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THE FTC AT 100: WHERE DO WE GO FROM HERE?

HEARING

BEFORE THE

SUBCOMMITTEE ON COMMERCE, MANUFACTURING, AND TRADE

OF THE

COMMITTEE ON ENERGY AND COMMERCE
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

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C O N T E N T S

	Page
Hon. Lee Terry, a Representative in Congress from the State of Nebraska, opening statement	2
Prepared statement	3
Hon. Marsha Blackburn, a Representative in Congress from the State of Tennessee, opening statement	4
Hon. Janice D. Schakowsky, a Representative in Congress from the State of Illinois, opening statement	5
Hon. Fred Upton, a Representative in Congress from the State of Michigan, opening statement	6
Prepared statement	7
Hon. Joe Barton, a Representative in Congress from the State of Texas, opening statement	7

WITNESSES

Edith Ramirez, Chairwoman, Federal Trade Commission	8
Prepared statement	10
Answers to submitted questions	62
Julie Brill, Commissioner, Federal Trade Commission	20
Prepared statement [1]	
Answers to submitted questions	86
Maureen K. Ohlhausen, Commissioner, Federal Trade Commission	21
Prepared statement	24
Answers to submitted questions	98
Joshua D. Wright, Commissioner, Federal Trade Commission	28
Prepared statement	30
Answers to submitted questions	108

[1] Ms. Brill did not offer a written statement for the record.

THE FTC AT 100: WHERE DO WE GO FROM HERE?

TUESDAY, DECEMBER 3, 2013

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCE, MANUFACTURING, AND TRADE,
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC.

The subcommittee met, pursuant to call, at 10:06 a.m., in room 2123, Rayburn House Office Building, Hon. Lee Terry (chairman of the subcommittee) presiding.

Members present: Representatives Terry, Lance, Blackburn, Harper, Guthrie, Olson, Pompeo, Kinzinger, Bilirakis, Johnson, Long, Barton, Upton (ex officio), Schakowsky, Sarbanes, McNerney, Welch, Yarmuth, Dingell, Matheson, Barrow, and Christensen.

Staff present: Charlotte Baker, Press Secretary; Kirby Howard, Legislative Clerk; Nick Magallanes, Policy Coordinator, Commerce, Manufacturing, and Trade; Gib Mullan, Chief Counsel, Commerce, Manufacturing, and Trade; Shannon Taylor, Counsel, Commerce, Manufacturing, and Trade; Michelle Ash, Democratic Chief Counsel, Commerce, Manufacturing, and Trade; and William Wallace, Democratic Professional Staff Member.

Mr. TERRY. All right. We are going to go ahead and get started or start this hearing, and I just want to say at the beginning before I start my statement that I am just really pleased that all of our Commissioners are here today. And we have Chairwoman Edith Ramirez, sworn into office as a Commissioner in April 2010 and designated Chairwoman in March 2013. And prior to joining the Commission, Chairwoman Ramirez was a partner in the law firm of Quinn Emanuel Urquhart—close enough—and Sullivan—as an Irishman, the Sullivan is a lot easier to pronounce—LLP in Los Angeles.

And then we have Commissioner Julie Brill. Thank you. She was sworn into office in April 2010. Previously Commissioner Brill was the Senior Deputy Attorney General and Chief of Consumer Protection and Antitrust for the North Carolina Department of Justice. Prior to that she served as Assistant Attorney General for Consumer Protection and Antitrust for the State of Vermont for more than two decades.

Thank you for being here.

Maureen Ohlhausen, Commissioner, sworn into office April 2012. Commissioner Ohlhausen previously has served for 11 years at the Commission and held the position of Director of Policy Planning

under Chairman Kovacic. She is the most recently a partner at Wilkinson Barker and Knauer.

And then last but not least, our Commissioner Joshua Wright, sworn into office January 13th. Commissioner Wright was a professor of law at George Mason University School of Law focusing on antitrust and competition law. He holds a Ph.D. in economics and served at the FTC as its scholar-in-residence at the Bureau of Competition from 2007 to 2008.

And we are glad to have you here, and now we are going to start our opening statements. I think a lot of you have been through our hearings before. Commissioner Wright, you may be the only one that is new to this position as a Commissioner.

OPENING STATEMENT OF HON. LEE TERRY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEBRASKA

So good morning, and welcome, everyone here, to this hearing, which is aptly titled, "The FTC at 100: Where Do We Go from Here?" And that is a good question. We all have a stake in the FTC's current mission to promote consumer welfare by ensuring that business practices in the United States are fair and transparent, while also addressing any market collusion or anticompetitive activity that could unfairly fix prices at a higher level than the market would otherwise demand.

To achieve these goals, the FTC has a wide mix of instruments at its disposal, such as administrative adjudication, law enforcement, and rulemaking authority. However, like all entities in the Government, prioritization of goals is critical. Not only are the FTC's resources finite, but they also—the sheer breadth of the FTC's jurisdiction makes it necessary.

To that end I am concerned with various issues that the FTC, some recent and others long standing, that not only may take the Commission away from the scope in which Congress legislated, but it also add to the regulatory uncertainty many businesses feel already.

One clear example is the Commission's use of Section 5 authority under the FTC Act, which allows the Commission to address unfair and deceptive trade practices. I understand that authorities under this section represents an important enforcement tool for the agency, especially in tackling entities like patent trolls. However, absent a coherent statement of policy on how the Commission plans to enforce Section 5, many businesses, large and small, are left to examining past decisions to see how they may fit into a certain set of facts.

I think one area under Section 5 that warrants review is how the Commission uses its authority to address the use of security of data. Commercial entities are finding new ways of using data, invaluable ways, that can help bring new products to consumers. For example, Google may sell some of our information, but we get free cloud-based email service in return. The FTC's job is to police the actions of companies in its use of personal information. Essentially this means enforcing Section 5's requirement that companies don't make any misrepresentations to consumers about what the companies do with personal information.

But we wouldn't be doing our job in Congress if we didn't examine whether the arrangement continues to work to the benefit of consumers and businesses alike. The exchange in monetization of data is valuable. According to a recent Harvard study and Columbia, the data-driven marketing sector created about $156 billion in revenue and contributed to about 675,000 jobs. But the exchange of our data could only be done with our consent, and that consent should be meaningful choice. We should examine the other consent decree paradigm, you know, the right answer for both consumers, for companies trying to comply with FTC policies.

Now, another example is the recently established Consumer Financial Protection Bureau. At first blush it seems that many of the actions undertaken by this agency were formerly under the purview of the FTC, and I have been vocal with my distrust of the CFPB and my concerns with this obscure agency further compounded by the possibility that they may be duplicating the efforts of the FTC, or hindering your efforts in the FTC. This is something that I hope to address during this hearing.

Lastly, I just want to again thank all of you for being here. And who wants a minute 28?

I yield to the vice chair.

[The prepared statement of Mr. Terry follows:]

PREPARED STATEMENT OF HON. LEE TERRY

Good morning and welcome to today's hearing, which is aptly titled, "The FTC at 100: Where do we go from here?"

And that's a good question. Over the past century, the commission has seen its authority grow and the industries it regulates change dramatically. So on the eve of this 100-year milestone, I want to first to take a glimpse into the past and better understand what has prompted certain actions by the commission.

Understanding where we've been will provide the roadmap for where we go. This will be helpful for Congress, and this committee in particular, to know what we can do to ensure that the FTC stays focused on its statutory mission while also maintaining the necessary nimbleness needed to protect consumers and ensure competitive markets at a time when business practices are evolving at a remarkable pace.

We all have a stake in the FTC's current mission to promote consumer welfare by ensuring that business practices in the United States are fair and transparent-while also addressing any market collusion or anti-competitive activity that could unfairly fix prices at a higher level than the market would otherwise demand. To achieve these goals, the FTC has a wide mix of instruments at its disposal, such as administrative adjudication, law enforcement, and rulemaking authority.

However, like all entities in the Government, prioritization of goals is critical. Not only are the FTC's resources finite, but also the sheer breadth of the FTC's jurisdiction makes it necessary.

To that end, I am concerned with various issues at the FTC-some recent and others longstanding-that not only may take the commission away from the scope in which Congress legislated, but also add to the regulatory uncertainty many businesses already feel.

One clear example is the commission's use of its Section 5 authority under the FTC Act, which allows the commission to address "unfair and deceptive trade practices." I understand that the authorities under this section represent an important enforcement tool for the agency—especially in tackling entities like patent trolls. However, absent a coherent statement of policy on how the commission plans to enforce Section 5, many businesses-large and small-are left to examine past decisions to see how they may fit into the specific facts of that case.

I think one area under Section 5 that warrants review is how the commission uses its authority to address the use and security of data. Commercial entities are finding new ways of using data in valuable ways that can help bring new products to consumers. For example, Google may sell some of our information, but we get free, cloud-based e-mail service in return.

The FTC's job is to police the actions of companies like Google in its use of personal information. Essentially, this means enforcing Section 5's requirement that companies don't make any misrepresentations to consumers about what the companies do with personal information. But we wouldn't be doing our job in Congress if we didn't examine whether this arrangement continues to work for the benefit of consumers and businesses alike.

The exchange and monetization of data is valuable. According to a recent study by Harvard and Columbia, the data-driven marketing sector created about $156 billion in revenue and contributed to about 675,000 jobs. But the exchange of our data should only be done with our consent, and that consent should be a meaningful choice. We should examine whether the consent decree paradigm is the right answer for both consumers and for companies trying to comply with FTC policies; and if so, whether it can be improved upon.

Another example is the recently established Consumer Financial Protection Bureau. At first blush, it seems as though many of the actions being undertaken by this agency were formerly under the purview of the FTC. I have been vocal with my distrust for the CFPB. My concerns with this obscure agency are further compounded by the possibility that they may be duplicating efforts of the FTC. This is something I hope will be addressed in your testimony today or fleshed out by some questions.

Lastly, I would like to thank all of you. I have had the opportunity to meet personally with most of you, and hope to continue building a positive relationship, particularly because this is hopefully the first of many hearings on the FTC that our subcommittee will hold in the next few months, as we continue looking at the agency and potential legislation to modernize the FTC.

OPENING STATEMENT OF HON. MARSHA BLACKBURN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TENNESSEE

Mrs. BLACKBURN. Thank you, Mr. Chairman.

The FTC is turning 100 in less than a year, and I think it is wonderful that we are assembling today to explore your current role in jurisdiction over protecting consumers and competition in what we want to have remain a dynamic marketplace. The Federal Government's propensity to constantly overreach is a huge concern, and it is important that our regulators respect the rule of law. That means making their case in courts instead of creating back-door informal regulations without judicial oversight.

Something else we should be mindful of is that if the DC Circuit strikes down the FCC's open Internet order, it will become clear that the FTC is the de facto arbiter of the Net neutrality concerns, which will dramatically increase policymakers' attention on this agency. We need to understand whether the Commission is as well suited to effectively enforce its core mission as it can be? Is the Commission rigorous in its analysis of our markets, technologies, and economies? Is it prioritizing its resources appropriately? How can Congress and the FTC work better together to maximize consumer welfare?

We welcome you and appreciate your time today.

I yield back.

Mr. TERRY. Thank you.

And I now recognize the ranking member of the subcommittee, Ms. Schakowsky, for her 5 minutes.

OPENING STATEMENT OF HON. JANICE D. SCHAKOWSKY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Ms. SCHAKOWSKY. Well, thank you, Mr. Chairman, for holding this hearing today on the Federal Trade Commission's nearly 100th birthday and to discuss the future of the agency. We have a real power panel today, and I want to welcome all of them for being here.

The FTC is on the front line of protecting both consumers and businesses from unfair, deceptive, fraudulent, or anticompetitive practices. Since taking over the head of the FTC in March, Chairwoman Ramirez has maintained a strong agency and pushed to increase standards in the marketplace to protect consumers and strengthen our economy. As a lifelong consumer advocate, I appreciate the work that has already been done at the FTC, and I look forward to Chairwoman Ramirez's continued leadership.

I am particularly pleased that the Chairwoman has focused on access to life-saving drugs, which I believe is one of the most important roles of the agency. The FTC has fought for pay-for-delay agreements in recent years, and the Supreme Court's decision in FTC is that Actavis——

Ms. RAMIREZ. Actavis.

Ms. SCHAKOWSKY. Actavis—that reversed payment agreements can violate antitrust laws was a big win for consumers. The Commission's recent filing of an amicus brief in opposition to using risk evaluation and mitigation strategies to delay the creation of generics is another strong step towards protecting consumers. I look forward to the continued progress of the Commission in ensuring access to safe, affordable drugs.

The FTC's role continues to expand as our social networks, shopping, banking, and other forms of communication and business, move to the Internet. At the same time, as its role is expanding, the FTC is struggling with less and less funding which has been worsened by the 5 percent sequester cuts. The Commission's prepared testimony points to, quote, "resource constraints," unquote, and the need to leverage those resources through, quote, "careful case selection," unquote.

We should not be asking one of our country's most important agencies to always choose which consumer protections it will be able to enforce. Priorities are important, but we don't want to shortchange consumers. We should, instead, work to ensure that the FTC has the resources it needs to maintain consumer protection and a fair marketplace.

The growth of the Internet has presented us with new questions about privacy rights and expectations, and that is why Chairman Terry and I decided earlier this year to form a Privacy Working Group, which is cochaired by Congress Members Blackburn and Welch. The group is tasked with exploring the current privacy landscape and considering possible solutions to challenges that we find.

A major concern for me within the privacy framework is the issue of privacy agreements. The FTC has the power to hold companies to the privacy agreements they offer their companies, their customers, visitors, and users, and it does hold bad actors account-

able. But there is no law requiring online businesses to offer specific privacy protections, or even to have privacy policies, and the FTC can't enforce what isn't promised. And it is also true, I think, that what is promised is often in a form not really meaningful to average consumers, if you have read any of those privacy agreements or found them, and you have the eyesight to actually see them. I look forward to hearing from our Commissioners as to whether a minimum online privacy standard is needed or would at least be helpful to the agency as it continues its important work.

Again, I look forward to your testimony today and to working with all of you Commissioners and my colleagues to support the FTC in its mission going forward.

Mr. TERRY. You have got an extra minute. Do you want to yield?

Ms. SCHAKOWSKY. Oh, I would be happy to yield a minute. Any of the Members?

Then I yield back, Mr. Chairman.

Mr. TERRY. The gentlelady yields back.

At this time I recognize the full committee chair, Mr. Upton of Michigan.

OPENING STATEMENT OF HON. FRED UPTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. UPTON. Thank you, Mr. Chairman. I, too, want to thank each of our Commissioners for being here this morning. Today we are going to examine the important role of the FTC, its impact on jobs in the economy, and what to look forward to in the agency's next century.

The FTC's grasp reaches far and wide, and it is the only Federal agency with both consumer protection and competition jurisdiction. From the smallest independent corner store to the largest industry, from online data collection to multimillion-dollar merger reviews, the FTC is charged with ensuring industry players play fair, competition thrives, and the consumers enjoy the fruits of that competition as well as protection from fraudsters. Of course, with such great power comes equal concern about the appropriate use of that power and potential consequences for job creation and economic growth.

Through a broader lens this committee is taking an agency-by-agency approach to review the state of Government. How do we operate? How can we function better, more efficiently, and more effectively? Chairman Terry often puts it best when he calls it "clearing the underbrush"; clearing the bog that slows us down and makes us less efficient.

Our duties are twofold: Pursue policies that protect the public, while also allowing us to work to ensure job creation, innovation, and economic growth are allowed to flourish. The FTC can play and does play an important role as we seek to improve our economic recovery.

And I yield to any other Member on our side wishing time.

Mr. Barton.

[The prepared statement of Mr. Upton follows:]

PREPARED STATEMENT OF HON. FRED UPTON

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From the smallest, independent corner store to the largest industry, from online data collection to multimillion-dollar merger reviews, the FTC is charged with ensuring industry players play fair, competition thrives, and that consumers enjoy the fruits of that competition as well as protection from fraudsters. Of course, with such great power comes equal concern about the appropriate use of that power and potential consequences for job creation and economic growth.

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Our duties are twofold—pursue policies that protect the public while also working to ensure job creation, innovation, and economic growth are allowed to flourish. The FTC can play an important role as we seek to recover fully from the Great Recession.

I thank each of the commissioners for being here today and I look forward to our discussion. I know a number of my colleagues have comments they would like to share so I yield the balance of my time.

Mr. TERRY. Mr. Barton.

OPENING STATEMENT OF HON. JOE BARTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. BARTON. Thank you, Mr. Chairman.

Well, first of all, an early happy birthday. As I understand, this is the FTC's 100th anniversary next year, so happy birthday to the Commissioners.

I have been on this committee almost 30 years. It is very rarely that we have the time and the inclination to study an agency in depth, but we do want to take a real look at the FTC as it enters its second century of existence. And I will focus in my questions on the role of the FTC in protecting privacy of American citizens, with a special emphasis on children's privacy.

I have participated with the Commissioners of the FTC over the last several years on a number of panels, and we have looked at the issue of privacy and what the industry is doing, what the standard practices are, and, looking forward, what they need to be.

I look forward to listening to the Commissioners. I look forward to participating with the members of the committee in this subcommittee hearing, and I hope that very soon we will be working with the FTC to implement some new protections for our children's privacy, and our general citizens' privacy.

And with that I would be happy to yield to anybody. Anybody? If not, then I yield back to the subcommittee chairman.

Mr. TERRY. The gentleman yields back.

Now the other side has 5 minutes. Mr. Dingell, emeritus, would you like any of that time? You are entitled to it.

Mr. DINGELL. Mr. Chairman, I thank you. I will let you allocate the time, and I thank you.

Mr. TERRY. All right. Does anyone else on the minority side wish the time?

Seeing none, then all time has been yielded back.

And I think all of you know how this works. And so, Chairwoman Ramirez, you are now recognized, and we will not gavel at 5 minutes. We will let you finish.

STATEMENTS OF EDITH RAMIREZ, CHAIRWOMAN, FEDERAL TRADE COMMISSION; JULIE BRILL, COMMISSIONER, FEDERAL TRADE COMMISSION; MAUREEN K. OHLHAUSEN, COMMISSIONER, FEDERAL TRADE COMMISSION; AND JOSHUA D. WRIGHT, COMMISSIONER, FEDERAL TRADE COMMISSION

STATEMENT OF EDITH RAMIREZ

Ms. RAMIREZ. Chairman Terry, Ranking Member Schakowsky, and members of the subcommittee, thank you for inviting us to testify regarding the Federal Trade Commission's work as we approach our 100th year. We appreciate this opportunity to discuss the FTC's unique, dual, and complementary role in promoting competition and protecting consumers.

The FTC has a tradition of working at the forefront of the most important emerging issues of the day. We do so using a mix of law enforcement, advocacy, research, and business and consumer education. Changes to the marketplace, like rapid technological innovation and globalization, drive much of our work. However, over the last century our goals have remained fundamentally the same, to prevent fraud and deception, ensure that companies keep their promises to consumers, and remove barriers to competition, all of which promote an even playing field that allows law-abiding businesses to flourish.

With a staff of approximately 1,200 and a fiscal year 2013 budget of $296 million, the FTC has delivered results that belie its modest size. Over the last 3 years, we have returned over $196 million to victims of deceptive and unfair conduct, and delivered an additional $117 million in several penalties and ill-gotten gains to the U.S. Treasury. We have also saved consumers approximately $3 billion in estimated economic injury by stopping anticompetitive practices and mergers.

The hallmark of the FTC's consumer protection work is anticipating and tackling new marketplace issues and problems. In the 1960s, we were the first Federal agency to act on the health threat created by cigarettes, forcing manufacturers to implement health warnings in their advertising.

In the 1980s and 1990s, we used our congressional authority to launch a law enforcement program which continues today; obtaining Federal Court restraining orders, consumer redress, and permanent prohibitions against thousands of consumer deception schemes. And in the early 2000s, the agency took action against unwanted telemarketing calls by implementing the Do Not Call Registry, which kicked off our role as an early protector of consumers' privacy both offline and online.

The FTC continues to combat scams most familiar to consumers, such as harassing telemarketers, sham weight-loss cures and fraudulent business opportunities, and newer harms associated with emerging technologies and business practices.

As in our consumer protection efforts, we have a long history of promoting competition in the marketplace, using enforcement, ad-

vocacy and research. We have issued the influential Horizontal Merger Guidelines along with the Department of Justice, advanced merger and monopolization law with many important victories in crucial cases, and released reports that have helped shape competition policy and enforcement in critical areas to consumers and the economy such as technology and health care.

In more recent years we have turned our attention to those emerging activities that posed the greatest threat to vigorous competition. For example, we have worked to stop drug companies from stifling the entry of generic drugs by entering into pay-for-delay agreements, including obtaining a significant victory for consumers at the Supreme Court last term in Actavis. We have fought against anticompetitive healthcare provider consolidation that threatens higher cost without better care, and in doing so we achieved another important victory in the Supreme Court in the Phoebe Putney case, clarifying the scope of the State action doctrine. And we have acted to protect competition and innovation in the technology sector.

In fiscal year 2013, we brought 27 new competition cases and continued to enforce compliance with our existing orders and obligations under the Hart-Scott-Rodino Act. Beyond our law enforcement, we promote competition and educate stakeholders with workshops, reports, and advocacy. For example, our staff recently submitted comments to the District of Columbia Taxicab Commission, cautioning that rules it has proposed may restrict consumers from using new SmartPhone software applications to hail cabs. And as businesses become increasingly global, the FTC has coordinated closely with international counterparts in both our enforcement and policy efforts.

The Commission has benefited from a culture of bipartisanship, collegiality, and consensus in our decisionmaking that yields a balanced and consistent approach to our work, and we are fortunate to have a truly expert and dedicated staff, one that, despite being asked to do more with fewer resources, has consistently rated the FTC as among the top agencies to work for. Given this rich reservoir of talent, commitment, and energy, we are confident that we can meet the challenges of our second century.

And with that background, it is my pleasure to introduce my fellow Commissioners. First, Julie Brill, who will be providing more details on some of the Commission's current priorities, including our efforts to stop scams targeting financially distressed consumers, protect privacy and data security, and address anticompetitive conduct in the healthcare industry.

Next, Maureen Ohlhausen, who will describe the FTC's efforts to address and adapt to external changes and challenges, including technological advances, evolving markets, and globalization.

And Josh Wright, who will discuss our unique research capacity, the expertise of our Bureau of Economics, and our ongoing efforts to review and update our rules and guides.

Thank you.

[The prepared statement of Ms. Ramirez follows:]

PREPARED STATEMENT OF

THE FEDERAL TRADE COMMISSION

on

THE FTC AT 100: WHERE DO WE GO FROM HERE?

Before the

UNITED STATES HOUSE OF REPRESENTATIVES

COMMITTEE ON ENERGY AND COMMERCE

SUBCOMMITTEE ON COMMERCE, MANUFACTURING, AND TRADE

Washington, D.C.

December 3, 2013

I. INTRODUCTION

Chairman Terry, Ranking Member Schakowsky, and Members of the Subcommittee, I am Edith Ramirez, Chairwoman of the Federal Trade Commission ("FTC" or "Commission"). I appreciate the opportunity to appear before you today with my fellow Commissioners to discuss the FTC's work in its 100th year and beyond.[1]

The FTC is a highly productive and efficient, small independent agency with a large mission. It is the only federal agency with jurisdiction to protect consumers and maintain competition in broad sectors of the economy. The agency enforces laws that prohibit business practices that are anticompetitive, deceptive, or unfair to consumers, and seeks to do so without impeding legitimate business activity.[2] The FTC also educates consumers and businesses to encourage informed consumer choices, compliance with the law, and public understanding of the competitive process. Through enforcement, advocacy, education, and policy work, the FTC protects consumers and promotes competitive markets in the United States.

The impact of the FTC's work is significant. Over the past three years, the agency saved consumers approximately $3 billion in economic injury by stopping illegal anticompetitive practices and mergers in the marketplace.[3] During that same time period, the FTC returned over

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[1] The written statement represents the views of the Federal Trade Commission. The oral presentations and responses to questions reflect the views of individual Commissioners, and do not necessarily reflect the views of the Commission or any other Commissioner.

[2] The FTC has broad law enforcement responsibilities under the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.*, and enforces a wide variety of other laws ranging from the Clayton Act to the Fair Credit Reporting Act. In total, the Commission has enforcement or administrative responsibilities under more than 70 laws. *See* http://www.ftc.gov/ogc/stats.shtm.

[3] Consumer savings is calculated by estimating how much prices would have increased if the FTC did not take action to preserve competition. Staff uses a formulaic approach taking one percent of the volume of commerce in the affected market(s). For example, if the FTC takes action to preserve competition in a local metropolitan grocery store market by requiring divestitures, staff would estimate the volume of grocery sales in that metropolitan region and calculate consumer savings as one percent of that sales volume. For mergers, the consumer savings are assumed

$196 million to victims of deceptive or unfair practices and forwarded $117 million in disgorgement of ill-gotten gains and civil penalties to the U.S. Treasury, following the successful prosecution of Commission cases and the resulting court-ordered judgments or settlements.

Much of the Commission's work today is driven by evolving technology and globalization and is different in many respects from the work the FTC engaged in a century ago. At the same time, many of the problems in the marketplace are fundamentally the same – consumer fraud schemes, deceptive advertising, and anticompetitive conduct – all of which the agency tackles through aggressive law enforcement. Our agency structure, research capacity, continued commitment to bipartisanship and cooperation, and exceptional staff will allow the FTC to continue to adapt to external changes and successfully fulfill its mission of protecting consumers and competition into its next century.

II. HISTORY OF THE FTC

President Woodrow Wilson signed the Federal Trade Commission Act ("FTC Act") and the Clayton Act in 1914, and the FTC opened its doors on March 16, 1915. The Commission absorbed the work and staff of the Commerce Department's Bureau of Corporations, which had been created in 1903. Like the Bureau of Corporations, the FTC could conduct investigations, gather information, and publish reports. The FTC, however, had enforcement authority and could bring administrative cases. It also could challenge "unfair methods of competition" under Section 5 of the FTC Act and enforce the Clayton Act's more specific prohibitions against mergers, interlocking directorships, and stock acquisitions that may substantially lessen competition or tend to create a monopoly.

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to last for two years, and for nonmerger actions, the assumption is one year. When the staff has case-specific information, it uses that information instead of the formula.

There have been several important amendments to the FTC Act over the years. For example, the 1938 Wheeler-Lea Act amended Section 5 of the FTC Act to proscribe "unfair or deceptive acts or practices" as well as "unfair methods of competition." It also provided authority to impose civil penalties for violations of Section 5 orders. In 1973, Congress broadened the FTC's authority to allow it to seek preliminary and permanent injunctions in federal court. Two years later, Congress granted the Commission express authority to promulgate rules addressing unfair or deceptive acts or practices and to seek civil penalties for violations of those rules. Congress specified the procedures the Commission needed to follow to promulgate such rules, and further amended the agency's rulemaking proceedings in the Federal Trade Commission Improvements Act of 1980.

Other changes include the 1976 Hart-Scott-Rodino ("HSR") Act. The HSR Act imposed a statutory premerger notification requirement and waiting period before covered mergers could be consummated, which greatly expanded the agency's ability to fashion effective relief in merger challenges. In addition, in 1994, Congress articulated what constitutes an "unfair" act or practice, adopting the Commission's own definition that it is one that "causes or 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 to competition."[4] Most recently, Congress amended the Act to permit greater cooperation and information sharing with foreign authorities in cross-border cases.[5]

Additionally, Congress has expanded the FTC's responsibilities through a number of other statutes. For example, the Commission enforces an array of consumer credit laws,

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[4] 15 U.S.C. 45(n).

[5] *See, e.g.*, 15 U.S.C. §§ 46(f), 46(j), 57b-2(b)(6).

including the Fair Credit Reporting Act and the Fair Debt Collection Practices Act, as well as laws addressing specific problems, such as the 1994 Telemarketing and Consumer Fraud and Abuse Prevention Act. The latter Act provided the basis for the FTC to establish the National Do Not Call Registry. We recently celebrated the Registry's 10th anniversary, and it continues to be one of the government's most popular programs because of its positive impact on hundreds of millions of Americans.

III. THE FTC TODAY

Today the FTC's mission is carried out by the equivalent of 1,176 full time staff located in Washington, DC and offices in seven regions around the country. Our fiscal year 2013 enacted budget, net of sequester, totaled $296 million. The agency's law enforcement and policy work is carried out by the Bureaus of Consumer Protection, Competition, and Economics as well as the Office of the General Counsel, the Office of International Affairs, and the Office of Policy Planning.

A. Consumer Protection

The FTC works to protect consumers from unfair, deceptive, or fraudulent practices in the marketplace by, among other things, taking law enforcement actions to stop unlawful practices and educating consumers and businesses about their rights and responsibilities. The FTC targets its enforcement and education efforts to achieve maximum impact and works closely with federal, state, international, and private sector partners in joint initiatives. The agency also convenes workshops with various stakeholders to examine emerging consumer protection issues and releases reports on a variety of consumer protection topics.

In recent years, the FTC has emphasized protecting financially distressed consumers from fraud, stopping harmful uses of technology, protecting consumer privacy and data security,

prosecuting false or deceptive health claims, and safeguarding children in the marketplace. For example, the Commission has: (1) stopped foreclosure rescue scams and deceptive payday lending practices; (2) taken aggressive enforcement actions to stop illegal robocalls and hosted a public challenge to find technological solutions to the problem; (3) held a public workshop and issued a report examining mobile payment systems; (4) prosecuted operations that placed unauthorized charges on consumers' mobile phone bills; (5) sued companies that made false or unsubstantiated claims that their dietary supplements prevent or treat serious diseases; and (6) brought actions that protect the privacy choices of well over one billion people.

In fiscal year 2013, the FTC filed 72 new consumer protection complaints in federal district court and obtained 100 permanent injunctions and orders (including two civil contempt orders) requiring defendants to pay approximately $198 million in consumer redress or disgorgement of ill-gotten gains. In addition, consumer protection cases referred to the Department of Justice resulted in 15 court judgments for civil penalties totaling more than $41 million. The FTC also filed 16 new administrative consumer protection actions and obtained 27 administrative orders.

During the same timeframe, the Commission issued 13 reports on a variety of consumer protection topics, released 256 new consumer and business education publications, and released 33 consumer and business education videos and audio public service announcements.

Consumer fraud knows no boundaries and strong cross-border cooperation is key to effective law enforcement. The FTC, therefore, continues to develop strong bilateral relationships with foreign authorities around the globe. In 2012, Congress reauthorized the Undertaking Spam, Spyware, And Fraud Enforcement With Enforcers beyond Borders ("U.S. SAFE WEB") Act of 2006, renewing the FTC's authority to cooperate with foreign law

enforcers by sharing information with them and obtaining information on their behalf. The U.S. SAFE WEB Act allows law enforcers to achieve greater results together than they could working alone.

B. Competition

The FTC's efforts to maintain competition focus on stopping anticompetitive mergers and other anticompetitive business practices in a wide range of industries of critical importance to American consumers. These include health care, technology, energy, consumer goods and services, and manufacturing. This work is critical to protect and strengthen free and open markets – the cornerstone of a vibrant economy. Vigorous competition results in lower prices, higher quality goods and services, and innovation leading to beneficial new products and services. As a part of its program to maintain competition, the FTC undertakes competition policy research and development activities to improve agency decision-making. In addition to enforcement, the FTC also promotes competition through advocacy and education initiatives. These initiatives deter anticompetitive mergers and business practices and reduce business' costs of compliance with antitrust laws. Advocacy encourages governmental actors at the federal, state, and local levels to evaluate the effects of their policies on competition and ensure such policies promote consumer welfare.

In fiscal year 2013, the agency pursued 27 new competition law enforcement actions (merger and nonmerger) and undertook several important workshops, reports, and advocacy opportunities to promote competition and educate its stakeholders about the importance of competition to consumers. The FTC also continued to monitor and vigorously enforce compliance with consent orders as well as with merger and acquisition reporting obligations under the HSR Act, bringing two compliance enforcement actions. During the same time period,

the agency also closed without action 37 non-merger and merger investigations in which we ultimately did not find a threat to competition.

The FTC has also further developed cooperative relationships with foreign antitrust agencies to ensure close collaboration on cross-border cases and convergence toward sound competition policies. The FTC effectively coordinated reviews of multijurisdictional mergers and continued to work with its international counterparts to achieve consistent outcomes in cases of possible unilateral anticompetitive conduct. The FTC has further strengthened the roles that it plays in the International Competition Network and the competition groups of the OECD, the United Nations Conference on Trade and Development, and the Asia Pacific Economic Cooperation forum. These venues provide opportunities to promote convergence toward best practices on substantive analysis and on principles of due process, and for competition officials to share insights on law enforcement and policy initiatives.

IV. CHALLENGES FACING THE FTC

The FTC has worked to keep pace with the vast changes of the past 100 years, including those resulting from technological advances and our increasingly global economy. The agency must remain nimble to anticipate and respond to future marketplace changes and other challenges.

Like other government organizations, the Commission seeks ways to do more with less. Resource constraints, despite a growing workload, remain a constant challenge. The FTC will continue to leverage its resources through careful case selection and by partnering with public and private entities on enforcement and educational efforts. The agency focuses on having efficient internal processes to expedite its work, and improving its own technological infrastructure to allow its staff to work more effectively.

Technology continues to evolve, as exemplified by the explosion in the use of mobile devices. The agency has and will continue to ensure that it has the appropriate information, tools, and staff to address new issues. The agency convenes public meetings, such as its recent workshop exploring the Internet of Things, to gather information from those at the cutting edge of technological advances. These meetings help the agency to identify the consumer protection and competition issues that may be raised by the use of new technology. The FTC also ensures that its staff has the tools to investigate fraud in the high-tech arena. For example, the FTC invested in new technology such as mobile devices spanning various platforms along with the software necessary to collect and preserve evidence, to respond to the growth of mobile commerce and conduct mobile-related investigations. Finally, the FTC hires employees and consultants with the technological expertise needed to support its high-tech work.

Increased globalization and an international marketplace also present challenges to the FTC's competition and consumer protection missions. The agency will seek to address these challenges through continued engagement with and support of foreign authorities and the many bilateral and multilateral organizations that address antitrust and consumer protection issues.

Finally, the Commission's regulations and guides serve an important public interest, protecting consumers from deceptive and unfair business practices, assisting businesses by identifying problematic practices, and creating a level playing field for legitimate businesses. In a rapidly changing marketplace, however, even effective regulations and industry guidance can become outdated, unnecessary, or unduly burdensome. Since 1992, the FTC has systematically and rigorously reviewed its rules and guides to ensure that they continue to enhance consumer welfare without imposing undue burdens on business. The Commission will continue to conduct these regular reviews and repeal or update its rules and guides as appropriate. The FTC also will

continue to coordinate closely with the many federal, state, and local authorities with which it shares jurisdiction.

V. CONCLUSION

The Commission's effectiveness in championing the interests of American consumers is enhanced by its collegial, bipartisan, and consensus-driven nature. The FTC also benefits from its strong leadership, exceptional staff, and results-oriented culture. The 2013 Federal Employee Viewpoint Survey offers one source of information to evaluate agencies' performance in human capital management, leadership, and accountability.[6] In each of the four indices that are used to measure agency progress, the FTC was ranked in the top four, out of a total of 37 similarly-sized agencies. As we approach our 100th anniversary, the FTC remains committed to finding ways 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.

[6] U.S. Office of Personnel Management, *2013 Federal Employee Viewpoint Survey Results, available at* http://www.fedview.opm.gov/2013files/2013_Governmentwide_Management_Report.PDF.

Mr. TERRY. Commissioner Brill.

STATEMENT OF JULIE BRILL

Ms. BRILL. Good morning. My name is Julie Brill. I will highlight some of the significant substantive work under way at the Federal Trade Commission as we approach our 100th anniversary.

Let me begin with our consumer protection mission. The Federal Trade Commission is taking effective actions to protect consumers in a recovering economy. Aggressive enforcement plays a key role, and we actively monitor the marketplace to identify, understand, and eliminate financial scams. Recently we have focused on putting an end to scams that falsely promised to reduce consumers' mortgage payments, prevent foreclosure, or ease credit card debts. And we have stopped debt collectors who violated the law in their efforts to obtain payments from consumers, some of whom did not even owe a debt in the first place. We pay particularly close attention to schemes that target vulnerable consumers, such as the elderly, and military service members and their families.

The FTC is also the Nation's top cop on the consumer, data security, and privacy beat. Our enforcement and policy work in these areas helps to ensure that consumers have confidence in the dynamic and ever-changing marketplace for personal information. We enforce the Fair Credit Reporting Act, and we pay particularly close attention to children's online privacy as mandated by Congress in the Children's Online Privacy Protection Act.

For over a decade, under both Republican and Democratic leadership, we have challenged deceptive and unfair data security and privacy practices. In that time period, we have brought 47 cases against companies that failed to properly secure consumer information, and more than 40 cases relating to the privacy of consumer data. Some of these cases involve household names such as Google and Facebook, but we have also broad myriad cases against less well-known companies that spammed consumers, violated commitments in their privacy policies, installed spyware on consumers' computers, or otherwise crossed the lines of deception or unfairness in their data collection and use practices.

In all our work we recognize the need to stay abreast of fast-paced technological changes. As the world has moved to mobile, we have focused on the effects of data collection and use practices, as well as the variety of mobile payment systems in this complex and evolving marketplace. We just held a workshop on the Internet of Things to explore data security and privacy issues related to connected devices, smart cars, smart medical devices, and smart appliances.

Moving to our competition mission, here are some highlights, some recent highlights, from our work to promote competition and free markets. In the high-tech marketplace, the Commission has examined difficult issues at the intersection of antitrust and intellectual property laws; issues related to innovation, standards setting, and patents. The Commission's policy work in this area is grounded in the recognition that intellectual property and competition laws share the fundamental goals of promoting innovation and consumer welfare.

With respect to the healthcare market, the Commission devotes significant resources to ensure that competition will enable market participants to deliver cost containment, excellence, and innovation. Using enforcement as its primary tool, the Commission works to prevent anticompetitive mergers and conduct that might diminish competition in health care.

This year, as both Ranking Member Schakowsky and Chairwoman Ramirez have noted, the FTC won an important pharmaceutical enforcement case in the Supreme Court. The Actavis case involved so-called reverse payments between branded and generic pharmaceutical firms. These payments had the effect of keeping lower-priced generic drugs off the market to the detriment of consumers. The Supreme Court ruling that these payments should be subject to the antitrust laws was an important win for consumers. The Actavis decision vindicated the balanced and bipartisan goal of the Hatch-Waxman Act to increase the rewards of branded pharmaceutical manufacturers for bringing new drugs to market, and increase the incentive of generics to challenge invalid drug patents.

Thank you.

Mr. TERRY. Commissioner Ohlhausen, you are now recognized.

STATEMENT OF MAUREEN K. OHLHAUSEN

Ms. OHLHAUSEN. Chairman Terry, Ranking Member Schakowsky, and members of the subcommittee, thank you for the opportunity to appear before you today. I am Commissioner Maureen Ohlhausen, and my statement will briefly address the FTC's ongoing efforts to address technological change, evolving markets, and increasing globalization, as well as the agency's important international activities.

I will first highlight some of our recent efforts to stay abreast of competition and consumer protection issues in high tech and other rapidly evolving areas, which include law enforcement as well as other tools. For example, using our authority under Section 6(b) of the FTC Act, we can obtain information under a compulsory process for market participants and pursue a study of a particular competition or consumer protection issue.

As we announced in September, the FTC plans to perform such a study of the impact of patent assertion entity, or PAE, activity on competition and innovation. This study should provide us with a better understanding of the activities of PAEs and its various costs and benefits.

The Commission may also form an internal task force to examine the competition or consumer protection implications raised by a particular policy proposal. The FTC did this in in 2007, when former Chairman Majoras formed the Internet Access Task Force, which I had the honor of heading. The task force issued a set of recommendations regarding network neutrality proposals that were being debated at the time, and which continue to be debated today.

Finally, one of the FTC's most effective means of obtaining information is holding public workshops, and as Commissioner Brill already mentioned, we recently held a workshop on the Internet of Things.

The Commission is also devoting significant resources to addressing the mobile phenomena. The FTC has a Mobile Technology Unit

which conducts research; follows various platforms, app stores and applications available to consumers; trains FTC staff on mobile technology issues; and develops law enforcement cases involving mobile technologies.

Before concluding my comments on the FTC's efforts in the high-tech space, I would like briefly to discuss an area in which expanding our existing statutory authority would be in the public interest.

Although the FTC has nearly a century of experience protecting consumers across many industries, the exemption from our jurisdiction for communications common carriers frustrates effective consumer protection with respect to a wide variety of activities, including privacy, data security, and billing practices. With the convergence of telecom, broadband, and other technologies, I urge Congress seriously to consider removing this antiquated limitation on our jurisdiction and putting these competing technologies on an equal footing. The Commission has testified in favor of repealing the Communications Common Carrier Exemption in the past, and I would like to take this opportunity to express my support for such repeal.

Another key change for consumers and competition is our increasingly global economy. Thus, the FTC's international efforts are critical to the agency's competition and consumer protection missions. I would like to highlight two important areas of focus in our bilateral efforts: our use of the U.S. SAFE WEB Act and our interactions with the Chinese competition agencies.

The U.S. SAFE WEB Act enables the FTC both to share information with foreign law enforcement agencies and to obtain information on their behalf. And this is vital to strengthening the culture of mutual assistance, but enables law enforcers to achieve greater results for consumers. And one example of this cooperation is the six cases the FTC filed last year against mostly foreign-based operators of a massive tech-support scam. I applaud Congress' decision to reauthorize this important law enforcement tool last year.

On the competition side, the FTC has an increasingly important bilateral relationship with China and its three competition agencies. In July 2011, the FTC and the DOJ signed a Memorandum of Understanding with the Chinese agencies, and since then we have met on multiple occasions to discuss enforcement and policy issues.

Even before the signing of the MOU, the FTC and the DOJ had devoted considerable resources to working with Chinese officials on developing the Chinese antimonopoly law which went in effect in 2008, and our efforts to convince the Chinese agencies to pursue sound competition policies will ultimately benefit U.S. businesses and consumers.

One of the top priorities of the FTC's international program is its work with multilateral fora, including in particular the International Competition Network, in developing best practices for the world's competition agencies. The ICN has a chief consensus on recommended practices in several areas, including merger review procedures, substantive merger analysis, and the criteria for assessing abusive dominance.

I look forward to working with my colleagues on the Commission on the opportunities and challenges our agency will face as we enter our second century. Thank you.

[The prepared statement of Ms. Ohlhausen follows:]

United States of America
Federal Trade Commission

Prepared Statement of Maureen K. Ohlhausen
Commissioner, Federal Trade Commission

Before the U.S. House of Representatives
Energy & Commerce Committee
Commerce, Manufacturing, and Trade Subcommittee

Concerning
"The FTC at 100: Where Do We Go from Here?"

Washington, D.C.
December 3, 2013

I. Introduction

Chairman Terry, Ranking Member Schakowsky, and members of the Subcommittee, thank you for the opportunity to appear before you today. I am Commissioner Maureen Ohlhausen.

My statement will briefly address the FTC's ongoing efforts to address technological change, evolving markets, and increasing globalization, as well as the agency's important international activities.

II. FTC Efforts in the Technology and Other Evolving Areas

A. Our Many Information Gathering Tools

I will first highlight some of our recent efforts to stay abreast of competition and consumer protection issues in high-tech and other rapidly evolving areas, which include law enforcement as well as other tools. For example, using our authority under Section 6(b) of the FTC Act, we can obtain information under compulsory process from market participants and pursue a study of a particular competition or consumer protection issue. As we announced in

September, the FTC plans to perform such a study of the impact of patent assertion entity, or PAE, activity on competition and innovation. This study should provide us with a better understanding of the activity of PAEs and its various costs and benefits.

The Commission also may form an internal task force to examine the competition or consumer protection implications raised by a particular policy proposal. The FTC did this in 2007 when former Chairman Majoras formed the Internet Access Task Force, which I had the honor of heading. The Task Force issued a set of recommendations regarding network neutrality proposals that were being debated at the time and which continue to be debated today.

Finally, one of the FTC's most effective means of obtaining information is holding public workshops. For example, the FTC held a workshop on the Internet of Things on November 19 to get a better understanding of how to achieve the benefits of this next phase of Internet development while reducing risks to consumers' privacy.

B. FTC Efforts in the Mobile Space

The Commission is also devoting significant resources to addressing the mobile phenomenon. The FTC has a Mobile Technology Unit, which conducts research, follows the various platforms, app stores, and applications available to consumers, trains FTC staff on mobile technology issues, and develops law enforcement cases involving mobile technologies.

C. Repeal of the Common Carrier Exemption

Before concluding my comments on the FTC's efforts in the high-tech space, I would like briefly to discuss an area in which expanding our existing statutory authority would be in the public interest. Although the FTC has nearly a century of experience protecting consumers across many industries, the exemption from our jurisdiction for communications common carriers frustrates effective consumer protection with respect to a wide variety of activities, including privacy, data security, and billing practices. With the convergence of telecom,

broadband, and other technologies, I urge Congress seriously to consider removing this antiquated limitation on our jurisdiction and putting these competing technologies on an equal footing. The Commission has testified in favor of repealing the communications common carrier exemption in the past, and I would like to take this opportunity to express my support for such repeal.

III. The FTC's Important International Activities

Another key change for consumers and competition is our increasingly global economy. Thus, the FTC's international efforts are critical to the agency's competition and consumer protection missions.

A. Bilateral Efforts

I would like to highlight two important areas of focus in our bilateral efforts: our use of the U.S. SAFE WEB Act and our interactions with the Chinese competition agencies.

The U.S. SAFE WEB Act enables the FTC both to share information with foreign law enforcement agencies and to obtain information on their behalf and is vital to strengthening the culture of mutual assistance that enables law enforcers to achieve greater results for consumers. One example of this cooperation is the six cases the FTC filed last year against mostly foreign-based operators of a massive tech support scam. I applaud Congress's decision to reauthorize this important law enforcement tool last year.

On the competition side, the FTC has an increasingly important bilateral relationship with China and its three competition agencies. In July 2011, the FTC and the Department of Justice (DOJ) signed a memorandum of understanding (MOU) with the Chinese agencies, and since then, we have met on multiple occasions to discuss enforcement and policy issues. Even before the signing of the MOU, the FTC and the DOJ had devoted considerable resources to working with Chinese officials on developing the China Anti-Monopoly Law (AML), which went into

effect in 2008. Our efforts to convince the Chinese agencies to pursue sound competition policies will ultimately benefit U.S. businesses and consumers.

B. Multilateral Efforts

One of the top priorities of the FTC's international program is its work with multilateral fora, including in particular the International Competition Network (ICN), in developing best practices for the world's competition agencies. The ICN has achieved consensus on recommended practices in several areas, including merger review procedures, substantive merger analysis, and the criteria for assessing abuse of dominance.

Through the ICN and other international fora, the FTC has played a leading role in promoting convergence toward substantive competition norms, procedural standards, and operational techniques that are grounded in economic analysis, respectful of intellectual property rights, and fair and transparent to affected persons and businesses, and which will benefit U.S. consumers and ensure that U.S. businesses receive fair and equal treatment from competition regimes around the world.

IV. Conclusion

I look forward to working with my colleagues on the Commission on the opportunities and challenges our agency will face as we enter our second century. Thank you.

Mr. TERRY. Thank you.

And now, Mr. Wright, Commissioner Wright, you are recognized for 5 minutes.

STATEMENT OF JOSHUA D. WRIGHT

Mr. WRIGHT. Thank you, Chairman Terry, Ranking Member Schakowsky, and distinguished members of the subcommittee, for this opportunity to speak to you today about the FTC at 100. I want to begin by discussing some of the unique institutional advantages and expertise at the Federal Trade Commission.

As both an economist and a lawyer, I appreciate the unique structure of the FTC and how its organization enhances our ability to protect consumers. As you know, the FTC has three bureaus: Competition, Consumer Protection, and Economics. The Bureau of Competition endeavors to promote and protect free markets and vigorous competition, and the Bureau of Consumer Protection works to prevent fraud, deception, and unfair business practices in the marketplace.

The FTC's dual missions complement each other in promoting consumer welfare, encouraging the disclosure of accurate information to consumers in the marketplace, which, in turn, facilitates free and healthy competition. What is sometimes lost in that discussion, however, is the vital role played by the Bureau of Economics in achieving both of those missions.

The Bureau of Economics provides guidance and support to the agency's antitrust and consumer protection activities. Working with the Bureaus of Competition and Consumer Protection, the Bureau of Economics participates in the investigation of mergers and alleged anticompetitive, deceptive or unfair acts or practices. The Bureaus provide an independent recommendation on the merits of antitrust and consumer protection matters to the Commission. The Bureau also integrates economic analysis into enforcement proceedings and works with the Bureaus to divide appropriate remedies.

The Bureau of Economics also conducts rigorous economic analyses of various markets and industries. Some recent examples include its consumer fraud survey, which provided insight into the frequency of certain types of consumer fraud and how the incidence of fraud has changed over time. The Bureau of Economics conducts merger retrospectives that help the agency assess how a particular transaction affected the market, and allows the agency to evaluate enforcement decisions to improve future analysis and decision-making.

Finally, the Bureau also analyzes the economic impact of Government regulation, and provides Congress, the executive branch, and the public with policy recommendations relating to competition and consumer protection issues. Recent examples include the Bureau's work on children's online privacy and protection rule and the endorsement and testimonials guides.

Analyzing the impact of regulations also is one of the main components of the FTC's modernization efforts. To ensure the Commission's regulations and compliance advice remain cost-effective, the agency has engaged in a systematic regulatory review program for the last two decades. Pursuant to that program, the Commission

has rescinded 13 trade rules and 24 guides, and updated dozens of others since the early 1990s. The FTC is committed to continuing its systematic regulatory review program in order to reduce burdens on the business community, while providing real benefits to consumers.

As the FTC enters its second century, it is an appropriate time to reflect upon whether the agency's enforcement and policy tools are being put to the best possible use to help the agency fulfill its mission. One of these tools, the Commission's authority to protect—to prosecute unfair methods of competition as stand-alone violations of Section 5 of the FTC Act, is particularly suitable, in my view—is a particularly suitable candidate for evaluation. The historical record reveals an unfortunate gap between the theoretical promise of Section 5 as articulated by Congress and its application and practice by the FTC.

The gap has grown large in part due to the persistent absence of any meaningful guidance articulating what constitutes an unfair method of competition. For at least the past 20 years, Commissioners from both parties have acknowledged that a principal standard for application of Section 5 would be a welcome improvement and have called for formal guidelines. With that goal in mind, I have offered a detailed policy statement articulating my own views on how best to modernize the agency's Section 5 authority.

The fundamental problem with the Commission's Section 5 enforcement in the unfair methods context is caused by a combination of the agency's administrative process advantages and the vague nature of the Section 5 authority governing unfair methods of competition. This combination gives the FTC the ability in some cases to elicit a settlement even when the conduct in question may benefit consumers. This is because firms typically prefer to settle Section 5 claims rather than go through the lengthy and costly administrative litigation in which they are both shooting at a moving target and may have the chips stacked against them.

Indeed, the empirical evidence documents a near perfect rate at which the Commission rules in favor of FTC staff after administrative adjudication. The evidence also reveals that the FTC's own decisions are reversed by Federal courts of appeal at a much greater rate than those of general district court judges with little or no antitrust experience.

Formal guidelines would help the Commission's mission by focusing the Commission's unfair methods enforcement upon plainly anticompetitive conduct and provide businesses with important guidance about what conduct is lawful and what conduct is unlawful under Section 5. Indeed, the FTC has issued nearly 50 sets of guidelines on a variety of topics, many of them much less important to our mission than Section 5. The Commission can and should, in my view, provide similar guidance for its signature competition statute.

In closing, the FTC is committed to effectively updating and modernizing to achieve its goals of protecting consumers through its consumer protection and competition missions.

I am happy to answer any questions.

[The prepared statement of Mr. Wright follows:]

Federal Trade Commission

STATEMENT

OF

COMMISSIONER JOSHUA D. WRIGHT*
FEDERAL TRADE COMMISSION

BEFORE THE

SUBCOMMITTEE ON COMMERCE, MANUFACTURING, AND TRADE
COMMITTEE ON ENERGY AND COMMERCE
UNITED STATES HOUSE OF REPRESENTATIVES

HEARING ON

"THE FTC AT 100: WHERE DO WE GO FROM HERE?"

WASHINGTON, D.C.
DECEMBER 3, 2013

* The views expressed in this statement are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner.

Thank you, Chairman Terry, Ranking Member Schakowsky, and distinguished Members of the Subcommittee for this opportunity to speak to you today about the "FTC at 100."

I. Institutional Advantages and Expertise

As both an economist and a lawyer, I appreciate the unique structure of the FTC and how its organization enhances our ability to protect consumers. As you know, the FTC has three Bureaus: Competition, Consumer Protection, and Economics. The Bureau of Competition endeavors to promote and protect free markets and vigorous competition, and the Bureau of Consumer Protection works to prevent fraud, deception, and unfair business practices in the marketplace. The FTC's dual missions complement each other in promoting consumer welfare—encouraging the disclosure of accurate information to consumers in the marketplace, which in turn facilitates free and healthy competition. What is sometimes lost in that discussion, however, is the vital role played by the Bureau of Economics in achieving both of these missions.

The Bureau of Economics provides guidance and support to the agency's antitrust and consumer protection activities. Working with the Bureaus of Competition and Consumer Protection, the Bureau of Economics participates in the investigation of mergers and alleged anticompetitive, deceptive, and unfair acts or practices. The Bureau provides an independent recommendation on the merits of antitrust and consumer protection matters to the Commission. The Bureau also integrates economic analysis into enforcement proceedings and works with the Bureaus to devise appropriate remedies.

The Bureau of Economics also conducts rigorous economic analyses of various markets and industries. Some recent examples include:

Consumer Fraud Survey: The Consumer Fraud Survey provides insights into the frequency of certain types of consumer fraud and how the incidence of fraud has changed over time.

Merger Retrospectives: The Bureau of Economics conducts merger retrospectives that help the agency assess how a particular transaction affected the market, and allow the agency to evaluate enforcement decisions to improve future analysis and decision-making.

Analysis of Government Regulations: Finally, the Bureau also analyzes the economic impact of government regulation, and provides Congress, the Executive Branch, and the public with policy recommendations relating to competition and consumer protection issues. Recent examples include work on the Children's Online Privacy Protection Rule and the Endorsement and Testimonials Guides.

II. Modernization Initiatives

Analyzing the impact of regulations also is one of the main components of the FTC's modernization efforts. To ensure that the Commission's regulations and compliance advice remain cost effective, the agency has engaged in a systematic regulatory review program for the last two decades. Pursuant to that program, the Commission has rescinded 13 trade rules and 24 guides and updated dozens of others since the early 1990s. The FTC is committed to continuing its systematic regulatory review program in order to reduce burdens on the business community while providing real benefits to consumers.

As the FTC enters its second century it is an appropriate time to reflect upon whether the agency's enforcement and policy tools are being put to the best possible use to help the agency fulfill its mission. One of these tools—the Commission's authority to prosecute "unfair methods

of competition" as standalone violations of Section 5 of the FTC Act—is a particularly suitable candidate for evaluation.

The historical record reveals an unfortunate gap between the theoretical promise of Section 5 as articulated by Congress and its application in practice by the FTC. This gap has grown in large part due to the persistent absence of any meaningful guidance articulating what constitutes an unfair method of competition. For at least the past twenty years, commissioners from both parties have acknowledged that a principled standard for application of Section 5 would be a welcome improvement and have called for formal guidelines. With that goal in mind, I have offered a detailed Proposed Policy Statement articulating my own views on how best to modernize the agency's Section 5 authority.

The fundamental problem with the Commission's Section 5 enforcement is caused by a combination of the agency's administrative process advantages and the vague nature of the Section 5 authority governing unfair methods of competition. This combination gives the FTC the ability, in some cases, to elicit a settlement even when the conduct in question may benefit consumers. This is because firms typically prefer to settle Section 5 claims rather than go through lengthy and costly administrative litigation in which they are both shooting at a moving target and may have the chips stacked against them. Indeed, the empirical evidence documents a near perfect rate at which the Commission rules in favor of FTC staff after administrative adjudication. The evidence also reveals that the FTC's own decisions are reversed by federal courts of appeal at a much greater rate than those of generalist district court judges with little or no antitrust expertise.

Formal guidelines would focus the Commission's unfair methods enforcement upon plainly anticompetitive conduct and provide businesses with important guidance about what

conduct is lawful and what conduct is unlawful under Section 5. Indeed, the FTC has issued nearly fifty sets of guidelines on a variety of topics, many of them much less important than Section 5. The Commission can and should provide similar guidance for its signature competition statute.

In closing, the FTC is committed to effectively updating and modernizing to achieve its goal of protecting consumers through its consumer protection and competition missions. I am happy to answer any questions.

Mr. TERRY. Thank you, Commissioners and Chairwoman. I appreciate your testimony. And at this point it is the question-and-answer part where we get to do a little deeper dive into your testimonies. And as I telegraphed in my opening statement, and when we had time to chat beforehand, I am concerned about the CFPB having what appears to be substantially similar jurisdiction, although without the maturity of 100 years of testimony and cases to work from.

So in regard to the FTC's interpretation and guidance on how it interprets unfair and deceptive, are there any indications that they will or will not—the CFPB is going to follow any of the historical interpretations by the FTC, Chairwoman?

Ms. RAMIREZ. Chairman, let me say that we have worked very closely with the CFPB. We entered into a Memorandum of Understanding back in January of 2002—2012, excuse me, in which we set out processes and procedures specifying how we would coordinate to avoid duplication of effort, and to avoid double teaming any one company. I also think that—so we consult in connection with enforcement actions as well as rulemakings and other policy work.

The statutory definition of unfairness tracks—that is in Dodd-Frank tracks what is in the FTC Act, so I do believe that the CFPB will be informed by the relevant case law, as well as the relevant work that the FTC has engaged in when it comes to its use of its——

Mr. TERRY. Do you have any experiences so far, though, whether to determine if CFPB will use or will not use those historical precedents from the FTC?

Ms. RAMIREZ. At the end of the day, I think the agency will do what is appropriate under their statutory——

Mr. TERRY. That is what I am afraid of.

Ms. RAMIREZ [continuing]. Authority. However, again, I do believe that they will be informed by the work of the FTC. We cooperate very closely, and we certainly, you know——

Mr. TERRY. But no evidence of that that you can point to?

Ms. RAMIREZ. I haven't seen any evidence that they are doing anything inappropriate.

Mr. TERRY. OK. And I want to dive down a little deeper on the duplication, because some of the fears of the entities that are under—particularly financial institutions where there may be an FTC review, let us take mortgages, for example, or debt collection, that it could be under both the jurisdictions, and there is an FTC pathway, and then there is going to be a duplication or maybe even a slightly different standard under CFPB.

You mentioned that you kind of have an agreement on jurisdiction. Can you give us more details regarding the—that agreement on how you are going to work through those shared jurisdictions?

Ms. RAMIREZ. I wouldn't call it an agreement on jurisdiction, but rather it is an agreement to put in place processes and procedures to ensure that there is no duplication, and to ensure that we collaborate effectively and efficiently. We did—under Dodd-Frank the FTC lost certain rulemaking authority relating to the financial sector, which now is housed and is under the province of the CFPB. So it is really on enforcement matters where we are primarily collaborating. And, again, we make a great effort and we are in con-

tact with them on a regular basis to ensure that we are both effective agencies.

And let me also just say that we have a very strong history and a good track record of working with sister agencies to collaborate and have shared jurisdiction.

Mr. TERRY. Well, but CFPB is, A, new, and, B, has been given a wide berth without too many regulatory barriers to that jurisdiction. And one of the issues that we have discussed is on their unfair and deceptive actor or practice guidance that seems like it may be different than FTC.

Have you worked with the CFPB on the issuance of their own use of——

Ms. RAMIREZ. It is not a topic that I have addressed with them directly. We, of course, have our own policy statements addressing unfairness and their deception authority.

Mr. TERRY. Right.

Ms. RAMIREZ. Again——

Mr. TERRY. You haven't had any conversations——

Ms. RAMIREZ. I personally have not engaged on that particular issue, but I know that staff is in discussions, and this is no doubt a subject that was addressed.

Mr. TERRY. OK, staff are in discussions.

Any of the other three Commissioners in 29 seconds have any concerns with CFPB?

Ms. OHLHAUSEN. Chairman Terry, I do think that it is important that the FTC and the CFPB try to interpret and apply similar authority in a similar way. So I completely agree with what Chairwoman Ramirez said.

The CFPB has not had the enforcement history that the FTC has had thus far, but I am concerned that in one of the complaints that they did issue, they did seem to apply unfairness in a very—possibly in a very broad manner to reach pricing in particular. So if that were to be an actual representation of their enforcement position, that would create concerns for me down the road, because I don't think that is consistent with how the FTC is interpreted.

Mr. TERRY. And I appreciate that.

One last question, Chairman: Do you want to move out of your building?

Ms. RAMIREZ. No, we do not.

Mr. TERRY. All right. Thank you.

I now recognize the ranking member for 5 minutes.

Ms. SCHAKOWSKY. Thank you, Mr. Chairman.

I first want to correct a word in my opening statement. I mistakenly said that the FTC has fought for pay-for-delay. It has actually fought against pay-for-delay. I wanted to clarify that.

But I did want to ask more questions about pharmaceuticals. Pharmacy benefit managers, or PBMs, are middlemen between insurers, drug manufacturers and patients, as well as to negotiate discounts and rebates with pharmacists and drug manufacturers to lower the cost of medicines for patients. In 2005, the FTC conducted an analysis of competition among PBMs and determined the market was competitive.

In the wake of the 2005 report, there have been a number of large PBM mergers, either mergers between PBMs or vertical

mergers between PBMs and pharmacies. CVS Caremark was created by the merger of Caremark Rx with AdvancePCS. Last year the FTC allowed the PBM giant Express Scripts and Medco to merge. Now the new Express Scripts and CVS Caremark account for more than 80 percent of the PBM market.

So, Commissioner Brill, I want to ask you a question. Given these recent PBM mergers, is it perhaps time for the FTC to revisit the PBM market to ensure that it remains generally competitive and free of pervasive anticompetitive behavior?

Ms. BRILL. Thank you, Ranking Member Schakowsky.

I have had a long history dealing with PBMs at the State level, as well as at the Federal Trade Commission, and I have been involved with State laws and State efforts to enact laws to increase transparency around PBMs. This is an issue where some of the States have had an intellectual disagreement with the traditional position of the Federal Trade Commission.

I think that it is important to examine the ways in which PBMs do operate and to ensure that they are being as transparent as possible, yet still maintaining competition with respect to their clients; that is, us, employers, whether large or small, or other types of entities that hire PBMs.

With respect to concentration in the market for PBMs, as you know, I dissented in the Commission's decision to allow the most recent merger to go forward, and the reason I dissented is that I felt the parties said themselves that they did not need to merge in order to gain any further economies of scale. And as a result, I was looking at their other activity, and I saw some evidence of coordination, and I worried a great deal about coordination in this market.

And as a result, at the close of the case, I did suggest that it would be appropriate for the Federal Trade Commission, given what our resources are, given the other issues that we have to examine, for instance, patent assertion entities, patent trolls, if you will, and others, that if we do have the resources, I think it would be appropriate to take a look at concentration in the PBM industry and whether or not some of the concerns that I have seen are going to bear fruit. And that would be something that would probably—should take place not necessarily right now, but maybe in a few years.

Ms. SCHAKOWSKY. In a few years.

Ms. BRILL. A year or two, yes. I think we need to see how the market matures, given the now even greater concentration in the market.

Ms. SCHAKOWSKY. Chairwoman Ramirez, we have heard from experts that there are particular concerns in the area of specialty pharmacy where patients are using more expensive drugs with more complicated treatment regimens that require special attention from pharmacists that are specially trained.

Do you have any concerns about the impact that the mergers will have on patients' choice of specialty pharmacists?

Ms. RAMIREZ. We are aware of the concerns that have been raised in connection with the merger that you just mentioned, Express Scripts and Medco. This was an issue that we looked at very closely. We issued a closing statement in which we explained that we did not believe that there were any adverse impacts on the

availability of specialty drugs that would result from the merger, and I believe that that is the case. However, we are aware of the concerns, and this is going to be an area that we will continue to look at closely.

Ms. SCHAKOWSKY. I am going to see if I can get in one more question on the privacy front.

Really quickly, I wanted to ask you, Chairwoman Ramirez, I agree with the general conclusion of your November 19th workshop that the Internet of Things brings great potential for innovative, useful technologies, but also new challenges. At the workshop you stressed that companies taking part in the new Internet of Things ecosystem have a great responsibility to, quote, "build in consumer privacy protections from the outset."

Could you please address why you believe that this approach to data collection, where privacy is hard-coded into new technologies, is the right one?

Ms. RAMIREZ. This is an approach that the Commission has advocated since we issued a privacy report in March of last year. We advocate three broad principles that we believe should be—are good best practices for companies to abide by. That includes privacy by design, which means that companies ought to think about and incorporate privacy protections as they develop products. I also think that it is important to provide both simplified notice and choice so that consumers can exercise greater control over their personal information. And then finally, it is also critically important that companies be open and transparent about how they collect and use personal information from consumers.

Ms. SCHAKOWSKY. Well, we are following up as a committee on that as well, so we look forward to working with you.

Mr. TERRY. Appreciate that. And there may even be more privacy questions from our gentlelady from Tennessee. You are now recognized for 5 minutes.

Mrs. BLACKBURN. Thank you, Mr. Chairman, and I will stay right with that line of questioning.

Commissioner Brill, let me come to you on the Internet of Things issue, and this is something as a committee and a working group that we are looking at. And I have to tell you, I was a little bit, I guess, befuddled would be the word about the FTC's intended approach to the Internet of Things, and I would like for you to speak to this.

You wrote a New York Times piece saying the FTC should guide the development of the Internet of Things, and you did that 2 months before the FTC's workshop on that topic. And I would like to know if you think it was appropriate to write such a piece when you were holding an exploratory workshop, and, therefore, now some people have come forward and said that your workshop was just outcome driven. You were meant to lay the groundwork for new regulations, and so is this a good approach, or should you all be listening and learning from these workshops and those that are participating in that before trying to drive policy in the New York Times on very complex and dynamic technologies?

Ms. BRILL. Thank you for the question. I appreciate being able to respond to that.

Yes, I think it was very appropriate for me to place that piece in the New York Times. I was asked by the New York Times to write a very short piece about what some of the issues around the Internet of Things were, and I wrote the piece to raise questions about the kinds of things that I was individually thinking about.

Mrs. BLACKBURN. So you did it to raise questions and not to drive outcomes?

Ms. BRILL. Absolutely not.

Mrs. BLACKBURN. So you did not want to predetermine what the outcome from the workshop would be?

Ms. BRILL. Absolutely not. And I think a close and fair reading of my piece would show that it is raising questions, and it is certainly not——

Mrs. BLACKBURN. It has raised questions for some of us, but we want to make certain, and this is one of the reasons we are looking so closely at the Internet of Things and privacy.

I want to move on with the time that I have. Commissioner Wright, I would like to come to you. Can you tell me why antitrust is a better way to address net neutrality concerns and why you think the FTC is the appropriate agency to handle the so-called net neutrality bucket of issues?

Mr. WRIGHT. Absolutely, and I appreciate the question.

With respect to the concerns raised in and around the net neutrality space, in general most of these concerns involve what antitrust economists and lawyers call vertical agreements or vertical contracts, contracts between complement providers. And these are the types of contracts which antitrust law and antitrust agencies like the FTC have looked at and evaluated and developed a framework through the common law under the Sherman Act for nearly 100 years; developed a set of tools for identifying which of these agreements pose problems and actually harm consumers, and which can be beneficial. And quite a few can be beneficial to consumers rather than harm.

So the FTC and the antitrust institutions generally, I believe, have a framework that, from an analytical perspective, is asking the right questions: Which of these agreements will help consumers? Let us allow the consumers to get the benefits of those. Which of these will harm? Let us investigate further, bringing enforcement action with respect to those agreements. That is precisely the framework that we have, and I have argued in my personal capacity that it is a better framework.

Mrs. BLACKBURN. OK. Let me stop you there. Just a yes or no. In your opinion, has the FTC ever really explained what its unfair methods of competition covers that antitrust does not?

Mr. WRIGHT. No.

Mrs. BLACKBURN. Thank you.

Chairwoman Ramirez, if I could come to you. I have got a question on Magnuson Moss, that warranty act, and I am about to run out of time on this, and I want to be sensitive to the clock, but I have some questions on this related to the tying prohibition, and I know that it has been nearly 2 years since the release of the request for comments and 3 years since the first complaint had been filed with the FTC by the aftermarket groups and there has been no further comment and no public action taken by the FTC. So,

since we are about out of time, if you would submit to me where you are on that, I would like to know if you have an anticipated timeline for the review for that, for the complaints and the answers to those from the aftermarket groups.

Ms. RAMIREZ. Well, let me just say quickly that we do anticipate completing that review in the coming year, and I am happy to provide you more detail about the status of that.

Mrs. BLACKBURN. I appreciate that.

Thank you so much.

Mr. LANCE [presiding]. Thank you very much.

The Chair now recognizes the Dean of the Congress, Mr. Dingell.

Mr. DINGELL. Mr. Chairman, I thank you for your courtesy.

I note that the agency is approximately 100 years old, for which I extend my congratulations. I want to particularly welcome the commissioners, especially Chairwoman Ramirez. I have some questions which I hope will be answerable in the yes or no.

To you, Madam Chairman, would consumers and industry benefit from having one Federal agency enforcing a uniform set of national data breach notification requirements? Yes or no.

Ms. RAMIREZ. Yes, I believe so.

Mr. DINGELL. Thank you, Madam Chairman. Now, in your opinion, should that agency be the Federal Trade Commission?

Ms. RAMIREZ. Yes.

Mr. DINGELL. I happen to concur. Now, Madam Chairman, provided they are strong enough, should Federal data breach notification requirements supersede State requirements? Yes or no.

Ms. RAMIREZ. Yes.

Mr. DINGELL. Madam Chairman, should State attorneys general be allowed to enforce such requirements? Yes or no.

Ms. RAMIREZ. Yes.

Mr. DINGELL. Madam Chairman, does the Commission believe that a violation of Federal data breach notification requirements should be deemed an unfair or deceptive act or practice in commerce, thus subject to the commission's authority under section 18(a)(1)(b) of The Federal Trade Commission Act? Yes or no.

Ms. RAMIREZ. Yes.

Mr. DINGELL. Madam Chairman, would a uniform Federal data breach notification law enforced by the Commission as well as State attorneys general provide a significantly greater level of protection for consumers than that which now exists? Yes or no.

Ms. RAMIREZ. Yes.

Mr. DINGELL. Madam Chairman, does the Commission believe a business should notify consumers of a data breach within a reasonable time certain provided the Commission may extend such time based on a reasonable demonstration of necessity by a business? Yes or no.

Ms. RAMIREZ. Yes.

Mr. DINGELL. Madam Chairman, should a data breach occur, do you believe a business should be required to notify credit reporting agencies without unreasonable delay?

Ms. RAMIREZ. Yes, I do, particularly if the breach involved Social Security numbers.

Mr. DINGELL. Thank you, Madam Chairman.

Now, I understand the Commission is currently conducting a study on data brokers, including how they collect information about consumers and consumers' ability to dispute the veracity of such information. Do you anticipate that the Commission will complete that study in the near future? Yes or no.

Ms. RAMIREZ. Yes.

Mr. DINGELL. Madam Chairman, does the Commission believe any uniform Federal data breach notification requirements should include a safe harbor for businesses subject to mandatory risk assessments to be submitted to the Commission? Yes or no.

Ms. RAMIREZ. I am a bit unclear as to how the safe harbor would work, so I will defer an opinion on that.

Mr. DINGELL. Do you want to submit your further thoughts at a later time?

Ms. RAMIREZ. That would be terrific. Thank you.

Mr. DINGELL. Madam Chairman, does the Commission believe that it would require additional authorization of appropriations in order to enforce uniform Federal data breach notification requirements?

Ms. RAMIREZ. No.

Mr. DINGELL. Now, Madam Chairman, should the Commission be permitted to promulgate rules and regulations appropriately tailored for the enforcement of any uniform Federal data breach notification requirements subject to The Administrative Procedure Act, yes or no.

Ms. RAMIREZ. Yes.

Mr. DINGELL. Thank you, Madam Chairman. Your responses have been most helpful.

Mr. Chairman, I look forward to working with you and my Democratic and Republican colleagues to write a commonsense law to establish uniform data breach notification requirements. The administration has proposed a sound basis for moving forward in this particular regard and I note that similar such legislation has been proposed and even considered by this committee in successive recent Congresses. I believe we should avail ourselves of this opportunity to do thorough bipartisan work for which this committee has been traditionally known under the leadership of yourself, my old friend Mr. Barton, and, of course, our current chairman, Mr. Upton.

I thank you, and I yield back one second.

Mr. LANCE. Thank you very much, Mr. Dingell.

The Chair now recognizes the chairman emeritus of the full committee, Mr. Barton of Texas.

Mr. BARTON. Thank you, Mr. Chairman.

The FTC has made numerous revisions to the current law on children's online protection, the COPA Act. Most recently, about this time last year, the FTC had a rulemaking that modified the list of personal information that can't be collected without parental notice and consent. It closed a loophole that allowed children directed apps and Web sites to permit third parties to collect to personal information from children through plug-ins without parental notice and consent. It extended the COPA rule to cover persistent identifiers that recognize users over time from across different Web sites or online services. It strengthened some data security protec-

tions by requiring that covered Web site operators and online service providers take reasonable steps to release the children's personal information only to companies that are capable of keeping it secure and confidential. And it strengthened the FTC's oversight of self-regulatory safe harbor programs.

Having done those things, does the FTC or would the FTC support or at least consider supporting additional protections such as are included in a proposed piece of legislation that myself and Congressman Rush of Chicago have offered, the Children's Online Protection Act of 2013?

In other words, in spite of what the agency has done, do you support even more secure privacy for our children? I will start with the chairman and then go right down the line.

Ms. RAMIREZ. I do support the aim of giving more control to teenagers and children over their personal information, so I am generally supportive of that, yes.

Ms. BRILL. And I, too, am supportive of the goals of your bill and particularly am interested in exploring the feasibility of the eraser button concept that you have incorporated in that bill.

Mr. BARTON. Thank you.

Ms. OHLHAUSEN. To echo my colleagues, I definitely support the aims of the bill. I would like to get more deeply into the issue of what, given the COPA rule revisions and some of the self-regulatory options that are out there, what remains to be done in the market to extend those kind of protections.

Mr. BARTON. Thank you.

Mr. WRIGHT. I echo the sentiments of my colleagues on the Commission that I am certainly supportive of the goals of the bill and would certainly be open to considering further details.

Mr. BARTON. Good. Well, we have, under Chairman Terry's leadership, he has created a privacy task force, a bipartisan task force, Chairwoman Marsha Blackburn is very active on that, as I am, and hopefully, we will be holding a legislative hearing on Mr. Rush's and my bill sometime in the spring.

Another privacy question, and this one is not quite as obvious, but we heard yesterday Amazon's efforts to use drones to deliver packages. It opens up a whole new realm of privacy issues if that does occur. Most of the attention has been focused on what the FAA would do. But my question to the FTC, if and when companies like Amazon.com want to use drones commercially in the public sector, does the FTC have a role to play in issuing privacy guidelines? I will start with the chairwoman.

Ms. RAMIREZ. Yes, thank you. Let me say that, as was discussed earlier, I do believe that we have a role to play and the agency has been very active, of course, when it comes to privacy. But in addition to enforcement work that we have done pursuant to our Section 5 authority, we have also engaged in extensive policy work in this area. I mentioned earlier the policy framework that the Commission issued a year and a half ago, and I would say that for any emerging technology, we believe that it is an appropriate lens through which companies should examine any product or service that implicates individual privacy.

At the same time, let me also note there are limits to what the FTC can do under our authority, and I do believe, I personally am

supportive of baseline Federal privacy legislation because we can't do everything when it comes to privacy.

Mr. BARTON. Anybody else?

Ms. BRILL. I agree wholeheartedly with what the chairwoman just said, and I think in particular our report in 2012 outlined concepts that are applicable with respect to different technologies, privacy by design, transparency, simplified notice in choice. These are the kind of concepts that could be imported into the drone framework. But, again, it would be helpful to have clear lines of authority with respect to that issue.

Ms. OHLHAUSEN. I think this is a great example of how new technologies are surprising us, and it is hard to forecast where things will be going. So I think the FTC's approach of having clear principles or deception or unfairness authority that we have applied very actively in enforcement, coupled with using our policy tools to get an idea of what new technologies are occurring, what particular risks and benefits they may offer and getting a good understanding of that and perhaps issuing some sort of guidance based on really having a full knowledge of what that new technology is, is a very appropriate path, one we have followed in other technologies. And, who knows, maybe we will have a workshop on drones sometime in the future.

Mr. WRIGHT. I will note very quickly just that I had not had the opportunity to think about drones and packages in this job until yesterday, so I don't have much profound to say about what our approach might be, but I want to echo my colleagues' sentiments here and particularly Commissioner Ohlhausen. One of the advantages in our approach, both on the competition and the consumer protection side, is these principles coupled with a framework and the tools that allow us to get at what the consumer welfare implications are, what the cost and benefits of various approaches are, is in the intellectual blueprint of the agency and I think is very helpful for addressing new and sometimes surprising technologies.

Mr. TERRY [presiding]. Thank you.

And at this time, I recognize the gentleman from Maryland for his 5 minutes.

Mr. SARBANES. Thank you, Chairman Terry, for pulling this hearing together, and I want to thank the panelists. Listening to your testimony, it is amazing how broad the jurisdiction of the FTC is and your testimony has given me confidence certainly that that jurisdiction is being managed in an efficient and fair way. So thank you for your testimony today. I have a couple of broad questions to ask, but before that, I hope you would indulge me in sort of a parochial question.

Chairman Ramirez, we have exchanged some correspondence relating to ongoing review by the FTC of a merger of two large funeral home companies, SCI and Stewart Industries, and I have gotten a lot of inquiry and communication, as I think the FTC has as well, from members of the Jewish community in the greater Washington, DC, area who have expressed some concern that that merger might reduce the access of the Jewish community to certain affordable funeral services that comport with rights and rituals of the Jewish faith.

I just wanted to ask you while I had you here today, can you tell me if and how the FTC is taking those concerns into account as this merger is being reviewed and evaluated?

Ms. RAMIREZ. I appreciate the concerns. Unfortunately, I can't comment on an ongoing investigation. But what I can say is that we are certainly aware of your concern as well as a similar concern that has been expressed by others. And that is really all I can say at this time.

Mr. SARBANES. I appreciate that. I would urge the Commission to give serious attention to the concerns that have been expressed. Right now, these special services are available on an affordable basis. It would be a shame for that to fall by the wayside as a result of the merger. So I thank you for your attention to that.

I wanted to ask, given that this is kind of an overview hearing as we come up on the 100th anniversary of the FTC, a couple of questions about, and anybody can answer this, one relates to the kind of rhythms of your jurisdiction, depending on the state of the economy. So I would presume that when times are bad, or perhaps maybe that is not the case, maybe it is when things are getting better and certain people have resources that they didn't otherwise have, that the kinds of scams you see increase, the number of scams increase. So I would be curious to get some response to that question.

Also, as you know, there is a demographic wave coming at us of seniors and I would imagine as a result of that you are seeing obviously many more seniors coming into a certain cohort, and I imagine the kinds of scams that are being perpetuated against our seniors is increasing as a result of that because there is also a tremendous amount of resources there. So if you could speak to either or both of those issues, those who would feel comfortable responding, that would be great.

Ms. RAMIREZ. Why don't I lead things off, if I may. Unfortunately, fraud flourishes at all times, when the economy is distressed as well as in good times, but we do see differences in the types of fraud. So, for instance, over the last several years, we have seen particular frauds that have been targeted at financially distressed consumers, and it does impact seniors and other underserved communities, so we have been particularly vigilant when it comes to that and we place significant resources in addressing those times of frauds. Those continue, but we are seeing them a bit diminished in light of the economic recovery. But, unfortunately, there is ample fraud, regardless of what the economy looks like, and we are vigilant at all times.

With regard to your question about seniors, we are very much attuned to scams that may affect seniors in particular and that does include work at home scams, prize and lottery type of scams. We are attuned to those issues. We held a workshop earlier in the year addressing identity theft as it pertains to seniors. So we are working with other enforcement partners as well as with members of the community, community organizations, AARP, to do what we can both to press forward with enforcement efforts as well as to educate seniors with how to avoid fraud.

Ms. OHLHAUSEN. Just to augment what the chairwoman said, I wanted to mention one of the great strength that I see that we

have at our disposal at the FTC is how we are able to collect and analyze data to help drive our enforcement priorities. And your questions brought to mind how we use Consumer Sentinel, which is a database that we collect complaints so we find out where particular frauds or what types of particular frauds are trending, so we can turn our enforcement tools that way. And also we did a fraud study last winter that looked at what groups were vulnerable to what particular frauds, and this included seniors. And these are both great tools for us to better target our enforcement efforts to particular groups that are experiencing certain problems.

Mr. SARBANES. Thank you very much.

I would love to get a copy of that fraud study if it is available. Thank you.

Mr. TERRY. Thank you.

Now the vice chairman of the subcommittee, Mr. Lance, you are recognized for 5 minutes.

Mr. LANCE. Thank you very much, Mr. Chairman.

As I understand it in the antitrust context regarding adjudicative process, first, there is the ALJ, then an appeal to the Commission, and then finally to the Federal courts. Is it true that the FTC staff has never lost a case before one of its ALJs or an appeal to the Commission?

Ms. RAMIREZ. I think the statistics I think that have been stated in this arena really can be misleading. I think it is a much more nuanced picture. There have been times when both the ALJ takes a different view than the staff that is prosecuting a case. The Commission has also taken a different view on certain claims as regards the arguments that are being made by complaint counsel.

Mr. LANCE. So you have lost? The staff has lost?

Ms. RAMIREZ. With regard to certain claims, yes. But you need to look—you can't just look at the case as a whole, but you need to look at and evaluate particular claims. Let me just also observe that before a matter even gets to the administrative process, there is a lengthy and thorough investigation that is conducted by staff. Then there is a decision by the Commission as to whether or not to move forward with a particular complaint. So that ends up really weeding out any weak cases.

Mr. LANCE. And this process is different from the process at DOJ. Is that accurate?

Ms. RAMIREZ. We have the ability to use both the Federal court or to use in the alternative the adjudicative process. The Department of Justice only has the avenue of the Federal court.

Mr. LANCE. Would any of the other commissioners like to comment? Yes, Mr. Wright.

Mr. WRIGHT. I want to make one small correction, but I think it is one that will help us focus on the right issue. The statistic, it is not whether the staff wins or loses in front of the ALJ. The record in front of the ALJ is actually fairly similar to what you get in Federal Court, a little bit different. But the FTC staff wins and loses cases in front of ALJs, either as Chairman Ramirez was saying, on a whole count, on some counts, on part of the case, all of the case. The statistic that I think raises some questions and that I alluded to in my testimony which I think is interesting with respect to the process is that when the ALJ decision has been

reached, the historical trend for the past, at least past couple of decades, has been if the ALJ rules in favor of the FTC staff, the Commission affirms. If the ALJ rules against the staff, the Commission reverses. Now, there are nuances in the data, but the rate is near 100 percent.

So there are potential explanations of the differences, and I certainly don't have any qualms to folks raising them. But 100 percent is an impressive number, and it is a number——

Mr. LANCE. It is indeed.

Mr. WRIGHT. And it is a number quite different from the processes and institutions that folks face when they go into Federal Court, and I think there is a question about what to do about that.

Mr. LANCE. Thank you. I am sure we will continue to have a discussion on that.

Last week, the Wall Street Journal noted the Commission opened an investigation of the Music Teachers National Association and found its longstanding code of ethics contained a provision that members should not seek to poach other members' clients, and I understand this is currently under investigation and I am sure you can't comment on the specific facts of that situation. But to the Chair, what is the FTC's jurisdiction over nonprofits and does that include nonprofit membership associations?

Ms. RAMIREZ. We do have jurisdiction over nonprofits where the membership and the trade association would be organized for the purpose of monetary gain and profit for its members, so in that circumstance, we would have jurisdiction. And I can't comment on the specific——

Mr. LANCE. Yes, I realize that. Does the FTC have any evidence that the code of ethics hurts consumers or has raised prices?

Ms. RAMIREZ. Again, I can't comment on that particular——

Mr. LANCE. I am not asking on that case. Generally speaking.

Ms. RAMIREZ. Let me just say, generally speaking, the FTC is concerned when there are code of ethics that amount to agreements not to compete. That would be a fundamental violation of the antitrust laws. Our job is to promote vigorous competition, and that is what we aim to do.

Mr. LANCE. I see. Any other members like to comment on that?

Thank you. With 10 seconds, let me say when I was in college at the fraternities, you were not supposed to poach on your fraternity brothers' girlfriend. You were not to ask her for a date.

Mr. TERRY. That is a different type of trust.

Mr. LANCE. Thank you very much, Mr. Chairman.

Mr. TERRY. So, with that enlightened statement, I will recognize the gentleman from California, Mr. McNerney, for 5 minutes.

Mr. MCNERNEY. Thank you, Mr. Chairman.

I just want to say your presentation was well-crafted and coordinated, I appreciate that, and it shows that you are working together, which is important in terms of protecting consumers and carrying out the tradition of stopping the old—before the Commission—"let the buyer beware" philosophy that ruled this country. So thank you for carrying on that great tradition.

Commissioner Brill, you mentioned the privacy issue. What are one of the things that I am working with Mrs. Blackburn and Mr. Welch and other members of our privacy working group was that

the companies are telling us that if they have specific policies that are stated and that they don't follow those policies, that the Commission will go after them, and that that is the best thing that could happen as opposed to us imposing some sort of regulatory framework over privacy. Would you comment on that? Do you agree with that?

Ms. BRILL. I think it is important that we police whether or not companies are abiding by their commitments to consumers that are contained within privacy policies, so I do think that is an important part of what we do. However, there is another aspect of what we do which is our unfairness jurisdiction, which I think is equally important. And we have brought many cases, dozens of cases, involving whether or not companies' practices, leaving aside what they State what they are going to do, whether or not their practices are harmful to consumers and should be subject to our jurisdiction.

I have actually had conversations with companies, tech companies, that have said that they think that our unfairness jurisdiction is important because it at least has a measure of harm in it. If you look at our unfairness statement, there is some aspect of harm that we have to demonstrate.

So I think it is important actually to have both aspects of our jurisdiction, not just focusing on whether or not a company is abiding by its privacy policies, which is an important aspect.

Mr. MCNERNEY. Thank you.

Ms. Ohlhausen, I want to talk about patents for a minute. You mentioned the word "patent assertion entity." Another more derogatory word that has been going around lately is "patent troll." I am a patent holder, innovations that I developed, and I have a suspicion that there is a large company that is violating my patent, that is infringing on my patent. I talked to another engineer that had a similar situation in the past, and he said, well, it is going to cost you about $5 million to $10 million to go up against the companies that do this. And he says, I have some investors I will put you in touch with if you want to pursue that.

Well, obviously, I am not in a position to do that. But I think we need a balanced approach in terms of going after patent assertion entities to make sure that they have a certain amount of protection for patent holders and innovators. Would you comment on that, please?

Ms. OHLHAUSEN. Yes. Thank you. You raise a very important point, which is that our patent system, it is important that there are protections for patent holders and that one of the things that we need to keep in mind, and I am glad the FTC is doing a study on this, is to get a very clear sense of what problems are really being created and what isn't a problem. So it is important that the patent holder does the have the ability to protect its rights, and sometimes to protect the small patent holder, they would be able to sell their patent to another entity that might be better suited to capitalize on it, to enforce it, to create around it.

So that is one of the reasons why I was very supportive of the agency doing our patent assertion entity study, to get a better idea of what is really happening in the market and what the interests are. Because we do need to proceed very carefully in this area to

make sure that the rights of particularly small patent holders are protected.

Mr. MCNERNEY. OK. Thank you. Mr. Wright, one of the things you mentioned was the analysis of the impact of government regulations on business, and that is something that I think on both sides of the aisle we are quite interested in. We don't want too much regulation, but we want a level playing field for good competition.

What do you see the long-term impact and long-term goal of that study and of that work is with the agency?

Mr. WRIGHT. I think for me the right way to think about that study from the FTC's perspective is that it is an ongoing commitment. The commitment to continually review our rules and regs is something that we do; we do on a regular basis; we have done for 20 years. It involves older regulations that are no longer relevant that we pared down—I think I gave the numbers of 24 rules and 13 regs over just the last 23 years or so—in addition to updating rules that we have that are still relevant moving forward.

So what we do, and I think the economic capacity in the agency to do, is internal cost-benefit analysis to make sure that we are keeping the rules that have a high rate of returns for consumers, that we are getting rid of the ones that have zero or negative rate for consumers, and that we are continually asking those questions. I think that is a long-standing commitment of the agency, one that will continue and one that has been very successful.

Mr. MCNERNEY. Does that effort apply to other agencies, like the EPA or other agencies that are having an impact on businesses out there?

Mr. WRIGHT. If you mean whether we review their regs, no. But I am not very familiar with what the other agencies are doing in terms of their own review, of course, or how they go about conducting any internal evaluation of their rules.

Mr. MCNERNEY. So this only refers internally to the FTC.

Mr. WRIGHT. That is the only thing I can speak to with any knowledge.

Mr. MCNERNEY. Thank you.

Mr. TERRY. I think we will step stipulate that the FTC probably does a better job with that than any other.

Mr. WRIGHT. Here, here.

Mr. TERRY. At this time I recognize the gentleman from Mississippi, Mr. Harper.

Mr. HARPER. Thank you, Mr. Chairman, and thank you each for being here and providing this insight into a lot of important issues and responsibilities that you have.

If I may start with you, Chairwoman Ramirez, and you touched on this earlier, at least on the workshop issue and some other things that were ongoing, but today it is no secret that the Internet has opened up a lot of new doors and provided new tools for a lot of fraudulent and predatory businesses to prey on consumers. You see it in the form of fraudulent work at home programs, which you have mentioned, fraudulent advertising of such things as weight loss products, or fraudulent price promotions and others and many other scams through the Web that are most threatening to the American consumers this year.

As you mark and approach the 100th anniversary, is the Commission taking sufficient action to protect consumers from online scams, such as those fraudulent work-at-home programs?

Ms. RAMIREZ. I think we are doing an effective job of monitoring the marketplace when it comes to both our mission to protect consumers against fraud as well as guarding against anticompetitive practices. So, yes, we ultimately are constrained, of course, by the resources that we have. We are a small agency, but I think that we are doing an effective job.

Mr. HARPER. In particular, I guess as a follow-up, what is the FTC doing to crack down on the deceptive use of Internet-based lead generation, in which email addresses are sold to people running multilevel marketing distributions at premium prices, and in fact, the so-called lead is simply the email address of someone who has clicked on to a Web site and maybe isn't a bona fide potential customer?

Ms. RAMIREZ. I think your question implicates a number of things we do. One includes the work that we are doing in connection with both privacy and data security. I personally have advocated for the implementation of a do-not-track system that would allow consumers to opt out of online tracking. I think it is just fundamental that consumers ought to have more control over their data. We are also, again, vigilant when it comes to any other promises that are not maintained and fulfilled by companies.

So, again, I think we are doing an effective job. We are paying particular attention to the mobile arena where we see a lot of scams as people migrate to increasingly the use of smart phones and tablets.

Mr. HARPER. And, of course, it is a challenge to stay ahead of a lot of those abusive practices and stay up on the technology.

Ms. RAMIREZ. It is a challenge, but that is another reason why we hold workshops and we are also constantly engaging with the business community as well as with consumer advocates, so that we make sure that we learn about what is happening on the ground and stay attuned to all of those issues.

Mr. HARPER. And if I could shift gears a little bit, Chairwoman, and ask you to elaborate on the FTC's expertise and experiences with privacy and data security, do you think the FTC has unique expertise for protecting information collected and/or stored online, and are you satisfied with where you are on that?

Ms. RAMIREZ. We certainly are the primary law enforcer in this arena in the United States. I think we are doing a he effective job with the tools that we have under Section 5. But, as I mentioned earlier, there are limits to what we can do, and I personally believe it would be appropriate for Congress to enact baseline Federal legislation in the privacy arena.

Mr. HARPER. Commissioner Brill, if I may ask you, do you think the FTC has enhanced companies' data security efforts through the agency's enforcement actions and, if so, give us an example.

Ms. BRILL. Sure. Thank you for the question. I do believe that our enforcement work has raised the issue with respect to data security and privacy protection for companies, and I think, as a result, companies have really taken up the mantel and developed policies. They have put into place chief privacy officers, have

brought them into the C suite in certain circumstances, and I think the privacy and data security issue has been enhanced with respect to corporate practices as a result of our enforcement work. So, yes, I do think that our enforcement work has played a key role in enhancing the issue in corporate America.

Mr. HARPER. Thank you, and I yield back, Mr. Chairman.

Mr. TERRY. At this time, we recognize Donna Christensen for your 5 minutes.

Ms. CHRISTENSEN. Thank you, Mr. Chairman.

And welcome to the commissioners. It is great to you have here for this hearing. I want to ask some questions about Reclaim Your Name and data brokers.

Dozens and dozens of information brokers exist that have detailed profiles about each of us; data is collected, aggregated, analyzed and used and disseminated for a wide range of commercial practices. The Web site NextMark, for example, offers 60,000 customer lists for sale on topics that range from mundane and innocuous issues to more sensitive topics. There are consumer lists for sale that target people with addictions, mental illnesses, reproductive concerns, weight loss issues and dozens of other physical and mental health conditions. The list is categorized by past purchase history, including so-called impulse purchases.

So, Chairwoman Ramirez, should there be categories of information, such as health conditions or sexual preferences, that should not be collected?

Ms. RAMIREZ. Thank you for your question. This is an issue that we addressed in our privacy report that we issued last year, and I believe that when it comes to sensitive information, health information would be among information that I would consider sensitive. I believe that consumers ought to have greater control and I think there ought to be an opt-ion these numbers, it is not surprising that most Internet users express that having control over their personal information online was important to them.

Commissioner Brill, can you elaborate on your Reclaim Your Name program and why it is so important for consumers and also for those who hold the data?n mechanism when it comes to sensitive information.

Ms. CHRISTENSEN. Thanks. Can you also clarify why purchases of over-the-counter medicines at stores such as target and CVS are not protected by HIPAA?

Ms. RAMIREZ. HIPAA only provides limited protection and is only aimed at healthcare providers. So that is why we are particularly concerned about both online and offline collection of health information. We do think that it is sensitive information that ought to be especially protected.

Ms. CHRISTENSEN. I agree. And often data collection is done without consumers' knowledge. For example, you might think you are sharing information with only your favorite store when you agree to carry a customer loyalty card, but that store often sells your purchasing habits to other stores and data brokers, and some data brokers have taken steps toward opening their data bases to the public. However, in most cases, data brokers do not share their stockpile of information.

A recent Pew Research report showed that 68 percent of Internet users believe that current privacy laws do not provide adequate protection and 50 percent of users were concerned about the amount of personal information about them or us that is online. Based

Ms. BRILL. Sure. Thank you for your question. One of my chief concerns with respect to data brokers is that their practices are largely invisible to consumers. Consumers don't understand that when they go to WebMD or when they go to other online sites and provide sensitive health information, that that information may be culled and provided to others and may become part of a profile that then characterizes them as they move through the Web and, frankly, as they move through other transactions, whether online or offline.

This is an issue where I think much more transparency needs to provided to consumers. I would like to see data brokers provide to consumers information about the types of information that they collect and to give to consumers information about the choices that consumers may have with respect to the data.

Chairman Ramirez referred to our 2012 report, and in that report, we talked about the need for giving consumers some kind of choice with respect to data that is used for eligibility decisions and whether or not consumers ought to be given the right to suppress information that is used for marketing decisions. The information won't go away, but at least to give consumers some kind of choice as to whether their data that is collected online and offline is used for marketing purposes.

I just believe that much more transparency needs to be brought to this issue, and I encourage and am working with the industry so they can provide these tools to consumers.

Ms. CHRISTENSEN. Thank you, Mr. Chairman.

I yield back.

Mr. TERRY. Thank you.

Now the Chair recognizes the gentleman from Texas, Mr. Olson, for 5 minutes.

Mr. OLSON. I thank the Chair.

And welcome to all the witnesses. The topic of this hearing is "The FTC at 100: Where Do We Go From Here?" But before we determine where we go, let's take a look at where we have been.

The FTC was created on September 26, 1914, with one sole mission, to promote fair competition. It was a very different world in 1914. A couple of examples. Interstate commerce industry took a huge blow on September 7th when the last passenger pigeon, Martha, died in Cincinnati. Market access was changing dramatically. The Panama Canal was opening. The first steam vessel came through on the 7th of January, and the first ship coming from the East Coast to San Francisco came through on August 7th. And the most important invention for the prosperity of my State, the patent for W.H. Carrier, who patented the air conditioner, happened on April 29, 1914. In 1938, the consumer protection mission was added to FTC's jurisdiction, but since that time, I have concerns that the enforcement actions are going beyond those congressional limitations.

I want follow up on some of the questions from the vice chair about the actions that the FTC has taken about the company that promotes—a nonprofit that promotes music competition, the Music Teachers National Association, in the Wall Street Journal article. That raised a bright red flag for me.

I am looking at their Web site right now and per the Web site, it looks pretty innocuous. They have two missions: To provide guidelines for music performance competition and music composition competitions. They start out in the States. They have seven divisions across the Nation and finals in five categories: piano, string, chamber music string, chamber music wind, and woodwind.

Chairman Ramirez, in your written testimony, you state that one of the challenges facing the FTC is constrained resources and a growing workload, less money, growing workload. You also say that one way to mitigate this challenge is to, quote, "leverage resources through careful case selection."

Do you think that the action against the Music Teachers National Association, a nonprofit with 12 employees and a $2 million budget, is that "careful case selection?"

Ms. RAMIREZ. I can't address the particular matter that you have mentioned because it is a nonpublic investigation, but what I can tell you is that we will address it at an appropriate time. And I will say that I believe we do use our resources effectively. There are certain investigations that we are as efficient as we can with investigations when it is appropriate, and when parties also feel it is in their interests, we end up revolving them through consent orders and not having to litigate. But I do believe that we have used our authority quite effectively. We examine evolving markets every single day, and we are well equipped and well positioned to do so, and I think we do an effective job at promoting competition.

Mr. OLSON. Commissioner Brill, Ms. Ohlhausen, Mr. Wright, do you have any comments about what the chairwoman said?

Ms. BRILL. I agree with the chairman.

Mr. OLSON. Surprise.

Ms. OHLHAUSEN. I would just also like to mention, not commenting on any particular investigation, but the FTC has brought a series of these kinds of cases going back to the 1970s, and it has been across administrations, and one of our functions I think is to give guidance to the broader industry. So a particular case might be useful in that it gives guidance to a lot of other different associations across a variety of industries.

Mr. OLSON. Thank you.

Commissioner Wright?

Mr. WRIGHT. I concur with the chairwoman's comments. In general, I will say, with respect to, again not commenting on any particular case, but with respect to trade association guidelines and codes of ethics, the history of the Sherman Act, going back beyond the history of the FTC is replete with examples of price fixing arrangements that harm consumers dressed up in the guise of codes of ethics or trade associations. They are not uncommon cases in that sense and can establish an important principle in cases small or large that harm to consumers arising from price fixing, whether written down in a document or verbally committed to between competitors, are worthy of the agency's attention.

Mr. OLSON. I am out of time. I yield back balance of my time. Thank you.

Mr. TERRY. Thank you. At this time, let's see, oh, Mr. Welch.

Mr. Welch, you are recognized, cochair of the privacy working group. You are recognized for your 5 minutes.

Mr. WELCH. Thank you, Mr. Chairman.

First of all, I want to thank all of you. The FTC, it is so important, as my colleague from Texas went through the history, 100 years and things have really changed. But it is a tough world out there for consumers. They really don't have an advocate. With I think computerization and with information, there is a lot of opportunities, but there is also an immense amount of power that can be consolidated in the marketers and in the market where in order to have competition that is fair, we need a very strong and a very cooperative FTC. So I just want to thank each and every one of you for your service.

You are entrusted with this extraordinary responsibility to provide for fair competition, but that means that consumers have to be, obviously, their interests have to be respected. And it is really tough where technology has changed so many things and where, in this privacy working group that several of us are on, there is an enormous desire to maintain the benefits that come from technology, the choice and the opportunity and the ease of access and the market opportunities, but on the other hand balance that with protecting consumers who have no say over how they are treated frequently. So, I understand the incredible importance of your job, each and every one of you, and I am glad to see how well you work together.

One of the issues that has come up in the Privacy Working Group has been about the impact with the European Union and their reaction to reports about the acquisition of information through our own intelligence efforts. And one of the concerns that has been expressed to me by some of our companies that are major companies that are very important players in our economy is that some of these EU issues on the privacy question may actually start to interfere with their ability to have market penetration in the EU.

So I would actually be interested in hearing a little bit about your thoughts on that and what suggestions you would make for Congress to make certain there is a level playing field for our Internet providers. I want to get both sides of on this, but I would start with Commissioner Ohlhausen. Could you speak to that?

Ms. OHLHAUSEN. Certainly. It is an issue that has certainly been in the news a lot and the FTC through our Office of International Affairs in particular has tried to engage the Europeans quite actively on that. In fact, Commissioner Brill and I went to the Data Protection Authority Conference in Warsaw together just this past fall, and we got an earful on these issues.

One of the things that I think we have been able to do is to sort of make the case about we have the safe harbor provision, which really focus on interoperability between the European system and the U.S. system, and that has worked fairly effectively for a number of years. And I know personally I would be concerned if Europe were to depart from that because I think it could hurt competition.

I think it ultimately could hurt consumers. So we have tried to engage with them to address some of their concerns, but also to maintain some of these important principles.

One of the things we have done over time at the FTC is for companies that have claimed that they are adhering to this safe harbor principle, we have brought enforcement actions against companies that claim they were adhering and haven't, and so we provide some important enforcement backstop to that.

Mr. WELCH. Let me just ask Commissioner Brill—thank you very much. I only have a minute.

But Commissioner Brill, a Vermonter, I am very proud of having a good Vermonter. I worked with you when you were in the Attorney General's Office, and you were good there, and you are doing a great job here. If you could comment.

Ms. BRILL. Thank you. So I have been working very hard to express to my European counterparts as well as Vice President Reding and others in the European Commission that the national security issues need to be separated from the commercial privacy issues. And I have been a very strong advocate of maintaining safe harbor, which is one of the tools, as Commissioner Ohlhausen mentioned, one the tools that companies in the United States use in order to transfer data across the pond.

I have said to my European counterparts that safe harbor is one of the tools that we at the Federal Trade Commission use to protect, not only U.S. citizens but also European citizens. When we bring an enforcement action against Google and Facebook and we find out they have been violating the safe harbor, we can incorporate provisions that deal with these kind of safe harbor principles, and we have done so. So not only are we looking at the enforcement work that Commissioner Ohlhausen mentioned where people are falsely claiming to be members of the safe harbor, but in fact our entire privacy and data security agenda focuses on enhancing privacy and data security for citizens all around the world.

So I have been a very strong advocate of maintaining safe harbor. Having said, that as Chairwoman Ramirez said in a letter recently to Vice President Reding, there is always room for improvement. It is a good program. It works very well. There is room for improvement, and we will be having discussions about that.

Mr. WELCH. Thank you. I have to yield back, but I think all of us would be interested in continuing to work with you on those issues. Thank you.

Mr. TERRY. Yes, we would.

At this time, I recognize the gentleman from Kansas, Mr. Pompeo, for 5 minutes.

Mr. POMPEO. Thank you, Mr. Chairman.

Commissioner Ohlhausen, you recently delivered a speech, it was back in June, focused on the impacts and ramifications of potential privacy legislation. You said, quote, "I believe however that a voluntary self-regulatory process should operate without undue Government involvement. Otherwise, industry may lose the incentive to participate and instead would take a wait-and-see attitude to see whether Congress would ever impose such requirements through legislation," end of quote.

A couple other folks have mentioned they are on the Working Group on Privacy. I am participating in that as well. I would be interested in your thoughts on how industry reacts when we even begin to discuss putting in place a top-down Washington-centered set of privacy rules on top of what is already out there today?

Ms. OHLHAUSEN. Thank you for your question. I think it certainly gets their attention when Congress starts to pay attention to these issues. I think that, you know, the FTC's approach of bringing our enforcement actions, brining guidance, having discussions is helpful, but one of the things that I personally think we need too look at is also what is happening in the marketplace, and are there options out there for consumers that would give them the choices that they are seeking in things like interstate advertising or targeting?

So I do have some concerns though that if, in particular, my agency were to play too forceful a role in what is supposed to be a self-regulatory process, that it interfere with the incentives of the different participants to come to an agreement on their own. So that is what I was expressing in that speech.

Mr. POMPEO. I appreciate that and I share your concerns. My observation, as I watch consumers, and I hear from them when they call our office. I run into them at church, at the PTA meetings, all of those wonderful places; they are very focused in privacy. In fact, we see it with the Affordable Care Act, right? We see customers very aware of the risk to their data when they put into this thing they call a computer on their desk.

I think private sector companies will compete, just like they compete on value and price and delivery and all of those things, I think they will compete on privacy as well, trying to match exactly what it is consumers want and deliver that to them in a way that they are deeply aware that that privacy is provided them. Otherwise, these folks will go someplace else. So I think that is self-regulatory system has an enormous opportunity to work and do a great good for consumers.

Chairwoman Ramirez, I wanted to ask you about an unrelated issue. The FTC recently released its draft strategic plan for fiscal years 2014 to 2018. However, the draft strategic plan section on consumer protection did not mention weighing burdens on business or competition or assessing economic analysis or avoiding unnecessary burdens on innovation. In contrast to that, the strategic plan for the Commission's work on competition did address those issues. In fact, while the plan for the Bureau of Competition described its coordinated work with the FTC's Bureau of Economics, the plan's consumer protection section didn't even mention the Bureau of Economics.

Can you tell me going forward what steps have been taken and will be taken by the Bureau of Consumer Protection to analyze the impact of regulatory activities on businesses and competition, including greater integration and cooperation with the FTC's Bureau of Economics?

Ms. RAMIREZ. I appreciate the opportunity to address that question. It is something that we take into account in all of the work that we do, and Commissioner Wright touched on this in his opening remarks. We do have a Bureau of Economics that supports both

our competition mission as well as our consumer protection mission, and I can assure you that in every matter we look at, enforcement, rulemaking, we are always—I am getting the advice of our economists, and we are absolutely looking at both how to most effectively protect consumers but also looking at the costs that would be imposed on the business consumer.

Mr. POMPEO. Maybe, Mr. Wright, maybe you can tell me then why wasn't it even mentioned, why in the consumer protection provisions was the Bureau of Economics not even mentioned? It was expressly done so in the others. That can't be an accident.

Mr. WRIGHT. I think it can be. I can't say much about how or why the asymmetry and the treatment of incorporated economics on the Bureau of Competition side and the Bureau of Consumer Protection side resulted in the draft. I can say from my experience at the agency and as somebody who cares very deeply about integrating economics into everything we do that it is certainly the case that on the Bureau of Consumer Protection side, we do in fact, with respect to law enforcement matters, with respect to rules and regulations, take the work of BE very seriously, the Bureau of Economics, very seriously, and I suspect that the asymmetry in the draft will be resolved upon the next opportunity.

Mr. POMPEO. That is great. Thank you.

Ms. Brill, go ahead.

Ms. BRILL. I was just going to add it is an absolute oversight and that our strategic plan is out for comment, and we will make sure that we correct it.

Mr. POMPEO. Thank you very much. I appreciate those answers.

Mr. TERRY. Thank you, Mr. Pompeo.

Now the Chair recognizes the full committee ranking member. The gentleman from California is recognized for 5 minutes.

Mr. WAXMAN. Thank you very much, Mr. Chairman, and I welcome the members of the Federal Trade Commission that are here today to make a presentation to us on the hundredth anniversary of the FTC.

I, in my opening statement, which I made part of the record, I acknowledged the fact that FTC has a dual mission, and it is a very important one for our economy, prevent business practices that are anticompetitive and also to protect consumers from unfair or deceptive actions. I want to ask you about an issue that is important to me because it involves a law that I helped write in 1984, the Hatch-Waxman Act, which created the generic drug system.

And Chairwoman Ramirez, in 2007, the law was changed so that the Food and Drug Administration made several landmark improvements to our post-marketing drug safety system. And one of the most important new tools that that law provided was a so-called risk evaluation and mitigation strategies, or REMS. One condition of a REMS that FDA could impose might include restrictions on how a brand manufacturer will distribute and sell a particular product. For example, FDA could require that a brand manufacturer only provide a particularly risky drug to patients via certain qualified physicians or pharmacies, and that makes a lot of sense from a patient safety perspective.

But even back in 2007, when we were working on this legislation, we were concerned about the possibility that brand name com-

panies could use this kind of restrictive distribution REMS program as a tool for delaying generic competition. In fact, the House passed a version of the legislation containing some very strong language that could have gone a long way to preventing these kinds of abuses. But after we conferenced the bill with the Senate, that strong language was watered down and was not as effective as I would have hoped. And I understand the FTC shares my concerns about these abusive practices.

Chairwoman Ramirez, I would like to ask you to briefly explain in more detail how the practice has been used to delay generic competition and discuss potential effects on the ability of consumers to get access to generic drugs. Has the FTC witnessed a proliferation of these kinds of abuses over the years?

Ms. RAMIREZ. Thank you for the question.

This is an area, as you noted, in which we have been—that we have been looking at very closely, and we are concerned. I can't discuss any particular companies, but I will say that we are all worried that branded companies may use—as a way of impeding the generic from getting on the—and what I can tell you is that we are looking at it very closely, and if we find a violation of the antitrust laws and if we find that these restrictions are being used in an anticompetitive manner, we do intend to take action.

Mr. WAXMAN. Well, I appreciate that. I think part of the problem is the differences of the two agencies, the FDA, and the FTC. FDA has indicated that absent a specific legislative directive, it can't prevent brand companies from abusing these REMS protocols to restrict access of generic developers, and the agencies noted that the FTC is the more appropriate agency to ensure, quote, "that the marketplace actions are fair and do not block competition."

Chairwoman Ramirez, can you explain why the language of the 2007 act that attempted to give FDA the ability to prevent these abusive practices has not been sufficient to curb these kinds of behaviors?

Ms. RAMIREZ. I can't speak to what is happening at the FDA, and I don't have in mind the particular language, but again, what I can assure you is that we take these issues very seriously. As you know, the agency has been very active when it comes to trying to ensure that generic drugs enter the market in order to provide low-cost drugs for consumers.

Mr. WAXMAN. Do you agree—yes, excuse me.

Ms. RAMIREZ. I can assure that you we will be looking closely at the issue, and we will take action, but I can't say what is happening——

Mr. WAXMAN. Do you agree with the FDA that the FTC is the more appropriate agency to oversee anticompetitive practices like these, and would the FTC need additional tools or resources to help enforce the current statute?

Ms. RAMIREZ. Given our long history as a law enforcer, I believe that we are very well positioned to address these issues. I don't believe that we need new authority. I believe that we have authority under Section 5 to take action against these types of practices if they are found to be violative of the antitrust laws.

Mr. WAXMAN. Thank you very much. I look forward to working with you on this.

Mr. TERRY. Thank you. Good questions.

I will now recognize the gentleman from Ohio, Mr. Johnson.

Mr. JOHNSON. Thank you, Mr. Chairman.

And I want to thank our witnesses for being here today also. I come from a region of the country where trade is critically important. Appalachia, Ohio, is the home to many, many small family-owned manufacturing companies and their ability to play on a level playing field is extremely important. So I applaud the Commission for its advocacy efforts, especially in the area of pro-competition or against anticompetitive policies that emerge, such as, for example, the recent attempts by States and localities to create Government-imposed obstacles to new technology-delivered services, such as the Uber car service. Consumers benefit from more choices and more competition, and the FTC should continue this practice.

What is on the Commission's current advocacy agenda? And more broadly, how is the agenda established, and how does the office's activities compare to years past? I will just open it up from left to right.

Ms. RAMIREZ.

Ms. RAMIREZ. Yes, and as you noted, we do have an active staff that is engaged in advocacy work, and this is an important part.

Mr. JOHNSON. What's on the agenda?

Ms. RAMIREZ. We focus on a number of different issues we are looking at, and frankly, some of the issues may come to our attention just merely by staff.

Mr. JOHNSON. Do you have any specifics? I don't want to use the whole 5 minutes.

Ms. RAMIREZ. We are paying particular attention to scope of practice issues in the healthcare arena. For instance, there may be paraprofessionals, nurses, dental hygienists, who might be able to help lower costs, improve access to health services, so we pay attention to what is happening at the local level. There sometimes may be proposals that are aimed to restrict activities of these type of professionals. And we opine and we submit comments asking legislators to——

Mr. JOHNSON. How is the agenda established?

Ms. RAMIREZ. Health care is a priority for us, so we are looking at that primarily, but we also welcome comments from stakeholders. If they become aware of an issue that they believe we should be commenting on, we are open to suggestions because oftentimes we don't have the resources to be examining everything that takes place at a local level.

Mr. JOHNSON. Commissioner Ohlhausen, previously in your career, you were director of the Office of Policy Planning. How many policy planning offices does the FTC currently have, and is it accurate that there are now three different policy offices—if my understanding is correct, a Commission level Office of Policy Planning, a General Council Office of Policy Studies, and the Bureau of Competition Office of Policy and Evaluation—so is it necessary to have more than one?

Ms. OHLHAUSEN. Thank you for your question. Yes, I did run the FTC's Office of Policy Planning from 2004 to 2008. And some of the functions that were previously in the Office of General Counsel and in the Bureau of Competition have been consolidated into a bigger

Office of Policy Planning that was done under previous Chairman Leibowitz' tenure, which I think was a good development. There are still some staff in the Office of General Counsel and in the Bureau of Competition, but they play somewhat of a different role. The FTC's Office of Policy Planning, one of its primary missions is overseeing the Competition Advocacy Program, as you mentioned. And the focus has been on things like health care, and new technologies, and reaching some underserved communities. One of the things that drives our responses also is foreign advocacy. The FTC needs an invitation from a policymaker to comment. So that also helps shape what we are able to comment on.

The other policy staff that are in the Bureau of Competition, they help consult on cases, on enforcement work, and in the General Counsel's Office, they do a little bit more of like sort of very deep studies, things like the patent issues. So there is a separation of functions that makes sense.

Mr. JOHNSON. OK, I have time for one more question. The FTC has seen its budget authorization and resources double over the past decade, and by most accounts, a budget that has more than doubled in the last decade would not garner much sympathy for being resource constrained. If you had to explain to the American taxpayers what they have received for their money, how would you respond to that? Ms. Ramirez?

Ms. RAMIREZ. I think the American taxpayer receives quite a bit for their money. We are a small agency. We have approximately 1,200 employees. Our budget is under $300 million.

Mr. JOHNSON. But it doubled over the last decade. How do you justify that?

Ms. RAMIREZ. There was a point in time when the agency's staff did expand. We are now at a lower number than we have been in the past. I think that we do quite a bit for consumers. In my opening remarks, I noted some of the monetary savings that consumers receive just by—in enforcing our competition mission alone, we have saved consumers approximately $3 billion over the course of the last few years. So I think that the American taxpayer gets quite a bit.

Mr. JOHNSON. Mr. Chairman, I yield back.

Mr. TERRY. Thank you.

At this time, I recognize the gentleman from Illinois Mr. Kinzinger for 5 minutes.

Mr. KINZINGER. Thank you, Mr. Chairman.

And thank you all for being here. I appreciate it. I was pleased to see that the Securities and Exchange Commission issued in October an investor alert warning investors to beware of pyramid schemes posing as multilevel marketing programs. As the investor alert notes, investors should be aware of companies that do not show revenue from retail sales, that offer easy money, that have complex commission structures or require buy-in to participate.

In fact, the three most common types of fraud were 7.6 million incidents, I believe, of fraudulent weight-loss products; fraudulent prize promotions, 2.9 million incidents of that; and fraudulent work-at-home programs, 2.8 million incidents.

We will start with you, Chairwoman Ramirez. Do you coordinate with informal working groups formally on enforcement actions or

otherwise with the FCC on investigating and stopping pyramid schemes?

Ms. RAMIREZ. We do coordinate and work with other agencies, certainly. On any specific matters, I can't talk about particular companies or matters.

Mr. KINZINGER. Sure.

Ms. RAMIREZ. But I will say that we work very effectively with a number of different sister agencies as appropriate.

Mr. KINZINGER. Does anybody else on the panel have anything to add to that?

Just throw it out there. What has the FTC done lately to combat these pyramid schemes?

Ms. RAMIREZ. It is an issue that we looked at and have looked at closely in the past and what I can tell you is that we continue to be vigilant in looking at and monitoring the marketplace to ensure and guard against——

Mr. KINZINGER. Can you give me something beyond just I am continuing to be vigilant? I mean, what has been done lately? I know you can't name names.

Ms. RAMIREZ. I apologize, I can't give you particular companies.

Mr. KINZINGER. I am not asking for names.

Ms. RAMIREZ. But I think our most recent case, I can't remember. I am happy to provide that detail to you.

Mr. KINZINGER. OK, hopefully, we can get that done.

Ms. RAMIREZ. Yes.

Mr. KINZINGER. Maybe you can give me this answer without answering names. How many cases have you brought within the last year against pyramid schemes?

Ms. RAMIREZ. Within the last year, we have not brought any enforcement actions against pyramid schemes, but I will provide you the prior activity that the——

Mr. KINZINGER. How come not in the last year?

Ms. RAMIREZ. I may be mistaken about that. My colleagues are correcting me. There may be one enforcement action against a pyramid scheme. But we can provide you further accurate information about that.

Mr. KINZINGER. All right, because I am—yes, I am looking at, as I mentioned in the beginning, something like 13 million incidents, and so we have maybe one case you said that is going?

Ms. RAMIREZ. I can provide you——

Mr. KINZINGER. You can provide me the information, but I just want to—but I think it is important to——

Ms. BRILL. Can I just mention? So sorry for interrupting.

Mr. KINZINGER. No, please.

Ms. BRILL. Just to augment what the chairman has said, pyramid cases are incredibly complex. I actually began my career at the State AG's officedoing a pyramid case, and they are very resource intensive. So although we might have only done one case—and we will get you those details—it is a tremendous amount of work, and each one of those cases is very important in sending appropriate messages to the community, both the investor community and consumer community.

Mr. KINZINGER. OK, and I will go to a bit of a different subject here. Some have raised concerns because the FTC faces a lesser

burden in obtaining a preliminary injunction from a Federal judge than does the Department of Justice Antitrust Division. Merging parties can reasonably anticipate the possibility of different substantive outcomes depending on which agency has jurisdiction to review the matter. To avoid the potential for these different outcomes, why shouldn't Congress require the FTC to litigate merger challenges in Federal Court, just as the DOJ is required to?

Ms. RAMIREZ. So the FTC, when it seeks as preliminary injunction, it does go to Federal Court. The standard for obtaining a preliminary injunction is differently stated as between the Department of Justice and the FTC.

In my view, however, as a practical matter, the standards end up being about the same. I don't see a material difference, and I don't believe that the difference in words have led to any disparate outcomes. So that is between the two agencies.

Mr. KINZINGER. OK. Well, thank you all for serving your country.

Mr. Chairman, I yield back.

Mr. TERRY. Well, thank you for your service to our country.

Well, that concludes all of the question and answer period, so that it brings us to the end of this hearing. But I just want to tell you that I think it is a really tribute to the FTC and your importance that we had 22 members show up at this hearing. Lots of interest, as I mentioned before the hearing, from our outside folks, and so I look forward to working with you, continuing to work with you over the next year to ensure that you will have equally or even a better 100 years at the FTC.

So, also, as you probably know, we have the ability, or right to submit written questions to you. And I am going to guarantee you, you will get written questions. In fact, I am going to send one that is a generic question that just says looking back, as Mr. Olson did, and now looking forward, what is the underbrush that needs to be cleaned out? I am sure that is something every agency could and should do.

So I will telegraph that is one of my questions to you. What I would appreciate is when we receive all of the questions from the members, we will send them to you and if you could, in a timely manner, I have asked others to—timely, means to me, 14 days-ish; 14 days to get those back to us. I would greatly appreciate that.

With that, Mr. McNerney, anything for you to close?

Mr. MCNERNEY. No.

Mr. TERRY. All right, then we are adjourned. Thank you.

[Whereupon, at 12:14 p.m., the subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]

FRED UPTON, MICHIGAN
CHAIRMAN

HENRY A. WAXMAN, CALIFORNIA
RANKING MEMBER

ONE HUNDRED THIRTEENTH CONGRESS

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June 18, 2014

The Honorable Edith Ramirez
Chairwoman
Federal Trade Commission
600 Pennsylvania Avenue
Washington, D.C. 20580

Dear Chairwoman Ramirez,

Thank you for appearing before the Subcommittee on Commerce, Manufacturing, and Trade on Tuesday, December 3, 2013 to testify at the hearing entitled "FTC at 100: Where Do We Go From Here?"

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for ten business days to permit Members to submit additional questions for the record, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and (3) your answer to that question in plain text.

To facilitate the printing of the hearing record, please respond to these questions by the close of business on Wednesday, July 2, 2014. Your responses should be e-mailed to the Legislative Clerk in Word format at **Kirby.Howard@mail.house.gov** and mailed to Kirby Howard, Legislative Clerk, Committee on Energy and Commerce, 2125 Rayburn House Office Building, Washington, D.C. 20515.

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,

Lee Terry
Chairman
Subcommittee on Commerce,
Manufacturing, and Trade

cc: Jan Schakowsky, Ranking Member, Subcommittee on Commerce, Manufacturing, and Trade
Attachment

Responses of Chairwoman Edith Ramirez to Additional Questions for the Record

The Honorable Lee Terry

1. The Consumer Financial Protection Bureau (CFPB) now shares some of the Federal Trade Commission's (FTC) jurisdiction. They also share some of the same language from Section 5 in their organic statute, but as we understand it, the CFPB is not sharing your century of development of the term "unfair." We have also heard the CFPB intends to issue its own unfair or deceptive act or practice guidance. What is the danger if two consumer protection agencies have different definitions of the same term?

   As you note, Section 1031(c) of the Dodd Frank Act, the CFPB's organic statute, shares the same language as Section 5(n) of the FTC Act in connection with the agencies' unfairness authority. Specifically, the CFPB must have a reasonable basis to conclude that "(A) the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers; and (B) such substantial injury is not outweighed by countervailing benefits to consumers or to competition."

   To best ensure that the two agencies apply the standard in the same way, the FTC closely coordinates with the CFPB in areas where the agencies have concurrent jurisdiction and where the FTC's experience and history could assist the CFPB with its mission. In January 2012, the two agencies entered into a Memorandum of Understanding to create a comprehensive framework for coordination and cooperation. In keeping with the MOU, our two agencies meet regularly from the staff level up to senior management to coordinate on law enforcement, rulemaking, and other activities; notify each other prior to initiating investigations or bringing enforcement actions; consult on rulemaking and guidance initiatives to promote consistency and reflect the experience and expertise of both agencies; cooperate on consumer education efforts to promote consistency of messages and maximize resources; and share consumer complaints.

   In addition, it is our understanding that the CFPB, and the courts, will look to FTC jurisprudence as the CFPB uses its unfairness authority. However, the way each agency applies its standard, and how the courts do so, depends on the facts of each case.

2. The FTC and the CFPB share enforcement of a number of consumer protection statutes. The CFPB authorizing statute even copied some of the language from the FTC Act regarding the prohibition of unfair or deceptive acts and practices, with one large distinction: the CFPA also prohibits *abusive* acts and practices – a term left undefined by the CFPA. Are you aware of whether the CFPB has yet employed the abusive standard in an enforcement action?

   We are aware of two enforcement actions in which the CFPB has employed the abusive standard: CFPB v. ITT Educational Services, Inc. and CFPB v. American Debt Settlement Solutions.

3. As cited in Chairwoman Ramirez's testimony, the Commission's definition of an unfair act or practice is one that "causes or 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." Can this harm standard – the "causes or likely to cause substantial injury" - be instructive in the debate on how to define harm in the data breach context?

As you note, in determining whether conduct is unfair under Section 5 of the FTC Act, the Commission considers whether an 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 countervailing benefits to consumers or to competition."[1] This is the standard by which the Commission and courts determine whether the law has been violated.

By contrast, in the context of data breach notification legislation, the standard for requiring companies to notify consumers of a breach should be lower than the standard to establish a violation of law, as the purpose of notice is to help consumers minimize their risk of injury. When an entity discovers a security breach, the entity should be required to notify every consumer whose personal information was, or there is a reasonable basis to conclude was, accessed by an unauthorized person, unless the entity can demonstrate that there is no reasonable risk of identity theft, fraud, or other harm. This standard balances the need for consumers to know when their information has been breached against the threat of over-notification for breaches that have no reasonable risk of harm, and should help to avoid undue compliance costs by businesses. It also appropriately places the burden on the breached entity, which is in the best position to know the nature and extent of the data that was released in a breach, to demonstrate the absence of a reasonable risk of identity theft, fraud, or other harm.

4. The Commission is charged with enforcing the U.S.-E.U. Safe Harbor agreement on privacy.

   a. What is the Commission doing to ensure a workable agreement with the E.U.? What has the FTC done in terms of enforcing the Safe Harbor?

   I believe that U.S.-E.U. Safe Harbor is an effective system that provides an important way to allow businesses to transfer data from the EU to the United States in a manner consistent with EU privacy requirements. The FTC and the Department of Commerce have been working with the European Commission to address recommendations aimed at improving the Safe Harbor program. We have been making good progress on the recommendations and are working closely with our colleagues to strengthen the program by, among other things, making improvements to the administration of the program, increasing awareness, and working to increase international cooperation.

   The FTC has also continued to make Safe Harbor an enforcement priority. To date we have brought enforcement actions against 24 companies – including Google, Facebook, and Myspace – resulting in orders protecting consumers in the US, Europe, and throughout the world. We have brought 14 Safe Harbor actions

[1] 15 U.S.C. § 45(n); *see also* Federal Trade Commission Policy Statement on Unfairness, *appended to Int'l Harvester Co.*, 104 F.T.C. 949, 1070 (1984).

this year alone against companies in a wide range of industries, including retail, professional sports, laboratory science, data brokerage, debt collection, and information security. These companies handle a variety of consumer information, including in some instances sensitive data about health, employment and children. Having received just a handful of referrals from EU privacy regulators of potential Safe Harbor violations since the inception of the program nearly 15 years ago, we actively look for Safe Harbor violations in our own privacy and data security investigations.

b. What are the annual aggregate compliance costs for U.S.-based companies?

The Department of Commerce (DOC) is charged with administering the Safe Harbor program, and we understand that the DOC regularly consults with key stakeholders, including industry, regarding issues related to compliance, including the impact of existing and proposed requirements and costs associated with those requirements. Over the course of the last 15 years, the Safe Harbor program has been embraced by a wide variety of businesses as a cost-effective and productive way to transfer the data of EU citizens to the U.S. Currently, there are over 3,600 U.S. companies participating in the program.

c. Does the Commission use the compliance cost information to inform U.S. negotiations with the E.U. for further changes to the program? If not, why not?

The DOC has had a dialogue with stakeholders, including industry representatives and consumer groups, to discuss ways to improve the Safe Harbor program. The DOC is using this feedback, including feedback about compliance costs, to help inform negotiations with the European Commission about potential changes to the administration of the program. As noted above, the FTC has been working with DOC in discussions with the EC to address recommendations aimed at improving the Safe Harbor program.

5. The Chairwoman's testimony mentioned recent enforcement efforts in the dietary supplement market. The Commission sued companies for making allegedly unsubstantiated claims regarding their dietary supplements. The Commission also sued the producers of food products for making allegedly unsubstantiated claims of health benefits. This effort has, in effect, established an FDA approval standard on what is essentially a food product (e.g., pomegranate juice). Food, absent food allergies, does not pose the same risk of serious or fatal side effects. Has the Commission changed its policy statement regarding advertising substantiation? If so, why?

The FTC has not changed its policy statement or practice regarding advertising substantiation. Our enforcement work in this area remains guided by factors that include the type of claim made, the type of product at issue, and what the scientific community thinks is needed to substantiate the asserted claim.[2] Applying these factors, the FTC has typically required "competent and reliable scientific evidence" to support claims about the safety and efficacy of foods and dietary supplements, including claims about the health benefits of these products. The standard is intended to be both

[2] *See* Pfizer, 81 F.T.C. 23, 64 (1972); Thompson Medical Co., 104 F.T.C. 638, 821 (1984).

rigorous and flexible and will vary with the facts of the specific case and the level of evidence that experts in the relevant field would consider reasonable. As a general rule, the Commission will expect human clinical research to support claims about weight loss and other health benefits, with some exceptions where human clinical research is infeasible.[3] In certain cases involving misleading disease claims and weight loss claims, the Commission has entered orders explicitly requiring reliable clinical tests to support claims that a product can treat, prevent, or reduce the risk of disease or cause weight loss.[4] This standard is appropriate given the serious nature of the claims being made, the current state of the science, consumers' inability to judge for themselves whether the product will work as claimed, and the potential for consumers to use an ineffective product rather than take treatments or make necessary dietary or lifestyle changes to avoid or treat disease or lose weight.

In other cases where we alleged the company made misleading disease claims, the Commission entered orders requiring the companies, going forward, to have FDA pre-approval for claims that a product can treat or prevent a disease. The Commission made clear that this was to "fence-in" alleged law violators and help ensure compliance in the future.[5]

6. This summer the FTC withdrew its disgorgement policy – the framework outlining when the Commission would seek equitable monetary remedies (including the disgorgement of ill-gotten gains) in competition cases – without replacing it. What was the reason behind the decision to withdraw the policy? Why repeal guidelines, which provide a framework for ensuring consistency in Commission actions as well as providing a reliable expectation for the regulated community, without replacing it? Do you plan to issue a new policy? If so, when? If not, why not?

   Monetary equitable remedies such as disgorgement or restitution can be effective remedies in competition cases by ensuring that wrongdoers are not unjustly enriched and that victims are compensated for their loss and restored to their prior positions. Because the purpose and effect of anticompetitive conduct is to enrich wrongdoers at the expense of consumers, it may be appropriate to seek monetary equitable relief in certain competition cases. Our experience had been that the 2003 Policy Statement chilled the pursuit of monetary remedies and placed undue burdens on the FTC. Accordingly, in 2012, the Commission withdrew the 2003 Policy

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[3] *See* Dietary Supplements; An Advertising Guide for Industry, FTC (1998).

[4] *See, e.g.,* Nestlé Healthcare Nutrition, Inc., 151 F.T.C. 1 (2011) (requiring that respondent possess two randomized controlled trials for claims that any probiotic drink reduces the duration of acute diarrhea in children); FTC v. Iovate Health Sci. USA, Inc., No. 10-CV-587 (W.D.N.Y. July 29, 2010) (prohibiting weight loss claims without two RCTs); FTC v. Skechers USA., Inc., No. 1:12-cv-01213-JG (N.D. Ohio July 12, 2012) (prohibiting muscle strengthening claims for footwear without one RCT).

[5] *See, e.g.,* FTC v. Iovate Health Sci. USA, Inc., No. 10-CV-587 (W.D.N.Y. July 29, 2010) (requiring FDA pre-approval of claims for treatment, cure, and prevention of cold, flu, and other diseases); Dannon Co., 151 F.T.C. 62 (2011) (requiring FDA preapproval of claims that yogurt or foods/drinks containing probiotics reduce the likelihood of getting the cold or flu).

Statement, explaining that like other agencies we will rely on existing case law, which provides sufficient guidance on the use of monetary requitable remedies.[6]

7. There have been calls for the FTC to consider adopting a statement defining what the Commission considers to be unfair methods of competition, as it did with its unfairness statement issued in the 1980s. Is the Commission considering this? If not, why not? What can you do to give the regulated community notice of what you consider to be unfair before they receive a call from your enforcement attorneys?

   It is widely accepted by courts and the antitrust community that through the FTC Act, Congress granted the Commission authority to pursue unfair methods of competition that are beyond the scope of the Sherman Act. Despite this additional authority, the Commission pursues the vast majority of its unfair competition matters under the same standards that courts use to apply the Sherman Act. Sherman Act standards have developed effectively over time on a case-by-case basis and provide significant guidance to the business community and consumers of what may constitute an antitrust violation.

   In the relatively few instances in recent decades in which the Commission has exercised its "standalone" unfair methods of competition authority, the Commission has condemned conduct only where, as with invitations to collude, the likely competitive harm outweighs the cognizable efficiencies.[7] **This is the same standard we apply every day in our investigations and one that is well familiar to the business community.**

   While I will continue to welcome open dialogue with my fellow Commissioners on the issue of guidance, I believe it is appropriate for the Commission to continue developing its standalone unfair methods of competition authority on a case-by-case basis. That is the same approach courts have taken for over a century to develop standards under the Sherman Act. A case-by-case approach is well suited to identifying and remedying likely anticompetitive conduct in a world where markets, business methods and economic learning evolve. Members of the business community can find reasonable guidance on avoiding liability in the decisions, complaints, statements and analyses associated with our prior enforcement actions, while the FTC maintains flexibility to respond to new competitive threats.

8. The business community has voiced concerns about the FTC's authority under Section 5, which stem largely from uncertainty in not knowing what conduct is lawful under the traditional antitrust laws yet unlawful under Section 5. In the absence of guidance from the FTC, some have suggested Congress should simply pass legislation clarifying that Section 5 is no broader than the Sherman and Clayton Acts, the boundaries of which are fairly well understood. What is your reaction to such a proposal?

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[6] Withdrawal of the Commission's Policy Statement on Monetary Equitable Remedies in Competition Cases, Statement of the Commission, July 31, 2012, *available at*, http://www.ftc.gov/system/files/documents/public_statements/296171/120731commstmt-monetaryremedies.pdf.

[7] *See e.g. In re Motorola Mobility LLC*, No. C-4410 (F.T.C July 23, 2013)(complaint), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2013/07/130724googlemotorolacmpt.pdf; *In re Bosley, Inc.*, No. C-4404 (F.T.C. May 30, 2013)(complaint), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2013/06/130605aderansregiscmpt.pdf.

I would be very concerned that such an effort to restrict the FTC's authority would be detrimental to consumers and to competition. Importantly, my experience does not bear out the suggestion that this is a significant issue for the business community. I engage regularly with businesses of all types and sizes, and business executives have not expressed any significant worry to me about the reach of the Commission's standalone Section 5 authority. This is so because the business community understands that the Commission's day-to-day enforcement efforts will remain largely focused – as they have been for decades – on enforcement under the standards established by the courts for the Sherman Act.

In addition, as noted above, the Commission's recent actions involving its standalone Section 5 authority demonstrate that the Commission will only act to stop conduct that harms, or is likely to harm, competition or the competitive process, without any offsetting benefits. These prior actions provide reasonable guidance on what constitutes lawful and procompetitive behavior.

At the same time, any effort to restrict the FTC's Section 5 authority risks undermining the flexible framework that Congress very deliberately created to protect consumers and competition. Flexibility is crucial to identifying and remedying likely anticompetitive conduct in a world where markets, business methods, and economic understanding evolve. The FTC's Section 5 authority enables the Commission to adapt as its knowledge about markets and economic behavior becomes more refined and as new competitive threats arise.

9. What standards does the FTC apply when deciding whether to bring a data security enforcement action? Are there any limiting principles or guidelines that are relevant to such an action? Does the FTC intend to issue regulations, policy guidelines, or other guiding principles explaining what constitutes unfair trade practices with respect to a company's data security practices? If not, what guidance is available to companies with respect to their data security practices?

In deciding whether to pursue a data security enforcement matter, the Commission's chief consideration is the reasonableness of the company's procedures to safeguard consumer information. We look at a number of factors to determine whether a company's data security practices are reasonable, including the sensitivity and volume of consumer information a business holds; the size and complexity of its data operations; and the cost of available tools to improve security and reduce vulnerabilities. The reasonableness test is flexible: reasonable data security safeguards should be appropriate to the company's size and complexity, the nature and scope of its activities, and the sensitivity of the customer information it handles.

In addition to the more than 50 data security complaints and consent orders, which provide guidance to businesses about what constitutes reasonable security, the Commission has also published business guidance and educational materials about effective data security practices for companies. Moreover, the FTC widely disseminates business guide on data security,[8] along with an online tutorial based on the guide.[9]

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[8] *See Protecting Personal Information: A Guide for Business, available at* http://business.ftc.gov/documents/bus69-protecting-personal-information-guide-business.

These resources are designed to provide a variety of businesses – and especially small businesses – with practical, concrete advice as they develop data security programs and plans for their companies. The Commission has also released guidance materials directed towards a non-legal audience regarding basic data security issues for businesses.[10] For example, because mobile applications and devices often rely on consumer data, the FTC has developed specific security guidance for mobile app developers as they create, release, and monitor their apps.[11] The FTC also publishes business educational materials on specific topics – such as the risks associated with peer-to-peer file-sharing programs and companies' obligations to protect consumer and employee information from these risks[12] and how to properly secure and dispose of information on digital copiers.[13]

We have emphasized a process-based approach that includes designating a person to be responsible for data security; conducting risk assessments; designing a program to address the risks identified, including training, security and incident response; and monitoring the program and updating it as necessary.

10. In the data security context, we are hesitant to establish hard rules or standards because technology evolves too quickly. Have the requirements of the Commission's Safeguards Rule for financial institutions changed over time? If so, how? Has the Commission adapted its interpretation of "reasonable" security over time with respect to the Safeguards Rule? If so, how has it communicated the change of interpretation?

Instead of prescribing particular technologies or standards, the FTC has taken a process-based approach to reasonable security for the very reasons you highlight. Threats to consumers' data are constantly evolving, so it would be very difficult for a government agency to impose rigid technical obligations on companies in this area. Congress, in enacting the Gramm-Leach-Bliley Act, required that companies defined under the law as "financial institutions" ensure the security and confidentiality of customer information. In doing so, financial institutions must have certain safeguards in place to keep customer information secure. The requirements set forth in the Safeguards Rule, which implements the GLB Act, are designed to be flexible, so they do not become outdated as technology changes. Companies should implement safeguards relevant to their own circumstances, and the required information security plan should be appropriate to the company's size and complexity, the nature and scope of its activities, and the sensitivity of the customer information it handles. By using this flexible standard, the FTC allows businesses to assess the potential risks to data and take appropriate steps to protect that data.

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[9] *See Protecting Personal Information: A Guide for Business (Interactive Tutorial), available at* http://business.ftc.gov/multimedia/videos/protecting-personal-information.
[10] *See generally* http://www.business.ftc.gov/privacy-and-security/data-security.
[11] *See Mobile App Developers: Start with Security* (Feb. 2013), *available at* http://business.ftc.gov/documents/bus83-mobile-app-developers-start-security.
[12] *See Peer-to-Peer File Sharing: A Guide for Business* (Jan. 2010), *available at* http://business.ftc.gov/documents/bus46-peer-peer-file-sharing-guide-business.
[13] *See Copier Data Security: A Guide for Business* (Nov. 2010), *available at* http://business.ftc.gov/documents/bus43-copier-data-security.

We have provided substantial guidance to businesses about how to follow the requirements of the Safeguards Rule and have outlined the standards for compliance and best practices for businesses to secure customer information.[14]

11. Why does the FTC believe that private, administrative settlements provide fair notice to companies with respect to their data security practices when there are often economic incentives for companies to settle and when such settlements are not subject to judicial review?

The more than 50 complaints and consent orders issued by the FTC in the data security area, along with its extensive consumer and business education materials, provide ample guidance to businesses about the standards for reasonable data security. The vast majority of these settlements were administrative and, as a consequence, the Commission solicited and responded to public comment on them before their final adoption. Those settlements filed in federal court were reviewed by a federal district court judge. No matter the venue, the Commission's complaints, consent orders, and analyses to aid public comment are publicly available from a variety of sources, including the FTC website. Our complaints provide examples of data security practices that did not meet the Commission's flexible reasonableness test, and our consent orders serve as templates for best practices for companies in establishing and implementing a successful information security program.

Moreover, as noted above, the FTC widely disseminates a business guide on data security, along with an online tutorial based on the guide. These resources are designed to provide a variety of businesses – and especially small businesses – with practical, concrete advice as they develop data security programs and plans for their companies.

Notably, the District Court in the *Wyndham* litigation agreed with the Commission on this point in rejecting a motion to dismiss our complaint for lack of fair notice, among other grounds.[15]

12. It has been suggested that one way to make consent decrees more functional as rules of the road – or as "common law of settlements" as Chairman Ramirez and Commissioner Brill have called them – is to show more of the legal analysis that back the settlements. This analysis is not published in the complaints, the settlements, or the short explanatory statements to the public about the case. Is there any reason you wouldn't want to share those memos? Would this information be helpful to the regulated community?

The FTC explains the basis for its enforcement actions in its complaints, consent orders, and, in the case of administrative complaints, analyses to aid public comment. We also solicit and respond to public comments on all our administrative consent orders. In addition, we have two blogs, the BCP Business Center blog, http://www.business.ftc.gov, and Competition Matters, http://www.ftc.gov/news-

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[14] *See Financial Institutions and Customer Information: Complying with the Safeguards Rule* (April 2006), *available at* http://www.business.ftc.gov/documents/bus54-financial-institutions-and-customer-information-complying-safeguards-rule.

[15] *FTC v. Wyndham Worldwide Corp.*, ___ F. Supp. 2d ___, 2014 WL 1349019 (D.N.J. Apr. 7, 2014), *petition for leave to appeal filed* (3d Cir. July 3, 2014).

events/blogs/competition-matters, that provide guidance to businesses about how best to understand recently-announced Commission enforcement actions.

As for the Commission's internal memoranda, those documents are privileged deliberative materials that often contain confidential, proprietary business information. Maintaining the confidentiality of these internal memoranda is vital to the Commission's ability to engage in meaningful deliberations before deciding whether to issue a complaint or enter into a consent order.

13. How important is technological expertise to your consumer protection and competition missions? What is the FTC's long-term plan for enhancing its competency in this area?

Technology plays an increasingly central role in consumers' daily lives, a fact that is reflected in the FTC's consumer protection and competition work. I am committed to ensuring that the FTC has the requisite technological expertise to address the issues raised by emerging technologies from an early stage. Toward that end, we employ and routinely rely on expert technologists and attorneys with technology expertise to support both our consumer protection and competition missions. In addition, in recent years, we have brought on a succession of eminent computer scientists to serve as the FTC's Chief Technologist.

14. In 1993 President Clinton issued Executive Order 12866 requiring significant regulatory actions be submitted to OIRA for review. Should this requirement be made applicable to independent agencies, including the FTC?

When engaging in rulemaking, the Commission regularly evaluates the costs and benefits of its proposed rules and amendments, as reflected in both its notices of proposed rulemaking and statements of basis and purpose. In addition, the FTC reviews all of its rules and guides on a decennial basis. Each review begins with a series of standard questions about the costs and benefits, to both business and consumers, of the current rule and any proposed changes. Additionally, for each rule and rule review, the Commission conducts both Paperwork Reduction Act and RegFlex analyses that also examine the potential costs to businesses.

I believe the level of review the FTC undertakes is appropriate. Requiring the FTC to conduct formal, statistical cost-benefit analysis for every regulatory action would consume significant resources and negatively impact our ability to nimbly address both business and consumer needs in a rapidly changing marketplace.

15. By certain accounts litigation under State "mini FTC Acts" has exploded in recent years. As a result, we have State courts interpreting FTC authority because the language is often identical. What is the current or potential impact of State interpretations on FTC authority?

We are not aware of any issues that have arisen because of state court interpretation of state "mini-FTC Acts." Where state statutes are modeled on federal legislation, state courts often rely on the federal courts' interpretation of the federal statute. In fact,

some state "mini-FTC Acts" explicitly provide that state courts are to be guided by the FTC's and the federal courts' interpretation of the Federal Trade Commission Act.[16]

It is possible that a federal court might look at the way a state court interprets a standard that appears in both the FTC Act and a state mini-FTC Act. In such a situation, the federal court could consider the state court's interpretation, but would not be bound by the state court opinion.

16. The financial burden of second requests in a merger filing – the requests for additional information after certain HSR pre-merger notifications – have far exceeded anyone's expectations. In March 2006 the Commission announced new guidelines meant to lower the cost of merger investigations by reducing the volume of materials that must be produced in response to such requests. The cost of these requests can nonetheless still amount to millions. Is the Commission looking at additional ways to reduce the burden of these second requests? If not, why not?

    Very few HSR premerger filings - typically less than 4% - result in a second request in any given year. However, when a merger does raise potential competitive concerns warranting further investigation, the Commission is obligated to conduct a thorough review and analysis. The highly fact-specific nature of merger review means that second requests can often involve significant data and document production, which are necessary to ensure a complete understanding of the potential competitive effects of a transaction.

    At the same time, the Commission recognizes that a merger investigation can impose a significant burden on parties. We therefore regularly review the second request process in an effort to ensure that the information sought is appropriately tailored to the competitive concerns the agency is examining. To reduce the burden on parties, as well as on our own staff, the Commission has streamlined its information requests, including narrowing the number of custodians and/or the time-period covered by the requests. Most recently, the Bureau of Competition provided guidance to the business community for electronic productions, including the use of several techniques to reduce the size of the submission such as de-duplication, email threading, and technology-assisted review.

    Fundamentally, the best way for parties to reduce the costs and burden of responding to a second request – or any request for information from the FTC, for that matter – is to engage with staff about the information the agency seeks. While staff will work to ensure that the agency obtains the information needed to conduct a sound and thorough merger review, constructive engagement often leads to more targeted ways of obtaining that information, to the benefit of both parties and the Commission.

17. How does the FTC weigh the competitive impact of its rules and regulations for small and medium-sized businesses? For example, in the Internet privacy space, it appears the evolution of the marketplace is leading to the biggest players controlling a larger percentage of the online advertising industry. Has the Commission taken a look how such restrictions or

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[16] *See, e.g.*, CT Gen. Stat § 42-110b (2012); R.I. GEN. LAWS § 6-13.1-3.

requirements under the self-regulatory models will affect the competition within the industry?

The FTC pays close attention to the impact its rules have on businesses, especially small- and medium-sized businesses. Among other things, our Bureau of Economics (BE) is specifically tasked with determining the effect of a proposed rule or regulation on industry, including large and small businesses. In addition, our economists assess whether a proposed rule, or the application of an existing rule in a particular enforcement action, will have a detrimental impact on competition, such as by erecting unjustified barriers to entry by small businesses.

The FTC also supports self-regulatory schemes that are the product of a transparent process and that yield clear and meaningful standards subject to robust enforcement. An effective self-regulatory program should be broadly applicable to businesses of all sizes and types operating in an industry. Industry self-regulation that is robust and properly implemented is likely to provide consumers with more useful information and increased choice with little or no risk of diminishing competition.

At the same time, we recognize that competitors in a manner that may harm competition can sometimes misuse self-regulatory programs. For example, such arrangements could operate as an agreement among competitors to exclude non-compliant products or companies from the market. The Commission, in keeping with our dual mission to protect consumers and promote competition, is alert to these risks in all of the sectors we oversee, including in the area of online commerce and privacy.[17]

18. In recent years, the Commission has entered certain consent decree agreements with parties that require, for a 20-year period, an annual or biannual audit to measure compliance. Do any other Federal agencies have consent decrees that cover 20 years hence? In a technology and Internet world that is ever-changing, does it make sense for a 20-year audit when the technology or practice may no longer be relevant in 10, 5, or even 2 years later?

The duration of the Commission's consumer protection and competition orders is ordinarily twenty years. This standard has been in place for nearly two decades and was established after a thorough analysis, including a public notice and comment period, by the Commission in 1995.[18] **Notably, federal court orders have no equivalent sunsetting provisions, which means that federal court order requirements generally remain in force indefinitely.**

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[17] *See* Letter of Michael Bloom, Assistant Director for Policy and Coordination, Bureau of Competition, Federal Trade Commission to Alan L. Cohen, Vice-President and General Counsel, Council of Better Business Bureaus, Inc. (Aug. 15, 2011) (analyzing likely competitive impact of accountability component of self-regulatory program for online behavioral advertising), *available at* http://www.ftc.gov/policy/advisory-opinions/council-better-business-bureaus-inc.

[18] Federal Trade Commission, Policy Statement Regarding Duration of Competition and Consumer Protection Orders, 60 Fed. Reg. 42569 (Aug. 16, 1995), *available at* http://www.ftc.gov/sites/default/files/documents/federal_register_notices/policy-statement-regarding-duration-competition-and-consumer-protection-orders/950816durationofcompetitionandconsumer.pdf.

The comprehensive data security and privacy programs, including biennial assessments, are core provisions of our administrative data security orders and are required for the duration of the orders themselves. Where the Commission has reason to believe that a company failed to have reasonable security for consumer data, the Commission has found that requiring outside assessments is appropriate fencing-in relief.

Importantly, the comprehensive data security and privacy provisions in our orders are flexible and expressly take into account a company's size and complexity, the nature and scope of its activities, and the sensitivity of the consumer information collected. As a result, companies under order can adjust and update their programs as needed. FTC orders are purposefully designed to be technology-neutral so the requirements can adapt to changes in technology over time. In addition, a company may petition the Commission for an order modification if, due to changed circumstances, any provision in the order is no longer warranted.[19]

The Honorable Marsha Blackburn

1. The Commission has been increasingly aggressive in seeking to hold credit card payment processors liable for providing merchants, allegedly involved in conduct that harms consumers, with access to credit card networks. It's possible the Commission could seek from a processor the full amount of consumer harm caused by the alleged unlawful acts of one of its merchants, thereby making processors act as insurers or guarantors for merchants that harm consumers.

   The Commission's enforcement actions appear to involve cases wherein the relationship between the merchant and processor is less than arms-length, and the unscrupulous processor was integrally involved in the merchant's bad behavior.

   While I appreciate the Commission's efforts to crack down on mass consumer fraud and prevent bad merchants from gaining access to the U.S. financial system, I am concerned about the harm to the economy that could ensue if the Commission seeks enforcement actions to hold legitimate processors fully liable, even when the relationship with the merchant is at arms-length and the processor took no steps to aid the merchant beyond processing for that merchant. The risk of such exposure for processors could result in higher prices or diminished choices for small businesses and consumers, and processors might stop serving certain small businesses that operate in e-commerce and other card-not-present environments or charge substantially higher fees to certain merchants.

   As you may be aware, the payment processing industry, through its trade association, the Electronic Transactions Association (ETA), is investing significant resources into developing and implementing enhanced industry best practices in order to better fulfill the Commission's goal of depriving bad merchants of access to the U.S. financial system. I am hopeful that such enhanced industry best practices, once finalized and implemented, will provide a more

[19] *See* 16 C.F.R. § 2.51; Fed. R. Civ. P. 60(b).

effective means of advancing the Commission's goal than ad hoc enforcement, while also mitigating risk of harm to the economy that could come from enforcement.

It would seem reasonable to allow the industry time to finalize and implement their best practices before further enforcement actions could be taken against any who conduct their business at arm's length with a merchant subject to FTC enforcement. Do you agree? If not, please explain.

As you observe, to buttress our ongoing efforts to stop consumer fraud and cut off the supply of money to fraudulent operations, the Commission's law enforcement actions have targeted a variety of nonbank payment processors and other intermediaries – so-called "gatekeepers"– that we have charged engaged in unfair acts and practices in violation of the FTC Act or provided substantial assistance to telemarketers in violation of the Telemarketing Sales Rule.[20] The payment methods involved have included credit and debit cards,[21] Automated Clearing House ("ACH") debits,[22] money transfers,[23] unsigned demand drafts known as Remotely Created Checks ("RCCs"), and electronic versions of RCCs, known as Remotely Created Payment Orders ("RCPOs").[24]

Regardless of the payment method used, the Commission's cases have highlighted the numerous red flags that should put processors on notice of a high likelihood of illegal activity. These signs include unusually high rates of returned or reversed transactions (or chargeback rates in connection with credit cards), sales scripts or websites containing statements that are facially false or highly likely to be false, consumer complaints, and inquiries from law enforcement or regulators.

Self-regulation, if it is sufficiently robust, can serve as an important complement to law enforcement in this area. Industry standards, such as those from the credit card networks, have been in place for many years and have assisted processors and banks in ferreting out entities engaged in illegal conduct. We commend the steps the Electronic Transactions Association ("ETA") has taken to develop and implement guidelines that can assist its members in complying with relevant laws and regulations. At the same

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[20] 16 C.F.R. 310

[21] *E.g.*, FTC Press Release, *Payment Processor Agrees to Give Up More Than $1 Million to Settle FTC Charges it Assisted, Facilitated Telemarketing Scammers* (June 11, 2014) (announcing $1.1 million settlement with credit card processor); *FTC. v. Loewen,* 2013 WL 5816420 (W.D.Wash. Oct. 29, 2013) (Summ. J.) (finding defendants' activities, including credit card processing, violated the TSR).

[22] *E.g., FTC v. Your Money Access, LLC* , Civ. No. 07-5147 (E.D. Pa. Aug. 11, 2010) (Stip. Perm. Inj.) (alleging ACH and RCC payment processor unfairly debited or attempted to debit more than $200 million from consumer accounts on behalf of fraudulent telemarketers); *FTC v. Electronic Financial Group, et al.,* No. W-03-CA-211 (W.D. Tex. Mar. 23, 2004) (Stip. Perm. Inj.) (settlement requiring defendants to pay $1.5 million).

[23] *FTC v. MoneyGram*, Civ. No. 09-6576 (N.D. Ill. Oct. 19, 2009) (Stip. Perm. Inj.) (resolving allegations that defendant allowed its money transfer system to be used for fraud).

[24] *E.g., FTC v. Automated Electronic Checking, Inc.* , Civ. No. 13-00056-RCJ-WGC (D. Nev. Feb. 5, 2013) (Stip. Perm. Inj.) (payment processor of RCCs and RCPOs); *FTC v. Neovi, Inc.*, 598 F. Supp. 2d 1104 (S.D. Cal. Sept. 16, 2008), *aff'd*, 604 F.3d 1150, 1158 (9th Cir. 2010) (Perm. Inj.) (Internet-based check creation and delivery service).

time, the Commission must continue to monitor the marketplace and take action where appropriate.

Importantly, the Commission recognizes the critical role that processors play for legitimate merchants, especially small businesses. Any decision about whether to take law enforcement action is highly dependent on the facts of a particular case. The Commission will continue to carefully consider the relevant facts of each case – including the processor's relationship to the merchant, its participation in the merchant's illegal activities, and its knowledge of the illegal activities – to determine whether law enforcement is appropriate.

The Honorable Pete Olson

1. In your written testimony you say that a way to mitigate the challenge of limited Commission resources versus workload is to "leverage…resources through careful case selection."

   In your appearance before the Subcommittee, you said that maybe one pyramid scheme had been enforced against in 2013.

   Why then does the Commission choose not to more vigorously pursue claims of pyramid schemes despite your own recent survey of fraud in the United States, which stated that during 2011 an estimated 10.8% of U.S. adults – 25.6 million people – were victims of one or more of the frauds surveyed, and despite your own website's admonition that "Pyramid schemes are illegal, and the vast majority of participants lose money."?

   Sources: Keith B. Anderson, Staff Report of the Bureau of Economics, Federal Trade Commission, Consumer Fraud in the United States, 2011: The Third FTC Survey, at i-ii (April 2013); http://www.consumer.ftc.gov/articles/0065-multilevel-marketing

   The Commission does vigorously pursue claims of pyramid schemes. Such cases are highly fact-intensive and can require substantial resources and expert economic analysis to investigate and prosecute. These are the most recent examples:

   - **On June 2, 2014, the Court of Appeals for the Ninth Circuit upheld a district court ruling in favor of the FTC against a multi-level marketing business called BurnLounge. In that case, the court ruled that BurnLounge and several associated individuals operated a pyramid scheme causing millions of dollars of consumer harm. The court order permanently halted the defendants' marketing methods, which lured more than 56,000 consumers into their scheme by pretending to be a legitimate multi-level marketing program and making misleading claims about how much money participants could earn. The BurnLounge defendants were ordered to pay $16.2 million in redress. In addition, the defendants are prohibited from engaging in pyramid, Ponzi, chain letter, or similar schemes, and barred from making misrepresentations about multi-level marketing operations or business ventures, including misrepresentations about sales, income, profitability, or legality. In its June order, the Ninth Circuit remanded the case to the district court for clarification regarding its calculation of consumer harm. As such, the matter remains in litigation,**

but we will pursue a final order providing for the payment of millions of dollars to compensate injured consumers.[25]

- **On May 9, 2014, a settlement was reached in another case brought by the FTC, this one against a Kentucky-based pyramid scheme called Fortune Hi-Tech Marketing. The company enrolled more than 350,000 consumers throughout the United States, Puerto Rico and Canada in a four-year period. According to the FTC's complaint, the defendants falsely claimed consumers would earn significant income for selling the products and services of companies such as Dish Network, Frontpoint Home Security, and various cell phone providers, and for selling Fortune Hi-Tech's line of health and beauty products. Despite its claims, nearly all consumers who signed up with the scheme lost more money than they ever made. The settlement bans the defendants from multi-level marketing and also requires defendants to surrender assets totaling at least $7.75 million, which we expect to use for redress to consumers.**[26]

- **On March 12, 2014, the Commission confirmed that we are investigating the California-based diet-shake company Herbalife, one of the largest publicly-traded multi-level marketing firms in the United States.**

The Commission's law enforcement cases against pyramid schemes are just one example of the work the FTC does to protect consumers from scams that promise to provide an opportunity to earn income. Since July 2009, the FTC has brought four law enforcement sweeps with state and federal partners to halt job scams, work at home schemes, and business opportunity fraud.[27]

The Honorable Mike Pompeo

1. Has the FTC conducted a thorough review of the tools and authorities it has under Section 5 and determined that there are real, tangible privacy harms occurring in the marketplace today that it cannot address under its current broad Section 5 authority. If so, please articulate those harms.

   There are numerous harms that may result from companies' failure to provide reasonable privacy and data security protections, as the FTC has seen in connection with its enforcement efforts and through workshops conducted on specific issues, such as child and senior identity theft. For instance, a breach of location or health information can reveal personal details about consumers' lives such as the medication they are taking, the doctors they visit, or the location of their place of worship.

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[25] FTC v. BurnLounge, Inc., ___ F.3d ___, 2014 WL 2445812 (9th Cir. 2014).
[26] FTC. v. Fortune Hi-Tech Marketing, Inc., Case No. 5:13-cv-00123-GFVT-REW (E.D. Ky 2014).
[27] *See* Operation Lost Opportunity, 2012, http://www.ftc.gov/news-events/press-releases/2012/11/ftc-expands-fight-against-deceptive-business-opportunity-schemes; Operation Empty Promises, 2011, http://www.ftc.gov/news-events/press-releases/2011/03/ftc-steps-efforts-against-scams-target-financially-strapped; Operation Bottom Dollar, 2010, http://www.ftc.gov/news-events/press-releases/2010/02/ftc-cracks-down-con-artists-who-target-jobless-americans; Operation Short Change, 2009, http://www.ftc.gov/news-events/press-releases/2009/07/ftc-cracks-down-scammers-trying-take-advantage-economic-downturn.

Moreover, a breach involving financial information can lead to unauthorized charges on consumers' accounts and identity theft. The disclosure of email addresses can be used to perpetrate phishing attacks or target users for malware, the latter of which can be used to install keyloggers or other technology to capture even more personal information. A form of identity theft known as "synthetic identity theft" – where an individual's Social Security number is combined with a fictitious name – is a significant problem, and accounts for more than 80 percent of identity fraud according to some estimates.

These are very real concerns. Identity theft has been the top complaint received by the FTC for each of the last 13 years. And the Bureau of Justice Statistics estimates that 16.6 million persons – a staggering seven percent of all U.S. residents ages 16 and older – were victims of identity theft in 2012.[28]

Unfortunately, many companies continue to under-invest in data security and to make basic mistakes when in it comes to protecting consumer information, as suggested by a 2013 report that concluded that 78 percent of breaches resulted from initial intrusions that were of "low" or "very low" difficulty.[29] The Commission has authority to challenge companies' data security practices that are unfair or deceptive under Section 5 of the FTC Act, and we have used this authority to settle over 50 data security cases. But we believe more needs to be done. The Commission has unanimously called for data security legislation that would strengthen our existing tools and authority to help us address lax data security practices. Specifically, we support legislation that would give the FTC civil penalty authority, jurisdiction over non-profits, and APA rulemaking to ensure we have adequate flexibility to respond to new technology and threats in implementing the statute.

Such legislation is important for a number of reasons. First, the FTC currently lack authority under Section 5 to obtain civil penalties, an important deterrent. Second, enabling the FTC to bring cases against non-profits, which have been the source of a number of breaches, would help ensure that whenever personal information is collected from consumers, the entities that maintain such data take reasonable measures to protect it. Finally, rulemaking authority under the Administrative Procedure Act would help enable the FTC to respond to changes in technology in implementing the legislation.

The Honorable Billy Long

1. In November 2012, the FTC sent warning letters to 22 hotel operators regarding the practice of "drip pricing." (Available at http://www.ftc.gov/opa/2012/11/hotelresort.shtm) As the letter explained, in the context of the retail travel industry, drip pricing is a pricing technique in which hotels do not include certain fees, often referred to as "resort fees", in advertised room night prices. These are mandatory fees about which many consumers are not aware until they check out. The FTC indicated that the fees can total as much as $30 per day,

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[28] Bureau of Justice Statistics, *Victims of Identity Theft, 2012* (Dec. 2013), *available at* http://www.bjs.gov/content/pub/pdf/vit12.pdf.

[29] *Verizon 2013 Data Breach Investigations Report* at 49, *available at* http://www.verizonenterprise.com/resources/reports/rp_data-breach-investigations-report-2013_en_xg.pdf.

which can be a significant percentage of the cost of a hotel stay. In some documented cases, these fees can approach 50% of the advertised price.

The FTC letters strongly encouraged the companies to review their websites and ensure that room rates incorporate all mandatory amounts consumers are expected to pay. In press statements in November 2012, the FTC state, "We wanted to give the hotel operators an opportunity to comply on their own voluntary (sic)." (Available at http://www.hotelnewsnow.com/Article/9475/Jury-still-out-on-FTC-resort-fee-compliance) Simple Internet searches show that many hotel websites continue to mislead consumers by failing to include all mandatory fees in advertised room night prices.

The November 2012 letter indicated that the FTC "may take action to enforce and seek redress for" violations of the FTC Act in this area. Given that this practice persists in the hotel industry, and in light of the continued consumer harm resulting therefrom, how has the FTC addressed this issue to ensure compliance? Has the FTC undertaken any enforcement actions to stop these misleading practices?

The FTC continues to work with the travel industry to ensure that mandatory hotel resort fees are properly disclosed to consumers. As you noted, in November 2012, FTC staff sent warning letters to 22 hotel operators strongly encouraging them to include any mandatory resort fees in total price quotes. In March 2013, the FTC updated its Dot Com Disclosures to provide further guidance to online advertisers, including the travel industry. The updated Dot Com Disclosures stress that if a business advertises a product's basic cost on one page, the existence and nature of any unexpected additional fees should be prominently disclosed on the same page and immediately adjacent to the cost claim. In other words, if a hotel advertises only the room rate on one page (*e.g.*, the page where a consumer selects the room type), the mandatory resort fee should appear "as close as possible" to the room rate.

We remain committed to improving resort fee disclosures. While we have not taken any enforcement action yet, we are following up with the targets of our warning letters and are reaching out to others and will evaluate whether additional action is warranted in this area.

The Honorable Jan Schakowsky

1. In 2008, as part of the proposed Federal Trade Commission Reauthorization Act, the bill's sponsors in the Senate sought to repeal the common carrier exemption of the FTC Act. The FTC has been in full support of repealing this exemption, and has testified to that effect.

   The exemption presently bars the FTC from policing companies that are subject to the Communications Act from using unfair methods of competition or unfair or deceptive acts or practices. However, most of us agree that this exemption is outdated.

As technology progresses and Internet industries continue to converge, the common carrier exemption may well frustrate the FTC's ability to stop deceptive and unfair practices throughout the marketplace.

a. I understand that the FTC already protects against unfair and deceptive practices by non-common carriers engaged in telecommunications, information, and payment services. Do you believe the FTC has the expertise and the resources to prevent unfair or deceptive practices by common carriers?

Yes. The Commission has extensive experience protecting consumers from unfair or deceptive acts or practices by market participants under Section 5 of the FTC Act. Section 5 exempts "common carriers subject to the Acts to regulate commerce," 15 U.S.C. § 45(a)(2), which includes the Communications Act and its amendments, id. § 44. However, the Commission can enforce Section 5 against telecommunications providers when they are not engaged in common carrier activities. For example, the Commission can enforce Section 5 against telecommunications providers that are engaged in third-party billing to consumers, because billing and collection on behalf of a third party is not common carrier activity.[30]

The FTC's wide range of experience in protecting consumers against unfair or deceptive acts or practices would be valuable in examining common carriage activities. Absent the common carrier exception, the FTC would apply the prohibitions under Section 5 equally to all market participants, including companies engaged in common carrier activities. Further, the Commission already has considerable experience in dealing with market participants in the telecommunications sector when dealing with non-common carrier issues, including bringing numerous enforcement actions to address text message spam and both landline and mobile cramming, enforcing the Telemarketing Sales Rule, and bringing actions to enforce privacy and data security protections in connection with mobile devices.[31]

b. Do you believe that the common carrier exemption at 15 U.S.C. § 45(a)(2) should be repealed?

Yes, the Commission supports the repeal of the common carrier exemption. Because of this exemption, consumers dealing with a very important segment of the economy – telecommunications activities – do not benefit from standard FTC prohibitions against deceptive and unfair practices. The common carrier exemption can frustrate effective consumer protection under FTC principles when dealing with advertising, marketing, and billing practices for common carrier activities. Moreover, the exemption is outdated and no longer serves its intended purpose, as it dates from a period when common carrier telecommunications

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[30] *See, e.g., FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 59-60 (2d Cir. 2006); *In re Detariffing of Billing and Collection Servs.*, 102 FCC 2d 1150 ¶¶ 30-34 (1986).

[31] *See, e.g.*, FTC, "Mobile Technology Issues," *available at* http://www.ftc.gov/news-events/media-resources/mobile-technology.

services were provided primarily by highly regulated monopolies, which is no longer the case.

c. Do you believe repealing the common carrier exemption would allow the FTC to better protect consumers across technologies and platforms? If so, why?

Yes, consumers would be better served by the repeal of the common carrier exception. As communications technologies and platforms have continued to evolve, market participants may offer a range of communications-related services to consumers, some of which are subject to common carrier requirements under the Communications Act but many of which are not. Consumers should expect and receive the same protections against unfair or deceptive acts or practices in the context of common carrier services as in other services.

2. A few years ago, our Committee held a hearing on the issue of fraudulent calling cards. I recall that when the FTC was able to get an injunction placed on a bad actor, he or she would just reopen down the street under a new name. I would think if the FTC could have hit the bad actor where it hurts – in the wallet, with a monetary penalty – things might have played out differently.

Under current law, it seems as if the FTC could be forced to choose between seeking preliminary relief and seeking civil penalties. If the FTC wants to seek civil penalties in an enforcement action, it must first refer the case to the Department of Justice (DOJ). DOJ has 45 days to decide whether it will bring the case on FTC's behalf. FTC can only litigate the case if, at the end of 45 days, DOJ decides not to take action. I would think FTC would often decide to quickly stop the ongoing harm and forgo civil penalties. It's an unfortunate choice that, perhaps, the Commission should not have to make.

a. In cases where the FTC is granted the authority to impose civil penalties directly, how does having that tool enhance the great work that the Commission is already doing?

Civil penalties can be a critical tool to deter unlawful conduct, helping to ensure that companies do not view an FTC enforcement action as a mere cost of doing business. In our experience, civil penalties are most important where the FTC's authority to obtain equitable monetary relief, primarily restitution and disgorgement of ill-gotten gains, fails to yield a sufficient deterrent effect. This may arise where the unlawful conduct does not create readily quantifiable financial harm to consumers. For example, under the Energy Policy and Conservation Act ("EPCA"), Congress gave the FTC the authority to assess civil penalties in an administrative proceeding where manufacturers fail to disclose energy information about major household appliances according to FTC regulations.[32] The agency has used this authority by taking legal action against companies that failed to post required Energy Guide information on sales websites.[33] For other statutes, such as the Children's Online

[32] *See* 42 U.S.C. § 6303(a); 16 C.F.R. Part 305; 16 C.F.R. §§ 1.92-1.97.

[33] *See, e.g.,* Decision and Order, *In the Matter of Universal Appliances, Kitchens, and Baths, Inc.*, F.T.C. File No. 102-3042 (Apr. 1, 2011), *available at* http://www.ftc.gov/enforcement/cases-proceedings/1023042/universal-appliances-kitchens-baths-inc; Decision and Order, *In the Matter of P.C. Richard & Son, Inc.*, F.T.C. File No. 102-3039 (Nov. 1, 2010), *available at*

Privacy Protection Act ("COPPA"), Congress has given the Commission the authority to seek civil penalties in court, when, for example, operators of websites and apps directed to children failed to obtain verified parental consent to collect the personal information of young children or employ lax security to safeguard such information.[34]

Under the FTC's current authority, except under the EPCA, when the Commission wants to seek civil penalties, including where a party has already agreed to pay penalties in a consent order, the FTC must refer the matter to the Department of Justice.[35] DOJ then has 45 days to consider whether to accept the referral.[36] Although the agencies coordinate, this process may cause what can be unnecessary delay. Moreover, in the event that the Commission seeks to litigate, rather than settle, a civil penalty matter in court, litigators at two federal agencies – both the FTC and DOJ – must become well-versed in the facts and the law of a particular matter. This process is, by its nature, duplicative and, to my knowledge, unusual when it comes to independent federal agencies, as the SEC, CFPB, and CFTC all ordinarily have the authority to bring their own civil penalty enforcement actions in federal court. There is, in my view, no basis to treat the FTC differently from its sister independent civil enforcement agencies in this regard.

b. Would you support Congress giving the FTC authority to seek civil penalties for the following violations:

   i. Fraudulently marketed prepaid calling cards?

   Yes. The FTC has repeatedly requested the authority to seek civil penalties for fraudulently marketed prepaid calling cards.[37] We continue to support this change, which would provide the agency with a powerful new remedy. In this context, civil penalties also would assist in quantifying a recovery amount that would promote effective deterrence, given that the measure of consumer harm for each individual prepaid calling card may be quite small.

   ii. Companies that fail to maintain reasonable data security?

   Yes. Civil penalty authority can be an important tool to help deter violations of law. Under current laws, the FTC only has the authority to seek civil penalties (through a referral to DOJ) for data security violations with regard

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http://www.ftc.gov/enforcement/cases-proceedings/1023039/pc-richard-son-inc. The Energy and Policy Conservation Act is the only statute that permits the FTC to assess civil penalties without referral to the Department of Justice.

[34] 15 U.S.C. §§ 6506(d) & 45(m).

[35] By contrast, Congress has generally given the Commission independent litigating authority to pursue enforcement actions seeking equitable relief. *See* 15 U.S.C. § 53(b).

[36] *See* 15 U.S.C. § 56(a).

[37] *See, e.g.*, Prepared Statement of the Federal Trade Commission on Prepaid Calling Cards Before the Committee on Commerce, Science, and Transportation, United States Senate (Sept. 19, 2008) at 10-11, *available at* http://www.ftc.gov/public-statements/2008/09/prepared-statement-federal-trade-commission-prepaid-calling-cards-0.

to children's online information under the Children's Online Privacy Protection Act ("COPPA") or credit report information under the Fair Credit Report Act ("FCRA"). The Commission may also seek civil penalties for violations of FTC administrative orders regardless of the nature of the original offense.[38] However, the vast majority of our data security cases are brought under Section 5 of the FTC Act or under the GLB Safeguards Rule against companies that make deceptive statements about data security or fail to maintain reasonable data security. In those cases, the Commission does not have the authority to seek civil penalties. Granting the FTC civil penalty authority in data security cases would level the playing field between those currently covered by sector-specific data security laws with civil penalties (FCRA, COPPA, Health Insurance Portability and Accountability Act) and everyone else. It would also help to ensure effective deterrence in this area.

The Honorable Henry A. Waxman

1. Many of us on the Energy and Commerce Committee would have anticipated Congress to have passed a federal data security law by now. It has been stated at several hearings on the issue that 46 states, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands possess data breach laws of varying stringency that require businesses to notify consumers when their personal information has been compromised. Some states have enacted additional laws – again, of varying stringency – that require business to maintain minimum data security standards to prevent personal information from being compromised.

   In recent years, there has been some Congressional interest in passing a national breach notification law that would preempt state rules. However, I am concerned that we could end up preempting strong data security laws (not just breach notification laws) in the process.

   The Commission has testified in the past in support of federal data security legislation. Do you think Congress should pass a comprehensive federal breach notification-only law if it preempts strong state data security standards already in place?

   A unanimous Commission has expressed support for a federal data security and breach notification law. Breach notification and data security standards at the federal level, with appropriate preemption of state law as discussed below, would extend notifications to all citizens nationwide while simplifying compliance for businesses that now must comply with 47 separate state laws as well as the laws of the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands. A federal law would also create uniform protections for all American consumers. However, our support for a federal law that would preempt state law has been conditioned on both the inclusion of a data security standard that is sufficiently strong and on states having concurrent jurisdiction with the FTC to enforce the law. If a consistent nationwide standard were to come at the expense of weakening existing state legal protections for consumer information, the

[38] Outside the data security context, and with regard to the FTC's important work to combat consumer fraud, the FTC's ability to seek civil penalties is generally limited to the enforcement of specific rules, such as the Telemarketing Sales Rule, which typically has no application to the fraudulent marketing of prepaid calling cards.

Commission would not support the law. Such an outcome would not be a net positive for consumers.

2. Certain tobacco products (e.g., roll-your-own tobacco) are currently regulated by the Food and Drug Administration (FDA) and taxed at a federal excise tax rate comparable to cigarettes. However, other products (e.g., pipe tobacco) are unregulated and taxed at a lower federal excise tax rate.

   A Government Accountability Office (GAO) report issued last year found that some tobacco companies made minor product modifications or simply changed a product's labeling in order to sell it as pipe tobacco – rather than roll-your-own tobacco – so that they could avoid FDA regulation and a higher federal tax rate. FDA is currently undertaking rulemaking to bring additional tobacco products under the agency's jurisdiction, referred to as "deeming" regulations.

   I am concerned about the sale of tobacco products intended for use in roll-your-own cigarettes being labeled as pipe tobacco.

   a. What, if any, false advertising or unfair or deceptive acts or practices has the Commission observed related to pipe and roll-your-own tobacco?

      Pipe tobacco is advertised primarily by online sellers of tobacco products and by some retailers. There does not appear to be significant national advertising through traditional tobacco advertising media such as magazines or newspapers. The FTC is aware that some ads at least implicitly suggest that the labeled pipe tobacco can be used to make roll-your-own cigarettes. However, we have not yet made a determination as to whether such advertising is unfair or deceptive.

   b. What, if any, actions to date has the Commission taken in response to any observed false advertising or unfair or deceptive practices?

      The FTC has not brought any law enforcement actions concerning the advertising or marketing of tobacco products intended for use in roll-your-own cigarettes yet labeled as pipe tobacco. FTC staff has met with representatives of a cigarette manufacturer to discuss this issue. FTC staff has also had informal discussions with staff at the FDA's Center for Tobacco Products as part of our general cooperation and coordination of tobacco advertising and marketing issues.

   c. Without addressing any specific case, if the Commission were to investigate the sale of tobacco intended for use, or likely to be used, as roll-your-own tobacco but labeled as pipe tobacco, how would the Commission determine that a tobacco product was falsely advertised or marketed in an unfair or deceptive manner? What specific product attributes or advertising/marketing acts or practices would the FTC examine and consider as it made a determination?

      The central question in determining whether a product is being falsely advertised as pipe tobacco is whether the claim is false or misleading. This could be difficult to establish. According to reports published by GAO and CDC, although the cut of pipe tobacco is typically larger than the cut of roll-your-own tobacco, there does not appear to be any product attribute of roll-your-own tobacco that would make

it impossible to use as pipe tobacco. Currently, there are no regulatory standards or statutory definitions of pipe tobacco and roll-your-own tobacco that differentiate these products based on product characteristics, such as type of tobacco, type of curing process used, or cut of tobacco. In addition, any target of an investigation would probably argue that its advertisement is not likely to mislead consumers, i.e., that consumers who buy pipe tobacco know what they are getting. Although the available data indicates a large increase in sales of pipe tobacco since the federal excise tax on roll-your-tobacco increased significantly in 2009, there does not appear to be any increase in the number of actual pipe smokers. The GAO report indicates that consumers may be purchasing the relabeled pipe tobacco in order to take advantage of the significantly lower price of pipe tobacco versus roll-your-own cigarette tobacco.

d. Does the Commission intend to comment on the proposed "deeming" regulations issued by FDA?

The Commission has not filed a formal comment on FDA's proposed "deeming" regulation, but has consulted informally with FDA on its proposed rulemakings. We recognize the importance of a science-based agency such as FDA having authority to address the complex issues concerning the serious health risks posed by tobacco products.

FRED UPTON, MICHIGAN
CHAIRMAN

HENRY A. WAXMAN, CALIFORNIA
RANKING MEMBER

ONE HUNDRED THIRTEENTH CONGRESS

Congress of the United States

House of Representatives

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June 18, 2014

The Honorable Julie Brill
Commissioner
Federal Trade Commission
600 Pennsylvania Avenue
Washington, D.C. 20580

Dear Commissioner Brill,

Thank you for appearing before the Subcommittee on Commerce, Manufacturing, and Trade on Tuesday, December 3, 2013 to testify at the hearing entitled "FTC at 100: Where Do We Go From Here?"

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for ten business days to permit Members to submit additional questions for the record, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and (3) your answer to that question in plain text.

To facilitate the printing of the hearing record, please respond to these questions by the close of business on Wednesday, July 2, 2014. Your responses should be e-mailed to the Legislative Clerk in Word format at **Kirby.Howard@mail.house.gov** and mailed to Kirby Howard, Legislative Clerk, Committee on Energy and Commerce, 2125 Rayburn House Office Building, Washington, D.C. 20515.

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,

Lee Terry
Chairman
Subcommittee on Commerce,
Manufacturing, and Trade

cc: Jan Schakowsky, Ranking Member, Subcommittee on Commerce, Manufacturing, and Trade
Attachment

Responses of Commissioner Julie Brill, Federal Trade Commission

Questions for the Record on the hearing entitled "FTC at 100: Where Do We Go From Here?"
(December 3, 2013)
U.S. House of Representatives Energy & Commerce Committee, Subcommittee on Commerce, Manufacturing and Trade

2. The Honorable Pete Olson

In your written testimony you say that a way to mitigate the challenge of limited Commission resources versus workload is to "leverage...resources through careful case selection." In your appearance before the Subcommittee, you said that maybe one pyramid scheme had been enforced against in 2013.

Why then does the Commission choose not to more vigorously pursue claims of pyramid schemes despite your own recent survey of fraud in the United States, which stated that during 2011 an estimated 10.8% of U.S. adults – 25.6 million people – were victims of one or more of the frauds surveyed, and despite your own website's admonition that "Pyramid schemes are illegal, and the vast majority of participants lose money."?

Sources: Keith B. Anderson, Staff Report of the Bureau of Economics, Federal Trade Commission, Consumer Fraud in the United States, 2011: The Third FTC Survey, at i-ii (April 2013); http://www.consumer.ftc.gov/articles/0065-multilevel-marketing

ANSWER

The Commission does vigorously pursue claims of pyramid schemes. As you may know, such cases are highly fact-intensive and can require substantial resources and expert economic analysis. Here are the most recent examples.

On June 2, 2014, the Court of Appeals for the Ninth Circuit upheld a district court ruling against a multi-level marketing business called BurnLounge in a case brought by the FTC. In that case, the court ruled that BurnLounge and several associated individuals operated a pyramid scheme causing millions of dollars of consumer harm. The court order permanently halted the defendants' marketing methods, which lured more than 56,000 consumers by pretending to be a legitimate multi-level marketing program and making misleading claims about how much money participants could earn. BurnLounge was ordered to pay $16.2 million in redress. In addition, defendants are prohibited from engaging in pyramid, Ponzi, chain letter, or similar schemes, and barred from making misrepresentations about multi-level marketing operations or business ventures, including misrepresentations about sales, income, profitability, or legality. In its June order, the Ninth Circuit remanded the case to the district court for clarification regarding its calculation of consumer harm. As such the matter remains in litigation, but we will pursue a final order providing for the payment of millions of dollars to compensate injured consumers. FTC v. BurnLounge, Inc., ___ F.3d ___, 2014 WL 2445812 (9th Cir. 2014).

On May 9, 2014, a settlement was reached in another case brought by the FTC, against a Kentucky-based pyramid scheme called Fortune Hi-Tech Marketing. The company enrolled more than 350,000 consumers throughout the United States, Puerto Rico and Canada in a four-year period. According to the FTC's complaint, the defendants falsely claimed consumers would earn significant income for selling the products and services of companies such as Dish Network, Frontpoint Home Security, and various cell phone providers, and for selling FHTM's line of health and beauty products. Despite FHTM's claims, nearly all consumers who signed up with the scheme lost more money than they ever made. To the extent that consumers could make any income, however, it was mainly for recruiting other consumers, and FHTM's compensation plan ensured that most consumers made little or no money, the complaint alleged. The settlement bans the defendants from multi-level marketing and also requires defendants to surrender assets totaling at least $7.75 million, which we expect to use to provide redress to consumers. FTC. v. Fortune Hi-Tech Marketing, Inc., Case No. 5:13-cv-00123-GFVT-REW (E.D. Ky. 2014).

On March 12, 2014, the FTC confirmed it is investigating the California-based diet-shake company Herbalife, one of the largest publicly-traded MLM firms in the United States.

The Commission's law enforcement cases against pyramid schemes are just one example of the work the FTC does to protect consumers from scams that promise to provide an opportunity to earn income. Since July of 2009, the FTC has brought four law enforcement sweeps with state and federal partners to halt job scams, work at home schemes, and business opportunity fraud. See Operation Lost Opportunity, 2012, http://www.ftc.gov/news-events/press-releases/2012/11/ftc-expands-fight-against-deceptive-business-opportunity-schemes; Operation Empty Promises, 2011, http://www.ftc.gov/news-events/press-releases/2011/03/ftc-steps-efforts-against-scams-target-financially-strapped; Operation Bottom Dollar, 2010, http://www.ftc.gov/news-events/press-releases/2010/02/ftc-cracks-down-con-artists-who-target-jobless-americans; Operation Short Change, 2009, http://www.ftc.gov/news-events/press-releases/2009/07/ftc-cracks-down-scammers-trying-take-advantage-economic-downturn.

1. The Honorable Mike Pompeo

Has the FTC conducted a thorough review of the tools and authorities it has under Section 5 and determined that there are real, tangible privacy harms occurring in the marketplace today that it cannot address under its current broad Section 5 authority. If so, please articulate those harms.

ANSWER

Numerous harms can result from companies' failure to provide reasonable privacy and data security protections. For instance, the unexpected use of location or health information can reveal highly sensitive personal details about consumers' lives, such as the medication they are taking, the doctors they visit, or the location of their place of worship. With respect to data security, a breach involving financial information can lead to unauthorized charges on consumers' accounts and identity theft. Although we believe we have the authority to address these harms through our authority under Section 5, this authority has been challenged. For example, in our case against Wyndham hotels, the defendants have challenged the Commission's authority to bring a data security unfairness action, even where the Commission has alleged substantial credit card fraud resulted from the breaches at issue.

We have called for data security and breach notification legislation that would strengthen our existing authority. The FTC supports federal legislation that would (1) strengthen its existing authority governing data security standards for companies and (2) require companies, in appropriate circumstances, to provide notification to consumers when there is a security breach. Such legislation is important for a number of reasons. First, we currently lack authority under Section 5 to obtain civil penalties, an important remedy for deterring violations. Second, enabling the FTC to bring cases against non-profits would help ensure that whenever these entities collect personal information from consumers, they take reasonable measures to protect it. Finally, rulemaking authority under the Administrative Procedure Act would enable the FTC to respond to changes in technology when implementing the legislation.

The Honorable Marsha Blackburn

The Commission has been increasingly aggressive in seeking to hold credit card payment processors liable for providing merchants, allegedly involved in conduct that harms consumers, with access to credit card networks. It's possible the Commission could seek from a processor the full amount of consumer harm caused by the alleged unlawful acts of one of its merchants, thereby making processors act as insurers or guarantors for merchants that harm consumers.

The Commission's enforcement actions appear to involve cases wherein the relationship between the merchant and processor is less than arms-length, and the unscrupulous processor was integrally involved in the merchant's bad behavior.

While I appreciate the Commission's efforts to crack down on mass consumer fraud and prevent bad merchants from gaining access to the U.S. financial system, I am concerned about the harm to the economy that could ensue if the Commission seeks enforcement actions to hold legitimate processors fully liable, even when the relationship with the merchant is at arms-length and the processor took no steps to aid the merchant beyond processing for that merchant. The risk of such exposure for processors could result in higher prices or diminished choices for small businesses and consumers, and processors might stop serving certain small businesses that operate in e-commerce and other card-not-present environments or charge substantially higher fees to certain merchants.

As you may be aware, the payment processing industry, through its trade association, the Electronic Transactions Association (ETA), is investing significant resources into developing and implementing enhanced industry best practices in order to better fulfill the Commission's goal of depriving bad merchants of access to the U.S. financial system. I am hopeful that such enhanced industry best practices, once finalized and implemented, will provide a more effective means of advancing the Commission's goal than ad hoc enforcement, while also mitigating risk of harm to the economy that could come from enforcement.

It would seem reasonable to allow the industry time to finalize and implement their best practices before further enforcement actions could be taken against any who conduct their business at arm's length with a merchant subject to FTC enforcement. Do you agree? If not, please explain.

ANSWER

As you observe, to buttress our ongoing efforts to stop consumer fraud and cut off the supply of money to fraudulent operations, the Commission's law enforcement actions have targeted a variety of nonbank payment processors and other intermediaries – so-called "gatekeepers"– that we have charged with engaging in unfair acts and practices in violation of the FTC Act or providing substantial assistance to telemarketers in violation of the Telemarketing Sales Rule, 16 C.F.R. 310. The payment methods involved have included credit

and debit cards,[1] Automated Clearing House ("ACH") debits,[2] money transfers,[3] unsigned demand drafts known as Remotely Created Checks ("RCCs"), and electronic versions of RCCs, known as Remotely Created Payment Orders ("RCPOs").[4]

Regardless of the payment method used, the Commission's cases have highlighted the numerous red flags that put the processors on notice of the high likelihood of illegal activity. These signs include unusually high rates of returned or reversed transactions (or chargeback rates in connection with credit cards), sales scripts or websites containing statements that are facially false or highly likely to be false, consumer complaints, and inquiries from law enforcement or regulators.

Self-regulation, if it is sufficiently robust, can serve as an important complement to law enforcement. Industry standards, such as those from the credit card networks, have been in place for many years and have assisted processors and banks to ferret out entities engaged in illegal conduct. We commend the steps the Electronic Transactions Association ("ETA") has taken to develop and implement guidelines that can assist its members in complying with relevant laws and regulations. At the same time, the Commission must continue to monitor the marketplace and take action where appropriate.

Importantly, the Commission recognizes the critical role that processors play for legitimate merchants, especially small businesses. Any decision about whether to take law enforcement action is highly dependent on the facts of the particular case. The Commission will continue to carefully consider the relevant facts of each case, including the processor's

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[1] *E.g.*, FTC Press Release, *Payment Processor Agrees to Give Up More Than $1 Million to Settle FTC Charges it Assisted, Facilitated Telemarketing Scammers* (June 11, 2014) (announcing $1.1 million settlement with credit card processor); FTC Press Release, *FTC Settlements Crack Down on Payment Processing Operation that Enabled "Google Money Tree" Scammers to Charge Consumers $15 Million in Hidden Fees "Process America"*) (Nov. 18, 2013) (announcing proposed settlement against credit card payment processor); *FTC. v. Loewen,* 2013 WL 5816420 (W.D.Wash. Oct. 29, 2013) (Summ. J.) (finding defendants' activities, including credit card processing, violated the TSR); *FTC v. WV Universal Management, LLC*, Civ. No. 12-CV-1618 (M.D. Fla. June 18, 2012) (alleging credit card payment processor assisted and facilitated violations of the TSR).

[2] *E.g., FTC v. Your Money Access, LLC* , Civ. No. 07-5147 (E.D. Pa. Aug. 11, 2010) (Stip. Perm. Inj.) (alleging ACH and RCC payment processor unfairly debited or attempted to debit more than $200 million from consumer accounts on behalf of fraudulent telemarketers); *FTC v. Global Marketing Group, Inc.*, Civ. No 06-02272 (JSM) (M.D. Fla. 2006) (same, $5.1 million); *FTC v. First American Payment Processing, Inc., et al.*, No. CV-04-0074 (PHX) (D. Ariz. Nov. 3, 2004) (Stip. Perm. Inj.) (settlement requiring defendants to pay $3.9 million); *FTC v. Electronic Financial Group, et al.*, No. W-03-CA-211 (W.D. Tex. Mar. 23, 2004) (Stip. Perm. Inj.) (settlement requiring defendants to pay $1.5 million).

[3] *FTC v. MoneyGram*, Civ. No. 09-6576 (N.D. Ill. Oct. 19, 2009) (Stip. Perm. Inj.) (resolving allegations that defendant allowed its money transfer system to be used for fraud).

[4] *E.g., FTC v. Automated Electronic Checking, Inc.* , Civ. No. 13-00056-RCJ-WGC (D. Nev. Feb. 5, 2013) (Stip. Perm. Inj.) (payment processor of RCCs and RCPOs); *FTC v. Landmark Clearing Inc.*, Civ. No. 4:11-00826 (E.D. Tex. Dec. 15, 2011) (Stip. Perm. Inj.) (payment processor of RCCs and RCPOs); *FTC v. YMA*, Civ. No. 07-5147 (payment processor of RCCs and ACH debits); *FTC v. Neovi, Inc.*, 598 F. Supp. 2d 1104 (S.D. Cal. Sept. 16, 2008), *aff'd*, 604 F.3d 1150, 1158 (9th Cir. 2010) (Perm. Inj.) (Internet-based check creation and delivery service).

relationship to the merchant, its participation in the merchant's illegal activities, and its knowledge of the illegal activities, to determine whether law enforcement is appropriate.

The Honorable Jan Schakowsky

1. In 2008, as part of the proposed Federal Trade Commission Reauthorization Act, the bill's sponsors in the Senate sought to repeal the common carrier exemption of the FTC Act. The FTC has been in full support of repealing this exemption, and has testified to that effect.

The exemption presently bars the FTC from policing companies that are subject to the Communications Act from using unfair methods of competition or unfair or deceptive acts or practices. However, most of us agree that this exemption is outdated.

As technology progresses and Internet industries continue to converge, the common carrier exemption may well frustrate the FTC's ability to stop deceptive and unfair practices throughout the marketplace.

a. I understand that the FTC already protects against unfair and deceptive practices by non-common carriers engaged in telecommunications, information, and payment services. Do you believe the FTC has the expertise and the resources to prevent unfair or deceptive practices by common carriers?
b. Do you believe that the common carrier exemption at 15 U.S.C. § 45(a)(2) should be repealed?
c. Do you believe repealing the common carrier exemption would allow the FTC to better protect consumers across technologies and platforms? If so, why?

ANSWER

a. Yes. The Commission has extensive experience protecting consumers from unfair or deceptive acts or practices by market participants under Section 5 of the FTC Act. Section 5 exempts "common carriers subject to the Acts to regulate commerce," 15 U.S.C. § 45(a)(2), which includes the Communications Act and its amendments, id. § 44. The Commission can, however, enforce Section 5 against telecommunications providers when they are not engaged in common carrier activities. For example, the Commission can enforce Section 5 against telecommunications providers that are engaged in third-party billing to consumers, because billing and collection on behalf of a third party is not common carrier activity. See, e.g., FTC v. Verity Int'l, Ltd., 443 F.3d 48, 59-60 (2d Cir. 2006); In re Detariffing of Billing and Collection Servs., 102 FCC 2d 1150 ¶¶ 30-34 (1986).

The FTC's wide range of experience in protecting consumers against unfair or deceptive acts or practices would be valuable in examining common carriage activities. Absent the common carrier exception, the FTC would apply the prohibitions under Section 5 equally to all market participants, including companies engaged in common carrier activities. Further, the Commission already has considerable experience in dealing with market participants in the telecommunications sector when dealing with non-common carrier issues, including bringing numerous enforcement actions to address text message spam and both landline and mobile cramming, enforcing the Telemarketing Sales Rule, and bringing actions to enforce privacy and

data security protections in connection with mobile devices. *See, e.g.*, FTC, "Mobile Technology Issues," available at http://www.ftc.gov/news-events/media-resources/mobile-technology.

b. Yes, the Commission supports the repeal of the common carrier exemption. Because of this exemption, consumers dealing with a very important segment of the economy – telecommunications activities – do not benefit from standard FTC prohibitions against deceptive and unfair practices. The common carrier exemption can frustrate effective consumer protection under FTC principles when dealing with advertising, marketing, and billing practices for common carrier activities. Moreover, as noted, the exemption is outdated, as it originates from a period when common carrier telecommunications services were provided primarily by highly regulated monopolies, which is no longer the case.

c. Yes, consumers would be better served by repeal of the common carrier exception. As communications technologies and platforms have continued to evolve, market participants may offer a range of communications-related services to consumers, some of which are subject to common carrier requirements under the Communications Act but many of which are not. Consumers should expect and receive the same protections against unfair or deceptive acts or practices in the context of common carrier services as in other services.

The Honorable Jan Schakowsky

2. Some commentators have suggested that data security and privacy legislation should be based on the harm model, which essentially means that the FTC would only be able to bring enforcement actions if it could prove a consumer harm, such as a substantial risk of identity theft.

In the past, you have discussed your concerns with the harm model for privacy. Can you discuss the limitations of the harm model and perhaps list a few less-quantifiable harms that raise particular concerns for you?

ANSWER

The "harm-based model" of privacy protections that you refer to – which I will call the "narrow harms-based model" – focuses on preventing a limited set of harms: physical injury; economic injury, such as identity theft; and intrusive commercial solicitations, such as spam and spyware.[5] Identifying such specific harms plays a critical role in developing any effective privacy framework. Congress has taken aim at some of these harms through laws such as the CAN-SPAM Act and the Fair and Accurate Credit Transactions Act. In addition to enforcing these laws, the FTC has alleged in numerous cases that companies' failures to provide reasonable protections for consumers' data have put them at risk of identity theft and other economic harms.

In some cases, however, the narrow harms-based model, and its focus only physical harm, economic harm, or intrusive commercial solicitations, could provide less effective protections for important privacy interests. For example, the FTC recently alleged that a firm whose software allowed surreptitious monitoring through computers' built-in cameras violated Section 5 of the FTC Act. The Commission also sued several rent-to-own companies that installed and used the software on laptop computers they offered to consumers.[6] According to the complaints in these cases, the software allowed cameras to collect images of visitors, children, and family interactions. While alleging that the disclosure of such images to third parties could cause physical or financial harm to consumers, the Commission also alleged that the impairment of peaceful enjoyment of consumers' homes was, on its own, a source of substantial consumer injury.[7] A privacy framework that is limited to the narrow harms-based model might have been less capable of addressing this additional real harm in the rent-to-own computer cases.

I believe we need a privacy framework that includes the narrow harms-based model, but also includes a more expansive vision of harms arising from the expansive data collection and use that occurs in our rapidly changing technological era. Many entities collect information – some of it highly sensitive – about consumers without their knowledge and in unexpected ways.

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[5] *See* Timothy Muris, Protecting Consumers' Privacy: 2002 and Beyond (2001), *available at* http://www.ftc.gov/public-statements/2001/10/protecting-consumers-privacy-2002-and-beyond.

[6] *See* Press Release, Fed. Trade Comm'n, Aaron's Rent-To-Own Chain Settles FTC Charges That It Enabled Computer Spying by Franchisees (Oct. 22, 2013), *available at* http://www.ftc.gov/news-events/press-releases/2013/10/aarons-rent-own-chain-settles-ftc-charges-it-enabled-computer.

[7] *See, e.g.*, *In re* DesignerWare, LLC, Complaint, at ¶ 19 (Apr. 11, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2013/04/130415designerwarecmpt.pdf.

For example, data brokers gather massive amounts of data, from online and offline sources, and combine the data into individual consumer profiles. These profiles may reveal where consumers live; how much they earn; and their race, health conditions, and interests.[8] Data brokers use this information to construct marketing "segments" – categories that group consumers based on their interests and attributes, including their ethnicity, financial status, and health conditions.[9] Data organized in this way could give rise to discriminatory effects in marketing and a broad array of other commercial transactions.[10]

Data brokers' profiles may also lead to harmful financial consequences. Some data brokers offer identity verification, fraud detection, and other "risk mitigation" products based on a consumer's history of transactions. Like their marketing products, these risk mitigation products may depend on sensitive information, including information that is closely related to race, ethnicity, and financial status. If the underlying information is inaccurate, consumers may wrongly be denied economically important opportunities, such as the ability to establish mobile phone service. And accurate descriptions of consumers' race, ethnicity, and other sensitive characteristics may also have a significant effect on these decisions.

In 2012, the Commission undertook a broad study of whether the narrow harms-based model was appropriate in this new technological era, with its vast expansion of data collection and use.[11] The Commission believed that this new era warranted recognition of a broader set of privacy harms – including the revelation of sensitive health information and precise geolocation information.[12] Several major industry groups have recognized that at least some health-related information[13] and precise geolocation information[14] are sensitive. The growth of big data analytics further supports the need for a broad view of harm in consumer privacy enforcement, industry best practices, and legislation.

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[8] *See* FED. TRADE COMM'N, DATA BROKERS: A CALL FOR TRANSPARENCY AND ACCOUNTABILITY 20, 25 & nn.52, 57 (May 2014), *available at* http://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf.

[9] *Id.* at 20 n.52; Statement of Commissioner Julie Brill on *Data Brokers: A Call for Transparency and Accountability*, at 3 (May 27, 2014), *available at* http://www.ftc.gov/system/files/documents/public_statements/311551/140527databrokerrptbrillstmt.pdf [hereinafter "Brill, Statement on Data Broker Report"].

[10] Brill, Statement on Data Broker Report, *supra* note 5, at 3.

[11] FED. TRADE COMM'N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE: RECOMMENDATIONS FOR BUSINESSES AND POLICYMAKERS 7-9 (2012), *available at* http://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf.

[12] *See id.* at 58-59.

[13] *See* Network Advertising Initiative, *NAI Code of Conduct* 4 (2013) (including sexual orientation and "[p]recise information about past, present, or potential future health or medical conditions or treatments, including genetic, genomic, and family medical history within the definition of "sensitive data") [hereinafter "NAI, *Code of Conduct*"], *available at* http://www.networkadvertising.org/2013_Principles.pdf; Direct Marketing Ass'n, *Guidelines for Ethical Business Practice* 20-21 (2011) (defining a category of personally identifiable "health-related data" and deeming such information "sensitive and personal"), *available at* http://thedma.org/wp-content/uploads/DMA-Ethics-Guidelines.pdf; Digital Advertising Alliance, *Self-Regulatory Principles for Online Behavioral Advertising* 16 (2009) (including "pharmaceutical prescriptions" and "medical records about a specific individual" within the definition of "sensitive data), *available at* http://www.aboutads.info/resource/download/seven-principles-07-01-09.pdf.

[14] *See* NAI, *Code of Conduct*, *supra* note 9, at 6 (requiring member companies to obtain opt-in consent in order to use precise geolocation information for interest-based advertising).

As the Commission stated in its 2012 Privacy Report, well-established privacy principles, such as transparency, choice, and data minimization, provide ready ways to address this broader set of privacy harms. Giving consumers information that they can use effectively to make choices about sharing information, and providing them with user-friendly ways to exercise these choices, would allow consumers to exercise control over information about them. Limiting data collection to what is necessary to achieve specific purposes and requiring reasonable security for personal information would help prevent the harms that consumers suffer through the unanticipated exposure or use of their information.

While focusing on the well-established privacy principles of transparency, choice, and data minimization will play a critical role in addressing a more inclusive harms-based model, I believe additional legislation is also necessary to address specific key concerns in this new technological era. First, I believe Congress should enact legislation to address the lack of transparency surrounding data brokers, as well as the economic impact that data brokers' products can have on individual consumers. The Commission recently recommended legislation that would add transparency across the data broker industry, provide more information about the sources of data brokers' information, help give consumers appropriate access and the ability to correct data used for marketing and risk mitigation products, and give consumers greater ability to correct data in their people search profiles. I would urge you to consider two additional legislative measures. I believe any data broker legislation should also require data brokers to employ reasonable procedures to ensure that their clients do not use their products for unlawful purposes. And I believe such legislation should also require data brokers to take reasonable steps to ensure that their original sources of information obtained appropriate consent from consumers.

Second, I believe Congress should enact data security and breach notification legislation. The more inclusive set of privacy harms that the Commission has identified in connection with privacy protections should also be in focus for discussions about such legislation. As discussed above, consumers can suffer significant harms from the use, or misuse, of personal information that seems innocuous in isolation; the potential for harm is not limited to information that can lead directly to identity theft or financial fraud. Accordingly, I would urge you to enact legislation that requires safeguards that are reasonable in light of the sensitivity of information and the likelihood that a breach of such information could lead to any of the broad range of harms that the Commission has identified. Similarly, notifying consumers of breaches in the security of such information is a reasonable way to help consumers protect themselves after breaches. Such notification should not be limited only to breaches that are likely to result in identity theft.

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ONE HUNDRED THIRTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON ENERGY AND COMMERCE

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June 18, 2014

The Honorable Maureen K. Ohlhausen
Commissioner
Federal Trade Commission
600 Pennsylvania Avenue
Washington, D.C. 20580

Dear Commissioner Ohlhausen,

Thank you for appearing before the Subcommittee on Commerce, Manufacturing, and Trade on Tuesday, December 3, 2013 to testify at the hearing entitled "FTC at 100: Where Do We Go From Here?"

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for ten business days to permit Members to submit additional questions for the record, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and (3) your answer to that question in plain text.

To facilitate the printing of the hearing record, please respond to these questions by the close of business on Wednesday, July 2, 2014. Your responses should be e-mailed to the Legislative Clerk in Word format at **Kirby.Howard@mail.house.gov** and mailed to Kirby Howard, Legislative Clerk, Committee on Energy and Commerce, 2125 Rayburn House Office Building, Washington, D.C. 20515.

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,

Lee Terry
Chairman
Subcommittee on Commerce,
Manufacturing, and Trade

cc: Jan Schakowsky, Ranking Member, Subcommittee on Commerce, Manufacturing, and Trade
Attachment

Responses for the Record From the Hearing on the FTC at 100 (December 3, 2013)
Maureen K. Ohlhausen, Commissioner, Federal Trade Commission

Q1. *It is often said that the Federal Trade Commission's (FTC) settlements with companies can be used as "rules of the road" in absence of formal rules to determine what are, and what are not acceptable business practices to the FTC. How can the settlements be effective rules of the road if they lack robust explanations of the action that occurred? –* ***The Honorable Lee Terry***

A1. Industry, counsel, and the public often look to settlements with companies as "rules of the road," and it is a misconception that they lack sufficient explanation to provide effective guidance to businesses or that settlement overall is a negative practice. The Commission takes a number of steps to ensure that its settlements provide a "robust explanation of the action" including issuing the complaint, placing the terms of the settlement on the public record for comment, and providing an often lengthy analysis to aid public comment to assist in understanding the terms. The Commission also publishes a detailed press release and, in some cases, the Commission or individual Commissioners issue statements regarding the settlement at issue. The Bureau of Consumer Protection's Business Center also provides detailed guidance to business for major cases. In announcing settlements, the Commission is mindful of one of the key recommendations from the FTC at 100 Report: that the agency must clearly articulate not just what it is doing when it takes enforcement actions or guidance on issues, but also explain why these activities will further the agency's mission to promote competition and protect consumers without unduly burdening legitimate business. Consistent with this goal, the various documents released in connection with a settlement inform the public, including industry and the Bar, about particular problematic behavior. In the vast majority of situations, this information is more than sufficient to communicate the boundaries of what the FTC considers illegal behavior. As a former private attorney who led a law firm's FTC practice, I frequently relied on the settlement materials to advise clients on how to stay within the boundaries of behavior considered acceptable to the FTC.

It is also important to consider that settlements are often a more efficient use of scarce resources for the Commission, are less burdensome to business than fully litigating a matter, and frequently result in better outcomes for consumers then if the Commission had litigated. The bottom line is that a mix of litigated cases and settlements provides the optimal result.

Q2. What do you see as the barriers to the Commission's success in the next 100 years? What is needed to overcome these barriers? - ***The Honorable Lee Terry***

A2. To maximize its success in its next 100 years, the FTC must be sufficiently flexible to respond to rapid technological advances and increased globalization of the economy, ensure that the rules and statutes it enforces are current and relevant, and engage in global discussions on policies that affect American consumers.

Many of the scams the FTC investigates have been around for decades, but are now perpetrated using new technologies. In other cases, new technologies provide new opportunities to harm consumers. Unless the agency keeps abreast of the latest technologies used by scammers, it will not be able to fully meet its mission of protecting American consumers. The agency works to meet this goal by using a number of tools at its disposal. It holds numerous workshops on cutting edge issues, such as mobile payment systems, the Internet of Things, and privacy disclosures on kids' apps. We conduct research and write reports, such as our recently released report on Data Brokers. In the last few years, the Commission has brought cases for unfair and deceptive practices involving new technologies, such as

mobile cramming, in-app purchases, Internet connected devices, and online violations involving disclosures required by the Fair Credit Reporting Act. To ensure the FTC stays technologically current, the FTC established a Mobile Technology Unit that is tasked with keeping the agency on top of the latest technologies.

Congress must also give the Commission the necessary tools to respond to the changing world. Data breaches have, unfortunately, become almost commonplace and the consequences to consumers can be huge. The FTC has brought over 50 cases in this area using our current authority. However, the Commission's effectiveness in this area would be enhanced by the enactment of federal data security/breach legislation. We stand ready to work with this Committee to help pass legislation to enhance the FTC's ability to protect consumers from and in response to data breaches.

With respect to our rulemaking authority, the Commission is continually reviewing existing rules to ensure they are up-to-date and can respond to current market situations. For example, the FTC's new Children's Online Privacy Protection Act of 1998 (COPPA) Rule went into effect on July 1, 2013. The revisions to the Rule were intended to address the tremendous growth of online data collection and the increasing use of mobile devices.

The amended Rule expands the definition of "personal information" to include geolocation information, photographs, and videos, along with other persistent identifiers that can be used to recognize a user over time and across different websites or online services. The Rule's broader definition of "personal information" requires mobile app developers, as well as certain websites and online services, to provide parental notice and consent before collecting or using photographs, location information, cookies, IP addresses, or other identifiers for children under the age of 13.

Much of the fraudulent activities we see cross international borders. When Congress enacted the U.S. SAFEWEB Act in 2006, it gave the Commission tools to better protect American consumers from frauds originating in other countries. In the future, it is likely that new statutory tools may be required for effective enforcement. The Commission is also involved in global privacy initiatives and enforcement. Just this year, the Commission has announced over a dozen Safe Harbor cases. Our role in privacy is important to show our global partners, especially in the EU, that the US is committed to principle of privacy. We participate in numerous forums with our global partners to discuss ways to better align our privacy policies. The US and the EU may have a different framework for their privacy policies, but interoperability is essential.

As I mentioned in my testimony before the committee, in our increasingly global economy, the FTC's international efforts are also critical to the agency's competition mission. The FTC builds strong bilateral relationships with foreign counterparts to further cooperation on enforcement matters, takes a lead role in multilateral fora, such as the International Competition Network, to promote convergence toward sound competition policies, and provides technical assistance to help foreign agencies apply their laws to support free markets.

A primary goal of our international efforts is to convince other competition authorities – particularly emerging competition regimes, such as China – to embrace sound competition policies, which are grounded in economic analysis, respectful of intellectual property rights, and fair and transparent to affected persons and businesses. Sound competition analysis, consistent outcomes, and convergence toward best practices benefits U.S. consumers and ensures that U.S. businesses receive fair and equal treatment from competition regimes around the world.

Q3. One of the goals of this FTC hearing series is to "clear the underbrush" to make the Commission more modern and efficient. Where do you see the greatest need for modernizing? What would you identify as underbrush? Are there issues that you have identified that require a larger cultural, programmatic, or structural change? - ***The Honorable Lee Terry***

A3. An important step Congress could take to modernize the Commission's authority and make it more effective would be to eliminate the common carrier exemption on the consumer protection side. The FTC Act exempts common carrier activities subject to the Communications Act from its prohibitions on unfair and deceptive acts or practices and unfair methods of competition. This exemption dates from a period when telecommunications were provided by highly-regulated monopolies, and is now outdated. Congress and the FCC have dismantled much of the economic regulatory apparatus formerly applicable to this industry. The current environment requires telecommunications firms to compete in providing telecommunications services. Removing the exemption from the FTC Act would not alter the jurisdiction of the FCC, but would give the FTC the authority to protect consumers from unfair and deceptive practices by common carriers in the same way that it protects them against other unfair and deceptive practices.

Repeal of the common carrier exemption is particularly timely as the array of communications-related services continues to expand. The FTC has a long track record of addressing competition, consumer protection, and privacy issues with respect to information, entertainment, and payment services. In addition, the FTC has procedural and remedial tools that could be used effectively to address developing problems in the telecommunications industry.

Beyond that, I would define "underbrush" as activities pursued by the Commission that aren't directly related to the core mission of the agency. As an agency with limited resources, it is critical that we pursue cases, studies and research that are most directly related to our mission. It is also important that the Commission allocate its resources to pursuing actions that bring the "biggest bang for the buck" by sending a message to specific industries about practices that violate the law. We also consistently undergo a process to review our Rules to modify or eliminate those that have become dated or obsolete.

A further way to enhance the agency's efficient operation is for Congress to periodically review the reoccurring reports it has requested of the Commission. While Reports to Congress can provide important and timely information that can support Congress in its work, there have been occasions when the mandate to submit reports has extended beyond the time in which the information has significant value.

Q4. What issues were identified in the "FTC at 100" report but have yet to be addressed in terms of modernizing the FTC? Has the Commission implemented any of the recommendations? Have they implemented the most important ones in your opinion? - ***The Honorable Lee Terry***

A4. The Commission continues to address the issues raised in the FTC at 100 Report. To a great extent, I believe the Commission has been largely successful in implementing the Report's recommendations. But in some respects, the goal is aspirational and requires ongoing effort and focus to align our activities with those principles. The key recommendations in the Report are that the Commission:

1. clearly articulate its mission;
2. use all of its tools to further its mission and to evaluate carefully what tool or set of tools is appropriate;
3. pay close attention to outcomes, rather than simply tallying outputs, examine whether agency activity is actually improving consumer welfare, and determine whether it can be done more effectively;
4. continue to build and maintain support for the FTC's mission throughout the administration, Congress, the states, industry, and the public; and
5. act in a way that reflects transparency and predictability.

I believe that the Commission is committed to following the recommendations contained in the Report, as well as other principals of good government. The FTC at 100 Report provided a very useful framework from which the Commission can measure its work.

Q5. In your testimony you said the common carrier exemption "frustrates effective consumer protection with respect to a wide variety of activities." Can you provide us a few examples? - ***The Honorable Lee Terry***

A5. Technological advances have blurred the traditional boundaries among telecommunications, entertainment, and computer technologies. As the telecommunications and Internet industries continue to converge, I believe that the common carrier exemption is as an impediment to the FTC's ability to stop deceptive and unfair acts and practices and unfair methods of competition with respect to interconnected communications, information, and entertainment services.

Enforcement challenges posed by the common carrier exemption are ongoing. Because there is some disagreement on whether the common carrier exemption is status based or activity based, the Commission must spend resources arguing its authority in many cases involving common carrier companies. By way of example, in the decision of the Second Circuit, *FTC v. Verity Int'l Ltd.,* 335 F. Supp. 2d 479 (S.D.N.Y. 2004), *aff'd in part, rev'd in part*, 443 F.3d 48 (2d Cir. 2006), defendants' attempted to thwart an FTC enforcement action by asserting that the common carrier exemption precluded FTC action. In that case, the Commission alleged that the defendants orchestrated a scheme that disconnected consumers' computers from their regular Internet service providers and reconnected their computers' modems to a Madagascar phone number for purposes of providing online entertainment. In that case, AT&T and Sprint carried the calls that connected the consumers' computers to the defendants' servers. Based on the common carrier exemption in the FTC Act, the defendants argued that because AT&T and Sprint carried the calls, the entertainment service for which consumers were billed was outside the FTC's jurisdiction. One defendant also claimed to be a common carrier and therefore exempt from the FTC's jurisdiction. Although both the District Court and the Court of Appeals rejected those arguments, the defendants have moved for reconsideration on the common carrier exemption issue, and the FTC continues to expend substantial time and resources litigating the issue.

Q6. On July 1, 2013, the FTC's new online privacy rules for children went into effect. The revisions to the Children's Online Privacy Protection Act of 1998 (COPPA) Rule were intended to address the incredible growth of online data collection and the increasing use of mobile devices.

The revised COPPA Rule's broader definition of "personal information" requires mobile app developers, as well as certain websites and online services, to provide parental notice and consent before collecting or using photographs, location information, cookies, IP addresses, or other identifiers for children under the age of 13. More specifically, the amended Rule expands the definition of "personal information" to

include geolocation information, photographs, and videos, along with other persistent identifiers that can be used to recognize a user over time and across different websites or online services.

Although, for other reasons, you voted against the update to the COPPA Rule, you noted that "[m]uch of the language of the amendments is designed to preserve flexibility for the industry while striving to protect children's privacy, a goal I support strongly."

Do you believe that if Congress chooses to legislate on consumer data privacy or security, it would be appropriate to grant the FTC – as Congress did when it passed COPPA – the flexibility to modify the definition of "personal information" over time? – ***The Honorable Henry A. Waxman***

A6. Recent history has shown that it very difficult if not impossible to predict technological advances even a few years away. It is thus unreasonable to require Congress to act to modify statutory definitions to keep pace with these rapid changes. I therefore recommend that Congress give the FTC clear guidance on the general types of personal information it wishes to protect, such as information that provides real time location or that gives access to sensitive data, including financial or medical records. I would thus support passage of data security/breach legislation that includes this kind of guidance from Congress and gives the Commission the flexibility to modify the definition of Personally Identifiable Information in response to technological changes.

Q7. In 1993, President Clinton issued Executive Order 12866 requiring significant regulatory actions be submitted to the Office of Information and Regulatory Affairs, or OIRA, for review. Should this requirement be made applicable to independent agencies, including the FTC? - ***The Honorable Lee Terry***

A7. I have cited to EO 12866 in speeches as useful guidance for agencies, including the FTC. When engaging in new rule making, the Commission regularly evaluates the costs and benefits of its rules and proposed amendments -- in both its Notices of Proposed Rulemaking and Statements of Basis and Purpose. In addition, the FTC reviews all of its rules and guides on a decennial basis. Each review begins with a series of standard questions about the costs and benefits, to both business and consumers, of the current rule, and any proposed changes. Additionally, for each rule and rule review, the Commission conducts both Paperwork Reduction and RegFlex analyses that also examine the potential costs to businesses.

However, the FTC is a very small agency; so requiring it to conduct formal, statistical cost-benefit analyses for every regulatory action would consume significant resources and erode the Commission's ability to address nimbly both business and consumer needs in a rapidly changing marketplace. I will note that the FTC, as well as other agencies, does submit its regulatory agenda to OIRA on a semiannual basis, not for review, but for information. This is an appropriate, indeed effective, type of coordination. I do not believe, however, that the FTC, which is an independent agency, should be required to submit its proposed regulations to OIRA for review.

The Commission is not in a position to address the processes of other independent agencies.

Q8. The Commission has been increasingly aggressive in seeking to hold credit card payment processors liable for providing merchants, allegedly involved in conduct that harms consumers, with access to credit card networks. It's possible the Commission could seek from a processor the full amount of consumer harm caused by the alleged unlawful acts of one of its merchants, thereby making processors act as insurers or guarantors for merchants that harm consumers.

The Commission's enforcement actions appear to involve cases wherein the relationship between the merchant and processor is less than arms-length, and the unscrupulous processor was integrally involved in the merchant's bad behavior.

While I appreciate the Commission's efforts to crack down on mass consumer fraud and prevent bad merchants from gaining access to the U.S. financial system, I am concerned about the harm to the economy that could ensue if the Commission seeks enforcement actions to hold legitimate processors fully liable, even when the relationship with the merchant is at arms-length and the processor took no steps to aid the merchant beyond processing for that merchant. The risk of such exposure for processors could result in higher prices or diminished choices for small businesses and consumers, and processors might stop serving certain small businesses that operate in e-commerce and other card-not-present environments or charge substantially higher fees to certain merchants.

As you may be aware, the payment processing industry, through its trade association, the Electronic Transactions Association (ETA), is investing significant resources into developing and implementing enhanced industry best practices in order to better fulfill the Commission's goal of depriving bad merchants of access to the U.S. financial system. I am hopeful that such enhanced industry best practices, once finalized and implemented, will provide a more effective means of advancing the Commission's goal than ad hoc enforcement, while also mitigating risk of harm to the economy that could come from enforcement.

It would seem reasonable to allow the industry time to finalize and implement their best practices before further enforcement actions could be taken against any who conduct their business at arm's length with a merchant subject to FTC enforcement. Do you agree? If not, please explain. – ***The Honorable Marsha Blackburn***

A8. I am a strong supporter of self-regulation, and believe it is a critical complement to our law enforcement efforts. The steps the Electronic Transactions Association ("ETA") is taking to develop and implement guidelines to assist its members in complying with relevant laws and regulations are exactly the kind of effort which can result in robust and effective self-regulation.

However, self-regulation works only for those industry members who seek to act within the law. Entities working to defraud consumers make no effort to comport with laws or regulations, either self or governmental. Thus, it would not be appropriate for the Commission suspend enforcement in this area where the facts suggest a payment processor is clearly not acting at arms' length and is rather, directly involved in the illegal behavior.

I recognize the critical role that processors play for legitimate merchants, especially small businesses. Any decision about whether to take law enforcement action is highly dependent on the facts of the particular case. I will continue to consider carefully the relevant facts of each case, including the processor's relationship to the merchant, its participation in the merchant's illegal activities, and its knowledge of the illegal activities, to determine whether law enforcement is appropriate.

Q9. In your written testimony, you say that a way to mitigate the challenge of limited Commission resources versus workload is to "leverage...resources through careful case selection."

In your appearance before the Subcommittee, you said that maybe one pyramid scheme had been enforced against in 2013.

Why then does the Commission choose not to more vigorously pursue claims of pyramid schemes despite your own recent survey of fraud in the United States, which stated that during 2011 an estimated 10.8% of U.S. adults – 25.6 million people – were victims of one or more of the frauds surveyed, and despite your own website's admonition that "Pyramid schemes are illegal, and the vast majority of participants lose money."? – ***The Honorable Pete Olson***

Sources: Keith B. Anderson, Staff Report of the Bureau of Economics, Federal Trade Commission, Consumer Fraud in the United States, 2011: The Third FTC Survey, at i-ii (April 2013); http://www.consumer.ftc.gov/articles/0065-multilevel-marketing.

A9. The Commission has an active program in the area of pyramid schemes that includes both law enforcement and consumer and business education. The Commission's law enforcement cases against pyramid schemes are just one example of the work the FTC does to protect consumers from scams that promise to provide an opportunity to earn income. Since July of 2009, the FTC has brought four law enforcement sweeps with state and federal partners to halt job scams, work at home schemes, and business opportunity fraud. Additionally, the Commission's Division of Business and Consumer Education regularly publishes information to consumers and businesses in the area that help distinguish between legitimate multilevel marketing opportunities and illegal pyramid schemes. Finally, Commissioners and staff meet with and speak at a trade association conference for members representing multilevel marketers to discuss the Commission's priorities, as well as to learn from the industry to enhance our work in this area.

Q10. Has the FTC conducted a thorough review of the tools and authorities it has under Section 5 and determined that there are real, tangible privacy harms occurring in the marketplace today that it cannot address under its current broad Section 5 authority. If so, please articulate those harms. – ***The Honorable Mike Pompeo***

A10. There are numerous harms that can result from companies' failure to provide reasonable privacy and data security protections. For instance, a breach of location or health information can reveal personal details about consumers' lives such as the medication they are taking, the doctors they visit, or the location of their place of worship. Moreover, a breach involving financial information can lead to unauthorized charges on consumers' accounts and identity theft. Although we believe we have the authority to address these harms through our unfairness authority under Section 5, this authority has been challenged. For example, in our case against Wyndham hotels, the defendants have challenged the Commission's authority to bring a data security unfairness action, even where the Commission has alleged substantial credit card fraud resulted from the breaches at issue. *FTC v. Wyndham Worldwide Corp., et al.,* Opinion, Civ. Act. No. 13-1887(ES) (D.N.J. Apr. 7, 2014), denying Wyndham's motion to dismiss on the grounds that the FTC did not have authority to bring Section 5 cases in the data security area.

We have called for data security and breach notification legislation that would create a uniform national standard for business and consumers. The FTC supports federal legislation that would (1) strengthen its existing authority governing data security standards for companies and (2) require companies, in appropriate circumstances, to provide notification to consumers when there is a security breach. Such legislation is important for a number of reasons. First, we currently lack authority under Section 5 to obtain civil penalties, an important remedy for deterring violations. Second, enabling the FTC to bring cases against non-profits would help ensure that whenever personal information is collected from consumers, entities that maintain such data take reasonable measures to protect it. Finally, rulemaking

authority under the Administrative Procedure Act would enable the FTC to respond to changes in technology when implementing the legislation.

Q11. In 2008, as part of the proposed Federal Trade Commission Reauthorization Act, the bill's sponsors in the Senate sought to repeal the common carrier exemption of the FTC Act. The FTC has been in full support of repealing this exemption, and has testified to that effect.

The exemption presently bars the FTC from policing companies that are subject to the Communications Act from using unfair methods of competition or unfair or deceptive acts or practices. However, most of us agree that this exemption is outdated.

As technology progresses and Internet industries continue to converge, the common carrier exemption may well frustrate the FTC's ability to stop deceptive and unfair practices throughout the marketplace.

a. I understand that the FTC already protects against unfair and deceptive practices by non-common carriers engaged in telecommunications, information, and payment services. Do you believe the FTC has the expertise and the resources to prevent unfair or deceptive practices by common carriers?

b. Do you believe that the common carrier exemption at 15 U.S.C. § 45(a)(2) should be repealed?

c. Do you believe repealing the common carrier exemption would allow the FTC to better protect consumers across technologies and platforms? If so, why? – ***The Honorable Jan Schakowsky***

A11. a. Yes. The Commission has extensive experience protecting consumers from unfair or deceptive acts or practices by market participants under Section 5 of the FTC Act. Section 5 exempts "common carriers subject to the Acts to regulate commerce," 15 U.S.C. § 45(a)(2), which includes the Communications Act and its amendments. *Id.* § 44. The Commission can, however, enforce Section 5 against telecommunications providers when they are not engaged in common carrier activities. For example, the Commission can enforce Section 5 against telecommunications providers that are engaged in third-party billing to consumers, because billing and collection on behalf of a third party is not common carrier activity. *See, e.g., FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 59-60 (2d Cir. 2006); *In re Detariffing of Billing and Collection Servs.*, 102 FCC 2d 1150 ¶¶ 30-34 (1986).

The FTC's experience in protecting consumers against unfair or deceptive acts or practices would be valuable in examining common carriage activities. Absent the common carrier exception, the FTC would apply the prohibitions under Section 5 equally to all market participants, including companies engaged in common carrier activities. Further, the Commission already has considerable experience in dealing with market participants in the telecommunications sector when dealing with non-common carrier issues, including bringing numerous enforcement actions to address text message spam and both landline and mobile cramming, enforcing the Telemarketing Sales Rule, and bringing actions to enforce privacy and data security protections in connection with mobile devices. With the elimination of the common carrier exemption, the resources currently expended clarifying our authority in non-common carrier cases could be used to pursue cases against common carriers engaged in unfair and deceptive practices.

b. Yes, the Commission supports the repeal of the common carrier exemption. Because of this exemption, consumers dealing with a very important segment of the economy – telecommunications activities – do not benefit from standard FTC prohibitions against deceptive and unfair practices. The common carrier exemption can frustrate effective consumer protection under FTC principles when dealing with advertising, marketing, and billing practices for common carrier activities. Moreover, as

noted, the exemption is outdated, as it dates from a period when common carrier telecommunications services were provided primarily by highly-regulated monopolies, which is no longer the case.

c. Yes, consumers would be better served by repeal of the common carrier exception. As communications technologies and platforms have continued to evolve, market participants may offer a range of communications-related services to consumers, some of which are subject to common carrier requirements under the Communications Act but many of which are not. Consumers should expect and receive the same protections against unfair or deceptive acts or practices in the context of common carrier services as in other services.

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June 18, 2014

The Honorable Joshua D. Wright
Commissioner
Federal Trade Commission
600 Pennsylvania Avenue
Washington, D.C. 20580

Dear Commissioner Wright,

Thank you for appearing before the Subcommittee on Commerce, Manufacturing, and Trade on Tuesday, December 3, 2013 to testify at the hearing entitled "FTC at 100: Where Do We Go From Here?"

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for ten business days to permit Members to submit additional questions for the record, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and (3) your answer to that question in plain text.

To facilitate the printing of the hearing record, please respond to these questions by the close of business on Wednesday, July 2, 2014. Your responses should be e-mailed to the Legislative Clerk in Word format at **Kirby.Howard@mail.house.gov** and mailed to Kirby Howard, Legislative Clerk, Committee on Energy and Commerce, 2125 Rayburn House Office Building, Washington, D.C. 20515.

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,

Lee Terry
Chairman
Subcommittee on Commerce,
Manufacturing, and Trade

cc: Jan Schakowsky, Ranking Member, Subcommittee on Commerce, Manufacturing, and Trade
Attachment

Responses for the Record From the Hearing on the FTC at 100 (December 3, 2013)
Joshua D. Wright, Commissioner, Federal Trade Commission

The Honorable Lee Terry

Q1. Some critics of guidelines have questioned whether Section 5 is a big enough part of the Federal Trade Commission's (FTC) enforcement agenda to merit formal guidance. As a strong proponent of Section 5 guidelines, what is your response to claims that it is not worth the Commission's time and resources to embark upon the process of issuing formal guidance in this area?

A1. The Commission's standalone unfair methods of competition enforcement agenda under Section 5 represents a significant part, from an economic perspective, of the agency's competition mission. Although standalone Section 5 cases are a relatively infrequent part of the work the agency does by volume—that is, the FTC clearly does more merger investigations than standalone Section 5 cases—such cases nevertheless have a substantial economic impact. For instance, of the consumer savings the Commission has reported as having been generated from its competition work over the past five years, over one-third of those savings are attributable to standalone unfair methods of competition cases under Section 5. When one examines only the consumer savings from the Commission's non-merger work, the portion of consumer savings attributable to standalone unfair methods of competition cases under Section 5 balloons to approximately 75 percent. The Commission's Section 5 enforcement agenda thus clearly has serious implications for consumer welfare. In light of this reality, it is my view the Commission should improve its use of Section 5 by articulating in a formal agency policy statement a principled standard for the application of its authority to prosecute unfair methods of competition. The Commission has done this with areas that are far less important than its unfair methods of competition authority in terms of impact upon consumers, and it should finally do so now with its signature competition statute.

Q2. Do you believe the Bureau of Economics is being effectively utilized to fulfill the Commission's dual mission? Is it being utilized as frequently as it should be? In what other ways should it be used?

A2. The Bureau of Economics does a tremendous job in supporting the Commission's missions, on both the competition and the consumer protection fronts. As I mentioned in my Statement to this Subcommittee last December, the Bureau of Economics provides guidance and support to the agency's antitrust and

consumer protection activities. Working with the Bureaus of Competition and Consumer Protection, the Bureau of Economics participates in the investigation of mergers and alleged anticompetitive, deceptive, and unfair acts or practices. The Bureau of Economics provides an independent recommendation on the merits of antitrust and consumer protection matters to the Commission. It also integrates economic analysis into enforcement proceedings and works with the Bureaus to devise appropriate remedies.

That said, I would support further integrating more systematic economic analysis into the consent process. In other words, I believe the Bureau of Economics should be more deeply involved in the consent process. Sometimes economic analysis is arbitrarily restricted to questions of liability and left out of analyzing consents and the economic impact of remedies. I believe this is the result of organizational design, process, and resource constraints, rather than a conscious decision, but I think it is critically important to integrate economic analysis into all stages of merger review and Commission actions on conduct cases. This includes the stage in which the agency analyzes whether a consent is in the public interest, which to me means whether it improves consumer welfare relative to other feasible alternatives, including litigation, other consents, or no consent at all.

Q3. **Commissioners have spoken about how the agency creates guidance for companies through a "common law of privacy" created by its consent decrees. However the FTC's consent decrees lack the hallmarks of traditional common law (e.g., an independent fact finder/judge, appeal rights for the accused). In addition, the settlements do not provide discernible and generally applicable legal principles but rather limit the guidance to the specific facts at hand, without any discussion of the broader application of the principles. Should the Commission limit its use of consent decrees to settled legal precedent rather than repeatedly trying to create new law outside of the adversarial process? Do you believe that consent decrees are an adequate way, by themselves, to provide guidance to companies about their privacy and security responsibilities?**

A3. The common law approach, characterized by the gradual exposition of broader legal rules and principles through the narrow resolution of individual cases, has played a central role in the development of law in the United States. Through the common law process, disputes between litigants create opportunities for judges to issue reasoned opinions announcing substantive legal rules that permit parties to distinguish between lawful and unlawful conduct. The question is

whether this case-by-case approach to discerning substantive legal rules can produce the same virtues in the context of the Commission's authority to prosecute "unfair methods of competition" and "unfair and deceptive acts and practices" under Section 5, where an overwhelming majority of the cases are resolved through consent decrees.

In my view, a common law process based upon consent decrees alone cannot provide adequate guidance about the Commission's authority to prosecute either "unfair methods of competition" or "unfair and deceptive acts and practices" under Section 5. This is because consent decrees can be relatively vague as a result of the need to protect confidential business information and often offer only a cursory discussion of why the specific conduct in question should be challenged without articulating a broader framework. Significantly, in contrast to reasoned judicial decisions, which explain both what conduct is lawful and what conduct is unlawful, consent decrees reveal nothing about what conduct falls outside the scope of Section 5. Consent decrees alone thus fail to articulate adequately the limiting principles that apply to the Commission's authority under Section 5. Nevertheless, consent decrees often can be an efficient means of resolving a case from both the standpoint of the agency and defendants, and thus represent an important tool for fulfilling the Commission's enforcement mission.

As a result, it is my view that where there is an insufficient number of litigated decisions and consent decrees represent the primary body of law, the Commission should offer formal guidance to describe both to the business community and agency staff how the Commission will apply Section 5. The Commission has provided such guidance with great success as part of its consumer protection mission in the form of a Policy Statement on Unfairness and a Policy Statement on Deception. When coupled with the body of consent decrees, these policy statements articulate analytical frameworks sufficient to explain how the agency will implement its enforcement authority.

In contrast to the Commission's consumer protection mission, there exists no formal policy statement articulating the agency's authority to prosecute "unfair methods of competition" as part of its competition mission. In the absence of such a policy statement there is significant uncertainty about the precise reach of the Commission's unfair methods of competition authority and whether it is bound by any limiting principles. That uncertainty remains despite nearly a century of trying to rely on the case-by-case approach to discerning the substantive boundaries of the Commission's signature competition statute. In my view, a policy statement defining what precisely constitutes an unfair

method of competition would provide a useful starting point for the Commission's analysis and offer meaningful guidance to the business community and agency staff about the scope of Section 5.

Q4. One of the goals of the hearing series is "clearing the underbrush" to make the Commission more modern and efficient. As you two are the most recent appointees and have the freshest eyes, where do you see the greatest need for modernizing? What would you identify as underbrush? Are there issues that you have identified that require a larger cultural, programmatic, or structural change?

A4. The FTC is a small agency that generally has done well to operate efficiently and to ensure that its regulations and industry guidance are not outdated. For instance, as I discussed in my Statement before the Subcommittee in December, since 1992 the Commission has systematically and rigorously reviewed its rules and guides to ensure that they continue to enhance consumer welfare without imposing undue burdens on business. These regulations and guides serve an important public interest, protecting consumers from deceptive and unfair business practices, assisting businesses by identifying problematic practices, and creating a level playing field for legitimate business. I believe the FTC will continue to conduct these regular reviews and repeal or update its rules and guides as appropriate.

I believe the Commission can continue to improve by better incorporating modern economics and involving the Bureau of Economics in all stages of the decision-making process. For instance, the Commission has done well to update how it analyzes the likely anticompetitive effects of a merger by moving away from a structural analysis focused on the number of firms in the relevant market and towards an effects-based analysis that focuses on the firms' likely incentives. I believe, however, more can be done to incorporate modern economics into how the agency analyzes potential efficiencies arising from a merger, including considering more seriously out-of-market efficiencies and fixed cost efficiencies, to help ensure enforcement decisions maximize consumer welfare. It also is my view that the Commission should integrate analysis from the Bureau of Economics into stages of the decision-making process other than whether or not to file a complaint. For instance, the Bureau of Economics also should be used to weigh in on what the potential implications of a proposed consent decree might be aside from remedying the alleged unlawful activity.

The Honorable Marsha Blackburn

Q1: The Commission has been increasingly aggressive in seeking to hold credit card payment processors liable for providing merchants, allegedly involved in conduct that harms consumers, with access to credit card networks. It's possible the Commission could seek from a processor the full amount of consumer harm caused by the alleged unlawful acts of one of its merchants, thereby making processors act as insurers or guarantors for merchants that harm consumers.

The Commission's enforcement actions appear to involve cases wherein the relationship between the merchant and processor is less than arms-length, and the unscrupulous processor was integrally involved in the merchant's bad behavior.

While I appreciate the Commission's efforts to crack down on mass consumer fraud and prevent bad merchants from gaining access to the U.S. financial system, I am concerned about the harm to the economy that could ensue if the Commission seeks enforcement actions to hold legitimate processors fully liable, even when the relationship with the merchant is at arms-length and the processor took no steps to aid the merchant beyond processing for that merchant. The risk of such exposure for processors could result in higher prices or diminished choices for small businesses and consumers, and processors might stop serving certain small businesses that operate in e-commerce and other card-not-present environments or charge substantially higher fees to certain merchants.

As you may be aware, the payment processing industry, through its trade association, the Electronic Transactions Association (ETA), is investing significant resources into developing and implementing enhanced industry best practices in order to better fulfill the Commission's goal of depriving bad merchants of access to the U.S. financial system. I am hopeful that such enhanced industry best practices, once finalized and implemented, will provide a more effective means of advancing the Commission's goal than ad hoc enforcement, while also mitigating risk of harm to the economy that could come from enforcement.

It would seem reasonable to allow the industry time to finalize and implement their best practices before further enforcement actions could be taken against

any who conduct their business at arm's length with a merchant subject to FTC enforcement. Do you agree? If not, please explain.

A1. Self-regulation, if it is sufficiently robust, can serve as an important complement to law enforcement. Industry standards, such as those from the credit card networks, have been in place for many years and have assisted processors and banks to ferret out entities engaged in illegal conduct. The steps taken by the Electronic Transactions Association ("ETA") to develop and implement guidelines that can assist its members in complying with relevant laws and regulations are commendable. At the same time, no matter how robust the self-regulation, some actors will fail to play by the rules. Accordingly, the Commission must continue to monitor the marketplace and take action where appropriate.

The Commission recognizes the critical role that processors play for legitimate merchants, especially small businesses. Any decision about whether to take law enforcement action is highly dependent on the facts of a particular case. The Commission will continue to carefully consider the relevant facts of each case, including the processor's relationship to the merchant, its participation in the merchant's illegal activities, and its knowledge of the illegal activities, to determine whether law enforcement is appropriate.

<u>The Honorable Pete Olson</u>

Q1. **In your written testimony you say that a way to mitigate the challenge of limited Commission resources versus workload is to "leverage . . . resources through careful case selection." In your appearance before the Subcommittee, you said that maybe one pyramid scheme had been enforced against in 2013.**

Why then does the Commission choose not to more vigorously pursue claims of pyramid schemes despite your own recent survey of fraud in the United States, which stated that during 2011 an estimated 10.8% of U.S. adults – 25.6 million people – were victims of one or more of the frauds surveyed, and despite your own website's admonition that "Pyramid schemes are illegal, and the vast majority of participants lose money"?

Sources: Keith B. Anderson, Staff Report of the Bureau of Economics, Federal Trade Commission, Consumer Fraud in the United States, 2011: The Third FTC Survey, at i-ii (April 2013); http://www.consumer.ftc.gov/articles/0065-multilevel-marketing

A1. The Commission does vigorously pursue claims of pyramid schemes. Such cases are highly fact-intensive and can require substantial resources and expert economic analysis. Here are the most recent examples.

- On June 2, 2014, the Court of Appeals for the Ninth Circuit upheld a district court ruling against a multi-level marketing business called BurnLounge in a case brought by the FTC. In that case, the court ruled that BurnLounge and several associated individuals operated a pyramid scheme causing millions of dollars of consumer harm. The court order permanently halted the defendants' marketing methods, which lured more than 56,000 consumers by pretending to be a legitimate multi-level marketing program and making misleading claims about how much money participants could earn. BurnLounge was ordered to pay $16.2 million in redress. In addition, defendants are prohibited from engaging in pyramid, Ponzi, chain letter, or similar schemes, and barred from making misrepresentations about multi-level marketing operations or business ventures, including misrepresentations about sales, income, profitability, or legality. In its June order, the Ninth Circuit remanded the case to the district court for clarification regarding its calculation of consumer harm. As such the matter remains in litigation, but we will pursue a final order providing for the payment of millions of dollars to compensate injured consumers.

- On May 9, 2014, a settlement was reached in another case brought by the FTC, against a Kentucky-based pyramid scheme called Fortune Hi-Tech Marketing. The company enrolled more than 350,000 consumers throughout the United States, Puerto Rico and Canada in a four-year period. According to the FTC's complaint, the defendants falsely claimed consumers would earn significant income for selling the products and services of companies such as Dish Network, Frontpoint Home Security, and various cell phone providers, and for selling FHTM's line of health and beauty products. Despite FHTM's claims, nearly all consumers who signed up with the scheme lost more money than they ever made. To the extent that consumers could make any income, however, it was mainly for recruiting other consumers, and FHTM's compensation plan ensured that most consumers made little or no money, the complaint alleged. The settlement bans the defendants from multi-level marketing and also requires defendants to surrender assets totaling at least $7.75 million, which we expect to use to provide redress to consumers.

- On March 12, 2014, the FTC confirmed it is investigating the California-based diet-shake company Herbalife, one of the largest publicly-traded multi-level marketing firms in the United States.

The Commission's law enforcement cases against pyramid schemes are just one example of the work the FTC does to protect consumers from scams that promise to provide an opportunity to earn income. Since July of 2009, the FTC has brought four law enforcement sweeps with state and federal partners to halt job scams, work at home schemes, and business opportunity fraud.

The Honorable Mike Pompeo

Q1. Has the FTC conducted a thorough review of the tools and authorities it has under Section 5 and determined that there are real, tangible privacy harms occurring in the marketplace today that it cannot address under its current broad Section 5 authority? If so, please articulate those harms.

A1. Numerous harms can result from companies' failure to provide reasonable privacy and data security protections. For instance, a breach involving financial information can lead to unauthorized charges on consumers' accounts and identity theft. With respect to certain other information, such as health information, a breach can reveal sensitive personal information such as medical conditions and treatments. Unauthorized access to precise geolocation information, especially in instances of domestic violence or custody disputes, can risk consumers' safety and well-being. Although I believe that the Commission has the authority to address these harms through its Section 5 authority to prohibit deceptive or unfair acts or practices, I believe that the promulgation of data security and breach notification legislation, if narrowly tailored, could serve to further protect consumers. In crafting such legislation, Congress should consider providing the Commission with civil penalty authority to strengthen our ability to deter violations; enabling the FTC to bring cases against non-profits to help ensure that all entities take reasonable data security measures; and allowing Administrative Procedure Act rulemaking to efficiently implement such legislation.

The Honorable Jan Schakowsky

Q1. **In 2008, as part of the proposed Federal Trade Commission Reauthorization Act, the bill's sponsors in the Senate sought to repeal the common carrier exemption of the FTC Act. The FTC has been in full support of repealing this exemption, and has testified to that effect.**

The exemption presently bars the FTC from policing companies that are subject to the Communications Act from using unfair methods of competition or unfair or deceptive acts or practices. However, most of us agree that this exemption is outdated.

As technology progresses and Internet industries continue to converge, the common carrier exemption may well frustrate the FTC's ability to stop deceptive and unfair practices throughout the marketplace.

a. **I understand that the FTC already protects against unfair and deceptive practices by non-common carriers engaged in telecommunications, information, and payment services. Do you believe the FTC has the expertise and the resources to prevent unfair or deceptive practices by common carriers?**

b. **Do you believe that the common carrier exemption at 15 U.S.C. § 45(a)(2) should be repealed?**

c. **Do you believe repealing the common carrier exemption would allow the FTC to better protect consumers across technologies and platforms? If so, why?**

A1. a. Yes. The Commission has extensive experience protecting consumers from unfair or deceptive acts or practices by market participants under Section 5 of the FTC Act. Section 5 exempts "common carriers subject to the Acts to regulate commerce," 15 U.S.C. § 45(a)(2), which includes the Communications Act and its amendments, id. § 44. The Commission can, however, enforce Section 5 against telecommunications providers when they are not engaged in common carrier activities. For example, the Commission can enforce Section 5 against telecommunications providers that are engaged in third-party billing to consumers, because billing and collection on behalf of a third party is not common carrier activity.

The FTC's wide range of experience in protecting consumers against unfair or deceptive acts or practices would be valuable in examining common carriage activities. Absent the common carrier exception, the FTC would apply the the prohibitions under Section 5 equally to all market participants, including companies engaged in common carrier activities. Further, the Commission already has considerable experience in dealing with market participants in the telecommunications sector when dealing with non-common carrier issues, including bringing numerous enforcement actions to address text message spam and both landline and mobile cramming, enforcing the Telemarketing Sales Rule, and bringing actions to enforce privacy and data security protections in connection with mobile devices.

b. Yes, the Commission supports the repeal of the common carrier exemption. Because of this exemption, consumers dealing with a very important segment of the economy – telecommunications activities – do not benefit from standard FTC prohibitions against deceptive and unfair practices. The common carrier exemption can frustrate effective consumer protection under FTC principles when dealing with advertising, marketing, and billing practices for common carrier activities. Moreover, as noted, the exemption is outdated, as it dates from a period when common carrier telecommunications services were provided primarily by highly regulated monopolies, which is no longer the case.

c. Yes, consumers would be better served by repeal of the common carrier exception. As communications technologies and platforms have continued to evolve, market participants may offer a range of communications-related services to consumers, some of which are subject to common carrier requirements under the Communications Act but many of which are not. Consumers should expect and receive the same protections against unfair or deceptive acts or practices in the context of common carrier services as in other services.