

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

Questions for Rebecca Kelly Slaughter, Commissioner, Federal Trade Commission

Additional Questions for the Record

The Honorable Jan Schakowsky

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

Response: Yes, I support the concept of comprehensive privacy and data security legislation.

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

Response: The high cost of prescription drugs is a critical concern for me and it is important to fully understand the impact PBMs have on competition in the drug supply chain. Merger retrospectives in particular can help the FTC determine how its work affects markets, competition, and consumers. I understand that the Commission is currently exploring the feasibility of conducting merger retrospective reviews in a number of industries, including PBMs.

- 3. At the hearing, I explored whether the FTC could issue an advanced notice of proposed rulemaking (ANPR) or a notice of inquiry to collect data and get the process started on a data security rule. Regardless of whether Congress passes a law, should the FTC consider issuing an ANPR or notice of inquiry, or other pre-rulemaking efforts on data security right now? Why or why not? What are the benefits to doing this?**

Response: Unfortunately, the FTC does not currently have practical rulemaking authority in the area of data security that would justify issuing an advanced notice of proposed rulemaking. The FTC can, however, contribute to the process of developing data security legislation through its own expertise, research, public fora and invitations for public

comment. For example, the FTC is holding a series of public hearings this fall and has invited public comment on a number of topics, including the intersection between privacy, big data and competition and the FTC's remedial authority to deter unfair and deceptive conduct in privacy and data security matters.¹ I am hopeful that the commentary and discussions born of these hearings will provide meaningful insights into the type of data security legislation that would be most beneficial to consumers.

4. I'm concerned that the FTC is unable to keep up with all the consent decrees. If the FTC cannot ensure compliance, the consent decrees are not effective in stopping unfair and deceptive acts.

- a. I understand that the Commission can request information from a company to ensure compliance with those consent decrees. With that many consent decrees, how does staff know what to ask for? How can you be sure the Commission is not missing violations?**

Response: The Division of Enforcement's highly experienced attorneys have developed efficient and effective techniques and protocols to monitor compliance, including through periodic requests for information. However, law enforcement is not a perfect science and our resources are limited. In the absence of additional resources, we can most effectively triage what we have by pursuing violators with contempt and order enforcement actions. The judgments and conduct relief obtained in these actions can 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).

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

Response: The Commission regularly requires third-party assessors in data security and privacy orders, but typically does not in its other cases because the technical compliance issues are not as complex.² The assessments for Commission data security and privacy orders require the assessor to examine the practices of the defendants, assess their compliance with the standards contained in the order, and certify that the defendants are in active compliance. Thus, while in the past, the third party has had no affirmative duty to notify the Commission of a violation, a failure to submit an initial assessment

¹ See Press Release, FTC Announces Hearings On Competition and Consumer Protection in the 21st Century (June 20, 2018), available at <https://www.ftc.gov/news-events/press-releases/2018/06/ftc-announces-hearings-competition-consumer-protection-21st>.

² One notable recent order addressing conduct other than data security and privacy that requires a third-party monitor is the Commission's stipulated order resolving allegations against Herbalife. See Press Release, Herbalife Will Restructure Its Multi-level Marketing Operations and Pay \$200 Million For Consumer Redress to Settle FTC Charges (July 15, 2016), available at <https://www.ftc.gov/news-events/press-releases/2016/07/herbalife-will-restructure-its-multi-level-marketing-operations>.

certifying that the company's privacy controls were operating effectively would provide such notice.³

The Commission is currently engaged in a broad review of whether we are using every available remedy as effectively as possible and considering how to best structure third-party monitoring provisions is a question that must receive thoughtful consideration.

c. 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 generally have significant contact with third-party assessors. Working that closely 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).

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

Response: I agree that ensuring compliance with our orders is necessary for us to be effective in stopping violations of the laws we enforce and preventing future violations.

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.⁴ 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.⁵ 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.

³ In the stipulated order governing Herbalife, the Commission affirmatively required the third-party monitor to notify the FTC if it becomes aware that Herbalife is not in substantial compliance with key order provisions. See <https://www.ftc.gov/system/files/documents/cases/160725herbalifeorder.pdf>.

⁴ *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>.

⁵ *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).

When the Commission identifies violations of its administrative orders, it can seek civil penalties in federal court.⁶ 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.⁷

We should always be thinking carefully about whether our current enforcement program is as effective as it can be, and what if anything we could change to improve compliance and deter violations.

- 5. Last year, this Subcommittee held a hearing on the data breach at Equifax. It was a particularly large breach, which concerned many consumers especially because so many consumers had never heard of Equifax and had no idea that a company they had never heard of could have so much of their personal information.**

I know the FTC has announced that it is investigating the Equifax breach and that you cannot comment on the details. But I have some questions about the general privacy and data security concerns that were brought up by that breach.

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

Response: Yes, and the Commission has brought such cases.⁸

Some credit reporting agencies also function as data brokers for advertising and other purposes. Equifax, for example, has its consumer reporting services as well as many services for business like digital marketing, real estate and property analytics, and income and employment verifications. We were told that in the case of the Equifax breach, the database that was accessed was not from the credit bureau side. The data was collected through Equifax's other businesses.

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

Response: The Safeguards Rule applies to “financial institutions” as defined by the Rule,⁹ and covers all businesses, regardless of size, that are “significantly engaged” in providing financial products or services. Thus, determining if the breach is covered by the Safeguards Rule would be a fact-specific inquiry regarding the types of services in which the data broker engaged.

⁶ The Department of Justice (DOJ) has the right of first refusal to litigate these cases. 15 U.S.C. 45(l).

⁷ *U.S. v. Google Inc.*, No. 512-cv-04177-HRL (N.D. Cal. Nov. 16, 2012), <https://www.ftc.gov/enforcement/cases-proceedings/google-inc>.

⁸ See, e.g., *In the Matter of SettlementOne Credit Corporation*, (Aug. 17, 2011), <https://www.ftc.gov/enforcement/cases-proceedings/082-3208/settlementone-credit-corporation>.

⁹ See 16 C.F.R. § 313.3.

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

Response: Current law is based on a sectoral approach for protecting consumer data; that approach came into being when data was well segregated between sectors and by type. I am not confident it remains the best approach given the use and sharing of data across sectors today.

That said, the Commission leverages all of the sectoral laws in place today, as well as its unfairness authority under Section 5 of the FTC Act, to protect consumer privacy, bringing more than 50 cases addressing alleged privacy and data security violations. It is no secret, however, that the sectoral laws and Section 5 are imperfect tools for enforcement in these areas and potentially leave gaps where sensitive consumer data is not specifically protected by law.

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

Response: Comprehensive privacy and data security legislation that authorizes the FTC to engage in APA rulemaking and gives us civil penalty authority would enable the Commission to engage in much more effective enforcement in this area. And repeal of the common carrier exemption would enable us without question to reach more entities that hold sensitive consumer data.

The Honorable Doris Matsui

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

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

Response: The Federal Trade Commission has long been committed to preserving and protecting competition in prescription drug markets, and it actively investigates anticompetitive businesses practices and mergers in the industry. The FTC has been particularly focused on anticompetitive "pay-for-delay" agreements between brand and generic drug companies. While the number of settlements potentially involving "pay-for-delay" agreements has decreased in the wake of the Supreme Court's 2013 decision

in *FTC v. Actavis*, they have not disappeared entirely.¹⁰ In addition to reviewing all agreements submitted to the FTC under the Medicare Prescription Drug, Improvement, and Modernization Act, the Commission is currently challenging several of these agreements in courts around the country.

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: In addition to being vigilant when it comes to “pay-for-delay” agreements, the Commission has been examining and prosecuting other practices that thwart competition and increase the cost of prescription drugs. For example, in June, the FTC secured a judgment for \$493.7 million in equitable monetary relief for consumers harmed by AbbVie’s use of baseless “sham” patent infringement lawsuits to delay generic competitors from introducing lower-priced versions of the testosterone replacement drug AndroGel. The FTC has also brought a case against Shire ViroPharma Inc. alleging serial sham petitioning before the FDA that had the purpose and effect of delaying generic competition. Both of these matters are currently on appeal.

The FTC is concerned about other threats to generic and biosimilar competition. For example, the FTC highlighted anticompetitive misuse of *Risk Evaluation and Mitigation Strategies* (“REMS”) in a comment to the Department of Health and Human Services regarding the “*Blueprint to Lower Drug Prices and Reduce Out-of-Pocket Costs*.”¹¹ First, branded manufacturers sometimes refuse to make samples of their products available to generic drug and biosimilar makers by improperly invoking REMS requirements. Second, the branded manufacturer may improperly deny its competitor access to a single, shared REMS system, which leaves the FDA unable to approve the competitor’s application and labeling. The Creating and Restoring Equal Access to Equivalent Samples Act of 2017 (CREATES Act) would be an important and effective way to stop drug companies from manipulating REMS to block generic or biosimilar competition and consumer access to lower cost drugs.

The FTC’s comment also suggested that the FDA consider certain steps to improve biosimilar and interchangeable competition. Specifically, it recommended that the FDA: (1) continue to create a pathway for expedited approval of interchangeable biologics; (2) reconsider the current naming guidance for biologics in light of the Blueprint; and (3) improve the Purple Book.

¹⁰Agreements Filed with the Federal Trade Commission under the Medicare Prescription Drug, Improvement, and Modernization Act of 2003: Overview of Agreements Filed in FY 2015, Bureau of Competition, November 1, 2017 (https://www.ftc.gov/system/files/documents/reports/agreements-filed-federal-trade-commission-under-medicare-prescription-drug-improvement-modernization/overview_of_fy_2015_mma_agreements_0.pdf).

¹¹ Statement of the Federal Trade Commission to the Department of Health and Human Services Regarding the HHS Blueprint to Lower Drug Prices and Reduce Out-of-Pocket Costs, July 16, 2018 (https://www.ftc.gov/system/files/documents/advocacy_documents/statement-federal-trade-commission-department-health-human-services-regarding-hhs-blueprint-lower/v180008_commission_comment_to_hhs_re_blueprint_for_lower_drug_prices_and_costs.pdf).

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 partners¹² 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, LLC¹³ 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.¹⁴ 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.

¹² *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>.

¹³ *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>.

¹⁴ 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.