S. HRG. 115–730

OVERSIGHT OF THE FEDERAL TRADE COMMISSION

HEARING

BEFORE THE

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

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION
UNITED STATES SENATE

ONE HUNDRED FIFTEENTH CONGRESS

SECOND SESSION

NOVEMBER 27, 2018

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ONE HUNDRED FIFTEENTH CONGRESS

SECOND SESSION

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OVERSIGHT OF THE FEDERAL TRADE COMMISSION

TUESDAY, NOVEMBER 27, 2018

U.S. SENATE,
SUBCOMMITTEE ON CONSUMER PROTECTION, PRODUCT SAFETY, INSURANCE, AND DATA SECURITY,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:38 p.m., in room SR–253, Russell Senate Office Building, Hon. Jerry Moran, Chairman of the Subcommittee, presiding.

Present: Senators Thune, Moran [presiding], Nelson, Cruz, Capito, Blumenthal, Klobuchar, Markey, Udall, Hassan, and Cortez Masto.

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

Senator MORAN. The hearing will come to order.

Thank you, all of the commissioners, for being with us here today as the Subcommittee conducts on oversight of the Federal Trade Commission.

The Commission has a broad mandate to protect consumers from unfair and deceptive trade practices. Its consumer protection mission includes protecting consumers from everything from robocalls, ticket bots, and data breaches, and enforcing laws such as the Consumer Review Fairness Act, the Fair Credit Reporting Act, and the Children's Online Privacy Protection Act.

This is the first opportunity for this subcommittee to hear from all five new commissioners since their confirmation this past spring and learn about their enforcement priorities.

This spring the Commission announced it would hold a series of hearings titled Competition and Consumer Protection in the 21st Century with the goal of exploring whether evolving businesses practices and emerging technologies might necessitate changes to the FTC enforcement policy and priorities. So far, the Commission has held seven hearings on topics which included big data and artificial intelligence, with data security and privacy hearings to be held in the next few months.

I would like to hear from the commissioners about the response they have gotten to the hearings, what they have learned so far, and what, if any, policy or enforcement guidance might result.

I am also interested in what the Commission can share on its investigation into Equifax and Facebook. In September 2017 the FTC announced that it had opened an investigation into Equifax's mas-

sive data breach that affected the personal information of at least 148 million Americans. The breach apparently went unnoticed by Equifax for more than 70 days, and once the company finally realized that a breach had occurred, the company waited six weeks to report it. The breach put consumers at high risk of identity theft.

Last March following the Cambridge Analytical scandal, the FTC also confirmed that it was investigating whether Facebook's privacy practices violated the Commission's 2012 consent decree.

This Subcommittee held a hearing on June 19, focused on how the use of the app by about 300,000 Facebook users ultimately resulted in the personal information of nearly 87 million Facebook users being transferred to Cambridge Analytica. It would be useful to know if the Commission has an anticipated timeline for when the results of that investigation will be announced and what penalties the company might face if the Commission determines if practices did violate the consent decree.

Privacy has emerged as an area of major concern for consumers. In the past month alone, Facebook and Google revealed the exposure of personal information of up to 30 million and 500,000 users respectively, and these are just the latest in a long series of incidents that have raised serious concerns about privacy practices of large tech companies and the adequacy of their responses.

In the wake of these incidents, the implementation of the General Data Protection Regulation, GDPR, in Europe and the recent passage of the California Consumer Privacy Act, it has become clear that the U.S. needs a Federal consumer data privacy law. My colleagues on the committee and I are pursuing a bipartisan privacy legislative proposal.

As the primary Federal privacy regulator that has brought over 100 data security and privacy cases over the last 20 years and issued privacy guidance, the FTC has unique experience and expertise to call on when we work to develop that privacy legislation.

I look forward to hearing from the commissioners about what they think should be included in any Federal privacy legislation and what additional tools the FTC might need in order to effectively protect consumer privacy while still encouraging and enhancing innovation.

With that, I turn to the Ranking Member so that he can make his opening statement.

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

Senator BLUMENTHAL. Thanks, Senator Moran. Thank you to you and Chairman Thune for your leadership.

And I have been working with Senator Moran on a bipartisan privacy bill that I hope will make very good progress very soon.

Congress has long empowered and directed the Federal Trade Commission to enforce the tools it has now, not to mention new ones that we may give it in such a privacy law. And looking back, this year really exemplifies the urgent need for the FTC to be more vigorous and vigilant in its enforcement; to stand up for consumers, promote competitive markets, and combat fraud.

And I will be very blunt. First, thank you all for your service, but thank you for recognizing, as I hope you will, that all too often the

FTC has fallen short of that empower/enforcement trust. It is falling short on confronting pressing challenges. Sometimes it's because the Commission lacks the needed tools, but too regularly the problem appears to be lack of will. And I say that with great respect based not only on my 8 years as a United States Senator but 20 years as a law enforcer at the state level, attorney general of Connecticut.

This hearing is about finding out whether the FTC is ready and willing to take on hard problems and whether the FTC will robustly protect privacy using the authorities and resources that you have now and that we will hopefully provide.

We've seen the consequences of lack of enforcement with Facebook. After over a year of foot dragging on Russian interference earlier this year, we learned a political firm had secretly amassed Facebook data on tens of millions of people to manipulate our election.

Cambridge Analytica should never have happened. It would never have happened if the consent order reached by the FTC with Facebook had been vigorously and adequately enforced. When Mark Zuckerberg came before the Senate, I showed him the terms of service of Cambridge Analytica's app. He acknowledged that Facebook was not paying attention and promised change. In fact, he said he hadn't seen them before.

Instead, we have learned that while Mr. Zuckerberg embarked on this apology tour, surrogates of Facebook were maligning critics and Members of Congress. That issue is only one of many, and it won't be the last, I'm afraid. My colleagues and I have raised countless more concerns about Facebook's privacy and security practices.

I have been frustrated that there has been no cost to Facebook for catastrophic failure to protect consumers, and I will be asking, like Senator Moran, where the investigation stands and when we will see results.

Facebook has captured the headlines but it's hardly alone. In July, the *Wall Street Journal* disclosed that Google had potentially exposed the private data of hundreds of thousands of Google's users. Google's instinct was concealment. A memo from Google policy staff quoted by the *Journal* warned disclosure would likely result in, "us coming into the spotlight alongside or even instead of Facebook despite having stayed under the radar throughout the Cambridge Analytical scandal." I, along with Senators Markey and Udall wrote the FTC about this incident and I hope for a response today.

This issue is about big tech, and Congress is fed up. It's about big tech no longer being entitled to say to America, Trust us. Big tech is no longer entitled to that trust if it ever was. And big tech maybe is no longer entitled to be as big as it is. Misuse of bigness can be in violation of antitrust laws. There may be nothing that prohibits the amassment of market power, but misuse of that power can violate antitrust laws. And so it's not only privacy, consumer protection, but also antitrust that has to be assessed.

You all know, America is well aware that we all carry with us the most sophisticated tracking devices ever invented. Our phones monitor our movements on a minute-by-minute basis. They are

privy to the most intimate conversations. We use them as credit cards and to monitor our health. They may know us better than we know ourselves, and the ones collecting the data yielded by those phones know us the best of all. That is also big tech. And worse, there is little that any individual can do about it.

That's not the basis of innovation. It's an invitation to disaster. We have seen this year that the misuse and abuse of our data represents a threat to consumer safety but also national security, the defense of our nation, and the health of our democracy. We need changes.

I look forward to collaborating with my colleagues on this Committee to pass bipartisan legislation that sets clear rules of the road on consumer privacy and other issues essential to our national security. And we need to do it not only because Europe has done it, not only because California has done it, but these rules are long overdue. We can't simply endorse the status quo.

And these real changes must include, at a minimum, rules passed by Congress that will provide all Americans with the same or better rights and redress than California and Europe, move us beyond the failed notice and choice regime; and set requirements for transparency, access and control; end the secret harvesting and sale of personal data through requiring reasonable data minimization; provide the FTC with the resources, and expertise, and structure to enforce the rules; establish meaningful penalties on first offenses to pose a credible deterrent, and recognize the importance of state attorneys general to ensure that violations are investigated and punished.

And finally, to end where I began, any rules that we pass need to be enforced. That FTC consent decree already on the books should have prevented Cambridge Analytica. The FTC simply can't claim to be surprised here. If we let Facebook and Google police themselves, set their own goal posts, make their own rules, they will always come up short. And so I look forward to hearing whether the FTC is up to this task, and we need a commitment from you to end the cycle of impunity.

Thank you, Mr. Chairman.

Senator MORAN. Thank you, Senator Blumenthal.

Senator Nelson, would you care to make an opening statement?

STATEMENT OF HON. BILL NELSON,
U.S. SENATOR FROM FLORIDA

Senator NELSON. Thank you, Mr. Chairman.

The FTC, the consumer—premier consumer protection agency set up in 1914, it's the bedrock of American consumer protection. The agency is tasked with policing and promoting competitive markets and with protecting consumers from unfair or deceptive acts or practices.

And despite the important mission, an enormous mandate, the FTC remains a relatively small agency. For years, I have consistently advocated that the FTC be provided with more resources so that you can effectively do your job, particularly during an age where the American economy is becoming increasingly complex and digitized. And with a little over a thousand full-time employees, the FTC can only do so much in a 19-trillion-dollar economy.

It's my hope that Congress will finally do the right thing by providing the FTC with the increased funding and personnel to police the marketplace and to protect American consumers from a myriad of scams, frauds, corporate practices that fleece them from their hard-earned money.

It is my hope that the FTC continues to operate in a bipartisan and a consensus manner. It is all too common today, not only from this institution but from the administrative agencies, that we are beginning to see creep into the agencies the same thing that is happening in the body politic: the tribalism that has now entered and dominating our political milieu.

The Commission has a long, proud history of bipartisanship. It's a tradition from which other independent agencies should draw. Too often agencies like the FCC or the CPSC, Consumer Product Safety Commission, they get mired in competing individual ideological agendas. And we speak in this Committee from a position of knowing because we have the oversight of both the FCC and the CPSC. And by and large, the FTC has avoided this kind of dysfunction, and it's served the American consumer well. Congress obviously can learn from your example of bipartisan deliberation and cooperation.

And to the FTC commissioners before us in the Committee today, thank you for your public service. It has been a privilege and an honor to have worked closely with you during the tenure in my capacity as Ranking Member on this Committee.

Thank you again, Mr. Chairman.

Senator MORAN. Thank you, Senator Nelson.

We are now ready for that testimony. We have before us today Trade Commission Chairman Joseph Simons, Commissioner Rohit Chopra, Commissioner Noah Phillips, Commissioner Rebecca Kelly Slaughter, and Commissioner Christine Wilson.

It is my understanding that your testimony is going to be a joint testimony and will be delivered by the Chairman.

Mr. Chairman, you are recognized.

STATEMENT OF HON. JOSEPH J. SIMONS, CHAIRMAN, FEDERAL TRADE COMMISSION

Mr. SIMONS. Chairman Moran, Ranking Member Blumenthal, and members of the Subcommittee, it is an honor to appear before you today, especially alongside my esteemed colleagues.

As Senator Nelson said, the FTC is a highly productive and efficient, independent agency with a broad dual mission: to protect consumers and to maintain competition. The FTC has a long history of bipartisanship and we work hard to maintain it and we will continue to work hard to maintain it.

I'm going to focus my oral remarks today on data security and privacy. Year after year, these issues top the list of the FTC's consumer protection priorities. The Commission has challenged numerous privacy and data security practices under Section 5 of the FTC Act. Our program in these areas, which includes enforcement as well as consumer and business education, has been highly successful within the limits of our authority. But as mentioned, Section 5 is an imperfect tool.

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

The Commission also urges the Congress to consider enacting privacy legislation that would be enforced by the FTC. While we remain committed to vigorously enforcing existing privacy-related statutes, we are hopeful that Congress can craft legislation that would more seamlessly balance consumers' legitimate concerns regarding collection, use, and sharing of their data while providing the flexibility to foster competition and innovation to the benefit of consumers. This process understandably will involve difficult value judgments and tradeoffs that are appropriately left to the Congress. No matter the specific privacy or data-security laws that Congress enacts, the Commission commits to using its extensive experience and expertise to enforce them vigorously and enthusiastically.

Irrespective of any new legislation, privacy and data security will continue to be a top enforcement priority for us, and we will use every tool in our existing arsenal to redress consumer harm to the extent we can under existing authority.

To date, the Commission has brought more than 60 cases alleging that companies failed to reasonably protect their consumer data as well as more than 60 general privacy cases. Since I became Chairman, we have announced eight new enforcement actions, seven policy initiatives, and a Notice of Proposed Rulemaking to give active military consumers free credit monitoring. And we have launched our small business cyber education campaign. We have no intention of slowing down.

The FTC also enforces the Privacy Shield Framework, a mechanism that enables data to be legally transferred from Europe to the United States. Our commitment to support the Privacy Shield Framework is unwavering, and we will continue to enforce and uphold it.

Let me mention one additional item. The FTC has a tradition of self-critical examination, and our public hearings on Competition and Consumer Protection in the 21st Century are exploring whether we need to adjust our enforcement efforts, our priorities, and our policies in light of changes in the marketplace and new thinking.

Issues we are discussing include whether we need to change the governing standard for antitrust enforcement, whether merger enforcement has been too lax; our remedial authority, whether it's sufficient with respect to privacy and data security; and many other critical issues. The comments and discussions on these issues will inform the FTC's enforcement and policy priorities.

We are committed to maximizing our resources to enhance our effectiveness in protecting consumers and promoting competition, to anticipate and to respond to changes in the marketplace, and to meet current and future challenges.

We look forward to working with the Subcommittee and the Congress, and I would be happy to answer your questions. Thank you.

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

PREPARED STATEMENT OF THE FEDERAL TRADE COMMISSION

I. Introduction

Chairman Moran, Ranking Member Blumenthal, and members of the Subcommittee, the Federal Trade Commission ("FTC" or "Commission") is pleased to appear before you today to discuss the FTC's work to protect consumers and promote competition.[1]

The FTC is an independent agency with three main bureaus: the Bureau of Consumer Protection ("BCP"); the Bureau of Competition ("BC"); and the Bureau of Economics ("BE"), which supports both BCP and BC. The FTC is the only Federal agency with a broad mission to both protect consumers and maintain competition in most sectors of the economy. Its jurisdiction ranges from privacy and data security, to mergers and acquisitions, to anticompetitive tactics by pharmaceutical and other companies. We enforce the law across a range of sectors, including high technology and emerging industries. The FTC has a long history of bipartisanship and cooperation, and we work hard to maintain it.

The FTC has broad law enforcement responsibilities under the Federal Trade Commission Act,[2] 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.[3] The Commission pursues a vigorous and effective law enforcement program, and the impact of its work is significant. In addition to its consumer protection work, its competition enforcement program is critically important to maintaining competitive markets across the country; vigorous competition results in lower prices, higher quality goods and services, and innovative and beneficial new products and services.

The FTC investigates and prosecutes those engaging in unfair or deceptive acts or practices or unfair methods of competition, and seeks to do so without impeding lawful business activity. The agency has a varied toolkit to advance its mission. For example, the Commission collects consumer complaints from the public and maintains one of the most extensive consumer protection complaint databases, Consumer Sentinel. The FTC and other federal, state, and local law enforcement agencies use these complaints in their law enforcement and policy efforts. The FTC also has rulemaking authority. In addition to the FTC's Magnuson-Moss rulemaking authority, Congress has given the agency discrete rulemaking authority under the Administrative Procedure Act ("APA") over specific topics. The agency regularly analyzes its rules, including seeking public feedback, to ensure their continued efficacy. 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 seeks to promote an honest and competitive marketplace and works with foreign counterparts to harmonize competition and consumer protection laws across the globe.

To complement its enforcement efforts, the FTC pursues a consumer protection and competition policy and research agenda to improve agency decision-making, and engages in advocacy and education initiatives. This past September, the Commission began holding its *Hearings on Competition and Consumer Protection in the 21st Century*.[4] These multi-day, multi-part public hearings are exploring whether broad-based changes in the economy, evolving business practices, new technologies, or international developments might require adjustments to competition and consumer protection law, enforcement priorities, and policy. To date, we have heard from more than 200 panelists and received more than 700 public comments. This project is ongoing, and the FTC will continue to hold public hearings through early 2019.

This testimony provides a short overview of the FTC's work to protect U.S. consumers and competition, including highlights of some of the agency's major recent

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

[2] 15 U.S.C. § 41 et seq.

[3] *See https://www.ftc.gov/enforcement/statutes.*

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

activities and initiatives. It also discusses the Commission's international efforts to protect consumers and promote competition.

II. Consumer Protection Mission

As the Nation's primary consumer protection agency, the FTC has a broad mandate to protect consumers from unfair, deceptive, or fraudulent practices in the marketplace. It does this by, among other things, pursuing law enforcement actions to stop unlawful practices, and educating consumers and businesses about their rights and responsibilities. The FTC's enforcement and education efforts include working closely with federal, state, international, and private sector partners on joint initiatives. The Commission's structure, research capacity, and committed staff enable it to pursue its mandate of protecting consumers and competition in an ever-changing marketplace. Among other issues, the FTC works to protect privacy and data security, helps ensure that advertising claims to consumers are truthful and not misleading, addresses fraud across most sectors of the economy, and combats illegal robocalls.

The FTC's law enforcement orders prohibit defendants from engaging in further illegal activity, impose data security and other compliance obligations, and in some cases, ban defendants from engaging in certain conduct altogether. When possible, the FTC collects money to return to harmed consumers. During FY 2018, Commission actions resulted in over $1.6 billion being returned to consumers. Specifically, the Commission returned more than $83.3 million in redress to consumers, and FTC orders—including in the *Volkswagen,*[5] *Amazon,*[6] and *NetSpend*[7] matters—required defendants to self-administer consumer refund programs worth more than $1.6 billion. The FTC also collected civil penalties worth more than $2.4 million pursuant to these orders in FY 2018. In addition, the Commission deposited an additional $8.5 million into the U.S. Treasury.

A. Protecting Consumer Privacy and Data Security

The FTC has served as the primary Federal agency charged with protecting consumer privacy, dating back to the 1970 enactment of the Fair Credit Reporting Act ("FCRA").[8] The FTC has played a key role enforcing this law, which protects sensitive data used for credit, employment, insurance, and other decisions from disclosure to unauthorized persons.

Beginning in the mid-1990s, with the development of the Internet as a commercial medium, the FTC expanded its focus on privacy to reflect the growing collection, use, and sharing of consumer data in the commercial marketplace. At that time, the FTC began concentrating on children's privacy, and in 1998, Congress enacted the Children's Online Privacy Protection Act to address the unique privacy and safety risks created when young children—those under 13 years of age—access the Internet.[9] Since then, the Commission also has used Section 5 of the FTC Act,[10] which empowers the Commission to take action against deceptive or unfair commercial practices,[11] as its primary source of legal authority in the privacy and data security arena.

Year after year, privacy and data security top the list of consumer protection priorities at the Federal Trade Commission. These issues are critical to consumers and businesses alike. Press reports about privacy practices and data breaches are increasingly common—such as the reports about Facebook and Equifax, just to name two companies, both of which the FTC is currently investigating.[12] Some consumers are concerned when their data are used in ways they do not expect or understand. Hackers and others seek to exploit vulnerabilities, obtain unauthorized access to

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

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

[7] *FTC v. NetSpend Corp.,* No. 1:16-cv-04203–AT (N.D. Ga. Apr. 10, 2017), *https://www.ftc.gov/enforcement/cases-proceedings/netspend-corporation.*

[8] 15 U.S.C. § 1681.

[9] Children's Online Privacy Protection Act of 1998, 15 U.S.C. §§ 6501–6506.

[10] 15 U.S.C. § 45.

[11] The Commission also enforces sector-specific statutes containing privacy and data security provisions, such as the Gramm-Leach-Bliley Act ("GLB Act"), Pub. L. No. 106–102, 113 Stat. 1338 (1999) (codified as amended in scattered sections of 12 and 15 U.S.C.), and the Children's Online Privacy Protection Act ("COPPA"), 15 U.S.C. §§ 6501–6506.

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

consumers' sensitive information, and potentially misuse it in ways that can cause serious harms to consumers as well as businesses.

These incidents are not a new phenomenon. In fact, we have been hearing about data breaches for well over a decade. These incidents fuel the debate about both privacy and data security, and the best ways to ensure them. The FTC has long used its broad authority under Section 5 of the FTC Act to address consumer harms arising from new technologies and business practices and consequently has challenged certain deceptive or unfair privacy and security practices.[13] The FTC's privacy and data security program—which includes enforcement as well as consumer and business education—helps to promote a well-functioning market.

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

To date, the Commission has brought more than 60 cases alleging that companies failed to implement reasonable data security safeguards, as well as more than 60 general privacy cases.[14] The FTC has aggressively pursued privacy and data security cases in myriad areas, including financial privacy, children's privacy, health privacy, and the Internet of Things.[15]

For example, the Commission recently gave final approval to an expanded settlement with ride-sharing platform company Uber Technologies related to allegations that the company failed to reasonably secure sensitive consumer data stored in the cloud.[16] As a result, an intruder allegedly accessed personal information about Uber customers and drivers, including more than 25 million names and e-mail addresses, 22 million names and mobile phone numbers, and 600,000 names and driver's license numbers. Under the final settlement, Uber must notify the FTC about future incidents and meet other order requirements relating to privacy or data security, with the threat of strong civil penalties if it fails to comply. And earlier this year, the Commission approved a settlement with PayPal, Inc. to resolve allegations that its Venmo peer-to-peer payment service misled consumers about their ability to control the privacy of their Venmo transactions and the extent to which their financial accounts were protected by "bank grade security systems."[17] Among other order requirements, Venmo must make certain disclosures to consumers or face the threat of civil penalties for the failure to do so.

The Commission takes seriously its obligation to protect children's privacy. In the Commission's first children's privacy case involving Internet-connected toys, the FTC announced a settlement—including a $650,000 civil penalty—with electronic toy manufacturer VTech Electronics for violations of the Children's Online Privacy Protection Rule.[18] The FTC alleged that the company collected children's personal information online without first obtaining parental consent, and failed to take reasonable steps to secure the data it collected.[19]

Section 5, however, is not without limitations. For example, Section 5 does not provide for civil penalties, reducing the Commission's deterrent capability. The Commission also lacks authority over non-profits and over common carrier activity, even

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[13] 15 U.S.C. § 45(a). The FTC also enforces sector-specific statutes that protect certain health, credit, financial, and children's information. *See* 16 C.F.R. Part 318 (Health Breach Notification Rule); 15 U.S.C. §§ 1681–1681x (Fair Credit Reporting Act); 16 C.F.R. Parts 313–314 (Gramm-Leach-Bliley Privacy and Safeguards Rules), implementing 15 U.S.C. §§ 6801–6809; 16 C.F.R. Part 312 (Children's Online Privacy Protection Rule), implementing 15 U.S.C. §§ 6501–6506.

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

[15] *Id.*

[16] *See* Press Release, FTC, *Federal Trade Commission Gives Final Approval to Settlement with Uber* (Oct. 26, 2018), *https://www.ftc.gov/news-events/press-releases/2018/10/federal-trade-commission-gives-final-approval-settlement-uber.* Uber suffered a second, larger breach of drivers' and riders' data in October-November 2016, and failed to disclose that breach to consumers or the FTC for more than a year, despite being the subject of an ongoing FTC investigation of its data security practices during that time.

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

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

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

though the acts or practices of these market participants often have serious implications for consumer privacy and data security. Finally, the FTC lacks broad APA rulemaking authority for data security generally.[20] The Commission continues to reiterate its longstanding bipartisan call for comprehensive data security legislation.

The Commission also must continue to prioritize, examine, and address privacy and data security with a fresh perspective. Under the umbrella of the *21st Century Hearings,* the Commission recently announced panels taking place over four days, specifically addressing consumer privacy and data security.[21] The Commission's remedial authority with respect to privacy and data security will be a key topic in these panels, and the comments and discussions on these issues will be one source to inform the FTC's enforcement and policy priorities. In addition, the Commission recently announced its fourth PrivacyCon, an annual event that reviews evolving privacy and data security issues.[22]

Recently, the European Union put into effect its General Data Protection Regulation ("GDPR"). GDPR, like the EU's data protection directive before it, imposes certain restrictions on the ability of companies to transfer consumer data from the EU to other jurisdictions. The EU–U.S. Privacy Shield Framework is a voluntary mechanism companies can use to promise certain protections for data transferred from Europe to the United States—and the FTC enforces the promises made by Privacy Shield participants under its jurisdiction.[23] The Commission is committed to the success of the EU–U.S. Privacy Shield Framework, a critical tool for protecting privacy and enabling cross-border data flows. The FTC has actively enforced Privacy Shield—bringing four cases in just the last two months—and will continue to do so when Privacy Shield participants fail to meet their legal obligations.[24] Chairman Simons recently participated, along with the Secretary of Commerce, in the second annual review of the functioning of the Privacy Shield framework with our European government counterparts. The Commission also will continue to work with the Department of Commerce, other agencies in the U.S. government, and with its partners in Europe to ensure businesses and consumers can continue to benefit from Privacy Shield.

Finally, the Commission urges Congress to consider enacting privacy legislation that would be enforced by the FTC. While the agency remains committed to vigorously enforcing existing privacy-related statutes, Congress may be able to craft Federal legislation that would more seamlessly address consumers' legitimate concerns regarding the collection, use, and sharing of their data and provide greater clarity to businesses while retaining the flexibility required to foster competition and innovation. The Commission and its staff are prepared to share our expertise and assist with formulating appropriate legislation, as we did with the Children's Online Privacy Protection Act, CAN–SPAM, and the Gramm-Leach-Bliley Act. This process understandably will involve difficult value judgments and tradeoffs that are appropriately left to Congress. No matter the specific laws Congress enacts in the privacy and/or data security arenas, the Commission commits to using its extensive expertise and experience to enforce them vigorously, consistent with its ongoing and bipartisan emphasis on privacy and data security enforcement.

B. Truthfulness in National Advertising

Ensuring that advertising is truthful and not misleading has always been one of the FTC's core missions because it allows consumers to make well-informed decisions about how to best use their resources and promotes the efficient functioning of market forces by promoting the dissemination of accurate information. Below are a few recent examples of the Commission's work in this area.

This past year, the agency has continued to bring cases challenging false and unsubstantiated health claims, including those targeting older consumers, consumers affected by the opioid crisis, and consumers with serious medical conditions. The

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

[21] *See* Press Release, FTC, *FTC Announces Sessions on Consumer Privacy and Data Security as Part of Its Hearings on Competition and Consumer Protection in the 21st Century* (Oct. 26, 2018), *https://www.ftc.gov/news-events/press-releases/2018/10/ftc-announces-sessions-consumer-privacy-data-security-part-its.*

[22] *See* Press Release, FTC, *FTC Announces PrivacyCon 2019 and Calls for Presentations* (Oct. 24, 2018), *https://www.ftc.gov/news-events/press-releases/2018/10/ftc-announces-privacycon-2019-calls-presentations.*

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

[24] *See* Press Release, *FTC, FTC Reaches Settlements with Four Companies That Falsely Claimed Participation in the EU–U.S. Privacy Shield* (Sept. 27, 2018), *https://www.ftc.gov/news-events/press-releases/2018/09/ftc-reaches-settlements-four-companies-falsely-claimed.*

Commission has brought cases challenging products that claim to improve memory and ward off cognitive decline, relieve joint pain and arthritis symptoms, and even reverse aging.[25] We have challenged bogus claims that treatments could cure, treat, or mitigate various serious diseases and ailments, including those affecting children and older consumers.[26] The Commission also has sued companies that claimed, allegedly without scientific evidence, that using their products could alleviate the symptoms of opioid withdrawal and increase the likelihood of overcoming opioid dependency.[27] Finally, the Commission obtained an order barring a marketer from making deceptive claims about its products' ability to mitigate the side effects of cancer treatments.[28]

When consumers with serious health concerns fall victim to unsupported health claims, they may put their health at risk by avoiding proven therapies and treatments. Through consumer education, including the FTC's advisories, the agency urges consumers to check with a medical professional before starting any treatment or product to treat serious medical conditions.[29]

The FTC also protects consumers from illegal practices in the financial area. For example, last month, the Commission alleged that online student loan refinancer Social Finance made deceptive claims about the average savings members could achieve by refinancing—sometimes doubling the average savings.[30] The Commission also filed a complaint against Lending Club, an online lender, alleging that its marketing was deceptive because it claimed its loans had "no hidden fees," when in fact consumers later learned they were charged hundreds, and even thousands, of dollars in origination fees.[31]

C. Protecting Consumers from Fraud

Fighting fraud is a major focus of the FTC's law enforcement efforts. The Commission's anti-fraud program tracks down and stops some of the most egregious scams that prey on U.S. consumers—often, the most vulnerable consumers who can least afford to lose money. For example, reports about imposter scams have been on the rise over the past few years, and many of these scams target older Americans.[32] Fraudsters falsely claiming to be government agents (including the IRS and even the FTC), family members, or well-known tech companies contact consumers and pressure them to send money, often via cash-like payment methods such as gift cards or money transfers, or trick them into providing personal information. Fraudsters also target small businesses, sometimes cold-calling businesses to "collect" on invoices they do not owe.

In 2017, the FTC joined federal, state, and international law enforcement partners in announcing "Operation Tech Trap," a nationwide and international crackdown on tech support scams that dupe consumers into believing their computers are infected with viruses and malware, and then charge them hundreds of dollars for

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[25] *See, e.g.,* Telomerase Activation Sci., Inc. *et al.,* No. C–4644 (Apr. 19, 2018), *https://www.ftc.gov/enforcement/cases-proceedings/142–3103/telomerase-activation-sciences-inc-noel-thomas-patton-matter; FTC v. Health Research Labs., Inc.,* No. 2:17-cv-00467 (D. Maine Nov. 30, 2017), *https://www.ftc.gov/enforcement/cases-proceedings/152-3021/health-research-laboratories-llc.*

[26] *FTC v. Regenerative Med. Grp., Inc.,* No. 8:18-cv-01838 (C.D. Cal. filed Oct. 12, 2018), *https://www.ftc.gov/enforcement/cases-proceedings/172-3062/regenerative-medicalgroup-inc; A&O Enters., Inc.,* No. 1723016 (Sept. 20, 2018), *https://www.ftc.gov/enforcement/cases-proceedings/172-3016/ao-enterprises-doing-business-iv-bars-aaron-k-roberts-matter.*

[27] *FTC v. Catlin Enters., Inc.,* No. 1:17-cv-403 (W.D. Tex. May 17, 2017), *https://www.ftc.gov/enforcement/cases-proceedings/1623204/catlin-enterprises-inc.* In addition, in conjunction with the FDA, the FTC issued letters to companies that appeared to be making questionable claims in order to sell addiction or withdrawal remedies. *See* Press Release, FTC, *FTC, FDA Warn Companies about Marketing and Selling Opioid Cessation Products* (Jan. 24, 2018), *https://www.ftc.gov/news-events/press-releases/2018/01/ftc-fda-warn-companies-about-marketing-selling-opioid-cessation.*

[28] *FTC v. CellMark Biopharm,* No. 2:18-cv-00014-JES-CM (M.D. Fla. Jan. 12, 2018), *https://www.ftc.gov/enforcement/cases-proceedings/162-3134/cellmark-biopharma-derek-e-vest.*

[29] FTC Consumer Blog, *Treatments and Cures, https://www.consumer.ftc.gov/topics/treatments-cures.*

[30] Press Release, FTC, *Online Student Loan Refinance Company SoFi Settles FTC Charges, Agrees to Stop Making False Claims About Loan Refinancing Savings* (Oct. 28, 2018), *https://www.ftc.gov/news-events/press-releases/2018/10/online-student-loan-refinance-company-sofi-settles-ftc-charges.*

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

[32] FTC Fiscal Year 2019 Congressional Budget Justification, *https://www.ftc.gov/reports/fy-2019-congressional-budget-justification.*

unnecessary repairs.[33] The FTC brought actions to shut down these deceptive operations and also developed consumer education materials to help consumers avoid falling victim to tech support scams in the first place.[34] This past June, the FTC announced "Operation Main Street," an initiative to stop small business scams. The FTC, jointly with the offices of two U.S. Attorneys' Offices, the New York Division of the U.S. Postal Inspection Service, eight state Attorneys General, and the Better Business Bureau, announced 24 actions targeting fraud aimed at small businesses and released new education materials to help small businesses identify and avoid potential scams.[35]

In September, the Commission brought an action against Sunkey Publishing, alleging that the lead generation operation falsely claimed to be affiliated with the military and promised to use consumers' information only for military recruitment purposes. Instead, the FTC alleged that Sunkey used the information it collected to make millions of illegal telemarketing calls and sold the information to post-secondary schools.[36] This action is part of the FTC's work in the area of lead generation, which is the process of identifying and cultivating individual consumers who are potentially interested in purchasing a product or service.[37]

The FTC strives to stay ahead of scammers, who are always on the lookout for new ways to market old schemes. For example, there has been an increase in frauds involving cryptocurrencies—digital assets that use cryptography to secure or verify transactions.[38] The Commission has worked to educate consumers about cryptocurrencies and hold fraudsters accountable.[39] In March, the FTC halted the operations of Bitcoin Funding Team, which allegedly falsely promised that participants could earn large returns by enrolling in moneymaking schemes and paying with cryptocurrency.[40] And in June, the FTC hosted a workshop to explore how scammers are exploiting public interest in cryptocurrencies like Bitcoin and Litecoin, and discussed ways to empower and protect consumers against this growing threat.[41]

In addition to targeting scammers, the FTC also brings actions against companies that facilitate fraud, often by ignoring red flags associated with fraudulent transactions. Money transfers are a preferred method of payment for fraudsters because money sent through money transfer systems can be retrieved quickly at locations all over the world, and once retrieved, the money is all but impossible to recover. Earlier this month, MoneyGram agreed to pay $125 million to settle allegations that the company failed to take steps required under a 2009 FTC order to crack down on fraudulent money transfers that cost U.S. consumers millions of dollars, and also

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

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

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

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

[37] *See generally* FTC Staff Perspective, *"Follow the Lead" Workshop* (Sept. 2016), *https://www.ftc.gov/system/files/documents/reports/staff-perspective-follow-lead/staff_perspective_follow_the_lead_workshop.pdf.*

[38] *See, e.g.,* FTC, *What to Know About Cryptocurrency* (Oct. 2018), *https://www.consumer.ftc.gov/articles/what-know-about-cryptocurrency.*

[39] *See, e.g.,* FTC Consumer Blog, *Know the risks before investing in cryptocurrencies, https://www.ftc.gov/news-events/blogs/business-blog/2018/02/know-risks-investing-cryptocurrencies;* FTC Consumer Blog, *Protecting your devices from cryptojacking, https://www.consumer.ftc.gov/blog/2018/06/protecting-your-devices-cryptojacking.*

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

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

to resolve allegations that the company violated a 2012 deferred prosecution agreement with the U.S. Department of Justice ("DOJ").[42]

D. Illegal Robocalls

Illegal robocalls also remain a significant consumer protection problem and consumers' top complaint to the FTC. They repeatedly disturb consumers' privacy, and frequently use fraud and deception to pitch goods and services, leading to significant economic harm. In FY 2018, the FTC 1received more than 3.7 million robocall complaints.[43] The FTC has used many methods to fight these illegal calls, including 136 enforcement actions to date.[44] Technological advances, however, have allowed bad actors to place millions or even billions of calls, often from abroad, at very low cost, and in ways that are difficult to trace. This phenomenon continues to infuriate consumers and challenge enforcers.

Part of the huge uptick in illegal calls, including robocalls, is attributable to relatively recent technological developments that facilitate telemarketing without requiring a significant capital investment in specialized hardware and labor.[45] Today, robocallers benefit from automated dialing technology, inexpensive international and long distance calling rates, and the ability to move internationally and employ cheap labor. The result: law-breaking telemarketers can place robocalls for a fraction of one cent per minute. Moreover, technological changes have also affected the marketplace by enabling telemarketers to conceal their identities and "spoof" caller IDs when they place calls.[46]

Recognizing that law enforcement, while critical, is not enough to solve the problem of illegal calls, the FTC has taken steps to spur the marketplace to develop technological solutions. For instance, from 2013 to 2015, the FTC led four public challenges to incentivize innovators to help tackle the unlawful robocalls that plague consumers.[47] The FTC's challenges contributed to a shift in the development

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[42] Press Release, FTC, *MoneyGram Agrees to Pay $125 Million to Settle Allegations that the Company Violated the FTC's 2009 Order and Breached a 2012 DOJ Deferred Prosecution Agreement* (Nov. 8, 2018), *https://www.ftc.gov/news-events/press-releases/2018/11/moneygram-agrees-pay-125-million-settle-allegations-company; see also FTC v. The Western Union Co.,* No. 1:17-cv-00110 (M.D. Pa. Jan. 19, 2017), *https://www.ftc.gov/enforcement/cases-proceedings/122-3208/western-union-company.*

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

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

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

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

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

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and availability of technological solutions in this area, particularly call-blocking and call-filtering products. Consumers can access information about potential solutions available to them on the FTC's website.[48]

In addition, the FTC regularly works with its state, federal, and international partners to combat illegal robocalls. For example, this spring the FTC and the Federal Communications Commission ("FCC") co-hosted a Joint Policy Forum on illegal robocalls to discuss the regulatory and enforcement challenges posed by this activity, as well as a public expo featuring new technologies, devices, and applications to minimize or eliminate the number of illegal robocalls that consumers receive.[49] As described in more detail in the International Cooperation section, the Commission also participated in several international initiatives focusing on robocalls and other calling abuses.[50]

Also, for many years, the Commission has testified in favor of eliminating the common carrier exemption. The exemption is outdated and no longer makes sense in today's marketplace where the lines between telecommunications and other services are increasingly blurred. It impedes the FTC's work tackling illegal robocalls and more broadly circumscribes other enforcement initiatives. For example, a carrier that places, or assists and facilitates, illegal telemarketing may be beyond the Commission's reach because of the common carrier exemption. Likewise, the exemption may frustrate the Commission's ability to obtain complete relief for consumers when there are multiple parties, some of whom are common carriers. It also may pose difficulties when a company engages in deceptive or unfair practices involving a mix of common carrier and non-common carrier activities. Finally, litigation has been complicated by entities that attempt to use their purported status as common carriers to shield themselves from FTC enforcement.[51]

E. Consumer and Business Education and Outreach

Public outreach and education is another critical element of the FTC's efforts to fulfill its consumer protection mission. The Commission's education and outreach programs reach tens of millions of people each year through the FTC's website, the media, and partner organizations that disseminate consumer information on the agency's behalf. The FTC delivers actionable, practical, plain-language guidance on dozens of issues, and updates its consumer education materials whenever it has new information to share. The FTC disseminates these tips through articles, blog posts, social media, infographics, videos, audio, and campaigns. For example, in response to the enactment of the Economic Growth, Regulatory Relief, and Consumer Protection Act,[52] which allows consumers to freeze their credit and place one-year fraud alerts for free, the Commission updated its IdentityTheft.gov website to help consumers take advantage of the new protections.[53]

Among the key audiences served by the FTC are older adults, as described in a recent report to Congress that details how older adults experience scams.[54] For example, according to the FTC's 2017 data, people 60 and over are much more likely

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www.ftc.gov/news-events/press-releases/2015/08/ftc-awards-25000-top-cash-prize-contest-winning-mobile-app-blocks; Press Release, FTC, *FTC Announces Winners of "Zapping Rachel" Robocall Contest* (Aug. 28, 2014), *https://www.ftc.gov/news-events/press-releases/2014/08/ftc-announces-winners-zapping-rachel-robocall-contest.*

[48] *See https://www.consumer.ftc.gov/features/how-stop-unwanted-calls.*

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

[50] *See, e.g.,* Memorandum of Understanding Among Public Authorities of the Unsolicited Communications Enforcement Network Pertaining to Unlawful Telecommunications and SPAM (May 2016), *https://www.ftc.gov/policy/cooperation-agreements/international-unlawful-telecommunications-spam-enforcement-cooperation;* Press Release, FTC, *FTC Signs Memorandum of Understanding With Canadian Agency To Strengthen Cooperation on Do Not Call, Spam Enforcement* (Mar. 24, 2016), *https://www.ftc.gov/news-events/press-releases/2016/03/ftc-signs-memorandum-understanding-canadian-agency-strengthen*

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

[52] Pub. L. No: 115–174.

[53] *See,* Press Release, FTC, *Starting Today, New Federal Law Allows Consumers to Place Free Credit Freezes and Yearlong Fraud Alerts* (Sept. 21, 2018), *https://www.ftc.gov/news-events/press-releases/2018/09/starting-today-new-law-allows-consumers-place-free-credit-freezes.*

[54] FTC Report, *Protecting Older Consumers: 2017–2018* (Oct. 2018), *https://www.ftc.gov/reports/protecting-older-consumers-2017–2018-report-congress-federal-trade-commission.*

to report fraud than people in their 20s, but far less likely to say they lost money.[55] However, when people 80 and over report losing money to a scam, they lose much more than do their younger counterparts.[56] As a response to older adults' experience with scams, the FTC created its Pass It On campaign,[57] which gives older adults the information they need to start a conversation about scams with family and friends.

The Commission also works to provide companies with resources on a variety of issues that affect businesses. Just last month, we released our "Cybersecurity for Small Business" campaign, based on concerns we heard from small businesses. The campaign discusses a dozen need-to-know topics, such as "Cybersecurity Basics," "Tech Support Scams," and "Hiring a Web Host."[58]

III. Competition Mission

In addition to the work of BCP described above, the FTC enforces U.S. antitrust law in many sectors that directly affect consumers and their wallets, such as health care, consumer products and services, technology, manufacturing, and energy. The Commission shares Federal antitrust enforcement responsibilities with the Antitrust Division of the Department of Justice.

One of the agencies' principal responsibilities is to prevent mergers that may substantially lessen competition. Under U.S. law, parties to certain mergers and acquisitions must file premerger notification and observe the statutorily prescribed waiting period before consummating their transactions. Premerger filings under the Hart-Scott-Rodino ("HSR") Act have increased steadily since FY 2013. In FY 2017, the antitrust agencies received over 2,000 HSR filings for the first time since 2007, bringing filings in the past Fiscal Year to the average over the past 20 years.[59] The vast majority of reported transactions do not raise competitive concerns and the agencies clear those non-problematic transactions expeditiously. But when the evidence gives the Commission reason to believe that a proposed merger likely would be anticompetitive, it does not hesitate to intervene. Since the beginning of FY 2017, the Commission has challenged 45 mergers after the evidence showed that they would likely harm consumers. Although many of these cases were resolved through divestiture settlements, in FY 2018 alone, the Commission voted to initiate litigation to block five mergers, each of which has required a significant commitment of resources. Three of the challenges ended successfully when the parties abandoned the transactions before the district court could issue a decision,[60] while the other two are still being litigated.[61] In two of these matters, a federal district court granted the Commission's motion for a preliminary injunction pending an administrative trial, and issued a decision resolving important issues of merger law.[62]

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

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[55] *Id.* at 5.

[56] *Id.* at 6.

[57] *See www.ftc.gov/PassItOn* and *www.ftc.gov/Pasalo.* The campaign has distributed more than 9.5 million print publications since its creation, including 2.2 million in Fiscal Year 2018.

[58] *See Cybersecurity Resources for Your Small Business* (Oct. 18, 2018), *https://www.ftc.gov/news-events/blogs/business-blog/2018/10/cybersecurity-resources-your-small-business.*

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

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

[61] *Tronox Ltd.,* Dkt. 9377 (Dec. 5, 2017), *https://www.ftc.gov/enforcement/cases-proceedings/171-0085/tronoxcristal-usa; Otto Bock HealthCare North America, Inc.,* Dkt. 9378 (Dec. 20, 2017), *https://www.ftc.gov/enforcement/cases-proceedings/171-0231/otto-bock-healthcarefreedom-innovations.*

[62] *FTC v. Wilhelmsen,* No. 1:18-cv-00414 (D.D.C. Feb. 23, 2018), *https://www.ftc.gov/enforcement/cases-proceedings/171-0161/wilhelm-wilhelmsen-et-al-ftc-v; FTC v. Tronox, Ltd.,* No. 1:18-cv-01622 (D.D.C. Jul. 10, 2018), *https://www.ftc.gov/enforcement/cases-proceedings/171-0085/tronox-limited-et-al-ftc-v.*

agency's mission. The Commission appreciates Congress's attention to its resource needs, including the need to hire outside experts.

The Commission also maintains a robust program to identify and stop anticompetitive conduct, and it currently has a number of cases in active litigation.[63] For over twenty years and on a bipartisan basis, the Commission has prioritized ending anticompetitive reverse-payment patent settlements in which a brand-name drug firm pays its potential generic rival to delay entering the market with a lower cost generic product. Following the U.S. Supreme Court's 2013 decision in *FTC v. Actavis, Inc.*,[64] the Commission is in a much stronger position to protect consumers. Since that ruling, the FTC obtained a landmark $1.2 billion settlement in its litigation involving the sleep disorder drug, Provigil,[65] and other manufacturers have agreed to abandon the practice.[66] In addition, the Commission has challenged other anticompetitive conduct by drug manufacturers, including the abuse of government process through sham litigation or repetitive regulatory filings intended to slow the approval of competitive drugs.[67] For example, a Federal court recently ruled that AbbVie Inc. used sham litigation illegally to maintain its monopoly over the testosterone replacement drug Androgel, and ordered $493.7 million in monetary relief to consumers who were overcharged for Androgel as a result of AbbVie's conduct.[68] The Commission also obtained a stipulated injunction in which Mallinckrodt ARD Inc. agreed to pay $100 million and divest assets to settle charges that it had illegally acquired the rights to develop a drug that threatened its monopoly in the U.S. market for a specialty drug used to treat a rare seizure disorder afflicting infants.[69]

The Commission also follows closely developments in the high-technology sector. From smart appliances and smart cars to mobile devices and artificial intelligence, the widespread adoption of new technologies is not only changing the way we live, but also the way firms operate. Although many of these changes may offer consumer benefits, they also raise complex competition issues. Given the important role that technology companies play in the American economy, it is critical that the Commission—in furthering its mission to protect consumers and promote competition—not only understand the current and developing business models, but also ensure that companies in this sector abide by the same rules of competitive markets that apply to any company.[70]

In addition to competition enforcement, the FTC promotes competition principles in advocacy comments to state lawmakers and regulators, as well as to its sister Federal agencies,[71] and in *amicus* briefs filed in Federal courts considering important areas of antitrust law.[72] Last year, the Commission concluded a comprehensive review of its merger remedies to evaluate the effectiveness of the Commission's or-

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

[64] *FTC v. Actavis, Inc.,* 570 U.S. 756 (2013).

[65] Press Release, FTC, *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.*

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

[67] *FTC v. AbbVie Inc.,* No. 14-cv-5151 (E.D. Pa. Sept. 8, 2014), *https://www.ftc.gov/enforcement/cases-proceedings/121–0028/abbvie-inc-et-al.*

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

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

[70] *See, e.g.,* 1–800 Contacts, Inc., No. 9372 (Nov. 14, 2017), *https://www.ftc.gov/enforcement/cases-proceedings/141-0200/1-800-contacts-inc-matter* (Commissioner Phillips dissented in this matter); *DraftKings, Inc./FanDuel Ltd.,* No. 9375 (July 14, 2017), *https://www.ftc.gov/enforcement/cases-proceedings/161-0174/draft-kings-inc-fanduel-limited.*

[71] *See generally https://www.ftc.gov/policy/advocacy.*

[72] Amicus briefs are posted at *https://www.ftc.gov/policy/advocacy/amicus-briefs.*

ders issued between 2006 and 2012, and made public its findings.[73] The Commission continues to conduct merger retrospectives, examining prior merger enforcement decisions to assess their impact on competition and consumers, and plans to broaden this effort going forward. Similarly, through the series of hearings described above, the Commission is devoting significant resources to refresh and, if warranted, renew its thinking on a wide range of cutting-edge competition issues.[74]

IV. International Cooperation

In addition to its domestic programs, the FTC engages in significant international work, much of which relies on the expiring SAFE WEB Act, which the Commission urges Congress to reauthorize. On the competition side, with the expansion of global trade and the operation of many companies across national borders, the FTC and DOJ increasingly engage with foreign antitrust agencies to ensure close collaboration on cross-border cases and convergence toward sound

competition policies and procedures.[75] The FTC effectively coordinates reviews of multijurisdictional mergers and continues to work with its international counterparts to achieve consistent outcomes in cases of possible anticompetitive conduct. The U.S. antitrust agencies facilitate dialogue and promote convergence through multiple channels, including through strong bilateral relations with foreign competition agencies and multilateral competition organization projects and initiatives. When appropriate, the FTC also works with other agencies within the U.S. government to advance consistent competition enforcement policies, practices, and procedures in other parts of the world.[76]

On the consumer protection side, enforcement cooperation is the top priority of the FTC's international consumer protection program. In a global, digital economy, the number of FTC investigations and cases with cross-border components—including foreign-based targets and defendants, witnesses, documentary evidence, and assets—continues to grow. During the last Fiscal Year, the FTC cooperated in 43 investigations, cases, and enforcement projects with foreign consumer, privacy, and criminal enforcement agencies. To sustain this level of productive cooperation, the agency often works through global enforcement networks, such as the International Consumer Protection and Enforcement Network, the Global Privacy Enforcement Network, the Unsolicited Communications Enforcement Network, and the International Mass Marketing Fraud Working Group. Just last month, for example, the FTC organized an Unsolicited Communications Enforcement Network conference with 11 foreign enforcement agencies (plus the FCC) to develop international approaches on robocalls, tech support scams, and other online abuses.

The FTC's key tool for cross-border enforcement is the U.S. SAFE WEB Act.[77] Passed in 2006 and renewed in 2012, this Act strengthens the FTC's ability to work on cases with an international dimension. It has allowed the FTC to share evidence and provide investigative assistance to foreign authorities in cases involving spam, spyware, misleading health and safety claims, privacy violations and data security breaches, and telemarketing fraud. In many of these cases, the foreign agencies investigated conduct that directly harmed U.S. consumers, while in others, the FTC's action led to reciprocal assistance.

The U.S. SAFE WEB Act has been a remarkable success. The FTC has responded to 130 SAFE WEB information sharing requests from more than 30 foreign enforcement agencies. The FTC has issued more than 115 civil investigative demands in more than 50 investigations on behalf of foreign agencies, both civil and criminal. The Commission has also used this authority to file suit in Federal court to obtain judicial assistance for one of its closest law enforcement partners, the Canadian

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

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

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

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

[77] Undertaking Spam, Spyware, and Fraud Enforcement With Enforcers Beyond Borders Act (U.S. SAFE WEB Act), Pub. L. No. 109–455, 120 Stat. 3372, extended by Pub. L. No. 112–203, 126 Stat. 1484 (amending 15 U.S.C. §§ 41 et seq.).

Competition Bureau.[78] The FTC's foreign law enforcement partners similarly have assisted FTC enforcement actions. In cases relying on the U.S. SAFE WEB Act, the FTC has collected millions of dollars in restitution for injured consumers, both foreign and domestic. For example, the FTC worked with DOJ, the Royal Canadian Mounted Police, and other Canadian agencies to obtain a Montreal court order returning nearly $2 million to the U.S. victims of a mortgage assistance and debt relief scam.[79] In the privacy arena, the FTC used key provisions of the U.S. SAFE WEB Act to collaborate successfully with the Office of the Privacy Commissioner of Canada in the FTC's first case involving Internet-connected toys. Specifically, in 2018, the FTC brought an enforcement action against V-Tech, a Hong Kong-based electronics toy manufacturer, alleging COPPA violations.[80] The Act sunsets in 2020: the Commission requests that Congress reauthorize this important authority and eliminate the sunset provision.

The Act also underpins the FTC's ability to participate in cross-border cooperation arrangements, including the EU–U.S. Privacy Shield Framework, which facilitates billions of transatlantic data flows.[81] Critically, the Act also expressly confirms the FTC's authority both to challenge practices occurring in other countries that harm U.S. consumers, a common scenario in cases involving fraud, and to challenge U.S. business practices harming foreign consumers, such as Privacy Shield violations.

A key focus of the FTC's international privacy efforts is support for global interoperability of data privacy regimes. The FTC works with the U.S. Department of Commerce on three key cross-border data transfer programs for the commercial sector: the EU–U.S. Privacy Shield, the Swiss-U.S. Privacy Shield, and the Asia-Pacific Economic Cooperation ("APEC") Cross-Border Privacy Rules (CPBR) System. As already explained, the Privacy Shield programs provide legal mechanisms for companies to transfer personal data from the EU and Switzerland to the United States with strong privacy protections. The APEC CBPR system is a voluntary, enforceable code of conduct protecting personal information transferred among the United States and other APEC economies. The FTC enforces companies' privacy declarations and commitments in these programs, bringing cases as violations of Section 5 of the FTC Act.[82] The FTC also works closely with agencies developing and implementing new privacy and data security laws around the world, including Asia, Africa, and Latin America. And the FTC convenes discussions on important and emerging privacy issues. For example, just two weeks ago, senior officials from the agency-conducted meetings with government officials and other stakeholders in India, together with partners from the U.K. and Japan, on India's proposed data security and privacy legislation.

VII. Conclusion

The FTC remains committed to marshalling its resources efficiently in order to effectively protect consumers and promote competition, to anticipate and respond to changes in the marketplace, and to meet current and future challenges. We look forward to continuing to work with the Subcommittee and Congress, and we would be happy to answer your questions.

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

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

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

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

[82] *See, e.g.,* ReadyTech Corp., No. C–4659 (Oct. 25, 2018), *https://www.ftc.gov/enforcement/cases-proceedings/182-3100/readytech-corporation-matter; Md7, LLC,* No. C–4629 (Nov. 29, 2017), *https://www.ftc.gov/enforcement/cases-proceedings/172-3172/md7-llc; Tru Commc'n, Inc.,* No. C–4628 (Nov. 29, 2017), *https://www.ftc.gov/enforcement/cases-proceedings/172-3171/tru-communication-inc; Decusoft, LLC,* No. C–4630 (Nov. 29, 2017), *https://www.ftc.gov/enforcement/cases-proceedings/172-3173/decusoft-llc; Sentinel Labs, Inc.,* No. C–4608 (Apr. 14, 2017), *https://www.ftc.gov/enforcement/cases-proceedings/162-3250/sentinel-labs-inc; Vir2us, Inc.,* No. C–4609 (Apr. 14, 2017), *https://www.ftc.gov/enforcement/cases-proceedings/162-3248/vir2us-inc; SpyChatter, Inc.,* No. C–4614 (Apr. 14, 2017), *https://www.ftc.gov/enforcement/cases-proceedings/162-3251/spychatter-inc.*

Senator MORAN. It's my understanding that my understanding was incorrect: that you all hoped to make an opening statement. We do not have your written testimony as required by our rules, but I think it would be a mistake for us not to hear from you if you're prepared to do so.

So we do not have in front of us their written statement, but all the Commissioners would like to make a statement, and I now recognize Mr. Chopra.

STATEMENT OF HON. ROHIT CHOPRA, COMMISSIONER, FEDERAL TRADE COMMISSION

Mr. CHOPRA. Chairman Moran, Ranking Member Blumenthal and members of the Subcommittee, thank you for holding this hearing.

The FTC has a clear mission: to make sure markets are fair and competitive, not corrupted by conflicts of interest, distortions, and lies. The primary way we seek to accomplish this is through our law enforcement program.

Today I want to talk about some of the most important questions that the FTC must routinely answer when enforcing the law. Given all the misconduct in the market, which companies are the best targets, and, after investigation, when should we push for a settlement and when should we go to trial?

In my view, no matter how big or powerful they might be, we must hold companies accountable for widespread failures and we must always be willing to take them to court. Forty-five years ago, Congress gave the FTC the authority to sue companies and individuals in Federal court using Section 13(b) of the FTC Act. The FTC can go to court to seek restitution for victims, take back ill-gotten gains, permanently halt harmful practices, and seek other changes to business practices.

And like almost every other Federal enforcement agency with the power to take companies to court, the FTC resolves most of its actions through settlements. And without question, settlements are important. No agency can litigate everything, but no agency should ever appear to strong-arm small defendants into financial ruin while letting large companies off the hook with a slap on the wrist.

Now, in the aftermath of the financial crisis, we saw how large firms saw settlements as nothing more than the cost of doing business. After all, corporate boards on Wall Street almost never agreed to a settlement that threatened their profit model. And while big penalties made for good headlines, I question whether they truly deterred lawbreaking. Too many individual executives evaded accountability and even got rewarded with a bonus for their skillful dealings with the government. Unsurprisingly, even after big settlements, we saw how agencies continued to fight fire after fire with companies like Wells Fargo where abuse was widespread.

In trials, we get to find out the whole story told from both sides by the actual individuals who called the shots and we see due process in action. And when the government prevails, the law can provide for recoupment of certain taxpayer costs.

Now, the FTC has shown it is willing to go to trial. Too often, pharmaceutical companies go to great lengths to protect monopolies created by their patents. Take the example of AbbVie, the pharma-

ceutical giant famous for continuing to raises prices and creating billions of dollars in healthcare costs with the blockbuster drug Humira.

In 2014, the FTC sued AbbVie for filing sham patent infringement lawsuits that stopped generic drug makers from challenging another top-selling product, AndroGel. A few months ago, a court ruled that AbbVie did indeed use sham lawsuits to illegally maintain its monopoly. The court ordered the company to pay 448 million dollars for its wrongdoing that harmed patients, the public, and its competitors. After the ruling, we saw pharmacies who were allegedly harmed by these practices filing their own actions, and certain aspects of this matter remain on appeal.

In another matter, after years of litigation and a trial, a court-ordered DISH Network to pay $280 million for its Do Not Call violations, and in a few weeks the FTC will begin its trial against semiconductor giant Qualcomm for its alleged anti-competitive tactics in the chip market.

Filing a lawsuit and taking a powerful corporation to trial is tough. In my past agency experience, I have seen how going up against a company with legions of lawyers and lobbyists and PR professionals can be daunting for an agency with finite resources. But Congress cannot expect any agency, including the FTC, to meet its mission unless it is unambiguous to the market that we have the resources and the resolve to go to court no matter how big or connected a company may be.

It will be critical for Congress to continue to support our 13(b) authority and to ensure that every law enforcement agency exercises its prosecutorial discretion in ways that create real accountability for those that break the law.

Thank you, and I look forward to your questions.

Senator MORAN. Thank you, Commissioner.

Commissioner Phillips.

STATEMENT OF HON. NOAH JOSHUA PHILLIPS, COMMISSIONER, FEDERAL TRADE COMMISSION

Mr. PHILLIPS. Thank you. Chairman Moran, Ranking Member Blumenthal, distinguished members of the Subcommittee, thank you for the opportunity to appear before you today. Thanks especially to Senator Nelson for his thoughtful and kind remarks earlier.

I'm honored to be back here, especially with my fellow commissioners, to highlight the important work that the FTC and its talented staff do every day on behalf of American consumers. In my brief remarks, I'd like to address two international issues as well as the legislative process that you all have undertaken on consumer privacy.

While offering incredible opportunities for American consumers, the digital economy poses new challenges for law enforcement particularly relating to cross-border activities. In 2006, Congress recognized this and passed the U.S. SAFE WEB Act allowing the FTC to share evidence with and assist foreign authorities in matters involving issues such as privacy violations and data breach. U.S. SAFE WEB also confirms our authority to challenge foreign frauds that harm U.S. consumers or involve material conduct in the

United States. Using SAFE WEB, we have worked with foreign authorities to stop illegal conduct and secure millions for consumers and sometimes even obtain criminal convictions with the help of our partners.

SAFE WEB is a vital tool but it sunsets next year.

Congress should reauthorize it and should eliminate the sunset provision.

Next, the FTC works with the Department of Commerce to enable transatlantic data flows and support American business leadership through three cross-border data transfer programs including the E.U./U.S. Privacy Shield. We as an agency look for Privacy Shield violations in four ways.

First, referrals from the Department of Commerce; second, priority referrals from the European Union; third, we look for violations in every privacy investigation that we conduct as an agency; and finally, we conduct proactive monitoring for Privacy Shield participants. We are committed to the success of these cross-border data transfer mechanisms. We have brought nearly 50 actions over the course of their lives, and enforcement will remain a priority for all of us.

Finally, on the ongoing debate we are all having as a nation on consumer privacy, I want to stress three points. First, privacy can be a nebulous concept. And as you consider legislation, it is critical to be clear and frank about the wrongs you seek to right. Advocates for new regulation invoke a variety of alleged market failures to justify new rules: from data insecurity to imperfect information about data sharing to creepiness and surveillance. According to the NTIA, while online privacy concerns appear generally to be declining, Americans' level of concern about privacy issues varies based on the subject, with people substantially more concerned about issues like identity theft and consumer fraud than, for example, the collection of data by firms or the loss of control of data.

Reasonable minds can differ on the privacy risks. But everyone should agree that the best policy is developed when aimed at clearly defined harms and with consensus built about how to address them. High-profile incidents and large firms dominate headlines, but legal restrictions have an impact that is broader and more fundamental.

Second, any new rules will come with tradeoffs: to consumers, innovation, and competition. As I've said elsewhere, regulations can chill innovation and competition, including by entrenching incumbents. We need to keep small businesses and startups in mind.

To be clear, that is not to say that we should not reevaluate our privacy regime given emerging issues and technologies, but neither can we ignore half a century of our nation's experience balancing privacy and other interests including tremendous levels of innovation. On innovation, America has been leading. I am concerned that early indications about the European GDPR indicate reduced investment in technology and greater concentration in ad tech.

The tradeoffs are not easy and there are no simple answers. So my third point is that, given the important value judgments that must be made, Congress is the place to make them. Broad delegations to an expert agency are a poor substitute for the lawmaking process that our founders created. I was honored to work here in

the Senate for seven years, so I have great faith in the capacity of Congress to listen to the public, to build consensus, and to reach the right answer.

Of course the FTC with our talented staff and half a century of experience enforcing privacy law stand ready to assist you in fashioning legislation and we will enforce any new privacy authority that Congress deems fit to assign us.

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

Senator MORAN. Thank you, Commissioner.

Commissioner Slaughter.

STATEMENT OF HON. REBECCA KELLY SLAUGHTER, COMMISSIONER, FEDERAL TRADE COMMISSION

Ms. SLAUGHTER. Thank you. Can you hear me?

Chairman Moran, Ranking Member Blumenthal and members of the Subcommittee, thank you so much for inviting us here today.

I have spent my first six months at the FTC immersed in getting to know the talented staff of the agency and understanding the opportunities and challenges they see on the ground as the Commission fulfills its dual missions of protecting consumers and promoting competition.

As Senator Blumenthal noted, in today's increasingly data-driven and concentrated economy, consumers demand and deserve vigorous enforcement from the FTC. That is precisely what Chairman Simons has pledged, and I join him in his commitment. We should and we will enforce the law against wrongdoers to the fullest extent that our authority and our resources allow and we should continue to engage in critical self-examination to identify ways we can do more within those parameters. However, I want to use my time today to highlight how additional resources and authority would enable the Commission to better protect consumers and promote competition.

Let me first address resources. I'll begin with an example. In 2012, the FTC sued a payday lender known as AMG that buried consumers with illegal fees. The FTC aggressively litigated this matter and ultimately secured a hard-fought $1.3 billion court order against the defendants in 2016. Two months ago, in late September, the FTC returned over $500 million to AMG-related victims.

The outcome in AMG is instructive in two ways. First, it demonstrates that the FTC provides meaningful results for consumers that far exceed our resources. On that one day in September, we returned to consumers more than our entire appropriated budget for Fiscal Year 2018, which is about $300 million. In fact, during all of Fiscal Year 2018, Commission actions resulted in over $1.6 billion being returned to consumers, more than five times our annual budget. Put another way, the FTC provides an extremely good return on investment for the American taxpayer.

The AMG resolution also demonstrates a second plain but paramount point. Good outcomes for consumers take time and money, especially where the target of the investigation is a large, well-financed corporation. Very simply, no substitute for careful, thorough investigation and, where appropriate, aggressive litigation.

I agree with Commissioner Chopra's comments about the value of litigation and I want to be clear about what it means from a resource perspective. Litigation requires teams of dedicated and talented staff and complementary resources. Case such as AMG and the AbbVie case that Commissioner Chopra mentioned demonstrate the talent and the dedication are here, but imagine how much more we could be doing with additional resources.

The challenges consumers face in the marketplace today are growing in number and complexity. To address them, the FTC must initiate more investigations and litigate more cases. Those cases have become more complex both legally and technologically and they involve defendants with deep pockets and armies of attorneys. Our resources have not kept pace with these developments.

As one key metric, consider that we had about 50 percent more full-time-equivalent employees in the beginning of the Reagan administration than we do today. It is critical that the FTC has sufficient resources to support its work, particularly as demands for enforcement in so many complex areas continue to grow.

In addition to sufficient resources, sufficient authority is critical for the FTC to meet the demands of the 21st century marketplace. Expanding our authority to seek monetary penalties for violations of the law, providing the FTC with better rulemaking authority, and eliminating jurisdictional exemptions would each go a long way to help the FTC better meet today's challenges as well as tomorrow's.

I want to highlight in particular that the limitations on our authority are particularly constraining when it comes to protecting consumer data. No matter how big the breach or how egregious the conduct, the FTC has no authority to seek financial penalties for most types of abuse or misuse of consumer data. We also lack the authority to engage in notice-and-comment rulemaking in the areas of consumer privacy and data security, and the common carrier and nonprofit exemptions put some of the largest hosts of consumer data beyond our reach.

I strongly support Chairman Simons's call for Congress to consider enacting Federal privacy legislation that would address these limitations. I believe we need a law that requires companies to take consumer privacy seriously, gives the FTC the authority to impose significant penalties for failing to do so, and invests the necessary resources for the FTC to carry out Congress's directive effectively.

I look forward to continuing this important dialogue with you and to taking your questions.

Senator MORAN. Thank you.

Now Commissioner Wilson.

STATEMENT OF HON. CHRISTINE S. WILSON, COMMISSIONER, FEDERAL TRADE COMMISSION

Ms. WILSON. Thank you, Chairman Moran, Ranking Member Blumenthal, and distinguished members of the Subcommittee for the opportunity to appear before you and testify today. It is an honor to be here for the first time since I joined the Commission two months ago.

I would like to highlight today one of the areas I identified as a priority during the confirmation process: the healthcare industry. As you know, this industry impacts every American and takes a bite out of each paycheck. Given its importance, it should come as no surprise that the FTC is quite active in this segment of the economy. I would like to briefly discuss two issues associated with healthcare, one related to consumer protection and the other to competition.

On the consumer protection side, the marketing of unproven or ineffective treatments for serious health conditions is unfortunately all too common and rightly remains a top priority for FTC enforcement. One important area is marketing that targets opioid addiction. The CDC estimates that a staggering 115 Americans die every day—every day—from an opioid overdose. People seeking life-saving help for opioid addiction or withdrawal must get the right kind of help as soon as they are ready to receive it. Products that promise miracle cures or fast results can cost precious time and money and can contribute to relapse or even death.

The Commission has sued two companies that marketed bogus withdrawal and addiction treatment products. The FTC also is conducting a number of non-public investigations in this area. Thanks to the leadership of members of this Committee including Senators Cortez Masto and Capito, the FTC can now bring civil penalty authority to bear when companies market sham opioid treatments and services.

Earlier this year, the FTC partnered with the FDA to send warning letters to marketers selling products that claimed to help with opioid addiction. The FTC also collaborated with the Substance Abuse and Mental Health Services Administration to release a fact sheet on getting the right help with opioid dependence or withdrawal. Armed with our expanded resources, the FTC will continue to support local, state, and Federal agencies combating the opioid epidemic.

On the competition side, the FTC has long recognized and challenged false and unsubstantiated health claims, but REMS abuses, in contrast, are a relatively recent problem. The FTC continues to investigate allegations that branded pharmaceutical companies misuse Risk Evaluation and Mitigation Strategies, known as REMS, to impede competition.

In theory, a REMS program is designed to protect patient safety by managing the known or potential risks associated with the use or distribution of certain medications. Often times that is also the practice. But sometimes branded manufacturers misuse REMS to thwart entry by would-be generic competitors. This conduct upsets the careful balance between competition and innovation that Congress established in both the Hatch-Waxman Act and the Biologics Price Competition and Innovation Act.

REMS abuses can take various forms. But regardless of the precise method employed, concerns arise when branded manufacturers subvert laws and regulations that are designed to protect the health and safety of consumers and instead use those frameworks to insulate themselves from competition. By excluding competitors from the market, branded drug companies can price products higher than they otherwise would, preventing drug prices from falling.

Recognizing that REMS abuse is a competition problem, the FTC has used its existing powers to investigate potential antitrust violations and is actively looking for a good case to bring. The Commission has also engaged in advocacy, including filing amicus briefs in private litigation.

We are grateful that members of the subcommittee share our concerns and have proposed legislation that would more directly address this problem. FTC staff have provided technical assistance on various bills and we will continue to support these important legislative efforts.

I am happy to answer any questions you may have.

Senator MORAN. Thank you very much.

I'm going to defer to the Ranking Member who has another hearing to attend. I'll turn to him for questions, then it'll be my turn and then we'll——

Senator BLUMENTHAL. Great.

Senator MORAN.—work our way across.

[Applause.]

Senator BLUMENTHAL. Before he leaves, I want to join in thanking Senator Nelson for his leadership over such a distinguished and extraordinary period of time. Thank you, Senator.

I also want to thank each of you for your testimony today, and I want to begin with coming back to big tech.

This morning, a member of the U.K. parliament disclosed that an entity with Russian I.P. addresses was pulling over 3 billion data points a day about Facebook users, using fraudulent means. This allegation is new and chilling.

Mr. Chairman, were you aware of it?

Mr. SIMONS. Not until it was reported.

Senator BLUMENTHAL. Facebook never disclosed it to you and they never disclosed it to us; correct?

Mr. SIMONS. That's my understanding.

Senator BLUMENTHAL. I am assuming that the FTC continues to have an ongoing investigation; correct?

Mr. SIMONS. Yes, absolutely.

Senator BLUMENTHAL. It has been eight months since the FTC first indicated that investigation. Since then, the United Kingdom's Information Commissioner's Office issued penalties to Facebook regarding the matter of privacy violation, and on Sunday, a U.K. parliamentary committee also seized a trove of documents from the company Six Four Three regarding Facebook's privacy practices.

The urgency of this investigation could not be clearer. Can you tell us when you will be done and when you will have results of this investigation?

Mr. SIMONS. Thank you, Senator.

It's inappropriate for me to comment on a specific non-public investigation, but let me say the following: Any time you see a press report of a significant privacy issue, a potential privacy violation of our authority, it is safe to assume that we either are investigating it already or shortly after that media release we will investigate it.

The other thing to keep in mind is that when companies have problems that become public that are serial in nature—as you described, new problems—you can also assume that we will be looking at those too. I am standing here——

Senator BLUMENTHAL. With all due respect, Mr. Chairman—and I do have great respect for you—you're saying it's safe to assume. It is not safe to assume anything.

Mr. SIMONS. It's safe to assume what my staff is doing, what our staff is doing.

Senator BLUMENTHAL. But we need to know, and that was my question, when you will have some results; because these continuing violations clearly show that we have something more than a single bad-actor problem and it is not only Facebook. I want to be fair to Facebook. It is not only Facebook.

And one of the most dramatic and important questions that was asked—and I asked it during the hearings with Mark Zuckerberg—was how many more Cambridge Analyticas are there out there? We still have no idea. So I think you have an obligation to tell us when you think this investigation will be done.

Mr. SIMONS. We're going to do this—our goal is to do this as fast as possible and get to the right result as soon as possible, but I cannot comment on the details of any specific non-public investigation. I'm sorry, Senator.

Senator BLUMENTHAL. How many full-time employees are assigned to investigate Facebook's privacy and data protection practices?

Mr. SIMONS. Again, I can't comment on a non-public investigation.

Senator BLUMENTHAL. Are you satisfied there are sufficient resources devoted to this investigation?

Mr. SIMONS. That is my goal with respect to every investigation that the FTC is conducting, and especially the most important ones.

Senator BLUMENTHAL. Facebook knew about Cambridge Analytica at least since December 2015. Did Facebook disclose this matter to the FTC prior to March 2018?

Mr. SIMONS. Again, Senator, I'm sorry, but it's inappropriate for me to comment on the specific details of a non-public investigation.

Senator BLUMENTHAL. Well, without being unduly critical of your predecessors, are you satisfied that the Facebook consent decree was adequately enforced?

Mr. SIMONS. What I would say is this: We do engage in self-critical examination. It's a very important part of our history and we take that very seriously. And so one of the things we are looking at is how to modify our orders to make sure that things that shouldn't have happened before don't happen again.

Senator BLUMENTHAL. Are you monitoring the Cambridge Analytica bankruptcy?

Mr. SIMONS. Again, I don't want to comment on a specific non-public investigation.

Senator BLUMENTHAL. Do you have any investigation concerning the issues relating to Google that I mentioned earlier?

Mr. SIMONS. Again, I can't comment on any non-public investigations that may or may not be going on.

Senator BLUMENTHAL. Well, I think that, again, with all due respect, the American people really deserve to know more about these ongoing investigations, either generally as to timeframe, amounts of resources, and, indeed whether you have wrongdoing

and abuses under investigation. I'm not talking only about Facebook but about other companies as well.

Mr. SIMONS. Our goal is to vigorously enforce, and we are working hard at that and I think we are going to . . . One thing I hope to do, Senator, is I hope to turn your opinion around in terms of the performance of the FTC. That is one of my main goals with respect to you and others in the Congress.

Senator BLUMENTHAL. Well, I appreciate that and I have great respect for, again, the commissioners and the very dedicated professionals that you have working for you at the FTC and I share my colleagues' view that, to some extent, it may be a matter of resources but we need to know what is needed for, as you put it, turning around performance.

Mr. Chairman, I have many more questions and I'm going to defer to my colleagues now and stay roughly within the five-minute rule. Thank you.

Senator MORAN. You were late, you talked long, and our agreement is that you're not coming back.

Senator BLUMENTHAL. I will be back; I shall return. But I thank you for those kind words, Mr. Chairman.

Senator MORAN. Senator Blumenthal has focused on Facebook and current investigations. I just would add to what he said: that this Subcommittee and me personally, will do everything we can to provide you the resources, both legal and financial, and we will continue to monitor.

We obviously want more information than you're capable of giving us, Mr. Chairman, at this point in time, but we're going to pay a lot of attention to this issue. And by that, I think we are conveying its importance to us and to you.

Let me start with a resource question. Senator Udall and I used to serve together on FSGG that funds the FTC. He abandoned me, so I think I'm the only appropriator in the room. I would say to you that I have a strong interest in ensuring that your agency has the resources it needs to effectively and efficiently protect consumers from unfair and deceptive practices. In part, our efforts will be determined by what the administration and you request in your budget submission.

I would start with, because I think your workload is growing and I think it is going to continue to grow, I think it's conceivable that Congress will give you greater authorities, but let's start with just what you have current authority to do at the FTC.

Let me see if I can get you to tell me in short order, in few words, does the FTC have the necessary resources to enforce its current consumer data privacy and security authorities as provided by Section 5 of the FTC Act and other relevant statutes?

Mr. SIMONS. Senator, I think we do, but let me also say that if we had additional resources, I guarantee they could be put to very good use.

Senator MORAN. I think anyone could say that, Mr. Chairman. I think I—well, in my own household.

Mr. SIMONS. Fair.

Senator MORAN. So what is it that you would do if you had more resources?

Let me make certain I stick with current. What would you do under your current authorization, what you're legally obligated to do? What more would you do if you had additional resources?

Mr. SIMONS. So I think we would—we have an enormous litigation level going on inside the Commission, and if that remains the same, our staff is literally almost killing themselves, they're working so hard on these litigations. If that remains at an historic high level or increases, we would need more resources for that.

In addition, we probably could use some resources with respect to the Bureau of Economics and also technology resources.

Senator MORAN. It's my understanding that a significant amount of work at the FTC is provided by consultants and by outside counsel. Is that the best method by which you can perform your responsibilities?

Mr. SIMONS. So not so much outside counsel, but consultants, experts; so economists, technology people. And what we want to do is we want to have a good mix because we want to have the technology available to us that we need, and so that may vary from case to case. And so sometimes you'll have new types of cases that you haven't had before and you bring in a consultant specifically for that case because that may come and go; it may not be sustained. So I think you want a mix. You want a core of people who are inside the agency and supplement that with outside consultants.

Senator MORAN. I've tried to focus and I want to make sure that any commissioner who has a comment to make about this topic has that opportunity. But I tried to get you to tell me about current responsibilities——

Mr. SIMONS. Yes.

Senator MORAN.—and current needs for resources based upon those current responsibilities.

I also would ask you that as we develop—and I indicated in my opening statement and Senator Blumenthal confirmed in his that we're working to author legislation related to privacy. I also need from you not only yours—as Commissioner Phillips indicated a willingness to provide us and a number of you indicated the things that you would suggest in that legislation, but I also need to understand what the additional resources that would be necessary that would come with additional responsibilities or greater authorities of the FTC.

So I want to make sure that as we develop legislation, we're not operating in a vacuum in which we would have the likelihood of saying, well, this is what the law should be, but knowing that the law would be somewhat irrelevant if the resources aren't there to enforce the new authority. So I need to know what additional resources it would take as we develop this legislation?

Let me see if any of the commissioners have anything they'd like to respond to my questions or comments or perhaps different than the Chairman.

Mr. CHOPRA. Well, Senator, I'll just add that with respect to data privacy and security, more and more sectors of our economy, whether it's the automotive industry, the agriculture industry, retail, there is more and more data collection, and our largest firms in the economy are relying heavily on how to monetize that data.

So this is not just about consumer-facing businesses; it is a bigger and bigger part of the U.S. GDP. And if that is going to grow, then the FTC's resources have to grow commensurately. When cities grow and get much bigger, they hire more cops, and we have to do the same for us.

Senator MORAN. Anyone need or want to add—want or need to add something to this? Ms. Slaughter?

Ms. SLAUGHTER. Yes, I'll just—I'll echo what Commissioner Chopra said and say I agree with everything Chairman Simon said he would do with more resources.

I would depart only that I think we do need them. I don't think that we have enough resources right now to do the job that consumers and Congress expects of us. I think we want to do that job. And those additional technologists, those additional employees getting us anywhere back to near the staffing levels we had in the Reagan administration I think would be very valuable to carry out our mission.

Senator MORAN. Let me say just from my perspective, I've never met an agency or a department or a Commission that didn't believe they needed more resources. I hear it on an ongoing basis.

But I think this is different. I am sympathetic to that plea because the volume—as Commissioner Chopra says, the city is growing. And there has to be a greater focus on how we spend the money, but that is insufficient in this case, I think, to have the necessary resources to meet the demand.

Senator?

Mr. PHILLIPS. Yes.

Senator MORAN. Senator, Phillips or—didn't mean to——

Mr. PHILLIPS. I expect my colleagues will agree with me. As my colleagues have said, it bears repeating, we work very nimbly and we work very efficiently, so you should trust in the fact that we are giving great credence to the resources we are given and we are employing them efficiently.

Senator MORAN. All right. Thank you.

Senator Klobuchar.

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

Senator KLOBUCHAR. Thank you very much, Mr. Chairman. Thanks for having this popular hearing.

So when you were talking about the town growing, the other thing that has really grown, as the commissioners know, is mergers, and we've had a 50 percent increase in the number of mergers in just the last 5 years.

And I thank you, Mr. Chairman, for your testimony in front of the Antitrust subcommittee that Chairman Lee and I have chaired for a long period of time. And as you know, I have a bill to add more resources to that piece of your work by charging some extra fees on some of the mega mergers, the very large mergers. And could you just explain to my Commerce Committee friends here your feelings on doing something like that?

Mr. SIMONS. Yes. So this is one of the things I mentioned before. We have like an historic level of litigation going on at the agency right now, and particularly on the competition side. So when I

showed up on May 1 at the agency, there were four merger cases being litigated at once. I don't remember that ever happening.

Senator KLOBUCHAR. Just to the legislation because I have so many other questions.

Mr. SIMONS. So—and one of the things we want to do and which also is I think in your legislation, which is to do merger retrospectives. So one of the things we need to do for that is more economists. And so that will help us get a better sense of, you know, whether our merger enforcement has been too lax, whether we have to tighten it up and how much.

Senator KLOBUCHAR. And just for my colleagues' sake, Senator Lee and Senator Moran is interested in this bill, some version of this only because it's not more taxpayer money; it is the humongous billion-, trillion-dollar mergers that these guys are trying to analyze. And so that's why we are looking at it as a way to get them the resources to do it as well as the Justice Department with Mr. Delrahim.

Second, my colleague Senator Blumenthal asked a lot about Facebook. As you know, I've been very involved with that with the Honest Ads Act, with the privacy legislation that I have with Senator Kennedy.

Could you tell me, Mr. Chairman, will the FTC make a statement at the conclusion of this investigation to inform the public of the circumstances surrounding this breach and whether Facebook's action or lack thereof violated the terms of its consent order?

Mr. SIMONS. I would think so.

Senator KLOBUCHAR. OK. Thank you.

Commissioner Slaughter, you were talking, I know you do a lot on privacy. Can you talk about why it's important to have disclosures on online ads and disclaimers? Of course this is something that is under some of the FCC's jurisdiction, but in general why do you think that's important?

Ms. SLAUGHTER. Thank you, Senator, for the question.

Disclosures help consumers understand what is happening with their data, with the information that they're seeing. The FTC has the opportunity to police against deceptive disclosures in various circumstances, but if there is no disclosure, we could not call the disclosure deceptive specifically in most circumstances.

Senator KLOBUCHAR. Right.

Ms. SLAUGHTER. So I think I under—I am familiar with your bill. I think it's a really important contribution to the debate around making sure consumers understand what they're seeing and from whom they're seeing it.

Senator KLOBUCHAR. And as you know, some of the companies including Twitter and Facebook have done this voluntarily, but we're going to have a patchwork. We have a lot of other platforms that aren't doing it at all and a complete crazy situation where TV, radio, and newspaper is required and these guys aren't.

Commissioner Chopra, why is it important for the FTC to have enforcement over privacy violations? And could you talk about—we have in our bill, Senator Kennedy and I, notification of consumers of a privacy violation within 70 hours. Do you support something like that?

Mr. CHOPRA. Yes, I think we need some clear rules of the road at the Federal level of when people's data is essentially stolen from them.

And look, you can pass all the privacy laws you want, but if there's no enforcement and no penalties for violating them, no one's going to follow them.

Senator KLOBUCHAR. Right.

OK. And then Commissioner Slaughter, back to you.

The CREATES Act. This is something that Senator Grassley and Leahy and Lee and I have introduced on the Senate side. This is of course about prescription drugs and trying to get more competition going. Do you believe the legislation could help put a stop to some of the anti-competitive practices?

As you know, Senator Grassley and I have our pay-for-delay bill that I know we will pass if we could just get a vote, and I know the FTC, all of you have been involved in this issue. Do you want to comment further on that?

Ms. SLAUGHTER. Sure. These are very important issues for consumers. Commissioner Wilson in her opening talked about REMS abuse and the problems of REMS abuse, and we're actively looking for opportunities to enforce, but I know the legislation that's out there would make it a lot harder for the bad practices to happen, to begin with, and a lot easier for us to enforce against them.

Ms. SLAUGHTER. Very good.

Well, I will ask—Commissioner Phillips and Wilson, I will be asking you something in writing because my time is now ended.

Look at those crossed arms. It is time for me to end my questions.

So thank you very much for your time and your really good work and your commitment to making the FTC as bipartisan as it has been for so long and working together even though you probably don't agree on every single thing. Thank you.

Senator MORAN. Pleased to recognize Chairman Thune.

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

The CHAIRMAN. Well, good afternoon, and I want to thank Chairman Moran and Ranking Member Blumenthal for holding this hearing and for their continued work on FTC oversight and also want to thank all the commissioners for being here today to provide the Committee with an update of some of the FTC's activities.

Earlier this fall, the FTC began a series of innovation hearings aimed at ensuring the Commission can meet the challenges posed by modern economic and consumer trends, and I'm looking forward to hearing more about how these sessions will inform the Commission's competition consumer protection work. I'm also here to discuss possible comprehensive data privacy legislation with the commissioners as well.

Currently the Committee and several key members are exploring privacy legislation, I'm sure as you know, and it would be helpful to know from the commissioners if you all support this effort, if you think the FTC's an appropriate enforcement agency, and what kind of penalties and statutory tools are going to be needed to ensure compliance.

Let me start with you, Mr. Simons, Mr. Chairman. In the past, the Commission has used its authority under Section 6(b) of the FTC Act to study particular industries or practices. For example, in 2014, the Commission completed a 6(b) study of the data broker industry and issued a report of its findings along with some recommendations.

Would the Commission consider using its 6(b) authority to study consumer information data flows; specifically, sending requests to Google, Facebook, Amazon and others in the tech industry to learn what information they collect from consumers and how that information is used, shared and sold?

Mr. SIMONS. 6(b) is a really powerful tool and that's the type of thing that might very well make sense for us to use it for.

The CHAIRMAN. Well, it seems to me, at least, based upon what we know and what we observe happening around us today and there would be a lot of interest among consumers in this country in having that sort of information available.

Mr. SIMONS. And that may be guided also by what comes out of our hearings.

The CHAIRMAN. Right.

Mr. CHOPRA. And Senator, the 6(b) studies can actually inform not just our consumer protection enforcement, but, in the case you mention, also our antitrust enforcement where data and data flows is of intense interest to us.

The CHAIRMAN. Yes. And I want to shift to that for just a minute because, as I'd mentioned earlier, this Committee has been exploring comprehensive consumer privacy legislations and we've held two hearings this fall earlier, one with industry and one with public-interest groups, to discuss the issue of consumer privacy.

And this would be for any of you to respond to, but do you support efforts by Congress to develop comprehensive privacy legislation?

Mr. SIMONS. Absolutely.

Mr. PHILLIPS. Yes, I support those efforts.

Mr. CHOPRA. Yes.

Ms. SLAUGHTER. Yes.

Ms. WILSON. Yes.

The CHAIRMAN. Good answer.

So now for the harder question, and that is, in your view, are there key features that should be included in any privacy legislation?

Mr. SIMONS. So one of the things that we've asked for on the data security side is civil penalty authority in order to create effective deterrents, and my sense is that the same dynamic is going to apply on the privacy side as well, so I think that will be very important, that there is civil penalty authority.

The CHAIRMAN. Yes. Is that a view that is shared by members of the Commission?

Mr. PHILLIPS. Senator, I have a slightly different view on that.

The CHAIRMAN. OK.

Mr. PHILLIPS. And it's not a totally settled one. As I said in my opening remarks, one of the things about privacy is that it is a nebulous concept and different people see different risks as greater.

Those are very reasonable debates. A lot of people have strong feelings about this.

It is critical that Congress decide what the harms are and then target tools to address those harms. I don't think that the liability standard, what harms we are addressing, can be separated from the civil penalties. You have to think about the two together: what you're enforcing and how. Because what you don't want to do, penalties can chill conduct. You want to make sure that the conduct that you're chilling is bad conduct, not conduct that potentially benefits consumers.

Ms. WILSON. If I could also address this. First of all, I do encourage Congress to pursue privacy legislation. Businesses need clarity and certainty regarding the rules of the road. Markets work best when consumers have complete information and can make informed choices. And studies show that right now consumers do not understand what is being done with their data. And current legislation does provide protections but it's been outstripped by technological developments.

For example, HIPAA protects medical information stored in the doctors' files but not the medical information collected by your Fitbit. And so I think I perhaps have a slightly different perspective than Commissioner Phillips.

I do believe the FTC should be the one to enforce any new legislation that is prepared, and I think in terms of elements of new legislation, I think it should grant jurisdiction to the FTC over nonprofits and common carriers. I think it should provide for civil monetary penalties. I think it should grant targeted APA rulemaking authority and I think it should be undertaken in conjunction with a national data breach notification and data security law.

The CHAIRMAN. Good. So does everybody on the Commission share the view that the FTC is the appropriate enforcement agency for comprehensive privacy legislation?

Mr. SIMONS. Yes.

Mr. PHILLIPS. Yes.

Ms. SLAUGHTER. Yes.

The CHAIRMAN. And you answered this question, too, but to the other members of the Commission: Should Congress repeal the common-carrier exemption to the FTC Act?

Ms. WILSON. Yes.

Mr. PHILLIPS. Yes.

Mr. CHOPRA. Yes.

Mr. SIMONS. You bet.

The CHAIRMAN. Mr. Chairman, my time is expired, so thank you and I will yield back.

Senator MORAN. I will treat you better than I treated Senator Blumenthal.

Senator Markey.

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

Senator MARKEY. Thank you, Mr. Chairman.

We're celebrating the 20th anniversary of the Child Online Privacy Protection Act which I authored back 20 years ago. Now we're seeing where the holes might exist in the modern era. Google's You

Tube is a particularly troubling example. Last year an enormous 80 percent of 6- through 12-year-olds used You Tube on a daily basis yet Google claims that even its third-most You Tube channel, Toy Reviews for Kids, is not targeted to children, meaning COPPA does not apply.

Chairman Simon, in your opinion, is Toy Reviews for Kids targeted to children?

Mr. SIMONS. Thank you, Senator. I don't want to comment on any specific investigation that may or may not be going on, but that clearly would be of concern to us, Senator.

Senator MARKEY. I hope it would be a concern because they're collecting data from kids about what their preferences would be, which can be used to market back to them.

I also sent the Commission a letter after a recent study found that thousands of apps were accessing children's sensitive information such as location without obtaining the required consent. The study also found that Google's app store is including games that aren't COPPA compliant in its kids' section.

Chairman Simons, in light of this evidence, will you commit to investigating allegations that app developers track kids' each and every movement and whether app stores such as Google take adequate steps to ensure apps labeled as kid-friendly are in fact kid-friendly and do not track children?

Mr. SIMONS. We got your letter and we share your concerns. The Commission has a long history of protecting children from deception and unfair advertising practices online and this will continue to be a priority for us.

Senator MARKEY. Just for the record, new research found that over half of reviewed apps were violating COPPA and many games were collecting kids' geolocation data without consent. I urge you to follow up and to proceed accordingly.

Earlier this month I sent the Federal Trade Commission a letter encouraging the Commission to investigate manipulative marketing in children's apps. A new study found that children's games frequently disguise advertisements, coerce children into making in-app purchases and, characterize themselves as educational when they are in fact saturated with advertising.

Chairman Simons, do you believe this business practice constitutes unfair and deceptive practices under Section 5 of the Federal Trade Commission Act?

Mr. SIMONS. Yes. Without reaching a conclusion on any specific issues or specific matters, nonpublic investigations or whatever, certainly that would—that's a concern for us.

Senator MARKEY. And just a little more info here, in one game the main character starts crying if the child playing does not spend money on the app. In another game, Harvey continuously urges players to put on clothing that can only be unlocked through an extra purchase. So these are, from my perspective, unfair and deceptive practices taking advantage of kids, and we just have to do something about it. So thank you for that.

And finally just let me say that we do need new protections for young people. Any comprehensive privacy legislation that Congress considers next year must include special safeguards for children and teens. Must update the Child Online Privacy Protection Act of

1998. First and foremost, we need to extend special protections to 13, 14, and 15-year-olds who right now are not covered. We only went to under 13 in 1998.

And so toward that goal, I will be reintroducing the Do Not Track Kids Act of 2019. So in addition to extending privacy protection to teens, the bill bans targeted advertisements to children, creates an eraser button for parents and children by requiring companies to permit users to eliminate personal information posted by the child and prohibits the sale of connected devices targeted toward children and minors unless they meet the strongest possible cybersecurity standards.

Commissioner Chopra, what do you think? Do we need to add protections into these areas?

Mr. CHOPRA. Well, I hope that as part of the whole comprehensive privacy bill debate you look at updating that. There are places where we will have some ideas of where it needs to be updated and catch up.

And let me just say that this is part of the reason why it was good Congress gave us rulemaking. Rulemaking allows us, with the parameters you set, to update the law based upon what's happening in the marketplace rather than it just staying static.

Senator MARKEY. Yes. If we reach a consensus on nothing else, it should be on the children of our country not just being a product that all these companies trying to create for their own financial benefit.

Thank you, Mr. Chairman.

Senator MORAN. Thank you, Senator Markey.

Senator Udall.

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

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

And let me just say I'm still on the Appropriations Committee and I'm not going to abandon you if you want the FTC to have additional resources and I'm happy to co-lead a letter with you or whatever to push for the additional resources. I think it's appalling that they're below the Reagan administration level in terms of employees and I think we all know that they have made a very persuasive case on that here today.

While the FTC should be conducting a significant amount of work to protect consumers, I'm very concerned about what the appointment of Matthew Whitaker as Acting Attorney General says about the future of consumer protection, not only in the World Patent Marketing case but other consumer protection enforcement actions.

Before he was hired as Chief of Staff to Attorney General Jeff Sessions, Matthew Whitaker served as a paid Advisory Committee Board Member to World Patent Marketing. World Patent Marketing is under criminal investigation by the FBI for allegedly scamming millions of dollars from consumers. It paid a $25 million fine to settle the FTC investigation and to shut down the company.

Mr. Whitaker is known to have sent at least one threatening e-mail to a dissatisfied customer to defend his company, and most shockingly, media stories say he was issued a subpoena for docu-

ments but failed to comply with the subpoena. Reportedly, he was too busy moving to go to Washington, D.C. to go to work for the Justice Department.

The FTC is tasked with a critical mission, consumer protection, and we must do all we can to protect your ability to continue to do so.

Chairman Simons, my colleagues and I sent you a letter this morning regarding Mr. Whitaker's involvement with the World Parent Marketing case. It is worrisome if a person so closely involved in World Patent Marketing could fail to respond to a lawful subpoena and that he is now appointed to be the Nation's chief law enforcement officer, which many believe is unconstitutional and illegal.

I will now ask you a series of yes-or-no questions.

Did the FTC seek a subpoena from Mr. Whitaker in the World Patent Marketing case?

Mr. SIMONS. Senator, so this case was done before any of us showed up at the Commission and I don't have the details of what went on in the case. It was quite extensive. But I would be more than happy for the staff to come talk to you and brief you. They have all the details.

Senator UDALL. OK. We'd be happy to do that and we would really like to have solid answers on these.

Mr. SIMONS. Absolutely.

Senator UDALL. If you don't have a copy of the letter, I hope you have it, but——

Mr. SIMONS. I haven't seen it yet but I'll make sure I get it and——

Senator UDALL. The House is also very interested in this. House Democratic members wrote you about this case seeking information to be shared. Are you complying with that request?

Mr. SIMONS. We certainly are.

Senator UDALL. OK. And you'll give us everything you're giving them?

Mr. SIMONS. We certainly will.

Senator UDALL. OK. And you've agreed to brief us on the details.

Additionally, if the Department of Justice attempts to interfere with the enforcement of the stipulated order against World Patent Marketing, will you notify both the majority and minority staff of this committee?

Mr. SIMONS. The only reservation I have is if my general counsel tells me for some reason I can't do it, but absent that, yes.

Senator UDALL. But thinking about it here, I mean if that happened——

Mr. SIMONS. Oh, it would——

Senator UDALL.—interfering with you, you must be concerned about that.

Mr. SIMONS. Oh, I would be extremely concerned.

Senator UDALL. Yes, yes. And so I'm not even sure you'd listen to your general counsel, would you?

That's OK.

Mr. SIMONS. Yes. Any kind of——

Senator UDALL. You don't need to answer that one.

Mr. SIMONS. Any kind of political intervention——

Senator UDALL. Yes.

Mr. SIMONS.—would be something I would be very, very allergic to.

Senator UDALL. OK. Good.

Mr. CHOPRA. Senator, I just want to say I have no concern about any of my colleagues, including the Chairman, engaging in any special treatment or being stooges to anybody, and you should have no concern that we are going to exercise our authority independently.

Senator UDALL. Good. Thank you.

Ms. SLAUGHTER. I also wanted to add that I think it's important. I think I can speak for all of my colleagues here when I say that, from our perspective, compliance with FTC subpoenas and investigation demands are not optional and we will pursue people who receive them to the fullest extent of the law to ensure compliance.

Senator UDALL. Thank you, Commissioner Slaughter.

Mr. Chairman, are you aware of any previous instance when a potential party to an FTC order has served in a senior DOJ position? Can you—any of you, can you think of anyone where you had that situation?

We've been trying to research it. We can't find anything. So do you——

Mr. SIMONS. No, I'm not aware of any.

Senator UDALL. Any of you can think of anybody who has been promoted and the guy's now Acting Attorney General of the United States of America?

OK. Thank—your blankness, I will take that as you can't think of any incidents. Is that fair?

Mr. SIMONS. That's fair.

Senator UDALL. All of you are nodding.

Mr. Phillips, please.

Mr. PHILLIPS. I just wanted to add one thing. I wanted to add one thing my colleague has said. And you absolutely should rest assured that we will not let any kind of politics interfere with the work we do.

What I will also say is that the history of our work with the Justice Department has been a very positive thing. We've worked together as partners. And I hope I speak—I'm certain I speak for all of us when I say we all expect that to continue.

Mr. SIMONS. And it has continued.

Senator UDALL. Yes. And I know that very well. That's what concerns me. I'm very aware of what you're saying.

Mr. SIMONS. We recently had a big case involving Moneygram where they did a terrific job working alongside our staff and we recovered $125 million.

Senator UDALL. Yes. Thank you all for your service. Really appreciate the work you do on behalf of consumers.

Thank you, Mr. Chairman. Sorry for running over a little bit there, but I was kind of taking General Blumenthal's lead here. That's how I know him. You know, we're former attorneys general. He served 20 years. I only served 8, so I still call him General.

Senator MORAN. And part of your time was indicting a willingness to cooperate with me, so I wasn't counting it, Senator Udall. Thank you.

Senator Hassan.

STATEMENT OF HON. MAGGIE HASSAN,
U.S. SENATOR FROM NEW HAMPSHIRE

Senator HASSAN. Well, thank you, Mr. Chair and Ranking Member Blumenthal. Thank you for holding this hearing.

And thank you to all of the commissioners. Thank you for your service and for your testimony and answers today.

I want to start by following up on the topic of how we're doing on protecting our kids that Senator Markey started to raise.

Earlier this year at the confirmation hearing for most of you, I discussed the possibility of the FTC examining the issue of children in the videogame space. Specifically we discussed loop boxes which allow in-game purchases with real currency, for surprise winnings, and most of you agreed that this is an area that could use additional oversight by the FTC.

Loop boxes are now endemic in the videogame industry and are present in everything from casual smart phone games to the newest, high-budget videogame releases. Loop boxes will represent a 50-billion-dollar industry by the year 2022 according to the latest research estimates.

Children may be particularly susceptible to engaging with these in-game purchases which are often considered integral components of videogames. And just this month, Great Britain's gambling commission released a report finding that 30 percent of children have used loop boxes in videogames. The report further found that this exposure may correlate with the rise in young problem gamblers in the United Kingdom. Belgium, the Netherlands, Japan, and other countries have all moved to regulate the use of loop boxes in videogames given this close link to gambling.

So given the seriousness of this issue, I think it is in fact time for the FTC to investigate these mechanisms to ensure that children are being adequately protected and to educate parents about potential addiction or other negative impacts of these games.

Would you commit to undertaking this project and keeping this Committee informed about it?

Mr. SIMONS. Yes.

Mr. CHOPRA. Yes.

Mr. PHILLIPS. Yes.

Senator HASSAN. I'm seeing nodding heads.

Ms. WILSON. Yes.

Ms. SLAUGHTER. Yes.

Senator HASSAN. Wonderful. Thank you.

I also wanted to follow up on something that I know is of an interest to Commissioner Slaughter, and Commissioner Wilson, you mentioned it too, so maybe I'll just—I'll start with you, Commissioner Slaughter, and then we'll let anybody else who wants to respond.

We've discussed that the heroin, fentanyl and opioid crisis is our most pressing public health and safety challenge facing both my home state of New Hampshire and the home states of just about everybody in the United States Senate. It's taking a massive toll on our communities, our workforce, our economy.

So we all understand that this is an epidemic that impacts people from all walks of life, in every corner of every state, and it really requires a concerted, all-hands-on-deck response and approach

including from agencies that may not traditionally be focused on some of the issues that the epidemic presents.

It's my understanding that the investigation surrounding deceptive marketing practices with regard to products like opioids. And Commissioner Wilson, you mentioned recovery programs as well. But it's my understanding that right now these are handled through a 1971 Memorandum of Understanding between the FTC and the FDA.

Is the protocol from 1971 working specifically for opioids or should we revisit this to ensure that we're doing all we can to fight the epidemic? And I'll start with you, Commissioner Slaughter.

Ms. SLAUGHTER. Thank you for the question, Senator. As a parent, as a person, the opioid epidemic literally keeps me up at night and I agree with you that it is something that requires an all-hands-on-deck.

Too many of these addictions start with legal prescriptions——

Senator HASSAN. Right.

Ms. SLAUGHTER.—in the first place, and so I think one of the really important tools we need to apply is all collective efforts to keep people from getting addicted to begin with. And I think it is a great idea for the FTC, the FDA, DOJ to all sit down together and consider how we can best employ the statutory tools at all of our disposal to most effectively combat this epidemic where it starts.

Senator HASSAN. Thank you.

Commissioner Wilson, would you like to comment?

Ms. WILSON. I agree with Commissioner Slaughter's comments. I would also like to note my understanding since I arrived is that the FTC and the FDA have been working closely on ways to combat this problem together——

Senator HASSAN. Right.

Ms. WILSON.—have sent out letters to marketers of products that appear to have false claims. But I agree that if there are ways that we can work more closely together, we should be doing that.

Senator HASSAN. Thank you.

Anyone else want to comment?

Mr. CHOPRA. I guess I'll just say that we now know years later that the maker of OxyContin knew——

Senator HASSAN. Right.

Mr. CHOPRA.—that their drug was very addictive, being snorted, and they continued to advertise it as the less addictive pill.

Now, if we don't figure out how to sanction companies like this, we will see this happen again——

Senator HASSAN. Right.

Mr. CHOPRA.—in a different field. So we need to see all of this that is happening as downstream from that.

Senator HASSAN. Yes.

Mr. CHOPRA. We know that what happened, we did not get justice there, and so we have to be on alert and maybe be thinking broadly about how are we going to hold pharmaceutical companies accountable when they break the law repeatedly? You know, we grant them government patents——

Senator HASSAN. Right.

Mr. CHOPRA.—for them to promote innovation, but when they consistently abuse it, we really need to think about what the sanction should be.

Senator HASSAN. Thank you all for that, and I look forward to working with you all on it. Thank you. Thank you, Mr. Chair.

Senator MORAN. Senator Cortez Masto.

STATEMENT OF HON. CATHERINE CORTEZ MASTO, U.S. SENATOR FROM NEVADA

Senator CORTEZ MASTO. Thank you. Thank you, Mr. Chair and Ranking Member for holding this hearing, and welcome to all five of you.

Let me just say I am very supportive and have been over the years of the FTC and have, similar to my colleagues, as an AG, worked closely with the FTC and so appreciate your candor in coming forward and talking about the needs and the direction, where you see we need to be focused for the future.

I do support additional resources. I think you are understaffed for just the very reasons we talked about today, and I know, as somebody with former law enforcement, yes, you can always use more money, but it can be used so effectively to not only protect consumers and competition but we've seen the positive impacts of it. So I support any direction that we move forward for your organization.

Let me jump back, though, to the conversation that we have on privacy and data security. This is our future, and we need to get a handle on this. That's why this is a discussion that I so appreciate some of my colleagues are working on legislation. I'm looking at something as well.

But one of the conversations we've had over many hearings is this idea of data minimization, and as you are aware, we're talking about this is the idea that businesses should only collect, process, and store the minimum amount of data that is necessary to carry out the purposes for which it is collected. But we also know that at the same time we are in the age of big data analytics which is going to be necessary as we move forward with smart communities, artificial intelligence, so many important technological future for the use of this technology.

I'm curious on your thoughts on how we balance that. And let me put it to you this way: A lot of the questions on this have been asked on your thoughts on how we address data security and privacy.

One of the things I heard, though, was the targeted rulemaking authority FTC should have, and I'm curious.

And I know that was Commissioner Wilson; you talked about that. What do you mean by targeted? And if you could address it.

Are you including in that the idea that finding this balance between minimization as well as big data analytics and how, by giving you that targeted authority, it allows you to kind of grow into this space and evolve and be flexible with it without Congress coming in and dictating this is where you can only go and this is where you cannot go? So I'm curious just if you don't mind talking a little bit about targeted rulemaking authority.

Ms. WILSON. Sure. To take a step back, when you talk about the data minimization and artificial intelligence, these are topics that the FTC is exploring in the hearings that are being held. We have held a number of hearings on related topics. We will continue to explore these topics. We appreciate the input that we have been provided and we are working through that input with the FTC staff and so we will continue to think about and grapple with these issues.

In terms of the rulemaking that I mentioned, Congress enacted COPPA, Gramm-Leach-Bliley, a number of other laws and then delegated to the FTC after creating the broad strokes of the legislation filling in the gaps and creating some of the specifics to the rulemaking authority of the Federal Trade Commission. I do agree that that would be appropriate here.

As my fellow commissioner, Commissioner Phillips, mentioned, we do believe it is appropriate for Congress to establish the balance between the different values that are being considered but then to ask the FTC as the expert agency to help flesh out some of the specifics and then to maintain a rule going forward that can evolve as the market evolves.

Senator HASSAN. Please, go ahead.

Ms. SLAUGHTER. I want to add that I think some of the benefits of rulemaking that are important to consider are, first, flexibility. As technology evolves and practices evolve, we want rules to change and evolve and keep pace with them, and rules can change and evolve more easily and more quickly than statutes can, often.

And the second is the element of rulemaking that involves openness, transparency, and stakeholder involvement. Notice-and-comment rulemaking requires an opportunity for stakeholders, public advocates, good government groups to have an opportunity to consider the rules that we might propose, to issue comments, to have us reconsider them. And that back and forth is a really important part to keep, make sure we're doing it right and make sure stakeholders are actively engaged. I think those are benefits that are important to keep in mind as you consider crafting legislation.

Senator HASSAN. Thank you.

Mr. CHOPRA. Senator, on minimization, this is really in some ways not a new concept. In the Fair Credit Reporting Act, there's disposal. In COPPA, there are some minimization concepts. In GDPR and many of the other global privacy laws, data minimization is key.

And I want to be responsive to your question. You can still harness some of the benefits without necessarily keeping a dossier on every individual consumer about individual data. If you run a search engine, your algorithm can get better and better without you keeping the search history of every single person who has used it. So I'm not sure the tradeoffs are incredibly hard. They need to be thoughtful.

But I think that balance and minimization, that's becoming the global norm, and because the U.S. has not really passed a comprehensive privacy law, the rest of the world is essentially already converging around that, so I expect that our firms are also going to be complying with that anyway.

Senator HASSAN. OK. Thank you. I notice my time is up. Thank you.

Senator MORAN. Senator Capito.

STATEMENT OF HON. SHELLEY MOORE CAPITO, U.S. SENATOR FROM WEST VIRGINIA

Senator CAPITO. Thank you, Mr. Chairman. Thank all of you. Thank you for your service and thank you for being with us today.

I recently had a birthday, and my phone rang and I looked down and I thought, oh, I'm sure this is a birthday greeting from one of my friends that I didn't have in my address book, and lo and behold, it was a robocall trying to sell me insurance. I cannot tell you how many times my constituents say to me, Congress has got to do something about this. I thought we had. We addressed it. We've had hearings on it.

And so I guess my question to you is because I know there's some jurisdictional issues with FCC and FTC, so I'm going to throw it open to the panel. How can we stop this practice of spoofing numbers and locations onto your phone? And really for elderly people, which I represent a state that has a lot of elderly people, when you tell your grandmother don't pick up the phone unless you know who it is, you could be doing her a good service or maybe not such a good service because it could be somebody registering an emergency call or something to help her out.

So would anybody like to tell me the status of this and who's really taking the lead here between the FCC and the FTC?

Mr. SIMONS. I think this is a joint effort. So they have authority and powers that we don't have and maybe vice versa. So we work with them to try to—like for example, one of the things that they have done recently is empower the carriers to do some call blocking and identification, which is helpful.

On our side, one of the things that we have done is run technology challenges that have produced some software which is now on the market which you can load onto your smart phone and which will block robocalls, and one of them even will send the call to a bot which will keep the robocaller online indefinitely, wasting their money and time and not yours.

One other thing I would say is that I think it would be a significant help to us in dealing with these robocalls if we got rid of the common carrier exemption because a lot of the robocalls are coming through specific carriers and these carriers know that they are transmitting robocalls.

Senator CAPITO. So that would take a legislative action, then?

Mr. SIMONS. Yes.

Senator CAPITO. To block that.

Mr. SIMONS. Right.

Senator CAPITO. Well, you know, again, I think it's frustrating and a challenge. We all get it. But for particular reasons, I think it can be damaging to individuals.

Mr. SIMONS. Oh, yes.

Senator CAPITO. I'm going to change to the topic of fraudulent addiction and recovery centers. I believe Commissioner Wilson mentioned it in her opening statement. Senator Cortez Masto and I were able to get that into the big bill based on stories of people

either—I guess the term is "body brokering," which I hadn't really heard, or convincing addicts to attend fraudulent rehab centers.

Not really having a quality index of rehab centers and particularly for an area like mine and other areas that are deeply affected, this is of grave concern.

So Commissioner Wilson, could you speak to that a little bit, what direction the FTC is going on this?

Ms. WILSON. So my understanding—of course I've been there just a few short weeks, but my understanding is that staff is very focused on monitoring claims that are made and ensuring that claims that are made are valid and accurate, and to the extent they're not, staff is pursuing those claims. There are a number of non-public investigations that are ongoing right now, and I think we all agree with you that this is a significant issue. If people are addicted and are seeking to end that addiction, they need legitimate help as soon as they are ready to receive it, and wasting time and money with false or ineffective treatments is a travesty.

Ms. WILSON. Or even treatments where you fraudulently bring them into your system for treatment and all you're doing is giving them more drugs at the same time. I know a couple of those cases have come up.

But I know as friends of parents who have had this issue, you're going to do anything you can to help your child or your husband or your wife, whoever it is, and you're so vulnerable at this time, especially maybe it's not your first treatment but it's your second or third and numerous overdoses and everything. So this is an area of great concern.

Did anybody else want to speak about that on the panel? Yes. Commissioner Phillips, yes.

Mr. PHILLIPS. I just wanted to thank you both for your efforts. You've given us new authority and we mean to use it.

Senator CAPITO. OK. Last question I have on fraudulent marketing would be the—I didn't realize this was a problem but my staff brought it to my attention—the fraudulent "Made In America" label. How prevalent is this and what are some of the means you're going to use to try to curb this practice?

Mr. SIMONS. This is fairly prevalent. We get hundreds of these, hundreds of complaints a year that people are improperly using the Made In the U.S.A. label, and we are committed to investigating those.

I mean usually a lot of times what happens is the firm, the company doesn't even realize that it's a violation and so we explain to them it's a violation and they stop it.

Sometimes companies do it intentionally. Sometimes we tell them and they don't stop, and those people we sue. And one of the things that we're exploring now, as a general rule, we've only gotten injunctive relief in cases like this previously but now we're exploring whether we can find a good case that would be appropriate for monetary relief to serve as an additional deterrent.

Mr. CHOPRA. I just want to add here that I think there are manufacturers out there who hire American workers and who purposefully do that because they want to put the flag on their product, and for those who lie, this cheapens the Made In U.S.A. label. So

it's not just hurting American consumers, it's hurting every American manufacturer who——

Ms. WILSON. Right.

Mr. CHOPRA.—is trying to do right. So you know, I want us to be much more aggressive with this, actually, and if you and Senator Cortez Masto want to team up again, you know, finding civil penalties for some of these bad actors, we can really make sure we increase compliance levels.

And I got to tell you, right now there's country-of-origin labeling issues in agriculture, country-of-origin issues in product marketing. We have to do more to put a stop to this because this is extremely unfair to honest companies.

Ms. SLAUGHTER. I would agree with everything my colleagues have said and I would add that Commissioner Chopra's point about financial-penalty authority is a well-taken one. In order for us to assess monetary—we'd say penalties, but in order for us to get a monetary remedy right now we'd have to show a monetary harm and show a price premium and make that demonstration. That can be very difficult to do.

So we can't just say you've broken the law, now pay the government money, even if the ability to do so might really deter some of this reprehensible behavior.

Mr. CHOPRA. We would like to reduce these—or at least I would like to reduce these settlements that end in no money, no findings of fact, no nothing. We just received a comment letter from a company who actually was denied the ability to sell their products to the members of the military because one of our respondents actually was violating this. So this is extremely unfair and we need to fix it.

Senator CAPITO. All right. Thank you.

Thank you, Mr. Chairman.

Senator MORAN. Senator Blumenthal surprised me and indicated he has a couple more questions.

Senator Blumenthal.

Senator BLUMENTHAL. Thanks, Mr. Chairman. I know how grateful you are for my additional questions.

I want to again, by the way, in all seriousness, thank Senator Moran for his leadership here. Believe it or not, we have an excellent team going. And I want to thank our staff who have prepared for this hearing.

And come back to the Whitaker issue that was raised with you, Mr. Simons, Chairman Simons. There has been a report that Mr. Whitaker contacted one consumer to say that there would be, in quotes, serious civil and criminal consequences, end quote, if that consumer engaged in any further online negative reviews of World Patent Marketing.

Are you aware of that report?

Mr. SIMONS. I've seen that; yes, sir.

Senator BLUMENTHAL. Are you aware of facts that would substantiate it?

Mr. SIMONS. I don't have the detail on that.

As I mentioned to Senator Udall, this case was completed before we showed up. We would be happy——

Senator BLUMENTHAL. Well, it was——

Mr. SIMONS. And we would be very happy to have the staff who has all the details provide a complete briefing for you.

Senator BLUMENTHAL. Are you aware of facts that would substantiate that report?

Mr. SIMONS. Personally, no.

Senator BLUMENTHAL. But your staff has such facts?

Mr. SIMONS. My staff has—has the facts.

Senator BLUMENTHAL. OK. You would agree with me, would you not, that that kind of statement——

Mr. SIMONS. That's troubling.

Senator BLUMENTHAL.—would be improper?

Mr. SIMONS. That's troubling, yes.

Senator BLUMENTHAL. And possibly illegal.

Mr. SIMONS. That's troubling.

Senator BLUMENTHAL. Are you aware of a subpoena that was issued to Mr. Whitaker? Or that Mr. Udall, Senator Udall has asked you a similar question. I'm asking you whether you're aware of any subpoena that's been issued to Mr. Whitaker by the FTC?

Mr. SIMONS. I haven't studied what subpoenas have been issued in that case but, like I said, the staff has all the details, and it's not a secret. They would be more than happy to provide a briefing.

Senator BLUMENTHAL. Are you aware that the e-mail Mr. Whitaker sent to that consumer was on the FTC's docket in that case?

Mr. SIMONS. I'm not aware personally of that.

Senator BLUMENTHAL. Would you be aware of subpoenas that have not been complied with?

Mr. SIMONS. Potentially, but, you know, I'm not aware of what happens with every subpoena that the Commission issues. We issue lots of subpoenas.

Senator BLUMENTHAL. This subpoena is a pretty high-profile one; correct?

Mr. SIMONS. Like I said, we weren't at the Commission when this was voted out.

Senator BLUMENTHAL. Would you agree with me that anyone, particularly somebody involved in the case as a potential defendant, has an obligation to comply with FTC subpoenas?

Mr. SIMONS. Yes, we definitely expect people to comply with subpoenas when we issue them.

There might be circumstances where they wouldn't. Like so, for example, if the case—if the subpoena went out and the case settled the next day, then you don't go out and try to enforce the subpoena because you've gotten what you need already and you've settled the case.

But generally, if we need the information, we should enforce the subpoena.

Senator BLUMENTHAL. But that kind of circumstance was not present here, was it?

Mr. SIMONS. I don't know. But like I said, the staff would be happy to brief you.

Senator BLUMENTHAL. Well, I'm asking you these questions not only because they are significant to Mr. Whitaker but they are important to compliance with your subpoenas. If World thinks that they can claim, well, I'm moving from one house to another or I'm

moving from Washington, D.C. to Iowa or Iowa to Washington, D.C. and that's enough reason to just say forget about it, you'll have diminished compliance with your subpoenas, and that will take more resources to enforce them. So——

Mr. SIMONS. I agree.

Senator BLUMENTHAL.—it's really in your interest to have answers to these questions.

Mr. SIMONS. Yes, I agree.

Ms. WILSON. If I can jump in for one minute.

Senator BLUMENTHAL. Yes, of course.

Ms. WILSON. As a senior commissioner on the Commission, it is my responsibility to work with the general counsel's office to respond to motions to quash or motions to limit subpoenas and CIDs. I can tell you we take this very seriously. There has been an instance recently where I worked with the general counsel's office to say, No, we are not going to quash the CID and we fully expect that the respondents will not comply, and we will take them to court to make sure we get the information that we need from them. I've actually told my staff I'd like to sit in the investigational hearing when those people are brought in to give testimony because I'd like to see who it is that wants to flout the authority of the Federal Trade Commission. So we do take this very seriously.

Senator BLUMENTHAL. I'm sure you do.

Well, let me ask you, Mrs. Wilson. Do you have knowledge of this subpoena to Mr. Whitaker?

Ms. WILSON. I have no knowledge of these circumstances, no.

Senator BLUMENTHAL. And why not?

Ms. WILSON. Because I was sworn in two months ago.

Senator BLUMENTHAL. Well, you had to know we were going to ask you about it today; right?

Ms. WILSON. The Chairman's office has been dealing with this issue, it's my understanding, and I have not been briefed on this topic.

Senator BLUMENTHAL. Well, I really think that you owe this Committee answers quickly about this subpoena for the sake of your law enforcement credibility.

Mr. SIMONS. We're happy to provide the details. The staff can give a briefing; they can be full and open and it's not an issue. We'd be happy to do it.

Senator BLUMENTHAL. And when you're going to be full and open, I assume there's no problem with our disclosing ——

Mr. SIMONS. No.

Senator BLUMENTHAL.—the circumstances because the case has been settled; correct?

Mr. SIMONS. Correct.

Senator BLUMENTHAL. OK. And by the way, a 26-million-dollar settlement, that's not a nickel-and-dime. It's an all-time case.

Mr. SIMONS. No. That's a serious case for us, absolutely.

Senator BLUMENTHAL. Right. Has anyone from the White House ever communicated with you about this case?

Mr. SIMONS. Not with me.

Senator BLUMENTHAL. With anyone in the FTC, whether it's the staff or any of the present or past commissioners?

Mr. SIMONS. Certainly not that I'm aware of.

Senator BLUMENTHAL. Any other commissioners aware of any contact from anyone in the White House from the President on down about this case?

And the record should show that everyone is shaking their heads no.

And are you aware of the White House contacting anyone at the FTC about Mr. Whitaker if not about this case?

Mr. SIMONS. No.

Senator BLUMENTHAL. And the same is true of others.

Mr. SIMONS. No.

Senator BLUMENTHAL. Has the White House contacted you, Mr. Chairman, or other commissioners about hiring anyone for either the FTC staff or in any other capacity?

Mr. SIMONS. I don't remember anything like that.

Senator BLUMENTHAL. No one has asked you to hire anyone either from the private sector or from another government agency?

Mr. SIMONS. I don't remember. I mean I don't have—I have very little contact with the White House.

Senator BLUMENTHAL. What kind of contact do you have?

Mr. SIMONS. I have had lunch at the White House mess where I was introduced to the nominee for the BCFP and the General Counsel of the Commerce Department because our agencies, you know, work together, and that's really about it.

Senator BLUMENTHAL. And the purpose of that lunch was to introduce you to those individuals?

Mr. SIMONS. Yes.

Senator BLUMENTHAL. OK. And I'm assuming that you will let this Committee know of any contacts between you or any of the commissioners and the White House staff, meaning any of the political appointments including the President.

Mr. SIMONS. You mean in conjunction with Mr. Whitaker?

Senator BLUMENTHAL. Or in any other way. Can we have that commitment from you?

Mr. SIMONS. I think I would like to talk to the General Counsel just to make sure there's not a reason that I can't do it.

Senator BLUMENTHAL. I'm happy to give you that opportunity. Thank you.

That concludes my questions, Mr. Chairman. Thank you.

Senator MORAN. Senator Blumenthal, thank you very much. As you indicated, I appreciate the opportunity to work with you.

Let me ask a couple of questions and then I think we can conclude this hearing.

There has been concerns raised about the recently adopted California Consumer Privacy Act. Those concerns—that Act is expected to take effect in 2020. The concerns are that that legislation will influence other states to enact their own versions of privacy regulations, each of which would potentially impose differing obligations on companies and different types of protections and remedies for consumers.

As the Federal agency that has primary expertise over unfair and deceptive practices affecting interstate commerce, what are your thoughts about this state-by-state approach to regulating privacy practices of U.S. companies and whether that complicates the

consumer's ability to enjoy the same privacy protections no matter where they live or use the Internet?

Do you believe that there is a potential for consumer confusion between Federal standards and varying state-by-state approaches?

Mr. SIMONS. I'll take that.

Sure. I think that is a possibility. If you've got a good Federal statute and you've got state statutes that are either inconsistent or varied, I think you can get confusion, and depending on the right—you know, what the mix is and the details, Federal preemption might be the way to go on that.

Senator MORAN. Mr. Phillips.

Mr. PHILLIPS. Thank you, Senator.

One of the things that I've said publicly, including here today, about Federal privacy legislation is that we should keep competition in mind. For large businesses, it's easy to deal with lots of different compliance costs. For smaller businesses, having one clear rule can help them compete.

Mr. CHOPRA. Can I just add that of all the preemption that occurs, you should tread very, very carefully. We saw how preemption of state law in the mortgage market—and the same argument was used about making sure that there's enough entry, not confusion. That preemption of state laws there was catastrophic, and there are certain states that may want to have higher standards than the Federal law.

We can talk about material conflicts, but broad preemption I think would be a huge mistake, but I'm happy to keep talking about that with you and figure out how we can balance all the things you're concerned about.

Ms. SLAUGHTER. I would say that I am not concerned about states that want to have strong laws. I am concerned about the idea of inconsistent laws between states. I think there could be a case for Federal preemption as long as a Federal law was really meaningful and really strong. I would be very concerned about a weak Federal law that replaced strong state laws.

Ms. WILSON. I do respect federalism and states as laboratories for democracy. In the words of Justice Brandeis, the states provide an important opportunity to conduct novel social and economic experiments.

And so I would be wary of advocating for preemption in very many circumstances. But I think in this kind of circumstance, it will be important to do that. I think for the reasons you described, for consumer confusion but also businesses need clarity and predictability so that we don't dampen innovation and chill competition.

As Commissioner Phillips noted, if there are small companies trying to get into the marketplace and they are looking at a patchwork of laws, it raises the costs for them to enter, and so I think in this kind of circumstance preemption would be useful for consumers and useful for competition itself.

Senator MORAN. I have great regard for everyone's commentary on this topic. It's a challenge.

Ms. Slaughter, you did say something that catches my attention in that this may be the way to find the solution to this issue is by the strength of the Federal law. In other words, there's a give and

take that takes place here, something that we can further explore as we try to figure out a solution to Federal legislation.

I support privacy rules that afford consumers the same protection no matter where they are in the Internet ecosystem, slightly a different topic than the one that we just were talking about.

Would you agree that regulating and enforcing privacy rules based on the sensitivity of the data collected, used or transferred or stored is a preferred approach and in the best interest of consumers in terms of certainty and transparency? In other words, the standard, the focus should be on the type of data that's involved and its consequences of being impaired from privacy protection.

Senator—oh, I've call you Senator twice. I've promoted you on two occasions and I'm sorry. Commissioner Phillips.

Mr. PHILLIPS. In my heart, Senator, I'm still a staffer.

What I would say is this: The system we have today in America, the system we've had for a long time protects health information especially; it protects information about children, it protects financial information. And that reflects a collective judgment that there are certain kinds of data that the disclosure of which inappropriately may pose greater risks and may require greater care.

Additionally, something we talk a lot about in the privacy world is the idea of context; you know, what consumer expectations are in a given circumstance. It may be reasonable for a consumer to expect more sensitive data to be treated with more care, so I definitely think that there is a wisdom to how things have long been done. There's a collective wisdom reflected in our laws today.

I'm sorry. I think that's definitely an important issue to keep in mind. Thank you.

Senator MORAN. Let me turn to a different topic. The FTC began holding open hearings in September to evaluate evolving technologies and business practices in an increasingly globalized economy while also identifying possible changes to competition and consumer protection laws and enforcement priorities.

Other topics including data security and privacy are scheduled to occur in the near future, as I understand, in early 2019. What would you describe as a high-level takeaway or priority action item that you've identified through this public process to date?

What have you learned so far, Mr. Chairman?

Mr. SIMONS. I think what we've learned so far is a lot of—we've gotten views from both sides of the spectrum across a whole range and so we're getting terrific input. We've had 200 people testify already from diverse backgrounds and we've had a large number of written comments, some of them very detailed and very thoughtful, so we're getting a lot of input.

I think at this point we're still—we still have more to go, and in particular, we're going to get comments at the end of the process. So I think as of this point we are still absorbing the input and synthesizing it and we don't really have any takeaways in terms of what the specific output of the hearings is going to be.

Mr. CHOPRA. Senator, one initial takeaway I have is that data is a more and more valuable asset every day to firms that are in our economy. The traditional ways we have looked at how to enforce some of our laws, whether it be on the antitrust side or the consumer protection side, we are trying to develop further views on

that because there is clearly a race to get all of our data and figure out how to monetize it in a big way.

This raises some issues that we deal with. It raises national security issues. But we are in learning mode. But certainly we have to accept that we are going to do our job in a very data-oriented economy where that is similar to gold.

Senator MORAN. Thank you for that comment. I have one question and then I'm going to turn to Senator Cruz.

This one is for Commissioner Slaughter. As you are well aware, we were successful in enacting better online ticket sales, the Bots Act in 2016. We provided the FTC and state attorneys general authority to treat any, quote, circumvention of a security measure, access control system or other technological measures including online bots to suppress ticket purchasing limits as an unfair or deceptive practice.

I understand there's an upcoming workshop on this topic and I was interested if you would explain this to me. But more broadly than that, how are we coming along on the enforcement of the Bots Act?

Ms. SLAUGHTER. Thank you for the question, Senator. This is one of those issues like robocalls that people really care about. Consumers really, really care about it and it really makes them nuts when they cannot get tickets to their favorite show or a play, and that's an important thing for us to take seriously.

So it was my pleasure and privilege and honor as a Senate staffer to work with your office on the legislation and now it is my pleasure and privilege and honor to be in the position of considering the enforcement of it. So I would say two things to you.

First in terms of enforcement, we're actively monitoring for enforcement opportunities. It's an important tool that we've been given and we need to use it and we would like to use it.

And then in terms of the workshop, our goal I think is to gather stakeholders, get input to make sure we're staying abreast of the technological developments in the ticket industry. It is a very fast-moving target and so we want to make sure we know what's going on, we're targeting our investigations and enforcement efforts appropriately and that we're appropriately communicating with you to make sure that we continue to have the tools we need to try to tackle this important problem.

Senator MORAN. Do you have any colleagues as commissioners who don't share your enthusiasm for the Bots Act that I need to question?

Ms. SLAUGHTER. I cannot imagine that any of my colleagues don't share my enthusiasm.

Senator MORAN. Well, maybe I should ask them.

Are there any commissioners who do not share the enthusiasm for the Bots Act?

Mr. PHILLIPS. That was a double negative, but we share her enthusiasm.

Senator MORAN. Thank you.

Senator Cruz.

STATEMENT OF HON. TED CRUZ,
U.S. SENATOR FROM TEXAS

Senator CRUZ. Thank you, Mr. Chairman. Welcome everyone, and I would ask you to convey my well wishes to all the wonderful people that work at the FTC.

Mr. SIMONS. I would be happy to do that.

Senator CRUZ. It's good to see you.

I want to raise a topic that we've discussed at some length in the past, which is big tech, and there are many issues about big tech that intersect with the FTC's mission and mandate.

So I want to start with this past spring the Commission received several requests to investigate Google's alleged violations of privacy. One request from Senators Blumenthal and Markey detailed what they described as Google's deceptive and intrusive collection of location information on android smart phones. Another request came from the Electronic Privacy Information Center raising concerns about Google's tracking of in-store purchases.

Yet another was filed by seven consumer groups about Google's deceptive-by-design user privacy settings, and the list goes on.

And I wanted to ask Chairman Simons has the Commission investigated the claims in those letters and what have you all found?

Mr. SIMONS. So I can't talk about any specific non-public investigation, as you know, but one thing I will say is that if you read about it in the press, if there's a Congressional letter that points out a potential problem, we are on it.

Senator CRUZ. Good.

Mr. SIMONS. We look at those things very carefully.

Senator CRUZ. I am glad to hear that.

Let me ask a broader question to each of the commissioners.

During the February nomination hearing which most of you all participated in, I highlighted concerns that was raised in an article published in *Esquire* that detailed how, quote, Facebook and Google are together worth $1.3 trillion, which to put that in perspective, you could merge the world's top five advertising agencies with five major media companies and still need to add five major communications companies. And by the way, that would be WPP, Omnicon, Publicist, IPG, Dentsu, Disney, Time Warner, 21st Century Fox, CBS, Viacomm, AT&T, Verizon, Comcast, Charter, and DISH all merged into one giant company and that would still only total 90 percent of what Google and Facebook are together worth.

Does the Commission have concerns about that massive accumulation of power that big tech has and, in particular, how should antitrust law approach that massive concentration of power?

Mr. SIMONS. Thank you, Senator.

So in the antitrust context, we're worried about exercise of market power, right? And so that's where you want to look for the anti-competitive conduct; that's where you want to look for your case generation and for your investigations. And so of course when you've got a situation . . .

But let me say this, also, which is that the fact that they're big doesn't mean it's a problem under the antitrust laws. Big is not necessarily bad. But if you got big by being bad, if you got big through anti-competitive conduct or you're staying big because of

anti-competitive conduct, that's something that we need to prohibit and we need to stop.

Senator CRUZ. Any other commissioners have thoughts on that?

Mr. CHOPRA. Senator, I'll just add that if you talk to investors, many of them will tell you that they're not going to fund a new startup unless they can figure out how to sell that company to an existing large incumbent like Google and Facebook. And that makes me question, do we have a really competitive, innovative economy where investors are putting money only into ideas that they can sell to an existing incumbent?

We should want to live in an economy where people are investing to create new ideas that challenge and that create real rivalry. And I worry about writ large when companies are trying to get going but a larger incumbent can seal their fate by cutting them off. So you know, we take these issues seriously on the privacy side and the antitrust side, but it is clear that we have to think about this hard and so do you.

Senator CRUZ. I think you raise good and important concerns there.

Let me shift the discussion slightly to a different aspect of big tech's power, which is as I'm home in Texas and listening to Texans, a concern that I hear on virtually a daily basis is that the major technology companies are far too willing to engage in censorship, that are using their market power to silence voices in the political market's face and the public discourse with which they disagree.

In recent weeks, media outlets have reported that Facebook fired a senior executive because of his political views. We've also seen Twitter recently getting bolder and bolder, blocking conservatives altogether from speaking and just banning them from the platform because what they were saying was inconsistent with Twitter's political views.

And one of the frustrating things from the perspective of this Committee is that there is virtually no transparency. There are no objective data. Twitter, Facebook, Google, they don't answer any questions. They don't answer the extent to which they are silencing people, the extent to which political bias is affecting those decisions.

How can and should the FTC address that concern that is being raised? And it is a concern of millions across the country.

Mr. SIMONS. It's not clear to me that the FTC should be addressing that at all. What you're describing is something similar to what the FCC used to do with the Fairness Act and so maybe there's an FCC angle there that it is appropriate for either the Congress to pursue or maybe the FCC to pursue. But unless it's something that relates to a competition issue or its unfair or deceptive, then I don't think we have a role.

Mr. CHOPRA. I'll just add here that I think the public, you're right, knows very little about how some of these companies make decisions, and there are free speech issues which may not be in our, you know, authority.

But certainly, and as you know, Senator Cruz, the FTC has its 6(b) authority where we can compel certain information about busi-

ness practices, and based upon a vote of the Commission, make some of that information public.

I think the FTC is well situated to do quite a bit of study and reveal some of those findings about how some of these companies operate but I will think hard about what you're mentioning about speech as well.

Senator CRUZ. And I would very much encourage you to do so.

And I would also encourage the Commission, when you say that you don't think you have the authority to address these issues, you do have extensive consumer protection authority. And when tech companies are holding themselves out to the public and customers as neutral public forums and are actively engaged in hidden censorship, that is actively deceptive, and the FTC has a great deal of authority to address deception and to help provide transparency.

And right now, big tech has been very comfortable refusing to answer these questions. The FTC I think has ample authority to help provide that transparency, which is I think something both the public and Congress would be very interested in knowing the answers to.

Mr. PHILLIPS. Senator, if I could just add one thing just to echo something the Chairman said before, we are very mindful of the very important antitrust and consumer protection authorities that we wield.

I think part of the concern is those are not authorities to police the First Amendment itself. And you've been such a leader in defending the First Amendment. We want to make sure that we do the job assigned to us very carefully but that we not tread into First Amendment-implicating space.

Senator MORAN. Senator Blumenthal.

Senator BLUMENTHAL. I just want to make sure we understand each other. Senator Cruz was asking questions about antitrust authority, and, as you will recall, I made similar reference earlier in this hearing and one of you indicated that your authority is limited to deceptive and misleading practice.

The fact is you do have antitrust authority; correct?

Mr. SIMONS. Correct.

Senator BLUMENTHAL. Very much. And the misuse of market power or market share, which is implied possibly—underscore "possibly"—by some of what we've seen lately certainly would be within your jurisdiction; correct?

Mr. SIMONS. Yes.

Senator BLUMENTHAL. I notice Mr. Phillips——

Mr. PHILLIPS. Yes.

Senator BLUMENTHAL.—is nodding his head in assent and others are as well.

I think, you know, that we're expecting you to use the full range of your authority—consumer protection, antitrust—and they're both really—and deceptive and misleading practices that affect consumers and antitrust affects consumers. In fact, the misuse of market power may include deceptive and misleading——

Mr. SIMONS. Sure.

Senator BLUMENTHAL.—practices. So what I'd like to ask is a commitment from you that you will assess the market share of the

big tech companies, the top five, and that you will report back to us on what that market share is.

Mr. CHOPRA. Well, I think our hearings and any studies we might do to compel information—you know, market share is a little bit of a tricky issue with this one. But let me just say we have the antitrust laws, we have the FTC Act, we have other statutes Congress has given us, but several of the largest tech companies on the plant are also under order by the FTC—Google, Facebook, Twitter and there's more—and we expect that those orders are followed. They are not suggestions. And so we also have that tool as well.

Senator BLUMENTHAL. Well, this is a big question, and I'm not going to prolong this hearing but I would like to follow up on it with some questions for the record on information that you could provide us that would reflect on the current potential antitrust issues that we've raised here. Thank you.

Senator MORAN. Thank you all very much.

No further questions from me, but I would indicate that you've caught my attention on the U.S. SAFE WEB reauthorization, and if you'd have your staff visit with my staff, we'd be interested in working with you about its reauthorization.

And I've always had the practice of allowing witnesses before our Subcommittee to add anything to the record they'd like to add. Is there anyone who has spoken today that would like to say anything further, something you left out, something you want to clear up or something that you feel like we did not ask you?

All heads are shaking to the negative, suggesting that you too are ready for this hearing to come to a conclusion.

The hearing record will remain open for two weeks. During this time, senators are asked to submit any questions for the record. Upon receipt, the witnesses are requested to submit their written answers to the Committee.

I again thank you for appearing today and appreciate your cooperation. I was impressed by the nature of your responses, your testimony, your articulation of complicated matters, and I was particularly pleased to see the nature of the relationship that appears to be among all of you in working together that is appealing to me.

With that, this hearing is now adjourned.

[Whereupon, at 4:49 p.m., the hearing was adjourned.]

A P P E N D I X

ELECTRONIC PRIVACY INFORMATION CENTER
Washington, DC, November 26, 2018

Hon. JERRY MORAN, Chairman,
Hon. RICHARD BLUMENTHAL, Ranking Member,
U.S. Senate Committee on Commerce, Science, and Transportation,
Subcommittee on Consumer Protection, Product Safety, Insurance, and Data Security,
Washington, DC.

Dear Chairman Moran and Ranking Member Blumenthal:

We write to you in advance of the hearing "Oversight of the Federal Trade Commission."[1] We appreciate your interest in the role of the FTC and consumer protection. We look forward to working with the Commerce Committee in the next Congress. Your oversight of the Federal Trade Commission is critical to safeguard the interests of American consumers and businesses.

From EPIC's perspective, the FTC must do more far more to address the growing threats to consumer privacy and to assure our trading partners as to the adequacy of data protection in the United States. Consumers today face unprecedented risks of identity theft, financial fraud, and data breaches. And because so many U.S. firms collect personal data of European consumers, the FTC's failure to enforce consent orders also risks continued trade relations with the country's largest trading partners. Before giving the FTC more authority, the Senate Commerce Committee should review the FTC's use of its current authority and ask specific questions about commitments made regarding the enforcement of consent orders and merger review. In February, the new Commissioners said there would be vigorous enforcement. That simply has not happened.

For many years, EPIC has worked with the Senate Commerce Committee to help protect the privacy rights of Americans.[2] EPIC has also played a leading role at the FTC, helping to establish the Commission's authority to bring privacy investigations and to protect the personal data of American consumers.[3] EPIC is the group that filed the comprehensive complaint against Facebook with the FTC in 2009, resulting

[1] *Oversight of the Federal Trade Commission,* 115th Cong. (2018), Senate Comm. on Commerce, Sci., and Trans., Subcomm. on Consumer Protection, Product Safety, Insurance, and Data Security (Nov. 27, 2018), *https://www.commerce.senate.gov/public/index.cfm/2018/11/oversight-of-the-federal-trade-commission.*

[2] *See, e.g, Impact and Policy Implications of Spyware on Consumers and Businesses Before S. Comm. on Commerce, Sci., and Transp.,* 110th Cong. (2008) (statement of Marc Rotenberg, Executive Director, EPIC), *https://epic.org/privacy/dv/Spyware_Test061108.pdf; Protecting Consumers' Phone Records Before the S. Comm. On Commerce, Sci., and Transp.,* 109th Cong. (2006) (statement of Marc Rotenberg, Executive Director, EPIC), *https://epic.org/privacy/iei/testimony2806.pdf.*

[3] Letter from EPIC Executive Director Marc Rotenberg to FTC Commissioner Christine Varney (Dec. 14, 1995), *http://epic.org/privacy/internet/ftc/ftc_letter.html* (urging the FTC to investigate the misuse of personal information by the direct marketing industry); *See also* EPIC, *In the Matter of DoubleClick, Complaint and Request for Injunction, Request for Investigation and for Other Relief, before the Federal Trade Commission* (Feb. 10, 2000), *http://epic.org/privacy/internet/ftc/DCLK_complaint.pdf;* EPIC, *In the Matter of Microsoft Corporation, Complaint and Request for Injunction, Request for Investigation and for Other Relief* (July 26, 2001), *http://epic.org/privacy/consumer/MS_complaint.pdf, In the Matter of Choicepoint, (Complaint, Request for Investigation and for Other Relief)* (Dec. 16, 2004), *http://epic.org/privacy/choicepoint/fcraltr12.16.04.html.*

in the Commission's 2011 Consent Order with Facebook,[4] and is the group that sued the FTC for the Commission's failure to enforce a similar order against Google.[5]

Below, EPIC raises five critical points for committee consideration: *(1) The FTC fails to enforce its own consent orders; (2) Even when the FTC finds violations, it does not sanction companies; (3) The FTC failed to stop mergers that threaten consumer privacy; (4) The FTC lacks transparency; and (5) The United States needs a data protection agency.*

Why Does the FTC Fail to Enforce Its Own Consent Orders?

In 2011, the FTC entered into a Consent Order with Facebook, following an extensive investigation and complaint pursued by EPIC and several U.S. consumer privacy organizations. The Consent Order specifically prohibited Facebook from transferring personal data to third parties without user consent.[6] As EPIC told this Committee in April of this year, the transfer of personal data on 87 million Facebook users to Cambridge Analytica could have been prevented had the FTC enforced its 2011 Consent Order against Facebook.[7] *The obvious question now is "why did the FTC fail to act?"*

In 2011, EPIC also obtained a significant judgment at the FTC against Google after the disastrous roll-out of Google "Buzz."[8] In that case, the FTC established a consent order after Google tried to enroll Gmail users into a social networking service without obtaining meaningful consent.[9] But a problem we did not anticipate became apparent almost immediately: *the FTC was unwilling to enforce its own consent orders.* Almost immediately after the settlements, both Facebook and Google began to test the Commission's willingness to stand behind its judgments: Dramatic changes in the two companies' advertising models led to more invasive tracking of Internet users, user behaviors both online and offline were tracked and merged, and Facebook used facial recognition tools on Internet users who were not even using their platform. Still the FTC did nothing.

In March 2018, after the Cambridge Analytica scandal became public, the FTC announced it would reopen the investigation of Facebook.[10] In a press release, the FTC stated that "[c]ompanies who have settled previous FTC actions must also comply with FTC order provisions imposing privacy and data security requirements. Accordingly, the FTC takes very seriously recent press reports raising substantial concerns about the privacy practices of Facebook."[11] Chairman Simons also told this Committee in February, a "first priority for the Commission" will be "vigorous enforcement,"[12] and Commissioner Rohit Chopra stated in May that "FTC orders are not suggestions."[13]

Despite strong words, eight months have passed since the FTC's announcement of a new investigation, but still there is no judgment, no report, nor even a public statement about one of the most serious data breaches in U.S. history. It is critical

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[4] *In the Matter of Facebook, Inc.* (EPIC, Complaint, Request for Investigation, Injunction, and Other Relief) before the Federal Trade Commission, Washington, D.C. (filed Dec. 17, 2009), *http://www.epic.org/privacy/inrefacebook/EPIC-FacebookComplaint.pdf.*

[5] *EPIC v. FTC,* 844 F. Supp. 2d 98 (D.D.C. 2012), *https://epic.org/privacy/ftc/google/EPICvFTC-CtMemo.pdf.*

[6] Fed. Trade Comm'n., *In re Facebook,* Decision and Order, FTC File No. 092 3184 (July 27, 2012), *https://www.ftc.gov/sites/default/files/documents/cases/2012/08/120810facebookdo.pdf.*

[7] *See,* Letter from EPIC to S. Comm. on the Judiciary and S. Comm on Commerce, Sci. and Trans. (Apr. 9, 2018), *https://epic.org/testimony/congress/EPIC–SJC-Facebook-Apr2018.pdf.*

[8] *In the Matter of Google, Inc.,* EPIC Complaint, Request for Investigation, Injunction, and Other Relief, before the Federal Trade Commission, Washington, D.C. (filed Feb. 16, 2010), *https://epic.org/privacy/ftc/googlebuzz/GoogleBuzz_Complaint.pdf.*

[9] Press Release, Fed. Trade Comm'n., *FTC Charges Deceptive Privacy Practices in Googles Rollout of Its Buzz Social Network: Google Agrees to Implement Comprehensive Privacy Program to Protect Consumer Data* (Mar. 30, 2011), *https://www.ftc.gov/news-events/press-releases/2011/03/ftc-charges-deceptive-privacy-practices-googles-rollout-its-buzz.*

[10] Press Release, Fed. Trade Comm'n., Statement by the Acting Director of FTC's Bureau of Consumer Protection Regarding Reported Concerns About Facebook Privacy Practices (Mar. 26, 2018), *https://www.ftc.gov/news-events/press-releases/2018/03/statement-acting-director-ftcs-bureau-consumer-protection.*

[11] *Id.*

[12] *Nomination Hearing,* 115th Cong. (2018), S. Comm. on Science, Commerce and Transportation, (Feb. 14, 2018) (Joseph Simons, Chairman, Fed. Trade Comm'n. at 59:40), *https://www.commerce.senate.gov/public/index.cfm/hearings?ID=EECF6964-F8DC-469E-AEB2-D7C16182A0E8.*

[13] Memorandum from Commissioner Rohit Chopra to Commission Staff and Commissioners, Fed. Trade Comm'n, (May 14, 2018), *https://www.ftc.gov/system/files/documents/public_statements/1378225/chopra_-_repeat_offenders_memo_5-14-18.pdf.*

that the FTC conclude the Facebook matter, issue a significant fine, and ensure that the company upholds its privacy commitments to users.

The Committee should ask the FTC Chairman and the Commissioners: When will there be a final determination in the Facebook investigation? What other steps can the FTC take to assure the American public that the Commission will enforce its legal orders?

Even When the FTC Finds Violations, It Does Not Sanction Companies

EPIC filed a complaint with the FTC in 2015 regarding Uber's egregious misuse of personal data.[14] That complaint led to an FTC settlement with Uber in August 2017.[15] But shortly after announcing that settlement, the FTC discovered that Uber had failed to disclose another massive data breach of its third-party cloud storage service.[16] The breach exposed unencrypted files containing more than 25 million names and e-mail addresses, 22 million names and phone numbers, and 600,000 names and driver's license numbers.[17] Uber became aware of this breach in November 2016 but waited a full *year* to notify its customers while secretly paying the hackers $100,000 through its "bug bounty" program. Furthermore, Uber failed to notify the FTC of this breach despite the fact that it occurred during the FTC's investigation into Uber's failure to protect consumer data.

Last month, the FTC finalized a revised settlement with Uber.[18] The modified settlement requires Uber to submit all of its biennial privacy assessments to the FTC, rather than just the initial assessment, but those assessments will not be made public. *Despite Uber's repeated failures to protect consumer data, the proposed Order contains no mandatory provisions for how Uber will safeguard consumer data.* The FTC imposed no fines.

It is the responsibility of the FTC to protect consumer privacy and prosecute companies that engage in unfair or deceptive trade practices. The Commission has failed to do so. This is even more troubling because the Commission claimed that its inability to impose fines hampers its enforcement powers.[19] But there is no such hurdle in cases involving companies like Uber that are already subject to FTC consent orders.

Why Has the FTC Failed to Stop Mergers that Threaten Consumer Privacy?

The FTC must also address the serious threats to consumer privacy posed by increasing consolidation among the dominant technology firms in the United States. Facebook's strategic acquisitions of Instagram and WhatsApp, and their use of consumer data from both acquisitions, provide two examples. As Columbia professor Tim Wu writes in his new book *The Curse of Bigness: Antitrust in the New Gilded Age,* the failures of antitrust enforcement "sit right in front of our faces: the centralization of the once open and competitive tech industries into just a handful of giants. . ."[20] The FTC's failure to take these threats into account in its merger review process is one of the main reasons that consumer privacy has diminished and the secretive tracking and profiling of consumers has proliferated.

In 2007, EPIC warned the FTC that Google's acquisition of DoubleClick would lead to Google tracking consumers across the web, accelerating its dominance of the online advertising industry.[21] The FTC ultimately allowed the merger to go forward

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[14] EPIC Complaint to the FTC, *In the Matter of Uber Technologies, Inc.* (June 22, 2015), *https://epic.org/privacy/internet/ftc/uber/Complaint.pdf.*

[15] Agreement Containing Consent Order FILE NO. 1523054, *In the Matter of Uber Technologies, Inc., https://www.ftc.gov/system/files/documents/cases/1523054_uber_technologies_agreement.pdf.*

[16] Press Release, Fed. Trade Comm'n., Uber Agrees to Expanded Settlement with FTC Related to Privacy, Security Claims (Apr. 12, 2018), *https://www.ftc.gov/news-events/press-releases/2018/04/uber-agrees-expanded-settlement-ftc-related-privacy-security.*

[17] *Id.*

[18] Press Release, Fed. Trade Comm'n., Federal Trade Commission Gives Final Approval to Settlement with Uber (Oct. 26, 2018), *https://www.ftc.gov/news-events/press-releases/2018/10/federal-trade-commission-gives-final-approval-settlement-uber.*

[19] *Oversight of the Federal Trade Commission Before the Subcomm. on Dig. Commerce and Consumer Prot. of the H. Comm. on Energy & Commerce,* 115th Cong. 6 (2018) (statement of Joseph J. Simons, Chairman, Fed. Trade Comm'n), *https://www.ftc.gov/system/files/documents/public_statements/1394526/p180101_ftc_testimony_re_oversight_house_07182018.pdf.*

[20] Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* 23 (2018).

[21] *In the Matter of Google Inc. and DoubleClick Inc.,* (EPIC Complaint, Request for Injunction, Investigation, and Other Relief), (Apr. 20, 2007), *https://epic.org/privacy/ftc/google/epic_complaint.pdf.*

over the compelling dissent of Pamela Jones Harbour.[22] Not surprisingly, Google today accounts for 90 percent of all Internet searches and, together with Facebook, absorbs 73 percent of all digital advertising revenue in the United States.[23]

Despite the clear lessons from Google-DoubleClick, in 2014, the FTC failed to impose privacy safeguards for Facebook's acquisition of WhatsApp, a text-messaging service that attracted users specifically because of its strong privacy protections.[24] The FTC allowed the merger based on assurances by both companies that they would honor WhatsApp users' privacy.[25] But in 2016, WhatsApp announced that it would begin disclosing its users' personal information to Facebook.[26] The UK Information Commissioner's Office blocked WhatsApp's transfer of data to Facebook,[27] and the European Commission fined Facebook $122 million for misleading European authorities about the data transfer.[28] But the FTC again failed to take action.

Chairman Joseph Simons said in February that "the FTC needs to devote substantial resources to determine whether its merger enforcement has been too lax, and if that is the case, the agency needs to determine the reason for such failure and to fix it."[29] More pointedly, Congress must ensure that the Commission uses its current authorities to the fullest extent possible. For example, as EPIC has argued elsewhere, the Commission could "unwind" the Facebook-WhatsApp deal because of Facebook's failure to uphold its commitments to users.[30] Even the founders of WhatsApp have acknowledged that Facebook broke its commitments. How can it be that the FTC does not act in such circumstances?

The Committee should ask the FTC Chairman and the Commissioners: Will the FTC unwind the Facebook-WhatsApp deal? What further steps is the FTC going to take to protect consumer privacy in its merger review process?

The FTC Lacks Transparency

The FTC should be more transparent about its review of companies under consent orders. Earlier this year, EPIC filed a Freedom of Information Act lawsuit against the FTC to publicly release the biennial audits of Facebook's privacy practices and related records to understand why the FTC failed to bring any enforcement action against the company.[31] As a result of EPIC's lawsuit, the FTC released several communications between the FTC and Facebook that reveal the comfortable relationship between the Commission and Facebook.[32]

In the early years following the 2011 Consent Decree, a set of e-mails revealed disagreement between Facebook and the FTC over potential enforcement action on Facebook's proposed changes to its Data Use Policy and Statement of Rights and Responsibility.[33] In a September 11, 2013 e-mail, the FTC counsel wrote that the agency is "greatly disappointed that [Facebook] did not provide [the FTC with] the information [the FTC] requested to assess Facebook's compliance with the Commis-

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[22] *In the Matter of Google/DoubleClick,* FTC File No. 070–0170 (2007) (Harbor, C., dissenting), *https://www.ftc.gov/sites/default/files/documents/public_statements/statement-matter-google/doubleclick/071220harbour_0.pdf.*

[23] Editorial, *Break Up Google,* Boston Globe (June 14, 2018), *https://apps.bostonglobe.com/opinion/graphics/2018/06/break-google/.*

[24] *In the Matter of WhatsApp, Inc.,* (EPIC and Center for Digital Democracy Complaint, Request for Investigation, Injunction, and Other Relief) (Mar. 6, 2014), *https://epic.org/privacy/ftc/whatsapp/WhatsApp-Complaint.pdf.*

[25] *See, See* Letter from Jessica L. Rich, Director, Bureau of Consumer Prot., Fed. Trade Comm'n., to Facebook and WhatsApp (Apr. 10, 2014), *https://epic.org/privacy/internet/ftc/whatsapp/FTC-facebook-whatsapp-ltr.pdf* (concerning the companies' pledge to honor WhatsApp's privacy promises).

[26] WHATSAPP, *Looking Ahead for WhatsApp,* WhatsApp Blog, (Aug. 25, 2016), *https://blog.whatsapp.com/10000627/Looking-ahead-for-WhatsApp.*

[27] Information Commissioner's Office, *WhatsApp, Inc.* (Mar. 12, 2018), *https://ico.org.uk/media/action-weve-taken/undertakings/2258376/whatsapp-undertaking-20180312.pdf.*

[28] Press Release, European Commission, *Mergers: Commission Fines Facebook €110 Million for Providing Misleading Information About WhatsApp Takeover* (May 18, 2017), *http://europa.eu/rapid/press-release_IP-17-1369_en.htm.*

[29] *Nomination Hearing Before the S. Comm. on Science, Commerce and Transportation,* 115th Cong. (2018) (testimony of Joseph Simons, Nominee to be Chairman, Fed. Trade Comm'n.), *https://www.commerce.senate.gov/public/index.cfm/hearings?ID=EECF6964-F8DC-469E-AEB2-D7C16182A0E8.*

[30] Marc Rotenberg, *The Facebook-WhatsApp Lesson: Privacy Protection Necessary for Innovation,* Techonomy (May 4, 2018), *https://techonomy.com/2018/05/facebook-whatsapp-lesson-privacy-protection-necessary-innovation/.*

[31] *See* EPIC, *EPIC v. FTC, https://www.epic.org/foia/ftc/facebook/.*

[32] See EPIC, *EPIC v. FTC: FOIA Documents, https://www.epic.org/foia/ftc/facebook/#foia.*

[33] *See* E-mail from S. Ashlie Beringer, Partner, Gibson, Dunn & Crutcher, to Reenah Kim, *et al.,* Attorney, Fed. Trade Comm'n 83–86, *https://epic.org/foia/ftc/facebook/EPIC-18-03-20-FTC-FOIA-20181019-FTC-FB-Addtl-Communications-2013.pdf.*

sion's orders."[34] The e-mail alludes to an earlier phone call where Facebook would not answer the agency's questions to eight specific issues, "essentially making the call a waste of time."[35] Facebook responded to this e-mail by stating they were "surprised and concerned by the suggestion" that they did not address the FTC's questions and stated that Facebook does not "believe there is any credible basis to assert that [the FTC's] questions relate to Facebook's obligation under the Consent Order."[36] Following this exchange, Facebook cooperated with the FTC's request for information, having stated that the provided information "reflects Facebook's continued commitment to cooperation and collaboration with [the FTC]."[37]

Communications since 2013 reflect a similar lack of commitment by the FTC to enforce the terms of the original consent order. For example, in a chain of e-mails, the FTC expressed concerns about the scope of Facebook's 2015 assessment, stating "[the auditor's] report does not demonstrate whether and how Facebook addressed the impact of the acquisitions on its Privacy Program."[38] In another e-mail, the FTC expressed similar concerns about the 2017 assessment and whether the audit evaluated the company's acquisitions impact on Facebook's privacy program.[39] The FTC accepted Facebook and its auditor's response letters assuring the Commission that the auditor addressed the impact of acquisitions on Facebook's privacy program at face value without additional inquiry.[40] The release of this information, as a result of EPIC's lawsuit, provides insight into the FTC's inability to make use of its current enforcement authorities.

The United States Needs a Data Protection Agency

The Federal Trade Commission helps to safeguard consumers and to promote competition, but the FTC is not an effective data protection agency. *The agency lacks authority to enforce basic data protection obligations and has failed to enforce the orders it has established. The FTC also lacks the ability, authority and expertise to engage the broad range of challenges we now confront*—such as Internet of Things, Artificial Intelligence, connected vehicles, and more. This problem will not be solved by granting the FTC more authority: the agency has failed to use the authority it already has.

Given the enormity of the challenge, the United States would be best served to do what other countries have done and create a dedicated data protection agency. An independent agency could more effectively utilize its resources to police the current widespread exploitation of consumers' personal information and would be staffed with personnel who possess the requisite expertise to regulate the field of data security.

The United States is one of the few advanced economies in the world that does not have a Federal data protection agency, even though the original proposal for such an institution emerged from the United States in the 1970s.[41] *The practical consequence is that the U.S consumers experience the highest levels of data breach, financial fraud, and identity theft in the world.* And U.S. businesses, with their vast collections of personal data, remain the target of cyber-attack by criminals and foreign adversaries. The Cambridge Analytica case is just one illustration of the ways in which that vulnerability threatens not only U.S. citizens, but also our democratic institutions. The longer the United States continues on this course, the greater will be the threats to consumer privacy, democratic institutions, and national security.

As the data breach epidemic reaches unprecedented levels, the need for an effective, independent data protection agency has never been greater.

Conclusion

The FTC has failed to make use of its current legal authorities to enforce consent orders and unwind mergers that stifle innovation and competition. Seven years have

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[34] *Id.* at 83–84.
[35] *Id.* at 84.
[36] *Id.* at 83.
[37] Letter from S. Ashlie Beringer, Partner, Gibson, Dunn & Crutcher, to Reenah Kim, *et al.,* Attorney, Fed. Trade Comm'n 98 (Sept. 30, 2013), *https://epic.org/foia/ftc/facebook/EPIC-18-03-20-FTC-FOIA-20181019-FTC-FB-Addtl-Communications-2013.pdf.*
[38] Letter from Laura D. Koss, *et al.,* Attorney, Fed. Trade Comm'n to Edward Palmieri, Assoc. General Counsel, Facebook 117–118 (June 4, 2015), *https://epic.org/foia/FTC/facebook/EPIC-18-03-20-FTC-FOIA-20181012-FTC-FB-Communications.pdf.*
[39] Letter from Reenah Kim, Attorney, Fed. Trade Comm'n to Edward Palmieri, Assoc. General Counsel, Facebook 134–136 (June 1, 2017), *https://epic.org/foia/FTC/facebook/EPIC-18-03-20-FTC-FOIA-20181012-FTC-FB-Communications.pdf.*
[40] *See* Response Letters from Facebook and PwC to Fed. Trade Comm'n 108–119, *https://epic.org/foia/ftc/facebook/EPIC-18-03-20-FTC-FOIA-20180910-FB-Assessment-Records-2013.pdf.*
[41] *See* EPIC, *The Privacy Act of 1974, https://epic.org/privacy/1974act/#history.*

passed since the FTC heralded the consent order with Facebook, and yet the Commission has not issued a single fine against the company that has been widely criticized for its business practices. It is unclear how additional regulatory authority will fix that problem.

EPIC appreciates the Committee's decision to convene this hearing and respects the FTC's role as the lead consumer protection agency in the United States. But as for data protection in the United States, the FTC is not up to the task. It is time to establish an independent Federal data protection agency.

We ask that this letter be entered in the hearing record. EPIC looks forward to working with the Committee on these issues of vital importance to the American public.

Sincerely,

/s/MARC ROTENBERG
Marc Rotenberg
EPIC President

/s/CAITRIONA FITZGERALD
Caitriona Fitzgerald
EPIC Policy Director

/s/CHRISTINE BANNAN
Christine Bannan
EPIC Consumer Privacy Counsel

/s/ENID ZHOU
Enid Zhou
EPIC Open Government Counsel

/s/LORRAINE KISSELBURGH
Lorraine Kisselburgh
EPIC Scholar in Residence

/s/JEFF GARY
Jeff Gary
EPIC Legislative Fellow

Additional Resources

- *In the Matter of Facebook, Inc.* (EPIC, Complaint, Request for Investigation, Injunction, and Other Relief) before the Federal Trade Commission, Washington, D.C. (filed Dec. 17, 2009), *http://www.epic.org/privacy/inrefacebook/EPIC-FacebookComplaint.pdf*.
- *In the Matter of Facebook, Inc.* (EPIC, Supplemental Materials in Support of Pending Complaint and Request for Injunction, Request for Investigation and for Other Relief) before the Federal Trade Commission, Washington, D.C. (filed Jan. 14, 2010), *http://www.epic.org/privacy/inrefacebook/EPIC-FacebookComplaint.pdf*.
- Fed. Trade Comm'n., *Facebook Settles FTC Charges That It Deceived Consumers by Failing to Keep Privacy Promises,* Press Release, (Nov. 29, 2011), *https://www.ftc.gov/news-events/press-releases/2011/11/facebook-settles-ftc-charges-it-deceived-consumers-failing-keep*.
- *EPIC v. FTC,* 844 F. Supp. 2d 98 (D.D.C. 2012), *https://epic.org/privacy/ftc/google/EPICvFTC-CtMemo.pdf*.
- EPIC, *In re Facebook and Facial Recognition (2018), https://www.epic.org/privacy/ftc/facebook/facial-recognition2018*.
- Info. Comm'rs Office, *Findings Recommendations and Actions from ICO Investigation into Data Analytics in Political Campaigns* (2018), *https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2018/07/findings-recommendations-and-actions-from-ico-investigation-into-data-analytics-in-political-campaigns*.
- EPIC Statement to Subcomm. on Antitrust, Competition Policy, and Consumer Rights of the S. Comm. on the Judiciary, 115th Cong. (2018), *https://epic.org/testimony/congress/EPIC-SJC-AntitrustOversight-Oct2018.pdf*.
- EPIC Statement to Subcomm. on Research and Tech. of the H. Comm. on Sci., Space, and Tech., 115th Cong. (2018)), *https://epic.org/testimony/congress/EPIC-HSC-AI-June2018.pdf*.

November 26, 2018

JOSEPH J. SIMONS, Chairman,
Federal Trade Commission,
Washington, DC.

VIA EMAIL TRANSMISSION

Dear Chairman Simons:

We, the undersigned consumer, privacy and civil liberties organizations, write to express our disappointment about the comments [1] that the Federal Trade Commission (FTC) staff recently submitted to the National Telecommunications and Information Administration's request for comments on "Developing the Administration's Approach to Consumer Privacy." [2] We appreciate the work that the FTC has done over the years to protect consumers' privacy, within the limitations that it describes in its comments.[3] However, we remain frustrated by the agency's failure to act promptly on timely and important privacy-related complaints [4] before the agency as well as by the lack of adequate enforcement actions for cases resolved in recent years.[5]

What is most troubling to us in these comments, however, is the FTC's apparent position, citing a study by the advertising industry, that a policy approach in which consumers were opted out of online advertising by default would not be appropriate because "the likely result would include the loss of advertising-funded online content." [6] The study fails to cite any empirical data suggesting that without targeted advertising, free online content will decrease. We would have hoped that the FTC would take a broader look at the evidence, rather than relying on a self-serving study by one stakeholder.

The FTC's stated position ignores the fact that contextual advertising, which does not raise the same privacy concerns as behavioral advertising, would still be possible. In addition, the FTC fails to recognize that placing the burden on individuals to deal with the privacy-intrusive nature of behavioral tracking and targeting is unfair. Privacy management across hundreds of websites and untold numbers of advertisers and data brokers, many hidden from public view, is an impossible task for consumers.

That is why the General Data Protection Regulation (GDPR) in Europe places the burden on data controllers to demonstrate that they have a legal basis to collect, use or share an individual's personal information. A data controller can only process personal data if it has a legal basis to do so, which includes the processing on the basis of a freely given, specific, informed and unambiguous consent.[7] In fact, European data protection authorities have clarified that opt-in consent should be required "for tracking and profiling for purposes of direct marketing, behavioural advertisement, data-brokering, location-based advertising or tracking-based digital market research." [8] We suggest that the FTC's position is out of step with most of the rest of the world, and it makes consumers in the United States second class citizens when it comes to privacy protection.

In its comments, the FTC cites examples of how consumer data fuels innovation, most of which (such as better responses to emergency situations, improved fraud de-

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[1] *https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-ntia-developing-administrations-approach-consumer-privacy/p195400_ftc_comment_to_ntia_112018.pdf.*

[2] Federal Register Vol. 83, No 187 (September 26, 2018), notice and request for comments, *https://www.gpo.gov/fdsys/pkg/FR-2018-09-26/pdf/2018-20941.pdf.*

[3] *Supra* at pages 18–19.

[4] For instance, the FTC has taken no action on a complaint that consumer and privacy groups made in 2016 alleging that cable and satellite providers were deceiving consumers about their privacy practices; *see* letter sent to the FTC one year after the complaint was submitted, *https://consumerfed.org/wp-content/uploads/2017/06/6-12-17-FTC-Consumer-Privacy_Letter.pdf.* Another example is the complaint that consumer and privacy groups made about the internet-connected doll, My Friend Cayla, in 2016, *see* December 2017 letter demanding action, *http://www.commercialfreechildhood.org/consumer-and-privacy-groups-demand-action-toys-spy-children.*

[5] *See,* for example, April 6, 2018 complaint to the FTC from consumer and privacy groups alleging that Facebook violated previous Consent Order, *https://consumerfed.org/wp-content/uploads/2018/04/consumer-privacy-groups-ftc-complaint-facebook-facial-recognition.pdf,* and recent consumer and privacy group comments to the FTC about its failure to protect privacy in its merger review process, *https://consumerfed.org/wp-content/uploads/2018/08/consumer-privacy-groups-comment-on-intersection-between-privacy-big-data-and-competition.pdf.*

[6] *Supra* at page 18.

[7] Information about the GDPR and other EU data protections is available at *https://ec.europa.eu/info/law/law-topic/data-protection/data-protection-eu_en.*

[8] Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC, *http://ec.europa.eu/justice/data-protection/index_en.htm.*

tection, safer homes, better health and wellness, improved inventory control, easier-to-find parking, and increased connectivity) can be accomplished without necessarily unduly impinging on individuals' privacy.[9] These data uses (1) are specifically related to the purposes for which the individuals provided their data; (2) could be accomplished with aggregate data; or (3) could be allowed under reasonable exceptions (*e.g.,* fraud control). "More relevant online experiences," on the other hand, is something that consumers should be given the option to affirmatively agree to if they wish. We do not think that "more relevant" should be read to mean more beneficial to advertisers.

The FTC staff also commented that the benefits of privacy regulation should be weighed against potential costs to competition and gives as an example a small outdoor equipment company seeking to expand its customer base.[10] We suggest that a narrow-minded economic balancing test ignores the fundamental right to privacy that should be the proper starting point for analysis. In any event, nothing would prevent that small outdoor equipment company from serving ads on a contextual basis—for instance, on a camping or hiking site. Furthermore, if the FTC took more assertive action to ensure that search engines cannot dominate the online ecosystem and unfairly rig the results,[11] individuals would be able to find that small company more easily. It seems that the FTC relies on its own failures to police competition in the online marketplace as justification for overriding the privacy interests of consumers.

We appreciate the fact that the FTC continues to call for Congress to enact privacy and security legislation, and we support enhancing the agency's resources, rulemaking authority and enforcement capabilities. We do not believe, however, that the scale should be tipped in favor of corporate interests over the fundamental civil and human rights of individuals.

Sincerely,

Campaign for a Commercial Free Childhood

Center for Digital Democracy

Consumer Action

Consumer Federation of America

Consumer Watchdog

Customer Commons

Electronic Frontier Foundation

Electronic Privacy Information Center

Media Alliance

National Hispanic Media Coalition

Privacy Rights Clearinghouse

Public Citizen

Public Knowledge

Stop Online Violence Against Women

U.S. PIRG

CC: Commissioner Noah Joshua Phillips
Commissioner Rohit Chopra
Commissioner Rebecca Kelly Slaughter
Commissioner Christine S. Wilson
Andrew Smith, Director, Bureau of Consumer Protection
Maneesha Mithal, Director, Division of Privacy and Identity Protection

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[9] *Supra* at pages 10–11.

[10] *Id.*

[11] *See* European Commission press release announcing fine levied against Google for imposing illegal restrictions on Android device manufacturers and mobile network operators to cement its dominant position in general Internet search (July 18, 2018), *http://europa.eu/rapid/press-release_IP-18-4581_en.htm.* The FTC missed an opportunity to rein in Google's anti-competitive behavior five years earlier, *see* Craig Timberg, "FTC: Google did not break antitrust law with search practices," Washington Post (January 3, 2013), *https://www.washingtonpost.com/business/technology/ftc-to-announce-google-settlement-today/2013/01/03/ecb599f0–55c6–11e2-bf3e-76c0a789346f_story.html?utm_term=.3d532f0e0425.*

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN THUNE TO HON. JOSEPH J. SIMONS

Question 1. You recently attended the Second Annual Privacy Shield Review. Did the European regulators raise any concerns about the effectiveness of the program? Do you think Privacy Shield is operating effectively and will continue to be a valid means for businesses to transfer personal data to the United States from Europe?

Answer. The European Commission (EC) issued its report on the Annual Review in December 2018. I agree with the ultimate conclusion of the EC report: Privacy Shield remains a robust program for protecting privacy and enabling transatlantic data flows. The report found that U.S. authorities continue to improve the program, highlighting the proactive approach to enforcement by the FTC. The EC raised concerns with the national security aspects of the program, specifically requesting the nomination of an Ombudsperson within the State Department. The Administration has since created and filled a Privacy Shield Ombudsperson position.

Question 2. Vertical mergers such as the merger between AT&T and Time Warner have garnered some attention lately. The Federal Trade Commission (FTC) and the Department of Justice (DOJ) have not updated vertical merger guidance since 1984. Do you believe that the FTC and DOJ should issue new guidance on vertical mergers?

Answer. I believe that the 1984 Non-Horizontal Merger Guidelines do not reflect current scholarship and thinking on vertical merger enforcement.[1] They are significantly out of date. If we were to attempt to draft new guidelines, we would probably have to start from scratch, based on the practical learning and experience of more recent merger challenges and investigations.

Over the years, the Commission and its staff have provided substantial insight on vertical merger analysis through speeches and other policy work,[2] and through rigorous case selection.[3] The Commission is actively considering whether we—along with our sister agency, the Antitrust Division of the Department of Justice—should formally publish vertical merger guidelines. This topic is a key focus of the FTC's ambitious program of *Hearings on Competition and Consumer Protection in the 21st Century.*[4] Two panel discussions on vertical mergers were held in November 2018, and the Commission has invited public commentary on the topic.

Question 3. Government lawsuits to stop mergers are litigated using different procedures depending on which agency, the FTC or DOJ, handles the case. Do you think Congress should take action to ensure that agencies follow the same procedures, or do you support another approach?

Answer. While I have no opinion as to whether Congress should take action, I note that there are significant benefits to the Commission's administrative litigation path; in particular, it provides the Commission an opportunity to develop important aspects of competition law. But if the FTC is denied a preliminary injunction in a merger matter in Federal court, I do not believe the Commission should pursue that matter in administrative litigation. The Commission has not pursued an administrative proceeding following the denial of a preliminary injunction in Federal court for over twenty years. I agree with this approach.

Separately, it is not clear to me whether it would be beneficial to prohibit the FTC from conducting an administrative proceeding while the parties to a merger remain

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[1] *U.S. Dep't of Justice Non-Horizontal Merger Guidelines* (1984), *https://www.justice.gov/sites/default/files/atr/legacy/2006/05/18/2614.pdf.*

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

[3] For example, the Commission recently challenged a vertical merger between Northrop Grumman, a leading provider of missile systems to the Department of Defense, and Orbital ATK, a key supplier of solid rocket motors. *In re Northrop Grumman,* Dkt. C–4652 (June 5, 2018), *https://www.ftc.gov/enforcement/cases-proceedings/181-0005-c-4652/northrop-grumman-orbital-atk. See also In re Sycamore Partners II, L.P., Staples, Inc., and Essendant Inc.,* Dkt. C–4667 (Jan. 25, 2018), *https://www.ftc.gov/enforcement/cases-proceedings/181–0180/sycamore-partners-ii-lp-staples-inc-essendant-inc-matter* (consent agreement resolving charges that a merger between Staples, the world's largest retailer of office products and related services, and Essendant, a wholesale distributor of office products, was likely to harm competition in the market for office supply products sold to small- and mid-sized businesses).

[4] FTC, *Hearings on Competition and Consumer Protection in the 21st Century, https://www.ftc.gov/policy/hearings-competition-consumer-protection; see also* FTC Workshop, *FTC Hearing #5: Competition and Consumer Protection in the 21st Century* (Nov. 1, 2018), *https://www.ftc.gov/news-events/events-calendar/ftc-hearing-5-competition-consumer-protection-21st-century.*

unable to close their transaction for a significant period of time. Many transactions are subject to multijurisdictional reviews, whether by foreign competition authorities or state regulators. Under current law, the FTC can commence an administrative action while other reviews are pending. The FTC may delay an injunction action in Federal court until other review processes are completed and the merger is imminent. This approach could have certain advantages that I believe are worth discussing when thinking about making changes to the Commission's process for challenging mergers.

In the recent *Tronox* case, the FTC was able to complete an administrative trial while the parties waited for foreign approvals.[5] Once those approvals were granted and the parties would have been able to close their transaction, the FTC filed suit in Federal court seeking a preliminary injunction. The existence of the record from the FTC administrative proceeding allowed the parties to avoid a substantial discovery period in the Federal proceeding, enabled the district court judge to substantially expedite the preliminary injunction hearing, and very likely reduced the overall time for the court to reach a decision. In this case, the injunction was granted. If the injunction had not been granted, the parties likely would have been able to close their transaction faster than if there had been no FTC administrative proceeding. To the extent there was duplication between the two proceedings, it appears to have been minor, and the matter was very likely resolved faster as a result. Certainly, it reduced cost and resource burdens on the Federal district court.

Question 4. Should Congress amend Section 5(n) of the FTC Act, which addresses unfair practices, to clarify what constitutes "substantial injury?" If so, how?

Answer. No. Neither the Commission, nor the courts that have ruled on this issue, have struggled to interpret that element of Section 5(n). Substantial injury can be financial, physical, reputational, or unwanted intrusions. Financial injury can manifest in a variety of ways: fraudulent charges, delayed benefits, expended time, opportunity costs, fraud, and identity theft, among other things.[6] Physical injuries include risks to individuals' health or safety, including the risks of stalking and harassment.[7] Reputational injury involves disclosure of private facts about an individual, which damages the individual's reputation. Tort law recognizes reputational injury.[8] The FTC has brought cases involving this type of injury, for example, in a case involving public disclosure of individuals' Prozac use[9] and public disclosure of individuals' membership on an infidelity-promoting website.[10] Finally, unwanted intrusions involve two categories. The first includes activities that intrude on the sanctity of people's homes and their intimate lives. The FTC's cases involving a revenge porn website,[11] an adult-dating website,[12] and companies spying on people in their bedrooms through remotely-activated webcams fall into this category.[13] The second category involves unwanted commercial intrusions, such as telemarketing, spam, and harassing debt collection calls.

Question 5. Should the FTC issue more guidance to marketers on the level of support needed to substantiate their claims? If so, when do you anticipate that such guidance could be issued?

Answer. The FTC has issued extensive guidance over the years to help marketers determine the level of support needed to substantiate claims. The Commission first

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[5] *FTC v. Tronox Ltd. and Nat'l Titanium Dioxide Co. Ltd. (Cristal),* No. 1:18-cv-01622 (D.D.C. Sept. 12, 2018), *https://www.ftc.gov/enforcement/cases-proceedings/171-0085/tronox-limited-et-al-ftc-v.*

[6] *See, e.g., TaxSlayer, LLC,* No. C–4626 (F.T.C. Oct. 20, 2017), *https://www.ftc.gov/enforcement/cases-proceedings/162-3063/taxslayer* (alleging delayed benefits, expended time, and risk of identity theft).

[7] *See, e.g., FTC v. Accusearch, Inc.,* No. 06–CV–0105 (D. Wyo. May 3, 2006), *https://www.ftc.gov/enforcement/cases-proceedings/052-3126/accusearch-inc-dba-abikacom-jay-patel* (alleging that telephone records pretexting endangered consumers' health and safety).

[8] Under the tort of public disclosure of private facts (or publicity given to private life), a plaintiff may recover where the defendant's conduct is highly offensive to a reasonable person. Restatement (Second) of Torts § 652D (1977).

[9] *Eli Lilly and Co.,* No. C–4047 (F.T.C. May 8, 2002), *https://www.ftc.gov/enforcement/cases-proceedings/012-3214/eli-lilly-company-matter.*

[10] *FTC v. Ruby Corp., et al.,* No. 1:16-cv-02438 (D.D.C. Dec. 14, 2016), *https://www.ftc.gov/enforcement/cases-proceedings/152-3284/ashley-madison.*

[11] *FTC v. EMP Media, Inc., et al.,* No. 2:18-cv-00035 (D. Nev. Jan. 9, 2018), *https://www.ftc.gov/enforcement/cases-proceedings/162-3052/emp-media-inc-myexcom.*

[12] *FTC v. Ruby Corp., et al.,* No. 1:16-cv-02438 (D.D.C. Dec. 14, 2016), *https://www.ftc.gov/enforcement/cases-proceedings/152-3284/ashley-madison.*

[13] See Press Release, *FTC Halts Computer Spying* (Sept. 25, 2012), *https://www.ftc.gov/news-events/press-releases/2012/09/ftc-halts-computer-spying; see also Aaron's, Inc.,* C–4442 (F.T.C. Mar. 10, 2014), *https://www.ftc.gov/enforcement/cases-proceedings/122-3256/aarons-inc-matter.*

articulated the relevant factors used to determine the level of evidence required to substantiate objective performance claims in *Pfizer, Inc.*[14] Those factors included the type of claim, type of product, consequences of a false claim, benefits of a truthful claim, cost of developing substantiation for the claim, and amount of substantiation experts in the field believe is reasonable. The Commission and the courts have reaffirmed this standard many times since 1972.[15] In addition, the FTC also has provided extensive guidance through Guides and staff guidance documents.[16] FTC staff regularly provide further guidance through speeches and presentations to industry trade groups and industry attorneys.

The Commission's precedent and subsequent guidance set forth flexible principles that can be applied to multiple products and claims. These materials do not attempt to answer every question about substantiation, given the virtually limitless range of advertising claims, products, and services to which it could be applied. Instead, they seek to strike the right balance: specific enough to be helpful, but not so granular as to overlook some important factor that might arise, and thereby chill useful speech.

Question 6. In June, the 11th Circuit vacated the Commission's data security order against Lab-MD. What effect, if any, will this have on the Commission's data security orders going forward?

Answer. The Eleventh Circuit determined that the mandated data security provision of the Commission's LabMD Order was insufficiently specific. We are engaged in an ongoing process to craft appropriate order language in data security cases, based on the Eleventh Circuit opinion, feedback we received from our December hearing on data security, and our own internal discussion of how to use our existing tools to implement remedies that better deter future misconduct.

Question 7. If Federal privacy legislation is passed, what enforcement tools would you like to be included for the FTC?

Answer. First, I would recommend that Congress consider giving the FTC the authority to seek civil penalties for initial privacy violations, which would create an important deterrent effect. Second, while the process of enacting Federal privacy legislation will involve difficult tradeoffs that are appropriately left to Congress, targeted APA rulemaking authority, similar to that in the Children's Online Privacy Protection Act, would allow the FTC to keep up with technological developments. For example, in 2013, the FTC used its APA rulemaking authority to amend the COPPA Rule to address new business models, including social media and collection of geolocation information, that did not exist when the initial 2000 Rule was promulgated. Third, the FTC could use broader enforcement authority to take action against common carriers and nonprofits, which it cannot currently do under the FTC Act.

Question 8. During the hearing, I asked you whether the FTC would consider using its section 6(b) authority to study consumer information data flows, specifically sending requests to Google, Facebook, Amazon, and others in the tech industry to learn what information they collect from consumers and how that information is used, shared, and sold. You responded, "Sure, 6(b) is a really powerful tool and that's the type of thing that might very well make sense for us to use it for." I believe the FTC's section 6(b) authority could provide some much needed transparency to consumers about the data practices of large technology companies, and help identify areas that may require additional attention from lawmakers. Can you explain in more detail whether you believe the FTC should conduct a study pursuant to section 6(b) of the Federal Trade Commission Act on the data collection, use, filtering, sharing, and sale practices of large technology companies?

Answer. I agree with you that the FTC's section 6(b) authority could be used to provide some much needed transparency to consumers about the data practices of large technology companies. We are developing plans to issue 6(b) orders in the technology area.

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[14] 81 F.T.C. 23 (1972)

[15] *See, e.g., Thompson Med. Co.,* 104 F.T.C. 648, 813 (1984), *aff'd,* 791 F.2d 189 (D.C. Cir. 1986); *Daniel Chapter One,* 2009 WL 5160000 at *25–26 (F.T.C. 2009), *aff'd,* 405 Fed. Appx. 505 (D.C. Cir. 2010) (unpublished opinion), *available at* 2011–1 Trade Cas. (CCH) ¶77,443 (D.C. Cir. 2010); *POM Wonderful, LLC,* 155 F.T.C. 1, 55–60 (2013), *aff'd,* 777 F.3d 478 (D.C. Cir. 2015), *cert. denied,* 136 S. Ct. 1839, 194 L. Ed. 2d 839 (2016); *FTC Policy Statement Regarding Substantiation,* 104 F.T.C. 839, 840 (1984) (appended to *Thompson Med. Co.,* 104 F.T.C. 648 (1984)).

[16] *See, e.g., Guides for the Use of Environmental Marketing Claims,* 16 C.F.R. §260.2 (2019), *https://www.ecfr.gov/cgi-bin/text-idx?SID=bd96b2cdcd01f7620d43e50a9d1d8cec&mc=true&node=se16.1.260_12&rgn=div8; Dietary Supplements: An Advertising Guide for Industry, https://www.ftc.gov/tips-advice/business-center/guidance/dietary-supplements-advertising-guide-industry.*

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. ROY BLUNT TO HON. JOSEPH J. SIMONS

Question. The Food and Drug Administration (FDA) cataloged reports that patients have foregone or discontinued their doctor prescribed medications, in some cases resulting in serious injury and death, after seeing lawsuit advertisements making claims about certain FDA-approved medications.

It is incumbent upon the Federal Trade Commission (FTC) to examine and curb false and misleading advertising practices, particularly when such practices result in serious injury and death.

What is the FTC doing to stop these false and misleading lawsuit advertising practices?

Answer. Some of these advertisements could be unfair or deceptive in violation of the FTC Act. The FTC is monitoring attorney advertising that solicits people who may have been harmed by prescription drugs or medical devices to determine whether such advertising is likely to cause physical or financial harm to consumers. We also are consulting with the FDA to determine how we may assist each other in protecting consumers. In particular, among other requests, we are seeking FDA input as to whether particular ads contain misleading statements concerning the risks associated with specific drugs and the potential risk to patients of discontinuing the drugs without a doctor's consultation. In addition, we are seeking information from the FDA concerning adverse event reports suggesting a patient stopped taking his or her medication after viewing such advertising. However, it should be noted that adverse event reports do not establish causation, and an enforcement action would have to be based on more than a reported incident.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JERRY MORAN TO HON. JOSEPH J. SIMONS

Question 1. Section 5(a) of the FTC Act, which prohibits "unfair or deceptive acts or practices in or affecting commerce" is the legal basis for a body of consumer protection law that covers data privacy and security practices. The FTC has brought hundreds of cases to date to protect the privacy and security of consumer information held by companies of all sizes under this authority. The FTC staff recently submitted comments to the National Telecommunications and Information Administration (NTIA) that clearly indicate the FTC staff's view that the FTC would be the appropriate agency to enforce a new comprehensive privacy legislative framework. Do you agree with the staff's view?

Answer. Absolutely. The FTC has developed a substantial body of expertise on privacy issues over the past several decades, by bringing hundreds of cases, hosting approximately 70 workshops, and conducting numerous policy initiatives. The FTC is committed to using all of its expertise, its existing tools under the FTC Act and sector-specific privacy statutes, and whatever additional authority Congress gives us, to protect consumer privacy while promoting innovation and competition in the marketplace.

Question 2. As Congress evaluates opportunities to create meaningful Federal legislation to appropriately ensure privacy of consumers' data, there have been suggestions to increase the FTC's authorities to enforce in this space. Will you commit to working with this Committee in measuring what resources, if any, will be needed to allow the agency to enforce any additional authorities that may or may not be provided in Federal legislation?

Question 3. Sharing responsibilities with the DOJ's Antitrust Division, the FTC enforces antitrust law in a variety of sectors as described by your testimony. While the vast majority of premerger filings submitted to enforcement agencies do not raise competition concerns, the FTC challenged 45 mergers since the beginning of 2017, and of those, the FTC only voted to initiate litigation to block five transactions. Would you please describe the resource needs of the agency associated with hiring qualified outside experts to support its litigation efforts? Please explain how developments in the high-technology sector are accounted for in the FTC's decision-making process related to antitrust enforcement.

Answer. I appreciate your attention to the agency's resource needs. As I mentioned in my November 27 testimony, the FTC is committed to maximizing its resources to enhance its effectiveness in protecting consumers and promoting competition, to anticipate and respond to changes in the marketplace, and to meet current and future challenges. Resource constraints, however, remain a significant challenge. As discussed in more detail below, evolving technologies and intellectual property issues continue to increase the complexity of antitrust investigations and litiga-

tion. This complexity, coupled with the rising costs of necessary expert witnesses and increases in caseload, sometimes leads to financial and personnel resource limitations. In the past, we have requested additional resources for experts, information technology, and more full-time employees in support of our mission to protect consumers and promote competition. These continue to be critical areas of need for our agency. If we were to receive additional resources, they likely would be applied to these areas as needed.

Qualified experts are an essential resource in all of the FTC's competition cases heading toward litigation (including some cases that ultimately are resolved via consent orders, through which we obtain effective relief without litigation). For example, the services of expert witnesses are critical to the successful investigation and litigation of merger cases; experts provide insight on proper definition of product and geographic markets, the likelihood of entry by new competitors, and the development of models to contrast merger efficiencies with potential competitive harm.

Expert witness costs are highly dependent on the number, scope, duration, and disposition of our Federal and administrative court challenges. The cost of an expert, for example, increases if we require the expert to testify or produce a report. To limit these costs, the FTC has identified and implemented a variety of strategies, including using internal personnel from its Bureau of Economics as expert witnesses whenever practical. The opportunities to use internal experts as testifying experts are limited, however, by several factors, including staff availability, testifying experience, and the specialized expertise required for specific matters. Under my direction, the FTC will continue to evaluate how to increase its use of internal experts and control expert costs without compromising case outcomes or reducing the number of enforcement actions.

In addition to expert witness costs, you asked about how developments in the high-technology sector factor into the FTC's decision-making process related to antitrust enforcement. The FTC follows closely activity in the high-technology sector. Given the important role that technology companies play in the American economy, it is critical that the Commission—in furthering its mission to protect consumers and promote competition—understand the current and developing business models and scrutinize incumbents' conduct to ensure that they abide by the same rules of competitive markets that apply to any company. When appropriate, the Commission will take action to counter any harmful effects of coordinated or unilateral conduct by technology firms.

The fundamental principles of antitrust do not differ when applied to high-technology industries, including those in which patents or other intellectual property are highly significant. The issues, however, are often more complex and require different expertise, which may necessitate the hiring of outside experts or consultants to help us develop and litigate our cases. The FTC also strives to adapt to the dynamic markets we protect by leveraging the research, advocacy, and education tools at our disposal to improve our understanding of significant antitrust issues and emerging trends in business practices, technology, and markets. For example, last fall, the Commission launched its *Hearings on Competition and Consumer Protection in the 21st Century* to consider whether the FTC's enforcement and policy efforts are keeping pace with changes in the economy, including advancements in technology and new business models made possible by those developments.[17] Under my leadership, the FTC will continue to scrutinize technology mergers and conduct by technology firms to ensure not only that consumers benefit from their innovative products, but also that competition thrives in this dynamic and highly influential sector. Our recent announcement of a new Technology Task Force within the Bureau of Competition demonstrates our commitment to monitoring competition in

[17] FTC, *Hearings on Competition and Consumer Protection in the 21st Century, https://www.ftc.gov/policy/hearings-competition-consumer-protection.* Recent hearings included a two-day workshop on the potential for collusive, exclusionary, and predatory conduct in multisided, technology-based platform industries. FTC Workshop, *FTC Hearing #3: Competition and Consumer Protection in the 21st Century* (Oct. 15–17, 2018), *https://www.ftc.gov/news-events/events-calendar/2018/10/ftc-hearing-3-competition-consumer-protection-21st-century.* Similarly, in early November, the Commission held a two-day workshop on the antitrust frameworks for evaluating acquisitions of nascent competitors in the technology and digital marketplace, and the antitrust analysis of mergers and conduct where data is a key asset or product. FTC Workshop, *FTC Hearing #6: Competition and Consumer Protection in the 21st Century* (Nov. 6–8, 2018), *https://www.ftc.gov/news-events/events-calendar/ftc-hearing-6-competition-consumer-protection-21st-century.* Also in November, the Commission held a two-day workshop on the competition and consumer protection issues associated with algorithms, artificial intelligence, and predictive analysis in business decisions and conduct. FTC Workshop, *FTC Hearing #7: Competition and Consumer Protection in the 21st Century* (Nov. 13–14), *https://www.ftc.gov/news-events/events-calendar/ftc-hearing-7-competition-consumer-protection-21st-century.*

U.S. technology markets, investigating any potential anticompetitive conduct in those markets, and taking enforcement actions when warranted.

Question 4. Earlier this year, I introduced legislation called the *Senior Scams Prevention Act* with Senator Bob Casey to combat continued and increasingly complex attempts to defraud one of the Nation's most vulnerable populations, our senior community. This bill seeks to ensure retailers, financial institutions and wire transfer companies have the resources to train employees to help stop financial frauds and scams on seniors. Would you agree that awareness and education, guided by "best practices" established by industry and government partners, is a valuable tool in preventing consumer harms against our Nation's seniors?

Answer. Yes, I agree, and your question fully aligns with the FTC's work in this area. Protecting older consumers is one of the agency's top priorities. As the population of older Americans grows, the FTC's efforts to identify scams affecting seniors and to bring aggressive law enforcement action, as well as provide awareness and useful advice to seniors, are increasingly vital. Based on consumer research, the FTC developed its *Pass It On* campaign to share preventative information about frauds and scams with older adults.[18] This popular campaign, used by many of our partners, engages active older adults to share these educational materials with others in their communities, including people in their lives who may particularly benefit from this information. The FTC stands ready to work with industry and government partners to create additional materials for industry, such as retailers, financial institutions, and wire transfer companies, to help prevent harm to our Nation's seniors.

Question 5. In its comments submitted to NTIA on "Developing the Administration's Approach to Consumer Privacy," the FTC discussed the various cases that it has taken up to address privacy-related harms to consumers, and it specifically noted four categories of harms: financial injury, physical injury, reputational injury, and unwanted intrusion. Could you please briefly describe each category while noting any FTC enforcement considerations specific to that type of harm?

Answer. Certainly. Financial injury can manifest in a variety of ways: fraudulent charges, delayed benefits, expended time, opportunity costs, fraud, and identity theft, among other things.[19] Physical injuries include risks to individuals' health or safety, including the risks of stalking and harassment.[20] Reputational injury involves disclosure of private facts about an individual, which damages the individual's reputation. Tort law recognizes reputational injury.[21] The FTC has brought cases involving this type of injury, for example, in a case involving public disclosure of individuals' Prozac use [22] and public disclosure of individuals' membership on an infidelity-promoting website.[23] Finally, unwanted intrusions involve two categories. The first includes activities that intrude on the sanctity of people's homes and their intimate lives. The FTC's cases involving a revenge porn website,[24] an adult-dating website,[25] and companies spying on people in their bedrooms through remotely-activated webcams fall into this category.[26] The second category involves unwanted commercial intrusions, such as telemarketing, spam, and harassing debt collection calls. In terms of enforcement considerations, as noted above, the FTC is very mind-

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[18] *Consumer Information—Pass it on, https://www.consumer.ftc.gov/features/feature-0030-pass-it-on* (providing consumer information on identity theft, imposter scams, charity fraud, and other topics).

[19] *See, e.g., TaxSlayer, LLC,* No. C–4626 (Oct. 20, 2017), *https://www.ftc.gov/enforcement/cases-proceedings/162-3063/taxslayer* (alleging delayed benefits, expended time, and risk of identity theft).

[20] *See, e.g., FTC v. Accusearch, Inc.,* No. 06–CV–0105 (D. Wyo. May 3, 2006), *https://www.ftc.gov/enforcement/cases-proceedings/052-3126/accusearch-inc-dba-abikacom-jay-patel* (alleging that telephone records pretexting endangered consumers' health and safety).

[21] Under the tort of public disclosure of private facts (or publicity given to private life), a plaintiff may recover where the defendant's conduct is highly offensive to a reasonable person. Restatement (Second) of Torts § 652D (1977).

[22] *Eli Lilly and Co.,* No. C–4047 (May 8, 2002), *https://www.ftc.gov/enforcement/cases-proceedings/012-3214/eli-lilly-company-matter.*

[23] *FTC v. Ruby Corp., et al.,* No. 1:16-cv-02438 (D.D.C. Dec. 14, 2016), *https://www.ftc.gov/enforcement/cases-proceedings/152-3284/ashley-madison.*

[24] *FTC v. EMP Media, Inc., et al.,* No. 2:18-cv-00035 (D. Nev. Jan. 9, 2018), *https://www.ftc.gov/enforcement/cases-proceedings/162-3052/emp-media-inc-myexcom.*

[25] *FTC v. Ruby Corp., et al.,* No. 1:16-cv-02438 (D.D.C. Dec. 14, 2016), *https://www.ftc.gov/enforcement/cases-proceedings/152-3284/ashley-madison.*

[26] *See* Press Release, *FTC Halts Computer Spying* (Sept. 25, 2012), *https://www.ftc.gov/news-events/press-releases/2012/09/ftc-halts-computer-spying; see also Aaron's, Inc.,* No. C–4442 (F.T.C. Mar. 10, 2014), *https://www.ftc.gov/enforcement/cases-proceedings/122-3256/aarons-inc-matter.*

ful of ensuring that it addresses these harms, while not impeding the benefits of legitimate data collection and use practices.

Question 6. In the FTC's recent comments in NTIA's privacy proceeding, the FTC said that its "guiding principles" are based on "balancing risk of harm with the benefits of innovation and competition." Would you describe what this means, how you strike this balance, and how it is applied in practice under your Section 5 authority in the *FTC Act*?

Answer. In unfairness cases, section 5(n) of the FTC Act requires us to strike this balance. It does not allow the FTC to bring a case alleging unfairness "unless the act or practice causes or is likely to cause substantial injury to consumers, which is not reasonably avoidable by consumers themselves and not outweighed by benefits to consumers or to competition." Thus, for example, in our data security complaints and orders, we often plead the specific harms that consumers are likely to suffer from a company's data security failures. We do not assert that companies need to spend unlimited amounts of money to address these harms; in many of our cases, we specifically allege that the company could have fixed the security vulnerabilities at low or no cost.

Question 7. The FTC's comments pertaining to "control" in NTIA's privacy proceeding stated, "Choice also may be unnecessary when companies collect and disclose de-identified data, which can power data analytics and research, while minimizing privacy concerns." How would the FTC suggest Federal regulation account for de-identified data, if at all?

Answer. One possible standard identified in the FTC's 2012 Privacy Report states that data is de-identified if it is not "reasonably linkable" to a consumer, computer, or device.[27] Data can be deemed to be de-identified to the extent that a company: (1) takes reasonable measures to ensure that the data is de-identified; (2) publicly commits not to try to re-identify the data; and (3) contractually prohibits downstream recipients from trying to re-identify the data. Although this language provides some general principles for de-identification, we would be happy to work with your staff on drafting more specific legislative language.

Question 8. Your testimony indicated that continued technological developments allow illegal robocallers to conceal their identities in "spoofing" caller IDs while exponentially increasing robocall volumes through automated dialing systems. These evolving technological changes mean that the critical law enforcement efforts of the FTC cannot be the only solution, and your testimony described the additional steps the FTC is taking to develop innovative solutions to these issues. Would you please describe the process and outcomes of the four public challenges that the FTC held from 2013 to 2015? Are there plans to incentivize innovators to combat robocalls in the future?

Answer. The FTC's process for its robocall challenges included public announcements, committees with independent judges, and, in some cases, cash prizes awarded under the America COMPETES Reauthorization Act.[28] To maximize publicity, the FTC announced each of its four challenges in connection with public events. The FTC announced the first robocall challenge at the FTC's 2012 Robocall Summit. In 2014, the FTC conducted its second challenge, "Zapping Rachel," at DEF CON 22. The FTC conducted its third challenge, "DetectaRobo," in June 2015 in conjunction with the National Day of Civic Hacking. The final phase of the FTC's fourth public robocall challenge took place at DEF CON 23. When the FTC held its first public challenge, there were few, if any, call blocking or call labeling solutions available for consumers. Today, two FTC challenge winners, NomoRobo and Robokillller, offer call blocking applications, and there are hundreds of mobile apps offering call blocking and call labeling solutions for cell phones. Many home telephone service providers also now offer call blocking and call labeling solutions. The FTC will not hesitate to initiate additional innovation contests if it identifies further challenges that could meaningfully benefit consumers by reducing the harm caused by illegal robocalls.

In addition to developing call blocking and call labeling technology, the telecom industry has also developed call verification technology, called STIR/SHAKEN, to help consumers know whether a call is using a spoofed Caller ID number and to assist call analytics companies in implementing call blocking and call labeling prod-

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[27] FTC Report, *Protecting Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers* (Mar. 2012), *https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf*

[28] *Details About the FTC's Robocall Initiatives, https://www.consumer.ftc.gov/features/feature-0025-robocalls.*

ucts. If widely implemented and made available to consumers, the STIR/SHAKEN protocol should minimize unwanted calls. Certain industry members have begun to roll out this technology in beta-testing mode. We will monitor this industry initiative and, assuming the results are as expected, continue to encourage its implementation.

Question 9. Would you please describe the FTC's coordination efforts with state, federal, and international partners to combat illegal robocalls?

Answer. The FTC frequently coordinates its efforts with its state, federal, and international partners. The FTC often brings robocall enforcement actions with states as co-plaintiffs. For example, in the FTC's case against Dish Network, the FTC brought the case jointly with California, Illinois, North Carolina, and Ohio. Collectively, the states and the FTC obtained a historic $280 million trial verdict.[29]

The FTC also coordinates outreach and education with the FCC. In 2018, the agencies co-hosted two robocall events—a policy forum that discussed technological and law enforcement solutions to the robocall problem[30] and a public expo that allowed companies to showcase their call blocking and call labeling products for the public.[31] Additionally, the FTC and FCC hold quarterly calls, speak regularly on an informal basis, and coordinate on a monthly basis with our state partners through the National Association of Attorneys General. The FTC also engages with international partners through participation in international law enforcement groups such as the *International Consumer Protection Enforcement Network,* International Mass Marketing Fraud Working Group, and *Unsolicited Communications Network (formerly known as the London Action Plan).*

Question 10. Your testimony described the limitations of the FTC's current data security enforcement authority provided by Section 5 of the *FTC Act* including: lacking civil penalty authority, lacking authority over non-profits and common carrier activity, and missing broad APA rulemaking authority. Please describe each of these limitations and how adjusted FTC authority to address these items would improve the protection of consumers from data security risks.

Answer. Under current law, the FTC cannot obtain civil penalties for first-time data security violations. I believe this lack of civil penalty authority under-deters problematic data security practices. If Congress were to give the FTC the authority to seek civil penalties for first-time violators (subject to statutory limitations on the imposition of civil penalties, such as ability to pay and stay in business), better deterrence would be achieved. Additionally, should Congress enact specific data security legislation, it would be important for the FTC to have associated APA rulemaking authority[32] so that the Commission can enact rules and amend them as necessary to keep up with technological developments. For example, in 2013, the FTC was able to use its APA rulemaking authority to amend its Rule under the Children's Online Privacy Protection Act to address new business models, including social media and collection of geolocation information, that did not exist when the initial 2000 Rule was promulgated. As to nonprofits and common carriers, news reports are filled with breaches affecting these sectors (*e.g.,* the education sector) but the FTC does not currently have jurisdiction over them. Giving the FTC jurisdiction over these entities to enforce data security laws would create a level playing field and ensure that these entities would be subject to the same rules as other entities that collect similar types of data.

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[29] Press Release, *FTC and DOJ Case Results in Historic Decision Awarding $280 Million in Civil Penalties Against Dish Network and Strong Injunctive Relief for Do Not Call Violations* (June 6, 2017), *https://www.ftc.gov/news-events/press-releases/2017/06/ftc-doj-case-results-historic-decision-awarding-280-million-civil.* The case is on appeal before the Seventh Circuit Court of Appeals.

[30] Press Release, *FTC and FCC to Host Joint Policy Forum and Consumer Expo to Fight the Scourge of Illegal Robocalls* (Mar. 22, 2018), *https://www.ftc.gov/news-events/press-releases/2018/03/ftc-fcc-host-joint-policy-forum-illegal-robocalls.*

[31] Press Release, *FTC and FCC to Co-Host Expo on April 23 Featuring Technologies to Block Illegal Robocalls* (Apr. 19, 2018), *https://www.ftc.gov/news-events/press-releases/2018/04/ftc-fcc-co-host-expo-april-23-featuring-technologies-block-0.*

[32] The FTC is not seeking general APA rulemaking authority for a broad statute like Section 5.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. RICHARD BLUMENTHAL TO HON. JOSEPH J. SIMONS

Facebook: FTC Investigation Status

In May, the Bureau of Consumer Protection took the rare step of acknowledging a "non-public investigation" into the privacy practices of Facebook. It is now over eight months since the FTC's announcement with no further comment or report.

Question 1. How many full-time employees have been primarily assigned to investigate Facebook's privacy and data protection practices?

Question 2. Who is responsible for coordinating the investigation of Facebook? What divisions of the FTC are involved in the investigation?

Question 3. Has the FTC made requests for documents or conducted interviews with Facebook, Cambridge Analytica, and other relevant parties?

Question 4. Is the FTC in regular contact with its European counterparts on their investigation of Facebook?

Question 5. Does the FTC require further resources, including technologists or privacy lawyers, in order to complete its investigation of Facebook?

Answer. Although the existence of this investigation has been made public, details about the investigation, including how it is being staffed and any steps that have or have not been taken, are non-public. Therefore, we cannot answer these questions at this time.

Question 6. Has the FTC ever taken issue with Facebook or Google's assessments under their consent decrees?

Question 7. Has the Commission reviewed its consent decree with Google this year to determine whether the company is in compliance?

Answer. As part of its review of compliance with consent decrees, the FTC carefully reviews all assessments, seeks additional information as appropriate, and reviews compliance through a variety of means. However, because any investigation of a specific company's compliance is non-public, we cannot comment specifically about the steps taken regarding Google or Facebook.

Privacy Rules

We know that Americans care about privacy—that they eagerly want these rights. We need baseline rules. Companies should not store sensitive information indefinitely and use that data for purposes that people never intended. Federal rules must set meaningful obligations on those that handle our data. We must enable consumers to trust and control their personal data.

Question 8. Do you support providing state AGs with the power to enforce Federal privacy protections and would you commit to working with state AGs?

Answer. Yes. I view the Attorneys General as important partners in protecting consumers. I endorse a model that gives state Attorneys General the power to enforce Federal privacy protections, which ensures that there are multiple enforcers on the beat.

Question 9. Why is it important that the FTC have rulemaking authority when it comes to privacy? Where best would rulemaking be applied?

Answer. The process of enacting Federal privacy legislation will involve difficult tradeoffs that are appropriately left to Congress. Targeted APA rulemaking authority within those parameters is important, because it will enable the FTC to keep up with technological developments. For example, Congress gave the FTC APA rulemaking authority to implement the Children's Online Privacy Protection Act. In 2013, the FTC was able to use this authority to amend a rule it had initially promulgated in 2000, in order to address new business models, including social media and collection of geolocation information, as well as new technologies such as smart phones, that did not exist when the initial 2000 rule was promulgated.

Question 10. Do you believe elevating the Office of Technology Research and Investigation to the Bureau level would meaningfully help the FTC in addressing new technological developments across its mandates?

Answer. At this time, I do not believe that elevating the Office of Technology Research and Investigation to the Bureau level would meaningfully enhance the FTC's ability to vigorously pursue our current enforcement mandates. I am, however, actively considering how best to integrate technologists into our agency and how most effectively to deploy our limited resources to address our needs in this area. This effort includes evaluating the information developed at the Commission's *Hearings on Competition and Consumer Protection in the 21st Century.*

Question 11. When will the FTC appoint a Chief Technology Officer?

Answer. I have held off on appointing a Chief Technology Officer because I was actively considering the best way to utilize our existing resources and integrate new ones, across both our consumer protection and competition missions. We recently announced the creation of a Technology Task Force within the Bureau of Competition, which will be dedicated to monitoring competition in U.S. technology markets, investigating any potential anticompetitive conduct in those markets, and taking enforcement actions when warranted. The task force will include a Technology Fellow who will provide important technical assistance and expertise to support the task force's investigations. In addition, members of the task force will coordinate with their counterparts in the Bureau of Consumer Protection who also focus on technology platforms. Once the new task force is up and running, we will be in a better position to evaluate our need for technologists, including a Chief Technology Officer, and how best to integrate and leverage additional expertise.

Board Accountability

Question 12. What is the FTC doing to investigate and hold accountable individual board members and executives who knowingly assist their companies in committing fraud? What more should the FTC be doing in this regard?

Answer. The FTC always considers the potential liability of individual officers and others who participated in or controlled deceptive and unfair practices. In cases where the FTC finds evidence of wrongdoing that meets the applicable legal standard, and where naming the individual is appropriate to obtain full and complete relief for consumers and appropriate injunctive relief, we do so.

Net Neutrality

After the FCC abdicated its responsibility to protect net neutrality this year, we are left with no discernible rules to prevent Internet service providers from blocking or slowing Internet traffic. We have already started to see the effects of this disastrous decision. Earlier this month, Senators Markey, Wyden, and I wrote to several mobile carriers on reports those companies throttled video streaming applications. These practices would violate the core principle of net neutrality.

Question 13. Has the FTC investigated reports that mobile carriers are throttling video applications?

Answer. As you know, because the Commission's investigations are not public, I cannot comment on the practices of specific companies. However, the Commission has a strong interest in ensuring that companies stand by their promises to consumers and do not engage in deceptive or unfair practices. In general, except for the period when the FCC reclassified Broadband Internet Access Service ("BIAS") as a common carrier activity and the FTC lost the ability to protect consumers in this space, FTC staff has been monitoring and will continue to monitor the marketing and business practices of BIAS providers. To determine whether particular instances of throttling are deceptive or unfair, the Commission must evaluate what representations the provider made to consumers about its services, as well as available information and data about the nature and quality of the services actually provided to consumers.

The Commission will closely review any relevant research that may support or disprove particular advertising claims or provide evidence of particular business practices. When reviewing such reports, we evaluate a study's design, scope, and results, and consider how the study relates to a particular claim or informs a particular practice.

Question 14. If an Internet service provider blocks an application, does the FTC have the authority to investigate and penalize such actions?

Answer. When the FCC reclassified BIAS as a common carrier activity, the FTC temporarily lost the ability to protect consumers in this space because the FTC does not have authority over common carrier activities. The FTC brought several types of cases against BIAS providers prior to 2015.[1] Now that the reclassification has been reversed, we can bring those types of cases again.[2] If a company makes claims about blocking that are materially misleading, or if the practice causes substantial

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[1] *See, e.g., FTC v. TracFone Wireless, Inc.,* No. 3:15-cv-00392-EMC (N.D. Cal. Feb. 20, 2015), *https://www.ftc.gov/enforcement/cases-proceedings/132-3176/straight-talk-wireless-tracfone-wireless-inc; FTC v. AT&T Mobility, LLC,* No. 3:14-CV-04785-EMC (N.D. Cal. Oct. 28, 2014), *https://www.ftc.gov/enforcement/cases-proceedings/122-3253/att-mobility-llc-mobile-data-service; In re America Online, Inc.,* No. C-4105 (Jan. 28, 2004), *https://www.ftc.gov/enforcement/cases-proceedings/002-3000/america-online-inc-compuserve-interactive-services-incin; In re Juno Online Servs., Inc.,* No. C-4016 (June 25, 2001), *https://www.ftc.gov/enforcement/cases-proceedings/002-3061/juno-online-services-inc.*

[2] *FTC v. AT&T Mobility LLC,* 883 F.3d 848, 863–64 (9th Cir. 2018) (*en banc*) (concluding that "the FTC may regulate common carriers' non-common-carriage activities").

consumer injury that is not reasonably avoidable and not outweighed by benefits to consumers or competition, the FTC can bring an enforcement action under Section 5. In addition, the FTC has experience enforcing the antitrust laws to prevent unfair methods of competition for the benefit of consumers in many different markets. As part of its *Hearings on Competition and Consumer Protection in the 21st Century,* the agency will hold public hearings on March 20, 2019 to continue to explore how the FTC can use its enforcement authority most effectively in BIAS markets. If the FTC identifies, through these hearings or otherwise, that it does not have sufficient authority or resources to protect consumers or address competition issues in BIAS markets, the agency will report this to Congress.

Question 15. You have said that blocking, throttling, and paid prioritization could be deemed unfair practice(s) under the right circumstances. What would be "the right circumstances" that would have to occur for the FTC to pursue net neutrality enforcement?

Answer. As the Commission noted in its Policy Statement on Unfairness,[3] and as codified in 15 U.S.C. § 5(n), to be unfair, an act or practice must cause or be likely to cause substantial injury. Such injury "must be substantial; it must not be outweighed by any countervailing benefit to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided." [4]

Pursuant to this authority, the Commission sued AT&T Mobility LLC, alleging that the company deceptively promised consumers unlimited data but then reduced speeds, in some instances by nearly 90 percent, without telling consumers. We also alleged that the company unfairly locked consumers into long-term contracts based on promises of unlimited service and charged early termination fees if the consumers canceled their plans.[5]

Question 16. What specific resources and expertise does the FTC have to address technical issues of discrimination of Internet traffic by ISPs? Has the FTC hired technical experts to investigate violations of net neutrality?

Answer. FTC staff includes technologists with generalized expertise who regularly work with investigation and case teams to analyze a wide range of technical data, including in matters relating to network traffic analysis. The Commission also regularly hires independent consulting and testifying experts to provide more specialized expertise on a dedicated and ongoing basis. In addition, the Commission consults with staff at other agencies, including the FCC, as needed, regarding technical issues.

Copycat Military Websites

Last month, I led a group of nine Senators in writing the FTC, asking the Commission to release the full list of schools that purchased user information from copycat military websites. These websites, with names like *Army.com* and *EnlistArmy.com,* mimicked official military enlistment websites and deceived prospective recruits into thinking they would be contacted by an official "military representative." To truly stop such unscrupulous companies from taking root again, it is critical that the institutions that knowingly purchased these ill-gotten leads are also held to account.

Question 17. Do you agree that such post-secondary schools should be held liable for deceptive third-party marketing conducted on their behalf? Will you commit to pursuing such cases to root out fraud at the source?

Answer. No individual or entity, including post-secondary schools, should be able to avoid complying with the law by outsourcing deceptive marketing to third parties. In fact, the Commission has pursued several law enforcement actions to root out such conduct. In June 2018, the Commission obtained an order against Credit Bureau Center, a credit monitoring company, which held the company liable for deceptive third-party marketing conducted on its behalf.[6] The Commission has also pursued law enforcement actions against affiliate marketing networks for the deceptive conduct of their third-party marketing affiliates. The FTC recognizes the importance of pursuing all actors in the marketing ecosystem that fail to comply with the law.

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[3] *See* FTC Policy Statement on Unfairness, *appended to Int'l Harvester Co.,* 104 F.T.C. 949, 1070 (1984).

[4] *Id.*

[5] *FTC v. AT&T Mobility LLC,* No. 3:14-cv-04785-EMC (N.D. Cal. Oct. 28, 2014), *https://www.ftc.gov/enforcement/cases-proceedings/122-3253/att-mobility-llc-mobile-data-service.*

[6] *FTC v. Credit Bureau Center, LLC,* No. 1:17-cv-194 (N.D. Ill. June 26, 2018), *https://www.ftc.gov/enforcement/cases-proceedings/162-3120/credit-bureau-center-llc-formerly-known-myscore-llc.*

The Commission will continue to monitor the marketplace for unfair or deceptive conduct on the part of post-secondary schools that benefit from the deceptive practices of third parties and will actively investigate wherever warranted.

SoFi Penalties

Last month, the FTC proposed a settlement with SoFi—the online student loan refinancer that had greatly exaggerated in advertisements how much student loan borrowers would save when they refinance through the company. Unfortunately, the FTC was not able to require SoFi to pay any kind of penalty for its misconduct. As you noted in your testimony, this is one of the significant flaws in FTC's Section 5 authority. However, the CFPB or State Attorneys General could have sought meaningful penalties for SoFi's misconduct under existing law.

Question 18. Why didn't you work with State AGs to ensure SoFi would be subject to civil penalty for its misconduct? How will you make sure there is cooperation with State AGs in the future—in order to more effectively deter bad actors from violating the law?

Answer. The FTC regularly consults and coordinates with our Federal and state law enforcement partners when bringing actions to stop deception and other unlawful practices in the marketplace.[7] We will continue to work with our partners, where appropriate, to use our respective tools to most effectively protect consumers.

We believe our action against SoFi secures appropriately strong and timely relief to protect consumers from the unlawful conduct in this case—by ensuring that SoFi stops making deceptive savings claims regarding its loans and other credit products. If SoFi violates the FTC's order in this matter, the FTC could seek significant civil penalties against it. Further, when announcing this action, the FTC sent warning letters to other student loan advertisers who were making savings claims.

FTC Investigation of Algorithms

Section 6(b) of the FTC Act gives the agency broad investigatory and information-gathering powers. For example, in the 1970s the FTC used its Section 6(b) authority to require companies to submit product-line specific information, enabling the agency to assess the state of competition across markets.

The FTC has released reports on big data and the harms biased algorithms can cause to disadvantaged communities. These reports drew attention to the potential loss of economic opportunity and diminished participation in our society. Yet, information on how these algorithms work, and on the inputs that go into them, remains opaque.

Question 19. Where the FTC consider using its Section 6(b) investigative power to help us understand how these algorithms and black-box A.I. systems work—the biases that shape them, and how those can affect trade, opportunity, and the market?

Answer. I agree that algorithms and artificial intelligence are important topics of study. In 2017, the FTC and Department of Justice submitted a joint paper on algorithms and collusion to the Organization for Economic Cooperation and Development as part of the OECD's broader look at the role of competition policy and the digital age.[8] More recently, we examined the competition and consumer protection implications of algorithms, artificial intelligence, and predictive analytics as part of the Commission's *Hearings on Competition and Consumer Protection in the 21st Century*.[9] The two-day hearing featured technologists, scientists, academics, and industry leaders (as well as economists and lawyers), who gathered to educate us and the broader competition and consumer protection community about how these tech-

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[7] *See, e.g.,* Press Release, *FTC, Partners Conduct First Compliance Sweep under Newly Amended Used Car Rule* (July 12, 2018), *https://www.ftc.gov/news-events/press-releases/2018/07/ftc-partners-conduct-first-compliance-sweep-under-newly-amended; Press Release, FTC, BBB, and Law Enforcement Partners Announce Results of Operation Main Street* (June 18, 2018), *https://www.ftc.gov/news-events/press-releases/2018/06/ftc-bbb-law-enforcement-partners-announce-results-operation-main; Press Release, FTC, State Law Enforcement Partners Announce Nationwide Crackdown on Student Loan Debt Relief Scams* (Oct. 13, 2017), *https://www.ftc.gov/news-events/press-releases/2017/10/ftc-state-law-enforcement-partners-announce-nationwide-crackdown.*

[8] Note to the OECD by the United States on Algorithms and Collusion, DAF/COMP/WD(2017)41 (May 26, 2017), *https://www.ftc.gov/system/files/attachments/us-submissions-oecd-other-international-competition-fora/algorithms.pdf.*

[9] FTC, *Hearings on Competition and Consumer Protection in the 21st Century, https://www.ftc.gov/policy/hearings-competition-consumer-protection;* FTC Workshop, *FTC Hearing #7: Competition and Consumer Protection in the 21st Century* (Nov. 13–14, 2018), *https://www.ftc.gov/news-events/events-calendar/ftc-hearing-7-competition-consumer-protection-21st-century.*

nologies work, how they are used in the marketplace, and their policy implications. The Commission also invited public comments on this topic.

I will keep you apprised of any initiatives that come out of our hearings project. I also appreciate your interest in the Commission conducting a study of algorithms and artificial intelligence under Section 6(b) of the FTC Act. I intend to conduct 6(b) studies in the technology area, though the subjects of these studies are still being considered.

FTC Consent Decree on Unrepaired Recalls

Most consumers probably do not know that, while *new* car dealers are prohibited from selling vehicles with open recalls, *used* car dealers are not. A recent FTC consent decree, which I strenuously disagreed with and is currently being scrutinized in the courts, allows the sale of used cars with unrepaired recalls. According to the consent decree, car dealers can advertise that cars with unrepaired safety recalls like a defective Takata airbag are "safe" or have passed a "rigorous inspection"—as long as they have a disclosure that the vehicle *may* be subject to an unrepaired recall and directs consumers on how they can determine the vehicle has an open recall.

Question 20. In your opinion, is a car with an open, unrepaired recall, a "safe" car? Why would the FTC allow unsafe cars to be advertised as "safe" and "repaired for safety," with or without a vague, contradictory and confusing disclaimer?

Answer. I believe that all auto recalls pose safety risks to consumers, and that unrepaired recalls should be fixed.

Our orders do not allow unsafe cars to be advertised as "safe." For example, if a car dealer claims that a specific car with a risk of exploding airbags is "safe," it would violate our orders, whether or not they made the required disclosures. Specifically, Part I of the orders prohibits safety-related claims unless there is a clear and conspicuous disclosure about recalls *and the claim is not otherwise misleading.*

Before our orders were issued, car dealers were selling used vehicles subject to open recalls (a practice currently permitted under Federal product safety law), while widely making inspection claims that we alleged were deceptive. Our actions create a new floor of legal protection for consumers. Now, if the respondents in our actions make any claims suggesting a vehicle has been inspected for safety issues, they must clearly and conspicuously disclose that their vehicles may be subject to open recalls and how consumers can determine the recall status of a particular car. Importantly, the orders define "clear and conspicuous" to prohibit exactly the sort of confusing or contradictory disclosures you mention. These disclosures must be "easily understandable by ordinary consumers" and cannot be "contradicted or mitigated by, or inconsistent with, anything else in the communication."

Tesla's Deceptive "Autopilot" Advertisements

Two consumer groups—the Center for Auto Safety and Consumer Watchdog—have petitioned the FTC to investigate Tesla's potentially deceptive advertising of its "Autopilot" system. As you may know, there have been at least two deaths and additional injuries in the United States linked to Tesla Autopilot. Consumer advocates have criticized that Tesla's deceptive and misleading use of term "Autopilot" for its assisted-driving system falsely conveys to drivers that their vehicles are self-driving.

Question 21. What is the FTC doing to investigate these concerns?

Answer. As you noted, the Center for Auto Safety and Consumer Watchdog have asked the FTC to investigate the marketing of the Tesla Autopilot driving system. As is our normal procedure when we get such requests, we have spoken with the parties involved to better understand the issues. However, whether or not we have opened a law enforcement investigation is non-public, and we can neither confirm nor deny the existence of any such investigation.

Contact Lens Rule

In November 2016, the Federal Trade Commission issued a Notice of Proposed Rulemaking proposing amendments to the Contact Lens Rule aimed at promoting competition and consumer choice in the marketplace for prescription contact lenses.

Question 22. When does the Commission intend to finalize this rulemaking?

Answer. The Commission initially published a Federal Register notice generally requesting comments on the Rule in September 2015. Based on review of the 660 comments received, the Commission published a Notice of Proposed Rulemaking (NPRM) in December 2016, requesting comment on proposed Rule amendments. The NPRM proposed to amend the rule to require prescribers to obtain a signed acknowledgment after releasing a contact lens prescription to a patient, and maintain it for three years. The purpose of the proposed amendment was to enhance both

compliance and our ability to enforce the rule (by providing a record that the prescription was given out). We received over 4,100 additional comments in response to this NPRM.

The Commission held a workshop on March 7, 2018 to collect additional information on various Rule-related issues, including the proposed amendments. The public comment period associated with the workshop closed on April 6, 2018. We received and reviewed approximately 3,500 additional comments.

We collected additional information during the workshop and in public comments, and are considering alternatives to increase prescriber compliance with the Rule without imposing unnecessary burdens on prescribers. In addition, based on the comments received, we are considering additional modifications to the Rule. The FTC staff intends to submit a recommendation to the Commission in the coming months. If the Commission decides that additional public input would be beneficial, the Commission would allow an appropriate period of time for public input. The length of the comment period would depend on the complexity of the modifications under consideration, but most likely it would be 30–60 days; the original NPRM had a 60-day comment period, and we accepted comments for about 30 days after the workshop. The timeline for then completing the rulemaking and issuing the final rule would depend on the number and complexity of the comments received.

Questions on Non-Compete Clauses

I am concerned about the growth of non-compete clauses, which block employees from switching jobs to another employer in the same sector for a certain period of time. These clauses weaken workers' bargaining power once they are in the job, because workers often cannot credibly threaten to leave if their employer forces refuses to give them a raise or imposes poor working conditions. According to the Economic Policy Institute, roughly 30 million workers—including one in six workers without a college degree—are now covered by non-compete clauses.

The consensus in favor of addressing non-compete clauses is growing. For example, just this past December, an interagency report indicated that non-compete clauses can be harmful in certain contexts, such as the healthcare industry. Yet, the FTC has not yet undertaken forceful action. In September, Commissioner Chopra suggested that the FTC use its rulemaking authority to "remove any ambiguity as to when non-compete agreements are permissible or not."

Question 23. Do you agree with the proposal that the FTC use its rulemaking authority to address non-compete clauses? I invite you to explain your reasoning regarding your stance.

Answer. I am still considering whether the FTC should use its rulemaking authority to address non-compete employment agreements or whether other approaches might be better. I am particularly interested in sectors of the economy where employee training requirements are not significant. Non-competes in those instances are less likely to be justified by efficiencies and are more likely to be anticompetitive on balance.

Questions on Local Merger Enforcement

Even though big national mergers typically garner the most media attention, smaller mergers can often raise monopoly concerns on the local level. This can be true in the healthcare industry, for example. In November, Commissioner Simons told me: "Some local mergers may be too small to require Hart-Scott-Rodino premerger notification, but may still have anticompetitive effects."

Question 24. Would you agree with me that Hart-Scott-Rodino premerger notifications help antitrust enforcers catch concerning mergers?

Answer. Yes, I agree that the premerger notification requirements of the Hart-Scott-Rodino Premerger Notification Act help antitrust enforcers identify anticompetitive mergers before they are consummated, preventing consumer harm. Once a merger is consummated and the firms' operations are integrated, it can be very difficult, if not impossible, to "unscramble the eggs" and restore the acquired firm to its former status as an independent competitor.

Question 25. What sort of anticompetitive effects might be raised by local mergers even when those mergers are too small to require Hart-Scott-Rodino premerger notification?

Answer. Anticompetitive mergers harm consumers through higher prices and by reducing quality, choices, and innovation, or by thwarting competitors' entry into a market.[10] The arena of competition affected by a merger may be geographically

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

bounded (*e.g.,* confined to a small or local area) if geography limits some customers' willingness or ability to substitute to some products or services, or some suppliers' willingness or ability to serve some customers.[11]

The FTC often examines local geographic markets when reviewing mergers in retail markets, such as supermarkets, pharmacies, retail gas or diesel fuel stations, or funeral homes, or in service markets, such as health care. For example, in a recent Federal court action to enjoin the proposed merger of two rival physician services providers, the FTC and the State of North Dakota defined the relevant geographic market as the Bismarck-Mandan, North Dakota, Metropolitan Statistical Area—a four-county area that includes the cities of Bismarck and Mandan and smaller communities within the surrounding 40 to 50 mile radius.[12] The types of anticompetitive effects that may occur in local markets are the same as those that may occur in larger geographic markets: higher prices, lower levels of service, reduced innovation, and fewer choices.

Question 26. What action would you recommend either the FTC or Congress take in order to assist Federal and state antitrust enforcers in catching local mergers that raise anticompetitive concerns?

Answer. I have no opinion as to whether Congress should take action. Identifying anticompetitive mergers remains one of the top priorities of the agency's competition mission. The vast majority of mergers the FTC investigates are reported and examined at the premerger stage. The FTC does, however, devote significant attention to identifying unreported, often consummated, mergers that could harm consumers. With respect to both mergers that do not meet the premerger notification requirements and potentially anticompetitive conduct, the FTC relies on the trade press and other news articles, consumer and competitor complaints, hearings, economic studies, and other means to identify harmful practices that threaten competition. The FTC also routinely partners with state Attorneys General in its enforcement efforts; state Attorneys General routinely join the FTC as co-plaintiffs in the FTC's Federal court litigations, such as in the North Dakota physician services merger litigation discussed above.

Question on Horizontal Shareholding

Recent research has raised questions about whether horizontal shareholding harms competition in our economy. I would like to understand your view on this ongoing research.

Question 27. Do you believe that horizontal shareholding raises anticompetitive concerns?

Answer. The short answer is that I do not yet know enough to draw sound, reliable conclusions on this point. The research on this topic is still at a relatively early stage, and the studies that have been completed so far have yielded conflicting results. At present, this remains a very unsettled issue.[13]

There is little doubt that active investment (*i.e.,* investment that seeks to control a company, obtain board seats and the like) in competitors can create the kinds of competition problems that the antitrust laws are designed to address. The antitrust agencies have long policed improper relationships between corporate competitors, even when these relationships fall short of a full combination or merger. For example, Section 8 of the Clayton Act effectively prohibits so-called "interlocking directorates" in which an officer or director of one firm serves as an officer or director of a competitor. But it is an open question whether the same kinds of problems cre-

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partment-justice-federal ("A merger enhances market power if it is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives.").

[11] *Id.* at § 4.2. In antitrust analysis, a relevant market identifies a set of products or services and a geographic area of competition in which to analyze the potential effects of a proposed transaction. The purpose of market definition is to identify options available to consumers. *See id.* at § 4 (describing market definition in antitrust analysis).

[12] *FTC v. Sanford Health,* No. 1:17-cv-0133 (D.N.D. Dec. 13, 2017), *https://www.ftc.gov/enforcement/cases-proceedings/171-0019/sanford-health-ftc-state-north-dakota-v.* The U.S. District Court for the District of North Dakota granted the FTC and State of North Dakota's preliminary injunction motion on December 13, 2017. The parties have appealed and the case is now pending before the Eighth Circuit.

[13] *See* Note to the OECD by the United States on Common Ownership by Institutional Investors and Its Impact on Competition at ¶1, DAF/COMP/WD(2017)86 (Nov. 28, 2017), *https://www.ftc.gov/system/files/attachments/us-submissions-oecd-other-international-competition-fora/common_ownership_united_states.pdf* (explaining that "[g]iven the ongoing academic research and debate, and its early stage of development, the U.S. antitrust agencies are not prepared at this time to make any changes to their policies or practices with respect to common ownership by institutional investors.").

ated by active investments may also manifest from investments by institutional investors in competing companies.

The theory put forward, purportedly supported by early research, is that large institutional investors' shareholdings in competing firms in the same industry may blunt the competitive vitality of rival firms and, consequently, lead to higher prices and other anticompetitive effects. For example, if a company's shareholders have equity interests in a rival, that company may be less likely to engage in a price war or other forms of aggressive competition that could reduce its rival's profits, because the rival's profits are ultimately returned to the company's shareholders through their interests in the rival. Proponents of this theory argue that the risk of upsetting common investors may make it easier for firms to maintain stable market conditions or potentially even increase prices, compared to market conditions that might prevail without common ownership by large, institutional investors.

Critics of this theory have cited methodological problems with the original research, as well as various structural issues that would make it difficult or even impossible for institutional investors in the real world to play the envisioned disciplining role. Critics also point out that any remedy to address these concerns would likely increase the cost of retail investment, and thereby cause harm to ordinary investors.

To date, there is no reliable consensus as to which side in this debate has the stronger argument, and the limited research suggests this question will remain unsettled until additional empirical work is completed in this area. Given the formative nature of the academic debate, I cannot definitively take a position on this issue. Additional study is required and, as I mention below, the Commission is currently helping to facilitate such work.

Question 28. Do you believe that our antitrust laws can be used to address the anticompetitive concerns raised by horizontal shareholding?

Answer. As noted above, I am still evaluating the viability of this concern. Therefore, I believe the use of the agency's enforcement powers in this area would be premature. That said, antitrust doctrine is flexible, allowing us to address even novel harms in the economy. If the Commission were to identify a meritorious case against common ownership by a single institutional investor, I believe we could bring such a case, even though we have not previously litigated that type of case. The Commission's ability to take future action in this area would, of course, be circumscribed by prior case law, due process considerations, and legal standards. The Commission would be unlikely to take enforcement action in this area without sufficient confidence that it can demonstrate to the courts both that the underlying theory of harm is robust, and that a specific set of passive investments has had actual anticompetitive effects in the real world.

Question 29. What, if anything, are you doing to address any potential harms of horizontal shareholding?

Answer. In December 2018, the Commission held a full-day public hearing that was largely devoted to exploring the merits of the common ownership issue in greater detail.[14] At this event, which was part of our *Hearings on Competition and Consumer Protection in the 21st Century,* respected academics and industry experts on both sides of this issue shared their expertise. The Commission also invited public comments on this topic.

We are still accepting public comments on this issue. Once the comment period ends, we intend to carefully evaluate all of the public submissions and the workshop testimony with a view towards better refining our understanding of the merits of this concern. Hearings like this one serve to bring together experts with different views, allowing them to hear and respond to criticisms of their positions, which we have found to be useful in fostering future academic work in areas of continuing interest to the agency.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MAGGIE HASSAN TO HON. JOSEPH J. SIMONS

Question 1. This is an issue that is particularly important and concerning to me, and it is one that my colleagues and I have contacted the FTC about before.

Answer. It is vitally important that we support our military veterans and their families, and I am honored to have worked on legislation improving veterans' access to workforce training, education, and health care, many of which have become law.

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[14] FTC Workshop, *FTC Hearing # 8: Competition and Consumer Protection in the 21st Century* (Dec. 6, 2018), *https://www.ftc.gov/news-events/events-calendar/ftc-hearing-8-competition-consumer-protection-21st-century.*

We are committed to giving our veterans access to the tools they need to improve their education and employment opportunities.

Unfortunately, certain companies and academic institutions have shamefully and brazenly engaged in unscrupulous and often illegal "lead-generating" practices where schools pay companies, such as Sunkey Publishing, Fanmail, and Victory Media, to steer prospective student-veterans to them by claiming the schools are "military-friendly" or falsely representing the schools as affiliated with or endorsed by the Department of Defense.

My colleagues and I have sent letters urging the FTC to investigate these harmful, deceptive, and unfair marketing practices by military-branded websites that target veterans, service members, and their families, and I applaud the FTC for taking action against some of these schools and companies.

Knowing the names of offenders would be important for prospective student-veterans as they determine which schools or career training institutions they would like to attend.

In your response to one of our letters, you cite Federal statute and regulations as prohibiting the release of the names of the schools that participated in lead-generating schemes. Your letter notes that the FTC may vote to initiate a process to release the names of the schools.

Given the importance of this information to student-veterans, and with the understanding that no one wants to hinder ongoing investigations, does the FTC intend to hold a vote to release the names of the involved schools? Why or why not?

Answer. Thank you for recognizing the Commission's work in combating deception against military consumers and military recruits. As mentioned in my response to the October 9, 2018 letter from you and several of your colleagues inquiring about schools that used deceptive lead generators to market their programs, the FTC shares your concerns about ensuring that those who serve or who want to serve are not deceived in making decisions about their educational futures.

In my response to your letter, I explained that the information you requested is non-public material because we obtained it during the course of a law enforcement investigation. The Commission can provide you with information to contact the party that submitted the information to us. If you have determined that contacting the submitter directly is not a viable course of action, I can further consider whether the Commission should hold a vote on the release of information about the identity of lead purchasers. Several factors would play into such consideration, including whether the release of the information could prejudice ongoing or future law enforcement efforts. Furthermore, the FTC generally does not release information pertaining to individuals and entities that have not been adjudged to have violated the law; a key question to address in determining whether to depart from that practice in this instance is whether release of the information would benefit consumers or, conversely, cause confusion in the marketplace.

Question 2. Brewers and non-alcoholic beverage makers are large consumers of aluminum. The price index for the storage and transportation costs of the aluminum they purchase, the "Midwest Premium," has increased dramatically since President Trump's tariffs were implemented.

Do you believe that the end-users of metal would meet the definition of "consumer" for FTC purposes? If so, could the FTC investigate the sharp increase in the Midwest Premium? If not, do you believe the Department of Justice, or another Federal agency is more appropriate to investigate? Finally, if another agency commences an investigation, can the FTC provide expertise and support for that investigation?

Answer. Depending on the facts, end-users of aluminum could be harmed by a violation of the antitrust laws even though they are businesses rather than individuals. For example, in an FTC action to enjoin the merger of the second-and third-largest U.S. glass container manufacturers, the FTC alleged the transaction would likely harm the customers who use glass containers: brewers and distillers.[15]

If the Commission finds or is presented with evidence that a firm within our jurisdiction is engaging in conduct that harms competition and may violate the antitrust laws, we will review that information for potential law enforcement action. As you know, the FTC shares jurisdiction over the enforcement of the antitrust laws with the Department of Justice. The agencies use a "clearance" process to ensure that only one agency investigates and, if necessary, challenges any given transaction. Assignment to one agency or the other takes place after preliminary review of a transaction, based principally on each agency's relative expertise in the markets relevant

[15] *In re Ardagh Group and Saint-Gobain Containers,* Dkt. No. D–9356 (Mar. 24, 2014), *https://www.ftc.gov/enforcement/cases-proceedings/131-0087/ardagh-group-sa-saint-gobain-containers-inc-compagnie-de.*

to the proposed transaction. For many years, the Department of Justice has pursued antitrust enforcement in aluminum; the Department also works closely with the Commodities Futures Trading Commission in this area. Thus, the FTC would likely refer any evidence of anticompetitive conduct involving Midwest Premium aluminum pricing to our sister agency and, if requested, would coordinate with the Department of Justice on any ensuing investigation.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. TOM UDALL TO HON. JOSEPH J, SIMONS

Privacy

Question 1. Do you support strong civil penalties for consumer privacy violations?

Answer. Yes. Under the FTC's current authority, we cannot seek civil penalties for initial privacy violations of Section 5 of the FTC Act. I believe we need the ability to seek civil penalties for initial violations in order to more effectively deter unlawful conduct. These penalties would of course be subject to the statutory limitations in Section 5(n) of the FTC Act, including ability to pay, degree of culpability, and ability to continue to do business.

Question 2. The California Consumer Protection Act goes into effect in January 2020. As Congress considers pre-emption of that state law, what additional authority should we give the FTC to ensure that consumer privacy adequately is protected?

Answer. I support the enactment of Federal privacy legislation that would be enforced by the FTC and contain at least three components. First, as I noted above, any such legislation should give the Commission the ability to seek civil penalties for initial privacy violations. Second, it should give the Commission the ability to conduct APA rulemaking in order to make sure any legislation keeps pace with technological developments. Third, it should give the Commission jurisdiction over nonprofits and common carriers. Beyond these general parameters, I note that the process of enacting Federal privacy legislation will involve difficult tradeoffs that are appropriately left to Congress. No matter the specific privacy or data security laws Congress enacts, the Commission commits to using its extensive expertise and experience to enforce them vigorously and enthusiastically.

Question 3. A recent *New York Times* analysis found that both the Apple App Store and the Google Play Store have apps in their respective children's or family sections that potentially violate COPPA.[16] What specific role should platform owners play to ensure COPPA compliance on their platforms?

Answer. In 2012, the Commission revised the COPPA Rule to cover not just websites, app developers, and other online services but also third parties collecting personal information from users of those sites or services. At that time, the Commission made clear that it did not intend to make platforms responsible merely for offering consumers access to someone else's child-directed content. Rather, platforms would be liable under COPPA only if they had actual knowledge that they were collecting personal information from a child-directed app. At the same time, platforms are in a unique position to set and enforce rules for apps that seek placement in the platform's store, and to drive good practices. We encourage platforms to pursue best practices in this regard, beyond those required by COPPA. For example, platforms can serve an important educational function for apps that may not understand the requirements of COPPA.

Question 4. Compliance for mobile apps may be hard to achieve against fly-by-night operators overseas who do not care if their apps violate U.S. law. How can the Vtech Electronics investigation and civil penalty serve as an example for how the FTC can hold foreign app developers responsible for violating COPPA?

Answer. In addition to the VTech case you mention, the Commission has taken action in a number of privacy- or security-related cases against companies that have a foreign presence.[17] We rely on the U.S. SAFE WEB Act Amendments to the FTC

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[16] Valentino-DeVries, J., Singer, N., Krolick, A., Keller, M. H., *How Game Apps That Captivate Kids Have Been Collecting Their Data,* N.Y. TIMES, Sept. 12, 2018, *https://www.nytimes.com/interactive/2018/09/12/technology/kids-apps-data-privacy-google-twitter.html.*

[17] *In re: TRENDnet, Inc.,* No. C–4426 (Jan. 16, 2014), *https://www.ftc.gov/enforcement/cases-proceedings/122-3090/trendnet-inc-matter; United States v. InMobi Pte Ltd.,* No. 3:16-cv-3474 (N.D. Cal. June 22, 2016), *https://www.ftc.gov/enforcement/cases-proceedings/152-3203/inmobi-pte-ltd; In re ASUSTeK Computer Inc.,* No. C–4587 (July 18, 2016), *https://www.ftc.gov/enforcement/cases-proceedings/142-3156/asustek-computer-inc-matter; In re HTC America Inc.,* No. C–4406 (July 25, 2013), *https://www.ftc.gov/enforcement/cases-proceedings/122-3049/htc-america-inc-matter.*

Act to address unfair and deceptive acts or practices involving foreign commerce. Using this authority, the agency has been able to obtain successful relief for consumers in the United States against the foreign entities that manufactured the devices at issue (as well as their U.S. subsidiaries in certain matters) when they purposefully directed their activities to the United States by advertising, marketing, distributing, or selling their products to U.S. consumers.This relief has included a substantial civil penalties in the VTech and inMobi settlements. More recently, the FTC took action against Blu, a U.S.-based phone manufacturer that was allowing its Chinese service provider to access text messages and other private information, contrary to its representations to consumers.[18]

Due to some of the practical challenges the Commission faces in bringing enforcement actions against foreign companies, the Commission has also used other means to address illegal conduct affecting U.S. consumers. For example, a few years ago, Commission staff sent a warning letter to a Chinese company, Baby Bus, about COPPA violations relating to the collection of children's personal information through its apps. The Commission copied the three U.S.-based app platforms on this communication. The company quickly responded and addressed the concerns.

In determining how to address illegal conduct by foreign companies, we generally consider a number of factors. These include the nature and breadth of harm or potential harm to U.S. consumers from the foreign company's practices; the legal rules relating to service, evidence collection, and enforceability in the jurisdiction where the target is based; practical issues, such as whether the company has incentives to enter into a settlement with the FTC and remediate its conduct such as a large base of U.S. customers and supplier/distributor relationships in the United States; and resource issues such as the added time and costs of proceeding against a foreign entity. We also, in appropriate cases, seek cooperation from foreign counterparts who may be able to provide us with relevant information or be able to better address the conduct at issue.

Question 5. The COPPA safe harbor organizations must submit an annual report to the Federal Trade Commission, Can you share the reports from the last 5 years?

Answer. The FTC-approved safe harbor organizations do submit annual reports to the FTC each year. Unfortunately, we are not able to disclose these reports because they contain confidential proprietary information, which is exempt from disclosure by FOIA and Section 6(f) of the FTC Act.

Concussions

Question 6. As you all are aware, I continue to bring attention to issue of helmet safety and marketing practices—particularly equipment that children use for sports. While there has been increased testing and awareness of traumatic brain injury caused by sports, I remain concerned that companies are mischaracterizing their equipment's ability to prevent or lessen concussions or other head injuries. Have FTC staff been able to continue their good work monitoring the helmet and other sports equipment in the marketplace to ensure that helmets and other gear is not being marketed in a deceptive manner?

Answer. Following its investigation into football helmet manufacturers and settlement against Brain-Pad, Inc.,[19] a mouthguard manufacturer, FTC staff have continued to monitor the marketplace for claims related to head injuries. When appropriate, staff have sent warning letters, civil investigative demands, and voluntary requests for information to marketers of athletic equipment.

Question 7. Have staff from the FTC been briefed by the National Football League or other entities that are conducting research on helmet design and safety?

Answer. FTC staff have not been briefed by the National Football League or other entities conducting research on helmet design and safety, although we are following research and development in the area.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. CATHERINE CORTEZ MASTO TO HON. JOSEPH J. SIMONS

Pet Leasing

I appreciate the Commission's attention to my request with six of my colleagues for the FTC to investigate the practice of pet leasing that is leading some consumers into confusing or deceptive contractual obligations that cause them to have an issue

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[18] *In re BLU Prods. and Samuel Ohev-Zion,* No. C–4657 (Sept. 6, 2018), *https://www.ftc.gov/enforcement/cases-proceedings/172-3025/blu-products-samuel-ohev-zion-matter.*

[19] *In re Brain-Pad, Inc. and Joseph Manzo,* No. C–4375 (Nov. 5, 2012), *https://www.ftc.gov/enforcement/cases-proceedings/122-3073/brain-pad-inc*

with their beloved pet and negatively impact their financial status, such as credit scores, for far into the future. This is an issue that is a little under the radar but needs strong oversight and attention under your deceptive practices mandate if there are concerning financial practices being discovered.

Question. Can I get a further commitment from you all to keep my office informed of actions and determinations you all may make pertaining to this concerning issue and the Humane Society and Animal Legal Defense Fund's formal petition to the Commission?

Answer. The FTC is committed to protecting consumers from unfair or deceptive acts or practices, including any such practices carried out by merchants or third-party leasing and financing companies. Since our response to your letter last November, FTC staff have met with the Humane Society and Animal Legal Defense Fund to discuss their joint formal petition to the Commission. The FTC will continue to keep your office informed of public actions the Commission takes concerning pet leasing or the Humane Society and Animal Legal Defense Fund's petition to the Commission.

Data Minimization vs Big Data

A topic that has come up a lot during our discussions on privacy is data minimization. This is a concept that I have been considering on as I work on developing a comprehensive data privacy bill. As you're aware, this is the idea that businesses should only collect, process, and store the minimum amount of data that is necessary to carry out the purposes for which is was collected. There are obvious advantages to this as it minimizes the risk of data breaches and other privacy harms. At the same time, big data analytics are going to be crucial for the future and play an important role in smart cities, artificial intelligence, and other important technologies that fuel economic growth. I think it is important to find a balance between minimization and ensuring that data, especially de-identified data, is available for these applications.

Question. Can you describe how you view this balance and how we in Congress can ensure that people's data is not abused but can still be put to use in positive ways?

Answer. Your question neatly captures the dilemma. Businesses can apply "big data" analysis tools to gain insights from large data sets that help the business to innovate—for example, to improve an existing product. This analysis can provide new consumer benefits, such as the development of new features. On the other hand, consumers' data may be used for unexpected purposes in ways that are unwelcome.[20] Long-term retention of consumer information—such as sensitive financial information—also presents a data security issue.[21]

The FTC issued a report on the subject of the benefits and risks of big data that contains guidance for companies that use big data analytics.[22] In November 2018, the Commission also hosted a workshop on the intersections between big data, privacy, and competition.[23] We are happy to work with your staff to develop legislation on how to balance the benefits and risks of big data.

FTC Resource Needs—Staffing Specifics

To get a sense of the challenge additional authority or requirements on your commission may be, can you tell us how many full time technologists do you have on staff at the FTC?

Question 1. More broadly, how many staff does the FTC have working on data privacy?

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[20] *See, e.g.*, Press Release, *FTC Charges Deceptive Privacy Practices in Google's Rollout of Its Buzz Social Network* (Mar. 30, 2011), *https://www.ftc.gov/news-events/press-releases/2011/03/ftc-charges-deceptive-privacy-practices-googles-rollout-its-buzz)* (alleging that Google deceptively repurposed information it had obtained from users of its Gmail e-mail service to set up the Buzz social networking service, leading to public disclosure of users' e-mail contacts).

[21] *See, e.g., In re Ceridian Corp.,* No. C–4325 (June 8, 2011), *https://www.ftc.gov/enforcement/cases-proceedings/102-3160/ceridian-corporation-matter)* (final order resolving charges that the company created unnecessary risks by storing information such as individuals' e-mail address, telephone number, Social Security number, date of birth, and direct deposit account number indefinitely on its network without a business need).

[22] *See* FTC Report, *Big Data: A Tool for Inclusion or Exclusion? Understanding the Issues* (Jan. 2016), *https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf.*

[23] *See* FTC Workshop, *FTC Hearing #6: Competition and Consumer Protection in the 21st Century* (Nov. 6–8, 2018), *https://www.ftc.gov/news-events/events-calendar/ftc-hearing-6-competition-consumer-protection-21st-century.*

Question 2. Do you have the resources you need to effectively protect privacy in the digital age?

Question 3. If not, what additional resources would be helpful?

Answer. We have about 5 full time staff whose positions are classified as technologists. Beyond these specific full-time employees, we have a number of investigators and lawyers who have developed significant in-house technical expertise through their enforcement and policy work in the areas of big data, cybersecurity, the online advertising ecosystem, Internet of Things, artificial intelligence, and related fields. When the FTC needs more complex and richer information about a specific industry or technology, we supplement our internal technological proficiency by hiring outside technical experts to help us develop and litigate cases. We also keep abreast of technological developments by hosting an annual event called PrivacyCon, in which we call on academics to present original research on privacy and security issues. If provided additional funding, we would hire additional technologists and other staff to enhance our privacy and data security enforcement efforts.

Answer to Question 1. As reflected in the Commission's annual budget request, the Division of Privacy and Identity Protection has approximately 40 staff tasked with protecting consumers' privacy and security. Additionally, staff from other Divisions and regional offices also work on data privacy issues.[24]

Answer to Questions 2 and 3. The Commission works hard to effectively employ whatever resources Congress gives us. While we use our existing resources efficiently, we believe that the agency could use additional resources. Some areas in which we could use additional resources include the hiring of additional technologists and the hiring of additional staff to monitor and enforce compliance with privacy and data security orders. Furthermore, if Congress were to give the FTC additional rulemaking and enforcement tools in the privacy area, we would need more resources to handle those tasks while continuing the agency's existing enforcement, policy, and education work. Whatever resources Congress gives us, we will put to good use.

General Privacy Recommendations

Question 1. While privacy was a significant topic of the oversight hearing, as we look to develop a bill, can you specifically lay out some of the top priorities you individually would like to see included and what do you think gets overlooked in the conversations policymakers have with allowing for future innovations and yet raising the bar for protecting consumers?

Answer. In its written testimony, the Commission urged Congress to consider enacting privacy legislation that would be enforced by the FTC. The testimony recognized that, while the agency remains committed to vigorously enforcing existing privacy-related statutes, Congress may be able to craft Federal legislation that would more seamlessly address consumers' legitimate concerns regarding the collection, use, and sharing of their data and provide greater clarity to businesses while retaining the flexibility required to foster competition and innovation. As far as top priorities for such legislation: first, Congress should give the Commission authority to deter violations by fining companies for initial violations, as it has for violations of other statutes. Second, Congress should ensure that all types of companies across the economy are held accountable for protecting consumers' privacy and security. As one example, the Commission has long urged the repeal of the FTC Act's provision that places limits on the agency's ability to go after law violations by common carriers and by non-profits. Third, Congress should consider giving the FTC targeted APA rulemaking authority so that the FTC can enact rules to keep up with technology developments. An excellent example of this approach appears in statutes such as CAN–SPAM and COPPA.

Question 2. Can you also outline the optimal role you see for our state Attorneys General in this privacy enforcement process?

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[24] *See, e.g.*, Press Release, *LifeLock to Pay $100 Million to Consumers to Settle FTC Charges it Violated 2010 Order* (Dec. 17, 2015), *https://www.ftc.gov/news-events/press-releases/2015/12/lifelock-pay-100-million-consumers-settle-ftc-charges-it-violated* ($100 million settlement for order violation obtained by the Division of Enforcement); Press Release, *Online Talent Search Company Settles FTC Allegations it Collected Children's Information Without Consent and Misled Consumers* (Feb. 5, 2018), *https://www.ftc.gov/news-events/press-releases/2018/02/online-talent-search-company-settles-allegations-it-collected* (settlement for COPPA violations obtained by Midwest Region staff); FTC, Website: *Cybersecurity for Small Businesses* (website created by the Division of Consumer and Business Education), *https://www.ftc.gov/tips-advice/business-center/small-businesses/cybersecurity.*

Answer. I see the state Attorneys General as important partners in protecting consumers. For a number of statutes, such as COPPA, Congress enacted legislation that enables Attorneys General to enforce the law in addition to the Commission. We applaud this model. A number of state AGs have brought actions to enforce COPPA, for example, which benefits consumers because there are multiple cops on the beat. And when state Attorneys General bring these actions, they are enforcing the same legal standard that other states and the Commission are enforcing, so the same protections apply consistently nationwide.

Updated Aspects of Banking or Health Care Data Security

Given the incredibly innovative technologies being developed, from apps that are commonly used in various banking transactions, to wearables that by design are tracking personally sensitive health care related metrics by the second, there is a lot of data being collected, stored and utilized.

And many of these technologies are providing incredibly helpful in cases like telemedicine to help residents of rural communities. Within your testimony, you stated quote *"The Commission also must continue to prioritize, examine, and address privacy and data security with a fresh perspective."*

Question 1. So do you think there is a need for a broader conversation about how our current banking and health care information protection statutes like HIPAA, for example, and regulators like the FTC serve in aiding the different enforcement agencies ensure these laws are moving ahead with the times?

Answer. Laws and regulators certainly need to keep up with the times. The series of hearings the Commission has been holding on a wide range of issues are one part of the Commission's process to do just that. Laws regarding financial privacy, in particular, have been changing rapidly at the state level, with the adoption of new laws by states such as New York and South Carolina with respect to financial institutions and insurance companies, respectively. The Commission has been following these developments closely.

Question 2. Are there any specific examples or thoughts you have on what kind of further considerations need to be given to these kinds of technologies given the increased personal nature of the type of data that is being collected, stored and utilized?

Answer. With respect to financial and health privacy specifically, it is important that privacy and security obligations apply regardless of the type of entity that is collecting the data. For both financial and health privacy, that is not currently the case. Companies covered by HIPAA, such as health plans and certain medical providers, have specific obligations with respect to health information they collect; meanwhile, other entities that collect the same types of information (*e.g.,* data brokers, health apps, health information websites) may not face the same obligations. Similarly, financial institutions have obligations under the Gramm-Leach-Bliley (GLB) Act to protect information such as account numbers and SSNs, but other entities collecting the same types of information do not.

Question 3. Is it time for a reconsideration or expansion of safeguards at all stages of transmission of consumer's banking information?

Answer. While the Commission does not have jurisdiction over banks and does not have the expertise to comment on banking information specifically, I do believe it is time for a reexamination of safeguards for financial institutions generally. The FTC has jurisdiction over a wide range of non-bank financial institutions such as tax preparers, mortgage brokers, payday lenders, credit bureaus, and debt collectors. The FTC enforces the GLB Safeguards Rule, which applies to these institutions. As part of its periodic review of its rules and guides, the Commission is currently reviewing its GLB Safeguards Rule, which requires financial institutions to take reasonable measures to secure consumers' data. More broadly, in urging Congress to consider enacting privacy legislation that would be enforced by the FTC, the Commission expects that the legislative process would involve a fresh new look at the current regulatory landscape, and would consider harmonizing and updating that landscape where needed. We agree that financial information, in particular, should be maintained securely throughout the information lifecycle.

Question 4. What regulatory structures and rules under the Gramm-Leach-Bliley Act could apply to other entities which collect and hold sensitive information?

Answer. The Commission's GLB Safeguards Rule requires financial institutions to develop, implement, and maintain a comprehensive, written information security program, and, as noted above, is currently under review. One of the strengths of the Rule is its flexible, process-based approach, which requires the institution to implement administrative, technical, and physical safeguards appropriate to the size and complexity of the financial institution, the nature and scope of its activities, and

the sensitivity of the customer information at issue. The Rule also requires each financial institution, among other things, to keep its security program up-to-date—for example, by adjusting the program to address new types of threats. This process of continual updating is essential. We believe a similar, process-based approach would be appropriate for a wide range of companies. To respond to companies' desire for more specific guidance about which security measures to adopt, the Rule's process-based, results-oriented approach can be combined with more specific technology-neutral requirements.

Question 5. From your perspective, should entities such as financial institutions be on the list of those to be informed of any compromised personally identifiable information when associated accounts are involved?

Answer. Previous legislation that would require data breach notification has required that companies notify the nationwide credit reporting companies, possibly because these are large, well-known entities that would be expected to develop processes to handle such notifications. Although consumers would presumably notify their bank, for example, if a company were to inform them that their bank account information has been exposed in a breach, direct notification of financial institutions could enable the institution to take additional measures to monitor breached accounts for fraud, even if the consumer does not take action.

First and Third Party Entities

There has been a lot of calls for a privacy bill that evens the playing field and is technologically neutral. This is important, but it is also important to think about how consumers interact with different entities. For example, many small and medium sized businesses contract with secondary firms that process data on their behalf. The consumer has no relationship with these entities, and so many of the requirements like transparency and control are more difficult to meet.

Question. How do we address this problem while ensuring a bill maintains an even playing field and does not favor any one business model?

Answer. One of consumers' main privacy concerns is the sharing of their data—particularly the sale of their data—with third parties with whom, often, the consumer has no direct relationship. At the same time, large entities that collect vast amounts of data from consumers may be able to share information widely within their organizations, without sharing with "third parties," while smaller competitors cannot. The implications on competition of different privacy regimes is one of the issues that the Commission has been examining in its ongoing series of hearings. One option to protect privacy in a way that does not disadvantage smaller players would be to impose requirements based on factors other than whether the entity is a "third party"—for example, by restricting the use of certain information for particular purposes by both first parties and third parties. We would be pleased to work with your staff further on this issue.

Privacy Risky Communities/Groups

Question 1. Do you think that certain communities or groups are any more or less vulnerable to privacy risks and harms?

Answer. Yes. Part of the discussion around big data and AI, for example, concerns the potential for bias, such as perpetuating historical discrimination, even unintentionally, through the use of biased data. In a 2016 report, *Big Data: A Tool for Inclusion or Exclusion? Understanding the Issues,* the Commission staff reported on a workshop relating to the risks and benefits of big data. The report recognized that big data analysis can bring significant consumer benefits, but also may cause harm relating to disparate treatment. For example, the report noted that potential inaccuracies and biases in data analysis might lead to detrimental effects for low-income and underserved populations. The Commission has worked to address issues particularly affecting certain communities or groups through a number of means, including a series of seminars and other events around the country and through consumer education.[25]

Question 2. Should privacy law and regulations account for such unique or disparate harms, and if so, how?

Answer. Certainly, harmful discriminatory treatment based on an individual's race, age, gender, religion, national origin, sexual orientation, and other prohibited factors should not be lawful. Existing laws, such as the Fair Credit Reporting Act and the Equal Credit Opportunity Act, offer important protections against unlawful

[25] *See, e.g., Common Ground Conferences and Roundtables Calendar, https://www.consumer.gov/content/common-ground-conferences-and-roundtables-calendar; Consumer Information—Fraud Affects Every Community, https://www.consumer.ftc.gov/features/every-community.*

discrimination. As noted above, much of the discussion around discriminatory treatment in the privacy area relates to the possibility that the use of algorithms will perpetuate past discrimination, even unintentionally.[26] Panelists at the Commission's November 2018 hearing on competition and consumer protection issues associated with the use of algorithms, artificial intelligence, and predictive analytics delved into these complicated issues.[27] We are happy to work with you to think through these issues as you craft legislation to prevent unlawful discrimination.

Immediate Civil Penalties Authority

Noting from your FTC testimony, "*Section 5 (of the FTC Act), however, is not without limitations. For example, Section 5 does not provide for civil penalties, reducing the Commission's deterrent capability.*"

Question. While I appreciate the long term successes of the FTC in many respects to investigate data security matters, what are your thoughts to whether there is enough of a deterrent effect with Section 5 authority when you can't immediately enforce against those who misuse data with civil penalties right from the start, rather than as the result of often times flagrant offenses to their already establish consent decrees?

Answer. In the data security area, I believe that Congress should enact legislation giving the FTC the authority to seek civil penalties against first-time violators, which we cannot currently do under the FTC Act. I support such legislation precisely because I believe that our existing legal regime does not provide sufficient deterrence.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN THUNE TO HON. ROHIT CHOPRA

Question 1. Vertical mergers such as the merger between AT&T and Time Warner have garnered some attention lately. The Federal Trade Commission (FTC) and the Department of Justice (DOJ) have not updated vertical merger guidance since 1984. Do you believe that the FTC and DOJ should issue new guidance on vertical mergers?

Answer. Vertical mergers can threaten competition. For example, as I noted in my dissenting statement in the *Fresenius/NxStage* matter, vertical mergers can make it tougher for a new business to get off the ground.

Senior officials in the antitrust agencies have openly communicated that the 1984 guidelines do not provide useful guidance.[1]

It is troubling that the agencies have published guidance that we do not actually follow. I am very open to the idea of updating these guidelines.

Question 2. Government lawsuits to stop mergers are litigated using different procedures depending on which agency, the FTC or DOJ, handles the case. Do you think Congress should take action to ensure that agencies follow the same procedures, or do you support another approach?

Answer. While I appreciate the theoretical concerns that have been raised, it does not appear that this has much real world impact. There are broader issues that stem from the FTC and DOJ having concurrent jurisdiction in merger review that Congress might consider giving a higher priority for examination. For example, thought should be given to ways to improve our clearance process.

Question 3. Should Congress amend Section 5(n) of the FTC Act, which addresses unfair practices, to clarify what constitutes "substantial injury?" If so, how?

Answer. Both the courts and the Commission have identified various types of injury that meet this criterion. If there are additional types of injury that Congress wishes to codify, I am happy to work with you to determine how to best achieve those goals.

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[26] *See, e.g.,* Elizabeth Weise, *Amazon Same-Day Delivery Less Likely in Black Areas, Report Says,* USA TODAY (Apr. 22, 2016), *https://www.usatoday.com/story/tech/news/2016/04/22/amazon-same-day-delivery-less-likely-black-areas-report-says/83345684/* (mapping Amazon's algorithmically-based same day delivery areas in certain cities, as originally proposed, with historical segregation in those cities).

[27] *See* FTC Workshop, *FTC Hearing #7: Competition and Consumer Protection Issues in the 21st Century* (Nov. 13–14), *https://www.ftc.gov/news-events/events-calendar/ftc-hearing-7-competition-consumer-protection-21st-century.*

[1] *See* D. Bruce Hoffman, Vertical Merger Enforcement at the FTC, Prepared Remarks for Delivery at the Credit Suisse 2018 Washington Perspectives Conference (Jan. 10, 2018), available at *http://www.ftc.gov/system/files/documents/public_statements/1304213/hoffman_vertical_merger_speech_final.pdf.*

Question 4. Should the FTC issue more guidance to marketers on the level of support needed to substantiate their claims? If so, when do you anticipate that such guidance could be issued?

Answer. Both consumers and marketers that are interested in complying with the law benefit from FTC guidance. Given case law, the Commission's Policy Statement on Advertising Substantiation, and other Commission statements, there is certainly an array of information to assist marketers with compliance, but I am always open to hearing ways to improve information to help law-abiding businesses.

Question 5. In June, the 11th Circuit vacated the Commission's data security order against Lab-MD. What effect, if any, will this have on the Commission's data security orders going forward?

Answer. Given this decision, as well as feedback from stakeholders and our recent hearing on data security, we are actively engaged in discussions on how our orders can provide optimal deterrence under our existing Section 5 authority.

Question 6. If Federal privacy legislation is passed, what enforcement tools would you like to be included for the FTC?

Answer. Federal privacy legislation needs enforcement teeth to be effective. In addition to strong civil penalty authority, it would be useful for the FTC to have independent litigating authority. Commission fines must be strong enough to realign market incentives, rather than representing a cost of doing business. I look forward to working with Congress to identify additional tools and authorities to make any legislation effective.

Question 7. During the hearing, I asked the Chairman whether the FTC would consider using its section 6(b) authority to study consumer information data flows, specifically sending requests to Google, Facebook, Amazon, and others in the tech industry to learn what information they collect from consumers and how that information is used, shared, and sold. I believe the FTC's section 6(b) authority could provide some much needed transparency to consumers about the data practices of large technology companies, and help identify areas that may require additional attention from lawmakers. What are your views with respect to the FTC potentially conducting a study pursuant to section 6(b) of the Federal Trade Commission Act on the data collection, use, filtering, sharing, and sale practices of large technology companies such as Google, Facebook, Amazon, and others?

Answer. Yes, the FTC should pursue a 6(b) study about the practices in the technology sector. This will help advance our competition and consumer protection mission. The FTC's research function is fundamental to how we should work to make markets fair and effective.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JERRY MORAN TO HON. ROHIT CHOPRA

Question 1. Section 5(a) of the *FTC Act,* which prohibits "unfair or deceptive acts or practices in or affecting commerce" is the legal basis for a body of consumer protection law that covers data privacy and security practices. The FTC has brought hundreds of cases to date to protect the privacy and security of consumer information held by companies of all sizes under this authority. The FTC staff recently submitted comments to the National Telecommunications and Information Administration (NTIA) that clearly indicate the FTC staff's view that the FTC would be the appropriate agency to enforce a new comprehensive privacy legislative framework. Do you agree with the staff's view?

Answer. It is clear that data is playing an ever-increasing role in shaping all markets. From banking to real estate to travel to health care, every industry is relying on more and more data. Federal legislation should avoid problems of regulatory arbitrage that can impede Federal enforcement. Even if the FTC has enforcement authority over a new law, it will be critical to ensure that this supplements, and does not supplant, the role of state law enforcement.

Question 2. As Congress evaluates opportunities to create meaningful Federal legislation to appropriately ensure privacy of consumers' data, there have been suggestions to increase the FTC's authorities to enforce in this space. Will you commit to working with this Committee in measuring what resources, if any, will be needed to allow the agency to enforce any additional authorities that may or may not be provided in Federal legislation?

Answer. Yes.

Question 3. Sharing responsibilities with the DOJ's Antitrust Division, the FTC enforces antitrust law in a variety of sectors as described by your testimony. While the vast majority of premerger filings submitted to enforcement agencies do not

raise competition concerns, the FTC challenged 45 mergers since the beginning of 2017, and of those, the FTC only voted to initiate litigation to block five transactions. Would you please describe the resource needs of the agency associated with hiring qualified outside experts to support its litigation efforts? Please explain how developments in the high-technology sector are accounted for in the FTC's decision-making process related to antitrust enforcement.

Answer. Expert spending is costly. Compared to other statutes we enforce, our antitrust laws lack clear presumptions and rules, making litigation lengthy and resource-intensive. Given the state of the law, it is necessary to ensure adequate resources for litigation.

To be seen as an effective and credible enforcer, we must have enough qualified experts to collect and analyze data on business practices in the technology sector.

Question 4. Earlier this year, I introduced legislation called the *Senior Scams Prevention Act* with Senator Bob Casey to combat continued and increasingly complex attempts to defraud one of the Nation's most vulnerable populations, our senior community. This bill seeks to ensure retailers, financial institutions and wire transfer companies have the resources to train employees to help stop financial frauds and scams on seniors. Would you agree that awareness and education, guided by "best practices" established by industry and government partners, is a valuable tool in preventing consumer harms against our Nation's seniors?

Answer. Older Americans are disproportionately affected by fraud, and any effort to enlist industry and government in protecting them from the worst abuses is commendable. Educational initiatives can complement aggressive enforcement of those who defraud older American consumers.

Question 5. In its comments submitted to NTIA on "Developing the Administration's Approach to Consumer Privacy," the FTC discussed the various cases that it has taken up to address privacy-related harms to consumers, and it specifically noted four categories of harms: financial injury, physical injury, reputational injury, and unwanted intrusion. Could you please briefly describe each category while noting any FTC enforcement considerations specific to that type of harm?

Answer. The FTC staff comment identified financial injury, physical harm, reputational injury, and unwanted intrusion as four categories of privacy harms that FTC enforcement actions have acted to address. *Financial injury* is the injury that an act or practice causes to a consumer's financial position. The NTIA comment notes that financial injury manifests in a variety of ways, including through fraudulent charges, delayed benefits, expended time, opportunity costs, fraud, and identity theft. Consumers may also suffer financial injury when they purchase a product sold through deceptive representations. *Physical injuries* include risks to individuals' health or safety, including the risk of stalking or harassment. *Reputational injury* involves disclosure of damaging private facts about an individual. And *unwanted intrusion* includes both activities that intrude on the sanctity of people's homes or intimate lives and commercial intrusions.

Through its enforcement of particular statutes or rules, like the Fair Debt Collections Practices Act, Telemarketing Sales Rule, and COPPA, the FTC vindicates particular legislative and regulatory judgments meant to prevent harms such as these.

This effort to categorize privacy harms should not be seen as creating an exclusive list or harms, nor should it be read to exclude from FTC scrutiny activities that may not directly implicate these types of harm. For example, the FTC Act prohibits companies from making certain misrepresentations in connection with privacy and data security. To the extent that a company acts in a manner that is deceptive under the law, the FTC must be able to take appropriate action.

Question 6. In the FTC's recent comments in NTIA's privacy proceeding, the FTC said that its "guiding principles" are based on "balancing risk of harm with the benefits of innovation and competition." Would you describe what this means, how you strike this balance, and how it is applied in practice under your Section 5 authority in the *FTC Act*?

Answer. The FTC's staff comment reflects the fact that many of the FTC's enforcement efforts related to privacy and data security have proceeded under the FTC's Section 5 unfairness authority. Section 5(n) of the FTC Act requires that the FTC weigh the actual or likely substantial injury of an act or practice against countervailing benefits to consumers or competition. The FTC must be sure that it is not over-or under-estimating either side of the balance. Of course, Section 5's deception standard does not require this balancing exercise.

Question 7. The FTC's comments pertaining to "control" in NTIA's privacy proceeding stated, "Choice also may be unnecessary when companies collect and disclose de-identified data, which can power data analytics and research, while mini-

mizing privacy concerns." How would the FTC suggest Federal regulation account for de-identified data, if at all?

Answer. While companies may sometimes claim that data has been "de-identified," in some cases these data can be easily "re-identified." We would be happy to work with you should you choose to specifically legislate on this issue.

Question 8. Your testimony indicated that continued technological developments allow illegal robocallers to conceal their identities in "spoofing" caller IDs while exponentially increasing robocall volumes through automated dialing systems. These evolving technological changes mean that the critical law enforcement efforts of the FTC cannot be the only solution, and your testimony described the additional steps the FTC is taking to develop innovative solutions to these issues. Would you please describe the process and outcomes of the four public challenges that the FTC held from 2013 to 2015? Are there plans to incentivize innovators to combat robocalls in the future?

Answer. The FTC's process for its robocall challenges included public announcements, committees with independent judges, and, in some cases, cash prizes awarded under the America COMPETES Reauthorization Act.[2] To maximize publicity, the FTC announced each of its four challenges in connection with public events. The FTC announced the first robocall challenge at the FTC's 2012 Robocall Summit. In 2014, the FTC conducted its second challenge, "Zapping Rachel" at DEF CON 22. The FTC conducted its third challenge, "DetectaRobo," in June 2015 in conjunction with the National Day of Civic Hacking. The final phase of the FTC's fourth public robocall challenge took place at DEF CON 23. When the FTC held its first public challenge, there were few, if any, call blocking or call labeling solutions available for consumers. Today, two FTC challenge winners, NomoRobo and Robokillller, offer call blocking applications, and there are hundreds of mobile apps offering call blocking and call labeling solutions for cell phones. Many home telephone service providers also now offer call blocking and call labeling solutions. The FTC will not hesitate to initiate additional innovation contests if it identifies further challenges that could meaningfully benefit consumers by reducing the harm caused by illegal robocalls.

In addition to developing call blocking and call labeling technology, the telecom industry has also developed call verification technology, called STIR/SHAKEN, to help consumers know whether a call is using a spoofed Caller ID number and assist call analytics companies in implementing call blocking and call labeling products. If widely implemented and made available to consumers, the STIR/SHAKEN protocol should minimize unwanted calls. Certain industry members have begun to roll out this technology and it is in beta testing mode. We will keep a close eye on this industry initiative and continue to encourage its implementation.

Question 9. Would you please describe the FTC's coordination efforts with state, federal, and international partners to combat illegal robocalls?

Answer. The FTC frequently coordinates its efforts with its state, federal, and international partners. The FTC often brings robocall enforcement actions with states as co-plaintiffs. For example, in the FTC's case against Dish Network, litigated for the FTC by the Department of Justice, the FTC brought the case jointly with California, Illinois, North Carolina, and Ohio. Collectively, the states and the FTC obtained a historic $280 million trial verdict.[3]

The FTC also coordinates outreach and education with the FCC. In 2018, the agencies co-hosted two robocall events—a policy forum that discussed technological and law enforcement solutions to the robocall problem[4] and a public expo that allowed companies offering call blocking and call labeling services to showcase their products for the public.[5] Additionally, the FTC and FCC hold quarterly calls, speak regularly on an informal basis, and coordinate on a monthly basis with our state partners through the National Association of Attorneys General. The FTC also engages with international partners through participation in international law en-

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[2] *See* "Details About the FTC's Robocall Initiatives" at *https://www.consumer.ftc.gov/features/feature-0025-robocalls*

[3] Press Release, FTC and DOJ Case Results in Historic Decision Awarding $280 Million in Civil Penalties Against Dish Network and Strong Injunctive Relief for Do Not Call Violations (June 6, 2017), *https://www.ftc.gov/news-events/press-releases/2017/06/ftc-doj-case-results-historic-decision-awarding-280-million-civil.* The case is on appeal before the Seventh Circuit Court of Appeals.

[4] Press Release, FTC and FCC to Host Joint Policy Forum and Consumer Expo to Fight the Scourge of Illegal Robocalls (Mar. 22, 2018), *https://www.ftc.gov/news-events/press-releases/2018/03/ftc-fcc-host-joint-policy-forum-illegal-robocalls.*

[5] Press Release, FTC and FCC to Co-Host Expo on April 23 Featuring Technologies to Block Illegal Robocalls (Apr. 19, 2018), *https://www.ftc.gov/news-events/press-releases/2018/04/ftc-fcc-co-host-expo-april-23-featuring-technologies-block-0.*

forcement groups such as the International Consumer Protection Enforcement Network, International Mass Marketing Fraud Working Group, and the Unsolicited Communications Network *(formerly known as the London Action Plan).*

Question 10. Your testimony described the limitations of the FTC's current data security enforcement authority provided by Section 5 of the *FTC Act* including: lacking civil penalty authority, lacking authority over non-profits and common carrier activity, and missing broad APA rulemaking authority. Please describe each of these limitations and how adjusted FTC authority to address these items would improve the protection of consumers from data security risks.

Answer. As a general matter, the FTC Act does not provide the Commission with the authority to seek civil penalties from first-time violators of Section 5. Providing the FTC with expanded civil penalty authority would assist the FTC in its efforts to deter illegal conduct. Without civil penalties, companies with unlawful privacy and security practices get a free bite at the apple. Strong civil penalties and clear rules of the road are critical to deter lax privacy and security practices.

The FTC Act excludes or exempts non-profits and common carriers from the FTC's jurisdiction, but non-profits and common carriers rely on consumer data just as other persons subject to the FTC's jurisdiction do. Broadened FTC authority that also covers non-profits and common carriers will eliminate opportunities for arbitrage and help ensure that persons collecting, storing, using, disposing of, or transporting consumer data do so in accordance with consistent rules.

The FTC Act provides the FTC with authority to issue rules that define with specificity acts or practices in or affecting commerce that are unfair or deceptive. Through this authority, the FTC could issue rules pertaining to data privacy and security. Unfortunately, this rulemaking must be conducted in accordance with the Magnuson-Moss Warranty Act, which adds time-consuming requirements to the rulemaking process that go well-beyond the requirements of the Administrative Procedure Act. Granting the FTC the authority to issue data security rules in accordance with the Administrative Procedure Act would allow the Commission to issue timely and appropriate rules that keep pace with technological development and seek civil penalties if companies violate them.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. RICHARD BLUMENTHAL TO HON. ROHIT CHOPRA

Privacy Rules

We know that Americans care about privacy—that they eagerly want these rights. We need baseline rules. Companies should not store sensitive information indefinitely and use that data for purposes that people never intended. Federal rules must set meaningful obligations on those that handle our data. We must enable consumers to trust and control their personal data.

Question 8. Do you support providing state AGs with the power to enforce Federal privacy protections and would you commit to working with state AGs?

Answer. Yes. There is precedent for state attorney general enforcement of Federal privacy law. For example, state attorneys general have the authority to take action under the Children's Online Privacy Protection Act. However, this should not necessarily be a substitute for state attorneys general enforcing their own state laws protecting citizen data.

Question 9. Why is it important that the FTC have rulemaking authority when it comes to privacy? Where best would rulemaking be applied?

Answer. If privacy rules cannot evolve with changing technology, this will threaten fair competition and fair treatment of consumers.

For example, the last major privacy legislation, COPPA, was in 1998. If we did not have rulemaking authority, we would not have been able to make critical updates as the landscape evolved to mobile apps. Additionally, rulemaking means that the public will weigh in and help shape how it works. I believe in Joy's Law—"no matter who you are, most of the smartest people work for someone else,"—ccoined by Sun Microsystems co-founder Bill Joy. We need the input of the best researchers, engineers, entrepreneurs and the critically, the populations most at risk in privacy lapses.

Question 10. Do you believe elevating the Office of Technology Research and Investigation to the Bureau level would meaningfully help the FTC in addressing new technological developments across its mandates?

Answer. The line between "consumer protection" and "competition" is very blurry in today's digital economy. Just as our lawyers and economists make substantial contributions to our mission, the FTC would benefit from additional employees with

professionalized technical skills and capabilities. Elevating the staff from the Office of Technology Research and Investigation into a new Bureau of Technology would be one potential step in helping us rise to meet the challenge of how markets and business models work today.

Board Accountability

Question 12. What is the FTC doing to investigate and hold accountable individual board members and executives who knowingly assist their companies in committing fraud? What more should the FTC be doing in this regard?

Answer. The FTC should focus on holding individual board members and executives accountable when they break the law. While individuals are typically pursued in smaller matters, I believe we should sharpen our focus on individuals in all investigations, regardless of the size of the firm. This is especially true for firms subject to an existing Commission order.

FTC Investigation of Algorithms

Section 6(b) of the FTC Act gives the agency broad investigatory and information-gathering powers. For example, in the 1970s the FTC used its Section 6(b) authority to require companies to submit product-line specific information, enabling the agency to assess the state of competition across markets.

The FTC has released reports on big data and the harms biased algorithms can cause to disadvantaged communities. These reports drew attention to the potential loss of economic opportunity and diminished participation in our society. Yet, information on how these algorithms work, and on the inputs that go into them, remains opaque.

Question 19. Where the FTC consider using its Section 6(b) investigative power to help us understand how these algorithms and black-box A.I. systems work—the biases that shape them, and how those can affect trade, opportunity, and the market?

Answer. Black-box algorithms increasingly make decisions about our lives. This can raise serious concerns about fairness and civil rights. The FTC should consider a wide range of potential studies to better understand how markets, technology, and business models work today.

FTC Consent Decree on Unrepaired Recalls

Most consumers probably do not know that, while *new* car dealers are prohibited from selling vehicles with open recalls, *used* car dealers are not. A recent FTC consent decree, which I strenuously disagreed with and is currently being scrutinized in the courts, allows the sale of used cars with unrepaired recalls. According to the consent decree, car dealers can advertise that cars with unrepaired safety recalls like a defective Takata airbag are "safe" or have passed a "rigorous inspection"—as long as they have a disclosure that the vehicle *may* be subject to an unrepaired recall and directs consumers on how they can determine the vehicle has an open recall.

Question 20. In your opinion, is a car with an open, unrepaired recall, a "safe" car? Why would the FTC allow unsafe cars to be advertised as "safe" and "repaired for safety," with or without a vague, contradictory and confusing disclaimer?

Answer. It is extremely concerning that American drivers are unknowingly purchasing used cars with open recalls. While we have pursued enforcement cases relating to deceptive advertising in the past, I am concerned that these actions without the threat of civil penalties do not do enough to deter this sort of behavior, which puts people on the road at risk. We should utilize the rulemaking authority granted to us in 2010 pursuant to Section 1029 of the Dodd-Frank Act to ensure that we can seek civil penalties on an auto dealer's first offense.

Question on Non-Compete Clauses

I am concerned about the growth of non-compete clauses, which block employees from switching jobs to another employer in the same sector for a certain period of time. These clauses weaken workers' bargaining power once they are in the job, because workers often cannot credibly threaten to leave if their employer forces refuses to give them a raise or imposes poor working conditions. According to the Economic Policy Institute, roughly 30 million workers—including one in six workers without a college degree—are now covered by non-compete clauses.

The consensus in favor of addressing non-compete clauses is growing. For example, just this past December, an interagency report indicated that non-compete clauses can be harmful in certain contexts, such as the healthcare industry. Yet, the FTC has not yet undertaken forceful action. In September, Commissioner Chopra

suggested that the FTC use its rulemaking authority to "remove any ambiguity as to when non-compete agreements are permissible or not."

Question 23. Do you agree with the proposal that the FTC use its rulemaking authority to address non-compete clauses? I invite you to explain your reasoning regarding your stance.

Answer. The prevalence of non-compete clauses are a significant concern. Firms may be using these clauses to suppress wages and impede a competitive labor market. I support examining the use of all tools, including rulemaking, to address concerns of anticompetitive conduct with respect to non-compete clauses and other terms and conditions in worker and independent contractor agreements.

Question on Local Merger Enforcement

Even though big national mergers typically garner the most media attention, smaller mergers can often raise monopoly concerns on the local level. This can be true in the healthcare industry, for example. In November, Commissioner Simons told me: "Some local mergers may be too small to require Hart-Scott-Rodino premerger notification, but may still have anticompetitive effects."

Question 24. Would you agree with me that Hart-Scott-Rodino premerger notifications help antitrust enforcers catch concerning mergers?

Answer. Yes.

Question 25. What sort of anticompetitive effects might be raised by local mergers even when those mergers are too small to require Hart-Scott-Rodino premerger notification?

Answer. Hospitals and Main Street retail are some of the foundations of a local economy. Mergers like these that are not subject to the requirements under the HSR Act can be just as anticompetitive as mergers that are. They can lead to higher prices and less access to necessities like food and health care.

Question 26. What action would you recommend either the FTC or Congress take in order to assist Federal and state antitrust enforcers in catching local mergers that raise anticompetitive concerns?

Answer. This is an important issue for local economies across the country. We should closely examine whether our reporting regime adequately captures transactions that lead to potentially anticompetitive effects. I look forward to working with you and other interested offices on this issue.

Question on Horizontal Shareholding

Recent research has raised questions about whether horizontal shareholding harms competition in our economy. I would like to understand your view on this ongoing research.

Question 27. Do you believe that horizontal shareholding raises anticompetitive concerns?

Answer. This is a new area of concern that we need to learn more about. There is an emerging literature about this topic that focuses on passive investment vehicles. I am also interested in how holdings by private pools of capital, such as private equity and hedge funds, could raise a special set of anticompetitive concerns.

Question 28. Do you believe that our antitrust laws can be used to address the anticompetitive concerns raised by horizontal shareholding?

Answer. I do not know if our laws are sufficient to address potential problems. Our 21st Century Hearings on Competition and Consumer Protection are covering this issue. I plan to study the record on this issue closely to assess any anticompetitive concerns.

Question 29. What, if anything, are you doing to address any potential harms of horizontal shareholding?

Answer. I am still gathering information to determine the appropriate course of action.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. CATHERINE CORTEZ MASTO TO HON. ROHIT CHOPRA

Pet Leasing

I appreciate the Commission's attention to my request with six of my colleagues for the FTC to investigate the practice of pet leasing that is leading some consumers into confusing or deceptive contractual obligations that cause them to have an issue with their beloved pet and negatively impact their financial status, such as credit scores, for far into the future. This is an issue that is a little under the radar but

needs strong oversight and attention under your deceptive practices mandate if there are concerning financial practices being discovered.

Question. Can I get a further commitment from you all to keep my office informed of actions and determinations you all may make pertaining to this concerning issue and the Humane Society and Animal Legal Defense Fund's formal petition to the Commission?

Answer. Consistent with the FTC's Rules of Practice, we are happy to provide your office with updates on this topic.

Bureau of Technology

Former Commissioner Terrell McSweeny has suggested creating a Bureau of Technology at the FTC.

Question 1. Does the Commission have sufficient resources and staffing to protect consumer privacy in the digital age?

Answer. Given the challenges faced in the digital marketplace, more resources would help advance the goal of protecting consumer privacy and competition.

Question 2. Do support the establishment of a Bureau of Technology?

Answer. Just as our lawyers and economists make substantial contributions to our mission, the FTC would benefit from additional employees with professionalized technical skills and capabilities. Establishing a new Bureau of Technology would be one important step in helping us rise to meet the challenge of how markets and business models work today.

Robocalls

Obviously protecting consumers from fraud is a fundamental tenet of the FTC. And I applaud your work in both the education and enforcement sectors of protecting consumers. But one area we all are still struggling to stay ahead of the curve on is robocalls. That's why I have legislation, the Deter Obnoxious, Nefarious, and Outrageous Telephone Calls, or DO NOT Call Act with four of my Senate colleagues. It would increase the deterrent against illegal robocalls by imposing a potential criminal penalty rather than just civil fines. While these tools would be more for the Federal Communications Commission, we are obviously interested in fighting this problem on all fronts.

Question 1. Would you agree that in addition to finding more effective technological tools to fight this problem, that this kind of enhanced deterrent needs to receive serious consideration in Congress to help provide regulators the tools to hold bad actors accountable for this persistent nuisance and scurrilous action by scammers?

Answer. Yes, more tools to hold bad actors accountable would be helpful.

Question 2. Are there additional actions Congress should be considering related to this specific challenge?

Answer. Congress should consider repealing the common carrier exemption in the FTC Act. In addition, Congress may need to weigh whether criminal penalties are appropriate for the worst abusers of robocalling.

Data Minimization vs Big Data

A topic that has come up a lot during our discussions on privacy is data minimization. This is a concept that I have been considering on as I work on developing a comprehensive data privacy bill. As you're aware, this is the idea that businesses should only collect, process, and store the minimum amount of data that is necessary to carry out the purposes for which is was collected. There are obvious advantages to this as it minimizes the risk of data breaches and other privacy harms. At the same time, big data analytics are going to be crucial for the future and play an important role in smart cities, artificial intelligence, and other important technologies that fuel economic growth. I think it is important to find a balance between minimization and ensuring that data, especially de-identified data, is available for these applications.

Question. Can you describe how you view this balance and how we in Congress can ensure that people's data is not abused but can still be put to use in positive ways?

Answer. Data minimization and big data are complementary. Some assume that "big data" means that more is simply better, but firms collecting massive amounts of data face practical, computational, and architectural constraints.

We need to ensure that when firms accumulate massive amounts of data, they do not engage exclusionary conduct and other anticompetitive practices. This is also important in merger review, where data is a critical asset. We will also need to take

steps to ensure that there are mechanisms to ensure that big data does not lead to discrimination or reinforce biases.

General Privacy Recommendations

Question 1. While privacy was a significant topic of the oversight hearing, as we look to develop a bill, can you specifically lay out some of the top priorities you individually would like to see included and what do you think gets overlooked in the conversations policymakers have with allowing for future innovations and yet raising the bar for protecting consumers?

Answer. Technology moves quickly. The best thing we can do is make sure that this movement is happening within a competitive market that ensures autonomy, choice, and individual rights. We need to take aim at all of the structural incentives and business models that can distort competition and infringe on personal privacy.

For example, we need to address "terms of service" that include one-sided terms that lead to a race to the bottom. Also overlooked is the role of data in mergers and acquisitions. We need to look carefully at whether firms are combining data to erode privacy and exclude competition. We also need to examine whether there are conflicts of interest in certain types of business models that harm both users and competitors.

Question 2. Can you also outline the optimal role you see for our state Attorneys General in this privacy enforcement process?

Answer. State Attorneys General play a critical law enforcement role and are often times in a better position to quickly identify and respond to problems that impact citizens of their states than Federal law enforcement is. Any privacy enforcement regime should recognize and account for this reality and enable states to act as necessary to protect their citizens. In addition to enforcing their own state law protecting citizen data, I support state attorney general enforcement authority of Federal privacy protections.

Data Privacy—Binding Contracts?

We live with this time information inundation where people can't really read privacy policies and fairly agree to their content. But, we all know that basically no one reads privacy policies—and indeed, no reasonable person should read privacy policies, because according to research done at Carnegie Mellon, it would take 76 work days to read all of the privacy policies on encounters in a year. Companies take advantage of the fact that no one reads privacy policies to bury terms in those policies that no rational consumer would agree to (such as Grindr selling its users HIV status to third parties).

Question. Should these terms of service be binding contracts?

Answer. No. "Terms of service" include one-sided terms that are contributing to a race to the bottom. Congress will need to ensure that terms of service are not used to strip away rights and erode competition.

Privacy Risky Communities/Groups

Question 1. Do you think that certain communities or groups are any more or less vulnerable to privacy risks and harms?

Answer. Yes. For example, communities of color have been subject to "digital redlining" where a company uses surveillance to build a profile that infers race, and then restricts the opportunities that they can see based on that profile. Privacy isn't an abstract concept for people whose personal information is used to restrict, for example, housing or job opportunities.

Question 2. Should privacy law and regulations account for such unique or disparate harms, and if so, how?

Answer. It is critical that Americans are able to vindicate their civil rights. Privacy law and regulations should affirmatively address protecting civil rights. We need to take a hard look at how behavioral advertising might infringe on our civil rights. We also need to make sure that algorithms do not operate in the shadows that are discriminatory by design.

Immediate Civil Penalties Authority

Noting from your FTC testimony, "*Section 5 (of the FTC Act), however, is not without limitations. For example, Section 5 does not provide for civil penalties, reducing the Commission's deterrent capability.*"

Question. While I appreciate the long term successes of the FTC in many respects to investigate data security matters, what are your thoughts to whether there is enough of a deterrent effect with Section 5 authority when you can't immediately enforce against those who misuse data with civil penalties right from the start,

rather than as the result of often times flagrant offenses to their already establish consent decrees?

Answer. Without civil penalties, companies with unlawful security practices get a free bite at the apple. Strong civil penalties and clear rules of the road are critical to deter lax security practices.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. MAGGIE HASSAN TO HON. ROHIT CHOPRA

Question 3. The heroin, fentanyl, and opioid crisis is the most pressing public health and safety challenge facing both my home state of New Hampshire and our country, and it is taking a massive toll on our communities, our workforce, and our economy.

This crisis affects people from all walks of life in every corner of my state and the entire country, and it requires an "all-hands-on-deck" response, including from agencies that may not traditionally be focused on these issues.

Would you please describe the FTC's efforts to regulate unscrupulous treatment programs? More specifically, are you able to discuss illegal lead generation and what the FTC is doing to combat this practice that harms those who have taken the first step towards confronting substance use disorder?

Answer. Across the country, opioid addiction is tearing apart the lives of individuals, their families, and their communities. It is critical that the FTC do everything in its power to tackle this problem. As I noted in a letter to the House Energy and Commerce Committee, I am particularly concerned about lead generators and body brokers who collude with treatment centers to target addiction sufferers. Rather than helping these sufferers, these entities gouge them, their families, and their insurance companies. Last year, the Opioid Addiction Recovery Fraud Prevention Act granted the FTC new authority for combatting those who seek to profit from this epidemic, and is essential that we exercise this authority with vigor.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. AMY KLOBUCHAR TO HON. ROHIT CHOPRA

Question. The Federal Trade Commission's budget has remained flat for the past several years despite increasing demands on your agency's resources, including a significant rise in merger filings.

- If additional resources were made available to the Federal Trade Commission, how would you deploy those resources to advance the agency's consumer protection and competition missions?

Answer. The Commission oversees vast sectors of the economy with a staff significantly smaller than what it was a generation ago. We are in particular need of additional technologists who can analyze emerging antitrust and consumer protection challenges, and attorneys prepared to take firms to court when they break the law.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. TOM UDALL TO HON. ROHIT CHOPRA

Privacy

Question 1. Do you support strong civil penalties for consumer privacy violations?

Answer. Yes. Absent real penalties, there will be no deterrence for bad actors.

Question 2. The California Consumer Protection Act goes into effect in January 2020. As Congress considers pre-emption of that state law, what additional authority should we give the FTC to ensure that consumer privacy adequately is protected?

Answer. Any Federal privacy law should create more competition, give users meaningful rights, and come with real consequences for violators. At the same time, I am concerned that broad preemption of state laws would do more harm than good. We look forward to working with you closely as these efforts progress.

Question 3. A recent *New York Times* analysis found that both the Apple App Store and the Google Play Store have apps in their respective children's or family

sections that potentially violate COPPA.[1] What specific role should platform owners play to ensure COPPA compliance on their platforms?

Answer. The 2012 revisions to the COPPA rule make platforms liable if they have actual knowledge of collecting personal information from a child-directed app. We will need to keep a close eye on platforms to ensure that they are not purposely turning a blind eye to violations of COPPA. We will also need to continue reviewing the COPPA rules on a regular basis, given the influence of the major tech platform companies.

Question 4. Compliance for mobile apps may be hard to achieve against fly-by-night operators overseas who do not care if their apps violate U.S. law. How can the Vtech Electronics investigation and civil penalty serve as an example for how the FTC can hold foreign app developers responsible for violating COPPA?

Answer. The FTC will need to keep a close eye on foreign operators collecting information on American users. I support continued efforts to monitor and hold violators accountable.

Question 5. The COPPA safe harbor organizations must submit an annual report to the Federal Trade Commission, Can you share the reports from the last 5 years?

Answer. Given that the Commission voted to designate these organizations, I support the sharing of performance data submitted by COPPA safe harbor organizations, subject to law and regulation governing confidentiality. I have reviewed these reports and am concerned that these organizations are not engaging in fulsome monitoring and collection of consumer complaints.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN THUNE TO HON. NOAH JOSHUA PHILLIPS

Question 1. Vertical mergers such as the merger between AT&T and Time Warner have garnered some attention lately. The FTC and DOJ have not updated vertical merger guidance since 1984. Do you believe that the FTC and DOJ should issue new guidance on vertical mergers?

Answer. Antitrust officials, practitioners, and scholars recognize that, in many respects, the 1984 Non-Horizontal Merger Guidelines [1] reflect neither current practice nor scholarship on vertical merger enforcement.[2] New guidelines should be based on modern caselaw, the practical experience of recent merger challenges and investigations, and insights from both theoretical and empirical scholarship.

Over the years, the agencies have provided substantial insight on vertical merger analysis through speeches and other policy work,[3] and through rigorous case selection.[4] I am open to drafting new guidelines, provided they reflect guidance from the courts, experience from agencies, and the weight of scholarship on the question.

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[1] Valentino-DeVries, J., Singer, N., Krolick, A., Keller, M. H., "How Game Apps That Captivate Kids Have Been Collecting Their Data." *The New York Times.* 2018, September 12. *https://www.nytimes.com/interactive/2018/09/12/technology/kids-apps-data-privacy-google-twitter.html*

[1] U.S. Department of Justice, *Non-Horizontal Merger Guidelines* (1984), *https://www.justice.gov/sites/default/files/atr/legacy/2006/05/18/2614.pdf.*

[2] *See, e.g.,* Aldrin Brown, *US DOJ Seeks to Issue New Vertical Merger Guidelines 'Within the Next Year,' Antitrust Chief Says,* PARR (Oct. 30, 2018) (quoting Assistant Attorney General Makan Delrahim as stating that these guidelines are "not used" and do not "[r]eflect new evidence or case law"); Bruce Hoffman, *Vertical Merger Enforcement at the FTC,* Remarks at Credit Suisse 2018 Washington Perspectives Conference (Jan. 10, 2018), *https://www.ftc.gov/public-statements/2018/01/vertical-merger-enforcement-ftc.*

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

[4] For example, the Commission recently challenged several vertical mergers, including one between Northrop Grumman, a leading provider of missile systems to the Department of Defense, and Orbital ATK, a key supplier of solid rocket motors. *Northrop Grumman,* No. C–4652 (F.T.C. 2018), *https://www.ftc.gov/enforcement/cases-proceedings/181-0005-c-4652/northrop-grumman-orbital-atk. See also Sycamore Partners II, L.P.,* No. C–4667 (F.T.C. 2019), *https://www.ftc.gov/enforcement/cases-proceedings/181-0180/sycamore-partners-ii-lp-staples-inc-essendant-inc-matter* (consent agreement resolving charges that a merger between Staples, the world's largest retailer of office products and related services, and Essendant, a wholesale distributor of office products, was likely to harm competition in the market for office supply products sold to small- and mid-sized businesses); *Fresenius Medical Care AG & Co. KGaA,* No. C–4671 (F.T.C. 2019), *https://www.ftc.gov/enforcement/cases-proceedings/171-0227/fresenius-medical-care-nxstage-medical-matter.*

Question 2. Government lawsuits to stop mergers are litigated using different procedures depending on which agency, the FTC or DOJ, handles the case. Do you think Congress should take action to ensure that agencies follow the same procedures or do you support another approach?

Answer. There is no good reason for different standards for preliminary injunctive relief between the two antitrust enforcement agencies, and Congress adopting carefully crafted legislation to align standards could be beneficial. As a practical matter, courts typically interpret the standard to be applied when the FTC files for a preliminary injunction in pre-merger cases to be the same as for such DOJ filings. Making it clear via statute that the two standards are the same would, however, eliminate: (1) any potential for different standards to be erroneously adopted; and (2) the criticism that companies may face different standards depending on the happenstance of which agency reviews its transaction.

With respect to the FTC's administrative litigation path, there are several additional considerations. The FTC has utilized administrative litigation to help develop antitrust doctrine in important ways—including in complex and critical areas like healthcare. The Commission's reworking of its approach to hospital mergers is perhaps the most striking example of the FTC's successful use of administrative litigation to advance antitrust enforcement.[5] In contemplating legislation regarding the FTC's use of administrative litigation, Congress should consider whether and to what extent it desires the Commission to continue using administrative litigation—as opposed to Federal court litigation—to develop antitrust doctrine.

Congress should also consider whether and to what extent administrative litigation may make the ultimate resolution of cases more efficient. Whether a case is litigated in Federal court or administratively may make a difference, particularly for unconsummated mergers. Merging parties remain unable to close their transaction for a significant period of time, for example when they are subject to review by multiple authorities. The FTC can commence an administrative action while other reviews are pending and delay an injunction action in Federal court until other review processes are completed and the merger is imminent. In the recent *Tronox* case, the FTC filed its case in December 2017 and litigated it administratively while the parties waited for foreign approvals.[6] In the summer of 2018, once those approvals were granted and the parties would have been able to close their transaction, the FTC filed suit in Federal court, seeking a preliminary injunction. The pre-existing administrative record allowed the parties to avoid a substantial discovery period in the Federal proceeding, enabled the district court judge to expedite its hearing and to issue a ruling in September 2018. However, the administrative litigation remains pending before the Commission. In other recent merger cases where the Commission has sought a preliminary injunction in Federal court from the beginning, Federal courts were able to issue rulings on the preliminary injunctions—which typically effectively end any litigation and obviate the need for any administrative trial—within six months.[7]

That said, the Commission's use of administrative litigation for merger review has met with criticism. Some express concern that the FTC has "two bites at the apple" when it comes to mergers: the Commission can seek a preliminary injunction in Federal court, and if it loses, can continue to a full administrative trial before an ALJ (an option the DOJ does not have).[8] The Commission has not continued to litigate a merger case after losing a preliminary injunction motion in Federal court for over twenty years, and modern policy is to stop litigating after such a loss. I agree with that policy. That said, the policy could be changed by the Commission, while it would not be able to unilaterally deviate from legislation adopting this policy.

There also is a concern that, in administrative litigation, the Commission essentially serves as a check on itself—it votes to issue a complaint, and then is the

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[5] *See, e.g.,* Edith Ramirez, Chairwoman, Fed. Trade Comm'n, *Retrospectives at the FTC: Promoting an Antitrust Agenda,* Remarks at ABA Retrospective Analysis of Agency Determinations in Merger Transactions Symposium (June 28, 2013), *https://www.ftc.gov/public-statements/2013/06/retrospectives-ftc-promoting-antitrust-agenda; S. 2102: the Standard Merger & Acquisition Review Through Equal Rules Act of 2015 Before the Subcomm. on Antitrust, Competition Policy & Consumer Rights of the S. Comm. on the Judiciary,* 114th Cong. 4 (2015) (statement of Jonathan M. Jacobson, Partner, Wilson Sonsini Goodrich & Rosati, PC), *https://www.judiciary.senate.gov/imo/media/doc/10-07-15%20Jacobson%20Testimony.pdf.*

[6] *Tronox Ltd.,* No. 9377 (F.T.C. 2018), *https://www.ftc.gov/enforcement/cases-proceedings/171-0085/tronoxcristal-usa.*

[7] *See, e.g., Sysco Corporation,* No. 9364 (F.T.C. 2015), *https://www.ftc.gov/enforcement/cases-proceedings/141-0067/syscousf-holdingus-foods-matter; Staples, Inc.,* No. 9367 (F.T.C. 2016), *https://www.ftc.gov/enforcement/cases-proceedings/151-0065/staplesoffice-depot-matter.*

[8] *See, e.g.,* ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS, ch. II.A (2007), *https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.*

factfinder and decision-maker as to the ultimate merits of that complaint before parties have any opportunity to go to Federal court.[9] The FTC ultimately finds liability (on one or more counts) in administrative litigation an overwhelming percent of the time, often overruling the Administrative Law Judge (who renders an initial decision, following an administrative trial) to do so.[10] This has led some to question the administrative process and the use of the ALJ.

In considering whether to take action to align the approaches of the two Federal antitrust agencies, Congress should keep in mind these benefits and potential drawbacks.

Question 3. Should Congress amend Section 5(n) of the FTC Act, which addresses unfair practices, to clarify what constitutes "substantial injury?" If so, how?

Answer. I do not have a view at this time as to whether Congress should clarify the definition of "substantial injury" under Section 5(n). Historically, the Commission has interpreted substantial injury to include financial,[11] physical,[12] reputational,[13] or unwanted intrusions.[14]

Some have raised questions as to the scope of injury appropriately covered by Section 5(n), including whether (and how) 5(n) should be applied to intangible injuries.[15] In response to some of these questions, on December 12, 2017, the FTC

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[9] *See* Mark Leddy, Christopher Cook, James Abell & Georgina Eclair-Heath, *Transatlantic Merger Control: The Courts and the Agencies,* 43 CORNELL INT'L L.J. 25, 53 (2010) ("[T]he FTC's recent proposals [ ] raise concerns about prosecutorial bias and lack of effective judicial oversight."); Maureen K. Ohlhausen, *Administrative Litigation at the FTC: Effective Tool for Developing the Law or Rubber Stamp?,* 12(4) J. COMPETITION L. & ECON. 1 (2016) (describing and analyzing the concerns); David A. Balto, *The FTC at a Crossroads: Can It Be Both Prosecutor and Judge?,* 28 LEGAL BACKGROUNDER 1, 1 (2013); Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission, 58 ANTITRUST L.J. 43, 118 (1989) ("No thoughtful observer is entirely comfortable with the FTC's (or other agencies') combining of prosecutor and adjudicatory functions. Whenever the same people who issued a complaint later decide whether it should be dismissed, concern about at least the appearance of fairness is inevitable.").

[10] *See, e.g.,* A. Douglas Melamed, Comments on Public Workshop Concerning the Prohibition of Unfair Methods of Competition In Section 5 of the Federal Trade Commission Act 14 (Oct. 14, 2008), *https://www.ftc.gov/policy/public-comments/comment-537633-00004* ("Over that 25-year period [from 1983–2007], *respondents did not win a single* [Sherman Act] *case* [before the ALJ]. The staff won 16 cases and lost none. That record now covers the 26-year period from 1983 to 2008. [¶] Notably, respondents had greater difficulty winning before the Commission than before the ALJs. Respondents actually won four of the sixteen cases before the ALJ." (emphasis in original)); Joshua Wright, *Supreme Court Should Tell FTC To Listen To Economists, Not Competitors On Antitrust,* FORBES (Mar. 14, 2016), *https://www.forbes.com/sites/danielfisher/2016/03/14/supreme-court-should-tell-ftc-on-antitrust/#76b9fd647c16* ("[T]he FTC has ruled for itself in 100 percent of its cases over the past three decades—though it is reversed more often than the decisions of Federal court judges.")

[11] Financial injury can manifest in a variety of ways: fraudulent charges, delayed benefits, expended time, opportunity costs, fraud, and identity theft, among other things. *See, e.g.,* Complaint, *TaxSlayer, LLC,* No. C–4626 (F.T.C. Oct. 20, 2017), *https://www.ftc.gov/enforcement/cases-proceedings/162-3063/taxslayer* (alleging delayed benefits, expended time, and risk of identity theft).

[12] Physical injuries include risks to individuals' health or safety, including the risks of stalking and harassment. *See, e.g.,* Complaint, *FTC v. Accusearch, Inc.,* No. 06–CV–0105 (D. Wyo. April 27, 2006), *https://www.ftc.gov/enforcement/cases-proceedings/052-3126/accusearch-inc-dba-abikacom-jay-patel* (alleging that telephone records pretexting endangered consumers' health and safety).

[13] Reputational injury involves disclosure of private facts about an individual, which damages the individual's reputation. Tort law recognizes reputational injury. The FTC has brought cases involving this type of injury, for example, in a case involving public disclosure of individuals' Prozac use and public disclosure of individuals' membership on an infidelity-promoting website. *Eli Lilly And Company,* No. C–4047 (F.T.C. May 8, 2002), *https://www.ftc.gov/enforcement/cases-proceedings/012-3214/eli-lilly-company-matter; FTC v. Ruby Corp. et al.,* No. 1:16-cv-02438 (D.D.C. Dec. 14, 2016), *https://www.ftc.gov/enforcement/cases-proceedings/152-3284/ashley-madison.*

[14] Finally, unwanted intrusions involve two categories. The first includes activities that intrude on the sanctity of people's homes and their intimate lives. The FTC's cases involving a revenge porn website, an adult-dating website, and companies spying on people through remotely-activated webcams fall into this category. The second category involves unwanted commercial intrusions, such as telemarketing, spam, and harassing debt collection calls.

[15] *See, e.g., Oversight of the Federal Trade Commission; Hearing Before the S. Comm. on Commerce, Science, and Transportation,* 114th Cong. 74 (2016) (written question submitted by Sen. Thune, Chairman, S. *Comm. on Commerce, Science, and Transportation*) (asking about the use of the FTC's unfairness doctrine to address intangible and non-economic harms, including whether "there a predictable limiting factor on the types of harm that will result in FTC enforcement actions"), *https://www.govinfo.gov/content/pkg/CHRG-114shrg25376/pdf/CHRG-114shrg25376.pdf; LabMD, Inc. v. FTC,* 678 F. App'x 816, 820 (11th Cir. 2016) (noting that "it is not clear that a reasonable interpretation of § 45(n) includes intangible harms like those that

hosted a workshop in Washington, DC to discuss "informational injuries", which are injuries—both market-based and non-market[16]—that consumers may suffer from privacy and security incidents, such as data breaches or unauthorized disclosure of data. The workshop asked participants to discuss and develop analytical frameworks to help guide future application of the "substantial injury" prong in cases involving informational injury.

This work targets issues that Congress is now considering addressing through privacy legislation. I believe the discussion about the scope of Section 5(n) is relevant to that consideration.

Question 4. Should the FTC issue more guidance to marketers on the level of support needed to substantiate their claims? If so, when do you anticipate that such guidance could be issued?

Answer. The FTC has issued extensive guidance over the years to help marketers in determining the level of support needed to substantiate claims. The Commission first articulated the relevant factors used to determine the level of evidence required to substantiate objective performance claims in *Pfizer, Inc.,* 81 F.T.C. 23 (1972). Those factors included the type of claim, type of product, the consequences of a false claim, the benefits of a truthful claim, the cost of developing substantiation for the claim, and the amount of substantiation experts in the field believe is reasonable. The Commission and the courts have reaffirmed this standard many times since 1972.[17] In addition, the FTC also has provided extensive guidance through Guides and staff guidance documents.[18] In addition, FTC staff provide additional guidance through speeches and presentations to industry trade groups and industry attorneys.

The Commission's precedent and other guidance sets forth flexible principles that can be applied to multiple products and claims. It does not attempt to answer every question about substantiation, given the virtually limitless range of advertising claims, products, and services to which it could be applied. Instead, it seeks to strike the right balance between being specific enough to be helpful but not so granular that it would overlook some important factor that might arise under given circumstances and thereby actually chill useful speech.

Question 5. In June, the 11th Circuit vacated the Commission's data security order against Lab-MD. What effect, if any, will this have on the Commission's data security orders going forward?

Answer. The U.S. Court of Appeals for the Eleventh Circuit determined that the mandated data security provision of the Commission's *LabMD* Order was insufficiently specific. That ruling effectively mandates that our data security orders be more prescriptive, which is not necessarily good from a policy perspective. The flexible approach we had applied, which both the Commission and defendants generally preferred, permitted firms to base their data security compliance on the particular risks and needs of individual firms. Congress should consider whether to address the ruling of the Eleventh Circuit through a statutory fix.

The Court having issued its order, however, we are now working to craft order language in data security cases that is consistent with the Eleventh Circuit's opinion.

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the FTC found in this case."); Concurring Statement of Acting Chairman Maureen K. Ohlhausen in the Matter of Vizio, Inc. at 1, *FTC v. VIZIO, Inc.,* No. 2:17-cv-00758 (D.N.J. 2017) (noting "the need for the FTC to examine more rigorously what [type of harm] constitutes 'substantial injury' in the context of information about consumers."), *https://www.ftc.gov/public-statements/2017/02/concurring-statement-acting-chairman-maureen-k-ohlhausen-matter-vizio-inc.*

[16] "Market-based" injuries can be objectively measured—for example, credit card fraud and medical identity theft affect consumers' finances in a directly measurable way. Alternatively, a "non-market" injury, such the embarrassment that comes from a breach of sensitive health information, cannot be objectively measured using available tools because there is no functioning market for it.

[17] *See, e.g., Thompson Med. Co.,* 104 F.T.C. 648, 813 (1984), *aff'd,* 791 F.2d 189 (D.C. Cir. 1986); *Daniel Chapter One,* 2009 WL 5160000, at *25–26 (F.T.C. 2009), *aff'd,* 405 Fed. Appx. 505 (D.C. Cir. 2010) (unpublished opinion), available at 2011–1 Trade Cas. (CCH) ¶77,443 (D.C. Cir. 2010); *POM Wonderful, LLC,* 155 F.T.C. 1, 55–60 (2013), *aff'd,* 777 F.3d 478 (D.C. Cir. 2015), *cert. denied,* 136 S. Ct. 1839, 194 L. Ed. 2d 839 (2016); *FTC Policy Statement Regarding Substantiation,* 104 F.T.C. 839, 840 (1984) (appended to *Thompson Med. Co.,* 104 F.T.C. 648 (1984)).

[18] *See Guides for the Use of Environmental Marketing Claims,* 16 C.F.R. §260.2 (2019), *https://www.ecfr.gov/cgi-bin/text-idx?SID=bd96b2cdcd01f7620d43e50a9d1d8cec&mc=true&node=se16.1.260_12&rgn=div8;* FTC, *Dietary Supplements: An Advertising Guide for Industry, https://www.ftc.gov/tips-advice/business-center/guidance/dietary-supplements-advertising-guide-industry.*

Question 6. If Federal privacy legislation is passed, what enforcement tools would you like to be included for Federal Trade Commission?

Answer. The question of tools is a secondary one, which cannot and should not be considered in the abstract. Answering the question necessarily requires preliminary determinations first as to what harms Congress wishes to address and, second, what liability standards it adopts to address those harms. Civil penalties, for instance, are better tailored to conduct that is clearly-defined—for example, violations of specific rules set forth in FTC consent orders or regulations like COPPA. Otherwise, the prospect of paying them may chill innovation and other conduct that benefits consumers. The FTC has rulemaking authority today.[19] It differs from APA rulemaking in several respects, following restraints imposed upon the Commission by Congress after attempts by the agency to ban certain types of advertising to children. Rulemaking authority raises important issues of delegation and democratic accountability. Congress, not an administrative agency, is the best place to make policy with a profound impact on a substantial portion of the economy. Congress should consider that the flexibility that rulemaking permits also allows for changes in rules over time, which—regardless of the underlying policy—can be terrifically difficult for businesses attempting to adapt.

Today, the FTC cannot take action against telecommunications common carriers and non-profits. I support removing those jurisdictional limitations.

Question 7. During the hearing, I asked the Chairman whether the FTC would consider using its section 6(b) authority to study consumer information data flows, specifically sending requests to Google, Facebook, Amazon, and others in the tech industry to learn what information they collect from consumers and how that information is used, shared, and sold. I believe the FTC's section 6(b) authority could provide some much needed transparency to consumers about the data practices of large technology companies, and help identify areas that may require additional attention from lawmakers. What are your views with respect to the FTC potentially conducting a study pursuant to section 6(b) of the Federal Trade Commission Act on the data collection, use, filtering, sharing, and sale practices of large technology companies such as Google, Facebook, Amazon, and others?

Answer. The Commission's 6(b) authority enables it to conduct economic studies that do not have a specific law enforcement purpose, but rather are for the purpose of obtaining information about "the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals" of the entities to whom the inquiry is addressed. As with subpoenas and CIDs, the recipient of a *6(b) order* may file a petition to limit or quash, and the Commission may seek a court order requiring compliance.[20]

The FTC has used its 6(b) authority to study and answer discrete questions regarding industry practices, such as to gather information regarding the marketing practices of major alcoholic beverage advertisers to study whether voluntary industry guidelines for reducing advertising and marketing to underage audiences had been effective.[21] Another example is the Commission's July 2002 report, Generic Drug Entry Prior to Patent Expiration,[22] which was the product of a 6(b) study, and the results of which the Commission was able to publish publicly pursuant to 15 U.S.C. § 46(f).

For any 6(b) study of the wide-ranging tech sector to be effective, it should focus on areas where there is reason to suspect wrongdoing is occurring or where the Commission believes it lacks adequate understanding of the conduct, practice, or management in question. Casting too broad a net could easily incur costs in excess of the information's incremental benefit, as occurred with the Commission's Line of Business program, which was designed to compel annual reporting of financial and statistical data by hundreds of manufacturing firms but was discontinued after being plagued by recurring non-compliance and costly legal battles.[23] Congress (to the extent it seeks to direct such studies) and the Commission should develop clear

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[19] 15 U.S.C. § 57a.

[20] In addition, the Commission may commence suit in Federal court under Section 10 of the FTC Act, 15 U.S.C. § 50, against any party who fails to comply with a 6(b) order after receiving a notice of default from the Commission. After expiration of a thirty-day grace period, the defaulting party is liable for a penalty for each day of noncompliance.

[21] FTC Press Release, *FTC Orders Alcoholic Beverage Manufacturers to Provide Data for Agency's Fourth Major Study on Alcohol Advertising* (April 12, 2012), *https://www.ftc.gov/news-events/press-releases/2012/04/ftc-orders-alcoholic-beverage-manufacturers-provide-data-agencys*

[22] FTC, *Generic Drug Entry Prior to Patent Expiration: An FTC Study* (July 2002), *https://www.ftc.gov/sites/default/files/documents/reports/generic-drug-entry-prior-patent-expiration-ftc-study/genericdrugstudy_0.pdf.*

[23] B.J. Linder & Allan H. Savage, *The Line of Business Program: The FTC's New Tool,* 21 CAL. MGMT. REV. 57 (1979).

and concise goals for such studies, to ensure that we have a concrete goal to work towards and to avoid, as much as possible, lengthy and expensive disputes over the scope or burden of such orders.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JERRY MORAN TO HON. NOAH JOSHUA PHILLIPS

Question 1. Set to expire on September 30, 2020, the U.S. SAFE WEB Act allows for increased cooperation with foreign law enforcement authorities through confidential information sharing and the provision of investigative assistance. Specifically, the law authorizes the FTC to provide assistance to foreign law enforcement agencies to support their investigations and enforcement actions. Your testimony requested that Congress reauthorize this authority while eliminating the sunset provision. Would you please explain how U.S. SAFE WEB Act will impact U.S. consumers?

Answer. Our economy is increasingly globalized, digitized, and connected. These changes generate incredible opportunity, but also pose new problems for American consumers, such as traditional scams that now thrive online and new, Internet-enabled, frauds. They also raise law enforcement challenges, like the enhanced ability of scammers to act anonymously or move ill-gotten gains outside our jurisdiction; and roadblocks to international law enforcement cooperation.

Congress has been an essential ally in this fight. In 2006, it passed the U.S. SAFE WEB Act. SAFE WEB allows the FTC to share evidence with and provide investigative assistance to foreign authorities in cases involving issues including spam, spyware, privacy violations and data breach. It also confirms our authority to challenge foreign-based frauds that harm U.S. consumers or involve material conduct in the United States.

Using SAFE WEB, the FTC has worked with authorities abroad to stop illegal conduct and secure millions in judgements from fraudsters, sometimes even criminal convictions. The FTC uses SAFE WEB authority in important international privacy cases. We collaborated with Canadian and Australian privacy authorities on the massive data breach of the Toronto-based, adult dating website AshleyMadison.com,[24] and we worked again with Canadian authorities on the FTC's first children's privacy and security case involving connected toys, a settlement with electronic toy manufacturer VTech Electronics[25] under the Children's Online Privacy Protection Act.

In total, the FTC has responded to more than 130 SAFE WEB information-sharing requests from 30 foreign enforcement agencies. We have issued more than 115 civil investigative demands in more than 50 investigations on behalf of foreign agencies, civil and criminal. The FTC has collected millions of dollars in restitution for injured consumers, both foreign and domestic.

SAFE WEB helps protect Americans by policing and instilling confidence in the digital economy, but it sunsets in 2020. I believe that American consumers will be best served if Congress reauthorizes this authority and eliminates the sunset provision.

Question 2. Section 5(a) of the *FTC Act,* which prohibits "unfair or deceptive acts or practices in or affecting commerce" is the legal basis for a body of consumer protection law that covers data privacy and security practices. The FTC has brought hundreds of cases to date to protect the privacy and security of consumer information held by companies of all sizes under this authority. The FTC staff recently submitted comments to the National Telecommunications and Information Administration (NTIA) that clearly indicate the FTC staff's view that the FTC would be the appropriate agency to enforce a new comprehensive privacy legislative framework. Do you agree with the staff's view?

Answer. Absolutely. The FTC has developed a substantial body of expertise on privacy issues over decades by bringing hundreds of cases, hosting approximately 70 workshops, and conducting numerous policy initiatives. The FTC is committed to using all of its expertise, its existing tools under the FTC Act, and whatever addi-

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[24] FTC Press Release, *Operators of AshleyMadison.com Settle FTC, State Charges Resulting From 2015 Data Breach that Exposed 36 Million Users' Profile Information* (Dec. 14, 2016), *https://www.ftc.gov/news-events/press-releases/2016/12/operators-ashleymadisoncom-settle-ftc-state-charges-resulting.*

[25] FTC Press Release, *Electronic Toy Maker VTech Settles FTC Allegations That it Violated Children's Privacy Law and the FTC Act* (Jan. 8, 2018), *https://www.ftc.gov/news-events/press-releases/2018/01/electronic-toy-maker-vtech-settles-ftc-allegations-it-violated.*

tional authority Congress gives us, to protect consumer privacy while at the same time promoting innovation and competition in the marketplace.

Question 3. As Congress evaluates opportunities to create meaningful Federal legislation to appropriately ensure privacy of consumers' data, there have been suggestions to increase the FTC's authorities to enforce in this space. Will you commit to working with this Committee in measuring what resources, if any, will be needed to allow the agency to enforce any additional authorities that may or may not be provided in Federal legislation?

Answer. Yes. The FTC has developed substantial expertise in the area of data privacy and security and we are committed to working with Congress to help determine whether and what additional resources may be appropriate, commiserate with any new authorities.

Question 4. Sharing responsibilities with the DOJ's Antitrust Division, the FTC enforces antitrust law in a variety of sectors as described by your testimony. While the vast majority of premerger filings submitted to enforcement agencies do not raise competition concerns, the FTC challenged 45 mergers since the beginning of 2017, and of those, the FTC only voted to initiate litigation to block five transactions. Would you please describe the resource needs of the agency associated with hiring qualified outside experts to support its litigation efforts? Please explain how developments in the high-technology sector are accounted for in the FTC's decision-making process related to antitrust enforcement.

Answer. As a threshold matter, it is well-recognized that the vast majority of premerger filings do not raise competitive concerns, and so the percentage of reviewed versus challenged mergers is not the result of a resource problem. Nor does a low incidence of full-phase investigations or merger challenges, relative to the total number of filings, indicate lax merger enforcement or the deterioration of competition. The ultimate antitrust question is whether a merger is likely to harm competition and consumers, and the FTC challenges far fewer mergers than it reviews because most simply do not raise competitive issues. That said, I appreciate your attention to the agency's resource needs. As we mentioned in our November 27 testimony, the FTC works very hard to accomplish as much as possible with the resources we have. We are tasked with the important dual goals of protecting consumers and promoting competition, both which are of increasing importance in the changing economy. Resource constraints remain a significant challenge. Evolving technologies and intellectual property issues, among others, continue to increase the complexity of antitrust investigations and litigation. That complexity, coupled with the rising costs of critical expert witnesses and increases in caseload, sometimes leads to financial and personnel resource limitations. In the past, we have requested additional resources for experts, information technology, and more full-time employees in support of our mission to protect consumers and promote competition. We also have heard the need for additional paralegals to help support our staff attorneys; paralegals can provide very valuable services and allow attorneys to devote more time to substantive issues, but they are a rare commodity at the Commission today. These all continue to be critical areas of need for our agency. If we receive additional resources, we plan to apply them to these areas.

Qualified experts are a critical resource in all of the FTC's competition cases heading toward litigation. For example, expert witness services are critical to merger cases, as they help the FTC satisfy key burdens such as defining product and geographic markets and estimating the likely harms (and countering defendants' estimation of any alleged procompetitive benefits).

Expert witness costs are highly dependent on the number, scope, duration, and disposition of our Federal and administrative court challenges—increasing (often significantly) as these factors increase. To limit these costs, the FTC has continued to identify and implement a variety of strategies, including using internal personnel from its Bureau of Economics as expert witnesses whenever practical. The opportunities to use internal experts as testifying experts are limited, however, by several factors, including staff availability, testifying experience, and the specialized expertise required for specific matters.

As with other critical areas under our jurisdiction, the FTC closely follows activity and developments in the high-technology sector. Given the important role that technology companies play in the modern American economy, the Commission has prioritized understanding the competition and consumer protection issues that can arise in this space.

The fundamental principles of antitrust do not differ when applied to high-technology industries, including those in which patents or other intellectual property are highly significant. The issues, however, can be more complex and require different expertise, which may necessitate the hiring of outside experts or consultants to help

us develop and litigate our cases. The FTC strives to adapt to the dynamic markets we protect by leveraging the research, advocacy, and education tools at our disposal. For example, last fall, the Commission launched its *Hearings on Competition and Consumer Protection in the 21st Century* to understand better both the advancements in technology and the new business models they support, and how to target enforcement efforts in these evolving spaces.[26]

Question 5. Earlier this year, I introduced legislation called the *Senior Scams Prevention Act* with Senator Bob Casey to combat continued and increasingly complex attempts to defraud one of the Nation's most vulnerable populations, our senior community. This bill seeks to ensure retailers, financial institutions and wire transfer companies have the resources to train employees to help stop financial frauds and scams on seniors. Would you agree that awareness and education, guided by "best practices" established by industry and government partners, is a valuable tool in preventing consumer harms against our Nation's seniors?

Answer. I agree that awareness and education are essential to protect our Nation's seniors. Indeed, protecting older Americans has long been a top priority, and it is increasingly important as that population grows. To this end, we engage in research, education, and enforcement actions focused on educating and protecting older Americans, including our *Pass It On* campaign,[27] to help both protect seniors and prosecute wrongdoers.

More generally, our anti-fraud activities are at the core of our law enforcement efforts, protecting not just seniors but a broad range of vulnerable consumer populations, including minorities and veterans. That includes efforts to stop fraudulent business opportunity schemes, police unsubstantiated health claims, and shut down sham charities that prey on unsuspecting consumers and target their hard-earned savings.

The Commission must and will keep a focus on these efforts, which protect consumers from immediate and tangible harms. We are ready and willing to work with additional partners—from government, civil society, academia, and industry—to identify and prevent harms to older consumers, as well as other vulnerable consumers.

Question 6. In its comments submitted to NTIA on "Developing the Administration's Approach to Consumer Privacy," the FTC discussed the various cases that it has taken up to address privacy-related harms to consumers, and it specifically noted four categories of harms: financial injury, physical injury, reputational injury, and unwanted intrusion. Could you please briefly describe each category while noting any FTC enforcement considerations specific to that type of harm?

Answer. Certainly. Financial injury can manifest in a variety of ways: fraudulent charges, delayed benefits, expended time, opportunity costs, fraud, and identity theft, among other things.[28] Physical injuries include risks to individuals' health or safety, including the risks of stalking and harassment.[29] Reputational injury in-

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[26] FTC, *Hearings on Competition and Consumer Protection in the 21st Century, https://www.ftc.gov/policy/hearings-competition-consumer-protection.* Recent hearings included a two-day workshop on the potential for collusive, exclusionary, and predatory conduct in multisided, technology-based platform industries. FTC, *FTC Hearing on Competition and Consumer Protection in the 21st Century #3: Multi-Sided Platforms, Labor Markets, and Potential Competition* (Oct. 15–17, 2018), *https://www.ftc.gov/news-events/events-calendar/2018/10/ftc-hearing-3-competition-consumer-protection-21st-century.* Similarly, in early November, the Commission held a two-day workshop on the antitrust frameworks for evaluating acquisitions of nascent competitors in the technology and digital marketplace, and the antitrust analysis of mergers and conduct where data is a key asset or product. FTC, *FTC Hearing on Competition and Consumer Protection in the 21st Century #6: Privacy, Big Data, and Competition* (Nov. 6–8, 2018), *https://www.ftc.gov/news-events/events-calendar/ftc-hearing-6-competition-consumer-protection-21st-century.* Also in November, the Commission held a two-day workshop on the competition and consumer protection issues associated with algorithms, artificial intelligence, and predictive analysis in business decisions and conduct. FTC, *FTC Hearing on Competition and Consumer Protection in the 21st Century #7: The Competition and Consumer Protection Issues of Algorithms, Artificial Intelligence, and Predictive Analytics* (Nov. 13–14, 2018), *https://www.ftc.gov/news-events/events-calendar/ftc-hearing-7-competition-consumer-protection-21st-century.*

[27] FTC, *Consumer Information—Pass it on, https://www.consumer.ftc.gov/features/feature-0030-pass-it-on* (providing consumer information on identity theft, imposter scams, charity fraud, and other topics).

[28] *See, e.g.,* Complaint, *TaxSlayer, LLC,* No. C–4626 (F.T.C. Oct. 20, 2017), *https://www.ftc.gov/enforcement/cases-proceedings/162-3063/taxslayer* (alleging delayed benefits, expended time, and risk of identity theft).

[29] *See, e.g.,* Complaint, *FTC v. Accusearch, Inc.,* No. 06–CV–0105 (D. Wyo. April 27, 2006), *https://www.ftc.gov/enforcement/cases-proceedings/052-3126/accusearch-inc-dba-abikacom-jay-patel* (alleging that telephone records pretexting endangered consumers' health and safety).

volves disclosure of private facts about an individual, which damages the individual's reputation. Tort law recognizes reputational injury.[30] The FTC has brought cases involving this type of injury, for example, in a case involving public disclosure of individuals' Prozac use [31] and public disclosure of individuals' membership on an infidelity-promoting website.[32] Finally, unwanted intrusions involve two categories. The first includes activities that intrude on the sanctity of people's homes and their intimate lives. The FTC's cases involving a revenge porn website,[33] an adult-dating website,[34] and companies spying on people in their bedrooms through remotely-activated webcams fall into this category.[35] The second category involves unwanted commercial intrusions, such as telemarketing, spam, and harassing debt collection calls. In terms of enforcement considerations, as noted above, the FTC is very mindful of ensuring that it addresses these harms, while not impeding the benefits of data collection and use practices.

I note additionally that the definition of "substantial injury" under Section 5(n) has been interpreted by the Commission in the past to reach these types of harms. "Privacy" harms often involve largely non-economic harms, potentially including harms not presently cognizable under the FTC Act. In considering privacy legislation, I urge Congress to study and understand the harms it wishes to address and craft remedies appropriate to them.

Question 7. In the FTC's recent comments in NTIA's privacy proceeding, the FTC said that its "guiding principles" are based on "balancing risk of harm with the benefits of innovation and competition." Would you describe what this means, how you strike this balance, and how it is applied in practice under your Section 5 authority in the *FTC Act*?

Answer. In its comments to NTIA, the Commission wrote that it "supports a balanced approach to privacy that weighs the risks of data misuse with the benefits of data to innovation and competition", noting that striking that balance is "essential to protecting consumers and promoting competition and innovation." [36] Recognizing the kinds of harms we have pursued in privacy enforcement matters—financial, physical, and reputational injury, and unwanted intrusions—we also recognized the many benefits and innovations that the sharing of data have achieved for American consumers. The Commission went on to warn that "privacy standards that give short shrift to the benefits of data-driven practices may negatively affect innovation and competition" and that "regulation can unreasonably impede market entry or expansion by existing companies."

All of this means that, in thinking about regulation or law enforcement with respect to privacy, we must keep in mind that we are talking about one of the most dynamic aspects of the global economy, one where the U.S. is a leader in innovation and job growth. We should be clear about the harms we wish to stop, and weigh those against the benefits.

In unfairness cases, Section 5(n) of the FTC Act requires us to strike this balance. It does not allow the FTC to bring a case alleging unfairness "unless the act or practice causes or is likely to cause substantial injury to consumers, which is not reasonably avoidable by consumers themselves and not outweighed by benefits to consumers or to competition." Thus, for example, in our data security complaints and orders, we often plead the specific harms that consumers are likely to suffer from a company's data security failures. We do not assert that companies need to spend unlimited amounts of money to address these harms; in many of our cases, we specifically allege that the company could have fixed the security vulnerabilities at low or no cost.

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[30] Under the tort of public disclosure of private facts (or publicity given to private life), a plaintiff may recover where the defendant's conduct is highly offensive to a reasonable person. Restatement (Second) of Torts § 652D (1977).

[31] *Eli Lilly and Co.,* No. C–4047 (F.T.C. 2002), *https://www.ftc.gov/enforcement/cases-proceedings/012-3214/eli-lilly-company-matter.*

[32] *FTC v. Ruby Corp., et al.,* No. 1:16-cv-02438 (D.D.C. 2016), *https://www.ftc.gov/enforcement/cases-proceedings/152-3284/ashley-madison.*

[33] *FTC v. EMP Media, Inc., et al.,* No. 2:18-cv-00035 (D. Nev. 2018), *https://www.ftc.gov/enforcement/cases-proceedings/162-3052/emp-media-inc-myexcom.*

[34] *FTC v. Ruby Corp., et al.,* No. 1:16-cv-02438 (D.D.C. 2016), *https://www.ftc.gov/enforcement/cases-proceedings/152-3284/ashley-madison.*

[35] *See* FTC Press Release, *FTC Halts Computer Spying* (Sept. 25, 2012), *https://www.ftc.gov/news-events/press-releases/2012/09/ftc-halts-computer-spying; see also Aaron's, Inc.,* No. C–4442 (F.T.C. Mar. 10, 2014), *https://www.ftc.gov/enforcement/cases-proceedings/122-3256/aarons-inc-matter.*

[36] Federal Trade Commission Staff, Comment to the National Telecommunications and Information Administration on Developing the Administration's Approach to Consumer Privacy (Nov. 9, 2018), *https://www.ftc.gov/policy/advocacy/advocacy-filings/2018/11/ftc-staff-comment-ntia-developing-administrations-approach.*

As with any law enforcement agency, we should and do exercise our discretion when deciding whether to pursue matters and how to resolve them. In so doing, we should keep our guiding principles in mind and focus on deterring real and significant harms to consumers, providing the right incentives to the marketplace to take reasonable steps that will limit both consumer harm and liability, and avoiding the creation of a culture of uncertainty and fear that would impede consumer-friendly innovation.

Question 8. The FTC's comments pertaining to "control" in NTIA's privacy proceeding stated, "Choice also may be unnecessary when companies collect and disclose de-identified data, which can power data analytics and research, while minimizing privacy concerns." How would the FTC suggest Federal regulation account for de-identified data, if at all?

Answer. In our NTIA comment, we reference different types of privacy-related harms: financial, physical, reputational, and unwanted intrusion. All these types of harms are mitigated, or even eliminated, when data cannot be tracked to a consumer. As such, appropriately de-identified data does not raise the same risks and should be treated differently, especially considering the benefits of using such data for innovative, consumer-friendly purposes.

Question 9. Your testimony indicated that continued technological developments allow illegal robocallers to conceal their identities in "spoofing" caller IDs while exponentially increasing robocall volumes through automated dialing systems. These evolving technological changes mean that the critical law enforcement efforts of the FTC cannot be the only solution, and your testimony described the additional steps the FTC is taking to develop innovative solutions to these issues. Would you please describe the process and outcomes of the four public challenges that the FTC held from 2013 to 2015? Are there plans to incentivize innovators to combat robocalls in the future?

Answer. The FTC's process for its robocall challenges included public announcements, committees with independent judges, and, in some cases, cash prizes awarded under the America COMPETES Reauthorization Act.[37] To maximize publicity, the FTC announced each of its four challenges in connection with public events. The FTC announced the first robocall challenge at the FTC's 2012 Robocall Summit. In 2014, the FTC conducted its second challenge, "Zapping Rachel" at DEF CON 22. The FTC conducted its third challenge, "DetectaRobo," in June 2015 in conjunction with the National Day of Civic Hacking. The final phase of the FTC's fourth public robocall challenge took place at DEF CON 23. When the FTC held its first public challenge, there were few, if any, call blocking or call labeling solutions available for consumers. Today, two FTC challenge winners, NomoRobo and Robokillller, offer call blocking applications, and there are hundreds of mobile apps offering call blocking and call labeling solutions for cell phones. Many home telephone service providers also now offer call blocking and call labeling solutions. The FTC will not hesitate to initiate additional innovation contests if it identifies further challenges that could meaningfully benefit consumers by reducing the harm caused by illegal robocalls.

In addition to developing call blocking and call labeling technology, the telecom industry has also developed call verification technology, called STIR/SHAKEN, to help consumers know whether a call is using a spoofed Caller ID number and assist call analytics companies in implementing call blocking and call labeling products. If widely implemented and made available to consumers, the STIR/SHAKEN protocol should minimize unwanted calls. Certain industry members have begun to roll out this technology and it is in beta testing mode. We will keep a close eye on this industry initiative and continue to encourage its implementation.

Question 10. Would you please describe the FTC's coordination efforts with state, federal, and international partners to combat illegal robocalls?

Answer. Robocalls are a pernicious problem, a fact of which the average American consumer is reminded several times a day.

The FTC frequently coordinates its efforts with its state, federal, and international partners. The FTC often brings robocall enforcement actions with states as co-plaintiffs. For example, in the FTC's case against Dish Network, litigated for the FTC by the Department of Justice, the FTC brought the case jointly with California,

[37] *See* FTC, *Consumer Information—Robocalls, https://www.consumer.ftc.gov/features/feature-0025-robocalls.*

Illinois, North Carolina, and Ohio. Collectively, the states and the FTC obtained a historic $280 million trial verdict.[38]

The FTC also coordinates outreach and education with the FCC. In 2018, the agencies co-hosted two robocall events—a policy forum that discussed technological and law enforcement solutions to the robocall problem[39] and a public expo that allowed companies offering call blocking and call labeling services to showcase their products for the public.[40] Additionally, the FTC and FCC hold quarterly calls, speak regularly on an informal basis, and coordinate on a monthly basis with our state partners through the National Association of Attorneys General. The FTC also engages with international partners through participation in international law enforcement groups such as the International Consumer Protection Enforcement Network, International Mass Marketing Fraud Working Group, and the Unsolicited Communications Network (formerly known as the London Action Plan).

Question 11. Your testimony described the limitations of the FTC's current data security enforcement authority provided by Section 5 of the *FTC Act* including: lacking civil penalty authority, lacking authority over non-profits and common carrier activity, and missing broad APA rulemaking authority. Please describe each of these limitations and how adjusted FTC authority to address these items would improve the protection of consumers from data security risks.

Answer. Congress should consider all these tools in fashioning data security legislation. For good reason, the FTC Act does not give the Commission penalty authority for first-time violators. If Congress were to give the FTC the authority to seek civil penalties for first-time violators of data security rules specifically (subject to statutory limitations on the imposition of such penalties, such as ability to pay), we would have greater ability to deter potentially harmful conduct. Due to asymmetric information, interdependent systems, and difficulties in tracing ID theft to a particular firm, there are reasons to believe that in many circumstances firms may lack sufficient incentives to adequately invest in data security under current law.[41] Correctly calibrated civil penalties would cause companies to internalize the full costs of inadequate data security, fostering proper incentives to protect consumer data.

As to APA rulemaking authority, were Congress to enact specific data security legislation, APA rulemaking authority would allow us more efficiently to adopt implementing rules. Such authority will ensure that the FTC can enact rules and amend them as necessary to keep up with technological developments. However, as I have stated in other contexts, the difficult judgments as to details and shape of data security legislation should be made in Congress, not at the agency level. This will provide for more certainty and consistency, and is the more appropriate democratic forum.

As to non-profits and common carriers, we are all well aware of the regular reports of breaches impacting these sectors. Indeed, the need for security in these sectors is not appreciably different from the need in many other sectors of the economy already under FTC jurisdiction. Giving us jurisdiction for data security in these sectors will create more consistency across the marketplace and allow for more certainty and clarity.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. RICHARD BLUMENTHAL TO HON. NOAH JOSHUA PHILLIPS

Privacy Rules

We know that Americans care about privacy—that they eagerly want these rights. We need baseline rules. Companies should not store sensitive information indefi-

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[38] FTC Press Release, *FTC and DOJ Case Results in Historic Decision Awarding $280 Million in Civil Penalties against Dish Network and Strong Injunctive Relief for Do Not Call Violations* (June 6, 2017), *https://www.ftc.gov/news-events/press-releases/2017/06/ftc-doj-case-results-historic-decision-awarding-280-million-civil.* The case is on appeal before the Seventh Circuit Court of Appeals.

[39] FTC Press Release, *FTC and FCC to Host Joint Policy Forum on Illegal Robocalls* (Mar. 22, 2018), *https://www.ftc.gov/news-events/press-releases/2018/03/ftc-fcc-host-joint-policy-forum-illegal-robocalls.*

[40] FTC Press Release, *FTC and FCC to Co-Host Expo on April 23 Featuring Technologies to Block Illegal Robocalls* (Apr. 19, 2018), *https://www.ftc.gov/news-events/press-releases/2018/04/ftc-fcc-co-host-expo-april-23-featuring-technologies-block-0.*

[41] *See, e.g.,* STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 244 (2004) (when victims cannot identify the injurer, injurers will lack adequate incentives to take care); George Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism,* 84 Q.J. ECON. 488 (1970); Howard Kunreuther & Geoffrey Heal, *Interdependent Security,* 26 J. RISK & UNCERTAINTY 231 (2003).

nitely and use that data for purposes that people never intended. Federal rules must set meaningful obligations on those that handle our data. We must enable consumers to trust and control their personal data.

Question 8. Do you support providing state AGs with the power to enforce Federal privacy protections and would you commit to working with state AGs?

Answer. Attorneys General can be important partners in protecting consumers, acting as force multipliers for Federal law enforcement. I think this is a valuable model that Congress should weigh. It should also consider whether to allow the FTC authority to assert exclusive jurisdiction when necessary, to ensure consistent and coherent application of Federal law.

Question 9. Why is it important that the FTC have rulemaking authority when it comes to privacy? Where best would rulemaking be applied?

Answer. Rulemaking authority raises important issues of delegation and democratic accountability. Congress, not an administrative agency, is the best place to make policy with a profound impact on a substantial portion of the economy. Congress should consider that the flexibility that rulemaking permits also allows for changes in rules over time, which—regardless of the underlying policy—can be terrifically difficult for businesses attempting to adapt.

Question 10. Do you believe elevating the Office of Technology Research and Investigation to the Bureau level would meaningfully help the FTC in addressing new technological developments across its mandates?

Answer. I do not believe that elevating the Office of Technology Research and Investigation to the Bureau level would meaningfully help the FTC.

Board Accountability

Question 12. What is the FTC doing to investigate and hold accountable individual board members and executives who knowingly assist their companies in committing fraud? What more should the FTC be doing in this regard?

Answer. The FTC always considers the potential liability of individual officers and others who knowingly assist fraud. Where we find the appropriate facts, we name such people as defendants.

FTC Investigation of Algorithms

Section 6(b) of the FTC Act gives the agency broad investigatory and information-gathering powers. For example, in the 1970s the FTC used its Section 6(b) authority to require companies to submit product-line specific information, enabling the agency to assess the state of competition across markets.

The FTC has released reports on big data and the harms biased algorithms can cause to disadvantaged communities. These reports drew attention to the potential loss of economic opportunity and diminished participation in our society. Yet, information on how these algorithms work, and on the inputs that go into them, remains opaque.

Question 19. Where the FTC consider using its Section 6(b) investigative power to help us understand how these algorithms and black-box A.I. systems work—the biases that shape them, and how those can affect trade, opportunity, and the market?

Answer. Advancements in algorithm design, A.I. systems, and data analytics have played and continue to play a crucial role in spurring innovation that can deliver significant benefits to our society and drive our Nation's economic growth. Given their significance, I agree that algorithms and artificial intelligence are important topics of study. In 2017, the FTC and Department of Justice submitted a joint paper on algorithms and collusion to the Organization for Economic Cooperation and Development as part of the OECD's broader look at the role of competition policy and the digital age.[1] More recently, we examined the competition and consumer protection implications of algorithms, artificial intelligence, and predictive analytics as part of the Commission's *Hearings on Competition and Consumer Protection in the 21st Century*.[2] The two-day hearing featured a distinguished group of technologists, scientists, public servants, academics, and industry leaders (as well as economists and lawyers), who gathered to educate us and the broader competition and con-

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[1] Note by the United States on Algorithms and Collusion, OECD Doc. DAF/COMP/WD(2017)41 (May 26, 2017), *https://www.ftc.gov/policy/reports/us-submissions-oecd-2010-present#oecd.*

[2] FTC, *Hearings on Competition and Consumer Protection in the 21st Century, https://www.ftc.gov/policy/hearings-competition-consumer-protection;* FTC, *FTC Hearing on Competition and Consumer Protection in the 21st Century #7: The Competition and Consumer Protection Issues of Algorithms, Artificial Intelligence, and Predictive Analytics* (Nov. 13–14, 2018), *https://www.ftc.gov/news-events/events-calendar/ftc-hearing-7-competition-consumer-protection-21st-century.*

sumer protection community about how these technologies work, how they are used in the marketplace, and their policy implications. The Commission also invited public commentary on this topic.

The Commission will keep you apprised of any initiatives that come out of our hearings project. I also appreciate your interest in the Commission conducting a study of algorithms and artificial intelligence under Section 6(b) of the FTC Act. It is my understanding that the agency intends to conduct 6(b) studies in the technology area, though the subjects of these studies are still being considered.

FTC Consent Decree on Unrepaired Recalls

Most consumers probably do not know that, while *new* car dealers are prohibited from selling vehicles with open recalls, *used* car dealers are not. A recent FTC consent decree, which I strenuously disagreed with and is currently being scrutinized in the courts, allows the sale of used cars with unrepaired recalls. According to the consent decree, car dealers can advertise that cars with unrepaired safety recalls like a defective Takata airbag are "safe" or have passed a "rigorous inspection"—as long as they have a disclosure that the vehicle *may* be subject to an unrepaired recall and directs consumers on how they can determine the vehicle has an open recall.

Question 20. In your opinion, is a car with an open, unrepaired recall, a "safe" car? Why would the FTC allow unsafe cars to be advertised as "safe" and "repaired for safety," with or without a vague, contradictory and confusing disclaimer?

Answer. We share your concerns regarding the safety issues raised by recalls in the used automobile marketplace. As you note, while Federal auto safety law requires that all new cars sold be free from recalls, it does not prohibit auto dealers from selling used cars with open recalls.

However, the FTC Act enables the Commission to stop auto dealers selling such cars from engaging in misleading advertising practices that mask the existence of open recalls. In an effort to stop such claims, in 2016 and 2017, the Commission brought actions against General Motors Company, CarMax, Inc., and four other large used car dealerships. In these actions, the Commission alleged that these companies' advertising claims violated the FTC Act by touting the rigorousness of their used car inspections while failing to clearly disclose the existence of unrepaired safety recalls in some cars.[3]

Our orders stop this deceptive conduct and provide important additional protections for consumers. First, they prohibit each company from making any safety-related claim about its vehicles unless the vehicles are recall-free, or, alternatively, the company discloses clearly and conspicuously[4] and in close proximity to the representation both that the vehicles may be subject to open recalls and how consumers can determine the recall status of a particular car. This means that, if any car on the companies' lots is subject to an open recall, every time the companies make these types of inspection claims, they must prominently disclose this important information on recalls. Further, the orders required each company to warn consumers who already purchased one of its used cars that the vehicle may have an open recall.

Without our actions, these car sellers could not only continue to sell used vehicles subject to open recalls (a practice currently permitted under Federal product safety law), but could also make misleading inspection claims masking this fact—without in any way disclosing the possibility of recalls. Under the Commission's orders, consumers will instead receive important information about open recalls whenever respondents make these kinds of claims.[5]

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[3] FTC Press Release, *GM, Jim Koons Management, and Lithia Motors Inc. Settle FTC Actions Charging That Their Used Car Inspection Program Ads Failed to Adequately Disclose Unrepaired Safety Recalls* (Jan. 28, 2016), *https://www.ftc.gov/news-events/press-releases/2016/01/gm-jim-koons-management-lithia-motors-inc-settle-ftc-actions; FTC Press Release, CarMax and Two Other Dealers Settle FTC Charges That They Touted Inspections While Failing to Disclose Some of the Cars Were Subject to Unrepaired Safety Recalls* (Dec. 16, 2016), *https://www.ftc.gov/news-events/press-releases/2016/12/carmax-two-other-dealers-settle-ftc-charges-they-touted.*

[4] Importantly, the orders define "clearly and conspicuously" in detail to mean, among other things, that disclosures must be "difficult to miss (*i.e.,* easily noticeable) and easily understandable by ordinary consumers," and to require that "[a] visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood." *E.g., General Motors LLC,* No. C–4596, 2016 WL 7383980, at *4, (F.T.C. 2016).

[5] Beyond this sweep of cases, in October 2018, the FTC secured orders in the *Passport Toyota* matter against a group of dealerships, and their principals, for mailing more than 21,000 fake "urgent" recall notices to consumers. We alleged that the vast majority of the vehicles covered by the notices did not have open recalls, but that the dealers instead used these fake recall no-

Question on Non-Compete Clauses

I am concerned about the growth of non-compete clauses, which block employees from switching jobs to another employer in the same sector for a certain period of time. These clauses weaken workers' bargaining power once they are in the job, because workers often cannot credibly threaten to leave if their employer forces refuses to give them a raise or imposes poor working conditions. According to the Economic Policy Institute, roughly 30 million workers—including one in six workers without a college degree—are now covered by non-compete clauses.

The consensus in favor of addressing non-compete clauses is growing. For example, just this past December, an interagency report indicated that non-compete clauses can be harmful in certain contexts, such as the healthcare industry. Yet, the FTC has not yet undertaken forceful action. In September, Commissioner Chopra suggested that the FTC use its rulemaking authority to "remove any ambiguity as to when non-compete agreements are permissible or not."

Question 23. Do you agree with the proposal that the FTC use its rulemaking authority to address non-compete clauses? I invite you to explain your reasoning regarding your stance.

Answer. Recent research shows that non-compete clauses may be far more prevalent in the modern economy than enforcers realized. The validity and enforceability of these clauses is not always clear—some states have strict limitations against enforcing such clauses and it is uncertain today whether employees covered by such clauses always understand their legal position.

I fear the increase in various labor restrictions may be combining to stifle worker mobility, and with it potentially wages and opportunities, as well. Non-compete clauses, no-poach agreements (which also appear to have proliferated in some spaces), and occupational licensing requirements (which have dramatically increased in scope in recent decades) all and together affect workers' ability to find and obtain desirable jobs. Many of the insights regarding the prevalence of non-competes clauses and no-poach agreements have come to light only recently, and the Commission has been closely following these developments and working to understand better the scope and effects of such clauses, to add to its long-established work on occupational licensing. It is not clear that non-compete clauses present antitrust issues, except in narrow circumstances; but as the agency tasked with protecting consumers and competition, the FTC is working to understand how such clauses may impact markets, alone or in combination with other restrictive clauses.

A rulemaking is probably premature at this stage, as these issues deserve careful study and a clear understanding of both how such terms may impact labor flow and how best to tailor any rules or enforcement efforts to achieve better outcomes. Several states have begun efforts to curb the use of non-competes, and senators have been working on bills that would help limit such practices nationwide. I look forward to working with members on this critical question.

Question on Local Merger Enforcement

Even though big national mergers typically garner the most media attention, smaller mergers can often raise monopoly concerns on the local level. This can be true in the healthcare industry, for example. In November, Commissioner Simons told me: "Some local mergers may be too small to require Hart-Scott-Rodino premerger notification, but may still have anticompetitive effects."

Question 24. Would you agree with me that Hart-Scott-Rodino premerger notifications help antitrust enforcers catch concerning mergers?

Answer. Yes, I agree that the premerger notification requirements of the Hart-Scott-Rodino Premerger Notification Act (HSR) help antitrust enforcers identify anticompetitive mergers before they are consummated, preventing consumer harm. Once a merger is consummated and the firms' operations are integrated, it can be very difficult, if not impossible, to "unscramble the eggs" and restore the acquired firm to its former status as an independent competitor.

It is important, however, to ensure that the HSR filing requirements are tailored properly. The FTC typically issues requests for additional documents and evidence for only a very small percentage of filings it receives—with wide, bipartisan agreement that most mergers do not pose competitive problems—and ultimately enters into consent decrees or seeks to block even fewer mergers. In other words, HSR filing requirements today cast a very large net to catch a very few—albeit very important—fish. Given the vast expansion of antitrust regimes around the globe in recent

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tices to increase business at the dealerships' service departments. Complaint, *FTC v. Passport Imports, Inc.,* No. 8:18-cv-03118 (D. Md. Oct. 10, 2018), *https://www.ftc.gov/enforcement/cases-proceedings/162-3193/passport-imports-inc-passport-toyota.*

years, the U.S. should endeavor to be a leader in setting meaningful and appropriate premerger filing requirements, and to avoid setting a standard that would allow other jurisdictions to say they are following the U.S. in using antitrust regimes as a method of increasing government revenues.

Question 25. What sort of anticompetitive effects might be raised by local mergers even when those mergers are too small to require Hart-Scott-Rodino premerger notification?

Answer. Anticompetitive mergers can harm consumers in several ways, including by increasing prices and reducing output, or by lowering quality or services, hampering innovation, or diminishing new entry or expansion.[6] These harmful effects can manifest in local as well as more geographically-expansive mergers. Although the harms local mergers present are, by definition, restricted to a smaller geographic area, their effects can still be pernicious.[7]

The FTC often examines local geographic markets in the course of its merger review, both when assessing the effects that mergers of national companies might have in local areas and when examining local mergers. For instance, the FTC typically considers local geographic markets in retail markets, such as supermarkets, pharmacies, retail gas or diesel fuel stations, or funeral homes, and in service markets, such as health care. In a recent Federal court action seeking to enjoin the proposed merger of two rival physician services providers, the FTC and State of North Dakota defined the relevant geographic market as the Bismarck-Mandan, North Dakota, Metropolitan Statistical Area—a four-county area that includes the cities of Bismarck and Mandan and smaller communities within the surrounding 40 to 50 mile radius.[8]

Question 26. What action would you recommend either the FTC or Congress take in order to assist Federal and state antitrust enforcers in catching local mergers that raise anticompetitive concerns?

Answer. While I have no opinion as to whether Congress should take action, identifying anticompetitive mergers remains one of the FTC's top competition priorities. Today, the FTC devotes the bulk of its merger review efforts to transactions that parties report pre-consummation. However, the FTC also closely monitors M&A activity more broadly, to identify unreported (often, but not always, consummated) mergers that could harm consumers. The FTC uses the trade press and other news articles, consumer and competitor complaints, hearings, economic studies, and other means to identify such potentially harmful activity (both merger and other conduct). The FTC also routinely works with state attorneys general in its enforcement efforts; state attorneys general routinely join the FTC as co-plaintiffs in Federal court litigations, such as in the North Dakota physician services merger litigation discussed above.

Question on Horizontal Shareholding

Recent research has raised questions about whether horizontal shareholding harms competition in our economy. I would like to understand your view on this ongoing research.

Question 27. Do you believe that horizontal shareholding raises anticompetitive concerns?

Answer. See below.

Question 28. Do you believe that our antitrust laws can be used to address the anticompetitive concerns raised by horizontal shareholding?

Answer. See below.

Question 29. What, if anything, are you doing to address any potential harms of horizontal shareholding?

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[6] U.S. Department of Justice & Federal Trade Commission, *Horizontal Merger Guidelines* § 1 (2010), *https://www.ftc.gov/public-statements/2010/08/horizontal-merger-guidelines-united-states-department-justice-federal* ("A merger enhances market power if it is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives.").

[7] *Id.* at § 4.2. In antitrust analysis, a relevant market identifies a set of products or services and a geographic area of competition in which to analyze the potential effects of a proposed transaction. The purpose of market definition is to identify options available to consumers. *See id.* at § 4 (describing market definition in antitrust analysis).

[8] *FTC v. Sanford Health,* No. 1:17-cv-0133 (D.N.D. 2017), *https://www.ftc.gov/enforcement/cases-proceedings/171-0019/sanford-health-ftc-state-north-dakota-v.* The U.S. District Court for the District of North Dakota granted the FTC and State of North Dakota's preliminary injunction motion on December 13, 2017. The parties have appealed and the case is now pending before the Eighth Circuit.

Answer. Today, there is insufficient evidence to conclude that horizontal shareholding presents real competitive concerns. There have been a few recent and notable papers attempting to analyze the competitive effects of such holdings, but they do not yet provide a basis for enforcers attempting to extrapolate whether a larger, more pernicious phenomenon is at play.[9]

The U.S. antitrust agencies define common ownership as "the simultaneous ownership of stock in competing companies by a single investor, where none of the stock holdings is large enough to give the owner control of any of these companies".[10] It is distinct from "cross ownership", wherein a company holds an interest in one of its competitors, and other joint venture or co-partner scenarios, which have long been a focus of U.S. antitrust law.

The general theory of harmful common shareholdings is that large institutional investors' common holdings may lead firms to compete less aggressively—by virtue of the companies' knowledge that more aggressive competition may not be in the interest of such shareholders, by active encouragement from such investors, or simply by the failure of large shareholders to spur competition—and thereby lead to higher prices or other harmful effects. Proponents of this theory point to several empirical papers that purport to identify such effects, and several have proposed wide-ranging remedies that they argue would solve this alleged problem. In response, critics have identified various methodological flaws in the original research, which they argue call into question the results of these papers. They further identify alleged shortcomings in the harmful common ownership theory, including the absence of a clear mechanism of harm, the failure to distinguish between the economic owners and the beneficial owners of the shares at issue, and the fact that the theory assumes managers behave in ways diametrically opposed to how theory and real world evidence from corporate law experience have demonstrated they typically behave.

The FTC has continued to stay abreast of the common ownership research. In November 2017, the Commission participated in an Organisation for Economic Co-operation and Development (OECD) conference devoted to this topic. The Commission also held a full-day workshop, supplemented by a public comment process, in December 2018 that was largely devoted to exploring the merits of the common ownership issue.[11] At the workshop, which was part of our *Hearings on Competition and Consumer Protection in the 21st Century,* respected academics and industry experts on both sides of this issue shared their expertise with both us and the public.

From what we have seen so far, I do not believe there is sufficient evidence to warrant policy changes in response to the alleged common shareholding problem. I have identified a series of questions for scholars to answer and that I believe would help shed more light on the issue and whether such changes may be warranted.[12]

The FTC has tools already at our disposal to monitor and discipline anticompetitive activity, which we will continue to deploy where the law and evidence provide a basis for doing so. In considering any policy changes—some proposals for which have been extreme—the Commission will also bear in mind that many Americans

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[9] *See* Note by the United States on Common Ownership by institutional investors and its impact on competition at ¶1, OECD Doc. DAF/COMP/WD(2017)86 (Nov. 28, 2017), *https://www.ftc.gov/policy/reports/us-submissions-oecd-2010-present#oecd* (explaining that "[g]iven the ongoing academic research and debate, and its early stage of development, the U.S. antitrust agencies are not prepared at this time to make any changes to their policies or practices with respect to common ownership by institutional investors."); *see also* Noah Joshua Phillips, Commissioner, Federal Trade Commission, Opening Remarks at FTC Hearing on Competition and Consumer Protection in the 21st Century #8: Corporate Governance, Institutional Investors, and Common Ownership (Dec. 6, 2018), *https://www.ftc.gov/public-statements/2018/12/opening-remarks-commissioner-noah-joshua-phillips-ftc-hearing-8;* Noah Joshua Phillips, Commissioner, Federal Trade Commission, Prepared Remarks at the Global Antitrust Economics Conference: *Taking Stock: Assessing Common Ownership,* (June 1, 2018), *https://www.ftc.gov/public-statements/2018/06/taking-stock-assessing-common-ownership.*

[10] Note by the United States on Common Ownership by institutional investors and its impact on competition at ¶1, OECD Doc. DAF/COMP/WD(2017)86 (Nov. 28, 2017), *https://www.ftc.gov/policy/reports/us-submissions-oecd-2010-present#oecd.*

[11] FTC, *FTC Hearing on Competition and Consumer Protection in the 21st Century #8: Corporate Governance, Institutional Investors, and Common Ownership* (Dec. 6, 2018), *https://www.ftc.gov/news-events/events-calendar/ftc-hearing-8-competition-consumer-protection-21st-century.*

[12] Noah Joshua Phillips, Commissioner, Federal Trade Commission, Opening Remarks at FTC Hearing on Competition and Consumer Protection in the 21st Century #8: Corporate Governance, Institutional Investors, and Common Ownership (Dec. 6, 2018), *https://www.ftc.gov/public-statements/2018/12/opening-remarks-commissioner-noah-joshua-phillips-ftc-hearing-8;* Noah Joshua Phillips, Commissioner, Federal Trade Commission, Prepared Remarks at the Global Antitrust Economics Conference: *Taking Stock: Assessing Common Ownership,* (June 1, 2018), *https://www.ftc.gov/public-statements/2018/06/taking-stock-assessing-common-ownership.*

benefit from the low-cost investment options large institutional investors make possible.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. CATHERINE CORTEZ MASTO TO HON. NOAH JOSHUA PHILLIPS

Pet Leasing

I appreciate the Commission's attention to my request with six of my colleagues for the FTC to investigate the practice of pet leasing that is leading some consumers into confusing or deceptive contractual obligations that cause them to have an issue with their beloved pet and negatively impact their financial status, such as credit scores, for far into the future. This is an issue that is a little under the radar but needs strong oversight and attention under your deceptive practices mandate if there are concerning financial practices being discovered.

Question. Can I get a further commitment from you all to keep my office informed of actions and determinations you all may make pertaining to this concerning issue and the Humane Society and Animal Legal Defense Fund's formal petition to the Commission?

Answer. The FTC is committed to protecting consumers from unfair or deceptive acts or practices, including any such practices carried out by merchants or third party leasing and financing companies. Since our response to your letter last November, FTC staff has met with the Humane Society and Animal Legal Defense Fund to discuss their joint formal petition to the Commission. The FTC will continue to keep your office informed of public actions the Commission takes concerning pet leasing or the Humane Society and Animal Legal Defense Fund's petition to the Commission.

Data Minimization vs Big Data

A topic that has come up a lot during our discussions on privacy is data minimization. This is a concept that I have been considering on as I work on developing a comprehensive data privacy bill. As you're aware, this is the idea that businesses should only collect, process, and store the minimum amount of data that is necessary to carry out the purposes for which is was collected. There are obvious advantages to this as it minimizes the risk of data breaches and other privacy harms. At the same time, big data analytics are going to be crucial for the future and play an important role in smart cities, artificial intelligence, and other important technologies that fuel economic growth. I think it is important to find a balance between minimization and ensuring that data, especially de-identified data, is available for these applications.

Question. Can you describe how you view this balance and how we in Congress can ensure that people's data is not abused but can still be put to use in positive ways?

Answer. This is one of the most important questions that we need to ask when evaluating any future privacy regime. Algorithims, Big Data and AI are areas of tremendous and important innovation that have the potential to provide significant benefits for our economy, for consumers, and for our national welfare.

Your question neatly captures the dilemma. Businesses can apply "big data" analysis tools to gain insights from large data sets that help the business to innovate, for example to improve an existing product. This analysis can provide new consumer benefits, such as the development of new features. On the other hand, consumers' data may be used for unexpected purposes in ways that are unwelcome.[13] Long-term retention of consumer information—such as sensitive financial information—also presents a data security issue.[14]

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[13] *See, e.g.,* FTC Press Release, *FTC Charges Deceptive Privacy Practices in Google's Rollout of Its Buzz Social Network* (Mar. 30, 2011), *https://www.ftc.gov/news-events/press-releases/2011/03/ftc-charges-deceptive-privacy-practices-googles-rollout-its-buzz)* (alleging that Google deceptively repurposed information it had obtained from users of its Gmail e-mail service to set up the Buzz social networking service, leading to public disclosure of users' e-mail contacts).

[14] *See, e.g., Ceridian Corp.*, No. C–4325 (F.T.C. 2011), *https://www.ftc.gov/enforcement/cases-proceedings/102-3160/ceridian-corporation-matter*) (resolving charges that the company created unnecessary risks by storing information such as individuals' e-mail address, telephone number, Social Security number, date of birth, and direct deposit account number indefinitely on its network without a business need).

The FTC has issued a report on the subject of the benefits and risks of big data that contains guidance for companies that use big data analytics.[15] Last fall, the Commission also hosted a workshop on the intersections between big data, privacy and competition.[16] We are happy to work with your staff to develop legislation on how to balance the benefits and risks of big data.

General Privacy Recommendations

Question 1. While privacy was a significant topic of the oversight hearing, as we look to develop a bill, can you specifically lay out some of the top priorities you individually would like to see included and what do you think gets overlooked in the conversations policymakers have with allowing for future innovations and yet raising the bar for protecting consumers?

Answer. As an initial matter, in considering whether to develop comprehensive privacy legislation, I urge Congress to first study, identify, and understand the harms it wishes to address. Only through that crucial inquiry can Congress the develop policy and craft remedies appropriate to the problem it is trying to solve. It is also essential that Congress carefully and fully weigh the costs and benefits of any legislation and, in particular, the costs of regulation to innovation and competition, and the potential entrenchment of incumbents that may result. Regulation, by its nature, involves tradeoffs; only if we do our best to understand the tradeoffs can we make coherent and thoughtful decisions in lawmaking.

In terms of my priorities for any legislation, my number one priority is data security legislation, to be enforced by the FTC—though not identical to privacy legislation, nothing will do more for privacy that improved data security. The Commission has been calling for data security legislation for years on a bipartisan basis, as it is necessary to provide both security to consumers and coherence to the market. I also support civil money penalty authority as part of data security legislation, to correct flaws in the market that result in an under-investment in security.[17] And, in addition, I believe that the FTC needs legislation that will address the Court's concerns in *LabMD* and permit the Commission to once again apply a "reasonableness" standard in data security orders, which provides the flexibility that the market requires.[18]

There are other immediate, consumer protection enforcement needs. I urge Congress to amend the FTC Act to undo the *ViroPharma* decision[19] and make it clear to courts and litigants alike that the Commission's authority is not limited to ongoing conduct, but rather that the Commission can pursue enforcement actions and, where appropriate, monetary relief, even for conduct that has ceased.

As for broader privacy legislation, in considering whether and what to do, Congress is not acting in a vacuum. The United States has already been working with our economic allies on privacy issues for decades—for instance, in the form of the OECD Privacy Framework and the APEC Privacy Framework[20]—and these can and should form the basis for the discussion. Moreover, while any legislation should maintain the FTC's role as that nation's primary privacy and data security enforcement agency, I would stress that it is Congress that should make the difficult and important decisions in the privacy and data security sphere—while the Commission can issue implementing regulations, any legislation will necessarily involve value judgements that should be left to Congress, not unelected Commission officials.

I also believe that, in considering legislation, Congress should focus on information asymmetry, helping ensure that the market, and consumers in particular, have more, and more accessible, information on which to make informed decisions. I also believe there is value in encouraging companies to engage in internal privacy assessments so that they better understand their own landscape and can make informed, risk-based decisions about how they gather, use, and share data.

In terms of FTC-specific authority, as I have said elsewhere, I support removing common carrier and non-profit exceptions to the FTC's authority, but I remain cau-

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[15] *See* FTC, *Big Data: A Tool for Inclusion or Exclusion? Understanding the Issues* (Jan. 2016), *https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf.*

[16] *See* FTC, *FTC Hearing on Competition and Consumer Protection in the 21st Century #6: Privacy, Big Data, and Competition*(Nov. 6–8, 2018), *https://www.ftc.gov/news-events/events-calendar/ftc-hearing-6-competition-consumer-protection-21st-century.*

[17] *See, e.g.,* STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 244 (2004) (where consumers cannot trace the full harm to the injurer, injurers will not internalize the full amount of harm).

[18] *LabMD v. FTC,* 894 F.3d 1221 (11th Cir. 2018).

[19] *FTC v. Shire ViroPharma, Inc.,* No. 18–1807, 2019 WL 908577 (3d Cir. 2019).

[20] OECD, *The OECD Privacy Framework* (2013), *http://www.oecd.org/sti/ieconomy/oecd_privacy_framework.pdf.*

tious on civil penalties outside of the data security context. Penalties are tools, and whether penalties are appropriate and effective will ultimately depend on the liability scheme that Congress sets up in any legislation, and specifically whether Congress applies a more rules-based approach or a looser standards-based approach, as well as whether the data demonstrate that penalties in fact effectively deter the relevant conduct, rather than chill beneficial conduct.

Question 2. Can you also outline the optimal role you see for our state Attorneys General in this privacy enforcement process?

Answer. Attorneys General can be important partners in protecting consumers, acting as force multipliers for Federal law enforcement. I think this is a valuable model that Congress should weigh. It should also consider whether to allow the FTC authority to assert exclusive jurisdiction when necessary, to ensure consistent and coherent application of Federal law.

Privacy Risky Communities/Groups

Question 1. Do you think that certain communities or groups are any more or less vulnerable to privacy risks and harms?

Answer. Yes. Congress previously has recognized that certain communities or groups may be more or less vulnerable to privacy risks and harms when promulgating the Children's Online Privacy Protection Act, and certain provisions of Gramm-Leach Bliley and the Health Insurance Portability and Accountability Act. The Commission also has worked to address issues particularly affecting certain communities or groups through a number of means, including law enforcement as well as a series of seminars and other events around the country and through consumer education.[21]

Question 2. Should privacy law and regulations account for such unique or disparate harms, and if so, how?

Answer. Yes. I believe the approach Congress took with COPPA, GLB and HIPAA is instructive here. Existing laws like the Fair Credit Reporting Act and the Equal Credit Opportunity Act also provide important protections against unlawful discrimination. The Commission is happy to work with you to think through these issues as you craft legislation.

Immediate Civil Penalties Authority

Noting from your FTC testimony, "*Section 5 (of the FTC Act), however, is not without limitations. For example, Section 5 does not provide for civil penalties, reducing the Commission's deterrent capability.*"

Question. While I appreciate the long term successes of the FTC in many respects to investigate data security matters, what are your thoughts to whether there is enough of a deterrent effect with Section 5 authority when you can't immediately enforce against those who misuse data with civil penalties right from the start, rather than as the result of often times flagrant offenses to their already establish consent decrees?

Answer. For good reason, the FTC Act does not give the Commission penalty authority for first-time violators. If Congress were to give us the authority to seek civil penalties for first-time violators of data security rules specifically (subject to statutory limitations on the imposition of such penalties, such as ability to pay), we would have greater ability to deter potentially harmful conduct. Due to asymmetric information, interdependent systems, and difficulties in tracing ID theft to a particular firm, there are reasons to believe that in many circumstances firms may lack sufficient incentives to adequately invest in data security under current law.[22] Correctly calibrated civil penalties would cause companies to internalize the full costs of inadequate data security, fostering proper incentives to protect consumer data.

However, for privacy more broadly, it must be remembered that penalties are a tool; and, in my view, the question of tools is a secondary one, that cannot and should not be considered in the abstract. That question necessarily requires preliminary determinations first as to what harms Congress wishes to address and second, what liability standards it adopts to address those harms. Civil penalties are better

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[21] *See, e.g.,* FTC, *Common Ground Conferences and Roundtables Calendar, https://www.consumer.gov/content/common-ground-conferences-and-roundtables-calendar;* FTC, *Consumer Information—Fraud Affects Every Community, https://www.consumer.ftc.gov/features/every-community.*

[22] *See, e.g.,* STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 244 (2004) (when victims cannot identify the injurer, injurers will lack adequate incentives to take care); George Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism,* 84 Q.J. ECON. 488 (1970); Howard Kunreuther & Geoffrey Heal, *Interdependent Security,* 26 J. RISK & UNCERTAINTY 231 (2003).

tailored to conduct that is clearly defined—for example, violations of specific rules set forth in FTC Consent Orders or regulations like COPPA. Otherwise, the prospect of paying them may chill innovation and other conduct that benefits consumers.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. AMY KLOBUCHAR TO HON. NOAH JOSHUA PHILLIPS

Question 1. The FTC is charged with enforcing the Children's Online Privacy Protection Act (COPPA) and has done so for the last two decades. Protecting the privacy of children has never been more important than it is now, but the online privacy of all Americas is also increasingly at risk.

- Both of you have recently commented that we should learn from the FTC's experience in enforcing COPPA when we consider our approach to protecting consumer privacy more broadly. What lessons should we take away from the Commission's experience enforcing COPPA when considering ways to protect online privacy and data security for all Americans?

Answer. I believe that our experience with COPPA—in particular, its enactment and its implementation—can help inform and guide efforts to protect online privacy and data for all Americans.

The American privacy framework is built upon identifying risks and then designing a solution that balances competing interests. This requires evaluating the sensitivity of the information involved and the potential harms that would result from its collection, use or disclosure, and then creating a solution that will limit these harms while still allowing appropriate use of even sensitive information. With COPPA, rather than trying to protect children's privacy and safety by enacting draconian legislation that could severely limit children's experience on the Internet, Congress instead created a comprehensive, yet flexible, framework to protect both children's privacy and children's ability to access interactive content on the Internet. And, importantly, Congress itself made the tough choices in balancing privacy and the tradeoffs inherent in privacy regulation, most notably, the age of children to be covered by COPPA.

We can also learn lessons from the implementation of COPPA. In including the modifier "taking into consideration available technology" in its definition of "verifiable parental consent", Congress gave the FTC the latitude, in drafting the first iteration of the COPPA Rule, to develop a consent mechanism based upon how the child's information would be used and with whom it would be shared. In crafting the Rule, FTC staff recognized that the cost of a technologically rigorous mechanism could sometimes outweigh its benefits, especially if there was less risk associated with the collection and use of the child's information. Importantly, they were able to engage in this cost-benefit analysis because Congress drafted the COPPA statute with this consideration in mind. Congress should study the history of COPPA enforcement and rulemaking in considering whether and how to proceed on broader privacy legislation.

COPPA is a deliberately paternalistic statute, because it deals with children; so it is not necessarily a model for broader privacy legislation. But, despite the fact that COPPA is twenty years old, its more flexible approach to protecting children's privacy which considers benefits and harms has been a critical component in its continuing success and effectiveness.

Question 2. The Federal Trade Commission's budget has remained flat for the past several years despite increasing demands on your agency's resources, including a significant rise in merger filings.

- If additional resources were made available to the Federal Trade Commission, how would you deploy those resources to advance the agency's consumer protection and competition missions?

Answer. I appreciate your attention to the agency's resource needs. As we mentioned in our November 27 testimony, the FTC works very hard to accomplish as much as possible with the resources we have. We are tasked with the important dual goals of protecting consumers and promoting competition, both which are of increasing importance in the changing economy. Resource constraints remain a significant challenge. Evolving technologies and intellectual property issues, among others, continue to increase the complexity of antitrust investigations and litigation. That complexity, coupled with the rising costs of critical expert witnesses and increases in caseload, sometimes leads to financial and personnel resource limitations. In the past, we have requested additional resources for experts, information technology, and more full-time employees in support of our mission to protect consumers and

promote competition. We also have heard the need for additional paralegals to help support our staff attorneys; paralegals can provide very valuable services and allow attorneys to devote more time to substantive issues, but they are a rare commodity at the Commission today. These all continue to be critical areas of need for our agency. If we receive additional resources, we plan to apply them to these areas.

On the competition side, qualified experts are a key resource in all of the FTC's cases—both merger and conduct—heading toward litigation. Expert witness services are critical to these cases, as they help the FTC satisfy key burdens such as defining product and geographic markets and estimating the likely harms (and countering defendants' estimation of any alleged procompetitive benefits). Expert witness may often prove crucial to litigated cases on the consumer protection side, as well.

Expert witness costs are highly dependent on the number, scope, duration, and disposition of our Federal and administrative court challenges—increasing (often significantly) as these factors increase. To limit these costs, the FTC has continued to identify and implement a variety of strategies, including using internal personnel from its Bureau of Economics as expert witnesses whenever practical. The opportunities to use internal experts as testifying experts are limited, however, by several factors, including staff availability, testifying experience, and the specialized expertise required for specific matters.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. TOM UDALL TO HON. NOAH JOSHUA PHILLIPS

Privacy

Question 1. Do you support strong civil penalties for consumer privacy violations?

Answer. Penalties are a tool and, in my view, the question of tools is a secondary one, which cannot and should not be considered in the abstract. That question necessarily requires preliminary determinations first as to what harms Congress wishes to address and second, what liability standards it adopts to address those harms. Civil penalties are better tailored to conduct that is clearly-defined—for example, violations of specific rules set forth in FTC Consent Orders or regulations like COPPA. Otherwise, the prospect of paying them may chill innovation and other conduct that benefits consumers.

Question 2. The California Consumer Protection Act goes into effect in January 2020. As Congress considers pre-emption of that state law, what additional authority should we give the FTC to ensure that consumer privacy adequately is protected?

Answer. I support Congress including preemption of the California Consumer Protection Act, should it take up Federal privacy legislation. Clarity and consistency in the regulation of technology, rather than a patchwork of laws, is critical, especially to protecting the ability of small firms to compete.

In terms of additional authority, the first question we must ask is about the harms—what privacy harms are we focused on and trying to solve. Only when we understand that can we make the policy decision over which tools—new authorities—are necessary and appropriate. That said, the one authority that we unquestionably should have in any new privacy law is the authority to enforce that law against common carriers and non-profits. The current state of the law creates unprincipled inconsistencies, and we should rectify those to allow for more clarity and consistency across markets.

Question 3. A recent *New York Times* analysis found that both the Apple App Store and the Google Play Store have apps in their respective children's or family sections that potentially violate COPPA.[23] What specific role should platform owners play to ensure COPPA compliance on their platforms?

Answer. In 2012, the Commission revised the COPPA Rule to cover not just websites, app developers, and other online services but also third parties collecting personal information from users of those sites or services. At that time, the Commission made clear that it did not intend to make platforms responsible merely for offering consumers access to someone else's child-directed content. Rather, they would be liable under COPPA only if they had actual knowledge that they were collecting personal information from a child-directed app. At the same time, platforms are in a unique position to set and enforce rules for apps that seek placement in the platform's store and to drive good practices. We encourage platforms to pursue best

[23] Jennifer Valentino-DeVries, Natasha Singer,Aaron Krolik, Michael H. Keller, *How Game Apps That Captivate Kids Have Been Collecting Their Data,* NEW YORK TIMES (Sept. 12, 2018), *https://www.nytimes.com/interactive/2018/09/12/technology/kids-apps-data-privacy-google-twitter.html.*

practices in this regard, beyond those required by COPPA. For example, platforms can serve an important educational function for apps that may not understand the requirements of COPPA.

Question 4. Compliance for mobile apps may be hard to achieve against fly-by-night operators overseas who do not care if their apps violate U.S. law. How can the Vtech Electronics investigation and civil penalty serve as an example for how the FTC can hold foreign app developers responsible for violating COPPA?

Answer. When Congress takes action and enacts a privacy statute, it is the FTC's job to faithfully execute congressional will and enforce that law. This is important in all contexts, but I would argue it is especially important when protecting the privacy of children. As a Federal Trade Commissioner, I consider it crucial that we continue to investigate businesses' practices as they relate to children's privacy, and that we enforce this law as Congress intended. At the new FTC, COPPA enforcement ought to be a signature feature of our American privacy regime.

In addition to the VTech case you mention, the Commission has taken action in a number of privacy- or security-related cases against companies that have a foreign presence (see, *e.g.,* TrendNet, inMobi, ASUS, and HTC).[24] In some of these cases, for example, a foreign entity manufactured the devices at issue. In each of these cases, the FTC obtained successful relief for consumers in the United States, including a substantial civil penalty in the VTech and inMobi settlements. More recently, the FTC took action against Blu, a U.S.-based phone manufacturer that was allowing its Chinese service provider to access text messages and other private information, contrary to its representations to consumers.[25] The Commission has also used other means to address illegal conduct affecting U.S. consumers. For example, a few years ago Commission staff sent a warning letter to a Chinese company, Baby Bus, about COPPA violations relating to the collection of children's personal information through its apps. The Commission copied the app platforms on this communication. The company quickly responded and addressed the concerns.

Question 5. The COPPA safe harbor organizations must submit an annual report to the Federal Trade Commission. Can you share the reports from the last 5 years?

Answer. Industry self-regulatory organizations and the COPPA safe harbor programs are critical partners in the FTC's privacy enforcement efforts. The FTC-approved safe harbor organizations submit annual reports to the FTC each year. However, organizations claim confidentiality with respect to the information in their annual reports.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN THUNE TO HON. REBECCA KELLY SLAUGHTER

Question 1. Vertical mergers such as the merger between AT&T and Time Warner have garnered some attention lately. The FTC and DOJ have not updated vertical merger guidance since 1984. Do you believe that the FTC and DOJ should issue new guidance on vertical mergers?

Answer. Given the enormous impact that vertical mergers could have on the economy, markets, and consumers, I think the Commission should closely scrutinize them, particularly when they involve oligopoly markets and markets with high barriers to entry.[1] There is broad agreement that the 1984 non-horizontal guidelines do not reflect the Commission's current enforcement practice. Indeed, Commission investigations and cases have identified a range of competition concerns arising from vertical mergers, including limiting access to or raising the costs of key inputs, restricting access to an important customer, inhibiting entry by new competitors, evading regulations, facilitating coordination, and anticompetitive information sharing. I recently urged the Commission to routinely conduct retrospective examinations of vertical merger enforcement decisions. This would allow the Commission to see if its predictions about a merger were correct and facilitate the Commission's

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[24] *TRENDnet, Inc.,* No. C–4426 (F.T.C. 2014), *https://www.ftc.gov/enforcement/cases-proceedings/122-3090/trendnet-inc-matter; United States v. InMobi Pte Ltd.,* No. 3:16-cv-3474 (N.D. Cal. 2016), *https://www.ftc.gov/enforcement/cases-proceedings/152-3203/inmobi-pte-ltd; ASUSTeK Computer Inc.,* No. C–4587 (F.T.C. 2016), *https://www.ftc.gov/enforcement/cases-proceedings/142-3156/asustek-computer-inc-matter; HTC America Inc.,* No. C–4406 (F.T.C. 2013), *https://www.ftc.gov/enforcement/cases-proceedings/122-3049/htc-america-inc-matter.*

[25] *BLU Prods.,* No. C–4657 (F.T.C. 2018), *https://www.ftc.gov/enforcement/cases-proceedings/172-3025/blu-products-samuel-ohev-zion-matter.*

[1] For my detailed views on vertical mergers, please see my statement dissenting from *In the Matter of Sycamore Partners, Staples, and Essendant,* No. 181–0180 (Jan. 28, 2019), *https://www.ftc.gov/system/files/documents/public_statements/1448321/181_0180_staples_essendant_slaughter_statement.pdf.*

ability to take any necessary enforcement action. The Commission is considering whether the agencies should issue guidance on vertical merger enforcement and such retrospectives would be critical to informing such an endeavor.

Question 2. Government lawsuits to stop mergers are litigated using different procedures depending on which agency, the FTC or DOJ, handles the case. Do you think Congress should take action to ensure that agencies follow the same procedures or do you support another approach?

Answer. I do not think Congress should take action to change the procedures used by the Federal Trade Commission to carry out its merger enforcement mission. Congress intentionally created the Commission as an antitrust enforcement entity distinct from the DOJ. Accordingly, the FTC Act provides the Commission with additional tools to study markets and enforce the laws that are critical to our mission. Specifically, the administrative litigation process has been enormously useful in developing certain aspects of the law regarding mergers, such as mergers between hospitals. I do not share the concern some have articulated that the different statutory procedures between the agencies produce different outcomes; to the contrary, I think it is widely recognized that, in order to block a transaction, the DOJ and Commission both must show that a transaction would likely be anticompetitive.

Question 3. Should Congress amend Section 5(n) of the FTC Act, which addresses unfair practices, to clarify what constitutes "substantial injury?" If so, how?

Answer. The Commission has alleged and Courts have found that "substantial injury" can take the form of financial, physical, or reputational injuries. In addition, the Commission has alleged and Courts have found that "substantial injury" can take the form of an unwanted intrusion into the sanctity of people's homes and their intimate lives. As a general matter, there is no need to clarify what constitutes "substantial injury" under Section 5(n) of the FTC Act.

In many areas, however, the FTC also has specific rules that allow it to target specific law violations and seek monetary penalties without having to demonstrate or quantify "substantial injury." For example, while abusive telephone calls are an unfair practice that cause substantial injury in the form of an unwanted intrusion into consumers' homes that wastes their time, the Telemarketing Sales Rule sets out with specificity which practices are abusive and imposes a penalty for violations. This gives clarity to business and reduces the Commission's enforcement burden of having to prove that the calls amounted to "substantial injury" in each case. I believe the Commission would benefit from the authority to issue similar rules in the areas of privacy and data security, both to give clarity to business and to reduce the Commission's enforcement burden of having to prove that each data breach causes "substantial injury" to consumers.

Question 4. Should the FTC issue more guidance to marketers on the level of support needed to substantiate their claims? If so, when do you anticipate that such guidance could be issued?

Answer. The FTC has issued extensive guidance over the years to help marketers in determining the level of support needed to substantiate claims. The Commission first articulated the relevant factors used to determine the level of evidence required to substantiate objective performance claims in *Pfizer, Inc.,* 81 F.T.C. 23 (1972). Those factors included the type of claim, type of product, the consequences of a false claim, the benefits of a truthful claim, the cost of developing substantiation for the claim, and the amount of substantiation experts in the field believe is reasonable. The Commission and the courts have reaffirmed this standard many times since 1972.[2] In addition, the FTC also has provided extensive guidance through Guides and staff guidance documents.[3] Finally, FTC staff provide additional guidance through speeches and presentations to industry trade groups and industry attorneys.

Question 5. In June, the 11th Circuit vacated the Commission's data security order against Lab-MD. What effect, if any, will this have on the Commission's data security orders going forward?

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[2] *See, e.g., Thompson Med. Co.,* 104 F.T.C. 648, 813 (1984), *aff'd,* 791 F.2d 189 (D.C. Cir. 1986); *Daniel Chapter One,* 2009 WL 5160000 at *25–26 (F.T.C. 2009), *aff'd,* 405 Fed. App'x 505 (D.C. Cir. 2010) (unpublished opinion), available at 2011–1 Trade Cas. (CCH) ¶77,443 (D.C. Cir. 2010); *POM Wonderful, LLC,* 155 F.T.C. 1, 55–60 (2013), *aff'd,* 777 F.3d 478 (D.C. Cir. 2015), *cert. denied,* 136 S. Ct. 1839, 194 L. Ed. 2d 839 (2016); *FTC Policy Statement Regarding Substantiation,* 104 F.T.C. 839, 840 (1984) (appended to *Thompson Med. Co.,* 104 F.T.C. 648 (1984)).

[3] *See Guides for the Use of Environmental Marketing Claims,* 16 C.F.R. § 260.2 (2019), *https://www.ecfr.gov/cgi-bin/text-idx?SID=bd96b2cdcd01f7620d43e50a9d1d8cec&mc=true&node=se16.1.260_12&rgn=div8; Dietary Supplements: An Advertising Guide for Industry, https://www.ftc.gov/tips-advice/business-center/guidance/dietary-supplements-advertising-guide-industry.*

Answer. The Eleventh Circuit determined that the mandated data security provision of the Commission's LabMD Order was insufficiently specific. The opinion did not have any effect on the FTC's use of Section 5 to protect consumers from deceptive or unfair data security practices. The Commission is engaged in an ongoing process to craft appropriate order language in data security cases, based on the Eleventh Circuit opinion, feedback we received from our December hearing on data security, and our own internal discussion of how our orders can create better deterrence of future misconduct, using our existing tools.

One of the reasons I support comprehensive data security and privacy legislation is that such legislation could limit the impact of competing court opinions by directly empowering the FTC to require reasonable data security and privacy practices.

Question 6. If Federal privacy legislation is passed, what enforcement tools would you like to be included for Federal Trade Commission?

Answer. I support strong comprehensive privacy legislation that would (1) empower the FTC to seek significant monetary penalties for privacy violations in the first instance; (2) give the FTC APA rulemaking authority, to allow us to craft flexible rules that reflect stakeholder input and can be periodically updated to keep up with technological developments; and (3) repeal the common carrier and nonprofit exemptions under the FTC Act to ensure that more of the entities entrusted with consumer data are held to a consistent standard. Moreover, I support an increase in resources and personnel to enable the FTC to use these enforcement tools effectively.

Question 7. During the hearing, I asked the Chairman whether the FTC would consider using its section 6(b) authority to study consumer information data flows, specifically sending requests to Google, Facebook, Amazon, and others in the tech industry to learn what information they collect from consumers and how that information is used, shared, and sold. I believe the FTC's section 6(b) authority could provide some much needed transparency to consumers about the data practices of large technology companies, and help identify areas that may require additional attention from lawmakers. What are your views with respect to the FTC potentially conducting a study pursuant to section 6(b) of the Federal Trade Commission Act on the data collection, use, filtering, sharing, and sale practices of large technology companies such as Google, Facebook, Amazon, and others?

Answer. The Commission's 6(b) investigative authority is a critical tool that the Commission can use to increase its understanding of industries and markets in order to inform both our competition and consumer protection policy and enforcement agendas. There are many issues in the technology arena that could be the subject of a 6(b) study, and I would support such an effort.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JERRY MORAN TO HON. REBECCA KELLY SLAUGHTER

Question 1. Section 5(a) of the *FTC Act,* which prohibits "unfair or deceptive acts or practices in or affecting commerce" is the legal basis for a body of consumer protection law that covers data privacy and security practices. The FTC has brought hundreds of cases to date to protect the privacy and security of consumer information held by companies of all sizes under this authority. The FTC staff recently submitted comments to the National Telecommunications and Information Administration (NTIA) that clearly indicate the FTC staff's view that the FTC would be the appropriate agency to enforce a new comprehensive privacy legislative framework. Do you agree with the staff's view?

Answer. Yes. The FTC has the experience and expertise to enforce new comprehensive privacy legislation—and the demonstrated dedication to consumers to do so effectively. The FTC's dual missions demand that we think critically about the impact of regulations and enforcement on both consumers and the competitive marketplace, which will be valuable in executing whatever framework Congress passes.

Question 2. As Congress evaluates opportunities to create meaningful Federal legislation to appropriately ensure privacy of consumers' data, there have been suggestions to increase the FTC's authorities to enforce in this space. Will you commit to working with this Committee in measuring what resources, if any, will be needed to allow the agency to enforce any additional authorities that may or may not be provided in Federal legislation?

Answer. Yes.

Question 3. Sharing responsibilities with the DOJ's Antitrust Division, the FTC enforces antitrust law in a variety of sectors as described by your testimony. While

the vast majority of premerger filings submitted to enforcement agencies do not raise competition concerns, the FTC challenged 45 mergers since the beginning of 2017, and of those, the FTC only voted to initiate litigation to block five transactions. Would you please describe the resource needs of the agency associated with hiring qualified outside experts to support its litigation efforts? Please explain how developments in the high-technology sector are accounted for in the FTC's decision-making process related to antitrust enforcement.

Answer. The Commission is always looking for ways to use existing resources more efficiently, but additional resources would be put to good use and help us to do more to further our competition and consumer protection missions. With respect to our merger enforcement efforts, economic and other experts are necessary to support investigations and bring litigation. As larger and larger mergers come before the Commission and complexity of investigations increase, the cost of outside experts becomes a greater resource burden. Resource constraints can require the agency to make difficult tradeoffs between litigating a case to achieve the optimal result and settling for a good but imperfect resolution.

Competition in the technology industry must be closely monitored and the Commission is well equipped to examine fast-moving high-technology markets. However, I think that creating a Bureau of Technology would be useful for centralizing technological expertise and more regularly deploying technologists to assist in both competition and consumer protection investigations. As you know, there continues to be some overlap between competition and consumer protection issues and the Commission should always be mindful of the fact that what we do in the competition arena could impact our consumer protection mission and vice versa.

Question 4. Earlier this year, I introduced legislation called the *Senior Scams Prevention Act* with Senator Bob Casey to combat continued and increasingly complex attempts to defraud one of the Nation's most vulnerable populations, our senior community. This bill seeks to ensure retailers, financial institutions and wire transfer companies have the resources to train employees to help stop financial frauds and scams on seniors. Would you agree that awareness and education, guided by "best practices" established by industry and government partners, is a valuable tool in preventing consumer harms against our Nation's seniors?

Answer. Yes, coupled with effective law enforcement, efforts to empower our senior consumers to recognize and avoid scams are invaluable. The FTC works closely with multiple federal, state, and private partners to increase awareness about frauds that target our seniors, and we have developed our own *Pass It On* campaign to share preventative information about frauds and scams with older adults.

Question 5. In its comments submitted to NTIA on "Developing the Administration's Approach to Consumer Privacy," the FTC discussed the various cases that it has taken up to address privacy-related harms to consumers, and it specifically noted four categories of harms: financial injury, physical injury, reputational injury, and unwanted intrusion. Could you please briefly describe each category while noting any FTC enforcement considerations specific to that type of harm?

Answer. Financial injury describes harm that can be quantified, such as lost money, time, or opportunity. When we talk about physical injury, that covers harms arising from increased risks to an individuals' health or safety, including their mental and emotional health. Reputational injury involves disclosure of private facts about an individual, which damages the individual's reputation. Finally, unwanted intrusion into the sanctity of people's homes, communications and intimate lives also constitute serious harms. Outside of lost dollars, quantifying appropriate relief to address these serious harms can present enforcement challenges that would be eased by consumer privacy legislation that imposed money penalties for privacy violations.

Question 6. In the FTC's recent comments in NTIA's privacy proceeding, the FTC said that its "guiding principles" are based on "balancing risk of harm with the benefits of innovation and competition." Would you describe what this means, how you strike this balance, and how it is applied in practice under your Section 5 authority in the *FTC Act*?

Answer. When the Commission brings an action sounding in its unfairness authority under Section 5 of the FTC Act, we can only challenge an act or practice that "causes or is likely to cause substantial injury to consumers, which is not reasonably avoidable by consumers themselves and not outweighed by benefits to consumers or to competition." The FTC does not, however, need to engage in this specific inquiry when it proceeds under its deception authority pursuant to Section 5 of the FTC Act. For example, when a company makes promises to consumers about how it will collect, store or use consumer data and breaks those promises, the FTC need not engage in any balancing inquiry to bring an enforcement action.

Question 7. The FTC's comments pertaining to "control" in NTIA's privacy proceeding stated, "Choice also may be unnecessary when companies collect and disclose de-identified data, which can power data analytics and research, while minimizing privacy concerns." How would the FTC suggest Federal regulation account for de-identified data, if at all?

Answer. To the extent that Federal regulation would be more permissive in its treatment of de-identified data, I would urge careful consideration to ensure that data cannot be re-linked to individuals. For example, I would point to the formulation used in the EU General Data Protection Regulation ("GDPR"), which makes clear that "anonymization" of personal data refers to de-identified data for which direct and indirect personal identifiers have been removed and steps have been taken to ensure that the data can never be re-identified.

Question 8. Your testimony indicated that continued technological developments allow illegal robocallers to conceal their identities in "spoofing" caller IDs while exponentially increasing robocall volumes through automated dialing systems. These evolving technological changes mean that the critical law enforcement efforts of the FTC cannot be the only solution, and your testimony described the additional steps the FTC is taking to develop innovative solutions to these issues. Would you please describe the process and outcomes of the four public challenges that the FTC held from 2013 to 2015? Are there plans to incentivize innovators to combat robocalls in the future?

Answer. The FTC's process for its robocall challenges included public announcements, committees with independent judges, and, in some cases, cash prizes awarded under the America COMPETES Reauthorization Act.[4] To maximize publicity, the FTC announced each of its four challenges in connection with public events. The FTC announced the first robocall challenge at the FTC's 2012 Robocall Summit. In 2014, the FTC conducted its second challenge, "Zapping Rachel" at DEF CON 22. The FTC conducted its third challenge, "DetectaRobo," in June 2015 in conjunction with the National Day of Civic Hacking. The final phase of the FTC's fourth public robocall challenge took place at DEF CON 23. When the FTC held its first public challenge, there were few, if any, call blocking or call labeling solutions available for consumers. Today, two FTC challenge winners, NomoRobo and Robokillller, offer call blocking applications, and there are hundreds of mobile apps offering call blocking and call labeling solutions for cell phones. Many home telephone service providers also now offer call blocking and call labeling solutions. The FTC will not hesitate to initiate additional innovation contests if it identifies further challenges that could meaningfully benefit consumers by reducing the harm caused by illegal robocalls.

In addition to developing call blocking and call labeling technology, the telecom industry has also developed call verification technology, called STIR/SHAKEN, to help consumers know whether a call is using a spoofed Caller ID number and assist call analytics companies in implementing call blocking and call labeling products. If widely implemented and made available to consumers, the STIR/SHAKEN protocol should minimize unwanted calls. Certain industry members have begun to roll out this technology and it is in beta testing mode. We will keep a close eye on this industry initiative and continue to encourage its implementation.

Question 9. Would you please describe the FTC's coordination efforts with state, federal, and international partners to combat illegal robocalls?

Answer. The FTC frequently coordinates its efforts with its state, federal, and international partners. The FTC often brings robocall enforcement actions with states as co-plaintiffs. For example, in the FTC's case against Dish Network, litigated for the FTC by the Department of Justice, the FTC brought the case jointly with California, Illinois, North Carolina, and Ohio. Collectively, the states and the FTC obtained a historic $280 million trial verdict.[5]

The FTC also coordinates outreach and education with the FCC. In 2018, the agencies co-hosted two robocall events—a policy forum that discussed technological

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[4] *See* FTC, "Details About the FTC's Robocall Initiatives," *https://www.consumer.ftc.gov/features/feature-0025-robocalls.*

[5] Press Release, FTC and DOJ Case Results in Historic Decision Awarding $280 Million in Civil Penalties Against Dish Network and Strong Injunctive Relief for Do Not Call Violations (June 6, 2017), *https://www.ftc.gov/news-events/press-releases/2017/06/ftc-doj-case-results-historic-decision-awarding-280-million-civil.* The case is on appeal before the Seventh Circuit Court of Appeals.

and law enforcement solutions to the robocall problem[6] and a public expo that allowed companies offering call blocking and call labeling services to showcase their products for the public.[7] Additionally, the FTC and FCC hold quarterly calls, speak regularly on an informal basis, and coordinate on a monthly basis with our state partners through the National Association of Attorneys General. The FTC also engages with international partners through participation in international law enforcement groups such as the International Consumer Protection Enforcement Network, International Mass Marketing Fraud Working Group, and the Unsolicited Communications Network *(formerly known as the London Action Plan).*

Question 10. Your testimony described the limitations of the FTC's current data security enforcement authority provided by Section 5 of the *FTC Act* including: lacking civil penalty authority, lacking authority over non-profits and common carrier activity, and missing broad APA rulemaking authority. Please describe each of these limitations and how adjusted FTC authority to address these items would improve the protection of consumers from data security risks.

Answer. Under current law, the FTC generally cannot obtain civil penalties—in other words, money—for first-time security or privacy violations. This means that, in order to be financial liable for data security or privacy violations, a company often must violate the law, be pursued by the Commission and put under order, and then violate the law again. I believe this under-deters problematic data security and privacy practices. If Congress were to give us the authority to seek civil penalties for first-time violators, better deterrence would be achieved. As to APA rulemaking authority, the Commission would benefit from such authority in the areas of data security and privacy. Rulemaking authority will ensure that the FTC can enact rules, with notice and comment and consistent with Congressional direction, and amend them as necessary to keep up with technological developments. For example, in 2013, the FTC was able to use its APA rulemaking authority to amend its Rule under the Children's Online Privacy Protection Act to address new business models, including social media and collection of geolocation information, that were not in place when the initial 2000 Rule was promulgated. As to nonprofits and common carriers, news reports are filled with breaches affecting these sectors (*e.g.,* the education sector), and the FTC does not currently have jurisdiction over them. Giving the FTC jurisdiction over these entities for purposes of enforcing data security and privacy laws will create a level playing field and ensure that these entities are subject to the same rules as other entities that collect similar types of data.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. RICHARD BLUMENTHAL TO HON. REBECCA KELLY SLAUGHTER

Privacy Rules

We know that Americans care about privacy—that they eagerly want these rights. We need baseline rules. Companies should not store sensitive information indefinitely and use that data for purposes that people never intended. Federal rules must set meaningful obligations on those that handle our data. We must enable consumers to trust and control their personal data.

Question 8. Do you support providing state AGs with the power to enforce Federal privacy protections and would you commit to working with state AGs?

Answer. Yes. The state AGs are critical partners in our enforcement efforts and would help ensure compliance with Federal privacy rules—we cannot have too many cops on the beat.

Question 9. Why is it important that the FTC have rulemaking authority when it comes to privacy? Where best would rulemaking be applied?

Answer. APA rulemaking authority in the area of privacy provides two big benefits: (1) notice and comment proceedings and (2) flexibility to accommodate changing technology and practices. Notice and comment rulemaking requires the FTC to solicit comment from stakeholders on proposed rules or changes to a rule, which allows industry, advocates, experts and consumers to weigh in. And the ability to amend the rule in the future, again with notice and comment, would enable the FTC to keep up with technological developments and any unanticipated consequences.

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[6] Press Release, FTC and FCC to Host Joint Policy Forum and Consumer Expo to Fight the Scourge of Illegal Robocalls (Mar. 22, 2018), *https://www.ftc.gov/news-events/press-releases/2018/03/ftc-fcc-host-joint-policy-forum-illegal-robocalls.*

[7] Press Release, FTC and FCC to Co-Host Expo on April 23 Featuring Technologies to Block Illegal Robocalls (Apr. 19, 2018), *https://www.ftc.gov/news-events/press-releases/2018/04/ftc-fcc-co-host-expo-april-23-featuring-technologies-block-0.*

Question 10. Do you believe elevating the Office of Technology Research and Investigation to the Bureau level would meaningfully help the FTC in addressing new technological developments across its mandates?

Answer. Yes. Our cases are more sophisticated than ever and creating, and more critically funding, a body of experts who can assist on our most complex competition and consumer protection cases would be invaluable. Today we have an economist assigned to every single case; but almost all of our cases have a technological element and could benefit from a technologist as well. We also need more research in the areas of privacy and data security. Right now the FTC's Bureau of Economics engages in substantial research and scholarship, producing reports and papers on topics relevant to the Commission's consumer protection and competition missions. I envision a Bureau of Technology serving a very similar role. There are many emerging issues and policy questions in the technology space that impact consumers and competition: IoT security, AI, data portability, VR. Expert research and scholarship on these issues would provide a significant benefit to the Commission and public.

Board Accountability

Question 12. What is the FTC doing to investigate and hold accountable individual board members and executives who knowingly assist their companies in committing fraud? What more should the FTC be doing in this regard?

Answer. I support increased focus on individual accountability for company leaders who knowingly assist their companies in violating the law and failing to comply with FTC orders. In February, the FTC announced a record-setting COPPA fine against a company, Musical.ly, now known as TikTok, that engaged in unlawful practices that put children at risk. In connection with this case, I issued a statement with my colleague Commissioner Chopra, calling publicly for the FTC to look more closely at individuals in such matters going forward.[1] When any company appears to have made a business decision to violate or disregard the law, the Commission should identify and investigate those individuals who made or ratified that decision and evaluate whether and how to hold them accountable.

FTC Investigation of Algorithms

Section 6(b) of the FTC Act gives the agency broad investigatory and information-gathering powers. For example, in the 1970s the FTC used its Section 6(b) authority to require companies to submit product-line specific information, enabling the agency to assess the state of competition across markets.

The FTC has released reports on big data and the harms biased algorithms can cause to disadvantaged communities. These reports drew attention to the potential loss of economic opportunity and diminished participation in our society. Yet, information on how these algorithms work, and on the inputs that go into them, remains opaque.

Question 19. Where the FTC consider using its Section 6(b) investigative power to help us understand how these algorithms and black-box A.I. systems work—the biases that shape them, and how those can affect trade, opportunity, and the market?

Answer. The Commission's 6(b) investigative authority is a critical tool that the Commission can use to increase its understanding of industries and markets in order to inform both our competition and consumer protection policy and enforcement agendas. There are many issues in the technology arena that could be the subject of a 6(b) study, and I would support such an effort.

FTC Consent Decree on Unrepaired Recalls

Most consumers probably do not know that, while new car dealers are prohibited from selling vehicles with open recalls, used car dealers are not. A recent FTC consent decree, which I strenuously disagreed with and is currently being scrutinized in the courts, allows the sale of used cars with unrepaired recalls. According to the consent decree, car dealers can advertise that cars with unrepaired safety recalls like a defective Takata airbag are "safe" or have passed a "rigorous inspection"—as long as they have a disclosure that the vehicle may be subject to an unrepaired recall and directs consumers on how they can determine the vehicle has an open recall.

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[1] Joint Statement of Commissioner Rohit Chopra and Commissioner Rebecca Kelly Slaughter, *In the Matter of Musical.ly Inc.* (now known as TikTok), No. 1723004 (Feb. 27, 2019), *https://www.ftc.gov/system/files/documents/public_statements/1463167/chopra_and_slaughter_musically_tiktok_joint_statement_2-27-19.pdf.*

Question 20. In your opinion, is a car with an open, unrepaired recall, a "safe" car? Why would the FTC allow unsafe cars to be advertised as "safe" and "repaired for safety," with or without a vague, contradictory and confusing disclaimer?

Answer. In my opinion, cars that have an open recall need to be fixed.

Question on Non-Compete Clauses

I am concerned about the growth of non-compete clauses, which block employees from switching jobs to another employer in the same sector for a certain period of time. These clauses weaken workers' bargaining power once they are in the job, because workers often cannot credibly threaten to leave if their employer forces refuses to give them a raise or imposes poor working conditions. According to the Economic Policy Institute, roughly 30 million workers—including one in six workers without a college degree—are now covered by non-compete clauses.

The consensus in favor of addressing non-compete clauses is growing. For example, just this past December, an interagency report indicated that non-compete clauses can be harmful in certain contexts, such as the healthcare industry. Yet, the FTC has not yet undertaken forceful action. In September, Commissioner Chopra suggested that the FTC use its rulemaking authority to "remove any ambiguity as to when non-compete agreements are permissible or not."

Question 23. Do you agree with the proposal that the FTC use its rulemaking authority to address non-compete clauses? I invite you to explain your reasoning regarding your stance.

Answer. Non-compete clauses are anticompetitive and unfair for the vast majority of workers in our country, and unequivocally for those who have little or no bargaining power when negotiating employment contracts. A Commission rule to address non-compete clauses should be considered among the potential mechanisms for stopping their use so that workers reap the benefits of a fair and competitive marketplace for their labor.

Question on Local Merger Enforcement

Even though big national mergers typically garner the most media attention, smaller mergers can often raise monopoly concerns on the local level. This can be true in the healthcare industry, for example. In November, Commissioner Simons told me: "Some local mergers may be too small to require Hart-Scott-Rodino premerger notification, but may still have anticompetitive effects."

Question 24. Would you agree with me that Hart-Scott-Rodino premerger notifications help antitrust enforcers catch concerning mergers?

Answer. Yes.

Question 25. What sort of anticompetitive effects might be raised by local mergers even when those mergers are too small to require Hart-Scott-Rodino premerger notification?

Answer. Similar to mergers and acquisitions involving large firms, mergers and acquisitions involving small firms in local markets can result in competitive harm that violates Section 7 of the Clayton Act. For example, a merger might eliminate horizontal competition, resulting in higher prices, reduced quality, and/or less innovation. A merger might also enable and incentivize anticompetitive conduct resulting from vertical integration, including foreclosing or raising the cost to rivals of a key input or foreclosing competitors' access to customers. Finally, it is not difficult to imagine a large company engaging in acquisitions—or potentially serial acquisitions—of nascent competitors. These transactions may occur in local markets and be too small to trigger HSR notification, but nonetheless merit scrutiny by the Commission.

Question 26. What action would you recommend either the FTC or Congress take in order to assist Federal and state antitrust enforcers in catching local mergers that raise anticompetitive concerns?

Answer. The Commission should continue its practice of routinely monitoring the market for potentially problematic mergers that do not meet the HSR reporting requirements. It should also maintain its close working relationship with state Attorneys General to help identify non-reportable mergers that may be of mutual interest.

Question on Horizontal Shareholding

Recent research has raised questions about whether horizontal shareholding harms competition in our economy. I would like to understand your view on this ongoing research.

Question 27. Do you believe that horizontal shareholding raises anticompetitive concerns?

Answer. I believe that the competitive impact of horizontal shareholding merits close attention. If investors hold significant minority stakes of competing firms and the investors orchestrate collusion between the firms or exercise influence over the firms the effect of which would be to substantially lessen competition, I believe such actions would raise significant competitive concerns.

Question 28. Do you believe that our antitrust laws can be used to address the anticompetitive concerns raised by horizontal shareholding?

Answer. The Clayton Act applies to partial acquisitions of competing firms that do not confer control, but are likely to substantially lessen competition. Traditionally, enforcement has focused on cross-ownership acquisitions—or acquisitions between competitors—but there is a developing literature about the application of the Clayton Act to common ownership acquisitions and the evidence that would demonstrate that such acquisitions are likely to substantially lessen competition. This is a productive area of research and debate, and I believe it raises significant questions for antitrust enforcement and competition policy.

Question 29. What, if anything, are you doing to address any potential harms of horizontal shareholding?

Answer. Going forward, the Commission should be on the lookout for common ownership acquisitions that could potentially raise competitive concerns and investigate to determine whether there is sufficient evidence to merit enforcement action.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. CATHERINE CORTEZ MASTO TO HON. REBECCA KELLY SLAUGHTER

Pet Leasing

I appreciate the Commission's attention to my request with six of my colleagues for the FTC to investigate the practice of pet leasing that is leading some consumers into confusing or deceptive contractual obligations that cause them to have an issue with their beloved pet and negatively impact their financial status, such as credit scores, for far into the future. This is an issue that is a little under the radar but needs strong oversight and attention under your deceptive practices mandate if there are concerning financial practices being discovered.

Question. Can I get a further commitment from you all to keep my office informed of actions and determinations you all may make pertaining to this concerning issue and the Humane Society and Animal Legal Defense Fund's formal petition to the Commission?

Answer. Yes. Business models predicated on long-term exorbitant leasing terms (such as the rent-to-own industry) have appropriately garnered scrutiny and criticism from consumer advocates. The extension of these types of practices to something as personal and emotional as the relationship between people and their pets is deeply distressing, and I appreciate your efforts to raise awareness of the issue. The FTC is committed to protecting consumers from unfair or deceptive acts or practices, including in this troubling area. FTC staff has met with the Humane Society and Animal Legal Defense Fund to discuss their concerns and will continue to keep your office informed of the steps we are taking in this area.

Bureau of Technology

Former Commissioner Terrell McSweeny has suggested creating a Bureau of Technology at the FTC.

Question 1. Does the Commission have sufficient resources and staffing to protect consumer privacy in the digital age?

Answer. No. The Commission has used the resources and staffing it currently has to bring over 60 data security and privacy cases and to engage in extensive consumer and business education and outreach regarding privacy and security. And we will continue to use our existing resources to do all that we can—but it is not enough. Not a week goes by in which a data breach or problematic privacy practice does not grab headlines. As consumer data are collected, stored, and shared by more and more sectors of the economy, the FTC needs more resources and more staff to help ensure that data is secure.

Question 2. Do support the establishment of a Bureau of Technology?

Answer. Yes. Our cases are more sophisticated than ever and creating, and more critically funding, a body of experts who can assist on our most complex competition and consumer protection cases would be invaluable. Today we have an economist assigned to every single case; but almost all of our cases have a technological element and could benefit from a technologist as well. We also need more research in the areas of privacy and data security. Right now the FTC's Bureau of Economics

engages in substantial research and scholarship, producing reports and papers on topics relevant to the Commission's consumer protection and competition missions. I envision a Bureau of Technology serving a very similar role. There are many emerging issues and policy questions in the technology space that affect consumers and competition: IoT security, AI, data portability, VR. Expert research and scholarship on these issues would provide a significant benefit to the Commission and public.

Robocalls

Obviously protecting consumers from fraud is a fundamental tenet of the FTC. And I applaud your work in both the education and enforcement sectors of protecting consumers. But one area we all are still struggling to stay ahead of the curve on is robocalls. That's why I have legislation, the Deter Obnoxious, Nefarious, and Outrageous Telephone Calls, or DO NOT Call Act with four of my Senate colleagues. It would increase the deterrent against illegal robocalls by imposing a potential criminal penalty rather than just civil fines. While these tools would be more for the Federal Communications Commission, we are obviously interested in fighting this problem on all fronts.

Question 1. Would you agree that in addition to finding more effective technological tools to fight this problem, that this kind of enhanced deterrent needs to receive serious consideration in Congress to help provide regulators the tools to hold bad actors accountable for this persistent nuisance and scurrilous action by scammers?

Answer. Yes, I support increasing the deterrent against illegal robocalls, including through criminal penalties. In addition, technological tools should be developed and applied to identify those who are using sophisticated technology to evade detection, and we must continue to work with our international partners to ensure that the threat of penalties meaningfully reaches scammers who may escape the jurisdiction of U.S. law enforcement.

Question 2. Are there additional actions Congress should be considering related to this specific challenge?

Answer. I recommend Congress consider requiring or strongly incentivizing voice service providers to offer call-blocking services to all customers and to implement the STIR/SHAKEN protocol. In addition, repealing the common-carrier exemption from the FTC act would enable us to bring enforcement actions against carriers that routinely and knowingly pass illegal traffic across their networks. Carriers should have both the authority and the responsibility to keep nuisance spam calls off their networks.

Data Minimization vs Big Data

A topic that has come up a lot during our discussions on privacy is data minimization. This is a concept that I have been considering on as I work on developing a comprehensive data privacy bill. As you're aware, this is the idea that businesses should only collect, process, and store the minimum amount of data that is necessary to carry out the purposes for which is was collected. There are obvious advantages to this as it minimizes the risk of data breaches and other privacy harms. At the same time, big data analytics are going to be crucial for the future and play an important role in smart cities, artificial intelligence, and other important technologies that fuel economic growth. I think it is important to find a balance between minimization and ensuring that data, especially de-identified data, is available for these applications.

Question. Can you describe how you view this balance and how we in Congress can ensure that people's data is not abused but can still be put to use in positive ways?

Answer. I agree that there is significant tension in how we balance the known benefits of data minimization with the benefits that might be derived from big data analytics. As a starting point, I believe that careful consideration of several topics would help inform this balancing: (1) the benefits *and potential harms* that arise from big data; (2) how best to ensure that de-identified data is not later re-linked to individuals; and (3) whether and how to preserve consumer choice regarding how de-identified data is used beyond the expected purposes for which it is collected.

General Privacy Recommendations

Question 1. While privacy was a significant topic of the oversight hearing, as we look to develop a bill, can you specifically lay out some of the top priorities you individually would like to see included and what do you think gets overlooked in the conversations policymakers have with allowing for future innovations and yet raising the bar for protecting consumers?

Answer. From an enforcement perspective, my priorities include (1) empowering the FTC to seek significant monetary penalties for privacy violations in the first instance; (2) giving the FTC APA rulemaking authority, to allow us to craft flexible rules that reflect stakeholder input and can be periodically updated to keep up with future innovations; and (3) repealing the common carrier and nonprofit exemptions under the FTC Act to ensure that more of the entities entrusted with consumer data are held to consistent standards. From a policy perspective, I care deeply about making sure consumers have meaningful information about how and when their data is being collected, used and shared; lengthy and unintelligible click-through contracts do not provide this information today. Furthermore, I am concerned that consumers do not have meaningful choice when it comes to accepting the terms presented today for data use and sharing, because refusal to consent often leaves consumers unable to access services necessary for participation in contemporary democratic society. I think policymakers should endeavor to provide consumers with as much choice as practicable regarding their data; to that end, I encourage Congress to also think seriously about the implications of privacy rules on competition so that if a customer prefers a more privacy-protective product, she has the information and options available to meet that preference.

Question 2. Can you also outline the optimal role you see for our state Attorneys General in this privacy enforcement process?

Answer. I believe state Attorneys General should be given full enforcement authority under any Federal privacy legislation. The state AGs are critical partners in our enforcement efforts and would help ensure compliance with Federal privacy rules—we cannot have too many cops on the beat.

Data Privacy—Binding Contracts?

We live with this time information inundation where people can't really read privacy policies and fairly agree to their content. But, we all know that basically no one reads privacy policies—and indeed, no reasonable person should read privacy policies, because according to research done at Carnegie Mellon, it would take 76 work days to read all of the privacy policies on encounters in a year. Companies take advantage of the fact that no one reads privacy policies to bury terms in those policies that no rational consumer would agree to (such as Grindr selling its users HIV status to third parties).

Question. Should these terms of service be binding contracts?

Answer. Without comprehensive privacy legislation, the FTC relies heavily on our Section 5 authority to police data security and privacy practices, including our deception authority. For example, when a company makes representations to its users through its privacy policies but does not fulfill those promises, the FTC can bring and has brought enforcement actions against the company. In addition, if a company buries a material term of service in its terms and conditions, particularly if it is unexpected or contrary to the impression created more prominently elsewhere, it is unlikely that such a disclosure is adequate.

As a general matter, we should be concerned about terms of service written so opaquely and unintelligibly that no reasonable customer can read or understand them. Furthermore, I am concerned that consumers do not have meaningful choice when it comes to accepting the terms presented today for data use and sharing, because refusal to consent often leaves consumers unable to access services necessary for participation in contemporary democratic society.

Privacy Risky Communities/Groups

Question 1. Do you think that certain communities or groups are any more or less vulnerable to privacy risks and harms?

Answer. I am concerned that marginalized communities and groups are especially vulnerable to elevated privacy risks and harms. Groups that historically have been subject to profiling or targeting are understandably wary of invasions of privacy. For example, we have heard from LGBTQ civil rights organizations about the unique risks their community faces from privacy violations. I would encourage the FTC to take an intersectional approach and work with you as well as directly affected communities to identify any existing data on these unique vulnerabilities and to explore research opportunities to gather and analyze additional data.

Question 2. Should privacy law and regulations account for such unique or disparate harms, and if so, how?

Answer. Privacy law and regulations should protect all consumers, but I believe there may be instances where additional protections are needed for certain types of data or certain groups of consumers—for example, our youngest consumers.

Immediate Civil Penalties Authority

Noting from your FTC testimony, *"Section 5 (of the FTC Act), however, is not without limitations. For example, Section 5 does not provide for civil penalties, reducing the Commission's deterrent capability."*

Question. While I appreciate the long term successes of the FTC in many respects to investigate data security matters, what are your thoughts to whether there is enough of a deterrent effect with Section 5 authority when you can't immediately enforce against those who misuse data with civil penalties right from the start, rather than as the result of often times flagrant offenses to their already establish consent decrees?

Answer. One need only open a newspaper (or scroll through a news feed) on any given day to see reports of new privacy and data-security incidents. If our current regime provided an effective deterrent, we would see fewer and fewer of these reports rather than more and more. So I do not believe that our Section 5 authority provides enough of a deterrent, which is one reason that I support comprehensive privacy legislation that would give the FTC the authority to impose money penalties for first-time violations.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. AMY KLOBUCHAR TO HON. REBECCA KELLY SLAUGHTER

The FTC is charged with enforcing the Children's Online Privacy Protection Act (COPPA) and has done so for the last two decades. Protecting the privacy of children has never been more important than it is now, but the online privacy of all Americas is also increasingly at risk.

Question 1. Both [you and Commissioner Noah Phillips] have recently commented that we should learn from the FTC's experience in enforcing COPPA when we consider our approach to protecting consumer privacy more broadly. What lessons should we take away from the Commission's experience enforcing COPPA when considering ways to protect online privacy and data security for all Americans?

Answer. One key takeaway from the Commission's experience enforcing COPPA is the flexibility afforded by APA Rulemaking. For example, in 2013, the FTC was able to use its APA rulemaking authority to amend the COPPA Rule to address new business models, including social media and collection of geolocation information, that were not in place when the initial 2000 Rule was promulgated.

The Federal Trade Commission's budget has remained flat for the past several years despite increasing demands on your agency's resources, including a significant rise in merger filings.

Question 2. If additional resources were made available to the Federal Trade Commission, how would you deploy those resources to advance the agency's consumer protection and competition missions?

Answer. The Commission is always looking for ways to use existing resources more efficiently, but additional resources would be put to good use and help us to do more to further our competition and consumer protection missions.

With respect to our competition mission, additional resources could be dedicated to economic experts to support investigations and litigations, freeing up funding for more investigations and enforcement generally. Similarly, increasing the number of retrospective analyses of our merger enforcement decisions could be resource-intensive, but they help us learn from our enforcement decisions and inform future enforcement or merger investigations. Moreover, additional resources could be devoted to conducting studies of specific industries, including technology-related industries, in order to enhance and sharpen the Commission's understanding of competitive dynamics in emerging and developing markets.

With respect to our consumer protection mission, additional resources to support the increasing numbers of investigations and enforcement actions are essential. In particular, the Commission needs more technologists, experts, investigators, and attorneys to keep pace with the challenges facing consumers in an increasingly complex and digital marketplace.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. TOM UDALL TO HON. REBECCA KELLY SLAUGHTER

Privacy

Question 1. Do you support strong civil penalties for consumer privacy violations?

Answer. Yes.

Question 2. The California Consumer Protection Act goes into effect in January 2020. As Congress considers pre-emption of that state law, what additional authority should we give the FTC to ensure that consumer privacy adequately is protected?

Answer. I support strong comprehensive privacy legislation that would (1) empower the FTC to seek significant money penalties for privacy violations in the first instance; (2) give the FTC APA rulemaking authority, to allow us to craft flexible rules that reflect stakeholder input and can be periodically updated to keep up with technological developments; and (3) repeal the common carrier and nonprofit exemptions under the FTC Act to ensure that more of the entities entrusted with consumer data are held to consistent standards. Moreover, I support an increase in resources and personnel to enable the FTC to use these enforcement tools effectively.

Question 3. A recent *New York Times* analysis found that both the Apple App Store and the Google Play Store have apps in their respective children's or family sections that potentially violate COPPA. What specific role should platform owners play to ensure COPPA compliance on their platforms?

Answer. In 2012, the Commission revised the COPPA Rule to cover not only websites, app developers, and other online services but also third parties collecting personal information from users of those sites or services. At that time, the Commission made clear that it did not intend to make platforms responsible merely for offering consumers access to someone else's child-directed content. Rather, they would be liable under COPPA only if they had actual knowledge that they were collecting personal information from a child-directed app. At the same time, platforms are in a unique position to set and enforce rules for apps that seek placement in the platform's store and to drive good practices.

Question 4. Compliance for mobile apps may be hard to achieve against fly-by-night operators overseas who do not care if their apps violate U.S. law. How can the Vtech Electronics investigation and civil penalty serve as an example for how the FTC can hold foreign app developers responsible for violating COPPA?

Answer. In addition to the VTech case you mention, the Commission has taken action in a number of privacy- or security-related cases against companies that have a foreign presence, including Musical.ly, TrendNet, inMobi, ASUS, and HTC.[2] In each of these cases, the FTC obtained successful relief for consumers in the United States, including a substantial civil penalty in the Musical.ly, VTech, and inMobi settlements. The Commission has also used other means to address illegal conduct affecting U.S. consumers. For example, a few years ago Commission staff sent a warning letter to a Chinese company, Baby Bus, about COPPA violations relating to the collection of children's personal information through its apps. The Commission copied the app platforms on this communication. The company quickly responded and addressed the concerns.

Question 5. The COPPA safe harbor organizations must submit an annual report to the Federal Trade Commission, Can you share the reports from the last 5 years?

Answer. The FTC-approved safe harbor organizations do submit annual reports to the FTC each year. However, these organizations claim confidentiality with respect to the information in their annual reports. I generally support increased transparency of these reports, and I would be glad to work with your office to identify appropriate ways to make this information available.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN THUNE TO HON. CHRISTINE S. WILSON

Question 1. Vertical mergers such as the merger between AT&T and Time Warner have garnered some attention lately. The FTC and the DOJ have not updated vertical merger guidance since 1984. Do you believe that the FTC and DOJ should issue new guidance on vertical mergers?

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[2] *United States v. Musical.ly,* No. 2:19-cv-01439 (C.D. Cal. filed Feb. 27, 2019), *https://www.ftc.gov/enforcement/cases-proceedings/172-3004/musically-inc; In re: TRENDnet, Inc.,* No. C–4426 (Jan. 16, 2014), *https://www.ftc.gov/enforcement/cases-proceedings/122-3090/trendnet-inc-matter; United States v. InMobi Pte Ltd.,* No. 3:16-cv-3474 (N.D. Cal. filed June 22, 2016), *https://www.ftc.gov/enforcement/cases-proceedings/152-3203/inmobi-pte-ltd; In re ASUSTeK Computer Inc.,* No. C–4587 (July 18, 2016), *https://www.ftc.gov/enforcement/cases-proceedings/142-3156/asustek-computer-inc-matter; In re HTC America Inc.,* No. C–4406 (July 25, 2013), *https://www.ftc.gov/enforcement/cases-proceedings/122-3049/htc-america-inc-matter.*

Answer. I believe that the 1984 Department of Justice Non-Horizontal Merger Guidelines [1] are out of date. As we heard during our hearing on the topic in November 2018, our understanding of the economics of vertical integration has changed over the past thirty-five years.[2] The law governing vertical relationships, and particularly vertical conduct such as resale price maintenance, has also changed since then.[3]

The agencies traditionally issue guidelines to promote transparent and predictable agency enforcement. This goal can be achieved in several different ways. For example, the agencies may use guidelines to summarize the current state of the law. Alternatively, when the law is not particularly clear, the agencies may use guidelines to clarify how they intend to approach topics on which there is no clear binding precedent. The agencies may also use guidelines either (a) to disclose and formalize an approach the agencies already use or (b) to advance new analytic techniques. For a variety of reasons, it is not clear to me that new vertical merger guidelines could meaningfully increase the transparency and predictability of our vertical merger decisions.

However, there is a range of alternatives between the two extremes of issuing guidelines and saying nothing. For example, the agencies already provide substantial insight on vertical merger analysis through speeches,[4] public statements,[5] and rigorous case selection.[6] I believe this approach is well worth considering as an alternative to issuing new formal guidelines.

Question 2. Government lawsuits to stop mergers are litigated using different procedures depending on which agency, the FTC or DOJ, handles the case. Do you think Congress should take action to ensure that agencies follow the same procedures, or do you support another approach?

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[1] *U.S. Dep't of Justice Non-Horizontal Merger Guidelines* (1984), *https://www.justice.gov/sites/default/files/atr/legacy/2006/05/18/2614.pdf.*

[2] FTC, *Hearings on Competition and Consumer Protection in the 21st Century, https://www.ftc.gov/policy/hearings-competition-consumer-protection; see also* FTC Workshop, *FTC Hearing #5: Competition and Consumer Protection in the 21st Century* (Nov. 1, 2018), *https://www.ftc.gov/news-events/events-calendar/ftc-hearing-5-competition-consumer-protection-21st-century.*

[3] *See, e.g.,* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 887 (2007) (minimum resale price maintenance must be analyzed under the rule of reason rather than the *per se* rule); State Oil Co. v. Khan, 552 U.S. 3 (1997) (same holding, but as applied to maximum resale price maintenance).

[4] *See, e.g.,* Christine S. Wilson, *Vertical Merger Policy: What Do We Know and Where Do We Go?,* Keynote Address at GCR Live 8th Annual Antitrust Law Leaders Forum (Feb. 1, 2019), *https://www.ftc.gov/system/files/documents/public_statements/1455670/wilson_-_vertical_merger_speech_at_gcr_2-1-19.pdf;* Bruce Hoffman, *Vertical Merger Enforcement at the FTC,* Remarks at Credit Suisse 2018 Washington Perspectives Conference (Jan. 10, 2018), *https://www.ftc.gov/public-statements/2018/01/vertical-merger-enforcement-ftc* (explaining the FTC's current analysis of proposed vertical mergers and highlighting the extent to which that analysis has moved beyond the 1984 Non-Horizontal Merger Guidelines).

[5] *See, e.g., In re Fresenius Med. Care AG & Co.,* FTC File No. 171–0227 (Feb. 19, 2019), *https://www.ftc.gov/enforcement/cases-proceedings/171-0227/fresenius-medical-care-nxstage-medical-matter* (Statements of (i) Chairman Simons, Commissioner Phillips, and Commissioner Wilson; (ii) Commissioner Chopra; and (iii) Commissioner Slaughter); *In re Sycamore Partners II, L.P.,* FTC File No. 181–0180 (Jan. 28, 2019), *https://www.ftc.gov/enforcement/cases-proceedings/181-0180/sycamore-partners-ii-lp-staples-inc-essendant-inc-matter* (Statements of (i) Chairman Simons, Commissioner Phillips, and Commissioner Wilson; (ii) Commissioner Wilson; (iii) Commissioner Chopra; and (iv) Commissioner Slaughter).

[6] For example, the Commission recently challenged a vertical merger between Northrop Grumman, a leading provider of missile systems to the Department of Defense, and Orbital ATK, a key supplier of solid rocket motors. *In re Northrop Grumman,* Dkt. C–4652 (June 5, 2018), *https://www.ftc.gov/enforcement/cases-proceedings/181-0005-c-4652/northrop-grumman-orbital-atk.* The Commission also accepted consent agreements to settle allegations that two other vertical mergers would, absent the remedies imposed, diminish competition. *See Fresenius Med. Care AG & Co.,* FTC File No. 171–0227 (Feb. 19, 2019), *https://www.ftc.gov/system/files/documents/public_statements/1455719/171_0227_fresenius_nxstage_majority_statement_*2-19-19.pdf (Statement of Chairman Simons, Commissioner Phillips, and Commissioner Wilson Concerning the Proposed Acquisition of NxStage Medical, Inc. by Fresenius Medical Care AG & Co. KGaA) (explaining consent agreement addresses horizontal concern regarding harm to competition in market for bloodline tubing sets for hemodialysis treatment but finding no evidence of competitive harm from vertical concerns); *In re Sycamore Partners II, L.P., Staples, Inc., and Essendant Inc.,* Dkt. C–4667 (Jan. 25, 2018), *https://www.ftc.gov/enforcement/cases-proceedings/181-0180/sycamore-partners-ii-lp-staples-inc-essendant-inc-matter* (Statement of Chairman Simons, Commissioner Phillips, and Commissioner Wilson) (consent agreement resolving charges that a merger between Staples, the world's largest retailer of office products and related services, and Essendant, a wholesale distributor of office products, was likely to harm competition in the market for office supply products sold to small- and mid-sized businesses).

Answer. It is not clear to me why the use of different procedures, by itself, is problematic. Nor, apparently, was it clear to the legislators that enacted these different statutes. Absent strong evidence that these differences in procedure meaningfully affect the ultimate result, I see little reason to alter the machinery of antitrust enforcement.

One procedural difference between the two antitrust agencies is the Commission's unique authority to initiate administrative litigation, which we call "Part 3" litigation after the relevant portion of our Rules of Practice. In theory it could be problematic for the agency to file a merger case in Part 3 litigation *after* seeking a preliminary injunction in Federal district court and having that request denied. I myself would not support proceeding in that circumstance. Yet the Commission has very rarely done so in practice, and indeed has over the years put in place several safeguards to ensure the practice remains very rare. For example, under Commission Rule 3.26,[7] the Commission automatically stays a pending Part 3 matter if a Federal district court denies the staff's request for a preliminary injunction and the respondent makes a timely motion thereafter to withdraw the case from Part 3 adjudication.[8] Moreover, the Commission's stated policy is to proceed in such circumstances only when several conditions are met.[9] In practice these conditions obtain, and the Commission proceeds, only very rarely.[10]

In contrast to the largely theoretical problems with Part 3 litigation, there is substantial evidence that this procedure can provide real benefits. A detailed analysis of every case the Commission brought in Part 3 since 1977—more than one hundred cases in all—concluded that our administrative litigation authority provided "clear value" in complex antitrust cases that require the agency's "institutional expertise in law and economics."[11] This has been particularly true in "healthcare mergers, pay-for-delay agreements, and state-action immunity" cases.[12] The same analysis found scant evidence that the Part 3 process disfavors defendants.[13]

In summary, I am loathe to "fix" procedural differences between the two antitrust agencies without strong evidence both that there is a problem and that the proposed solution is meaningfully better. For example, there is scant evidence that one procedural difference, Part 3 administrative litigation, is problematic. There is instead substantial evidence that Part 3 litigation has helped us protect competition in key sectors of our economy, such as health care.

Question 3. Should Congress amend Section 5(n) of the FTC Act, which addresses unfair practices, to clarify what constitutes "substantial injury?" If so, how?

Answer. No. Neither the Commission, nor the Courts who have ruled on this issue, have struggled to interpret that element. Substantial injury can be financial, physical, reputational, or unwanted intrusions. Financial injury can manifest in a variety of ways: fraudulent charges, delayed benefits, expended time, opportunity costs, fraud, and identity theft, among other things.[14] Physical injuries include risks to individuals' health or safety, including the risks of stalking and harassment.[15] Reputational injury involves disclosure of private facts about an individual, which

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[7] 16 C.F.R. § 3.26.

[8] *Id.* § 3.26(c).

[9] *See* Administrative Litigation Following the Denial of a Preliminary Injunction: Policy Statement, 60 Fed. Reg. 39,741 (Aug. 3, 1995), available at *https://www.ftc.gov/sites/default/files/attachments/merger-review/950803administrativelitigation.pdf.*

[10] *See, e.g.,* Press Release, FTC Withdraws Appeal Seeking a Preliminary Injunction to Stop LabCorp's Integration with Westcliff Medical Laboratories, Mar. 24, 2011, *https://www.ftc.gov/news-events/press-releases/2011/03/ftc-withdraws-appeal-seeking-preliminary-injunction-stop-labcorps* (noting the vote to withdraw the matter from litigation was 5–0); Statement of Commissioners Leibowitz, Kovacic, and Ramirez, *In re Laboratory Corp. of Am.,* FTC Docket No. 9345 (Apr. 21, 2011), available at *https://www.ftc.gov/system/files/documents/public_statements/568671/110422labcorpcommstmt.pdf* (concluding, under an earlier version of Rule 3.26 and after applying the factors listed in the Commission's 1995 policy statement, that the Commission should not proceed with administrative litigation following a Federal district court's order denying a request for a preliminary injunction).

[11] Maureen K. Ohlhausen, *Administrative Litigation at the FTC: Effective Tool for Developing the Law or Rubber Stamp?,* 12 J. COMP. L. & ECON. 623, 656 (2016).

[12] *Id.*

[13] *Id.* at 656–57 (noting both due process protections afforded to defendants and the significant proportion of cases (40 percent) in which the Commission ultimately rejected antitrust liability).

[14] *See, e.g., TaxSlayer, LLC,* No. C–4626 (F.T.C. Oct. 20, 2017) (Complaint), *https://www.ftc.gov/enforcement/cases-proceedings/162-3063/taxslayer* (alleging delayed benefits, expended time, and risk of identity theft).

[15] *See, e.g., FTC v. Accusearch, Inc.,* No. 06–CV–0105 (D. Wyo. May 3, 2006) (Complaint), *https://www.ftc.gov/enforcement/cases-proceedings/052-3126/accusearch-inc-dba-abikacom-jay-patel* (alleging that telephone records pretexting endangered consumers' health and safety).

damages the individual's reputation. Tort law recognizes reputational injury.[16] The FTC has brought cases involving this type of injury, for example, in a case involving public disclosure of individuals' Prozac use[17] and public disclosure of individuals' membership on an infidelity-promoting website.[18] Finally, unwanted intrusions involve two categories. The first includes activities that intrude on the sanctity of people's homes and their intimate lives. The FTC's cases involving a revenge porn website,[19] an adult-dating website,[20] and companies spying on people in their bedrooms through remotely-activated webcams fall into this category.[21] The second category involves unwanted commercial intrusions, such as telemarketing, spam, and harassing debt collection calls.

Question 4. Should the FTC issue more guidance to marketers on the level of support needed to substantiate their claims? If so, when do you anticipate that such guidance could be issued?

Answer. The FTC has issued extensive guidance over the years to help marketers in determining the level of support needed to substantiate claims. The Commission first articulated the relevant factors used to determine the level of evidence required to substantiate objective performance claims in *Pfizer, Inc.,* 81 F.T.C. 23 (1972). Those factors included the type of claim, the type of product, the consequences of a false claim, the benefits of a truthful claim, the cost of developing substantiation for the claim, and the amount of substantiation experts in the field believe is reasonable. The Commission and the courts have reaffirmed this standard many times since 1972.[22] The FTC also has provided extensive guidance through Guides, staff guidance documents, speeches, and presentations to industry trade groups and industry attorneys.[23]

As late as 2014, the Commission took a more stringent view on substantiation, requiring in orders that companies support challenged diet and health claims with two randomized, placebo-controlled, double blind clinical trials ("RCTs").[24] Recently, the D.C. Circuit correctly rejected the Commission's heightened requirements on First Amendment grounds, noting the Commission failed "to justify a categorical floor of two RCTs for any and all disease claims."[25] Today, the Commission has re-

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[16] Under the tort of public disclosure of private facts (or publicity given to private life), a plaintiff may recover where the defendant's conduct is highly offensive to a reasonable person. Restatement (Second) of Torts § 652D (1977).

[17] *Eli Lilly and Co.,* No. C–4047 (F.T.C. May 8, 2002), *https://www.ftc.gov/enforcement/cases-proceedings/012-3214/eli-lilly-company-matter.*

[18] *FTC v. Ruby Corp., et al.,* No. 1:16-cv-02438 (D.D.C. Dec. 14, 2016), *https://www.ftc.gov/enforcement/cases-proceedings/152-3284/ashley-madison.*

[19] *FTC v. EMP Media, Inc., et al.,* No. 2:18-cv-00035 (D. Nev. Jan. 9, 2018), *https://www.ftc.gov/enforcement/cases-proceedings/162-3052/emp-media-inc-myexcom.*

[20] *FTC v. Ruby Corp., et al.,* No. 1:16-cv-02438 (D.D.C. Dec. 14, 2016), *https://www.ftc.gov/enforcement/cases-proceedings/152-3284/ashley-madison.*

[21] See Press Release, FTC Halts Computer Spying (Sept. 25, 2012), *https://www.ftc.gov/news-events/press-releases/2012/09/ftc-halts-computer-spying; see also Aaron's, Inc.,* C–4442 (F.T.C. Mar. 10, 2014), *https://www.ftc.gov/enforcement/cases-proceedings/122-3256/aarons-inc-matter.*

[22] *See, e.g., Thompson Med. Co.,* 104 F.T.C. 648, 813 (1984), *aff'd,* 791 F.2d 189 (D.C. Cir. 1986); *Daniel Chapter One,* 2009 WL 5160000 at *25–26 (F.T.C. 2009), *aff'd,* 405 Fed. Appx. 505 (D.C. Cir. 2010) (unpublished opinion), available at 2011–1 Trade Cas. (CCH) ¶ 77,443 (D.C. Cir. 2010); *POM Wonderful, LLC,* 155 F.T.C. 1, 55–60 (2013), *aff'd,* 777 F.3d 478 (D.C. Cir. 2015), *cert. denied,* 136 S. Ct. 1839, 194 L. Ed. 2d 839 (2016); *FTC Policy Statement Regarding Substantiation,* 104 F.T.C. 839, 840 (1984) (appended to *Thompson Med. Co.,* 104 F.T.C. 648 (1984)).

[23] *See Guides for the Use of Environmental Marketing Claims,* 16 C.F.R. § 260.2 (2019), *https://www.ecfr.gov/cgi-bin/text-idx?SID=bd96b2cdcd01f7620d43e50a9d1d8cec&mc=true&node=se16.1.260_12&rgn=div8; Dietary Supplements: An Advertising Guide for Industry, https://www.ftc.gov/tips-advice/business-center/guidance/dietary-supplements-advertising-guide-industry.*

[24] *See Applied Food Sciences, Inc.,* FTC File No. 142–3054 (Sept. 10, 2014) (stipulated final judgment and order), *https://www.ftc.gov/system/files/documents/cases/140908afsstip1.pdf; In re The Dannon Company, Inc.,* FTC File No. 082–3158 (Feb. 4, 2011) (decision and order), *https://www.ftc.gov/sites/default/files/documents/cases/2011/02/110204dannondo.pdf;* In re Nestle Healthcare Nutrition, Inc., FTC File No. 092–3087 (Jan. 18, 2011) (decision and order), *https://www.ftc.gov/sites/default/files/documents/cases/2011/01/110118nestledo.pdf;* FTC v. Iovate Health Sciences USA, Inc., Case. No. 10–CV–587 (W.D.N.Y. July 29, 2010) (stipulated final judgment and order), *https://www.ftc.gov/sites/default/files/documents/cases/2010/07/100729iovatestip.pdf.* This level of substantiation exceeds what is specified in the Commission's Dietary Supplements Guide. *Dietary Supplements: An Advertising Guide for Industry, https://www.ftc.gov/tips-advice/business-center/guidance/dietary-supplements-advertising-guide-industry.*

[25] *POM Wonderful, LLC v. FTC,* 777 F.3d 478, 502 (D.C. Cir. 2015) ("If there is a categorical bar against claims about the disease related benefits of a food product or dietary supplement in the absence of two RCTs, consumers may be denied useful, truthful information about prod-

turned to its traditional, more flexible standard.[26] As noted above, this approach is encapsulated in the *Pfizer* opinion and reflects the central role of balancing the costs of prohibiting truthful claims against the benefits of prohibiting false claims.[27]

The Commission's guidance sets forth flexible principles that can be applied to multiple products and claims. It does not attempt to answer every question about substantiation, given the virtually limitless range of advertising claims, products, and services to which it could be applied. Instead, it seeks to strike the right balance between being specific enough to be helpful but not so granular that it would overlook some important factor that might arise under given circumstances and thereby actually chill useful speech.

Question 5. In June, the 11th Circuit vacated the Commission's data security order against Lab-MD. What effect, if any, will this have on the Commission's data security orders going forward?

Answer. The Eleventh Circuit determined that the mandated data security provision of the Commission's LabMD Order was insufficiently specific. The opinion did not have any effect on the FTC's use of Section 5 to protect consumers from deceptive or unfair data security practices. We are engaged in an ongoing process to craft appropriate order language in data security cases, based on the Eleventh Circuit opinion, feedback we received from our December hearing on data security, and our own internal discussion of how our orders can create better deterrence of future misconduct using our existing tools.

Question 6. If Federal privacy legislation is passed, what enforcement tools would you like to be included for the FTC?

Answer. First, I would recommend that Congress consider giving the FTC the authority to seek civil penalties for initial privacy violations, which will create an important deterrent effect. Second, while the process of enacting Federal privacy legislation will involve difficult tradeoffs that are appropriately left to Congress, targeted APA rulemaking authority, similar to that in the Children's Online Privacy Protection Act, will allow the FTC to keep up with technological developments. For example, in 2013, the FTC was able to use its APA rulemaking authority to amend the COPPA Rule to address new business models, including social media and collection of geolocation information, that were not in place when the initial 2000 Rule was promulgated. Third, the FTC could use broader enforcement authority to take action against common carriers and nonprofits, which it cannot currently do under the FTC Act. I also believe that the promulgation of Federal privacy legislation should be undertaken in conjunction with national data breach notification and data security legislation.

Question 7. During the hearing, I asked you whether the FTC would consider using its section 6(b) authority to study consumer information data flows, specifically sending requests to Google, Facebook, Amazon, and others in the tech industry to learn what information they collect from consumers and how that information is used, shared, and sold. You responded, "Sure, 6(b) is a really powerful tool and that's the type of thing that might very well make sense for us to use it for." I believe the FTC's section 6(b) authority could provide some much needed transparency to consumers about the data practices of large technology companies, and help identify areas that may require additional attention from lawmakers. Can you explain in more detail whether you believe the FTC should conduct a study pursuant to section 6(b) of the Federal Trade Commission Act on the data collection, use, filtering, sharing, and sale practices of large technology companies?

Answer. The FTC's section 6(b) authority could be used to conduct a study about the data practices of large technology companies. The FTC has a comparative advantage in policy research and development through the use of 6(b) studies, which allows the Commission to proceed in measured and thoughtful ways on complicated

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ucts with a demonstrated capacity to treat or prevent serious disease. That would subvert rather than promote the objectives of the commercial speech doctrine.").

[26] *See e.g., Nobetes Corp.,* Case No. 2:18-cv-10068–KS (Dec. 13, 2018) (stipulated order) (requiring "competent and reliable scientific evidence shall consist of human clinical testing of the Covered Product, or of an Essentially Equivalent Product, that is sufficient in quality and quantity based on standards generally accepted by experts in the relevant disease, condition, or function to which the representation relates, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true."), *https://www.ftc.gov/system/files/documents/cases/nobetes_-_signed_stipulated_order.pdf.*

[27] *See generally* J. Howard Beales, Timothy J. Muris & Robert Pitofsky, *In Defense of the Pfizer Factors, in* THE REGULATORY REVOLUTION AT THE FTC: A THIRTY–YEAR PERSPECTIVE ON COMPETITION AND CONSUMER PROTECTION 83 (James C. Cooper ed., 2013) (All three of the authors served as Director of the Bureau of Consumer Protection and two served as Chairman at the FTC. The article provides a comprehensive discussion of *Pfizer*).

policy questions. I will continue to encourage the Commission to issue 6(b) studies in the technology area.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JERRY MORAN TO HON. CHRISTINE S. WILSON

Question 1. Section 5(a) of the *FTC Act,* which prohibits "unfair or deceptive acts or practices in or affecting commerce" is the legal basis for a body of consumer protection law that covers data privacy and security practices. The FTC has brought hundreds of cases to date to protect the privacy and security of consumer information held by companies of all sizes under this authority. The FTC staff recently submitted comments to the National Telecommunications and Information Administration (NTIA) that clearly indicate the FTC staff's view that the FTC would be the appropriate agency to enforce a new comprehensive privacy legislative framework. Do you agree with the staff's view?

Answer. Absolutely. The FTC has developed a substantial body of expertise on privacy issues over the past several decades, by bringing hundreds of cases, hosting approximately 70 workshops, and conducting numerous policy initiatives. The FTC is committed to using all of its expertise, its existing tools under the FTC Act, and whatever additional authority Congress gives us, to protect consumer privacy while promoting innovation and competition in the marketplace.

Question 2. As Congress evaluates opportunities to create meaningful Federal legislation to appropriately ensure privacy of consumers' data, there have been suggestions to increase the FTC's authorities to enforce in this space. Will you commit to working with this Committee in measuring what resources, if any, will be needed to allow the agency to enforce any additional authorities that may or may not be provided in Federal legislation?

Answer. Yes. We can certainly use additional resources, additional staff, and additional authorities including civil penalties, targeted APA rulemaking, and jurisdiction over non-profits and common carriers. We are committed to utilizing whatever additional tools Congress gives us efficiently and vigorously.

Question 3. Sharing responsibilities with the DOJ's Antitrust Division, the FTC enforces antitrust law in a variety of sectors as described by your testimony. While the vast majority of premerger filings submitted to enforcement agencies do not raise competition concerns, the FTC challenged 45 mergers since the beginning of 2017, and of those, the FTC only voted to initiate litigation to block five transactions. Would you please describe the resource needs of the agency associated with hiring qualified outside experts to support its litigation efforts? Please explain how developments in the high-technology sector are accounted for in the FTC's decision-making process related to antitrust enforcement.

Answer. I appreciate your attention to the agency's resource needs. The FTC is committed to maximizing its resources to enhance its effectiveness in protecting consumers and promoting competition, to anticipate and respond to changes in the marketplace, and to meet current and future challenges. Resource constraints, however, remain a significant challenge. As discussed in more detail below, evolving technologies and intellectual property issues continue to increase the complexity of antitrust investigations and litigation. This complexity, coupled with the rising costs of critical expert witnesses and increases in caseload, sometimes leads to financial and personnel resource limitations. In the past, we have requested additional resources for experts, information technology, and more full-time employees in support of our mission to protect consumers and promote competition. These continue to be critical areas of need for our agency. If we receive additional resources, they likely would be applied to these areas as needed.

Qualified experts are a critical resource in all of the FTC's competition cases heading toward litigation. For example, the services of these expert witnesses are critical to the successful investigation and litigation of merger cases, as they provide insight on proper definition of product and geographic markets, the likelihood of entry by new competitors, and the development of models to contrast merger efficiencies with potential competitive harm.

Expert witness costs are highly dependent on the number, scope, duration, and disposition of our Federal and administrative court challenges. The cost of an expert, for example, increases if we require the expert to testify or produce a report. To limit these costs, the FTC has identified and implemented a variety of strategies, including using internal personnel from its Bureau of Economics as expert witnesses whenever practical. The opportunities to use internal experts as testifying experts are limited, however, by several factors, including staff availability, testifying experience, and the specialized expertise required for specific matters. I will continue to

encourage the FTC to evaluate how to increase its use of internal experts and control expert costs without compromising case outcomes or reducing the number of enforcement actions.

In addition to expert witness costs, you asked about how developments in the high-technology sector factor into the FTC's decision-making process related to antitrust enforcement. The FTC closely follows activity in the high-technology sector. Given the important role that technology companies play in the American economy, it is critical that the Commission—in furthering its mission to protect consumers and promote competition—understand the current and developing business models and scrutinize incumbents' conduct to ensure that they abide by the same rules of competitive markets that apply to any company. When appropriate, the Commission will take action to counter the harmful effects of coordinated or unilateral conduct by technology firms.

The fundamental principles of antitrust do not differ when applied to high-technology industries, including those in which patents or other intellectual property are highly significant. The issues, however, are often more complex and require different expertise, which may necessitate the hiring of outside experts or consultants to help us develop and litigate our cases. The FTC also strives to adapt to the dynamic markets we protect by leveraging the research, advocacy, and education tools at our disposal to improve our understanding of significant antitrust issues and emerging trends in business practices, technology, and markets. For example, last fall, the Commission launched its *Hearings on Competition and Consumer Protection in the 21st Century* to consider whether the FTC's enforcement and policy efforts are keeping pace with changes in the economy, including advancements in technology and new business models made possible by those developments.[28] I will continue to encourage the agency to scrutinize technology mergers and conduct by technology firms to ensure not only that consumers benefit from their innovative products, but also that competition thrives in this dynamic and highly influential sector.

Question 4. Earlier this year, I introduced legislation called the *Senior Scams Prevention Act* with Senator Bob Casey to combat continued and increasingly complex attempts to defraud one of the Nation's most vulnerable populations, our senior community. This bill seeks to ensure retailers, financial institutions and wire transfer companies have the resources to train employees to help stop financial frauds and scams on seniors. Would you agree that awareness and education, guided by "best practices" established by industry and government partners, is a valuable tool in preventing consumer harms against our Nation's seniors?

Answer. Yes. Protecting older consumers is one of the agency's top priorities. As the population of older Americans grows, the FTC's efforts to identify scams affecting seniors and to bring aggressive law enforcement action, as well as provide awareness and useful advice to seniors, become increasingly vital. Using research, the FTC developed its *Pass It On* campaign to share preventative information about frauds and scams with older adults.[29] This popular campaign, used by many of our partners, engages active older adults to share the materials with people in their communities, including people in their lives who may need this information. The FTC stands ready to work with industry and our government partners to create additional material for industry, including retailers, financial institutions, wire transfer companies and others to help prevent harm to our Nation's seniors.

Question 5. In its comments submitted to NTIA on "Developing the Administration's Approach to Consumer Privacy," the FTC discussed the various cases that it

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[28] FTC, *Hearings on Competition and Consumer Protection in the 21st Century, https://www.ftc.gov/policy/hearings-competition-consumer-protection.* Recent hearings included a two-day workshop on the potential for collusive, exclusionary, and predatory conduct in multisided, technology-based platform industries. FTC Workshop, *FTC Hearing #3: Competition and Consumer Protection in the 21st Century* (Oct. 15–17, 2018), *https://www.ftc.gov/news-events/events-calendar/2018/10/ftc-hearing-3-competition-consumer-protection-21st-century.* Similarly, in early November, the Commission held a two-day workshop on the antitrust frameworks for evaluating acquisitions of nascent competitors in the technology and digital marketplace, and the antitrust analysis of mergers and conduct where data is a key asset or product. FTC Workshop, *FTC Hearing #6: Competition and Consumer Protection in the 21st Century* (Nov. 6–8, 2018), *https://www.ftc.gov/news-events/events-calendar/ftc-hearing-6-competition-consumer-protection-21st-century.* Also in November, the Commission held a two-day workshop on the competition and consumer protection issues associated with algorithms, artificial intelligence, and predictive analysis in business decisions and conduct. FTC Workshop, *FTC Hearing #7: Competition and Consumer Protection in the 21st Century* (Nov. 13–14), *https://www.ftc.gov/news-events/events-calendar/ftc-hearing-7-competition-consumer-protection-21st-century.*

[29] FTC, FTC Website: *Consumer Information—Pass it on, https://www.consumer.ftc.gov/features/feature-0030-pass-it-on (providing consumer information on identity theft, imposter scams, charity fraud, and other topics).*

has taken up to address privacy-related harms to consumers, and it specifically noted four categories of harms: financial injury, physical injury, reputational injury, and unwanted intrusion. Could you please briefly describe each category while noting any FTC enforcement considerations specific to that type of harm?

Answer. Certainly. Financial injury can manifest in a variety of ways: fraudulent charges, delayed benefits, expended time, opportunity costs, fraud, and identity theft, among other things.[30] Physical injuries include risks to individuals' health or safety, including the risks of stalking and harassment.[31] Reputational injury involves disclosure of private facts about an individual, which damages the individual's reputation. Tort law recognizes reputational injury.[32] The FTC has brought cases involving this type of injury, for example, in a case involving public disclosure of individuals' Prozac use [33] and public disclosure of individuals' membership on an infidelity-promoting website.[34] Finally, unwanted intrusions involve two categories. The first includes activities that intrude on the sanctity of people's homes and their intimate lives. The FTC's cases involving a revenge porn website,[35] an adult-dating website,[36] and companies spying on people in their bedrooms through remotely-activated webcams fall into this category.[37] The second category involves unwanted commercial intrusions, such as telemarketing, spam, and harassing debt collection calls. In terms of enforcement considerations, as noted above, the FTC is very mindful of ensuring that it addresses these harms, while not impeding the benefits of data collection and use practices.

Question 6. In the FTC's recent comments in NTIA's privacy proceeding, the FTC said that its "guiding principles" are based on "balancing risk of harm with the benefits of innovation and competition." Would you describe what this means, how you strike this balance, and how it is applied in practice under your Section 5 authority in the *FTC Act*?

Answer. Regulations may impose significant costs on regulated companies, so new regulations must be handled with care to avoid stifling innovation or entrenching incumbents. The FTC has a longstanding history of weighing the countervailing benefits when determining if an injury to consumers justifies the imposition of a remedy. In unfairness cases, section 5(n) of the FTC Act requires us to strike this balance. It does not allow the FTC to bring a case alleging unfairness "unless the act or practice causes or is likely to cause substantial injury to consumers, which is not reasonably avoidable by consumers themselves and not outweighed by benefits to consumers or to competition." Thus, for example, in our data security complaints and orders, we often plead the specific harms that consumers are likely to suffer from a company's data security failures. We do not assert that companies need to spend unlimited amounts of money to address these harms; in many of our cases, we specifically allege that the company could have fixed the security vulnerabilities at low or no cost.

Question 7. The FTC's comments pertaining to "control" in NTIA's privacy proceeding stated, "Choice also may be unnecessary when companies collect and disclose de-identified data, which can power data analytics and research, while minimizing privacy concerns." How would the FTC suggest Federal regulation account for de-identified data, if at all?

Answer. This question is an excellent one, and pertains to an area in which I continue to listen to various perspectives and analyze policy ramifications. There are many potentially important uses for de-identified data. But protecting privacy using

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[30] *See, e.g., TaxSlayer, LLC,* No. C–4626 (F.T.C. Oct. 20, 2017) (complaint), *https://www.ftc.gov/enforcement/cases-proceedings/162-3063/taxslayer* (alleging delayed benefits, expended time, and risk of identity theft).

[31] *See, e.g., FTC v. Accusearch, Inc.,* No. 06–CV–0105 (D. Wyo. May 3, 2006) (complaint), *https://www.ftc.gov/enforcement/cases-proceedings/052-3126/accusearch-inc-dba-abikacom-jay-patel* (alleging that telephone records pretexting endangered consumers' health and safety).

[32] Under the tort of public disclosure of private facts (or publicity given to private life), a plaintiff may recover where the defendant's conduct is highly offensive to a reasonable person. Restatement (Second) of Torts § 652D (1977).

[33] *Eli Lilly and Co.,* No. C–4047 (F.T.C. May 8, 2002), *https://www.ftc.gov/enforcement/cases-proceedings/012-3214/eli-lilly-company-matter.*

[34] *FTC v. Ruby Corp., et al.,* No. 1:16-cv-02438 (D.D.C. Dec. 14, 2016), *https://www.ftc.gov/enforcement/cases-proceedings/152-3284/ashley-madison.*

[35] *FTC v. EMP Media, Inc., et al.,* No. 2:18-cv-00035 (D. Nev. Jan. 9, 2018), *https://www.ftc.gov/enforcement/cases-proceedings/162-3052/emp-media-inc-myexcom.*

[36] *FTC v. Ruby Corp., et al.,* No. 1:16-cv-02438 (D.D.C. Dec. 14, 2016), *https://www.ftc.gov/enforcement/cases-proceedings/152-3284/ashley-madison.*

[37] *See* Press Release, FTC Halts Computer Spying (Sept. 25, 2012), *https://www.ftc.gov/news-events/press-releases/2012/09/ftc-halts-computer-spying; see also Aaron's, Inc.,* No. C–4442 (F.T.C. Mar. 10, 2014), *https://www.ftc.gov/enforcement/cases-proceedings/122-3256/aarons-inc-matter.*

de-identified information is becoming more complex as new and powerful tools are able to combine data sets and extract information. One possible standard identified in the FTC's 2012 Privacy Report states that data is de-identified if it is not "reasonably linkable" to a consumer, computer, or device.[38] Data can be deemed to be de-identified to the extent that a company: (1) takes reasonable measures to ensure that the data is de-identified; (2) publicly commits not to try to re-identify the data; and (3) contractually prohibits downstream recipients from trying to re-identify the data. Additionally, I think that we must invest in research and education to ensure consumers and the market place understand the evolving risks associated with de-identified data. Although this language provides some general principles for de-identification, we would be happy to work with your staff on drafting more specific legislative language.

Question 8. Your testimony indicated that continued technological developments allow illegal robocallers to conceal their identities in "spoofing" caller IDs while exponentially increasing robocall volumes through automated dialing systems. These evolving technological changes mean that the critical law enforcement efforts of the FTC cannot be the only solution, and your testimony described the additional steps the FTC is taking to develop innovative solutions to these issues. Would you please describe the process and outcomes of the four public challenges that the FTC held from 2013 to 2015? Are there plans to incentivize innovators to combat robocalls in the future?

Answer. The FTC's process for its robocall challenges included public announcements, committees with independent judges, and, in some cases, cash prizes awarded under the America COMPETES Reauthorization Act.[39] To maximize publicity, the FTC announced each of its four challenges in connection with public events. The FTC announced the first robocall challenge at the FTC's 2012 Robocall Summit. In 2014, the FTC conducted its second challenge, "Zapping Rachel" at DEF CON 22. The FTC conducted its third challenge, "DetectaRobo," in June 2015 in conjunction with the National Day of Civic Hacking. The final phase of the FTC's fourth public robocall challenge took place at DEF CON 23. When the FTC held its first public challenge, there were few, if any, call blocking or call labeling solutions available for consumers. Today, two FTC challenge winners, NomoRobo and Robokiller, offer call blocking applications, and there are hundreds of mobile apps offering call blocking and call labeling solutions for cell phones. Many home telephone service providers also now offer call blocking and call labeling solutions. The FTC will not hesitate to initiate additional innovation contests if it identifies further challenges that could meaningfully benefit consumers by reducing the harm caused by illegal robocalls.

In addition to developing call blocking and call labeling technology, the telecom industry has also developed call verification technology, called STIR/SHAKEN, to help consumers know whether a call is using a spoofed Caller ID number and assist call analytics companies in implementing call blocking and call labeling products. If widely implemented and made available to consumers, the STIR/SHAKEN protocol should minimize unwanted calls. Certain industry members have begun to roll out this technology and it is in beta testing mode. I understand Chairman Pai recently called on the Nation's largest carriers to provide details about their caller ID authentication plans for 2019. I support this industry initiative.

Question 9. Would you please describe the FTC's coordination efforts with state, federal, and international partners to combat illegal robocalls?

Answer. The FTC frequently coordinates its efforts with its state, federal, and international partners. The FTC often brings robocall enforcement actions with states as co-plaintiffs. For example, in the FTC's case against Dish Network, litigated for the FTC by the Department of Justice, the FTC brought the case jointly with California, Illinois, North Carolina, and Ohio. Collectively, the states and the FTC obtained a historic $280 million trial verdict.[40]

The FTC also coordinates outreach and education with the FCC. In 2018, the agencies co-hosted two robocall events—a policy forum that discussed technological

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[38] Available at *https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf.*

[39] *See* "Details About the FTC's Robocall Initiatives" at *https://www.consumer.ftc.gov/features/feature-0025-robocalls.*

[40] Press Release, FTC and DOJ Case Results in Historic Decision Awarding $280 Million in Civil Penalties Against Dish Network and Strong Injunctive Relief for Do Not Call Violations (June 6, 2017), *https://www.ftc.gov/news-events/press-releases/2017/06/ftc-doj-case-results-historic-decision-awarding-280-million-civil. The case is on appeal before the Seventh Circuit Court of Appeals.*

and law enforcement solutions to the robocall problem [41] and a public expo that allowed companies offering call blocking and call labeling services to showcase their products for the public.[42] Additionally, the FTC and FCC hold quarterly calls, speak regularly on an informal basis, and coordinate on a monthly basis with our state partners through the National Association of Attorneys General. The FTC also engages with international partners through participation in international law enforcement groups such as the *International Consumer Protection Enforcement Network,* International Mass Marketing Fraud Working Group, and the *Unsolicited Communications Network (formerly known as the London Action Plan).*

Question 10. Your testimony described the limitations of the FTC's current data security enforcement authority provided by Section 5 of the *FTC Act* including: lacking civil penalty authority, lacking authority over non-profits and common carrier activity, and missing broad APA rulemaking authority. Please describe each of these limitations and how adjusted FTC authority to address these items would improve the protection of consumers from data security risks.

Answer. Under current law, the FTC cannot obtained civil penalties for first-time security violations. I believe this under-deters problematic data security practices. If Congress were to give us the authority to seek civil penalties for first-time violators (subject to statutory limitations on the imposition of civil penalties, such as ability to pay and stay in business), better deterrence would be achieved. As to APA rulemaking authority, though we are not seeking general APA rulemaking authority for a broad statute like Section 5, were Congress to enact specific data security legislation, it is important for the FTC to have APA rulemaking authority. Such authority will ensure that the FTC can enact rules and amend them as necessary to keep up with technological developments. For example, in 2013, the FTC was able to use its APA rulemaking authority to amend its Rule under the Children's Online Privacy Protection Act to address new business models, including social media and collection of geolocation information, that were not in place when the initial 2000 Rule was promulgated. As to nonprofits and common carriers, news reports are filled with breaches affecting these sectors (*e.g.,* the education sector) and the FTC does not currently have jurisdiction over them. Giving the FTC jurisdiction over these entities for purposes of enforcing data security laws will create a level playing field and ensure that these entities are subject to the same rules as other entities that collect similar types of data.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. AMY KLOBUCHAR TO HON. CHRISTINE S. WILSON

Question 1. Net neutrality is the bedrock of a fair, fast, open, and global internet. Now that the FCC has eliminated critical net neutrality protections that prevent Internet service providers from blocking, slowing, and prioritizing web traffic, it is clear that the FTC now has primary authority in preventing Internet abuses.

a. Can you please describe the Commission's activity in policing the internet?

b. Does the FTC have the resources and expertise to effectively fulfill its mission in this area?

Answer. The consumer protection and competition issues raised by the growth of the Internet and all of its subsidiary technologies are not new to the FTC, which is well equipped to analyze potential conduct and business arrangements that may impact consumers and competition. The FTC's complementary competition and consumer protection tools are capable of protecting consumers and competition online.

The FTC has significant expertise in understanding competition in broadband markets.[1] From an antitrust perspective, the ultimate issue is whether broadband

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[41] Press Release, FTC and FCC to Host Joint Policy Forum and Consumer Expo to Fight the Scourge of Illegal Robocalls (Mar. 22, 2018), *https://www.ftc.gov/news-events/press-releases/2018/03/ftc-fcc-host-joint-policy-forum-illegal-robocalls.*

[42] Press Release, FTC and FCC to Co-Host Expo on April 23 Featuring Technologies to Block Illegal Robocalls (Apr. 19, 2018), *https://www.ftc.gov/news-events/press-releases/2018/04/ftc-fcc-co-host-expo-april-23-featuring-technologies-block-0.*

[1] *See generally Comment of the Staff of the Bureau of Consumer Protection, Bureau of Competition, and Bureau of Economics of the Fed. Trade Comm'n,* WC Docket No. 17–108 (filed July 17, 2017), *https://www.ftc.gov/system/files/documents/advocacy_documents/comment-staff-bureau-consumer-protection-bureau-competition-bureau-economics-federal-trade/ftc_staff_comment_to_fcc_wc_docket_no17-108_7-17-17.pdf;* Fed. Trade Comm'n, Broadband Connectivity Competition Policy (2007), *https://www.ftc.gov/reports/broadband-connectivity-competition-policy-staff-report.*

Internet access providers engage in unilateral or joint conduct that is likely to harm competition in a relevant market.

The FTC has reviewed a number of mergers in the Broadband Internet Access Service ("BIAS") and Internet markets, and has required remedies where necessary to preserve competition. For example, in 2014, Nielsen Holdings N.V. agreed to divest and license assets and intellectual property to address the FTC's concerns that its acquisition of Arbitron Inc. might substantially lessen competition.[2] In 2000, the Commission reviewed the merger of America Online, Inc. ("AOL") and Time Warner and issued an order that resolved antitrust concerns by imposing a number of conditions to prevent the integrated firm from denying access to or discriminating against unaffiliated Internet Service Providers ("ISPs").[3] In 2006, the FTC scrutinized a transaction among firms that provided multichannel video programming distribution, closing its investigation after determining that the evidence did not suggest the proposed acquisition was likely to substantially lessen competition in any geographic region in the United States.[4]

Likewise, the FTC's consumer protection tools are well suited to ensure that companies keep their promises to consumers about their broadband service. The FTC can take action against Section 5 violations by BIAS providers, also known as ISPs, for non-common carrier activities including deceptive advertising of services or prices, privacy violations, or unfair billing methods. The FTC recently has brought a number of throttling cases. In 2015, the FTC settled charges that TracFone, a large prepaid wireless provider, failed to disclose that it throttled the speeds of consumers on "unlimited" data plans. The company paid $40 million in consumer refunds.[5] The FTC is currently litigating against AT&T Mobility over allegations that the company unfairly throttled the speeds of consumers on plans advertised as "unlimited."[6]

The FTC has the expertise to effectively fulfill its mission in this area. The FTC also has the requisite resources. If Congress were to entrust us with additional resources, I am confident that we could deploy those resources in efficient and effective manners.

Question 2. The Federal Trade Commission's budget has remained flat for the past several years despite increasing demands on your agency's resources, including a significant rise in merger filings.

a. If additional resources were made available to the Federal Trade Commission, how would you deploy those resources to advance the agency's consumer protection and competition missions?

Answer. To effectively and efficiently perform our antitrust and consumer protection missions, the FTC must receive sufficient funding to attract and retain competent staff, conduct investigations, engage in our important research and development, and produce timely consumer education materials. If additional resources were made available to the FTC, I would prioritize three areas.

Health care expenditures as a percentage of GDP have been growing for several decades, and accounted for 17.9 percent of GDP in 2017. Given the importance of this sector to ordinary Americans, the FTC has long devoted significant attention to this arena. Both the FTC's Bureau of Competition and its Bureau of Consumer Protection have played a key role in promoting vibrant competition, ensuring accurate information about products and services, protecting consumers' sensitive medical information, and advising government entities on the likely impact of new regulations on entry and competition. The past decade has seen significant regulatory and technological changes that impact health care, as well as notable innovations in how health care is delivered to patients. The continuing growth of this sector, combined with significant concerns about health care costs, misuse of sensitive data, and burgeoning occupational licensing requirements, underscore the need for the FTC to maintain its focus on this industry. It is imperative for the FTC to continue increasing its understanding of how these developments affect patient choice and the quality of patient care, and how these changes should be incorporated into the Commission's advocacy and enforcement efforts.

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[2] *Nielsen Holdings N.V.,* No. C–4439 (F.T.C. Feb. 24, 2014), *https://www.ftc.gov/enforcement/cases-proceedings/131–0058/nielsen-holdings-nv-arbitron-inc-matter.*

[3] *Am. Online, Inc.,* No. C–3989 (F.T.C. Apr. 17, 2001), *https://www.ftc.gov/enforcement/cases-proceedings/0010105/america-online-inc-time-warner-inc.*

[4] *Comcast Corporation,* No. 051–0151 (F.T.C. Jan. 31, 2006) *https://www.ftc.gov/public-statements/2013/07/acquisition-comcast-corporation-and-time-warner-cable-inc-cable-assets.*

[5] *FTC v. TracFone Wireless, Inc.,* No. 15-cv-00392–EMC (N.D. Cal. Feb. 20, 2015), *https://www.ftc.gov/enforcement/cases-proceedings/132-3176/straight-talk-wireless-tracfone-wireless-inc.*

[6] *FTC v. AT&T Mobility LLC,* 87 F. Supp. 3d 1087 (N.D. Cal. 2015) (No. C–14–4785 EMC) (complaint).

Trade across borders and the rapid proliferation of competition and consumer protection regimes generate benefits for consumers and businesses, but also give rise to potential pitfalls. Consumers can easily fall prey to fraudsters who have never set foot on U.S. soil, and foreign cartels can raise the prices of goods imported into the United States. American businesses can face exclusionary conduct from foreign competitors that limits access to markets overseas, and foreign governments can apply their competition laws in ways that disproportionately disadvantage U.S. companies. The FTC, together with the DOJ Antitrust Division, has long played a role in coordinating with and providing technical assistance to competition and consumer protection agencies in other jurisdictions. But challenges remain, and now more than ever the FTC and the DOJ Antitrust Division must assume a global leadership role in advancing sensible antitrust and consumer protection policies that promote competition, protect consumers, and move away from the use of competition and consumer protection regimes to favor national champions and advance industrial policy goals.

Advances in technology create many benefits for consumers but present enforcement complexities for the FTC. Some of the most controversial public policy issues—*e.g.,* the intersection of intellectual property and antitrust, data security and privacy—are rooted in continuing technological advances. An informed understanding of how technologies work and how their use affects consumers is therefore necessary to the sensible and economically grounded exercise of the FTC's authority. The FTC historically has taken advantage of its unique R&D capabilities—including 6(b) studies, hearings, and workshops to stay abreast of technological developments that may implicate new enforcement priorities and challenges, to fashion sound enforcement policies, and to make policy recommendations to Congress, as well as to Federal and state agencies. In fact, the FTC recently announced the creation of a task force, within the Bureau of Competition, to investigate competition in U.S. technology markets and take enforcement action when warranted. In light of this new initiative, the FTC is well positioned to be a thought leader on the complex issues that arise in this arena, and should continue taking full advantage of that capability.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. TOM UDALL TO HON. CHRISTINE S. WILSON

Privacy

Question 1. Do you support strong civil penalties for consumer privacy violations?

Answer. Yes. Under the FTC's current authority, we cannot seek civil penalties for initial privacy violations of Section 5 of the FTC Act. I believe we need the ability to seek civil penalties for initial violations in order to more effectively deter unlawful conduct. These penalties would of course be subject to the statutory limitations in Section 5(n) of the FTC Act, including ability to pay, degree of culpability and ability to continue to do business.

Question 2. The California Consumer Protection Act goes into effect in January 2020. As Congress considers pre-emption of that state law, what additional authority should we give the FTC to ensure that consumer privacy adequately is protected?

Answer. I support the enactment of Federal privacy legislation that would be enforced by the FTC and contain at least three components. First, as I noted above, it should give the Commission the ability to seek civil penalties for initial privacy violations. Second, it should give the Commission the ability to conduct APA rulemaking in order to make sure any legislation keeps up with technological developments. Third, it should give the Commission jurisdiction over nonprofits and common carriers. Beyond these general parameters, I note that the process of enacting Federal privacy legislation will involve difficult tradeoffs that are appropriately left to Congress. I also believe that the promulgation of Federal privacy legislation should be undertaken in conjunction with national data breach notification and data security legislation. No matter the specific privacy or data security laws Congress enacts, the Commission commits to using its extensive expertise and experience to enforce them vigorously and enthusiastically.

Question 3. A recent *New York Times* analysis found that both the Apple App Store and the Google Play Store have apps in their respective children's or family

sections that potentially violate COPPA.[7] What specific role should platform owners play to ensure COPPA compliance on their platforms?

Answer. In 2012, the Commission revised the COPPA Rule to cover not just websites, app developers, and other online services but also third parties collecting personal information from users of those sites or services. At that time, the Commission made clear that it did not intend to make platforms responsible merely for offering consumers access to someone else's child-directed content. Rather, they would be liable under COPPA only if they had actual knowledge that they were collecting personal information from a child-directed app. At the same time, platforms are in a unique position to set and enforce rules for apps that seek placement in the platform's store and to drive good practices. We encourage platforms to pursue best practices in this regard, beyond those required by COPPA. For example, platforms can serve an important educational function for apps that may not understand the requirements of COPPA.

Question 4. Compliance for mobile apps may be hard to achieve against fly-by-night operators overseas who do not care if their apps violate U.S. law. How can the Vtech Electronics investigation and civil penalty serve as an example for how the FTC can hold foreign app developers responsible for violating COPPA?

Answer. The Commission benefits significantly from the expertise of its Office of International Affairs in cases involving foreign companies or individuals. In addition to the VTech case you mention, the Commission has taken action in a number of privacy- or security-related cases against companies that have a foreign presence (*see, e.g.,* TrendNet, inMobi, ASUS, and HTC).[8] In some of these cases, for example, a foreign entity manufactured the devices at issue. In each of these cases, the FTC obtained successful relief for consumers in the United States, including substantial civil penalties in the VTech and inMobi settlements. More recently, the FTC took action against BLU, a U.S.-based phone manufacturer that was allowing its Chinese service provider to access text messages and other private information, contrary to its representations to consumers.[9] The Commission has also used other means to address illegal conduct affecting U.S. consumers. For example, a few years ago Commission staff sent a warning letter to a Chinese company, Baby Bus, about COPPA violations relating to the collection of children's personal information through its apps. The Commission copied the app platforms on this communication. The company quickly responded and addressed the concerns.

Question 5. The COPPA safe harbor organizations must submit an annual report to the Federal Trade Commission, can you share the reports from the last 5 years?

Answer. The FTC-approved safe harbor organizations do submit annual reports to the FTC each year. However, organizations claim confidentiality with respect to the information in their annual reports.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. RICHARD BLUMENTHAL TO HON. CHRISTINE S. WILSON

Question 1. Do you support providing state AGs with the power to enforce Federal privacy protections and would you commit to working with state AGs?

Answer. Yes. The Attorneys General are important partners in protecting consumers, and I believe the model of giving state Attorneys General the power to enforce Federal privacy protections ensures that there are multiple enforcers investigating potential law violations.

Question 2. Why is it important that the FTC have rulemaking authority when it comes to privacy? Where best would rulemaking be applied?

Answer. The process of enacting Federal privacy legislation will involve difficult tradeoffs that are appropriately left to Congress. APA rulemaking authority within those parameters is important, because it will enable the FTC to keep up with technology developments. For example, Congress gave the FTC APA rulemaking author-

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[7] Valentino-DeVries, J., Singer, N., Krolick, A., Keller, M. H., *How Game Apps That Captivate Kids Have Been Collecting Their Data,* N.Y. TIMES, Sept. 12, 2018, *https://www.nytimes.com/interactive/2018/09/12/technology/kids-apps-data-privacy-google-twitter.html.*

[8] *In re: TRENDnet, Inc.,* No. C–4426 (Jan. 16, 2014), *https://www.ftc.gov/enforcement/cases-proceedings/122-3090/trendnet-inc-matter; United States v. InMobi Pte Ltd.,* No. 3:16-cv-3474 (N.D. Cal. June 22, 2016), *https://www.ftc.gov/enforcement/cases-proceedings/152-3203/inmobi-pte-ltd; In re ASUSTeK Computer Inc.,* No. C–4587 (July 18, 2016), *https://www.ftc.gov/enforcement/cases-proceedings/142-3156/asustek-computer-inc-matter; In re HTC America Inc.,* No. C–4406 (July 25, 2013), *https://www.ftc.gov/enforcement/cases-proceedings/122-3049/htc-america-inc-matter.*

[9] *In re BLU Prods. and Samuel Ohev-Zion,* No. C–4657 (Sept. 6, 2018), *https://www.ftc.gov/enforcement/cases-proceedings/172-3025/blu-products-samuel-ohev-zion-matter.*

ity to implement the Children's Online Privacy Protection Act. In 2013, the FTC was able to use this authority to amend a Rule it had initially promulgated in 2000, in order to address new business models, technologies such as smart phones, and social media and collection of geolocation information. I believe providing the FTC with APA rulemaking in targeted areas, as Congress did with the Children's Online Privacy Protection Act, would be most effective.

Question 3. Do you believe elevating the Office of Technology Research and Investigation to the Bureau level would meaningfully help the FTC in addressing new technological developments across its mandates?

Answer. At this time, I do not believe that elevating the Office of Technology Research and Investigation to the Bureau level would meaningfully help the FTC. However, I share your concerns and am actively thinking about how best to integrate technologists into our agency and how most effectively to deploy our limited resources to address our needs in this area. The FTC recently announced the creation of a task force within the Bureau of Competition to investigate competition in U.S. technology markets and take enforcement action when warranted. The task force will collaborate closely with the Bureaus of Consumer Protection and Economics. Moreover, we are continuing to examine technology markets to ensure consumers benefit from robust competition. This effort includes evaluating the information developed at the Commission's *Hearings on Competition and Consumer Protection in the 21st Century.*

Question 4. What is the FTC doing to investigate and hold accountable individual board members and executives who knowingly assist their companies in committing fraud? What more should the FTC be doing in this regard?

Answer. The FTC always considers the potential liability of individual officers and others who participated in or controlled deceptive and unfair practices. In cases where the FTC finds evidence of wrongdoing that meets the applicable legal standard, and where naming the individual is appropriate to obtain full and complete relief for consumers and appropriate injunctive relief, we do so.

Question 5. Where the FTC consider using its Section 6(b) investigative power to help us understand how these algorithms and black-box A.I. systems work—the biases that shape them, and how those can affect trade, opportunity, and the market?

Answer. I agree that algorithms and artificial intelligence are important topics of study. The FTC has issued a report on the subject of the benefits and risks of big data that contains guidance for companies that use big data analytics.[10] In 2017, the FTC and Department of Justice submitted a joint paper on algorithms and collusion to the Organization for Economic Cooperation and Development ("OECD") as part of the OECD's broader look at the role of competition policy and the digital age.[11] More recently, we examined the competition and consumer protection implications of algorithms, artificial intelligence, and predictive analytics as part of the Commission's *Hearings on Competition and Consumer Protection in the 21st Century.*[12] The two-day hearing featured a distinguished group of technologists, scientists, public servants, academics, and industry leaders (as well as economists and lawyers), who gathered to educate us and the broader competition and consumer protection community about how these technologies work, how they are used in the marketplace, and their policy implications. The Commission also invited public commentary on this topic.

The FTC has a comparative advantage in policy research and development through the use of 6(b) studies, which allows the Commission to proceed in measured and thoughtful ways on complicated policy questions. I will continue to encourage the Commission to stay abreast of developments in these areas, including through the use of 6(b) studies, when appropriate.

Question 6. In your opinion, is a car with an open, unrepaired recall, a "safe" car? Why would the FTC allow unsafe cars to be advertised as "safe" and "repaired for safety," with or without a vague, contradictory and confusing disclaimer?

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[10] *See* FTC, *FTC Report—Big Data: A Tool for Inclusion or Exclusion? Understanding the Issues* (Jan. 2016), *https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf.*

[11] Note to the OECD by the United States on Algorithms and Collusion, DAF/COMP/WD(2017)41 (May 26, 2017), *https://www.ftc.gov/system/files/attachments/us-submissions-oecd-other-international-competition-fora/algorithms.pdf.*

[12] FTC, *Hearings on Competition and Consumer Protection in the 21st Century, https://www.ftc.gov/policy/hearings-competition-consumer-protection;* FTC Workshop, *FTC Hearing #7: Competition and Consumer Protection in the 21st Century* (Nov. 13–14, 2018), *https://www.ftc.gov/news-events/events-calendar/ftc-hearing-7-competition-consumer-protection-21st-century.*

Answer. I share your concerns regarding the safety issues raised by recalls in the used automobile marketplace. As you note, while Federal auto safety law requires that all new cars sold be free from recalls, it does not prohibit auto dealers from selling used cars with open recalls.

However, the FTC Act enables the Commission to stop auto dealers selling such cars from engaging in misleading advertising practices that mask the existence of open recalls. In an effort to stop such claims, in 2016 and 2017, the Commission brought actions against General Motors Company, CarMax, Inc., and four other large used car dealerships.[13] In these actions, the Commission alleged that these companies' advertising claims violated the FTC Act by touting the rigorousness of their used car inspections while failing to clearly disclose the existence of unrepaired safety recalls in some cars.

Our orders stop this deceptive conduct and provide important additional protections for consumers.

Question 7. Do you agree with the proposal that the FTC use its rulemaking authority to address non-compete clauses? I invite you to explain your reasoning regarding your stance.

Answer. I do not believe the Commission should use its rulemaking authority to address non-compete clauses. The Commission has long assessed the legality of business conduct on a case-by-case basis, rather than through blanket rulemaking, and we should continue to do so. So too have the courts, which have established the firm legal rule that a covenant not to compete does not violate the Sherman Act if it is ancillary to a significant lawful business purpose of the contract and is reasonably limited in scope to protect legitimate interests.[14] The inquiry into the reasonableness of the scope of the clauses typically considers the duration, territory, and type of product involved. To the extent that these factors are factual, the case-by-case approach of the common law is an appropriate way to develop the law regarding non-compete clauses. There is no reason to deviate from the common law tradition to establish Commission rules to assess non-compete clauses.

Question 8. Would you agree with me that Hart-Scott-Rodino premerger notifications help antitrust enforcers catch concerning mergers?

Answer. Yes, I agree that the premerger notification requirements of the Hart-Scott-Rodino Premerger Notification Act help antitrust enforcers identify anticompetitive mergers before they are consummated, preventing consumer harm. Once a merger is consummated and the firms' operations are integrated, it can be very difficult, if not impossible, to "unscramble the eggs" and restore the acquired firm to its former status as an independent competitor.

Question 9. What sort of anticompetitive effects might be raised by local mergers even when those mergers are too small to require Hart-Scott-Rodino premerger notification?

Answer. Anticompetitive mergers harm consumers through higher prices and by reducing quality, choices, and innovation, or by thwarting competitors' entry into a market.[15] The arena of competition affected by a merger may be geographically bounded (*e.g.,* confined to a small or local area) if geography limits some customers' willingness to or ability to substitute to some products, or some suppliers' willingness or ability to serve some customers.[16]

The FTC often examines local geographic markets when reviewing mergers in retail markets, such as supermarkets, pharmacies, retail gas or diesel fuel stations, or funeral homes, or in service markets, such as health care. For example, in a recent Federal court action to enjoin the proposed merger of two rival physician serv-

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[13] *See* Press Release, GM, Jim Koons Management, and Lithia Motors Inc. Settle FTC Actions Charging That Their Used Car Inspection Program Ads Failed to Adequately Disclose Unrepaired Safety Recalls, Jan. 28, 2016, *https://www.ftc.gov/news-events/press-releases/2016/01/gm-jim-koons-management-lithia-motors-inc-settle-ftc-actions;* Press Release, CarMax and Two Other Dealers Settle FTC Charges That They Touted Inspections While Failing to Disclose Some of the Cars Were Subject to Unrepaired Safety Recalls, Dec. 16, 2016, *https://www.ftc.gov/news-events/press-releases/2016/12/carmax-two-other-dealers-settle-ftc-charges-they-touted.*

[14] *See, e.g.,* Eichorn v. AT&T Corp., 248 F.3d 131, 145 (3d Cir. 2001).

[15] *U.S. Dep't of Justice & Fed. Trade Comm'n Horizontal Merger Guidelines* §1 (2010), *https://www.ftc.gov/public-statements/2010/08/horizontal-merger-guidelines-united-states-department-justice-federal* ("A merger enhances market power if it is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives.").

[16] *Id.* at §4.2. In antitrust analysis, a relevant market identifies a set of products or services and a geographic area of competition in which to analyze the potential effects of a proposed transaction. The purpose of market definition is to identify options available to consumers. *See id.* at §4 (describing market definition in antitrust analysis).

ices providers, the FTC and State of North Dakota defined the relevant geographic market as the Bismarck-Mandan, North Dakota, Metropolitan Statistical Area—a four-county area that includes the cities of Bismarck and Mandan and smaller communities within the surrounding 40 to 50 mile radius.[17] The types of anticompetitive effects that may occur in local markets are the same as those that may occur in larger geographic markets—higher prices, lower levels of service, reduced innovation, and fewer choices.

Question 10. What action would you recommend either the FTC or Congress take in order to assist Federal and state antitrust enforcers in catching local mergers that raise anticompetitive concerns?

Answer. I have no opinion as to whether Congress should take action, but note that identifying anticompetitive mergers remains one of the top priorities of the agency's competition mission. The vast majority of mergers the FTC investigates are reported and examined at the premerger stage. The FTC, however, also devotes significant attention to identifying unreported, often consummated, mergers that could harm consumers. Both for mergers that do not meet the premerger notification requirements and for conduct matters, the FTC uses the trade press and other news articles, consumer and competitor complaints, hearings, economic studies, and other means to identify harmful practices that threaten competition. The FTC also routinely works with states' Attorneys General in its enforcement efforts, and state Attorneys General routinely join the FTC as co-plaintiffs in the FTC's Federal court litigations, such as in the North Dakota physician services merger litigation discussed above.

Question 11. Do you believe that horizontal shareholding raises anticompetitive concerns?

Answer. The short answer is that I do not yet know enough to draw sound, reliable conclusions here. Very little empirical research has been done on this topic, and the few studies that have been completed are quite controversial. At present, this remains a very unsettled issue.[18]

There is little doubt that active investment (*i.e.,* investment that seeks to control a company, obtain board seats and the like) in competitors can create the kinds of competition problems that the antitrust laws are designed to address. The antitrust agencies have long policed improper relationships between corporate competitors, even when they fall short of a full combination or merger. For example, Section 8 of the Clayton Act effectively prohibits so-called "interlocking directorates" in which an officer or director of one firm serves as an officer or director of a competitor. But it is an open question whether the same kinds of problems created by active investments may also arise as the result of investments by institutional investors in competing companies.

The general theory is that cross-holdings by large institutional investors may blunt the competitive vitality of rival firms within that industry, and lead to higher prices and other effects. For example, if a company's shareholders have interests in a rival, that company may be less likely to engage in a price war or other forms of aggressive competition that could reduce its rival's profits because those profits are ultimately returned to the company's shareholders through their interests in the rival. Proponents of this theory note that the risk of upsetting common investors may make it easier for firms to maintain stable market conditions or potentially even increase prices over what might prevail without common ownership by large, institutional investors. Critics have cited methodological problems in the original research and various structural issues that would make it difficult or even impossible for institutional investors to play the disciplining role envisioned by this theory in the real world. Critics also point out that any remedy to address these concerns would likely increase the cost of retail investment and thereby cause harm to ordinary investors.

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[17] *FTC v. Sanford Health,* No. 1:17-cv-0133 (D.N.D. Dec. 13, 2017), *https://www.ftc.gov/enforcement/cases-proceedings/171-0019/sanford-health-ftc-state-north-dakota-v.* The U.S. District Court for the District of North Dakota granted the FTC and State of North Dakota's preliminary injunction motion on December 13, 2017. The parties have appealed and the case is now pending before the Eighth Circuit.

[18] *See* Note to the OECD by the United States on Common Ownership by Institutional Investors and Its Impact on Competition at ¶1, DAF/COMP/WD(2017)86 (Nov. 28, 2017), *https://www.ftc.gov/system/files/attachments/us-submissions-oecd-other-international-competition-fora/common_ownership_united_states.pdf* (explaining that "[g]iven the ongoing academic research and debate, and its early stage of development, the U.S. antitrust agencies are not prepared at this time to make any changes to their policies or practices with respect to common ownership by institutional investors.").

To date, there is no reliable consensus as to which side in this debate has the stronger argument, and the limited research suggests this question will remain unsettled until additional empirical work is completed in this area. Given the formative nature of the academic debate, I cannot definitively take a position on this issue. Additional study is required, which as I mention below, the Commission is currently helping to facilitate.

Question 12. Do you believe that our antitrust laws can be used to address the anticompetitive concerns raised by horizontal shareholding?

Answer. As noted above, I am still evaluating the viability of this concern. The use of the agency's enforcement powers in this area is therefore premature in my view.

That said, antitrust doctrine is flexible, allowing us to address even novel harms in the economy. The fact that the FTC has not litigated a case involving horizontal shareholding by a single institutional investor is not a bar to the Commission's launching a meritorious case, should it identify one. However, the Commission's ability to take future action in this area will be circumscribed by prior caselaw, due process considerations, and the need to demonstrate actual anticompetitive effects in the real world.

The Commission is unlikely to take enforcement action in this area until it has sufficient confidence that it can demonstrate to the courts both that the underlying theory of harm is robust, and that a specific set of passive investments has had actual anticompetitive effects in the real world. Should those conditions be satisfied, the Commission could take action under current law.

Question 13. What, if anything, are you doing to address any potential harms of horizontal shareholding?

Answer. In December 2018, the Commission held a full-day workshop that was largely devoted to exploring the merits of the common ownership issue in greater detail.[19] At the workshop, which was part of our *Hearings on Competition and Consumer Protection in the 21st Century,* respected academics and industry experts on both sides of this issue shared their expertise with both us and the public. The Commission also invited public commentary on this topic.

We are still accepting public comments on this issue. Once the comment period ends, we intend to carefully evaluate all of the public submissions and the workshop testimony with a view towards better refining our understanding of the merits of this concern. Workshops like the one we held also serve to bring together those of different views, allowing them to hear and respond to criticisms of their positions, which we have found to be useful in fostering future academic work in areas of continuing interest to the agency.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. CATHERINE CORTEZ MASTO TO HON. CHRISTINE S. WILSON

Pet Leasing

I appreciate the Commission's attention to my request with six of my colleagues for the FTC to investigate the practice of pet leasing that is leading some consumers into confusing or deceptive contractual obligations that cause them to have an issue with their beloved pet and negatively impact their financial status, such as credit scores, for far into the future. This is an issue that is a little under the radar but needs strong oversight and attention under your deceptive practices mandate if there are concerning financial practices being discovered.

Question. Can I get a further commitment from you all to keep my office informed of actions and determinations you all may make pertaining to this concerning issue and the Humane Society and Animal Legal Defense Fund's formal petition to the Commission?

Answer. The FTC is committed to protecting consumers from unfair or deceptive acts or practices, including any such practices carried out by merchants or third party leasing and financing companies. As the proud owner of four cats and three dogs, I am committed to the well-being of all pets and their humans. Pet owners are entitled to understand whether their payments are going towards a lease or a purchase. For these reasons, I commit to continuing to keep your office informed of public actions the Commission takes concerning pet leasing or the Humane Society and Animal Legal Defense Fund's petition to the Commission.

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[19] FTC Workshop, *FTC Hearing # 8: Competition and Consumer Protection in the 21st Century* (Dec. 6, 2018), *https://www.ftc.gov/news-events/events-calendar/ftc-hearing-8-competition-consumer-protection-21st-century.*

Data Minimization vs Big Data

A topic that has come up a lot during our discussions on privacy is data minimization. This is a concept that I have been considering on as I work on developing a comprehensive data privacy bill. As you're aware, this is the idea that businesses should only collect, process, and store the minimum amount of data that is necessary to carry out the purposes for which is was collected. There are obvious advantages to this as it minimizes the risk of data breaches and other privacy harms. At the same time, big data analytics are going to be crucial for the future and play an important role in smart cities, artificial intelligence, and other important technologies that fuel economic growth. I think it is important to find a balance between minimization and ensuring that data, especially de-identified data, is available for these applications.

Question. Can you describe how you view this balance and how we in Congress can ensure that people's data is not abused but can still be put to use in positive ways?

Answer. Your question neatly captures the dilemma. Businesses can apply "big data" analysis tools to gain insights from large data sets that help the business to innovate, for example, to improve an existing product. This analysis can provide new consumer benefits, such as the development of new features. On the other hand, consumers' data may be used for unexpected purposes in ways that are unwelcome.[20]

The FTC has issued a report on the benefits and risks of big data that contains guidance for companies that use big data analytics.[21] Last fall, the Commission also hosted a workshop on the intersections between big data, privacy and competition.[22] We are happy to work with your staff to develop legislation on how to balance the benefits and risks of big data.

General Privacy Recommendations

Question 1. While privacy was a significant topic of the oversight hearing, as we look to develop a bill, can you specifically lay out some of the top priorities you individually would like to see included and what do you think gets overlooked in the conversations policymakers have with allowing for future innovations and yet raising the bar for protecting consumers?

Answer. In its testimony, the Commission urged Congress to consider enacting privacy legislation that would be enforced by the FTC. The testimony recognized that, while the agency remains committed to vigorously enforcing existing privacy-related statutes, Congress may be able to craft Federal legislation that would more seamlessly address consumers' legitimate concerns regarding the collection, use, and sharing of their data and provide greater clarity to businesses while retaining the flexibility required to foster competition and innovation. Such legislation would also demonstrate our country's commitment to global leadership in the digital economy in light of the patchwork of emerging privacy standards both domestically and abroad. As far as top priorities for such legislation, first, Congress should give the Commission authority to deter violations by fining companies for initial violations, as it has for violations of other statutes. Second, Congress should ensure that all types of companies across the economy must protect consumers' privacy and security. As one example, the Commission has long urged the repeal of the FTC Act's provision that places limits on the agency's ability to go after law violations by common carriers and by non-profits. Third, Congress should consider giving the FTC targeted APA rulemaking authority so that the FTC can enact rules to keep up with technology developments. Excellent examples of this approach appear in statutes such as CAN–SPAM and COPPA.

Question 2. Can you also outline the optimal role you see for our state Attorneys General in this privacy enforcement process?

Answer. The Attorneys General are important partners in protecting consumers. For a number of statutes, such as COPPA, Congress enacted legislation that enables

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[20] *See, e.g.,* Press Release, FTC Charges Deceptive Privacy Practices in Google's Rollout of Its Buzz Social Network (Mar. 30, 2011), *https://www.ftc.gov/news-events/press-releases/2011/03/ftc-charges-deceptive-privacy-practices-googles-rollout-its-buzz)* (alleging that Google deceptively repurposed information it had obtained from users of its Gmail e-mail service to set up the Buzz social networking service, leading to public disclosure of users' e-mail contacts).

[21] *See* FTC, *FTC Report—Big Data: A Tool for Inclusion or Exclusion? Understanding the Issues* (Jan. 2016), *https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf.*

[22] *See* FTC Workshop, *FTC Hearing #6: Competition and Consumer Protection in the 21st Century* (Nov. 6–8, 2018), *https://www.ftc.gov/news-events/events-calendar/ftc-hearing-6-competition-consumer-protection-21st-century.*

Attorneys General to enforce the law in addition to the Commission. I applaud this model. A number of state Attorneys General have brought actions to enforce COPPA, for example, so there is not just one enforcer. And when state Attorneys General bring these actions, they are enforcing the same standard that other states and the Commission are enforcing, so the same protections apply consistently nationwide.

Privacy Risky Communities/Groups

Question 1. Do you think that certain communities or groups are any more or less vulnerable to privacy risks and harms?

Answer. Yes. Congress previously has recognized that certain communities or groups may be more or less vulnerable to privacy risks and harms when promulgating the Children's Online Privacy Protection Act, and certain provisions of Gramm-Leach Bliley and the Health Insurance Portability and Accountability Act. The Commission also has worked to address issues particularly affecting certain communities or groups through a number of means, including law enforcement as well as a series of seminars and other events around the country and through consumer education.[23]

Question 2. Should privacy law and regulations account for such unique or disparate harms, and if so, how?

Answer. Yes. I believe the approach Congress took with COPPA, GLB and HIPAA is instructive here. Existing laws like the Fair Credit Reporting Act and the Equal Credit Opportunity Act also provide important protections against unlawful discrimination. The Commission is happy to work with you to think through these issues as you craft legislation.

Immediate Civil Penalties Authority

Noting from your FTC testimony, "*Section 5 (of the FTC Act), however, is not without limitations. For example, Section 5 does not provide for civil penalties, reducing the Commission's deterrent capability.*"

Question. While I appreciate the long term successes of the FTC in many respects to investigate data security matters, what are your thoughts to whether there is enough of a deterrent effect with Section 5 authority when you can't immediately enforce against those who misuse data with civil penalties right from the start, rather than as the result of often times flagrant offenses to their already establish consent decrees?

Answer. In the data security area, I believe that Congress should enact legislation giving the FTC the authority to seek civil penalties against first-time violators, which we cannot currently do under the FTC Act. I support such legislation precisely because I believe that our existing legal regime does not provide sufficient deterrence.

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[23] *See, e.g.,* FTC, Website: *Common Ground Conferences and Roundtables Calendar, https://www.consumer.gov/content/common-ground-conferences-and-roundtables-calendar;* FTC, Web site: *Consumer Information—Fraud Affects Every Community, https://www.consumer.ftc.gov/features/every-community.*