

**House Energy and Commerce Committee
“Oversight of the Federal Trade Commission”
July 18, 2018**

Questions for Rohit Chopra, Commissioner, Federal Trade Commission

Additional Questions for the Record

The Honorable Jan Schakowsky

- 1. In the past, FTC staff has recommended that Congress enact broad baseline privacy legislation. They made the recommendation in the Commission's 2012 privacy report and they made it again in the 2015 report on the Internet of Things. And former Chairwoman Edith Ramirez testified before this Subcommittee in 2013 that they were supportive of baseline Federal privacy legislation. I have also been advocating for comprehensive privacy legislation to provide a framework for companies and to protect Americans' privacy from unwanted intrusion and to give consumers back control of their own data. Understanding that the devil is in the details, yes or no, do you support the concept of comprehensive privacy legislation?**

Response: Yes.

- 2. Should the FTC be examining whether PBM mergers are driving up costs for consumers? With the understanding that the FTC cannot disclose nonpublic investigations, please explain what steps the FTC can take, including but not limited to a retrospective review of past PBM mergers, to protect consumers and promote competition in the PBM industry.**

Response: The high cost of prescription drugs is a severe problem for families in our country. I agree that the FTC must closely monitor pharmacy benefit managers to ensure that anticompetitive practices are not making problems worse for patients and their families. Congress granted the FTC broad authorities to collect information and publish data on business practices in our marketplace. In addition to enforcement and research, I would like the FTC to work closely with state attorneys general and other federal agencies to confront the high cost of drugs.

It is clear the Administration is also deeply concerned about the role of PBMs. According to a February 2018 report by the White House Council of Economic Advisers, “three PBMs account for 85 percent of the market, which allows them to exercise undue market power against manufacturers and against the health plans and beneficiaries they are supposed to be representing, thus generating outsized profits for themselves.” This is a bipartisan issue that requires close attention.

- 3. At the hearing, I explored whether the FTC could issue an advanced notice of proposed rulemaking (ANPR) or a notice of inquiry to collect data and get the process started on a data security rule. Regardless of whether Congress passes a law, should the FTC consider issuing an ANPR or notice of inquiry, or other pre-**

rulemaking efforts on data security right now? Why or why not? What are the benefits to doing this?

Response: As I noted in the hearing, the United States should lead on privacy and data security. In general, rulemaking enables the Commission to collect information through a participatory process. It gives market actors and individuals an opportunity to weigh in on an issue that will affect them. It also enables the FTC to propose a rule based on rigorous analysis and comprehensive study.

A request for information on a data security rule can supplement information and insights already collected by the FTC and could give the agency a head start on finalizing a rule, should Congress grant the FTC authority to finalize a rule pursuant to the Administrative Procedure Act.

- 4. I'm concerned that the FTC is unable to keep up with all the consent decrees. If the FTC cannot ensure compliance, the consent decrees are not effective in stopping unfair and deceptive acts.**
- a. I understand that the Commission can request information from a company to ensure compliance with those consent decrees. With that many consent decrees, how does staff know what to ask for? How can you be sure the Commission is not missing violations?**

Response: Given the extremely meager resources that Congress allocates to the FTC, the agency must prioritize its resources accordingly. While I believe the agency works to ensure compliance with consent decrees, I believe our budgetary constraints have increased the risk of missing violations.

This is why it is critical that order violations face significant consequences. There must be a clear understanding in the marketplace that FTC orders are not suggestions.

- b. I understand the FTC can require third-party monitoring reports. Are these full audits, and are these outside parties required to notify the FTC if they think a company is violating a consent decree?**

Response: The terms of third-party monitoring provisions can vary based on the settlement. Although third-party monitors can serve a useful purpose in certain cases, their independence can be compromised,¹ and the FTC must be vigilant in ensuring their incentives are sufficiently aligned.

¹ See, e.g., Agreement, NY State Dept. of Financial Services, In the Matter of Promontory Financial Group, LLC (Aug. 18, 2015), <https://www.dfs.ny.gov/about/ea/ea150818.pdf>; Agreement, NY State Dept. of Financial Services, In the Matter of Deloitte Financial Advisory Services LLP (Jun. 18, 2013), <https://www.dfs.ny.gov/about/ea/ea130618.pdf>.

- c. **How does the FTC evaluate third-party monitors/auditors? Can the FTC require that a particular auditor be used or not used?**

Response: The FTC should never sign onto settlements that allow lawbreaking firms to shop around for acquiescent auditors. In selecting or approving auditors, the Commission should carefully examine a firm's track record and be vigilant about overseeing its activities throughout the duration of the order.

- d. **When a consumer protection order is violated, what steps are taken to ensure that the violator is held accountable?**

Response: When companies violate orders, this is usually the result of serious management dysfunction, a calculated risk that the payoff of skirting the law is worth the expected consequences, or both. Either of these explanations requires serious remedies that address the underlying causes of noncompliance, and not just the effects.

In addition to civil penalties, I would like to see the Commission pursue a broad range of remedies to correct underlying deficiencies.

- e. **You have been especially concerned about stopping repeat offenders. Does the Commission have the tools and resources it needs to track compliance with the consent decrees? What would help?**

Response: Corporate recidivism is a problem for federal law enforcement agencies writ large. While we have strong tools, I am concerned about the level of resources Congress has allocated to the FTC to meet the challenges of the day.

5. **Last year, this Subcommittee held a hearing on the data breach at Equifax. It was a particularly large breach, which concerned many consumers especially because so many consumers had never heard of Equifax and had no idea that a company they had never heard of could have so much of their personal information. I know the FTC has announced that it is investigating the Equifax breach and that you cannot comment on the details. But I have some questions about the general privacy and data security concerns that were brought up by that breach.**

- a. **If a breach occurs at a credit bureau, the FTC could bring a case under the Safeguards Rule, right?**

Response: The Safeguards Rule applies to nonbank financial institutions, including credit bureaus.

Some credit reporting agencies also function as data brokers for advertising and other purposes. Equifax, for example, has its consumer reporting services as well as many services for business like digital marketing, real estate and property analytics, and income and employment verifications. We were told that in the case of the

Equifax breach, the database that was accessed was not from the credit bureau side. The data was collected through Equifax's other businesses.

- b. If there is a breach of a data broker, would that breach come under the Safeguards Rule?**

Response: Any financial institution, or company that is “significantly engaged” in providing financial products or services is subject to the Safeguards Rule. Many data brokers may meet this criterion.

- c. Does it make sense to you that consumers' data held by the same company in different databases are treated differently under the law?**

Response: Massive amounts of consumer data are collected, stored, shared, and sold by companies that are not subject to clear guidelines on data security. In order to facilitate trust in the marketplace, consumers need to be confident that their sensitive data is secure.

- d. What recommendations do you have to address this discrepancy?**

Response: The marketplace would benefit from Congress granting the FTC authority to develop data security rules using procedures pursuant to the Administrative Procedure Act. Violations of these rules should be subject to civil penalties to create sufficient deterrence against improper, lax practices.

The Honorable Doris Matsui

- 1. Patients in my district are very concerned about the skyrocketing prices of prescription drugs. One way that we can keep drug prices lower is by ensuring competition in the marketplace and encouraging the entry of generic drugs. Brand-name drug-makers are incentivized to delay the entry of generic competition to their products, because the longer they have a monopoly, the longer they can charge higher prices. Therefore, some brand-name drug makers have found ways to extend the time that their drug is the only one on the market. One such scheme includes buying off generic drugs with "pay-for delay" agreements - where the brand-name drug maker pays the generic drug manufacturer to stay off the market longer.**

- a. What is the Commission doing to review or prevent "pay-for-delay" agreements due to their anti-competitive nature?**

Response: The Commission closely monitors settlements of patent litigation between manufacturers of branded and generic versions of the same drug. The Commission has worked hard to reduce the anticompetitive effects of these settlements.

At the same time, I am concerned that these settlements may evolve in ways that require ongoing enforcement resources by the Commission, which are already stretched thin.

It will be important for the FTC to share with Congress any potential legislative changes that could help reduce the anticompetitive effects of these settlements.

- b. Is the Commission reviewing other similar anti-competitive behaviors in the drug manufacturer space? Can the Commission commit to remaining active in this area?**

Response: The Commission recently filed an amicus brief in the Mylan/Warner-Chilcott case, which was supportive of private action against “product hopping” conduct, in which a branded firm makes a small change to its product so that the generic version can no longer be automatically substituted by pharmacists, thereby prolonging their monopoly far beyond the original patent. While the Commission has not brought any product hopping cases, doing so is worthy of serious consideration.

I am also concerned about so-called “killer acquisitions,” where a company purchases a product line from another firm to prevent that product line from competing with the acquirer’s. In addition, I am aware of concerns about “patent thickening,” where companies protect patented drugs by filing many other ancillary patents that can be weaponized against potential generic competition. We should also closely monitor whether patent holders are withholding samples from generic manufacturers in ways that harm competition.

- 2. One core function of the Commission's mission is to protect consumers from scams. With the continued growth of online commerce, there has been an increase in online booking scams that potentially mislead consumers using fraudulent websites.**

- a. What further attention do you believe the Commission should be giving to this and similar issues as part of the Commission's overall effort to prevent online scams?**

Response: Online booking scams pose serious harms to families that save up for months, or even years, for a family vacation or to visit a loved one. In addition to travel booking scams, there are ongoing concerns about risks to consumers and competition with respect to travel websites, especially those offering hotels. This is an important area to examine, given the volume of consumer spend on travel and hospitality.

A key tool in the arsenal to fight scammers who are targeting Americans is our Consumer Sentinel Database. The database is populated by our Consumer Sentinel Network, which collects complaints and law enforcement tips from across the country, and makes them available to law enforcement offices to help

root out and stop crimes against consumers. Unfortunately, there are large information gaps in the database, including a number of non-participating state attorneys general. Filling these gaps and making the Consumer Sentinel Database a true clearinghouse is critical to combat scams.