advice regarding numerous data security investigations per year. He charges $300 per hour, and we typically use a few hours of his time every month.

The Commission also retains consulting and testifying experts for specific litigation matters. In its three litigated data security cases, the Commission has spent respectively about $2 million, $250,000, and $400,000 on experts, though the third case is not yet complete. Depending on the case, the Commission also would need experts on claim interpretation, who typically charge $250 per hour; experts on surveys and copy tests, who typically charge $675 per hour; experts on harms suffered by consumers, who have charged between $400 and $675 per hour; and experts on data security, who have charged between $150 and $550 per hour.

4. **Chairman Simons, how are Bureau of Economics staff utilized in data security and data privacy cases within the Bureau of Consumer Protection? Please give specific examples of action items in an enforcement case assigned to the Bureau of Economics staff.**

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[6] *See* 84 Fed. Reg. 20777 (May 13, 2019); 84 Fed. Reg. 18711 (May 2, 2019); 84 Fed. Reg. 13115 (Apr. 4, 2019).

The Bureau of Economics reviews every complaint or settlement recommendation that the Bureau of Consumer Protection makes on privacy and data security matters, as they do in all enforcement matters. The Bureau of Economics provides a separate recommendation memorandum to the Commission. In some instances, the Bureau of Consumer Protection requests more specific input from staff economists. For example, staff economists may assist Bureau of Consumer Protection staff with drafting discovery requests aimed at determining the amount of harm caused by a particular practice; analyzing, categorizing, and creating statistical samples of consumer complaints; and developing surveys, studies, and/or copy tests, either with Bureau of Consumer Protection staff as part of an investigation or with outside experts during litigation.

5. Chairman Simons, with respect to violations of an FTC consent order, what authority does the Commission have to hold company executives personally liable for company acts or practices the Commission determines to violate such order?

a. Please identify the specific statute, rule, or regulation that grants the Commission such authority.

Rule 65(d)(2) of the Federal Rules of Civil Procedure explicitly states that federal court orders bind a party's officers, agents, servants, employees and attorneys. To prevail against a non-party to an order, the Commission must prove that defendants violated a valid, clear, and unambiguous order where they had notice of the order and the ability to comply.[7] Rule 65(d) applies equally to the Commission's administrative orders.[8]

6. Chairman Simons, with respect to Section 5 of the FTC Act, what authority does the Commission have to hold company executives personally liable for company acts or practices the Commission determines to violate Section 5?

a. Please identify the specific statute, rule, or regulation that grants the Commission such authority.

Numerous circuit courts have held that an individual officer, director, or employee may be held liable under the FTC Act for a company's unlawful acts or practices, if the FTC proves the necessary level of involvement. Specifically, individual liability for injunctive relief can be established by showing that the individual defendant participated directly in the unlawful practices or had authority to control them. Individual liability for monetary relief can be established by showing that the individual defendant, in addition to meeting the standard for injunctive relief, had actual knowledge of the unlawful conduct, was recklessly indifferent to its unlawfulness, or had an awareness of a high probability of illegality and intentionally avoided learning the truth.[9]

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[7] *Angiodynamics, Inc. v. Biolitec AG*, 780 F.3d 420, 426 (1st Cir. 2015).

[8] *Reich v. Sea Sprite Boat Co.*, 50 F.3d 413, 417, (7th Cir. 1995) ("Long ago, however, the Supreme Court held that Rule 65(d) simply restates a norm of federal equity practice and therefore is equally germane to orders enforcing decisions of administrative agencies. *Regal Knitware Co. v. NLRB*, 324 U.S. 9, 14 (1945)."

[9] *See, e.g.*, *FTC v. Ross*, 743 F.3d 886, 892-93 (4th Cir. 2014); *FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 12 (1st Cir. 2010); *FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1202-07 (10th Cir. 2005); *FTC v. Publ'g Clearing*

7. **Chairman Simons, with respect to trade regulation rules prescribed by the Commission under Section 18 of the FTC Act, what authority does the Commission have to hold company executives personally liable for company acts or practices the Commission determines to violate a trade regulation rule?**

    a. **Please identify the specific statute, rule, or regulation that grants the Commission such authority.**

When the FTC issues a trade regulation rule under Section 18 of the FTC Act, it does so in order to define with specificity acts or practices that are unfair or deceptive within the meaning of Section 5 of the FTC Act. Courts have held that the standard for liability of individual officers, directors, or employees that applies in Section 5 cases, discussed above in response to Question 6, also applies in cases brought to enforce trade regulation rules.[10]

8. **Chairman Simons, some stakeholders have raised concerns with companies naming products or features that arguably misrepresent the product's capability. For example, Tesla has a feature named "Autopilot" that arguably suggests their cars can operate fully autonomously without human intervention. The operation instructions include disclosures around the feature capabilities which are designed only to assist the driver and that the system requires active driver supervision. With respect to naming products that exceed the products capabilities, please answer the following:**

    a. **Does the FTC have any existing authority to address this concern? If so, please identify such authority.**

The FTC has authority to address product names that exceed the product's capability under Section 5 of the FTC Act, which generally prohibits "unfair or deceptive acts or practices in or affecting commerce."[11] As set forth in the FTC's *Deception Policy Statement*, the FTC considers an act or practice to be deceptive if it contains a representation or an omission of information that would be considered material to consumers and that would mislead consumers acting reasonably under the circumstances.[12] In addition, the Commission has long held that making objective claims without a reasonable basis for the claims constitutes a deceptive practice.[13] Whether or not a particular product name conveys a particular performance claim to consumers would be determined on a case-by-case basis. In some cases, extrinsic evidence may

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House, Inc., 104 F.3d 1168, 1170-71 (9th Cir. 1997); *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 470 (11th Cir. 1996); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 573-74 (7th Cir. 1989).

[10] *See, e.g.*, *FTC v. Nat'l Bus. Consultants, Inc.*, 781 F. Supp. 1136, 1145 (E.D. La. 1991); *FTC v. Essex Marketing Group, Inc.*, No. 02-cv-3415, 2008 WL 2704918, at *4-6, (E.D.N.Y. July 8, 2008); *FTC v. Wolf*, No. 94-8119-CIV, 1996 WL 812940, at *8 (S.D. Fla. Jan. 31, 1996).

[11] 15 U.S.C. § 45.

[12] *See FTC Policy Statement on Deception*, *appended to Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174 (1984).

[13] *FTC Policy Statement Regarding Advertising Substantiation*, 104 F.T.C. 839 (1984), appended to *Thompson Med. Co.*, 104 F.T.C. 648 (1984).

be needed to determine whether consumers acting reasonably would find a particular product name misleading.

b. Could the Commission's deception authority be applied to review such cases?

The Commission's Section 5 authority to prohibit unfair or deceptive practices extends to false or unsubstantiated advertising claims, including claims made through product names.[14]

9. Chairman Simons, what are the limitations on the Commission's existing deception authority with respect to data privacy?

a. Please answer the same question above with respect to data security.

In order to prove that a claim is deceptive under the FTC Act, the Commission must show that the claim has been made, that it is likely to mislead a consumer acting reasonably under the circumstances, and that it is material. Companies often make claims about privacy and data security in their privacy policies. Some defendants have argued that, because consumers do not typically read privacy policies, claims contained therein cannot be material, and therefore cannot be deceptive under the FTC Act. Although prior Commission statements and relevant case law are contrary to this argument,[15] the Commission likely will continue to face continued legal challenges on this issue.

10. Chairman Simons, what are the limitations on the Commission's existing unfairness authority with respect to data privacy?

a. Please answer the same question above with respect to data security.

Defendants in litigation have made several arguments as to the limitations of the FTC's unfairness authority in the areas of privacy and data security. Most of these arguments relate to the first element the FTC needs to prove in unfairness cases: that an act or practice "causes or is likely to cause substantial injury to consumers."[16] First, defendants have argued that certain non-financial and non-physical harms are not "substantial injury," based on legislative history stating that "emotional impact and other more subjective types of harm, on the other hand, will not ordinarily make a practice unfair."[17] Second, they have argued that, in order to prove that a practice is "likely" to cause substantial injury, the FTC must prove that injury is probable, or will occur with a 51% certainty. Third, defendants have argued that the FTC cannot prove that a

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[14] *See, e.g., Brake Guard Prods., Inc.*, 125 F.T.C. 138 (1998) (Commission challenged claims that aftermarket brake product, "Brake Guard ABS," was an antilock braking system and provided the benefits of same; Commission order banned the use of the term "ABS" in connection with the product)

[15] *See FTC Policy Statement on Deception*, 103 F.T.C. 110, 174 (1984) (*appended to Cliffdale Assocs., Inc.*) (noting several categories of material claims, such as express claims, claims about the central characteristic of a product, and claims that the Defendant intended to make); *see also In the Matter of Novartis*, 1999 FTC LEXIS 63 *38 (May 27, 1999) ("Materiality is not a test of the effectiveness of the communication in reaching large numbers of consumers. It is a test of the likely effect of the claim on the conduct of a consumer who has been reached and deceived.").

[16] 15 U.S.C. 45(n).

[17] *See FTC Policy Statement on Unfairness*, 104 F.T.C. 949, 1070 (1984) (*appended to International Harvester).*

particular practice "caused" a given injury. For example, in a data breach case, it may be difficult to prove that a particular theft of a consumer's identity resulted from the specific breach at issue in the case.[18] The Commission has rejected each of these arguments,[19] and the Third Circuit in the *Wyndham* case has also confirmed that non-financial injury, such as the cost of people's time in dealing with a breach, is cognizable injury under the FTC Act.[20] Nonetheless, we continue to expend significant litigation resources on these issues.

11. Chairman Simons, we know that small businesses have suffered in Europe since the implementation of GDPR, with some reports finding that investments in startups are down 40 percent. Do you have any suggestions for how can we guard against the same happening here with a federal privacy bill, including lessons learned from the public hearings on consumer protection issues in the 21st Century?

Because the GDPR has been in effect for only a year, there is a limited basis upon which researchers and others might draw conclusions about potential effects that the GDPR has had on investments in startups. That said, the FTC's recent *Hearings on Competition and Consumer Protection in the 21st Century* did include discussion of research showing that, in the European Union, the number of venture capital technology deals and the average amount invested per deal declined in the first several months after the GDPR took effect.[21] Researchers have stated their intent to monitor to see whether those observations remain true on a longer-term basis, and whether they reflect correlation or causation. The FTC will keep abreast of such research.

12. Chairman Simons, at the hearing, you indicated that a federal privacy bill should consider State Attorneys General enforcement. Please answer the following questions about state enforcement:

a. Do you agree that any state enforcement action of the federal law should be brought exclusively in federal court?

i. If yes, please explain.

b. Do you agree that the Commission should receive notice from a state prior to state enforcement of the federal privacy bill?

i. If yes, please explain.

c. Do you agree that the Commission should be able to intervene in any civil action brought by a state?

i. If yes, please explain.

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[18] *See, e.g.*, *LabMD, Inc. v. FTC*, Appellee's Initial Brief, 2017 U.S. 11th Cir. Briefs Lexis 14*, 10-11 (Feb. 9, 2017).
[19] Opinion of the Commission, *In re LabMD*, Docket No. 9357, 2016 FTC Lexis 128*, 59-60 (July 28, 2016).
[20] *FTC v. Wyndham Worldwide Corp., et al.*, 10 F. Supp. 3d 602, 621-22 (D.N.J. 2014).
[21] Jia, Jian and Jin, Ginger Zhe and Wagman, Liad, *The Short-Run Effects of GDPR on Technology Venture Investment* (May 31, 2019), https://ssrn.com/abstract=3278912 or http://dx.doi.org/10.2139/ssrn.3278912.

d. Do you agree that if the Commission initiates a civil or administrative action on against the same defendant under the same circumstances of a state action, that the state action should be stayed pending resolution of the Commission's action?

i. If yes, please explain.

I believe that the Children's Online Privacy Protection Act ("COPPA") provides a useful model for granting concurrent enforcement authority to state attorneys general. Under COPPA, state attorneys general can bring civil actions enforcing the law on behalf of their residents in federal district courts. The law requires that state attorneys general provide the Commission notice and a copy of the complaint before filing an action, unless doing so is infeasible. COPPA also gives the Commission the right to intervene in any civil action brought by a state and, if the Commission has instituted an action against a defendant, the law prohibits any state from filing a civil action against the same defendant for violating COPPA during the pendency of the Commission's action.

This model has been very successful. Multiple states, including Texas, New Jersey, and New York, have brought actions to enforce COPPA, which ultimately improves children's privacy. The other requirements of the COPPA statute help foster greater collaboration between the Commission and the states, and ensure that the law is interpreted in a consistent manner. I would be in favor of a similar approach in any future federal privacy law.

13. Chairman Simons, in the 114th Congress this Committee, on a party line vote with Republicans voting for and Democrats voting against, reported the Data Security and Breach Notification Act of 2015 to the House Floor. Under that bill, the FTC would currently have first offense civil penalty authority for data security incidents like Equifax. Do you still agree, as you did during our oversight hearing held in July 2018, that the FTC would benefit from having civil penalty authority for violations of the Safeguards Rule?

Yes. Financial institutions subject to the GLB Safeguards Rule often maintain highly sensitive personal information of consumers. Financial institutions that are subject to the Safeguards Rule and that do not comply should be subject to civil penalties for first-time violations.

14. Chairman Simons, I appreciate your focus on whether our current consumer protection and competition laws are working as well as they should, especially in this digital world we now live in. That is why I was encouraged when you announced that you would be holding your 21st Century hearings on consumer protection issues, as well as creating the Technology Taskforce. Please answer the following with respect to the Technology Taskforce and hearings:

a. Please explain what the Technology Taskforce is and how you intend to utilize it's activities or findings with respect to data privacy and data security issues.

b. What is the status of the Technology Taskforce? How many FTEs are dedicated to the Taskforce?

c. Do you have any feedback from the 21st Century hearings you can share? If not, do you plan on producing any summary of findings from the hearings?

d. Do you have any feedback with respect to the Technology Taskforce you can share?

The TTF will be a focal point for the Commission's efforts to further develop our legal and economic understanding of technology markets and promote effective antitrust enforcement in this area of the economy. It will provide a natural home for attorneys and economists with a technical background or with significant practical experience in relevant industries.

The primary focus of the TTF is to identify and investigate anticompetitive conduct (including consummated mergers) in markets in which digital technology is an important dimension of competition, such as online platforms, digital advertising, social networking, software, operating systems, and streaming services. Privacy and data security issues will continue to be handled by the Bureau of Consumer Protection, which has similar technology-focused components already in place. The Bureau of Competition will work closely with the Bureau of Consumer Protection on shared issues and concerns, especially in the context of investigations that raise related issues between privacy and data collection.

The TTF currently has 15 attorneys, with plans to hire two additional attorneys and a technologist soon. The TTF is supported by staff throughout the agency, including other technology experts and the Bureau of Economics. As there is no additional funding for personnel, all of the FTEs have come from within the FTEs allotted to the Bureau of Competition. The TTF staff is busy at work, and I expect them to move quickly to identify potential actions for the Commission.

The Commission's *Hearings on Competition and Consumer Protection in the 21st Century* have explored whether broad-based changes in the economy, evolving business practices, new technologies, and international developments might require adjustments to competition and consumer protection law, enforcement priorities, or policy. Several hearings have focused on the role of technology-based platform businesses. The Hearings and related public comments are helping the Commission obtain and evaluate a broad and diverse range of viewpoints from outside experts and interested persons about high-tech business practices.

15. Chairman Simons, I understand there is an effort to modernize prescription release and delivery with patient portals and electronic health records (EHRs). There are some questions around the prescription verification process under the Contact Lens Rule. Are you soliciting comment about, and open to considering, updates to modernize the Contact Lens Rule to reflect how e-commerce has transformed the marketplace since it's origination?

The Commission has proposed changes in the May 28, 2019 Supplemental Notice of Proposed Rulemaking ("SNPRM") to reflect advances in technology. Under this proposal, a prescriber, with the patient's verifiable affirmative consent, could provide the patient with a digital copy of the prescription in lieu of a paper copy. Additionally, the proposed Rule would require that sellers provide a mechanism to allow patients to present their prescriptions directly to sellers. Among other options, sellers could use email, text message, or file upload to obtain such prescriptions. Finally, in the December 7, 2016 Notice of Proposed Rulemaking, the Commission made an initial determination that a portal could be used by a prescriber or a patient to provide a contact lens prescription to a seller, which would allow the seller to complete the sale. The Commission will consider comments received in response to this initial determination and the SNPRM and, if appropriate, make changes before issuing a final rule.

16. Chairman Simons, is the Commission aware of any other instances of verification by automated call for other self-administered class 2 and class 3 medical devices? If so, please list those other instances.

The Commission is not aware of other instances where a self-administered class 2 or class 3 medical device can be verified with a medical provider using an automated telephone message.

a. Please provide information on what percentages of verifications are filled through the following methods: fax, electronic means, personal live calls, or automated calls.

The Commission does not have information about the percentage of verifications made through the various permissible methods.

17. Chairman Simons, how many sellers does the Commission audit annually for verification compliance under the Contact Lens Rule?

The Commission does not conduct annual audits of sellers or prescribers for compliance with the verification process. The Commission investigates sellers and prescribers based on complaints received and by monitoring the marketplace.

a. How many of those audits have led to an enforcement action by the Commission?

Since the Rule's passage, the Commission has taken law enforcement action against eleven contact lens sellers alleging violations of the Rule.[22] The settlement orders in these cases have provided injunctive relief that, among other things, prohibited the defendants from: selling contact lenses without obtaining a prescription from a consumer; selling contact lenses without

[22] *U.S. v. Lawrence L. Duskin,* No. 1:18-cv-07359 (N.D. Cal. Dec. 6, 2018); *U.S. v. Kim*, No. 1:11-cv-05723 (E.D.N.Y. Feb 7, 2012); *U.S. v. Royal Tronics, Inc.*, No. No. 0:11-cv-62491 (S.D. Fla. Jan. 27, 2012); *U.S. v. Thy Xuan Ho*, No. 1:11-cv-03419 (D. Minn. Dec. 27, 2011); *U.S. v. Gothic Lens, LLC*, No. 1:11-cv-00159 (N.D. Ga. Feb. 3, 2011); *U.S. v. Jokeshop, LLC,* No. 1:11-cv-11221 (D. Mass. Nov. 29, 2011); *U.S. v. Contact Lens Heaven, Inc.*, No. 0:08-cv-61713 (S.D. Fla. Dec. 3, 2008); *U.S. v. Chapin N. Wright, II,* No. 1:08-cv-11793 (D. Mass. Oct. 31, 2008); *U.S. v. BeWild, Inc.,* No. 2:07-cv-04896 (E.D.N.Y. Dec. 3, 2007); *U.S. v. Pretty Eyes, LLC,* No. 1:07-cv-02462 (D. Colo. Nov. 28, 2007); *U.S. v. Walsh Optical, Inc.,* No. 2:06-cv-03591 (D.N.J. Aug. 30, 2006).

verifying prescriptions by communicating directly with the prescriber; and failing to maintain records of prescriptions and verifications. In addition, the Commission has sent numerous warning letters to both sellers and prescribers who potentially violated the Rule. Staff will continue to monitor the marketplace and, if appropriate, take action.

18. Chairman Simons, in March 2019, the FTC announced that it would be conducting a Section 6(b) study of certain Internet Service Providers. Does the Commission intend to conduct a similar study of consumer-facing content delivery services including social media services, sometimes referred to as "edge providers"?

The Commission regularly uses its authority under Section 6(b) of the FTC Act, which allows it to conduct industry-wide studies. In the past few years alone, we have studied the practices of data brokers and mobile device manufacturers and, as you mention, we currently are undertaking a study of internet service providers. These types of studies are best suited to areas in which we can make apples-to-apples comparisons across a range of companies. We are considering further 6(b) studies in other industries.

19. Chairman Simons, reports have surfaced that a Civil Investigative Demand (CID) has been issued by the Bureau of Competition to companies that run the largest automobile Dealer Management Systems (DMS) arising from an allegation that by improving the security of the DMSs, some companies are now technologically blocked from accessing them. These DMSs house and process dealership and manufacturer inventory, accounting, human resources and marketing information, and also contain financial, personal and sensitive data about consumer purchases and dealer services provided to consumers. As the FTC urge networks to secure personal data in testimony and guidance and other materials, is the Bureau of Competition having conversations with the Bureau of Consumer Protection about the various access issues that can arise with implementing security

The agency does not publicly comment on the substance of any pending law enforcement investigation. I assure you that the Bureau of Competition and the Bureau of Consumer Protection regularly and appropriately work together on issues of common concern.

The Honorable Robert E. Latta (R-OH)

1. **Chairman Simons, the FTC has emphasized for years how important access to WHOIS data is to its online investigative and enforcement work. Domain name providers have begun limiting access to that data because of Europe's privacy law. The FTC's international consumer protection counsel has been documenting how that is hindering consumer protection and cyber security efforts, and the NTIA has called upon ICANN to solve this problem. How important is it that WHOIS access be restored as soon as possible to protect consumers and intellectual property?**

We believe it remains important for ICANN to develop a unified mechanism to enable those with legitimate interests—law enforcement, regulators, cyber security professionals, IP rights holders, and consumers—to obtain access to appropriate domain name registration (WHOIS) information. Contact information for domain name owners has long been one of the key building blocks in website investigations. The loss of ready access to this data due to EU privacy law developments has created obstacles and delays for those investigating illicit internet activities. For example, recent studies of more than 300 cybersecurity "first responders" and law enforcement investigators concluded that the masking of WHOIS information has impaired the ability to blacklist domains that transmit spam and expose internet users to online threats that could have been preemptively stopped, had WHOIS contact information remained available.[23]

We continue to cooperate with our foreign consumer protection and other enforcement counterparts to work towards a standard ICANN system to promptly and lawfully respond to requests for WHOIS information.

2. **Chairman Simons, we want companies of all sizes to protect consumer information, but we do not want new privacy obligations to crush small businesses and benefit big companies. In the 2012 FTC privacy report, the Commission grappled with this specific concern and excluded some small businesses from its recommendations. How do you think we should be addressing this concern?**

To the extent Congress is considering excluding small businesses from privacy legislation, we would suggest focusing not simply on the size of the company, but on the amount and sensitivity of the data the company collects. A company with few employees can collect highly-sensitive data of millions of consumers, and such a company should be subject to privacy rules. As you note, this is the approach the Commission took in its 2012 Privacy Report. We also took a similar approach in our recent Notice of Proposed Rulemaking on the GLB Safeguards Rule, where we proposed requiring all financial institutions to comply with general provisions requiring reasonable security, but suggested imposing more specific requirements on companies that collect data of more than 5,000 consumers.

3. **Chairman Simons, to date companies have failed to adequately explain to consumers how their information is collected, used, and often shared online. I**

[23] *See* Facts & Figures: Whois Policy Changes Impair Blocklisting Defenses, https://www.securityskeptic.com/2019/03/facts-figures-whois-policy-changes-impair-blacklisting-defenses.html.

believe any federal privacy bill must increase transparency. Can you speak to why transparency is important?

Transparency with respect to data collection, use, and sharing practices is important for multiple reasons. First, transparency helps consumers make informed decisions when choosing to provide their data to businesses whose practices align with the consumer's privacy preferences and expectations. Second, transparency promotes competition by enabling consumers to compare and contrast businesses' data practices and enabling businesses to compete based on their willingness and ability to meet consumers' preferences and expectations. Third, transparency promotes accountability by providing a basis for the FTC and other stakeholders to take action to hold businesses accountable if their actual practices do not comport with their claims. Finally, the process of publicly committing to certain data practices serves an important internal accountability function in making sure that company personnel examine and confirm the practices to which they are publicly committing.

4. **Chairman Simons, What data is being collected to determine the impacts of the GDPR in the United States? And does the FTC have a plan to collect data on the potential impacts of the CCPA? If that information is not being studied already, are there plans to study it?**

The FTC is continuing to collect public comments, including empirical research, until June 30, 2019, on the topics the FTC included in its recent *Hearings on Competition and Consumer Protection in the 21st Century*. The questions that the FTC has posted for public comment include:

- How do state, federal, and international privacy laws and regulations, adopted to protect data and consumers, affect competition, innovation, and product offerings in the United States and abroad?
- What are existing and emerging legal frameworks for privacy protection? What are the benefits and drawbacks of each framework?
- Does the need for federal privacy legislation depend on the efficacy of emerging legal frameworks at the state level? How much time is needed to assess their effect?

The final hearing record will help inform future FTC plans to collect additional data to determine the impacts of the GDPR in the United States and the potential impacts of the CCPA as well as other existing or future privacy laws.

The Honorable Michael C. Burgess (R-TX)

1. **Chairman Simons, in December 2016, the FTC issued a Notice of Proposed Rulemaking announcing changes to the Commission's Contact Lens Rule. These changes included a new regulatory requirement for doctors to collect and maintain for 3 years a signed confirmation that a patient received their contact lens prescription. In addition, the proposal did not address illegal sales, including the filling of expired or incorrect prescriptions.**

   On May 2, 2019, the FTC issued a Supplemental Notice of Proposed Rulemaking that kept the confirmation mandate, but allowed digital copies, and only required sellers to provide patient prescription information to prescribers in a slow and deliberate manner, without eliminating the automation of robocalls.

   Last Congress, Congressman Bobby Rush and I led a letter requesting the FTC reevaluate its 2016 proposed rulemaking, requesting the new rule limit the paperwork mandate and improve enforcement of existing provision to combat illegal sales.

   a. **Can you describe why the FTC assesses the requirement to keep prescription confirmation records for 3 years is a necessary improvement upon the Contact Lens Rule?**

The Commission believes that maintaining records of prescription releases for three years will allow staff to investigate potential violations and, where appropriate, bring enforcement actions. The three-year period is consistent with other recordkeeping obligations in the Rule, and the FTC Act has a three-year statute of limitations for bringing enforcement actions pursuant to a rule violation.[24] Additionally, the Commission believes that some prescribers may already retain eye examination records for at least three years due to state requirements or may already keep customer sales receipts for financial recordkeeping purposes. The Commission will consider comments received in response to the May 28, 2019 Supplemental Notice of Proposed Rulemaking ("SNPRM") and, if appropriate, make changes before issuing a final rule.

   b. **Do you anticipate sellers maintaining the ability to exploit prescriber communication rules to fill prescriptions?**

When Congress enacted the Fairness to Contact Lens Consumers Act, it determined that passive verification was necessary to balance the interests of prescription portability and consumer health. Congress was aware that, in some instances, passive verification could allow sellers to sell contact lenses based on an invalid or inaccurate prescription, and that this could potentially lead to health risks. In the SNPRM, the Commission proposed several changes to improve the passive verification process. The Commission proposed that sellers who use automated telephone verification messages would have to: (1) record the entire call and preserve the

[24] 15 U.S.C. § 57b(d).

complete recording; (2) begin the call by identifying it as a prescription verification request made in accordance with the Contact Lens Rule; (3) deliver the verification message in a slow and deliberate manner and at a reasonably understandable volume; and (4) make the message repeatable at the prescriber's option. This proposal would enable prescribers to better fulfill their role as protectors of patients' eye health because prescribers cannot correct and police invalid, inaccurate, and expired prescriptions if they cannot comprehend a seller's verification request.

Additionally, the Commission proposed changes that would increase patients' access to their prescriptions, maintain patient choice and flexibility, and potentially reduce the number of verification requests. Under the proposal, a prescriber, with the patient's verifiable affirmative consent, has the option to provide the patient with a digital copy of the prescription in lieu of a paper copy. Moreover, although the Rule has always required that prescribers, upon request, provide any person designated to act on behalf of the patient with a copy of the patient's valid contact lens prescription, the Rule did not prescribe a time limit within which this copy had to be provided. The Commission proposed requiring that a prescriber respond to requests for an additional copy of a prescription within forty business hours. To facilitate patients' ability to use their prescriptions, another proposed change would require sellers to provide a mechanism that would allow patients to present their prescriptions directly to sellers.

Finally, the Commission proposed amending the prohibition on seller alteration of prescriptions to address concerns about the misuse of passive verification to substitute a different brand and manufacturer of lenses. The proposal requires a seller who makes an alteration to provide a verification request to the prescriber that includes the name of a manufacturer or brand other than that specified by the patient's prescriber. There is a proposed exception if the patient entered that manufacturer or brand on the seller's order form or the patient orally requested it from the seller.

The Commission will consider comments received in response to the SNPRM and, if appropriate, make changes before issuing a final rule.

2. **Chairman Simons, in the 114th Congress this Committee, on a party line vote with Republicans voting for and Democrats voting against, reported the Data Security and Breach Notification Act of 2015 to the House Floor. Under that bill, the FTC would currently have first offense civil penalty authority for data security incidents, including the Equifax breach.**

    a. **Do you still agree, as you did during our oversight hearing in 2018, that the FTC would benefit from having civil penalty authority for violations of the Safeguards Rule?**

Yes. Financial institutions subject to the GLB Safeguards Rule often maintain highly sensitive personal information of consumers. Financial institutions that are subject to the Safeguards Rule and that do not comply should be subject to civil penalties for first-time violations.

3. **Chairman Simons, when the FTC enjoyed broad rulemaking authority in the 1970s it got so bad that a Democratic-led Congress cut funding to the Commission for several days.**

    a. **How should the events of the past inform our discussion about FTC rulemaking today and under future administrations**

Since the 1970s, Congress has enacted numerous laws that give the FTC discrete rulemaking authority in a variety of areas—children's privacy, privacy and data security for financial institutions, email marketing, telemarketing sales, and contact lens prescriptions, to name just a few. The FTC has exercised that rulemaking authority judiciously. In addition, rulemaking in all of these areas is subject to the procedural protections provided by the Administrative Procedure Act—including public notice and comment, a requirement that the Commission explain its reasoning, and an opportunity for judicial review. In its hearing testimony, the Commission requested similarly targeted APA rulemaking authority for consumer privacy and data security.

Since 1992, the FTC has also maintained a robust regulatory review program. All FTC rules and guides are reviewed periodically to ensure they are up to date, effective, and not overly burdensome. As part of the review process, the FTC solicits public input on issues such as the rule's economic impact; whether there is a continuing need for the rule; whether the rule may conflict with state, local, or other federal laws or regulations; and whether the rule has been affected by any technological, economic, or other industry changes. Decades of experience with targeted rulemaking and regulatory reviews have given the FTC a thorough understanding of rules' regulatory and economic impact, and will continue to inform the FTC's actions in the future.

4. **Chairman Simons, we know that small businesses have suffered in Europe since the implementation of the General Data Protection Regulation (GDPR). In fact, according to some reports, investments in startups are down an astounding 40 percent.**

    a. **How can we guard against the same happening here?**

Because the GDPR has been in effect for only a year, there is a limited basis upon which researchers and others might draw conclusions about potential effects that the GDPR has had on investments in startups. That said, the FTC's recent *Hearings on Competition and Consumer Protection in the 21st Century* did include discussion of research showing that, in the European Union, the number of venture capital technology deals and the average amount invested per deal declined in the first several months after the GDPR took effect. Researchers have stated their intent to monitor to see whether those observations remain true on a longer-term basis, and whether they reflect correlation or causation. The FTC will keep abreast of such research.

The Honorable Richard Hudson (R-NC)

1. **In an article dated May 2, 2019, the Wall Street Journal reported that Facebook is interested in entering the payments and remittances markets as the company "aims to burrow more deeply into the lives of its users." The article also notes that one-third of the world's population logs on to Facebook on a monthly basis.**

    a. **Given Facebook's track record with consumer data, what concerns would FTC have if Facebook gained access to billions of people's sensitive financial data?**

The Commission has confirmed a non-public investigation into Facebook. It would be inappropriate to comment on potential practices of a company under investigation.

    b. **Given the potential scale of this business, what competition issues does FTC foresee? How will the FTC assure that other services will be able to compete against the likes of a Facebook?**

The Bureau of Competition recently announced the creation of a Technology Task Force ("TTF") that will enhance the Commission's antitrust focus on technology-related ecosystems, including technology platforms as well as markets for online advertising, social networking, mobile operating systems, and apps. The TTF will monitor competition in U.S. technology markets, investigate any conduct in these markets that may harm competition, and, when warranted, take actions to ensure that consumers benefit from free and fair competition.

2. **TechCrunch blog post entitled "Facebook is Pivoting" suggested that Facebook's recent moves indicate that it will evolve into a private end-to-end encryption platform for communication and commerce. The blog states that what "Facebook really wants next is for Messenger to become… an impregnable walled garden, used for business communications as well as personal, which dominates not just messaging but commerce." A situation "in which Instagram is the king of all social media, while Messenger/WhatsApp rule messaging, occupy the half-trillion dollar international-remittances space, and also take basis points from millions of daily transactions performed on" Facebook's platforms.**

    a. **As Facebook Inc. seeks to leverage its owned platforms to offer financial and other services, how is the FTC going to ensure Facebook responsibly manages this evolution into a financial and e-commerce giant?**

    b. **Given that Facebook touches one-third of the world's population and nearly two-thirds of all Americans, does the FTC have confidence Facebook will handle this evolution properly, given the company's history of handling sensitive data?**

The Commission has confirmed a non-public investigation into Facebook. It would be inappropriate to comment on potential practices of a company under investigation.

Additional Questions for the Record

Subcommittee on Consumer Protection and Commerce
Hearing on
"Oversight of the Federal Trade Commission: Strengthening Protections for Americans' Privacy and Data Security"
May 8, 2019

The Honorable Rohit Chopra, Commissioner
The Federal Trade Commission

The Honorable Jan Schakowsky (D-IL)

1. **On June 11, 2019, the Federal Trade Commission (FTC) will hold a workshop on online event tickets. I have heard reports of a number of consumer protection issues concerning online event tickets that raise serious concerns and I hope the FTC will consider addressing these issues during its workshop. For example, I have heard concerns that primary ticket platforms have begun forcing purchasers to disclose personally identifiable information by creating an account with the primary ticket seller to use a ticket, even when tickets are resold on a secondary market. I have also heard complaints about primary ticket sellers that hold tickets back from the market pursuant to agreements with venues, artists, or other partners. In addition, I have received complaints about primary ticket vendors putting technological restrictions on the transfer of tickets, which can prevent ticket holders from reselling or giving away tickets if they cannot attend the event.**

    a. **Will the FTC examine these issues at its upcoming hearing on online event tickets?**

These are critical issues. In addition to exploring these issues at the workshop, we invited public comments on this marketplace to inform our approach going forward.

    b. **Has the FTC received similar complaints from consumers?**

The most common consumer complaints we receive about online event ticketing concern hidden or inadequately disclosed ticketing fees in the primary and secondary markets, and consumers who report ticket resellers misled them to believe they were purchasing tickets from the venue or authorized seller at face value (when in fact they were purchasing tickets from resellers at a significant markup). The Commission also received several thousand consumer comments in connection with the upcoming ticketing workshop. Those comments overwhelmingly concerned hidden or inadequately disclosed ticketing fees and/or the high cost of such fees. While the FTC may also have received consumer complaints or comments regarding the practices you outline, they do not appear to be as prevalent.

c. Do you agree that, if true, these practices raise concerns about unfair or deceptive practices in the market for online event tickets?

Yes. In addition, the ticketing market is highly concentrated and vertically integrated with other parts of the industry that can impact ticket practices and prices. It's concerning that one company controls so many aspects of the entertainment industry – from ticketing, to live venues, to resale technologies. It can be much easier for firms to engage in practices that are harmful to consumers when they face little competition. Other problems arise when a company is able to use their dominance in one market to choke off competition in ancillary markets. The FTC should pay close attention for potential anticompetitive practices in this industry and bring enforcement actions when appropriate.

The Honorable Bobby L. Rush (D-IL)

1. **In 2014, the Federal Trade Commission (FTC) published a report called "Data Brokers: A Call for Transparency and Accountability" that shed light on the secretive world of data brokers that buy and sell vast amounts of consumer personal information, often entirely behind the scenes. The FTC's report called on Congress to pass legislation that would require data brokers to be more transparent and give consumers the right to opt-out, among other things.**

    a. **Do you still agree that Congress should pass legislation addressing data brokers?**

Yes, I agree.

2. **While innovation in the tech industry is having a tremendous impact on our economy and the lives of everyday Americans, it is also creating new challenges in protecting consumers and competitive markets. I have heard reports of certain online platforms giving their subsidiary businesses preferential treatment over their competitors.**

    a. **Are you looking into anti-consumer and anti-competitive behaviors of this nature?**

    b. **In your opinion, does the FTC currently have the authority and capacity to curtail this behavior?**

The Commission already has a robust set of tools for tackling these challenges, and it is essential we use them not only against small players but also against large firms that pose risks to consumers and competition. I have previously advocated that the Commission should use its competition rulemaking authority to help rein in anticompetitive practices; potential abuses by online dominant tech platforms is one area where the Commission's competition rulemaking authority may be useful. In addition, the Commission has the authority to study industries and collect industry-wide data through our Section 6(b) authority. The Commission should use this authority to study the business practices of online platforms, which will help fine tune potential future law enforcement actions.

Under the U.S. antitrust laws, firms with market power are prohibited from engaging in conduct that anticompetitively excludes rivals or maintains a monopoly, as well as conduct that amounts to attempted monopolization. The "unfair method of competition" prong of the FTC Act's Section 5 also prohibits conduct that violate the policies that underlie the antitrust laws, or conduct that constitutes incipient violations of those laws.

Unilateral conduct by tech firms that meet any of these criteria is especially dangerous to our economy, because of the loss in innovation by excluded nascent competitors. Some of the best innovations in our economy have traditionally been by small firms who, in today's economy, may be at risk of exclusion by powerful online platforms. The vast data troves and network

effects of large online platforms may create insurmountable entry barriers for nascent competitors, which in turn would give online platforms durable market power.

3. **As all of you know, robocalls are extremely burdensome on consumers and every effort needs to be taken to ensure that consumers are not being taken advantage of by these unscrupulous actors. I am also concerned by the reports I have heard that robocalls are now being used by online contact lens retailers to usurp the verification of contact lens prescriptions, placing consumers at an even greater risk of receiving the wrong Class II or III medical devices.**

    a. **Do you agree that efforts need to be taken to update the passive verification process?**

When Congress enacted the Fairness to Contact Lens Consumers Act ("FCLCA"), it determined that passive verification was necessary to balance the interests of prescription portability and consumer health. Congress was aware that passive verification could, in some instances, allow sellers to sell contact lenses based on an invalid or inaccurate prescription, and that this could potentially lead to health risks. In the May 28, 2019 Supplemental Notice of Proposed Rulemaking ("SNPRM"), the Commission proposed several changes to improve the passive verification process. The Commission proposed that sellers who use automated telephone verification messages would have to: (1) record the entire call and preserve the complete recording; (2) begin the call by identifying it as a prescription verification request made in accordance with the Contact Lens Rule; (3) deliver the verification message in a slow and deliberate manner and at a reasonably understandable volume; and (4) make the message repeatable at the prescriber's option. This proposal enables prescribers to fulfill their role as protectors of patients' eye health because prescribers cannot correct and police invalid, inaccurate, and expired prescriptions if they cannot comprehend a seller's verification request.

Additionally, the Commission proposed changes that would increase patients' access to their prescription, maintain patient choice and flexibility, and potentially reduce the number of verification requests. Under the proposal, a prescriber, with the patient's verifiable affirmative consent, has the option to provide the patient with a digital copy of the prescription in lieu of a paper copy. Moreover, although the Rule has always required that prescribers, upon request, provide any person designated to act on behalf of the patient with a copy of the patient's valid contact lens prescription, the Rule did not prescribe a time limit in which this copy had to be provided. The Commission proposed requiring that a prescriber respond to requests for an additional copy of a prescription within forty business hours. To facilitate patients' ability to use their prescriptions, another proposed change would require sellers to provide a mechanism that would allow patients to present their prescriptions directly to sellers.

Finally, the Commission proposed amending the prohibition on seller alteration of prescriptions to address concerns about the misuse of passive verification to substitute a different brand and manufacturer of lenses. The proposal requires a seller who makes an alteration to provide a verification request to the prescriber that includes the name of a manufacturer or brand other than that specified by the patient's prescriber. There is an exception if the patient entered that manufacturer or brand on the seller's order form or the patient orally requested it from the seller.

The Commission will consider comments received in response to the SNPRM and, if appropriate, make changes before issuing a final rule.

b. Do you agree that robocalls need to be eliminated from use within the passive verification system?

An effective verification process enables prescribers, when necessary, to prevent improper sales and allows sellers to provide consumers with their prescribed contact lenses without delay. The FCLCA expressly permits telephone communication for verification and the Commission believes it would be contrary to Congressional intent to prohibit use of automated technology for the purpose of prescription verification. The Commission does not have empirical data showing the frequency of incomplete or incomprehensible automated telephone messages or that a phone call with an automated message is necessarily less reliable than one with a live person. The evidence suggests that these calls can be an efficient method of verification. However, the Commission recognizes the burden on prescribers and potential health risk to patients from incomplete or incomprehensible automated telephone messages. As described in response to question 3.a, the Commission has proposed changes to automated telephone messages that would improve the verification process.

c. Could you support updating the Fairness to Contact Lens Consumers Act to eliminate robocalls and update the passive verification system to include secured emails and patient portals to verify and document contact lens prescription verification?

Under the current Rule, a "seller may sell contact lenses only in accordance with a contact lens prescription for the patient that is: (1) Presented to the seller by the patient or prescriber directly or by facsimile; or (2) Verified by direct communication." 16 C.F.R. § 315.5(a). Because the Rule's definition of direct communication already includes electronic mail, a seller and a prescriber could use email during the verification process. In the December 7, 2016 Notice of Proposed Rulemaking ("NPRM"), the Commission made an initial determination that a portal could be used by a prescriber or a patient to "directly" present a contact lens prescription to a seller. The Commission will consider comments received in response to this initial determination and, if appropriate, make changes before issuing a final rule.

4. In December 2016, the FTC issued a Notice of Proposed Rulemaking to update the Contact Lens Rule. As a part of this process, providers and manufacturers of contact lenses urged the FTC to require common-sense changes to the current contact lens market, including quantity limits and ways to update methods of communication under the passive verification process. The FTC responded by stating that there was insufficient evidence that consumers are buying excessive quantities of contact lenses and that it did not have the statutory authority to update the passive verification process.

a. Do you support efforts to ensure patient safety regarding the current proposed rulemaking process that will include patients only receiving contact lenses as prescribed under the valid prescription?

The Commission does not believe patients should be able to purchase contacts without a valid prescription. The SNPRM's proposed changes improve patient access to contact lens prescriptions and address concerns with the passive verification requests and alterations by sellers.

5. Last May, Rep. Michael Burgess (R-TX) and I led a letter to the FTC that laid out several concerns we have regarding the FTC rulemaking process around the Fairness to Contact Lens Consumers Act. In total, over 50 members of Congress signed this letter where we discussed the lack of enforcement action by the FTC to address the illegal sales of contact lenses and the burdensome new requirements on eye care providers.

a. Has the FTC investigated or independently audited any online sellers to determine the number of lenses provided to patients?

No.

b. What enforcement mechanisms has the FTC used to ensure that sellers are not enabling the circumvention of state laws governing prescription renewal or harming patients by providing excessive numbers of contact lenses?

In the NPRM, the Commission considered the issue of patients purchasing excessive quantities of contact lenses. Although concerned with anecdotal reports, the Commission concluded that the evidence did not show that the sale of excessive amounts of contact lenses is a widespread problem[1]. Furthermore, a prescriber who receives a verification request for an excessive amount of lenses can contact the seller to prevent the sale from being completed. Staff has investigated specific complaints of illegal sales related to excessive quantities. We will continue to monitor the marketplace, taking action against violations as appropriate.

c. How often has the FTC acted on this important safety issue?

As discussed in the response to question 5.b, the Commission does not believe that the evidence shows that excessive sale of contact lenses is a widespread problem. However, the Commission recognizes the importance of patient safety. Staff will continue to monitor the marketplace and, if appropriate, take action.

6. Many businesses are increasingly dependent on digital platforms that they do not own or operate to connect with customers.

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[1] NPRM at 88549-50; *see also* Vision Council, U.S. Optical Market Eyewear Overview 13 (2018), https://www.ftc.gov/sites/default/files/filefield_paths/steve_kodey_ppt_presentation.pdf (noting that 82% of contact lens users had an eye exam within the last 12 months and over 95% had an exam within the last two years)

a. **With current statutory authorities in mind, what can be done to protect consumers if companies that operate these platforms offer subsidiary business products and restrict or disadvantage competitors with similar businesses on these platforms? What is the FTC doing to curtail it?**

b. **One example of how a platform operator might harm consumers is by prohibiting businesses from communicating with their customers through that platform. Do you believe that this sort of behavior must be addressed and, if so, does the FTC currently have the statutory authority to do so?**

Please see the answer to question 2.

7. **It has been brought to my attention that the leading internet browser has been considering a major change in what type of information is available to consumers in their product, reducing the available information that consumers use to defend themselves against a host of online threats like phishing and content spoofing.**

    a. **As the agency charged with protecting our nation's consumers and enforcing our data privacy laws, do you have concerns about what this practice means for consumers and their data privacy and security?**

    b. **Have you discussed this issue with the browsers or asked them to explain their changes and how they will impact consumer safety online? If not, do you intend to?**

I understand your question to refer to how browsers display certain digital certificates in their user interface. In May 2018, Google announced that it would change its user interface in its Chrome browser to remove certain indicators of the presence of an expensive digital certificate – called an extended validation certificate – such as green text and a padlock icon.

I have not discussed these changes with Google. Consumers' secure online experiences depend on many factors, and the ecosystem continues to evolve quickly. I do not believe that the Commission should promote one type of certificate over another or prescribe how certificates should be displayed in user interfaces.

Additional Questions for the Record

Subcommittee on Consumer Protection and Commerce
Hearing on
"Oversight of the Federal Trade Commission: Strengthening Protections for Americans' Privacy and Data Security"
May 8, 2019

The Honorable Christine S. Wilson, Commissioner
The Federal Trade Commission

The Honorable Jan Schakowsky (D-IL)

1. **On June 11, 2019, the Federal Trade Commission (FTC) will hold a workshop on online event tickets. I have heard reports of a number of consumer protection issues concerning online event tickets that raise serious concerns and I hope the FTC will consider addressing these issues during its workshop. For example, I have heard concerns that primary ticket platforms have begun forcing purchasers to disclose personally identifiable information by creating an account with the primary ticket seller to use a ticket, even when tickets are resold on a secondary market. I have also heard complaints about primary ticket sellers that hold tickets back from the market pursuant to agreements with venues, artists, or other partners. In addition, I have received complaints about primary ticket vendors putting technological restrictions on the transfer of tickets, which can prevent ticket holders from reselling or giving away tickets if they cannot attend the event.**

    a. **Will the FTC examine these issues at its upcoming hearing on online event tickets?**

Yes, the June 11 Online Event Ticketing Workshop will examine the issues that you raise and their possible impact on consumers in the online event tickets marketplace.

    b. **Has the FTC received similar complaints from consumers?**

The most common consumer complaints we receive about online event ticketing concern hidden or inadequately disclosed ticketing fees in the primary and secondary markets, and consumers who report ticket resellers misled them to believe they were purchasing tickets from the venue or authorized seller at face value (when in fact they were purchasing tickets from resellers at a significant markup). The Commission also received several thousand consumer comments in connection with the upcoming ticketing workshop. Those comments overwhelmingly concerned hidden or inadequately disclosed ticketing fees and/or the high cost of such fees. The FTC has received consumer complaints or comments regarding the practices you outline, but they are not as prevalent.

c. Do you agree that, if true, these practices raise concerns about unfair or deceptive practices in the market for online event tickets?

These practices may raise questions about transparency and consumer understanding in the online event tickets marketplace; however, it is unclear whether requiring ticket buyers to provide personally identifying information, holding back tickets for later sale, or restricting the transfer of tickets are unfair or deceptive acts or practices under Section 5 of the FTC Act.

The Honorable Bobby L. Rush (D-IL)

1. **In 2014, the Federal Trade Commission (FTC) published a report called "Data Brokers: A Call for Transparency and Accountability" that shed light on the secretive world of data brokers that buy and sell vast amounts of consumer personal information, often entirely behind the scenes. The FTC's report called on Congress to pass legislation that would require data brokers to be more transparent and give consumers the right to opt-out, among other things.**

    a. **Do you still agree that Congress should pass legislation addressing data brokers?**

The current Commission has not taken a position on data broker legislation specifically. It has supported federal privacy and security legislation that would give the Commission authority to seek civil penalties for first-time privacy and security violations; conduct targeted APA rulemaking; and exercise jurisdiction over common carriers and non-profit entities. I am concerned about data broker collection, use, and sale of sensitive consumer information and encourage Congress to consider data broker practices in conjunction with its deliberations regarding federal privacy legislation.

2. **While innovation in the tech industry is having a tremendous impact on our economy and the lives of everyday Americans, it is also creating new challenges in protecting consumers and competitive markets. I have heard reports of certain online platforms giving their subsidiary businesses preferential treatment over their competitors.**

    a. **Are you looking into anti-consumer and anti-competitive behaviors of this nature?**

    b. **In your opinion, does the FTC currently have the authority and capacity to curtail this behavior?**

As more and more of the nation's commerce takes place on online platforms, the operation of these platforms has received increased scrutiny by both the public and the antitrust agencies. I believe the FTC has many of the tools it needs to protect consumers online, although I have called for Congress to consider giving the FTC the authority to seek civil penalties for initial privacy violations, which would create an important deterrent effect. Moreover, I believe consumers would benefit if the FTC had broader enforcement authority to take action against common carriers and nonprofits, which it cannot currently do under the FTC Act. That said, you can be assured that the agency is vigilant in its oversight of the internet economy, and we will not hesitate to take strong and appropriate action against any act or practice that violates any statute that we enforce.

Given the growing importance of high-technology industries, the FTC's Bureau of Competition recently announced the creation of a Technology Task Force that will enhance the Commission's antitrust focus on technology-related ecosystems, including technology platforms and markets for online advertising, social networking, mobile operating systems, and apps. The task force

will monitor competition in U.S. technology markets, investigate any conduct in these markets that may harm competition, and, when warranted, take actions to ensure that consumers benefit from competition.

The FTC does not publicly comment on pending law enforcement investigations. As a general matter, however, I can say that the U.S. antitrust laws prohibit certain kinds of conduct that harm consumers by diminishing competition. Some conduct, like price-fixing, is so pernicious that it is condemned as *per se* unlawful without an elaborate inquiry. In the remaining cases, however, we must conduct a fact-specific inquiry to assess whether the challenged conduct is, on net, anticompetitive. ,I look forward to supporting the work of the task force as it conducts its analysis of these issues.

3. **As all of you know, robocalls are extremely burdensome on consumers and every effort needs to be taken to ensure that consumers are not being taken advantage of by these unscrupulous actors. I am also concerned by the reports I have heard that robocalls are now being used by online contact lens retailers to usurp the verification of contact lens prescriptions, placing consumers at an even greater risk of receiving the wrong Class II or III medical devices.**

    a. **Do you agree that efforts need to be taken to update the passive verification process?**

When Congress enacted the Fairness to Contact Lens Consumers Act ("FCLCA"), it determined that passive verification was necessary to balance the interests of prescription portability and consumer health. Congress was aware that passive verification could, in some instances, allow sellers to sell contact lenses based on an invalid or inaccurate prescription, and that this could potentially lead to health risks. In the May 28, 2019 Supplemental Notice of Proposed Rulemaking ("SNPRM"), the Commission proposed several changes to improve the passive verification process. The Commission proposed that sellers who use automated telephone verification messages would have to: (1) record the entire call and preserve the complete recording; (2) begin the call by identifying it as a prescription verification request made in accordance with the Contact Lens Rule; (3) deliver the verification message in a slow and deliberate manner and at a reasonably understandable volume; and (4) make the message repeatable at the prescriber's option. This proposal enables prescribers to fulfill their role as protectors of patients' eye health because prescribers cannot correct and police invalid, inaccurate, and expired prescriptions if they cannot comprehend a seller's verification request.

Additionally, the Commission proposed changes that would increase patients' access to their prescription, maintain patient choice and flexibility, and potentially reduce the number of verification requests. Under the proposal, a prescriber, with the patient's verifiable affirmative consent, has the option to provide the patient with a digital copy of the prescription in lieu of a paper copy. Moreover, although the Rule has always required that prescribers, upon request, provide any person designated to act on behalf of the patient with a copy of the patient's valid contact lens prescription, the Rule did not prescribe a time limit in which this copy had to be provided. The Commission proposed requiring that a prescriber respond to requests for an additional copy of a prescription within forty business hours. To facilitate patients' ability to use

their prescriptions, another proposed change would require sellers to provide a mechanism that would allow patients to present their prescriptions directly to sellers.

Finally, the Commission proposed amending the prohibition on seller alteration of prescriptions to address concerns about the misuse of passive verification to substitute a different brand and manufacturer of lenses. The proposal requires a seller who makes an alteration to provide a verification request to the prescriber that includes the name of a manufacturer or brand other than that specified by the patient's prescriber. There is an exception if the patient entered that manufacturer or brand on the seller's order form or the patient orally requested it from the seller.

The Commission will consider comments received in response to the SNPRM and, if appropriate, make changes before issuing a final rule.

b. Do you agree that robocalls need to be eliminated from use within the passive verification system?

An effective verification process enables prescribers, when necessary, to prevent improper sales and allows sellers to provide consumers with their prescribed contact lenses without delay. The FCLCA expressly permits telephone communication for verification and the Commission believes it would be contrary to Congressional intent to prohibit use of automated technology for the purpose of prescription verification. The Commission does not have empirical data showing the frequency of incomplete or incomprehensible automated telephone messages or that a phone call with an automated message is necessarily less reliable than one with a live person. The evidence suggests that these calls can be an efficient method of verification. However, the Commission recognizes the burden on prescribers and potential health risk to patients from incomplete or incomprehensible automated telephone messages. As described in response to question 3.a, the Commission has proposed changes to automated telephone messages that would improve the verification process.

c. Could you support updating the Fairness to Contact Lens Consumers Act to eliminate robocalls and update the passive verification system to include secured emails and patient portals to verify and document contact lens prescription verification?

Under the current Rule, a "seller may sell contact lenses only in accordance with a contact lens prescription for the patient that is: (1) Presented to the seller by the patient or prescriber directly or by facsimile; or (2) Verified by direct communication." 16 C.F.R. § 315.5(a). Because the Rule's definition of direct communication already includes electronic mail, a seller and a prescriber could use email during the verification process. In the December 7, 2016 Notice of Proposed Rulemaking ("NPRM"), the Commission made an initial determination that a portal could be used by a prescriber or a patient to "directly" present a contact lens prescription to a seller. The Commission will consider comments received in response to this initial determination and, if appropriate, make changes before issuing a final rule.

4. In December 2016, the FTC issued a Notice of Proposed Rulemaking to update the Contact Lens Rule. As a part of this process, providers and manufacturers of

contact lenses urged the FTC to require common-sense changes to the current contact lens market, including quantity limits and ways to update methods of communication under the passive verification process. The FTC responded by stating that there was insufficient evidence that consumers are buying excessive quantities of contact lenses and that it did not have the statutory authority to update the passive verification process.

a. Do you support efforts to ensure patient safety regarding the current proposed rulemaking process that will include patients only receiving contact lenses as prescribed under the valid prescription?

Federal law does not permit a seller to sell contact lenses to a patient unless the seller has obtained a copy of the prescription or verified the patient's prescription information with the prescriber. The SNPRM's proposed changes improve patient access to contact lens prescriptions and address concerns with the passive verification requests and alterations by sellers.

5. **Last May, Rep. Michael Burgess (R-TX) and I led a letter to the FTC that laid out several concerns we have regarding the FTC rulemaking process around the Fairness to Contact Lens Consumers Act. In total, over 50 members of Congress signed this letter where we discussed the lack of enforcement action by the FTC to address the illegal sales of contact lenses and the burdensome new requirements on eye care providers.**

a. Has the FTC investigated or independently audited any online sellers to determine the number of lenses provided to patients?

The Commission has not audited online sellers to determine the number of lenses provided to patients. Staff has investigated specific complaints of illegal sales related to excessive quantities. We will continue to monitor the marketplace, taking action against violations as appropriate.

b. What enforcement mechanisms has the FTC used to ensure that sellers are not enabling the circumvention of state laws governing prescription renewal or harming patients by providing excessive numbers of contact lenses?

In the NPRM, the Commission considered the issue of patients purchasing excessive quantities of contact lenses. Although concerned with anecdotal reports, the Commission concluded that the evidence did not show that the sale of excessive amounts of contact lenses is a widespread problem.[1] Furthermore, a prescriber who receives a verification request for an excessive amount of lenses can contact the seller to prevent the sale from being completed.

The Commission recently has taken enforcement action with respect to unlawful conduct by a seller. Specifically, the Commission recently announced an enforcement action against a contact lens seller challenging the sale of contact lenses without a valid prescription. The order banned

[1] NPRM at 88549-50; *see also* Vision Council, U.S. Optical Market Eyewear Overview 13 (2018), https://www.ftc.gov/sites/default/files/filefield_paths/steve_kodey_ppt_presentation.pdf (noting that 82% of contact lens users had an eye exam within the last 12 months and over 95% had an exam within the last two years)

the defendant from selling contact lens and imposed a $575,000 civil penalty. *U.S. v. Duskin*, No. 1:18-cv-07359 (N.D. Cal. Dec. 6, 2018).

How often has the FTC acted on this important safety issue?

As discussed in the response to question 5.b, the Commission does not believe that the evidence shows that excessive sale of contact lenses is a widespread problem. However, the Commission recognizes the importance of patient safety. Staff will continue to monitor the marketplace and, if appropriate, take action.

6. **Many businesses are increasingly dependent on digital platforms that they do not own or operate to connect with customers.**

    a. **With current statutory authorities in mind, what can be done to protect consumers if companies that operate these platforms offer subsidiary business products and restrict or disadvantage competitors with similar businesses on these platforms? What is the FTC doing to curtail it?**

    b. **One example of how a platform operator might harm consumers is by prohibiting businesses from communicating with their customers through that platform. Do you believe that this sort of behavior must be addressed and, if so, does the FTC currently have the statutory authority to do so?**

Please see the answer to question 2.

7. **It has been brought to my attention that the leading internet browser has been considering a major change in what type of information is available to consumers in their product, reducing the available information that consumers use to defend themselves against a host of online threats like phishing and content spoofing.**

    a. **As the agency charged with protecting our nation's consumers and enforcing our data privacy laws, do you have concerns about what this practice means for consumers and their data privacy and security?**

    b. **Have you discussed this issue with the browsers or asked them to explain their changes and how they will impact consumer safety online? If not, do you intend to?**

Consumers' secure online experiences depend on many factors, and the ecosystem continues to evolve quickly. The Commission is committed to promoting consumer safety online and will monitor these changes to evaluate whether they are likely to harm consumers.

In addition to our enforcement work, detailed in the Commission's written testimony, we engage in extensive consumer education, examples of which you may find here: https://www.consumer.ftc.gov/articles/0009-computer-security.

The Honorable Robert E. Latta (R-OH)

1. **Commissioner Wilson, to date companies have failed to adequately explain to consumers how their information is collected, used, and often shared online. I believe any federal privacy bill must increase transparency.**

    a. **Can you speak to why transparency is important?**

Transparency with respect to data collection, use, and sharing practices is important for multiple reasons. First, transparency helps to facilitate informed decisions whereby a consumer can choose to provide their data to those businesses whose data practices comport with the consumer's preferences and expectations. Second, transparency promotes competition by enabling consumers to compare and contrast businesses' data practices and enabling businesses to compete based on their willingness and ability to meet consumers' preferences and expectations. Third, transparency promotes accountability by providing a basis for the FTC and other stakeholders to be able to take action to hold businesses accountable if their actual practices do not comport with their stated practices. Finally, the process of publicly committing to data practices serves an important internal purpose. This process typically requires companies to examine and confirm their practices to ensure compliance with public commitments.

Senate Committee on Commerce, Science, and Transportation
"Oversight of the Federal Trade Commission"
November 27, 2018
Questions for Rohit Chopra, Commissioner, Federal Trade Commission

Senator Blumenthal Questions for the Record

"Oversight of the Federal Trade Commission" – Senate Committee on Commerce, Science, and Transportation Subcommittee on Consumer Protection, Product Safety, Insurance, and Data Security

Privacy Rules

We know that Americans care about privacy – that they eagerly want these rights. We need baseline rules. Companies should not store sensitive information indefinitely and use that data for purposes that people never intended. Federal rules must set meaningful obligations on those that handle our data. We must enable consumers to trust and control their personal data.

Questions for all Witnesses:

Question 8. Do you support providing state AGs with the power to enforce federal privacy protections and would you commit to working with state AGs?

> Yes. There is precedent for state attorney general enforcement of federal privacy law. For example, state attorneys general have the authority to take action under the Children's Online Privacy Protection Act. However, this should not necessarily be a substitute for state attorneys general enforcing their own state laws protecting citizen data.

Question 9. Why is it important that the FTC have rulemaking authority when it comes to privacy? Where best would rulemaking be applied?

> If privacy rules cannot evolve with changing technology, this will threaten fair competition and fair treatment of consumers.
>
> For example, the last major privacy legislation, COPPA, was in 1998. If we did not have rulemaking authority, we would not have been able to make critical updates as the landscape evolved to mobile apps. Additionally, rulemaking means that the public will weigh in and help shape how it works. I believe in Joy's Law – "no matter who you are, most of the smartest people work for someone else," – coined by Sun Microsystems co-founder Bill Joy. We need the input of the best researchers, engineers, entrepreneurs and the critically, the populations most at risk in privacy lapses.

Question 10. Do you believe elevating the Office of Technology Research and Investigation to the Bureau level would meaningfully help the FTC in addressing new technological developments across its mandates?

> The line between "consumer protection" and "competition" is very blurry in today's digital economy. Just as our lawyers and economists make substantial contributions to our mission, the FTC would benefit from additional employees with professionalized technical skills and capabilities. Elevating the staff from the Office of Technology Research and Investigation into a new Bureau of Technology would be one potential step in helping us rise to meet the challenge of how markets and business models work today.

Board Accountability

Questions for all Witnesses:

Question 12. What is the FTC doing to investigate and hold accountable individual board members and executives who knowingly assist their companies in committing fraud? What more should the FTC be doing in this regard?

> The FTC should focus on holding individual board members and executives accountable when they break the law. While individuals are typically pursued in smaller matters, I believe we should sharpen our focus on individuals in all investigations, regardless of the size of the firm. This is especially true for firms subject to an existing Commission order.

FTC Investigation of Algorithms

Section 6(b) of the FTC Act gives the agency broad investigatory and information-gathering powers. For example, in the 1970s the FTC used its Section 6(b) authority to require companies to submit product-line specific information, enabling the agency to assess the state of competition across markets.

The FTC has released reports on big data and the harms biased algorithms can cause to disadvantaged communities. These reports drew attention to the potential loss of economic opportunity and diminished participation in our society. Yet, information on how these algorithms work, and on the inputs that go into them, remains opaque.

Questions for all Witnesses:

Question 19. Where the FTC consider using its Section 6(b) investigative power to help us understand how these algorithms and black-box A.I. systems work – the biases that shape them, and how those can affect trade, opportunity, and the market?

> Black-box algorithms increasingly make decisions about our lives. This can raise serious concerns about fairness and civil rights. The FTC should consider a wide range of

potential studies to better understand how markets, technology, and business models work today.

FTC Consent Decree on Unrepaired Recalls

Most consumers probably do not know that, while *new* car dealers are prohibited from selling vehicles with open recalls, *used* car dealers are not. A recent FTC consent decree, which I strenuously disagreed with and is currently being scrutinized in the courts, allows the sale of used cars with unrepaired recalls. According to the consent decree, car dealers can advertise that cars with unrepaired safety recalls like a defective Takata airbag are "safe" or have passed a "rigorous inspection"—as long as they have a disclosure that the vehicle *may* be subject to an unrepaired recall and directs consumers on how they can determine the vehicle has an open recall.

Questions for all Witnesses:

Question 20. In your opinion, is a car with an open, unrepaired recall, a "safe" car? Why would the FTC allow unsafe cars to be advertised as "safe" and "repaired for safety," with or without a vague, contradictory and confusing disclaimer?

It is extremely concerning that American drivers are unknowingly purchasing used cars with open recalls. While we have pursued enforcement cases relating to deceptive advertising in the past, I am concerned that these actions without the threat of civil penalties do not do enough to deter this sort of behavior, which puts people on the road at risk. We should utilize the rulemaking authority granted to us in 2010 pursuant to Section 1029 of the Dodd-Frank Act to ensure that we can seek civil penalties on an auto dealer's first offense.

Question on Non-Compete Clauses

I am concerned about the growth of non-compete clauses, which block employees from switching jobs to another employer in the same sector for a certain period of time. These clauses weaken workers' bargaining power once they are in the job, because workers often cannot credibly threaten to leave if their employer forces refuses to give them a raise or imposes poor working conditions. According to the Economic Policy Institute, roughly 30 million workers – including one in six workers without a college degree – are now covered by non-compete clauses.

The consensus in favor of addressing non-compete clauses is growing. For example, just this past December, an interagency report indicated that non-compete clauses can be harmful in certain contexts, such as the healthcare industry. Yet, the FTC has not yet undertaken forceful action. In September, Commissioner Chopra suggested that the FTC use its rulemaking authority to "remove any ambiguity as to when non-compete agreements are permissible or not."

Questions for all Witnesses:

Question 23. Do you agree with the proposal that the FTC use its rulemaking authority to address non-compete clauses? I invite you to explain your reasoning regarding your stance.

> The prevalence of non-compete clauses are a significant concern. Firms may be using these clauses to suppress wages and impede a competitive labor market. I support examining the use of all tools, including rulemaking, to address concerns of anticompetitive conduct with respect to non-compete clauses and other terms and conditions in worker and independent contractor agreements.

Question on Local Merger Enforcement

Even though big national mergers typically garner the most media attention, smaller mergers can often raise monopoly concerns on the local level. This can be true in the healthcare industry, for example. In November, Commissioner Simons told me: "Some local mergers may be too small to require Hart-Scott-Rodino premerger notification, but may still have anticompetitive effects."

Questions for all Witnesses:

Question 24. Would you agree with me that Hart-Scott-Rodino premerger notifications help antitrust enforcers catch concerning mergers?

> Yes.

Question 25. What sort of anticompetitive effects might be raised by local mergers even when those mergers are too small to require Hart-Scott-Rodino premerger notification?

> Hospitals and Main Street retail are some of the foundations of a local economy. Mergers like these that are not subject to the requirements under the HSR Act can be just as anticompetitive as mergers that are. They can lead to higher prices and less access to necessities like food and health care.

Question 26. What action would you recommend either the FTC or Congress take in order to assist federal and state antitrust enforcers in catching local mergers that raise anticompetitive concerns?

> This is an important issue for local economies across the country. We should closely examine whether our reporting regime adequately captures transactions that lead to potentially anticompetitive effects. I look forward to working with you and other interested offices on this issue.

Question on Horizontal Shareholding

Recent research has raised questions about whether horizontal shareholding harms competition in our economy. I would like to understand your view on this ongoing research.

Questions for all Witnesses:

Question 27. Do you believe that horizontal shareholding raises anticompetitive concerns?

> This is a new area of concern that we need to learn more about. There is an emerging literature about this topic that focuses on passive investment vehicles. I am also interested in how holdings by private pools of capital, such as private equity and hedge funds, could raise a special set of anticompetitive concerns.

Question 28. Do you believe that our antitrust laws can be used to address the anticompetitive concerns raised by horizontal shareholding?

> I do not know if our laws are sufficient to address potential problems. Our 21st Century Hearings on Competition and Consumer Protection are covering this issue. I plan to study the record on this issue closely to assess any anticompetitive concerns.

Question 29. What, if anything, are you doing to address any potential harms of horizontal shareholding?

> I am still gathering information to determine the appropriate course of action.

Questions for the Record from Sen. Cortez Masto
Senate Commerce Hearing on
Oversight of the Federal Trade Commission
Tuesday, November 27, 2018 at 2:30 p.m. in SR 253

The Honorable Rohit Chopra, Commissioner, Federal Trade Commission

Pet Leasing

I appreciate the Commission's attention to my request with six of my colleagues for the FTC to investigate the practice of pet leasing that is leading some consumers into confusing or deceptive contractual obligations that cause them to have an issue with their beloved pet and negatively impact their financial status, such as credit scores, for far into the future. This is an issue that is a little under the radar but needs strong oversight and attention under your deceptive practices mandate if there are concerning financial practices being discovered.

Question 1: Can I get a further commitment from you all to keep my office informed of actions and determinations you all may make pertaining to this concerning issue and the Humane Society and Animal Legal Defense Fund's formal petition to the Commission?

> Consistent with the FTC's Rules of Practice, we are happy to provide your office with updates on this topic.

Bureau of Technology

Former Commissioner Terrell McSweeny has suggested creating a Bureau of Technology at the FTC.

Question 1: Does the Commission have sufficient resources and staffing to protect consumer privacy in the digital age?

> Given the challenges faced in the digital marketplace, more resources would help advance the goal of protecting consumer privacy and competition.

Question 2: Do support the establishment of a Bureau of Technology?

> Just as our lawyers and economists make substantial contributions to our mission, the FTC would benefit from additional employees with professionalized technical skills and capabilities. Establishing a new Bureau of Technology would be one important step in helping us rise to meet the challenge of how markets and business models work today.

Robocalls

Obviously protecting consumers from fraud is a fundamental tenet of the FTC. And I applaud your work in both the education and enforcement sectors of protecting consumers. But one area we all are still struggling to stay ahead of the curve on is robocalls. That's why I have legislation, the Deter Obnoxious, Nefarious, and Outrageous Telephone Calls, or DO NOT Call Act with four of my Senate colleagues. It would increase the deterrent against illegal robocalls

by imposing a potential criminal penalty rather than just civil fines. While these tools would be more for the Federal Communications Commission, we are obviously interested in fighting this problem on all fronts.

Question 1: Would you agree that in addition to finding more effective technological tools to fight this problem, that this kind of enhanced deterrent needs to receive serious consideration in Congress to help provide regulators the tools to hold bad actors accountable for this persistent nuisance and scurrilous action by scammers?

Yes, more tools to hold bad actors accountable would be helpful.

Question 2: Are there additional actions Congress should be considering related to this specific challenge?

Congress should consider repealing the common carrier exemption in the FTC Act. In addition, Congress may need to weigh whether criminal penalties are appropriate for the worst abusers of robocalling.

Data Minimization vs Big Data

For all commissioners:

A topic that has come up a lot during our discussions on privacy is data minimization. This is a concept that I have been considering on as I work on developing a comprehensive data privacy bill. As you're aware, this is the idea that businesses should only collect, process, and store the minimum amount of data that is necessary to carry out the purposes for which is was collected. There are obvious advantages to this as it minimizes the risk of data breaches and other privacy harms. At the same time, big data analytics are going to be crucial for the future and play an important role in smart cities, artificial intelligence, and other important technologies that fuel economic growth. I think it is important to find a balance between minimization and ensuring that data, especially de-identified data, is available for these applications.

Question 1: Can you describe how you view this balance and how we in Congress can ensure that people's data is not abused but can still be put to use in positive ways?

Data minimization and big data are complementary. Some assume that "big data" means that more is simply better, but firms collecting massive amounts of data face practical, computational, and architectural constraints.

We need to ensure that when firms accumulate massive amounts of data, they do not engage exclusionary conduct and other anticompetitive practices. This is also important in merger review, where data is a critical asset. We will also need to take steps to ensure that there are mechanisms to ensure that big data does not lead to discrimination or reinforce biases.

General Privacy Recommendations

Question 1: While privacy was a significant topic of the oversight hearing, as we look to develop a bill, can you specifically lay out some of the top priorities you individually would like to see included and what do you think gets overlooked in the conversations policymakers have with allowing for future innovations and yet raising the bar for protecting consumers?

> Technology moves quickly. The best thing we can do is make sure that this movement is happening within a competitive market that ensures autonomy, choice, and individual rights. We need to take aim at all of the structural incentives and business models that can distort competition and infringe on personal privacy.
>
> For example, we need to address "terms of service" that include one-sided terms that lead to a race to the bottom. Also overlooked is the role of data in mergers and acquisitions. We need to look carefully at whether firms are combining data to erode privacy and exclude competition. We also need to examine whether there are conflicts of interest in certain types of business models that harm both users and competitors.

Question 2: Can you also outline the optimal role you see for our state Attorneys General in this privacy enforcement process?

> State Attorneys General play a critical law enforcement role and are often times in a better position to quickly identify and respond to problems that impact citizens of their states than federal law enforcement is. Any privacy enforcement regime should recognize and account for this reality and enable states to act as necessary to protect their citizens. In addition to enforcing their own state law protecting citizen data, I support state attorney general enforcement authority of federal privacy protections.

Data Privacy – Binding Contracts?

We live with this time information inundation where people can't really read privacy policies and fairly agree to their content. But, we all know that basically no one reads privacy policies -- and indeed, no reasonable person should read privacy policies, because according to research done at Carnegie Mellon, it would take 76 work days to read all of the privacy policies on encounters in a year. Companies take advantage of the fact that no one reads privacy policies to bury terms in those policies that no rational consumer would agree to (such as Grindr selling its users HIV status to third parties).

Question 1: Should these terms of service be binding contracts?

> No. "Terms of service" include one-sided terms that are contributing to a race to the bottom. Congress will need to ensure that terms of service are not used to strip away rights and erode competition.

Privacy Risky Communities/Groups

Question 1: Do you think that certain communities or groups are any more or less vulnerable to privacy risks and harms?

Yes. For example, communities of color have been subject to "digital redlining" where a company uses surveillance to build a profile that infers race, and then restricts the opportunities that they can see based on that profile. Privacy isn't an abstract concept for people whose personal information is used to restrict, for example, housing or job opportunities.

Question 2: Should privacy law and regulations account for such unique or disparate harms, and if so, how?

It is critical that Americans are able to vindicate their civil rights. Privacy law and regulations should affirmatively address protecting civil rights. We need to take a hard look at how behavioral advertising might infringe on our civil rights. We also need to make sure that algorithms do not operate in the shadows that are discriminatory by design.

Immediate Civil Penalties Authority

Noting from your FTC testimony, "*Section 5 (of the FTC Act), however, is not without limitations. For example, Section 5 does not provide for civil penalties, reducing the Commission's deterrent capability."*

Question 1: While I appreciate the long term successes of the FTC in many respects to investigate data security matters, what are your thoughts to whether there is enough of a deterrent effect with Section 5 authority when you can't immediately enforce against those who misuse data with civil penalties right from the start, rather than as the result of often times flagrant offenses to their already establish consent decrees?

Without civil penalties, companies with unlawful security practices get a free bite at the apple. Strong civil penalties and clear rules of the road are critical to deter lax security practices.

Written Question Submitted by Hon. Margaret Wood Hassan to Commissioner Chopra:

Question 3. The heroin, fentanyl, and opioid crisis is the most pressing public health and safety challenge facing both my home state of New Hampshire and our country, and it is taking a massive toll on our communities, our workforce, and our economy.

This crisis affects people from all walks of life in every corner of my state and the entire country, and it requires an "all-hands-on-deck" response, including from agencies that may not traditionally be focused on these issues.

Would you please describe the FTC's efforts to regulate unscrupulous treatment programs? More specifically, are you able to discuss illegal lead generation and what the FTC is doing to combat

this practice that harms those who have taken the first step towards confronting substance use disorder?

Across the country, opioid addiction is tearing apart the lives of individuals, their families, and their communities. It is critical that the FTC do everything in its power to tackle this problem. As I noted in a letter to the House Energy and Commerce Committee, I am particularly concerned about lead generators and body brokers who collude with treatment centers to target addiction sufferers. Rather than helping these sufferers, these entities gouge them, their families, and their insurance companies. Last year, the Opioid Addiction Recovery Fraud Prevention Act granted the FTC new authority for combatting those who seek to profit from this epidemic, and is essential that we exercise this authority with vigor.

Questions for the Record- Senator Amy Klobuchar
Oversight of the Federal Trade Commission

Question for Commissioners Rohit Chopra, Noah Phillips, Rebecca Slaughter and Christine Wilson of the Federal Trade Commission

The Federal Trade Commission's budget has remained flat for the past several years despite increasing demands on your agency's resources, including a significant rise in merger filings.

- If additional resources were made available to the Federal Trade Commission, how would you deploy those resources to advance the agency's consumer protection and competition missions?

The Commission oversees vast sectors of the economy with a staff significantly smaller than what it was a generation ago. We are in particular need of additional technologists who can analyze emerging antitrust and consumer protection challenges, and attorneys prepared to take firms to court when they break the law.

Subcommittee on Consumer Protection, Product Safety, Insurance, and Data Security
"Oversight of the Federal Trade Commission"
Senator Udall Questions for the Record
November 27, 2018

To all Commissioners
Privacy
Question 1. Do you support strong civil penalties for consumer privacy violations?

Yes. Absent real penalties, there will be no deterrence for bad actors.

Question 2. The California Consumer Protection Act goes into effect in January 2020. As Congress considers pre-emption of that state law, what additional authority should we give the FTC to ensure that consumer privacy adequately is protected?

Any federal privacy law should create more competition, give users meaningful rights, and come with real consequences for violators. At the same time, I am concerned that broad preemption of state laws would do more harm than good. We look forward to working with you closely as these efforts progress.

Question 3. A recent *New York Times* analysis found that both the Apple App Store and the Google Play Store have apps in their respective children's or family sections that potentially violate COPPA.[1] What specific role should platform owners play to ensure COPPA compliance on their platforms?

The 2012 revisions to the COPPA rule make platforms liable if they have actual knowledge of collecting personal information from a child-directed app. We will need to keep a close eye on platforms to ensure that they are not purposely turning a blind eye to violations of COPPA. We will also need to continue reviewing the COPPA rules on a regular basis, given the influence of the major tech platform companies.

Question 4. Compliance for mobile apps may be hard to achieve against fly-by-night operators overseas who do not care if their apps violate U.S. law. How can the Vtech Electronics investigation and civil penalty serve as an example for how the FTC can hold foreign app developers responsible for violating COPPA?

The FTC will need to keep a close eye on foreign operators collecting information on American users. I support continued efforts to monitor and hold violators accountable.

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[1] Valentino-DeVries, J., Singer, N., Krolick, A., Keller, M. H., "How Game Apps That Captivate Kids Have Been Collecting Their Data." *The New York Times.* 2018, September 12. https://www.nytimes.com/interactive/2018/09/12/technology/kids-apps-data-privacy-google-twitter.html

Question 5. The COPPA safe harbor organizations must submit an annual report to the Federal Trade Commission, Can you share the reports from the last 5 years?

Given that the Commission voted to designate these organizations, I support the sharing of performance data submitted by COPPA safe harbor organizations, subject to law and regulation governing confidentiality. I have reviewed these reports and am concerned that these organizations are not engaging in fulsome monitoring and collection of consumer complaints.

Senate Committee on Commerce, Science, and Transportation
"Oversight of the Federal Trade Commission"
November 27, 2018
Questions for Rohit Chopra, Commissioner, Federal Trade Commission

Written Questions Submitted by Chairman John Thune to Honorable Rohit Chopra

Question 1. Vertical mergers such as the merger between AT&T and Time Warner have garnered some attention lately. The Federal Trade Commission (FTC) and the Department of Justice (DOJ) have not updated vertical merger guidance since 1984. Do you believe that the FTC and DOJ should issue new guidance on vertical mergers?

> Vertical mergers can threaten competition. For example, as I noted in my dissenting statement in the *Fresenius/NxStage* matter, vertical mergers can make it tougher for a new business to get off the ground.
>
> Senior officials in the antitrust agencies have openly communicated that the 1984 guidelines do not provide useful guidance.[1]
>
> It is troubling that the agencies have published guidance that we do not actually follow. I am very open to the idea of updating these guidelines.

Question 2. Government lawsuits to stop mergers are litigated using different procedures depending on which agency, the FTC or DOJ, handles the case. Do you think Congress should take action to ensure that agencies follow the same procedures, or do you support another approach?

> While I appreciate the theoretical concerns that have been raised, it does not appear that this has much real world impact. There are broader issues that stem from the FTC and DOJ having concurrent jurisdiction in merger review that Congress might consider giving a higher priority for examination. For example, thought should be given to ways to improve our clearance process.

Question 3. Should Congress amend Section 5(n) of the FTC Act, which addresses unfair practices, to clarify what constitutes "substantial injury?" If so, how?

> Both the courts and the Commission have identified various types of injury that meet this criterion. If there are additional types of injury that Congress wishes to codify, I am happy to work with you to determine how to best achieve those goals.

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[1] *See* D. Bruce Hoffman, Vertical Merger Enforcement at the FTC, Prepared Remarks for Delivery at the Credit Suisse 2018 Washington Perspectives Conference (Jan. 10, 2018), *available at* http://www.ftc.gov/system/files/documents/public_statements/1304213/hoffman_vertical_merger_speech_final.pdf.

Question 4. Should the FTC issue more guidance to marketers on the level of support needed to substantiate their claims? If so, when do you anticipate that such guidance could be issued?

> Both consumers and marketers that are interested in complying with the law benefit from FTC guidance. Given case law, the Commission's Policy Statement on Advertising Substantiation, and other Commission statements, there is certainly an array of information to assist marketers with compliance, but I am always open to hearing ways to improve information to help law-abiding businesses.

Question 5. In June, the 11th Circuit vacated the Commission's data security order against LabMD. What effect, if any, will this have on the Commission's data security orders going forward?

> Given this decision, as well as feedback from stakeholders and our recent hearing on data security, we are actively engaged in discussions on how our orders can provide optimal deterrence under our existing Section 5 authority.

Question 6. If federal privacy legislation is passed, what enforcement tools would you like to be included for the FTC?

> Federal privacy legislation needs enforcement teeth to be effective. In addition to strong civil penalty authority, it would be useful for the FTC to have independent litigating authority. Commission fines must be strong enough to realign market incentives, rather than representing a cost of doing business. I look forward to working with Congress to identify additional tools and authorities to make any legislation effective.

Question 7: During the hearing, I asked the Chairman whether the FTC would consider using its section 6(b) authority to study consumer information data flows, specifically sending requests to Google, Facebook, Amazon, and others in the tech industry to learn what information they collect from consumers and how that information is used, shared, and sold. I believe the FTC's section 6(b) authority could provide some much needed transparency to consumers about the data practices of large technology companies, and help identify areas that may require additional attention from lawmakers. What are your views with respect to the FTC potentially conducting a study pursuant to section 6(b) of the Federal Trade Commission Act on the data collection, use, filtering, sharing, and sale practices of large technology companies such as Google, Facebook, Amazon, and others?

> Yes, the FTC should pursue a 6(b) study about the practices in the technology sector. This will help advance our competition and consumer protection mission. The FTC's research function is fundamental to how we should work to make markets fair and effective.

Questions for the Record from Senator Jerry Moran:

Questions for the Honorable Rohit Chopra, Commissioner, Federal Trade Commission

1. Section 5(a) of the *FTC Act*, which prohibits "unfair or deceptive acts or practices in or affecting commerce" is the legal basis for a body of consumer protection law that covers data privacy and security practices. The FTC has brought hundreds of cases to date to protect the privacy and security of consumer information held by companies of all sizes under this authority. The FTC staff recently submitted comments to the National Telecommunications and Information Administration (NTIA) that clearly indicate the FTC staff's view that the FTC would be the appropriate agency to enforce a new comprehensive privacy legislative framework. Do you agree with the staff's view?

It is clear that data is playing an ever-increasing role in shaping all markets. From banking to real estate to travel to health care, every industry is relying on more and more data. Federal legislation should avoid problems of regulatory arbitrage that can impede federal enforcement. Even if the FTC has enforcement authority over a new law, it will be critical to ensure that this supplements, and does not supplant, the role of state law enforcement.

2. As Congress evaluates opportunities to create meaningful federal legislation to appropriately ensure privacy of consumers' data, there have been suggestions to increase the FTC's authorities to enforce in this space. Will you commit to working with this Committee in measuring what resources, if any, will be needed to allow the agency to enforce any additional authorities that may or may not be provided in federal legislation?

Yes.

3. Sharing responsibilities with the DOJ's Antitrust Division, the FTC enforces antitrust law in a variety of sectors as described by your testimony. While the vast majority of premerger filings submitted to enforcement agencies do not raise competition concerns, the FTC challenged 45 mergers since the beginning of 2017, and of those, the FTC only voted to initiate litigation to block five transactions. Would you please describe the resource needs of the agency associated with hiring qualified outside experts to support its litigation efforts? Please explain how developments in the high-technology sector are accounted for in the FTC's decision-making process related to antitrust enforcement.

Expert spending is costly. Compared to other statutes we enforce, our antitrust laws lack clear presumptions and rules, making litigation lengthy and resource-intensive. Given the state of the law, it is necessary to ensure adequate resources for litigation.

To be seen as an effective and credible enforcer, we must have enough qualified experts to collect and analyze data on business practices in the technology sector.

4. Earlier this year, I introduced legislation called the *Senior Scams Prevention Act* with Senator Bob Casey to combat continued and increasingly complex attempts to defraud one of the nation's most vulnerable populations, our senior community. This bill seeks to ensure retailers, financial institutions and wire transfer companies have the resources to train employees to help stop financial frauds and scams on seniors. Would you agree that awareness and education, guided by "best practices" established by industry and government partners, is a valuable tool in preventing consumer harms against our nation's seniors?

Older Americans are disproportionately affected by fraud, and any effort to enlist industry and government in protecting them from the worst abuses is commendable. Educational initiatives can complement aggressive enforcement of those who defraud older American consumers.

5. In its comments submitted to NTIA on "Developing the Administration's Approach to Consumer Privacy," the FTC discussed the various cases that it has taken up to address privacy-related harms to consumers, and it specifically noted four categories of harms: financial injury, physical injury, reputational injury, and unwanted intrusion. Could you please briefly describe each category while noting any FTC enforcement considerations specific to that type of harm?

The FTC staff comment identified financial injury, physical harm, reputational injury, and unwanted intrusion as four categories of privacy harms that FTC enforcement actions have acted to address. *Financial injury* is the injury that an act or practice causes to a consumer's financial position. The NTIA comment notes that financial injury manifests in a variety of ways, including through fraudulent charges, delayed benefits, expended time, opportunity costs, fraud, and identity theft. Consumers may also suffer financial injury when they purchase a product sold through deceptive representations. *Physical injuries* include risks to individuals' health or safety, including the risk of stalking or harassment. *Reputational injury* involves disclosure of damaging private facts about an individual. And *unwanted intrusion* includes both activities that intrude on the sanctity of people's homes or intimate lives and commercial intrusions.

Through its enforcement of particular statutes or rules, like the Fair Debt Collections Practices Act, Telemarketing Sales Rule, and COPPA, the FTC vindicates particular legislative and regulatory judgments meant to prevent harms such as these.

This effort to categorize privacy harms should not be seen as creating an exclusive list or harms, nor should it be read to exclude from FTC scrutiny activities that may not directly implicate these types of harm. For example, the FTC Act prohibits companies from making certain misrepresentations in connection with privacy and data security. To the extent that a company acts in a manner that is deceptive under the law, the FTC must be able to take appropriate action.

6. In the FTC's recent comments in NTIA's privacy proceeding, the FTC said that its "guiding principles" are based on "balancing risk of harm with the benefits of innovation and competition." Would you describe what this means, how you strike this balance, and how it is applied in practice under your Section 5 authority in the *FTC Act*?

The FTC's staff comment reflects the fact that many of the FTC's enforcement efforts related to privacy and data security have proceeded under the FTC's Section 5 unfairness authority. Section 5(n) of the FTC Act requires that the FTC weigh the actual or likely substantial injury of an act or practice against countervailing benefits to consumers or competition. The FTC must be sure that it is not over- or under-estimating either side of the balance. Of course, Section 5's deception standard does not require this balancing exercise.

7. The FTC's comments pertaining to "control" in NTIA's privacy proceeding stated, "Choice also may be unnecessary when companies collect and disclose de-identified data, which can power data analytics and research, while minimizing privacy concerns." How would the FTC suggest federal regulation account for de-identified data, if at all?

While companies may sometimes claim that data has been "de-identified," in some cases these data can be easily "re-identified." We would be happy to work with you should you choose to specifically legislate on this issue.

8. Your testimony indicated that continued technological developments allow illegal robocallers to conceal their identities in "spoofing" caller IDs while exponentially increasing robocall volumes through automated dialing systems. These evolving technological changes mean that the critical law enforcement efforts of the FTC cannot be the only solution, and your testimony described the additional steps the FTC is taking to develop innovative solutions to these issues. Would you please describe the process and outcomes of the four public challenges that the FTC held from 2013 to 2015? Are there plans to incentivize innovators to combat robocalls in the future?

The FTC's process for its robocall challenges included public announcements, committees with independent judges, and, in some cases, cash prizes awarded under the America COMPETES Reauthorization Act.[2] To maximize publicity, the FTC announced each of its four challenges in connection with public events. The FTC announced the first robocall challenge at the FTC's 2012 Robocall Summit. In 2014, the FTC conducted its second challenge, "Zapping Rachel" at DEF CON 22. The FTC conducted its third challenge, "DetectaRobo," in June 2015 in conjunction with the National Day of Civic Hacking. The final phase of the FTC's fourth public robocall challenge took place at DEF CON 23. When the FTC held its first public challenge, there were few, if any, call blocking or call labeling solutions available for consumers. Today, two FTC challenge winners, NomoRobo and Robokilller, offer call blocking applications, and there are hundreds of mobile apps offering call blocking and call labeling solutions for cell phones. Many home telephone service providers also now offer call blocking and call labeling

[2] *See* "Details About the FTC's Robocall Initiatives" at https://www.consumer.ftc.gov/features/feature-0025-robocalls

solutions. The FTC will not hesitate to initiate additional innovation contests if it identifies further challenges that could meaningfully benefit consumers by reducing the harm caused by illegal robocalls.

In addition to developing call blocking and call labeling technology, the telecom industry has also developed call verification technology, called STIR/SHAKEN, to help consumers know whether a call is using a spoofed Caller ID number and assist call analytics companies in implementing call blocking and call labeling products. If widely implemented and made available to consumers, the STIR/SHAKEN protocol should minimize unwanted calls. Certain industry members have begun to roll out this technology and it is in beta testing mode. We will keep a close eye on this industry initiative and continue to encourage its implementation.

a. Would you please describe the FTC's coordination efforts with state, federal, and international partners to combat illegal robocalls?

The FTC frequently coordinates its efforts with its state, federal, and international partners. The FTC often brings robocall enforcement actions with states as co-plaintiffs. For example, in the FTC's case against Dish Network, litigated for the FTC by the Department of Justice, the FTC brought the case jointly with California, Illinois, North Carolina, and Ohio. Collectively, the states and the FTC obtained a historic $280 million trial verdict.[3]

The FTC also coordinates outreach and education with the FCC. In 2018, the agencies co-hosted two robocall events— a policy forum that discussed technological and law enforcement solutions to the robocall problem[4] and a public expo that allowed companies offering call blocking and call labeling services to showcase their products for the public.[5] Additionally, the FTC and FCC hold quarterly calls, speak regularly on an informal basis, and coordinate on a monthly basis with our state partners through the National Association of Attorneys General. The FTC also engages with international partners through participation in international law enforcement groups such as the International Consumer Protection Enforcement Network, International Mass Marketing Fraud Working Group, and the Unsolicited Communications Network (formerly known as the London Action Plan).

9. Your testimony described the limitations of the FTC's current data security enforcement authority provided by Section 5 of the *FTC Act* including: lacking civil penalty authority, lacking authority over non-profits and common carrier activity, and missing broad APA rulemaking authority. Please describe each of these limitations and how adjusted FTC

[3] Press Release, FTC and DOJ Case Results in Historic Decision Awarding $280 Million in Civil Penalties Against Dish Network and Strong Injunctive Relief for Do Not Call Violations (June 6, 2017), https://www.ftc.gov/news-events/press-releases/2017/06/ftc-doj-case-results-historic-decision-awarding-280-million-civil. The case is on appeal before the Seventh Circuit Court of Appeals.

[4] Press Release, FTC and FCC to Host Joint Policy Forum and Consumer Expo to Fight the Scourge of Illegal Robocalls (Mar. 22, 2018), https://www.ftc.gov/news-events/press-releases/2018/03/ftc-fcc-host-joint-policy-forum-illegal-robocalls.

[5] Press Release, FTC and FCC to Co-Host Expo on April 23 Featuring Technologies to Block Illegal Robocalls (Apr. 19, 2018), https://www.ftc.gov/news-events/press-releases/2018/04/ftc-fcc-co-host-expo-april-23-featuring-technologies-block-0.

authority to address these items would improve the protection of consumers from data security risks.

As a general matter, the FTC Act does not provide the Commission with the authority to seek civil penalties from first-time violators of Section 5. Providing the FTC with expanded civil penalty authority would assist the FTC in its efforts to deter illegal conduct. Without civil penalties, companies with unlawful privacy and security practices get a free bite at the apple. Strong civil penalties and clear rules of the road are critical to deter lax privacy and security practices.

The FTC Act excludes or exempts non-profits and common carriers from the FTC's jurisdiction, but non-profits and common carriers rely on consumer data just as other persons subject to the FTC's jurisdiction do. Broadened FTC authority that also covers non-profits and common carriers will eliminate opportunities for arbitrage and help ensure that persons collecting, storing, using, disposing of, or transporting consumer data do so in accordance with consistent rules.

The FTC Act provides the FTC with authority to issue rules that define with specificity acts or practices in or affecting commerce that are unfair or deceptive. Through this authority, the FTC could issue rules pertaining to data privacy and security. Unfortunately, this rulemaking must be conducted in accordance with the Magnuson-Moss Warranty Act, which adds time-consuming requirements to the rulemaking process that go well-beyond the requirements of the Administrative Procedure Act. Granting the FTC the authority to issue data security rules in accordance with the Administrative Procedure Act would allow the Commission to issue timely and appropriate rules that keep pace with technological development and seek civil penalties if companies violate them.

Senate Committee on Commerce, Science, and Transportation
"Oversight of the Federal Trade Commission"
November 27, 2018

The Honorable John Thune

Questions for Chairman Joseph J. Simons

1. **You recently attended the Second Annual Privacy Shield Review. Did the European regulators raise any concerns about the effectiveness of the program? Do you think Privacy Shield is operating effectively and will continue to be a valid means for businesses to transfer personal data to the United States from Europe?**

The European Commission (EC) issued its report on the Annual Review in December 2018. I agree with the ultimate conclusion of the EC report: Privacy Shield remains a robust program for protecting privacy and enabling transatlantic data flows. The report found that U.S. authorities continue to improve the program, highlighting the proactive approach to enforcement by the FTC. The EC raised concerns with the national security aspects of the program, specifically requesting the nomination of an Ombudsperson within the State Department. The Administration has since created and filled a Privacy Shield Ombudsperson position.

2. **Vertical mergers such as the merger between AT&T and Time Warner have garnered some attention lately. The Federal Trade Commission (FTC) and the Department of Justice (DOJ) have not updated vertical merger guidance since 1984. Do you believe that the FTC and DOJ should issue new guidance on vertical mergers?**

I believe that the 1984 Non-Horizontal Merger Guidelines do not reflect current scholarship and thinking on vertical merger enforcement.[1] They are significantly out of date. If we were to attempt to draft new guidelines, we would probably have to start from scratch, based on the practical learning and experience of more recent merger challenges and investigations.

Over the years, the Commission and its staff have provided substantial insight on vertical merger analysis through speeches and other policy work,[2] and through rigorous case selection.[3] The

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[1] *U.S. Dep't of Justice Non-Horizontal Merger Guidelines* (1984), https://www.justice.gov/sites/default/files/atr/legacy/2006/05/18/2614.pdf.

[2] *See, e.g.*, Bruce Hoffman, *Vertical Merger Enforcement at the FTC*, Remarks at Credit Suisse 2018 Washington Perspectives Conference (Jan. 10, 2018), https://www.ftc.gov/public-statements/2018/01/vertical-merger-enforcement-ftc (explaining the FTC's current analysis of proposed vertical mergers and highlighting the extent to which that analysis has moved beyond the 1984 Non-Horizontal Merger Guidelines).

[3] For example, the Commission recently challenged a vertical merger between Northrop Grumman, a leading provider of missile systems to the Department of Defense, and Orbital ATK, a key supplier of solid rocket motors. *In re Northrop Grumman*, Dkt. C-4652 (June 5, 2018), https://www.ftc.gov/enforcement/cases-proceedings/181-0005-c-4652/northrop-grumman-orbital-atk. *See also In re Sycamore Partners II, L.P., Staples, Inc., and Essendant Inc.*, Dkt. C-4667 (Jan. 25, 2018), https://www.ftc.gov/enforcement/cases-proceedings/181-0180/sycamore-partners-ii-lp-staples-inc-essendant-inc-matter (consent agreement resolving charges that a merger between Staples, the world's largest retailer of office products and related services, and Essendant, a wholesale distributor of office products, was likely to harm competition in the market for office supply products sold to small- and mid-sized businesses).

Commission is actively considering whether we – along with our sister agency, the Antitrust Division of the Department of Justice – should formally publish vertical merger guidelines. This topic is a key focus of the FTC's ambitious program of *Hearings on Competition and Consumer Protection in the 21st Century*.[4] Two panel discussions on vertical mergers were held in November 2018, and the Commission has invited public commentary on the topic.

3. **Government lawsuits to stop mergers are litigated using different procedures depending on which agency, the FTC or DOJ, handles the case. Do you think Congress should take action to ensure that agencies follow the same procedures, or do you support another approach?**

While I have no opinion as to whether Congress should take action, I note that there are significant benefits to the Commission's administrative litigation path; in particular, it provides the Commission an opportunity to develop important aspects of competition law. But if the FTC is denied a preliminary injunction in a merger matter in federal court, I do not believe the Commission should pursue that matter in administrative litigation. The Commission has not pursued an administrative proceeding following the denial of a preliminary injunction in federal court for over twenty years. I agree with this approach.

Separately, it is not clear to me whether it would be beneficial to prohibit the FTC from conducting an administrative proceeding while the parties to a merger remain unable to close their transaction for a significant period of time. Many transactions are subject to multijurisdictional reviews, whether by foreign competition authorities or state regulators. Under current law, the FTC can commence an administrative action while other reviews are pending. The FTC may delay an injunction action in federal court until other review processes are completed and the merger is imminent. This approach could have certain advantages that I believe are worth discussing when thinking about making changes to the Commission's process for challenging mergers.

In the recent *Tronox* case, the FTC was able to complete an administrative trial while the parties waited for foreign approvals.[5] Once those approvals were granted and the parties would have been able to close their transaction, the FTC filed suit in federal court seeking a preliminary injunction. The existence of the record from the FTC administrative proceeding allowed the parties to avoid a substantial discovery period in the federal proceeding, enabled the district court judge to substantially expedite the preliminary injunction hearing, and very likely reduced the overall time for the court to reach a decision. In this case, the injunction was granted. If the injunction had not been granted, the parties likely would have been able to close their transaction faster than if there had been no FTC administrative proceeding. To the extent there was duplication between the two proceedings, it appears to have been minor, and the matter was very likely resolved faster as a result. Certainly, it reduced cost and resource burdens on the federal district court.

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[4] FTC, *Hearings on Competition and Consumer Protection in the 21st Century*, https://www.ftc.gov/policy/hearings-competition-consumer-protection; *see also* FTC Workshop, *FTC Hearing #5: Competition and Consumer Protection in the 21st Century* (Nov. 1, 2018), https://www.ftc.gov/news-events/events-calendar/ftc-hearing-5-competition-consumer-protection-21st-century.

[5] *FTC v. Tronox Ltd. and Nat'l Titanium Dioxide Co. Ltd. (Cristal)*, No. 1:18-cv-01622 (D.D.C. Sept. 12, 2018), https://www.ftc.gov/enforcement/cases-proceedings/171-0085/tronox-limited-et-al-ftc-v.

4. **Should Congress amend Section 5(n) of the FTC Act, which addresses unfair practices, to clarify what constitutes "substantial injury?" If so, how?**

No. Neither the Commission, nor the courts that have ruled on this issue, have struggled to interpret that element of Section 5(n). Substantial injury can be financial, physical, reputational, or unwanted intrusions. Financial injury can manifest in a variety of ways: fraudulent charges, delayed benefits, expended time, opportunity costs, fraud, and identity theft, among other things.[6] Physical injuries include risks to individuals' health or safety, including the risks of stalking and harassment.[7] Reputational injury involves disclosure of private facts about an individual, which damages the individual's reputation. Tort law recognizes reputational injury.[8] The FTC has brought cases involving this type of injury, for example, in a case involving public disclosure of individuals' Prozac use[9] and public disclosure of individuals' membership on an infidelity-promoting website.[10] Finally, unwanted intrusions involve two categories. The first includes activities that intrude on the sanctity of people's homes and their intimate lives. The FTC's cases involving a revenge porn website,[11] an adult-dating website,[12] and companies spying on people in their bedrooms through remotely-activated webcams fall into this category.[13] The second category involves unwanted commercial intrusions, such as telemarketing, spam, and harassing debt collection calls.

5. **Should the FTC issue more guidance to marketers on the level of support needed to substantiate their claims? If so, when do you anticipate that such guidance could be issued?**

The FTC has issued extensive guidance over the years to help marketers determine the level of support needed to substantiate claims. The Commission first articulated the relevant factors used to determine the level of evidence required to substantiate objective performance claims in *Pfizer, Inc.*[14] Those factors included the type of claim, type of product, consequences of a false claim, benefits of a truthful claim, cost of developing substantiation for the claim, and amount of substantiation experts in the field believe is reasonable. The Commission and the courts have reaffirmed this standard many times since

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[6] *See, e.g.*, *TaxSlayer, LLC*, No. C-4626 (F.T.C. Oct. 20, 2017), https://www.ftc.gov/enforcement/cases-proceedings/162-3063/taxslayer (alleging delayed benefits, expended time, and risk of identity theft).

[7] *See, e.g.*, *FTC v. Accusearch, Inc.*, No. 06-CV-0105 (D. Wyo. May 3, 2006), https://www.ftc.gov/enforcement/cases-proceedings/052-3126/accusearch-inc-dba-abikacom-jay-patel (alleging that telephone records pretexting endangered consumers' health and safety).

[8] Under the tort of public disclosure of private facts (or publicity given to private life), a plaintiff may recover where the defendant's conduct is highly offensive to a reasonable person. Restatement (Second) of Torts § 652D (1977).

[9] *Eli Lilly and Co.*, No. C-4047 (F.T.C. May 8, 2002), https://www.ftc.gov/enforcement/cases-proceedings/012-3214/eli-lilly-company-matter.

[10] *FTC v. Ruby Corp., et al.*, No. 1:16-cv-02438 (D.D.C. Dec. 14, 2016), https://www.ftc.gov/enforcement/cases-proceedings/152-3284/ashley-madison.

[11] *FTC v. EMP Media, Inc., et al.*, No. 2:18-cv-00035 (D. Nev. Jan. 9, 2018), https://www.ftc.gov/enforcement/cases-proceedings/162-3052/emp-media-inc-myexcom.

[12] *FTC v. Ruby Corp., et al.*, No. 1:16-cv-02438 (D.D.C. Dec. 14, 2016), https://www.ftc.gov/enforcement/cases-proceedings/152-3284/ashley-madison.

[13] See Press Release, *FTC Halts Computer Spying* (Sept. 25, 2012), https://www.ftc.gov/news-events/press-releases/2012/09/ftc-halts-computer-spying; *see also Aaron's, Inc.*, C-4442 (F.T.C. Mar. 10, 2014), https://www.ftc.gov/enforcement/cases-proceedings/122-3256/aarons-inc-matter.

[14] 81 F.T.C. 23 (1972)

1972.[15] In addition, the FTC also has provided extensive guidance through Guides and staff guidance documents.[16] FTC staff regularly provide further guidance through speeches and presentations to industry trade groups and industry attorneys.

The Commission's precedent and subsequent guidance set forth flexible principles that can be applied to multiple products and claims. These materials do not attempt to answer every question about substantiation, given the virtually limitless range of advertising claims, products, and services to which it could be applied. Instead, they seek to strike the right balance: specific enough to be helpful, but not so granular as to overlook some important factor that might arise, and thereby chill useful speech.

6. **In June, the 11th Circuit vacated the Commission's data security order against Lab-MD. What effect, if any, will this have on the Commission's data security orders going forward?**

The Eleventh Circuit determined that the mandated data security provision of the Commission's LabMD Order was insufficiently specific. We are engaged in an ongoing process to craft appropriate order language in data security cases, based on the Eleventh Circuit opinion, feedback we received from our December hearing on data security, and our own internal discussion of how to use our existing tools to implement remedies that better deter future misconduct.

7. **If federal privacy legislation is passed, what enforcement tools would you like to be included for the FTC?**

First, I would recommend that Congress consider giving the FTC the authority to seek civil penalties for initial privacy violations, which would create an important deterrent effect. Second, while the process of enacting federal privacy legislation will involve difficult tradeoffs that are appropriately left to Congress, targeted APA rulemaking authority, similar to that in the Children's Online Privacy Protection Act, would allow the FTC to keep up with technological developments. For example, in 2013, the FTC used its APA rulemaking authority to amend the COPPA Rule to address new business models, including social media and collection of geolocation information, that did not exist when the initial 2000 Rule was promulgated. Third, the FTC could use broader enforcement authority to take action against common carriers and nonprofits, which it cannot currently do under the FTC Act.

8. **During the hearing, I asked you whether the FTC would consider using its section 6(b) authority to study consumer information data flows, specifically sending requests to Google, Facebook, Amazon, and others in the tech industry to learn what information they collect from consumers and how that information is used, shared, and sold. You responded, "Sure, 6(b) is a really powerful tool and that's the type of thing that might very well make sense for us to use it for." I believe the FTC's section 6(b) authority could**

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[15] *See, e.g.*, *Thompson Med. Co.*, 104 F.T.C. 648, 813 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986); *Daniel Chapter One*, 2009 WL 5160000 at *25-26 (F.T.C. 2009), *aff'd*, 405 Fed. Appx. 505 (D.C. Cir. 2010) (unpublished opinion), *available at* 2011-1 Trade Cas. (CCH) ¶ 77,443 (D.C. Cir. 2010); *POM Wonderful, LLC*, 155 F.T.C. 1, 55-60 (2013), *aff'd*, 777 F.3d 478 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 1839, 194 L. Ed. 2d 839 (2016); *FTC Policy Statement Regarding Substantiation*, 104 F.T.C. 839, 840 (1984) (appended to *Thompson Med. Co.*, 104 F.T.C. 648 (1984)).

[16] *See, e.g.*, *Guides for the Use of Environmental Marketing Claims*, 16 C.F.R. § 260.2 (2019), https://www.ecfr.gov/cgi-bin/text-idx?SID=bd96b2cdcd01f7620d43e50a9d1d8cec&mc=true&node=se16.1.260_12&rgn=div8; *Dietary Supplements: An Advertising Guide for Industry*, https://www.ftc.gov/tips-advice/business-center/guidance/dietary-supplements-advertising-guide-industry.

provide some much needed transparency to consumers about the data practices of large technology companies, and help identify areas that may require additional attention from lawmakers. Can you explain in more detail whether you believe the FTC should conduct a study pursuant to section 6(b) of the Federal Trade Commission Act on the data collection, use, filtering, sharing, and sale practices of large technology companies?

I agree with you that the FTC's section 6(b) authority could be used to provide some much needed transparency to consumers about the data practices of large technology companies. We are developing plans to issue 6(b) orders in the technology area.

The Honorable Roy Blunt

Question for Chairman Joseph J. Simons

The Food and Drug Administration (FDA) cataloged reports that patients have foregone or discontinued their doctor prescribed medications, in some cases resulting in serious injury and death, after seeing lawsuit advertisements making claims about certain FDA-approved medications.

It is incumbent upon the Federal Trade Commission (FTC) to examine and curb false and misleading advertising practices, particularly when such practices result in serious injury and death.

What is the FTC doing to stop these false and misleading lawsuit advertising practices?

Some of these advertisements could be unfair or deceptive in violation of the FTC Act. The FTC is monitoring attorney advertising that solicits people who may have been harmed by prescription drugs or medical devices to determine whether such advertising is likely to cause physical or financial harm to consumers. We also are consulting with the FDA to determine how we may assist each other in protecting consumers. In particular, among other requests, we are seeking FDA input as to whether particular ads contain misleading statements concerning the risks associated with specific drugs and the potential risk to patients of discontinuing the drugs without a doctor's consultation. In addition, we are seeking information from the FDA concerning adverse event reports suggesting a patient stopped taking his or her medication after viewing such advertising. However, it should be noted that adverse event reports do not establish causation, and an enforcement action would have to be based on more than a reported incident.

The Honorable Jerry Moran

Questions for Chairman Joseph J. Simons

1. **Section 5(a) of the *FTC Act*, which prohibits "unfair or deceptive acts or practices in or affecting commerce" is the legal basis for a body of consumer protection law that covers data privacy and security practices. The FTC has brought hundreds of cases to date to protect the privacy and security of consumer information held by companies of all sizes under this authority. The FTC staff recently submitted comments to the National Telecommunications and Information Administration (NTIA) that clearly indicate the FTC staff's view that the FTC would be the appropriate agency to enforce a new comprehensive privacy legislative framework. Do you agree with the staff's view?**

   Absolutely. The FTC has developed a substantial body of expertise on privacy issues over the past several decades, by bringing hundreds of cases, hosting approximately 70 workshops, and conducting numerous policy initiatives. The FTC is committed to using all of its expertise, its existing tools under the FTC Act and sector-specific privacy statutes, and whatever additional authority Congress gives us, to protect consumer privacy while promoting innovation and competition in the marketplace.

2. **As Congress evaluates opportunities to create meaningful federal legislation to appropriately ensure privacy of consumers' data, there have been suggestions to increase the FTC's authorities to enforce in this space. Will you commit to working with this Committee in measuring what resources, if any, will be needed to allow the agency to enforce any additional authorities that may or may not be provided in federal legislation?**

   Yes. We can certainly use additional resources, including additional staff, as well as additional authorities, including civil penalties, targeted APA rulemaking, and jurisdiction over non-profits and common carriers. We are committed to utilizing whatever additional tools Congress gives us efficiently and vigorously.

3. **Sharing responsibilities with the DOJ's Antitrust Division, the FTC enforces antitrust law in a variety of sectors as described by your testimony. While the vast majority of premerger filings submitted to enforcement agencies do not raise competition concerns, the FTC challenged 45 mergers since the beginning of 2017, and of those, the FTC only voted to initiate litigation to block five transactions. Would you please describe the resource needs of the agency associated with hiring qualified outside experts to support its litigation efforts? Please explain how developments in the high-technology sector are accounted for in the FTC's decision-making process related to antitrust enforcement.**

   I appreciate your attention to the agency's resource needs. As I mentioned in my November 27 testimony, the FTC is committed to maximizing its resources to enhance its effectiveness in protecting consumers and promoting competition, to anticipate and respond to changes in the marketplace, and to meet current and future challenges. Resource constraints, however, remain a significant challenge. As discussed in more detail below, evolving technologies and intellectual property issues continue to increase the complexity of antitrust investigations and litigation. This

complexity, coupled with the rising costs of necessary expert witnesses and increases in caseload, sometimes leads to financial and personnel resource limitations. In the past, we have requested additional resources for experts, information technology, and more full-time employees in support of our mission to protect consumers and promote competition. These continue to be critical areas of need for our agency. If we were to receive additional resources, they likely would be applied to these areas as needed.

Qualified experts are an essential resource in all of the FTC's competition cases heading toward litigation (including some cases that ultimately are resolved via consent orders, through which we obtain effective relief without litigation). For example, the services of expert witnesses are critical to the successful investigation and litigation of merger cases; experts provide insight on proper definition of product and geographic markets, the likelihood of entry by new competitors, and the development of models to contrast merger efficiencies with potential competitive harm.

Expert witness costs are highly dependent on the number, scope, duration, and disposition of our federal and administrative court challenges. The cost of an expert, for example, increases if we require the expert to testify or produce a report. To limit these costs, the FTC has identified and implemented a variety of strategies, including using internal personnel from its Bureau of Economics as expert witnesses whenever practical. The opportunities to use internal experts as testifying experts are limited, however, by several factors, including staff availability, testifying experience, and the specialized expertise required for specific matters. Under my direction, the FTC will continue to evaluate how to increase its use of internal experts and control expert costs without compromising case outcomes or reducing the number of enforcement actions.

In addition to expert witness costs, you asked about how developments in the high-technology sector factor into the FTC's decision-making process related to antitrust enforcement. The FTC follows closely activity in the high-technology sector. Given the important role that technology companies play in the American economy, it is critical that the Commission—in furthering its mission to protect consumers and promote competition—understand the current and developing business models and scrutinize incumbents' conduct to ensure that they abide by the same rules of competitive markets that apply to any company. When appropriate, the Commission will take action to counter any harmful effects of coordinated or unilateral conduct by technology firms.

The fundamental principles of antitrust do not differ when applied to high-technology industries, including those in which patents or other intellectual property are highly significant. The issues, however, are often more complex and require different expertise, which may necessitate the hiring of outside experts or consultants to help us develop and litigate our cases. The FTC also strives to adapt to the dynamic markets we protect by leveraging the research, advocacy, and education tools at our disposal to improve our understanding of significant antitrust issues and emerging trends in business practices, technology, and markets. For example, last fall, the Commission launched its *Hearings on Competition and Consumer Protection in the 21st Century* to consider whether the FTC's enforcement and policy efforts are keeping pace with changes in the economy, including advancements in technology and new business models made possible by those developments.[17]

[17] FTC, *Hearings on Competition and Consumer Protection in the 21st Century*, https://www.ftc.gov/policy/hearings-competition-consumer-protection. Recent hearings included a two-day workshop on the potential for collusive, exclusionary, and predatory conduct in multisided, technology-based platform industries. FTC Workshop, *FTC Hearing #3: Competition*

Under my leadership, the FTC will continue to scrutinize technology mergers and conduct by technology firms to ensure not only that consumers benefit from their innovative products, but also that competition thrives in this dynamic and highly influential sector. Our recent announcement of a new Technology Task Force within the Bureau of Competition demonstrates our commitment to monitoring competition in U.S. technology markets, investigating any potential anticompetitive conduct in those markets, and taking enforcement actions when warranted.

4. **Earlier this year, I introduced legislation called the *Senior Scams Prevention Act* with Senator Bob Casey to combat continued and increasingly complex attempts to defraud one of the nation's most vulnerable populations, our senior community. This bill seeks to ensure retailers, financial institutions and wire transfer companies have the resources to train employees to help stop financial frauds and scams on seniors. Would you agree that awareness and education, guided by "best practices" established by industry and government partners, is a valuable tool in preventing consumer harms against our nation's seniors?**

   Yes, I agree, and your question fully aligns with the FTC's work in this area. Protecting older consumers is one of the agency's top priorities. As the population of older Americans grows, the FTC's efforts to identify scams affecting seniors and to bring aggressive law enforcement action, as well as provide awareness and useful advice to seniors, are increasingly vital. Based on consumer research, the FTC developed its *Pass It On* campaign to share preventative information about frauds and scams with older adults.[18] This popular campaign, used by many of our partners, engages active older adults to share these educational materials with others in their communities, including people in their lives who may particularly benefit from this information. The FTC stands ready to work with industry and government partners to create additional materials for industry, such as retailers, financial institutions, and wire transfer companies, to help prevent harm to our nation's seniors.

5. **In its comments submitted to NTIA on "Developing the Administration's Approach to Consumer Privacy," the FTC discussed the various cases that it has taken up to address privacy-related harms to consumers, and it specifically noted four categories of harms: financial injury, physical injury, reputational injury, and unwanted intrusion. Could you please briefly describe each category while noting any FTC enforcement considerations specific to that type of harm?**

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and Consumer Protection in the 21st Century (Oct. 15-17, 2018), https://www.ftc.gov/news-events/events-calendar/2018/10/ftc-hearing-3-competition-consumer-protection-21st-century. Similarly, in early November, the Commission held a two-day workshop on the antitrust frameworks for evaluating acquisitions of nascent competitors in the technology and digital marketplace, and the antitrust analysis of mergers and conduct where data is a key asset or product. FTC Workshop, *FTC Hearing #6: Competition and Consumer Protection in the 21st Century* (Nov. 6-8, 2018), https://www.ftc.gov/news-events/events-calendar/ftc-hearing-6-competition-consumer-protection-21st-century. Also in November, the Commission held a two-day workshop on the competition and consumer protection issues associated with algorithms, artificial intelligence, and predictive analysis in business decisions and conduct. FTC Workshop, *FTC Hearing #7: Competition and Consumer Protection in the 21st Century* (Nov. 13-14), https://www.ftc.gov/news-events/events-calendar/ftc-hearing-7-competition-consumer-protection-21st-century.

[18] *Consumer Information – Pass it on*, *https://www.consumer.ftc.gov/features/feature-0030-pass-it-on* (providing consumer information on identity theft, imposter scams, charity fraud, and other topics).

Certainly. Financial injury can manifest in a variety of ways: fraudulent charges, delayed benefits, expended time, opportunity costs, fraud, and identity theft, among other things.[19] Physical injuries include risks to individuals' health or safety, including the risks of stalking and harassment.[20] Reputational injury involves disclosure of private facts about an individual, which damages the individual's reputation. Tort law recognizes reputational injury.[21] The FTC has brought cases involving this type of injury, for example, in a case involving public disclosure of individuals' Prozac use[22] and public disclosure of individuals' membership on an infidelity-promoting website.[23] Finally, unwanted intrusions involve two categories. The first includes activities that intrude on the sanctity of people's homes and their intimate lives. The FTC's cases involving a revenge porn website,[24] an adult-dating website,[25] and companies spying on people in their bedrooms through remotely-activated webcams fall into this category.[26] The second category involves unwanted commercial intrusions, such as telemarketing, spam, and harassing debt collection calls. In terms of enforcement considerations, as noted above, the FTC is very mindful of ensuring that it addresses these harms, while not impeding the benefits of legitimate data collection and use practices.

6. In the FTC's recent comments in NTIA's privacy proceeding, the FTC said that its "guiding principles" are based on "balancing risk of harm with the benefits of innovation and competition." Would you describe what this means, how you strike this balance, and how it is applied in practice under your Section 5 authority in the *FTC Act*?

In unfairness cases, section 5(n) of the FTC Act requires us to strike this balance. It does not allow the FTC to bring a case alleging unfairness "unless the act or practice causes or is likely to cause substantial injury to consumers, which is not reasonably avoidable by consumers themselves and not outweighed by benefits to consumers or to competition." Thus, for example, in our data security complaints and orders, we often plead the specific harms that consumers are likely to suffer from a company's data security failures. We do not assert that companies need to spend unlimited amounts of money to address these harms; in many of our cases, we specifically allege that the company could have fixed the security vulnerabilities at low or no cost.

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[19] *See, e.g.*, *TaxSlayer, LLC*, No. C-4626 (Oct. 20, 2017), https://www.ftc.gov/enforcement/cases-proceedings/162-3063/taxslayer (alleging delayed benefits, expended time, and risk of identity theft).

[20] *See, e.g.*, *FTC v. Accusearch, Inc.*, No. 06-CV-0105 (D. Wyo. May 3, 2006), https://www.ftc.gov/enforcement/cases-proceedings/052-3126/accusearch-inc-dba-abikacom-jay-patel (alleging that telephone records pretexting endangered consumers' health and safety).

[21] Under the tort of public disclosure of private facts (or publicity given to private life), a plaintiff may recover where the defendant's conduct is highly offensive to a reasonable person. Restatement (Second) of Torts § 652D (1977).

[22] *Eli Lilly and Co.*, No. C-4047 (May 8, 2002), https://www.ftc.gov/enforcement/cases-proceedings/012-3214/eli-lilly-company-matter.

[23] *FTC v. Ruby Corp., et al.*, No. 1:16-cv-02438 (D.D.C. Dec. 14, 2016), https://www.ftc.gov/enforcement/cases-proceedings/152-3284/ashley-madison.

[24] *FTC v. EMP Media, Inc., et al.*, No. 2:18-cv-00035 (D. Nev. Jan. 9, 2018), *https://www.ftc.gov/enforcement/cases-proceedings/162-3052/emp-media-inc-myexcom*.

[25] *FTC v. Ruby Corp., et al.*, No. 1:16-cv-02438 (D.D.C. Dec. 14, 2016), https://www.ftc.gov/enforcement/cases-proceedings/152-3284/ashley-madison.

[26] *See* Press Release, *FTC Halts Computer Spying* (Sept. 25, 2012), https://www.ftc.gov/news-events/press-releases/2012/09/ftc-halts-computer-spying; *see also Aaron's, Inc.*, No. C-4442 (F.T.C. Mar. 10, 2014), https://www.ftc.gov/enforcement/cases-proceedings/122-3256/aarons-inc-matter.

7. **The FTC's comments pertaining to "control" in NTIA's privacy proceeding stated, "Choice also may be unnecessary when companies collect and disclose de-identified data, which can power data analytics and research, while minimizing privacy concerns." How would the FTC suggest federal regulation account for de-identified data, if at all?**

   One possible standard identified in the FTC's 2012 Privacy Report states that data is de-identified if it is not "reasonably linkable" to a consumer, computer, or device.[27] Data can be deemed to be de-identified to the extent that a company: (1) takes reasonable measures to ensure that the data is de-identified; (2) publicly commits not to try to re-identify the data; and (3) contractually prohibits downstream recipients from trying to re-identify the data. Although this language provides some general principles for de-identification, we would be happy to work with your staff on drafting more specific legislative language.

8. **Your testimony indicated that continued technological developments allow illegal robocallers to conceal their identities in "spoofing" caller IDs while exponentially increasing robocall volumes through automated dialing systems. These evolving technological changes mean that the critical law enforcement efforts of the FTC cannot be the only solution, and your testimony described the additional steps the FTC is taking to develop innovative solutions to these issues. Would you please describe the process and outcomes of the four public challenges that the FTC held from 2013 to 2015? Are there plans to incentivize innovators to combat robocalls in the future?**

   The FTC's process for its robocall challenges included public announcements, committees with independent judges, and, in some cases, cash prizes awarded under the America COMPETES Reauthorization Act.[28] To maximize publicity, the FTC announced each of its four challenges in connection with public events. The FTC announced the first robocall challenge at the FTC's 2012 Robocall Summit. In 2014, the FTC conducted its second challenge, "Zapping Rachel," at DEF CON 22. The FTC conducted its third challenge, "DetectaRobo," in June 2015 in conjunction with the National Day of Civic Hacking. The final phase of the FTC's fourth public robocall challenge took place at DEF CON 23. When the FTC held its first public challenge, there were few, if any, call blocking or call labeling solutions available for consumers. Today, two FTC challenge winners, NomoRobo and Robokillller, offer call blocking applications, and there are hundreds of mobile apps offering call blocking and call labeling solutions for cell phones. Many home telephone service providers also now offer call blocking and call labeling solutions. The FTC will not hesitate to initiate additional innovation contests if it identifies further challenges that could meaningfully benefit consumers by reducing the harm caused by illegal robocalls.

   In addition to developing call blocking and call labeling technology, the telecom industry has also developed call verification technology, called STIR/SHAKEN, to help consumers know whether a call is using a spoofed Caller ID number and to assist call analytics companies in implementing call blocking and call labeling products. If widely implemented and made available to consumers, the STIR/SHAKEN protocol should minimize unwanted calls. Certain industry members have begun to

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[27] FTC Report, *Protecting Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers* (Mar. 2012), https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf

[28] *Details About the FTC's Robocall Initiatives*, https://www.consumer.ftc.gov/features/feature-0025-robocalls.

roll out this technology in beta-testing mode. We will monitor this industry initiative and, assuming the results are as expected, continue to encourage its implementation.

a. Would you please describe the FTC's coordination efforts with state, federal, and international partners to combat illegal robocalls?

The FTC frequently coordinates its efforts with its state, federal, and international partners. The FTC often brings robocall enforcement actions with states as co-plaintiffs. For example, in the FTC's case against Dish Network, the FTC brought the case jointly with California, Illinois, North Carolina, and Ohio. Collectively, the states and the FTC obtained a historic $280 million trial verdict.[29]

The FTC also coordinates outreach and education with the FCC. In 2018, the agencies co-hosted two robocall events— a policy forum that discussed technological and law enforcement solutions to the robocall problem[30] and a public expo that allowed companies to showcase their call blocking and call labeling products for the public.[31] Additionally, the FTC and FCC hold quarterly calls, speak regularly on an informal basis, and coordinate on a monthly basis with our state partners through the National Association of Attorneys General. The FTC also engages with international partners through participation in international law enforcement groups such as the International Consumer Protection Enforcement Network, International Mass Marketing Fraud Working Group, and Unsolicited Communications Network (formerly known as the London Action Plan).

9. Your testimony described the limitations of the FTC's current data security enforcement authority provided by Section 5 of the *FTC Act* including: lacking civil penalty authority, lacking authority over non-profits and common carrier activity, and missing broad APA rulemaking authority. Please describe each of these limitations and how adjusted FTC authority to address these items would improve the protection of consumers from data security risks.

Under current law, the FTC cannot obtain civil penalties for first-time data security violations. I believe this lack of civil penalty authority under-deters problematic data security practices. If Congress were to give the FTC the authority to seek civil penalties for first-time violators (subject to statutory limitations on the imposition of civil penalties, such as ability to pay and stay in business), better deterrence would be achieved. Additionally, should Congress enact specific data security legislation, it would be important for the FTC to have associated APA rulemaking authority[32] so that the Commission can enact rules and amend them as necessary to keep up with technological developments. For example, in 2013, the FTC was able to use its APA rulemaking authority to amend its Rule under the Children's Online Privacy Protection Act to address new business models,

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[29] Press Release, *FTC and DOJ Case Results in Historic Decision Awarding $280 Million in Civil Penalties Against Dish Network and Strong Injunctive Relief for Do Not Call Violations* (June 6, 2017), https://www.ftc.gov/news-events/press-releases/2017/06/ftc-doj-case-results-historic-decision-awarding-280-million-civil. The case is on appeal before the Seventh Circuit Court of Appeals.

[30] Press Release, *FTC and FCC to Host Joint Policy Forum and Consumer Expo to Fight the Scourge of Illegal Robocalls* (Mar. 22, 2018), https://www.ftc.gov/news-events/press-releases/2018/03/ftc-fcc-host-joint-policy-forum-illegal-robocalls.

[31] Press Release, *FTC and FCC to Co-Host Expo on April 23 Featuring Technologies to Block Illegal Robocalls* (Apr. 19, 2018), https://www.ftc.gov/news-events/press-releases/2018/04/ftc-fcc-co-host-expo-april-23-featuring-technologies-block-0.

[32] The FTC is not seeking general APA rulemaking authority for a broad statute like Section 5.

including social media and collection of geolocation information, that did not exist when the initial 2000 Rule was promulgated. As to nonprofits and common carriers, news reports are filled with breaches affecting these sectors (e.g., the education sector) but the FTC does not currently have jurisdiction over them. Giving the FTC jurisdiction over these entities to enforce data security laws would create a level playing field and ensure that these entities would be subject to the same rules as other entities that collect similar types of data.

The Honorable Richard Blumenthal

Facebook: FTC Investigation Status

In May, the Bureau of Consumer Protection took the rare step of acknowledging a "non-public investigation" into the privacy practices of Facebook. It is now over eight months since the FTC's announcement with no further comment or report.

Questions for Chairman Joseph J. Simons

Question 1. How many full-time employees have been primarily assigned to investigate Facebook's privacy and data protection practices?

Question 2. Who is responsible for coordinating the investigation of Facebook? What divisions of the FTC are involved in the investigation?

Question 3. Has the FTC made requests for documents or conducted interviews with Facebook, Cambridge Analytica, and other relevant parties?

Question 4. Is the FTC in regular contact with its European counterparts on their investigation of Facebook?

Question 5. Does the FTC require further resources, including technologists or privacy lawyers, in order to complete its investigation of Facebook?

Although the existence of this investigation has been made public, details about the investigation, including how it is being staffed and any steps that have or have not been taken, are non-public. Therefore, we cannot answer these questions at this time.

Question 6. Has the FTC ever taken issue with Facebook or Google's assessments under their consent decrees?

Question 7. Has the Commission reviewed its consent decree with Google this year to determine whether the company is in compliance?

As part of its review of compliance with consent decrees, the FTC carefully reviews all assessments, seeks additional information as appropriate, and reviews compliance through a variety of means. However, because any investigation of a specific company's compliance is non-public, we cannot comment specifically about the steps taken regarding Google or Facebook.

Privacy Rules

We know that Americans care about privacy – that they eagerly want these rights. We need baseline rules. Companies should not store sensitive information indefinitely and use that data for purposes that people never intended. Federal rules must set meaningful obligations on those that handle our data. We must enable consumers to trust and control their personal data.

Questions for all Witnesses

Question 8. Do you support providing state AGs with the power to enforce federal privacy protections and would you commit to working with state AGs?

Yes. I view the Attorneys General as important partners in protecting consumers. I endorse a model that gives state Attorneys General the power to enforce federal privacy protections, which ensures that there are multiple enforcers on the beat.

Question 9. Why is it important that the FTC have rulemaking authority when it comes to privacy? Where best would rulemaking be applied?

The process of enacting federal privacy legislation will involve difficult tradeoffs that are appropriately left to Congress. Targeted APA rulemaking authority within those parameters is important, because it will enable the FTC to keep up with technological developments. For example, Congress gave the FTC APA rulemaking authority to implement the Children's Online Privacy Protection Act. In 2013, the FTC was able to use this authority to amend a rule it had initially promulgated in 2000, in order to address new business models, including social media and collection of geolocation information, as well as new technologies such as smart phones, that did not exist when the initial 2000 rule was promulgated.

Question 10. Do you believe elevating the Office of Technology Research and Investigation to the Bureau level would meaningfully help the FTC in addressing new technological developments across its mandates?

At this time, I do not believe that elevating the Office of Technology Research and Investigation to the Bureau level would meaningfully enhance the FTC's ability to vigorously pursue our current enforcement mandates. I am, however, actively considering how best to integrate technologists into our agency and how most effectively to deploy our limited resources to address our needs in this area. This effort includes evaluating the information developed at the Commission's *Hearings on Competition and Consumer Protection in the 21st Century*.

Questions for Chairman Joseph J. Simons:

Question 11. When will the FTC appoint a Chief Technology Officer?

I have held off on appointing a Chief Technology Officer because I was actively considering the best way to utilize our existing resources and integrate new ones, across both our consumer protection and competition missions. We recently announced the creation of a Technology Task Force within the Bureau of Competition, which will be dedicated to monitoring competition in U.S. technology markets, investigating any potential anticompetitive conduct in those markets, and taking enforcement actions when warranted. The task force will include a Technology Fellow who will provide important technical assistance and expertise to support the task force's investigations. In addition, members of the task force will coordinate with their counterparts in the Bureau of Consumer Protection who also focus on technology platforms. Once the new task force is up and running, we will be in a better position to

evaluate our need for technologists, including a Chief Technology Officer, and how best to integrate and leverage additional expertise.

Board Accountability

Questions for all Witnesses

Question 12. What is the FTC doing to investigate and hold accountable individual board members and executives who knowingly assist their companies in committing fraud? What more should the FTC be doing in this regard?

The FTC always considers the potential liability of individual officers and others who participated in or controlled deceptive and unfair practices. In cases where the FTC finds evidence of wrongdoing that meets the applicable legal standard, and where naming the individual is appropriate to obtain full and complete relief for consumers and appropriate injunctive relief, we do so.

Net Neutrality

After the FCC abdicated its responsibility to protect net neutrality this year, we are left with no discernible rules to prevent Internet service providers from blocking or slowing Internet traffic. We have already started to see the effects of this disastrous decision. Earlier this month, Senators Markey, Wyden, and I wrote to several mobile carriers on reports those companies throttled video streaming applications. These practices would violate the core principle of net neutrality.

Questions for Chairman Joseph J. Simons

Question 13. Has the FTC investigated reports that mobile carriers are throttling video applications?

As you know, because the Commission's investigations are not public, I cannot comment on the practices of specific companies. However, the Commission has a strong interest in ensuring that companies stand by their promises to consumers and do not engage in deceptive or unfair practices. In general, except for the period when the FCC reclassified Broadband Internet Access Service ("BIAS") as a common carrier activity and the FTC lost the ability to protect consumers in this space, FTC staff has been monitoring and will continue to monitor the marketing and business practices of BIAS providers. To determine whether particular instances of throttling are deceptive or unfair, the Commission must evaluate what representations the provider made to consumers about its services, as well as available information and data about the nature and quality of the services actually provided to consumers.

The Commission will closely review any relevant research that may support or disprove particular advertising claims or provide evidence of particular business practices. When reviewing such reports, we evaluate a study's design, scope, and results, and consider how the study relates to a particular claim or informs a particular practice.

Question 14. If an Internet service provider blocks an application, does the FTC have the authority to investigate and penalize such actions?

When the FCC reclassified BIAS as a common carrier activity, the FTC temporarily lost the ability to protect consumers in this space because the FTC does not have authority over common carrier activities. The FTC brought several types of cases against BIAS providers prior to 2015.[33] Now that the reclassification has been reversed, we can bring those types of cases again.[34] If a company makes claims about blocking that are materially misleading, or if the practice causes substantial consumer injury that is not reasonably avoidable and not outweighed by benefits to consumers or competition, the FTC can bring an enforcement action under Section 5. In addition, the FTC has experience enforcing the antitrust laws to prevent unfair methods of competition for the benefit of consumers in many different markets. As part of its *Hearings on Competition and Consumer Protection in the 21st Century*, the agency will hold public hearings on March 20, 2019 to continue to explore how the FTC can use its enforcement authority most effectively in BIAS markets. If the FTC identifies, through these hearings or otherwise, that it does not have sufficient authority or resources to protect consumers or address competition issues in BIAS markets, the agency will report this to Congress.

Question 15. You have said that blocking, throttling, and paid prioritization could be deemed unfair practice(s) under the right circumstances. What would be "the right circumstances" that would have to occur for the FTC to pursue net neutrality enforcement?

As the Commission noted in its Policy Statement on Unfairness,[35] and as codified in 15 U.S.C. § 5(n), to be unfair, an act or practice must cause or be likely to cause substantial injury. Such injury "must be substantial; it must not be outweighed by any countervailing benefit to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided."[36]

Pursuant to this authority, the Commission sued AT&T Mobility LLC, alleging that the company deceptively promised consumers unlimited data but then reduced speeds, in some instances by nearly 90%, without telling consumers. We also alleged that the company unfairly locked consumers into long-term contracts based on promises of unlimited service and charged early termination fees if the consumers canceled their plans.[37]

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[33] *See, e.g.*, *FTC v. TracFone Wireless, Inc.*, No. 3:15-cv-00392-EMC (N.D. Cal. Feb. 20, 2015), https://www.ftc.gov/enforcement/cases-proceedings/132-3176/straight-talk-wireless-tracfone-wireless-inc; *FTC v. AT&T Mobility, LLC*, No. 3:14-CV-04785-EMC (N.D. Cal. Oct. 28, 2014), https://www.ftc.gov/enforcement/cases-proceedings/122-3253/att-mobility-llc-mobile-data-service; *In re America Online, Inc.*, No. C-4105 (Jan. 28, 2004), https://www.ftc.gov/enforcement/cases-proceedings/002-3000/america-online-inc-compuserve-interactive-services-incin; *In re Juno Online Servs., Inc.*, No. C-4016 (June 25, 2001), https://www.ftc.gov/enforcement/cases-proceedings/002-3061/juno-online-services-inc.

[34] *FTC v. AT&T Mobility LLC*, 883 F.3d 848, 863-64 (9th Cir. 2018) (*en banc*) (concluding that "the FTC may regulate common carriers' non-common-carriage activities").

[35] *See* FTC Policy Statement on Unfairness, *appended to Int'l Harvester Co.*, 104 F.T.C. 949, 1070 (1984).

[36] *Id.*

[37] *FTC v. AT&T Mobility LLC*, No. 3:14-cv-04785-EMC (N.D. Cal. Oct. 28, 2014), https://www.ftc.gov/enforcement/cases-proceedings/122-3253/att-mobility-llc-mobile-data-service.

Question 16. What specific resources and expertise does the FTC have to address technical issues of discrimination of Internet traffic by ISPs? Has the FTC hired technical experts to investigate violations of net neutrality?

FTC staff includes technologists with generalized expertise who regularly work with investigation and case teams to analyze a wide range of technical data, including in matters relating to network traffic analysis. The Commission also regularly hires independent consulting and testifying experts to provide more specialized expertise on a dedicated and ongoing basis. In addition, the Commission consults with staff at other agencies, including the FCC, as needed, regarding technical issues.

Copycat Military Websites

Last month, I led a group of nine Senators in writing the FTC, asking the Commission to release the full list of schools that purchased user information from copycat military websites. These websites, with names like *Army.com* and *EnlistArmy.com*, mimicked official military enlistment websites and deceived prospective recruits into thinking they would be contacted by an official "military representative." To truly stop such unscrupulous companies from taking root again, it is critical that the institutions that knowingly purchased these ill-gotten leads are also held to account.

Question for Chairman Joseph J. Simons

Question 17. Do you agree that such post-secondary schools should be held liable for deceptive third-party marketing conducted on their behalf? Will you commit to pursuing such cases to root out fraud at the source?

No individual or entity, including post-secondary schools, should be able to avoid complying with the law by outsourcing deceptive marketing to third parties. In fact, the Commission has pursued several law enforcement actions to root out such conduct. In June 2018, the Commission obtained an order against Credit Bureau Center, a credit monitoring company, which held the company liable for deceptive third-party marketing conducted on its behalf. [38] The Commission has also pursued law enforcement actions against affiliate marketing networks for the deceptive conduct of their third-party marketing affiliates. The FTC recognizes the importance of pursuing all actors in the marketing ecosystem that fail to comply with the law.

The Commission will continue to monitor the marketplace for unfair or deceptive conduct on the part of post-secondary schools that benefit from the deceptive practices of third parties and will actively investigate wherever warranted.

SoFi Penalties

Last month, the FTC proposed a settlement with SoFi—the online student loan refinancer that had greatly exaggerated in advertisements how much student loan borrowers would save when they refinance through the company. Unfortunately, the FTC was not able to require SoFi to pay any kind of penalty for its misconduct. As you noted in your testimony, this is one of the significant flaws in FTC's

[38] *FTC v. Credit Bureau Center, LLC*, No. 1:17-cv-194 (N.D. Ill. June 26, 2018), https://www.ftc.gov/enforcement/cases-proceedings/162-3120/credit-bureau-center-llc-formerly-known-myscore-llc.

Section 5 authority. However, the CFPB or State Attorneys General could have sought meaningful penalties for SoFi's misconduct under existing law.

Question for Chairman Joseph J. Simons

Question 18. Why didn't you work with State AGs to ensure SoFi would be subject to civil penalty for its misconduct? How will you make sure there is cooperation with State AGs in the future—in order to more effectively deter bad actors from violating the law?

The FTC regularly consults and coordinates with our federal and state law enforcement partners when bringing actions to stop deception and other unlawful practices in the marketplace.[39] We will continue to work with our partners, where appropriate, to use our respective tools to most effectively protect consumers.

We believe our action against SoFi secures appropriately strong and timely relief to protect consumers from the unlawful conduct in this case – by ensuring that SoFi stops making deceptive savings claims regarding its loans and other credit products. If SoFi violates the FTC's order in this matter, the FTC could seek significant civil penalties against it. Further, when announcing this action, the FTC sent warning letters to other student loan advertisers who were making savings claims.

FTC Investigation of Algorithms

Section 6(b) of the FTC Act gives the agency broad investigatory and information-gathering powers. For example, in the 1970s the FTC used its Section 6(b) authority to require companies to submit product-line specific information, enabling the agency to assess the state of competition across markets.

The FTC has released reports on big data and the harms biased algorithms can cause to disadvantaged communities. These reports drew attention to the potential loss of economic opportunity and diminished participation in our society. Yet, information on how these algorithms work, and on the inputs that go into them, remains opaque.

Question for all Witnesses

Question 19. Where the FTC consider using its Section 6(b) investigative power to help us understand how these algorithms and black-box A.I. systems work – the biases that shape them, and how those can affect trade, opportunity, and the market?

I agree that algorithms and artificial intelligence are important topics of study. In 2017, the FTC and Department of Justice submitted a joint paper on algorithms and collusion to the Organization for

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[39] *See, e.g.,* Press Release, *FTC, Partners Conduct First Compliance Sweep under Newly Amended Used Car Rule* (July 12, 2018), https://www.ftc.gov/news-events/press-releases/2018/07/ftc-partners-conduct-first-compliance-sweep-under-newly-amended; Press Release, *FTC, BBB, and Law Enforcement Partners Announce Results of Operation Main Street* (June 18, 2018), https://www.ftc.gov/news-events/press-releases/2018/06/ftc-bbb-law-enforcement-partners-announce-results-operation-main; Press Release, *FTC, State Law Enforcement Partners Announce Nationwide Crackdown on Student Loan Debt Relief Scams* (Oct. 13, 2017), https://www.ftc.gov/news-events/press-releases/2017/10/ftc-state-law-enforcement-partners-announce-nationwide-crackdown.

Economic Cooperation and Development as part of the OECD's broader look at the role of competition policy and the digital age.[40] More recently, we examined the competition and consumer protection implications of algorithms, artificial intelligence, and predictive analytics as part of the Commission's *Hearings on Competition and Consumer Protection in the 21st Century*.[41] The two-day hearing featured technologists, scientists, academics, and industry leaders (as well as economists and lawyers), who gathered to educate us and the broader competition and consumer protection community about how these technologies work, how they are used in the marketplace, and their policy implications. The Commission also invited public comments on this topic.

I will keep you apprised of any initiatives that come out of our hearings project. I also appreciate your interest in the Commission conducting a study of algorithms and artificial intelligence under Section 6(b) of the FTC Act. I intend to conduct 6(b) studies in the technology area, though the subjects of these studies are still being considered.

FTC Consent Decree on Unrepaired Recalls

Most consumers probably do not know that, while *new* car dealers are prohibited from selling vehicles with open recalls, *used* car dealers are not. A recent FTC consent decree, which I strenuously disagreed with and is currently being scrutinized in the courts, allows the sale of used cars with unrepaired recalls. According to the consent decree, car dealers can advertise that cars with unrepaired safety recalls like a defective Takata airbag are "safe" or have passed a "rigorous inspection"—as long as they have a disclosure that the vehicle *may* be subject to an unrepaired recall and directs consumers on how they can determine the vehicle has an open recall.

Question for all Witnesses

Question 20. In your opinion, is a car with an open, unrepaired recall, a "safe" car? Why would the FTC allow unsafe cars to be advertised as "safe" and "repaired for safety," with or without a vague, contradictory and confusing disclaimer?

I believe that all auto recalls pose safety risks to consumers, and that unrepaired recalls should be fixed.

Our orders do not allow unsafe cars to be advertised as "safe." For example, if a car dealer claims that a specific car with a risk of exploding airbags is "safe," it would violate our orders, whether or not they made the required disclosures. Specifically, Part I of the orders prohibits safety-related claims unless there is a clear and conspicuous disclosure about recalls *and the claim is not otherwise misleading*.

Before our orders were issued, car dealers were selling used vehicles subject to open recalls (a practice currently permitted under federal product safety law), while widely making inspection claims that we alleged were deceptive. Our actions create a new floor of legal protection for consumers. Now, if the

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[40] Note to the OECD by the United States on Algorithms and Collusion, DAF/COMP/WD(2017)41 (May 26, 2017), https://www.ftc.gov/system/files/attachments/us-submissions-oecd-other-international-competition-fora/algorithms.pdf.

[41] FTC, *Hearings on Competition and Consumer Protection in the 21st Century*, https://www.ftc.gov/policy/hearings-competition-consumer-protection; FTC Workshop, *FTC Hearing #7: Competition and Consumer Protection in the 21st Century* (Nov. 13-14, 2018), https://www.ftc.gov/news-events/events-calendar/ftc-hearing-7-competition-consumer-protection-21st-century.

respondents in our actions make any claims suggesting a vehicle has been inspected for safety issues, they must clearly and conspicuously disclose that their vehicles may be subject to open recalls and how consumers can determine the recall status of a particular car. Importantly, the orders define "clear and conspicuous" to prohibit exactly the sort of confusing or contradictory disclosures you mention. These disclosures must be "easily understandable by ordinary consumers" and cannot be "contradicted or mitigated by, or inconsistent with, anything else in the communication."

Tesla's Deceptive "Autopilot" Advertisements

Two consumer groups—the Center for Auto Safety and Consumer Watchdog—have petitioned the FTC to investigate Tesla's potentially deceptive advertising of its "Autopilot" system. As you may know, there have been at least two deaths and additional injuries in the United States linked to Tesla Autopilot. Consumer advocates have criticized that Tesla's deceptive and misleading use of term "Autopilot" for its assisted-driving system falsely conveys to drivers that their vehicles are self-driving.

Question for Chairman Joseph J. Simons

Question 21. What is the FTC doing to investigate these concerns?

As you noted, the Center for Auto Safety and Consumer Watchdog have asked the FTC to investigate the marketing of the Tesla Autopilot driving system. As is our normal procedure when we get such requests, we have spoken with the parties involved to better understand the issues. However, whether or not we have opened a law enforcement investigation is non-public, and we can neither confirm nor deny the existence of any such investigation.

Contact Lens Rule

In November 2016, the Federal Trade Commission issued a Notice of Proposed Rulemaking proposing amendments to the Contact Lens Rule aimed at promoting competition and consumer choice in the marketplace for prescription contact lenses.

Question for Chairman Joseph J. Simons

Question 22. When does the Commission intend to finalize this rulemaking?

The Commission initially published a Federal Register notice generally requesting comments on the Rule in September 2015. Based on review of the 660 comments received, the Commission published a Notice of Proposed Rulemaking (NPRM) in December 2016, requesting comment on proposed Rule amendments. The NPRM proposed to amend the rule to require prescribers to obtain a signed acknowledgment after releasing a contact lens prescription to a patient, and maintain it for three years. The purpose of the proposed amendment was to enhance both compliance and our ability to enforce the rule (by providing a record that the prescription was given out). We received over 4,100 additional comments in response to this NPRM.

The Commission held a workshop on March 7, 2018 to collect additional information on various Rule-related issues, including the proposed amendments. The public comment period associated with the

workshop closed on April 6, 2018. We received and reviewed approximately 3,500 additional comments.

We collected additional information during the workshop and in public comments, and are considering alternatives to increase prescriber compliance with the Rule without imposing unnecessary burdens on prescribers. In addition, based on the comments received, we are considering additional modifications to the Rule. The FTC staff intends to submit a recommendation to the Commission in the coming months. If the Commission decides that additional public input would be beneficial, the Commission would allow an appropriate period of time for public input. The length of the comment period would depend on the complexity of the modifications under consideration, but most likely it would be 30-60 days; the original NPRM had a 60-day comment period, and we accepted comments for about 30 days after the workshop. The timeline for then completing the rulemaking and issuing the final rule would depend on the number and complexity of the comments received.

Questions on Non-Compete Clauses

I am concerned about the growth of non-compete clauses, which block employees from switching jobs to another employer in the same sector for a certain period of time. These clauses weaken workers' bargaining power once they are in the job, because workers often cannot credibly threaten to leave if their employer forces refuses to give them a raise or imposes poor working conditions. According to the Economic Policy Institute, roughly 30 million workers – including one in six workers without a college degree – are now covered by non-compete clauses.

The consensus in favor of addressing non-compete clauses is growing. For example, just this past December, an interagency report indicated that non-compete clauses can be harmful in certain contexts, such as the healthcare industry. Yet, the FTC has not yet undertaken forceful action. In September, Commissioner Chopra suggested that the FTC use its rulemaking authority to "remove any ambiguity as to when non-compete agreements are permissible or not."

Questions for all Witnesses

Question 23. Do you agree with the proposal that the FTC use its rulemaking authority to address non-compete clauses? I invite you to explain your reasoning regarding your stance.

I am still considering whether the FTC should use its rulemaking authority to address non-compete employment agreements or whether other approaches might be better. I am particularly interested in sectors of the economy where employee training requirements are not significant. Non-competes in those instances are less likely to be justified by efficiencies and are more likely to be anticompetitive on balance.

Questions on Local Merger Enforcement

Even though big national mergers typically garner the most media attention, smaller mergers can often raise monopoly concerns on the local level. This can be true in the healthcare industry, for example. In November, Commissioner Simons told me: "Some local mergers may be too small to require Hart-Scott-Rodino premerger notification, but may still have anticompetitive effects."

Questions for all Witnesses

Question 24. Would you agree with me that Hart-Scott-Rodino premerger notifications help antitrust enforcers catch concerning mergers?

Yes, I agree that the premerger notification requirements of the Hart-Scott-Rodino Premerger Notification Act help antitrust enforcers identify anticompetitive mergers before they are consummated, preventing consumer harm. Once a merger is consummated and the firms' operations are integrated, it can be very difficult, if not impossible, to "unscramble the eggs" and restore the acquired firm to its former status as an independent competitor.

Question 25. What sort of anticompetitive effects might be raised by local mergers even when those mergers are too small to require Hart-Scott-Rodino premerger notification?

Anticompetitive mergers harm consumers through higher prices and by reducing quality, choices, and innovation, or by thwarting competitors' entry into a market.[42] The arena of competition affected by a merger may be geographically bounded (*e.g.*, confined to a small or local area) if geography limits some customers' willingness or ability to substitute to some products or services, or some suppliers' willingness or ability to serve some customers.[43]

The FTC often examines local geographic markets when reviewing mergers in retail markets, such as supermarkets, pharmacies, retail gas or diesel fuel stations, or funeral homes, or in service markets, such as health care. For example, in a recent federal court action to enjoin the proposed merger of two rival physician services providers, the FTC and the State of North Dakota defined the relevant geographic market as the Bismarck-Mandan, North Dakota, Metropolitan Statistical Area—a four-county area that includes the cities of Bismarck and Mandan and smaller communities within the surrounding 40 to 50 mile radius.[44] The types of anticompetitive effects that may occur in local markets are the same as those that may occur in larger geographic markets: higher prices, lower levels of service, reduced innovation, and fewer choices.

Question 26. What action would you recommend either the FTC or Congress take in order to assist federal and state antitrust enforcers in catching local mergers that raise anticompetitive concerns?

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[42] *U.S. Dep't of Justice & Fed. Trade Comm'n Horizontal Merger Guidelines* § 1 (2010), https://www.ftc.gov/public-statements/2010/08/horizontal-merger-guidelines-united-states-department-justice-federal ("A merger enhances market power if it is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives.").

[43] *Id.* at § 4.2. In antitrust analysis, a relevant market identifies a set of products or services and a geographic area of competition in which to analyze the potential effects of a proposed transaction. The purpose of market definition is to identify options available to consumers. *See id.* at § 4 (describing market definition in antitrust analysis).

[44] *FTC v. Sanford Health*, No. 1:17-cv-0133 (D.N.D. Dec. 13, 2017), https://www.ftc.gov/enforcement/cases-proceedings/171-0019/sanford-health-ftc-state-north-dakota-v. The U.S. District Court for the District of North Dakota granted the FTC and State of North Dakota's preliminary injunction motion on December 13, 2017. The parties have appealed and the case is now pending before the Eighth Circuit.

I have no opinion as to whether Congress should take action. Identifying anticompetitive mergers remains one of the top priorities of the agency's competition mission. The vast majority of mergers the FTC investigates are reported and examined at the premerger stage. The FTC does, however, devote significant attention to identifying unreported, often consummated, mergers that could harm consumers. With respect to both mergers that do not meet the premerger notification requirements and potentially anticompetitive conduct, the FTC relies on the trade press and other news articles, consumer and competitor complaints, hearings, economic studies, and other means to identify harmful practices that threaten competition. The FTC also routinely partners with state Attorneys General in its enforcement efforts; state Attorneys General routinely join the FTC as co-plaintiffs in the FTC's federal court litigations, such as in the North Dakota physician services merger litigation discussed above.

Question on Horizontal Shareholding

Recent research has raised questions about whether horizontal shareholding harms competition in our economy. I would like to understand your view on this ongoing research.

Questions for all Witnesses

Question 27. Do you believe that horizontal shareholding raises anticompetitive concerns?

The short answer is that I do not yet know enough to draw sound, reliable conclusions on this point. The research on this topic is still at a relatively early stage, and the studies that have been completed so far have yielded conflicting results. At present, this remains a very unsettled issue.[45]

There is little doubt that active investment (*i.e.*, investment that seeks to control a company, obtain board seats and the like) in competitors can create the kinds of competition problems that the antitrust laws are designed to address. The antitrust agencies have long policed improper relationships between corporate competitors, even when these relationships fall short of a full combination or merger. For example, Section 8 of the Clayton Act effectively prohibits so-called "interlocking directorates" in which an officer or director of one firm serves as an officer or director of a competitor. But it is an open question whether the same kinds of problems created by active investments may also manifest from investments by institutional investors in competing companies.

The theory put forward, purportedly supported by early research, is that large institutional investors' shareholdings in competing firms in the same industry may blunt the competitive vitality of rival firms and, consequently, lead to higher prices and other anticompetitive effects. For example, if a company's shareholders have equity interests in a rival, that company may be less likely to engage in a price war or other forms of aggressive competition that could reduce its rival's profits, because the rival's profits are ultimately returned to the company's shareholders through their interests in the rival. Proponents of this theory argue that the risk of upsetting common investors may make it easier for firms to maintain stable

[45] *See* Note to the OECD by the United States on Common Ownership by Institutional Investors and Its Impact on Competition at ¶ 1, DAF/COMP/WD(2017)86 (Nov. 28, 2017), https://www.ftc.gov/system/files/attachments/us-submissions-oecd-other-international-competition-fora/common_ownership_united_states.pdf (explaining that "[g]iven the ongoing academic research and debate, and its early stage of development, the U.S. antitrust agencies are not prepared at this time to make any changes to their policies or practices with respect to common ownership by institutional investors.").

market conditions or potentially even increase prices, compared to market conditions that might prevail without common ownership by large, institutional investors.

Critics of this theory have cited methodological problems with the original research, as well as various structural issues that would make it difficult or even impossible for institutional investors in the real world to play the envisioned disciplining role. Critics also point out that any remedy to address these concerns would likely increase the cost of retail investment, and thereby cause harm to ordinary investors.

To date, there is no reliable consensus as to which side in this debate has the stronger argument, and the limited research suggests this question will remain unsettled until additional empirical work is completed in this area. Given the formative nature of the academic debate, I cannot definitively take a position on this issue. Additional study is required and, as I mention below, the Commission is currently helping to facilitate such work.

Question 28. Do you believe that our antitrust laws can be used to address the anticompetitive concerns raised by horizontal shareholding?

As noted above, I am still evaluating the viability of this concern. Therefore, I believe the use of the agency's enforcement powers in this area would be premature. That said, antitrust doctrine is flexible, allowing us to address even novel harms in the economy. If the Commission were to identify a meritorious case against common ownership by a single institutional investor, I believe we could bring such a case, even though we have not previously litigated that type of case. The Commission's ability to take future action in this area would, of course, be circumscribed by prior case law, due process considerations, and legal standards. The Commission would be unlikely to take enforcement action in this area without sufficient confidence that it can demonstrate to the courts both that the underlying theory of harm is robust, and that a specific set of passive investments has had actual anticompetitive effects in the real world.

Question 29. What, if anything, are you doing to address any potential harms of horizontal shareholding?

In December 2018, the Commission held a full-day public hearing that was largely devoted to exploring the merits of the common ownership issue in greater detail.[46] At this event, which was part of our *Hearings on Competition and Consumer Protection in the 21st Century*, respected academics and industry experts on both sides of this issue shared their expertise. The Commission also invited public comments on this topic.

We are still accepting public comments on this issue. Once the comment period ends, we intend to carefully evaluate all of the public submissions and the workshop testimony with a view towards better refining our understanding of the merits of this concern. Hearings like this one serve to bring together experts with different views, allowing them to hear and respond to criticisms of their positions, which we have found to be useful in fostering future academic work in areas of continuing interest to the agency.

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[46] FTC Workshop, *FTC Hearing # 8: Competition and Consumer Protection in the 21st Century* (Dec. 6, 2018), https://www.ftc.gov/news-events/events-calendar/ftc-hearing-8-competition-consumer-protection-21st-century.

The Honorable Margaret Wood Hassan

Questions for Chairman Joseph J. Simons

Question 1. **This is an issue that is particularly important and concerning to me, and it is one that my colleagues and I have contacted the FTC about before.**

It is vitally important that we support our military veterans and their families, and I am honored to have worked on legislation improving veterans' access to workforce training, education, and health care, many of which have become law. We are committed to giving our veterans access to the tools they need to improve their education and employment opportunities.

Unfortunately, certain companies and academic institutions have shamefully and brazenly engaged in unscrupulous and often illegal "lead-generating" practices where schools pay companies, such as Sunkey Publishing, Fanmail, and Victory Media, to steer prospective student-veterans to them by claiming the schools are "military-friendly" or falsely representing the schools as affiliated with or endorsed by the Department of Defense.

My colleagues and I have sent letters urging the FTC to investigate these harmful, deceptive, and unfair marketing practices by military-branded websites that target veterans, service members, and their families, and I applaud the FTC for taking action against some of these schools and companies.

Knowing the names of offenders would be important for prospective student-veterans as they determine which schools or career training institutions they would like to attend.

In your response to one of our letters, you cite federal statute and regulations as prohibiting the release of the names of the schools that participated in lead-generating schemes. Your letter notes that the FTC may vote to initiate a process to release the names of the schools.

Given the importance of this information to student-veterans, and with the understanding that no one wants to hinder ongoing investigations, does the FTC intend to hold a vote to release the names of the involved schools? Why or why not?

Thank you for recognizing the Commission's work in combating deception against military consumers and military recruits. As mentioned in my response to the October 9, 2018 letter from you and several of your colleagues inquiring about schools that used deceptive lead generators to market their programs, the FTC shares your concerns about ensuring that those who serve or who want to serve are not deceived in making decisions about their educational futures.

In my response to your letter, I explained that the information you requested is non-public material because we obtained it during the course of a law enforcement investigation. The Commission can provide you with information to contact the party that submitted the information to us. If you have determined that contacting the submitter directly is not a viable course of action, I can further consider whether the Commission should hold a vote on the release of information about the identity of lead purchasers. Several factors would play into such consideration, including whether the release of the

information could prejudice ongoing or future law enforcement efforts. Furthermore, the FTC generally does not release information pertaining to individuals and entities that have not been adjudged to have violated the law; a key question to address in determining whether to depart from that practice in this instance is whether release of the information would benefit consumers or, conversely, cause confusion in the marketplace.

***Question 2*. Brewers and non-alcoholic beverage makers are large consumers of aluminum. The price index for the storage and transportation costs of the aluminum they purchase, the "Midwest Premium," has increased dramatically since President Trump's tariffs were implemented.**

Do you believe that the end-users of metal would meet the definition of "consumer" for FTC purposes? If so, could the FTC investigate the sharp increase in the Midwest Premium? If not, do you believe the Department of Justice, or another federal agency is more appropriate to investigate? Finally, if another agency commences an investigation, can the FTC provide expertise and support for that investigation?

Depending on the facts, end-users of aluminum could be harmed by a violation of the antitrust laws even though they are businesses rather than individuals. For example, in an FTC action to enjoin the merger of the second- and third-largest U.S. glass container manufacturers, the FTC alleged the transaction would likely harm the customers who use glass containers: brewers and distillers.[47]

If the Commission finds or is presented with evidence that a firm within our jurisdiction is engaging in conduct that harms competition and may violate the antitrust laws, we will review that information for potential law enforcement action. As you know, the FTC shares jurisdiction over the enforcement of the antitrust laws with the Department of Justice. The agencies use a "clearance" process to ensure that only one agency investigates and, if necessary, challenges any given transaction. Assignment to one agency or the other takes place after preliminary review of a transaction, based principally on each agency's relative expertise in the markets relevant to the proposed transaction. For many years, the Department of Justice has pursued antitrust enforcement in aluminum; the Department also works closely with the Commodities Futures Trading Commission in this area. Thus, the FTC would likely refer any evidence of anticompetitive conduct involving Midwest Premium aluminum pricing to our sister agency and, if requested, would coordinate with the Department of Justice on any ensuing investigation.

[47] *In re Ardagh Group and Saint-Gobain Containers*, Dkt. No. D-9356 (Mar. 24, 2014), https://www.ftc.gov/enforcement/cases-proceedings/131-0087/ardagh-group-sa-saint-gobain-containers-inc-compagnie-de.

The Honorable Tom Udall

Privacy
Questions for all Commissioners

Question 1. Do you support strong civil penalties for consumer privacy violations?

Yes. Under the FTC's current authority, we cannot seek civil penalties for initial privacy violations of Section 5 of the FTC Act. I believe we need the ability to seek civil penalties for initial violations in order to more effectively deter unlawful conduct. These penalties would of course be subject to the statutory limitations in Section 5(n) of the FTC Act, including ability to pay, degree of culpability, and ability to continue to do business.

Question 2. The California Consumer Protection Act goes into effect in January 2020. As Congress considers pre-emption of that state law, what additional authority should we give the FTC to ensure that consumer privacy adequately is protected?

I support the enactment of federal privacy legislation that would be enforced by the FTC and contain at least three components. First, as I noted above, any such legislation should give the Commission the ability to seek civil penalties for initial privacy violations. Second, it should give the Commission the ability to conduct APA rulemaking in order to make sure any legislation keeps pace with technological developments. Third, it should give the Commission jurisdiction over nonprofits and common carriers. Beyond these general parameters, I note that the process of enacting federal privacy legislation will involve difficult tradeoffs that are appropriately left to Congress. No matter the specific privacy or data security laws Congress enacts, the Commission commits to using its extensive expertise and experience to enforce them vigorously and enthusiastically.

Question 3. A recent *New York Times* analysis found that both the Apple App Store and the Google Play Store have apps in their respective children's or family sections that potentially violate COPPA.[48] What specific role should platform owners play to ensure COPPA compliance on their platforms?

In 2012, the Commission revised the COPPA Rule to cover not just websites, app developers, and other online services but also third parties collecting personal information from users of those sites or services. At that time, the Commission made clear that it did not intend to make platforms responsible merely for offering consumers access to someone else's child-directed content. Rather, platforms would be liable under COPPA only if they had actual knowledge that they were collecting personal information from a child-directed app. At the same time, platforms are in a unique position to set and enforce rules for apps that seek placement in the platform's store, and to drive good practices. We encourage platforms to pursue best practices in this regard, beyond those required by COPPA. For example, platforms can serve an important educational function for apps that may not understand the requirements of COPPA.

[48] Valentino-DeVries, J., Singer, N., Krolick, A., Keller, M. H., *How Game Apps That Captivate Kids Have Been Collecting Their Data*, N.Y. TIMES, Sept. 12, 2018, https://www.nytimes.com/interactive/2018/09/12/technology/kids-apps-data-privacy-google-twitter.html.

Question 4. Compliance for mobile apps may be hard to achieve against fly-by-night operators overseas who do not care if their apps violate U.S. law. How can the Vtech Electronics investigation and civil penalty serve as an example for how the FTC can hold foreign app developers responsible for violating COPPA?

In addition to the VTech case you mention, the Commission has taken action in a number of privacy-or security-related cases against companies that have a foreign presence.[49] We rely on the U.S. SAFE WEB Act Amendments to the FTC Act to address unfair and deceptive acts or practices involving foreign commerce. Using this authority, the agency has been able to obtain successful relief for consumers in the United States against the foreign entities that manufactured the devices at issue (as well as their U.S. subsidiaries in certain matters) when they purposefully directed their activities to the United States by advertising, marketing, distributing, or selling their products to U.S. consumers.This relief has included a substantial civil penalties in the VTech and inMobi settlements. More recently, the FTC took action against Blu, a U.S.-based phone manufacturer that was allowing its Chinese service provider to access text messages and other private information, contrary to its representations to consumers.[50]
Due to some of the practical challenges the Commission faces in bringing enforcement actions against foreign companies, the Commission has also used other means to address illegal conduct affecting U.S. consumers. For example, a few years ago, Commission staff sent a warning letter to a Chinese company, Baby Bus, about COPPA violations relating to the collection of children's personal information through its apps. The Commission copied the three U.S.-based app platforms on this communication. The company quickly responded and addressed the concerns.

In determining how to address illegal conduct by foreign companies, we generally consider a number of factors. These include the nature and breadth of harm or potential harm to U.S. consumers from the foreign company's practices; the legal rules relating to service, evidence collection, and enforceability in the jurisdiction where the target is based; practical issues, such as whether the company has incentives to enter into a settlement with the FTC and remediate its conduct such as a large base of U.S. customers and supplier/distributor relationships in the United States; and resource issues such as the added time and costs of proceeding against a foreign entity. We also, in appropriate cases, seek cooperation from foreign counterparts who may be able to provide us with relevant information or be able to better address the conduct at issue.

Question 5. The COPPA safe harbor organizations must submit an annual report to the Federal Trade Commission, Can you share the reports from the last 5 years?

The FTC-approved safe harbor organizations do submit annual reports to the FTC each year. Unfortunately, we are not able to disclose these reports because they contain confidential proprietary information, which is exempt from disclosure by FOIA and Section 6(f) of the FTC Act.

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[49] *In re: TRENDnet, Inc.,* No. C-4426 (Jan. 16, 2014), https://www.ftc.gov/enforcement/cases-proceedings/122-3090/trendnet-inc-matter; *United States v. InMobi Pte Ltd.,* No. 3:16-cv-3474 (N.D. Cal. June 22, 2016), https://www.ftc.gov/enforcement/cases-proceedings/152-3203/inmobi-pte-ltd; *In re ASUSTeK Computer Inc.*, No. C-4587 (July 18, 2016), https://www.ftc.gov/enforcement/cases-proceedings/142-3156/asustek-computer-inc-matter; *In re HTC America Inc.*, No. C-4406 (July 25, 2013), https://www.ftc.gov/enforcement/cases-proceedings/122-3049/htc-america-inc-matter.

[50] *In re BLU Prods. and Samuel Ohev-Zion*, No. C-4657 (Sept. 6, 2018), https://www.ftc.gov/enforcement/cases-proceedings/172-3025/blu-products-samuel-ohev-zion-matter.

Concussions
Questions for Chairman Joseph J. Simons

Question 6. As you all are aware, I continue to bring attention to issue of helmet safety and marketing practices – particularly equipment that children use for sports. While there has been increased testing and awareness of traumatic brain injury caused by sports, I remain concerned that companies are mischaracterizing their equipment's ability to prevent or lessen concussions or other head injuries. Have FTC staff been able to continue their good work monitoring the helmet and other sports equipment in the marketplace to ensure that helmets and other gear is not being marketed in a deceptive manner?

Following its investigation into football helmet manufacturers and settlement against Brain-Pad, Inc.,[51] a mouthguard manufacturer, FTC staff have continued to monitor the marketplace for claims related to head injuries. When appropriate, staff have sent warning letters, civil investigative demands, and voluntary requests for information to marketers of athletic equipment.

Question 7. Have staff from the FTC been briefed by the National Football League or other entities that are conducting research on helmet design and safety?

FTC staff have not been briefed by the National Football League or other entities conducting research on helmet design and safety, although we are following research and development in the area.

[51] *In re Brain-Pad, Inc. and Joseph Manzo*, No. C-4375 (Nov. 5, 2012), https://www.ftc.gov/enforcement/cases-proceedings/122-3073/brain-pad-inc

The Honorable Catherine Cortez Masto

The Honorable Joseph J. Simons, Chairman, Federal Trade Commission

Pet Leasing
I appreciate the Commission's attention to my request with six of my colleagues for the FTC to investigate the practice of pet leasing that is leading some consumers into confusing or deceptive contractual obligations that cause them to have an issue with their beloved pet and negatively impact their financial status, such as credit scores, for far into the future. This is an issue that is a little under the radar but needs strong oversight and attention under your deceptive practices mandate if there are concerning financial practices being discovered.

Question 1: Can I get a further commitment from you all to keep my office informed of actions and determinations you all may make pertaining to this concerning issue and the Humane Society and Animal Legal Defense Fund's formal petition to the Commission?

The FTC is committed to protecting consumers from unfair or deceptive acts or practices, including any such practices carried out by merchants or third-party leasing and financing companies. Since our response to your letter last November, FTC staff have met with the Humane Society and Animal Legal Defense Fund to discuss their joint formal petition to the Commission. The FTC will continue to keep your office informed of public actions the Commission takes concerning pet leasing or the Humane Society and Animal Legal Defense Fund's petition to the Commission.

Data Minimization vs Big Data
Question for all Commissioners
A topic that has come up a lot during our discussions on privacy is data minimization. This is a concept that I have been considering on as I work on developing a comprehensive data privacy bill. As you're aware, this is the idea that businesses should only collect, process, and store the minimum amount of data that is necessary to carry out the purposes for which is was collected. There are obvious advantages to this as it minimizes the risk of data breaches and other privacy harms. At the same time, big data analytics are going to be crucial for the future and play an important role in smart cities, artificial intelligence, and other important technologies that fuel economic growth. I think it is important to find a balance between minimization and ensuring that data, especially de-identified data, is available for these applications.
Question 1. **Can you describe how you view this balance and how we in Congress can ensure that people's data is not abused but can still be put to use in positive ways?**

Your question neatly captures the dilemma. Businesses can apply "big data" analysis tools to gain insights from large data sets that help the business to innovate – for example, to improve an existing product. This analysis can provide new consumer benefits, such as the development of new features. On the other hand, consumers' data may be used for unexpected purposes in ways that are unwelcome.[52]

[52] *See, e.g.,* Press Release, *FTC Charges Deceptive Privacy Practices in Google's Rollout of Its Buzz Social Network* (Mar. 30, 2011), https://www.ftc.gov/news-events/press-releases/2011/03/ftc-charges-deceptive-privacy-practices-googles-rollout-its-buzz) (alleging that Google deceptively repurposed information it had obtained from users of its Gmail email service to set up the Buzz social networking service, leading to public disclosure of users' email contacts).

Long-term retention of consumer information—such as sensitive financial information—also presents a data security issue.[53]

The FTC issued a report on the subject of the benefits and risks of big data that contains guidance for companies that use big data analytics.[54] In November 2018, the Commission also hosted a workshop on the intersections between big data, privacy, and competition.[55] We are happy to work with your staff to develop legislation on how to balance the benefits and risks of big data.

FTC Resource Needs – Staffing Specifics
To get a sense of the challenge additional authority or requirements on your commission may be, can you tell us how many full time technologists do you have on staff at the FTC?
Question 1. **More broadly, how many staff does the FTC have working on data privacy?**
Question 2. **Do you have the resources you need to effectively protect privacy in the digital age?**
Question 3. **If not, what additional resources would be helpful?**

We have about 5 full time staff whose positions are classified as technologists. Beyond these specific full-time employees, we have a number of investigators and lawyers who have developed significant in-house technical expertise through their enforcement and policy work in the areas of big data, cybersecurity, the online advertising ecosystem, Internet of Things, artificial intelligence, and related fields. When the FTC needs more complex and richer information about a specific industry or technology, we supplement our internal technological proficiency by hiring outside technical experts to help us develop and litigate cases. We also keep abreast of technological developments by hosting an annual event called PrivacyCon, in which we call on academics to present original research on privacy and security issues. If provided additional funding, we would hire additional technologists and other staff to enhance our privacy and data security enforcement efforts.

Response to Question 1: As reflected in the Commission's annual budget request, the Division of Privacy and Identity Protection has approximately 40 staff tasked with protecting consumers' privacy and security. Additionally, staff from other Divisions and regional offices also work on data privacy issues.[56]

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[53] *See, e.g., In re Ceridian Corp.*, No. C-4325 (June 8, 2011), https://www.ftc.gov/enforcement/cases-proceedings/102-3160/ceridian-corporation-matter) (final order resolving charges that the company created unnecessary risks by storing information such as individuals' email address, telephone number, Social Security number, date of birth, and direct deposit account number indefinitely on its network without a business need).
[54] *See* FTC Report, *Big Data: A Tool for Inclusion or Exclusion? Understanding the Issues* (Jan. 2016), https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf.
[55] *See* FTC Workshop, *FTC Hearing #6: Competition and Consumer Protection in the 21st Century* (Nov. 6-8, 2018), https://www.ftc.gov/news-events/events-calendar/ftc-hearing-6-competition-consumer-protection-21st-century.
[56] *See, e.g.*, Press Release, *LifeLock to Pay $100 Million to Consumers to Settle FTC Charges it Violated 2010 Order* (Dec. 17, 2015), https://www.ftc.gov/news-events/press-releases/2015/12/lifelock-pay-100-million-consumers-settle-ftc-charges-it-violated ($100 million settlement for order violation obtained by the Division of Enforcement); Press Release, *Online Talent Search Company Settles FTC Allegations it Collected Children's Information Without Consent and Misled Consumers* (Feb. 5, 2018), https://www.ftc.gov/news-events/press-releases/2018/02/online-talent-search-company-settles-allegations-it-collected (settlement for COPPA violations obtained by Midwest Region staff); FTC, Website: *Cybersecurity for Small Businesses* (website created by the Division of Consumer and Business Education), https://www.ftc.gov/tips-advice/business-center/small-businesses/cybersecurity.

Response to Questions 2 and 3: The Commission works hard to effectively employ whatever resources Congress gives us. While we use our existing resources efficiently, we believe that the agency could use additional resources. Some areas in which we could use additional resources include the hiring of additional technologists and the hiring of additional staff to monitor and enforce compliance with privacy and data security orders. Furthermore, if Congress were to give the FTC additional rulemaking and enforcement tools in the privacy area, we would need more resources to handle those tasks while continuing the agency's existing enforcement, policy, and education work. Whatever resources Congress gives us, we will put to good use.

General Privacy Recommendations

Question 1. **While privacy was a significant topic of the oversight hearing, as we look to develop a bill, can you specifically lay out some of the top priorities you individually would like to see included and what do you think gets overlooked in the conversations policymakers have with allowing for future innovations and yet raising the bar for protecting consumers?**

In its written testimony, the Commission urged Congress to consider enacting privacy legislation that would be enforced by the FTC. The testimony recognized that, while the agency remains committed to vigorously enforcing existing privacy-related statutes, Congress may be able to craft federal legislation that would more seamlessly address consumers' legitimate concerns regarding the collection, use, and sharing of their data and provide greater clarity to businesses while retaining the flexibility required to foster competition and innovation. As far as top priorities for such legislation: first, Congress should give the Commission authority to deter violations by fining companies for initial violations, as it has for violations of other statutes. Second, Congress should ensure that all types of companies across the economy are held accountable for protecting consumers' privacy and security. As one example, the Commission has long urged the repeal of the FTC Act's provision that places limits on the agency's ability to go after law violations by common carriers and by non-profits. Third, Congress should consider giving the FTC targeted APA rulemaking authority so that the FTC can enact rules to keep up with technology developments. An excellent example of this approach appears in statutes such as CAN-SPAM and COPPA.

Question 2. **Can you also outline the optimal role you see for our state Attorneys General in this privacy enforcement process?**

I see the state Attorneys General as important partners in protecting consumers. For a number of statutes, such as COPPA, Congress enacted legislation that enables Attorneys General to enforce the law in addition to the Commission. We applaud this model. A number of state AGs have brought actions to enforce COPPA, for example, which benefits consumers because there are multiple cops on the beat. And when state Attorneys General bring these actions, they are enforcing the same legal standard that other states and the Commission are enforcing, so the same protections apply consistently nationwide.

Updated Aspects of Banking or Health Care Data Security
Given the incredibly innovative technologies being developed, from apps that are commonly used in various banking transactions, to wearables that by design are tracking personally sensitive health care related metrics by the second, there is a lot of data being collected, stored and utilized.

And many of these technologies are providing incredibly helpful in cases like telemedicine to help residents of rural communities. Within your testimony, you stated quote *"The Commission also must continue to prioritize, examine, and address privacy and data security with a fresh perspective."* *Question 1.* So do you think there is a need for a broader conversation about how our current banking and health care information protection statutes like HIPAA, for example, and regulators like the FTC serve in aiding the different enforcement agencies ensure these laws are moving ahead with the times?

Laws and regulators certainly need to keep up with the times. The series of hearings the Commission has been holding on a wide range of issues are one part of the Commission's process to do just that. Laws regarding financial privacy, in particular, have been changing rapidly at the state level, with the adoption of new laws by states such as New York and South Carolina with respect to financial institutions and insurance companies, respectively. The Commission has been following these developments closely.

Question 2. **Are there any specific examples or thoughts you have on what kind of further considerations need to be given to these kinds of technologies given the increased personal nature of the type of data that is being collected, stored and utilized?**

With respect to financial and health privacy specifically, it is important that privacy and security obligations apply regardless of the type of entity that is collecting the data. For both financial and health privacy, that is not currently the case. Companies covered by HIPAA, such as health plans and certain medical providers, have specific obligations with respect to health information they collect; meanwhile, other entities that collect the same types of information (e.g., data brokers, health apps, health information websites) may not face the same obligations. Similarly, financial institutions have obligations under the Gramm-Leach-Bliley (GLB) Act to protect information such as account numbers and SSNs, but other entities collecting the same types of information do not.

Question 3. **Is it time for a reconsideration or expansion of safeguards at all stages of transmission of consumer's banking information?**

While the Commission does not have jurisdiction over banks and does not have the expertise to comment on banking information specifically, I do believe it is time for a reexamination of safeguards for financial institutions generally. The FTC has jurisdiction over a wide range of non-bank financial institutions such as tax preparers, mortgage brokers, payday lenders, credit bureaus, and debt collectors. The FTC enforces the GLB Safeguards Rule, which applies to these institutions. As part of its periodic review of its rules and guides, the Commission is currently reviewing its GLB Safeguards Rule, which requires financial institutions to take reasonable measures to secure consumers' data. More broadly, in urging Congress to consider enacting privacy legislation that would be enforced by the FTC, the Commission expects that the legislative process would involve a fresh new look at the current regulatory landscape, and would consider harmonizing and updating that landscape where needed. We agree that financial information, in particular, should be maintained securely throughout the information lifecycle.

Question 4. **What regulatory structures and rules under the Gramm-Leach-Bliley Act could apply to other entities which collect and hold sensitive information?**

The Commission's GLB Safeguards Rule requires financial institutions to develop, implement, and maintain a comprehensive, written information security program, and, as noted above, is currently under review. One of the strengths of the Rule is its flexible, process-based approach, which requires the institution to implement administrative, technical, and physical safeguards appropriate to the size and complexity of the financial institution, the nature and scope of its activities, and the sensitivity of the customer information at issue. The Rule also requires each financial institution, among other things, to keep its security program up-to-date—for example, by adjusting the program to address new types of threats. This process of continual updating is essential. We believe a similar, process-based approach would be appropriate for a wide range of companies. To respond to companies' desire for more specific guidance about which security measures to adopt, the Rule's process-based, results-oriented approach can be combined with more specific technology-neutral requirements.

Question 5. **From your perspective, should entities such as financial institutions be on the list of those to be informed of any compromised personally identifiable information when associated accounts are involved?**

Previous legislation that would require data breach notification has required that companies notify the nationwide credit reporting companies, possibly because these are large, well-known entities that would be expected to develop processes to handle such notifications. Although consumers would presumably notify their bank, for example, if a company were to inform them that their bank account information has been exposed in a breach, direct notification of financial institutions could enable the institution to take additional measures to monitor breached accounts for fraud, even if the consumer does not take action.

First and Third Party Entities
There has been a lot of calls for a privacy bill that evens the playing field and is technologically neutral. This is important, but it is also important to think about how consumers interact with different entities. For example, many small and medium sized businesses contract with secondary firms that process data on their behalf. The consumer has no relationship with these entities, and so many of the requirements like transparency and control are more difficult to meet.
Question 1. **How do we address this problem while ensuring a bill maintains an even playing field and does not favor any one business model?**

One of consumers' main privacy concerns is the sharing of their data—particularly the sale of their data—with third parties with whom, often, the consumer has no direct relationship. At the same time, large entities that collect vast amounts of data from consumers may be able to share information widely within their organizations, without sharing with "third parties," while smaller competitors cannot. The implications on competition of different privacy regimes is one of the issues that the Commission has been examining in its ongoing series of hearings. One option to protect privacy in a way that does not disadvantage smaller players would be to impose requirements based on factors other than whether the entity is a "third party"—for example, by restricting the use of certain information for particular purposes by both first parties and third parties. We would be pleased to work with your staff further on this issue.

Privacy Risky Communities/Groups

Question 1. **Do you think that certain communities or groups are any more or less vulnerable to privacy risks and harms?**

Yes. Part of the discussion around big data and AI, for example, concerns the potential for bias, such as perpetuating historical discrimination, even unintentionally, through the use of biased data. In a 2016 report, *Big Data: A Tool for Inclusion or Exclusion? Understanding the Issues*, the Commission staff reported on a workshop relating to the risks and benefits of big data. The report recognized that big data analysis can bring significant consumer benefits, but also may cause harm relating to disparate treatment. For example, the report noted that potential inaccuracies and biases in data analysis might lead to detrimental effects for low-income and underserved populations. The Commission has worked to address issues particularly affecting certain communities or groups through a number of means, including a series of seminars and other events around the country and through consumer education.[57]

Question 2. **Should privacy law and regulations account for such unique or disparate harms, and if so, how?**

Certainly, harmful discriminatory treatment based on an individual's race, age, gender, religion, national origin, sexual orientation, and other prohibited factors should not be lawful. Existing laws, such as the Fair Credit Reporting Act and the Equal Credit Opportunity Act, offer important protections against unlawful discrimination. As noted above, much of the discussion around discriminatory treatment in the privacy area relates to the possibility that the use of algorithms will perpetuate past discrimination, even unintentionally.[58] Panelists at the Commission's November 2018 hearing on competition and consumer protection issues associated with the use of algorithms, artificial intelligence, and predictive analytics delved into these complicated issues.[59] We are happy to work with you to think through these issues as you craft legislation to prevent unlawful discrimination.

Immediate Civil Penalties Authority

Noting from your FTC testimony, "*Section 5 (of the FTC Act), however, is not without limitations. For example, Section 5 does not provide for civil penalties, reducing the Commission's deterrent capability.*"

Question 1. **While I appreciate the long term successes of the FTC in many respects to investigate data security matters, what are your thoughts to whether there is enough of a deterrent effect with Section 5 authority when you can't immediately enforce against those who misuse data with civil penalties right from the start, rather than as the result of often times flagrant offenses to their already establish consent decrees?**

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[57] *See, e.g.*, *Common Ground Conferences and Roundtables Calendar*, https://www.consumer.gov/content/common-ground-conferences-and-roundtables-calendar; *Consumer Information – Fraud Affects Every Community*, https://www.consumer.ftc.gov/features/every-community.

[58] *See, e.g.*, Elizabeth Weise, *Amazon Same-Day Delivery Less Likely in Black Areas, Report Says*, USA TODAY (Apr. 22, 2016), https://www.usatoday.com/story/tech/news/2016/04/22/amazon-same-day-delivery-less-likely-black-areas-report-says/83345684/ (mapping Amazon's algorithmically-based same day delivery areas in certain cities, as originally proposed, with historical segregation in those cities).

[59] *See* FTC Workshop, *FTC Hearing #7: Competition and Consumer Protection Issues in the 21st Century* (Nov. 13-14), https://www.ftc.gov/news-events/events-calendar/ftc-hearing-7-competition-consumer-protection-21st-century.

In the data security area, I believe that Congress should enact legislation giving the FTC the authority to seek civil penalties against first-time violators, which we cannot currently do under the FTC Act. I support such legislation precisely because I believe that our existing legal regime does not provide sufficient deterrence.

Senate Committee on Commerce, Science, and Transportation
"Oversight of the Federal Trade Commission"
November 27, 2018
Questions for Rebecca Kelly Slaughter
Commissioner, Federal Trade Commission

The Honorable John Thune

1. **Vertical mergers such as the merger between AT&T and Time Warner have garnered some attention lately. The FTC and DOJ have not updated vertical merger guidance since 1984. Do you believe that the FTC and DOJ should issue new guidance on vertical mergers?**

Given the enormous impact that vertical mergers could have on the economy, markets, and consumers, I think the Commission should closely scrutinize them, particularly when they involve oligopoly markets and markets with high barriers to entry.[1] There is broad agreement that the 1984 non-horizontal guidelines do not reflect the Commission's current enforcement practice. Indeed, Commission investigations and cases have identified a range of competition concerns arising from vertical mergers, including limiting access to or raising the costs of key inputs, restricting access to an important customer, inhibiting entry by new competitors, evading regulations, facilitating coordination, and anticompetitive information sharing. I recently urged the Commission to routinely conduct retrospective examinations of vertical merger enforcement decisions. This would allow the Commission to see if its predictions about a merger were correct and facilitate the Commission's ability to take any necessary enforcement action. The Commission is considering whether the agencies should issue guidance on vertical merger enforcement and such retrospectives would be critical to informing such an endeavor.

2. **Government lawsuits to stop mergers are litigated using different procedures depending on which agency, the FTC or DOJ, handles the case. Do you think Congress should take action to ensure that agencies follow the same procedures or do you support another approach?**

I do not think Congress should take action to change the procedures used by the Federal Trade Commission to carry out its merger enforcement mission. Congress intentionally created the Commission as an antitrust enforcement entity distinct from the DOJ. Accordingly, the FTC Act provides the Commission with additional tools to study markets and enforce the laws that are critical to our mission. Specifically, the administrative litigation process has been enormously useful in developing certain aspects of the law regarding mergers, such as mergers between hospitals. I do not share the concern some have articulated that the different statutory procedures between the agencies produce different outcomes; to the contrary, I think it is widely recognized that, in order to block a transaction, the DOJ and Commission both must show that a transaction would likely be anticompetitive.

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[1] For my detailed views on vertical mergers, please see my statement dissenting from *In the Matter of Sycamore Partners, Staples, and Essendant*, No. 181-0180 (Jan. 28, 2019), https://www.ftc.gov/system/files/documents/public_statements/1448321/181_0180_staples_essendant_slaughter_statement.pdf.

3. **Should Congress amend Section 5(n) of the FTC Act, which addresses unfair practices, to clarify what constitutes "substantial injury?" If so, how?**

The Commission has alleged and Courts have found that "substantial injury" can take the form of financial, physical, or reputational injuries. In addition, the Commission has alleged and Courts have found that "substantial injury" can take the form of an unwanted intrusion into the sanctity of people's homes and their intimate lives. As a general matter, there is no need to clarify what constitutes "substantial injury" under Section 5(n) of the FTC Act.

In many areas, however, the FTC also has specific rules that allow it to target specific law violations and seek monetary penalties without having to demonstrate or quantify "substantial injury." For example, while abusive telephone calls are an unfair practice that cause substantial injury in the form of an unwanted intrusion into consumers' homes that wastes their time, the Telemarketing Sales Rule sets out with specificity which practices are abusive and imposes a penalty for violations. This gives clarity to business and reduces the Commission's enforcement burden of having to prove that the calls amounted to "substantial injury" in each case. I believe the Commission would benefit from the authority to issue similar rules in the areas of privacy and data security, both to give clarity to business and to reduce the Commission's enforcement burden of having to prove that each data breach causes "substantial injury" to consumers.

4. **Should the FTC issue more guidance to marketers on the level of support needed to substantiate their claims? If so, when do you anticipate that such guidance could be issued?**

The FTC has issued extensive guidance over the years to help marketers in determining the level of support needed to substantiate claims. The Commission first articulated the relevant factors used to determine the level of evidence required to substantiate objective performance claims in *Pfizer, Inc.*, 81 F.T.C. 23 (1972). Those factors included the type of claim, type of product, the consequences of a false claim, the benefits of a truthful claim, the cost of developing substantiation for the claim, and the amount of substantiation experts in the field believe is reasonable. The Commission and the courts have reaffirmed this standard many times since 1972.[2] In addition, the FTC also has provided extensive guidance through Guides and staff guidance documents.[3] Finally, FTC staff provide additional guidance through speeches and presentations to industry trade groups and industry attorneys.

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[2] *See, e.g., Thompson Med. Co.*, 104 F.T.C. 648, 813 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986); *Daniel Chapter One*, 2009 WL 5160000 at *25–26 (F.T.C. 2009), *aff'd*, 405 Fed. App'x 505 (D.C. Cir. 2010) (unpublished opinion), *available at* 2011-1 Trade Cas. (CCH) ¶ 77,443 (D.C. Cir. 2010); *POM Wonderful, LLC*, 155 F.T.C. 1, 55–60 (2013), *aff'd*, 777 F.3d 478 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 1839, 194 L. Ed. 2d 839 (2016); *FTC Policy Statement Regarding Substantiation*, 104 F.T.C. 839, 840 (1984) (appended to *Thompson Med. Co.*, 104 F.T.C. 648 (1984)).

[3] *See Guides for the Use of Environmental Marketing Claims*, 16 C.F.R. § 260.2 (2019), https://www.ecfr.gov/cgi-bin/text-idx?SID=bd96b2cdcd01f7620d43e50a9d1d8cec&mc=true&node=se16.1.260_12&rgn=div8; *Dietary Supplements: An Advertising Guide for Industry,* https://www.ftc.gov/tips-advice/business-center/guidance/dietary-supplements-advertising-guide-industry.

5. **In June, the 11th Circuit vacated the Commission's data security order against LabMD. What effect, if any, will this have on the Commission's data security orders going forward?**

The Eleventh Circuit determined that the mandated data security provision of the Commission's LabMD Order was insufficiently specific. The opinion did not have any effect on the FTC's use of Section 5 to protect consumers from deceptive or unfair data security practices. The Commission is engaged in an ongoing process to craft appropriate order language in data security cases, based on the Eleventh Circuit opinion, feedback we received from our December hearing on data security, and our own internal discussion of how our orders can create better deterrence of future misconduct, using our existing tools.

One of the reasons I support comprehensive data security and privacy legislation is that such legislation could limit the impact of competing court opinions by directly empowering the FTC to require reasonable data security and privacy practices.

6. **If federal privacy legislation is passed, what enforcement tools would you like to be included for Federal Trade Commission?**

I support strong comprehensive privacy legislation that would (1) empower the FTC to seek significant monetary penalties for privacy violations in the first instance; (2) give the FTC APA rulemaking authority, to allow us to craft flexible rules that reflect stakeholder input and can be periodically updated to keep up with technological developments; and (3) repeal the common carrier and nonprofit exemptions under the FTC Act to ensure that more of the entities entrusted with consumer data are held to a consistent standard. Moreover, I support an increase in resources and personnel to enable the FTC to use these enforcement tools effectively.

7. **During the hearing, I asked the Chairman whether the FTC would consider using its section 6(b) authority to study consumer information data flows, specifically sending requests to Google, Facebook, Amazon, and others in the tech industry to learn what information they collect from consumers and how that information is used, shared, and sold. I believe the FTC's section 6(b) authority could provide some much needed transparency to consumers about the data practices of large technology companies, and help identify areas that may require additional attention from lawmakers. What are your views with respect to the FTC potentially conducting a study pursuant to section 6(b) of the Federal Trade Commission Act on the data collection, use, filtering, sharing, and sale practices of large technology companies such as Google, Facebook, Amazon, and others?**

The Commission's 6(b) investigative authority is a critical tool that the Commission can use to increase its understanding of industries and markets in order to inform both our competition and consumer protection policy and enforcement agendas. There are many issues in the technology arena that could be the subject of a 6(b) study, and I would support such an effort.

The Honorable Jerry Moran

1. **Section 5(a) of the *FTC Act*, which prohibits "unfair or deceptive acts or practices in or affecting commerce" is the legal basis for a body of consumer protection law that covers data privacy and security practices. The FTC has brought hundreds of cases to date to protect the privacy and security of consumer information held by companies of all sizes under this authority. The FTC staff recently submitted comments to the National Telecommunications and Information Administration (NTIA) that clearly indicate the FTC staff's view that the FTC would be the appropriate agency to enforce a new comprehensive privacy legislative framework. Do you agree with the staff's view?**

Yes. The FTC has the experience and expertise to enforce new comprehensive privacy legislation—and the demonstrated dedication to consumers to do so effectively. The FTC's dual missions demand that we think critically about the impact of regulations and enforcement on both consumers and the competitive marketplace, which will be valuable in executing whatever framework Congress passes.

2. **As Congress evaluates opportunities to create meaningful federal legislation to appropriately ensure privacy of consumers' data, there have been suggestions to increase the FTC's authorities to enforce in this space. Will you commit to working with this Committee in measuring what resources, if any, will be needed to allow the agency to enforce any additional authorities that may or may not be provided in federal legislation?**

Yes.

3. **Sharing responsibilities with the DOJ's Antitrust Division, the FTC enforces antitrust law in a variety of sectors as described by your testimony. While the vast majority of premerger filings submitted to enforcement agencies do not raise competition concerns, the FTC challenged 45 mergers since the beginning of 2017, and of those, the FTC only voted to initiate litigation to block five transactions. Would you please describe the resource needs of the agency associated with hiring qualified outside experts to support its litigation efforts? Please explain how developments in the high-technology sector are accounted for in the FTC's decision-making process related to antitrust enforcement.**

The Commission is always looking for ways to use existing resources more efficiently, but additional resources would be put to good use and help us to do more to further our competition and consumer protection missions. With respect to our merger enforcement efforts, economic and other experts are necessary to support investigations and bring litigation. As larger and larger mergers come before the Commission and complexity of investigations increase, the cost of outside experts becomes a greater resource burden. Resource constraints can require the agency to make difficult tradeoffs between litigating a case to achieve the optimal result and settling for a good but imperfect resolution.

Competition in the technology industry must be closely monitored and the Commission is well equipped to examine fast-moving high-technology markets. However, I think that creating a Bureau of Technology would be useful for centralizing technological expertise and more regularly deploying technologists to assist in both competition and consumer protection investigations. As you know, there continues to be some overlap between competition and consumer protection issues and the Commission should always be mindful of the fact that what we do in the competition arena could impact our consumer protection mission and vice versa.

4. **Earlier this year, I introduced legislation called the *Senior Scams Prevention Act* with Senator Bob Casey to combat continued and increasingly complex attempts to defraud one of the nation's most vulnerable populations, our senior community. This bill seeks to ensure retailers, financial institutions and wire transfer companies have the resources to train employees to help stop financial frauds and scams on seniors. Would you agree that awareness and education, guided by "best practices" established by industry and government partners, is a valuable tool in preventing consumer harms against our nation's seniors?**

Yes, coupled with effective law enforcement, efforts to empower our senior consumers to recognize and avoid scams are invaluable. The FTC works closely with multiple federal, state, and private partners to increase awareness about frauds that target our seniors, and we have developed our own *Pass It On* campaign to share preventative information about frauds and scams with older adults.

5. **In its comments submitted to NTIA on "Developing the Administration's Approach to Consumer Privacy," the FTC discussed the various cases that it has taken up to address privacy-related harms to consumers, and it specifically noted four categories of harms: financial injury, physical injury, reputational injury, and unwanted intrusion. Could you please briefly describe each category while noting any FTC enforcement considerations specific to that type of harm?**

Financial injury describes harm that can be quantified, such as lost money, time, or opportunity. When we talk about physical injury, that covers harms arising from increased risks to an individuals' health or safety, including their mental and emotional health. Reputational injury involves disclosure of private facts about an individual, which damages the individual's reputation. Finally, unwanted intrusion into the sanctity of people's homes, communications and intimate lives also constitute serious harms. Outside of lost dollars, quantifying appropriate relief to address these serious harms can present enforcement challenges that would be eased by consumer privacy legislation that imposed money penalties for privacy violations.

6. **In the FTC's recent comments in NTIA's privacy proceeding, the FTC said that its "guiding principles" are based on "balancing risk of harm with the benefits of innovation and competition." Would you describe what this means, how you strike this balance, and how it is applied in practice under your Section 5 authority in the *FTC Act*?**

When the Commission brings an action sounding in its unfairness authority under Section 5 of the FTC Act, we can only challenge an act or practice that "causes or is likely to cause substantial injury to consumers, which is not reasonably avoidable by consumers themselves and not outweighed by benefits to consumers or to competition." The FTC does not, however, need to engage in this specific inquiry when it proceeds under its deception authority pursuant to Section 5 of the FTC Act. For example, when a company makes promises to consumers about how it will collect, store or use consumer data and breaks those promises, the FTC need not engage in any balancing inquiry to bring an enforcement action.

7. **The FTC's comments pertaining to "control" in NTIA's privacy proceeding stated, "Choice also may be unnecessary when companies collect and disclose de-identified data, which can power data analytics and research, while minimizing privacy concerns." How would the FTC suggest federal regulation account for de-identified data, if at all?**

To the extent that federal regulation would be more permissive in its treatment of de-identified data, I would urge careful consideration to ensure that data cannot be re-linked to individuals. For example, I would point to the formulation used in the EU General Data Protection Regulation ("GDPR"), which makes clear that "anonymization" of personal data refers to de-identified data for which direct and indirect personal identifiers have been removed and steps have been taken to ensure that the data can never be re-identified.

8. **Your testimony indicated that continued technological developments allow illegal robocallers to conceal their identities in "spoofing" caller IDs while exponentially increasing robocall volumes through automated dialing systems. These evolving technological changes mean that the critical law enforcement efforts of the FTC cannot be the only solution, and your testimony described the additional steps the FTC is taking to develop innovative solutions to these issues. Would you please describe the process and outcomes of the four public challenges that the FTC held from 2013 to 2015? Are there plans to incentivize innovators to combat robocalls in the future?**

The FTC's process for its robocall challenges included public announcements, committees with independent judges, and, in some cases, cash prizes awarded under the America COMPETES Reauthorization Act.[4] To maximize publicity, the FTC announced each of its four challenges in connection with public events. The FTC announced the first robocall challenge at the FTC's 2012 Robocall Summit. In 2014, the FTC conducted its second challenge, "Zapping Rachel" at DEF CON 22. The FTC conducted its third challenge, "DetectaRobo," in June 2015 in conjunction with the National Day of Civic Hacking. The final phase of the FTC's fourth public robocall challenge took place at DEF CON 23. When the FTC held its first public challenge, there were few, if any, call blocking or call labeling solutions available for consumers. Today, two FTC challenge winners, NomoRobo and Robokilller, offer call blocking applications, and there are hundreds of mobile apps offering call blocking and call labeling solutions for cell phones. Many home telephone service providers also now offer call blocking and call labeling

[4] *See* FTC, "Details About the FTC's Robocall Initiatives," https://www.consumer.ftc.gov/features/feature-0025-robocalls.

solutions. The FTC will not hesitate to initiate additional innovation contests if it identifies further challenges that could meaningfully benefit consumers by reducing the harm caused by illegal robocalls.

In addition to developing call blocking and call labeling technology, the telecom industry has also developed call verification technology, called STIR/SHAKEN, to help consumers know whether a call is using a spoofed Caller ID number and assist call analytics companies in implementing call blocking and call labeling products. If widely implemented and made available to consumers, the STIR/SHAKEN protocol should minimize unwanted calls. Certain industry members have begun to roll out this technology and it is in beta testing mode. We will keep a close eye on this industry initiative and continue to encourage its implementation.

a. Would you please describe the FTC's coordination efforts with state, federal, and international partners to combat illegal robocalls?

The FTC frequently coordinates its efforts with its state, federal, and international partners. The FTC often brings robocall enforcement actions with states as co-plaintiffs. For example, in the FTC's case against Dish Network, litigated for the FTC by the Department of Justice, the FTC brought the case jointly with California, Illinois, North Carolina, and Ohio. Collectively, the states and the FTC obtained a historic $280 million trial verdict.[5]

The FTC also coordinates outreach and education with the FCC. In 2018, the agencies co-hosted two robocall events—a policy forum that discussed technological and law enforcement solutions to the robocall problem[6] and a public expo that allowed companies offering call blocking and call labeling services to showcase their products for the public.[7] Additionally, the FTC and FCC hold quarterly calls, speak regularly on an informal basis, and coordinate on a monthly basis with our state partners through the National Association of Attorneys General. The FTC also engages with international partners through participation in international law enforcement groups such as the International Consumer Protection Enforcement Network, International Mass Marketing Fraud Working Group, and the Unsolicited Communications Network (formerly known as the London Action Plan).

9. Your testimony described the limitations of the FTC's current data security enforcement authority provided by Section 5 of the *FTC Act* including: lacking civil penalty authority, lacking authority over non-profits and common carrier activity, and missing broad APA rulemaking authority. Please describe each of these

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[5] Press Release, FTC and DOJ Case Results in Historic Decision Awarding $280 Million in Civil Penalties Against Dish Network and Strong Injunctive Relief for Do Not Call Violations (June 6, 2017), https://www.ftc.gov/news-events/press-releases/2017/06/ftc-doj-case-results-historic-decision-awarding-280-million-civil. The case is on appeal before the Seventh Circuit Court of Appeals.

[6] Press Release, FTC and FCC to Host Joint Policy Forum and Consumer Expo to Fight the Scourge of Illegal Robocalls (Mar. 22, 2018), https://www.ftc.gov/news-events/press-releases/2018/03/ftc-fcc-host-joint-policy-forum-illegal-robocalls.

[7] Press Release, FTC and FCC to Co-Host Expo on April 23 Featuring Technologies to Block Illegal Robocalls (Apr. 19, 2018), https://www.ftc.gov/news-events/press-releases/2018/04/ftc-fcc-co-host-expo-april-23-featuring-technologies-block-0.

limitations and how adjusted FTC authority to address these items would improve the protection of consumers from data security risks.

Under current law, the FTC generally cannot obtain civil penalties—in other words, money—for first-time security or privacy violations. This means that, in order to be financial liable for data security or privacy violations, a company often must violate the law, be pursued by the Commission and put under order, and then violate the law again. I believe this under-deters problematic data security and privacy practices. If Congress were to give us the authority to seek civil penalties for first-time violators, better deterrence would be achieved. As to APA rulemaking authority, the Commission would benefit from such authority in the areas of data security and privacy. Rulemaking authority will ensure that the FTC can enact rules, with notice and comment and consistent with Congressional direction, and amend them as necessary to keep up with technological developments. For example, in 2013, the FTC was able to use its APA rulemaking authority to amend its Rule under the Children's Online Privacy Protection Act to address new business models, including social media and collection of geolocation information, that were not in place when the initial 2000 Rule was promulgated. As to nonprofits and common carriers, news reports are filled with breaches affecting these sectors (e.g., the education sector), and the FTC does not currently have jurisdiction over them. Giving the FTC jurisdiction over these entities for purposes of enforcing data security and privacy laws will create a level playing field and ensure that these entities are subject to the same rules as other entities that collect similar types of data.

The Honorable Richard Blumenthal

Privacy Rules

We know that Americans care about privacy – that they eagerly want these rights. We need baseline rules. Companies should not store sensitive information indefinitely and use that data for purposes that people never intended. Federal rules must set meaningful obligations on those that handle our data. We must enable consumers to trust and control their personal data.

8. **Do you support providing state AGs with the power to enforce federal privacy protections and would you commit to working with state AGs?**

Yes. The state AGs are critical partners in our enforcement efforts and would help ensure compliance with federal privacy rules—we cannot have too many cops on the beat.

9. **Why is it important that the FTC have rulemaking authority when it comes to privacy? Where best would rulemaking be applied?**

APA rulemaking authority in the area of privacy provides two big benefits: (1) notice and comment proceedings and (2) flexibility to accommodate changing technology and practices. Notice and comment rulemaking requires the FTC to solicit comment from stakeholders on proposed rules or changes to a rule, which allows industry, advocates, experts and consumers to weigh in. And the ability to amend the rule in the future, again with notice and comment, would enable the FTC to keep up with technological developments and any unanticipated consequences.

10. **Do you believe elevating the Office of Technology Research and Investigation to the Bureau level would meaningfully help the FTC in addressing new technological developments across its mandates?**

Yes. Our cases are more sophisticated than ever and creating, and more critically funding, a body of experts who can assist on our most complex competition and consumer protection cases would be invaluable. Today we have an economist assigned to every single case; but almost all of our cases have a technological element and could benefit from a technologist as well. We also need more research in the areas of privacy and data security. Right now the FTC's Bureau of Economics engages in substantial research and scholarship, producing reports and papers on topics relevant to the Commission's consumer protection and competition missions. I envision a Bureau of Technology serving a very similar role. There are many emerging issues and policy questions in the technology space that impact consumers and competition: IoT security, AI, data portability, VR. Expert research and scholarship on these issues would provide a significant benefit to the Commission and public.

Board Accountability

12. What is the FTC doing to investigate and hold accountable individual board members and executives who knowingly assist their companies in committing fraud? What more should the FTC be doing in this regard?

I support increased focus on individual accountability for company leaders who knowingly assist their companies in violating the law and failing to comply with FTC orders. In February, the FTC announced a record-setting COPPA fine against a company, Musical.ly, now known as TikTok, that engaged in unlawful practices that put children at risk. In connection with this case, I issued a statement with my colleague Commissioner Chopra, calling publicly for the FTC to look more closely at individuals in such matters going forward.[8] When any company appears to have made a business decision to violate or disregard the law, the Commission should identify and investigate those individuals who made or ratified that decision and evaluate whether and how to hold them accountable.

FTC Investigation of Algorithms

Section 6(b) of the FTC Act gives the agency broad investigatory and information-gathering powers. For example, in the 1970s the FTC used its Section 6(b) authority to require companies to submit product-line specific information, enabling the agency to assess the state of competition across markets.

The FTC has released reports on big data and the harms biased algorithms can cause to disadvantaged communities. These reports drew attention to the potential loss of economic opportunity and diminished participation in our society. Yet, information on how these algorithms work, and on the inputs that go into them, remains opaque.

19. Where the FTC consider using its Section 6(b) investigative power to help us understand how these algorithms and black-box A.I. systems work – the biases that shape them, and how those can affect trade, opportunity, and the market?

The Commission's 6(b) investigative authority is a critical tool that the Commission can use to increase its understanding of industries and markets in order to inform both our competition and consumer protection policy and enforcement agendas. There are many issues in the technology arena that could be the subject of a 6(b) study, and I would support such an effort.

FTC Consent Decree on Unrepaired Recalls

Most consumers probably do not know that, while new car dealers are prohibited from selling vehicles with open recalls, used car dealers are not. A recent FTC consent decree, which I strenuously disagreed with and is currently being scrutinized in the courts, allows

[8] Joint Statement of Commissioner Rohit Chopra and Commissioner Rebecca Kelly Slaughter, *In the Matter of Musical.ly Inc.* (now known as TikTok), No. 1723004 (Feb. 27, 2019), https://www.ftc.gov/system/files/documents/public_statements/1463167/chopra_and_slaughter_musically_tiktok_joint_statement_2-27-19.pdf.

the sale of used cars with unrepaired recalls. According to the consent decree, car dealers can advertise that cars with unrepaired safety recalls like a defective Takata airbag are "safe" or have passed a "rigorous inspection"—as long as they have a disclosure that the vehicle may be subject to an unrepaired recall and directs consumers on how they can determine the vehicle has an open recall.

20. In your opinion, is a car with an open, unrepaired recall, a "safe" car? Why would the FTC allow unsafe cars to be advertised as "safe" and "repaired for safety," with or without a vague, contradictory and confusing disclaimer?

In my opinion, cars that have an open recall need to be fixed.

Question on Non-Compete Clauses

I am concerned about the growth of non-compete clauses, which block employees from switching jobs to another employer in the same sector for a certain period of time. These clauses weaken workers' bargaining power once they are in the job, because workers often cannot credibly threaten to leave if their employer forces refuses to give them a raise or imposes poor working conditions. According to the Economic Policy Institute, roughly 30 million workers – including one in six workers without a college degree – are now covered by non-compete clauses.

The consensus in favor of addressing non-compete clauses is growing. For example, just this past December, an interagency report indicated that non-compete clauses can be harmful in certain contexts, such as the healthcare industry. Yet, the FTC has not yet undertaken forceful action. In September, Commissioner Chopra suggested that the FTC use its rulemaking authority to "remove any ambiguity as to when non-compete agreements are permissible or not."

23. Do you agree with the proposal that the FTC use its rulemaking authority to address non-compete clauses? I invite you to explain your reasoning regarding your stance.

Non-compete clauses are anticompetitive and unfair for the vast majority of workers in our country, and unequivocally for those who have little or no bargaining power when negotiating employment contracts. A Commission rule to address non-compete clauses should be considered among the potential mechanisms for stopping their use so that workers reap the benefits of a fair and competitive marketplace for their labor.

Question on Local Merger Enforcement

Even though big national mergers typically garner the most media attention, smaller mergers can often raise monopoly concerns on the local level. This can be true in the healthcare industry, for example. In November, Commissioner Simons told me: "Some local mergers may be too small to require Hart-Scott-Rodino premerger notification, but may still have anticompetitive effects."

24. Would you agree with me that Hart-Scott-Rodino premerger notifications help antitrust enforcers catch concerning mergers?

Yes.

25. What sort of anticompetitive effects might be raised by local mergers even when those mergers are too small to require Hart-Scott-Rodino premerger notification?

Similar to mergers and acquisitions involving large firms, mergers and acquisitions involving small firms in local markets can result in competitive harm that violates Section 7 of the Clayton Act. For example, a merger might eliminate horizontal competition, resulting in higher prices, reduced quality, and/or less innovation. A merger might also enable and incentivize anticompetitive conduct resulting from vertical integration, including foreclosing or raising the cost to rivals of a key input or foreclosing competitors' access to customers. Finally, it is not difficult to imagine a large company engaging in acquisitions—or potentially serial acquisitions—of nascent competitors. These transactions may occur in local markets and be too small to trigger HSR notification, but nonetheless merit scrutiny by the Commission.

26. What action would you recommend either the FTC or Congress take in order to assist federal and state antitrust enforcers in catching local mergers that raise anticompetitive concerns?

The Commission should continue its practice of routinely monitoring the market for potentially problematic mergers that do not meet the HSR reporting requirements. It should also maintain its close working relationship with state Attorneys General to help identify non-reportable mergers that may be of mutual interest.

Question on Horizontal Shareholding

Recent research has raised questions about whether horizontal shareholding harms competition in our economy. I would like to understand your view on this ongoing research.

27. Do you believe that horizontal shareholding raises anticompetitive concerns?

I believe that the competitive impact of horizontal shareholding merits close attention. If investors hold significant minority stakes of competing firms and the investors orchestrate collusion between the firms or exercise influence over the firms the effect of which would be to substantially lessen competition, I believe such actions would raise significant competitive concerns.

28. Do you believe that our antitrust laws can be used to address the anticompetitive concerns raised by horizontal shareholding?

The Clayton Act applies to partial acquisitions of competing firms that do not confer control, but are likely to substantially lessen competition. Traditionally, enforcement has focused on cross-ownership acquisitions—or acquisitions between competitors—but there is a developing literature about the application of the Clayton Act to common ownership acquisitions and the evidence that would demonstrate that such acquisitions are likely to substantially lessen competition. This is a productive area of research and debate, and I believe it raises significant questions for antitrust enforcement and competition policy.

29. What, if anything, are you doing to address any potential harms of horizontal shareholding?

Going forward, the Commission should be on the lookout for common ownership acquisitions that could potentially raise competitive concerns and investigate to determine whether there is sufficient evidence to merit enforcement action.

The Honorable Catherine Cortez Masto

Pet Leasing

I appreciate the Commission's attention to my request with six of my colleagues for the FTC to investigate the practice of pet leasing that is leading some consumers into confusing or deceptive contractual obligations that cause them to have an issue with their beloved pet and negatively impact their financial status, such as credit scores, for far into the future. This is an issue that is a little under the radar but needs strong oversight and attention under your deceptive practices mandate if there are concerning financial practices being discovered.

1. **Can I get a further commitment from you all to keep my office informed of actions and determinations you all may make pertaining to this concerning issue and the Humane Society and Animal Legal Defense Fund's formal petition to the Commission?**

Yes. Business models predicated on long-term exorbitant leasing terms (such as the rent-to-own industry) have appropriately garnered scrutiny and criticism from consumer advocates. The extension of these types of practices to something as personal and emotional as the relationship between people and their pets is deeply distressing, and I appreciate your efforts to raise awareness of the issue. The FTC is committed to protecting consumers from unfair or deceptive acts or practices, including in this troubling area. FTC staff has met with the Humane Society and Animal Legal Defense Fund to discuss their concerns and will continue to keep your office informed of the steps we are taking in this area.

Bureau of Technology

Former Commissioner Terrell McSweeny has suggested creating a Bureau of Technology at the FTC.

1. **Does the Commission have sufficient resources and staffing to protect consumer privacy in the digital age?**

No. The Commission has used the resources and staffing it currently has to bring over 60 data security and privacy cases and to engage in extensive consumer and business education and outreach regarding privacy and security. And we will continue to use our existing resources to do all that we can—but it is not enough. Not a week goes by in which a data breach or problematic privacy practice does not grab headlines. As consumer data are collected, stored, and shared by more and more sectors of the economy, the FTC needs more resources and more staff to help ensure that data is secure.

2. **Do support the establishment of a Bureau of Technology?**

Yes. Our cases are more sophisticated than ever and creating, and more critically funding, a body of experts who can assist on our most complex competition and consumer protection cases would

be invaluable. Today we have an economist assigned to every single case; but almost all of our cases have a technological element and could benefit from a technologist as well. We also need more research in the areas of privacy and data security. Right now the FTC's Bureau of Economics engages in substantial research and scholarship, producing reports and papers on topics relevant to the Commission's consumer protection and competition missions. I envision a Bureau of Technology serving a very similar role. There are many emerging issues and policy questions in the technology space that affect consumers and competition: IoT security, AI, data portability, VR. Expert research and scholarship on these issues would provide a significant benefit to the Commission and public.

Robocalls

Obviously protecting consumers from fraud is a fundamental tenet of the FTC. And I applaud your work in both the education and enforcement sectors of protecting consumers. But one area we all are still struggling to stay ahead of the curve on is robocalls. That's why I have legislation, the Deter Obnoxious, Nefarious, and Outrageous Telephone Calls, or DO NOT Call Act with four of my Senate colleagues. It would increase the deterrent against illegal robocalls by imposing a potential criminal penalty rather than just civil fines. While these tools would be more for the Federal Communications Commission, we are obviously interested in fighting this problem on all fronts.

1. **Would you agree that in addition to finding more effective technological tools to fight this problem, that this kind of enhanced deterrent needs to receive serious consideration in Congress to help provide regulators the tools to hold bad actors accountable for this persistent nuisance and scurrilous action by scammers?**

Yes, I support increasing the deterrent against illegal robocalls, including through criminal penalties. In addition, technological tools should be developed and applied to identify those who are using sophisticated technology to evade detection, and we must continue to work with our international partners to ensure that the threat of penalties meaningfully reaches scammers who may escape the jurisdiction of U.S. law enforcement.

2. **Are there additional actions Congress should be considering related to this specific challenge?**

I recommend Congress consider requiring or strongly incentivizing voice service providers to offer call-blocking services to all customers and to implement the STIR/SHAKEN protocol. In addition, repealing the common-carrier exemption from the FTC act would enable us to bring enforcement actions against carriers that routinely and knowingly pass illegal traffic across their networks. Carriers should have both the authority and the responsibility to keep nuisance spam calls off their networks.

Data Minimization vs Big Data

A topic that has come up a lot during our discussions on privacy is data minimization. This is a concept that I have been considering on as I work on developing a comprehensive data

privacy bill. As you're aware, this is the idea that businesses should only collect, process, and store the minimum amount of data that is necessary to carry out the purposes for which is was collected. There are obvious advantages to this as it minimizes the risk of data breaches and other privacy harms. At the same time, big data analytics are going to be crucial for the future and play an important role in smart cities, artificial intelligence, and other important technologies that fuel economic growth. I think it is important to find a balance between minimization and ensuring that data, especially de-identified data, is available for these applications.

1. **Can you describe how you view this balance and how we in Congress can ensure that people's data is not abused but can still be put to use in positive ways?**

I agree that there is significant tension in how we balance the known benefits of data minimization with the benefits that might be derived from big data analytics. As a starting point, I believe that careful consideration of several topics would help inform this balancing: (1) the benefits *and potential harms* that arise from big data; (2) how best to ensure that de-identified data is not later re-linked to individuals; and (3) whether and how to preserve consumer choice regarding how de-identified data is used beyond the expected purposes for which it is collected.

General Privacy Recommendations

1. **While privacy was a significant topic of the oversight hearing, as we look to develop a bill, can you specifically lay out some of the top priorities you individually would like to see included and what do you think gets overlooked in the conversations policymakers have with allowing for future innovations and yet raising the bar for protecting consumers?**

From an enforcement perspective, my priorities include (1) empowering the FTC to seek significant monetary penalties for privacy violations in the first instance; (2) giving the FTC APA rulemaking authority, to allow us to craft flexible rules that reflect stakeholder input and can be periodically updated to keep up with future innovations; and (3) repealing the common carrier and nonprofit exemptions under the FTC Act to ensure that more of the entities entrusted with consumer data are held to consistent standards. From a policy perspective, I care deeply about making sure consumers have meaningful information about how and when their data is being collected, used and shared; lengthy and unintelligible click-through contracts do not provide this information today. Furthermore, I am concerned that consumers do not have meaningful choice when it comes to accepting the terms presented today for data use and sharing, because refusal to consent often leaves consumers unable to access services necessary for participation in contemporary democratic society. I think policymakers should endeavor to provide consumers with as much choice as practicable regarding their data; to that end, I encourage Congress to also think seriously about the implications of privacy rules on competition so that if a customer prefers a more privacy-protective product, she has the information and options available to meet that preference.

2. **Can you also outline the optimal role you see for our state Attorneys General in this privacy enforcement process?**

I believe state Attorneys General should be given full enforcement authority under any federal privacy legislation. The state AGs are critical partners in our enforcement efforts and would help ensure compliance with federal privacy rules—we cannot have too many cops on the beat.

Data Privacy – Binding Contracts?

We live with this time information inundation where people can't really read privacy policies and fairly agree to their content. But, we all know that basically no one reads privacy policies -- and indeed, no reasonable person should read privacy policies, because according to research done at Carnegie Mellon, it would take 76 work days to read all of the privacy policies on encounters in a year. Companies take advantage of the fact that no one reads privacy policies to bury terms in those policies that no rational consumer would agree to (such as Grindr selling its users HIV status to third parties).

1. **Should these terms of service be binding contracts?**

Without comprehensive privacy legislation, the FTC relies heavily on our Section 5 authority to police data security and privacy practices, including our deception authority. For example, when a company makes representations to its users through its privacy policies but does not fulfill those promises, the FTC can bring and has brought enforcement actions against the company. In addition, if a company buries a material term of service in its terms and conditions, particularly if it is unexpected or contrary to the impression created more prominently elsewhere, it is unlikely that such a disclosure is adequate.

As a general matter, we should be concerned about terms of service written so opaquely and unintelligibly that no reasonable customer can read or understand them. Furthermore, I am concerned that consumers do not have meaningful choice when it comes to accepting the terms presented today for data use and sharing, because refusal to consent often leaves consumers unable to access services necessary for participation in contemporary democratic society.

Privacy Risky Communities/Groups

1. **Do you think that certain communities or groups are any more or less vulnerable to privacy risks and harms?**

I am concerned that marginalized communities and groups are especially vulnerable to elevated privacy risks and harms. Groups that historically have been subject to profiling or targeting are understandably wary of invasions of privacy. For example, we have heard from LGBTQ civil rights organizations about the unique risks their community faces from privacy violations. I would encourage the FTC to take an intersectional approach and work with you as well as directly affected communities to identify any existing data on these unique vulnerabilities and to explore research opportunities to gather and analyze additional data.

2. **Should privacy law and regulations account for such unique or disparate harms, and if so, how?**

Privacy law and regulations should protect all consumers, but I believe there may be instances where additional protections are needed for certain types of data or certain groups of consumers—for example, our youngest consumers.

Immediate Civil Penalties Authority

Noting from your FTC testimony, "*Section 5 (of the FTC Act), however, is not without limitations. For example, Section 5 does not provide for civil penalties, reducing the Commission's deterrent capability.*"

1. **While I appreciate the long term successes of the FTC in many respects to investigate data security matters, what are your thoughts to whether there is enough of a deterrent effect with Section 5 authority when you can't immediately enforce against those who misuse data with civil penalties right from the start, rather than as the result of often times flagrant offenses to their already establish consent decrees?**

One need only open a newspaper (or scroll through a news feed) on any given day to see reports of new privacy and data-security incidents. If our current regime provided an effective deterrent, we would see fewer and fewer of these reports rather than more and more. So I do not believe that our Section 5 authority provides enough of a deterrent, which is one reason that I support comprehensive privacy legislation that would give the FTC the authority to impose money penalties for first-time violations.

The Honorable Amy Klobuchar

The FTC is charged with enforcing the Children's Online Privacy Protection Act (COPPA) and has done so for the last two decades. Protecting the privacy of children has never been more important than it is now, but the online privacy of all Americas is also increasingly at risk.

1. **Both [you and Commissioner Noah Phillips] have recently commented that we should learn from the FTC's experience in enforcing COPPA when we consider our approach to protecting consumer privacy more broadly. What lessons should we take away from the Commission's experience enforcing COPPA when considering ways to protect online privacy and data security for all Americans?**

One key takeaway from the Commission's experience enforcing COPPA is the flexibility afforded by APA Rulemaking. For example, in 2013, the FTC was able to use its APA rulemaking authority to amend the COPPA Rule to address new business models, including social media and collection of geolocation information, that were not in place when the initial 2000 Rule was promulgated.

The Federal Trade Commission's budget has remained flat for the past several years despite increasing demands on your agency's resources, including a significant rise in merger filings.

2. **If additional resources were made available to the Federal Trade Commission, how would you deploy those resources to advance the agency's consumer protection and competition missions?**

The Commission is always looking for ways to use existing resources more efficiently, but additional resources would be put to good use and help us to do more to further our competition and consumer protection missions.

With respect to our competition mission, additional resources could be dedicated to economic experts to support investigations and litigations, freeing up funding for more investigations and enforcement generally. Similarly, increasing the number of retrospective analyses of our merger enforcement decisions could be resource-intensive, but they help us learn from our enforcement decisions and inform future enforcement or merger investigations. Moreover, additional resources could be devoted to conducting studies of specific industries, including technology-related industries, in order to enhance and sharpen the Commission's understanding of competitive dynamics in emerging and developing markets.

With respect to our consumer protection mission, additional resources to support the increasing numbers of investigations and enforcement actions are essential. In particular, the Commission needs more technologists, experts, investigators, and attorneys to keep pace with the challenges facing consumers in an increasingly complex and digital marketplace.

The Honorable Tom Udall

Privacy

1. **Do you support strong civil penalties for consumer privacy violations?**

Yes.

2. **The California Consumer Protection Act goes into effect in January 2020. As Congress considers pre-emption of that state law, what additional authority should we give the FTC to ensure that consumer privacy adequately is protected?**

I support strong comprehensive privacy legislation that would (1) empower the FTC to seek significant money penalties for privacy violations in the first instance; (2) give the FTC APA rulemaking authority, to allow us to craft flexible rules that reflect stakeholder input and can be periodically updated to keep up with technological developments; and (3) repeal the common carrier and nonprofit exemptions under the FTC Act to ensure that more of the entities entrusted with consumer data are held to consistent standards. Moreover, I support an increase in resources and personnel to enable the FTC to use these enforcement tools effectively.

3. **A recent New York Times analysis found that both the Apple App Store and the Google Play Store have apps in their respective children's or family sections that potentially violate COPPA. What specific role should platform owners play to ensure COPPA compliance on their platforms?**

In 2012, the Commission revised the COPPA Rule to cover not only websites, app developers, and other online services but also third parties collecting personal information from users of those sites or services. At that time, the Commission made clear that it did not intend to make platforms responsible merely for offering consumers access to someone else's child-directed content. Rather, they would be liable under COPPA only if they had actual knowledge that they were collecting personal information from a child-directed app. At the same time, platforms are in a unique position to set and enforce rules for apps that seek placement in the platform's store and to drive good practices.

4. **Compliance for mobile apps may be hard to achieve against fly-by-night operators overseas who do not care if their apps violate U.S. law. How can the Vtech Electronics investigation and civil penalty serve as an example for how the FTC can hold foreign app developers responsible for violating COPPA?**

In addition to the VTech case you mention, the Commission has taken action in a number of privacy- or security-related cases against companies that have a foreign presence, including Musical.ly, TrendNet, inMobi, ASUS, and HTC.[9] In each of these cases, the FTC obtained

[9] *United States v. Musical.ly*, No. 2:19-cv-01439 (C.D. Cal. filed Feb. 27, 2019), https://www.ftc.gov/enforcement/cases-proceedings/172-3004/musically-inc; *In re: TRENDnet, Inc.*, No. C-4426

successful relief for consumers in the United States, including a substantial civil penalty in the Musical.ly, VTech, and inMobi settlements. The Commission has also used other means to address illegal conduct affecting U.S. consumers. For example, a few years ago Commission staff sent a warning letter to a Chinese company, Baby Bus, about COPPA violations relating to the collection of children's personal information through its apps. The Commission copied the app platforms on this communication. The company quickly responded and addressed the concerns.

5. **The COPPA safe harbor organizations must submit an annual report to the Federal Trade Commission, Can you share the reports from the last 5 years?**

The FTC-approved safe harbor organizations do submit annual reports to the FTC each year. However, these organizations claim confidentiality with respect to the information in their annual reports. I generally support increased transparency of these reports, and I would be glad to work with your office to identify appropriate ways to make this information available.

(Jan. 16, 2014), https://www.ftc.gov/enforcement/cases-proceedings/122-3090/trendnet-inc-matter; *United States v. InMobi Pte Ltd.,* No. 3:16-cv-3474 (N.D. Cal. filed June 22, 2016), https://www.ftc.gov/enforcement/cases-proceedings/152-3203/inmobi-pte-ltd; *In re ASUSTeK Computer Inc.*, No. C-4587 (July 18, 2016), https://www.ftc.gov/enforcement/cases-proceedings/142-3156/asustek-computer-inc-matter; *In re HTC America Inc.*, No. C-4406 (July 25, 2013), https://www.ftc.gov/enforcement/cases-proceedings/122-3049/htc-america-inc-matter.

Senate Committee on Commerce, Science, and Transportation
"Oversight of the Federal Trade Commission"
November 27, 2018
Questions for Christine S. Wilson
Commissioner, Federal Trade Commission

Additional Questions for the Record

The Honorable Amy Klobuchar

1. **Net neutrality is the bedrock of a fair, fast, open, and global internet. Now that the FCC has eliminated critical net neutrality protections that prevent internet service providers from blocking, slowing, and prioritizing web traffic, it is clear that the FTC now has primary authority in preventing internet abuses.**

    a. **Can you please describe the Commission's activity in policing the internet?**

    b. **Does the FTC have the resources and expertise to effectively fulfill its mission in this area?**

The consumer protection and competition issues raised by the growth of the internet and all of its subsidiary technologies are not new to the FTC, which is well equipped to analyze potential conduct and business arrangements that may impact consumers and competition. The FTC's complementary competition and consumer protection tools are capable of protecting consumers and competition online.

The FTC has significant expertise in understanding competition in broadband markets.[1] From an antitrust perspective, the ultimate issue is whether broadband internet access providers engage in unilateral or joint conduct that is likely to harm competition in a relevant market.

The FTC has reviewed a number of mergers in the Broadband Internet Access Service ("BIAS") and internet markets, and has required remedies where necessary to preserve competition. For example, in 2014, Nielsen Holdings N.V. agreed to divest and license assets and intellectual property to address the FTC's concerns that its acquisition of Arbitron Inc. might substantially lessen competition.[2] In 2000, the Commission reviewed the merger of America Online, Inc. ("AOL") and Time Warner and issued an order that resolved antitrust concerns by imposing a number of conditions to prevent the integrated firm from denying access to or discriminating

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[1] *See generally Comment of the Staff of the Bureau of Consumer Protection, Bureau of Competition, and Bureau of Economics of the Fed. Trade Comm'n*, WC Docket No. 17-108 (filed July 17, 2017), https://www.ftc.gov/system/files/documents/advocacy_documents/comment-staff-bureau-consumer-protection-bureau-competition-bureau-economics-federal-trade/ftc_staff_comment_to_fcc_wc_docket_no17-108_7-17-17.pdf; Fed. Trade Comm'n, Broadband Connectivity Competition Policy (2007), https://www.ftc.gov/reports/broadband-connectivity-competition-policy-staff-report.

[2] *Nielsen Holdings N.V.*, No. C-4439 (F.T.C. Feb. 24, 2014), https://www.ftc.gov/enforcement/cases-proceedings/131-0058/nielsen-holdings-nv-arbitron-inc-matter.

against unaffiliated Internet Service Providers ("ISPs").[3] In 2006, the FTC scrutinized a transaction among firms that provided multichannel video programming distribution, closing its investigation after determining that the evidence did not suggest the proposed acquisition was likely to substantially lessen competition in any geographic region in the United States.[4]

Likewise, the FTC's consumer protection tools are well suited to ensure that companies keep their promises to consumers about their broadband service. The FTC can take action against Section 5 violations by BIAS providers, also known as ISPs, for non-common carrier activities including deceptive advertising of services or prices, privacy violations, or unfair billing methods. The FTC recently has brought a number of throttling cases. In 2015, the FTC settled charges that TracFone, a large prepaid wireless provider, failed to disclose that it throttled the speeds of consumers on "unlimited" data plans. The company paid $40 million in consumer refunds.[5] The FTC is currently litigating against AT&T Mobility over allegations that the company unfairly throttled the speeds of consumers on plans advertised as "unlimited."[6]

The FTC has the expertise to effectively fulfill its mission in this area. The FTC also has the requisite resources. If Congress were to entrust us with additional resources, I am confident that we could deploy those resources in efficient and effective manners.

2. **The Federal Trade Commission's budget has remained flat for the past several years despite increasing demands on your agency's resources, including a significant rise in merger filings.**

    a. **If additional resources were made available to the Federal Trade Commission, how would you deploy those resources to advance the agency's consumer protection and competition missions?**

To effectively and efficiently perform our antitrust and consumer protection missions, the FTC must receive sufficient funding to attract and retain competent staff, conduct investigations, engage in our important research and development, and produce timely consumer education materials. If additional resources were made available to the FTC, I would prioritize three areas.

Health care expenditures as a percentage of GDP have been growing for several decades, and accounted for 17.9 percent of GDP in 2017. Given the importance of this sector to ordinary Americans, the FTC has long devoted significant attention to this arena. Both the FTC's Bureau of Competition and its Bureau of Consumer Protection have played a key role in promoting vibrant competition, ensuring accurate information about products and services, protecting consumers' sensitive medical information, and advising government entities on the likely impact of new regulations on entry and competition. The past decade has seen significant regulatory and

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[3] *Am. Online, Inc.*, No. C-3989 (F.T.C. Apr. 17, 2001), https://www.ftc.gov/enforcement/cases-proceedings/0010105/america-online-inc-time-warner-inc.
[4] *Comcast Corporation*, No. 051-0151 (F.T.C. Jan. 31, 2006) https://www.ftc.gov/public-statements/2013/07/acquisition-comcast-corporation-and-time-warner-cable-inc-cable-assets.
[5] *FTC v. TracFone Wireless, Inc.*, No. 15-cv-00392-EMC (N.D. Cal. Feb. 20, 2015), https://www.ftc.gov/enforcement/cases-proceedings/132-3176/straight-talk-wireless-tracfone-wireless-inc.
[6] *FTC v. AT&T Mobility LLC*, 87 F. Supp. 3d 1087 (N.D. Cal. 2015) (No. C-14-4785 EMC) (complaint).

technological changes that impact health care, as well as notable innovations in how health care is delivered to patients. The continuing growth of this sector, combined with significant concerns about health care costs, misuse of sensitive data, and burgeoning occupational licensing requirements, underscore the need for the FTC to maintain its focus on this industry. It is imperative for the FTC to continue increasing its understanding of how these developments affect patient choice and the quality of patient care, and how these changes should be incorporated into the Commission's advocacy and enforcement efforts.

Trade across borders and the rapid proliferation of competition and consumer protection regimes generate benefits for consumers and businesses, but also give rise to potential pitfalls. Consumers can easily fall prey to fraudsters who have never set foot on U.S. soil, and foreign cartels can raise the prices of goods imported into the United States. American businesses can face exclusionary conduct from foreign competitors that limits access to markets overseas, and foreign governments can apply their competition laws in ways that disproportionately disadvantage U.S. companies. The FTC, together with the DOJ Antitrust Division, has long played a role in coordinating with and providing technical assistance to competition and consumer protection agencies in other jurisdictions. But challenges remain, and now more than ever the FTC and the DOJ Antitrust Division must assume a global leadership role in advancing sensible antitrust and consumer protection policies that promote competition, protect consumers, and move away from the use of competition and consumer protection regimes to favor national champions and advance industrial policy goals.

Advances in technology create many benefits for consumers but present enforcement complexities for the FTC. Some of the most controversial public policy issues – *e.g.*, the intersection of intellectual property and antitrust, data security and privacy – are rooted in continuing technological advances. An informed understanding of how technologies work and how their use affects consumers is therefore necessary to the sensible and economically grounded exercise of the FTC's authority. The FTC historically has taken advantage of its unique R&D capabilities – including 6(b) studies, hearings, and workshops to stay abreast of technological developments that may implicate new enforcement priorities and challenges, to fashion sound enforcement policies, and to make policy recommendations to Congress, as well as to federal and state agencies. In fact, the FTC recently announced the creation of a task force, within the Bureau of Competition, to investigate competition in U.S. technology markets and take enforcement action when warranted. In light of this new initiative, the FTC is well positioned to be a thought leader on the complex issues that arise in this arena, and should continue taking full advantage of that capability.

The Honorable Tom Udall

Privacy

1. **Do you support strong civil penalties for consumer privacy violations?**

Yes. Under the FTC's current authority, we cannot seek civil penalties for initial privacy violations of Section 5 of the FTC Act. I believe we need the ability to seek civil penalties for initial violations in order to more effectively deter unlawful conduct. These penalties would of

course be subject to the statutory limitations in Section 5(n) of the FTC Act, including ability to pay, degree of culpability and ability to continue to do business.

2. **The California Consumer Protection Act goes into effect in January 2020. As Congress considers pre-emption of that state law, what additional authority should we give the FTC to ensure that consumer privacy adequately is protected?**

I support the enactment of federal privacy legislation that would be enforced by the FTC and contain at least three components. First, as I noted above, it should give the Commission the ability to seek civil penalties for initial privacy violations. Second, it should give the Commission the ability to conduct APA rulemaking in order to make sure any legislation keeps up with technological developments. Third, it should give the Commission jurisdiction over nonprofits and common carriers. Beyond these general parameters, I note that the process of enacting federal privacy legislation will involve difficult tradeoffs that are appropriately left to Congress. I also believe that the promulgation of federal privacy legislation should be undertaken in conjunction with national data breach notification and data security legislation. No matter the specific privacy or data security laws Congress enacts, the Commission commits to using its extensive expertise and experience to enforce them vigorously and enthusiastically.

3. **A recent *New York Times* analysis found that both the Apple App Store and the Google Play Store have apps in their respective children's or family sections that potentially violate COPPA.[7] What specific role should platform owners play to ensure COPPA compliance on their platforms?**

In 2012, the Commission revised the COPPA Rule to cover not just websites, app developers, and other online services but also third parties collecting personal information from users of those sites or services. At that time, the Commission made clear that it did not intend to make platforms responsible merely for offering consumers access to someone else's child-directed content. Rather, they would be liable under COPPA only if they had actual knowledge that they were collecting personal information from a child-directed app. At the same time, platforms are in a unique position to set and enforce rules for apps that seek placement in the platform's store and to drive good practices. We encourage platforms to pursue best practices in this regard, beyond those required by COPPA. For example, platforms can serve an important educational function for apps that may not understand the requirements of COPPA.

4. **Compliance for mobile apps may be hard to achieve against fly-by-night operators overseas who do not care if their apps violate U.S. law. How can the Vtech Electronics investigation and civil penalty serve as an example for how the FTC can hold foreign app developers responsible for violating COPPA?**

The Commission benefits significantly from the expertise of its Office of International Affairs in cases involving foreign companies or individuals. In addition to the VTech case you mention, the Commission has taken action in a number of privacy- or security-related cases against companies

that have a foreign presence (*see, e.g.*, TrendNet, inMobi, ASUS, and HTC).[8] In some of these cases, for example, a foreign entity manufactured the devices at issue. In each of these cases, the FTC obtained successful relief for consumers in the United States, including substantial civil penalties in the VTech and inMobi settlements. More recently, the FTC took action against BLU, a U.S.-based phone manufacturer that was allowing its Chinese service provider to access text messages and other private information, contrary to its representations to consumers.[9] The Commission has also used other means to address illegal conduct affecting U.S. consumers. For example, a few years ago Commission staff sent a warning letter to a Chinese company, Baby Bus, about COPPA violations relating to the collection of children's personal information through its apps. The Commission copied the app platforms on this communication. The company quickly responded and addressed the concerns.

5. **The COPPA safe harbor organizations must submit an annual report to the Federal Trade Commission, can you share the reports from the last 5 years?**

The FTC-approved safe harbor organizations do submit annual reports to the FTC each year. However, organizations claim confidentiality with respect to the information in their annual reports.

The Honorable Richard Blumenthal

1. **Do you support providing state AGs with the power to enforce federal privacy protections and would you commit to working with state AGs?**

Yes. The Attorneys General are important partners in protecting consumers, and I believe the model of giving state Attorneys General the power to enforce federal privacy protections ensures that there are multiple enforcers investigating potential law violations.

2. **Why is it important that the FTC have rulemaking authority when it comes to privacy? Where best would rulemaking be applied?**

The process of enacting federal privacy legislation will involve difficult tradeoffs that are appropriately left to Congress. APA rulemaking authority within those parameters is important, because it will enable the FTC to keep up with technology developments. For example, Congress gave the FTC APA rulemaking authority to implement the Children's Online Privacy Protection Act. In 2013, the FTC was able to use this authority to amend a Rule it had initially promulgated in 2000, in order to address new business models, technologies such as smart phones, and social media and collection of geolocation information. I believe providing the FTC with APA

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[8] *In re: TRENDnet, Inc.,* No. C-4426 (Jan. 16, 2014), https://www.ftc.gov/enforcement/cases-proceedings/122-3090/trendnet-inc-matter; *United States v. InMobi Pte Ltd.,* No. 3:16-cv-3474 (N.D. Cal. June 22, 2016), https://www.ftc.gov/enforcement/cases-proceedings/152-3203/inmobi-pte-ltd; *In re ASUSTeK Computer Inc.*, No. C-4587 (July 18, 2016), https://www.ftc.gov/enforcement/cases-proceedings/142-3156/asustek-computer-inc-matter; *In re HTC America Inc.*, No. C-4406 (July 25, 2013), https://www.ftc.gov/enforcement/cases-proceedings/122-3049/htc-america-inc-matter.

[9] *In re BLU Prods. and Samuel Ohev-Zion*, No. C-4657 (Sept. 6, 2018), https://www.ftc.gov/enforcement/cases-proceedings/172-3025/blu-products-samuel-ohev-zion-matter.

rulemaking in targeted areas, as Congress did with the Children's Online Privacy Protection Act, would be most effective.

3. **Do you believe elevating the Office of Technology Research and Investigation to the Bureau level would meaningfully help the FTC in addressing new technological developments across its mandates?**

At this time, I do not believe that elevating the Office of Technology Research and Investigation to the Bureau level would meaningfully help the FTC. However, I share your concerns and am actively thinking about how best to integrate technologists into our agency and how most effectively to deploy our limited resources to address our needs in this area. The FTC recently announced the creation of a task force within the Bureau of Competition to investigate competition in U.S. technology markets and take enforcement action when warranted. The task force will collaborate closely with the Bureaus of Consumer Protection and Economics. Moreover, we are continuing to examine technology markets to ensure consumers benefit from robust competition. This effort includes evaluating the information developed at the Commission's *Hearings on Competition and Consumer Protection in the 21st Century*.

4. **What is the FTC doing to investigate and hold accountable individual board members and executives who knowingly assist their companies in committing fraud? What more should the FTC be doing in this regard?**

The FTC always considers the potential liability of individual officers and others who participated in or controlled deceptive and unfair practices. In cases where the FTC finds evidence of wrongdoing that meets the applicable legal standard, and where naming the individual is appropriate to obtain full and complete relief for consumers and appropriate injunctive relief, we do so.

5. **Where the FTC consider using its Section 6(b) investigative power to help us understand how these algorithms and black-box A.I. systems work – the biases that shape them, and how those can affect trade, opportunity, and the market?**

I agree that algorithms and artificial intelligence are important topics of study. The FTC has issued a report on the subject of the benefits and risks of big data that contains guidance for companies that use big data analytics.[10] In 2017, the FTC and Department of Justice submitted a joint paper on algorithms and collusion to the Organization for Economic Cooperation and Development ("OECD") as part of the OECD's broader look at the role of competition policy and the digital age.[11] More recently, we examined the competition and consumer protection implications of algorithms, artificial intelligence, and predictive analytics as part of the

[10] *See* FTC, *FTC Report - Big Data: A Tool for Inclusion or Exclusion? Understanding the Issues* (Jan. 2016), https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf.

[11] Note to the OECD by the United States on Algorithms and Collusion, DAF/COMP/WD(2017)41 (May 26, 2017), https://www.ftc.gov/system/files/attachments/us-submissions-oecd-other-international-competition-fora/algorithms.pdf.

Commission's *Hearings on Competition and Consumer Protection in the 21st Century*.[12] The two-day hearing featured a distinguished group of technologists, scientists, public servants, academics, and industry leaders (as well as economists and lawyers), who gathered to educate us and the broader competition and consumer protection community about how these technologies work, how they are used in the marketplace, and their policy implications. The Commission also invited public commentary on this topic.

The FTC has a comparative advantage in policy research and development through the use of 6(b) studies, which allows the Commission to proceed in measured and thoughtful ways on complicated policy questions. I will continue to encourage the Commission to stay abreast of developments in these areas, including through the use of 6(b) studies, when appropriate.

6. **In your opinion, is a car with an open, unrepaired recall, a "safe" car? Why would the FTC allow unsafe cars to be advertised as "safe" and "repaired for safety," with or without a vague, contradictory and confusing disclaimer?**

I share your concerns regarding the safety issues raised by recalls in the used automobile marketplace. As you note, while federal auto safety law requires that all new cars sold be free from recalls, it does not prohibit auto dealers from selling used cars with open recalls.

However, the FTC Act enables the Commission to stop auto dealers selling such cars from engaging in misleading advertising practices that mask the existence of open recalls. In an effort to stop such claims, in 2016 and 2017, the Commission brought actions against General Motors Company, CarMax, Inc., and four other large used car dealerships.[13] In these actions, the Commission alleged that these companies' advertising claims violated the FTC Act by touting the rigorousness of their used car inspections while failing to clearly disclose the existence of unrepaired safety recalls in some cars.

Our orders stop this deceptive conduct and provide important additional protections for consumers.

7. **Do you agree with the proposal that the FTC use its rulemaking authority to address non-compete clauses? I invite you to explain your reasoning regarding your stance.**

I do not believe the Commission should use its rulemaking authority to address non-compete clauses. The Commission has long assessed the legality of business conduct on a case-by-case

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[12] FTC, *Hearings on Competition and Consumer Protection in the 21st Century*, https://www.ftc.gov/policy/hearings-competition-consumer-protection; FTC Workshop, *FTC Hearing #7: Competition and Consumer Protection in the 21st Century* (Nov. 13-14, 2018), https://www.ftc.gov/news-events/events-calendar/ftc-hearing-7-competition-consumer-protection-21st-century.

[13] *See* Press Release, GM, Jim Koons Management, and Lithia Motors Inc. Settle FTC Actions Charging That Their Used Car Inspection Program Ads Failed to Adequately Disclose Unrepaired Safety Recalls, Jan. 28, 2016, https://www.ftc.gov/news-events/press-releases/2016/01/gm-jim-koons-management-lithia-motors-inc-settle-ftc-actions; Press Release, CarMax and Two Other Dealers Settle FTC Charges That They Touted Inspections While Failing to Disclose Some of the Cars Were Subject to Unrepaired Safety Recalls, Dec. 16, 2016, https://www.ftc.gov/news-events/press-releases/2016/12/carmax-two-other-dealers-settle-ftc-charges-they-touted.

basis, rather than through blanket rulemaking, and we should continue to do so. So too have the courts, which have established the firm legal rule that a covenant not to compete does not violate the Sherman Act if it is ancillary to a significant lawful business purpose of the contract and is reasonably limited in scope to protect legitimate interests.[14] The inquiry into the reasonableness of the scope of the clauses typically considers the duration, territory, and type of product involved. To the extent that these factors are factual, the case-by-case approach of the common law is an appropriate way to develop the law regarding non-compete clauses. There is no reason to deviate from the common law tradition to establish Commission rules to assess non-compete clauses.

8. Would you agree with me that Hart-Scott-Rodino premerger notifications help antitrust enforcers catch concerning mergers?

Yes, I agree that the premerger notification requirements of the Hart-Scott-Rodino Premerger Notification Act help antitrust enforcers identify anticompetitive mergers before they are consummated, preventing consumer harm. Once a merger is consummated and the firms' operations are integrated, it can be very difficult, if not impossible, to "unscramble the eggs" and restore the acquired firm to its former status as an independent competitor.

9. What sort of anticompetitive effects might be raised by local mergers even when those mergers are too small to require Hart-Scott-Rodino premerger notification?

Anticompetitive mergers harm consumers through higher prices and by reducing quality, choices, and innovation, or by thwarting competitors' entry into a market.[15] The arena of competition affected by a merger may be geographically bounded (*e.g.*, confined to a small or local area) if geography limits some customers' willingness to or ability to substitute to some products, or some suppliers' willingness or ability to serve some customers.[16]

The FTC often examines local geographic markets when reviewing mergers in retail markets, such as supermarkets, pharmacies, retail gas or diesel fuel stations, or funeral homes, or in service markets, such as health care. For example, in a recent federal court action to enjoin the proposed merger of two rival physician services providers, the FTC and State of North Dakota defined the relevant geographic market as the Bismarck-Mandan, North Dakota, Metropolitan Statistical Area—a four-county area that includes the cities of Bismarck and Mandan and smaller communities within the surrounding 40 to 50 mile radius.[17] The types of anticompetitive effects

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[14] *See, e.g.*, Eichorn v. AT&T Corp., 248 F.3d 131, 145 (3d Cir. 2001).

[15] *U.S. Dep't of Justice & Fed. Trade Comm'n Horizontal Merger Guidelines* § 1 (2010), https://www.ftc.gov/public-statements/2010/08/horizontal-merger-guidelines-united-states-department-justice-federal ("A merger enhances market power if it is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives.").

[16] *Id.* at § 4.2. In antitrust analysis, a relevant market identifies a set of products or services and a geographic area of competition in which to analyze the potential effects of a proposed transaction. The purpose of market definition is to identify options available to consumers. *See id.* at § 4 (describing market definition in antitrust analysis).

[17] *FTC v. Sanford Health*, No. 1:17-cv-0133 (D.N.D. Dec. 13, 2017), https://www.ftc.gov/enforcement/cases-proceedings/171-0019/sanford-health-ftc-state-north-dakota-v. The U.S. District Court for the District of North Dakota granted the FTC and State of North Dakota's preliminary injunction motion on December 13, 2017. The parties have appealed and the case is now pending before the Eighth Circuit.

that may occur in local markets are the same as those that may occur in larger geographic markets—higher prices, lower levels of service, reduced innovation, and fewer choices.

10. What action would you recommend either the FTC or Congress take in order to assist federal and state antitrust enforcers in catching local mergers that raise anticompetitive concerns?

I have no opinion as to whether Congress should take action, but note that identifying anticompetitive mergers remains one of the top priorities of the agency's competition mission. The vast majority of mergers the FTC investigates are reported and examined at the premerger stage. The FTC, however, also devotes significant attention to identifying unreported, often consummated, mergers that could harm consumers. Both for mergers that do not meet the premerger notification requirements and for conduct matters, the FTC uses the trade press and other news articles, consumer and competitor complaints, hearings, economic studies, and other means to identify harmful practices that threaten competition. The FTC also routinely works with states' Attorneys General in its enforcement efforts, and state Attorneys General routinely join the FTC as co-plaintiffs in the FTC's federal court litigations, such as in the North Dakota physician services merger litigation discussed above.

11. Do you believe that horizontal shareholding raises anticompetitive concerns?

The short answer is that I do not yet know enough to draw sound, reliable conclusions here. Very little empirical research has been done on this topic, and the few studies that have been completed are quite controversial. At present, this remains a very unsettled issue.[18]

There is little doubt that active investment (*i.e.*, investment that seeks to control a company, obtain board seats and the like) in competitors can create the kinds of competition problems that the antitrust laws are designed to address. The antitrust agencies have long policed improper relationships between corporate competitors, even when they fall short of a full combination or merger. For example, Section 8 of the Clayton Act effectively prohibits so-called "interlocking directorates" in which an officer or director of one firm serves as an officer or director of a competitor. But it is an open question whether the same kinds of problems created by active investments may also arise as the result of investments by institutional investors in competing companies.

The general theory is that cross-holdings by large institutional investors may blunt the competitive vitality of rival firms within that industry, and lead to higher prices and other effects. For example, if a company's shareholders have interests in a rival, that company may be less likely to engage in a price war or other forms of aggressive competition that could reduce its

[18] *See* Note to the OECD by the United States on Common Ownership by Institutional Investors and Its Impact on Competition at ¶ 1, DAF/COMP/WD(2017)86 (Nov. 28, 2017), https://www.ftc.gov/system/files/attachments/us-submissions-oecd-other-international-competition-fora/common_ownership_united_states.pdf (explaining that "[g]iven the ongoing academic research and debate, and its early stage of development, the U.S. antitrust agencies are not prepared at this time to make any changes to their policies or practices with respect to common ownership by institutional investors.").

rival's profits because those profits are ultimately returned to the company's shareholders through their interests in the rival. Proponents of this theory note that the risk of upsetting common investors may make it easier for firms to maintain stable market conditions or potentially even increase prices over what might prevail without common ownership by large, institutional investors. Critics have cited methodological problems in the original research and various structural issues that would make it difficult or even impossible for institutional investors to play the disciplining role envisioned by this theory in the real world. Critics also point out that any remedy to address these concerns would likely increase the cost of retail investment and thereby cause harm to ordinary investors.

To date, there is no reliable consensus as to which side in this debate has the stronger argument, and the limited research suggests this question will remain unsettled until additional empirical work is completed in this area. Given the formative nature of the academic debate, I cannot definitively take a position on this issue. Additional study is required, which as I mention below, the Commission is currently helping to facilitate.

12. Do you believe that our antitrust laws can be used to address the anticompetitive concerns raised by horizontal shareholding?

As noted above, I am still evaluating the viability of this concern. The use of the agency's enforcement powers in this area is therefore premature in my view.

That said, antitrust doctrine is flexible, allowing us to address even novel harms in the economy. The fact that the FTC has not litigated a case involving horizontal shareholding by a single institutional investor is not a bar to the Commission's launching a meritorious case, should it identify one. However, the Commission's ability to take future action in this area will be circumscribed by prior caselaw, due process considerations, and the need to demonstrate actual anticompetitive effects in the real world.

The Commission is unlikely to take enforcement action in this area until it has sufficient confidence that it can demonstrate to the courts both that the underlying theory of harm is robust, and that a specific set of passive investments has had actual anticompetitive effects in the real world. Should those conditions be satisfied, the Commission could take action under current law.

13. What, if anything, are you doing to address any potential harms of horizontal shareholding?

In December 2018, the Commission held a full-day workshop that was largely devoted to exploring the merits of the common ownership issue in greater detail.[19] At the workshop, which was part of our *Hearings on Competition and Consumer Protection in the 21st Century*, respected academics and industry experts on both sides of this issue shared their expertise with both us and the public. The Commission also invited public commentary on this topic.

[19] FTC Workshop, *FTC Hearing # 8: Competition and Consumer Protection in the 21st Century* (Dec. 6, 2018), https://www.ftc.gov/news-events/events-calendar/ftc-hearing-8-competition-consumer-protection-21st-century.

We are still accepting public comments on this issue. Once the comment period ends, we intend to carefully evaluate all of the public submissions and the workshop testimony with a view towards better refining our understanding of the merits of this concern. Workshops like the one we held also serve to bring together those of different views, allowing them to hear and respond to criticisms of their positions, which we have found to be useful in fostering future academic work in areas of continuing interest to the agency.

The Honorable Cortez Masto

Pet Leasing

I appreciate the Commission's attention to my request with six of my colleagues for the FTC to investigate the practice of pet leasing that is leading some consumers into confusing or deceptive contractual obligations that cause them to have an issue with their beloved pet and negatively impact their financial status, such as credit scores, for far into the future. This is an issue that is a little under the radar but needs strong oversight and attention under your deceptive practices mandate if there are concerning financial practices being discovered.

1. **Can I get a further commitment from you all to keep my office informed of actions and determinations you all may make pertaining to this concerning issue and the Humane Society and Animal Legal Defense Fund's formal petition to the Commission?**

The FTC is committed to protecting consumers from unfair or deceptive acts or practices, including any such practices carried out by merchants or third party leasing and financing companies. As the proud owner of four cats and three dogs, I am committed to the well-being of all pets and their humans. Pet owners are entitled to understand whether their payments are going towards a lease or a purchase. For these reasons, I commit to continuing to keep your office informed of public actions the Commission takes concerning pet leasing or the Humane Society and Animal Legal Defense Fund's petition to the Commission.

Data Minimization vs Big Data

A topic that has come up a lot during our discussions on privacy is data minimization. This is a concept that I have been considering on as I work on developing a comprehensive data privacy bill. As you're aware, this is the idea that businesses should only collect, process, and store the minimum amount of data that is necessary to carry out the purposes for which is was collected. There are obvious advantages to this as it minimizes the risk of data breaches and other privacy harms. At the same time, big data analytics are going to be crucial for the future and play an important role in smart cities, artificial intelligence, and other important technologies that fuel economic growth. I think it is important to find a balance between minimization and ensuring that data, especially de-identified data, is available for these applications.

1. **Can you describe how you view this balance and how we in Congress can ensure that people's data is not abused but can still be put to use in positive ways?**

Your question neatly captures the dilemma. Businesses can apply "big data" analysis tools to gain insights from large data sets that help the business to innovate, for example, to improve an existing product. This analysis can provide new consumer benefits, such as the development of new features. On the other hand, consumers' data may be used for unexpected purposes in ways that are unwelcome.[20]

The FTC has issued a report on the benefits and risks of big data that contains guidance for companies that use big data analytics.[21] Last fall, the Commission also hosted a workshop on the intersections between big data, privacy and competition.[22] We are happy to work with your staff to develop legislation on how to balance the benefits and risks of big data.

General Privacy Recommendations

1. **While privacy was a significant topic of the oversight hearing, as we look to develop a bill, can you specifically lay out some of the top priorities you individually would like to see included and what do you think gets overlooked in the conversations policymakers have with allowing for future innovations and yet raising the bar for protecting consumers?**

In its testimony, the Commission urged Congress to consider enacting privacy legislation that would be enforced by the FTC. The testimony recognized that, while the agency remains committed to vigorously enforcing existing privacy-related statutes, Congress may be able to craft federal legislation that would more seamlessly address consumers' legitimate concerns regarding the collection, use, and sharing of their data and provide greater clarity to businesses while retaining the flexibility required to foster competition and innovation. Such legislation would also demonstrate our country's commitment to global leadership in the digital economy in light of the patchwork of emerging privacy standards both domestically and abroad. As far as top priorities for such legislation, first, Congress should give the Commission authority to deter violations by fining companies for initial violations, as it has for violations of other statutes. Second, Congress should ensure that all types of companies across the economy must protect consumers' privacy and security. As one example, the Commission has long urged the repeal of the FTC Act's provision that places limits on the agency's ability to go after law violations by

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[20] *See, e.g.,* Press Release, FTC Charges Deceptive Privacy Practices in Google's Rollout of Its Buzz Social Network (Mar. 30, 2011), https://www.ftc.gov/news-events/press-releases/2011/03/ftc-charges-deceptive-privacy-practices-googles-rollout-its-buzz) (alleging that Google deceptively repurposed information it had obtained from users of its Gmail email service to set up the Buzz social networking service, leading to public disclosure of users' email contacts).

[21] *See* FTC, *FTC Report - Big Data: A Tool for Inclusion or Exclusion? Understanding the Issues* (Jan. 2016), https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf.

[22] *See* FTC Workshop, *FTC Hearing #6: Competition and Consumer Protection in the 21st Century* (Nov. 6-8, 2018), https://www.ftc.gov/news-events/events-calendar/ftc-hearing-6-competition-consumer-protection-21st-century.

common carriers and by non-profits. Third, Congress should consider giving the FTC targeted APA rulemaking authority so that the FTC can enact rules to keep up with technology developments. Excellent examples of this approach appear in statutes such as CAN-SPAM and COPPA.

2. **Can you also outline the optimal role you see for our state Attorneys General in this privacy enforcement process?**

The Attorneys General are important partners in protecting consumers. For a number of statutes, such as COPPA, Congress enacted legislation that enables Attorneys General to enforce the law in addition to the Commission. I applaud this model. A number of state Attorneys General have brought actions to enforce COPPA, for example, so there is not just one enforcer. And when state Attorneys General bring these actions, they are enforcing the same standard that other states and the Commission are enforcing, so the same protections apply consistently nationwide.

Privacy Risky Communities/Groups

1. **Do you think that certain communities or groups are any more or less vulnerable to privacy risks and harms?**

Yes. Congress previously has recognized that certain communities or groups may be more or less vulnerable to privacy risks and harms when promulgating the Children's Online Privacy Protection Act, and certain provisions of Gramm-Leach Bliley and the Health Insurance Portability and Accountability Act. The Commission also has worked to address issues particularly affecting certain communities or groups through a number of means, including law enforcement as well as a series of seminars and other events around the country and through consumer education.[23]

2. **Should privacy law and regulations account for such unique or disparate harms, and if so, how?**

Yes. I believe the approach Congress took with COPPA, GLB and HIPAA is instructive here. Existing laws like the Fair Credit Reporting Act and the Equal Credit Opportunity Act also provide important protections against unlawful discrimination. The Commission is happy to work with you to think through these issues as you craft legislation.

Immediate Civil Penalties Authority

Noting from your FTC testimony, "*Section 5 (of the FTC Act), however, is not without limitations. For example, Section 5 does not provide for civil penalties, reducing the Commission's deterrent capability.*"

[23] *See, e.g.*, FTC, Website: *Common Ground Conferences and Roundtables Calendar*, https://www.consumer.gov/content/common-ground-conferences-and-roundtables-calendar; FTC, Website: *Consumer Information – Fraud Affects Every Community*, https://www.consumer.ftc.gov/features/every-community.

1. **While I appreciate the long term successes of the FTC in many respects to investigate data security matters, what are your thoughts to whether there is enough of a deterrent effect with Section 5 authority when you can't immediately enforce against those who misuse data with civil penalties right from the start, rather than as the result of often times flagrant offenses to their already establish consent decrees?**

In the data security area, I believe that Congress should enact legislation giving the FTC the authority to seek civil penalties against first-time violators, which we cannot currently do under the FTC Act. I support such legislation precisely because I believe that our existing legal regime does not provide sufficient deterrence.

The Honorable John Thune

1. **Vertical mergers such as the merger between AT&T and Time Warner have garnered some attention lately. The FTC and the DOJ have not updated vertical merger guidance since 1984. Do you believe that the FTC and DOJ should issue new guidance on vertical mergers?**

I believe that the 1984 Department of Justice Non-Horizontal Merger Guidelines[24] are out of date. As we heard during our hearing on the topic in November 2018, our understanding of the economics of vertical integration has changed over the past thirty-five years.[25] The law governing vertical relationships, and particularly vertical conduct such as resale price maintenance, has also changed since then.[26]

The agencies traditionally issue guidelines to promote transparent and predictable agency enforcement. This goal can be achieved in several different ways. For example, the agencies may use guidelines to summarize the current state of the law. Alternatively, when the law is not particularly clear, the agencies may use guidelines to clarify how they intend to approach topics on which there is no clear binding precedent. The agencies may also use guidelines either (a) to disclose and formalize an approach the agencies already use or (b) to advance new analytic techniques. For a variety of reasons, it is not clear to me that new vertical merger guidelines could meaningfully increase the transparency and predictability of our vertical merger decisions.

However, there is a range of alternatives between the two extremes of issuing guidelines and saying nothing. For example, the agencies already provide substantial insight on vertical merger

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[24] *U.S. Dep't of Justice Non-Horizontal Merger Guidelines* (1984), https://www.justice.gov/sites/default/files/atr/legacy/2006/05/18/2614.pdf.

[25] FTC, *Hearings on Competition and Consumer Protection in the 21st Century*, https://www.ftc.gov/policy/hearings-competition-consumer-protection; *see also* FTC Workshop, *FTC Hearing #5: Competition and Consumer Protection in the 21st Century* (Nov. 1, 2018), https://www.ftc.gov/news-events/events-calendar/ftc-hearing-5-competition-consumer-protection-21st-century.

[26] *See, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 887 (2007) (minimum resale price maintenance must be analyzed under the rule of reason rather than the *per se* rule); State Oil Co. v. Khan, 552 U.S. 3 (1997) (same holding, but as applied to maximum resale price maintenance).

analysis through speeches,[27] public statements,[28] and rigorous case selection.[29] I believe this approach is well worth considering as an alternative to issuing new formal guidelines.

2. Government lawsuits to stop mergers are litigated using different procedures depending on which agency, the FTC or DOJ, handles the case. Do you think Congress should take action to ensure that agencies follow the same procedures, or do you support another approach?

It is not clear to me why the use of different procedures, by itself, is problematic. Nor, apparently, was it clear to the legislators that enacted these different statutes. Absent strong evidence that these differences in procedure meaningfully affect the ultimate result, I see little reason to alter the machinery of antitrust enforcement.

One procedural difference between the two antitrust agencies is the Commission's unique authority to initiate administrative litigation, which we call "Part 3" litigation after the relevant portion of our Rules of Practice. In theory it could be problematic for the agency to file a merger case in Part 3 litigation *after* seeking a preliminary injunction in federal district court and having that request denied. I myself would not support proceeding in that circumstance. Yet the

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[27] *See, e.g.*, Christine S. Wilson, *Vertical Merger Policy: What Do We Know and Where Do We Go?*, Keynote Address at GCR Live 8th Annual Antitrust Law Leaders Forum (Feb. 1, 2019), https://www.ftc.gov/system/files/documents/public_statements/1455670/wilson_-_vertical_merger_speech_at_gcr_2-1-19.pdf; Bruce Hoffman, *Vertical Merger Enforcement at the FTC*, Remarks at Credit Suisse 2018 Washington Perspectives Conference (Jan. 10, 2018), https://www.ftc.gov/public-statements/2018/01/vertical-merger-enforcement-ftc (explaining the FTC's current analysis of proposed vertical mergers and highlighting the extent to which that analysis has moved beyond the 1984 Non-Horizontal Merger Guidelines).

[28] *See, e.g.*, *In re Fresenius Med. Care AG & Co.*, FTC File No. 171-0227 (Feb. 19, 2019), https://www.ftc.gov/enforcement/cases-proceedings/171-0227/fresenius-medical-care-nxstage-medical-matter (Statements of (i) Chairman Simons, Commissioner Phillips, and Commissioner Wilson; (ii) Commissioner Chopra; and (iii) Commissioner Slaughter); *In re Sycamore Partners II, L.P.*, FTC File No. 181-0180 (Jan. 28, 2019), https://www.ftc.gov/enforcement/cases-proceedings/181-0180/sycamore-partners-ii-lp-staples-inc-essendant-inc-matter (Statements of (i) Chairman Simons, Commissioner Phillips, and Commissioner Wilson; (ii) Commissioner Wilson; (iii) Commissioner Chopra; and (iv) Commissioner Slaughter).

[29] For example, the Commission recently challenged a vertical merger between Northrop Grumman, a leading provider of missile systems to the Department of Defense, and Orbital ATK, a key supplier of solid rocket motors. *In re Northrop Grumman*, Dkt. C-4652 (June 5, 2018), https://www.ftc.gov/enforcement/cases-proceedings/181-0005-c-4652/northrop-grumman-orbital-atk. The Commission also accepted consent agreements to settle allegations that two other vertical mergers would, absent the remedies imposed, diminish competition. *See Fresenius Med. Care AG & Co.*, FTC File No. 171-0227 (Feb. 19, 2019), https://www.ftc.gov/system/files/documents/public_statements/1455719/171_0227_fresenius_nxstage_majority_statement_2-19-19.pdf (Statement of Chairman Simons, Commissioner Phillips, and Commissioner Wilson Concerning the Proposed Acquisition of NxStage Medical, Inc. by Fresenius Medical Care AG & Co. KGaA) (explaining consent agreement addresses horizontal concern regarding harm to competition in market for bloodline tubing sets for hemodialysis treatment but finding no evidence of competitive harm from vertical concerns); *In re Sycamore Partners II, L.P., Staples, Inc., and Essendant Inc.*, Dkt. C-4667 (Jan. 25, 2018), https://www.ftc.gov/enforcement/cases-proceedings/181-0180/sycamore-partners-ii-lp-staples-inc-essendant-inc-matter (Statement of Chairman Simons, Commissioner Phillips, and Commissioner Wilson) (consent agreement resolving charges that a merger between Staples, the world's largest retailer of office products and related services, and Essendant, a wholesale distributor of office products, was likely to harm competition in the market for office supply products sold to small- and mid-sized businesses).

Commission has very rarely done so in practice, and indeed has over the years put in place several safeguards to ensure the practice remains very rare. For example, under Commission Rule 3.26,[30] the Commission automatically stays a pending Part 3 matter if a federal district court denies the staff's request for a preliminary injunction and the respondent makes a timely motion thereafter to withdraw the case from Part 3 adjudication.[31] Moreover, the Commission's stated policy is to proceed in such circumstances only when several conditions are met.[32] In practice these conditions obtain, and the Commission proceeds, only very rarely.[33]

In contrast to the largely theoretical problems with Part 3 litigation, there is substantial evidence that this procedure can provide real benefits. A detailed analysis of every case the Commission brought in Part 3 since 1977 – more than one hundred cases in all – concluded that our administrative litigation authority provided "clear value" in complex antitrust cases that require the agency's "institutional expertise in law and economics."[34] This has been particularly true in "healthcare mergers, pay-for-delay agreements, and state-action immunity" cases.[35] The same analysis found scant evidence that the Part 3 process disfavors defendants.[36]

In summary, I am loathe to "fix" procedural differences between the two antitrust agencies without strong evidence both that there is a problem and that the proposed solution is meaningfully better. For example, there is scant evidence that one procedural difference, Part 3 administrative litigation, is problematic. There is instead substantial evidence that Part 3 litigation has helped us protect competition in key sectors of our economy, such as health care.

3. Should Congress amend Section 5(n) of the FTC Act, which addresses unfair practices, to clarify what constitutes "substantial injury?" If so, how?

No. Neither the Commission, nor the Courts who have ruled on this issue, have struggled to interpret that element. Substantial injury can be financial, physical, reputational, or unwanted intrusions. Financial injury can manifest in a variety of ways: fraudulent charges, delayed benefits, expended time, opportunity costs, fraud, and identity theft, among other

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[30] 16 C.F.R. § 3.26.
[31] *Id.* § 3.26(c).
[32] *See* Administrative Litigation Following the Denial of a Preliminary Injunction: Policy Statement, 60 Fed. Reg. 39,741 (Aug. 3, 1995), *available at* https://www.ftc.gov/sites/default/files/attachments/merger-review/950803administrativelitigation.pdf.
[33] *See, e.g.*, Press Release, FTC Withdraws Appeal Seeking a Preliminary Injunction to Stop LabCorp's Integration with Westcliff Medical Laboratories, Mar. 24, 2011, https://www.ftc.gov/news-events/press-releases/2011/03/ftc-withdraws-appeal-seeking-preliminary-injunction-stop-labcorps (noting the vote to withdraw the matter from litigation was 5-0); Statement of Commissioners Leibowitz, Kovacic, and Ramirez, *In re Laboratory Corp. of Am.*, FTC Docket No. 9345 (Apr. 21, 2011), *available at* https://www.ftc.gov/system/files/documents/public_statements/568671/110422labcorpcommstmt.pdf (concluding, under an earlier version of Rule 3.26 and after applying the factors listed in the Commission's 1995 policy statement, that the Commission should not proceed with administrative litigation following a federal district court's order denying a request for a preliminary injunction).
[34] Maureen K. Ohlhausen, *Administrative Litigation at the FTC: Effective Tool for Developing the Law or Rubber Stamp?*, 12 J. COMP. L. & ECON. 623, 656 (2016).
[35] *Id.*
[36] *Id.* at 656-57 (noting both due process protections afforded to defendants and the significant proportion of cases (40 percent) in which the Commission ultimately rejected antitrust liability).

things.[37] Physical injuries include risks to individuals' health or safety, including the risks of stalking and harassment.[38] Reputational injury involves disclosure of private facts about an individual, which damages the individual's reputation. Tort law recognizes reputational injury.[39] The FTC has brought cases involving this type of injury, for example, in a case involving public disclosure of individuals' Prozac use[40] and public disclosure of individuals' membership on an infidelity-promoting website.[41] Finally, unwanted intrusions involve two categories. The first includes activities that intrude on the sanctity of people's homes and their intimate lives. The FTC's cases involving a revenge porn website,[42] an adult-dating website,[43] and companies spying on people in their bedrooms through remotely-activated webcams fall into this category.[44] The second category involves unwanted commercial intrusions, such as telemarketing, spam, and harassing debt collection calls.

4. **Should the FTC issue more guidance to marketers on the level of support needed to substantiate their claims? If so, when do you anticipate that such guidance could be issued?**

The FTC has issued extensive guidance over the years to help marketers in determining the level of support needed to substantiate claims. The Commission first articulated the relevant factors used to determine the level of evidence required to substantiate objective performance claims in *Pfizer, Inc.*, 81 F.T.C. 23 (1972). Those factors included the type of claim, the type of product, the consequences of a false claim, the benefits of a truthful claim, the cost of developing substantiation for the claim, and the amount of substantiation experts in the field believe is reasonable. The Commission and the courts have reaffirmed this standard many times since 1972.[45] The FTC also has provided extensive guidance through Guides, staff guidance documents, speeches, and presentations to industry trade groups and industry attorneys.[46]

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[37] *See, e.g.*, *TaxSlayer, LLC*, No. C-4626 (F.T.C. Oct. 20, 2017) (Complaint), https://www.ftc.gov/enforcement/cases-proceedings/162-3063/taxslayer (alleging delayed benefits, expended time, and risk of identity theft).

[38] *See, e.g.*, *FTC v. Accusearch, Inc.*, No. 06-CV-0105 (D. Wyo. May 3, 2006) (Complaint), https://www.ftc.gov/enforcement/cases-proceedings/052-3126/accusearch-inc-dba-abikacom-jay-patel (alleging that telephone records pretexting endangered consumers' health and safety).

[39] Under the tort of public disclosure of private facts (or publicity given to private life), a plaintiff may recover where the defendant's conduct is highly offensive to a reasonable person. Restatement (Second) of Torts § 652D (1977).

[40] *Eli Lilly and Co.*, No. C-4047 (F.T.C. May 8, 2002), https://www.ftc.gov/enforcement/cases-proceedings/012-3214/eli-lilly-company-matter.

[41] *FTC v. Ruby Corp., et al.*, No. 1:16-cv-02438 (D.D.C. Dec. 14, 2016), https://www.ftc.gov/enforcement/cases-proceedings/152-3284/ashley-madison.

[42] *FTC v. EMP Media, Inc., et al.*, No. 2:18-cv-00035 (D. Nev. Jan. 9, 2018), https://www.ftc.gov/enforcement/cases-proceedings/162-3052/emp-media-inc-myexcom.

[45] *See, e.g.*, *Thompson Med. Co.*, 104 F.T.C. 648, 813 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986); *Daniel Chapter One*, 2009 WL 5160000 at *25-26 (F.T.C. 2009), *aff'd*, 405 Fed. Appx. 505 (D.C. Cir. 2010) (unpublished opinion), *available at* 2011-1 Trade Cas. (CCH) ¶ 77,443 (D.C. Cir. 2010); *POM Wonderful, LLC*, 155 F.T.C. 1, 55-60 (2013), *aff'd*, 777 F.3d 478 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 1839, 194 L. Ed. 2d 839 (2016); *FTC Policy Statement Regarding Substantiation*, 104 F.T.C. 839, 840 (1984) (appended to *Thompson Med. Co.*, 104 F.T.C. 648 (1984)).

[46] *See Guides for the Use of Environmental Marketing Claims*, 16 C.F.R. § 260.2 (2019), https://www.ecfr.gov/cgi-bin/text-idx?SID=bd96b2cdcd01f7620d43e50a9d1d8cec&mc=true&node=se16.1.260_12&rgn=div8; *Dietary*

As late as 2014, the Commission took a more stringent view on substantiation, requiring in orders that companies support challenged diet and health claims with two randomized, placebo-controlled, double blind clinical trials ("RCTs").[47] Recently, the D.C. Circuit correctly rejected the Commission's heightened requirements on First Amendment grounds, noting the Commission failed "to justify a categorical floor of two RCTs for any and all disease claims."[48] Today, the Commission has returned to its traditional, more flexible standard.[49] As noted above, this approach is encapsulated in the *Pfizer* opinion and reflects the central role of balancing the costs of prohibiting truthful claims against the benefits of prohibiting false claims.[50]

The Commission's guidance sets forth flexible principles that can be applied to multiple products and claims. It does not attempt to answer every question about substantiation, given the virtually limitless range of advertising claims, products, and services to which it could be applied. Instead, it seeks to strike the right balance between being specific enough to be helpful but not so granular that it would overlook some important factor that might arise under given circumstances and thereby actually chill useful speech.

5. In June, the 11th Circuit vacated the Commission's data security order against LabMD. What effect, if any, will this have on the Commission's data security orders going forward?

Supplements: An Advertising Guide for Industry, https://www.ftc.gov/tips-advice/business-center/guidance/dietary-supplements-advertising-guide-industry.

[47] *See Applied Food Sciences, Inc.,* FTC File No. 142-3054 (Sept. 10, 2014) (stipulated final judgment and order), https://www.ftc.gov/system/files/documents/cases/140908afsstip1.pdf; *In re The Dannon Company, Inc.*, FTC File No. 082-3158 (Feb. 4, 2011) (decision and order), https://www.ftc.gov/sites/default/files/documents/cases/2011/02/110204dannondo.pdf; In re Nestle Healthcare Nutrition, Inc., FTC File No. 092-3087 (Jan. 18, 2011) (decision and order), https://www.ftc.gov/sites/default/files/documents/cases/2011/01/110118nestledo.pdf; FTC v. Iovate Health Sciences USA, Inc., Case. No. 10-CV-587 (W.D.N.Y. July 29, 2010) (stipulated final judgment and order), https://www.ftc.gov/sites/default/files/documents/cases/2010/07/100729iovatestip.pdf. This level of substantiation exceeds what is specified in the Commission's Dietary Supplements Guide. *Dietary Supplements: An Advertising Guide for Industry,* https://www.ftc.gov/tips-advice/business-center/guidance/dietary-supplements-advertising-guide-industry.

[48] *POM Wonderful, LLC v. FTC*, 777 F.3d 478, 502 (D.C. Cir. 2015) ("If there is a categorical bar against claims about the disease related benefits of a food product or dietary supplement in the absence of two RCTs, consumers may be denied useful, truthful information about products with a demonstrated capacity to treat or prevent serious disease. That would subvert rather than promote the objectives of the commercial speech doctrine.").

[49] *See e.g., Nobetes Corp.*, Case No. 2:18-cv-10068-KS (Dec. 13, 2018) (stipulated order) (requiring "competent and reliable scientific evidence shall consist of human clinical testing of the Covered Product, or of an Essentially Equivalent Product, that is sufficient in quality and quantity based on standards generally accepted by experts in the relevant disease, condition, or function to which the representation relates, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true."), https://www.ftc.gov/system/files/documents/cases/nobetes_-_signed_stipulated_order.pdf.

[50] *See generally* J. Howard Beales, Timothy J. Muris & Robert Pitofsky, *In Defense of the Pfizer Factors*, *in* THE REGULATORY REVOLUTION AT THE FTC: A THIRTY-YEAR PERSPECTIVE ON COMPETITION AND CONSUMER PROTECTION 83 (James C. Cooper ed., 2013) (All three of the authors served as Director of the Bureau of Consumer Protection and two served as Chairman at the FTC. The article provides a comprehensive discussion of *Pfizer*).

The Eleventh Circuit determined that the mandated data security provision of the Commission's LabMD Order was insufficiently specific. The opinion did not have any effect on the FTC's use of Section 5 to protect consumers from deceptive or unfair data security practices. We are engaged in an ongoing process to craft appropriate order language in data security cases, based on the Eleventh Circuit opinion, feedback we received from our December hearing on data security, and our own internal discussion of how our orders can create better deterrence of future misconduct using our existing tools.

6. **If federal privacy legislation is passed, what enforcement tools would you like to be included for the FTC?**

First, I would recommend that Congress consider giving the FTC the authority to seek civil penalties for initial privacy violations, which will create an important deterrent effect. Second, while the process of enacting federal privacy legislation will involve difficult tradeoffs that are appropriately left to Congress, targeted APA rulemaking authority, similar to that in the Children's Online Privacy Protection Act, will allow the FTC to keep up with technological developments. For example, in 2013, the FTC was able to use its APA rulemaking authority to amend the COPPA Rule to address new business models, including social media and collection of geolocation information, that were not in place when the initial 2000 Rule was promulgated. Third, the FTC could use broader enforcement authority to take action against common carriers and nonprofits, which it cannot currently do under the FTC Act. I also believe that the promulgation of federal privacy legislation should be undertaken in conjunction with national data breach notification and data security legislation.

7. **During the hearing, I asked you whether the FTC would consider using its section 6(b) authority to study consumer information data flows, specifically sending requests to Google, Facebook, Amazon, and others in the tech industry to learn what information they collect from consumers and how that information is used, shared, and sold. You responded, "Sure, 6(b) is a really powerful tool and that's the type of thing that might very well make sense for us to use it for." I believe the FTC's section 6(b) authority could provide some much needed transparency to consumers about the data practices of large technology companies, and help identify areas that may require additional attention from lawmakers. Can you explain in more detail whether you believe the FTC should conduct a study pursuant to section 6(b) of the Federal Trade Commission Act on the data collection, use, filtering, sharing, and sale practices of large technology companies?**

The FTC's section 6(b) authority could be used to conduct a study about the data practices of large technology companies. The FTC has a comparative advantage in policy research and development through the use of 6(b) studies, which allows the Commission to proceed in measured and thoughtful ways on complicated policy questions. I will continue to encourage the Commission to issue 6(b) studies in the technology area.

The Honorable Jerry Moran

1. **Section 5(a) of the *FTC Act*, which prohibits "unfair or deceptive acts or practices in or affecting commerce" is the legal basis for a body of consumer protection law that covers data privacy and security practices. The FTC has brought hundreds of cases to date to protect the privacy and security of consumer information held by companies of all sizes under this authority. The FTC staff recently submitted comments to the National Telecommunications and Information Administration (NTIA) that clearly indicate the FTC staff's view that the FTC would be the appropriate agency to enforce a new comprehensive privacy legislative framework. Do you agree with the staff's view?**

Absolutely. The FTC has developed a substantial body of expertise on privacy issues over the past several decades, by bringing hundreds of cases, hosting approximately 70 workshops, and conducting numerous policy initiatives. The FTC is committed to using all of its expertise, its existing tools under the FTC Act, and whatever additional authority Congress gives us, to protect consumer privacy while promoting innovation and competition in the marketplace.

2. **As Congress evaluates opportunities to create meaningful federal legislation to appropriately ensure privacy of consumers' data, there have been suggestions to increase the FTC's authorities to enforce in this space. Will you commit to working with this Committee in measuring what resources, if any, will be needed to allow the agency to enforce any additional authorities that may or may not be provided in federal legislation?**

Yes. We can certainly use additional resources, additional staff, and additional authorities including civil penalties, targeted APA rulemaking, and jurisdiction over non-profits and common carriers. We are committed to utilizing whatever additional tools Congress gives us efficiently and vigorously.

3. **Sharing responsibilities with the DOJ's Antitrust Division, the FTC enforces antitrust law in a variety of sectors as described by your testimony. While the vast majority of premerger filings submitted to enforcement agencies do not raise competition concerns, the FTC challenged 45 mergers since the beginning of 2017, and of those, the FTC only voted to initiate litigation to block five transactions. Would you please describe the resource needs of the agency associated with hiring qualified outside experts to support its litigation efforts? Please explain how developments in the high-technology sector are accounted for in the FTC's decision-making process related to antitrust enforcement.**

I appreciate your attention to the agency's resource needs. The FTC is committed to maximizing its resources to enhance its effectiveness in protecting consumers and promoting competition, to anticipate and respond to changes in the marketplace, and to meet current and future challenges.

Resource constraints, however, remain a significant challenge. As discussed in more detail below, evolving technologies and intellectual property issues continue to increase the complexity of antitrust investigations and litigation. This complexity, coupled with the rising costs of critical expert witnesses and increases in caseload, sometimes leads to financial and personnel resource limitations. In the past, we have requested additional resources for experts, information technology, and more full-time employees in support of our mission to protect consumers and promote competition. These continue to be critical areas of need for our agency. If we receive additional resources, they likely would be applied to these areas as needed.

Qualified experts are a critical resource in all of the FTC's competition cases heading toward litigation. For example, the services of these expert witnesses are critical to the successful investigation and litigation of merger cases, as they provide insight on proper definition of product and geographic markets, the likelihood of entry by new competitors, and the development of models to contrast merger efficiencies with potential competitive harm.

Expert witness costs are highly dependent on the number, scope, duration, and disposition of our federal and administrative court challenges. The cost of an expert, for example, increases if we require the expert to testify or produce a report. To limit these costs, the FTC has identified and implemented a variety of strategies, including using internal personnel from its Bureau of Economics as expert witnesses whenever practical. The opportunities to use internal experts as testifying experts are limited, however, by several factors, including staff availability, testifying experience, and the specialized expertise required for specific matters. I will continue to encourage the FTC to evaluate how to increase its use of internal experts and control expert costs without compromising case outcomes or reducing the number of enforcement actions.

In addition to expert witness costs, you asked about how developments in the high-technology sector factor into the FTC's decision-making process related to antitrust enforcement. The FTC closely follows activity in the high-technology sector. Given the important role that technology companies play in the American economy, it is critical that the Commission—in furthering its mission to protect consumers and promote competition—understand the current and developing business models and scrutinize incumbents' conduct to ensure that they abide by the same rules of competitive markets that apply to any company. When appropriate, the Commission will take action to counter the harmful effects of coordinated or unilateral conduct by technology firms.

The fundamental principles of antitrust do not differ when applied to high-technology industries, including those in which patents or other intellectual property are highly significant. The issues, however, are often more complex and require different expertise, which may necessitate the hiring of outside experts or consultants to help us develop and litigate our cases. The FTC also strives to adapt to the dynamic markets we protect by leveraging the research, advocacy, and education tools at our disposal to improve our understanding of significant antitrust issues and emerging trends in business practices, technology, and markets. For example, last fall, the Commission launched its *Hearings on Competition and Consumer Protection in the 21st Century* to consider whether the FTC's enforcement and policy efforts are keeping pace with changes in the economy, including advancements in technology and new business models made possible by

those developments.[51] I will continue to encourage the agency to scrutinize technology mergers and conduct by technology firms to ensure not only that consumers benefit from their innovative products, but also that competition thrives in this dynamic and highly influential sector.

4. **Earlier this year, I introduced legislation called the *Senior Scams Prevention Act* with Senator Bob Casey to combat continued and increasingly complex attempts to defraud one of the nation's most vulnerable populations, our senior community. This bill seeks to ensure retailers, financial institutions and wire transfer companies have the resources to train employees to help stop financial frauds and scams on seniors. Would you agree that awareness and education, guided by "best practices" established by industry and government partners, is a valuable tool in preventing consumer harms against our nation's seniors?**

Yes. Protecting older consumers is one of the agency's top priorities. As the population of older Americans grows, the FTC's efforts to identify scams affecting seniors and to bring aggressive law enforcement action, as well as provide awareness and useful advice to seniors, become increasingly vital. Using research, the FTC developed its *Pass It On* campaign to share preventative information about frauds and scams with older adults.[52] This popular campaign, used by many of our partners, engages active older adults to share the materials with people in their communities, including people in their lives who may need this information. The FTC stands ready to work with industry and our government partners to create additional material for industry, including retailers, financial institutions, wire transfer companies and others to help prevent harm to our nation's seniors.

5. **In its comments submitted to NTIA on "Developing the Administration's Approach to Consumer Privacy," the FTC discussed the various cases that it has taken up to address privacy-related harms to consumers, and it specifically noted four categories of harms: financial injury, physical injury, reputational injury, and unwanted intrusion. Could you please briefly describe each category while noting any FTC enforcement considerations specific to that type of harm?**

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[51] FTC, *Hearings on Competition and Consumer Protection in the 21st Century*, https://www.ftc.gov/policy/hearings-competition-consumer-protection. Recent hearings included a two-day workshop on the potential for collusive, exclusionary, and predatory conduct in multisided, technology-based platform industries. FTC Workshop, *FTC Hearing #3: Competition and Consumer Protection in the 21st Century* (Oct. 15-17, 2018), https://www.ftc.gov/news-events/events-calendar/2018/10/ftc-hearing-3-competition-consumer-protection-21st-century. Similarly, in early November, the Commission held a two-day workshop on the antitrust frameworks for evaluating acquisitions of nascent competitors in the technology and digital marketplace, and the antitrust analysis of mergers and conduct where data is a key asset or product. FTC Workshop, *FTC Hearing #6: Competition and Consumer Protection in the 21st Century* (Nov. 6-8, 2018), https://www.ftc.gov/news-events/events-calendar/ftc-hearing-6-competition-consumer-protection-21st-century. Also in November, the Commission held a two-day workshop on the competition and consumer protection issues associated with algorithms, artificial intelligence, and predictive analysis in business decisions and conduct. FTC Workshop, *FTC Hearing #7: Competition and Consumer Protection in the 21st Century* (Nov. 13-14), https://www.ftc.gov/news-events/events-calendar/ftc-hearing-7-competition-consumer-protection-21st-century.

[52] FTC, FTC Website: *Consumer Information – Pass it on, https://www.consumer.ftc.gov/features/feature-0030-pass-it-on* (providing consumer information on identity theft, imposter scams, charity fraud, and other topics).

Certainly. Financial injury can manifest in a variety of ways: fraudulent charges, delayed benefits, expended time, opportunity costs, fraud, and identity theft, among other things.[53] Physical injuries include risks to individuals' health or safety, including the risks of stalking and harassment.[54] Reputational injury involves disclosure of private facts about an individual, which damages the individual's reputation. Tort law recognizes reputational injury.[55] The FTC has brought cases involving this type of injury, for example, in a case involving public disclosure of individuals' Prozac use[56] and public disclosure of individuals' membership on an infidelity-promoting website.[57] Finally, unwanted intrusions involve two categories. The first includes activities that intrude on the sanctity of people's homes and their intimate lives. The FTC's cases involving a revenge porn website,[58] an adult-dating website,[59] and companies spying on people in their bedrooms through remotely-activated webcams fall into this category.[60] The second category involves unwanted commercial intrusions, such as telemarketing, spam, and harassing debt collection calls. In terms of enforcement considerations, as noted above, the FTC is very mindful of ensuring that it addresses these harms, while not impeding the benefits of data collection and use practices.

6. In the FTC's recent comments in NTIA's privacy proceeding, the FTC said that its "guiding principles" are based on "balancing risk of harm with the benefits of innovation and competition." Would you describe what this means, how you strike this balance, and how it is applied in practice under your Section 5 authority in the *FTC Act*?

Regulations may impose significant costs on regulated companies, so new regulations must be handled with care to avoid stifling innovation or entrenching incumbents. The FTC has a longstanding history of weighing the countervailing benefits when determining if an injury to consumers justifies the imposition of a remedy. In unfairness cases, section 5(n) of the FTC Act requires us to strike this balance. It does not allow the FTC to bring a case alleging unfairness

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[53] *See, e.g.*, *TaxSlayer, LLC*, No. C-4626 (F.T.C. Oct. 20, 2017) (complaint), https://www.ftc.gov/enforcement/cases-proceedings/162-3063/taxslayer (alleging delayed benefits, expended time, and risk of identity theft).

[54] *See, e.g.*, *FTC v. Accusearch, Inc.*, No. 06-CV-0105 (D. Wyo. May 3, 2006) (complaint), https://www.ftc.gov/enforcement/cases-proceedings/052-3126/accusearch-inc-dba-abikacom-jay-patel (alleging that telephone records pretexting endangered consumers' health and safety).

[55] Under the tort of public disclosure of private facts (or publicity given to private life), a plaintiff may recover where the defendant's conduct is highly offensive to a reasonable person. Restatement (Second) of Torts § 652D (1977).

[56] *Eli Lilly and Co.*, No. C-4047 (F.T.C. May 8, 2002), https://www.ftc.gov/enforcement/cases-proceedings/012-3214/eli-lilly-company-matter.

[57] *FTC v. Ruby Corp., et al.*, No. 1:16-cv-02438 (D.D.C. Dec. 14, 2016), https://www.ftc.gov/enforcement/cases-proceedings/152-3284/ashley-madison.

[58] *FTC v. EMP Media, Inc., et al.*, No. 2:18-cv-00035 (D. Nev. Jan. 9, 2018), *https://www.ftc.gov/enforcement/cases-proceedings/162-3052/emp-media-inc-myexcom*.

[59] *FTC v. Ruby Corp., et al.*, No. 1:16-cv-02438 (D.D.C. Dec. 14, 2016), https://www.ftc.gov/enforcement/cases-proceedings/152-3284/ashley-madison.

[60] *See* Press Release, FTC Halts Computer Spying (Sept. 25, 2012), https://www.ftc.gov/news-events/press-releases/2012/09/ftc-halts-computer-spying; *see also Aaron's, Inc.*, No. C-4442 (F.T.C. Mar. 10, 2014), https://www.ftc.gov/enforcement/cases-proceedings/122-3256/aarons-inc-matter.

"unless the act or practice causes or is likely to cause substantial injury to consumers, which is not reasonably avoidable by consumers themselves and not outweighed by benefits to consumers or to competition." Thus, for example, in our data security complaints and orders, we often plead the specific harms that consumers are likely to suffer from a company's data security failures. We do not assert that companies need to spend unlimited amounts of money to address these harms; in many of our cases, we specifically allege that the company could have fixed the security vulnerabilities at low or no cost.

7. **The FTC's comments pertaining to "control" in NTIA's privacy proceeding stated, "Choice also may be unnecessary when companies collect and disclose de-identified data, which can power data analytics and research, while minimizing privacy concerns." How would the FTC suggest federal regulation account for de-identified data, if at all?**

This question is an excellent one, and pertains to an area in which I continue to listen to various perspectives and analyze policy ramifications. There are many potentially important uses for de-identified data. But protecting privacy using de-identified information is becoming more complex as new and powerful tools are able to combine data sets and extract information. One possible standard identified in the FTC's 2012 Privacy Report states that data is de-identified if it is not "reasonably linkable" to a consumer, computer, or device.[61] Data can be deemed to be de-identified to the extent that a company: (1) takes reasonable measures to ensure that the data is de-identified; (2) publicly commits not to try to re-identify the data; and (3) contractually prohibits downstream recipients from trying to re-identify the data. Additionally, I think that we must invest in research and education to ensure consumers and the market place understand the evolving risks associated with de-identified data. Although this language provides some general principles for de-identification, we would be happy to work with your staff on drafting more specific legislative language.

8. **Your testimony indicated that continued technological developments allow illegal robocallers to conceal their identities in "spoofing" caller IDs while exponentially increasing robocall volumes through automated dialing systems. These evolving technological changes mean that the critical law enforcement efforts of the FTC cannot be the only solution, and your testimony described the additional steps the FTC is taking to develop innovative solutions to these issues. Would you please describe the process and outcomes of the four public challenges that the FTC held from 2013 to 2015? Are there plans to incentivize innovators to combat robocalls in the future?**

The FTC's process for its robocall challenges included public announcements, committees with independent judges, and, in some cases, cash prizes awarded under the America COMPETES

[61] *Available at* https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf.

Reauthorization Act.[62] To maximize publicity, the FTC announced each of its four challenges in connection with public events. The FTC announced the first robocall challenge at the FTC's 2012 Robocall Summit. In 2014, the FTC conducted its second challenge, "Zapping Rachel" at DEF CON 22. The FTC conducted its third challenge, "DetectaRobo," in June 2015 in conjunction with the National Day of Civic Hacking. The final phase of the FTC's fourth public robocall challenge took place at DEF CON 23. When the FTC held its first public challenge, there were few, if any, call blocking or call labeling solutions available for consumers. Today, two FTC challenge winners, NomoRobo and Robokiller, offer call blocking applications, and there are hundreds of mobile apps offering call blocking and call labeling solutions for cell phones. Many home telephone service providers also now offer call blocking and call labeling solutions. The FTC will not hesitate to initiate additional innovation contests if it identifies further challenges that could meaningfully benefit consumers by reducing the harm caused by illegal robocalls.

In addition to developing call blocking and call labeling technology, the telecom industry has also developed call verification technology, called STIR/SHAKEN, to help consumers know whether a call is using a spoofed Caller ID number and assist call analytics companies in implementing call blocking and call labeling products. If widely implemented and made available to consumers, the STIR/SHAKEN protocol should minimize unwanted calls. Certain industry members have begun to roll out this technology and it is in beta testing mode. I understand Chairman Pai recently called on the nation's largest carriers to provide details about their caller ID authentication plans for 2019. I support this industry initiative.

a. Would you please describe the FTC's coordination efforts with state, federal, and international partners to combat illegal robocalls?

The FTC frequently coordinates its efforts with its state, federal, and international partners. The FTC often brings robocall enforcement actions with states as co-plaintiffs. For example, in the FTC's case against Dish Network, litigated for the FTC by the Department of Justice, the FTC brought the case jointly with California, Illinois, North Carolina, and Ohio. Collectively, the states and the FTC obtained a historic $280 million trial verdict.[63]

The FTC also coordinates outreach and education with the FCC. In 2018, the agencies co-hosted two robocall events—a policy forum that discussed technological and law enforcement solutions to the robocall problem[64] and a public expo that allowed companies offering call blocking and

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[62] *See* "Details About the FTC's Robocall Initiatives" at https://www.consumer.ftc.gov/features/feature-0025-robocalls.

[63] Press Release, FTC and DOJ Case Results in Historic Decision Awarding $280 Million in Civil Penalties Against Dish Network and Strong Injunctive Relief for Do Not Call Violations (June 6, 2017), https://www.ftc.gov/news-events/press-releases/2017/06/ftc-doj-case-results-historic-decision-awarding-280-million-civil. The case is on appeal before the Seventh Circuit Court of Appeals.

[64] Press Release, FTC and FCC to Host Joint Policy Forum and Consumer Expo to Fight the Scourge of Illegal Robocalls (Mar. 22, 2018), https://www.ftc.gov/news-events/press-releases/2018/03/ftc-fcc-host-joint-policy-forum-illegal-robocalls.

call labeling services to showcase their products for the public.[65] Additionally, the FTC and FCC hold quarterly calls, speak regularly on an informal basis, and coordinate on a monthly basis with our state partners through the National Association of Attorneys General. The FTC also engages with international partners through participation in international law enforcement groups such as the International Consumer Protection Enforcement Network, International Mass Marketing Fraud Working Group, and the Unsolicited Communications Network (formerly known as the London Action Plan).

9. **Your testimony described the limitations of the FTC's current data security enforcement authority provided by Section 5 of the *FTC Act* including: lacking civil penalty authority, lacking authority over non-profits and common carrier activity, and missing broad APA rulemaking authority. Please describe each of these limitations and how adjusted FTC authority to address these items would improve the protection of consumers from data security risks.**

Under current law, the FTC cannot obtained civil penalties for first-time security violations. I believe this under-deters problematic data security practices. If Congress were to give us the authority to seek civil penalties for first-time violators (subject to statutory limitations on the imposition of civil penalties, such as ability to pay and stay in business), better deterrence would be achieved. As to APA rulemaking authority, though we are not seeking general APA rulemaking authority for a broad statute like Section 5, were Congress to enact specific data security legislation, it is important for the FTC to have APA rulemaking authority. Such authority will ensure that the FTC can enact rules and amend them as necessary to keep up with technological developments. For example, in 2013, the FTC was able to use its APA rulemaking authority to amend its Rule under the Children's Online Privacy Protection Act to address new business models, including social media and collection of geolocation information, that were not in place when the initial 2000 Rule was promulgated. As to nonprofits and common carriers, news reports are filled with breaches affecting these sectors (*e.g.*, the education sector) and the FTC does not currently have jurisdiction over them. Giving the FTC jurisdiction over these entities for purposes of enforcing data security laws will create a level playing field and ensure that these entities are subject to the same rules as other entities that collect similar types of data.

[65] Press Release, FTC and FCC to Co-Host Expo on April 23 Featuring Technologies to Block Illegal Robocalls (Apr. 19, 2018), https://www.ftc.gov/news-events/press-releases/2018/04/ftc-fcc-co-host-expo-april-23-featuring-technologies-block-0.

Responses for the Questions for the Record
Senate Commerce Subcommittee Hearing: "Oversight of Federal Trade Commission"
November 27, 2018

Noah Joshua Phillips, Commissioner, Federal Trade Commission

The Honorable Chairman John Thune

Question 1. **Vertical mergers such as the merger between AT&T and Time Warner have garnered some attention lately. The FTC and DOJ have not updated vertical merger guidance since 1984. Do you believe that the FTC and DOJ should issue new guidance on vertical mergers?**

Antitrust officials, practitioners, and scholars recognize that, in many respects, the 1984 Non-Horizontal Merger Guidelines[1] reflect neither current practice nor scholarship on vertical merger enforcement. [2] New guidelines should be based on modern caselaw, the practical experience of recent merger challenges and investigations, and insights from both theoretical and empirical scholarship.

Over the years, the agencies have provided substantial insight on vertical merger analysis through speeches and other policy work,[3] and through rigorous case selection.[4] I am open to drafting new guidelines, provided they reflect guidance from the courts, experience from agencies, and the weight of scholarship on the question.

Question 2. **Government lawsuits to stop mergers are litigated using different procedures depending on which agency, the FTC or DOJ, handles the case. Do you think Congress**

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[1] U.S. Department of Justice, *Non-Horizontal Merger Guidelines* (1984), https://www.justice.gov/sites/default/files/atr/legacy/2006/05/18/2614.pdf.

[2] *See, e.g.*, Aldrin Brown, *US DOJ Seeks to Issue New Vertical Merger Guidelines 'Within the Next Year,' Antitrust Chief Says*, PARR (Oct. 30, 2018) (quoting Assistant Attorney General Makan Delrahim as stating that these guidelines are "not used" and do not "[r]eflect new evidence or case law"); Bruce Hoffman, *Vertical Merger Enforcement at the FTC*, Remarks at Credit Suisse 2018 Washington Perspectives Conference (Jan. 10, 2018), https://www.ftc.gov/public-statements/2018/01/vertical-merger-enforcement-ftc.

[3] *See, e.g.*, Bruce Hoffman, *Vertical Merger Enforcement at the FTC*, Remarks at Credit Suisse 2018 Washington Perspectives Conference (Jan. 10, 2018), https://www.ftc.gov/public-statements/2018/01/vertical-merger-enforcement-ftc (explaining the FTC's current analysis of proposed vertical mergers and highlighting the extent to which that analysis has moved beyond the 1984 Non-Horizontal Merger Guidelines).

[4] For example, the Commission recently challenged several vertical mergers, including one between Northrop Grumman, a leading provider of missile systems to the Department of Defense, and Orbital ATK, a key supplier of solid rocket motors. *Northrop Grumman*, No. C-4652 (F.T.C. 2018), https://www.ftc.gov/enforcement/cases-proceedings/181-0005-c-4652/northrop-grumman-orbital-atk. *See also Sycamore Partners II, L.P.*, No. C-4667 (F.T.C. 2019), https://www.ftc.gov/enforcement/cases-proceedings/181-0180/sycamore-partners-ii-lp-staples-inc-essendant-inc-matter (consent agreement resolving charges that a merger between Staples, the world's largest retailer of office products and related services, and Essendant, a wholesale distributor of office products, was likely to harm competition in the market for office supply products sold to small- and mid-sized businesses); *Fresenius Medical Care AG & Co. KGaA*, No. C-4671 (F.T.C. 2019), https://www.ftc.gov/enforcement/cases-proceedings/171-0227/fresenius-medical-care-nxstage-medical-matter.

should take action to ensure that agencies follow the same procedures or do you support another approach?

There is no good reason for different standards for preliminary injunctive relief between the two antitrust enforcement agencies, and Congress adopting carefully crafted legislation to align standards could be beneficial. As a practical matter, courts typically interpret the standard to be applied when the FTC files for a preliminary injunction in pre-merger cases to be the same as for such DOJ filings. Making it clear via statute that the two standards are the same would, however, eliminate: (1) any potential for different standards to be erroneously adopted; and (2) the criticism that companies may face different standards depending on the happenstance of which agency reviews its transaction.

With respect to the FTC's administrative litigation path, there are several additional considerations. The FTC has utilized administrative litigation to help develop antitrust doctrine in important ways—including in complex and critical areas like healthcare. The Commission's reworking of its approach to hospital mergers is perhaps the most striking example of the FTC's successful use of administrative litigation to advance antitrust enforcement.[5] In contemplating legislation regarding the FTC's use of administrative litigation, Congress should consider whether and to what extent it desires the Commission to continue using administrative litigation—as opposed to federal court litigation—to develop antitrust doctrine.

Congress should also consider whether and to what extent administrative litigation may make the ultimate resolution of cases more efficient. Whether a case is litigated in federal court or administratively may make a difference, particularly for unconsummated mergers. Merging parties remain unable to close their transaction for a significant period of time, for example when they are subject to review by multiple authorities. The FTC can commence an administrative action while other reviews are pending and delay an injunction action in federal court until other review processes are completed and the merger is imminent. In the recent *Tronox* case, the FTC filed its case in December 2017 and litigated it administratively while the parties waited for foreign approvals.[6] In the summer of 2018, once those approvals were granted and the parties would have been able to close their transaction, the FTC filed suit in federal court, seeking a preliminary injunction. The pre-existing administrative record allowed the parties to avoid a substantial discovery period in the federal proceeding, enabled the district court judge to expedite its hearing and to issue a ruling in September 2018. However, the administrative litigation remains pending before the Commission. In other recent merger cases where the Commission has sought a preliminary injunction in federal court from the beginning, federal courts were able

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[5] *See*, *e.g.*, Edith Ramirez, Chairwoman, Fed. Trade Comm'n, *Retrospectives at the FTC: Promoting an Antitrust Agenda,* Remarks at ABA Retrospective Analysis of Agency Determinations in Merger Transactions Symposium (June 28, 2013), https://www.ftc.gov/public-statements/2013/06/retrospectives-ftc-promoting-antitrust-agenda; *S. 2102: the Standard Merger & Acquisition Review Through Equal Rules Act of 2015 Before the Subcomm. on Antitrust, Competition Policy & Consumer Rights of the S. Comm. on the Judiciary*, 114th Cong. 4 (2015) (statement of Jonathan M. Jacobson, Partner, Wilson Sonsini Goodrich & Rosati, PC), https://www.judiciary.senate.gov/imo/media/doc/10-07-15%20Jacobson%20Testimony.pdf.

[6] *Tronox Ltd.*, No. 9377 (F.T.C. 2018), https://www.ftc.gov/enforcement/cases-proceedings/171-0085/tronoxcristal-usa.

to issue rulings on the preliminary injunctions—which typically effectively end any litigation and obviate the need for any administrative trial—within six months.[7]

That said, the Commission's use of administrative litigation for merger review has met with criticism. Some express concern that the FTC has "two bites at the apple" when it comes to mergers: the Commission can seek a preliminary injunction in federal court, and if it loses, can continue to a full administrative trial before an ALJ (an option the DOJ does not have).[8] The Commission has not continued to litigate a merger case after losing a preliminary injunction motion in federal court for over twenty years, and modern policy is to stop litigating after such a loss. I agree with that policy. That said, the policy could be changed by the Commission, while it would not be able to unilaterally deviate from legislation adopting this policy.

There also is a concern that, in administrative litigation, the Commission essentially serves as a check on itself—it votes to issue a complaint, and then is the factfinder and decision-maker as to the ultimate merits of that complaint before parties have any opportunity to go to federal court.[9] The FTC ultimately finds liability (on one or more counts) in administrative litigation an overwhelming percent of the time, often overruling the Administrative Law Judge (who renders an initial decision, following an administrative trial) to do so.[10] This has led some to question the administrative process and the use of the ALJ.

In considering whether to take action to align the approaches of the two federal antitrust agencies, Congress should keep in mind these benefits and potential drawbacks.

Question 3. **Should Congress amend Section 5(n) of the FTC Act, which addresses unfair practices, to clarify what constitutes "substantial injury?" If so, how?**

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[7] *See*, *e.g.*, *Sysco Corporation*, No. 9364 (F.T.C. 2015), https://www.ftc.gov/enforcement/cases-proceedings/141-0067/syscousf-holdingus-foods-matter; *Staples, Inc.*, No. 9367 (F.T.C. 2016), https://www.ftc.gov/enforcement/cases-proceedings/151-0065/staplesoffice-depot-matter.

[8] *See*, *e.g.*, ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS, ch. II.A (2007), https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

[9] *See* Mark Leddy, Christopher Cook, James Abell & Georgina Eclair-Heath, *Transatlantic Merger Control: The Courts and the Agencies*, 43 CORNELL INT'L L.J. 25, 53 (2010) ("[T]he FTC's recent proposals [] raise concerns about prosecutorial bias and lack of effective judicial oversight."); Maureen K. Ohlhausen, *Administrative Litigation at the FTC: Effective Tool for Developing the Law or Rubber Stamp?*, 12(4) J. COMPETITION L. & ECON. 1 (2016) (describing and analyzing the concerns); David A. Balto, *The FTC at a Crossroads: Can It Be Both Prosecutor and Judge?*, 28 LEGAL BACKGROUNDER 1, 1 (2013); Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission, 58 ANTITRUST L.J. 43, 118 (1989) ("No thoughtful observer is entirely comfortable with the FTC's (or other agencies') combining of prosecutor and adjudicatory functions. Whenever the same people who issued a complaint later decide whether it should be dismissed, concern about at least the appearance of fairness is inevitable.").

[10] *See*, *e.g.*, A. Douglas Melamed, Comments on Public Workshop Concerning the Prohibition of Unfair Methods of Competition In Section 5 of the Federal Trade Commission Act 14 (Oct. 14, 2008), https://www.ftc.gov/policy/public-comments/comment-537633-00004 ("Over that 25-year period [from 1983-2007], *respondents did not win a single* [Sherman Act] *case* [before the ALJ]. The staff won 16 cases and lost none. That record now covers the 26-year period from 1983 to 2008. [¶] Notably, respondents had greater difficulty winning before the Commission than before the ALJs. Respondents actually won four of the sixteen cases before the ALJ." (emphasis in original)); Joshua Wright, *Supreme Court Should Tell FTC To Listen To Economists, Not Competitors On Antitrust*, FORBES (Mar. 14, 2016), https://www.forbes.com/sites/danielfisher/2016/03/14/supreme-court-should-tell-ftc-on-antitrust/#76b9fd647c16 ("[T]he FTC has ruled for itself in 100 percent of its cases over the past three decades—though it is reversed more often than the decisions of federal court judges.")

I do not have a view at this time as to whether Congress should clarify the definition of "substantial injury" under Section 5(n). Historically, the Commission has interpreted substantial injury to include financial,[11] physical,[12] reputational,[13] or unwanted intrusions.[14]

Some have raised questions as to the scope of injury appropriately covered by Section 5(n), including whether (and how) 5(n) should be applied to intangible injuries.[15] In response to some of these questions, on December 12, 2017, the FTC hosted a workshop in Washington, DC to discuss "informational injuries", which are injuries—both market-based and non-market[16]—that consumers may suffer from privacy and security incidents, such as data breaches or unauthorized disclosure of data. The workshop asked participants to discuss and develop analytical frameworks to help guide future application of the "substantial injury" prong in cases involving informational injury.

This work targets issues that Congress is now considering addressing through privacy legislation. I believe the discussion about the scope of Section 5(n) is relevant to that consideration.

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[11] Financial injury can manifest in a variety of ways: fraudulent charges, delayed benefits, expended time, opportunity costs, fraud, and identity theft, among other things. *See*, *e.g.*, Complaint, *TaxSlayer, LLC*, No. C-4626 (F.T.C. Oct. 20, 2017), https://www.ftc.gov/enforcement/cases-proceedings/162-3063/taxslayer (alleging delayed benefits, expended time, and risk of identity theft).

[12] Physical injuries include risks to individuals' health or safety, including the risks of stalking and harassment. *See*, *e.g.*, Complaint, *FTC v. Accusearch, Inc.*, No. 06-CV-0105 (D. Wyo. April 27, 2006), https://www.ftc.gov/enforcement/cases-proceedings/052-3126/accusearch-inc-dba-abikacom-jay-patel (alleging that telephone records pretexting endangered consumers' health and safety).

[13] Reputational injury involves disclosure of private facts about an individual, which damages the individual's reputation. Tort law recognizes reputational injury. The FTC has brought cases involving this type of injury, for example, in a case involving public disclosure of individuals' Prozac use and public disclosure of individuals' membership on an infidelity-promoting website. *Eli Lilly And Company*, No. C-4047 (F.T.C. May 8, 2002), https://www.ftc.gov/enforcement/cases-proceedings/012-3214/eli-lilly-company-matter; *FTC v. Ruby Corp. et al.*, No. 1:16-cv-02438 (D.D.C. Dec. 14, 2016), https://www.ftc.gov/enforcement/cases-proceedings/152-3284/ashley-madison.

[14] Finally, unwanted intrusions involve two categories. The first includes activities that intrude on the sanctity of people's homes and their intimate lives. The FTC's cases involving a revenge porn website, an adult-dating website, and companies spying on people through remotely-activated webcams fall into this category. The second category involves unwanted commercial intrusions, such as telemarketing, spam, and harassing debt collection calls.

[15] *See*, *e.g.*, *Oversight of the Federal Trade Commission; Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 114th Cong. 74 (2016) (written question submitted by Sen. Thune, Chairman, S. *Comm. on Commerce, Science, and Transportation*) (asking about the use of the FTC's unfairness doctrine to address intangible and non-economic harms, including whether "there a predictable limiting factor on the types of harm that will result in FTC enforcement actions"), https://www.govinfo.gov/content/pkg/CHRG-114shrg25376/pdf/CHRG-114shrg25376.pdf; *LabMD, Inc. v. FTC*, 678 F. App'x 816, 820 (11th Cir. 2016) (noting that "it is not clear that a reasonable interpretation of § 45(n) includes intangible harms like those that the FTC found in this case."); Concurring Statement of Acting Chairman Maureen K. Ohlhausen in the Matter of Vizio, Inc. at 1, *FTC v. VIZIO, Inc.*, No. 2:17-cv-00758 (D.N.J. 2017) (noting "the need for the FTC to examine more rigorously what [type of harm] constitutes 'substantial injury' in the context of information about consumers."), https://www.ftc.gov/public-statements/2017/02/concurring-statement-acting-chairman-maureen-k-ohlhausen-matter-vizio-inc .

[16] "Market-based" injuries can be objectively measured—for example, credit card fraud and medical identity theft affect consumers' finances in a directly measurable way. Alternatively, a "non-market" injury, such the embarrassment that comes from a breach of sensitive health information, cannot be objectively measured using available tools because there is no functioning market for it.

Question 4. **Should the FTC issue more guidance to marketers on the level of support needed to substantiate their claims? If so, when do you anticipate that such guidance could be issued?**

The FTC has issued extensive guidance over the years to help marketers in determining the level of support needed to substantiate claims. The Commission first articulated the relevant factors used to determine the level of evidence required to substantiate objective performance claims in *Pfizer, Inc.*, 81 F.T.C. 23 (1972). Those factors included the type of claim, type of product, the consequences of a false claim, the benefits of a truthful claim, the cost of developing substantiation for the claim, and the amount of substantiation experts in the field believe is reasonable. The Commission and the courts have reaffirmed this standard many times since 1972.[17] In addition, the FTC also has provided extensive guidance through Guides and staff guidance documents.[18] In addition, FTC staff provide additional guidance through speeches and presentations to industry trade groups and industry attorneys.

The Commission's precedent and other guidance sets forth flexible principles that can be applied to multiple products and claims. It does not attempt to answer every question about substantiation, given the virtually limitless range of advertising claims, products, and services to which it could be applied. Instead, it seeks to strike the right balance between being specific enough to be helpful but not so granular that it would overlook some important factor that might arise under given circumstances and thereby actually chill useful speech.

Question 5. **In June, the 11th Circuit vacated the Commission's data security order against Lab-MD. What effect, if any, will this have on the Commission's data security orders going forward?**

The U.S. Court of Appeals for the Eleventh Circuit determined that the mandated data security provision of the Commission's *LabMD* Order was insufficiently specific. That ruling effectively mandates that our data security orders be more prescriptive, which is not necessarily good from a policy perspective. The flexible approach we had applied, which both the Commission and defendants generally preferred, permitted firms to base their data security compliance on the particular risks and needs of individual firms. Congress should consider whether to address the ruling of the Eleventh Circuit through a statutory fix.

The Court having issued its order, however, we are now working to craft order language in data security cases that is consistent with the Eleventh Circuit's opinion.

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[17] *See, e.g.*, *Thompson Med. Co.*, 104 F.T.C. 648, 813 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986); *Daniel Chapter One*, 2009 WL 5160000, at *25-26 (F.T.C. 2009), *aff'd*, 405 Fed. Appx. 505 (D.C. Cir. 2010) (unpublished opinion), *available at* 2011-1 Trade Cas. (CCH) ¶ 77,443 (D.C. Cir. 2010); *POM Wonderful, LLC*, 155 F.T.C. 1, 55-60 (2013), *aff'd*, 777 F.3d 478 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 1839, 194 L. Ed. 2d 839 (2016); *FTC Policy Statement Regarding Substantiation*, 104 F.T.C. 839, 840 (1984) (appended to *Thompson Med. Co.*, 104 F.T.C. 648 (1984)).

[18] *See Guides for the Use of Environmental Marketing Claims*, 16 C.F.R. § 260.2 (2019), https://www.ecfr.gov/cgi-bin/text-idx?SID=bd96b2cdcd01f7620d43e50a9d1d8cec&mc=true&node=se16.1.260_12&rgn=div8; FTC, *Dietary Supplements: An Advertising Guide for Industry,* https://www.ftc.gov/tips-advice/business-center/guidance/dietary-supplements-advertising-guide-industry.

Question 6. **If federal privacy legislation is passed, what enforcement tools would you like to be included for Federal Trade Commission?**

The question of tools is a secondary one, which cannot and should not be considered in the abstract. Answering the question necessarily requires preliminary determinations first as to what harms Congress wishes to address and, second, what liability standards it adopts to address those harms. Civil penalties, for instance, are better tailored to conduct that is clearly-defined—for example, violations of specific rules set forth in FTC consent orders or regulations like COPPA. Otherwise, the prospect of paying them may chill innovation and other conduct that benefits consumers. The FTC has rulemaking authority today.[19] It differs from APA rulemaking in several respects, following restraints imposed upon the Commission by Congress after attempts by the agency to ban certain types of advertising to children. Rulemaking authority raises important issues of delegation and democratic accountability. Congress, not an administrative agency, is the best place to make policy with a profound impact on a substantial portion of the economy. Congress should consider that the flexibility that rulemaking permits also allows for changes in rules over time, which—regardless of the underlying policy—can be terrifically difficult for businesses attempting to adapt.

Today, the FTC cannot take action against telecommunications common carriers and non-profits. I support removing those jurisdictional limitations.

Question 7: **During the hearing, I asked the Chairman whether the FTC would consider using its section 6(b) authority to study consumer information data flows, specifically sending requests to Google, Facebook, Amazon, and others in the tech industry to learn what information they collect from consumers and how that information is used, shared, and sold. I believe the FTC's section 6(b) authority could provide some much needed transparency to consumers about the data practices of large technology companies, and help identify areas that may require additional attention from lawmakers. What are your views with respect to the FTC potentially conducting a study pursuant to section 6(b) of the Federal Trade Commission Act on the data collection, use, filtering, sharing, and sale practices of large technology companies such as Google, Facebook, Amazon, and others?**

The Commission's 6(b) authority enables it to conduct economic studies that do not have a specific law enforcement purpose, but rather are for the purpose of obtaining information about "the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals" of the entities to whom the inquiry is addressed. As with subpoenas and CIDs, the recipient of a 6(b) order may file a petition to limit or quash, and the Commission may seek a court order requiring compliance.[20]

The FTC has used its 6(b) authority to study and answer discrete questions regarding industry practices, such as to gather information regarding the marketing practices of major alcoholic beverage advertisers to study whether voluntary industry guidelines for reducing advertising and

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[19] 15 U.S.C. § 57a.

[20] In addition, the Commission may commence suit in Federal court under Section 10 of the FTC Act, 15 U.S.C. § 50, against any party who fails to comply with a 6(b) order after receiving a notice of default from the Commission. After expiration of a thirty-day grace period, the defaulting party is liable for a penalty for each day of noncompliance.

marketing to underage audiences had been effective.[21] Another example is the Commission's July 2002 report, Generic Drug Entry Prior to Patent Expiration,[22] which was the product of a 6(b) study, and the results of which the Commission was able to publish publicly pursuant to 15 U.S.C. § 46(f).

For any 6(b) study of the wide-ranging tech sector to be effective, it should focus on areas where there is reason to suspect wrongdoing is occurring or where the Commission believes it lacks adequate understanding of the conduct, practice, or management in question. Casting too broad a net could easily incur costs in excess of the information's incremental benefit, as occurred with the Commission's Line of Business program, which was designed to compel annual reporting of financial and statistical data by hundreds of manufacturing firms but was discontinued after being plagued by recurring non-compliance and costly legal battles.[23] Congress (to the extent it seeks to direct such studies) and the Commission should develop clear and concise goals for such studies, to ensure that we have a concrete goal to work towards and to avoid, as much as possible, lengthy and expensive disputes over the scope or burden of such orders.

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[21] FTC Press Release, *FTC Orders Alcoholic Beverage Manufacturers to Provide Data for Agency's Fourth Major Study on Alcohol Advertising* (April 12, 2012), https://www.ftc.gov/news-events/press-releases/2012/04/ftc-orders-alcoholic-beverage-manufacturers-provide-data-agencys

[22] FTC, *Generic Drug Entry Prior to Patent Expiration: An FTC Study* (July 2002), https://www.ftc.gov/sites/default/files/documents/reports/generic-drug-entry-prior-patent-expiration-ftc-study/genericdrugstudy_0.pdf.

[23] B.J. Linder & Allan H. Savage, *The Line of Business Program: The FTC's New Tool*, 21 CAL. MGMT. REV. 57 (1979).

The Honorable Chairman Jerry Moran

1. **Set to expire on September 30, 2020, the U.S. SAFE WEB Act allows for increased cooperation with foreign law enforcement authorities through confidential information sharing and the provision of investigative assistance. Specifically, the law authorizes the FTC to provide assistance to foreign law enforcement agencies to support their investigations and enforcement actions. Your testimony requested that Congress reauthorize this authority while eliminating the sunset provision. Would you please explain how U.S. SAFE WEB Act will impact U.S. consumers?**

Our economy is increasingly globalized, digitized, and connected. These changes generate incredible opportunity, but also pose new problems for American consumers, such as traditional scams that now thrive online and new, Internet-enabled, frauds. They also raise law enforcement challenges, like the enhanced ability of scammers to act anonymously or move ill-gotten gains outside our jurisdiction; and roadblocks to international law enforcement cooperation.

Congress has been an essential ally in this fight. In 2006, it passed the U.S. SAFE WEB Act. SAFE WEB allows the FTC to share evidence with and provide investigative assistance to foreign authorities in cases involving issues including spam, spyware, privacy violations and data breach. It also confirms our authority to challenge foreign-based frauds that harm U.S. consumers or involve material conduct in the United States.

Using SAFE WEB, the FTC has worked with authorities abroad to stop illegal conduct and secure millions in judgements from fraudsters, sometimes even criminal convictions. The FTC uses SAFE WEB authority in important international privacy cases. We collaborated with Canadian and Australian privacy authorities on the massive data breach of the Toronto-based, adult dating website AshleyMadison.com,[24] and we worked again with Canadian authorities on the FTC's first children's privacy and security case involving connected toys, a settlement with electronic toy manufacturer VTech Electronics[25] under the Children's Online Privacy Protection Act.

In total, the FTC has responded to more than 130 SAFE WEB information-sharing requests from 30 foreign enforcement agencies. We have issued more than 115 civil investigative demands in more than 50 investigations on behalf of foreign agencies, civil and criminal. The FTC has collected millions of dollars in restitution for injured consumers, both foreign and domestic.

SAFE WEB helps protect Americans by policing and instilling confidence in the digital economy, but it sunsets in 2020. I believe that American consumers will be best served if Congress reauthorizes this authority and eliminates the sunset provision.

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[24] FTC Press Release, *Operators of AshleyMadison.com Settle FTC, State Charges Resulting From 2015 Data Breach that Exposed 36 Million Users' Profile Information* (Dec. 14, 2016), https://www.ftc.gov/news-events/press-releases/2016/12/operators-ashleymadisoncom-settle-ftc-state-charges-resulting.

[25] FTC Press Release, *Electronic Toy Maker VTech Settles FTC Allegations That it Violated Children's Privacy Law and the FTC Act* (Jan. 8, 2018), https://www.ftc.gov/news-events/press-releases/2018/01/electronic-toy-maker-vtech-settles-ftc-allegations-it-violated.

2. **Section 5(a) of the *FTC Act*, which prohibits "unfair or deceptive acts or practices in or affecting commerce" is the legal basis for a body of consumer protection law that covers data privacy and security practices. The FTC has brought hundreds of cases to date to protect the privacy and security of consumer information held by companies of all sizes under this authority. The FTC staff recently submitted comments to the National Telecommunications and Information Administration (NTIA) that clearly indicate the FTC staff's view that the FTC would be the appropriate agency to enforce a new comprehensive privacy legislative framework. Do you agree with the staff's view?**

Absolutely. The FTC has developed a substantial body of expertise on privacy issues over decades by bringing hundreds of cases, hosting approximately 70 workshops, and conducting numerous policy initiatives. The FTC is committed to using all of its expertise, its existing tools under the FTC Act, and whatever additional authority Congress gives us, to protect consumer privacy while at the same time promoting innovation and competition in the marketplace.

3. **As Congress evaluates opportunities to create meaningful federal legislation to appropriately ensure privacy of consumers' data, there have been suggestions to increase the FTC's authorities to enforce in this space. Will you commit to working with this Committee in measuring what resources, if any, will be needed to allow the agency to enforce any additional authorities that may or may not be provided in federal legislation?**

Yes. The FTC has developed substantial expertise in the area of data privacy and security and we are committed to working with Congress to help determine whether and what additional resources may be appropriate, commiserate with any new authorities.

4. **Sharing responsibilities with the DOJ's Antitrust Division, the FTC enforces antitrust law in a variety of sectors as described by your testimony. While the vast majority of premerger filings submitted to enforcement agencies do not raise competition concerns, the FTC challenged 45 mergers since the beginning of 2017, and of those, the FTC only voted to initiate litigation to block five transactions. Would you please describe the resource needs of the agency associated with hiring qualified outside experts to support its litigation efforts? Please explain how developments in the high-technology sector are accounted for in the FTC's decision-making process related to antitrust enforcement.**

As a threshold matter, it is well-recognized that the vast majority of premerger filings do not raise competitive concerns, and so the percentage of reviewed versus challenged mergers is not the result of a resource problem. Nor does a low incidence of full-phase investigations or merger challenges, relative to the total number of filings, indicate lax merger enforcement or the deterioration of competition. The ultimate antitrust question is whether a merger is likely to harm competition and consumers, and the FTC challenges far fewer mergers than it reviews because most simply do not raise competitive issues. That said, I appreciate your attention to the agency's resource needs. As we mentioned in our November 27 testimony, the FTC works very hard to accomplish as much as possible with the resources we have. We are tasked with the important

dual goals of protecting consumers and promoting competition, both which are of increasing importance in the changing economy. Resource constraints remain a significant challenge. Evolving technologies and intellectual property issues, among others, continue to increase the complexity of antitrust investigations and litigation. That complexity, coupled with the rising costs of critical expert witnesses and increases in caseload, sometimes leads to financial and personnel resource limitations. In the past, we have requested additional resources for experts, information technology, and more full-time employees in support of our mission to protect consumers and promote competition. We also have heard the need for additional paralegals to help support our staff attorneys; paralegals can provide very valuable services and allow attorneys to devote more time to substantive issues, but they are a rare commodity at the Commission today. These all continue to be critical areas of need for our agency. If we receive additional resources, we plan to apply them to these areas.

Qualified experts are a critical resource in all of the FTC's competition cases heading toward litigation. For example, expert witness services are critical to merger cases, as they help the FTC satisfy key burdens such as defining product and geographic markets and estimating the likely harms (and countering defendants' estimation of any alleged procompetitive benefits).

Expert witness costs are highly dependent on the number, scope, duration, and disposition of our federal and administrative court challenges—increasing (often significantly) as these factors increase. To limit these costs, the FTC has continued to identify and implement a variety of strategies, including using internal personnel from its Bureau of Economics as expert witnesses whenever practical. The opportunities to use internal experts as testifying experts are limited, however, by several factors, including staff availability, testifying experience, and the specialized expertise required for specific matters.

As with other critical areas under our jurisdiction, the FTC closely follows activity and developments in the high-technology sector. Given the important role that technology companies play in the modern American economy, the Commission has prioritized understanding the competition and consumer protection issues that can arise in this space.

The fundamental principles of antitrust do not differ when applied to high-technology industries, including those in which patents or other intellectual property are highly significant. The issues, however, can be more complex and require different expertise, which may necessitate the hiring of outside experts or consultants to help us develop and litigate our cases. The FTC strives to adapt to the dynamic markets we protect by leveraging the research, advocacy, and education tools at our disposal. For example, last fall, the Commission launched its *Hearings on Competition and Consumer Protection in the 21st Century* to understand better both the advancements in technology and the new business models they support, and how to target enforcement efforts in these evolving spaces.[26]

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[26] FTC, *Hearings on Competition and Consumer Protection in the 21st Century*, https://www.ftc.gov/policy/hearings-competition-consumer-protection. Recent hearings included a two-day workshop on the potential for collusive, exclusionary, and predatory conduct in multisided, technology-based platform industries. FTC, *FTC Hearing on Competition and Consumer Protection in the 21st Century #3: Multi-Sided Platforms, Labor Markets, and Potential Competition* (Oct. 15-17, 2018), https://www.ftc.gov/news-events/events-calendar/2018/10/ftc-hearing-3-competition-consumer-protection-21st-century. Similarly, in early November, the Commission held a two-day workshop on the antitrust frameworks for evaluating acquisitions of

5. **Earlier this year, I introduced legislation called the *Senior Scams Prevention Act* with Senator Bob Casey to combat continued and increasingly complex attempts to defraud one of the nation's most vulnerable populations, our senior community. This bill seeks to ensure retailers, financial institutions and wire transfer companies have the resources to train employees to help stop financial frauds and scams on seniors. Would you agree that awareness and education, guided by "best practices" established by industry and government partners, is a valuable tool in preventing consumer harms against our nation's seniors?**

I agree that awareness and education are essential to protect our nation's seniors. Indeed, protecting older Americans has long been a top priority, and it is increasingly important as that population grows. To this end, we engage in research, education, and enforcement actions focused on educating and protecting older Americans, including our *Pass It On* campaign,[27] to help both protect seniors and prosecute wrongdoers.

More generally, our anti-fraud activities are at the core of our law enforcement efforts, protecting not just seniors but a broad range of vulnerable consumer populations, including minorities and veterans. That includes efforts to stop fraudulent business opportunity schemes, police unsubstantiated health claims, and shut down sham charities that prey on unsuspecting consumers and target their hard-earned savings.

The Commission must and will keep a focus on these efforts, which protect consumers from immediate and tangible harms. We are ready and willing to work with additional partners—from government, civil society, academia, and industry—to identify and prevent harms to older consumers, as well as other vulnerable consumers.

6. **In its comments submitted to NTIA on "Developing the Administration's Approach to Consumer Privacy," the FTC discussed the various cases that it has taken up to address privacy-related harms to consumers, and it specifically noted four categories of harms: financial injury, physical injury, reputational injury, and unwanted intrusion. Could you please briefly describe each category while noting any FTC enforcement considerations specific to that type of harm?**

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nascent competitors in the technology and digital marketplace, and the antitrust analysis of mergers and conduct where data is a key asset or product. FTC, *FTC Hearing on Competition and Consumer Protection in the 21st Century #6: Privacy, Big Data, and Competition* (Nov. 6-8, 2018), https://www.ftc.gov/news-events/events-calendar/ftc-hearing-6-competition-consumer-protection-21st-century. Also in November, the Commission held a two-day workshop on the competition and consumer protection issues associated with algorithms, artificial intelligence, and predictive analysis in business decisions and conduct. FTC, *FTC Hearing on Competition and Consumer Protection in the 21st Century #7: The Competition and Consumer Protection Issues of Algorithms, Artificial Intelligence, and Predictive Analytics* (Nov. 13-14, 2018), https://www.ftc.gov/news-events/events-calendar/ftc-hearing-7-competition-consumer-protection-21st-century.

[27] FTC, *Consumer Information – Pass it on, https://www.consumer.ftc.gov/features/feature-0030-pass-it-on* (providing consumer information on identity theft, imposter scams, charity fraud, and other topics).

Certainly. Financial injury can manifest in a variety of ways: fraudulent charges, delayed benefits, expended time, opportunity costs, fraud, and identity theft, among other things.[28] Physical injuries include risks to individuals' health or safety, including the risks of stalking and harassment.[29] Reputational injury involves disclosure of private facts about an individual, which damages the individual's reputation. Tort law recognizes reputational injury.[30] The FTC has brought cases involving this type of injury, for example, in a case involving public disclosure of individuals' Prozac use[31] and public disclosure of individuals' membership on an infidelity-promoting website.[32] Finally, unwanted intrusions involve two categories. The first includes activities that intrude on the sanctity of people's homes and their intimate lives. The FTC's cases involving a revenge porn website,[33] an adult-dating website,[34] and companies spying on people in their bedrooms through remotely-activated webcams fall into this category.[35] The second category involves unwanted commercial intrusions, such as telemarketing, spam, and harassing debt collection calls. In terms of enforcement considerations, as noted above, the FTC is very mindful of ensuring that it addresses these harms, while not impeding the benefits of data collection and use practices.

I note additionally that the definition of "substantial injury" under Section 5(n) has been interpreted by the Commission in the past to reach these types of harms. "Privacy" harms often involve largely non-economic harms, potentially including harms not presently cognizable under the FTC Act. In considering privacy legislation, I urge Congress to study and understand the harms it wishes to address and craft remedies appropriate to them.

7. **In the FTC's recent comments in NTIA's privacy proceeding, the FTC said that its "guiding principles" are based on "balancing risk of harm with the benefits of innovation and competition." Would you describe what this means, how you strike this balance, and how it is applied in practice under your Section 5 authority in the *FTC Act*?**

In its comments to NTIA, the Commission wrote that it "supports a balanced approach to privacy that weighs the risks of data misuse with the benefits of data to innovation and competition",

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[28] *See, e.g.*, Complaint, *TaxSlayer, LLC*, No. C-4626 (F.T.C. Oct. 20, 2017), https://www.ftc.gov/enforcement/cases-proceedings/162-3063/taxslayer (alleging delayed benefits, expended time, and risk of identity theft).

[29] *See, e.g.*, Complaint, *FTC v. Accusearch, Inc.*, No. 06-CV-0105 (D. Wyo. April 27, 2006), https://www.ftc.gov/enforcement/cases-proceedings/052-3126/accusearch-inc-dba-abikacom-jay-patel (alleging that telephone records pretexting endangered consumers' health and safety).

[30] Under the tort of public disclosure of private facts (or publicity given to private life), a plaintiff may recover where the defendant's conduct is highly offensive to a reasonable person. Restatement (Second) of Torts § 652D (1977).

[31] *Eli Lilly and Co.*, No. C-4047 (F.T.C. 2002), https://www.ftc.gov/enforcement/cases-proceedings/012-3214/eli-lilly-company-matter.

[32] *FTC v. Ruby Corp., et al.*, No. 1:16-cv-02438 (D.D.C. 2016), https://www.ftc.gov/enforcement/cases-proceedings/152-3284/ashley-madison.

[33] *FTC v. EMP Media, Inc., et al.*, No. 2:18-cv-00035 (D. Nev. 2018), *https://www.ftc.gov/enforcement/cases-proceedings/162-3052/emp-media-inc-myexcom*.

[34] *FTC v. Ruby Corp., et al.*, No. 1:16-cv-02438 (D.D.C. 2016), https://www.ftc.gov/enforcement/cases-proceedings/152-3284/ashley-madison.

[35] *See* FTC Press Release, *FTC Halts Computer Spying* (Sept. 25, 2012), https://www.ftc.gov/news-events/press-releases/2012/09/ftc-halts-computer-spying; *see also Aaron's, Inc.*, No. C-4442 (F.T.C. Mar. 10, 2014), https://www.ftc.gov/enforcement/cases-proceedings/122-3256/aarons-inc-matter.

noting that striking that balance is "essential to protecting consumers and promoting competition and innovation."[36] Recognizing the kinds of harms we have pursued in privacy enforcement matters—financial, physical, and reputational injury, and unwanted intrusions—we also recognized the many benefits and innovations that the sharing of data have achieved for American consumers. The Commission went on to warn that "privacy standards that give short shrift to the benefits of data-driven practices may negatively affect innovation and competition" and that "regulation can unreasonably impede market entry or expansion by existing companies."

All of this means that, in thinking about regulation or law enforcement with respect to privacy, we must keep in mind that we are talking about one of the most dynamic aspects of the global economy, one where the U.S. is a leader in innovation and job growth. We should be clear about the harms we wish to stop, and weigh those against the benefits.

In unfairness cases, Section 5(n) of the FTC Act requires us to strike this balance. It does not allow the FTC to bring a case alleging unfairness "unless the act or practice causes or is likely to cause substantial injury to consumers, which is not reasonably avoidable by consumers themselves and not outweighed by benefits to consumers or to competition." Thus, for example, in our data security complaints and orders, we often plead the specific harms that consumers are likely to suffer from a company's data security failures. We do not assert that companies need to spend unlimited amounts of money to address these harms; in many of our cases, we specifically allege that the company could have fixed the security vulnerabilities at low or no cost.

As with any law enforcement agency, we should and do exercise our discretion when deciding whether to pursue matters and how to resolve them. In so doing, we should keep our guiding principles in mind and focus on deterring real and significant harms to consumers, providing the right incentives to the marketplace to take reasonable steps that will limit both consumer harm and liability, and avoiding the creation of a culture of uncertainty and fear that would impede consumer-friendly innovation.

8. **The FTC's comments pertaining to "control" in NTIA's privacy proceeding stated, "Choice also may be unnecessary when companies collect and disclose de-identified data, which can power data analytics and research, while minimizing privacy concerns." How would the FTC suggest federal regulation account for de-identified data, if at all?**

In our NTIA comment, we reference different types of privacy-related harms: financial, physical, reputational, and unwanted intrusion. All these types of harms are mitigated, or even eliminated, when data cannot be tracked to a consumer. As such, appropriately de-identified data does not raise the same risks and should be treated differently, especially considering the benefits of using such data for innovative, consumer-friendly purposes.

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[36] Federal Trade Commission Staff, Comment to the National Telecommunications and Information Administration on Developing the Administration's Approach to Consumer Privacy (Nov. 9, 2018), https://www.ftc.gov/policy/advocacy/advocacy-filings/2018/11/ftc-staff-comment-ntia-developing-administrations-approach.

9. **Your testimony indicated that continued technological developments allow illegal robocallers to conceal their identities in "spoofing" caller IDs while exponentially increasing robocall volumes through automated dialing systems. These evolving technological changes mean that the critical law enforcement efforts of the FTC cannot be the only solution, and your testimony described the additional steps the FTC is taking to develop innovative solutions to these issues. Would you please describe the process and outcomes of the four public challenges that the FTC held from 2013 to 2015? Are there plans to incentivize innovators to combat robocalls in the future?**

The FTC's process for its robocall challenges included public announcements, committees with independent judges, and, in some cases, cash prizes awarded under the America COMPETES Reauthorization Act.[37] To maximize publicity, the FTC announced each of its four challenges in connection with public events. The FTC announced the first robocall challenge at the FTC's 2012 Robocall Summit. In 2014, the FTC conducted its second challenge, "Zapping Rachel" at DEF CON 22. The FTC conducted its third challenge, "DetectaRobo," in June 2015 in conjunction with the National Day of Civic Hacking. The final phase of the FTC's fourth public robocall challenge took place at DEF CON 23. When the FTC held its first public challenge, there were few, if any, call blocking or call labeling solutions available for consumers. Today, two FTC challenge winners, NomoRobo and Robokilller, offer call blocking applications, and there are hundreds of mobile apps offering call blocking and call labeling solutions for cell phones. Many home telephone service providers also now offer call blocking and call labeling solutions. The FTC will not hesitate to initiate additional innovation contests if it identifies further challenges that could meaningfully benefit consumers by reducing the harm caused by illegal robocalls.

In addition to developing call blocking and call labeling technology, the telecom industry has also developed call verification technology, called STIR/SHAKEN, to help consumers know whether a call is using a spoofed Caller ID number and assist call analytics companies in implementing call blocking and call labeling products. If widely implemented and made available to consumers, the STIR/SHAKEN protocol should minimize unwanted calls. Certain industry members have begun to roll out this technology and it is in beta testing mode. We will keep a close eye on this industry initiative and continue to encourage its implementation.

   a. **Would you please describe the FTC's coordination efforts with state, federal, and international partners to combat illegal robocalls?**

Robocalls are a pernicious problem, a fact of which the average American consumer is reminded several times a day.

The FTC frequently coordinates its efforts with its state, federal, and international partners. The FTC often brings robocall enforcement actions with states as co-plaintiffs. For example, in the FTC's case against Dish Network, litigated for the FTC by the Department of Justice, the FTC

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[37] *See* FTC, *Consumer Information – Robocalls*, https://www.consumer.ftc.gov/features/feature-0025-robocalls.

brought the case jointly with California, Illinois, North Carolina, and Ohio. Collectively, the states and the FTC obtained a historic $280 million trial verdict.[38]

The FTC also coordinates outreach and education with the FCC. In 2018, the agencies co-hosted two robocall events— a policy forum that discussed technological and law enforcement solutions to the robocall problem[39] and a public expo that allowed companies offering call blocking and call labeling services to showcase their products for the public.[40] Additionally, the FTC and FCC hold quarterly calls, speak regularly on an informal basis, and coordinate on a monthly basis with our state partners through the National Association of Attorneys General. The FTC also engages with international partners through participation in international law enforcement groups such as the International Consumer Protection Enforcement Network, International Mass Marketing Fraud Working Group, and the Unsolicited Communications Network (formerly known as the London Action Plan).

10. Your testimony described the limitations of the FTC's current data security enforcement authority provided by Section 5 of the *FTC Act* including: lacking civil penalty authority, lacking authority over non-profits and common carrier activity, and missing broad APA rulemaking authority. Please describe each of these limitations and how adjusted FTC authority to address these items would improve the protection of consumers from data security risks.

Congress should consider all these tools in fashioning data security legislation. For good reason, the FTC Act does not give the Commission penalty authority for first-time violators. If Congress were to give the FTC the authority to seek civil penalties for first-time violators of data security rules specifically (subject to statutory limitations on the imposition of such penalties, such as ability to pay), we would have greater ability to deter potentially harmful conduct. Due to asymmetric information, interdependent systems, and difficulties in tracing ID theft to a particular firm, there are reasons to believe that in many circumstances firms may lack sufficient incentives to adequately invest in data security under current law.[41] Correctly calibrated civil penalties would cause companies to internalize the full costs of inadequate data security, fostering proper incentives to protect consumer data.

As to APA rulemaking authority, were Congress to enact specific data security legislation, APA rulemaking authority would allow us more efficiently to adopt implementing rules. Such authority will ensure that the FTC can enact rules and amend them as necessary to keep up with

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[38] FTC Press Release, *FTC and DOJ Case Results in Historic Decision Awarding $280 Million in Civil Penalties against Dish Network and Strong Injunctive Relief for Do Not Call Violations* (June 6, 2017), https://www.ftc.gov/news-events/press-releases/2017/06/ftc-doj-case-results-historic-decision-awarding-280-million-civil. The case is on appeal before the Seventh Circuit Court of Appeals.

[39] FTC Press Release, *FTC and FCC to Host Joint Policy Forum on Illegal Robocalls* (Mar. 22, 2018), https://www.ftc.gov/news-events/press-releases/2018/03/ftc-fcc-host-joint-policy-forum-illegal-robocalls.

[40] FTC Press Release, *FTC and FCC to Co-Host Expo on April 23 Featuring Technologies to Block Illegal Robocalls* (Apr. 19, 2018), https://www.ftc.gov/news-events/press-releases/2018/04/ftc-fcc-co-host-expo-april-23-featuring-technologies-block-0.

[41] *See, e.g.*, STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 244 (2004) (when victims cannot identify the injurer, injurers will lack adequate incentives to take care); George Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970); Howard Kunreuther & Geoffrey Heal, *Interdependent Security*, 26 J. RISK & UNCERTAINTY 231 (2003).

technological developments. However, as I have stated in other contexts, the difficult judgments as to details and shape of data security legislation should be made in Congress, not at the agency level. This will provide for more certainty and consistency, and is the more appropriate democratic forum.

As to non-profits and common carriers, we are all well aware of the regular reports of breaches impacting these sectors. Indeed, the need for security in these sectors is not appreciably different from the need in many other sectors of the economy already under FTC jurisdiction. Giving us jurisdiction for data security in these sectors will create more consistency across the marketplace and allow for more certainty and clarity.

Responses for the Questions for the Record
Senate Commerce Subcommittee Hearing: "Oversight of Federal Trade Commission"
November 27, 2018

Noah Joshua Phillips, Commissioner, Federal Trade Commission

The Honorable Richard Blumenthal

Privacy Rules

We know that Americans care about privacy – that they eagerly want these rights. We need baseline rules. Companies should not store sensitive information indefinitely and use that data for purposes that people never intended. Federal rules must set meaningful obligations on those that handle our data. We must enable consumers to trust and control their personal data.

Question 8. **Do you support providing state AGs with the power to enforce federal privacy protections and would you commit to working with state AGs?**

Attorneys General can be important partners in protecting consumers, acting as force multipliers for federal law enforcement. I think this is a valuable model that Congress should weigh. It should also consider whether to allow the FTC authority to assert exclusive jurisdiction when necessary, to ensure consistent and coherent application of federal law.

Question 9. **Why is it important that the FTC have rulemaking authority when it comes to privacy? Where best would rulemaking be applied?**

Rulemaking authority raises important issues of delegation and democratic accountability. Congress, not an administrative agency, is the best place to make policy with a profound impact on a substantial portion of the economy. Congress should consider that the flexibility that rulemaking permits also allows for changes in rules over time, which—regardless of the underlying policy—can be terrifically difficult for businesses attempting to adapt.

Question 10. **Do you believe elevating the Office of Technology Research and Investigation to the Bureau level would meaningfully help the FTC in addressing new technological developments across its mandates?**

I do not believe that elevating the Office of Technology Research and Investigation to the Bureau level would meaningfully help the FTC.

Board Accountability

Question 12. **What is the FTC doing to investigate and hold accountable individual board members and executives who knowingly assist their companies in committing fraud? What more should the FTC be doing in this regard?**

The FTC always considers the potential liability of individual officers and others who knowingly assist fraud. Where we find the appropriate facts, we name such people as defendants.

FTC Investigation of Algorithms

Section 6(b) of the FTC Act gives the agency broad investigatory and information-gathering powers. For example, in the 1970s the FTC used its Section 6(b) authority to require companies to submit product-line specific information, enabling the agency to assess the state of competition across markets.

The FTC has released reports on big data and the harms biased algorithms can cause to disadvantaged communities. These reports drew attention to the potential loss of economic opportunity and diminished participation in our society. Yet, information on how these algorithms work, and on the inputs that go into them, remains opaque.

Question 19. **Where the FTC consider using its Section 6(b) investigative power to help us understand how these algorithms and black-box A.I. systems work – the biases that shape them, and how those can affect trade, opportunity, and the market?**

Advancements in algorithm design, A.I. systems, and data analytics have played and continue to play a crucial role in spurring innovation that can deliver significant benefits to our society and drive our nation's economic growth. Given their significance, I agree that algorithms and artificial intelligence are important topics of study. In 2017, the FTC and Department of Justice submitted a joint paper on algorithms and collusion to the Organization for Economic Cooperation and Development as part of the OECD's broader look at the role of competition policy and the digital age.[42] More recently, we examined the competition and consumer protection implications of algorithms, artificial intelligence, and predictive analytics as part of the Commission's *Hearings on Competition and Consumer Protection in the 21st Century*.[43] The two-day hearing featured a distinguished group of technologists, scientists, public servants, academics, and industry leaders (as well as economists and lawyers), who gathered to educate us and the broader competition and consumer protection community about how these technologies work, how they are used in the marketplace, and their policy implications. The Commission also invited public commentary on this topic.

The Commission will keep you apprised of any initiatives that come out of our hearings project. I also appreciate your interest in the Commission conducting a study of algorithms and artificial intelligence under Section 6(b) of the FTC Act. It is my understanding that the agency intends to

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[42] Note by the United States on Algorithms and Collusion, OECD Doc. DAF/COMP/WD(2017)41 (May 26, 2017), https://www.ftc.gov/policy/reports/us-submissions-oecd-2010-present#oecd.

[43] FTC, *Hearings on Competition and Consumer Protection in the 21st Century*, https://www.ftc.gov/policy/hearings-competition-consumer-protection; FTC, *FTC Hearing on Competition and Consumer Protection in the 21st Century #7: The Competition and Consumer Protection Issues of Algorithms, Artificial Intelligence, and Predictive Analytics* (Nov. 13-14, 2018), https://www.ftc.gov/news-events/events-calendar/ftc-hearing-7-competition-consumer-protection-21st-century.

conduct 6(b) studies in the technology area, though the subjects of these studies are still being considered.

FTC Consent Decree on Unrepaired Recalls

Most consumers probably do not know that, while *new* car dealers are prohibited from selling vehicles with open recalls, *used* car dealers are not. A recent FTC consent decree, which I strenuously disagreed with and is currently being scrutinized in the courts, allows the sale of used cars with unrepaired recalls. According to the consent decree, car dealers can advertise that cars with unrepaired safety recalls like a defective Takata airbag are "safe" or have passed a "rigorous inspection"—as long as they have a disclosure that the vehicle *may* be subject to an unrepaired recall and directs consumers on how they can determine the vehicle has an open recall.

Question 20. **In your opinion, is a car with an open, unrepaired recall, a "safe" car? Why would the FTC allow unsafe cars to be advertised as "safe" and "repaired for safety," with or without a vague, contradictory and confusing disclaimer?**

We share your concerns regarding the safety issues raised by recalls in the used automobile marketplace. As you note, while federal auto safety law requires that all new cars sold be free from recalls, it does not prohibit auto dealers from selling used cars with open recalls.

However, the FTC Act enables the Commission to stop auto dealers selling such cars from engaging in misleading advertising practices that mask the existence of open recalls. In an effort to stop such claims, in 2016 and 2017, the Commission brought actions against General Motors Company, CarMax, Inc., and four other large used car dealerships. In these actions, the Commission alleged that these companies' advertising claims violated the FTC Act by touting the rigorousness of their used car inspections while failing to clearly disclose the existence of unrepaired safety recalls in some cars.[44]

Our orders stop this deceptive conduct and provide important additional protections for consumers. First, they prohibit each company from making any safety-related claim about its vehicles unless the vehicles are recall-free, or, alternatively, the company discloses clearly and conspicuously[45] and in close proximity to the representation both that the vehicles may be subject to open recalls and how consumers can determine the recall status of a particular car. This means that, if any car on the companies' lots is subject to an open recall, every time the

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[44] FTC Press Release, *GM, Jim Koons Management, and Lithia Motors Inc. Settle FTC Actions Charging That Their Used Car Inspection Program Ads Failed to Adequately Disclose Unrepaired Safety Recalls* (Jan. 28, 2016), https://www.ftc.gov/news-events/press-releases/2016/01/gm-jim-koons-management-lithia-motors-inc-settle-ftc-actions; FTC Press Release, *CarMax and Two Other Dealers Settle FTC Charges That They Touted Inspections While Failing to Disclose Some of the Cars Were Subject to Unrepaired Safety Recalls* (Dec. 16, 2016), https://www.ftc.gov/news-events/press-releases/2016/12/carmax-two-other-dealers-settle-ftc-charges-they-touted.

[45] Importantly, the orders define "clearly and conspicuously" in detail to mean, among other things, that disclosures must be "difficult to miss (i.e., easily noticeable) and easily understandable by ordinary consumers," and to require that "[a] visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood." *E.g.*, *General Motors LLC*, No. C-4596, 2016 WL 7383980, at *4, (F.T.C. 2016).

companies make these types of inspection claims, they must prominently disclose this important information on recalls. Further, the orders required each company to warn consumers who already purchased one of its used cars that the vehicle may have an open recall.

Without our actions, these car sellers could not only continue to sell used vehicles subject to open recalls (a practice currently permitted under federal product safety law), but could also make misleading inspection claims masking this fact—without in any way disclosing the possibility of recalls. Under the Commission's orders, consumers will instead receive important information about open recalls whenever respondents make these kinds of claims.[46]

Question on Non-Compete Clauses

I am concerned about the growth of non-compete clauses, which block employees from switching jobs to another employer in the same sector for a certain period of time. These clauses weaken workers' bargaining power once they are in the job, because workers often cannot credibly threaten to leave if their employer forces refuses to give them a raise or imposes poor working conditions. According to the Economic Policy Institute, roughly 30 million workers – including one in six workers without a college degree – are now covered by non-compete clauses.

The consensus in favor of addressing non-compete clauses is growing. For example, just this past December, an interagency report indicated that non-compete clauses can be harmful in certain contexts, such as the healthcare industry. Yet, the FTC has not yet undertaken forceful action. In September, Commissioner Chopra suggested that the FTC use its rulemaking authority to "remove any ambiguity as to when non-compete agreements are permissible or not."

Question 23. Do you agree with the proposal that the FTC use its rulemaking authority to address non-compete clauses? I invite you to explain your reasoning regarding your stance.

Recent research shows that non-compete clauses may be far more prevalent in the modern economy than enforcers realized. The validity and enforceability of these clauses is not always clear—some states have strict limitations against enforcing such clauses and it is uncertain today whether employees covered by such clauses always understand their legal position.

I fear the increase in various labor restrictions may be combining to stifle worker mobility, and with it potentially wages and opportunities, as well. Non-compete clauses, no-poach agreements (which also appear to have proliferated in some spaces), and occupational licensing requirements (which have dramatically increased in scope in recent decades) all and together affect workers' ability to find and obtain desirable jobs. Many of the insights regarding the prevalence of non-

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[46] Beyond this sweep of cases, in October 2018, the FTC secured orders in the *Passport Toyota* matter against a group of dealerships, and their principals, for mailing more than 21,000 fake "urgent" recall notices to consumers. We alleged that the vast majority of the vehicles covered by the notices did not have open recalls, but that the dealers instead used these fake recall notices to increase business at the dealerships' service departments. Complaint, *FTC v. Passport Imports, Inc.*, No. 8:18-cv-03118 (D. Md. Oct. 10, 2018), https://www.ftc.gov/enforcement/cases-proceedings/162-3193/passport-imports-inc-passport-toyota.

competes clauses and no-poach agreements have come to light only recently, and the Commission has been closely following these developments and working to understand better the scope and effects of such clauses, to add to its long-established work on occupational licensing. It is not clear that non-compete clauses present antitrust issues, except in narrow circumstances; but as the agency tasked with protecting consumers and competition, the FTC is working to understand how such clauses may impact markets, alone or in combination with other restrictive clauses.

A rulemaking is probably premature at this stage, as these issues deserve careful study and a clear understanding of both how such terms may impact labor flow and how best to tailor any rules or enforcement efforts to achieve better outcomes. Several states have begun efforts to curb the use of non-competes, and senators have been working on bills that would help limit such practices nationwide. I look forward to working with members on this critical question.

Question on Local Merger Enforcement

Even though big national mergers typically garner the most media attention, smaller mergers can often raise monopoly concerns on the local level. This can be true in the healthcare industry, for example. In November, Commissioner Simons told me: "Some local mergers may be too small to require Hart-Scott-Rodino premerger notification, but may still have anticompetitive effects."

Question 24. Would you agree with me that Hart-Scott-Rodino premerger notifications help antitrust enforcers catch concerning mergers?

Yes, I agree that the premerger notification requirements of the Hart-Scott-Rodino Premerger Notification Act (HSR) help antitrust enforcers identify anticompetitive mergers before they are consummated, preventing consumer harm. Once a merger is consummated and the firms' operations are integrated, it can be very difficult, if not impossible, to "unscramble the eggs" and restore the acquired firm to its former status as an independent competitor.

It is important, however, to ensure that the HSR filing requirements are tailored properly. The FTC typically issues requests for additional documents and evidence for only a very small percentage of filings it receives—with wide, bipartisan agreement that most mergers do not pose competitive problems—and ultimately enters into consent decrees or seeks to block even fewer mergers. In other words, HSR filing requirements today cast a very large net to catch a very few—albeit very important—fish. Given the vast expansion of antitrust regimes around the globe in recent years, the US should endeavor to be a leader in setting meaningful and appropriate premerger filing requirements, and to avoid setting a standard that would allow other jurisdictions to say they are following the U.S. in using antitrust regimes as a method of increasing government revenues.

Question 25. What sort of anticompetitive effects might be raised by local mergers even when those mergers are too small to require Hart-Scott-Rodino premerger notification?

Anticompetitive mergers can harm consumers in several ways, including by increasing prices and reducing output, or by lowering quality or services, hampering innovation, or diminishing new entry or expansion.[47] These harmful effects can manifest in local as well as more geographically-expansive mergers. Although the harms local mergers present are, by definition, restricted to a smaller geographic area, their effects can still be pernicious.[48]

The FTC often examines local geographic markets in the course of its merger review, both when assessing the effects that mergers of national companies might have in local areas and when examining local mergers. For instance, the FTC typically considers local geographic markets in retail markets, such as supermarkets, pharmacies, retail gas or diesel fuel stations, or funeral homes, and in service markets, such as health care. In a recent federal court action seeking to enjoin the proposed merger of two rival physician services providers, the FTC and State of North Dakota defined the relevant geographic market as the Bismarck-Mandan, North Dakota, Metropolitan Statistical Area—a four-county area that includes the cities of Bismarck and Mandan and smaller communities within the surrounding 40 to 50 mile radius.[49]

Question 26. What action would you recommend either the FTC or Congress take in order to assist federal and state antitrust enforcers in catching local mergers that raise anticompetitive concerns?

While I have no opinion as to whether Congress should take action, identifying anticompetitive mergers remains one of the FTC's top competition priorities. Today, the FTC devotes the bulk of its merger review efforts to transactions that parties report pre-consummation. However, the FTC also closely monitors M&A activity more broadly, to identify unreported (often, but not always, consummated) mergers that could harm consumers. The FTC uses the trade press and other news articles, consumer and competitor complaints, hearings, economic studies, and other means to identify such potentially harmful activity (both merger and other conduct). The FTC also routinely works with state attorneys general in its enforcement efforts; state attorneys general routinely join the FTC as co-plaintiffs in federal court litigations, such as in the North Dakota physician services merger litigation discussed above.

Question on Horizontal Shareholding

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[47] U.S. Department of Justice & Federal Trade Commission, *Horizontal Merger Guidelines* § 1 (2010), https://www.ftc.gov/public-statements/2010/08/horizontal-merger-guidelines-united-states-department-justice-federal ("A merger enhances market power if it is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives.").

[48] *Id.* at § 4.2. In antitrust analysis, a relevant market identifies a set of products or services and a geographic area of competition in which to analyze the potential effects of a proposed transaction. The purpose of market definition is to identify options available to consumers. *See id.* at § 4 (describing market definition in antitrust analysis).

[49] *FTC v. Sanford Health*, No. 1:17-cv-0133 (D.N.D. 2017), https://www.ftc.gov/enforcement/cases-proceedings/171-0019/sanford-health-ftc-state-north-dakota-v. The U.S. District Court for the District of North Dakota granted the FTC and State of North Dakota's preliminary injunction motion on December 13, 2017. The parties have appealed and the case is now pending before the Eighth Circuit.

Recent research has raised questions about whether horizontal shareholding harms competition in our economy. I would like to understand your view on this ongoing research.

Question 27. Do you believe that horizontal shareholding raises anticompetitive concerns?

See below.

Question 28. Do you believe that our antitrust laws can be used to address the anticompetitive concerns raised by horizontal shareholding?

See below.

Question 29. What, if anything, are you doing to address any potential harms of horizontal shareholding?

Today, there is insufficient evidence to conclude that horizontal shareholding presents real competitive concerns. There have been a few recent and notable papers attempting to analyze the competitive effects of such holdings, but they do not yet provide a basis for enforcers attempting to extrapolate whether a larger, more pernicious phenomenon is at play.[50]

The U.S. antitrust agencies define common ownership as "the simultaneous ownership of stock in competing companies by a single investor, where none of the stock holdings is large enough to give the owner control of any of these companies".[51] It is distinct from "cross ownership", wherein a company holds an interest in one of its competitors, and other joint venture or co-partner scenarios, which have long been a focus of U.S. antitrust law.

The general theory of harmful common shareholdings is that large institutional investors' common holdings may lead firms to compete less aggressively—by virtue of the companies' knowledge that more aggressive competition may not be in the interest of such shareholders, by active encouragement from such investors, or simply by the failure of large shareholders to spur competition—and thereby lead to higher prices or other harmful effects. Proponents of this theory point to several empirical papers that purport to identify such effects, and several have proposed wide-ranging remedies that they argue would solve this alleged problem. In response,

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[50] *See* Note by the United States on Common Ownership by institutional investors and its impact on competition at ¶ 1, OECD Doc. DAF/COMP/WD(2017)86 (Nov. 28, 2017), https://www.ftc.gov/policy/reports/us-submissions-oecd-2010-present#oecd (explaining that "[g]iven the ongoing academic research and debate, and its early stage of development, the U.S. antitrust agencies are not prepared at this time to make any changes to their policies or practices with respect to common ownership by institutional investors."); *see also* Noah Joshua Phillips, Commissioner, Federal Trade Commission, Opening Remarks at FTC Hearing on Competition and Consumer Protection in the 21st Century #8: Corporate Governance, Institutional Investors, and Common Ownership (Dec. 6, 2018), https://www.ftc.gov/public-statements/2018/12/opening-remarks-commissioner-noah-joshua-phillips-ftc-hearing-8; Noah Joshua Phillips, Commissioner, Federal Trade Commission, Prepared Remarks at the Global Antitrust Economics Conference: *Taking Stock: Assessing Common Ownership*, (June 1, 2018), https://www.ftc.gov/public-statements/2018/06/taking-stock-assessing-common-ownership.

[51] Note by the United States on Common Ownership by institutional investors and its impact on competition at ¶ 1, OECD Doc. DAF/COMP/WD(2017)86 (Nov. 28, 2017), https://www.ftc.gov/policy/reports/us-submissions-oecd-2010-present#oecd.

critics have identified various methodological flaws in the original research, which they argue call into question the results of these papers. They further identify alleged shortcomings in the harmful common ownership theory, including the absence of a clear mechanism of harm, the failure to distinguish between the economic owners and the beneficial owners of the shares at issue, and the fact that the theory assumes managers behave in ways diametrically opposed to how theory and real world evidence from corporate law experience have demonstrated they typically behave.

The FTC has continued to stay abreast of the common ownership research. In November 2017, the Commission participated in an Organisation for Economic Co-operation and Development (OECD) conference devoted to this topic. The Commission also held a full-day workshop, supplemented by a public comment process, in December 2018 that was largely devoted to exploring the merits of the common ownership issue.[52] At the workshop, which was part of our *Hearings on Competition and Consumer Protection in the 21st Century*, respected academics and industry experts on both sides of this issue shared their expertise with both us and the public.

From what we have seen so far, I do not believe there is sufficient evidence to warrant policy changes in response to the alleged common shareholding problem. I have identified a series of questions for scholars to answer and that I believe would help shed more light on the issue and whether such changes may be warranted.[53]

The FTC has tools already at our disposal to monitor and discipline anticompetitive activity, which we will continue to deploy where the law and evidence provide a basis for doing so. In considering any policy changes—some proposals for which have been extreme—the Commission will also bear in mind that many Americans benefit from the low-cost investment options large institutional investors make possible.

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[52] FTC, *FTC Hearing on Competition and Consumer Protection in the 21st Century #8: Corporate Governance, Institutional Investors, and Common Ownership* (Dec. 6, 2018), https://www.ftc.gov/news-events/events-calendar/ftc-hearing-8-competition-consumer-protection-21st-century.

[53] Noah Joshua Phillips, Commissioner, Federal Trade Commission, Opening Remarks at FTC Hearing on Competition and Consumer Protection in the 21st Century #8: Corporate Governance, Institutional Investors, and Common Ownership (Dec. 6, 2018), https://www.ftc.gov/public-statements/2018/12/opening-remarks-commissioner-noah-joshua-phillips-ftc-hearing-8; Noah Joshua Phillips, Commissioner, Federal Trade Commission, Prepared Remarks at the Global Antitrust Economics Conference: *Taking Stock: Assessing Common Ownership*, (June 1, 2018), https://www.ftc.gov/public-statements/2018/06/taking-stock-assessing-common-ownership.

The Honorable Catherine Cortez Masto

Pet Leasing

I appreciate the Commission's attention to my request with six of my colleagues for the FTC to investigate the practice of pet leasing that is leading some consumers into confusing or deceptive contractual obligations that cause them to have an issue with their beloved pet and negatively impact their financial status, such as credit scores, for far into the future. This is an issue that is a little under the radar but needs strong oversight and attention under your deceptive practices mandate if there are concerning financial practices being discovered.

Question 1: **Can I get a further commitment from you all to keep my office informed of actions and determinations you all may make pertaining to this concerning issue and the Humane Society and Animal Legal Defense Fund's formal petition to the Commission?**

The FTC is committed to protecting consumers from unfair or deceptive acts or practices, including any such practices carried out by merchants or third party leasing and financing companies. Since our response to your letter last November, FTC staff has met with the Humane Society and Animal Legal Defense Fund to discuss their joint formal petition to the Commission. The FTC will continue to keep your office informed of public actions the Commission takes concerning pet leasing or the Humane Society and Animal Legal Defense Fund's petition to the Commission.

Data Minimization vs Big Data

A topic that has come up a lot during our discussions on privacy is data minimization. This is a concept that I have been considering on as I work on developing a comprehensive data privacy bill. As you're aware, this is the idea that businesses should only collect, process, and store the minimum amount of data that is necessary to carry out the purposes for which is was collected. There are obvious advantages to this as it minimizes the risk of data breaches and other privacy harms. At the same time, big data analytics are going to be crucial for the future and play an important role in smart cities, artificial intelligence, and other important technologies that fuel economic growth. I think it is important to find a balance between minimization and ensuring that data, especially de-identified data, is available for these applications.

Question 1: **Can you describe how you view this balance and how we in Congress can ensure that people's data is not abused but can still be put to use in positive ways?**

This is one of the most important questions that we need to ask when evaluating any future privacy regime. Algorithims, Big Data and AI are areas of tremendous and important innovation that have the potential to provide significant benefits for our economy, for consumers, and for our national welfare.

Your question neatly captures the dilemma. Businesses can apply "big data" analysis tools to gain insights from large data sets that help the business to innovate, for example to improve an existing product. This analysis can provide new consumer benefits, such as the development of new features. On the other hand, consumers' data may be used for unexpected purposes in ways that are unwelcome.[54] Long-term retention of consumer information—such as sensitive financial information—also presents a data security issue.[55]

The FTC has issued a report on the subject of the benefits and risks of big data that contains guidance for companies that use big data analytics.[56] Last fall, the Commission also hosted a workshop on the intersections between big data, privacy and competition.[57] We are happy to work with your staff to develop legislation on how to balance the benefits and risks of big data.

General Privacy Recommendations

Question 1: **While privacy was a significant topic of the oversight hearing, as we look to develop a bill, can you specifically lay out some of the top priorities you individually would like to see included and what do you think gets overlooked in the conversations policymakers have with allowing for future innovations and yet raising the bar for protecting consumers?**

As an initial matter, in considering whether to develop comprehensive privacy legislation, I urge Congress to first study, identify, and understand the harms it wishes to address. Only through that crucial inquiry can Congress the develop policy and craft remedies appropriate to the problem it is trying to solve. It is also essential that Congress carefully and fully weigh the costs and benefits of any legislation and, in particular, the costs of regulation to innovation and competition, and the potential entrenchment of incumbents that may result. Regulation, by its nature, involves tradeoffs; only if we do our best to understand the tradeoffs can we make coherent and thoughtful decisions in lawmaking.

In terms of my priorities for any legislation, my number one priority is data security legislation, to be enforced by the FTC—though not identical to privacy legislation, nothing will do more for privacy that improved data security. The Commission has been calling for data security legislation for years on a bipartisan basis, as it is necessary to provide both security to consumers

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[54] *See*, *e.g.*, FTC Press Release, *FTC Charges Deceptive Privacy Practices in Google's Rollout of Its Buzz Social Network* (Mar. 30, 2011), https://www.ftc.gov/news-events/press-releases/2011/03/ftc-charges-deceptive-privacy-practices-googles-rollout-its-buzz) (alleging that Google deceptively repurposed information it had obtained from users of its Gmail email service to set up the Buzz social networking service, leading to public disclosure of users' email contacts).

[55] *See*, *e.g.*, *Ceridian Corp.*, No. C-4325 (F.T.C. 2011), https://www.ftc.gov/enforcement/cases-proceedings/102-3160/ceridian-corporation-matter) (resolving charges that the company created unnecessary risks by storing information such as individuals' email address, telephone number, Social Security number, date of birth, and direct deposit account number indefinitely on its network without a business need).

[56] *See* FTC, *Big Data: A Tool for Inclusion or Exclusion? Understanding the Issues* (Jan. 2016), https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf.

[57] *See* FTC, *FTC Hearing on Competition and Consumer Protection in the 21st Century #6: Privacy, Big Data, and Competition*(Nov. 6-8, 2018), https://www.ftc.gov/news-events/events-calendar/ftc-hearing-6-competition-consumer-protection-21st-century.

and coherence to the market. I also support civil money penalty authority as part of data security legislation, to correct flaws in the market that result in an under-investment in security.[58] And, in addition, I believe that the FTC needs legislation that will address the Court's concerns in *LabMD* and permit the Commission to once again apply a "reasonableness" standard in data security orders, which provides the flexibility that the market requires.[59]

There are other immediate, consumer protection enforcement needs. I urge Congress to amend the FTC Act to undo the *ViroPharma* decision[60] and make it clear to courts and litigants alike that the Commission's authority is not limited to ongoing conduct, but rather that the Commission can pursue enforcement actions and, where appropriate, monetary relief, even for conduct that has ceased.

As for broader privacy legislation, in considering whether and what to do, Congress is not acting in a vacuum. The United States has already been working with our economic allies on privacy issues for decades—for instance, in the form of the OECD Privacy Framework and the APEC Privacy Framework[61]—and these can and should form the basis for the discussion. Moreover, while any legislation should maintain the FTC's role as that nation's primary privacy and data security enforcement agency, I would stress that it is Congress that should make the difficult and important decisions in the privacy and data security sphere—while the Commission can issue implementing regulations, any legislation will necessarily involve value judgements that should be left to Congress, not unelected Commission officials.

I also believe that, in considering legislation, Congress should focus on information asymmetry, helping ensure that the market, and consumers in particular, have more, and more accessible, information on which to make informed decisions. I also believe there is value in encouraging companies to engage in internal privacy assessments so that they better understand their own landscape and can make informed, risk-based decisions about how they gather, use, and share data.

In terms of FTC-specific authority, as I have said elsewhere, I support removing common carrier and non-profit exceptions to the FTC's authority, but I remain cautious on civil penalties outside of the data security context. Penalties are tools, and whether penalties are appropriate and effective will ultimately depend on the liability scheme that Congress sets up in any legislation, and specifically whether Congress applies a more rules-based approach or a looser standards-based approach, as well as whether the data demonstrate that penalties in fact effectively deter the relevant conduct, rather than chill beneficial conduct.

Question 2: **Can you also outline the optimal role you see for our state Attorneys General in this privacy enforcement process?**

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[58] *See, e.g.*, STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 244 (2004) (where consumers cannot trace the full harm to the injurer, injurers will not internalize the full amount of harm).
[59] *LabMD v. FTC*, 894 F.3d 1221 (11th Cir. 2018).
[60] *FTC v. Shire ViroPharma, Inc.*, No. 18-1807, 2019 WL 908577 (3d Cir. 2019).
[61] OECD, *The OECD Privacy Framework* (2013), http://www.oecd.org/sti/ieconomy/oecd_privacy_framework.pdf.

Attorneys General can be important partners in protecting consumers, acting as force multipliers for federal law enforcement. I think this is a valuable model that Congress should weigh. It should also consider whether to allow the FTC authority to assert exclusive jurisdiction when necessary, to ensure consistent and coherent application of federal law.

Privacy Risky Communities/Groups

Question 1: **Do you think that certain communities or groups are any more or less vulnerable to privacy risks and harms?**

Yes. Congress previously has recognized that certain communities or groups may be more or less vulnerable to privacy risks and harms when promulgating the Children's Online Privacy Protection Act, and certain provisions of Gramm-Leach Bliley and the Health Insurance Portability and Accountability Act. The Commission also has worked to address issues particularly affecting certain communities or groups through a number of means, including law enforcement as well as a series of seminars and other events around the country and through consumer education.[62]

Question 2: **Should privacy law and regulations account for such unique or disparate harms, and if so, how?**

Yes. I believe the approach Congress took with COPPA, GLB and HIPAA is instructive here. Existing laws like the Fair Credit Reporting Act and the Equal Credit Opportunity Act also provide important protections against unlawful discrimination. The Commission is happy to work with you to think through these issues as you craft legislation.

Immediate Civil Penalties Authority

Noting from your FTC testimony, "*Section 5 (of the FTC Act), however, is not without limitations. For example, Section 5 does not provide for civil penalties, reducing the Commission's deterrent capability.*"

Question 1: **While I appreciate the long term successes of the FTC in many respects to investigate data security matters, what are your thoughts to whether there is enough of a deterrent effect with Section 5 authority when you can't immediately enforce against those who misuse data with civil penalties right from the start, rather than as the result of often times flagrant offenses to their already establish consent decrees?**

For good reason, the FTC Act does not give the Commission penalty authority for first-time violators. If Congress were to give us the authority to seek civil penalties for first-time violators of data security rules specifically (subject to statutory limitations on the imposition of such penalties, such as ability to pay), we would have greater ability to deter potentially harmful

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[62] *See, e.g.*, FTC, *Common Ground Conferences and Roundtables Calendar*, https://www.consumer.gov/content/common-ground-conferences-and-roundtables-calendar; FTC, *Consumer Information – Fraud Affects Every Community*, https://www.consumer.ftc.gov/features/every-community.

conduct. Due to asymmetric information, interdependent systems, and difficulties in tracing ID theft to a particular firm, there are reasons to believe that in many circumstances firms may lack sufficient incentives to adequately invest in data security under current law.[63] Correctly calibrated civil penalties would cause companies to internalize the full costs of inadequate data security, fostering proper incentives to protect consumer data.

However, for privacy more broadly, it must be remembered that penalties are a tool; and, in my view, the question of tools is a secondary one, that cannot and should not be considered in the abstract. That question necessarily requires preliminary determinations first as to what harms Congress wishes to address and second, what liability standards it adopts to address those harms. Civil penalties are better tailored to conduct that is clearly defined—for example, violations of specific rules set forth in FTC Consent Orders or regulations like COPPA. Otherwise, the prospect of paying them may chill innovation and other conduct that benefits consumers.

[63] *See, e.g.,* STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 244 (2004) (when victims cannot identify the injurer, injurers will lack adequate incentives to take care); George Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970); Howard Kunreuther & Geoffrey Heal, *Interdependent Security*, 26 J. RISK & UNCERTAINTY 231 (2003).

The Honorable Amy Klobuchar

The FTC is charged with enforcing the Children's Online Privacy Protection Act (COPPA) and has done so for the last two decades. Protecting the privacy of children has never been more important than it is now, but the online privacy of all Americas is also increasingly at risk.

- **Both of you have recently commented that we should learn from the FTC's experience in enforcing COPPA when we consider our approach to protecting consumer privacy more broadly. What lessons should we take away from the Commission's experience enforcing COPPA when considering ways to protect online privacy and data security for all Americans?**

I believe that our experience with COPPA—in particular, its enactment and its implementation—can help inform and guide efforts to protect online privacy and data for all Americans.

The American privacy framework is built upon identifying risks and then designing a solution that balances competing interests. This requires evaluating the sensitivity of the information involved and the potential harms that would result from its collection, use or disclosure, and then creating a solution that will limit these harms while still allowing appropriate use of even sensitive information. With COPPA, rather than trying to protect children's privacy and safety by enacting draconian legislation that could severely limit children's experience on the Internet, Congress instead created a comprehensive, yet flexible, framework to protect both children's privacy and children's ability to access interactive content on the Internet. And, importantly, Congress itself made the tough choices in balancing privacy and the tradeoffs inherent in privacy regulation, most notably, the age of children to be covered by COPPA.

We can also learn lessons from the implementation of COPPA. In including the modifier "taking into consideration available technology" in its definition of "verifiable parental consent", Congress gave the FTC the latitude, in drafting the first iteration of the COPPA Rule, to develop a consent mechanism based upon how the child's information would be used and with whom it would be shared. In crafting the Rule, FTC staff recognized that the cost of a technologically rigorous mechanism could sometimes outweigh its benefits, especially if there was less risk associated with the collection and use of the child's information. Importantly, they were able to engage in this cost-benefit analysis because Congress drafted the COPPA statute with this consideration in mind. Congress should study the history of COPPA enforcement and rulemaking in considering whether and how to proceed on broader privacy legislation.

COPPA is a deliberately paternalistic statute, because it deals with children; so it is not necessarily a model for broader privacy legislation. But, despite the fact that COPPA is twenty years old, its more flexible approach to protecting children's privacy which considers benefits and harms has been a critical component in its continuing success and effectiveness.

The Federal Trade Commission's budget has remained flat for the past several years despite increasing demands on your agency's resources, including a significant rise in merger filings.

- **If additional resources were made available to the Federal Trade Commission, how would you deploy those resources to advance the agency's consumer protection and competition missions?**

I appreciate your attention to the agency's resource needs. As we mentioned in our November 27 testimony, the FTC works very hard to accomplish as much as possible with the resources we have. We are tasked with the important dual goals of protecting consumers and promoting competition, both which are of increasing importance in the changing economy. Resource constraints remain a significant challenge. Evolving technologies and intellectual property issues, among others, continue to increase the complexity of antitrust investigations and litigation. That complexity, coupled with the rising costs of critical expert witnesses and increases in caseload, sometimes leads to financial and personnel resource limitations. In the past, we have requested additional resources for experts, information technology, and more full-time employees in support of our mission to protect consumers and promote competition. We also have heard the need for additional paralegals to help support our staff attorneys; paralegals can provide very valuable services and allow attorneys to devote more time to substantive issues, but they are a rare commodity at the Commission today. These all continue to be critical areas of need for our agency. If we receive additional resources, we plan to apply them to these areas.

On the competition side, qualified experts are a key resource in all of the FTC's cases—both merger and conduct—heading toward litigation. Expert witness services are critical to these cases, as they help the FTC satisfy key burdens such as defining product and geographic markets and estimating the likely harms (and countering defendants' estimation of any alleged procompetitive benefits). Expert witness may often prove crucial to litigated cases on the consumer protection side, as well.

Expert witness costs are highly dependent on the number, scope, duration, and disposition of our federal and administrative court challenges—increasing (often significantly) as these factors increase. To limit these costs, the FTC has continued to identify and implement a variety of strategies, including using internal personnel from its Bureau of Economics as expert witnesses whenever practical. The opportunities to use internal experts as testifying experts are limited, however, by several factors, including staff availability, testifying experience, and the specialized expertise required for specific matters.

The Honorable Tom Udall

Privacy

Question 1. Do you support strong civil penalties for consumer privacy violations?

Penalties are a tool and, in my view, the question of tools is a secondary one, which cannot and should not be considered in the abstract. That question necessarily requires preliminary determinations first as to what harms Congress wishes to address and second, what liability standards it adopts to address those harms. Civil penalties are better tailored to conduct that is clearly-defined—for example, violations of specific rules set forth in FTC Consent Orders or regulations like COPPA. Otherwise, the prospect of paying them may chill innovation and other conduct that benefits consumers.

Question 2. The California Consumer Protection Act goes into effect in January 2020. As Congress considers pre-emption of that state law, what additional authority should we give the FTC to ensure that consumer privacy adequately is protected?

I support Congress including preemption of the California Consumer Protection Act, should it take up federal privacy legislation. Clarity and consistency in the regulation of technology, rather than a patchwork of laws, is critical, especially to protecting the ability of small firms to compete.

In terms of additional authority, the first question we must ask is about the harms—what privacy harms are we focused on and trying to solve. Only when we understand that can we make the policy decision over which tools—new authorities—are necessary and appropriate. That said, the one authority that we unquestionably should have in any new privacy law is the authority to enforce that law against common carriers and non-profits. The current state of the law creates unprincipled inconsistencies, and we should rectify those to allow for more clarity and consistency across markets.

Question 3. A recent *New York Times* analysis found that both the Apple App Store and the Google Play Store have apps in their respective children's or family sections that potentially violate COPPA.[64] What specific role should platform owners play to ensure COPPA compliance on their platforms?

In 2012, the Commission revised the COPPA Rule to cover not just websites, app developers, and other online services but also third parties collecting personal information from users of those sites or services. At that time, the Commission made clear that it did not intend to make platforms responsible merely for offering consumers access to someone else's child-directed content. Rather, they would be liable under COPPA only if they had actual knowledge that they were collecting personal information from a child-directed app. At the same time, platforms are

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[64] Jennifer Valentino-DeVries, Natasha Singer,Aaron Krolik, Michael H. Keller, *How Game Apps That Captivate Kids Have Been Collecting Their Data*, NEW YORK TIMES (Sept. 12, 2018), https://www.nytimes.com/interactive/2018/09/12/technology/kids-apps-data-privacy-google-twitter.html.

in a unique position to set and enforce rules for apps that seek placement in the platform's store and to drive good practices. We encourage platforms to pursue best practices in this regard, beyond those required by COPPA. For example, platforms can serve an important educational function for apps that may not understand the requirements of COPPA.

Question 4. Compliance for mobile apps may be hard to achieve against fly-by-night operators overseas who do not care if their apps violate U.S. law. How can the Vtech Electronics investigation and civil penalty serve as an example for how the FTC can hold foreign app developers responsible for violating COPPA?

When Congress takes action and enacts a privacy statute, it is the FTC's job to faithfully execute congressional will and enforce that law. This is important in all contexts, but I would argue it is especially important when protecting the privacy of children. As a Federal Trade Commissioner, I consider it crucial that we continue to investigate businesses' practices as they relate to children's privacy, and that we enforce this law as Congress intended. At the new FTC, COPPA enforcement ought to be a signature feature of our American privacy regime.

In addition to the VTech case you mention, the Commission has taken action in a number of privacy- or security-related cases against companies that have a foreign presence (see, e.g., TrendNet, inMobi, ASUS, and HTC).[65] In some of these cases, for example, a foreign entity manufactured the devices at issue. In each of these cases, the FTC obtained successful relief for consumers in the United States, including a substantial civil penalty in the VTech and inMobi settlements. More recently, the FTC took action against Blu, a U.S.-based phone manufacturer that was allowing its Chinese service provider to access text messages and other private information, contrary to its representations to consumers.[66] The Commission has also used other means to address illegal conduct affecting U.S. consumers. For example, a few years ago Commission staff sent a warning letter to a Chinese company, Baby Bus, about COPPA violations relating to the collection of children's personal information through its apps. The Commission copied the app platforms on this communication. The company quickly responded and addressed the concerns.

Question 5. The COPPA safe harbor organizations must submit an annual report to the Federal Trade Commission. Can you share the reports from the last 5 years?

Industry self-regulatory organizations and the COPPA safe harbor programs are critical partners in the FTC's privacy enforcement efforts. The FTC-approved safe harbor organizations submit annual reports to the FTC each year. However, organizations claim confidentiality with respect to the information in their annual reports.

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[65] *TRENDnet, Inc.*, No. C-4426 (F.T.C. 2014), https://www.ftc.gov/enforcement/cases-proceedings/122-3090/trendnet-inc-matter; *United States v. InMobi Pte Ltd.*, No. 3:16-cv-3474 (N.D. Cal. 2016), https://www.ftc.gov/enforcement/cases-proceedings/152-3203/inmobi-pte-ltd; *ASUSTeK Computer Inc.*, No. C-4587 (F.T.C. 2016), https://www.ftc.gov/enforcement/cases-proceedings/142-3156/asustek-computer-inc-matter; *HTC America Inc.*, No. C-4406 (F.T.C. 2013), https://www.ftc.gov/enforcement/cases-proceedings/122-3049/htc-america-inc-matter.

[66] *BLU Prods.*, No. C-4657 (F.T.C. 2018), https://www.ftc.gov/enforcement/cases-proceedings/172-3025/blu-products-samuel-ohev-zion-matter.

Additional Questions for the Record

Subcommittee on Consumer Protection and Commerce
Hearing on
"Oversight of the Federal Trade Commission: Strengthening Protections for Americans' Privacy and Data Security"
May 8, 2019

The Honorable Rebecca Kelly Slaughter, Commissioner
The Federal Trade Commission

The Honorable Jan Schakowsky (D-IL)

1. **On June 11, 2019, the Federal Trade Commission (FTC) will hold a workshop on online event tickets. I have heard reports of a number of consumer protection issues concerning online event tickets that raise serious concerns and I hope the FTC will consider addressing these issues during its workshop. For example, I have heard concerns that primary ticket platforms have begun forcing purchasers to disclose personally identifiable information by creating an account with the primary ticket seller to use a ticket, even when tickets are resold on a secondary market. I have also heard complaints about primary ticket sellers that hold tickets back from the market pursuant to agreements with venues, artists, or other partners. In addition, I have received complaints about primary ticket vendors putting technological restrictions on the transfer of tickets, which can prevent ticket holders from reselling or giving away tickets if they cannot attend the event.**

    a. **Will the FTC examine these issues at its upcoming hearing on online event tickets?**

Yes, the June 11 Online Event Ticketing Workshop examined the issues that you raised and their possible impact on consumers in the online event tickets marketplace. In my opening remarks, I called for industry to adopt all-in upfront pricing to limit sticker shock and improve consumers' ability to comparison shop. Should industry fail to do so, government intervention may be appropriate. The written and audio-visual record of the workshop is available at: https://www.ftc.gov/news-events/events-calendar/2019/03/online-event-tickets-workshop.

    b. **Has the FTC received similar complaints from consumers?**

The most common consumer complaints we receive about online event ticketing concern hidden or inadequately disclosed ticketing fees in the primary and secondary markets, and consumers who report ticket resellers misled them to believe they were purchasing tickets from the venue or authorized seller at face value (when in fact they were purchasing tickets from resellers at a significant markup). The Commission also received several thousand consumer comments in connection with the recent ticketing workshop. Those comments overwhelmingly concerned

hidden or inadequately disclosed ticketing fees or the high cost of such fees. I am concerned that in many cases the fee disclosures can happen only after the consumer creates an account and thereby provides PII. And I share concerns about creating artificial scarcity—whether it is through the venue's practice of holding tickets back or the unscrupulous use of bots—to create artificially high prices for tickets. These issues, in addition to the ones you raise, should be the focus of continued Commission investigatory attention.

c. Do you agree that, if true, these practices raise concerns about unfair or deceptive practices in the market for online event tickets?

The practices you raise and others discussed at the ticket workshop make clear that the ticket market is not functioning well for consumers. In my opening remarks at the workshop, I called for a federal solution to the problem of bait-and-switch fees that add 30% to the cost of the ticket on the final check-out screen, long after a consumer has signed in, selected seats, and sometimes entered credit card information. Consumers deserve and demand all-in upfront pricing for live events, just as airlines are required to provide by federal rule. I was pleased that in the panel on the subject, representatives from SeatGeek, StubHub, Eventbrite, and Ticketmaster all stated that they would support a federal standard that requires all-in upfront pricing for tickets.

In addition to the consumer protection matters you raise, we must also think carefully about competition concerns in the ticketing market. If the ticket marketplace is not functioning competitively, consumers will never be adequately protected.

The Honorable Bobby L. Rush (D-IL)

1. **In 2014, the Federal Trade Commission (FTC) published a report called "Data Brokers: A Call for Transparency and Accountability" that shed light on the secretive world of data brokers that buy and sell vast amounts of consumer personal information, often entirely behind the scenes. The FTC's report called on Congress to pass legislation that would require data brokers to be more transparent and give consumers the right to opt-out, among other things.**

    a. **Do you still agree that Congress should pass legislation addressing data brokers?**

Yes. The FTC's call for legislation that would require data brokers to be more transparent and give consumers more control over the collection and sharing of their data is just as critical now as it was in 2014—if not more so. In the 2014 report, the Commission found that there was "a fundamental lack of transparency about data broker industry practices. Data brokers acquire a vast array of detailed and specific information about consumers; analyze it to make inferences about consumers, some of which may be considered sensitive; and share the information with clients in a range of industries. All of this activity takes place behind the scenes, without consumers' knowledge." In the five years that have passed since the FTC issued its report, the industry has only grown more opaque—while reaching even more consumer data. I am concerned that non-consumer facing entities such as data brokers, ad networks and analytics companies are operating with near total impunity—invisible to consumers and clouded to regulators.

2. **While innovation in the tech industry is having a tremendous impact on our economy and the lives of everyday Americans, it is also creating new challenges in protecting consumers and competitive markets. I have heard reports of certain online platforms giving their subsidiary businesses preferential treatment over their competitors.**

    a. **Are you looking into anti-consumer and anti-competitive behaviors of this nature?**

I share your concern about the importance of protecting American consumers and competition in technology markets. In February, the FTC announced the creation of a Technology Task Force, a team that is intensely focused addressing competition in the technology industry. While I cannot publicly comment on any pending law enforcement investigations or confirm the existence of any investigations, I believe the Commission should be and is committed to investigating alleged anticompetitive conduct and taking strong action when it finds violations.

    b. **In your opinion, does the FTC currently have the authority and capacity to curtail this behavior?**

The FTC enforces Section 5 of the FTC Act, which gives it the authority to investigate and challenge "unfair methods of competition." The antitrust statutes are purposely broad and intended to cover evolving patterns of conduct or market structure; however, especially in light

of recent jurisprudence, the burden on the government to succeed in court is high. Under current Section 5 jurisprudence, the conduct you identify would likely be subject to a "rule of reason" analysis and require a fact-intensive investigation into whether the anticompetitive effects of the conduct outweigh the procompetitive justifications. We should always be using our existing statutory authority to its maximum effectiveness, and we should not be afraid to bring hard or novel cases. That said, it may be worthwhile for Congress to consider legislation to correct problematic court decisions. An even more pressing problem than constraints on our statutory authority, however, is constraints on our resources. Over the past 30 years, FTC funding has not kept pace with the demands placed on it as a result of the expansion of our economy, the volume of merger activity, and the resource intensity of merger review and litigation. The Commission is always looking for ways to use existing resources more efficiently, but additional resources would be put to good use and help us to do more to further our competition and consumer protection missions.

3. **As all of you know, robocalls are extremely burdensome on consumers and every effort needs to be taken to ensure that consumers are not being taken advantage of by these unscrupulous actors. I am also concerned by the reports I have heard that robocalls are now being used by online contact lens retailers to usurp the verification of contact lens prescriptions, placing consumers at an even greater risk of receiving the wrong Class II or III medical devices.**

    a. **Do you agree that efforts need to be taken to update the passive verification process?**

When Congress enacted the Fairness to Contact Lens Consumers Act ("FCLCA"), it determined that passive verification was necessary to balance the interests of prescription portability and consumer health. Congress was aware that passive verification could, in some instances, allow sellers to sell contact lenses based on an invalid or inaccurate prescription, and that this could potentially lead to health risks. In the May 28, 2019 Supplemental Notice of Proposed Rulemaking ("SNPRM"), the Commission proposed several changes to improve the passive verification process. The Commission proposed that sellers who use automated telephone verification messages would have to: (1) record the entire call and preserve the complete recording; (2) begin the call by identifying it as a prescription verification request made in accordance with the Contact Lens Rule; (3) deliver the verification message in a slow and deliberate manner and at a reasonably understandable volume; and (4) make the message repeatable at the prescriber's option. This proposal enables prescribers to fulfill their role as protectors of patients' eye health because prescribers cannot correct and police invalid, inaccurate, or expired prescriptions if they cannot comprehend a seller's verification request.

Additionally, the Commission proposed changes that would increase patients' access to their prescription, maintain patient choice and flexibility, and potentially reduce the number of verification requests. Under the proposal, a prescriber, with the patient's verifiable affirmative consent, has the option to provide the patient with a digital copy of the prescription in lieu of a paper copy. Moreover, although the Rule has always required that prescribers, upon request, provide any person designated to act on behalf of the patient with a copy of the patient's valid contact lens prescription, the Rule did not prescribe a time limit in which this copy had to be provided. The Commission proposed requiring that a prescriber respond to requests for an

additional copy of a prescription within forty business hours. To facilitate patients' ability to use their prescriptions, another proposed change would require sellers to provide a mechanism that would allow patients to present their prescriptions directly to sellers, including electronically.

The Commission will consider comments received in response to the SNPRM and, if appropriate, make changes before issuing a final rule.

b. Do you agree that robocalls need to be eliminated from use within the passive verification system?

No. While I share your concern about robocalls that target and irritate consumers, the robocalls in question here do not go to individual consumers or personal cell phones; they go to the business lines of contact lens prescribers. An effective verification process enables prescribers, when necessary, to prevent improper sales and allows sellers to provide consumers with their prescribed contact lenses without delay. The FCLCA expressly permits telephone communication for verification, and the Commission believes it would be contrary to Congressional intent to prohibit use of automated technology for the purpose of prescription verification. The Commission does not have empirical data showing the frequency of incomplete or incomprehensible automated telephone messages or that a phone call with an automated message is necessarily less reliable than one with a live person. The evidence suggests that these calls can be an efficient method of verification. Still, the Commission recognizes the burden on prescribers and potential health risk to patients from incomplete or incomprehensible automated telephone messages. As described in response to question 3.a, the Commission has proposed changes to automated telephone messages that would improve the verification process.

c. Could you support updating the Fairness to Contact Lens Consumers Act to eliminate robocalls and update the passive verification system to include secured emails and patient portals to verify and document contact lens prescription verification?

Under the current Rule, a "seller may sell contact lenses only in accordance with a contact lens prescription for the patient that is: (1) Presented to the seller by the patient or prescriber directly or by facsimile; or (2) Verified by direct communication." 16 C.F.R. § 315.5(a). Because the Rule's definition of direct communication already includes electronic mail, a seller and a prescriber could use email during the verification process. In the December 7, 2016 Notice of Proposed Rulemaking ("NPRM"), the Commission made an initial determination that a portal could be used by a prescriber or a patient to "directly" present a contact lens prescription to a seller. The Commission will consider comments received in response to this initial determination and, if appropriate, make changes before issuing a final rule.

4. **In December 2016, the FTC issued a Notice of Proposed Rulemaking to update the Contact Lens Rule. As a part of this process, providers and manufacturers of contact lenses urged the FTC to require common-sense changes to the current contact lens market, including quantity limits and ways to update methods of communication under the passive verification process. The FTC responded by stating that there was insufficient evidence that consumers are buying excessive**

quantities of contact lenses and that it did not have the statutory authority to update the passive verification process.

a. Do you support efforts to ensure patient safety regarding the current proposed rulemaking process that will include patients only receiving contact lenses as prescribed under the valid prescription?

The FCLCA reflects Congress's understanding of the need to prioritize both patient safety and access to affordable contact lenses. The Commission does not believe patients should be able to purchase contacts without a valid prescription. The SNPRM's proposed changes improve patient access to contact lens prescriptions and address concerns with the passive verification requests and alterations by sellers. Speaking for myself, I am interested in learning from comments in answer to the questions asked in the SNPRM how often a prescriber's election of brand or manufacturer is based on medical judgment about the ocular health of the patient (for example, the patient's astigmatism requires toric lenses). I am also interested in learning, for circumstances in which a prescriber elects a brand or manufacturer for reasons other than medical judgment about ocular health, what reasons inform the selection and whether it is common for a patient to test the fit of more than one material, brand, or manufacturer before receiving a prescription. In such circumstances, I am concerned about whether a consumer is able to make an informed choice among competing sellers.

5. **Last May, Rep. Michael Burgess (R-TX) and I led a letter to the FTC that laid out several concerns we have regarding the FTC rulemaking process around the Fairness to Contact Lens Consumers Act. In total, over 50 members of Congress signed this letter where we discussed the lack of enforcement action by the FTC to address the illegal sales of contact lenses and the burdensome new requirements on eye care providers.**

a. Has the FTC investigated or independently audited any online sellers to determine the number of lenses provided to patients?

I am not aware of any Commission audits of online sellers to determine the number of lenses provided to patients.

b. What enforcement mechanisms has the FTC used to ensure that sellers are not enabling the circumvention of state laws governing prescription renewal or harming patients by providing excessive numbers of contact lenses?

In the 2016 NPRM, the Commission considered the issue of patients' purchasing excessive quantities of contact lenses. Although concerned by anecdotal reports, the Commission concluded that the evidence did not show that the sale of excessive amounts of contact lenses is a widespread problem.[1] Furthermore, a prescriber who receives a verification request for an excessive amount of lenses can contact the seller to prevent the sale from being completed. Staff

[1] *See* Fed. Trade Comm'n, Contact Lens Rule, Notice of Proposed Rulemaking, 81 Fed. Reg. 88526, 88549–50 (Dec. 7, 2016); *see also* Vision Council, U.S. Optical Market Eyewear Overview 13 (2018), https://www.ftc.gov/sites/default/files/filefield_paths/steve_kodey_ppt_presentation.pdf (noting that 82% of contact lens users had an eye exam within the last 12 months and over 95% had an exam within the last two years).

has investigated and will continue to investigate specific complaints of illegal sales related to excessive quantities. We will continue to monitor the marketplace, taking action against violations as appropriate.

c. How often has the FTC acted on this important safety issue?

As discussed in the response to question 5.b, the Commission does not believe that the evidence shows that excessive sale of contact lenses is a widespread problem. Because the Commission recognizes the importance of patient safety, staff will continue to monitor the marketplace and, if appropriate, take action.

6. Many businesses are increasingly dependent on digital platforms that they do not own or operate to connect with customers.

a. With current statutory authorities in mind, what can be done to protect consumers if companies that operate these platforms offer subsidiary business products and restrict or disadvantage competitors with similar businesses on these platforms? What is the FTC doing to curtail it?

Under current Section 5 jurisprudence, the conduct you identify would likely be subject to a "rule of reason" analysis and require a fact-intensive investigation into whether the anticompetitive effects of the conduct outweigh the procompetitive justifications. In February, the FTC announced the creation of a Technology Task Force, a team that is intensely focused on addressing competition in the technology industry. While I cannot publicly comment on any pending law enforcement investigations or confirm the existence of any investigations, I believe the Commission is committed to investigating alleged anticompetitive conduct and taking strong action when it finds violations of the law.

b. One example of how a platform operator might harm consumers is by prohibiting businesses from communicating with their customers through that platform. Do you believe that this sort of behavior must be addressed and, if so, does the FTC currently have the statutory authority to do so?

The Commission must closely scrutinize mergers and conduct in technology markets. The FTC enforces Section 5 of the FTC Act, which gives it the authority to investigate and challenge "unfair methods of competition." Under current Section 5 jurisprudence, the conduct you identify would likely be subject to a "rule of reason" analysis and require a fact-intensive investigation into whether the anticompetitive effects of the conduct outweigh the procompetitive justifications.

The antitrust statutes are purposely broad and intended to cover evolving patterns of conduct or market structure; however, especially in light of recent jurisprudence, the burden on the government to succeed in court is high. We should always be using our existing statutory authority to its maximum effectiveness, and we should not be afraid to bring hard or novel cases. That said, it may be worthwhile for Congress to consider legislation to correct problematic court decisions and decrease the burden on the agency.

An even more pressing problem than constraints on our statutory authority, however, is constraints on our resources. Over the past 30 years, FTC funding has not kept pace with the demands placed on it as a result of the expansion of our economy, the volume of merger activity, and the resource intensity of merger review and litigation. The Commission is always looking for ways to use existing resources more efficiently, but additional resources would be put to good use and help us to do more to further our competition and consumer protection missions.

7. **It has been brought to my attention that the leading internet browser has been considering a major change in what type of information is available to consumers in their product, reducing the available information that consumers use to defend themselves against a host of online threats like phishing and content spoofing.**

    a. **As the agency charged with protecting our nation's consumers and enforcing our data privacy laws, do you have concerns about what this practice means for consumers and their data privacy and security?**

    b. **Have you discussed this issue with the browsers or asked them to explain their changes and how they will impact consumer safety online? If not, do you intend to?**

While it would be imprudent to comment on any particular company or fact pattern, as a general matter I believe the FTC should always carefully scrutinize practices that may harm consumers and pursue appropriate action if the law has been violated. Ensuring that consumers' data privacy and security is protected by the companies they patronize—and on which they depend—is a top priority for me and for the Commission as a whole.

Additional Questions for the Record

Subcommittee on Consumer Protection and Commerce
Hearing on
"Oversight of the Federal Trade Commission: Strengthening Protections for Americans' Privacy and Data Security"
May 8, 2019

The Honorable Noah Joshua Phillips, Commissioner
The Federal Trade Commission

The Honorable Jan Schakowsky (D-IL)

1. **On June 11, 2019, the Federal Trade Commission (FTC) will hold a workshop on online event tickets. I have heard reports of a number of consumer protection issues concerning online event tickets that raise serious concerns and I hope the FTC will consider addressing these issues during its workshop. For example, I have heard concerns that primary ticket platforms have begun forcing purchasers to disclose personally identifiable information by creating an account with the primary ticket seller to use a ticket, even when tickets are resold on a secondary market. I have also heard complaints about primary ticket sellers that hold tickets back from the market pursuant to agreements with venues, artists, or other partners. In addition, I have received complaints about primary ticket vendors putting technological restrictions on the transfer of tickets, which can prevent ticket holders from reselling or giving away tickets if they cannot attend the event.**

    a. **Will the FTC examine these issues at its upcoming hearing on online event tickets?**

Yes, the June 11 Online Event Ticketing Workshop examined the issues that you raise and their possible impact on consumers in the online event tickets marketplace.

    b. **Has the FTC received similar complaints from consumers?**

The most common consumer complaints we receive about online event ticketing concern hidden or inadequately disclosed ticketing fees in the primary and secondary markets, and consumers who report that ticket resellers misled them to believe they were purchasing tickets from the venue or authorized seller at face value (when in fact they were purchasing tickets from resellers at a significant markup). The Commission also received several thousand consumer comments in connection with the ticketing workshop, which overwhelmingly concerned hidden, inadequately disclosed, or excessive ticketing fees. While the FTC may also have received consumer complaints or comments regarding the practices you outline, they do not appear to be as prevalent.

c. Do you agree that, if true, these practices raise concerns about unfair or deceptive practices in the market for online event tickets?

These practices may raise questions about privacy, transparency, and consumer understanding in the online event tickets marketplace. Without knowing more, however, it is unclear that the practices your question describes constitute unfair or deceptive acts or practices under Section 5 of the FTC Act. I look forward to learning more about these and other practices from the output from our Online Event Ticketing Workshop.

The Honorable Bobby L. Rush (D-IL)

1. **In 2014, the Federal Trade Commission (FTC) published a report called "Data Brokers: A Call for Transparency and Accountability" that shed light on the secretive world of data brokers that buy and sell vast amounts of consumer personal information, often entirely behind the scenes. The FTC's report called on Congress to pass legislation that would require data brokers to be more transparent and give consumers the right to opt-out, among other things.**

    a. **Do you still agree that Congress should pass legislation addressing data brokers?**

The current Commission has not taken a position on data broker legislation. It has supported data security legislation that would give the Commission authority to seek civil penalties; conduct targeted APA rulemaking; and exercise jurisdiction over common carriers and non-profit entities. I also support congressional efforts to consider federal privacy legislation. I believe it is important for the Congress to craft such legislation to address more seamlessly consumers' legitimate concerns regarding the collection, use, and sharing of their data and businesses' need for clear rules of the road, while retaining the flexibility required to foster innovation and competition. The Commission would be pleased to share our expertise in any way that Congress deems helpful to assist with formulating appropriate legislation.

2. **While innovation in the tech industry is having a tremendous impact on our economy and the lives of everyday Americans, it is also creating new challenges in protecting consumers and competitive markets. I have heard reports of certain online platforms giving their subsidiary businesses preferential treatment over their competitors.**

    a. **Are you looking into anti-consumer and anti-competitive behaviors of this nature?**

Please see the answer to question 2.b below.

    b. **In your opinion, does the FTC currently have the authority and capacity to curtail this behavior?**

The FTC does not publicly comment on pending law enforcement investigations. As a general matter, we examine carefully conduct in markets within our jurisdiction, including those involving online platforms. As more and more of the nation's commerce takes place on online platforms, the public and the antitrust agencies are devoting increasing attention to the operation of these platforms. For example, the Bureau of Competition recently announced the creation of a task force to enhance the Commission's antitrust focus on technology-related ecosystems, including technology platforms as well as markets for online advertising, social networking, mobile operating systems, and apps.

Under the U.S. antitrust laws, e-commerce firms with market power are prohibited from engaging in conduct that anticompetitively excludes rivals. Large market share alone, however,

is not a violation of the U.S. antitrust laws. Whether any particular policy of preferential access or limits on communications with customers qualifies as exclusionary is fact-driven and highly dependent on the actual market dynamics in the specific markets at issue. The Technology Task Force (TTF) will monitor competition in U.S. technology markets, investigate any conduct in these markets that may harm competition, and, when warranted, take actions to ensure that consumers benefit from free and fair competition.

On the consumer protection front, the FTC's core deception and unfairness authorities are flexible standards that have allowed the agency to protect consumers in new markets for decades; and, in many ways, online markets are no different. That said, I believe consumers would benefit if the FTC had broader enforcement authority to take action against common carriers and non-profits, which it cannot currently do under the FTC Act. Furthermore, as noted above, I do support congressional efforts to consider new legislative tools that are focused on protecting consumers in the digital economy. Such efforts should begin with agreement on the harms Congress is trying to address and work from there to appropriate remedies and authorities. Congress should further recognize the tradeoffs inherent in any such efforts, including the impacts on innovation and competition. Should Congress grant the FTC new authority, you can be assured that the agency will continue to be vigilant and that we will not hesitate to take strong and appropriate action against any act or practice that violates any statute that we enforce.

3. **As all of you know, robocalls are extremely burdensome on consumers and every effort needs to be taken to ensure that consumers are not being taken advantage of by these unscrupulous actors. I am also concerned by the reports I have heard that robocalls are now being used by online contact lens retailers to usurp the verification of contact lens prescriptions, placing consumers at an even greater risk of receiving the wrong Class II or III medical devices.**

    a. **Do you agree that efforts need to be taken to update the passive verification process?**

When Congress enacted the Fairness to Contact Lens Consumers Act ("FCLCA"), it determined that passive verification was necessary to balance the interests of prescription portability and consumer health. Congress was aware that passive verification could, in some instances, allow sellers to sell contact lenses based on an invalid or inaccurate prescription, and that this could potentially lead to health risks. In the May 28, 2019 Supplemental Notice of Proposed Rulemaking ("SNPRM"), the Commission proposed several changes to improve the passive verification process. The Commission proposed that sellers who use automated telephone verification messages would have to: (1) record the entire call and preserve the complete recording; (2) begin the call by identifying it as a prescription verification request made in accordance with the Contact Lens Rule; (3) deliver the verification message in a slow and deliberate manner and at a reasonably understandable volume; and (4) make the message repeatable at the prescriber's option. This proposal enables prescribers to fulfill their role as protectors of patients' eye health because prescribers cannot correct and police invalid, inaccurate, and expired prescriptions if they cannot comprehend a seller's verification request.

Additionally, the Commission proposed changes that would increase patients' access to their prescription, maintain patient choice and flexibility, and potentially reduce the number of

verification requests. Under the proposal, a prescriber, with the patient's verifiable affirmative consent, has the option to provide the patient with a digital copy of the prescription in lieu of a paper copy. Moreover, although the Contact Lens Rule has always required that prescribers, upon request, provide any person designated to act on behalf of the patient with a copy of the patient's valid contact lens prescription, the Rule did not prescribe a time limit in which this copy had to be provided. The Commission proposed requiring that a prescriber respond to requests for an additional copy of a prescription within forty business hours. To facilitate patients' ability to use their prescriptions, another proposed change would require sellers to provide a mechanism that would allow patients to present their prescriptions directly to sellers.

Finally, the Commission proposed amending the prohibition on seller alteration of prescriptions to address concerns about the misuse of passive verification to substitute a different brand and manufacturer of lenses. The proposal requires a seller who makes an alteration to provide a verification request to the prescriber that includes the name of a manufacturer or brand other than that specified by the patient's prescriber. There is an exception if the patient entered that manufacturer or brand on the seller's order form or the patient orally requested it from the seller.

The Commission will consider comments received in response to the SNPRM and, if appropriate, make changes before issuing a final rule.

b. Do you agree that robocalls need to be eliminated from use within the passive verification system?

An effective verification process enables prescribers, when necessary, to prevent improper sales and allows sellers to provide consumers with their prescribed contact lenses without delay. The FCLCA expressly permits telephone communication for verification and the Commission believes it would be contrary to Congressional intent to prohibit use of automated technology for the purpose of prescription verification. The Commission does not have empirical data showing the frequency of incomplete or incomprehensible automated telephone messages or that a phone call with an automated message is necessarily less reliable than one with a person. The evidence suggests that these calls can be an efficient method of verification. However, the Commission recognizes the burden on prescribers and potential health risk to patients from incomplete or incomprehensible automated telephone messages. As described in response to question 3.a, the Commission has proposed changes to automated telephone messages that would improve the verification process.

c. Could you support updating the Fairness to Contact Lens Consumers Act to eliminate robocalls and update the passive verification system to include secured emails and patient portals to verify and document contact lens prescription verification?

Under the current Rule, a "seller may sell contact lenses only in accordance with a contact lens prescription for the patient that is: (1) Presented to the seller by the patient or prescriber directly or by facsimile; or (2) Verified by direct communication." 16 C.F.R. § 315.5(a). Because the Rule's definition of direct communication already includes electronic mail, a seller and a prescriber could use email during the verification process. In the December 7, 2016 Notice of Proposed Rulemaking ("NPRM"), the Commission made an initial determination that a portal

could be used by a prescriber or a patient to "directly" present a contact lens prescription to a seller. The Commission will consider comments received in response to this initial determination and, if appropriate, make changes before issuing a final rule.

4. **In December 2016, the FTC issued a Notice of Proposed Rulemaking to update the Contact Lens Rule. As a part of this process, providers and manufacturers of contact lenses urged the FTC to require common-sense changes to the current contact lens market, including quantity limits and ways to update methods of communication under the passive verification process. The FTC responded by stating that there was insufficient evidence that consumers are buying excessive quantities of contact lenses and that it did not have the statutory authority to update the passive verification process.**

    a. **Do you support efforts to ensure patient safety regarding the current proposed rulemaking process that will include patients only receiving contact lenses as prescribed under the valid prescription?**

Federal law does not permit a seller to sell contact lenses to a patient unless the seller has obtained a copy of the prescription or the verified the patient's prescription information with the prescriber. The SNPRM's proposed changes improve patient access to contact lens prescriptions and address concerns with the passive verification requests and alterations by sellers.

5. **Last May, Rep. Michael Burgess (R-TX) and I led a letter to the FTC that laid out several concerns we have regarding the FTC rulemaking process around the Fairness to Contact Lens Consumers Act. In total, over 50 members of Congress signed this letter where we discussed the lack of enforcement action by the FTC to address the illegal sales of contact lenses and the burdensome new requirements on eye care providers.**

    a. **Has the FTC investigated or independently audited any online sellers to determine the number of lenses provided to patients?**

The Commission has not audited online sellers to determine the number of lenses provided to patients. Staff has investigated specific complaints of illegal sales related to excessive quantities. We will continue to monitor the marketplace, taking action against violations as appropriate. The Commission recently announced an enforcement action against a contact lens seller challenging the sale of contact lenses without a valid prescription. The order banned the defendant from selling contact lens and imposed a $575,000 civil penalty. *U.S. v. Duskin*, No. 1:18-cv-07359 (N.D. Cal. Dec. 6, 2018).

    b. **What enforcement mechanisms has the FTC used to ensure that sellers are not enabling the circumvention of state laws governing prescription renewal or harming patients by providing excessive numbers of contact lenses?**

In the NPRM, the Commission considered the issue of patients purchasing excessive quantities of contact lenses. Although concerned with anecdotal reports, the Commission concluded that the evidence did not show that the sale of excessive amounts of contact lenses is a widespread

problem.[1] Furthermore, a prescriber who receives a verification request for an excessive amount of lenses can contact the seller to prevent the sale from being completed.

c. How often has the FTC acted on this important safety issue?

As discussed in the response to question 5.b, the Commission does not believe that the evidence shows that excessive sale of contact lenses is a widespread problem. However, the Commission recognizes the importance of patient safety. Staff will continue to monitor the marketplace and, if appropriate, take action.

6. Many businesses are increasingly dependent on digital platforms that they do not own or operate to connect with customers.

a. With current statutory authorities in mind, what can be done to protect consumers if companies that operate these platforms offer subsidiary business products and restrict or disadvantage competitors with similar businesses on these platforms? What is the FTC doing to curtail it?

Please see the answer to question 2.b above.

b. One example of how a platform operator might harm consumers is by prohibiting businesses from communicating with their customers through that platform. Do you believe that this sort of behavior must be addressed and, if so, does the FTC currently have the statutory authority to do so?

Please see the answer to question 2.b above.

7. It has been brought to my attention that the leading internet browser has been considering a major change in what type of information is available to consumers in their product, reducing the available information that consumers use to defend themselves against a host of online threats like phishing and content spoofing.

a. As the agency charged with protecting our nation's consumers and enforcing our data privacy laws, do you have concerns about what this practice means for consumers and their data privacy and security?

Please see the answer to 7.b below.

b. Have you discussed this issue with the browsers or asked them to explain their changes and how they will impact consumer safety online? If not, do you intend to?

I understand your question to refer to how browsers display certain digital certificates in their user interface. When properly validated, digital certificates serve as proof that consumers are communicating with an authentic website and not an impostor. They also serve to encrypt traffic

[1] NPRM at 88549-50; *see also* Vision Council, U.S. Optical Market Eyewear Overview 13 (2018), https://www.ftc.gov/sites/default/files/filefield_paths/steve_kodey_ppt_presentation.pdf (noting that 82% of contact lens users had an eye exam within the last 12 months and over 95% had an exam within the last two years)

between a consumer's browser and a site's web server. In May 2018, Google announced that it would change its user interface in its Chrome browser to remove certain indicators of the presence of an expensive digital certificate – called an extended validation certificate – such as green text and a padlock icon.

I have not discussed these changes with Google. Consumers' secure online experiences depend on many factors, and the ecosystem continues to evolve quickly. I do not believe that the Commission should promote one type of certificate over another or prescribe how certificates should be displayed in user interfaces.

The Commission is nonetheless committed to promoting consumer safety online. In addition to our enforcement work, detailed in the Commission's written testimony, we engage in extensive consumer education, examples of which you may find here: https://www.consumer.ftc.gov/articles/0009-computer-security.

The Honorable Cathy McMorris Rodgers (R-WA)

1. **Commissioner Phillips, it appears that while the Commission imposes requirements that last differing lengths inside consent order-based settlements, the overall order lasts 20 years as a default. Please answer the following questions about consent orders:**

    a. **Why does the Commission, as a default, enter consent orders for 20 years?**

As a general matter, administrative orders entered in consumer protection matters sunset in 20 years, absent any intervening enforcement action. However, in certain cases, administrative orders have been shorter, for example, ten years. In contrast, federal district court orders remain in effect forever. Historically, the FTC has brought consumer protection cases against defendants permeated by unfair or deceptive practices – where there is a likelihood that the defendant will violate the order – in federal district court where the order does not sunset. In cases involving defendants less likely to violate orders – for example, companies not permeated by unfair or deceptive practices, the FTC has used the administrative process, with its shorter order-sunset period of 20 years. However, in recent years, the FTC has frequently brought cases in federal district court against companies not permeated with unfair or deceptive acts or practices. The vast majority of defendants in administrative actions continue to be companies that have violated the law but are not permeated with unfair or deceptive practices.

Administrative orders relating to anticompetitive mergers last ten years. Administrative orders relating to anticompetitive conduct, as opposed to anticompetitive mergers, last 20 years as a default, although the Commission may accept orders of shorter duration based on the facts and market realities in a given matter. And these competition conduct orders' fencing-in provisions – provisions that are broader than the unlawful conduct – typically expire well before the order sunsets.

Any party under administrative order may petition the Commission to modify or set aside the order due to changes in law or fact or to a determination that the public interest so requires, which happens from time to time.

    b. **Is there any data to support the 20-year length of consent orders?**

For consumer protection matters, there is no publicly available aggregated data to support the 20-year length of administrative consent orders. Because many of the FTC's consumer protection administrative orders involve technology companies and other rapidly evolving businesses, I believe it would be useful to examine whether 20 years is the appropriate length for an administrative order.

For competition matters, please see the answer to 1.c. below.

    c. **Are there compelling reasons for consent orders in the competition space to last longer than consumer protection cases?**

I support shortening the default duration of competition conduct orders to ten years. Since the mid-1990s, the Commission has issued over 100 competition orders. Yet, in that same period, the Commission brought enforcement actions in only three competition conduct matters more than ten years after issuing the order. In other words, limiting orders to ten years would have affected only three competition actions over the past 20 years. Furthermore, a ten-year order term would reduce the burden on companies under order, free up Commission resources, and provide greater consistency by aligning the Commission's competition conduct orders with those of the Department of Justice's Antitrust Division.

i. If so, what are those reasons?

Please see the answer to question 1.c above.

d. Has the Commission conducted a study of similar enforcement regimes and the length of consent orders issued by those other agencies and considered adjusting the FTC's standard 20-year consent order timeframe?

i. If yes, which agencies?

ii. If no, why not?

I am not aware of such a study. Twenty years is a long time, in particular in markets that develop quickly, such as those characterized by technological innovation. I support efforts to adjust the default length of our consent orders, and believe we should take seriously requests to adjust those defaults in particular cases.

2. Commissioner Phillips, I understand the desire to give the Commission more tools to hold bad actors accountable on first offenses, but I also am concerned with potentially eroding due process protections. If Congress grants the Commission first offense civil penalty authority for violations of Section 5 of the FTC Act, do you believe we should also consider an expedited track to judicial review?

I am not in favor of civil penalty authority for violations of Section 5 of the FTC Act in the first instance. The FTC's statutory jurisdiction is very broad. Not only does the agency have jurisdiction over a wide swath of the American economy, the agency has the authority to challenge conduct falling under Section 5's expansive mandate: prohibiting unfair or deceptive acts or practices. Prior to an FTC enforcement investigation, it might be difficult for some companies to recognize that their conduct is prohibited by these standards.

This broad statutory regime is balanced by the fact that the FTC does not have the authority to impose civil penalties in the first instance for violations of Section 5 of the FTC Act. This addresses the due process concerns that apply when engaging in enforcement for conduct that was not clearly proscribed. In those cases where the FTC does impose penalties for first-time

violations, clear rules – either from Congress itself or through Magnusson-Moss or APA rulemaking – should predicate the imposition of penalties.

Should new legislation include penalties for first-time violations under similarly broad standards as are currently in Section 5, expedited review may help alleviate some of the burden; but it would not address the core issue of imposing penalties where the illegality of the conduct could not readily have been anticipated.

a. Are there any other considerations we should contemplate to ensure persons' due process rights are protected under any new federal privacy regime?

In addition to the due process considerations noted above, I am concerned that excessive penalties could deter companies from exploring innovative and consumer-friendly products and services; the risk may simply be too great. This is of particular concern given that many privacy harms being contemplated result in little to no tangible consumer harm. To account for this, any penalty scheme set by Congress should balance a range of factors, including consumer harm, and be set on a graduated scale, so as to tether them to coherent set of principles set out by Congress. Furthermore, even if Congress is to impose penalties for initial violations, that scheme need not apply to every violation. Some conduct, and particularly conduct whose legality is more difficult to determine in the abstract and whose deterrence may have negative consequences, should continue to be enforced under our current structure.

3. Commissioner Phillips, I have concerns with companies making promises that potentially oversell technical capabilities or features. For example, one tech firm has advertised that what happens on your device stays on your device. But this same company allows consumers to download apps that collect consumer information and share that information with third parties. In other cases, some firms have started marketing "unhackable" devices when we know perfect security is aspirational. With respect to this concern, please answer the following:

a. Does the FTC have any existing authority to address this concern? If so, please identify such authority.

Advertising plays a critical role in our economy, providing consumers with valuable information. However, to be useful, advertising must not be misleading. The FTC Act prohibits deceptive and unfair acts or practices. The examples of advertising and product claims that you describe are troubling and could constitute deceptive or unfair practices depending upon the facts of the case. To establish that an advertisement is deceptive requires a showing that (1) there was a representation or omission, (2) the representation or omission was likely to mislead consumers acting reasonably under the circumstances, and (3) the representation or omission was material.[2] To establish that a practice is unfair requires a showing that an act or practice is likely to cause

[2] *See* Federal Trade Commission Policy Statement on Deception, *appended to Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174 (1984).

substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or competition.[3]

b. Could the Commission's deception authority apply to these types of claims?

Yes, please see the answer to 3.a.

4. Commissioner Phillips, do you believe a private right of action, delegating enforcement authority of any new federal privacy bill to private sector plaintiffs' attorneys, will disproportionately hurt small business?

Yes.

a. If yes, please explain why.

A private right of action will have a substantial and unwarranted negative impact, particularly on small, innovative, businesses, deterring them from innovating and growing jobs, as they prioritize lawsuit avoidance over doing what they do best.

Data collection and use are endemic to our economy and are the engines of significant economic growth and consumer benefit. Any federal privacy bill will thus apply to a vast array of companies, large and small.

No matter the size of the firm, the strike suit behavior encouraged by a private right of action threatens economic vitality. Businesses will settle cases for substantial sums, even where the cases lack merit or where consumer injury is limited. This is particularly a concern for smaller companies, as their limited staffs and natural start-up mistakes in a complex regulatory environment may make them a specific target for the private bar, while they have fewer resources to avoid and challenge such suits than their larger competitors. As a consequence, entrepreneurs may avoid making decisions and offering new services that enhance innovation and competition. They will pay nuisance amounts in settlement, mis-allocating resources. Recent FTC experience bears this out. Patent rights are critical to encouraging innovation. But they can be abused, as they were in the notorious MPHJ scheme, where many small businesses were threatened with patent litigation and paid substantial sums.[4] Federal enforcement avoids risks like these by removing the economic incentives of lawyers from the calculus.

A new federal privacy law must provide for rules and regulation, but it should do so in a way that best permits for future growth and innovation and that encourages investment and risk-taking.

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[3] Federal Trade Commission Policy Statement on Unfairness, *appended to Int'l Harvester Co.*, 104 F.T.C. 949, 1070 (1984).

[4] *See, e.g.*, FTC Approves Final Order Barring Patent Assertion Entity From Using Deceptive Tactics, Mar. 17, 2015, https://www.ftc.gov/news-events/press-releases/2015/03/ftc-approves-final-order-barring-patent-assertion-entity-using (discussing FTC administrative consent with MPHJ Technology Investments, LLC, where small businesses were targeted with demand letters). *See also* FTC Staff Report, *Patent Assertion Activity: An FTC Study*, Oct. 2016, https://www.ftc.gov/reports/patent-assertion-entity-activity-ftc-study (examining non-public information and data covering the period 2009 to 2014 from 22 PAEs, 327 PAE affiliates, and more than 2100 holding entities obtained through compulsory process orders using the FTC's Section 6(b) authority).

Government enforcement of a privacy law, rather private lawsuits, is the best way to balance those interests.

5. **Commissioner Phillips, can you explain how a fragmented internet, regulated on a state-by-state basis, may result in different online opportunities, options, and experiences for people in rural communities than people in urban areas?**

Application of a single legal framework across the country provides consistency and fairness, which is especially important to the businesses that operate in many rural communities. Allowing different states to apply different laws – laws whose content we do not and cannot yet know – could result in radically different regimes in different states, and, accordingly, radically different goods and services offered by technology companies. It will favor large, national, firms; and disproportionately hurt smaller operators, many of which may be local. In some cases, technology companies may choose not to provide certain services to citizens of some states due to the undue legal and financial risks a particular state's laws would impose. A single federal law could help avoid such outcomes and ensure that consumers across the country are treated fairly and equally.

6. **Commissioner Phillips, how difficult would it be for the FTC to enforce a federal privacy law with various, potentially competing, state laws also in effect?**

Where we have a variety of differing state laws, the FTC will have to engage in competing investigations and lawsuits with state law enforcement agencies, rather than more efficient collaborations. The result will be less federal-state cooperation and more protracted investigations, more complicated litigation, and more challenging settlement environments. We may also face situations where similar – yet distinct – laws are subject to different legal interpretations by courts, removing some of the Commission's power to help shape consistency in that interpretation through our own case selection and legal arguments in federal court.

7. **Commissioner Phillips, is there an impact we should be considering when crafting privacy legislation that could have an unintended or negative impact on competition in the U.S. marketplace? What factors should be considered to guard against these unintended consequences?**

Privacy legislation will involve tradeoffs, in particular when it comes to innovation and competition. Large companies can more easily bear the costs of compliance, while smaller entities will face more risk and uncertainty. That means that legislation carries the possibility of entrenching incumbents while limiting new market entrants who may provide competition and innovative, valuable products and services. This is an issue that I have spoken about before,[5] and there is already some evidence that since the implementation of GDPR, investment in startups is

[5] Commissioner Noah Joshua Phillips, *Keep It: Maintaining Competition in the Privacy Debate*, Internet Governance Forum USA, Washington, DC (July 27, 2018), https://www.ftc.gov/public-statements/2018/07/keep-it-maintaining-competition-privacy-debate.

down in Europe[6] and more market share is flowing to the largest companies.[7] Time will tell about that impact.

To guard against these concerns, as Congress moves forward to regulate so much of the economy, it should take care and be cognizant about the impacts and tradeoffs. This means moving more cautiously and learning from the experiences of jurisdictions that have already instituted new privacy rules. Congress should also favor simplicity over complexity, especially in the early days, with lower penalties and federal preemption to create a single set of rules of the road for businesses and consumers.

8. **Commissioner Phillips, this year a number of state legislatures are considering laws requiring proprietary auto Dealer Management Systems (DMS) to be accessed by unlicensed, unmonitored third parties. There are questions about the cybersecurity and privacy risks raised in these circumstances even with well-intended goals for example in Arizona and Montana. Are you aware of these state laws and do they raise on cybersecurity or privacy concerns?**

I have not studied those laws in depth, and they are outside the jurisdiction of the Commission's authority. Laws mandating the sharing of data can raise competition concerns, as well as cybersecurity and privacy ones. All these, and open-access, are important goals that must be managed.

9. **Commissioner Phillips, my understanding is when the FTC seeks to recover ill-gotten gains from an entity that has violated FTC competition rules, the Commission only seeks to disgorge the profit from that unlawful act. Is that correct?**

Yes, in competition cases, the equitable relief available to the FTC includes disgorgement of the improperly obtained gains.

   a. **Please explain how the Commission calculates the profit of those ill-gotten gains.**

The Commission estimates, based on the available facts and data, how much profit the defendant(s) would have earned absent the anticompetitive conduct. The estimation process is heavily influenced by the facts of the particular case and may require sophisticated modeling. Therefore, the Bureau of Competition works closely with the Bureau of Economics and with the FTC's experts on the specific matter to estimate the appropriate disgorgement amount. At trial, the FTC bears the burden of persuading the court that it has a reasonable basis for the amount of monetary relief sought.

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[6] Jian Jia, Ginger Jin & Liad Wagman, *The short-run effects of GDPR on technology venture investment*, VOX EU (Jan. 7, 2019), https://voxeu.org/article/short-run-effects-gdpr-technology-venture-investment.
[7] Björn Greif, *Study: Google is the biggest beneficiary of the GDPR*, CLIQZ (Oct. 10, 2018), https://cliqz.com/en/magazine/study-google-is-the-biggest-beneficiary-of-the-gdpr.

For example, in *AbbVie*, the FTC sued several pharmaceutical companies for filing sham patent infringement lawsuits to delay entry of generic AndroGel. The FTC's testifying economic expert determined that, absent the sham litigation, generic AndroGel products would have entered market in 2012. He then estimated that, as a result of delaying generic competition, defendants earned about $1 billion more than they otherwise would have between 2012 and 2018. The judge agreed with the overall approach taken by the FTC's expert but reduced $450 million based on his findings that generic entry would have happened one year later than the FTC claimed and that the generic products had fully penetrated the market by 2017 and thus no part of the defendants' profit after that point resulted from the anticompetitive conduct.

The Honorable Robert E. Latta (R-OH)

1. **Commissioner Phillips, we want companies of all sizes to protect consumer information, but we do not want new privacy obligations to crush small businesses and benefit big companies. In the 2012 FTC privacy report, the Commission grappled with this specific concern and excluded some small businesses from its recommendations.**

    a. **How do you think we should be addressing this concern?**

As a general matter, the best rules are those that can be applied to firms of all sizes. To the extent Congress is considering excluding small businesses from privacy legislation, we would suggest focusing not on the size of the company, but on the amount and sensitivity of the data the company collects. A company with few employees can collect highly-sensitive data of millions of consumers, and such a company should be subject to privacy rules. As you note, this is the approach we took in the 2012 Privacy Report.

The Honorable Michael C. Burgess (R-TX)

1. **Commissioner Phillips, we know that small businesses have suffered in Europe since the implementation of the General Data Protection Regulation (GDPR). In fact, according to some reports, investments in startups are down an astounding 40 percent.**

    a. **How can we guard against the same happening here?**

Because the GDPR has now been in effect for only a year, there is a limited basis upon which researchers and others have been able to draw conclusions about potential effects that the GDPR has had on investments in startups. That said, the FTC's recent Hearings on Competition and Consumer Protection in the 21st Century did include discussion of research showing that, in the European Union, the number of venture capital technology deals and the average amount invested per deal declined in the first several months after the GDPR took effect. Researchers have stated their intent to monitor to see whether those observations remain true on a longer-term basis. The FTC will keep abreast of such research.

Small firms want growth and ease of access to markets. They want to focus on building their businesses, not legal compliance. Congress recognized this dynamic with respect to the securities laws when it passed the JOBS Act in 2012. The best way to protect startups in a new privacy law are to keep the rules clear and constant over time (including limiting rulemaking authority), preempt a multiplicity of state laws, and ensure that enforcement does not chill innovation.

2. **Commissioner Phillips, when the FTC enjoyed broad rulemaking authority in the 1970s it got so bad that a Democratic-led Congress cut funding to the Commission for several days.**

    a. **How should the events of the past inform our discussion about FTC rulemaking today and under future administrations**

Congress has the legal and political mandate to make the key decisions about what the rules of the road for business and the public should be. When too much rulemaking authority is delegated, regulators may usurp legislative authority and the public may end up with rules the content of which can change dramatically over short periods of time. Businesses need confidence to plan and consumers are best off when they can rely on rules they know. Too much delegated power also is not good for the Commission itself, involving the agency – a law enforcement body – and its Commissioners in political issues, distracting us from our attention on our core, bipartisan mission.

    b. **Do you have any concerns about the scope of the Administrative Procedures Act rulemaking in conjunction with privacy legislation? If so, what are those concerns?**

The purported benefit of APA-style rulemaking is its efficiency, but that can be a bad thing depending on the scope of the authority. Privacy legislation necessarily demands complex value judgments, as it must define harms, create new rights for American consumers that have not previously existed in law, and impose substantial new obligations on American businesses. These are weighty issues that are the domain of our democratically elected Congress, not agency Staff and Commissioners. To the extent the Commission has rulemaking authority under any new privacy legislation, that rulemaking should be limited and targeted. It should not involve establishing substantive standards, but rather focus on the technical details – such as the form of a particular notice – and be subject to the very clear guidance of Congress to ensure that the agency remains faithful to Congressional intent.

Subcommittee Chairman Marino
Questions for the Record
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
"Net Neutrality and the Role of Antitrust"
November 1, 2017

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1. **One particularly troubling aspect of the FCC's 2015 Order was its singling out of Internet service providers for particularly invasive regulation - even though other major Internet platforms pose at least as great a threat of foreclosing online competition (through blocking or various forms of harmful discrimination) as any single ISP. It seems to me that an important benefit of an FTC-based regime is that the FTC has a greater ability to prevent unfair methods of competition and unfair or deceptive acts or practices by all participants in the Internet ecosystem. Wouldn't an FTC-based regime be more effective at promoting a technology-neutral level playing field in this important area of the economy?**

I believe that the same competition and consumer protection approach should apply regardless of whether companies provide broadband services, data analytics, social media, or other so-called edge services. Indeed, having one agency with jurisdiction over these entities helps ensure consistent standards and consistent application of such standards.

As an agency with general jurisdiction across the economy, with a few notable exceptions, the FTC provides a technology-neutral approach to promoting competition and protecting consumers online. The FTC's investigations and enforcement actions in Internet-related markets have been consistent with its actions in other industries. Where harm to the competitive process outweighs the potential benefits to consumers, the FTC has initiated antitrust enforcement. Equally important, the Commission has stayed its hand when business practices are procompetitive or competitively neutral. To grow output and foster innovation across the economy, all firms must be subject to consistent antitrust enforcement—enforcement that protects consumers without placing undue restrictions on business practices that enable new technologies to flourish. The FTC's activities in Internet-related markets demonstrate its ability to protect the competitive process, promote the innovation that such competition fosters, and preserve the resulting benefits to consumers.

2. **In the waning days of the previous administration, the FCC was concerned with "zero rating," the exemption of certain online content from broadband providers' data caps. In the mobile broadband industry, zero rating spurred fierce competition, leading to lower prices and improved services for customers. How does this impact your view that antitrust is superior to *ex ante* regulation when it comes to "net neutrality"? Can you elaborate on the FTC's experience with similar vertical arrangements?**

The group of practices collectively known as "zero rating" involve contractual agreements between ISPs and content providers. So long as these firms are not directly competing with one another, such agreements are properly viewed as a type of vertical restraint.

The consensus among economists is that most vertical restraints are competitively benign and often ultimately beneficial to consumers. While it is certainly possible for vertical restraints to create competition problems that warrant government enforcement action, these situations arise relatively infrequently. Antitrust law reflects this economic consensus, generally requiring clear proof of anticompetitive harm before vertical restraints can establish a violation of law.

We note that these general principles are just as applicable to high-technology markets as they are to other parts of the economy.

Against this background, an ex post, case-by-case approach has certain key advantages over ex ante prescriptive regulation. One particular advantage is that ex post enforcement evaluates specific business practices in light of their actual market outcomes: did the practice at issue truly harm consumers or hurt the competitive process? By focusing on outcomes of specific practices, enforcers do not need to engage in the much more challenging and difficult effort of predicting the future course of economic activity.

In turn, this allows enforcers to focus their attention on clearly problematic conduct, rather than broadly squelching market developments based on hypothetical concerns that may or may not ultimately come to fruition. Where new technology is developing rapidly and it is extremely difficult to forecast future impacts, ex post enforcement is considerably less likely to falsely condemn behavior that would ultimately benefit the public.

3. If the FCC's 2015 Order is rolled back, why is it still important to repeal the FTC Act's "common carrier" exemption? How would such repeal impact the FTC's ability to regulate competition and consumer protection?

On a bipartisan basis and long before the FCC's 2015 Order, the FTC has consistently urged the repeal of the FTC Act's common carrier exemption. This carve-out is obsolete. It originated in an era when telecommunications services were provided by highly-regulated monopolies. It no longer makes sense in today's marketplace where the lines between telecommunications and other services are increasingly blurred.

As the telecommunications and Internet industries continue to converge, the common carrier exemption is likely to frustrate the FTC's ability to stop deceptive and unfair acts and practices and unfair methods of competition with respect to a wide array of business activities. The FCC's 2015 Order accelerated that effect. But even if it is reversed, the common carrier exemption will remain problematic.

This is particularly so if the Ninth Circuit panel's decision in the AT&T case stands. In that case, which arose from AT&T's pre-reclassification conduct, the FTC alleged that AT&T's "unlimited data" advertising was deceptive. AT&T moved to dismiss the FTC's complaint arguing that the common carrier exemption is activity based, not status-based. While the district court held that the exemption was status-based and allowed the FTC's suit to proceed, a three judge panel for the Ninth Circuit reversed the lower court finding the exemption to be status-based. The Ninth Circuit reheard the matter *en banc*, and we are awaiting the outcome. If the *en banc* decision is consistent with the panel decision, the common carrier exemption could disable

the FTC from enforcing Section 5 of the FTC Act not only against common carriage activities, but also against non-common-carriage activities engaged in by an entity with the "status" of a common carrier, even if that is not its principal line of business. This would put large sectors of the U.S. economy beyond the reach of the FTC, and would prevent the FTC from protecting consumers in areas that have nothing to do with provision of common carriage, such as "cramming". In addition, the decision could have other farther-reaching effects on FTC programs including Do Not Call and enforcement of the Children's Online Privacy Protection Act.

In addition if the *en banc* court rules that the exemption is status based, there may also be a regulatory gap because the FCC's authority over common carriers is limited to the provision of services for or in connection with common carriage. If common carriers are providing non-common carrier products or services, it is possible that neither the FCC nor the FTC would have jurisdiction to respond to practices that harm consumers. And even in cases where the FCC can respond, it lacks the FTC's authority to seek consumer redress.

Even if the Ninth Circuit decides in favor of the FTC, removing the common carrier exemption would still benefit the FTC's work to protect consumers. The exemption creates an incentive for defendants to litigate over what is and isn't a common carrier service, which inserts unnecessary cost and uncertainty into our enforcement work and the marketplace.

Removing the exemption from the FTC Act would enable the FTC to protect consumers of common carriage services (and non-common-carriage services offered by common carriers) against unfair and deceptive practices in the same way that it can protect consumers against unfair and deceptive practices by other services. For example, the FTC has a long history of privacy and data security enforcement against a wide range of technology and communications entities– companies like Microsoft, Facebook, Google, HTC, and Twitter, app providers like Snapchat, Fandango, and Credit Karma, and cases involving the Internet of Things, mobile payments, retail tracking, crowdsourcing, and lead generators. Removing the exemption will also ensure that the FTC can pursue unfair methods of competition in a uniform manner across the Internet and the rest of the economy.

In short, removing the common carrier exemption is the simplest, cleanest way to ensure consistent continued consumer protection and antitrust enforcement by the FTC.

Senator Josh Hawley
Questions for the Record

Hearing on the Oversight of the Antitrust Laws
Subcommittee on Antitrust, Competition Policy, and Consumer Rights

Questions for both witnesses

1. **Aluminum end-users like those who manufacture canned beverages are concerned that the Midwest Premium paid by American purchasers may be inflated above its appropriate rate. Despite the lifting of the aluminum tariffs imposed on Canadian and Mexican aluminum supply, and despite reductions in transportation and storage costs, the Midwest Premium remains well above its pre-tariff level. Currently, the Midwest Premium is set based on data compiled by a single ratings agency, data that end-users fear may be subject to manipulation that forces these end users to pay monopoly prices for aluminum.**

   You received a request last Congress from members of the House to examine this market to determine whether anticompetitive conduct has inflated the Midwest Premium. Please provide an update about any preliminary inquiries the Department of Justice has undertaken on this matter, your office's response to any recent submissions of new information by aluminum end-users to your staff, and the basis for any decision not to pursue a formal inquiry.

   Response: The Department of Justice has expertise in this industry and generally handles its competitive issues. We defer to the DOJ.

2. **Are you aware of any claims by large tech companies that section 230 creates an immunity from liability for violations of the Children's Online Privacy Protection Act, rules promulgated under that Act, any other federal privacy regulation, or section 5 of the FTC Act?**

   Has the federal government sought to impose weaker fines or penalties of any kind than it otherwise would have when enforcing competition and consumer protection laws because of a concern that a company might have immunity from liability because of section 230?

   Response: While the Commission's rules prevent me from discussing nonpublic deliberations and negotiations regarding civil penalty amounts in specific investigations, the FTC has been vigorous about enforcing the COPPA Rule. The Commission has not shied away, on the basis of Section 230 or for any other reason, from imposing liability and large fines on tech companies that host the content of others. For example, as part of its settlement earlier this year, Musical.ly agreed to pay a $5.7 million civil penalty, at the

time the largest civil penalty ever paid for a COPPA violation.[1] And in August, the FTC announced its settlement with Google and YouTube, in which the companies agreed to pay a $170 million penalty and to make fundamental changes to the YouTube platform by requiring YouTube channel owners to designate whether their content is directed to children.[2]

[1] *See* FTC Press Release, *Video Social Networking App Musical.ly Agrees to Settle FTC Allegations That it Violated Children's Privacy Law* (Feb. 27, 2019), https://www.ftc.gov/news-events/press-releases/2019/02/video-social-networking-app-musically-agrees-settle-ftc.

[2] *See* FTC Press Release, *Google and YouTube Will Pay Record $170 Million for Alleged Violations of Children's Privacy Law* (Sept. 4, 2019), https://www.ftc.gov/news-events/press-releases/2019/09/google-youtube-will-pay-record-170-million-alleged-violations.

Senator Ted Cruz
Question for the Record for Hon. Joseph Simons and Hon. Makan Delrahim

I understand that manufacturers purchasing aluminum wholesale for manufacture into aluminum products—particularly those purchasing aluminum for manufacture into cans—are currently experiencing significant cost increases due to an increase in one particular index of shipping costs. The "Midwest Premium," an industry-wide index for the cost of storage and transportation of aluminum, has increased significantly since January 2018, despite no significant underlying cost increases in the actual costs for either storing or shipping aluminum. These increases cannot be wholly explained by tariffs, given that they began before the most recent aluminum tariffs were implemented. Some industry watchers believe that upstream market participants, including aluminum rolling mills, have conspired in violation of Section 1 of the Sherman Act to require downstream manufacturers to adhere to one particular Midwest Premium index, the Platts index, because it is reliably substantially higher than other indices, and because it is subject to manipulation by unverified claims related to storage and transportation costs.

Is either the Department of Justice or Federal Trade Commission investigating these concerns? If so, what have you determined so far, and when do you expect to be able to report your findings? If not, will you commit to investigating them?

Response: The Department of Justice has expertise in this industry and generally handles its competitive issues. We defer to the DOJ.

Written Questions for Joseph Simons
Chairman, Federal Trade Commission
Submitted by Senator Patrick Leahy
September 24, 2019

1. **In response to a letter from Senator Blumenthal, the FTC stated that while the Commission was interested in conducting retrospective merger reviews, the Bureau of Economics had not found mergers with adequate data to conduct the review. At the hearing, you added that the FTC is now considering retrospective reviews of hospital mergers.**

    (a.) Can you provide an estimated timeline for when the first retrospective review may be completed?

    Response: The Commission's merger retrospective program is an ongoing effort to evaluate the competitive effects of past mergers and acquisitions. The Commission's Bureau of Economics ("BE") regularly performs these retrospective analyses. In the ten years between March 2008 and July 2018, BE staff completed and released twenty merger retrospective studies. These retrospectives are often published in peer-reviewed economic journals after initially being released as BE working papers.[3] At any given time (including now), BE typically has a number of merger retrospectives ongoing. The timing of completion of these important studies is influenced by various factors, including the economists' caseload of enforcement matters.

    (b.) What can be done to better ensure that mergers in other industries have adequate data to review?

    Response: When data are not publicly available, the Commission may be able to purchase data to conduct studies, including retrospectives. We may also be able to issue 6(b) orders to acquire the necessary data. But merger retrospectives generally require the identification of a control group to compare to the market with the merged firm in order to separate out competitive effects caused by the merger as opposed to other factors. For many mergers, no proper control group is available, and this limits the universe of mergers that are good candidates for retrospectives.

2. **You stated during the oversight hearing that the Pharmacy Benefit Managers (PBM) market has become even more consolidated since the FTC's last study on pharmaceutical intermediaries in 2005 and that you would be happy to conduct another study.**

    (a.) Regardless of whether the mandate to conduct a new PBM study in the Prescription Pricing for the People Act becomes law, will the FTC commit to conducting the study?

[3] The Bureau of Economics' working paper series is available at https://www.ftc.gov/policy/reports/policy-reports/economics-research/working-papers.

Response: As I noted during the hearing, the PBM industry is even more concentrated than when the FTC last conducted a study, and I would like to understand what effect rising concentration may have had on conduct by PBMs. Our ability to conduct such a study would be limited by available resources. We have estimated that it would require at least nine FTEs working for a full year to conduct the PBM study outlined in pending legislation, and that timeline is very optimistic. (GAO's recent PBM study, which was focused on the role of PBMs in Medicare Part D, took a little over two years to complete.) Any study, whether mandatory or voluntary, would consume resources that would not be available for other matters, including law enforcement. If Congress does not act, we will consider whether aspects of the study could be done with fewer resources.

3. **Recently, Taiwan Semiconductor Manufacturing Company (TSMC) has been accused of using its dominant position in the electronic chip manufacturing market to hurt competition through unfair usage of loyalty rebates, exclusivity clauses, and penalties designed to discourage customers from switching to competitors. GlobalFoundries, one of TSMC's largest competitors, employs a large number of Vermonters.**

    (a.) Is the FTC aware of these allegations against TSMC? If so, is the Commission investigating or considering investigating whether TSMC's practices are harmful to competition?

Response: I cannot comment on whether the agency has a pending investigation. In general, the FTC has authority to challenge certain unilateral conduct by a firm that impedes rivals from competing on the merits and that enables the firm to maintain or attain a monopoly position.

Joseph Simons
Chairman
Federal Trade Commission
Questions for the Record
Submitted October 1, 2019

QUESTIONS FROM SENATOR BOOKER

1. **As we navigate the contours of crafting federal privacy legislation, one of the most intense and recurring debates centers around interoperability provisions, i.e., the ability of consumers to control the use of the information they provide on one service within another service.**

   a. **What kinds of data should be portable?**

   Response: As I have noted in previous testimony, I believe that Congress should make the value judgments as to the scope of specific consumer privacy rights, including data portability. Should Congress enact a law describing what data must be portable, the FTC will enforce it vigorously.

   b. **Who should bear the burden of protecting information as it moves from one service to another?**

   Response: Companies that collect, store, use, or share data should protect it. In connection with a data transfer, both the sending entity and the recipient entity have obligations. For example, the sending entity has the obligation to train its employees on secure sending techniques, to ensure that the data is protected in transit, and to enter into appropriate arrangements with the recipient entity to refrain from using the data for impermissible purposes. The recipient entity should abide by any use limitations and protect the received data in storage.

   c. **Is there a downside to interoperability provisions? For example, Facebook is reportedly rushing to integrate all of its services (Facebook, WhatsApp, Instagram, and Messenger) in order to make a potential break-up impractical and inordinately expensive.[4]**

   d. **Are you at all concerned about this reported behavior by Facebook? Would a more tightly integrated Facebook present additional challenges for remedying anticompetitive conduct?**

   Response to 1.c. and d.: Without commenting specifically on Facebook's conduct due to our pending antitrust investigation, I am confident in the Commission's ability to design effective remedies for anticompetitive conduct. Courts have routinely

[4] *E.g.*, Mike Isaac, *Zuckerberg Plans To Integrate WhatsApp, Instagram and Facebook Messenger*, N.Y. TIMES (Jan. 25, 2019), https://www.nytimes.com/2019/01/25/technology/facebook-instagram-whatsapp-messenger.html.

found that the Commission's remedial powers are broad and well-suited to deal with a broad range of harmful conduct.[5] The goal of non-merger remedies is to stop or prevent behavior that lessens or restricts competition, primarily by means of "cease and desist" or injunctive requirements. The FTC may also seek to remedy harm from anticompetitive conduct, and prevent recurrence of behavior that reduces consumer choices, increases prices, or slows innovation. The Commission has required structural and behavioral relief even when the company's operations are highly integrated.

2. **The Federal Trade Commission's (FTC) $5 billion fine for Facebook's consent decree violations was record breaking. However, Facebook has roughly $45.2 billion in cash and securities on hand.[6] Meanwhile, Apple and Alphabet (Google) each reportedly have well over $100 billion in cash on hand.[7]**

   As massive as the Facebook fine was, the company had the resources to pay it and then some. What do you make of the argument that fines in the billions or even tens of billions of dollars actually entrench the dominance of incumbent platforms while doing little to deter illegal activity?

   I do not agree with that argument.

   First, it is important to note that the recent Facebook enforcement action settled alleged violations of an FTC consumer protection order, and did not involve any antitrust allegations or remedies. The FTC has initiated a separate competition investigation into Facebook, as the company has reported.

   Second, fines need not wipe out a company's reserves to be effective. The $5 billion penalty imposed on Facebook was nearly a quarter of the company's 2018 profits—providing a significant disincentive to violate an FTC order again. Even more importantly, the penalty significantly exceeded what the agency was likely to obtain in court, and therefore was clearly our best option. The only other recourse for the FTC would have been to expend resources in time-consuming litigation to achieve a less effective remedy, with a delayed result. The negotiated settlement will go into effect much sooner than a remedy imposed after litigation, and if the negotiated order is violated, we will then be in a position to argue to a court that $5 billion and the significant injunctive relief we negotiated were not sufficient. If we litigate, we will likely get much less relief years in the future, and if an order after litigation is violated, we would likely still not get anything approaching the relief we have already negotiated.

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[5] When a violation of Section 5 is established, the Commission can enter an appropriate order to prevent a recurrence of the violation. *In re Polygram*, 136 F.T.C. 310, 379 (2003) (Commission order remedying price and advertising restraints). The Commission has wide discretion in its choice of remedy, *FTC v. National Lead Co.*, 352 U.S. 419, 428 (1957), and "is not limited to prohibiting the illegal practice in the precise form in which it is found to have existing in the past," but "must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity." *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952).

[6] *E.g.*, Josh Constine, *Facebook Reserves $3B for FTC Fine, but Keeps Growing with 2.38B Users in Q1*, TECHCRUNCH (Apr. 24, 2019), https://techcrunch.com/2019/04/24/facebook-earnings-q1-2019/.

[7] Jon Porter, *Alphabet Overtakes Apple To Become Most Cash-Rich Company*, VERGE (Aug. 1, 2019), https://www.theverge.com/2019/8/1/20749831/alphabet-google-apple-cash-reserves-richest-company.

Third, in addition to the hefty fine, the new order imposes extensive conduct relief on Facebook, which is a critical aspect of the overall relief obtained by the FTC. The new order will subject the company to dozens of additional fencing-in requirements. For example, Facebook's CEO must certify compliance with the new order quarterly for the next 20 years. Failure to certify compliance, or misrepresenting compliance, would subject the CEO to both civil and criminal penalties. The order also requires Facebook to establish a privacy board committee, which must be comprised of independent directors. The Committee must meet quarterly, outside the presence of Facebook management, with a new, more powerful independent assessor. Together with other relief, these injunctive provisions provide significant specific and general deterrence against future violations.

3. **My home state of New Jersey has led the way on consumer protection issues when it comes to online event ticketing. My New Jersey colleagues in the House have been outspoken and written to your agencies several times about our shared concerns with the Live Nation Entertainment monopoly (from the 2010 merger of Live Nation and Ticketmaster) and the anticompetitive practices the company continues to utilize to stifle competition and harm consumers.[8]**

4.

   a. **Why has Live Nation Entertainment's dominance grown so much?**

   b. **What remedies do you propose would bring back competition to the industry?**

Response: The Commission takes a strong interest in protecting consumer confidence in the online event tickets market and ensuring that consumers receive clear, complete, and truthful information about what they are buying. A key purpose of the FTC's online tickets workshop, held this past June, was to address ways to increase transparency and improve the consumer experience in the tickets market.[9]

Given the Department of Justice's 2010 consent order settling its investigation of the merger of Ticketmaster and Live Nation, and DOJ's continuing enforcement authority over that order, I will defer to that agency on the competition issues raised by your question.

5. **A potentially anticompetitive practice known as the "rebate wall" can harm patients and prevent doctors from providing the best possible care. Rebate walls occur when a market leader pairs volume-based rebates with retaliatory measures. These measures can include rescinding rebates for all of a drug's approved indications if a payer refuses to comply with the market leader's formulary placement demands.**

   My understanding is that rebate walls greatly influence which drugs are covered on a patient's prescription drug formulary. Market leaders in certain therapeutic areas, including those competing in the immunology and biosimilars markets, use conditional

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[8] *E.g.*, Letter from Rep. Bill Pascrell, Jr., to Att'y Gen. Jeff Sessions (Oct. 5, 2018), https://pascrell.house.gov/news/documentsingle.aspx?DocumentID=2429; Letter from Reps. Frank Pallone, Jr. & Bill Pascrell, Jr., to Joseph J. Simons, Chairman, Fed. Trade Comm'n (July 20, 2018), https://pascrell.house.gov/news/documentsingle.aspx?DocumentID=2355.

[9] *See* FTC Press Release, FTC to Hold Workshop Examining Online Event Ticket Sales (Oct. 4, 2018), https://www.ftc.gov/news-events/press-releases/2018/10/ftc-hold-workshop-examining-online-event-ticket-sales.

rebates to require payers to limit patient access to new, innovative products. These limits can include placing innovative therapies in higher tiers, requiring patients to undergo onerous step therapy (or "fail first") procedures prior to receiving access to an innovator product, and in some cases blocking an innovator product from the formulary altogether. Innovator products are often subject to these limitations *even when they are more clinically effective at treating a specific disease compared with the established product.*

Allowing established manufacturers to dictate patient access to innovator drugs is wrong. It can lead to ineffective care and adverse health outcomes, it interferes with a physician's ability to treat patients with the most appropriate medications, and it has serious implications for innovation and competition.

a. **Can you please elaborate on how the FTC reviews potentially anticompetitive practices such as the rebate wall, and how the FTC measures and addresses the consumer/ patient harms caused by such practices?**

b. **How can the FTC and Congress work together to address potentially anticompetitive practices including the rebate wall to ensure that patients and providers have appropriate access to innovative products?**

c. **How does the FTC evaluate the impact potentially anticompetitive practices such as the rebate wall have on innovation and competition in the pharmaceutical market?**

Response: For over 20 years and on a bipartisan basis, one of the Commission's top priorities has been combatting anticompetitive conduct by pharmaceutical companies. We have challenged anticompetitive reverse payment agreements, sham litigation, and most recently, product hopping behavior that illegally suppresses competition from new products entering pharmaceutical markets. As tactics continue to evolve, and especially for high-cost biologic treatments, the Commission will remain vigilant to investigate and challenge conduct by pharmaceutical firms that delays new entry, keeps prices high, and denies patients access to life-saving treatments.

In general, the FTC has authority to challenge certain unilateral conduct by a firm that impedes rivals from competing on the merits and that enables the firm to maintain or attain a monopoly position. Pricing practices such as volume-based rebates may be part of an illegal exclusionary scheme that helps a firm attain or maintain a monopoly in violation of antitrust law. For instance, the Commission found that McWane, Inc. illegally maintained its monopoly by adopting a "Full Support Program" that denied unpaid rebates to customers who purchased products from its competitors.[10] Recently, the Commission filed an action in federal court alleging that healthcare technology company Surescripts, Inc. structured its contracts to lock customers into exclusive arrangements, providing loyalty discounts that would make it unattractive for buyers to shift their business away to

[10] McWane, Inc. v. FTC, 783 F.3d 814, 821 (11th Cir. 2015).

Surescripts' rivals.[11] The FTC's complaint alleges that through a web of exclusive arrangements and other exclusionary conduct, Surescripts was able to protect its dominant position in two e-prescription markets, to the detriment of U.S. consumers.

I look forward to working with those in Congress interested in deterring anticompetitive conduct by pharmaceutical companies. Over the past year, Commission staff has provided technical assistance on a number of legislative proposals directed at these concerns. In addition, I support legislation that would more effectively deter anticompetitive behavior that delays entry of new treatments, including new biologic products.

6. **Today, we received reports that Mark Zuckerberg said his company's approach to antitrust litigation would be to "go the mat and fight."[12] This has not been the modern FTC or Department of Justice approach, primarily because of the history of such litigation. Specifically, the Microsoft, IBM, and AT&T antitrust cases each took the better part of a decade and were prohibitively expensive. However, Professor Tim Wu of Columbia Law School has argued that the IBM case was worth bringing because—despite the costs and delays—the litigation immediately caused IBM to change some of its anticompetitive conduct.[13] Others have made similar claims about Microsoft.[14] Indeed, late last year, Facebook reportedly ended its acquisition talks with Houseparty, a video-centered social network popular with consumers under 25, fearing the acquisition would invite too much additional antitrust scrutiny.[15] This suggests that the very specter of antitrust probes, investigations, and litigation can cause powerful corporations to think twice before abusing their market power.**

   a. **Do you have any data establishing that the scrutiny being brought to bear on social media platforms has created a deterrent effect as far as acquisitions?**

Response: I am not aware of any data that suggests that the potential for antitrust scrutiny is deterring procompetitive acquisitions in the tech or other sectors. In fact, the number of acquisitions reported to the enforcement agencies under the Hart-Scott-Rodino Act continues to increase year-over-year, including among technology firms.[16] While it is not possible to fully measure the deterrent effect of an effective antitrust enforcement program, I am confident, that the Commission's recent success in blocking harmful mergers in court has reduced the number of potentially *harmful* mergers—which, in the face of less antitrust

[11] FTC Press Release, FTC Charges Surescripts with Illegal Monopolization of E-Prescription Markets (Apr. 24, 2019), https://www.ftc.gov/news-events/press-releases/2019/04/ftc-charges-surescripts-illegal-monopolization-eprescription.

[12] Casey Newton, *All Hands on Deck*, VERGE (Oct. 1, 2019), https://www.theverge.com/2019/10/1/20756701/mark-zuckerberg-facebook-leak-audio-ftc-antitrust-elizabeth-warren-tiktok-comments.

[13] Tim Wu, *Tech Dominance and the Policeman at the Elbow* (Columbia Pub. Law Research Paper No. 14- 623, 2019), https://scholarship.law.columbia.edu/faculty_scholarship/2289.

[14] Matthew Yglesias, *The Justice Department Was Absolutely Right To Go After Microsoft in the 1990s*, SLATE (Aug. 26, 2013), https://slate.com/business/2013/08/microsoft-antitrust-suit-the-vindication-of-the-justice-department.html.

[15] Mike Isaac, *How Facebook Is Changing To Deal With Scrutiny of Its Power*, N.Y. TIMES (Aug. 12, 2019), https://www.nytimes.com/2019/08/12/technology/facebook-antitrust.html.

[16] The agencies received 2,100 HSR filings in FY 2018, a slight increase from FY 2017, where we received 2,052. Apart from these two years, the last time HSR filings exceeded 2,000 was in FY 2007.

scrutiny, would otherwise move forward. Given the unprecedented level of antitrust litigation by the Commission over the past two years, it should be clear that the Commission does not hesitate to initiate litigation when necessary to prevent a merger that is likely to reduce competition in any market.

b. The risks of failed enforcement actions are well known. However, do you feel your agency has appropriately considered the costs of failing to even commence antitrust litigation?

Response: Yes, the FTC appropriately and carefully considers all litigation decisions. In general, when considering whether to commence litigation in a competition matter, I consider the following criteria:

1. Does the conduct pose a substantial threat to consumers?

2. Does the conduct involve a significant economic sector of the economy?

3. Does the FTC have experience that will allow it to make an impact quickly and efficiently?

4. Does the conduct present a legal issue that would benefit from further study, and potentially have a significant effect on antitrust jurisprudence?

5. Does the matter involve unilateral conduct by a dominant firm in industries with substantial network effects where such conduct may impede entry or fringe expansion?

6. What remedies might be available, and likely could be obtained, by pursuing litigation versus obtaining a settlement?

7. Today the D.C. Circuit upheld the vast majority of the Federal Communications Commission's (FCC) 2017 decision to reverse the 2015 Open Internet Order.[17]

FCC Commissioner Brendan Carr has said that the 2017 decision "return[ed] the FTC to its role as a steady cop on the beat an empower it to take enforcement action against any ISP that engages in unfair and deceptive practices" and that "federal antitrust laws will apply" if an ISP engaged in anticompetitive practices.[18]

However, in March of this year you stated the exact opposite: "The FTC is, principally,

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[17] *Mozilla Corp. v. FCC*, No. 18-1051 (D.C. Cir. Oct. 1, 2019), https://www.cadc.uscourts.gov/internet/opinions.nsf/FA43C305E2B9A35485258486004F6D0F/$file/18-1051-1808766.pdf.

[18] Brendan Carr, *No, The FCC Is Not Killing the Internet*, WASH. POST (Nov. 30, 2017), https://www.washingtonpost.com/opinions/no-the-fcc-is-not-killing-the-internet/2017/11/30/9205ac88-d457-11e7-a986-d0a9770d9a3e_story.html.

a law enforcement agency. It is not a sector regulator like the FCC."[19] You then added that behavior like "blocking, throttling, or paid prioritization would not be per se antitrust violations."[20] These comments concern me, as it appears that, at least for the time being, the FTC is the federal protector of an open and free internet.

Has your thinking on the FTC's role in the open internet debate changed at all?

Response: My thinking has not changed. I welcome this opportunity to clarify my views.

As I stated in March, Congress has charged the FTC with investigating and, when warranted, bringing cases for violations of the FTC Act. Under Section 5 of the FTC Act, the Commission has broad authority over much of the economy to protect consumers from unfair or deceptive acts or practices and unfair methods of competition. The FTC does not, however, have jurisdiction over common carrier activities. When the FCC reclassified Broadband Internet Access Service ("BIAS") as a common carrier activity, the FTC lost any ability to protect consumers in this space. Now that the reclassification has been reversed,[21] as upheld by the D.C. Circuit's recent opinion,[22] the FTC again has authority to sue internet service providers ("ISPs") and others for alleged anticompetitive conduct or unfair or deceptive practices that may violate the laws we enforce.

With respect to *deceptive* practices, the FTC's authority under Section 5 allows it to take action against an ISP whose advertising claims mislead consumers about its actual practices. To determine whether an act or practice is deceptive, the FTC considers whether it is likely to mislead reasonable consumers and whether it is material to consumers, meaning likely to affect a consumer's purchase or use decisions. For example, pursuant to its Section 5 authority, the FTC charged prepaid mobile service provider TracFone Wireless, Inc. with deceptive advertising for promising unlimited data to consumers but not disclosing that it slowed down their service—by between 60-90%—after exceeding certain data limits.[23] The company agreed to pay $40 million in consumer redress to settle those charges.[24] Likewise, the FTC would also have the authority to take action against ISPs if they were to block applications without adequately disclosing those practices to consumers, or if they misled consumers about which applications they block or how.

Section 5 of the FTC Act also prohibits *unfair* acts or practices, which are defined as those

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[19] Joseph J. Simons, Chairman, Fed. Trade Comm'n, Remarks at the Eleventh Annual Telecom Policy Conference 2 (Mar. 26, 2019), https://www.ftc.gov/system/files/documents/public_statements/1508991/free_state_foundation_speech_march_26.pdf.

[20] *Id.* at 3.

[21] Restoring Internet Freedom, 33 FCC Rcd. 311 (2018), https://www.fcc.gov/document/fcc-releases-restoring-internet-freedom-order.

[22] *Mozilla Corp. v. FCC*, No. 18-1051, 2019 U.S. App. LEXIS 29480 (D.C. Cir. Oct. 1, 2019) (per curiam).

[23] *FTC v. TracFone Wireless, Inc.*, No. 15-cv-392 EMC (N.D. Cal. Jan. 28, 2015) (complaint), https://www.ftc.gov/system/files/documents/cases/150128tracfonecmpt.pdf. *See also Juno Online Servs., Inc.*, No. C-4016 (F.T.C. June 25, 2001), (complaint) (alleging the service provider made false and deceptive claims for its "free" and fee-based online services), https://www.ftc.gov/sites/default/files/documents/cases/2001/06/junocmp.pdf.

[24] *FTC v. TracFone Wireless, Inc.*, No. 15-cv-392 EMC (N.D. Cal. Feb 20, 2015) (consent order), https://www.ftc.gov/system/files/documents/cases/150223tracfoneorder.pdf.

that cause or are likely to cause substantial consumer injury that consumers cannot reasonably avoid and that is not outweighed by countervailing benefits to consumers or competition.[25] For example, the Commission sued AT&T Mobility LLC, alleging that the company unfairly locked consumers into long-term contracts based on promises of unlimited service and charged early termination fees if the consumers canceled their plans.[26] The FTC also alleged that AT&T Mobility deceptively promised consumers unlimited data but then reduced speeds, in some instances by nearly 90%, without telling consumers. The litigation in that case is currently stayed so that the Commission can consider a proposed settlement.

The FTC can also use its privacy and data security expertise to take action against unfair or deceptive privacy and data security practices by ISPs. For example, in one action against an ISP, the FTC alleged that the company caused substantial consumer injury when it distributed spam, child pornography, malware, and other harmful electronic content.[27] We have also investigated whether Verizon Communications unreasonably failed to secure its routers and issued a closing letter in 2014.[28] In addition, the Commission can conduct industry studies under Section 6(b) of the FTC Act, including those related to privacy and data security.[29] This year, the FTC issued orders to several ISPs to learn more about their privacy practices.[30] We will use that information to better inform our policy and enforcement work.

With respect to *unfair methods of competition*, I still believe that blocking, throttling, or paid prioritization would not necessarily constitute per se violations of Section 5. If presented with allegations of such conduct, we would need to conduct a fact-intensive analysis that would account for not only any harm to competition, but also any countervailing procompetitive justifications. In fact, many forms of "paid prioritization" (i.e., price discrimination) that takes place in our economy such as couponing, loyalty discounts, and early bird specials can be procompetitive. We will remain vigilant for conduct that might,

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[25] *See* FTC Policy Statement on Unfairness, *appended to Int'l Harvester Co.*, 104 F.T.C. 949, 1070 (1984), https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness.

[26] *FTC v. AT&T Mobility LLC*, No. 3:14-cv-04785-EMC (N.D. Cal. Oct. 28, 2014) (complaint), https://www.ftc.gov/system/files/documents/cases/141028attcmpt.pdf. The Ninth Circuit subsequently affirmed that the FTC Act's exemption for common carriers does not bar FTC from regulating such carriers' non-common-carriage activities. 883 F.3d 848 (9th Cir. 2018) (*en banc*), https://www.ftc.gov/system/files/documents/cases/att_enbanc_5-16585.pdf. *See also America Online, Inc.*, No. C-4105 (F.T.C. Jan. 28, 2004) (complaint) (alleging that service provider unfairly failed to honor customer cancellation requests and continued to charge them monthly service fees, and unfairly failed to timely pay rebates), https://www.ftc.gov/sites/default/files/documents/cases/2004/02/040203aolcscomp.pdf.

[27] *See* FTC Press Release, *FTC Shuts Down Notorious Rogue Internet Service Provider, 3FN Service Specializes in Hosting Spam-Spewing Botnets, Phishing Web sites, Child Pornography, and Other Illegal, Malicious Web Content* (Jun. 4, 2009), https://www.ftc.gov/news-events/press-releases/2009/06/ftc-shuts-down-notorious-rogue-internetservice-provider-3fn.

[28] *See* Closing Letter to Dana Rosenfeld, Counsel for Verizon Communications, Inc. (Nov. 12, 2014), https://www.ftc.gov/system/files/documents/closing_letters/verizon-communicationsinc./141112verizonclosingletter.pdf.

[29] 15 U.S.C. § 46(b).

[30] *See* FTC Press Release, *FTC Seeks to Examine the Privacy Practices of Broadband Providers* (Mar. 26, 2019), https://www.ftc.gov/news-events/press-releases/2019/03/ftc-seeks-examine-privacy-practices-broadband-providers; FTC Press Release, *FTC Revises List of Companies Subject to Broadband Privacy Study* (Aug. 29, 2019), https://www.ftc.gov/news-events/press-releases/2019/08/ftc-revises-list-companies-subject-broadband-privacy-study.

on balance, constitute unfair methods of competition under Section 5.

The Commission continues to consider how broadband activities affect consumers and competition. A recent Commission hearing examined developments in U.S. broadband markets, technology, and law.[31] The hearing included a panel focused on speed advertising claims, substantiation of such claims, and the potential for FTC consumer protection actions if such claims are unsubstantiated.

[31] *Hearings on Competition and Consumer Protection in the 21st Century, FTC Hearing #10: Competition and Consumer Protection Issues in U.S. Broadband Markets* (Mar. 20, 2019), https://www.ftc.gov/news-events/events-calendar/ftc-hearing-10-competition-consumer-protection-21st-century.

SENATOR GRASSLEY'S QUESTIONS FOR JUDICIARY ANTITRUST SUBCOMMITTEE HEARING, "OVERSIGHT OF THE ENFORCEMENT OF THE ANTITRUST LAWS," SEPTEMBER 17, 2019

TO CHAIRMAN SIMONS

1. I'm increasingly concerned by reports of major players in the pharmaceutical supply chain engaging in practices that seem to prevent competition. For example, some manufacturers have used so-called rebate walls or rebate traps to bundle together rebates and block a competitor's access to a PBM's formulary. This could have the effect of keeping drug prices high, even though competitors are trying to enter the market with lower cost alternatives.

- **Are you familiar with rebate walls or rebate traps? Has the FTC looked at these practices? Does the FTC have any concerns about potential anticompetitive impacts of these practices?**

Response: Yes, I share your concerns about the rebating practices of pharmaceutical manufacturers where they are part of exclusionary scheme to gain or maintain a monopoly. In general, the FTC has authority to challenge unilateral conduct by a firm that impedes rivals from competing on the merits and that enables the firm to attain or maintain a monopoly position. Pricing practices such as volume-based rebates may be part of an illegal exclusionary scheme that helps a firm attain or maintain a monopoly in violation of antitrust law. For instance, the Commission ruled that McWane, Inc. illegally maintained its monopoly by adopting a "Full Support Program" that denied unpaid rebates to customers who purchased products from its competitors.[32] Recently, the Commission filed an action in federal court alleging that healthcare technology company Surescripts, Inc. structured its contracts to lock customers into exclusive arrangements, providing loyalty discounts that would make it unattractive for buyers to shift their business away to Surescripts' rivals.[33] The FTC's complaint alleges that through a web of exclusive arrangements and other exclusionary conduct, Surescripts was able to protect its dominant position in two e-prescription markets, to the detriment of U.S. consumers.

I look forward to working with those in Congress interested in deterring anticompetitive conduct by pharmaceutical companies. Over the past year, Commission staff has provided technical assistance on a number of legislative proposals directed at these concerns. In addition, I support legislation that would more effectively deter anticompetitive behavior that delays entry of new treatments, including high-cost biologic products.

2. In November 2017, the FTC held a roundtable titled "Understanding Competition in Prescription Drug Markets: Entry and Supply Chain Dynamics." Attendees were invited to

[32] McWane, Inc. v. FTC, 783 F.3d 814, 821 (11th Cir. 2015).
[33] FTC Press Release, FTC Charges Surescripts with Illegal Monopolization of E-Prescription Markets (Apr. 24, 2019), https://www.ftc.gov/news-events/press-releases/2019/04/ftc-charges-surescripts-illegal-monopolization-eprescription.

comment on the roles and practices of intermediaries, like PBMs and GPOs. I sent a letter to the FTC about this last year, but the FTC's response didn't completely answer my questions.

- **What specifically did the FTC learn from this roundtable? Did it help the FTC identify any specific concerns about anticompetitive behavior by PBMs, GPOs, or other intermediaries?**
- **What is the FTC doing, or intending to do, to directly address these issues?**

Response: The November 2017 roundtable, "Understanding Competition in Prescription Drug Markets," was one example of the FTC's continual efforts to study competitive dynamics in healthcare markets. In my September 27, 2018 letter, I mentioned that the FTC relied on the November 2017 roundtable when drafting the Commission's comments on the Department of Health and Human Services's Blueprint to Lower Drug Prices and Reduce Out-of-Pocket Costs.[34] Although the 2017 roundtable has not contributed directly to other public output, the FTC has integrated roundtable participant comments into our non-public enforcement efforts, and we continue to evaluate the unique structures of drug distribution markets.

Promoting competition in healthcare markets remains a top FTC priority. Where appropriate, the FTC will use its enforcement authority to address harmful behavior by intermediaries and other market actors. The FTC's pending action against Surescripts, Inc. is an example. Surescripts is a health information technology company with monopolies in two markets: electronic prescription routing and eligibility. Routing is the transmission of prescription and prescription-related information from a prescriber (via the prescriber's electronic health record system) to a pharmacy. Eligibility is the transmission of a patient's formulary and benefit information from a payer (usually the patient's PBM) to a prescriber's system. Through a web of exclusive arrangements and other exclusionary conduct, the complaint alleges, Surescripts was able to protect its dominant position in these markets and keep other health information technology companies from threatening its monopolies. In addition, intermediary behavior is a suitable focus for continued Commission policy studies and advocacy, and the FTC will continue to file advocacy comments where it can share its collective expertise in healthcare markets. Finally, the FTC will continue to work with the Food and Drug Administration and others—as it did for the November 2017 roundtable—to promote effective competition in U.S. pharmaceutical markets.

3. Many discussions in Congress about protecting consumers from skyrocketing healthcare costs focus on the manufacturers, intermediaries, insurers, and care providers. It's also important to recognize that patients' own electronic healthcare information and prescription histories are a key part of this complex supply chain. As is often the case, information is power—and an entity's control of information can ultimately impact the prices that consumers pay.

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[34] *See* STATEMENT OF THE FEDERAL TRADE COMMISSION TO THE DEPARTMENT OF HEALTH AND HUMAN SERVICES REGARDING THE HHS BLUEPRINT TO LOWER DRUG PRICES AND REDUCE OUT-OF-POCKET COSTS, https://www.ftc.gov/system/files/documents/advocacy_documents/statement-federal-trade-commission-department-health-human-services-regarding-hhs-blueprint-lower/v180008_commission_comment_to_hhs_re_blueprint_for_lower_drug_prices_and_costs.pdf.

- **Has the FTC observed any anticompetitive activities in the realm of patient information and data? Do PBMs or other intermediaries play a role in these activities? If so, please explain.**
- **Does the FTC have the tools it needs to investigate and protect consumers against abuses in the patient health and prescription information marketplace?**

Response: I agree that the expansion of patient-specific healthcare information, including electronic health records and prescription histories, has implications for how some healthcare firms compete. In certain circumstances, firms with access to this type of data may be able to exclude rivals that do not have access to similar data in order to attain or maintain a monopoly in violation of antitrust law. For instance, as discussed in the response above, the FTC's pending action against Surescripts, Inc. alleges that Surescripts employed a web of exclusive arrangements and other exclusionary conduct to protect its dominant position in the electronic prescription routing and eligibility markets and to keep other health information technology companies from threatening its monopolies.

I believe the Commission has sufficient tools to continue to vigorously protect consumers and their personal health information, relying on both its competition and consumer protection authority.

4. It's no secret that the healthcare supply chain is growing increasingly concentrated. Last year, for example, mergers were announced between Cigna Corp. and Express Scripts, and CVS Health and Aetna. According to the Kaiser Family Foundation, these two combined entities cover 71% of all Medicare Part D enrollees and 86% of all stand-alone drug plan enrollees. We're also witnessing mergers of pharmaceutical manufacturers, like the recently proposed AbbVie and Allergan deal, and the Bristol-Myers Squibb and Celgene deal. Some of these actors have engaged in anticompetitive practices before, such as Allergan's sham transfer of a patent and Celgene's abuse of the REMS process.

- **Are Americans right to be concerned about increased concentration in the healthcare marketplace?**
- **What can you say to the American people to reassure us that your agency is conducting *robust* analyses of these and other mergers in the healthcare marketplace?**

Response: I agree that there is evidence that many healthcare markets have become more concentrated over the last decade. We also know that healthcare providers, including hospitals, with significant market power are able to charge higher prices.[35] That is why it is critically important to preserve existing competition through rigorous antitrust enforcement, and to look for ways to encourage new providers to enter concentrated markets by reducing barriers to entry, such as unnecessarily burdensome state licensing requirements.

[35] *See, e.g.*, Martin Gaynor, Kate Ho, and Robert J. Town (2015), "The Industrial Organization of Health-Care Markets," J. OF ECON. LIT. 53 (2), 235-84; Paul B. Ginsburg, "Wide variation in hospital and physician payment rates evidence of provider market Power," Center for Studying Health System Change, Research Brief No. 16 (Nov. 2010), http://www.hschange.org/CONTENT/1162/; Martin Gaynor, Competition policy in healthcare markets: navigating the enforcement and policy maze, 33 HEALTH AFF. 1088 (June 2014).

I assure you that promoting vigorous competition in healthcare markets is one of the Commission's top priorities. Our testimony details the breadth and impact of our enforcement actions to prevent anticompetitive mergers and conduct by healthcare firms. I cannot comment in detail on the Cigna/ESI or CVS/Aetna mergers as the Department of Justice reviewed those transactions, nor can I comment on ongoing investigations. But I can assure you that every year, the FTC challenges a number of mergers to maintain competition in healthcare markets. We continue to bring difficult conduct cases, devoting significant resources to combat anticompetitive conduct by pharmaceutical companies such as reverse payment agreements and product hopping. As a result, we have seen a significant reduction in the number of patent settlements with harmful anticompetitive reverse payments.[36] We also advocate for policies that reduce barriers to entry for healthcare providers so as to infuse more markets with new sources of competition. We study the effects of state regulatory requirements such as certificates of public advantage ("COPAs"). There is always more to do, and the FTC will continue to use enforcement, advocacy, and research to prevent anticompetitive mergers and conduct and to improve outcomes in healthcare markets.

[36] *See* Fed. Trade Comm'n, Agreements Filed With the Federal Trade Commission Under the Medicare Prescription Drug, Improvement, and Modernization Act of 2003: Overview of Agreements Filed In Fiscal Year 2016: A Report By the Bureau of Competition, https://www.ftc.gov/reports/agreements-filed-federal-trade-commission-under-medicare-prescription-drug-improvement-fy2016.

Questions for the Record

"Oversight of the Enforcement of the Antitrust Laws"
Senator Mike Lee
September 17, 2019

1. **Chairman Simons testified that the FTC could benefit from additional resources to enforce the antitrust laws. As I noted in my opening statement, "there's no analytical basis for splitting a monopolization investigation between the FTC and DOJ. Doing so simply looks like both agencies want to have the same slice of the same pie at the same time." AAG Delrahim, however, testified that it would be possible to divide a monopolization investigation of the same company if each agency investigated different conduct.**

    a. **Explain how taxpayers and consumers will benefit by the FTC and Antitrust Division simultaneously investigating different conduct by the same company under a monopolization or attempted monopolization theory of harm.**

    b. **Explain how the FTC and Antitrust Division can conduct such a simultaneous investigation without duplicating efforts, wasting government resources, and burdening the company under investigation or third parties.**

    c. **Explain any additional litigation risks the FTC may face if the FTC and Antitrust Division simultaneously attempt to challenge in court different conduct by the same company under a monopolization or attempted monopolization theory of harm.**

    d. **Describe any potential opportunity costs involved in splitting what is in essence a single monopolization investigation between the FTC and Antitrust Division.**

    Response: I agree that having two federal enforcement agencies investigate the same conduct is bad policy and bad practice. In addition to wasting scarce taxpayer resources that could be put to use on other enforcement matters, it would be confusing and burdensome for companies—targets and third parties—trying to navigate each agency's investigative demands. It is undesirable to have separate FTC and DOJ litigation efforts targeting the same or related conduct. The agencies developed the clearance process specifically to avoid any duplication of effort in civil antitrust enforcement. For many years and through several changes in leadership, that process has worked well. I would like to see us return to the normal course.

2. **Having two antitrust agencies responsible for civil antitrust enforcement requires a process to determine which agency will investigate which matter to avoid duplicative efforts. Both Chairman Simons and AAG Delrahim acknowledged at the hearing that the clearance process, at least in some instances, is not currently working well.**

a. Besides moving all civil antitrust enforcement to a single agency, what can be done in the short term to improve the clearance process?

Response: For the vast majority of matters, and certainly for our important merger review work, the clearance process continues to work well. Even beyond our enforcement work, we collaborate with our colleagues at the Department of Justice every day on many projects, and are united in our effort to enforce the antitrust laws for the benefit of consumers and our economy. As I have said, this past year the clearance process did not work well for a small number of potential conduct investigations involving technology companies. While each agency has developed expertise in different technology markets, technology is now a pervasive factor in many sectors of the economy, so there needs to be a mechanism for making a decision. I am committed to getting the clearance process back on track for all matters, and I will continue to work to minimize the impact of any disagreements on effective law enforcement at the federal level.

3. **The Supreme Court hasn't issued a decision on a merger challenge since 1974. It's been more than 50 years since the Court specifically addressed whether efficiencies resulting from a merger can be considered when judging its legality. In the meantime, antitrust analysis has evolved considerably, and now embraces an approach that is grounded in economics. In analyzing non-merger antitrust issues, the Supreme Court has followed this modern economic approach. However, while the trend among lower courts has been to entertain merging parties' efficiency claims, no court has ever held that an otherwise illegal merger could proceed given the likely large efficiencies.**

Twelve months ago, when asked at the October 2018 oversight hearing whether an efficiencies defense should be codified, Chairman Simons stated that he would want to think more about that question. In response to a follow-up question for the record on that topic, Chairman Simons responded that he was "still considering whether a codified efficiencies defense would improve the predictability of merger outcomes."

a. **Should an efficiencies defense be codified given the apparent confusion in the courts about whether such a defense may be unlawful under Supreme Court precedent?**

Response: As a matter of practice, our merger reviews always consider efficiencies to determine whether the likely overall effect of a proposed merger would be to substantially reduce competition in any relevant market. Following Section 10 of the Horizontal Merger Guidelines, we credit cognizable merger-specific efficiencies that can be verified. When those efficiencies are of sufficient magnitude that the merger is not likely to be anticompetitive in any market, the Commission is unlikely to challenge that merger, either in a court action or through a Commission order that requires divestitures. When the Commission does challenge a merger and the defendants proffer efficiencies as a justification for the merger, courts assess those arguments, typically relying on the Horizontal Merger Guidelines. However, as courts have recognized, the greater the potential for harm from a merger, the larger the efficiencies need to be in order to overcome the predicted anticompetitive effects.

Written Questions from Senator Dick Durbin
Hearing on "Oversight of the Enforcement of the Antitrust Laws"
September 24, 2019

For questions with subparts, please answer each subpart.

Questions for Chairman Simons

1. **Recently, the FTC announced a settlement with predatory for-profit college operator, Career Education Corporation (CEC). According to the FTC's findings, CEC used illegal and deceptive telemarketing scheme to lure consumers; used lead generators that posed as U.S. military recruiters or job-finding services to gain access to student contact and personal information; has used the false impression that the military, independent education advisors, or employers recommend or endorse its schools to lure students; and had CEC telemarketers use high-pressure sales tactics to pressure students into enrolling.**

   According to reports, the settlement does not include any admission of wrongdoing by CEC, and the company has agreed to pay a mere $30 million—a relatively small amount compared to the billions it was taking in annually and far less than a $100 million settlement the FTC reached with DeVry a few years ago.

   a. **Can you explain how the FTC arrived at $30 million in this case?**

   Response: The $30 million consumer redress figure estimates consumer injury resulting from the specific illegal practices alleged in the complaint. One of the Commission's priorities is to return money to harmed consumers whenever possible.

   In addition to returning money to consumers, this settlement also requires a complete overhaul of CEC's lead generation practices. Notably, CEC must review its lead generators' marketing materials in advance and is prohibited from purchasing any leads generated using deception or other unlawful tactics. This action demonstrates that companies like CEC cannot turn a blind eye to their lead generators' practices.

   b. **The FTC's probe reportedly dates back to 2015. From 2010 to 2015, now-Department of Education Principal Deputy Undersecretary Diane Auer Jones worked in high-level positions at CEC. This is troubling considering what we know was going on at the company during this time. A June 2019 *New York Times* article reported that Ms. Jones claimed that she was the one who reported improprieties. Is there any evidence that you're aware of that Ms. Jones reported any potential misconduct by CEC to the FTC?**

   Response: We are unable to comment on the sources of any particular FTC investigation, including the investigation of CEC, as this information is non-public. As a general matter, Commission investigations may rely on a wide variety of sources, such as consumer complaints, referrals from other agencies or Congress, news reports, and information uncovered from prior investigations and enforcement actions.

2. **I have often spoken about my concerns that internet companies are increasingly using programs that are tailored to and marketed for pre-teens, such as Facebook Messenger and YouTube Kids. I have previously asked you to commit to working with me on my bill, the *Clean Slate for Kids Online Act*, that would ensure Americans have a right to request the deletion of online information collected from or about them before they were 13.**

   But beyond social networking and online games, countless students across the country are now using Education Technology (EdTech) products and applications, which use machine learning and predictive analytics to individualize student learning based on data that captures student progress.

   While these programs can be helpful in facilitating collaboration and allowing teachers to track student progress, they also put our nation's students, teachers, and parents at risk of having substantial amounts of personal data used and collected without their permission or understanding.

   I'm not the only one who is concerned about making sure that students' personal data is being secured and protected. In 2018, the Federal Bureau of Investigation issued a Public Service Announcement warning that malicious use of data collected by EdTech could result in "social engineering, bullying, tracking, identity theft, or other means for targeting children".

   And despite improvements over previous years, Common Sense Media's 2019 State of EdTech Privacy Report found "a widespread lack of transparency and inconsistent privacy and security practices for products intended for children and students".

   In August, I sent letters to more than 50 EdTech companies and data brokers asking for more information about their student data collection practices. Based on the responses I have received so far, it is clear that parents and students deserve to have more direct control over their data, including stronger transparency around the personal data being used and retained.

   a. **What is the FTC doing to ensure that children's privacy is protected for students using EdTech, and how is the FTC working to ensure that the Children's Online Privacy Protection Act of 1998 (COPPA) is fully enforced with regards to EdTech companies?**

      Response: The FTC shares your concerns regarding the importance of safeguarding students' privacy when using EdTech products. As the use of these products in the classroom has exploded over the last several years, the Commission has engaged in extensive outreach to vendors, schools, parents, and consumer advocates on this important issue.

In 2015, we updated our COPPA FAQs to emphasize that when an EdTech vendor relies on the consent of the school, it may only use the personal information collected for an educational purpose, and for no other commercial purpose.[37] In 2017, the FTC held a joint workshop with the Department of Education, *Student Privacy and Ed Tech*, to explore how COPPA works in the EdTech context, and whether further guidance is needed.[38] And recently, as part of our ongoing COPPA Rule review, we have requested comment on whether the Rule should be amended to specifically address school consent for the use of EdTech, including any potential use restrictions.[39]

Commission staff regularly engage in outreach on the COPPA Rule and its application to EdTech. For example, staff has presented to EdTech vendors and schools at the Future of Privacy Forum's Student Privacy Bootcamp and at the Consortium of School Networking (CoSN), highlighting the importance that EdTech vendors comply with the COPPA Rule and Section 5 of the FTC Act.

b. **Without revealing any identifying information, can you confirm whether the FTC currently has any open investigations into EdTech data collection practices?**

Response: While the Commission's rules prevent me from revealing whether the FTC has opened an investigation into any specific matter, I can say that we do have ongoing investigations into EdTech companies.

c. **I believe that any federal data privacy legislation must prioritize stronger protection for children and students. What more can the federal government do to ensure that EdTech companies are providing robust privacy protections for students and their parents?**

Response: As discussed in detail above, the FTC is committed to ensuring that EdTech companies provide robust privacy protections to students. Although the Commission is actively considering whether amendments to the COPPA Rule can improve privacy protections for students and parents, any such changes would only apply to students under age 13. As you know, the Commission has urged Congress to enact federal privacy legislation. This legislation would help ensure privacy protections for students and parents not covered by the COPPA Rule.

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[37] *See* FTC, *Complying with COPPA: Frequently Asked Questions, A Guide for Business and Parents and Small Entity Compliance Guide*, https://www.ftc.gov/tips-advice/business-center/guidance/complying-coppa-frequently-asked-questions.

[38] *See* FTC Press Release, *Student Privacy and Ed Tech* (Dec. 1, 2017), https://www.ftc.gov/news-events/events-calendar/2017/12/student-privacy-ed-tech.

[39] *See* Federal Register, *Request for Public Comment on the Federal Trade Commission's Implementation of the Children's Online Privacy Protection Rule*, 84 FR 35842 (July 25, 2019), https://www.federalregister.gov/documents/2019/07/25/2019-15754/request-for-public-comment-on-the-federal-trade-commissions-implementation-of-the-childrens-online.

The Honorable Amy Klobuchar (D-MN)

Questions for Joseph Simons, Federal Trade Commission

1. **Consumers have been charged excessive fees in the online ticketing market for years. I recently sent a letter to the Antitrust Division with Senator Blumenthal raising competition concerns in connection with the Ticketmaster/Live Nation merger consent decree. As a result of that merger, Live Nation Entertainment has established market dominance in primary ticketing, event promotion, and venue operation.**

   In your view, to what extent does the dominance of Live Nation Entertainment in ticketing and related markets contribute to the public's consumer protection concerns regarding ticket availability, pricing and transaction disclosures?

   Response: The Commission takes a strong interest in protecting consumer confidence in the online event tickets marketplace and ensuring that consumers receive clear, complete, and truthful information about what they are buying. A key purpose of the FTC's online tickets workshop, held this past June, was to address ways to increase transparency and improve the consumer experience in the tickets marketplace.

   Given the Department of Justice's 2010 consent order settling its investigation of the merger of Ticketmaster and Live Nation, and DOJ's continuing enforcement authority over that order, I defer to that agency on the competition issues raised by your question.

2. **Reports have highlighted how certain technology companies have been using humans to review what consumers say to their voice-activated smart speakers—without the knowledge of users, who did not expect that other people would be listening to or seeing transcripts of what they said to devices like Alexa, Google Home, or Siri.**

   What can the FTC do to ensure that consumers are aware of what will be done to the audio information that they provide to use these services? And how can consumers protect their privacy going forward?

   I share your concern about the privacy of information consumers provide through their voice-activated smart speakers. Consumers who are concerned about the privacy of their home assistants and other devices generally can take advantage of tools available through their accounts, such as deleting their recording history or muting their devices. We are drafting consumer education materials on this important topic, which we will make public soon.

United States Senate Judiciary
Subcommittee on Antitrust, Competition Policy, and Consumer Rights

"Competition in Digital Technology Markets: Examining Acquisitions of Nascent or Potential Competitors by Digital Platforms."

Questions for the Record for Bruce Hoffman
Submitted by Senator Richard Blumenthal
October 8, 2019

1. **The *Wall Street Journal* has reported that the FTC is examining Facebook's many acquisitions as part of its antitrust investigation into the social media giant, seeking to determine if they were part of a campaign to snap up potential rivals to head off competitive threats.**

    a. **Has the FTC brought a Section 2 case against a company in the past for engaging in a pattern of serial acquisitions designed to thwart potential competition?**
    b. **If so, what were those cases and was the FTC successful?**

    Response: The Commission has historically relied on Section 7 of the Clayton Act to mitigate the effects of a series of acquisitions that resulted in a firm having a virtual monopoly. For example, the Commission charged Graco, Inc. with buying its two closest competitors in the North American market for fast set equipment ("FSE") in unreportable transactions that did not receive premerger review.[1] After the acquisitions, Graco raised prices for its FSE products, reduced product options, reduced innovation, and raised barriers to entry for firms seeking to compete with Graco, by taking steps to ensure that its distributors would distribute only its products. The Commission's order required Graco to stop implementing any arrangement with distributors that would preclude them from dealing with Graco's FSE competitors. The order also prohibits Graco from discriminating, coercing, threatening, or in any other way pressuring its distributors not to carry its competitors' products.

    As our testimony details, the Commission has relied on Section 2 theories of harm to undo acquisitions of nascent competitors that allowed a firm with market power to maintain its monopoly. In Questcor,[2] for example, not only did the Commission require that the acquired assets be sold to another firm that could develop a competing drug, but Questcor also paid $100 million in monetary equitable relief.

    We have been analyzing the possible use of Section 2 to address patterns of serial acquisitions designed to thwart potential competition. We believe the legal framework supplied by Section 2 could apply to such conduct and provide a useful vehicle for challenging it in appropriate circumstances. Overall, I am confident in the Commission's ability to use its full range of antitrust authority to combat acquisitions that create durable market power.

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[1] *In re Graco, Inc.*, Dkt. C-4399 (Apr. 18, 2013).
[2] This case is often cited as "Mallinckrodt," because Questcor—the firm that engaged in the anticompetitive acquisition—was subsequently acquired by Mallinckrodt.

2. **In a number of mergers over the past decade, antitrust authorities have approved tech mergers based on mistaken industry forecasts. I asked you about some of these during the hearing – specifically, the Google-AdMob merger in 2010 and Google-Double Click in 2007, for which the FTC issued a public closing statement, and the Facebook-Instagram transaction, for which the FTC did not but the UK Office of Fair Trading did.**

    a. **Where the FTC's assumptions and predictions in the context of a merger approval are incorrect, what steps does the agency take to correct its mistakes?**

        i. **Does the FTC continue reviewing consummated mergers where it declined to take any enforcement action to determine the accuracy of its assumptions and predictions?**

            1. **If not, why not? Please be specific.**

            2. **If so, does the FTC consider unwinding a merger after the fact where it finds that its assumptions about competition did not pan out? Please provide an example of when the agency did that.**

Response: The Commission can and does unwind consummated acquisitions that harm competition, even if we had an opportunity to prevent the transaction as part of our premerger review. For instance, that precise scenario occurred when the Commission succeeded in requiring Chicago Bridge & Iron to reestablish a stand-alone competitor after the Commission proved that the company's acquisition of its closest competitor violated Section 7 of the Clayton Act.[3] Where appropriate to restore the competitive status quo, the Commission may require the divestitures of assets outside the market to ensure that the new operator can compete on par with other market participants.[4]

While it is not possible or practical for the FTC to constantly monitor every consummated merger, we rely on various sources of information to ensure we learn about the most pernicious ones. When we hear from customers or other sources about post-merger price increases, quality or output reductions, or other anticompetitive effects, we have the ability to conduct a targeted inquiry that may lead to a law enforcement action. Often, this happens for a non-reportable merger, which may lead us to initiate an enforcement action to unwind the merger. With respect to consummated deals, the Commission can then issue an administrative complaint and proceed to an administrative trial, such as the pending action involving the merger of Otto Bock and Freedom Innovations.[5]

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[3] *Chicago Bridge & Iron v. FTC*, 534 F.3d 410 (2008).

[4] See FTC *Competition Matters* blog, "Taking a hard look at the asset package," (Nov. 9, 2016), https://www.ftc.gov/news-events/blogs/competition-matters/2016/11/taking-hard-look-asset-package.

[5] In re Otto Bock HealthCare North America, Inc., Dkt. 9378, https://www.ftc.gov/enforcement/cases-proceedings/171-0231/otto-bock-healthcarefreedom-innovations.

ii. Does the FTC impose behavioral requirements on companies whose mergers you approve where your assumptions are incorrect?

Response: The Commission prefers structural remedies for illegal mergers, even consummated mergers. Divestitures to a buyer capable of maintaining or restoring competition prevent mergers from causing competitive harm, provide the right incentives for firms in the market to continue to compete, and do not require the same level of monitoring by the Commission. Nevertheless, in appropriate circumstances, we would consider non-structural remedies for harmful consummated mergers.

b. **When the FTC reviewed and eventually approved the Facebook-Instagram merger, how did the agency define the market for each company? Please be specific.**

Response: I was not working at the Commission when this merger was reviewed, and therefore do not have first-hand knowledge of how that decision was reached. I can assure you that the Bureau's newly formed Technology Enforcement Division is taking a fresh look at the markets in which these firms compete. We have not yet reached any conclusions regarding the definition or assessment of any relevant markets.

c. When the FTC reviewed and eventually approved the Amazon-Whole Foods merger, how did the agency define the market for each company? Please be specific.

Response: The Commission and its staff looked at a very broad range of markets that might have been affected by the proposed merger. For instance, we looked at markets for online groceries, as well as possible effects in delivered groceries. We also considered the effect of Amazon's plans to open brick-and-mortar outlets. In each of these potential relevant markets, we found that consumers would have many options other than Amazon/Whole Foods. Our investigation did not yield evidence that the proposed merger—which combined two firms with, at most, a miniscule overlap, numerous larger competitors, virtually no competitive interaction between them pre-merger, and almost none in the then-foreseeable future—would have any harmful effect on competition. We also considered other theories, such as whether the merger would provide Amazon with access to data that could strengthen its position; however, such a result would be procompetitive in most circumstances, and no evidence indicated any likelihood of countervailing anticompetitive effects. Additionally, we considered other possible effects, such as implications of the transaction for various trading partners of Amazon and Whole Foods; while there was some possibility of commercial disruptions of the kind that occur with any merger, there was no evidence that competition would be harmed. In the end, we determined that there was no evidence to support any valid theory of harm, in any market, that could be the basis of an enforcement action.

While we have not conducted a formal retrospective study of this merger, anecdotal evidence suggests that our assessment was correct. There appears to be some evidence that the merger has generated procompetitive effects, such as lower prices on certain grocery items at Whole Foods, plus strong competitive responses by rival grocery stores (e.g., accelerated efforts to provide online ordering, delivery services, and so forth). There is no indication that market prices have risen, quality or output have fallen, or innovation declined. Even Instacart, which was identified by some commentators as likely to be harmed by the merger due to its prior relationship with Whole Foods, appears to have successfully entered into arrangements with other grocery stores to compete and to have grown rapidly since the merger. We are not aware of any evidence that data Amazon may have obtained from Whole Foods' relatively small number of customers (compared to other grocery stores) has created any harmful effects.

d. It has been publicized that the FTC is reviewing consummated mergers in the technology industry. As part of this review, are you considering whether the agency was making incorrect predictions that systematically led to less aggressive enforcement?

i. If not, will you commit to analyzing this issue?

Response: I cannot comment on any specific investigation, but I can assure you that we have not prejudged any issues and are committed to taking a fresh look at these markets.

9. For the following transactions, provide a written explanation for (a) why the FTC did not bring an enforcement action, (b) any judgements or predictions the agency made about how the market would develop post-merger, and (c) whether those predictions have been accurate. I am not asking for information that is privileged, but merely the type of information the agency has made publicly available in its closing statements in other transactions, such as Google-Doubleclick and Google-Admob.

a. Google acquisition of YouTube – October 9, 2006
b. Amazon acquisition of Zappos – July 22, 2009
c. Amazon acquisition of Quidsi – November 8, 2010
d. Google acquisition of Waze – June 11, 2013
e. Facebook acquisition of WhatsApp - February 19, 2014
f. Facebook acquisition of Instagram – August 22, 2012

Response: I was not at the Commission during the review of any of these mergers. The Commission, in its discretion, chose not to explain what (if anything) it had concluded about the likely effects of these mergers. I am unable to provide further details regarding these non-public matters.

10. As you know, the FTC can pursue a range of remedies if it finds antitrust issues in a particular industry. In the context of the large technology companies, one popular remedy that has been floating is seeking a spinoff (breakup) of certain acquisitions; another is to restrict the company's future conduct. Pursuing breakup in particular is likely to lead to litigation. The FTC's and DOJ's track record in litigating against tech companies is abysmal. The *only* technology merger challenged in federal court between the years 2001-2017 was Google-ITA, a case brought by DOJ. The FTC challenged none in that same time period. Antitrust regulators have failed to challenge several key mergers that consolidated the tech industry and killed off competition, including Google-Admob, Google-Doubleclick, Facebook-Instagram, and Facebook-WhatsApp.

Response: I do not agree that the Commission has not challenged acquisitions involving "technology" companies. In the first place, as both Professor Moss and I pointed out in our testimony, there is no such thing as a category of "tech companies" that includes only Google, Amazon, Apple, and Facebook and none of the other tens of thousands of technology companies—including software companies, digital platforms, chip, switch, computer, mobile phone, and other hardware manufacturers, and many others. Even the companies identified in the question are not "tech companies" in the same sense; for example, Google is primarily active in search, and is at most a weak competitor or potential competitor in social networking, while the opposite is true for Facebook. Our testimony catalogues a number of mergers that the Commission blocked involving important technology markets, such as CDK/AutoMate. In fact, many of our cases involve firms that compete with patented technology, where innovation is often a main driver of competition. Similarly, the question ignores our substantial history of bringing cases against high technology companies for alleged anticompetitive conduct, such as the Commission's cases against Intel, Rambus, Unocal, Qualcomm, and others.

Second, without commenting on any pending investigations, while many in the media have claimed that the mergers specifically identified in this question "killed off competition," neither a court decision nor rigorous analysis have yet determined that to be true for any of these mergers. In fact, some recent analyses that we are aware of were unable to conclude whether Facebook's acquisition of Instagram actually reduced competition because of a lack of sufficient evidence to determine whether, absent the transaction, Instagram would have developed into a substantial competitor to Facebook, or instead would have continued as a small and relatively inconsequential player in the industry. Determining whether consummated mergers harmed competition is a fact-intensive, complex exercise that requires a rigorous review of evidence and economics and identifies the differences between merger effects and intervening changes in the industry that did not result from the merger. The Commission has a demonstrated history of successfully undertaking that challenging exercise, and—as we did in the case of hospital mergers—taking action where the evidence supports doing so.

a. **If you find anticompetitive conduct in your investigation of the big tech companies, are you prepared to engage in litigation and take these companies to court?**

Response: Yes, and we have several cases pending in federal court against a number of significant technology companies such as Qualcomm, Inc. and Surescripts, Inc., as well as others referenced in the prepared testimony. The Commission has a long track record of consistent, effective, and determined litigation. We have not hesitated to litigate all the way to the U.S. Supreme Court, and to bring multiple cases despite initial setbacks, where the evidence and law indicated to us that we were on the right path.

For example, we litigated multiple cases over many years, eventually to the Supreme Court, to ensure that anticompetitive reverse payment patent settlements would receive rigorous antitrust scrutiny.[6] The Commission recently obtained the first litigated ruling involving sham litigation as a method of monopolization.[7] We have challenged opportunistic behavior in the context of industry standard setting organizations.[8] Despite many difficult outcomes, we patiently and repeatedly challenged improper attempts to shield anticompetitive conduct under the state action doctrine, ultimately triumphing in three separate Supreme Court decisions.[9]

The FTC is committed to developing the law through fact-based, economically sound litigation for the benefit of consumers. In the roughly twenty years since the *Microsoft* decision, the FTC has brought well over 100 conduct challenges, including 26 monopolization (or unilateral conduct) cases—with the latter number comprising the overwhelming majority of federal monopolization cases. As I noted in my testimony, in the two years I've been back at the Commission, we completed nine trials, which of course does not account for all the cases where respondents settled with us or abandoned transactions rather than litigate against us. We have been working at or near the limits of our resources in terms of both litigation and other enforcement activity. This is an extraordinary record of litigation activity, which I think more than speaks for itself.

b. **Have you ever decided, or been told by Commissioners, to avoid remedies that would require litigation?**

Response: While I cannot discuss any particular non-public deliberation, the Commission considers many factors in determining when and how to bring an enforcement action in the public interest. In general, the Commission will weigh alternative outcomes that would be achievable with and without resorting to litigation. As my answer to the previous question demonstrates, the Commission certainly does not shy away from litigation.

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[6] *Schering-Plough Corp. v. FTC*, 402 F.3d 1056 (11th Cir. 2005), *cert. denied*, 548 U.S. 919 (2006); *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013).
[7] *FTC v. Abbvie, Inc.*, 329 F.Supp.3d 98 (E.D. Pa. 2018).
[8] *Rambus, Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008); *Union Oil Co. of California*, Dkt. 9305 (Jul. 27, 2005).
[9] *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992); *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216 (2013); *North Carolina State Bd. of Dental Examiners v. FTC*, 135 S.Ct. 1101 (2015).

11. In July, the FTC settled with Facebook for $5 billion over its violations of a data privacy consent decree negotiated in 2011. Although this is the largest fine the FTC has ever issued for a privacy case, it was a slap on the wrist, and resulted in the company's stock to soar the next day. This fine – without any substantial structural reforms – suggests that antitrust authorities may not have the will or the tools necessary to robustly enforce the federal antitrust laws against the big tech giants.

a. What additional tools does the FTC need to deter and address such conduct in the future?

i. Does the FTC need the ability to issue fines for first instance violations?

Response: The Commission's settlement with Facebook, which related to its violations of a prior Commission consumer protection order, contained significant conduct relief in addition to the record-setting civil penalty. Our Chairman has discussed the Facebook consumer protection settlement in more detail in his testimony, and I defer to that testimony. Notably, the recent Facebook settlement was not an antitrust matter and has no bearing on the Commission's antitrust enforcement.

Some members of the Commission support legislation to give the Commission the authority to impose civil penalties for initial violations of the FTC Act, for both consumer protection and competition matters, as an additional deterrent. Personally, I think that additional remedial authority, such as the ability to impose fines or civil penalties for antitrust violations, merits serious consideration.

ii. Are there barriers to litigation that the FTC currently experiences that can be removed through statute?

Response: The FTC's track record in antitrust litigation is stellar. However, as noted above, the lack of civil penalty authority for first-instance violations may somewhat limit our enforcement. This is because—with the exception of cases where equitable monetary relief is appropriate—violators sometimes may conclude that litigating, including prolonging the litigation for as long as possible, is the best strategy since the likely outcome of a loss is not very different than what we would accept in a consent decree. As a result, we may have to expend resources on litigating matters that should settle, diverting resources from other matters where litigation might be more necessary. Civil penalty authority might alter that calculus, enabling us to settle more cases and then have more resources available to litigate even more challenging cases.

The greatest threat to the Commission's ability to effectively enforce the FTC Act is a set of recent circuit court decisions that mistakenly reinterpret Section 13(b). Section 13(b) of the FTC Act authorizes the FTC to sue in federal court for any provision of law enforced by the FTC. But in a recent ruling in a monopolization case involving a pharmaceutical defendant, the Third Circuit overturned 40 years of precedent and dismissed our complaint, holding that the FTC may not rely on Section 13(b) unless the

violation is ongoing or impending at the time the suit is filed.[10] If widely adopted, this purported new limitation on our authority may give prospective defendants the means to avoid enforcement simply by stopping their conduct before the Commission completes its investigation. In a separate ruling in a consumer protection case, the Seventh Circuit reversed its own precedent and found that the statute allows only behavioral remedies (such as an injunction) and not monetary relief.[11] Again, if widely adopted, this new limitation would render the agency unable to obtain monetary redress for consumers who are the victims of fraud or anticompetitive behavior, or to deter harmful behavior through other equitable remedies such as disgorgement. These incorrect rulings could undermine the FTC's ability to bring cases in certain circuits, and impair the efficacy of the agency's core statute. All of our current Commissioners have testified in support of corrective legislation to reaffirm the FTC's authority to pursue federal remedies and protect consumers in all circuits. Without a legislative fix to clarify any ambiguities introduced by recent court decisions, the FTC likely will face repeated attempts to dismiss our federal court actions brought under Section 13(b).

b. Has the Bureau of Competition been provided all of the documentation from the Bureau of Consumer Protection and/or other parts of the FTC used in the Facebook privacy case?

Response: While I cannot comment on any ongoing non-public investigation, the Bureau of Competition works closely with our colleagues in the Bureau of Consumer Protection and when appropriate, seeks insight and relevant materials.

c. Does Bureau of Competition engage with the Bureau of Consumer Protection during settlement negotiations and investigations? If so, did you provide any advice, feedback or help to the Bureau of Consumer Protection with the recent Facebook or YouTube settlements?

Response: I am not able to comment on the details on any individual investigation, but I would note that the Commissioners and their advisors see all case-related materials generated by the investigative staff of the Commission during their deliberations. At the Commission level, experience with both consumer protection and competition law can be directly synthesized.

[10] *FTC v. Shire ViroPharma, Inc.*, 917 F.3d 147 (3d Cir. 2019).
[11] *FTC v. Credit Bureau Center, LLC*, No. 18-3310 (7th Cir. 2019).

12. **The European Union certainly believed that Facebook did not keep its commitment on WhatsApp. In May 2017, its Antitrust Chief fined Facebook $122 million for providing misleading statements during the acquisition. This was a rare case where even Facebook acknowledged it was wrong. It told European regulators that the social network would not combine the company's data with that of WhatsApp. Yet, by 2016, it reversed course started disclosing the phone numbers and analytics data of its users to Facebook.**

    a. **Did Facebook provide similar commitments to the FTC? Has the FTC conducted a review to determine whether Facebook held to its commitments with the WhatsApp acquisition?**

Response: While I cannot comment on the non-public aspects of any investigation, I note that this was a consumer protection matter. The then-Director of the Bureau of Consumer Protection publicly warned Facebook that it would be held to its obligations to the FTC regardless of its acquisition of WhatsApp.[12]

13. **As you know, the HSR Act mandates that companies attempting mergers above a certain threshold must file a pre-merger notification with the FTC or DOJ. These notifications allow the agencies to review the merger for anticompetitive harms and, where necessary, block the merger before it is consummated. There are concerns, however, that the thresholds for these notifications are too high. How does the FTC learn of mergers or acquisitions that are below current HSR thresholds and therefore not formally reported to the FTC?**

Response: We have many sources to learn about non-reportable transactions. Our staff are experts in their industries, and they routinely monitor trade press to learn of non-reportable transactions, for instance by setting up news alerts. In other instances, we are contacted directly by customers, competitors, suppliers, or other market participants to alert us of pending deals. During our pending investigations, we hear about other deals during our contacts with industry members. We receive emails and phone calls from the public with tips. And I and others in the Bureau routinely encourage industry participants to contact us with concerns about mergers or conduct when we speak to groups or to the media. Our efforts to welcome tips and complaints have resulted in many Commission challenges to consummated mergers, including the recent Otto Bock matter.[13]

[12] FTC News Release, FTC Notifies Facebook, WhatsApp of Privacy Obligations in Light of Proposed Acquisition," (Apr. 10, 2014), https://www.ftc.gov/news-events/press-releases/2014/04/ftc-notifies-facebook-whatsapp-privacy-obligations-light-proposed.

[13] *In re Otto Bock HealthCare N.A.*, Dkt. 9378 (Dec. 20, 2017).

a. Would you support mandatory filing for all mergers of any size if pursued by one of the Big Tech firms (Facebook, Apple, Amazon, Google). If not, why not?

Response: No, for several reasons—though I specifically reserve the possibility of a different answer in the event that we were to find, after investigation, that a remedy of that nature was necessary to address an established anticompetitive practice by a specific firm.

First, having special antitrust rules for specific companies is not fair, may not be legal, and would be bad policy. There is as yet no evidence that these four firms have engaged in more or fewer anticompetitive mergers than any other comparable group of four firms. Nor is there evidence that any such mergers would not have been reportable—in fact, the mergers mentioned earlier in these questions were reportable under HSR. Further, such a filing requirement would impose a burden on the agencies to devote staff and resources to processing and reviewing additional filings, and would raise the cost of such transactions to the firms, which—given the current lack of evidence that small acquisitions by these firms have been anticompetitive—could be economically inefficient and wasteful. Finally, one of the reasons antitrust law has been so successful for so long—notwithstanding the current popular but factually unsupported claims to the contrary—is that rather than long lists of specifically proscribed conduct or targeted companies which tend to become outdated as soon as written,[14] and which also can often be circumvented,[15] antitrust law is written as broad policy guidance capable of evolving with legal and economic learning and adapting to changing facts and conduct.

Second, as I observed earlier, there is as yet no actual evidence establishing either that acquisitions—particularly non-reportable acquisitions—by these firms are so uniquely problematic as to justify a specific filing requirement. As of now, I know of no systematic evidence that acquisitions of these or other "tech" firms are more common or more likely harmful than acquisitions by other types of companies. I am not aware of any valid empirical work quantifying, for example, the frequency of acquisitions by these firms, or by all firms in the industries in which they compete, relative to the frequency of acquisitions by other firms in other industries.[16] Moreover, any such

[14] Not very long ago, the list of firms viewed as likely to be subject to such a requirement would probably have been quite different, and a few years from now, it could be quite different again.

[15] For example, it would be difficult to draft such a requirement that could not be circumvented by a change of corporate form or other similar behavior or restructuring by the targeted companies. For similar reasons, using industry codes or some other basis for the added filing requirements rather than identifying specific companies would also be unlikely to be effective (and, in this context, I note again that even these four firms do not file all or even most of their transactions in the same industry codes).

[16] As I noted in my live testimony, the study by AAI, while a laudable effort to generate the type of empirical evidence that is currently lacking, was flawed for the precise reason that the firms in question are not part of a single "tech" industry. Thus, transactions in which they are involved use multiple industry codes, and the activity in the code analyzed in the AAI study was not representative of the actual activity of these firms or the industries in which they participate. As I said, I do not mean to be critical of AAI—the flaw in the data they used could not be corrected by AAI because the relevant information is non-public and would not have been observable to AAI's researchers.

broad measure would fail to address the most important question—the significance of anticompetitive acquisitions. An industry in which acquisitions are quite rare could nevertheless suffer greatly from a single, profoundly anticompetitive acquisition, while an industry in which acquisitions are frequent could be vigorously competitive. The crucial point to assess is whether there is evidence of anticompetitive acquisitions (or a pattern of acquisitions that, as a whole, is anticompetitive). An ex ante filing requirement for small transactions by four specific companies would not likely supply that evidence. The best way to address this issue is by specific investigations.

Generally lowering the HSR thresholds—as opposed to selectively targeting a few companies for unique thresholds—would avoid some of the problems I described above. But as of now, the evidence indicates that any such cure would likely be worse than the disease. There is no valid evidence that the antitrust agencies are systematically missing competitively troubling below-HSR threshold acquisitions, or that if we were, that lowering the HSR notification thresholds would solve the problem. I note that HSR merger notifications have topped 2000 per year, doubling our workload in reviewing these filings over the past ten years, while over the same period we have experienced a decrease in staffing. This is not sustainable at current levels, and the problem would be exacerbated by lowering the filing thresholds. Moreover, enforcement is closely correlated with merger size. While there are always exceptions, small mergers generally are less likely to raise competitive issues. This is why Congress raised the HSR threshold in the first place—the agencies were being inundated with filings involving small transactions that required resources to process but raised no competition issues. Finally, we actively hunt for anticompetitive nonreportable mergers, and take action when we find them.

b. **Is the FTC looking into so-called "killer acquisitions" in the tech industry?**

Response: Yes, but I cannot comment on any particular non-public investigation.

Bruce Hoffman
Director of the Bureau of Competition
Federal Trade Commission
Questions for the Record
Submitted October 8, 2019

QUESTIONS FROM SENATOR BOOKER

1. **The metaphor of data as "the new oil" is somewhat inaccurate,[1] but there is no denying that venture capital investors oftentimes evaluate startups based on their ability to access or build data sufficient to extract rents, and gain insights into which competitors to copy, buy, or block.**

    a. **What is the best metaphor for the role data play in the platform economy?**

    b. **How important is it for a startup to have the data in the first place, compared with being able to invent with the research and infrastructure necessary to develop and cultivate those data? Which is the bigger barrier to entry?**

    Response: There is no single answer to this question because it depends on the type of data and how it is used. Data can have many different implications for competition analysis. In some circumstances, data is a product that is bought and sold. Such data might be necessary, or helpful, for a new firm to compete, and in such situations, access to data, especially historical data, can theoretically operate as a barrier to entry. However, this is not necessarily the case; old data may not be very useful (or useful at all), or might be easily replicable, or the competitive implications may not result from the data, but from firms' skill in making use of the data.

    In other situations, data may be an important input into another product or service. In such a case, lack of access to data can prevent a new firm from competing if there are no alternative sources for the data. Or an entrant may have different (possibly better) data sources that would allow it to compete, or (as noted above), old data may not be as useful as new data, which would allow entrants to rapidly reach a competitive state.

    Further, use of data by incumbents might generate important consumer benefits, such as increased quality, better services, or lower prices (think of a supermarket that realizes that its customers just don't buy particular products; consumers benefit when the supermarket uses that data to change its product mix to match evolving customer preferences). It is important to keep in mind the possibility of deterring firms from investing in developing and using data.

2. I have focused extensively on how millions of American workers are limited in their ability to switch jobs because of "noncompete" and "no poaching" agreements—contractual provisions that forbid employees from leaving their job, and working for a competitor or starting their own business.[2] These provisions have been shown to reduce employee motivation, entrepreneurship, and knowledge sharing, all of which are integral to fostering innovation and growth.

There are similarly restrictive contractual provisions throughout the tech platform industry— namely, exclusive contracts and loyalty contracts—that can be used to exclude nascent competitors. For example, long-term contracts that prohibit advertisers from using new entrants can stifle demand from that new provider, causing them to exit the industry prematurely. Similarly, contracts between platforms and advertisers that provide for individual negotiation can keep incumbents from losing unique targeted sales to new competitors without requiring the incumbent to lower prices across the board.

a. **There is a very strong case to be made that no-poaching agreements are unfair trade practices in violation of Section 5 of the Federal Trade Commission (FTC) Act. Has the FTC considered issuing a rule banning these agreements? If not, should it do so?**

Response: In 2016, the FTC and Department of Justice issued Antitrust Guidance for HR Professionals, which made clear that certain no-poach and wage fixing agreements could be viewed as *per se* violations of the Sherman Act, possibly leading to criminal liability for those involved. Since that time, the FTC challenged an illegal wage-fixing agreement involving home therapy providers, and DOJ has also pursued numerous no-poach cases, and has announced that it intends to bring criminal charges where appropriate. In light of these clear statements and vigorous enforcement, I do not see the need for an FTC rule banning no-poach or wage-fixing agreements among competitors.

[1] *See, e.g.*, Antonio García Martínez, *No, Data Is Not the New Oil*, WIRED (Feb. 26, 2019), https://www.wired.com/story/no-data-is-not-the-new-oil.

[2] *See, e.g.*, Cory Booker, *The American Dream Deferred*, BROOKINGS INST. (June 2018), https://www.brookings.edu/essay/senator-booker-american-dream-deferred; Office of Sen. Cory Booker, Press Release, Booker, Warren Introduce Bill To Crack Down on Collusive "No Poach" Agreements (Feb. 28, 2018), https://www.booker.senate.gov/?p=press_release&id=760.

b. Are there potential efficiency benefits that make it particularly difficult to challenge this behavior under existing antitrust law?

Response: For the types of *per se* violations discussed above, defendants may not offer efficiency arguments to justify naked agreements not to compete for workers. There are certain circumstances in which a restraint on hiring or soliciting current or former employees is part of a larger legitimate collaboration between employers such that is would not be subject to *per se* condemnation but would instead be evaluated under a rule of reason framework. In this situation, a court would consider efficiency justifications for the restraint. For example, a buyer will often require the seller of a business to agree not to solicit employees for a short period of time after the sale. In fact, the FTC may require merging parties to agree not to solicit workers for a certain period of time from the divested business (their former employees) to ensure the new competitor has the skilled labor necessary to maintain competition. Current antitrust standards permit reasonable restraints on soliciting workers in these circumstances. Here, too, caselaw provides sufficient guidance to assess these agreements under a rule of reason analysis.

c. Do the current safe harbors for "short-term" exclusive dealing arrangements capture the market power of dominant platforms, which, arguably, do not need long-term contracts to create the desired outcome from their partners?

Response: Although in the past, courts would consider the duration of exclusive dealing arrangements as a factor in their legality, courts today focus on the practical effect of these dealings, not the nominal term of the agreement.[1] In fact, even exclusive arrangements that are terminable at will can be anticompetitive when used to attain or maintain a monopoly. For instance, the Commission found (and the 11th Circuit affirmed) that McWane Inc.'s Full Support Program operated as a *de facto* exclusive dealing policy that penalized distributors who bought domestic fittings from other companies by withholding earned rebates or cutting them off from purchasing McWane's domestic fittings. The Commission found that this "voluntary" program allowed McWane to maintain its monopoly power by impairing the ability of rivals to grow into effective competitors that might erode the firm's dominant position.[2] This focus on the practical effect of the conduct follows the Supreme Court's approach to monopolization claims as set out in *Tampa Electric Co. v, Nashville Coal Co.*, 365 U.S. 320-326-28 (1961).

[1] *McWane, Inc. v. FTC*, 783 F.3d 814, 833-34 (11th Cir. 2015) (discussing and dismissing older decisions that presumed short term exclusion arrangements to be presumptively legal).
[2] Id at 833.

3. **As we navigate the contours of crafting federal privacy legislation, one of the most intense recurring debates centers around interoperability provisions, i.e., the ability of consumers to control the use of the information they provide on one service on another service.**

   a. **What kinds of data should be portable?**

   Response: In general, the antitrust laws may not provide the proper framework to assess how and when to make data portable because the antitrust laws do not impose a general obligation to share data or make it portable. From an antitrust perspective, we would ask if a lack of data portability violates one of the antitrust laws. There doesn't seem to be a clear answer here. As a result, there is little to be gleaned from competition analysis to inform a judgment about how to craft a privacy law.

   b. **Generally speaking, how would a law giving consumers control of their data affect the viability and valuation of nascent tech companies?**

   Response: From a business perspective, there may be several reasons to offer data portability to consumers. That decision would probably entail a complicated cost/benefit analysis that is beyond the reach of antitrust analysis. On the other hand, requiring data portability may reduce incentives to invest in businesses that rely on data collection, including start-ups. Data portability could reduce the costs of entry by making it easier for consumers to provide data to the nascent competitor. But if the data is widely available and is also available to incumbents, this might make it more difficult for nascent competitors to differentiate their product or service. Again, from a competition standpoint, there is no certain benefit from requiring data portability.

   c. **Does the FTC, as currently constructed, have the resources to effectively manage a behavioral remedy that mandated data sharing from bad actors?**

   Response: Yes, and the Commission has experience with requiring data sharing to remedy anticompetitive mergers. For instance, we have had some remedies that mandate data sharing. In 2014, the Commission required CoreLogic, Inc. to divest bulk data in order to maintain competition in conjunction with its acquisition of DataQuick.[3] When the Commission determined that CoreLogic had failed to provide all the data and information that the divestiture buyer needed to compete, the Commission extended the term of the data-sharing requirements and clarified the company's obligations. We are well aware of the challenges of requiring data sharing, and the ongoing monitoring required to make it an effective means of preventing anticompetitive harm.

[3] *In re CoreLogic, Inc.*, C-4458 (Mar. 24, 2014), https://www.ftc.gov/enforcement/cases-proceedings/131-0199/corelogic-inc-matter.

4. **The United States stands out for its reluctance to address privacy as a competition issue. The FTC has frequently failed to consider consumer privacy and data security in its merger review process. Specifically, I am concerned that when companies combine large amounts of data, it increases the risk of a breach, but it also enables companies to use those data in even more opaque ways. I've introduced a bill with Senator Wyden that would hold companies accountable for auditing the automated decision-making tools that increasingly affect sensitive aspects of American lives.**

    a. **Should companies be allowed to merge large sets of consumer data without oversight, accountability, and transparency?**

    Response: I do not agree that the Commission fails to consider privacy as a competition concern. Privacy can be viewed as a form of price or non-price competition and whenever firms compete by offering better privacy protection, we will consider it as a form of competition that could be restrained or eliminated via a merger.[4]

    The question presented in this subpart is whether companies should be allowed to merge large sets of consumer data. Competition law does not provide a single answer to that question. Where merging data sets harms competition, the answer is that the merger—of the firms, not of the data sets—should not be permitted, or should be subject to adequate remedies. If merging data sets does not harm competition, no antitrust remedy is appropriate. Merging data sets could also be procompetitive, such as by increasing the firm's efficiency or improving its products or services. If a remedy is appropriate, its terms will be dictated by the harm to competition that we are trying to remedy.

    Although the Commission has not yet stopped a merger solely on the grounds that it would substantially reduce the level of privacy protection offered post-merger, we routinely assess that along with other potential harms and would expect that this analysis will become more frequent to the extent that firms compete more directly on privacy.

[4] Economic literature to date does not clearly indicate whether, and to what extent, consumers value privacy, especially relative to possible improvements in service that reduced privacy may create. As just one example, consumers may value mapping apps that use the consumer's actual location data to provide directions more than they would value mapping apps that are unable to use the consumer's actual location, notwithstanding the lesser privacy protections for the more accurate mapping apps. Once again, this is an issue that likely does not have a single answer from the perspective of competition policy.

b. Will the FTC make algorithmic transparency a priority for merger review in the future?

Response: No, there is no basis in antitrust law or policy for making algorithms public as a general matter. In fact, there is a substantial risk that such transparency could facilitate collusion or lower incentives to invest by forcing companies to give up the "secret sauce" of their pricing decisions. It is always possible that in a particular case, some form of access or transparency might be an appropriate remedy for particular anticompetitive conduct, or a particular anticompetitive transaction, but generally antitrust enforcers have been appropriately skeptical and cautious about such remedies for the reasons I noted above.

5. Mr. Hoffman, this precedes your tenure as Director, but I remain concerned about the FTC's decision not to sue to block Facebook's acquisition of Instagram back in 2012.

a. **Can you tell us in general how the agency thinks about an acquisition by a very large and powerful company of another company in a similar industry that shows a lot of fast growth but is still very small?**

Response: As described in the Commission's testimony, we use standard merger analysis under Section 7 caselaw and the Horizontal Merger Guidelines to determine if the acquisition of a firm with few or no sales may nonetheless violate the law. The Commission has also applied Section 2 monopolization standards to undo acquisitions of emerging competitors that allowed a firm to maintain its monopoly by eliminating a nascent threat.

b. Do you believe that the purchase of a relatively small company can have a significant impact on competition? Did this purchase affect competition?

Response: Yes. I think the best example of this is the Commission's challenge to CDK's acquisition of AutoMate. In March 2018, the FTC challenged the merger of market leader CDK Global, and far-smaller competitor, Auto/Mate, alleging that the transaction would have reduced competition in the already-concentrated U.S. market for specialized software known as dealer management systems. Auto/Mate competed with CDK and other larger franchise dealer management system providers and won business by offering lower prices, flexible contract terms, free software upgrades and training, and high quality customer service. The Commission's complaint alleged harm to current competition but also stressed the potential for harm to future competition given Auto/Mate's substantial efforts to grow its single-digit market share through important price and non-price competition. Shortly after the FTC issued its complaint, the parties abandoned their proposed transaction. Similarly, our recent challenge to the below-threshold consummated acquisition by Otto Bock of Freedom Industries involved what we

alleged was a clearly anticompetitive acquisition of a relatively small company.

6. **The field of behavioral economics seemingly provides answers to everything from why tech platform alternatives are not simply "just a click away" to why giving users more granular privacy controls can actually incentivize more reckless sharing. The explanatory power of behavioral economics seems apparent, and yet our traditional enforcement agencies do not account for it in their analyses.**

   Why is that? What, specifically, can be done to change it?

   Response: It is not correct that we do not account for behavioral economics in our analysis. The FTC has over 80 PhD economists and many of them are well-versed in the literature from the field of behavioral economics, especially as it relates to the FTC's enforcement of consumer protection standards. As long ago as 2007, the Bureau of Economics hosted a workshop on behavioral economics to discuss insights from psychological research to identify ways in which consumers may systematically fail to act in their own best interests due to behavioral traits such as self-control problems, failure to process information objectively, and inaccurately predicting the costs and benefits of prospective choices.[5]

   That said, the FTC always looks for insights into consumer behavior, which is complex and not easily categorized or uniformly predictable. Some have raised concerns that solutions offered from the field of behavioral economics are not a panacea.[6] Namely, the challenge is to adopt policies that improve consumer welfare by more closely aligning each individual's actual choices with his "true" or unbiased preferences without reducing his ability to make a choice among those available to him.

7. **The German Bundeskartellamt now prohibits Facebook from combining data gathered from WhatsApp or Instagram and assigning those data to a Facebook user account without a user's voluntary consent.**

   What prohibits the FTC from adopting a similar remedy for other anticompetitive tech platforms?

   Response: My understanding is that the outcome of this decision was suspended by a higher court in Germany as potentially not consistent with German law, and that the case may be reviewed again on appeal. In any event, the FTC will be applying U.S. law using prevailing U.S. legal standards and economic learning, and any consideration of appropriate remedies must wait until there is a proven violation of U.S. law.

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[5] See FTC Conference on Behavioral Economics and Consumer Policy webpage, https://www.ftc.gov/news-events/events-calendar/2007/04/conference-behavioral-economics-consumer-policy.

[6] Joshua D. Wright and Douglas H. Ginsburg, *Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty*, 106 Nw. U. L. Rev. 1033 (2015), https://scholarlycommons.law.northwestern.edu/nulr/vol106/iss3/2.

House Financial Services and General Government Subcommittee
"Federal Trade Commission: Protecting Consumers
and Fostering Competition in the 21st Century"
September 25, 2019
Questions for Chairman Joseph Simons

Questions for the Record from Chairman Mike Quigley

Enforcement Authority

FTC Commissioners have recently asked Congress to expand its enforcement authority. For example, on May 8, 2019, Commissioner Wilson testified before the U.S. House Committee on Energy and Commerce Subcommittee on Consumer Protection and Commerce, and asked Congress to clarify the extent of the FTC's authority to obtain monetary relief under Section 13(b) of the FTC Act. Pending this expansion, the FTC has also advocated for increased use of lawsuits should a target not agree to the FTC's requirement that the target adhere to expanded 'fencing-in' protections.

What is the FTC's justification for adopting this approach? In your opinion, should Congress consider changes to the FTC Act to grant the authority the FTC seeks?

Yes, it would be helpful if Congress clarified the Commission's remedial authority under Section 13(b), to ensure the FTC can continue to get meaningful monetary relief for American consumers.

Section 13(b) of the FTC Act[1] is the FTC's primary, and most efficient and effective, way of providing redress to injured consumers. The relevant portion of Section 13(b), often referred to as the "final proviso," authorizes the FTC to sue in federal court and states as follows: "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." Since the 1980s, courts across the country have held that Section 13(b) allows all types of equitable relief, including money judgments to remedy consumer injuries. In 1994, Congress acknowledged and strengthened the Commission's ability to use Section 13(b) to obtain full monetary relief when it added language to the final proviso of Section 13(b) expanding venue and service of process.[2]

Over the years, the Commission has secured billions of dollars in relief in a wide variety of cases using this authority, including telemarketing fraud, anticompetitive pharmaceutical practices, data security and privacy, scams that target seniors and veterans, and deceptive business practices, just to name a few.

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[1] 15 U.S.C. § 53(b).

[2] Federal Trade Commission Act Amendments of 1994, S. Rep. No. 103-130, at 15-16, *as reprinted in* 1994 U.S.C.C.A.N. 1776, 1790-91. As the Senate Report noted, "Section 13 of the FTC Act authorizes the FTC to file suit to enjoin any violation of the FTC. The FTC can go into court ex parte to obtain an order freezing assets, and is also able to obtain consumer redress. . . . The FTC has used its section 13(b) injunction authority to counteract consumer fraud, and the Committee believes that the expansion of venue and service of process in the reported bill should assist the FTC in its overall efforts." *Id.*

However, recent judicial opinions have created ambiguities that have compromised the Commission's ability to use Section 13(b). Specifically, the Seventh Circuit's *Credit Bureau Center* opinion held that the word "injunction" in the statute allows only behavioral restrictions and not monetary remedies.[3] The court, overruling decades of its own precedent holding otherwise, severely restricts and in some cases effectively eliminated the FTC's ability to obtain equitable monetary relief in that circuit. In addition, the Third Circuit's *ViroPharma* decision held that the FTC may sue under Section 13(b) only when a violation is either ongoing or "impending" at the time the suit is filed, which puts an unnecessary limitation on the Commission's ability to obtain relief for consumers who have been harmed by unlawful conduct that occurred in the past but is not ongoing.[4] The ambiguity created by these opinions increases defendants' incentive to litigate instead of settle with the FTC, and increases the agency's costs.

To restore the status quo, Congress should clarify Section 13(b) to reaffirm the Commission's longstanding authority to secure all types of equitable relief, including restitution and disgorgement. In addition, Congress should revise Section 13(b) to clarify that the Commission may sue in federal court to obtain equitable relief even if conduct is no longer ongoing or impending when the suit is filed.

Technology Investments

The Federal Trade Commission (FTC) has recently intensified its focus on the high technology industry. The Commission has launched a Technology Task Force, is conducting an antitrust investigation into Facebook and perhaps other high technology companies, and recently made high-profile privacy settlements with YouTube and Facebook.

Privacy crosses over into both the competition and consumer protection functions of the FTC. Is the Commission currently organized in a way that allows it to effectively investigate issues that implicate market power and consumer protection at the same time? What changes could be made to increase its effectiveness when dealing with issues that implicate both core functions of the FTC?

The Commission's organizational structure, at all levels, contributes significantly to its ability to effectively investigate conduct that implicates both competition and consumer protection concerns. At the staff level, the renamed Technology Enforcement Division of the Bureau of Competition is consulting with staff in the Bureau of Consumer Protection to share expertise gained from recent investigations involving technology companies.[5] Similarly, the leadership of the Bureau of Competition and Bureau of Consumer Protection are in regular contact to ensure consistency in enforcement, and to flag relevant issues discovered by one Bureau that may implicate the other Bureau's enforcement priorities. Importantly, the Commissioners themselves

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[3] *See FTC v. Credit Bureau Center, LLC et al.*, No. 18-2847 (7th Cir. Aug. 21, 2019)

[4] *FTC v. Shire ViroPharma Inc.*, No. 18-1807 (3d Cir. Feb. 25, 2019).

[5] Patricia Galvan and Krisha Cerilli, *What's in a Name? Ask the Technology Enforcement Division*, FED. TRADE COMM'N: COMPETITION MATTERS (Oct. 16, 2019), https://www.ftc.gov/news-events/blogs/competition-matters/2019/10/whats-name-ask-technology-enforcement-division.

ensure that both missions are taken into account: we and our staff see all case-related materials generated by each Bureau, and we are able to directly synthesize competition and consumer protection issues. The agency's five-member bipartisan membership ensures that critical issues are fully explored and weaknesses debated during Commission deliberations.

At this time, I am not aware of any specific changes that could be made to increase the Commission's effectiveness when dealing with issues that implicate both competition and consumer protection concerns. However, I always welcome suggestions on how we might strengthen the Commission's ability to protect consumers and promote competition and innovation, especially in tech markets.

Q: The FTC is responsible for overseeing a broad swathe of the American economy. Will this new focus on high technology come at the expense of the FTC's other important work – for example, on health care or non-compete agreements?

The FTC remains committed to marshalling its resources effectively to protect consumers and promote competition, to anticipate and respond to changes in the marketplace, and to meet current and future challenges. Our dedicated staff work extremely hard on behalf of American consumers. Nonetheless, the FTC is highly resource constrained. On the competition side alone, in the last two years, the FTC challenged 43 mergers and litigated nine competition cases; FTC competition staff logged 132 days of trial time, representing one out of every five business days. At current funding levels, the Commission also faces a significant challenge in hiring testifying economic experts, a critical resource in every FTC competition case where litigation appears likely. Over the last five years, our annual expert costs for competition matters have essentially tripled. For a small agency like the FTC, cost changes of this magnitude are difficult to absorb.

While we are taking steps to manage these increasing expenses more aggressively, we expect that the cost of expert work will continue to grow.[6] For this reason, I greatly appreciate the additional $40 million your subcommittee would provide for the FTC in the Fiscal Year 2020 Financial Services and General Government appropriations bill. As I testified last month, more than half of those funds might be needed just to cover mandatory compensation increases and non-compensation costs related to our agency operations (such as litigation support services and expert fees). I expect the remaining amount would be used to add full-time staff to priority areas, particularly our competition and consumer protection enforcement divisions.

Antitrust and the Technology Industry

A recent analysis by the American Antitrust Institute found that the five largest multinational online service or computer hardware and software companies have made more than 700 acquisitions since 1987. However, only one of these acquisitions was challenged in federal district court, and that challenge was brought by the Department of Justice, not the FTC. The analysis noted that this is a far lower rate than other industries.

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[6] Today, companies can create and store vast amounts of data about their operations. These richer datasets may enable our testifying experts to conduct higher quality empirical work, but their complexity also requires more review and analysis, and therefore much more time and effort by our experts and their support staff.

The FTC has subjected many of these acquisitions to in-depth investigation but has declined to bring a single case under its authority. Is this because the FTC has not found any competitive concerns with these acquisitions? Or are there other obstacles to pursuing such cases, such as litigation risk or statutory factors that make bringing a challenge difficult?

I cannot comment on any non-public investigation, although I note that the Commission issued statements explaining its decision not to challenge several technology mergers.[7]

I assure you that promoting competition in the technology sector is one of the Commission's top priorities. I am open to re-examining the effects of prior transactions to ensure our analysis remains robust, although these sorts of retrospective analyses must be balanced with current enforcement work in light of limited resources. Given the Commission's unprecedented level of litigation over the last two years, it is clear that the Commission does not hesitate to initiate litigation when necessary to prevent a merger that is likely to substantially lessen competition in any market.

The FTC is working on new antitrust guidance on online platforms and vertical mergers. This comes simultaneously with increasing concerns among lawmakers and civil society that the current U.S. antitrust paradigm fails to properly account for the market power of large technology platforms. Notable issues include whether these companies favor their own products and services on infrastructure they control and whether they engage in preemptive acquisitions of potential competitors. When will the new guidance documents be finalized, and will they address these concerns?

Yes, the FTC is working to formulate guidance on the application of the antitrust laws to technology platform conduct and vertical mergers, as well as other topics addressed at the Commission's *Hearings on Competition and Consumer Protection in the 21st Century*. When finalized, I expect that these documents will address a range of competition issues, including the acquisition of potential entrants and the potential for vertically integrated firms to favor their own products and services. We have not yet determined a release date for these documents.

Enforcement against Large Companies

In the recent YouTube and Facebook settlements, no executives were held personally liable. However, in cases involving smaller companies, executives are often named individually as

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[7] *See, e.g.*, Statement of Commissioner Ohlhausen, Commissioner Wright, and Commissioner McSweeny Concerning Zillow, Inc./Trulia Inc., FTC File No. 141-0214 (Feb. 19, 2015), https://www.ftc.gov/system/files/documents/public_statements/625671/150219zillowmko-jdw-tmstmt.pdf; Statement of the Federal Trade Commission Concerning Google/AdMob, FTC File No. 101-0031 (May 21, 2010), https://www.ftc.gov/enforcement/cases-proceedings/closing-letters/google-incadmob-inc; Statement of the Federal Trade Commission Concerning Google/DoubleClick, FTC File No. 071-0170 (Dec. 20, 2007), https://www.ftc.gov/public-statements/2007/12/statement-federal-trade-commission-concerning-googledoubleclick. *See also* Press Release, Statement of Federal Trade Commission's Acting Director of the Bureau of Competition on the Agency's Review of Amazon.com, Inc.'s Acquisition of Whole Foods Market Inc. (Aug. 23, 2017), https://www.ftc.gov/news-events/press-releases/2017/08/statement-federal-trade-commissions-acting-director-bureau.

defendants in proposed settlements. For example, this recently occurred in 2019 complaints against the operators of i-Dressup.com and ClixSense.com.

What criteria does the FTC use when determining when to hold an executive liable?

The decision whether to name an individual as a defendant depends on the facts of the case. The Commission typically looks at a variety of factors, including the following: (1) how involved the individual was in the unlawful activity; (2) the risk that the individual will engage in prohibited misconduct in the future; (3) whether the individual has assets that should be disgorged or are needed to provide full redress to harmed consumers; and (4) whether the public interest will be served by naming the individual.

What kind of structural and legal challenges does the FTC face when investigating bigger companies that it doesn't face when scrutinizing smaller companies?

There are no specific structural or legal challenges to investigating bigger companies—although their size and market share often affect the scope and magnitude of the relief, as evidenced by the FTC's $10 billion settlement with Volkswagen, and its $5 billion civil penalty against Facebook. Of course, with larger companies there are likely to be significantly more documents to review, and more custodians whose documents must be searched. Because discovery is an iterative process, these investigations can take longer.

Given the scope and significance of the YouTube and Facebook cases, why weren't any company executives held personally liable?

As discussed above, the decision whether to name an individual as a defendant depends on the facts of the case, and the Commission typically looks at a variety of factors. Although I cannot address the specific non-public facts that led to the Commission's decisions about who to name in these cases, I can assure you that we seriously considered the issue of individual liability.

Additionally, with respect to the Facebook case, although Mark Zuckerberg was not named as a defendant, he is being held accountable. The provisions of the order extinguish the ability of Mr. Zuckerberg to make privacy decisions unilaterally by vesting responsibility and accountability for those decisions within business units, designated compliance officers, and the newly formed Board of Directors privacy committee. Mr. Zuckerberg will also be responsible for certifying quarterly— under threat of civil and criminal penalties—that the company's privacy program is in compliance with the order.

Equifax Settlement

Under the recently announced settlement with Equifax, only $31 million is available for cash payments to consumers who already have credit monitoring. Due to overwhelming demand for this portion of the settlement, the FTC has said that "you will be disappointed with the amount you receive" and has recommended choosing free credit monitoring instead.

Why didn't the Commission obtain a larger settlement, given the size and scope of this breach and the potential negative impacts on consumers?

As you note in your question, the settlement set aside $31 million for Alternative Reimbursement Compensation to consumers who certify that they will have at least six months of credit monitoring services at the time they submit a claim and who do not want to obtain free credit monitoring under the settlement. The $31 million fund for the cash reimbursement was an element of the class action settlement that the Commission adopted in its Equifax order. In reaching a global settlement, the Commission had to rely on our state and federal partners in this case to obtain certain monetary relief that the FTC does not have authority to obtain. Our main focus was the credit monitoring product, largely provided by a third party vendor, as the primary source of relief for affected consumers because it was viewed as the best source of future protection from identity theft. The option to obtain reimbursement for alternative credit monitoring, as set forth originally in the class action settlement, was never intended to be a cash payout for all affected consumers.

Why should consumers trust credit monitoring from Equifax after the company exposed so much sensitive customer data? Isn't that like inviting the fox back into the henhouse? What other options did the FTC consider during the settlement negotiation process to help people affected by the breach?

The settlement provides for four years of three-bureau credit monitoring provided by Experian. Consumers do not need to provide any information to Equifax in order to obtain this relief. The settlement also provides up to six additional years of single bureau credit monitoring provided by Equifax; however, consumers are not required to sign up for the Equifax product in order to get the three-bureau monitoring from Experian. The FTC order also prohibits Equifax from marketing to consumers who do choose to obtain single-bureau monitoring from Equifax and requires Equifax to implement a comprehensive data security program to protect consumer information.

Do you think the settlement terms are proportionate to the harms consumers suffered from this data breach?

The global settlement provides relief that far exceeds the relief the FTC could have obtained under its own statutory authority. The FTC could not have obtained comparable relief were the agency to litigate these claims against Equifax. In reaching a settlement, the Commission's primary goals were to ensure that Equifax would protect consumers' data going forward, that consumers would get the best and longest possible credit monitoring to protect them from future identity theft, and that consumers would get restitution for the amounts they paid for Equifax subscription products. The Commission does not, on its own, have authority to obtain legal damages for consumers as a result of the breach or to obtain civil penalties against Equifax.

Given the FTC's limited authority, however, the Commission continues to reiterate its longstanding, bipartisan call for Congress to enact data security legislation that would give the agency additional tools and authority—such as the ability to obtain civil penalties—to better protect American consumers.

Timeliness of FTC Investigations

Some organizations have complained that about the amount of time it takes the FTC to investigate and resolve cases. Equifax, for instance, announced its data breach in September 2017, but it took nearly two years for the FTC to announce a settlement with the company. The earliest reporting on Cambridge Analytica's Facebook mining was in 2015, so the Facebook settlement took almost four years to complete.

Why did it take so long for the FTC to investigate and resolve these cases?

The FTC staff moved expeditiously to complete thorough investigations of these matters and to negotiate complex settlements. The allegations contained in these complaints are extensive and complicated. Uncovering information to support these allegations in a manner that will stand up in court is difficult and time consuming. Complaint allegations must be backed up by admissible evidence. And, in both of these cases, our investigations uncovered significant deficiencies that were not publicly reported.

Would more staff resources help speed up the timeline for investigating this and future cases of similar complexity?

There is no question that the Commission needs additional staff resources to protect the privacy of American consumers, and in responding to questions from House authorizers we have explained how we would use a significant number of new FTEs for this purpose. We would use any additional FTEs to bring more cases in a variety of areas, including COPPA and order enforcement.

At the same time, I do not believe that adding FTEs would significantly speed up the timeline for bringing complex cases. These cases are often document-heavy, requiring rolling document productions. Typically, the staff we assign to cases are able to complete their review of initial sets of documents before we receive the next batch. Adding more staff would not significantly speed up the document review process; nor would additional staff speed up the process of drafting recommendations to the Commission and working with Commissioners' offices to approve recommendations.

Questions for the Record from Ranking Member Tom Graves

With the debate over data privacy in full swing, it is important to identify the FTC's role in protecting the consumer's privacy and choice. Under the Federal Trade Commission Act (FTC Act), the Commission's primary focus is supposed to be the prevention of unjustified consumer injury. An injury need not be tangible to be concrete; the Commission should recognize both tangible and intangible injuries relating to privacy and misuses of consumer information.

While tangible harms, including monetary, physical, and disruptive injuries are clearly concrete, it can be more difficult to determine when intangible harms qualify.

While Section 5 of the FTC Act states that the Commission "may consider established public policies as evidence to be considered", it also states that such "public policy considerations may not serve as a primary basis for such determination."

That said, principles of tort law would seem to present themselves as an appropriate source for the Commission to consider in determining whether an intangible harm rises to the level of potential actionable injury, in part, because they share the same cost-benefit foundations as section 5 unfairness analysis.

Has the Commission considered a standard, instructed by longstanding tort principles, which could recognize both tangible and intangible injuries while simultaneously distinguishing actionable intangible privacy-related injuries from those that are abstract or hypothetical?

As you know, Section 5 of the FTC Act prohibits unfair or deceptive acts or practices in or affecting commerce. We continually evaluate practices to determine whether they violate Section 5 and, in particular, whether a practice is unfair as set forth in Section 5(n) of the FTC Act and the Commission's 1980 Policy Statement on Unfairness.[8]

To establish unfairness, Section 5(n) of the FTC Act requires proof that an act or practice causes or is likely to cause injury to consumers that is (1) substantial, (2) not outweighed by countervailing benefits to consumers or competition, and (3) not reasonably avoidable by consumers themselves. This three-part test is in turn derived from the Commission's 1980 *Policy Statement on Unfairness* and codifies the analytical framework for the Commission's application of its unfairness authority.

As reflected in the first prong of Section 5(n), a finding of unfairness requires proof that consumer injury is "substantial." It is well established that substantial injury may be demonstrated by showing a small amount of harm to a large number of people, as well as a large

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[8] *See* FTC, Commission Statement of Policy on the Scope of the Consumer Unfairness Jurisdiction ("*Unfairness Statement*") (Dec. 17, 1980) (*appended to Int'l Harvester Co.*, 104 F.T.C. 949, 1070 (1984)), *available at* https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness; S. REP. NO. 103-130, at 12-23 (1993) ("SENATE REPORT") (explaining that the amendments were "intended to codify . . . the principles of the FTC's [*Unfairness Statement*]."

amount of harm to a small number of people.[9] Most cases of substantial injury involve economic harm or serious risks to health or safety and the Commission observed in the *Unfairness Statement* that "[e]motional impact and other more subjective types of harm . . . will not ordinarily make a practice unfair."[10]

As you note in your question, Section 5(n) expressly authorizes the Commission to look to "established public policies" as additional evidence in support of a determination about whether a practice is unfair, including whether it causes substantial injury, although public policy considerations are not permitted to "serve as a primary basis for [an unfairness] determination."[11]

The Commission has previously concluded that the disclosure of sensitive health or medical information causes substantial injury that is neither economic nor physical in nature but is nonetheless real and cognizable under Section 5(n). For example, the Commission's opinion in *LabMD* concluded that the unauthorized release of sensitive medical information harms consumers, pointing to numerous FTC cases and broad recognition in federal and state law of the inherent harm caused by the disclosure of sensitive health and medical information.[12] In reaching this conclusion, the Commission looked to federal statutes, such as HIPAA and the HITECH Act, numerous federal court decisions, and, as you suggest, broad principles of tort law that recognize privacy harms as neither economic nor physical, such as the tort of invasion of privacy.[13]

The FTC also examined the question of whether "informational injuries" can cause substantial injury under Section 5(n) at a December 2017 workshop. In a staff perspective published by the FTC's Bureaus of Economics and Consumer Protection, staff identified various examples of "non-market" informational injuries that cannot be objectively measured in the same manner as harm that directly affects consumers' finances, such as "doxing"—the disclosure of private information that a consumer wishes to keep private, such as sensitive medical information, or a consumer's sexual orientation or gender identity.[14] The Commission further examined these and other topics at a series of *Hearings on Competition and Consumer Protection in the 21st Century*,[15] which included hearings on the intersection between privacy, big data, and

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[9] *See* S. REP. NO. 103-130, at 13 (1993); *Unfairness Statement*, 104 F.T.C. at 1073 n.12; *FTC v. Neovi, Inc.*, 604 F.3d 1150, 1557 (9th Cir. 2010).
[10] *Unfairness Statement*, 104 F.T.C. at 1073.
[11] 15 U.S.C. § 45(n).
[12] FTC, Opinion of the Commission, *In re: LabMD, Inc.*, at 17-19 (July 29, 2016), https://www.ftc.gov/system/files/documents/cases/160729labmd-opinion.pdf, *vacated on other grounds*, *LabMD, Inc. v. FTC*, 894 F.3d 1221 (11th Cir. 2018).
[13] *Id.* at 19.
[14] FTC Staff Perspective, *FTC Informational Injury Workshop* (Oct. 2018), https://www.ftc.gov/reports/ftc-informational-injury-workshop-be-bcp-staff-perspective.
[15] *See generally* FTC, *Hearings on Competition and Consumer Protection in the 21st Century*, https://www.ftc.gov/policy/hearings-competition-consumer-protection.

competition,[16] and on the Commission's remedial authority to deter unfair and deceptive conduct in privacy and data security matters.[17]

The Commission continues to research analytical frameworks for evaluating informational injury under Section 5, and will continue to use all tools at its disposal to enforce the FTC Act. At the same time, the Commission continues to urge Congress to enact privacy and data security legislation that grants the agency civil penalty authority, authority to issue targeted rules under the Administrative Procedure Act, and jurisdiction over non-profits and common carriers.

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[16] FTC Workshop, *FTC Hearing #6: Competition and Consumer Protection in the 21st Century* (Nov. 6-8, 2018), https://www.ftc.gov/news-events/events-calendar/ftc-hearing-6-competition-consumer-protection-21st-century.

[17] FTC Workshop, *FTC Hearing #9: Competition and Consumer Protection in the 21st Century* (Dec. 11-12, 2018), https://www.ftc.gov/news-events/events-calendar/ftc-hearing-competition-consumer-protection-21st-century-december-2018.

Questions for the Record from Rep. Sanford D. Bishop Jr.

Fake 5G

A cellular carrier recently started updating phones to indicate that they are connected to a "5GE" network, despite the underlying technology being an evolution of 4G LTE rather than 5G technology based on the new global 5G NR standard. Speed tests have found that this "5GE" service is not appreciably faster, and sometimes slower, than other carrier's 4G networks. True 5G service can be an order of magnitude faster than 4G.

When I spoke with FCC Chairman Pai in April, he stated that the FTC would be the appropriate agency to examine this issue.

- **Do you disagree with Chairman Pai? Do you believe the FTC should examine deceptive marketing such as this?**
- **You have testified that you are in favor of Congress removing the FTC Act's common carrier exemption. Does that exemption limit your ability to police fraudulent claims related to mobile carriers? Did the FCC's Restoring Internet Freedom Order change your jurisdiction in this area in any way?**
- **Do you believe the FCC should be examining deceptive marketing in the telecommunications space?**

Under Section 5 of the FTC Act, the Federal Trade Commission has long had broad authority over much of the economy to protect consumers from unfair or deceptive acts or practices and unfair methods of competition. However, the FTC has never been able to reach common carrier activities.[18] In addition, the FTC lost the ability to protect consumers as to any broadband internet service provider activities between 2015, when the FCC reclassified broadband internet service as a common carrier activity,[19] and 2018, when the FCC reversed the reclassification.[20] Since 2018, the FTC has again had authority to sue broadband ISPs, including mobile broadband providers,[21] and others for alleged anticompetitive conduct or unfair or deceptive practices, including those related to 5G and other aspects of speed and network performance.

With respect to deceptive practices, Section 5 allows the FTC to take action against providers whose advertising claims mislead consumer about their actual practices. To determine whether an act or practice is deceptive, the FTC considers whether it is likely to mislead reasonable consumers and whether it is material to consumers, meaning likely to affect a consumer's purchase or use decisions. For example, pursuant to its Section 5 authority, the FTC charged prepaid mobile service provider TracFone Wireless, Inc. with deceptive advertising for

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[18] 15 U.S.C. § 45(a)(2).

[19] Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601 (2015), https://www.fcc.gov/document/fcc-releases-open-internet-order.

[20] Restoring Internet Freedom, 33 FCC Rcd. 311 (2018) (RIFO), https://www.fcc.gov/document/fcc-releases-restoring-internet-freedom-order. The D.C. Circuit recently upheld the RIFO in large part, including the classification change. *Mozilla Corp. v. FCC*, No. 18-1051, 2019 WL 4777860 (D.C. Cir. Oct. 1, 2019) (per curiam).

[21] *Id.* at *2-3 (The RIFO classifies broadband internet service and private mobile service as "information services"; it classifies mobile broadband as a private mobile service.).

promising unlimited data to consumers but not disclosing that it slowed down their service—by between 60%-90%—after they exceeded certain data limits.[22] The company agreed to pay $40 million in consumer redress to settle those charges.[23]

Section 5 of the FTC Act also prohibits unfair acts or practices, defined as those that cause or are likely to cause substantial consumer injury that consumers cannot reasonably avoid and that are not outweighed by countervailing benefits to consumers or competition. [24] For example, the Commission sued AT&T Mobility LLC, alleging that the company unfairly locked consumers into long-term contracts based on promises of unlimited service and charged early termination fees if the consumers canceled their plans.[25] The FTC also alleged that AT&T Mobility deceptively promised consumers unlimited data but then reduced speeds, in some instances by nearly 90%, without telling consumers. This week, the Commission announced a $60 million settlement with AT&T resolving the allegations.[26]

The Commission continues to consider how broadband activities affect consumers and competition, including whether speed claims in advertising are deceptive or unfair. A recent Commission hearing examined issues surrounding U.S. broadband markets, including a panel focused on speed advertising claims, substantiation of such claims, and the potential for FTC consumer protection actions if such claims are unsubstantiated.[27] The panelists agreed that speed of broadband and data service is important to consumers and is widely touted in advertising. They also acknowledged that speed claims are difficult to substantiate because measuring speed is complex—different tools yield different results, especially at higher speeds, and particular tests may not identify the location of a bottleneck, or whether hardware, software, interconnection, or other factors are affecting speed.

The Commission continues to favor elimination of the common carrier exemption. Because of the exemption,[28] when a company acts as a common carrier—such as transmitting voice over a

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[22] *FTC v. TracFone Wireless, Inc.*, No. 15-cv-392 EMC (N.D. Cal. Jan. 28, 2015) (complaint), https://www.ftc.gov/system/files/documents/cases/150128tracfonecmpt.pdf. *See also Juno Online Servs., Inc.*, 131 F.T.C. 1252 (2001) (consent order) (alleging that service provider made false and deceptive claims for its "free" and fee-based online services), https://www.ftc.gov/sites/default/files/documents/cases/2001/06/junocmp.pdf.

[23] *FTC v. TracFone Wireless, Inc.*, No. 15-cv-392 EMC (N.D. Cal. Feb 20, 2015) (consent order), https://www.ftc.gov/system/files/documents/cases/150223tracfoneorder.pdf.

[24] *See* FTC Policy Statement on Unfairness, *supra* n.7.

[25] *FTC v. AT&T Mobility LLC*, No. 3:14-cv-04785-EMC (N.D. Cal. Oct. 28, 2014) (complaint), https://www.ftc.gov/system/files/documents/cases/141028attcmpt.pdf. The Ninth Circuit subsequently affirmed that the FTC Act's exemption for common carriers does not bar the FTC from regulating such carriers' non-common-carriage activities. 883 F.3d 848 (9th Cir. 2018) (*en banc*), https://www.ftc.gov/system/files/documents/cases/att_enbanc_5-16585.pdf. *See also America Online, Inc.*, 137 F.T.C. 117 (2004) (consent order) (alleging that service provider unfairly failed to honor customer cancellation requests and continued to charge them monthly service fees, and unfairly failed to timely pay rebates), https://www.ftc.gov/sites/default/files/documents/cases/2004/02/040203aolcscomp.pdf.

[26] FTC Press Release, *AT&T to Pay $60 Million to Resolve FTC Allegations It Misled Consumers with 'Unlimited Data' Promises* (Nov. 5, 2019), https://www.ftc.gov/news-events/press-releases/2019/11/att-pay-60-million-resolve-ftc-allegations-it-misled-consumers.

[27] FTC Workshop, *FTC Hearing #10: Competition and Consumer Protection Issues in U.S. Broadband Markets* (Mar. 20, 2019), https://www.ftc.gov/news-events/events-calendar/ftc-hearing-10-competition-consumer-protection-21st-century.

[28] 15 U.S.C. § 45(a)(2).

phone line—the Commission cannot intervene, even though the acts or practices of these market participants often have serious implications for consumers. When that same company provides a non-common carrier activity—such as providing access to the internet—that activity is subject to the FTC's authority.

This distinction is outdated and makes no sense in today's marketplace, where the lines between telecommunications and other services are increasingly blurred. The Commission has testified for years in favor of eliminating the exemption, which impedes the FTC's work tackling illegal robocalls and more broadly circumscribes other enforcement initiatives.[29] For example, a carrier that places, or assists and facilitates, illegal telemarketing may be beyond the Commission's reach because of the common carrier exemption. Likewise, the exemption may frustrate the Commission's ability to obtain complete relief for consumers when there are multiple parties, some of whom are common carriers. It also may pose difficulties when a company engages in deceptive or unfair practices involving a mix of common carrier and non-common carrier activities. Finally, litigation has been complicated by entities that attempt to use their purported status as common carriers to shield themselves from FTC enforcement.[30] So long as the common carrier exemption remains in place, parties other than the FTC, such as the FCC and state attorneys general, need to examine deceptive common carrier telecommunications practices.

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[29] *See, e.g.*, Prepared Statement of the FTC on *Oversight of the Federal Trade Commission*, Before the Subcomm. on Consumer Protection and Commerce, Comm. on Energy & Commerce, U.S. House of Reps. (May 8, 2019), https://www.ftc.gov/public-statements/2019/05/prepared-statement-federal-trade-commission-oversight-federal-trade.

[30] *See, e.g.*, Answer and Affirmative Defenses of Defendant Pacific Telecom Communications Group at 9, 17-20, Dkt. 19, *FTC et al. v. Caribbean Cruise Line et al.*, No. 0:15-cv-60423 (S.D. Fla. June 2, 2015), https://www.ftc.gov/enforcement/cases-proceedings/122-3196-x150028/caribbean-cruise-line-inc.

United States Senate Judiciary
Subcommittee on Antitrust, Competition Policy, and Consumer Rights

"Oversight of the Enforcement of the Antitrust Laws"
October 1, 2019

Questions for Chairman Joseph Simons
Submitted by Senator Richard Blumenthal

1. **Public reports indicate that the Federal Trade Commission (FTC) and Department of Justice (DOJ) are investigating Amazon, Facebook, Google and Apple (sometimes referred to as the "Big Tech" companies). The *Wall Street Journal* reported earlier this year that the FTC has jurisdiction over Facebook and Amazon while DOJ is investigating Google and Amazon. However, recent reports suggest that this agreement has frayed, if not disintegrated entirely. In July, despite the negotiated agreement, the Department announced a broad investigation into the digital platforms. Just a few weeks ago, the FTC reportedly sent a letter to DOJ raising concerns about the Department's behavior with respect to these cases.**

    a. **Is the FTC operating under a negotiated clearance agreement with DOJ regarding its investigations of the digital technology companies?**

The two federal antitrust agencies developed and have long maintained the clearance process to minimize duplication of effort in civil antitrust enforcement. For the vast majority of matters, and certainly for merger review, the clearance process continues to work well. This past year, the clearance process has not worked well with respect to a small number of potential investigations involving conduct by technology companies. Both agencies are very interested in ensuring that potential anticompetitive conduct is investigated and, if necessary, prosecuted. I am committed to getting the clearance process back on track for all matters. In the meantime, we will continue to work with our colleagues at the Department of Justice to minimize the impact of any duplication on effective law enforcement at the federal level.

    b. **What is the timeline for the investigation into the digital technology companies?**

I cannot comment on any nonpublic investigations, but I assure you that promoting vigorous competition in the technology sector is one of the Commission's top priorities. In addition, as a small agency with very limited resources, we seek to resolve matters promptly so we can most efficiently deploy our resources to promote competition and protect consumers.

    c. **How many full-time FTC employees are working on the Technology Task Force?**

    d. **How many of those employees are technologists or have a background in technology?**

When the now-renamed Technology Enforcement Division of the Bureau of Competition was announced in February 2019, we stated that 17 attorneys would move to this unit from other divisions within the Bureau of Competition. The Division has since hired two additional attorneys who will be joining the agency soon. The Division is also in the process of hiring two technologists who will be dedicated to the work of the Division.

In addition, the FTC's existing technologists play a critical role in helping all FTC attorneys and economists, including staff in the Technology Enforcement Division, understand technical issues relevant to their investigations and in interpreting technical information provided by companies. It is also worth noting that a number of investigators and attorneys have developed significant in-house technical expertise through their enforcement and policy work in the digital space, including big data and related fields.

In particular, the Technology Enforcement Division is consulting with the staff in the Office of Technology Research and Investigation (OTech) within the Bureau of Consumer Protection. OTech focuses on issues at the intersection of technology with the FTC's consumer protection mission, including fraud, privacy, data security, online and mobile advertising, payment systems, and malware. More generally, the leadership of the Bureau of Competition and Bureau of Consumer Protection are in regular contact to ensure consistency in enforcement and to flag relevant issues discovered by one Bureau that may implicate the other Bureau's enforcement priorities.

e. Were any of the employees on the Task Force previously employed by Apple, Amazon, Google, or Facebook? If so, how many?

Almost all of the Technology Enforcement Division's current employees were transferred from other divisions within the FTC's Bureau of Competition. One attorney recently joined from the DOJ Antitrust Division. No one in the Technology Enforcement Division was previously employed by Apple, Amazon, Google, or Facebook. As we hire new employees, they will be subject to government conflict of interest and ethics laws.

f. Without identifying any of the companies under investigation, have those companies been fully cooperative in your investigate efforts so far?

g. Will you commit to informing Congress if, at any point, they are not cooperative?

I am unable to comment on any nonpublic investigation. If any concerns arise, I will share them to the extent allowed. As a general matter, the Commission has the authority to compel the production of information if parties do not comply with Commission-issued compulsory process for documents or information in law enforcement investigations. Legal efforts to enforce or quash Commission subpoenas and civil investigative demands are public events. For example, the Commission recently issued a decision denying Johnson & Johnson's petition to limit compulsory process.[1]

[1] Order Denying Petition to Limit Civil Investigative Demand and Subpoena Duces Tecum, In the Matters of Civil Investigative Demand to Johnson & Johnson and Subpoenas Duces Tecum to Johnson & Johnson, No. 191-0152

h. If you find anticompetitive conduct in your investigation, are you prepared to engage in litigation and take these companies to court?

Yes. As noted above, anticompetitive conduct in the technology sector is a significant priority. If the Commission finds or is presented with evidence that a company within our jurisdiction is engaging in conduct that harms competition and may violate the antitrust laws, the Commission will review that information for potential law enforcement action, including litigation. For example, we are presently in litigation against a technology platform in which we allege that Surescripts, Inc., a multi-sided platform providing e-prescription services, violated the antitrust laws by employing exclusive agreements to monopolize two double-sided platform markets.[2]

2. In approving the Facebook-WhatsApp acquisition, the FTC issued a letter stating that the Commission would hold WhatsApp to their privacy commitments in connection with the acquisition, namely, to honor WhatsApp's privacy policies, which were stricter than Facebook's at the time. Unlike Facebook Messenger and Instagram, WhatsApp does not store messages, keeps minimal user data, and is the only text messaging service to currently use end-to-end encryption by default. Has WhatsApp honored the privacy commitments it made to you in connection with this acquisition?

Prior to my joining the Commission, at the time of the Facebook-WhatsApp acquisition, FTC staff sent a letter to the companies reminding them of WhatsApp's promises to its users about the limited nature of its data collection, use, and sharing practices. Staff warned the companies that, if the companies failed to honor these promises, they could be in violation of Section 5 and/or the FTC's 2012 order against Facebook.[3] Staff has continued to monitor WhatsApp's practices. The FTC's 2019 order against Facebook gives the agency additional tools to monitor and take action against WhatsApp if it misrepresents its privacy promises. Under the FTC's 2012 order with Facebook, the requirement to create a comprehensive privacy program did not apply to WhatsApp. Under the 2019 order, however, an expanded requirement to create such a program does apply to WhatsApp. As a result, for example, going forward we will receive compliance reports, assessments, and other documentation about WhatsApp's compliance with its privacy commitments.

3. The FTC's recent settlement with Facebook over its blatant and inexcusable privacy violations was a slap on the wrist that actually benefited Facebook's shareholders: The company's market value rose by about $10 billion after the settlement was announced, double the $5 billion fine.

(Oct. 18, 2019), https://www.ftc.gov/system/files/documents/petitions-quash/johnson-johnson/1910152jjpetitiontoquash.pdf.

[2] FTC Press Release, FTC Charges Surescripts with Illegal Monopolization of E-Prescription Markets (Apr. 24, 2019), https://www.ftc.gov/news-events/press-releases/2019/04/ftc-charges-surescripts-illegal-monopolization-e-prescription.

[3] *See* Letter from Jessica Rich, Director of the Bureau of Consumer Protection, to Erin Egan, Chief Privacy Officer of Facebook and Anne Hoge, General Counsel of WhatsApp (April 10, 2014), https://www.ftc.gov/system/files/documents/public_statements/297701/140410facebookwhatappltr.pdf.

a. Did the FTC conduct a specific analysis of Facebook's unjust enrichment from these privacy violations?

Yes. FTC staff carefully considered this approach. See additional details below.

b. If so, how much was Facebook unjustly enriched through these violations?

See below.

c. If not, why not?

It was not feasible to accurately analyze Facebook's financial gain from the order violations due to the complexity of its business model and the nature of its violations.

For example, the FTC's complaint charged that Facebook violated the order by giving app developers access to the data of the "friends" of app users without adequately disclosing that fact. Although this conduct benefited Facebook, the company did not charge app developers to use its platform or to access this "friend" data, or charge a fee for each app installation. Instead, Facebook made money by connecting audiences to advertisers for a price. A larger, more active user base allows Facebook to serve more targeted ads. To maximize user engagement, Facebook offered a number of ostensibly free services, including third-party apps and, more significantly, its social networking services.

The more information Facebook made available to app developers, the more appealing it was for developers to build on Facebook's platform. Increasing the number of available apps could attract users and increase their engagement, enhancing Facebook's ability to provide advertisers with more robust, targeted audiences for their paid marketing campaigns.

This multivariable causal chain approach makes tracing revenue to violations essentially impossible. First, we would have to determine how many additional apps Facebook garnered by offering developers more information about the installing users' friends—an extremely difficult counter-factual universe to construct. Next, we would have to determine how many fewer users would have joined Facebook, and how much less active they would have been, if Facebook offered fewer apps. Given that people joined and used Facebook for a mix of reasons and utilized various services, it would not be possible to make these calculations in any meaningful way.

d. When the Commission negotiates such penalties, what metrics does it use in reaching a fair and accurate estimate?

The Commission and courts consider a number of factors to determine an appropriate civil penalty for order violations.[4] When the Commission considers a negotiated outcome, the primary question is always whether the Commission could obtain a better result through further

[4] These factors include "(1) the good or bad faith of the defendants; (2) the injury to the public; (3) the defendant's ability to pay; (4) the desire to eliminate the benefits derived by a violation; and (5) the necessity of vindicating the authority of the FTC." *United States v. Reader's Digest Ass'n, Inc.*, 494 F. Supp. 770, 772 (D. Del. 1980), *aff'd*, 662 F.2d 955 (3d Cir. 1981).

litigation.

In the Facebook matter, given the range of past civil penalties, and the unanimous assessment of experienced litigators at the FTC and the Department of Justice, we determined that litigation would have yielded not only far less money, but also far less comprehensive conduct relief than the settlement negotiated by staff. Importantly, even if we had litigated and eventually won, Facebook would not have been required to make any changes to its practices or pay any penalty for years. Under the circumstances, the best and most appropriate outcome for consumers was to settle the matter under the historic terms the agency obtained.

e. The 2019 Facebook order "resolves all consumer-protection claims known by the FTC prior to June 12, 2019, that Defendant, its officers, and directors violated Section 5 of the FTC Act." In your statement on the settlement, you stated, "all potential Section 5 and 2012 order violations the Commission currently knows about are address in this Order."

i. Based on your statement, then, any Section 5 claims that are not included in the order are preserved. Is that accurate?

Yes. The release would not preclude the FTC from addressing any subsequently discovered consumer protection violation of Section 5 of the FTC Act by Facebook that occurred prior to June 12, 2019, including any claims against individuals relating to such violations. In addition, known and unknown antitrust claims are explicitly preserved.

ii. In Commissioner Chopra's dissent, he stated, "I have not been able to find a single Commission order – certainly not one against a repeat offender – that contains a release as broad as this one." Commissioner Slaughter, in her dissent, likewise noted that the liability releases in other recent settlements – Deepwater Horizon, Wells Fargo, CitiMortgage, Ocwen, and others – were far more limited. Do you agree with their interpretations that the liability release was broader than the FTC typically agrees to?

I do not agree with their interpretations. There has been considerable misunderstanding of the release clause in the 2019 order. I appreciate the opportunity to clarify the 2019 order's terms.

First, the 2019 order only releases claims for consumer protection violations of Section 5 of the FTC Act (*i.e.*, unfair or deceptive acts or practices) *known* by the FTC prior to June 12, 2019. FTC staff investigated all such potential violations, including allegations received from interest groups and issues reported by the press, and determined that the 2019 order addressed all *known* valid claims as of June 12, 2019. The release would not preclude the FTC from addressing any subsequently discovered violation of Section 5 of the FTC Act by Facebook that occurred prior to June 12, 2019, including any claims against individuals relating to such violations.

Second, the release of known and unknown claims for violation of the 2012 order is much less significant than some have suggested. It mirrors the legal standard governing *res judicata* for

order violations that has long been applicable to most FTC enforcement matters. Even in the absence of a release, a court likely would determine that the doctrine of *res judicata* (or claim preclusion) releases all claims, known and unknown, that could have been brought in the order enforcement action.[5] For this reason, all FTC order enforcement actions—including both settlements and victories in court—effectively release all known and unknown claims for violations of that order that arose prior to the enforcement action, including claims against individuals resulting from the same transaction or occurrence.[6]

f. In negotiating the agreement, did the Bureau of Consumer Protection engage with the Bureau of Competition?

g. If so, did the Bureau of Competition provide any advice, feedback, or help to the Bureau of Consumer Protection with regards to the 2019 Facebook order?

The Bureau of Competition provided feedback on the terms of the 2019 order prior to it being finalized. In addition, the Bureau of Competition is engaged in a separate investigation under a wholly separate analytical framework. As noted above, the 2019 order preserves known and unknown antitrust claims.

4. I am also concerned about the FTC's recent settlement with YouTube over its violations of the Children's Online Privacy Protection Act (COPPA). YouTube profited from capturing the personal information of young children watching Barbie, Hot Wheels, and Thomas and Friends.

a. Did the FTC conduct an analysis of YouTube's unjust enrichment from these privacy violations?

b. If so, how much was YouTube unjustly enriched through these violations?

c. If not, why not?

Yes, Commission staff analyzed YouTube's and Google's (collectively, "Defendants") unjust enrichment from the COPPA violations alleged in the FTC's complaint. Defendants' unjust enrichment is the amount they earned from collecting personal information from, and serving online behavioral ads to, users of those YouTube channels Defendants knew were child-directed, less the amount they would have earned from serving COPPA-compliant contextual

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[5] *See United States v. ITT Continental Baking Co.*, 420 U.S. 223, 238 (1975) (noting that "a consent decree or order is to be construed for enforcement purposes basically as a contract"); *see also, e.g., Int'l Union of Operating Eng'rs v. Karr*, 994 F.2d 1426, 1429-30 (9th Cir. 1993) (holding claims for breach of the same contract barred by *res judicata*) (citing *McClain v. Apodaca*, 793 F.2d 1031, 1034 (9th Cir. 1986)); *May v. Parker-Abbott Transfer & Storage, Inc.*, 899 F.2d 1007, 1009-11 (10th Cir. 1990) (same); *TechnoMarine SA v. Giftports, Inc.*, 758 F.3d 493, 499-501 (2d Cir. 2013). While the legal analysis in the D.C. Circuit is somewhat more complex, it appears to lead to the same result. *See United States Indus. v. Blake Constr. Co.*, 765 F.2d 195, 205-210 (D.C. Cir. 1985).

[6] *See Ananiev v. Freitas*, 37 F. Supp. 3d 297, 310 (D.D.C. 2014). Specifically, to hold an individual liable in an order enforcement action, we would have to establish that the individual was in active concert or participation with Facebook in violating the order, or that they controlled Facebook's actions. *See Wash. Metro. Area Transit Comm'n v. Reliable Limousine Serv., LLC*, 776 F.3d 1, 9-10 (D.C. Cir. 2015). Thus, *res judicata* would likely bar subsequently suing the individual for an order violation, since such a claim would entail the proof of related facts.

ads.

In the course of its investigation, FTC staff sought information relating to child-directed content and behavioral advertising on the YouTube platform. Defendants provided their revenue information pursuant to compulsory process, and it is therefore confidential. Similarly, FTC staff's specific calculations as to the civil penalty amount are also confidential. However, the Commission believes that analysis of the relevant statutory factors for calculating civil penalties supports the $136 million amount, which is almost 30 times greater than the largest COPPA civil penalty the FTC has ever obtained.[7]

d. The order prohibits YouTube from using, disclosing or benefiting from the personal information previously collected from users of child-directed websites covered by the order. However, that prohibition does not apply until 90 days after the Compliance Date, which is four months after the order. In other words, YouTube appears to be able to continue profiting off the personal information for seven months after the order.

i. Why did FTC permit the FTC to use or benefit from this data for seven months after the order?

With respect to the timing of the injunctive relief, the consent order requires Defendants, within four months of the order's entry, to develop a mechanism that requires content creators to identify which of their content is directed to children. The four-month period is necessary so that Defendants have time to engineer and implement significant changes to the YouTube platform to conform to the order, including the creation of the content-designation system and changes to the content displayed to users. Additionally, this gives Defendants time to educate channel owners about their new designation obligations and to explain to YouTube users the effect of changes to the user experience. For example, after the compliance date, logged-in users will no longer be able to post comments or otherwise interact with child-directed content without verifiable parental consent. The Commission has allowed for a delay of compliance with provisions in other orders that similarly required companies to undertake significant technical engineering changes.[8]

Once Defendants have implemented the designation mechanism and channel owners are able to identify their child-directed content, Defendants will have to comply with COPPA as to new content by the compliance date.

For content on the platform that predates the existence of the designation mechanism required by the order, channel owners have 60 additional days to review such content, determine whether it is child-directed, and designate it as such. Defendants then have an additional 30

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[7] In addition to the $136 million civil penalty, the Commission's consent order requires Defendants to pay the State of New York $34 million, for a total monetary judgement of $170 million.

[8] *See* FTC, Decision & Order, *In the Matter of PayPal, Inc.* (May 24, 2018) (allowing 150 days from entry of order to make required disclosures within user interface), https://www.ftc.gov/system/files/documents/cases/1623102-c4651_paypal_venmo_decision_and_order_final_5-24-18.pdf; FTC, Decision & Order, *In the Matter of Lenovo (United States) Inc.* (Jan. 2, 2018) (allowing 120 days from entry of order to implement software changes), https://www.ftc.gov/system/files/documents/cases/1523134_lenovo_united_states_agreement_and_do.pdf.

days to implement the technical measures necessary to effectuate the channel owners' designations for that content. This sequence takes into account the time it will take creators, many of whom are small businesses, to look backward at their body of content to determine whether it is child-directed, along with time for Defendants to ensure that it turns off the comment functionality and behavioral advertising for that content.

e. In negotiating the order, did the Bureau of Consumer Protection engage with the Bureau of Competition?

f. If so, did the Bureau of Competition provide any advice, feedback, or help to the Bureau of Consumer Protection with regards to the YouTube order?

The Bureau of Competition knew about the investigation into whether YouTube and Google's conduct violated COPPA. The Bureau of Competition was not involved in the negotiations and did not provide any feedback on the order. As with all Commission investigations and cases, staff from the Bureau of Consumer Protection engaged and worked collaboratively with staff from the FTC's Bureau of Economics, as well as the Commissioner offices, all of whom have focused on intersections between privacy and competition.

5. Under the Hart-Scott-Rodino Act (HSR Act), merging companies are only required to report their merger to the FTC and DOJ if they reach certain thresholds. Currently, if the size of the transaction is below $90 million, they do not need to report the merger to the agencies.

a. Is the FTC missing any anticompetitive mergers due to the current HSR thresholds?

In passing the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Congress decided not to require premerger notification for all acquisitions, believing that the burden of complying with file-and-wait requirements was not justified for small parties or small deals.[9] Unreportable transactions are still subject to the antitrust laws. The FTC and DOJ can and do investigate and bring complaints against mergers that are below the HSR reporting thresholds, even if those transactions have already closed. For example, the Commission ordered the unwinding of the consummated acquisition of Freedom Innovations by Otto Bock HealthCare North America because the merger resulted in anticompetitive harm in the microprocessor knee market.[10] The

[9] In December 2000, Congress amended the HSR statute "to address concerns about the growing scope and burden of the Act." AMERICAN MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS, 157 (2007) (citing Department of Commerce, Justice, State, and the Judiciary, and Related Agencies Appropriations Act, FY 2001, Pub. L. No. 106-553, § 630, 114 Stat. 2762, 2762A-108 to 111 (2000) (codified as amended at 15 U.S.C. §§ 18a & 181a note)), https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf. Among other things, the amendments additionally exempted transactions valued at less than $50 million (the previous size-of-transaction threshold was $15 million) and provided that the Commission would adjust the reporting thresholds annually based on changes in gross national product beginning in 2005. FTC Press Release, Major Changes to Hart-Scott-Rodino Premerger Notification Requirements to Take Effect February 1, 2001 (Jan. 25, 2001), https://www.ftc.gov/news-events/press-releases/2001/01/major-changes-hart-scott-rodino-premerger-notification.

[10] The Commission's order requires Otto Bock to divest the Freedom Innovation assets to an FTC-approved buyer. FTC Press Release, FTC Commissioners Unanimously Find that Consummated Merger of Microprocessor

two medical device manufacturers closed their nonreportable transaction in September 2017, and the FTC acted quickly to stop the merger, filing its complaint three months later.[11] The Commission's order in the Johnson & Johnson matter referenced above also involves a nonreportable transaction that is under investigation by the FTC's Bureau of Competition.

As part of its mandate, the FTC's Technology Enforcement Division will investigate consummated transactions. The FTC does not hesitate to undo consummated mergers that cause harm, regardless of whether those mergers were reported under the HSR Act.[12]

If we were to identify a particular type of transaction structure designed to evade HSR requirements, or sectors where there was a pattern of competitive harm from transactions that are not reportable, we would consider amending the HSR rules to provide for additional premerger reporting.[13]

b. How does the agency learn of potentially anticompetitive mergers that fall beneath the reporting thresholds?

FTC investigative staff rely on trade press and other news articles (which are regularly monitored), consumer and competitor complaints, hearings, economic studies, evidence uncovered in an existing investigation or litigation, publicly available evidence of suspicious market behavior, referrals from other agencies or Congress, and other means to identify practices that threaten competition, including potentially anticompetitive mergers. The FTC also solicits leads on its public website, inviting contacts by email, letter, and telephone.

c. Does the FTC support any changes that could enable the agency to discover mergers that are currently falling beneath the reporting thresholds?

We are actively exploring this issue. In administering the HSR premerger notification program,

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Prosthetic Knee Companies Was Anticompetitive; Assets Must be Unwound (Nov. 6, 2019), https://www.ftc.gov/news-events/press-releases/2019/11/ftc-commissioners-unanimously-find-consummated-merger.

[11] Compl., In the Matter of Otto Bock HealthCare N.A., Dkt. No. 9378 (Dec. 20, 2017), https://www.ftc.gov/system/files/documents/cases/otto_bock_part_3_complaint_redacted_public_version.pdf.

[12] Expiration of the HSR waiting period does not immunize a transaction from antitrust scrutiny. The FTC and Department of Justice continue to have jurisdiction to investigate and challenge a merger after its closing if they believe that the acquisition substantially lessens competition. *See, e.g.*, *Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410 (5th Cir. 2008) (denying petition for review of FTC decision that found consummated acquisition unlawful and FTC order that required acquiring firm to create two separate, standalone competitors).

[13] For example, in 2013, the FTC amended the HSR rules to clarify when the transfer of pharmaceutical (including biological) patent rights is reportable as an asset sale under the HSR Act. The rule change, which was largely prompted by the evolving licensing structure within the pharmaceutical industry, closed a perceived loophole that applied when a licensor or transferor retained manufacturing rights. The rule change also facilitated the FTC's preclosing review of developmental-stage pharmaceutical product collaborations that may involve potential competitors. Premerger Notification; Reporting and Waiting Period Requirements, 78 Fed. Reg. 68706 (Nov. 15, 2013) (amending 16 CFR pt. 801), https://www.ftc.gov/sites/default/files/documents/federal_register_notices/2013/11/131115premergerfrn.pdf. *See also* FTC Press Release, Federal Appeals Court Rules in Favor of FTC: Pharmaceutical Industry Patent Rights Reportable under Hart-Scott-Rodino Act (June 10, 2015), https://www.ftc.gov/news-events/press-releases/2015/06/federal-appeals-court-rules-favor-ftc-pharmaceutical-industry.

the FTC is responsible for ensuring that the HSR rules are clear and serve the interest of effective merger enforcement. One of the topics discussed at the Commission's *Hearings on Competition and Consumer Protection in the 21st Century* was whether changes in investment behavior and deal construction warrant a reassessment of current HSR reporting requirements. We are considering the use of our Section 6(b) authority to examine past acquisitions by large technology platforms. We continue to evaluate the impact of HSR reporting requirements, including whether premerger review of certain currently nonreportable transactions would be beneficial.[14]

d. Apple CEO Tim Cook said earlier this year that Apple purchases a company every two-to-three weeks and had purchased 20-25 companies in the previous six months.[15] Furthermore, Cook said that Apple often does not announce these deals because they are small and Apple is "primarily looking for talent and intellectual property."

i. Was the FTC aware of more than 20 acquisitions by Apple between October 1, 2018 and May 1, 2019?

ii. If so, how did the FTC become aware of the 20-plus acquisitions? Please break down this number into categories by source (HSR filing, media, public notice, etc.).

iii. If not, how many acquisitions by Apple was the FTC aware occurred between October 1, 2018 and May 1, 2019?

iv. Outside of any ongoing investigation into Big Tech companies, did the FTC investigate any of these acquisitions for potential competition issues?

v. If so, how many acquisitions by Apple during that period did the FTC investigate?

vi. Is the FTC concerned that it is missing "killer acquisitions" due to the current HSR thresholds?

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[14] For example, the FTC recently published a notice of proposed rulemaking that would clarify whether a transaction is exempt from premerger notification because the entity involved is foreign. Premerger Notification; Reporting and Waiting Period Requirements, 84 Fed. Reg. 58348 (Oct. 31, 2019) (amending 16 CFR pts. 801 & 803), https://www.federalregister.gov/documents/2019/10/31/2019-23560/premerger-notification-reporting-and-waiting-period-requirements. In general, acquisitions of foreign assets and voting securities of foreign issuers may be exempt from HSR requirements if there is only a limited nexus with U.S. commerce. Under the current HSR rules, determination of whether an entity qualifies as "foreign" depends in part on the location of its "principal offices," a term that is not defined in the rules. The proposed amendments would introduce a "principal offices" definition based on the residency of officers and directors and the location of the entity's assets. Specifically, under the proposed rule, if 50 percent or more of an entity's officers, directors, or assets reside in the United States, that entity would be considered a U.S. entity for premerger notification purposes. FTC Press Release, *FTC and DOJ Approve Procedural Amendments to HSR Rules for Foreign Entities* (Nov. 8, 2019), https://www.ftc.gov/news-events/press-releases/2019/11/ftc-doj-approve-procedural-amendments-hsr-rules-foreign-entities.

[15] https://www.cnbc.com/2019/05/06/apple-buys-a-company-every-few-weeks-says-ceo-tim-cook.html.

vii. Does the FTC support any changes that could enable the agency to discover potential "killer acquisitions"?

I cannot discuss our nonpublic investigations or disclose the source of any particular FTC investigation. As a general matter, if an acquisition by a large technology firm was reported in the press or otherwise made public, we are very likely aware of it.

We are aware of concerns that certain firms may be engaging in "killer acquisitions" that have the effect of eliminating nascent or potential competitors, and we are taking this issue very seriously. As noted above, we are considering the use of our Section 6(b) authority to examine past acquisitions by large technology platforms. Any proposal to change the HSR rules would be subject to public notice and comment, a process through which we typically receive useful feedback that we integrate into our analysis.

6. Chairman Simons stated at the hearing in response to my question about anticompetitive practices in the healthcare industry that the Commission is looking into the use of "rebate walls" – a practice in which pharmaceutical companies leverage their market power to use volume-based rebates to block a competitor's access to formularies.

a. Does the FTC believe that "rebate walls" are harming market competition and preventing lower-priced biosimilars from gaining market share?

I share your concerns about the rebating practices of pharmaceutical manufacturers when these practices are part of an exclusionary scheme to gain or maintain a monopoly. In general, the FTC has authority to challenge unilateral conduct by a firm that impedes rivals from competing on the merits and that enables the firm to attain or maintain a monopoly position. Pricing practices such as market share rebates, rebates based on formulary access, and rebate clawbacks may be part of an illegal exclusionary scheme that helps a firm attain or maintain a monopoly in violation of the antitrust laws. For example, the Commission ruled that McWane, Inc. illegally maintained its monopoly by adopting a "Full Support Program" that denied unpaid rebates to customers who purchased products from its competitors.[16] More recently, the Commission filed an action in federal court alleging that healthcare technology company Surescripts, Inc. structured its contracts to lock customers into exclusive arrangements, conditioning discounts on exclusivity to make it impossible for buyers to shift their business to Surescripts' rivals. The FTC's complaint alleges that through a web of exclusive arrangements and other exclusionary conduct, Surescripts was able to protect its dominant position in two e-prescription markets, to the detriment of U.S. consumers.

b. What is the FTC doing to address such behaviors?

For over 20 years and on a bipartisan basis, one of the Commission's top priorities has been combatting anticompetitive conduct by pharmaceutical companies. We have challenged anticompetitive reverse payment agreements, sham litigation, and most recently, product-hopping behavior that illegally suppresses competition from new products entering

[16] *McWane, Inc. v. FTC*, 783 F.3d 814, 820-21 (11th Cir. 2015).

pharmaceutical markets. As tactics continue to evolve, the Commission will remain vigilant to investigate and challenge conduct by pharmaceutical firms that delays new entry, keeps prices artificially high, and denies patients access to life-saving treatments.

I look forward to working with you and others in Congress who are interested in deterring anticompetitive conduct by pharmaceutical companies. Over the past year, Commission staff has provided technical assistance on a number of legislative proposals directed at these concerns. In addition, I support legislation that would more effectively deter anticompetitive behavior that delays entry of new treatments, including lower-cost biosimilar products.

c. Without identifying any companies, you stated at the hearing that you would look into whether the FTC has an active investigation concerning rebate walls. Upon review, does the FTC have any investigation(s) ongoing?

d. If so, how many investigations does the FTC have ongoing regarding rebate walls?

The Commission's rules prevent me from revealing whether the FTC has opened an investigation into any specific matter. I can confirm that we do have ongoing investigations into pharmaceutical contracting practices, including rebate walls.

7. I was pleased to learn at the hearing that the FTC is planning to conduct a retrospective analysis of the labor market effects of hospital mergers.

a. What is the timeline for conducting that merger retrospective?

Last month, the Commission issued orders to five health insurance companies and two health systems to provide information that will help the agency conduct retrospective analyses of the effects of so-called "Certificates of Public Advantage" (COPAs) recently granted for two different hospital mergers.[17] The FTC intends to collect information over the next several years as part of this effort. The retrospectives will examine not only the effects of the certificates of advantage on price, quality, access, and innovation for healthcare services, but also the impact of hospital consolidation on employee wages. Once this multiyear study is complete, the FTC plans to publicly report its findings.

b. In questions for the record after the 2018 Senate Judiciary Committee oversight hearing on antitrust, you stated that the agency did not have sufficient data to enable a retrospective analysis of the labor market effects of a consummated merger.

i. What changed over the past year to allow the FTC to conduct such a retrospective analysis for hospital mergers?

In June 2019, the FTC held a public workshop to assess the impact of COPAs on hospital

[17] FTC Press Release, FTC to Study the Impact of COPAs (Oct. 21, 2019), https://www.ftc.gov/news-events/press-releases/2019/10/ftc-study-impact-copas.

merger consolidation.[18] Academics, health policy experts, healthcare industry stakeholders, state regulators and law enforcers, and staff from the FTC's Bureau of Economics discussed research regarding the effects of certificates of public advantage and the impact of hospital mergers on employee wages. Workshop testimony and public comments informed the current study design. The orders issued last month will assist the agency in compiling its study.

ii. Does the FTC have sufficient data to conduct a retrospective analysis of the labor market effects of mergers in other industries?

Beyond the COPA hospital merger retrospective studies that we discussed above, we continue to look for candidate merger retrospective studies to evaluate labor market effects.

iii. If not, why not? Can Congress provide any help in ensuring that the FTC has the necessary data to conduct these analyses?

The FTC is very interested in conducting research on the impact of mergers on labor markets, but currently does not have access to the appropriate data to perform such a study. To determine if a merger caused wages to decline (or increase), we need access to data describing how the employees' wages at the merged firm changed following the merger and data describing how workers performing similar tasks at other firms (both in the same geographic area and in other geographic areas) changed during the same time period.

Although the FTC does not possess such data, we believe other U.S. government agencies may already collect the information necessary to conduct this study. For instance, the U.S Treasury possesses tax-filing data and the Census Bureau collects matched employee-employer survey data, which some researchers have recently used to explore market power in labor markets. Nevertheless, we believe researchers using confidential Treasury or Census data cannot report findings at a level where the firms being studied can be identified, or even where relatively specific information about the characteristics of markets being studied can be revealed. These restrictions could seriously impede the FTC's ability to report the results of a study of a merger's labor market effects in a way that would shed light on what types of mergers harm workers. As a result, in addition to gaining access to the data, we would need a waiver from the disclosure rules in order to provide meaningful insight into the labor market effects of a merger.

8. While non-compete agreements can help protect employers and incentivize investments in workers, too often they are used to stifle competition. I was disappointed to hear that the Commission found insufficient evidence in its literature review to justify a rulemaking. Nevertheless, I am glad that the FTC is hosting a workshop on this issue in October and is seeking additional evidence to support a rulemaking.

Please provide a list of each study that the FTC reviewed in its literature review of non-competes. For each study, please include: (i) names of the author(s); (ii) title of

[18] FTC Workshop, A Health Check on COPAs: Assessing the Impact of Certificates of Public Advantage in Healthcare Markets (June 19, 2019), https://www.ftc.gov/news-events/events-calendar/health-check-copas-assessing-impact-certificates-public-advantage.

the study; (iii) date of publication; and (iv) name of publication.

I share your concern that non-compete agreements may sometimes be used to stifle competition, without sufficient countervailing benefits. I appreciate your interest in our upcoming workshop, which we expect to hold in early 2020. This summer, I asked the Commission's Bureau of Economics to conduct a literature review of non-compete agreements. Below are the materials reviewed by staff in connection with their review of the then-current literature. Some of these materials do not directly address non-compete agreements, but were included because they were part of staff's literature review, providing helpful background on methodology and theory.

Staff's review continues, in anticipation of the upcoming workshop on the effects of non-compete agreements on workers.

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- Toby E. Stuart & Olav Sorenson, *Liquidity Events and the Geographic Distribution of Entrepreneurial Activity*, 48 ADMIN. SCI. Q. 175 (2003).

- Evan Starr, *Consider This: Wages, Training, and the Enforceability of Covenants Not to Compete*, 72 INDUS. & LAB. REL. REV. 783 (2019).

- Evan Starr, Natarajan Balasubramanian & Mariko Sakakibara, *Screening Spinouts? How Noncompete Enforceability Affects the Creation, Growth, and Survival of New Firms*, 64 MGMT. SCI. 552 (2017).

- Evan Starr, Justin Frake & Rajshree Agarwal, *Mobility Constraint Externalities*, ORG. SCI. (forthcoming).

- Evan Starr, J.J. Prescott & Norman Bishara, *The in terrorem Effects of (Unenforceable) Contracts* (U. Mich. L. & Econ. Res. Paper No. 16-032, 2019).

- Evan Starr, J.J. Prescott & Norman Bishara, *Noncompetes in the U.S. Labor Force* (U. Mich. L. & Econ. Res. Paper No. 18-013, 2019).

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- Joshua D. Angrist & Jörn-Steffen Pischke, MOSTLY HARMLESS ECONOMETRICS: AN EMPIRICIST'S COMPANION (2009).

- Joshua D. Angrist & Jörn-Steffen Pischke, *The Credibility Revolution in Empirical Economics: How Better Research Design is Taking the Con out of Econometrics*, 24 J. ECON. PERSPECTIVES 3 (2010).

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- Mindy S. Marks, *Minimum Wages, Employer-Provided Health Insurance, and the Nondiscrimination Law*, 50 INDUS. REL. 241 (2011).

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Senate Financial Services and General Government Appropriations Subcommittee
"Hearing to review the Fiscal Year 2020 funding request and budget justification for the Federal Communications Commission and the Federal Trade Commission"
May 7, 2019
Questions for Chairman Simons

Questions for the Record from Senator Boozman:

Regarding the Contact Lens Rule:

1. **What evidence does the Commission have from official Congressional proceedings during consideration of the Fairness to Contact Lens Consumers Act that indicates Congressional intent to include automated telephone calls in the Act's definition of direct communication?**

   With respect to official Congressional proceedings during consideration of the Fairness to Contact Lens Consumers Act, there is relatively little in the evidentiary record that explicitly discusses or implicates automated telephone calls. There is evidence that the American Optometric Association informed members of Congress that contact lens sellers were using "automated phone calls" to verify prescriptions, and that optometrists viewed such calls as a significant cause for concern.[1] However, Congress did not expressly exclude the use of automated technology for verification purposes in the FCLCA, and did not otherwise include the phrase "automated telephone call," instead defining the term "direct communication" to include "communication by telephone, facsimile, or electronic mail," and noting that this list is "not exclusive."[2]

   Following enactment of the FCLCA, the Commission, in 2004, issued the Contact Lens Rule, and echoed the language of the FCLCA for its definition of "direct communication" as meaning "completed communication by telephone, facsimile, or electronic mail."[3] The Commission further explained, in its Statement of Basis and Purpose, "The Act expressly authorizes sellers to send verification requests by telephone, which is commonly understood to include automated telephone systems. It would thus seem to be contrary to Congressional intent to prohibit the use of this technology."[4] The Commission has always emphasized, however, that automated telephone systems must fully comply with all applicable Rule requirements in order for the verification request to be valid. For example, telephone requests—whether automated or spoken by a live person—must be delivered at a volume or cadence capable of being understood by a reasonable person.[5]

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[1] *See* "Fairness to Contact Lens Consumers Act: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce," 108th Cong. 1 (2003) (statements of J. Pat Cummings, American Optometric Association, discussing what he viewed as problematic automated verification messages, and noting that such messages can be "difficult, if not impossible for doctors to respond to").
[2] H.R. Rep. No. 108-318, at 10 (2003). The Committee Report also noted, "It is the intent of the Committee that 'direct communication' means a message has been both sent and received."
[3] Contact Lens Rule, 69 Fed. Reg. 40,509 (July 2, 2004) (codified at 16 C.F.R. 315).
[4] *Id.* at 40,489.
[5] *Id.* (stating "direct communication by telephone would require reaching and speaking with the intended recipient, or clearly leaving a voice message on the telephone answering machine"); *see also* FTC Facts for Business,

The Commission has reiterated its view on the use of automated telephone verifications under the FCLCA and CLR on several occasions since 2004. Most recently, in the May 28, 2019 Supplemental Notice of Proposed Rulemaking ("SNPRM"), the Commission proposed several changes to improve the passive verification process and make automated telephone verifications more effective. The Commission proposed that sellers who use automated telephone verification messages would have to: (1) record the entire call and preserve the complete recording; (2) begin the call by identifying it as a prescription verification request made in accordance with the Contact Lens Rule; (3) deliver the verification message in a slow and deliberate manner and at a reasonably understandable volume; and (4) make the message repeatable at the prescriber's option. This amendment is intended to enable prescribers to better fulfill their role as protectors of patients' eye health since prescribers cannot correct or police invalid, inaccurate, and expired prescriptions if they cannot comprehend a seller's verification request.

2. **Please describe the Commission's test-buy activities and other methods used to ensure compliance with the Rule.**

The Commission monitors the marketplace by engaging in its own review of the practices of contact lens sellers and by receiving complaints. The Commission also works collaboratively with the FDA in its monitoring of contact lens sellers. When staff determines it is appropriate, it purchases contact lenses through the use of undercover accounts. The Commission recently announced an enforcement action against a contact lens seller challenging the sale of contact lenses without a valid prescription. The order banned the defendant from selling contact lenses and imposed a $575,000 civil penalty.[6] The Commission has also sent warning letters to sellers, including letters to ten contact lens sellers in 2016.[7] We will continue to monitor the marketplace, taking action against violations as appropriate.

3. **Please provide information on what percentages of verifications are filled through the following methods: fax, electronic means, personal live calls, or automated calls.**

The Commission does not have information on the specific percentages of verifications that occur by the various permissible means. Through discussions with industry, the Commission knows that the preferred method varies by seller.

Complying with the Contact Lens Rule (2005), https://www.ftc.gov/tips-advice/business-center/guidance/complying-contact-lens-rule ("Automated telephone verification messages must be delivered in a volume and cadence that a reasonable person can understand" and "[a] request delivered by an automated telephone system doesn't comply with the Rule if: it isn't delivered in a volume and cadence that a reasonable person can understand; it contains incomplete verification information; or it requires the prescriber's office to provide an immediate response.").

[6] *U.S. v. Lawrence L. Duskin*, No. 1:18-cv-07359 (N.D. Cal. Dec. 6, 2018).

[7] *See* FTC Press Release, *FTC Issues Warning Letters Regarding the Agency's Contact Lens Rule* (Apr. 7, 2016), https://www.ftc.gov/news-events/press-releases/2016/04/ftc-issues-warning-letters-regarding-agencys-contact-lens-rule.

4. **How many sellers does the Commission audit annually for verification compliance? How many have been the recipient of some form of enforcement action?**

   The Commission does not conduct annual audits of sellers or prescribers for compliance with the verification process. The Commission investigates sellers and prescribers based on complaints received and through internet surveillance. Since the Rule's passage, the Commission has taken law enforcement action against eleven contact lens sellers who violated the Rule by, *inter alia*, failing to properly verify prescriptions.[8]

   Our settlement orders have provided injunctive relief that, among other things, prohibited the defendants from: selling contact lenses without obtaining a prescription from a consumer; selling contact lenses without verifying prescriptions by communicating directly with the prescriber; and failing to maintain records of prescriptions and verifications. In addition, the Commission has sent numerous warning letters to both sellers and prescribers who potentially violated the Rule.

5. **Does the Commission track the effectiveness of the verification process for stopping expired prescriptions from being filled? If so, how many expired prescriptions are filled each year in the United States? How many are not filled?**

   The Commission does not have specific data on the effectiveness of the verification process in stopping the filling of expired prescriptions. However, the Commission investigates sellers based on complaints received for, among other things, selling lenses on expired prescriptions, and will take action as appropriate.

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[8] *U.S. v. Lawrence L. Duskin*, No. 1:18-cv-07359 (N.D. Cal. Dec. 6, 2018); *U.S. v. Gene Kim*, No. 1:11-cv-05723 (E.D.N.Y. Feb 7, 2012); *U.S. v. Royal Tronics, Inc.*, No. 0:11-cv-62491 (S.D. Fla. Jan. 27, 2012); *U.S. v. Thy Xuan Ho*, No. 1:11-cv-03419 (D. Minn. Dec. 27, 2011); *U.S. v. Gothic Lens, LLC*, No. 1:11-cv-00159 (N.D. Ga. Feb. 3, 2011); *U.S. v. Jokeshop, LLC*, No. 1:11-cv-11221 (D. Mass. Nov. 29, 2011); *U.S. v. Contact Lens Heaven, Inc.*, No. 0:08-cv-61713 (S.D. Fla. Dec. 3, 2008); *U.S. v. Chapin N. Wright, II*, No. 1:08-cv-11793 (D. Mass. Oct. 31, 2008); *U.S. v. BeWild, Inc.*, No. 2:07-cv-04896 (E.D.N.Y. Dec. 3, 2007); *U.S. v. Pretty Eyes, LLC*, No. 1:07-cv-02462 (D. Colo. Nov. 28, 2007); *U.S. v. Walsh Optical, Inc.*, No. 2:06-cv-03591 (D.N.J. Aug. 30, 2006).

Questions for the Record from Senator Jerry Moran:

1. **Your testimony highlighted the FTC's increasing need for expert witnesses in the complex investigations and litigation for both competition and consumer protection matters. Would you please expand upon the distinct uses of expert witnesses between the agency's competition cases and consumer protection cases?**

    a. **Specific to the FTC's consumer protection efforts related to data privacy and security, would you please describe the resource needs for expert witnesses related to these efforts?**

    b. **What additional value do these experts bring beyond that of the FTC staff, inclusive of its technologists, investigators, and lawyers?**

Thank you for your attention to this important issue. Our expert witness engagements are complex, which we would like to explain to the Subcommittee. In general, the Commission employs experts outside the agency to support its litigation matters when necessary. In antitrust litigation in particular, expert economic testimony has become an essential component of helping the adjudicator assess the facts and apply the law. Sometimes, economists from the Bureau of Economics prepare to testify as an expert witness, either in an administrative proceeding or in federal court. But preparing to testify is a time-consuming endeavor that limits that economist's availability to work on other investigations or enforcement actions. Choosing to employ an outside economic expert is a resource decision made in matters that appear to be heading toward litigation. Of course, the agency often relies on outside experts other than economists when it lacks specific in-house expertise.

Given some significant differences between competition and consumer protection cases, this response breaks out information separately for each of our two enforcement missions

Competition Cases

A variety of factors such as the type of case and the complexity of the industry in which the parties under investigation operate can affect the amount of time and the financial and human resources required to litigate competition cases. Moreover, as companies generate and store more data, that adds to what FTC staff must review and process in order to conduct relevant economic analyses. In short, competition litigation can be resource intensive, and those constraints are only growing over time.

External experts, however, provide critical support in helping the agency meet the resource constraints that we face in litigating competition cases. Outside testifying experts and their support staff provide the significant back-end support needed to review and process voluminous datasets and conduct empirical analyses at the rapid pace required in many fast-moving litigation matters. That is particularly true in merger litigation cases where outside parties dictate the volume, nature, and timing of their deals thus compelling agency staff to move quickly to build a case. Testifying experts also often bring litigation experience and subject matter expertise to our competition cases.

But, despite the critical role that outside experts play in our litigation work, the large size and growth in expert costs present another set of challenges to the Commission. When a competition case goes to litigation (versus settlement or closing), expert witness costs typically increase exponentially and may lead to millions of dollars in additional expert fees. Even very small changes in the total number of competition cases per year can have a dramatic impact on the agency's overall spending on expert fees.

Unfortunately, the agency has a limited ability to control this primary driver of our expert costs. The Commission votes out a complaint when it has reason to believe that a competition enforcement action is in the public interest. But, after the vote, the course of litigation (and possible settlement) is determined in large part by the defendants and, of course, the judge or judges. Among other factors, defendants may choose to retain one or more experts of their own, which can affect our expert strategy.

In general, we have observed that the kinds of experts qualified for this kind of work are becoming more expensive. In an increasingly data-rich world, each case requires more of an expert's time, and significant support resources to process data and increasingly large volumes of documents. Our expert budget is depleted not only by higher prices per hour worked, but also by the need for experts to spend more time preparing for each case, and the need for more support resources to manage each case.

On the competition side, we have determined that the range of total expert costs for cases that are fully litigated (meaning a preliminary injunction, administrative hearing on the merits or both) in the last five years is $583,100 - $6.90 million.

The remaining, requested data points for our competition cases are as follows:

Fiscal Year	Expert Spending*
2008	$3.05 million
2009	$3.40 million
2010	$3.16 million
2011	$2.97 million
2012	$2.09 million
2013	$2.98 million
2014	$4.84 million
2015	$10.03 million
2016	$12.21 million
2017	$11.46 million
2018	$15.80 million
*Some years' expenditures may change due to ongoing work	

To date, the Commission has managed allocated funds to pay the expert witness fees needed to pursue vigorous competition enforcement on behalf of consumers. We are, however, increasingly concerned with our ability to continue to do so.

Consumer Protection Cases

Many of the expert challenges identified above—such as the increased amounts of data, fast-paced nature of litigation, and time-consuming nature of expert work—apply equally in our consumer protection cases. Evolving technologies also continue to increase the complexity of our privacy and data security investigations and litigations.

The Commission currently employs five technologists, three of whom work full time on privacy and security matters. These technologists provide expert assistance on privacy and security cases, for example, by helping attorneys draft discovery requests, participating in meetings with opposing parties and assisting staff in better understanding technical issues, and reviewing pleadings for technical accuracy.

However, additional resources for expert witnesses in these cases continue to be a critical area of need for our agency. Although we have requested additional resources hire new staff technologists, we will need to supplement those technologists with outside consulting and testifying experts, who can address specific issues in cases as they arise. Indeed, in privacy and data security litigation, it is almost always necessary to have third-party testifying experts not employed by the agency. For example, in past cases we have hired external experts to testify on such matters as (1) whether a company's security practices were reasonable; (2) actual and likely harms resulting from data breaches and identity theft; and (3) the operation of peer-to-peer networks.

Average expert cost per case: Between FY16 and FY18, the Commission filed an average of 71 consumer protection cases (mostly in federal court) per year, spending approximately $30,000 per case on expert witness contracts. The Commission uses experts in approximately 44 consumer protection matters per year, spending an average of approximately $49,000 on expert witness contracts in each of those cases.

Total yearly expert costs: Between FY16 and FY18, the Commission spent approximately $2.16 million on expert witness contracts for consumer protection cases per year, and is on track to obligate $2.28 million during FY19.

Expert spending over past 10 years: The Commission's expert spending on consumer protection cases has remained steady over the past 10 years. In FY 2008, the Commission expended approximately $2.07 million on expert contracts in consumer protection cases, and is on track to obligate $2.28 million during FY19.

2. **As for the IT modernization efforts of the FTC, I found the current Hart-Scott-Rodino Premerger Filing Process example that you cited in your testimony to be particularly troubling. Was the FTC's Chief Information Officer (CIO) consulted in the development of the FTC's FY2020 budget request? Are other IT modernization projects included in the request?**

The FTC is pursuing a multi-year modernization program to update its IT and the underlying support in terms of contracting, security, and governance. The agency has already implemented a Blanket Purchase Agreement ("BPA") to update its IT services, including those in support of HSR. Use of the BPA has already led to updates in the agency's security architecture necessary to support modernization of HSR practices. Through the Digital Roadmap activities directed by the 21st Century Integrated Digital Experience Act (IDEA), the agency will evaluate several analytic platforms to improve the user experience for practitioners who submit filings to the FTC—including HSR filings. Each of these efforts has been led by the CIO or one of his delegated staff.

3. **In January, I joined Senator Casey in introducing the Stop Senior Scams Act, which would ensure retailers, financial institutions and wire transfer companies have the resources to train employees to help stop financial frauds and scams on seniors. Specifically, the bill would create a federal advisory council at the FTC to develop educational materials for companies from these specific industries to use to train employees on how to identify and stop financial scams at the point of sale. Based on my conversations with consumer advocates and industry representatives, education and awareness remains one of the key tools in preventing fraudulent practices in the first place. Do you agree that effective training of employees to identify consumer fraud and stop it would be valuable to consumers?**

   I fully agree that training employees to identify and stop fraud is critically important. Consumer education is a vital tool in preventing consumer harm, and the Commission tailors its educational materials and messages for specific audiences, such as older adults, small businesses, and parents. Commission staff have spoken with many companies about their training programs and efforts to minimize fraud through store signage, employee training, and technology that creates speed bumps or triggers inquiries at the check-out counter when certain transactions are conducted (e.g., large denomination purchases for gift cards). We also hear of individual store employees who successfully assist customers to prevent a scam.[9]

4. **In March, the FTC utilized its Section 6(b) authorities from the FTC Act to issue orders to seven U.S. internet broadband providers and related entities seeking information about the companies' privacy policies, procedures, and practices. The FTC has conducted similar examinations in the past including their 2014 report on data brokers. Does the FTC plan to initiate additional 6(b) special reports related to consumer data privacy in other industries or sectors? Do these special reports require significant resources?**

   The Commission frequently uses its authority under Section 6(b) of the FTC Act, which allows it to conduct industry-wide studies. In the past few years alone, we have studied the practices of data brokers and mobile device manufacturers and, as you mention, we are undertaking a study of internet service providers. These types of studies are best

[9] FTC Consumer Blog, *Scam Spotted thanks to a Clever Store Clerk* (Jan. 18, 2018), https://www.consumer.ftc.gov/blog/2018/01/scam-spotted-thanks-clever-store-clerk.

suited to areas in which we can make apples-to-apples comparisons across a range of companies. We are considering further 6(b) studies in other industries.

5. **As you are aware, enactment of the Better Online Ticket Sales (BOTS) Act in 2016 provided the FTC and state attorneys general authority to treat any "circumvention of a security measure, access control system, or other technological measures" (including online bots) to surpass ticket purchasing limits as an "unfair or deceptive practice" under the FTC Act. Since the enactment of this law, has the FTC taken any enforcement actions against bad actors utilizing "online bots" to harm consumers?**
    a. **If not, why? Are there resource issues that are preventing the FTC from enforcing under this authority?**

    To date, the FTC has not taken any action under the BOTS Act. While I cannot comment on whether any non-public investigations are or are not underway, as a general matter capturing the use of bots in any context, and identifying the individuals or companies operating ticket bots, can be extremely complex and time consuming.

    The FTC continues to engage with primary ticket sellers, ticket resellers, foreign agencies, and state attorneys general about strategies for stopping bots. Most recently, we held a public workshop concerning ticket bots and other consumer protection issues related to the online event-ticket marketplace.[10]

[10] FTC, *Online Event Tickets Workshop* (June 11, 2019), https://www.ftc.gov/news-events/events-calendar/2019/03/online-event-tickets-workshop.

Questions for the Record from Senator Durbin:

1. **I frequently get robocalls myself—just a few months ago, I received a scam call from someone claiming to be part of the Social Security Administration. Chairman Simons, what more can the FTC be doing to educate consumers about scams—including Social Security scams and calls purporting to be from the Internal Revenue Service? What resources would allow the FTC to more effectively pursue these bad actors scamming Americans out of billions of dollars every year?**

   Because we have seen an alarming growth in the number of reports about government imposters—largely driven by Social Security Administration imposter scams—the FTC is engaged in a concerted effort to bring attention to government imposter scams. Earlier this month, the FTC published a Data Spotlight to highlight the top government imposter scams that are reported to the FTC and to identify tactics these fraudsters use to scare consumers and get their money.[11] Along with it, we released an interactive infographic, which enables people to find the top government imposter for any year since 2014, and for any of those, the aggregate dollar losses reported, the median individual dollar losses reported, and the number of people who reported losing money.[12] These are just the latest in a series of FTC data publications, with the goal to educate the public more broadly about the tactics such scammers employ so consumers can recognize a scam call, hang up, and avoid losing money.

   On the enforcement side, the FTC is working with other federal agencies to identify where these calls are coming from and to develop strategies for combating such fraud. In late June, the FTC convened its fourth India Call Center roundtable to enable industry and law enforcement personnel to share information and collaborate on strategies to stop these government imposter calls.[13]

   As discussed more fully in the Commission's written testimony, Congress should eliminate the outdated common carrier exemption, which impedes our ability to tackle illegal robocalls, among other enforcement initiatives. For example, removing the common carrier exemption would allow the FTC to reach carriers that assist and facilitate illegal telemarketing and obtain complete relief for consumers when there are multiple parties to a scheme.

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[11] FTC Consumer Protection Data Spotlight, *Government imposter scams top the list of reported frauds* (July 1, 2019), https://www.ftc.gov/news-events/blogs/data-spotlight/2019/07/government-imposter-scams-top-list-reported-frauds.

[12] *Explore Government Imposter Scams* (June 26, 2019), https://public.tableau.com/profile/federal.trade.commission#!/vizhome/GovernmentImposter/Infographic. These resources are also available by accessing www.ftc.gov/data.

[13] *See* U.S.-India Business Council & FTC, *4th Annual Round Table on Stepping Up to Stop Indian Call Center Fraud* (June 20, 2019), https://www.usibc.com/event/4th-annual-round-table-on-stepping-up-to-stop-indian-call-center-fraud/.

Questions for the Record from Senator Manchin:

Question 1: Ensuring Privacy After Deleting Social Media

I believe that the pictures and videos that you take belong to you. Even if you post them on a social media site they should still belong to you, and you should be able to choose to remove them.

In November of 2011, your agency found that social networking sites, like Facebook, were allowing third parties to access photos or videos that a user had uploaded and had been stored by the site, even after the user had deleted his or her account.

- **Are social media platforms still allowing access to data even after a user has deleted his or her account?**
- **Can users retrieve their data that has already been shared to third parties?**
- **What can Congress do to ensure these companies are not using, disclosing, or in any way monetizing the content that a user has requested be removed?**

  As background, the FTC Act prohibits companies from making deceptive statements about consumers' ability to delete information from their accounts. For example, in 2012, the Commission alleged that Facebook had made deceptive statements about users' ability to delete content, and required in its 2012 consent agreement that Facebook block third parties from accessing content that users thought they had deleted. In the new order just announced on July 24, Facebook is now also required to remove such deleted content from its servers.

  In the absence of deception, the FTC Act generally does not prohibit social media platforms or other companies from accessing user data after a user has deleted his or her account. In some instances, this may be a good thing. For example, consumers may change their mind about deletion and prefer not to have to re-create their entire social media profile. Deleted information may be needed for law enforcement purposes, such as locating missing or exploited children. At the same time, the right to access, correct, and delete serves an important privacy purpose. To the extent Congress considers developing privacy legislation that requires social media platforms or other companies to provide access, correction, or deletion rights to consumers, I would urge Congress to balance these considerations.

Question 2: Deceptive Treatment Practices for Opioids and other Drugs

On multiple occasions, the Federal Trade Commission and the U.S. Food and Drug Administration have worked together to issue warning letters to marketers and distributors for illegally marketing products with unproven claims about their ability to help treat opioid addiction. Last year, in July 2018, FTC Commissioner Rohit Chopra wrote a letter to Congress about widespread abuse in the drug treatment industry.

- **Do you need new legislative authorities to address and combat this behavior?**

Congress recently provided the Commission with additional authority to address the deceptive marketing of drug treatment products and services. In October 2018, the President signed into law the "Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities Act," or the "SUPPORT for Patients and Communities Act." The Act makes it unlawful to engage in an unfair or deceptive act or practice with respect to any substance use disorder treatment service or substance use disorder treatment product, and authorizes the FTC to enforce violations and obtain civil penalties. In light of this newly-obtained authority, we do not believe that additional legislative action is needed at this time.

Question 3: Opioid Sales over the Internet

FTC's efforts to investigate deceptive advertising and marketing practices in the opioid treatment industry are commendable. In April 2019, FDA Commissioner Gottlieb identified the rise in illegal sales of opioids over the internet as a critical public health concern and major focus attention of the FDA. Since 2017, the FDA has identified more than 450 websites illegally offering opioids for sale. Major social media sites have repeatedly been identified as hosting ads, posts, and other messages directing users toward drug sales. Many of these ads are driven by algorithms and it can take days and weeks for social media companies to identify and take them down. Tech companies have been warned about illegal drug sales on their platforms for years, but these companies have resisted taking practical steps to find and remove opioid-related listings.

- **While the DEA has jurisdiction over illegal sales, the FTC works to protect and educate consumers. What actions are you taking to protect consumers from deceptive or illegal ads on social media?**

The FDA has primary jurisdiction over the advertising of all prescription drugs, including opioids, under an FDA-FTC Memorandum of Understanding. However, with regard to advertising in general, the Commission evaluates advertising on social media under the same standards as it does advertising in traditional media and devotes substantial resources to addressing social media and influencer marketing.

For example, the FTC recently issued joint warning letters with the FDA to four marketers of flavored e-liquid products whose products were promoted by influencers on social media sites including Facebook, Instagram, and Twitter.[14] These letters reminded the marketers that their advertisements must disclose material health or safety risks of the promoted product, as well as any material connections (such as monetary payments) between the marketer and influencers promoting the products.

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[14] *See* FTC Press Release, *FTC and FDA Send Warning Letters to Companies Selling Flavored E-liquids About Social Media Endorsements without Health Warnings* (June 7, 2019), https://www.ftc.gov/news-events/press-releases/2019/06/ftc-fda-send-warning-letters-companies-selling-flavored-e-liquids.

Similarly, in other recently-announced actions, we have targeted advertising that included promotion through social media.[15]

[15] *See, e.g.*, Warning letter from FDA and FTC to TEK Naturals (Feb. 5, 2019), https://www.ftc.gov/system/files/attachments/press-releases/ftc-fda-send-warning-letters-companies-selling-dietary-supplements-claiming-treat-alzheimers-disease/tek_naturals_warning_letter_wl_565026.pdf (regarding products claimed to treat conditions including Alzheimer's and Parkinson's disease, that were marketed online, including through Facebook, Instagram, and Twitter); FTC Press Release, *PR Firm and Publisher Settle FTC Allegations They Misrepresented Product Endorsements as Independent Opinions, Commercial Advertising as Editorial Content* (Nov. 13, 2018), https://www.ftc.gov/news-events/press-releases/2018/11/pr-firm-publisher-settle-ftc-allegations-they-misrepresented (insect repellent promoted by celebrity athlete endorsers on social media).

Questions for the Record from the Honorable David N. Cicilline, Chairman, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary

Questions for the Record for the Honorable Joseph Simons, Chairman, Federal Trade Commission

Merger Enforcement

1. Please provide the performance objectives for managers in merger shops.

The Bureau of Competition (BC) comprises several merger enforcement divisions, each led by an Assistant Director (AD) and one or more Deputy Assistant Directors (DADs). The ADs and DADs are responsible for carrying out the FTC's competition mission by executing the merger enforcement-related strategies identified in the FTC's annual performance plan.[1] These strategies include, among other things:

- Investigating potentially anticompetitive mergers using rigorous, economically sound, and fact-based analyses that enhance enforcement outcomes and minimize burdens on business; and

- Negotiating merger consent orders and winning litigated orders that have significant remedial, precedential, and deterrent effects.

2. Are any merger shop managers evaluated based on the number of settlements they reach? If so, do you believe that this incentivizes reaching settlements over litigation?

No, the number of settlements reached is not an element of performance management for merger shop managers.

The FTC's annual performance plan identifies the agency's performance metrics and goals, which are designed to ensure that the FTC—including its managers and senior leaders—effectively and efficiently uses its limited resources in areas where the agency can achieve the most positive change.[2] The metrics for merger enforcement treat litigated victories the same as settlements or abandoned or restructured transactions.[3] Likewise, we compute consumer savings across all merger enforcement actions (whether resolved through litigation or settlement), and total consumer savings compared to the amount of resources allocated to our merger program.[4]

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[1] FTC, FISCAL YEAR 2018 PERFORMANCE REPORT AND ANNUAL PERFORMANCE PLAN FOR FISCAL YEARS 2019 AND 2020 at 36-37, https://www.ftc.gov/system/files/documents/reports/fy-2019-20-performance-plan-fy-2018-performance-report/2020-app-apr.pdf.
[2] *Id.* at 42.
[3] *Id.* at 38 (Key Performance Goal 2.1.1).
[4] *Id.* at 39-40 (Key Performance Goals 2.1.2 & 2.1.3).

3. How does the Commission incentivize staff to recommend and litigate cases where it finds there has been—or is likely to be—harm to competition, even where that litigation may end in a loss?

The FTC does not shy away from litigating difficult cases, and this message is consistently conveyed to staff. Of course, the Commission must consider litigation risks when it determines how best to use its limited resources—but staff knows the Commission does not expect a 100 percent "win" rate. For example, the Commission has brought and prevailed in Supreme Court cases addressing reverse payment pharmaceutical agreements and the state-action doctrine, even after losing at the lower court level.[5] In the last few years, the agency tried and lost two hospital merger challenges in federal district court, only to prevail at the appellate level.[6] And just a couple of weeks ago, the agency lost a preliminary injunction action in federal district court regarding an industrial chemical merger.[7] When the Commission votes to bring these and other challenging cases and to devote considerable resources to them, even after exhaustive discussions of litigation risk, the Commission clearly signals to staff that the Commission has their backs when they seek to vigorously enforce the antitrust laws.

4. Is litigation a risk factor that the Commission considers when deciding whether to challenge a merger?

Yes, the Commission must consider litigation risk as part of our responsibility to be effective stewards of the resources entrusted to us. Antitrust merger litigation is a fast-paced, labor-intensive process, and we are always mindful of resource constraints when weighing enforcement options. But when we determine that a merger poses competitive harm, we do not let concerns over litigation risk dictate our decision to litigate. In assessing when and how to bring an enforcement action in the public interest, we consider multiple factors, but arguably the most important factor is the strength of the evidence. In evaluating the case, we look at the three legs of the stool of any good antitrust case: documents, witnesses, and economic analysis. We try to build merger challenges that have all three legs, but we very often bring cases that have only two—maybe even one—of the three legs.

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[5] *FTC v. Actavis, Inc.*, 570 U.S. 136 (2013) (rejecting lower courts' rulings immunizing reverse-payment settlements that were within the "scope of patent" and allowing antitrust scrutiny under a rule of reason analysis); *FTC v. Phoebe Putney Health Sys.*, 568 U.S. 216 (2013) (rejecting lower courts' rulings that state action doctrine immunized hospital acquisition from antitrust laws because state did not clearly and affirmatively express a policy allowing the special-purpose entity hospital authorities to make acquisitions that substantially lessened competition).

[6] *FTC v. Advocate Health Care Network*, 841 F.3d 460 (7th Cir. 2016); *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327 (3d Cir. 2016). In each case, the FTC alleged that the proposed merger would substantially reduce competition for general acute care inpatient hospital services sold to commercial health plans, leading to higher healthcare costs and lower quality service in local communities, but the district court rejected the FTC's proffered geographic market. On appeal, both circuit courts overturned the district court's decision and validated the FTC's geographic market analysis. The decisions acknowledged the commercial reality of U.S. hospital competition: that because patients prefer to receive hospital services close to home, employers require—and commercial health plans must offer—access to in-network hospitals close to where their employees live. This dynamic—rather than where patients living in the market might travel for healthcare if the cost of hospital services were to rise—determines the relevant geographic market.

[7] *FTC. v. Rag-Stiftung*, No. 1:19-cv-02337-TJK (D.D.C. Feb. 3, 2020), https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2019cv2337-150.

Of course, we entertain proffered settlement offers that we believe will restore competition, especially when we are confident that the settlement outcome will rival what we might obtain via protracted litigation.

5. **Is it appropriate for the Commission to consider litigation risk when deciding whether to vote out a complaint in a merger or case of anticompetitive conduct if the Commission otherwise believes the transaction or conduct violated the antitrust laws?**

Yes, consideration of litigation risk is always appropriate and necessary. Antitrust litigation is incredibly resource intensive, and we have an obligation to be good stewards of the resources that Congress has allocated to carry out our dual competition and consumer protection missions. When we decide whether to pursue litigation, we evaluate the likelihood that our enforcement efforts will result in relief to consumers. For the same reason, we also consider whether accepting a well-crafted settlement could resolve the alleged harm much faster, and without expending resources to litigate the case.

Nevertheless, lawsuits are central to effective antitrust enforcement, and the Commission does not hesitate to litigate when necessary. The unprecedented level of antitrust litigation by the Commission over the last two years—including four merger challenges approved unanimously by the Commission and filed in the last two months—shows this. [8]

Litigation risk is just one of many factors that inform the agency's enforcement priorities. Early in my term as Chairman, I identified five factors that I use in prioritizing our enforcement efforts:

i. Does the conduct pose a substantial threat to consumers?
ii. Does the conduct involve a significant sector of the economy?
iii. Does the FTC have experience that will allow it to make an impact quickly and efficiently?
iv. Does the conduct present a legal issue that would benefit from further study, and potentially have a significant effect on antitrust jurisprudence?
v. Does the conduct involve unilateral conduct by dominant firms in industries with substantial network effects?[9]

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[8] *See, e.g.*, FTC Press Release, *FTC Files Suit to Block Edgewell Personal Care Company's Acquisition of Harry's, Inc.* (Feb. 3, 2020), https://www.ftc.gov/news-events/press-releases/2020/02/ftc-files-suit-block-edgewell-personal-care-companys-acquisition; FTC Press Release, *FTC Challenges Consummated Merger of Companies that Market Body-Worn Camera Systems to Large Metropolitan Police Departments* (Jan. 3, 2020), https://www.ftc.gov/news-events/press-releases/2020/01/ftc-challenges-consummated-merger-companies-market-body-worn; *FTC Press Release, FTC Alleges Post Holdings, Inc.'s Proposed Acquisition of TreeHouse Foods, Inc.'s Private Label Ready-to-Eat Cereal Business will Harm Competition* (Dec. 19, 2019), https://www.ftc.gov/news-events/press-releases/2019/12/ftc-alleges-post-holdings-incs-proposed-acquisition-treehouse; FTC Press Release, *FTC Challenges Illumina's Proposed Acquisition of PacBio* (Dec. 17, 2019), https://www.ftc.gov/news-events/press-releases/2019/12/ftc-challenges-illuminas-proposed-acquisition-pacbio.

[9] Prepared Remarks of Chairman Joseph Simons, Georgetown Law Global Antitrust Enforcement Symposium at 4-5 (Sept. 25, 2018),

Following these principles, I believe that the agency is able to deliver the most bang for its buck in bringing litigation cases.

6. When was the last time that the Commission voted to file a complaint in a case that involved a new or novel theory of harm? Please provide a description of that case.

On December 17, 2019, the Commission, by unanimous vote, authorized an action to challenge Illumina, Inc.'s proposed acquisition of Pacific Biosciences of California under Section 2 of the Sherman Act and Section 7 of the Clayton Act.[10] The complaint alleged that Illumina violated Section 2 of the Sherman Act by seeking to acquire and therefore extinguish PacBio, a nascent competitive threat to Illumina's 90-percent share monopoly in the U.S. market for next-generation DNA sequencing systems. The complaint also alleged that the proposed acquisition would eliminate current competition and prevent increased future competition between Illumina and PacBio.[11] Two weeks after the Commission issued its complaint, the parties abandoned their transaction.

I note this is not an isolated example. There have been other firsts in the past year, including our first case to preserve competition in private label foods.[12]

7. According to a September report by the Washington Center for Equitable Growth, non-merger enforcement has been at historical lows over the past two years.[13] What is your response to this report?

As the report itself noted, "numbers do not tell the entire story." I am proud of the Commission's substantial record on non-merger enforcement during my time as Chairman. The Commission unanimously supported the agency's first action involving a multi-sided

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https://www.ftc.gov/system/files/documents/public_statements/1413340/simons_georgetown_lunch_address_9-25-18.pdf.

[10] FTC Press Release, *FTC Challenges Illumina's Proposed Acquisition of PacBio* (Dec. 17, 2019), https://www.ftc.gov/news-events/press-releases/2019/12/ftc-challenges-illuminas-proposed-acquisition-pacbio.

[11] In addition to issuing an administrative complaint, the Commission authorized staff to seek a temporary restraining order and a preliminary injunction in federal court, if necessary, to maintain the status quo pending the administrative proceeding. *Id.*

[12] FTC Press Release, *FTC Alleges Post Holdings, Inc.'s Proposed Acquisition of TreeHouse Foods, Inc.'s Private Label Ready-to-Eat Cereal Business will Harm Competition* (Dec. 19, 2019), https://www.ftc.gov/news-events/press-releases/2019/12/ftc-alleges-post-holdings-incs-proposed-acquisition-treehouse. Outside the merger context, the Commission also brought its first pharmaceutical product-hopping case this year. The Commission's complaint alleged that the pharmaceutical company made knowingly false statements to the FDA while engaging in a "product hopping" scheme to shift existing patients away from the tablet product about to face generic competition and onto another, more lucrative film product that enjoyed patent protection and provided no legitimate incremental benefits. FTC Press Release, *Reckitt Benckiser Group plc to Pay $50 Million to Consumers, Settling FTC Charges that the Company Illegally Maintained a Monopoly over the Opioid Addiction Treatment Suboxone* (July 11, 2019), https://www.ftc.gov/news-events/press-releases/2019/07/reckitt-benckiser-group-plc-pay-50-million-consumerssettling-ftc.

[13] Michael Kades, *The State of U.S. Federal Antitrust Enforcement*, Washington Center for Equitable Growth (Sept. 2019), https://equitablegrowth.org/wp-content/uploads/2019/09/091719-antitrust-enforcement-report.pdf.

health information platform,[14] the first case alleging pharmaceutical product hopping as an illegal method of maintaining a monopoly,[15] and most recently, a case filed with the New York Attorney General alleging an illegal course of conduct to maintain high prices for off-patent drugs.[16] In addition, we have many investigations underway.

While there is more variation in the number of competition conduct cases brought from year to year as compared to the FTC's merger enforcement numbers, rest assured that conduct cases are a priority. During the two years that I was the Director of the FTC's Bureau of Competition from 2001-2003, the Commission filed 25 non-merger cases and opened 100 investigations. My commitment to challenging anticompetitive conduct continues today.

Three points are worth noting to provide context regarding the Commission's approach to conduct cases. First, although conduct enforcement is often targeted at the most harmful conduct, our case selection is also about helping to evolve the law. For example, the *Actavis* matter was just one case, but it has been the lynchpin of the Commission's bipartisan, decades-long effort to push back against anticompetitive reverse-payment patent settlements that deter generic drug competition.[17] Second, conduct enforcement matters are particularly time-consuming and often require significant resources to see through to the end. Again, *Actavis* was finally settled last year with broad injunctive relief—a full ten years after the Commission filed its complaint in federal court. Finally, done well, conduct enforcement can have deterrent effects beyond a single case. Again using *Actavis* as an example, one reason for a significant drop off in civil non-merger cases is that the Commission has prioritized challenging reverse-payment pharmaceutical settlements. As a result, there are far fewer problematic settlements.[18]

8. How do you think the Commission should analyze transactions involving a private equity buyer? Do these transactions raise any unique issues?

The Commission applies the same methods and analysis to mergers involving all types of investors and owners, including acquisitions made by private equity buyers. I joined a Commission statement in *Staples/Essendant* that addressed concerns that private equity buyers

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[14] FTC Press Release, *FTC Charges Surescripts with Illegal Monopolization of E-Prescription Markets* (Apr. 24, 2019), https://www.ftc.gov/news-events/press-releases/2019/04/ftc-charges-surescripts-illegal-monopolization-e-prescription.

[15] FTC Press Release, *Reckitt Benckiser Group plc to Pay $50 Million to Consumers, Settling FTC Charges that the Company Illegally Maintained a Monopoly over the Opioid Addiction Treatment Suboxone* (July 11, 2019), https://www.ftc.gov/news-events/press-releases/2019/07/reckitt-benckiser-group-plc-pay-50-million-consumerssettling-ftc.

[16] FTC Press Release, *FTC and NY Attorney General Charge Vyera Pharmaceuticals, Martin Shkreli, and Other Defendants with Anticompetitive Scheme to Protect a List-Price Increase of More Than 4,000 Percent for Life-Saving Drug Daraprim* (Jan. 27, 2020), https://www.ftc.gov/news-events/press-releases/2020/01/ftc-ny-attorney-general-charge-vyera-pharmaceuticals-martin.

[17] *FTC v. Actavis, Inc.*, 570 U.S. 136 (2013).

[18] The data show that the FTC's *Actavis* litigation has had a substantial deterrent effect in significantly reducing the kinds of reverse-payment agreements that are most likely to impede generic entry and harm consumers. *See* FTC BUREAU OF COMPETITION, AGREEMENTS FILED WITH THE FEDERAL TRADE COMMISSION UNDER THE MEDICARE PRESCRIPTION DRUG, IMPROVEMENT, AND MODERNIZATION ACT OF 2003: OVERVIEW OF AGREEMENTS FILED IN FY 2016 (May 2019), https://www.ftc.gov/reports/agreements-filed-federal-trade-commission-under-medicare-prescription-drug-improvement-fy2016.

require additional scrutiny.[19] As explained in that statement, the antitrust laws focus on curbing harm to the competitive process. Concerns about the motivations of the private equity buyer in that case were unrelated to an analysis of how the acquiring company might use the acquired business to harm the competitive process.

I will keep an open mind when assessing the facts presented in each merger case, but in general, I do not believe acquisitions by private equity buyers require unique scrutiny.

9. **According to Columbia Law School Professor Tim Wu, dominant technology platforms have completed more than 350 mergers and acquisitions to date. Many of these involved Facebook and Google acquiring actual and nascent competitors. Professor Wu observed, "As with a basketball referee who never calls a foul, the question is whether the players have really been faultless—or whether the referee is missing something." How do you respond to the Professor Wu's concern that the agency has been missing something when it comes to merger enforcement in digital markets?**

I was not at the Commission when many of these mergers were reviewed, and therefore do not have first-hand knowledge of how those decisions were reached. But I am sensitive to concerns that the Commission might have missed something. To that end, the Commission is considering whether to use its Section 6(b) authority to examine past mergers and acquisitions by large technology platforms.

Addressing anticompetitive conduct in the technology sector is one of my top priorities. I created the Bureau of Competition's new Technology Enforcement Division to take a fresh look at the markets in which technology platforms compete. If appropriate, the Commission will take action to counter any harmful effects of coordinated or unilateral conduct by technology firms. As we demonstrated in our complaint challenging the Illumina/PacBio merger, acquisitions can be a method of monopolization and so are actionable under a monopolization theory.

10. **You have repeatedly stated that you are committed to blocking "killer acquisitions." Has the Commission challenged any killer acquisitions under your leadership, or developed policies for doing so? If so, please describe the relevant transactions or policies.**

We are aware of concerns that certain firms may be engaging in so-called "killer acquisitions" that have the effect of eliminating nascent or potential competitors, and we are taking this issue very seriously. On the enforcement front, we continue to scrutinize mergers between large incumbents and smaller rivals for potential harm to innovation competition.[20] For example:

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[19] Statement of Chairman Joseph J. Simons, Commissioner Noah Joshua Phillips, and Commissioner Christine S. Wilson Concerning the Proposed Acquisition of Essendant, Inc. by Staples, Inc., File No. 181-0180 (Jan. 28, 2019), https://www.ftc.gov/system/files/documents/public_statements/1448328/181_0180_staples_essendant_majority_statement_1-28-19.pdf.

[20] This is consistent with the FTC's past practice. *See, e.g.,* FTC Press Release, FTC, Mallinckrodt Will Pay $100 Million to Settle FTC, State Charges It Illegally Maintained its Monopoly of Specialty Drug Used to Treat Infants

- The Commission recently successfully challenged Illumina's proposed acquisition of PacBio, preserving competition in the U.S. market for next-generation DNA sequencing systems.[21]

- The Commission challenged a consummated acquisition in which the market leader in microprocessor prosthetic knees, Otto Bock, eliminated a primary competitive threat, Freedom Innovations.[22]

- As recently as a few weeks ago, the Commission, by unanimous vote, challenged the consummated acquisition of VieVu, LLC by Axon Enterprise, Inc., the largest provider of body-worn camera systems to large, metropolitan police departments in the United States.[23]

As a complement to our enforcement work, the Commission is considering the use of its Section 6(b) authority to examine past acquisitions by large technology platforms to better understand what was done with the acquired assets.

11. In November, the FTC published a proposed consent order approving Bristol-Myers-Squibb's $74 billion acquisition of Celgene, subject to the divestiture of Celgene's Otezla for $13.4 billion. Although the proposed divestiture is the largest that a U.S. antitrust agency has required in a merger enforcement matter, two commissioners dissented from the order, arguing that the Commission's analysis of pharmaceutical mergers remains narrowly focused on questions of product overlap and neglects critical questions about whether the transaction is likely to facilitate anticompetitive conduct or hamper innovation.

a. Do you believe that an analytical approach that focuses on product overlap is sufficient to capture all potential anticompetitive effects of pharmaceutical mergers?

(Jan. 18, 2017), https://www.ftc.gov/news-events/press-releases/2017/01/mallinckrodt-will-pay-100-million-settle-ftc-state-charges-it (blocking acquisition because Questcor "acquired the rights to its greatest competitive threat, a synthetic version of Acthar, to forestall future competition").

[21] FTC Press Release, *Statement of Gail Levine, Deputy Director of FTC Bureau of Competition, Regarding the Announcement that Illumina Inc. has Abandoned Its Proposed Acquisition of Pacific Biosciences of California* (Jan. 2, 2020), https://www.ftc.gov/news-events/press-releases/2020/01/statement-gail-levine-deputy-director-ftc-bureau-competition.

[22] FTC Press Release, *FTC Commissioners Unanimously Find that Consummated Merger of Microprocessor Prosthetic Knee Companies was Anticompetitive; Assets Must Be Unwound* (Nov. 6, 2019), https://www.ftc.gov/news-events/press-releases/2019/11/ftc-commissioners-unanimously-find-consummated-merger.

[23] FTC Press Release, *FTC Challenges Consummated Merger of Companies that Market Body-Worn Camera Systems to Large Metropolitan Police Departments* (Jan. 3, 2020), https://www.ftc.gov/news-events/press-releases/2020/01/ftc-challenges-consummated-merger-companies-market-body-worn.

No, and our analysis is not so limited. In every merger investigation during my tenure, the Commission has evaluated a wide range of theories of competitive harm.[24] For example, in every pharmaceutical merger investigation during my tenure, including *Bristol-Myers Squibb/Celgene*, the Commission has analyzed whether the merger would likely result in harm to innovation competition. We evaluate whether each merger would result in a meaningful decline in the number of firms capable of innovating in specific therapeutic areas (including for generic drugs) and the number of drug manufacturers overall.

Section 6.4 of the *Horizontal Merger Guidelines* explains the FTC's innovation effects analysis.[25] Under Section 6.4, the agencies will consider whether a merger is likely to diminish innovation competition by reducing the merged firm's incentive to continue with an existing product-development effort, or by reducing the merged firm's incentive to initiate development of new products.

As the *Guidelines* instruct, the first type of harm to innovation is most likely to occur if at least one of the merging firms is engaging in efforts to introduce new products that would capture substantial revenue from the other merging firm. In the *BMS/Celgene* matter, the Commission determined the acquisition would result in this type of harm to innovation, and ordered BMS to divest Otezla in order to preserve BMS's incentive to continue developing its own oral product for treating moderate-to-severe psoriasis.[26]

When evaluating whether a merger will reduce the merged firm's incentive to develop new products in the future, we look to whether the merger will diminish innovation competition by combining two of a small number of firms with the strongest capabilities to successfully innovate in a specific direction.[27] The Commission evaluated this theory in *BMS/Celgene*, as it does in every pharmaceutical merger investigation, but the evidence developed in *BMS/Celgene* indicated that this type of harm to innovation competition was unlikely to occur.

b. Please identify all pharmaceutical mergers reviewed by the FTC during your tenure as Chairman where the Commission's analysis extended beyond product overlap concerns.

As stated above, the Commission evaluates a wide range of theories of competitive harm in every pharmaceutical merger investigation. In every case, staff considers each relevant theory

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[24] This is consistent with past Commission practice. For example, in the *Teva/Allergan* matter, the Commission evaluated three additional potential theories of harm beyond individual product overlaps: whether the transaction would likely lead to anticompetitive effects from the bundling of generic products; whether it would likely decrease incentives to challenge the patents held by brand-name pharmaceutical companies and bring new generic drugs to market; and whether it might dampen incentives to develop new generic products. Statement of the Federal Trade Commission In the Matter of Teva Pharm. Indus. Ltd. and Allergan plc, No. C-4589 (July 27, 2016), https://www.ftc.gov/system/files/documents/public_statements/973673/160727tevaallergan-statement.pdf.

[25] U.S. Dep't of Justice & FTC, Horizontal Merger Guidelines (2020), https://www.ftc.gov/system/files/documents/public_statements/804291/100819hmg.pdf.

[26] FTC Press Release, *FTC Requires Bristol-Myers Squibb Company and Celgene Corporation to Divest Psoriasis Drug Otezla as a Condition of Acquisition* (Nov. 15, 2019), https://www.ftc.gov/news-events/press-releases/2019/11/ftc-requires-bristol-myers-squibb-company-celgene-corporation.

[27] Horizontal Merger Guidelines § 6.4.

of harm and, based on the evidence gathered during the investigation, evaluates whether each theory supports a challenge to the transaction.[28]

I appreciate that the price of pharmaceutical products has a significant impact on American consumers' health care costs. I believe that the Commission's rigorous scrutiny of pharmaceutical mergers and anticompetitive conduct[29] is a critical component of fulfilling our mission to protect American consumers, and is one of the agency's most lasting legacies.

c. Please identify all pharmaceutical mergers blocked by the FTC where the Commission's theory of harm extended beyond product overlap concerns.

The Commission has challenged numerous pharmaceutical mergers based on concerns other than product overlaps. For example, the Commission has challenged numerous pharmaceutical mergers to protect innovation competition.[30] The Commission has also challenged pharmaceutical mergers to protect vertical competition. For example, in the *Teva/Allergan* matter, the Commission issued a consent order that required Teva Pharmaceuticals Industries Ltd. to offer its active pharmaceutical ingredient (API) customers the option of entering into long-term API supply contracts.[31] The order resolved concerns that Teva's acquisition of the

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[28] *See, e.g.*, Statement of the Federal Trade Commission In the Matter of Roche Holding and Spark Therapeutics, File No. 191-0086 (Dec. 16, 2019), https://www.ftc.gov/system/files/documents/public_statements/1558049/1910086_roche-spark_commission_statement_12-16-19.pdf (noting that "[m]erger investigations are highly fact-specific, and the determination of whether a transaction will result in potential competitive harm requiring an enforcement action is driven by evidence.").

[29] The Commission recently filed a complaint against Vyera Pharmaceuticals, LLC, alleging an anticompetitive scheme to preserve a monopoly for the life-saving drug, Daraprim. FTC Press Release, *FTC and NY Attorney General Charge Vyera Pharmaceuticals, Martin Shkreli, and Other Defendants with Anticompetitive Scheme to Protect a List-Price Increase of More than 4,000 Percent for Life-Saving Drug Daraprim* (Jan. 27, 2020), https://www.ftc.gov/news-events/press-releases/2020/01/ftc-ny-attorney-general-charge-vyera-pharmaceuticals-martin.

[30] *See, e.g.*, FTC Press Release, *FTC, Mallinckrodt Will Pay $100 Million to Settle FTC, State Charges It Illegally Maintained its Monopoly of Specialty Drug Used to Treat Infants* (Jan. 18, 2017), https://www.ftc.gov/news-events/press-releases/2017/01/mallinckrodt-will-pay-100-million-settle-ftc-state-charges-it (blocking acquisition because Questcor "acquired the rights to its greatest competitive threat, a synthetic version of Acthar, to forestall future competition"); FTC Press Release, *FTC Puts Conditions on Novartis AG's Proposed Acquisition of GlaxoSmithKline's Oncology Drugs* (Feb. 23, 2015), https://www.ftc.gov/news-events/press-releases/2015/02/ftc-puts-conditions-novartis-ags-proposed-acquisition (requiring divestitures of in-development BRAF and MEK inhibitor drugs to ensure development of the BRAF and MEK inhibitors continues uninterrupted, and competition in BRAF and MEK inhibitor markets is not reduced); FTC Press Release, *FTC Puts Conditions on Generic Drug Maker Lupin Ltd.'s Proposed Acquisition of Gavis Pharmaceuticals LLC* (Feb. 19, 2016), https://www.ftc.gov/news-events/press-releases/2016/02/ftc-puts-conditions-generic-drug-marketer-lupin-ltds-proposed (requiring divestitures to ensure continued development of generic mesalimine ER capsules, which Lupin and Gavis were developing independently at the time of the merger). For a brief overview of the many other pharmaceutical mergers the Commission has blocked to protect innovation competition, *see* FTC HEALTH CARE DIVISION STAFF, OVERVIEW OF FTC ACTIONS IN PHARMACEUTICAL PRODUCTS AND DISTRIBUTION (Sept. 2019), https://www.ftc.gov/system/files/attachments/competition-policy-guidance/20190930_overview_pharma_final.pdf.

[31] FTC Press Release, *FTC Requires Teva to Divest Over 75 Generic Drugs to Settle Competition Concerns Related to its Acquisition of Allergan's Generic Business* (July 27, 2016), https://www.ftc.gov/news-events/press-releases/2016/07/ftc-requires-teva-divest-over-75-generic-drugs-rival-firms-settle.

generic pharmaceutical business of Allergan plc would increase Teva's incentive to withhold eight APIs from other manufacturers, to benefit newly acquired Allergan products.[32]

In most pharmaceutical mergers, the companies have been willing to divest products and intellectual property sufficient to resolve the Commission's concerns without litigation.

12. At the time of your nomination, you submitted responses to a questionnaire from the Senate Committee on Commerce, Science, and Transportation. In one of your answers, you wrote:

> **The FTC needs to devote substantial resources to determine whether its merger enforcement has been too lax, and if that's the case, the agency needs to determine the reason for such failure and to fix it. Even if the evidence shows no such failure, it would be good practice to evaluate more systematically the Commission's merger enforcement program through the regular use of retrospective studies to prevent potential problems in the future. It would also be good practice to extend the retrospectives to non-merger matters as well.[33]**

a. Please identify the number of merger retrospective studies the Commission has pursued during the course of your tenure as Chairman and describe the scope and subject of each study.

b. Please describe the finding of each study.

The Commission's merger retrospective program is an ongoing effort to evaluate the competitive effects of past mergers and acquisitions. Merger retrospectives are an important part of the Bureau of Economics (BE) research program, a significant goal of which is to improve the economic analysis performed to support the Commission's enforcement activities. BE typically has a number of merger retrospectives ongoing at any point in time, including now. The time required to complete these important studies may vary based on a number of factors—not the least of which includes our economists' caseload of enforcement matters, which has been particularly demanding given current staffing levels.

Since the start of my tenure, we have completed several merger retrospectives and have made significant progress on several more. A recently completed study addresses the important question of how the acquisition of the physician practices by hospital systems can affect quality

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[32] APIs are central inputs in manufacturing finished dose form pharmaceutical products. API supply sources must be designated in a drug's FDA marketing application. Switching to a non-designated API source requires a generic drug maker to supplement its Abbreviated New Drug Application (ANDA), a process that can take as long as two years or even more. Consequently, a generic drug manufacturer's API supply options are limited to the sources qualified under its ANDA. Analysis of Agreement Containing Consent Orders to Aid Public Comment, In the Matter of Teva Pharm. Indus. Ltd. and Allergan, plc, No. C-4589 (July 27, 2016), https://www.ftc.gov/system/files/documents/cases/160727tevaallergananalysis.pdf; *see also* Statement of the Federal Trade Commission In the Matter of Teva Pharm. Indus. Ltd. and Allergan plc, No. C-4589 (July 27, 2016), https://www.ftc.gov/system/files/documents/public_statements/973673/160727tevaallergan-statement.pdf.

[33] Joseph Simons, Questionnaire Response, Senate Committee on Commerce, Science, and Transportation (Jan. 31, 2018), https://www.commerce.senate.gov/services/files/6c4149af-3023-4825-90f1-3c38e279fd0d.

of care.[34] The outcomes studied represent the progression of hypertension and diabetes patients into worse health states. These outcomes were selected because they are common but serious health problems experienced by the subject population, Medicare beneficiaries. The results indicate that hospital acquisitions of existing physician practices have no statistically significant clinical benefits for the health outcomes considered. This is particularly interesting because the same researchers found in an earlier study that expenditures increased following these mergers.[35] A related, nearly completed study looks at the impact of mergers between physician practices on health outcomes and finds mixed results, depending on the types of practices and the health outcomes considered.

BE staff presented initial results from retrospective studies of two hospital mergers at a June 2019 FTC workshop on certificates of public advantage (COPAs).[36] One study looked at the 1998 hospital merger in Asheville, North Carolina, which the study found resulted in estimated price increases of approximately 20 percent relative to control hospitals.[37] The second study focused on a 1997 hospital merger in Columbia, South Carolina, and found no significant price effects.[38] One possible explanation for the different results is that there were more competitors in the South Carolina case than there were in the North Carolina case.

In order to continue investigating the impact of mergers that are shielded from antitrust scrutiny by COPAs, in October 2019, the Commission issued orders to five health insurance companies and two health systems to provide information that will help the agency conduct retrospective analyses of the effects of two more recent hospital mergers that proceeded subject to COPAs. The FTC intends to collect information over the next several years as part of this effort. The retrospective studies will examine the effects of the COPAs on price, quality, access, and innovation for healthcare services, but also the impact of hospital consolidation on employee wages. Once this multiyear study is complete, the FTC plans to report publicly on its findings.

In addition to our ongoing studies, we currently are working on developing a protocol that will provide the agency with a more systematic framework for identifying and carrying out merger retrospective studies. We also are exploring the possibility of hiring additional economists to increase our capacity for carrying out these studies—something that is possible because of the additional resources that are available to us. As always, we thank the Committee for its continuing support for the FTC's mission.

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[34] This paper followed the usual progression of economic research, which is to release a draft of the paper once the results have largely been obtained, but for the analysis to continue to undergo revision as the authors receive feedback. A draft of this research was released as a Bureau of Economics working paper in 2018, https://www.ftc.gov/reports/effects-physician-hospital-integration-medicare-beneficiaries-health-outcomes.

[35] Thomas G. Koch, Brett W. Wendling & Nathan E. Wilson, *How Vertical Integration Affects the Quantity and Cost of Care for Medicare Beneficiaries*, 52 J. HEALTH ECON. 19 (2017).

[36] FTC Workshop, *A Health Check on COPAs: Assessing the Impact of Certificates of Public Advantage in Healthcare Markets* (June 18, 2018), https://www.ftc.gov/news-events/events-calendar/health-check-copas-assessing-impact-certificates-public-advantage.

[37] *See* slides for *The Mission Health COPA: Evidence on Price Effects from CMS HCRIS Data*, Lien Tran & Rena Schwarz (at 37-53), https://www.ftc.gov/system/files/documents/public_events/1508753/slides-copa-jun_19.pdf.

[38] *See* slides for *Palmetto Health COPA: Evidence on Price Effects*, Kishan Bhatt (at 18-36), https://www.ftc.gov/system/files/documents/public_events/1508753/slides-copa-jun_19.pdf.

c. Please describe what these studies revealed about the efficacy of the Commission's merger review and enforcement efforts and about how they can be improved.

Although dozens of merger retrospectives have been published, that still is a relatively small sample size. Moreover, the mergers studied are not necessarily representative of the population of mergers. For instance, the studies tend to be concentrated, out of necessity, in industries where relevant data are readily available. As a result, these studies should be interpreted as measuring the effectiveness of specific (non-)enforcement decisions and not as the average price effect of a representative sample of consummated mergers.

Nevertheless, the main implication of this research is that mergers in concentrated markets can lead to price increases, which is consistent with standard economic theory. Given our limited knowledge, it is impossible to draw either broader conclusions about the effectiveness of enforcement or specific guidance as to what market characteristics are more likely to result in anticompetitive mergers. Nevertheless, we hope to address this problem by developing a more systematic merger retrospectives program.

d. Please identify all steps the Commission has taken to evaluate more systematically the Commission's merger enforcement program.

I believe merger retrospectives are critical to ensuring the success of our merger enforcement program. Evaluation of our past choices can provide valuable guidance for our future decisions. The FTC has long been at the forefront of conducting retrospective studies. FTC economists have authored or coauthored more than twenty-five studies that have estimated the effects of mergers on competition.[39] FTC staff have also authored retrospective studies of Commission-ordered divestitures and merger remedies.[40] For example, the most recent study looked back at Commission orders issued between 2006 and 2012. The report found that the agency's process for designing and implementing merger remedies is generally effective and in most cases resulted in remedies that preserved or restored competition that would have been lost due to the merger. The study also identified certain areas in which improvements could be made, particularly for divestitures of limited asset packages in horizontal, non-consummated mergers.

The Commission's *Hearings on Competition and Consumer Protection in the 21st Century* are another important component of our merger retrospective efforts. I announced the *Hearings* with the intention that they would stimulate internal and external evaluation of and commentary on the Commission's law enforcement program. I believe the *Hearings* sessions, including the full day session on merger retrospectives, and public commentary have already done this, and we

[39] FTC Bureau of Economics, List of FTC Bureau of Economics Merger Retrospective Studies (Apr. 2019), https://www.ftc.gov/system/files/attachments/press-releases/ftc-announces-agenda-14th-session-its-hearings-competition-consumer-protection-21st-century/list_of_be_retrospective_studies.pdf.

[40] FTC Staff Report, THE FTC'S MERGER REMEDIES 2006-2012: A REPORT OF THE BUREAUS OF COMPETITION AND ECONOMICS (2017), https://www.ftc.gov/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics; FTC Staff Report, A STUDY OF THE COMMISSION'S DIVESTITURE PROCESS (1999), https://www.ftc.gov/reports/study-commissions-divestiture-process.

continue to think critically about these issues.[41] In fact, we currently are working on developing our protocols for identifying viable candidates for future merger retrospective studies. As noted above, the additional resources allocated by Congress will allow us to make developing a more systematic program more feasible, but we still need additional resources in order to build a robust retrospectives program.

The Commission also engages in less formal retrospective learning. As part of its regular antitrust work, staff often investigates mergers and other business activity in the same industries, often in the same geographic market. These subsequent investigations can reveal the effects of earlier transactions and provide some insight into prior enforcement decisions.

Settlement Policy

13. The FTC's recent settlement with Facebook contained an extremely broad release from legal liability. Since violations of many consumer protection statutes—such as the Children's Online Privacy Protection Act (COPPA)—also constitute violations of the FTC Act, it would appear that the proposed settlement releases Facebook from claims under COPPA and other consumer protection statutes. Is that correct?

There has been considerable misunderstanding of the release clause in the 2019 order, which, in fact, is not extremely broad. First, the order only releases claims for known violations of the FTC Act. FTC staff investigated all such potential violations, including allegations received from interest groups and issues reported by the press. Based on these investigations, staff determined there were no known valid claims as of June 12, 2019, other than those addressed in the 2019 order. Thus, the release would not preclude the FTC from addressing any subsequently discovered violation of law by Facebook that occurred prior to or after June 12, 2019. This would include direct violations of the FTC Act, or of any rule or statute the FTC enforces, including the COPPA Rule.

Second, the release of known and unknown claims for violation of the 2012 order is much less dramatic than commonly portrayed. The law in most jurisdictions is very clear that the doctrine of *res judicata* (or claim preclusion) releases all claims, known and unknown, that could have been brought in an order enforcement action.[42] Thus, all the FTC's order enforcement actions, both settlements and victories in court, effectively release all known and unknown claims for order violations. Because preclusion law is different for violations of law (*e.g.*, the FTC Act), the FTC's *de novo* consumer protection settlements (the vast majority of the agency's orders) are

[41] FTC, *Hearings on Competition and Consumer Protection in the 21st Century: Merger Retrospectives* (Apr. 12, 2019), https://www.ftc.gov/news-events/events-calendar/ftc-hearing-14-merger-retrospectives.

[42] *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 238 (1975) ("[A] consent decree or order is to be construed for enforcement purposes basically as a contract."); *see also Int'l Union of Operating Eng'rs-Emp'rs Constr. Indus. Pension, Welfare, and Training Trust Funds v. Karr*, 994 F.2d 1426, 1429-30 (9th Cir. 1993) (holding claims for breach of the same contract barred by *res judicata*) (citing *McClain v. Apodaca*, 793 F.2d 1031, 1034 (9th Cir. 1986)); *May v. Parker-Abbott Transfer & Storage, Inc.*, 899 F.2d 1007, 1009-11 (10th Cir. 1990) (same); *TechnoMarine SA v. Giftports, Inc.*, 758 F.3d 493, 499-501 (2d Cir. (2013). The legal analysis in the D.C. Circuit is more complex, but appears to lead to the same result. *See United States Indus. v. Blake Constr. Co.*, 765 F.2d 195 (D.C. Cir. 1985).

simply irrelevant. The fact that the provision is explicit in the 2019 order does not change the legal reality that such a release is not only common, but also automatically prescribed by law.

14. What other Commission orders have contained a comparably broad release of known and unknown order violation claims, as well as all known Section 5 claims?

No other Commission order explicitly contains the same provision. However, as indicated above, all of the FTC's settlement orders addressing order violations, both administrative and federal court orders, effectively contain the same release for known and unknown claims for order violations under the doctrine of *res judicata*.

15. Does the FTC complaint list the full universe of known order violations and known Section 5 violations for which the FTC has granted Facebook release?

The complaint in the Facebook matter alleges all violations that were known to the FTC prior to June 12, 2012.

16. Did the FTC record a full list of conduct that it investigated as potential order violations but ultimately determined did not violate the order?

FTC investigations are non-public, but staff keeps records of what it investigates.

17. Did the FTC record a full list of conduct that it investigated as potential Section 5 violations but ultimately determined did not violate Section 5?

See response to QFR 16, above.

18. Last year, the FTC uncovered a wage-fixing scheme among several health staffing companies in Integrity Home Therapy. Although wage fixing is a clear violation of the antitrust laws, the FTC decided against securing any meaningful relief, declining to secure a finding of admission or liability or to issue formal notification to third parties. In other words, upon discovering that companies were clearly violating the law, the FTC's response was to tell companies not to break the law. FTC Commissioner Chopra has described this as a "no-consequence" settlement. Under what conditions—if any—do you think "no consequence" settlements that solely order a respondent to cease and desist are appropriate?

I disagree that the Commission's order in the *Your Therapy Source* matter is of "no consequence." The Commission's order not only requires respondents to stop engaging in the anticompetitive conduct, but also allows the Commission to seek civil penalties for order violations, which can be a powerful deterrent against recidivism.[43]

[43] *See* Statement of the Federal Trade Commission Concerning the Commission's Consent Order, In the Matter of Your Therapy Source, LLC, Neeraj Jindal, and Sheri Yarbray, C- 4689 (Oct. 31, 2019), https://www.ftc.gov/system/files/documents/public_statements/1552414/171_0134_your_therapy_source_commission_statement.pdf.

When appropriate, the Commission seeks equitable monetary remedies to compensate victims for losses resulting from unlawful conduct. But our investigation in the *Your Therapy Source* matter did not yield evidence that any therapists' wages were actually reduced as a result of the illegal agreement to fix wages.[44] The lack of such evidence may be explained by the fact that FTC staff launched an investigation very quickly after learning of the invitation to collude, and stopped the conduct before it had an effect.

I also disagree that Commission enforcement actions ever impose "no consequences" for the wrongdoer. Whenever the Commission charges a company with violating a statute it enforces, we are affirming that we have collected evidence sufficient to give a majority of the Commission a reason to believe that the defendant has violated the law. This public action is a statement of what the law requires and how the company has failed to comply with it. The defendant must agree to stop the illegal conduct, and the Commission may seek additional relief, including monetary equitable remedies, when appropriate. And if the defendant violates the Commission's order, for instance by engaging in the illegal conduct again, it will be subject to civil penalties for each day and for each violation of the order.

19. In October, the Commission filed a complaint charging the high-end cosmetics company Sunday Riley for posting fake reviews at the CEO's direction. These fake reviews deceived consumers and distorted fair competition. Yet the FTC's proposed settlement includes no monetary relief, no notice to consumers, and no admission of wrongdoing. In other words, this company was found clearly breaking the law—and the FTC's remedy is to tell them not to break the law again. This appears to be part of a pattern of "no-consequence" settlements at the FTC. As Commissioner Chopra pointed out in his dissent, honest companies may wonder if they are losing out by following the law. Does failing to penalize lawbreakers incentive law-abiding companies to break the law?

I disagree that this was a "no consequence" settlement, or that the proposed relief in the Sunday Riley case incentivizes companies to break the law.

As a general matter, it is important to note that over the years the Commission has obtained thousands of no-money orders, and we believe these orders impose both specific and general deterrence. In the *Sunday Riley* case, the Commission's proposed complaint alleges violations of Section 5 of the FTC Act relating to Sunday Riley employees having deceptively posted reviews of Sunday Riley products on a third-party website. The Commission's proposed cease and desist order names the company CEO individually and has strong injunctive provisions. It prohibits misrepresenting the status of any endorser or person reviewing a product and failing to disclose any endorser's unexpected material connection; and it requires the company to instruct all employees, agents, and representatives as to their disclosure responsibilities and to get signed

[44] The lack of evidence indicating that any therapists' wages were reduced as a result of the illegal conduct also weighed against requiring respondents to provide notice of the Commission's action to individual therapists targeted by the unlawful conduct. Individual notice would have been unlikely to facilitate recovery in private civil litigation. The Commission will, however, take steps to ensure that the order and facts of the *Your Therapy Source* matter are disseminated as widely as possible in order to educate staffing firms, home healthcare workers, and small businesses about the illegality of wage fixing. *See id.* at 2-3.

acknowledgements from them. If Sunday Riley or its CEO violate this order, the U.S. Department of Justice (DOJ) can sue them in federal court and seek large civil penalties. The FTC investigation and resulting negotiations likely cost Sunday Riley significant attorney fees, and the case resulted in considerable negative publicity. Other companies do not want to be subjected to investigations, legal fees, injunctive provisions, compliance costs, reputational costs, and possible future civil penalties—all of which are serious consequences.

Investigative Process

20. In November, California's Attorney General filed a petition in California State Court to enforce a subpoena against Facebook. According to the filing, Facebook has broadly refused to comply with the subpoena by, among other things, refusing to search communications among Facebook's senior executives. Did Facebook try to thwart the FTC's investigation in similar ways? If so, did the FTC take actions in court or otherwise to ensure compliance with FTC discovery requests?

I am unable to comment on our nonpublic investigations. As a general matter, the Commission has authority to compel the production of documents and information if parties do not comply with Commission-issued compulsory process for documents and information in law enforcement investigations. When recipients of process requests move to quash or limit, the Commission makes public its ruling on such a motion.[45]

21. What is the Commission doing to make sure that FTC staff have the support it needs to obtain information from all levels of companies that they are investigating, up to and including the CEOs?

The Office of General Counsel (OGC) has a vigorous program to obtain judicial enforcement of FTC compulsory process. Commission staff is encouraged to contact OGC whenever staff experiences, or even anticipates, a problem with obtaining compliance with a Commission subpoena or civil investigative demand. OGC litigation attorneys then work closely with staff to determine the best course of action to achieve compliance. Early involvement by OGC staff serves to put the process recipient on notice that FTC staff is serious about possible enforcement, which often is sufficient to motivate compliance. However, if a recipient continues to stonewall a Commission investigation, OGC staff are more than willing to file a process enforcement action in federal district court to obtain full compliance.

22. Is the agency's Office of General Counsel prepared to fully and aggressively support staff if and when they need it to enforce FTC-issued subpoenas against any company that may decide they want to ignore such requests, including Facebook?

Yes.

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[45] *See, e.g.*, Order Denying Petition to Limit Civil Investigative Demand and Subpoena Duces Tecum, In the Matter of Civil Investigative Demand to Johnson & Johnson and Subpoena Duces Tecum to Johnson & Johnson, No. 191-0152 (Oct. 18, 2019), https://www.ftc.gov/system/files/documents/petitions-quash/johnson-johnson/1910152jjpetitiontoquash.pdf.

23. How does the number of subpoena enforcement actions in antitrust matters compare to the number in consumer protection matters? If there is a difference, what accounts for the disparity?

Since 2008, the Commission has commenced 41 process enforcement proceedings. These include proceedings to enforce FTC-issued subpoenas, civil investigative demands, and orders to file reports under 15 U.S.C. § 46. Of these 41 proceedings, 27 related to matters investigated by the Bureau of Consumer Protection, and 14 related to matters investigated by the Bureau of Competition or other projects involving competition. When comparing these numbers it is important to keep in mind that a significant portion of the Commission's competition docket involves review of proposed mergers notified under the Hart-Scott-Rodino (HSR) Amendments to the Clayton Act.[46] Under the HSR Act, parties to certain mergers and acquisitions must file premerger notification and wait for government review. After an initial waiting period, if the agency needs additional information, it often issues compulsory process that solicits broad information about the parties' transaction. The parties are prohibited from closing their deal until the waiting period outlined in the HSR Act has passed or the government has granted early termination of the waiting period. As a result, the HSR review process provides a powerful incentive for parties to submit the information that the agencies requested, which allows the Commission to obtain necessary information without resorting to judicial enforcement.

Executive Accountability

24. In your view, when is it appropriate for the FTC to hold individual executives accountable for order violations in which they participated?

This is necessarily a very fact-specific analysis. The Commission first must determine whether we can prove the elements necessary to obtain relief under controlling legal precedent and the provisions of the underlying injunction. Second, the Commission considers whether naming the individual would result in more effective final relief, whether it would better protect consumers, and whether it would be appropriate given the level of the individual's involvement.

25. Please describe what steps the FTC takes to investigate the involvement of individual executives in corporate order violations.

We tailor investigations to the underlying facts and order provisions. That said, in undercover investigations, our attorneys and investigators look for corporate filings, registrations, bank accounts, insider information, consumer complaints, and accounts of former employees. We also share and obtain information, where permissible, with/from our criminal and state law enforcement partners. In open investigations, we look to the same evidence, but also send specific discovery demands to the defendants pursuant to the monitoring provisions in the order. In addition to sending discovery to the investigation's targets, we often send subpoenas to third parties who have relevant information. We craft these demands, among other things, to determine which individuals in the company have responsibility for, and knowledge of, the

[46] 15 U.S.C. § 18a.

practices under investigation. Our standard order provisions also allow us to depose individuals in the target company, and we take that step in appropriate circumstances.

26. Please identify all instances since January 2015 in which the FTC held individual executives accountable for order violations.

The FTC enforces its orders through civil penalty and contempt actions. The Commission currently has pending contempt actions naming individuals as defendants in the *Sanctuary Belize*[47] matter, which went to trial on January 20, 2020; the *Health Research Labs*[48] matter filed in December 2019; and the *Netforce*[49] matter filed in January 2020. The Commission also charged two executives in a recent antitrust filing.[50] Since 2015, we won cases against individuals who were already under FTC order in the following matters: *Blue Hippo*,[51] *GM Funding*,[52] *Lakhany*,[53] *iSpring*,[54] *Capital Home Advocacy*,[55] *Daniel Chapter One*,[56] *Cedarcide*,[57] and *Hi-Tech*.[58] Additionally, for strategic reasons, the FTC will occasionally choose to address an individual's order violations through a *de novo* case. The *CD Capital*,[59] *F9 Advertising*,[60] and *Debtpro 12*[61] matters are examples of this strategy.

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[47] *In re Sanctuary Belize Litig.*, No. 1:18-cv-03309 (D. Md.), https://www.ftc.gov/enforcement/cases-proceedings/0223171/ameridebt-inc.
[48] *FTC and State of Maine v. Health Research Labs., Inc.*, No. 2:17-cv-00467 (D. Me.), https://www.ftc.gov/system/files/documents/cases/netforce_amended_complaint.pdf.
[49] *FTC v. Noland et al.*, No. cv-20-0047 (D. Ariz.), https://www.ftc.gov/system/files/documents/cases/netforce_amended_complaint.pdf.
[50] FTC Press Release, *FTC and NY Attorney General Charge Vyera Pharmaceuticals, Martin Shkreli, and Other Defendants with Anticompetitive Scheme to Protect a List-Price Increase of More than 4,000 Percent for Life-Saving Drug Daraprim* (Jan. 27, 2020), https://www.ftc.gov/news-events/press-releases/2020/01/ftc-ny-attorney-general-charge-vyera-pharmaceuticals-martin.
[51] *FTC v. Bluehippo Funding*, No. 08-Civ-1819 (S.D.N.Y) (contempt entered 2016), https://www.ftc.gov/enforcement/cases-proceedings/052-3092/bluehippo-funding-llc-bluehippo-capital-llc.
[52] *FTC v. Damian Kutzner*, No. 8:16-cv-00999 (C.D. Cal. 2017), https://www.ftc.gov/enforcement/cases-proceedings/x030002/damian-kutzner-0.
[53] *FTC v. Sameer Lakhany*, No. 8:12-cv-337 (C.D. Cal.) (contempt order entered 2015), https://www.ftc.gov/enforcement/cases-proceedings/112-3136/lakhany-sameer-credit-shop-llc-fidelity-legal-services-llc.
[54] *US v. iSpring Water Sys.*, No. 1:19-cv-01620 (N.D. Ga. 2019) (civil penalties for violation of FTC Order), https://www.ftc.gov/enforcement/cases-proceedings/172-3033-c4611/ispring-water-systems-llc-federal.
[55] *FTC v. American Home Servicing Ctr. et al.*, No. 8:18-cv-00597 (C.D. Cal. 2018), at https://www.ftc.gov/enforcement/cases-proceedings/172-3138/capital-home-advocacy-center.
[56] *US v. Daniel Chapter One*, No. 1:10-cv-01362 (D.D.C. 2015) (civil penalties for violation of FTC Order), https://www.ftc.gov/enforcement/cases-proceedings/082-3085/daniel-chapter-one.
[57] *FTC v. Dave Glassel*, No. 4:12-cv-4631 (N.D. Cal. 2018), https://www.ftc.gov/enforcement/cases-proceedings/112-3128/springtech-77376-llc-also-dba-cedarcidecom-et-al/
[58] *FTC v. Hi-Tech Pharm., Inc. et al.*, 1:04-cv-03294 (N.D. Ga. 2017), at https://www.ftc.gov/enforcement/cases-proceedings/022-3165/national-urological-group-inc-et-al.
[59] *FTC v. CD Capital Inv.*, No. 8:14-cv-01033 (C.D. Cal. final order 2019), at https://www.ftc.gov/enforcement/cases-proceedings/132-3289/cd-capital-investments-llc.
[60] *FTC v. F9 Advert.*, No. 3:19-cv-01174 (D. P.R. 2019), https://www.ftc.gov/enforcement/cases-proceedings/1723164/f9-advertising-llc.
[61] *FTC v. DebtPro123*, No. SACV:14-00693 (C.D. Cal. final order 2015), https://www.ftc.gov/enforcement/cases-proceedings/132-3112/debtpro-123-llc.

27. The Commission has been criticized for not holding Facebook CEO Mark Zuckerberg personally liable in its $5 billion settlement with Facebook over extensive privacy violations and, furthermore, in not requiring Zuckerberg's appearance as the company's ultimate decision-maker for a deposition during the investigation. What is the Commission doing to ensure that CEOs of large companies are held accountable when their companies violate antitrust law with the CEO's knowledge or at his or her direction?

As you indicate, the Commission and the DOJ did not sue Mr. Zuckerberg personally. However, it is totally inaccurate to suggest that the FTC failed to investigate his role in Facebook's violation or that the 2019 order does not hold him accountable. The FTC thoroughly investigated Facebook, including a review of Mr. Zuckerberg's role in the alleged violations. Among other things, staff carefully reviewed tens of thousands of documents, including emails between key decision makers. The settlement is based upon a careful analysis of the facts uncovered in that review, as well as the law. Significantly, Mr. Zuckerberg's primary asset, Facebook, agreed to pay a massive fine. Had the FTC named Mr. Zuckerberg, any fine assessed against him likely would have been paid by Facebook. Furthermore, as I have noted before, it was highly unlikely that any court would have levied fines approaching the $5 billion we obtained via settlement. Finally, and most importantly, under the settlement, Mr. Zuckerberg must now personally certify compliance with the 2019 order four times every year. That certification is subject to both civil and criminal penalties. This relief represents significantly more accountability than could reasonably have been achieved with the legal tools at the Commission's disposal through continued litigation.

28. The Department of Justice's *Justice Manual* states: "In instances where the Department reaches a resolution with a company before resolving matters with responsible individuals, Department attorneys should take care to preserve the ability to pursue individuals. A Department attorney seeking to allow the release of civil claims related to the liability of individuals based on a corporate settlement must document the basis for the determination that further action against the individuals is not necessary or warranted, and must obtain written supervisory approval of the decision to allow the release of civil claims in the case."[62] Did the FTC follow the *Justice Manual's* recommended approach and document the basis for determining that further action against Mark Zuckerberg or other individuals at Facebook was not necessary or warranted? If not, why not?

The FTC is an independent agency and is not bound by the *Justice Manual*. However, the Commission's procedures for settlement are even stricter than those set forth in the DOJ's *Justice Manual*. No attorney at the Commission, neither a trial attorney nor any manager in their supervisory chain, can settle any matter without approval from the Commission, effectuated by a majority vote on the record. To obtain such permission, staff needs to write a detailed memorandum justifying all the relief they propose. That reasoning is reviewed by the relevant Bureau front office (Consumer Protection or Competition) and the Bureau of Economics.

[62] U.S. Dep't of Justice, 4-3.100: Pursuit of Claims Against Individuals, https://www.justice.gov/jm/jm-4-3000-compromising-and-closing.

Moreover, Commissioners and their advisors have every opportunity to seek additional information or clarification from staff. The Commission follows this procedure in all cases, including the Facebook order enforcement matter.

29. In their statement, the Commissioners who voted in favor of the proposed settlement with Facebook stated: "Here, we have made the determination that, in light of the meaningful relief we have achieved, retaining the ability to sue Mr. Zuckerberg for past order violations we did not find and for which have been personally liable would not serve the public interest." How did the Majority Commissioners reach this conclusion?

See response to QFR 27, above.

30. When assessing whether to hold individual executives accountable for order violations, what role does a firm's size play in the Commission's analysis?

See response to QFR 31, below.

31. Are there any factors that differentiate the FTC's analysis of individual liability for executives at large companies versus at small companies?

The FTC conducts the same analysis, regardless of the size of a firm, to determine whether to hold an individual liable for violations of the FTC Act. First, we determine whether we can prove the elements necessary to obtain individual injunctive and monetary relief under controlling legal precedent. Second, we consider whether naming the individual is necessary and appropriate to obtain effective final relief and protect consumers.

When determining whether to name an individual officer liable for the acts of a corporation, the Commission considers whether the person's conduct demonstrates a need to have the person under order to protect the public in the future, and whether the person has assets that could contribute to consumer redress or should be disgorged to prevent unjust enrichment. To obtain effective relief, particularly in fraud cases, it is often necessary to name the principles of closely held companies because those individuals can avoid the injunctive requirements of a court order simply by setting up a new corporate entity. Similarly, the principals of closely held companies engaged in fraud often are more directly involved in the unlawful conduct and more likely to pay themselves an outsized share of the proceeds. For these reasons, as a practical matter, it is often more likely to be necessary to name the executives of small, transient companies, especially those engaged in fraud, to protect consumers from future injury, and to get money back to consumers.[63]

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[63] The Commission recently, by unanimous vote, authorized a federal court action against Vyera Pharmaceuticals, LLC, alleging an elaborate anticompetitive scheme to preserve a monopoly for the life-saving drug, Daraprim. The complaint seeks remedial injunctive relief as well as equitable monetary relief to provide redress to purchasers who have overpaid for the drug. The complaint also names Martin Shkreli and Kevin Mulleady, who allegedly were directly responsible for orchestrating the anticompetitive scheme, as well as Phoenixus AG, Vyera's parent company. FTC Press Release, *FTC and NY Attorney General Charge Vyera Pharmaceuticals, Martin Shkreli, and Other Defendants with Anticompetitive Scheme to Protect a List-Price Increase of More than 4,000 Percent for Life-*

Technological Capabilities

32. Earlier this year, the Commission established a Tech Task Force, which later became the Technology Enforcement Division (TED) when it was converted into a permanent Division within the Bureau of Competition.

a. What are the biggest obstacles to enforcement, if any, that TED currently faces?

The largest obstacle to enforcement remains resources. We created the now-renamed TED using existing resources, which meant reallocating personnel from other enforcement Divisions in BC to TED. Since it became a permanent Division, we have expanded TED's leadership to mirror the structure in other permanent Divisions in BC. We have also supplemented its initial staffing with technologists, detailees from within the Commission, and additional newly-hired attorneys in order to address some of these resource challenges.

I am not aware of any legal obstacles to enforcement at this time. As outlined in the Commission testimony, current law provides the Commission with several potential avenues to counter anticompetitive conduct in technology markets, including conduct by technology firms that seek to thwart nascent and potential threats by acquisition or other means.[64]

Combatting anticompetitive conduct in the technology sector is one of my top priorities and we are devoting significant resources to this effort. I greatly appreciate your support for additional resources for the FTC's competition mission.

b. How many attorneys are on the TED's staff who work exclusively on the TED's caseload and when was each of them hired?

As of today, TED has 20 attorneys, and we expect one attorney to join soon. As a result of the additional funding provided in the most recent budget, we intend to add four more attorneys to the Division. When the now-renamed TED was launched, the Bureau of Competition moved 15 attorneys to this unit from other Divisions within the Bureau. That realignment was completed in April 2019. TED has since hired three additional attorneys, who started their positions in the last two months. Additional attorneys have been detailed from other parts of the Commission and are now working full time on TED matters. Division leadership consists of an Assistant Director and two Deputy Assistant Directors. In addition, the Compliance Division of the Bureau of Competition has designated an attorney to work with TED on remedy issues that may arise in the context of investigations and potential enforcement actions.

Saving Drug Daraprim (Jan. 27, 2020), https://www.ftc.gov/news-events/press-releases/2020/01/ftc-ny-attorney-general-charge-vyera-pharmaceuticals-martin.

[64] Prepared Statement of the Federal Trade Commission before the H. Comm. on the Judiciary, Subcommittee on Antitrust, Commercial and Administrative Law (Nov. 13, 2019), https://www.ftc.gov/system/files/documents/public_statements/1553856/p180101_house_competition_oversight_testimony_-_platforms_part_4_11-13-2019.pdf.

c. How many full-time technologists are on the TED's staff who work exclusively on the TED's caseload and when was each of them hired?

TED has two technologists on staff: one started work in January 2020, and the other will start in early February 2020. Both are dedicated to the work of the Division.

d. How many full-time economists are on TED's staff who work exclusively on the TED's caseload and when was each of them hired?

TED does not have any economists on staff. The FTC has a separate Bureau of Economics, which helps the FTC evaluate the economic impact of its actions by, among other things, providing economic analysis for competition investigations. BE economists are not permanently assigned to work with specific BC or BCP divisions, but are assigned to investigations on a case-by-case basis, taking into consideration not only industry knowledge but also the types of economic expertise each case is likely to require.

Seven economists are currently heavily involved in the work of TED. These economists have tenures at the FTC ranging from around three years to over a decade, and in total represent approximately fifty years of merger enforcement experience at the FTC.

33. Several FTC consent orders have required firms to engage independent third-party assessors to perform security assessments. What processes does the FTC have in place to ensure third-party security assessments are trustworthy and accurate?

The FTC insists on third-party assessors in situations that demand significant levels of expertise. The FTC's orders allow us to refuse to approve an assessment from an assessor who lacks that expertise, or who has shown any indication of not being trustworthy or accurate. Compliance attorneys within the Division of Enforcement, working with attorneys and others from the relevant Division, review all assessors' reports and ask follow-up questions to enhance our understanding of the assessors' processes and conclusions, as well as address any apparent inconsistencies or holes in the assessment. We require companies under order to carry the cost of retaining assessors rather than bear the extremely high cost with our limited budget.

34. Some commentators have suggested that the FTC's decisions to allow Facebook to acquire Instagram and WhatsApp resulted from a lack of understanding of the relevant technology markets. What are you doing to ensure that the TED—as well as other divisions reviewing mergers in technology markets—do not make erroneous decisions due to a lack of understanding of the relevant markets?

I agree that it is important that the FTC have sufficient technical, policy, and economic expertise to consider whether mergers in technology markets could harm competition. That is why I created TED within BC: to marshal resources and expertise to tackle competition issues in the technology sector. I am confident in our ability to understand the relevant industry practices and markets and evaluate mergers and other business conduct.

The recent public *Hearings* were designed to further our knowledge.[65] They included sessions on a number of issues relating to technology and digital markets, including: the identification and analysis of collusive, exclusionary, and predatory conduct by digital and technology-based platform businesses; the antitrust framework for evaluating acquisitions of potential or nascent competitors in digital marketplaces; innovation and intellectual property policy; privacy, big data, and competition; and algorithms, artificial intelligence, and predictive analytics. We received over 900 public comments, which we have reviewed.

TED is hard at work and they are pursuing all leads. The Division has an open-door policy and encourages those with concerns about competition in technology markets to contact them.[66] Likewise, a number of other BC Divisions focus on technology sectors and are carefully considering technological changes and related antitrust implications.

FTC Hearings

35. In September 2018, the FTC launched a series of public hearings to examine "whether broad-based changes in the economy, evolving business practices, new technologies, or international developments may require adjustments to competition and consumer protection law, enforcement priorities, and policy." Has the FTC produced any summaries, findings, or reports following the hearings? If yes, please describe these materials and whether they have been made available to all of the relevant divisions at the agency and Commissioner offices.

The Office of Policy Planning (OPP) has worked closely with all the relevant Bureaus, Divisions, and Offices at the Commission following the hearings, and has provided numerous briefings and resource material to the Commissioners and their offices.

On January 10, 2020, the FTC and DOJ released for public comment draft 2020 *Vertical Merger Guidelines* that would, if adopted, replace the DOJ's 1984 *Non-Horizontal Merger Guidelines*.[67] A number of public comments on the *Hearings* suggested that the agencies should provide updated guidelines and additional guidance on how the agencies evaluate vertical mergers. These Guidelines were prepared and released as part of the Commission's follow-on work product from the *Hearings.*

The FTC expects to release a report on the international hearings, which took place over two days in late March 2019.[68]

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[65] FTC, *Hearings on Competition and Consumer Protection in the 21st Century*, https://www.ftc.gov/policy/hearingscompetition-consumer-protection.
[66] FTC, Inside the Bureau of Competition: Technology Enforcement Division, https://www.ftc.gov/about-ftc/bureaus-offices/bureau-competition/inside-bureau-competition/technology-enforcement-division.
[67] FTC Press Release, *FTC and DOJ Announce Draft Vertical Merger Guidelines for Public Comment* (Jan. 10, 2020), https://www.ftc.gov/news-events/press-releases/2020/01/ftc-doj-announce-draft-vertical-merger-guidelines-public-comment.
[68] FTC, *Hearings on Competition and Consumer Protection in the 21st Century*: *The FTC's Role in a Changing World* (Mar. 25-26, 2019), https://www.ftc.gov/news-events/events-calendar/ftc-hearing-11-competition-consumer-protection-21st-century.

In addition, OPP staff are preparing several guidance documents and staff papers as *Hearings* follow-on projects.

36. Does the FTC plan to make public any work product that is a result of the hearings? If so, what process will the FTC have in place to identify whether this work product has support among Commissioners?

As noted above, the FTC and DOJ recently released for public comment draft 2020 *Vertical Merger Guidelines*, and we hope to release a report on the international hearings as well. The Commissioners review and vote to release all formal staff reports, Commission reports, and guidelines; we plan to follow that process for other *Hearings* output.

37. How much did the FTC spend on its public hearings?

The costs directly attributable to the *Hearings* were $562,956.27.

The vast majority of the costs expended related to providing audio/visual services to the public. This amount included onsite video and live webcast hosting, as well as creating a video archive. This provided the public with the greatest transparency into the Commission's hearings. Another significant area of costs included travel and room rentals so that the agency could obtain a wider diversity of views by holding several of the hearings outside the Washington, D.C. area.

38. What type of data did the FTC collect through its public hearings?

The Chairman's announcement of the *Hearings* and the call for comments indicated that "[t]he Commission is especially interested in new empirical research that indicates (or contraindicates) a causal relationship with respect to any of the topics identified for comment."[69] Unfortunately, we have not received this type of information to date.

We are exploring what additional research the agency can do with its limited resources to achieve this goal.

39. In what specific ways have the FTC's hearings on digital platforms and the relationship between privacy, big data, and competition helped TED better investigate potential violations in the tech sector and, when they find violations, bring and win these cases?

The agency does not publicly comment on any pending law enforcement investigation.

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[69] Prepared Remarks of FTC Chairman Simons Announcing the Competition and Consumer Protection Hearings at 2 (June 20, 2018), https://www.ftc.gov/system/files/documents/public_statements/1385308/prepared_remarks_of_joe_simons_announcing_the_hearings_6-20-18_0.pdf; FTC, *Hearings on Competition and Consumer Protection: Public Comment Topics and Process*, https://www.ftc.gov/policy/advocacy/public-comment-topics-process.

TED is actively investigating conduct, including consummated mergers, in the technology sector. The *Hearings* covered a number of topics relevant to these ongoing investigations, and the learning and thinking from the *Hearings* is informing that investigative work.

40. In September, the head of the FTC's Office of Policy Planning (OPP), Bilal Sayyed, stated in a speech that is his office is planning to release a guidance document on the application of the antitrust laws to conduct by technology platforms. What are you doing to ensure that OPP's work will complement the work and mission of the Bureau of Competition?

As noted above, the OPP is working closely with all relevant components of the agency on all work product resulting from the *Hearings*. Any formal guidance documents would be voted on by the Commission for public release.

41. Is OPP working with the attorneys in TED to craft these guidelines? If yes, please describe how.

Yes. OPP is preparing the draft in conjunction with BC personnel, including managers and staff from TED.

42. Is OPP coordinating closely with the Department of Justice to craft these guidelines? If yes, please describe how.

The FTC is keeping DOJ informed of our work on this possible guidance document and will welcome their input.

43. What are you doing to ensure that the various parts of the agency are working to support each other in the agency's efforts to promote competition and aggressively enforce the antitrust laws?

The dual mission of the agency, and the support that BE provides for both missions, helps to ensure that the FTC continues to leverage its resources and expertise to vigorously enforce the antitrust laws. TED, in particular, is receiving support for its work from throughout the agency. TED is consulting with staff from BCP's Office of Technology Research and Investigation, which focuses on issues at the intersection of technology with the FTC's consumer protection mission, including fraud, privacy, data security, online and mobile advertising, payment systems, and malware. More generally, BC and BCP leadership are in regular contact and hold regularly-scheduled meetings to ensure consistency in enforcement, and also to flag relevant issues discovered by one Bureau that may implicate the other Bureau's enforcement priorities.

44. What steps does the FTC take to ensure that outside interests do not improperly influence the agency's policy and enforcement decisions?

We took significant steps to ensure that a wide variety of views were reflected during the *Hearings*. We invited legal and economic academics, legal and economic consultants, public interest groups, public advocacy groups, and representatives of businesses and industries to our

hearing sessions. Overall, we hosted over 350 unique non-FTC participants over 24 days of public hearings. We sought public input and, to the greatest extent possible, facilitated informed comments from a wide range of interested parties. For example, before each hearing, we released an agenda, a list of participants, and a list of specific questions for public comment. The comment period also extended well beyond the date of each specific hearing, to allow interested parties to comment on the discussion at the public session. We streamed each hearing session live, and posted a video of the hearing session on our website as a resource for those who could neither attend nor watch live. We also released a transcript of each hearing session shortly after it concluded.

We have received over 900 unique comments on our hearings topics. The FTC posted all germane comments on our website shortly after we received them, allowing the public to comment on points raised.

More generally, the Commission and its staff regularly review arguments and advocacy of parties, persons, and interest groups who comment to us or appear before us on enforcement and policy matters. We always carefully evaluate the information and arguments on the merits.

45. Have you ever received or sent communications from a non-government email or phone number to an executive at a firm under investigation or with a pending merger?

No, I have had no such communications with an executive. I was once contacted via text, on my personal phone, by counsel for one of the parties in an ongoing merger investigation. Counsel was seeking a meeting prior to a Commission vote to authorize an enforcement action, to which I agreed. The Commission subsequently voted to initiate an enforcement action. The matter is now in litigation.

Conflicts of Interest

46. The Commission's rules require former FTC employees to obtain clearance for working on matters that may have been pending while they were employed by the Commission. Please identify how many of these requests the Commission received for each month since January 2017.

A former Commission employee must seek and receive clearance before appearing before a current Commission official or providing behind-the-scenes assistance on a matter that was pending during his or her Commission service, or that "directly resulted from" such a matter.[70] Many "clearance matters" are resolved informally. Such informal resolutions may result in former employees not filing for clearance at all—either because they have been advised that clearance would not be granted, or because a request for clearance is not necessary (*e.g.*, a matter was initiated after the former employee's departure). Thus, the number of reported clearance

[70] 16 C.F.R. § 4.1(b)(2). This rule also requires a former employee to seek and receive clearance before participating in a Commission matter (even if the matter had not yet been initiated formally) if non-public documents or information pertaining to that matter likely would have come to the former employee's attention during the course of his or her official duties, and the employee left the Commission within the previous three years.

requests may be under- and/or over-inclusive. Having said that, the FTC's ethics officials received the following number of clearance requests covering the period of January 1, 2017 to January 10, 2020, broken out by month.

Month/Year	Number of Requests Received	Notes
1/17	1	
2/17	4	
3/17	2	
4/17	2	
5/17	0	
6/17	1	
7/17	3	This number includes one request withdrawn after employee was advised by an FTC ethics official that clearance was not required.
8/17	5	This number includes three requests withdrawn after employees were advised by FTC ethics officials that clearance was not required.
9/17	0	
10/17	0	
11/17	1	
12/17	0	
1/18	0	
2/18	1	
3/18	2	
4/18	2	This number includes one request withdrawn after employee was advised by an FTC ethics official that clearance was not required.
5/18	1	This number includes one request withdrawn after employee was advised by an FTC ethics official that the request would be denied.
6/18	0	
7/18	0	
8/18	0	
9/18	0	
10/18	0	
11/18	1	
12/18	1	
1/19	1	
2/19	4	
3/19	2	
4/19	3	
5/19	1	
6/19	2	

7/19	5	
8/19	5	
9/19	7	
10/19	1	
11/19	1	
12/19	5	
1/2020	2	This number reflects requests received as of February 4, 2020.
TOTAL	**66**	

47. Since January 2017, how many FTC enforcement actions or investigations had a respondent or defendant represented by a former director of the Bureau of Competition, Bureau of Economics, or Bureau of Consumer Protection, or by a former FTC Commissioner?

Apart from clearance requests, the FTC does not track the participation of former Commission employees in FTC enforcement actions or investigations. Based on the clearance requests received and identified above, a former FTC Commissioner or Director represented a respondent or defendant in eight enforcement actions or investigations. This number excludes one request to participate in a matter submitted by a former Director. The excluded request, submitted in May 2018 and identified above, was withdrawn after a former Director received guidance from an FTC ethics official that the request would be denied.

Expert Costs

48. The FTC Office of Inspector General (OIG) identified the escalating costs of expert witnesses as one of the two top "management challenges" facing the FTC in 2019. Please describe each step of the process by which the Commission selects an economic expert or consulting firm to retain, including any processes for setting up competitive bidding, for negotiating fees, and for determining fees.

In October 2019, I instructed staff to adopt several changes in expert acquisition and contract management practices, across both the competition and consumer protection missions. The goal of these changes, which are broadly outlined below, is to reduce expert costs.

- Enhance competition in the expert retention process.
- Use internal experts whenever feasible and consider lower-cost outside expert and support team options.
- Document the processes and considerations involved with expert contracting decisions, including the use of internal experts and support teams.
- Rigorously manage contracts to ensure efficient use of expert resources.

49. Please describe how contracts for outside experts and consulting firms are structured.

The FTC has historically awarded time and materials contracts for outside experts and consulting firms.[71] However, staff also may consider using alternative expert contract structures to manage costs.

50. Please identify any features of the current contract structure that might incentivize outside experts and consulting firms to complete their work in a more or less cost-effective manner.

Termination for cause is the ultimate incentive for any outside expert to perform his or her obligations in an appropriate manner. Staff may also consider using alternative expert contract structures to align incentives and manage costs.

In addition, staff is to maintain detailed data on expert expenditures for each matter. I expect these data will help staff obtain better terms in contract negotiations, select more cost-effective expert teams, and more effectively manage future expert engagements.

51. Please identify what processes the Commission has in place to monitor and review the work performed by outside economic experts and consulting firms.

BC litigating teams work with BE staff to monitor expert and consulting firm performance under engagement contracts.

In addition, the FTC has a series of controls in place such that every dollar added to expert contracts must first proceed through a multistage review. This ensures that decision-makers at all levels are continually aware of expert spending and agree with any allocation of additional funds.

52. In its November 2019 report, the OIG identified several instances where the FTC failed to fully document the process by which it selects experts. Please identify what steps the Commission is taking to rectify this shortcoming.

If staff determines that using an internal expert and/or support team is not feasible for a particular enforcement action, staff must document why an outside expert and/or support team are necessary, and why internal resources are not a viable option.

40 U.S.C. § 559

53. 40 U.S.C. § 559 states: "An executive agency shall not dispose of property to a private interest until the agency has received the advice of the Attorney General on whether the disposal to a private interest would tend to create or maintain a situation inconsistent with antitrust law." Please provide a full list of matters on

[71] Time and materials contracts are indefinite quantity contracts with fixed hourly rates for each labor category that may be required during the engagement with a not-to-exceed amount beyond which the contractor is not authorized to work. These contracts allow for direct expenses (*e.g.*, travel costs, data purchases) incurred as a result of the engagement. Because of the indefinite nature of time and materials contracts, the FTC may fund the work in increments.

which the FTC has consulted with the Attorney General pursuant to this statutory provision.

The cited provision relates to the disposition of Federal property by Federal agencies. The FTC does not dispose of Federal properties subject to this provision.

Political Influence

54. Please identify all officials from the Office of Policy Planning, the Office of General Counsel, the Bureau of Competition, the Bureau of Consumer Protection, and the Bureau of Economics that have attended meetings in the White House complex since January 2017 and describe the circumstances of each meeting.

The FTC does not keep a log of its interactions with the White House complex. In consultation with relevant staff, I have attempted to provide the most complete response possible. Many SES-level officials have left the agency between January 2017 and the present, so I cannot state that this is a definitive list of meetings attended by the listed FTC officials at the White House complex during the time in question for the Offices and Bureaus requested.

Month/Year	Bureau/Office	Official	Subject Matter
5/17	Bureau of Economics (BE) Office of Policy Planning (OPP)	David Schmidt, Assistant Director Tara Isa Koslov, Acting Director	Interagency Drug Pricing and Innovation Task Force meeting to discuss drug pricing policies and related anticompetitive practices
6/17	BE	David Schmidt, Assistant Director	Interagency Drug Pricing and Innovation Task Force meeting to discuss drug pricing policies and a meeting to discuss the drug supply chain
7/17	BE	David Schmidt, Assistant Director	Interagency meeting to discuss pharmacy benefits managers
9/17	Bureau of Consumer Protection (BCP)	Daniel Kaufman, Deputy Director	Interagency meeting with National Economic Council staff to discuss Privacy and Data Security
10/17	Bureau of Competition (BC), OPP	Ian Conner, Former Deputy Director (now Director) Tara Isa Koslov, Acting Director	Interagency meeting with National Economic Council staff to discuss Healthcare Competition Executive Order
11/17 (two occasions)	OPP	Tara Isa Koslov, Acting Director	Interagency meeting to discuss report required by Executive Order on Healthcare Competition
11/17	OPP	Tara Isa Koslov, Acting	Discussion with National

		Director	Security Council staff regarding licensure portability for military spouses
11/17	BCP	James Kohm, Associate Director	Meeting with Domestic Policy Council staff to discuss Made in USA labeling matters
12/17	BE, OPP	David Schmidt, Assistant Director Tara Isa Koslov, Acting Director	Interagency Healthcare Competition Executive Order Report Working Group meeting to discuss drafting report
12/17	OPP	Tara Isa Koslov, Acting Director	Interagency Healthcare Competition Executive Order Report Working Group meeting to discuss drafting report
12/17	OPP	Tara Isa Koslov, Acting Director	Meeting with Brookings Institution representatives and Interagency Healthcare Competition Executive Order Report Working Group
1/18	BE, OPP	David Schmidt, Assistant Director Tara Isa Koslov, Acting Director	Interagency Healthcare Competition Executive Order Report Working Group meeting to discuss drafting report
2/18	OPP	Tara Isa Koslov, Acting Director	Meeting of report working group for Executive Order on Healthcare Competition and Choice
2/18	OPP	Tara Isa Koslov, Acting Director	Meeting with Hoover Institution representatives and Interagency Healthcare Competition Executive Order Report Working Group
4/18	BCP	James Kohm Associate Director	Meeting with Domestic Policy Council staff to discuss Made in USA labeling matters
6/18	OPP	Bilal Sayyed, Director	Interagency meeting with Privacy Policy staff to discuss Privacy Issues
7/18	BCP	James Kohm, Associate Director	Meeting with Domestic Policy Council staff to discuss Made in USA labeling matters
8/18	OPP	Bilal Sayyed, Director	Interagency meeting with the National Economic Council

			staff to discuss Healthcare Competition Executive Order
8/18	OPP	Bilal Sayyed, Director	Lunch with Kathleen Kraninger
9/18	BCP	Andrew Smith, Director	Interagency meeting with Privacy Policy staff to discuss Privacy issues
10/18	BE	David Schmidt, Assistant Director	Interagency Healthcare Competition Executive Order Report Working Group meeting to discuss health care provider laws
12/18	BCP	Andrew Smith, Director	Meeting with Privacy Policy staff to discuss Privacy issues
1/19	BCP	Mary Engle, Associate Director	Interagency meeting with National Economic Council staff to discuss transparency and surprise medical billing
2/19	OPP	Bilal Sayyed, Director	Interagency meeting with National Economic Council staff to discuss transparency and surprise Medical billing
3/19	OPP	Bilal Sayyed, Director	Interagency meeting with Domestic Policy Council staff to discuss transparency and surprise Medical billing
3/19	BE	Aileen Thompson, Assistant Director	Interagency meeting with National Economic Council staff to discuss antitrust and healthcare.
3/19	BCP	Jennifer Leach, Associate Director	Interagency meeting with Director of Policy staff to discuss the First Lady's Policy for Youth Programs Executive Order
5/19	BCP	Andrew Smith, Director	Interagency meeting with Privacy Policy staff to discuss Privacy issues
5/19	OPP	Bilal Sayyed, Director	Interagency meeting with National Economic Council staff to discuss State Health Care Competitiveness Index
6/19	BCP	Andrew Smith, Director	Interagency meeting with Privacy Policy staff to discuss Privacy issues

6/19	OPP	Bilal Sayyed, Director	Interagency meeting with National Economic Council staff to discuss State Health Care Competitiveness Index
7/19	BCP	Andrew Smith, Director Mary Engle, Associate Director	Interagency meeting with Domestic Policy Council to discuss the use of algorithms in the distribution of social media content
7/19	OPP	Bilal Sayyed, Director	Interagency meeting with National Economic Council staff to discuss State Health Care Competitiveness Index
8/19	Office of General Counsel (OGC)	Reilly Dolan, Principal Deputy General Counsel Alden Abbott, General Counsel	Interagency meeting with Domestic Policy Council to discuss the use of algorithms in the distribution of social media content
8/19	BE, OPP	David Schmidt, Assistant Director Bilal Sayyed, Director	Interagency meeting with National Economic Council staff to discuss healthcare price transparency and State Healthcare Competitiveness Index
9/19	BCP, OGC	Andrew Smith, Director Reilly Dolan, Principal Deputy General Counsel Alden Abbott, General Counsel	Interagency meeting with Domestic Policy Council to discuss the use of algorithms in the distribution of social media content
9/19	BCP	James Kohm, Associate Director	Meeting with Domestic Policy Council staff to discuss Made in USA labeling matters
9/19	OPP	Bilal Sayyed, Director	Interagency meeting with National Economic Council staff to discuss Healthcare Competition Executive Order
10/19	BCP	Andrew Smith, Director	Interagency meeting with Automated Vehicle Fast Track Action Committee to discuss drafting strategy for automated vehicles
10/19	BCP	Daniel Kaufman, Deputy Director	Meeting with National Economic Council staff to discuss BCP issues
10/19	BC	Bruce Hoffman, Former Director; Ian Conner,	Interagency meeting with National Economic Council

		Former Deputy Director (now Director)	staff to discuss Healthcare Competition Executive Order
12/19	BCP	Jennifer Leach, Associate Director	Interagency FLOTUS Be Best Ambassadors celebration

Statutory Authority

55. Under current law, the Commission has the authority to obtain equitable monetary relief under Section 13(b) of the FTC Act. Do you have concerns about the Commission's continued ability to do so? If so, what are your recommendations for actions Congress could take, or should refrain from taking, in support of the Commission's existing authority to obtain equitable monetary relief as a means of holding violators of the FTC Act accountable and providing redress to their victims?

I am gravely concerned that recent judicial decisions have substantially threatened the Commission's ability to use Section 13(b). Congress should clarify the Commission's remedial authority under Section 13(b) to ensure the FTC can continue to get meaningful monetary relief for American consumers.

Section 13(b) of the FTC Act is the FTC's primary, and most efficient and effective, way of providing redress to injured consumers.[72] The relevant portion of Section 13(b), often referred to as the "final proviso," authorizes the FTC to sue in federal court and states as follows: "in proper cases, the Commission may seek, and after proper proof, the court may issue, a permanent injunction." Since the 1980s, courts across the country have held that Section 13(b) allows all types of equitable relief, including money judgments to remedy consumer injuries. In 1994, Congress acknowledged and strengthened the Commission's ability to use Section 13(b) to obtain full monetary relief when it added language to the final proviso of Section 13(b) expanding venue and service of process.[73]

Over the years, the Commission has secured billions of dollars in relief in a wide variety of cases using its Section 13(b) authority, including telemarketing fraud, anticompetitive pharmaceutical practices, data security and privacy, scams that target seniors and veterans, and deceptive business practices, just to name a few.

But the Seventh Circuit's recent *Credit Bureau Center* opinion effectively eliminated the FTC's ability to obtain equitable monetary relief in Illinois, Indiana, and Wisconsin, and it may tempt other courts to follow suit. The court, overruling decades of its own precedent holding otherwise, held that the word "injunction" in the statute allows only behavioral restrictions and not

[72] 15 U.S.C. §53(b).

[73] Federal Trade Commission Act Amendments of 1994, S. Rep. No. 103-130, at 15-16, *as reprinted in* 1994 U.S.C.C.A.N. 1776, 1790-91. As the Senate Report noted, "Section 13 of the FTC Act authorizes the FTC to file suit to enjoin any violation of the FTC Act. The FTC can go into court ex parte to obtain an order freezing assets, and is also able to obtain consumer redress…The FTC has used its section 13(b) injunction authority to counteract consumer fraud, and the Committee believes that the expansion of venue and service of process in the reported bill should assist the FTC in its overall efforts." *Id.*

monetary remedies.[74] In addition, the Third Circuit's *ViroPharma* decision held that the FTC may sue under Section 13(b) only when a violation is either ongoing or "impending" at the time the suit is filed, which puts an unnecessary limitation on the Commission's ability to obtain relief for consumers who have been harmed by unlawful conduct that occurred in the past but is not ongoing.[75]

The issue in *Credit Bureau Center* is pending in the courts of appeals for the Third and Eleventh Circuits and is also pending before the Supreme Court in three separate petitions. The Supreme Court is looking at a related question in *Liu v. SEC*, and it is possible that the Court's ruling could adversely affect the FTC's monetary redress authority. The ambiguity created by these cases increases defendants' incentive to litigate instead of settle with the FTC, and increases the agency's costs.

To restore the status quo, Congress should clarify Section 13(b) to reaffirm the Commission's longstanding authority to secure all types of equitable relief, including restitution and disgorgement. In addition, Congress should revise Section 13(b) to clarify that the Commission may sue in federal court to obtain equitable relief even if conduct is no longer ongoing or impending when the suit is filed.

56. Section 19 of the FTC Act authorizes the Commission to seek remedies that are broader than those available under Section 13(b), including damages. Specifically, Section 19 authorizes the Commission to seek this additional relief from a party that is subject to a final FTC order involving an unfair or deceptive act or practice if a "reasonable man" would have known that the act or practice was dishonest or fraudulent.

a. Please identify any cases where the FTC has pursued damages under Section 19 during your leadership.

During my leadership, the FTC has brought many cases under Section 19(a)(1) for violations of rules governing unfair or deceptive acts or practices (UDAP), and we have sought equitable monetary remedies under both 19(a)(1) and Section 13(b), such as disgorgement and restitution.[76] When making awards in these cases, courts do not specify which section of the FTC Act they are relying on. Although "damages" can technically be broader than disgorgement and restitution, as a practical matter they are often equivalent. Moreover, defendants often do not have enough assets to cover restitution judgments, so there is little to gain by seeking the potentially broader scope of damages relief.

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[74] *FTC v .Credit Bureau Center, LLC*, 937 F.3d 764 (7th Cir. 2019).
[75] *FTC v. Shire ViroPharma Inc.*, 917 F.3d 147 (3d Cir. 2019).
[76] Recent examples where we have sought relief under both Section 13(b) and 19(a)(1) include: *FTC v. James Noland, et al.*, No. 2:20-cv-00047 (D.Az. 2020), at https://www.ftc.gov/enforcement/cases-proceedings/x0100166/james-d-noland-jr-success-health; *FTC v. Educare Centre Services, Inc. et al.*, No. 3:19-cv-00196 (W.D.Tx. 2019), at https://www.ftc.gov/enforcement/cases-proceedings/192-3033/educare-centre-services-inc; *FTC and Utah v. Nudge, LLC et al.*, No. 2:19-cv-00867 (D.Utah 2019), at https://www.ftc.gov/enforcement/cases-proceedings/182-3016/nudge-llc.

As for Section 19(a)(2), we have not pursued damages or any other monetary remedies under this section for UDAP violations during my tenure for a number of reasons. Most importantly, we can sue for damages or other relief under Section 19(a)(2) only at the conclusion of an administrative case and all subsequent judicial proceedings, which can take years. In the meantime, there is a significant risk that defendants will dissipate assets, and there is no practical way of preserving them. Moreover, to get any monetary relief in such cases, we have to cross the high hurdle of showing that a "reasonable man would have known under the circumstances" that the conduct was "dishonest or fraudulent."

As a practical matter, consumers are much better served if the FTC brings cases in federal court for injunctive remedies and equitable monetary relief under Section 13(b). In Section 13(b) cases, unlike those that could be brought under Section 19(a)(2), the FTC can readily obtain asset freezes; does not have to complete an adjudicative process before seeking restitution in a separate proceeding; does not face a 3-year statute of limitations; and does not have to prove that in addition to being deceptive or unfair, that a practice was also "dishonest or fraudulent." In addition, the only court to consider the issue has held that Section 19 does not allow disgorgement of ill-gotten gains.

At bottom, I—like other Chairmen and Commissioners before me—seek to use the most efficient tool at my disposal to achieve the best outcome for consumers, and that is what I have done in my tenure. As you know, however, the Commission's ability to use Section 13(b) is facing significant challenges now, and I ask that you clarify the statute to permit the Commission to use this critical tool as courts, for decades, have allowed.

b. Commissioner Chopra has noted that deceptive acts can undermine competition by disfavoring honest businesses. Do you agree that the FTC should assert claims of deception in competition cases where the deceptive act or practice appears to have harmed competition and fair business rivalry?

I agree that it is important for the Commission to combat conduct not only because it harms consumers, but also because it undermines competition. I also agree that deception can be the basis of an anticompetitive act. In fact, when I was the Director for the Bureau of Competition, we brought two cases where we alleged that deceptive practices where at the heart of the anticompetitive scheme: *Rambus* and *Unocal*.[77] And if similar conduct appeared in future cases, I still would support alleging that the company behaved deceptively.

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[77] Compl. at ¶ 1, *In re Union Oil Comp. of Cal.*, Dkt. No. 9305 (Mar. 4, 2003), https://www.ftc.gov/sites/default/files/documents/cases/2003/03/030304unocaladmincmplt.pdf; ("Unocal actively participated in the CARB RFG rulemaking proceedings and engaged in a pattern of bad-faith, deceptive conduct, exclusionary in nature, that enabled it to undermine competition and harm consumers."); Compl. at ¶ 2, *In re Rambus Inc.*, Dkt. No. 9302 (June 18, 2002), https://www.ftc.gov/sites/default/files/documents/cases/2002/06/020618admincmp.pdf ("By concealing this information—in violation of JEDEC's own operating rules and procedures—and through other bad-faith, deceptive conduct, Rambus purposefully sought to and did convey to JEDEC the materially false and misleading impression that it possessed no relevant intellectual property rights.").

Questions for the Record from Representative Hank Johnson
Hearing on Online Platforms and Market Power, Part 4:
Perspectives of the Antitrust Agencies
November 13, 2019

1. **Chairman Simons, it's my understanding that the FTC's Bureau of Competition as well as its Consumer Protection Bureau have recently been involved in examining the cybersecurity practices of automobile dealer management software systems. In fact, not long ago, the Consumer Protection Bureau brought and settled an action against one software provider for failing to take reasonable steps to secure consumers' data, which resulted in a breach of data affecting approximately 12.5 million individuals. Meanwhile, the Competition Bureau has been engaged in the investigation of a different software provider under the auspices that its utilization of strong data security protocols could implicate antitrust concerns. Can you please provide some insight into whether the two bureaus are coordinating on important policy issues like the impact of antitrust laws on data security?**

The Commission's organizational structure, at all levels, contributes to its ability to effectively investigate conduct and consider policy issues that implicate both competition and consumer protection missions. For example, at the staff level, Bureau of Competition (BC) and Bureau of Consumer Protection (BCP) staff consult with one another to share expertise gained from recent investigations. Similarly, BC and BCP leadership communicate regularly to ensure consistency in enforcement and to flag relevant issues discovered by one Bureau that may implicate the other Bureau's enforcement priorities. Importantly, the Commissioners themselves ensure that both missions are taken into account: we and our staff see all case-related materials generated by each Bureau, which allows us to directly synthesize competition and consumer protection issues. The agency's five-member bipartisan membership also ensures that critical issues are fully explored during Commission deliberations.

Subcommittee on Antitrust, Commercial and Administrative Law
Hearing on Online Platforms and Market Power, Part 4:
Perspectives of the Antitrust Agencies
Questions for the Record

Question submitted by Representative Buck

1. **In recent months, several issues concerning Apple have raised attention. These include Apple's practices involving its App Store, as discussed in a July 2019 Wall Street Journal article.[78] Other issues include Apple's practices involving the online provision of news, Apple's expansion into audiovisual services, and European authorities' increased focus on and criticism of Apple's payment system. Finally, there may be questions concerning Apple's use of data. Will you consider these issues as you examine whether large online platforms are engaging in practices to consolidate dominant market power?**

I will keep an open mind when assessing the facts presented in each investigation and enforcement action.

Vigorous enforcement in the technology sector is a top priority for me. I created the Bureau of Competition's new Technology Enforcement Division to monitor competition in technology markets, investigate any potential anticompetitive conduct in those markets, and take enforcement actions when warranted.

[78] Tripp Mickle, *Apple Dominates App Store Search Results, Thwarting Competitors*, Wall. St. Journal (July 23, 2019), https://www.wsj.com/articles/apple-dominates-app-store-search-results-thwarting-competitors-11563897221.

Questions for the Record from Representative Pramila Jayapal
Online Platforms and Market Power, Part 4: Perspectives of the Antitrust Agencies
November 11, 2019

Questions for FTC Chairman Joe Simons:

1. **What decision-making process does the FTC utilize to determine the appropriate consequences to impose on lawbreaking companies?**

The Commission uses its enforcement authority to impose consequences for law violators, to reverse the harm caused by the defendant's illegal conduct, and to deter illegal conduct in the future. Choosing the right remedy will depend on the type of violation and the defendant's role in the violation. When staff recommends that the Commission initiate a legal challenge, the recommendation will often include remedial options for the Commission to consider.

Remedies available to the Commission under a variety of statutes fall into three general categories: conduct, structural, and monetary. When the Commission deliberates, it chooses the remedy that is most likely to stop or prevent harm to consumers and, when appropriate, return money to those harmed by the defendant's illegal behavior. In some cases, the defendant is willing to negotiate a settlement of charges in lieu of litigation, and the Commission will issue a consent order along with a complaint that outlines what the defendant has done to violate the law. These negotiated settlements have the force of law, and if the defendant violates the terms of a Commission order, the defendant may be subject to civil penalties. In other cases, the Commission will prosecute its allegations in federal court or in an administrative proceeding to obtain an enforceable injunction against the conduct, as well as other fencing-in relief. In appropriate cases, the Commission may also seek monetary relief in federal court. The Commission does not have the authority to impose monetary relief in an administrative proceeding.

2. **What factors does the FTC rely on to determine whether debarment is an appropriate consequence to impose on defendants that have engaged in anticompetitive behaviors?**

The Commission has never used debarment in a competition case.[79] Because anticompetitive conduct cases typically occur in markets with few competitors, debarment would limit competition, which potentially would exacerbate the competition problem. As a result, we would only consider debarment in the rarest—if any—competition cases.

[79] I am aware that certain commentators have advocated for using debarment in addition to jail time and fines in order to more effectively deter criminal violations of the antitrust laws. *See* Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Sanctions*, 6(2) COMPETITION POLICY INT'L at 3-39 (2010), https://www.competitionpolicyinternational.com/assets/0d358061e11f2708ad9d62634c6c40ad/CPIAutumn2010eBook.pdf. Because the FTC does not have criminal authority to enforce the antitrust laws, I do not have a view on whether debarment would be an appropriate deterrent to criminal conduct. It is my understanding that debarment is not used anywhere for civil antitrust violations.

3. What factors does the FTC rely on to determine whether defendant companies should be required to inform affected parties that they have been harmed?

In many consumer protection cases, the FTC disburses the funds collected from defendants directly to consumers; in these cases, the FTC notifies consumers that they may have been harmed by illegal conduct and are entitled to a refund.[80] In some circumstances, the Commission may require the defendant to notify those affected by its illegal conduct so they can take steps to avoid monetary harm or a threat to their health or safety in the future. When deciding whether to require notice, factors that we consider include: whether those harmed have an ongoing relationship with the defendant; whether they are forgoing other treatments in reliance on defendant's deceptive claims; whether they would otherwise learn about the defendant's illegal conduct on their own; and whether they need notice in order to seek relief available to them under other laws, including state law.[81] The Commission has an interest in making sure the public is aware of our enforcement actions, and in providing sufficient relief to those harmed so that the defendant is unlikely to violate the law again.

4. What factors does the FTC rely on to determine whether defendants should be required to inform affected workers that they have been harmed by anticompetitive behaviors?

I would rely on the factors listed above. Just as consumers are entitled to robust competition for the products and services they buy, workers are entitled to robust competition among employers when they seek employment. Wage-fixing agreements among competing employers are *per se* illegal under the antitrust laws, and the Commission is committed to promoting competition in labor markets for the benefit of all workers.

5. Where the FTC determines that companies made agreements that undermined competition in the labor market and harmed workers, why is the FTC not requiring that those companies provide notice to impacted workers?

Wage-fixing agreements among employers are *per se* illegal, and companies must have programs in place to avoid forming agreements with competing employers that harm workers.[82] When the FTC discovers such an agreement, we will act quickly to stop the illegal behavior, as we did in

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[80] Once an FTC lawsuit or settlement is final and the defendants have paid the money the court orders, the Office of Claims and Refunds in the Bureau of Consumer Protection develops a plan for returning that money to the right people. If there is money left over at the conclusion of the refund program, or if there is not enough money to provide meaningful refund amounts, then the FTC sends the money to the U.S. Treasury, where it is deposited into the General Fund. According to the most recent report on the FTC's refund program, FTC cases resulted in more than $2.3 billion in refunds for consumers between July 2017 and July 2018. FTC OFFICE OF CLAIMS AND REFUNDS, 2018 FTC ANNUAL REPORT ON REFUNDS TO CONSUMERS (Feb. 2019), https://www.ftc.gov/system/files/documents/reports/2018-annual-report-refunds-consumers/annual_redress_report_2018.pdf.

[81] We also consider whether notice is practicable; for example, whether there is a viable means to identify and contact consumers who may have been affected by the conduct.

[82] *See* U.S. Dep't of Justice & FTC, Antitrust Guidance for Human Resource Professionals at 3 (Oct. 2016), https://www.ftc.gov/system/files/documents/public_statements/992623/ftc-doj_hr_guidance_final_10-20-16.pdf (explaining that "naked wage-fixing or no-poaching agreements among employers, whether entered into directly or through a third-party intermediary, are per se illegal under the antitrust laws").

the Your Therapy Source case, before the agreement has any effect on wages. In the right circumstances—such as when the illegal agreement has actually depressed wages paid to workers—the Commission will consider notifying affected workers or seeking other relief to make them whole.

6. **In the case of *Your Therapy Source*, the FTC found clear evidence that Texas staffing agencies broke the law by secretly making agreements to set low wages for the hard- working therapists they employed and even inviting more agencies to engage in this illegal practice. However, the FTC did not require the defendant agencies to provide notice to impacted workers. Why did the FTC decline to require that affected parties be notified?**

I joined the Commission's statement finalizing the order in this case because, after reviewing all the facts uncovered in our investigation and considering over 100 public comments, I did not believe the order needed to include a requirement to provide notice of the Commission's action to individual therapists targeted by the unlawful conduct.[83] Our investigation did not indicate that any therapists' wages were reduced as a result of the illegal wage-fixing agreement, so individual notice would have been unlikely to facilitate recovery in private civil litigation.[84] The Commission will take steps to ensure that the order and the facts of this case are disseminated as widely as possible in order to educate staffing firms, home healthcare workers, and small businesses about the illegality of wage fixing.

7. **What criteria does the FTC use to determine that an admonishment alone is an appropriate consequences to impose on lawbreaking companies?**

If your question implies that the Commission's cease-and-desist orders are mere admonishments, I strongly disagree with that characterization. The Commission will issue a cease-and-desist order to stop the illegal conduct alleged in a complaint and to prevent it from happening again. Commission cease-and-desist orders routinely require respondents to submit periodic reports on their efforts to comply with the order. If the Commission determines that a respondent is not fulfilling its legal obligations, the Commission may seek enforcement of the order and the imposition of civil penalties.[85]

8. **Does the FTC consider admonishments to be a sufficient deterrent to stop companies from engaging in anticompetitive behavior? On what basis has the FTC made that determination?**

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[83] Statement of the Federal Trade Commission Concerning the Commission's Consent Order, In the Matter of Your Therapy Source, LLC, Neeraj Jindal, and Sheri Yarbray, C-4689 (Oct. 31, 2019), https://www.ftc.gov/system/files/documents/public_statements/1552414/171_0134_your_therapy_source_commission_statement.pdf.

[84] Notice of the illegal wage-fixing agreement also might have caused consumer confusion, given that none of the therapists' wages were reduced as a result of the illegal agreement.

[85] Failing to submit a complete compliance report can violate Section 10 of the FTC Act, 15 U.S.C. § 50, and lead to civil penalties even in the absence of any violation of the order's other terms.

To reiterate, I do not believe the Commission's cease-and-desist orders are mere admonishments. The Commission's ability to seek civil monetary penalties for cease-and-desist order violations, and to order compliance reporting and monitor compliance, deters respondents from engaging in the prohibited conduct in the future. The possibility of a subsequent private action for treble damages also may have a deterrent effect.

9. **Where the FTC has imposed the power to impose broader consequences on lawbreaking companies, when does the FTC find it appropriate to impose only an admonishment?**

Again, the Commission's orders are not admonishments; they are legally enforceable injunctions. The Commission will continue to seek relief commensurate with the facts and circumstances of each case, including, where appropriate, disgorgement, notice to those affected, and admissions of liability for individuals involved.

10. **Does the FTC commit to carefully scrutinizing each negotiated settlement to determine what remedy would best make the workers who have been harmed by anticompetitive behavior whole?**

Yes, absolutely.

11. **Does the FTC commit to carefully scrutinizing each negotiated settlement to determine what remedy would most effectively deter illegal and anticompetitive conduct by corporations?**

I commit that we will consider all available options for stopping anticompetitive and other illegal conduct, obtaining redress for those harmed, and deterring future violations in every negotiated order.

Senate Committee on Aging
Full Committee Hearing: "Still Ringing Off the Hook: An Update on Efforts to Combat Robocalls"

For Associate Director Lois Greisman of the Federal Trade Commission:

Questions for the Record – Ranking Member Bob Casey

Topic: Stopping robocalls
Introduction: There are a number of initiatives going on to help reduce robocalls. There is the Strike Force, FCC rules, FTC actions, education campaigns and other things. However, the number of robocalls seems to still be at an all-time high.

Question: What action do you believe would be most helpful to reducing the number of unwanted robocalls?

In my view, the most effective way to reduce the number of illegal calls reaching consumers is a multi-faceted approach that focuses on rigorous law enforcement, technological innovation, consumer education and involves multiple stakeholders, including our government partners, industry, academics, and consumer groups.

The FTC is actively working to stop those responsible for making illegal calls. First, we engage in a vigorous law enforcement campaign against violators. When the FTC is able to locate and identify companies responsible for placing illegal telemarketing calls, the FTC takes aggressive action to hold those companies accountable. To date, the FTC has filed law enforcement actions against more than 770 companies and individuals alleged to have been responsible for placing billions of unwanted telemarketing calls to consumers. The FTC has obtained more than $1.5 billion in judgments against these violators and has collected over $121 million dollars.[1] In cases where perpetrators were running telemarketing scams, the FTC obtained court orders shutting these businesses down and freezing their assets so that those funds could ultimately be returned to consumer victims. The FTC will continue its ongoing efforts to identify and take strong law enforcement action against those who place illegal telemarketing calls.

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[1] One example of a recent successful enforcement action is the historic win the FTC and its law enforcement partners achieved in a long-running litigation against Dish Network. On June 5, 2017, a federal district court in Illinois issued an order imposing the largest penalty ever issued in a Do Not Call case: $280 million against Dish Network. *See U.S. v. Dish Network*, LLC, No. 3:09-cv-03073 (C.D. Ill. June 6, 2017) *available at* https://www.ftc.gov/news-events/press-releases/2017/06/ftc-doj-case-results-historic-decision-awarding-280-million-civil. The litigation centered on allegations that Dish and its telemarketers made tens of millions of calls—often robocalls—to telephone numbers on the Do Not Call Registry and called consumers who previously asked Dish and its telemarketers to stop calling. Additional information is available on the FTC's Do Not Call Enforcement page about our recent enforcement efforts targeting defendants who violate the Do Not Call rules and the robocall prohibitions.

Technological solutions, particularly call-blocking and call-filtering solutions for consumers, are also a critical part of the effort to stop unwanted robocalls. Such efforts have been underway for some time and continue to gain momentum. To spur the development of effective call-blocking and call-filtering solutions to help consumers ward off illegal and unwanted calls, in 2012, the FTC announced a robocall challenge in which it called upon innovators to develop a consumer-facing solution that blocks illegal robocalls, applies to landlines and mobile phones, and operates on proprietary and non-proprietary platforms.[2] One of the winners, "NomoRobo," was on the market six months later and today reports blocking over 300 million calls.[3] The FTC hosted three additional, successful challenges to spur industry initiatives to develop solutions to help both consumers and law enforcement combat illegal and unwanted robocalls.[4]

In addition, last year, the industry-led Robocall Strikeforce continued the push to develop call-blocking and call-filtering solutions.[5] Now, a number of major voice service providers offer these products to some or all of their customers.[6] In addition, a growing number of free or low-cost apps that offer call-blocking and call-filtering solutions are available for download on wireless devices.[7]

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[2] For more information on the first FTC Robocall challenge, *see* https://www.ftc.gov/news-events/press-releases/2013/04/ftc-announces-robocall-challenge-winners.

[3] *See* http://www.nomorobo.com/ (last visited Nov. 15, 2017).

[4] For more information on the FTC's subsequent challenges *see* https://www.ftc.gov/news-events/contests/zapping-rachel (Zapping Rachel challenge); https://www.ftc.gov/news-events/contests/detectarobo (Detectarobo challenge); and https://www.ftc.gov/news-events/contests/robocalls-humanity-strikes-back (Robocalls: Humanity Strikes Back challenge).

[5] The Robocall Strike Force organized in response to a request from the FCC to carriers to make better call blocking solutions available to consumers, quickly and free of charge. *See* Robocall Strike Force, Robocall Strike Force Report at 1 (2016), https://transition.fcc.gov/cgb/Robocall-Strike-Force-Final-Report.pdf.

[6] For example, in late 2016 AT&T launched "Call Protect", a product available to many AT&T wireless customers that blocks fraud calls and flags others as potential "spam." *See* http://about.att.com/story/att_call_protect.html. T-Mobile offers its wireless customers two free products, "Scam ID" and "Scam Block", that flag and block unwanted calls. *See* http://explore.t-mobile.com/callprotection (last visited Nov. 15, 2017). Verizon offers a product called "Caller Name ID" to its wireless customers that also attempts to flag and block unwanted calls. *See* https://www.verizonwireless.com/solutions-and-services/caller-name-id/. In addition, a number of carriers make Nomorobo available to their VoIP or cable line customers. *See, e.g.,* https://www.fcc.gov/consumers/guides/stop-unwanted-calls-texts-and-faxes (listing available call blocking resources from a number of wireline providers) (last visited Nov. 15, 2017).

[7] The Cellular Telecommunications Industry Association (CTIA) maintains a list of some of the available call blocking apps, both for iOS devices: https://www.ctia.org/consumer-

Most recently, the FTC began a new initiative to help facilitate industry call-blocking solutions by increasing the amount and frequency of consumer complaint data that we make publicly available.[8] Beginning in August of this year, the FTC began releasing the phone numbers reported by consumers in their Do Not Call and robocall complaints each business day. The FTC also began releasing the following consumer-reported data: the date and time the unwanted call was received, the general subject matter of the call (such as debt reduction, energy, warranties, home security, etc.), and whether the call was a robocall.[9] By making our available data more up-to-date and robust, the FTC seeks to help telecommunications carriers and other industry partners that are implementing call-blocking solutions for consumers that choose to use a call-blocking service or feature.

To maximize their effectiveness, call-blocking and call-filtering solutions will need to be supported by long-term technological solutions such as the STIR/SHAKEN framework for Caller ID authentication.[10] And, of course, call-blocking and call-filtering solutions should be made available to all consumers and consumers should be made aware of the available options. While technological solutions are no substitute for vigorous law enforcement, which the FTC continues to pursue, such solutions are a necessary complement.

In addition to law enforcement and technological innovation, consumer education is also an essential tool in the FTC's consumer protection and fraud prevention work. The Commission's education and outreach program reaches tens of millions of people a year through our website, the media, and partner organizations that disseminate consumer information on the FTC's behalf. The FTC delivers practical, plain language information on numerous issues in English and in Spanish. The Commission also uses law enforcement announcements as opportunities to remind consumers how to recognize a similar situation and report it to the FTC. In the case of robocalls, the FTC's message to consumers is simple: if you answer a call and hear an unwanted recorded sales message—hang up. Period. Other key messages to consumers include how to place a

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tips/robocalls/ios-robocall-blocking and for Android devices: https://www.ctia.org/consumer-tips/robocalls/android-robocall-blocking (last visited Nov. 15, 2017).

[8] *See* https://www.ftc.gov/news-events/press-releases/2017/08/ftc-escalates-fight-against-illegal-robocalls-using-consumer. The complaint data is available at: https://www.ftc.gov/site-information/open-government/data-sets/do-not-call-data.

[9] In the past, the Commission released a bi-weekly report that published only the telephone numbers that consumers complained about in their Do Not Call and robocall complaints.

[10] The STIR/SHAKEN standards will serve as the basis for verifying calls, classifying calls, and facilitating the restoration of trusted caller ID information. More information about STIR (Secure Telephony Identity Revisited) is available at https://datatracker.ietf.org/wg/stir/about/ (last visited Nov. 16, 2017). More information about SHAKEN (Signature-based Handling of Asserted information using toKENs) is available at https://www.sipforum.org/activities/technical-wg-overview-and-charter/atissip-forum-nni-task-force-charter/ (last visited Nov. 16, 2017).

phone number on the Do Not Call Registry, how and where to report illegal robocalls,[11] available call blocking solutions,[12] and how to identify common scams.[13]

I believe that this combination of law enforcement, technological innovation, and consumer education, in collaboration with our public and private partners, is the best approach to reduce the number of illegal calls reaching consumers.

Questions for the Record - Senator Elizabeth Warren

In December of 2015, Congress directed the IRS to contract with private debt collectors to collect certain categories of uncollected tax receivables.[14] The IRS hired four debt collection companies – CBE, ConServe, Performant, and Pioneer[15] – and they have now begun to contact Americans to collect unpaid taxes. The companies are compensated based on the amount they recover.

This arrangement raises two primary concerns as it relates to seniors. First, these debt collectors are authorized to attempt to collect tax debts on the phone.[16] For years, phone scammers have been trying to steal money from seniors by impersonating IRS agents. In fact, the Treasury Inspector General for Tax Administration (TIGTA) has received nearly 2.1 million complaints of calls impersonating the IRS[17] and IRS impersonation is the scam

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[11] *See, e.g.,* National Do Not Call Registry, http://www.consumer.ftc.gov/articles/0108-national-do-not-call-registry.

[12] *See, e.g.,* FTC Consumer Information Blocking Unwanted Calls https://www.consumer.ftc.gov/articles/0548-blocking-unwanted-calls.

[13] *See, e.g.,* FTC Consumer Information Scam Alerts, https://www.consumer.ftc.gov/scam-alerts.

[14] Fixing America's Surface Transportation (FAST) Act, Pub. L. No. 114-94 §32102.

[15] "Private Debt Collection," IRS, last reviewed October 4, 2017. Available at: https://www.irs.gov/businesses/smallbusinesses-self-employed/private-debt-collection.

[16] Tax Scam / Consumer Alerts, IRS, last reviewed October 3, 2017. Available at: https://www.irs.gov/newsroom/tax-scams-consumer-alerts.

[17] "Testimony of the Honorable J. Russell George," Subcommittee on Financial Services and General Government, Committee on Appropriation, United States House of Representatives, last reviewed October 4, 2017. Available at: http://docs.house.gov/meetings/AP/AP23/20170523/105897/HHRG-115-AP23-Wstate-GeorgeJ-20170523.pdf.

most-often reported to the Senate Committee on Aging's hotline.[18] In 2015 alone, IRS scams cost Americans over $15 million. In the past, educational efforts to protect seniors from this scam have focused on one simple message: the IRS would never attempt to collect a debt by phone.[19]

1. **Now that debt collectors working on behalf of the IRS will contact taxpayers by phone, what guidance is the FTC giving seniors to help them differentiate between scams and legitimate attempts to collect taxes?**

In April of 2017, the FTC changed the guidance[20] it gives to consumers regarding how to recognize an IRS scam call and informed consumers that debt collectors working on behalf of the IRS may contact them by phone. The FTC advises consumers that if their tax debt is assigned to a private debt collection company, they will receive two letters. The first letter will come from the IRS and will identify the private debt collection company to which the account has been assigned, and the second letter will come from the debt collection company assigned to the account. The FTC guidance emphasizes that both letters will include the tax amount owed, the name of the private debt collection company assigned, and a unique taxpayer authentication number.

The FTC's updated guidance also gives tips to consumers regarding how they can tell if they are dealing with a legitimate debt collector or a scammer.[21] The most important difference that we emphasize is that the private debt collectors working with the IRS will never ask consumers to pay them directly, but will instead direct consumers to pay electronically at IRS.gov/payments, or to send a check, made out to the US Treasury, directly to the IRS. We highlight that anyone who claims to be collecting for the IRS and asks you to make a payment over the phone is a scammer and we instruct consumers never to pay by credit or debit card, electronic check, wire, or a prepaid or gift card. We also let consumers know that the debt collectors will never use robocalls or pre-recorded messages and they will always use the authentication number identified in the hard copy letters sent to the consumer.

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[18] "Fighting Fraud: Senate Aging Committee Identifies Top 10 Scams Targeting Our Nation's Seniors," United States Senate Special Committee on Aging, last reviewed on October 4, 2017. Available at: https://www.collins.senate.gov/sites/default/files/Fraud%20Book%202017.pdf.

[19] "The IRS is Now using Private Debt Collectors; Here's What You Need to Know," Consumerist, last reviewed on October 4, 2017. Available at: https://consumerist.com/2017/04/03/the-irs-is-now-using-private-debt-collectors-heres-what-you-need-to-know/.

[20] *See* "The IRS is Now Using Private Debt Collectors" available at https://www.consumer.ftc.gov/blog/2017/04/irs-now-using-private-debt-collectors.

[21] *See id.* In addition, the FTC has published comprehensive guidance to help consumers recognize government impostor scams: https://www.consumer.ftc.gov/articles/0048-government-imposter-scams.

2. **What measures is the FTC taking to correct seniors' now-mistaken impression that IRS will not attempt to collect tax debt over the phone?**

The FTC published a consumer advisory in April of 2017[22] to communicate the information summarized above. Over 240,000 consumers and groups automatically receive copies of our consumer blog posts, including the IRS private debt collector guidance, and they are available in English and Spanish. The FTC also updated its imposter scam materials to reflect this change in IRS practice.

In addition to changing our online and printed guidance, the FTC has highlighted the change in IRS practice throughout our many outreach initiatives. For example, we talk about these changes during presentations on identity theft and imposter scams, including at the National Aging and the Law Conference, National Area Agencies on Aging (n4a) Conference, Home and Community Based Services (HSCBS) Conference, and webinars with the Identity Theft Resource Center (ITRC). The FTC also highlighted these changes during the FTC's Tax Identity Theft Awareness Week 2017 and we plan to do the same during Tax Identity Theft Awareness Week 2018. The FTC also hosts monthly consumer education calls with our federal, state, and private partners who engage in consumer outreach, and specifically highlighted the IRS changes and our revised guidance to consumers in our March 2017 call. Finally, the FTC has begun offering state-specific webinars on fighting fraud and identity theft, and includes information about the IRS changes in each webinar.

3. **Has the FTC seen any increase in the number of IRS impersonation scams? Has the FTC taken any additional steps to more closely monitor IRS scams given the IRS's new policy?**

I understand that the IRS began contacting consumers using four private debt collection companies in or around April of this year. The FTC's Division of Consumer Response and Operations reviewed government-imposter fraud complaints in our Consumer Sentinel database in which the primary or associated subject name entered was "IRS" from November 2016 through October 2017. While there was a short spike in this type of complaint from May to June, the complaint numbers have decreased every month since June, so it does not appear that the use of private debt collectors is causing a sustained increase in IRS imposter scams at this time.

In addition to monitoring consumer complaints, we are in regular contact with staff from IRS and TIGTA to discuss trends and monitor developments relating to IRS scams.

   a. **If there has been an increase in these scams, does the FTC have adequate funding to address this increase? If not, will you bring your additional funding needs to the attention of the committee?**

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[22] *See* "The IRS is Now Using Private Debt Collectors" at https://www.consumer.ftc.gov/blog/2017/04/irs-now-using-private-debt-collectors

We appreciate the Committee's willingness to hear about any additional funding needs the Commission may have in this area, and will reach out should the need arise and appreciate your support for our mission.

I am also concerned that the use of debt collection companies that are compensated based on the amount they recover increases the risk of abusive collection practices. According to a report released in December 2016, the Consumer Financial Protection Bureau has received more total complaints about debt collection practices than about any other subject.[23] In fact, the IRS has hired a debt collection company with a troubling history of misleading debtors that it contacted on behalf of the government. Pioneer, a subsidiary of Navient, was one of the several debt collectors fired by the Department of Education in 2015 for providing borrowers with "inaccurate information at unacceptably high rates.[24]"

4. **Was the FTC consulted in IRS's procurement process which resulted in hiring these debt collection companies? Does the FTC ever consult with the other agencies to ensure that they procure services from the good actors?**

The Federal Trade Commission does not perform procurement consultation for other government agencies or offices that engage in debt collection activities, and was not consulted in the IRS's private debt collector procurement process. The FTC is primarily a law enforcement agency. Our expertise is in monitoring marketplaces for significant law violations and then taking appropriate enforcement action to halt unlawful conduct. More generally, the FTC does not "pre-approve" any particular company's practices; the Commission only comments on an individual company's business operations if it has reason to believe, after an investigation has been completed, that the law has been violated and law enforcement action is warranted. Information about the Commission's public law enforcement actions is available on the FTC's website, ftc.gov. The website also includes a list of companies and people who are banned by federal court order from participating in the debt collection business. *See https://www.ftc.gov/enforcement/cases-proceedings/banned-debt-collectors*.

In support of our law enforcement mission, the Commission regularly educates businesses on how to comply with the laws the FTC enforces, and consumers on how to exercise their rights and identify and report illegal conduct. As the IRS was preparing to initiate its private debt collection program, the FTC recognized the need to update its consumer education in this area to provide consumers with the tools they would need to avoid IRS impersonation scams. As such, we coordinated with the IRS and TIGTA on a new consumer education piece explaining to

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[23] "Monthly Complaint Report," Consumer Financial Protection Bureau, last reviewed on October 4, 2017. Available at: http://files.consumerfinance.gov/f/documents/201612_cfpb_MonthlyComplaintReport.pdf.

[24] "Feds Fire 5 Debt Collectors," Inside Higher Ed, last reviewed on October 4, 2017. Available at https://www.insidehighered.com/news/2015/03/02/us-ends-contract-5-debt-collectors-citing-misrepresentations-borrowers.

consumers how to determine whether collection attempts were from actual IRS debt collectors and not scammers.[25]

Any consumer complaints the Commission receives are available through the FTC-maintained Consumer Sentinel Network to numerous federal and state law enforcement partners, including a number of offices within Treasury and the IRS.

5. **Has the FTC received complaints that any of the IRS debt collectors – CBE Group, ConServe, Performant Recovery or Pioneer – have acted inappropriately or unlawfully in collecting IRS or any other debts?**

The FTC gathers complaints across the debt collection industry through the Consumer Sentinel Network—a secure online database maintained by the FTC containing millions of consumer complaints. The contents of Consumer Sentinel are non-public, and the complaints are unverified. As a baseline matter, large, consumer-facing companies tend to be the subject of a number of consumer complaints, and the FTC has received some complaints about the collectors identified above. This fact by itself does not establish that a law violation has occurred. On the other hand, where law violations are occurring, complaints may represent only a fraction of the total number of consumers affected, as many consumers do not complain even when they are harmed.

6. **What process does the FTC use to investigate consumer complaints that it received via the Consumer Sentinel database? Under what circumstances would it make these complaints public?**

The FTC routinely receives complaints from consumers regarding potentially unlawful conduct, including from consumers with debt collection-related issues. Consumer complaints help the FTC detect patterns of fraud and abuse, and may be among the reasons the FTC decides to open an investigation into potentially unlawful conduct. In determining whether a particular practice warrants FTC 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, the number of consumers affected, and the likelihood of preventing future unlawful conduct.

Each year, the FTC releases aggregate data about consumer complaints.[26] Individual complaints often contain significant amounts of personal information about the consumers who submit them, including identifying information and sensitive financial information, and the agency treats individual complaints as non-public information. Such complaints generally are available only to members of law enforcement organizations that have entered into a confidentiality and data security agreement with the FTC, but may otherwise be released—typically in redacted form to protect consumers' personal information—in other limited

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[25] *See* "The IRS is Now Using Private Debt Collectors" available at https://www.consumer.ftc.gov/blog/2017/04/irs-now-using-private-debt-collectors.

[26] The FTC's Consumer Sentinel Network Data Book for January - December 2016 is available at https://www.ftc.gov/reports/consumer-sentinel-network-data-book-january-december-2016.

circumstances, including in response to court orders, subpoenas, discovery requests, or Freedom of Information Act requests.

7. **When considering whether to bring an enforcement action for a violation of the Fair Debt Collection Practices Act, does the FTC give special consideration to companies that collect debts on behalf of the government?**

The FTC considers a number of factors when determining whether to open an investigation, and when deciding what, if any, action to take. Generally, no one or two factors are conclusive; we look at the whole picture, including the type of violation, the scope of consumer injury, the number of affected consumers, and the likelihood of deterring future unlawful conduct. One of the FTC's key priorities of its debt collection program is halting collection-related scams that involve egregious practices like false threats of legal action, "phantom" debts that consumers do not actually owe to the collectors, or both. This is a particularly high-priority area for the FTC because of the pernicious threats, which sometimes involve government impersonation, these scammers make to consumers, including violent threats, and elaborate false threats of arrest or lawsuits. The Commission has also taken action where it has had sufficient evidence of other significant violations, including in circumstances where the violator is collecting debts on behalf of a federal agency. For example, when the FTC had reason to believe that a federal student loan debt collector had a practice of leaving voicemail messages that revealed consumer debts to third parties, the agency filed suit to stop this unlawful conduct.[27]

8. **Given that the total number of taxpayer accounts turned over to private debt collectors will continue to grow as the IRS fully implements this program, what plans does the FTC have for continuing to monitor possible abuses by these companies as they contact a growing number of taxpayers?**

FTC attorneys and investigators regularly review complaints to look for law enforcement targets, evaluate the need for consumer education, and make policy recommendations. We will continue to monitor the marketplace for illegal conduct, including any such conduct associated with the collection of IRS tax debts by private companies, and we will continue to prioritize our debt collection enforcement work.

The FTC has long been committed to halting unlawful debt collection practices that generate significant consumer concern and put compliant businesses at a competitive disadvantage. For example, since the beginning of 2010, the FTC has brought 48 debt collection cases and obtained more than $425 million in judgments against a variety of debt collectors. In the past year alone, we filed or resolved 12 debt collection cases against 61 defendants, obtaining nearly $70 million in judgments and banning 44 companies and individuals that engaged in serious and repeated violations of law from ever working in debt collection again. We remain committed to protecting consumers from deceptive, unfair, and abusive debt collection practices.

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[27] *See FTC v. GC Services*, https://www.ftc.gov/news-events/press-releases/2017/02/student-loan-debt-collector-will-pay-700000-unlawful-collection.

Questions for the Record – Senator Sheldon Whitehouse

1. **Last election cycle, there were several reports of robocalls being made to voters falsely telling them their ballot would not counted unless they updated their voter registration status. How can robocalling technology be used to suppress votes? What actions can Congress take to address that threat?**

The FTC's enforcement authority over illegal robocalls is limited to telemarketing robocalls, as that term is defined in the Telemarketing Sales Rule,[28] and does not cover voter suppression calls. Voter suppression calls, however, may rely on similar deceptive tactics used in telemarketing scams that seek to deprive consumers of their money, rather than their vote. Congress could support extensive consumer outreach and education to assist consumers in identifying and knowing to hang up on scam calls.

[28] In relevant part, the Telemarketing Sales Rule defines telemarketing as "a plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution, by use of one or more telephones and which involves more than one interstate telephone call." 16 C.F.R. § 310.2 (gg).

Senate Financial Services and General Government Appropriations Subcommittee
"Hearing to review the Fiscal Year 2019 funding request and budget justification for the Federal Communications and the Federal Trade Commission"
May 17, 2018
Questions for the Honorable Joseph Simons, Chairman, Federal Trade Commission

Questions for the Record from Chairman Lankford

Contact Lens Rule

1. **One thing I very much appreciate about the FTC is that it likes to periodically take a look at its rules to make sure that they are up-to-date, effective, and not overly burdensome. As we briefly discussed at the hearing, I understand that you all are now in the middle of just such a review of the Contact Lens Rule. I understand that the Commission has issued a proposed rule that would require all 50,000 practicing eye doctors in the country to obtain from each of the 40 million or so contact lens wearers signed documents vouching that their eye doctor has followed the law by giving them a copy of their contact lens prescription. The rule would also require that the doctors keep these forms on file for three years to aid in any future federal investigation. According to the FTC's own figures, its proposed new requirement would add about $10.5 million in additional costs. Eye doctors have told me that it could cost roughly $18,000 per doctor, per year to comply. I understand that the FTC has issued a total of 55 warning letters to contact lens prescribers within the last decade and that 2017 Freedom of Information Act data shows that the Commission received 300 or so complaints over the last five years out of nearly 200 million prescriptions issued. While I share the Commission's commitment to ensuring choice and competition in the contact lens market, the current system seems to be working. Is this new broad mandate really necessary? Is there possibly a less burdensome way to ensure maximum doctor compliance? Frankly, it worries me the new costs that we could be could be saddling on thousands of small businesses in Oklahoma and across the country.**

   Response: The Contact Lens Rule (Rule) was enacted to implement the requirements of the Fairness to Contact Lens Consumers Act. The statute and the Rule require the automatic release of a contact lens prescription to the patient upon completion of a lens fitting, or at the end of the examination if there is no change in the prescription, in order to facilitate consumers' ability to shop around for contact lenses. Commenters have cited evidence suggesting that many contact lens consumers are not receiving their prescription as required by the Rule, either because they are not receiving their prescription at all, or because they do not receive it until they request it. Prescriber compliance with the automatic release requirement is critical to maximizing the Rule's intended competitive benefits.

   As part of its regular program to periodically review all its rules and guides, in September 2015 the Commission published a Federal Register notice generally requesting comments on the Rule, its costs and benefits, and the need for any amendments. Six hundred sixty

comments were received. Based on review of the comments, the Commission published a Notice of Proposed Rulemaking (NPRM) in December 2016, requesting comment on proposed Rule amendments. The NPRM proposed to amend the Rule to require prescribers to obtain a simple signed acknowledgment after releasing a contact lens prescription to a patient, and to maintain a record of the acknowledgment for three years. The NPRM also sought comments on how to streamline the acknowledgment requirement to minimize the costs imposed on eye doctors. The purpose of the proposed amendment was to enhance both compliance and our ability to enforce the Rule (by providing a record that the prescription was given out). The Commission received over 4,100 comments.

The Commission held a workshop on March 7, 2018 to collect additional information on various Rule-related issues, including the proposal to require the signed acknowledgement. The public comment period closed on April 6, 2018. We received approximately 3,500 comments. Based on the additional information from the workshop and the public comments, staff is considering how best to increase prescriber compliance with the Rule without imposing unnecessary burdens on prescribers.

Pharmacy Benefit Managers (PBMs)

1. **My constituents have expressed numerous concerns regarding the anticompetitive effects of continued consolidation in pharmacy benefits management (PBM) industry, which is dominated by three behemoth health care companies that control nearly 80% of the market. They have told me that consolidation has reduced patient choice, decreased access to pharmacy services and lead to higher prescription drug costs paid by plan sponsors and consumers. How should the FTC evaluate and address these concerns as it reviews ongoing consolidation in this market? How would you ensure that purported merger efficiencies would be passed on to plan sponsors and consumers? Would you be willing to review consummated mergers in this industry to assess their impact on plan sponsors and consumers?**

   Response: As you know, scrutiny of competitive issues relating to PBMs is part of the agency's ongoing mission to promote competition in health care. The FTC has examined the conduct of PBMs in various contexts, including during merger investigations, and as part of broad-based hearings on health care competition. Recently, the FTC hosted a workshop with the FDA to examine pharmaceutical distribution practices, including the role of intermediaries such as PBMs and Group Purchasing Organizations (GPOs). We held the workshop to deepen our understanding of various players in the pharmaceutical industry. In addition to presentations by experts in health care policy and economics, we also received over 300 public comments as part of the workshop, which identified additional areas of concern. Materials related to the workshop can be found on the FTC's website.[1]

[1] FTC Workshop, *Understanding Competition in Prescription Drug Markets: Entry and Supply Chain Dynamics* (Nov. 8, 2017), https://www.ftc.gov/news-events/events-calendar/2017/11/understanding-competition-prescription-drug-markets-entry-supply.

We understand that there are concerns about PBM concentration and PBM practices. We are committed to bringing enforcement actions against any company, including a PBM, that violates the laws we enforce.

2. **The PBMs set the rates retail pharmacies charge insured consumers as well as the reimbursement rates they pay the retail pharmacies with which they compete. Most PBMs own proprietary pharmacies (mail order and/or specialty pharmacies) that compete with retail pharmacies. It is my understanding that many PBMs offer plan designs that either force or incentivize consumers to use their proprietary pharmacies for certain prescriptions. I have also heard that recently one of the largest PBMs, which also owns thousands of retail pharmacies, dramatically cut reimbursement rates to pharmacies and within days sent solicitations to purchase those same stores, acknowledging how difficult it was for the pharmacies to stay in business. How should the FTC assess such apparent conflicts of interest?**

   Response: The Medicare Modernization Act of 2003 asked the FTC to examine issues that arise when PBMs operate mail-order pharmacies. Specifically, we examined concerns that although insurance plan sponsors rely on PBMs to manage and lower the costs of pharmacy benefits offered by the plans, a PBM might have the incentive to increase costs and generate additional profits by steering business through their own mail-order pharmacy. We collected data and assessed whether a PBM that owns a mail-order pharmacy acts in a manner that maximizes competition and results in lower prescription drug prices for its plan sponsor members.

   The 2005 FTC report, sometimes referred to as the PBM Conflict of Interest Study, looked at both claims-level and aggregate data on prices, generic substitution and dispensing rates, savings due to therapeutic drug switches, and repackaging practices. The report concluded that, at that time, there was strong evidence that PBMs' ownership of mail-order pharmacies generally did not disadvantage plan sponsors.[2]

   As stated above, we are aware of continued concerns with PBM practices, including alleged self-dealing. We are always open to receiving information about these concerns.

3. **More and more transactions in the health care industry are vertical in nature such as the pending CVS/Aetna and Cigna/Express Scripts mergers. Please explain how you believe the FTC should evaluate these transactions and how it can ensure that plan sponsors and consumers will continue to have competitive choices.**

   Response: Without commenting on the specific mergers that are currently under review by the Department of Justice, vertical mergers are subject to review under Section 7 of the Clayton Act, which prohibits mergers where the effect of the acquisition may be substantially to lessen competition or tend to create a monopoly. The antitrust agencies have challenged vertical mergers over concerns that these transactions would give the

[2] FTC Report, *Pharmacy Benefit Managers: Ownership of Mail-Order Pharmacies* (Aug. 2005), https://www.ftc.gov/sites/default/files/documents/reports/pharmacy-benefit-managers-ownership-mail-order-pharmacies-federal-trade-commission-report/050906pharmbenefitrpt_0.pdf.

merged firm the ability and incentive to disfavor unintegrated rivals in upstream or downstream markets, and through such means to harm competition. The Commission recently challenged a vertical merger between Northrup Grumman and Orbital ATK. There, the Commission required Northrup Grumman to supply solid rocket motors on a non-discriminatory basis to unintegrated rivals competing to supply the Department of Defense with integrated missile systems. Without such a remedy, the vertical merger would have permitted the combined firm to raise the price of solid rocket motors to other firms competing for DOD missile contracts and ultimately harm DOD. The FTC has previously challenged vertical mergers involving PBMs. For instance, in the 1999 merger of Merck & Co., Inc. and Medco Health Solutions, the Commission challenged the transaction over concerns that Merck could favor its own drugs on Medco's PBM formulary and as a result increase prices to consumers for certain drugs. (Merck & Co., Inc., 127 F.T.C. 156 (final order issued Feb. 18, 1999)). Where a merger creates a likelihood of harm based on the discriminatory treatment of rivals, structural relief is the strongly preferred approach to prevent that harm.

4. **I have concerns with the lack of PBM transparency and its impact on plan sponsors and consumers. This lack of transparency has enabled PBMs to increase profits and market share at the expense of plan sponsors and consumers. Given continued consolidation and the growing negotiation leverage that PBMs command in the market, what role should transparency play to enhance competition and consumer protections?**

   Response: FTC staff has commented on proposals to increase transparency in health care markets. These comments cautioned that not all transparency efforts benefit consumers, and some may actually dampen competition by giving competitors access to competitively sensitive information they would not otherwise have. In general, the FTC staff supports laws (such as those that exist in many states) that increase consumer access to relevant information about health care products and services they may buy. However, laws that require the public disclosure of competitively sensitive information, including information related to price and cost, may chill competition by facilitating or increasing the likelihood of unlawful collusion among competitors. In addition, disclosure laws may undermine the effectiveness of selective contracting by health plans, an approach that generally reduces health care costs and improves overall value in the delivery of health care. The competitive risks are especially great if information is available to competing health care providers, especially in highly concentrated markets where competition among providers is already limited.[3]

[3] *See* FTC Staff Comment Regarding Amendments to the Minnesota Government Data Practices Act Regarding Health Care Contract Data, Which Would Classify Health Plan Provider Contracts As Public Data (June 2015), https://www.ftc.gov/policy/advocacy/advocacy-filings/2015/06/ftc-staff-comment-regarding-amendments-minnesota-government.

Questions for the Record from Senator Boozman

1. **According to the CDC, nearly 1 in 5 contact lens-related eye infections reported to the FDA's federal database involved a patient who experienced permanent eye damage, including scarred cornea, needed a corneal transplant, or otherwise suffered a reduction in vision. These contact lens-related eye infections can lead to long-lasting eye damage but are often preventable with proper adherence to safe contact lens use and a doctor's oversight. FDA records indicate that from 2005-2015 there were 1,075 incidences of permanent vision loss related to improper contact lens use. Given the risk of permanent vision loss for contact lens wearers, what is the FTC's role in regulating the safe use of medical devices? How does the FTC work with other health-focused regulators, like the FDA, in determining the effect FTC rulemaking may have on patient safety?**

   Response: The FTC's role in regulating contact lenses is limited to enforcing and promoting compliance with the Contact Lens Rule, which promotes choice and competition in the contact lens marketplace. The FTC does not directly regulate medical devices such as contact lenses, nor the conditions under which they are prescribed. At the same time, prescriber and seller compliance with the Rule's requirements promotes the safe use of contact lenses. To ensure compliance, the FTC has taken law enforcement action against contact lens sellers who violate the Rule.[4] Our settlement orders provide injunctive relief that, among other things: prohibits the defendants from selling contact lenses without obtaining a prescription from a consumer and without verifying prescriptions by communicating directly with the prescriber; and requires defendants to maintain records of prescriptions and verifications. In addition, the FTC has sent numerous warning letters to both sellers and prescribers that potentially violated the Contact Lens Rule. We will continue to monitor the marketplace and will take action against violations of the Contact Lens Rule as appropriate.

   The Commission routinely works with the FDA in this area. For example, in 2011, the FTC and the FDA jointly warned over 200 sellers of contact lenses about their obligations under the Contact Lens Rule. In addition, we have consulted with the FDA on issues relating to safety of contact lenses, and a representative from the FDA spoke at the FTC's March 7, 2018, workshop "The Contact Lens Rule and the Evolving Contact Lens Marketplace." The FTC has also worked with the CDC on its Contact Lens Health campaigns to educate consumers about the Rule; the need for a prescription for all lenses, including non-corrective lenses; and safe wear and care habits. A representative from the CDC also participated in the FTC's March 2018 workshop to address the issue of contact lens safety.

[4] *See, e.g.*, *U.S. v. Kim*, No. 1:11-cv-05723 (E.D.N.Y. Nov. 28, 2011), https://www.ftc.gov/enforcement/cases-proceedings/112-3043/buyexclusivenet-gene-kim-us; *U.S. v. Royal Tronics, Inc*, No. 0:11-cv-62491 (S.D. Fla. Nov. 28, 2011), https://www.ftc.gov/enforcement/cases-proceedings/112-3044/royal-tronics-inc-dba-mycandyeyescom-jamil-hindi-us; *U.S. v. Thy Xuan Ho*, No. 1:11-cv-03419 (D. Minn. Nov. 28, 2011), https://www.ftc.gov/enforcement/cases-proceedings/112-3042/mycutelenscom-thy-xuan-ho-aka-brandon-lee-us.

Questions for the Record from Senator Daines

1. **Chairman Simons, the FTC recently charged a group of bad actors for misleading consumers who were booking hotels online. I want to commend the commission for their actions. This issue is a growing problem that has major consequences on Montana's tourist economy. I have introduced the bipartisan Stop Online Booking Scams Act, which tackles this issue and sets important transparency requirements to protect consumers. Do you share my concerns and would you commit to working with me to stop the proliferation of online booking scams?**

   Response**:** I share the underlying concerns about deceptive online travel sites. False or misleading information about hotel booking sites can harm both consumers and competition. Protecting consumers as they use and benefit from new technologies, such as those made available to online shoppers for hotel and other travel services, is a top FTC priority.

   We would be happy to work with you on legislation to address online booking fraud. The Commission commented on the legislation you introduced, S. 1164, in its 2017 Report to Congress on the Online Hotel Booking Market.[5] The Report supported the underlying concerns of the legislation, and recommended that the proposed bill be modified to ensure that it does not impose undue burdens on legitimate businesses or unintentionally exclude sites it may intend to cover. The Commission offered similar comments in testimony presented in 2016.[6]

2. **Chairman Simons, according to a recent study the world creates 44 exabytes of new data each day. This huge amount of data creates unique challenges for the FTC to help balance innovation, privacy and competition. Further, we are seeing a trend in a select number of companies controlling vast amounts of data and market share. Do you see a need to hire more specialists who focus on big data and big data economics to address these challenges?**

   Response: I agree that, in today's data-driven marketplace, it is important that the FTC have sufficient technical, policy, and economic expertise to explore the challenges associated with big data. On the technical front, the FTC has an Office of Technology, Research, and Investigation (OTech), composed of investigators, technologists, and lawyers. Among other things, OTech conducts original research on technology and big

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[5] FTC Report, *The Online Hotel Booking Market: A Report to Congress on Recommended Enforcement Actions Against Deceptive Marketers Engaging in the Online Hotel Booking Market and Appropriate Remedies to Apply in this Area* (Aug. 2017), https://www.ftc.gov/reports/online-hotel-booking-market-federal-trade-commission-report-congress-recommended-enforcement.

[6] Prepared Statement of the Federal Trade Commission on "Legislative Hearing on 17 FTC Bills" before the Committee on Energy and Commerce, Subcommittee on Commerce, Manufacturing, and Trade, United States House of Representatives (May 24, 2016), www.ftc.gov/public-statements/2016/05/prepared-statement-federal-trade-commission-legislative-hearing-seventeen. The Commission's testimony, among other things, commented on H.R. 4526, which was introduced in 2016 and is virtually identical to S.1164.

data related projects.[7] On the policy front, the Commission held a workshop and issued a report in 2016, which discussed potential benefits of big data, highlighted challenges such as lack of transparency, and described how current laws may apply to the use of big data.[8] In addition, the FTC's Bureau of Economics has conducted a host of relevant research, including several reports on the accuracy of data collected by credit bureaus.[9] All of our offices work together to solicit additional original academic research on big data topics, including through our annual PrivacyCon event.[10] This outside research further informs our enforcement and policy efforts.

From a competition perspective, the FTC generally views data as we would any other asset. In some markets, data is the product that is sold to others, such as a database. In other markets, data is a key input to a product or service. The idea that data may have competitive significance or strategic importance is not new. For instance, the FTC has challenged several mergers involving data, applying our standard merger analysis framework.[11] In cases involving data, the FTC often alleges harm to innovation as an anticompetitive effect of the merger.

In terms of hiring, over the past few years, the FTC has hired several lawyers, technologists, and investigators with a technology background. I expect this trend to continue. Expertise and familiarity with big data issues, technology, markets, and economics will certainly be an important factor in hiring decisions.

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[7] For example, OTech has produced original research on the practice of cross-device tracking and the tracking of data online. *See* Justin Brookman et al., *Cross-Device Tracking: Measurement and Disclosures*, PROC. ON PRIVACY ENHANCING TECH. 113, 117–22 (2017), https://petsymposium.org/2017/papers/issue2/paper29-2017-2-source.pdf; Dan Salsburg and Tina Yeung, Tracking the Use of Leaked Consumer data, May 2017 https://www.ftc.gov/system/files/documents/public_events/987523/ftc-leakeddataresearch-slides.pdf.

[8] FTC Report, *Big Data: A Tool for Inclusion or Exclusion? Understanding the Issues* (Jan. 2016), https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf.

[9] *See* FTC, *Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003* (Dec. 2012), https://www.ftc.gov/sites/default/files/documents/reports/section-319-fair-and-accurate-credit-transactions-act-2003-fifth-interim-federal-trade-commission/130211factareport.pdf. FTC, *Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003* (Jan. 2015), https://www.ftc.gov/system/files/documents/reports/section-319-fair-accurate-credit-transactions-act-2003-sixth-interim-final-report-federal-trade/150121factareport.pdf.

[10] *See* PrivacyCon 2018, https://www.ftc.gov/news-events/events-calendar/2018/02/privacycon-2018.

[11] *See, e.g.*, *Reed Elsevier NV*, No. C-4257 (complaint issued Sept. 15, 2008); *FTC v. CCC Holdings, Inc.*, Civ. No. 1:08-CV-02043 (D.D.C. Nov. 26, 2008); *CoreLogic, Inc.*, No. C-4458 (complaint issued Mar. 24, 2014); *CDK Global, Inc.*, Dkt. 9382 (complaint issued Mar. 19, 2018; dismissed Mar. 26, 2018 after parties abandoned merger).

Questions for the Record from Senator Moran

1. **Following the FTC's Memorandum of Understanding with the FCC in implementing the recent 2017 Restoring Internet Freedom Order, do you agree that the FTC has the necessary enforcement authorities provided under Section 5 of the FTC Act to protect consumers?**

   Response: We have authority under Section 5 of the FTC Act to address unfair or deceptive acts or practices, and unfair methods of competition. I intend to use our authority aggressively to address violations of the laws we enforce. If I find that we do not have adequate authority to protect consumers and competition, I will come back to Congress to seek it.

2. **How would you describe the IT modernization priorities of the FTC? Are there specific proposals that this committee should be aware of?**

   Response: The FTC's modernization priorities are contained in an Information Resource Management Plan (IRM) that was approved by the FTC's Information Technology Governance Board, which comprises senior agency officials. The IRM prioritizes IT investments in security, network modernization, and support for cloud based e-discovery services. Roughly half of the FTC's base IT spending already provides modern, cloud-based services to the agency. The FTC is in the midst of a multi-year effort to modernize its remaining legacy IT systems, so the agency can continue to address its need to process ever-increasing volumes of information. Last year, the agency addressed network security concerns when it adopted the use of Personal Identity Verification (PIV) cards by its staff, as well as the use of GSA contract services for network security. More recently, the FTC sponsored a cloud services provider specializing in litigation support services through FedRAMP, to help meet our need for modern document review tools. The FTC also issued a multi-award Blanket Purchase Agreement to support the next phases of our IT modernization efforts.

3. **How do FTC enforcement actions that challenge the data security practices of companies impact the commission's ability to protect consumers?**

   Response: The FTC uses its existing authority under the FTC Act to protect consumers from unfair or deceptive data security practices. To date, the Commission has brought more than 60 cases alleging that companies failed to implement reasonable safeguards for the consumer data they maintain. For example, the Commission recently announced an expanded settlement with ride-sharing platform company Uber Technologies related to allegations that the company failed to reasonably secure sensitive consumer data stored in the cloud. As a result, an intruder allegedly accessed personal information about Uber customers and drivers, including more than 25 million names and email addresses, 22 million names and mobile phone numbers, and 600,000 names and driver's license numbers.[12] The FTC also reached a settlement with one of the world's largest computer

[12] *Uber Technologies, Inc.*, Matter No. 152-3054 (Apr. 2018) (proposed order), https://www.ftc.gov/enforcement/cases-proceedings/152-3054/uber-technologies-inc.

manufacturers, Lenovo, related to allegations that the company pre-loaded software onto some of its laptops that compromised security protections in order to deliver ads to consumers.[13]

At the same time, I believe the FTC could use additional tools to protect consumers. For example, under the FTC Act, the FTC does not currently have the authority to seek civil penalties against first-time violators. I support comprehensive data security legislation that would strengthen the FTC's existing data security authority and 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, jurisdiction over non-profits and common carriers, and the authority to issue implementing rules under the notice and comment rulemaking procedures of the Administrative Procedure Act, 5 U.S.C. § 553. The FTC has long recommended these additional tools on a bipartisan basis, and I urge Congress to enact legislation to give these tools to the agency.

4. **Your testimony mentioned the innovative security research that the FTC has promoted through its annual PrivacyCon event and other related workshops. Can you further describe how the agency can facilitate improved data security practices across industries by providing a platform to innovators in the data security field?**

Response: The FTC uses three main strategies to facilitate improved data security practices across industries. First, the FTC deters poor data security practices by bringing enforcement actions against companies that engage in unfair or deceptive data security practices. Some examples are discussed above. Second, the FTC provides businesses with a host of guidance. In 2015, we announced our *Start with Security* initiative, in which we set forth ten lessons from our numerous data security enforcement actions.[14] Last year, we provided additional guidance to businesses through our *Stick with Security* initiative, which was based on cases we have brought, cases we have closed, and frequently asked questions we receive from companies.[15]

Finally, the Commission engages in policy discussions, one goal of which is to provide a platform for innovators in the data security field. In addition to PrivacyCon, another example is last year's *IoT Home Inspector Challenge*, a public competition aimed at spurring the development of security update-related IoT tools.[16] The winning contestant developed a tool to enable users with limited technical expertise to scan their home Wi-Fi and Bluetooth networks to identify and inventory connected devices in their homes. The

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[13] *Lenovo, Inc.*, No. C-4636 (Jan. 2018), https://www.ftc.gov/enforcement/cases-proceedings/152-3134/lenovo-inc.
[14] FTC Business Guide, *Start with Security: A Guide for Business* (June 2015), https://www.bulkorder.ftc.gov/system/files/publications/pdf0205-startwithsecurity.pdf.
[15] FTC Blog Series, *Stick With Security* (Oct. 2017), https://www.ftc.gov/tips-advice/business-center/guidance/stick-security-business-blog-series.
[16] *See* FTC Notice of IoT Home Inspector Challenge, 82 Fed. Reg. 840-47 (Jan. 4, 2017), https://www.ftc.gov/system/files/documents/federal_register_notices/2017/01/iot_frn_pub_010417_-_2016-31731.pdf.

tool would flag devices with out-of-date software and other common vulnerabilities and provide instructions to consumers on how to update their devices.[17]

5. **In 2016, Congress enacted the Better Online Ticket Sales (BOTS) Act to empower the FTC and state attorneys general to go after people who use computer programs – called "bots"-- to seize up large portions of ticket inventories for live events, and re-sell them on the secondary market. As you know, this law seeks to aid our constituents in gaining access quality tickets at face value. However, laws are not effective unless they are enforced. We have provided the FTC with a tool, which we believe should be used rigorously to protect consumers. Can you please provide an update on the commission's enforcement actions against the use of "bots" since the enactment of the law?**

   Response: The FTC is committed to enforcing the Better Online Ticket Sales (BOTS) Act. We appreciate this new authority and are looking for appropriate targets. However, the FTC's investigations are confidential, so we cannot disclose publicly the status of any BOTS Act investigations. Prior to enactment of the BOTS Act, the FTC had taken action in cases that involved other problematic ticket-selling practices. In 2010, the FTC settled allegations that Ticketmaster deceptively directed consumers seeking tickets to its resale site, TicketsNow.[18] In 2014, the FTC settled cases with several ticket resellers, alleging that they used deceptive search engine ads linking to websites designed to look like the official venues.[19]

   To advance the aims of the BOTS Act, the FTC has engaged with primary ticket sellers, ticket resellers, foreign agencies, and state attorneys general about strategies for stopping bots. Also, the FTC has published two advisories on the BOTS Act to educate consumers[20] and businesses[21] about their rights and obligations under the Act.

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[17] FTC Press Release, *FTC Announces Winner of its Internet of Things Home Device Security Contest* (July 26, 2017), https://www.ftc.gov/news-events/press-releases/2017/07/ftc-announces-winner-its-internet-things-home-device-security.

[18] *See FTC v. Ticketmaster L.L.C.*, No. 1:10-cv-1093 (N.D. Ill. Feb. 18, 2010), https://www.ftc.gov/enforcement/cases-proceedings/092-3091/ftc-v-ticketmaster-llc-limited-liability-company-ticketmaster.

[19] *See FTC v. TicketNetwork, Inc. et al.*, No. 3:14-cv-1046 (D. Conn. Aug. 12, 2014), https://www.ftc.gov/enforcement/cases-proceedings/132-3203-132-3204-132-3207/ticketnetwork-inc-ryadd-inc-secureboxoffice.

[20] FTC Consumer Blog, *Battling Ticket Bots* (Aug. 14, 2017), https://www.consumer.ftc.gov/blog/2017/08/battling-ticket-bots.

[21] FTC Business Blog, *BOTS Act: That's The Ticket!* (Apr. 7, 2017), https://www.ftc.gov/news-events/blogs/business-blog/2017/04/bots-act-thats-ticket.

Questions for the Record of Vice Chairman Patrick Leahy

1. **You noted that you are conducting a study of the FTC's resources to ensure it has what it needs to appropriately oversee the broadband industry following repeal of the FCC's 2015 net neutrality rules.**

   Q. When do you expect to conclude this study?

   Q. When do you expect to share the results with this Committee?

   Response: I expect to have an update for the Committee soon and, if necessary, a follow-up request for additional resources.

2. **The FCC has traditionally been considered the expert agency for telecommunications matters, which is why I believe it is the correct agency to enforce net neutrality rules. You indicated at the hearing that the FCC may end up lending the FTC expert technical staff to assist it in the enforcement of open Internet principles.**

   Q. Why would the FCC need to lend the FTC expert technical staff if the FTC is adequately prepared to step in and enforce open Internet principles?

   Q. How many network engineers and other telecommunications experts does the FTC currently employ?

   Q. How many cases has the FTC brought against ISPs for discriminatory practices such as discrimination of Internet traffic?

   Response: The FTC is committed to working with the FCC to prevent unfair, deceptive, or anticompetitive conduct by internet service providers (ISPs) or edge providers that would harm consumers. I have spoken with Chairman Pai about this issue, and we share this common commitment to protect consumers going forward.

   To supplement the FTC's existing expertise in competition and consumer protection law, we will seek input from FCC staff, when appropriate, to ensure that the FTC can effectively combat unfair or deceptive conduct by ISPs. To that end, in December 2017, the Commission signed a Memorandum of Understanding with the FCC, which provides a framework and a process for sharing information that will help us protect consumers.[22] Each agency has its own legal, technical, and investigative expertise and experience related to ISPs, and the MOU sets out each agency's commitment to the other. For instance, under the MOU, the agencies will discuss potential investigations against ISPs that could arise under each agency's jurisdiction, and coordinate such activities to

[22] *See Restoring Internet Freedom: FCC-FTC Memorandum of Understandi*ng (Dec. 2017), https://www.ftc.gov/policy/cooperation-agreements/restoring-internet-freedom-fcc-ftc-memorandum-understanding.

promote consistency in law enforcement and to prevent duplicative or conflicting actions.

While the FTC brought significant enforcement actions against ISPs for unfair or deceptive conduct prior to the FCC's reclassification of these companies as common carriers, the FTC has not challenged ISP conduct under the antitrust laws recently, although it has reviewed a number of mergers in internet-related markets. In addition, the FTC has used other tools to monitor conduct by ISPs. For instance, FTC staff studied competition policies that directly affect ISPs in its comprehensive 2007 report, *Broadband Connectivity Competition Policy*.[23]

The FTC has experience and expertise in investigating anticompetitive conduct by technology firms and has brought numerous enforcement actions alleging consumer harm from unilateral conduct.[24] When necessary, in these markets and others, we seek data and information from industry and technical experts. I strongly believe that, going forward, case-specific antitrust enforcement focused on consumer harm will protect consumers from anticompetitive conduct by ISPs and other firms in this fast-paced industry.

3. **I am very concerned about the flood of robocalls that consumers are subjected to on a daily basis. I appreciate the work the FTC does to help stem the tide of unwanted and fraudulent calls; however, most Vermonters I speak to worry that not enough is being done. In your testimony, you mentioned the success of the FTC's robocall challenges.**

   Q. Can you expand on why you believe these challenges were such a successful tool to crack down on robocalls?

   Response: The FTC challenges helped spur development of tools consumers can use to block abusive robocalls. Two winners of FTC public challenges—essentially innovation contests with cash prizes—have developed frequently used call blocking apps: Nomorobo and Robokiller. When the FTC held the first of these challenges in 2012, there were few call blocking apps on the market. Since those public challenges, the number and variety of call blocking apps have grown exponentially. Today, there are hundreds of call blocking apps available on the

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[23] FTC, *Broadband Connectivity Competition Policy Staff Report* 52 (June 2007), https://www.ftc.gov/reports/broadband-connectivity-competition-policy-staff-report.

[24] *See, e.g. Dell Computer Corporation*, No. C-3658 (May 20, 1996), https://www.ftc.gov/enforcement/cases-proceedings/931-0097/dell-computer-corporation; *In re Rambus, Inc.*, No. 9302 (decision Aug. 2, 2006), *rev'd, Rambus Inc. v. Federal Trade Commission*, 522 F.3d 456, 468 (D.C. Cir. 2008), https://www.ftc.gov/enforcement/cases-proceedings/011-0017/rambus-inc-matter; *Union Oil Co. of Cal.,* No. 9305 (Aug. 2, 2005), https://www.ftc.gov/enforcement/cases-proceedings/0110214/union-oil-company-california-matter; *Negotiated Data Solutions LLC*, No. C-4234 (Sept. 23, 2008), https://www.ftc.gov/enforcement/cases-proceedings/051-0094/negotiated-data-solutions-llc-matter; *Intel Corporation*, No. 9341 (Nov. 2, 2010), https://www.ftc.gov/enforcement/cases-proceedings/061-0247/intel-corporation-matter; *Victrex plc*, No. C-4586 (Jul. 30, 2016), https://www.ftc.gov/enforcement/cases-proceedings/141-0042/victrex-plc-et-al-matter; *FTC v. Qualcomm* No. 5:17-cv-00220 (N.D. Cal. Jan. 17, 2017), https://www.ftc.gov/enforcement/cases-proceedings/141-0199/qualcomm-inc.

Android and iPhone platforms, as well as call blocking solutions available for consumers with residential VoIP telephone service.

House Energy and Commerce Committee
"Oversight of the Federal Trade Commission"
July 18, 2018
Questions for Joseph Simons, Chairman, Federal Trade Commission

The Honorable Robert E. Latta

1. **In your testimony you noted the importance of the FTC's antitrust authority, and the filings which are submitted to the agency under the Hart-Scott-Rodino Act ("HSR"). Investors point out that the extent of shareholder monitoring and communication with management of companies has increased significantly over the last 20 years, and this activity, in their view, has been productive and beneficial to the marketplace. My understanding is that there is growing concern across the investment community that the FTC needs to update its interpretation that only passive investors can use the HSR "investment-only exemption" from filing requirements. These investors suggest that without HSR reform, there is a chilling effect on investors being able to engage with companies, and there are unnecessary filing burdens for investments of 10 percent or less that raise no substantive antitrust concerns.**

    a. **Do you believe it is now time for the FTC to consider the merits of HSR reform?**

    b. **Would you consider exploring this topic as part of upcoming FTC hearings, and provide this committee with your thoughts on the results of those hearings?**

Response: In passing the Hart-Scott-Rodino Act, Congress decided not to require premerger notification for all acquisitions, believing that the burden of complying with the file-and-wait requirements was not justified for small parties or small deals.[1] Congress also provided that the FTC, with the concurrence of the Department of Justice ("DOJ"), could exempt from HSR filing categories of transactions that are not likely to violate the antitrust laws—authority we have occasionally used to exempt transactions that pose little antitrust risk.[2]

It is worthwhile to consider whether changes in the economy may warrant a reassessment of current filing requirements. As you mention, in June, I announced the Commission's new public hearings project—*Hearings on Competition and Consumer Protection in the*

[1] In 2001, Congress raised the minimum size-of-transaction threshold from $15 million to $50 million, with annual adjustments beginning in 2005 based on changes in GNP. The current HSR threshold is $84.4 million.

[2] Subsection (d)(2)(b) of the HSR Act (15 U.S.C. § 18a(d)(2)(b)) gives the FTC, with the concurrence of the DOJ, authority to exempt from the Act's waiting and notice requirements persons or transactions which are not likely to violate the antitrust laws. *See, e.g.*, 61 Fed. Reg. 13,666 (Mar. 28, 1996) (final rule exempting ordinary course acquisitions of real estate and mineral reserves).

21st Century—to consider whether broad-based changes in the economy, evolving business practices, new technologies, and international developments warrant adjustments to competition and consumer protection law, enforcement priorities, and policy.[3] One of the topics to be discussed at these hearings is the analysis of acquisitions and holdings of a non-controlling ownership interest in competing companies. We expect that the panelists will discuss recent scholarship regarding the antitrust risks associated with small holdings in competing firms. We are also inviting public comment on this and other issues related to merger control.[4]

In administering the HSR premerger program, the FTC is responsible for ensuring that the HSR rules are clear and serve the interest of effective merger enforcement. The FTC routinely looks for ways to streamline and clarify HSR rules, including 16 C.F.R. § 802.9, which exempts acquisitions solely for the purpose of investment. At several times in the past, the Commission, in consultation with DOJ, has considered the merits of exempting acquisitions of *de minimis* amounts of voting securities regardless of investment intent.[5] We are aware of the investor concerns you highlight. Any potential change in HSR rules will consider the views of all stakeholders. In addition to the public hearings, we plan to engage with investors, other shareholders, and issuers to understand fully the impact of current HSR filing requirements. Any proposal to change the HSR rules would be subject to public notice and comment, a process through which we typically receive useful feedback that we integrate into our analysis.

2. **In December 2016, the FTC issued a Notice of Proposed Rulemaking announcing proposed changes to the Commission's Contact Lens Rule. In March 2018, the Commission held a workshop on the Contact Lens Rule and received comments on the proceedings until early April 2018. Does the FTC expect to update its 2016 draft for comment or move directly to issue a final Contact Lens Rule? If the Commission decides to solicit additional public input to update the 2016 NPRM, how long would you anticipate extending the comment period and what would be the timeline for the issuance of the final Contact Lens Rule?**

Response: The Commission initially published a Federal Register notice generally requesting comments on the Contact Lens Rule in September 2015. Based on review of the 660 comments received, the Commission published a Notice of Proposed Rulemaking (NPRM) in December 2016, requesting comment on proposed Rule amendments. The NPRM proposed to amend the Rule to require prescribers to obtain a signed acknowledgment after releasing a contact lens prescription to a patient, and maintain it

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[3] FTC, *Hearings on Competition and Consumer Protection in the 21st Century*, https://www.ftc.gov/policy/hearings-competition-consumer-protection; *see also* FTC Press Release, *FTC Announces Hearings On Competition and Consumer Protection in the 21st Century* (June 20, 2018), https://www.ftc.gov/news-events/press-releases/2018/06/ftc-announces-hearings-competition-consumer-protection-21st.

[4] Public comments on this topic will be posted on the FTC website at https://www.ftc.gov/policy/public-comments/2018/07/initiative-759.

[5] For example, in 1988 the Commission proposed to modify the "investment-only exemption" (53 Fed. Reg. 36,831 (Sept. 22, 1988), but did not adopt a final rule.

for three years. The purpose of the proposed amendment was to enhance both compliance and our ability to enforce the Rule (by providing a record that the prescription was given out). We received over 4,100 comments in response to the NPRM.

The Commission held a workshop on March 7, 2018 to collect additional information on various Rule-related issues, including the proposed amendments. The public comment period associated with that workshop closed on April 6, 2018. We received and reviewed approximately 3,500 additional comments following the workshop.

We collected additional information during the workshop and in public comments, and are considering alternatives to increase prescriber compliance with the Rule without imposing unnecessary burdens on prescribers. In addition, based on the comments received, we are considering additional modifications. FTC staff intends to submit a recommendation to the Commission by the end of the year. If the Commission were to decide that additional public input would be beneficial, the Commission would allow an appropriate period of time to receive it. The length of the comment period would depend on the complexity of the modifications under consideration but most likely it would be 30 to 60 days; the original NPRM had a 60-day comment period, and we accepted comments for about 30 days after the workshop. The timeline for then completing the rulemaking and issuing the final Rule would depend on the number and complexity of the comments received.

3. **Please explain in detail how the FTC determines whether to proceed against a particular defendant in district court or in an administrative proceeding. If a decision is made to proceed in district court, how does the FTC determine whether to proceed through the use of traditional litigation, administrative proceeding, or through relief such as ex parte proceedings, preliminary injunctions to freeze assets, or injunctions for receivership? Please account for the total number of incidences in which the FTC elected to use each of these enforcement tools in the last 24 months, and the FTC's success rate for each enforcement tool over the same period of time.**

Response: At the outset, any Commission action whether administrative or federal, requires a vote by the Commission to proceed. A number of factors influence the Commission's decision to proceed administratively or in federal court. First, the Commission considers the types of remedies available in each forum. In administrative proceedings, the FTC cannot directly obtain monetary relief (although money can be included in a settlement). Instead, the FTC must first prevail in administrative litigation and then bring a subsequent case under Section 19 of the FTC Act for damages. By contrast, in federal district court actions, the FTC may seek equitable monetary relief, including restitution, disgorgement, or rescission. Therefore, where the FTC seeks an equitable monetary remedy to make consumers whole or prevent unjust enrichment, it typically brings a federal district court case.

Another factor we consider is whether the violative practices and consumer injury are ongoing. In such cases, it is often appropriate to seek a preliminary injunction in federal

court. If there is a significant risk of dissipation of assets or destruction of documents, the FTC may seek an *ex parte* Temporary Restraining Order (TRO) (please see answers to 4 and 5, below). In such consumer protection cases, the FTC files in federal district court.

Finally, the Commission considers the remedies available to enforce any injunctive relief it obtains. Upon referral by the FTC, DOJ may seek civil penalties for violations of an FTC administrative consent decree (or refer the matter back to the FTC to seek civil penalties). By contrast, the FTC can seek to enforce a violation of a federal district court order through a contempt action, can seek compensatory or coercive sanctions, and can bring a parallel motion to modify and toughen its orders under Rule 60 of the Federal Rules of Civil Procedure (FRCP). Finally, an intentional violation of a federal district court order can subject a defendant to criminal penalties. Although the FTC has no criminal enforcement authority, it refers appropriate cases to the DOJ and U.S. Attorney's offices.

Since January 2017, the FTC has filed 29 consumer protection administrative proceedings and 86 consumer protection cases in federal district court. During that same time period, the FTC sought *ex parte* TROs in 34 of those matters. Courts granted each of those requests.

4. Is the FTC required to comply with Federal Rule of Civil Procedure Rule 65(b)(1) that a plaintiff show "immediate and irreparable injury" when seeking an ex parte request for a temporary restraining order ("TRO") that would freeze a defendant's assets?

Response: Yes. Federal Rule of Civil Procedure 65(b)(1) provides that a court may issue a TRO without notice if immediate and irreparable injury, loss, or damage would otherwise result. This standard is met where notice would "render fruitless the further prosecution of the action."[6] Advance notice would render the action "fruitless" when it would prompt defendants to dissipate assets or destroy evidence.[7] In cases in which the Commission seeks an *ex parte* TRO, it presents evidence to satisfy FRCP Rule 65, including the requirement that it "show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition."

This is an appropriately high threshold for such extraordinary relief, and one that both the Commission and courts take seriously. In cases the FTC brings *ex parte*, the Commission presents strong evidence that it is likely to prevail on the merits of its underlying claims, that an injunction is necessary to prevent ongoing consumer injury, and that there is a significant likelihood that, if provided notice, the defendants will dissipate assets and/or destroy evidence. Courts have found that a number of factors can contribute to demonstrating that a defendant is likely to dissipate assets or destroy documents. These include showing: the defendant's business is permeated with fraud or is inherently illegal;

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[6] *Reno Air Racing Ass'n, Inc. v. McCord*, 452 F.3d 1126, 1131 (9th Cir. 2006).

[7] *See In re Vuitton et Fils S.A.*, 606 F.2d 1 (2d Cir. 1979) 1, 4-5 (granting *ex parte* injunction to prevent destruction of evidence); *see also FTC v. Affordable Media*, 179 F.3d 1228, 1236-37 (9th Cir. 1999) (upholding asset freeze, initially entered *ex parte*, because of risk of asset dissipation).

prior, or ongoing, secretion of assets; a history of moving assets offshore or otherwise encumbering assets without a valid business reason; a history of crime involving fraud or dishonesty; a history of destroying documents in prior litigation; a pattern of using front companies and taking other steps to evade detection; or demonstrated unwillingness to abide by court orders, such as contempt. To support its *ex parte* TRO applications, the FTC also presents an affidavit with a lengthy list of examples in which defendants in FTC cases who were tipped off about an action before an asset freeze could be executed have dissipated and secreted assets or destroyed vital evidence.

5. **What percentage of the FTC's requests for TRO asset freezes have included the presentation of evidence to the court showing that specific individual defendants in the case-at-hand had taken steps to hide or dissipate assets?**

   Response: As noted above in the answer to question 4, evidence that a specific defendant has taken steps to hide or dissipate assets can be the basis to support an asset freeze application. However, there are several other ways the FTC can show that notice would "render fruitless the further prosecution of the action." Each case is unique, and the FTC does not track the specific allegations used to support *ex parte* TRO applications. However, before the staff can file such an application, the Commission must find reason to believe that it is appropriate to proceed *ex parte*. FTC staff then must present sufficient evidence to the court, under the applicable case law in that jurisdiction,[8] to convince the court to provide this extraordinary relief.

6. **Section 13(b) of the FTC Act states that a court may grant a TRO to the FTC without the FTC posting a bond, "after notice to the defendant." In an ex parte proceeding, in which the Commission does not give any notice to the defendant and the defendant has no opportunity to oppose the issuance of the order, is the FTC required to post a bond? Are there any cases where a TRO has been granted without the FTC posting a bond? Should the FTC be required to post a bond in these cases?**

   Response: Section 13(b) of the FTC Act authorizes the agency to seek a TRO with notice whenever the Commission has reason to believe a party is violating or about to violate any provision of law enforced by the FTC. Section 13(b) further states that in proper cases, the FTC is authorized to seek, and after proper proof the court may issue, a permanent injunction. Courts have interpreted this grant of equitable authority as including "the power to order any ancillary equitable relief necessary to effectuate the exercise of the granted powers."[9] Congress affirmed the FTC's use of this authority in the

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[8] The standard for an asset freeze varies by circuit. For example, in the 9th Circuit litigants must demonstrate that dissipation of assets is likely, while in the 11th Circuit, litigants need only demonstrate a reasonable possibility of dissipation. The FTC files many of its cases in those two circuits.

[9] *FTC v. Amy Travel Serv.*, Inc., 875 F.2d 564, 572 (7th Cir. 1989); *see also FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1112-13 (9th Cir. 1982) (holding that Section 13(b) authorizes courts "to grant any ancillary relief necessary to accomplish complete justice").

FTC Act Amendments of 1994.[10] The language in Section 13(b) authorizing a court to grant a TRO without requiring the FTC to post a bond conforms with 28 U.S.C. § 2408 and FRCP 65, which exempt federal agencies from the general requirement that a party seeking a TRO must post a security bond.[11]

Accordingly, the FTC is not required to post a security bond when seeking an *ex parte* TRO and no court has required the FTC to do so. Defendants do have the right, pursuant to FRCP 65(b)(4), to appear and move to modify or dissolve the TRO. In addition, a TRO issued without notice to the party expires in 14 days unless the party agrees to an extension or the court holds a hearing and enters a preliminary injunction.

7. **What consideration does the FTC take in evaluating enforcement actions based on a standard of unfairness in the absence of any proof of actual injury? If so, is "unfairness" determined solely by objective, tangible criteria? Are any subjective factors part of an "unfairness" standard? Is a hypothetical injury a sufficient basis for an enforcement action?**

Response: As the Commission noted in its Policy Statement on Unfairness,[12] and as codified in 15 U.S.C. § 5(n), to be unfair, an act or practice must cause or be likely to cause substantial injury. Such injury "must be substantial; it must not be outweighed by any countervailing benefit to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided."[13] The most common forms of substantial consumer injury with which the Commission concerns itself are monetary injury,[14] and unwarranted health and safety risks.[15] However, as the Policy Statement notes, "In an extreme case, however, where tangible injury could be clearly demonstrated, emotional effects might possibly be considered as the basis for a

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[10] *See* S. Rep. No. 103-130, at 15-16 (1993) ("Section 13 of the FTC Act authorizes the FTC to file suit to enjoin any violation of the FTC. The FTC can go into court ex parte to obtain an order freezing assets, and is also able to obtain consumer redress.").

[11] *See* 28 U.S.C. § 2408 ("Security for damages or costs shall not be required of the United States, any department or agency thereof or any party acting under the direction of any such department or agency on the issuance of process or the institution or prosecution of any proceeding."); Fed. R. Civ. P. 65(c) ("The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. The United States, its officers, and its agencies are not required to give security.").

[12] *See* FTC Policy Statement on Unfairness, *appended to Int'l Harvester Co.*, 104 F.T.C. 949, 1070 (1984).

[13] *Id.*

[14] *FTC v. Accusearch*, 570 F.3d 1187, 1193-94 (10th Cir. 2009) (defendant's use of pretexting to obtain telephone records cost consumers money to change telephone providers); *FTC v. Inc21.com*, 745 F. Supp. 2d 975, 1003-05 (N.D. Cal. 2010) (telephone bill cramming caused substantial monetary injury); *FTC v. West Asset Management*, No. 1:11-cv-746 (N.D. Ga. Mar. 16, 2011) (debt collection company withdrew funds from consumers' bank accounts or charged their credit cards without obtaining consumers' express informed consent).

[15] *Consolid. Cigar Corp.*, No. C-3966, 2000 FTC LEXIS 103, at *1-2 (Aug. 18, 2000) (consent) (failure to disclose that regular cigar smoking can cause several serious adverse health conditions); *Fitness Quest, Inc.*, 113 F.T.C. 923, 925-26 (1990) (consent) (failure to adequately disclose that stomach exerciser frequently breaks and causes serious injury).

finding of unfairness."[16] For example, the Commission recently filed a complaint and obtained stipulated judgments against the operators of an alleged "revenge porn" website based in part on the range of different harms consumers suffered, including having their intimate images and personal information posted on the site without their consent.[17]

8. **In consent orders entered into between the FTC and companies, have there been requirements for companies to provide personal information about individuals to the agency, and what security protections exist at the FTC to safeguard such personal information?**

Response: Yes, the FTC sometimes requires entities it has sued to provide data about their customers when the FTC anticipates providing refunds to affected consumers. In those instances, the FTC applies strong privacy and data security standards to manage consumers' personally identifiable information ("PII"). For example, FTC employees and redress contractors access consumer PII only on a need-to-know basis. The FTC shares data with a redress contractor only after determining that redress is feasible and a specific redress plan has been developed. Only the data necessary to carry out the redress program is provided to the contractor. FTC redress contractors are required to use an encrypted email system for sending and receiving any consumer PII. More broadly, FTC redress contractors are required to provide information about the databases they use to store consumer data, including: system security plans, monthly security scans, information about possible vulnerabilities, and plans for addressing these vulnerabilities. These systems must be audited by either the FTC or a third party annually. FTC staff holds monthly security calls with the contractors to address any concerns, and the FTC's redress team has a Certified Information Systems Security Professional on staff to oversee the privacy and security practices of the contractors and to enforce our standards.

9. **How does the FTC determine its priorities for industries and enterprises to target for enforcement action? For example, to what extent does the agency's online complaint tracking tools like Consumer Sentinel Network, Consumer Response Center, or the Do-Not-Call Registry play, or not play, in that analysis in determining whether or not to bring cases against illegal robocalling operators or other consumer protection cases.**

Response: The Commission may open investigations at the request of the President, Congress, the Attorney General, or other governmental agencies; upon referrals by the courts; on the basis of complaints filed by members of the public; or on its own initiative.[18] In determining whether to open an investigation, the Commission acts only in the public interest, and does not initiate an investigation or take other action when the violation of law alleged is a matter of private controversy that does not tend to adversely affect the public.[19]

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[16] Policy Statement on Unfairness, *supra* n.12 at n.16.
[17] *FTC and State of Nevada v. Emp Media, Inc. et al.* (D.Nev. 2018). *See*, https://www.ftc.gov/enforcement/cases-proceedings/162-3052/emp-media-inc-myexcom
[18] 16 C.F.R. § 2.1.
[19] *Id.* at § 2.3.

Commission staff relies heavily on consumer complaints in its Consumer Sentinel database. Consumer Sentinel is a secure online database of reports from consumers about problems they experience in the marketplace; it is available only to law enforcement organizations. Approximately 2,500 law enforcement users across the country access the database, which currently holds more than 16 million consumer complaints about fraud and identity theft. More than 40 entities contribute consumer complaint data to Sentinel, including the Council of Better Business Bureaus, various federal and state agencies, organizations like the AARP Fraud Watch Network, and some companies, like Microsoft Corporation.

Although consumer complaints are not, by themselves, proof of deceptive or unfair practices, they are particularly helpful for identifying practices that are causing consumer injury, for spotting emerging frauds, and for identifying areas that deserve additional scrutiny. With some practices, such as privacy violations, consumers may not be aware of the violation, and are unlikely to file complaints. In those cases, the FTC relies on industry watchdogs and researchers to identify potential serious law violations. For other types of violations, such as energy and "green" claims, consumers are generally not in a position to assess the truth of a claim, and are unlikely to file complaints. In those instances, competitor complaints and consumer watchdog complaints are often the basis to begin an investigation.

10. In April of this year, this subcommittee held a hearing on robocalls and heard from technology companies about various technology solutions and strategies for combatting robocalls. This is one of the top complaints the FTC has every year. What plans do you have moving forward to combat the pervasive problem of illegal robocalls?

Response: The FTC takes a multi-faceted approach to combatting illegal robocalls and other abusive telemarketing. The FTC uses every tool at its disposal: aggressive law enforcement, initiatives to spur technological solutions, and robust consumer and business outreach. The FTC plans to continue its aggressive work in each of these areas, as discussed in more detail below.

Law Enforcement

First and foremost, the FTC is a law enforcement agency. As of September 1, 2018, the Commission has filed 138 lawsuits against 454 companies and 367 individuals alleged to be responsible for placing billions of unwanted telemarketing calls to consumers. The FTC has collected over $121 million from these violators. In cases where perpetrators were running telemarketing scams, the FTC has obtained court orders shutting these businesses down and freezing their remaining assets so that those funds could be returned to consumer victims.

Industry Outreach to Spur Technology

The FTC recognizes that law enforcement alone will not solve the problem of illegal robocalls. That is why the FTC intends to continue its long history of working with industry to promote technological solutions. The FTC has provided input to support the industry-led Robocall Strike Force, coordinated by the FCC, which is working to deliver comprehensive solutions to prevent, detect, and filter unwanted robocalls. In tandem with this effort, the FTC worked with a major carrier and federal law enforcement partners to help block IRS scam calls that were spoofing well-known IRS telephone numbers. FTC staff continues to work with federal law enforcement partners and major carriers to encourage network-level blocking of illegal robocall campaigns.

The FTC also led four public challenge contests to help spur industry initiatives to tackle unlawful robocalls by blocking calls.[20] These challenges contributed to a shift in the development and availability of technological solutions in this area. When the FTC held its first public challenge, few call blocking applications existed. Today, there are hundreds of apps available to consumers, and two winners of the FTC's challenges offer leading call blocking tools that have blocked hundreds of millions of unwanted calls.[21]

The FTC also engages with technical experts, academics, and others through industry groups, such as the Messaging, Malware and Mobile Anti-Abuse Working Group ("MAAWG") and the Voice and Telephony Abuse Special Interest Group ("VTA SIG"). The FTC has encouraged ongoing industry efforts to develop new technological protocols that will change how caller ID works so that it will be more difficult for callers to engage in illegal caller ID spoofing.

Consumer Education & Outreach

The FTC's education and outreach program reaches tens of millions of people a year through our website, the media, and partner organizations that disseminate consumer information on the FTC's behalf. In the case of robocalls, the advice is simple: if you answer a call and hear an unwanted recorded sales message—hang up.

11. There are a number of advertisements that claim certain medications or drugs may cause complications and prompt the viewer to contact to the organization or law firm airing the advertisement for possible recourse. Some lawsuit ads and websites use phrases like "recall" and "medical alert," while others show

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[20] The first challenge, in 2013, called upon the public to develop a consumer-facing solution to blocks illegal robocalls. *See* FTC Press Release, *FTC Announces Robocall Challenge Winners* (Apr. 2, 2013), https://www.ftc.gov/news-events/press-releases/2013/04/ftc-announces-robocall-challenge-winners; *see also* FTC Press Release, *FTC Awards $25,000 Top Cash Prize for Contest-Winning Mobile App That Blocks Illegal Robocalls* (Aug. 17, 2015), https://www.ftc.gov/news-events/press-releases/2015/08/ftc-awards-25000-top-cash-prize-contest-winning-mobile-app-blocks; FTC Press Release, *FTC Announces Winners of "Zapping Rachel" Robocall Contest* (Aug. 28, 2014), https://www.ftc.gov/news-events/press-releases/2014/08/ftc-announces-winners-zapping-rachel-robocall-contest.

[21] One of the winners, "NomoRobo," was on the market within 6 months after being selected by the FTC. NomoRobo, which reports blocking over 600 million calls to date, is being offered directly to consumers by a number of telecommunications providers and is available as an app on iPhones.

flashing lights and sirens. These advertisements may at times be misleading or fraudulent, leading to potential physical or financial harm for consumers, especially our senior citizen community. Under your leadership, will the FTC focus on these potentially deceptive advertisements and, if it will, what processes or activities can the FTC improve or highlight to protect consumers, including seniors, from false or misleading advertisements?

Response: Advertising plays a critical role in our economy. It is one of the primary ways that people find out about available goods and services. Attorney advertising, in particular, may alert people who have been injured that they be may be entitled to compensation. However, to be useful, advertising must not be misleading. The FTC is monitoring attorney advertising that solicits people who may have been harmed by prescription drugs or medical devices to determine whether such advertising is misleading and likely to harm consumers. Depending on the results of our review, we will consider all available options, including law enforcement actions, warning letters, and consumer education. We also are consulting with the FDA to determine how we may assist each other on this topic.

12. **Over a year ago, your colleague Commissioner Ohlhausen, in her former capacity as Acting Chairman, announced a set of process reforms for its consumer protection investigations and enforcement. For example, she instructed the Bureau of Consumer Protection to form an internal working group to examine the agency's use of Civil Investigative Demands (CIDs) for documents and information in non-public investigations.**

    a. **Please describe in detail what progress and recommendations have been made by the FTC's various working groups in the intervening year?**

Response: Please see answer to question 12.c. below.

    b. **What specific steps has the Commission taken in implementing these process reforms?**

Response: Please see answer to question 12.c. below.

    c. **Specifically, please describe what recommendations were made by FTC staff about adopting more narrowly focused use of Civil Investigative Demands, as well as whether CIDs should require notice and approval by more than one Commissioner?**

Response: As a result of the work initiated by Acting Chairman Ohlhausen, the Commission has taken several steps to reduce the burden imposed on targets and on third parties by its uses of compulsory process in consumer protection investigations. First, the model instructions and definitions used in most CIDs have been simplified to make them easier for recipients to read, understand, and respond. Second, staff has been instructed to meet and confer with CID recipients, to prioritize responses and offer rolling production deadlines, and to negotiate to reduce any undue burden and provide additional time to

respond where appropriate. Third, the model CIDs to third parties, such as banks, telecommunications providers, and payment processors, have been streamlined to request less information, and staff has been instructed to take burden into account when drafting all CIDs. Fourth, unless staff articulates a specific need, CIDs are generally time limited to request information going back at most three years. The Commission and its staff continue to look for ways to obtain the vital information needed to bring enforcement actions and protect consumers while minimizing the burden on CID recipients.

13. **Commissioner Ohlhausen also instructed the Bureaus of Consumer Protection and Economics to integrate the agency's economists earlier in consumer protection investigations. Please explain in detail how the Commission's economic expertise is brought to bear at the initiation of a non-public investigation through any potential enforcement action.**

    a. **Does the Bureau of Economics currently provide economic analysis and information in each consumer protection investigation? If it does not, why not?**

Response: The Bureau of Economics ("BE") provides economic support on all aspects of the Commission's antitrust and consumer protection activities, subject to staffing constraints. In particular, BE economists routinely provide economic support and analysis on individual investigations and cases, including reviewing all complaints, consents, and consent negotiation proposals; providing expertise as needed in litigation; and making policy recommendations to the Commission.[22] BE also plays a significant role in developing and advising the Commission on staff proposals related to the FTC's rulemaking and rule review activities. It is important to emphasize that all of the Bureaus—the Bureau of Competition ("BC"), the Bureau of Consumer Protection ("BCP"), and BE—make recommendations to the Commission, which is ultimately responsible for the final decision on all complaints and consent agreements.

    b. **Is the Bureau of Consumer Protection required to consider analysis and information from the Bureau of Economics in evaluating whether an investigation warrants enforcement action? If it is not, why not?**

Response: Yes, BCP routinely consults with BE and always considers its analysis and information in evaluating whether an investigation warrants enforcement action. As noted above, BE economists routinely provide economic support and analysis on individual investigations and cases, including reviewing all complaints, consents, and consent negotiation proposals. BE also makes its own recommendations to the Commission regarding any proposed enforcement action or settlement. In a significant majority of matters, the Bureaus agree about the violations and the complaint or consent agreement at issue. In those instances where recommendations diverge, the Commission thoroughly

[22] *See generally* https://www.ftc.gov/about-ftc/bureaus-offices/bureau-economics; *see also* FTC Business Blog, *The Role of the Bureau of Economics in Consumer Protection: A Conversation with Bureau Directors* (Nov. 9, 2015), https://www.ftc.gov/news-events/blogs/business-blog/2015/11/role-bureau-economics-consumer-protection-conversation.

reviews all of the information it receives and makes the final decision as to how to proceed by vote.[23]

c. Would the publication of a summary description of the Bureau of Economics' analysis and justification in support of, or against, consumer protection enforcement actions be in the public interest?

Response: I do not believe that issuing such reports or separate statements would serve the public interest. As an initial matter, the Commission receives staff input and recommendations from various parts of the agency, including, but not limited to, BE. Disclosure of any single recommendation would convey only a partial picture of all of the information available to the Commission to inform its decision. Additionally, BE's internal memoranda contain non-public confidential information that, even after extensive editing, could provide clues as to the target of an investigation, thereby unfairly harming its reputation. Further, disclosing these internal memoranda would discourage and otherwise interfere with the free exchange of views among FTC staff and Commissioners, which helps the Commission to reach appropriate law enforcement decisions. Finally, the time required to create reports suitable for public disclosure would come at the expense of many other important activities that BE performs—including review and analysis of evidence, calculation of redress and penalties, expert testimony, and studies and reports about market trends and areas of concern.

14. FTC consent orders against companies like Equifax, Facebook, Google, and Uber require independent, third-party "assessments" (i.e., audits) to certify on-going compliance with the provisions of the consent order by the subject company. For example, Facebook was required in part "to establish and maintain a comprehensive privacy program designed to address privacy risks associated with the development and management of new and existing products and services, and to protect the privacy and confidentiality of consumers' information."

In response to the Committee's questions, Facebook indicated on June 29, 2018: "To date, three independent privacy assessments prepared by PwC have been completed and submitted to the FTC: a 180-Day assessment report (dated April 16, 2013), a biennial report covering the period between February 12, 2013 and February 11, 2015 (dated April 13, 2015), and a biennial report covering the period between February 12, 2015 and February 11, 2017 (dated April 12, 2017). In each of these assessments, PwC determined that Facebook' s privacy controls were operating with sufficient effectiveness to provide reasonable assurance to protect the privacy information covered under the FTC Consent Order, in all material respects."

a. Please explain in detail the process following an FTC consent order requiring an initial assessment report, in particular which party (subject company or auditor) is responsible for preparing the initial assessment

[23] 16 C.F.R. § 4.14(c).

and whether the assessment is fully available to the public. Are subsequent biennial third-party assessments submitted and reviewed by the FTC, and are they available to the public?

Response: FTC privacy and data security orders typically require that companies obtain independent, third party assessments of their practices. The initial assessment must cover the first 180 days after the order is signed, and subsequent biennial assessments must cover each two-year period thereafter. The assessors must complete their assessments within 60 days from the end of the reporting period to which the assessment applies, and the company under order has 10 days from the day the assessment is completed to provide it to the FTC. Although the assessor is responsible for preparing the assessments, the subject company is responsible for providing the initial assessment to the FTC and for retaining subsequent assessments and providing them to the FTC upon request within 10 days.

Once we receive the initial assessment, staff carefully reviews it and follows up with questions for the company and the assessor as appropriate. Staff also obtains compliance reports and compliance notices from the company, which they review carefully. In addition, staff keep abreast of developments related to that company, such as consumer complaints or press reports, and they request production of subsequent assessments when they determine that aspects of the company's compliance or of the assessment warrant further scrutiny.

Initial and biennial assessments that are in the FTC's possession are available to the public in response to FOIA requests, but typically are redacted to protect information that could be exploited by bad actors (e.g., details about the subject company's systems for data collection, storage, and security) or by companies subject to assessments (e.g., details about the assessor's methods).

b. Please explain in detail what steps the FTC could pursue to strengthen the effectiveness of its assessment/audit compliance regime?

Response: Currently, once a privacy or security order is finalized, case attorneys enter details about the order into a proprietary enforcement database that the agency has developed to keep track of orders. At that point, the Bureau of Consumer Protection's Division of Enforcement assigns a compliance attorney, along with a supervisor, to monitor each order. In privacy and data security cases, as noted above, this compliance team receives and carefully reviews both the company's compliance reports and assessor's report, follows up with questions for the company and assessor, and evaluates consumer complaints and leads from other sources.

While the current system is robust, we are constantly looking to improve our processes related to privacy and data security enforcement. The FTC has formed a remedies task force to examine appropriate remedies in privacy and data security cases. The agency will also host its *Hearings on Competition and Consumer Protection in the 21st Century* this fall, including hearings on whether it needs additional tools in the privacy and data

security area.

c. Has the FTC considered and/or conducted its own independent audit of a subject company's compliance with its consent order requirements? If not, why not?

Response: Yes. The BCP Division of Enforcement investigates potential order violations in a variety of ways. For example, as noted above, it carefully reviews companies' compliance reports and assessor reports, follows up with questions, and tracks consumer complaints, press reports, and leads from security researchers to determine whether there may be order violations. If it determines that certain practices warrant further scrutiny, it can send a letter to the company requesting additional information (including subsequent biennial assessments), to which the company must respond in 10 days. The Division of Enforcement staff has investigated numerous possible order violations as part of this non-public process. In cases where it determines a law violation has occurred, it has recommended a public order enforcement action. In the privacy and security area, these actions have included Choicepoint,[24] Google,[25] Lifelock,[26] and Upromise.[27]

d. Does the FTC receive a copy of every assessment conducted by the independent, third-party auditor required under a consent order entered into by the agency?

Response: The FTC receives a copy of every initial assessment. For subsequent biennial assessments, the FTC's orders require companies to retain these assessments. The BCP Division of Enforcement then obtains those assessments when it determines whether the company's compliance warrants further scrutiny. The company must provide any material requested by staff within 10 days of a request.

e. How does the FTC determine which independent, third-party auditing firms are qualified to conduct and prepare such assessments? Does the FTC maintain a schedule of eligible firms to prepare assessments? If so, what specific auditing firms are currently eligible?

Response: As stated in the Commission's data security orders, the assessor must either have qualified for one of the specified professional credentials (Certified Information System Security Professional (CISSP), Certified Information Systems Auditor (CISA), or a Global Information Assurance Certification (GIAC) from the SANS Institute), or be approved by the FTC. As stated in the Commission's privacy orders, the assessor must have a minimum of three years of experience in the field of privacy and data protection

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[24] *U.S. v. ChoicePoint*, Inc., No. 1:06-cv-00198-JTC (N.D. Ga. Sept. 3, 2010), https://www.ftc.gov/enforcement/cases-proceedings/052-3069/choicepoint-inc.
[25] *U.S. v. Google*, Inc., No. 3:12-cv-04177-SI (N.D. Cal. Nov. 16, 2012), https://www.ftc.gov/enforcement/cases-proceedings/google-inc.
[26] *U.S. v. LifeLock*, Inc., No. 2:10-cv-00530-JJT (D. Ariz. Jan. 4, 2016), https://www.ftc.gov/enforcement/cases-proceedings/072-3069-x100023/lifelock-inc-corporation.
[27] *U.S. v. Upromise, Inc.*, No. 1:17-cv-10442 (D. Mass. Mar. 23, 2017), https://www.ftc.gov/enforcement/cases-proceedings/102-3116-c-4351/upromise-inc.

and be approved by the FTC. In those cases where the FTC approves the assessor, the agency reviews the assessor's qualifications to determine whether the assessor has the ability to effectively and independently perform the required assessment. The FTC does not maintain a schedule of eligible firms, since it grants approval on a case-by-case basis.

f. Does the FTC approve, formally or informally, which companies are permitted to complete the audits for companies under order with the FTC?

Response: Please see answer to 14.e. above.

15. Some have claimed that when the FCC restored internet freedom by repealing the Obama era rules that stripped the Federal Trade Commission's authority over Internet service providers, it somehow made the internet less safe for consumers. The FCC's *Restoring Internet Freedom Order* actually restored the power of the FTC, the nation's premiere consumer protection agency, to protect internet users from unfair and deceptive practices. Please explain in detail how you believe the agency' s authority can be leveraged to consistently protect consumers across the internet?

Response: The FTC has broad authority over much of the economy to protect consumers against unfair or deceptive acts or practices and unfair methods of competition. The FTC cannot reach common carrier activities, however, and when the FCC reclassified Broadband Internet Access Service ("BIAS") as a common carrier activity, the FTC lost the ability to protect consumers in this space. There are several types of cases that the FTC brought against BIAS providers prior to 2015, and can bring again now that the reclassification has been reversed.[28] For instance, the FTC will use its privacy and data security expertise to prevent unfair or deceptive privacy and data security practices of BIAS providers. Using our flexible, enforcement-focused approach will enable the agency to continue to apply strong consumer privacy and security protections across a wide range of changing technologies and business models, without imposing unnecessary or undue burdens on industry.

Moreover, the FTC has experience enforcing the antitrust laws to prevent unfair methods of competition for the benefit of consumers in nearly all markets. As part of its *Hearings on Competition and Consumer Protection in the 21st Century*, the agency will hold public hearings in early 2019 to continue to explore how the FTC can use this enforcement authority most effectively in BIAS markets. If the FTC identifies, through these hearings or otherwise, that it does not have sufficient authority or resources to

[28] *See, e.g.*, *FTC v. AT&T Mobility, LLC*, No. 3:14-CV-04785-EMC (N.D. Cal. Oct. 28, 2014), https://www.ftc.gov/enforcement/cases-proceedings/122-3253/att-mobility-llc-mobile-data-service; *FTC v. TracFone Wireless, Inc.*, No. 15-cv-00392-EMC (N.D. Cal. Feb. 20, 2015), https://www.ftc.gov/enforcement/cases-proceedings/132-3176/straight-talk-wireless-tracfone-wireless-inc; *America Online, Inc.*, No. C-4105 (F.T.C. Jan. 28, 2004), https://www.ftc.gov/enforcement/cases-proceedings/002-3000/america-online-inc-compuserve-interactive-services-incin; *Juno Online Servs., Inc.*, No. C-4016 (F.T.C. June 25, 2001), https://www.ftc.gov/enforcement/cases-proceedings/002-3061/juno-online-services-inc

address competition issues in BIAS markets, the agency will report this to Congress.

The Honorable Michael C. Burgess

1. **An increase in hospital market concentration caused by hospital mergers has resulted in price increases. These mergers may also substantially lessen quality and competition by undermining the ability of physicians, on behalf of patients, to shop for hospital affiliations based upon quality factors, such as adequacy of hospital staffing, equipment, and administrative support services that would allow physicians to spend more time with their patients. Will the FTC evaluate future hospital mergers along these quality dimensions?**

Response: An acquisition that combines healthcare providers may violate Section 7 of the Clayton Act if the competition eliminated by the acquisition is likely to result in higher prices, lower quality of care, or reduced innovation. The FTC, along with the Antitrust Division of the Department of Justice ("DOJ"), maintains a vigorous enforcement program to scrutinize healthcare mergers and prevent mergers that are likely to have anticompetitive effects.

As part of that review, the FTC routinely examines the likely effects of a proposed merger—not only on provider pricing but also on quality of care. Empirical evidence, in the form of studies by FTC staff and others, demonstrates that healthcare consumers benefit from lower prices and higher quality services when healthcare markets, including hospital markets, are more competitive.[29] Hospitals compete with each other by providing higher quality and more convenient healthcare services. Because such non-price competition benefits patients, the FTC will continue to evaluate healthcare mergers for potential impact on quality of care and other important non-price aspects of competition. For instance, the FTC considers whether hospital mergers might adversely affect competition for recruitment of physicians.

Finally, merging hospitals often claim that their mergers will result in increased quality of care. The FTC has considered these claims seriously and has closely scrutinized whether such claims deserve credit under the case law and the Horizontal Merger Guidelines jointly issued by the FTC and DOJ.[30]

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[29] *See, e.g.*, Martin Gaynor & Robert Town, *The Impact of Hospital Consolidation – Update*, ROBERT WOOD JOHNSON FOUNDATION: THE SYNTHESIS PROJECT (2012) (synthesizing research on the impact of hospital mergers on prices, cost, and quality and finding that hospital consolidation generally results in higher prices, hospital competition improves quality of care, and physician-hospital consolidation has not led to either improved quality or reduced costs); Martin Gaynor & Robert J. Town, *Competition in Health Care Markets*, 2 HANDBOOK OF HEALTH ECONOMICS 499, 637 (2012); Martin Gaynor et al., *The Industrial Organization of Health-Care Markets,* 53 J. ECON.2 LITERATURE 235, 284 (2015) (critical review of empirical and theoretical literature regarding markets in healthcare services and insurance); Patrick S. Romano & David J. Balan, *A Retrospective Analysis of the Clinical Quality Effects of the Acquisition of Highland Park Hospital by Evanston Northwestern Healthcare*, 18 INT'L J. ECON. BUS. 45 (2011).

[30] U.S. Dep't of Justice and FTC, *Horizontal Merger Guidelines* §10 (2010), *available at* https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf.

2. **The cost of complying with administrative regulatory obligations has resulted in an increasing number of physicians leaving their practices that could have offered the marketplace more competition. Rather than compete with hospitals, physician practices are pressured by the added administrative costs to vertically integrate with hospitals. What are the potential benefits and risks of vertical integration for the healthcare marketplace?**

Response: Recent studies have documented the trend of vertical integration between hospitals and physicians. For example, in its 2013 *Report to the Congress,* the Medicare Payment Advisory Commission ("MedPAC"), an independent, non-partisan, Congressional support agency, reported that while the number of physicians employed by hospitals was relatively constant from 1998 to 2003, it increased by 55 percent from 2003 to 2011.[31] The causes and effects of such vertical integration are varied and complex. In particular, the overall effects of a hospital becoming the owner of a physician practice are complicated and, depending on the circumstances, may be pro-competitive (*i.e.*, beneficial for consumers), anticompetitive (*i.e.*, harmful to consumers), or competitively neutral. In addition, sometimes it is difficult to distinguish between vertical and horizontal effects. For instance, in the FTC's 2013 enforcement action challenging the acquisition of Saltzer Medical Group by St. Luke's Health System, some characterized the transaction as a vertical one, but the FTC's successful challenge was based on a horizontal theory. The FTC alleged, and the court found, that the combination of the hospital's employed physicians and Saltzer's 16 primary care physicians would lead to higher reimbursement rates for adult primary care services in Nampa, Idaho.[32]

   a. **One good way of introducing competition into hospital markets would be to restore the Stark exception for physician-owned hospitals that the Affordable Care Act revoked. Will the FTC support restoring this "whole hospital" exception?**

Response: Although there may be other reasons for the government to prohibit physicians from owning hospitals, there is no antitrust-related reason that I am aware of to have a blanket ban on such vertical integration. However, without studying this issue more carefully, I cannot take a firm position.

3. **Many academics believe that healthcare provider markets are "highly concentrated." In fact, cities like Pittsburgh, Boston, and San Francisco are controlled by just one or two dominant multi-hospital systems. These systems**

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[31] MedPAC, (2013) Report to Congress: Medicare and the Health Care Delivery System. Policy Brief.

[32] *St. Alphonsus Med. Center-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775 (9th Cir. 2015). The FTC's analysis of quality in this merger also was discussed as one example in a more general discussion of our approach to quality analysis in hospital mergers in an article written by several of our economists, Keith Brand, et al, *Economics at the FTC: Office Supply Retailers Redux, Healthcare Quality Efficiencies Analysis, and Litigation of an Alleged Get-Rich-Quick Scheme*." 45 REVIEW OF INDUSTRIAL ORGANIZATION 4, 325-344.

drive up healthcare costs and marginalize physicians who wish to remain independent. What is the FTC doing alleviate this growing issue?

Response: The Commission maintains a robust program to review hospital mergers in order to challenge ones that eliminate an important competitor and are likely to result in higher prices, lower quality of care, or reduced innovation.[33] Retrospective studies of consummated hospital mergers provide support for vigorous antitrust enforcement to prevent the accumulation of market power.[34] But there are limits on our ability to use the federal antitrust laws to prevent harmful healthcare mergers. For example, some state policies, such as certificate-of-need and certificates of public advantage laws, may deter or prevent antitrust enforcement to block mergers that are likely to lead to increased concentration in local healthcare markets.[35] Nonetheless, the FTC will continue to closely scrutinize hospital mergers, and to challenge those that are likely to substantially lessen competition and cause consumer harm.

4. **Health insurers claim that by merging they will obtain bargaining leverage with providers that will enable a lowering of premiums. An FTC retrospective study of the effect of past mergers on provider reimbursement and, most importantly, premiums, would be helpful in evaluating future health insurance mergers. Has FTC considered such a study? Would the FTC need congressional authority to undertake that study in health insurance markets?**

    a. **Relatedly, there is a concern that post-merger an insurer could exercise buyer/monopsony power in physician markets. Could FTC study the effects of past health insurer mergers on physician reimbursement and determine whether a decline in reimbursement has led to a decline in the quantity and/or quality of physician services?**

Response: You correctly point out that Section 6 of the FTC Act limits the Commission's ability to study the "business of insurance," although the Commission

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[33] *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559 (6th Cir. 2014), *cert. denied*, 135 S. Ct. 2049 (2015); *St. Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys.*, 778 F.3d 775 (9th Cir. 2015); *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327 (3d Cir. 2016); *FTC v. Advocate Health Care Network*, 841 F.3d 460 (7th Cir. 2016); FTC v. Sanford Health, No. 1:17-cv-00133 (N.D.)(Dec. 14, 2017) (appeal pending).

[34] Deborah Haas-Wilson & Christopher Garmon, Two Hospital Mergers on Chicago's North Shore: A Retrospective Study, 18 INT'L J. ECON. BUS. 17 (20110; Leemore Dafny, Estimation and Identification of Merger Effects: An Application to Hospital Mergers, 52 J. L. & ECON. 523, 544 (2009) ("hospitals increase price by roughly 40 percent following the merger of nearby rivals"); Cory Capps & David Dranove, Hospital Consolidation and Negotiated PPO Prices, 23 HEALTH AFFAIRS 175, 179 (2004); see also, e.g., Joseph Farrell et al., Economics at the FTC: Retrospective Merger Analysis with a Focus on Hospitals, 35 REV. INDUS. ORG. 369 (2009) (mergers between not-for-profit hospitals can result in substantial anticompetitive price increases).

[35] Statement of the Commission, *Phoebe Putney Health System, Inc.*, Dkt. 9348 (Mar. 31, 2015), https://www.ftc.gov/system/files/documents/public_statements/634181/150331phoebeputneycommstmt.pdf; Statement of the Commission, Cabell Huntington Hospital, Inc., Dkt. 9366 (Jul. 6, 2016), https://www.ftc.gov/system/files/documents/public_statements/969783/160706cabellcommstmt.pdf.

can study various aspects of the relationship between insurers and providers. I am not aware of any prior proposal for an FTC retrospective study related to provider reimbursement or insurance premiums, although I am aware that others have studied this question.[36] As you know, the FTC and the Department of Justice share enforcement of the federal antitrust laws; the Department of Justice has reviewed, and challenged, recent proposed mergers involving health insurers.

5. **In December 2016, the FTC issued a Notice of Proposed Rulemaking announcing proposed changes to the Commission's Contact Lens Rule. These changes propose a new regulatory requirement on providers, requiring doctors to collect and maintain for 3 years a signed document indicating that each patient received a copy of their contact lens prescription. Out of 309 complaints about prescriber prescription release, the FTC has determined that 55 warning letters to prescribers were necessary over the course of a decade. How does this small percentage of complaints and enforcement action provide sufficient evidence to justify imposition of a costly new regulatory burden on an entire industry?**

Response: The Contact Lens Rule was promulgated to implement the requirements of the Fairness to Contact Lens Consumers Act. The statute and the Rule require the automatic release of a contact lens prescription to the patient upon completion of a lens fitting, or at the end of the examination if there is no change in the prescription, and are intended to facilitate consumers' ability to shop around for contact lenses.

The Commission initially published a Federal Register notice generally requesting comments on the Rule in September 2015. Based on a review of the 660 comments received, the Commission published a Notice of Proposed Rulemaking (NPRM) in December 2016, requesting comment on proposed Rule amendments. The NPRM proposed to amend the Rule to require prescribers to obtain a signed acknowledgment after releasing a contact lens prescription to a patient, and maintain it for three years. The purpose of the proposed amendment was to enhance both compliance and our ability to enforce the Rule by providing a record that the prescription was given out. The Commission received over 4,100 comments. There is evidence on the public record that suggests that at least half of contact lens consumers are not receiving their prescription as required by the Rule, either because they are not receiving their prescription at all (25%-35%) or because they do not receive it until they request it. Prescriber compliance with the automatic release requirement is critical to maximizing the Rule's intended competitive benefits.

Although the Rule has been in place for over 10 years, the FTC continues to receive consumer complaints about prescribers' failure to comply with the automatic release requirement. However, the number of complaints the FTC has received is not the best

[36] Leemore Dafny, Mark Duggan, & Subramaniam Ramanarayanan, *Paying a premium on your premium? Consolidation in the US health insurance industry*, American Economic Review 102.2 (2012): 1161-85 (growth in insurer bargaining power after Aetna-Prudential merger reduced earnings and employment growth of physicians and raised earnings and employment growth of nurses, reflecting postmerger substitution of nurses for physicians, and the exercise of monopsony power vis-à-vis physicians).

evidence of compliance with the automatic prescription requirement, for several reasons:

- Many consumers do not know of their right to receive their prescription (and so would not complain if they did not get it);
- Consumers may not know to complain to the FTC;
- Consumers who receive their prescription only after asking for it (which is still a Rule violation) may be unlikely to complain;
- Consumers who do not automatically receive their prescriptions may feel reluctant to complain about their prescriber, with whom they may otherwise be satisfied; and
- Consumers may not take the time to complain.

The Commission held a workshop on March 7, 2018 to collect additional information on various Rule-related issues, including the proposed amendments and alternative ways to increase subscriber compliance with the Rule. The public comment period closed on April 6, 2018. We received and reviewed approximately 3,500 additional comments. FTC staff intends to submit a recommendation to the Commission by the end of the year.

6. **In March 2018, the Commission held a workshop on the Contact Lens Rule and received comments on the proceedings until early April 2018. In May 2018, I led a letter with Rep. Bobby Rush requesting that the Commission reconsider this Notice of Proposed Rulemaking. Does the FTC expect to update its 2016 draft for comment or move directly to issue a final Contact Lens Rule? What is the FTC's anticipated timing for action?**

   Response: As discussed in response to question 5 above, staff collected additional information during the workshop and in public comments, and is considering alternatives to increase prescriber compliance with the Rule without imposing unnecessary burdens on prescribers. FTC staff intends to submit a recommendation to the Commission by the end of the year. If the Commission decides that additional public input would be beneficial, the Commission would allow an appropriate period of time for public input. The length of the comment period would depend on the complexity of the modifications under consideration but most likely it would be 30 to 60 days; the original NPRM had a 60-day comment period, and we accepted comments for about 30 days after the workshop. The timeline for then completing the rulemaking and issuing the final Rule would depend on the number and complexity of the comments received.

7. **The FTC has jurisdiction over enforcing the Fair Debt Collection Practices Act. This Act was enacted in 1977 and many new technologies have come into use since then. Many third-party collectors have fallen prey to frivolous litigation as a result of unclear rules. The Bureau of Consumer Financial Protection has indicated that it plans to propose rules for the Fair Debt Collection Practices Act. How will these potential rules reconcile eliminating bad actors with creating clear, but not overly burdensome requirements for those acting responsibly? What is the timeline for these potential rules?**

   Response: For more than four decades, the FTC has been protecting consumers from

unlawful debt collection practices. Stopping such practices remains a top priority for the agency. Since 2010, the FTC has sued more than 290 companies and individuals who engaged in unlawful collection practices in violation of the FDCPA and FTC Act, obtaining industry-wide bans against more than 150 of them and securing more than $480 million in judgments. In addition to vigorous law enforcement, the FTC also engages in education and public outreach to inform consumers about their rights under the FDCPA and businesses about their obligations under the law.

The Commission has long taken the position that "the debt collection legal system needs to be reformed and modernized to reflect changes in consumer debt, the debt collection industry, and technology" since enactment of the FDCPA.[37] Accordingly, while the FTC does not have rulemaking authority under the FDCPA, we look forward to reviewing any proposed rules issued by the Bureau of Consumer Financial Protection regarding debt collection. The Bureau has recently estimated that it anticipates issuing such proposed rules in the spring of 2019.[38] The FTC continues to work closely with the Bureau to coordinate efforts to protect consumers from unfair and deceptive debt collection practices, including by consulting with the Bureau on its debt collection rulemaking and guidance initiatives.

8. **The FTC has engaged in efforts against "illegal robocallers" that use technology to abuse consumers with unwanted nuisance calls. However, there is confusion about who is considered a robocaller. For example, those who have a legal, established business relationship with a consumer and a need to contact them often fall under the definition of a robocaller. Can you please describe in detail what defines a robocall? How are illegal robocalls differentiated from legal business calls?**

Response: The FTC's regulation of robocalls stems from the Telemarketing Sales Rule ("TSR").[39] The TSR does not define or use the word "robocall." However, the TSR prohibits any call that delivers a prerecorded message to solicit the sale of goods, services, or charitable contributions. Other statutes, such as the Telephone Consumer Protection Act ("TCPA") and certain state laws, may define illegal "robocalls" based on the use of specific technology to dial calls, but under the TSR the primary defining questions are: (1) whether the call delivers a prerecorded message; and (2) whether the calls is part of a campaign to solicit the sale of goods and services. If the answer is yes to both these questions, the call is presumptively illegal under the TSR, subject to certain defenses and exemptions.

The following is a list of categories of calls that may deliver prerecorded messages and still be permissible under the TSR:

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[37] FTC Report, *Collecting Consumer Debts: The Challenges of Change* (2009), at i, https://www.ftc.gov/reports/collecting-consumer-debts-challenges-change-federal-trade-commission-workshop-report.

[38] https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201804&RIN=3170-AA41. *See* Office of Information and Regulatory Affairs, Office of Management and Budget, Spring 2018 Unified Agenda of Regulatory and Deregulatory Actions, available at https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201804&RIN=3170-AA41.

[39] 16 C.F.R. § 310, *et seq.*

- Calls that are exclusively to provide information and do not solicit any goods, services, or donations fall outside of the TSR. Informational calls from utility companies, doctors' offices, or school districts fall into this category.
- Calls to solicit the sale of goods or services where the consumer receiving the call has given express *written* agreement to receive marketing calls from the specific seller whose goods or services are being marketed, subject to several explicit requirements.[40] These calls are permitted under a limited exception to the TSR's general prohibition on sales calls delivering prerecorded messages. Note, however, that the agreement must be "in writing" and cannot be provided orally.
- Calls that deliver a prerecorded healthcare message made by, or on behalf of, an entity covered under the HIPAA Privacy Rule are exempted from the TSR's robocall rule.[41]
- Calls to a business to solicit the sale of goods or services from that business, other than calls selling nondurable office or cleaning supplies, are exempted from the TSR.[42]

It should be noted that while some of the above-mentioned calls may not be prohibited by the TSR, they may be prohibited by the TCPA or state laws. Moreover, in addition to prohibiting robocalls, the TSR also prohibits sales calls by live operators to numbers listed on the National Do Not Call Registry.

The Honorable Leonard Lance

1. **The recent "FTC Staff Offers Business Guidance Concerning Multi-Level Marketing" ("MLM Guidance") states: "At the most basic level, the law requires that an MLM pay compensation that is based on actual sales to real customers, rather than based on wholesale purchases or other payments by its participants."**

    a. **Which specific "law" is referenced here? Identify the specific statutes and case law.**

Response: The referenced document, "Business Guidance Concerning Multi-Level Marketing," is focused on multi-level marketing practices that may violate Section 5(a) of the FTC Act, which prohibits unfair or deceptive acts or practices in or affecting commerce. The particular statement quoted in your question addresses the circumstances under which a multi-level marketer ("MLM") might be determined to have an unfair or deceptive compensation structure in violation of Section 5. Such MLMs are sometimes called "pyramid schemes."

The most widely cited description of an unlawful MLM compensation structure appears in the Commission's *Koscot* decision, which observed that such enterprises are characterized in part by "the right to receive in return for recruiting other participants into

[40] 16 C.F.R. § 310.4(b)(1)(v)(A).
[41] 16 C.F.R. § 310.4(b)(1)(v)(D).
[42] 16 C.F.R. § 310.6(b)(7).

the program rewards which are unrelated to the sale of the product to ultimate users."[43] In accord with this standard, the courts and the Commission have consistently held that lawful MLM compensation is based on actual sales to customers, not on wholesale purchases or other payments by the MLM's participants.[44]
Additional discussion of selected issues relating to this topic—such as how the FTC considers claims that MLM participants are making some purchases to satisfy their own genuine product demand, and methods of documenting actual sales to consumers—is provided in response to Questions 5–8 of the "Business Guidance" document.

2. **Please elaborate on the specific criteria or vetting process that is used by the Commission to determine if an independent organization purporting to be a consumer watchdog, or a corporation that operates as a direct competitor in the marketplace, is a reliable source of relevant information?**

Response: The Commission may open investigations at the request of the President, Congress, the Attorney General, or other governmental agencies; upon referrals by the courts; on the basis of complaints filed by members of the public; or on its own initiative.[45] In determining whether to open an investigation, the Commission acts only in the public interest, and does not initiate an investigation or take other action when the violation of law alleged is a matter of private controversy that does not tend to adversely affect the public.[46] In some cases, competitors complain about alleged deceptive or unfair practices that they claim harm consumers and put themselves at a competitive disadvantage. In other instances, consumer watchdog groups complain to the FTC.

There are multiple opportunities to test the value of information provided by such third parties. Commission staff carefully evaluate such complaints to determine whether the alleged practices, if proven, would violate the law; the complaining party has ulterior motives; staff can independently verify the supplied information, and; as with all cases, there is a sufficiently significant likelihood of a law violation to justify opening an investigation. In all but the most egregious cases of fraud, the next step generally is to contact the entity against whom the complaint has been lodged. At this stage, the subject of the complaint has every opportunity and incentive to provide information and evidence, and explain any apparent potential law violation. At the same time, as appropriate, staff typically seeks additional information from third parties and consults

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[43] *In re Koscot Interplanetary, Inc.*, 86 F.T.C. 1106, 1181 (1975).
[44] *See, e.g.*, *FTC v. BurnLounge, Inc.*, 753 F.3d 878, 885–86 (9th Cir. 2014) (citing with approval the issuance of a preliminary injunction against an MLM in which "rewards are received by purchasing product and by recruiting others to do the same"); *Webster v. Omnitrition Int'l, Inc.*, 79 F.3d 776, 782 (9th Cir. 1996) (noting that an MLM is facially unlawful if a participant earns compensation that is based "on product orders made by [his] recruits" rather than "on actual sales to consumers" (emphasis in original)); *FTC v. Equinox Int'l Corp.*, No. 99-0969, 1999-2 Trade Cas. (CCH) ¶ 72,704 (D. Nev. Sept. 14, 1999) (preliminarily enjoining an MLM in which compensation was "facially unrelated to sales to the ultimate user" because it was "based on purchases made from [the MLM] by the distributor and his downline"); I*n re Holiday Magic, Inc.*, 84 F.T.C. 748, 1042–43 (1974) (explaining that lawful MLM compensation is "based strictly on product sales of recruits, and not on inventory purchases (or other payments) of recruits").
[45] 16 C.F.R. § 2.1.
[46] 16 C.F.R. § 2.3.

with relevant experts as needed, to corroborate any allegations against an entity or defenses raised by it.

The Honorable Brett Guthrie

1. **The FTC Franchise Rule (Rule) is the governing federal regulation for franchise businesses and I understand it is due for renewal this year. Constituents of mine have raised concerns that if the Rule is eliminated or allowed to expire that very negative consequences could result for both franchisors and franchisees. The concern for franchisees centers around the denial of access to important pre-investment information for them, and on allowing unscrupulous franchisors to offer franchises in thirty-five states without providing any disclosure at all. On the other hand, for franchisors the risk is seeing a patchwork of laws to develop across the country, including a spike in complicated and onerous regulation.**

    a. **Based on the information that has been shared with me, I would ask that you carefully consider the usefulness of the existing Rule and that you give full and fair consideration to the concerns raised by franchisors and franchisees. Do you intend to move forward with a renewal of the Rule and if so, what is your expected time frame? Is the Rule under consideration for expiration under the Administrations "Two out, one in" deregulatory effort?**

Response: The Commission routinely conducts a regulatory review of each of its trade regulation rules, including the Franchise Rule, about every 10 years. The regulatory review of the Franchise Rule is scheduled to begin by the end of 2018. The review will seek public comment, by means of a notice in the Federal Register, on whether the Rule is still needed to give prospective franchisees the information they need to make informed investment decisions and, if so, whether changes in the marketplace or technologies warrant any revisions to the Rule. The Commission is aware that both franchisor and franchisee stakeholders have supported the Franchise Rule since it was first issued in 1978, and will carefully consider all stakeholder comments on the continuing need for the Rule.

The Commission's trade regulation rules do not expire. A resource-intensive notice and comment amendment proceeding pursuant to Section 18 of the FTC Act would be required to terminate any of them.[47]

Independent agencies such as the FTC are not bound by Presidential Executive Orders.

The Honorable Gus Bilirakis

1. **Over 4 billion robocalls were placed nationwide in June 2018, equaling roughly 12.7 calls per person affected. Are you concerned about the incidence rate of robocalls and their potential impact for fraud and victimizing consumers, and what can the**

[47] *See* 15 U.S.C. § 57a(d)(2)(B).

FTC do to limit the impact of illegal robocalls?

Response: Yes, we are very concerned. The FTC has seen reports from various private actors, such as the YouMail index, concerning the number of robocalls placed on a monthly basis. Consumer complaints about unwanted calls and robocalls reported to the FTC remain the top consumer complaint the FTC receives—over 7 million complaints about unwanted calls in fiscal year 2017, more than 4.5 million of which were complaints about robocalls.

We know from our law enforcement work that fraudsters frequently use robocalls to contact potential victims. Accordingly, the FTC makes great efforts to litigate against robocallers, seize ill-gotten funds and return them to victims of scams, and educate consumers to avoid the harm from fraudulent and abusive robocalls. The FTC also works closely with industry to help spur innovation to tackle the problem.

The FTC takes a multi-faceted approach to combatting illegal robocalls and other abusive telemarketing. The FTC uses every tool at its disposal: aggressive law enforcement, initiatives to spur technological solutions, and robust consumer and business outreach. The FTC plans to continue its aggressive work in each of these areas, each of which is discussed in more detail below.

Law Enforcement

First and foremost, the FTC is a law enforcement agency. As of September 1, 2018, the Commission has filed 138 lawsuits against 454 companies and 367 individuals alleged to be responsible for placing billions of unwanted telemarketing calls to consumers. The FTC has collected over $121 million from these violators. In cases where perpetrators were running telemarketing scams, the FTC has obtained court orders shutting these businesses down and freezing their remaining assets so that those funds could be returned to consumer victims.

Industry Outreach to Spur Technology

The FTC recognizes that law enforcement alone will not solve the problem of illegal robocalls. That is why the FTC intends to continue its long history of working with industry to promote technological solutions. The FTC has provided input to support the industry-led Robocall Strike Force, coordinated by the FCC, which is working to deliver comprehensive solutions to prevent, detect, and filter unwanted robocalls. In tandem with this effort, the FTC worked with a major carrier and federal law enforcement partners to help block IRS scam calls that were spoofing well-known IRS telephone numbers. FTC staff continues to work with federal law enforcement partners and major carriers to encourage network-level blocking of illegal robocall campaigns.

The FTC also led four public challenge contests to help spur industry initiatives to tackle

unlawful robocalls by blocking calls.[48] These challenges contributed to a shift in the development and availability of technological solutions in this area. When the FTC held its first public challenge, few call blocking applications existed. Today, there are hundreds of apps available to consumers, and two winners of the FTC's challenges offer leading call blocking tools that have blocked hundreds of millions of unwanted calls.[49]

The FTC also engages with technical experts, academics, and others through industry groups, such as the Messaging, Malware and Mobile Anti-Abuse Working Group ("MAAWG") and the Voice and Telephony Abuse Special Interest Group ("VTA SIG"). The FTC has encouraged ongoing industry efforts to develop new technological protocols that will change how caller ID works so that it will be more difficult for callers to engage in illegal caller ID spoofing.

Consumer Education & Outreach

The FTC's education and outreach program reaches tens of millions of people a year through our website, the media, and partner organizations that disseminate consumer information on the FTC's behalf. In the case of robocalls, the advice is simple: if you answer a call and hear an unwanted recorded sales message—hang up.

2. Do you have all of the tools you need to succeed in the mission of combatting robocalls, or do you believe further legislative action is needed? If so, what can Congress do to help in this effort?

Response: The FTC has expended significant time and effort to combat illegal robocalls and uses every tool at its disposal. As with any law enforcement challenge, additional resources and enforcement tools could yield even greater results. Presently, the FTC seeks to advance its robocall enforcement via repeal of the common carrier exemption from its jurisdiction. The exemption impedes investigations, complicates litigation and, critically, prevents the FTC from challenging common carriers of telecommunications that violate the TSR.

3. What role can the FTC play in combatting the national opioid crisis, including the marketing and advertising of patient recovery services, illegal opioids as well as prescription and over-the-counter drugs?

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[48] The first challenge, in 2013, called upon the public to develop a consumer-facing solution to blocks illegal robocalls. *See* FTC Press Release, *FTC Announces Robocall Challenge Winners* (Apr. 2, 2013), https://www.ftc.gov/news-events/press-releases/2013/04/ftc-announces-robocall-challenge-winners; *see also* FTC Press Release, *FTC Awards $25,000 Top Cash Prize for Contest-Winning Mobile App That Blocks Illegal Robocalls* (Aug. 17, 2015), https://www.ftc.gov/news-events/press-releases/2015/08/ftc-awards-25000-top-cash-prize-contest-winning-mobile-app-blocks; FTC Press Release, *FTC Announces Winners of "Zapping Rachel" Robocall Contest* (Aug. 28, 2014), https://www.ftc.gov/news-events/press-releases/2014/08/ftc-announces-winners-zapping-rachel-robocall-contest.

[49] One of the winners, "NomoRobo," was on the market within 6 months after being selected by the FTC. NomoRobo, which reports blocking over 600 million calls to date, is being offered directly to consumers by a number of telecommunications providers and is available as an app on iPhones.

Response: The Commission has addressed the opioid crisis by taking enforcement action in federal court, issuing warning letters, and engaging in consumer education.

To date, the Commission has brought two enforcement actions against marketers of bogus withdrawal and addiction treatment products.[50] In January 2018, the Commission partnered with the FDA to send warning letters to 11 marketers selling products that allegedly helped with opioid withdrawal and/or addiction.[51] The Commission on its own sent letters to four additional marketers.[52] Concurrently with the January letters, the Commission partnered with the Substance Abuse and Mental Health Services Administration (SAMSHA), which is part of the Department of Health and Human Services, to issue a consumer education piece advising of the hazards of deceptive advertising and directing consumers to trusted resources for help with addiction treatment.[53]

The Commission will continue to monitor this area for unfair or deceptive practices, including potentially deceptive advertising by treatment centers. We will continue to work with stakeholders, including state and local enforcers, to determine whether law enforcement action in this field is appropriate. Any such law enforcement could be against the treatment centers themselves, companies that recruit consumers for placement into treatment programs, or online review sites that might have undisclosed, material connections to the programs they review.

4. **I'd like to congratulate the FTC on its successful enforcement action against an online hotel booking reseller, Reservation Counter. As part of the enforcement action, the FTC alleged that the party misled consumers through ads, webpages, and call centers that led consumers to mistakenly believe they were reserving the rooms directly from the hotel. The Commission further alleged that the company failed to adequately tell consumers that their credit cards would be charged immediately, rather than after they arrived at the hotel. The FTC's constructive action highlights the good work it can do to protect consumers. While this enforcement action is a good first step, do you believe this hotel scam website problem may be a symptom of a larger problem when it comes to the online hotel booking market? What do you feel is the FTC's role to help mitigate websites that have not been investigated by the FTC, from using harmful tactics against consumers?**

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[50] *FTC v. Caitlin Enterprises, Inc.*, No. 1:17-cv-403 (W.D. Tex. May 17, 2017), https://www.ftc.gov/enforcement/cases-proceedings/1623204/catlin-enterprises-inc (settlement included $6.6 million judgment, suspended due to the defendants' inability to pay, and injunctive relief prohibition the defendants from making misleading claims); *FTC v. Sunrise Nutraceuticals, LLC et al.*, No. 9:15-cv-81567 (S.D. Fla. July 6, 2016), https://www.ftc.gov/enforcement/cases-proceedings/152-3208-x160006/sunrise-nutraceuticals-llc (settlement included $1.4 million judgment, all but $235,000 suspended due to the defendants' inability to pay, and injunctive relief prohibiting the defendants from making misleading claims).

[51] FTC & FDA Opioid Warning Letters (2018), https://www.ftc.gov/ftc-fda-opioid-warning-letters.

[52] *Id.*

[53] *Getting the Right Help for Opioid Dependence or Withdrawal* (Jan. 2018), https://www.consumer.ftc.gov/articles/0223-getting-right-help-opioid-dependence-or-withdrawal.

Response: The Commission shares your underlying concerns about deceptive online travel sites. False or misleading information about hotel booking sites harms consumers and competition. FTC staff continues to monitor the online travel market. If the Commission has reason to believe that an online travel booking reseller has engaged in deceptive practices, it has authority under the FTC Act to bring a law enforcement action against the reseller.

In addition to law enforcement, FTC staff published a consumer advisory that provides information and tips for consumers who wish to book a hotel room online [54] The Commission also issued a report to Congress on the online hotel booking market.[55] The report described the FTC's law enforcement authority over deceptive online hotel booking practices and commented on proposed legislation that required third-party resellers to disclose they are not affiliated with the hotel they are advertising.[56]

Online travel websites provide easy access to information about multiple hotels. Greater information about hotels and lower costs of acquiring information make it easier for consumers to find and compare hotel options. In its report to Congress and in previous testimony, the Commission stated that the nature and appearance of many online travel sites do not raise the deception concerns at issue in the *Reservation Counter* matter.[57]

5. **In 2016, the American Medical Association ("AMA") passed a resolution noting that some lawsuit advertisements emphasize the negative side effects of prescription medications, while ignoring their life-saving benefits and FDA-approval. The AMA resolution referred to these ads as "fear mongering" and "dangerous." Earlier this year, the AARP issued a Fraud Alert to its members warning them about lawsuit advertisements soliciting patients to join class actions if they have taken certain medications. The AARP Fraud Alert noted that the "surge in television, radio and internet ads from law firms and lawsuit marketing companies is causing some patients to take serious risks." These lawsuit advertisements often frighten viewers, especially the older adults they frequently target, into discontinuing or refusing to take FDA approved medication prescribed by a physician, often for life-threatening conditions. What is the FTC currently doing to prevent false and misleading lawsuit advertisements from scaring patients, particularly among vulnerable populations, into discontinuing or refusing doctor prescribed and FDA approved medications?**

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[54] FTC Consumer Blog, *Did You Book That Night at the Hotel's Site?* (July 14, 2015), www.consumer.ftc.gov/blog/2015/07/did-you-book-night-hotels-site.

[55] *The Online Hotel Booking Market: A Federal Trade Commission Report To Congress On Recommended Enforcement Actions Against Deceptive Marketers Engaging in the Online Hotel Booking Market, and Appropriate Remedies To Apply In This Area To Protect Consumers* (Aug. 2017), www.ftc.gov/reports/online-hotel-booking-market-federal-trade-commission-report-congress-recommended-enforcement ("Report to Congress").

[56] *Id.*

[57] Report to Congress, *supra* n.53, at 2 n.2; Prepared Statement of the FTC on "Legislative Hearing on 17 FTC Bills" before the Comm. on Energy and Commerce, Subcomm. on Commerce, Manufacturing, & Trade, U.S. House of Rep. (May 24, 2016), www.ftc.gov/public-statements/2016/05/prepared-statement-federal-trade-commission-legislative-hearing-seventeen.

Response: Advertising plays a critical role in our economy, providing consumers with valuable information. However, to be useful, advertising must not be misleading. The FTC is monitoring attorney advertising that solicits people who may have been harmed by prescription drugs or medical devices to determine whether such advertising is misleading and likely to cause harm to consumers. Depending on the results of our search, we will consider all available options, including law enforcement actions, warning letters, and consumer education. We also are consulting with the FDA to determine how we may assist each other on this topic.

6. **There are a number of lawsuit advertisements that portray specific FDA approved drugs as inherently dangerous by using frightening imagery, words, and noises. Some lawsuit ads and websites use phrases like "recall" and "medical alert," while others show flashing lights and sirens. Others even direct viewers to call numbers like 1-800-BAD-DRUG and show people being rolled into a morgue. Many times, these advertisements will display an FDA logo and feature a narrator dressed in a physician's white coat. Advertisements that use these bombastic and deceptive tactics, often supplemented by little or no mention of a drug' s FDA approval or benefits, present a clear danger to consumers-who in this instance are patients taking prescribed medications. In fact, an FDA adverse event report through 2016 showed that 61 patients watching lawsuit ads about their prescribed anticoagulants stopped taking their medication, leading to 4 deaths and several other serious injuries. National patient advocacy organizations such as the Alliance for Aging Research have asserted that the 1-800-BAD-DRUG ads are deceptive under the FTCs' truth-in-advertising rules. How can the FTC enforce laws under its jurisdiction to deter deceptive practices that are documented by the FDA as leading to severe injury and death?**

Response: The FTC Act prohibits deceptive and unfair acts or practices. To establish that an advertisement is deceptive requires a showing that (1) there was a representation or omission, (2) the representation or omission was likely to mislead consumers acting reasonably under the circumstances, and (3) the representation or omission was material.[58] To establish that a practice is unfair requires a showing that an act or practice is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or competition.[59] As noted in response to question 5 above, the FTC is monitoring attorney advertising that solicits people who may have been harmed by prescription drugs or medical devices to determine whether such advertising is misleading and likely to cause harm to consumers. We also are consulting with the FDA to determine how we may assist each other on this topic.

7. **An April 2018 New York Times article uncovered a network of lawyers, doctors, and financers who preyed on women who had surgical mesh implants intended to treat**

[58] *See* Federal Trade Commission Policy Statement on Deception, *appended to Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174 (1984).
[59] Federal Trade Commission Policy Statement on Unfairness, *appended to Int'l Harvester Co.*, 104 F.T.C. 949, 1070 (1984).

pelvic organ prolapse. The scheme described in the article included coaxing women into getting surgery to remove the mesh- in some instances unnecessarily- to make them " more lucrative plaintiffs in lawsuits against medical device manufacturers." The article describes that one of the tactics used to get women into this lawsuit pipeline was by using online video ads. The article even shows one ad that uses the FDA logo and has a man in a doctor's outfit urging women to call the number. Isn't this exactly the type of deceptive, harmful advertising that the FTC should investigate? Would the FTC consider supporting regulatory guidelines for attorney advertisements to avoid this type of harm and deception?

Response: Although the FTC has jurisdiction over attorney advertising, it does not have jurisdiction over the practice of either law or medicine. The ethical conduct of doctors and attorneys falls to their respective professional licensing boards. As a general matter, the FTC would support guidance intended to deter unfair and deceptive attorney advertisements. Although we cannot comment on the particular facts set forth in your question, if attorney advertising crosses the line into deception, the FTC does have jurisdiction and, when warranted by the facts, the FTC can take appropriate action, including enforcement. We also would consider additional methods, such as the use of warning and advisory letters, to educate attorneys and firms soliciting patients on how to avoid violations of the FTC Act.

8. **In the online and digital marketplace, many of the largest companies both own the internet commerce platforms and also sell their own products. Small businesses hoping to compete are drawn to utilize this platform online while competing with their products. This can prove difficult when the large companies have continued access to online customer data that they can use to channel their own products. What is FTC doing to prevent monopoly and encourage free market principles when it comes to online data and sales?**

Response: The widespread use of technology and data is not only changing the way we live, but also the way firms operate. While many of these changes offer consumer benefits, they also raise complex and sometimes novel competition issues. Given the important role that technology companies play in the American economy, it is critical that the Commission—in furthering its mission to protect consumers and promote competition—understand the current and developing business models and scrutinize incumbents' conduct to ensure that they abide by the same rules of competitive markets that apply to any company. When appropriate, the Commission will take action to counter the harmful effects of coordinated or unilateral conduct by technology firms.

In June, I announced a new public hearings project—*Hearings on Competition and Consumer Protection in the 21st Century*—to consider whether broad-based changes in the economy, evolving business practices, new technologies, and international developments warrant adjustments to competition and consumer protection law, enforcement priorities, and policy.[60] One of the topics to be discussed at these hearings is

[60] FTC, *Hearings on Competition and Consumer Protection in the 21st Century*, https://www.ftc.gov/policy/hearings-competition-consumer-protection; *see also* FTC Press

the unique competition and consumer protection issues associated with internet and online commerce. We are also inviting public comment on this and other issues related to communication, information, and media technology networks.[61] Through the upcoming series of hearings, the Commission will devote significant resources to refresh and, if warranted, renew its thinking on a wide range of cutting-edge competition and consumer protection issues.

9. Should privacy protections be based on the sensitivity of the information, or the entity collecting such information?

Response: Privacy protections may appropriately depend on both sensitivity of information and nature of the entities collecting the information. For example, in data security cases, the FTC has noted that a company's data security measures "must be reasonable and appropriate in light of the sensitivity and volume of consumer information it holds, the size and complexity of its business, and the cost of available tools to improve security and reduce vulnerabilities."[62] One factor in determining reasonable security is the "sensitivity" of information. For example, a company that collects consumers' Social Security numbers should have in place greater protections than a company that collects only public information. Another factor in determining reasonable security is the size and complexity of a business. For example, a business that collects large amounts of consumer information should have in place greater protection than a company that only incidentally collects such information. In the privacy context, the Commission has similarly stated that the level of protection should depend on factors including the sensitivity of data and how the entity uses it.[63]

10. Should Congress allow California to dictate privacy protections for the entire country, or is the appropriate response from Congress to set the right national policy for the entire country? Are there any tools which Congress could provide that would make the FTC an even more effective enforcer of consumer privacy protections?

Response: I support a national data breach notification and data security law that would give the FTC APA rulemaking authority, jurisdiction over non-profits and common carriers, and the authority to seek civil penalties. The FTC has not taken any position on additional tools for enforcement of consumer privacy protections, and stands ready to enforce any law that Congress enacts. Previously, when Congress has enacted a law that gives the FTC authority to protect consumers' privacy, from CAN-SPAM to COPPA to

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Release, *FTC Announces Hearings On Competition and Consumer Protection in the 21st Century* (June 20, 2018), https://www.ftc.gov/news-events/press-releases/2018/06/ftc-announces-hearings-competition-consumer-protection-21st.

[61] Public comments on this topic will be posted on the FTC website at https://www.ftc.gov/policy/public-comments/2018/07/initiative-756.

[62] *See Commission Statement Marking the FTC's 50th Data Security Settlement* (Jan.31, 2014), https://www.ftc.gov/system/files/documents/cases/140131gmrstatement.pdf.

[63] *See, e.g.*, FTC Report, *Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers* (Mar. 2012), https://www.ftc.gov/reports/protecting-consumer-privacy-era-rapid-change-recommendations-businesses-policymakers.

the Gramm-Leach-Bliley Act, we have robustly exercised that authority; if we were given additional authority, we would vigorously use it. With respect to state laws regulating privacy, our task is to enforce federal laws as authorized by Congress. The Commission will be hosting its *Hearings on Competition and Consumer Protection in the 21st Century* this fall, where we expect to discuss these issues and hear from stakeholders about, for example, the potential impacts of the California law and whether to consider adopting a uniform national standard.

11. Recently, our committee sent a letter to Google about the fact that it continues to give third parties access to the content of Gmail users' emails. Does that practice by Google concern you? Is the FTC going to investigate this practice?

Response: As you know, because the Commission's investigations are not public, I cannot comment on the practices of specific companies. Generally, I share your concerns about companies that may share contents of consumers' communications without their knowledge or consent. For example, in the FTC's case against smart television manufacturer Vizio, we alleged that the company's collection and sharing of consumers' second-by-second viewing data without their knowledge or consent constituted a deceptive and unfair practice.[64] Companies should, however, be permitted to share such data with consumers' informed consent.

12. The FTC has been conducting a comprehensive review of the contact lens rule for the past several years. The review began in October of 2015 and to date has not been completed. In conducting this review, the FTC recommended several updates to the contact lens rule to educate and protect consumers. Specifically, the FTC recommended changes to the rule that help to educate consumers on their right to their prescription. Unfortunately, these common sense changes to the rule have not yet been finalized. This delay has caused uncertainty for consumers in the contact lens marketplace. Can you please provide me with an update on the status of the review of the rule and tell me when you expect this rule to be finalized?

Response: I share your concern that the Contact Lens Rule review be completed as promptly as possible while, at the same time, giving due consideration to the substantial public input we received. FTC staff intends to submit a recommendation to the Commission by the end of the year.

The Commission initially published a Federal Register notice generally requesting comments on the Rule in September 2015. Based on review of the 660 comments received, the Commission published a Notice of Proposed Rulemaking (NPRM) in December 2016, providing a 60-day period for comments on proposed Rule amendments. The NPRM proposed to amend the Rule to require prescribers to obtain a signed acknowledgment after releasing a contact lens prescription to a patient, and maintain it for three years. The purpose of the proposed amendment was to enhance both compliance and our ability to enforce the Rule by providing a record that the prescription was given

[64] *FTC & State of New Jersey v. Vizio, Inc. et al.*, No. 2:17-cv-00758 (D.N.J. Feb. 6, 2017), https://www.ftc.gov/enforcement/cases-proceedings/162-3024/vizio-inc-vizio-inscape-services-llc.

out. We received over 4,100 comments.

The Commission held a workshop on March 7, 2018 to collect additional information on various Rule-related issues, including the proposed amendments. The public comment period closed on April 6, 2018. We received and reviewed approximately 3,500 comments. FTC staff intends to submit a recommendation to the Commission by the end of the year.

The Honorable Mimi Walters

1. **As you know, the Franchise Rule requires franchisors to provide all potential franchisees with a disclosure document containing 23 specific items of information about the offered franchise, its officers, and other franchisees. As the FTC reviews all rules every ten years, I understand the next review of the Franchise Rule is due at the end of 2018.**

    a. **In light of the Administration's focus on deregulation, what are the FTC's plans for the Franchise Rule?**

    b. **Does the FTC plan to reconsider the Franchise Rule?**

    c. **If so, when do you anticipate commencing a review and public comment process on the rule?**

Response: The Commission routinely conducts a regulatory review of each of its trade regulation rules, including the Franchise Rule, about every 10 years. The regulatory review of the Franchise Rule is scheduled to begin by the end of 2018. The review will seek public comment, by means of a notice in the Federal Register, on whether the Rule is still needed to give prospective franchisees the information they need to make informed investment decisions and, if so, whether changes in the marketplace or technologies warrant any revisions to the Rule. The Commission is aware that both franchisor and franchisee stakeholders have supported the Franchise Rule since it was first issued in 1978, and will carefully consider all stakeholder comments on the continuing need for the Rule.

The Honorable Jeff Duncan

1. **Has the Federal Trade Commission (FTC) undertaken any studies or made any determinations related to the ability of the Federal or state governments to regulate alcohol beverage sales in the online marketplace?**

Response: In 1998, 2003, 2008, and 2014, the FTC released four studies on alcohol industry compliance with self-regulatory guidelines and concerns about youth access to alcohol marketing.[65] The studies recommended, among other things, that

[65] FTC Report, *Self-Regulation in the Alcohol Industry* (2014), https://www.ftc.gov/system/files/documents/reports/self-regulation-alcohol-industry-report-

companies take advantage of age-gating technologies offered by social media, including YouTube. These age gates on company websites should require consumers to enter their date of birth, rather than simply asking them to certify that they are of legal drinking age. The FTC also recommended that state regulatory authorities and others who are concerned about alcohol marketing should participate in the industry's external complaint review system when they see advertising that appears to violate the voluntary codes.

FTC recommendations from these studies resulted in agreements by the Beer Institute, the Distilled Spirits Council of the United States, and the Wine Institute to adopt improved voluntary advertising placement standards; buying guidelines for placing ads for alcoholic beverages on radio, in print, on television, and on the internet; a requirement that suppliers conduct periodic internal audits of past placements; and systems for external review of complaints about compliance.

In 2003, the FTC also issued a staff report concluding that e-commerce offers consumers lower prices and more choices in the wine market, and that states could expand e-commerce by permitting direct shipping of wine to consumers.[66]

2. **Does the FTC have specific jurisdiction and authority in which to regulate online marketplace platforms such as Craigslist, eBay, Facebook and others, in order to restrict or prohibit consumer to consumer sales of alcohol beverages that are facilitated through these platforms?**

Response: The FTC does not have specific authority to restrict or prohibit consumer-to-consumer sales of alcohol beverages unless those sales violate Section 5 of the FTC Act. Section 5 of the FTC Act prohibits unfair methods of competition and unfair or deceptive acts or practices in most areas of the economy not expressly exempted from the FTC Act. The FTC has used this authority to scrutinize proposed mergers in the alcohol industry under the FTC Act and the Clayton Act. The FTC also has used this authority to evaluate proposed mergers and potential anticompetitive or deceptive conduct in online marketplaces. In addition, through the FTC's competition advocacy program, FTC staff has provided information that may assist lawmakers and regulators in assessing the competitive impact of proposed laws and regulations related to alcoholic beverage sales. This authority complements the authority of other state and federal agencies.

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federal-trade-commission/140320alcoholreport.pdf; FTC Report, *Self-Regulation in the Alcohol Industry* (2008), https://www.ftc.gov/sites/default/files/documents/reports/self-regulation-alcohol-industry-report-federal-trade-commission/080626alcoholreport.pdf; *Alcohol Marketing and Advertising: A Fed. Trade Comm'n Report to Congress* (2003), https://www.ftc.gov/sites/default/files/documents/reports/alcohol-marketing-and-advertising-federal-trade-commission-report-congress-september-2003/alcohol08report.pdf; *Self-Regulation in the Alcohol Industry: A Fed. Trade Comm'n Report to Congress* (1999), https://www.ftc.gov/sites/default/files/documents/reports/self-regulation-alcohol-industry-federal-trade-commission-report-congress/1999_alcohol_report.pdf.

[66] *FTC, Possible Anticompetitive Barriers to E-Commerce: Wine* (2003), https://www.ftc.gov/sites/default/files/documents/reports/possible-anticompetitive-barriers-e-commerce-wine/winereport2_0.pdf

3. **Is the FTC working with the Tobacco Tax and Trade Bureau (TTB) and any state attorneys general or Alcohol Beverage Commission (ABC) Boards to monitor and regulate online liquor sales for the benefit and protection of the consumer?**

Response: The Commission routinely collaborates with other federal agencies on matters of common interest. The Commission and TTB (Alcohol and Tobacco Tax and Trade Bureau, part of the U.S. Treasury) are two of the fifteen federal agency members of the Interagency Coordinating Committee to Prevent Underage Drinking (ICCPUD). Each year, ICCPUD publishes a Report to Congress on the status of alcohol use by those under the legal drinking age. This annual Report includes a section that summarizes the status of state alcohol laws designed to prevent underage access to alcohol, including laws pertaining to online liquor sales and retailer interstate shipments of alcohol.[67] In addition, in 2010, we sent warning letters to manufacturers of four premixed caffeinated alcohol beverages, in coordination with TTB and FDA.[68] As a result, premixed caffeinated alcohol beverages are no longer on the market.

The Honorable Jan Schakowsky

1. **I'm concerned that the FTC is unable to keep up with all the consent decrees. If the FTC cannot ensure compliance, the consent decrees are not effective in stopping unfair and deceptive acts.**

    a. **How many consent decrees are currently active?**

Response: Most of the FTC's consumer protection orders are permanent federal court injunctions, and are all currently enforceable. However, absent any indication of violations, the agency ceases active compliance monitoring after specified periods, based on the likelihood of recidivism and the nature of the underlying violations. If red flags, such as an insider tip or a consumer complaint, reappear in any matter, active monitoring begins anew.

Over the past decade, the Commission obtained original final orders in 965 consumer protection matters—701 federal court matters and 264 administrative matters, all of which are currently enforceable.

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[67] *See, e.g.*, ICCPUD, *2017 Report to Congress in the Prevention and Reduction of Underage Drinking, State Reports*, https://alcoholpolicy.niaaa.nih.gov/sites/default/files/imce/users/u1743/stop_act_rtc_2017_state_reports_al-mt.pdf.

[68] See *FTC Sends Warning Letters to Marketers of Caffeinated Alcohol Drinks* (Press Release, Nov. 10, 2010) at https://www.ftc.gov/news-events/press-releases/2010/11/ftc-sends-warning-letters-marketers-caffeinated-alcohol-drinks. See *FTC, Alcohol Marketing and Advertising: A Report to Congress*, pages 3, 4 (2003) (describing 2001 joint FTC/TTB survey of flavored malt beverage alcohol placement at retail).

b. How many FTC employees review them?

Response: Thirty-three (33) attorneys currently review compliance with consumer protection orders, in addition to their other responsibilities. (Separate staff review compliance with competition orders.)

c. I understand that the Commission can request information from a company to ensure compliance with those consent decrees. With that many consent decrees, how does staff know what to ask for? How can you be sure the Commission is not missing violations?

Response: The Division of Enforcement's highly experienced attorneys have developed efficient and effective techniques and protocols. However, law enforcement is not a perfect science, and no enforcement agency can guarantee that it will not miss violations. Thus, like all law enforcement, the FTC vigorously pursues violators with contempt and order enforcement actions. The judgments and conduct relief obtained in these actions help deter future violations, even those we may not otherwise have detected. To effect this deterrence, the Commission has initiated 46 order enforcement actions in consumer protection matters during the last 13 years, obtaining judgments totaling nearly $500 million (24 contempt, 15 administrative enforcement, and 7 actions to lift suspended judgments).

d. I understand the FTC can require third-party monitoring reports. Are these full audits, and are these outside parties required to notify the FTC if they think a company is violating a consent decree?

Response: The Commission regularly requires third-party assessors in data security and privacy orders, but generally does not in its other cases because the technical compliance issues are not as complex. The assessments for Commission data security and privacy orders require the assessor to examine the practices of defendants/respondents, assess their compliance with the standards contained in the order, and certify the defendants/respondents are in active compliance. Thus, while there is no duty to notify the Commission of a violation, a failure to submit an initial assessment certifying that the company's privacy controls were operating effectively would provide such notice.

e. How does the FTC evaluate third-party monitors/auditors? Can the FTC require that a particular auditor be used or not used?

Response: Compliance attorneys have close, significant contact with third-party assessors, which allows staff to evaluate the assessors' work. The FTC's orders require the defendants/respondents either to obtain FTC approval of the monitor/auditor (e.g., the Commission's privacy orders), or that the monitor/auditor possess relevant credentials (e.g., data security orders).

f. When a consumer protection order is violated, what steps are taken to ensure that the violator is held accountable?

Response: Over the past decade, the FTC has established a comprehensive order enforcement program. First, the agency developed a proprietary database that collects information from the original case attorneys, allows the compliance attorney to systematically track his or her investigation, provides easy access to relevant documents, and issues alerts to prevent cases from falling through the cracks. A group of more than 30 experienced attorneys uses this database and the compliance monitoring tools contained in our orders to identify and investigate likely recidivists and bring enforcement actions.

The Commission enforces federal court orders directly by bringing contempt and de novo actions in its own name. Over the past 10 years, the Commission has initiated 24 contempt actions, and over a dozen new cases against recidivists. For example, when in 2015 it appeared that LifeLock had violated a 2010 order, the Commission launched an extensive investigation and then negotiated an order imposing a $100 million judgment, of which $67 million has been returned to consumers thus far.[69] Staff also works with our criminal law enforcement partners through the agency's Criminal Liaison Unit ("CLU Program") to enable criminal prosecution of the worst of these violators. For example, the FTC obtained a $38 million contempt judgment against Kevin Trudeau, while the CLU Program worked with the U.S Attorney's Office for the Northern District of Illinois.[70] Pursuant to these actions, a receiver has amassed over $10 million from Mr. Trudeau's various holdings, and he is serving a 10-year criminal sentence based on his contempt.

Courts may assess civil penalties for violations of administrative orders; the Department of Justice (DOJ) has the right of first refusal to litigate these cases.[71] Over the past decade, the agency has initiated 15 such cases. For example, when Google violated its Google Buzz order, the Commission negotiated a penalty of $22.5 million.[72]

2. **The Division of Privacy and Identity Protection, which oversees issues related to consumer privacy, data security, credit reporting, and identity theft, only has about 40 full-time employees. According to the Privacy Rights Clearinghouse, this year alone, there have been more than 240 data breaches involving more than 812 million records.**

    a. **How does the FTC determine which cases to bring or what investigations to open?**

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[69] *U.S. v. LifeLock*, Inc., No. 2:10-cv-00530-JJT (D. Ariz. Jan. 4, 2016), https://www.ftc.gov/enforcement/cases-proceedings/072-3069-x100023/lifelock-inc-corporation.
[70] *FTC v. Trudeau*, 662 F.3d 947 (7th Cir. 2011) (affirming $38 million civil contempt judgment against Kevin Trudeau); *United States v. Trudeau*, 812 F.3d 578 (7th Cir. 2016) (affirming criminal conviction of Kevin Trudeau for contempt and ten-year sentence).
[71] 15 U.S.C. 45(l).
[72] *U.S. v. Google Inc.*, No. 512-cv-04177-SI (N.D. Cal. Nov. 16, 2012), https://www.ftc.gov/enforcement/cases-proceedings/google-inc.

Response: The Commission generates cases from a number of sources, including consumer complaints submitted to the FTC's Consumer Sentinel database, academic research articles, press reports, petitions from consumer groups, and staff's own research and investigation. In evaluating whether to open a case to investigate a particular set of facts, the Commission staff develops information about the incident or practice and assesses factors such as the likelihood of a potential law violation, the types and quantity of information at issue, the potential consumer harm, and the number of individuals affected.

b. On average, how many investigations are ongoing in the Division of Privacy and Identity Protection at any given time?

Response: The number of investigations and other activities in the Division of Privacy and Identity Protection (DPIP) varies over time. Currently, DPIP staff are pursuing approximately 80 matters, which include investigations of particular companies, projects that may lead to additional investigations, and policy- or regulatory-focused projects (such as regulatory reviews, studies, and workshops). The agency's privacy- and security-related work is not limited to DPIP; staff in the FTC's regional offices also work on these issues. For example, our Midwest Regional Office recently brought a case against an online talent agency for violations of the Children's Online Privacy Protection Act.[73] In addition, the Bureau of Consumer Protection's Division of Enforcement enforces orders in the privacy and data security area. Other Bureau of Consumer Protection Divisions also engage in privacy-related work, such as Do Not Call enforcement and enforcement of the CAN-SPAM Act.

c. On average, how many cases are ongoing at any given time?

Response: In addition to the investigations described in 2.b. above, DPIP staff has been actively litigating one or two matters at any given time over the past few years.

d. On average, how many attorneys work on each case or investigation?

Response: On average, most investigations in DPIP are staffed by one or two staff attorneys. For more complex litigation matters, teams may include anywhere from 4 to 6 people.

e. Does it sometimes happen that attorneys are pulled from an investigation or case they are working on to work on a bigger or more newsworthy investigation or case? If so, please describe under what circumstances this transfer of personnel might occur. How does the Commission decide which cases take priority?

Response: Depending on the type of matter involved, it is often necessary to add more staff to litigate a matter than were needed to handle the investigation phase. Obviously,

[73] *U.S. v Prime Sites, Inc.* (Explore Talent), No. 2:18-cv-00199(D. NV. February 12, 2018). https://www.ftc.gov/enforcement/cases-proceedings/162-3218/prime-sites-inc-explore-talent.

this can present a challenge for managers, particularly when staffing large litigation teams, but the Commission has some flexibility to reassign attorneys as the flow of work demands. For example, matters are opened or closed with some frequency, and an attorney who closes an investigation is then available to assist a litigation team. When extraordinary resource constraints arise, the Commission can deploy resources across divisions and the regional offices.

f. What other resources could the FTC, particularly in the areas of consumer privacy, data security, credit reporting, and identity theft?

Response: I support a national data breach notification and data security law that would give the FTC APA rulemaking authority, jurisdiction over non-profits and common carriers, and the authority to seek civil penalties. If Congress were to determine that the Commission needs additional resources or authorities to tackle any of these important consumer protection issues, we would put them to good use. The FTC will host *Hearings on Competition and Consumer Protection in the 21st Century* this fall, which will include hearings on whether the agency needs additional tools in the privacy and data security area, specifically.

g. I am concerned about the push to close out cases. While a person should not be under investigation indefinitely, cases should not be closed just because staff are temporarily assigned other matters. Can you assure me that potential violators are not given a free pass because of this push to close out cases?

Response: Commission staff constantly open new matters for investigation, and close matters once they have determined the Commission would not have reason to believe that a company or individual under investigation has violated the law. I fully agree that cases should not be closed for resource issues alone, and I am unaware of any situations where this has happened. But as careful stewards of limited government resources, the agency must move matters along efficiently and effectively to their conclusion, whether that means filing an action or settlement, or closing an investigation so that companies are not under investigation indefinitely and resources can be redeployed to more promising cases. I strongly believe in vigorous law enforcement, and assure you that I will not push staff to close meritorious cases.

3. Is the FTC examining whether PBM mergers are driving up costs for consumers? With the understanding that the FTC cannot disclose nonpublic investigations, please explain what steps FTC will take, including but not limited to a retrospective review of past PBM mergers, to protect consumers and promote competition in the PBM industry.

Response: As you know, scrutiny of competitive issues relating to PBMs is part of the agency's ongoing mission to promote competition in health care. The FTC has examined the conduct of PBMs in various contexts, including during merger investigations, and as part of broad-based hearings on health care competition. Recently, the FTC hosted a

workshop with the FDA to examine pharmaceutical distribution practices, including the role of intermediaries such as PBMs and Group Purchasing Organizations. We held the workshop to deepen our understanding of various players in the pharmaceutical industry. In addition to presentations by experts in health care policy and economics, we also received over 300 public comments as part of the workshop, which identified additional areas of concern. Materials related to the workshop can be found on the FTC's website.[74]

We understand that there are concerns about PBM concentration and PBM practices. We are exploring the feasibility of conducting merger retrospective reviews of a number of industries, including PBMs, and we are committed to bringing enforcement actions against any company, including a PBM, that violates the laws that we enforce.

4. **At the hearing, I asked you whether the FTC could issue an advanced notice of proposed rulemaking (ANPR) or a notice of inquiry to collect data and get the process started on a data security rule. At the time you responded that the FTC "could certainly start a rulemaking under Mag-Moss," with the caveat that it could be time consuming and resource intensive. Regardless of whether Congress passes a law, is the FTC considering issuing an ANPR or notice of inquiry, or other pre-rulemaking efforts on data security right now? Why or why not? What are the benefits to doing this?**

   Response: The Commission is not currently considering initiating a Magnuson-Moss rulemaking process with respect to data security in lieu of Congressional action. I believe that Congressional action on this issue would send a strong signal about the importance of securing consumers' personal information, and would be necessary to accomplish key goals such as extending the Commission's jurisdiction to enable it to protect consumer information held by additional types of entities (e.g., non-profit entities and common carriers). As I noted at the hearing, Mag-Moss rulemaking procedures that the Commission has undertaken have typically been time-consuming endeavors taking many years.

5. **In August 2003, former Chairman Timothy Muris stated, "Sometimes robust competition alone will not punish or deter seller dishonesty." He cited as an example "credence goods," which are products for which "consumers cannot readily use their own experiences to assess whether the seller's quality claims are true." He noted that for such goods "the market may not identify and discipline a deceptive seller because the product's qualities are so difficult to measure."**

   a. **Do you agree or disagree with Chairman Muris's statement? Why or why not?**

   Response: I agree that robust competition alone will not always punish or deter dishonest sellers, including for credence goods.

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[74] FTC Workshop, *Understanding Competition in Prescription Drug Markets: Entry and Supply Chain Dynamics* (Nov. 8, 2017), https://www.ftc.gov/news-events/events-calendar/2017/11/understanding-competition-prescription-drug-markets-entry-supply.

b. What are examples of credence goods that fall within the FTC's jurisdiction?

Response: Many goods for which credence claims are made fall within the FTC's jurisdiction. Credence claims include country of origin claims as well as many claims about a product's health or environmental benefits or attributes.

i. Has the FTC taken law enforcement action against marketers of credence goods?

Response: The FTC has taken numerous law enforcement action against marketers of credence goods, including two recent settlements with manufacturers of products promoted as being made or built in the USA (Bollman Hat Company, Nectar Brand mattresses).[75] Other examples include four recent settlement with companies that claimed that their paints did not emit VOCs (Imperial Paint, ICP Construction, Benjamin Moore, and YOLO Colorhouse).[76] In each of these cases, while consumers received a valuable product and could assess the products' quality and functionality as hats, mattresses, or paint, consumers could not rely on their experience to assess the truth of the Made in USA or no VOC emission claims.

Similarly, many health products are credence goods; it can be impossible for a consumer to ascertain if the product is working. Many health conditions may wax and wane on their own, or over the passage of time, or the consumer may be making other medication changes or dietary or lifestyle changes, such that the consumer cannot attribute any changed health condition to a particular product. For products that claim to prevent or reduce the risk of a disease or health condition, consumers who do not get the disease or health condition cannot know whether it was due to the product.

Since November 2017, the FTC has brought five dietary supplement cases and a device case challenging claims of treating or preventing aging, hearing loss, memory loss, Alzheimer's, arthritis, HIV, high blood pressure, and weight loss, among other diseases or conditions.[77]

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[75] *See Bollman Hat Co.*, No. C-4643 (Apr. 17, 2017), https://www.ftc.gov/enforcement/cases-proceedings/172-3197/bollman-hat-company-matter; *Nectar Brand LLC*, Matter No. 1823038 (Mar. 20, 2018), (proposed consent agreement), https://www.ftc.gov/enforcement/cases-proceedings/182-3038/nectar-brand-llc.

[76] *Imperial Paints*, No. C-4647 (Apr. 27, 2018), https://www.ftc.gov/enforcement/cases-proceedings/162-3080/imperial-paints-matter; *ICP Construction, Inc.*, No. C-4648 (Apr. 27, 2018), https://www.ftc.gov/enforcement/cases-proceedings/162-3081/icp-construction-inc-matter; *Benjamin Moore & Co., Inc.*, No. C-4646 (Apr. 27, 2018), https://www.ftc.gov/enforcement/cases-proceedings/162-3079/benjamin-moore-co-inc-matter; *YOLO Colorhouse*, No. C-4649 (Apr. 27, 2018), https://www.ftc.gov/enforcement/cases-proceedings/162-3082/yolo-colorhouse-matter.

[77] *Telomerase Activation Sciences*, No. C-4644 (Apr. 19, 2018), https://www.ftc.gov/news-events/press-releases/2018/02/new-york-based-supplement-seller-barred-false-unsupported-health; *FTC v. Global Concepts Ltd.*, No. 0:18-cv-60990-NBF (S.D. Fla. May 2, 2018), https://www.ftc.gov/news-events/press-releases/2018/05/ftc-settlement-turns-down-volume-deceptive-sound-amplifier-ads; *FTC v. Marketing Architects*, No. 2:18-cv-00050 (D. Me. Feb. 5, 2018), https://www.ftc.gov/news-events/press-releases/2018/02/advertising-firm-barred-

ii. What type of monetary relief, if any, did the FTC obtain in these cases?

Response: The FTC has obtained large judgments, including money for consumer redress, in many of its recent cases involving health benefit claims. For example, the FTC obtained a $3,700,514 judgment against another dietary supplement manufacturer, with $800,000 paid for consumer redress (representing all of the funds the defendants were able to pay).[78] Although we have not historically sought consumer redress in our Made in USA or environmental benefit cases, we are reevaluating our approach.

c. In addition to credence goods, are there any other products, services, or industries under FTC's jurisdiction for which robust competition alone will not punish or deter seller dishonesty?

Response: Robust competition does not necessarily prevent deception in the marketplace. Even in competitive markets, numerous goods and services may involve deceptive claims or practices, such as where deceptive claims are difficult for consumers to detect in a timely manner, or at all; where market entry or exit is easy; and where many or most competitors are engaged in deceptive behavior. Particularly where marketing and selling is online, dishonest sellers are easily able to start up a new business if consumers complain, and to stop doing business with the old one. In addition, companies can buy fake online reviews to make it appear they have satisfied consumers and/or have been in business for a while, making it difficult for consumers to detect a dishonest seller.

The event ticket market and hotel industries are also areas where robust competition alone cannot be relied upon to punish or deter seller deception. The FTC has been active in bringing law enforcement actions to address deceptive advertising in the online event ticket and travel marketplaces. For example, in 2014, the FTC entered into settlements with TicketNetwork and two of its marketing partners[79] to prohibit them from misrepresenting that resale ticket websites were official venues or offering tickets at face value. Similarly, in 2017, the FTC settled charges that Reservation Counter, LLC[80] and related companies misled consumers to believe they were reserving hotel rooms from

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assisting-marketing-sale-weight-loss; *FTC v. Cellmark Biopharma*, No. 2:18-cv-00014-JES-CM (M.D. Fla. Jan. 12, 2018), https://www.ftc.gov/news-events/press-releases/2018/01/marketers-barred-making-deceptive-claims-about-products-ability; *FTC v. NextGen Nutritionals*, No. 8:17-cv-02807-CEH-AEP (M.D. Fla. Jan. 11, 2018), https://www.ftc.gov/news-events/press-releases/2017/11/florida-based-supplement-sellers-settle-ftc-false-advertising; *FTC v. Health Research Labs LLC*, No. 2:117-cv-00467-JDL (D. Me. Nov. 30, 2017), https://www.ftc.gov/news-events/press-releases/2017/11/supplement-sellers-settle-ftc-state-maine-false-advertising.

[78] *FTC and State of Maine v. Health Research Laboratories, LLC et al.*, Case 2:17-cv-00467 (D. Maine 2017), https://www.ftc.gov/enforcement/cases-proceedings/152-3021/health-research-laboratories-llc

[79] *FTC and State of Connecticut v, TicketNetwork, Inc.; Ryadd, Inc.; and SecureBoxOffice, LLC, et al.*, No. 3:14-cv-1046 (D.Conn.. Jul. 23, 2014), https://www.ftc.gov/enforcement/cases-proceedings/132-3203-132-3204-132-3207/ticketnetwork-inc-ryadd-inc-secureboxoffice.

[80] *Federal Trade Commission v. Reservation Counter* 2:17-cv-01304 (D. Utah. Dec. 21, 2017) https://www.ftc.gov/enforcement/cases-proceedings/152-3219/reservation-counter-llc.

advertised hotels. In these industries, competition appears to encourage a race to the bottom, rather than serving to deter deceptive conduct. This is particularly true with respect to "drip" pricing, where an initially low price attracts consumers but additional costs or fees are revealed later in the purchase process. Those sellers whose initial price fully discloses all the fees will appear to be more expensive than, and thus risk losing market share to, those who misleadingly quote an initially lower price.

6. **You testified that in cases involving fraud, the FTC's existing Section 5 authority, which includes ancillary relief such as restitution and disgorgement "probably is sufficient." However, many of FTC's fraud cases allege both violations of Section 5 as well as violations of a regulation. Allegations of violations of a regulation, of course, allow the FTC to pursue civil penalties in those Section 5 for which the Commission would not otherwise be able to pursue**

    a. **What are some examples of fraud cases not involving a violation of a regulation for which civil penalties would be helpful, such as online giving portal scams?**

Response: In the vast majority of fraud cases brought by the FTC, the ability to obtain civil penalties would provide little, or no, practical advantage. For example, every telemarketing fraud case involves both violations of Section 5 and violations of the Telemarketing Sales Rule, for which civil penalties are available. However, the Commission has found that it can move more quickly and obtain full relief without seeking civil penalties in those cases, for two reasons. First, the amount of consumer injury is typically equal to the total revenues of the enterprise, and the Commission seeks that amount as equitable restitution. For equitable restitution, unlike civil penalties, ability to pay is not a factor in determining the judgment amount. Therefore, the FTC seeks and is often rewarded a judgment that far exceeds the combined assets of all defendants. There is no available remaining money for a civil penalty. Second, the FTC has been highly successful bringing its own fraud enforcement cases for equitable relief in federal district court. Because these are equitable proceedings, the cases are tried before a judge and move more quickly than civil penalties proceedings, which generally are tried by the Department of Justice before a jury.

    b. **What are some examples of non-fraud cases for which civil penalties would be helpful, such as cases involving vaping products marketed to teens?**

Response: For many years, there has been full bipartisan Commission support for legislation that would provide the Commission with the authority to seek civil penalties in data security cases. I continue to support that position.

The Honorable Doris Matsui

1. **Patients in my district are very concerned about the skyrocketing prices of prescription drugs. One way that we can keep drug prices lower is by ensuring competition in the marketplace and encouraging the entry of generic drugs.**

Brand-name drug-makers are incentivized to delay the entry of generic competition to their products, because the longer they have a monopoly, the longer they can charge higher prices. Therefore, some brand-name drug makers have found ways to extend the time that their drug is the only one on the market. One such scheme includes buying off generic drugs with "pay-for-delay" agreements - where the brand-name drug maker pays the generic drug manufacturer to stay off the market longer.

a. What is the Commission doing to review or prevent "pay-for-delay" agreements due to their anti-competitive nature?

Response: For over twenty years and on a bipartisan basis, one of the Commission's top priorities has been to put an end to anticompetitive reverse payment agreements in which a brand-name drug firm pays its potential generic rival to give up its patent challenge and agree not to launch a lower cost generic product. The FTC continues to devote significant resources to this effort, as the foregone savings to consumers can be significant. Moreover, anticompetitive reverse payment agreements undermine the regulatory framework of the Hatch-Waxman Act, which was intended to speed up the entry of generic drugs.

Following the U.S. Supreme Court's 2013 decision in *FTC v. Actavis, Inc.*,[81] the Commission is in a much stronger position to challenge agreements of this type, and recently, the district court on remand denied the defendants' motion for summary judgment in that case, clearing it for trial.[82] In addition, since *Actavis*, the FTC obtained a landmark $1.2 billion settlement from the maker of sleep disorder drug Provigil,[83] and other manufacturers have agreed to abandon the practice of pay for delay.[84] Currently, the FTC has three other matters pending in litigation challenging reverse payment agreements.[85] FTC staff also monitors private litigation to leverage our expertise and file amicus briefs where appropriate. Finally, we review agreements filed with the FTC as required by the Medicare Prescription Drug, Improvement and Modernization Act (also known as MMA filings), and publish an annual report on the number of final patent settlements filed as well as the incidence

[81] *FTC v. Actavis, Inc.*, 570 U.S. 756 (2013).
[82] *FTC v. Actavis, Inc.*, No. 1:09-MD-2084 (N.D. Ga. Jun. 14, 2018).
[83] Press Release, *FTC Settlement of Cephalon Pay for Delay Case Ensures $1.2 Billion in Ill-Gotten Gains Relinquished; Refunds Will Go To Purchasers Affected by Anticompetitive Tactics* (May 28, 2015), https://www.ftc.gov/news-events/press-releases/2015/05/ftc-settlement-cephalon-pay-delay-case-ensures-12-billion-ill.
[84] Joint Motion for Entry of Stipulated Order for Permanent Injunction, *FTC v. Allergan plc*, No. 17-cv-00312 (N.D. Cal. Jan. 23, 2017), https://www.ftc.gov/enforcement/cases-proceedings/141-0004/allergan-plc-watson-laboratories-inc-et-al (Endo agreed to enter a joint motion to stipulate to an Order for a permanent injunction) and Stipulated Order for Permanent Injunction, *FTC v. Teikoku Pharma USA, Inc.*, No. 16-cv-01440 (E.D. Pa. Mar. 30, 2016), https://www.ftc.gov/enforcement/cases-proceedings/141-0004/endo-pharmaceuticals-impax-labs.
[85] *In re Impax Laboratories, Inc.*, Dkt. 9373 (complaint filed Jan. 23, 2017); *FTC v. Allergan plc*, No. 17-cv-00312 (N.D. Cal. Jan. 23, 2017); *FTC v. Abbvie Inc.*, No. 14-cv-5151 (E.D. Pa. Sept. 8, 2014), https://www.ftc.gov/enforcement/cases-proceedings/121-0028/abbvie-inc-et-al (appealing dismissal of reverse payment claim to Third Circuit).

of certain terms that may operate as anticompetitive reverse-payment agreements between the brand and a generic entrant.[86]

b. **Is the Commission reviewing other similar anti-competitive behaviors in the drug manufacturer space? Can the Commission commit to remaining active in this area?**

Response: The Commission is, and will remain, vigilant to stop other types of anticompetitive conduct by pharmaceutical manufacturers. For instance, the Commission also has challenged anticompetitive unilateral conduct by drug manufacturers to maintain a monopoly, such as abusing government processes through sham litigation or repetitive regulatory filings intended to slow the approval of competitive drugs. In a recent FTC case, a federal court found that AbbVie Inc. used sham litigation to illegally maintain its monopoly over the testosterone replacement drug Androgel, and ordered $493.7 million in monetary relief to those who were overcharged for Androgel as a result of AbbVie's conduct. This case, which is currently on appeal, represents the first time any court has found on the basis of a full record that sham litigation violated Section 2 of the Sherman Act. Additionally, the FTC has brought a case against ViroPharma alleging serial sham petitioning before the FDA that had the purpose and effect of delaying generic competition. This matter also is currently on appeal. In addition, the Commission recently filed an amicus brief in private litigation involving counterclaims of sham litigation, urging the court not to expand Noerr-Pennington protection to all patent infringement suits brought under the provisions of the Hatch-Waxman Act.[87]

The Commission has also raised concerns about pharmaceutical conduct related to restricted distribution systems, including Risk Evaluation and Mitigation Strategies ("REMS"). REMS help protect the public from potential safety risks associated with a drug, but they have also provided branded companies with opportunities to delay generic entry. In a recent submission to the Department of Health and Human Services regarding its Blueprint to Lower Drug Prices and Reduce Out-of-Pocket Costs,[88] the FTC highlighted two ways in which branded drug makers may abuse REMS requirements. First, branded manufacturers have relied on REMS requirements when refusing to make samples of their products available to generic drug makers seeking to test their product and obtain FDA approval. Second, the branded manufacturer may deny the generic firm access to a single, shared REMS system, which also prevents the FDA from approving the drug. Either strategy undermines the careful balance between competition and innovation that Congress established in the Hatch-Waxman Act and the Biologics Price Competition and

[86] MMA reports are posted on the FTC website at https://www.ftc.gov/tips-advice/competition-guidance/industry-guidance/health-care/pharmaceutical-agreement-filings.
[87] FTC Brief as Amicus Curiae, *Takeda Pharmaceutical Co. v. Zydus Pharmaceuticals* (Jul. 2, 2018), https://www.ftc.gov/policy/advocacy/amicus-briefs/2018/06/takeda-pharmaceutical-company-limited-et-al-v-zydus.
[88] *See* Press Release, *FTC Submits Statement to HHS on its Blueprint to Lower Drug Prices* (July 17, 2018), https://www.ftc.gov/news-events/press-releases/2018/07/ftc-submits-statement-hhs-its-blueprint-lower-drug-prices.

Innovation Act. I support the goals of legislation that would effectively protect against abuse of the REMS process to delay generic entry.

2. **One core function of the Commission's mission is to protect consumers from scams. With the continued growth of online commerce, there has been an increase in online booking scams that potentially mislead consumers using fraudulent websites.**

    a. **What further attention do you believe the Commission should be giving to this and similar issues as part of the Commission's overall effort to prevent online scams?**

Response: The Commission has a strong interest in protecting consumer confidence in the online marketplace, including, for example, the online markets for event tickets and travel. The FTC has been active in bringing law enforcement actions to address deceptive advertising in these areas. For example, in 2014, the FTC entered into settlements with online ticket reseller TicketNetwork and two of its marketing partners[89] to prohibit them from misrepresenting that resale ticket websites were official venues or offering tickets at face value. Similarly, in 2017, the FTC settled charges that Reservation Counter, LLC[90] and related companies misled consumers to believe they were reserving hotel rooms from advertised hotels.

In 2015, the FTC issued consumer education to caution consumers about third-party websites that may deceptively mimic hotel websites.[91] FTC staff also has met with members of Congress and stakeholders in the hotel and event ticket industries to discuss deceptive travel and event ticket websites. We also have provided comments on proposed legislation addressing the same. Working with various online platforms to reduce the likelihood that consumers see fraudulent ads and providing additional industry guidance could be useful as well. Finally, more consumer guidance could help consumers identify and protect themselves from these types of online scams.

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[89] *FTC and State of Connecticut v, TicketNetwork, Inc.*; *Ryadd, Inc.; and SecureBoxOffice, LLC, et al.*, No. 3:14-cv-1046 (D.Conn.. Jul. 23, 2014); https://www.ftc.gov/enforcement/cases-proceedings/132-3203-132-3204-132-3207/ticketnetwork-inc-ryadd-inc-secureboxoffice.

[90] *FTC v. Reservation Counter* 2:17-cv-01304 (D. Utah. Dec. 21, 2017), https://www.ftc.gov/enforcement/cases-proceedings/152-3219/reservation-counter-llc.

[91] FTC Consumer Blog, *Did You Book That Night at the Hotel's Site?* (July 14, 2015), www.consumer.ftc.gov/blog/2015/07/did-you-book-night-hotels-site.

House Energy and Commerce Committee
"Oversight of the Federal Trade Commission"
July 18, 2018
Questions for Rohit Chopra, Commissioner, Federal Trade Commission

Additional Questions for the Record

The Honorable Jan Schakowsky

1. **In the past, FTC staff has recommended that Congress enact broad baseline privacy legislation. They made the recommendation in the Commission's 2012 privacy report and they made it again in the 2015 report on the Internet of Things. And former Chairwoman Edith Ramirez testified before this Subcommittee in 2013 that they were supportive of baseline Federal privacy legislation. I have also been advocating for comprehensive privacy legislation to provide a framework for companies and to protect Americans' privacy from unwanted intrusion and to give consumers back control of their own data. Understanding that the devil is in the details, yes or no, do you support the concept of comprehensive privacy legislation?**

   Response: Yes.

2. **Should the FTC be examining whether PBM mergers are driving up costs for consumers? With the understanding that the FTC cannot disclose nonpublic investigations, please explain what steps the FTC can take, including but not limited to a retrospective review of past PBM mergers, to protect consumers and promote competition in the PBM industry.**

   Response: The high cost of prescription drugs is a severe problem for families in our country. I agree that the FTC must closely monitor pharmacy benefit managers to ensure that anticompetitive practices are not making problems worse for patients and their families. Congress granted the FTC broad authorities to collect information and publish data on business practices in our marketplace. In addition to enforcement and research, I would like the FTC to work closely with state attorneys general and other federal agencies to confront the high cost of drugs.

   It is clear the Administration is also deeply concerned about the role of PBMs. According to a February 2018 report by the White House Council of Economic Advisers, "three PBMs account for 85 percent of the market, which allows them to exercise undue market power against manufacturers and against the health plans and beneficiaries they are supposed to be representing, thus generating outsized profits for themselves." This is a bipartisan issue that requires close attention.

3. **At the hearing, I explored whether the FTC could issue an advanced notice of proposed rulemaking (ANPR) or a notice of inquiry to collect data and get the process started on a data security rule. Regardless of whether Congress passes a law, should the FTC consider issuing an ANPR or notice of inquiry, or other pre-**

rulemaking efforts on data security right now? Why or why not? What are the benefits to doing this?

Response: As I noted in the hearing, the United States should lead on privacy and data security. In general, rulemaking enables the Commission to collect information through a participatory process. It gives market actors and individuals an opportunity to weigh in on an issue that will affect them. It also enables the FTC to propose a rule based on rigorous analysis and comprehensive study.

A request for information on a data security rule can supplement information and insights already collected by the FTC and could give the agency a head start on finalizing a rule, should Congress grant the FTC authority to finalize a rule pursuant to the Administrative Procedure Act.

4. **I'm concerned that the FTC is unable to keep up with all the consent decrees. If the FTC cannot ensure compliance, the consent decrees are not effective in stopping unfair and deceptive acts.**

    a. **I understand that the Commission can request information from a company to ensure compliance with those consent decrees. With that many consent decrees, how does staff know what to ask for? How can you be sure the Commission is not missing violations?**

    Response: Given the extremely meager resources that Congress allocates to the FTC, the agency must prioritize its resources accordingly. While I believe the agency works to ensure compliance with consent decrees, I believe our budgetary constraints have increased the risk of missing violations.

    This is why it is critical that order violations face significant consequences. There must be a clear understanding in the marketplace that FTC orders are not suggestions.

    b. **I understand the FTC can require third-party monitoring reports. Are these full audits, and are these outside parties required to notify the FTC if they think a company is violating a consent decree?**

    Response: The terms of third-party monitoring provisions can vary based on the settlement. Although third-party monitors can serve a useful purpose in certain cases, their independence can be compromised,[1] and the FTC must be vigilant in ensuring their incentives are sufficiently aligned.

[1] *See, e.g.*, Agreement, NY State Dept. of Financial Services, In the Matter of Promontory Financial Group, LLC (Aug. 18, 2015), https://www.dfs.ny.gov/about/ea/ea150818.pdf; Agreement, NY State Dept. of Financial Services, In the Matter of Deloitte Financial Advisory Services LLP (Jun. 18, 2013), https://www.dfs.ny.gov/about/ea/ea130618.pdf.

c. **How does the FTC evaluate third-party monitors/auditors? Can the FTC require that a particular auditor be used or not used?**

Response: The FTC should never sign onto settlements that allow lawbreaking firms to shop around for acquiescent auditors. In selecting or approving auditors, the Commission should carefully examine a firm's track record and be vigilant about overseeing its activities throughout the duration of the order.

d. **When a consumer protection order is violated, what steps are taken to ensure that the violator is held accountable?**

Response: When companies violate orders, this is usually the result of serious management dysfunction, a calculated risk that the payoff of skirting the law is worth the expected consequences, or both. Either of these explanations requires serious remedies that address the underlying causes of noncompliance, and not just the effects.

In addition to civil penalties, I would like to see the Commission pursue a broad range of remedies to correct underlying deficiencies.

e. **You have been especially concerned about stopping repeat offenders. Does the Commission have the tools and resources it needs to track compliance with the consent decrees? What would help?**

Response: Corporate recidivism is a problem for federal law enforcement agencies writ large. While we have strong tools, I am concerned about the level of resources Congress has allocated to the FTC to meet the challenges of the day.

5. **Last year, this Subcommittee held a hearing on the data breach at Equifax. It was a particularly large breach, which concerned many consumers especially because so many consumers had never heard of Equifax and had no idea that a company they had never heard of could have so much of their personal information. I know the FTC has announced that it is investigating the Equifax breach and that you cannot comment on the details. But I have some questions about the general privacy and data security concerns that were brought up by that breach.**

a. **If a breach occurs at a credit bureau, the FTC could bring a case under the Safeguards Rule, right?**

Response: The Safeguards Rule applies to nonbank financial institutions, including credit bureaus.

Some credit reporting agencies also function as data brokers for advertising and other purposes. Equifax, for example, has its consumer reporting services as well as many services for business like digital marketing, real estate and property analytics, and income and employment verifications. We were told that in the case of the

Equifax breach, the database that was accessed was not from the credit bureau side. The data was collected through Equifax's other businesses.

b. If there is a breach of a data broker, would that breach come under the Safeguards Rule?

Response: Any financial institution, or company that is "significantly engaged" in providing financial products or services is subject to the Safeguards Rule. Many data brokers may meet this criterion.

c. Does it make sense to you that consumers' data held by the same company in different databases are treated differently under the law?

Response: Massive amounts of consumer data are collected, stored, shared, and sold by companies that are not subject to clear guidelines on data security. In order to facilitate trust in the marketplace, consumers need to be confident that their sensitive data is secure.

d. What recommendations do you have to address this discrepancy?

Response: The marketplace would benefit from Congress granting the FTC authority to develop data security rules using procedures pursuant to the Administrative Procedure Act. Violations of these rules should be subject to civil penalties to create sufficient deterrence against improper, lax practices.

The Honorable Doris Matsui

1. **Patients in my district are very concerned about the skyrocketing prices of prescription drugs. One way that we can keep drug prices lower is by ensuring competition in the marketplace and encouraging the entry of generic drugs. Brand-name drug-makers are incentivized to delay the entry of generic competition to their products, because the longer they have a monopoly, the longer they can charge higher prices. Therefore, some brand-name drug makers have found ways to extend the time that their drug is the only one on the market. One such scheme includes buying off generic drugs with "pay-for delay" agreements - where the brand-name drug maker pays the generic drug manufacturer to stay off the market longer.**

a. What is the Commission doing to review or prevent "pay-for-delay" agreements due to their anti-competitive nature?

Response: The Commission closely monitors settlements of patent litigation between manufacturers of branded and generic versions of the same drug. The Commission has worked hard to reduce the anticompetitive effects of these settlements.

At the same time, I am concerned that these settlements may evolve in ways that require ongoing enforcement resources by the Commission, which are already stretched thin.

It will be important for the FTC to share with Congress any potential legislative changes that could help reduce the anticompetitive effects of these settlements.

b. Is the Commission reviewing other similar anti-competitive behaviors in the drug manufacturer space? Can the Commission commit to remaining active in this area?

Response: The Commission recently filed an amicus brief in the Mylan/Warner-Chilcott case, which was supportive of private action against "product hopping" conduct, in which a branded firm makes a small change to its product so that the generic version can no longer be automatically substituted by pharmacists, thereby prolonging their monopoly far beyond the original patent. While the Commission has not brought any product hopping cases, doing so is worthy of serious consideration.

I am also concerned about so-called "killer acquisitions," where a company purchases a product line from another firm to prevent that product line from competing with the acquirer's. In addition, I am aware of concerns about "patent thicketing," where companies protect patented drugs by filing many other ancillary patents that can be weaponized against potential generic competition. We should also closely monitor whether patent holders are withholding samples from generic manufacturers in ways that harm competition.

2. One core function of the Commission's mission is to protect consumers from scams. With the continued growth of online commerce, there has been an increase in online booking scams that potentially mislead consumers using fraudulent websites.

a. What further attention do you believe the Commission should be giving to this and similar issues as part of the Commission's overall effort to prevent online scams?

Response: Online booking scams pose serious harms to families that save up for months, or even years, for a family vacation or to visit a loved one. In addition to travel booking scams, there are ongoing concerns about risks to consumers and competition with respect to travel websites, especially those offering hotels. This is an important area to examine, given the volume of consumer spend on travel and hospitality.

A key tool in the arsenal to fight scammers who are targeting Americans is our Consumer Sentinel Database. The database is populated by our Consumer Sentinel Network, which collects complaints and law enforcement tips from across the country, and makes them available to law enforcement offices to help

root out and stop crimes against consumers. Unfortunately, there are large information gaps in the database, including a number of non-participating state attorneys general. Filling these gaps and making the Consumer Sentinel Database a true clearinghouse is critical to combat scams.

Responses for the Record From the Hearing on "Oversight of Federal Trade Commission"
(July 18, 2018)
Noah Joshua Phillips, Commissioner, Federal Trade Commission

The Honorable Robert E. Latta

1. **One of the digital trade issues that we hear about, particularly from small and medium sized businesses, is the EU-U.S. Privacy Shield framework. This framework allows for the transfer of data between the EU and the United States, mutually benefitting thousands of companies and consumers on both sides of the Atlantic and resulting in over $1 trillion dollars in commerce.**

    a. **What is the FTC doing to support the U.S. Government in the upcoming annual review of the framework, and how many enforcement cases has the FTC brought to enforce our commitments under the Privacy Shield? Do you commit to working with other Federal departments and agencies to support U.S. businesses that rely on the Privacy Shield?**

The EU-U.S. Privacy Shield Framework is a voluntary mechanism that companies of all sizes can use to promise certain protections for data transferred from Europe to the United States, thus facilitating the transfer of personal data from the EU with strong privacy protections. The FTC enforces those promises by Privacy Shield participants under its jurisdiction,[1] bringing violation cases under Section 5 of the FTC Act. The Commission is committed to the success of the EU-U.S. Privacy Shield Framework, a critical tool for protecting privacy and enabling cross-border data flows. The upcoming annual review of the Privacy Shield framework is in October 2018 and the Commission is engaged wholeheartedly in efforts to make the review as successful as possible. Chairman Simons and members of the FTC's Office of International Affairs and Division of Privacy & Identity Protection will be traveling to Brussels in October to advocate for the U.S. and to ensure the success of the annual review.

The Commission also is committed to continue to work with other agencies in the U.S. government and with its partners in Europe to ensure businesses and consumers can continue to benefit from Privacy Shield and other cross-border data transfer programs. A key focus of the FTC's international privacy efforts is support for global interoperability of data privacy regimes. The FTC works with the U.S. Department of Commerce on three key cross-border data transfer programs for the commercial sector: the EU-U.S. Privacy Shield, the Swiss-U.S. Privacy Shield, and the Asia-Pacific Economic Cooperation (APEC) Cross-Border Privacy Rules (CPBR) System. As noted above, the Privacy Shield programs provide legal mechanisms for companies to transfer personal data from the EU and Switzerland to the United States with strong privacy protections. The APEC CBPR system is a voluntary, enforceable code of conduct protecting personal information transferred among the United States and other APEC economies. The FTC also works closely with agencies developing and implementing new privacy and data security laws in Latin America and Asia. And, the FTC convenes discussions on important and emerging privacy trends. For example, the agency recently hosted the 49th Asia Pacific Privacy Authorities

[1] *See* www.privacyshield.gov and www.ftc.gov/tips-advice/business-center/privacy-and-security/privacy-shield. Companies can also join a Swiss-U.S. Privacy Shield for transfers from Switzerland.

forum in San Francisco, which addressed privacy issues such as artificial intelligence, data breach notification, and cross-border data flows.[2]

The FTC is committed to the success of these cross-border transfer mechanisms. Carrying out its enforcement role under these international privacy frameworks, the FTC has brought 47 actions – 39 under an older "U.S.-EU Safe Harbor" program, four under APEC CBPR, and four under Privacy Shield.[3] Most recently, the FTC charged a California company, ReadyTech, with falsely claiming that it was in the process of being certified as Privacy Shield compliant.[4] As part of its settlement with the FTC, ReadyTech is prohibited from misrepresenting its participation in any privacy or security program. Privacy Shield is and will remain a priority for the agency.

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[2] FTC Press Release, *FTC Hosts Semi-Annual Forum for Asia Pacific Privacy Authorities* (June 27, 2018), https://www.ftc.gov/news-events/press-releases/2018/06/ftc-hosts-semi-annual-forum-asia-pacific-privacy-authorities.

[3] *See, e.g.*, *Md7, LLC*, No. C-4629 (Nov. 29, 2017) (Privacy Shield), https://www.ftc.gov/enforcement/cases-proceedings/172-3172/md7-llc; *Tru Communication, Inc.*, No. C-4628 (Nov. 29, 2017) (Privacy Shield), https://www.ftc.gov/enforcement/cases-proceedings/172-3171/tru-communication-inc; *Decusoft, LLC*, No. C-4630 (Nov. 29, 2017) (Privacy Shield), https://www.ftc.gov/enforcement/cases-proceedings/172-3173/decusoft-llc; *Sentinel Labs, Inc.*, No. C-4608 (Apr. 14, 2017) (APEC CBPR), https://www.ftc.gov/enforcement/cases-proceedings/162-3250/sentinel-labs-inc; *Vir2us, Inc.*, No. C-4609 (Apr. 14, 2017) (APEC CBPR), https://www.ftc.gov/enforcement/cases-proceedings/162-3248/vir2us-inc; *SpyChatter, Inc.*, No. C-4614 (Apr. 14, 2017) (APEC CBPR), https://www.ftc.gov/enforcement/cases-proceedings/162-3251/spychatter-inc.

[4] *ReadyTech Corp.*, Matter No. 1823100 (July 2, 2018), https://www.ftc.gov/enforcement/cases-proceedings/182-3100/readytech-corporation-matter.

The Honorable Michael C. Burgess

1. **Commissioner Phillips, it has been brought to my attention that certain lawsuit advertisements deceptively display an FDA logo or mislead viewers by depicting an actor dressed as a physician urging folks to stop taking certain medications. Such tactics have led to some of our most vulnerable members of society to stop taking medication they need and, in some instances, has even resulted in death. This issue is literally a matter of life and death. Can you explain to me what steps the FTC plans to take to address this and will you commit to working with us on this very serious matter moving forward?**

Advertising plays a critical role in our economy, providing consumers with valuable information. However, to be useful, advertising must not be misleading. The FTC Act prohibits deceptive and unfair acts or practices. The examples of lawsuit advertisements that you describe are indeed troubling and could constitute deceptive or unfair practices depending upon the facts of the case. To establish that an advertisement is deceptive requires a showing that (1) there was a representation or omission, (2) the representation or omission was likely to mislead consumers acting reasonably under the circumstances, and (3) the representation or omission was material.[5] To establish that a practice is unfair requires a showing that an act or practice is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or competition.[6]

The FTC is monitoring attorney advertising that solicits people who may have been harmed by prescription drugs or medical devices to determine whether such advertising is misleading and likely to cause harm to consumers. Depending on the results of our search, we will consider all available options, including law enforcement actions, warning letters, and consumer education. We also are consulting with the FDA to determine how we may assist each other on this topic. I commit to working with Congress and others on this very serious matter.

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[5] *See* Federal Trade Commission Policy Statement on Deception, *appended to Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174 (1984).

[6] Federal Trade Commission Policy Statement on Unfairness, *appended to Int'l Harvester Co.*, 104 F.T.C. 949, 1070 (1984).

House Energy and Commerce Committee
"Oversight of the Federal Trade Commission"
July 18, 2018
Questions for Rebecca Kelly Slaughter, Commissioner, Federal Trade Commission

Additional Questions for the Record

The Honorable Jan Schakowsky

1. **In the past, FTC staff has recommended that Congress enact broad baseline privacy legislation. They made the recommendation in the Commission' s 2012 privacy report and they made it again in the 2015 report on the Internet of Things. And former Chairwoman Edith Ramirez testified before this Subcommittee in 2013 that they were supportive of baseline Federal privacy legislation.**

2. **I have also been advocating for comprehensive privacy legislation to provide a framework for companies and to protect Americans' privacy from unwanted intrusion and to give consumers back control of their own data. Understanding that the devil is in the details, yes or no, do you support the concept of comprehensive privacy legislation?**

   Response: Yes, I support the concept of comprehensive privacy and data security legislation.

   Should the FTC be examining whether PBM mergers are driving up costs for consumers? With the understanding that the FTC cannot disclose nonpublic investigations, please explain what steps the FTC can take, including but not limited to a retrospective review of past PBM mergers, to protect consumers and promote competition in the PBM industry.

   Response: The high cost of prescription drugs is a critical concern for me and it is important to fully understand the impact PBMs have on competition in the drug supply chain. Merger retrospectives in particular can help the FTC determine how its work affects markets, competition, and consumers. I understand that the Commission is currently exploring the feasibility of conducting merger retrospective reviews in a number of industries, including PBMs.

3. **At the hearing, I explored whether the FTC could issue an advanced notice of proposed rulemaking (ANPR) or a notice of inquiry to collect data and get the process started on a data security rule. Regardless of whether Congress passes a law, should the FTC consider issuing an ANPR or notice of inquiry, or other pre-rulemaking efforts on data security right now? Why or why not? What are the benefits to doing this?**

   Response: Unfortunately, the FTC does not currently have practical rulemaking authority in the area of data security that would justify issuing an advanced notice of proposed rulemaking. The FTC can, however, contribute to the process of developing data security legislation through its own expertise, research, public fora and invitations for public

comment. For example, the FTC is holding a series of public hearings this fall and has invited public comment on a number of topics, including the intersection between privacy, big data and competition and the FTC's remedial authority to deter unfair and deceptive conduct in privacy and data security matters.[1] I am hopeful that the commentary and discussions born of these hearings will provide meaningful insights into the type of data security legislation that would be most beneficial to consumers.

4. **I'm concerned that the FTC is unable to keep up with all the consent decrees. If the FTC cannot ensure compliance, the consent decrees are not effective in stopping unfair and deceptive acts.**

   a. **I understand that the Commission can request information from a company to ensure compliance with those consent decrees. With that many consent decrees, how does staff know what to ask for? How can you be sure the Commission is not missing violations?**

      Response: The Division of Enforcement's highly experienced attorneys have developed efficient and effective techniques and protocols to monitor compliance, including through periodic requests for information. However, law enforcement is not a perfect science and our resources are limited. In the absence of additional resources, we can most effectively triage what we have by pursuing violators with contempt and order enforcement actions. The judgments and conduct relief obtained in these actions can help deter future violations, even those we may not otherwise have detected. To effect this deterrence, the Commission has initiated 46 order enforcement actions in consumer protection matters during the last 13 years, obtaining judgments totaling nearly $500 million (24 contempt, 15 administrative enforcement, and 7 actions to lift suspended judgments).

   b. **I understand the FTC can require third-party monitoring reports. Are these full audits, and are these outside parties required to notify the FTC if they think a company is violating a consent decree?**

      Response: The Commission regularly requires third-party assessors in data security and privacy orders, but typically does not in its other cases because the technical compliance issues are not as complex.[2] The assessments for Commission data security and privacy orders require the assessor to examine the practices of the defendants, assess their compliance with the standards contained in the order, and certify that the defendants are in active compliance. Thus, while in the past, the third party has had no affirmative duty to notify the Commission of a violation, a failure to submit an initial assessment

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[1] *See* Press Release, FTC Announces Hearings On Competition and Consumer Protection in the 21st Century (June 20, 2018), *available at* https://www.ftc.gov/news-events/press-releases/2018/06/ftc-announces-hearings-competition-consumer-protection-21st.

[2] One notable recent order addressing conduct other than data security and privacy that requires a third-party monitor is the Commission's stipulated order resolving allegations against Herbalife. *See* Press Release, Herbalife Will Restructure Its Multi-level Marketing Operations and Pay $200 Million For Consumer Redress to Settle FTC Charges (July 15, 2016), *available at* https://www.ftc.gov/news-events/press-releases/2016/07/herbalife-will-restructure-its-multi-level-marketing-operations.

certifying that the company's privacy controls were operating effectively would provide such notice.[3]

The Commission is currently engaged in a broad review of whether we are using every available remedy as effectively as possible and considering how to best structure third-party monitoring provisions is a question that must receive thoughtful consideration.

c. **How does the FTC evaluate third-party monitors/auditors? Can the FTC require that a particular auditor be used or not used?**

Response: Compliance attorneys generally have significant contact with third-party assessors. Working that closely allows staff to evaluate the assessors' work. The FTC's orders require the defendants/respondents either to obtain FTC approval of the monitor/auditor (e.g., the Commission's privacy orders), or that the monitor/auditor possess relevant credentials (e.g., data security orders).

d. **When a consumer protection order is violated, what steps are taken to ensure that the violator is held accountable?**

Response: I agree that ensuring compliance with our orders is necessary for us to be effective in stopping violations of the laws we enforce and preventing future violations.

The Commission enforces federal court orders directly by bringing contempt and *de novo* actions in its own name. Over the past 10 years, the Commission has initiated 24 contempt actions, and over a dozen new cases against recidivists. For example, when in 2015 it appeared that LifeLock had violated a 2010 order, the Commission launched an extensive investigation and then negotiated an order imposing a $100 million judgment, of which $67 million has been returned to consumers thus far.[4] Staff also works with our criminal law enforcement partners through the agency's Criminal Liaison Unit ("CLU Program") to enable criminal prosecution of the worst of these violators. For example, the FTC obtained a $38 million contempt judgment against Kevin Trudeau, while the CLU Program worked with the U.S Attorney's Office for the Northern District of Illinois.[5] Pursuant to these actions, a receiver has amassed over $10 million from Mr. Trudeau's various holdings, and he is serving a 10-year criminal sentence based on his contempt.

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[3] In the stipulated order governing Herbalife, the Commission affirmatively required the third-party monitor to notify the FTC if it becomes aware that Herbalife is not in substantial compliance with key order provisions. *See* https://www.ftc.gov/system/files/documents/cases/160725herbalifeorder.pdf.

[4] *U.S. v. LifeLock*, Inc., No. 2:10-cv-00530-JJT (D. Ariz. Jan. 4, 2016), https://www.ftc.gov/enforcement/cases-proceedings/072-3069-x100023/lifelock-inc-corporation.

[5] *FTC v. Trudeau*, 662 F.3d 947 (7th Cir. 2011) (affirming $38 million civil contempt judgment against Kevin Trudeau); *United States v. Trudeau*, 812 F.3d 578 (7th Cir. 2016) (affirming criminal conviction of Kevin Trudeau for contempt and ten-year sentence).

When the Commission identifies violations of its administrative orders, it can seek civil penalties in federal court.[6] Over the past decade, the agency has initiated 15 such cases. For example, when Google violated its Google Buzz order, the Commission negotiated a penalty of $22.5 million.[7]

We should always be thinking carefully about whether our current enforcement program is as effective as it can be, and what if anything we could change to improve compliance and deter violations.

5. **Last year, this Subcommittee held a hearing on the data breach at Equifax. It was a particularly large breach, which concerned many consumers especially because so many consumers had never heard of Equifax and had no idea that a company they had never heard of could have so much of their personal information.**

   I know the FTC has announced that it is investigating the Equifax breach and that you cannot comment on the details. But I have some questions about the general privacy and data security concerns that were brought up by that breach.

   a. **If a breach occurs at a credit bureau, the FTC could bring a case under the Safeguards Rule, right?**

      Response: Yes, and the Commission has brought such cases.[8]

   Some credit reporting agencies also function as data brokers for advertising and other purposes. Equifax, for example, has its consumer reporting services as well as many services for business like digital marketing, real estate and property analytics, and income and employment verifications. We were told that in the case of the Equifax breach, the database that was accessed was not from the credit bureau side. The data was collected through Equifax's other businesses.

   b. **If there is a breach of a data broker, would that breach come under the Safeguards Rule?**

      Response: The Safeguards Rule applies to "financial institutions" as defined by the Rule,[9] and covers all businesses, regardless of size, that are "significantly engaged" in providing financial products or services. Thus, determining if the breach is covered by the Safeguards Rule would be a fact-specific inquiry regarding the types of services in which the data broker engaged.

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[6] The Department of Justice (DOJ) has the right of first refusal to litigate these cases. 15 U.S.C. 45(l).
[7] *U.S. v. Google Inc.*, No. 512-cv-04177-HRL (N.D. Cal. Nov. 16, 2012), https://www.ftc.gov/enforcement/cases-proceedings/google-inc.
[8] *See, e.g., In the Matter of SettlementOne Credit Corporation*, (Aug. 17, 2011), https://www.ftc.gov/enforcement/cases-proceedings/082-3208/settlementone-credit-corporation.
[9] *See* 16 C.F.R. § 313.3.

c. Does it make sense to you that consumers' data held by the same company in different databases are treated differently under the law?

Response: Current law is based on a sectoral approach for protecting consumer data; that approach came into being when data was well segregated between sectors and by type. I am not confident it remains the best approach given the use and sharing of data across sectors today.

That said, the Commission leverages all of the sectoral laws in place today, as well as its unfairness authority under Section 5 of the FTC Act, to protect consumer privacy, bringing more than 50 cases addressing alleged privacy and data security violations. It is no secret, however, that the sectoral laws and Section 5 are imperfect tools for enforcement in these areas and potentially leave gaps where sensitive consumer data is not specifically protected by law.

d. What recommendations do you have to address this discrepancy?

Response: Comprehensive privacy and data security legislation that authorizes the FTC to engage in APA rulemaking and gives us civil penalty authority would enable the Commission to engage in much more effective enforcement in this area. And repeal of the common carrier exemption would enable us without question to reach more entities that hold sensitive consumer data.

The Honorable Doris Matsui

1. Patients in my district are very concerned about the skyrocketing prices of prescription drugs. One way that we can keep drug prices lower is by ensuring competition in the marketplace and encouraging the entry of generic drugs. Brand-name drug-makers are incentivized to delay the entry of generic competition to their products, because the longer they have a monopoly, the longer they can charge higher prices. Therefore, some brand-name drug makers have found ways to extend the time that their drug is the only one on the market. One such scheme includes buying off generic drugs with "pay-for-delay" agreements - where the brand-name drug maker pays the generic drug manufacturer to stay off the market longer.

a. What is the Commission doing to review or prevent "pay-for-delay" agreements due to their anti-competitive nature?

Response: The Federal Trade Commission has long been committed to preserving and protecting competition in prescription drug markets, and it actively investigates anticompetitive businesses practices and mergers in the industry. The FTC has been particularly focused on anticompetitive "pay-for-delay" agreements between brand and generic drug companies. While the number of settlements potentially involving "pay-for-delay" agreements has decreased in the wake of the Supreme Court's 2013 decision

in *FTC v. Actavis*, they have not disappeared entirely.[10] In addition to reviewing all agreements submitted to the FTC under the Medicare Prescription Drug, Improvement, and Modernization Act, the Commission is currently challenging several of these agreements in courts around the country.

b. Is the Commission reviewing other similar anti-competitive behaviors in the drug manufacturer space? Can the Commission commit to remaining active in this area?

Response: In addition to being vigilant when it comes to "pay-for-delay" agreements, the Commission has been examining and prosecuting other practices that thwart competition and increase the cost of prescription drugs. For example, in June, the FTC secured a judgment for $493.7 million in equitable monetary relief for consumers harmed by AbbVie's use of baseless "sham" patent infringement lawsuits to delay generic competitors from introducing lower-priced versions of the testosterone replacement drug AndroGel. The FTC has also brought a case against Shire ViroPharma Inc. alleging serial sham petitioning before the FDA that had the purpose and effect of delaying generic competition. Both of these matters are currently on appeal.

The FTC is concerned about other threats to generic and biosimilar competition. For example, the FTC highlighted anticompetitive misuse of *Risk Evaluation and Mitigation Strategies ("REMS")* in a comment to the Department of Health and Human Services regarding the "*Blueprint to Lower Drug Prices and Reduce Out-of-Pocket Costs.*"[11] *First,* branded manufacturers sometimes refuse to make samples of their products available to generic drug and biosimilar makers by improperly invoking REMS requirements. Second, the branded manufacturer may improperly deny its competitor access to a single, shared REMS system, which leaves the FDA unable to approve the competitor's application and labeling. The Creating and Restoring Equal Access to Equivalent Samples Act of 2017 (CREATES Act) would be an important and effective way to stop drug companies from manipulating REMS to block generic or biosimilar competition and consumer access to lower cost drugs.

The FTC's comment also suggested that the FDA consider certain steps to improve biosimilar and interchangeable competition. Specifically, it recommended that the FDA: (1) continue to create a pathway for expedited approval of interchangeable biologics; (2) reconsider the current naming guidance for biologics in light of the Blueprint; and (3) improve the Purple Book.

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[10] Agreements Filed with the Federal Trade Commission under the Medicare Prescription Drug, Improvement, and Modernization Act of 2003: Overview of Agreements Filed in FY 2015, Bureau of Competition, November 1, 2017 (https://www.ftc.gov/system/files/documents/reports/agreements-filed-federal-trade-commission-under-medicare-prescription-drug-improvement-modernization/overview_of_fy_2015_mma_agreements_0.pdf).

[11] Statement of the Federal Trade Commission to the Department of Health and Human Services Regarding the HHS Blueprint to Lower Drug Prices and Reduce Out-of-Pocket Costs, July 16, 2018 (https://www.ftc.gov/system/files/documents/advocacy_documents/statement-federal-trade-commission-department-health-human-services-regarding-hhs-blueprint-lower/v180008_commission_comment_to_hhs_re_blueprint_for_lower_drug_prices_and_costs.pdf).

2. One core function of the Commission's mission is to protect consumers from scams. With the continued growth of online commerce, there has been an increase in online booking scams that potentially mislead consumers using fraudulent websites.

a. What further attention do you believe the Commission should be giving to this and similar issues as part of the Commission's overall effort to prevent online scams?

Response: The Commission has a strong interest in protecting consumer confidence in the online marketplace, including, for example, the online markets for event tickets and travel. The FTC has been active in bringing law enforcement actions to address deceptive advertising in these areas. For example, in 2014, the FTC entered into settlements with online ticket reseller TicketNetwork and two of its marketing partners[12] to prohibit them from misrepresenting that resale ticket websites were official venues or offering tickets at face value. Similarly, in 2017, the FTC settled charges that Reservation Counter, LLC[13] and related companies misled consumers to believe they were reserving hotel rooms from advertised hotels.

In 2015, the FTC issued consumer education to caution consumers about third-party websites that may deceptively mimic hotel websites.[14] FTC staff also has met with members of Congress and stakeholders in the hotel and event ticket industries to discuss deceptive travel and event ticket websites. We also have provided comments on proposed legislation addressing the same. Working with various online platforms to reduce the likelihood that consumers see fraudulent ads and providing additional industry guidance could be useful as well. Finally, more consumer guidance could help consumers identify and protect themselves from these types of online scams.

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[12] *FTC and State of Connecticut v, TicketNetwork, Inc.; Ryadd, Inc.; and SecureBoxOffice, LLC, et al.*, No. 3:14-cv-1046 (D.Conn.. Jul. 23, 2014); https://www.ftc.gov/enforcement/cases-proceedings/132-3203-132-3204-132-3207/ticketnetwork-inc-ryadd-inc-secureboxoffice.

[13] *FTC v. Reservation Counter* 2:17-cv-01304 (D. Utah. Dec. 21, 2017), https://www.ftc.gov/enforcement/cases-proceedings/152-3219/reservation-counter-llc.

[14] FTC Consumer Blog, *Did You Book That Night at the Hotel's Site?* (July 14, 2015), www.consumer.ftc.gov/blog/2015/07/did-you-book-night-hotels-site.