

**Responses for the Record From the Hearing on “Oversight of Federal Trade Commission”
(July 18, 2018)**

Noah Joshua Phillips, Commissioner, Federal Trade Commission

The Honorable Robert E. Latta

- 1. One of the digital trade issues that we hear about, particularly from small and medium sized businesses, is the EU-U.S. Privacy Shield framework. This framework allows for the transfer of data between the EU and the United States, mutually benefitting thousands of companies and consumers on both sides of the Atlantic and resulting in over \$1 trillion dollars in commerce.**
 - a. What is the FTC doing to support the U.S. Government in the upcoming annual review of the framework, and how many enforcement cases has the FTC brought to enforce our commitments under the Privacy Shield? Do you commit to working with other Federal departments and agencies to support U.S. businesses that rely on the Privacy Shield?**

The EU-U.S. Privacy Shield Framework is a voluntary mechanism that companies of all sizes can use to promise certain protections for data transferred from Europe to the United States, thus facilitating the transfer of personal data from the EU with strong privacy protections. The FTC enforces those promises by Privacy Shield participants under its jurisdiction,¹ bringing violation cases under Section 5 of the FTC Act. The Commission is committed to the success of the EU-U.S. Privacy Shield Framework, a critical tool for protecting privacy and enabling cross-border data flows. The upcoming annual review of the Privacy Shield framework is in October 2018 and the Commission is engaged wholeheartedly in efforts to make the review as successful as possible. Chairman Simons and members of the FTC’s Office of International Affairs and Division of Privacy & Identity Protection will be traveling to Brussels in October to advocate for the U.S. and to ensure the success of the annual review.

The Commission also is committed to continue to work with other agencies in the U.S. government and with its partners in Europe to ensure businesses and consumers can continue to benefit from Privacy Shield and other cross-border data transfer programs. A key focus of the FTC’s international privacy efforts is support for global interoperability of data privacy regimes. The FTC works with the U.S. Department of Commerce on three key cross-border data transfer programs for the commercial sector: the EU-U.S. Privacy Shield, the Swiss-U.S. Privacy Shield, and the Asia-Pacific Economic Cooperation (APEC) Cross-Border Privacy Rules (CPBR) System. As noted above, the Privacy Shield programs provide legal mechanisms for companies to transfer personal data from the EU and Switzerland to the United States with strong privacy protections. The APEC CBPR system is a voluntary, enforceable code of conduct protecting personal information transferred among the United States and other APEC economies. The FTC also works closely with agencies developing and implementing new privacy and data security laws in Latin America and Asia. And, the FTC convenes discussions on important and emerging privacy trends. For example, the agency recently hosted the 49th Asia Pacific Privacy Authorities

¹ See www.privacyshield.gov and www.ftc.gov/tips-advice/business-center/privacy-and-security/privacy-shield. Companies can also join a Swiss-U.S. Privacy Shield for transfers from Switzerland.

forum in San Francisco, which addressed privacy issues such as artificial intelligence, data breach notification, and cross-border data flows.²

The FTC is committed to the success of these cross-border transfer mechanisms. Carrying out its enforcement role under these international privacy frameworks, the FTC has brought 47 actions – 39 under an older “U.S.-EU Safe Harbor” program, four under APEC CBPR, and four under Privacy Shield.³ Most recently, the FTC charged a California company, ReadyTech, with falsely claiming that it was in the process of being certified as Privacy Shield compliant.⁴ As part of its settlement with the FTC, ReadyTech is prohibited from misrepresenting its participation in any privacy or security program. Privacy Shield is and will remain a priority for the agency.

² FTC Press Release, *FTC Hosts Semi-Annual Forum for Asia Pacific Privacy Authorities* (June 27, 2018), <https://www.ftc.gov/news-events/press-releases/2018/06/ftc-hosts-semi-annual-forum-asia-pacific-privacy-authorities>.

³ *See, e.g., Md7, LLC*, No. C-4629 (Nov. 29, 2017) (Privacy Shield), <https://www.ftc.gov/enforcement/cases-proceedings/172-3172/md7-llc>; *Tru Communication, Inc.*, No. C-4628 (Nov. 29, 2017) (Privacy Shield), <https://www.ftc.gov/enforcement/cases-proceedings/172-3171/tru-communication-inc>; *Decusoft, LLC*, No. C-4630 (Nov. 29, 2017) (Privacy Shield), <https://www.ftc.gov/enforcement/cases-proceedings/172-3173/decusoft-llc>; *Sentinel Labs, Inc.*, No. C-4608 (Apr. 14, 2017) (APEC CBPR), <https://www.ftc.gov/enforcement/cases-proceedings/162-3250/sentinel-labs-inc>; *Vir2us, Inc.*, No. C-4609 (Apr. 14, 2017) (APEC CBPR), <https://www.ftc.gov/enforcement/cases-proceedings/162-3248/vir2us-inc>; *SpyChatter, Inc.*, No. C-4614 (Apr. 14, 2017) (APEC CBPR), <https://www.ftc.gov/enforcement/cases-proceedings/162-3251/spychatter-inc>.

⁴ *ReadyTech Corp.*, Matter No. 1823100 (July 2, 2018), <https://www.ftc.gov/enforcement/cases-proceedings/182-3100/readytech-corporation-matter>.

The Honorable Michael C. Burgess

- 1. Commissioner Phillips, it has been brought to my attention that certain lawsuit advertisements deceptively display an FDA logo or mislead viewers by depicting an actor dressed as a physician urging folks to stop taking certain medications. Such tactics have led to some of our most vulnerable members of society to stop taking medication they need and, in some instances, has even resulted in death. This issue is literally a matter of life and death. Can you explain to me what steps the FTC plans to take to address this and will you commit to working with us on this very serious matter moving forward?**

Advertising plays a critical role in our economy, providing consumers with valuable information. However, to be useful, advertising must not be misleading. The FTC Act prohibits deceptive and unfair acts or practices. The examples of lawsuit advertisements that you describe are indeed troubling and could constitute deceptive or unfair practices depending upon the facts of the case. To establish that an advertisement is deceptive requires a showing that (1) there was a representation or omission, (2) the representation or omission was likely to mislead consumers acting reasonably under the circumstances, and (3) the representation or omission was material.⁵ To establish that a practice is unfair requires a showing that an act or practice is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or competition.⁶

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 misleading and likely to cause harm to consumers. Depending on the results of our search, we will consider all available options, including law enforcement actions, warning letters, and consumer education. We also are consulting with the FDA to determine how we may assist each other on this topic. I commit to working with Congress and others on this very serious matter.

⁵ See Federal Trade Commission Policy Statement on Deception, *appended to Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174 (1984).

⁶ Federal Trade Commission Policy Statement on Unfairness, *appended to Int'l Harvester Co.*, 104 F.T.C. 949, 1070 (1984).