

**OVERSIGHT OF THE FEDERAL TRADE
COMMISSION**

HEARING
BEFORE THE
SUBCOMMITTEE ON DIGITAL COMMERCE AND
CONSUMER PROTECTION
OF THE
COMMITTEE ON ENERGY AND
COMMERCE
HOUSE OF REPRESENTATIVES
ONE HUNDRED FIFTEENTH CONGRESS

SECOND SESSION

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OVERSIGHT OF THE FEDERAL TRADE COMMISSION

WEDNESDAY, JULY 18, 2018

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON DIGITAL COMMERCE AND CONSUMER
PROTECTION,
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC.

The subcommittee met, pursuant to call, at 9:15 a.m., in room 2123 Rayburn House Office Building, Hon. Robert Latta (chairman of the subcommittee) presiding.

Members present: Representatives Latta, Kinzinger, Burgess, Lance, Guthrie, McKinley, Bilirakis, Bucshon, Walters, Costello, Walden (ex officio), Schakowsky, Luján, Clarke, Dingell, Matsui, Welch, Kennedy, Green, and Pallone (ex officio).

Staff present: Melissa Froelich, Chief Counsel, Digital Commerce and Consumer Protection; Adam Fromm, Director of Outreach and Coalitions; Ali Fulling, Legislative Clerk, Oversight & Investigations, Digital Commerce and Consumer Protection; Elena Hernandez, Press Secretary; Paul Jackson, Professional Staff, Digital Commerce and Consumer Protection; Bijan Koohmaraie, Counsel, Digital Commerce and Consumer Protection; Austin Stonebraker, Press Assistant; Madeline Vey, Policy Coordinator, Digital Commerce and Consumer Protection; Hamlin Wade, Special Advisor, External Affairs; Greg Zerzan, Counsel, Digital Commerce and Consumer Protection; Michelle Ash, Minority Chief Counsel, Digital Commerce and Consumer Protection; Jeff Carroll, Minority Staff Director; Lisa Goldman, Minority Counsel; Carolyn Hann, Minority FTC Detailee; Caroline Paris-Behr, Minority Policy Analyst; Tim Robinson, Minority Chief Counsel; Andrew Souvall, Minority Director of Communications, Outreach and Member Services; and C.J. Young, Minority Press Secretary.

OPENING STATEMENT OF HON. ROBERT E. LATTA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Mr. LATTA. Well, good morning. I'd like to call the Subcommittee on Digital Commerce and Consumer Protection to order.

And before we begin our opening statements, I'd like to say how pleased I am to have all of our FTC commissioners before us today.

And what I'd like to do before I begin my opening remarks is introduce our FTC commissioners. Today, we have Chairman Joe Simons, who was sworn into office on May 1st. Before joining the commission, the chairman was a partner at Paul, Weiss and co-chair of the firm's anti-trust group. He previously served at the

commission in various positions between 1987 and 1989 as well as 2001 to 2003.

Next, we have Commissioner Maureen Ohlhausen, who was sworn into office on April the 4th, 2012, and served as acting FTC chairman between January 2017 and May 1st, 2018. Prior to joining the FTC she was a partner at Wilkinson Barker Knauer, LLP. She previously served at the commission for 11 years in various capacities and leadership roles. We thank the commissioner for her leadership for the past 15 months when she was acting chair and for her work at the agency.

Commissioner Noah Phillips was sworn into office on May 2nd, 2018. Before joining the commission he served as chief counsel to Senator John Cornyn of Texas.

Commissioner Rohit Chopra was also sworn in on May 2nd, 2018. He previously served as a senior fellow at the Consumer Federation of America.

And finally, we have Commissioner Rebecca Slaughter, sworn in on May 2nd, 2018, and prior to joining the commission, Commissioner Slaughter served as chief counsel to Senator Chuck Schumer of New York.

Our witnesses have a strong fidelity to public service and they are once again being asked to serve the American people to maintain competitive markets and to protect consumers against unfair and deceptive acts and practices, and again, we thank you very much for being with us today.

And at this time now, I'll recognize myself for a 5-minute opening statement.

Our hearing today will focus on oversight of the Federal Trade Commission. The FTC functions as the top cop on the beat and keeps consumers safe and to promote a vibrant free market in the United States.

We look forward to working with the FTC on specific issues relating to this subcommittee's jurisdiction, including self-driving cars, data security, the Internet of Things, blockchain technologies, privacy issues, deceptive advertising, robocalls, and more.

Emerging consumer protection issues are at the forefront of this committee. Recently, I joined Chairman Walden, Chairman Blackburn, and Chairman Harper, sending letters to Apple and Google, asking them to explain how smartphone users' data is protected, and when audio recording data and location information is compiled and shared. This morning, we will be sending letters to location data aggregator LocationSmart, Securus, and 3CInteractive Corporation.

We continue to remain concerned about cybercrime, estimated to cost millions to the global economy each year, and how businesses prioritize protecting the most sensitive data they hold about individuals. As we all know, there is no such thing as 100 percent perfect security.

We will continue to work with regulators to understand what transpired in the recent high-profile breaches and what we should learn from these actions for the future.

The Economist proclaims, "The world's most valuable resource is no longer oil, but data." I look forward to a thoughtful discussion on the appropriate steps the FTC is considering, including the

chairman's recently announced hearings on 21st century challenges.

In my remaining time, I would like to hear how Chairman Simons will work to utilize the FTC's annual funding to its greatest need and impact, judiciously using the taxpayers' dollars, including on the FTC's current priorities, authorities, and performance, including its human resources efforts at securing and retaining the best experts in the fields of antitrust and consumer protection. While we are in a challenging fiscal environment, the House Appropriations Committee approved \$2 million more dollars to the FTC than the agency requested for fiscal year 2019.

I am also encouraged by the large refunds the FTC has been able to return directly to consumers, most recently to Uber drivers and customers who bought deceptively marketed bed bug products, consumers in both cases receiving average checks over \$200.

This is a unique tool in the FTC toolbox. The FTC has returned over \$543 million to consumers and deposited \$94 million in the U.S. Treasury. FTC orders in the Volkswagen, Amazon, and Net Spend matters required defendants to self-administer consumer refund programs worth more than \$11.5 billion.

The FTC's enforcement authorities are broad and far reaching. The unique position of the FTC as the civil law enforcement agency for the majority of the U.S. economy cannot be taken lightly. Calls for expanded rulemaking authority, shifting the agency from its expertise in enforcement to regulatory and rulemaking, raises serious questions for me because Congress has explicitly granted the agency rulemaking that has not been utilized in years.

Some may argue that the FTC is not equipped to handle the challenges of the day, but I believe their actions speak louder than words. The FTC has vigorously defended its jurisdiction and consumers and we have no reason to believe that will stop any time soon.

Finally, the FTC plays an important enforcement role in the EU-U.S. Privacy Shield framework, particularly relating to compliance and enforcement of U.S. businesses. With the second annual review of the Privacy Shield by the European Commission coming this fall, we want to hear about FTC's and the commissioners' roles, and what can this committee do to help make sure that 3,100 businesses, including small businesses, continue to have access to the Privacy Shield.

Again, at this time I want to thank our witnesses for being here today, and this time I am going to yield to the gentlelady from Illinois, the ranking member of the subcommittee, for 5 minutes for an opening statement.

[The prepared statement of Mr. Latta follows:]

PREPARED STATEMENT OF HON. ROBERT E. LATTA

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In my remaining time, I would like to hear how Chairman Simons will work to utilize the FTC's annual funding to its greatest need and impact, judiciously using the taxpayer's dollars. Including on the FTC's current priorities, authorities and performance, including its human resources efforts securing and retaining the best experts in the fields of antitrust and consumer protection. While we are in a challenging fiscal environment, the House Appropriations Committee approved \$2 million more dollars for the FTC than the agency requested for fiscal year 2019.

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Thank you to all of our witnesses for being here today. I yield to the gentlewoman from Illinois, ranking member of the subcommittee, for her 5 minute opening statement.

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

Ms. SCHAKOWSKY. Thank you so much, Mr. Chairman, for holding this hearing on the FTC and I want to welcome Chairman Simons. I know you're new to the job. I look forward to meeting with you.

Today's hearing really comes down to two questions: is the Federal Trade Commission equipped to fulfill its mission of protecting consumers and what can Congress do to make it more effective—a more effective consumer advocate.

The FTC is—to echo the chairman—the top cop on the beat, protecting both the public and businesses against unfair, deceptive, fraudulent, or anti-competitive practices through the consumer protection and anti-trust authorities.

As the economy continues to change and expand, the FTC has had to adapt to this new economy and as our social networks, shopping, banking, and other forms of communication and businesses move to the internet, the FTC has changed, bringing in more technology experts. At the same time, many suggest that the commission needs more technology experts, even though its resources are as tight as ever.

I am concerned that we are asking one of our country's most important consumer agencies to choose which protections it will be able to enforce. I hope we will work together to ensure that the FTC has all the resources that it needs to maintain consumer protection and a fair marketplace.

From a regulatory standpoint, it's time to look at ways to reduce barriers to FTC consumer protection rulemaking. The FTC's ability to move forward with important rulemaking is much more limited than those at other agencies.

In the rapidly changing climate of commerce today, rulemaking must be efficient and timely to keep pace. Specifically, I would like to discuss how well the FTC is protecting consumers' privacy and what they are doing to promote data security. It's my belief that on data security this committee and Congress should be giving the FTC the tools it needs to do more.

Ranking Member Pallone and I have introduced H.R. 3895, the Secure and Protect America's Data Act, which gives the FTC rulemaking authority and civil penalty authority for data security breach notification. These issues are becoming more important for Americans, not less. In our hearing last October with former Equifax CEO Richard Smith, I asked him if, as a consumer, can I opt out of Equifax—after all, I never opted in. Equifax collects my data whether I want them to do it or not and now my data is at risk of being shared because Equifax failed to adequately protect it, and the answer was, sadly, yes, I don't have an opportunity to opt out.

It would be one thing if that breach were an isolated incident, and it wasn't. We saw this with Facebook and we saw this with Uber. In the case of Uber, it actually paid the hackers \$100,000 before reporting the incident to the FTC.

This can't be standard industry practice. We need to change that power balance by strengthening consumer protections. With the FTC as our partner, we, as Congress, must work to strengthen the agency to face the 21st century challenges.

Many of these new marketplaces, which are often highly concentrated, are failing American consumers. Part of the FTC's mission is the issue of anti-trust and, as we saw this morning with the EU leveling a \$5.1 billion fine on Google, strong consumer protection and robust competition go hand in hand, and that's why Congress and consumer watchdogs must step in.

I welcome the new commissioners, Chairman Simon and Commissioners Phillips, Chopra, and Slaughter. Did I miss somebody?

Commissioner Simons, Phillips, Chopra, and Slaughter, and I want to thank Commissioner—I am going to say it wrong—Ohlhausen, for her work on the commission and her stewardship during the transition.

I look forward to hearing your perspective, all of you, on these issues, and I yield back.

Mr. LATA. Thank you. The gentlelady yields back.

The chair now recognizes the gentleman from Oregon, the chairman of the full committee, for 5 minutes for an opening statement.

OPENING STATEMENT OF HON. GREG WALDEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OREGON

Mr. WALDEN. Well, good morning, Mr. Chairman, and to the members of the FTC, good morning. Welcome before the Energy and Commerce Committee.

We are delighted you're here. We want to welcome our five distinguished public servants and welcome to the committee. We have a lot of work to do. So do you, and so we appreciate your counsel.

While our economy is the driver of so much growth and opportunity for Americans, there are still, unfortunately, some bad actors and the Federal Trade Commission is one of the top cops on the beat. It is charged with the dual mission of competition and consumer protection across large segments of the United States economy and this committee's jurisdiction. So we need the FTC to follow its statutory authority to protect consumers from unfair, deceptive, and anti-competitive practices, both online and off.

Recent data security incidents involving Facebook, Equifax, Uber, and other companies continue to raise concerns about the various aspects of protecting consumers in a data-driven economy.

I understand the commission does not, for good reason, comment on open investigations—we won't ask you to do that—but I would emphasize that data security incidents involving sensitive, personal, and financial information are a significant threat to United States consumers and businesses and we are laser focused on these issues here at the Energy and Commerce Committee.

The revelations surrounding Facebook and Cambridge Analytica have brought the issue of privacy of consumers' data and information in the age of pervasive social media to the forefront. In fact, Mark Zuckerberg sat in that chair in the middle for 5 hours not long ago. Particularly with Facebook being under a consent order with the FTC, we are closely evaluating the tools used by the Federal Trade Commission in cases as that matter moves forward.

Two weeks ago, we asked Apple CEO Tim Cook and Alphabet CEO Larry Page to explain how their companies use audio recording data as well as locational information collected on iPhone and Android smartphones. Consumers want to know who's tracking them and how.

And following reports that location data aggregators obtained locational data from U.S. wireless carriers, in turn selling it to other firms, this morning we will be sending letters to LocationSmart, Securus, and 3CInteractive Corporation to probe their data handling and use practices.

We have pursued, and will continue to pursue, important oversight work on these issues and we will explore the question of

whether there are improvements in the current privacy regulations that would increase consumer understanding of how data flows support the global economy.

We do not want to unduly saddle companies with unnecessary regulations or impose compliance burdens that will not result in any meaningful impact for consumers. But we will ensure companies are being responsible and that they do not misuse consumer data, period.

This is the overarching reason I support the Federal Communications Commission's "Restoring Internet Freedom Order," which reaffirms the FTC's authority over both ISPs—internet service providers—and tech companies alike. This authority is critical for enforcing data privacy practices, promoting a free and open internet, and protecting consumers from anti-competitive behaviors across the digital ecosystem.

So as we consider these issues, I reiterate my invitation to the technology company CEOs to come to Congress, come to Washington, D.C., engage with us and talk directly to the committee and the public about your practices.

Our goal is to work with all stakeholders on how best to incentivize data security and help protect personal and financial data.

So I am encouraged to have all of you here today because I know you each understand the importance of these issues and the complexity of these issues, and the role that the Federal Trade Commission has in protecting consumers.

So we look forward to your testimony. Again, thanks for being here before the committee and with that, unless any other members on our side want the remainder of my time, I would be happy to yield back.

[The prepared statement of Mr. Walden follows:]

PREPARED STATEMENT OF HON. GREG WALDEN

Good morning. Today we welcome five distinguished public servants from the Federal Trade Commission. Chairman Simons and fellow commissioners, welcome to the Energy and Commerce Committee. We are so pleased to have a fully-constituted FTC in place, and we look forward to working with each of you.

While our economy is the driver of so much growth and opportunity for Americans, there are still, unfortunately, bad actors. The FTC is one of the top cops on the beat. It is charged with a dual mission of competition and consumer protection across large segments of the U.S. economy and this Committee's jurisdiction. We need the FTC to follow its statutory authority to protect consumers from unfair, deceptive, and anti-competitive practices, both online and off.

Recent data security incidents involving Facebook, Equifax, Uber, and other companies continue to raise concerns about the various aspects of protecting consumers in a data-driven economy.

I understand the Commission does not, for good reason, comment on open investigations, but I would emphasize that data security incidents involving sensitive personal and financial information are a significant threat to U.S. consumers and businesses and we are laser focused on these issues at the committee.

The revelations surrounding Facebook and Cambridge Analytica have brought the issue of privacy of consumers' data and information in the age of pervasive social media to the forefront. Particularly with Facebook being under a consent order with the FTC, I will be closely evaluating the tools used by the FTC in that case as the matter moves forward.

Two weeks ago, we asked Apple CEO Tim Cook and Alphabet CEO Larry Page to explain how their companies use audio recording data as well as location information collected on iPhone and Android smartphones.

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This is the overarching reason I support the Federal Communications Commission's Restoring Internet Freedom Order, which reaffirms the FTC's authority over both ISPs and tech companies alike. This authority is critical for enforcing data privacy practices, promoting a free and open internet, and protecting consumers from anticompetitive behaviors across the digital ecosystem.

As we consider these issues, I reiterate my invitation to tech CEOs to come here to D.C., engage with Congress, and talk directly to the committee and the public about their practices.

Our goal is to work with all stakeholders on how best to incentivize data security and help protect personal and financial data.

I am encouraged to have you all here today because I know you each understand the importance of these issues and the roll of the FTC in protecting consumers.

Thank you for being with us this morning and I look forward to working with you moving forward and to our important discussion today.

Mr. LATTI. Seeing none, the gentleman yields back the balance of his time.

The chair now recognizes the gentleman from New Jersey, the ranking member of the full committee, 5 minutes for an opening statement.

OPENING STATEMENT OF HON. FRANK PALLONE, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Mr. PALLONE. Thank you, Mr. Chairman.

Today's hearing focuses on the important work of the Federal Trade Commission.

I want to congratulate and welcome the new commissioners: Chairman Simons, Commissioners Phillips, Chopra, and Slaughter, and welcome back Commissioner Ohlhausen—I guess I am pronouncing it right.

The FTC plays a critical role in protecting consumers nationwide. It has the dual mission to prevent anti-competitive business practices and protect consumers from unfair or deceptive actions.

It's an enormous endeavor covering many industries and issues. It works to stop anti-competitive business practices that are likely to leave the higher prices and lower quality of goods and services and at the same time it works to protect consumers from false advertising, annoying telemarketing, data throttling, and other forms of fraud.

While the FTC has had successes such as its case against Volkswagen, in which it obtained \$11 billion in compensation for consumers who purchased clean diesel cars that turned out not to be clean, the commission should be doing more, in my opinion.

But in order to do more in support of consumers, the FTC needs the support and legislative authorizations from Congress. Unfortunately, instead of working with the FTC, this committee, just 2

years ago, sought to further reduce the already limited authorities of the FTC and I am hopeful we will not see that effort again.

The FTC is a relatively small agency, especially given the breadth of its mission. In the area of data privacy and security—one of the more critical consumer protection issues today—FTC's entire division is only 45 full time employees and only 35 of those are attorneys who are able to bring enforcement actions.

These actions are important since the commission's rulemaking authorities are hindered by overly burdensome requirements that effectively nullify its ability to establish regulations for consumer privacy and data security. And even its enforcement authorities are limited.

Most often the FTC can only get an injunction stopping the unfair or deceptive acts for a first time violation. The FTC cannot hit the offender where it hurts, with a monetary penalty. A slap on the wrist with a promise not to do the bad act again often fails to be a sufficient deterrent to further bad action. Only if the company commits the same unscrupulous act again after promising in a consent that it would stop such conduct can the FTC seek fines, and that limitation on fining authority has allowed some companies to repeatedly take advantage of consumers without real consequences.

Just a few months ago, we were here listening to Mark Zuckerberg apologize yet again for Facebook's failure to properly inform users of how their data would be shared. If the FTC was able to fine Facebook in 2011 the first time it found that Facebook failed to properly notify users, we may not have seen the Cambridge Analytica scandal.

And to make matters worse, FTC has only 40 employees reviewing the hundreds of consent decrees that are in effect. Those employees cannot possibly know whether any one company is keeping the commitments it made in the consent decree.

After all, Facebook was under a consent decree and we saw what that wrist slapping did—nothing. And yes, Equifax was under a consent decree as well.

So today's hearing is not on the breaches at Facebook or Equifax but those breaches are good examples for exploring how the FTC could better fulfill its mission and I look forward to hearing from the commissioners about their ideas for the future of the FTC and hope we can discuss ways to support the FTC's dual mission and give it the tools that it needs.

And I'd like to yield the time I have left to Ms. Matsui.

Ms. MATSUI. Thank you very much, Ranking Member Pallone.

I've discussed the potential of blockchain applications in this subcommittee before. These include as possibility to facilitate spectrum sharing as next-generation broadband networks are deployed, maintain patient health records and secure business transactions and communications between the Internet of Things networks.

In its basic and essential element and function, blockchain is a decentralized ledger technology. But as the hype surrounding blockchain and its applications grow, how exactly blockchain is defined has become less clear.

More fundamentally, there is no agreed upon definition of blockchain. So I am working on legislation that would direct the Department of Commerce to convene a working group or Federal

and industry stakeholders to develop a consensus-based agreed upon definition of blockchain.

I believe a common definition of blockchain could greatly assist in its development and deployment. I invite all of you here on the panel to work with me on this as well as my colleagues here and I hope that we can do this as quickly as possible.

Thank you, and I yield back.

Mr. PALLONE. And I yield back, Mr. Chairman.

Mr. LATTA. Thank you very much. The gentleman yields back the balance of his time and that will conclude with member opening statements.

The chair would like to remind members that pursuant to committee rules all members' opening statements will be made part of the record.

And, again, I want to thank all of our witnesses for appearing before us today to take time to testify before the subcommittee. Today's witnesses will have the opportunity to give a 5-minute opening statement followed by a round of questions from the members of the subcommittee.

Chairman Simons, you are recognized for 5 minutes. If you'd just pull the mic up close and turn the button on, we'll—glad to have you here today.

Thank you.

STATEMENTS OF THE HONORABLE JOSEPH SIMONS, CHAIRMAN, FEDERAL TRADE COMMISSION; THE HONORABLE MAUREEN OHLHAUSEN, COMMISSIONER, FEDERAL TRADE COMMISSION; THE HONORABLE NOAH PHILLIPS, COMMISSIONER, FEDERAL TRADE COMMISSION; THE HONORABLE ROHIT CHOPRA, COMMISSIONER, FEDERAL TRADE COMMISSION; THE HONORABLE REBECCA SLAUGHTER, COMMISSIONER, FEDERAL TRADE COMMISSION

STATEMENT OF JOSEPH SIMONS

Mr. SIMONS. Thank you so much.

Chairman Latta, Ranking Member Schakowsky, and members of the subcommittee, I am Joe Simons and I am the new chairman of the Federal Trade Commission. It's an honor to appear before you today, especially alongside my fellow commissioners. I'd also like to thank you for being so supportive of the FTC's resource needs over the years.

As you've already said, the FTC is a highly productive and effective independent agency with a broad mission—to protect consumers and to maintain competition. The FTC also has a long history of bipartisanship and all of us here today are very committed to continuing that strong tradition.

I am going to focus my oral remarks today primarily on data security and privacy. Year after year, these two issues topped the list of consumer protection priorities at the FTC. The commission has challenged numerous privacy and security practices under Section 5 of the FTC Act.

Our program in these areas, which includes enforcement as well as consumer and business education, has been highly successful within the limits of our authority. Section 5 is an imperfect tool.

In my view, we do need more authority. I support data security legislation that would give us three things: one, the ability to seek civil penalties to effectively deter unlawful conduct; two, jurisdiction over nonprofits and common carriers; and three, the authority to issue implementing rules under the Administrative Procedure Act.

Make no mistake, however. Under my leadership, privacy and data security will continue to be an enforcement priority and the FTC will use every tool in its arsenal to address consumer harm to the extent we can. To date, the commission has brought more than 60 cases alleging that companies failed to implement reasonable data security safeguards as well as dozens of general privacy cases.

We have aggressively pursued privacy and data security cases in myriad areas including financial privacy, children's privacy, health privacy, and the Internet of Things.

Recently, the European Union put into effect its general data protection regulation. The FTC will be watching carefully and assessing the impact of this new regime to see what lessons we can learn that might be applicable to the U.S.

In addition, GDPR, like its predecessor, imposes restrictions on the ability of companies to transfer consumer data from the EU to other jurisdictions, including the U.S.

The EU-U.S. Privacy Shield framework provides a mechanism that enables data to be legally transferred from Europe to the United States and the FTC is committed to strenuously enforcing Privacy Shield.

Finally, let me mention one additional item. The FTC has the tradition of self-critical examination, and in that vein, we recently announced our hearings on competition and consumer protection in the 21st century, and these will begin in the fall.

This series of public hearings will explore whether we need to adjust our enforcement efforts, our priorities, and policies in light of changes in the marketplace and new thinking.

The issues to discuss include whether we need to change the governing standard for anti-trust enforcement, whether merger enforcement has been too lax, our remedial authority with respect to privacy and data security, and other issues.

A discussion of these issues at the hearing along with the public comments that will be collected throughout the hearings will help inform our thinking. The FTC is committed to maximizing the use of its resources, to enhance its effectiveness in protecting consumers, and promoting competition, to anticipate and to respond to changes in the marketplace, and to meet current and future challenges.

We look forward to continuing to work with the subcommittee and Congress, and I look forward to answering your questions.

Thank you so much.

[The prepared statement of Mr. Simons follows:]

**PREPARED STATEMENT OF THE
FEDERAL TRADE COMMISSION
“OVERSIGHT OF THE FEDERAL TRADE COMMISSION”**

Before the

**COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON DIGITAL COMMERCE AND
CONSUMER PROTECTION
UNITED STATES HOUSE OF REPRESENTATIVES**

WASHINGTON, DC

JULY 18, 2018

I. INTRODUCTION

Chairman Latta, Ranking Member Schakowsky, and members of the Subcommittee, I am Joe Simons, Chairman of the Federal Trade Commission (“FTC” or “Commission”), and I am pleased to appear before you today with my fellow Commissioners to discuss the FTC’s work to protect consumers and promote competition.¹

The FTC is an independent agency that comprises three bureaus: the Bureau of Consumer Protection (“BCP”); the Bureau of Competition (“BC”); and the Bureau of Economics, which supports both BCP and BC. It is the only federal agency with a broad mission to both protect consumers and maintain competition in most sectors of the economy. Its jurisdiction ranges from privacy and data security, to mergers and acquisitions, to anticompetitive tactics by pharmaceutical companies, to high-technology and emerging industries. The FTC has a long history of bipartisanship and cooperation, and we look forward to continuing this tradition.

The FTC investigates and prosecutes those engaging in unfair or deceptive acts or practices or unfair methods of competition, and seeks to do so without impeding legitimate business activity. The Commission collects consumer complaints from the public and maintains one of the most extensive consumer protection complaint databases, Consumer Sentinel. The FTC, as well as other local, state, and federal law enforcement agencies, use these complaints in its law enforcement and policy efforts. In addition to its Magnuson-Moss rulemaking authority, Congress has given the agency discrete rulemaking authority under the Administrative Procedure Act (“APA”) over specific topics. The agency regularly analyzes these rules, including seeking public feedback, to ensure their continued efficacy. The FTC also educates consumers and businesses to

¹ This written statement presents the views of the Federal Trade Commission. Our oral statements and responses to questions reflect the views of individual Commissioners, and do not necessarily reflect the views of the Commission or any other Commissioner.

encourage informed consumer choices, compliance with the law, and public understanding of the competitive process. Through its research, advocacy, education, and policy work, the FTC seeks to promote an honest and competitive marketplace and works with foreign counterparts to harmonize competition and consumer protection laws across the globe.

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.² The Commission pursues a vigorous and effective law enforcement program, and the impact of its work is significant. In addition to its consumer protection work, its competition enforcement program is critically important to maintaining competitive markets across the country; vigorous competition results in lower prices, higher quality goods and services, and innovative and beneficial new products and services. Given the dynamic changes taking place today in many different industries, the FTC is taking a serious look at the rigor and direction of its merger enforcement program.

When possible, the FTC collects money to return to harmed consumers. During FY 2017, the Commission returned over \$543 million in redress to consumers and deposited \$94 million into the U.S. Treasury, reflecting collections in both consumer protection and competition matters. In addition, in FY 2017, FTC orders in the *Volkswagen*,³ *Amazon*,⁴ and *Net Spend*⁵ matters required defendants to self-administer consumer refund programs worth more than \$11.5 billion.

² See <https://www.ftc.gov/enforcement/statutes>.

³ *FTC v. Volkswagen Group of America, Inc.*, No. 3:15-md-02672-CRB (N.D. Cal. May 17, 2017), <https://www.ftc.gov/enforcement/cases-proceedings/162-3006/volkswagen-group-america-inc>.

⁴ *FTC v. Amazon.com, Inc.*, No. 2:14-cv-01038 (W.D. Wash. Apr. 4, 2017), <https://www.ftc.gov/enforcement/cases-proceedings/122-3238/amazoncom-inc>.

⁵ *FTC v. NetSpend Corporation*, No. 1:16-cv-04203-AT (N.D. Ga. Apr. 10, 2017), <https://www.ftc.gov/enforcement/cases-proceedings/netspend-corporation>.

To complement its enforcement efforts, the FTC pursues a consumer protection and competition policy and research agenda to improve agency decision-making, and engages in advocacy and education initiatives. Most recently, the Commission has announced its *Hearings on Competition and Consumer Protection in the 21st Century*, which begin this fall.⁶ These multi-day, multi-part public hearings will explore whether broad-based changes in the economy, evolving business practices, new technologies, or international developments might require adjustments to competition and consumer protection law, enforcement priorities, and policy.

This testimony provides a short overview of the FTC's work to protect U.S. consumers and competition, including highlights of some of the agency's major recent activities and initiatives. It also discusses the Commission's international efforts to protect consumers and promote competition.

II. CONSUMER PROTECTION MISSION

As the nation's primary consumer protection agency, the FTC has a broad mandate to protect consumers from unfair, deceptive, or fraudulent practices in the marketplace. It does this by, among other things, pursuing law enforcement actions to stop unlawful practices, and educating consumers and businesses about their rights and responsibilities, respectively. The FTC's enforcement and education efforts include working closely with federal, state, international, and private sector partners on joint initiatives. The Commission's structure, research capacity, and committed staff enable it to meet its mandate of protecting consumers and competition in an ever-changing marketplace. Among other issues, the FTC works to protect privacy and data security,

⁶ FTC, *Hearings on Competition and Consumer Protection in the 21st Century*, <https://www.ftc.gov/policy/hearings-competition-consumer-protection>; see also FTC Press Release, *FTC Announces Hearings On Competition and Consumer Protection in the 21st Century* (June 20, 2018), <https://www.ftc.gov/news-events/press-releases/2018/06/ftc-announces-hearings-competition-consumer-protection-21st>.

helps ensure that advertising claims to consumers are truthful and not misleading, addresses fraud across most sectors of the economy, and combats illegal robocalls.

A. Protecting Consumer Privacy and Data Security

Year after year, privacy and data security top the list of consumer protection priorities at the Federal Trade Commission. These concerns are critical to consumers and businesses alike. Press reports about privacy concerns and data breaches are increasingly common—such as the reports about Facebook and Equifax, just to name two companies, both of which the FTC is currently investigating.⁷ Some consumers are concerned when their data are used in ways they do not expect or understand. Hackers and others seek to exploit vulnerabilities, obtain unauthorized access to consumers' sensitive information, and potentially misuse it in ways that can cause serious harms to consumers as well as businesses. All of this taken together may undermine trust in the marketplace.

These incidents are not a new phenomenon. In fact, we have been hearing about data breaches for well over a decade. Every year, news articles reignite the debate about both privacy and data security, and the best ways to ensure them. The FTC has long used its broad authority under Section 5 of the FTC Act to address consumer harms arising from new technologies and business practices and has thus challenged certain deceptive and unfair privacy and security practices.⁸ The FTC's privacy and data security program—which includes enforcement, as well as consumer and business education—has been highly lauded.

⁷ See, e.g., Statement by the Acting Director of FTC's Bureau of Consumer Protection Regarding Reported Concerns about Facebook Privacy Practices (Mar. 26, 2018), <https://www.ftc.gov/news-events/press-releases/2018/03/statement-acting-director-ftcs-bureau-consumer-protection>.

⁸ 15 U.S.C. § 45(a). The FTC also enforces sector-specific statutes that protect certain health, credit, financial, and children's information. See 16 C.F.R. Part 318 (Health Breach Notification Rule); 15 U.S.C. §§ 1681-1681x (Fair Credit Reporting Act); 16 C.F.R. Parts 313-314 (Gramm-Leach-Bliley Privacy and Safeguards Rules), implementing 15 U.S.C. §§ 6801-6809; 16 C.F.R. Part 312 (Children's Online Privacy Protection Rule), implementing 15 U.S.C. §§ 6501-6506.

Privacy and data security will continue to be an enforcement priority at the Commission, and it will use every tool at its disposal to redress consumer harm. Many of the FTC's investigations and cases involve complex facts and well-financed defendants, often requiring outside experts, which can be costly. It is critical that the FTC have sufficient resources to support its investigative and litigation needs, including expert work, particularly as demands for enforcement in this area continue to grow.

To date, the Commission has brought more than 60 cases alleging that companies failed to implement reasonable safeguards, as well as more than 50 general privacy cases.⁹ The FTC has aggressively pursued privacy and data security cases in myriad areas, including financial privacy, children's privacy, health privacy, and the Internet of Things.¹⁰

For example, the Commission recently announced an expanded settlement with ride-sharing platform company Uber Technologies related to allegations that the company failed to reasonably secure sensitive consumer data stored in the cloud.¹¹ As a result, an intruder allegedly accessed personal information about Uber customers and drivers, including more than 25 million names and email addresses, 22 million names and mobile phone numbers, and 600,000 names and driver's license numbers. The Commission also recently approved a settlement with PayPal, Inc. to resolve allegations that its Venmo peer-to-peer payment service misled consumers about their ability to

⁹ See generally FTC Report, *Privacy & Data Security Update: 2017* (Jan. 2018), <https://www.ftc.gov/reports/privacy-data-security-update-2017-overview-commissions-enforcement-policy-initiatives>.

¹⁰ *Id.*

¹¹ *Uber Technologies, Inc.*, Matter No. 1523054 (Apr. 11, 2018), <https://www.ftc.gov/enforcement/cases-proceedings/152-3054/uber-technologies-inc>. Following the announcement of last year's original proposed settlement, the Commission learned that Uber had failed to disclose a significant breach of consumer data that occurred in 2016, in the midst of the FTC's investigation that led to the August 2017 settlement announcement. Due to Uber's misconduct related to the 2016 breach, Uber will be subject to additional requirements. Among other things, the revised settlement could subject Uber to civil penalties if it fails to notify the FTC of certain future incidents involving unauthorized access of consumer information.

control the privacy of their Venmo transactions and the extent to which their financial accounts were protected by “bank grade security systems.”¹²

The Commission takes seriously its commitment to protect children’s privacy. In the Commission’s first children’s privacy case involving Internet-connected toys, the FTC announced a settlement—including a \$650,000 civil penalty—with electronic toy manufacturer VTech Electronics for violations of the Children’s Online Privacy Protection Rule.¹³ The FTC alleged that the company collected children’s personal information online without first obtaining parental consent, and failed to take reasonable steps to secure the data it collected.¹⁴

Section 5, however, cannot address *all* privacy and data security concerns in the marketplace. For example, Section 5 does not provide for civil penalties, reducing the Commission’s deterrent capability. The Commission also lacks authority over non-profits and over common carrier activity, even though these acts or practices often have serious implications for consumer privacy and data security. Finally, the FTC lacks broad APA rulemaking authority for privacy and data security generally.¹⁵ The Commission continues to reiterate its longstanding bipartisan call for comprehensive data security legislation.

The Commission must continue to prioritize, examine, and address privacy and data security with a fresh perspective. One way in which the agency plans to inform its work is through the recently announced *Hearings on Competition and Consumer Protection in the 21st Century*,

¹² *PayPal, Inc.*, No. C-4651 (May 24, 2018), <https://www.ftc.gov/enforcement/cases-proceedings/162-3102/paypal-inc-matter>.

¹³ *U.S. v. VTech Electronics Ltd. et al.*, No. 1:18-cv-00114 (N.D. Ill. Jan. 8, 2018), <https://www.ftc.gov/enforcement/cases-proceedings/162-3032/vtech-electronics-limited>.

¹⁴ In addition to law enforcement, the FTC also undertakes policy initiatives, such as its recent workshop co-hosted with the Department of Education on educational technology and student privacy. See *Student Privacy and Ed Tech* (Dec. 1, 2017), <https://www.ftc.gov/news-events/events-calendar/2017/12/student-privacy-ed-tech>.

¹⁵ The Commission has been granted APA rulemaking authority for discrete topics such as children’s privacy, financial data security, and certain provisions of credit reporting.

which will begin this fall.¹⁶ The Commission's remedial authority with respect to privacy and data security will be a key topic in these hearings, and the comments and discussions on these issues will be one source to inform the FTC's enforcement and policy priorities.

Recently, the European Union put into effect its General Data Protection Regulation ("GDPR"). GDPR, like the EU's data protection directive before it, imposes certain restrictions on the ability of companies to transfer consumer data from the EU to other jurisdictions. The EU-U.S. Privacy Shield Framework is a voluntary mechanism companies can use to promise certain protections for data transferred from Europe to the United States—and the FTC enforces those promises by Privacy Shield participants under its jurisdiction.¹⁷ The Commission is committed to the success of the EU-U.S. Privacy Shield Framework, a critical tool for protecting privacy and enabling cross-border data flows. The FTC has actively enforced Privacy Shield, and will continue to do so when Privacy Shield participants fail to meet their legal obligations. The Commission also will continue to work with other agencies in the U.S. government and with its partners in Europe to ensure businesses and consumers can continue to benefit from Privacy Shield.

B. Truthfulness in National Advertising

Ensuring that advertising is truthful and not misleading has always been one of the FTC's core missions because it allows consumers to make the best use of their resources and promotes competition by companies on a level playing field. Below are a few recent examples of the Commission's work in this area.

This past year, the agency has continued to bring cases challenging false and unsubstantiated health claims, including those targeting older consumers, consumers affected by the

¹⁶ See *supra* note 6.

¹⁷ See www.privacyshield.gov and www.ftc.gov/tips-advice/business-center/privacy-and-security/privacy-shield. Companies can also join a Swiss-U.S. Privacy Shield for transfers from Switzerland.

opioid crisis, and consumers with serious medical conditions. The Commission has brought cases challenging products that claim to improve memory and ward off cognitive decline, relieve joint pain and arthritis symptoms, and even reverse aging.¹⁸ The Commission also has sued companies that allegedly claimed, without scientific evidence, that using their products could alleviate the symptoms of opioid withdrawal and increase the likelihood of overcoming opioid dependency.¹⁹ Finally, the Commission recently barred a marketer from making deceptive claims about its products' ability to mitigate the side effects of cancer treatments.²⁰

When consumers with serious health concerns fall victim to unsupported health claims, they may put their health at risk by avoiding proven therapies and treatments. Through consumer education, including the FTC's advisories, the agency urges consumers to check with a medical professional before starting any treatment or product to treat serious medical conditions.²¹

The FTC has also challenged false claims in the financial area. For example, the Commission recently filed a complaint against Lending Club, an online lender, alleging that its marketing was deceptive because it claimed its loans had "no hidden fees," when in fact consumers later learned they were charged hundreds, and even thousands, of dollars in origination fees.²²

¹⁸ See, e.g., *FTC and State of Maine v. Health Research Laboratories, Inc.*, No. 2:17-cv-00467 (D. Maine Nov. 30, 2017), <https://www.ftc.gov/enforcement/cases-proceedings/152-3021/health-research-laboratories-llc; Telomerase Activation Sciences, Inc. and Noel Thomas Patton>, No. C-4644 (Apr. 19, 2018), <https://www.ftc.gov/enforcement/cases-proceedings/142-3103/telomerase-activation-sciences-inc-noel-thomas-patton-matter>.

¹⁹ *FTC v. Catlin Enterprises, Inc.*, No. 1:17-cv-403 (W.D. Tex. May 17, 2017), <https://www.ftc.gov/enforcement/cases-proceedings/1623204/catlin-enterprises-inc>. In addition, in conjunction with the FDA, the FTC recently issued letters to companies that appeared to be making questionable claims in order to sell addiction or withdrawal remedies. See *FTC and U.S. FDA Opioid Warning Letters* (Jan. 24, 2018), <https://www.ftc.gov/ftc-fda-opioid-warning-letters>.

²⁰ *FTC v. CellMark Biopharma and Derek E. Vest*, No. 2:18-cv-00014-JES-CM (M.D. Fla. Jan. 12, 2018), <https://www.ftc.gov/enforcement/cases-proceedings/162-3134/cellmark-biopharma-derek-e-vest>.

²¹ FTC Consumer Blog, *Treatments and Cures*, <https://www.consumer.ftc.gov/topics/treatments-cures>.

²² *FTC v. Lending Club Corp.*, No. 3:18-cv-02454 (N.D. Cal. Apr. 25, 2018), <https://www.ftc.gov/enforcement/cases-proceedings/162-3088/federal-trade-commission-v-lendingclub-corporation>.

C. Protecting Consumers From Fraud

Fighting fraud is a major focus of the FTC’s law enforcement efforts. The Commission’s anti-fraud program attempts to track down and stop some of the most egregious scams that prey on U.S. consumers—often, the most vulnerable consumers who can least afford to lose money. For example, reports about imposter scams have been on the rise over the past few years, and many of these scams target older Americans.²³ Fraudsters falsely claiming to be government agents (including the IRS and even the FTC), family members, or well-known tech companies contact consumers and pressure them to send money, often via cash-like payment methods. Fraudsters also target small businesses, sometimes cold-calling businesses to “collect” on invoices they do not owe.

During the past year, the FTC joined federal, state, and international law enforcement partners in announcing “Operation Tech Trap,” a nationwide and international crackdown on tech support scams that trick consumers into believing their computers are infected with viruses and malware, and then charge them hundreds of dollars for unnecessary repairs.²⁴ The FTC brought actions to shut down these deceptive operations and also developed consumer education materials to help consumers avoid falling victim to tech support scams in the first place.²⁵ Just last month, the FTC announced Operation Main Street, an initiative to stop small business scams. The FTC, jointly with the offices of eight state Attorneys General, the New York Division of the U.S. Postal

²³ FTC Fiscal Year 2019 Congressional Budget Justification, <https://www.ftc.gov/reports/fy-2019-congressional-budget-justification>.

²⁴ FTC Press Release, *FTC and Federal, State and International Partners Announce Major Crackdown on Tech Support Scams* (May 12, 2017), <https://www.ftc.gov/news-events/press-releases/2017/05/ftc-federal-state-international-partners-announce-major-crackdown>. “Operation Tech Trap” is just one example of a law enforcement “sweep”—coordinated, simultaneous law enforcement actions with partners—that the FTC uses to leverage resources to maximize effects. Another example of a recent sweep is “Game of Loans,” the first coordinated federal-state law enforcement initiative targeting deceptive student loan debt relief scams. Press Release, *FTC, State Law Enforcement Partners Announce Nationwide Crackdown on Student Loan Debt Relief Scams* (Oct. 13, 2017), <https://www.ftc.gov/news-events/press-releases/2017/10/ftc-state-law-enforcement-partners-announce-nationwide-crackdown>.

²⁵ FTC Guidance, *Tech Support Scams* (July 2017), <https://www.consumer.ftc.gov/articles/0346-tech-support-scams#How>.

Inspection Service, two U.S. Attorneys' Offices, and the Better Business Bureau, announced a total of 24 actions targeting fraud aimed at small businesses, as well as new education materials to help small businesses identify and avoid potential scams.²⁶

The FTC also strives to stay ahead of scammers, who are always on the lookout for new ways to market old schemes. For example, there has been an increase in deceptive moneymaking frauds involving cryptocurrencies—digital assets that use cryptography to secure or verify transactions. The Commission has worked to educate consumers about cryptocurrencies and hold fraudsters accountable. In March, the FTC halted the operations of Bitcoin Funding Team, which allegedly falsely promised that participants could earn large returns by enrolling in moneymaking schemes and paying with cryptocurrency.²⁷ And in June, the FTC hosted a workshop to explore how scammers are exploiting public interest in cryptocurrencies like bitcoin and Litecoin, and discussed ways to empower and protect consumers against this growing threat of exploitation.²⁸

D. Illegal Robocalls

Illegal robocalls also remain a significant consumer protection problem and consumers' top complaint to the FTC. They repeatedly disturb consumers' privacy, and frequently use fraud and deception to pitch goods and services, leading to significant economic harm. In FY 2017, the FTC received more than 4.5 million robocall complaints.²⁹ The FTC has used many methods to fight

²⁶ FTC Press Release, *FTC, BBB, and Law Enforcement Partners Announce Results of Operation Main Street: Stopping Small Business Scams Law Enforcement and Education Initiative* (June 18, 2018), <https://www.ftc.gov/news-events/press-releases/2018/06/ftc-bbb-law-enforcement-partners-announce-results-operation-main>.

²⁷ *FTC v. Thomas Dluca, et al. (Bitcoin Funding Team)*, No. 0:18-cv-60379-KMM (S.D.N.Y. Mar. 16, 2018), <https://www.ftc.gov/enforcement/cases-proceedings/172-3107/federal-trade-commission-v-thomas-dluca-et-al-bitcoin-funding>.

²⁸ FTC Workshop, *Decrypting Cryptocurrency Scams* (June 25, 2018), <https://www.ftc.gov/news-events/events-calendar/2018/06/decrypting-cryptocurrency-scams>.

²⁹ Total unwanted-call complaints for FY 2017, including both robocall complaints and complaints about live calls from consumers whose phone numbers are registered on the Do Not Call Registry, exceeded 7 million. See *Do Not Call Registry Data Book 2017: Complaint Figures for FY 2017*, <https://www.ftc.gov/reports/national-do-not-call-registry-data-book-fiscal-year-2017>.

these illegal calls.³⁰ Technological advances, however, have allowed bad actors to place millions or even billions of calls, often from abroad, at very low cost, and in ways that are difficult to trace. This continues to infuriate consumers and challenge enforcers.

Part of the huge uptick in illegal calls, including robocalls, is attributable to relatively recent technological developments that facilitate telemarketing without requiring a significant capital investment in specialized hardware and labor.³¹ Today, robocallers benefit from automated dialing technology, inexpensive international and long distance calling rates, and the ability to move internationally and employ cheap labor. The result: law-breaking telemarketers can place robocalls for a fraction of one cent per minute. Moreover, technological changes have also affected the marketplace by enabling telemarketers to conceal their identities and “spoof” caller IDs when they place calls.³²

Recognizing that law enforcement, while critical, is not enough to solve the problem of illegal calls, the FTC has taken some steps to spur the marketplace to develop technological

³⁰ See FTC Robocall Initiatives, <https://www.consumer.ftc.gov/features/feature-0025-robocalls>. Since establishing the Do Not Call Registry in 2003, the Commission has fought vigorously to protect consumers’ privacy from unwanted calls. Indeed, since the Commission began enforcing the Do Not Call provisions of the Telemarketing Sales Rule (“TSR”) in 2004, the Commission has brought 136 enforcement actions seeking civil penalties, restitution for victims of telemarketing scams, and disgorgement of ill-gotten gains against 444 corporations and 358 individuals. As a result of the 125 cases resolved thus far, the Commission has collected over \$121 million in equitable monetary relief and civil penalties. See Enforcement of the Do Not Call Registry, <https://www.ftc.gov/news-events/media-resources/do-not-call-registry/enforcement>. Recently, the FTC and its law enforcement partners achieved an historic win in a long-running fight against unwanted calls when a federal district court in Illinois issued an order imposing a \$280 million penalty against Dish Network—the largest penalty ever issued in a Do Not Call case. *U.S. et al. v. Dish Network, L.L.C.*, No. 309-cv-03073-JES-CHE (C.D. Ill. Aug. 10, 2017), <https://www.ftc.gov/enforcement/cases-proceedings/052-3167/dish-network-llc-united-states-america-federal-trade>.

³¹ FTC Workshop, *Robocalls: All the Rage* (Oct. 18, 2012), <https://www.ftc.gov/news-events/events-calendar/2012/10/robocalls-all-rage-ftc-summit>. A transcript of the workshop is available at https://www.ftc.gov/sites/default/files/documents/public_events/robocalls-all-rage-ftc-summit/robocallsummittranscript.pdf.

³² Recently, the FTC filed a complaint against two related operations and their principals who allegedly facilitated billions of illegal robocalls to consumers nationwide. The complaint charged that these operations provided the computer-based dialing platform and “spoofed” caller IDs for robocallers to pitch everything from auto warranties to home security systems and supposed debt-relief services. *FTC v. James Christiano et al.*, No. 8:18-cv-00936 (C.D. Cal. June 5, 2018), <https://www.ftc.gov/enforcement/cases-proceedings/162-3124/james-christiano-et-al-netdotsolutions-inc>.

solutions. For instance, from 2013 to 2015, the FTC led four public challenges to incentivize innovators to help tackle the unlawful robocalls that plague consumers.³³ The FTC's challenges contributed to a shift at the time in the development and availability of technological solutions in this area, particularly call-blocking and call-filtering products. Consumers can access information about potential solutions available to them on the FTC's website.³⁴

In addition, the FTC regularly works with its state, federal, and international partners to combat illegal robocalls. For example, this spring the FTC and Federal Communications Commission co-hosted a Joint Policy Forum on Illegal Robocalls to discuss the regulatory and enforcement challenges posed by illegal robocalls, as well as a public expo featuring new technologies, devices, and applications to minimize or eliminate the number of illegal robocalls consumers receive.³⁵

Also, for many years, the Commission has testified in favor of eliminating the common carrier exemption. The exemption is outdated and no longer makes sense in today's marketplace where the lines between telecommunications and other services are increasingly blurred. It impedes the FTC's work tackling illegal robocalls and more broadly circumscribes other enforcement initiatives. For example, a carrier that places, or assists and facilitates, illegal telemarketing is

³³ The first challenge, in 2013, called upon the public to develop a consumer-facing solution to blocks illegal robocalls. One of the winners, "NomoRobo," was on the market within 6 months after being selected by the FTC. NomoRobo, which reports blocking over 600 million calls to date, is being offered directly to consumers by a number of telecommunications providers and is available as an app on iPhones. See FTC Press Release, *FTC Announces Robocall Challenge Winners* (Apr. 2, 2013), <https://www.ftc.gov/news-events/press-releases/2013/04/ftc-announces-robocall-challenge-winners>; see also FTC Press Release, *FTC Awards \$25,000 Top Cash Prize for Contest-Winning Mobile App That Blocks Illegal Robocalls* (Aug. 17, 2015), <https://www.ftc.gov/news-events/press-releases/2015/08/ftc-awards-25000-top-cash-prize-contest-winning-mobile-app-blocks>; FTC Press Release, *FTC Announces Winners of "Zapping Rachel" Robocall Contest* (Aug. 28, 2014), <https://www.ftc.gov/news-events/press-releases/2014/08/ftc-announces-winners-zapping-rachel-robocall-contest>.

³⁴ See <https://www.consumer.ftc.gov/features/how-stop-unwanted-calls>.

³⁵ FTC Press Release, *FTC and FCC to Host Joint Policy Forum on Illegal Robocalls* (Mar. 22, 2018), www.ftc.gov/news-events/press-releases/2018/03/ftc-fcc-host-joint-policy-forum-illegal-robocalls; FTC Press Release, *FTC and FCC Seek Exhibitors for an Expo Featuring Technologies to Block Illegal Robocalls* (Mar. 7, 2018), www.ftc.gov/news-events/press-releases/2018/03/ftc-fcc-seek-exhibitors-expo-featuring-technologies-block-illegal.

beyond the Commission's reach because of the common carriage exemption. Likewise, the exemption may frustrate the Commission's ability to obtain complete relief for consumers when there are multiple parties, some of whom are common carriers and some that are not. It also may pose difficulties when a company engages in deceptive or unfair practices involving a mix of common carrier and non-common carrier activities. Finally, litigation has been complicated by entities that use their purported status as common carriers as a defense to FTC litigation.³⁶

E. Consumer Education and Outreach

Public outreach and education is another critical element of the FTC's efforts to fulfill its consumer protection mission. The Commission's education and outreach programs reach tens of millions of people each year through its website, the media, and partner organizations that disseminate consumer information on the agency's behalf. The FTC delivers actionable, practical, plain-language materials on dozens of issues, and updates its consumer education whenever it has new information to share. The FTC disseminates these tips through articles, blog posts, social media, infographics, videos, audio, and campaigns such as its "Pass It On" effort to arm older consumers with information about scams that they can "pass on" to their friends and family.³⁷

III. COMPETITION MISSION

In addition to the work of BCP described above, the FTC enforces U.S. antitrust law in many sectors that directly affect consumers and their pocketbooks, such as health care, consumer products and services, technology, manufacturing, and energy. The Commission shares federal

³⁶ See, e.g., Answer and Affirmative Defenses of Defendant Pacific Telecom Communications Group at 9, 17-20, Dkt. 19, *FTC et al. v. Caribbean Cruise Line et al.*, No. 0:15-cv-60423 (S.D. Fla. June 2, 2015), <https://www.ftc.gov/enforcement/cases-proceedings/122-3196-x150028/caribbean-cruise-line-inc>.

³⁷ See FTC Consumer Information, *Pass It On*, <http://www.consumer.ftc.gov/features/feature-0030-pass-it-on>.

antitrust enforcement responsibilities with the Antitrust Division of the U.S. Department of Justice (“DOJ”).

One of the agencies’ principal responsibilities is to prevent mergers that may substantially lessen competition. Under U.S. law, parties to certain mergers and acquisitions must file premerger notification and wait for government review. Over the past five fiscal years, premerger filings under the Hart-Scott-Rodino (“HSR”) Act have increased more than 50 percent; in the most recent fiscal year, the antitrust agencies received over 2,000 HSR filings for the first time since 2007.³⁸ While the vast majority of reported transactions do not raise competitive concerns and the agencies clear those transactions expeditiously, when the evidence gives the Commission reason to believe that a proposed merger likely would be anticompetitive, the Commission does not hesitate to intervene. Since the beginning of FY 2016, the Commission has challenged 53 mergers after the evidence showed that they would likely be anticompetitive. Although many of these cases were resolved through divestiture settlements, in the last year alone, the Commission voted to initiate litigation to block seven mergers, each of which has required a significant commitment of resources to prosecute. Three of those challenges ended successfully when the parties abandoned the transactions after the Commission initiated litigation.³⁹ The four other merger cases are still being litigated.⁴⁰ In addition, Walgreens substantially restructured its proposed acquisition of Rite Aid after the Commission raised concerns about the original transaction during an extensive review.⁴¹

³⁸ In FY 2017, the agencies received notice of 2,052 transactions, compared with 1,326 in FY 2013 and 2,201 in FY 2007. For historical information about HSR filings and U.S. merger enforcement, see the joint FTC/DOJ Hart-Scott-Rodino annual reports, <https://www.ftc.gov/policy/reports/policy-reports/annual-competition-reports>.

³⁹ *FTC v. DraftKings, Inc.*, No. 17-cv-01195 (D.D.C. Jun. 19, 2017), <https://www.ftc.gov/enforcement/cases-proceedings/161-0174/draftkings-fanduel-ftc-state-california-district-columbia-v>; FTC Press Release, *FTC Challenges Proposed Acquisition of Conagra’s Wesson Cooking Oil Brand by Crisco owner, J.M. Smucker Co.*, (Mar. 5, 2018), <https://www.ftc.gov/news-events/press-releases/2018/03/ftc-challenges-proposed-acquisition-conagras-wesson-cooking-oil>; *In re CDK Global & Auto/Mate*, Dkt. 9382 (Mar. 20, 2018), <https://www.ftc.gov/enforcement/cases-proceedings/171-0156/cdk-global-automate-matter>.

⁴⁰ *FTC v. Sanford Health*, No. 1:17-cv-00133 (W.D.N.D. Jun. 23, 2017), <https://www.ftc.gov/enforcement/cases-proceedings/171-0156/cdk-global-automate-matter>.

One increasing challenge for the Commission in litigating competition cases is continuing to hire testifying economic experts. Qualified experts are a critically important component in all of the FTC's competition cases heading toward litigation. While the agency thus far has managed to find sufficient resources to fund the experts needed to support its cases, the FTC is reaching the point where it cannot meet these needs without compromising its ability to fulfill other aspects of the agency's mission. The Commission appreciates Congress's attention to its resource needs, including the need to hire outside experts.

The Commission also maintains a robust program to identify and stop anticompetitive conduct, and it currently has a number of cases in active litigation.⁴² For over twenty years and on a bipartisan basis, the Commission has prioritized ending anticompetitive reverse-payment patent settlements in which a brand-name drug firm pays its potential generic rival to delay entering the market with a lower cost generic product. Following the U.S. Supreme Court's 2013 decision in *FTC v. Actavis, Inc.*,⁴³ the Commission is in a much stronger position to protect consumers. Since that ruling, the FTC obtained a landmark \$1.2 billion settlement in its litigation involving the sleep disorder drug, Provigil,⁴⁴ and other manufacturers have agreed to abandon the practice.⁴⁵ In

[proceedings/171-0019/sanford-health-ftc-state-north-dakota-v](https://www.ftc.gov/enforcement/cases-proceedings/171-0019/sanford-health-ftc-state-north-dakota-v); *In re Tronox Ltd.*, Dkt. 9377 (Dec. 5, 2017), <https://www.ftc.gov/enforcement/cases-proceedings/171-0085/tronoxcrystal-usa>; *In re Otto Bock HealthCare North America, Inc.*, Dkt. 9378 (Dec. 20, 2017), <https://www.ftc.gov/enforcement/cases-proceedings/171-0231/otto-bock-healthcarefreedom-innovations>; *FTC v. Wilhelmsen*, No. 1:18-cv-00414 (D.D.C. Feb. 23, 2018), <https://www.ftc.gov/enforcement/cases-proceedings/171-0161/wilhelm-wilhelmsen-et-al-ftc-v>.

⁴¹ See Statement of Acting Chairman Maureen K. Ohlhausen in Walgreens Boots Alliance/Rite Aid (Sept. 19, 2017), <https://www.ftc.gov/public-statements/2017/09/statement-acting-chairman-maureen-k-ohlhausen-walgreens-boots-alliancerite>.

⁴² In addition to the cases involving pharmaceutical firms discussed *infra*, pending litigation alleging anticompetitive conduct includes *FTC v. Qualcomm, Inc.*, No. 17-cv-00220 (N.D. Cal. Jan. 17, 2017), <https://www.ftc.gov/enforcement/cases-proceedings/141-0199/qualcomm-inc>; *In re 1-800 Contacts, Inc.*, Dkt. 9372 (Aug. 8, 2016), <https://www.ftc.gov/enforcement/cases-proceedings/141-0200/1-800-contacts-inc-matter>; *In re Louisiana Real Estate Appraisers Board*, Dkt. 9374 (May 31, 2017), <https://www.ftc.gov/enforcement/cases-proceedings/161-0068/louisiana-real-estate-appraisers-board>; and *In re Benco Dental Supply et al.*, Dkt. 9379 (Feb. 12, 2018), <https://www.ftc.gov/enforcement/cases-proceedings/151-0190/bencoscheinpatterson-matter>.

⁴³ *FTC v. Actavis, Inc.*, 570 U.S. 756 (2013).

⁴⁴ Press Release, *FTC Settlement of Cephalon Pay for Delay Case Ensures \$1.2 Billion in Ill-Gotten Gains*

addition, the Commission has challenged other anticompetitive conduct by drug manufacturers, such as abuse of government process through sham litigation or repetitive regulatory filings intended to slow the approval of competitive drugs.⁴⁶ For example, most recently a federal court ruled that AbbVie Inc. used sham litigation to illegally maintain its monopoly over the testosterone replacement drug Androgel, and ordered \$448 million in monetary relief to consumers who were overcharged for Androgel as a result of AbbVie's conduct.⁴⁷ The Commission also obtained a stipulated injunction in which Mallinckrodt ARD Inc. agreed to pay \$100 million and divest assets to settle charges that it had illegally acquired the rights to develop a drug that threatened its monopoly in the U.S. market for a specialty drug used to treat a rare seizure disorder afflicting infants.⁴⁸

The Commission also follows closely activity in the high-technology sector. From smart appliances and smart cars to mobile devices and search platforms, the widespread use of technology and data is not only changing the way we live, but also the way firms operate. While many of these changes offer consumer benefits, they also raise complex and sometimes novel competition issues. Given the important role that technology companies play in the American economy, it is critical that the Commission—in furthering its mission to protect consumers and promote competition—

Relinquished; Refunds Will Go To Purchasers Affected by Anticompetitive Tactics (May 28, 2015), <https://www.ftc.gov/news-events/press-releases/2015/05/ftc-settlement-cephalon-pay-delay-case-ensures-12-billion-ill>.

⁴⁵ Joint Motion for Entry of Stipulated Order for Permanent Injunction, *FTC v. Allergan plc*, No. 17-cv-00312 (N.D. Cal. Jan. 23, 2017), <https://www.ftc.gov/enforcement/cases-proceedings/141-0004/allergan-plc-watson-laboratories-inc-et-al>, and Stipulated Order for Permanent Injunction, *FTC v. Teikoku Pharma USA, Inc.*, No. 16-cv-01440 (E.D. Pa. Mar. 30, 2016), <https://www.ftc.gov/enforcement/cases-proceedings/141-0004/endo-pharmaceuticals-impax-labs>.

⁴⁶ *FTC v. Abbvie Inc.*, No. 14-cv-5151 (E.D. Pa. Sept. 8, 2014), <https://www.ftc.gov/enforcement/cases-proceedings/121-0028/abbvie-inc-et-al>; *FTC v. Shire ViroPharma Inc.*, No. 17-cv-131(D. Del. Feb. 7, 2017), <https://www.ftc.gov/enforcement/cases-proceedings/121-0062/shire-viropharma>.

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

⁴⁸ Stipulated Order for Permanent Injunction and Equitable Monetary Relief, *FTC v. Mallinckrodt ARD Inc.*, No. 1:17-cv-00120 (D.D.C. Jan. 30, 2017), https://www.ftc.gov/system/files/documents/cases/stipulated_order_for_permanent_injunction_mallinckrodt.pdf.

understand the current and developing business models and scrutinize incumbents' conduct to ensure that they abide by the same rules of competitive markets that apply to any company.⁴⁹

In addition to competition enforcement, the FTC takes full advantage of its policy tools. The FTC promotes competition principles in advocacy comments to state lawmakers and regulators, as well as to its sister federal agencies,⁵⁰ and in *amicus* briefs filed in federal courts considering important areas of antitrust law.⁵¹ Last year, the Commission concluded a comprehensive review of its merger remedies to evaluate the effectiveness of the Commission's orders issued between 2006 and 2012, and made public its findings.⁵² Examining prior enforcement efforts to assess their impact on competition and consumers is critical to formulating an effective and efficient antitrust enforcement program, and the Commission will continue these self-assessment efforts in order to deploy its resources where they can do the most good. Similarly, through the upcoming series of hearings described above,⁵³ the Commission will devote significant resources to refresh and, if warranted, renew its thinking on a wide range of cutting-edge competition issues.⁵⁴

IV. INTERNATIONAL COOPERATION

In addition to its domestic programs, the FTC engages in significant international work. On the competition side, with the expansion of global trade and the operation of many companies across national borders, the FTC and DOJ increasingly engage with foreign antitrust agencies to

⁴⁹ See, e.g., *DraftKings, Inc./FanDuel Limited*, Docket No. 9375 (July 14, 2017), <https://www.ftc.gov/enforcement/cases-proceedings/161-0174/draft-kings-inc-fanduel-limited>.

⁵⁰ See generally <https://www.ftc.gov/policy/advocacy>.

⁵¹ Amicus briefs are posted at <https://www.ftc.gov/policy/advocacy/amicus-briefs>.

⁵² FTC Staff Report, *The FTC's Merger Remedies 2006-2012: A Report of the Bureau of Competition and Economics* (2017), https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureau-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf.

⁵³ See *supra* note 6.

⁵⁴ See Prepared Remarks of Chairman Simons Announcing the Competition and Consumer Protection Hearings (June 20, 2018), https://www.ftc.gov/system/files/documents/public_statements/1385308/prepared_remarks_of_joe_simons_announcing_the_hearings_6-20-18_0.pdf.

ensure close collaboration on cross-border cases and convergence toward sound competition policies and procedures.⁵⁵ The FTC effectively coordinates reviews of multijurisdictional mergers and continues to work with its international counterparts to achieve consistent outcomes in cases of possible unilateral anticompetitive conduct. The U.S. antitrust agencies facilitate dialogue and promote convergence through multiple channels, including through strong bilateral relations with foreign competition agencies, and an active role in multilateral competition organization projects and initiatives. When appropriate, the FTC also works with other agencies within the U.S. government to advance consistent competition enforcement policies, practices, and procedures in other parts of the world.⁵⁶

On the consumer protection side, enforcement cooperation is the top priority of the FTC's international consumer protection program. In a global, digital economy, the number of FTC investigations and cases with cross-border components—including foreign-based targets and defendants, witnesses, documentary evidence, and assets—continues to grow. During the last fiscal year, the FTC cooperated in 51 investigations, cases, and enforcement projects with foreign consumer, privacy, and criminal enforcement agencies. To sustain this level of productive cooperation, the agency often works through global enforcement networks, such as the International Consumer Protection and Enforcement Network, the Global Privacy Enforcement Network, the Unsolicited Communications Enforcement Network, and the International Mass Marketing Fraud Working Group.

⁵⁵ In competition matters, the FTC also seeks to collaborate with the state Attorneys General to maximize results and use of limited resources in the enforcement of the U.S. antitrust laws.

⁵⁶ For example, the Commission works through the U.S. government's interagency processes to ensure that competition-related issues that also implicate broader U.S. policy interests, such as the protection of intellectual property and non-discrimination, are addressed in a coordinated and effective manner.

The FTC's key tool for cross-border enforcement is the U.S. SAFE WEB Act.⁵⁷ Passed in 2006, and renewed in 2012, this Act strengthens the FTC's ability to work on cases with an international dimension. Among other things, it has allowed the FTC to share evidence and provide investigative assistance to foreign authorities in cases involving spam, spyware, misleading health and safety claims, privacy violations and data security breaches, and telemarketing fraud. In many of these cases, the foreign agencies investigated conduct that directly harmed U.S. consumers, while in others, the FTC's action led to reciprocal assistance.

The Act also underpins the FTC's ability to participate in cross-border cooperation arrangements, including the EU-U.S. Privacy Shield Framework, which helps enable billions of transatlantic data flows.⁵⁸ Critically, the Act also expressly confirms the FTC's authority to challenge practices occurring in other countries that harm U.S. consumers, a common scenario in cases involving fraud, and confirms its authority to challenge U.S. business practices harming foreign consumers, such as Privacy Shield violations.

The U.S. SAFE WEB Act has been a remarkable success. The FTC has responded to more than 125 SAFE WEB information sharing requests from 30 foreign enforcement agencies. The FTC has issued more than 110 civil investigative demands in more than 50 investigations on behalf of foreign agencies, both civil and criminal. It has also used this authority to file suit in federal court to obtain judicial assistance for one of its closest law enforcement partners, the Canadian

⁵⁷ Undertaking Spam, Spyware, And Fraud Enforcement With Enforcers beyond Borders Act (U.S. SAFE WEB Act), Pub. L. No. 109-455, 120 Stat. 3372, extended by Pub. L. No. 112-203, 126 Stat. 1484 (amending 15 U.S.C. §§ 41 et seq.).

⁵⁸ See generally <https://www.ftc.gov/tips-advice/business-center/privacy-and-security/privacy-shield>. The FTC's SAFE WEB powers enable stronger cooperation with European data protection authorities on investigations and enforcement against possible Privacy Shield violations, a point cited in the European Commission's Privacy Shield adequacy decision. See Commission Implementing Decision No. 2016/1250 (on the adequacy of the protection provided by the EU-U.S. Privacy Shield), 2016 O.J. L207/1 at ¶ 51, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:L:2016:207:FULL&from=EN>.

Competition Bureau.⁵⁹ The FTC's enforcement actions have similarly been assisted by its foreign law enforcement partners. In cases relying on the U.S. SAFE WEB Act, the FTC has collected millions of dollars in restitution for injured consumers, both foreign and domestic. For example, the FTC worked with DOJ, the Royal Canadian Mounted Police, and other Canadian agencies to obtain a Montreal court order returning nearly \$2 million to the U.S. victims of a mortgage assistance and debt relief scam.⁶⁰ The Act sunsets in 2020; the Commission requests that Congress reauthorize this important authority and eliminate the sunset provision.

A key focus of the FTC's international privacy efforts is support for global interoperability of data privacy regimes. The FTC works with the U.S. Department of Commerce on three key cross-border data transfer programs for the commercial sector: the EU-U.S. Privacy Shield, the Swiss-U.S. Privacy Shield, and the Asia-Pacific Economic Cooperation ("APEC") Cross-Border Privacy Rules (CPBR) System. As already explained, the Privacy Shield programs provide legal mechanisms for companies to transfer personal data from the EU and Switzerland to the United States with strong privacy protections. The APEC CBPR system is a voluntary, enforceable code of conduct protecting personal information transferred among the United States and other APEC economies. The FTC enforces companies' privacy promises in these programs, bringing cases as violations of Section 5 of the FTC Act.⁶¹ The FTC also works closely with agencies developing and

⁵⁹ Competition Bureau Canada Press Release, *Bureau case against Rogers, Bell, Telus and the CWTA advances thanks to collaboration with US Federal Trade Commission* (Aug. 29, 2014), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03805.html>.

⁶⁰ FTC Press Release, *FTC Returns \$1.87 Million to Consumers Harmed by Debt Relief Scam* (May 9, 2016), <https://www.ftc.gov/news-events/press-releases/2016/05/ftc-returns-187-million-consumers-harmed-debt-relief-scam>.

⁶¹ See, e.g., *ReadyTech Corp.*, Matter No. 1823100 (July 2, 2018), <https://www.ftc.gov/enforcement/cases-proceedings/182-3100/readytech-corporation-matter>; *Md7, LLC*, No. C-4629 (Nov. 29, 2017), <https://www.ftc.gov/enforcement/cases-proceedings/172-3172/md7-llc>; *Tru Communication, Inc.*, No. C-4628 (Nov. 29, 2017), <https://www.ftc.gov/enforcement/cases-proceedings/172-3171/tru-communication-inc>; *Decusoft, LLC*, No. C-4630 (Nov. 29, 2017), <https://www.ftc.gov/enforcement/cases-proceedings/172-3173/decusoft-llc>; *Sentinel Labs, Inc.*, No. C-4608 (Apr. 14, 2017), <https://www.ftc.gov/enforcement/cases-proceedings/162-3250/sentinel-labs-inc>; *Vir2us, Inc.*, No. C-4609 (Apr. 14, 2017), <https://www.ftc.gov/enforcement/cases-proceedings/162-3248/vir2us-inc>; *SpyChatter, Inc.*, No. C-4614 (Apr. 14, 2017), <https://www.ftc.gov/enforcement/cases-proceedings/162->

implementing new privacy and data security laws in Latin America and Asia. And, the FTC convenes discussions on important and emerging privacy trends. For example, the agency recently hosted the 49th Asia Pacific Privacy Authorities forum in San Francisco, which addressed privacy issues such as artificial intelligence, data breach notifications, and cross-border data flows.⁶²

V. CONCLUSION

The FTC remains committed to maximizing its resources to enhance its effectiveness in protecting consumers and promoting competition, to anticipate and respond to changes in the marketplace, and to meet current and future challenges. We look forward to continuing to work with the Subcommittee and Congress, and we would be happy to answer your questions.

[3251/spychatter-inc.](https://www.ftc.gov/news-events/press-releases/2018/06/ftc-hosts-semi-annual-forum-asia-pacific-privacy-authorities)

⁶² FTC Press Release, *FTC Hosts Semi-Annual Forum for Asia Pacific Privacy Authorities* (June 27, 2018), <https://www.ftc.gov/news-events/press-releases/2018/06/ftc-hosts-semi-annual-forum-asia-pacific-privacy-authorities>.

Mr. Latta. Thank you very much for your statement.
And, Commissioner Ohlhausen, you are recognized for 5 minutes.

STATEMENT OF MAUREEN OHLHAUSEN

Ms. OHLHAUSEN. Chairman Latta, Ranking Member Schakowsky, and members of the subcommittee, I am pleased to appear before you today alongside my FTC colleagues.

I've been a commissioner for 6 years and was honored to be named Acting Chairman in January 2017 and to serve in that capacity until May 2018.

Having a leadership role at the FTC provides a unique insight into the vital protections the agency provides for the American consumer and I am proud of the work that we'll discuss in today's hearing.

Although the FTC has many accomplishments, I will limit my remarks today to two areas: process reforms and competition enforcement.

First, process reforms. In April 2017, I directed the FTC's Bureau of Consumer Protection to identify ways we could streamline our civil investigative demands, or CIDs, which are the agency's version of administrative subpoenas. This initiative was in part in response to concerns raised by members of Congress that FTC investigations often imposed undue burdens on legitimate companies.

Now, of course, the FTC must remain an effective and aggressive protector of the American consumer. That is our primary mission. But we should also look for ways to be more efficient.

These CID reforms have been in effect for a year and I believe the agency has successfully navigated making the CID process friendlier to legitimate businesses without sacrificing our effectiveness. For example, one difficulty for small business is wading through pages of legalese. To lighten this burden, the FTC now includes a plain language description of the CID process in every CID we issue and we've posted FAQs for small businesses on our website to help them.

We are also being more selective about the time frame for requested documents or information. Obviously, the broader the time frame the greater the burden on companies.

It is now our policy where appropriate to limit the time frames in our CIDs to more recent years and, of course, when there is good cause, we will seek a broader range of documents and information. But that is now the exception, not the rule.

These are just a handful of the ways that we've reformed our CID process so that we can continue to protect consumers without placing undue burdens on legitimate companies.

And now turning briefly to competition enforcement, I would like to make just a few points. In fiscal year 2017, the FTC challenged 23 mergers and obtained remedies for consumers in 15 others, maintaining, essentially, the same merger enforcement pace during the beginning of this administration as it had during the previous one.

And the brisk pace continues in fiscal year 2018. The agency has already undertaken a number of merger challenges including Tronox, Williamson, and Otto Bock, all of which are currently in litigation.

During the 2017–2018 period, the commission also stopped three mergers when the parties abandoned them after we sued, and, in addition, Walgreen’s substantially restructured its proposed acquisition of Rite-Aid due to commission concerns.

And I would like to highlight two merger cases that focused on important points about our competition mission. Draft Kings-FanDuel was a proposed merger of two internet platforms offering so-called daily fantasy sports contests and the FTC sued to block the deal, finding that these two companies were the leading providers and that other forms of fantasy sports were inadequate substitutes.

And, importantly, the commission rejected arguments that the technology was too nascent and fast moving to be able to draw reliable conclusions, and in the face of the FTC’s challenge, the companies ultimately abandoned their transaction.

And the other case I would like to briefly mention was CDK-AutoMate, which involved two providers of specialized software used by auto dealers. Our challenge to the deal noted that the current levels of competition between the parties likely understated the competitive significance of the smaller firm.

In effect, the larger firm was buying out this promising upstart before it could grow to become a much more serious competitive threat, and in the face of the FTC’s challenge the parties abandoned their deal.

Both of these cases were big wins for U.S. consumers but they also show how the commission can use its existing authority to intervene in a factually grounded economically nuanced way, even in fast-moving high technology markets.

In addition to merger review, we also brought a number of important conduct cases including several challenging anti-competitive behavior by drug manufacturers.

And finally, our Economic Liberty Task Force, which I launched last year, has helped to spotlight unnecessary or over broad occupational licensing which often disproportionately harms those near the bottom of the economic ladder and burdens our military families.

So thank you for your time and I look forward to your questions.

Mr. Latta. And thank you very much for your testimony today.

And Commissioner Phillips, you are recognized for 5 minutes.

STATEMENT OF NOAH PHILLIPS

Mr. Phillips. Thank you.

Chairman Latta, Ranking Member Schakowsky, distinguished members of the subcommittee, thank you all for the opportunity to be before you today.

I am honored to be here with my fellow commissioners, and from our testimony I hope you see the important work that the FTC and its staff do every day on behalf of American consumers.

As you all know, our economy is increasingly globalized, digitized, and connected. These changes generate incredible opportunity but they also pose new problems for consumers such as traditional scams that now thrive online and new internet-enabled frauds, and they also raise important enforcement challenges like

the enhanced ability of scammers to act anonymously or to move their ill-gotten gains abroad and outside of our jurisdiction.

They also create roadblocks to international law enforcement cooperation. Congress has been an essential ally in this fight. In 2006, it passed the U.S. SAFE WEB Act. SAFE WEB allows the FTC to share evidence with and provide investigative assistance to foreign authorities in cases involving spam, spyware, privacy violations, and data breach.

It also confirms our authority to challenge foreign-based frauds that harm U.S. consumers or involve material conduct in the United States.

Using SAFE WEB, the FTC has worked with authorities abroad to stop illegal conduct and secure millions in judgments from fraudsters and sometimes even criminal convictions.

The FTC uses SAFE WEB authority in important international privacy cases. We collaborated with Canadian and Australian privacy authorities on the massive data breach of the Toronto-based adult dating website ashleymadison.com, and we worked again with Canadian authorities on FTC's first children's privacy and security case involving connected toys, a settlement with electronic toy manufacturer VTech Electronics under the Children's Online Privacy Protection Act.

In total, the FTC has responded to more than 125 SAFE WEB information sharing requests from 30 foreign enforcement agencies. We have issued more than 110 civil investigative demands in more than 50 investigations on behalf of foreign agencies, civil and criminal.

The FTC has collected millions of dollars in restitution for injured consumers, both foreign and domestic. SAFE WEB helps protect Americans by policing and instilling confidence in the digital economy. But it sunsets in 2020. The commission respectfully requests that Congress reauthorize this authority and eliminate the sunset provision.

Our international efforts support American business leadership in the global digital economy by enabling transatlantic data flows and protecting privacy.

As Chairman Latta rightly highlighted in his remarks, the FTC works with the Department of Commerce on three key cross-border data transfer programs including the EU-U.S. Privacy Shield.

Privacy Shield provides a legal mechanism for companies to transfer personal data from the EU to the U.S. with strong privacy protections and the FTC enforces these companies' Privacy Shield promises under Section 5 of our organic statute.

We are committed to the success of Privacy Shield and the other cross-border data transfer mechanisms. We have brought nearly 50 actions to enforce them including four under the new Privacy Shield, one announced just two weeks ago.

Privacy Shield is an important mechanism for encouraging commerce and protecting privacy. Enforcement of it is and will remain a priority for the agency.

Thank you for your time and attention and I look forward to answering any questions that you have.

Mr. Latta. Again, thank you very much for your testimony.

And Commissioner Chopra, you are recognized for 5 minutes.

STATEMENT OF ROHIT CHOPRA

Mr. CHOPRA. Chairman Latta, Ranking Member Schakowsky, and members of the subcommittee, thank you for the opportunity to testify and discuss data security and privacy.

According to survey data, 91 percent of adults believe they have lost control about how companies are collecting and using their personal information.

News reports of data breaches and disclosure of sensitive data have become routine. On the dark web, stolen credit card and Social Security numbers and social media profiles can be bought and sold.

For many Americans, the situation seems hopeless and they feel powerless, and Washington cannot be sitting on the sidelines. We must confront the risks to our economy, our society, and national security of inadequate data security and privacy, and the cost of inaction is growing.

According to an industry study, over 15 million Americans were a victim of identity theft in some form in 2016, leading to \$16 billion of losses. The majority of these Americans had their records accessed in a data breach in the years prior to their identity theft. When we talk about data security in Washington we typically focus on protecting power grids, payment networks, and other critical infrastructure to avoid a crippling attack.

But we also know that the infiltration of commercial holdings of consumer data can also cause chaos. Large-scale breaches of unencrypted data are increasing these risks and we must do more to secure personal data from falling into the wrong hands.

Chairman Simons is right. The FTC cracks down on illegal practices whenever we can. But I think our existing toolkit won't do the trick. In too many situations, our resolution is to tell a lawbreaking company to simply stop breaking the law.

To truly make a difference when it comes to data protection we need the ability to deter misconduct through financial penalties and sensible safeguards that can evolve with the marketplace and when it comes to privacy the United States should lead.

New privacy protections from Europe and California are advancing but we shouldn't feel we have to simply copy and paste. We should be leading. I believe privacy and competition can go hand in hand, especially when consumers can access their data in portable and interoperable formats.

We can increase privacy protections without crowning corporate royalty. We don't need to start from scratch either. Congress can build upon existing privacy laws such as the Children's Online Privacy Protection Act.

Twenty years ago, incumbents warned that this bipartisan effort to protect children online would end in utter disaster for our information economy and, boy, were they wrong.

COPPA has common sense ideas. Data collected for one purpose shouldn't be used for another purpose without your permission. You should have the ability to review the information collected about you.

Companies should be up front and honest about who they're sharing your data with and strong protections should be backed by

an enforcement regime that can hold companies and their operators accountable.

Over the past decade, the FTC has produced scores of studies and reports but now it is time for Congress to act. I am confident that if Congress entrusts the Federal Trade Commission with the authority and resources to do more to protect families and businesses, we will deploy them efficiently and effectively while continuing to promote a dynamic digital economy that truly benefits all of us.

Thank you.

Mr. Latta. And thank you very much for your testimony.

And Commissioner Slaughter, you are recognized for 5 minutes for your opening statement.

STATEMENT OF REBECCA SLAUGHTER

Ms. Slaughter. Thank you, Chairman Latta, Ranking Member Schakowsky, and members of the subcommittee. Thank you for inviting all of us here today.

I would like to use my oral remarks to highlight the critical work the commission does to protect American consumers from fraud and from illegal robocalls. I also want to draw attention to the resource challenges of the commission.

Although it sometimes grabs fewer headlines, fighting fraud is a central part of the FTC's consumer protection mission. The commission routinely tracks down and stops some of the worst scams, often targeting consumers who can least afford to lose money, including the elderly, members of the military, students burdened by debt, and small businesses.

The FTC takes the lead on important initiatives to shut down fraudsters and joins with our Federal, State, and international law enforcement partners. Some recent examples of these initiatives include Operation Tech Trap, a crackdown on tech support scams. Another example was Operation Game of Loans, where we led the first Federal and State coordinated action targeting 36 student loan debt relief scams. And just last month, we announced Operation Main Street, an effort to stop small business scams.

The agency has also been at the forefront of addressing deceptive moneymaking frauds involving crypto currencies, bringing enforcement action and hosting a workshop to explore house scammers or exploiting public interest in crypto currency and how to empower and protect consumers against the growing threat of exploitation. This is an area we must continue to monitor closely including working with stakeholders who don't traditionally engage with the FTC.

On robocalls, few things unite Americans more than their outrage over illegal robocalls and I include myself among the outraged. The FTC uses every tool at its disposal to stop illegal calls. We've brought 137 cases targeting over 800 individuals and companies responsible for billions of illegal calls to U.S. consumers and we've collected over \$120 million in judgments.

But, as anyone with a phone knows, the problem persists. While our aggressive law enforcement efforts will continue, we know that the explosion in illegal calls stems from technological developments in the calling landscape.

Law violators can now place endless streams of calls for a fraction of a cent and too often the criminals behind some of the worst calling scams are located abroad, beyond the immediate reach of a civil law enforcement agency.

Technological problems need technological solutions. The FTC has been a leader in pushing industry to develop those solutions, helping to spur providers and third parties into offering call-blocking options. However, the best long-term solution is to empower and expect providers to deploy solutions at the network level that will reach every consumer.

Effective blocking tools to stop spam should be available to all consumers using every kind of phone system and carriers should have both the right and the responsibility to keep their systems clear of unwanted calls.

The FTC is currently limited in its ability to address failures on the part of providers as a result of the common carrier exemption to our jurisdiction. Some carriers know or have every reason to know that they are passing along illegal or even fraudulent calls but they are beyond our reach. Speaking as a consumer as well as an enforcement official, I share the public outrage at robocalls and I am eager to work with Congress to empower the FTC to do even more to combat this profound nuisance.

Finally, I would like to say a word about our resources. The FTC works tirelessly to protect consumers and advance competition in an increasingly technical, digital, and sophisticated marketplace.

Consumers rightly look to the FTC to address evolving challenges and one of my top priorities is to make sure that we meet those expectations successfully. We have excellent expert experienced staff who want nothing more than to hold lawbreakers accountable. We leverage them as effectively as possible. But we have more cases to bring every day. Those cases have become more complex both legally and technologically and they involve defendants with deep pockets and armies of attorneys.

Our budget has not kept pace with these developments. To wit, we had more full time employees in the Reagan administration than we do today. It is critical that the FTC have sufficient resources to support its work, particularly as demands for enforcement in so many complex areas continue to grow.

In addition to sufficient resources, as several of my colleagues have noted, sufficient authority is critical for the FTC to continue to meet the demands of the 21st century marketplace.

Repeal of the common carrier exemption, APA rulemaking authority, and related civil penalty authority would each go a long way to help the FTC better meet today's challenges as well as tomorrow's.

Thank you, and I look forward to taking your questions.

Mr. LATTA. Thank you very much for your testimony today and I, again, thank all the commissioners for being with us today and I will start the questioning with 5 minutes.

And Chairman Simons, if I could start with you. You bring very strong anti-trust credentials to the FTC, previously serving as head of the Bureau of Competition.

One of the priority issues of the subcommittee is the consumer protection jurisdiction enforcement activities of the FTC and I

noted in your opening remarks you talked about especially enforcement on IoT—I sponsored legislation with the gentleman from Vermont and on the Internet of Things.

But we also, in the last Congress, had the working group. So Internet of Things is something that we are very concerned about.

With recent headlines highlighting the open investigations of Equifax and Facebook, which I know you can't comment on, and the Eleventh Circuit recent decision highlighting the unenforceable order of LabMD data security case, how would you describe your general approach to consumer protection enforcement?

Mr. SIMONS. Our mantra is vigorous enforcement, Chairman.

So that's what we are all about. We are about protecting the consumer and vigorous enforcement. In addition, we are very active in terms of not only trying to create a disincentive for the bad guys to do the wrong thing, but in addition, to educate consumers and small businesses and businesses generally to make sure they do the right thing.

So very enforcement oriented, very vigorous, and across the board. One of the things you probably noticed from the remarks of the commissioners was that it was spread out in terms of different subject matters and that was not by accident.

So we are aggressive across the board whether it's data security, privacy, all kinds of different fraud across the board.

Mr. LATTA. OK. Let me follow up. You mentioned on the civil penalty authority the FTC doesn't have the civil penalty authority today to enforce initial violation of the safeguards rule that covers companies like Equifax.

Would you support civil penalty authority to enforce the safeguards rule?

Mr. SIMONS. Yes.

Mr. LATTA. OK. Thank you.

Would you like to follow up on that?

[Laughter.]

Mr. SIMONS. Yes. Sure.

So one of the problems that we have is we are able to show in these cases that there is sufficient harm to show a violation under the statute. But in terms of our monetary remedial authority and showing damage from any particular breach and tracing it to that specific breach is very difficult.

So it really hinders our ability to seek a significant monetary penalty and monetary relief and to create a sufficient deterrence so that conduct doesn't occur in the future.

Mr. LATTA. Let me follow up with another question to you. I was listening when you were talking about your announcement of the series of public hearings this year on the 21st century challenges to the economy and I also commend you and the commission for taking a thoughtful approach to examining whether the current legal, economic, and technological predicates—warrants adjustment to competition and consumer protection policy.

Would you share your goals for the hearing including efforts to update the agency's research and policy function or to set the foundation for enforcement actions in policy agenda setting?

Mr. SIMONS. So we are conducting these hearings with a broad range of participants from all over the spectrum of thoughts and

ideas and so we are going in with an open mind and we are not expecting any particular outcome. But potential outcomes would be things that would involve, for example, amending our horizontal merger guidelines, drafting potentially new vertical merger guidelines.

We are going to also look at privacy and data security and maybe we'll come out with strong suggestions there as to how to move forward maybe along the lines of Commissioner Chopra's suggestions a minute ago.

So it's really quite wide open. Last time that hearings of this nature were conducted there were substantial action items coming out of those hearings. This was done by then Chairman Robert Pitofsky, and one of the main things that came out of that was amendments to the merger guidelines relating to efficiencies.

There was also a lot of work done on the intellectual property area. And so our goal is to try to be as effective in these hearings as Chairman Pitofsky was in his hearings.

Mr. LATTI. Well, thank you very much, and my time is about to expire so I am going to yield back and recognize the gentlelady from Illinois, the ranking member of the subcommittee for 5 minutes.

Ms. SCHAKOWSKY. Thank you.

Let me just say I've been a long-term consumer advocate since I was a very young woman. So I have a special place in my heart for the Federal Trade Commission and I want to ask about your authorities.

Most agencies issue regulations under the Administrative Procedures Act, which sets out notice and public comment procedures for issuing regulations. But unless granted APA rulemaking authority for specific issues by Congress, the FTC issues rules under a different law, which provides more burdensome procedures and makes it more difficult for the commission to issue rules.

So I wanted to ask you, Mr. Chairman, do you agree that the FTC currently is limited and, an example I think you gave in a meeting could not write rules like the open internet rules written by the FCC?

Mr. SIMONS. So I generally do agree with your characterization of a rulemaking authority. So our general rulemaking authority is under the Magnuson-Moss Act and it is considerably more burdensome than the Administrative Procedure Act. So I agree with that completely.

In terms of your question about the net neutrality rule, I don't think that we could adopt exactly the same rule, and if we were to try to do it under Magnuson-Moss, like you said, it would be pretty time consuming.

However, what we normally do is we bring enforcement actions and our sense is that those actually accomplish pretty much the same thing. By doing.

Ms. SCHAKOWSKY. I wanted to ask about that. It says without effective rulemaking authority, the FCC has focused its efforts on law enforcement, and we've heard a number of really positive examples.

But it seems to me the enforcement only approach is not as effective as when legal standards are supported by agency rulemaking.

Mr. SIMONS. I think a mix, depending on the circumstance of rulemaking and enforcement, could be optimal.

Ms. SCHAKOWSKY. So, this issue has come up often in this committee's discussion of data breach legislation. Previous commissions have supported APA rulemaking authority for data security and breach notification.

Ranking Member Pallone and I have introduced a bill—I mentioned it in my opening statement—3896, the Secure and Protect America's Data Act—that would require companies to have reasonable data security and notify consumers in a reasonable time when breaches occur.

So to the whole panel, our bill would give the FTC authority to write rules on data security and breach notification using APA rulemaking and I would just like to go down the row and see if you would support that.

Mr. SIMONS. Yes. Without commenting on the specifics of your bill I certainly support in concept what you're suggesting.

Ms. SCHAKOWSKY. OK.

Ms. OHLHAUSEN. As I have previously supported data security and breach notification legislation, I would also support it without supporting particular details.

Ms. SCHAKOWSKY. I understand. Right. Thank you.

Mr. Phillips.

Mr. PHILLIPS. I too support legislation, Congresswoman. I have not yet formed an opinion with respect to particular rulemakings. One of the things I look forward to in our upcoming hearings that the chairman has announced is the fact that we are going to be doing a careful study of the remedies available to us and I look forward to learning from those.

Mr. CHOPRA. Yes, and I would add that the development of rules is a much more participatory process than individual enforcement actions and it also gives clear notice to the marketplace rather than being surprised, and I think it would be a good idea.

Ms. SCHAKOWSKY. Good point. Yes.

Ms. SLAUGHTER. Yes. Like my colleagues, I haven't studied your particular bill. But as you describe it, it's something that I would very much support.

Ms. SCHAKOWSKY. Let me just say, the word partner came up a good deal in various testimonies, both on the committee and on the panel, and I hope that we can use that approach.

Chairman Simons, if the FTC had APA rulemaking authority now, would you direct staff to begin the rulemaking process for data security and breach notification?

Mr. SIMONS. Sure. Yes.

Ms. SCHAKOWSKY. OK. Even though FTC's current rulemaking procedures are burdensome, couldn't the FTC issue an advanced notice of proposed rulemaking or a notice of inquiry to collect data and get the process started now?

Mr. SIMONS. We could certainly start a rulemaking under Mag-Moss. It would just, you know, be time consuming and really resource intensive and so there's an issue about whether we want to start that, not knowing whether we could finish it under—

Ms. SCHAKOWSKY. If I could just have a couple more seconds. We've had these high-profile hearings from Equifax, Zuckerberg was sitting in that chair, as the chairman mentioned.

And yet, we really have not moved forward, I think, in doing something about these data breaches and the mistakes that have been made. I really look forward to working with you and meeting with all of you.

Thank you.

Mr. LATTA. Thank you very much. The gentlelady's time has expired and the chair now recognizes the gentleman from Oregon, the chairman of the full committee, for 5 minutes.

Mr. WALDEN. Thank you, Mr. Chairman, and I want to thank you for your leadership in this area on data breach, data security, and all—I think you have had, what, four roundtables including one yesterday, I think, with how many participants? Thirty-eight?

Yes, we know this is pretty complicated. If there were an easy answer we'd all do it because, I think of my colleague from Illinois, Ms. Schakowsky, said, she worries about her data being breached by Equifax.

I don't think you have to worry. I think it is.

[Laughter.]

I think the worry part is gone and that's the tragedy of it all is we don't have control over our data and we have laws on the books in some cases. Companies have trust obligations in other cases and they don't have the security in most cases, and so it is something we are all concerned about as consumers and as policy makers and enforcers.

And so it's something this committee is very concerned about and, as I say, we've been trying to find if there's an eye in that needle to thread legislation to get to data notification. Hold people accountable and we are closing in on it.

And, like others on the committee, I think we are all consumers and I care deeply about putting the consumer first. That's been part of my mantra as chairman of the committee, because if you do that you have competitive markets. You have innovation and you have price competition and you have choice and consumers benefit.

And, Ms. Slaughter, your comment about robocalls I am fully in agreement with. I remember when pop-up ads were a nuisance. I tongue-in-cheek suggested death penalty for those people, because you couldn't do anything on your computer. You had bazillions of these pop-up ads.

We had a hearing on robocalls and the private sector—the technology sector is being pretty inventive and one of the witnesses has an app that they market—I won't promote a particular one—but it actually figures out how to answer the call and then pretends to be real and keeps the caller on the line for half an hour.

I love that kind of thing. Run their bill up, drive them crazy. And so, we have a lot of young kids out there with brilliant minds that can develop these apps and help us in this endeavor. But one of the big challenges, of course, is a lot of this stuff is overseas and hard even for you or for us or anybody to get their hands around. Boy, we'd have our hands around their necks.

So, Chairman Simons, what role to do you believe anti-trust plays with respect to consumer protection? Give us your thoughts on that as the chairman. Try—yes.

Mr. SIMONS. It's similar, Mr. Chairman, to what you just suggested. So the more competition, the more likely it is the consumer is going to be benefited, and what goes hand in hand is that competition and consumer protection in terms of nondeceptive information in the marketplace, an efficient advertising market, those are things that make firms compete stronger and it drives competition.

So we want to have those two things. We want to have vigorous competition. We want to make sure that firms are not behaving anti-competitively and at the same time we want to make sure that consumers have the information that is necessary for them to make the right decisions and right choices in the marketplace.

Mr. WALDEN. And with this emerging digital economy that's, well, fully underway but, it's emerging every day there's something new, you see we have legacy rules.

We have industries that are built upon those and then you have a new entrant into the market and then you have consolidation and mergers and people trying to compete. So what questions are you most focused on regarding the changing digital nature of the U.S. economy during your public hearings.

Mr. SIMONS. We are focused on a very broad range of things, everything from whether the consumer welfare standard—which has been the consensus standard for the last 20 or 30 years—whether that needs to be changed or not, whether the way we have done merger analysis in the past 20 or 30 years has been appropriate, whether that's been too lax.

And then we are also focused on the consumer protection side, particularly in terms of privacy and data security. As I mentioned in my oral remarks that we are very focused on is the potential tradeoff between privacy on the one hand and data security on the one hand and competition on the other hand.

Mr. WALDEN. Right.

Mr. SIMONS. We are a little nervous that if you do privacy in the wrong way, have it go too far in one direction that you might end up reducing competition.

You might create a situation in which you entrench the large tech platforms, for example. You make it very difficult, because the advertising market becomes, potentially, much less efficient. You make it much more difficult for new entrants and smaller firms to get the attention of the consumers that they're trying to reach.

In fact, one of the things that I saw very recently after the effective date of the GDPR was an article in the Wall Street Journal that reported that they could already see that advertising was moving to the Google platform over in Europe and so that's something we are very conscious of and we want to be very careful about.

And when Congress thinks about these things in legislation, this is something that my recommendation would be you think carefully about to strike the right balance.

Mr. WALDEN. And I know I am over, but that's exactly the conundrum we are in is finding that right balance because you have just a couple of platforms that dominate in the online advertising world today.

So you want that competition but you don't want to do something that actually enhances their dominance, if you will. So I appreciate that.

And I yield back.

Mr. LATTA. Thank you very much. The gentleman yields back.

The chair now recognizes the gentleman from New Jersey, the ranking member of the full committee for 5 minutes.

Mr. PALLONE. Thank you, Mr. Chairman.

Much of the FTC's consumer protection enforcement actions are brought under Section 5 of the FTC Act, which prohibits unfair and deceptive acts or practices, and the remedies available for these cases are limited. The FTC can only seek an injunction in conditions which most often come in consent decrees. It can seek civil penalties for first violations.

And I know, Chairman Simons, you mentioned already today that you support giving the FTC authority to seek civil penalties for first violations when companies fail to maintain reasonable data security.

How would that tool help the FTC's efforts to protect consumers from data breaches?

Mr. SIMONS. Thank you, Congressman.

So what that would do is that would enable us to impose a sufficient monetary penalty that would incentivize companies to better protect data.

As you have said and as others have said, if what is going on in terms of our enforcement authority is that we can only get an injunction that just says, sin no more, then that's much less of a deterrent than if we could get monetary penalties that would actually cause the business to think through how it's conducting its business and what it's doing in terms of security and privacy.

Mr. PALLONE. Now, to clarify, when the FTC does have authority to seek civil penalties, it's still up to the FTC to decide whether to even ask for those penalties and how much those penalties should be, correct?

Mr. SIMONS. I am sorry. Could you repeat that?

Mr. PALLONE. When the FTC does have authority to seek civil penalties, it's still up to you to decide whether to even ask for those penalties and how much those penalties should be, correct?

Mr. SIMONS. Yes.

Mr. PALLONE. OK. So do you think that civil penalty authority would be beneficial for FTC's privacy cases as well?

Mr. SIMONS. That's something I think we should explore. I don't have a view on that yet. Maybe something will come out of the hearings that we are going to conduct in the fall that will inform our views.

Mr. PALLONE. I appreciate your having those hearings in the fall, too. I think it's great that you're doing that.

What about the other Section 5 violations? Would you support legislation giving the FTC civil penalty authority for other enforcement actions?

Mr. SIMONS. So other enforcement actions, I think, are a little different in the sense—like, fraud, for example. Even though we are going under our Section 5 authority that provides for injunctive relief, as part—what's ancillary to injunctive relief is the ability to

get restitution and disgorgement, and those can serve as significant deterrent effects.

So with respect to fraud, that's something that where our existing authority probably is sufficient. But with data security and privacy, it just becomes very hard to prove the extent of damage to any specific —

Mr. PALLONE. I am thinking of robocalls, which I know we discussed. Do you see that as different? Like if, you know—

Mr. SIMONS. Well, we have a rule and so we can get civil penalties for violations of the robocall, the marketing and sales.

Mr. PALLONE. OK.

Mr. CHOPRA. Congressman, under our statute, we are able to ask a court for civil penalties in the case where there's a rule on the books or when there's a violation of an order, generally speaking.

So when we do have a rule on the books, it is easier, even on the first defense, we are able to ask a court for civil penalty. That's one of the reasons why rulemaking also could increase deterrence as well.

Mr. PALLONE. All right.

Well, now, let me just say one more thing. I wanted to ask you about the Uber settlement. FTC recently announced an expanded settlement with Uber, and while the FTC was in the process of negotiating a settlement with Uber, making deceptive privacy and data security claims, FTC learned that Uber failed to disclose another significant breach of the customers' data, which Commissioner Ohlhausen called strikingly similar.

So just quickly, Chairman Simons, the expanded settlement with Uber includes some additional requirements but does not include civil penalties.

Why couldn't the FTC seek civil penalties related to the second data breach?

Mr. SIMONS. We would have to show that that was a violation of a preexisting order.

Mr. PALLONE. OK.

Mr. SIMONS. There was no preexisting order.

Mr. PALLONE. But FTC found that Uber twice committed misconduct but still couldn't impose fines? Maybe I will go back to Commissioner Chopra.

Do you think this situation is sufficient to stop repeat offenders in the case of Uber?

Mr. CHOPRA. Well, my understanding of the Uber resolution was that the order was modified based on conduct that was not a direct violation of the original order, and this is what I am talking about.

Our limitations on obtaining civil penalties are when there's a rule violation or a violation of an order itself. So I, of course, and I think all of us want to make sure that FTC orders are followed and if they are not followed we will seek all appropriate relief we should.

But the question you're raising about whether on a first offense there should be penalties, I think that in order to deter misconduct we need to consider when it's appropriate that even on a first offense the lack of penalties may not serve as adequate deterrence.

Mr. PALLONE. All right. Thanks so much.

Thank you, Mr. Chairman.

Mr. LATTA. Thank you. The gentleman's time has expired.

The chair now recognizes the vice chairman of the subcommittee, the gentleman from Illinois, for 5 minutes.

Mr. KINZINGER. Well, thank you, Chairman, for yielding and I thank you all for being here today and taking some time and everything you do for the country.

Commissioner Ohlhausen, the commission's website states that the FTC protects consumers by stopping unfair, deceptive, or fraudulent practices in the marketplace.

I want to ask you a rudimentary and kind of direct question. Do you think a private company should ever be compelled to provide inaccurate information to consumers that deceptive or could impact the marketplace?

Ms. OHLHAUSEN. I would certainly be concerned about any company providing inaccurate information to consumers, whether they did it voluntarily or were required to do so.

Mr. KINZINGER. OK.

Commissioner Ohlhausen, crypto currency scams have been fertile ground for scammers since the value of bitcoin and other tokens skyrocketed in value at the end of 2017, bringing with it rising interest in raising capital for startups via initial coin offerings.

Last Congress, I worked with Representative Cardenas to pass Resolution 835 through the House highlighting the importance of improving consumer access to financial technology tools.

Besides the recent workshop on crypto currency scams, what more is the FTC doing to target things like deceptive investment opportunities and focussed mining operations?

Ms. OHLHAUSEN. So we actually have brought two cases involving crypto currency to enforcement actions where there were deceptive representations to consumers and we also have a long history of bringing, at different times, enforcement actions against deceptive promises about precious metals.

Mr. KINZINGER. And is that getting enough public attention, do you think, or should it get more and how?

Ms. OHLHAUSEN. We are always happy to get more public attention and interested in ways to find that out.

Mr. KINZINGER. Sometimes you have to compete for bandwidth in the media.

The goal of the U.S.—and I will ask each of you this question—the goal of the EU-U.S. Privacy Shield is to protect personal data and enable the flow of transatlantic data.

Without this framework, companies on both sides of the Atlantic would face grave uncertainty and serious limitations on their ability to conduct business overseas.

So for each of you, yes or no—do you pledge support for Privacy Shield and commitment to enforce the framework?

Mr. SIMONS. Absolutely.

Ms. OHLHAUSEN. Yes.

Mr. PHILLIPS. Absolutely.

Mr. CHOPRA. Yes.

Ms. SLAUGHTER. Yes.

Mr. KINZINGER. Good. It's easy.

And Chairman Simons, the calendar years 2015 and 2017 and the first quarter of 2018 all broke records for merger and acquisi-

tion activity. In the first quarter of 2018, for instance, the merger activity increased 67 percent year over year.

Researchers found that economic concentration has increased in many or most economic sectors. At the same time, researchers have found that entrepreneurs are not starting new businesses at a rate sufficient to overcome business closings.

Do you think that increase in concentration is cause for concern or evidence of declining competition in the U.S. economy?

Mr. SIMONS. Thank you, Congressman.

So that is one of the main focuses of the hearings that we are going to have in the fall. Precisely that concern is one of the things that we want to get testimony about and take comments on.

Mr. KINZINGER. You will be in a better position, you think, to comment after all that?

Mr. SIMONS. Yes. In other words, it's an important focus of the hearings because, based on what we see in terms of the economic literature and otherwise, there's enough out there to be concerned that those things are really problematic.

Mr. KINZINGER. Do you see any correlation between rising concentration and declining rates of new firm formation?

Mr. SIMONS. Not specifically. Some of the material that you're probably citing relates to broad industry categories.

So, for example, you might have—and the categories could be national. And so if what you have in the marketplace is you have chains who are becoming more pervasive in displacing local companies.

The local concentration might not be changing at all. But the national concentration is, and for anti-trust purposes in those types of markets it would probably be the local concentration that you'd want to worry about.

So there might be some other issues going on. But our job or our intent is to kind of figure that out.

Mr. KINZINGER. Thank you. And the last question for you—two companies, Google and Apple, together dominate the market for mobile operating systems, accounting for 99 percent of the market for smartphones in the United States, and you have seen the news, I am sure, this morning that the EU is set to fine Google \$5 billion anti-trust for the way it bundles its apps on Android smartphones and tablets.

The question is what, if any, competitive discipline exists in such a highly concentrated market?

Mr. SIMONS. So there's the two of them so they compete pretty heavily against each other. So that's one level of competition.

But I have to agree with you, it's concentrated. So, it's not like commodities in the Midwest or whatever. It's, obviously, very fragmented. This is a concentrated industry and this is an industry, as I've said before, what we do in the anti-trust world is most of the problematic conduct occurs where firms are big and have market power and that's where we look. And so this is one of the places we would focus on.

Mr. KINZINGER. OK. Thank you. I yield back.

Mr. LATTI. Thank you very much. The gentleman's time has expired.

And the chair now recognizes the gentleman from Vermont for 5 minutes.

Mr. WELCH. Thank you, Mr. Chairman.

I've got 5 minutes, so I want to go through this quickly.

First, I want to say congratulations to each of you. I've read all your resumes. You people are smart, and in addition to that, you have got a record of public service and it demonstrates you're not only smart but you actually want to use your talent for the public good, and I just want to say to you that I think serving on the FTC at this time is incredibly important.

I think a lot of working Americans are being squeezed at one end because wages aren't going up and, at the other end, because what Mr. Kinzinger was talking about, incredible pricing power as a result of anti-competitive practices, and that is so essential that you stand up for the American consumer.

So you're 3-2. But I hope you're 5-0 in asserting the need to have a very strong FTC to help working Americans. So thank you.

I want to talk about a couple of things. One, in April, a bipartisan group of my colleagues including on this subcommittee Congressman Jeff Duncan and I wrote to you about the technological changes taking place in mobile commerce.

And we think it's important for the FTC and the Department of Justice to be vigilant to make sure that incumbent businesses with existing payment technologies don't use that market position to block innovations and developments by potential competitors.

And I appreciate it very much the commission's response to our letter where you indicated that you'd look closely at the payment standard setting process and your assurance that the commission will take appropriate action against any act or practice in the mobile payments marketplace that violates any of these statutes that you enforce.

And I would like to submit for the record if I could, Mr. Chairman, our letter—these letters.

I want to ask you, Chairman Simons, with our mutual goal of detecting and remedying any practice that may harm competition and consumers, can you share what you have done to date on the issues we raised in our letter to protect competition and innovation and, quickly, if you can.

Mr. SIMONS. Yes. Sure.

So standard setting, which is what you're describing is a really important thing in our economy. It can be useful for great numbers of efficiencies. As you can tell, the payment system itself is very interoperable.

There's a bunch of different players in it and they have to interoperate. It's all the banks, the credit card companies, and all the merchants, of course.

And so it's really important that that function but it's also possible that those types of organizations can be used for anti-competitive purposes and we've had cases involving anti-competitive activity in standard-setting bodies. And so we are focused on that.

Mr. WELCH. Thank you. Let me go on to my next question.

And I was pleased to see just yesterday that the FTC issued a statement to Health and Human Services in response to the HHS request for public comment on lowering drug prices and out-of-

pocket costs, which laid out the commission's concerns with pharma companies abusing the REMS program to prevent generic competition.

The commission comments really captured the issue perfectly and I can read it. The REMS program can protect the public from pharma abuse but they can also be misused to disrupt competition and innovation, and you go on to say the FTC supports regulatory and legislative actions aimed at correcting the misuse of REMS programs.

I believe that's exactly right and I want to thank you for that. Chairman Simons, as we continue to consider the FAST Generics Act and the CREATES Act, how can Congress deter the current abuses and delays by brand manufacturers, instead, motivate them to provide generics with access to samples in a timely way?

Mr. SIMONS. So without giving a view on the precise specifications in the act and the legislation you're describing, we are very supportive of this issue.

Mr. WELCH. OK. Let me interject because I just have a few seconds left.

Mr. SIMONS. OK. Sorry.

Mr. WELCH. But thank you, and I appreciated the FTC letter.

Another issue that's come to my attention is that web browsers are considering the changes to the user interface that consumers see on their screens.

Specifically, in the coming months consumers who are already wrestling with how best to protect themselves will potentially be provided with less information about the security of the website they are using at any given time.

We should be working together to provide consumers with that information. Is this potential change to consumers' web browsing experience something that the commission is aware of? That's the security label at the top.

If so, I would ask the commission to keep consumers and this committee updated on the impact of that potential change. And I am out of time, so it ends up as a statement, not a question.

But, again, Mr. Chairman, I want to thank you. I think your institution, your agency, is so, so vital. I hope you find a way better than sometimes we find a way to work together to get to an outcome that will be durable and helpful to the American people.

We thank you.

Mr. LATTA. Thank you very much. The gentleman's time has expired and the chair now recognizes the gentleman from Texas, the chairman of the Health Subcommittee of the full committee for 5 minutes.

Mr. BURGESS. Thank you, Mr. Chairman, and I appreciate our commissioners being here. This is always a good day when we have all of our commissioners in front of the committee.

Chairman Simons, you began your testimony stating that Section 5 is an imperfect tool and, granted it is. But it's the tool that we have.

Still, after years of studying the LabMD case, and I realize that most of you were not even born when that case started, and I also understand that it's—although there was a recent Eleventh Circuit decision, I am certain it's not settled yet. But here in the aftermath

of that, the business had arguably had a good business plan and was competently run.

But because of a breach that occurred in technology that was really poorly understood years ago, now this business is no more and the people that were involved have, obviously, suffered significant harm.

And, really, my question is, is this a learning process as we look back? And I know you can't talk about the specifics of the case because I do understand that it's still in litigation.

But it's been a hard one as I've watched for the last 10, 15 years in Congress. I practiced medicine before then so I certainly understand that yes, you can have somebody in your front office do something on a computer that puts some data at risk.

But in the absence of harm, to do this much violence to the business plan and the business model seems a little bit over the top. I just wondered, is this an ongoing process that you're learning about this imperfect tool?

Mr. SIMONS. Sure. One of the things the FTC does is it has a good history of engaging in self-critical examination.

So, first of all, let me say that, of course, we never intentionally tried to put legitimate businesses out of business.

We try to get them to comply with the law and not drive them from the market. That's bad for competition, which is the other side of our mission. So we really don't want to do that.

And then the other thing I will say is that we do engage in self-critical examination, even outside these public hearings. We do it internally, and so one of the things that we've got going on is a task force on how we do our orders, and so that's relevant to the LabMD decision.

Mr. BURGESS. It's reassuring to know that. Again, history is history and what has happened has happened and none of us can undo that. But I am grateful to hear that.

Let me ask a question on robocalls because man, they are a nuisance, and at our house we have three cell phones and they can all ring simultaneously with the same identifying number from a town called Mexia, Texas, which is a small little town between Waco and Dallas. I don't know if it really did originate from there, and they're all selling, well, there was a hailstorm in your community and we are in the neighborhood and we thought we'd come by and check your roof for you. But three simultaneous calls come at the exact same time. It just doesn't seem reasonable that that that's one person doing that. Is there recourse for the consumer at this point?

I know we've passed do not call laws. In this committee, we've passed anti-spoofing laws. Is there recourse for the consumer? Should I have them call your 800 number? What is the next step?

Mr. SIMONS. So one of the things—I am sorry, was that directed to—

Mr. BURGESS. Well, anyone can answer. Ms. Slaughter brought it up but, Chairman, you're welcome to answer as well.

Mr. SIMONS. Well, I don't want to hog the attention. So if anyone else would like to answer please go ahead.

Ms. SLAUGHTER. Thank you for the question. I think we probably are all on the same page about this. So you could hear a similar answer from any of us. It is enormously frustrating for consumers.

It is just endlessly frustrating, and I can't tell you, sitting here, whether those three calls originated really from Texas or not.

The challenge for us that I outlined a little bit in my testimony is that many of the people orchestrating these calls and orchestrating these schemes are overseas and hide behind spoofing technology.

Mr. BURGESS. So the next step for the consumer that gets these calls what should we tell them?

Ms. SLAUGHTER. Right now, the technological solutions that the FTC has helped push into the marketplace can be among the most helpful that identify calls as fake or robocalls when they come into your phone and block them.

Chairman Walden talked about one such example. But I think looking at larger scale solutions that can be implemented across network levels is an important thing.

Mr. BURGESS. And it's a longer discussion. I am going to submit some questions for the record. But the issue of consolidation in the health care industry and when I was in practice back in the late '80s I worried that there was going to be a single payer health care system and it was going to be called Aetna.

And now the corner drug store is buying Aetna. So it is a cause of some concern for those of us who sit on this committee.

We've had hearings on it. I will have some specific questions for you on that and I would appreciate your attention to that.

Thank you.

Mr. LATTA. Thank you very much. The gentleman's time has expired, and the chair now recognizes the gentleman from Massachusetts for 5 minutes.

Mr. KENNEDY. Thank you, Chairman. I want to thank everybody for coming and testifying this morning, and helpful information has been provided and I appreciate all of your service.

I wanted to touch a little bit on some of the focus of a number of hearings that we've had on this committee over the course of the past year or so with regards to internet and internet companies.

So following the revelations of Facebook's data sharing practices with third parties, specifically for third party app developers, which led to Facebook users ending or data ending up with Cambridge Analytica, there was a lot of discussion around the FTC's 2011 consent decree with Facebook.

That consent decree was entered into following Facebook's earlier failure to notify its customers of its data sharing policies and the recent Cambridge Analytica issue appears very similar.

Chairman, I am not going to ask you details. I imagine you're not going to get into the details of an investigation. But I believe you have confirmed that the FTC is investigating whether Facebook violated its consent decree. Is that right?

Mr. SIMONS. Yes, that's correct.

Mr. KENNEDY. And so, sir, under the consent decree Facebook was required to get biennial independent audits certifying that it has in fact a privacy program in place that meets or exceeds their

requirements of the FTC order and to ensure that the privacy of consumers' information is protected.

Given that requirement, it's a bit troubling to see that the FTC didn't discover the Cambridge Analytica issue earlier. So, again, I know you're not going to discuss the ongoing investigation.

But this is a circumstance in which the FTC is investigating the acts of a company that is subject to a consent decree.

Is the investigation limited to whether the consent decree was violated or with the FTC also consider whether there were new unfair deceptive practices?

Mr. SIMONS. Thank you, Congressman.

Like you said, it is an ongoing investigation. We publically announced that. But what we can't do is we can't discuss the particulars of the investigation itself.

And so I am sorry, but I can't comment on that.

Mr. KENNEDY. OK.

Mr. CHOPRA. Congressman Kennedy, though, I just want to add, FTC orders typically do not preclude the agency from investigating conduct outside of those orders. So if you reviewed the wide swath of orders that we have entered into over the years, we typically do not handcuff ourself to the four quarters.

Mr. KENNEDY. So just the four quarters of the scope of that. Thank you. I appreciate that, Commissioner.

So to reiterate a couple of the points that were made earlier, if new unfair deceptive practices are in fact found, a repeat offender could then be subject to civil penalties for those violations. Is that correct?

Mr. SIMONS. Yes.

Mr. KENNEDY. So thank you. I also want to understand whether the FTC takes into account public statements made by those companies. Commissioner, you might have just touched on this point.

But Facebook has made public statements that it's investigating all third party apps to determine if there was in fact misuse of users' information.

Contrary to that statement, though, it's also been reported that Facebook has not even been able to access data regarding Cambridge Analytica to understand what happened in that case because the company and the data are located abroad.

Again, without getting into the details of the current investigation, I respect that, Chairman. Do you consider those public statements as commitments made to consumers?

Mr. SIMONS. So let me just say without tying it to a specific case, we look at everything. We look at what they say in their public documents. We look at what they say in their advertising. We look at what they say on their website—the whole range.

So we would look at everything.

Mr. KENNEDY. OK.

Mr. PHILLIPS. Congressman, if I—please, I apologize for interrupting you.

Mr. KENNEDY. No.

Mr. PHILLIPS. One of the things that I talked about in my oral statement earlier was the importance of Congress reauthorizing and eliminating the sunset in the U.S. SAFE WEB Act.

You mentioned access to data abroad without, again, speaking to the specific case. That is a very important tool. So we really do urge you all to consider that.

Mr. KENNEDY. I appreciate the insight, sir.

Last bit, and I think one of my colleagues touched on this as well. Google has told the public that it would stop scanning personal emails. Of course, most consumers probably didn't know that that was happening.

But now we hear that Google does allow third parties to scan emails. Do you review those public statements for violations of either Section 5 generally or of a consent decree?

Mr. SIMONS. Yes, we review everything. So, that's one of the ways we start investigations. We issue public announcements or public statements and we get complaints. So, we consider everything.

Mr. KENNEDY. OK. Chairman, thank you, and I thank all the commissioners for being here. Appreciate your testimony and I yield back.

Mr. LATTA. Thank you very much. The gentleman yields back and, as agreed upon, we are going to take a 5-minute recess at this time and come back in at 10 til the hour.

Thank you.

[Recess.]

Mr. LATTA. I would like to reconvene the subcommittee to order, and at this time I would recognize the gentleman from New Jersey for 5 minutes.

Mr. LANCE. Thank you very much, and good morning to the distinguished panel.

I champion the Consumer Review Fairness Act in 2016 to protect consumers ability to share their honest reviews and opinions about products, services, or conduct in various forms including social media.

There has been growth and influence of search and social media since the bill became law. Much has changed since the FTC closed its Google investigation in 2012, and I ask the panel, beginning with the chair, what is your view on how best to maintain competitive markets and better safeguard consumer reviews?

Mr. SIMONS. So let me just say that that piece of legislation is terrific.

Mr. LANCE. This is being recorded.

[Laughter.]

Mr. SIMONS. OK. I stick with that statement.

So one of the key things as I've described a little bit earlier or alluded to in terms of competition is that you need good information.

Good information allows consumers to make the best choices and the reviews are just terrific in that regard. They really help spur competition. So that's terrific and we are very much looking to—and have enforced under that statute.

Mr. LANCE. Thank you. Would others on the panel like to comment?

Yes, of course.

Ms. OHLHAUSEN. Yes, thank you, Congressman.

I think that legislation was also very beneficial, and I was at the commission when we brought the case against Roca Labs—

Mr. LANCE. Yes.

Ms. OHLHAUSEN [continuing]. Saying that that was a violation. But I also want to mention in addition to making sure that consumers are free to express their opinions, we want to be sure that when opinions are expressed what they're paid for by a sponsor that that's clear to consumers, too.

So the FTC has engaged in a lot of enforcement and consumer ed and business warning letters to make sure that reviews, if they're sponsored, are labeled as such.

Mr. LANCE. And is that a more recent addition to this whole issue, the fact that you have required there be a disclaimer or whatever the appropriate word would be for the fact that some are being paid?

Ms. OHLHAUSEN. So it's not recent but we've given additional guidance for the new, on Twitter or online to make sure that the old rules that have always applied that people understand how they apply in the new economy as well.

Mr. LANCE. Thank you very much, Commissioner.

Other comments? Yes, Commissioner.

Mr. PHILLIPS. Just briefly. I just want to associate myself with the comments of my colleagues and thank you for your work on that really important legislation.

Mr. LANCE. Thank you. It's based upon the fact that there was a review of I think an orchestra at a wedding and there was some discussion that those who might purchase that service had to sign a form saying that there could be no disparaging review online which, of course, I think appals the American consuming public.

Mr. CHOPRA. I agree, and I also want to share that one useful provision of that bill as well as some other bills that have been passed on a bipartisan basis is also allowing our state attorneys general to enforce it as well.

We don't have the resources to do everything. But sometimes we won't be able to catch every orchestra violation. But the more we can rely on our state partners, the better.

Mr. LANCE. Thank you.

Without commenting on any particular company or investigation, if a company is operating under a consent order and found in violation of the agency's data security or privacy rules, does that affect the assessment of fines and penalties?

Whoever would like to begin.

Mr. CHOPRA. So, typically, violations of orders allow the FTC to seek from a court injunctions equitable relief, which can include consumer refunds as well as substantial civil penalties over 40,000 per violation.

So we have the discretion in many ways of when to seek it and how much to seek. But enforcement of our orders has to be a top priority.

Mr. LANCE. Thank you. I ask these questions as the FTC continues its investigation into Facebook. During my questioning at this committee's hearing with Facebook CEO Mark Zuckerberg on April 11th, I indicated that Facebook's actions leading up to the

Cambridge Analytica hack may have violated the consent agreement Facebook struck with the FTC in 2011.

News reports since that hearing have highlighted other questionable practices at Facebook. This has strengthened my belief that the company has routinely violated its promise to obtain express consent from consumers before sharing information with third parties.

I realize you cannot comment on that as members of the commission. But that is my considered view, having reviewed the matter.

Thank you, Mr. Chairman. I yield back.

Mr. LATTA. Thank you. The gentleman yields back.

The chair now recognizes the gentlelady from California for 5 minutes.

Ms. MATSUI. Thank you very much, Mr. Chairman.

Last week in the Telecom subcommittee, we discussed the difference frameworks governing consumer privacy. Current privacy rules for the telecommunications providers, for instance, require opt in consent from consumers before their provider could share so-called CPNI with unrelated third parties for independent use.

More broadly, however, it is often the case that an unrelated third party to an online platform can and does receive data on a consumer that visits that platform.

Third party analytics tools on a given website which send information on a user's visit to a third party and allows that third party to assess user data.

So I believe that a necessary part of the data privacy discussion—maybe the most important part—could be addressing access to data by a third party with whom a consumer has no direct relationship or knowledge.

Mr. Chopra, what role does addressing independent third party data use have in the FTC's consumer protection mission?

Mr. CHOPRA. Well, under our current authority, if that is disclosed, we may be frustrated in being able to combat that. But with respect to any privacy legislation that offers consumers affirmative rights to know where data is being shared, to know what it's being used for, and for consumers to be able to access that, if we were able to implement that and some of these principles come from our work from nearly 20 years ago in 1999, I think that would be very effective for the marketplace.

Ms. MATSUI. So you're basically saying you need legislation.

Mr. CHOPRA. We are doing what we can—

Ms. MATSUI. Right.

Mr. CHOPRA [continuing]. With what we have. But we can't solve all of these problems with the existing law we have. This is why I really think we need more tools and resources to—

Ms. MATSUI. So we have to be very specific, though, in our legislation to direct you then. Is that correct?

Mr. CHOPRA. Well, many people know how to craft legislation better than me.

But the extent to which you can provide the framework in which we can implement through rulemaking, that will allow us to be flexible as how the market changes.

No one would have known the extent to which website trackers would be used 10 years ago.

Ms. MATSUI. Right. OK.

Any other comments?

OK. As you all know, regular HTTP connections sent in plain text can be intercepted and exploited by anybody or anything between a user and the website including somebody using public wifi.

So I am pleased that HTTPS deployment continues to grow. HTTPS protocol can ensure an online connection between a consumer and a website that's encrypted. And I am interested that the commission is looking at whether the same standard UI security indicators could be helpful in providing consistent meaningful consumer information no matter which browser you're using and whether you are using a desktop or mobile device.

Common security indicators that are deployed consistently could be a step towards increasing consumer understanding as to when their connection to a website is not only secure but also safe.

Does anybody have any thoughts on how security indicators deployed by web browsers could promote consumer protection?

Mr. CHOPRA. Well, I think the advancements in how we are securing website traffic are a positive step in the marketplace.

We know from other sectors of the economy, particularly in financial services, that encryption and higher standards for website security continue to be far ahead of the rest of the digital economy.

I don't necessarily know what we can do from a law enforcement perspective. But, obviously, companies that are maintaining sensitive data, financial health or whatever it may be, need to take steps to secure that data.

Ms. MATSUI. The rest of the panel any comments?

Ms. OHLHAUSEN. I think it's important that we look at how consumers get information about the security of the entire chain.

So the FTC has brought enforcement actions against browsers that weren't secure against—that was the ASUS case—computers that had inadvertently or they didn't understand that it was really providing a man in the middle attack for adware in the Lenovo case. So I think we've paid attention to all links in the chain for consumers.

Ms. MATSUI. And I think the consumer needs to know and that's the part of it that we like to look at and I hope you're looking at too, because they don't know, in essence, and that's what's causing a lot of problems today, because they are unaware of what's protected, what's secure, what's not.

So anyway, it looks like I've run out of time. I yield back my time. Thank you.

Mr. LATTA. Thank you very much. The gentlelady yields back.

The chair now recognizes the gentleman from Kentucky for 5 minutes.

Mr. GUTHRIE. Thank you, Mr. Chairman. Thank you for holding this meeting and thank you all for being here.

This first one is for Commissioner Ohlhausen. Last Congress, I introduced—it was H.R. 5315, which is the CLEAR Act, which we had part of a series of bills that we put forward on commission process reform.

And I think it was almost a year ago that the commission announced a set of reforms for consumer protection investigations,

and it was reportedly looking into reforms for competitive investigations as well.

Has there been progress made?

Ms. OHLHAUSEN. So yes, there has been progress that's been made. So we had our civil investigative demands reforms that I talked about at the beginning of my testimony that tried to give recipients clearer information and better guidance.

We also reduced the time for civil investigative demand. I gave a little more time to respond. We've gone through, under my leadership and we closed a number of investigations, but one of the other things that we did is we went through and looked at all our data security investigations, and privacy, the ones that we closed, and we distilled from that lessons about what steps companies had taken where we found it gave reasonable security and we issued that in an updated guidance called Stick with Security. It gave us 10 additional lessons to supplement or start with security for sure.

Mr. GUTHRIE. OK. Well, thank you.

And Mr. Chairman, do you have any comments on the issues the committee should be considering in just terms of process reform as well?

Mr. SIMONS [continuing]. Process, also on the competition side. So one of the things that's been reported publicly is that the merger investigation seems to have gotten longer, at least according to some measures.

So one of the things we are looking at is actually developing a tracking mechanism to see how long they are in fact taking and why they are taking as long as they are and then allow us to determine what we can do to make them more efficient and less burdensome.

Mr. GUTHRIE. Thank you very much. And I am going to shift gears to the chairman as well. Particularly with older folks we've advertised and talked—our office to try to put out when somebody calls you never give any information over the phone. Hey, we are your bank—we need to fix your account or whatever—we do that.

But the concern that I have is these fake websites. When you go online and you're seeking the information and you're trying to engage with a hotel chain or to get a reservation or whatever and you got to give information to confirm a rental car—any of that—any consumer, actually, retail business.

So just interested in how we know the identity of a website. One, I know the committee is looking at how websites or identities confirmed, and the question is what tools can consumers use to confirm they're on a real website where they intended to go instead of a phishing site.

I think it's the green padlock that should be next to the site. Is that secure? Is that something we should look for? If anybody that's in that area to talk about that? Is there any—talking about secure websites under that?

OK. I guess that's not, unfortunately —

Mr. PHILLIPS. Congressman, you had asked about other process reforms. I think I would be remiss not to bring up the Sunshine Act. While that law has a really great name, the way it operates today it inhibits our ability as a commission to talk to each other.

And so I just forward that for your consideration.

Mr. GUTHRIE. How is that detrimental?

Mr. PHILLIPS. Well——

Mr. GUTHRIE. I am not challenging. I am asking to ——

Mr. PHILLIPS. Sure. So——

Mr. GUTHRIE. An example you would like to talk with each other and——

Mr. PHILLIPS. If three of us want to talk together about an important issue or four of us want to talk together, unless we publicly notice it in advance we can't meet and while there are some really important meetings that take place that are noticed, the daily back and forth can also be important.

Mr. SIMONS. The ability to informally meet without having to in advance schedule a full commission meeting would be enormously helpful.

Mr. GUTHRIE. OK. So——

Mr. SIMONS. It allows us to work through issues much more quickly and without delay as opposed to actually scheduling a formal meeting.

Mr. GUTHRIE. So the idea if you were going to take any action that it would be noticed but you can't even——

Mr. SIMONS. We'd have to vote. We'd have to vote.

Mr. GUTHRIE. OK. Any action would report, I see that.

Mr. PHILLIPS. Typically, we are talking about informal conversation—take any legal action. Yes, of course.

Mr. GUTHRIE. Yes. I've seen city commissions in a room or something. They say, oh, we got one commissioner needs to step out and talk about something.

Mr. PHILLIPS. It happens.

Mr. GUTHRIE. So there only can be two instead of three when I am talking to them about different business I've seen that before, and they literally do that.

They don't take advantage. They send somebody out of the room and say they don't have the quorum or moving forward. But it does seem like him and I just talk about what issues are important to the city. It's not an action that's being taking and moving forward. I see your point to that.

I yield back.

Mr. LATTA. Thank you very much.

The gentleman yields back the balance of his time.

And the chair now recognizes the gentlelady from New York for 5 minutes.

Ms. CLARKE. Thank you, Chairman Latta and Ranking Member Schakowsky, for convening this morning's hearing.

A pleasant good morning to all of our commissioners and a special welcome to our newest FTC commissioners. Your role is more important now than it has ever been before.

The American people count on you to protect their data, privacy, promote competition, and much more. There are so many pressing issues and changes happening under the FTC's authority daily.

I can say that I'm very anxious to hear your answers regarding these issues and the significant changes. I would like to start with the issue of privacy, and direct this question to Commissioner Chopra.

When it comes to privacy, there are many changes that need to be made to protect American consumers. Over the past years, discrimination online has been rapid, resulting in the marginalization of struggling families and communities.

So can you please talk about the impact that the lack of meaningful privacy protections has on consumers, particularly those in under served and low income communities?

Mr. CHOPRA. Yes. So 50 years ago, Congress had a debate about secret databases that were making decisions about where we could live, about where we could work, and about what loans we could take.

We passed the Fair Credit Reporting Act in 1970 to advance new levels of transparency, to give consumers redress when there are mistakes.

In today's digital economy, decisions are increasingly being made through data sets that we could have never imagined. It's no longer a manila folder world. It's a digital world.

And in many cases, it's very hard for us to look at what was the data that was being used. With machine learning and algorithms that are constantly changing, it's hard to audit and hard to see when maybe those mechanisms are reinforcing biases rather than leading to more inclusion.

The FTC has done work on big data and inclusion issues and I am concerned that our existing laws to prevent discrimination can't really be easily used when it comes to how technology is affecting the choices of firms in our economy, particularly with employment, housing, and credit.

Ms. CLARKE. So what can the FTC do to make sure that these consumers are protected and do you feel that the FTC has the resources, expertise, and authority necessary to protect these consumers?

Mr. CHOPRA. Well, we have the Fair Credit Reporting Act. We have the Equal Credit Opportunity Act. We have not brought a case in a long time in the Equal Credit Opportunity Act. I would like us to energetically enforce those two laws.

But, truthfully, on the second part of your question, my answer would be no, I don't think we have the resources and authority to confront some of the issues you're raising, particularly with respect to privacy and data security.

Ms. CLARKE. OK. Well, I think that, Mr. Chairman, this is something we need to take a look at because it's only something that will become more insidious over time.

Net neutrality and the FTC's authority is an issue that I believe is on everyone's mind. So let me just extend this to the panel.

Would you state or believe that the recent Supreme Court decision in *Ohio v. American Express* has affected the FTC's ability to police anti-competitive behavior and net neutrality violations by broadband providers?

Mr. SIMONS. I will answer first. I don't think so.

I think the *Am Ex* case is extremely narrow. I think, really, the basic crux of it is limited to situations where there's a multi-sided platform that effectively involves a transaction where the platform is providing a service to both sides at the same time in the same way, basically.

So I think, generally, that's going to apply to very few situations.

Ms. CLARKE [continuing]. That it serves a two-sided market—edge providers or interconnecting parties on one side and consumers on the other.

Does the American Express decision potentially preclude effective FTC enforcement against anti-competitive conduct against edge providers?

Mr. SIMONS. It might depend on the very specific facts. But, in general, I would think not.

Ms. CLARKE. Very well.

Former FTC Commissioner Terrell McSweeney has suggested creating a bureau of technology at the FTC. Does the commission have sufficient resources and staffing to protect consumer privacy in the digital age and were resources an issue in failing to enforce the 2011 consent order?

Mr. SIMONS. We can't talk about an existing investigation. So we have numerous ways of getting the technology help that we need. So we have an office of technology research and investigation which has, I think, about eight technologists in it. We frequently contract with outside parties to get technology resources and we hold workshops and seminars where we bring people in to educate us about new developments in the technological area.

Ms. CLARKE. Very well. Mr. Chair—

Ms. SLAUGHTER. Can I jump in, Congresswoman?

I would lend my personal support to the idea of a bureau of technology. I think it is the kind of thing we could really benefit from and I am concerned that with our current resource constraints to set something like that up we would have to be taking resources away from other important work that we are doing.

So it is an area where I think we could really benefit from some injection of more resources.

Mr. SIMONS. We are looking into that. So we actually are affirmatively evaluating whether to create a bureau of technology and that's just in process So I am not sure how that's going to come out.

There's a group of technologists that are embedded in the Bureau of Consumer Protection and so they're already there. And so the question is whether we need to have a commission wide bureau as opposed to one that's just in one of the bureaus.

Ms. CLARKE. And whether, in fact, the workload is—

Mr. SIMONS. And yes.

Ms. CLARKE [continuing]. Would be a burden to those who are already in that space.

Mr. Chairman, I yield back.

Mr. LATTA. Thank you very much.

The gentlelady's time has expired.

The chair now recognizes the gentleman from Indiana for 5 minutes.

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

As a physician, I am concerned to hear reports that the DOJ may not challenge the CVS-Aetna merger. In the health care industry that already lacks price transparency and, in many areas, competition, this vertical merger could increase anti-competitive practices.

I am not passing any judgements on the merger at all, up or down. I am just voicing a few concerns and then I have a few questions.

The merger could potentially lead to Aetna customers receiving some pressure to fill prescriptions at CVS and to visit CVS walk-in clinics instead of other pharmacies or clinics, eliminating real choice for the consumer.

In addition, Caremark, owned by CVS, is one of the largest PBMs—pharmacy benefit managers—in the country, and as you likely know, ensures our PBMs to negotiate prices from drug manufacturers.

The top three PBMs manage the drug benefits for approximately 95 percent of the American people. The merger might incentivize Caremark to secure better deals from Aetna while potentially increasing costs for other companies.

While I understand that the DOJ is currently investigating the merger, I want to get your perspective not particularly on this merger. I am getting to my point here. I want to get your perspective since the FTC also has jurisdiction enforcing Federal anti-trust laws.

So to the panel, what are your thoughts on this type of vertical merger in the health care industry, again, not specific to this but in general, in the health care industry and other industries.

Particularly in health care, I am very concerned about this because, as you know, as a country, we are struggling to get health care costs down and provide coverage for all of our citizens.

So I guess I will just address this to the panel. What are your thoughts about this type of merger in the health care space?

Mr. SIMONS. So let me say first, that the health care industry has been and will continue to be an enormous emphasis for the FTC for all the reasons that you just described.

So we are very focused on this part of the economy and we are very much looking out for the consumer here.

So, and in terms of the vertical mergers, they turn out to be very, very fact specific. So sometimes they can be efficiency enhancing and beneficial for the consumer, even maybe when the companies involved are relatively large.

But sometimes they can be very harmful to the consumer. And so, the job of the anti-trust authority is to determine which is which and act accordingly.

Ms. OHLHAUSEN. I agree that healthcare is enormously important to consumers and it's an enormously important part of our economy and thus an enormously important and focus at the FTC and health care enforcement in general.

Regarding vertical mergers, I agree with Chairman Simons they are intensely fact specific. But I would mention that's outside the healthcare space. But we recently just had a vertical merger where we had a behavioral remedy in the Northrop-Orbital ATK matter.

So there can be problems in vertical mergers and where there are problems the mergers should be stopped or maybe a remedy should be proposed that takes care of that problem and allows the efficiencies to occur.

Mr. PHILLIPS. Thank you for the question, Congressman. I agree with my colleagues that healthcare has been for a very long time

and will remain a focus for this agency—I am very proud of the work that our staff have done in fighting all sorts of anti-competitive conduct in the health care space in ensuring that mergers work for consumers.

Experience and economic learning teach us that verticals can be very good for consumers. But the specifics depend on the facts, and that makes it really important that we, as law enforcers, pay attention to trends, in that sector of our economy. Look at how companies are changing their behavior, look at how they're combining and stay on top of them when we fear that there may be anti-competitive effects.

Mr. CHOPRA. I think the structure of the pharmacy benefit manager business raises very serious transparency and conflict of interest issues.

Ms. SLAUGHTER. My colleagues have said basically everything I was going to say. I was going to add a point that I think in health care in particular consumers are frequently frustrated and competition is frustrated by a lack of transparency, as Commissioner Chopra mentioned, and it's particularly true with respect to pharmaceutical benefits.

Mr. BUCSHON. Quickly, Commissioner Phillips, this committee is very focused on ways in which companies and devices collect information about consumers.

As I've raised in several hearings, I have specific concerns with cell phones and other smart devices listening and collecting information and then that information being used to deliver targeted ads, and this happens to all of us all the time.

Is this something you're concerned with—and I know you are—that—and will it be an issue that the FTC makes a priority?

Mr. PHILLIPS. I think it's one of those economic trends that I mentioned a moment ago outside the healthcare space that very much is at the front of what we are looking.

Mr. BUCSHON. OK. Thank you very much. I yield back.

Mr. LATTI. Thank you. The gentleman's time has expired. The chair now recognizes the gentleman from Texas for 5 minutes.

Mr. GREEN. Thank you, Mr. Chairman. I thank you for holding this hearing, also for our ranking member.

I would like to talk a bit about our robocall problem and consumer fraud. As you know, robocalls and failure of the do not call registry are some of the top complaints received by the FTC and by members of Congress and our constituents, particularly older Americans.

Older Americans lose more money to fraud than younger age groups. According to the FTC's Consumer Sentinel Network Data Book, Americans ages 50 and older are reporting a median loss of \$1,092 over two and a half times the median loss for Americans in their 30s for only \$380.

Chairman Simons, out of all the complaints received by the FTC on these calls and can you provide a rough estimate on how many come from U.S. companies or individuals and how many come from overseas?

Mr. SIMONS. Thank you for the question.

We are very interested in that. But, unfortunately, the data that we have access to doesn't allow us to determine that. If I had to guess, I would say it's probably, largely, coming from overseas.

Mr. GREEN. Well, I've heard that the hearing to date—she said that she got a robocall and somebody was speaking to Chinese to her. I don't know how that would do any good to try to call us in Texas. But—

Mr. SIMONS. That's one of the problems really is that the do not call rule has been superseded by technology—right, technological developments.

You can have the telecommunications costs have come down so dramatically and the computing costs have come down so dramatically that blasting out millions and millions of calls is so cheap.

Mr. GREEN. Do you know how many defrauded older Americans receive consumer redress from the FTC?

If you don't know, if you'd just get it to us, because a lot of us do senior townhall meetings and they want to know about Social Security and Medicare and then they say we are tired of robocalls.

Mr. SIMONS. We are all tired of robocalls and actually one of the things we think would be really helpful in that regard is to give us jurisdiction over common carriers because some of them are, we think, are facilitating robocalls and we could challenge that.

Mr. GREEN. I've understood that and I don't have any opposition to it. But I know when we get the FTC and the FCC it's—somehow in our committee had jurisdiction over both of them. So you're talking to the right committee.

What more could the FTC do under current law to protect older Americans from fraud?

Mr. SIMONS. We do a lot. So we have enforcement actions. We have community outreach. On our website we have consumer materials for the elderly and we do sweeps.

We recently conducted a sweep that dealt with the elderly. Or actually, there's a task force now that the DOJ is spearheading that we are involved with. That is one of the communities that's geared to help is elderly.

Mr. GREEN. Could the FTC partner with the FCC on a joint effort, particularly for seniors and older Americans?

Mr. SIMONS. We would certainly be happy to talk to Chairman Pai about that.

Mr. GREEN. I will bring that up at our telecom subcommittee.

Elder abuse is an issue and that's a big one I know we all hear about. Mr. Chairman, I will yield back the balance of my time.

Mr. LATTA. Thank you very much. The gentleman yields back.

The chair now recognizes the gentleman from Pennsylvania for 5 minutes.

Mr. COSTELLO. Thank you. In May, the FTC and the FDA sent 13 warning letter to retailers, manufacturers, and distributors of vaping nicotine products to stop marketing these products to children. As we have recently seen, vaping—some people call it JUULing—has increasingly become pervasive in our schools.

As FDA Commissioner Gottlieb announced in April, it is well established that nicotine can “rewire an adolescent's brain, leading to years of addiction.”

Two questions, Mr. Chairman, and if anyone else would like to weigh in—does the FTC agree with Chairman Gottlieb’s statement that there is no acceptable number of children using tobacco products—I guess that’s an easy answer—

Ms. SLAUGHTER. Yes.

Mr. COSTELLO [continuing]. Followed by this question. Would it be a powerful deterrent to give the FTC the authority to find a party marketing these vaping products to children for their first violation?

Mr. SIMONS. I would think any financial penalty would be more of a deterrent than no financial penalty.

Mr. COSTELLO. This comes on the heels, I think, of Commissioner Chopra’s comment about the difference between having the ability to find versus working on a—

Mr. SIMONS. Correct.

Mr. CHOPRA. If there was a rule in place or if we had that authority, we would certainly be able not only to just tell someone stop; we would be able to seek penalties and other remedies to—

Mr. COSTELLO. What would that rule look like and how could Congress carefully tailor that so that you don’t have all the freedom that we fear you could have?

Mr. CHOPRA. Yes. Well, I think actually some of the comments Commissioner Gottlieb has made on this I think that would really inform how you might prescribe it because there is some changing science.

There are some changing delivery mechanisms of nicotine. Maybe someone is but I am not an expert in the tobacco market.

But I think you would be able to put the guardrails around it to make it as narrow or as wide as you want. I just want to make sure that whatever you do give us we vigorously enforce.

Mr. COSTELLO. Yes. The broader application of that example is, from a marketing perspective, how do you fashion how you would go about determining what is and isn’t a violation and just how broadly would that power be vested upon you to go into the marketing space and say we are going to fine you here versus we are going to enter into a consent decree there.

And is it so broad as to say any marketing or is it going to be sort of certain types of marketing or certain products?

Mr. CHOPRA. Right. So actually we do—

Mr. COSTELLO. Because I gave you the easy example.

Mr. CHOPRA. We do enforce a children’s online privacy protection act and there’s implementing regulations, and as part of that we help to communicate to the marketplace what is considered dealing with online transactions with children. We specify that.

So one of the advantages of putting some meat on the bones through implementing rules is that it gives all market participants a clear sense as to what is inside and outside the bounds rather than just waiting for enforcement action.

Mr. COSTELLO. Right. I have another question for you. I will ask that and if you want to follow up on this one.

The Smart IoT Act was approved by the full committee. We were focused on both the benefits and challenges of what a connected world brings.

Can you talk about the actions and initiatives the FTC has or will take to promote consumer protection with respect to IoT devices?

Mr. SIMONS. Yes. So we are active in that space, as Commissioner Ohlhausen mentioned. We've had a couple of orders there already and we continue to look at that.

We've also had an IoT workshop and so to educate ourselves and to look at what we should be doing, going forward.

So we are very active in this area.

Mr. COSTELLO. Ms. Ohlhausen, you also mentioned that in your opening testimony. Anything to add to that in terms of what you're doing in the IoT space?

Ms. OHLHAUSEN. I think it's a particularly interesting area and, certainly, our enforcement actions against the first connected toy case in VTech, other ones that we brought about—internet connected cameras and the routers as well as the policy inquiries, because Internet of Things can have enormous benefits for consumers and for competition.

So we want to draw the lines in the right place to make sure consumers are protected but that innovation can still continue in the market.

Mr. COSTELLO. Do you have the type of authority vested in you to be able to do that or have you found that lacking in your diligence?

Ms. OHLHAUSEN. I think for the Internet of Things, the cases we've been able to bring I think do show that we do have sufficient authority there to—teeth and got the attention of the industry about making sure that they don't have flaws and that they are looking at things.

But it is a challenging area because they are often disposable products they don't necessarily get updated a lot. So there may be—

Mr. COSTELLO. Layered with other products?

Ms. OHLHAUSEN [continuing]. Industry involvement as well.

Mr. COSTELLO. I appreciate your feedback.

I yield back.

Mr. LATTA. Thank you.

The chair now recognizes the gentleman from Florida for 5 minutes.

Mr. BILIRAKIS. Thank you, Mr. Chairman, I appreciate it.

To the panel, well, this is actually for Chairman Simons.

The FTC points out it serves its dual mission through vigorous enforcement, education, advocacy, and policy work, and by anticipating and responding to changes in the marketplace.

Outside of law enforcement, are there past or recent examples of policy work, reports, and workshops related to online privacy that you can share with us today, please?

Mr. SIMONS. I am drawing a blank right now. But maybe one of my colleagues could help me.

Ms. OHLHAUSEN. So just in the past year and a half, we actually have done six workshops in major policy efforts looking at privacy and data security things from industry guidance.

We did a student privacy and NED tech workshop. We did an informational injury workshop to explore the boundaries and types of

industries consumers may suffer. We did an identity theft workshop, a connected cars workshop, going to the Internet of Things.

So I think we have done quite a bit in this space. Just in recent time, and that's just building on all the other years of work we've done in this area.

Mr. BUCSHON. OK. Thank you. And Commissioner Phillips—does somebody else want to add something?

Mr. PHILLIPS. I was going to.

Mr. BUCSHON. OK. Go ahead, please.

Mr. PHILLIPS. I was just going to say the chairman also has announced a very ambitious set of hearings to begin this fall on a variety of issues including those.

Mr. BUCSHON. OK. Very good. Thank you.

Mr. CHOPRA. And we also—I would encourage you—our 2012 privacy report as well as a later report on data brokers—those two, I think, provide a real consensus roadmap on a lot of the initiatives that could be pursued on a bipartisan basis, in my view.

Mr. BUCSHON. Right. Do you have anything to add? We are OK? I will go on the next one.

Commissioner Phillips, do you believe American consumers fully comprehend exactly how much personal health and financial data has been collected on them? What can the FTC do to better educate consumers on data collection activity that industry is engaged on? It's up to the individual. But they need to get all the facts. So if you could answer that I would appreciate it.

Mr. PHILLIPS. Thank you for that question. I think that's a really important one. I can't sit here and tell you that every individual fully comprehends the way which data are being collected, how those data are being used or how those data, as Commissioner Chopra said earlier, are being shared.

You're right to note that consumers have access to that information and consumers also have certain expectations. For instance, my ability to use an app, let's say, that guides me through traffic and tells me where the traffic jams are going to be.

I know that it must have information about that traffic from drivers like me who are supplying it. That balance is a very important one.

Fostering the innovation as we want to do and also helping to keep consumer understanding in line, I think that's going to be one of the biggest challenges that we face over all of our tenures.

I know it's going to be a topic that we are going to be talking about in years to come and we look forward to working with you on that.

Mr. BILIRAKIS. Thank you. If someone else wants to add, but would you recommend that the consumer assume that particular data would be collected when they make an informed decision as to whether they want to log in or log out, and a lot of times they don't have the opportunity to opt out.

Mr. PHILLIPS. Let me start with the second one. I hope in my own life and I hope that everyone in their own lives always make informed decisions.

That's not always how we do things. I will admit to you that I have repeatedly in the last few weeks clicked on any number of ac-

cept accept accepts online. And now I've forgotten the first part of the question. I apologize.

Ms. SLAUGHTER. I will jump in.

Mr. BILIRAKIS. Well, just—yes. Should I repeat the question?

Mr. PHILLIPS. If you don't mind.

Mr. BILIRAKIS. For our consumer, would you recommend the consumer assume—

Mr. PHILLIPS. Let's assume.

Mr. BILIRAKIS. Yes, assume that this data is collected on them.

Mr. PHILLIPS. The short answer is yes. As we engage with the digital economy, we derive tremendous benefits from that almost every minute of every day of our lives and in many respects we are sharing information and so that is a pretty reasonable assumption.

Mr. CHOPRA. That's pretty sad, though.

Mr. BILIRAKIS. Would you like to add something?

Mr. CHOPRA. It's pretty sad that we have to assume helplessness. So I understand we may want to warn consumers that anything can be up for grabs. But that can really lower consumers' confidence in engaging online or engaging in spaces where they just think everything is going to be taken from them.

So we have to make sure that we are also not scaring people from engaging in productive transactions for their lives because they fear that someone is always spying on them and this is why we have to put into place the right framework to protect privacy.

Ms. SLAUGHTER. And from an enforcement perspective it's our obligation to ensure that when companies represent to consumers that they are collecting data in a certain way or not collecting data in a certain way that they're living up to those representations that they make and that is an area under the current law where we can and do enforce.

Mr. BILIRAKIS. Yes, go ahead, please.

Ms. OHLHAUSEN. So going back to the FTC's 2012 privacy report it talks about the importance of it being context specific.

So if I am sharing my location with the traffic app, I certainly understand that it knows where I am to route me around the traffic jams. But we have to understand that the consumer may not expect that that data will be used in other ways.

For example, we brought an enforcement action in a case called Goldenhores, which was about a flashlight app and it worked fine as a flashlight. But the consumers didn't know that it was also collecting their real-time location data and sharing that with marketers.

So I think that is an important thing is the context. Is the information being used the way the consumer expects to get the service or is it being shared—their sensitive data being shared in some way that they don't anticipate and I think that's where enforcement and guidance and policy concerns need to focus.

Mr. BILIRAKIS. All right. I have a couple more questions but I will submit them for the record. I appreciate it, Mr. Chairman. I yield back.

Mr. LATTA. Thank you very much. The gentleman's time has expired.

The chair now recognizes the gentleman from New Mexico for 5 minutes.

Mr. LUJÁN. Thank you, Chairman Latta, Ranking Member Pallone, and Schakowsky, Chairman Walden, for holding this important hearing with our Federal Trade Commission Oversight.

When it comes to protecting consumers, I am afraid that both Congress and the FTC have much more to do.

Commissioner Simons, I am going to direct my questions to you, which I believe you should be able to address without getting into the FTC's active investigations.

In September of 2017, the credit bureau Equifax announced a massive consumer data breach due to vulnerability that the company knew about but failed to adequately address.

Personal information including Social Security numbers, birth dates, addresses, and, in some cases, driver license numbers or partial driver's licence numbers of almost 150 million consumers were exposed to illicit actors.

Commissioner Simons, is that correct?

Mr. SIMONS. I am sorry. Is that what?

Mr. LUJÁN. Is that correct?

Mr. SIMONS. That's my understanding. That's consistent with what I—

Mr. LUJÁN. And, again, it's that Equifax announced the massive consumer—

Mr. SIMONS. Yes. This is public information.

Mr. LUJÁN. Is it correct, due to this breach of the credit card numbers of more than 200,000 consumers were compromised as well as other personal information included in the dispute documents of more than 180 consumers?

Mr. SIMONS. So I am not sure if that was public. So I really don't—

Mr. LUJÁN. I believe that that was public as well. So we can verify that. We'll get that entered into the record.

Mr. SIMONS. OK.

Mr. LUJÁN. Is it correct that Facebook recently revealed that 87 million Facebook users had their data exposed to Cambridge Analytica?

Mr. SIMONS. I believe there were press reports to that effect.

Mr. LUJÁN. Is it correct that in November of last year we learned that hackers stole information of 57 million Uber drivers and riders?

Mr. SIMONS. I think that's reported as well.

Mr. LUJÁN. So Mr. Chairman, I would like to support a business insider article into the record. The article states that since January 2017 at least 15 retailers were hacked and likely had information stolen from them. Techy include Macy's, Adidas, Sears, Kmart, Delta, Best Buy, Saks Fifth Avenue, Lord & Taylor, Under Armour, Panera Bread, Forever 21, Sonic, Whole Foods, Game Stop, and Arby's.

Commissioner Simons, have you ever shopped at one of these establishments?

Mr. SIMONS. Yes.

Mr. LUJÁN. Me too. I think most Americans have. Commissioner Simons, is there any reason to expect that there will be fewer data breaches in the future?

Mr. SIMONS. That's our goal and that's what we are working for.

Mr. LUJÁN. But the reason we are working toward that goal is because we are concerned that they could happen.

Mr. SIMONS. Yes, and one of the things that we discussed earlier is the need for civil penalty authority to act as an increased deterrent.

Mr. LUJÁN. So building on that, Commissioner, can you detail what rules the FTC is currently developing to better protect consumers' privacy and data?

Mr. SIMONS. We don't have any rulemakings going on. We are engaged in enforcement to the extent our current authority allows us to do that and we are as aggressive as we can under our current authority.

Mr. LUJÁN. Does the FTC have rulemaking authority?

Mr. SIMONS. We do under Magnuson-Moss. But it's very cumbersome.

Mr. LUJÁN. But not in this space?

Mr. SIMONS. No, well, it's general.

Mr. LUJÁN. Could the FTC use support for authority to have more clear rulemaking authority to protect consumers' privacy?

Mr. SIMONS. I think through individual enforcement we are able to make pretty clear what companies are supposed to do.

So I think we are relatively effective in that regard, and I don't think we need a rule to make it clear what the companies need to do. I think the civil penalty authority would act as a substantial conditional deterrent.

Mr. LUJÁN. So some of the numbers that I rattled off—150 million people exposed with Equifax, 200,000 consumers were compromised, 180,000 consumers here and there, 87 million with Facebook and Cambridge Analytica, 57 million Uber drivers, a lot of people are getting their information stolen.

Commissioner, are you aware of any recent legislation that's been passed by the Congress and signed into law that will strengthen privacy protections for consumers?

Mr. SIMONS. You mean like COPPA?

Mr. LUJÁN. Anything that you might be aware of.

Mr. SIMONS. COPPA would be one. That would be a relatively recent one.

Ms. OHLHAUSEN. It's not recent, but there's the Fair Credit Reporting Act as well.

Mr. LUJÁN. The reason I ask that question is this subcommittee, Mr. Chairman, held a hearing on Equifax in October of 2017. We had Mark Zuckerberg before the full committee in April 2018. It's now July.

And these breaches took place before the holidays. There were assurances that the Congress would act to provide more certainty to the comments that Commissioner Chopra shared—that you need to instill confidence.

Nothing happened. I believe, Mr. Chairman, that this Congress and this committee need to act before the August recess, need to act before the end of this year to be able to get more comprehensive privacy legislation adopted and I believe our constituents and the American people deserve better.

I thank everyone for their time and I see my time has expired.

Mr. LATTA. Thank you very much. The gentleman's time has expired.

The chair now recognizes the gentleman from Georgia for 5 minutes.

Mr. CARTER. Thank you, Mr. Chairman. I appreciate you letting me sit in on this.

I thank all of you for being here. You have a very important job and certainly, it's very important to consumers.

Full disclosure—currently I am the only pharmacist serving in Congress for over 30 years. I practiced in retail pharmacy and I am very familiar with what's going on in that.

And I wanted to ask you—I want to talk specifically about PBMs—pharmacy benefit managers—where three companies control 78 percent of the market.

First of all, Mr. Simons, you and I met after you became director and we met and we talked about the anti-competitive nature of this. Would you consider three companies owning 78 percent of the market be a problem?

Mr. SIMONS. Certainly, a market structure in which you might find and we might look for anti-competitive conduct.

As I mentioned before, in terms of anti-trust enforcement, the places you look are the places where there are small numbers of firms with large shares.

Mr. CARTER. Right.

Mr. SIMONS. And this would be such a case.

Mr. CARTER. One of the things that confuses me is when we talk about vertical integration and horizontal integration and often times you tell me, well, vertical integration is fine and we just have to worry about horizontal integration.

Mr. SIMONS. No, I wouldn't say that.

Mr. CARTER. Well, I appreciate you correcting me because that's probably a misnomer that I want to dispose of because the vertical integration as we see it right now, all of you know what's going on. All of you know what's going on.

We've got the top three—those three that I mentioned—PBMs that control 78 percent of the market—you have got CVS, Caremark that now is buying Aetna. So all of a sudden you're going to have a vertical integration that includes the insurance company owning the pharmacy benefits manager owning the pharmacy.

Now you have got Cigna buying out Express Scripts. Did you know that Express Scripts, according to volume, is the third largest pharmacy chain in America right now?

So now you have gone number one at CVS. You have got number three at Express Scripts. Cigna is going to be the insurance company.

Express Scripts will be the PBM and there will be the pharmacy, and that vertical integration you yourself, Mr. Simons, the FTC investigated in January of 2012 regarding patient steering from Caremark to CVS. And what was going on there?

We see it. I've got numerous examples that I can share with you and I will be glad to share with you, and yet they hide under the auspices of a lack of transparency.

This is the most opaque system that's known out there, and they hide behind that and their profits have been just outrageous.

In fact, I don't like to read but I am going to read this: according to data from CMS, between 1987, when PBMs first became involved in this when they were formed, and 2014 expenditures on prescription drugs have jumped by 1,100 percent.

There's been 1,553 percent increase in per employee prescription drug benefit cost since 1987. In the last 10 years, the two largest PBMs have increased their profit margins by nearly 600 percent.

Now, folks, I am not opposed to anybody making money. But if you ask them what is the mission of a PBM, they'll tell you it's to control prescription drug prices.

Well, how is that working out? Why is that an initiative of the president of Health and Human Services right now to lower prescription drug prices?

If they are fulfilling their mission, and yet they're hiding again and this is what we look to the FTC to do. Am I wrong? Is that not your responsibility? Should I be talking to some other agency?

Mr. SIMONS. Well, it's partially our responsibility. So we look at anti-competitive conduct and if they're engaging in anti-competitive conduct we should be challenging it.

Mr. CARTER. So just a quick story. I had a pharmacist that shared a story with me—that he filled a prescription at his drug store for his wife, who was covered under Caremart insurance.

That night he got a call at his home from CVS saying if you get it filled at our pharmacy you can get a lower co-payment.

Now, is there supposed to be a firewall? What happened to that firewall? This was his wife.

Mr. SIMONS. I understand.

Mr. CARTER. That's the kind of behavior that's going on here. Yet and we look to you to help us with this, not because of the pharmacy but because of the consumer. It's the consumer who's suffering here, because as you do away the independent retail pharmacies, you do away with choice, less competition, that's not going to benefit the consumer at all.

It's just very frustrating when you have a profession where the PBMs are responsible—they create the pharmacy networks. They decide who's going to be let into that network and who's not going to be let into that network. They direct the patients to the certain pharmacies and it they own the pharmacy who do you think they're going to direct it to?

My one question is who is supposed to be watching this. I thought it was the FTC. Can I get a commitment that you will look into this?

Mr. SIMONS. We are looking into it.

Mr. CARTER. You're looking into it now?

Mr. SIMONS. You and I had a meeting and—

Mr. CARTER. We did.

Mr. SIMONS. —And I took what you said to heart.

Mr. CARTER. Thank you.

I look forward to continuing that conversation with you.

Mr. LATTA. Thank you very much.

Mr. CARTER. Thank you. I yield.

Mr. LATTI. The gentleman's time has expired and the chair now recognizes the chairman from Maryland for 5 minutes.

Mr. SARBANES. Thank you, Mr. Chairman, for the opportunity to participate in the hearing. Just before I start my questions, I want to say I agree 1,000 percent with my colleague. These mergers are kind of out of control. They're putting the consumer, really, in a very, very bad position.

I want to thank you all for being here, for your work. This is an incredibly important commission in terms of protecting consumers, obviously, and the opportunities to lean in to do that, I think are expansive right now, if you look across all the various areas of jurisdiction that you have.

Commissioner, is it Simmons? Is that the pronunciation?

Mr. SIMONS. It's Simons.

Mr. SARBANES. It's Simons. OK.

Mr. SIMONS. One M, two S's.

Mr. SARBANES. I was wondering why everyone was saying Simons.

Mr. SIMONS. But it's remarkable how often it's pronounced so I am used to it.

Mr. SARBANES. OK. So Commissioner Simons, I wanted to talk a little bit about biologic drugs and biosimilars. The FTC, as I understand it, doesn't currently have the authority to monitor agreements made between the manufacturers of biologics and biosimilars, and I wanted to know if you thought it was important that the FTC get that authority and, if so, why.

Mr. SIMONS. I mean, in terms of, like, pay for delay and—

Mr. SARBANES. Exactly.

Mr. SIMONS. Yes, that would be helpful.

Mr. SARBANES. I mean, my understanding is that if you look at the authority you have over the agreements between brand name drug manufacturers and generic drug manufacturers where you can monitor this anti-competitive behavior, the pay for delay agreements, and so forth, that you can have a significant impact on the overall cost to the consumer out there is you take those actions.

Can you describe a little bit some of the tools you have when you go after those pay for delay agreements?

Mr. SIMONS. So the statute you're talking about requires that if there's any agreement between a brand and a generic I think that delays the marketing of the product that they have to report that to the FTC and those disclosures are significant way in which the commission finds out about these agreements and whether it tells us where to look for whether these agreements might be anti-competitive or not.

So the alert says hey, these agreements, and it's a big brief description of what they are, and we can look at them and then figure out OK, which ones look like they're problems and then we go after them.

Mr. SARBANES. It's incredibly important. I think there's a study out there that shows that while brand name drugs are about 10 percent of all drugs that are dispensed, I think that's including biologics in the equation, they make up about 72 percent of the annual U.S. drug spending.

So there's a huge amount of money on the line, obviously, from patients directly and from payers like Medicare and Medicaid, government payers that can be saved by monitoring these agreements, blocking these agreements.

But it's really critical to get that same kind of authority with respect to the biologics and the biosimilars because in the same way those paid for delays are decreasing market competition. They're keeping the costs high. That's hurting patients at the counter, and I want to, again, commend you on the work you're doing with respect to the brand name drugs and the generics.

But the Medicare Modernization Act of 2003, which gave FTC this authority, as you know, didn't extend it to biologics and biosimilar drugs.

So I will be introducing soon the Biosimilars Competition Act of 2018 to grant FTC that authority so that you can begin to monitor these deals, punish the bad actors and hopefully deter many of these backroom deals from being made in the first place.

We look forward to any comments you all will have with respect to the proposed because we do want to give you that authority.

Mr. SIMONS. Thank you very much.

Mr. SARBANES. I wanted to switch gears really quickly. You had probably two or three members ask you about your authority as it related to Facebook and that earlier consent decree and I wanted to pick up on that a little bit.

I was sort of struck in a recent earnings call—the various Wall Street analysts were, like, peppering Mark Zuckerberg and Sheryl Sandberg about the implications of Europe's new privacy law, the general data protection regulation, how it might impact the company and its earnings.

Not a single analyst asked about the FTC's announced investigation into Facebook's privacy concerns, potential violation of the 2011 consent decree.

So the market, in any event, doesn't seem to be taking that consent decree—your ability to enforce it and punish Facebook if you see violations, seriously from a kind of market standpoint.

Actually, Commissioner Chopra, I would like your perspective, if you could share it quickly, just about this issue of the commission's credibility.

I mean, to me that treatment on the earnings call suggests that they're not taking it seriously. Can you speak to how the FTC could be taken more seriously on things like that and the tools that you could maybe use to do that?

Mr. CHOPRA. Without speaking about this specific matter at hand, the FTC very energetically goes after companies that break the law and when it comes to small time scammers, we really do lay down the hammer. We seek bans of executives. We sometimes close down a business.

I would like us to apply the law evenly regardless if it's a small time scammer or a big time publicly traded corporation and it's our duty, I think, to apply that law equally and the market needs to see that we are willing to do that. Otherwise, the credibility of our orders and enforcement will not be as high as it needs to be.

Mr. SARBANES. Well, thank you very much. I appreciate that. I agree with you and I think we do need to make sure the big guys receive the same kind of attention as the small guys.

The public's confidence in the commission, I think, is dependent upon that.

Thank you, and I yield back my time.

Mr. LATTA. Thank you. The gentleman's time has expired, and the chair now recognizes the gentleman from California for 5 minutes.

Mr. MCNERNEY. Well, I thank the chair and the ranking member. I thank the commissioners for your service with limited resources. It's a tough job.

In recent years, we've witnessed numerous data breaches incidents from many companies like Facebook, Equifax, Target, Home Depot, LinkedIn, and Anthem.

The FTC does have resources to help consumers who have been victims of data breaches.

Commissioner Slaughter, what more could the FTC be doing for consumers?

Ms. SLAUGHTER. Thank you for the question, Congressman.

I think my colleagues and I have all spoken particularly in the area of data breach and data security. Well, I don't say all—several of us have spoken.

No, I think all, actually, about how we could benefit from data security legislation, perhaps data breach notification legislation that gave us more specific authority and perhaps rulemaking authority with respect to data security and data privacy.

Mr. MCNERNEY. So that would be your specific recommendation as it you—the FTC be given rulemaking authority?

Ms. SLAUGHTER. Yes. A number of us have outlined different kinds of authorities that would be useful in different ways. Rule-making is one. Civil penalty authority is another.

I think we do and we will go after violations of the law where we find them now. But deterring these problems on a large scale would be better able to do that with a little bit more authority.

Mr. MCNERNEY. Thank you.

Commissioner Chopra, do you have anything to add to that?

Mr. CHOPRA. Well, I think that you mentioned Target and some other large retailers. I just want to underscore, particularly with respect to stolen credit card information at these large retailers, this actually impacts a wide swath of our banking industry as well. Community banks, others, who in some ways have to take those losses.

So we require financial institutions. We require certain health care institutions to protect data. I think we, in some ways, need to level the playing field and make sure other big sectors of the economy are doing the same thing.

Mr. MCNERNEY. Thank you.

Chairman Simons, facial recognition features are increasingly being incorporated into technology. However, just last week, Brad Smith from Microsoft stated that facial recognition technology should be regulated, which is voicing a great concern on this issue.

What is the FTC doing to address privacy concerns raised by facial recognition technology?

Mr. SIMONS. Thank you for the question, Congressman.

So this is a good example of something that maybe even a few years ago was not really considered sensitive information, and now with the development of technology now it is sensitive information.

And so one of the things we are following and are careful about is whether people are being misled about information that is sensitive information for them and whether the companies have disclosed how they're using it in the correct way.

Mr. MCNERNEY. Thank you.

Mr. Chopra, do you have anything to add to that?

Mr. CHOPRA. Well, I agree with Chairman Simons.

I will just add I think the potential for misuse with facial recognition implicates a lot of issues and values that we are not always best situated to combat.

I don't know if I want to live in a society where everyone knows my movements at all time and where my face can be scanned and it can be used to decide other things about me.

Mr. MCNERNEY. Hear, hear.

Mr. CHOPRA. So it's something I am worried about when it comes to misuse. I saw Microsoft's announcement about this. We will do what we can.

But I want to be clear. We can't solve everything with respect to the issues with facial recognition. We have limited authority to do that.

Mr. MCNERNEY. So this is an area you think Congress needs to get involved in?

Mr. CHOPRA. Well, I think it involves a lot of issues beyond our narrow lens including really our values as Americans and our civil liberties, and that is something that we want to enforce the law with respect to promises that are made or misuse of data in certain commercial transactions.

But I think it's on you guys to really think about the big picture.

Mr. MCNERNEY. OK. Thank you.

Chairman, I am going to follow up on the Cambridge Analytica issue.

The FTC entered a consent decree with Facebook in 2011. In 2015, it was revealed that Cambridge Analytica illegitimately obtained consumer data.

Yet, it was not until this spring that the commission announced it was investigating. Now, I realize you can't comment on Facebook specifically, but can you tell us what steps the commission is taking to improve how it monitors compliance with consent decrees?

Mr. SIMONS. Yes. Without saying anything about the particular matter, so this is another example of self-critical examination.

So when this all came to light, one of the things we did was we started a task force to deal with potential changes in how we do our orders.

Mr. MCNERNEY. And how you enforce those?

Mr. SIMONS. How we write them and how we enforce them.

Mr. MCNERNEY. Because, you don't enforce them. There's no point in—

Mr. SIMONS. Right. But also you have to write them in the right way. So you have to get the company committed to doing what it

needs to do and you have to—and also in terms of being able to monitor them properly.

So writing the orders is important and enforcing is important. Both are important.

Mr. MCNERNEY. Thank you for that answer.

Mr. CHOPRA. Congressman, if I can quickly add, I think we all take enforcement of our orders seriously. I will note that when Chairman Simons was—his previous stint at the FTC he achieved and obtained a very significant penalty against a larger order violator and I think we will continue with that spirit and use all the tools we can to correct violations of our orders.

Mr. MCNERNEY. Thank you.

I would like to yield back.

Mr. LATTA. Thank you very much.

The gentleman's time has expired and at this time the ranker and I are going to ask one last quick question each that we agreed upon.

Chairman, I was wondering if I could start, to just ask my last question to you. I want to touch on an issue we've all heard about. We have seen advertisements that target the senior population. We've all seen or heard the lawsuit advertisements that proclaim that certain medications or drugs may cause complications and to contact the organization or law firm airing the advertisement.

I also understand that these ads may at times be misleading or in some cases just outright fraudulent, leading to potential physical harm.

Is this an issue that the FTC is focused on and, if you are, what is the FTC doing to prevent misleading or false ads?

Mr. SIMONS. Yes, so this is potentially deception in a very sensitive area and it also, because of the area of its involvement, it's something that we would do in conjunction with the FDA.

Mr. LATTA. OK. But this is something you're actively working on then?

Mr. SIMONS. Well, you brought it to our attention, yes. So this is some of the concern, yes.

Mr. LATTA. OK. Well, thank you very much.

And I will recognize the gentlelady from Illinois, the ranker of the subcommittee.

Ms. SCHAKOWSKY. As I mentioned in my opening statement, the European Commission announced a \$5.1 billion antitrust fine on Google.

The E.U. alleges, among other things, that Google, for smart phone makers, preinstall Google Search together with its Play Store and Chrome browser and sign agreements not to sell devices on rival Android systems by imposing its bundled package on smart phone makers.

Google, arguably, gave itself an advantage over its competitors. So, Chairman Simons, I know that you have announced a series of hearings that will examine a competition policy.

But as of right now, are there any limitations under U.S. law that would prevent the FTC from looking into Google's conduct regarding this kind of bundling.

Specifically, do you have enough authority to consider if Google's conduct is anti-competitive?

Mr. SIMONS. So thank you for the question.

We do have enough authority to determine whether it's anti-competitive or not. And let me just say, we are going to read what the EU put out very closely.

We are very interested in what they're doing. I had a conversation with Commissioner Vestager yesterday. So we are very interested in what the EU is——

Ms. SCHAKOWSKY. I am sorry. Who is that person?

Mr. SIMONS. She's the commissioner. She's my counterpart of the European Commission's competition directorate.

But in terms of what they look at versus what we look at, their regulatory regime is a little different than ours.

So once they find that a company is dominant, as I understand it, that imposes upon the company kind of like a fairness obligation irrespective of what the effect is on the consumer.

Our anti-trust regime requires that there be a harm to consumer welfare. So the consumer has to be injured.

So the two tests are a little bit different. But we are going to look closely at what the EU is doing.

Ms. SCHAKOWSKY. Thank you.

I yield back.

Mr. LATTA. Thank you very much. The gentlelady yields back.

And seeing that there are no other further members here to ask any questions, again, we want to thank you all for being with us today and appearing before the subcommittee.

Before we do conclude, I would like to submit them for the record by unanimous consent: A letter from ACA International, a letter from the Electronic Privacy Information Center, a letter from the Coalition Trade Association, and a letter from the Internet Association.

And without objection, so ordered.

[The information appears at the conclusion of the hearing.]

Mr. LATTA. Pursuant to committee rules, I remind members that they have 10 business days to submit additional questions for the record, and I ask that our witnesses submit their responses within 10 business days upon receipt of those questions.

And without objection, the subcommittee stands adjourned.

[Whereupon, at 12:02 p.m., the committee was adjourned.]

[Material submitted for inclusion in the record follows:]



July 17, 2018

The Honorable Bob Latta
Chairman
Subcommittee on Digital Commerce and
Consumer Protection
U.S. House of Representatives
Washington, DC 20515

The Honorable Jan Schakowsky
Ranking Member
Subcommittee on Digital Commerce and
Consumer Protection
U.S. House of Representatives
Washington, DC 20510

Dear Chairman Latta and Ranking Member Schakowsky:

On behalf of ACA International, I am writing regarding the hearing, "Oversight of the Federal Trade Commission" in the Energy and Commerce Subcommittee on Digital Commerce and Consumer Protection. ACA International is the leading trade association for credit and collection professionals representing approximately 3,000 members, including credit grantors, third-party collection agencies, asset buyers, attorneys, and vendor affiliates in an industry that employs more than 230,000 employees worldwide.

The credit and collection industry is a highly regulated industry complying with applicable federal and state laws and regulations regarding debt collection, as well as ethical standards and guidelines established by ACA. ACA members contact consumers exclusively for non-telemarketing reasons to facilitate the recovery of payment for services that have already been rendered, goods that have already been received, or loans that have already been provided. The use of modern technology is critical for the ability to contact consumers in a timely and efficient matter, and often the sooner and earlier in the collection process that a consumer is put on notice of a debt, the better off they are.

Congress passed the Fair Debt Collection Practice Act (FDCPA) in 1977 to govern third party debt collection practices including communications with consumers. However, at the time of its enactment, Congress provided the Federal Trade Commission (FTC), then the primary regulator for the FDCPA, with enforcement authority only but no rulemaking authority. In 2010 when enacting the Dodd Frank Wall Street Reform and Consumer Protection Act, (Dodd-Frank Act) Congress also provided the Bureau of Consumer Financial Protection (BCFP) with the authority to write rules for the FDCPA. The BCFP has indicated that it plans to propose rules for the FDCPA in March 2019 and shares jurisdiction with the FTC for enforcing it.

Despite that the credit and collection industry is already highly regulated, and despite that the industry is making informational calls not subject to the Do Not Call List, which is aimed at telemarketing communications, some of their calls have been blocked or impeded by

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technologies allegedly targeting “robocalls”. Without question, the FTC’s efforts in this area concerning “robocalls” have been laudable for the focus on bad actors making illegal calls. However, it must do a better job going forward differentiating between highly legal informational calls and illegal “robocallers”, and stop using one-size-fits-all rhetoric punishing all callers seeking to communicate with consumers. Sweeping all communications into the category of “robocalls” is misleading to consumers and can often cause more harm than good when they do not receive information that they need.

Some Call Blocking Technologies are Impeding Legal Informational Calls

ACA has stood in support of FTC efforts to thwart the growing number of unlawful “robocalls” through narrow and targeted technological solutions. However, it is critical that as “robocall” processing tools are developed and implemented, these should not cause legitimate calls to be blocked, harming lawful business communications and depriving consumers of important, timely information. In 2017, ACA members became increasingly alarmed as they began to discover drops in right-party contacts coupled with discoveries that their legitimate business calls were being labeled as “suspected scam,” “scam likely,” or some other version that implied the call was not from a legitimate caller. Currently, industry members report that many carriers will provide a busy signal to the call originator when they block a legitimate call. Often the consumer does not even know a call attempt was made.

In recent months, ACA members have continued to report that legitimate calls that they are making are either blocked or mislabeled by third parties providers. Not only does this impede legitimate business communications but it also prompts misguided complaints when callers believe they are dealing with a bad actor. This mislabeling can also make a consumer reticent to communicate with the caller, even though it is in their best interest to learn about and resolve an outstanding account, if it appears they are speaking with a scammer. Given the critical importance of effective two-way communication to the debt collection process, this has become a serious issue that threatens the fundamental ability of debt collectors to communicate with consumers to share important account information and resolve outstanding debt.

ACA fears that the unintended negative effects of “robocall” processing tools will only get worse without intervention. Accordingly, we urge Congress to work with the FTC and other agencies such as the Federal Communications Commission (FCC) to ensure that legitimate businesses are not harmed by call blocking technologies, which can disadvantage consumers when they do not get informational business communications that they need.

The Stopping Bad Robocalls Act Could Harm Needed Legitimate Communications

We also have serious concerns about H.R. 6026 and S.3078 both entitled the Stopping Bad Robocalls Act. While the Stopping Bad Robocalls Act on its face sounds positive, implying that it addresses bad and illegal actors making abusive “robocalls”, in reality it is not appropriately tailored to achieving that objective. Despite its purported efforts to curtail practices harming consumers, in practicality this legislation would harm businesses seeking to make informational calls to consumers about needed information. Specifically, the overly broad characterization of

what is considered a “robocall” and the proposed expanded definition of what is considered an autodialer are very problematic.

The legislation would stymie the free flow of information between thousands of legitimate businesses and consumers, by saddling them with additional compliance burdens and increased risks for the exorbitant costs and resource burdens associated with Telephone Consumer Protection Act (TCPA) litigation. This lack of clarity would also have a disproportionately harmful impact on small businesses and financial institutions, which would have a difficult time navigating how to comply with such broad definitions of what is considered an autodialer and the seemingly unlimited number of different ways that consent already provided could be revoked.

If the Stopping Bad Robocalls Act was appropriately tailored to focus on bad actors that are making abusive and illegal “robocalls”, we would be in staunch support of such efforts. ACA members strongly agree that consumers deserve to be treated fairly and respectfully. However, the Stopping Bad Robocalls Act is not tailored to that goal and it instead does more harm than good by creating additional confusion, in an already confusing marketplace for determining how to comply with the TCPA. When Congress enacted the TCPA it was for the purpose of limiting abusive telemarketing calls, and this legislation would mark an even further departure from that laudable goal of stopping sales calls that consumers have not consented to receive. The FTC also has several other means to address abusive telemarketing calls such as the Do Not Call List, which does not require new legislation that sweeps in a plethora of other types of non-telemarketing calls.

Limiting consumers’ ability to receive needed information is not a helpful step towards protecting them. As the BCFP recently noted in a letter to the FCC, “Consumers benefit from communications with consumer financial products providers in many contexts, including receiving offers of goods and services and notifications about their accounts. Recent years have seen rapid increases in the use of smart phones, text messages, email, social media, and other new or newer methods of communication. With the advent and deployment of these communication technologies, it is important to review how statutes and regulations apply to them.”

Unfortunately, the Stopping Bad Robocalls Act is a step backwards. It is not helpful in clarifying a severely outdated statute enacted in 1991 that has not kept up with modern technology and consumers’ preferences. Instead, it will make it harder for legitimate businesses to contact consumers, and for those consumers to learn about information they need to preserve their ability to access credit, health services, and a large variety of other exigent information.

Without an effective collection process, the economic viability of businesses and, by extension, the American economy in general, is threatened. Recovering rightfully-owed consumer debt enables organizations to survive, helps prevent job losses, keeps credit, goods, and services available, and reduces the need for tax increases to cover governmental budget shortfalls. Also of great importance, the information that callers are seeking to provide consumers with often includes vital information that impacts their daily lives. Accordingly, Congress and the FTC

should draw clear distinctions between communications that are illegal and abusive and those that are highly legal and needed.

Thank you for your attention to these important matters.

Sincerely,

A handwritten signature in black ink, appearing to read 'Mark Neeb', with a stylized flourish at the end.

Mark Neeb
Chief Executive Officer

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July 17, 2018

The Honorable Robert Latta, Chairman
The Honorable Janice Schakowsky, Ranking Member
U.S. House Committee on Energy and Commerce
Subcommittee on Digital Commerce & Consumer Protection
2125 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Latta and Ranking Member Schakowsky:

We write to you regarding the hearing on "Oversight of the Federal Trade Commission."¹ We appreciate your interest in the critical role of the FTC and consumer protection. We look forward to working with the new FTC Chairman and Commissioners. But the FTC must do more to address the growing threats to consumer privacy in the United States. Consumers today face unprecedented risks of identity theft, financial fraud, and data breaches. The FTC's continued failure to act against the growing threats to consumer privacy and security could be catastrophic.

For many years, the Electronic Privacy Information Center ("EPIC") has worked with the House Commerce Committee to help protect the privacy rights of Americans.² EPIC has also played a leading role at the Federal Trade Commission, helping to establish the Commission's authority to safeguard American consumers, and bringing to the Commission's attention emerging privacy and civil liberties.³ And EPIC is the group that filed the detailed complaint against Facebook with the

¹ *Oversight of the Federal Trade Commission*, 115th Cong. (2018), H. Comm. on Energy & Commerce, Subcomm. on Digital Commerce and Consumer Protection, <https://energycommerce.house.gov/hearings/oversight-of-the-federal-trade-commission-2018/> (Jul. 18, 2018).

² See, e.g. Marc Rotenberg, EPIC Executive Director, Testimony before the H. Comm. on Energy & Commerce, Subcomm. on Communications & Technology, *Examining the EU Safe Harbor Decision and Impacts for Transatlantic Data Flows* (Nov. 13, 2015), <https://epic.org/privacy/intl/schrems/EPIC-EU-SH-Testimony-HCEC-11-3-final.pdf>.

³ Letter from EPIC Executive Director Marc Rotenberg to FTC Commissioner Christine Varney, EPIC (Dec. 14, 1995) (urging the FTC to investigate the misuse of personal information by the direct marketing industry) available at http://epic.org/privacy/internet/ftc/ftc_letter.html; See also EPIC, *In the Matter of DoubleClick, Complaint and Request for Injunction, Request for Investigation and for Other Relief, before the Federal Trade Commission* (Feb. 10, 2000), available at http://epic.org/privacy/internet/ftc/DCLK_complaint.pdf; EPIC, *In the Matter of Microsoft Corporation, Complaint and Request for Injunction, Request for Investigation and for Other Relief*, before the Federal Trade Commission (July 26, 2001), available at http://epic.org/privacy/consumer/MS_complaint.pdf; EPIC, *In the Matter of Choicepoint, (Complaint, Request for Investigation and for Other Relief)*, Dec. 16, 2004, available at <http://epic.org/privacy/choicepoint/fcraltr12.16.04.html>.

FTC in 2009, resulting in the Commission's 2011 Consent Order with Facebook.⁴ EPIC is also the group that sued the FTC for its failure to enforce a similar order against Google.⁵

Why Does the FTC Fail to Enforce Its Own Consent Orders?

In 2011, the FTC entered into a Consent Order with Facebook, following an extensive investigation and complaint pursued by EPIC and several US consumer privacy organizations. The Consent Order prohibited Facebook from transferring personal data to third parties without user consent.⁶ As EPIC told Congress back in April, the transfer of personal data on 87 million Facebook users to Cambridge Analytica could have been prevented had the FTC enforced its 2011 Consent Order against Facebook.⁷ *The obvious question now is "why did the FTC fail to act?"*

In 2011, EPIC also obtained a significant judgment at the FTC against Google after the disastrous roll-out of Google "Buzz."⁸ In that case, the FTC established a consent order after Google tried to enroll Gmail users into a social networking service without meaningful consent.⁹

But a problem we did not anticipate became apparent almost immediately: the FTC was unwilling to enforce its own consent orders. Almost immediately after the settlements, both Facebook and Google began to test the FTC's willingness to stand behind its judgements. Dramatic changes in the two companies' advertising models led to more invasive tracking of Internet users. Online and offline activities were increasingly becoming merged.

In March, the FTC finally announced that is investigating Facebook.¹⁰ Tom Pahl, Acting Director of the Federal Trade Commission's Bureau of Consumer Protection, issued the following statement regarding reported concerns about Facebook's privacy practices:

The FTC is firmly and fully committed to using all of its tools to protect the privacy of consumers. Foremost among these tools is enforcement action against

⁴ *In the Matter of Facebook, Inc.* (EPIC, Complaint, Request for Investigation, Injunction, and Other Relief) before the Federal Trade Commission, Washington, D.C. (filed Dec. 17, 2009), <http://www.epic.org/privacy/infacebook/EPIC-FacebookComplaint.pdf>.

⁵ *EPIC v. FTC*, 844 F. Supp. 2d 98 (D.D.C. 2012), <https://epic.org/privacy/ftc/google/EPICvFTC-CtMemo.pdf>.

⁶ Fed. Trade Comm'n., *In re Facebook*, Decision and Order, FTC File No. 092 3184 (Jul. 27, 2012) (Hereinafter "Facebook Consent Order"), <https://www.ftc.gov/sites/default/files/documents/cases/2012/08/120810facebookdo.pdf>.

⁷ See, Letter from EPIC to S. Comm. on the Judiciary and S. Comm on Commerce, Science and Transportation, (Apr. 9, 2018), <https://epic.org/testimony/congress/EPIC-SJC-Facebook-Apr2018.pdf>.

⁸ *In the Matter of Google, Inc.*, EPIC Complaint, Request for Investigation, Injunction, and Other Relief, before the Federal Trade Commission, Washington, D.C. (filed Feb. 16, 2010), https://epic.org/privacy/ftc/googlebuzz/GoogleBuzz_Complaint.pdf.

⁹ Fed. Trade Comm'n., *FTC Charges Deceptive Privacy Practices in Googles Rollout of Its Buzz Social Network: Google Agrees to Implement Comprehensive Privacy Program to Protect Consumer Data*, Press Release, (Mar. 30, 2011), <https://www.ftc.gov/news-events/press-releases/2011/03/ftc-charges-deceptive-privacy-practices-googles-rollout-its-buzz>.

¹⁰ Fed. Trade Comm'n., *Statement by the Acting Director of FTC's Bureau of Consumer Protection Regarding Reported Concerns about Facebook Privacy Practices* (Mar. 26, 2018), <https://www.ftc.gov/news-events/press-releases/2018/03/statement-acting-director-ftcs-bureau-consumer-protection>.

companies that fail to honor their privacy promises, including to comply with Privacy Shield, or that engage in unfair acts that cause substantial injury to consumers in violation of the FTC Act. Companies who have settled previous FTC actions must also comply with FTC order provisions imposing privacy and data security requirements. Accordingly, the FTC takes very seriously recent press reports raising substantial concerns about the privacy practices of Facebook. Today, the FTC is confirming that it has an open non-public investigation into these practices.¹¹

It is critical that the FTC conclude the Facebook matter, issue a significant fine, and ensure that the company uphold its privacy commitments to users. The U.K. Information Commissioner's Office recently fined Facebook the maximum allowable fine under U.K. law as the result of the Cambridge Analytica breach, charging the company with "failing to safeguard people's information [and] failing to be transparent about how people's data was harvested by others and why they might be targeted by a political party or campaign."¹² Given the current focus on Privacy Shield, it is vital that the FTC not lag behind other countries in enforcement.

Four months have now passed since the new Commission announced it was reopening its investigation of Facebook, but still there is no judgment. As Chairman Simons has stated, a "first priority for the Commission" will be "vigorous enforcement."¹³ FTC Commissioner Rohit Chopra recently stated that "FTC orders are not suggestions."¹⁴ EPIC strongly agrees, and we hope that this sentiment will translate into concrete action by the FTC. EPIC has repeatedly urged the FTC to enforce its consent orders. Its failure to do so has had devastating consequences for American consumers.

The Committee should ask the FTC Chairman and the Commissioners: When will there be a final determination in the Facebook investigation? What other steps can the FTC take to assure the American public that the Commission will enforce its legal orders?

Why Has the FTC Failed to Stop Mergers that Threaten Consumer Privacy?

The FTC must also address the serious threats to consumer privacy posed by increasing consolidation among the dominant technology firms in the United States. The FTC's failure to take these threats into account in its merger review process is one of the main reasons that consumer privacy has diminished and the secretive tracking and profiling of consumers has proliferated.

¹¹ *Id.*

¹² Information Commissioner's Office, *Investigation Into the Use of Data Analytics In Political Campaigns*, (Jul. 10, 2018), <https://ico.org.uk/media/action-weve-taken/2259371/investigation-into-data-analytics-for-political-purposes-update.pdf>.

¹³ *Nomination Hearing*, 115th Cong. (2018), S. Comm. on Science, Commerce and Transportation, (Feb. 14, 2018) (Joseph Simons, Chairman, Fed. Trade Comm'n. at 59:40), <https://www.commerce.senate.gov/public/index.cfm/hearings?ID=EECF6964-F8DC-469E-AEB2-D7C16182A0E8>.

¹⁴ Memorandum from Commissioner Rohit Chopra to Commission Staff and Commissioners, Fed. Trade Comm'n, (May 14, 2018), https://www.ftc.gov/system/files/documents/public_statements/1378225/chopra_-_repeat_offenders_memo_5-14-18.pdf.

In 2007, EPIC warned the FTC that Google's acquisition of DoubleClick would lead to Google tracking consumers across the web, accelerating its dominance of the online advertising industry.¹⁵ The FTC ultimately allowed the merger to go forward over the compelling dissent of Pamela Jones Harbour.¹⁶ Not surprisingly, Google today accounts for 90 percent of all Internet searches and, together with Facebook, absorbs 73 percent of all digital advertising revenue in the U.S.¹⁷

In 2014, the FTC failed to impose privacy safeguards for Facebook's acquisition of WhatsApp, a text-messaging service that attracted users specifically because of its privacy protections.¹⁸ The FTC allowed the merger to go through based on assurances by both companies that they would honor WhatsApp users' privacy.¹⁹ But in 2016, WhatsApp announced that it would begin disclosing its users' personal information to Facebook.²⁰ The U.K. ICO blocked WhatsApp's transfer of data to Facebook,²¹ and the European Commission fined Facebook \$122 million for misleading European authorities about the data transfer.²² But the FTC again failed to take action.

Chairman Joseph Simons stated during his nomination hearing that, "the FTC needs to devote substantial resources to determine whether its merger enforcement has been too lax, and if that is the case, the agency needs to determine the reason for such failure and to fix it."²³ Chairman Simons has recently announced a substantial review of competition policy which EPIC supports.²⁴ However, we must ensure that the Commission uses its current authorities to the fullest extent possible. For example, the Commission could "unwind" the Facebook-WhatsApp deal because of

¹⁵ *In the Matter of Google Inc. and DoubleClick Inc.*, (EPIC Complaint, Request for Injunction, Investigation, and Other Relief), (Apr. 20, 2007), https://epic.org/privacy/ftc/google/epic_complaint.pdf.

¹⁶ *In the Matter of Google/DoubleClick*, FTC File No. 070-0170 (2007) (Harbor, C., dissenting), https://www.ftc.gov/sites/default/files/documents/public_statements/statement-matter-google/doubleclick/071220harbour_0.pdf.

¹⁷ Editorial, *Break Up Google*, Boston Globe (Jun. 14, 2018), <https://apps.bostonglobe.com/opinion/graphics/2018/06/break-google/>.

¹⁸ *In the Matter of WhatsApp, Inc.*, (EPIC and Center for Digital Democracy Complaint, Request for Investigation, Injunction, and Other Relief), (Mar. 6, 2014), <https://epic.org/privacy/ftc/whatsapp/WhatsApp-Complaint.pdf>.

¹⁹ See, Fed. Trade Comm'n., *Letter to Facebook and WhatsApp from Jessica L. Rich, Director, Bureau of Consumer Prot.*, (Apr. 10, 2014), available at <https://epic.org/privacy/internet/ftc/whatsapp/FTC-facebook-whatsapp-ltr.pdf> (concerning the companies' pledge to honor WhatsApp's privacy promises).

²⁰ WHATSAPP, *Looking Ahead for WhatsApp*, WhatsApp Blog, (Aug. 25, 2016), <https://blog.whatsapp.com/10000627/Looking-ahead-for-WhatsApp>.

²¹ Information Commissioner's Office, *WhatsApp, Inc.*, (Mar. 12, 2018), <https://ico.org.uk/media/action-weve-taken/undertakings/2258376/whatsapp-undertaking-20180312.pdf>.

²² European Commission, *Mergers: Commission Fines Facebook €110 Million for Providing Misleading Information About WhatsApp Takeover*, Press Release, (May 18, 2017), http://europa.eu/rapid/press-release_IP-17-1369_en.htm.

²³ *Nomination Hearing*, 115th Cong. (2018), S. Comm. on Science, Commerce and Transportation, (Feb. 14, 2018) (statement of Joseph Simons, Chairman, Fed. Trade Comm'n.), <https://www.commerce.senate.gov/public/index.cfm/hearings?ID=EECF6964-F8DC-469E-AEB2-D7C16182A0E8>.

²⁴ Press Release, Fed Trade Comm'n, *FTC Announces Hearings On Competition and Consumer Protection in the 21st Century* (June 20, 2018), available at <https://www.ftc.gov/news-events/press-releases/2018/06/ftc-announces-hearings-competition-consumer-protection-21st>.

Facebook's failure to uphold its commitments to users.²⁵ Even the founders of WhatsApp have acknowledged that Facebook broke its commitments. How can it be that the FTC does not act in such circumstances?

The Committee should ask the FTC Chairman and the Commissioners: Will the FTC unwind the Facebook-WhatsApp deal? What further steps is the FTC going to take to protect consumer privacy in its merger review process?

Recommendations

There is a lot of work ahead to safeguard the personal data of Americans. Here are a few preliminary recommendations:

- *Improve oversight of the Federal Trade Commission.* The FTC has failed to protect the privacy interests of American consumer and the Commission's inaction contributed directly to the Cambridge Analytica breach, and possibly the Brexit vote and the outcome of the 2016 Presidential election. Oversight of the Commission's failure to enforce the 2011 consent order is critical, particularly for the House Commerce Committee which also bears some responsibility for this outcome.
- *Update US privacy laws.* It goes without saying (though obviously it still needs to be said) that U.S. privacy law is out of date. There has always been a gap between changes in technology and business practices and the development of new privacy protections. But the gap today in the United States is the greatest at any time since the emergence of modern privacy law in the 1960s. The current approach is also unnecessarily inefficient, complex, and ineffective. And many of the current proposals, e.g. better privacy notices, would do little to protect privacy or address the problems arising from recent data breaches.
- *Establish a federal privacy agency in the United States.* The U.S. is one of the few developed countries in the world without a data protection agency. The practical consequence is that the U.S. consumers experience the highest levels of data breach, financial fraud, and identity theft in the world. And U.S. businesses, with their vast collections of personal data, remain the target of cyber attack by criminals and foreign adversaries. The longer the U.S. continues on this course, the greater will be the threats to consumer privacy, democratic institutions, and national security.

Conclusion

The credibility of the FTC as the US agency responsible for consumer protection turns on its willingness to enforce its Consent Orders. If the Commission fails to enforce its orders, Americans will face ever greater risks and Europeans will be unwilling to send their personal data to the United States. There is an urgent need for the FTC to act.

²⁵ Marc Rotenberg, *The Facebook-WhatsApp Lesson: Privacy Protection Necessary for Innovation*, Techonomy (May 4, 2018), <https://techonomy.com/2018/05/facebook-whatsapp-lesson-privacy-protection-necessary-innovation/>

We ask that this letter be entered in the hearing record. EPIC looks forward to working with the Committee on these issues of vital importance to the American public.

Sincerely,

/s/ Marc Rotenberg
Marc Rotenberg
EPIC President

/s/ Caitriona Fitzgerald
Caitriona Fitzgerald
EPIC Policy Director

/s/ Christine Bannan
Christine Bannan
EPIC Administrative Law Fellow

/s/ Sam Lester
Sam Lester
EPIC Consumer Privacy Fellow

July 17, 2018

The Honorable Robert Latta
Chairman, Subcommittee on Digital
Commerce and Consumer Protection
House Committee on Energy & Commerce
Washington, DC 20515

The Honorable Jan Schakowsky
Ranking Member, Subcommittee on Digital
Commerce and Consumer Protection
House Committee on Energy & Commerce
Washington, DC 20515

RE: Hearing on "Oversight of the Federal Trade Commission"

Dear Chairman Latta and Ranking Member Schakowsky,

The undersigned associations, representing over a million businesses in industries that directly serve American consumers, have a vested interest in the security of consumer data. Protection of that information and providing consumers with the information they need when problems arise is important to provide confidence to American consumers in this age of rapidly advancing digital technology.

We want to compliment this subcommittee for its commitment to examining this issue and inviting a broad cross-section of stakeholders to participate. The listening sessions led by Chairman Latta have been a productive exercise and we appreciate the time and effort that has gone into them. Those sessions have helped illuminate what the data bears out, that every industry sector – whether consumer-facing or business-to-business – suffers data security breaches that may put consumer data at risk. To protect consumers comprehensively, wherever breaches occur, Congress should ensure that any federal breach notification law applies to *all* affected industry sectors and leaves no holes in our system that would enable some industries to keep the fact of their breaches secret.

Under the breach legislation reported by the House Financial Services Committee last Congress, however, there were multiple exemptions that would have been problematic. For example, Equifax would have been exempt from the bill's provisions along with banks, credit unions and other entities that qualify as "financial institutions" under the Gramm Leach Bliley Act (GLBA). In addition, telecommunications service providers, information technology companies, and other third parties that play a key role in handling vast amounts of information would have been able to shift onto other businesses the legal responsibility for providing notice to consumers when they suffer breaches. The absence of breach notice requirements for these businesses would have left millions of Americans unaware of, or confused about, their potential risks of financial harm and identity theft. The exemption of Equifax and other financial services companies from the requirements of that bill would have created particularly weak public policy given that the same bill provided those companies with preemption from the requirements of state laws.

Considering the widespread risk of data breaches afflicting all American industries and our governmental institutions, there are four key principles we support in federal data security and breach notification legislation:

1. **Establish Uniform Nationwide Law:** First, with the fifty-four inconsistent breach laws currently in effect in 50 states and 4 federal jurisdictions, there is no sound reason to enact federal legislation in this area unless it preempts the existing laws to establish a uniform, nationwide standard so that every business and consumer knows the singular rules of the road. One federal law applying to all breached entities would ensure clear, concise and consistent notices to all affected consumers regardless of where they live or where the breach occurs. Simply enacting a different, fifty-fifth law on this subject would not advance data security or consumer notification; it would only create more confusion.
2. **Promote Reasonable Data Security Standards:** Second, data security requirements in a federal law applicable to a broad array of U.S. businesses should be based on a standard of reasonableness. America's commercial businesses are remarkably diverse in size, scope and operations. A reasonable standard, consistent with federal consumer protection laws applicable to businesses of all types and sizes, would allow the right degree of flexibility while giving businesses the appropriate level of guidance they need to comply. Legislation taking this approach also would be consistent with the data security standard now used by the Federal Trade Commission (FTC) and nearly all state laws that include data security requirements in their breach notification statutes.
3. **Maintain Appropriate FTC Enforcement Regime:** Third, federal agencies should not be granted overly-punitive enforcement authority that exceeds current legal frameworks. For example, absent a completed rulemaking, the FTC must bring an action requiring a business to stop behavior that the FTC deems to be a violation of law. The FTC cannot seek civil penalties until it establishes what a violation is. That process gives businesses notice of the FTC's view of the law and is fair given the breadth of the FTC's discretion to determine what is legal.
4. **Ensure All Breached Entities Have Notice Obligations:** Finally, businesses in every affected industry sector should have an obligation to notify consumers when they suffer a breach of sensitive personal information that creates a risk of identity theft or financial harm. Informing the public of breaches can help consumers take steps to protect themselves from potential harm. Moreover, the prospect of public disclosure of breaches creates greater incentives for all businesses handling sensitive personal information to improve their data security practices. Creating exemptions for particular industry sectors or allowing breached entities to shift their notification burdens onto other businesses will weaken the effectiveness of the legislation, undermine consumer confidence, ignore the scope of the problem, and create loopholes that criminals can exploit.

The four principles above, which are supported by the undersigned organizations, are important to ensure that any data security and breach notification legislation advanced in

Congress does not overly burden businesses already victimized by a breach, does not impose unfair burdens on unbreached entities, and does not pick regulatory winners and losers among differing business sectors in the process. We urge you to exercise your leadership to find legislation that can meet these four principles. Additionally, any such process needs to include input from all affected industries and from businesses of all sizes. Otherwise, it risks imposing unfair or crippling burdens on some sectors but not others, which, unfortunately, has been the case with several past legislative proposals.

We appreciate your consideration of our views and we look forward to a continued constructive dialogue with you on these matters.

Sincerely,

American Hotel & Lodging Association
International Franchise Association
National Association of Convenience Stores
National Association of Realtors
National Association of Truck Stop Operators
National Council of Chain Restaurants
National Restaurant Association
National Retail Federation
Petroleum Marketers Association of America
Society of Independent Gasoline Marketers of America
US Travel Association

cc: Members of the U.S. House of Representatives

July 18, 2018 | News, Statements

Statement On The FTC Oversight Hearing

Washington, DC — Internet Association President and CEO Michael Beckerman issued the following statement on the House Energy & Commerce Committee Subcommittee on Digital Commerce and Consumer Protection hearing on Federal Trade Commission (FTC) oversight:

“The many benefits of the internet can be seen in every aspect of our society and economy – by consumers, business, and government alike – in ways that were unimaginable even 5 years ago. Internet Association is committed to having a discussion with Congress and the FTC about the current regulatory framework.

“The U.S. is home to some of the most successful internet companies that are global leaders in the technology industry. A key to America's success in building a vibrant internet ecosystem is an approach to regulation and enforcement that focuses on practices that materially harm consumers, with a clear view of benefits. The internet economy, as a result, is characterized by low barriers to entry, companies that focus on innovation and delivering value to consumers, and fierce competition that's just a click away. It's important that both policymakers and regulators keep in mind the important economic and national security benefits of having internet companies founded and based here in the U.S. as they export their products and services around the world.

“Core to the mission of Internet Association and our members is empowering people through a free and open internet. We encourage the FTC to keep the overwhelming benefits to consumers in mind as they seek to examine aspects of the internet industry.”

###

Congress of the United States
Washington, DC 20515

April 24, 2018

Maureen K. Ohlhausen
Commissioner
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Terrell McSweeney
Commissioner
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Commissioners Ohlhausen and McSweeney:

Technological change is revolutionizing many areas of life and business in the United States and around the world. Our mobile devices have changed the way in which we communicate, shop, and do business. These new technologies are also changing the way we pay for goods and services.

Mobile payments and mobile commerce are making a range of transactions more convenient and efficient. However, this technology is still relatively new here in the United States. Many other parts of the world are ahead of us when it comes to mobile transactions. We need to ensure new mobile payment technologies take root and flourish here.

One key to these technologies taking off is ensuring the incumbent players in the payments industry do not use their market positions to block the development of these technologies. The development of standards is one means by which incumbent businesses might try to protect their market share from the competition of new innovations. The risk of that happening in payments is acute because the largest card networks control standard-setting and other stakeholders (consumers, merchants, and financial institutions) do not have a vote in how those standards are made.

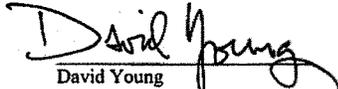
We have already seen evidence of that happening with payments. As security standards have been developed over the past couple of decades, we have seen favored, proprietary technologies given a leg up – and open platforms pushed out. With respect to card security, some industry sectors have been allowed to deploy state-of-the-art technology, such as the use of personal identification numbers (PINs) at automated teller machines, while other parts of industry, such as merchant points-of-sale, have been prevented from fully deploying that same technology.

We cannot afford to let payments innovations be stifled through standard-setting that favors proprietary technology over open platforms or holds back innovative approaches – including security innovations that will protect all of us – in any way. Innovations that drive efficiency in the marketplace are one of the primary underpinnings of the growth of the U.S. economy for generations. We need it now.

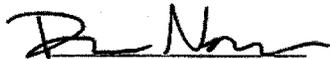
With that in mind, we urge you to closely review the standard-setting processes for payments and payment security, and take decisive action to ensure that those processes are changed in any way necessary to make those processes open and consistent with U.S. standard-setting guidelines that protect against domination of standard-setting by any one industry sector and ensure standards are not used to anti-competitive ends.

Thank you for your attention and vigilance in protecting payments and security innovation.

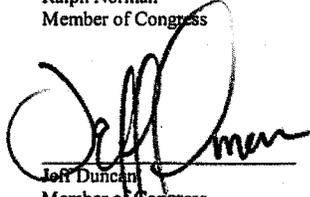
Sincerely,

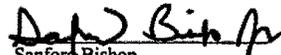

David Young
Member of Congress

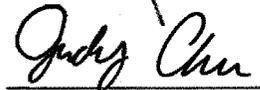

Peter Welch
Member of Congress


Ralph Norman
Member of Congress

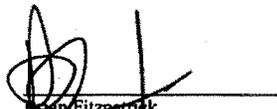

Jaime Herrera Beutler
Member of Congress


Jeff Duncan
Member of Congress


Sanford Bishop
Member of Congress


Judy Chu
Member of Congress


Glenn Grothman
Member of Congress


Sean Fitzpatrick
Member of Congress



Office of the Secretary

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

June 25, 2018

The Honorable Peter Welch
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative Welch:

Thank you for your letter to the Federal Trade Commission calling for vigilant antitrust oversight of standard-setting activities involving the development of mobile payment and payment security technologies. We appreciate receiving your views and hearing your concerns in relation to these developing markets. The financial services industry comprises a significant portion of the United States economy, and the Commission takes seriously the risk that major financial services incumbents might utilize their positions to impose anticompetitive restraints during a standard-setting process.

We also wholeheartedly share your goal of detecting and remedying any practice that may harm competition and consumers in the emerging mobile transaction arena, thereby protecting pathways for efficiency-enhancing innovations that can help foster economic expansion. As you know, the Commission acts in the interest of consumers to prevent deceptive or unfair acts or practices and unfair methods of competition that violate Section 5 of the Federal Trade Commission Act,¹ such as collusion to increase prices or restrict output and exclusionary or predatory practices that harm competition and consumers. Congress also has empowered the Commission to prevent mergers, acquisitions, and certain other practices that may substantially lessen competition or tend to create a monopoly, in violation of the Clayton Act.² I can assure you that the Commission will take appropriate action against any act or practice in the mobile-payments marketplace that violates any of the statutes we enforce. We have also taken the liberty of forwarding your letter to the Antitrust Division of the Department of Justice, so that the Division may also review it.³

¹ 15 U.S.C. § 45.

² 15 U.S.C. §§ 12 *et seq.*

³ As you also know, the Commission and the Department have concurrent jurisdiction over many aspects of antitrust enforcement. In order to avoid duplication and maximize the effectiveness of federal antitrust enforcement, the Commission and the Department's Antitrust Division have developed, and have for many years maintained, a liaison arrangement through which we divide responsibility for antitrust review on the basis of agency authority and expertise.

The Honorable Peter Welch -- Page 2

Thank you again for your thoughts on maintaining competition and protecting consumers in the development of mobile transaction technologies. If you have any questions, please feel free to have your staff call Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2195.

Sincerely,

Donald S. Clark Digitally signed by Donald S. Clark
Date: 2018.06.25 15:27:35 -04'00'
Donald S. Clark
Secretary of the Commission

cc: Adrienne M. Hahn
Counsel for Legislative and
Intergovernmental Affairs
Antitrust Division
U.S. Department of Justice

Business Insider

If you shopped at these 15 stores in the last year, your data might have been stolen

Dennis Green and Mary Hanbury

Jul. 14, 2018, 2:13 PM



Macy's is the latest retailer to report a data breach. Thomson Reuters

- At least 15 retailers were hacked and likely had information stolen from them since January 2017.
- Many of these were caused by flaws in payment systems taken advantage of by hackers.

At least 15 separate security breaches occurred at retailers from January 2017 until now. Many of them were caused by flaws in payment systems, either online or in stores.

Data breaches are on the rise for both retailers and other businesses. According to Business Insider Intelligence, data breaches are a real danger for both brands and customers, and they can affect a customer's trust in brands.

According to a study by KPMG, 19% of consumers would completely stop shopping at a retailer after a breach, and 33% would take a break from shopping there for an extended period.

Here are 15 retailers that have been affected by data breaches since January 2017:

Macy's



Flickr/Mr Hicks

Macy's confirmed that some customers shopping online at Macys.com and Bloomingdales.com between April 26 and June 12 could have had their personal information and credit card details exposed to a third party.

Macy's did not confirm exactly how many people were impacted. However, a spokesperson for the company said the breach was limited to a small group of people.

Macy's said in a statement: "We have investigated the matter thoroughly, addressed the cause and, as a precaution, have implemented additional security measures. Macy's, Inc.

will provide consumer protection services at no cost to those customers. We have contacted potentially impacted customers with more information about these services."

Adidas



Adidas

Adidas announced in June that an "unauthorized party" said it had gained access to customer data on Adidas' US website. Currently, the company believes only customers who shopped on and purchased items from the US version of Adidas.com may have been affected by the breach.

The data that is potentially at risk includes customer contact information, like email addresses and physical addresses, as well as login information, like usernames and passwords. The passwords were stored with an encryption, however, which would need to be unencrypted before they could be used.

Adidas did not say exactly how many customers could have been affected by the breach, but an Adidas spokeswoman confirmed it is likely "a few million."

Sears



Getty Images

Sears alerted customers on April 4 of a "security incident" with an online support partner [24]7.ai that may have resulted in up to 100,000 people having their credit-card information stolen.

The incident affected shoppers who bought items online from September 27, 2017 to October 12, 2017

Kmart



Business Insider/Hayley Peterson

Kmart, which is owned by Sears Holdings, was also affected by the breach, the company reported on April 4.

Kmart had been affected by a separate breach last June.

Delta



John Amis / AP

Delta used the same online support service as Sears and was also affected by the reported breach.

The airline said customer payment information may have been vulnerable but did not estimate how many of its customers were affected.

Best Buy



AP/Sue Ogrocki

Best Buy was also affected by the breach of [24]7.ai, it told customers on April 5.

The retailer said only "a small fraction of our overall online customer population" was affected in the breach, which might have jeopardized payment information.

Saks Fifth Avenue



Darren Omitz/Reuters

Hudson's Bay, the parent company of Saks Fifth Ave, confirmed in April that a data breach compromised payment systems and therefore customers' credit and debit cards.

Estimates of the amount of affected customers have not yet been released, but could number in the millions. Online customers were not affected.

Lord & Taylor



Mark Matousek/Business Insider

Hudson's Bay also owns Lord & Taylor, and those stores were also affected by the breach.

Under Armour



Facebook/Under Armour

Under Armour confirmed in March that data from its MyFitnessPal app was accessed by an "unauthorized party."

Payment information was not released, but the app is used to track weight loss and information pertaining to that likely leaked. More than 150 million people's information was likely compromised.

Panera Bread



Facebook/Panera Bread

Panera Bread confirmed on April 2 that it was notified of a data leak on its website.

At the time, it said personal information, including names, addresses, and partial credit card numbers may have leaked, though the company says the investigation is ongoing.

The flaw in the website was fixed as of Monday, but up to 37 million people's information could have been leaked according to an estimate. That number was later revised to be an estimated less than 10,000 customers.

Forever 21



A Forever 21 store in Chicago. Timothy Hiatt/Getty Images

Forever 21 alerted its customers in November that some of their information may have been stolen.

A flaw in the store's cashier terminals may have inadvertently exposed data like credit card numbers, expiration dates, and internal verification codes to hackers. Customers who shopped in stores from March through October 2017 are vulnerable.

Sonic



Sonic

Sonic told Business Insider in September that it detected "unusual security regarding credit cards being used at Sonic."

Credit cards from 5 million customers may have been stolen, as most of the chains more than 3,600 locations use the same payment system.

Whole Foods



Getty/Justin Sullivan

Whole Foods announced in August that it "recently received information regarding unauthorized access of payment card information."

A flaw in the point-of-sale system used by the chain's taprooms and table-service restaurants was affected, but not the system the grocery store itself uses.

Gamestop



Chris Snyder/Business Insider

Gamestop confirmed a data breach in April 2017. Customers who shopped online for a six-month period are vulnerable, from August 10, 2016 to February 9, 2017.

Names, addresses, and credit card information were all taken in a breach of the website's payments processor.

Arby's



Arby's

Arby's confirmed in February 2017 a data breach may have affected 355,000 credit and debit cards used at its stores.

Malware in the chain's cashier systems between October 25, 2016 and January 19, 2017 allowed the unauthorized access.

GREG WALDEN, OREGON
CHAIRMAN

FRANK PALLONE, JR., NEW JERSEY
RANKING MEMBER

ONE HUNDRED FIFTEENTH CONGRESS
Congress of the United States
House of Representatives

COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6115

Majority (202) 225-2927
Minority (202) 225-3641
August 7, 2018

The Honorable Joseph J. Simons
Chairman
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

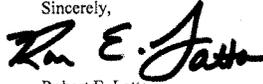
Dear Chairman Simons:

Thank you for appearing before the Subcommittee on Digital Commerce and Consumer Protection on Wednesday, July 18, 2018, to testify at the hearing entitled "Oversight of the Federal Trade Commission."

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. To facilitate the printing of the hearing record, please respond to these questions by the close of business on Tuesday, August 21, 2018. Your responses should be mailed to Ali Fulling, Legislative Clerk, Committee on Energy and Commerce, 2125 Rayburn House Office Building, Washington, DC 20515 and e-mailed in Word format to ali.fulling@mail.house.gov.

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

Sincerely,



Robert E. Latta
Chairman
Subcommittee on Digital Commerce
and Consumer Protection

cc: Janice D. Schakowsky, Ranking Member, Subcommittee on Digital Commerce and Consumer Protection

Attachment

House Energy and Commerce Committee
“Oversight of the Federal Trade Commission”
July 18, 2018

Questions for Joseph Simons, Chairman, Federal Trade Commission

The Honorable Robert E. Latta

1. **In your testimony you noted the importance of the FTC’s antitrust authority, and the filings which are submitted to the agency under the Hart-Scott-Rodino Act (“HSR”). Investors point out that the extent of shareholder monitoring and communication with management of companies has increased significantly over the last 20 years, and this activity, in their view, has been productive and beneficial to the marketplace. My understanding is that there is growing concern across the investment community that the FTC needs to update its interpretation that only passive investors can use the HSR “investment-only exemption” from filing requirements. These investors suggest that without HSR reform, there is a chilling effect on investors being able to engage with companies, and there are unnecessary filing burdens for investments of 10 percent or less that raise no substantive antitrust concerns.**

- a. **Do you believe it is now time for the FTC to consider the merits of HSR reform?**
- b. **Would you consider exploring this topic as part of upcoming FTC hearings, and provide this committee with your thoughts on the results of those hearings?**

Response: In passing the Hart-Scott-Rodino Act, Congress decided not to require premerger notification for all acquisitions, believing that the burden of complying with the file-and-wait requirements was not justified for small parties or small deals.¹ Congress also provided that the FTC, with the concurrence of the Department of Justice (“DOJ”), could exempt from HSR filing categories of transactions that are not likely to violate the antitrust laws—authority we have occasionally used to exempt transactions that pose little antitrust risk.²

It is worthwhile to consider whether changes in the economy may warrant a reassessment of current filing requirements. As you mention, in June, I announced the Commission’s new public hearings project—*Hearings on Competition and Consumer Protection in the*

¹ In 2001, Congress raised the minimum size-of-transaction threshold from \$15 million to \$50 million, with annual adjustments beginning in 2005 based on changes in GNP. The current HSR threshold is \$84.4 million.

² Subsection (d)(2)(b) of the HSR Act (15 U.S.C. § 18a(d)(2)(b)) gives the FTC, with the concurrence of the DOJ, authority to exempt from the Act’s waiting and notice requirements persons or transactions which are not likely to violate the antitrust laws. *See, e.g.*, 61 Fed. Reg. 13,666 (Mar. 28, 1996) (final rule exempting ordinary course acquisitions of real estate and mineral reserves).

21st Century—to consider whether broad-based changes in the economy, evolving business practices, new technologies, and international developments warrant adjustments to competition and consumer protection law, enforcement priorities, and policy.³ One of the topics to be discussed at these hearings is the analysis of acquisitions and holdings of a non-controlling ownership interest in competing companies. We expect that the panelists will discuss recent scholarship regarding the antitrust risks associated with small holdings in competing firms. We are also inviting public comment on this and other issues related to merger control.⁴

In administering the HSR premerger program, the FTC is responsible for ensuring that the HSR rules are clear and serve the interest of effective merger enforcement. The FTC routinely looks for ways to streamline and clarify HSR rules, including 16 C.F.R. § 802.9, which exempts acquisitions solely for the purpose of investment. At several times in the past, the Commission, in consultation with DOJ, has considered the merits of exempting acquisitions of *de minimis* amounts of voting securities regardless of investment intent.⁵ We are aware of the investor concerns you highlight. Any potential change in HSR rules will consider the views of all stakeholders. In addition to the public hearings, we plan to engage with investors, other shareholders, and issuers to understand fully the impact of current HSR filing requirements. Any proposal to change the HSR rules would be subject to public notice and comment, a process through which we typically receive useful feedback that we integrate into our analysis.

2. **In December 2016, the FTC issued a Notice of Proposed Rulemaking announcing proposed changes to the Commission’s Contact Lens Rule. In March 2018, the Commission held a workshop on the Contact Lens Rule and received comments on the proceedings until early April 2018. Does the FTC expect to update its 2016 draft for comment or move directly to issue a final Contact Lens Rule? If the Commission decides to solicit additional public input to update the 2016 NPRM, how long would you anticipate extending the comment period and what would be the timeline for the issuance of the final Contact Lens Rule?**

Response: The Commission initially published a Federal Register notice generally requesting comments on the Contact Lens Rule in September 2015. Based on review of the 660 comments received, the Commission published a Notice of Proposed Rulemaking (NPRM) in December 2016, requesting comment on proposed Rule amendments. The NPRM proposed to amend the Rule to require prescribers to obtain a signed acknowledgment after releasing a contact lens prescription to a patient, and maintain it

³ FTC, *Hearings on Competition and Consumer Protection in the 21st Century*, <https://www.ftc.gov/policy/hearings-competition-consumer-protection>; see also FTC Press Release, *FTC Announces Hearings On Competition and Consumer Protection in the 21st Century* (June 20, 2018), <https://www.ftc.gov/news-events/press-releases/2018/06/ftc-announces-hearings-competition-consumer-protection-21st>.

⁴ Public comments on this topic will be posted on the FTC website at <https://www.ftc.gov/policy/public-comments/2018/07/initiative-759>.

⁵ For example, in 1988 the Commission proposed to modify the “investment-only exemption” (53 Fed. Reg. 36,831 (Sept. 22, 1988)), but did not adopt a final rule.

for three years. The purpose of the proposed amendment was to enhance both compliance and our ability to enforce the Rule (by providing a record that the prescription was given out). We received over 4,100 comments in response to the NPRM.

The Commission held a workshop on March 7, 2018 to collect additional information on various Rule-related issues, including the proposed amendments. The public comment period associated with that workshop closed on April 6, 2018. We received and reviewed approximately 3,500 additional comments following the workshop.

We collected additional information during the workshop and in public comments, and are considering alternatives to increase prescriber compliance with the Rule without imposing unnecessary burdens on prescribers. In addition, based on the comments received, we are considering additional modifications. FTC staff intends to submit a recommendation to the Commission by the end of the year. If the Commission were to decide that additional public input would be beneficial, the Commission would allow an appropriate period of time to receive it. The length of the comment period would depend on the complexity of the modifications under consideration but most likely it would be 30 to 60 days; the original NPRM had a 60-day comment period, and we accepted comments for about 30 days after the workshop. The timeline for then completing the rulemaking and issuing the final Rule would depend on the number and complexity of the comments received.

3. **Please explain in detail how the FTC determines whether to proceed against a particular defendant in district court or in an administrative proceeding. If a decision is made to proceed in district court, how does the FTC determine whether to proceed through the use of traditional litigation, administrative proceeding, or through relief such as ex parte proceedings, preliminary injunctions to freeze assets, or injunctions for receivership? Please account for the total number of incidences in which the FTC elected to use each of these enforcement tools in the last 24 months, and the FTC's success rate for each enforcement tool over the same period of time.**

Response: At the outset, any Commission action whether administrative or federal, requires a vote by the Commission to proceed. A number of factors influence the Commission's decision to proceed administratively or in federal court. First, the Commission considers the types of remedies available in each forum. In administrative proceedings, the FTC cannot directly obtain monetary relief (although money can be included in a settlement). Instead, the FTC must first prevail in administrative litigation and then bring a subsequent case under Section 19 of the FTC Act for damages. By contrast, in federal district court actions, the FTC may seek equitable monetary relief, including restitution, disgorgement, or rescission. Therefore, where the FTC seeks an equitable monetary remedy to make consumers whole or prevent unjust enrichment, it typically brings a federal district court case.

Another factor we consider is whether the violative practices and consumer injury are ongoing. In such cases, it is often appropriate to seek a preliminary injunction in federal

court. If there is a significant risk of dissipation of assets or destruction of documents, the FTC may seek an *ex parte* Temporary Restraining Order (TRO) (please see answers to 4 and 5, below). In such consumer protection cases, the FTC files in federal district court.

Finally, the Commission considers the remedies available to enforce any injunctive relief it obtains. Upon referral by the FTC, DOJ may seek civil penalties for violations of an FTC administrative consent decree (or refer the matter back to the FTC to seek civil penalties). By contrast, the FTC can seek to enforce a violation of a federal district court order through a contempt action, can seek compensatory or coercive sanctions, and can bring a parallel motion to modify and toughen its orders under Rule 60 of the Federal Rules of Civil Procedure (FRCP). Finally, an intentional violation of a federal district court order can subject a defendant to criminal penalties. Although the FTC has no criminal enforcement authority, it refers appropriate cases to the DOJ and U.S. Attorney's offices.

Since January 2017, the FTC has filed 29 consumer protection administrative proceedings and 86 consumer protection cases in federal district court. During that same time period, the FTC sought *ex parte* TROs in 34 of those matters. Courts granted each of those requests.

4. Is the FTC required to comply with Federal Rule of Civil Procedure Rule 65(b)(1) that a plaintiff show "immediate and irreparable injury" when seeking an *ex parte* request for a temporary restraining order ("TRO") that would freeze a defendant's assets?

Response: Yes. Federal Rule of Civil Procedure 65(b)(1) provides that a court may issue a TRO without notice if immediate and irreparable injury, loss, or damage would otherwise result. This standard is met where notice would "render fruitless the further prosecution of the action."⁶ Advance notice would render the action "fruitless" when it would prompt defendants to dissipate assets or destroy evidence.⁷ In cases in which the Commission seeks an *ex parte* TRO, it presents evidence to satisfy FRCP Rule 65, including the requirement that it "show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition."

This is an appropriately high threshold for such extraordinary relief, and one that both the Commission and courts take seriously. In cases the FTC brings *ex parte*, the Commission presents strong evidence that it is likely to prevail on the merits of its underlying claims, that an injunction is necessary to prevent ongoing consumer injury, and that there is a significant likelihood that, if provided notice, the defendants will dissipate assets and/or destroy evidence. Courts have found that a number of factors can contribute to demonstrating that a defendant is likely to dissipate assets or destroy documents. These include showing: the defendant's business is permeated with fraud or is inherently illegal;

⁶ *Reno Air Racing Ass'n, Inc. v. McCord*, 452 F.3d 1126, 1131 (9th Cir. 2006).

⁷ See *In re Vuitton et Fils S.A.*, 606 F.2d 1 (2d Cir. 1979) 1, 4-5 (granting *ex parte* injunction to prevent destruction of evidence); see also *FTC v. Affordable Media*, 179 F.3d 1228, 1236-37 (9th Cir. 1999) (upholding asset freeze, initially entered *ex parte*, because of risk of asset dissipation).

prior, or ongoing, secretion of assets; a history of moving assets offshore or otherwise encumbering assets without a valid business reason; a history of crime involving fraud or dishonesty; a history of destroying documents in prior litigation; a pattern of using front companies and taking other steps to evade detection; or demonstrated unwillingness to abide by court orders, such as contempt. To support its *ex parte* TRO applications, the FTC also presents an affidavit with a lengthy list of examples in which defendants in FTC cases who were tipped off about an action before an asset freeze could be executed have dissipated and secreted assets or destroyed vital evidence.

5. What percentage of the FTC's requests for TRO asset freezes have included the presentation of evidence to the court showing that specific individual defendants in the case-at-hand had taken steps to hide or dissipate assets?

Response: As noted above in the answer to question 4, evidence that a specific defendant has taken steps to hide or dissipate assets can be the basis to support an asset freeze application. However, there are several other ways the FTC can show that notice would "render fruitless the further prosecution of the action." Each case is unique, and the FTC does not track the specific allegations used to support *ex parte* TRO applications. However, before the staff can file such an application, the Commission must find reason to believe that it is appropriate to proceed *ex parte*. FTC staff then must present sufficient evidence to the court, under the applicable case law in that jurisdiction,⁸ to convince the court to provide this extraordinary relief.

6. Section 13(b) of the FTC Act states that a court may grant a TRO to the FTC without the FTC posting a bond, "after notice to the defendant." In an ex parte proceeding, in which the Commission does not give any notice to the defendant and the defendant has no opportunity to oppose the issuance of the order, is the FTC required to post a bond? Are there any cases where a TRO has been granted without the FTC posting a bond? Should the FTC be required to post a bond in these cases?

Response: Section 13(b) of the FTC Act authorizes the agency to seek a TRO with notice whenever the Commission has reason to believe a party is violating or about to violate any provision of law enforced by the FTC. Section 13(b) further states that in proper cases, the FTC is authorized to seek, and after proper proof the court may issue, a permanent injunction. Courts have interpreted this grant of equitable authority as including "the power to order any ancillary equitable relief necessary to effectuate the exercise of the granted powers."⁹ Congress affirmed the FTC's use of this authority in the

⁸ The standard for an asset freeze varies by circuit. For example, in the 9th Circuit litigants must demonstrate that dissipation of assets is likely, while in the 11th Circuit, litigants need only demonstrate a reasonable possibility of dissipation. The FTC files many of its cases in those two circuits.

⁹ *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 572 (7th Cir. 1989); see also *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1112-13 (9th Cir. 1982) (holding that Section 13(b) authorizes courts "to grant any ancillary relief necessary to accomplish complete justice").

FTC Act Amendments of 1994.¹⁰ The language in Section 13(b) authorizing a court to grant a TRO without requiring the FTC to post a bond conforms with 28 U.S.C. § 2408 and FRCP 65, which exempt federal agencies from the general requirement that a party seeking a TRO must post a security bond.¹¹

Accordingly, the FTC is not required to post a security bond when seeking an *ex parte* TRO and no court has required the FTC to do so. Defendants do have the right, pursuant to FRCP 65(b)(4), to appear and move to modify or dissolve the TRO. In addition, a TRO issued without notice to the party expires in 14 days unless the party agrees to an extension or the court holds a hearing and enters a preliminary injunction.

7. What consideration does the FTC take in evaluating enforcement actions based on a standard of unfairness in the absence of any proof of actual injury? If so, is “unfairness” determined solely by objective, tangible criteria? Are any subjective factors part of an “unfairness” standard? Is a hypothetical injury a sufficient basis for an enforcement action?

Response: As the Commission noted in its Policy Statement on Unfairness,¹² and as codified in 15 U.S.C. § 5(n), to be unfair, an act or practice must cause or be likely to cause substantial injury. Such injury “must be substantial; it must not be outweighed by any countervailing benefit to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided.”¹³ The most common forms of substantial consumer injury with which the Commission concerns itself are monetary injury,¹⁴ and unwarranted health and safety risks.¹⁵ However, as the Policy Statement notes, “In an extreme case, however, where tangible injury could be clearly demonstrated, emotional effects might possibly be considered as the basis for a

¹⁰ See S. Rep. No. 103-130, at 15-16 (1993) (“Section 13 of the FTC Act authorizes the FTC to file suit to enjoin any violation of the FTC. The FTC can go into court *ex parte* to obtain an order freezing assets, and is also able to obtain consumer redress.”).

¹¹ See 28 U.S.C. § 2408 (“Security for damages or costs shall not be required of the United States, any department or agency thereof or any party acting under the direction of any such department or agency on the issuance of process or the institution or prosecution of any proceeding.”); Fed. R. Civ. P. 65(c) (“The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. The United States, its officers, and its agencies are not required to give security.”).

¹² See FTC Policy Statement on Unfairness, *appended to Int’l Harvester Co.*, 104 F.T.C. 949, 1070 (1984).

¹³ *Id.*

¹⁴ *FTC v. Accusearch*, 570 F.3d 1187, 1193-94 (10th Cir. 2009) (defendant’s use of pretexting to obtain telephone records cost consumers money to change telephone providers); *FTC v. Inc21.com*, 745 F. Supp. 2d 975, 1003-05 (N.D. Cal. 2010) (telephone bill cramming caused substantial monetary injury); *FTC v. West Asset Management*, No. 1:11-cv-746 (N.D. Ga. Mar. 16, 2011) (debt collection company withdrew funds from consumers’ bank accounts or charged their credit cards without obtaining consumers’ express informed consent).

¹⁵ *Consolid. Cigar Corp.*, No. C-3966, 2000 FTC LEXIS 103, at *1-2 (Aug. 18, 2000) (consent) (failure to disclose that regular cigar smoking can cause several serious adverse health conditions); *Fitness Quest, Inc.*, 113 F.T.C. 923, 925-26 (1990) (consent) (failure to adequately disclose that stomach exerciser frequently breaks and causes serious injury).

finding of unfairness.”¹⁶ For example, the Commission recently filed a complaint and obtained stipulated judgments against the operators of an alleged “revenge porn” website based in part on the range of different harms consumers suffered, including having their intimate images and personal information posted on the site without their consent.¹⁷

8. In consent orders entered into between the FTC and companies, have there been requirements for companies to provide personal information about individuals to the agency, and what security protections exist at the FTC to safeguard such personal information?

Response: Yes, the FTC sometimes requires entities it has sued to provide data about their customers when the FTC anticipates providing refunds to affected consumers. In those instances, the FTC applies strong privacy and data security standards to manage consumers’ personally identifiable information (“PII”). For example, FTC employees and redress contractors access consumer PII only on a need-to-know basis. The FTC shares data with a redress contractor only after determining that redress is feasible and a specific redress plan has been developed. Only the data necessary to carry out the redress program is provided to the contractor. FTC redress contractors are required to use an encrypted email system for sending and receiving any consumer PII. More broadly, FTC redress contractors are required to provide information about the databases they use to store consumer data, including: system security plans, monthly security scans, information about possible vulnerabilities, and plans for addressing these vulnerabilities. These systems must be audited by either the FTC or a third party annually. FTC staff holds monthly security calls with the contractors to address any concerns, and the FTC’s redress team has a Certified Information Systems Security Professional on staff to oversee the privacy and security practices of the contractors and to enforce our standards.

9. How does the FTC determine its priorities for industries and enterprises to target for enforcement action? For example, to what extent does the agency’s online complaint tracking tools like Consumer Sentinel Network, Consumer Response Center, or the Do-Not-Call Registry play, or not play, in that analysis in determining whether or not to bring cases against illegal robocalling operators or other consumer protection cases.

Response: The Commission may open investigations at the request of the President, Congress, the Attorney General, or other governmental agencies; upon referrals by the courts; on the basis of complaints filed by members of the public; or on its own initiative.¹⁸ In determining whether to open an investigation, the Commission acts only in the public interest, and does not initiate an investigation or take other action when the violation of law alleged is a matter of private controversy that does not tend to adversely affect the public.¹⁹

¹⁶ Policy Statement on Unfairness, *supra* n.12 at n.16.

¹⁷ *FTC and State of Nevada v. Emp Media, Inc. et al.* (D.Nev. 2018). See, <https://www.ftc.gov/enforcement/cases-proceedings/162-3052/emp-media-inc-myexcom>

¹⁸ 16 C.F.R. § 2.1.

¹⁹ *Id.* at § 2.3.

Commission staff relies heavily on consumer complaints in its Consumer Sentinel database. Consumer Sentinel is a secure online database of reports from consumers about problems they experience in the marketplace; it is available only to law enforcement organizations. Approximately 2,500 law enforcement users across the country access the database, which currently holds more than 16 million consumer complaints about fraud and identity theft. More than 40 entities contribute consumer complaint data to Sentinel, including the Council of Better Business Bureaus, various federal and state agencies, organizations like the AARP Fraud Watch Network, and some companies, like Microsoft Corporation.

Although consumer complaints are not, by themselves, proof of deceptive or unfair practices, they are particularly helpful for identifying practices that are causing consumer injury, for spotting emerging frauds, and for identifying areas that deserve additional scrutiny. With some practices, such as privacy violations, consumers may not be aware of the violation, and are unlikely to file complaints. In those cases, the FTC relies on industry watchdogs and researchers to identify potential serious law violations. For other types of violations, such as energy and “green” claims, consumers are generally not in a position to assess the truth of a claim, and are unlikely to file complaints. In those instances, competitor complaints and consumer watchdog complaints are often the basis to begin an investigation.

- 10. In April of this year, this subcommittee held a hearing on robocalls and heard from technology companies about various technology solutions and strategies for combatting robocalls. This is one of the top complaints the FTC has every year. What plans do you have moving forward to combat the pervasive problem of illegal robocalls?**

Response: The FTC takes a multi-faceted approach to combatting illegal robocalls and other abusive telemarketing. The FTC uses every tool at its disposal: aggressive law enforcement, initiatives to spur technological solutions, and robust consumer and business outreach. The FTC plans to continue its aggressive work in each of these areas, as discussed in more detail below.

Law Enforcement

First and foremost, the FTC is a law enforcement agency. As of September 1, 2018, the Commission has filed 138 lawsuits against 454 companies and 367 individuals alleged to be responsible for placing billions of unwanted telemarketing calls to consumers. The FTC has collected over \$121 million from these violators. In cases where perpetrators were running telemarketing scams, the FTC has obtained court orders shutting these businesses down and freezing their remaining assets so that those funds could be returned to consumer victims.

Industry Outreach to Spur Technology

The FTC recognizes that law enforcement alone will not solve the problem of illegal robocalls. That is why the FTC intends to continue its long history of working with industry to promote technological solutions. The FTC has provided input to support the industry-led Robocall Strike Force, coordinated by the FCC, which is working to deliver comprehensive solutions to prevent, detect, and filter unwanted robocalls. In tandem with this effort, the FTC worked with a major carrier and federal law enforcement partners to help block IRS scam calls that were spoofing well-known IRS telephone numbers. FTC staff continues to work with federal law enforcement partners and major carriers to encourage network-level blocking of illegal robocall campaigns.

The FTC also led four public challenge contests to help spur industry initiatives to tackle unlawful robocalls by blocking calls.²⁰ These challenges contributed to a shift in the development and availability of technological solutions in this area. When the FTC held its first public challenge, few call blocking applications existed. Today, there are hundreds of apps available to consumers, and two winners of the FTC's challenges offer leading call blocking tools that have blocked hundreds of millions of unwanted calls.²¹

The FTC also engages with technical experts, academics, and others through industry groups, such as the Messaging, Malware and Mobile Anti-Abuse Working Group ("MAAWG") and the Voice and Telephony Abuse Special Interest Group ("VTA SIG"). The FTC has encouraged ongoing industry efforts to develop new technological protocols that will change how caller ID works so that it will be more difficult for callers to engage in illegal caller ID spoofing.

Consumer Education & Outreach

The FTC's education and outreach program reaches tens of millions of people a year through our website, the media, and partner organizations that disseminate consumer information on the FTC's behalf. In the case of robocalls, the advice is simple: if you answer a call and hear an unwanted recorded sales message—hang up.

11. There are a number of advertisements that claim certain medications or drugs may cause complications and prompt the viewer to contact to the organization or law firm airing the advertisement for possible recourse. Some lawsuit ads and websites use phrases like "recall" and "medical alert," while others show

²⁰ The first challenge, in 2013, called upon the public to develop a consumer-facing solution to blocks illegal robocalls. *See* FTC Press Release, *FTC Announces Robocall Challenge Winners* (Apr. 2, 2013), <https://www.ftc.gov/news-events/press-releases/2013/04/ftc-announces-robocall-challenge-winners>; *see also* FTC Press Release, *FTC Awards \$25,000 Top Cash Prize for Contest-Winning Mobile App That Blocks Illegal Robocalls* (Aug. 17, 2015), <https://www.ftc.gov/news-events/press-releases/2015/08/ftc-awards-25000-top-cash-prize-contest-winning-mobile-app-blocks>; FTC Press Release, *FTC Announces Winners of "Zapping Rachel" Robocall Contest* (Aug. 28, 2014), <https://www.ftc.gov/news-events/press-releases/2014/08/ftc-announces-winners-zapping-rachel-robocall-contest>.

²¹ One of the winners, "NomoRobo," was on the market within 6 months after being selected by the FTC. NomoRobo, which reports blocking over 600 million calls to date, is being offered directly to consumers by a number of telecommunications providers and is available as an app on iPhones.

flashing lights and sirens. These advertisements may at times be misleading or fraudulent, leading to potential physical or financial harm for consumers, especially our senior citizen community. Under your leadership, will the FTC focus on these potentially deceptive advertisements and, if it will, what processes or activities can the FTC improve or highlight to protect consumers, including seniors, from false or misleading advertisements?

Response: Advertising plays a critical role in our economy. It is one of the primary ways that people find out about available goods and services. Attorney advertising, in particular, may alert people who have been injured that they be may be entitled to compensation. However, to be useful, advertising must not be misleading. The FTC is monitoring attorney advertising that solicits people who may have been harmed by prescription drugs or medical devices to determine whether such advertising is misleading and likely to harm consumers. Depending on the results of our review, we will consider all available options, including law enforcement actions, warning letters, and consumer education. We also are consulting with the FDA to determine how we may assist each other on this topic.

12. Over a year ago, your colleague Commissioner Ohlhausen, in her former capacity as Acting Chairman, announced a set of process reforms for its consumer protection investigations and enforcement. For example, she instructed the Bureau of Consumer Protection to form an internal working group to examine the agency's use of Civil Investigative Demands (CIDs) for documents and information in non-public investigations.

a. Please describe in detail what progress and recommendations have been made by the FTC's various working groups in the intervening year?

Response: Please see answer to question 12.c. below.

b. What specific steps has the Commission taken in implementing these process reforms?

Response: Please see answer to question 12.c. below.

c. Specifically, please describe what recommendations were made by FTC staff about adopting more narrowly focused use of Civil Investigative Demands, as well as whether CIDs should require notice and approval by more than one Commissioner?

Response: As a result of the work initiated by Acting Chairman Ohlhausen, the Commission has taken several steps to reduce the burden imposed on targets and on third parties by its uses of compulsory process in consumer protection investigations. First, the model instructions and definitions used in most CIDs have been simplified to make them easier for recipients to read, understand, and respond. Second, staff has been instructed to meet and confer with CID recipients, to prioritize responses and offer rolling production deadlines, and to negotiate to reduce any undue burden and provide additional time to

respond where appropriate. Third, the model CIDs to third parties, such as banks, telecommunications providers, and payment processors, have been streamlined to request less information, and staff has been instructed to take burden into account when drafting all CIDs. Fourth, unless staff articulates a specific need, CIDs are generally time limited to request information going back at most three years. The Commission and its staff continue to look for ways to obtain the vital information needed to bring enforcement actions and protect consumers while minimizing the burden on CID recipients.

13. Commissioner Ohlhausen also instructed the Bureaus of Consumer Protection and Economics to integrate the agency’s economists earlier in consumer protection investigations. Please explain in detail how the Commission’s economic expertise is brought to bear at the initiation of a non-public investigation through any potential enforcement action.

a. Does the Bureau of Economics currently provide economic analysis and information in each consumer protection investigation? If it does not, why not?

Response: The Bureau of Economics (“BE”) provides economic support on all aspects of the Commission’s antitrust and consumer protection activities, subject to staffing constraints. In particular, BE economists routinely provide economic support and analysis on individual investigations and cases, including reviewing all complaints, consents, and consent negotiation proposals; providing expertise as needed in litigation; and making policy recommendations to the Commission.²² BE also plays a significant role in developing and advising the Commission on staff proposals related to the FTC’s rulemaking and rule review activities. It is important to emphasize that all of the Bureaus—the Bureau of Competition (“BC”), the Bureau of Consumer Protection (“BCP”), and BE—make recommendations to the Commission, which is ultimately responsible for the final decision on all complaints and consent agreements.

b. Is the Bureau of Consumer Protection required to consider analysis and information from the Bureau of Economics in evaluating whether an investigation warrants enforcement action? If it is not, why not?

Response: Yes, BCP routinely consults with BE and always considers its analysis and information in evaluating whether an investigation warrants enforcement action. As noted above, BE economists routinely provide economic support and analysis on individual investigations and cases, including reviewing all complaints, consents, and consent negotiation proposals. BE also makes its own recommendations to the Commission regarding any proposed enforcement action or settlement. In a significant majority of matters, the Bureaus agree about the violations and the complaint or consent agreement at issue. In those instances where recommendations diverge, the Commission thoroughly

²² See generally <https://www.ftc.gov/about-ftc/bureaus-offices/bureau-economics>; see also FTC Business Blog, *The Role of the Bureau of Economics in Consumer Protection: A Conversation with Bureau Directors* (Nov. 9, 2015), <https://www.ftc.gov/news-events/blogs/business-blog/2015/11/role-bureau-economics-consumer-protection-conversation>.

reviews all of the information it receives and makes the final decision as to how to proceed by vote.²³

c. Would the publication of a summary description of the Bureau of Economics' analysis and justification in support of, or against, consumer protection enforcement actions be in the public interest?

Response: I do not believe that issuing such reports or separate statements would serve the public interest. As an initial matter, the Commission receives staff input and recommendations from various parts of the agency, including, but not limited to, BE. Disclosure of any single recommendation would convey only a partial picture of all of the information available to the Commission to inform its decision. Additionally, BE's internal memoranda contain non-public confidential information that, even after extensive editing, could provide clues as to the target of an investigation, thereby unfairly harming its reputation. Further, disclosing these internal memoranda would discourage and otherwise interfere with the free exchange of views among FTC staff and Commissioners, which helps the Commission to reach appropriate law enforcement decisions. Finally, the time required to create reports suitable for public disclosure would come at the expense of many other important activities that BE performs—including review and analysis of evidence, calculation of redress and penalties, expert testimony, and studies and reports about market trends and areas of concern.

- 14. FTC consent orders against companies like Equifax, Facebook, Google, and Uber require independent, third-party "assessments" (i.e., audits) to certify on-going compliance with the provisions of the consent order by the subject company. For example, Facebook was required in part "to establish and maintain a comprehensive privacy program designed to address privacy risks associated with the development and management of new and existing products and services, and to protect the privacy and confidentiality of consumers' information."**

In response to the Committee's questions, Facebook indicated on June 29, 2018: "To date, three independent privacy assessments prepared by PwC have been completed and submitted to the FTC: a 180-Day assessment report (dated April 16, 2013), a biennial report covering the period between February 12, 2013 and February 11, 2015 (dated April 13, 2015), and a biennial report covering the period between February 12, 2015 and February 11, 2017 (dated April 12, 2017). In each of these assessments, PwC determined that Facebook's privacy controls were operating with sufficient effectiveness to provide reasonable assurance to protect the privacy information covered under the FTC Consent Order, in all material respects."

- a. Please explain in detail the process following an FTC consent order requiring an initial assessment report, in particular which party (subject company or auditor) is responsible for preparing the initial assessment**

²³ 16 C.F.R. § 4.14(c).

and whether the assessment is fully available to the public. Are subsequent biennial third-party assessments submitted and reviewed by the FTC, and are they available to the public?

Response: FTC privacy and data security orders typically require that companies obtain independent, third party assessments of their practices. The initial assessment must cover the first 180 days after the order is signed, and subsequent biennial assessments must cover each two-year period thereafter. The assessors must complete their assessments within 60 days from the end of the reporting period to which the assessment applies, and the company under order has 10 days from the day the assessment is completed to provide it to the FTC. Although the assessor is responsible for preparing the assessments, the subject company is responsible for providing the initial assessment to the FTC and for retaining subsequent assessments and providing them to the FTC upon request within 10 days.

Once we receive the initial assessment, staff carefully reviews it and follows up with questions for the company and the assessor as appropriate. Staff also obtains compliance reports and compliance notices from the company, which they review carefully. In addition, staff keep abreast of developments related to that company, such as consumer complaints or press reports, and they request production of subsequent assessments when they determine that aspects of the company's compliance or of the assessment warrant further scrutiny.

Initial and biennial assessments that are in the FTC's possession are available to the public in response to FOIA requests, but typically are redacted to protect information that could be exploited by bad actors (e.g., details about the subject company's systems for data collection, storage, and security) or by companies subject to assessments (e.g., details about the assessor's methods).

b. Please explain in detail what steps the FTC could pursue to strengthen the effectiveness of its assessment/audit compliance regime?

Response: Currently, once a privacy or security order is finalized, case attorneys enter details about the order into a proprietary enforcement database that the agency has developed to keep track of orders. At that point, the Bureau of Consumer Protection's Division of Enforcement assigns a compliance attorney, along with a supervisor, to monitor each order. In privacy and data security cases, as noted above, this compliance team receives and carefully reviews both the company's compliance reports and assessor's report, follows up with questions for the company and assessor, and evaluates consumer complaints and leads from other sources.

While the current system is robust, we are constantly looking to improve our processes related to privacy and data security enforcement. The FTC has formed a remedies task force to examine appropriate remedies in privacy and data security cases. The agency will also host its *Hearings on Competition and Consumer Protection in the 21st Century* this fall, including hearings on whether it needs additional tools in the privacy and data

security area.

c. Has the FTC considered and/or conducted its own independent audit of a subject company's compliance with its consent order requirements? If not, why not?

Response: Yes. The BCP Division of Enforcement investigates potential order violations in a variety of ways. For example, as noted above, it carefully reviews companies' compliance reports and assessor reports, follows up with questions, and tracks consumer complaints, press reports, and leads from security researchers to determine whether there may be order violations. If it determines that certain practices warrant further scrutiny, it can send a letter to the company requesting additional information (including subsequent biennial assessments), to which the company must respond in 10 days. The Division of Enforcement staff has investigated numerous possible order violations as part of this non-public process. In cases where it determines a law violation has occurred, it has recommended a public order enforcement action. In the privacy and security area, these actions have included Choicepoint,²⁴ Google,²⁵ Lifelock,²⁶ and Upromise.²⁷

d. Does the FTC receive a copy of every assessment conducted by the independent, third-party auditor required under a consent order entered into by the agency?

Response: The FTC receives a copy of every initial assessment. For subsequent biennial assessments, the FTC's orders require companies to retain these assessments. The BCP Division of Enforcement then obtains those assessments when it determines whether the company's compliance warrants further scrutiny. The company must provide any material requested by staff within 10 days of a request.

e. How does the FTC determine which independent, third-party auditing firms are qualified to conduct and prepare such assessments? Does the FTC maintain a schedule of eligible firms to prepare assessments? If so, what specific auditing firms are currently eligible?

Response: As stated in the Commission's data security orders, the assessor must either have qualified for one of the specified professional credentials (Certified Information System Security Professional (CISSP), Certified Information Systems Auditor (CISA), or a Global Information Assurance Certification (GIAC) from the SANS Institute), or be approved by the FTC. As stated in the Commission's privacy orders, the assessor must have a minimum of three years of experience in the field of privacy and data protection

²⁴ *U.S. v. ChoicePoint, Inc.*, No. 1:06-cv-00198-JTC (N.D. Ga. Sept. 3, 2010),

<https://www.ftc.gov/enforcement/cases-proceedings/052-3069/choicepoint-inc>.

²⁵ *U.S. v. Google, Inc.*, No. 3:12-cv-04177-SI (N.D. Cal. Nov. 16, 2012),

<https://www.ftc.gov/enforcement/cases-proceedings/google-inc>.

²⁶ *U.S. v. LifeLock, Inc.*, No. 2:10-cv-00530-JJT (D. Ariz. Jan. 4, 2016),

<https://www.ftc.gov/enforcement/cases-proceedings/072-3069-x100023/lifelock-inc-corporation>.

²⁷ *U.S. v. Upromise, Inc.*, No. 1:17-cv-10442 (D. Mass. Mar. 23, 2017),

<https://www.ftc.gov/enforcement/cases-proceedings/102-31116-c-4351/upromise-inc>.

and be approved by the FTC. In those cases where the FTC approves the assessor, the agency reviews the assessor's qualifications to determine whether the assessor has the ability to effectively and independently perform the required assessment. The FTC does not maintain a schedule of eligible firms, since it grants approval on a case-by-case basis.

f. Does the FTC approve, formally or informally, which companies are permitted to complete the audits for companies under order with the FTC?

Response: Please see answer to 14.e. above.

15. Some have claimed that when the FCC restored internet freedom by repealing the Obama era rules that stripped the Federal Trade Commission's authority over Internet service providers, it somehow made the internet less safe for consumers. The FCC's *Restoring Internet Freedom Order* actually restored the power of the FTC, the nation's premiere consumer protection agency, to protect internet users from unfair and deceptive practices. Please explain in detail how you believe the agency's authority can be leveraged to consistently protect consumers across the internet?

Response: The FTC has broad authority over much of the economy to protect consumers against unfair or deceptive acts or practices and unfair methods of competition. The FTC cannot reach common carrier activities, however, and when the FCC reclassified Broadband Internet Access Service ("BIAS") as a common carrier activity, the FTC lost the ability to protect consumers in this space. There are several types of cases that the FTC brought against BIAS providers prior to 2015, and can bring again now that the reclassification has been reversed.²⁸ For instance, the FTC will use its privacy and data security expertise to prevent unfair or deceptive privacy and data security practices of BIAS providers. Using our flexible, enforcement-focused approach will enable the agency to continue to apply strong consumer privacy and security protections across a wide range of changing technologies and business models, without imposing unnecessary or undue burdens on industry.

Moreover, the FTC has experience enforcing the antitrust laws to prevent unfair methods of competition for the benefit of consumers in nearly all markets. As part of its *Hearings on Competition and Consumer Protection in the 21st Century*, the agency will hold public hearings in early 2019 to continue to explore how the FTC can use this enforcement authority most effectively in BIAS markets. If the FTC identifies, through these hearings or otherwise, that it does not have sufficient authority or resources to

²⁸ See, e.g., *FTC v. AT&T Mobility, LLC*, No. 3:14-CV-04785-EMC (N.D. Cal. Oct. 28, 2014), <https://www.ftc.gov/enforcement/cases-proceedings/122-3253/att-mobility-llc-mobile-data-service>; *FTC v. TracFone Wireless, Inc.*, No. 15-cv-00392-EMC (N.D. Cal. Feb. 20, 2015), <https://www.ftc.gov/enforcement/cases-proceedings/132-3176/straight-talk-wireless-tracfone-wireless-inc>; *America Online, Inc.*, No. C-4105 (F.T.C. Jan. 28, 2004), <https://www.ftc.gov/enforcement/cases-proceedings/002-3000/america-online-inc-compuserve-interactive-services-incin>; *Juno Online Servs., Inc.*, No. C-4016 (F.T.C. June 25, 2001), <https://www.ftc.gov/enforcement/cases-proceedings/002-3061/juno-online-services-inc>

address competition issues in BIAS markets, the agency will report this to Congress.

The Honorable Michael C. Burgess

1. **An increase in hospital market concentration caused by hospital mergers has resulted in price increases. These mergers may also substantially lessen quality and competition by undermining the ability of physicians, on behalf of patients, to shop for hospital affiliations based upon quality factors, such as adequacy of hospital staffing, equipment, and administrative support services that would allow physicians to spend more time with their patients. Will the FTC evaluate future hospital mergers along these quality dimensions?**

Response: An acquisition that combines healthcare providers may violate Section 7 of the Clayton Act if the competition eliminated by the acquisition is likely to result in higher prices, lower quality of care, or reduced innovation. The FTC, along with the Antitrust Division of the Department of Justice (“DOJ”), maintains a vigorous enforcement program to scrutinize healthcare mergers and prevent mergers that are likely to have anticompetitive effects.

As part of that review, the FTC routinely examines the likely effects of a proposed merger—not only on provider pricing but also on quality of care. Empirical evidence, in the form of studies by FTC staff and others, demonstrates that healthcare consumers benefit from lower prices and higher quality services when healthcare markets, including hospital markets, are more competitive.²⁹ Hospitals compete with each other by providing higher quality and more convenient healthcare services. Because such non-price competition benefits patients, the FTC will continue to evaluate healthcare mergers for potential impact on quality of care and other important non-price aspects of competition. For instance, the FTC considers whether hospital mergers might adversely affect competition for recruitment of physicians.

Finally, merging hospitals often claim that their mergers will result in increased quality of care. The FTC has considered these claims seriously and has closely scrutinized whether such claims deserve credit under the case law and the Horizontal Merger Guidelines jointly issued by the FTC and DOJ.³⁰

²⁹ See, e.g., Martin Gaynor & Robert Town, *The Impact of Hospital Consolidation – Update*, ROBERT WOOD JOHNSON FOUNDATION: THE SYNTHESIS PROJECT (2012) (synthesizing research on the impact of hospital mergers on prices, cost, and quality and finding that hospital consolidation generally results in higher prices, hospital competition improves quality of care, and physician-hospital consolidation has not led to either improved quality or reduced costs); Martin Gaynor & Robert J. Town, *Competition in Health Care Markets*, 2 HANDBOOK OF HEALTH ECONOMICS 499, 637 (2012); Martin Gaynor et al., *The Industrial Organization of Health-Care Markets*, 53 J. ECON. LITERATURE 235, 284 (2015) (critical review of empirical and theoretical literature regarding markets in healthcare services and insurance); Patrick S. Romano & David J. Balan, *A Retrospective Analysis of the Clinical Quality Effects of the Acquisition of Highland Park Hospital by Evanston Northwestern Healthcare*, 18 INT’L J. ECON. BUS. 45 (2011).

³⁰ U.S. Dep’t of Justice and FTC, *Horizontal Merger Guidelines* §10 (2010), available at <https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf>.

2. **The cost of complying with administrative regulatory obligations has resulted in an increasing number of physicians leaving their practices that could have offered the marketplace more competition. Rather than compete with hospitals, physician practices are pressured by the added administrative costs to vertically integrate with hospitals. What are the potential benefits and risks of vertical integration for the healthcare marketplace?**

Response: Recent studies have documented the trend of vertical integration between hospitals and physicians. For example, in its 2013 *Report to the Congress*, the Medicare Payment Advisory Commission (“MedPAC”), an independent, non-partisan, Congressional support agency, reported that while the number of physicians employed by hospitals was relatively constant from 1998 to 2003, it increased by 55 percent from 2003 to 2011.³¹ The causes and effects of such vertical integration are varied and complex. In particular, the overall effects of a hospital becoming the owner of a physician practice are complicated and, depending on the circumstances, may be pro-competitive (*i.e.*, beneficial for consumers), anticompetitive (*i.e.*, harmful to consumers), or competitively neutral. In addition, sometimes it is difficult to distinguish between vertical and horizontal effects. For instance, in the FTC’s 2013 enforcement action challenging the acquisition of Saltzer Medical Group by St. Luke’s Health System, some characterized the transaction as a vertical one, but the FTC’s successful challenge was based on a horizontal theory. The FTC alleged, and the court found, that the combination of the hospital’s employed physicians and Saltzer’s 16 primary care physicians would lead to higher reimbursement rates for adult primary care services in Nampa, Idaho.³²

- a. **One good way of introducing competition into hospital markets would be to restore the Stark exception for physician-owned hospitals that the Affordable Care Act revoked. Will the FTC support restoring this “whole hospital” exception?**

Response: Although there may be other reasons for the government to prohibit physicians from owning hospitals, there is no antitrust-related reason that I am aware of to have a blanket ban on such vertical integration. However, without studying this issue more carefully, I cannot take a firm position.

3. **Many academics believe that healthcare provider markets are “highly concentrated.” In fact, cities like Pittsburgh, Boston, and San Francisco are controlled by just one or two dominant multi-hospital systems. These systems**

³¹ MedPAC, (2013) Report to Congress: Medicare and the Health Care Delivery System. Policy Brief.

³² *St. Alphonsus Med. Center-Nampa Inc. v. St. Luke’s Health Sys., Ltd.*, 778 F.3d 775 (9th Cir. 2015). The FTC’s analysis of quality in this merger also was discussed as one example in a more general discussion of our approach to quality analysis in hospital mergers in an article written by several of our economists, Keith Brand, et al, *Economics at the FTC: Office Supply Retailers Redux, Healthcare Quality Efficiencies Analysis, and Litigation of an Alleged Get-Rich-Quick Scheme.* 45 REVIEW OF INDUSTRIAL ORGANIZATION 4, 325-344.

drive up healthcare costs and marginalize physicians who wish to remain independent. What is the FTC doing to alleviate this growing issue?

Response: The Commission maintains a robust program to review hospital mergers in order to challenge ones that eliminate an important competitor and are likely to result in higher prices, lower quality of care, or reduced innovation.³³ Retrospective studies of consummated hospital mergers provide support for vigorous antitrust enforcement to prevent the accumulation of market power.³⁴ But there are limits on our ability to use the federal antitrust laws to prevent harmful healthcare mergers. For example, some state policies, such as certificate-of-need and certificates of public advantage laws, may deter or prevent antitrust enforcement to block mergers that are likely to lead to increased concentration in local healthcare markets.³⁵ Nonetheless, the FTC will continue to closely scrutinize hospital mergers, and to challenge those that are likely to substantially lessen competition and cause consumer harm.

4. Health insurers claim that by merging they will obtain bargaining leverage with providers that will enable a lowering of premiums. An FTC retrospective study of the effect of past mergers on provider reimbursement and, most importantly, premiums, would be helpful in evaluating future health insurance mergers. Has the FTC considered such a study? Would the FTC need congressional authority to undertake that study in health insurance markets?

- a. Relatedly, there is a concern that post-merger an insurer could exercise buyer/monopsony power in physician markets. Could the FTC study the effects of past health insurer mergers on physician reimbursement and determine whether a decline in reimbursement has led to a decline in the quantity and/or quality of physician services?**

Response: You correctly point out that Section 6 of the FTC Act limits the Commission's ability to study the "business of insurance," although the Commission

³³ *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559 (6th Cir. 2014), *cert. denied*, 135 S. Ct. 2049 (2015); *St. Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys.*, 778 F.3d 775 (9th Cir. 2015); *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327 (3d Cir. 2016); *FTC v. Advocate Health Care Network*, 841 F.3d 460 (7th Cir. 2016); *FTC v. Sanford Health*, No. 1:17-cv-00133 (N.D.) (Dec. 14, 2017) (appeal pending).

³⁴ Deborah Haas-Wilson & Christopher Garmon, Two Hospital Mergers on Chicago's North Shore: A Retrospective Study, 18 INT'L J. ECON. BUS. 17 (2011); Leemore Dafny, Estimation and Identification of Merger Effects: An Application to Hospital Mergers, 52 J. L. & ECON. 523, 544 (2009) ("hospitals increase price by roughly 40 percent following the merger of nearby rivals"); Cory Capps & David Dranove, Hospital Consolidation and Negotiated PPO Prices, 23 HEALTH AFFAIRS 175, 179 (2004); see also, e.g., Joseph Farrell et al., Economics at the FTC: Retrospective Merger Analysis with a Focus on Hospitals, 35 REV. INDUS. ORG. 369 (2009) (mergers between not-for-profit hospitals can result in substantial anticompetitive price increases).

³⁵ Statement of the Commission, *Phoebe Putney Health System, Inc.*, Dkt. 9348 (Mar. 31, 2015), https://www.ftc.gov/system/files/documents/public_statements/634181/150331phoebeputneycommstmt.pdf; Statement of the Commission, *Cabell Huntington Hospital, Inc.*, Dkt. 9366 (Jul. 6, 2016), https://www.ftc.gov/system/files/documents/public_statements/969783/160706cabellcommstmt.pdf.

can study various aspects of the relationship between insurers and providers. I am not aware of any prior proposal for an FTC retrospective study related to provider reimbursement or insurance premiums, although I am aware that others have studied this question.³⁶ As you know, the FTC and the Department of Justice share enforcement of the federal antitrust laws; the Department of Justice has reviewed, and challenged, recent proposed mergers involving health insurers.

5. **In December 2016, the FTC issued a Notice of Proposed Rulemaking announcing proposed changes to the Commission's Contact Lens Rule. These changes propose a new regulatory requirement on providers, requiring doctors to collect and maintain for 3 years a signed document indicating that each patient received a copy of their contact lens prescription. Out of 309 complaints about prescriber prescription release, the FTC has determined that 55 warning letters to prescribers were necessary over the course of a decade. How does this small percentage of complaints and enforcement action provide sufficient evidence to justify imposition of a costly new regulatory burden on an entire industry?**

Response: The Contact Lens Rule was promulgated to implement the requirements of the Fairness to Contact Lens Consumers Act. The statute and the Rule require the automatic release of a contact lens prescription to the patient upon completion of a lens fitting, or at the end of the examination if there is no change in the prescription, and are intended to facilitate consumers' ability to shop around for contact lenses.

The Commission initially published a Federal Register notice generally requesting comments on the Rule in September 2015. Based on a review of the 660 comments received, the Commission published a Notice of Proposed Rulemaking (NPRM) in December 2016, requesting comment on proposed Rule amendments. The NPRM proposed to amend the Rule to require prescribers to obtain a signed acknowledgment after releasing a contact lens prescription to a patient, and maintain it for three years. The purpose of the proposed amendment was to enhance both compliance and our ability to enforce the Rule by providing a record that the prescription was given out. The Commission received over 4,100 comments. There is evidence on the public record that suggests that at least half of contact lens consumers are not receiving their prescription as required by the Rule, either because they are not receiving their prescription at all (25%-35%) or because they do not receive it until they request it. Prescriber compliance with the automatic release requirement is critical to maximizing the Rule's intended competitive benefits.

Although the Rule has been in place for over 10 years, the FTC continues to receive consumer complaints about prescribers' failure to comply with the automatic release requirement. However, the number of complaints the FTC has received is not the best

³⁶ Leemore Dafny, Mark Duggan, & Subramaniam Ramanarayanan, *Paying a premium on your premium? Consolidation in the US health insurance industry*, *American Economic Review* 102.2 (2012): 1161-85 (growth in insurer bargaining power after Aetna-Prudential merger reduced earnings and employment growth of physicians and raised earnings and employment growth of nurses, reflecting postmerger substitution of nurses for physicians, and the exercise of monopsony power vis-à-vis physicians).

evidence of compliance with the automatic prescription requirement, for several reasons:

- Many consumers do not know of their right to receive their prescription (and so would not complain if they did not get it);
- Consumers may not know to complain to the FTC;
- Consumers who receive their prescription only after asking for it (which is still a Rule violation) may be unlikely to complain;
- Consumers who do not automatically receive their prescriptions may feel reluctant to complain about their prescriber, with whom they may otherwise be satisfied; and
- Consumers may not take the time to complain.

The Commission held a workshop on March 7, 2018 to collect additional information on various Rule-related issues, including the proposed amendments and alternative ways to increase subscriber compliance with the Rule. The public comment period closed on April 6, 2018. We received and reviewed approximately 3,500 additional comments. FTC staff intends to submit a recommendation to the Commission by the end of the year.

6. **In March 2018, the Commission held a workshop on the Contact Lens Rule and received comments on the proceedings until early April 2018. In May 2018, I led a letter with Rep. Bobby Rush requesting that the Commission reconsider this Notice of Proposed Rulemaking. Does the FTC expect to update its 2016 draft for comment or move directly to issue a final Contact Lens Rule? What is the FTC's anticipated timing for action?**

Response: As discussed in response to question 5 above, staff collected additional information during the workshop and in public comments, and is considering alternatives to increase prescriber compliance with the Rule without imposing unnecessary burdens on prescribers. FTC staff intends to submit a recommendation to the Commission by the end of the year. If the Commission decides that additional public input would be beneficial, the Commission would allow an appropriate period of time for public input. The length of the comment period would depend on the complexity of the modifications under consideration but most likely it would be 30 to 60 days; the original NPRM had a 60-day comment period, and we accepted comments for about 30 days after the workshop. The timeline for then completing the rulemaking and issuing the final Rule would depend on the number and complexity of the comments received.

7. **The FTC has jurisdiction over enforcing the Fair Debt Collection Practices Act. This Act was enacted in 1977 and many new technologies have come into use since then. Many third-party collectors have fallen prey to frivolous litigation as a result of unclear rules. The Bureau of Consumer Financial Protection has indicated that it plans to propose rules for the Fair Debt Collection Practices Act. How will these potential rules reconcile eliminating bad actors with creating clear, but not overly burdensome requirements for those acting responsibly? What is the timeline for these potential rules?**

Response: For more than four decades, the FTC has been protecting consumers from

unlawful debt collection practices. Stopping such practices remains a top priority for the agency. Since 2010, the FTC has sued more than 290 companies and individuals who engaged in unlawful collection practices in violation of the FDCPA and FTC Act, obtaining industry-wide bans against more than 150 of them and securing more than \$480 million in judgments. In addition to vigorous law enforcement, the FTC also engages in education and public outreach to inform consumers about their rights under the FDCPA and businesses about their obligations under the law.

The Commission has long taken the position that “the debt collection legal system needs to be reformed and modernized to reflect changes in consumer debt, the debt collection industry, and technology” since enactment of the FDCPA.³⁷ Accordingly, while the FTC does not have rulemaking authority under the FDCPA, we look forward to reviewing any proposed rules issued by the Bureau of Consumer Financial Protection regarding debt collection. The Bureau has recently estimated that it anticipates issuing such proposed rules in the spring of 2019.³⁸ The FTC continues to work closely with the Bureau to coordinate efforts to protect consumers from unfair and deceptive debt collection practices, including by consulting with the Bureau on its debt collection rulemaking and guidance initiatives.

- 8. The FTC has engaged in efforts against “illegal robocallers” that use technology to abuse consumers with unwanted nuisance calls. However, there is confusion about who is considered a robocaller. For example, those who have a legal, established business relationship with a consumer and a need to contact them often fall under the definition of a robocaller. Can you please describe in detail what defines a robocall? How are illegal robocalls differentiated from legal business calls?**

Response: The FTC’s regulation of robocalls stems from the Telemarketing Sales Rule (“TSR”).³⁹ The TSR does not define or use the word “robocall.” However, the TSR prohibits any call that delivers a prerecorded message to solicit the sale of goods, services, or charitable contributions. Other statutes, such as the Telephone Consumer Protection Act (“TCPA”) and certain state laws, may define illegal “robocalls” based on the use of specific technology to dial calls, but under the TSR the primary defining questions are: (1) whether the call delivers a prerecorded message; and (2) whether the calls is part of a campaign to solicit the sale of goods and services. If the answer is yes to both these questions, the call is presumptively illegal under the TSR, subject to certain defenses and exemptions.

The following is a list of categories of calls that may deliver prerecorded messages and still be permissible under the TSR:

³⁷ FTC Report, *Collecting Consumer Debts: The Challenges of Change* (2009), at i, <https://www.ftc.gov/reports/collecting-consumer-debts-challenges-change-federal-trade-commission-workshop-report>.

³⁸ <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201804&RIN=3170-AA41>. See Office of Information and Regulatory Affairs, Office of Management and Budget, Spring 2018 Unified Agenda of Regulatory and Deregulatory Actions, available at <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201804&RIN=3170-AA41>.

³⁹ 16 C.F.R. § 310, *et seq.*

- Calls that are exclusively to provide information and do not solicit any goods, services, or donations fall outside of the TSR. Informational calls from utility companies, doctors' offices, or school districts fall into this category.
- Calls to solicit the sale of goods or services where the consumer receiving the call has given express *written* agreement to receive marketing calls from the specific seller whose goods or services are being marketed, subject to several explicit requirements.⁴⁰ These calls are permitted under a limited exception to the TSR's general prohibition on sales calls delivering prerecorded messages. Note, however, that the agreement must be "in writing" and cannot be provided orally.
- Calls that deliver a prerecorded healthcare message made by, or on behalf of, an entity covered under the HIPAA Privacy Rule are exempted from the TSR's robocall rule.⁴¹
- Calls to a business to solicit the sale of goods or services from that business, other than calls selling nondurable office or cleaning supplies, are exempted from the TSR.⁴²

It should be noted that while some of the above-mentioned calls may not be prohibited by the TSR, they may be prohibited by the TCPA or state laws. Moreover, in addition to prohibiting robocalls, the TSR also prohibits sales calls by live operators to numbers listed on the National Do Not Call Registry.

The Honorable Leonard Lance

1. **The recent "FTC Staff Offers Business Guidance Concerning Multi-Level Marketing" ("MLM Guidance") states: "At the most basic level, the law requires that an MLM pay compensation that is based on actual sales to real customers, rather than based on wholesale purchases or other payments by its participants."**
 - a. **Which specific "law" is referenced here? Identify the specific statutes and case law.**

Response: The referenced document, "Business Guidance Concerning Multi-Level Marketing," is focused on multi-level marketing practices that may violate Section 5(a) of the FTC Act, which prohibits unfair or deceptive acts or practices in or affecting commerce. The particular statement quoted in your question addresses the circumstances under which a multi-level marketer ("MLM") might be determined to have an unfair or deceptive compensation structure in violation of Section 5. Such MLMs are sometimes called "pyramid schemes."

The most widely cited description of an unlawful MLM compensation structure appears in the Commission's *Koscot* decision, which observed that such enterprises are characterized in part by "the right to receive in return for recruiting other participants into

⁴⁰ 16 C.F.R. § 310.4(b)(1)(v)(A).

⁴¹ 16 C.F.R. § 310.4(b)(1)(v)(D).

⁴² 16 C.F.R. § 310.6(b)(7).

the program rewards which are unrelated to the sale of the product to ultimate users.”⁴³ In accord with this standard, the courts and the Commission have consistently held that lawful MLM compensation is based on actual sales to customers, not on wholesale purchases or other payments by the MLM’s participants.⁴⁴ Additional discussion of selected issues relating to this topic—such as how the FTC considers claims that MLM participants are making some purchases to satisfy their own genuine product demand, and methods of documenting actual sales to consumers—is provided in response to Questions 5–8 of the “Business Guidance” document.

2. Please elaborate on the specific criteria or vetting process that is used by the Commission to determine if an independent organization purporting to be a consumer watchdog, or a corporation that operates as a direct competitor in the marketplace, is a reliable source of relevant information?

Response: The Commission may open investigations at the request of the President, Congress, the Attorney General, or other governmental agencies; upon referrals by the courts; on the basis of complaints filed by members of the public; or on its own initiative.⁴⁵ In determining whether to open an investigation, the Commission acts only in the public interest, and does not initiate an investigation or take other action when the violation of law alleged is a matter of private controversy that does not tend to adversely affect the public.⁴⁶ In some cases, competitors complain about alleged deceptive or unfair practices that they claim harm consumers and put themselves at a competitive disadvantage. In other instances, consumer watchdog groups complain to the FTC.

There are multiple opportunities to test the value of information provided by such third parties. Commission staff carefully evaluate such complaints to determine whether the alleged practices, if proven, would violate the law; the complaining party has ulterior motives; staff can independently verify the supplied information, and; as with all cases, there is a sufficiently significant likelihood of a law violation to justify opening an investigation. In all but the most egregious cases of fraud, the next step generally is to contact the entity against whom the complaint has been lodged. At this stage, the subject of the complaint has every opportunity and incentive to provide information and evidence, and explain any apparent potential law violation. At the same time, as appropriate, staff typically seeks additional information from third parties and consults

⁴³ *In re Koscot Interplanetary, Inc.*, 86 F.T.C. 1106, 1181 (1975).

⁴⁴ *See, e.g., FTC v. BurnLounge, Inc.*, 753 F.3d 878, 885–86 (9th Cir. 2014) (citing with approval the issuance of a preliminary injunction against an MLM in which “rewards are received by purchasing product and by recruiting others to do the same”); *Webster v. Omnitrition Int’l, Inc.*, 79 F.3d 776, 782 (9th Cir. 1996) (noting that an MLM is facially unlawful if a participant earns compensation that is based “on product orders made by [his] recruits” rather than “on actual sales to consumers” (emphasis in original)); *FTC v. Equinox Int’l Corp.*, No. 99-0969, 1999-2 Trade Cas. (CCH) ¶ 72,704 (D. Nev. Sept. 14, 1999) (preliminarily enjoining an MLM in which compensation was “facially unrelated to sales to the ultimate user” because it was “based on purchases made from [the MLM] by the distributor and his downline”); *In re Holiday Magic, Inc.*, 84 F.T.C. 748, 1042–43 (1974) (explaining that lawful MLM compensation is “based strictly on product sales of recruits, and not on inventory purchases (or other payments) of recruits”).

⁴⁵ 16 C.F.R. § 2.1.

⁴⁶ 16 C.F.R. § 2.3.

with relevant experts as needed, to corroborate any allegations against an entity or defenses raised by it.

The Honorable Brett Guthrie

1. **The FTC Franchise Rule (Rule) is the governing federal regulation for franchise businesses and I understand it is due for renewal this year. Constituents of mine have raised concerns that if the Rule is eliminated or allowed to expire that very negative consequences could result for both franchisors and franchisees. The concern for franchisees centers around the denial of access to important pre-investment information for them, and on allowing unscrupulous franchisors to offer franchises in thirty-five states without providing any disclosure at all. On the other hand, for franchisors the risk is seeing a patchwork of laws to develop across the country, including a spike in complicated and onerous regulation.**
 - a. **Based on the information that has been shared with me, I would ask that you carefully consider the usefulness of the existing Rule and that you give full and fair consideration to the concerns raised by franchisors and franchisees. Do you intend to move forward with a renewal of the Rule and if so, what is your expected time frame? Is the Rule under consideration for expiration under the Administrations “Two out, one in” deregulatory effort?**

Response: The Commission routinely conducts a regulatory review of each of its trade regulation rules, including the Franchise Rule, about every 10 years. The regulatory review of the Franchise Rule is scheduled to begin by the end of 2018. The review will seek public comment, by means of a notice in the Federal Register, on whether the Rule is still needed to give prospective franchisees the information they need to make informed investment decisions and, if so, whether changes in the marketplace or technologies warrant any revisions to the Rule. The Commission is aware that both franchisor and franchisee stakeholders have supported the Franchise Rule since it was first issued in 1978, and will carefully consider all stakeholder comments on the continuing need for the Rule.

The Commission’s trade regulation rules do not expire. A resource-intensive notice and comment amendment proceeding pursuant to Section 18 of the FTC Act would be required to terminate any of them.⁴⁷

Independent agencies such as the FTC are not bound by Presidential Executive Orders.

The Honorable Gus Bilirakis

1. **Over 4 billion robocalls were placed nationwide in June 2018, equaling roughly 12.7 calls per person affected. Are you concerned about the incidence rate of robocalls and their potential impact for fraud and victimizing consumers, and what can the**

⁴⁷ See 15 U.S.C. § 57a(d)(2)(B).

FTC do to limit the impact of illegal robocalls?

Response: Yes, we are very concerned. The FTC has seen reports from various private actors, such as the YouMail index, concerning the number of robocalls placed on a monthly basis. Consumer complaints about unwanted calls and robocalls reported to the FTC remain the top consumer complaint the FTC receives—over 7 million complaints about unwanted calls in fiscal year 2017, more than 4.5 million of which were complaints about robocalls.

We know from our law enforcement work that fraudsters frequently use robocalls to contact potential victims. Accordingly, the FTC makes great efforts to litigate against robocallers, seize ill-gotten funds and return them to victims of scams, and educate consumers to avoid the harm from fraudulent and abusive robocalls. The FTC also works closely with industry to help spur innovation to tackle the problem.

The FTC takes a multi-faceted approach to combatting illegal robocalls and other abusive telemarketing. The FTC uses every tool at its disposal: aggressive law enforcement, initiatives to spur technological solutions, and robust consumer and business outreach. The FTC plans to continue its aggressive work in each of these areas, each of which is discussed in more detail below.

Law Enforcement

First and foremost, the FTC is a law enforcement agency. As of September 1, 2018, the Commission has filed 138 lawsuits against 454 companies and 367 individuals alleged to be responsible for placing billions of unwanted telemarketing calls to consumers. The FTC has collected over \$121 million from these violators. In cases where perpetrators were running telemarketing scams, the FTC has obtained court orders shutting these businesses down and freezing their remaining assets so that those funds could be returned to consumer victims.

Industry Outreach to Spur Technology

The FTC recognizes that law enforcement alone will not solve the problem of illegal robocalls. That is why the FTC intends to continue its long history of working with industry to promote technological solutions. The FTC has provided input to support the industry-led Robocall Strike Force, coordinated by the FCC, which is working to deliver comprehensive solutions to prevent, detect, and filter unwanted robocalls. In tandem with this effort, the FTC worked with a major carrier and federal law enforcement partners to help block IRS scam calls that were spoofing well-known IRS telephone numbers. FTC staff continues to work with federal law enforcement partners and major carriers to encourage network-level blocking of illegal robocall campaigns.

The FTC also led four public challenge contests to help spur industry initiatives to tackle

unlawful robocalls by blocking calls.⁴⁸ These challenges contributed to a shift in the development and availability of technological solutions in this area. When the FTC held its first public challenge, few call blocking applications existed. Today, there are hundreds of apps available to consumers, and two winners of the FTC's challenges offer leading call blocking tools that have blocked hundreds of millions of unwanted calls.⁴⁹

The FTC also engages with technical experts, academics, and others through industry groups, such as the Messaging, Malware and Mobile Anti-Abuse Working Group ("MAAWG") and the Voice and Telephony Abuse Special Interest Group ("VTA SIG"). The FTC has encouraged ongoing industry efforts to develop new technological protocols that will change how caller ID works so that it will be more difficult for callers to engage in illegal caller ID spoofing.

Consumer Education & Outreach

The FTC's education and outreach program reaches tens of millions of people a year through our website, the media, and partner organizations that disseminate consumer information on the FTC's behalf. In the case of robocalls, the advice is simple: if you answer a call and hear an unwanted recorded sales message—hang up.

2. Do you have all of the tools you need to succeed in the mission of combatting robocalls, or do you believe further legislative action is needed? If so, what can Congress do to help in this effort?

Response: The FTC has expended significant time and effort to combat illegal robocalls and uses every tool at its disposal. As with any law enforcement challenge, additional resources and enforcement tools could yield even greater results. Presently, the FTC seeks to advance its robocall enforcement via repeal of the common carrier exemption from its jurisdiction. The exemption impedes investigations, complicates litigation and, critically, prevents the FTC from challenging common carriers of telecommunications that violate the TSR.

3. What role can the FTC play in combatting the national opioid crisis, including the marketing and advertising of patient recovery services, illegal opioids as well as prescription and over-the-counter drugs?

⁴⁸ The first challenge, in 2013, called upon the public to develop a consumer-facing solution to blocks illegal robocalls. See FTC Press Release, *FTC Announces Robocall Challenge Winners* (Apr. 2, 2013), <https://www.ftc.gov/news-events/press-releases/2013/04/ftc-announces-robocall-challenge-winners>; see also FTC Press Release, *FTC Awards \$25,000 Top Cash Prize for Contest-Winning Mobile App That Blocks Illegal Robocalls* (Aug. 17, 2015), <https://www.ftc.gov/news-events/press-releases/2015/08/ftc-awards-25000-top-cash-prize-contest-winning-mobile-app-blocks>; FTC Press Release, *FTC Announces Winners of "Zapping Rachel" Robocall Contest* (Aug. 28, 2014), <https://www.ftc.gov/news-events/press-releases/2014/08/ftc-announces-winners-zapping-rachel-robocall-contest>.

⁴⁹ One of the winners, "NomoRobo," was on the market within 6 months after being selected by the FTC. NomoRobo, which reports blocking over 600 million calls to date, is being offered directly to consumers by a number of telecommunications providers and is available as an app on iPhones.

Response: The Commission has addressed the opioid crisis by taking enforcement action in federal court, issuing warning letters, and engaging in consumer education.

To date, the Commission has brought two enforcement actions against marketers of bogus withdrawal and addiction treatment products.⁵⁰ In January 2018, the Commission partnered with the FDA to send warning letters to 11 marketers selling products that allegedly helped with opioid withdrawal and/or addiction.⁵¹ The Commission on its own sent letters to four additional marketers.⁵² Concurrently with the January letters, the Commission partnered with the Substance Abuse and Mental Health Services Administration (SAMSHA), which is part of the Department of Health and Human Services, to issue a consumer education piece advising of the hazards of deceptive advertising and directing consumers to trusted resources for help with addiction treatment.⁵³

The Commission will continue to monitor this area for unfair or deceptive practices, including potentially deceptive advertising by treatment centers. We will continue to work with stakeholders, including state and local enforcers, to determine whether law enforcement action in this field is appropriate. Any such law enforcement could be against the treatment centers themselves, companies that recruit consumers for placement into treatment programs, or online review sites that might have undisclosed, material connections to the programs they review.

4. **I'd like to congratulate the FTC on its successful enforcement action against an online hotel booking reseller, Reservation Counter. As part of the enforcement action, the FTC alleged that the party misled consumers through ads, webpages, and call centers that led consumers to mistakenly believe they were reserving the rooms directly from the hotel. The Commission further alleged that the company failed to adequately tell consumers that their credit cards would be charged immediately, rather than after they arrived at the hotel. The FTC's constructive action highlights the good work it can do to protect consumers. While this enforcement action is a good first step, do you believe this hotel scam website problem may be a symptom of a larger problem when it comes to the online hotel booking market? What do you feel is the FTC's role to help mitigate websites that have not been investigated by the FTC, from using harmful tactics against consumers?**

⁵⁰ *FTC v. Caitlin Enterprises, Inc.*, No. 1:17-cv-403 (W.D. Tex. May 17, 2017), <https://www.ftc.gov/enforcement/cases-proceedings/1623204/catlin-enterprises-inc> (settlement included \$6.6 million judgment, suspended due to the defendants' inability to pay, and injunctive relief prohibiting the defendants from making misleading claims); *FTC v. Sunrise Nutraceuticals, LLC et al.*, No. 9:15-cv-81567 (S.D. Fla. July 6, 2016), <https://www.ftc.gov/enforcement/cases-proceedings/152-3208-x160006/sunrise-nutraceuticals-llc> (settlement included \$1.4 million judgment, all but \$235,000 suspended due to the defendants' inability to pay, and injunctive relief prohibiting the defendants from making misleading claims).

⁵¹ FTC & FDA Opioid Warning Letters (2018), <https://www.ftc.gov/ftc-fda-opioid-warning-letters>.

⁵² *Id.*

⁵³ *Getting the Right Help for Opioid Dependence or Withdrawal* (Jan. 2018), <https://www.consumer.ftc.gov/articles/0223-getting-right-help-opioid-dependence-or-withdrawal>.

Response: The Commission shares your underlying concerns about deceptive online travel sites. False or misleading information about hotel booking sites harms consumers and competition. FTC staff continues to monitor the online travel market. If the Commission has reason to believe that an online travel booking reseller has engaged in deceptive practices, it has authority under the FTC Act to bring a law enforcement action against the reseller.

In addition to law enforcement, FTC staff published a consumer advisory that provides information and tips for consumers who wish to book a hotel room online.⁵⁴ The Commission also issued a report to Congress on the online hotel booking market.⁵⁵ The report described the FTC's law enforcement authority over deceptive online hotel booking practices and commented on proposed legislation that required third-party resellers to disclose they are not affiliated with the hotel they are advertising.⁵⁶

Online travel websites provide easy access to information about multiple hotels. Greater information about hotels and lower costs of acquiring information make it easier for consumers to find and compare hotel options. In its report to Congress and in previous testimony, the Commission stated that the nature and appearance of many online travel sites do not raise the deception concerns at issue in the *Reservation Counter* matter.⁵⁷

5. **In 2016, the American Medical Association (“AMA”) passed a resolution noting that some lawsuit advertisements emphasize the negative side effects of prescription medications, while ignoring their life-saving benefits and FDA-approval. The AMA resolution referred to these ads as “fear mongering” and “dangerous.” Earlier this year, the AARP issued a Fraud Alert to its members warning them about lawsuit advertisements soliciting patients to join class actions if they have taken certain medications. The AARP Fraud Alert noted that the “surge in television, radio and internet ads from law firms and lawsuit marketing companies is causing some patients to take serious risks.” These lawsuit advertisements often frighten viewers, especially the older adults they frequently target, into discontinuing or refusing to take FDA approved medication prescribed by a physician, often for life-threatening conditions. What is the FTC currently doing to prevent false and misleading lawsuit advertisements from scaring patients, particularly among vulnerable populations, into discontinuing or refusing doctor prescribed and FDA approved medications?**

⁵⁴ FTC Consumer Blog, *Did You Book That Night at the Hotel's Site?* (July 14, 2015), www.consumer.ftc.gov/blog/2015/07/did-you-book-night-hotels-site.

⁵⁵ *The Online Hotel Booking Market: A Federal Trade Commission Report To Congress On Recommended Enforcement Actions Against Deceptive Marketers Engaging in the Online Hotel Booking Market, and Appropriate Remedies To Apply In This Area To Protect Consumers* (Aug. 2017), www.ftc.gov/reports/online-hotel-booking-market-federal-trade-commission-report-congress-recommended-enforcement (“Report to Congress”).

⁵⁶ *Id.*

⁵⁷ Report to Congress, *supra* n.53, at 2 n.2; Prepared Statement of the FTC on “Legislative Hearing on 17 FTC Bills” before the Comm. on Energy and Commerce, Subcomm. on Commerce, Manufacturing, & Trade, U.S. House of Rep. (May 24, 2016), www.ftc.gov/public-statements/2016/05/prepared-statement-federal-trade-commission-legislative-hearing-seventeen.

Response: Advertising plays a critical role in our economy, providing consumers with valuable information. However, to be useful, advertising must not be misleading. The FTC is monitoring attorney advertising that solicits people who may have been harmed by prescription drugs or medical devices to determine whether such advertising is misleading and likely to cause harm to consumers. Depending on the results of our search, we will consider all available options, including law enforcement actions, warning letters, and consumer education. We also are consulting with the FDA to determine how we may assist each other on this topic.

6. **There are a number of lawsuit advertisements that portray specific FDA approved drugs as inherently dangerous by using frightening imagery, words, and noises. Some lawsuit ads and websites use phrases like “recall” and “medical alert,” while others show flashing lights and sirens. Others even direct viewers to call numbers like 1-800-BAD-DRUG and show people being rolled into a morgue. Many times, these advertisements will display an FDA logo and feature a narrator dressed in a physician’s white coat. Advertisements that use these bombastic and deceptive tactics, often supplemented by little or no mention of a drug’s FDA approval or benefits, present a clear danger to consumers-who in this instance are patients taking prescribed medications. In fact, an FDA adverse event report through 2016 showed that 61 patients watching lawsuit ads about their prescribed anticoagulants stopped taking their medication, leading to 4 deaths and several other serious injuries. National patient advocacy organizations such as the Alliance for Aging Research have asserted that the 1-800-BAD-DRUG ads are deceptive under the FTCs’ truth-in-advertising rules. How can the FTC enforce laws under its jurisdiction to deter deceptive practices that are documented by the FDA as leading to severe injury and death?**

Response: The FTC Act prohibits deceptive and unfair acts or practices. To establish that an advertisement is deceptive requires a showing that (1) there was a representation or omission, (2) the representation or omission was likely to mislead consumers acting reasonably under the circumstances, and (3) the representation or omission was material.⁵⁸ To establish that a practice is unfair requires a showing that an act or practice is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or competition.⁵⁹ As noted in response to question 5 above, the FTC is monitoring attorney advertising that solicits people who may have been harmed by prescription drugs or medical devices to determine whether such advertising is misleading and likely to cause harm to consumers. We also are consulting with the FDA to determine how we may assist each other on this topic.

7. **An April 2018 New York Times article uncovered a network of lawyers, doctors, and financiers who preyed on women who had surgical mesh implants intended to treat**

⁵⁸ See Federal Trade Commission Policy Statement on Deception, *appended to Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174 (1984).

⁵⁹ Federal Trade Commission Policy Statement on Unfairness, *appended to Int’l Harvester Co.*, 104 F.T.C. 949, 1070 (1984).

pelvic organ prolapse. The scheme described in the article included coaxing women into getting surgery to remove the mesh- in some instances unnecessarily- to make them “ more lucrative plaintiffs in lawsuits against medical device manufacturers.” The article describes that one of the tactics used to get women into this lawsuit pipeline was by using online video ads. The article even shows one ad that uses the FDA logo and has a man in a doctor’s outfit urging women to call the number. Isn’t this exactly the type of deceptive, harmful advertising that the FTC should investigate? Would the FTC consider supporting regulatory guidelines for attorney advertisements to avoid this type of harm and deception?

Response: Although the FTC has jurisdiction over attorney advertising, it does not have jurisdiction over the practice of either law or medicine. The ethical conduct of doctors and attorneys falls to their respective professional licensing boards. As a general matter, the FTC would support guidance intended to deter unfair and deceptive attorney advertisements. Although we cannot comment on the particular facts set forth in your question, if attorney advertising crosses the line into deception, the FTC does have jurisdiction and, when warranted by the facts, the FTC can take appropriate action, including enforcement. We also would consider additional methods, such as the use of warning and advisory letters, to educate attorneys and firms soliciting patients on how to avoid violations of the FTC Act.

8. **In the online and digital marketplace, many of the largest companies both own the internet commerce platforms and also sell their own products. Small businesses hoping to compete are drawn to utilize this platform online while competing with their products. This can prove difficult when the large companies have continued access to online customer data that they can use to channel their own products. What is FTC doing to prevent monopoly and encourage free market principles when it comes to online data and sales?**

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

In June, I announced a new public hearings project—*Hearings on Competition and Consumer Protection in the 21st Century*—to consider whether broad-based changes in the economy, evolving business practices, new technologies, and international developments warrant adjustments to competition and consumer protection law, enforcement priorities, and policy.⁶⁰ One of the topics to be discussed at these hearings is

⁶⁰ FTC, *Hearings on Competition and Consumer Protection in the 21st Century*, <https://www.ftc.gov/policy/hearings-competition-consumer-protection>; see also FTC Press

the unique competition and consumer protection issues associated with internet and online commerce. We are also inviting public comment on this and other issues related to communication, information, and media technology networks.⁶¹ Through the upcoming series of hearings, the Commission will devote significant resources to refresh and, if warranted, renew its thinking on a wide range of cutting-edge competition and consumer protection issues.

9. Should privacy protections be based on the sensitivity of the information, or the entity collecting such information?

Response: Privacy protections may appropriately depend on both sensitivity of information and nature of the entities collecting the information. For example, in data security cases, the FTC has noted that a company's data security measures "must be reasonable and appropriate in light of the sensitivity and volume of consumer information it holds, the size and complexity of its business, and the cost of available tools to improve security and reduce vulnerabilities."⁶² One factor in determining reasonable security is the "sensitivity" of information. For example, a company that collects consumers' Social Security numbers should have in place greater protections than a company that collects only public information. Another factor in determining reasonable security is the size and complexity of a business. For example, a business that collects large amounts of consumer information should have in place greater protection than a company that only incidentally collects such information. In the privacy context, the Commission has similarly stated that the level of protection should depend on factors including the sensitivity of data and how the entity uses it.⁶³

10. Should Congress allow California to dictate privacy protections for the entire country, or is the appropriate response from Congress to set the right national policy for the entire country? Are there any tools which Congress could provide that would make the FTC an even more effective enforcer of consumer privacy protections?

Response: I support a national data breach notification and data security law that would give the FTC APA rulemaking authority, jurisdiction over non-profits and common carriers, and the authority to seek civil penalties. The FTC has not taken any position on additional tools for enforcement of consumer privacy protections, and stands ready to enforce any law that Congress enacts. Previously, when Congress has enacted a law that gives the FTC authority to protect consumers' privacy, from CAN-SPAM to COPPA to

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

⁶¹ Public comments on this topic will be posted on the FTC website at <https://www.ftc.gov/policy/public-comments/2018/07/initiative-756>.

⁶² See *Commission Statement Marking the FTC's 50th Data Security Settlement* (Jan.31, 2014), <https://www.ftc.gov/system/files/documents/cases/140131gmrstatement.pdf>.

⁶³ See, e.g., FTC Report, *Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers* (Mar. 2012), <https://www.ftc.gov/reports/protecting-consumer-privacy-era-rapid-change-recommendations-businesses-policymakers>.

the Gramm-Leach-Bliley Act, we have robustly exercised that authority; if we were given additional authority, we would vigorously use it. With respect to state laws regulating privacy, our task is to enforce federal laws as authorized by Congress. The Commission will be hosting its *Hearings on Competition and Consumer Protection in the 21st Century* this fall, where we expect to discuss these issues and hear from stakeholders about, for example, the potential impacts of the California law and whether to consider adopting a uniform national standard.

11. Recently, our committee sent a letter to Google about the fact that it continues to give third parties access to the content of Gmail users' emails. Does that practice by Google concern you? Is the FTC going to investigate this practice?

Response: As you know, because the Commission's investigations are not public, I cannot comment on the practices of specific companies. Generally, I share your concerns about companies that may share contents of consumers' communications without their knowledge or consent. For example, in the FTC's case against smart television manufacturer Vizio, we alleged that the company's collection and sharing of consumers' second-by-second viewing data without their knowledge or consent constituted a deceptive and unfair practice.⁶⁴ Companies should, however, be permitted to share such data with consumers' informed consent.

12. The FTC has been conducting a comprehensive review of the contact lens rule for the past several years. The review began in October of 2015 and to date has not been completed. In conducting this review, the FTC recommended several updates to the contact lens rule to educate and protect consumers. Specifically, the FTC recommended changes to the rule that help to educate consumers on their right to their prescription. Unfortunately, these common sense changes to the rule have not yet been finalized. This delay has caused uncertainty for consumers in the contact lens marketplace. Can you please provide me with an update on the status of the review of the rule and tell me when you expect this rule to be finalized?

Response: I share your concern that the Contact Lens Rule review be completed as promptly as possible while, at the same time, giving due consideration to the substantial public input we received. FTC staff intends to submit a recommendation to the Commission by the end of the year.

The Commission initially published a Federal Register notice generally requesting comments on the Rule in September 2015. Based on review of the 660 comments received, the Commission published a Notice of Proposed Rulemaking (NPRM) in December 2016, providing a 60-day period for comments on proposed Rule amendments. The NPRM proposed to amend the Rule to require prescribers to obtain a signed acknowledgment after releasing a contact lens prescription to a patient, and maintain it for three years. The purpose of the proposed amendment was to enhance both compliance and our ability to enforce the Rule by providing a record that the prescription was given

⁶⁴ *FTC & State of New Jersey v. Vizio, Inc. et al.*, No. 2:17-cv-00758 (D.N.J. Feb. 6, 2017), <https://www.ftc.gov/enforcement/cases-proceedings/162-3024/vizio-inc-vizio-inscape-services-llc>.

out. We received over 4,100 comments.

The Commission held a workshop on March 7, 2018 to collect additional information on various Rule-related issues, including the proposed amendments. The public comment period closed on April 6, 2018. We received and reviewed approximately 3,500 comments. FTC staff intends to submit a recommendation to the Commission by the end of the year.

The Honorable Mimi Walters

1. **As you know, the Franchise Rule requires franchisors to provide all potential franchisees with a disclosure document containing 23 specific items of information about the offered franchise, its officers, and other franchisees. As the FTC reviews all rules every ten years, I understand the next review of the Franchise Rule is due at the end of 2018.**
 - a. **In light of the Administration's focus on deregulation, what are the FTC's plans for the Franchise Rule?**
 - b. **Does the FTC plan to reconsider the Franchise Rule?**
 - c. **If so, when do you anticipate commencing a review and public comment process on the rule?**

Response: The Commission routinely conducts a regulatory review of each of its trade regulation rules, including the Franchise Rule, about every 10 years. The regulatory review of the Franchise Rule is scheduled to begin by the end of 2018. The review will seek public comment, by means of a notice in the Federal Register, on whether the Rule is still needed to give prospective franchisees the information they need to make informed investment decisions and, if so, whether changes in the marketplace or technologies warrant any revisions to the Rule. The Commission is aware that both franchisor and franchisee stakeholders have supported the Franchise Rule since it was first issued in 1978, and will carefully consider all stakeholder comments on the continuing need for the Rule.

The Honorable Jeff Duncan

1. **Has the Federal Trade Commission (FTC) undertaken any studies or made any determinations related to the ability of the Federal or state governments to regulate alcohol beverage sales in the online marketplace?**

Response: In 1998, 2003, 2008, and 2014, the FTC released four studies on alcohol industry compliance with self-regulatory guidelines and concerns about youth access to alcohol marketing.⁶⁵ The studies recommended, among other things, that

⁶⁵ FTC Report, *Self-Regulation in the Alcohol Industry* (2014), <https://www.ftc.gov/system/files/documents/reports/self-regulation-alcohol-industry-report->

companies take advantage of age-gating technologies offered by social media, including YouTube. These age gates on company websites should require consumers to enter their date of birth, rather than simply asking them to certify that they are of legal drinking age. The FTC also recommended that state regulatory authorities and others who are concerned about alcohol marketing should participate in the industry's external complaint review system when they see advertising that appears to violate the voluntary codes.

FTC recommendations from these studies resulted in agreements by the Beer Institute, the Distilled Spirits Council of the United States, and the Wine Institute to adopt improved voluntary advertising placement standards; buying guidelines for placing ads for alcoholic beverages on radio, in print, on television, and on the internet; a requirement that suppliers conduct periodic internal audits of past placements; and systems for external review of complaints about compliance.

In 2003, the FTC also issued a staff report concluding that e-commerce offers consumers lower prices and more choices in the wine market, and that states could expand e-commerce by permitting direct shipping of wine to consumers.⁶⁶

2. Does the FTC have specific jurisdiction and authority in which to regulate online marketplace platforms such as Craigslist, eBay, Facebook and others, in order to restrict or prohibit consumer to consumer sales of alcohol beverages that are facilitated through these platforms?

Response: The FTC does not have specific authority to restrict or prohibit consumer-to-consumer sales of alcohol beverages unless those sales violate Section 5 of the FTC Act. Section 5 of the FTC Act prohibits unfair methods of competition and unfair or deceptive acts or practices in most areas of the economy not expressly exempted from the FTC Act. The FTC has used this authority to scrutinize proposed mergers in the alcohol industry under the FTC Act and the Clayton Act. The FTC also has used this authority to evaluate proposed mergers and potential anticompetitive or deceptive conduct in online marketplaces. In addition, through the FTC's competition advocacy program, FTC staff has provided information that may assist lawmakers and regulators in assessing the competitive impact of proposed laws and regulations related to alcoholic beverage sales. This authority complements the authority of other state and federal agencies.

[federal-trade-commission/140320alcoholreport.pdf](https://www.ftc.gov/sites/default/files/documents/reports/self-regulation-alcohol-industry-report-federal-trade-commission/080626alcoholreport.pdf); FTC Report, *Self-Regulation in the Alcohol Industry* (2008), <https://www.ftc.gov/sites/default/files/documents/reports/self-regulation-alcohol-industry-report-federal-trade-commission/080626alcoholreport.pdf>; *Alcohol Marketing and Advertising: A Fed. Trade Comm'n Report to Congress* (2003), <https://www.ftc.gov/sites/default/files/documents/reports/alcohol-marketing-and-advertising-federal-trade-commission-report-congress-september-2003/alcohol08report.pdf>; *Self-Regulation in the Alcohol Industry: A Fed. Trade Comm'n Report to Congress* (1999), https://www.ftc.gov/sites/default/files/documents/reports/self-regulation-alcohol-industry-federal-trade-commission-report-congress/1999_alcohol_report.pdf.

⁶⁶ *FTC, Possible Anticompetitive Barriers to E-Commerce: Wine* (2003), https://www.ftc.gov/sites/default/files/documents/reports/possible-anticompetitive-barriers-e-commerce-wine/winereport2_0.pdf

3. **Is the FTC working with the Tobacco Tax and Trade Bureau (TTB) and any state attorneys general or Alcohol Beverage Commission (ABC) Boards to monitor and regulate online liquor sales for the benefit and protection of the consumer?**

Response: The Commission routinely collaborates with other federal agencies on matters of common interest. The Commission and TTB (Alcohol and Tobacco Tax and Trade Bureau, part of the U.S. Treasury) are two of the fifteen federal agency members of the Interagency Coordinating Committee to Prevent Underage Drinking (ICCPUD). Each year, ICCPUD publishes a Report to Congress on the status of alcohol use by those under the legal drinking age. This annual Report includes a section that summarizes the status of state alcohol laws designed to prevent underage access to alcohol, including laws pertaining to online liquor sales and retailer interstate shipments of alcohol.⁶⁷ In addition, in 2010, we sent warning letters to manufacturers of four premixed caffeinated alcohol beverages, in coordination with TTB and FDA.⁶⁸ As a result, premixed caffeinated alcohol beverages are no longer on the market.

The Honorable Jan Schakowsky

1. **I'm concerned that the FTC is unable to keep up with all the consent decrees. If the FTC cannot ensure compliance, the consent decrees are not effective in stopping unfair and deceptive acts.**

- a. **How many consent decrees are currently active?**

Response: Most of the FTC's consumer protection orders are permanent federal court injunctions, and are all currently enforceable. However, absent any indication of violations, the agency ceases active compliance monitoring after specified periods, based on the likelihood of recidivism and the nature of the underlying violations. If red flags, such as an insider tip or a consumer complaint, reappear in any matter, active monitoring begins anew.

Over the past decade, the Commission obtained original final orders in 965 consumer protection matters—701 federal court matters and 264 administrative matters, all of which are currently enforceable.

⁶⁷ See, e.g., ICCPUD, *2017 Report to Congress in the Prevention and Reduction of Underage Drinking, State Reports*, https://alcoholpolicy.niaaa.nih.gov/sites/default/files/imce/users/u1743/stop_act_rtc_2017_state_reports_al-mt.pdf.

⁶⁸ See *FTC Sends Warning Letters to Marketers of Caffeinated Alcohol Drinks* (Press Release, Nov. 10, 2010) at <https://www.ftc.gov/news-events/press-releases/2010/11/ftc-sends-warning-letters-marketers-caffeinated-alcohol-drinks>. See *FTC, Alcohol Marketing and Advertising: A Report to Congress*, pages 3, 4 (2003) (describing 2001 joint FTC/TTB survey of flavored malt beverage alcohol placement at retail).

b. How many FTC employees review them?

Response: Thirty-three (33) attorneys currently review compliance with consumer protection orders, in addition to their other responsibilities. (Separate staff review compliance with competition orders.)

c. I understand that the Commission can request information from a company to ensure compliance with those consent decrees. With that many consent decrees, how does staff know what to ask for? How can you be sure the Commission is not missing violations?

Response: The Division of Enforcement's highly experienced attorneys have developed efficient and effective techniques and protocols. However, law enforcement is not a perfect science, and no enforcement agency can guarantee that it will not miss violations. Thus, like all law enforcement, the FTC vigorously pursues violators with contempt and order enforcement actions. The judgments and conduct relief obtained in these actions help deter future violations, even those we may not otherwise have detected. To effect this deterrence, the Commission has initiated 46 order enforcement actions in consumer protection matters during the last 13 years, obtaining judgments totaling nearly \$500 million (24 contempt, 15 administrative enforcement, and 7 actions to lift suspended judgments).

d. I understand the FTC can require third-party monitoring reports. Are these full audits, and are these outside parties required to notify the FTC if they think a company is violating a consent decree?

Response: The Commission regularly requires third-party assessors in data security and privacy orders, but generally does not in its other cases because the technical compliance issues are not as complex. The assessments for Commission data security and privacy orders require the assessor to examine the practices of defendants/respondents, assess their compliance with the standards contained in the order, and certify the defendants/respondents are in active compliance. Thus, while there is no duty to notify the Commission of a violation, a failure to submit an initial assessment certifying that the company's privacy controls were operating effectively would provide such notice.

e. How does the FTC evaluate third-party monitors/auditors? Can the FTC require that a particular auditor be used or not used?

Response: Compliance attorneys have close, significant contact with third-party assessors, which allows staff to evaluate the assessors' work. The FTC's orders require the defendants/respondents either to obtain FTC approval of the monitor/auditor (e.g., the Commission's privacy orders), or that the monitor/auditor possess relevant credentials (e.g., data security orders).

f. When a consumer protection order is violated, what steps are taken to ensure that the violator is held accountable?

Response: Over the past decade, the FTC has established a comprehensive order enforcement program. First, the agency developed a proprietary database that collects information from the original case attorneys, allows the compliance attorney to systematically track his or her investigation, provides easy access to relevant documents, and issues alerts to prevent cases from falling through the cracks. A group of more than 30 experienced attorneys uses this database and the compliance monitoring tools contained in our orders to identify and investigate likely recidivists and bring enforcement actions.

The Commission enforces federal court orders directly by bringing contempt and de novo actions in its own name. Over the past 10 years, the Commission has initiated 24 contempt actions, and over a dozen new cases against recidivists. For example, when in 2015 it appeared that LifeLock had violated a 2010 order, the Commission launched an extensive investigation and then negotiated an order imposing a \$100 million judgment, of which \$67 million has been returned to consumers thus far.⁶⁹ Staff also works with our criminal law enforcement partners through the agency's Criminal Liaison Unit ("CLU Program") to enable criminal prosecution of the worst of these violators. For example, the FTC obtained a \$38 million contempt judgment against Kevin Trudeau, while the CLU Program worked with the U.S. Attorney's Office for the Northern District of Illinois.⁷⁰ Pursuant to these actions, a receiver has amassed over \$10 million from Mr. Trudeau's various holdings, and he is serving a 10-year criminal sentence based on his contempt.

Courts may assess civil penalties for violations of administrative orders; the Department of Justice (DOJ) has the right of first refusal to litigate these cases.⁷¹ Over the past decade, the agency has initiated 15 such cases. For example, when Google violated its Google Buzz order, the Commission negotiated a penalty of \$22.5 million.⁷²

2. The Division of Privacy and Identity Protection, which oversees issues related to consumer privacy, data security, credit reporting, and identity theft, only has about 40 full-time employees. According to the Privacy Rights Clearinghouse, this year alone, there have been more than 240 data breaches involving more than 812 million records.

a. How does the FTC determine which cases to bring or what investigations to open?

⁶⁹ *U.S. v. LifeLock, Inc.*, No. 2:10-cv-00530-JJT (D. Ariz. Jan. 4, 2016), <https://www.ftc.gov/enforcement/cases-proceedings/072-3069-x100023/lifelock-inc-corporation>.

⁷⁰ *FTC v. Trudeau*, 662 F.3d 947 (7th Cir. 2011) (affirming \$38 million civil contempt judgment against Kevin Trudeau); *United States v. Trudeau*, 812 F.3d 578 (7th Cir. 2016) (affirming criminal conviction of Kevin Trudeau for contempt and ten-year sentence).

⁷¹ 15 U.S.C. 45(l).

⁷² *U.S. v. Google Inc.*, No. 512-cv-04177-SI (N.D. Cal. Nov. 16, 2012), <https://www.ftc.gov/enforcement/cases-proceedings/google-inc>.

Response: The Commission generates cases from a number of sources, including consumer complaints submitted to the FTC's Consumer Sentinel database, academic research articles, press reports, petitions from consumer groups, and staff's own research and investigation. In evaluating whether to open a case to investigate a particular set of facts, the Commission staff develops information about the incident or practice and assesses factors such as the likelihood of a potential law violation, the types and quantity of information at issue, the potential consumer harm, and the number of individuals affected.

b. On average, how many investigations are ongoing in the Division of Privacy and Identity Protection at any given time?

Response: The number of investigations and other activities in the Division of Privacy and Identity Protection (DPIP) varies over time. Currently, DPIP staff are pursuing approximately 80 matters, which include investigations of particular companies, projects that may lead to additional investigations, and policy- or regulatory-focused projects (such as regulatory reviews, studies, and workshops). The agency's privacy- and security-related work is not limited to DPIP; staff in the FTC's regional offices also work on these issues. For example, our Midwest Regional Office recently brought a case against an online talent agency for violations of the Children's Online Privacy Protection Act.⁷³ In addition, the Bureau of Consumer Protection's Division of Enforcement enforces orders in the privacy and data security area. Other Bureau of Consumer Protection Divisions also engage in privacy-related work, such as Do Not Call enforcement and enforcement of the CAN-SPAM Act.

c. On average, how many cases are ongoing at any given time?

Response: In addition to the investigations described in 2.b. above, DPIP staff has been actively litigating one or two matters at any given time over the past few years.

d. On average, how many attorneys work on each case or investigation?

Response: On average, most investigations in DPIP are staffed by one or two staff attorneys. For more complex litigation matters, teams may include anywhere from 4 to 6 people.

e. Does it sometimes happen that attorneys are pulled from an investigation or case they are working on to work on a bigger or more newsworthy investigation or case? If so, please describe under what circumstances this transfer of personnel might occur. How does the Commission decide which cases take priority?

Response: Depending on the type of matter involved, it is often necessary to add more staff to litigate a matter than were needed to handle the investigation phase. Obviously,

⁷³ *U.S. v Prime Sites, Inc.* (Explore Talent), No. 2:18-cv-00199(D. NV. February 12, 2018). <https://www.ftc.gov/enforcement/cases-proceedings/162-3218/prime-sites-inc-explore-talent>.

this can present a challenge for managers, particularly when staffing large litigation teams, but the Commission has some flexibility to reassign attorneys as the flow of work demands. For example, matters are opened or closed with some frequency, and an attorney who closes an investigation is then available to assist a litigation team. When extraordinary resource constraints arise, the Commission can deploy resources across divisions and the regional offices.

f. What other resources could the FTC, particularly in the areas of consumer privacy, data security, credit reporting, and identity theft?

Response: I support a national data breach notification and data security law that would give the FTC APA rulemaking authority, jurisdiction over non-profits and common carriers, and the authority to seek civil penalties. If Congress were to determine that the Commission needs additional resources or authorities to tackle any of these important consumer protection issues, we would put them to good use. The FTC will host *Hearings on Competition and Consumer Protection in the 21st Century* this fall, which will include hearings on whether the agency needs additional tools in the privacy and data security area, specifically.

g. I am concerned about the push to close out cases. While a person should not be under investigation indefinitely, cases should not be closed just because staff are temporarily assigned other matters. Can you assure me that potential violators are not given a free pass because of this push to close out cases?

Response: Commission staff constantly open new matters for investigation, and close matters once they have determined the Commission would not have reason to believe that a company or individual under investigation has violated the law. I fully agree that cases should not be closed for resource issues alone, and I am unaware of any situations where this has happened. But as careful stewards of limited government resources, the agency must move matters along efficiently and effectively to their conclusion, whether that means filing an action or settlement, or closing an investigation so that companies are not under investigation indefinitely and resources can be redeployed to more promising cases. I strongly believe in vigorous law enforcement, and assure you that I will not push staff to close meritorious cases.

3. Is the FTC examining whether PBM mergers are driving up costs for consumers? With the understanding that the FTC cannot disclose nonpublic investigations, please explain what steps FTC will take, including but not limited to a retrospective review of past PBM mergers, to protect consumers and promote competition in the PBM industry.

Response: As you know, scrutiny of competitive issues relating to PBMs is part of the agency's ongoing mission to promote competition in health care. The FTC has examined the conduct of PBMs in various contexts, including during merger investigations, and as part of broad-based hearings on health care competition. Recently, the FTC hosted a

workshop with the FDA to examine pharmaceutical distribution practices, including the role of intermediaries such as PBMs and Group Purchasing Organizations. We held the workshop to deepen our understanding of various players in the pharmaceutical industry. In addition to presentations by experts in health care policy and economics, we also received over 300 public comments as part of the workshop, which identified additional areas of concern. Materials related to the workshop can be found on the FTC's website.⁷⁴

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

4. **At the hearing, I asked you whether the FTC could issue an advanced notice of proposed rulemaking (ANPR) or a notice of inquiry to collect data and get the process started on a data security rule. At the time you responded that the FTC “could certainly start a rulemaking under Mag-Moss,” with the caveat that it could be time consuming and resource intensive. Regardless of whether Congress passes a law, is the FTC considering issuing an ANPR or notice of inquiry, or other pre-rulemaking efforts on data security right now? Why or why not? What are the benefits to doing this?**

Response: The Commission is not currently considering initiating a Magnuson-Moss rulemaking process with respect to data security in lieu of Congressional action. I believe that Congressional action on this issue would send a strong signal about the importance of securing consumers' personal information, and would be necessary to accomplish key goals such as extending the Commission's jurisdiction to enable it to protect consumer information held by additional types of entities (e.g., non-profit entities and common carriers). As I noted at the hearing, Mag-Moss rulemaking procedures that the Commission has undertaken have typically been time-consuming endeavors taking many years.

5. **In August 2003, former Chairman Timothy Muris stated, “Sometimes robust competition alone will not punish or deter seller dishonesty.” He cited as an example “credence goods,” which are products for which “consumers cannot readily use their own experiences to assess whether the seller’s quality claims are true.” He noted that for such goods “the market may not identify and discipline a deceptive seller because the product’s qualities are so difficult to measure.”**

- a. **Do you agree or disagree with Chairman Muris’s statement? Why or why not?**

Response: I agree that robust competition alone will not always punish or deter dishonest sellers, including for credence goods.

⁷⁴ FTC Workshop, *Understanding Competition in Prescription Drug Markets: Entry and Supply Chain Dynamics* (Nov. 8, 2017), <https://www.ftc.gov/news-events/events-calendar/2017/11/understanding-competition-prescription-drug-markets-entry-supply>.

b. What are examples of credence goods that fall within the FTC's jurisdiction?

Response: Many goods for which credence claims are made fall within the FTC's jurisdiction. Credence claims include country of origin claims as well as many claims about a product's health or environmental benefits or attributes.

i. Has the FTC taken law enforcement action against marketers of credence goods?

Response: The FTC has taken numerous law enforcement action against marketers of credence goods, including two recent settlements with manufacturers of products promoted as being made or built in the USA (Bollman Hat Company, Nectar Brand mattresses).⁷⁵ Other examples include four recent settlement with companies that claimed that their paints did not emit VOCs (Imperial Paint, ICP Construction, Benjamin Moore, and YOLO Colorhouse).⁷⁶ In each of these cases, while consumers received a valuable product and could assess the products' quality and functionality as hats, mattresses, or paint, consumers could not rely on their experience to assess the truth of the Made in USA or no VOC emission claims.

Similarly, many health products are credence goods; it can be impossible for a consumer to ascertain if the product is working. Many health conditions may wax and wane on their own, or over the passage of time, or the consumer may be making other medication changes or dietary or lifestyle changes, such that the consumer cannot attribute any changed health condition to a particular product. For products that claim to prevent or reduce the risk of a disease or health condition, consumers who do not get the disease or health condition cannot know whether it was due to the product.

Since November 2017, the FTC has brought five dietary supplement cases and a device case challenging claims of treating or preventing aging, hearing loss, memory loss, Alzheimer's, arthritis, HIV, high blood pressure, and weight loss, among other diseases or conditions.⁷⁷

⁷⁵ See *Bollman Hat Co.*, No. C-4643 (Apr. 17, 2017), <https://www.ftc.gov/enforcement/cases-proceedings/172-3197/bollman-hat-company-matter>; *Nectar Brand LLC*, Matter No. 1823038 (Mar. 20, 2018), (proposed consent agreement), <https://www.ftc.gov/enforcement/cases-proceedings/182-3038/nectar-brand-llc>.

⁷⁶ *Imperial Paints*, No. C-4647 (Apr. 27, 2018), <https://www.ftc.gov/enforcement/cases-proceedings/162-3080/imperial-paints-matter>; *ICP Construction, Inc.*, No. C-4648 (Apr. 27, 2018), <https://www.ftc.gov/enforcement/cases-proceedings/162-3081/icp-construction-inc-matter>; *Benjamin Moore & Co., Inc.*, No. C-4646 (Apr. 27, 2018), <https://www.ftc.gov/enforcement/cases-proceedings/162-3079/benjamin-moore-co-inc-matter>; *YOLO Colorhouse*, No. C-4649 (Apr. 27, 2018), <https://www.ftc.gov/enforcement/cases-proceedings/162-3082/yolo-colorhouse-matter>.

⁷⁷ *Telomerase Activation Sciences*, No. C-4644 (Apr. 19, 2018), <https://www.ftc.gov/news-events/press-releases/2018/02/new-york-based-supplement-seller-barred-false-unsupported-health>; *FTC v. Global Concepts Ltd.*, No. 0:18-cv-60990-NBF (S.D. Fla. May 2, 2018), <https://www.ftc.gov/news-events/press-releases/2018/05/ftc-settlement-turns-down-volume-deceptive-sound-amplifier-ads>; *FTC v. Marketing Architects*, No. 2:18-cv-00050 (D. Me. Feb. 5, 2018), <https://www.ftc.gov/news-events/press-releases/2018/02/advertising-firm-barred>.

ii. What type of monetary relief, if any, did the FTC obtain in these cases?

Response: The FTC has obtained large judgments, including money for consumer redress, in many of its recent cases involving health benefit claims. For example, the FTC obtained a \$3,700,514 judgment against another dietary supplement manufacturer, with \$800,000 paid for consumer redress (representing all of the funds the defendants were able to pay).⁷⁸ Although we have not historically sought consumer redress in our Made in USA or environmental benefit cases, we are reevaluating our approach.

c. In addition to credence goods, are there any other products, services, or industries under FTC's jurisdiction for which robust competition alone will not punish or deter seller dishonesty?

Response: Robust competition does not necessarily prevent deception in the marketplace. Even in competitive markets, numerous goods and services may involve deceptive claims or practices, such as where deceptive claims are difficult for consumers to detect in a timely manner, or at all; where market entry or exit is easy; and where many or most competitors are engaged in deceptive behavior. Particularly where marketing and selling is online, dishonest sellers are easily able to start up a new business if consumers complain, and to stop doing business with the old one. In addition, companies can buy fake online reviews to make it appear they have satisfied consumers and/or have been in business for a while, making it difficult for consumers to detect a dishonest seller.

The event ticket market and hotel industries are also areas where robust competition alone cannot be relied upon to punish or deter seller deception. The FTC has been active in bringing law enforcement actions to address deceptive advertising in the online event ticket and travel marketplaces. For example, in 2014, the FTC entered into settlements with TicketNetwork and two of its marketing partners⁷⁹ to prohibit them from misrepresenting that resale ticket websites were official venues or offering tickets at face value. Similarly, in 2017, the FTC settled charges that Reservation Counter, LLC⁸⁰ and related companies misled consumers to believe they were reserving hotel rooms from

assisting-marketing-sale-weight-loss; FTC v. Cellmark Biopharma, No. 2:18-cv-00014-JES-CM (M.D. Fla. Jan. 12, 2018), <https://www.ftc.gov/news-events/press-releases/2018/01/marketers-barred-making-deceptive-claims-about-products-ability>; FTC v. NextGen Nutritionals, No. 8:17-cv-02807-CEH-AEP (M.D. Fla. Jan. 11, 2018), <https://www.ftc.gov/news-events/press-releases/2017/11/florida-based-supplement-sellers-settle-ftc-false-advertising>; FTC v. Health Research Labs LLC, No. 2:117-cv-00467-JDL (D. Me. Nov. 30, 2017), <https://www.ftc.gov/news-events/press-releases/2017/11/supplement-sellers-settle-ftc-state-maine-false-advertising>.

⁷⁸ FTC and State of Maine v. Health Research Laboratories, LLC et al., Case 2:17-cv-00467 (D. Maine 2017), <https://www.ftc.gov/enforcement/cases-proceedings/152-3021/health-research-laboratories-llc>

⁷⁹ FTC and State of Connecticut v. TicketNetwork, Inc.; Ryadd, Inc.; and SecureBoxOffice, LLC, et al., No. 3:14-cv-1046 (D.Conn. Jul. 23, 2014), <https://www.ftc.gov/enforcement/cases-proceedings/132-3203-132-3204-132-3207/ticketnetwork-inc-ryadd-inc-secureboxoffice>.

⁸⁰ Federal Trade Commission v. Reservation Counter 2:17-cv-01304 (D. Utah. Dec. 21, 2017) <https://www.ftc.gov/enforcement/cases-proceedings/152-3219/reservation-counter-llc>.

advertised hotels. In these industries, competition appears to encourage a race to the bottom, rather than serving to deter deceptive conduct. This is particularly true with respect to “drip” pricing, where an initially low price attracts consumers but additional costs or fees are revealed later in the purchase process. Those sellers whose initial price fully discloses all the fees will appear to be more expensive than, and thus risk losing market share to, those who misleadingly quote an initially lower price.

6. **You testified that in cases involving fraud, the FTC’s existing Section 5 authority, which includes ancillary relief such as restitution and disgorgement “probably is sufficient.” However, many of FTC’s fraud cases allege both violations of Section 5 as well as violations of a regulation. Allegations of violations of a regulation, of course, allow the FTC to pursue civil penalties in those Section 5 for which the Commission would not otherwise be able to pursue**

- a. **What are some examples of fraud cases not involving a violation of a regulation for which civil penalties would be helpful, such as online giving portal scams?**

Response: In the vast majority of fraud cases brought by the FTC, the ability to obtain civil penalties would provide little, or no, practical advantage. For example, every telemarketing fraud case involves both violations of Section 5 and violations of the Telemarketing Sales Rule, for which civil penalties are available. However, the Commission has found that it can move more quickly and obtain full relief without seeking civil penalties in those cases, for two reasons. First, the amount of consumer injury is typically equal to the total revenues of the enterprise, and the Commission seeks that amount as equitable restitution. For equitable restitution, unlike civil penalties, ability to pay is not a factor in determining the judgment amount. Therefore, the FTC seeks and is often rewarded a judgment that far exceeds the combined assets of all defendants. There is no available remaining money for a civil penalty. Second, the FTC has been highly successful bringing its own fraud enforcement cases for equitable relief in federal district court. Because these are equitable proceedings, the cases are tried before a judge and move more quickly than civil penalties proceedings, which generally are tried by the Department of Justice before a jury.

- b. **What are some examples of non-fraud cases for which civil penalties would be helpful, such as cases involving vaping products marketed to teens?**

Response: For many years, there has been full bipartisan Commission support for legislation that would provide the Commission with the authority to seek civil penalties in data security cases. I continue to support that position.

The Honorable Doris Matsui

1. **Patients in my district are very concerned about the skyrocketing prices of prescription drugs. One way that we can keep drug prices lower is by ensuring competition in the marketplace and encouraging the entry of generic drugs.**

Brand-name drug-makers are incentivized to delay the entry of generic competition to their products, because the longer they have a monopoly, the longer they can charge higher prices. Therefore, some brand-name drug makers have found ways to extend the time that their drug is the only one on the market. One such scheme includes buying off generic drugs with “pay-for-delay” agreements - where the brand-name drug maker pays the generic drug manufacturer to stay off the market longer.

a. What is the Commission doing to review or prevent “pay-for-delay” agreements due to their anti-competitive nature?

Response: For over twenty years and on a bipartisan basis, one of the Commission’s top priorities has been to put an end to anticompetitive reverse payment agreements in which a brand-name drug firm pays its potential generic rival to give up its patent challenge and agree not to launch a lower cost generic product. The FTC continues to devote significant resources to this effort, as the foregone savings to consumers can be significant. Moreover, anticompetitive reverse payment agreements undermine the regulatory framework of the Hatch-Waxman Act, which was intended to speed up the entry of generic drugs.

Following the U.S. Supreme Court’s 2013 decision in *FTC v. Actavis, Inc.*,⁸¹ the Commission is in a much stronger position to challenge agreements of this type, and recently, the district court on remand denied the defendants’ motion for summary judgment in that case, clearing it for trial.⁸² In addition, since *Actavis*, the FTC obtained a landmark \$1.2 billion settlement from the maker of sleep disorder drug Provigil,⁸³ and other manufacturers have agreed to abandon the practice of pay for delay.⁸⁴ Currently, the FTC has three other matters pending in litigation challenging reverse payment agreements.⁸⁵ FTC staff also monitors private litigation to leverage our expertise and file amicus briefs where appropriate. Finally, we review agreements filed with the FTC as required by the Medicare Prescription Drug, Improvement and Modernization Act (also known as MMA filings), and publish an annual report on the number of final patent settlements filed as well as the incidence

⁸¹ *FTC v. Actavis, Inc.*, 570 U.S. 756 (2013).

⁸² *FTC v. Actavis, Inc.*, No. 1:09-MD-2084 (N.D. Ga. Jun. 14, 2018).

⁸³ Press Release, *FTC Settlement of Cephalon Pay for Delay Case Ensures \$1.2 Billion in Ill-Gotten Gains Relinquished; Refunds Will Go To Purchasers Affected by Anticompetitive Tactics* (May 28, 2015), <https://www.ftc.gov/news-events/press-releases/2015/05/ftc-settlement-cephalon-pay-delay-case-ensures-12-billion-ill>.

⁸⁴ Joint Motion for Entry of Stipulated Order for Permanent Injunction, *FTC v. Allergan plc*, No. 17-cv-00312 (N.D. Cal. Jan. 23, 2017), <https://www.ftc.gov/enforcement/cases-proceedings/141-0004/allergan-plc-watson-laboratories-inc-et-al> (Endo agreed to enter a joint motion to stipulate to an Order for a permanent injunction) and Stipulated Order for Permanent Injunction, *FTC v. Teikoku Pharma USA, Inc.*, No. 16-cv-01440 (E.D. Pa. Mar. 30, 2016), <https://www.ftc.gov/enforcement/cases-proceedings/141-0004/endo-pharmaceuticals-impax-labs>.

⁸⁵ *In re Impax Laboratories, Inc.*, Dkt. 9373 (complaint filed Jan. 23, 2017); *FTC v. Allergan plc*, No. 17-cv-00312 (N.D. Cal. Jan. 23, 2017); *FTC v. Abbvie Inc.*, No. 14-cv-5151 (E.D. Pa. Sept. 8, 2014), <https://www.ftc.gov/enforcement/cases-proceedings/121-0028/abbvie-inc-et-al> (appealing dismissal of reverse payment claim to Third Circuit).

of certain terms that may operate as anticompetitive reverse-payment agreements between the brand and a generic entrant.⁸⁶

b. Is the Commission reviewing other similar anti-competitive behaviors in the drug manufacturer space? Can the Commission commit to remaining active in this area?

Response: The Commission is, and will remain, vigilant to stop other types of anticompetitive conduct by pharmaceutical manufacturers. For instance, the Commission also has challenged anticompetitive unilateral conduct by drug manufacturers to maintain a monopoly, such as abusing government processes through sham litigation or repetitive regulatory filings intended to slow the approval of competitive drugs. In a recent FTC case, a federal court found that AbbVie Inc. used sham litigation to illegally maintain its monopoly over the testosterone replacement drug Androgel, and ordered \$493.7 million in monetary relief to those who were overcharged for Androgel as a result of AbbVie's conduct. This case, which is currently on appeal, represents the first time any court has found on the basis of a full record that sham litigation violated Section 2 of the Sherman Act. Additionally, the FTC has brought a case against ViroPharma alleging serial sham petitioning before the FDA that had the purpose and effect of delaying generic competition. This matter also is currently on appeal. In addition, the Commission recently filed an amicus brief in private litigation involving counterclaims of sham litigation, urging the court not to expand Noerr-Pennington protection to all patent infringement suits brought under the provisions of the Hatch-Waxman Act.⁸⁷

The Commission has also raised concerns about pharmaceutical conduct related to restricted distribution systems, including Risk Evaluation and Mitigation Strategies ("REMS"). REMS help protect the public from potential safety risks associated with a drug, but they have also provided branded companies with opportunities to delay generic entry. In a recent submission to the Department of Health and Human Services regarding its Blueprint to Lower Drug Prices and Reduce Out-of-Pocket Costs,⁸⁸ the FTC highlighted two ways in which branded drug makers may abuse REMS requirements. First, branded manufacturers have relied on REMS requirements when refusing to make samples of their products available to generic drug makers seeking to test their product and obtain FDA approval. Second, the branded manufacturer may deny the generic firm access to a single, shared REMS system, which also prevents the FDA from approving the drug. Either strategy undermines the careful balance between competition and innovation that Congress established in the Hatch-Waxman Act and the Biologics Price Competition and

⁸⁶ MMA reports are posted on the FTC website at <https://www.ftc.gov/tips-advice/competition-guidance/industry-guidance/health-care/pharmaceutical-agreement-filings>.

⁸⁷ FTC Brief as Amicus Curiae, *Takeda Pharmaceutical Co. v. Zydus Pharmaceuticals* (Jul. 2, 2018), <https://www.ftc.gov/policy/advocacy/amicus-briefs/2018/06/takeda-pharmaceutical-company-limited-et-al-v-zydus>.

⁸⁸ See Press Release, *FTC Submits Statement to HHS on its Blueprint to Lower Drug Prices* (July 17, 2018), <https://www.ftc.gov/news-events/press-releases/2018/07/ftc-submits-statement-hhs-its-blueprint-lower-drug-prices>.

Innovation Act. I support the goals of legislation that would effectively protect against abuse of the REMS process to delay generic entry.

2. **One core function of the Commission's mission is to protect consumers from scams. With the continued growth of online commerce, there has been an increase in online booking scams that potentially mislead consumers using fraudulent websites.**
 - a. **What further attention do you believe the Commission should be giving to this and similar issues as part of the Commission's overall effort to prevent online scams?**

Response: The Commission has a strong interest in protecting consumer confidence in the online marketplace, including, for example, the online markets for event tickets and travel. The FTC has been active in bringing law enforcement actions to address deceptive advertising in these areas. For example, in 2014, the FTC entered into settlements with online ticket reseller TicketNetwork and two of its marketing partners⁸⁹ to prohibit them from misrepresenting that resale ticket websites were official venues or offering tickets at face value. Similarly, in 2017, the FTC settled charges that Reservation Counter, LLC⁹⁰ and related companies misled consumers to believe they were reserving hotel rooms from advertised hotels.

In 2015, the FTC issued consumer education to caution consumers about third-party websites that may deceptively mimic hotel websites.⁹¹ FTC staff also has met with members of Congress and stakeholders in the hotel and event ticket industries to discuss deceptive travel and event ticket websites. We also have provided comments on proposed legislation addressing the same. Working with various online platforms to reduce the likelihood that consumers see fraudulent ads and providing additional industry guidance could be useful as well. Finally, more consumer guidance could help consumers identify and protect themselves from these types of online scams.

⁸⁹ *FTC and State of Connecticut v. TicketNetwork, Inc.; Ryadd, Inc.; and SecureBoxOffice, LLC, et al.*, No. 3:14-cv-1046 (D.Conn., Jul. 23, 2014); <https://www.ftc.gov/enforcement/cases-proceedings/132-3203-132-3204-132-3207/ticketnetwork-inc-ryadd-inc-secureboxoffice>.

⁹⁰ *FTC v. Reservation Counter 2:17-cv-01304* (D. Utah, Dec. 21, 2017), <https://www.ftc.gov/enforcement/cases-proceedings/152-3219/reservation-counter-llc>.

⁹¹ FTC Consumer Blog, *Did You Book That Night at the Hotel's Site?* (July 14, 2015), www.consumer.ftc.gov/blog/2015/07/did-you-book-night-hotels-site.

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August 7, 2018

The Honorable Noah Joshua Phillips
Commissioner
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Dear Commissioner Phillips:

Thank you for appearing before the Subcommittee on Digital Commerce and Consumer Protection on Wednesday, July 18, 2018, to testify at the hearing entitled "Oversight of the Federal Trade Commission."

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. To facilitate the printing of the hearing record, please respond to these questions by the close of business on Tuesday, August 21, 2018. Your responses should be mailed to Ali Fulling, Legislative Clerk, Committee on Energy and Commerce, 2125 Rayburn House Office Building, Washington, DC 20515 and e-mailed in Word format to ali.fulling@mail.house.gov.

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

Sincerely,



Robert E. Latta
Chairman
Subcommittee on Digital Commerce
and Consumer Protection

cc: Janice D. Schakowsky, Ranking Member, Subcommittee on Digital Commerce and Consumer Protection

Attachment

Responses for the Record From the Hearing on “Oversight of Federal Trade Commission”
(July 18, 2018)

Noah Joshua Phillips, Commissioner, Federal Trade Commission

The Honorable Robert E. Latta

1. **One of the digital trade issues that we hear about, particularly from small and medium sized businesses, is the EU-U.S. Privacy Shield framework. This framework allows for the transfer of data between the EU and the United States, mutually benefitting thousands of companies and consumers on both sides of the Atlantic and resulting in over \$1 trillion dollars in commerce.**
 - a. **What is the FTC doing to support the U.S. Government in the upcoming annual review of the framework, and how many enforcement cases has the FTC brought to enforce our commitments under the Privacy Shield? Do you commit to working with other Federal departments and agencies to support U.S. businesses that rely on the Privacy Shield?**

The EU-U.S. Privacy Shield Framework is a voluntary mechanism that companies of all sizes can use to promise certain protections for data transferred from Europe to the United States, thus facilitating the transfer of personal data from the EU with strong privacy protections. The FTC enforces those promises by Privacy Shield participants under its jurisdiction,¹ bringing violation cases under Section 5 of the FTC Act. The Commission is committed to the success of the EU-U.S. Privacy Shield Framework, a critical tool for protecting privacy and enabling cross-border data flows. The upcoming annual review of the Privacy Shield framework is in October 2018 and the Commission is engaged wholeheartedly in efforts to make the review as successful as possible. Chairman Simons and members of the FTC’s Office of International Affairs and Division of Privacy & Identity Protection will be traveling to Brussels in October to advocate for the U.S. and to ensure the success of the annual review.

The Commission also is committed to continue to work with other agencies in the U.S. government and with its partners in Europe to ensure businesses and consumers can continue to benefit from Privacy Shield and other cross-border data transfer programs. A key focus of the FTC’s international privacy efforts is support for global interoperability of data privacy regimes. The FTC works with the U.S. Department of Commerce on three key cross-border data transfer programs for the commercial sector: the EU-U.S. Privacy Shield, the Swiss-U.S. Privacy Shield, and the Asia-Pacific Economic Cooperation (APEC) Cross-Border Privacy Rules (CPBR) System. As noted above, the Privacy Shield programs provide legal mechanisms for companies to transfer personal data from the EU and Switzerland to the United States with strong privacy protections. The APEC CBPR system is a voluntary, enforceable code of conduct protecting personal information transferred among the United States and other APEC economies. The FTC also works closely with agencies developing and implementing new privacy and data security laws in Latin America and Asia. And, the FTC convenes discussions on important and emerging privacy trends. For example, the agency recently hosted the 49th Asia Pacific Privacy Authorities

¹ See www.privacyshield.gov and www.ftc.gov/tips-advice/business-center/privacy-and-security/privacy-shield. Companies can also join a Swiss-U.S. Privacy Shield for transfers from Switzerland.

forum in San Francisco, which addressed privacy issues such as artificial intelligence, data breach notification, and cross-border data flows.²

The FTC is committed to the success of these cross-border transfer mechanisms. Carrying out its enforcement role under these international privacy frameworks, the FTC has brought 47 actions – 39 under an older “U.S.-EU Safe Harbor” program, four under APEC CBPR, and four under Privacy Shield.³ Most recently, the FTC charged a California company, ReadyTech, with falsely claiming that it was in the process of being certified as Privacy Shield compliant.⁴ As part of its settlement with the FTC, ReadyTech is prohibited from misrepresenting its participation in any privacy or security program. Privacy Shield is and will remain a priority for the agency.

² FTC Press Release, *FTC Hosts Semi-Annual Forum for Asia Pacific Privacy Authorities* (June 27, 2018), <https://www.ftc.gov/news-events/press-releases/2018/06/ftc-hosts-semi-annual-forum-asia-pacific-privacy-authorities>.

³ See, e.g., *Md7, LLC*, No. C-4629 (Nov. 29, 2017) (Privacy Shield), <https://www.ftc.gov/enforcement/cases-proceedings/172-3172/md7-llc>; *Tru Communication, Inc.*, No. C-4628 (Nov. 29, 2017) (Privacy Shield), <https://www.ftc.gov/enforcement/cases-proceedings/172-3171/tru-communication-inc>; *Decusoft, LLC*, No. C-4630 (Nov. 29, 2017) (Privacy Shield), <https://www.ftc.gov/enforcement/cases-proceedings/172-3173/decusoft-llc>; *Sentinel Labs, Inc.*, No. C-4608 (Apr. 14, 2017) (APEC CBPR), <https://www.ftc.gov/enforcement/cases-proceedings/162-3250/sentinel-labs-inc>; *Vir2us, Inc.*, No. C-4609 (Apr. 14, 2017) (APEC CBPR), <https://www.ftc.gov/enforcement/cases-proceedings/162-3248/vir2us-inc>; *SpyChatter, Inc.*, No. C-4614 (Apr. 14, 2017) (APEC CBPR), <https://www.ftc.gov/enforcement/cases-proceedings/162-3251/spychatter-inc>.

⁴ *ReadyTech Corp.*, Matter No. 1823100 (July 2, 2018), <https://www.ftc.gov/enforcement/cases-proceedings/182-3100/readytech-corporation-matter>.

The Honorable Michael C. Burgess

- 1. Commissioner Phillips, it has been brought to my attention that certain lawsuit advertisements deceptively display an FDA logo or mislead viewers by depicting an actor dressed as a physician urging folks to stop taking certain medications. Such tactics have led to some of our most vulnerable members of society to stop taking medication they need and, in some instances, has even resulted in death. This issue is literally a matter of life and death. Can you explain to me what steps the FTC plans to take to address this and will you commit to working with us on this very serious matter moving forward?**

Advertising plays a critical role in our economy, providing consumers with valuable information. However, to be useful, advertising must not be misleading. The FTC Act prohibits deceptive and unfair acts or practices. The examples of lawsuit advertisements that you describe are indeed troubling and could constitute deceptive or unfair practices depending upon the facts of the case. To establish that an advertisement is deceptive requires a showing that (1) there was a representation or omission, (2) the representation or omission was likely to mislead consumers acting reasonably under the circumstances, and (3) the representation or omission was material.⁵ To establish that a practice is unfair requires a showing that an act or practice is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or competition.⁶

The FTC is monitoring attorney advertising that solicits people who may have been harmed by prescription drugs or medical devices to determine whether such advertising is misleading and likely to cause harm to consumers. Depending on the results of our search, we will consider all available options, including law enforcement actions, warning letters, and consumer education. We also are consulting with the FDA to determine how we may assist each other on this topic. I commit to working with Congress and others on this very serious matter.

⁵ See Federal Trade Commission Policy Statement on Deception, *appended to Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174 (1984).

⁶ Federal Trade Commission Policy Statement on Unfairness, *appended to Int'l Harvester Co.*, 104 F.T.C. 949, 1070 (1984).

GREG WALDEN, OREGON
CHAIRMAN

FRANK PALLONE, JR., NEW JERSEY
RANKING MEMBER

ONE HUNDRED FIFTEENTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
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WASHINGTON, DC 20515-6115
Majority (202) 225-2927
Minority (202) 225-3641
August 7, 2018

The Honorable Rohit Chopra
Commissioner
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

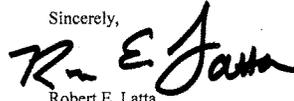
Dear Commissioner Chopra:

Thank you for appearing before the Subcommittee on Digital Commerce and Consumer Protection on Wednesday, July 18, 2018, to testify at the hearing entitled "Oversight of the Federal Trade Commission."

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. To facilitate the printing of the hearing record, please respond to these questions by the close of business on Tuesday, August 21, 2018. Your responses should be mailed to Ali Fulling, Legislative Clerk, Committee on Energy and Commerce, 2125 Rayburn House Office Building, Washington, DC 20515 and e-mailed in Word format to ali.fulling@mail.house.gov.

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

Sincerely,



Robert E. Latta
Chairman
Subcommittee on Digital Commerce
and Consumer Protection

cc: Janice D. Schakowsky, Ranking Member, Subcommittee on Digital Commerce and Consumer Protection

Attachment

House Energy and Commerce Committee
“Oversight of the Federal Trade Commission”
July 18, 2018

Questions for Rohit Chopra, Commissioner, Federal Trade Commission

Additional Questions for the Record

The Honorable Jan Schakowsky

1. **In the past, FTC staff has recommended that Congress enact broad baseline privacy legislation. They made the recommendation in the Commission's 2012 privacy report and they made it again in the 2015 report on the Internet of Things. And former Chairwoman Edith Ramirez testified before this Subcommittee in 2013 that they were supportive of baseline Federal privacy legislation. I have also been advocating for comprehensive privacy legislation to provide a framework for companies and to protect Americans' privacy from unwanted intrusion and to give consumers back control of their own data. Understanding that the devil is in the details, yes or no, do you support the concept of comprehensive privacy legislation?**

Response: Yes.

2. **Should the FTC be examining whether PBM mergers are driving up costs for consumers? With the understanding that the FTC cannot disclose nonpublic investigations, please explain what steps the FTC can take, including but not limited to a retrospective review of past PBM mergers, to protect consumers and promote competition in the PBM industry.**

Response: The high cost of prescription drugs is a severe problem for families in our country. I agree that the FTC must closely monitor pharmacy benefit managers to ensure that anticompetitive practices are not making problems worse for patients and their families. Congress granted the FTC broad authorities to collect information and publish data on business practices in our marketplace. In addition to enforcement and research, I would like the FTC to work closely with state attorneys general and other federal agencies to confront the high cost of drugs.

It is clear the Administration is also deeply concerned about the role of PBMs. According to a February 2018 report by the White House Council of Economic Advisers, “three PBMs account for 85 percent of the market, which allows them to exercise undue market power against manufacturers and against the health plans and beneficiaries they are supposed to be representing, thus generating outsized profits for themselves.” This is a bipartisan issue that requires close attention.

3. **At the hearing, I explored whether the FTC could issue an advanced notice of proposed rulemaking (ANPR) or a notice of inquiry to collect data and get the process started on a data security rule. Regardless of whether Congress passes a law, should the FTC consider issuing an ANPR or notice of inquiry, or other pre-**

rulemaking efforts on data security right now? Why or why not? What are the benefits to doing this?

Response: As I noted in the hearing, the United States should lead on privacy and data security. In general, rulemaking enables the Commission to collect information through a participatory process. It gives market actors and individuals an opportunity to weigh in on an issue that will affect them. It also enables the FTC to propose a rule based on rigorous analysis and comprehensive study.

A request for information on a data security rule can supplement information and insights already collected by the FTC and could give the agency a head start on finalizing a rule, should Congress grant the FTC authority to finalize a rule pursuant to the Administrative Procedure Act.

4. **I'm concerned that the FTC is unable to keep up with all the consent decrees. If the FTC cannot ensure compliance, the consent decrees are not effective in stopping unfair and deceptive acts.**
- a. **I understand that the Commission can request information from a company to ensure compliance with those consent decrees. With that many consent decrees, how does staff know what to ask for? How can you be sure the Commission is not missing violations?**

Response: Given the extremely meager resources that Congress allocates to the FTC, the agency must prioritize its resources accordingly. While I believe the agency works to ensure compliance with consent decrees, I believe our budgetary constraints have increased the risk of missing violations.

This is why it is critical that order violations face significant consequences. There must be a clear understanding in the marketplace that FTC orders are not suggestions.

- b. **I understand the FTC can require third-party monitoring reports. Are these full audits, and are these outside parties required to notify the FTC if they think a company is violating a consent decree?**

Response: The terms of third-party monitoring provisions can vary based on the settlement. Although third-party monitors can serve a useful purpose in certain cases, their independence can be compromised,¹ and the FTC must be vigilant in ensuring their incentives are sufficiently aligned.

¹ See, e.g., Agreement, NY State Dept. of Financial Services, In the Matter of Promontory Financial Group, LLC (Aug. 18, 2015), <https://www.dfs.ny.gov/about/ea/ea150818.pdf>; Agreement, NY State Dept. of Financial Services, In the Matter of Deloitte Financial Advisory Services LLP (Jun. 18, 2013), <https://www.dfs.ny.gov/about/ea/ea130618.pdf>.

- c. **How does the FTC evaluate third-party monitors/auditors? Can the FTC require that a particular auditor be used or not used?**

Response: The FTC should never sign onto settlements that allow lawbreaking firms to shop around for acquiescent auditors. In selecting or approving auditors, the Commission should carefully examine a firm's track record and be vigilant about overseeing its activities throughout the duration of the order.

- d. **When a consumer protection order is violated, what steps are taken to ensure that the violator is held accountable?**

Response: When companies violate orders, this is usually the result of serious management dysfunction, a calculated risk that the payoff of skirting the law is worth the expected consequences, or both. Either of these explanations requires serious remedies that address the underlying causes of noncompliance, and not just the effects.

In addition to civil penalties, I would like to see the Commission pursue a broad range of remedies to correct underlying deficiencies.

- e. **You have been especially concerned about stopping repeat offenders. Does the Commission have the tools and resources it needs to track compliance with the consent decrees? What would help?**

Response: Corporate recidivism is a problem for federal law enforcement agencies writ large. While we have strong tools, I am concerned about the level of resources Congress has allocated to the FTC to meet the challenges of the day.

5. **Last year, this Subcommittee held a hearing on the data breach at Equifax. It was a particularly large breach, which concerned many consumers especially because so many consumers had never heard of Equifax and had no idea that a company they had never heard of could have so much of their personal information. I know the FTC has announced that it is investigating the Equifax breach and that you cannot comment on the details. But I have some questions about the general privacy and data security concerns that were brought up by that breach.**

- a. **If a breach occurs at a credit bureau, the FTC could bring a case under the Safeguards Rule, right?**

Response: The Safeguards Rule applies to nonbank financial institutions, including credit bureaus.

Some credit reporting agencies also function as data brokers for advertising and other purposes. Equifax, for example, has its consumer reporting services as well as many services for business like digital marketing, real estate and property analytics, and income and employment verifications. We were told that in the case of the

Equifax breach, the database that was accessed was not from the credit bureau side. The data was collected through Equifax's other businesses.

- b. If there is a breach of a data broker, would that breach come under the Safeguards Rule?**

Response: Any financial institution, or company that is “significantly engaged” in providing financial products or services is subject to the Safeguards Rule. Many data brokers may meet this criterion.

- c. Does it make sense to you that consumers' data held by the same company in different databases are treated differently under the law?**

Response: Massive amounts of consumer data are collected, stored, shared, and sold by companies that are not subject to clear guidelines on data security. In order to facilitate trust in the marketplace, consumers need to be confident that their sensitive data is secure.

- d. What recommendations do you have to address this discrepancy?**

Response: The marketplace would benefit from Congress granting the FTC authority to develop data security rules using procedures pursuant to the Administrative Procedure Act. Violations of these rules should be subject to civil penalties to create sufficient deterrence against improper, lax practices.

The Honorable Doris Matsui

- 1. Patients in my district are very concerned about the skyrocketing prices of prescription drugs. One way that we can keep drug prices lower is by ensuring competition in the marketplace and encouraging the entry of generic drugs. Brand-name drug-makers are incentivized to delay the entry of generic competition to their products, because the longer they have a monopoly, the longer they can charge higher prices. Therefore, some brand-name drug makers have found ways to extend the time that their drug is the only one on the market. One such scheme includes buying off generic drugs with "pay-for delay" agreements - where the brand-name drug maker pays the generic drug manufacturer to stay off the market longer.**

- a. What is the Commission doing to review or prevent "pay-for-delay" agreements due to their anti-competitive nature?**

Response: The Commission closely monitors settlements of patent litigation between manufacturers of branded and generic versions of the same drug. The Commission has worked hard to reduce the anticompetitive effects of these settlements.

At the same time, I am concerned that these settlements may evolve in ways that require ongoing enforcement resources by the Commission, which are already stretched thin.

It will be important for the FTC to share with Congress any potential legislative changes that could help reduce the anticompetitive effects of these settlements.

b. Is the Commission reviewing other similar anti-competitive behaviors in the drug manufacturer space? Can the Commission commit to remaining active in this area?

Response: The Commission recently filed an amicus brief in the Mylan/Warner-Chilcott case, which was supportive of private action against “product hopping” conduct, in which a branded firm makes a small change to its product so that the generic version can no longer be automatically substituted by pharmacists, thereby prolonging their monopoly far beyond the original patent. While the Commission has not brought any product hopping cases, doing so is worthy of serious consideration.

I am also concerned about so-called “killer acquisitions,” where a company purchases a product line from another firm to prevent that product line from competing with the acquirer’s. In addition, I am aware of concerns about “patent thickening,” where companies protect patented drugs by filing many other ancillary patents that can be weaponized against potential generic competition. We should also closely monitor whether patent holders are withholding samples from generic manufacturers in ways that harm competition.

2. One core function of the Commission's mission is to protect consumers from scams. With the continued growth of online commerce, there has been an increase in online booking scams that potentially mislead consumers using fraudulent websites.

a. What further attention do you believe the Commission should be giving to this and similar issues as part of the Commission's overall effort to prevent online scams?

Response: Online booking scams pose serious harms to families that save up for months, or even years, for a family vacation or to visit a loved one. In addition to travel booking scams, there are ongoing concerns about risks to consumers and competition with respect to travel websites, especially those offering hotels. This is an important area to examine, given the volume of consumer spend on travel and hospitality.

A key tool in the arsenal to fight scammers who are targeting Americans is our Consumer Sentinel Database. The database is populated by our Consumer Sentinel Network, which collects complaints and law enforcement tips from across the country, and makes them available to law enforcement offices to help

root out and stop crimes against consumers. Unfortunately, there are large information gaps in the database, including a number of non-participating state attorneys general. Filling these gaps and making the Consumer Sentinel Database a true clearinghouse is critical to combat scams.

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ONE HUNDRED FIFTEENTH CONGRESS
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Majority (202) 225-2927
Minority (202) 225-3641
August 7, 2018

The Honorable Rebecca Kelly Slaughter
Commissioner
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

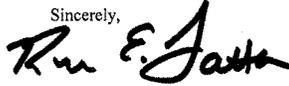
Dear Commissioner Slaughter:

Thank you for appearing before the Subcommittee on Digital Commerce and Consumer Protection on Wednesday, July 18, 2018, to testify at the hearing entitled "Oversight of the Federal Trade Commission."

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

Sincerely,



Robert E. Latta
Chairman
Subcommittee on Digital Commerce
and Consumer Protection

cc: Janice D. Schakowsky, Ranking Member, Subcommittee on Digital Commerce and Consumer Protection

Attachment

**House Energy and Commerce Committee
“Oversight of the Federal Trade Commission”
July 18, 2018**

**Questions for Rebecca Kelly Slaughter, Commissioner, Federal Trade
Commission**

Additional Questions for the Record

The Honorable Jan Schakowsky

- 1. In the past, FTC staff has recommended that Congress enact broad baseline privacy legislation. They made the recommendation in the Commission's 2012 privacy report and they made it again in the 2015 report on the Internet of Things. And former Chairwoman Edith Ramirez testified before this Subcommittee in 2013 that they were supportive of baseline Federal privacy legislation.**
- 2. I have also been advocating for comprehensive privacy legislation to provide a framework for companies and to protect Americans' privacy from unwanted intrusion and to give consumers back control of their own data. Understanding that the devil is in the details, yes or no, do you support the concept of comprehensive privacy legislation?**

Response: Yes, I support the concept of comprehensive privacy and data security legislation.

Should the FTC be examining whether PBM mergers are driving up costs for consumers? With the understanding that the FTC cannot disclose nonpublic investigations, please explain what steps the FTC can take, including but not limited to a retrospective review of past PBM mergers, to protect consumers and promote competition in the PBM industry.

Response: The high cost of prescription drugs is a critical concern for me and it is important to fully understand the impact PBMs have on competition in the drug supply chain. Merger retrospectives in particular can help the FTC determine how its work affects markets, competition, and consumers. I understand that the Commission is currently exploring the feasibility of conducting merger retrospective reviews in a number of industries, including PBMs.

- 3. At the hearing, I explored whether the FTC could issue an advanced notice of proposed rulemaking (ANPR) or a notice of inquiry to collect data and get the process started on a data security rule. Regardless of whether Congress passes a law, should the FTC consider issuing an ANPR or notice of inquiry, or other pre-rulemaking efforts on data security right now? Why or why not? What are the benefits to doing this?**

Response: Unfortunately, the FTC does not currently have practical rulemaking authority in the area of data security that would justify issuing an advanced notice of proposed rulemaking. The FTC can, however, contribute to the process of developing data security legislation through its own expertise, research, public fora and invitations for public

comment. For example, the FTC is holding a series of public hearings this fall and has invited public comment on a number of topics, including the intersection between privacy, big data and competition and the FTC's remedial authority to deter unfair and deceptive conduct in privacy and data security matters.¹ I am hopeful that the commentary and discussions born of these hearings will provide meaningful insights into the type of data security legislation that would be most beneficial to consumers.

- 4. I'm concerned that the FTC is unable to keep up with all the consent decrees. If the FTC cannot ensure compliance, the consent decrees are not effective in stopping unfair and deceptive acts.**
- a. I understand that the Commission can request information from a company to ensure compliance with those consent decrees. With that many consent decrees, how does staff know what to ask for? How can you be sure the Commission is not missing violations?**

Response: The Division of Enforcement's highly experienced attorneys have developed efficient and effective techniques and protocols to monitor compliance, including through periodic requests for information. However, law enforcement is not a perfect science and our resources are limited. In the absence of additional resources, we can most effectively triage what we have by pursuing violators with contempt and order enforcement actions. The judgments and conduct relief obtained in these actions can help deter future violations, even those we may not otherwise have detected. To effect this deterrence, the Commission has initiated 46 order enforcement actions in consumer protection matters during the last 13 years, obtaining judgments totaling nearly \$500 million (24 contempt, 15 administrative enforcement, and 7 actions to lift suspended judgments).

- b. I understand the FTC can require third-party monitoring reports. Are these full audits, and are these outside parties required to notify the FTC if they think a company is violating a consent decree?**

Response: The Commission regularly requires third-party assessors in data security and privacy orders, but typically does not in its other cases because the technical compliance issues are not as complex.² The assessments for Commission data security and privacy orders require the assessor to examine the practices of the defendants, assess their compliance with the standards contained in the order, and certify that the defendants are in active compliance. Thus, while in the past, the third party has had no affirmative duty to notify the Commission of a violation, a failure to submit an initial assessment

¹ See Press Release, FTC Announces Hearings On Competition and Consumer Protection in the 21st Century (June 20, 2018), available at <https://www.ftc.gov/news-events/press-releases/2018/06/ftc-announces-hearings-competition-consumer-protection-21st>.

² One notable recent order addressing conduct other than data security and privacy that requires a third-party monitor is the Commission's stipulated order resolving allegations against Herbalife. See Press Release, Herbalife Will Restructure Its Multi-level Marketing Operations and Pay \$200 Million For Consumer Redress to Settle FTC Charges (July 15, 2016), available at <https://www.ftc.gov/news-events/press-releases/2016/07/herbalife-will-restructure-its-multi-level-marketing-operations>.

certifying that the company's privacy controls were operating effectively would provide such notice.³

The Commission is currently engaged in a broad review of whether we are using every available remedy as effectively as possible and considering how to best structure third-party monitoring provisions is a question that must receive thoughtful consideration.

c. How does the FTC evaluate third-party monitors/auditors? Can the FTC require that a particular auditor be used or not used?

Response: Compliance attorneys generally have significant contact with third-party assessors. Working that closely allows staff to evaluate the assessors' work. The FTC's orders require the defendants/respondents either to obtain FTC approval of the monitor/auditor (e.g., the Commission's privacy orders), or that the monitor/auditor possess relevant credentials (e.g., data security orders).

d. When a consumer protection order is violated, what steps are taken to ensure that the violator is held accountable?

Response: I agree that ensuring compliance with our orders is necessary for us to be effective in stopping violations of the laws we enforce and preventing future violations.

The Commission enforces federal court orders directly by bringing contempt and *de novo* actions in its own name. Over the past 10 years, the Commission has initiated 24 contempt actions, and over a dozen new cases against recidivists. For example, when in 2015 it appeared that LifeLock had violated a 2010 order, the Commission launched an extensive investigation and then negotiated an order imposing a \$100 million judgment, of which \$67 million has been returned to consumers thus far.⁴ Staff also works with our criminal law enforcement partners through the agency's Criminal Liaison Unit ("CLU Program") to enable criminal prosecution of the worst of these violators. For example, the FTC obtained a \$38 million contempt judgment against Kevin Trudeau, while the CLU Program worked with the U.S. Attorney's Office for the Northern District of Illinois.⁵ Pursuant to these actions, a receiver has amassed over \$10 million from Mr. Trudeau's various holdings, and he is serving a 10-year criminal sentence based on his contempt.

³ In the stipulated order governing Herbalife, the Commission affirmatively required the third-party monitor to notify the FTC if it becomes aware that Herbalife is not in substantial compliance with key order provisions. See <https://www.ftc.gov/system/files/documents/cases/160725herbalifeorder.pdf>.

⁴ *U.S. v. LifeLock, Inc.*, No. 2:10-cv-00530-JJT (D. Ariz. Jan. 4, 2016), <https://www.ftc.gov/enforcement/cases-proceedings/072-3069-x100023/lifelock-inc-corporation>.

⁵ *FTC v. Trudeau*, 662 F.3d 947 (7th Cir. 2011) (affirming \$38 million civil contempt judgment against Kevin Trudeau); *United States v. Trudeau*, 812 F.3d 578 (7th Cir. 2016) (affirming criminal conviction of Kevin Trudeau for contempt and ten-year sentence).

When the Commission identifies violations of its administrative orders, it can seek civil penalties in federal court.⁶ Over the past decade, the agency has initiated 15 such cases. For example, when Google violated its Google Buzz order, the Commission negotiated a penalty of \$22.5 million.⁷

We should always be thinking carefully about whether our current enforcement program is as effective as it can be, and what if anything we could change to improve compliance and deter violations.

5. **Last year, this Subcommittee held a hearing on the data breach at Equifax. It was a particularly large breach, which concerned many consumers especially because so many consumers had never heard of Equifax and had no idea that a company they had never heard of could have so much of their personal information.**

I know the FTC has announced that it is investigating the Equifax breach and that you cannot comment on the details. But I have some questions about the general privacy and data security concerns that were brought up by that breach.

- a. **If a breach occurs at a credit bureau, the FTC could bring a case under the Safeguards Rule, right?**

Response: Yes, and the Commission has brought such cases.⁸

Some credit reporting agencies also function as data brokers for advertising and other purposes. Equifax, for example, has its consumer reporting services as well as many services for business like digital marketing, real estate and property analytics, and income and employment verifications. We were told that in the case of the Equifax breach, the database that was accessed was not from the credit bureau side. The data was collected through Equifax's other businesses.

- b. **If there is a breach of a data broker, would that breach come under the Safeguards Rule?**

Response: The Safeguards Rule applies to “financial institutions” as defined by the Rule,⁹ and covers all businesses, regardless of size, that are “significantly engaged” in providing financial products or services. Thus, determining if the breach is covered by the Safeguards Rule would be a fact-specific inquiry regarding the types of services in which the data broker engaged.

⁶ The Department of Justice (DOJ) has the right of first refusal to litigate these cases. 15 U.S.C. 45(l).

⁷ *U.S. v. Google Inc.*, No. 512-cv-04177-HRL (N.D. Cal. Nov. 16, 2012), <https://www.ftc.gov/enforcement/cases-proceedings/google-inc>.

⁸ See, e.g., *In the Matter of SettlementOne Credit Corporation*, (Aug. 17, 2011), <https://www.ftc.gov/enforcement/cases-proceedings/082-3208/settlementone-credit-corporation>.

⁹ See 16 C.F.R. § 313.3.

- c. **Does it make sense to you that consumers' data held by the same company in different databases are treated differently under the law?**

Response: Current law is based on a sectoral approach for protecting consumer data; that approach came into being when data was well segregated between sectors and by type. I am not confident it remains the best approach given the use and sharing of data across sectors today.

That said, the Commission leverages all of the sectoral laws in place today, as well as its unfairness authority under Section 5 of the FTC Act, to protect consumer privacy, bringing more than 50 cases addressing alleged privacy and data security violations. It is no secret, however, that the sectoral laws and Section 5 are imperfect tools for enforcement in these areas and potentially leave gaps where sensitive consumer data is not specifically protected by law.

- d. **What recommendations do you have to address this discrepancy?**

Response: Comprehensive privacy and data security legislation that authorizes the FTC to engage in APA rulemaking and gives us civil penalty authority would enable the Commission to engage in much more effective enforcement in this area. And repeal of the common carrier exemption would enable us without question to reach more entities that hold sensitive consumer data.

The Honorable Doris Matsui

1. **Patients in my district are very concerned about the skyrocketing prices of prescription drugs. One way that we can keep drug prices lower is by ensuring competition in the marketplace and encouraging the entry of generic drugs. Brand-name drug-makers are incentivized to delay the entry of generic competition to their products, because the longer they have a monopoly, the longer they can charge higher prices. Therefore, some brand-name drug makers have found ways to extend the time that their drug is the only one on the market. One such scheme includes buying off generic drugs with "pay-for-delay" agreements - where the brand-name drug maker pays the generic drug manufacturer to stay off the market longer.**

- a. **What is the Commission doing to review or prevent "pay-for-delay" agreements due to their anti-competitive nature?**

Response: The Federal Trade Commission has long been committed to preserving and protecting competition in prescription drug markets, and it actively investigates anticompetitive businesses practices and mergers in the industry. The FTC has been particularly focused on anticompetitive "pay-for-delay" agreements between brand and generic drug companies. While the number of settlements potentially involving "pay-for-delay" agreements has decreased in the wake of the Supreme Court's 2013 decision

in *FTC v. Actavis*, they have not disappeared entirely.¹⁰ In addition to reviewing all agreements submitted to the FTC under the Medicare Prescription Drug, Improvement, and Modernization Act, the Commission is currently challenging several of these agreements in courts around the country.

b. Is the Commission reviewing other similar anti-competitive behaviors in the drug manufacturer space? Can the Commission commit to remaining active in this area?

Response: In addition to being vigilant when it comes to “pay-for-delay” agreements, the Commission has been examining and prosecuting other practices that thwart competition and increase the cost of prescription drugs. For example, in June, the FTC secured a judgment for \$493.7 million in equitable monetary relief for consumers harmed by AbbVie’s use of baseless “sham” patent infringement lawsuits to delay generic competitors from introducing lower-priced versions of the testosterone replacement drug AndroGel. The FTC has also brought a case against Shire ViroPharma Inc. alleging serial sham petitioning before the FDA that had the purpose and effect of delaying generic competition. Both of these matters are currently on appeal.

The FTC is concerned about other threats to generic and biosimilar competition. For example, the FTC highlighted anticompetitive misuse of *Risk Evaluation and Mitigation Strategies (“REMS”)* in a [comment](#) to the Department of Health and Human Services regarding the “*Blueprint to Lower Drug Prices and Reduce Out-of-Pocket Costs*.”¹¹ First, branded manufacturers sometimes refuse to make samples of their products available to generic drug and biosimilar makers by improperly invoking REMS requirements. Second, the branded manufacturer may improperly deny its competitor access to a single, shared REMS system, which leaves the FDA unable to approve the competitor’s application and labeling. The Creating and Restoring Equal Access to Equivalent Samples Act of 2017 (CREATES Act) would be an important and effective way to stop drug companies from manipulating REMS to block generic or biosimilar competition and consumer access to lower cost drugs.

The FTC’s comment also suggested that the FDA consider certain steps to improve biosimilar and interchangeable competition. Specifically, it recommended that the FDA: (1) continue to create a pathway for expedited approval of interchangeable biologics; (2) reconsider the current naming guidance for biologics in light of the Blueprint; and (3) improve the Purple Book.

¹⁰Agreements Filed with the Federal Trade Commission under the Medicare Prescription Drug, Improvement, and Modernization Act of 2003: Overview of Agreements Filed in FY 2015, Bureau of Competition, November 1, 2017 (https://www.ftc.gov/system/files/documents/reports/agreements-filed-federal-trade-commission-under-medicare-prescription-drug-improvement-modernization/overview_of_fy_2015_mma_agreements_0.pdf).

¹¹ Statement of the Federal Trade Commission to the Department of Health and Human Services Regarding the HHS Blueprint to Lower Drug Prices and Reduce Out-of-Pocket Costs, July 16, 2018 (https://www.ftc.gov/system/files/documents/advocacy_documents/statement-federal-trade-commission-department-health-human-services-regarding-hhs-blueprint-lower/v180008_commission_comment_to_hhs_re_blueprint_for_lower_drug_prices_and_costs.pdf).

2. One core function of the Commission's mission is to protect consumers from scams. With the continued growth of online commerce, there has been an increase in online booking scams that potentially mislead consumers using fraudulent websites.

- a. What further attention do you believe the Commission should be giving to this and similar issues as part of the Commission's overall effort to prevent online scams?**

Response: The Commission has a strong interest in protecting consumer confidence in the online marketplace, including, for example, the online markets for event tickets and travel. The FTC has been active in bringing law enforcement actions to address deceptive advertising in these areas. For example, in 2014, the FTC entered into settlements with online ticket reseller TicketNetwork and two of its marketing partners¹² to prohibit them from misrepresenting that resale ticket websites were official venues or offering tickets at face value. Similarly, in 2017, the FTC settled charges that Reservation Counter, LLC¹³ and related companies misled consumers to believe they were reserving hotel rooms from advertised hotels.

In 2015, the FTC issued consumer education to caution consumers about third-party websites that may deceptively mimic hotel websites.¹⁴ FTC staff also has met with members of Congress and stakeholders in the hotel and event ticket industries to discuss deceptive travel and event ticket websites. We also have provided comments on proposed legislation addressing the same. Working with various online platforms to reduce the likelihood that consumers see fraudulent ads and providing additional industry guidance could be useful as well. Finally, more consumer guidance could help consumers identify and protect themselves from these types of online scams.

¹² FTC and State of Connecticut v. TicketNetwork, Inc.; Ryadd, Inc.; and SecureBoxOffice, LLC, et al., No. 3:14-cv-1046 (D.Conn., Jul. 23, 2014); <https://www.ftc.gov/enforcement/cases-proceedings/132-3203-132-3204-132-3207/ticketnetwork-inc-ryadd-inc-secureboxoffice>.

¹³ FTC v. Reservation Counter 2:17-cv-01304 (D. Utah, Dec. 21, 2017), <https://www.ftc.gov/enforcement/cases-proceedings/152-3219/reservation-counter-llc>.

¹⁴ FTC Consumer Blog, *Did You Book That Night at the Hotel's Site?* (July 14, 2015), www.consumer.ftc.gov/blog/2015/07/did-you-book-night-hotels-site.