

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 Rebecca Kelly Slaughter, 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 raised and their possible impact on consumers in the online event tickets marketplace. In my opening remarks, I called for industry to adopt all-in upfront pricing to limit sticker shock and improve consumers’ ability to comparison shop. Should industry fail to do so, government intervention may be appropriate. The written and audio-visual record of the workshop is available at: <https://www.ftc.gov/news-events/events-calendar/2019/03/online-event-tickets-workshop>.

- 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 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 recent ticketing workshop. Those comments overwhelmingly concerned

hidden or inadequately disclosed ticketing fees or the high cost of such fees. I am concerned that in many cases the fee disclosures can happen only after the consumer creates an account and thereby provides PII. And I share concerns about creating artificial scarcity—whether it is through the venue’s practice of holding tickets back or the unscrupulous use of bots—to create artificially high prices for tickets. These issues, in addition to the ones you raise, should be the focus of continued Commission investigatory attention.

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

The practices you raise and others discussed at the ticket workshop make clear that the ticket market is not functioning well for consumers. In my opening remarks at the workshop, I called for a federal solution to the problem of bait-and-switch fees that add 30% to the cost of the ticket on the final check-out screen, long after a consumer has signed in, selected seats, and sometimes entered credit card information. Consumers deserve and demand all-in upfront pricing for live events, just as airlines are required to provide by federal rule. I was pleased that in the panel on the subject, representatives from SeatGeek, StubHub, Eventbrite, and Ticketmaster all stated that they would support a federal standard that requires all-in upfront pricing for tickets.

In addition to the consumer protection matters you raise, we must also think carefully about competition concerns in the ticketing market. If the ticket marketplace is not functioning competitively, consumers will never be adequately protected.

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?**

Yes. The FTC’s call for legislation that would require data brokers to be more transparent and give consumers more control over the collection and sharing of their data is just as critical now as it was in 2014—if not more so. In the 2014 report, the Commission found that there was “a fundamental lack of transparency about data broker industry practices. Data brokers acquire a vast array of detailed and specific information about consumers; analyze it to make inferences about consumers, some of which may be considered sensitive; and share the information with clients in a range of industries. All of this activity takes place behind the scenes, without consumers’ knowledge.” In the five years that have passed since the FTC issued its report, the industry has only grown more opaque—while reaching even more consumer data. I am concerned that non-consumer facing entities such as data brokers, ad networks and analytics companies are operating with near total impunity—invisible to consumers and clouded to regulators.

- 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?**

I share your concern about the importance of protecting American consumers and competition in technology markets. In February, the FTC announced the creation of a Technology Task Force, a team that is intensely focused addressing competition in the technology industry. While I cannot publicly comment on any pending law enforcement investigations or confirm the existence of any investigations, I believe the Commission should be and is committed to investigating alleged anticompetitive conduct and taking strong action when it finds violations.

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

The FTC enforces Section 5 of the FTC Act, which gives it the authority to investigate and challenge “unfair methods of competition.” The antitrust statutes are purposely broad and intended to cover evolving patterns of conduct or market structure; however, especially in light

of recent jurisprudence, the burden on the government to succeed in court is high. Under current Section 5 jurisprudence, the conduct you identify would likely be subject to a “rule of reason” analysis and require a fact-intensive investigation into whether the anticompetitive effects of the conduct outweigh the procompetitive justifications. We should always be using our existing statutory authority to its maximum effectiveness, and we should not be afraid to bring hard or novel cases. That said, it may be worthwhile for Congress to consider legislation to correct problematic court decisions. An even more pressing problem than constraints on our statutory authority, however, is constraints on our resources. Over the past 30 years, FTC funding has not kept pace with the demands placed on it as a result of the expansion of our economy, the volume of merger activity, and the resource intensity of merger review and litigation. The Commission is always looking for ways to use existing resources more efficiently, but additional resources would be put to good use and help us to do more to further our competition and consumer protection missions.

- 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, or 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 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, including electronically.

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?

No. While I share your concern about robocalls that target and irritate consumers, the robocalls in question here do not go to individual consumers or personal cell phones; they go to the business lines of contact lens prescribers. 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 live person. The evidence suggests that these calls can be an efficient method of verification. Still, 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?**

The FCLCA reflects Congress's understanding of the need to prioritize both patient safety and access to affordable contact lenses. The Commission does not believe patients should be able to purchase contacts without a valid prescription. The SNPRM's proposed changes improve patient access to contact lens prescriptions and address concerns with the passive verification requests and alterations by sellers. Speaking for myself, I am interested in learning from comments in answer to the questions asked in the SNPRM how often a prescriber's election of brand or manufacturer is based on medical judgment about the ocular health of the patient (for example, the patient's astigmatism requires toric lenses). I am also interested in learning, for circumstances in which a prescriber elects a brand or manufacturer for reasons other than medical judgment about ocular health, what reasons inform the selection and whether it is common for a patient to test the fit of more than one material, brand, or manufacturer before receiving a prescription. In such circumstances, I am concerned about whether a consumer is able to make an informed choice among competing 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?**

I am not aware of any Commission audits of online sellers to determine the number of lenses provided to patients.

- 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 2016 NPRM, the Commission considered the issue of patients' purchasing excessive quantities of contact lenses. Although concerned by 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. Staff

¹ See Fed. Trade Comm'n, Contact Lens Rule, Notice of Proposed Rulemaking, 81 Fed. Reg. 88526, 88549–50 (Dec. 7, 2016); 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).

has investigated and will continue to investigate specific complaints of illegal sales related to excessive quantities. We will continue to monitor the marketplace, taking action against violations as appropriate.

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. Because 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?

Under current Section 5 jurisprudence, the conduct you identify would likely be subject to a “rule of reason” analysis and require a fact-intensive investigation into whether the anticompetitive effects of the conduct outweigh the procompetitive justifications. In February, the FTC announced the creation of a Technology Task Force, a team that is intensely focused on addressing competition in the technology industry. While I cannot publicly comment on any pending law enforcement investigations or confirm the existence of any investigations, I believe the Commission is committed to investigating alleged anticompetitive conduct and taking strong action when it finds violations of the law.

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?

The Commission must closely scrutinize mergers and conduct in technology markets. The FTC enforces Section 5 of the FTC Act, which gives it the authority to investigate and challenge “unfair methods of competition.” Under current Section 5 jurisprudence, the conduct you identify would likely be subject to a “rule of reason” analysis and require a fact-intensive investigation into whether the anticompetitive effects of the conduct outweigh the procompetitive justifications.

The antitrust statutes are purposely broad and intended to cover evolving patterns of conduct or market structure; however, especially in light of recent jurisprudence, the burden on the government to succeed in court is high. We should always be using our existing statutory authority to its maximum effectiveness, and we should not be afraid to bring hard or novel cases. That said, it may be worthwhile for Congress to consider legislation to correct problematic court decisions and decrease the burden on the agency.

An even more pressing problem than constraints on our statutory authority, however, is constraints on our resources. Over the past 30 years, FTC funding has not kept pace with the demands placed on it as a result of the expansion of our economy, the volume of merger activity, and the resource intensity of merger review and litigation. The Commission is always looking for ways to use existing resources more efficiently, but additional resources would be put to good use and help us to do more to further our competition and consumer protection missions.

- 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?**
 - 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?**

While it would be imprudent to comment on any particular company or fact pattern, as a general matter I believe the FTC should always carefully scrutinize practices that may harm consumers and pursue appropriate action if the law has been violated. Ensuring that consumers’ data privacy and security is protected by the companies they patronize—and on which they depend—is a top priority for me and for the Commission as a whole.