

**OVERSIGHT OF  
THE FEDERAL TRADE COMMISSION**

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**HEARING**

BEFORE THE

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

**ONE HUNDRED SIXTEENTH CONGRESS**

**SECOND SESSION**

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**AUGUST 5, 2020**  
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SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED SIXTEENTH CONGRESS

SECOND SESSION

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# OVERSIGHT OF THE FEDERAL TRADE COMMISSION

WEDNESDAY, AUGUST 5, 2020

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

The Committee met, pursuant to notice, at 10 a.m., in room SR-254, Russell Senate Office Building, Hon. Roger Wicker, Chairman of the Committee, presiding.

Present: Senators Wicker [presiding], Thune, Blunt, Fischer, Moran, Sullivan, Blackburn, Moore, Lee, Young, Scott, Cantwell, Klobuchar, Blumenthal, Schatz, Udall, Peters, Baldwin, Tester, Sinema, and Rosen [presiding].

## OPENING STATEMENT OF HON. ROGER WICKER, U.S. SENATOR FROM MISSISSIPPI

The CHAIRMAN. Good morning. The meeting will come to order. And welcome to today's hearing on the oversight of the Federal Trade Commission, FTC. I extend a special welcome to our distinguished panel of witnesses and thank them for appearing. They will all appear remotely this morning, including FTC Chairman Joe Simons, Commissioner Noah Phillips, Commissioner Rohit Chopra, Commissioner Christine Wilson, and Commissioner Rebecca Slaughter.

The FTC is the Nation's primary consumer protection agency. Established in 1914 by the Federal Trade Commission Act, the FTC is chiefly responsible for protecting consumers from unfair, deceptive, or fraudulent business practices in the marketplace. This includes protecting consumers' privacy and the security of their data, preventing harmful uses of technology, and combatting deceptive advertising and illegal robocalls among other issues. The FTC is also responsible for educating consumers about fraudulent activity and predatory business practices. Consumer education is an essential part of the FTC's mission and it is intended to inform customer choices and help prevent Americans from falling victim to scammers, fraudsters, cybercriminals, and other bad actors.

As was recently discussed at Chairman Moran's subcommittee hearing on COVID-19 scams last month, the coronavirus has created a new avenue for scammers to take advantage of consumers. The surge in Internet usage, in particular, because of stay-at-home orders has been a prime target for exploitation. I appreciate the Commission's ongoing efforts to protect consumers from identity theft, e-mail phishing schemes, and other online dangers during this public health crisis. Today's hearing is an opportunity to dis-

cuss what more can be done to protect Americans from deceptive and unfair commercial practices. This work begins by ensuring the FTC has the proper authority and resources at its disposal to carry out its broad statutory mandate.

The FTC's authority under the U.S. SAFE WEB Act, for example, empowers the agency to work with foreign law enforcement agencies to combat international crimes. This law has provided critical cross-border enforcement tools to the FTC to take swift action against criminal activity, such as Internet pyramid schemes and data theft. The reauthorization of this Act was favorably reported out of this committee in March and soon we will have a finalized committee report.

Once this is completed, I urge Congress to reauthorize the U.S. SAFE WEB Act quickly before it expires next month. There have also been challenges to the scope of the FTC's authority under Section 13(b) of the FTC Act, which the Supreme Court plans to address in its next term. The Commission has long relied upon this section of the law to require scammers to give money back to those who have been defrauded. I look forward to examining how Congress can clarify the statute to empower the FTC not only to enjoin improper behavior, but also to compensate victims for their losses. The FTC's ability to protect the privacy and security of data is also essential. I hope we can all agree that the COVID-19 pandemic further underscores the need for strong, uniform national data privacy legislation. Such a law would provide all citizens with more transparency, choice, and control over their data. It would also provide certainty and clear, workable rules for businesses across all 50 states.

I hope the Commissioners will discuss the scope of their existing authority to protect the privacy and security of personal data and outline additional tools that are needed to safeguard information from misuse and unauthorized access. I am sure Commissioners will also want to discuss the potential impact of the recently invalidated EU, U.S. Privacy Shield Framework. The Privacy Shield provided a method for companies to transfer personal data back and forth between the United States and the European Union in compliance with EU data protection requirements and in support of transatlantic commerce.

The FTC has played a critical role in enforcing compliance with the Privacy Shield since it was established in 2016. Today's hearing is an opportunity to review how the FTC is working with the Department of Commerce to develop interim guidance for thousands of U.S. companies, including many small- and medium-sized businesses impacted by this recent decision. Finally, some policy-makers are proposing that the FTC take a more active role in overseeing unfair or deceptive commercial practices with respect to issues ranging from Section 230 of the Communications Decency Act to compensating collegiate athletes for the use of their name, image, or likeness.

I look forward to hearing more about the FTC's authority and expertise to address these matters, as well as whether it has sufficient tools to protect consumers engaging in these commercial activities. Clearly, with the FTC there is much to discuss. I thank the Commissioners again for their testimonies. And I now turn to my

friend and the Ranking Member for her opening remarks. Senator Cantwell.

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

Senator CANTWELL. Thank you, Mr. Chairman, and thank you for holding this important hearing today as we invite the Commissioners to come before Congress to talk about the impacts of this pandemic on our constituents, the amazing impact that it is having on our economy and on our health care system. My view of the FTC is simple, you should be doing everything in your power to help Americans during this time of crisis.

The mission is of extreme importance and our Nation continues to reel from one of the worst health emergencies and one of the biggest economic crises we have ever faced. And so, we have seen that the COVID-19 pandemic has attracted bad actors, and scam artists, including those who take advantage of people's fear and dire circumstances. I am sure every member of this committee has heard from their constituents on these issues about buying ineffective face masks or being subject to COVID-19 phishing attacks or seeing advertisements for miracle coronavirus cures. Thousands of people have reported sky high prices for goods and services from their family.

And just like the spread of COVID-19, these scams are happening in every part of the state. There was a recent story in the *Seattle Times* about sanitizer for \$150 for \$7 sanitizer. So, price gouging and the issues related to price gouging continue to pile up. So just like the spread of COVID-19, these virus scams are happening everywhere. They are impacting rural communities, urban communities, and hurting Americans young and old. Certainly that is the case in my state of Washington where according to the FTC, people have been scammed out of over \$2.5 million since the pandemic began, and more than 3,500 reports of fraud.

And while many of the Attorneys General have gone after these profiteers, I believe the FTC is holding back. You could be doing more. We must move beyond warnings and threats in response to these unconscionable scams. We must see the FTC exercising real enforcement with real consequences to protect consumers and families when they are most vulnerable. That is why I believe the FTC needs clear price gouging legislation to go after these scammers.

We must not allow unscrupulous merchants to exchange exorbitant prices sometimes for life saving supplies like personal protective equipment or medical equipment simply because their families are desperate. And trust me, on the frontlines of the epidemic in Kirkland, Washington was Evergreen Hospital. And I can tell you it is not a good thing to get calls from emergency room doctors who were saying they are getting price gouged on essential equipment when they were at the front lines of this pandemic.

So we need to make it clear that it is illegal to peddle defective masks or fake COVID cures and we need to empower our states' Attorneys General to go after these bad actors to buttress the argument and the FTC enforcement. So this is especially true, given our crisis today. So with many sales happening online, Internet sale platforms should also be working with the Federal and local law

enforcement to identify price gouging. So, Mr. Chairman, I plan to introduce in the coming days Federal legislation to do two things, to move both on price gouging definition to make sure the law is clear that consumers can be protected in this area, and to enforce civil penalties for deceptive COVID scams.

It is time for us to act on these important pieces of legislation. It is time for us to protect our consumers from these very important issues during the time of crisis. People need help and support. They don't need deception and schemes, and we need an FTC that will be more aggressive. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Cantwell. And we look forward to seeing that legislation once you get it drafted and introduced. We now turn to testimony—summaries of testimony from our witnesses. Written testimony has been submitted and will be admitted into the record in full at this point. And we ask each member of the Commission to summarize testimony in 5 minutes if possible. We begin with the Chair, the Honorable Joseph J. Simons, again, who joins us remotely along with all of the other members. Chairman Simons, you are recognized, sir.

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

Chairman SIMONS. Thank you so much, Chairman Wicker, Ranking Member Cantwell, and members of the Committee. It is an honor to be with you today even if it is virtual and especially alongside my fellow Commissioners. Despite the challenges presented by the pandemic, the FTC has remained active, open, and aggressive. We are using every tool in our arsenal on COVID-related initiatives while simultaneously handling our everyday efforts to protect consumers' privacy and data security, to stop fraud, and to ensure that advertising claims are truthful and not misleading, and to combat illegal robocalls. And what is truly extraordinary, the Commission staff has accomplished this while quickly transitioning from nearly 100 percent office space work to nearly 100 percent telework.

I want to take a moment to focus on one of my priorities, privacy and data security. Our enforcement in these areas, including cases against Facebook, Google and YouTube, and Equifax has been highly successful within the limits of our authority. But as I have said before, Section 5 is a 100 year old statute that is an imperfect tool for this purpose. We believe we need more authority, which is why I urge you to continue your hard work to enact privacy and data security legislation that would be enforced by the FTC. As policymakers, it is appropriate for you to make the difficult value based decisions underlying new privacy protections. From an enforcement perspective, I ask that the legislation give us three things, one, the ability to seek civil penalties, two, jurisdiction over nonprofits and common carriers as well as everybody else, and three, targeted APA rulemaking authority to ensure that the law keeps pace with changes in technology and the market.

This is similar to the approach Congress took under COPPA. We will continue to vigorously enforce existing privacy statutes and we will use our extensive experience and expertise to enforce aggressively any new privacy or data security laws that you pass. We also need your help to clarify our authority under 13(b) of the FTC Act



which is our principal means of getting money back for consumers. Using this authority as it has been interpreted for decades, the FTC has returned over \$10 billion to consumers in just the last 4 years. Recent court decisions, however, threaten this essential authority and this issue is now before the Supreme Court.

So, I strongly urge you to clarify the law on 13(b). I want to thank the Committee for advancing legislation to reauthorize SAFE WEB which is an indispensable tool in combating cross-border fraud. However, without further action, SAFE WEB will sunset on September 30. So I would really like your continued support in pushing this effort across the goal line and keeping SAFE WEB in our enforcement arsenal. Though I am asking for more help, please know how grateful I am for what you have already done on these issues. And I am very thankful for the financial support that Congress has given the FTC this year.

The \$20 million increase averted FTE reductions and instead allows us to hire more people for some of our most critical work. I also want to mention the recent EU ruling on Privacy Shield and that we are studying its effects. We stand ready to support the Administration's efforts in this area. But at the same time, we will continue to hold companies accountable for their privacy commitments including privacy promises made under the Privacy Shield. I will end by briefly highlighting our antitrust enforcement. We are on pace for the highest number of merger enforcement actions in 20 years since Fiscal Year 2000. We have brought four monopolization cases in the last two years.

Last year we formed the Technology Enforcement Division, what we call TED, which is currently pursuing a number of very significant investigations involving big tech platforms. And we have used our study authority to issue special orders to Alphabet, Amazon, Apple, Facebook, and Microsoft, requiring them to provide information about prior acquisitions not reported under the HSR Act.

We are committed to using every resource as effectively as we can to protect consumers and to promote competition, and we certainly look forward to continuing to work with you. And I would be happy to answer your questions. Thank you so much.

[The prepared statement of Chairman Simons follows:]

PREPARED STATEMENT OF HON. JOSEPH J. SIMONS<sup>1</sup>, CHAIRMAN,  
FEDERAL TRADE COMMISSION

Chairman Wicker, Ranking Member Cantwell, and Members of the Committee, I am Joe Simons, and I am the Chairman of the Federal Trade Commission ("FTC" or "Commission"). It is an honor to be with you today, especially alongside my fellow Commissioners.

Despite the challenges presented by the pandemic, the FTC has remained open, active, and aggressive. We have used every tool in our arsenal on COVID-related initiatives,<sup>2</sup> while simultaneously handling our everyday efforts to protect consumers' privacy and data security, stop fraud, ensure that advertising claims are truthful and not misleading, and combat illegal robocalls. And—what is truly extraordinary—Commission staff has accomplished this while quickly transitioning from nearly 100 percent office-based work to nearly 100 percent telework.

<sup>1</sup>These remarks reflect my own views. They do not necessarily reflect the views of the Commission or any other individual Commissioner.

<sup>2</sup>See generally [www.ftc.gov/coronavirus](http://www.ftc.gov/coronavirus).

I want to take a moment to focus on one of my top priorities: privacy and data security. Our enforcement in these areas—including cases against Facebook,<sup>3</sup> Google and YouTube,<sup>4</sup> and Equifax<sup>5</sup>—has been highly successful within the limits of our authority.<sup>6</sup> But, as I have said before, Section 5<sup>7</sup> is a 100-year-old statute that is an imperfect tool for this purpose. I believe we need more authority, which is why I urge you to continue your hard work to enact privacy and data security legislation that would be enforced by the FTC. As policymakers, it is appropriate for you to make the difficult value-based decisions underlying new privacy protections. From an enforcement perspective, I ask that the legislation give us: (1) the ability to seek civil penalties, (2) jurisdiction over non-profits and common carriers, and (3) targeted Administrative Procedure Act (“APA”) rulemaking authority to ensure the law keeps pace with changes in technology and the market. This is similar to the approach Congress took under the Children’s Online Privacy Protection Act (“COPPA”).<sup>8</sup> We will continue to vigorously enforce existing privacy statutes,<sup>9</sup> and we will use our extensive expertise and experience to enforce aggressively any new privacy or data security laws that you pass.

We also need your help to clarify our authority under Section 13(b) of the FTC Act,<sup>10</sup> which is our principal means of getting money back for consumers. Using this authority as it has been interpreted for decades, the FTC has returned over \$10 billion to consumers in just the last four years.<sup>11</sup> Recent court decisions, however, threaten this essential authority, and this issue is now before the Supreme Court.<sup>12</sup> I strongly urge you to clarify the law.

I want to thank the Committee for advancing legislation to reauthorize the U.S. SAFE WEB Act<sup>13</sup>—an indispensable tool in combatting cross-border fraud. However, without further Congressional action, SAFE WEB will sunset on September 30. I would like your continued support in pushing this effort across the goal line, and keeping SAFE WEB in our enforcement arsenal.

Though I am asking for more help, please know how grateful I am for what you already have done on these issues. I am also very thankful for the financial support Congress has given the FTC this year. The \$20 million increase averted full-time employee reductions, and instead allows us to hire more people for some of our most critical work.

I also want to mention the recent European Union (“EU”) ruling on the EU–U.S. Privacy Shield and note that we are studying its effects.<sup>14</sup> We stand ready to support the administration’s efforts in this area, but at the same time we will continue to hold companies accountable for their privacy commitments, including promises made under the Privacy Shield.

<sup>3</sup> FTC Press Release, *FTC Imposes \$5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook* (July 24, 2019), <https://www.ftc.gov/news-events/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions>. In April 2020, a court approved the record-breaking \$5 billion penalty the FTC negotiated with Facebook. FTC Press Release, *FTC Gives Final Approval to Modify FTC’s 2012 Privacy Order with Facebook with Provisions from 2019 Settlement* (Apr. 28, 2020), <https://www.ftc.gov/news-events/press-releases/2020/04/ftc-gives-final-approval-modify-ftcs-2012-privacy-order-facebook>.

<sup>4</sup> FTC Press Release, *Google and YouTube Will Pay Record \$170 Million for Alleged Violations of Children’s Privacy Law* (Sept. 4, 2019), <https://www.ftc.gov/news-events/press-releases/2019/09/google-youtube-will-pay-record-170-million-alleged-violations>.

<sup>5</sup> FTC Press Release, *Equifax to Pay \$575 Million as Part of Settlement with FTC, CFPB, and States Related to 2017 Data Breach* (July 22, 2019), <https://www.ftc.gov/news-events/press-releases/2019/07/equifax-pay-575-million-part-settlement-ftc-cfpb-states-related>.

<sup>6</sup> See, e.g., FTC Press Release, *FTC Releases 2019 Privacy and Data Security Update* (Feb. 25, 2020), <https://www.ftc.gov/news-events/press-releases/2020/02/ftc-releases-2019-privacy-data-security-update>.

<sup>7</sup> 15 U.S.C. § 45.

<sup>8</sup> 15 U.S.C. §§ 6501–6506.

<sup>9</sup> 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.

<sup>10</sup> 15 U.S.C. § 53(b).

<sup>11</sup> See [https://public.tableau.com/profile/federal.trade.commission#!/vizhome/Refunds\\_15797958402020/RefundsbyCase](https://public.tableau.com/profile/federal.trade.commission#!/vizhome/Refunds_15797958402020/RefundsbyCase).

<sup>12</sup> See *FTC v. Credit Bureau Center*, 937 F.3d 764 (7th Cir. 2020), *petition for cert. granted*, 2020 WL 3865251 (July 9, 2020) (No. 19–825); see also FTC Press Release, *Statement of FTC General Counsel Alden F. Abbott regarding Supreme Court Orders Granting Review of Two FTC Matters* (July 9, 2020), <https://www.ftc.gov/news-events/press-releases/2020/07/statement-ftc-general-counsel-abbott-regarding-supreme-court>.

<sup>13</sup> 15 U.S.C. §§ 41 *et seq.*

<sup>14</sup> See FTC Business Center, *Update on the Privacy Shield Framework* (July 21, 2020), <https://www.ftc.gov/tips-advice/business-center/privacy-and-security/privacy-shield>.

I will end by briefly highlighting our antitrust enforcement. We are on pace for the highest number of merger enforcement actions in 20 years (since FY 2000). We have brought four monopolization cases in the last two years.<sup>15</sup> Last year we formed the Technology Enforcement Division (“TED”),<sup>16</sup> which is currently pursuing a number of very significant investigations involving big tech platforms, and we have used our study authority to issue special orders to Alphabet, Amazon, Apple, Facebook, and Microsoft requiring them to provide information about prior acquisitions not reported under the HSR Act.<sup>17</sup>

We are committed to using every resource to effectively protect consumers and promote competition. We look forward to continuing to work with you, and I would be happy to answer your questions.

The CHAIRMAN. Thank you very much, Mr. Chairman. And now we turn to Commissioner Noah Phillips. You are recognized.

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

Commissioner PHILLIPS. Thank you, Mr. Chairman. Chairman Wicker, Ranking Member Cantwell, members of the Committee, thank you for the opportunity to appear before you. I am honored to be with you today and to testify alongside my fellow Commissioners about the important work that we do at the FTC. I also want to thank you for your flexibility on format. It is always good to be back at the Senate, even if that means virtually. There is a lot to cover and I look forward to our discussion. But I want to take a moment to highlight an important issue, which I know is a focus for many of you, data security. Hardly a week goes by without Americans learning about another major cyber-attack, breach, or vulnerability.

Accounts on a major social media platform were exploited 3 weeks ago. Last week, researchers reveal the vulnerability on devices running Windows and Linux operating system, which could impact billions of devices. Consumers get this. A 2018 Commerce Department study showed identity theft as the number one privacy and security issue concerning Americans. Considering the harms Americans have in mind when they think about privacy, data security legislation is one of the best things that we can all do for privacy. The endemic use of data in our economy is not going away and it supports not only the new ways—

The CHAIRMAN. OK. Commissioner, your video froze there for a moment so we want to make sure at that point we can iron out these technical difficulties and you can resume at that very point

<sup>15</sup> FTC Press Release, *FTC and NY Attorney General Charge Vyera Pharmaceuticals, Martin Shkreli, and Other Defendants with Anticompetitive Scheme to Protect a List-Price Increase of More Than 4,000 Percent for Life-Saving Drug Daraprim* (Jan. 27, 2020), <https://www.ftc.gov/news-events/press-releases/2020/01/ftc-ny-attorney-general-charge-vyera-pharmaceuticals-martin>; FTC Press Release, *FTC Challenges Illumina’s Proposed Acquisition of PacBio* (Dec. 17, 2019), <https://www.ftc.gov/news-events/press-releases/2019/12/ftc-challenges-illumina-proposed-acquisition-pacbio>; FTC Press Release, *Reckitt Benckiser Group plc to Pay \$50 Million to Consumers, Settling FTC Charges that the Company Illegally Maintained a Monopoly over the Opioid Addiction Treatment Suboxone* (July 11, 2019), <https://www.ftc.gov/news-events/press-releases/2019/07/reckitt-benckiser-group-plc-pay-50-million-consumers-settling-ftc>; FTC Press Release, *FTC Charges Surescripts with Illegal Monopolization of E-Prescription Markets* (Apr. 24, 2019), <https://www.ftc.gov/news-events/press-releases/2019/04/ftc-charges-surescripts-illegal-monopolization-e-prescription>.

<sup>16</sup> FTC Competition Matters Blog, *What’s in a Name? Ask the Technology Enforcement Division* (Oct. 16, 2019), <https://www.ftc.gov/news-events/blogs/competition-matters/2019/10/whats-name-ask-technology-enforcement-division>.

<sup>17</sup> FTC Press Release, *FTC to Examine Past Acquisitions by Large Technology Companies* (Feb. 11, 2020), <https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies>.

in the testimony. So we will just pause for a moment and rely on the advice of our technical experts.

Commissioner PHILLIPS. Can you hear me?

The CHAIRMAN. We can now hear you.

Commissioner PHILLIPS. Thank you. My apologies. I am having some connectivity issues.

The CHAIRMAN. OK, so if you could just back up a sentence or two there and we will hear you. We don't see you.

Commissioner PHILLIPS. My apologies.

The CHAIRMAN. OK. Good.

Commissioner PHILLIPS. While the vast majority of attacks are thwarted, in 2019 there were still over 1,400 reported data breaches in the U.S. exposing over 160 million records. The loss, corruption, and ransoming of these data can pose serious harm to businesses, including identity and IP theft, exposure of sensitive data, years of expensive litigation, and so on. And of course, inadequate data security is a profound National Security issue.

At the FTC, we investigate and bring actions against companies that fail to maintain reasonable data security or mislead consumers about it. Recent examples include our enforcement against DealerBuilt, an auto dealer management software provider Retina-X, a stalkerware app which also raised other profound privacy problems, and of course Equifax, the credit bureau we allege neglected to fix an Apache Struts vulnerability, resulting in a theft of records of over 145 million Americans.

We are also imposing new requirements for defendants and data security orders like certifications of compliance by senior officials and a better third-party assessor process. Statutes like COPPA and Gramm-Leach-Bliley give us data security authority in areas of heightened sensitivity, like kids and financial services, but the regime today has gaps including in areas of particular vulnerability. Consider the Internet of Things. The proliferation of connected devices is good for consumers and the economy but it creates risks. The manufacturer of a \$15 device may not have adequate incentives to secure it. We grappled with this issue in a 2017 suit against the Wi-Fi router company D-Link, and again just a few months ago in our settlement with Taplock, a maker of smart locks.

The Department of Homeland Security's Cybersecurity and Infrastructure Security Agency, CISA, which builds up cybersecurity defenses in partnership with public and private entities is also active on IoT. We regularly consult with CISA and refer to them as a resource in our consumer and business education. We also view use of CISA's tools, such as those that help businesses identify risks, favorably in our data security investigations. I think we ought to go further, and consider carrots and sticks to encourage participation with CISA through mechanisms like integrating their work into our orders. Today, though, I want to stress the importance of the Commission's call for data security legislation.

We need to be flexible to deal with rapid technological development, and mindful of the fact that defendants in data security cases are often themselves victims of felonies. But a specific Congressional mandate and additional incentives to protect data are critical.

As a report issued just days ago about many large public companies still failing to patch known vulnerabilities showed, those who could most efficiently address data security problems often fail to do so. Data privacy is something on which many of you have been working hard and it is an important part of our mission and priority. Data security legislation is one of the best things I think we can do——

The CHAIRMAN. OK, just so you will know, on that sentence about data privacy, that is when your video froze up, Mr. Commissioner. So perhaps we can iron that out. Well, let's see. Can you hear us now, sir?

Commissioner CHOPRA. Commissioner Phillips, I believe the Chairman is addressing you.

Commissioner PHILLIPS. Forgive me, Mr. Chairman, I did not hear the question. Can you repeat it, please?

The CHAIRMAN. Commissioner Phillips, you were in the middle of a sentence about data privacy and your screen froze up again. So if you could restart there at about the minute 2040 mark——

Commissioner PHILLIPS.—Mr. Chairman. I believe that data security legislation is one of the most important things we can do for privacy.

The CHAIRMAN. Very good. If you will just complete your statement then, we will appreciate it.

Commissioner PHILLIPS. Yes, thank you. And of course, I will submit a copy for the record.

[The prepared statement of Commissioner Phillips follows:]

PREPARED STATEMENT OF HON. NOAH JOSHUA PHILLIPS<sup>1</sup>, COMMISSIONER,  
FEDERAL TRADE COMMISSION

Chairman Wicker, Ranking Member Cantwell, Members of the Committee, thank you for the opportunity to appear before you. I'm honored to testify with my fellow Commissioners about the important work we do at the FTC. I also want to thank you for your flexibility on format. It is always good to be back at the Senate, even if that means virtually.

There is a lot to cover, and I look forward to our discussion; but I want to take a moment to highlight an important issue, which I know is a focus for many of you: data security.

Hardly a week goes by without Americans learning about another major cyberattack, breach, or vulnerability. Accounts on a major social media platform were exploited three weeks ago.<sup>2</sup> Last week, researchers revealed a vulnerability on devices running Windows and Linux operating systems, which could impact *billions* of devices.<sup>3</sup> Consumers get this: a 2018 Commerce Department study showed identity theft as the number one privacy and security issue concerning Americans.<sup>4</sup> Considering the harms Americans have in mind when they think about privacy, data security legislation is one of best things we can do for privacy.

<sup>1</sup>This written statement, my oral testimony, and my responses to questions reflect my views and do not necessarily reflect the views of the Commission or any individual Commissioner.

<sup>2</sup>Eurim Choi and Robert McMillan, *Widespread Twitter Hack Reaches Bill Gates, Kanye West, Elon Musk, Joe Biden, and Barack Obama*, THE WALL STREET JOURNAL (July 15, 2020), <https://www.wsj.com/articles/twitter-accounts-of-bill-gates-jeff-bezos-elon-musk-appear-to-have-been-hacked-11594849077>.

<sup>3</sup>Tim Starks, *Billions of Windows, Linux devices at risk from vulnerability that could give hackers "near total control," researchers say*, POLITICO (July 29, 2020), <https://subscriber.politicopro.com/article/2020/07/billions-of-windows-linux-devices-at-risk-from-vulnerability-that-could-give-hackers-near-total-control-researchers-say-3982874>.

<sup>4</sup>Rafi Goldberg, *Most Americans Continue to Have Privacy and Security Concerns, NTIA Survey Finds*, NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION (Aug. 20, 2018), <https://www.ntia.doc.gov/blog/2018/most-americans-continue-have-privacy-and-security-concerns-ntia-survey-finds>.

The endemic use of data in our economy is not going away, and it supports not only the new ways that we all are working, worshipping, learning, and shopping, but countless jobs. Americans are putting an increasing amount of data online, a lot of which is sensitive. My view is that attempts broadly to roll back these trends are unlikely to succeed, and also would hurt consumers and the economy; so we need to focus on how to enjoy the fruits of progress while protecting Americans' data.

The data we put online are targets for criminals and hostile states. While the vast majority of attacks are thwarted, in 2019 there were still over 1,400 reported data breaches in the U.S., exposing over 160 million records.<sup>5</sup> The loss, corruption, and ransoming of these data can pose serious harm to people and businesses, including identity and intellectual property (IP) theft, exposure of sensitive data, years of expensive litigation, and so on. And, of course, inadequate data security is a profound national security issue.

At the FTC, we investigate and bring actions against companies that fail to maintain reasonable data security, or mislead consumers about it. Recent examples include our enforcements against DealerBuilt, an auto dealer software provider<sup>6</sup>; Retina-X, a stalkerware app (which also raised other privacy problems)<sup>7</sup>; and Equifax, the credit bureau we allege neglected to fix an Apache Struts vulnerability, resulting in the theft of records of over 145 million Americans.<sup>8</sup> We're also imposing new requirements for defendants in data security orders, like certifications of compliance by senior officials and a better third-party assessor process.<sup>9</sup>

Statutes like COPPA<sup>10</sup> and Gramm-Leach-Bliley<sup>11</sup> give us data security authority in areas of heightened sensitivity, like kids' data and financial services; but the regime today has gaps, including in areas of particular vulnerability. Consider the Internet of Things. The proliferation of connected devices is good for consumers and the economy, but it creates risks—the manufacturer of a \$15 device may not have an adequate incentive to secure it. We grappled with this issue in our 2017 suit against the Wi-Fi router company D-Link<sup>12</sup>, and again just a few months ago in our settlement with Tapplock, a maker of smart locks.<sup>13</sup>

The Department of Homeland Security's Cybersecurity and Infrastructure Security Agency (CISA), which builds up cybersecurity defenses in partnership with public and private entities, is also active on IOT. We regularly consult with CISA, and refer to them as a resource in our consumer and business education.<sup>14</sup> We also view use of CISA's tools, such as those that help businesses identify risks, favorably in our data security investigations. I think we ought to go further, and consider carrots and sticks to encourage participation with CISA through mechanisms like integrating their work into our orders.

Today, though, I want to stress the importance of the Commission's call for data security legislation. We need to be flexible to deal with rapid technological development, and mindful of the fact that defendants in data security cases are often themselves victims of felonies. But a specific congressional mandate and additional incentives to protect data are critical. As a report issued just days ago about many large public companies still failing to patch known vulnerabilities showed,<sup>15</sup> those who could most efficiently address data security problems often fail to do so.

<sup>5</sup> 2019 End-of-Year Data Breach Report, IDENTITY THEFT RESOURCE CENTER (Jan. 28, 2020), <https://www.idtheftcenter.org/identity-theft-resource-centers-annual-end-of-year-data-breach-report-reveals-17-percent-increase-in-breaches-over-2018/>.

<sup>6</sup> *Lightyear Dealer Technologies, LLC, d/b/a DealerBuilt*, No. C-4687 (Sept. 6, 2019), <https://www.ftc.gov/enforcement/cases-proceedings/172-3051/lightyear-dealer-technologies-llc-matter-0> ("DealerBuilt").

<sup>7</sup> *Retina X Studios, LLC, and James N. Johns Jr.*, No. C-4711 (Mar. 27, 2020), <https://www.ftc.gov/enforcement/cases-proceedings/172-3118/retina-x-studios-llc-matter>.

<sup>8</sup> *FTC v. Equifax Inc.*, No. 1:19-cv-03297-TWT (N.D. Ga. July 23, 2019), <https://www.ftc.gov/enforcement/cases-proceedings/172-3203/equifax-inc>.

<sup>9</sup> See, e.g., Statement of the Federal Trade Commission, *Regarding Unizix, Inc. d/b/a iDressup.com, and Zhijun Liu and Xichen Zhang individually & James V. Grago Jr., d/b/a ClixSense.com* (Apr. 24, 2019), [https://www.ftc.gov/system/files/documents/cases/2019-03-19\\_idressupclixsense\\_statement\\_final.pdf](https://www.ftc.gov/system/files/documents/cases/2019-03-19_idressupclixsense_statement_final.pdf); DealerBuilt.

<sup>10</sup> 15 U.S.C. §§ 6501–6506.

<sup>11</sup> Pub. L. No. 106–102, 113 Stat. 1338 (1999) (codified as amended in scattered sections of 12 and 15 U.S.C.).

<sup>12</sup> *FTC v. D-Link Systems, Inc.*, No. 3:17-CV-39-JD (N. D. Cal. July 2, 2019), <https://www.ftc.gov/enforcement/cases-proceedings/132-3157/d-link>.

<sup>13</sup> *Tapplock, Inc.*, No. C-4718 (May 20, 2020), <https://www.ftc.gov/enforcement/cases-proceedings/192-3011/tapplock-inc-matter>.

<sup>14</sup> Lisa Weintraub Schifferle, *Free vulnerability scanning for your business*, FEDERAL TRADE COMMISSION (Dec. 4, 2019), <https://www.ftc.gov/news-events/blogs/business-blog/2019/12/free-vulnerability-scanning-your-business>.

<sup>15</sup> National/Industry/Cloud Exposure Report (NICER) 2020, RAPID7 (July 2020), <https://www.rapid7.com/research/report/nicer-2020/>.

Data privacy is something on which many of you have been working hard; and it's an important part of our mission and a priority. Data security legislation is one of the best things we can do to advance the goal of privacy.

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

The CHAIRMAN. Alright. Do you have do you have more of your written statement that you would like to—of your verbal statement that you would like to complete? I tell you, why don't we just go ahead then to the next witness because we have these difficulties. We thank you, Commissioner Phillips. And now we turn to Commissioner Chopra.

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

Commissioner CHOPRA. Thank you, Chairman Wicker, Ranking Member Cantwell, and members of the Committee for this opportunity to appear before you today with my colleagues. The Federal Trade Commission's responsibilities are wide and far reaching with so many that directly relate to the crisis we face, healthcare and pharmaceuticals, disinformation and fake reviews, abuse and misuse of data, and so much more. But there is one area in particular that the FTC can and should prioritize that I want to emphasize today, which is protecting America's small businesses.

According to a survey by the Society of Human Resource Management, 52 percent of small businesses believe that they are likely to fail due to the effects of COVID-19. And if this comes true, millions of businesses and many more millions who work for them could lose their livelihoods, devastating local economies in the process. The FTC has an important role to play to protect small businesses from abusive practices. First, we must crack down on small business loan sharking. Many small businesses are struggling to access credit, including through the Paycheck Protection Program, and this is giving an opening to bad actors that target restaurants, stores, and other local businesses with predatory loans.

Many of these Wall Street affiliated lenders provide funds to businesses in exchange for future credit card receipts, but the terms often set those small businesses up to fail. In these contracts, small businesses must agree to confessions of judgment where borrowers automatically plead guilty if the lender sues them for payment. These clauses are illegal in consumer contracts, but are being unfairly weaponized against America's small business owners.

The FTC is the only Federal agency with authority to crack down on these non-bank small business lending practices. And we have taken some important actions and we must look to systemically eliminate these illegal practices before it is too late. Second, the FTC must safeguard operators of franchised businesses from abusive practices by franchisors. Franchised businesses encompass a broad swath of businesses across the economy, from auto repair to real estate to fitness centers to fast food and so much more. Operators of franchised businesses employ millions of Americans and they are also more likely to be minority-owned compared to other small businesses.

However, there are signs that franchisors may be using the pandemic to impose new policies that are exacting more economic pain

on franchise operators. For example, Subway and 7-Eleven franchisees are fighting back against attempts by franchisors to gain more control and implement practices that ship more cost and risk to local business owners. The FTC administers the franchise rule and enforces laws that prohibit unfair business practices by franchisors. This responsibility is critical given the threats faced by so many operators of franchised businesses today.

And finally, the FTC will need to police markets for anti-competitive mergers that scoop up scores of small businesses. One common acquisition strategy is called a roll up. This is when a buyer, often a private equity fund, acquires a substantial number of small players in the market and combines them into a single large one. For example, many independent medical practitioners are seriously struggling right now and many believe they will need to sell their practices to an investment fund or a hospital system due to the dire economic straits they face.

The slow extinction of independent physician practices in particular may have a serious impact on cost and quality of care due to diminished competition. Many of these deals are not subject to merger reporting because they are relatively small but when buyers acquire dozens or even hundreds of these small businesses, this can kill competition and make it more difficult for new players to enter the market. The FTC will need to use its authority to halt any anti-competitive acquisitions freeze or monopolization schemes that stamp out competition.

In closing, we face unusual and extraordinary times for our economy and society, and the FTC needs to continue to sharpen its focus on the impact of the pandemic and the crisis on small businesses. Thank you again for the opportunity and I look forward to your questions.

[The prepared statement of Commissioner Chopra follows:]

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

Chairman Wicker, Ranking Member Cantwell, and Members of the Committee, thank you for the opportunity to appear before you.

The Federal Trade Commission's responsibilities are wide and far-reaching, with many directly relating to the crisis we face. Health care and pharmaceuticals, disinformation and fake reviews, abuse and misuse of data, and so much more. But, there is one area in particular that the FTC can and should prioritize: protecting America's small businesses.

According to a survey by the Society of Human Resource Management, 52 percent of small businesses believe that they are likely to fail due to the effects of COVID-19. If this comes true, millions of businesses—and many more millions who work for them—could lose their livelihoods, devastating local economies in the process. The FTC has an important role to play to protect small businesses from abuse.

First, we must crack down on small business loan sharking. Many small businesses are struggling to access credit, including through the Paycheck Protection Program. This is giving an opening to bad actors that target restaurants, stores, and other local businesses with predatory loans. These lenders provide funds to businesses in exchange for future credit card receipts, but the terms often set the small businesses up to fail. In these contracts, small businesses must agree to “confessions of judgment,” where borrowers automatically plead guilty if the lender sues them for payment. These clauses are illegal in consumer contracts, but are being unfairly weaponized against small businesses.

The FTC is the only Federal agency with authority to crack down on these nonbank small business lending practices. We have taken some important actions, and we must systemically eliminate these illegal practices before it's too late.



Second, the FTC must safeguard operators of franchised businesses from abusive practices by franchisors. Franchised businesses encompass a broad swath of businesses across the economy, from auto repair to real estate to fitness centers to fast food and more. Operators of franchised businesses employ Americans across the country, and they're also more likely to be minority-owned, compared to other small businesses.

However, there are signs that franchisors may be using the pandemic to impose new policies that are exacting more economic pain on franchise operators. For example, Subway and 7-Eleven franchisees are fighting back against attempts by franchisors to gain more control and implement practices that shift more cost and risk to local business owners.

The FTC administers the Franchise Rule and enforces laws that prohibit unfair business practices by franchisors. This responsibility is critical, given the threats faced by operators of franchised businesses today.

Finally, the FTC will need to police markets for anticompetitive mergers that scoop up scores of small businesses. One common acquisition strategy is called a "roll up." This is when a buyer, often a private equity fund, acquires a substantial number of small players in a market and combines them into a single large firm.

For example, many independent medical practitioners are seriously struggling, and many believe they will need to sell their practices to an investment fund or a hospital system, due to the dire economic straits they face. The slow extinction of independent physician practices, in particular, may have a serious impact on cost and quality of care.

Many of these deals are not subject to merger reporting, because they're relatively small. However, when buyers are acquiring sometimes dozens or even hundreds of these small businesses, this kills competition and can make it more difficult for new players to enter the market. The FTC will need to use its authority to halt anticompetitive acquisition sprees and monopolization schemes that stamp out competition and small players.

In closing, we face unusual and extraordinary times for our economy, and the FTC will need to sharpen its focus on the impact of the pandemic on small businesses. Thank you for again for the opportunity and I look forward to your questions.

The CHAIRMAN. Thank you very much, Commissioner Chopra. And now we turn to Commissioner Rebecca Kelly Slaughter.

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

Commissioner SLAUGHTER. Thank you, Mr. Chairman. And thank you, Ranking Member Cantwell and members of the Committee for inviting me here today.

The CHAIRMAN. Who is your guest?

Commissioner SLAUGHTER. Oh, this is Hattie. She is my new baby. She is 2 months old and like many Americans I am home with my kids so she is with me today.

The CHAIRMAN. She seems very relaxed about your position on the issues.

[Laughter.]

Commissioner SLAUGHTER. Well, hopefully. She is popping her head up right now so I am hoping she—

The CHAIRMAN. And her name is now in the Committee record forever and ever.

Commissioner SLAUGHTER. She will be very proud. Let me start over so I can address the Committee. Thank you so much for having us here today. Like most Americans and yourselves, fallout from the coronavirus is front of mind for me these days so I am going to confine my oral remarks to that topic. I worry most about the burden borne by three groups in particular: kids, workers, and patients.

As a working parent with four young children at home who has been struggling to manage distance learning for her kids even with

the best circumstances and resources, I am especially sensitive to education issues. The pandemic has exacerbated the existing deep disparity in educational equity in this country. From day one, we saw well-resourced schools transition relatively seamlessly to on-line models with continued learning. Families with access to broadband and devices and the flexibility for a parent to be available at home muddled through. But for millions of America's kids from vulnerable communities, school simply stopped. As many as one in six kids lack the equipment necessary to participate in distance learning and nearly one-quarter of kids lack reliable Internet access, conditions that particularly affect rural, urban, and low-income families.

The solutions parents and school districts are considering pose increased risks of privacy harm to kids, particularly kids in communities already battling the equity gap. We need to acknowledge that privacy and data issues are also equity and civil rights issues. Hybrid and in person learning models will require unprecedented collection of personal data to facilitate contact tracing, quarantines, and family choices. Online learning demands rapid adoption of a suite of technologies that may be unvetted and used without supervision. Where wealthy children's families can pay for privacy protective services, poor kids may pay by sacrificing their privacy. The FTC should help mitigate these potential harm. I was glad the agency worked quickly to put out guidance on how to protect student privacy.

The FTC must aggressively use COPPA and general Section 5 authority to hold companies accountable if the solutions offered to fill the education gap violate current law. But I want to be realistic about the best-case scenario many families face for the current Academic year, shared devices hastily filled with emerging apps and platforms being used by kids for hours with little oversight by adults. Current law provides very little protection in these circumstances, particularly for applications targeting teenagers and general audience. A need for comprehensive data privacy legislation with meaningful limitations on the collection and use of data, and prohibitions on discriminatory practices, dark patterns, and data abuses has never been greater.

The FTC stands ready to enforce a Federal privacy law, and my hope is that the pandemic's catastrophic consequences for children will serve as the final push for such legislation. Until then, I believe the mounting data harms emerging from the crisis demand that the Commission consider instituting a rulemaking under Magnuson-Moss to identify and address serious data abuses. In addition to supporting kids, we must support workers. I recognize how fortunate I am to navigate the challenges of child care and on-line learning from the privileged position of employment. At least eleven percent of my fellow Americans do not share that good fortune. I echo Commissioner Chopra's calls for the FTC to focus on supporting small businesses which are a significant source of employment and may be particularly squeezed right now.

I believe the FTC must also use its competition authority to better protect our workforce by sharpening our attention on anti-competitive conduct and mergers that harm workers. Employers ought to compete to attract workers by providing the highest wages, most

attractive benefits, and especially today, the most robust health and safety measures. We should focus on these issues in our enforcement action and also consider whether and how our rule-making authority might be applied to address them. The most fundamental challenge we all face of course is how to help overcome the deadly Public health crisis, which we know has an outsized impact on seniors and communities of color.

The FTC must continue to protect access to care by challenging problematic hospital and healthcare provider mergers that increase prices and limit patient choice. We must vigorously apply scrutiny to pharmaceutical mergers as well as address anti-competitive conduct involving healthcare service. We also must seek creative ways to challenge price gouging. Creativity is no substitute, however, for clear authority and I would ask Congress to give the FTC a direct mandate to stamp out abusive pricing practices. In conclusion, I want to acknowledge the dedicated public servants at the agency who have been working through this crisis in incredibly challenging circumstances.

Working from home, especially for parents of young kids, is harder than I could have imagined. Chairman Simons deserves great credit for providing unmatched flexibility for staff across the agency to ensure they and their families remain safe. And the staff deserve equal credit for their tenacity, resilience, and unwavering commitment to the important work of the Commission. I look forward to answering your questions.

[The prepared statement of Commissioner Slaughter follows:]

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

Chairman Wicker, Ranking Member Cantwell, and Members of the Committee, thank you for inviting us here today.

Like most Americans and yourselves, for me fallout from the coronavirus is front of mind these days, so I am going to confine my oral remarks to that topic. I worry most about the burden borne by three groups in particular: kids, workers, and patients.

#### **Supporting Solutions for Educational Equity**

As a parent who has been struggling to manage distance learning for her kids, even with the best circumstances and resources, I am especially sensitive to education issues. The pandemic has exacerbated the existing deep disparity in educational equity in this country. From day one, we saw well-resourced schools transition relatively seamlessly to online models with continued learning. Families with access to broadband and devices, and the flexibility for a parent to be available at home, muddled through. But for millions of America's kids from vulnerable communities, school simply stopped.<sup>1</sup> As many as one in six kids lack the equipment necessary to participate in distance learning,<sup>2</sup> and nearly one quarter of kids lack reli-

<sup>1</sup> Emma Dorn, Bryan Hancock, Jimmy Sarakatsannis, and Ellen Viruleg, "COVID-19 and Student learning in the United States: The Hurt Could Last a Lifetime," *McKinsey* (June 1, 2020) (collecting data showing that "only 60 percent of low-income students are regularly logging into online instruction; 90 percent of high-income students do. Engagement rates are also lagging behind in schools serving predominantly black and Hispanic students; just 60 to 70 percent are logging in regularly."), <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/covid-19-and-student-learning-in-the-unit-ed-states-the-hurt-could-last-a-lifetime>.

<sup>2</sup> Catherine E. Shoichet, "These Kids are Getting Left Behind When Schools Go Online," *CNN* (July 31, 2020, 8:36 AM), <https://www.cnn.com/2020/07/31/us/distance-learning-inequality/index.html>.

able Internet access—conditions that particularly affect rural, urban, and low-income families.<sup>3</sup>

The solutions parents and school districts are considering pose increased risks of privacy harms to kids, particularly kids in communities already battling the equity gap; we need to acknowledge that privacy and data issues are also equity and civil rights issues.<sup>4</sup> Hybrid and in-person learning models will require unprecedented collection of personal data to facilitate contact tracing, quarantines, and family choices. Online learning demands rapid adoption of a suite of technologies that may often be unvetted and used without supervision. Where wealthy children’s families can pay for privacy-protective services, poor kids may pay by sacrificing their privacy. The FTC should help mitigate these potential harms.

I was glad that the agency worked quickly to put out guidance on how to protect student privacy.<sup>5</sup> The FTC must aggressively use COPPA and general Section 5 authority to hold companies accountable if the solutions offered to fill the education gap violate current law. But I want to be realistic about the best-case scenario many families face for the current academic year: shared devices, hastily filled with emerging apps and platforms, being used by kids for hours with little oversight by adults. Current law provides very little protection in these circumstances, particularly for applications targeting teenagers or general audiences.

The need for comprehensive data-privacy legislation with meaningful limitations on the collection and use of data and prohibitions on discriminatory practices, dark patterns, and data abuses has never been greater. The FTC stands ready to enforce a Federal privacy law, and my hope is that the pandemic’s catastrophic consequences for children will serve as the final push for such legislation. Until then, I believe the mounting data harms emerging from the crisis demand that the Commission consider initiating a rulemaking under Magnuson-Moss to identify and address serious data abuses.

### Supporting Workers

In addition to supporting kids, we must support workers. As a parent with four young kids at home, I am fortunate to navigate the challenges of child-care and online learning from the privileged position of employment. At *least* 11 percent of my fellow Americans do not share that good fortune.<sup>6</sup> I echo Commissioner Chopra’s calls for the FTC to focus on supporting small businesses, which are a significant source of employment and may be particularly squeezed right now.<sup>7</sup>

I believe the FTC must also use its competition authority to better protect our workforce by sharpening our attention on anticompetitive conduct and mergers that harm workers. Employers ought to compete to attract workers by providing the highest wages, most attractive benefits, and, especially today, the most robust health and safety measures. We should focus on these issues in our enforcement actions and also consider whether and how our rulemaking authority might be applied to address them.

### Supporting Access to Affordable Care

The most fundamental challenge we all face, of course, is how to help overcome the deadly public-health crisis, which we know has an outsized impact on seniors and communities of color. The FTC must continue to protect access to care by chal-

<sup>3</sup>Emily A. Vogels, Andrew Perrin, Lee Rainie, and Monica Anderson, “53 percent of Americans Say the Internet Has Been Essential During the COVID-19 Outbreak,” *Pew Research Center* (Apr. 30, 2020); see also John Kahan, “It’s time for a new approach for mapping broadband data to better serve Americans,” *Microsoft* (Apr. 8, 2019), (estimating that about half of Americans, 163 million people, do not have high-speed Internet at home), <https://blogs.microsoft.com/on-the-issues/2019/04/08/its-time-for-a-new-approach-for-mapping-broadband-data-to-better-serve-americans/>.

<sup>4</sup>Hannah Quay-de la Vallee and Cody Venzke, “Privacy and Equity in the New School Year: Steps for In-Person, Remote, or Hybrid Learning,” Center for Democracy & Technology (July 2020), <https://cdt.org/wp-content/uploads/2020/07/2020-07-16-Privacy-Equity-in-the-New-School-Year-Guidance-FINAL-2.pdf>.

<sup>5</sup>See, e.g., Lisa Weintraub Schifferle, *COPPA Guidance for Ed Tech Companies and Schools during the Coronavirus*, Fed. Trade Comm’n: Business Information Blog (Apr. 9, 2020), <https://www.ftc.gov/news-events/blogs/business-blog/2020/04/coppa-guidance-ed-tech-companies-schools-during-coronavirus>; Lisa Weintraub Schifferle, *Remote learning and children’s privacy*, Fed. Trade Comm’n: Business Information Blog (Apr. 9, 2020), <https://www.consumer.ftc.gov/blog/2020/04/remote-learning-and-childrens-privacy>.

<sup>6</sup>*Employment Situation Summary*, U.S. Bureau of Labor Statistics (July 2, 2020), <https://www.bls.gov/news.release/empsit.nr0.htm>.

<sup>7</sup>More than 40 percent of American workers are employed by small businesses and small businesses can be significant drivers of new jobs. See *2018 Small Business Profile*, U.S. Small Bus. Admin., <https://www.sba.gov/sites/default/files/advocacy/2018-Small-Business-Profiles-US.pdf>.

lenging problematic hospital and healthcare-provider mergers that increase prices and limit patient choice.<sup>8</sup> We must vigorously apply scrutiny to pharmaceutical mergers as well as address anticompetitive conduct involving healthcare services. We also must seek creative ways to challenge price-gouging.<sup>9</sup> Creativity is no substitute, however, for clear authority, and I would ask Congress to give the FTC a direct mandate to stamp out abusive pricing practices.

In closing, I want to acknowledge the dedicated public servants at the agency who have been working through this crisis in incredibly challenging circumstances. Working from home, especially for parents of young kids, is harder than I could have imagined. Chairman Simons deserves great credit for providing unmatched flexibility for staff across the agency to ensure they and their families remain safe, and the staff deserve equal credit for their tenacity, resilience, and unwavering commitment to the important work of the Commission.

I look forward to answering your questions.

The CHAIRMAN. Thank you, Commissioner. It is indeed ironic that just as you were speaking about online distance learning, we lost your video although we could hear you and on the screen was a text saying that we had lost the picture because of low bandwidth. So—

Commissioner SLAUGHTER. I apologize.

The CHAIRMAN. Well, no. I think that points out the problems that we have. If a member of the Federal Trade Commission has problems with distance testimony, you can imagine what those students that are trying to do distance learning are experiencing. Also I want to tell you that Hattie has a beautiful head of hair there and she is well behaved. So thank you for that testimony. And now we turn to Commissioner Wilson. You are recognized.

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

Commissioner WILSON. Thank you. Chairman Wicker, Ranking Member Cantwell, and members of the Committee, I am pleased to appear before you today. I would like to highlight two areas where I respectfully believe Congress could help the FTC fulfill its mission. First, by enacting privacy legislation, and second, by maintaining the focus on consumer welfare and economics driven enforcement in antitrust. As my colleagues have shared, Federal privacy legislation is necessary for several reasons. First, businesses need predictability in the face of a growing patchwork of State and international frameworks.

Second, consumers need transparency regarding how their data is collected and shared but they currently face significant information asymmetries. Third, gaps have emerged in sectoral privacy laws. For example, HIPAA covers the privacy of health data collected by a doctor, but not by apps. The need is more urgent now giving COVID-19. For millions of Americans, work and school have moved online. Consumer data is being deployed to monitor compliance with quarantines and for contact tracing. While many view technology as key to safely easing quarantines and resuming nor-

<sup>8</sup>See Remarks of Commissioner Rebecca Kelly Slaughter As Prepared for Delivery, Antitrust and Health Care Providers Policies to Promote Competition and Protect Patients, Center for American Progress (May 14, 2019), [https://www.ftc.gov/system/files/documents/public\\_statements/1520570/slaughter\\_-\\_hospital\\_speech\\_5-14-19.pdf](https://www.ftc.gov/system/files/documents/public_statements/1520570/slaughter_-_hospital_speech_5-14-19.pdf).

<sup>9</sup>See Concurring Statement of Commissioner Rebecca Kelly Slaughter Regarding the Matter of *Federal Trade Commission and State of New York v. Vyera Pharmaceuticals, LLC; Phoenixus AG; Martin Shkrel; and Kevin Mulleady*, Fed. Trade Comm'n (Jan. 27, 2020), [https://www.ftc.gov/system/files/documents/public\\_statements/1564517/2020\\_01\\_27\\_final\\_rks\\_daraprim\\_concurring\\_statement.pdf](https://www.ftc.gov/system/files/documents/public_statements/1564517/2020_01_27_final_rks_daraprim_concurring_statement.pdf).

mal life, these tools depend on sensitive health and location data. Though we now face many new and complex privacy issues, interestingly effective contact tracing requires widespread adoption, but digital trust is lacking.

A *Washington Post* poll found that half of smartphone users who could use contact tracing apps won't because they don't trust tech companies. Privacy legislation would help build digital trust which is necessary to foster continued innovation and investment. Privacy legislation is also necessary to protect our Fourth Amendment rights. Courts employ a reasonable expectation of privacy tests in Fourth Amendment cases. Consumers surrender extensive data through their use of phones and other connected devices. If citizens know and accept that nothing is private, then they have no reasonable expectation of privacy and Fourth Amendment protections evaporate. While privacy is important, so is competition.

Privacy legislation must be crafted so as to maintain competition and foster innovation. Research indicates the passage of GDPR in the EU led to decreased venture capital investment and entrenchment of dominant players in digital advertising. And compliance is costly for small businesses and new entrants. U.S. legislation should seek to avoid these pitfalls. With our dual mission in competition and consumer protection, the FTC is well situated to provide technical assistance to Congress on this issue. Four other considerations for privacy legislation. First, the FTC should be the enforcing agency given its decades of relevant experience.

Second, like COPPA, legislation should include civil monetary penalties. Third, the FTC should have jurisdiction over nonprofits and common carriers which collect sensitive information. Finally, targeted APA rulemaking would permit the FTC to address technological development. I will turn now to the FTC's competition mission. The consumer welfare standard in antitrust which measures the impact of competitive conduct on consumers is under attack. Critics assert the standard suffers because it focuses only on price but the consumer welfare standard also addresses other important factors like quality and innovation. If people wanted only the cheapest product, we would still use flip phones instead of smartphones. But price does matter.

Antitrust scholar Herbert Hovenkamp has written, attacking low prices as a central antitrust goal is going to hurt consumers, but it is going to hurt vulnerable consumers the most. Some conduct like price-fixing drives up prices without increasing quality or innovation, but most of the business practices and mergers that we review require closer scrutiny. Enforcers determine whether an action or a deal is legal based not on its label but on its competitive effects. Economic analysis helps us determine whether any harm to competition is outweighed by benefits to consumers.

Without economic analysis, antitrust at best would be a series of per se rules resulting in business decisions that prioritize form over function, creating market distortions. At worst, antitrust untethered from economic analysis would be subjective and vulnerable to political manipulation. Companies would seek the favor of legislators and regulators instead of courting consumers. In closing, the FTC welcomes the opportunity to assist Congress on these issues. I am happy to answer any questions you may have.

[The prepared statement of Commissioner Wilson follows:]

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

### Introduction

Chairman Wicker, Ranking Member Cantwell, and Members of the Committee, I am pleased to appear before you today (albeit remotely).

I would like to highlight two areas where I respectfully believe that Congress could assist the Federal Trade Commission in fulfilling its mission to protect consumers and competition: first, by enacting Federal privacy legislation; and second, by maintaining the focus on consumer welfare and economics-driven enforcement in antitrust.

### Privacy Legislation

With respect to privacy legislation, I agree with Chairman Simons' opening statement on this topic. Federal privacy legislation is necessary for several reasons. First, businesses need predictability in the face of a growing patchwork of state and international privacy regimes. Federal privacy legislation would provide needed certainty to businesses in the form of guardrails governing information collection, use, and dissemination. Second, consumers need clarity regarding how their data is collected, used, and shared so they can make informed decisions about which goods and services to use. Currently, there are significant information asymmetries with regard to consumers' knowledge of the privacy characteristics of various products, leaving consumers ill-equipped to evaluate the quality and value of those products. Third, there are growing gaps in the sectoral coverage of our existing privacy laws. For example, the Health Insurance Portability and Accountability Act (HIPAA)<sup>1</sup> covers the privacy of sensitive health data collected by a doctor or pharmacist, but not by apps or wearables.

The need for Federal privacy legislation is even more urgent now, given the spread of Covid-19, which is driving data usage in ways not previously contemplated by consumers. For tens of millions of Americans, work, school, entertainment, and social interactions have moved online. Businesses, researchers, and government entities have deployed consumer data to monitor compliance with quarantines and to implement contact tracing. And many view technology, including both contact tracing and widespread health monitoring, as key to safely easing quarantines and resuming normal life. But these tools are fueled by sensitive data regarding people's movements and their health. These initiatives have raised new and complex issues regarding consumer privacy, and have laid bare both the lack of clear guidance for businesses and the absence of comprehensive privacy protections for consumers.

Proposed contact tracing initiatives have also exposed the dearth of digital trust in this country. For disease containment initiatives to be effective, consumers must trust that government entities and businesses will be careful stewards of their data. But among those who use smartphones and can download contact tracing apps, a *Washington Post* poll found that more than half do not trust tech companies to ensure that people who report a coronavirus diagnosis using an app would remain anonymous.<sup>2</sup> Privacy legislation would help build digital trust around data collection and use, which is necessary to foster continued innovation and investment in the tech arena.

An additional imperative for Federal privacy legislation is protection of our rights under the Fourth Amendment. In applying the Fourth Amendment, courts employ a "reasonable expectation of privacy" analysis.<sup>3</sup> Consumers have grown accustomed to surrendering extensive data through their daily use of phones, computers, digital assistants, and other connected devices. If citizens know and accept that nothing is private, then they have no reasonable expectation of privacy, and protections under the Fourth Amendment are eviscerated.

While privacy is important, so is competition. Federal privacy legislation must be crafted carefully to maintain competition and foster innovation. The General Data Protection Regulation in the EU ("GDPR") may have lessons to teach us in this re-

<sup>1</sup> The Health Insurance Portability and Accountability Act of 1996, Pub.L. 104–191, 110 Stat. 1936 (1996).

<sup>2</sup> Craig Timberg, Drew Harwell and Alauna Safarpour, *Most Americans are not willing or able to use an app tracking coronavirus infections. That's a problem for Big Tech's plan to slow the pandemic*, WASHINGTON POST (Apr. 29, 2020), <https://www.washingtonpost.com/technology/2020/04/29/most-americans-are-not-willing-or-able-use-an-app-tracking-coronavirus-infections-thats-problem-big-techs-plan-slow-pandemic/>

<sup>3</sup> Katz v. U.S., 389 U.S. 347 (1967).

gard. Preliminary research indicates that GDPR may have created unintended consequences, including a decrease in venture capital investment and entrenchment of dominant players in the digital advertising market.<sup>4</sup> Reports also indicate that compliance with GDPR is costly and difficult for small businesses and new entrants. U.S. legislation should seek to avoid these negative consequences. The FTC, with its dual mission in competition and consumer protection, is uniquely situated to provide technical assistance to Congress as it seeks to protect privacy while maintaining competition.

There are four other elements that I believe should be included in Federal privacy legislation:

- First, the FTC should be the enforcing agency. We have decades of experience in bringing privacy cases, and we have the requisite expertise to tackle any new law effectively.
- Second, any legislation should include civil monetary penalties, which Congress has included in other statutes enforced by the FTC, including the Children’s Online Privacy Protection Act.<sup>5</sup>
- Third, the FTC should be given jurisdiction over non-profits and common carriers, which collect significant volumes of sensitive information.
- Fourth, any law should include narrow and targeted APA rulemaking authority, which will enable the FTC to promulgate guidance and address technological developments.

Finally, on a related note, I encourage Congress to enact data security and data breach notification legislation.

### Consumer Welfare and Economics in Antitrust

Let me turn now to the FTC’s second mission, preserving competition. The consumer welfare standard in antitrust—in which competition in the markets for goods and services is measured by how well it serves consumers—has attracted criticism in recent years. Critics often over-simplify the standard by asserting that it is solely concerned with low prices. In fact, the consumer welfare standard encompasses other factors that consumers value, including quality and innovation; if people wanted only the cheapest product, we would still be using flip-phones instead of smartphones. But price does matter. As antitrust scholar Herbert Hovenkamp recently wrote, attacking “low prices as a central antitrust goal is going to hurt consumers, but it is going to hurt vulnerable consumers the most.”<sup>6</sup> Many of us are fortunate enough today to be able to buy a higher quality, name-brand product—but most of us also can remember those early days when we were thankful for the availability of a no-frills, value-priced version.

Some conduct, like price fixing and market allocation, clearly drives up prices without any redeeming increase in quality or innovation. But most of the business practices and mergers that come before the antitrust agencies are more ambiguous in their effects. Enforcers determine whether a business practice is legal based not on its label, but rather by examining its empirical effects. For that reason, we need economic analysis to help us determine whether any harm to competition is outweighed by benefits to consumers. Fortunately, the FTC has a Bureau of Economics that provides the expertise and experience needed for such analysis, as well as for studies including merger retrospectives that help to inform our enforcement. We also can hire outside economists to testify at trial.

In the absence of economic analysis, antitrust at best would be a series of per se rules. This system would result in business decisions that prioritize form over function, creating market distortions and inefficiencies. The U.S. experienced this phenomenon during the decades when many vertical restraints that had similar welfare effects could be either per se illegal or per se legal, and when merger decisions were,

<sup>4</sup>See Jian Jia, Ginger Zhe Jin & Liad Wagman, *The Short-Run Effects of GDPR on Technology Venture Investment* (Nat’l Bureau of Econ. Research, Working Paper 25248, 2018), <https://www.nber.org/papers/w25248.pdf>; *GDPR—What happened?*, WHOTRACKSME BLOG (2018), <https://whotracksme/blog/gdpr-what-happened.html>.

<sup>5</sup>Children’s Online Privacy Protection Act of 1998, 15 U.S.C. 6501–05; see also Children’s Online Privacy Protection Act Rule, 16 C.F.R. Part 312, available at: <https://www.ftc.gov/enforcement/rules/rulemaking-regulatory-reform-proceedings/childrens-online-privacy-protection-rule>.

<sup>6</sup>Herbert Hovenkamp, *Is Antitrust’s Consumer Welfare Principle Imperiled?* 45 J. CORP. L. 101, 130 (2019) (“The neo-Brandeisian attack on low prices as a central antitrust goal is going to hurt consumers, but it is going to hurt vulnerable consumers the most. . . . As a result, to the extent that it is communicated in advance, it could spell political suicide. Setting aside economic markets, a neo-Brandeis approach whose goals were honestly communicated could never win in an electoral market, just as it has never won in traditional markets.”).



as Justice Potter Stewart put it, a “counting-of-heads game” that ignored the actual competitive dynamics in the relevant market. At worst, antitrust untethered from economic analysis would be subjective and vulnerable to political manipulation. Companies would devote themselves to seeking the favor of legislators and regulators, instead of courting consumers.

**Conclusion**

In closing, the FTC would welcome the opportunity to provide technical assistance to Congress on these issues. Thank you for your assistance in strengthening the FTC’s ability to fulfill its mission.

I am happy to answer any questions you may have.

The CHAIRMAN. Well, thank you very much. And before I begin my questions, another thing I wanted to mention after the testimony of Rebecca Kelly Slaughter was to thank her for pointing out what a wonderful job the staff of the FTC does. And I am sure each member of the Commission subscribes to that. We certainly, Senator Cantwell, can say the same for our hard-working and talented and knowledgeable staff here in the Committee on both sides of the dais and that gives me a chance to say that. Let’s start off, and I guess we will begin with the Chair.

So Chairman Simons, let’s talk about the FTC’s role in overseeing the enforcement of Section 230 of the Communications Decency Act and in particular President Trump’s Executive Order in May on preventing online censorship. Specifically, Section 4 of this Order calls on the FTC to take action against online platforms that restrict speech in a manner inconsistent with their terms of service.

What is your view, Mr. Chairman, on the FTC’s responsibilities under the Executive Order? And have you seen any examples of the behavior described in the order and taken any action under your authority so far?

Chairman SIMONS. Thank you, Mr. Chairman. We haven’t taken any action according to the Executive Order. We get complaints from a wide variety of sources, from the public, from Congress, from competitors, from people in industry, from consumer watchdogs, and it is very important that we get those complaints and we pay attention to them. Lots of complaints have come from members of this committee and we are very thankful that you provide us with such thoughtful complaints. We are an independent agency so we review all of them independently.

We have jurisdiction over commercial speech, particularly non deceptive and unfair and then some other statutes. So we look to see whether the complaints are subject to unfairness or—I am sorry, whether they are within our authority as I described, and our authority focuses on commercial speech not political content curation. If we see complaints that are not within our jurisdiction, then we don’t do anything. If we see complaints that are, we take a closer look and figure out whether there is a violation, and then we determine whether it is appropriate for us to act.

The CHAIRMAN. So, Mr. Chairman, you don’t view political speech as within your jurisdiction?

Chairman SIMONS. Correct.

The CHAIRMAN. OK, and so if the public and members of the Senate are concerned about online platforms like Twitter and Facebook being inconsistent in the way they restrict political speech, you do not view that as within the purview of your statutory responsibil-

ities and therefore the Executive Order does not instruct you in that specific area. Is that correct?

Commissioner SIMONS. Yes, for political content curation. Yes.

The CHAIRMAN. OK. Now who else would like to comment on this? I am going to take my whole 5 minutes on this so—

Commissioner CHOPRA. Chairman Wicker, I am happy to weigh in. I think putting aside the Executive Order, the issue of Section 230 is one where of great concern, I think, and there is a growing bipartisan consensus that it has been abused. We see whether it comes to counterfeit and defective goods, an unlevel playing field between online platforms and brick-and-mortar stores, and in general, I think the scrutiny is warranted when it comes to technology platforms abusing any liabilities and public privileges, and using that as regulatory arbitrage.

I think many of these platforms do have too much power to dictate certain policies and regulations, and I don't want to see them continue, in my view, to overuse and abuse the legal immunities that Congress has provided and I think we need to take a hard look at that, particularly when it comes to the use of surveillance based behavioral advertising. I think that business model is inconsistent with the origins of Section 230.

Section 230 is supposed to safeguard and promote speech, it is not supposed to, you know, prioritize certain types of things over the others based on what makes those companies more money.

The CHAIRMAN. You know, Commissioner, I think you make some very good points there and I would observe that the hearing in the House of Representatives last week on a bipartisan basis indicated a real concern that these platforms are awfully big and too powerful, and that it is a matter of concern for the consuming public. So I appreciate your testimony there and—

Commissioner WILSON. I also have a comment, Senator Wicker.

The CHAIRMAN. Yes, please ma'am.

Commissioner WILSON. You noted that this was a bipartisan issue in last week's hearing and I actually have Chairman Nadler's quotes in front of me. He asked whether the ability to make money in any way affect Google's algorithm in terms of what news appears in a typical users search results. He also noted that Facebook and Google have gravely threatened journalism in the United States. He noted, now we hear Google and Facebook are making money over what news they let the American people see. He said it is a very dangerous situation.

And so I agree social media companies now provide a significant portion of America with its news and so there is concern about content curation. My colleague, Commissioner Chopra and I have previously asked the FTC in a public statement to prioritize 6(b) studies that explore how content curation and targeted advertising practices impact data collection use and sharing, and how the monetization of data impacts the creation and the refinement of algorithms that drive content curation and targeted advertising practices. And so I think this issue, as my colleague Commissioner Chopra noted, is a really important one for us to consider and to learn more about.

The CHAIRMAN. And have those studies been authorized and commenced at this point?

Commissioner WILSON. Nothing has been publicly announced, Senator.

The CHAIRMAN. Thank you. Thank you very much. And undoubtedly, there will be more discussion.

COMMISSIONER. Senator?

The CHAIRMAN. Yes? I hear a voice. Perhaps you are being censored at this point. Let me say, this will be a further topic of questions and I will not further intrude on my time at this point, but recognize the distinguished Ranking Member. We will get back to you for an answer once we get these kinks ironed out. Senator Cantwell.

Senator CANTWELL. Thank you, Mr. Chairman. And again, thanks for holding this important hearing and for all the feedback from the Commissioners. It has been quite interesting obviously on a breadth and depth, but I would like to go back to price gouging. In April, in the State of Washington, the Attorney General launched a “see it, snap it, send it” campaign to fight price gouging. The initiative followed 400 price gouging related complaints, a round of cease and desist letters to Washington-based online sellers accused of price gouging, and upwards of 150 site visits to businesses that were subjects of these complaints.

So this is a very important and timely issue as it relates to the crisis and we want to make sure that Americans are getting all the help that they deserve. Currently, the Federal agencies have very limited authority to prevent price gouging. The FTC, as the Chairman was just mentioning, go after unfair and deceptive practices, which really hasn’t been used in cases of price gouging. So that is why I believe that we need a new definition, particularly during the time of an emergency.

During the time of an emergency, we should not allow for these unconscionably excessive prices. And I think that we should do something about that. So I wanted to ask you, Chairman Simons, do you support Congress doing something specifically on price-gouging authority?

Chairman SIMONS. Senator, we agree that price gouging is a very serious problem, especially for PPE and the like. We currently work with this with the DOJ and the states to refer cases to them because as you said Section 5 really is not a good fit for price-gouging authority, but we would vigorously support and enforce legislation if Congress passed the law on price gouging. We think that legislation should include a triggering event and a time limit, should be National in scope, it should define the products that are covered, describe what constitutes an excessive price increase, and provide carve-outs for offsetting costs increase. Thank you.

Senator CANTWELL. Well, thank you for that list. I agree and I think particularly when you define a crisis, we have certainly been involved in what we think of being manipulations of oil markets and certainly people who took advantage of oil prices during a hurricane and certainly been involved in electricity rates and what we thought were manipulated electricity markets.

So anyway, look forward to working with you on that. Commissioner Slaughter and Chopra—well first let me just thank you Commissioner Slaughter for mentioning, well, first of all enlight-

ening our day with Hattie, thank you. That is very nice of you. But also for mentioning 4 broadband.

And I know the Chairman agrees that we have an important opportunity in front of us with the next COVID package as we are seeing schools make decisions about what they are going to do on the education system for the fall. We really have to address this gap and we need to make sure that the dollars are there and the specific programs are there for broadband. So we look forward to working with everybody to make sure that gets in a package. But on this issue of price gouging, Commissioner Slaughter, you also mentioned, and Commissioner Chopra, what is your perspective about the core provisions of a price gouging law? We heard from the Chairman, but what do you believe needs to be in the legislation?

Commissioner SLAUGHTER. Thank you, Senator, for the question and you are right about broadband. As you can see with all of us struggling with our feeds occasionally in the best circumstances, we can see how important it is. In terms of price gouging, I agree with a lot of what the Chairman said in terms of what the parameters of price gouging legislation should look like.

I would want to make sure that it wasn't too limited and didn't—excuse me, didn't put too high a burden on the agencies to establish that the circumstances have been met because when that's the case, then we can't really bring the cases effectively that we want to protect the public. And the last point I would make is, I agree also that Section 5 is very much an imperfect tool for addressing these kinds of problems, but I want to see us in all cases, including in the case of price gouging or maybe especially thinking about whether particular circumstances might give rise to a creative use of Section 5 authority on this topic, and this is something Commissioner Chopra and I both talked about in terms of drug price spikes recently.

So I think that we would really benefit from clear legislation from Congress, but very much share your view that this is a high priority and something that we can see the real life effects of for American people every day.

Senator CANTWELL. Thank you. Commissioner Chopra, did you want to say anything? I mean—

Commissioner CHOPRA. Yes, that thank you. I agree. Just two quick points. I do not want to see any Federal law delete the State laws, the preemption of State laws. I don't think is appropriate when it comes to this issue. And I also hope, given some of the framework in the Defense Production Act as well, that you also consider criminal penalties in certain circumstances.

Senator CANTWELL. Yes, I certainly believe so. We have done effective work on this as it relates as I said to energy markets, and having criminal penalties has been giving the FTC really—I mean the Federal Energy Regulatory Commission the tool that they needed to police energy markets.

So we certainly don't need any higher energy costs than what we should be paying. And just Mr. Chairman, I know my time has expired, but I just wanted to mention on Commissioner Wilson's point about content curation, this is really a very severe problem that is undermining the newspaper industry. The fact that these content

creators are basically becoming the entry and point of delivery is limiting the options for our broadcast and content delivers and the newspaper business.

And I so I look forward to seeing what the Commission comes out with on this but I think this is also a very important issue that needs to be addressed. Thank you.

The CHAIRMAN. Thank you very, very much, Senator Cantwell. Senator Fischer is next.

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

Senator FISCHER. Thank you, Mr. Chairman. Chairman Simons, as I am sure you know, this committee has been evaluating paths forward on the name image likeness rules that have begun to take shape at the State level along with the proposal recently developed by the NCAA.

I am interested to hear your perspective on this matter, particularly on the FTC's role in enforcing any new Federal NIL rules. As talks continue on a potential Federal framework, what new authorities and resources do you believe the Commission may or may not need to enforce added protections for student-athletes? I think you have to unmute, sir. There you go.

Chairman SIMONS. Alright. Can you hear me?

Senator FISCHER. Yes.

Chairman SIMONS. Alright. Thanks for the question. I think I was unmuted and by mistake muted. So I am sorry for that. So I am a big believer that competition should function in almost every situation including college athletics. I have been very concerned for a long period of time that students are not getting what they should get in terms of compensation for what they do. This is particularly serious because it has a large effect on minority, disadvantaged communities particularly with the football and the basketball programs.

And so I am very, very excited about what you are doing and I encourage you to go as far as you can. In terms of expertise, we don't really have very much expertise at all in this area as an institution. The DOJ has really been the one that has been interacting with colleges including college athletics. And so we don't really—we don't have that base that the DOJ has. But having said that, if you want to give us authority, we will of course enforce it.

But depending on exactly what you pass, it might require a lot of increased manpower on our part in order to do that. And also depending on what you pass, if it looks something like a professional regulation like where you are regulating agents or things like that and any kind of certification or other type of way, I think that would be not particularly suited for our agency.

Senator FISCHER. Thank you. Over the past few months, we have seen the pandemic add new volatility to our food supply chain and that requires a massive shift in logistics. And amid the financial strain, consumers are trying to stock up on food while producers and retailers are doing their best to ensure that the grocery store shelves are stocked.

The FTC has important responsibilities in helping safeguard America's food supply. Mr. Chairman, in terms of the FTC's rule,

what policies do you feel would be most effective to focus on for maintaining a stable food supply chain during these unprecedented times?

Chairman SIMONS. So our big focus on, with respect to food, is the retail aspect of it. And so we are very focused on that. We are making—we are doing our best to make sure that there are as competitive as possible and that the competition flourishes at the retail level. The DOJ is the one that focuses on the production of meat and things like that, and we are dealing with the agricultural side of it.

So we would defer to them on that part. But on terms of the retail part, we are very focused on making sure that there is good competition for consumer benefit.

Senator FISCHER. You know, as you know, the Packers and Stockyards Act was drafted following an FTC report that highlighted abuses by major meatpacking companies at that time and leveraged their concentrated market power. Mr. Commissioner Chopra, I would be interested in your take on this as well, particularly on more recent concerns about vertical integration trends that we are seeing in the food industry.

Commissioner CHOPRA. Thank you, Senator Fischer. I totally share those concerns. What we are seeing in the food industry from farm to table, including what Chairman Simon said on the retail side but also on the production side, there are serious issues with how certain large, powerful players are able to dictate terms in the lives of so many, whether they are poultry growers or livestock producers and ranchers. I am concerned that the USDA's rulemaking on the Packers and Stockyards Act is going to make matters worse. It is going to make it even harder to make sure that our food markets are competitive and fair.

The FTC does have some limited authority under the Packers and Stockyards Act but as we have seen during this pandemic, just recently the JBS, Mountain States Rosen transaction, there is going to be a lot of issues when it comes to the stability of our food supply and I think we all as Federal agencies need to think about it, including our national security regulators as well.

Senator FISCHER. Right. You do have say over retail sales of meat and livestock products. And when you look at, as I know you have been focused on that vertical integration, obviously that has an impact on those retail sales, the vertical integration that takes place. So I thank you for your comments and hope that you—Thank you, Mr. Chairman.

The CHAIRMAN. Thank you. Thank you, Senator Fischer. Let me just exercise a little discretion here and intrude on the next round of questioning. Mr. Chairman, you don't want this issue of athletic name image and likeness. You would rather the Justice Department have that, right?

Chairman SIMONS. Yes, they have the expertise.

The CHAIRMAN. OK. Does any member of the Commission disagree with the Chairman on that? Who wants this issue?

Commissioner CHOPRA. Well, I would personally favor a private right of action for some of this. It is very hard to police some of these markets and in some cases the 1 players themselves may be well situated to vindicate their own rights.

The CHAIRMAN. Would you like for the FTC to have jurisdiction over it?

Commissioner CHOPRA. You know, that is really your choice. I don't think that we seem best situated, but we will do ultimately what Congress passes laws instructing us to do.

The CHAIRMAN. OK. Well if anybody wants to comment—

Chairman SIMONS. Mr. Chairman, can I just make a comment there? I agree with Commissioner Chopra that a private right of action would be appropriate.

The CHAIRMAN. OK, and please submit, feel free to submit written responses expanding your position there. And Senator Klobuchar, I appreciate you letting me delay your questioning for a moment or two there. You are recognized.

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

Senator KLOBUCHAR. Well, thank you. Mr. Chairman. And again, thank you for conducting, along with Senator Cantwell, this really important hearing right now. You know, I have told many of you this before but I think that this pandemic has shed a big magnifying glass on some issues that we know are already out there with consolidation, with consumer scams, and the like, and I appreciate all the Commissioners being here.

Start with following up with some of Senator Cantwell's questions. I am on her bill along with Senators Markey and Schatz on privacy and then Senator Kennedy and I have a separate bill. But I wanted to ask, I think it was in your opening statement, Chair Simons, that you mentioned you believe you need additional rule-making authority. I think Commissioner Chopra is also taking this position. Could you just really briefly, because I have a lot of questions, answer that question in order to really do things on privacy outside of legislation, Chairman?

Chairman SIMONS. Yes, thank you, Senator. So in terms of the rulemaking, what we are looking for is a targeted rulemaking authority. So not kind of pass a general statute that says we want Federal privacy legislation, let the FTC figure it out.

No, we think that that is your job and you have done great efforts, as you have described, to the move that long and we really encourage you to go further and get across the finish line on that. In terms of us though, just like the Congress did with COPPA, they allowed us to have APA targeted rulemaking to do things such as change definitions to account for changes in technology or changes in business methods.

One example from COPPA was there the original language did not include photos. So this was like in 1998 or 2000 and photos weren't a big thing in terms of being uploaded to the internet. Now, of course they are and they are really important and sensitive. That is just an example of targeted rulemaking.

Senator KLOBUCHAR. OK. Before I go to Commissioner Chopra, one other question of you because I don't think we have delved into this yet. On the front of the hearing in the House last week with the CEOs of Amazon, Facebook, Google, and Apple, do you, based on what you heard at the hearing, I assume you watched it or read the transcript, do you believe that the FTC should look back at con-

summated mergers not just to learn from them, but potentially to take more enforcement action given what we have seen with Instagram and WhatsApp with Facebook and some of these others and what the market is looking like right now?

Chairman SIMONS. Yes, thank you, Senator. I don't think it would be appropriate for me to comment on any particular investigation or company. As I have said before that, yes, we have the ability to look back at consummated mergers and to undo them. And certainly we have done that many times in the past.

We have a litigation going on now where we are doing that so that is something that is definitely on the table for us. In addition, what we have done is we have issued 6(b) orders to all the major tech platform companies to get information from them about acquisitions that were not reportable under the HSR Act and so we are looking at those too.

Senator KLOBUCHAR. And one thing you and I discussed in Judiciary before the antitrust—I cut you off.

The CHAIRMAN. No, I think you are good.

Senator KLOBUCHAR. OK. OK, one thing you and I discussed at the antitrust subcommittee, and I guess you and the other Commissioners could briefly pitch in here, I look back historically at the staffing for the FTC. This is not about your decisions as Chairman. And when you look, you are like a shadow of yourselves from the 80s, from the Reagan Administration on down, and yet you are dealing with trillion dollar companies and are expected to be the counterweight to those companies and expected by the public and by all of us Democrats and Republicans to be looking at these things.

So Grassley and I have a bill to, as you know, add more resources with some filing fee changes for the mega-mergers and the like. I think we should be doing more going into next year in a big way, but could you just briefly say whether more resources would be helpful.

The public needs to understand and my colleagues need to understand this shift over time and how it is just literally going to be impossible for us to take on legions of lawyers and trillion dollar companies to do all the stuff everyone is talking about from Senator Hawley on, if we don't have the resources.

Chairman SIMONS. Yes, we dearly need the resources. You make a very good point that in the 80s we were about twice the size we are now, and some of that has to do with computerization and more efficiency among the staff. But still we are, I think, we are behind and we do need more resources. We are busting at the seams. We are having trouble staffing the existing mergers as it is. Like I mentioned earlier, we are on a pace to have more merger enforcement actions than any time since Fiscal Year 2000.

Senator KLOBUCHAR. Exactly and here is the point that for my colleagues that want to be fiscally responsible, which we all do, is that you bring in money, the FTC and the antitrust division of the Justice Department brings in money with these fines and we got to look at all of this in that context. And what is happening to consumer prices in this new gilded age that we are entering and if we don't do something with this pandemic profiteering and other things that is going on.



Chairman SIMONS. Yes, let me respond to one thing in particular about that, Senator. That is the way that the law, the HSR Act is currently determined, increasing the fees actually would not go into our budget but you could change that legislatively and we would ask that you do that.

Senator KLOBUCHAR. Got it. OK. I am just going to turn to, is that Commissioner Chopra's name, but I am running out of time quickly. Commissioner Slaughter, are you there?

The CHAIRMAN. She was going to have to come and go, so maybe perhaps we can get back to her.

Senator KLOBUCHAR. OK, I was going to complement the baby. But I will ask this on the record, but it is just simply about the exclusionary practices bill that we have and they need to update our standards for these mergers in light of what is going on around the country with monopolies and the like. And I can do that on the record. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you so much, Senator Klobuchar. Senator Moran.

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

Senator MORAN. Chairman, thank you. Thank you for having this hearing. Your subcommittee had a hearing two weeks ago on the issue of consumer protection in the times of COVID-19 as well. So I will skip those questions today. Senator Blumenthal is in the room. It seems like I should be asking you about data privacy, but I am going to deal with at least for this round of questions with the U.S.-EU Privacy Shield.

Chairman Simons, the court of justice at the—of the European Union in Schrems II recently invalidated the Privacy Shield arrangement as a basis for lawful transfers of data. With more than 70 percent of the nearly 5,300 Privacy Shield certified companies being small to medium sized businesses including many in my home state, I would understand this to be an extremely urgent matter for digital commerce in the United States. Just simply to begin with, do you agree with the significance of this?

Chairman SIMONS. I am sorry. Yes, particularly for small businesses. I was muted, sorry.

Senator MORAN. Yes, thank you, Chairman. Your website, the FTC's website includes an update on the recent developments related to the Privacy Shield. It states in there and I quote, "continues to expect companies to comply with the ongoing obligations with respect to transfers made under the Privacy Shield framework."

This statement aligns with the FTC's previous discretions and refraining from bringing any enforcement action in 2015 when the Privacy Shield's predecessor says Safe Harbor was invalidated in Schrems I. Can businesses expect a similar reasonable approach by the FTC in terms of enforcement in the aftermath of this invalidation of the Privacy Shield?

Chairman SIMONS. Yes, basically we you know, they are making promises that they are following the Privacy Shield principles and if they don't, that is a problem under our Act, under Section 5. In addition, so companies could say, they could put on their website

we are no longer certified under Privacy Shield. It has been overturned by the EU courts, but they would still be obligated to protect the data in a way that they promised going forward. So one thing they might have to delete it or otherwise just, you know, protect it in the way that they promised pursuant to the Privacy Shield principles.

Senator MORAN. And in that circumstance, how does the FTC respond to that business?

Chairman SIMONS. You mean if they don't?

Senator MORAN. Yes, if they do—let me let me first start with if they do, then the FTC would take no action. Is that right?

Chairman SIMONS. That is right.

Senator MORAN. OK. Commissioner Wilson, let me direct this to you. I would warn that the European's Court surveillance concerns in relation to Privacy Shield should not be conflated with the concerns about consumer data privacy. However, is it fair to say that the enactment of a pre-emptive Federal privacy framework might make achieving a future adequacy determination by the EU easier?

Commissioner WILSON. Yes, thank you for the question. And I would agree with that statement.

Senator MORAN. And then let me ask all, in the case of—if that is the case, would you support enactment of the Consumer Data Privacy Security Act which provides a uniform National standard? And I have seen some of the Commissioners have answered that question in other Senators' dialogue, but that uniform National standard, I would ask for a yes or no from each of you.

The CHAIRMAN. We will begin with Chairman Simons.

Chairman SIMONS. Yes, sorry.

Senator MORAN. Commissioner Wilson?

Commissioner WILSON. Yes, I think that one Federal privacy standard is incredibly important. The Internet does not stop at state or even international borders and businesses need the predictability and certainty of one Federal standard.

Senator MORAN. Are there any other Commissioners that have not spoken to this issue this morning in response to my colleagues' questions?

Commissioner SLAUGHTER. I don't believe I have. I don't know—can you hear me?

Senator MORAN. Yes.

Commissioner SLAUGHTER. Can you hear me? OK, great. Sorry, I would say I support the idea of a national floor. That makes a lot of sense to me, but I would be concerned about a law where that floor is too low or a law that invalidated stronger State privacy statutes or prohibited states from having the ability to innovate to fill gaps that aren't filled by the Federal law.

Senator MORAN. Thank you. Mr. Chairman, my time is almost expired.

The CHAIRMAN. Let's go ahead those—since we have not specifically heard from Commissioner Phillips and Commissioner Chopra on that question.

Senator MORAN. OK. Thank you. I thought we had from Commissioner Chopra.

Commissioner CHOPRA. Mr. Chairman, I agree that a national law would be helpful. I do have concerns about deleting all the

State laws. The FTC has dealt with this in the past in terms of working with State laws, determining if there is conflicts, and then what is more protective, and I think we could go down that path again to make sure we don't delete states that decide they want higher levels of protection.

Commissioner PHILLIPS. Senator, this is Commissioner Phillips. Can you hear me?

The CHAIRMAN. Yes.

Commissioner PHILLIPS. Thank you. I just want to echo what my colleagues, Chairman Simons and Commissioner Wilson said about the need for a coherent and singular Federal standard. Not only will this help businesses save costs and keep barriers down for smaller firms relative to large incumbents, it will also help with another critical privacy issue we face and that is consumer understanding. It is easier for consumers to understand one standard.

Senator MORAN. Let me thank the Commissioner for that answer. It is a point that has not been made often previously. Thank you.

The CHAIRMAN. And thank you, Senator Moran. Senator Blumenthal.

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

Senator BLUMENTHAL. Thank you, Mr. Chairman. And thank you to Senator Moran for raising the privacy issue. We are continuing to strive for bipartisan solutions, which I think should be within reach at some point because clearly these questions and the answers we received, and most important, the feelings of the American people, are that we need stronger privacy protection and we should continue to work to that end. But as important as new legislation is the commitment to enforce the tools that the FTC has right now.

On Monday, Twitter disclosed that it faces an FTC fine up to \$250 million for its misuse of account security information for ad targeting. According to Twitter this breach of trust lasted between 2013 and 2019, 6 years. And this announcement follows Twitter's catastrophic and dangerous breach of dozens of high-profile accounts last month. Twitter has been under a consent order since 2011 for exactly these kinds of problems, an order that requires bi-annual audits and a comprehensive information security program.

So I think that the public is rightly skeptical about the FTC's use of its existing tools and its inconsistent and inadequate enforcement of the laws already on the books, and I would like to hear what the FTC has to say about this issue at length, but I want to turn first to the issue of antitrust.

The House hearings, I think, should give the FTC a greater sense of urgency about bringing an action based on antitrust against both Facebook and Amazon which are within its purview. I want to ask Chairman Simons, can we expect some kind of antitrust action against tech firms that have monopolistic power and may have abused that monopolistic power by the end of the year, and what is preventing action now?

Chairman SIMONS. Thank you, Senator. I don't want to prejudge the outcome of an investigation, but let me say this, we are focused

on and this is the most important thing that we are doing on the competition side at the FTC which is these investigations of the tech platforms. We formed a new group in the Bureau of Consumer—Bureau of Competition, the Technology Enforcement Division specifically dedicated to investigating these types of companies.

And they are incredibly busy. They are very active and I have told them that what they are working on is the most important thing in the Bureau of Competition and that they should do it as quickly and as efficiently as possible, and I am very confident that they are doing that.

Senator BLUMENTHAL. Have you given them a mandate that is action oriented because I think the American people want to see action?

Chairman SIMONS. Oh, yes. I have absolutely and I talk to them regularly.

Senator BLUMENTHAL. Let me ask you about some of the scams that have appeared in the wake of the pandemic. As you know, the FTC has issued 255 warning letters about these snake oil scams that have appeared promising cures. It is really the wild west out there. Warning letters simply lack the deterrent and enforcement value of actions. Do you plan more action to stop these kinds of consumer scams that exploit people's fears about the pandemic and their search for treatments and cures?

Chairman SIMONS. Yes, thank you Senator. We try to do what is most effective and most efficiently—and efficient to get to the problematic advertising or claims off the internet. And so we are able to get out these warning letters very quickly and so far they have been extremely effective, extremely effective. Overwhelmingly, the companies take down the problematic language within 48 hours, and where they don't, then we initiate enforcement actions and we brought a number of those already. I think today in fact we announced three or four new ones. And so we have had seven of those already.

Senator BLUMENTHAL. Well, let me just interrupt because—I apologize my time is running out but we know from experience, I know as a former U.S. Attorney and a State Attorney General that a warning letter means that the company can just come back and you can do an enforcement action, but the better course is to have a judgment on the books that can be enforced rather than have to begin the case all over again.

Let me just ask you finally on the issue of privacy, in his Dissent in the Facebook privacy settlement, Commissioner Chopra criticized the FTC for not deposing Facebook executives. Don't you believe that the FTC should depose Mark Zuckerberg in your ongoing antitrust investigation?

Commissioner SIMONS. I can't comment on the specifics of any individual matter, but we—it depends on the circumstances. What we do is fact-specific. Sometimes it is important to depose the CEO and sometimes it is not necessary. But where it is important and helpful, we try to do it. And the other thing I would say is particularly with respect to Facebook, we got as much—we had e-mails from lots and lots of people, we did not need to get Mr. Zuckerberg in a deposition for that case.

Senator BLUMENTHAL. Don't you think in this antitrust investigation it will be necessary to depose both Zuckerberg and Jeff Bezos?

Chairman SIMONS. Well, Mr. Bezos works for Amazon, but I can't comment on—

Senator BLUMENTHAL. I understand that is a separate antitrust investigation but shouldn't this investigation—

Chairman SIMONS. I can't comment on what—sorry, I can't even comment on whether there is an investigation of Amazon. The only investigation that is publicly known that our TED group is doing is Facebook and that is only because they have disclosed it themselves and so we are able to confirm that. But other than that, we don't—we don't discuss individual cases.

Senator BLUMENTHAL. Fair enough. Let me just suggest because my time has expired that the credibility of this investigation is going to depend on its completeness and aggressiveness, and seems to me that the public will be satisfied only if you do depose the very top executives of whatever company you are investigating. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator Blumenthal. Senator Blackburn.

**STATEMENT OF HON. MARSHA BLACKBURN,  
U.S. SENATOR FROM TENNESSEE**

Senator BLACKBURN. Thank you to each of you for the time to be here today. Mr. Chairman, I think that—Chairman Simons, I think you know that Facebook compliance is very important to us and dealing with social media is very important to us. You are hearing a lot about it from letters and notes that are coming to you. We are hearing a good bit about it.

So I have been jumping back and forth from the Judiciary hearing to this one and so let me ask you this. Just very briefly, when do you think you are going to bring this to a conclusion? And are you satisfied that we are going to be able to get to a conclusion with the issues with Facebook and all of this going back to the 2012 Order?

Chairman SIMONS. OK, there we go, unmuted. So are you talking about the Facebook privacy order or you talking about a Facebook antitrust investigation?

Senator BLACKBURN. Yes. Let's take privacy first and then we can go to antitrust.

Chairman SIMONS. OK. Sure. So the order, the negotiated order settling the our order violation of Section 5 case against Facebook was finally entered I think on April 27 or 28 of this past year. It was in litigation in front of a judge in the D.C. District Court—

Senator BLACKBURN. We know all of that. Where are you? Where do you feel you are in compliance? Are they in compliance? And then are you satisfied with the progress? And then I will add something on it because the clock is ticking, what kind of legislative balance do you think we need to strike to make certain that you all can properly deal with this?

Chairman SIMONS. Yes, I think, I don't—so, I can't comment any particular investigation of any particular company, but we are very focused on that Order in particular and compliance with it. If there

is any problem with it, we will be on it. We will be active, but I can't talk about anything in particular about an existing, non-public—

Senator BLACKBURN. Correct, but you are pleased with where you are in the process. Is that what you are saying?

Chairman SIMONS. What I am saying is we are very happy with the Order. We think it really restructures aboard. It provides all kinds of—

Senator BLACKBURN. OK. Speak to whatever kind of legislative balance we need to strike to empower you to conduct enforcement to hold big tech accountable, because when we hear from Tennesseans, they will say well there is a lot of conversation around this but what are you going to do about it? So what kind of legislative action needs to happen?

Chairman SIMONS. So I think what your colleagues, what you and your colleagues are doing in terms of a new Federal privacy legislation is absolutely critical because our hundred-year-old statute is not really up to the task and doesn't give us the authority that we need. We don't really have anything looking even remotely close to what the Europeans have with GDPR so it is really important that you, you know, through your work on the privacy, Federal privacy legislation to continue.

Senator BLACKBURN. OK, I have got another question and I am not going to have time to get through this but looking at the invalidation of the Privacy Shield of the court of justice of the EU and some of the European data protection authorities, they have signaled that they do not foresee a grace period to allow data flows to continue during the negotiation of a successor agreement like that which occurred in 15–16.

So I would be interested to know if any of you have had conversations with any of your DPA colleagues in Europe about the importance to both economies of allowing these data flows to continue? And, also if you have a sense of whether or when there might be a final or collective decision on allowing data transfers to continue while a successor framework is negotiated? And Chairman Simons, I will come to you first and anyone else that wants to weigh in on this just raise your hand.

Chairman SIMONS. Thank you, Senator. So we are working with the Commerce Department and other parts of the Administration. We stand by ready to help them in whatever way we can be useful to them. They are carrying the water on this, and you know, we will have to see what direction they head in and will support them as much as we can.

Commissioner PHILLIPS. Senator, this is Commissioner Phillips. If I can just add—

Senator BLACKBURN. Absolutely.

Commissioner PHILLIPS. Thank you so much. I really appreciate it. A little bit of context, back in, after the Schrems I decision when the Safe Harbor agreement was invalidated, the U.S. Government and the European Commission were already negotiating what became the Privacy Shield agreements.

It was because of that ongoing negotiation that the European privacy authorities agreed to do what you are describing which is to standdown on enforcement and allows firms to continue to transact

in data. I shared the disappointment of Secretary Pompeo and Secretary Ross at this decision.

I do not think it is fair to hold the U.S. to a standard that other countries cannot meet. I think the transaction in this data is very important, in particular for small businesses and we are going to do whatever we can to support the Commerce Department in its efforts and to continue to hold companies accountable to the privacy promises that they make.

Senator BLACKBURN. Thank you. Anyone else want to weigh in on this? I am over time, Mr. Chairman. I thank you and I yield back my time.

The CHAIRMAN. Thank you, Senator Blackburn. Senator Schatz.

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

Senator SCHATZ. Thank you, Mr. Chairman, Ranking Member, members of the Commission. First thing I want to say is I just want to thank the Commissioners for making it very difficult to determine who was a Republican appointee and who was a Democratic appointee. This is the way that these Commissions should operate. It is the way that the Commerce Committee likes to do it and it is a real pleasure to sort of dig into the issues without necessarily digging 1 into each other.

My first question is for Chairman Simons on credit reporting. What actions is the FTC taking to verify that the credit reporting agencies are following the CARES Act provisions and what is the FTC doing to ensure that data furnishers are accurately reporting the data?

Chairman SIMONS. So, thank you, Senator. So yes, so we have investigations open. We had a—and we brought some actions as well. We had a workshop that was specifically focused on accuracy with the CFPB and we are working with them as well. They have supervisory authority under the big three credit bureaus and so we work with them and talk to them about accuracy issues in that regard.

Senator SCHATZ. Can you talk a little more about that because I had Ms. Kraninger in front of the Banking Committee and I was, you know, I don't mind a consultative educational process, but I am a little concerned as to where the enforcement stick is and to the degree and extent that the CARES Act specifically instructs the big three, you know, not to report say a forbearance as a negative credit event. I want to be satisfied that people have access to that information to know that the CARES Act is being complied with and that the big three are actually doing so.

Chairman SIMONS. Yes. So, we are monitoring for that, and yes, I didn't understand your question. We are monitoring for that and if we see something that is problematic, that is a priority for us.

Senator SCHATZ. Thank you. Commissioner Chopra, do you want to add anything just generally speaking about credit reporting and about the sort of public policy question of whether or not consumers should have access to their own credit reports?

Commissioner CHOPRA. Yes, I really think we are long overdue for broader reforms of what I see as a broken oligopoly where consumers are the product, they are not the customer. The CFPB really is the lead on this because of their broader authorities, but I

really want to see the FTC continue its focus on some of the tenant screening and employer background check abuses, because if we see some of this being misreported, you are going to see people who are trying to get to back to work, trying to get a new place if they can't afford their current one, and they might be blocked from doing it.

So we have got a lot to do but we have got to really figure out what we are going to do long-term about Equifax, TransUnion, and Experian because it is just simply not working, the current system.

Senator SCHATZ. I think that is right. And I think that, you know, some of the folks who are exasperated by the big three and their conduct to their incompetence and their unwillingness to give in any way are sometimes characterized as wanting to undermine the ability to do, you know, proper underwriting for mortgages and car loans and everything else. That is not what we are doing. We are trying to make sure that the error rate goes down and that consumers have access to their own information.

I remember being in a Commerce Committee hearing and one of the representatives from the big three said well, our error rate is only three to five percent, which means many, many millions of people are being prevented from having a job or a mortgage or a car as a result of the errors of these companies and they just plug along profitably. Commissioner Chopra, what do you think you can do under the FTC's authority here?

Commissioner CHOPRA. Well just to be candid with you, I think the Congress rightfully stripped the FTC of much of its authorities here and gave it to the CFPB. I have obviously been disappointed at the CFPB's actions in this regard because I think there is much more that they can be doing given the much broader panoply of authorities that they have.

I do want us to enforce the FCRA, including with respect to whether certain large data brokers and tech platforms may be subject to its requirements but have been flouting it. But I agree, we need to reform the big three credit reporting agencies, and it is going to take time, but we need to introduce some real competition because it is just not working right now.

Senator SCHATZ. Thank you very much, Commissioners. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Schatz. Senator Capito.

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

Senator CAPITO. Thank you, Mr. Chairman, and I thank all of you both for your testimony, but also for your service. I greatly appreciate the complexity of a lot of the issues that you are dealing with. In 2015, I launched my West Virginia Girls Rise Up program to encourage young women to take on leadership roles and to build and encourage the future leaders of America. There was a recent *Wall Street Journal* article that referenced a study that found that 78 percent of fifth through eighth graders, girls in particular, were lonely and isolated during this pandemic time and certainly understandably so.

And so it was also quoted that girls between 10 and 14 are spending about three to four hours a day on TikTok, Snapchat, and



Instagram to stay connected. So as children and teens turn to more social media platforms to stay connected, what is the Commission doing to ensure that companies who collect user data are not violating the Children's Online Privacy Protection Act and I will ask the Chairman that question?

Chairman SIMONS. Thank you, Senator. So we are monitoring the market very carefully. We have given advice to ed tech providers. We have given advice to schools. We have given advice to parents, consumers. And so, let's see what—you know, I mean that is what we are doing so far. And one of the things I think that this points to is that we really need Federal privacy legislation. This is an area where it is not just a matter of are you doing what you say? It is a matter of what you are doing may not be proper even if you don't say anything about it.

Senator CAPITO. Well, I think obviously and particularly nobody could have anticipated this and the availabilities obviously of on-line platforms to younger children, probably maybe were some parents might have prevented the use of it or limited the use of it, now it has become more difficult to do that because that is the only way that a lot of teens and pre-adolescents and everything are keeping in touch.

So I am concerned about that. I am going to shift to another issue and Commissioner Phillips on the Made in America provisions. I know that there has been some lack of clarity in terms of what does made in America mean? What does it mean to you? What does it mean to consumers for perception? I know you do studies on that.

Where are we on that made in America? Obviously here again during this pandemic when we saw our PPE is was being made in China, the lack of availability very frustrating. We are going to try to do something about that here, hopefully in our next CARES package. So do you have a comment on that Commissioner Phillips?

Commissioner PHILLIPS. Sure, and Senator, let me just begin by following up briefly on your last question to the Chairman. It is important also to note that the COPPA enforcement under this FTC, the five Commissioners sitting here before you today, is as aggressive as it ever has been. That began with what was then a record settlement against a company that few Americans have heard up at the time, TikTok.

We are very glad they are under order. It continued with our settlement with the New York Attorney General for \$170 million in the YouTube case. On "made in the USA," we are continuing to do our enforcement. We had a big case recently against William Sonoma. We are also in the process of doing a rulemaking. I have to tell you I dissented from that.

But the reason that I dissented is something very much within your power and that was I didn't think that we had the authority to make the rule that we were trying to make. That is a pretty easy legislative fix even though legislation as we all know is hard. That is certainly something that Congress can address and that I could work with you on going forward. Thank you.

Senator CAPITO. Thank you. I am going to go to Commissioner Slaughter. She just gave me a little chat and said she had some comments. So that is the beauty of technology. Yes, Commissioner.

Commissioner SLAUGHTER. Thank you so much, Senator. I just wanted to echo your comments about the importance of thinking about how our children are being affected by all of the online activity that they are engaging in and particularly thank you for your leadership in addressing the mental health issues for young women. I have three daughters and this is something I think about all the time.

And I just point out to you that COPPA does give us some specific authority for children's privacy, but only for kids 13 and under, and only basically to give parents' permission and to require reasonable data security. It doesn't give us the same sort of general authority to engage in protection against abuse of privacy and data practices that you are referring to, especially for teenagers, so I really hope that this is something that Congress will think about as you continue to discuss data privacy legislation.

Senator CAPITO. Well it certainly looks like the data coming forward over in the last several months would support something like that. Thank you very much. I think I probably used my 5 minutes. I appreciate it. Thank you all, and a cute little baby.

The CHAIRMAN. Thank you, Senator Capito. Senator Udall.

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

Senator UDALL. Thank you, Mr. Chairman and Ranking Member. Mr. Chairman, you can hear me, I assume?

The CHAIRMAN. You bet.

Senator UDALL. OK. Throughout the COVID-19 pandemic, we have seen Americans come together to support frontline workers. We have seen New Mexicans rally as communities to help their families and neighbors, but just as times of crisis can bring out the best in people, they can also bring out the worst who target vulnerable people. And that is why we have been seeing this I think a lot in numerous reports of harmful scams that put consumers at risk.

As a former Attorney General in New Mexico, I know you recognize the need to work with partners outside of the agency. State Attorneys General have their ear to the ground. They hear directly from consumers. And many are strong protectors of State consumer laws. A working relationship with them is essential and that is why I introduced the "Stopping COVID Scams Act" in the Senate to empower Federal and State authorities to do more to deter scammers and hold them accountable.

So my question is, my legislation would allow State Attorneys General to bring a civil action in District Court or State court to respond to COVID related fraud under the FTC Act. So a question for every Commissioner, do any of you oppose authorizing State Attorneys General to take action and respond to fraud under the FTC Act?

Chairman SIMONS. Hi, this is Chairman Simons. No, I don't have any reservations about that at all. And I agree completely and want to echo what you said about the importance of our relation-

ship with the State AGs. They are boots on the ground. They are terrific partners and we couldn't do what we do without cooperating with them.

Senator UDALL. Great. Thank you.

Commissioner SLAUGHTER. No concerns. I think it is a good idea.

Senator UDALL. Terrific. Thank you.

Commissioner CHOPRA. Same.

The CHAIRMAN. I think we want answers from Phillips, Chopra and Wilson also.

Commissioner PHILLIPS. Senator Udall, I would like to take a closer look at the legislation. A lot of our statutes do pair our State AG enforcement with ours and that tends to be a really good thing. A lot of states also have what we call baby FTC Acts so I am not sure how the statute, I mean the proposed bill will match up to that.

Commissioner WILSON. Senator, I agree with your proposal.

Senator UDALL. Great. Thank you very much. We would like to— Commissioner Phillips, we would like to continue the discussion with you and hopefully get to a place where you feel comfortable with Attorneys General doing that. Now my—

Commissioner PHILLIPS. I appreciate it.

Senator UDALL. You bet. Now, my second question goes to civil penalty authority. My bill also enhances the FTC's civil penalty authority. This is the same bill we talked about with regard to the Attorneys General. Currently FTC enforcement begins with an administrative complaint against a potential scammer. Then there is a cease and desist order or a settlement. Under current law, the Commission can only then seek civil penalties in court if there is a further violation.

This is months or potentially years of court action, but as we have seen the current health crisis moves quickly. New Mexicans have died due to contaminated hand sanitizers with false labeling, families fear for their health and are willing to spend their money on questionable products making false claims. Chairman Simons, would enhancing the FTC's authority to use civil penalty authority protect consumers in the current health crisis?

Chairman SIMONS. Yes. We support that. The other thing I would say is we really need 13(b) because with 13(b), we can go into Federal court and get a TRO, preliminary injunction, and we can get an asset freeze for these fraudsters. Whereas civil penalties might take a while to get through the court system and we have to get the Justice Department involved too. So that would be important in the absence of 13(b) but 13(b) is really important.

Senator UDALL. Yes. Thank you for that answer. Commissioner Slaughter, is the FTC's current toolkit of enforcement actions up to the present challenge?

Commissioner SLAUGHTER. Well, I think as you point out, Senator, civil penalty authority would be enormously helpful. It is really hard for us to have to go in most cases through that iterative process to get to civil penalties and civil penalties are valuable because they put a big stick on the table in terms of potential money that companies will have to pay which has an important deterrent effect. So seeing that would be important.

The Chairman pointed to an issue that I think is little-noticed but is also very important, which is that when we have civil penalties, we usually have to go through DOJ. I would rather see those be coupled with independent litigating authority for us on the civil penalty front. And I also agree with the Chairman's point about 13(b) which is not only gives us those important tools to go into court, but it also allows us to return money directly to consumers and what we want to do at the end of the day is make harmed consumers whole.

So I think civil penalties coupled with 13(b) authority that is clarified are really, really important to both give a big stick, help deter bad actions, punish companies that have wronged consumers, and also return money to consumers that have been wronged.

Senator UDALL. Thank you so much, Commissioner, and I have a couple of questions for the record that I hope you will answer with regards to refunds for flights and other travel arrangements and then some of these bots that are taking real advantage of consumers and the marketplace. So with that, I yield back, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Udall. Senator Thune.

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

Senator THUNE. Thank you, Mr. Chairman. Chairman Simons, as you know, reforming Section 230 of the Communications Decency Act has been hotly debated here in Congress. Section 230 is the law that prevents social media platforms like Facebook and Twitter from being sued for content that users post on their platforms. I have introduced a bipartisan bill with Senator Schatz on this issue known as the Platform Accountability and Consumer Transparency Act or the PACT Act which among other things would stipulate that the immunity provided by Section 230 does not apply to civil enforcement actions brought by the Federal Government.

The DOJ recommended this particular provision and it has recently published a list of recommendations for reforming Section 230. My question is how would consumers benefit from reforming Section 230 to ensure that the immunity provided by Section 230 does not apply to civil enforcement actions brought by the Federal Government such as the FTC?

Chairman SIMONS. Thank you, Senator. So we have a number of instances, it is actually fairly common, for us to go into court and have a defense put on us relating to Section 230. So it would be very helpful to us to avoid having to deal with that and allow us the ability to go not only after the platform participants but in the right circumstances the platform itself.

Senator THUNE. OK. This I would direct all Commissioners and it has to do with the bill that Congress passed last year that the President signed into law. It is called the TRACE Act, and among other things, the TRACE Act required that the FTC register a single entity that conducts private lead efforts to trace back the origin of illegal robocalls, and I was pleased to see that the FTC did fulfill that requirement this last month. Can you speak to the FTC's efforts on engaging with industry initiatives like the U.S. Telecom Industry Traceback Group and whether this public-private partner-

ship has been successful in identifying illegal robocallers? Let's start with the Chairman.

Chairman SIMONS. Yes, Senator. Yes, so absolutely. This has been extremely helpful for us. The traceback organization is very effective and we use—you know, we are just overjoyed with what they are doing with their progress. The other thing I will say is what we are doing is we are going after VoIP service providers who often serve as the entry point for scammers into the U.S. telephone network.

And we sued a company in December of last year, Globex, and then we sent a whole bunch of warning letters to other VoIP service providers and said hey, look at this. You may be liable. These people are already being sued. You may be next. And we think that that may have had some impact on a decrease, on a substantial decrease in robocalls since that time.

Senator THUNE. Great. Thanks. Is there anybody else quickly or—yes, go ahead.

Commissioner PHILLIPS. Senator, just to add briefly, in the TRACE Act, as you know, it also calls for the FTC to convene the Hospital Robocall Protection Group to come up with best practices for State and local governments, for telecom, and for hospitals to help deal with the particular storage, in particular the public health, that robocalls present. We had our first meeting last week and meetings are continuing, and we hope to have a report out according to the timeline indicated by Congress.

Senator THUNE. Good. Excellent. Thank you. Last question very quickly. I think I have got a little bit of time left. And Mr. Chairman, do you expect to exercise discretion and refrain from bringing any enforcement actions with regard to Privacy Shield until after a new structure is negotiated and put in place to transfer data from Europe?

Chairman SIMONS. I think what we are expecting to do, what we intend to do is make companies fulfill the promises they made under Privacy Shield. If they had made promises private—excuse me, if they made promises, which if you sign up for Privacy Shield you have and you are going to protect the data in a certain way and when you are done with it, you are going to delete it. Those types of things. We are going to enforce with respect to that.

Senator THUNE. OK. And my understanding is that the issue of preemption and the California law has been covered extensively already. But so I will—my time has running out. I will defer that one and perhaps may have a question for the record about that.

The CHAIRMAN. Thank you, Senator Thune. Senator Baldwin.

**STATEMENT OF HON. TAMMY BALDWIN,  
U.S. SENATOR FROM WISCONSIN**

Senator BALDWIN. Thank you, Mr. Chairman. A recent FTC press release noted that online shopping complaints that the FTC has received during the pandemic have surged. The FTC has pointed out—or has put out a shopping online guide that recommends online shoppers get the sellers' physical address and inspect product descriptions closely. These common-sense suggestions seem aimed at ensuring that the buyer has the same information shopping online during the pandemic as they would if they were shopping in person. Before I go further, I would like to just ask each

Commissioner if they agree that generally American consumers should seek the same information shopping online as they do in person? And if you could just briefly answer yes or no starting with Mr. Chairman.

Chairman SIMONS. Yes.

Senator BALDWIN. Mr. Phillips?

Commissioner PHILLIPS. Yes, they generally seek the same information.

Senator BALDWIN. Mr. Chopra?

Commissioner CHOPRA. Yes.

Senator BALDWIN. Ms. Slaughter?

[No response.]

Senator BALDWIN. Ms. Wilson?

Commissioner WILSON. Yes, I agree.

Senator BALDWIN. OK. I think I missed Ms. Slaughter, but let me carry on. I know that many consumers want to buy American-made products, but they can't verify the country of origin of items when they are shopping online. In order to ensure that online consumers get the same access to country of origin and seller location information that in-person shoppers have, I introduced the COOL Online Act with Senator Rick Scott back in May.

The bill requires online sellers to provide buyers the country of origin label for products that they are selling. With more and more consumers buying their goods online during the pandemic, this transparency is more important than ever. Commissioner Chopra, can you please share that if you are supportive of the goals of my COOL Online Act and explain the role you see the FTC playing in this important issue for American consumers?

Commissioner CHOPRA. Yes, there is no question that there are so many products where consumers want to know where they were made, particularly during the pandemic. I have had discussions with many major e-commerce platforms that been very concerned that they are not listing the country of origin except for textile wool and other things where they are required to and I think this needs to change. They should disclose country of origin for those goods, and in as much that they are lying about it, that can create some enforcement liability and I think this is a good way to create more information for consumers.

Senator BALDWIN. Thank you. In April, I joined my colleague Senator Hawley, in sending a letter to the Commission urging an investigation into the consolidation of the meat packing and processing industry, and its impact on consumers, farmers, workers, and our Nation's food supply. During the COVID-19 pandemic, we have seen severe outbreaks of the virus among workers at meat packing facilities in Wisconsin and elsewhere in the country.

Though the pandemic has brought many of the issues into starker relief, the concerns around consolidation have been simmering for years. Commissioner Chopra, I know there has been a previous question in this hearing about consolidation in the meat packing industry, but I want to hear if you agree that concentration has contributed specifically to workplace safety issues and pricing issues? And what do you believe the FTC as well as other Federal agencies can do to address these problems?

Commissioner CHOPRA. Yes. I agree. It was 100 years ago that the FTC's reports exposed a lot of the abuses by the food and the meat packing industry in particular. In 1921, Congress stripped some of those authorities to enforce those laws for the FTC but we still retain our industry-wide investigation authority under Section 6(b).

I really think the USDA needs to increase its enforcement and its rulemaking to change the undue preferences standards. I think they are going in the wrong direction and I think the DOJ, all of us need to really be cracking down on this. It has some real impact for those of us eating at the table as well as those working and everyone in our food industry.

Senator BALDWIN. I did note that Ms. Wilson said she had a comment on this issue. With the Chairman's indulgence can we—

The CHAIRMAN. Ms. Wilson?

Commissioner WILSON. Thank you, Senator Baldwin. I appreciate the opportunity to address this issue. I think actually while consolidation may be a concern, one of the significant issues that we may not perhaps be paying sufficient attention to is the fact that laws and regulations that are designed to apply to some of the larger food producers and meat producers impose significant costs and compliance issues when they are applied in the same way to smaller farmers.

And so smaller farmers do need to grapple with these massive compliance costs not even designed for them and end up having to exit the business. There is a fantastic book on this topic called "Everything I Want To Do is Illegal." So I think revisiting the way in which we regulate small farmers could perhaps help to reintroduce more competition into the food sector in the United States.

The CHAIRMAN. Thank you. And thank you very much. Our next questioner will be Senator Scott. But we heard there was a question about the connection. Senator Scott, can you hear us?

**STATEMENT OF HON. RICK SCOTT,  
U.S. SENATOR FROM FLORIDA**

Senator SCOTT. I can hear you perfectly.

The CHAIRMAN. You are recognized.

Senator SCOTT. Alright, thank you, Chairman Wicker. Just to follow up on what Senator Baldwin was talking about. I introduced the PRIME Act which is going to require online retailers to list the country of origin for each product they sell. Then I joined with Senator Baldwin to introduce the Country Of Origin Labeling Online Act which would give the FTC authority over such laws. The PRIME Act would also require app stores just to display the country of origin for apps sold in their marketplace.

So consumers know where the apps they download to their phones are developed and you know, they can make good decisions. I think we have seen this just recently with TikTok. So I am concerned, as I think all of us are, about companies influenced and controlled by the Chinese government like TikTok because under Chinese law they have to adhere to the communist government's demands of spy, steal user data, or any content the government wishes and we have seen that with TikTok.

I think we all would agree that no American should be subject to things like this and this sort of risk. And we will see if TikTok becomes owned by a U.S.-based company, but even if we do we have to be careful about back doors. So my question is, what enforcement measures and oversight does the FTC have to ensure a company operating in the United States with access to personal identifying information discloses to users where the company is housing the data and how they are using that data?

Commissioner SIMONS. So this is one of the—thank you, Senator. This is one of the reasons we need Federal privacy legislation because there isn't a lot—there is a hundred year old statute is based on deception standard where somebody says here is what we are doing with your data and then they don't do it. But if they don't say anything and it is not untruthful and we are deceptive, then it is very challenging for us to deal with that.

Senator SCOTT. Have you proposed legislation?

Chairman SIMONS. I am m sorry. Say again.

Senator SCOTT. Have you proposed legislation or do you—have you seen legislation that you like?

Chairman SIMONS. No, we have been relying on the Congress to do that, your new colleagues on the Committee and elsewhere.

Senator SCOTT. OK. Have you seen any legislation that has been proposed that you like with regard to giving you the authority you need?

Chairman SIMONS. I could get you something on that. We have given technical assistance on a bunch of statutes and we would be happy to provide that to you.

Senator SCOTT. So, I mean first off what Senator Baldwin and I are doing with regard to looking at apps and products sold online, do you think it is the right approach or do you have suggestions that we should change to make sure that our goal is accomplished, assuming we can get that passed?

Chairman SIMONS. I have to consult with the staff. I haven't had the opportunity to look at your legislation in detail, I am sorry, sir.

Commissioner CHOPRA. Senator Scott, if I could add one challenge that—I support the goals. One challenge that is an emerging issue among the technology community is verifying the country of origin for software code.

This is obviously something that the DOD and the Commerce Department have been thinking about. It is extremely difficult in certain circumstances to verify. It is not physical and it is going to be a more emerging problem as our whole industrial base as well as consumers are thinking more about supply chains and whether there might be back doors or theft from adversarial State and non-State actors.

Senator SCOTT. That makes sense.

Commissioner PHILLIPS. Senator Scott, this is Commissioner Phillips and if I could just add briefly, whenever we are talking about enforcement, again, privacy and other enforcement, against companies that are abroad that have effects here in the United States, we would be remiss not to mention the SAFE WEB Act and the passage of that authority which is set to expire is very, very important for us, not only on our own but in particular working



with our partners abroad on cases that—as cyber cases often do cross National boundaries.

Senator SCOTT. OK, and when is that expiring?

Commissioner PHILLIPS. I believe later this month.

Senator SCOTT. OK. Alright. Do anybody else want to respond? OK. Do you have—does the FTC have the ability to require online retailers to disclose the country of origin for either products or apps, understanding what you just said about the difficulty on the app side because of where codes are produced, do you have the ability to do this without legislation?

Commissioner CHOPRA. Yes, Senator. My understanding is that we have certain rulemaking authorities that could be used for that. It may be potentially cumbersome. There are certain statutes that directly require country of origin labeling for textiles, wool, and other products, but there is not a general requirement. So legislation would obviously make it much more expedited.

Senator SCOTT. OK.

Commissioner WILSON. Senator, this is Commissioner Wilson. I do believe that more information available to consumers is always better. It will allow them to more accurately evaluate the quality and value that various product and services may offer to them. And so I think this is definitely a good idea.

The CHAIRMAN. Thank you.

Senator SCOTT. Go ahead.

The CHAIRMAN. Thank you, Senator Scott.

Senator SCOTT. Thank you. Thank you, Chairman Wicker.

The CHAIRMAN. Thank you, sir. Senator Peters.

**STATEMENT OF HON. GARY PETERS,  
U.S. SENATOR FROM MICHIGAN**

Senator PETERS. Thank you, Mr. Chairman, and thank you for putting this hearing together and each of the Commissioners. Appreciate your testimony here today as well. My first question is for Commissioner Phillips. On June 5, one of Michigan's largest healthcare providers finished investigating a data breach that occurred in January.

They found that around 6,000 patients had information possibly exposed as a result of this breach. The system that assessed accounts contain personal and protected health information according to the system. This included patient names, dates of birth, diagnosis, the codes, procedures, treatment locations, treatment types, prescription information, patient account numbers, pretty extensive information.

So my question to you because I know in your opening statement you discussed the need for data security in particular, knowing that this technology is constantly evolving in a rapid fashion, what can the FTC and Congress particular do to ensure that companies are doing all that they can to protect this data, especially when it comes to patient data?

Commissioner PHILLIPS. There are things we can do here. I think a regime that includes a very specific legal authority that captures some of the work we do already ensuring that companies undertake adequate processes to make sure that they are protecting the kind of data that they have. I do think rulemaking authority is appro-

priate here and I think civil penalty authority is appropriate here. My view is that unfortunately, we don't always have the people who could most efficiently protect data, adequately protecting it, that the cost is borne by others. There are externalities, and a civil penalty regime that helps sort of right that incentive structure.

Senator PETERS. Well—

Commissioner CHOPRA. Senator, may I add something to that?

Senator PETERS. Absolutely.

Commissioner CHOPRA. Yes, one of the things that I think we are going to need to confront is there has been a change in my view over the last 10 years that much of the impetus for stealing personal data was really identity theft to open up a credit card at a department store in someone else's name. But really what we are seeing is something very different. Equifax, Anthem, Marriott, the Justice Department and others have all said that these were not necessarily identity thieves.

They were affiliated with State and non-State actors related to China. And I think we are now going to need to be thinking about really safeguarding our entire data security even in the commercial context to make sure that adversarial parties cannot collect detailed dossiers on each of us for the purposes of weaponizing it, interfering in our country, and manipulating us. So I think the stakes are much higher and the harms are on a different dimension than they were even just a few years ago.

Commissioner WILSON. Senator, this is Commissioner Wilson. If I may, just one thought.

Senator PETERS. Yes, please.

Commissioner WILSON. I think your question highlights one of the issues we need to confront. Privacy legislation and data security legislation essentially are two sides of the same coin and it is important to remember that many healthcare providers in the United States are classified as nonprofits and so in data security and privacy legislation, the FTC should gain jurisdiction to have authority over these nonprofits, because as you point out, they do have significant sensitive health data and so it is just another reason that we need to get privacy legislation coupled with data security legislation in place to protect consumers.

Senator PETERS. Yes, clearly. And really go online and follow those lines about more of this information. It is becoming available. Directed to Commissioner Slaughter initially, but others, please weigh in, you know, according to media reports, data brokers are buying and selling data collected from Americans phones and have even been tracking Americans at protest or at places of worship.

And while smartphones allow customers to choose whether or not to allow an app to have access to their location data, Americans have no ability to control whether either the app developer or its partners sell that information to third parties. So my question is, do you believe that Americans have sufficient control over secondary uses and the sharing of very sensitive data? And if not, what is the FTC doing to address this problem?

Commissioner SLAUGHTER. Thank you so much for the question, Senator. I think this is a really, really good point. No, I don't believe Americans have enough control for a number of reasons. Our current framework is as you suggested basically a notice and con-

sent framework that says companies are supposed to tell you what they are doing and you are supposed to be able to say yes or no. But as you know, often that notice is buried in really lengthy and unreadable privacy policies that consumers often have no choice but to click through to get access to the service.

They can't go back and say yes, I agree to some provisions or not other provisions and almost none of that controls secondary uses or tertiary uses down the line. So one of my big concerns is that the current FTC authority, which as we have discussed is basically premised on deception in the privacy context with some unfairness authority, really doesn't reach that kind of behavior that is deeply concerning and deeply problematic.

So I think you are highlighting a really important issue that should continue to be a focus for the Committee. And I do think in the meantime the Commission should think about where we can apply existing authorities that we have, whether it is standard UDAP enforcement or whether we dust off our Magma's rule-making authority which we basically rarely use because it is as Commissioner Chopra pointed out, it is somewhat cumbersome. I think undertaking that process is really an important thing for us to start and not just wait for Congress to act because these things are happening now in real time and they are creating real peril for Americans.

The CHAIRMAN. Senator Peters, could we let other members answer on the record since—

Senator PETERS. That would be great. Thank you.

The CHAIRMAN. Thank you, Senator Peters. Senator Lee.

**STATEMENT OF HON. MIKE LEE,  
U.S. SENATOR FROM UTAH**

Senator LEE. Thank you, Mr. Chairman. Thank you, Commissioners for being here today. The FTC first implemented the Contact Lens rule in 2004 after Congress passed the Fairness to Contact Lens Consumers Act. The Contact Lens rule at its heart is very simple. It simply requires prescribers to give consumers a copy of their contact lens prescriptions. The reason for this is also simple.

That contact lens consumers, as Congress determined and as the FTC has reiterated, need to have the opportunity to shop around to find the best deal. Now, Senator Klobuchar and I wrote to the Commission raising concerns that Federal law was not being properly implemented and enforced and the consumers don't always have access to their prescription and I was grateful for your response. I want to thank each of you for your unanimous agreement to finalize the new Contact Lens rule to help protect consumers against this kind of protectionism. Unfortunately, I am hearing that there are some efforts underway to delay this important rule and so I want to ask a couple of questions about that.

Chairman Simons, we will start with you. If this rule is delayed, particularly now when consumers are facing significant economic hardships in connection with the global pandemic and trying to socially distance, couldn't consumers end up being harmed and specifically couldn't it end up making it more difficult for consumers

to shop around and to purchase contact lenses from their retailer of choice and at a lower cost?

Chairman SIMONS. Thank you, Senator, for that question. Yes, absolutely. The whole purpose of this of this rule—

Senator LEE. Chairman Simons, you still there? Sounds like we may have lost you.

The CHAIRMAN. Chairman Simons, you were saying the whole purpose of the rule and then we lost the connection. Can you hear us, sir?

Senator LEE. OK. Mr. Chairman—

The CHAIRMAN. I think, Senator Lee, you were making such a poor point there that the technology went out—

[Laughter.]

Senator LEE. I know. I think it has much more to do with the fact that Chairman Phillips was emotionally overcome at the importance of this to Contact Lens consumers.

The CHAIRMAN. OK, can the witness hear us because we do need to get an answer there.

Senator LEE. OK. Maybe we can move along to some follow-up questions of other members of the panel and then we will move back to Chairman Simons if and when we hear back from him. Let's move to you then, Commissioner Phillips, optometrists argue in some cases not all cases, but some optometrists are arguing that the compliance costs associated with the rule are great.

Some have even argued that they can't do patient signatures because that would require pens to be disinfected between uses. Putting aside for a moment the fact that during COVID-19 optometrist should be practicing basic sterilization, did the Commission examine the compliance costs and if so, what were the findings?

Commissioner PHILLIPS. Absolutely, Senator. As you know, the Contact Lens rule that we recently promulgated was a very long process involving two proposed rules and taking into account some of the concerns about compliance costs about health. All of those things are reflected in the final version of the rule that we published. But as you noted earlier, the concerns that animated Congress and that animated us also include having a sufficient degree of competition in the market, allowing and making sure that consumers have available to them their prescriptions for contact lenses, and that sales for those lenses not only be done by the prescriber but also by other sellers.

Senator LEE. Thank you. Commissioner Slaughter, in your statement regarding the Contact Lens rule, you actually noted that Congress could go further to empower consumers. What additional reforms do you think Congress should perhaps consider in order to stop this kind of market protectionism? Perhaps we have lost Commissioner Slaughter as well.

I can move on to a subsequent question. We will pick up there if we pick them back up. I would next like to talk briefly about another issue. Our country is in a nationwide debate regarding online political bias and censorship among certain big tech firms. It is sad to think that Internet platforms, platforms that boast the ability to connect hundreds of millions of people and allow for the rapid dissemination of ideas and opinions believe that they know what is best for the American people, to read, to watch, and to listen, and

to know what opinions are dangerous, even when they have no technical expertise in a particular field.

In an effort to protect all viewpoints, a number of members including myself are asking whether Congress must amend current law as part of the solution and whether the FTC might play a new role in that. Chairman Simons, if you are back, I would like to ask you evaluating whether a tech company is following the terms of service is something that the FTC currently does, but having the FTC evaluate political viewpoints is much broader. Would FTC evaluation of online content for political bias or neutrality implicate the First Amendment and how would the FTC go about evaluating for such bias?

The CHAIRMAN. We are informed, Senator Lee, that Chairman Simons had to log off and try to log back on. Are you back on, Mr. Chairman? That may not have been accomplished. Let's—

Senator LEE. Can I ask the same question of Commissioner Phillips?

Commissioner PHILLIPS. Yes, Senator. Look, I think the process of content moderation is something that big firms face. It is something that a lot of small firms face. I am not sure if my answer was clear earlier in the hearing but we all recall with horror when press reports about the awful shooting at the Tree of Life synagogue in Pittsburgh included reports about communication on a platform called "Gab" so this isn't all just about large tech companies. It is a difficult question.

At the end of the day though, when it comes to moderating speech, the First Amendment is implicated and that is something that we have always taken into account when we have done any of our work related to the content of speech with respect to a kid video games, going back decades. And of course, the First Amendment is something we have to keep in mind as we move forward.

Senator LEE. Thank you. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you. Senator Tester.

**STATEMENT OF HON. JON TESTER,  
U.S. SENATOR FROM MONTANA**

Senator TESTER. Thank you, Mr. Chairman. I got to tell you I love this committee. This has been a great hearing and I appreciate the Commissioners. I just want to make a few statements, never going to get to my question. Number one, I cannot believe how concerned people are about textiles and electronics when it comes to country of origin labeling yet we don't give a damn about where the food that we put in our body comes from.

So maybe I need to use you guys to be able to enforce a country of origin labeling for food at least online food. And the second thing is I want to go back to Commissioner Wilson's point on smaller companies. You are absolutely correct. And I will tell you that when the 2012 Food Modernization Act came by and I put an amendment in to exempt smaller companies and we got it passed, guess who came to Capitol Hill and acted like the world was going to end, the big food companies. And that is where I come to my question is for you, Mr. Chopra, and it deals with consolidation in the packer industry, but it is going to deal with it from a Packers

and Stockyards Act perspective. Look, I am going to tell you a fact, this is an overstatement.

We got kalkhoff operators and we got medium and small-sized feeders that are going broke and it is going to change the food chain for food for this country from a consumer standpoint and a for food production standpoint. We authorized the USDA to put forth some new rules on the Packers and Stockyards Act and they came back with a document that wasn't worth the paper it was written on.

So my question to you, Mr. Chopra, what is your recommendations for improving the Packers and Stockyards Act so it actually works for folks in production agriculture and folks and consumers?

Commissioner CHOPRA. Well, I just have to say that in the submission I made to the USDA, I think the rulemaking they are doing is going to legalize lots of the worst practices that allow them to do everything from rigging the weights and measures to giving poor product and then penalizing farmers for doing it. So there is—we need to do a real rework of how that whole thing is working.

And we need to also more answers from the USDA about what is going to go on. There has almost been no enforcement on some of these things. So I also just add on country of origin labeling, even under the USDA guidelines, meat can come from overseas. And if it comes into a factory by a U.S. meat packer, it can be labeled as product of USA. It is totally inconsistent with every other country of origin standard and it just feels like a giveaway to me.

Senator TESTER. You are absolutely 100 percent correct. It is a giveaway and guess who suffers? The people in production ag suffer because you are bringing in crappy meat from Brazil or Argentina to put it with good U.S. product and the consumer doesn't know the difference. So we agree. The question I have for you, Mr. Chopra before I go to Commissioner Wilson is, is there anything the FTC can do about it or is it just the Congress has to get off their butt and do it?

Commissioner CHOPRA. Well, I would push Congress but legally and I am happy to share more with you and your staff later. Our authorities are much different when it comes to poultry products and margarine versus other types of meat. The Justice Department does a lot of the antitrust work. Our efforts are really on retail, but we got to start looking at the whole food system, whether it is food delivery apps, whether it is supermarkets, or whether it is the exploitation of farmers.

And I just want to share, you know, one of the reasons that we are seeing more poverty, more opioid issues in many of these communities is being unable to sell and make a livelihood. You know, last week we are seeing that a lot of those who raise lamb are not going to be able to get it to market and that is going to be devastating.

Senator TESTER. Well, let me tell you, I couldn't agree with you more. And the fact is that we are screwing things up by not enforcing the rules that have been put out 100 years ago. They still apply. They need some modification. We need to make them work or all we are going to turn into serfs working for the big man. OK, so thank you, Mr. Chopra, for your work.

Ms. Wilson, I want to talk about something else is near and dear to my heart and that is right to repair, OK. When I went back to Montana this weekend, we harvested a little bit of peas, we harvested a little bit of winter wheats, and I had a rear beater bearing go out of my combine. I was able to replace it because my combine is about 15 years old, OK. Today, it is a different story when you buy this equipment because of the technology and by the way, this isn't about cell phones. You can throw this damn cellphone away. I don't care. I can go buy a new one for \$300 bucks. It cost me \$300,000 bucks to buy a combine if I can't repair the damn thing.

So could you give me a little input on what we need to be doing on the "right to repair" stuff because it is going to put, once again for people in production agriculture, out of business. It will be consolidated at the ground. It will be consolidated at the packer level. It will be consolidated from top to bottom and it is going to ruin it for this country. You are muted.

Commissioner WILSON. Sir, thank you for the question, and I completely agree with you. Obviously "right to repair" is an issue that the FTC has explored in a recent workshop. There are competition issues and a bedrock principle of competition is that you are not tied to a manufacturer to do repairs on your equipment. We have a Massey Ferguson tractor on our farm out here in West Virginia and my husband broke a couple of bands using the chipper and replaced the band himself, because frankly, the dealer here isn't great.

And so the "right to repair" is important. I see you laughing. Yes, we have an issue with the Massey Ferguson dealer here. But at the same time, there are legitimate consumer protection concerns with respect to certain products. For example, if you put the wrong battery in a certain product, it might explode, so the FTC, as it has done with the contact lens rule, is looking to balance the benefit of competition with the protection of consumers from exploding products or products that are harmful to health.

But I do believe, sir, that you are correct. There are manufacturers who invoke safety concerns, in fact, not to protect consumers but to prevent competition for repairs in the aftermarket and that is just another cost that our small farmers are facing and that we need to eradicate.

Senator TESTER. And unnecessary. And I want to echoed Senator Schatz saying I appreciate the bipartisan work that this Commission does. Thank you.

**STATEMENT OF HON. KYRSTEN SINEMA,  
U.S. SENATOR FROM ARIZONA**

Senator SINEMA. Hi, it is Senator Sinema. I want to thank the Chairman for holding this hearing today and I want to thank our witnesses for being here. As the pandemic create significant challenges for American families and small businesses, scammers are using the pandemic as an opportunity to defraud Americans including our seniors. This week one of Arizona's major private lab companies Sonora Quest alerted patients that scammers are posing as Sonora Quest representatives to steal personal information from patients.

This is just one troubling example of the thousands of COVID-related scams Arizonans reported to the Federal Trade Commission. These scams have cost millions of dollars in losses for Arizona families, but they are not just a financial concern. COVID scams also endanger the health of the public who can be defrauded into believing that certain products can prevent or cure COVID, which of course as we know is not true. I am looking forward to working with the FTC to make sure you have the tools you need to protect Arizona families and small businesses from deceit and abuse.

I think Chairman Simons is not back on yet so I will direct my first question only to Commissioner Slaughter. I introduced the bipartisan Seas Act with Senators Gardner and Capito that expands FTC authority to stop false advertising and other deceptive ads during the Coronavirus pandemic by increasing civil and criminal penalties on scammers. This bill ensures that scammers face serious 1 Federal penalties for lying to the public about COVID. Do you support the goals of this legislation?

Chairman SIMONS. Senator Sinema, this is Joe Simons. I actually showed up. I had a power outage at my house and I am on battery power.

Senator SINEMA. Oh, wonderful. I am so glad.

Chairman SIMONS. I can—I am a little bit in the dark here as you can see because I have no light, but I do support the goals of that legislation absolutely, but I would have to say this, in terms of legislative priorities at least from our parochial standpoint, from my parochial standpoint at the FTC, your time is very valuable and—

Commissioner CHOPRA. Senator Sinema, I never like to speak for the Chairman, but I will just—I believe what he is probably going to say is that he would welcome Congressional action on Section 13(b) to make sure that we can get the ill-gotten gains and return money to consumers. And he can correct me later if I am wrong, but that is what I believe he was going to argue.

Senator SINEMA. Well, I appreciate it and thank you for stepping on that. We will follow up with him after the hearing to get those details. And is Commissioner Slaughter on?

Commissioner SLAUGHTER. I just tried to change my audio. Can you hear me now?

Senator SINEMA. Yes, I can.

Commissioner SLAUGHTER. OK, great. I don't know what the problem was. So I wanted to say, yes. I think the goals that you are talking about are extremely important. Stopping scams is part of the bread and butter of the FTC and it is never more important than in a moment like this where bad actors are really praying on vulnerable consumers and imperiling not only their wallets but their health and safety. So I really applaud you for working on that and look forward to continuing to work with your office and your colleagues on these issues.

Senator SINEMA. Thank you so much. Commissioner Chopra, due to the coronavirus pandemic, many Arizona small businesses are struggling to get by and entrepreneurs are doing everything they can to stay afloat. Some bad actors are using these difficult times to take advantage of small business owners with unfair and deceptive practices related to financial assistance. Can you tell me what



the FTC has done to protect small businesses from abuse and what should small business owners know when looking for financial assistance right now?

Commissioner CHOPRA. Thanks for that question. We have actually sued two actors in this space including one very recently that I think we believe were violating the law in order to profit off of small business owners' pain. One of the things that's really concerning to me is that the contract terms, some of them are completely unfair in how they are executed and essentially require that a small business owner automatically plead guilty when they are sued. This is called a "confession of judgment."

So I really hope that small business owners—I know they are struggling to work with many of the largest banks. A lot of the community banks have been much better in delivering PPP assistance, but really going after these high rates, sometimes 4,000 percent loans, it is just setting small businesses up to fail, and we just can't have that.

Senator SINEMA. Thank you. I know my time is close to expiring. I am not sure if the Chairman is back so I am going to go forward and ask one more question to Commissioner Slaughter. As I referenced earlier, Arizonans are being targeted by COVID scams such as the Sonora Quest imposter scam and we need to make sure that our enforcement agencies have adequate resources to protect Arizona families and return stolen money to Arizonans. Given the increase in scams during the pandemic, how could the FTC best use additional resources to protect Arizonans? And what authorities do you need to insure that victims of fraud do get their money back?

Commissioner SLAUGHTER. Thank you, Senator. This is a really important question and I appreciate your attention to this issue. In terms of resources, as determined, and some of my colleagues have noted, the FTC has been doing its work in a very substantially underresourced way for several decades and that has never been felt more acutely than it is right now as we are trying to cope with all the pandemic related issues as well as the general underlying ongoing work of the Commission. So I think whatever appropriations the Congress felt fit to give us would be able to put to very good use on behalf of the American people. In terms of authority and returning money to harmed consumers in particular, there are two things that we are talking the most about, clarifying our authority under Section 5 of the FTC Act, the provision that allows us to discord ill-gotten gains and return money to consumers.

I think that is one of the most important things that you do and right now that authority is under attack in the courts—verification from Congress on that point is enormously important. And then civil penalty authorities also helpful for us to create leverage with companies—bad actions and help us in our negotiations, keep the fraud from happening in the first place. So we can't return civil penalties to consumers. That money goes into the Treasury, but I think it is still useful for us to have a bigger—in order to prevent the fraud from happening to begin with.

Senator SINEMA. Thank you so much. Thank you, Mr. Chairman, for holding this hearing today and I do yield back.

**STATEMENT OF HON. JACKY ROSEN,  
U.S. SENATOR FROM NEVADA**

Senator ROSEN. Thank you, Senator Sinema. This is Senator Jackie Rosen from Nevada. I am not sure that Chairman Wicker is on so I believe that I am the last Senator and I will ask a few questions and we will close this hearing out. I want to thank you for being here today. And Commissioner Slaughter, I want to tell you that you really exemplify during this pandemic what so many families are going through trying to balance work and childcare and all of that and I appreciate you sharing your beautiful sleeping baby with us today. It reminds us of all the important work that we have to do to protect things for the next generations. But I want to talk just a little bit about notario scams.

You know, Nevada, is home to thousands of immigrant families who make up a really diverse fabric of our state and of our Nation. Almost 30 percent of Nevadans identify themselves as Hispanic or Latino and scammers have targeted members of these communities as they go through the immigration process. Of course, we know one common form of deception are the so-called “notario.” While public notaries may perform the duties of attorneys in some Latin American countries, they cannot practice law, give legal advice, or accept legal consultation fees here in the United States.

Nonetheless, bad actors will suggest that they can guide an individual through the U.S. immigration process, even though they are not qualified or authorized by Federal law to do so. We know that only a lawyer or federally accredited representative can provide someone with legal advice and so therefore so many in my state are falling prey to these scams. In response in 2015, the Federal Trade Commission, you released a fotonovela educational graphic novel to raise awareness about notario schemes in Latino community and since then Nevada’s Chief Deputy Attorney General Mark Ruger indicated that notario scams are expanding even broader into our AAPI communities, our Ethiopian communities, and our Nigerian communities.

So to Ms. Slaughter and Mr. Chopra, although the 2015 campaign increased awareness about notario scams in our Latino community, like I said, we know fraud is rising in many of our minority communities. What other types of outreach or resources are you doing with the FTC to protect individuals from the notarios or other kinds of fraud? How are you working with their State agencies and communities to prevent this? Ms. Slaughter, you can go first.

Commissioner SLAUGHTER. Thank you, Senator, and I want to thank you for your kind words about the baby and I just want you to know on behalf of all of the working parents out there, appreciate everybody saying nice things about how easy this looks. It is really hard. So just a moment for all of the families who are trying to juggle childcare and their professional responsibilities and acknowledge that these are really, really challenging times—so I appreciate the support from everybody on the Committee and the understanding. In terms of your question, I think this is a hugely important issue.

Paying attention to scams that target our most vulnerable communities should be among the highest priorities we have, and in

addition to the outreach that we do, we can work with our State partners and we often host local events with community organizers and groups and work with State AGs to raise awareness in order to help prevent people from falling for these scams before they even come up. We need to do enforcement to stop them when they happen where it is possible but we would rather they not happen to begin with.

Senator ROSEN. Mr. Chopra, anything to add?

Commissioner CHOPRA. Yes. Thank you, Senator Rosen. You know, when it comes to notario fraud, this has been actually an ongoing problem now. It is actually pretty difficult to enforce on a one-by-one basis, and one of the things I think we have to start thinking about is more criminal sanctions and also what are we going to do to go after the plumbing of some of these rings of mob-like fraudsters? We need to look at how they are moving money. I think we have to look at this more with cracking down on a mob mentality, an organized crime rather than one by one. So, you know, it is definitely a huge problem and it has been really worrisome to see how it is just invading so many states across the country. So we have to look at this systemically and not just one by one.

Senator ROSEN. Yes by the time sometimes we find out about it, the people that have been affected have just gone really through such a terrible experience. And I look forward to working with you and figuring out what we can do about that. But for the last question, I want to talk just what is on everybody else's mind too probably a little bit is unemployment and PII. You know, the Coronavirus, of course, hit Nevada's economy harder than any state in the Nation. I don't know if you know that.

We had unemployment over 30 percent in April. It was a highest in the country. It is still I think the highest in the country. Our average is about 15 percent now. That was in June but we will wait to see what the numbers are coming back up. Over half a million Nevadans filed for unemployment insurance since March 14, of course. Again, we are seeing scammers. We are seeing criminals. They are trying to defraud people. They are trying to hack into the system. They are taking that personal identifiable information. They are doing phishing and impersonation scams and the impact of this cannot be underestimated in Nevada.

Really thousands of families are waiting on their unemployment benefits because we are having to weed through some of these hackers and scammers, whatever you want to call them. And so as the agency charged with protecting consumers personal information, you at the FTC really have a significant role to play and we want to just quote a little bit from the FTC that using law enforcement policy initiatives, consumer, and business education to protect consumers personal information.

That is what you are charged to do. So let me ask, I don't think Chairman Simons is on so I see you there, Mr. Chopra. I will ask you. First, how much time and resources is being devoted? Do you know or anybody that is still on? I can't see everything on my screen either.

Commissioner CHOPRA. Sure. And I believe the Chairman has joined.

Senator ROSEN. OK, so whoever if that thinks they can answer. I see some blank screens, some initials. It is the joy of working this way. How much time are you devoting to this? Because it is not just a problem in Nevada. It is a problem everywhere and hard-working people are not able to pay their bills because we have to take so much time to stop the scammers from stealing the hard-earned tax dollars that we are using on unemployment benefits right now. Chairman Simons, are you on? I don't hear him—

Chairman SIMONS. Can you hear me?

Senator ROSEN. Yes. Yes, we can now. Thank you.

Chairman SIMONS. I can hear you. Like I said, the power went out and then my jetpack went out so but I got another battery supply so hopefully that will be OK. So we are doing at least two different types of things. One is we are actually suing people over this kind of stuff. And the other thing is that we have an incredible amount of outreach.

On all levels, we are dealing with our—well, first of all we have an FTC website that deals with all these types of scams relating to coronavirus, including the financial ones. We have got—our folks are out all over the place doing media and they are doing meetings and town halls and that type of thing. They did one effort with the AARP that was participated—where 800,000 people participated.

So you know, it is all our regional offices. We have boots on the ground there. They are out there all the time doing this kind of thing. And then we are doing it online and then we are bringing enforcement actions.

Senator ROSEN. And do you think there is a role for you to partner—this is my final question for you Chairman. Is there a role for us to partner, for you to partner with our State unemployment agencies? Of course during this pandemic everything is turned on its head where you might not partner with them, but in this extreme case with every state, everybody applying, what is a role that you can do to help states like mine who are really suffering with a lot of—could be a lot of potential fraud?

Chairman SIMONS. So one thing I would say is that we have all kinds of partners and they are very important in terms of making our work productive and effective and in using our scarce resources. And I don't see me, you know, why we wouldn't at least talk to the employment offices and see if there is something that we can do together to stop this type of horrible thing from happening.

Senator ROSEN. Well good. Well, I am going to have my team reach out to, maybe there are some ways we can get some help out there because it I know it is not just in my state but others. Well, I appreciate—you know, I am telling you the baby was good. The baby slept. You had your power up and down.

We are all in and out, all the technical difficulties today, but I want to thank everyone for taking the time to be here today and for the hard work that you do. And I know you're probably all happy to hear this as considering with all the challenges we have had that that concludes our hearing. And the hearing record will remain open for two weeks. During this time, Senators are asked to submit any questions for the record, and upon receipt, the wit-

nesses are requested to submit their written answers to the Committee as soon as possible.

I thank you again. Please stay safe and healthy. And this hearing is adjourned.

[Whereupon, at 12:43 p.m., the hearing was adjourned.]



## A P P E N D I X

INTERNATIONAL FRANCHISE ASSOCIATION  
*Washington, DC, August 11, 2020*

Hon. ROGER WICKER,  
Chair,  
Committee on Commerce, Science, and  
Transportation,  
U.S. Senate,  
Washington, DC.

Hon. MARIA CANTWELL,  
Ranking Member,  
Committee on Commerce, Science, and  
Transportation,  
U.S. Senate,  
Washington, DC.

Dear Chairman Wicker and Ranking Member Cantwell:

On behalf of the Franchisee Forum of the International Franchise Association (IFA), we appreciate the opportunity to comment for the record on how the franchise business model is a vehicle for achieving the American Dream, especially in the wake of COVID-19. Leveraging our experience as successful franchise business owners and mentors to prospective franchisees, we would like to offer a more comprehensive picture of franchising than the one painted at the Committee hearing by Commissioner Chopra and express our firm belief that participation in the franchise business industry helps unlock economic prosperity for all Americans.

As the representative body for franchisees within the IFA, we are proud to be a clarifying voice for franchisees as legislative and regulatory issues impacting the franchise business model arise at the federal, state, and local levels. The view on franchisee dissatisfaction offered in Commissioner Chopra's testimony suffers from flawed reasoning. Without providing any factual analysis of concern, it is irresponsible to conclude that franchisors must be prevented from alleged abusive practices. While there may be instances when a franchisor behaves or takes action that is perceived to be unjust to a franchisee or prospective franchisee, they are rare.

We know first-hand that small business franchise ownership is a viable pathway to achieving and maintaining economic success. With careful planning and execution, sound management of a franchise business can help grow the business and the franchisor's brand—contributing to a successful relationship between the franchisee and the franchisor. Allowing someone who profits off the unfortunate circumstances of others to paint a one-sided picture of franchising does a disservice to the thousands of small franchise business owners in this country who work hard every day to grow their business and our economy.

The story about franchising we wish had been aired at the hearing is one based in data rather than cherry-picked generalizations. A broader perspective is provided by Franchise Business Review, which surveyed over 6,500 franchisees over the last four months during the pandemic. Key findings from the comprehensive research include:

- 55 percent of franchise owners surveyed said they are (still) optimistic that they will meet their 90-day business goals;
- 80 percent said they feel very positive/mostly positive about their association with their franchise brand; and
- 83 percent said they have received valuable support from HQ during COVID-19.

Franchisee satisfaction with their franchisor has remained steady during the pandemic, and in some cases, has even risen. This data reflects the spirit of franchising: franchisors are vehicles for community, growth, and support for their franchisees, especially during a crisis. To ease franchisees' burdens and take steps to help the systems survive, there are numerous reports of franchisors taking proactive steps to provide flexibility to their franchisees during COVID-19. These actions include, but are not limited to:

- (1) Royalty/ad fund deferrals, fee waivers, abatements, and other cash-flow assistance to franchisees;<sup>1</sup>
- (2) Extensions of development schedules under development agreements;
- (3) Transitions to more “e-learning” and virtual learning as part of initial training programs to minimize travel for franchisee employees and related costs;
- (4) Extensions of unit opening deadlines under existing franchise agreements;<sup>2</sup>
- (5) Reductions of initial fees to incentivize new franchise sales;
- (6) Changing the unit’s footprint to lower development costs;
- (7) Providing franchisees with frequent, if not daily, updates on legislative assistance from the Federal government under CARES Act;<sup>3</sup>
- (8) Providing grants to employees suffering from pandemic-related layoffs or furloughs;<sup>4</sup>
- (9) Providing PPE to franchisees, local communities, front-line workers;<sup>5</sup>
- (10) Providing franchisees with signage related to social distancing, mask wearing and other Covid-19 prevention operations procedures; and
- (11) Providing guidance on safe re-opening, social-distancing, and related practices to protect employees, consumers, and the brand.<sup>6</sup>

The value of the franchise business model can be harnessed by Congress and provide a vehicle for sustained economic growth out of the pandemic. As a result of the significant economic impact of COVID–19, the number of unemployed individuals reached nearly 30 million workers. Given the dislocation in the economy, many of those jobs may not return forcing many individuals to find new employment or try entrepreneurial ventures, including starting a new franchise business. This has been the case following previous economic downturns, such as after the 2008 financial crisis where interest in franchise ownership significantly increased, as out of work Americans explored new career opportunities. For example, the growth in employment in the franchise sector was 7.4 percent from 2009 to 2012, while the total U.S. employment growth rate was only 1.8 percent.

IFA also maintains its commitment and strong support of the FTC Franchise Rule, which will continue to ensure that prospective franchisees receive relevant and material information about their proposed franchise purchases sufficiently in advance of such purchases to enable them to make informed and unpressured purchase decisions. This rule has been essential to the continued growth and success of the franchise business model.”<sup>7</sup>

<sup>1</sup> See “Subway to Slash Royalty Payments by 50 Percent” at <https://www.qsrmagazine.com/franchising/subway-slash-franchise-royalty-payments-50-percent>; see also “7-Eleven Ups Franchise Support Amidst Coronavirus Pandemic” at <https://csnews.com/7-eleven-ups-franchise-support-amidst-coronavirus-pandemic>; see also “Wyndham Continues Waivers on Franchise Fees” at <https://www.asianhospitality.com/wyndham-continues-waivers-on-franchise-fees/>; and see also “Church’s Chicken Franchisees Get Relief Plan” at <https://www.franchising.com/articles/churchs-chicken-franchisees-get-relief-plan.html>.

<sup>2</sup> Scott Deviney, President & CEO, Chicken Salad Chick.

<sup>3</sup> See “Stories from the Covid-19 Front Lines: CEO Q&A with Meg Roberts of The Lash Lounge” at <https://www.franchising.com/articles/stories-from-the-covid19-front-lines-ceo-qa-with-meg-roberts-of-the-lash-lo.html>.

<sup>4</sup> See “Self Esteem Brands Founders, Employees & Roark Capital Unveil \$1 Million SEB Relief Fund to Financially Aid Employees of Clubs, Studios Impacted by COVID–19” at <https://cutt.ly/Od1o04A>.

<sup>5</sup> See “With PPE Shortages, BrightStar Care Creates Fulfillment Center for Franchisees” at <https://www.franchisetimes.com/news/May-2020/With-PPE-Shortages-BrightStar-Care-Creates-Fulfillment-Center-for-Franchisees/>; see also “KFC Implements Additional Health and Safety Measures in U.S. Restaurants” at <https://www.yum.com/wps/portal/yumbrands/Yumbrands/kfc-newsroom/detail/Vertical+Content+3-SF/additional-safety-measures-4-16-20>; and see also “Two Men and a Truck volunteers to deliver face shields to Detroit hospital” at <https://www.mlive.com/coronavirus/2020/04/two-men-and-a-truck-volunteers-to-deliver-face-shields-to-detroit-hospital.html>.

<sup>6</sup> See “McDonald’s Engages Mayo Clinic to Advise on Continued Approach to Cleanliness and Safety” at <https://news.mcdonalds.com/news-releases/news-release-details/mcdonalds-engages-mayo-clinic-advise-continued-approach>.

<sup>7</sup> See IFA’s April 24, 2019, Comments to the Federal Trade Commission regarding Disclosure Requirements and Prohibitions Concerning Franchising, available at <https://bit.ly/2XpUIm7>.



We thank the Subcommittee for its attention to our views and the opportunity to comment.

Sincerely,

TAMRA KENNEDY

*President, Twin City's T.J.'s, Inc.,*

Chair, International Franchise Association Franchisee Forum.

cc: Members, Senate Committee on Commerce

