

**OVERSIGHT OF  
THE FEDERAL TRADE COMMISSION**

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**HEARING**

BEFORE THE

**COMMITTEE ON COMMERCE,  
SCIENCE, AND TRANSPORTATION  
UNITED STATES SENATE**

**ONE HUNDRED FOURTEENTH CONGRESS**

**SECOND SESSION**

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**SEPTEMBER 27, 2016**  
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ONE HUNDRED FOURTEENTH CONGRESS

SECOND SESSION

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# OVERSIGHT OF THE FEDERAL TRADE COMMISSION

TUESDAY, SEPTEMBER 27, 2016

U.S. SENATE,  
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,  
*Washington, DC.*

The Committee met, pursuant to notice, at 10 a.m., in room SR-253, Russell Senate Office Building, Hon. John Thune, Chairman of the Committee, presiding.

Present: Senators Thune [presiding], Ayotte, Fischer, Moran, Sullivan, Heller, Daines, Blumenthal, Cantwell, McCaskill, Klobuchar, Schatz, Markey, and Udall.

## OPENING STATEMENT OF HON. JOHN THUNE, U.S. SENATOR FROM SOUTH DAKOTA

The CHAIRMAN. This hearing will come to order. Good morning and welcome to today's hearing on oversight of the Federal Trade Commission.

This morning, we'll hear directly from the FTC's three sitting commissioners, Chairman Ramirez, Commissioner Ohlhausen, and Commissioner McSweeney.

Let me take this opportunity to welcome you to the Committee and to thank you all for your service.

I first want to note that Chairman Moran was scheduled to convene a subcommittee hearing this afternoon. That hearing was to include a panel of thought leaders who would offer their own perspectives from outside the Commission. Due to scheduling conflicts that have arisen, we will, unfortunately, have to reschedule that hearing until a later date. So, we appreciate the willingness of those witnesses to testify, and want to thank them for their understanding.

The FTC was founded in 1914 by Congress, specifically by this committee. In fact, the FTC is the oldest independent Federal agency under the jurisdiction of this committee. At the beginning of this Congress, the agency celebrated its 100th anniversary, an event that prompted retrospection both from the Commission and its observers.

As many in the room know, the agency was born of the concern that more needed to be done to ensure competitive markets in the United States and to bust the trusts that threatened that competition. The Commission's focus soon expanded to include an enforcement mandate against unfair and deceptive acts and practices that threaten consumer welfare.

A common theme uniting the Commission's dual focus on competition and consumer protection is ensuring freedom in the marketplace. Throughout the decades and on balance, the FTC has been a strong cop on the beat, ensuring that Americans reap the benefits of a functioning economy free from domination by firms with unfairly concentrated market power. It has also made it possible for Americans to be confident in their commercial transactions and grow the economy with the knowledge that they are protected from fraudsters and cheats seeking to do them harm.

Among its many programs, the FTC administers the National Do Not Call Program, which was created in 2003 and was once rated as the second most popular Federal initiative in American history, second only to the Elvis stamp. By 2010, the registry had topped 200 million numbers.

But, the agency has not been without controversy. In the late 1970s, for example, the agency drew criticism from none other than the Washington Post Editorial Board for its consideration of a regulation that would impose major restrictions on television advertisements aimed at young children in order to reduce the amount of sugar that children eat. This regulatory overreach led the *Post* to criticize the Commission as the "great national nanny" and led to Congress adopting heightened procedural safeguards on the Commission's authority to promulgate rules. It was a recognition that the proper role of government must be limited.

Despite these measures, the Commission has at times asserted itself in ways that continue to raise concerns about overreach. This committee has pressed the Commission, for instance, on the scope of its Section 5 authority, which prohibits unfair and deceptive acts in commerce. When Congress drafted the FTC Act, we took care to ensure the prohibitions of Section 5 would be evergreen. And this flexibility is one of the statute's key features.

For example, in the 1930s, in one of the first cases to use this "unfair and deceptive" language, the Commission brought a paint misbranding case against a manufacturer who allegedly sold a product branded as high quality white lead paint, when the paint, in fact, contained no white lead. While not the case today, at the same—at the time this occurred, lead in paint was a desirable characteristic. I raise this example to illustrate that, as market preferences and technologies evolve, Section 5 adapts.

The Commission is equally comfortable using the same language in recent years to bring cases against app developers who deviate from their stated privacy policy or against mobile phone carriers who cram third-party charges onto customers' bills.

But, Section 5's flexibility does not mean it's open-ended. To best serve customers, the business community needs certainty, guidance, and predictability in order to comply with the law. American merchants are also entitled to fairness and due process when it comes to enforcement. When the FTC deviates from longstanding practice, it creates uncertainty about what the Commission's interpretation of the law may be, who is liable, and the extent of that liability.

We've heard concerns, for instance, about the Commission's application of its unfairness authority to bring cases against private companies for lax data security practices. We all agree that con-

sumers should be protected against unreasonable data security practices that put them at risk of identity theft and financial harm. But, for some time now, a key element in any unfairness case has been whether or not a practice causes substantial—that is, monetary—but not subjective injury to consumers. In one recent high-profile case, the FTC sought to enforce against a small business on grounds that it failed to implement reasonable security measures to protect the sensitive consumer information on its computer network. The FTC took the extraordinary step of overturning the decision of its own administrative law judge, who found, on the basis of the evidence in the case, no monetary harm to the affected consumers. We will continue to monitor developments in this case.

Another area of focus for this committee has been regulations impacting technological innovation. One of the first hearings we held this Congress was on the Internet of Things. In that hearing, we examined the significant economic and societal impact the connected world might bring. At the time, I expressed my hope that we, the government, would have the humility to recognize that the best solutions are often not government solutions and that we not stifle the Internet of Things before we and consumers have had a chance to gain an understanding of its real promise and implications.

The Commission is also focused on the Internet of Things, both with enforcement activity and guidance to industry. The Commission issued its Internet of Things Report last year, which summarized a workshop the FTC held on the topic. The report provided policy recommendations that some, including Commissioner Ohlhausen, have criticized for its government-knows-best approach that could inhibit innovation and growth. While I appreciate the Commission's willingness to explore new topics, I would caution the Commission to exercise regulatory humility, preserve permissionless innovation, and continue to address actual consumer harms as they arise.

With that, I will close, again, by thanking the Commissioners for being here today and turn to Senator Blumenthal for any opening remarks that he would like to make.

Senator Blumenthal.

**STATEMENT OF HON. RICHARD BLUMENTHAL,  
U.S. SENATOR FROM CONNECTICUT**

Senator BLUMENTHAL. Thank you, Mr. Chairman. And thank you for holding this hearing to discuss many of the very pressing consumer protection issues that are before the FTC and before this committee.

And, as Senator Thune has said so well, protecting consumers is not only good for them, but it is also good for businesses that play by the rules and obey the law; effective, fair enforcement is critical to job creation and economic growth by establishing the rules that will also enforce a level playing field. The good guys should be rewarded for following the rules and playing by them, and the bad guys should be prosecuted. A fair and effective law enforcement agency like the FTC can lead to better consumer conduct, better consumer protection, and better economic growth and job creation.

We observe more than 100 years of effective enforcement by the FTC. Obviously, a lot of the markets, products, and types of businesses have changed radically over those 102 years. I've been privileged to work with the FTC in stopping false ads for dietary supplements, sham charities, and securing redress for consumers with unauthorized cramming charges on their mobile phones. As Attorney General of the state of Connecticut, the FTC was a ready and effective partner in those efforts. But, the advances of technology have also changed the challenges of protecting consumers under Section 5. Now we face what is, in my view, the new frontier of consumer protection, which is privacy.

Today's hearing is extraordinarily timely, because Yahoo confirmed, just last week, that more than 500 user accounts have been hacked. Consumers are grappling with yet another data breach. This committee must consider what to do to make sure that the FTC can hold businesses accountable for those breaches. And that means also making sure that consumers are notified promptly and efficiently when there are any breaches. There are serious questions as to whether Yahoo effectively notified consumers as promptly as they should have about those security breaches.

The FTC has brought numerous enforcement actions over the years against companies for lax data security practices, but this piecemeal after-the-fact approach might be better served if the Commission were able to prescribe rules requiring security practices. In fact, in my view, they would be, and that's the reason that Senator Nelson and I introduced the Data Security and Breach Notification Act. Only stiffer enforcement and stringent penalties will make sure companies are properly and promptly notifying consumers when their data has been compromised.

Protecting consumer privacy also means that children should be protected, because so much of the data about them is potentially within the realm of public observation. And so, we have introduced, and I hope we will pass—Senator Daines and I have introduced the SAFE KIDS Act. My strong hope is that the SAFE KIDS Act will be the next piece of legislation we vote out of committee, because protecting our children can't wait, and shouldn't wait.

Similarly, in other areas, data, personal facts are at risk, making the Internet of Things almost the Wild West of potential breaches of security. That puts identities in danger, it risks privacy, it creates potential costs, it discourages innovation and invention, and ultimately deters economic growth and job creation.

So, I look forward to moving forward, as we have done on a bipartisan basis, with the Online Ticket Sales Act, as we did in last week's Executive Session. I hope that legislation and other measures that we passed will be a template for the process that we adopt in this committee, and that we will recognize, in a very bipartisan way, that we all have a stake in protecting consumers.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Blumenthal.

And we'll proceed now to our witnesses. And again, thank you for being here.

We'll start on my left, and your right, with Chairman Ramirez, and then we'll go to Commissioner Ohlhausen and then Commissioner McSweeney.



So, Madam Chairwoman, if you would please proceed, we'd love to hear from you.

Thank you.

**STATEMENT OF HON. EDITH RAMIREZ, CHAIRWOMAN,  
FEDERAL TRADE COMMISSION**

Ms. RAMIREZ. Chairman Thune, Senator Blumenthal, and members of the Committee, thank you for the opportunity to testify about the Federal Trade Commission's important role protecting consumers and promoting competition.

The FTC is an independent, bipartisan agency charged with enforcing laws that prohibit unfair and deceptive practices and unfair methods of competition. We operate in a constantly evolving landscape as business practices, technologies, and our country's demographics continue to change. We seek to exercise our authority through targeted law enforcement efforts that address unlawful conduct without impeding legitimate business activity or innovation. As a complement to our law enforcement efforts, we also engage in policy work, research, and consumer and business education to address current and emerging challenges.

The hallmark of our consumer protection work is stopping unfair and deceptive practices and returning money to injured consumers. One example is the FTC's recent settlement with Volkswagen to resolve charges that VW violated the FTC Act by unfairly selling cars with illegal defeat devices to cheat emissions tests and deceptively advertising that these cars were clean. As part of a joint effort with the Department of Justice and the EPA, the FTC settlement required VW to create a \$10 billion fund to compensate affected consumers for the lost or diminished value of their cars and other harm caused by VW. This is the largest ever FTC consumer redress program.

Another recent example is the FTC's action against the multi-level marketing company Herbalife. We alleged that Herbalife deceived consumers into believing they could earn substantial money selling diet, nutritional, and personal care products, and that the company's business structure was unfair because it rewarded distributors for recruiting others to join and purchase products rather than in response to actual retail demand. Our landmark settlement requires Herbalife to fundamentally restructure its business, stop its deceptive practices, and return \$200 million to consumers.

In addition to these notable cases, we've brought numerous other actions addressing a wide array of issues, including financial scams, telemarketing fraud, and unsubstantiated health claims. And we're endeavoring to reach everyone affected by unlawful conduct. As part of our Every Community Initiative, we've expanded our consumer outreach to, among others, the elderly, low-income consumers, minorities, and military members and their families.

Another key priority for the Commission is protecting the privacy and security of consumers' personal information. We seek to ensure that companies keep the promises they make about how they handle consumer data, including sensitive health, financial, and children's information, and that they do not unfairly reveal private information or otherwise intrude on consumers' privacy. And, as the number of data breaches continues to rise, we've sought to address

data security issues on multiple fronts. We've brought approximately 60 actions against companies that we alleged failed to safeguard consumers' information with reasonable security measures. We also devote significant resources to business education. Last year, for instance, we launched our Start With Security Campaign to help small and medium-sized businesses implement effective data security practices.

To help address new challenges and the privacy and security implications of emerging technologies, we regularly host workshops and issue reports. Recent topics we've explored include ransomware, cross-device tracking, big data, and the Internet of Things.

The FTC also seeks to promote competition, our other core mission, through vigorous enforcement of our Nation's antitrust laws. In the last 2 years, the Commission has challenged 44 mergers. In eight of those instances, we sued to stop the proposed transactions outright. Among other major wins, we successfully challenged the Sysco/U.S. Foods and Staples Office Depot mergers, and we've been particularly active in addressing what we believe to be anticompetitive consolidation in the healthcare, pharmaceutical, retail, and energy sectors, among others.

The FTC also maintains a robust program to identify and stop anticompetitive conduct. We've had significant success in this area, as well, including three Supreme Court victories on important subjects that range from pay-for-delay agreements to exclusive dealing to the state action doctrine.

We also maintain an active competition policy and research agenda. A focus of our advocacy efforts has been to encourage policymakers to take into account the impact on competition of legislative and regulatory frameworks. We also urge that they not place unnecessary restrictions on new business models that have the potential to enhance competition and benefit consumers.

I'm delighted to be here with my colleagues, Commissioners Maureen Ohlhausen and Terrell McSweeney. And to expand on the overview that I've provided, Commissioner Ohlhausen will provide more details on the FTC's efforts to protect consumers in today's dynamic and global marketplace, and Commissioner McSweeney on our efforts to address fraud and deception in the marketplace and the important partners with whom we engage to protect consumers.

Thank you, again, for the invitation to be here.

[The prepared statement of the Federal Trade Commission follows:]

#### PREPARED STATEMENT OF THE FEDERAL TRADE COMMISSION

##### **I. Introduction**

Chairman Thune, Ranking Member Nelson, and members of the Committee, the Federal Trade Commission ("FTC" or "Commission") is pleased to appear before you today to testify about the FTC's work to protect consumers and promote competition.<sup>1</sup>

The FTC is a highly productive, bipartisan independent agency with a broad mission. It is the only Federal agency with jurisdiction to both protect consumers and maintain competition in most sectors of the economy. The agency enforces laws that

<sup>1</sup> This written statement presents the views of the Federal Trade Commission. Our oral statements and responses to questions are our own and do not necessarily reflect the views of the Commission or of any other Commissioner.

prohibit business practices that are unfair or deceptive to consumers, or anti-competitive, and seeks to do so without impeding legitimate business activity.<sup>2</sup> The FTC also educates consumers and businesses to 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 promotes consumer protection and competitive markets in the United States.

The impact of the FTC's work is significant. During the last Fiscal Year alone, the agency estimates that it saved consumers over \$3.4 billion through its competition enforcement efforts and over \$717 million through its consumer protection law enforcement actions.<sup>3</sup>

The FTC is committed to addressing the impact of technology and globalization as part of our law enforcement, rulemaking, and policy work. But even as commerce and technology continue to evolve, many of the fundamental problems we see in the marketplace remain the same: consumer fraud schemes, deceptive advertising, unfair practices causing substantial consumer harm with little or no benefits to consumers or competition, as well as mergers and conduct that harm or threaten to harm competition. The agency tackles these challenges through targeted law enforcement. Our structure, research capacity, and committed staff enable the FTC to continue to meet its mandate of protecting consumers and competition in an ever-changing marketplace.

Our testimony today highlights some of the agency's major recent activities and initiatives. It also identifies certain challenges that affect the Commission's ability to protect U.S. consumers and competition.

## II. FTC Accomplishments

### A. Consumer Protection

As the Nation's consumer protection agency, the FTC has a broad mandate to protect consumers from unfair, deceptive, or fraudulent practices in the marketplace by, among other things, taking law enforcement actions to stop unlawful practices and educating consumers and businesses about their rights and responsibilities. The FTC targets its enforcement and education efforts to achieve maximum impact and works closely with federal, state, international, and private sector partners in joint initiatives. The agency also convenes workshops with various stakeholders to examine emerging consumer protection issues and releases reports on a variety of consumer protection topics. In addition, last year we created an Office of Technology Research and Investigation comprised of technologists and researchers. The office plays an important role by engaging in research and supporting our work in, among other areas, privacy, data security, emerging payment systems, big data, and the Internet of Things.

During Fiscal Years 2013 through 2015, the FTC filed over 160 new consumer protection complaints in Federal district court and obtained over 300 permanent injunctions and orders requiring defendants to pay over \$1.6 billion in consumer redress or disgorgement of ill-gotten gains. In addition, the FTC's consumer protection cases that were referred to the Department of Justice resulted in over 40 court judgments for civil penalties totaling almost \$43 million. The FTC also filed 116 new administrative consumer protection actions and obtained 114 administrative orders.

During the same timeframe, the Commission hosted almost 40 workshops, conferences, and roundtables, and issued 18 reports on a variety of consumer protection topics, released 141 new or revised consumer and business education publications, and released almost 30 consumer and business education videos.

We recently have brought several high profile cases that illustrate two important goals: stopping unfair and deceptive practices, and returning money to consumers who are harmed. For example, earlier this year the FTC entered into a settlement that requires Volkswagen to create a \$10 billion compensation fund—the largest consumer refund program in the FTC's history—to resolve allegations that the company unfairly sold cars with illegal defeat devices that cheated emissions tests and deceptively advertised these cars with claims that they were “clean.”<sup>4</sup> And in July,

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

<sup>3</sup>See Summary of Performance and Financial Information Fiscal Year 2015 (Feb. 2016), available at <https://www.ftc.gov/reports/ftc-fy-2015-summary-performance-financial-information>.

<sup>4</sup>*FTC v. Volkswagen Group of Am., Inc.*, No. 3:15-md-02672-CRB (N.D. Cal. filed June 28, 2016), available at <https://www.ftc.gov/enforcement/cases-proceedings/162-3006/volkswagen-group-america-inc>.

the FTC obtained an order requiring multi-level marketing company Herbalife to fully restructure its U.S. business operations and pay \$200 million in consumer redress to settle allegations that the company deceived consumers into believing they could earn substantial money selling diet, nutritional supplements, and personal care products.<sup>5</sup>

In recent years, the FTC's consumer protection initiatives have focused primarily on addressing trends we see in the marketplace: protecting consumers on all platforms, protecting consumer privacy and data security, prosecuting false or deceptive health claims, safeguarding children in the marketplace, and stopping fraud in every community. Many of our cases have involved more than one of these trends. Each initiative is discussed in more detail below.

### 1. Protecting Consumers on All Platforms

In recent years, we have seen remarkable growth in the use of smartphones and connected devices, which enable consumers—from any location—to find information, contact friends, shop and pay for goods and services, update their social networks, monitor their health and fitness, and access devices in their cars and homes remotely, among many other benefits and conveniences. But the growth of technology provides new mechanisms for engaging in unfair or deceptive practices—for example, unauthorized payments, false advertising, and basic fraud. Protecting consumers as they use and benefit from new technologies and platforms has been a chief FTC priority in recent years.

For example, the FTC has taken action against numerous companies—including T-Mobile<sup>6</sup> and AT&T<sup>7</sup> (with all 50 states and the Federal Communications Commission)—for allegedly “cramming” unauthorized third-party charges on consumers’ mobile phone bills. In addition, the Commission has settled charges against TracFone,<sup>8</sup> which was accused of making misleading claims about “unlimited data” Internet service to subscribers.<sup>9</sup> Thus far, the agency has obtained hundreds of millions of dollars for consumers from these cases.

The Commission has also brought several actions challenging fraud on new platforms. For example, the FTC challenged the alleged deceptive tactics of Erik Chevalier, a project creator who raised money from consumers through a Kickstarter campaign by promising to provide rewards related to a board game, but instead used most of the funds on unrelated personal items, such as rent.<sup>10</sup> The agency also took action against the operators of Prized, a mobile gaming app that promised it would be free from malware. We alleged that it instead loaded consumers’ mobile phones with malicious software to mine virtual currencies.<sup>11</sup>

In addition, the FTC has focused resources to challenge deceptive endorsements online. For example, the Commission alleged that Warner Bros. Home Entertainment deceived consumers during a marketing campaign for a video game by failing to adequately disclose that it paid online “influencers” thousands of dollars to post positive gameplay video review on YouTube and social media.<sup>12</sup> And in *Roca Labs*, the Commission filed a case in Federal court against the marketers of a line of weight-loss supplements who allegedly made baseless claims for their products, and

<sup>5</sup> *FTC v. Herbalife of Am., Inc.*, No. 2:16-cv-05217 (C.D. Cal. filed July 25, 2016), available at <https://www.ftc.gov/enforcement/cases-proceedings/142-3037/herbalife-international-america-inc-et-al>.

<sup>6</sup> *FTC v. T-Mobile USA, Inc.*, No. 2:14-cv-0097-JLR (W.D. Wash. filed Dec. 19, 2014), available at <https://www.ftc.gov/enforcement/cases-proceedings/132-3231/t-mobile-usa-inc>.

<sup>7</sup> *FTC v. AT&T Mobility, Inc.*, No. 1:14-cv-3227-HLM (N.D. Ga. filed Oct. 8, 2014), available at <https://www.ftc.gov/enforcement/cases-proceedings/132-3248/att-mobility-llc>.

<sup>8</sup> *FTC v. TracFone Wireless, Inc.*, No. 3:15-cv-00392 (N.D. Cal. filed Jan. 28, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/132-3176/straight-talk-wireless-tracfone-wireless-inc>. See also *FTC v. DirecTV*, No. 3:15-cv-01129 (N.D. Cal. filed Mar. 11, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/102-3141/directv> (alleging company misrepresented costs of its cable service).

<sup>9</sup> The Court of Appeals for the Ninth Circuit recently held that the FTC could not bring a case similar to the *TracFone* matter against AT&T because the common carrier exception in Section 5 of the FTC Act precluded FTC enforcement of the Act against any company with the status of a common carrier, even if the case involved non-common-carrier service.

<sup>10</sup> *FTC v. Erik Chevalier, Co.*, No. 3:15-cv-1029-AC (D. Ore. filed June 11, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/142-3061/erik-chevalier-forking-path>.

<sup>11</sup> *FTC v. Equiliv Investments*, Matter No. 142-3144 (D.N.J. filed June 29, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/142-3144/equiliv-investments-prized>; see also *FTC v. BF Labs, Inc.*, No. 4:14-cv-00815-BCW (W.D. Mo. Feb. 18, 2016), available at <https://www.ftc.gov/enforcement/cases-proceedings/142-3058/bf-labs-inc> (settling allegations that the company deceptively marketed computers designed to produce Bitcoins).

<sup>12</sup> See *Warner Bros. Home Entertainment, Inc.*, Matter No. 1523034 (July 11, 2016) (proposed consent), available at <https://www.ftc.gov/enforcement/cases-proceedings/152-3034/warner-bros-home-entertainment-inc-matter>.

then threatened to enforce “gag clause” provisions against consumers to stop them from posting negative reviews and testimonials online.<sup>13</sup>

Last year, the Commission issued an Enforcement Policy Statement and accompanying guidance on native advertising, content that bears a similarity to the news, feature articles, product reviews, entertainment, and other material that surrounds it online.<sup>14</sup> The policy statement explains how established truth-in-advertising principles apply to different ad formats, including native ads. Following the policy statement, the FTC brought its first native advertising case against national retailer, Lord & Taylor.<sup>15</sup> The Commission alleged that the company deceived consumers by paying for native ads, including a seemingly objective article in the online publication Nylon, without disclosing the ads were actually paid promotions for a 2015 clothing launch.

Finally, the Commission has continued its efforts to stop illegal robocalls, which continue to top our complaint list. For example, the Commission and ten state attorneys general took action against Caribbean Cruise Line, and seven other assisting companies, for an alleged massive telemarketing campaign resulting in billions of robocalls.<sup>16</sup> Recognizing the need to spur the marketplace to develop technical solutions that protect American consumers from illegal robocalls, the FTC has led four public challenges to help tackle the unlawful robocalls that plague consumers.<sup>17</sup> And the FTC has developed numerous educational materials to deliver the key message to consumers: if you answer a call and hear an unwanted recorded sales message—hang up.<sup>18</sup>

## 2. Protecting Consumer Privacy and Data Security

The FTC has unparalleled experience in consumer privacy enforcement. The Commission has used its core enforcement authority—Section 5 of the FTC Act—to take action against companies engaged in unfair or deceptive practices involving the privacy and security of consumers’ information.<sup>19</sup> If a company makes materially misleading statements or omissions about a product or service, including its privacy or data security features, and such statements or omissions are likely to mislead reasonable consumers, such statements or omissions can be found to be deceptive and in violation of Section 5.<sup>20</sup> Further, if a company’s privacy or data security practices cause or are likely to cause substantial injury to consumers that is neither reasonably avoidable by consumers nor outweighed by countervailing benefits to consumers or to competition, those practices can be found to be unfair and in violation of Section 5.<sup>21</sup> The FTC also enforces sector-specific statutes that protect certain health,<sup>22</sup> credit,<sup>23</sup> financial,<sup>24</sup> and children’s information.<sup>25</sup>

The FTC’s current privacy enforcement priorities include health privacy, the Internet of Things, big data, and data security. Over the past few years, the Commission has brought several cases to stop illegal practices that compromise health

<sup>13</sup> *FTC v. Roca Labs, Inc.*, No. 8:15-cv-02231-MSS-TBM (M.D. Fla. Sept. 28, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/142-3255/roca-labs-inc>.

<sup>14</sup> See *Commission Enforcement Policy Statement on Deceptively Formatted Advertisements* (Dec. 2015), available at <https://www.ftc.gov/public-statements/2015/12/commission-enforcement-policy-statement-deceptively-formatted>; *Native Advertising: A Guide for Businesses* (Dec. 2015), available at <https://www.ftc.gov/tips-advice/business-center/guidance/native-advertising-guide-businesses>.

<sup>15</sup> *Lord & Taylor, LLC*, Matter No. 152 3181 (Mar. 15, 2016) (proposed consent), available at <https://www.ftc.gov/enforcement/cases-proceedings/152-3181/lord-taylor-llc-matter>.

<sup>16</sup> *FTC v. Caribbean Cruise Line, Inc. et al.*, No. 0:15-cv-60423 (S.D. Fla. Mar. 4, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/122-3196/caribbean-cruise-line-inc>.

<sup>17</sup> See, e.g., *Robocalls: Humanity Strikes Back Challenge*, at <https://www.ftc.gov/news-events/contests/robocalls-humanity-strikes-back>; *Detectarobo Challenge*, at <https://www.ftc.gov/news-events/contests/detectarobo>; *Zapping Rachel Challenge*, at <https://www.ftc.gov/news-events/contests/zapping-rachel>; *FTC Robocall Challenge (2012–2013)*, at <https://www.ftc.gov/news-events/press-releases/2013/04/ftc-announces-robocall-challenge-winners>.

<sup>18</sup> See, e.g., *FTC Robocall Microsite*, <https://www.consumer.ftc.gov/features/feature-0025-robocalls>.

<sup>19</sup> 15 U.S.C. § 45(a).

<sup>20</sup> See *FTC Policy Statement on Deception, appended to Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174 (1984), available at <https://www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception>.

<sup>21</sup> See *FTC Policy Statement on Unfairness, appended to Int’l Harvester Co.*, 104 F.T.C. 949, 1070 (1984), available at <https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness>; 15 U.S.C. § 45(n).

<sup>22</sup> 16 C.F.R. Part 318.

<sup>23</sup> 15 U.S.C. §§ 1681–1681x.

<sup>24</sup> 16 C.F.R. Part 314, implementing 15 U.S.C. § 6801(b).

<sup>25</sup> 15 U.S.C. §§ 6501–6506; see also 16 C.F.R. Part 312.

information.<sup>26</sup> For example, the FTC alleged that PaymentsMD and its former CEO misled thousands of consumers who signed up for an online billing portal.<sup>27</sup> According to the complaint, the defendants used the registration process for the billing portal as a way to deceptively seek consumers' consent to obtain highly-detailed medical information about the consumers from pharmacies, medical labs, and insurance companies to facilitate the launch of a separate online medical records service. The Commission also alleged that Practice Fusion, a company that provides management services to physicians, deceived hundreds of thousands of consumers by soliciting reviews about their doctors without adequately disclosing that the reviews would be posted publicly on the internet.<sup>28</sup> As detailed in our complaint, many of the posted reviews included consumers' full names, medications, health conditions, and treatments received.

The Internet of Things is also an expanding part of the Commission's privacy work. For example, the FTC announced a settlement with computer hardware company ASUS for allegedly failing to take reasonable steps to secure the software on its routers.<sup>29</sup> According to the complaint, the company's failures to timely address vulnerabilities or notify consumers about the availability of security updates resulted in critical security flaws in its routers that put the home networks of consumers at risk. The complaint also alleged that the routers' insecure "cloud" services led to the compromise of thousands of consumers' connected storage devices, exposing their sensitive personal data on the internet.<sup>30</sup> Last year, the FTC also issued a report addressing how longstanding privacy principles can be adapted to Internet of Things devices and recommending best practices for companies to follow.<sup>31</sup>

Another area of interest is big data, specifically the vast collection of data about consumers and enhanced capabilities to analyze data to make inferences and predictions about consumers. In January the Commission issued a report entitled *Big Data: A Tool for Inclusion or Exclusion?* addressing how the categorization of consumers may be both creating and limiting opportunities for them, with a focus on low-income and underserved consumers.<sup>32</sup> A key message in the report is that there are laws—including the Fair Credit Reporting Act, the Equal Credit Opportunity Act, and the FTC Act—that address some of the concerns raised by big data. The report also suggests questions businesses should ask to maximize the benefits of big data and reduce the risk of biases or inaccurate results about certain groups of consumers. The FTC also continues to focus on data brokers<sup>33</sup> and, among other things, the role they may play in facilitating fraud.<sup>34</sup> For example, last year, the Commission brought two cases against data brokers LeapLab and Sequoia One, alleging that both purchased the payday loan applications of financially strapped consumers—including names, addresses, phone numbers, Social Security numbers, and bank account numbers—and then sold them to scam artists who used the data to withdraw millions of dollars from consumers' accounts.<sup>35</sup> The FTC has also hosted

<sup>26</sup> See, e.g., *Henry Schein Practice Solutions, Inc.*, No. C-4575 (May 23, 2016), available at <https://www.ftc.gov/enforcement/cases-proceedings/142-3161/henry-schein-practice-solutions-inc-matter>; *GMR Transcription Servs., Inc.*, No. C-4482 (Aug. 21, 2014), available at <https://www.ftc.gov/enforcement/cases-proceedings/122-3095/gmr-transcription-services-inc-matter>.

<sup>27</sup> *PaymentsMD, LLC*, No. C-4505 (Jan. 27, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/132-3088/paymentsmd-llc-matter>.

<sup>28</sup> *Practice Fusion, Inc.*, Matter No. 1423039 (June 8, 2016) (proposed consent), available at <https://www.ftc.gov/enforcement/cases-proceedings/142-3039/practice-fusion-inc-matter>.

<sup>29</sup> *ASUSTeK Computer Inc.*, No. C-4587 (July 28, 2016), available at <https://www.ftc.gov/enforcement/cases-proceedings/142-3156/asustek-computer-inc-matter>.

<sup>30</sup> See also *TRENDnet, Inc.*, No. C-4426 (Jan. 16, 2014), available at <https://www.ftc.gov/enforcement/cases-proceedings/122-3090/trendnet-inc-matter>.

<sup>31</sup> FTC Staff Workshop Report, *The Internet of Things: Privacy and Security in a Connected World* (Jan. 2015), available at <https://www.ftc.gov/reports/federal-trade-commission-staff-report-november-2013-workshop-entitled-internet-things>.

<sup>32</sup> FTC Report, *Big Data: A Tool for Inclusion or Exclusion? Understanding the Issues*, (Jan. 2016), available at <https://www.ftc.gov/reports/big-data-tool-inclusion-or-exclusion-understanding-issues-ftc-report>.

<sup>33</sup> See, e.g., FTC Report, *Data Brokers: A Call For Transparency and Accountability* (May 2014), available at <https://www.ftc.gov/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014>.

<sup>34</sup> See, e.g., *FTC v. Bayview Solutions LLC*, No. 1:14-cv-01830-RC (D.D.C. filed Oct. 31, 2014), available at <https://www.ftc.gov/enforcement/cases-proceedings/142-3226-x140062/bayview-solutions-llc>; *FTC v. Cornerstone & Co.*, No. 1:14-cv-01479-RC (D.D.C. filed Aug. 27, 2014), available at <https://www.ftc.gov/enforcement/cases-proceedings/142-3211-x150005/cornerstone-company-llc>.

<sup>35</sup> *FTC v. Sitesearch Corp., LLC*, No. CV-14-02750-PHX-NVW (D. Az. Feb 5, 2016), available at <https://www.ftc.gov/enforcement/cases-proceedings/142-3192/sitesearch-corporation-doing-business-leaplab>; *FTC v. Sequoia One, LLC*, No. 2:15-cv-01512-JCM-CWH (D. Nev. filed

public workshops on big data issues such as the growing use of online lead generation in various industries<sup>36</sup> and cross-device tracking.<sup>37</sup>

Finally, data security continues to be a crucial part of the FTC's privacy work.<sup>38</sup> To date, the Commission has brought approximately 60 cases alleging that companies failed to implement reasonable safeguards for the consumer data they maintain.<sup>39</sup> For example, the Commission secured its largest data security judgment this year, \$100 million, against LifeLock based on allegations the company violated a 2010 Federal court order by, among other things, failing to establish and maintain a comprehensive information security program to protect its customers' sensitive personal information.<sup>40</sup> And, the Commission continues to reiterate its longstanding, bipartisan call for Federal legislation that would (1) strengthen its existing data security authority and (2) require companies, in appropriate circumstances, to provide notification to consumers when there is a security breach.<sup>41</sup>

Additionally, the agency has placed considerable emphasis in this area on education. Last year, for example, the Commission announced its *Start with Security* initiative, which includes a guide for businesses that summarizes the lessons learned from the FTC's 60 data security cases,<sup>42</sup> as well as videos.<sup>43</sup> As part of this initiative, the FTC has organized one-day conferences in Austin, San Francisco, Seattle, and Chicago, bringing business owners and developers together with industry experts to discuss practical tips and strategies for implementing effective data security.<sup>44</sup> The FTC has also launched an improved version of *IdentityTheft.gov*<sup>45</sup> (*robodeidentidad.gov* in Spanish<sup>46</sup>), a free, one-stop resource consumers can use to report and recover from identity theft. As part of the relaunched site, identity theft victims can use the site to create a personal recovery plan based on the type of identity theft they face, and get pre-filled letters and forms to send to credit bureaus, businesses, and debt collectors.

### 3. Prosecuting False or Deceptive Health Claims

The FTC has a long history of targeting deceptive health claims, which can result in serious harm to consumers. For example, as part of a joint law enforcement sweep with the Department of Justice and other Federal agencies targeting illegal dietary supplement marketing, the FTC settled allegations that Sunrise Nutraceuticals deceptively claimed its supplement would alleviate opiate withdrawal symptoms and increase a user's likelihood of overcoming opiate addiction.<sup>47</sup> The Commission is also targeting unsubstantiated health claims in the mobile space. The FTC charged two app developers with deceptively claiming that their mobile apps—Mole Detective and MelApp—could detect symptoms of melanoma, even

Aug. 12, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/132-3253/sequoia-one-llc>.

<sup>36</sup> FTC Workshop, *Follow the Lead: An FTC Workshop on Lead Generation* (Oct. 30, 2015), available at <https://www.ftc.gov/news-events/events-calendar/2015/10/follow-lead-ftc-workshop-lead-generation>.

<sup>37</sup> FTC Workshop, *Cross Device Tracking* (Nov. 16, 2015), available at <https://www.ftc.gov/news-events/events-calendar/2015/11/cross-device-tracking>.

<sup>38</sup> See, e.g., *FTC v. Wyndham Worldwide Corp.*, No. 2:13-CV-01887-ES-JAD (D.N.J. Dec. 11, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/1023142-x120032/wyndham-worldwide-corporation>. In 2015, the Third Circuit affirmed the Commission's authority under the FTC Act to challenge data security failures. See *FTC v. Wyndham Worldwide Corp.*, No. 14-3514 (3d Cir. Aug. 24, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/1023142-x120032/wyndham-worldwide-corporation>.

<sup>39</sup> See generally [www.ftc.gov/dataset](http://www.ftc.gov/dataset).

<sup>40</sup> *FTC v. Lifelock*, No. CV-10-00530-PHX-JJT (D. Az Dec. 17, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/072-3069-x100023/lifelock-inc-corporation> (Commissioner Ohlhausen dissenting).

<sup>41</sup> Legislation in both areas—data security and breach notification—should give the FTC the ability to seek civil penalties to help deter unlawful conduct, jurisdiction over non-profits, and rulemaking authority under the Administrative Procedure Act.

<sup>42</sup> *Start with Security: A Guide for Business* (June 2015), available at <https://www.ftc.gov/tips-advice/business-center/guidance/start-security-guide-business>.

<sup>43</sup> *Start with Security: Free Resources for Any Business* (Feb. 19, 2016), available at <https://www.ftc.gov/news-events/audio-video/business>.

<sup>44</sup> See, e.g., FTC Event, *Start with Security—Seattle*, Feb. 9, 2016, available at <https://www.ftc.gov/news-events/events-calendar/2016/02/start-security-seattle>.

<sup>45</sup> See <https://identitytheft.gov/>.

<sup>46</sup> See <https://robodeidentidad.gov/>.

<sup>47</sup> *FTC v. Sunrise Nutraceuticals, LLC*, No. 9:15-cv-81567 (S.D. Fla. filed Nov. 17, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/152-3208/sunrise-nutraceuticals-llc>.

in the early stages.<sup>48</sup> The Commission alleged the companies lacked scientific evidence to support their claims. Similarly, the Commission sued the marketers of an app called *Ultimeyes* for deceptive claims that they had scientific proof the app could “turn back the clock” on consumers’ vision through a series of visual exercises available on the app.<sup>49</sup> The Commission has also taken action against deceptive cognitive benefits claims. For example, this January, Lumosity agreed to pay \$2 million in redress to settle FTC charges that Lumosity deceptively claimed its “brain training” program could help users perform better at work and in school, and could stave off memory loss, dementia, and even Alzheimer’s disease.<sup>50</sup>

Deceptive weight loss claims continue to be an enforcement priority. In 2015, the Commission brought a number of cases against companies touting the slimming effects of various products. For example, the FTC obtained an \$11.9 million judgment against affiliate marketing network LeadClick Media for using fake news sites to convince consumers that acai berry and colon cleansing weight loss products were proven effective.<sup>51</sup> The FTC also obtained a Federal court order against Lunada Biomedical and its principals settling allegations that they deceptively advertised that their dietary supplement Amberen caused substantial weight loss for women over 40, and that the weight loss was clinically proven.<sup>52</sup>

#### 4. Safeguarding Children in the Marketplace

The FTC also spends significant resources to safeguard children in the marketplace. For example, the Commission announced cases against Apple,<sup>53</sup> Amazon,<sup>54</sup> and Google<sup>55</sup> for allegedly billing parents without their consent for items kids bought in mobile apps. We alleged that the companies either failed to require a password for in-app purchases or failed to alert parents that entering a password opened a significant window of time where kids could rack up charges. Apple and Google agreed to change their billing practices and pay at least \$32.5 million and \$19 million, respectively, as redress to consumers. A Federal judge granted the FTC’s request for summary judgment in the case against Amazon.<sup>56</sup>

The Commission has also focused its resources on deceptive health claims involving children. The FTC’s case against NourishLife challenged allegedly unsubstantiated claims for a supplement purporting to treat childhood speech and behavioral disorders, including those associated with autism.<sup>57</sup> Similarly, the Commission took action against the makers of the *Jungle Rangers* computer game for making false and unsubstantiated claims that the game permanently improves children’s focus, memory, behavior, and school performance—including for kids with ADHD.<sup>58</sup>

<sup>48</sup> *Health Discovery Corp.*, No. C-4516 (Mar. 13, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/132-3211/health-discovery-corporation-melapp-matter> (Commissioner Ohlhausen dissenting); *FTC v. New Consumer Solutions LLC et al.*, No. 15-C-1614 (N.D. Ill. filed Feb. 23, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/132-3210/new-consumer-solutions-llc-mole-detective> (Commissioner Ohlhausen dissenting).

<sup>49</sup> *Carrot Neurotechnology, Inc.*, No. C-4567 (Feb. 23, 2016), available at <https://www.ftc.gov/enforcement/cases-proceedings/142-3132/carrot-neurotechnology-inc-matter-ultimeyes> (Commissioner Ohlhausen concurring).

<sup>50</sup> *FTC v. Lumos Labs, Inc. d/b/a Lumosity*, No. 3:16-cv-00001 (N.D. Cal. filed Jan. 5, 2016), available at <https://www.ftc.gov/enforcement/cases-proceedings/132-3212/lumos-labs-inc-lumosity-mobile-online-cognitive-game>.

<sup>51</sup> See *FTC & Connecticut v. Leanspa, LLC*, No. 311-cv-01715 (D. Conn. Apr. 6, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/1123135/leanspa-llc-et-al> (Commissioner Ohlhausen dissenting in part and concurring in part).

<sup>52</sup> *FTC v. Lunada Biomedical, Inc.*, No. 2:15-cv-03380-MWF (PLAx) (C.D. Cal. filed May 12, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/132-3067/lunada-biomedical-inc>.

<sup>53</sup> *Apple, Inc.*, No. C-4444 (Mar. 25, 2014), available at <https://www.ftc.gov/enforcement/cases-proceedings/112-3108/apple-inc>.

<sup>54</sup> *FTC v. Amazon.com*, No. 2:14-cv-01038 (W.D. Wash. filed July 10, 2014), available at <https://www.ftc.gov/enforcement/cases-proceedings/122-3238/amazoncom-inc>.

<sup>55</sup> *Google, Inc.*, No. C-4499 (Dec. 2, 2014), available at <https://www.ftc.gov/enforcement/cases-proceedings/122-3237/google-inc>.

<sup>56</sup> *FTC v. Amazon.com*, No. 2:14-cv-01038 (W.D. Wash. Apr. 27, 2016) (summary judgment decision), available at <https://www.ftc.gov/enforcement/cases-proceedings/122-3238/amazoncom-inc>.

<sup>57</sup> *FTC v. NourishLife, LLC*, No. 1:15-cv-00093 (N.D. Ill. filed Jan. 7, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/132-3152/nourishlife-llc>; *Legacy Learning Systems, Inc.*, No. C-4323 (June 10, 2011), available at <https://www.ftc.gov/enforcement/cases-proceedings/102-3055/legacy-learning-systems-inc-et-al-matter>.

<sup>58</sup> *Focus Education, LLC*, No. C-4517 (Apr. 9, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/122-3153/focus-education-llc-matter>. See also *Learning Rx Franchise Corp.*, No. 1:16-cv-01159-RM (D. Colo. May 24, 2016) (alleging the defendants deceptively claimed that their programs were clinically proven to permanently improve serious health condi-



The Children’s Online Privacy Protection Act of 1998 (“COPPA”) generally requires websites and apps to obtain parental consent before collecting personal information from children under 13. In 2013, the FTC updated its regulatory rule that implements COPPA to address new developments—such as social networking, mobile apps, and the ability to use geolocation information—that affect children’s privacy. Since 2000, the FTC has brought over 20 COPPA cases and collected millions of dollars in civil penalties. For example, the COPPA cases against app developers LAI Systems<sup>59</sup> and Retro Dreamer<sup>60</sup> alleged that the companies created a number of apps directed to children that allowed third-party advertisers to collect personal information from children in the form of persistent identifiers without obtaining parental consent. Most recently, mobile advertising company InMobi agreed to pay \$950,000 in civil penalties to settle FTC allegations that it deceptively tracked the locations of hundreds of millions of consumers—including children—without their knowledge or consent to serve them geo-targeted advertising.<sup>61</sup>

### 5. Stopping Fraud in Every Community

Stopping fraud is the FTC’s largest consumer protection program, and for good reason: fraud causes enormous harm to consumers. The Commission’s work has targeted many different forms of fraud—including sham charities,<sup>62</sup> illegal robocalling,<sup>63</sup> phony business opportunities,<sup>64</sup> investment schemes,<sup>65</sup> bogus business coaching and mentoring,<sup>66</sup> and imposter scams.<sup>67</sup>

Through the agency’s *Every Community Initiative*, the FTC has conducted outreach and education, developed partnerships with trusted community advocates, and brought cases to stop fraud targeting certain groups of consumers like the elderly, low-income consumers, or minorities. The FTC has hosted over a dozen major conferences to learn more about consumer protection issues in a wide range of communities.<sup>68</sup> FTC regional offices have brought together key players in consumer protection for what we call “Common Ground” conferences in their communities.<sup>69</sup> In De-

tions like ADHD and autism, and that the training substantially improved school grades and college admission test scores).

<sup>59</sup> *U.S. v. LAI Systems, LLC*, No. 2:15-cv-09691 (C.D. Cal. filed Dec. 17, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/142-3261/lai-systems-llc>.

<sup>60</sup> *U.S. v. Retro Dream et al.*, No. 5:15-cv-02569 (C.D. Cal. filed Dec. 17, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/142-3262/retro-dreamer>.

<sup>61</sup> *U.S. v. InMobi Pte Ltd.*, No. 3:16-cv-03474 (N.D. Cal. filed June 22, 2016), available at <https://www.ftc.gov/enforcement/cases-proceedings/152-3203/inmobi-pte-ltd>.

<sup>62</sup> See, e.g., *FTC v. Cancer Fund of America, Inc. et al.*, No. CV15-884 PHX NVW (D. Az. filed May 18, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/122-3005/cancer-fund-america-inc>.

<sup>63</sup> See, e.g., *FTC v. Lifewatch Inc.*, 1:15-cv-05781 (N.D. IL. Jul. 14, 2016), available at <https://www.ftc.gov/enforcement/cases-proceedings/142-3123/lifewatch-inc>; *FTC v. Life Management Services, Inc.*, 6:16-cv-982 (MD. Fla. Jun. 14, 2016), available at <https://www.ftc.gov/enforcement/cases-proceedings/152-3216/life-management>; *FTC v. Caribbean Cruise Line, Inc. et al.*, No. 0:15-cv-60423 (S.D. Fla. Mar. 4, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/122-3196/caribbean-cruise-line-inc>.

<sup>64</sup> See, e.g., *FTC v. Money Now Funding, LLC*, No. CV-13-01583 (D. Ariz., June 3, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/122-3216-x130063/money-now-funding-llc>; *FTC v. The Online Entrepreneur, Inc.*, No. 812-cv-2500-T-27MAP (M.D. Fla. July 30, 2014), available at <https://www.ftc.gov/enforcement/cases-proceedings/122-3186/online-entrepreneur-inc-et-al>.

<sup>65</sup> See, e.g., *FTC v. Consumer Collection Advocates, Corp.*, No. 0:14-cv-62491-BB (S.D. Fla. Nov. 3, 2014), available at <https://www.ftc.gov/enforcement/cases-proceedings/142-3082/consumer-collection-advocates-corp>.

<sup>66</sup> *FTC v. Apply Knowledge, LLC*, 2:14-cv-00088 (D. UT., Mar. 2, 2016) (final orders), available at <https://www.ftc.gov/enforcement/cases-proceedings/132-3121-x140018/apply-knowledge-llc>; *FTC v. Top Shelf Marketing Corp.*, 1:16-cv-00206 (S.D.N.Y. Jan. 12, 2016), available at <https://www.ftc.gov/enforcement/cases-proceedings/142-3228/top-shelf-marketing-corp>.

<sup>67</sup> See, e.g., *FTC v. Centro Natural Corp.*, No. 14:23879 (S.D. Fla. June 30, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/142-3159/centro-natural-corp>; *FTC v. First Time Credit Solution, Corp.*, No. CV15-01921-DDP-PJW (C.D. Cal. filed Mar. 16, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/152-3114/first-time-credit-solution-corp-ftc-credit-solutions>.

<sup>68</sup> See, e.g., FTC Workshop, *Fraud Affects Every Community*, Oct. 29, 2014, available at <https://www.ftc.gov/news-events/events-calendar/2014/10/fraud-affects-every-community>; FTC Roundtable, *Debt Collection & the Latino Community Roundtable*, Oct. 23, 2014, available at <https://www.ftc.gov/news-events/events-calendar/2014/10/debt-collection-latino-community-roundtable>; FTC Conference, *Working Together to Advance Protections for Immigrant Consumers*, Apr. 21, 2014, available at <https://www.ftc.gov/news-events/events-calendar/2014/04/working-together-advance-protections-immigrant-consumers>.

<sup>69</sup> See, e.g., *Colorado Common Ground Conference: Working Together to Protect Colorado Consumers*, Apr. 24, 2015, available at <https://www.ftc.gov/news-events/events-calendar/2015/04/>

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ember, the FTC will bring together researchers, marketers, community groups, and law enforcement to examine the changing consumer demographics in this country and how they will affect the FTC's future work.<sup>70</sup>

Over the past year, the FTC has also expanded its outreach to older adults, service members and veterans, and people in African-American, Native American, immigrant and Latino communities. For example, the FTC has partnered with the Navajo Human Rights Commission to reach the Navajo Nation,<sup>71</sup> and with the NAACP to reach African Americans.<sup>72</sup> In addition, to encourage more attention to consumer protection issues in diverse communities, the FTC began a new project to reach ethnic media outlets by hosting roundtables with them in cities across the country. These ethnic media events highlight scams, frauds, and illegal practices affecting the relevant communities. The Bureau of Consumer Protection and its Regional Offices have participated in over 170 outreach events, including webinars, trainings, presentations, exhibits, and Twitter chats.

And the Commission has used its strongest tool—enforcement—to protect communities that have been specifically targeted by fraudsters. Most cases affect a broad cross-section of people, but scams are increasingly targeting specific groups, aided by the widespread availability of data profiles and leads on consumers. For example, the Commission halted the operations of a company that used false affiliation with the FTC—calling itself “FTC Credit Solutions”—to market bogus credit repair services to Spanish-speaking consumers.<sup>73</sup> Scams targeting the Spanish speaking population are pervasive, and the FTC has taken action to address many different kinds—involving pyramids and business opportunities,<sup>74</sup> unordered merchandise,<sup>75</sup> fraudulent debt collection,<sup>76</sup> and bogus health insurance.<sup>77</sup> The Commission is also stopping scams that target older consumers, including two sweepstakes that used personalized letters to seniors to trick them into paying to claim their prizes and took in more than \$28 million in one scam and over \$17 million in another.<sup>78</sup> Other frauds targeting seniors have involved tech support to fix nonexistent computer

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*colorado-common-ground-conference-working-together-protect* (joint event with Colorado Attorney General's Office); *NW Common Ground Conference*, Nov. 18–19, 2014, available at <https://www.ftc.gov/news-events/events-calendar/2014/11/nw-common-ground-conference> (joint event with Washington State Attorney General's Office).

<sup>70</sup> See FTC Workshop, *Changing Consumer Demographics*, Dec. 6, 2016, available at <https://www.ftc.gov/news-events/events-calendar/2016/12/changing-consumer-demographics>.

<sup>71</sup> FTC Roundtable, *Navajo Consumer Credit Seminar and Roundtable*, Apr. 17, 2015, available at <https://www.ftc.gov/news-events/events-calendar/2015/04/navajo-consumer-credit-seminar-roundtable>.

<sup>72</sup> *Obstacles to Economic Opportunity: A Joint Conference of the FTC and the NAACP Examining Frauds that Affect the African American Community*, May 19, 2015, available at <https://www.ftc.gov/news-events/events-calendar/2015/05/obstacles-economic-opportunity-joint-conference-ftc-naacp>.

<sup>73</sup> *FTC v. First Time Credit Solution, Corp.*, No. CV15–01921–DDP–P JW (C.D. Cal. Aug. 3, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/152-3114/first-time-credit-solution-corp-ftc-credit-solutions>.

<sup>74</sup> See, e.g., *FTC v. Oro Marketing, Inc.*, No. 2:13–CV–08843 (C.D. Cal. Dec 22, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/132-3047-x140010/oro-marketing-inc-et-al>; *FTC v. Fortune Hi-Tech Marketing, Inc.*, No. 5:13–cv–00123–GFVT–REW (N.D. Ill. May 9, 2014), available at <https://www.ftc.gov/enforcement/cases-proceedings/112-3069/fortune-hi-tech-marketing-inc-et-al>.

<sup>75</sup> See, e.g., *FTC v. Herbalife of Am., Inc.*, No. 2:16–cv–05217 (C.D. Cal. July 25, 2016), available at <https://www.ftc.gov/enforcement/cases-proceedings/142-3037/herbalife-international-america-inc-et-al>; *FTC v. Hispanic Global Way Corp.*, No. 14–22018–CIV–ALTONGA/O'Sullivan (Feb 26, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/132-3113/hispanic-global-way-corporation>.

<sup>76</sup> See, e.g., *FTC v. Centro Natural Corp.*, No. 14:23879–CIV–ALTONAGA/O'Sullivan (S.D. Fla. June 30, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/142-3159/centro-natural-corp>.

<sup>77</sup> *FTC v. Partners in Health Care Association, Inc.*, No. 1:14–CV–23109 (S.D. Fla., July 21, 2016) (summary judgment), available at <https://www.ftc.gov/enforcement/cases-proceedings/132-3122/partners-health-care-association-inc>.

<sup>78</sup> *FTC v. Mail Tree Inc.*, No. 0:15–cv–61034–JIC (S.D. Fla. June 12, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/142-3068/mail-tree-inc>; *FTC v. Dayton Films, No. 2:97–CV–00750–PMP* (LRL) (D. Nev. January 28, 2013), available at <https://www.ftc.gov/enforcement/cases-proceedings/x970058/dayton-family-productions-inc-et-al>.

problems,<sup>79</sup> recovery scams purporting to recoup losses from other frauds,<sup>80</sup> and fraudulent health and safety schemes.<sup>81</sup>

The FTC has also brought actions against companies that target military service members. For example, for-profit school Ashworth College recruited service members and their families and accepted their military benefits as payment.<sup>82</sup> The FTC alleged Ashworth misrepresented that students would get the training and credentials needed to switch careers or get a new job, and that the course credits they earned would transfer to other schools. In fact, the FTC alleged, neither claim was true. This fall, the FTC, in cooperation with the Department of Defense and other organizations, will release a consumer protection toolkit for servicemembers and their families.

The FTC is also fighting scams that specifically target consumers already facing financial difficulties. The *HOPE Services* case—just one example—involved a sham operation that allegedly told financially distressed homeowners it would help reduce their mortgages, but instead effectively stole their mortgage payments, leading some to foreclosure and bankruptcy.<sup>83</sup> And the Commission has brought several cases involving abusive debt collection that victimized consumers already in debt.<sup>84</sup>

### B. Competition

The Commission seeks to promote competition through vigorous law enforcement. The FTC enforces U.S. antitrust law in many sectors that most directly affect consumers and their pocketbooks, such as health care, consumer products and services, technology, manufacturing, and energy.<sup>85</sup> In addition, the FTC undertakes competition policy research to improve agency decision-making, and engages in competition advocacy and education initiatives to encourage state, local and foreign jurisdictions to adopt policies that promote competition and consumer welfare.

One of the agency's principal responsibilities is preventing mergers that may substantially lessen competition. Over the past two Fiscal Years, premerger filings under the Hart-Scott-Rodino Act have increased significantly; they are up approximately 36 percent in FY 2015 as compared to FY 2013 and have more than doubled over the past five years.<sup>86</sup> The vast majority of reported transactions, approximately 95 percent, do not raise competition concerns, and the Commission clears those transactions expeditiously. However, when the evidence has shown that the merger

<sup>79</sup> See, e.g., *FTC v. Help Desk National*, 1:16-cv-06607 (N.D. IL. Jul. 8, 2016), available at <https://www.ftc.gov/enforcement/cases-proceedings/162-3042-x160045/help-desk-national>; *FTC v. Boost Software, Inc.*, 14-cv-81397 (Feb. 12, 2016) (final orders), available at <https://www.ftc.gov/enforcement/cases-proceedings/132-3283-x150040/boost-software-inc>; *FTC v. Inbound Call Experts, LLC*, No. 9:14-cv-81395-KAM (S.D. Fla. Nov. 10, 2014), available at <https://www.ftc.gov/enforcement/cases-proceedings/132-3135/inbound-call-experts-llc>.

<sup>80</sup> See, e.g., *FTC v. Consumer Collection Advocates, Corp.*, No. 0:14-cv-62491-BB (S.D. Fla. Nov. 3, 2014), available at <https://www.ftc.gov/enforcement/cases-proceedings/142-3082/consumer-collection-advocates-corp>.

<sup>81</sup> See, e.g., *FTC v. Sunbright Ventures LLC*, No. 8:14-cv-02153-JDW-EAJ (M.D. Fla. July 22, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/132-3217/sun-bright-ventures-llc-gmy-llc>; *FTC v. Instant Response Systems LLC*, No. 1:13-cv-00976 (E.D.N.Y. Apr. 14, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/1223041/instant-response-systems-llc-et-al>.

<sup>82</sup> *FTC v. Professional Career Development Institute, LLC*, No. 1:15-cv-01872-WSD (N.D. Ga. June 4, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/132-3225/ashworth-college>.

<sup>83</sup> See *FTC v. Sameer Lakhany*, No. 8:12-cv-00337-CJC-JPR (C.D. Cal. Apr. 29, 2015), available at <https://www.ftc.gov/news-events/press-releases/2015/04/court-halts-mortgage-relief-operation-targeted-homeowners-facing>. See also *FTC v. C.C. Enterprises, Inc.*, No. 8:15-cv-00585-CJC-JPR (C.D. Cal. Apr. 16, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/112-3136-x120014/householdrelief>; *FTC v. Wealth Educators Inc.*, No. cv15-2357 (C.D. Cal. Apr. 10, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/1523004/wealth-educators-inc>.

<sup>84</sup> See e.g., *FTC v. Lanier Law, LLC*, No. 3:14-cv-00786-MMH-PDB (M.D. Fla. Sept. 1, 2016), available at <https://www.ftc.gov/enforcement/cases-proceedings/142-3038-x140039/lanier-law-llc>; *FTC & CFPB v. Green Tree Servicing, LLC*, No. 0:15-cv-02064 (D. Minn. filed Apr. 21, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/112-3008/green-tree-servicing-llc>; *FTC v. Asset & Capital Mgmt. Group*, No. CV13-5267 (C.D. Cal. May 19, 2014), available at <https://www.ftc.gov/enforcement/cases-proceedings/122-3031/asset-capital-management-group-dba-acm-group>.

<sup>85</sup> For a more detailed discussion of the FTC's recent antitrust enforcement matters, see Prepared Statement of the Federal Trade Commission On "Oversight of the Enforcement of the Antitrust Laws." Before the Subcommittee on Antitrust, Competition Policy and Consumer Rights of the Committee on the Judiciary, United States Senate (Mar. 9, 2016), [https://www.ftc.gov/system/files/documents/public\\_statements/934563/160309enforcementanti-trustlawstest.pdf](https://www.ftc.gov/system/files/documents/public_statements/934563/160309enforcementanti-trustlawstest.pdf).

<sup>86</sup> In FY 2015, the Agencies received notice of 1,801 transactions, compared with 1,326 in FY 2013 and 716 in FY 2009.

could be anticompetitive, the Commission has intervened. Since the beginning of Fiscal Year 2015, the Commission has challenged 44 mergers, including eight cases in which the Commission voted to initiate litigation to block the transactions.<sup>87</sup> This includes significant trial victories stopping both the Sysco/US Foods<sup>88</sup> and Staples/Office Depot<sup>89</sup> mergers. The Commission has been especially vigilant in response to heightened merger activity in the hospital and pharmaceutical sectors. In the last two years alone, the Commission has taken action in 13 pharmaceutical industry mergers, ordering divestitures of more than a hundred branded and generic drugs used to treat a variety of conditions.<sup>90</sup>

The Commission also maintains a robust program to identify and stop anticompetitive conduct. For nearly 20 years, 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 Supreme Court's 2013 decision in *FTC v. Actavis, Inc.*,<sup>91</sup> the Commission is in a much stronger position to protect consumers. Last June, for example, the FTC obtained a landmark settlement in its litigation against Cephalon, Inc.<sup>92</sup> when Cephalon's parent, Teva Pharmaceuticals, agreed to stop using certain types of anticompetitive patent settlements and pay up to \$1.2 billion in ill-gotten gains to reimburse drug wholesalers, pharmacies, insurers, and others who overpaid for the blockbuster sleep disorder drug Provigil.

To complement our enforcement efforts, the FTC pursues a robust policy and research agenda. The FTC promotes competition principles in advocacy comments to state lawmakers and regulators as well as our sister Federal agencies. The FTC also organizes public workshops and issues reports on cutting-edge topics, including workshops on solar distributed generation and the so-called "sharing economy." The Commission's current competition research projects include a remedy study to evaluate the effectiveness of the Commission's orders in past merger cases, which builds on a similar effort conducted in the 1990s that led to important improvements in the Commission's orders.<sup>93</sup> We are also in the final stages of a landmark study of patent assertion entities (PAEs) that will provide unique insights into PAE business models and activity.<sup>94</sup>

With the expansion of global trade and the operation of many companies across national borders, the FTC and the Antitrust Division of the Department of Justice increasingly engage with foreign antitrust agencies to ensure close collaboration on cross-border cases and convergence toward sound competition policies and procedures.<sup>95</sup> 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 also 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, we also work with other agencies within the U.S. government to advance consistent competition enforcement policies, practices, and procedures in other parts of the world.

<sup>87</sup> Complete data on the FTC's competition workload is available on its website at <https://www.ftc.gov/competition-enforcement-database>.

<sup>88</sup> *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1 (D.D.C. 2015).

<sup>89</sup> *FTC v. Staples, Inc.*, —F. Supp. 3d—(D.D.C. 2016), available at <https://www.ftc.gov/system/files/documents/cases/051016staplesopinion.pdf>.

<sup>90</sup> See, e.g., FTC News Release, *FTC Requires Teva to Divest Over 75 Generic Drugs to Settle Competition Concerns Related to its Acquisition of Allergan's Generic Business* (Jul. 27, 2016), <https://www.ftc.gov/news-events/press-releases/2016/07/ftc-requires-teva-divest-over-75-generic-drugs-rival-firms-settle>.

<sup>91</sup> *FTC v. Actavis, Inc.*, 570 U.S. 756 (2013).

<sup>92</sup> FTC News 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>.

<sup>93</sup> FTC News Release, *FTC Proposes to Study Merger Remedies* (Jan. 9, 2015), <https://www.ftc.gov/news-events/press-releases/2015/01/ftc-proposes-study-merger-remedies>.

<sup>94</sup> FTC News Release, *FTC Seeks to Examine Patent Assertion Entities and Their Impact on Innovation, Competition* (Sept. 26, 2013), available at <https://www.ftc.gov/news-events/press-releases/2013/09/ftc-seeks-examine-patent-assertion-entities-their-impact>.

<sup>95</sup> In competition matters, the FTC also seeks to collaborate with the state attorneys general to obtain the best results and maximize the use of limited resources in the enforcement of the U.S. antitrust laws.

### III. Challenges Facing the FTC

The FTC has worked to keep pace with the vast changes of the ever-changing marketplace. We recognize the agency must remain nimble to anticipate and respond to future marketplace changes and other challenges. However, two particular challenges are of concern: jurisdictional limitations over common carriers and non-profits.

#### A. *The FTC Act's Exception for Communications Common Carriers*

The FTC Act exempts common carriers subject to the Communications Act from the FTC's enforcement of its prohibitions on unfair or deceptive acts or practices and unfair methods of competition. The FTC has long called for the repeal of the common carrier exception. This carve-out originated in an era when telecommunications services were provided by highly-regulated monopolies. The exception no longer makes sense in today's deregulated environment where the lines between telecommunications and other services are increasingly becoming blurred, such as when telecommunications companies are buying edge providers and consumers increasingly communicate over online social networks instead of landlines.

As the telecommunications and Internet industries continue to converge, the common carrier exception is increasingly likely to frustrate the FTC's ability to stop deceptive and unfair acts and practices and unfair methods of competition with respect to a wide array of activities. That is particularly so if the Ninth Circuit's recent decision in the AT&T case stands.<sup>96</sup> As a result of that decision, the common carrier exception may disable the FTC from enforcing Section 5 of the FTC Act not only against common carriage activities, but also against non-common-carriage activities engaged in by an entity with merely the "status" of a common carrier, even if that is not its principal line of business. For example, the AT&T decision could prevent the FTC from bringing "cramming" cases against telephone companies and could have other farther-reaching effects as well on FTC programs ranging from Do Not Call to COPPA. The FCC's authority over common carriers is limited to the provision of services for or in connection with common carriage. If common carriers are providing non-common carrier products or services, one outcome might be that neither the FCC nor the FTC would have jurisdiction to respond to practices that harm consumers. And even in cases where the FCC can respond, it lacks authority to seek consumer redress.

This problem is intensified by the FCC's reclassification of broadband Internet access service as a common carriage service.<sup>97</sup> Because broadband providers are now deemed common carriers, not only is their broadband service beyond the reach of FTC enforcement, but other, non-broadband activities may be as well. Any company that has or acquires the status of a common carrier will be able to argue that it is immune from FTC enforcement against *any* of its lines of business by virtue of its common carrier status.

Even apart from the effect of the AT&T decision, unless the common carrier exception is repealed, the Commission will no longer be able to bring cases like the "throttling" actions against AT&T<sup>98</sup> and TracFone.<sup>99</sup> In both cases, we alleged that the companies promised their customers unlimited data but in reality severely limited data usage by reducing—or throttling—the data speeds of high-usage customers to the point that many common mobile phone applications, like web browsing, GPS navigation, and streaming video, became difficult or nearly impossible to use.

This type of basic consumer protection issue falls squarely within the core mission of the FTC. Such matters are emerging with increasing regularity in the telecommunications industry as major telecommunications and broadband companies increasingly diversify. Yet the common carrier exception may prevent the FTC from protecting consumers from these problems and emerging issues presented by new technologies and the blurring of industries. And under the AT&T decision, we could wind up in a situation where the same service or product (no matter how far afield from telecommunications) sold by two different companies, one with common carrier "status" and one without it, will be subject to unequal enforcement.

Removing the exception from the FTC Act would enable the FTC to bring its extensive law enforcement experience to bear in protecting consumers of common car-

<sup>96</sup> See *Federal Trade Comm'n v. AT&T Mobility LLC*, No. 15-16585 Slip Op. (9th Cir. Aug. 29, 2016).

<sup>97</sup> See *In re Protecting and Promoting the Open Internet*, FCC 15-24 (2015) (report and order) (GN Docket No. 14-28).

<sup>98</sup> *FTC v. AT&T Mobility, Inc.*, <https://www.ftc.gov/enforcement/cases-proceedings/122-3253/att-mobility-llc-mobile-data-service>.

<sup>99</sup> *FTC v. TracFone Wireless, Inc.*, No. 3:15-cv-00392 (N.D. Cal. filed Jan. 28, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/132-3176/straight-talk-wireless-tracfone-wireless-inc>.

riage services (and non-common-carriage services offered by common carriers) against unfair and deceptive practices in the same way that it can protect against unfair and deceptive practices for other services. For example, we have a long history of privacy and data security enforcement against a wide range of entities under our jurisdiction that operate in the technology and communications industries—companies like Microsoft, Facebook, Google, HTC, and Twitter, app providers like Snapchat, Fandango, and Credit Karma, and cases involving the Internet of Things, mobile payments, retail tracking, crowdsourcing, and lead generators. Removing the exception is the simplest, cleanest way to ensure continued consumer protection.

#### *B. Jurisdiction over Nonprofit Entities*

Currently, the FTC’s jurisdiction over non-profits is limited.<sup>100</sup> The FTC Act applies to “persons, partnerships, or corporations,”<sup>101</sup> and the Act defines “corporation” as an entity that “is organized to carry on business for its own profit or that of its members.”<sup>102</sup>

We recommend that our jurisdiction be extended to certain non-profit entities. In healthcare provider markets, where the Commission has particular expertise, the agency’s inability to reach conduct by various non-profit entities has prevented the Commission from taking action against potentially anticompetitive behavior of non-profits engaged in business.<sup>103</sup> These concerns also apply to our consumer protection mission. For example, despite many publicized data breaches at nonprofit hospitals and universities, the FTC cannot challenge unfair or deceptive data security or privacy practices of these entities.<sup>104</sup> These breaches have exposed the sensitive data of millions of consumers, yet the Commission cannot act due to the non-profit status of these entities. Further, while the Commission can use Section 5 to reach “sham” non-profits, such as shell non-profit corporations that actually operate for profit<sup>105</sup> and sham charities,<sup>106</sup> these investigations require resource-intensive factfinding to satisfy this standard.

#### **IV. Conclusion**

Thank you for the opportunity to provide the Commission’s views. We appreciate Congress’s confidence in the FTC’s ability to protect consumers and, through our enforcement, education, and policy efforts, we will ensure that your confidence is well-placed. The FTC remains committed to finding ways to enhance its effectiveness in protecting consumers and promoting competition, to anticipate and respond to

<sup>100</sup>The Commission has jurisdiction over most non-profits in several discrete areas, for example, under certain consumer financial statutes such as the Truth in Lending Act and the Equal Credit Opportunity Act. The Commission also has jurisdiction over non-profit entities for purposes of the Clayton Act, most notably Section 7, which prohibits mergers or acquisitions where “the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.” 15 U.S.C. § 18.

<sup>101</sup> 15 U.S.C. § 45(a)(2).

<sup>102</sup> 15 U.S.C. § 44. Under this framework, the Commission can reach “sham” non-profits, such as shell non-profit corporations that actually operate for profit; for-profit entities falsely claiming to be affiliated with charitable organizations who affirmatively misrepresent that “donations” collected will go to charity; and organizations such as trade associations that engage in activities that provide substantial economic benefit to their for-profit members, for example, by providing advice and other arrangements on insurance and business matters, or engaging in lobbying activities.

<sup>103</sup>For example, the Commission generally cannot challenge anticompetitive conduct, such as collusive behavior, by non-profit hospitals. In three past enforcement actions, the Commission alleged that groups of physicians and hospitals had participated in unlawful price-fixing arrangements, but was able to sue only the physicians and a for-profit hospital. See *Piedmont Health Alliance*, 138 F.T.C. 675 (2004) (consent order), available at <https://www.ftc.gov/enforcement/cases-proceedings/0210119i/piedmont-health-alliance-inc-et-al-matter>; *Tenet Healthcare Corp./Frye Regional Medical Center*, 137 F.T.C. 219 (2004) (consent order), available at <https://www.ftc.gov/enforcement/cases-proceedings/0210119h/tenet-healthcare-corporation-frye-regional-medical-center-inc>; *Maine Health Alliance*, 136 F.T.C. 616 (2003) (consent order), available at <https://www.ftc.gov/enforcement/cases-proceedings/0210017/maine-health-alliance-william-r-diggins-matter>.

<sup>104</sup>A substantial number of reported breaches have involved non-profit universities and health systems. See Privacy Rights Clearinghouse Chronology of Data Breaches (listing breaches including breaches at non-profits, educational institutions, and health facilities), available at <http://www.privacyrights.org/data-breach/new>.

<sup>105</sup>See, e.g., *FTC v. Ameridebt, Inc.*, 343 F. Supp. 2d 451, 460–62 (D. Md. 2004) (denying motion to dismiss where FTC complaint alleged that purported credit counseling organization incorporated as a non-profit entity was a “de facto for-profit organization”). The history of the FTC’s case is available at <https://www.ftc.gov/enforcement/cases-proceedings/0223171/ameridebt-inc>.

<sup>106</sup>See, e.g., *FTC et al., v. Cancer Fund of America, Inc. et al.*, No. CV15–884 PHX NVW (D. Az. filed May 19, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/122-3005-x150042/cancer-fund-america-inc>.

changes in the marketplace, and to meet current and future challenges. We look forward to continuing to work with the Committee and Congress, and we would be happy to answer any questions that you and other Members may have about the FTC.

The CHAIRMAN. Thank you, Madam Chair.  
Commissioner Ohlhausen.

**STATEMENT OF HON. MAUREEN K. OHLHAUSEN,  
COMMISSIONER, FEDERAL TRADE COMMISSION**

Ms. OHLHAUSEN. Chairman Thune, Senator Blumenthal, and members of the Committee, thank you for the opportunity to appear before you today. I'm FTC Commissioner Maureen Ohlhausen, and I will briefly address the FTC's efforts to protect consumers and competition in the face of technological change and increasing globalization.

These two trends offer substantial benefits to American consumers and businesses through new products, business models, and competition. Unfortunately, they also provide new avenues for unfair and deceptive practices. Thus, the FTC is committed to addressing the impact of new technology and increasing globalization as part of our law enforcement and policy efforts. In this work, we strive to ensure our approach remains flexible and effective in the face of dynamic conditions.

The FTC has been at the forefront of combating deceptive practices on the platforms that consumers use on a daily basis, including smartphones and connected devices. Our enforcement actions have included cases against ISPs and some of the biggest telecom and Internet companies. For example, T-Mobile and AT&T recently settled FTC allegations over cramming, which is the placement of unauthorized third-party charges on consumers' phone bills. Apple, Amazon, and Google settled FTC allegations that they billed parents for items kids bought in mobile apps without the parents' consent. TracFone settled FTC charges that it made deceptive claims concerning its unlimited data service. We also continue our aggressive enforcement and education efforts in the area of Do Not Call, and, in particular, the fight against automated telephone calls, known as robocalls.

The FTC is also the primary privacy and data-protection agency in the U.S. In 2015, in the Wyndham case, the Third Circuit affirmed the Commission's authority to challenge unreasonable data security failures. The Wyndham matter also serves as an important reminder that companies who store sensitive consumer data should create reasonable data security measures and keep the promises they make to consumers about protecting their information.

Another hallmark of our privacy work is protecting children online. The Children's Online Privacy Protection Act, or COPPA, requires websites and apps to obtain parental consent before collecting personal information from children under 13. To date, the FTC has brought over 20 COPPA cases protecting children and collecting millions of dollars in penalties. As children have increasingly used mobile phones and connected devices, we've brought actions against companies with child-directed apps that allowed third-party advertisers to collect kids' personal information and tracked kids' locations without parental consent.

In addition to enforcement, the Commission regularly employs other tools. For example, the FTC held a workshop on the Internet of Things, as you mentioned, Senator, a technology with the potential to revolutionize many fields, including manufacturing, logistics, medicine, transportation, and energy.

The ability to collect and use large amounts of information also raises important consumer privacy and data issues—data security issues, however. Following the workshop, we published a staff report addressing how longstanding privacy principles can be adapted to the Internet of Things, and recommended best practices. The report also stated that, given the rapid pace of technological innovation, Internet of Things specific regulations would be premature.

I would also like to reiterate the Commission's longstanding bipartisan request for Congress to repeal the common carrier exemption. Although the FTC has nearly a century of experience protecting consumers across many industries, the exemption from our jurisdiction for common carriers frustrates effective consumer protection with respect to a wide array of activities, including fraud in billing practices in the crucially important telecommunications and Internet industries. This is particularly true in light of the Ninth Circuit's recent decision in the AT&T case, which held the common carrier exemption was status-based and thus extended to non-common-carrier activities of common carriers. This may impact our ability to prevent cramming, deceptive marketing, COPPA violations, and unwanted calls affecting millions of consumers.

Along with technological innovation, globalization has also greatly impacted American consumers and businesses. Thus, the FTC has worked to build strong relationships with foreign counterparts and organizations to further cooperation on enforcement, promote convergence toward sound economic policies and enhanced due process.

To end on a broader note, I want to emphasize that the FTC's institutional structures and culture facilitate an open exchange of ideas among the Commissioners. I believe this process of finding common ground improves the quality of our decisions, and thus furthers our mission of protecting consumers. Occasionally, however, I have respectfully dissented, particularly where I believed FTC action would not, on balance, make consumers better off. Yet, I'm confident that my colleagues share with me the goal of ensuring that our work provides a net benefit to consumers, even if we don't always agree on how to reach that goal.

I look forward to working with the Committee and my colleagues to continue our important work to protect consumers and preserve competition.

The CHAIRMAN. Thank you, Commissioner Ohlhausen.  
Commissioner McSweeney.

**STATEMENT OF HON. TERRELL MCSWEENEY, COMMISSIONER,  
FEDERAL TRADE COMMISSION**

Ms. MCSWEENEY. Thank you very much, Chairman Thune, Senator Blumenthal, and members of the Committee, for inviting us here today. I'm Terrell McSweeney, a Federal Trade Commissioner. And, like my colleagues, I look forward to speaking with the Com-



mittee about our work, our priorities, and how we protect American consumers from scams and ensure a competitive marketplace.

The Federal Trade Commission safeguards consumers from unfair or deceptive acts and practices. Since its founding—and thank you for acknowledging our long history with this committee—the FTC has followed American consumers from the corner store of 1914 to the Internet-connected wearable of today.

Much of today’s discussion will focus on the Internet of Things, privacy, and data security, but our enforcement actions in those areas are a seamless part of our overall enforcement agenda, an agenda that is rooted in the principles that consumers should be treated fairly and honestly in the marketplace.

Even as we examine digital technologies, we continue to police against more analog frauds. For example, in the last week, we challenged a sweepstakes fraud that targeted senior citizens with promises of million-dollar prizes, but instead stole their money; we banned abusive debt collectors and shut down a phony business directory scam that stole millions from small businesses.

On the debt-collection front alone, in the first 9 months of this year we have recovered \$94 million for consumers and banned 30 companies from ever working in debt collection again.

These are the frauds that our attorneys and investigators fight every single day. These scams prey on people who are struggling, the elderly, and underserved communities. They are perpetrated by unscrupulous fraudsters, and ending their operations is a part of our bipartisan mission.

Policing frauds and scams are just one aspect of our efforts to protect American consumers. We also work closely with State and local enforcement partners throughout the country. Our collaboration with State attorneys general was integral in shutting down a fraudulent charity, Cancer Fund of America, which took in millions of dollars and largely served as a slush fund for its executives.

The Commission also works with partners on the local level. Each year, we hold multiple Common Ground Conferences around the country. These events give local law enforcement, social service organizations, community institutions, and regular old consumers a better understanding of our consumer protection work and helps us form the partnerships that both inform our enforcement and lead to stopping frauds in the marketplace.

Our Every Community Initiative recognizes that fraud impacts each and every community in our country. This could mean undertaking efforts to combat Medicare fraud among our seniors, mortgage modification frauds in distressed neighborhoods, or “notario” fraud in Latino communities. The initiative works with local partners, distributes materials to libraries and senior centers and other gathering places, and works with ethnic media to get specific information to media outlets that directly serve their communities.

In addition to our Every Community Initiative, last year we relaunched *IdentityTheft.gov*, creating an easy-to-use one-stop shop of information and personalized recovery plans for consumers experiencing identity theft. Our team is currently working on streamlining what was once a time-consuming and difficult process. Unfortunately, however, in this environment, identity theft remains a top consumer complaint in our sentinel system year after year.

Educating businesses and entrepreneurs is a major part of our effort to improve data security. This year, we launched our Start with Security program to help guide businesses through the process of developing strong data security procedures. Through sessions in various cities and the publication of our *Start With Security Guide*, the FTC has helped businesses of all sizes develop plans to safeguard their data.

Finally, we keep pace with developing technologies. Take for instance FinTech, or financial technology. This is the emerging technology of payments, banking, and lending. In the last year, we've brought cases involving the deceptive use of crowd-funding platforms and stopped a fraudulent bitcoin mining operation. We're also holding workshops on marketplace lending and ransomware, crowd funding, and peer-to-peer payments.

Our experience enforcing statutes like the Gramm-Leach-Bliley Act, the Truth in Lending Act, the Electronic Funds Transfer Act, and the Fair Credit Reporting Act, the Fair Debt Collection Practices Act, and others, gives the FTC the expertise and capacity to protect consumers as traditional banking is disrupted by new technologies and new services while at the same time facilitating this important innovation, which has tremendous consumer benefit.

We're a dynamic agency, even though we've been around for 100 years, and one that has always been protecting consumers wherever they are. The FTC will continue to be a bipartisan protector of the American consumer and markets.

We look forward to answering your questions. Thank you for having us here today.

The CHAIRMAN. Thank you, Commissioner McSweeney.

Let me just start. I want to ask about data security—it has been covered in your remarks, and some of ours as well—and the Commissioner's enforcement authority. The recent news of yet another massive data breach, this time involving at least 500 million Yahoo accounts, underscores the need to protect consumers against unreasonable data security practices that put them at risk of identity theft and financial harm. At the same time, there are questions that remain about the Commission's authority in this area. On the one hand, the Third Circuit's ruling last year would appear to be a major victory underscoring your authority to enforce against lax data security practices. On the other hand, as I noted in my opening remarks, the Commission's own recent administrative ruling raises serious questions about whether the FTC's actions are always predicated on substantial injury to consumers.

When weighing whether to bring a case alleging unfair practices, the Commission must assess whether the practices causes substantial injury, which has traditionally meant monetary harm, not emotional impact or other subjective types of harm. Chairwoman Ramirez, what do you believe it means for harm to be "substantial"? And what are the implications for the FTC's approach to data security cases?

Ms. RAMIREZ. Thank you for the question, Chairman Thune.

I agree with you that the issue of data security is a very significant concern, and it's an issue that we've been addressing for well over a decade. I will note that all of our cases do comply with the standard for unfairness that is set out in our statute, which re-

quires that there be substantial injury. However, I will disagree with you in one respect, and that is that there is no limitation or requirement that the harm be economic. Most of our cases do allege harm that is economic and tangible, but there is no such restriction. And in a few instances that are appropriate, we do feel that it's proper for the agency to address serious intangible harms, like privacy harms. That would include the infringement and potential revelation of private information, as well as privacy intrusions.

I'll give you one example, and that's our Aaron's case, which involves a company that rented out computers. As a method to attempt to address situations where customers did not either make rental payments or did not return these rented computers, they used software that allowed and basically captured, via camera, what was happening inside a person's home. In that kind of a situation, I believe that it would be absolutely appropriate for the agency to take action, and that it is important for us—when there is a serious intrusion of that type, for the Commission to take action.

The CHAIRMAN. So, substantial harm, in your mind, does not just constitute simply an economic or monetary—

Ms. RAMIREZ. Again, in most instances, that is likely to be the harm at issue, but, in certain cases, and, in particular, I think, in privacy and data security cases, there may be another more intangible harm that may be implicated. And I believe that a privacy intrusion would be one of those instances.

The CHAIRMAN. Regarding the FCC's Title II privacy proceeding, the Chairman, Tom Wheeler, has stated that the FTC filed good comments, and the FCC's final rule will look a lot like that. I appreciate Chairman Wheeler's deference to the FTC's experience regarding consumer privacy protection, but I also would like to know whether each of you believes that consumers would benefit from the FTC having an opportunity to review the text of the FCC's new privacy proposal and publicly comment on it before the FCC votes. And, if not, could you explain why?

We'll start with you, Chairwoman Ramirez, and then hear from each of the Commissioners.

Ms. RAMIREZ. Mr. Chairman, as you've noted, we have had an opportunity to publicly comment and provide our suggestions to the FCC about how they can improve their proposed framework. If it's appropriate for us to have an opportunity to do that again—and I'd have to defer to Chairman Wheeler and his colleagues as to whether it's appropriate for us to be commenting publicly again, and having another opportunity to do that—we are certainly happy to do so.

I will say that we do engage in regular conversations with the Federal Communications Commission, both at the staff level as well as at more senior levels and my level, to discuss the approach that we take when it comes to privacy. And I do, as you already noted—do know that they take our comments very seriously.

The CHAIRMAN. OK. And, before they vote on it and it becomes more final, do you think it would be useful and helpful for the FTC to be able to react to the current iteration of that proposal?

Ms. RAMIREZ. Again, I have to defer to them on what's appropriate for their process. I don't want to intrude on that process.

But, at the same time, we're certainly happy to provide any additional comments and offer our own suggestions. Certainly.

The CHAIRMAN. Commissioner Ohlhausen.

Ms. OHLHAUSEN. Thank you, Senator.

I was very pleased that the FTC was able to file bipartisan, unanimous comments approving our staff comments to the FCC on these important issues. And I continue to try to, through other means, bring attention to the FTC's time-tested approach in this area.

Like Chairwoman Ramirez, I would certainly want to be sure we were, you know, permitted to weigh in, but I think it could be beneficial, given the years and years of experience the FTC's brought to consumer privacy, to be able to give some additional feedback to the FCC.

The CHAIRMAN. Chairman McSweeney?

Ms. MCSWEENEY. Like my colleagues, I would reiterate that we stand ready to work with the Federal Communications Commission. You know, I want to make sure that I underscore the fact that, in our initial bipartisan comment to the FCC, we were very supportive of their proposed rule in this area. We do believe that, like the FTC, the FCC shares our goals of transparency, consumer choice, and security, and that they have an important role to play in protecting consumer privacy as they undertake this rulemaking. So, if it's—as my colleagues have said—if it's permissible for us to again comment, I'm sure we'd be willing to do so if it comported with their rules and procedures.

The CHAIRMAN. Senator Blumenthal.

Senator BLUMENTHAL. Thanks, Mr. Chairman.

Coming back to data breaches, Yahoo and the like—they have affected Home Depot, Target, Experian, Anthem, a variety of non-profits, insurers, hospitals, and literally every major collector or storer or possessor of data has been subject to this kind of attack or breach that, in many instances, could have been prevented by reasonable and appropriate measures to safeguard consumer data that these very entities collect.

So, my question is, under Section 5 and the report that the FTC issued—it's called "Protecting Consumer Privacy in an Era of Rapid Change"—aren't there changes in the law that could make the FTC a more effective enforcer of privacy, to require more robust security practices and more honest disclosure by these companies and other entities about what they do? I would like to ask each of the panel members whether they support the Data Security and Breach Notification Act that Senator Nelson and I have introduced.

Chairwoman Ramirez?

Ms. RAMIREZ. Senator, as I noted before, this is an incredibly important issue. I think, frankly, that data security is one of the most significant challenges that we face as a Nation. And I believe that, while we have been able to do very important work using our Section 5 authority at the Commission, including not only bringing enforcement actions, but then also providing guidance to the business community, I do believe that it is necessary for Congress to take action in this area. It would be very helpful for there to be Federal legislation that would give additional authority to the FTC, including providing for civil penalty authority, and among other things,

also providing and giving us jurisdiction over nonprofits, which also see significant—have experienced significant breaches. So, those would be two areas where we would benefit from additional authority.

So, yes, I am in favor of the proposed legislation and believe it's something that ought to happen.

Senator BLUMENTHAL. Commissioner Ohlhausen?

Ms. OHLHAUSEN. I agree with Chairwoman Ramirez that data security is one of the biggest issues facing businesses and consumers today, and, therefore, facing the FTC. And I have been supportive of having Federal data security and breach notification legislation that would give the agency civil penalty authority and authority over nonprofits.

Senator BLUMENTHAL. Thank you.

Commissioner McSweeney?

Ms. MCSWEENY. I believe you're witnessing one of those areas of bipartisan agreement among the Commissioners, because I, like my colleagues, support comprehensive data security legislation, as well.

I'd just like to underscore an important point here that, as we are on the cusp of this Internet of Things facilitated, sort of, innovation and revolution connecting all of these different parts of our daily lives, we have a significant challenge, which is that something like 84 percent of U.S. households are deeply concerned about the privacy and security implications of this technology. So, if we want this innovation to flourish, we want this marketplace to flourish, which I believe we do, we need to address their security concerns so that consumers feel comfortable adopting these technologies.

Senator BLUMENTHAL. I think that point is very, very well taken. There's no reason for this new frontier of privacy to be a Wild West. In fact, if it is, it will discourage innovation, invention and consumers adopting and adapting to this new world that increasingly confronts them.

Let me come back to an issue that Commissioner McSweeney raised, the plethora of complaints that are received about the Do Not Call List. States have them. The Federal Government has them—Do Not Call Lists. And yet, one of the most common sources of complaints to me and, I'm sure, my colleagues, is that they receive unwanted and unsolicited calls. Again, as technology enables robocalling and other new advances in outreach to consumers, do we need a different system, new legislation? What has to be done to make it more effective?

I have advocated, for example, for a ban on robocalls. What would this panel think about more effective new action in this area?

Ms. RAMIREZ. As you noted, Senator Blumenthal, this is an area that is a frustrating one for us. We do engage in significant efforts to try to ensure compliance with current law. But, at the same time, there's no question technology has enabled malefactors to avoid and bypass the law in this area. So, what we have done, in addition to continuing active enforcement, is to, frankly, try to utilize technology as a way of stopping these illegal robocalls. And so, we have—as already has been noted, we have had challenges to,

basically, seek assistance from the private sector and ask for the development of technology that might help in this arena. We're also consistently engaging in discussions with the Federal Communications Commission to see if there might be appropriate action that can be taken at their end to help block these unwanted calls.

So it's an area that we are certainly very keenly aware of and understand the concerns, and are working both to develop technological solutions as well as determine whether it's appropriate for other form of regulation to assist.

Senator BLUMENTHAL. My time is expired. I don't know whether the other members of the Commission have views, but I would welcome them in writing if you do. I don't want to take more time now. If we have a second round of questions, maybe we can return to this issue.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Blumenthal. Senator Heller is up next.

**STATEMENT OF HON. DEAN HELLER,  
U.S. SENATOR FROM NEVADA**

Senator HELLER. Mr. Chairman, thank you.

And, to the Commissioners, thank you for taking time and being here today. I certainly do appreciate it.

I want to talk a little bit about—a little bit about the state of Nevada and the tourism being the lifeblood of the economy. I guess I'll just let the statistic speak for itself.

I don't think there's anybody that hosts better than the state of Nevada. I think the rest of the world knows it, because nearly \$60 billion of travel spending is injected into Nevada's economy every year, accounting for about 13 percent of the State's annual GDP. Last year, the Las Vegas—Las Vegas experienced a record year, so it continues to grow, surpassing 42 million tourists. The Las Vegas Convention and Visitor Authorities has estimated that our tourism economy generates more than \$50 billion annually and supports over 366,000 jobs in southern Nevada alone, which is about 40 percent of the total jobs in that area of the state. I think most of you know that lodging and gaming industry is a big part of that. So, when travelers come to Nevada, they expect to stay in some of the nicest resorts in the world. They expect to be treated like kings and queens, and pampered with the latest and the greatest of amenities. It's all part of the Las Vegas and Nevada experience.

Chairwoman Ramirez, you and I had several discussions on some of these resort fees, and I'd like to move to that area. Now, the Commission offered some guidance in 2011. In your opinion, do you believe that the consumers have benefited from those 2011 practices coming from the Commission for lodging and for the industry as a whole?

Ms. RAMIREZ. Senator, yes. And so, let me just provide a little bit of background here so that my—

Senator HELLER. Don't take up too much of my time.

Ms. RAMIREZ. I promise I won't.

Senator HELLER. All right.

Ms. RAMIREZ. Back in 2012, we did provide some guidance with regard to the use of hotel resort fees.

Senator HELLER. Yes.

Ms. RAMIREZ. And we did have a concern that mandatory resort fees were being separated from room rates, and we were also concerned that those mandatory resort fees were not being properly disclosed to consumers. And so, we did provide some guidance indicating that it would be adequate to promptly—after advertising a room rate, to promptly thereafter show any mandatory resort fee.

I will note, however, that, although that guidance that we provided back in 2012 has improved the conduct of many companies when it comes to the effective disclosure of resort fees, I have become increasingly concerned about certain developments since then that have raised and—raise questions about whether that is enough when it comes to effective disclosure.

Senator HELLER. So, what brought your concern? What prompted your concern?

Ms. RAMIREZ. So, let me note that—

Senator HELLER. I guess the question is, How many complaints have you received?

Ms. RAMIREZ. Well, I don't have an—a number, but let me just say that—

Senator HELLER. I do.

Ms. RAMIREZ.—let me just say that it's important for us to continuously evaluate our positions, given the evolving marketplace. This is one of those areas where I think it is appropriate for us to take another look, because—number one, we've seen a surge in the use of mandatory resort fees being separated from room rates. Secondly, we've seen an increase in the use of comparison sites to search for information about hotels. We've also seen a rise in the use of smartphones that have very small screens. Additionally, I think we have a more sophisticated and refined understanding about how consumers actually process—

Senator HELLER. OK, so—

Ms. RAMIREZ.—information when—

Senator HELLER.—the question is—

Ms. RAMIREZ.—it comes to—

Senator HELLER. You're explaining all this. But, how many complaints have you actually received?

Ms. RAMIREZ. I can't give you a figure. I can certainly provide you additional information. What I can tell you is that this is a concern that we have—

Senator HELLER. Well, I can tell you what the number is.

Ms. RAMIREZ.—heard about breaking up—

Senator HELLER. Eight or ten.

Ms. RAMIREZ.—fees.

Senator HELLER. Eight or ten. Eight or ten complaints.

Ms. RAMIREZ. I'm happy to provide you additional information to—in terms of the number of complaints. What I can tell you is that I have received—we have received consumer complaints. We have received—

Senator HELLER. How many—

Ms. RAMIREZ.—concerns about this area.

Senator HELLER.—consumer complaints—how many consumer complaints do you get on consumer fraud?

Ms. RAMIREZ. We get hundreds of thousands, if not—

Senator HELLER. Millions.

Ms. RAMIREZ.—millions, of consumer—

Senator HELLER. Millions. You get eight or ten on this. And now you want to enact new regulations.

Ms. RAMIREZ. No. It's an issue that I think is very appropriate for us to take a look at. It's a concern—

Senator HELLER. Well—

Ms. RAMIREZ.—of mine. And I think it's something that, as an agency, as the marketplace evolves, and as consumers use the on-line marketplace, I think it's important for us to make sure that they can be confident in that online marketplace.

Senator HELLER. Have you taken any enforcement action against any hotel or resort operators on resort fees? Any actions?

Ms. RAMIREZ. We have sent warning letters, and—

Senator HELLER. Right. Right. I understand that. Twenty-two, I think—

Ms. RAMIREZ. As of—

Senator HELLER.—total.

Ms. RAMIREZ.—right now, what we're doing is, I'm taking another look at this issue, because I think it's one that's of serious concern. And in order to—

Senator HELLER. OK.

Ms. RAMIREZ.—ensure that consumers have confidence in the marketplace—before I take any—we take any enforcement action, I have been engaging in discussions with the industry to see if there might be a voluntary approach that can be taken here to address some of these concerns.

Senator HELLER. This—OK, thank you. Thank you for your comments.

Ms. Ohlhausen, you've been on the Commission since 2012. In your experience, does the Commission often spend time developing new guidance on issues, having received only eight complaints and zero enforcement actions in 5 years?

Ms. OHLHAUSEN. Well, I haven't done a study of how many complaints drive actions that we've taken. I would say that we do get information from a variety of sources. And particularly on the resort fees, I've been encouraged by the interactions we've had with the hotel and gaming industries on ideas they have for making progress in this area.

Senator HELLER. Do you believe that the current disclosures implemented as a result of the previous guidance in 2011 are deceptive?

Ms. OHLHAUSEN. I haven't applied the deception test to it. I would have to see what consumers—how they react to it. I certainly believe that you can have a disclosure that is nondeceptive, but the question is, Can you have one also that is improved or has technology changed in a way that makes it not as informative to consumers as previously available.

Senator HELLER. So, are you comfortable with the rulemaking authority on resort fees?

Ms. OHLHAUSEN. I don't anticipate, just speaking for myself, that this is where we will make a rule. I'm still in the phase of gathering information and hearing from the parties and hearing from



our staff, our economists, what information they have, to determine what the correct next step is.

Senator HELLER. Mr. Chairman, my time's run out.

The CHAIRMAN. Thank you, Senator Heller.

Senator Klobuchar is up next.

**STATEMENT OF HON. AMY KLOBUCHAR,  
U.S. SENATOR FROM MINNESOTA**

Senator KLOBUCHAR. Thank you very much.

And thank you all for being here today. You do very important work. I especially wanted to thank you for the work on Volkswagen at the Commission. I know that was a difficult issue, and I thank you for that. I understand you, just this morning, won an important case in the Third Circuit—Is that right?—on hospitals, which we appreciate. If we have more time, you can talk about that, as well.

I thought I'd start, before going to the issue that I'm most focused on with the FTC, which is the prescription drug prices, by following up on not the same, but a related travel issue. I'm Chair of the Tourist Subcaucus, and I know Senator Schatz does a lot of work on that, as well.

Chairwoman Ramirez, in March, when you appeared before the Judiciary Antitrust Subcommittee, of which I'm the Ranking Member, we discussed my concern about concentration in the online travel agency market. Specifically, I asked about the Expedia Accelerator Program, under which a hotel can pay Expedia more and obtain a better position in search results. We discussed the 2013 letters you sent to search, travel, and retail sites reminding them that they must be clear when their results are not natural search results. At that hearing, you committed to looking into whether the program complies with Section 5 of the Federal Trade Commission Act. What progress have you made on this matter?

Ms. RAMIREZ. Senator, again, thank you for the concern that you raised. Unfortunately, I can't discuss publicly any specific practices of particular companies. But, I assure you that we certainly did hear the concerns that you've raised, and I also can assure that we are committed to rooting out any anticompetitive conduct.

Senator KLOBUCHAR. Thank you.

Now, on to prescription drugs. As you know, one drug has made a lot of press lately. And that was the 500-percent increase to the EpiPen. There have been hearings. There have been the usual cycle of people complaining. Then there are *mea culpas*, then the drug price gets reduced, and then we start the cycle again with the next drug. What I hope my colleagues are aware of is that four out of ten of the top-selling drugs in America have, in fact, gone up over 100 percent in the last few years. Insulin has gone up three times the amount. This is getting to be an untenable situation for the American people.

There are a number of bills out there that I think would be helpful. One of them is the Pay for Delay bill that I have with Senator Grassley, which CBO estimates would bring in \$3 billion for taxpayers, even more for individuals. Same with the CREATES Act, which forces brand-name drug companies to give samples so we can create generics.

But, on the Pay for Delay, obviously you guys did some work here on the *FTC v. Actavis* case, which was an important victory.

Chairman Ramirez and Commissioner McSweeney, do you believe the bill that I have with Senator Grassley on the CREATES Act or the Pay for Delay bill—would these be helpful in trying to get more generics on the market and get more competition?

Ms. RAMIREZ. Senator, yes. You noted the victory that the FTC had in the Actavis case. I think that certainly was an important victory for the agency that allows us to do important work in the pay-for-delay arena. However, I do believe that your proposed legislation would buttress our efforts and, by creating a rebuttable presumption, would further strengthen our ability to tackle situations where we believe there might be anticompetitive conduct.

Ms. MCSWEENEY. And I agree.

Senator KLOBUCHAR. OK. Very good.

You want to add anything, Commissioner?

Ms. OHLHAUSEN. Well, I've been very supportive of the FTC's Pay for Delay enforcement. And I also generally have concerns about the ability of a competitor to abuse a government process to keep competitors out of the market.

Senator KLOBUCHAR. Thank you.

Evergreening or product hopping is another type of conduct that has raised antitrust concerns. For example, Allergan tried to force patients taking Namenda, which is a drug used to treat Alzheimer's, to switch to a new version of the drug before the generic was out and available. Instead of suing after the fact, the New York Attorney General used the antitrust laws and obtained a court order blocking the plan until after generic competition was available. According to one report, that action averted an estimated \$6 billion in increased Medicare drug spending.

Chairwoman, do you believe product hopping can cause consumer harm? And could you explain it to my colleagues?

Ms. RAMIREZ. Senator, yes. This is another area of concern. I think it's an area that we have to be careful in, because, of course, we do want companies to continue to make improvements with new drugs, but, at the same time, if a company makes a minor improvement in a drug product that ends up having little or no therapeutic benefit and has anticompetitive consequences, that could certainly violate the antitrust laws and would be of significant concern to us.

Senator KLOBUCHAR. And the idea here is that a company will take a drug and maybe go from a tablet to a capsule or maybe to a 24-release capsule, and that extends their patent protections. That's why they call it "evergreening." Then another competitor or a generic can't come in the market. So, you can just keep extending and extending, and then we have no competition at all.

Ms. RAMIREZ. That's right. What would happen would be that that would allow the branded drug manufacturer to bypass automatic generic substitution laws, and thereby prevent or impede and get in the way of a very effective distribution method, and that would end up potentially harming consumers.

Senator KLOBUCHAR. And this could be part of the reason that our drug prices in America are double the average prices in Canada?

Ms. RAMIREZ. This would be one of the areas, again, that causes us concern. And we certainly are, of course, concerned about significant hikes that we've seen in prices. So, it is a—it can be a concern.

Senator KLOBUCHAR. OK.

And my last question, just maybe a sentence answer, is that I've asked the FTC to investigate specifically whether Mylan Pharmaceuticals used incentives or exclusionary contracts with insurers, distributors, or pharmacies to deny an alternative product access to the market. I also asked you to provide any guidance or policy proposals to make these drugs more competitive and eliminate the ability of some drug manufacturers to reap windfall profits at the expense of consumers.

I know I asked for a response within 90 days, but can you update me on where the Commission is in answering these questions?

Ms. RAMIREZ. Certainly. Again, let me just say that we share the concerns that you've expressed, Senator Klobuchar, and we absolutely are committed to making sure that there's enforcement of the antitrust laws. We are in the process of preparing a response, and will, in short order, have a response to you.

Senator KLOBUCHAR. Thank you.

Thank you, to all three of you, for your good work.

The CHAIRMAN. Thank you, Senator Klobuchar.

Senator Schatz.

**STATEMENT OF HON. BRIAN SCHATZ,  
U.S. SENATOR FROM HAWAII**

Senator SCHATZ. Thank you, Mr. Chairman.

Commissioner Ramirez, I wanted to start with credit reports. The FTC found that 1 in 20 consumers have errors significant enough to materially hurt their credit scores. That's about a 5-percent error rate. And that means about 10 million individuals are likely unable to get a loan for a car or a mortgage and, in some instances, are prevented from getting the employment that they need as a result of an erroneous credit score.

The FTC recently followed up on its earlier study and found that nearly 70 percent of consumers with errors in their credit score were still unable to resolve those errors 2 years later. The FTC cited problems with the way the credit reporting agencies resolve disputes and communicate with consumers.

I guess my question for you is: what is the FTC doing to resolve this problem? As I hear about the Do Not Call and I hear about lots of individual consumer issues, resort fees—all of those important—but, I can't imagine that there is an issue larger than one that is potentially impacting 10 million Americans and their ability to, basically, participate in the economy.

Ms. RAMIREZ. Senator, thank you for your question.

I completely agree, this is an incredibly important issue. Unfortunately, I cannot comment on specific companies, but what I will say is that we take very seriously the role that we play here in enforcing the Fair Credit Reporting Act and other applicable law, including Section 5. And so, this is a priority area for us, and we do, and have, brought a number of actions relating to this area.

In addition to that, we also cooperate extensively with the Consumer Financial Protection Bureau, which also has jurisdiction in this area. And so I can assure you that it's a priority for us to ensure that consumers have, and are provided, accurate consumer reports. It is a top priority, and it's something that we are certainly looking at.

Senator SCHATZ. Commissioner Ohlhausen?

Ms. OHLHAUSEN. I agree with Chairwoman Ramirez. The Fair Credit Reporting Act, I think, is a very, very useful statute, both for consumers and businesses, but we have to make sure that it is providing accurate information on which those credit and employment and other important decisions are made.

Senator SCHATZ. Commissioner McSweeney.

Ms. MCSWEENY. I would second what my colleagues have said. It's a huge priority. As you point out, it's absolutely essential to consumers who are trying to access credit and function in the marketplace to have accurate information on their credit reports. And it's an essential part, also, of dealing with problems like identity theft.

So, we have to do several things. One is remind people of their obligations under the Fair Credit Reporting Act, make sure we're enforcing all through the marketplace, and continue to work with the credit reporting agencies to make sure that they have good processes in place to mitigate and address concerns and inaccuracies in reports.

Senator SCHATZ. Do you think they have good processes in place right now?

Ms. MCSWEENY. I think that we could continue to see some improvements in that area, especially with regards to including the speed with which people could correct errors on their credit reports. I have anecdotally heard the same kinds of problems with people having to go through really strenuous, time-consuming processes to get corrections made.

Senator SCHATZ. I just want to add one thought for you to consider, which is the potential for disparate impact in minority communities when it comes to erroneous credit reports, because I think it just stands to reason that people with resources—financial, time, access to people who can help them to navigate these challenges—are going to have a better shot at untangling an erroneous credit report. And if you are a shift worker, if you have limited English proficiency, if you are in any number of circumstances that make it difficult to unravel this, then I think there's a tremendous potential for disparate impact.

Chair Ramirez?

Ms. RAMIREZ. I absolutely concur with you, and I assure you that, in all of the work that we do, we are also thinking about how conduct and activities in the marketplace might impact low-income consumers, minorities, and others who may be underserved. So absolutely, this is certainly a priority for us.

Senator SCHATZ. My final question goes back to this data security issue. I guess I just wanted to say that we talk a lot on this committee about breach notification. And I think that's critically important. But, if we're talking about 900 million individual records that are breached, plus whatever number ends up being as-

signed to the Yahoo breach, it's not any longer about notification, it's about preventing the breach.

My question for the Commission, and I'll take it for the record, in the interest of time, is, What's a reasonable data security requirement? And not just under, sort of, the interpretation of the statute, but also, are you in a position, given the current law, to increase your data security requirements on the basis that they're obviously not working? Can you use this "reasonable" test in a commonsense way? Can you say, "It is not reasonable if it is not preventing data breaches in the hundreds of millions"? I'll take that for the record.

But, I'd really like for the Commission to get more aggressive when they consider whether the requirement is reasonable, or not. Because it seems to me, on a common sense level, it's just not working.

Thank you.

The CHAIRMAN. Thank you, Senator Schatz.

And please get that back on the record, that would be great.

Senator Moran.

**STATEMENT OF HON. JERRY MORAN,  
U.S. SENATOR FROM KANSAS**

Senator MORAN. Mr. Chairman, thank you. Thank you and Senator Blumenthal for the hearing.

Madam Chairwoman and Commissioners, welcome to our committee.

I want to talk about the topic—I'll direct my question to the Chairwoman, although if either of the other Commissioners have any comments, I would welcome that, as well. The topic I want to talk about is renewable identification numbers, known as RINs. This is the enforcement mechanism used by the EPA when it comes to determining whether the renewable fuel standard is being complied with. And, in the process of—there are obligated parties to demonstrate that they are complying with the EPA requirements of the Renewable Fuel Standard, but RINs become traded, separate from the actual fuel. And as that occurs, as that disassociation occurs between the unit of biofuel and you have an instrument that then is traded, my question is, Is there FTC oversight over that transaction? And I assume that the oversight would be in regard to any potential fraud that may exist in that market. My understanding is that the Office of Air Quality and Transportation within the EPA is the entity that's charged with the monitoring of and policing of RINs. But, I'm curious as to whether or not there's a role the FTC does play, should play, as buyers and sellers of this increasingly expensive compliance monitoring tool becomes so prevalent.

Ms. RAMIREZ. Chairman Moran, I'm certainly aware of the concern that you have. And there may be some authority that the FTC has if there were evidence of manipulation in this particular market. I'm happy to take a closer look at this issue and have further discussions with you or with your staff. But, it's conceivable that there may be a role to play here, but, again, happy to provide you with additional information.

Senator MORAN. Thank you very much. Does that answer suggest that, to date, there hasn't been any kind of review or investigation by the FTC?

Ms. RAMIREZ. Again, I'm limited in what I can say publicly. All I can say is that I am aware of this issue, we are aware of this, and we certainly do look very closely at energy markets. But, it would really, again, depend on the facts. And noting your concern, I'm certainly happy to take a closer look.

Senator MORAN. Well, I'd be glad to have additional conversation, and I welcome that look.

Any other Commissioners have the need or desire to share anything with me?

[No response.]

Senator MORAN. Thank you very much.

Let me turn to set-top boxes. As you know, we've had a number of conversations this morning about the Federal Communications Commission. They're advancing their own rule in regard to set-top boxes. But, by their own admission, it—indicated that they don't have jurisdiction over device manufacturers. Chairman Wheeler told us recently that he has worked with you, the FTC in writing that rule and has been advised that the FCC's final rule, quote, "Requires the devices warrant to consumers that they are in compliance with certain sections of the Communications Act and that the FTC will have the ability to do the necessary enforcement to protect that privacy." Could you confirm that, tell us of the conversations you've had with the FCC in this regard? And do you believe data should be treated differently based on what government entity regulates the company or by the level of sensitivity that the data has that's being collected?

Ms. RAMIREZ. Yes. The FTC did submit comments to the proposed set-top box rulemaking by the Federal Communications Commission. We did, in our comment, note that third-party manufacturers of set-top boxes ought to be required to make consumer-facing statements in which they indicated that they would comply with the rules that would apply to cable companies. And, by doing this, it would facilitate the ability of the FTC to enforce in this arena. And I am aware that Commissioner Wheeler has indicated an intent to include that in the rule. And again, that would allow us to take action in appropriate circumstances.

Senator MORAN. And your thought about my second question?

Ms. RAMIREZ. And I apologize.

Senator MORAN. Do you believe that data should be treated differently based on what government entity regulates the company or by the level of sensitivity the data has that's being collected?

Ms. RAMIREZ. I think it is important for there to be general harmony in the way that data is treated. And, in keeping with that and to that end, the FTC has submitted comments to the privacy rulemaking that the FCC is engaging in. I will note that we are in an era when a number of different agencies are having to take a look at issues that relate to privacy and data security. We certainly have been active in sharing the extensive expertise that we have in looking at these issues, given that we've devoted many resources and many years to this. But, I think, going forward, it will be appropriate for us to endeavor to harmonize. But, there's no

question that different agencies with different authority will be examining these issues.

Senator MORAN. Chairwoman, thank you very much.

Mr. Chairman, thank you. I would note, in our memo, that it announces a 1:30 subcommittee hearing, a subcommittee that I chair, the Subcommittee on Consumer Protection, Product Safety, Insurance, and Data Security. We have postponed that hearing until later in the year, due to a 2:15 vote and then a classified briefing at 3 o'clock for all Senators. So, we appreciate the chance we will soon have to bring in thought leaders in regard to the role of the FTC and consumer protection, as well as some of the industries that are affected by the FTC.

The CHAIRMAN. Thank you, Senator Moran. We do look forward to getting that hearing in, and adding the perspective that the various members of that panel were going to add. And so, we'll try and take that up, if not this week, sometime later in the year.

And I also am very interested in the RINs discussion that you began earlier, because that is something that has a pretty profound impact on most Midwestern states, wherever corn is raised. And I would love to—whatever the FTC has underway, in terms of looking into that issue, we would welcome, at some point, your findings.

Next up is Senator Daines.

**STATEMENT OF HON. STEVE DAINES,  
U.S. SENATOR FROM MONTANA**

Senator DAINES. Thank you, Mr. Chairman.

Welcome to the Committee today.

As technology has become more prevalent in our lives, data has certainly become now a form of currency. I'm a daddy of four children. I know firsthand how big a role technology certainly plays in our kids' lives, particularly in our schools. Protecting the privacy and security of our kids' data, I believe, is critical in today's world, which is why I introduced the SAFE KIDS Act with my colleague Senator Blumenthal. The SAFE KIDS Act provides clarity in what companies can and cannot do with student data collected in schools. And I look forward to working with this committee to advance this important legislation.

I now want to pivot to legislation that we do have on the books governing student data privacy. We have FERPA, passed in 1974. I think the Carpenters had a number one song called "On Top of the World" that year. John Denver was singing "Sunshine on My Shoulders," and I was in sixth grade. And that is—doesn't even apply to technology companies. We have the Children's Online Privacy Protection Act, which was passed in 1998, and that does not apply to children 13 years and older.

Commissioner Ohlhausen, is it fair to say that there are holes in Federal legislation pertaining to student data privacy? And how can Congress update the law to reflect the realities of today?

Ms. OHLHAUSEN. Senator, you bring up some very important issues about how technology has really changed so greatly students' lives, children's lives, and we are, you know, working very carefully to try to keep up with that. So, we have brought enforcement actions. We updated COPPA. We've done that.

Now, I do think that there is a question—COPPA goes up to age 13—and are there special—are there protections that would be appropriate for children between the ages of 13 and 18? And when we adopted COPPA, the Commission thought about this. Because teenagers do have different needs and different capabilities than do young children, and we—that is where we, and Congress, decided to draw the line.

So, I do think that there are some issues worth considering at the, you know, 13- to 18-year-old age group, but I would say they need to be sensitive to the differences between those older children and children who are currently covered by COPPA.

Senator DAINES. As we all know, it's somewhat remarkable, we all—our technology Help Desks now are typically our children when we want to get something fixed or corrected or an app adjusted.

I want to move to this issue of data collection—student data collection. The software and the apps our students are using, they know a lot about them—their location, they know their preferences, they know what school subjects they struggle with. And data collection is big business in the U.S., so there's a big incentive to collect user data.

Chairman Ramirez, the Commission's written testimony mentioned cases the FTC has brought against companies who collect personal information from children without parental consent. What do these companies do with the information they collect? And how could it be harmful to children?

Ms. RAMIREZ. Senator, there might be a variety of different uses—commercial uses that these companies might engage in. From our perspective, however, regardless of the proposed use, in my view, it's vital that personal information of children be protected, and that companies not be permitted to use that information unless there has been permission granted by parents. That's a mandate that Congress has issued, and we take our obligations to enforce COPPA very seriously. And, as you know, we promulgated the COPPA rule and are very active in enforcing in this area.

Senator DAINES. So, certainly, as you mentioned, there are legitimate uses for student data, like personalized learning. But, do you think it's appropriate for companies, for example, to use information about a student, let's say, struggling with literacy to determine what kind of credit they might be eligible for?

Ms. RAMIREZ. Senator, it may be inappropriate to make that kind of a use, because of the Fair Credit Reporting Act, but I will say that I certainly am, and would be, concerned about the use, for instance, for advertising purposes, of certain information about students. And for that reason, I do think that there are certain gaps in existing protections relating to student information, and am supportive of efforts to address those issues.

Senator DAINES. So I need to wrap up here. Five minutes goes by fast. But, does Congress, do you think, then have a role here in preventing this type of behavior, potentially?

Ms. RAMIREZ. I do, yes.

Senator DAINES. OK.

Thank you.

The CHAIRMAN. Thank you, Senator Daines.



Next up is Senator Sullivan.

**STATEMENT OF HON. DAN SULLIVAN,  
U.S. SENATOR FROM ALASKA**

Senator SULLIVAN. Thank you, Mr. Chairman. I appreciate you calling this hearing to have an oversight testimony on an important Commission, but a Commission that actually has broad regulatory authority. So, I think that's important. I appreciate that very much.

Madam Chair, I wanted to follow up. I actually kind of came in at the end of Senator Blumenthal's questions. But, I want to go back to this issue of security breaches. And what—and maybe it has already been answered, so I apologize if it has been—but, what is the obligation right now, either under FTC regulations or Federal law, for the kind of episode we had recently with Yahoo? And I know this is happening a lot. When I was Attorney General for the state of Alaska, we had an—we had an incident where a company that was working for the State lost a lot of data on the state of Alaska employees. And one of the things we tried to do was get it—make people aware of that as soon as we could.

So, what is the obligation right now, either under your regs or Federal law? And do you need more—what do you—how do you balance that? What—seems sometimes that companies hold this for a long, long, long time, and it doesn't seem to be promoting consumer welfare when that happens.

Ms. RAMIREZ. The obligations of a company, under Section 5 of the FTC Act, are for companies to put in place reasonable security measures to protect consumer information.

Senator SULLIVAN. Right. But, what I'm talking about is notification to consumers once there has been a breach.

Ms. RAMIREZ. With regard—

Senator SULLIVAN. What's the obligation to—

Ms. RAMIREZ. With regard to notification, there are applicable State laws, and there may be pertinent—just across the board, I'm speaking generally—there are sectoral laws that also provide certain notification requirements. I believe that there is need for Congress to have Federal legislation in this area. I did have a chance to speak about this earlier in my testimony. And I believe, number one, that there needs to be a Federal standard that's put in place for security, a reasonableness approach along the lines of the approach that we take at the FTC. And I also believe that it's important for there to be a Federal requirement when it comes to data breach notification that also provides—within a reasonable time-frame, requires companies to notify affected consumers.

Senator SULLIVAN. And so, what do you think is—I mean, it's—is it case-by-case? Is “reasonable” 2 weeks? Is it 30 days? I mean, what—certainly not a year or 6 months, is it?

Ms. RAMIREZ. In our view, approximately 30 to 60 days might be appropriate. I think you want to allow a company to appropriately evaluate what has transpired so that consumers also aren't over-notified and have appropriate information about what has happened. But, at the same time, it is necessary for consumers to be notified so that they can take appropriate measures to protect

themselves against potential identity theft or other possible harm that may flow from a data breach.

Senator SULLIVAN. Let me—I'd like to broaden my line of questioning, here, to the economy. I know you have an economic bureau that focuses on economic issues. In terms of macroeconomic issues, you know, we've had a—essentially, what's been a lost decade of economic growth. The country's growth rate, in terms of GDP, has been anemic.

The last two quarters have been barely above 1 percent. I think President Obama will be the first President, perhaps ever, since the statistics were kept, that's never hit 3 percent GDP growth, even in 1 year. And, of course, that hurts everybody. That hurts the whole country. That hurts some of the most vulnerable people in the country.

Do you think we can do better than that? You know, sometimes the Obama administration talks about, "Well, this is the new normal. We have to accept one and a half, 2 percent GDP growth." The actual average for the country over the last 200 years is about 3.7, almost 4 percent, whether it's Democrat or Republican administrations.

Should we be satisfied with one and a half percent GDP growth? Do you believe in the new normal, or can we do better?

Ms. RAMIREZ. What I can speak to is the role that we can play.

Senator SULLIVAN. Yes, I'd be very interested in that. How do you balance your role as regulating industry, consumer protection, unfair competition, all of which are very important, with the broader goal that we all share of creating the conditions for much more robust economic growth? So, if you can just, any of you, answer that. Can we do better? Do we have to live with 2 percent or less—

Ms. RAMIREZ. Well, let me—

Senator SULLIVAN.—GDP growth? And if we can, how do you guys view the broad macroeconomic issues in balancing your regulatory authority over industries?

Ms. RAMIREZ. Well, let me just start by saying that we are, first and foremost, a law enforcement agency, and that really is how we see ourselves. So, the role that we play when it comes to promoting competition, I think, is a very important and vital one to assist in aiding a competitive marketplace and furthering economic growth.

Let me also add that as part of our role, we also are very active in engaging in advocacy. And, as part of that, we do comment and urge policymakers to take a look at regulatory frameworks and take into account competitive impacts so that we can ultimately promote competition and not create barriers to entry that might enhance competition. So—

Senator SULLIVAN. So, does your economic bureau think that we can do better than one and a half, 2 percent GDP growth?

Ms. RAMIREZ. So, the—you're raising macro questions that are a bit beyond the role that we play, but I can assure you that, in everything that we do, we get the input of our economists, who are microeconomists. And again, in terms of the role that we play, we do what we can to promote competition and ensure that there's an active and competitive marketplace.

At the same time, let me also note that what we do play, while an important role, is a limited role. We aren't market regulators. Nonetheless, we take our role very seriously. And I think we do well by it.

Senator SULLIVAN. Any other Commissioners want to comment on that line of questions?

Ms. OHLHAUSEN. In a previous life at the FTC, I used to run our competition advocacy program. And that was focusing on identifying barriers to competition, barriers to innovation that the Commission could weigh in upon and help encourage the free flow of new ideas, new business models into the economy. So, I think that's a useful and appropriate role that the FTC has played over a number of years. And I'm proud that I used to head that up. And I'm glad, as a Commissioner, we've continued to focus on those areas.

Senator SULLIVAN. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Sullivan.

Senator Markey.

**STATEMENT OF HON. EDWARD MARKEY,  
U.S. SENATOR FROM MASSACHUSETTS**

Senator MARKEY. Thank you, Mr. Chairman, very much.

In Massachusetts and communities across the country, we have an epidemic of heroin and prescription drug overdose that is absolutely out of control. Buprenorphine is the active ingredient in suboxone, and has proven to be an effective treatment for opioid use disorders. However, actions by Indivior, the producer of suboxone, may have made the crucial drug less accessible as a treatment to deal with this problem. Indivior is alleged to have violated antitrust laws by conspiring to block generic competition, extending its monopoly over treatments for opioid addiction and driving up drug costs. Thirty-five states and the District of Columbia have recently filed a lawsuit against the company. Public documents show that the Federal Trade Commission has begun an investigation into Indivior's actions, but the investigation was significantly impeded by the company's repeated attempts to deny the Federal Trade Commission access to documents that were critical to its investigation. And it now appears that the court has recently ordered Indivior to turn over all remaining non-privileged documents.

Now, I've sent a letter to the Federal Trade Commission on this issue to investigate whether or not Indivior has engaged in unlawful behavior to delay the approval of cheaper generic competition, which could help deal with this incredible epidemic of heroin and prescription drug Fentanyl overdoses in our country.

Do you have enough resources at the Federal Trade Commission to be able to take that issue on and to get it completed in a timely fashion? We just see a spike across this country. We need more help.

Ms. RAMIREZ. Senator, yes, thank you for your question.

I had an opportunity to talk, a bit earlier, about the importance of examining and monitoring the pharmaceutical marketplace, and I can assure you that we're very active. I can't comment on the specifics of any investigation, but I can tell you that we are certainly

doing everything that we can with our resources. We could, of course, use—always use additional resources. And we've made appropriate requests from Congress with regard to our budget in order to fulfill our dual mission of protecting consumers and promoting competition. But, what I can tell you, with our existing resources, we're doing everything that we can.

Senator MARKEY. Does that mean that you are right now aggressively pursuing Indivior and its attempt to control the market for Buprenorphine?

Ms. RAMIREZ. All I can say publicly is to let you know that we certainly are continuing with our investigation. But, unfortunately, due to confidentiality restrictions, I can't say more than that.

Senator MARKEY. OK.

Let me move over to child privacy. Right now, as Congress—as Senator Daines pointed out, the existing law, which I'm the author of in 1998, protects children 12 and under and their privacy. Can you give us your view as to whether or not children 13 to 15 are entitled to the same kinds of protections as those that are 12 and under?

Ms. RAMIREZ. Under current law, as you've noted, it does apply to those children that are under 13. As I had an opportunity to discuss earlier, I do think that it would be appropriate to address issues particularly relating to education and information about students. And, in that regard, I think appropriate protection would be beyond the age of 12. So, I think there are areas where Congress may want to take a look and see if there—if it's appropriate to have further protection.

Senator MARKEY. Do you think that the parents of children 15 and younger should have an eraser button which they're able to call and have all these companies then erase the information about their children 15 and under so that that mistake that the child may have made doesn't track them for the rest of their life?

Ms. RAMIREZ. I think one can discuss where one draws the line appropriately for the protection of children. I am certainly sympathetic and supportive of efforts to provide additional protection to children, given, of course, the indefinite nature of information that can be posted online.

So, yes—I'm generally supportive of efforts to look at that issue.

Senator MARKEY. OK, thank you.

And now that the question of whether broadband is a telecommunications service under Title II was strongly settled by the D.C. Circuit Court, the Federal Communications Commission is correctly extending privacy protections to broadband. It's clear that the Federal Trade Commission and Federal Communications Commission both have clear roles to play as privacy cops on the beat. But, now that the broadband privacy issue is in the basket of common carriage, which the Federal Trade Commission does not have jurisdiction over, the Federal Communications Commission must act without delay to put in place strong broadband privacy rules. Do you agree with that that they are the principal agency responsible for that issue?

Ms. RAMIREZ. Yes. In light of the reclassification of broadband service, the Federal Communications Commission is the one that has jurisdiction here. I do think it's appropriate for them to put in

place appropriate privacy rules. We have, as part of their rule-making process, submitted comments in which we've opined as to what we believe would be improvements to what they've proposed.

Senator MARKEY. OK, thank you and thank all the Commissioners for your great work.

The CHAIRMAN. Thank you, Senator Markey.

Next up is Senator Udall.

**STATEMENT OF HON. TOM UDALL,  
U.S. SENATOR FROM NEW MEXICO**

Senator UDALL. Thank you, Mr. Chairman, for this very good hearing on oversight.

And wonderful to see the Commissioners here today.

Chairwoman Ramirez, this Friday, a sports tradition will play out across New Mexico and the Nation. High school teams will take to the gridiron and the soccer pitch, and we absolutely want to encourage young people to play sports. But, we want them to do so safely. And parents and coaches have good reason to be concerned about the dangers of concussions. The National Academy of Sciences has stated that all concussions involve some level of injury to the brain.

Earlier this month, the NFL said it will provide \$100 million for medical and engineering research on concussion, chronic traumatic encephalopathy, or CTE, and player health. This follows the blockbuster movie "Concussion," starring Will Smith as the doctor who first diagnosed CTE in a professional football player.

The NFL denied the dangers of CTE and concussion for far too long. And it has been dangerously slow to act before now. So, its announcement is significant. We should welcome these new resources, and encourage more.

But, this isn't just about the million-dollar pros, this is about our kids. CTE has been found in former high school athletes. We can't just accept what the NFL-funded research finds. Medical research must be peer-reviewed and unbiased. Efforts to find an engineering solution or new technology to prevent concussion may prove elusive.

We also need agencies like the FTC engaged and ready to take action. For example, when it comes to sports products that prevent concussions, it is understandable that parents and players want to buy such products. But, the National Academy's report found there is no scientific evidence to support claims that sports gear such as mouth guards and soccer headbands reduce the risk of concussion. They've found little evidence that football helmets can reduce concussions. Unfortunately, some irresponsible sports equipment-makers falsely claim that their products protect against head injuries, and that may give players a false sense of safety and lead them to take risks. Former University of New Mexico soccer star Alexis Ball testified in this committee that she felt she could play more aggressively when wearing so-called anti-concussion headgear. Concussion experts warn that this is dangerous. It puts kids at greater risk of injury, including permanent brain damage from second-impact syndrome.

I'm pleased that this committee approved legislation I sponsored to crack down on these false claims. I continue to work with stake-

holders to enact it this year, and time's really running short to get this done.

Chairman Ramirez, here is just one current example of a dangerous anti-concussion marketing claim. The Shock Doctor is a leading mouth guard for youth sports. It is the official mouth guard of USA football, and sponsors its concussion awareness program Heads Up Football. Approximately 1 million young athletes are enrolled in Heads Up Football. So, I'm deeply concerned by Shock Doctors' false claims that its mouth guards prevent concussions. Shock Doctor mouth guards—and I'm quoting right here from this product—it promises it will absorb shock to help protect against brain concussions.

It promises hardcore protection and fearless performance. Shock Doctor even encourages this false sense of security when it states that—and this is what it states about its product—“Many athletes report that they perform better with a properly fitting mouth guard. Maybe it's because, with extra protection, you aren't afraid to really throw yourself into the tackle, the face-off, the draw, or the scrum.”

So, Chairwoman Ramirez, the FTC previously sent warning letters to sports equipment-makers and retailers about these types of advertising claims. Do you agree that this type of anti-concussion marketing constitutes a deceptive practice and that could put young athletes at real risk of injury?

Ms. RAMIREZ. Senator, thank you for your question. I absolutely agree that this is a very serious issue. And, as you've noted, the agency has sent warning letters to companies about these types of claims. I'm absolutely concerned about deceptive claims that lack substantiation. I appreciate you bringing this particular issue to my attention, and I assure you that we will take a very close look.

Senator UDALL. We really appreciate the earlier letters, and we want you to stay on guard and stay on top of this. As you know, earlier this year, the Committee approved my Youth Sports Concussions Act, which would increase the potential FTC penalties for such unscrupulous advertising. I'm working with Senate colleagues to get this important bill signed in this Congress. And it's past time to put an end to these dangerous anti-concussion marketing claims for youth sports.

Thank you.

And thank you for your courtesies, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Udall.

Senator Ayotte.

**STATEMENT OF HON. KELLY AYOTTE,  
U.S. SENATOR FROM NEW HAMPSHIRE**

Senator AYOTTE. Thank you, Chairman.

Commissioner Ohlhausen, I wanted to ask about the issue of healthcare. So, with the Affordable Care Act, we have seen greater consolidation in the healthcare sector. And one of the concerns I have is that we are able to foster competition, including innovation. Yet, that can be countered by healthcare consolidation, in terms of new innovation and competition.

So, what is—what are some of the challenges that a disruptive actor in the healthcare industry—so, let's say you've got a new in-

novation that wants to come on—and I mean “disruptive” in the good sense of a new idea to help serve consumers—that can be addressed? And how are—how is this healthcare consolidation and proposed mergers—what is the FTC view on its role? And what will you be doing to make sure that there continues to be competition and innovation in the healthcare sector?

Ms. OHLHAUSEN. Senator Ayotte, thank you for your question.

The FTC has a very active healthcare enforcement program on several grounds. Hospital consolidation is an area the FTC has been paying very close attention to. We want to be sure that consumers continue to have options for care in their communities that are cost-effective. So, the FTC continues to act in this space. Fortunately, we just won an important case in the Third Circuit about how we would define a healthcare hospital market. So, I’m pleased. I think that will help us continue to act in that space.

And then, second, you bring in the important issue of, How do new innovations—how do new methods of delivering healthcare to consumers get into the market? So, we recently won a case before the Supreme Court, called North Carolina Dental, where we stood for the proposition that if a board is made up of self-interested actors, they need additional—they need oversight by the State, and they need authorization by the State to do anything that might be anticompetitive. So, that has been a particularly useful statement in the areas of, like, telehealth, allowing doctors to treat patients remotely, or to have nurse practitioners there to help in telehealth. So, I think those are some very important areas where the FTC, through advancing the law, through bringing enforcement actions, and through bringing our advocacy expertise to bear, have tried to ensure that consumers get the benefits of competition through traditional methods and new and emerging methods, as well.

Senator AYOTTE. Great, thank you.

I wanted to ask the—Chairman Ramirez about an issue that—having served as Attorney General before coming to serve in the Senate, you know, I know that it’s really important that consumers—there have to be fair consumer service experiences. Charter recently completed its transaction with Time Warner Cable and Brighthouse Networks. This will greatly increase the combined subscriber base in states like New Hampshire. I also serve on the Homeland Security Committee, and there was recently a hearing on billing reports that Senators Johnson and McCaskill obtained that found that both companies’ practices for identifying and correcting overcharges had been substandard. And, in light of these findings, many cable TV providers have stated they’re striving to improve their billing practices.

But, I’m hearing from people in New Hampshire that—concerns about this transaction. One of my constituents in Campton, New Hampshire, who’s frequently away from home as a merchant mariner, recently wrote to me explaining that the promotional rates that kept jumping with every call he made to the company, and, after they expired and he attempted to adjust his subscription, the quoted prices skipped around with each call he made, leaving him exasperated, with no alternative providers in a rural and mountainous area of our state. This frustration was compounded by the fact that he returned from several months overseas and, after re-

peated calls, was given quotes not reflected what he was ultimately charged.

Can you comment at all on the FCC's plan and its provisions to ensure that the Merger serves in the public interest to provide fair and transparent services to consumers in affected states like mine, especially in areas where you end up with one provider?

Ms. RAMIREZ. I can certainly talk about what falls under FTC jurisdiction, but I have to defer to the FCC to address how they might address issues that are within their domain.

Senator AYOTTE. But, do you have any jurisdiction when it comes to looking at the merger, itself, in terms of the lack of competition and—

Ms. RAMIREZ. So, what these—

Senator AYOTTE.—and also the consumer practices that can be deceptive or problematic?

Ms. RAMIREZ. We did not look at that particular merger. This is something that was examined by the Department of Justice and the Federal Communications Commission. What I can tell you is that if it falls outside of common carriage activity, we would have jurisdiction over deceptive practices. And we, I think, are very vigilant when it comes to ensuring that those parts of the economy that are subject to our jurisdiction, that we tackle deceptive practices. So, if it falls within our jurisdiction, we would certainly play a role—and I believe that we're active in the marketplace—but this is one that I'd have to defer to the FCC on.

Senator AYOTTE. OK. Even on the billing practice piece?

Ms. RAMIREZ. Yes.

Senator AYOTTE. OK.

Thanks.

The CHAIRMAN. Thank you, Senator Ayotte.

Senator Cantwell.

**STATEMENT OF HON. MARIA CANTWELL,  
U.S. SENATOR FROM WASHINGTON**

Senator CANTWELL. Thank you, Mr. Chairman.

And it's good to see the members here of the FTC.

I wanted to talk about the BOTS Act, which is the Better Online Ticket Sales Act that was passed out of the Committee and has had similar action in the House. It will make it illegal to use computer software to scoop up large chunks of tickets, making them more expensive before consumers can get to them. This is about empowering consumers through your organization and through attorneys general. So, can any of you comment on what aggressive measures—if this legislation becomes law—the FTC will take to prosecute these companies and organizations?

Ms. RAMIREZ. We are certainly aware of the concern that you have, Senator. It's also a concern that has been expressed by others. I can certainly tell you that we would absolutely—any jurisdiction that Congress would give us in this respect, we would absolutely enforce in the area. We have taken certain actions using our existing authority under the FTC Act, but are aware that it continues to be an issue. And again, we're happy to continue looking at this area and then, if we're given additional authority, to utilize that.



Senator CANTWELL. Anybody else want to comment on that?

Ms. OHLHAUSEN. When we get a new authority, one of the important adjunct things we can do is also to bring business education materials into the marketplace to educate businesses about what their new obligations may be. So, I would say, in addition to any enforcement, I would certainly support that we tell businesses what—where the rules of the road are.

Senator CANTWELL. Yes. I guess I'm looking for something a little more aggressive. And I know you haven't gotten the authority. But, this is clearly a problem for consumers. While I expect people like our Attorney General will be very aggressive on it, I think that we pass laws giving the FTC this simultaneous authority because we expect the FTC to be aggressive on it. So we'll be looking to you to what avenues that you will be taking to aggressively pursue this from a Federal level. I think it's very important that we protect consumers and that we're going to use the power of the Federal Government to help on these cases. So, thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Cantwell.

Senator Blumenthal has a couple more questions. We'll give Senator Fischer a chance to get set up here.

Senator Blumenthal.

Senator BLUMENTHAL. Mr. Chairman, I'd be happy to yield to Senator Fischer if she wants to go now, or I can go ahead, whichever she would prefer.

The CHAIRMAN. Senator—

Senator FISCHER. Thank you, Senator.

The CHAIRMAN.—Fischer, are you ready to roll?

**STATEMENT OF HON. DEB FISCHER,  
U.S. SENATOR FROM NEBRASKA**

Senator FISCHER. Thank you, Mr. Chairman.

The CHAIRMAN. All right.

Senator FISCHER. And thank you, Senator Blumenthal, for your kindness. I appreciate that.

Commissioner Ohlhausen, earlier this year, the FTC filed comments in the FCC's privacy proceeding. You wrote a separate statement warning that the FCC's approach may not best serve consumer interests and that some of its proposals would prevent consumers from willingly sharing their data to obtain benefits, such as price discounts. I believe that consumers should be able to choose when and how to share that data. This option can be particularly beneficial for low-income consumers who could opt to receive a benefit in the form of lower prices or access to innovative services. Could you elaborate on your concern that customers could be negatively impacted by the FCC's proposed discounts policy for me, please?

Ms. OHLHAUSEN. Thank you, Senator.

I do think it's important to keep in mind that consumers, if they have—if they're informed about what the deal is, should have the right to make that deal, and that, in lots of areas of life, we share information to get discounts. For example, I use a discount, you know, Giant card to get discounts at the grocery store. And that if consumers have choices in the marketplace, and they have infor-

mation, I think they should be permitted to make that choice to decide to share some of their data to reduce costs or prices.

Particular surveys have indicated that one of the main reasons consumers are not adopting broadband is because of cost concerns. So, this could help alleviate those kinds of challenges that some consumers face.

Senator FISCHER. And how important is that access to broadband?

Ms. OHLHAUSEN. I think access—

Senator FISCHER. Do you have an opinion on that?

Ms. OHLHAUSEN. I'm sorry. I think access to broadband is very important, and I think that's something that the FTC, the FCC, and really anyone who's looked at this issue has considered it, sort of, as the road to the future for consumers.

Senator FISCHER. I'm glad you used the terminology "road," because broadband, in my opinion, is infrastructure, as are highways and bridges and ports, and it's important that we move forward on that.

Chairwoman, if I could ask you, I understand that there are over 48 million pages of FTC documents that may be used as guidance or that otherwise help companies understand how the FTC interprets its broad statutory authority. That number is large, and it's daunting. In addition, stakeholders have raised concerns that the FTC could treat these materials as enforceable, even though they are not the result of legislation and they're not the result of rule-making. So, I worry that the FTC could use an FAQ document or materials professed to be just guidance as evidence that a company's business practices are illegal, creating regulatory uncertainty that will hurt economic growth.

So, just to be clear, could guidance documents be used as the basis for a complaint or for a consent order?

Ms. RAMIREZ. The guidance that we issue does not have the force of law, but we do think that it's beneficial for us to explain to the business community and to practitioners and other relevant stakeholders how it is that we apply our law. And so, we think it is useful guidance, but it does not have the force of law. So, ultimately, any enforcement action would have to reflect a considered decision by the Commission that we have a reasonable belief that the law—applicable law, whether it's the FTC Act or other statutes that we enforce has been violated.

Senator FISCHER. OK. And also, as I understand it, the FTC lost its jurisdiction over Internet Service Providers in the area of data security and privacy after the FCC reclassified retail broadband as a common carrier service. Recently, the U.S. Court of Appeals for the Ninth Circuit reaffirmed that the FTC is categorically barred from taking action against common carriers.

So, I'm curious to know whether the FCC coordinated with you prior to taking action that effectively took away your agency's jurisdiction over Internet Service Providers. Did the FTC caution them against the consequences of reclassification?

Ms. RAMIREZ. We certainly communicated the impact that this would have. At the end of the day, the FCC, of course, had to make a decision about what they felt was appropriate when it came to addressing the issue of net neutrality. That has had a consequence

for us. But, at the same time, the FTC, on a unanimous and bipartisan basis, has long argued that the common carrier exception to our jurisdiction is something that really no longer ought to apply. It's absolutely outdated.

This recent decision that you referred to, the Ninth Circuit decision, in our view, has significant implications, because the court disagreed with the position that we articulated, which is that the common carrier exception is activities-based and not status-based. Unfortunately, the court took a different view, and that has significant ramifications for our jurisdiction. I will note that we're going to be seeking a rehearing in that matter, so we're hopeful that we shall have an opportunity to voice our concerns about this.

But, in any event, reclassification has had an impact on our jurisdiction, yes.

Senator FISCHER. And was that a unanimous concern by your board?

Ms. RAMIREZ. It's simply a consequence of reclassification. You'd have to, you know, ask the FCC Commissioners as to what factors most influenced them. Again, at the end of the day, I think they made a decision based on what they felt was appropriate for the public interest, when it came to net neutrality.

Senator FISCHER. OK. Thank you.

Thank you, Mr. Chairman. And thank you, Senator Blumenthal. The CHAIRMAN. Thank you, Senator Fischer.

Senator Blumenthal.

Senator BLUMENTHAL. Thanks, Mr. Chairman.

Just a few questions to tie up some loose ends.

I am assuming that if a rehearing is denied, as is customary in most courts of appeals, there will be an appeal in the Ninth Circuit ruling, which I regard as unfortunate and erroneous, and I think you agree.

Ms. RAMIREZ. I do, Senator. I can assure you that we're going to explore all options that we have available to us, in terms of appeal.

Senator BLUMENTHAL. Let me ask you about drug pricing. Mylan's pricing of EpiPens was simply another strawbreaking the backs of consumers. They are running out of the tolerance and endurance that are attributed to camels when the straw breaks the camel's back. This is profiteering at the expense of countless consumers, many of them children who can't afford \$600 or more, the astronomic price increases. I know that you have committed to get back to us within a specific amount of time, but can't your response be expedited?

Ms. RAMIREZ. Again, I am limited in what I can say, because I'm restricted from conveying any information about specific investigations. But, I can assure you that these are issues, of course, that we've seen before. This is not the first time that we've seen a significant spike in drug prices. It's an issue that does concern us. And I can assure you that when that happens, we will look very closely to see if the reasons for those price hikes might be due to anticompetitive activity.

Senator BLUMENTHAL. And——

Ms. RAMIREZ. This is an area that we care very deeply about and are very active in.

Senator BLUMENTHAL. And I think that's really the point, because deterrence of abuses in this area really depends on effective and prompt enforcement. For example, in recent testimony given to Congress, just in the past week, Mylan has seemingly obfuscated and misrepresented profit margins, according to stories as recently as this morning's *Wall Street Journal*, which pointed out how it has engaged in potentially deceptive and misleading practices relating to pricing. These new reports are even more disturbing, are they not?

Ms. RAMIREZ. Absolutely. And again, I can't get into details, but what I also want to note—and I'm not commenting at all on Mylan's conduct, but I will also just simply note that in prior examinations of price hikes, we have also observed that sometimes they happen without there being what we believe to be a violation of the antitrust laws. So, this is an area where we play an important role, but it is limited. And, unfortunately, sometimes companies that have appropriately obtained market power end up exercising that in a way that is detrimental to consumers. So, it may be appropriate for there to be other actions that are taken.

I just want to convey that, while we have an important role, we can't address all of the problems that exist when it comes to drug prices.

Senator BLUMENTHAL. Not all of the problems, but many of them, because your agency is uniquely located at the intersection of deceptive and misleading pricing and other abusive practices and the antitrust responsibility. That you have both of them seemingly involved in Mylan's power to raise prices in the—and now offer a generic version, at \$300, that may, in fact, forestall other competition. So—

Ms. RAMIREZ. Where there's anticompetitive activity, I assure you that we will absolutely take action.

Senator BLUMENTHAL. It really is of a piece with other drugs that may have been involved in the same kinds of practices—Narcain, Daraprim. There are other instances. And I think they cry out for action. I would just urge you to take prompt and effective action.

Let me also join with Senator Udall in expressing very grave concern about the marketing of sports equipment. I have been very vocal about the NHL's practices in this area, as well as the NFL's, because of the power that they have over players at the younger league levels, whether it's in high school or college. As models, they can set better practices. I welcome the National Football League devoting money to research. I've urged the NHL to do the same. But, sports equipment, in a sense, illustrates the real importance of being vigilant and vigorous, not only as to specific products, but also as to the governing standards. I would welcome your scrutiny and involvement in this area.

And let me just finish. I've written to you already about my concern regarding the public safety implications of the FTC's recent proposed settlement with used car dealers. Under the proposed settlement, used car dealers will continue to be allowed to advertise that they have rigorously inspected their vehicles for safety, including that they're certified—in quotes, "certified"—even if the vehicle has unrepaired safety recalls. NHTSA has repeatedly said that all

recalls address an unreasonable risk to safety and should not be ignored. I've introduced legislation, with Senator Markey, the Used Car Safety Recall Repair Act, that would require used car dealers to fix recalls before selling or leasing a vehicle.

Despite the proposed settlement, or maybe because of it, I'd like to ask each of you, Do you support this legislation?

Ms. RAMIREZ. Senator, I do.

Ms. OHLHAUSEN. Senator, I certainly support the goals of the legislation, but I would need to review the details.

Senator BLUMENTHAL. I'd ask you to review it and get back to me, if you would, please Commissioner—

Ms. OHLHAUSEN. Certainly.

Ms. MCSWEENEY. I would support the legislation.

Senator BLUMENTHAL. Thank you.

I want to thank all of you for being here today. I have other questions that I'll submit for the record.

I want to thank Commissioner McSweeney for her reference to the nonprofit area, where I'd like to follow up with some questions. I don't want to keep the Committee going now.

But, thank you all for being here and for your excellent work.

Thank you.

The CHAIRMAN. Thank you, Senator Blumenthal.

And again, thank you, to all three of you, for being here and for responding to these questions. And there are some, I'm sure, that will be submitted for the record. We will keep the hearing record open for 2 weeks, during which time Senators are asked to submit any questions. And, upon receipt of those questions, we would ask you to respond as promptly and quickly as possible.

So, thank you so much for being here.

This hearing is adjourned.

[Whereupon, at 11:56 a.m., the hearing was adjourned.]



## A P P E N D I X

ELECTRONIC PRIVACY INFORMATION CENTER  
September 26, 2016

Hon. JOHN THUNE, Chairman,  
Hon. BILL NELSON, Ranking Member,  
U.S. Senate Committee on Commerce, Science, and Transportation,  
Washington, DC.

RE: Hearing on “Oversight of the Federal Trade Commission”

Dear Chairman Thune and Ranking Member Nelson:

We write to you regarding the upcoming hearing on “Oversight of the Federal Trade Commission.” Simply put, the Federal Trade Commission (“FTC”) is not doing enough to protect the personal data of American consumers. Identity theft, data breaches, and financial fraud are increasing. The damage to American consumers and families is escalating. Rather than curtailing the Commission’s enforcement efforts, you must determine why the agency is not doing more. The FTC’s continued failure to act against the growing threats to consumer privacy and security could be catastrophic.

The Electronic Privacy Information Center (“EPIC”) is a public interest research center established more than 20 years ago to focus public attention on emerging privacy and civil liberties issues. EPIC has a particular interest in protecting consumer privacy, and has played a leading role in developing the authority of the FTC to address emerging privacy issues and to safeguard the privacy rights of consumers.<sup>1</sup> EPIC is involved in a wide range of activities involving the FTC, from consumer privacy and antitrust to rulemaking, enforcement of consent orders, and participation in public workshops.<sup>2</sup> Most recently, EPIC and the Center for Digital Democracy (“CDD”) filed a complaint with the FTC over WhatsApp’s decision to transfer user data to Facebook in violation of commitments both companies previously made to subscribers.<sup>3</sup> At the time Facebook acquired WhatsApp, the FTC stated clearly that the companies must honor their privacy promises to users.<sup>4</sup>

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<sup>1</sup>See, e.g., Letter from EPIC Exec. Dir. Marc Rotenberg to FTC Comm’r Christine Varney (Dec. 14, 1995) (urging the FTC to investigate the misuse of personal information by the direct marketing industry), [http://epic.org/privacy/internet/ftc/ftc\\_letter.html](http://epic.org/privacy/internet/ftc/ftc_letter.html); DoubleClick, Inc., FTC File No. 071-0170 (2000) (Complaint and Request for Injunction, Request for Investigation and for Other Relief), [http://epic.org/privacy/internet/ftc/DCLK\\_complaint.pdf](http://epic.org/privacy/internet/ftc/DCLK_complaint.pdf); Microsoft Corporation, FTC File No. 012 3240 (2002) (Complaint and Request for Injunction, Request for Investigation and for Other Relief), [http://epic.org/privacy/consumer/MS\\_complaint.pdf](http://epic.org/privacy/consumer/MS_complaint.pdf); Press Release, Federal Trade Comm’n, FTC Charges Deceptive Privacy Practices in Google’s Rollout of Its Buzz Social Network (Mar. 30, 2011), <http://ftc.gov/opa/2011/03/google.shtm> (“Google’s data practices in connection with its launch of Google Buzz were the subject of a complaint filed with the FTC by the Electronic Privacy Information Center shortly after the service was launched.”); *In the Matter of Facebook, Inc.*, (2009) (EPIC Complaint, Request for Investigation, Injunction, and Other Relief), <https://epic.org/privacy/infacebook/EPIC-FacebookComplaint.pdf>; *In the Matter of Facebook, Inc.*, (2010) (EPIC Complaint, Request for Investigation, Injunction, and Other Relief), [https://epic.org/privacy/facebook/EPIC\\_FTC\\_FB\\_Complaint.pdf](https://epic.org/privacy/facebook/EPIC_FTC_FB_Complaint.pdf).

<sup>2</sup>See EPIC, *Federal Trade Commission*, <https://epic.org/privacy/internet/ftc/>.

<sup>3</sup>*In the Matter of WhatsApp, Inc.*, (Aug. 29, 2016) (EPIC, CDD Complaint, Request for Investigation, Injunction, and Other Relief), <https://epic.org/privacy/ftc/whatsapp/EPIC-CDDFTC-WhatsApp-Complaint-2016.pdf>.

<sup>4</sup>Letter from Jessica Rich, Director of FTC Bureau of Consumer Protection, to WhatsApp and Facebook (Apr. 10, 2014) [https://www.ftc.gov/system/files/documents/public\\_statements/297701/140410facebookwhatappltr.pdf](https://www.ftc.gov/system/files/documents/public_statements/297701/140410facebookwhatappltr.pdf).

### **American Consumers Face Unprecedented Privacy and Security Challenges**

The unregulated collection of personal data has led to staggering increases in identity theft, security breaches, and financial fraud in the United States.<sup>5</sup> The recent Yahoo! data breach that exposed the personal information of at least half-a-billion users<sup>6</sup> is the latest in a growing number of high-profile hacks that threaten the privacy, security, and financial stability of American consumers. Far too many organizations collect, use, and disclose detailed personal information with too little regard for the consequences.

Not surprisingly, the privacy concerns of Americans are increasing at a rapid rate. Industry expert Mary Meeker's most recent Internet Trend report said simply, "[a]s data explodes . . . data security trends explode." According to Meeker, 45 percent of users "are more worried about their online privacy than one year ago" and 74 percent have limited their online activity in the last year due to privacy concerns.<sup>7</sup> Public opinion polls show that 91 percent of Americans believe they have lost control of how companies collect and use their personal information.<sup>8</sup> And a recent government study found that nearly half of American internet users refrain from online activities due to privacy and security concerns.<sup>9</sup>

The threats to consumer privacy and security are growing as new challenges emerge. Protecting consumer privacy will become increasingly difficult as the Internet of Things becomes more prevalent.<sup>10</sup> The ubiquity of connected devices enables collection of data about sensitive behavior patterns, which could be used in unauthorized ways or by unauthorized individuals. Another significant risk to consumers in the Internet of Things is security, of both the users' data and their physical person.

The increased use of drones for commercial purposes also raises unique privacy issues for American consumers. Drones are designed to undertake constant, persistent surveillance to a degree that former methods of video surveillance were unable to achieve. The FTC recently held a workshop that explored privacy issues related to the commercial uses of drones, but more must be done to protect consumers from this invasive technology.

### **The American Public Supports and Deserves Baseline Consumer Privacy Legislation**

The United States has been slow to update its privacy laws, and companies have been reluctant to implement Privacy Enhancing Technologies. Thus, neither an appropriate legal nor technical framework has been implemented to consistently safeguard individual privacy in the United States. Many of the current laws are no longer suited to protect the privacy of American consumers in the digital age. It is critical that privacy protections for consumers keep pace with advances in technology.

The American public supports updating U.S. privacy safeguards. According to a recent study by the Pew Research Center, "68% of internet users believe current laws are not good enough in protecting people's privacy online; and 64% believe the government should do more to regulate advertisers."<sup>11</sup> 91 percent of Americans believe they have lost control of how companies collect and use their personal information.<sup>12</sup> The overwhelming majority want that control, with 74 percent of Americans saying it is "very important" to control who gets their information and 65 percent

<sup>5</sup> See, e.g., Fed. Trade Comm'n, *Consumer Sentinel Network Data Book* (Feb. 2016), <https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-january-december-2015/160229csn-2015databook.pdf>.

<sup>6</sup> Yahoo!, *An Important Message to Yahoo Users on Security* (Sept. 22, 2016), <https://investor.yahoo.net/releasedetail.cfm?ReleaseID=990570>.

<sup>7</sup> Mary Meeker, *Internet Trends 2016—Code Conference*, KPCB (June 1, 2016), <http://www.kpcb.com/internet-trends>.

<sup>8</sup> Lee Rainie, *The State of Privacy in Post-Snowden America*, PEW RESEARCH CENTER (Sept. 21, 2016), <http://www.peuresearch.org/fact-tank/2016/01/20/the-state-of-privacy-in-america>.

<sup>9</sup> Rafi Goldberg, *Lack of Trust in Internet Privacy and Security May Deter Economic and Other Online Activities*, NAT'L TELECOMM. AND INFO. ADMIN. (May 13, 2016), <https://www.ntia.doc.gov/blog/2016/lack-trust-internet-privacy-and-security-may-deter-economic-and-other-online-activities>.

<sup>10</sup> See, e.g., EPIC, *Comments on the Benefits, Challenges, and Potential Roles for the Government in Fostering the Advancement of the Internet of Things*, NTIA Docket No. 160331306-6306-01 (June 2, 2016), <https://epic.org/apa/comments/EPIC-NTIA-on-IOT.pdf>.

<sup>11</sup> Lee Rainie, *The State of Privacy in Post-Snowden America*, PEW RESEARCH CENTER (Sept. 21, 2016), <http://www.peuresearch.org/fact-tank/2016/01/20/the-state-of-privacy-in-america>.

<sup>12</sup> *Id.*



saying it is “very important” to control what information gets collected.<sup>13</sup> Americans also consistently express a lack of confidence in the privacy and security of their online communications.<sup>14</sup> Pew also found that “young adults are more focused than elders when it comes to online privacy,” and many have tried to protect their privacy, removed their names from tagged photos, and taken steps to mask their identity.

The consequences of inadequate data protection in the U.S. implicate the interests of U.S. consumers and businesses.<sup>15</sup> The competitiveness of American technology companies in the global market also requires strong U.S. legal protections for communications privacy.<sup>16</sup> Officials in Europe are reviewing the “ePrivacy Directive” as internet users in Europe face challenges similar to those faced by American consumers.<sup>17</sup> A framework for baseline consumer privacy protections may provide a good starting point to build a common approach to online privacy and to avoid the dramatic divergence that has arisen.<sup>18</sup>

The common refrain that greater privacy protections are contrary to innovation is simply wrong. According to a recent report by the World Economic Forum, three of the top five countries that benefit most from technology innovation are members of the European Union: Finland, Sweden, and Norway.<sup>19</sup> The United States ranked fifth in this report. These European

countries are subject to robust EU data protection laws, yet foster greater technology innovation than that of the United States. Privacy and innovation are not mutually exclusive.

Moreover, strong privacy protections are also a necessary and pragmatic part of risk mitigation in the age of the ubiquitous cybersecurity breach. Failure to protect user privacy frequently stems from failure to adequately protect user data, which can result in enormous liability for companies.<sup>20</sup> The more data a company stores, the more valuable a target its database is for hackers; and the more stored data, the greater the company’s losses in the event of a breach.<sup>21</sup>

### **The FTC’s Current Approach is Insufficient to Protect Consumer Privacy and Security**

EPIC has fought for privacy rights for internet users at the FTC for more than two decades. We filed landmark complaints about privacy violations by Microsoft, Facebook, and Google.<sup>22</sup> While we respect the efforts of the Commission to protect consumers, the reality is that the FTC lacks the statutory authority, the resources,

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> See Marc Rotenberg, Testimony before the U.S. House of Representatives Energy & Commerce Subcommittees on Commerce, Manufacturing, and Trade and Communications and Technology, *Examining the EU Safe Harbor Decision and Impacts for Transatlantic Data Flows* (Nov. 3, 2015), <https://epic.org/privacy/intl/schrems/EPIC-EU-SH-Testimony-HCEC-11-3-final.pdf>.

<sup>16</sup> See Aarti Shahani, *A Year After Snowden, U.S. Tech Losing Trust Overseas*, NPR (June 5, 2014), <http://www.npr.org/sections/alltechconsidered/2014/06/05/318770896/a-year-after-snowden-u-s-tech-losing-trust-overseas>; Claire Caine Miller, *Revelations of N.S.A. Spying Cost U.S. Tech Companies*, NY TIMES (Mar. 21, 2014), <http://www.nytimes.com/2014/03/22/business/fallout-from-snowden-hurting-bottom-line-of-tech-companies.html>.

<sup>17</sup> ePrivacy Directive: assessment of transposition, effectiveness and compatibility with proposed Data Protection Regulation, European Commission (June 10, 2015), <https://ec.europa.eu/digital-agenda/en/news/eprivacy-directive-assessment-transposition-effectiveness-and-compatibility-proposed-data>.

<sup>18</sup> EPIC, *Examining the EU Safe Harbor Decision and Impacts for Transatlantic Data Flows*, EPIC (Nov. 3, 2015) <https://epic.org/privacy/intl/schrems/EPIC-EU-SH-Testimony-HCEC-11-3-final.pdf>.

<sup>19</sup> WORLD ECONOMIC FORUM, *Global Information Technology Report 2016*, <http://reports.weforum.org/global-information-technology-report-2016/report-highlights/>.

<sup>20</sup> 2016 Cost of Data Breach Study: United States, PONEMON INST., 1 (June 2016).

<sup>21</sup> Bruce Schneier, *Data Is A Toxic Asset*, SCHNEIER ON SECURITY, (March 4, 2016), [https://www.schneier.com/blog/archives/2016/03/data\\_is\\_a\\_toxic.html](https://www.schneier.com/blog/archives/2016/03/data_is_a_toxic.html) (“saving [data] is dangerous because failing to secure it is damaging. It will reduce a company’s profits, reduce its market share, hurt its stock price, cause it public embarrassment, and—in some cases—result in expensive lawsuits and occasionally, criminal charges. All this makes data a toxic asset, and it continues to be toxic as long as it sits in a company’s computers and networks.”).

<sup>22</sup> See Complaint and Request for Injunction, Request for Investigation and for Other Relief, *In the Matter of Microsoft Corporation*, (July 26, 2001), [https://www.epic.org/privacy/consumer/MS\\_complaint.pdf](https://www.epic.org/privacy/consumer/MS_complaint.pdf). See also Complaint, Request for Investigation, Injunction, and Other Relief, *In the Matter of Facebook, Inc.*, (Dec. 17, 2009), <https://epic.org/privacy/inrefacebook/EPIC-FacebookComplaint.pdf>; Complaint, Request for Investigation, Injunction, and Other Relief, *In the Matter of Google, Inc.*, (Feb. 16, 2010), [https://epic.org/privacy/ftc/googlebuzz/GoogleBuzz\\_Complaint.pdf](https://epic.org/privacy/ftc/googlebuzz/GoogleBuzz_Complaint.pdf).

and the political will to adequately protect the online privacy of American consumers.

The FTC's privacy framework—based largely on “notice and choice”—is simply not working. Research shows that consumers rarely read privacy policies; when they do, these complex legal documents are difficult to understand. Moreover, emphasizing notice or disclosure favors the interests of businesses over consumers and fails to establish meaningful privacy safeguards. Nor can industry self-regulatory programs provide realistic privacy protections when they are not supported by enforceable legal standards.

Even when the FTC reaches a consent agreement with a privacy-violating company, the Commission rarely enforces the Consent Order terms.<sup>23</sup> American consumers whose privacy has been violated by unfair or deceptive trade practices do not have a private right of action to obtain redress. Only enforceable privacy protections create meaningful safeguards, and the lack of FTC enforcement has left consumers with little recourse.

This is illustrated by the FTC's decision to permit Google to consolidate users' personal information across more than 60 Google services, including search, email, browsing, and YouTube, into single, comprehensive user profiles.<sup>24</sup> Google's plan to consolidate user data without consent was a clear violation of the FTC's 2011 consent order with the company, which bars Google from misrepresenting its privacy practices and sharing user information without affirmative consent.<sup>25</sup> EPIC filed suit seeking to compel the FTC to enforce the terms of its consent order with Google, but the agency succeeded in dismissing the suit and took no action to protect the privacy interests of Google users.<sup>26</sup> As a result of the FTC's inaction, virtually all internet activity now comes under the purview of one company.

The FTC also consistently fails to modify proposed settlement agreements in response to public comments. EPIC has submitted comments to the Commission on numerous proposed orders that implicate the privacy interests of consumers. However, to date the Commission has adopted these consent orders without any modification.<sup>27</sup> The FTC's failure to make any changes to proposed settlements based on comments it has explicitly requested is: (1) contrary to the explicit purpose of the statutory provision that allows the Commission to request comments from the public;<sup>28</sup> (2) contrary to the broader purpose of the Commission to police unfair and deceptive trade practices;<sup>29</sup> and (3) contrary to the interests of American consumers.

The Commission has never required compliance with the Consumer Privacy Bill of Rights (“CPBR”),<sup>30</sup> a basic set of privacy requirements, under its Consent Orders even when companies are found to violate Section 5 of the FTC Act.<sup>31</sup> By requiring compliance with the CPBR, the Commission could ensure that the personal data of consumers is protected throughout the data lifecycle. More importantly, the Com-

<sup>23</sup> See *EPIC v. FTC*, No. 12–206 (D.C. Cir. Feb. 8, 2012).

<sup>24</sup> See *EPIC, EPIC v. FTC (Enforcement of the Google Consent Order)*, <https://epic.org/privacy/ftc/google/consent-order.html>.

<sup>25</sup> The FTC's 2011 consent order with Google arose from a complaint filed by EPIC in 2010 over the company's introduction of the Google Buzz social network, which automatically enrolled Gmail users and published their contact lists without first notifying users or obtaining their consent. See *EPIC, In re Google Buzz*, <https://epic.org/privacy/ftc/googlebuzz/>.

<sup>26</sup> See *EPIC, supra* note 18.

<sup>27</sup> Comments of the Elec. Privacy Info. Ctr., FTC Docket No. 102 3058 (Jun. 8, 2012), <https://epic.org/privacy/socialnet/EPIC-Myspace-comments-FINAL.pdf>; Comments of the Elec. Privacy Info. Ctr., FTC Docket No. 092 3184 (Dec. 17, 2011), <https://epic.org/privacy/facebook/Facebook-FTCSettlement-Comments-FINAL.pdf>; Comments of the Elec. Privacy Info. Ctr., FTC Docket No. 102 3136 (May 2, 2011), [https://epic.org/privacy/ftc/googlebuzz/EPIC\\_Comments\\_to\\_FTC\\_Google\\_Buzz.pdf](https://epic.org/privacy/ftc/googlebuzz/EPIC_Comments_to_FTC_Google_Buzz.pdf).

<sup>28</sup> Commission Rules of Practice, 16 C.F.R. § 2.34 (C) (2014).

<sup>29</sup> Federal Trade Commission Act, 15 U.S.C. § 46 (2006).

<sup>30</sup> White House, *Consumer Data Privacy in a Networked World: A Framework for Protecting Privacy and Promoting Innovation in the Global Economy*, Feb. 23, 2012, <http://www.whitehouse.gov/sites/default/files/privacy-final.pdf>; see also EPIC, *White House Sets Out Consumer Privacy Bill of Rights*, [https://epic.org/privacy/white\\_house\\_consumer\\_privacy.html](https://epic.org/privacy/white_house_consumer_privacy.html).

<sup>31</sup> EPIC has recommended compliance with the CPBR in numerous settlement proceeding where the FTC has asked for public comment. See, e.g., EPIC Comments, FTC Project No P114506 (Jul. 11, 2012), <https://epic.org/privacy/ftc/FTC-In-Short-Cmts-7-11-12-FINAL.pdf>; EPIC Comments, FTC Docket No. 102 3058 (Jun. 8, 2012), <https://epic.org/privacy/socialnet/EPIC-Myspace-comments-FINAL.pdf>; EPIC Comments, FTC Project No P114506 (May 11, 2012), <https://epic.org/privacy/ftc/EPIC-FTCAAd-Disclosures-FINAL.pdf>; EPIC Comments, FTC Docket No. 092 3184 (Dec. 17, 2011), <https://epic.org/privacy/facebook/Facebook-FTC-Settlement-Comments-FINAL.pdf>; EPIC Comments, FTC Docket No. 102 3136 (May 2, 2011), [https://epic.org/privacy/ftc/googlebuzz/EPIC\\_Comments\\_to\\_FTC\\_Google\\_Buzz.pdf](https://epic.org/privacy/ftc/googlebuzz/EPIC_Comments_to_FTC_Google_Buzz.pdf).

mission would be able to put in place the baseline privacy standards that are widely recognized around the world and necessary to protect the interests of consumers.

Fundamentally, the FTC is not a data protection agency. Without regulatory authority, the FTC is limited to reactive, after-the-fact enforcement actions that largely focus on whether companies honored their own privacy promises. Because the United States currently lacks comprehensive privacy legislation or an agency dedicated to privacy protection, there are very few legal constraints on business practices that impact the privacy of American consumers.

#### **EPIC's Recommendations**

Maintaining the status quo imposes enormous costs on American consumers and businesses. Consumers face unprecedented threats of identity theft, financial fraud, and security breach.<sup>32</sup> Privacy protections based on industry self-regulation and burdensome “notice and choice” policies do not provide meaningful safeguards for consumers. The FTC must issue effective guidance and use its Section 5 enforcement authority to ensure adequate protection of consumer privacy in the digital age.

Moreover, the FTC must promptly investigate business practices, pursue complaints, enforce existing Consent Orders, and modify proposed settlements to reflect public comments. The Commission’s ongoing failure to fulfill these obligations is (1) contrary to the explicit purpose of the statutory provision that allows the Commission to request comments from the public;<sup>33</sup> (2) contrary to the broader purpose of the Commission to police unfair and deceptive trade practices;<sup>34</sup> and (3) contrary to the interests of American consumers.

We urge Congress to consider the Commission’s use of Section 5 authority in the context of the greater American legal landscape. Because the U.S. lacks a comprehensive privacy law or an agency dedicated to privacy protection, there are very few legal constraints on business practices that impact the privacy of Americans. The FTC’s already modest Section 5 authority helps to deter and penalize the abuse of data. Any effort to limit the Commission’s authority—coupled with Congress’ failure to update America’s privacy laws—is a disservice to the vast majority of Americans who are increasingly concerned about their loss of privacy and want their government to do more to protect this important democratic value.

We look forward to working with you to improve the FTC’s authority in this field and to develop rules to provide meaningful and much-needed protections for consumer privacy.

Sincerely,

MARC ROTENBERG,  
*President,*  
EPIC.

CLAIRE GARTLAND,  
*Director,*  
EPIC Consumer Privacy Project.

cc: The Honorable Jerry Moran, Chairman, U.S. Senate Subcommittee on Consumer Protection, Product Safety, Insurance & Data Security

The Honorable Richard Blumenthal, Ranking Member, U.S. Senate Subcommittee on Consumer Protection, Product Safety, Insurance & Data Security

*September 26, 2016*

Hon. TOM WHEELER,  
Chairman,  
Federal Communications Commission,  
Washington, DC.

Dear Chairman Wheeler:

The Information Technology Industry Council (“ITI”) and the 21st Century Privacy Coalition (“Coalition”) share the Federal Communications Commission’s (“FCC”) interest in protecting the privacy and security of consumers’ online information. Privacy and data security exist at the core of the trust relationship that all entities in the Internet ecosystem must establish with consumers. However, we con-

<sup>32</sup> See, e.g., FED. TRADE COMM’N, *Consumer Sentinel Network Data Book* (Feb. 2016), <https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-januarydecember-2015/160229csn-2015databook.pdf>.

<sup>33</sup> Commission Rules of Practice, 16 C.F.R. § 2.34 (C) (2014).

<sup>34</sup> Federal Trade Commission Act, 15 U.S.C. § 46 (2006).

tinue to have concerns about the FCC's broadband privacy proposal.<sup>1</sup> We therefore urge the FCC to modify the proposal so that it provides Americans with appropriate privacy protections while at the same time enabling consumers to fully benefit from the products and services our member companies are proud to provide.

Fundamentally, the FCC has proposed a series of burdensome privacy and data security requirements that are inconsistent with established law, policy, and practice in this area. These requirements do not reflect what is best for consumers. There is no evidence to indicate that consumers have been ill served under the traditional privacy framework currently administered by the Federal Trade Commission ("FTC").

Consumers have embraced today's thriving internet, fueled by responsible data practices, and they have come to expect a seamless online experience across multiple applications, services, and devices that delivers convenience while also protecting their privacy. The current online ecosystem supports online offerings that consumers value, promotes innovation, and contributes substantially to U.S. economic growth. As currently drafted, the NPRM could disrupt this healthy ecosystem.

Rather than adopting a regime aligned with the FTC's well-established, sensitivity-based approach to online privacy, the privacy regime proposed by the FCC in the NPRM departs from the FTC framework in significant and material respects. We are concerned that the prescriptive nature of the proposed regulatory approach could have precedential effects that would negatively impact the entire Internet ecosystem. We believe the FCC's primary objective should be to closely harmonize its rules with the existing FTC framework that has both protected consumers and enabled the Internet to flourish.

Our additional concerns with the NPRM include its (1) overly broad definition of personally identifiable information;(2) unnecessary restrictions on first-party marketing that would deprive consumers of discounts and new product offerings that can save consumers money; (3) inflexible, strict-liability data security and breach notification requirements; and (4) an impractically short breach notification timeframe.

Consistent with the FTC's enforcement framework, the FCC should modify its consent requirements to take into consideration whether the information is sensitive, rather than focusing on the use of such information and the entity engaged in such use. In addition, Internet protocol addresses or other unique identifiers necessary for the functioning of connected Internet devices, application usage data, and persistent online identifiers (cookies)—data that is highly unlikely to contribute to a risk of concrete harm such as identity theft—should not be subject to onerous consent requirements.

The FCC's data breach proposal does not afford organizations adequate time to remediate any discovered vulnerabilities or to conduct thorough investigations to ascertain the nature and scope of any breach before notifying customers or government agencies of a breach of data. It also fails to include a risk analysis, and therefore will contribute to notice fatigue at best, or incite unnecessary panic at worst. If over-notification becomes commonplace, consumers will have difficulty distinguishing between notices and determining which ones warrant them to take action. Notification should be made to consumers if an organization has determined there is a significant risk of identity theft or financial harm.

We support the goal of ensuring that consumers' online activities are subject to privacy and data security protections that comport with consumer expectations and long-standing policies that have protected consumers from harm while allowing the Internet to flourish. We hope that the FCC will modify its privacy proposal to ensure that this goal will be achieved.

Sincerely,

DEAN GARFIELD  
*ITI President and CEO*

MARY BONO  
*Co-Chair*  
21st Century Privacy  
Coalition

JON LEIBOWITZ  
*Co-Chair*  
21st Century Privacy  
Coalition

cc: The Honorable Mignon Clyburn; The Honorable Michael O'Rielly;  
The Honorable Ajit Pai; The Honorable Jessica Rosenworcel

<sup>1</sup>*Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, WC Docket No. 16-106, Notice of Proposed Rulemaking, FCC 15-138 (April 1, 2016) ("NPRM").

COALITION FOR PATIENT VISION CARE SAFETY  
*September 28, 2016*

Hon. JOHN THUNE,  
 Chairman,  
 Committee on Commerce, Science, and  
 Transportation,  
 United States Senate,  
 Washington, DC.

Hon. BILL NELSON,  
 Ranking Member,  
 Committee on Commerce, Science, and  
 Transportation,  
 United States Senate,  
 Washington, DC.

Dear Mr. Chairman and Ranking Member Nelson:

On behalf of the Coalition for Patient Vision Care Safety (the Coalition), we thank you for the opportunity to submit this letter as a part of the formal record accompanying yesterday's hearing "Oversight of the Federal Trade Commission." Given that the Federal Trade Commission (FTC) is primarily charged with promoting consumer protection and ensuring competition in the marketplace, the Coalition writes today to encourage enhanced consumer protection and continued robust competition specifically in the eye contact lens marketplace.

The Coalition was formed to ensure that the health and safety of the contact lens patient is promoted, preserved, and protected as the FTC undergoes its regular review of the Contact Lens Rule (Rule) and the underlying Fairness to Contact Lens Consumers Act (FCLCA) passed by Congress in 2003. While there have been significant technological and medical advances over the past 13 years, loopholes in the law, and noncompliance, have allowed some online retailers to use deceptive marketing practices that discourage regular eye care checkups.

One important example involves online sellers that often circumvent the intent of the law and jeopardize patient protections by encouraging sales of contact lenses in quantities that would permit use well beyond the length of the prescription, in some cases for *several* additional years. Put another way, online sellers ignore or intentionally extend the practical length of a prescription far beyond the legal expiration date and outside the time-frame envisioned by the FCLCA. We would ask that the FTC end the sales of lenses in quantities that go well beyond a prescription's expiration date. This would help to ensure that patients are seeing their eye care professionals at frequencies recommended by such agencies as the Centers for Disease Control (CDC).

Additionally, the proliferation of robocalling, the practice of contacting prescribers through recorded voice messages, denies the prescriber access to a live conversation and often makes impossible any capacity for confirming or even asking questions about the prescription. For these reasons, we believe that eliminating the use of robocalls will better ensure eye patient safety by ensuring that eye care providers have all appropriate information to accurately validate a prescription.

Finally, the Coalition fully supports the authority of the FTC to enforce the FCLCA in a way that protects patients and allows for a robust and competitive marketplace. The Coalition recommends that the FTC promote ways to make eye patient and provider complaints about contact lenses more easily articulated to the FTC; it also encourages the FTC to investigate more rigorously instances of deceptive and fraudulent practices by some sellers.

The Coalition submitted comments to the FTC in October 2015, during the FTC's review of the 2004 Rule. These comments are attached for the Committee's review. We respectfully request that the FTC use its authority over the contact lens marketplace to ensure that the patient-provider relationship is safeguarded and we stand ready to assist you, the other Senators on the Committee, and the FTC in this endeavor. Thank you for your continued leadership on all issues related to the FTC.

Sincerely,

The Coalition for Patient Vision Care Safety  
 AdvaMed  
 Alcon—a Novartis Company  
 American Optometric Association  
 Bausch+Lomb  
 CooperVision, Inc.  
 Johnson & Johnson Vision Care, Inc.  
 a member of Johnson & Johnson's Family of Companies

**The Coalition for Patient Vision Care Safety**  
**Comments Regarding the FTC's Regular Review of the Contact Lens Rule**  
**October 26, 2015**

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 COALITION FOR PATIENT VISION CARE SAFETY  
*October 26, 2015*

Federal Trade Commission,  
 Office of the Secretary,  
 Washington, DC.

RE: Contact Lens Rule, 16 CFR 315, Project No. R5119955

Dear Secretary Clark:

The Coalition for Patient Vision Care Safety (the “Coalition”) is pleased to submit comments on the Federal Trade Commission’s (the “FTC” or “Commission”) review of its 2004 Final Rule (the “Contact Lens Rule” or “Rule”) implementing the Fairness to Contact Lens Consumers Act (the “Act”). Our Coalition, composed of manufacturers, eye care doctors, and medical device trade associations, seeks to ensure that the patient-doctor relationship is preserved and protected as the Commission undertakes this important review.<sup>1</sup> Our aim is to improve the existing Rule to maintain pro-competitive intentions of the Act and Contact Lens Rule without allowing anticompetitive practices to undermine patient health and safety.

**Introduction**

The Coalition believes firmly that there is a continuing need for the Rule, and would be strongly opposed to significant changes that weaken the Rule or the statute. Since enactment, and the FTC’s subsequent implementation, the market for contact lenses has become extremely competitive and is now one of the most heated markets in the country. This competition has led to increased investment in research and development, and a proliferation of innovation that has served to benefit the nearly 44 million Americans who use contact lenses every day. Today, the U.S. contact lens consumer has numerous choices as to how to procure and where to purchase their contact lenses, as well as competitive choices among manufacturers of these medical devices. Be it an online seller, a traditional retail store, or a doctor

<sup>1</sup>The Coalition consists of the following members: The American Optometric Association (AOA); Vision Care—a Johnson and Johnson Company; Bausch + Lomb; CooperVision, Inc.; Alcon—a Novartis Company; AdvaMed, and The Contact Lens Institute.

of optometry or ophthalmologist, patients do not lack for choices in their purchasing options. Because of the strength of the market and the accessibility of these medical devices to patients, the FTC should view its authority over the marketplace as a safeguard for patients seeking to fill their prescription for their contact lenses, which are regulated medical devices.

While most FTC rules and related statutes are primarily concerned with prices and innovation for consumers, the Contact Lens Rule has a significant impact on the competition to supply contact lenses in a manner that enhances patient safety and the patient-doctor relationship, as well as the regulation of contact lenses, which are Class II and Class III medical devices as approved by the Food and Drug Administration (FDA). As such, any examination of the rules and their effectiveness should be viewed, at least in part, with an eye toward patient health and safety, and whether anticompetitive conduct fails to preserve and protect confidence in the patient-doctor relationship. As an FTC staff report from 2004 importantly noted:

“The primary health care concern with contact lenses appears to be ensuring that contact lens wearers return to their doctors regularly for eye examinations. . . . Some individuals may develop eye problems even if they follow the doctor’s advice; their eyes may develop problems simply in response to wearing lenses. Contact lens wearers incur health risks if they forego regular eye exams that would allow the optometrist or ophthalmologist to spot emerging health problems in their early stages. *Consumers may thus endanger the health of their eyes if they obtain and wear replacement contact lenses without a valid prescription.*”<sup>2</sup>

In the spirit of protecting patients’ eye health, we would ask the Commission to implement improvements in three areas of the Rule:

1. The FTC should strengthen enforcement of provisions of the statute and Contact Lens Rule, and simplify the process where patient and prescriber complaints are filed with the Commission.
2. The FTC should impose reasonable limits with respect to prescription expiration and to the quantity of contact lenses permitted to be prescribed and sold so as to ensure patients:
  - Receive appropriate professional supervision when using these regulated medical devices;
  - Receive contact lenses that are appropriate for the patient’s ocular health and needs;
  - Receive contact lenses that match the lens brand and type delineated on a valid prescription, regardless of where the contact lenses are purchased; and
  - Receive regular attention to their ocular health care issues.
3. The FTC should enhance the verification process, to protect against unverified sales of contact lenses and ensure that patients receive the contact lenses prescribed by their doctor of optometry or ophthalmologist.

We believe that without undermining the Act, the Commission can make specific changes to its Rule to better protect the ocular health of the nearly 44 million Americans wearing contact lenses today, and to ensure that the desire for profits is not placed above the need to protect the eye health of patients.

### **Enforcement**

The Coalition believes the Commission should increase significantly the enforcement of the Act. The FTC has asked about the effects of the Rule on the flow of truthful and deceptive information to consumers. The Coalition believes noncompliance with and loopholes within the law have resulted in a deceptive flow of information to contact lens patients, and have the potential to compromise seriously the vision health of patients.

The FTC, the FDA, and the Department of Justice (DOJ) all possess varying degrees of jurisdiction over the enforcement of legislation governing the contact lens marketplace; however, Congress gave the FTC explicit marketplace enforcement jurisdiction over the Act. The FTC has specific authority, under all appropriate enforcement provisions of the Federal Trade Commission Act, to issue complaints or bring actions against contact lens sellers who violate the Act. The Coalition understands that the FTC’s jurisdiction is primarily related to enforcement against companies that make misleading claims about their products or services. Moreover,

<sup>2</sup> *Possible Anticompetitive Barriers to E-Commerce: Contact Lenses*. A Report from the Staff of the Federal Trade Commission; March 2004. pp. 8–9 (emphasis added).

under its unfairness jurisdiction, the Commission can regulate marketing practices that cause or are likely to cause substantial consumer injury, are not reasonably avoidable by consumers, and are not outweighed by countervailing benefits to consumers or to competition.

The Act's mandate is clear. As is the Rule, which states that any "person that engages in the manufacture, processing, assembly, sale, offering for sale, or distribution of contact lenses may not represent, by advertisement, sales presentation, or otherwise, there is evidence that contact lenses may be obtained without a prescription."<sup>3</sup> In today's marketplace; however, contact lenses are often obtained either without an accurate and valid prescription or without any prescription at all. The opportunities for violating the prescription requirements in the Act are much greater than when the Act passed in 2003. These opportunities exist largely because the use of the Internet has increased exponentially in the last 11 years and overall product purchasing (and, in particular contact lenses product purchasing) is simpler than it once was. As a result, the Coalition members have all encountered increasing examples of noncompliance and exploitation in numerous areas.

#### *Noncompliance of the Act: Selling Lenses Without a Prescription*

Technological advances since the passage of the Act have made online contact lens purchases easier. But these advances have also occasioned competition-quashing and deceptive contact lens marketing from sellers. Increased website access and social media (through such sites as Facebook, eBay, Amazon, and others) offer illegal online traders and resellers a massive and often unsuspecting customer audience. Social media and the Internet have also helped foreign companies that promote the fact that they do not verify prescriptions easily reach thousands of consumers. The example below, NextDayLenses.com, is a U.K. company shipping contact lenses globally, "including the U.S.A."

The screenshot shows the NextDayLenses.com website. At the top, there is a navigation menu with categories: DAILY, MONTHLY, 2-WEEKLY, COLOURED, TORIC/ASTIGMATISM, B/MULTIFOCAL, and SOLUTIONS & ACCESSORIES. Below the menu, there is a search bar and a delivery information box stating "Order before: 2pm for London same day delivery 5pm for same day dispatch" and "OUR TIME: 12:56am". The main content area features a section titled "FIND YOUR CONTACT LENSES" with a sub-section "Contact Lenses Without a Prescription". This section includes a list of lens brands under "Shop by Family" and a paragraph explaining that users can buy contact lenses online without a prescription if they are happy with their current one. It also mentions that the company stocks the same brands as on the High Street and sources products from trusted manufacturers like CIBA Vision and Alcon.

Note that while this company does tell patients that "it is important to ensure your prescription is kept up to date . . ." they lead with "As long as you are happy that your current prescription is correct, you can buy contact lenses online without a prescription . . ."<sup>4</sup>

It is telling that a now seven-year-old Journal of Optometry study on the Act, and on online contact lens marketplaces, found poor eye care practices among patients who purchased contact lenses online and predicted additional unhealthy practices. The report concluded, in 2008, that online contact lens purchasers "are less likely to regularly visit their doctor and [are] at greater risk for unhealthy eye care practices."<sup>5</sup> The significant increase in online lens sales growth has only exacerbated this risky behavior. Fast forward to 2015, and it is apparent to the Coalition that the 2008 predictions have come true. According to a 2015 APCO Insight Survey of

<sup>3</sup> Federal Register 40504; July 2, 2004.

<sup>4</sup> <http://www.nextdaylenses.com/buy-contact-lenses-online-without-a-prescription-last> accessed on 10/24/2015

<sup>5</sup> Journal of Optometry 2008 Report, p. 34 "Contact lenses purchased over the Internet place individuals potentially at risk for harmful eye care practices." Joshua Fogel, PhD., and Chaya Zidile.



contact lens wearers who purchase online, numerous consumers admit to ordering contact lenses with expired or close-to-expired prescriptions and online retailers are encouraging this practice.<sup>6</sup> One-in-three (32 percent) purchasers admit to ordering contacts using an already expired prescription.<sup>7</sup> The same survey found that, of those who believe a prescriber should be contacted directly by a lens retailer to fill a prescription, only 35 percent report that the retailer contacted their doctor directly to get the prescription.<sup>8</sup>

The American Optometric Association (AOA) also recently reported to the Coalition that it has identified several online contact lens retailers who, in the Coalition's view, inappropriately allow consumers to purchase contact lenses without a prescription, contravening either the intent or the Act itself. For example, during the order process AALens.com does not request any prescriber information to verify a prescription and AALens.com does not appear to request a copy of the patient's prescription. Rather, the retailer indicates, "Our terms and conditions are simple: All customers who order replacement contact lenses must have a valid prescription which must be less than 24 months old. Your order must be for the same contact lenses that you are already successfully wearing. We accept no responsibility for our customers' lack of suitability to wear contact lenses."<sup>9</sup> Similarly, Saveonlens.com does not request prescriber information to initiate the verification process and does not require the patient to provide a copy of a prescription to complete an order.<sup>10</sup> There are also several retailers who sell cosmetic lenses seemingly without following the requirements of the Act.<sup>11</sup> Therefore, it appears that there is a practice by some online retailers to either sell without a prescription or to avoid contacting a prescriber directly to obtain or confirm information required by the Act. We believe that these violations are going largely unchecked.

#### *The Manner in Which the Market Works Misleads Patients*

According to the 2015 APCO Insight Survey, and from numerous anecdotal accounts provided to the Coalition, lens patients are ordering, and are being encouraged to order, large quantities of contact lenses, particularly just prior to a prescription's expiration in order to circumvent Federal prescription mandates. There are even online blogs offering advice as to how to do so, as detailed below:<sup>12</sup>



**Best Answer:** Presumably you wear one of the national brands which means only sites within the US/Canada/UK sell them.

The US has laws governing the sale of contact lenses that the sites within the US have to obey. Even sites in Canada or the UK have agreed to follow the US demand ( as a good will gesture ) that the prescription be validated before shipping. If the shipping address is in the US , no one will send them without verifying with the Dr.

One trick is to call and order when you know they won't be able to get a hold of the Dr's office for several days, because of vacation or something. After 2 or 3 days, they consider that as having tried, and send the order. So if your Dr. is in a small office, they may be closed for a few days next week because of the July 4th holiday...a good time to try. If he is in a mall, then it is always open so that won't work.

It's frustrating at times, but that is the laws of the land.

Source(s):  
Optician

Six-in-ten online purchasers (62 percent) say they have ordered contacts using a prescription less than a month from its expiration date.<sup>13</sup> While not an outright violation of the Act, it is troubling that online contact lens sellers encourage and market the "stocking up" of contact lenses just prior to a prescription's expiration. While the Act does not limit the number of contact lenses that can be sold, it does require that, absent an outright prescription, the quantity of contact lenses be included in the verification request that is sent to the prescriber. In 2004, the FTC thought that providing such information would prevent the patient from receiving more contact lenses than are available through the remainder of the prescription. In the Rule,

<sup>6</sup>From September 24 to October 2, 2015 APCO Insight conducted an online quantitative survey among U.S. consumers who purchased contact lenses online. APCO surveyed 500 contact lens wearers over 18 who had purchased online in the previous six months.

<sup>7</sup>*Id.*

<sup>8</sup>*Id.*

<sup>9</sup><http://www.aalens.com/faq.html>

<sup>10</sup>[http://www.saveonlens.com/contact\\_lenses\\_no\\_prescription.html](http://www.saveonlens.com/contact_lenses_no_prescription.html)

<sup>11</sup><https://www.honeycolor.com>; [www.pinkyparadise.com](http://www.pinkyparadise.com); <http://thedolleye.com>

<sup>12</sup><https://answers.yahoo.com/question/index?qid=20130627093112AAEu68o>

<sup>13</sup>APCO Insight Survey.

the FTC declared that “the verification process itself . . . generally allows prescribers to prevent patients from ordering excessive contact lenses.”<sup>14</sup>

In practice; however, patients are regularly “ordering excessive contact lenses.”<sup>15</sup> This is despite the purported quantity reporting safeguard that the FTC believed would limit excessive ordering. Just because the quantity is required to be reported, does not mean that a consumer has to limit the number of contact lenses ordered.

Furthermore, if a patient provides a copy of a contact lens prescription to a retailer, that prescription is not required by the Rule to include any quantity information. Additionally, when a complete copy of a contact lens prescription is provided to a retailer, the verification process is not triggered. So, while the FTC previously believed that the verification system provided a safeguard against the purchase of excessive contact lenses, the FTC did not seem to account for retailers seeking to obtain a complete copy of the contact lens prescription to circumvent verification. Clearly, more needs to be done to ensure that retailers do not encourage the purchase of large numbers of contact lenses that might no longer meet the eye care needs of the patient and may allow threats to a patient’s vision to fester.

There are obvious examples of these practices. For example, *Lens.com* allows consumers to purchase up to 50 boxes of a 90-day pack of daily disposable contact lenses for each eye, which provides 4,500 contact lenses per eye. This is more than a 12-year supply of contact lenses, well over a one year’s supply, which if purchased virtually eliminates the doctor-patient relationship in its entirety.

The screenshot shows the Lens.com website interface. At the top, there is a navigation bar with links for Home, All Products: A to Z, Reorder, FAQ, and About. A search bar is located on the right. Below the navigation bar, the breadcrumb trail reads: Home > Contact Lenses > CIBA Vision > Daily Disposable > Dailies AquaComfort Plus Contact Lenses. The main product section is titled "Dailies AquaComfort Plus Contact Lenses". It lists the price as "As Low As: \$39.99 per box" and includes details about the manufacturer (CIBA Vision), type (Daily Disposable), and quantity (90 Lenses per Box). A promotional banner says "BUY MORE SAVE MORE! Buy 3+ per eye @ \$39.99 per box" with a "LOWEST PRICE GUARANTEE" badge. Below this is a table for entering the prescription. The table has columns for Quantity, Base Curve, Diameter, Power, and Price per Box. The Right Eye (OD) and Left Eye (OS) rows show 50 boxes, a base curve of 8.7, and a diameter of 14.0. There is also an "Add biofresh Multi-Purpose Solution" section with a price of \$0.00. At the bottom, there are security logos for McAfee SECURE, Norton SECURED, and a "Add to Cart" button.

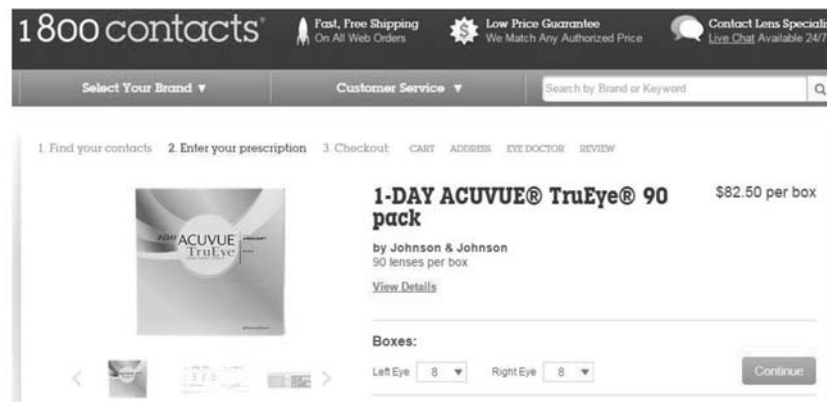
	Quantity	Base Curve	Diameter	Power	Price per Box (as low as)
Right Eye (OD)	50 Boxes	8.7	14.0	Select	\$39.99
Left Eye (OS)	50 Boxes	8.7	14.0	Select	\$39.99

Additionally, 1-800-CONTACTS allows a patient to purchase eight boxes of 90-day packs for each eye, which provides 720 contact lenses per eye, which is about a 2-year supply, stocking most patients with contact lenses well beyond their prescription’s expiration date. With 1-800-CONTACTS dominating the online market (the company itself asserts that it holds 75 percent of the online market),<sup>16</sup> it is not surprising that patients are uneducated as to the need for regular visits to their eye doctor or the importance of maintaining an updated prescription.

<sup>14</sup> Federal Register 40488; July 2, 2004.

<sup>15</sup> Id.

<sup>16</sup> <http://www.judiciary.senate.gov/hearings/watch?hearingid=12e98234-5056-a032-52ea-90f98e940d9b>



The Coalition believes that the selling of excessive amounts of contact lenses unfairly disadvantages competition, discourages patients from seeking regular visits with their eye doctor and is not in the best interest of patient health. Regular visits allow doctors not only to determine changes in a patient's vision, but also serve as a forum to inform patients how dangerous some eye health habits can be, and assess whether their patients are engaging in such risky behavior. According to a recent report published by the Centers for Disease Control and Prevention (CDC), more than 99 percent of survey respondents reported engaging in at least one risky behavior with regard to contact lens habits.<sup>17</sup> The CDC's research found that some of these riskier behaviors include:

- Patients keeping contact lens cases for longer than recommended (82.3 percent);
- Adding new solution to the existing solution instead of emptying the case out fully before adding new solution (55.1 percent); or
- Patients wearing their contact lenses while sleeping (50.2 percent).

As this survey data demonstrates, the importance of annual eye exams and the preservation of the patient-doctor relationship is critical not only to determine the patient's prescription needs, but also to examine their overall eye health habits, ensuring their safety when using contact lenses.

#### *Brand Substitution*

An additional area of concern related to patient safety involves significant incidences of contact lens brand substitution, which is prohibited under the Act. Again, according to the 2015 APCO Insight Survey, consumers do not want brand substitutions, yet many say they have received a substitution without advance notice or that their online retailer has advised them to substitute when out of stock.<sup>18</sup> One-in-four (24 percent) online purchasers reported having received—without warning—a different brand of contact lenses than those which were ordered.<sup>19</sup> Another three-in-ten (31 percent) reported having experienced supply issues with their online retailer and being advised to get another brand of contact lenses as a solution.<sup>20</sup> While the Act allows for substitution of contact lenses by the same manufacturer if such contact lenses are the same but sold under a different label, substitutions from one manufacturer to another are prohibited and, yet, are routinely practiced by online sellers.<sup>21</sup> This is potentially quite dangerous for the contact lens patient. A 2015 Ohio State University report showed clearly how the ocular response to each contact lens is significantly different and leads to a variety of physiological reactions, even when fitting the same patient with various contact lenses.<sup>22</sup> Thus, maintaining and enforcing the current requirement that prescribers must include the specific brand and product name on patient prescriptions and prohibiting substi-

<sup>17</sup> [http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6432a2.htm?s\\_cid=mm6432a2\\_w](http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6432a2.htm?s_cid=mm6432a2_w)

<sup>18</sup> APCO Insight Survey.

<sup>19</sup> Id.

<sup>20</sup> Id.

<sup>21</sup> 15 U.S.C. 7603; § 4(f).

<sup>22</sup> Ohio State University 2015 Report. "Are Contact Lenses Interchangeable?" Jeffrey J. Walline, OD PhD.

tution is absolutely necessary to minimize the risk of potentially sight-threatening complications.

The Coalition understands and supports the spirit of increased competition, small business opportunity, and patient convenience envisioned by the Act. But we strongly believe that some online contact lens sellers have sought to reduce competition among retail and medical eye care providers and manufacturers through noncompliance or outright violation of the Act. This can be prevented with stronger enforcement.

#### *Enforcement Recommendations*

Operation Double Vision, a short-term program run primarily by U.S. Immigration and Customs Enforcement (ICE), seized 20,000 illegal pairs of contact lenses in 2014.<sup>23</sup> And, yet, there is currently no dedicated office, online category, or phone number at the FTC assigned to Contact Lens Rule complaints. The FTC, in fact, routes eye contact complaints about non-compliance to its general complaint lines. These include complaints regarding:

- Sale or advertising of contact lenses without a prescription;
- Fake prescriptions;
- Filling of expired prescriptions;
- Supplying inappropriate and exorbitant quantities of contact lenses;
- Ignoring the eight-hour passive verification period by prescribers;
- Substituting contact lenses without the consent of prescriber;
- Unintelligible recorded robocall messages; and
- Failure to provide reasonable access to any actual contact person to verify the prescription.

We believe the general routing of complaints both discourages reporting of complaints and does not provide the FTC with adequate and accessible information to enforce the Rule. We believe that dedicated personnel paired with, a dedicated website or phone number within the FTC, and/or a dedicated office, would go a long way toward protecting the contact lens patient. We also recommend:

- An analysis be conducted and made available by the FTC that provides compliance and enforcement details about the Act—including, but not limited to, how many complaints the FTC receives about the Act annually, the nature of those complaints, how often the FTC processes complaints, and how many investigations, complaints, and enforcement proceedings and fines the FTC has completed to date;
- Significantly increased enforcement of the Act;
- A requirement that a live person be available for doctors to verify or reject a prescription or information about a prescription, with a phone number to such person clearly identified, as part of the verification process; and
- A determination that robocalling is not a “completed” communication for the purposes of the verification process.

There is overwhelming evidence of continued deceptive and misleading practices by some in the online contact lens marketplace, and we urge the Commission to hold these entities accountable. We, therefore, urge the Commission to pursue our requested enforcement-related recommendations.

#### **Quantity and Length of Prescriptions**

The Act preempted state laws that specified prescription expiration dates “less than one year after the issue date of the prescription.”<sup>24</sup> The Act permits prescriptions longer than one year to the extent the laws of the state in which the prescription was written permit longer terms.<sup>25</sup> And the Act otherwise requires that prescriptions shall expire “not less than one year after the issue date of the prescription.”<sup>26</sup> The exception in the statute pertaining to ocular health is not pertinent to these comments.

The Commission in its Contact Lens Rule essentially codified the above referenced statutory language, except for some added clarity with respect to prescriptions shorter than one year. The Coalition urges the Commission to retain the prescrip-

<sup>23</sup> U.S. Immigration Customs & Enforcement Press Release; 10-12-2015.

<sup>24</sup> 15 U.S.C. 7604; § 5(a)(2).

<sup>25</sup> 15 U.S.C. 7604; § 5(a)(1).

<sup>26</sup> 15 U.S.C. 7604; § 5(a)(2).

tion limits imposed in the Rule and also strengthen the Rule to provide increased protections for patient eye safety and health.

The reasoning behind the prescription limits in the Rule was, as the Commission noted in its publication of the Contact Lens Rule, to “prevent prescribers from selecting a short expiration date for a prescription that unduly limits the ability of consumers to purchase contact lenses from other sellers[.]”<sup>27</sup> The Coalition agrees that expiration dates should not be unduly restrictive; however, we do not believe that prescribers would have selected short expiration dates so as to limit consumer choice. The one-year rule now serves a separate yet equally important purpose which is not fully realized.

*Competition and Convenience Can Lead to Compromising Patient Safety*

To be specific, the one-year limit serves to make it more likely that patients requiring renewals of their prescriptions will undergo regular and annual eye exams. Any alteration to the Rule toward lengthening the time frame would undermine this vital health benefit. The competitive benefits behind the Rule have been mostly achieved but the health benefits that the Rule encourages need to be protected and, to some degree, have yet to be realized. As discussed earlier, some patients do not prioritize regular eye exams with their doctor, and retailers regularly encourage this behavior with misleading information about the importance of regular eye care. This is concerning as 87 percent of contact lens patients had an eye exam last year, and of those, 94 percent reported a change in their prescription since their last visit.<sup>28</sup>

As the above numbers suggest, around 13 percent of contact lens patients did not see a licensed practitioner for an exam last year. Put another way, around five million contact lens patients did not receive the care they need. Why is this? The Coalition believes there are two predominant factors: first, when the Commission crafted Rule §315.6, it did not, and perhaps could not, take into account the proliferation of sellers that deliberately or inadvertently ignore verification requirements and sell large supplies of contact lenses to patients after or close to the expiration of their prescription. Second, the Commission could not anticipate that many consumers would flock to such sellers, and that sellers would be willing to disseminate misleading information regarding the need for regular eye exams and valid, updated prescriptions with little concern about the health benefits the patient may be foregoing.

*Limits on Quantity Can Preserve Competition and Promote Patient Safety*

Fortunately, the solution is quite simple. The Coalition urges the FTC to strengthen the Rule as implemented by adding quantity limits—along with the enhanced verification standards we recommend below, to better protect patient safety and health.

The Act gives the Commission the authority to impose quantity limits. In fact, 15 U.S.C. § 7607 gives the FTC broad rulemaking authority “to carry out this Act.” Putting reasonable limits on prescriptions does not contravene the statute and is consistent with the goals of protecting consumers and competition. The Act contemplates quantity limits in its requirement that sellers include the specific quantity of contact lenses ordered in their verification requests.<sup>29</sup>

Consistent with the recommendations of the Contact Lens Rule, the majority of states have prescription expiration standards of one year. However, as cited above, sellers will often contact patients toward the end of their prescription and urge them to buy more, and in some cases, several years’ supply of contact lenses. Also, consumers will often seek to buy contact lenses without a new prescription thinking they do not need a visit to their eye doctor. In both cases, the patients forego regular eye care, fail to receive a valid new prescription, and miss an important opportunity to be evaluated for other health conditions. For example, doctors of optometry and ophthalmologists are often the first health care practitioners to examine persons with undiagnosed diabetes mellitus or ocular manifestations of diabetes.<sup>30</sup> These providers also identify other chronic conditions such as multiple sclerosis, Crohn’s disease, and juvenile rheumatoid arthritis.

The Coalition urges the FTC to adopt several complementary quantity limits to address these interrelated problems. In light of the fact that most prescriptions are one-year in length, the Coalition urges the FTC to forbid retailers to sell in a single transaction a quantity of contact lenses that exceeds a single year’s supply. An al-

<sup>27</sup> Federal Register 40504; July 2, 2004.

<sup>28</sup> APCO Insight Survey.

<sup>29</sup> 15 U.S.C. 7603 § 4(c)(3).

<sup>30</sup> <http://aoa.uberflip.com/i/374890-evidence-based-clinical-practice-guideline-diabetes-mellitus>

ternative approach could be for the FTC to require that sellers only provide a supply equal to the length of the underlying prescription. During the initial comment period after the Act was passed, commenters expressed concern that patients lose or damage their contact lenses and therefore argued against such limits. In such circumstances; however, patients can always buy more contact lenses, so long as their prescription is still valid. However, to avoid the practice of sellers and/or consumers attempting to get a year or more of contact lenses toward the end of their prescription, the Coalition recommends the Commission prohibit the sale of a quantity of contact lenses that exceeds the length of time before the prescription will expire.

In the 11 years since the publication of the Rule, a significant number of patients have ordered and received contact lenses that were never verified and never in fact even prescribed. Oftentimes, sellers, in sending these contact lenses, are not technically violating the rules in the sense that they are sending the new supply while the original prescription is still valid (usually in the final month of the prescription). But they are violating the spirit of the rules in the sense that they are sending quantities well beyond the amount left on the original prescription. Given that 94 percent of patients require a change in their prescription when they actually have an eye exam; this practice seems to do a disservice to the patient.

*Lack of Quantity Limits Can Stifle Competition and Patient Choice*

With respect to competition, an area the FTC is charged with protecting and promoting, there is a subtle, anticompetitive effect at play, particularly in the online market for contact lenses. That effect would be mitigated should the Commission adopt the rule changes urged in these comments. In the online market, one player, 1-800-CONTACTS, dominates the playing field, by its own estimates, controlling 75 percent of online sales.<sup>31</sup> When any merchant sends patients a year or more supply of contact lenses toward the end of their year's prescription, they are in essence locking up that patient for the foreseeable future, and forestalling competition for that patient's loyalty. Instead, as the data shows, a large percentage of patients that do receive regular eye exams actually learn of changes with their eyes, changes that result in changes to their prescriptions, and changes that should lead to competition for their purchasing dollar. Instead, when 1-800-CONTACTS simply sends a two years' supply to a patient, that practice "unduly limits the ability of patients to purchase contact lenses from other sellers[.]"<sup>32</sup>

In its explanation of the Contact Lens Rule in 2004, the FTC opined that "[t]he verification process itself thus generally allows prescribers to prevent patients from ordering excessive contact lenses."<sup>33</sup> In reaching this conclusion, the Commission deduced that because verification requests were required to include the quantity of contact lenses ordered, prescribers would have ample opportunity to "treat a request for verification of a prescription as 'inaccurate.'"<sup>34</sup> But as these comments and the data in the field demonstrates, it is possible that a significant number of Americans are getting large quantities of contact lenses beyond the length of their initial prescription, without getting a new prescription, despite the fact that their initial prescription would most likely change had they in fact gone for an eye exam.

The FTC should impose reasonable limits with respect to the quantity of contact lenses permitted to be prescribed as well as sold. The Coalition makes the following recommendations to the Commission regarding quantity limits:

- Require the inclusion of quantity limits on the patient's prescription to ensure patients receive appropriate and regular medical supervision when using these regulated medical devices;
- Permit retailers to provide a quantity of contact lenses equal to a single year's supply in a single transaction;
- Prohibit the sale of a quantity of contact lenses that exceeds the amount reasonably necessary for use before the prescription will expire; and restrict the sale of contact lenses on a prescription that is nine months after issuance or older to up to 25 percent of the prescription's course; and
- Prohibit sellers from acting as outright agents of patients in terms of filling a prescription thereby requiring patients to take a more active and ongoing role in their eye care health.

<sup>31</sup> <http://www.judiciary.senate.gov/hearings/watch?hearingid=12e98234-5056-a032-52ea-90f98e940d9b>

<sup>32</sup> Federal Register 40504; July 2, 2004.

<sup>33</sup> Federal Register 40488; July 2, 2004.

<sup>34</sup> Id.

### Passive Verification

When the Act was originally considered by the Congress, some versions of the draft legislation did not adopt a specific approach to prescription verification, recognizing benefits to both passive and active verification processes. Former FTC Consumer Protection Director Howard J. Beales testified before the House Energy and Commerce Committee in 2003 during a Committee hearing on the bill, and noted—“Proponents of passive verification favor this approach because it allows the seller to presume verification if the eye care practitioner does not take affirmative action to correct any errors in the prescription . . . . By contrast, proponents of active verification systems express concern that passive verification may allow sellers to ship contact lenses even if the customer has an invalid or incorrect prescription . . . . [C]ustomers may face serious health risks if they obtain and wear contact lenses based on such a prescription.”<sup>35</sup>

As passed by Congress, the Act adopted a passive verification mechanism—which may help the contact lens *consumer*, but adversely affect the contact lens *patient*. Subsequently, the FTC’s intent in designing the verification process in the Rule was to provide flexibility and choice to consumers in purchasing contact lenses, but also put in place a critical safeguard that patients receive the correct contact lenses as prescribed by their eye care professional. Importantly, the FTC also sought to ensure that individuals are not able to circumvent the prescription expiration requirements.

The Coalition does not believe that these safeguards have been achieved and, therefore urges the FTC to reexamine the passive verification system to ensure that patients are receiving contact lenses that are tied to an accurate and valid prescription. There are several areas of particular concern for the Coalition, over which we believe the Commission has the authority to act, including taking steps to:

1. Ensure, through enforcement, that online sellers are not able to advertise or communicate that they sell contact lenses without a valid prescription, or advertise reorders of prescription contact lens prescription after the prescription has expired;
2. Examine the various methods of communication between a seller and provider, including robocalling, and in particular look at whether existing methods actually constitute “direct communication”; and
3. Study how the current passive verification system could be modified to better protect patients’ health.

#### *Deceptive Practices from Sellers Regarding Prescription Verification*

After 11 years of the Rule, it has become clear that the passive verification process can vary substantially in practice. The Coalition has heard reports from patients and prescribers of instances in which consumers have received contact lenses based on expired prescriptions; stockpiled contact lenses that last well beyond the prescription expiration; or duplicate orders of contact lenses. Not only do these examples raise concerns around patient health and safety, but they also suggest that the safeguards that Congress and the FTC created aren’t protecting patients as intended.

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<sup>35</sup>Fairness to Contact Lens Consumers Act: hearing before the Subcommittee on Commerce, Trade, and Consumer Protection of the Committee on Energy and Commerce, House of Representatives, One Hundred Eighth Congress, first session, on H.R. 2221, September 12, 2003.



The advertisement banner for daysoft.com features the company logo at the top left, with the tagline "comfortable, affordable, daily-disposables" below it. To the right is a partial view of a globe. The main headline reads "daysoft replaces other brands for half the price because we manufacture & supply direct to you". Below this is a list of seven bullet points: "UK design and manufacture", "All the oxygen your eyes require for daily wear", "Slim letter box friendly pack", "500+ million lenses sold via opticians and online", "Customer care support online", "Free online personal support from our optician", and "No quibble money back guarantee". On the left side of the list is an image of two Daysoft contact lens cases, one open, with water splashing around them. At the bottom, there is a navigation bar with the text "For price, delivery, wearer reviews and easy ordering click your country flag" and a row of small national flags (UK, Canada, USA, Germany, France, Spain) followed by the text "or Select your country..." and a dropdown arrow.

The Coalition is aware of multiple online sellers that advertise their ability to provide contact lenses *without* a valid prescription. These sellers include *DaySoft.com*, a contact lens company that markets to patients in the United States. DaySoft's business practices are in violation of the Act because it does not require a verified prescription. Instead, the company directs patients to enter in the brand of contact lenses they were previously prescribed and then DaySoft replaces them with what they deem to be an adequately equivalent lens.<sup>36</sup> We are aware of individuals who were personally able to purchase contact lenses through this site, and also received contact lenses that were other than those that were prescribed by their eye care professional. The homepage of their website includes a testimonial from a patient in New York;<sup>37</sup> these sites are clearly reaching patients in the United States.

The Coalition urges the FTC to examine these deceptive practices, and consider enforcement actions against these online sellers who are endangering the eye health of many Americans who purchase their contact lenses online. According to the Rule, "The Commission emphasizes that the sale of contact lenses based on a verification request which does not contain all of the required information constitutes a Rule violation."<sup>38</sup> The FTC has the authority and the responsibility to act against these bad actors.

#### *Should Robocalling be a Valid Method of Communication?*

Another area of increasing concern to the Coalition is the growth of robocalling by retailers is leading to more and more prescriptions being verified passively. According to the Rule, once the eye care professional receives the request to verify the prescription, they have eight business hours to verify the information. If the eye care professional fails to verify the prescription within eight business hours, the patients' prescription is automatically filled.<sup>39</sup>

The Rule allows for a variety of methods of communication for sellers to verify prescriptions, ranging from outdated communication via fax to seller-initiated robocallers leaving voice messages on prescriber's office phone lines, often after hours and without a return number or seller contact. As a result, prescribers are

<sup>36</sup> <https://www.daysoftcontactlenses.com/US/Buy.aspx#Vh-grdKrSM8>

<sup>37</sup> <http://www.daysoftcontactlenses.com/US/CountryHomepage.aspx#ThisMonth>

<sup>38</sup> Federal Register 40496; July 2, 2004.

<sup>39</sup> Federal Register 40483; July 2, 2004.



often unable to provide the proper verification of the patient's prescription information within eight business hours.

With regard to the definition of "direct communication," the Commission ultimately decided in the Rule that an automated phone call would qualify as a completed communication to verify a prescription, even though the Commission received a "substantial"<sup>40</sup> number of comments opposed to the use of automated telephone systems. That decision should be revisited. There is an important amount of critical patient information that must be communicated by the seller and verified by the prescriber, and that is very difficult to communicate in a robocall.<sup>41</sup> In fact, the AOA has received numerous complaints from doctors of optometry that robocalls from on-line sellers, such as 1-800-CONTACTS, are difficult to understand or do not include all of the legally required patient information to verify the prescription. As a result, patients may receive contact lenses that are based on outdated or incorrect prescription information. The Coalition believes that the FTC and the FDA share the responsibility for the health and safety of contact lens patients. The fact that patients are receiving contact lenses based on incorrect, outdated, or unverified prescription information runs counter to the FDA's medical device safety standards, and can also lead to serious vision issues.

Additionally, in the FTC's 2004 publication, *The Contact Lens Rule: A Guide for Prescribers and Sellers*, the FTC states that "direct communication by telephone requires reaching and speaking to the intended recipient, or leaving a voice message on the telephone answering machine of the intended recipient."<sup>42</sup> This definition runs counter to the inclusion of automated phone calls (which do not allow for human feedback) as a valid method of verification. For example, a voice mail box may have a time limit within which to leave a message, and yet an autodialed message cannot by its very nature adapt to time constraints, and may therefore be cut off before conveying in entirety the patient's information. As such, prescribers often get calls without information, or without a return phone number; this invariably leads to sales when in fact the prescription has never been fully received or verified.

The FTC wrote in the Rule that "the Commission will continue to monitor whether full, valid requests for verification of a prescription are being made through the use of automated telephone systems. If evidence demonstrates that sellers are not making valid verification requests but are providing consumers with contact lenses despite deficient requests, the Commission may revisit this issue."<sup>43</sup> The Coalition requests that the FTC publish its findings, if any, in this regard. The Coalition believes that the FTC will find that there is substantial evidence that sellers' attempts to verify vital patient information are deficient, and the Commission should ban the use of automated phone systems.

#### *Possible Changes to Passive Verification and Other Options to Improve Patient Health Safeguards*

Given that Congress permitted a passive verification system in the Act, we recognize that the Commission is unlikely to alter significantly this portion of the rule without Congressional action. While the Coalition supports the elimination of passive verification, we believe that modifications to the passive verification standards under the FTC jurisdiction could be made to provide a better baseline for patient safety standards. In a 2004 staff report, the FTC recommended that "prescription release requirements and prescription verification requirements ensure that both consumers' health and consumers' economic interests are protected, especially given that consumers are more likely to adhere to recommended replacement schedules if contact lenses are less expensive and/or more conveniently available."<sup>44</sup> To meet this standard while ensuring that patients are receiving optimum vision care, we support the following modifications:

<sup>40</sup> Federal Register 40489; July 2, 2004.

<sup>41</sup> (1) The patient's full name and address; (2) The contact lens power, manufacturer, base curve or appropriate designation, and diameter when appropriate; (3) The quantity of lenses ordered; (4) The date of patient request; (5) The date and time of verification request; (6) The name of a contact person at the seller's company, including facsimile and telephone numbers; and (7) If the seller opts to include the prescriber's regular business hours on Saturdays as "business hours" for purposes of paragraph (c)(3) of this section, a clear statement of the prescriber's regular Saturday business hours." Federal Register 40496; July 2, 2004.

<sup>42</sup> *The Contact Lens Rule: A Guide for Prescribers and Sellers*. Federal Trade Commission, Bureau of Consumer Protection, Office of Consumer and Business Education. October 2004. pp. 3-4. (emphasis added).

<sup>43</sup> Federal Register 40489; July 2, 2004.

<sup>44</sup> *Possible Anticompetitive Barriers to E-Commerce: Contact Lenses*. A Report from the Staff of the Federal Trade Commission; March 2004. Page 31.

- Completion of the study on how the passive verification system affects patients' eye health;
- Modification of the eight-hour period of communication when the initial communication begins prior to a holiday or on a weekend when a doctor is not conducting normal office hours; and
- Rejection of any weakening of the current prescription verification standards.

### **Conclusion**

On behalf of the Coalition, we have suggested in this submission ways for the Commission to both maintain certain protections and make needed changes to the Contact Lens Rule in order to accommodate appropriately all the technological and medical advances that have occurred over the last 11 years. To summarize, our suggestions are as follows:

1. The FTC should strengthen the enforcement of provisions of the statute and Contact Lens Rule. To accomplish this, the Coalition recommends the following actions:
  - Simplify the process whereby patient and prescriber complaints are filed with the Commission, including dedicated personnel tasked with receiving and reviewing these complaints;
  - Conduct and publish an analysis providing compliance and enforcement details about the Act—including, but not limited to the annual totals of complaints the FTC receives regarding violations of the Act, the nature of the complaints, how often the FTC processes complaints, and how many investigations, enforcement proceedings and fines the FTC has completed to date; and
  - Increase enforcement penalties to deter retailers from advertising that they are able to sell contact lenses without an accurate and valid prescription.
2. The FTC should impose reasonable limits with respect to the quantity of contact lenses permitted to be prescribed as well as sold. The Coalition makes the following recommendations to the Commission regarding quantity limits:
  - Require the inclusion of quantity limits on the patient's prescription to ensure patients receive appropriate and regular medical supervision when using these regulated medical devices;
  - Permit retailers to provide a quantity of contact lenses equal to a single year's supply in a single transaction, or the length of the underlying prescription; and
  - Prohibit the sale of a quantity of contact lenses that exceeds the amount reasonably necessary for use before the prescription will expire.
3. The FTC should enhance the verification process, to protect against unverified sales of contact lenses and ensure that patients receive the contact lenses prescribed by their doctor of optometry or ophthalmologist. The Coalition makes the following recommendations regarding the communication between retailers and doctors:
  - Examine the various methods of communication between a seller and provider to determine whether existing methods actually constitute "direct communication";
  - Issue a determination that robocalling is not considered a "completed" communication for the purposes of the verification process;
  - Study how the current passive verification system could be modified to better protect patients' health; and
  - Reject any weakening of current prescription verification standards.

We are hopeful that the Commission will adopt our suggested modifications with regard to enforcement, length and quantity of prescriptions; and passive verification; we believe these modifications comport with the underlying Act and will create an environment for contact lens patients that will promote truthful interactions with sellers and providers. It is our ultimate goal to promote better eye health and safety with regard to the prescription and dispensing of contact lenses, while retaining a robust market for patients. We believe that the changes we suggest will also create a more level and competitive playing field for all those involved in the contact lens business—whether those involved be medical professionals, manufacturers, online retailers or small and large bricks and mortar retailers.

We stand ready to provide additional comments or any other material the Commission deems necessary to inform the best policies to protect patients and consumers of contact lenses.

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APPENDIX—FTC QUESTIONS

*1. Is there a continuing need for the Rule? Why or why not?*

According to the Fairness to Contact Lens Consumers Act (P.L. 108–164), the FTC is tasked with prescribing rules under its jurisdiction to carry out the Act. The Coalition believes firmly that there is a continuing need for the Rule, and would be strongly opposed to significant changes that weaken the Rule or the statute. In the years prior to the enactment of the Act, significant advances in medical technology were achieved that made the wearing of contact lenses more appealing and available to patients. In the years since the Contact Lens Rule was finalized, even more technological advances have occurred both in the contact lens medical device industry as well as in the contact lens marketplace. Because of the strength in the market and the accessibility of these medical devices to patients, the Coalition urges the Commission to view its authority over the marketplace as a safeguard for the contact lens *patient*, rather than the contact lens *consumer*.

*2. What benefits has the Rule provided to consumers? What evidence supports the asserted benefits?*

The Coalition believes that the Act led to numerous choices for patients regarding how and from whom they purchase their contact lenses. The nearly 44 million Americans that wear contact lenses have a robust marketplace that includes online sellers, traditional retail stores, or a doctor of optometry or ophthalmologist. However, this is only beneficial to patients when their ocular health is also protected within the marketplace. Because of the growth in the market and the accessibility of these medical devices to patients, the FTC must now view its authority over the marketplace as a safeguard from unfair business practices for patients seeking access to necessary regulated medical devices from entities that might care more about sales than safety.

*3. What modifications, if any, should be made to the Rule to increase its benefits to consumers?*

*a. What evidence supports the proposed modifications?*

*b. How would these modifications affect the costs the Rule imposes on businesses, including small businesses?*

*c. How would these modifications affect the benefits to consumers?*

As referenced in our comments, the Coalition believes that the FTC should approach the review of the Act with an eye toward patient safety, and examine whether the sanctity of the prescriber-patient relationship is being preserved to ensure patients are truly benefitting from the protections of the Act. To that end, we have identified three improvements to the rule that would be beneficial to patients in this marketplace.

First, the FTC must enforce the statute and Contact Lens Rule and ease the process whereby patient complaints could be filed with the Commission, thereby enhancing enforcement on the front end. This will allow patients to better inform the Commission when their eye health has potentially been compromised.

Second, the FTC should include reasonable quantity limits of contact lenses to be dispensed on a single prescription. This enhancement will ensure patients are receiving the quality of eye health care that they expect and deserve, and will reduce the burden on the patient to know if they are receiving the most recent version of this complex medical device.

Finally, the Commission should improve the prescription verification process. This modification would protect patients from unverified sales of contact lenses and ensure the accuracy of the prescriptions provided to them.

*4. What impact has the Rule had on the flow of truthful information to consumers and on the flow of deceptive information to consumers?*

The Act has effectively expanded the marketplace to retailers that do not have face to face interactions with the patient seeking to obtain these medical devices. This allows for deceptive information to flood the market regarding the need for a prescription to obtain contact lenses, the importance of adherence to the prescription, including the brand, and diminishes the importance of the doctor-patient relationship. As our comments reflect, the Coalition believes that the Act contains within it the authority granted to the FTC, the ability to reprimand and penalize those that disseminate this misinformation. We urge the Commission to consider enhanc-

ing its enforcement in an effort to reduce the incidences of deception we outline in our comments.

*5. What significant costs, if any, has the Rule imposed on consumers? What evidence supports the asserted costs?*

The improper use of contact lenses can lead to several serious conditions which require intensive treatment by doctors, adding not only additional monetary costs to the patient, but also impose serious health costs as well. The CDC estimates that, in 2014, costs associated with emergency room visits for keratitis alone, an impairment associated with the improper wearing of contact lenses added more than \$175 million to the overall health care system.<sup>45</sup> In addition to the medical costs incurred by the patient, there are additional costs related to loss of productivity as well as long term health consequences.

*6. What modifications, if any, should be made to the Rule to reduce any costs imposed on consumers?*

*a. What evidence supports the proposed modifications?*

*b. How would these modifications affect the benefits provided by the Rule?*

As the FTC reviews and modifies the Act, the Coalition strongly opposes significant changes that would weaken the Rule or the statute. Since enactment, and the FTC's subsequent implementation, the market for contact lenses remains extremely competitive. Today, the U.S. contact lens consumer has numerous choices as to how to procure and where to purchase their contact lenses, as well as competitive choices among manufacturers of these medical devices. Be it an online seller, a traditional retail store, or a doctor of optometry or ophthalmologist, patients do not lack for choices in their purchasing options. While most FTC statutes and rules are primarily concerned with prices, the Contact Lens Rule has a significant impact on competition for patient safety and the patient-doctor relationship, as well as the regulation of contact lenses, which are Class II and Class III medical devices. As such, any examination of the rules and their effectiveness should be viewed in part with an emphasis on patient health and safety, and whether the sanctity of the patient-doctor relationship is being preserved and protected adequately.

*7. What benefits, if any, has the Rule provided to businesses, including small businesses? What evidence supports the asserted benefits?*

The Act and the Contact Lens Rule were established to increase access by patients to medical devices. Since its implementation, the online retail market for contact lenses has grown exponentially, however, by its own admission, 1-800-CONTACTS maintains 75 percent market share of the online retail market.<sup>46</sup> Therefore there is little additional room for small businesses or other online retailers to reach these patients.

*8. What modifications, if any, should be made to the Rule to increase its benefits to businesses, including small businesses?*

*a. What evidence supports the proposed modifications?*

*b. How would these modifications affect the costs the Rule imposes on businesses, including small businesses?*

*c. How would these modifications affect the benefits to consumers?*

As we outline in our comments, the Coalition believes that there are several modifications that can be made to the Rule that will increase its benefits to patients as well as small businesses such as independent practices owned by a doctor of optometry or ophthalmologist. We believe that streamlining the process by which doctors, which are often also small business owners, communicate with these large online retailers by requiring a dedicated channel of communication and eliminating "robocalling" would ease the burdens on small eye care practices. We also believe that simplifying the process by which patients and eye care professionals are able to report potentially dangerous and misleading activities by large online retailers would serve the dual purpose of increasing patient safety and benefit these small practices.

*9. What significant costs, if any, including costs of compliance, has the Rule imposed on businesses, including small businesses? What evidence supports the asserted costs?*

Many of the practices discussed in our comments reflect costs to small practices that are focused on serving and treating patients. When any doctor substitutes time they should focus on patient care with time spent unsuccessfully attempting to

<sup>45</sup> <http://www.cdc.gov/media/releases/2014/p1113-eye-infections.html>

<sup>46</sup> <http://www.judiciary.senate.gov/hearings/watch?hearingid=12e98234-5056-a032-52ea-90f98e940d9b>

reach a retailer in order to correct an incorrect or false prescription or report potentially dangerous activity to the FTC, that time results in costs to that business, whether large or small.

*10. What modifications, if any, should be made to the Rule to reduce the costs imposed on businesses, including small businesses?*

*a. What evidence supports the proposed modifications?*

*b. How would these modifications affect the benefits provided by the Rule?*

As we address in our comments, the Coalition believes that the overall review of the Contact Lens Rule should focus on patient safety and maintaining the relationship between the patient and their doctors, which are often also small business owners. The resulting savings in cost to a small business should only be a byproduct of policies that protect patient's vision health.

*11. What evidence is available concerning the degree of industry compliance with the Rule?*

The Act was intended to allow sufficient patient access to their prescribed contact lenses. The Act specifically preempted state laws with respect to prescription expiration dates of fewer than one year after the issue date, and allows for states to permit prescriptions longer than one year. However, it is clear that some, if not many retailers are misleading patients as to the need for a prescription at all, or are encouraging patients to purchase large amounts of contact lenses beyond what is reasonably necessary for the duration of a prescription. The Coalition urges the FTC to strengthen the Act by adding reasonable quantity limits to the prescription to correct this practice and protect the patients served by this FTC regulated industry. The Coalition urges the FTC to consider enforcement mechanisms that provide meaningful deterrents to bad actors in the system that will greatly decrease the number of improper dispensing of contact lenses and the associated ocular health conditions. As laid out in our comments, the Coalition believes that the FTC should utilize its enforcement authority to protect patients by increasing the investigations and associated penalties assessed to violators of the Act.

*12. What modifications, if any, should be made to the Rule to account for changes in relevant technology or economic conditions? What evidence supports the proposed modifications?*

The Coalition urges the FTC to redesign the passive verification process to ensure that retailers are not able to readily circumvent the prescription expiration requirements. Our comments reflect our belief that the passive verification system could be "modernized" to reflect the changes in the contact lens marketplace. We believe the FTC should exercise its authority to define the "communication" between a seller and a provider to not include the practice of robocalling. The Coalition also believes that providing doctors and patients with a more streamlined, dedicated complaint process will enable them to alert the FTC to potentially dangerous practices before the harm, and cost, is inflicted.

*13. Does the Rule overlap or conflict with other federal, state, or local laws or regulations? If so, how?*

*a. What evidence supports the asserted conflicts?*

*b. With reference to the asserted conflicts, should the Rule be modified? If so, why, and how? If not, why not?*

The Coalition believes that the FTC and the FDA share the responsibility for the health and safety of contact lenses and contact lens wearers. Evidence of this overlap exists in the FDA's website. In its Contact Lens section, it states: "If you find a Website you think is illegally selling contact lenses over the Web, you should report it to FDA." The FDA allows for the reporting of unlawful sales of medical products on the Internet.

The FDA evaluates these medical devices for safety and efficacy assuming that the contact lenses will be marketed as a prescription medical device. The FDA can only make reliable determinations about the utilization of these devices with certainty that the FTC is utilizing its jurisdiction to ensure that contact lenses are not misbranded by online retailers as an over-the-counter device dispensed without a valid prescription.

Currently, the FTC requests all complaints regarding contact lenses be submitted through a "generic" Complaint Assistant online form. To file report related to contact lenses, individuals must first know to select "other" and then "health and fitness." Should they appropriately make these selections, the FTC asks if the individual has a concern with telemarketing practices as it relates to the National Do Not Call registry. It is only after navigating the gauntlet of these selections and questions that the patient or doctor is asked about the retailer specifically. This can be a confusing and onerous process for confused patients as well as busy doctors.

The Commission should work with the FDA to design a more streamlined complaint system.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN THUNE TO  
HON. EDITH RAMIREZ

*Question 1.* Before the Committee, you testified that “substantial injury” is not limited to actual or likely economic harm, and that while most of the Commission’s unfairness cases assert tangible economic harm, there are instances where intangible harms, including privacy harms, would constitute substantial harm. The Commission had previously assured this Committee that, in its unfairness analysis, it would recognize substantial injury in cases in which economic, health and safety harms exist.<sup>1</sup> It also has stated that, in “extreme cases,” broader forms of harm such as emotional effects, could be considered as a basis for a finding of unfairness, but only where “tangible injury could clearly be demonstrated.”<sup>2</sup>

A. Does your position represent a departure from the long-standing unfairness policy that does not include intangible harm?

Answer. The FTC’s position is not a departure from Section 5(n) of the FTC Act or the Unfairness Policy Statement. Neither forecloses the possibility that intangible harms such as privacy harms may constitute substantial injury. The FTC stated in the Unfairness Policy Statement that emotional effects would support a finding of unfairness in an extreme case where tangible injury could be clearly demonstrated, citing as an example harassing latenight phone calls by debt collectors. UNFAIRNESS POLICY STATEMENT at n.16. But a privacy harm such as the disclosure of sensitive health or medical information, though intangible, is not merely an emotional effect or impact. To the contrary, such a disclosure is inherently and objectively harmful. This harm has been broadly recognized under Federal and state statutes and tort law, *e.g.*, Fair Credit Reporting Act, 15 U.S.C. §§ 1681 a(i), 1681b(g)(1) (prohibiting inclusion of medical information in credit reports); Ga. Code Ann. § 31–33–2(d) (prohibiting medical records’ release without patient’s authorization); acknowledged by Federal and state courts, *e.g.*, *Maracich v. Spears*, 133 S. Ct. 2191, 2202 (2013) (noting sensitivity of “medical and disability history”); and recognized in a number of FTC cases, *e.g.*, Compl. ¶¶ 13, 21–22, *GMR Transcription Servs., Inc.*, Docket No. C–4482, 2014 WL 4252393, at \*3–4 (Aug. 14, 2014).

B. If economic harm is not required, is there a predictable limiting factor on the types of harm that will result in FTC enforcement actions?

Answer. Yes. As required by the first prong of Section 5(n) of the FTC Act and noted in the Unfairness Policy Statement, the harm in question must constitute a substantial injury. Trivial, speculative, or certain subjective harms, such as those that offend the tastes or social beliefs of particular consumers do not meet the first prong of Section 5(n). Unfairness Statement, 1984 FTC Lexis 2, at \*307. As an example, the disclosure of the most sensitive health and medical information of the type at issue in the GMR case, including medical information about psychiatric disorders, alcohol use, drug abuse, and pregnancy loss, is the type of widely-recognized, substantial injury that Section 5(n) was designed to address. In addition, for there to be a violation, the other prongs of Section 5(n) must also be satisfied, *i.e.*, the harm must not be reasonably avoidable by consumers or outweighed by countervailing benefits to consumers or competition.

C. In support of your argument that there is no economic harm requirement for unfairness cases, you referenced the FTC’s enforcement action In the Matter of Aaron’s, Inc. In that case, however, the Commission alleged the defendant’s practices

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<sup>1</sup>Letter from Hon. Michael Pertschuk, Chairman, Fed. Trade Comm’n (FTC), *et al.*, to Hon. Wendell Ford, Chairman, & Hon. John Danforth, Ranking Member, Consumer Subcomm., S. Comm. on Commerce, Sci. & Transp., Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction (Dec. 17, 1980), reprinted in *International Harvester Co.*, 104 F.T.C. 949, 1070, 1073 (1984) (“UNFAIRNESS POLICY STATEMENT”) (“the injury must be substantial . . . not . . . trivial or merely speculative;” that “[i]n most cases a substantial injury involves monetary harm . . . [but that] unwarranted health and safety risks may also support a finding of unfairness;” and that “[e]motional impact and other more subjective types of harm . . . will not ordinarily make a practice unfair”); Letter from FTC to Hon. Bob Packwood & Hon. Bob Kasten, S. Comm. on Commerce, Sci. & Transp., reprinted in 42 FTC ANTI-TRUST & TRADE REG. REP. (BNA) 1055 (1982), at 568–570 (stating that “[a]s a general proposition, substantial injury involves economic or monetary harm and does not cover subjective examples of harm such as emotional distress of offenses to taste or social belief”).

<sup>2</sup>UNFAIRNESS POLICY STATEMENT at n.16 (“[i]n an extreme case, however, where tangible injury could be clearly demonstrated, emotional effects might possibly be considered as the basis for a finding of unfairness”) (emphasis added)

were unfair, in part, because they placed consumers' financial accounts at risk of exposure.<sup>3</sup>

Can you provide an example of an FTC unfairness case that does not include such a tangible economic harm nexus?

Answer. The FTC has alleged that a company's practices were unfair without a nexus to economic harm in a number of cases:

- Making material retroactive changes to privacy policies without consent. Facebook, Inc., FTC File No. 0923184 (Aug. 10, 2012), available at <https://www.ftc.gov/sites/default/files/documents/cases/2012/08/120810facebookcmpt.pdf>; Gateway Learning Corp., Docket No. C-4120 (Sept. 17, 2004), available at <https://www.ftc.gov/sites/default/files/documents/cases/2004/09/040917comp0423047.pdf>;
- Exposing images from home cameras. Trendnet, FTC File No. 122 3090 (Feb. 7, 2014), <https://www.ftc.gov/enforcement/cases-proceedings/122-3090/trendnet-inc-matter>;
- Publicly disclosing health information. GMR Transcription Services, FTC File No. 122 3095 (Aug. 21, 2014), <https://www.ftc.gov/enforcement/cases-proceedings/122-3095/gmr-transcription-services-inc-matter>; and
- Posting intimate, sexually-explicit photographs and personal information of individuals online without their consent. Craig Brittain, FTC File No. 132 3120 (Jan. 8, 2016), available at <https://www.ftc.gov/system/files/documents/cases/160108craigbrittaincmpt.pdf>.

D. In establishing the substantial harm requirement of Section 5(n) of the Federal Trade Commission Act, 15 U.S.C. §§ 41–58, as amended, Congress sought to limit the Commission's authority over unfair acts or practices by codifying the principles of the FTC's policy statement on unfairness.<sup>4</sup> In doing so, this Committee intended to "enable the FTC to proceed in its development of the law of unfairness with a firm grounding in the precedents decided under this authority and consistent with the approach of the FTC and the courts in the past."<sup>5</sup>

Please provide examples of prior precedent supporting your view that intangible harm alone may constitute substantial injury.

Answer. In addition to the text of the Unfairness Policy Statement and the cases described above, below is a list of Federal court decisions that support the proposition that intangible harms can constitute substantial injury under Section 5(n):

- *FTC v. Accusearch, Inc.*, No. 06–CV–105–D, 2007 WL 4356786, at \*8 (D. Wyo. Sept. 28, 2007), *aff'd*, 570 F.3d 1187 (10th Cir. 2009) (finding that the loss of privacy caused by defendant resulted in a "host of emotional harms that are substantial and real and cannot fairly be classified as either trivial or speculative");
- *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1364–65 (11th Cir. 1988) (affirming Commission grant of summary judgment where injury included in part "intangible loss" relating to loss of the certainty of contract terms); and
- *Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 975 (D.C. Cir. (1985) (affirming FTC's adoption of Credit Practices Rule, which considered substantial emotional and subjective harms as part of analysis of substantial injury, 49 Fed. Reg. 7740, 7744 (Mar. 1, 1984)).

*Question 2.* One issue that the Committee is currently examining involves student privacy. In particular, the Safeguarding American Families from Exposure by Keeping Information and Data Secure (SAFE KIDS) Act, S. 1788, would extend additional privacy protections to pre-K through 12th grade students with respect to educational applications and software they may use, even outside the classroom. Two harms that this legislation seeks to prohibit are (1) the sale of student data to third parties and (2) the use of student data for the purposes of targeted advertising.

A. Please provide the number of complaints the Commission has received to its Consumer Sentinel network, in the past five years, as well as case summaries, regarding the following practices:

<sup>3</sup> Complaint ¶ 16, In the Matter of Aaron's, Inc., F.T.C. No. 122–3264 (Mar. 11, 2014).

<sup>4</sup>S. REP. NO. 103–130, at 12 (1993) ("SENATE REPORT") (explaining that Section 5(n) "amends section 5 of the FTC Act to add a new subsection limiting the FTC's authorizing over 'unfair acts or practices'" and that it "is intended to codify, as a statutory limitation on unfair and deceptive acts or practices, the principles of the . . . policy statement on unfairness") (emphasis added).

<sup>5</sup>SENATE REPORT at 12–13 (emphasis added).

- i. the sale of student data, collected through educational online services or applications, to third parties; and
- ii. the use of such student data for the purposes of targeted advertising.

*B.* Of these complaints, how many involve websites or online services currently subject to the Children's Online Privacy Protection Rule?

Answer. The FTC Consumer Sentinel database does not contain readily extractable data on these categories of complaints. However, over decades of enforcement experience, we have found that our Consumer Sentinel database is often an imperfect tool for measuring consumer concerns. This is especially so in an area like privacy where neither parents nor students may be aware that student data is being sold to third parties or used for targeted advertising. For this reason, the consumer complaints we receive are often only one factor in our analysis of potential consumer concerns.

We know from other data that the privacy of student information is a significant concern. For example, in a 2014 survey conducted by Common Sense Media, 90 percent of respondents said they were concerned about how private companies with non-educational interests are able to access and use the personal information of students. Seventy-seven percent of respondents were in favor of making it illegal for schools and education technology companies to sell students' private information to advertisers, and 74 percent were in favor of restricting companies from engaging in targeted advertising to students. See Common Sense Media Student Privacy Survey, available at [https://www.commonsensemedia.org/sites/default/files/uploads/about\\_us/student\\_privacy\\_survey.pdf](https://www.commonsensemedia.org/sites/default/files/uploads/about_us/student_privacy_survey.pdf).

Concerns about how private companies may be using children's personal information led the Commission to significantly revise the FTC's Children's Online Privacy Protection Rule ("COPPA Rule") in 2012. The revised Rule requires companies to give parents notice of, and control over, among other things, marketers' use of persistent identifiers to track their children for purposes of targeting advertising or compiling a profile. The FTC has brought several cases against companies who allegedly have collected personal information from children for behavioral advertising without obtaining parental consent. In settlements in December 2015 with LAI Systems, LLC and Retro Dreamer, for example, the Commission alleged that in violation of the COPPA Rule the companies allowed third-party advertisers to collect persistent identifiers from children under 13 and use it to serve targeted advertising, without parental consent. In a settlement in January 2016 with InMobi PTE, Ltd., the Commission alleged that an ad network unlawfully collected geolocation information from children's apps for behavioral targeting, without obtaining parental consent.

*Question 3.* The FTC is an agency with broad investigative and enforcement powers. Commission investigations can involve considerable discovery requests, and enforcement actions frequently result in settlements through consent decrees. While there are often legitimate reasons for settlements, this reliance on the administrative process has resulted in a lack of judicial review of agency enforcement decisions. This lack of case law means there may be fewer bright lines to guide the Commission, companies, and courts with respect to enforcement. Does this absence of clear guidance concern you? Please explain.

Answer. When the Commission determines that (1) it has reason to believe that an entity has engaged in unfair or deceptive acts or practices in violation of the FTC Act or violated another statute enforced by the Commission and (2) that an enforcement action against that entity is in the public interest, the Commission issues an administrative complaint or authorizes staff to file a complaint in Federal district court. The Commission determines to issue a complaint and place an entity under order only after a rigorous vetting process to ensure the evidence is strong and the case is appropriate under this standard. If a party chooses to settle prior to the Commission issuing the complaint, the Commission will issue the complaint along with the settlement and place both documents on the court docket and on the Commission's website. Accordingly, whether a case is litigated fully before a trier of fact or settled pre- or post-complaint, I believe the Commission provides ample guidance about what conduct it has found reason to believe violated a statute it enforces. Moreover, the majority of the Commission's consumer protection cases are filed in Federal court, and any settlement is subject to approval by a Federal court judge. Additionally, many of our cases do not settle, and there is a robust body of case law analyzing the specific facts of a case and evaluating whether and how the defendant's conduct violates the FTC Act or other statutes the Commission enforces.

In order to prevent deceptive or unfair acts before they cause, or are likely to cause, harm, the Commission provides a host of materials that explain the Commission's positions on a myriad of legal issues. For example, the Commission provides



detailed advice in formal guidance. Currently, the agency has published and updated thirteen Guides in areas ranging from Environmental Marketing Claims to Endorsements and Testimonials. See 16 CFR Subchapter B. The Commission also publishes a library of business education materials on its website. These materials address advertising and marketing generally, credit and finance, privacy and security, and issues within a number of select industries. See <https://www.ftc.gov/tips-advice/businesscenter>. The agency currently has 120 of these plain-language business guidance publications available to businesses. Additionally, over the last year alone, FTC staff have published 185 blog posts, providing advice on compliance with the FTC Act as well as other statutes and rules for which the Commission is responsible. Finally, the Commissioners and staff make dozens of annual appearances before industry groups to explain the law and the Commission's interpretation of it.

*Question 4.* You indicated recently that you “believe that it’s appropriate to require opt-in consent when you have . . . sensitive information like financial information, geo-location, children’s information, health information, content, but in areas outside of that, we think opt-out choice would suffice.” The comments filed by the FTC staff to the Federal Communications Commission (FCC) recommended that the FCC take this approach as well in adopting its broadband privacy rules. Why do you think this is the best approach?

Answer. The FTC’s general approach to consumer choice has focused on whether the collection and use of information is consistent with the context of a consumer’s interaction with a company and the consumer’s reasonable expectations. For practices that are inconsistent with consumer expectations, the FTC has advocated that companies provide meaningful choices to consumers, with the level of choice being tied to consumer expectations. The FTC has supported the approach of using opt-in for the collection, use, and sharing of sensitive information because the more sensitive the data, the more consumers expect it to be protected and the less they expect it to be used and shared without their consent.

*Question 5.* Before the Committee, you testified that you would welcome the opportunity to review the latest version of the FCC’s new privacy proposal and publicly comment on it before the FCC votes on it. Commissioner Ohlhausen testified that further comment on this proposal would be beneficial to consumers. Commissioner McSweeney testified that the FTC “stand[s] ready to work with the FCC” on this matter.

A. Has FCC requested additional comment from FTC, or have you requested that the FTC have an opportunity to review the latest version of this proposal and provide additional public comment before the FCC votes on it?

B. If not, does the FTC intend to make such a request? If so, when?

Answer. The FCC did not request additional comment from the FTC, nor did the FTC request to provide additional public comment. The FTC’s staff comment filed with the FCC on May 27, 2016 responded in detail to specific questions from the FCC and offered suggestions regarding the regulatory text based on the FTC’s decades of experience protecting the privacy and security of consumers’ data. I am pleased that the FCC adopted many of our recommendations in its final rule. We look forward to continuing to work with the FCC to protect consumers’ privacy across the Internet.

*Question 6.* In June 2016, the FTC held a workshop entitled Something New Under the Sun: Competition & Consumer Protection Issues in Solar Energy, to address competition and consumer protection issues related to solar distributed generation. Around the same time, the White House issued a report entitled Incorporating Renewables into the Electric Grid that focused on expanding opportunities for smart markets and energy storage, including variable energy resources.

A. Why did the FTC choose to focus its workshop on solar projects, rather than to examine the broader smart energy market, that includes other competing resources and technologies?

Answer. Our solar workshop grew out of the FTC’s longstanding general interest in electricity markets and our competition advocacy work in this important area.<sup>6</sup>

<sup>6</sup>In the early 2000s, the FTC issued two staff reports discussing competition and consumer protection issues in the broad electric power industry. FTC Staff Report, Competition and Consumer Protection Perspectives on Electric Power Regulatory Reform: Focus on Retail Competition (Sept. 2001); FTC Staff Report, Competition and Consumer Protection Perspectives on Electric Power Regulatory Reform (July 2000). More recently, states have been exploring ways to reform electricity markets at the distribution and retail levels of the supply chain. The FTC has submitted comments in connection with a number of these state efforts and regulatory reviews, including multiple comments to the New York State Public Service Commission. See FTC Staff

The FTC focused this workshop on solar distributed generation (DG), rather than the broader smart energy market, for two main reasons. First, the competition and consumer protection issues that arise when consumers install solar panels and generate electric power at their homes are a particularly good fit for the FTC's competition and consumer protection mandate and expertise. For example, solar DG and the changing regulatory environment surrounding electricity pricing present significant questions of consumer protection, such as whether solar firms are making truthful and non-deceptive claims about their products and electricity pricing. While the broader smart energy marketplace raises important and interesting policy issues, the FTC's expertise is not in energy policy more generally. Second, given that a one-day workshop was planned, we believed a narrower focus on solar DG would yield the most useful, in-depth discussion.

We will continue to monitor the energy industry, including the smart energy marketplace, to identify potential competition and consumer protection issues that may fall within the FTC's core areas of expertise.

*B.* Now that the comment period for this workshop has closed, what next steps does the FTC intend to take with respect to these issues, including consumer protection concerns? When can we expect these next steps to take place?

Answer. We are continuing to examine the workshop record, including more than 200 filed public comments, and evaluate potential next policy steps. For example, we may look for additional opportunities to file advocacy comments relating to the regulation of the electric power industry. We may also prepare a policy paper addressing some of the main pricing and competition issues discussed during the workshop. No specific decision has been made at this time.

With regard to consumer protection concerns, the FTC remains vigilant and will take action against any unfair or deceptive business practices that occur in the solar DG industry. The FTC will also continue education efforts in this area, such as the guidance we have provided to consumers.<sup>7</sup>

*Question 7.* I would like to ask you some questions about competition in the market for prescription eyewear. In particular, I wish to know how the FTC plans to encourage greater competition and consumer choice in this market.

*A.* Now that the public comment period for the Eyeglass Rule has ended, when do you anticipate the FTC will move forward with any modifications?

Answer. As you know, the Commission published an advance notice of proposed rulemaking in September 2015 soliciting comments on whether the Commission should modify the Eyeglass Rule, a rule promulgated in 1978 using the Commission's Magnuson-Moss rulemaking authority. The Commission received 831 comments prior to the comment period closing on October 26, 2015. Should the Commission determine that any modification to the Rule is justified, the Commission would then issue a notice of proposed rulemaking (NPRM), which, pursuant to 15 U.S.C. § 57a(b)(2)(C), the relevant congressional committees would receive at least 30 days prior to its publication in the Federal Register. While I cannot comment in detail on a pending rule review, the Commission currently anticipates making a decision on whether to recommend a modification to the Rule in early 2017. Any NPRM would again solicit public comment.<sup>8</sup> If the Commission decides to issue an NPRM, the Commission would also provide an opportunity for public hearings.<sup>9</sup>

*B.* The Contact Lens Rule requires prescribers to verify the accuracy of prescriptions within eight hours when asked by a provider to do so. The Eyeglass Rule, however, has no such requirement.

Reply Comment Before the State of New York Public Service Commission in the Reforming Energy Vision Proceeding, Responding to ThirdParty Comments on the NY PSC Benefit-Cost Analysis (Sept. 10, 2015), <https://www.ftc.gov/policy/policyactions/advocacy-filings/2015/09/ftc-staff-reply-comment-state-new-york-public-service>; FTC Staff Reply Comment to the New York State Public Service Commission on "Reforming the Energy Vision" Project (Oct. 23, 2014), <https://www.ftc.gov/policy/policy-actions/advocacy-filings/2014/10/federal-trade-commission-staff-reply-comment-new-york>; FTC Staff Comment Before the Massachusetts Department of Public Utilities Regarding its Investigation of Time-Varying Retail Rates for Electric Power (Mar. 10, 2014), <https://www.ftc.gov/policy/policyactions/advocacy-filings/2014/03/ftc-staff-comment-massachusetts-department-public>; FTC Staff Reply Comment Before the District of Columbia Public Service Commission Concerning a Proposed Program for Dynamic (Variable) Pricing of Electricity for Residential Customers (Jan. 13, 2014), <https://www.ftc.gov/policy/policyactions/advocacy-filings/2014/01/ftc-staff-reply-comment-district-columbia-public>.

<sup>7</sup> Federal Trade Commission, Solar Power for Your Home, <https://www.consumer.ftc.gov/articles/0532-solar-poweryour-home>.

<sup>8</sup> 15 U.S.C. § 57a(b)(1)(B).

<sup>9</sup> 15 U.S.C. § 57a(b)(1)(C), (c).

Does the FTC believe that this disparity between the Eyeglass Rule and the Contact Lens Rule should be remedied, and that the Eyeglass Rule should require prescribers to verify prescriptions within a short period of time?

Answer. The Contact Lens Rule contains a verification process whereby an authorized seller can sell contact lenses eight business hours after providing a prescriber with a complete verification request, if the seller has not heard from the prescriber.<sup>10</sup> We believe this provision has served its purpose in spurring competition among sellers of contact lenses and enabling comparison shopping by consumers, leading to both price and non-price benefits for consumers. As you note, the Eyeglass Rule has no analogous verification provision. The Commission specifically asked for public comment concerning whether the Eyeglass Rule should contain a similar verification provision, and some of the comments we received did address this issue.<sup>11</sup> Under the Magnuson-Moss rulemaking process that governs the Eyeglass Rule, the Commission would need to meet certain statutory requirements before it could propose to modify the rule by adding a verification framework. Notably, the Commission would need to have reason to believe that the unfair or deceptive acts or practices that are the subject of the proposed rulemaking are prevalent. By contrast, the Commission promulgated the Contact Lens Rule pursuant to a statute, the Fairness to Contact Lens Consumers Act (“FCLCA”), which specifically set forth many details of the verification framework.<sup>12</sup> These different procedural contexts could lead to a different outcome with respect to whether the Commission determines that the Eyeglass Rule should include a verification provision and, if so, how it should operate. We expect that this issue will be addressed in any forthcoming NPRM as part of the rule review process for the Eyeglass Rule.

C. Eyewear providers require certain information in order to fill a prescription accurately. The Contact Lens Rule requires that all prescriptions “contain sufficient information for the complete and accurate filling of a prescription.” The Eyeglass Rule has no such requirement, and prescribers often do not include all necessary information to allow a consumer to purchase eyeglasses elsewhere, including, for example, the measurement for “Pupillary Distance.”

Answer. Does the FTC believe that this disparity between the Eyeglass Rule and the Contact Lens Rule should be remedied, and that the Eyeglass Rule should require prescribers to provide consumers with “sufficient information for the complete and accurate filling of a prescription”?

The Eyeglass Rule defines a prescription as the written specifications for lenses for eyeglasses, which are derived from an eye examination, including all of the information specified by state law, if any, necessary to obtain lenses for eyeglasses. In its current review of the Eyeglass Rule, the Commission specifically asked for comment concerning whether the Eyeglass Rule should require that the definition of prescription be modified to explicitly include pupillary distance.<sup>13</sup> A number of the comments we received addressed this issue. The Commission must consider the evidence proffered on this point in the context of the standards of prevalence and unfairness. Specifically, as part of the unfairness inquiry, the Commission must balance the costs and benefits the requirement would have on prescribers, consumers, and competition.<sup>14</sup> Because the Commission promulgated the Contact Lens Rule pursuant to the FCLCA, which specifically set forth the requirement that all prescriptions contain sufficient information for the complete and accurate filling of a prescription,<sup>15</sup> the Commission could arrive at a different outcome with respect to its determination whether the Eyeglass Rule should require that a prescription include information such as pupillary distance. As the Eyeglass Rule review process continues, we anticipate that any forthcoming NPRM will examine this issue.

D. Today some states allow short-term prescriptions, requiring consumers to go back to their eye care provider to get another prescription whenever they want to get new eyeglasses, even when their vision has not changed at all. Does the Com-

<sup>10</sup> See 16 C.F.R. § 315.5.

<sup>11</sup> Ophthalmic Practice Rules (“Eyeglass Rule”); Request for comment, 80 Fed. Reg. 53,274, 53,276 (Sept. 3, 2015).

<sup>12</sup> 15 U.S.C. §§ 7601–7610.

<sup>13</sup> Ophthalmic Practice Rules (“Eyeglass Rule”); Request for comment, 80 Fed. Reg. 53,274, 53,276 (Sept. 3, 2015).

<sup>14</sup> An act or practice is unfair if it causes or is likely to cause substantial consumer injury which is not reasonably avoidable by consumers themselves and which is not outweighed by countervailing benefits to consumers or competition. 15 U.S.C. § 45(n); FTC, Commission Statement on the Scope of the Consumer Unfairness Jurisdiction (Dec. 17, 1980) (appended to Int’l Harvester Co., 104 F.T.C. 949, 1070 (1984)).

<sup>15</sup> 15 U.S.C. § 7610.

mission believe that the Eyeglass Rule and the Contact Lens Rule should be modified to address the issue of prescription duration?

Answer. As your question recognizes, state law provides for the length of contact lens and eyeglass prescriptions. Under the FCLCA and the Contact Lens Rule, contact lens prescriptions cannot expire in less than one year unless, based on medical judgment, a prescriber specifies a different date and documents the reasoning for the shorter prescription length.<sup>16</sup> In contrast, the Eyeglass Rule currently is silent on prescription length. Commenters in both rule review proceedings have raised issues about the length of prescriptions. We are considering these comments, as well as the evidence proffered in support of any proposed modifications to the rules. In the Contact Lens Rule review, the Commission is examining how any proposed modifications would fit within the framework set forth by the FCLCA and its goal of promoting competition among contact lens sellers and facilitating consumers' ability to comparison shop for contact lenses. In the Eyeglass Rule review, as described above, the Commission must consider whether there is a widespread pattern of unfair or deceptive practices involving short-term prescriptions that impacts consumers' ability to comparison shop for eyeglasses.

*Question 8.* The annual independent evaluations of the effectiveness of Commission information security programs under the Federal Information Security Modernization Act show that the FTC has taken robust steps to protect Federal information and systems. Yet, it must increase its governance and oversight efforts to institutionalize and mature its security program. Will you commit to implement information security-related recommendations from the FTC Office of Inspector General (OIG) and independent auditors fully and in a timely manner?

Answer. The Commission is committed to robustly protecting its information systems and has worked collaboratively with the OIG to identify opportunities to enhance the Commission's security and governance practices. We welcome this collaboration with the OIG and intend to continue it. The Commission evaluates all information-security related recommendations within the framework of the Commission's IT strategic plan to assess the long-term impact to the Commission's IT program, services, budget and process. The goal is to ensure implementation plans enhance security and provide sustained improvement. This approach is reflected in the Commission's response to the OIG and independent auditors' recommendations and milestones for implementation of the recommendations.

*Question 9.* The FTC OIG has recommended improvements to the Commission's information technology governance processes for the past several years. Most recently, the OIG's review of the FTC's information technology governance practices found that the Commission failed to follow the Federal Acquisition Regulation, resulting in increased costs and diminished performance for the e-Discovery Support System and mobile device Messaging Infrastructure Modernization project.

A. What steps has the Commission taken to increase accountability and oversight over its information technology investments?

Answer. The FTC's review revealed opportunities for improving the deployment and stability of our IT tools, as well as some discrepancies in following the internal Office of the Chief Information Officer (OCIO) Acquisition Strategy Plan. To improve our controls over future IT deployments, the Commission established the Risk and Policy Management (RPM) and Vendor and Program Management (VPM) divisions within OCIO to focus on process improvements with IT investments. The RPM division focuses on the areas of risk management, policy, procedure, and governance. The VPM division works closely with the Financial Management Office (FMO) and serves as the central review and coordination point for all IT acquisitions and related contract management processes and practices.

B. What is the status of agency's implementation of the recommendations from the OIG evaluation of the Office of the Chief Information Officer from December 2015? Are they closed? If so, please provide specific dates.

Answer. The Commission has taken significant steps to implement the OIG's December 2015 recommendations, including:

- Extending voting rights to the Chief Information Officer on the FTC IT Governance board and the IT Business Council (recommendation 1);
- Reorganizing the Office of the Chief Information Officer (recommendation 4);
- Establishing two new OCIO divisions—Strategic Planning and Vendor Program Management—and recruiting additional IT program managers to lead these divisions (recommendation 4);

<sup>16</sup> 15 U.S.C. § 7604; 16 C.F.R. § 315.6(a)(1).

- Developing and distributing new positions descriptions to all OCIO employees (recommendation 5);
- Publishing an IT Strategy and Transition Plan;
- Reprioritizing the IT budget to support the Commission's strategic IT objectives; and
- Making acquisitions and contract management process improvements to streamline procurement of IT services and ensure contract services provide value.

Based on actions taken by the Commission, including some of those listed above, the OIG closed recommendations 1, 4, and 5 on February 11, 2016, September 8, 2016, and September 29, 2016, respectively. In September 2016, OCIO submitted documentation to the OIG to support closure of the five remaining recommendations.

C. How often do you meet personally with the FTC's Chief Information Officer (CIO)? What specific steps have you taken to ensure that the CIO has the adequate level of support?

Answer. I have monthly meetings with the CIO and will sometimes meet more often with him, as needed. I work closely with the CIO to evaluate IT security, IT strategy, risk management, and related issues. Additionally, the Chief Privacy Officer (CPO) and Chief of Staff, both members of my office staff, are active participants in the IT Governance Board's work to ensure decisions regarding IT projects address risks or other impediments to meeting the agency's strategic objectives. In FY 2016, the Commission approved the reprioritization of IT funding to focus on improving e-discovery services and development of the IT modernization strategy. In September, we launched an IT modernization project, which will improve the performance of the FTC's network, security, and services.

*Question 10.* The OIG has also identified areas for improvement of the agency's controlled unclassified information program. Given the fact that the FTC obtains a large amount of sensitive information, including proprietary business information, law enforcement sensitive information, and consumer personal information, what steps are you taking to safeguard this information pursuant to new guidance from the National Archives and Records Administration and the National Institute of Standards and Technology?

Answer. The Commission has long placed great importance on its mandate to protect controlled unclassified information (CUI) from insider and other threats and strives to regularly update and adjust its practices to ensure the security of all non-public data in its control. Under the FTC Act, FTC employees who disclose non-public information without authorization are subject to possible criminal prosecution. Moreover, the FTC has adopted an extensive framework of protections for sensitive, but unclassified, information held by the Commission. This framework includes documented internal policies, procedures, and staff and contractor training concerning safeguarding sensitive personally identifiable information and business confidential information. As part of this ongoing effort to protect the non-public information in its possession, the FTC is reviewing the rule recently issued by the National Archives and Records Administration regarding the handling of CUI. See Final Rule, Controlled Unclassified Information, 81 Fed. Reg. 63324 (Sept. 14, 2016).

As part of this process, the Commission will address the OIG's recommendation to consider expanding the scope of the agency's insider threat program (ITP) beyond the protection of classified materials to all sensitive holdings, and how the Commission might leverage its ITP to protect CUI. The ITP allows the FTC to gather, share, integrate, identify, and report relevant insider threat information from offices across the agency, including security, information security, and human resources. The FTC has already established a multi-office working group, chaired by the Records and Filings Office (RFO) and that includes the Chief Privacy Officer (CPO), the Chief Information Security Officer, representatives from Physical and Personnel Security, the Office of General Counsel and others, to develop plans to implement the requirements of the final CUI rule and consider how these changes may be incorporated into the ITP. The CPO works with the ITP to ensure a balance between a robust and effective ITP, using NIST's risk management framework analysis, and the privacy rights of FTC employees under the Privacy Act and other Federal laws. Additionally, our Office of the CIO (OCIO) is reviewing the agency's FISMA and Risk Management and Governance policies to ensure that the control requirements of the CUI program, as identified in NIST security special publications, are taken into consideration when planning for systems and selecting information safeguards. OCIO will review capabilities for CUI marking and metadata analysis, and verify

and validate that potential technology acquisitions, when feasible, address these requirements.

*Question 11.* According to the OIG's top management challenges, the Commission continues to face challenges with contract management. Given that the FTC obligated approximately one-third of its operating budget on contracts for goods and services in Fiscal Year 2014, how do you plan to update agency processes and policies to increase oversight over contracts in order to improve stewardship of taxpayer dollars?

Answer. The Commission is committed to effectively managing our contracts to ensure that the FTC obtains the quality goods and services we need on schedule, within contracted prices, and consistent with expected quality performance. To this end, we are taking the following steps to improve our contract oversight and management:

#### *COR Education*

Contracting Officer Representative (COR) education continues to be a priority for the Commission, with primary oversight by the Financial Management Office (FMO) management and the Chief Acquisitions Officer (CAO). In FY 2016, FMO planned to hold quarterly COR training, but expanding it from quarterly to bi-monthly in February 2016 to address not only COR core competencies but also specific, tailored training. These efforts will mature and expand the capacity of the FTC's CORs to work effectively with contracting officers to procure and manage vendors and manage internal controls. To complement its in person training, the Acquisitions Division has posted a wide variety of COR resources online for easy access, including templates, sample documents, and Procurement Action Lead Time requirements for the most common acquisitions, including new task orders, open market contracts, sole source contracts, and supplies/services contracts through GSA.

The Records and Filings Office and FMO have also published additional tools to help CORs understand and meet relevant recordkeeping requirements. The tools include a new contract records tip sheet, an updated model performance standard, an updated COR appointment letter, a new receiving report form for contractor invoice payment that allows for electronic signatures and submissions, and policy revisions.

#### *Customer Outreach and Support*

The Acquisitions Division is also working to improve the quality of agency acquisitions by improving customer communications via targeted customer meetings and by obtaining acquisition liaison support for certain customers. The CAO customer meetings, first initiated in FY 2015, ensure standard topics are discussed, and new requirements are being addressed in an agreed-upon priority order. This process better supports the Acquisitions Division and the program offices to engage in integrated acquisition planning.

Additionally, the Acquisitions Division has contracted for three acquisition liaisons who will assist assigned program offices beginning in early FY 2017, by providing hands on guidance on the acquisition process; assisting customers with initiating contract actions; ensuring the adequacy of acquisition packages; and ensuring that both the Acquisitions Division and the customer maintain visibility and confidence throughout the entire process. The liaisons will also assess the current state of services received, so that they can structure subsequent acquisitions to improve the quality of contractor services. The liaisons' goal will be to provide acquisition assistance that ensures the customer-based performance management measures are built into the acquisitions package at the requirements definition phase. FMO anticipates that the liaison support will improve the quality of the acquisition packages, which will lead to better management of contractor performance and the delivery of improved services to the Commission.

#### *Revised Policies and Procedures*

Finally, the CAO has continued to review all acquisition-related policies and procedures to ensure consistency with the latest Federal regulations. The first phase of this effort includes a review and revision of acquisition policies. For example, review and revision of the policy on Market Research and Acquisition Planning will be completed in the second quarter of FY 2017. The Acquisitions Division will continue to identify areas of concern that need established policy and procedures in FY 2017 and beyond. Through this continuous assessment process, the Acquisitions Division will have legally compliant and standardized policies and procedures that will govern contracting actions and provide consistency and efficiency in operation and output of the Acquisitions Division, as well as clear guidance for the program offices. Establishment of policies and procedures is an ongoing effort of continuous review,

revision, and tested compliance, as the Federal Acquisition Regulation and industry standards are constantly changing in the acquisitions environment.

*Question 12.* The American Medical Association (AMA) recently adopted a resolution supporting a “requirement that attorney advertising, which may cause patients to discontinue medically necessary medications have appropriate and conspicuous warnings that patients should not discontinue medications without seeking the advice of their physician.”<sup>17</sup> The AMA’s resolution notes that “[t]elevision commercials that seek plaintiffs regarding new medications are rampant on late-night television,” that “[o]ften potential complications are spoken about in an alarming way,” and that “[a]s a result of these ads, some patients have endangered themselves by stopping prescribed medications without speaking to a physician.”<sup>18</sup> The AMA resolution concludes that advertisements “are ‘fearmongering’ and dangerous to the public at-large because they do not present a clear picture regarding the product.”

A. How would the Commission address whether such advertisements constitute unfair acts or practices under Section 5 of the FTC Act?

Answer. Section 5 of the FTC Act prohibits “unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. § 45(a). Pursuant to Section 5(n) of the Act, an act or practice may be deemed unfair if (1) it “causes or is likely to cause substantial injury to consumers”; (2) the injury “is not reasonably avoidable by consumers themselves”; and (3) the injury is “not outweighed by countervailing benefits to consumers or competition.” 15 U.S.C. § 45(n). Whether an advertisement seeking plaintiffs who might have been injured by medication that fails to disclose that patients should not discontinue their medication without seeking the advice of their physician would constitute an unfair act or practice under this standard is a factual question that can only be answered on a case-by-case basis.

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

The next element asks whether the injury would be reasonably avoidable by consumers themselves. Again, the answer to this question would likely depend on the claims made in the advertising, the medication involved, and the condition at issue. It is conceivable that in some cases the risk of stopping medication without consulting with a physician would be apparent to the patients themselves.

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

*Question 13.* In issuing invitations to witnesses to testify before the Committee, it is our practice to request that they submit written testimony two business days prior to the hearing and to allow each witness five minutes at the hearing to present his or her oral remarks. Prior to this hearing, I sent an invitation to you, individually, as well as to Commissioners Ohlhausen and McSweeney, requesting such testimony on, among other things, you views on regulatory reform, efforts to promote innovation, and consumer protection. The Committee received a single document representing a consensus view of the Commission rather than individual testimony. Prior to the hearing, the Commission also informed the Committee that, rather than deliver individual oral testimony, the Commissioners had coordinated their testimony rather than provide individual views.

A. What is the Commission’s policy with respect to complying with Committee requests for testimony?

Answer. When invited to testify, the Commission’s longstanding practice has been to submit written testimony that is approved and voted on by all of the Commissioners. As a bipartisan independent agency operating in a political environment in which partisanship can sometimes overwhelm substance, I believe that the FTC’s ability to engage in meaningful internal deliberations, and operate by consensus wherever possible, distinguishes the agency in a positive way. In addition, I note

<sup>17</sup> AM. MED. ASS’N, Res. 208 (Apr. 25, 2016).

<sup>18</sup> *Id.*

that we coordinated with respect to the subject matter of our individual oral testimony in order to avoid duplication.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. ROY BLUNT TO  
HON. EDITH RAMIREZ

Before I proceed, I want to clarify that my questions should not be viewed as speaking favorably or negatively about any potential merger under consideration by the Federal Trade Commission (FTC).

*Question 1.* Can you describe how the FTC evaluates the impact of mergers on Federal programs such as the 340B Drug Pricing Program?

Answer. Section 7 of the Clayton Act prohibits mergers and acquisitions when the effect “may be substantially to lessen competition, or to tend to create a monopoly.” A key question the FTC asks is whether the proposed merger is likely to create or enhance market power or facilitate its exercise. When the FTC evaluates any merger, we consider what aspects of competition may be impacted by the merger. This process includes defining a relevant product and geographic market and evaluating the likely anticompetitive effects of the proposed transaction. Depending on the type of commerce involved in the merger, a Federal agency or program may be impacted by the merger, for example as a customer in the relevant market. The FTC would evaluate the impact on such Federal agencies or programs.

*Question 2.* What safeguards does the FTC look for in mergers to ensure the equities and financial integrity of Federal programs like the 340B Drug Pricing Program are protected?

Answer. The goal of the FTC’s merger enforcement program is to preserve the competition that would otherwise be lost as a result of a merger, either by engaging in litigation to block the merger or ordering the merging parties to divest assets to an appropriate buyer to restore the competition that would be lost with the merger. The 2010 Horizontal Merger Guidelines issued by the Department of Justice and FTC set out the agencies’ analytical framework for reviewing a proposed merger pursuant to Section 7 of the Clayton Act and determining whether a merger is likely to substantially lessen competition. While a Section 7 analysis would not include the equities and financial integrity of Federal programs as direct factors in a decision to prohibit a merger, to the extent that Federal agencies or programs would likely be harmed by a reduction in competition, the FTC typically would take that information into account in its enforcement decisions and when designing merger remedies.

For example, in 2008, the Commission challenged an exclusive agreement between Fresenius, the Nation’s largest provider of dialysis services, and the manufacturer of an intravenous (IV) iron drug used in dialysis clinics to treat patients with end-stage renal disease. The Commission was concerned that this exclusive agreement would allow Fresenius to inflate the price it paid itself for using the IV iron drug, and that Fresenius would report these inflated prices to the Center for Medicare & Medicaid Services (CMS). If that happened, the inflated prices would drive up the Average Selling Price calculated by CMS and paid by CMS to reimburse Medicare when the drug was used to treat dialysis patients covered by Medicare. In order to mitigate the risk that the exclusive agreement would lead to higher Medicare reimbursement costs, the Commission barred Fresenius from reporting higher prices to CMS until CMS adopted new rules to address intra-company transfer prices.<sup>19</sup>

*Question 3.* Many community hospitals, clinics, and other entities are beneficiaries of the 340B Drug Pricing Program due to their role in providing needed care to poor and disadvantaged populations. Does the FTC consider whether pharmacy mergers might result in increased costs for local safety-net providers who meet the needs of poor and disadvantaged populations?

Answer. While I cannot discuss the details of any non-public investigation, the Commission is aware of the 340B Drug Pricing Program and its importance to the many community hospitals, clinics, and other entities that provide care to the poor and disadvantaged populations. In the past, the FTC has considered whether a merger of pharmacy chains was likely to substantially lessen competition by leading to higher prices and lower quality service. For example, in 2007, the FTC challenged Rite Aid’s proposed acquisition of Brooks and Eckerd pharmacies, alleging that the

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<sup>19</sup> FTC Press Release, FTC Challenges Vertical Agreement between Fresenius and Daiichi Sankyo (Sept. 15, 2008), <https://www.ftc.gov/news-events/press-releases/2008/09/ftc-challenges-vertical-agreement-between-fresenius-anddaiichi>.



acquisition would harm competition in 23 local markets in the northeast United States. To resolve these concerns and restore competition that would otherwise be lost, the FTC ordered Rite Aid to divest stores to Commission-approved buyers.<sup>20</sup> The order ensured that consumers would continue to have a choice in where they shopped for prescription drugs.

Similarly, in 2012, the Commission took action to block a merger of the two largest long-term care pharmacies, Omnicare and PharMerica, over concerns that the merged firm could demand higher reimbursement rates for Medicare Part D prescription drugs administered in skilled nursing facilities supplied by the merged firm. If allowed to proceed, the combined firm would have become a “must have” for Medicare Part D drug plans, which are responsible for providing subsidized prescription drug benefit coverage for most residents of skilled nursing facilities and other Medicare beneficiaries.<sup>21</sup> After the FTC filed a complaint alleging the merger violated the antitrust laws, the companies abandoned their merger plans.

*Question 4.* Do you anticipate the FTC may examine whether continued market consolidation in the pharmacy sector will adversely impact patients who benefit from the 340B Drug Pricing Program?

Answer. I can assure you that in determining whether under Section 7 of the Clayton Act a merger may substantially lessen competition or tend to create a monopoly, the FTC considers all aspects of competition in a market. The FTC strives to protect consumers from mergers whose effect may be substantially to lessen competition. In a merger review, the FTC would consider the impact of competition on Federal programs and customers, if applicable in that industry.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARCO RUBIO TO  
HON. EDITH RAMIREZ

*Question 1.* According to the most recent statistics, there are currently 728 travel related cases and 147 non-travel related cases of Zika in my home state of Florida. With the increase in cases, and the threat of mosquitos spreading around the Miami Beach area and to other parts of the United States and our territories, many are concerned with contracting the virus. Feeding into consumer concerns, many companies are marketing products that say they provide protection from the Zika virus.

A. Please speak to the FTC’s efforts to seek out these fraudulent companies that are capitalizing off of consumer concerns about Zika, and hold them accountable.

Answer. The Commission is very concerned about the health risks posed by Zika virus and other vector-borne diseases, and about the deceptive marketing of some products advertised to prevent them. The Commission’s prior experience in similar situations (e.g., the H1N1 virus) has been that after the news media report a significant public health concern, questionable products claiming to address that concern appear on the market. We were therefore concerned that reports about the serious potential health implications of Zika virus would give rise to advertising claims for products purporting to repel the mosquitoes that carry Zika, or otherwise to prevent consumers from contracting Zika. Accordingly, we conducted Internet surfs for on-line marketers making Zika protection claims early last summer, which culminated in the issuance on August 4, 2016 of warning letters to ten online marketers of wearable products (such as wristbands and stickers) for which such claims were being made.<sup>22</sup>

The warning letters reminded the marketers in question that their claims must be supported by competent and reliable scientific evidence in the form of well-controlled human clinical testing. The letters further explained that the testing must use the mosquito species that carry the virus and demonstrate that the repellent effects last as advertised. The FTC urged the marketers to review their claims and immediately delete or change them if the claims were not substantiated by scientific evidence. In an effort to notify other marketers who were or might be considering making Zika protection claims (or similar claims), we also issued a business blog

<sup>20</sup> FTC Press Release, FTC Challenges Rite Aid’s Proposed \$3.5 Billion Acquisition of Brooks and Eckerd Pharmacies from Canadas Jean Coutu Group, Inc. (Jun. 4, 2007), <https://www.ftc.gov/news-events/pressreleases/2007/06/ftc-challenges-rite-aids-proposed-35-billion-acquisition-brooks>.

<sup>21</sup> FTC Press Release, FTC Sues to Block Omnicare’s Bid to Buy Rival Pharmacy Provider PharMerica (Jan. 27, 2012), <https://www.ftc.gov/news-events/press-releases/2012/01/ftc-sues-block-omnicares-bid-buy-rival-pharmacy-provider>.

<sup>22</sup> See <https://www.ftc.gov/news-events/press-releases/2016/08/ftc-sends-warning-letters-online-sellers-makingzika-virus>.

post discussing the content of the warning letters and explaining what evidence marketers should have to substantiate their health claims.<sup>23</sup>

*B.* What can we do to educate my constituents back home in Florida, and across our nation, about what to look for to ensure they are not buying into falsely advertised products, and make sure they are protected as consumers?

Answer. The Commission agrees that consumer education is of utmost importance in helping consumers identify products that will be effective in helping to repel mosquitoes that might carry Zika virus and, at the same time, avoid wasting money on ineffective insect repellent products. The Commission advises consumers to seek information from knowledgeable and reputable sources, including government agencies, rather than just rely on claims made by marketers. To that end, the Commission released a consumer education blog in both English and Spanish discussing the warning letters and informing consumers about what they could do to protect themselves and their families from Zika virus and other insect-borne diseases.<sup>24</sup> The blog links to the websites of the Environmental Protection Agency and the Centers for Disease Control, both of which have published materials designed to educate the American public about how to protect themselves. In particular, the EPA has registered as safe and effective certain skinapplied insect repellent ingredients (DEET, Picaridin, IR3535, Oil of Lemon Eucalyptus, and 2-undecanone), and both the EPA and the CDC recommend using skin-applied products containing those ingredients. The EPA also has found clothing treated with the insecticide permethrin to be effective. The FTC's consumer blog also links to advice from EPA on how to use insect repellents safely and effectively; tips from the CDC on protecting oneself and family members; and what to consider when you are in a location where Zika has been found. The Commission hopes that centralizing this information will make it easier for consumers to make educated decisions about how to protect themselves and their families from Zika.

*Question 2.* The Federal Communication Commission (FCC) is scheduled to vote on its proposed broadband consumer privacy rule on October 27.

*A.* Will you speak to the FTC's comments on the proposed rule related to transparency, consumer choice and data security?

Answer. The FTC's comment commended the FCC's focus on the core privacy values of transparency, consumer choice, and data security, which mirror the FTC's privacy priorities. The FTC's many privacy initiatives have consistently emphasized the core principles of transparency and consumer choice. In addition, to promote strong data security practices, the FTC has brought approximately sixty enforcement actions, and launched numerous business education initiatives.

On transparency, the FTC generally supported the FCC's NPRM requirement that ISPs provide clear and conspicuous notice of their privacy policies. On choice, the FCC would have required opt out for marketing of communications-related services, and opt in for all other uses. The FTC suggested that opt in consent is important before (1) collecting sensitive information, (2) making material retroactive changes to privacy policies, or (3) collecting content of consumers' communications, through technologies such as deep packet inspection. For other categories, the FTC suggested that opt out would be sufficient. The FCC's final rule generally adopted this approach. Finally, on security, we generally supported the approach articulated in the NPRM, which was to require ISPs to maintain reasonable security. The FTC also generally supported the inclusion of a breach notification requirement for ISPs.

*B.* Prior to this ruling, how has the FTC regulated data privacy?

Answer. The FTC has protected privacy, and will continue to protect privacy, using a three-pronged approach. The first is enforcement, which is the linchpin of the FTC's approach to privacy protection. The FTC enforces a wide range of laws to protect the privacy and security of consumer data. The FTC also enforces sector-specific statutes that protect certain health, credit, financial, and children's information, and has issued regulations implementing each of these statutes. To date, the FTC has brought over 500 cases protecting the privacy and security of consumer information. The FTC's ongoing enforcement actions send an important message to companies about the need to protect consumers' privacy and data security.

Second, the FTC has pursued numerous policy initiatives designed to enhance consumer privacy. For example, the FTC has hosted workshops and issued reports to improve privacy disclosures in the mobile ecosystem, maximize the benefits of big data while mitigating the risks, and highlight the privacy and security implications of facial recognition, and the Internet of Things.

<sup>23</sup> See <https://www.ftc.gov/news-events/blogs/business-blog/2016/08/ftc-staff-sends-warning-letters-about-anti-zikaclaims>.

<sup>24</sup> See <https://www.consumer.ftc.gov/blog/will-those-insect-repellents-protect-you-zika>.

Finally, the FTC has engaged in consumer and business education to increase the impact of its enforcement and policy initiatives. The FTC uses a variety of tools—brochures, online resources, workshops, and social media—to distribute educational materials on a wide range of topics including mobile apps, children’s privacy, and data security. Most recently, on the business education front, the FTC released “Data Breach Response: A Guide for Businesses” providing advice on implementing a plan to protect consumers’ personal information, to prevent breaches and unauthorized access. For consumer education, the FTC recently announced the rollout of its enhanced IdentityTheft.gov website, a free, one-stop resource consumers can use to report and begin the process of recovery from identity theft.

C. In your opinion, is the FTC better equipped to regulate data privacy than the FCC?

Answer. While the FCC has important expertise in crafting and enforcing rules applicable to certain information held by common carriers, the FTC has expertise in enforcing privacy protections across online and offline ecosystems. Consumers would further benefit from FTC enforcement because the FTC Act provides for consumer redress. Whereas the FCC traditionally has exercised its authority to fine companies for noncompliance, the FTC focuses on putting money back in the pockets of consumers. It is important that both agencies have the tools to protect consumer privacy, so that there are no gaps in consumer protection. To that end, the FTC has long called for the repeal of the common carrier exception. This carve-out no longer makes sense in today’s deregulated environment where the lines between telecommunications and other services are increasingly becoming blurred. Removing the exception from the FTC Act would enable the FTC to bring its extensive law enforcement experience to bear in protecting consumers of common carriage services against unfair and deceptive practices in the same way that it can protect against unfair and deceptive practices for other services. If the exemption were repealed, we would work alongside the FCC to protect consumers in the common carrier space, as we do in other areas.

*Question 3.* As a top travel destination in the nation, and the world, Florida is home to thousands of hotels. As technology continues to move forward in the 21st Century, booking travel arrangements through third-party hotel booking sites offers enormous conveniences and potential cost savings to consumers. However, there have been allegations that certain companies or their affiliates are engaging in travel booking practices that mislead and harm consumers booking hotel rooms online. In June 2015, I joined Senator Nelson in sending a letter to the FTC urging investigation into allegations of fraudulent online hotel bookings through third-parties. The entire Florida House delegation sent a similar letter.

A. How many consumer complaints on this issue have been filed with the FTC?

Answer. The Commission’s Consumer Sentinel complaint database includes complaints received directly by the FTC as well as complaints contributed by the Better Business Bureau and other agencies. It contains approximately 60 complaints since 2012 indicating that consumers had booked a hotel through a third-party site when they thought they were booking directly with a hotel. As noted in response to Sen. Thune, consumer complaints we receive are often only one factor in our analysis of potential consumer concerns.

B. Can you all speak to the efforts FTC has made to investigate these fraudulent bookings, and how the FTC is working to protect consumers from this fraud?

Answer. The Commission has a strong interest in protecting consumer confidence in the online marketplace for travel and other services. In July 2015, the FTC issued consumer education cautioning consumers about third-party websites that may deceptively mimic hotel websites.<sup>25</sup> We have also met with members of Congress to discuss the issue of deceptive travel sites and have proposed technical assistance and comments on proposed legislation. Although the existence and details of investigations are non-public, I can assure you that the FTC staff will carefully monitor the marketplace and take enforcement action if appropriate.

*Question 4.* Florida is a top travel destination in both the United States and the world, and is home to hundreds of hotels and resorts. Orlando, Miami, the Florida Keys, and Fort Lauderdale are some of the most popular destinations with hotels charging resort fees for additional amenities. It has come to my attention that the FTC is looking to alter previous guidance, released in 2012, related to the mandatory disclosure of hotel resort fees. The 2012 guidance requires hotels to fully disclose all resort fees so that consumers know throughout the booking process exactly how much they are paying and which amenities they are receiving. Please speak

<sup>25</sup> See <https://www.consumer.ftc.gov/blog/did-you-book-night-hotels-site> and <https://www.ftc.gov/newsevents/blogs/business-blog/2015/07/business-travelers-check-it-out-you-check>.

to what has prompted the FTC to discuss reversing the 2012 guidance and moving towards “total price” guidance.

A. How many consumer complaints has the FTC received on resort fee disclosures since it issued its guidance on this issue in 2012?

Answer. The Federal Trade Commission received 401 complaints on resort fee disclosures between November 29, 2012, when staff issued its warning letters, and the beginning of July 2016. As noted in response to Sen. Thune, consumer complaints we receive are often only one factor in our analysis of potential consumer concerns.

Is there any empirical or legal evidence of actual consumer confusion or harm that demonstrates that the 2012 guidance needs to be altered? If so, please describe.

Answer. Partitioned pricing and drip pricing research has highlighted the need for companies to add resort fees into advertised room rates.<sup>26</sup> Partitioned pricing harms consumers because they are likely to ignore mandatory fees altogether or to underestimate the total price they must pay for their hotel stays. For example, the seminal study on partitioned pricing found that consumers shown a partitioned price recalled a significantly lower price than those shown an all-inclusive price. Some consumers ignored the surcharge. See Vicki G. Morwitz *et al.*, Divide and Prosper: Consumers’ Reactions to Partitioned Prices, 35 *J. Marketing Research* 453, 458 (1998); see also Eric A. Greenleaf *et al.*, The Price Does Not Include Additional Taxes, Fees and Surcharges: A Review of Research on Partitioned Pricing, 26 *J. Consumer Psychol.* 105 (2015). Drip pricing causes consumers to search less, as the initial disclosure of only part of the price has an enduring effect on their purchase decisions. Consumers behave as if the price is lower than it is, even if they later learn about the additional fees and see the total price before finalizing the transaction. Steffen Huck & Brian Wallace, The Impact of Price Frames on Consumer Decision Making, in Advertising of Price Market Study Report, Office of Fair Trading, Dec. 2010. Because they search less, consumers may miss offers that are more suitable to them.

In addition, consumers today increasingly use online travel agents, metasearch, and mobile platforms to comparison shop for hotels. These platforms allow consumers, at the start of the booking process, to sort hotel rooms by price. Sorting results are distorted if they are based on room rates that exclude resort fees. Consumers are then forced to click through multiple pages in the booking process for individual hotels to learn the true total cost for their hotel stays, and then go back and compare the various total rates.

B. Further, do any of those studies look at consumer understanding of current disclosures, specifically?

Answer. I am not aware of any research that has specifically examined consumer understanding of current resort fee disclosures.

*Question 5.* In November 2012, the FTC issued 22 warning letters to hotel operators on resort fee disclosures. The 2012 guidance was largely embraced by the industry. In 2013, the FTC issued additional warning letters. However, it is my understanding that the FTC has not taken enforcement action against hotel or resort operators since sending these warning letters. Why didn’t the FTC take enforcement action?

Answer. The FTC has worked with the travel industry since November 2012 to improve hotel price transparency for consumers. Nevertheless, the research and marketplace developments described in response to Question 4 have called into question the effectiveness of the resort fee disclosures currently used by numerous industry players in various travel destinations. At this time, law enforcement actions against a small subset of players are unlikely to achieve the necessary industry-wide adoption of displays that quote room rates that include resort fees. For this reason, I have met with a diverse group of industry stakeholders, urging them to come up with a solution that best protects consumers and promotes competition.

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RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. KELLY AYOTTE TO  
HON. EDITH RAMIREZ

*Question.* Competitive marketplaces form the foundation of a thriving economy:

A. What is the Commission doing to ensure that the digital economy market remains open and competitive?

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<sup>26</sup>Partitioned pricing entails dividing a price into multiple components without disclosing the total sum of the components. Drip pricing is the practice of advertising only part of a product’s price upfront and revealing additional charges later as consumers go through the buying process.

B. How is the Commission approaching issues concerning platform technology companies?

Answer. The Commission seeks to promote an open and competitive digital economy market through vigorous law enforcement, competition policy research, competition advocacy, and consumer and business education. Antitrust enforcement supports robust competition, which in turn promotes innovation. Unreasonable restraints of trade and other anticompetitive conduct can threaten market forces, leading to higher prices, lower quality products and services, and less innovation. The Commission's mission is to stop anticompetitive conduct. The Commission also takes enforcement against transactions that may substantially lessen competition and lead to higher prices, lower quality, or reduced innovation. The antitrust laws are flexible and apply across industries and market settings, including "high tech" industries and markets. Applying a balanced, fact-based approach to law enforcement is key to the Commission's mission to preserve and promote competition in this vital market.

For example, the Commission acted to preserve competition in the emerging market for syndicated cross-platform audience measurement services in its review of the merger of Nielsen and Arbitron.<sup>27</sup> Before the merger, each company was developing a new product which would allow media companies and advertisers to measure audiences across multiple platforms, such as TV and online. At the time, Nielsen was the leading provider of TV audience measurement services while Arbitron provided similar measurements for radio audiences. Based on our review, we determined Nielsen and Arbitron were best positioned to develop cross-platform measurement service because they were the only two companies that operated large and demographically representative panels that are capable of reporting television programming viewership. We had reason to believe that the elimination of future competition between Nielsen and Arbitron would likely cause advertisers, ad agencies, and programmers to pay more for national syndicated cross-platform audience measurement services. To preserve competition, the Commission required Nielsen to sell and license, for at least eight years, certain assets related to Arbitron's cross-platform audience measurement services to the FTC-approved buyer, comScore.

The Commission has long been at the forefront of competition policy research on the application of the antitrust laws to high tech industries. In the 1990s, back when e-commerce was in its infancy, former Chairman Pitofsky held a series of workshops that carefully assessed the applicability of antitrust principles to new industries. The Commission's current research agenda continues to place a high priority on understanding how high tech markets work, as well as the competition and consumer protection issues that arise as technology-enabled industries evolve.

For example, last year, the FTC held a workshop to explore issues relating to emerging Internet peer-to-peer platforms and the economic activity these platforms facilitate—often referred to as the "sharing" economy.<sup>28</sup> We are seeing a dramatic growth in products and services that are built on peer-to-peer platforms, such as ride-sharing and property rentals, as more entrepreneurs harness the power of technology to reach more consumers. These innovative business models have great potential to benefit our economy, market participants, and all consumers, not only by stimulating economic growth, encouraging entrepreneurship, and promoting more productive and efficient use of assets, but also by incentivizing suppliers of traditional economy services to improve quality in response to new forms of competition. However, the rapid expansion of commercial activity involving smaller suppliers on these platforms may tax the abilities and resources of regulators, who are confronted with the challenge of applying regulations that were written with conventional suppliers in mind. Last week, the FTC issued a report summarizing and synthesizing what we learned from the workshop and the related public comments we received. We believe the report will advance the understanding of these virtual marketplaces and provide insights on the competition, consumer protection, and regulatory issues that they raise.

The Commission also engages in advocacy to promote and protect competition in the digital economy and in platform technology markets. We encourage policy-

<sup>27</sup> FTC Press Release, "FTC Puts Conditions on Nielsen's Proposed \$1.26 billion Acquisition of Arbitron," (Sept. 20, 2013), <https://www.ftc.gov/news-events/press-releases/2013/09/ftc-puts-conditions-nielsens-proposed-126billion-acquisition>.

<sup>28</sup> FTC Press Release, "FTC to Examine Competition, Consumer Protection, and Economic Issues Raised by the Sharing Economy at June Workshop" (Apr. 17, 2015), <https://www.ftc.gov/news-events/press-releases/2015/04/ftc-examine-competition-consumer-protection-economic-issues>. All of the materials from the workshop are available on the workshop webpage: The "Sharing" Economy: Issues Facing Platforms, Participants, and Regulators, Fed. Trade Comm'n (Jun. 9, 2015), <https://www.ftc.gov/news-events/events-calendar/2015/06/sharing-economy-issues-facing-platforms-participants-regulators>.

makers to adopt policies that do not unnecessarily inhibit competition, dampen entry, or foreclose innovative companies or business models. For example, in June, the FTC and the DOJ Antitrust Division submitted a joint comment, in response to a request from North Carolina State Senator Bill Cook, on the impact on competition and consumers of interactive websites for generating legal forms.<sup>29</sup> Proposed legislation would exclude from the statutory definition of the practice of law the operation of websites that generate legal documents based on consumer responses to questions presented by interactive software, provided certain conditions are satisfied. The joint comment encouraged the North Carolina General Assembly to consider the benefits of interactive websites for consumers and competition, while recognizing that such products may raise legitimate consumer protection issues.

As another example, in August, the FTC submitted letters to two state boards in Delaware concerning regulations governing telemedicine. The FTC's comment to the Delaware Board of Occupational Therapy Practice related to a proposed regulation that would allow licensed occupational therapists (OTs) to determine whether telehealth is an appropriate level of care for a patient, and allow OTs to determine the level of supervision required for the provision of telehealth services by OT assistants. The FTC wrote that by not imposing rigid and unwarranted in-person care and supervision requirements, the proposed telehealth regulation would likely benefit Delaware consumers.<sup>30</sup> In a second letter to the Delaware Board of Dietetics/Nutrition, the FTC commented on a proposed telehealth regulation that would require in-person initial evaluations of patients, and then allow licensed dietitians and nutritionists to determine whether to use telehealth thereafter. The FTC noted that by allowing licensed dietitians/nutritionists to determine whether telehealth is an appropriate level of care for a patient, the proposed regulation could promote the use of telehealth, potentially enhancing competition in the provision of nutrition services, as well as reducing patient travel costs.<sup>31</sup> However, because the proposed regulation would also require that all initial evaluations be conducted in person, it may unnecessarily discourage the use of telehealth and restrict consumer choice.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. DEB FISCHER TO  
HON. EDITH RAMIREZ

*Question 1.* I have heard from constituents in Nebraska who raised concerns about card networks potentially circumventing the routing rights of merchants at the point of sale by implementing new prompt screens. Merchants and smaller PIN debit networks assert that some consumers are confused by the new prompt screens, which direct consumers to choose how to route a debit transaction (for example, to choose “Visa Debit” or “US Debit”), and that consumers often pick the name they recognize because terms like “US Debit” are unclear to them. As you are aware, Regulation II, which the FTC enforces, intended to bring competition to the debit marketplace by allowing multiple network routing options for the merchant at the point of sale. Regulation II specifically prohibits all issuers and networks from inhibiting a merchant’s ability to direct the routing of a debit transaction over any network that the issuer has enabled to process it. Do you believe that deployment of these new prompt screens could constitute a violation of Regulation II by shifting the routing decision at the point of sale from the merchant to the consumer? Is this something that the FTC plans to look into?

Answer. The FTC’s primary responsibility under the Durbin Amendment and Regulation II is to monitor compliance of the payment card networks with rules designed to eliminate network exclusivity and give merchants routing choice for processing electronic debit card payments. We track developments in this industry to ensure that the networks do not inhibit merchant routing choice. We are aware of concerns raised about the effect of the new prompt screens on merchant routing choice. The FTC this week closed its investigation of Visa following changes to the com-

<sup>29</sup> Letter from FTC Staff to the Honorable Bill Cook, North Carolina Senate, regarding North Carolina HB 436 (Jun. 10, 2016), <https://www.ftc.gov/policy/policy-actions/advocacy-filings/2016/06/joint-comment-federal-trade-commission-staff>.

<sup>30</sup> Letter from FTC Staff to the Delaware Board of Occupational Therapy Practice (Aug. 3, 2016), [https://www.ftc.gov/system/files/documents/advocacy\\_documents/ftc-staff-comment-delaware-board-occupationaltherapy-concerning-its-proposed-telehealth-regulation/v160014\\_delaware\\_ot\\_proposed\\_advocacy.pdf](https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-delaware-board-occupationaltherapy-concerning-its-proposed-telehealth-regulation/v160014_delaware_ot_proposed_advocacy.pdf).

<sup>31</sup> Letter from FTC Staff to LaTonya Brown, Administrator of the Delaware Board of Dietetics/Nutrition (Aug. 16, 2016), [https://www.ftc.gov/system/files/documents/advocacy\\_documents/ftc-staff-comment-delaware-board-dietetics/nutrition-regarding-its-proposed-telehealth-regulation/staff-comment-delaware-diet-telehealth-signed.pdf](https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-delaware-board-dietetics/nutrition-regarding-its-proposed-telehealth-regulation/staff-comment-delaware-diet-telehealth-signed.pdf).

pany's debit routing rules.<sup>32</sup> A number of statutory prohibitions and Commission Rules prevent me from disclosing the existence or details of nonpublic Commission investigations. I can assure you, however, that the Commission is dedicated to protecting competition and consumers and will take appropriate action against acts or practices in the marketplace that violate the statutes we enforce.

*Question 2.* I understand that competition authorities in some foreign countries are proposing to impose antitrust enforcement conditions on U.S. companies that could have the effect of regulating patents issued domestically. I am concerned that this could be a means for these countries to try and undermine the strong intellectual property protections that we have here in the U.S., so they might acquire our innovations more cheaply or put U.S. companies at a disadvantage when competing abroad. Does the FTC share these concerns? Should there be limits on the power of competition authorities to mandate remedies for the licensing of IP rights of other countries?

*Answer.* The FTC has heard concerns that some foreign jurisdictions may use competition enforcement and remedies as a means of advancing other policy goals. We share the concern that it is inappropriate to use competition enforcement to further industrial policy goals or to advantage domestic competitors, including with respect to IP licensing. We have advocated and will continue to advocate internationally that competition law should be used to maximize consumer welfare and should be applied in a non-discriminatory manner. Consumers are best served when competition enforcement is based solely on sound economic analysis of competitive effects. We recognize that many high-technology markets, particularly in the information and communications technology sector, are global and are often built upon global licensing arrangements between their participants. The strategies firms employ in these negotiations can affect competition and innovation across jurisdictions. Recognizing the international scope of this conduct, the FTC has taken a number of steps to promote coordination and cooperation with our foreign counterparts in a variety of contexts, including ongoing investigations, comments on proposed rules and guidelines, workshops, and technical assistance. Nevertheless, we believe it is appropriate for competition agencies to engage in antitrust enforcement only when there is a sufficient connection between the anticompetitive conduct and the jurisdiction in which the antitrust laws are to be applied. The FTC operates within these parameters when challenging global or extraterritorial anticompetitive conduct. We believe that foreign counterparts should likewise limit their enforcement to conduct that harms competition and consumers within that country's jurisdiction. Moreover, if a foreign agency were to find harm to competition and consumers within that country's jurisdiction stemming from global IP licensing conduct, we believe that any remedy should be tailored to address those harms, and should not be expanded to address other policy goals or to advantage domestic competitors.

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RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. RON JOHNSON TO  
HON. EDITH RAMIREZ

*Question.* The FTC has made a tremendous effort to weigh in against proposed state regulations that are anticompetitive or create unjustified barriers to entry, including in the health care and technology industries. Led by the staff of the Office of Policy Planning, the FTC staff has written over 40 letters in the last two years on issues ranging from taxi and ride-sharing rules to telehealth to direct-to-consumer vehicle sales. These letters make clear that innovators can offer tremendous benefits to consumers, but entrenched incumbents often try to use the regulatory process to keep the innovators out of the marketplace. Can the FTC commit to this Committee that it will continue to make reducing anticompetitive behavior by states a priority through letters to state lawmakers and regulators?

*Answer.* We fully intend to continue our competition policy and advocacy efforts, which serve as an important complement to our enforcement work. The FTC will continue to promote competition principles and analysis in comments to state lawmakers, regulators, and regulatory boards.

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<sup>32</sup> Letter from FTC Bureau of Competition Staff to Julie B. Rottenberg, Esq. SVP, Deputy General Counsel, Chief Counsel, North America, Risk and Merchant Solutions, Visa Inc. (November 22, 2016) [https://www.ftc.gov/system/files/documents/closing\\_letters/nid/closing\\_letter\\_from\\_james\\_frost\\_to\\_visa\\_-\\_11-2216.pdf](https://www.ftc.gov/system/files/documents/closing_letters/nid/closing_letter_from_james_frost_to_visa_-_11-2216.pdf)

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. STEVE DAINES TO  
HON. EDITH RAMIREZ

*Question 1.* Are there any Federal laws on the books today that apply to technology companies and specifically prevents them from using the data they collect about students through educational technologies for commercial purposes?

Answer. The Children's Online Privacy Protection Act ("COPPA") prohibits operators of websites or online services directed to children, and any operator that has actual knowledge that it is collecting or maintaining personal information from a child, from collecting personal information from children under the age of 13 without first obtaining verifiable parental consent. COPPA does not apply to the collection of personal information from students thirteen and older. Additionally, it applies only to information collected from children, and not to personal information collected about them, such as from a teacher or school administrator.

Section 5 of the FTC Act, which prohibits unfair and deceptive trade practices, also applies to technology and other companies' use of student data. For example, in a 2003 settlement with The National Research Center for College and University Admissions, Inc., the Commission alleged that the company engaged in a deceptive practice because it collected extensive personal information from high school students, claiming the information would only be shared with third parties providing education-related services. The Commission charged that, contrary to this representation, the company sold the information to commercial marketers. Generally, however, if a technology company's practices are truthful and non-misleading, Section 5 does not prevent the company from using data for non-educational purposes unless the Commission can demonstrate that the conduct is unfair. Unfair conduct is conduct that causes or is likely to cause substantial injury that is not outweighed by countervailing benefits to consumers or competition and that could not reasonably have been avoided.

*Question 2.* In your opinion, is it appropriate for technology companies to collect student data, or to use information in students' education records, to target advertising to them? For example, to use information about whether a student has a learning disability to target ads for soda, or video games, or other non-educational products to the student?

Answer. One of the significant revisions the Commission made to the COPPA Rule in 2012 was to give parents notice of, and control over, marketers' use of persistent identifiers to track their children for purposes of targeting advertising or compiling a profile. In the educational sphere, many school districts contract with third-party companies to offer online educational programs for their students. The Commission has long recognized the authority of schools to consent, as an agent or intermediary of the parent, to the collection of personal information from students under 13, provided the information is used for educational purposes. In other words, schools can partner with and share students' personal information with technology companies for educational uses, but those companies cannot then turn around and use information about students under the age 13 for commercial purposes, such as for behavioral advertising. While the protections COPPA provides are important, as noted above, COPPA's protections apply only to children under 13, and only to information collected from children, and not about children. I believe it is vital to protect the privacy of students in the educational setting. I therefore support the goal of the SAFE KIDS Act, which would extend important protections to teenagers, as well as prohibit targeted advertising based on information collected about children, rather than only information collected from them.

*Question 3.* Over 300 companies have signed the student privacy pledge which safeguards student privacy by setting parameters for the collection, maintenance, and use of student personal information. Is the privacy pledge enforceable by the FTC? Can a company who signs the privacy pledge revoke at any time?

Answer. To the extent a company signs on to the pledge and fails to live up to its promises, this may constitute a deceptive practice that would violate Section 5 of the FTC Act. However, companies that sign on to the pledge can revoke their pledge at any time. They would nonetheless need to abide by the pledge with respect to any information they collected during the time they were subject to the pledge, unless they obtained affirmative express consent from consumers to do otherwise.

*Question 4.* Most of the headlines we see surrounding data breaches are focused on the harm to adults when their data security is compromised. What unique harms do children face when they are victims of a data breach?

Answer. Children who are victims of a data breach, and who may therefore become victims of identity theft, face unique challenges. Children may experience



greater harm because their identities may be more useful to identity thieves. Most significantly, a child's identity can often be used for many years before a parent or affected child becomes aware of the identity theft. They may not learn of the identity theft until the first time they apply for credit, which may be years after the identity theft occurred, making it all the more difficult to unwind. The Commission discussed these issues in a workshop addressing identity theft issues affecting children. See <https://www.ftc.gov/news-events/events-calendar/2011/07/stolen-futures-forum-child-identitytheft>. The FTC has also provided information to consumers about child identity theft. See <https://www.consumer.ftc.gov/articles/0040-child-identity-theft>.

Also, while the Commission considers location data to be sensitive generally, parents may be concerned that their children's location might be available to child predators and others. Children's location information is specifically protected under COPPA. Earlier this year in the InMobi case, the Commission challenged a mobile ad network's use of information from smartphones to derive users' locations, including for users of child-directed apps, as a violation of COPPA. (See <https://www.ftc.gov/news-events/press-releases/2016/06/mobile-advertising-network-inmobi-settles-ftc-charges-it-tracked>.) We alleged that InMobi's software tracked location in thousands of child-directed apps with hundreds of millions of users without obtaining parental consent as required by COPPA.

*Question 5.* There are concerns that antitrust enforcement actions by foreign governments may be used to undermine U.S. companies abroad and effectively regulate U.S. issued patents. The FTC already collaborates with competition and consumer protection agencies around the world. In your view, what steps can or should the FTC take to limit the extraterritorial application of a nation's competition law when those actions may impact U.S. intellectual property?

*Answer.* The FTC has a robust program of international engagement with foreign counterpart agencies. Through senior level dialogues and staff level interactions, we stress with our counterparts the importance of pursuing consumer welfare—and the problems associated with pursuing other goals, such as industrial policies and the protection of domestic competitors—through competition law enforcement. We advocate for these principles through speeches,<sup>33</sup> directly with our foreign agency counterparts, through our active technical assistance program, and in multilateral bodies such as the International Competition Network and the OECD. The FTC has engaged, and will continue to engage, with our counterparts in a number of jurisdictions on these specific issues, in an effort to build consensus on policies that will benefit competition and consumers globally and prevent undermining the incentives for innovation that intellectual property systems are designed to provide. As appropriate, the FTC also works with other U.S. government agencies, including the U.S. Patent and Trademark Office, on these important policy issues at the intersection of antitrust and IP law. In short, we believe that the FTC is taking the appropriate steps to engage on these issues, and we intend to continue to do so.

*Question 6.* In your recent remarks to the Global Antitrust Enforcement Symposium, you stated that competition leads to lower prices, higher quality, and innovation. You stated, “at the FTC we must keep a watchful eye on markets to ensure fair competition that enhances consumer welfare . . . our job is to enforce the rules that safeguard vigorous competition if we see them being broken.” With those sentiments in mind, Congress in 2003 enacted the Fairness to Contact Lens Consumers Act to promote competition in the sale of contact lenses—a law whose implementing regulation is currently under review at the Commission. Despite the law's requirement that consumers receive copies of their prescriptions, there is evidence of widespread non-compliance. Specifically, a recent survey conducted on behalf of a national retailer found that only 35 percent of consumers automatically receive their prescription, and 36 percent left the office without a copy.

In reviewing the Rule, will you place focus on this law's goal of promoting competition, and take action to assure consumers are receiving their prescriptions as required by law?

*Answer.* While I cannot comment in detail on a pending rule review, I can confirm that promoting competition and examining the effectiveness of the prescription release requirement are two key areas of interest during our ongoing review of the

<sup>33</sup> See, e.g., Edith Ramirez, Chairwoman, Fed. Trade Comm'n, Core Competition Agency Principles: Lessons Learned from the FTC, Keynote Address at the Antitrust in Asia Conference, Beijing, China (May 22, 2014), available at [https://www.ftc.gov/system/files/documents/public\\_statements/314151/140522abachinakeynote.pdf](https://www.ftc.gov/system/files/documents/public_statements/314151/140522abachinakeynote.pdf); Edith Ramirez, Chairwoman, Fed. Trade Comm'n, Keynote Address, Seventh Annual Global Antitrust Enforcement Symposium (Sept. 25, 2013), available at [https://www.ftc.gov/sites/default/files/documents/public\\_statements/7th-annual-global-antitrust-enforcement-symposium/130925georgetownantitrustspeech.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/7th-annual-global-antitrust-enforcement-symposium/130925georgetownantitrustspeech.pdf).

Contact Lens Rule (CLR), the regulation that implements the Fairness to Contact Lens Consumers Act. Both the Act and the CLR promote competition in retail sales of contact lenses by fostering consumers' ability to comparison shop. The prescription release requirement is central, because consumers cannot buy lenses without a prescription. Consumers are not likely to comparison shop if they cannot purchase lenses from competing vendors. Likewise, sellers of contact lenses are not likely to compete on price or other aspects of sales and service if consumers cannot or do not comparison shop among them.

When the Commission requested public comments on the CLR,<sup>34</sup> we noted at the outset that the CLR "is intended to facilitate the ability of consumers to comparison shop for contact lenses," and that the CLR "requires that eye care prescribers provide a copy of a prescription to the consumer upon completion of a contact lens fitting."<sup>35</sup> We asked, in particular, for evidence on the degree of industry compliance with the CLR<sup>36</sup> and have been reviewing the available evidence. We recently issued a Notice of Proposed Rulemaking,<sup>37</sup> which proposes amending the Contact Lens Rule to require that after providing a copy of the prescription, prescribers request patients sign an acknowledgment form indicating receipt of the prescription. The Commission believes that implementation of signed acknowledgments would best serve several important objectives: reminding prescribers to release prescriptions, informing patients of their rights, and improving the Commission's verification and enforcement ability.

In addition, the Commission has taken some recent steps to achieve better compliance with the CLR. For example, in April 2016, the Commission sent warning letters to 45 contact lens prescribers after receiving consumer complaints alleging that the prescribers had violated the Rule, often by failing to provide patients with their prescriptions automatically.<sup>38</sup>

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. BILL NELSON TO  
HON. EDITH RAMIREZ

*Question 1.* Chairwoman Ramirez, can you bring us up to date on the Commission's work on card networks under Regulation II? Specifically, I am interested in how merchants are able to route debit transactions and their implications on consumers, business competition, and data security.

Answer. The FTC's primary responsibility under the Durbin Amendment and Regulation II is to monitor compliance of the payment card networks with rules designed to eliminate network exclusivity and give merchants routing choice for processing electronic debit card payments. We track developments in this industry to ensure that the networks do not inhibit merchant routing choice. We are aware of concerns raised about the effect of the new prompt screens on merchant routing choice. The FTC this week closed its investigation of Visa following changes to the company's debit routing rules.<sup>1</sup> A number of statutory prohibitions and Commission Rules prevent me from disclosing the existence or details of nonpublic Commission investigations. I can assure you, however, that the Commission is dedicated to protecting competition and consumers and will take appropriate action against acts or practices in the marketplace that violate the statutes we enforce.

*Question 2.* As you know, I represent a state with a large population of older Americans. Since 2005, the FTC has brought more than 30 cases against scam artists who have gone after older consumers.

Chairwoman Ramirez, could you talk about the type of frauds you see that specifically target seniors and discuss the consumer outreach—in addition to bringing law enforcement cases—the Commission engages in to educate consumers about how to avoid becoming victims?

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<sup>34</sup> Contact Lens Rule, Request for Comment, 80 FR 53272 (Sep. 3, 2015).

<sup>35</sup> *Id.* at 53773.

<sup>36</sup> *Id.* at 53774.

<sup>37</sup> 16 CFR Part 315: Contact Lens Rule; Notice of Proposed Rulemaking; Request for Public Comment (Nov. 10, 2016), <https://www.ftc.gov/policy/federal-register-notices/16-cfr-part-315-contact-lens-rule-notice-proposedrulemaking-request>.

<sup>38</sup> Press Release, Fed. Tr. Comm'n, FTC Issues Warning Letters Regarding the Agency's Contact Lens Rule (Apr. 7, 2016), <https://www.ftc.gov/news-events/press-releases/2016/04/ftc-issues-warning-letters-regarding-agencyscontact-lens-rule>.

<sup>1</sup> Letter from FTC Bureau of Competition Staff to Julie B. Rottenberg, Esq., SVP, Deputy General Counsel, Chief Counsel, North America, Risk and Merchant Solutions, Visa Inc. (November 22, 2016) [https://www.ftc.gov/system/files/documents/closing\\_letters/nid/closing\\_letter\\_from\\_james\\_frost\\_to\\_visa\\_-\\_11-22-16.pdf](https://www.ftc.gov/system/files/documents/closing_letters/nid/closing_letter_from_james_frost_to_visa_-_11-22-16.pdf)

Answer. As the population of older Americans continues to grow, the FTC's efforts to identify illegal marketing impacting seniors and to bring aggressive law enforcement action, as well as provide useful advice to seniors, become increasingly vital.

Based on research conducted by the FTC, older Americans are not necessarily defrauded at higher rates than younger consumers. However, certain types of scams are more likely to impact older Americans, such as prize promotion and lottery or sweepstakes schemes, technical support scams, and certain telemarketing schemes. In the past two years, the FTC has brought 15 actions involving conduct that significantly affected older adults. Seven of the matters involved alleged scams such as an investment opportunity fraud, sweepstakes and lottery scams, technical support scams, and robocalls pitching interest rate reduction schemes and medical alert systems. Eight of the matters alleged unsubstantiated advertising in the sale of brain training programs and products that made anti-aging claims, or otherwise aimed their advertising at seniors.

The Commission's education and outreach programs reach tens of millions of people a year through our website, the media, and partner organizations that disseminate FTC consumer information to their communities. 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 Commission's library of articles in English and Spanish includes numerous pieces of particular relevance to seniors, including those specifically describing grandparent scams, prize and lottery fraud, medical alert scams, Medicare scams, technical support scams, veterans' benefits scams, and government imposter fraud.

In 2014, the FTC launched its Pass It On campaign, an innovative education effort aimed at active, older adults. This campaign seeks to arm older people with information that they can "pass on" to family and friends who might need it. The materials and videos available at [www.ftc.gov/PassItOn](http://www.ftc.gov/PassItOn) are direct and to the point, with a friendly and respectful tone informed by research about the target community's preferences. The materials cover topics such as imposter and health care scams, charity fraud, and identity theft, all of which are available in print in both English and Spanish. In 2016, the FTC added new materials on specific imposter scams: IRS, tech support, grandparent and romance scams.

*Question 3.* The FTC is one of the crown jewels of this Committee's jurisdiction. It's the premier consumer protection agency in the Nation. The FTC is tasked with protecting average Americans from scams and frauds that steal their hard-earned money. However, I have always felt that the FTC has been chronically underfunded and understaffed given its vast mission.

Chairwoman Ramirez, do you have the resources you need to go after all of the crooks out there that are ripping people off? How much do you have to pick-and-choose when it comes to your enforcement actions given the FTC's limited resources?

Answer. Like other government agencies, the Commission seeks ways to do more with less. Resource constraints, despite a growing workload, remain a constant challenge. The FTC will continue to leverage its resources through careful case selection and by partnering with law enforcement and other partners on enforcement and educational efforts. We focus on having efficient internal processes to expedite our work, and improving our own IT infrastructure to allow our staff to work more effectively.

*Question 4.* What can we do in Congress to better help the Commission fulfill its mission, fight fraud, and protect consumers?

Answer. One area in which the FTC could use additional authority is data security, which is a crucial part of the FTC's work. To date, the Commission has brought approximately 60 cases alleging that companies failed to implement reasonable safeguards for the consumer data they maintain. We reiterate our longstanding, bipartisan call for Federal legislation that would (1) strengthen our existing data security authority and (2) require companies, in appropriate circumstances, to provide notification to consumers when there is a security breach. Legislation in both areas—data security and breach notification—should give the FTC the ability to seek civil penalties to help deter unlawful conduct, jurisdiction over non-profits, and rulemaking authority under the Administrative Procedure Act. We would be happy to work with your staff on such an initiative.

In addition, while the FTC has worked to keep pace with the ever-changing marketplace, two particular challenges are of concern: jurisdictional limitations over common carriers and non-profits.

The FTC has long called for the repeal of the common carrier exception. This carve-out no longer makes sense in today's deregulated environment where the lines between telecommunications and other services are increasingly becoming blurred.

Removing the exception from the FTC Act would enable the FTC to bring its extensive law enforcement experience to bear in protecting consumers of common carriage services against unfair and deceptive practices in the same way that it can protect against unfair and deceptive practices for other services.

We also recommend that our jurisdiction be extended to non-profit entities. In healthcare provider markets, where the Commission has particular expertise, the agency's inability to reach conduct by various non-profit entities has prevented the Commission from taking action against potentially anticompetitive behavior of non-profits engaged in commercial activities. These concerns also apply to our consumer protection mission. For example, despite many publicized data breaches at non-profit hospitals and universities, the FTC cannot challenge unfair or deceptive data security or privacy practices of these entities. These breaches have exposed the sensitive data of millions of consumers, yet the Commission cannot act due to the non-profit status of these entities.

*Question 5.* I am a firm believer that two cops on the beat are better than one. In that regard, I see no reason to pit one agency against another. In this Committee, we have had a debate as to whether the FCC or FTC should protect consumer privacy. I think this debate misses the point. There is no reason why both the FTC and FCC can't play prominent roles.

To all of the Commissioners, the FTC has overlapping jurisdiction with numerous agencies, such as the Department of Justice and the Food and Drug Administration. Your relationships with these agencies and overlapping jurisdictions have never been a problem. Don't you think you can have a similar cooperative relationship with the FCC? Shouldn't there be two cops on the beat?

Answer. Given the breadth of its jurisdiction, the FTC has cooperated frequently with a number of other agencies on areas of mutual concern. For example, the FTC has worked with the Department of Health and Human Services on health privacy and competition issues and with the Department of Education on student privacy issues. The Commission's goal in working with other agencies is to use its complementary authority to protect consumers as effectively and efficiently as possible, to avoid duplication, and to promote consistency.

The Commission also has a long history of successful cooperation with the FCC on consumer protection issues, including issues related to privacy and data security. In 2015, the agencies affirmed and formalized this collaboration by entering into a Memorandum of Understanding agreeing to coordinate on our respective consumer protection efforts.<sup>2</sup>

One example of our privacy collaboration is the Federal Do Not Call registry, created in 2003. The FTC and FCC Do Not Call teams hold regular conference calls to discuss enforcement issues, targeting, litigation, and complaint trends. The teams share data when investigations overlap. And the FCC has participated in the FTC's various robocall initiatives, including the FTC's Robocall Summit and the FTC's Robocall Challenges.

In addition, in the FTC case against T-Mobile,<sup>3</sup> the FCC and state authorities played an important role in negotiating a major settlement providing for injunctive relief and at least \$90 million in consumer redress for allegedly unauthorized third party charges on mobile phones, a practice known as mobile cramming. This settlement demonstrates how the FTC and FCC use complementary tools to remedy harms and deter future non-compliance. While the FTC's focus is typically to put money back in the pockets of consumers, the FCC traditionally has exercised its authority to fine companies for non-compliance.

Earlier this year, the FTC and FCC announced separate but coordinated studies of security in the mobile ecosystem.<sup>4</sup> The FTC is seeking information from mobile device manufacturers and operating systems about how they provide security updates to address vulnerabilities in smartphones, tablets, and other mobile devices. At the same time, the FCC is examining common carriers' policies regarding mobile device security updates. Given the complexity of the mobile ecosystem and the number of entities involved in developing and deploying security patches, it is difficult to discern how carriers, operating systems, and handset manufacturers determine

<sup>2</sup> *Memorandum of Understanding on Consumer Protection Between the Federal Trade Commission and the Federal Communications Commission* (Nov. 2015), available at <https://www.ftc.gov/policy/cooperation-agreements/memorandum-understanding-consumer-protection-between-federal-trade>.

<sup>3</sup> *FTC v. T-Mobile USA, Inc.*, No. 2:14-cv-0097-JLR (W.D. Wash. filed Dec. 19, 2014), available at <https://www.ftc.gov/enforcement/cases-proceedings/132-3231/t-mobile-usa-inc>.

<sup>4</sup> *FTC To Study Mobile Device Industry's Security Update Practices*, May 9, 2016, available at <https://www.ftc.gov/news-events/press-releases/2016/05/ftc-study-mobile-device-industrys-security-update-practices>.

when any specific device model receives a security update and on what timeline. The responses to the studies should provide important information about who is responsible for providing mobile security patches to consumers.

Finally, in response to the FCC's request for comment on its proposed rules governing the privacy of consumer information collected by broadband Internet access services providers, the FTC filed a comment recommending certain changes including with respect to how personally identifiable information is defined, the structure of privacy notices, the role of consumer notice and choice in various business practices, and the proposed regulations on data security and breach notification. Based on our decades of experience and leadership on consumer privacy issues, we believe the Commission can provide unique insights to the FCC.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARIA CANTWELL TO  
HON. EDITH RAMIREZ

*Question 1.* The era of autonomous cars is upon us. Self-driving cars and other vehicle technologies that have some degree of automation have entered the marketplace and their use is only going to become more widespread in the years to come. Right now, Google is testing its self-driving cars in Kirkland and some have even suggested dedicating a portion of I-5 from Seattle to Vancouver simply for self-driving cars.

Last week, the National Highway Traffic Safety Administration issued proposed guidance on the regulation of autonomous vehicles. While the guidance focused on the vehicles themselves, it's also important that manufactures of autonomous vehicles accurately relay information on these machines to consumers. As recent as July of this year, Mercedes-Benz had to pull advertising for its autonomous technology after Consumer Reports filed a complaint with the Federal Trade Commission.

*Question 1a.* How many complaints have been brought against auto manufactures for advertising claims for self-driving cars?

Answer. The FTC is aware of one complaint filed with the agency by a consumer advocacy group regarding advertising claims for self-driving cars. We have not received any consumer complaints regarding this issue.

*Question 1b.* Has the FTC made any enforcement actions?

Answer. The FTC has not taken an enforcement action regarding deceptive advertising for self-driving vehicles.

*Question 1c.* Will the FTC be issuing guidance for the advertisement of self-driving cars?

Answer. We do not believe separate guidance for the advertising of self-driving cars is warranted at this time. The FTC recognizes that the technology required to develop and manufacture self-driving vehicles in the future is rapidly evolving and may provide useful benefits to the consumer. We also recognize that consumer perceptions about the capabilities of self-driving cars may vary. For these reasons, I believe applying the FTC's traditional deception analysis on a case-by-case basis is the best approach in this area.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. RICHARD BLUMENTHAL TO  
HON. EDITH RAMIREZ

*Question 1.* In the last fiscal year alone, the Federal Trade Commission (FTC) estimates that it saved consumers over \$3.4 billion through its competition enforcement efforts and over \$717 million through its consumer protection law enforcement actions.

Chairwoman Ramirez, can you explain to me how the recent Ninth Circuit decision on *FTC v. AT&T* could affect the FTC's ability to take actions that protect consumers and save their money? How could this decision create uncertainty for businesses, who rely on the Commission's oversight to maintain a level playing field for competition and entrepreneurship, and to stop invitations to collude?

Answer. The Ninth Circuit's recent decision in *FTC v. AT&T* calls into question the FTC's ability to enforce Section 5 of the FTC Act against any unlawful activities engaged in by an entity with the mere "status" of a common carrier.<sup>5</sup> The decision would bar the FTC from bringing cramming cases against wireless telephone car-

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<sup>5</sup> See *Federal Trade Comm'n v. AT&T Mobility LLC*, No. 15-16585 Slip Op. (9th Cir. Aug. 29, 2016).

riers. Over the past 10 years, the FTC has brought 23 such cases and has provided or will be providing \$161 million in refunds directly to consumers.

Furthermore, many companies provide both common-carrier and non-common-carrier services, and companies that are not common carriers today may gain that status by offering new services or through corporate acquisitions. Under the *AT&T* decision, any company that has or acquires the “status” of a common carrier can use the decision to argue that it is immune from FTC enforcement against *any* of its lines of business by virtue of its common carrier status.

Telecommunications and technology companies hold enormous amounts of personal data that can inflict substantial harm if not properly safeguarded. If the FTC can no longer enforce the FTC Act against these companies’ non-common carrier activities, consumers may be unprotected from breach or misuse of their personal information. In addition, millions of consumers would lose protection against garden-variety deception, such as false advertising or improper billing. The *AT&T* decision also threatens the FTC’s ability to enforce other important consumer protection statutes including the Children’s Online Privacy Protection Act, the Telemarketing and Consumer Fraud and Abuse Act, and several others in which the FTC’s enforcement authority is tied to Section 5 of the FTC Act.

We are concerned that no other Federal agency can fill this gap. The authority of the FCC, the CFPB, and other agencies is limited. For example, the FCC lacks authority to provide redress for consumer harm.<sup>6</sup> The FTC is the only Federal agency with consumer protection authority throughout the economy that can obtain monetary redress for consumers as well as behavioral relief.

The *AT&T* decision can disrupt the level playing field by making the same service subject to different enforcement mechanisms depending on whether or not it is provided by a company that has the “status” of a common carrier. Take two e-mail providers, one owned by a telephone company and the other freestanding. Under the Ninth Circuit’s approach, the freestanding one would be subject to the FTC’s data security requirements and restrictions on deceptive practices, but the telephone-company-owned one would not. That could cause economic distortion by itself. It also provides an incentive for businesses to become part of a common carrier operation whether or not doing so is economically desirable.

On the antitrust side, the *AT&T* decision means that the Department of Justice would have to handle any cases involving companies with common carrier status. Not only would shifting the workload burden DOJ’s resources, but enforcement could suffer if the FTC is unable to bring antitrust enforcement cases in areas in which it has developed substantial expertise over many years, including, for example, matters involving pipelines. Additionally, there would be an enforcement gap involving invitations to collude because the Department of Justice cannot bring cases involving invitations to collude, nor can third parties.

*Question 2.* As I have written to the FTC already, I am very concerned about the public safety implications of the FTC’s recent proposed settlement with used car dealers regarding their advertising of vehicles that have been “certified” even if the vehicle has unrepaired safety recalls.

Chairwoman Ramirez, doesn’t the FTC have authority under Section 5 of the FTC Act to prohibit a dealer from falsely advertising a vehicle with an unrepaired recalled dealer as “safe,” “repaired for safety,” or having passed a “rigorous inspection”?

One of the triggers for a motor vehicle recall is the vehicle’s failure to comply with a Federal Motor Vehicle Safety Standard. Is it your position that dealers should be allowed to advertise that an unrepaired recalled car is “safe” and “repaired for safety,” passed a “rigorous inspection,” and qualified to be sold as “certified,” when it fails to comply with a Federal Motor Vehicle Safety Standard?

Answer. Under Section 5 of the FTC Act, the Commission has authority to bring actions to combat deceptive acts or practices and obtain orders prohibiting deceptive conduct. The Commission’s proposed complaints against General Motors Company, Jim Koons Management Company, and Lithia Motors, Inc. allege that these companies made general advertising claims promoting the rigorousness of their inspections of large categories of used cars, but failed to disclose that some of the cars were subject to open safety recalls. It is well-established under the FTC Act that a deceptive omission occurs “where a seller fails to disclose qualifying information necessary to prevent one of his affirmative statements from creating a misleading impression.” *See In re International Harvester Co.*, 104 F.T.C. 949, 1057 (1984). In these complaints, we allege that, while the companies may have been inspecting these vehicles, absent additional information in those advertisements, reasonable

<sup>6</sup>See 47 U.S.C. § 504.

consumers would likely believe that the inspections included repairing open recalls. We allege that the failure to disclose adequately that some cars were subject to open recalls, in light of the identified advertising representations, was a deceptive act or practice in violation of Section 5 of the FTC Act.

The proposed orders in these three matters address the allegedly deceptive omissions identified in the complaints and also impose additional requirements to prevent respondents from engaging in other deceptive conduct. Among other things, the proposed orders would prohibit the respondents from representing that their used motor vehicles are safe, have been repaired for safety issues, or have been subject to an inspection for safety issues unless the vehicles are recall-free or, alternatively, the respondents clearly and conspicuously, in close proximity to the representation, disclose at least two key facts to consumers: first, that the vehicles may be subject to open recalls and, second, how consumers can determine whether an individual car is subject to an open recall. Those requirements would apply regardless of whether recalls arise from a defect or a failure to meet a vehicle safety standard. Accordingly, under the proposed orders, consumers would receive important information about open recalls whenever respondents make these kinds of claims, including when consumers see advertisements prior to visiting a dealership. At the same time, by allowing the respondents to promote their inspection programs with clear and conspicuous disclosures regarding recalls, the proposed orders would allow them to provide truthful information that is material to consumers, rather than scaling back or potentially stopping inspection programs altogether to the detriment of consumers. We are continuing to review the comments we received to our proposed complaint and order, and expect to make a final determination in these matters in the coming weeks.

Let me emphasize that I share your concerns regarding the safety issues raised by recalls in the used automobile marketplace. I also agree that all recalls pose safety risks to consumers, and that open recalls should be repaired. While Federal law does not prohibit car dealers from selling used cars subject to open recalls, I support efforts by Congress to enact such a ban. In the meantime, the Commission will continue to enforce the FTC Act to curb deceptive conduct regarding recalls.

*Question 3.* It has recently been brought to my attention that manufacturers of pet medications can, and do offer inducements to veterinary clinics to prescribe and sell their medications. For example, the Merial Rewards Program Website offers Visa debit cards loaded with cash to veterinarians who prescribe and sell their pet medications.

Chairwoman Ramirez, do you consider this a kickback? How prevalent is this practice of drug manufacturers offering inducements to veterinarians? What evidence do you have that manufacturers may protect veterinarians who prescribe and sell their products from price competition by refusing to market their medications to anyone who is not a veterinarian? How does this practice affect consumer prices?

Answer. FTC staff is aware that most manufacturers have a policy of only selling pet medications through the veterinary channel. The FTC does not have data regarding the impact of these exclusive distribution practices on consumer prices, and has not taken a formal position on these practices. The FTC has, however, compiled substantial information regarding these practices, as discussed in detail in FTC staff's report on the pet medications industry.<sup>7</sup> Some non-veterinary retailers have suggested that they could offer lower prices to consumers with portable prescriptions if they could obtain products directly from manufacturers, rather than through secondary distribution. Although exclusive distribution practices may dampen competition and could have adverse effects, they may also benefit consumers in some situations, and pet medications manufacturers claim to have legitimate business reasons for engaging in these practices. Under most circumstances, it is not illegal for manufacturers to unilaterally limit to whom they sell their products. As a general matter, if we become aware of distribution-related conduct that might constitute an antitrust violation, the FTC would take appropriate action.

*Question 4.* In addition, it has come to my attention that there are examples of veterinarians requiring clients sign a waiver or pay an additional fee as a prerequisite to receiving a copy of the prescription. Would you consider these practices to be violations of Section 5 of the FTC Act?

Answer. The FTC has not taken a position on the legality of liability waivers or prescription fees for veterinary prescriptions.

<sup>7</sup> *Competition in the Pet Medications Industry (May 2015)*, available at <https://www.ftc.gov/system/files/documents/reports/competition-pet-medications-industry-prescription-portability-distribution-practices/150526-pet-meds-report.pdf>

We are aware that some veterinarians require clients to sign a waiver of liability before providing them with a portable prescription. The waivers typically state that the prescribing veterinarian is released from any potential liability stemming from the purchase and administration of medications from alternative retail sources, as well as any complications that may arise from the use of these medications. Often, these waivers also describe alleged safety concerns that could be associated with purchasing pet medications from retail sources other than the prescribing veterinarian.

Some veterinarians have expressed concerns about possible liability when pet medications are dispensed by retail pharmacists. For example, they worry that a veterinarian might be held responsible (or, at least, face litigation costs) if a pharmacist were to dispense an incorrect, counterfeit, or otherwise adulterated pet medication. FTC research has not uncovered situations where a veterinarian has been held liable for a pharmacist's dispensing error. Some pharmacy boards have expressly indicated that pharmacists, not veterinarians, are responsible for any prescription misfills. As long as an animal is properly examined and diagnosed, and a prescription is written properly, it is unlikely that liability would attach to a veterinarian in the event a retail pharmacist incorrectly dispensed a medication. Moreover, the practice of veterinarians asking for liability waivers may unnecessarily chill consumers' willingness to ask for and use portable prescriptions.

With respect to prescription fees, the FTC report on the pet medications industry acknowledges that veterinarians might face some administrative burden and cost (even if minimal) associated with greater prescription portability, including automatic prescription release. Prescription fees might be economically justified if they represent reasonable compensation for the actual cost of providing portable prescriptions (which might include, for example, reviewing patients' medical files, verifying prescriptions, and answering pharmacists' questions). But given the difficulty in determining a reasonable fee, some stakeholders have suggested that the procompetitive goals of prescription portability would be better served—and clients would face fewer real or perceived barriers to receiving portable prescriptions—if veterinarians simply charged clients a single professional services fee that encompassed all administrative activities, including providing prescriptions. This approach would, however, shift costs to clients who are not obtaining a prescription drug or who purchase medications directly from the veterinarian.

*Question 5.* In the Dodd-Frank Act of 2010, Congress gave the FTC extensive authority over the sale, servicing, and leasing of automobile—charging it to protect consumers from abusive auto lending practices and granting it exclusive authority to draft rules governing unfair or deceptive acts or practices by automobile dealers.

Chairwoman Ramirez, how does the Commission plan to use the rulemaking authority it was granted in the Dodd-Frank Act, to rein in unfair or deceptive acts or practices by automobile dealers?

*Answer.* The Commission considers various approaches as part of its ongoing efforts to address unfair or deceptive acts or practices by automobile dealers, consistent with its authority under the FTC Act and the Dodd-Frank Act. This includes enforcement activities, policy initiatives, consumer and business education, and rulemaking. On the enforcement front, since 2012, the FTC has brought 29 cases against auto dealers to address allegedly unlawful practices in connection with auto transactions. Enforcement actions include the Operation Ruse Control sweep, announced in 2015, which included six FTC cases among 252 cases overall brought in the United States and Canada, as well as a recent Federal court action against the Sage Auto group of dealerships, alleging unlawful “yo-yo” financing and add-on practices in addition to deceptive advertising and marketing claims. The FTC also announced the Operation Steer Clear sweep in 2014, which included 10 FTC cases against dealers alleging deceptive and unlawful advertising claims.

On the policy front, the FTC has held three roundtables bringing together consumer advocates, industry representatives, and other stakeholders to discuss key consumer protection issues in auto transactions, and it recently published a second Federal Register Notice proposing to conduct a qualitative study to learn about consumer experiences in buying and financing automobiles at dealerships. The Commission also continues to engage in business and consumer education, including the July 2016 release of four new short videos, in English and Spanish, to help consumers shopping for cars. Finally, the FTC has not made a determination at this point whether to issue any new rules. As a general matter, the type of evidence leading to an FTC rulemaking can vary. We look at a number of factors, and we continue to evaluate the marketplace. The FTC will continue to consider what additional steps may be appropriate in the auto area.



*Question 6.* Earlier this year, the FTC finally successfully cracked down on four sham charities that had bilked more than \$187 million from donors. According to the FTC complaint, their misappropriation of consumer donations dated back to at least 2008. Chairwoman Ramirez, Commissioner McSweeney, and Commissioner Ohlhausen: How were these sham charities able to rob donors of so much money and for so long?

Answer. As you note, in March 2016, the FTC, all 50 states and the District of Columbia resolved litigation against the remaining defendants in Cancer Fund of America, resulting in, among other things, a dissolution of the sham charities and a ban on the president's ability to profit from any charity fundraising in the future.<sup>8</sup> The four sham outfits were quite adept at masking their charade. For example, in our complaint, we charged that the sham cancer charities hid their wrongdoing by manipulating their financial reporting and using deceptive and invalid accounting techniques to claim huge donations of gifts-in-kind. We alleged that this allowed them to inflate their reported revenue and program spending by \$223 million and had the effect of making the organizations appear to be both larger and more efficient with donors' money than they really were. As charged in the complaint, it was not obvious from their public financial reports to the IRS or the states that less than 3 percent of donated cash was being spent on any program services (collectively).

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

*Question 7.* In what way has the nonprofit exemption in the FTC Act hamstrung the Commission's ability to act swiftly to protect consumers?

Answer. We recommend that our jurisdiction be extended to non-profit entities to further protect consumers. For example, despite many publicized data breaches at non-profit hospitals and universities, the FTC cannot challenge unfair or deceptive data security or privacy practices of these entities. These breaches have exposed the sensitive data of millions of consumers, yet the Commission cannot act due to the FTC Act's non-profit exemption. Further, while the Commission can use Section 5 to reach "sham" non-profits, such as shell non-profit corporations that actually operate for profit and sham charities, these investigations require resource-intensive fact finding to satisfy this standard. For example, proving that a charity is a sham requires significant probing into the internal operations of the organization, including reviewing bank records, board meeting minutes, employment practices and other things. Typically, we cannot discover the information without contacting the charity and obtaining documents from it. After getting the documents, a detailed financial analysis is necessary. Only with an understanding of how the money is spent and how the charity operates can we allege that it is a sham. Developing this kind of threshold evidence is time consuming and limits our ability to act swiftly to protect consumers in this area.

The non-profit exemption also prevents the Commission from taking action against potentially anticompetitive conduct of non-profits in the healthcare sector. The Commission actively promotes competition in health care markets, but it cannot reach the conduct of non-profits engaged in the business of health care, including non-profit health maintenance organizations (HMOs), health plans, and standard-setting organizations. For instance, the Commission generally cannot challenge price-fixing, boycotts, and other anticompetitive conduct by non-profit hospitals, even if we charge other parties to the illegal agreements. See *Piedmont Health Alliance*, 138 F.T.C. 675 (2004); *Tenet Healthcare Corp./Frye Regional Medical Center, Inc.*, 137 F.T.C. 219 (2004); *Maine Health Alliance*, 136 F.T.C. 616 (2003) (enforcement actions involving unlawful price-fixing arrangements brought against physicians and a for-profit hospital but not non-profit hospitals).

This has been especially limiting in our review of hospital mergers involving non-profit hospitals. Although the FTC has jurisdiction under the Clayton Act to challenge non-profit hospitals' merger plans, the FTC does not have jurisdiction under the FTC Act to challenge those hospitals' anticompetitive conduct. Such a case

<sup>8</sup> See <https://www.ftc.gov/news-events/press-releases/2016/03/ftc-states-settle-claims-against-two-entities-claiming-be-cancer>.

would have to be initiated by the Department of Justice, even if the Commission reviewed the merger.

*Question 8.* Last year, FTC staff released a comprehensive report on “Competition in the Pet Medications Industry.” In the report, the Commission found that “some veterinarians refuse to provide portable prescriptions to their clients or engage in behaviors intended to discourage clients from requesting portable prescriptions and filling them elsewhere.” The report also noted that spending by families on their pets has doubled over the last decade, with Americans spending \$7.6 billion on prescription and over-the-counter pet medications in 2013, and projected to spend \$10.2 billion by 2018. It has been estimated that pet owners who can get a copy of their pet’s prescription and shop around, could save 20 to 30 percent on branded medications and 50 percent when they purchase generics—suggesting that prescription portability can save pet owners billions of dollars every year. In May of last year, I introduced the Fairness to Pet Owners Act, which would ensure consumers have the freedom to choose where they buy prescription pet medication.

Chairwoman Ramirez, Commissioner McSweeney, and Commissioner Ohlhausen: Given the findings of the Commission’s report, do you support the Fairness to Pet Owners Act? Do you believe that providing pet owners with the right to their pets’ prescriptions will help ensure consumers have access to pet medications at the most affordable prices?

*Answer.* The FTC has not taken a formal position on the Fairness to Pet Owners Act. However, we believe prescription portability likely benefits consumers by empowering them to make informed choices about where to purchase their pet medications. For this reason, we generally support policies that would increase both consumer awareness and veterinarian release of prescriptions for pet medications.

As discussed extensively in the FTC staff report<sup>9</sup>, it appears that some consumers do not always receive portable prescriptions from their veterinarians or are uncomfortable requesting one. Likewise, it appears that at least some consumers are not aware that they have this option. Federal legislation requiring automatic prescription release would go further than current state laws and regulations that require prescription release only upon request, which could benefit consumers. Automatic prescription release is arguably a more effective way to raise consumer awareness about the option to obtain portable prescriptions from their veterinarians and comparison shop when purchasing pet medications. In addition, automatic prescription release likely would help to address situations where veterinarians are reluctant to provide portable prescriptions or try to discourage clients from requesting one, or where consumers are uncomfortable requesting one.

Federal legislation requiring automatic prescription release also could impact manufacturer distribution policies to a greater degree than the current patchwork of state laws. If greater prescription portability were to increase consumer demand for purchasing pet medications from non-veterinary retail pharmacists, the potential for increased sales opportunities might incentivize manufacturers to change their distribution policies in ways that would promote competition among different distribution channels and be more responsive to consumer choice.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. CORY BOOKER TO  
HON. EDITH RAMIREZ

*Question 1.* Changes in technology seem to be making it ever easier to deceive and defraud consumers with phone calls. Many New Jerseyans have told me that the number of fraudulent calls they receive is increasing, particularly on their cell phones. Last Congress, I joined with Ranking Member Nelson on legislation to help curb the use of so-called “spoofing” technology. This technology is used to trick recipients into answering the call by scrambling the phone number on the recipient’s caller identification display, but spoofing is just one of numerous practices used to defraud and harass recipients. This trend is especially concerning because my constituents frequently receive overtures from callers fraudulently claiming to represent government entities including the Internal Revenue Service (IRS) and the Federal Bureau of Investigation (FBI).

*Question 1a.* What steps is the Federal Trade Commission (FTC) taking to protect consumers from fraudulent calls?

*Answer.* The FTC uses every tool at its disposal to combat fraudulent and deceptive calls to consumers, including aggressive law enforcement, regulatory action, ro-

<sup>9</sup> *Competition in the Pet Medications Industry (May 2015)*, available at <https://www.ftc.gov/system/files/documents/reports/competition-pet-medications-industry-prescription-portability-distribution-practices/150526-pet-meds-report.pdf>

bust consumer education and outreach, and initiatives to spur technological solutions. We have brought more than 126 law enforcement actions shutting down operations responsible for billions of illegal calls, as well as numerous enforcement actions targeting fraudulent “impostors.” The FTC also amended the Telemarketing Sales Rule to ban payment methods favored by many robocallers and telemarketing scammers, such as remotely created checks and payment orders, “cash-to-cash” money transfers, and certain cash reload mechanisms for prepaid cards.

We also arm consumers with the tools and information they need to protect themselves against fraudulent calls. The FTC provides consumer information in English and Spanish in many forms including print and online articles, fact sheets, blog posts, brochures and videos with tips for avoiding scams and unwanted calls. One of our most popular features is a “Scam Alert” page that is frequently updated with blog posts about new scams.<sup>10</sup> More than 192,000 people subscribe to the FTC blogs, including scam alerts.

The exponential growth in unwanted and all too often fraudulent calls is the result of technological advances in telecommunications. Just as these changes have lowered costs and improved services to the benefit of consumers, they have also lowered costs and barriers to entry for scammers. Widespread use of caller ID spoofing by fraudsters to lend credibility to the caller is just one of the outgrowths of these technological advances. Recognizing that technology is at the heart of this issue, the FTC has led four public challenges to spur industry initiatives to develop solutions to help both consumers and law enforcement combat illegal and unwanted robocalls.

The FTC’s first challenge called upon innovators to develop a consumer-facing solution that blocks illegal robocalls, applies to landlines and mobile phones, and operates on proprietary and non-proprietary platforms.<sup>11</sup> In response, we received nearly 800 submissions and partnered with experts in the field to judge the entries. One of the winners, “Nomorobo,” was on the market and available to consumers by October 2013—just 6 months after being named one of the winners. To date, Nomorobo reports blocking over 150 million calls and is currently rolling out a mobile platform.<sup>12</sup>

The FTC launched a second challenge—Zapping Rachel—which called upon information security experts to help create a robust robocall honeypot.<sup>13</sup> A robocall honeypot is an information system designed to attract robocallers and help investigators and academics understand and combat illegal calls. Sixty teams and individuals registered to participate and FTC staff obtained new insights that improved current robocall honeypot designs and connected new partners and stakeholders.

In 2015, the FTC sponsored two more challenges, DetectaRobo<sup>14</sup> and Robocalls: Humanity Strikes Back.<sup>15</sup> The DetectaRobo challenge called upon the public to analyze call data to create algorithms that could predict which calls were likely robocalls. Finally, in our most recent challenge, contestants built tools consumers could use to block and forward robocalls automatically to a honeypot. The winning mobile app, RoboKiller, allows users to block and forward unwanted robocalls to a crowd-sourced honeypot.

The FTC also engages with technical experts, academics, and others through industry groups, such as the Messaging, Malware and Mobile Anti-Abuse Working Group (“M<sup>3</sup>AAWG”) and the Voice and Telephony Abuse Special Interest Group (“VTA SIG”). The FTC serves in a leadership role in VTA SIG, which currently works to support various initiatives that tackle voice spam, including anti-spoofing authentication efforts.

*Question 1b.* How can Congress help to address this issue?

*Answer.* We believe that Federal and international partnerships and technological initiatives, coupled with our ongoing law enforcement efforts, are critical to reducing the volume of illegal telemarketing calls that consumers receive. We recommend advising constituents to visit our consumer education website, where they can find more helpful information about the problem of unwanted calls.<sup>16</sup>

<sup>10</sup> See <https://www.consumer.ftc.gov/scam-alerts>.

<sup>11</sup> For more information on the first FTC Robocall challenge, see <https://www.ftc.gov/news-events/press-releases/2013/04/ftc-announces-robocall-challenge-winners>.

<sup>12</sup> See <http://www.nomorobo.com/> (last visited October 21, 2016).

<sup>13</sup> For more information on the Zapping Rachel challenge, see <https://www.ftc.gov/news-events/contests/zapping-rachel>.

<sup>14</sup> For more information on the DetectaRobo challenge, see <https://www.ftc.gov/news-events/contests/detectarobo>.

<sup>15</sup> For more information on the Robocalls: Humanity Strikes Back challenge, see <https://www.ftc.gov/news-events/contests/robocalls-humanity-strikes-back>.

<sup>16</sup> See <https://www.consumer.ftc.gov/topics/limiting-unwanted-calls-e-mails>.

*Question 1c.* What information should consumers have to better protect themselves from these practices?

Answer. There are several key messages that we convey to consumers facing unwanted and illegal calls. The first message is that consumers cannot trust the information contained in their caller ID display because, as you mentioned, fraudsters often “spoof” their number to make it appear that it is from a trustworthy source. In addition, when a consumer picks up and hears an unwanted call or robocall they should hang up; consumers should not press one or provide or confirm any information. We also try to highlight for consumers the call blocking options that are available to them to reduce the number of unwanted calls they receive.<sup>17</sup> Finally, in addition to providing frequent updates about new scams for consumers to be on the lookout for, we emphasize the critical role consumers have in stopping future fraud by passing on their experiences or near-misses to others and reporting potential fraud to the FTC and our state and Federal partners.

*Question 1d.* Is the FTC working in partnership with other Federal agencies to help educate the public and to protect them from giving away sensitive personal or financial information?

Answer. The FTC works with many Federal agencies to help educate the public and to protect them from giving away sensitive personal or financial information, including DOJ, the U.S. Postal Inspection Service, the IRS, U.S. Treasury Inspector General for Tax (TIGTA), the FCC, and DHS. The FTC also works closely with state and international partners. In June of 2016, the FTC led a multinational robocall sweep that took action against operations estimated to be responsible for billions of illegal robocalls. The sweep included 39 actions taken by the FTC, the Canadian Radio-television and Telecommunications Commission, the United Kingdom’s Information Commissioner’s Office, as well as DOJ, the FCC and Attorneys General or consumer protection offices from Colorado, Florida, Indiana, Kansas, Mississippi, Missouri, North Carolina, Ohio, Washington, and Tennessee.<sup>18</sup>

The FTC has broadened its efforts to focus on international partnerships, which are particularly valuable as a growing number of fraudulent calls originate overseas. For example, many of the tech-support and imposter-related cases, including the IRS scams, have been traced to India. Because the calls, malware and pop-up ads that promote these scams come from India, we have recognized the need to find partners there, on the ground, to discourage, disrupt and disable these frauds. Indian law enforcement has pledged its support to joint enforcement action, and has already shut down call center operations linked to IRS scam calls. These operations are tremendously profitable, so we will continue to strengthen our efforts across borders.

To combat scams from India targeting Americans, we have worked with the Indian Business Process Outsourcing (“BPO”) industry over the last three years, bringing together leaders in the call center, technology, financial, and law enforcement sectors in three roundtable events to develop a road map for identifying and shutting down the rogue call centers. The first two meetings were in New Delhi, and the most recent event, held here in Washington, D.C. in May, attracted about 70 participants, including U.S. law enforcement from DOJ, FBI, CFPB, and state Attorneys General’s offices; India’s Cyber Coordinator; representatives from NASSCOM (the trade association that represents the BPO industry); the Embassy of India; Indian businesses; U.S. industry, including Microsoft, Google, Yahoo, Facebook, and Apple; and consumer advocacy groups.

*Question 1e.* Is more cross-agency collaboration needed to serve the public when it comes to identifying, exposing, and preventing telemarketing fraud?

Answer. The FTC has had great success working with its federal, state, local and international partners in this area and regards collaboration as a vital component to tackling telemarketing fraud.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. GARY PETERS TO  
HON. EDITH RAMIREZ

*Question 1.* The Federal Trade Commission (FTC), Food and Drug Administration (FDA), and Department of Justice each possess a portion of jurisdiction over the contact lens marketplace. The FTC has the authority, under the Federal Trade Commission Act, to bring enforcement actions against sellers of contact lenses whose practices violate the law. My office has been made aware of the fact that

<sup>17</sup> See <https://www.consumer.ftc.gov/articles/0548-blocking-unwanted-calls>.

<sup>18</sup> <https://www.ftc.gov/news-events/press-releases/2016/06/ftc-florida-attorney-general-take-action-against-illegal-robocall>

there are online retailers who advertise that they dispense contact lenses, which are a FDA-regulated medical device, without verifying a patient's prescription.

*Question 1a.* What process does the FTC have in place for individuals to submit complaints regarding prescriber practices and how many complaints has the FTC received?

Answer. The FTC encourages consumers, as well as prescribers and retailers, to report suspected violations of the Contact Lens Rule. The primary avenue for reporting complaints is the FTC Complaint Assistant, [ftc.gov/complaint](https://www.ftc.gov/complaint), a link to which is featured prominently on the [ftc.gov](https://www.ftc.gov) homepage. Consumers also may file a complaint by calling 1-877-FTC-HELP (382-4357). We also receives e-mail messages reporting suspected instances of prescribers and retailers not complying with the Rule. The FTC receives a few hundred complaints a year about prescriber and retailer practices: these complaints describe a wide variety of alleged conduct, some of which is outside the purview of the Contact Lens Rule (for example, complaints about billing practices or insurance issues).

*Question 1b.* Has the FTC brought enforcement action against any retailers due to their prescribing practices? How many enforcement actions have been brought?

Answer. In April 2016, the Commission issued warning letters to ten contact lens retailers that potentially violated the Rule by dispensing contact lenses without a valid prescription, and 45 eye care prescribers that potentially violated the Rule by failing to comply with automatic prescription release requirements, thus impeding consumers' ability to comparison shop.<sup>19</sup> These letters reminded prescribers and sellers of their obligations under the Rule and warned them that violations of the Rule may result in legal action, including civil penalties of up to \$16,000 per violation.<sup>20</sup> In tandem with the warning letters, the FTC initiated an outreach campaign designed to increase prescriber, seller, and consumer awareness of the Contact Lens Rule, which included newly-revised consumer educational guidance, *Prescription Glasses and Contact Lenses*, and social media outreach to prescribers and sellers.<sup>21</sup> The FTC is also working with state law enforcement agencies and consumer advocacy groups to improve industry compliance and increase public awareness regarding the Rule.

The FTC has also taken law enforcement action against ten contact lens sellers for allegedly selling cosmetic contact lenses without obtaining consumers' contact lens prescriptions and failing to maintain records of consumers' prescriptions.<sup>22</sup> Our settlement orders have imposed civil penalties and provided injunctive relief that, among other things: prohibited the defendants from selling contact lenses without obtaining a prescription from a consumer; selling contact lenses without verifying prescriptions by communicating directly with the prescriber; and from failing to maintain records of prescriptions and verifications. We will continue to monitor the marketplace and will take action against violations of the Contact Lens Rule as appropriate.

*Question 2.* Under current law, most states require that patients get updated contact lens prescriptions every year in order to buy more lenses. Yet, some online retailers are selling multiple years' worth of contact lenses.

In conducting the 10-year review of the Contact Lens Rule, has the FTC taken into account the safety implications of prescribers that sell multiple years' worth of

<sup>19</sup> *FTC Issues Warning Letters Regarding the Agency's Contact Lens Rule*, FTC News Release (Apr. 7, 2016), available at: <https://www.ftc.gov/news-events/press-releases/2016/04/ftc-issues-warning-letters-regarding-agencys-contact-lens-rule>.

<sup>20</sup> As of August 1, 2016, the maximum civil penalty amount increased to \$40,000 per violation. See *FTC Raises Civil Penalty Maximums to Adjust for Inflation*, FTC News Release (June 29, 2016), available at: <https://www.ftc.gov/news-events/press-releases/2016/06/ftc-raises-civil-penalty-maximums-adjust-inflation>.

<sup>21</sup> *Prescription Glasses and Contact Lenses* (Apr. 2016), available at: <https://www.consumer.ftc.gov/articles/0116-prescription-glasses-and-contact-lenses>. See also *Buying contacts? You should see a prescription first* (Apr. 7, 2016), available at: <https://www.consumer.ftc.gov/blog/buying-contacts-you-should-see-prescription-first> and *An Rx for compliance with the Contact Lens Rule* (Apr. 7, 2016) available at: <https://www.ftc.gov/news-events/blogs/business-blog/2016/04/rx-compliance-contact-lens-rule>.

<sup>22</sup> See *United States v. Gene Kim*, No. 1:11-cv-05723 (E.D.N.Y. Feb. 7, 2012) (consent); *United States v. Royal Tronics, Inc.*, No. 0:11-cv-62491 (S.D. Fla. Jan. 27, 2012) (consent); *United States v. Thy Xuan Ho*, No. 1:11-cv-03419 (D. Minn. Dec. 27, 2011) (consent); *United States v. Gothic Lens, LLC*, No. 1:11-cv-00159 (N.D. Ga. Feb. 3, 2011) (consent); *United States v. Joheshop USA, LLC*, No. 1:11-cv-11221 (D. Mass. Nov. 28, 2011) (consent); *United States v. Contact Lens Heaven, Inc.*, No. 0:08-cv-61713 (S.D. Fla. Dec. 3, 2008) (consent); *United States v. Chapin N. Wright, II*, No. 1:08-cv-11793 (D. Mass. Oct. 31, 2008) (consent); *United States v. BeWild, Inc.*, No. 2:07-cv-04896 (E.D.N.Y. Dec. 3, 2007) (consent); *United States v. Pretty Eyes, LLC*, No. 1:07-cv-02462 (D. Colo. Nov. 28, 2007) (consent); *United States v. Walsh Optical, Inc.*, No. 2:06-cv-03591 (D.N.J. Aug. 30, 2006) (consent).

contact lenses? Has the FTC found any safety concerns associated with this practice and could you list them if so?

Answer. As you mention in your question, the Commission is currently conducting a review of the Contact Lens Rule. As part of this process, the Commission solicited public comments regarding the Rule and, among other topics, the effect of any technological, economic, or other industry changes on the Rule since it was promulgated.<sup>23</sup> A number of the 660 comments we received addressed the issue you raise: the quantity of contact lenses that some online retailers may be selling to consumers. We are examining this issue, as well as others, as part of our ongoing rule review process to ensure that the Contact Lens Rule operates as intended to promote competition in the contact lens industry and does so consistent with patient health and safety.

On November 10, 2016, we issued a Notice of Proposed Rulemaking (“NPRM”)<sup>24</sup>, setting forth our preliminary findings and recommendations for the Contact Lens Rule and requesting additional public comment. Among other things, the NPRM discusses quantities of contact lenses obtained by patients. After reviewing the comments and evidence produced by interested stakeholders, we determined not to propose to amend the Rule to adopt any of the contact lens quantity proposals put forth by commenters. First, the Commission does not believe that there is sufficient evidence in the rulemaking record to support amending the Rule to impose the quantity limit proposals suggested by commenters. Although some commenters conducted and submitted data from online surveys for the proposition that consumers are purchasing contact lenses as their prescriptions are about to expire, this data does not show the quantity of lenses that consumers are actually purchasing. Second, regardless of the evidence, or lack thereof, in the record to support the quantity limit proposals, the Commission believes that it would be difficult to administer the proposed limits, and that rather than increasing patient eye health and safety, such proposals could have the opposite effect. For example, if a consumer is running out of contact lenses and does not have time to see a prescriber promptly, there is a significant chance that the consumer will not adhere to the recommended contact lens replacement schedule and will instead try to “stretch out” their lenses by re-wearing them until they can visit a prescriber. The failure to replace lenses is a well-documented cause of many contact-lens-related health issues. Absent empirical evidence that a substantial number of consumers are obtaining excessive amounts of contact lenses, or are not returning to their prescribers for eye examinations, we believe that the risk of not replacing lenses outweighs the harm of consumers obtaining more lenses than strictly anticipated by the length of a contact lens prescription.

Nevertheless, we are concerned about anecdotal reports that sellers are contacting patients and encouraging them to stockpile contact lenses prior to the expiration of their prescriptions in order to avoid visiting their eye care professionals. Such practices run counter to the spirit of the Act, and we will look closely at these alleged practices.

*Question 3.* Current law requires a seller to verify a patients’ contact lens prescription. One of the allowable forms of communication are automated and non-live calls—commonly referred to as “robocalling.” I have heard from optometrists in Michigan that understanding and/or verifying required information from robocalling is nearly impossible.

*Question 3a.* Has the FTC heard similar concerns about the use of robocalling to verify a patient’s contact lens prescription?

Answer. In the course of our rule review, the FTC has received some comments from prescribers highlighting concerns about the use of automated telephone systems to verify contact lens prescriptions.<sup>25</sup> Some prescribers have stated that automated telephone calls are difficult to understand, while other prescribers have voiced issues with the length or timing of automated calls. We are examining these issues and considering how best to ensure that the Rule’s verification system operates as intended by the Fairness to Contact Lens Consumers Act, 15 U.S.C. §§ 7601–7610. As mentioned above, we recently issued a NPRM for the Contact Lens Rule. In that NPRM, we discuss automated telephone calls for prescription verification

<sup>23</sup> Contact Lens Rule; Request for comment, 80 Fed. Reg. 53,272, 53,273 (Sept. 3, 2015).

<sup>24</sup> 16 CFR Part 315: Contact Lens Rule; Notice of Proposed Rulemaking; Request for Public Comment (Nov. 10, 2016), <https://www.ftc.gov/policy/federal-register-notices/16-cfr-part-315-contact-lens-rule-notice-proposed-rulemaking-request>

<sup>25</sup> Contact lens seller verification calls are not sales calls covered by the Telemarketing Sales Rule (“TSR”), 16 C.F.R. Part 310, which prohibits certain robocalls. In addition, the TSR does not apply to most business-to-business communications. 16 C.F.R. § 310.6(b)(7).

and request comment on modifications to automated telephone calls that the Commission should consider to address the concerns raised by prescribers.

*Question 3b.* In its review of the Contact Lens Rule has the FTC examined the safety implications of allowing robocalling for verification purposes? If so, what did the FTC find?

Answer. The FTC is examining all concerns raised about the current operation of the Rule, including the safety implications of automated telephone systems and the evidence proffered by commenters in support of their proposed Rule amendments. In the recent NPRM, we discuss the safety concerns raised by some commenters about the use of automated calls: namely, that if the prescription is not properly verified, patients may be receiving contact lenses based on outdated or incorrect prescription information. However, commenters did not provide any empirical data regarding the frequency of these various practices, average or aggregate costs associated with automated calls in particular, or the number of illegal or otherwise deficient contact lens sales that result from such calls. Furthermore, we did not receive evidence indicating whether these problems occur with automated calls generally or are chiefly associated with only one or a small group of sellers. In the NPRM, we request additional comment on modifications to automated telephone calls that the Commission should consider.

The FTC encourages consumers, as well as prescribers and retailers, to report suspected violations of the Contact Lens Rule. The primary avenue for reporting complaints is the FTC Complaint Assistant, [ftc.gov/complaint](http://ftc.gov/complaint), a link to which is featured prominently on the [ftc.gov](http://ftc.gov) homepage. Consumers also may file a complaint by calling 1-877-FTC-HELP (382-4357). We also receives e-mail messages reporting suspected instances of prescribers and retailers not complying with the Rule. The FTC receives a few hundred complaints a year about prescriber and retailer practices: these complaints describe a wide variety of alleged conduct, some of which is outside the purview of the Contact Lens Rule (for example, complaints about billing practices or insurance issues).

*Question 3d.* Has the FTC considered allowing other forms of electronic communication that might improve or complement robocalling? If so, what are they?

Answer. The Fairness to Contact Lens Consumers Act specifies that a seller must provide the prescriber with a verification request through “direct communication.” 15 U.S.C. § 7603(a)(2). The Act defines direct communication as including “telephone, facsimile, or electronic mail.” 15 U.S.C. § 7603(g). The Contact Lens Rule, promulgated pursuant to the Act, contains the same language. 16 C.F.R. § 315.2. Accordingly, for purposes of verifying contact lens prescriptions, sellers may communicate with prescribers via telephone, facsimile, or electronic mail. In addition, in the course of the rule review described above, the FTC is considering the impact and use of other evolving technology as it relates to the Rule, including the verification framework set forth by the Act.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARCO RUBIO TO  
HON. MAUREEN K. OHLHAUSEN

*Question 1.* According to the most recent statistics, there are currently 728 travel related cases and 147 non-travel related cases of Zika in my home state of Florida. With the increase in cases, and the threat mosquitos spreading around the Miami Beach area and to other parts of the United States and our territories, many are concerned with contracting the virus. Feeding into consumer concerns, many companies are marketing products that say they provide protection from the Zika virus.

A. Please speak to the FTC’s efforts to seek out these fraudulent companies that are capitalizing off of consumer concerns about Zika, and hold them accountable.

Answer. The Commission has been diligent in seeking out and holding accountable fraudulent companies that are exploiting consumer concerns about Zika. Shortly after the Zika outbreak, the Commission issued 10 warning letters to online marketers selling products that purportedly provide protection from the Zika virus. The letters warned the marketers that any false or misleading claims may violate the FTC Act and subject the companies to legal action. In addition, the letters urged the marketers to review the claims that they and their affiliates and distributors are making for their products, and delete or change the claims immediately if they cannot be substantiated by scientific evidence. The warning letters also required each company to report back to the Commission detailing the specific actions they have taken to remove or change potentially false, misleading, or unsupported claims.

*B.* I understand the FTC has reached out to some of these online marketers and requested reports back on actions they have taken to remove or change false advertising claims. What is the status of these reports?

Answer. The Zika warning letter recipients promptly responded to the letters, and FTC staff continues to monitor their sites. Although I am not able to comment on whether the FTC has ongoing investigations in this area, the FTC remains vigilant and will take swift legal action against companies who make false promises about products they claim protect consumers from the Zika virus.

*C.* What can we do to educate my constituents back home in Florida, and across our nation, about what to look for to ensure they are not buying into falsely advertised products, and make sure they are protected as consumers?

Answer. In addition to our enforcement efforts, the Commission also developed helpful consumer education materials on its website. These materials discuss the Commission's efforts to combat false or misleading Zika-related claims and inform consumers about how they can protect themselves to ensure they are not buying into falsely-advertised Zika-related products. <https://www.consumer.ftc.gov/blog/will-those-insect-repellents-protect-you-zika>. The website tells consumers to look for insect repellents registered with the EPA and to take extra precautions when considering all-natural repellents that are not registered with the EPA. The website also refers consumers to additional tips from the Centers for Disease Control on protecting themselves from Zika-related viruses. We encourage those with constituents potentially impacted or concerned about Zika to link to this website.

*Question 2.* The Federal Communication Commission (FCC) is scheduled to vote on its proposed broadband consumer privacy rule on October 27.

*A.* Will you speak to the FTC's comments on the proposed rule related to transparency, consumer choice and data security?

Answer. The FTC's bipartisan, unanimous comments on the FCC's original privacy rule proposal was supportive of the FCC's goals of protecting consumer privacy but offered several strong criticisms of the FCC's approach. On transparency, the FTC generally supported the goal but recommended developing model notices. On data security, the FTC suggested clarifying the rule to preclude interpreting it as imposing strict liability for a breach. We also recommended requiring a written security program, exploring the idea of a safe harbor, and revising the breach notification proposal to make it more useful for consumers.

Most importantly, the FTC fundamentally disagreed with the FCC's approach to consumer choice. Specifically, the FTC criticized the FCC's failure to distinguish between sensitive and non-sensitive data in applying opt in and opt out choice. The FCC's proposed rules would in some cases have allowed ISPs to use highly sensitive information without express permission. At the same time, the rules would hinder ISPs' use of non-sensitive data, even though other companies like Google and Facebook can use that same data to offer innovative—and often free—services.

The FCC has since issued final rules that nominally distinguish between sensitive and nonsensitive data. Yet, the new rules still differ from the FTC's approach in important ways. Most obviously, the rules define an overly broad swath of data as "sensitive," without justification and in a manner that is inconsistent with the FTC's approach. For instance, the FCC's new rules treat all web browsing and application usage history data as sensitive, while the FTC does not.

The differences between the FCC's and FTC's approaches will have significant unintended consequences. For instance, the FCC's broader definition of sensitive information could lead to an uneven playing field for competitors because it would restrict ISPs' ability to collect information that edge providers and others have collected for years. The FCC's approach also is unlikely to reflect average consumer preferences and may confuse consumers who will not be able to easily assess which rules apply as they act online.

*B.* Prior to this ruling, how has the FTC regulated data privacy?

Answer. The FTC protects consumer privacy and information using a broad array of statutes, including Section 5 of the FTC Act, Gramm-Leach-Bliley, the Children's Online Privacy Protection Act (COPPA), and the Fair Credit Reporting Act (FCRA). The FTC has brought approximately 60 data security cases, 50 general privacy cases, more than 20 COPPA cases, and over 100 FCRA cases.

The FTC's approach to privacy recognizes that the use of data about consumers is extremely valuable—both to companies and to consumers. It also recognizes that consumers have a strong interest in controlling access to sensitive data about them. Thus, the FTC seeks to maximize effective consumer choice in a manner that is least intrusive into consumer and businesses transactions. This approach respects the autonomy of all consumers, including those with privacy preferences that differ from those of the regulator. As such, we seek to enable consumers to efficiently



match their privacy preferences with a company's privacy practices. In pursuit of this goal, the FTC protects privacy with a two-pronged approach, seeking to prevent both deception and unfairness.

For types of data and uses where consumers have widely varying privacy preferences—such as advertising—we use our deception authority to promote marketplace competition to satisfy this wide range of consumer preferences. A functioning market requires companies to keep their promises. Under our deception authority, we bring a case when a company makes privacy promises to consumers that materially affect consumers' actions, but the company does not keep those promises. This deception-based approach encourages companies to develop privacy practices that accommodate widely varying consumer privacy preferences.

Under our unfairness authority, we have found certain privacy practices to be unfair, even if a company has made no promises to a consumer. Specifically, our unfairness authority prohibits practices that cause substantial harm that is unavoidable by consumers and which is not outweighed by benefits to consumers or competition. Practices that the FTC has found unfair consistently match practices that most consumers generally reject. For example, we brought an unfairness case against a data broker that sold sensitive financial information to individuals whom the data broker knew or should have known were identity thieves. Other privacy violations with substantial harm involve accessing medical information, real time location data, and information about children without consumers' express consent.

Thus, unfairness establishes a baseline prohibition on practices that the overwhelming majority of consumers would never knowingly approve. Above that baseline, consumers are free to find providers that match their preferences, and our deception authority governs those arrangements.

*C.* In your opinion, is the FTC better equipped to regulate data privacy than the FCC?

*Answer.* Yes. The FTC's long experience applying our Section 5 and other statutory authorities to individualized cases has built institutional practices and topical knowledge that make the FTC uniquely capable. First, our emphasis on a case-by-case application of general principles requires far less speculation about the future and encourages a focus on addressing real consumer injury. Second, in addition to our enforcement expertise, the FTC actively immerses itself in new technologies and business models through workshops and public comments. Using these tools the FTC gathers and synthesizes information into reports and consumer and business education that summarizes the issues at hand and formulates the appropriate FTC response. A prime example of this kind of careful investigation is the 2012 Privacy Report, which was the result of more than two years of research, multiple rounds of public comment (including comments on a public preliminary draft), and many meetings with stakeholders. Third and finally, the FTC's institutional structure provide strong advantages. For example, the Bureau of Economics is an independent voice within the agency that advises on whether and how proposed consumer protection actions, including privacy-related actions, will benefit consumers. The FTC's experience on the topic of privacy and our legal and institutional structures provide us with significant capabilities in overseeing data privacy.

*Question 3.* As a top travel destination in the nation, and the world, Florida is home to thousands of hotels. As technology continues to move forward in the 21st Century, booking travel arrangements through third-party hotel booking sites offers enormous conveniences and potential cost savings to consumers. However, there have been allegations that certain companies or their affiliates are engaging in travel booking practices that mislead and harm consumers booking hotel rooms online. In June 2015, I joined Senator Nelson in sending a letter to the FTC urging investigation into allegations of fraudulent online hotel bookings through third-parties. The entire Florida House delegation sent a similar letter.

*A.* How many consumer complaints on this issue have been filed with the FTC?

*Answer.* The Commission's Consumer Sentinel complaint database includes complaints received directly by the FTC as well as complaints contributed by the Better Business Bureau and other agencies. It contains approximately 60 complaints since 2012 indicating that consumers had booked a hotel through a third-party site when they thought they were booking directly with a hotel.

*B.* Can you all speak to the efforts FTC has made to investigate these fraudulent bookings, and how the FTC is working to protect consumers from this fraud?

*Answer.* The FTC has a strong interest in protecting consumer confidence in the online hotel-booking marketplace. For example, in July 2015, the FTC issued consumer education cautioning consumers about third-party websites that may deceptively mimic hotel websites. FTC staff has also met with members of Congress to discuss the issue of deceptive travel sites and has provided technical assistance and

comments on the proposed legislation. Although I cannot comment on the existence of any non-public investigations, I can assure you that the FTC takes consumer deception in this marketplace very seriously. We will apprise you of any other public developments.

*Question 4.* Florida is a top travel destination in both the United States and the world, and is home to hundreds of hotels and resorts. Orlando, Miami, the Florida Keys, and Fort Lauderdale are some of the most popular destinations with hotels charging resort fees for additional amenities. It has come to my attention that the FTC is looking to alter previous guidance, released in 2012, related to the mandatory disclosure of hotel resort fees. The 2012 guidance requires hotels to fully disclose all resort fees so that consumers know throughout the booking process exactly how much they are paying and which amenities they are receiving. Please speak to what has prompted the FTC to discuss reversing the 2012 guidance and moving towards “total price” guidance.

A. How many consumer complaints has the FTC received on resort fee disclosures since it issued its guidance on this issue in 2012? Is there any empirical or legal evidence of actual consumer confusion or harm that demonstrates that the 2012 guidance needs to be altered? If so, please describe.

Answer. The FTC has received approximately 400 complaints on resort fee disclosures since it issued its 2012 guidance. There is some empirical research that has found that separating mandatory fees from baseline prices can be harmful to consumers. Eric A. Greenleaf *et al.*, *The Price Does Not Include Additional Taxes, Fees and Surcharges: A Review of Research on Partitioned Pricing*, 26 *J. Consumer Psychol.* 105 (2015). Another consumer preference study about resort fees found that 67 percent of consumers preferred a bundled room rate versus partitioned pricing. Tom Repetti *et al.*, *Pricing Strategies for Resort Fees: Consumer Preferences Favor Simplicity*, 27 *Int'l J. Contemporary Hosp.*, 790, 800, 804 (2014) (“As resort fees become more common, customers still prefer them bundled into the room rate than paying them separately.”).

B. Further, do any of those studies look at consumer understanding of current disclosures, specifically?

Answer. I am unaware of any specific studies examining current resort fee disclosures.

*Question 5.* In November 2012, the FTC issued 22 warning letters to hotel operators on resort fee disclosures. The 2012 guidance was largely embraced by the industry. In 2013, the FTC issued additional warning letters. However, it is my understanding that the FTC has not taken enforcement action against hotel or resort operators since sending these warning letters. Why didn't the FTC take enforcement action?

Answer. The FTC has a strong interest in protecting consumer confidence in the online marketplace, including the robust online market for hotel and travel services. Many hotels and other members of the travel industry have improved their disclosures of resort fees in response to Staff's earlier warning letters. Despite these improvements, the FTC wants to ensure that newer technological platforms, such as mobile applications on smaller screens and OTA and metasearch websites allowing for comparison shopping, continue to provide accurate and complete information at the time of booking. Although I am not able to comment on whether the FTC has any ongoing investigations, we continue to work with industry and other stakeholders to promote accurate disclosure of resort fees at the time of initial booking.

*Question 6.* If the Federal Communication Commission (FCC) adopts its proposed rules on Internet Service Providers (ISPs) on October 27, do you think consumers will understand that edge providers will still be subject to a different regime?

A. Will the FCC's rules confuse consumers about their control over their personal information?

Answer. I am concerned that the rules as proposed may confuse consumers. Many consumers do not distinguish between ISPs, ISP-owned companies, and other companies in the Internet ecosystem. Consumers should not need to know the intricacies of corporate structure, network topologies, and business arrangements to understand how data about them may be used. Subjecting different parts of the Internet to different default rules, particularly without any evidence that consumers see ISPs as different from other companies on the internet, is likely to create consumer confusion.

*Question 7.* In regard to the FTC potentially moving forward to alter the 2012 mandatory disclosure of hotel resort fee guidance:

A. Do you believe current disclosures are deceptive?

Answer. I believe many hotel and online travel sites prominently disclose resort fees early in the booking process and have added the resort fee to the “total” price

shown for the stay. This practice, however, may not be consistent throughout the entire travel industry.

*B.* What level of evidence do you think is appropriate when determining advertising standards? Has the FTC produced this evidence with respect to its new position on resort fees?

Answer. The Commission acts in the interest in consumers to prevent deceptive or unfair act or practices, pursuant to the FTC Act, 15 U.S.C. § 45. An act or practice is deceptive if it is likely to mislead consumers acting reasonably under the circumstances, and if it is material, meaning, likely to affect a consumer's purchasing decision. An act or practice is unfair if it causes or is likely to cause substantial injury that consumers cannot reasonably avoid, and that is not outweighed by the benefits to consumers or to competition. The FTC has not yet articulated any new official position on resort fees but all Commission guidance is founded on these guiding and time-tested principles.

*C.* Do you support the practice of the FTC releasing guidance that is, in effect, a regulation that has not been subject to a formal notice and comment period?

Answer. I have long encouraged the FTC to focus on identifying and addressing real consumer harm that the market and private arrangements cannot address on their own. I support transparency in government regulation and enforcement, including providing the opportunity for notice and comment on formal guidelines, by which interested stakeholders can provide input formally or informally to the Commission and Commissioners on matters, guidance, or any emerging issues.

*D.* Do you think the benefits of the FTC's proposed resort fee standards outweigh the costs? Do you think that Commission guidance should take into account benefits and costs?

Answer. I believe that any Commission guidance should take into account benefits and costs.

*E.* If you disagree with Chairwoman Ramirez's final proposal, will you inform this Committee and the public of your position and how it differs with the action the Commission takes?

Answer. Yes.

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RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. BILL NELSON TO  
HON. MAUREEN K. OHLHAUSEN

*Question.* I am a firm believer that two cops on the beat are better than one. In that regard, I see no reason to pit one agency against another. In this Committee, we have had a debate as to whether the FCC or FTC should protect consumer privacy. I think this debate misses the point. There is no reason why both the FTC and FCC can't play prominent roles.

To all of the Commissioners, the FTC has overlapping jurisdiction with numerous agencies, such as the Department of Justice and the Food and Drug Administration. Your relationships with these agencies and overlapping jurisdictions have never been a problem. Don't you think you can have a similar cooperative relationship with the FCC? Shouldn't there be two cops on the beat?

Answer. Given the breadth of its jurisdiction, the FTC has cooperated frequently with other agencies on areas of mutual concern, including many areas of cooperation with the FCC. The Commission's goal in working with other agencies is to use its complementary authority to protect consumers as effectively and efficiently as possible, to avoid duplication, and to promote consistency.

Having "two cops on a beat" can be beneficial, but only if two conditions are satisfied. First, the dual efforts must be complementary rather than conflicting—the cops' rulebooks must be the same or at least complement each other. Second, the dual efforts ought to reflect each agency's respective expertise, else risk unnecessarily diverting an agency's attention away from its areas of comparative advantage.

Many areas of FTC/FCC overlap meet both of these conditions, and thus the agencies have often been able to cooperate successfully. For example, the FCC and FTC coordinate on Do Not Call matters, robocall research, enforcement matters, and research such as our separate but complementary studies of security in the mobile ecosystem. Last year, the agencies affirmed and formalized certain collaborations by entering into a Memorandum of Understanding agreeing to coordinate on their respective consumer protection efforts.

However, the FCC's recently adopted privacy rules appear to establish a framework that does not meet either test for successful "two cops on the beat." First, the rulebooks are different and incompatible. The FCC's new privacy rules conflict with the FTC's longstanding approach. Specifically, the FCC's rules treat web browsing

history and app usage data as sensitive and require an opt-in from consumers. The FTC has not typically treated such data as sensitive, and has allowed an opt-out approach to collecting such data. (Web history or app usage that itself consists of sensitive data, such as health information, financial information, etc., is already treated by the FTC as sensitive.) In adopting this different approach, the FCC offered no evidence that the FTC's approach—which had previously governed ISPs—was failing to protect ISP consumers.

The differences between the FCC's and FTC's approaches will have significant unintended consequences. For instance, the FCC's broader definition of sensitive information could lead to an uneven playing field for competitors because it would restrict ISPs' ability to collect information that edge providers and others have collected for years. It also is unlikely to reflect average consumer preferences, and it may confuse consumers who will not be able to easily assess which rulebook applies.

Second, the duplicative efforts on consumer privacy do not capitalize on each agency's relative strengths. The FCC cannot match the FTC's long experience in case-by-case enforcement in the privacy area, our expert economic analysis of existing and likely consumer harm, and our focus on redress of consumer harm. The FCC's expertise lies in many other areas, such as spectrum policy and technical rules.

However, despite this new challenge, the FTC will continue to pursue productive cooperation with the FCC in order to protect consumers as effectively and efficiently as possible.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. RICHARD BLUMENTHAL TO  
HON. MAUREEN K. OHLHAUSEN

*Question 1.* Earlier this year, the FTC finally successfully cracked down on four sham charities that had bilked more than \$187 million from donors. According to the FTC complaint, their misappropriation of consumer donations dated back to at least 2008. Chairwoman Ramirez, Commissioner McSweeney, and Commissioner Ohlhausen: How were these sham charities able to rob donors of so much money and for so long?

Answer. As you note, in March 2016, the FTC, all 50 states and the District of Columbia resolved litigation against the remaining defendants in *Cancer Fund of America*, resulting in, among other things, a dissolution of the sham charities and a ban on the president's ability to profit from any charity fundraising in the future. The four sham outfits were quite adept at masking their charade. For example, the complaint charges that the sham cancer charities hid their wrongdoing by manipulating their financial reporting and using deceptive and invalid accounting techniques to claim huge donations of gifts-in-kind. This allegedly allowed them to inflate their reported revenue and program spending by \$223 million and had the effect of making the organizations appear to be both larger and more efficient with donors' money than they were. As charged in the complaint, it was not obvious from their public financial reports to the IRS or the states that in reality less than 3 percent of donated cash went towards program services (collectively).

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

To help educate consumers, the FTC has issued consumer education materials to inform consumers how they can protect themselves against sham charities, including by researching the charity before donating and tips on signs of a charity scam.<sup>1</sup>

*Question 2.* In what way has the nonprofit exemption in the FTC Act hamstrung the Commission's ability to act swiftly to protect consumers?

Answer. The Commission has long advocated that our jurisdiction be extended to non-profit entities to further protect consumers and preserve competition. For example, despite many publicized data breaches at non-profit hospitals and universities, the FTC cannot challenge unfair or deceptive data security or privacy practices of

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<sup>1</sup>*FTC Charity Scams*, FTC Consumer Information, <https://www.consumer.ftc.gov/features/feature-0011-charity-scams>; *FTC and States Wrap Up Largest Charity Enforcement Action Ever*, FTC Consumer Information (Mar. 30, 2016), <https://www.consumer.ftc.gov/blog/ftc-and-states-wrap-largest-charity-enforcement-action-ever>.

these entities. These breaches have exposed the sensitive data of millions of consumers, yet the Commission cannot act due to the non-profit status of these entities. Further, while the Commission can use Section 5 to reach “sham” non-profits, such as shell non-profit corporations that actually operate for profit and sham charities, these investigations require resource-intensive fact finding to satisfy this standard. For example, proving that a charity is a sham requires significant probing into the internal operations of the organization, including reviewing bank records, board meeting minutes, employment practices and other things. Typically, we cannot discover the information without contacting the charity and obtaining documents from it. After getting the documents, a detailed financial analysis is necessary. Only with an understanding of how the money is spent and how the charity operates can we allege that it is a sham. Developing this kind of threshold evidence is time consuming and limits our ability to act swiftly to protect consumers in this area.

The non-profit exemption also prevents the Commission from taking action against potentially anticompetitive conduct of non-profits in the healthcare sector. The Commission actively promotes competition in health care markets, but, aside from mergers or other transactions covered by the Section 7 of the Clayton Act, 15 U.S.C. §17, it cannot reach the conduct of non-profits engaged in the business of health care, including non-profit health maintenance organizations (HMOs), health plans, and standard-setting organizations. For instance, the Commission generally cannot challenge price-fixing, boycotts, and other anticompetitive conduct by non-profit hospitals, even if we charge other parties to the illegal agreements. See *Piedmont Health Alliance*, 138 F.T.C. 675 (2004); *Tenet Healthcare Corp./Frye Regional Medical Center, Inc.*, 137 F.T.C. 219 (2004); *Maine Health Alliance*, 136 F.T.C. 616 (2003) (enforcement actions involving unlawful price-fixing arrangements brought against physicians and a for-profit hospital but not non-profit hospitals).

This has been especially limiting in our review of hospital mergers involving non-profit hospitals. Further, although the FTC has jurisdiction under the Clayton Act to challenge non-profit hospitals’ merger plans, the FTC does not have jurisdiction under the FTC Act to challenge those hospitals’ anticompetitive conduct. Such a case would have to be initiated by the Department of Justice, even if the Commission reviewed the merger.

*Question 3.* Last year, FTC staff released a comprehensive report on “Competition in the Pet Medications Industry.” In the report, the Commission found that “some veterinarians refuse to provide portable prescriptions to their clients or engage in behaviors intended to discourage clients from requesting portable prescriptions and filling them elsewhere.” The report also noted that spending by families on their pets has doubled over the last decade, with Americans spending \$7.6 billion on prescription and over-the-counter pet medications in 2013, and projected to spend \$10.2 billion by 2018. It has been estimated that pet owners who can get a copy of their pet’s prescription and shop around, could save 20 to 30 percent on branded medications and 50 percent when they purchase generics—suggesting that prescription portability can save pet owners billions of dollars every year. In May of last year, I introduced the Fairness to Pet Owners Act, which would ensure consumers have the freedom to choose where they buy prescription pet medication.

Chairwoman Ramirez, Commissioner McSweeney, and Commissioner Ohlhausen: Given the findings of the Commission’s report, do you support the Fairness to Pet Owners Act? Do you believe that providing pet owners with the right to their pets’ prescriptions will help ensure consumers have access to pet medications at the most affordable prices?

Answer. While the FTC has not taken a formal position on the Fairness to Pet Owners Act, I believe prescription portability likely benefits consumers by empowering them to make informed choices about where to purchase their pet medications. For this reason, I generally support policies that would require veterinarian release of pet medication prescriptions and increase consumer awareness.

As discussed extensively in the FTC staff report, it appears that some consumers do not always receive portable prescriptions from their veterinarians, are uncomfortable requesting the prescription, or are not aware that they have this option. Federal legislation requiring automatic prescription release would go further than current state laws and regulations that require prescription release only upon request, which could benefit consumers. Automatic prescription release is arguably a more effective way to raise consumer awareness about the option to obtain portable prescriptions from their veterinarians and comparison shop when purchasing pet medications. In addition, automatic prescription release likely would help to address situations where veterinarians are reluctant to provide, or discourage clients from requesting, portable prescriptions, or when consumers are uncomfortable requesting portable prescriptions for pets.

Federal legislation requiring automatic prescription release also has the potential to positively impact manufacturer distribution policies. If greater prescription portability were to increase consumer demand for purchasing pet medications from non-veterinary retail pharmacists, the potential for increased sales opportunities might incentivize manufacturers to change their distribution policies in ways that would promote competition among different distribution channels and be more responsive to consumer choice.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. GARY PETERS TO  
HON. MAUREEN K. OHLHAUSEN

*Question 1.* The Federal Trade Commission (FTC), Food and Drug Administration (FDA), and Department of Justice each possess a portion of jurisdiction over the contact lens marketplace. The FTC has the authority, under the Federal Trade Commission Act, to bring enforcement actions against sellers of contact lenses whose practices violate the law. My office has been made aware of the fact that there are online retailers who advertise that they dispense contact lenses, which are a FDA-regulated medical device, without verifying a patient's prescription.

*Question 1a.* What process does the FTC have in place for individuals to submit complaints regarding prescriber practices and how many complaints has the FTC received?

Answer. The FTC encourages consumers, as well as prescribers and retailers, to report suspected violations of the Contact Lens Rule. The primary avenue for reporting complaints is the FTC Complaint Assistant, [ftc.gov/complaint](http://ftc.gov/complaint), featured prominently on the [ftc.gov](http://ftc.gov) homepage. Consumers also may file a complaint by calling 1-877-FTC-HELP (382-4357). FTC staff also receives e-mail messages reporting suspected instances of prescribers and retailers not complying with the Rule.

The FTC receives a few hundred complaints a year about a variety of prescriber and retailer practices, some outside the scope of the Contact Lens Rule, such as billing practices and insurance issues.

*Question 1b.* Has the FTC brought enforcement action against any retailers due to their prescribing practices? How many enforcement actions have been brought?

Answer. The FTC has taken a multi-faceted approach to ensure retailers and consumers are cognizant of their obligations and rights under the Contact Lens Rule.

For example, we have taken law enforcement action against ten contact lens sellers for allegedly selling cosmetic contact lenses without obtaining consumers' contact lens prescriptions and failing to maintain records of consumers' prescriptions. Our settlement orders have imposed civil penalties and provided injunctive relief that, among other things, prohibited the defendants from: (1) selling contact lenses without obtaining a prescription from a consumer, (2) selling contact lenses without verifying prescriptions by communicating directly with the prescriber; and (3) failing to maintain records of prescriptions and verifications.

In addition, in April, 2016, FTC staff sent 45 warning letters<sup>2</sup> to contact lens prescribers and 10 to contact lens sellers warning them of potential violations of the agency's Contact Lens Rule, which is intended to facilitate the ability of consumers to comparison shop for contact lenses while ensuring that sales occur only in accordance with a valid prescription. These letters reminded prescribers and sellers of their legal obligations and warned them that violations of the Contact Lens Rule may result in legal action, including civil penalties of up to \$16,000 per violation. Since we sent those letters, the civil penalty amount has increased up to \$40,000 per violation.

The agency has also increased its efforts to work with industry and educate the public concerning their rights and responsibilities. For example, FTC staff initiated an outreach campaign designed to increase prescriber, seller, and consumer awareness of the Contact Lens Rule, which included newly-revised consumer educational guidance, *Prescription Glasses and Contact Lenses*, and social media outreach to prescribers and sellers.<sup>3</sup> Additionally, the FTC is working with other Federal agencies,

<sup>2</sup>*FTC Issues Warning Letters Regarding the Agency's Contact Lens Rule*, FTC News Release (Apr. 7, 2016), available at: <https://www.ftc.gov/news-events/press-releases/2016/04/ftc-issues-warning-letters-regarding-agencys-contact-lens-rule>.

<sup>3</sup>*Prescription Glasses and Contact Lenses* (Apr. 2016), available at: <https://www.consumer.ftc.gov/articles/0116-prescription-glasses-and-contact-lenses>. See also *Buying contacts? You should see a prescription first* (Apr. 7, 2016), available at: <https://www.consumer.ftc.gov/blog/buying-contacts-you-should-see-prescription-first>; and *An Rx for compliance with the Contact Lens Rule* (Apr. 7, 2016), available at: <https://www.ftc.gov/news-events/blogs/business-blog/2016/04/rx-compliance-contact-lens-rule>.

state law enforcement agencies and consumer advocacy groups to improve industry compliance and increase public awareness regarding the Rule.

We will continue to monitor the marketplace and will take action against violations of the Contact Lens Rule as appropriate.

*Question 2.* Under current law, most states require that patients get updated contact lens prescriptions every year in order to buy more lenses. Yet, some online retailers are selling multiple years' worth of contact lenses.

In conducting the 10-year review of the Contact Lens Rule, has the FTC taken into account the safety implications of prescribers that sell multiple years' worth of contact lenses? Has the FTC found any safety concerns associated with this practice and could you list them if so?

Answer. The Contact Lens Rule mandates that sellers dispense contact lenses only in accordance with a valid prescription that is either presented to the seller or verified by direct communication with the prescriber.<sup>4</sup> The Rule sets out the information that must be included in a seller's verification request, and directs that a prescription is only verified under the Rule if: (1) a prescriber confirms the prescription is accurate; (2) a prescriber informs the seller that the prescription is inaccurate and provides an accurate prescription in its stead; or (3) the prescriber fails to communicate with the seller within eight business hours after receiving a compliant verification request.<sup>5</sup> The Rule states that if the prescriber informs the seller within eight business hours of receiving the verification request that the prescription is inaccurate, expired, or invalid, the seller shall not fill the prescription. The Rule requires that the prescriber specify the basis for the inaccuracy or invalidity of the prescription, and if the prescription is inaccurate, the prescriber must correct it.<sup>6</sup>

As part of its rule review process, the Commission received comments addressing the quantity of contact lenses that some online retailers may be selling to consumers, however, the comments varied widely on approach to address this issue. Based on a thorough review of the comments, the FTC made the initial determination that there was insufficient evidence in the rulemaking record to support amending the Rule to impose a quantity limitation but is seeking additional public comment concerning this initial determination.

*Question 3.* Current law requires a seller to verify a patients' contact lens prescription. One of the allowable forms of communication are automated and non-live calls—commonly referred to as “robocalling.” I have heard from optometrists in Michigan that understanding and/or verifying required information from robocalling is nearly impossible.

*Question 3a.* Has the FTC heard similar concerns about the use of robocalling to verify a patient's contact lens prescription?

Answer. In the course of our rule review, the FTC received various comments from prescribers. Some prescribers have stated that automated telephone calls are difficult to understand, while other prescribers voiced issues with the length or timing of automated calls. However, commenters did not provide any empirical data regarding the frequency of these various practices, average or aggregate costs associated with automated calls in particular, or the number of illegal or otherwise deficient contact lens sales that result from such calls. We are examining these issues and considering how best to ensure that the Rule's verification system operates as intended by the Fairness to Contact Lens Consumers Act, 15 U.S.C. §§ 7601–7610. We recently issued a NPRM for the Contact Lens Rule where we discuss automated telephone calls for prescription verification and request comment on modifications to automated telephone calls that the FTC should consider to address the concerns raised by prescribers.

*Question 3b.* In its review of the Contact Lens Rule has the FTC examined the safety implications of allowing robocalling for verification purposes? If so, what did the FTC find?

Answer. The FTC is examining all concerns raised about the current operation of the Rule, including the safety implications of automated telephone systems and the evidence proffered by commenters in support of their proposed Rule amendments. In the recent NPRM, we discuss the safety concerns raised by some commenters about the use of automated calls: namely, that if the prescription is not properly verified, patients may be receiving contact lenses based on outdated or incorrect prescription information. However, commenters did not provide any empirical data regarding the frequency of these various practices, average or aggregate costs associ-

<sup>4</sup> 16 CFR 315.5(a).

<sup>5</sup> 16 CFR 315.5(b)-(c).

<sup>6</sup> 16 CFR 315.5(d).

ated with automated calls in particular, or the number of illegal or otherwise deficient contact lens sales that result from such calls. Furthermore, we did not receive evidence indicating whether these problems occur with automated calls generally or are chiefly associated with only one or a small group of sellers. In the NPRM, we request additional comment on modifications to automated telephone calls that the FTC should consider.

*Question 3c.* Has the FTC examined robocalling to determine whether or not it effectively allows vendors to verify a patient's prescription? If so, what did the FTC find?

Answer. As described above, the FTC is currently in the process of conducting the Rule review. This process involves both reviewing comments received from all interested stakeholders as well as examining the empirical evidence produced by such parties in support of their positions. Incomplete or incoherent verification requests are not valid verification requests. As discussed in the recently issued NPRM, at this time, we have not seen convincing evidence that these practices frequently result in illegal sales of contact lenses. If the FTC receives evidence of a compelling widespread problem, it may revisit its position on the use of automated verification requests.

*Question 3d.* Has the FTC considered allowing other forms of electronic communication that might improve or compliment robocalling? If so, what are they?

Answer. The FTC is considering the impact and use of other evolving technologies as they relate to the Rule, including the verification framework set forth by the Fairness to Contact Lens Consumers Act. The FTC is seeking further public comment on this issue.<sup>7</sup>

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RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. JOHN THUNE TO  
HON. TERRELL MCSWEENEY

*Question.* The FTC is an agency with broad investigative and enforcement powers. Commission investigations can involve considerable discovery requests, and enforcement actions frequently result in settlements through consent decrees. While there are often legitimate reasons for settlements, this reliance on the administrative process has resulted in a lack of judicial review of agency enforcement decisions. This lack of case law means there may be fewer bright lines to guide the Commission, companies, and courts with respect to enforcement. Does this absence of clear guidance concern you? Please explain.

Answer. All of our enforcement actions are grounded in Section 5 of the FTC Act which gives the Commission the mandate to police “unfair or deceptive acts or practices in or affecting commerce.” Congress created this broad instruction out of a realization that the FTC needed broad authority to protect consumers in a dynamic marketplace. Over the years, the FTC has used its authority to pursue a range of harmful practices from diploma mills to lax data security to deceptive privacy policies. Section 5 has allowed the FTC to keep pace with changes in the American marketplace and protect consumers where they are—from the corner store to a handheld smart phone. I am sensitive to the need to make sure businesses know how we use our authorities and what it means for them. That’s why when we resolve a case through a consent decree settlement we publish it along with a detailed complaint. The FTC also issues press releases and blog posts, and engages with industry through a variety of workshops and forums. I believe it is important for the FTC to continue to provide guidance—especially through initiatives run by its Division of Business and Consumer Education. For example, the “Start with Security” initiative, synthesizes best practices from the Commission’s data security cases and explains our approach to assessing reasonable security practices. This guidance should continue to be regularly updated.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARCO RUBIO TO  
HON. TERRELL MCSWEENEY

*Question 1.* According to the most recent statistics, there are currently 728 travel related cases and 147 non-travel related cases of Zika in my home state of Florida. With the increase in cases, and the threat mosquitos spreading around the Miami Beach area and to other parts of the United States and our territories, many are

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<sup>7</sup>See FTC Press Release, *FTC Seeks Comment on Proposed Changes to Contact Lens Rule* (Nov. 10, 2016), <https://www.ftc.gov/news-events/press-releases/2016/11/ftc-seeks-comment-proposed-changes-contact-lens-rule>.



concerned with contracting the virus. Feeding into consumer concerns, many companies are marketing products that say they provide protection from the Zika virus.

A. Please speak to the FTC's efforts to seek out these fraudulent companies that are capitalizing off of consumer concerns about Zika, and hold them accountable.

Answer. Like my colleagues, I am concerned about the risks of the Zika virus. Unfortunately, when public health crises arise, they are usually followed by scammers who try to take advantage of public concern by peddling products of dubious value. As Chairwoman Ramirez informed you, when Commission staff was made aware of these problematic Zika-related products, they investigated and contacted the companies marketing the products. These communications informed the companies of their obligations and reminded them of the law. We also informed the public of these letters on one of our blogs and explained the evidence that is needed to make claims that products provide protection from infection. We are continuing to monitor the situation carefully.

B. I understand the FTC has reached out to some of these online marketers and requested reports back on actions they have taken to remove or change false advertising claims. What is the status of these reports?

Answer. I believe that Chairwoman Ramirez provided an answer to this question. I have nothing to add substantively. I believe the quick action by FTC staff is emblematic of the quality of the Commission's work and the level of seriousness our staff bring to their job of protecting the American consumer and American marketplace.

C. What can we do to educate my constituents back home in Florida, and across our nation, about what to look for to ensure they are not buying into falsely advertised products, and make sure they are protected as consumers?

Answer. The Commission posted a blog in English and Spanish about our warning letters to the companies and informing consumers about what they could do to protect themselves and their families from Zika. The blog included links to the EPA and the CDC that are quite informative about the steps consumers can take to protect themselves and their families. The FTC's consumer blog also links to advice from EPA on how to use insect repellents safely and effectively, and to tips from the CDC on protecting oneself and family members, and what to consider when you are in a location where Zika has been found. We want to centralize this information so we can make it easier for consumers to make educated decisions about how to protect themselves and their families from Zika.

*Question 2.* The Federal Communication Commission (FCC) is scheduled to vote on its proposed broadband consumer privacy rule on October 27.

A. Will you speak to the FTC's comments on the proposed rule related to transparency, consumer choice and data security?

Answer. The FTC staff comment commended the FCC's focus on the core privacy values of transparency, consumer choice, and data security. The FTC's privacy program has long focused on transparency and consumer choice.

The FTC staff generally supported the NPRM's requirement that ISPs provide clear and conspicuous choices and notices of privacy policies to their consumers. On choice, the FCC would have required opt out for use of consumer information for marketing of communications-related services, and opt in for all other uses of customer's private information. The FTC's comment suggested that opt in consent is important before (1) collecting sensitive information, (2) making material retroactive changes to privacy policies, or (3) collecting content of consumers' communications through technologies such as deep packet inspection. For other categories, the FTC staff suggested that opt out would be sufficient. The FCC's final rule adopted this approach. Regarding security, the FTC staff agreed with the approach that ISPs have reasonable security in place. The staff comment favored a breach notification requirement for ISPs.

B. Prior to this ruling, how has the FTC regulated data privacy?

Answer. I believe that Chairwoman Ramirez's statement captures the scope of how the FTC approaches privacy. Our approach is grounded in the FTC's authority to protect consumers from "unfair and deceptive acts and practices." As the Nation's chief privacy enforcer we have brought hundreds of cases concerning the protection of consumer privacy. Our enforcement based approach has enabled the FTC to keep pace with technology while giving American innovators plenty of room to do what they do best-providing innovative products and services to consumers around the globe.

Through our workshops and business education program we engage with cutting edge issues, particularly around consumer privacy.

C. In your opinion, is the FTC better equipped to regulate data privacy than the FCC?

Answer. I want to echo the Chairwoman's words about the FTC's long history of enforcement and the institutional knowledge housed within the Commission. I agree that the outdated common carrier exemption should be repealed. It is important to note, however, that the Federal Communications Commission also has a real role to play because it has expertise in areas like Deep Packet Inspection and network architecture, that are necessary to properly protecting consumer privacy in our hyperconnected world.

*Question 3.* As a top travel destination in the nation, and the world, Florida is home to thousands of hotels. As technology continues to move forward in the 21st Century, booking travel arrangements through third-party hotel booking sites offers enormous conveniences and potential cost savings to consumers. However, there have been allegations that certain companies or their affiliates are engaging in travel booking practices that mislead and harm consumers booking hotel rooms online. In June 2015, I joined Senator Nelson in sending a letter to the FTC urging investigation into allegations of fraudulent online hotel bookings through third-parties. The entire Florida House delegation sent a similar letter.

A. How many consumer complaints on this issue have been filed with the FTC?

Answer. I have nothing to add to the information provided by Chairwoman Ramirez.

B. Can you all speak to the efforts FTC has made to investigate these fraudulent bookings, and how the FTC is working to protect consumers from this fraud?

Answer. Protecting consumers wherever they are is our mandate. Last year, our staff issued consumer focused materials to educate the public about the problems with these websites. FTC staff also met with members of Congress to discuss this issue. Although any investigations are non-public, I can assure you that the FTC staff will carefully consider whether enforcement or other action is appropriate.

*Question 4.* Florida is a top travel destination in both the United States and the world, and is home to hundreds of hotels and resorts. Orlando, Miami, the Florida Keys, and Fort Lauderdale are some of the most popular destinations with hotels charging resort fees for additional amenities. It has come to my attention that the FTC is looking to alter previous guidance, released in 2012, related to the mandatory disclosure of hotel resort fees. The 2012 guidance requires hotels to fully disclose all resort fees so that consumers know throughout the booking process exactly how much they are paying and which amenities they are receiving. Please speak to what has prompted the FTC to discuss reversing the 2012 guidance and moving towards "total price" guidance.

A. How many consumer complaints has the FTC received on resort fee disclosures since it issued its guidance on this issue in 2012?

Answer. I have nothing to add to the Chairwoman's answer on the number of complaints received by the FTC on resort fees.

Is there any empirical or legal evidence of actual consumer confusion or harm that demonstrates that the 2012 guidance needs to be altered? If so, please describe.

Answer. I have nothing to add to the response from the Chairwoman.

B. Further, do any of those studies look at consumer understanding of current disclosures, specifically?

Answer. I am not aware of any research that has specifically examined consumer understanding of current resort fee disclosures.

*Question 5.* In November 2012, the FTC issued 22 warning letters to hotel operators on resort fee disclosures. The 2012 guidance was largely embraced by the industry. In 2013, the FTC issued additional warning letters. However, it is my understanding that the FTC has not taken enforcement action against hotel or resort operators since sending these warning letters. Why didn't the FTC take enforcement action?

Answer. I was not a Commissioner when the guidance was communicated and have no comment beyond what has been submitted by the Chairwoman.

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RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. DEB FISCHER TO  
HON. TERRELL MCSWEENEY

*Question.* The FTC has long used an unfair and deceptive practices standard for data security and considers whether practices are reasonable in light of a business's size and complexity. By doing so, the FTC recognizes that the data security standards that a large company can employ may be unreasonable for a small company with only a handful of employees and limited resources. From your perspective, does the FCC's proposed data security standard properly reflect the varying capabilities of companies of different sizes?

Answer. The most recent proposal from the Federal Communications Commission reflects the standards used by the Federal Trade Commission in assessing the reasonableness of an organization's cybersecurity practices.

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RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. BILL NELSON TO  
HON. TERRELL MCSWEENY

*Question.* I am a firm believer that two cops on the beat are better than one. In that regard, I see no reason to pit one agency against another. In this Committee, we have had a debate as to whether the FCC or FTC should protect consumer privacy. I think this debate misses the point. There is no reason why both the FTC and FCC can't play prominent roles.

To all of the Commissioners, the FTC has overlapping jurisdiction with numerous agencies, such as the Department of Justice and the Food and Drug Administration. Your relationships with these agencies and overlapping jurisdictions have never been a problem. Don't you think you can have a similar cooperative relationship with the FCC? Shouldn't there be two cops on the beat?

Answer. Yes. I think the American public is better off with as many effective cops on the consumer protection beat as possible—this is particularly true in areas like privacy and security where our increasing connectivity is raising new consumer protection issues for expert regulators. For example, the FTC has issued supportive comments to NHTSA regarding privacy and security considerations associated with automatous vehicles and to the FCC in setting the rules to govern common carriers' privacy obligations. Given that the FTC is the premier consumer protection agency in the Federal government we collaborate with many agencies from the Department of Education on for-profit education and diploma mills, to the Consumer Financial Protection Bureau and our work with various financial frauds, to our work with the IRS and tax identity frauds. All of these issues are better policed because of the dedication from multiple agencies. It is no different with the FCC. In an age where so many companies have business lines that cross traditional regulatory jurisdictions it is important that the FTC continue to have an excellent working relationship with other government agencies. Consumer protection issues like privacy and security will become more important as the lines between industries continue to evolve and blur thanks to our growing connectivity.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. RICHARD BLUMENTHAL TO  
HON. TERRELL MCSWEENY

*Question 1.* Earlier this year, the FTC finally successfully cracked down on four sham charities that had bilked more than \$187 million from donors. According to the FTC complaint, their misappropriation of consumer donations dated back to at least 2008. Chairwoman Ramirez, Commissioner McSweeney, and Commissioner Ohlhausen: How were these sham charities able to rob donors of so much money and for so long?

Answer. I believe Chairwoman Ramirez provides an accurate narrative of how and why these charities were able to perpetuate their fraud for so long. I would like to add that the example offered by the Cancer Fund for America cases is a reason—along with privacy and data security—that the FTC should have our jurisdiction extended to non-profits.

*Question 2.* In what way has the nonprofit exemption in the FTC Act hamstrung the Commission's ability to act swiftly to protect consumers?

Answer. On both the competition and consumer protection side, the non-profit exemption has hurt consumers. In the last few years, universities have been one of the biggest targets for data breaches but the FTC cannot challenge unfair or deceptive data security or privacy practices of these entities. It also creates challenges when we investigate sham non-profits like Cancer Fund for America.

The Commission also actively promotes competition in health care markets, but it cannot reach the conduct of non-profits engaged in the business of health care, including non-profit health maintenance organizations (HMOs), health plans, and standard-setting organizations.

The exemption has been limiting in our review of hospital mergers involving non-profit hospitals. Although the FTC has jurisdiction under the Clayton Act to challenge non-profit hospitals' merger plans, the FTC does not have jurisdiction under the FTC Act to challenge those hospitals' anticompetitive conduct.

*Question 3.* Last year, FTC staff released a comprehensive report on "Competition in the Ped Medications Industry." In the report, the Commission found that "some

veterinarians refuse to provide portable prescriptions to their clients or engage in behaviors intended to discourage clients from requesting portable prescriptions and filling them elsewhere.” The report also noted that spending by families on their pets has doubled over the last decade, with Americans spending \$7.6 billion on prescription and over-the-counter pet medications in 2013, and projected to spend \$10.2 billion by 2018. It has been estimated that pet owners who can get a copy of their pet’s prescription and shop around, could save 20 to 30 percent on branded medications and 50 percent when they purchase generics—suggesting that prescription portability can save pet owners billions of dollars every year. In May of last year, I introduced the Fairness to Pet Owners Act, which would ensure consumers have the freedom to choose where they buy prescription pet medication.

Chairwoman Ramirez, Commissioner McSweeney, and Commissioner Ohlhausen: Given the findings of the Commission’s report, do you support the Fairness to Pet Owners Act? Do you believe that providing pet owners with the right to their pets’ prescriptions will help ensure consumers have access to pet medications at the most affordable prices?

Answer. Like the Chairwoman, I generally support policies that would encourage prescription portability, introduce competition, and empower consumers to make informed choices about where to purchase pet medications.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. CORY BOOKER TO  
HON. TERRELL MCSWEENEY

*Question 1.* Changes in technology seem to be making it ever easier to deceive and defraud consumers with phone calls. Many New Jerseyans have told me that the number of fraudulent calls they receive is increasing, particularly on their cell phones. Last Congress, I joined with Ranking Member Nelson on legislation to help curb the use of so-called “spoofing” technology. This technology is used to trick recipients into answering the call by scrambling the phone number on the recipient’s caller identification display, but spoofing is just one of numerous practices used to defraud and harass recipients. This trend is especially concerning because my constituents frequently receive overtures from callers fraudulently claiming to represent government entities including the Internal Revenue Service (IRS) and the Federal Bureau of Investigation (FBI).

*Question 1a.* What steps is the Federal Trade Commission (FTC) taking to protect consumers from fraudulent calls?

Answer. We employ every tool we have to combat fraudulent and deceptive calls to consumers including: aggressive law enforcement, regulatory action, robust consumer education and outreach, and even using grants authorized by the America COMPETES Act to develop solutions for consumers. As the Chairwoman stated, we have brought 126 enforcement actions against these scammers.

New technologies have made it easier for scammers to get around the consumer protections we have in place. Just as these changes have lowered costs and improved services to the benefit of consumers, they have also lowered costs and barriers to entry for fraud. Widespread use of caller ID spoofing by scammers is a product of these advances.

I have personally met with technologists and researchers to encourage them on to create technological solutions for this problem.

*Question 1b.* How can Congress help to address this issue?

Answer. I would like to see Congress continue to support the FTC in our law enforcement and education mission as well as the authority to run competitions through challenge grants.

*Question 1c.* What information should consumers have to better protect themselves from these practices?

Answer. The steps outlined by the Chairwoman are a good checklist of appropriate measures consumers should take.

*Question 1d.* Is the FTC working in partnership with other Federal agencies to help educate the public and to protect them from giving away sensitive personal or financial information?

Answer. We have great working relationships with many agencies to help educate consumers such as DOJ, the U.S. Postal Inspection Service, the IRS, U.S. Treasury Inspector General for Tax (TIGTA), the FCC, and DHS. We are also working to implement President Obama’s Executive Order that directed Federal agencies that guard consumer data to work together to enhance protections and educate the public on identity theft. As part of that initiative, we redesigned and enhanced IdentityTheft.gov to make it a one stop resource for consumers looking for help

when a breach or hack compromises their personal data. The FTC also works closely with state Attorneys General and international consumer protection authorities. As Chairwoman Ramirez described, we led a multinational robocall sweep that took action against operations responsible for billions of illegal robocalls.

*Question 1e.* Is more cross-agency collaboration needed to serve the public when it comes to identifying, exposing, and preventing telemarketing fraud?

Answer. I agree with Chairwoman Ramirez's statement on this subject.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. GARY PETERS TO  
HON. TERRELL MCSWEENEY

*Question 1.* The Federal Trade Commission (FTC), Food and Drug Administration (FDA), and Department of Justice each possess a portion of jurisdiction over the contact lens marketplace. The FTC has the authority, under the Federal Trade Commission Act, to bring enforcement actions against sellers of contact lenses whose practices violate the law. My office has been made aware of the fact that there are online retailers who advertise that they dispense contact lenses, which are a FDA-regulated medical device, without verifying a patient's prescription.

*Question 1a.* What process does the FTC have in place for individuals to submit complaints regarding prescriber practices and how many complaints has the FTC received?

Answer. I have nothing to add to the answer provided by Chairwoman Ramirez.

*Question 1b.* Has the FTC brought enforcement action against any retailers due to their prescribing practices? How many enforcement actions have been brought?

Answer. I have nothing to add to Chairwoman Ramirez's statement.

*Question 2.* Under current law, most states require that patients get updated contact lens prescriptions every year in order to buy more lenses. Yet, some online retailers are selling multiple years' worth of contact lenses.

In conducting the 10-year review of the Contact Lens Rule, has the FTC taken into account the safety implications of prescribers that sell multiple years' worth of contact lenses? Has the FTC found any safety concerns associated with this practice and could you list them if so?

Answer. The FTC staff is examining this issue, as well as others, as part of our review process to ensure that the Contact Lens Rule operates as intended to promote competition and affordable prices in the contact lens industry consistent with patient health and safety.

*Question 3.* Current law requires a seller to verify a patients' contact lens prescription. One of the allowable forms of communication are automated and non-live calls—commonly referred to as “robocalling”. I have heard from optometrists in Michigan that understanding and/or verifying required information from robocalling is nearly impossible.

*Question 3a.* Has the FTC heard similar concerns about the use of robocalling to verify a patient's contact lens prescription?

Answer. As the Chairwoman said, we are examining this issue and will take this, and other issues, into account as we do more work on the Contact Lens Rule.

*Question 3b.* In its review of the Contact Lens Rule has the FTC examined the safety implications of allowing robocalling for verification purposes? If so, what did the FTC find?

Answer. Our staff is examining all aspects of the Rule.

*Question 3c.* Has the FTC examined robocalling to determine whether or not if effectively allows vendors to verify a patient's prescription? If so, what did the FTC find?

Answer. As described above, the FTC staff is currently in the process of conducting a review of the rule. This will involve both reviewing comments received from all interested stakeholders as well as examining the empirical evidence produced by such parties in support of their positions.

*Question 3d.* Has the FTC considered allowing other forms of electronic communication that might improve or compliment robocalling? If so, what are they?

Answer. I have nothing to add to Chairwoman Ramirez's statement on this matter.