Senate Committee on Commerce, Science, and Transportation
"Oversight of the Federal Trade Commission"
November 27, 2018

The Honorable John Thune

Questions for Chairman Joseph J. Simons

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

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

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

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Guidelines do not reflect current scholarship and thinking on vertical merger enforcement.[1] They are significantly out of date.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

Over the years, the Commission and its staff have provided substantial insight on vertical merger analysis through speeches and other policy work,[2] and through rigorous case selection.[3] The

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

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

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

Commission is actively considering whether we – along with our sister agency, the Antitrust Division of the Department of Justice – should formally publish vertical merger guidelines. This topic is a key focus of the FTC's ambitious program of *Hearings on Competition and Consumer Protection in the 21st Century*.[4] Two panel discussions on vertical mergers were held in November 2018, and the Commission has invited public commentary on the topic.

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

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

Separately, it is not clear to me whether it would be beneficial to prohibit the FTC from conducting an administrative proceeding while the parties to a merger remain unable to close their transaction for a significant period of time. Many transactions are subject to multijurisdictional reviews, whether by foreign competition authorities or state regulators. Under current law, the FTC can commence an administrative action while other reviews are pending. The FTC may delay an injunction action in federal court until other review processes are completed and the merger is imminent. This approach could have certain advantages that I believe are worth discussing when thinking about making changes to the Commission's process for challenging mergers.

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

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

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

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

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

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

The FTC has issued extensive guidance over the years to help marketers determine the level of support needed to substantiate claims. The Commission first articulated the relevant factors used to determine the level of evidence required to substantiate objective performance claims in *Pfizer, Inc.*[14] Those factors included the type of claim, type of product, consequences of a false claim, benefits of a truthful claim, cost of developing substantiation for the claim, and amount of substantiation experts in the field believe is reasonable. The Commission and the courts have reaffirmed this standard many times since

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

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

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

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

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

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

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

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

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

1972.[15] In addition, the FTC also has provided extensive guidance through Guides and staff guidance documents.[16] FTC staff regularly provide further guidance through speeches and presentations to industry trade groups and industry attorneys.

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

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

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

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

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

8. During the hearing, I asked you whether the FTC would consider using its section 6(b) authority to study consumer information data flows, specifically sending requests to Google, Facebook, Amazon, and others in the tech industry to learn what information they collect from consumers and how that information is used, shared, and sold. You responded, "Sure, 6(b) is a really powerful tool and that's the type of thing that might very well make sense for us to use it for." I believe the FTC's section 6(b) authority could

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

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

provide some much needed transparency to consumers about the data practices of large technology companies, and help identify areas that may require additional attention from lawmakers. Can you explain in more detail whether you believe the FTC should conduct a study pursuant to section 6(b) of the Federal Trade Commission Act on the data collection, use, filtering, sharing, and sale practices of large technology companies?

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

The Honorable Roy Blunt

Question for Chairman Joseph J. Simons

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

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

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

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

The Honorable Jerry Moran

Questions for Chairman Joseph J. Simons

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

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

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

   Yes. We can certainly use additional resources, including additional staff, as well as additional authorities, including civil penalties, targeted APA rulemaking, and jurisdiction over non-profits and common carriers. We are committed to utilizing whatever additional tools Congress gives us efficiently and vigorously.

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

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

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

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

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

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

The fundamental principles of antitrust do not differ when applied to high-technology industries, including those in which patents or other intellectual property are highly significant. The issues, however, are often more complex and require different expertise, which may necessitate the hiring of outside experts or consultants to help us develop and litigate our cases. The FTC also strives to adapt to the dynamic markets we protect by leveraging the research, advocacy, and education tools at our disposal to improve our understanding of significant antitrust issues and emerging trends in business practices, technology, and markets. For example, last fall, the Commission launched its *Hearings on Competition and Consumer Protection in the 21st Century* to consider whether the FTC's enforcement and policy efforts are keeping pace with changes in the economy, including advancements in technology and new business models made possible by those developments.[17]

[17] FTC, *Hearings on Competition and Consumer Protection in the 21st Century*, https://www.ftc.gov/policy/hearings-competition-consumer-protection. Recent hearings included a two-day workshop on the potential for collusive, exclusionary, and predatory conduct in multisided, technology-based platform industries. FTC Workshop, *FTC Hearing #3: Competition*

Under my leadership, the FTC will continue to scrutinize technology mergers and conduct by technology firms to ensure not only that consumers benefit from their innovative products, but also that competition thrives in this dynamic and highly influential sector. Our recent announcement of a new Technology Task Force within the Bureau of Competition demonstrates our commitment to monitoring competition in U.S. technology markets, investigating any potential anticompetitive conduct in those markets, and taking enforcement actions when warranted.

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

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

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

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

[18] *Consumer Information – Pass it on*, *https://www.consumer.ftc.gov/features/feature-0030-pass-it-on* (providing consumer information on identity theft, imposter scams, charity fraud, and other topics).

Certainly. Financial injury can manifest in a variety of ways: fraudulent charges, delayed benefits, expended time, opportunity costs, fraud, and identity theft, among other things.[19] Physical injuries include risks to individuals' health or safety, including the risks of stalking and harassment.[20] Reputational injury involves disclosure of private facts about an individual, which damages the individual's reputation. Tort law recognizes reputational injury.[21] The FTC has brought cases involving this type of injury, for example, in a case involving public disclosure of individuals' Prozac use[22] and public disclosure of individuals' membership on an infidelity-promoting website.[23] Finally, unwanted intrusions involve two categories. The first includes activities that intrude on the sanctity of people's homes and their intimate lives. The FTC's cases involving a revenge porn website,[24] an adult-dating website,[25] and companies spying on people in their bedrooms through remotely-activated webcams fall into this category.[26] The second category involves unwanted commercial intrusions, such as telemarketing, spam, and harassing debt collection calls. In terms of enforcement considerations, as noted above, the FTC is very mindful of ensuring that it addresses these harms, while not impeding the benefits of legitimate data collection and use practices.

6. In the FTC's recent comments in NTIA's privacy proceeding, the FTC said that its "guiding principles" are based on "balancing risk of harm with the benefits of innovation and competition." Would you describe what this means, how you strike this balance, and how it is applied in practice under your Section 5 authority in the *FTC Act*?

In unfairness cases, section 5(n) of the FTC Act requires us to strike this balance. It does not allow the FTC to bring a case alleging unfairness "unless the act or practice causes or is likely to cause substantial injury to consumers, which is not reasonably avoidable by consumers themselves and not outweighed by benefits to consumers or to competition." Thus, for example, in our data security complaints and orders, we often plead the specific harms that consumers are likely to suffer from a company's data security failures. We do not assert that companies need to spend unlimited amounts of money to address these harms; in many of our cases, we specifically allege that the company could have fixed the security vulnerabilities at low or no cost.

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

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

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

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

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

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

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

[26] *See* Press Release, *FTC Halts Computer Spying* (Sept. 25, 2012), https://www.ftc.gov/news-events/press-releases/2012/09/ftc-halts-computer-spying; *see also Aaron's, Inc.*, No. C-4442 (F.T.C. Mar. 10, 2014), https://www.ftc.gov/enforcement/cases-proceedings/122-3256/aarons-inc-matter.

7. **The FTC's comments pertaining to "control" in NTIA's privacy proceeding stated, "Choice also may be unnecessary when companies collect and disclose de-identified data, which can power data analytics and research, while minimizing privacy concerns." How would the FTC suggest federal regulation account for de-identified data, if at all?**

   One possible standard identified in the FTC's 2012 Privacy Report states that data is de-identified if it is not "reasonably linkable" to a consumer, computer, or device.[27] Data can be deemed to be de-identified to the extent that a company: (1) takes reasonable measures to ensure that the data is de-identified; (2) publicly commits not to try to re-identify the data; and (3) contractually prohibits downstream recipients from trying to re-identify the data. Although this language provides some general principles for de-identification, we would be happy to work with your staff on drafting more specific legislative language.

8. **Your testimony indicated that continued technological developments allow illegal robocallers to conceal their identities in "spoofing" caller IDs while exponentially increasing robocall volumes through automated dialing systems. These evolving technological changes mean that the critical law enforcement efforts of the FTC cannot be the only solution, and your testimony described the additional steps the FTC is taking to develop innovative solutions to these issues. Would you please describe the process and outcomes of the four public challenges that the FTC held from 2013 to 2015? Are there plans to incentivize innovators to combat robocalls in the future?**

   The FTC's process for its robocall challenges included public announcements, committees with independent judges, and, in some cases, cash prizes awarded under the America COMPETES Reauthorization Act.[28] To maximize publicity, the FTC announced each of its four challenges in connection with public events. The FTC announced the first robocall challenge at the FTC's 2012 Robocall Summit. In 2014, the FTC conducted its second challenge, "Zapping Rachel," at DEF CON 22. The FTC conducted its third challenge, "DetectaRobo," in June 2015 in conjunction with the National Day of Civic Hacking. The final phase of the FTC's fourth public robocall challenge took place at DEF CON 23. When the FTC held its first public challenge, there were few, if any, call blocking or call labeling solutions available for consumers. Today, two FTC challenge winners, NomoRobo and Robokilller, offer call blocking applications, and there are hundreds of mobile apps offering call blocking and call labeling solutions for cell phones. Many home telephone service providers also now offer call blocking and call labeling solutions. The FTC will not hesitate to initiate additional innovation contests if it identifies further challenges that could meaningfully benefit consumers by reducing the harm caused by illegal robocalls.

   In addition to developing call blocking and call labeling technology, the telecom industry has also developed call verification technology, called STIR/SHAKEN, to help consumers know whether a call is using a spoofed Caller ID number and to assist call analytics companies in implementing call blocking and call labeling products. If widely implemented and made available to consumers, the STIR/SHAKEN protocol should minimize unwanted calls. Certain industry members have begun to

[27] FTC Report, *Protecting Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers* (Mar. 2012), https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf

[28] *Details About the FTC's Robocall Initiatives*, https://www.consumer.ftc.gov/features/feature-0025-robocalls.

roll out this technology in beta-testing mode. We will monitor this industry initiative and, assuming the results are as expected, continue to encourage its implementation.

a. Would you please describe the FTC's coordination efforts with state, federal, and international partners to combat illegal robocalls?

The FTC frequently coordinates its efforts with its state, federal, and international partners. The FTC often brings robocall enforcement actions with states as co-plaintiffs. For example, in the FTC's case against Dish Network, the FTC brought the case jointly with California, Illinois, North Carolina, and Ohio. Collectively, the states and the FTC obtained a historic $280 million trial verdict.[29]

The FTC also coordinates outreach and education with the FCC. In 2018, the agencies co-hosted two robocall events— a policy forum that discussed technological and law enforcement solutions to the robocall problem[30] and a public expo that allowed companies to showcase their call blocking and call labeling products for the public.[31] Additionally, the FTC and FCC hold quarterly calls, speak regularly on an informal basis, and coordinate on a monthly basis with our state partners through the National Association of Attorneys General. The FTC also engages with international partners through participation in international law enforcement groups such as the International Consumer Protection Enforcement Network, International Mass Marketing Fraud Working Group, and Unsolicited Communications Network (formerly known as the London Action Plan).

9. Your testimony described the limitations of the FTC's current data security enforcement authority provided by Section 5 of the *FTC Act* including: lacking civil penalty authority, lacking authority over non-profits and common carrier activity, and missing broad APA rulemaking authority. Please describe each of these limitations and how adjusted FTC authority to address these items would improve the protection of consumers from data security risks.

Under current law, the FTC cannot obtain civil penalties for first-time data security violations. I believe this lack of civil penalty authority under-deters problematic data security practices. If Congress were to give the FTC the authority to seek civil penalties for first-time violators (subject to statutory limitations on the imposition of civil penalties, such as ability to pay and stay in business), better deterrence would be achieved. Additionally, should Congress enact specific data security legislation, it would be important for the FTC to have associated APA rulemaking authority[32] so that the Commission can enact rules and amend them as necessary to keep up with technological developments. For example, in 2013, the FTC was able to use its APA rulemaking authority to amend its Rule under the Children's Online Privacy Protection Act to address new business models,

[29] Press Release, *FTC and DOJ Case Results in Historic Decision Awarding $280 Million in Civil Penalties Against Dish Network and Strong Injunctive Relief for Do Not Call Violations* (June 6, 2017), https://www.ftc.gov/news-events/press-releases/2017/06/ftc-doj-case-results-historic-decision-awarding-280-million-civil. The case is on appeal before the Seventh Circuit Court of Appeals.

[30] Press Release, *FTC and FCC to Host Joint Policy Forum and Consumer Expo to Fight the Scourge of Illegal Robocalls* (Mar. 22, 2018), https://www.ftc.gov/news-events/press-releases/2018/03/ftc-fcc-host-joint-policy-forum-illegal-robocalls.

[31] Press Release, *FTC and FCC to Co-Host Expo on April 23 Featuring Technologies to Block Illegal Robocalls* (Apr. 19, 2018), https://www.ftc.gov/news-events/press-releases/2018/04/ftc-fcc-co-host-expo-april-23-featuring-technologies-block-0.

[32] The FTC is not seeking general APA rulemaking authority for a broad statute like Section 5.

including social media and collection of geolocation information, that did not exist when the initial 2000 Rule was promulgated. As to nonprofits and common carriers, news reports are filled with breaches affecting these sectors (e.g., the education sector) but the FTC does not currently have jurisdiction over them. Giving the FTC jurisdiction over these entities to enforce data security laws would create a level playing field and ensure that these entities would be subject to the same rules as other entities that collect similar types of data.

The Honorable Richard Blumenthal

Facebook: FTC Investigation Status

In May, the Bureau of Consumer Protection took the rare step of acknowledging a "non-public investigation" into the privacy practices of Facebook. It is now over eight months since the FTC's announcement with no further comment or report.

Questions for Chairman Joseph J. Simons

Question 1. How many full-time employees have been primarily assigned to investigate Facebook's privacy and data protection practices?

Question 2. Who is responsible for coordinating the investigation of Facebook? What divisions of the FTC are involved in the investigation?

Question 3. Has the FTC made requests for documents or conducted interviews with Facebook, Cambridge Analytica, and other relevant parties?

Question 4. Is the FTC in regular contact with its European counterparts on their investigation of Facebook?

Question 5. Does the FTC require further resources, including technologists or privacy lawyers, in order to complete its investigation of Facebook?

Although the existence of this investigation has been made public, details about the investigation, including how it is being staffed and any steps that have or have not been taken, are non-public. Therefore, we cannot answer these questions at this time.

Question 6. Has the FTC ever taken issue with Facebook or Google's assessments under their consent decrees?

Question 7. Has the Commission reviewed its consent decree with Google this year to determine whether the company is in compliance?

As part of its review of compliance with consent decrees, the FTC carefully reviews all assessments, seeks additional information as appropriate, and reviews compliance through a variety of means. However, because any investigation of a specific company's compliance is non-public, we cannot comment specifically about the steps taken regarding Google or Facebook.

Privacy Rules

We know that Americans care about privacy – that they eagerly want these rights. We need baseline rules. Companies should not store sensitive information indefinitely and use that data for purposes that people never intended. Federal rules must set meaningful obligations on those that handle our data. We must enable consumers to trust and control their personal data.

Questions for all Witnesses

Question 8. Do you support providing state AGs with the power to enforce federal privacy protections and would you commit to working with state AGs?

Yes. I view the Attorneys General as important partners in protecting consumers. I endorse a model that gives state Attorneys General the power to enforce federal privacy protections, which ensures that there are multiple enforcers on the beat.

Question 9. Why is it important that the FTC have rulemaking authority when it comes to privacy? Where best would rulemaking be applied?

The process of enacting federal privacy legislation will involve difficult tradeoffs that are appropriately left to Congress. Targeted APA rulemaking authority within those parameters is important, because it will enable the FTC to keep up with technological developments. For example, Congress gave the FTC APA rulemaking authority to implement the Children's Online Privacy Protection Act. In 2013, the FTC was able to use this authority to amend a rule it had initially promulgated in 2000, in order to address new business models, including social media and collection of geolocation information, as well as new technologies such as smart phones, that did not exist when the initial 2000 rule was promulgated.

Question 10. Do you believe elevating the Office of Technology Research and Investigation to the Bureau level would meaningfully help the FTC in addressing new technological developments across its mandates?

At this time, I do not believe that elevating the Office of Technology Research and Investigation to the Bureau level would meaningfully enhance the FTC's ability to vigorously pursue our current enforcement mandates. I am, however, actively considering how best to integrate technologists into our agency and how most effectively to deploy our limited resources to address our needs in this area. This effort includes evaluating the information developed at the Commission's *Hearings on Competition and Consumer Protection in the 21st Century*.

Questions for Chairman Joseph J. Simons:

Question 11. When will the FTC appoint a Chief Technology Officer?

I have held off on appointing a Chief Technology Officer because I was actively considering the best way to utilize our existing resources and integrate new ones, across both our consumer protection and competition missions. We recently announced the creation of a Technology Task Force within the Bureau of Competition, which will be dedicated to monitoring competition in U.S. technology markets, investigating any potential anticompetitive conduct in those markets, and taking enforcement actions when warranted. The task force will include a Technology Fellow who will provide important technical assistance and expertise to support the task force's investigations. In addition, members of the task force will coordinate with their counterparts in the Bureau of Consumer Protection who also focus on technology platforms. Once the new task force is up and running, we will be in a better position to

evaluate our need for technologists, including a Chief Technology Officer, and how best to integrate and leverage additional expertise.

Board Accountability

Questions for all Witnesses

Question 12. What is the FTC doing to investigate and hold accountable individual board members and executives who knowingly assist their companies in committing fraud? What more should the FTC be doing in this regard?

The FTC always considers the potential liability of individual officers and others who participated in or controlled deceptive and unfair practices. In cases where the FTC finds evidence of wrongdoing that meets the applicable legal standard, and where naming the individual is appropriate to obtain full and complete relief for consumers and appropriate injunctive relief, we do so.

Net Neutrality

After the FCC abdicated its responsibility to protect net neutrality this year, we are left with no discernible rules to prevent Internet service providers from blocking or slowing Internet traffic. We have already started to see the effects of this disastrous decision. Earlier this month, Senators Markey, Wyden, and I wrote to several mobile carriers on reports those companies throttled video streaming applications. These practices would violate the core principle of net neutrality.

Questions for Chairman Joseph J. Simons

Question 13. Has the FTC investigated reports that mobile carriers are throttling video applications?

As you know, because the Commission's investigations are not public, I cannot comment on the practices of specific companies. However, the Commission has a strong interest in ensuring that companies stand by their promises to consumers and do not engage in deceptive or unfair practices. In general, except for the period when the FCC reclassified Broadband Internet Access Service ("BIAS") as a common carrier activity and the FTC lost the ability to protect consumers in this space, FTC staff has been monitoring and will continue to monitor the marketing and business practices of BIAS providers. To determine whether particular instances of throttling are deceptive or unfair, the Commission must evaluate what representations the provider made to consumers about its services, as well as available information and data about the nature and quality of the services actually provided to consumers.

The Commission will closely review any relevant research that may support or disprove particular advertising claims or provide evidence of particular business practices. When reviewing such reports, we evaluate a study's design, scope, and results, and consider how the study relates to a particular claim or informs a particular practice.

Question 14. If an Internet service provider blocks an application, does the FTC have the authority to investigate and penalize such actions?

When the FCC reclassified BIAS as a common carrier activity, the FTC temporarily lost the ability to protect consumers in this space because the FTC does not have authority over common carrier activities. The FTC brought several types of cases against BIAS providers prior to 2015.[33] Now that the reclassification has been reversed, we can bring those types of cases again.[34] If a company makes claims about blocking that are materially misleading, or if the practice causes substantial consumer injury that is not reasonably avoidable and not outweighed by benefits to consumers or competition, the FTC can bring an enforcement action under Section 5. In addition, the FTC has experience enforcing the antitrust laws to prevent unfair methods of competition for the benefit of consumers in many different markets. As part of its *Hearings on Competition and Consumer Protection in the 21st Century*, the agency will hold public hearings on March 20, 2019 to continue to explore how the FTC can use its enforcement authority most effectively in BIAS markets. If the FTC identifies, through these hearings or otherwise, that it does not have sufficient authority or resources to protect consumers or address competition issues in BIAS markets, the agency will report this to Congress.

Question 15. You have said that blocking, throttling, and paid prioritization could be deemed unfair practice(s) under the right circumstances. What would be "the right circumstances" that would have to occur for the FTC to pursue net neutrality enforcement?

As the Commission noted in its Policy Statement on Unfairness,[35] and as codified in 15 U.S.C. § 5(n), to be unfair, an act or practice must cause or be likely to cause substantial injury. Such injury "must be substantial; it must not be outweighed by any countervailing benefit to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided."[36]

Pursuant to this authority, the Commission sued AT&T Mobility LLC, alleging that the company deceptively promised consumers unlimited data but then reduced speeds, in some instances by nearly 90%, without telling consumers. We also alleged that the company unfairly locked consumers into long-term contracts based on promises of unlimited service and charged early termination fees if the consumers canceled their plans.[37]

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[33] *See, e.g., FTC v. TracFone Wireless, Inc.*, No. 3:15-cv-00392-EMC (N.D. Cal. Feb. 20, 2015), https://www.ftc.gov/enforcement/cases-proceedings/132-3176/straight-talk-wireless-tracfone-wireless-inc; *FTC v. AT&T Mobility, LLC*, No. 3:14-CV-04785-EMC (N.D. Cal. Oct. 28, 2014), https://www.ftc.gov/enforcement/cases-proceedings/122-3253/att-mobility-llc-mobile-data-service; *In re America Online, Inc.*, No. C-4105 (Jan. 28, 2004), https://www.ftc.gov/enforcement/cases-proceedings/002-3000/america-online-inc-compuserve-interactive-services-incin; *In re Juno Online Servs., Inc.*, No. C-4016 (June 25, 2001), https://www.ftc.gov/enforcement/cases-proceedings/002-3061/juno-online-services-inc.

[34] *FTC v. AT&T Mobility LLC*, 883 F.3d 848, 863-64 (9th Cir. 2018) (*en banc*) (concluding that "the FTC may regulate common carriers' non-common-carriage activities").

[35] *See* FTC Policy Statement on Unfairness, *appended to Int'l Harvester Co.*, 104 F.T.C. 949, 1070 (1984).

[36] *Id.*

[37] *FTC v. AT&T Mobility LLC*, No. 3:14-cv-04785-EMC (N.D. Cal. Oct. 28, 2014), https://www.ftc.gov/enforcement/cases-proceedings/122-3253/att-mobility-llc-mobile-data-service.

Question 16. What specific resources and expertise does the FTC have to address technical issues of discrimination of Internet traffic by ISPs? Has the FTC hired technical experts to investigate violations of net neutrality?

FTC staff includes technologists with generalized expertise who regularly work with investigation and case teams to analyze a wide range of technical data, including in matters relating to network traffic analysis. The Commission also regularly hires independent consulting and testifying experts to provide more specialized expertise on a dedicated and ongoing basis. In addition, the Commission consults with staff at other agencies, including the FCC, as needed, regarding technical issues.

Copycat Military Websites

Last month, I led a group of nine Senators in writing the FTC, asking the Commission to release the full list of schools that purchased user information from copycat military websites. These websites, with names like *Army.com* and *EnlistArmy.com*, mimicked official military enlistment websites and deceived prospective recruits into thinking they would be contacted by an official "military representative." To truly stop such unscrupulous companies from taking root again, it is critical that the institutions that knowingly purchased these ill-gotten leads are also held to account.

Question for Chairman Joseph J. Simons

Question 17. Do you agree that such post-secondary schools should be held liable for deceptive third-party marketing conducted on their behalf? Will you commit to pursuing such cases to root out fraud at the source?

No individual or entity, including post-secondary schools, should be able to avoid complying with the law by outsourcing deceptive marketing to third parties. In fact, the Commission has pursued several law enforcement actions to root out such conduct. In June 2018, the Commission obtained an order against Credit Bureau Center, a credit monitoring company, which held the company liable for deceptive third-party marketing conducted on its behalf. [38] The Commission has also pursued law enforcement actions against affiliate marketing networks for the deceptive conduct of their third-party marketing affiliates. The FTC recognizes the importance of pursuing all actors in the marketing ecosystem that fail to comply with the law.

The Commission will continue to monitor the marketplace for unfair or deceptive conduct on the part of post-secondary schools that benefit from the deceptive practices of third parties and will actively investigate wherever warranted.

SoFi Penalties

Last month, the FTC proposed a settlement with SoFi—the online student loan refinancer that had greatly exaggerated in advertisements how much student loan borrowers would save when they refinance through the company. Unfortunately, the FTC was not able to require SoFi to pay any kind of penalty for its misconduct. As you noted in your testimony, this is one of the significant flaws in FTC's

[38] *FTC v. Credit Bureau Center, LLC*, No. 1:17-cv-194 (N.D. Ill. June 26, 2018), https://www.ftc.gov/enforcement/cases-proceedings/162-3120/credit-bureau-center-llc-formerly-known-myscore-llc.

Section 5 authority. However, the CFPB or State Attorneys General could have sought meaningful penalties for SoFi's misconduct under existing law.

Question for Chairman Joseph J. Simons

Question 18. Why didn't you work with State AGs to ensure SoFi would be subject to civil penalty for its misconduct? How will you make sure there is cooperation with State AGs in the future—in order to more effectively deter bad actors from violating the law?

The FTC regularly consults and coordinates with our federal and state law enforcement partners when bringing actions to stop deception and other unlawful practices in the marketplace.[39] We will continue to work with our partners, where appropriate, to use our respective tools to most effectively protect consumers.

We believe our action against SoFi secures appropriately strong and timely relief to protect consumers from the unlawful conduct in this case – by ensuring that SoFi stops making deceptive savings claims regarding its loans and other credit products. If SoFi violates the FTC's order in this matter, the FTC could seek significant civil penalties against it. Further, when announcing this action, the FTC sent warning letters to other student loan advertisers who were making savings claims.

FTC Investigation of Algorithms

Section 6(b) of the FTC Act gives the agency broad investigatory and information-gathering powers. For example, in the 1970s the FTC used its Section 6(b) authority to require companies to submit product-line specific information, enabling the agency to assess the state of competition across markets.

The FTC has released reports on big data and the harms biased algorithms can cause to disadvantaged communities. These reports drew attention to the potential loss of economic opportunity and diminished participation in our society. Yet, information on how these algorithms work, and on the inputs that go into them, remains opaque.

Question for all Witnesses

Question 19. Where the FTC consider using its Section 6(b) investigative power to help us understand how these algorithms and black-box A.I. systems work – the biases that shape them, and how those can affect trade, opportunity, and the market?

I agree that algorithms and artificial intelligence are important topics of study. In 2017, the FTC and Department of Justice submitted a joint paper on algorithms and collusion to the Organization for

[39] *See, e.g.,* Press Release, *FTC, Partners Conduct First Compliance Sweep under Newly Amended Used Car Rule* (July 12, 2018), https://www.ftc.gov/news-events/press-releases/2018/07/ftc-partners-conduct-first-compliance-sweep-under-newly-amended; Press Release, *FTC, BBB, and Law Enforcement Partners Announce Results of Operation Main Street* (June 18, 2018), https://www.ftc.gov/news-events/press-releases/2018/06/ftc-bbb-law-enforcement-partners-announce-results-operation-main; Press Release, *FTC, State Law Enforcement Partners Announce Nationwide Crackdown on Student Loan Debt Relief Scams* (Oct. 13, 2017), https://www.ftc.gov/news-events/press-releases/2017/10/ftc-state-law-enforcement-partners-announce-nationwide-crackdown.

Economic Cooperation and Development as part of the OECD's broader look at the role of competition policy and the digital age.[40] More recently, we examined the competition and consumer protection implications of algorithms, artificial intelligence, and predictive analytics as part of the Commission's *Hearings on Competition and Consumer Protection in the 21st Century*.[41] The two-day hearing featured technologists, scientists, academics, and industry leaders (as well as economists and lawyers), who gathered to educate us and the broader competition and consumer protection community about how these technologies work, how they are used in the marketplace, and their policy implications. The Commission also invited public comments on this topic.

I will keep you apprised of any initiatives that come out of our hearings project. I also appreciate your interest in the Commission conducting a study of algorithms and artificial intelligence under Section 6(b) of the FTC Act. I intend to conduct 6(b) studies in the technology area, though the subjects of these studies are still being considered.

FTC Consent Decree on Unrepaired Recalls

Most consumers probably do not know that, while *new* car dealers are prohibited from selling vehicles with open recalls, *used* car dealers are not. A recent FTC consent decree, which I strenuously disagreed with and is currently being scrutinized in the courts, allows the sale of used cars with unrepaired recalls. According to the consent decree, car dealers can advertise that cars with unrepaired safety recalls like a defective Takata airbag are "safe" or have passed a "rigorous inspection"—as long as they have a disclosure that the vehicle *may* be subject to an unrepaired recall and directs consumers on how they can determine the vehicle has an open recall.

Question for all Witnesses

Question 20. In your opinion, is a car with an open, unrepaired recall, a "safe" car? Why would the FTC allow unsafe cars to be advertised as "safe" and "repaired for safety," with or without a vague, contradictory and confusing disclaimer?

I believe that all auto recalls pose safety risks to consumers, and that unrepaired recalls should be fixed.

Our orders do not allow unsafe cars to be advertised as "safe." For example, if a car dealer claims that a specific car with a risk of exploding airbags is "safe," it would violate our orders, whether or not they made the required disclosures. Specifically, Part I of the orders prohibits safety-related claims unless there is a clear and conspicuous disclosure about recalls *and the claim is not otherwise misleading*.

Before our orders were issued, car dealers were selling used vehicles subject to open recalls (a practice currently permitted under federal product safety law), while widely making inspection claims that we alleged were deceptive. Our actions create a new floor of legal protection for consumers. Now, if the

[40] Note to the OECD by the United States on Algorithms and Collusion, DAF/COMP/WD(2017)41 (May 26, 2017), https://www.ftc.gov/system/files/attachments/us-submissions-oecd-other-international-competition-fora/algorithms.pdf.
[41] FTC, *Hearings on Competition and Consumer Protection in the 21st Century*, https://www.ftc.gov/policy/hearings-competition-consumer-protection; FTC Workshop, *FTC Hearing #7: Competition and Consumer Protection in the 21st Century* (Nov. 13-14, 2018), https://www.ftc.gov/news-events/events-calendar/ftc-hearing-7-competition-consumer-protection-21st-century.

respondents in our actions make any claims suggesting a vehicle has been inspected for safety issues, they must clearly and conspicuously disclose that their vehicles may be subject to open recalls and how consumers can determine the recall status of a particular car. Importantly, the orders define "clear and conspicuous" to prohibit exactly the sort of confusing or contradictory disclosures you mention. These disclosures must be "easily understandable by ordinary consumers" and cannot be "contradicted or mitigated by, or inconsistent with, anything else in the communication."

Tesla's Deceptive "Autopilot" Advertisements

Two consumer groups—the Center for Auto Safety and Consumer Watchdog—have petitioned the FTC to investigate Tesla's potentially deceptive advertising of its "Autopilot" system. As you may know, there have been at least two deaths and additional injuries in the United States linked to Tesla Autopilot. Consumer advocates have criticized that Tesla's deceptive and misleading use of term "Autopilot" for its assisted-driving system falsely conveys to drivers that their vehicles are self-driving.

Question for Chairman Joseph J. Simons

Question 21. What is the FTC doing to investigate these concerns?

As you noted, the Center for Auto Safety and Consumer Watchdog have asked the FTC to investigate the marketing of the Tesla Autopilot driving system. As is our normal procedure when we get such requests, we have spoken with the parties involved to better understand the issues. However, whether or not we have opened a law enforcement investigation is non-public, and we can neither confirm nor deny the existence of any such investigation.

Contact Lens Rule

In November 2016, the Federal Trade Commission issued a Notice of Proposed Rulemaking proposing amendments to the Contact Lens Rule aimed at promoting competition and consumer choice in the marketplace for prescription contact lenses.

Question for Chairman Joseph J. Simons

Question 22. When does the Commission intend to finalize this rulemaking?

The Commission initially published a Federal Register notice generally requesting comments on the Rule in September 2015. Based on review of the 660 comments received, the Commission published a Notice of Proposed Rulemaking (NPRM) in December 2016, requesting comment on proposed Rule amendments. The NPRM proposed to amend the rule to require prescribers to obtain a signed acknowledgment after releasing a contact lens prescription to a patient, and maintain it for three years. The purpose of the proposed amendment was to enhance both compliance and our ability to enforce the rule (by providing a record that the prescription was given out). We received over 4,100 additional comments in response to this NPRM.

The Commission held a workshop on March 7, 2018 to collect additional information on various Rule-related issues, including the proposed amendments. The public comment period associated with the

workshop closed on April 6, 2018. We received and reviewed approximately 3,500 additional comments.

We collected additional information during the workshop and in public comments, and are considering alternatives to increase prescriber compliance with the Rule without imposing unnecessary burdens on prescribers. In addition, based on the comments received, we are considering additional modifications to the Rule. The FTC staff intends to submit a recommendation to the Commission in the coming months. If the Commission decides that additional public input would be beneficial, the Commission would allow an appropriate period of time for public input. The length of the comment period would depend on the complexity of the modifications under consideration, but most likely it would be 30-60 days; the original NPRM had a 60-day comment period, and we accepted comments for about 30 days after the workshop. The timeline for then completing the rulemaking and issuing the final rule would depend on the number and complexity of the comments received.

Questions on Non-Compete Clauses

I am concerned about the growth of non-compete clauses, which block employees from switching jobs to another employer in the same sector for a certain period of time. These clauses weaken workers' bargaining power once they are in the job, because workers often cannot credibly threaten to leave if their employer forces refuses to give them a raise or imposes poor working conditions. According to the Economic Policy Institute, roughly 30 million workers – including one in six workers without a college degree – are now covered by non-compete clauses.

The consensus in favor of addressing non-compete clauses is growing. For example, just this past December, an interagency report indicated that non-compete clauses can be harmful in certain contexts, such as the healthcare industry. Yet, the FTC has not yet undertaken forceful action. In September, Commissioner Chopra suggested that the FTC use its rulemaking authority to "remove any ambiguity as to when non-compete agreements are permissible or not."

Questions for all Witnesses

Question 23. Do you agree with the proposal that the FTC use its rulemaking authority to address non-compete clauses? I invite you to explain your reasoning regarding your stance.

I am still considering whether the FTC should use its rulemaking authority to address non-compete employment agreements or whether other approaches might be better. I am particularly interested in sectors of the economy where employee training requirements are not significant. Non-competes in those instances are less likely to be justified by efficiencies and are more likely to be anticompetitive on balance.

Questions on Local Merger Enforcement

Even though big national mergers typically garner the most media attention, smaller mergers can often raise monopoly concerns on the local level. This can be true in the healthcare industry, for example. In November, Commissioner Simons told me: "Some local mergers may be too small to require Hart-Scott-Rodino premerger notification, but may still have anticompetitive effects."

Questions for all Witnesses

Question 24. Would you agree with me that Hart-Scott-Rodino premerger notifications help antitrust enforcers catch concerning mergers?

Yes, I agree that the premerger notification requirements of the Hart-Scott-Rodino Premerger Notification Act help antitrust enforcers identify anticompetitive mergers before they are consummated, preventing consumer harm. Once a merger is consummated and the firms' operations are integrated, it can be very difficult, if not impossible, to "unscramble the eggs" and restore the acquired firm to its former status as an independent competitor.

Question 25. What sort of anticompetitive effects might be raised by local mergers even when those mergers are too small to require Hart-Scott-Rodino premerger notification?

Anticompetitive mergers harm consumers through higher prices and by reducing quality, choices, and innovation, or by thwarting competitors' entry into a market.[42] The arena of competition affected by a merger may be geographically bounded (*e.g.*, confined to a small or local area) if geography limits some customers' willingness or ability to substitute to some products or services, or some suppliers' willingness or ability to serve some customers.[43]

The FTC often examines local geographic markets when reviewing mergers in retail markets, such as supermarkets, pharmacies, retail gas or diesel fuel stations, or funeral homes, or in service markets, such as health care. For example, in a recent federal court action to enjoin the proposed merger of two rival physician services providers, the FTC and the State of North Dakota defined the relevant geographic market as the Bismarck-Mandan, North Dakota, Metropolitan Statistical Area—a four-county area that includes the cities of Bismarck and Mandan and smaller communities within the surrounding 40 to 50 mile radius.[44] The types of anticompetitive effects that may occur in local markets are the same as those that may occur in larger geographic markets: higher prices, lower levels of service, reduced innovation, and fewer choices.

Question 26. What action would you recommend either the FTC or Congress take in order to assist federal and state antitrust enforcers in catching local mergers that raise anticompetitive concerns?

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[42] *U.S. Dep't of Justice & Fed. Trade Comm'n Horizontal Merger Guidelines* § 1 (2010), https://www.ftc.gov/public-statements/2010/08/horizontal-merger-guidelines-united-states-department-justice-federal ("A merger enhances market power if it is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives.").

[43] *Id.* at § 4.2. In antitrust analysis, a relevant market identifies a set of products or services and a geographic area of competition in which to analyze the potential effects of a proposed transaction. The purpose of market definition is to identify options available to consumers. *See id*. at § 4 (describing market definition in antitrust analysis).

[44] *FTC v. Sanford Health*, No. 1:17-cv-0133 (D.N.D. Dec. 13, 2017), https://www.ftc.gov/enforcement/cases-proceedings/171-0019/sanford-health-ftc-state-north-dakota-v. The U.S. District Court for the District of North Dakota granted the FTC and State of North Dakota's preliminary injunction motion on December 13, 2017. The parties have appealed and the case is now pending before the Eighth Circuit.

I have no opinion as to whether Congress should take action. Identifying anticompetitive mergers remains one of the top priorities of the agency's competition mission. The vast majority of mergers the FTC investigates are reported and examined at the premerger stage. The FTC does, however, devote significant attention to identifying unreported, often consummated, mergers that could harm consumers. With respect to both mergers that do not meet the premerger notification requirements and potentially anticompetitive conduct, the FTC relies on the trade press and other news articles, consumer and competitor complaints, hearings, economic studies, and other means to identify harmful practices that threaten competition. The FTC also routinely partners with state Attorneys General in its enforcement efforts; state Attorneys General routinely join the FTC as co-plaintiffs in the FTC's federal court litigations, such as in the North Dakota physician services merger litigation discussed above.

Question on Horizontal Shareholding

Recent research has raised questions about whether horizontal shareholding harms competition in our economy. I would like to understand your view on this ongoing research.

Questions for all Witnesses

Question 27. Do you believe that horizontal shareholding raises anticompetitive concerns?

The short answer is that I do not yet know enough to draw sound, reliable conclusions on this point. The research on this topic is still at a relatively early stage, and the studies that have been completed so far have yielded conflicting results. At present, this remains a very unsettled issue.[45]

There is little doubt that active investment (*i.e.*, investment that seeks to control a company, obtain board seats and the like) in competitors can create the kinds of competition problems that the antitrust laws are designed to address. The antitrust agencies have long policed improper relationships between corporate competitors, even when these relationships fall short of a full combination or merger. For example, Section 8 of the Clayton Act effectively prohibits so-called "interlocking directorates" in which an officer or director of one firm serves as an officer or director of a competitor. But it is an open question whether the same kinds of problems created by active investments may also manifest from investments by institutional investors in competing companies.

The theory put forward, purportedly supported by early research, is that large institutional investors' shareholdings in competing firms in the same industry may blunt the competitive vitality of rival firms and, consequently, lead to higher prices and other anticompetitive effects. For example, if a company's shareholders have equity interests in a rival, that company may be less likely to engage in a price war or other forms of aggressive competition that could reduce its rival's profits, because the rival's profits are ultimately returned to the company's shareholders through their interests in the rival. Proponents of this theory argue that the risk of upsetting common investors may make it easier for firms to maintain stable

[45] *See* Note to the OECD by the United States on Common Ownership by Institutional Investors and Its Impact on Competition at ¶ 1, DAF/COMP/WD(2017)86 (Nov. 28, 2017), https://www.ftc.gov/system/files/attachments/us-submissions-oecd-other-international-competition-fora/common_ownership_united_states.pdf (explaining that "[g]iven the ongoing academic research and debate, and its early stage of development, the U.S. antitrust agencies are not prepared at this time to make any changes to their policies or practices with respect to common ownership by institutional investors.").

market conditions or potentially even increase prices, compared to market conditions that might prevail without common ownership by large, institutional investors.

Critics of this theory have cited methodological problems with the original research, as well as various structural issues that would make it difficult or even impossible for institutional investors in the real world to play the envisioned disciplining role. Critics also point out that any remedy to address these concerns would likely increase the cost of retail investment, and thereby cause harm to ordinary investors.

To date, there is no reliable consensus as to which side in this debate has the stronger argument, and the limited research suggests this question will remain unsettled until additional empirical work is completed in this area. Given the formative nature of the academic debate, I cannot definitively take a position on this issue. Additional study is required and, as I mention below, the Commission is currently helping to facilitate such work.

Question 28. Do you believe that our antitrust laws can be used to address the anticompetitive concerns raised by horizontal shareholding?

As noted above, I am still evaluating the viability of this concern. Therefore, I believe the use of the agency's enforcement powers in this area would be premature. That said, antitrust doctrine is flexible, allowing us to address even novel harms in the economy. If the Commission were to identify a meritorious case against common ownership by a single institutional investor, I believe we could bring such a case, even though we have not previously litigated that type of case. The Commission's ability to take future action in this area would, of course, be circumscribed by prior case law, due process considerations, and legal standards. The Commission would be unlikely to take enforcement action in this area without sufficient confidence that it can demonstrate to the courts both that the underlying theory of harm is robust, and that a specific set of passive investments has had actual anticompetitive effects in the real world.

Question 29. What, if anything, are you doing to address any potential harms of horizontal shareholding?

In December 2018, the Commission held a full-day public hearing that was largely devoted to exploring the merits of the common ownership issue in greater detail.[46] At this event, which was part of our *Hearings on Competition and Consumer Protection in the 21st Century*, respected academics and industry experts on both sides of this issue shared their expertise. The Commission also invited public comments on this topic.

We are still accepting public comments on this issue. Once the comment period ends, we intend to carefully evaluate all of the public submissions and the workshop testimony with a view towards better refining our understanding of the merits of this concern. Hearings like this one serve to bring together experts with different views, allowing them to hear and respond to criticisms of their positions, which we have found to be useful in fostering future academic work in areas of continuing interest to the agency.

[46] FTC Workshop, *FTC Hearing # 8: Competition and Consumer Protection in the 21st Century* (Dec. 6, 2018), https://www.ftc.gov/news-events/events-calendar/ftc-hearing-8-competition-consumer-protection-21st-century.

The Honorable Margaret Wood Hassan

Questions for Chairman Joseph J. Simons

Question 1. **This is an issue that is particularly important and concerning to me, and it is one that my colleagues and I have contacted the FTC about before.**

It is vitally important that we support our military veterans and their families, and I am honored to have worked on legislation improving veterans' access to workforce training, education, and health care, many of which have become law. We are committed to giving our veterans access to the tools they need to improve their education and employment opportunities.

Unfortunately, certain companies and academic institutions have shamefully and brazenly engaged in unscrupulous and often illegal "lead-generating" practices where schools pay companies, such as Sunkey Publishing, Fanmail, and Victory Media, to steer prospective student-veterans to them by claiming the schools are "military-friendly" or falsely representing the schools as affiliated with or endorsed by the Department of Defense.

My colleagues and I have sent letters urging the FTC to investigate these harmful, deceptive, and unfair marketing practices by military-branded websites that target veterans, service members, and their families, and I applaud the FTC for taking action against some of these schools and companies.

Knowing the names of offenders would be important for prospective student-veterans as they determine which schools or career training institutions they would like to attend.

In your response to one of our letters, you cite federal statute and regulations as prohibiting the release of the names of the schools that participated in lead-generating schemes. Your letter notes that the FTC may vote to initiate a process to release the names of the schools.

Given the importance of this information to student-veterans, and with the understanding that no one wants to hinder ongoing investigations, does the FTC intend to hold a vote to release the names of the involved schools? Why or why not?

Thank you for recognizing the Commission's work in combating deception against military consumers and military recruits. As mentioned in my response to the October 9, 2018 letter from you and several of your colleagues inquiring about schools that used deceptive lead generators to market their programs, the FTC shares your concerns about ensuring that those who serve or who want to serve are not deceived in making decisions about their educational futures.

In my response to your letter, I explained that the information you requested is non-public material because we obtained it during the course of a law enforcement investigation. The Commission can provide you with information to contact the party that submitted the information to us. If you have determined that contacting the submitter directly is not a viable course of action, I can further consider whether the Commission should hold a vote on the release of information about the identity of lead purchasers. Several factors would play into such consideration, including whether the release of the

information could prejudice ongoing or future law enforcement efforts. Furthermore, the FTC generally does not release information pertaining to individuals and entities that have not been adjudged to have violated the law; a key question to address in determining whether to depart from that practice in this instance is whether release of the information would benefit consumers or, conversely, cause confusion in the marketplace.

***Question 2*. Brewers and non-alcoholic beverage makers are large consumers of aluminum. The price index for the storage and transportation costs of the aluminum they purchase, the "Midwest Premium," has increased dramatically since President Trump's tariffs were implemented.**

Do you believe that the end-users of metal would meet the definition of "consumer" for FTC purposes? If so, could the FTC investigate the sharp increase in the Midwest Premium? If not, do you believe the Department of Justice, or another federal agency is more appropriate to investigate? Finally, if another agency commences an investigation, can the FTC provide expertise and support for that investigation?

Depending on the facts, end-users of aluminum could be harmed by a violation of the antitrust laws even though they are businesses rather than individuals. For example, in an FTC action to enjoin the merger of the second- and third-largest U.S. glass container manufacturers, the FTC alleged the transaction would likely harm the customers who use glass containers: brewers and distillers.[47]

If the Commission finds or is presented with evidence that a firm within our jurisdiction is engaging in conduct that harms competition and may violate the antitrust laws, we will review that information for potential law enforcement action. As you know, the FTC shares jurisdiction over the enforcement of the antitrust laws with the Department of Justice. The agencies use a "clearance" process to ensure that only one agency investigates and, if necessary, challenges any given transaction. Assignment to one agency or the other takes place after preliminary review of a transaction, based principally on each agency's relative expertise in the markets relevant to the proposed transaction. For many years, the Department of Justice has pursued antitrust enforcement in aluminum; the Department also works closely with the Commodities Futures Trading Commission in this area. Thus, the FTC would likely refer any evidence of anticompetitive conduct involving Midwest Premium aluminum pricing to our sister agency and, if requested, would coordinate with the Department of Justice on any ensuing investigation.

[47] *In re Ardagh Group and Saint-Gobain Containers*, Dkt. No. D-9356 (Mar. 24, 2014), https://www.ftc.gov/enforcement/cases-proceedings/131-0087/ardagh-group-sa-saint-gobain-containers-inc-compagnie-de.

The Honorable Tom Udall

Privacy
Questions for all Commissioners

Question 1. Do you support strong civil penalties for consumer privacy violations?

Yes. Under the FTC's current authority, we cannot seek civil penalties for initial privacy violations of Section 5 of the FTC Act. I believe we need the ability to seek civil penalties for initial violations in order to more effectively deter unlawful conduct. These penalties would of course be subject to the statutory limitations in Section 5(n) of the FTC Act, including ability to pay, degree of culpability, and ability to continue to do business.

Question 2. The California Consumer Protection Act goes into effect in January 2020. As Congress considers pre-emption of that state law, what additional authority should we give the FTC to ensure that consumer privacy adequately is protected?

I support the enactment of federal privacy legislation that would be enforced by the FTC and contain at least three components. First, as I noted above, any such legislation should give the Commission the ability to seek civil penalties for initial privacy violations. Second, it should give the Commission the ability to conduct APA rulemaking in order to make sure any legislation keeps pace with technological developments. Third, it should give the Commission jurisdiction over nonprofits and common carriers. Beyond these general parameters, I note that the process of enacting federal privacy legislation will involve difficult tradeoffs that are appropriately left to Congress. No matter the specific privacy or data security laws Congress enacts, the Commission commits to using its extensive expertise and experience to enforce them vigorously and enthusiastically.

Question 3. A recent *New York Times* analysis found that both the Apple App Store and the Google Play Store have apps in their respective children's or family sections that potentially violate COPPA.[48] What specific role should platform owners play to ensure COPPA compliance on their platforms?

In 2012, the Commission revised the COPPA Rule to cover not just websites, app developers, and other online services but also third parties collecting personal information from users of those sites or services. At that time, the Commission made clear that it did not intend to make platforms responsible merely for offering consumers access to someone else's child-directed content. Rather, platforms would be liable under COPPA only if they had actual knowledge that they were collecting personal information from a child-directed app. At the same time, platforms are in a unique position to set and enforce rules for apps that seek placement in the platform's store, and to drive good practices. We encourage platforms to pursue best practices in this regard, beyond those required by COPPA. For example, platforms can serve an important educational function for apps that may not understand the requirements of COPPA.

[48] Valentino-DeVries, J., Singer, N., Krolick, A., Keller, M. H., *How Game Apps That Captivate Kids Have Been Collecting Their Data*, N.Y. TIMES, Sept. 12, 2018, https://www.nytimes.com/interactive/2018/09/12/technology/kids-apps-data-privacy-google-twitter.html.

Question 4. Compliance for mobile apps may be hard to achieve against fly-by-night operators overseas who do not care if their apps violate U.S. law. How can the Vtech Electronics investigation and civil penalty serve as an example for how the FTC can hold foreign app developers responsible for violating COPPA?

In addition to the VTech case you mention, the Commission has taken action in a number of privacy-or security-related cases against companies that have a foreign presence.[49] We rely on the U.S. SAFE WEB Act Amendments to the FTC Act to address unfair and deceptive acts or practices involving foreign commerce. Using this authority, the agency has been able to obtain successful relief for consumers in the United States against the foreign entities that manufactured the devices at issue (as well as their U.S. subsidiaries in certain matters) when they purposefully directed their activities to the United States by advertising, marketing, distributing, or selling their products to U.S. consumers.This relief has included a substantial civil penalties in the VTech and inMobi settlements. More recently, the FTC took action against Blu, a U.S.-based phone manufacturer that was allowing its Chinese service provider to access text messages and other private information, contrary to its representations to consumers.[50]

Due to some of the practical challenges the Commission faces in bringing enforcement actions against foreign companies, the Commission has also used other means to address illegal conduct affecting U.S. consumers. For example, a few years ago, Commission staff sent a warning letter to a Chinese company, Baby Bus, about COPPA violations relating to the collection of children's personal information through its apps. The Commission copied the three U.S.-based app platforms on this communication. The company quickly responded and addressed the concerns.

In determining how to address illegal conduct by foreign companies, we generally consider a number of factors. These include the nature and breadth of harm or potential harm to U.S. consumers from the foreign company's practices; the legal rules relating to service, evidence collection, and enforceability in the jurisdiction where the target is based; practical issues, such as whether the company has incentives to enter into a settlement with the FTC and remediate its conduct such as a large base of U.S. customers and supplier/distributor relationships in the United States; and resource issues such as the added time and costs of proceeding against a foreign entity. We also, in appropriate cases, seek cooperation from foreign counterparts who may be able to provide us with relevant information or be able to better address the conduct at issue.

Question 5. The COPPA safe harbor organizations must submit an annual report to the Federal Trade Commission, Can you share the reports from the last 5 years?

The FTC-approved safe harbor organizations do submit annual reports to the FTC each year. Unfortunately, we are not able to disclose these reports because they contain confidential proprietary information, which is exempt from disclosure by FOIA and Section 6(f) of the FTC Act.

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[49] *In re: TRENDnet, Inc.*, No. C-4426 (Jan. 16, 2014), https://www.ftc.gov/enforcement/cases-proceedings/122-3090/trendnet-inc-matter; *United States v. InMobi Pte Ltd.*, No. 3:16-cv-3474 (N.D. Cal. June 22, 2016), https://www.ftc.gov/enforcement/cases-proceedings/152-3203/inmobi-pte-ltd; *In re ASUSTeK Computer Inc.*, No. C-4587 (July 18, 2016), https://www.ftc.gov/enforcement/cases-proceedings/142-3156/asustek-computer-inc-matter; *In re HTC America Inc.*, No. C-4406 (July 25, 2013), https://www.ftc.gov/enforcement/cases-proceedings/122-3049/htc-america-inc-matter.

[50] *In re BLU Prods. and Samuel Ohev-Zion*, No. C-4657 (Sept. 6, 2018), https://www.ftc.gov/enforcement/cases-proceedings/172-3025/blu-products-samuel-ohev-zion-matter.

Concussions
Questions for Chairman Joseph J. Simons

Question 6. As you all are aware, I continue to bring attention to issue of helmet safety and marketing practices – particularly equipment that children use for sports. While there has been increased testing and awareness of traumatic brain injury caused by sports, I remain concerned that companies are mischaracterizing their equipment's ability to prevent or lessen concussions or other head injuries. Have FTC staff been able to continue their good work monitoring the helmet and other sports equipment in the marketplace to ensure that helmets and other gear is not being marketed in a deceptive manner?

Following its investigation into football helmet manufacturers and settlement against Brain-Pad, Inc.,[51] a mouthguard manufacturer, FTC staff have continued to monitor the marketplace for claims related to head injuries. When appropriate, staff have sent warning letters, civil investigative demands, and voluntary requests for information to marketers of athletic equipment.

Question 7. Have staff from the FTC been briefed by the National Football League or other entities that are conducting research on helmet design and safety?

FTC staff have not been briefed by the National Football League or other entities conducting research on helmet design and safety, although we are following research and development in the area.

[51] *In re Brain-Pad, Inc. and Joseph Manzo*, No. C-4375 (Nov. 5, 2012), https://www.ftc.gov/enforcement/cases-proceedings/122-3073/brain-pad-inc

The Honorable Catherine Cortez Masto

The Honorable Joseph J. Simons, Chairman, Federal Trade Commission

Pet Leasing
I appreciate the Commission's attention to my request with six of my colleagues for the FTC to investigate the practice of pet leasing that is leading some consumers into confusing or deceptive contractual obligations that cause them to have an issue with their beloved pet and negatively impact their financial status, such as credit scores, for far into the future. This is an issue that is a little under the radar but needs strong oversight and attention under your deceptive practices mandate if there are concerning financial practices being discovered.

Question 1: Can I get a further commitment from you all to keep my office informed of actions and determinations you all may make pertaining to this concerning issue and the Humane Society and Animal Legal Defense Fund's formal petition to the Commission?

The FTC is committed to protecting consumers from unfair or deceptive acts or practices, including any such practices carried out by merchants or third-party leasing and financing companies. Since our response to your letter last November, FTC staff have met with the Humane Society and Animal Legal Defense Fund to discuss their joint formal petition to the Commission. The FTC will continue to keep your office informed of public actions the Commission takes concerning pet leasing or the Humane Society and Animal Legal Defense Fund's petition to the Commission.

Data Minimization vs Big Data
Question for all Commissioners
A topic that has come up a lot during our discussions on privacy is data minimization. This is a concept that I have been considering on as I work on developing a comprehensive data privacy bill. As you're aware, this is the idea that businesses should only collect, process, and store the minimum amount of data that is necessary to carry out the purposes for which is was collected. There are obvious advantages to this as it minimizes the risk of data breaches and other privacy harms. At the same time, big data analytics are going to be crucial for the future and play an important role in smart cities, artificial intelligence, and other important technologies that fuel economic growth. I think it is important to find a balance between minimization and ensuring that data, especially de-identified data, is available for these applications.
***Question 1*. Can you describe how you view this balance and how we in Congress can ensure that people's data is not abused but can still be put to use in positive ways?**

Your question neatly captures the dilemma. Businesses can apply "big data" analysis tools to gain insights from large data sets that help the business to innovate – for example, to improve an existing product. This analysis can provide new consumer benefits, such as the development of new features. On the other hand, consumers' data may be used for unexpected purposes in ways that are unwelcome.[52]

[52] *See, e.g.*, Press Release, *FTC Charges Deceptive Privacy Practices in Google's Rollout of Its Buzz Social Network* (Mar. 30, 2011), https://www.ftc.gov/news-events/press-releases/2011/03/ftc-charges-deceptive-privacy-practices-googles-rollout-its-buzz) (alleging that Google deceptively repurposed information it had obtained from users of its Gmail email service to set up the Buzz social networking service, leading to public disclosure of users' email contacts).

Long-term retention of consumer information—such as sensitive financial information—also presents a data security issue.[53]

The FTC issued a report on the subject of the benefits and risks of big data that contains guidance for companies that use big data analytics.[54] In November 2018, the Commission also hosted a workshop on the intersections between big data, privacy, and competition.[55] We are happy to work with your staff to develop legislation on how to balance the benefits and risks of big data.

FTC Resource Needs – Staffing Specifics
To get a sense of the challenge additional authority or requirements on your commission may be, can you tell us how many full time technologists do you have on staff at the FTC?
***Question 1*. More broadly, how many staff does the FTC have working on data privacy?**
***Question 2*. Do you have the resources you need to effectively protect privacy in the digital age?**
***Question 3*. If not, what additional resources would be helpful?**

We have about 5 full time staff whose positions are classified as technologists. Beyond these specific full-time employees, we have a number of investigators and lawyers who have developed significant in-house technical expertise through their enforcement and policy work in the areas of big data, cybersecurity, the online advertising ecosystem, Internet of Things, artificial intelligence, and related fields. When the FTC needs more complex and richer information about a specific industry or technology, we supplement our internal technological proficiency by hiring outside technical experts to help us develop and litigate cases. We also keep abreast of technological developments by hosting an annual event called PrivacyCon, in which we call on academics to present original research on privacy and security issues. If provided additional funding, we would hire additional technologists and other staff to enhance our privacy and data security enforcement efforts.

Response to Question 1: As reflected in the Commission's annual budget request, the Division of Privacy and Identity Protection has approximately 40 staff tasked with protecting consumers' privacy and security. Additionally, staff from other Divisions and regional offices also work on data privacy issues.[56]

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[53] *See, e.g.*, *In re Ceridian Corp.*, No. C-4325 (June 8, 2011), https://www.ftc.gov/enforcement/cases-proceedings/102-3160/ceridian-corporation-matter) (final order resolving charges that the company created unnecessary risks by storing information such as individuals' email address, telephone number, Social Security number, date of birth, and direct deposit account number indefinitely on its network without a business need).
[54] *See* FTC Report, *Big Data: A Tool for Inclusion or Exclusion? Understanding the Issues* (Jan. 2016), https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf.
[55] *See* FTC Workshop, *FTC Hearing #6: Competition and Consumer Protection in the 21st Century* (Nov. 6-8, 2018), https://www.ftc.gov/news-events/events-calendar/ftc-hearing-6-competition-consumer-protection-21st-century.
[56] *See, e.g.*, Press Release, *LifeLock to Pay $100 Million to Consumers to Settle FTC Charges it Violated 2010 Order* (Dec. 17, 2015), https://www.ftc.gov/news-events/press-releases/2015/12/lifelock-pay-100-million-consumers-settle-ftc-charges-it-violated ($100 million settlement for order violation obtained by the Division of Enforcement); Press Release, *Online Talent Search Company Settles FTC Allegations it Collected Children's Information Without Consent and Misled Consumers* (Feb. 5, 2018), https://www.ftc.gov/news-events/press-releases/2018/02/online-talent-search-company-settles-allegations-it-collected (settlement for COPPA violations obtained by Midwest Region staff); FTC, Website: *Cybersecurity for Small Businesses* (website created by the Division of Consumer and Business Education), https://www.ftc.gov/tips-advice/business-center/small-businesses/cybersecurity.

Response to Questions 2 and 3: The Commission works hard to effectively employ whatever resources Congress gives us. While we use our existing resources efficiently, we believe that the agency could use additional resources. Some areas in which we could use additional resources include the hiring of additional technologists and the hiring of additional staff to monitor and enforce compliance with privacy and data security orders. Furthermore, if Congress were to give the FTC additional rulemaking and enforcement tools in the privacy area, we would need more resources to handle those tasks while continuing the agency's existing enforcement, policy, and education work. Whatever resources Congress gives us, we will put to good use.

General Privacy Recommendations

***Question 1*. While privacy was a significant topic of the oversight hearing, as we look to develop a bill, can you specifically lay out some of the top priorities you individually would like to see included and what do you think gets overlooked in the conversations policymakers have with allowing for future innovations and yet raising the bar for protecting consumers?**

In its written testimony, the Commission urged Congress to consider enacting privacy legislation that would be enforced by the FTC. The testimony recognized that, while the agency remains committed to vigorously enforcing existing privacy-related statutes, Congress may be able to craft federal legislation that would more seamlessly address consumers' legitimate concerns regarding the collection, use, and sharing of their data and provide greater clarity to businesses while retaining the flexibility required to foster competition and innovation. As far as top priorities for such legislation: first, Congress should give the Commission authority to deter violations by fining companies for initial violations, as it has for violations of other statutes. Second, Congress should ensure that all types of companies across the economy are held accountable for protecting consumers' privacy and security. As one example, the Commission has long urged the repeal of the FTC Act's provision that places limits on the agency's ability to go after law violations by common carriers and by non-profits. Third, Congress should consider giving the FTC targeted APA rulemaking authority so that the FTC can enact rules to keep up with technology developments. An excellent example of this approach appears in statutes such as CAN-SPAM and COPPA.

***Question 2.* Can you also outline the optimal role you see for our state Attorneys General in this privacy enforcement process?**

I see the state Attorneys General as important partners in protecting consumers. For a number of statutes, such as COPPA, Congress enacted legislation that enables Attorneys General to enforce the law in addition to the Commission. We applaud this model. A number of state AGs have brought actions to enforce COPPA, for example, which benefits consumers because there are multiple cops on the beat. And when state Attorneys General bring these actions, they are enforcing the same legal standard that other states and the Commission are enforcing, so the same protections apply consistently nationwide.

Updated Aspects of Banking or Health Care Data Security
Given the incredibly innovative technologies being developed, from apps that are commonly used in various banking transactions, to wearables that by design are tracking personally sensitive health care related metrics by the second, there is a lot of data being collected, stored and utilized.

And many of these technologies are providing incredibly helpful in cases like telemedicine to help residents of rural communities. Within your testimony, you stated quote *"The Commission also must continue to prioritize, examine, and address privacy and data security with a fresh perspective." Question 1*. So do you think there is a need for a broader conversation about how our current banking and health care information protection statutes like HIPAA, for example, and regulators like the FTC serve in aiding the different enforcement agencies ensure these laws are moving ahead with the times?

Laws and regulators certainly need to keep up with the times. The series of hearings the Commission has been holding on a wide range of issues are one part of the Commission's process to do just that. Laws regarding financial privacy, in particular, have been changing rapidly at the state level, with the adoption of new laws by states such as New York and South Carolina with respect to financial institutions and insurance companies, respectively. The Commission has been following these developments closely.

Question 2. **Are there any specific examples or thoughts you have on what kind of further considerations need to be given to these kinds of technologies given the increased personal nature of the type of data that is being collected, stored and utilized?**

With respect to financial and health privacy specifically, it is important that privacy and security obligations apply regardless of the type of entity that is collecting the data. For both financial and health privacy, that is not currently the case. Companies covered by HIPAA, such as health plans and certain medical providers, have specific obligations with respect to health information they collect; meanwhile, other entities that collect the same types of information (e.g., data brokers, health apps, health information websites) may not face the same obligations. Similarly, financial institutions have obligations under the Gramm-Leach-Bliley (GLB) Act to protect information such as account numbers and SSNs, but other entities collecting the same types of information do not.

Question 3. **Is it time for a reconsideration or expansion of safeguards at all stages of transmission of consumer's banking information?**

While the Commission does not have jurisdiction over banks and does not have the expertise to comment on banking information specifically, I do believe it is time for a reexamination of safeguards for financial institutions generally. The FTC has jurisdiction over a wide range of non-bank financial institutions such as tax preparers, mortgage brokers, payday lenders, credit bureaus, and debt collectors. The FTC enforces the GLB Safeguards Rule, which applies to these institutions. As part of its periodic review of its rules and guides, the Commission is currently reviewing its GLB Safeguards Rule, which requires financial institutions to take reasonable measures to secure consumers' data. More broadly, in urging Congress to consider enacting privacy legislation that would be enforced by the FTC, the Commission expects that the legislative process would involve a fresh new look at the current regulatory landscape, and would consider harmonizing and updating that landscape where needed. We agree that financial information, in particular, should be maintained securely throughout the information lifecycle.

Question 4. **What regulatory structures and rules under the Gramm-Leach-Bliley Act could apply to other entities which collect and hold sensitive information?**

The Commission's GLB Safeguards Rule requires financial institutions to develop, implement, and maintain a comprehensive, written information security program, and, as noted above, is currently under review. One of the strengths of the Rule is its flexible, process-based approach, which requires the institution to implement administrative, technical, and physical safeguards appropriate to the size and complexity of the financial institution, the nature and scope of its activities, and the sensitivity of the customer information at issue. The Rule also requires each financial institution, among other things, to keep its security program up-to-date—for example, by adjusting the program to address new types of threats. This process of continual updating is essential. We believe a similar, process-based approach would be appropriate for a wide range of companies. To respond to companies' desire for more specific guidance about which security measures to adopt, the Rule's process-based, results-oriented approach can be combined with more specific technology-neutral requirements.

Question 5. **From your perspective, should entities such as financial institutions be on the list of those to be informed of any compromised personally identifiable information when associated accounts are involved?**

Previous legislation that would require data breach notification has required that companies notify the nationwide credit reporting companies, possibly because these are large, well-known entities that would be expected to develop processes to handle such notifications. Although consumers would presumably notify their bank, for example, if a company were to inform them that their bank account information has been exposed in a breach, direct notification of financial institutions could enable the institution to take additional measures to monitor breached accounts for fraud, even if the consumer does not take action.

First and Third Party Entities

There has been a lot of calls for a privacy bill that evens the playing field and is technologically neutral. This is important, but it is also important to think about how consumers interact with different entities. For example, many small and medium sized businesses contract with secondary firms that process data on their behalf. The consumer has no relationship with these entities, and so many of the requirements like transparency and control are more difficult to meet.

Question 1. **How do we address this problem while ensuring a bill maintains an even playing field and does not favor any one business model?**

One of consumers' main privacy concerns is the sharing of their data—particularly the sale of their data—with third parties with whom, often, the consumer has no direct relationship. At the same time, large entities that collect vast amounts of data from consumers may be able to share information widely within their organizations, without sharing with "third parties," while smaller competitors cannot. The implications on competition of different privacy regimes is one of the issues that the Commission has been examining in its ongoing series of hearings. One option to protect privacy in a way that does not disadvantage smaller players would be to impose requirements based on factors other than whether the entity is a "third party"—for example, by restricting the use of certain information for particular purposes by both first parties and third parties. We would be pleased to work with your staff further on this issue.

Privacy Risky Communities/Groups

Question 1. **Do you think that certain communities or groups are any more or less vulnerable to privacy risks and harms?**

Yes. Part of the discussion around big data and AI, for example, concerns the potential for bias, such as perpetuating historical discrimination, even unintentionally, through the use of biased data. In a 2016 report, *Big Data: A Tool for Inclusion or Exclusion? Understanding the Issues*, the Commission staff reported on a workshop relating to the risks and benefits of big data. The report recognized that big data analysis can bring significant consumer benefits, but also may cause harm relating to disparate treatment. For example, the report noted that potential inaccuracies and biases in data analysis might lead to detrimental effects for low-income and underserved populations. The Commission has worked to address issues particularly affecting certain communities or groups through a number of means, including a series of seminars and other events around the country and through consumer education.[57]

Question 2. **Should privacy law and regulations account for such unique or disparate harms, and if so, how?**

Certainly, harmful discriminatory treatment based on an individual's race, age, gender, religion, national origin, sexual orientation, and other prohibited factors should not be lawful. Existing laws, such as the Fair Credit Reporting Act and the Equal Credit Opportunity Act, offer important protections against unlawful discrimination. As noted above, much of the discussion around discriminatory treatment in the privacy area relates to the possibility that the use of algorithms will perpetuate past discrimination, even unintentionally.[58] Panelists at the Commission's November 2018 hearing on competition and consumer protection issues associated with the use of algorithms, artificial intelligence, and predictive analytics delved into these complicated issues.[59] We are happy to work with you to think through these issues as you craft legislation to prevent unlawful discrimination.

Immediate Civil Penalties Authority

Noting from your FTC testimony, "*Section 5 (of the FTC Act), however, is not without limitations. For example, Section 5 does not provide for civil penalties, reducing the Commission's deterrent capability.*"

Question 1. **While I appreciate the long term successes of the FTC in many respects to investigate data security matters, what are your thoughts to whether there is enough of a deterrent effect with Section 5 authority when you can't immediately enforce against those who misuse data with civil penalties right from the start, rather than as the result of often times flagrant offenses to their already establish consent decrees?**

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[57] *See, e.g.*, *Common Ground Conferences and Roundtables Calendar*, https://www.consumer.gov/content/common-ground-conferences-and-roundtables-calendar; *Consumer Information – Fraud Affects Every Community*, https://www.consumer.ftc.gov/features/every-community.

[58] *See, e.g.*, Elizabeth Weise, *Amazon Same-Day Delivery Less Likely in Black Areas, Report Says*, USA TODAY (Apr. 22, 2016), https://www.usatoday.com/story/tech/news/2016/04/22/amazon-same-day-delivery-less-likely-black-areas-report-says/83345684/ (mapping Amazon's algorithmically-based same day delivery areas in certain cities, as originally proposed, with historical segregation in those cities).

[59] *See* FTC Workshop, *FTC Hearing #7: Competition and Consumer Protection Issues in the 21st Century* (Nov. 13-14), https://www.ftc.gov/news-events/events-calendar/ftc-hearing-7-competition-consumer-protection-21st-century.

In the data security area, I believe that Congress should enact legislation giving the FTC the authority to seek civil penalties against first-time violators, which we cannot currently do under the FTC Act. I support such legislation precisely because I believe that our existing legal regime does not provide sufficient deterrence.