Additional Questions for the Record

Subcommittee on Consumer Protection and Commerce
Hearing on
"Oversight of the Federal Trade Commission: Strengthening Protections for Americans' Privacy and Data Security"
May 8, 2019

The Honorable Noah Joshua Phillips, Commissioner
The Federal Trade Commission

The Honorable Jan Schakowsky (D-IL)

1. **On June 11, 2019, the Federal Trade Commission (FTC) will hold a workshop on online event tickets. I have heard reports of a number of consumer protection issues concerning online event tickets that raise serious concerns and I hope the FTC will consider addressing these issues during its workshop. For example, I have heard concerns that primary ticket platforms have begun forcing purchasers to disclose personally identifiable information by creating an account with the primary ticket seller to use a ticket, even when tickets are resold on a secondary market. I have also heard complaints about primary ticket sellers that hold tickets back from the market pursuant to agreements with venues, artists, or other partners. In addition, I have received complaints about primary ticket vendors putting technological restrictions on the transfer of tickets, which can prevent ticket holders from reselling or giving away tickets if they cannot attend the event.**

    a. **Will the FTC examine these issues at its upcoming hearing on online event tickets?**

Yes, the June 11 Online Event Ticketing Workshop examined the issues that you raise and their possible impact on consumers in the online event tickets marketplace.

    b. **Has the FTC received similar complaints from consumers?**

The most common consumer complaints we receive about online event ticketing concern hidden or inadequately disclosed ticketing fees in the primary and secondary markets, and consumers who report that ticket resellers misled them to believe they were purchasing tickets from the venue or authorized seller at face value (when in fact they were purchasing tickets from resellers at a significant markup). The Commission also received several thousand consumer comments in connection with the ticketing workshop, which overwhelmingly concerned hidden, inadequately disclosed, or excessive ticketing fees. While the FTC may also have received consumer complaints or comments regarding the practices you outline, they do not appear to be as prevalent.

c. Do you agree that, if true, these practices raise concerns about unfair or deceptive practices in the market for online event tickets?

These practices may raise questions about privacy, transparency, and consumer understanding in the online event tickets marketplace. Without knowing more, however, it is unclear that the practices your question describes constitute unfair or deceptive acts or practices under Section 5 of the FTC Act. I look forward to learning more about these and other practices from the output from our Online Event Ticketing Workshop.

The Honorable Bobby L. Rush (D-IL)

1. **In 2014, the Federal Trade Commission (FTC) published a report called "Data Brokers: A Call for Transparency and Accountability" that shed light on the secretive world of data brokers that buy and sell vast amounts of consumer personal information, often entirely behind the scenes. The FTC's report called on Congress to pass legislation that would require data brokers to be more transparent and give consumers the right to opt-out, among other things.**

    a. **Do you still agree that Congress should pass legislation addressing data brokers?**

The current Commission has not taken a position on data broker legislation. It has supported data security legislation that would give the Commission authority to seek civil penalties; conduct targeted APA rulemaking; and exercise jurisdiction over common carriers and non-profit entities. I also support congressional efforts to consider federal privacy legislation. I believe it is important for the Congress to craft such legislation to address more seamlessly consumers' legitimate concerns regarding the collection, use, and sharing of their data and businesses' need for clear rules of the road, while retaining the flexibility required to foster innovation and competition. The Commission would be pleased to share our expertise in any way that Congress deems helpful to assist with formulating appropriate legislation.

2. **While innovation in the tech industry is having a tremendous impact on our economy and the lives of everyday Americans, it is also creating new challenges in protecting consumers and competitive markets. I have heard reports of certain online platforms giving their subsidiary businesses preferential treatment over their competitors.**

    a. **Are you looking into anti-consumer and anti-competitive behaviors of this nature?**

Please see the answer to question 2.b below.

    b. **In your opinion, does the FTC currently have the authority and capacity to curtail this behavior?**

The FTC does not publicly comment on pending law enforcement investigations. As a general matter, we examine carefully conduct in markets within our jurisdiction, including those involving online platforms. As more and more of the nation's commerce takes place on online platforms, the public and the antitrust agencies are devoting increasing attention to the operation of these platforms. For example, the Bureau of Competition recently announced the creation of a task force to enhance the Commission's antitrust focus on technology-related ecosystems, including technology platforms as well as markets for online advertising, social networking, mobile operating systems, and apps.

Under the U.S. antitrust laws, e-commerce firms with market power are prohibited from engaging in conduct that anticompetitively excludes rivals. Large market share alone, however,

is not a violation of the U.S. antitrust laws. Whether any particular policy of preferential access or limits on communications with customers qualifies as exclusionary is fact-driven and highly dependent on the actual market dynamics in the specific markets at issue. The Technology Task Force (TTF) will monitor competition in U.S. technology markets, investigate any conduct in these markets that may harm competition, and, when warranted, take actions to ensure that consumers benefit from free and fair competition.

On the consumer protection front, the FTC's core deception and unfairness authorities are flexible standards that have allowed the agency to protect consumers in new markets for decades; and, in many ways, online markets are no different. That said, I believe consumers would benefit if the FTC had broader enforcement authority to take action against common carriers and non-profits, which it cannot currently do under the FTC Act. Furthermore, as noted above, I do support congressional efforts to consider new legislative tools that are focused on protecting consumers in the digital economy. Such efforts should begin with agreement on the harms Congress is trying to address and work from there to appropriate remedies and authorities. Congress should further recognize the tradeoffs inherent in any such efforts, including the impacts on innovation and competition. Should Congress grant the FTC new authority, you can be assured that the agency will continue to be vigilant and that we will not hesitate to take strong and appropriate action against any act or practice that violates any statute that we enforce.

3. **As all of you know, robocalls are extremely burdensome on consumers and every effort needs to be taken to ensure that consumers are not being taken advantage of by these unscrupulous actors. I am also concerned by the reports I have heard that robocalls are now being used by online contact lens retailers to usurp the verification of contact lens prescriptions, placing consumers at an even greater risk of receiving the wrong Class II or III medical devices.**

    a. **Do you agree that efforts need to be taken to update the passive verification process?**

When Congress enacted the Fairness to Contact Lens Consumers Act ("FCLCA"), it determined that passive verification was necessary to balance the interests of prescription portability and consumer health. Congress was aware that passive verification could, in some instances, allow sellers to sell contact lenses based on an invalid or inaccurate prescription, and that this could potentially lead to health risks. In the May 28, 2019 Supplemental Notice of Proposed Rulemaking ("SNPRM"), the Commission proposed several changes to improve the passive verification process. The Commission proposed that sellers who use automated telephone verification messages would have to: (1) record the entire call and preserve the complete recording; (2) begin the call by identifying it as a prescription verification request made in accordance with the Contact Lens Rule; (3) deliver the verification message in a slow and deliberate manner and at a reasonably understandable volume; and (4) make the message repeatable at the prescriber's option. This proposal enables prescribers to fulfill their role as protectors of patients' eye health because prescribers cannot correct and police invalid, inaccurate, and expired prescriptions if they cannot comprehend a seller's verification request.

Additionally, the Commission proposed changes that would increase patients' access to their prescription, maintain patient choice and flexibility, and potentially reduce the number of

verification requests. Under the proposal, a prescriber, with the patient's verifiable affirmative consent, has the option to provide the patient with a digital copy of the prescription in lieu of a paper copy. Moreover, although the Contact Lens Rule has always required that prescribers, upon request, provide any person designated to act on behalf of the patient with a copy of the patient's valid contact lens prescription, the Rule did not prescribe a time limit in which this copy had to be provided. The Commission proposed requiring that a prescriber respond to requests for an additional copy of a prescription within forty business hours. To facilitate patients' ability to use their prescriptions, another proposed change would require sellers to provide a mechanism that would allow patients to present their prescriptions directly to sellers.

Finally, the Commission proposed amending the prohibition on seller alteration of prescriptions to address concerns about the misuse of passive verification to substitute a different brand and manufacturer of lenses. The proposal requires a seller who makes an alteration to provide a verification request to the prescriber that includes the name of a manufacturer or brand other than that specified by the patient's prescriber. There is an exception if the patient entered that manufacturer or brand on the seller's order form or the patient orally requested it from the seller.

The Commission will consider comments received in response to the SNPRM and, if appropriate, make changes before issuing a final rule.

b. Do you agree that robocalls need to be eliminated from use within the passive verification system?

An effective verification process enables prescribers, when necessary, to prevent improper sales and allows sellers to provide consumers with their prescribed contact lenses without delay. The FCLCA expressly permits telephone communication for verification and the Commission believes it would be contrary to Congressional intent to prohibit use of automated technology for the purpose of prescription verification. The Commission does not have empirical data showing the frequency of incomplete or incomprehensible automated telephone messages or that a phone call with an automated message is necessarily less reliable than one with a person. The evidence suggests that these calls can be an efficient method of verification. However, the Commission recognizes the burden on prescribers and potential health risk to patients from incomplete or incomprehensible automated telephone messages. As described in response to question 3.a, the Commission has proposed changes to automated telephone messages that would improve the verification process.

c. Could you support updating the Fairness to Contact Lens Consumers Act to eliminate robocalls and update the passive verification system to include secured emails and patient portals to verify and document contact lens prescription verification?

Under the current Rule, a "seller may sell contact lenses only in accordance with a contact lens prescription for the patient that is: (1) Presented to the seller by the patient or prescriber directly or by facsimile; or (2) Verified by direct communication." 16 C.F.R. § 315.5(a). Because the Rule's definition of direct communication already includes electronic mail, a seller and a prescriber could use email during the verification process. In the December 7, 2016 Notice of Proposed Rulemaking ("NPRM"), the Commission made an initial determination that a portal

could be used by a prescriber or a patient to "directly" present a contact lens prescription to a seller. The Commission will consider comments received in response to this initial determination and, if appropriate, make changes before issuing a final rule.

4. **In December 2016, the FTC issued a Notice of Proposed Rulemaking to update the Contact Lens Rule. As a part of this process, providers and manufacturers of contact lenses urged the FTC to require common-sense changes to the current contact lens market, including quantity limits and ways to update methods of communication under the passive verification process. The FTC responded by stating that there was insufficient evidence that consumers are buying excessive quantities of contact lenses and that it did not have the statutory authority to update the passive verification process.**

    a. **Do you support efforts to ensure patient safety regarding the current proposed rulemaking process that will include patients only receiving contact lenses as prescribed under the valid prescription?**

Federal law does not permit a seller to sell contact lenses to a patient unless the seller has obtained a copy of the prescription or the verified the patient's prescription information with the prescriber. The SNPRM's proposed changes improve patient access to contact lens prescriptions and address concerns with the passive verification requests and alterations by sellers.

5. **Last May, Rep. Michael Burgess (R-TX) and I led a letter to the FTC that laid out several concerns we have regarding the FTC rulemaking process around the Fairness to Contact Lens Consumers Act. In total, over 50 members of Congress signed this letter where we discussed the lack of enforcement action by the FTC to address the illegal sales of contact lenses and the burdensome new requirements on eye care providers.**

    a. **Has the FTC investigated or independently audited any online sellers to determine the number of lenses provided to patients?**

The Commission has not audited online sellers to determine the number of lenses provided to patients. Staff has investigated specific complaints of illegal sales related to excessive quantities. We will continue to monitor the marketplace, taking action against violations as appropriate. The Commission recently announced an enforcement action against a contact lens seller challenging the sale of contact lenses without a valid prescription. The order banned the defendant from selling contact lens and imposed a $575,000 civil penalty. *U.S. v. Duskin*, No. 1:18-cv-07359 (N.D. Cal. Dec. 6, 2018).

    b. **What enforcement mechanisms has the FTC used to ensure that sellers are not enabling the circumvention of state laws governing prescription renewal or harming patients by providing excessive numbers of contact lenses?**

In the NPRM, the Commission considered the issue of patients purchasing excessive quantities of contact lenses. Although concerned with anecdotal reports, the Commission concluded that the evidence did not show that the sale of excessive amounts of contact lenses is a widespread

problem.[1] Furthermore, a prescriber who receives a verification request for an excessive amount of lenses can contact the seller to prevent the sale from being completed.

c. How often has the FTC acted on this important safety issue?

As discussed in the response to question 5.b, the Commission does not believe that the evidence shows that excessive sale of contact lenses is a widespread problem. However, the Commission recognizes the importance of patient safety. Staff will continue to monitor the marketplace and, if appropriate, take action.

6. Many businesses are increasingly dependent on digital platforms that they do not own or operate to connect with customers.

a. With current statutory authorities in mind, what can be done to protect consumers if companies that operate these platforms offer subsidiary business products and restrict or disadvantage competitors with similar businesses on these platforms? What is the FTC doing to curtail it?

Please see the answer to question 2.b above.

b. One example of how a platform operator might harm consumers is by prohibiting businesses from communicating with their customers through that platform. Do you believe that this sort of behavior must be addressed and, if so, does the FTC currently have the statutory authority to do so?

Please see the answer to question 2.b above.

7. It has been brought to my attention that the leading internet browser has been considering a major change in what type of information is available to consumers in their product, reducing the available information that consumers use to defend themselves against a host of online threats like phishing and content spoofing.

a. As the agency charged with protecting our nation's consumers and enforcing our data privacy laws, do you have concerns about what this practice means for consumers and their data privacy and security?

Please see the answer to 7.b below.

b. Have you discussed this issue with the browsers or asked them to explain their changes and how they will impact consumer safety online? If not, do you intend to?

I understand your question to refer to how browsers display certain digital certificates in their user interface. When properly validated, digital certificates serve as proof that consumers are communicating with an authentic website and not an impostor. They also serve to encrypt traffic

[1] NPRM at 88549-50; *see also* Vision Council, U.S. Optical Market Eyewear Overview 13 (2018), https://www.ftc.gov/sites/default/files/filefield_paths/steve_kodey_ppt_presentation.pdf (noting that 82% of contact lens users had an eye exam within the last 12 months and over 95% had an exam within the last two years)

between a consumer's browser and a site's web server. In May 2018, Google announced that it would change its user interface in its Chrome browser to remove certain indicators of the presence of an expensive digital certificate – called an extended validation certificate – such as green text and a padlock icon.

I have not discussed these changes with Google. Consumers' secure online experiences depend on many factors, and the ecosystem continues to evolve quickly. I do not believe that the Commission should promote one type of certificate over another or prescribe how certificates should be displayed in user interfaces.

The Commission is nonetheless committed to promoting consumer safety online. In addition to our enforcement work, detailed in the Commission's written testimony, we engage in extensive consumer education, examples of which you may find here: https://www.consumer.ftc.gov/articles/0009-computer-security.

The Honorable Cathy McMorris Rodgers (R-WA)

1. **Commissioner Phillips, it appears that while the Commission imposes requirements that last differing lengths inside consent order-based settlements, the overall order lasts 20 years as a default. Please answer the following questions about consent orders:**

    a. **Why does the Commission, as a default, enter consent orders for 20 years?**

As a general matter, administrative orders entered in consumer protection matters sunset in 20 years, absent any intervening enforcement action. However, in certain cases, administrative orders have been shorter, for example, ten years. In contrast, federal district court orders remain in effect forever. Historically, the FTC has brought consumer protection cases against defendants permeated by unfair or deceptive practices – where there is a likelihood that the defendant will violate the order – in federal district court where the order does not sunset. In cases involving defendants less likely to violate orders – for example, companies not permeated by unfair or deceptive practices, the FTC has used the administrative process, with its shorter order-sunset period of 20 years. However, in recent years, the FTC has frequently brought cases in federal district court against companies not permeated with unfair or deceptive acts or practices. The vast majority of defendants in administrative actions continue to be companies that have violated the law but are not permeated with unfair or deceptive practices.

Administrative orders relating to anticompetitive mergers last ten years. Administrative orders relating to anticompetitive conduct, as opposed to anticompetitive mergers, last 20 years as a default, although the Commission may accept orders of shorter duration based on the facts and market realities in a given matter. And these competition conduct orders' fencing-in provisions – provisions that are broader than the unlawful conduct – typically expire well before the order sunsets.

Any party under administrative order may petition the Commission to modify or set aside the order due to changes in law or fact or to a determination that the public interest so requires, which happens from time to time.

    b. **Is there any data to support the 20-year length of consent orders?**

For consumer protection matters, there is no publicly available aggregated data to support the 20-year length of administrative consent orders. Because many of the FTC's consumer protection administrative orders involve technology companies and other rapidly evolving businesses, I believe it would be useful to examine whether 20 years is the appropriate length for an administrative order.

For competition matters, please see the answer to 1.c. below.

    c. **Are there compelling reasons for consent orders in the competition space to last longer than consumer protection cases?**

I support shortening the default duration of competition conduct orders to ten years. Since the mid-1990s, the Commission has issued over 100 competition orders. Yet, in that same period, the Commission brought enforcement actions in only three competition conduct matters more than ten years after issuing the order. In other words, limiting orders to ten years would have affected only three competition actions over the past 20 years. Furthermore, a ten-year order term would reduce the burden on companies under order, free up Commission resources, and provide greater consistency by aligning the Commission's competition conduct orders with those of the Department of Justice's Antitrust Division.

i. If so, what are those reasons?

Please see the answer to question 1.c above.

d. Has the Commission conducted a study of similar enforcement regimes and the length of consent orders issued by those other agencies and considered adjusting the FTC's standard 20-year consent order timeframe?

i. If yes, which agencies?

ii. If no, why not?

I am not aware of such a study. Twenty years is a long time, in particular in markets that develop quickly, such as those characterized by technological innovation. I support efforts to adjust the default length of our consent orders, and believe we should take seriously requests to adjust those defaults in particular cases.

2. Commissioner Phillips, I understand the desire to give the Commission more tools to hold bad actors accountable on first offenses, but I also am concerned with potentially eroding due process protections. If Congress grants the Commission first offense civil penalty authority for violations of Section 5 of the FTC Act, do you believe we should also consider an expedited track to judicial review?

I am not in favor of civil penalty authority for violations of Section 5 of the FTC Act in the first instance. The FTC's statutory jurisdiction is very broad. Not only does the agency have jurisdiction over a wide swath of the American economy, the agency has the authority to challenge conduct falling under Section 5's expansive mandate: prohibiting unfair or deceptive acts or practices. Prior to an FTC enforcement investigation, it might be difficult for some companies to recognize that their conduct is prohibited by these standards.

This broad statutory regime is balanced by the fact that the FTC does not have the authority to impose civil penalties in the first instance for violations of Section 5 of the FTC Act. This addresses the due process concerns that apply when engaging in enforcement for conduct that was not clearly proscribed. In those cases where the FTC does impose penalties for first-time

violations, clear rules – either from Congress itself or through Magnusson-Moss or APA rulemaking – should predicate the imposition of penalties.

Should new legislation include penalties for first-time violations under similarly broad standards as are currently in Section 5, expedited review may help alleviate some of the burden; but it would not address the core issue of imposing penalties where the illegality of the conduct could not readily have been anticipated.

a. Are there any other considerations we should contemplate to ensure persons' due process rights are protected under any new federal privacy regime?

In addition to the due process considerations noted above, I am concerned that excessive penalties could deter companies from exploring innovative and consumer-friendly products and services; the risk may simply be too great. This is of particular concern given that many privacy harms being contemplated result in little to no tangible consumer harm. To account for this, any penalty scheme set by Congress should balance a range of factors, including consumer harm, and be set on a graduated scale, so as to tether them to coherent set of principles set out by Congress. Furthermore, even if Congress is to impose penalties for initial violations, that scheme need not apply to every violation. Some conduct, and particularly conduct whose legality is more difficult to determine in the abstract and whose deterrence may have negative consequences, should continue to be enforced under our current structure.

3. Commissioner Phillips, I have concerns with companies making promises that potentially oversell technical capabilities or features. For example, one tech firm has advertised that what happens on your device stays on your device. But this same company allows consumers to download apps that collect consumer information and share that information with third parties. In other cases, some firms have started marketing "unhackable" devices when we know perfect security is aspirational. With respect to this concern, please answer the following:

a. Does the FTC have any existing authority to address this concern? If so, please identify such authority.

Advertising plays a critical role in our economy, providing consumers with valuable information. However, to be useful, advertising must not be misleading. The FTC Act prohibits deceptive and unfair acts or practices. The examples of advertising and product claims that you describe are troubling and could constitute deceptive or unfair practices depending upon the facts of the case. To establish that an advertisement is deceptive requires a showing that (1) there was a representation or omission, (2) the representation or omission was likely to mislead consumers acting reasonably under the circumstances, and (3) the representation or omission was material.[2] To establish that a practice is unfair requires a showing that an act or practice is likely to cause

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

substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or competition.[3]

b. Could the Commission's deception authority apply to these types of claims?

Yes, please see the answer to 3.a.

4. Commissioner Phillips, do you believe a private right of action, delegating enforcement authority of any new federal privacy bill to private sector plaintiffs' attorneys, will disproportionately hurt small business?

Yes.

a. If yes, please explain why.

A private right of action will have a substantial and unwarranted negative impact, particularly on small, innovative, businesses, deterring them from innovating and growing jobs, as they prioritize lawsuit avoidance over doing what they do best.

Data collection and use are endemic to our economy and are the engines of significant economic growth and consumer benefit. Any federal privacy bill will thus apply to a vast array of companies, large and small.

No matter the size of the firm, the strike suit behavior encouraged by a private right of action threatens economic vitality. Businesses will settle cases for substantial sums, even where the cases lack merit or where consumer injury is limited. This is particularly a concern for smaller companies, as their limited staffs and natural start-up mistakes in a complex regulatory environment may make them a specific target for the private bar, while they have fewer resources to avoid and challenge such suits than their larger competitors. As a consequence, entrepreneurs may avoid making decisions and offering new services that enhance innovation and competition. They will pay nuisance amounts in settlement, mis-allocating resources. Recent FTC experience bears this out. Patent rights are critical to encouraging innovation. But they can be abused, as they were in the notorious MPHJ scheme, where many small businesses were threatened with patent litigation and paid substantial sums.[4] Federal enforcement avoids risks like these by removing the economic incentives of lawyers from the calculus.

A new federal privacy law must provide for rules and regulation, but it should do so in a way that best permits for future growth and innovation and that encourages investment and risk-taking.

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

[4] *See, e.g.*, FTC Approves Final Order Barring Patent Assertion Entity From Using Deceptive Tactics, Mar. 17, 2015, https://www.ftc.gov/news-events/press-releases/2015/03/ftc-approves-final-order-barring-patent-assertion-entity-using (discussing FTC administrative consent with MPHJ Technology Investments, LLC, where small businesses were targeted with demand letters). *See also* FTC Staff Report, *Patent Assertion Activity: An FTC Study*, Oct. 2016, https://www.ftc.gov/reports/patent-assertion-entity-activity-ftc-study (examining non-public information and data covering the period 2009 to 2014 from 22 PAEs, 327 PAE affiliates, and more than 2100 holding entities obtained through compulsory process orders using the FTC's Section 6(b) authority).

Government enforcement of a privacy law, rather private lawsuits, is the best way to balance those interests.

5. **Commissioner Phillips, can you explain how a fragmented internet, regulated on a state-by-state basis, may result in different online opportunities, options, and experiences for people in rural communities than people in urban areas?**

Application of a single legal framework across the country provides consistency and fairness, which is especially important to the businesses that operate in many rural communities. Allowing different states to apply different laws – laws whose content we do not and cannot yet know – could result in radically different regimes in different states, and, accordingly, radically different goods and services offered by technology companies. It will favor large, national, firms; and disproportionately hurt smaller operators, many of which may be local. In some cases, technology companies may choose not to provide certain services to citizens of some states due to the undue legal and financial risks a particular state's laws would impose. A single federal law could help avoid such outcomes and ensure that consumers across the country are treated fairly and equally.

6. **Commissioner Phillips, how difficult would it be for the FTC to enforce a federal privacy law with various, potentially competing, state laws also in effect?**

Where we have a variety of differing state laws, the FTC will have to engage in competing investigations and lawsuits with state law enforcement agencies, rather than more efficient collaborations. The result will be less federal-state cooperation and more protracted investigations, more complicated litigation, and more challenging settlement environments. We may also face situations where similar – yet distinct – laws are subject to different legal interpretations by courts, removing some of the Commission's power to help shape consistency in that interpretation through our own case selection and legal arguments in federal court.

7. **Commissioner Phillips, is there an impact we should be considering when crafting privacy legislation that could have an unintended or negative impact on competition in the U.S. marketplace? What factors should be considered to guard against these unintended consequences?**

Privacy legislation will involve tradeoffs, in particular when it comes to innovation and competition. Large companies can more easily bear the costs of compliance, while smaller entities will face more risk and uncertainty. That means that legislation carries the possibility of entrenching incumbents while limiting new market entrants who may provide competition and innovative, valuable products and services. This is an issue that I have spoken about before,[5] and there is already some evidence that since the implementation of GDPR, investment in startups is

[5] Commissioner Noah Joshua Phillips, *Keep It: Maintaining Competition in the Privacy Debate*, Internet Governance Forum USA, Washington, DC (July 27, 2018), https://www.ftc.gov/public-statements/2018/07/keep-it-maintaining-competition-privacy-debate.

down in Europe[6] and more market share is flowing to the largest companies.[7] Time will tell about that impact.

To guard against these concerns, as Congress moves forward to regulate so much of the economy, it should take care and be cognizant about the impacts and tradeoffs. This means moving more cautiously and learning from the experiences of jurisdictions that have already instituted new privacy rules. Congress should also favor simplicity over complexity, especially in the early days, with lower penalties and federal preemption to create a single set of rules of the road for businesses and consumers.

8. **Commissioner Phillips, this year a number of state legislatures are considering laws requiring proprietary auto Dealer Management Systems (DMS) to be accessed by unlicensed, unmonitored third parties. There are questions about the cybersecurity and privacy risks raised in these circumstances even with well-intended goals for example in Arizona and Montana. Are you aware of these state laws and do they raise on cybersecurity or privacy concerns?**

I have not studied those laws in depth, and they are outside the jurisdiction of the Commission's authority. Laws mandating the sharing of data can raise competition concerns, as well as cybersecurity and privacy ones. All these, and open-access, are important goals that must be managed.

9. **Commissioner Phillips, my understanding is when the FTC seeks to recover ill-gotten gains from an entity that has violated FTC competition rules, the Commission only seeks to disgorge the profit from that unlawful act. Is that correct?**

Yes, in competition cases, the equitable relief available to the FTC includes disgorgement of the improperly obtained gains.

   a. **Please explain how the Commission calculates the profit of those ill-gotten gains.**

The Commission estimates, based on the available facts and data, how much profit the defendant(s) would have earned absent the anticompetitive conduct. The estimation process is heavily influenced by the facts of the particular case and may require sophisticated modeling. Therefore, the Bureau of Competition works closely with the Bureau of Economics and with the FTC's experts on the specific matter to estimate the appropriate disgorgement amount. At trial, the FTC bears the burden of persuading the court that it has a reasonable basis for the amount of monetary relief sought.

[6] Jian Jia, Ginger Jin & Liad Wagman, *The short-run effects of GDPR on technology venture investment*, VOX EU (Jan. 7, 2019), https://voxeu.org/article/short-run-effects-gdpr-technology-venture-investment.
[7] Björn Greif, *Study: Google is the biggest beneficiary of the GDPR*, CLIQZ (Oct. 10, 2018), https://cliqz.com/en/magazine/study-google-is-the-biggest-beneficiary-of-the-gdpr.

For example, in *AbbVie*, the FTC sued several pharmaceutical companies for filing sham patent infringement lawsuits to delay entry of generic AndroGel. The FTC's testifying economic expert determined that, absent the sham litigation, generic AndroGel products would have entered market in 2012. He then estimated that, as a result of delaying generic competition, defendants earned about $1 billion more than they otherwise would have between 2012 and 2018. The judge agreed with the overall approach taken by the FTC's expert but reduced $450 million based on his findings that generic entry would have happened one year later than the FTC claimed and that the generic products had fully penetrated the market by 2017 and thus no part of the defendants' profit after that point resulted from the anticompetitive conduct.

The Honorable Robert E. Latta (R-OH)

1. **Commissioner Phillips, we want companies of all sizes to protect consumer information, but we do not want new privacy obligations to crush small businesses and benefit big companies. In the 2012 FTC privacy report, the Commission grappled with this specific concern and excluded some small businesses from its recommendations.**

    a. **How do you think we should be addressing this concern?**

As a general matter, the best rules are those that can be applied to firms of all sizes. To the extent Congress is considering excluding small businesses from privacy legislation, we would suggest focusing not on the size of the company, but on the amount and sensitivity of the data the company collects. A company with few employees can collect highly-sensitive data of millions of consumers, and such a company should be subject to privacy rules. As you note, this is the approach we took in the 2012 Privacy Report.

The Honorable Michael C. Burgess (R-TX)

1. **Commissioner Phillips, we know that small businesses have suffered in Europe since the implementation of the General Data Protection Regulation (GDPR). In fact, according to some reports, investments in startups are down an astounding 40 percent.**

    a. **How can we guard against the same happening here?**

Because the GDPR has now been in effect for only a year, there is a limited basis upon which researchers and others have been able to draw conclusions about potential effects that the GDPR has had on investments in startups. That said, the FTC's recent Hearings on Competition and Consumer Protection in the 21st Century did include discussion of research showing that, in the European Union, the number of venture capital technology deals and the average amount invested per deal declined in the first several months after the GDPR took effect. Researchers have stated their intent to monitor to see whether those observations remain true on a longer-term basis. The FTC will keep abreast of such research.

Small firms want growth and ease of access to markets. They want to focus on building their businesses, not legal compliance. Congress recognized this dynamic with respect to the securities laws when it passed the JOBS Act in 2012. The best way to protect startups in a new privacy law are to keep the rules clear and constant over time (including limiting rulemaking authority), preempt a multiplicity of state laws, and ensure that enforcement does not chill innovation.

2. **Commissioner Phillips, when the FTC enjoyed broad rulemaking authority in the 1970s it got so bad that a Democratic-led Congress cut funding to the Commission for several days.**

    a. **How should the events of the past inform our discussion about FTC rulemaking today and under future administrations**

Congress has the legal and political mandate to make the key decisions about what the rules of the road for business and the public should be. When too much rulemaking authority is delegated, regulators may usurp legislative authority and the public may end up with rules the content of which can change dramatically over short periods of time. Businesses need confidence to plan and consumers are best off when they can rely on rules they know. Too much delegated power also is not good for the Commission itself, involving the agency – a law enforcement body – and its Commissioners in political issues, distracting us from our attention on our core, bipartisan mission.

    b. **Do you have any concerns about the scope of the Administrative Procedures Act rulemaking in conjunction with privacy legislation? If so, what are those concerns?**

The purported benefit of APA-style rulemaking is its efficiency, but that can be a bad thing depending on the scope of the authority. Privacy legislation necessarily demands complex value judgments, as it must define harms, create new rights for American consumers that have not previously existed in law, and impose substantial new obligations on American businesses. These are weighty issues that are the domain of our democratically elected Congress, not agency Staff and Commissioners. To the extent the Commission has rulemaking authority under any new privacy legislation, that rulemaking should be limited and targeted. It should not involve establishing substantive standards, but rather focus on the technical details – such as the form of a particular notice – and be subject to the very clear guidance of Congress to ensure that the agency remains faithful to Congressional intent.