House Energy and Commerce Committee
"Oversight of the Federal Trade Commission"
July 18, 2018
Questions for Joseph Simons, Chairman, Federal Trade Commission

The Honorable Robert E. Latta

1. **In your testimony you noted the importance of the FTC's antitrust authority, and the filings which are submitted to the agency under the Hart-Scott-Rodino Act ("HSR"). Investors point out that the extent of shareholder monitoring and communication with management of companies has increased significantly over the last 20 years, and this activity, in their view, has been productive and beneficial to the marketplace. My understanding is that there is growing concern across the investment community that the FTC needs to update its interpretation that only passive investors can use the HSR "investment-only exemption" from filing requirements. These investors suggest that without HSR reform, there is a chilling effect on investors being able to engage with companies, and there are unnecessary filing burdens for investments of 10 percent or less that raise no substantive antitrust concerns.**

    a. **Do you believe it is now time for the FTC to consider the merits of HSR reform?**

    b. **Would you consider exploring this topic as part of upcoming FTC hearings, and provide this committee with your thoughts on the results of those hearings?**

Response: In passing the Hart-Scott-Rodino Act, Congress decided not to require premerger notification for all acquisitions, believing that the burden of complying with the file-and-wait requirements was not justified for small parties or small deals.[1] Congress also provided that the FTC, with the concurrence of the Department of Justice ("DOJ"), could exempt from HSR filing categories of transactions that are not likely to violate the antitrust laws—authority we have occasionally used to exempt transactions that pose little antitrust risk.[2]

It is worthwhile to consider whether changes in the economy may warrant a reassessment of current filing requirements. As you mention, in June, I announced the Commission's new public hearings project—*Hearings on Competition and Consumer Protection in the*

[1] In 2001, Congress raised the minimum size-of-transaction threshold from $15 million to $50 million, with annual adjustments beginning in 2005 based on changes in GNP. The current HSR threshold is $84.4 million.

[2] Subsection (d)(2)(b) of the HSR Act (15 U.S.C. § 18a(d)(2)(b)) gives the FTC, with the concurrence of the DOJ, authority to exempt from the Act's waiting and notice requirements persons or transactions which are not likely to violate the antitrust laws. *See, e.g.*, 61 Fed. Reg. 13,666 (Mar. 28, 1996) (final rule exempting ordinary course acquisitions of real estate and mineral reserves).

21st Century—to consider whether broad-based changes in the economy, evolving business practices, new technologies, and international developments warrant adjustments to competition and consumer protection law, enforcement priorities, and policy.[3] One of the topics to be discussed at these hearings is the analysis of acquisitions and holdings of a non-controlling ownership interest in competing companies. We expect that the panelists will discuss recent scholarship regarding the antitrust risks associated with small holdings in competing firms. We are also inviting public comment on this and other issues related to merger control.[4]

In administering the HSR premerger program, the FTC is responsible for ensuring that the HSR rules are clear and serve the interest of effective merger enforcement. The FTC routinely looks for ways to streamline and clarify HSR rules, including 16 C.F.R. § 802.9, which exempts acquisitions solely for the purpose of investment. At several times in the past, the Commission, in consultation with DOJ, has considered the merits of exempting acquisitions of *de minimis* amounts of voting securities regardless of investment intent.[5] We are aware of the investor concerns you highlight. Any potential change in HSR rules will consider the views of all stakeholders. In addition to the public hearings, we plan to engage with investors, other shareholders, and issuers to understand fully the impact of current HSR filing requirements. Any proposal to change the HSR rules would be subject to public notice and comment, a process through which we typically receive useful feedback that we integrate into our analysis.

2. In December 2016, the FTC issued a Notice of Proposed Rulemaking announcing proposed changes to the Commission's Contact Lens Rule. In March 2018, the Commission held a workshop on the Contact Lens Rule and received comments on the proceedings until early April 2018. Does the FTC expect to update its 2016 draft for comment or move directly to issue a final Contact Lens Rule? If the Commission decides to solicit additional public input to update the 2016 NPRM, how long would you anticipate extending the comment period and what would be the timeline for the issuance of the final Contact Lens Rule?

Response: The Commission initially published a Federal Register notice generally requesting comments on the Contact Lens 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

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

[4] Public comments on this topic will be posted on the FTC website at https://www.ftc.gov/policy/public-comments/2018/07/initiative-759.

[5] For example, in 1988 the Commission proposed to modify the "investment-only exemption" (53 Fed. Reg. 36,831 (Sept. 22, 1988), but did not adopt a final rule.

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 comments in response to the 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 that workshop closed on April 6, 2018. We received and reviewed approximately 3,500 additional comments following the workshop.

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. FTC staff intends to submit a recommendation to the Commission by the end of the year. If the Commission were to decide that additional public input would be beneficial, the Commission would allow an appropriate period of time to receive it. The length of the comment period would depend on the complexity of the modifications under consideration but most likely it would be 30 to 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.

3. **Please explain in detail how the FTC determines whether to proceed against a particular defendant in district court or in an administrative proceeding. If a decision is made to proceed in district court, how does the FTC determine whether to proceed through the use of traditional litigation, administrative proceeding, or through relief such as ex parte proceedings, preliminary injunctions to freeze assets, or injunctions for receivership? Please account for the total number of incidences in which the FTC elected to use each of these enforcement tools in the last 24 months, and the FTC's success rate for each enforcement tool over the same period of time.**

Response: At the outset, any Commission action whether administrative or federal, requires a vote by the Commission to proceed. A number of factors influence the Commission's decision to proceed administratively or in federal court. First, the Commission considers the types of remedies available in each forum. In administrative proceedings, the FTC cannot directly obtain monetary relief (although money can be included in a settlement). Instead, the FTC must first prevail in administrative litigation and then bring a subsequent case under Section 19 of the FTC Act for damages. By contrast, in federal district court actions, the FTC may seek equitable monetary relief, including restitution, disgorgement, or rescission. Therefore, where the FTC seeks an equitable monetary remedy to make consumers whole or prevent unjust enrichment, it typically brings a federal district court case.

Another factor we consider is whether the violative practices and consumer injury are ongoing. In such cases, it is often appropriate to seek a preliminary injunction in federal

court. If there is a significant risk of dissipation of assets or destruction of documents, the FTC may seek an *ex parte* Temporary Restraining Order (TRO) (please see answers to 4 and 5, below). In such consumer protection cases, the FTC files in federal district court.

Finally, the Commission considers the remedies available to enforce any injunctive relief it obtains. Upon referral by the FTC, DOJ may seek civil penalties for violations of an FTC administrative consent decree (or refer the matter back to the FTC to seek civil penalties). By contrast, the FTC can seek to enforce a violation of a federal district court order through a contempt action, can seek compensatory or coercive sanctions, and can bring a parallel motion to modify and toughen its orders under Rule 60 of the Federal Rules of Civil Procedure (FRCP). Finally, an intentional violation of a federal district court order can subject a defendant to criminal penalties. Although the FTC has no criminal enforcement authority, it refers appropriate cases to the DOJ and U.S. Attorney's offices.

Since January 2017, the FTC has filed 29 consumer protection administrative proceedings and 86 consumer protection cases in federal district court. During that same time period, the FTC sought *ex parte* TROs in 34 of those matters. Courts granted each of those requests.

4. Is the FTC required to comply with Federal Rule of Civil Procedure Rule 65(b)(1) that a plaintiff show "immediate and irreparable injury" when seeking an ex parte request for a temporary restraining order ("TRO") that would freeze a defendant's assets?

Response: Yes. Federal Rule of Civil Procedure 65(b)(1) provides that a court may issue a TRO without notice if immediate and irreparable injury, loss, or damage would otherwise result. This standard is met where notice would "render fruitless the further prosecution of the action."[6] Advance notice would render the action "fruitless" when it would prompt defendants to dissipate assets or destroy evidence.[7] In cases in which the Commission seeks an *ex parte* TRO, it presents evidence to satisfy FRCP Rule 65, including the requirement that it "show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition."

This is an appropriately high threshold for such extraordinary relief, and one that both the Commission and courts take seriously. In cases the FTC brings *ex parte*, the Commission presents strong evidence that it is likely to prevail on the merits of its underlying claims, that an injunction is necessary to prevent ongoing consumer injury, and that there is a significant likelihood that, if provided notice, the defendants will dissipate assets and/or destroy evidence. Courts have found that a number of factors can contribute to demonstrating that a defendant is likely to dissipate assets or destroy documents. These include showing: the defendant's business is permeated with fraud or is inherently illegal;

[6] *Reno Air Racing Ass'n, Inc. v. McCord*, 452 F.3d 1126, 1131 (9th Cir. 2006).
[7] *See In re Vuitton et Fils S.A.*, 606 F.2d 1 (2d Cir. 1979) 1, 4-5 (granting *ex parte* injunction to prevent destruction of evidence); *see also FTC v. Affordable Media*, 179 F.3d 1228, 1236-37 (9th Cir. 1999) (upholding asset freeze, initially entered *ex parte*, because of risk of asset dissipation).

prior, or ongoing, secretion of assets; a history of moving assets offshore or otherwise encumbering assets without a valid business reason; a history of crime involving fraud or dishonesty; a history of destroying documents in prior litigation; a pattern of using front companies and taking other steps to evade detection; or demonstrated unwillingness to abide by court orders, such as contempt. To support its *ex parte* TRO applications, the FTC also presents an affidavit with a lengthy list of examples in which defendants in FTC cases who were tipped off about an action before an asset freeze could be executed have dissipated and secreted assets or destroyed vital evidence.

5. What percentage of the FTC's requests for TRO asset freezes have included the presentation of evidence to the court showing that specific individual defendants in the case-at-hand had taken steps to hide or dissipate assets?

Response: As noted above in the answer to question 4, evidence that a specific defendant has taken steps to hide or dissipate assets can be the basis to support an asset freeze application. However, there are several other ways the FTC can show that notice would "render fruitless the further prosecution of the action." Each case is unique, and the FTC does not track the specific allegations used to support *ex parte* TRO applications. However, before the staff can file such an application, the Commission must find reason to believe that it is appropriate to proceed *ex parte*. FTC staff then must present sufficient evidence to the court, under the applicable case law in that jurisdiction,[8] to convince the court to provide this extraordinary relief.

6. Section 13(b) of the FTC Act states that a court may grant a TRO to the FTC without the FTC posting a bond, "after notice to the defendant." In an ex parte proceeding, in which the Commission does not give any notice to the defendant and the defendant has no opportunity to oppose the issuance of the order, is the FTC required to post a bond? Are there any cases where a TRO has been granted without the FTC posting a bond? Should the FTC be required to post a bond in these cases?

Response: Section 13(b) of the FTC Act authorizes the agency to seek a TRO with notice whenever the Commission has reason to believe a party is violating or about to violate any provision of law enforced by the FTC. Section 13(b) further states that in proper cases, the FTC is authorized to seek, and after proper proof the court may issue, a permanent injunction. Courts have interpreted this grant of equitable authority as including "the power to order any ancillary equitable relief necessary to effectuate the exercise of the granted powers."[9] Congress affirmed the FTC's use of this authority in the

[8] The standard for an asset freeze varies by circuit. For example, in the 9th Circuit litigants must demonstrate that dissipation of assets is likely, while in the 11th Circuit, litigants need only demonstrate a reasonable possibility of dissipation. The FTC files many of its cases in those two circuits.

[9] *FTC v. Amy Travel Serv.*, Inc., 875 F.2d 564, 572 (7th Cir. 1989); *see also FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1112-13 (9th Cir. 1982) (holding that Section 13(b) authorizes courts "to grant any ancillary relief necessary to accomplish complete justice").

FTC Act Amendments of 1994.[10] The language in Section 13(b) authorizing a court to grant a TRO without requiring the FTC to post a bond conforms with 28 U.S.C. § 2408 and FRCP 65, which exempt federal agencies from the general requirement that a party seeking a TRO must post a security bond.[11]

Accordingly, the FTC is not required to post a security bond when seeking an *ex parte* TRO and no court has required the FTC to do so. Defendants do have the right, pursuant to FRCP 65(b)(4), to appear and move to modify or dissolve the TRO. In addition, a TRO issued without notice to the party expires in 14 days unless the party agrees to an extension or the court holds a hearing and enters a preliminary injunction.

7. What consideration does the FTC take in evaluating enforcement actions based on a standard of unfairness in the absence of any proof of actual injury? If so, is "unfairness" determined solely by objective, tangible criteria? Are any subjective factors part of an "unfairness" standard? Is a hypothetical injury a sufficient basis for an enforcement action?

Response: As the Commission noted in its Policy Statement on Unfairness,[12] 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."[13] The most common forms of substantial consumer injury with which the Commission concerns itself are monetary injury,[14] and unwarranted health and safety risks.[15] However, as the Policy Statement notes, "In an extreme case, however, where tangible injury could be clearly demonstrated, emotional effects might possibly be considered as the basis for a

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[10] *See* S. Rep. No. 103-130, at 15-16 (1993) ("Section 13 of the FTC Act authorizes the FTC to file suit to enjoin any violation of the FTC. The FTC can go into court ex parte to obtain an order freezing assets, and is also able to obtain consumer redress.").

[11] *See* 28 U.S.C. § 2408 ("Security for damages or costs shall not be required of the United States, any department or agency thereof or any party acting under the direction of any such department or agency on the issuance of process or the institution or prosecution of any proceeding."); Fed. R. Civ. P. 65(c) ("The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. The United States, its officers, and its agencies are not required to give security.").

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

[13] *Id.*

[14] *FTC v. Accusearch*, 570 F.3d 1187, 1193-94 (10th Cir. 2009) (defendant's use of pretexting to obtain telephone records cost consumers money to change telephone providers); *FTC v. Inc21.com*, 745 F. Supp. 2d 975, 1003-05 (N.D. Cal. 2010) (telephone bill cramming caused substantial monetary injury); *FTC v. West Asset Management*, No. 1:11-cv-746 (N.D. Ga. Mar. 16, 2011) (debt collection company withdrew funds from consumers' bank accounts or charged their credit cards without obtaining consumers' express informed consent).

[15] *Consolid. Cigar Corp*., No. C-3966, 2000 FTC LEXIS 103, at *1-2 (Aug. 18, 2000) (consent) (failure to disclose that regular cigar smoking can cause several serious adverse health conditions); *Fitness Quest, Inc*., 113 F.T.C. 923, 925-26 (1990) (consent) (failure to adequately disclose that stomach exerciser frequently breaks and causes serious injury).

finding of unfairness."[16] For example, the Commission recently filed a complaint and obtained stipulated judgments against the operators of an alleged "revenge porn" website based in part on the range of different harms consumers suffered, including having their intimate images and personal information posted on the site without their consent.[17]

8. In consent orders entered into between the FTC and companies, have there been requirements for companies to provide personal information about individuals to the agency, and what security protections exist at the FTC to safeguard such personal information?

Response: Yes, the FTC sometimes requires entities it has sued to provide data about their customers when the FTC anticipates providing refunds to affected consumers. In those instances, the FTC applies strong privacy and data security standards to manage consumers' personally identifiable information ("PII"). For example, FTC employees and redress contractors access consumer PII only on a need-to-know basis. The FTC shares data with a redress contractor only after determining that redress is feasible and a specific redress plan has been developed. Only the data necessary to carry out the redress program is provided to the contractor. FTC redress contractors are required to use an encrypted email system for sending and receiving any consumer PII. More broadly, FTC redress contractors are required to provide information about the databases they use to store consumer data, including: system security plans, monthly security scans, information about possible vulnerabilities, and plans for addressing these vulnerabilities. These systems must be audited by either the FTC or a third party annually. FTC staff holds monthly security calls with the contractors to address any concerns, and the FTC's redress team has a Certified Information Systems Security Professional on staff to oversee the privacy and security practices of the contractors and to enforce our standards.

9. How does the FTC determine its priorities for industries and enterprises to target for enforcement action? For example, to what extent does the agency's online complaint tracking tools like Consumer Sentinel Network, Consumer Response Center, or the Do-Not-Call Registry play, or not play, in that analysis in determining whether or not to bring cases against illegal robocalling operators or other consumer protection cases.

Response: The Commission may open investigations at the request of the President, Congress, the Attorney General, or other governmental agencies; upon referrals by the courts; on the basis of complaints filed by members of the public; or on its own initiative.[18] In determining whether to open an investigation, the Commission acts only in the public interest, and does not initiate an investigation or take other action when the violation of law alleged is a matter of private controversy that does not tend to adversely affect the public.[19]

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[16] Policy Statement on Unfairness, *supra* n.12 at n.16.
[17] *FTC and State of Nevada v. Emp Media, Inc. et al.* (D.Nev. 2018). *See*, https://www.ftc.gov/enforcement/cases-proceedings/162-3052/emp-media-inc-myexcom
[18] 16 C.F.R. § 2.1.
[19] *Id.* at § 2.3.

Commission staff relies heavily on consumer complaints in its Consumer Sentinel database. Consumer Sentinel is a secure online database of reports from consumers about problems they experience in the marketplace; it is available only to law enforcement organizations. Approximately 2,500 law enforcement users across the country access the database, which currently holds more than 16 million consumer complaints about fraud and identity theft. More than 40 entities contribute consumer complaint data to Sentinel, including the Council of Better Business Bureaus, various federal and state agencies, organizations like the AARP Fraud Watch Network, and some companies, like Microsoft Corporation.

Although consumer complaints are not, by themselves, proof of deceptive or unfair practices, they are particularly helpful for identifying practices that are causing consumer injury, for spotting emerging frauds, and for identifying areas that deserve additional scrutiny. With some practices, such as privacy violations, consumers may not be aware of the violation, and are unlikely to file complaints. In those cases, the FTC relies on industry watchdogs and researchers to identify potential serious law violations. For other types of violations, such as energy and "green" claims, consumers are generally not in a position to assess the truth of a claim, and are unlikely to file complaints. In those instances, competitor complaints and consumer watchdog complaints are often the basis to begin an investigation.

10. In April of this year, this subcommittee held a hearing on robocalls and heard from technology companies about various technology solutions and strategies for combatting robocalls. This is one of the top complaints the FTC has every year. What plans do you have moving forward to combat the pervasive problem of illegal robocalls?

Response: The FTC takes a multi-faceted approach to combatting illegal robocalls and other abusive telemarketing. The FTC uses every tool at its disposal: aggressive law enforcement, initiatives to spur technological solutions, and robust consumer and business outreach. The FTC plans to continue its aggressive work in each of these areas, as discussed in more detail below.

Law Enforcement

First and foremost, the FTC is a law enforcement agency. As of September 1, 2018, the Commission has filed 138 lawsuits against 454 companies and 367 individuals alleged to be responsible for placing billions of unwanted telemarketing calls to consumers. The FTC has collected over $121 million from these violators. In cases where perpetrators were running telemarketing scams, the FTC has obtained court orders shutting these businesses down and freezing their remaining assets so that those funds could be returned to consumer victims.

Industry Outreach to Spur Technology

The FTC recognizes that law enforcement alone will not solve the problem of illegal robocalls. That is why the FTC intends to continue its long history of working with industry to promote technological solutions. The FTC has provided input to support the industry-led Robocall Strike Force, coordinated by the FCC, which is working to deliver comprehensive solutions to prevent, detect, and filter unwanted robocalls. In tandem with this effort, the FTC worked with a major carrier and federal law enforcement partners to help block IRS scam calls that were spoofing well-known IRS telephone numbers. FTC staff continues to work with federal law enforcement partners and major carriers to encourage network-level blocking of illegal robocall campaigns.

The FTC also led four public challenge contests to help spur industry initiatives to tackle unlawful robocalls by blocking calls.[20] These challenges contributed to a shift in the development and availability of technological solutions in this area. When the FTC held its first public challenge, few call blocking applications existed. Today, there are hundreds of apps available to consumers, and two winners of the FTC's challenges offer leading call blocking tools that have blocked hundreds of millions of unwanted calls.[21]

The FTC also engages with technical experts, academics, and others through industry groups, such as the Messaging, Malware and Mobile Anti-Abuse Working Group ("MAAWG") and the Voice and Telephony Abuse Special Interest Group ("VTA SIG"). The FTC has encouraged ongoing industry efforts to develop new technological protocols that will change how caller ID works so that it will be more difficult for callers to engage in illegal caller ID spoofing.

Consumer Education & Outreach

The FTC's education and outreach program reaches tens of millions of people a year through our website, the media, and partner organizations that disseminate consumer information on the FTC's behalf. In the case of robocalls, the advice is simple: if you answer a call and hear an unwanted recorded sales message—hang up.

11. There are a number of advertisements that claim certain medications or drugs may cause complications and prompt the viewer to contact to the organization or law firm airing the advertisement for possible recourse. Some lawsuit ads and websites use phrases like "recall" and "medical alert," while others show

[20] The first challenge, in 2013, called upon the public to develop a consumer-facing solution to blocks illegal robocalls. *See* FTC Press Release, *FTC Announces Robocall Challenge Winners* (Apr. 2, 2013), https://www.ftc.gov/news-events/press-releases/2013/04/ftc-announces-robocall-challenge-winners; *see also* FTC Press Release, *FTC Awards $25,000 Top Cash Prize for Contest-Winning Mobile App That Blocks Illegal Robocalls* (Aug. 17, 2015), https://www.ftc.gov/news-events/press-releases/2015/08/ftc-awards-25000-top-cash-prize-contest-winning-mobile-app-blocks; FTC Press Release, *FTC Announces Winners of "Zapping Rachel" Robocall Contest* (Aug. 28, 2014), https://www.ftc.gov/news-events/press-releases/2014/08/ftc-announces-winners-zapping-rachel-robocall-contest.

[21] One of the winners, "NomoRobo," was on the market within 6 months after being selected by the FTC. NomoRobo, which reports blocking over 600 million calls to date, is being offered directly to consumers by a number of telecommunications providers and is available as an app on iPhones.

flashing lights and sirens. These advertisements may at times be misleading or fraudulent, leading to potential physical or financial harm for consumers, especially our senior citizen community. Under your leadership, will the FTC focus on these potentially deceptive advertisements and, if it will, what processes or activities can the FTC improve or highlight to protect consumers, including seniors, from false or misleading advertisements?

Response: Advertising plays a critical role in our economy. It is one of the primary ways that people find out about available goods and services. Attorney advertising, in particular, may alert people who have been injured that they be may be entitled to compensation. However, to be useful, advertising must not be misleading. 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 harm consumers. Depending on the results of our review, 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.

12. **Over a year ago, your colleague Commissioner Ohlhausen, in her former capacity as Acting Chairman, announced a set of process reforms for its consumer protection investigations and enforcement. For example, she instructed the Bureau of Consumer Protection to form an internal working group to examine the agency's use of Civil Investigative Demands (CIDs) for documents and information in non-public investigations.**

    a. **Please describe in detail what progress and recommendations have been made by the FTC's various working groups in the intervening year?**

Response: Please see answer to question 12.c. below.

    b. **What specific steps has the Commission taken in implementing these process reforms?**

Response: Please see answer to question 12.c. below.

    c. **Specifically, please describe what recommendations were made by FTC staff about adopting more narrowly focused use of Civil Investigative Demands, as well as whether CIDs should require notice and approval by more than one Commissioner?**

Response: As a result of the work initiated by Acting Chairman Ohlhausen, the Commission has taken several steps to reduce the burden imposed on targets and on third parties by its uses of compulsory process in consumer protection investigations. First, the model instructions and definitions used in most CIDs have been simplified to make them easier for recipients to read, understand, and respond. Second, staff has been instructed to meet and confer with CID recipients, to prioritize responses and offer rolling production deadlines, and to negotiate to reduce any undue burden and provide additional time to

respond where appropriate. Third, the model CIDs to third parties, such as banks, telecommunications providers, and payment processors, have been streamlined to request less information, and staff has been instructed to take burden into account when drafting all CIDs. Fourth, unless staff articulates a specific need, CIDs are generally time limited to request information going back at most three years. The Commission and its staff continue to look for ways to obtain the vital information needed to bring enforcement actions and protect consumers while minimizing the burden on CID recipients.

13. Commissioner Ohlhausen also instructed the Bureaus of Consumer Protection and Economics to integrate the agency's economists earlier in consumer protection investigations. Please explain in detail how the Commission's economic expertise is brought to bear at the initiation of a non-public investigation through any potential enforcement action.

a. Does the Bureau of Economics currently provide economic analysis and information in each consumer protection investigation? If it does not, why not?

Response: The Bureau of Economics ("BE") provides economic support on all aspects of the Commission's antitrust and consumer protection activities, subject to staffing constraints. In particular, BE economists routinely provide economic support and analysis on individual investigations and cases, including reviewing all complaints, consents, and consent negotiation proposals; providing expertise as needed in litigation; and making policy recommendations to the Commission.[22] BE also plays a significant role in developing and advising the Commission on staff proposals related to the FTC's rulemaking and rule review activities. It is important to emphasize that all of the Bureaus—the Bureau of Competition ("BC"), the Bureau of Consumer Protection ("BCP"), and BE—make recommendations to the Commission, which is ultimately responsible for the final decision on all complaints and consent agreements.

b. Is the Bureau of Consumer Protection required to consider analysis and information from the Bureau of Economics in evaluating whether an investigation warrants enforcement action? If it is not, why not?

Response: Yes, BCP routinely consults with BE and always considers its analysis and information in evaluating whether an investigation warrants enforcement action. As noted above, BE economists routinely provide economic support and analysis on individual investigations and cases, including reviewing all complaints, consents, and consent negotiation proposals. BE also makes its own recommendations to the Commission regarding any proposed enforcement action or settlement. In a significant majority of matters, the Bureaus agree about the violations and the complaint or consent agreement at issue. In those instances where recommendations diverge, the Commission thoroughly

[22] *See generally* https://www.ftc.gov/about-ftc/bureaus-offices/bureau-economics; *see also* FTC Business Blog, *The Role of the Bureau of Economics in Consumer Protection: A Conversation with Bureau Directors* (Nov. 9, 2015), https://www.ftc.gov/news-events/blogs/business-blog/2015/11/role-bureau-economics-consumer-protection-conversation.

reviews all of the information it receives and makes the final decision as to how to proceed by vote.[23]

c. Would the publication of a summary description of the Bureau of Economics' analysis and justification in support of, or against, consumer protection enforcement actions be in the public interest?

Response: I do not believe that issuing such reports or separate statements would serve the public interest. As an initial matter, the Commission receives staff input and recommendations from various parts of the agency, including, but not limited to, BE. Disclosure of any single recommendation would convey only a partial picture of all of the information available to the Commission to inform its decision. Additionally, BE's internal memoranda contain non-public confidential information that, even after extensive editing, could provide clues as to the target of an investigation, thereby unfairly harming its reputation. Further, disclosing these internal memoranda would discourage and otherwise interfere with the free exchange of views among FTC staff and Commissioners, which helps the Commission to reach appropriate law enforcement decisions. Finally, the time required to create reports suitable for public disclosure would come at the expense of many other important activities that BE performs—including review and analysis of evidence, calculation of redress and penalties, expert testimony, and studies and reports about market trends and areas of concern.

14. FTC consent orders against companies like Equifax, Facebook, Google, and Uber require independent, third-party "assessments" (i.e., audits) to certify on-going compliance with the provisions of the consent order by the subject company. For example, Facebook was required in part "to establish and maintain a comprehensive privacy program designed to address privacy risks associated with the development and management of new and existing products and services, and to protect the privacy and confidentiality of consumers' information."

In response to the Committee's questions, Facebook indicated on June 29, 2018: "To date, three independent privacy assessments prepared by PwC have been completed and submitted to the FTC: a 180-Day assessment report (dated April 16, 2013), a biennial report covering the period between February 12, 2013 and February 11, 2015 (dated April 13, 2015), and a biennial report covering the period between February 12, 2015 and February 11, 2017 (dated April 12, 2017). In each of these assessments, PwC determined that Facebook's privacy controls were operating with sufficient effectiveness to provide reasonable assurance to protect the privacy information covered under the FTC Consent Order, in all material respects."

a. Please explain in detail the process following an FTC consent order requiring an initial assessment report, in particular which party (subject company or auditor) is responsible for preparing the initial assessment

[23] 16 C.F.R. § 4.14(c).

and whether the assessment is fully available to the public. Are subsequent biennial third-party assessments submitted and reviewed by the FTC, and are they available to the public?

Response: FTC privacy and data security orders typically require that companies obtain independent, third party assessments of their practices. The initial assessment must cover the first 180 days after the order is signed, and subsequent biennial assessments must cover each two-year period thereafter. The assessors must complete their assessments within 60 days from the end of the reporting period to which the assessment applies, and the company under order has 10 days from the day the assessment is completed to provide it to the FTC. Although the assessor is responsible for preparing the assessments, the subject company is responsible for providing the initial assessment to the FTC and for retaining subsequent assessments and providing them to the FTC upon request within 10 days.

Once we receive the initial assessment, staff carefully reviews it and follows up with questions for the company and the assessor as appropriate. Staff also obtains compliance reports and compliance notices from the company, which they review carefully. In addition, staff keep abreast of developments related to that company, such as consumer complaints or press reports, and they request production of subsequent assessments when they determine that aspects of the company's compliance or of the assessment warrant further scrutiny.

Initial and biennial assessments that are in the FTC's possession are available to the public in response to FOIA requests, but typically are redacted to protect information that could be exploited by bad actors (e.g., details about the subject company's systems for data collection, storage, and security) or by companies subject to assessments (e.g., details about the assessor's methods).

b. Please explain in detail what steps the FTC could pursue to strengthen the effectiveness of its assessment/audit compliance regime?

Response: Currently, once a privacy or security order is finalized, case attorneys enter details about the order into a proprietary enforcement database that the agency has developed to keep track of orders. At that point, the Bureau of Consumer Protection's Division of Enforcement assigns a compliance attorney, along with a supervisor, to monitor each order. In privacy and data security cases, as noted above, this compliance team receives and carefully reviews both the company's compliance reports and assessor's report, follows up with questions for the company and assessor, and evaluates consumer complaints and leads from other sources.

While the current system is robust, we are constantly looking to improve our processes related to privacy and data security enforcement. The FTC has formed a remedies task force to examine appropriate remedies in privacy and data security cases. The agency will also host its *Hearings on Competition and Consumer Protection in the 21st Century* this fall, including hearings on whether it needs additional tools in the privacy and data

security area.

c. Has the FTC considered and/or conducted its own independent audit of a subject company's compliance with its consent order requirements? If not, why not?

Response: Yes. The BCP Division of Enforcement investigates potential order violations in a variety of ways. For example, as noted above, it carefully reviews companies' compliance reports and assessor reports, follows up with questions, and tracks consumer complaints, press reports, and leads from security researchers to determine whether there may be order violations. If it determines that certain practices warrant further scrutiny, it can send a letter to the company requesting additional information (including subsequent biennial assessments), to which the company must respond in 10 days. The Division of Enforcement staff has investigated numerous possible order violations as part of this non-public process. In cases where it determines a law violation has occurred, it has recommended a public order enforcement action. In the privacy and security area, these actions have included Choicepoint,[24] Google,[25] Lifelock,[26] and Upromise.[27]

d. Does the FTC receive a copy of every assessment conducted by the independent, third-party auditor required under a consent order entered into by the agency?

Response: The FTC receives a copy of every initial assessment. For subsequent biennial assessments, the FTC's orders require companies to retain these assessments. The BCP Division of Enforcement then obtains those assessments when it determines whether the company's compliance warrants further scrutiny. The company must provide any material requested by staff within 10 days of a request.

e. How does the FTC determine which independent, third-party auditing firms are qualified to conduct and prepare such assessments? Does the FTC maintain a schedule of eligible firms to prepare assessments? If so, what specific auditing firms are currently eligible?

Response: As stated in the Commission's data security orders, the assessor must either have qualified for one of the specified professional credentials (Certified Information System Security Professional (CISSP), Certified Information Systems Auditor (CISA), or a Global Information Assurance Certification (GIAC) from the SANS Institute), or be approved by the FTC. As stated in the Commission's privacy orders, the assessor must have a minimum of three years of experience in the field of privacy and data protection

[24] *U.S. v. ChoicePoint*, Inc., No. 1:06-cv-00198-JTC (N.D. Ga. Sept. 3, 2010), https://www.ftc.gov/enforcement/cases-proceedings/052-3069/choicepoint-inc.
[25] *U.S. v. Google*, Inc., No. 3:12-cv-04177-SI (N.D. Cal. Nov. 16, 2012), https://www.ftc.gov/enforcement/cases-proceedings/google-inc.
[26] *U.S. v. LifeLock*, Inc., No. 2:10-cv-00530-JJT (D. Ariz. Jan. 4, 2016), https://www.ftc.gov/enforcement/cases-proceedings/072-3069-x100023/lifelock-inc-corporation.
[27] *U.S. v. Upromise, Inc.*, No. 1:17-cv-10442 (D. Mass. Mar. 23, 2017), https://www.ftc.gov/enforcement/cases-proceedings/102-3116-c-4351/upromise-inc.

and be approved by the FTC. In those cases where the FTC approves the assessor, the agency reviews the assessor's qualifications to determine whether the assessor has the ability to effectively and independently perform the required assessment. The FTC does not maintain a schedule of eligible firms, since it grants approval on a case-by-case basis.

f. Does the FTC approve, formally or informally, which companies are permitted to complete the audits for companies under order with the FTC?

Response: Please see answer to 14.e. above.

15. Some have claimed that when the FCC restored internet freedom by repealing the Obama era rules that stripped the Federal Trade Commission's authority over Internet service providers, it somehow made the internet less safe for consumers. The FCC's *Restoring Internet Freedom Order* actually restored the power of the FTC, the nation's premiere consumer protection agency, to protect internet users from unfair and deceptive practices. Please explain in detail how you believe the agency' s authority can be leveraged to consistently protect consumers across the internet?

Response: The FTC has broad authority over much of the economy to protect consumers against unfair or deceptive acts or practices and unfair methods of competition. The FTC cannot reach common carrier activities, however, and when the FCC reclassified Broadband Internet Access Service ("BIAS") as a common carrier activity, the FTC lost the ability to protect consumers in this space. There are several types of cases that the FTC brought against BIAS providers prior to 2015, and can bring again now that the reclassification has been reversed.[28] For instance, the FTC will use its privacy and data security expertise to prevent unfair or deceptive privacy and data security practices of BIAS providers. Using our flexible, enforcement-focused approach will enable the agency to continue to apply strong consumer privacy and security protections across a wide range of changing technologies and business models, without imposing unnecessary or undue burdens on industry.

Moreover, the FTC has experience enforcing the antitrust laws to prevent unfair methods of competition for the benefit of consumers in nearly all markets. As part of its *Hearings on Competition and Consumer Protection in the 21st Century*, the agency will hold public hearings in early 2019 to continue to explore how the FTC can use this 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

[28] *See, e.g.*, *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; *FTC v. TracFone Wireless, Inc.*, No. 15-cv-00392-EMC (N.D. Cal. Feb. 20, 2015), https://www.ftc.gov/enforcement/cases-proceedings/132-3176/straight-talk-wireless-tracfone-wireless-inc; *America Online, Inc.*, No. C-4105 (F.T.C. Jan. 28, 2004), https://www.ftc.gov/enforcement/cases-proceedings/002-3000/america-online-inc-compuserve-interactive-services-incin; *Juno Online Servs., Inc.*, No. C-4016 (F.T.C. June 25, 2001), https://www.ftc.gov/enforcement/cases-proceedings/002-3061/juno-online-services-inc

address competition issues in BIAS markets, the agency will report this to Congress.

The Honorable Michael C. Burgess

1. **An increase in hospital market concentration caused by hospital mergers has resulted in price increases. These mergers may also substantially lessen quality and competition by undermining the ability of physicians, on behalf of patients, to shop for hospital affiliations based upon quality factors, such as adequacy of hospital staffing, equipment, and administrative support services that would allow physicians to spend more time with their patients. Will the FTC evaluate future hospital mergers along these quality dimensions?**

Response: An acquisition that combines healthcare providers may violate Section 7 of the Clayton Act if the competition eliminated by the acquisition is likely to result in higher prices, lower quality of care, or reduced innovation. The FTC, along with the Antitrust Division of the Department of Justice ("DOJ"), maintains a vigorous enforcement program to scrutinize healthcare mergers and prevent mergers that are likely to have anticompetitive effects.

As part of that review, the FTC routinely examines the likely effects of a proposed merger—not only on provider pricing but also on quality of care. Empirical evidence, in the form of studies by FTC staff and others, demonstrates that healthcare consumers benefit from lower prices and higher quality services when healthcare markets, including hospital markets, are more competitive.[29] Hospitals compete with each other by providing higher quality and more convenient healthcare services. Because such non-price competition benefits patients, the FTC will continue to evaluate healthcare mergers for potential impact on quality of care and other important non-price aspects of competition. For instance, the FTC considers whether hospital mergers might adversely affect competition for recruitment of physicians.

Finally, merging hospitals often claim that their mergers will result in increased quality of care. The FTC has considered these claims seriously and has closely scrutinized whether such claims deserve credit under the case law and the Horizontal Merger Guidelines jointly issued by the FTC and DOJ.[30]

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[29] *See, e.g.*, Martin Gaynor & Robert Town, *The Impact of Hospital Consolidation – Update*, ROBERT WOOD JOHNSON FOUNDATION: THE SYNTHESIS PROJECT (2012) (synthesizing research on the impact of hospital mergers on prices, cost, and quality and finding that hospital consolidation generally results in higher prices, hospital competition improves quality of care, and physician-hospital consolidation has not led to either improved quality or reduced costs); Martin Gaynor & Robert J. Town, *Competition in Health Care Markets*, 2 HANDBOOK OF HEALTH ECONOMICS 499, 637 (2012); Martin Gaynor et al., *The Industrial Organization of Health-Care Markets*, 53 J. ECON.2 LITERATURE 235, 284 (2015) (critical review of empirical and theoretical literature regarding markets in healthcare services and insurance); Patrick S. Romano & David J. Balan, *A Retrospective Analysis of the Clinical Quality Effects of the Acquisition of Highland Park Hospital by Evanston Northwestern Healthcare*, 18 INT'L J. ECON. BUS. 45 (2011).

[30] U.S. Dep't of Justice and FTC, *Horizontal Merger Guidelines* §10 (2010), *available at* https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf.

2. **The cost of complying with administrative regulatory obligations has resulted in an increasing number of physicians leaving their practices that could have offered the marketplace more competition. Rather than compete with hospitals, physician practices are pressured by the added administrative costs to vertically integrate with hospitals. What are the potential benefits and risks of vertical integration for the healthcare marketplace?**

Response: Recent studies have documented the trend of vertical integration between hospitals and physicians. For example, in its 2013 *Report to the Congress*, the Medicare Payment Advisory Commission ("MedPAC"), an independent, non-partisan, Congressional support agency, reported that while the number of physicians employed by hospitals was relatively constant from 1998 to 2003, it increased by 55 percent from 2003 to 2011.[31] The causes and effects of such vertical integration are varied and complex. In particular, the overall effects of a hospital becoming the owner of a physician practice are complicated and, depending on the circumstances, may be pro-competitive (*i.e.*, beneficial for consumers), anticompetitive (*i.e.*, harmful to consumers), or competitively neutral. In addition, sometimes it is difficult to distinguish between vertical and horizontal effects. For instance, in the FTC's 2013 enforcement action challenging the acquisition of Saltzer Medical Group by St. Luke's Health System, some characterized the transaction as a vertical one, but the FTC's successful challenge was based on a horizontal theory. The FTC alleged, and the court found, that the combination of the hospital's employed physicians and Saltzer's 16 primary care physicians would lead to higher reimbursement rates for adult primary care services in Nampa, Idaho.[32]

   a. **One good way of introducing competition into hospital markets would be to restore the Stark exception for physician-owned hospitals that the Affordable Care Act revoked. Will the FTC support restoring this "whole hospital" exception?**

Response: Although there may be other reasons for the government to prohibit physicians from owning hospitals, there is no antitrust-related reason that I am aware of to have a blanket ban on such vertical integration. However, without studying this issue more carefully, I cannot take a firm position.

3. **Many academics believe that healthcare provider markets are "highly concentrated." In fact, cities like Pittsburgh, Boston, and San Francisco are controlled by just one or two dominant multi-hospital systems. These systems**

[31] MedPAC, (2013) Report to Congress: Medicare and the Health Care Delivery System. Policy Brief.

[32] *St. Alphonsus Med. Center-Nampa Inc. v. St. Luke's Health Sys., Ltd*., 778 F.3d 775 (9th Cir. 2015). The FTC's analysis of quality in this merger also was discussed as one example in a more general discussion of our approach to quality analysis in hospital mergers in an article written by several of our economists, Keith Brand, et al, *Economics at the FTC: Office Supply Retailers Redux, Healthcare Quality Efficiencies Analysis, and Litigation of an Alleged Get-Rich-Quick Scheme*." 45 REVIEW OF INDUSTRIAL ORGANIZATION 4, 325-344.

drive up healthcare costs and marginalize physicians who wish to remain independent. What is the FTC doing alleviate this growing issue?

Response: The Commission maintains a robust program to review hospital mergers in order to challenge ones that eliminate an important competitor and are likely to result in higher prices, lower quality of care, or reduced innovation.[33] Retrospective studies of consummated hospital mergers provide support for vigorous antitrust enforcement to prevent the accumulation of market power.[34] But there are limits on our ability to use the federal antitrust laws to prevent harmful healthcare mergers. For example, some state policies, such as certificate-of-need and certificates of public advantage laws, may deter or prevent antitrust enforcement to block mergers that are likely to lead to increased concentration in local healthcare markets.[35] Nonetheless, the FTC will continue to closely scrutinize hospital mergers, and to challenge those that are likely to substantially lessen competition and cause consumer harm.

4. **Health insurers claim that by merging they will obtain bargaining leverage with providers that will enable a lowering of premiums. An FTC retrospective study of the effect of past mergers on provider reimbursement and, most importantly, premiums, would be helpful in evaluating future health insurance mergers. Has FTC considered such a study? Would the FTC need congressional authority to undertake that study in health insurance markets?**

    a. **Relatedly, there is a concern that post-merger an insurer could exercise buyer/monopsony power in physician markets. Could FTC study the effects of past health insurer mergers on physician reimbursement and determine whether a decline in reimbursement has led to a decline in the quantity and/or quality of physician services?**

Response: You correctly point out that Section 6 of the FTC Act limits the Commission's ability to study the "business of insurance," although the Commission

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[33] *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559 (6th Cir. 2014), *cert. denied*, 135 S. Ct. 2049 (2015); *St. Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys.*, 778 F.3d 775 (9th Cir. 2015); *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327 (3d Cir. 2016); *FTC v. Advocate Health Care Network*, 841 F.3d 460 (7th Cir. 2016); FTC v. Sanford Health, No. 1:17-cv-00133 (N.D.)(Dec. 14, 2017) (appeal pending).

[34] Deborah Haas-Wilson & Christopher Garmon, Two Hospital Mergers on Chicago's North Shore: A Retrospective Study, 18 INT'L J. ECON. BUS. 17 (20110; Leemore Dafny, Estimation and Identification of Merger Effects: An Application to Hospital Mergers, 52 J. L. & ECON. 523, 544 (2009) ("hospitals increase price by roughly 40 percent following the merger of nearby rivals"); Cory Capps & David Dranove, Hospital Consolidation and Negotiated PPO Prices, 23 HEALTH AFFAIRS 175, 179 (2004); see also, e.g., Joseph Farrell et al., Economics at the FTC: Retrospective Merger Analysis with a Focus on Hospitals, 35 REV. INDUS. ORG. 369 (2009) (mergers between not-for-profit hospitals can result in substantial anticompetitive price increases).

[35] Statement of the Commission, *Phoebe Putney Health System, Inc.*, Dkt. 9348 (Mar. 31, 2015), https://www.ftc.gov/system/files/documents/public_statements/634181/150331phoebeputneycommstmt.pdf; Statement of the Commission, Cabell Huntington Hospital, Inc., Dkt. 9366 (Jul. 6, 2016), https://www.ftc.gov/system/files/documents/public_statements/969783/160706cabellcommstmt.pdf.

can study various aspects of the relationship between insurers and providers. I am not aware of any prior proposal for an FTC retrospective study related to provider reimbursement or insurance premiums, although I am aware that others have studied this question.[36] As you know, the FTC and the Department of Justice share enforcement of the federal antitrust laws; the Department of Justice has reviewed, and challenged, recent proposed mergers involving health insurers.

5. **In December 2016, the FTC issued a Notice of Proposed Rulemaking announcing proposed changes to the Commission's Contact Lens Rule. These changes propose a new regulatory requirement on providers, requiring doctors to collect and maintain for 3 years a signed document indicating that each patient received a copy of their contact lens prescription. Out of 309 complaints about prescriber prescription release, the FTC has determined that 55 warning letters to prescribers were necessary over the course of a decade. How does this small percentage of complaints and enforcement action provide sufficient evidence to justify imposition of a costly new regulatory burden on an entire industry?**

   Response: The Contact Lens Rule was promulgated to implement the requirements of the Fairness to Contact Lens Consumers Act. The statute and the Rule require the automatic release of a contact lens prescription to the patient upon completion of a lens fitting, or at the end of the examination if there is no change in the prescription, and are intended to facilitate consumers' ability to shop around for contact lenses.

   The Commission initially published a Federal Register notice generally requesting comments on the Rule in September 2015. Based on a 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. The Commission received over 4,100 comments. There is evidence on the public record that suggests that at least half of contact lens consumers are not receiving their prescription as required by the Rule, either because they are not receiving their prescription at all (25%-35%) or because they do not receive it until they request it. Prescriber compliance with the automatic release requirement is critical to maximizing the Rule's intended competitive benefits.

   Although the Rule has been in place for over 10 years, the FTC continues to receive consumer complaints about prescribers' failure to comply with the automatic release requirement. However, the number of complaints the FTC has received is not the best

[36] Leemore Dafny, Mark Duggan, & Subramaniam Ramanarayanan, *Paying a premium on your premium? Consolidation in the US health insurance industry*, American Economic Review 102.2 (2012): 1161-85 (growth in insurer bargaining power after Aetna-Prudential merger reduced earnings and employment growth of physicians and raised earnings and employment growth of nurses, reflecting postmerger substitution of nurses for physicians, and the exercise of monopsony power vis-à-vis physicians).

evidence of compliance with the automatic prescription requirement, for several reasons:

- Many consumers do not know of their right to receive their prescription (and so would not complain if they did not get it);
- Consumers may not know to complain to the FTC;
- Consumers who receive their prescription only after asking for it (which is still a Rule violation) may be unlikely to complain;
- Consumers who do not automatically receive their prescriptions may feel reluctant to complain about their prescriber, with whom they may otherwise be satisfied; and
- Consumers may not take the time to complain.

The Commission held a workshop on March 7, 2018 to collect additional information on various Rule-related issues, including the proposed amendments and alternative ways to increase subscriber compliance with the Rule. The public comment period closed on April 6, 2018. We received and reviewed approximately 3,500 additional comments. FTC staff intends to submit a recommendation to the Commission by the end of the year.

6. **In March 2018, the Commission held a workshop on the Contact Lens Rule and received comments on the proceedings until early April 2018. In May 2018, I led a letter with Rep. Bobby Rush requesting that the Commission reconsider this Notice of Proposed Rulemaking. Does the FTC expect to update its 2016 draft for comment or move directly to issue a final Contact Lens Rule? What is the FTC's anticipated timing for action?**

   Response: As discussed in response to question 5 above, staff collected additional information during the workshop and in public comments, and is considering alternatives to increase prescriber compliance with the Rule without imposing unnecessary burdens on prescribers. FTC staff intends to submit a recommendation to the Commission by the end of the year. 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 to 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.

7. **The FTC has jurisdiction over enforcing the Fair Debt Collection Practices Act. This Act was enacted in 1977 and many new technologies have come into use since then. Many third-party collectors have fallen prey to frivolous litigation as a result of unclear rules. The Bureau of Consumer Financial Protection has indicated that it plans to propose rules for the Fair Debt Collection Practices Act. How will these potential rules reconcile eliminating bad actors with creating clear, but not overly burdensome requirements for those acting responsibly? What is the timeline for these potential rules?**

   Response: For more than four decades, the FTC has been protecting consumers from

unlawful debt collection practices. Stopping such practices remains a top priority for the agency. Since 2010, the FTC has sued more than 290 companies and individuals who engaged in unlawful collection practices in violation of the FDCPA and FTC Act, obtaining industry-wide bans against more than 150 of them and securing more than $480 million in judgments. In addition to vigorous law enforcement, the FTC also engages in education and public outreach to inform consumers about their rights under the FDCPA and businesses about their obligations under the law.

The Commission has long taken the position that "the debt collection legal system needs to be reformed and modernized to reflect changes in consumer debt, the debt collection industry, and technology" since enactment of the FDCPA.[37] Accordingly, while the FTC does not have rulemaking authority under the FDCPA, we look forward to reviewing any proposed rules issued by the Bureau of Consumer Financial Protection regarding debt collection. The Bureau has recently estimated that it anticipates issuing such proposed rules in the spring of 2019.[38] The FTC continues to work closely with the Bureau to coordinate efforts to protect consumers from unfair and deceptive debt collection practices, including by consulting with the Bureau on its debt collection rulemaking and guidance initiatives.

8. **The FTC has engaged in efforts against "illegal robocallers" that use technology to abuse consumers with unwanted nuisance calls. However, there is confusion about who is considered a robocaller. For example, those who have a legal, established business relationship with a consumer and a need to contact them often fall under the definition of a robocaller. Can you please describe in detail what defines a robocall? How are illegal robocalls differentiated from legal business calls?**

Response: The FTC's regulation of robocalls stems from the Telemarketing Sales Rule ("TSR").[39] The TSR does not define or use the word "robocall." However, the TSR prohibits any call that delivers a prerecorded message to solicit the sale of goods, services, or charitable contributions. Other statutes, such as the Telephone Consumer Protection Act ("TCPA") and certain state laws, may define illegal "robocalls" based on the use of specific technology to dial calls, but under the TSR the primary defining questions are: (1) whether the call delivers a prerecorded message; and (2) whether the calls is part of a campaign to solicit the sale of goods and services. If the answer is yes to both these questions, the call is presumptively illegal under the TSR, subject to certain defenses and exemptions.

The following is a list of categories of calls that may deliver prerecorded messages and still be permissible under the TSR:

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[37] FTC Report, *Collecting Consumer Debts: The Challenges of Change* (2009), at i, https://www.ftc.gov/reports/collecting-consumer-debts-challenges-change-federal-trade-commission-workshop-report.

[38] https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201804&RIN=3170-AA41. *See* Office of Information and Regulatory Affairs, Office of Management and Budget, Spring 2018 Unified Agenda of Regulatory and Deregulatory Actions, available at https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201804&RIN=3170-AA41.

[39] 16 C.F.R. § 310, *et seq.*

- Calls that are exclusively to provide information and do not solicit any goods, services, or donations fall outside of the TSR. Informational calls from utility companies, doctors' offices, or school districts fall into this category.
- Calls to solicit the sale of goods or services where the consumer receiving the call has given express *written* agreement to receive marketing calls from the specific seller whose goods or services are being marketed, subject to several explicit requirements.[40] These calls are permitted under a limited exception to the TSR's general prohibition on sales calls delivering prerecorded messages. Note, however, that the agreement must be "in writing" and cannot be provided orally.
- Calls that deliver a prerecorded healthcare message made by, or on behalf of, an entity covered under the HIPAA Privacy Rule are exempted from the TSR's robocall rule.[41]
- Calls to a business to solicit the sale of goods or services from that business, other than calls selling nondurable office or cleaning supplies, are exempted from the TSR.[42]

It should be noted that while some of the above-mentioned calls may not be prohibited by the TSR, they may be prohibited by the TCPA or state laws. Moreover, in addition to prohibiting robocalls, the TSR also prohibits sales calls by live operators to numbers listed on the National Do Not Call Registry.

The Honorable Leonard Lance

1. **The recent "FTC Staff Offers Business Guidance Concerning Multi-Level Marketing" ("MLM Guidance") states: "At the most basic level, the law requires that an MLM pay compensation that is based on actual sales to real customers, rather than based on wholesale purchases or other payments by its participants."**

    a. **Which specific "law" is referenced here? Identify the specific statutes and case law.**

Response: The referenced document, "Business Guidance Concerning Multi-Level Marketing," is focused on multi-level marketing practices that may violate Section 5(a) of the FTC Act, which prohibits unfair or deceptive acts or practices in or affecting commerce. The particular statement quoted in your question addresses the circumstances under which a multi-level marketer ("MLM") might be determined to have an unfair or deceptive compensation structure in violation of Section 5. Such MLMs are sometimes called "pyramid schemes."

The most widely cited description of an unlawful MLM compensation structure appears in the Commission's *Koscot* decision, which observed that such enterprises are characterized in part by "the right to receive in return for recruiting other participants into

[40] 16 C.F.R. § 310.4(b)(1)(v)(A).
[41] 16 C.F.R. § 310.4(b)(1)(v)(D).
[42] 16 C.F.R. § 310.6(b)(7).

the program rewards which are unrelated to the sale of the product to ultimate users."[43] In accord with this standard, the courts and the Commission have consistently held that lawful MLM compensation is based on actual sales to customers, not on wholesale purchases or other payments by the MLM's participants.[44]
Additional discussion of selected issues relating to this topic—such as how the FTC considers claims that MLM participants are making some purchases to satisfy their own genuine product demand, and methods of documenting actual sales to consumers—is provided in response to Questions 5–8 of the "Business Guidance" document.

2. Please elaborate on the specific criteria or vetting process that is used by the Commission to determine if an independent organization purporting to be a consumer watchdog, or a corporation that operates as a direct competitor in the marketplace, is a reliable source of relevant information?

Response: The Commission may open investigations at the request of the President, Congress, the Attorney General, or other governmental agencies; upon referrals by the courts; on the basis of complaints filed by members of the public; or on its own initiative.[45] In determining whether to open an investigation, the Commission acts only in the public interest, and does not initiate an investigation or take other action when the violation of law alleged is a matter of private controversy that does not tend to adversely affect the public.[46] In some cases, competitors complain about alleged deceptive or unfair practices that they claim harm consumers and put themselves at a competitive disadvantage. In other instances, consumer watchdog groups complain to the FTC.

There are multiple opportunities to test the value of information provided by such third parties. Commission staff carefully evaluate such complaints to determine whether the alleged practices, if proven, would violate the law; the complaining party has ulterior motives; staff can independently verify the supplied information, and; as with all cases, there is a sufficiently significant likelihood of a law violation to justify opening an investigation. In all but the most egregious cases of fraud, the next step generally is to contact the entity against whom the complaint has been lodged. At this stage, the subject of the complaint has every opportunity and incentive to provide information and evidence, and explain any apparent potential law violation. At the same time, as appropriate, staff typically seeks additional information from third parties and consults

[43] *In re Koscot Interplanetary, Inc*., 86 F.T.C. 1106, 1181 (1975).
[44] *See, e.g.*, *FTC v. BurnLounge, Inc.*, 753 F.3d 878, 885–86 (9th Cir. 2014) (citing with approval the issuance of a preliminary injunction against an MLM in which "rewards are received by purchasing product and by recruiting others to do the same"); *Webster v. Omnitrition Int'l, Inc*., 79 F.3d 776, 782 (9th Cir. 1996) (noting that an MLM is facially unlawful if a participant earns compensation that is based "on product orders made by [his] recruits" rather than "on actual sales to consumers" (emphasis in original)); *FTC v. Equinox Int'l Corp.*, No. 99-0969, 1999-2 Trade Cas. (CCH) ¶ 72,704 (D. Nev. Sept. 14, 1999) (preliminarily enjoining an MLM in which compensation was "facially unrelated to sales to the ultimate user" because it was "based on purchases made from [the MLM] by the distributor and his downline"); I*n re Holiday Magic, Inc*., 84 F.T.C. 748, 1042–43 (1974) (explaining that lawful MLM compensation is "based strictly on product sales of recruits, and not on inventory purchases (or other payments) of recruits").
[45] 16 C.F.R. § 2.1.
[46] 16 C.F.R. § 2.3.

with relevant experts as needed, to corroborate any allegations against an entity or defenses raised by it.

The Honorable Brett Guthrie

1. **The FTC Franchise Rule (Rule) is the governing federal regulation for franchise businesses and I understand it is due for renewal this year. Constituents of mine have raised concerns that if the Rule is eliminated or allowed to expire that very negative consequences could result for both franchisors and franchisees. The concern for franchisees centers around the denial of access to important pre-investment information for them, and on allowing unscrupulous franchisors to offer franchises in thirty-five states without providing any disclosure at all. On the other hand, for franchisors the risk is seeing a patchwork of laws to develop across the country, including a spike in complicated and onerous regulation.**

    a. **Based on the information that has been shared with me, I would ask that you carefully consider the usefulness of the existing Rule and that you give full and fair consideration to the concerns raised by franchisors and franchisees. Do you intend to move forward with a renewal of the Rule and if so, what is your expected time frame? Is the Rule under consideration for expiration under the Administrations "Two out, one in" deregulatory effort?**

Response: The Commission routinely conducts a regulatory review of each of its trade regulation rules, including the Franchise Rule, about every 10 years. The regulatory review of the Franchise Rule is scheduled to begin by the end of 2018. The review will seek public comment, by means of a notice in the Federal Register, on whether the Rule is still needed to give prospective franchisees the information they need to make informed investment decisions and, if so, whether changes in the marketplace or technologies warrant any revisions to the Rule. The Commission is aware that both franchisor and franchisee stakeholders have supported the Franchise Rule since it was first issued in 1978, and will carefully consider all stakeholder comments on the continuing need for the Rule.

The Commission's trade regulation rules do not expire. A resource-intensive notice and comment amendment proceeding pursuant to Section 18 of the FTC Act would be required to terminate any of them.[47]

Independent agencies such as the FTC are not bound by Presidential Executive Orders.

The Honorable Gus Bilirakis

1. **Over 4 billion robocalls were placed nationwide in June 2018, equaling roughly 12.7 calls per person affected. Are you concerned about the incidence rate of robocalls and their potential impact for fraud and victimizing consumers, and what can the**

[47] *See* 15 U.S.C. § 57a(d)(2)(B).

FTC do to limit the impact of illegal robocalls?

Response: Yes, we are very concerned. The FTC has seen reports from various private actors, such as the YouMail index, concerning the number of robocalls placed on a monthly basis. Consumer complaints about unwanted calls and robocalls reported to the FTC remain the top consumer complaint the FTC receives—over 7 million complaints about unwanted calls in fiscal year 2017, more than 4.5 million of which were complaints about robocalls.

We know from our law enforcement work that fraudsters frequently use robocalls to contact potential victims. Accordingly, the FTC makes great efforts to litigate against robocallers, seize ill-gotten funds and return them to victims of scams, and educate consumers to avoid the harm from fraudulent and abusive robocalls. The FTC also works closely with industry to help spur innovation to tackle the problem.

The FTC takes a multi-faceted approach to combatting illegal robocalls and other abusive telemarketing. The FTC uses every tool at its disposal: aggressive law enforcement, initiatives to spur technological solutions, and robust consumer and business outreach. The FTC plans to continue its aggressive work in each of these areas, each of which is discussed in more detail below.

Law Enforcement

First and foremost, the FTC is a law enforcement agency. As of September 1, 2018, the Commission has filed 138 lawsuits against 454 companies and 367 individuals alleged to be responsible for placing billions of unwanted telemarketing calls to consumers. The FTC has collected over $121 million from these violators. In cases where perpetrators were running telemarketing scams, the FTC has obtained court orders shutting these businesses down and freezing their remaining assets so that those funds could be returned to consumer victims.

Industry Outreach to Spur Technology

The FTC recognizes that law enforcement alone will not solve the problem of illegal robocalls. That is why the FTC intends to continue its long history of working with industry to promote technological solutions. The FTC has provided input to support the industry-led Robocall Strike Force, coordinated by the FCC, which is working to deliver comprehensive solutions to prevent, detect, and filter unwanted robocalls. In tandem with this effort, the FTC worked with a major carrier and federal law enforcement partners to help block IRS scam calls that were spoofing well-known IRS telephone numbers. FTC staff continues to work with federal law enforcement partners and major carriers to encourage network-level blocking of illegal robocall campaigns.

The FTC also led four public challenge contests to help spur industry initiatives to tackle

unlawful robocalls by blocking calls.[48] These challenges contributed to a shift in the development and availability of technological solutions in this area. When the FTC held its first public challenge, few call blocking applications existed. Today, there are hundreds of apps available to consumers, and two winners of the FTC's challenges offer leading call blocking tools that have blocked hundreds of millions of unwanted calls.[49]

The FTC also engages with technical experts, academics, and others through industry groups, such as the Messaging, Malware and Mobile Anti-Abuse Working Group ("MAAWG") and the Voice and Telephony Abuse Special Interest Group ("VTA SIG"). The FTC has encouraged ongoing industry efforts to develop new technological protocols that will change how caller ID works so that it will be more difficult for callers to engage in illegal caller ID spoofing.

Consumer Education & Outreach

The FTC's education and outreach program reaches tens of millions of people a year through our website, the media, and partner organizations that disseminate consumer information on the FTC's behalf. In the case of robocalls, the advice is simple: if you answer a call and hear an unwanted recorded sales message—hang up.

2. Do you have all of the tools you need to succeed in the mission of combatting robocalls, or do you believe further legislative action is needed? If so, what can Congress do to help in this effort?

Response: The FTC has expended significant time and effort to combat illegal robocalls and uses every tool at its disposal. As with any law enforcement challenge, additional resources and enforcement tools could yield even greater results. Presently, the FTC seeks to advance its robocall enforcement via repeal of the common carrier exemption from its jurisdiction. The exemption impedes investigations, complicates litigation and, critically, prevents the FTC from challenging common carriers of telecommunications that violate the TSR.

3. What role can the FTC play in combatting the national opioid crisis, including the marketing and advertising of patient recovery services, illegal opioids as well as prescription and over-the-counter drugs?

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[48] The first challenge, in 2013, called upon the public to develop a consumer-facing solution to blocks illegal robocalls. *See* FTC Press Release, *FTC Announces Robocall Challenge Winners* (Apr. 2, 2013), https://www.ftc.gov/news-events/press-releases/2013/04/ftc-announces-robocall-challenge-winners; *see also* FTC Press Release, *FTC Awards $25,000 Top Cash Prize for Contest-Winning Mobile App That Blocks Illegal Robocalls* (Aug. 17, 2015), https://www.ftc.gov/news-events/press-releases/2015/08/ftc-awards-25000-top-cash-prize-contest-winning-mobile-app-blocks; FTC Press Release, *FTC Announces Winners of "Zapping Rachel" Robocall Contest* (Aug. 28, 2014), https://www.ftc.gov/news-events/press-releases/2014/08/ftc-announces-winners-zapping-rachel-robocall-contest.

[49] One of the winners, "NomoRobo," was on the market within 6 months after being selected by the FTC. NomoRobo, which reports blocking over 600 million calls to date, is being offered directly to consumers by a number of telecommunications providers and is available as an app on iPhones.

Response: The Commission has addressed the opioid crisis by taking enforcement action in federal court, issuing warning letters, and engaging in consumer education.

To date, the Commission has brought two enforcement actions against marketers of bogus withdrawal and addiction treatment products.[50] In January 2018, the Commission partnered with the FDA to send warning letters to 11 marketers selling products that allegedly helped with opioid withdrawal and/or addiction.[51] The Commission on its own sent letters to four additional marketers.[52] Concurrently with the January letters, the Commission partnered with the Substance Abuse and Mental Health Services Administration (SAMSHA), which is part of the Department of Health and Human Services, to issue a consumer education piece advising of the hazards of deceptive advertising and directing consumers to trusted resources for help with addiction treatment.[53]

The Commission will continue to monitor this area for unfair or deceptive practices, including potentially deceptive advertising by treatment centers. We will continue to work with stakeholders, including state and local enforcers, to determine whether law enforcement action in this field is appropriate. Any such law enforcement could be against the treatment centers themselves, companies that recruit consumers for placement into treatment programs, or online review sites that might have undisclosed, material connections to the programs they review.

4. **I'd like to congratulate the FTC on its successful enforcement action against an online hotel booking reseller, Reservation Counter. As part of the enforcement action, the FTC alleged that the party misled consumers through ads, webpages, and call centers that led consumers to mistakenly believe they were reserving the rooms directly from the hotel. The Commission further alleged that the company failed to adequately tell consumers that their credit cards would be charged immediately, rather than after they arrived at the hotel. The FTC's constructive action highlights the good work it can do to protect consumers. While this enforcement action is a good first step, do you believe this hotel scam website problem may be a symptom of a larger problem when it comes to the online hotel booking market? What do you feel is the FTC's role to help mitigate websites that have not been investigated by the FTC, from using harmful tactics against consumers?**

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[50] *FTC v. Caitlin Enterprises, Inc.*, No. 1:17-cv-403 (W.D. Tex. May 17, 2017), https://www.ftc.gov/enforcement/cases-proceedings/1623204/catlin-enterprises-inc (settlement included $6.6 million judgment, suspended due to the defendants' inability to pay, and injunctive relief prohibition the defendants from making misleading claims); *FTC v. Sunrise Nutraceuticals, LLC et al.*, No. 9:15-cv-81567 (S.D. Fla. July 6, 2016), https://www.ftc.gov/enforcement/cases-proceedings/152-3208-x160006/sunrise-nutraceuticals-llc (settlement included $1.4 million judgment, all but $235,000 suspended due to the defendants' inability to pay, and injunctive relief prohibiting the defendants from making misleading claims).

[51] FTC & FDA Opioid Warning Letters (2018), https://www.ftc.gov/ftc-fda-opioid-warning-letters.

[52] *Id.*

[53] *Getting the Right Help for Opioid Dependence or Withdrawal* (Jan. 2018), https://www.consumer.ftc.gov/articles/0223-getting-right-help-opioid-dependence-or-withdrawal.

Response: The Commission shares your underlying concerns about deceptive online travel sites. False or misleading information about hotel booking sites harms consumers and competition. FTC staff continues to monitor the online travel market. If the Commission has reason to believe that an online travel booking reseller has engaged in deceptive practices, it has authority under the FTC Act to bring a law enforcement action against the reseller.

In addition to law enforcement, FTC staff published a consumer advisory that provides information and tips for consumers who wish to book a hotel room online [54] The Commission also issued a report to Congress on the online hotel booking market.[55] The report described the FTC's law enforcement authority over deceptive online hotel booking practices and commented on proposed legislation that required third-party resellers to disclose they are not affiliated with the hotel they are advertising.[56]

Online travel websites provide easy access to information about multiple hotels. Greater information about hotels and lower costs of acquiring information make it easier for consumers to find and compare hotel options. In its report to Congress and in previous testimony, the Commission stated that the nature and appearance of many online travel sites do not raise the deception concerns at issue in the *Reservation Counter* matter.[57]

5. **In 2016, the American Medical Association ("AMA") passed a resolution noting that some lawsuit advertisements emphasize the negative side effects of prescription medications, while ignoring their life-saving benefits and FDA-approval. The AMA resolution referred to these ads as "fear mongering" and "dangerous." Earlier this year, the AARP issued a Fraud Alert to its members warning them about lawsuit advertisements soliciting patients to join class actions if they have taken certain medications. The AARP Fraud Alert noted that the "surge in television, radio and internet ads from law firms and lawsuit marketing companies is causing some patients to take serious risks." These lawsuit advertisements often frighten viewers, especially the older adults they frequently target, into discontinuing or refusing to take FDA approved medication prescribed by a physician, often for life-threatening conditions. What is the FTC currently doing to prevent false and misleading lawsuit advertisements from scaring patients, particularly among vulnerable populations, into discontinuing or refusing doctor prescribed and FDA approved medications?**

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[54] FTC Consumer Blog, *Did You Book That Night at the Hotel's Site?* (July 14, 2015), www.consumer.ftc.gov/blog/2015/07/did-you-book-night-hotels-site.

[55] *The Online Hotel Booking Market: A Federal Trade Commission Report To Congress On Recommended Enforcement Actions Against Deceptive Marketers Engaging in the Online Hotel Booking Market, and Appropriate Remedies To Apply In This Area To Protect Consumers* (Aug. 2017), www.ftc.gov/reports/online-hotel-booking-market-federal-trade-commission-report-congress-recommended-enforcement ("Report to Congress").

[56] *Id.*

[57] Report to Congress, *supra* n.53, at 2 n.2; Prepared Statement of the FTC on "Legislative Hearing on 17 FTC Bills" before the Comm. on Energy and Commerce, Subcomm. on Commerce, Manufacturing, & Trade, U.S. House of Rep. (May 24, 2016), www.ftc.gov/public-statements/2016/05/prepared-statement-federal-trade-commission-legislative-hearing-seventeen.

Response: Advertising plays a critical role in our economy, providing consumers with valuable information. However, to be useful, advertising must not be misleading. 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.

6. **There are a number of lawsuit advertisements that portray specific FDA approved drugs as inherently dangerous by using frightening imagery, words, and noises. Some lawsuit ads and websites use phrases like "recall" and "medical alert," while others show flashing lights and sirens. Others even direct viewers to call numbers like 1-800-BAD-DRUG and show people being rolled into a morgue. Many times, these advertisements will display an FDA logo and feature a narrator dressed in a physician's white coat. Advertisements that use these bombastic and deceptive tactics, often supplemented by little or no mention of a drug' s FDA approval or benefits, present a clear danger to consumers-who in this instance are patients taking prescribed medications. In fact, an FDA adverse event report through 2016 showed that 61 patients watching lawsuit ads about their prescribed anticoagulants stopped taking their medication, leading to 4 deaths and several other serious injuries. National patient advocacy organizations such as the Alliance for Aging Research have asserted that the 1-800-BAD-DRUG ads are deceptive under the FTCs' truth-in-advertising rules. How can the FTC enforce laws under its jurisdiction to deter deceptive practices that are documented by the FDA as leading to severe injury and death?**

Response: The FTC Act prohibits deceptive and unfair acts or practices. 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.[58] 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.[59] As noted in response to question 5 above, 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. We also are consulting with the FDA to determine how we may assist each other on this topic.

7. **An April 2018 New York Times article uncovered a network of lawyers, doctors, and financers who preyed on women who had surgical mesh implants intended to treat**

[58] *See* Federal Trade Commission Policy Statement on Deception, *appended to Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174 (1984).
[59] Federal Trade Commission Policy Statement on Unfairness, *appended to Int'l Harvester Co*., 104 F.T.C. 949, 1070 (1984).

pelvic organ prolapse. The scheme described in the article included coaxing women into getting surgery to remove the mesh- in some instances unnecessarily- to make them " more lucrative plaintiffs in lawsuits against medical device manufacturers." The article describes that one of the tactics used to get women into this lawsuit pipeline was by using online video ads. The article even shows one ad that uses the FDA logo and has a man in a doctor's outfit urging women to call the number. Isn't this exactly the type of deceptive, harmful advertising that the FTC should investigate? Would the FTC consider supporting regulatory guidelines for attorney advertisements to avoid this type of harm and deception?

Response: Although the FTC has jurisdiction over attorney advertising, it does not have jurisdiction over the practice of either law or medicine. The ethical conduct of doctors and attorneys falls to their respective professional licensing boards. As a general matter, the FTC would support guidance intended to deter unfair and deceptive attorney advertisements. Although we cannot comment on the particular facts set forth in your question, if attorney advertising crosses the line into deception, the FTC does have jurisdiction and, when warranted by the facts, the FTC can take appropriate action, including enforcement. We also would consider additional methods, such as the use of warning and advisory letters, to educate attorneys and firms soliciting patients on how to avoid violations of the FTC Act.

8. **In the online and digital marketplace, many of the largest companies both own the internet commerce platforms and also sell their own products. Small businesses hoping to compete are drawn to utilize this platform online while competing with their products. This can prove difficult when the large companies have continued access to online customer data that they can use to channel their own products. What is FTC doing to prevent monopoly and encourage free market principles when it comes to online data and sales?**

Response: The widespread use of technology and data is not only changing the way we live, but also the way firms operate. While many of these changes offer consumer benefits, they also raise complex and sometimes novel competition issues. Given the important role that technology companies play in the American economy, it is critical that the Commission—in furthering its mission to protect consumers and promote competition—understand the current and developing business models and scrutinize incumbents' conduct to ensure that they abide by the same rules of competitive markets that apply to any company. When appropriate, the Commission will take action to counter the harmful effects of coordinated or unilateral conduct by technology firms.

In June, I announced a new public hearings project—*Hearings on Competition and Consumer Protection in the 21st Century*—to consider whether broad-based changes in the economy, evolving business practices, new technologies, and international developments warrant adjustments to competition and consumer protection law, enforcement priorities, and policy.[60] One of the topics to be discussed at these hearings is

[60] FTC, *Hearings on Competition and Consumer Protection in the 21st Century*, https://www.ftc.gov/policy/hearings-competition-consumer-protection; *see also* FTC Press

the unique competition and consumer protection issues associated with internet and online commerce. We are also inviting public comment on this and other issues related to communication, information, and media technology networks.[61] Through the upcoming series of hearings, the Commission will devote significant resources to refresh and, if warranted, renew its thinking on a wide range of cutting-edge competition and consumer protection issues.

9. Should privacy protections be based on the sensitivity of the information, or the entity collecting such information?

Response: Privacy protections may appropriately depend on both sensitivity of information and nature of the entities collecting the information. For example, in data security cases, the FTC has noted that a company's data security measures "must be reasonable and appropriate in light of the sensitivity and volume of consumer information it holds, the size and complexity of its business, and the cost of available tools to improve security and reduce vulnerabilities."[62] One factor in determining reasonable security is the "sensitivity" of information. For example, a company that collects consumers' Social Security numbers should have in place greater protections than a company that collects only public information. Another factor in determining reasonable security is the size and complexity of a business. For example, a business that collects large amounts of consumer information should have in place greater protection than a company that only incidentally collects such information. In the privacy context, the Commission has similarly stated that the level of protection should depend on factors including the sensitivity of data and how the entity uses it.[63]

10. Should Congress allow California to dictate privacy protections for the entire country, or is the appropriate response from Congress to set the right national policy for the entire country? Are there any tools which Congress could provide that would make the FTC an even more effective enforcer of consumer privacy protections?

Response: I support a national data breach notification and data security law that would give the FTC APA rulemaking authority, jurisdiction over non-profits and common carriers, and the authority to seek civil penalties. The FTC has not taken any position on additional tools for enforcement of consumer privacy protections, and stands ready to enforce any law that Congress enacts. Previously, when Congress has enacted a law that gives the FTC authority to protect consumers' privacy, from CAN-SPAM to COPPA to

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

[61] Public comments on this topic will be posted on the FTC website at https://www.ftc.gov/policy/public-comments/2018/07/initiative-756.

[62] *See Commission Statement Marking the FTC's 50th Data Security Settlement* (Jan.31, 2014), https://www.ftc.gov/system/files/documents/cases/140131gmrstatement.pdf.

[63] *See, e.g.*, FTC Report, *Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers* (Mar. 2012), https://www.ftc.gov/reports/protecting-consumer-privacy-era-rapid-change-recommendations-businesses-policymakers.

the Gramm-Leach-Bliley Act, we have robustly exercised that authority; if we were given additional authority, we would vigorously use it. With respect to state laws regulating privacy, our task is to enforce federal laws as authorized by Congress. The Commission will be hosting its *Hearings on Competition and Consumer Protection in the 21st Century* this fall, where we expect to discuss these issues and hear from stakeholders about, for example, the potential impacts of the California law and whether to consider adopting a uniform national standard.

11. Recently, our committee sent a letter to Google about the fact that it continues to give third parties access to the content of Gmail users' emails. Does that practice by Google concern you? Is the FTC going to investigate this practice?

Response: As you know, because the Commission's investigations are not public, I cannot comment on the practices of specific companies. Generally, I share your concerns about companies that may share contents of consumers' communications without their knowledge or consent. For example, in the FTC's case against smart television manufacturer Vizio, we alleged that the company's collection and sharing of consumers' second-by-second viewing data without their knowledge or consent constituted a deceptive and unfair practice.[64] Companies should, however, be permitted to share such data with consumers' informed consent.

12. The FTC has been conducting a comprehensive review of the contact lens rule for the past several years. The review began in October of 2015 and to date has not been completed. In conducting this review, the FTC recommended several updates to the contact lens rule to educate and protect consumers. Specifically, the FTC recommended changes to the rule that help to educate consumers on their right to their prescription. Unfortunately, these common sense changes to the rule have not yet been finalized. This delay has caused uncertainty for consumers in the contact lens marketplace. Can you please provide me with an update on the status of the review of the rule and tell me when you expect this rule to be finalized?

Response: I share your concern that the Contact Lens Rule review be completed as promptly as possible while, at the same time, giving due consideration to the substantial public input we received. FTC staff intends to submit a recommendation to the Commission by the end of the year.

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, providing a 60-day period for comments 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

[64] *FTC & State of New Jersey v. Vizio, Inc. et al.*, No. 2:17-cv-00758 (D.N.J. Feb. 6, 2017), https://www.ftc.gov/enforcement/cases-proceedings/162-3024/vizio-inc-vizio-inscape-services-llc.

out. We received over 4,100 comments.

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 closed on April 6, 2018. We received and reviewed approximately 3,500 comments. FTC staff intends to submit a recommendation to the Commission by the end of the year.

The Honorable Mimi Walters

1. **As you know, the Franchise Rule requires franchisors to provide all potential franchisees with a disclosure document containing 23 specific items of information about the offered franchise, its officers, and other franchisees. As the FTC reviews all rules every ten years, I understand the next review of the Franchise Rule is due at the end of 2018.**

    a. **In light of the Administration's focus on deregulation, what are the FTC's plans for the Franchise Rule?**

    b. **Does the FTC plan to reconsider the Franchise Rule?**

    c. **If so, when do you anticipate commencing a review and public comment process on the rule?**

Response: The Commission routinely conducts a regulatory review of each of its trade regulation rules, including the Franchise Rule, about every 10 years. The regulatory review of the Franchise Rule is scheduled to begin by the end of 2018. The review will seek public comment, by means of a notice in the Federal Register, on whether the Rule is still needed to give prospective franchisees the information they need to make informed investment decisions and, if so, whether changes in the marketplace or technologies warrant any revisions to the Rule. The Commission is aware that both franchisor and franchisee stakeholders have supported the Franchise Rule since it was first issued in 1978, and will carefully consider all stakeholder comments on the continuing need for the Rule.

The Honorable Jeff Duncan

1. **Has the Federal Trade Commission (FTC) undertaken any studies or made any determinations related to the ability of the Federal or state governments to regulate alcohol beverage sales in the online marketplace?**

Response: In 1998, 2003, 2008, and 2014, the FTC released four studies on alcohol industry compliance with self-regulatory guidelines and concerns about youth access to alcohol marketing.[65] The studies recommended, among other things, that

[65] FTC Report, *Self-Regulation in the Alcohol Industry* (2014), https://www.ftc.gov/system/files/documents/reports/self-regulation-alcohol-industry-report-

companies take advantage of age-gating technologies offered by social media, including YouTube. These age gates on company websites should require consumers to enter their date of birth, rather than simply asking them to certify that they are of legal drinking age. The FTC also recommended that state regulatory authorities and others who are concerned about alcohol marketing should participate in the industry's external complaint review system when they see advertising that appears to violate the voluntary codes.

FTC recommendations from these studies resulted in agreements by the Beer Institute, the Distilled Spirits Council of the United States, and the Wine Institute to adopt improved voluntary advertising placement standards; buying guidelines for placing ads for alcoholic beverages on radio, in print, on television, and on the internet; a requirement that suppliers conduct periodic internal audits of past placements; and systems for external review of complaints about compliance.

In 2003, the FTC also issued a staff report concluding that e-commerce offers consumers lower prices and more choices in the wine market, and that states could expand e-commerce by permitting direct shipping of wine to consumers.[66]

2. Does the FTC have specific jurisdiction and authority in which to regulate online marketplace platforms such as Craigslist, eBay, Facebook and others, in order to restrict or prohibit consumer to consumer sales of alcohol beverages that are facilitated through these platforms?

Response: The FTC does not have specific authority to restrict or prohibit consumer-to-consumer sales of alcohol beverages unless those sales violate Section 5 of the FTC Act. Section 5 of the FTC Act prohibits unfair methods of competition and unfair or deceptive acts or practices in most areas of the economy not expressly exempted from the FTC Act. The FTC has used this authority to scrutinize proposed mergers in the alcohol industry under the FTC Act and the Clayton Act. The FTC also has used this authority to evaluate proposed mergers and potential anticompetitive or deceptive conduct in online marketplaces. In addition, through the FTC's competition advocacy program, FTC staff has provided information that may assist lawmakers and regulators in assessing the competitive impact of proposed laws and regulations related to alcoholic beverage sales. This authority complements the authority of other state and federal agencies.

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federal-trade-commission/140320alcoholreport.pdf; FTC Report, *Self-Regulation in the Alcohol Industry* (2008), https://www.ftc.gov/sites/default/files/documents/reports/self-regulation-alcohol-industry-report-federal-trade-commission/080626alcoholreport.pdf; *Alcohol Marketing and Advertising: A Fed. Trade Comm'n Report to Congress* (2003), https://www.ftc.gov/sites/default/files/documents/reports/alcohol-marketing-and-advertising-federal-trade-commission-report-congress-september-2003/alcohol08report.pdf; *Self-Regulation in the Alcohol Industry: A Fed. Trade Comm'n Report to Congress* (1999), https://www.ftc.gov/sites/default/files/documents/reports/self-regulation-alcohol-industry-federal-trade-commission-report-congress/1999_alcohol_report.pdf.

[66] *FTC, Possible Anticompetitive Barriers to E-Commerce: Wine* (2003), https://www.ftc.gov/sites/default/files/documents/reports/possible-anticompetitive-barriers-e-commerce-wine/winereport2_0.pdf

3. **Is the FTC working with the Tobacco Tax and Trade Bureau (TTB) and any state attorneys general or Alcohol Beverage Commission (ABC) Boards to monitor and regulate online liquor sales for the benefit and protection of the consumer?**

Response: The Commission routinely collaborates with other federal agencies on matters of common interest. The Commission and TTB (Alcohol and Tobacco Tax and Trade Bureau, part of the U.S. Treasury) are two of the fifteen federal agency members of the Interagency Coordinating Committee to Prevent Underage Drinking (ICCPUD). Each year, ICCPUD publishes a Report to Congress on the status of alcohol use by those under the legal drinking age. This annual Report includes a section that summarizes the status of state alcohol laws designed to prevent underage access to alcohol, including laws pertaining to online liquor sales and retailer interstate shipments of alcohol.[67] In addition, in 2010, we sent warning letters to manufacturers of four premixed caffeinated alcohol beverages, in coordination with TTB and FDA.[68] As a result, premixed caffeinated alcohol beverages are no longer on the market.

The Honorable Jan Schakowsky

1. **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. **How many consent decrees are currently active?**

Response: Most of the FTC's consumer protection orders are permanent federal court injunctions, and are all currently enforceable. However, absent any indication of violations, the agency ceases active compliance monitoring after specified periods, based on the likelihood of recidivism and the nature of the underlying violations. If red flags, such as an insider tip or a consumer complaint, reappear in any matter, active monitoring begins anew.

Over the past decade, the Commission obtained original final orders in 965 consumer protection matters—701 federal court matters and 264 administrative matters, all of which are currently enforceable.

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[67] *See, e.g.*, ICCPUD, *2017 Report to Congress in the Prevention and Reduction of Underage Drinking, State Reports*, https://alcoholpolicy.niaaa.nih.gov/sites/default/files/imce/users/u1743/stop_act_rtc_2017_state_reports_al-mt.pdf.

[68] See *FTC Sends Warning Letters to Marketers of Caffeinated Alcohol Drinks* (Press Release, Nov. 10, 2010) at https://www.ftc.gov/news-events/press-releases/2010/11/ftc-sends-warning-letters-marketers-caffeinated-alcohol-drinks. See *FTC, Alcohol Marketing and Advertising: A Report to Congress*, pages 3, 4 (2003) (describing 2001 joint FTC/TTB survey of flavored malt beverage alcohol placement at retail).

b. How many FTC employees review them?

Response: Thirty-three (33) attorneys currently review compliance with consumer protection orders, in addition to their other responsibilities. (Separate staff review compliance with competition orders.)

c. 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: The Division of Enforcement's highly experienced attorneys have developed efficient and effective techniques and protocols. However, law enforcement is not a perfect science, and no enforcement agency can guarantee that it will not miss violations. Thus, like all law enforcement, the FTC vigorously pursues violators with contempt and order enforcement actions. The judgments and conduct relief obtained in these actions help deter future violations, even those we may not otherwise have detected. To effect this deterrence, the Commission has initiated 46 order enforcement actions in consumer protection matters during the last 13 years, obtaining judgments totaling nearly $500 million (24 contempt, 15 administrative enforcement, and 7 actions to lift suspended judgments).

d. 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 Commission regularly requires third-party assessors in data security and privacy orders, but generally does not in its other cases because the technical compliance issues are not as complex. The assessments for Commission data security and privacy orders require the assessor to examine the practices of defendants/respondents, assess their compliance with the standards contained in the order, and certify the defendants/respondents are in active compliance. Thus, while there is no duty to notify the Commission of a violation, a failure to submit an initial assessment certifying that the company's privacy controls were operating effectively would provide such notice.

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

Response: Compliance attorneys have close, significant contact with third-party assessors, which allows staff to evaluate the assessors' work. The FTC's orders require the defendants/respondents either to obtain FTC approval of the monitor/auditor (e.g., the Commission's privacy orders), or that the monitor/auditor possess relevant credentials (e.g., data security orders).

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

Response: Over the past decade, the FTC has established a comprehensive order enforcement program. First, the agency developed a proprietary database that collects information from the original case attorneys, allows the compliance attorney to systematically track his or her investigation, provides easy access to relevant documents, and issues alerts to prevent cases from falling through the cracks. A group of more than 30 experienced attorneys uses this database and the compliance monitoring tools contained in our orders to identify and investigate likely recidivists and bring enforcement actions.

The Commission enforces federal court orders directly by bringing contempt and de novo actions in its own name. Over the past 10 years, the Commission has initiated 24 contempt actions, and over a dozen new cases against recidivists. For example, when in 2015 it appeared that LifeLock had violated a 2010 order, the Commission launched an extensive investigation and then negotiated an order imposing a $100 million judgment, of which $67 million has been returned to consumers thus far.[69] Staff also works with our criminal law enforcement partners through the agency's Criminal Liaison Unit ("CLU Program") to enable criminal prosecution of the worst of these violators. For example, the FTC obtained a $38 million contempt judgment against Kevin Trudeau, while the CLU Program worked with the U.S Attorney's Office for the Northern District of Illinois.[70] Pursuant to these actions, a receiver has amassed over $10 million from Mr. Trudeau's various holdings, and he is serving a 10-year criminal sentence based on his contempt.

Courts may assess civil penalties for violations of administrative orders; the Department of Justice (DOJ) has the right of first refusal to litigate these cases.[71] Over the past decade, the agency has initiated 15 such cases. For example, when Google violated its Google Buzz order, the Commission negotiated a penalty of $22.5 million.[72]

2. The Division of Privacy and Identity Protection, which oversees issues related to consumer privacy, data security, credit reporting, and identity theft, only has about 40 full-time employees. According to the Privacy Rights Clearinghouse, this year alone, there have been more than 240 data breaches involving more than 812 million records.

a. How does the FTC determine which cases to bring or what investigations to open?

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[69] *U.S. v. LifeLock*, Inc., No. 2:10-cv-00530-JJT (D. Ariz. Jan. 4, 2016), https://www.ftc.gov/enforcement/cases-proceedings/072-3069-x100023/lifelock-inc-corporation.
[70] *FTC v. Trudeau*, 662 F.3d 947 (7th Cir. 2011) (affirming $38 million civil contempt judgment against Kevin Trudeau); *United States v. Trudeau*, 812 F.3d 578 (7th Cir. 2016) (affirming criminal conviction of Kevin Trudeau for contempt and ten-year sentence).
[71] 15 U.S.C. 45(l).
[72] *U.S. v. Google Inc.*, No. 512-cv-04177-SI (N.D. Cal. Nov. 16, 2012), https://www.ftc.gov/enforcement/cases-proceedings/google-inc.

Response: The Commission generates cases from a number of sources, including consumer complaints submitted to the FTC's Consumer Sentinel database, academic research articles, press reports, petitions from consumer groups, and staff's own research and investigation. In evaluating whether to open a case to investigate a particular set of facts, the Commission staff develops information about the incident or practice and assesses factors such as the likelihood of a potential law violation, the types and quantity of information at issue, the potential consumer harm, and the number of individuals affected.

b. On average, how many investigations are ongoing in the Division of Privacy and Identity Protection at any given time?

Response: The number of investigations and other activities in the Division of Privacy and Identity Protection (DPIP) varies over time. Currently, DPIP staff are pursuing approximately 80 matters, which include investigations of particular companies, projects that may lead to additional investigations, and policy- or regulatory-focused projects (such as regulatory reviews, studies, and workshops). The agency's privacy- and security-related work is not limited to DPIP; staff in the FTC's regional offices also work on these issues. For example, our Midwest Regional Office recently brought a case against an online talent agency for violations of the Children's Online Privacy Protection Act.[73] In addition, the Bureau of Consumer Protection's Division of Enforcement enforces orders in the privacy and data security area. Other Bureau of Consumer Protection Divisions also engage in privacy-related work, such as Do Not Call enforcement and enforcement of the CAN-SPAM Act.

c. On average, how many cases are ongoing at any given time?

Response: In addition to the investigations described in 2.b. above, DPIP staff has been actively litigating one or two matters at any given time over the past few years.

d. On average, how many attorneys work on each case or investigation?

Response: On average, most investigations in DPIP are staffed by one or two staff attorneys. For more complex litigation matters, teams may include anywhere from 4 to 6 people.

e. Does it sometimes happen that attorneys are pulled from an investigation or case they are working on to work on a bigger or more newsworthy investigation or case? If so, please describe under what circumstances this transfer of personnel might occur. How does the Commission decide which cases take priority?

Response: Depending on the type of matter involved, it is often necessary to add more staff to litigate a matter than were needed to handle the investigation phase. Obviously,

[73] *U.S. v Prime Sites, Inc.* (Explore Talent), No. 2:18-cv-00199(D. NV. February 12, 2018). https://www.ftc.gov/enforcement/cases-proceedings/162-3218/prime-sites-inc-explore-talent.

this can present a challenge for managers, particularly when staffing large litigation teams, but the Commission has some flexibility to reassign attorneys as the flow of work demands. For example, matters are opened or closed with some frequency, and an attorney who closes an investigation is then available to assist a litigation team. When extraordinary resource constraints arise, the Commission can deploy resources across divisions and the regional offices.

f. What other resources could the FTC, particularly in the areas of consumer privacy, data security, credit reporting, and identity theft?

Response: I support a national data breach notification and data security law that would give the FTC APA rulemaking authority, jurisdiction over non-profits and common carriers, and the authority to seek civil penalties. If Congress were to determine that the Commission needs additional resources or authorities to tackle any of these important consumer protection issues, we would put them to good use. The FTC will host *Hearings on Competition and Consumer Protection in the 21st Century* this fall, which will include hearings on whether the agency needs additional tools in the privacy and data security area, specifically.

g. I am concerned about the push to close out cases. While a person should not be under investigation indefinitely, cases should not be closed just because staff are temporarily assigned other matters. Can you assure me that potential violators are not given a free pass because of this push to close out cases?

Response: Commission staff constantly open new matters for investigation, and close matters once they have determined the Commission would not have reason to believe that a company or individual under investigation has violated the law. I fully agree that cases should not be closed for resource issues alone, and I am unaware of any situations where this has happened. But as careful stewards of limited government resources, the agency must move matters along efficiently and effectively to their conclusion, whether that means filing an action or settlement, or closing an investigation so that companies are not under investigation indefinitely and resources can be redeployed to more promising cases. I strongly believe in vigorous law enforcement, and assure you that I will not push staff to close meritorious cases.

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

Response: As you know, scrutiny of competitive issues relating to PBMs is part of the agency's ongoing mission to promote competition in health care. The FTC has examined the conduct of PBMs in various contexts, including during merger investigations, and as part of broad-based hearings on health care competition. Recently, the FTC hosted a

workshop with the FDA to examine pharmaceutical distribution practices, including the role of intermediaries such as PBMs and Group Purchasing Organizations. We held the workshop to deepen our understanding of various players in the pharmaceutical industry. In addition to presentations by experts in health care policy and economics, we also received over 300 public comments as part of the workshop, which identified additional areas of concern. Materials related to the workshop can be found on the FTC's website.[74]

We understand that there are concerns about PBM concentration and PBM practices. We are exploring the feasibility of conducting merger retrospective reviews of a number of industries, including PBMs, and we are committed to bringing enforcement actions against any company, including a PBM, that violates the laws that we enforce.

4. **At the hearing, I asked you 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. At the time you responded that the FTC "could certainly start a rulemaking under Mag-Moss," with the caveat that it could be time consuming and resource intensive. Regardless of whether Congress passes a law, is the FTC considering 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: The Commission is not currently considering initiating a Magnuson-Moss rulemaking process with respect to data security in lieu of Congressional action. I believe that Congressional action on this issue would send a strong signal about the importance of securing consumers' personal information, and would be necessary to accomplish key goals such as extending the Commission's jurisdiction to enable it to protect consumer information held by additional types of entities (e.g., non-profit entities and common carriers). As I noted at the hearing, Mag-Moss rulemaking procedures that the Commission has undertaken have typically been time-consuming endeavors taking many years.

5. **In August 2003, former Chairman Timothy Muris stated, "Sometimes robust competition alone will not punish or deter seller dishonesty." He cited as an example "credence goods," which are products for which "consumers cannot readily use their own experiences to assess whether the seller's quality claims are true." He noted that for such goods "the market may not identify and discipline a deceptive seller because the product's qualities are so difficult to measure."**

   a. **Do you agree or disagree with Chairman Muris's statement? Why or why not?**

   Response: I agree that robust competition alone will not always punish or deter dishonest sellers, including for credence goods.

[74] FTC Workshop, *Understanding Competition in Prescription Drug Markets: Entry and Supply Chain Dynamics* (Nov. 8, 2017), https://www.ftc.gov/news-events/events-calendar/2017/11/understanding-competition-prescription-drug-markets-entry-supply.

b. What are examples of credence goods that fall within the FTC's jurisdiction?

Response: Many goods for which credence claims are made fall within the FTC's jurisdiction. Credence claims include country of origin claims as well as many claims about a product's health or environmental benefits or attributes.

i. Has the FTC taken law enforcement action against marketers of credence goods?

Response: The FTC has taken numerous law enforcement action against marketers of credence goods, including two recent settlements with manufacturers of products promoted as being made or built in the USA (Bollman Hat Company, Nectar Brand mattresses).[75] Other examples include four recent settlement with companies that claimed that their paints did not emit VOCs (Imperial Paint, ICP Construction, Benjamin Moore, and YOLO Colorhouse).[76] In each of these cases, while consumers received a valuable product and could assess the products' quality and functionality as hats, mattresses, or paint, consumers could not rely on their experience to assess the truth of the Made in USA or no VOC emission claims.

Similarly, many health products are credence goods; it can be impossible for a consumer to ascertain if the product is working. Many health conditions may wax and wane on their own, or over the passage of time, or the consumer may be making other medication changes or dietary or lifestyle changes, such that the consumer cannot attribute any changed health condition to a particular product. For products that claim to prevent or reduce the risk of a disease or health condition, consumers who do not get the disease or health condition cannot know whether it was due to the product.

Since November 2017, the FTC has brought five dietary supplement cases and a device case challenging claims of treating or preventing aging, hearing loss, memory loss, Alzheimer's, arthritis, HIV, high blood pressure, and weight loss, among other diseases or conditions.[77]

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[75] *See Bollman Hat Co.*, No. C-4643 (Apr. 17, 2017), https://www.ftc.gov/enforcement/cases-proceedings/172-3197/bollman-hat-company-matter; *Nectar Brand LLC*, Matter No. 1823038 (Mar. 20, 2018), (proposed consent agreement), https://www.ftc.gov/enforcement/cases-proceedings/182-3038/nectar-brand-llc.

[76] *Imperial Paints*, No. C-4647 (Apr. 27, 2018), https://www.ftc.gov/enforcement/cases-proceedings/162-3080/imperial-paints-matter; *ICP Construction, Inc.*, No. C-4648 (Apr. 27, 2018), https://www.ftc.gov/enforcement/cases-proceedings/162-3081/icp-construction-inc-matter; *Benjamin Moore & Co., Inc.*, No. C-4646 (Apr. 27, 2018), https://www.ftc.gov/enforcement/cases-proceedings/162-3079/benjamin-moore-co-inc-matter; *YOLO Colorhouse*, No. C-4649 (Apr. 27, 2018), https://www.ftc.gov/enforcement/cases-proceedings/162-3082/yolo-colorhouse-matter.

[77] *Telomerase Activation Sciences*, No. C-4644 (Apr. 19, 2018), https://www.ftc.gov/news-events/press-releases/2018/02/new-york-based-supplement-seller-barred-false-unsupported-health; *FTC v. Global Concepts Ltd.*, No. 0:18-cv-60990-NBF (S.D. Fla. May 2, 2018), https://www.ftc.gov/news-events/press-releases/2018/05/ftc-settlement-turns-down-volume-deceptive-sound-amplifier-ads; *FTC v. Marketing Architects*, No. 2:18-cv-00050 (D. Me. Feb. 5, 2018), https://www.ftc.gov/news-events/press-releases/2018/02/advertising-firm-barred-

ii. What type of monetary relief, if any, did the FTC obtain in these cases?

Response: The FTC has obtained large judgments, including money for consumer redress, in many of its recent cases involving health benefit claims. For example, the FTC obtained a $3,700,514 judgment against another dietary supplement manufacturer, with $800,000 paid for consumer redress (representing all of the funds the defendants were able to pay).[78] Although we have not historically sought consumer redress in our Made in USA or environmental benefit cases, we are reevaluating our approach.

c. In addition to credence goods, are there any other products, services, or industries under FTC's jurisdiction for which robust competition alone will not punish or deter seller dishonesty?

Response: Robust competition does not necessarily prevent deception in the marketplace. Even in competitive markets, numerous goods and services may involve deceptive claims or practices, such as where deceptive claims are difficult for consumers to detect in a timely manner, or at all; where market entry or exit is easy; and where many or most competitors are engaged in deceptive behavior. Particularly where marketing and selling is online, dishonest sellers are easily able to start up a new business if consumers complain, and to stop doing business with the old one. In addition, companies can buy fake online reviews to make it appear they have satisfied consumers and/or have been in business for a while, making it difficult for consumers to detect a dishonest seller.

The event ticket market and hotel industries are also areas where robust competition alone cannot be relied upon to punish or deter seller deception. The FTC has been active in bringing law enforcement actions to address deceptive advertising in the online event ticket and travel marketplaces. For example, in 2014, the FTC entered into settlements with TicketNetwork and two of its marketing partners[79] to prohibit them from misrepresenting that resale ticket websites were official venues or offering tickets at face value. Similarly, in 2017, the FTC settled charges that Reservation Counter, LLC[80] and related companies misled consumers to believe they were reserving hotel rooms from

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assisting-marketing-sale-weight-loss; *FTC v. Cellmark Biopharma*, No. 2:18-cv-00014-JES-CM (M.D. Fla. Jan. 12, 2018), https://www.ftc.gov/news-events/press-releases/2018/01/marketers-barred-making-deceptive-claims-about-products-ability; *FTC v. NextGen Nutritionals*, No. 8:17-cv-02807-CEH-AEP (M.D. Fla. Jan. 11, 2018), https://www.ftc.gov/news-events/press-releases/2017/11/florida-based-supplement-sellers-settle-ftc-false-advertising; *FTC v. Health Research Labs LLC*, No. 2:117-cv-00467-JDL (D. Me. Nov. 30, 2017), https://www.ftc.gov/news-events/press-releases/2017/11/supplement-sellers-settle-ftc-state-maine-false-advertising.

[78] *FTC and State of Maine v. Health Research Laboratories, LLC et al.*, Case 2:17-cv-00467 (D. Maine 2017), https://www.ftc.gov/enforcement/cases-proceedings/152-3021/health-research-laboratories-llc

[79] *FTC and State of Connecticut v, TicketNetwork, Inc.; Ryadd, Inc.; and SecureBoxOffice, LLC, et al*., No. 3:14-cv-1046 (D.Conn.. Jul. 23, 2014), https://www.ftc.gov/enforcement/cases-proceedings/132-3203-132-3204-132-3207/ticketnetwork-inc-ryadd-inc-secureboxoffice.

[80] *Federal Trade Commission v. Reservation Counter* 2:17-cv-01304 (D. Utah. Dec. 21, 2017) https://www.ftc.gov/enforcement/cases-proceedings/152-3219/reservation-counter-llc.

advertised hotels. In these industries, competition appears to encourage a race to the bottom, rather than serving to deter deceptive conduct. This is particularly true with respect to "drip" pricing, where an initially low price attracts consumers but additional costs or fees are revealed later in the purchase process. Those sellers whose initial price fully discloses all the fees will appear to be more expensive than, and thus risk losing market share to, those who misleadingly quote an initially lower price.

6. **You testified that in cases involving fraud, the FTC's existing Section 5 authority, which includes ancillary relief such as restitution and disgorgement "probably is sufficient." However, many of FTC's fraud cases allege both violations of Section 5 as well as violations of a regulation. Allegations of violations of a regulation, of course, allow the FTC to pursue civil penalties in those Section 5 for which the Commission would not otherwise be able to pursue**

    a. **What are some examples of fraud cases not involving a violation of a regulation for which civil penalties would be helpful, such as online giving portal scams?**

Response: In the vast majority of fraud cases brought by the FTC, the ability to obtain civil penalties would provide little, or no, practical advantage. For example, every telemarketing fraud case involves both violations of Section 5 and violations of the Telemarketing Sales Rule, for which civil penalties are available. However, the Commission has found that it can move more quickly and obtain full relief without seeking civil penalties in those cases, for two reasons. First, the amount of consumer injury is typically equal to the total revenues of the enterprise, and the Commission seeks that amount as equitable restitution. For equitable restitution, unlike civil penalties, ability to pay is not a factor in determining the judgment amount. Therefore, the FTC seeks and is often rewarded a judgment that far exceeds the combined assets of all defendants. There is no available remaining money for a civil penalty. Second, the FTC has been highly successful bringing its own fraud enforcement cases for equitable relief in federal district court. Because these are equitable proceedings, the cases are tried before a judge and move more quickly than civil penalties proceedings, which generally are tried by the Department of Justice before a jury.

    b. **What are some examples of non-fraud cases for which civil penalties would be helpful, such as cases involving vaping products marketed to teens?**

Response: For many years, there has been full bipartisan Commission support for legislation that would provide the Commission with the authority to seek civil penalties in data security cases. I continue to support that position.

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: For over twenty years and on a bipartisan basis, one of the Commission's top priorities has been to put an end to anticompetitive reverse payment agreements in which a brand-name drug firm pays its potential generic rival to give up its patent challenge and agree not to launch a lower cost generic product. The FTC continues to devote significant resources to this effort, as the foregone savings to consumers can be significant. Moreover, anticompetitive reverse payment agreements undermine the regulatory framework of the Hatch-Waxman Act, which was intended to speed up the entry of generic drugs.

Following the U.S. Supreme Court's 2013 decision in *FTC v. Actavis, Inc.*,[81] the Commission is in a much stronger position to challenge agreements of this type, and recently, the district court on remand denied the defendants' motion for summary judgment in that case, clearing it for trial.[82] In addition, since *Actavis*, the FTC obtained a landmark $1.2 billion settlement from the maker of sleep disorder drug Provigil,[83] and other manufacturers have agreed to abandon the practice of pay for delay.[84] Currently, the FTC has three other matters pending in litigation challenging reverse payment agreements.[85] FTC staff also monitors private litigation to leverage our expertise and file amicus briefs where appropriate. Finally, we review agreements filed with the FTC as required by the Medicare Prescription Drug, Improvement and Modernization Act (also known as MMA filings), and publish an annual report on the number of final patent settlements filed as well as the incidence

[81] *FTC v. Actavis, Inc.*, 570 U.S. 756 (2013).
[82] *FTC v. Actavis, Inc.*, No. 1:09-MD-2084 (N.D. Ga. Jun. 14, 2018).
[83] Press Release, *FTC Settlement of Cephalon Pay for Delay Case Ensures $1.2 Billion in Ill-Gotten Gains Relinquished; Refunds Will Go To Purchasers Affected by Anticompetitive Tactics* (May 28, 2015), https://www.ftc.gov/news-events/press-releases/2015/05/ftc-settlement-cephalon-pay-delay-case-ensures-12-billion-ill.
[84] Joint Motion for Entry of Stipulated Order for Permanent Injunction, *FTC v. Allergan plc*, No. 17-cv-00312 (N.D. Cal. Jan. 23, 2017), https://www.ftc.gov/enforcement/cases-proceedings/141-0004/allergan-plc-watson-laboratories-inc-et-al (Endo agreed to enter a joint motion to stipulate to an Order for a permanent injunction) and Stipulated Order for Permanent Injunction, *FTC v. Teikoku Pharma USA, Inc.*, No. 16-cv-01440 (E.D. Pa. Mar. 30, 2016), https://www.ftc.gov/enforcement/cases-proceedings/141-0004/endo-pharmaceuticals-impax-labs.
[85] *In re Impax Laboratories, Inc.*, Dkt. 9373 (complaint filed Jan. 23, 2017); *FTC v. Allergan plc*, No. 17-cv-00312 (N.D. Cal. Jan. 23, 2017); *FTC v. Abbvie Inc.*, No. 14-cv-5151 (E.D. Pa. Sept. 8, 2014), https://www.ftc.gov/enforcement/cases-proceedings/121-0028/abbvie-inc-et-al (appealing dismissal of reverse payment claim to Third Circuit).

of certain terms that may operate as anticompetitive reverse-payment agreements between the brand and a generic entrant.[86]

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 is, and will remain, vigilant to stop other types of anticompetitive conduct by pharmaceutical manufacturers. For instance, the Commission also has challenged anticompetitive unilateral conduct by drug manufacturers to maintain a monopoly, such as abusing government processes through sham litigation or repetitive regulatory filings intended to slow the approval of competitive drugs. In a recent FTC case, a federal court found that AbbVie Inc. used sham litigation to illegally maintain its monopoly over the testosterone replacement drug Androgel, and ordered $493.7 million in monetary relief to those who were overcharged for Androgel as a result of AbbVie's conduct. This case, which is currently on appeal, represents the first time any court has found on the basis of a full record that sham litigation violated Section 2 of the Sherman Act. Additionally, the FTC has brought a case against ViroPharma alleging serial sham petitioning before the FDA that had the purpose and effect of delaying generic competition. This matter also is currently on appeal. In addition, the Commission recently filed an amicus brief in private litigation involving counterclaims of sham litigation, urging the court not to expand Noerr-Pennington protection to all patent infringement suits brought under the provisions of the Hatch-Waxman Act.[87]

The Commission has also raised concerns about pharmaceutical conduct related to restricted distribution systems, including Risk Evaluation and Mitigation Strategies ("REMS"). REMS help protect the public from potential safety risks associated with a drug, but they have also provided branded companies with opportunities to delay generic entry. In a recent submission to the Department of Health and Human Services regarding its Blueprint to Lower Drug Prices and Reduce Out-of-Pocket Costs,[88] the FTC highlighted two ways in which branded drug makers may abuse REMS requirements. First, branded manufacturers have relied on REMS requirements when refusing to make samples of their products available to generic drug makers seeking to test their product and obtain FDA approval. Second, the branded manufacturer may deny the generic firm access to a single, shared REMS system, which also prevents the FDA from approving the drug. Either strategy undermines the careful balance between competition and innovation that Congress established in the Hatch-Waxman Act and the Biologics Price Competition and

[86] MMA reports are posted on the FTC website at https://www.ftc.gov/tips-advice/competition-guidance/industry-guidance/health-care/pharmaceutical-agreement-filings.
[87] FTC Brief as Amicus Curiae, *Takeda Pharmaceutical Co. v. Zydus Pharmaceuticals* (Jul. 2, 2018), https://www.ftc.gov/policy/advocacy/amicus-briefs/2018/06/takeda-pharmaceutical-company-limited-et-al-v-zydus.
[88] *See* Press Release, *FTC Submits Statement to HHS on its Blueprint to Lower Drug Prices* (July 17, 2018), https://www.ftc.gov/news-events/press-releases/2018/07/ftc-submits-statement-hhs-its-blueprint-lower-drug-prices.

Innovation Act. I support the goals of legislation that would effectively protect against abuse of the REMS process to delay generic entry.

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: The Commission has a strong interest in protecting consumer confidence in the online marketplace, including, for example, the online markets for event tickets and travel. The FTC has been active in bringing law enforcement actions to address deceptive advertising in these areas. For example, in 2014, the FTC entered into settlements with online ticket reseller TicketNetwork and two of its marketing partners[89] to prohibit them from misrepresenting that resale ticket websites were official venues or offering tickets at face value. Similarly, in 2017, the FTC settled charges that Reservation Counter, LLC[90] and related companies misled consumers to believe they were reserving hotel rooms from advertised hotels.

In 2015, the FTC issued consumer education to caution consumers about third-party websites that may deceptively mimic hotel websites.[91] FTC staff also has met with members of Congress and stakeholders in the hotel and event ticket industries to discuss deceptive travel and event ticket websites. We also have provided comments on proposed legislation addressing the same. Working with various online platforms to reduce the likelihood that consumers see fraudulent ads and providing additional industry guidance could be useful as well. Finally, more consumer guidance could help consumers identify and protect themselves from these types of online scams.

[89] *FTC and State of Connecticut v, TicketNetwork, Inc.*; *Ryadd, Inc.; and SecureBoxOffice, LLC, et al.*, No. 3:14-cv-1046 (D.Conn.. Jul. 23, 2014); https://www.ftc.gov/enforcement/cases-proceedings/132-3203-132-3204-132-3207/ticketnetwork-inc-ryadd-inc-secureboxoffice.
[90] *FTC v. Reservation Counter* 2:17-cv-01304 (D. Utah. Dec. 21, 2017), https://www.ftc.gov/enforcement/cases-proceedings/152-3219/reservation-counter-llc.
[91] FTC Consumer Blog, *Did You Book That Night at the Hotel's Site?* (July 14, 2015), www.consumer.ftc.gov/blog/2015/07/did-you-book-night-hotels-site.