

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 Christine S. Wilson, 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 will examine 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 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 upcoming ticketing workshop. Those comments overwhelmingly concerned hidden or inadequately disclosed ticketing fees and/or the high cost of such fees. The FTC has received consumer complaints or comments regarding the practices you outline, but they are not 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 transparency and consumer understanding in the online event tickets marketplace; however, it is unclear whether requiring ticket buyers to provide personally identifying information, holding back tickets for later sale, or restricting the transfer of tickets are unfair or deceptive acts or practices under Section 5 of the FTC Act.

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 specifically. It has supported federal privacy and security legislation that would give the Commission authority to seek civil penalties for first-time privacy and security violations; conduct targeted APA rulemaking; and exercise jurisdiction over common carriers and non-profit entities. I am concerned about data broker collection, use, and sale of sensitive consumer information and encourage Congress to consider data broker practices in conjunction with its deliberations regarding federal privacy 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?**

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

As more and more of the nation’s commerce takes place on online platforms, the operation of these platforms has received increased scrutiny by both the public and the antitrust agencies. I believe the FTC has many of the tools it needs to protect consumers online, although I have called for Congress to consider giving the FTC the authority to seek civil penalties for initial privacy violations, which would create an important deterrent effect. Moreover, I believe consumers would benefit if the FTC had broader enforcement authority to take action against common carriers and nonprofits, which it cannot currently do under the FTC Act. That said, you can be assured that the agency is vigilant in its oversight of the internet economy, and we will not hesitate to take strong and appropriate action against any act or practice that violates any statute that we enforce.

Given the growing importance of high-technology industries, the FTC’s Bureau of Competition recently announced the creation of a Technology Task Force that will enhance the Commission’s antitrust focus on technology-related ecosystems, including technology platforms and markets for online advertising, social networking, mobile operating systems, and apps. The task force

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 competition.

The FTC does not publicly comment on pending law enforcement investigations. As a general matter, however, I can say that the U.S. antitrust laws prohibit certain kinds of conduct that harm consumers by diminishing competition. Some conduct, like price-fixing, is so pernicious that it is condemned as *per se* unlawful without an elaborate inquiry. In the remaining cases, however, we must conduct a fact-specific inquiry to assess whether the challenged conduct is, on net, anticompetitive. I look forward to supporting the work of the task force as it conducts its analysis of these issues.

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 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 live 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 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.

- 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.

The Commission recently has taken enforcement action with respect to unlawful conduct by a seller. Specifically, 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

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)

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).

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?**
 - 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.

- 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?**

Consumers' secure online experiences depend on many factors, and the ecosystem continues to evolve quickly. The Commission is committed to promoting consumer safety online and will monitor these changes to evaluate whether they are likely to harm consumers.

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 Robert E. Latta (R-OH)

- 1. Commissioner Wilson, to date companies have failed to adequately explain to consumers how their information is collected, used, and often shared online. I believe any federal privacy bill must increase transparency.**

- a. Can you speak to why transparency is important?**

Transparency with respect to data collection, use, and sharing practices is important for multiple reasons. First, transparency helps to facilitate informed decisions whereby a consumer can choose to provide their data to those businesses whose data practices comport with the consumer's preferences and expectations. Second, transparency promotes competition by enabling consumers to compare and contrast businesses' data practices and enabling businesses to compete based on their willingness and ability to meet consumers' preferences and expectations. Third, transparency promotes accountability by providing a basis for the FTC and other stakeholders to be able to take action to hold businesses accountable if their actual practices do not comport with their stated practices. Finally, the process of publicly committing to data practices serves an important internal purpose. This process typically requires companies to examine and confirm their practices to ensure compliance with public commitments.