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6 OVERSIGHT OF THE FEDERAL TRADE

7 COMMISSION: STRENGTHENING PROTECTIONS FOR

8 AMERICANS' PRIVACY AND DATA SECURITY

9 WEDNESDAY, MAY 8, 2019

10 House of Representatives

11 Subcommittee on Consumer Protection and Commerce

12 Committee on Energy and Commerce

13 Washington, D.C.

14

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17 The subcommittee met, pursuant to call, at 10:30 a.m.,

18 in Room 2123 Rayburn House Office Building, Hon. Janice

19 Schakowsky [chairwoman of the subcommittee] presiding.

20 Members present: Representatives Schakowsky, Castor,

21 Kelly, O'Halleran, Lujan, Cardenas, Blunt Rochester, Soto,

22 Rush, Matsui, McNerney, Dingell, Pallone (ex officio),

23 Rodgers, Upton, Burgess, Latta, Guthrie, Bucshon, Hudson,

24 Carter, Gianforte, and Walden (ex officio).

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25 Staff present: Billy Benjamin, Systems Administrator;
26 Jeff Carroll, Staff Director; Evan Gilbert, Press Assistant;
27 Lisa Goldman, Counsel; Waverly Gordon, Deputy Chief Counsel;
28 Tiffany Guarascio, Deputy Staff Director; Alex Hoehn-Saric,
29 Chief Counsel, C&T; Zach Kahan, Outreach and Member Service
30 Coordinator; Meghan Mullon, Staff Assistant; Alivia Roberts,
31 Press Assistant; Tim Robinson, Chief Counsel; Chloe
32 Rodriguez, Policy Analyst; Ben Rossen, FTC Detailee; C.J.
33 Young, Press Secretary; Jordan Davis, Minority Senior
34 Advisor; Margaret Tucker Fogarty, Minority Staff Assistant;
35 Melissa Froelich, Minority Chief Counsel, CPAC; Bijan
36 Koochmaraie, Minority Counsel, CPAC; and Brannon Rains,
37 Minority Staff Assistant.

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38 Ms. Schakowsky. The Subcommittee on Consumer Protection
39 and Commerce will now come to order. We will begin with
40 member opening statements, and I will begin for 5 minutes.

41 So, good morning, and thank you to the Federal Trade
42 Commission for being with us this morning. It is really an
43 honor to have all of you here. It means a great deal to us.

44 The FTC is an independent agency created by Congress to
45 protect the American people. Recent media reports have
46 focused on the Federal Trade Commission's potentially record-
47 breaking fine of Facebook. The fact of the matter is that I
48 believe that the public information known about this case
49 underscores the need for comprehensive privacy legislation.
50 And we are really going to focus, at least I am, on privacy
51 legislation and what we can do.

52 And while I appreciate the Commission's work on and
53 action on the Facebook case, I believe the reality is that a
54 large fine in a single case does not meaningfully solve the
55 problems that consumers face because of the FTC's lack of
56 tools it needs to fulfill the mission to protect consumers in
57 today's economy. The FTC needs increased funding and the
58 APA, Administration Procedures Act -- I can't stand those
59 acronyms, okay -- the rulemaking authority, at a minimum, to
60 restore consumers' confidence in today's digital and brick
61 and mortar marketplace, the FTC should be able to pursue

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62 multiple investigations both large and small.

63 And, Chairman Simons, I want to thank you and offer my
64 support for APA rulemaking that you said that you wanted to
65 see. We know the American people are counting on us to act.

66 According to a recent survey, 67 percent of American adults
67 want the government to act to protect them and to protect
68 their privacy. But as it stands right now, the FTC does not
69 have authority to obtain civil penalties for initial
70 violations for most unfair or deceptive practices, making
71 matters much worse.

72 The Federal Trade Commission has only 40 full-time staff
73 devoted to privacy and data security. Contrast that with the
74 United Kingdom Information Commissioner's Office which has
75 about 500 employees for a country about one-fifth of the size
76 of the United States. And unfortunately, Chairman Simons,
77 unlike other recent administrations you have not appointed a
78 chief technologist, and, in fact, only five people at the FTC
79 right now are identified as technologists.

80 Energy and Commerce Democrats feel we have an obligation
81 to provide a solid piece of legislation that protects
82 consumer privacy. We have begun conversations now with the
83 Republicans as well, and I am very hopeful that legislation
84 will be bipartisan and I am looking forward to working with
85 all of you on the Federal Trade Commission in designing this

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86 legislation. We welcome the commissioners today to learn how
87 we can assist them in fulfilling their mission, our joint
88 mission. I want to yield the balance of my time to
89 Congressman Lujan.

90 Mr. Lujan. Thank you, Chairwoman Schakowsky. And I
91 thank Chairman Pallone, Ranking Members Walden and Rodgers,
92 for this important hearing today on privacy and data
93 security.

94 Let me start with just a few numbers: 500 million, 148
95 million, and 87 million. These are the numbers of consumers
96 impacted by the Marriott, 500 million; Equifax data breaches,
97 148 million; and the Facebook-Cambridge Analytica scandal, 87
98 million. These massive numbers represent real people, people
99 whose trust and privacy has been violated. Most of them not
100 been made whole, still vulnerable today.

101 Here is another number, 21. It has been 21 years since
102 Congress passed even limited privacy legislation, the
103 Children's Online Privacy Act. In 1998, America Online had
104 14 million subscribers, Google was a month old, and Facebook
105 didn't even exist. These numbers make it real; we must act
106 to pass comprehensive data privacy and security legislation.

107 And most recently in 2017, when we discovered and
108 learned about the breach with Equifax back in September of
109 '17, there were hearings held in October of '17. It appeared

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110 that there were commitments made in this committee to the
111 American people that action would be taken before the holiday
112 season and here we are today, still where no action taken and
113 that is why this hearing matters so very much.

114 And so with that, Madam Chair, I thank you for the
115 hearing. I urge us to act. And I thank the commissioners
116 for their testimony and I look forward to today's discussion.

117 And I yield back. Ms. Schakowsky. Would anyone else on the
118 Democratic side want the time that is remaining? Otherwise,
119 I yield back and I now recognize the ranking member, Ms.
120 McMorris Rodgers, for her opening statement.

121 Mrs. McMorris Rodgers. Thank you, Madam Chairman, and
122 welcome to everyone, the chairman and the commissioners from
123 the Federal Trade Commission.

124 Today's hearing is very important. Whether through
125 deceptive advertising, fraud, or other schemes, bad actors
126 regularly try to game the system and destroy trust. The FTC
127 has been one of the top cops on the consumer protection beat
128 for decades. I am glad that you are here to discuss the
129 Commission's vital mission to protect consumers and promote
130 competition and innovation especially as it relates to one of
131 the most important issues today, our privacy.

132 In America's 21st century economy, our days start and
133 end by exchanging our information with products that save us

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134 time, keep us informed, connect us with our communities.
135 Many of us start our day by asking Alexa or Siri, "What is
136 the weather today?" Then we browse Facebook and Instagram,
137 open some emails, read the news, check for traffic updates on
138 our iPhones, and if the traffic doesn't look too bad there is
139 time to order groceries to be picked up or delivered after
140 work. And that is just before we walk out the door. All day
141 long we are sharing our information with the internet
142 marketplace. And for people who use health trackers and
143 apps, it might not even stop when you go to sleep.

144 This free flow of information drives much of the
145 innovation and technology growth here in the United States.
146 Bottom line, we make choices every day to be connected, and
147 when we do we must be able to trust that our privacy is
148 protected. We deserve to know how our data is being
149 collected, how it is being used, and who it is being shared
150 with. There shouldn't be so many surprises and these
151 protections shouldn't change depending upon which state we
152 are in.

153 In a recent survey, 75 percent of respondents said
154 privacy protections should be the same everywhere they go.
155 The vast majority of Americans want the same protections
156 whether they live in Eastern Washington, San Francisco, New
157 Jersey, or Illinois. That is why I have been advocating and

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158 leading for a national standard for data privacy that, one,
159 doesn't leave our privacy vulnerable in a patchwork; two,
160 increases transparency and targets harmful practices like
161 Cambridge Analytica; three, improves data security practices;
162 and four, is workable for our nation's innovators and small
163 businesses.

164 So, today, I look forward to hearing from the Federal
165 Trade Commission which is the main cop on the beat to enforce
166 privacy standards, promote transparency, and hold companies
167 accountable. The FTC's mission is to protect consumers and
168 promote innovation. Our four principles for data privacy law
169 are in line with the mission. It is about protecting
170 consumers from concrete harms, empowering the choices that
171 they make, and also promoting new technologies that we
172 haven't even dreamed of yet. This Congress should lead on
173 writing privacy rules of the road. I remain ready and
174 willing to work with my colleagues on this committee for a
175 bipartisan solution that puts consumers and their choices
176 first.

177 In various proposals, some groups have called for the
178 FTC to have additional resources and authorities. I remain
179 skeptical of Congress delegating broad authority to the FTC
180 or any agency. However, we must be mindful of the
181 complexities of this issue as well as the lessons learned

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182 from previous grants of rulemaking authority to the
183 Commission.

184 The FTC's jurisdiction is incredibly broad. Its
185 authority extends beyond just big tech, touching almost every
186 aspect of our marketplace from loyalty programs at your local
187 grocery store to your favorite coffee shop. The existing
188 statutory rulemaking authority given to the FTC by Congress
189 must also be part of the discussion. Had the FTC undertaken
190 rulemaking efforts on any number of issues we will discuss
191 today, even starting 8 to 10 years ago, those efforts could
192 have already been completed. The history of the FTC's
193 authority is important and it should not be transformed from
194 a law enforcement agency to a massive rulemaking regime.

195 To understand the pain this could cause, look no further
196 than GDPR in Europe. Investment in startups in Europe is
197 down 40 percent and thousands of U.S. firms are no longer
198 operating in the EU because they can't take on the millions
199 of dollars in compliance cost. If we decide to increase
200 FTC's resources and authority to enforce privacy law, then
201 this committee must exercise its oversight of the Commission
202 to its fullest. Oversight must be a part of the conversation
203 so Congress does its job to review and hold the FTC
204 accountable.

205 Thank you, everyone, for being here and I look forward

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206 to our discussion. Ms. Schakowsky. The gentlelady yields
207 back. And now I recognize the chair of the full committee,
208 Mr. Pallone, for 5 minutes.

209 The Chairman. Thank you, Madam Chair.

210 The Federal Trade Commission plays a critical role in
211 protecting American consumers and promoting competition in
212 the marketplace. It is a relatively small agency, but the
213 breadth of its mission is vast. As the nation's consumer
214 protection agency, the FTC works to protect consumers from a
215 variety of unfair and deceptive practices including false
216 advertising, illegal telemarketing, unfair debt collection
217 and fraud.

218 Last year, the FTC received nearly three million
219 complaints from consumers who reported losing around one and
220 a half billion dollars to fraud. Seniors particularly were
221 preyed upon by criminals pretending to need money to bail
222 their grandchildren out of jail. Veterans were tricked into
223 giving their credit card information to a thief who claimed
224 to work for the Veterans Choice Program, just as examples.
225 And these two examples of the thousands of frauds the FTC
226 face every day, many are perpetrated through robocalls which
227 I am working to address through the Stopping Bad Robocalls
228 Act.

229 But that is not the only way fraudsters commit their

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230 offenses and the FTC needs more support and more authority to
231 prevent scams and enforce the law. The FTC is also the
232 nation's primary enforcer in the area of privacy and data
233 security. Talk about a daunting job. When you consider that
234 companies today monitor every move we make, they are tracking
235 where we go, who we are with, our private conversations, our
236 health, the websites we visit, and increasingly what we do
237 inside our homes. And as we have learned from the concerning
238 privacy issues surrounding Cambridge Analytica and Facebook
239 and from massive data breaches like the one at Equifax, there
240 is little reason to believe that consumers can trust these
241 companies with our personal data.

242 The FTC can and should be doing more to protect
243 consumers and Congress needs to give the FTC the tools it
244 needs to be more effective. That starts with resources. The
245 FTC has fewer employees today than it did in the 1980s when
246 the internet did not exist. It has just 40 employees
247 responsible for protecting the data of 300 million Americans.

248 I think that is just unacceptable, particularly when you
249 consider that the United Kingdom, which has a much smaller
250 population, has more than 500 people who protect the privacy
251 and data of its residents.

252 So we have to give the FTC the resources it needs to
253 become a global leader on privacy and data security. The FTC

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254 also needs more authority to prevent privacy abuses from
255 happening in the first place and to ensure that companies
256 properly secure the personal data entrusted to them. Too
257 often, the FTC can do little more than give a slap on the
258 wrist to companies the first time they violate the law. That
259 is because it lacks the authority to impose a monetary
260 penalty for initial violations.

261 Currently, the FTC can only order a company to stop the
262 bad practices and promise not to do it again. And if we
263 really want to deter companies from breaking the law, the FTC
264 needs to be able to impose substantial fines on companies the
265 first time. To make matters worse, there are no strong and
266 clear federal privacy laws and regulations that establish a
267 baseline for how companies collect, use, share, and protect
268 consumer information. The FTC lacks the ability to issue
269 such regulations, leaving Americans left to the whims of
270 corporations.

271 Companies should not be gathering consumer information
272 without a good reason and should have clear consent when they
273 use that information for purposes a consumer would not
274 reasonably expect. When I search online about the side
275 effects of a medicine, I don't expect that information to be
276 shared with advertisers, data brokers, or insurance
277 companies, and it shouldn't be shared unless I say so.

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278 Companies also need to protect the data they collect so
279 Americans are not as vulnerable to identity theft, scams, and
280 other unfair and deceptive acts as they are today. So
281 Congress should pass, or must pass strong, comprehensive
282 privacy legislation, and this committee intends to take that
283 action. The legislation that we pass should give consumers
284 control over their personal data including giving consumers
285 the ability to access, correct, and delete their personal
286 information. And it should shift the burden to companies to
287 ensure they only use the information consistent with
288 reasonable consumer expectations.

289 So I look forward to hearing from all the commissioners
290 about how the FTC can better fulfill its mission in this
291 important area of consumer protection. And unless somebody
292 wants the time, there is not much left -- yeah, I will yield
293 to the gentlewoman from Florida.

294 Ms. Castor. Well, I thank the chairman of the committee
295 for yielding the time.

296 And I just wanted to start out by saying that America
297 needs a modern online privacy law and the Federal Trade
298 Commission needs the tools and resources to effectively
299 enforce law and hold bad actors accountable. And I think, I
300 encourage you all today to also discuss the Children's Online
301 Privacy Protection Act because I think it is in need of

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302 substantial updates, especially looking at how we enforce it,
303 the sham safe harbor provisions, and your opinions on
304 adopting some reasonable collection parameters. So thank you
305 and I yield back.

306 The Chairman. And I yield back, Madam Chair.

307 Ms. Schakowsky. The gentleman yields back and now I
308 will recognize the ranking member of the committee, Mr.
309 Walden, for 5 minutes.

310 Mr. Walden. Good morning, Madam Chair. Thanks for
311 having this hearing. I want to welcome our commissioners as
312 well for being here from the Federal Trade Commission. Thank
313 you. We will be informed by your testimony and we appreciate
314 the work you do at the FTC.

315 We know you're tasked with broad and important
316 responsibilities and it is a jurisdiction that spreads out
317 over almost every aspect of the United States economy from
318 large household name technology companies at Silicon Valley
319 to small mom and pop shops in rural America. But recently
320 concerns surrounding data security and data privacy including
321 questions about what information is collected, how companies
322 use that information, who that information is shared with,
323 and what protections exist for consumers have demanded more
324 and more congressional attention and appropriately so.

325 In the last Congress, this committee held very high-

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326 profile hearings around incidents involving data security and
327 data privacy issues with CEOs. They sat right there from
328 Equifax; Mark Zuckerberg was there for 5 hours from Facebook;
329 we had those from Twitter as well. We also held hearings
330 focused on securing consumer information, on understanding
331 algorithmic decision making, exploring the online advertising
332 ecosystem and how it operates, and an oversight hearing with
333 you, the FTC. Privacy was a premier issue during these
334 hearings, but as we learned this is also a tough issue to
335 legislate on. Privacy does not mean the exact same thing to
336 each and every person.

337 I want to echo the sentiments of my colleague,
338 Representative Rodgers, who outlined the vast benefits
339 consumers also get from the use of their information online.

340 It is a goods for services exchange. We don't always know
341 that but we do benefit from that. We cannot lose sight of
342 the tremendous benefits consumers get from use of those data:
343 access to top tier journalism, affordable and quickly
344 delivered products, telehealth and research initiatives, and
345 much, much more.

346 Here in the United States we have a thriving startup
347 ecosystem and a regulatory environment that enables small
348 businesses to grow and compete in no small part because the
349 free flow of information. And as a result, companies

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350 innovate, they create jobs in America, and offer consumers
351 options and convenience that most of us never dreamed would
352 be possible.

353 I believe it is important we work together toward a
354 bipartisan, federal privacy bill and we are ready and willing
355 to tackle crafting such a bill. I think we were informed by
356 our hearings in the last 2 years and are more than prepared
357 now to move forward to write legislation in a bipartisan way.

358 A federal privacy bill must set one national standard.
359 Allowing a patchwork of state laws will not only hurt
360 innovation and small businesses, but will limit consumers'
361 options online. Consumers expect a seamless online
362 experience and I do not want to see that taken away.

363 We must protect innovation and small businesses. We
364 should learn from Europe where large companies are only
365 getting larger and unfortunately small companies are getting
366 smaller or disappearing altogether online. You know,
367 JPMorgan Chase & Company CEO Jamie Dimon recently said Dodd-
368 Frank created a moat around his company, which is exactly
369 what we risk doing with the likes of Google and Facebook and
370 the big ones, because they will always be able to comply and
371 they will just get bigger if we don't craft the law
372 correctly.

373 We must enhance security for consumers. Companies must

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374 have reasonable practices in place to protect consumer
375 information, period. We must increase transparency.
376 Consumers deserve to know how their information is collected,
377 how it is used, and how it is shared. And we must improve
378 accountability. When companies fail to keep their promises
379 or outright misuse consumer information, those companies must
380 be held accountable. This goes to the heart of the
381 enforcement issues. Federal Trade Commission accomplishes
382 its consumer protection mission through law enforcement, by
383 bringing action against companies who engage in unfair or
384 deceptive acts or practices. And we know you have a big
385 decision before you right now involving one of those
386 companies.

387 Through advocacy, through consumer and business
388 education efforts, you do it all. The FTC can file
389 injunctions, you can levy civil penalties, and you can seek
390 remedies on behalf of consumers to redress harms. Federal
391 Trade Commission generally operates a highly effective,
392 bipartisan agency, returning millions directly to consumers
393 after they are defrauded, and I look forward to hearing an
394 update on those efforts. I also look forward to hearing
395 about the consumer protection hearings and the agency has
396 learned about privacy harms and risks.

397 Every agency has challenges and recent court changes in

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398 cases have changed the direction of some agency activity to
399 refocus on due process. I am encouraged that these types of
400 improvements would help small businesses understand their
401 rights when faced with the full force of the FTC. I believe
402 the FTC is the right agency to enforce new privacy law with
403 appropriate safeguards and process improvements to ensure
404 strong, consistent enforcement.

405 Some have suggested the quick answer is more money, more
406 rulemaking authority, and more employees. There is no quick
407 fix, I would argue. I would like to hear from the chairman
408 about his views on unbounded rulemaking at the FTC and
409 whether the agency can compete for talent with the big tech
410 companies that are moving to the D.C. area. And we must
411 consider market realities and ask if there is more effective
412 ways to get experts to the FTC for unique cases.

413 So, Madam Chair, thanks for having this hearing. I
414 think it is really important and we look forward to working
415 with you and others on the committee to get this right and
416 get it into law. And I yield back.

417 Ms. Schakowsky. The gentleman yields back. And the
418 chair would like to remind members that pursuant to committee
419 rules, all members' written opening statements shall be made
420 part of the record.

421 Next, I am going to introduce all of our witnesses, but

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422 I want to tell all of you that I had a standing-room-only
423 FTC-sponsored scam workshop in my district along with
424 Congressman Brad Schneider, which was amazing, and I would
425 encourage all members to consider doing that. The turnout
426 was unprecedented and people really appreciated it. So thank
427 you.

428 So let me introduce our witnesses. The honorable Joseph
429 Simons, Chairman of the Federal Trade Commission;
430 Commissioner Christine Wilson; Honorable Commissioner Rebecca
431 Kelly, Rebecca Kelly Slaughter, sorry; Commissioner Noah
432 Joshua Phillips; Commissioner Rohit Chopra. We are happy to
433 have you all and we want to thank our witnesses for joining
434 us today. We look forward to your testimony.

435 And at this time, the chair will now recognize each
436 witness for 5 minutes to provide their opening statements.
437 Before we begin, I would like to explain the lighting system.

438 I think probably most of you know that the light will
439 initially be green at the start of your opening statement,
440 then it will go to yellow when you have 1 minute, and then it
441 will go to red. And we would appreciate it very much if you
442 would end in those 5 minutes. So, Chairman Simons, you are
443 recognized for your 5 minutes.

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444 STATEMENTS OF JOSEPH J. SIMONS, CHAIRMAN, FEDERAL TRADE
445 COMMISSION; CHRISTINE WILSON, COMMISSIONER, FEDERAL TRADE
446 COMMISSION; REBECCA KELLY SLAUGHTER, COMMISSIONER, FEDERAL
447 TRADE COMMISSION; NOAH JOSHUA PHILLIPS, COMMISSIONER, FEDERAL
448 TRADE COMMISSION; ROHIT CHOPRA, COMMISSIONER, FEDERAL TRADE
449 COMMISSION

450

451 STATEMENT OF JOSEPH SIMONS

452

453 Mr. Simons. Chairman Schakowsky, Ranking Member
454 Rodgers, and distinguished members of the subcommittee, it is
455 an honor and a privilege to appear before you today, and
456 especially with my esteemed colleagues, my fellow
457 commissioners.

458 The FTC is a highly effective, independent agency with a
459 broad mission to protect consumers and maintain competition
460 in most sectors of the economy. On the competition side,
461 examples of our vigorous enforcement program include cases
462 like Impax and AbbVie where we successfully attacked
463 anticompetitive conduct by pharmaceutical companies.

464 Ms. Schakowsky. If you could hold just for a minute.

465 We got the message, and if you will put the signs down,
466 appreciate it.

467 Thank you. Go ahead.

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468 Mr. Simons. Yes. We successfully attacked
469 anticompetitive conduct by pharmaceutical companies,
470 achieving a \$448 million judgment in the latter case. We
471 also recently filed an important case against a company
472 called Surescripts, a health IT company with a monopoly over
473 e-prescribing that is maintaining and acquired that monopoly
474 through exclusionary conduct.

475 And on the research and policy front, our extensive
476 Hearings on Competition and Consumer Protection in the 21st
477 Century have involved more than 350 panelists and more than
478 850 public comments. On the consumer protection side, we are
479 very active as well, with matters ranging from student debt
480 relief scams to various types of false advertising and many
481 other cases in between.

482 But today I would like to focus my remarks on data
483 security and privacy. As you have said, the FTC has been the
484 primary federal agency charged with protecting consumer
485 privacy since 1970 with the passage of the FCRA. From the
486 growth of the internet to the mobile device explosion to the
487 arrival of the Internet of Things and artificial
488 intelligence, we have continuously expanded our focus on
489 privacy to reflect how consumer data fuels these changes in
490 the marketplace.

491 Our primary legal authority in this space is Section 5

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492 of the FTC Act, which prohibits deceptive or unfair
493 commercial practices. But Section 5 is an imperfect tool --
494 imperfect tool. For example, Section 5 does not allow the
495 Commission to seek civil penalties for first-time privacy
496 violations. It does not allow us to reach nonprofits and
497 common carriers even when their practices have serious
498 implications for consumer privacy and data security.

499 These limitations have a critical effect on our ability
500 to protect consumers, which is why we urge Congress to enact
501 privacy and data security legislation enforceable by the FTC
502 which grants the FTC civil penalty authority, targeted APA
503 rulemaking authority, and jurisdiction over nonprofits and
504 common carriers. Irrespective of any new legislation,
505 however, we will continue to use every tool currently at our
506 disposal to address consumer harm including authorities given
507 to us by the Congress like the Children's Online Privacy
508 Protection Act and the Safeguards Rule.

509 We have aggressively pursued privacy and data security
510 cases to date bringing more than 65 data security cases as
511 well as more than 60 general privacy cases. For example, we
512 recently brought cases against two companies whose alleged
513 lax security practices resulted in a breach of eight million
514 consumers' data. And in March, the FTC announced a record
515 \$5.7 million civil penalty as part of its settlement with

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516 video social networking app Musical.ly for collecting
517 children's personal information online without first
518 obtaining parental consent.

519 To complement our efforts, we also engage in policy
520 initiatives in the privacy and data security areas. In
521 addition to the hearings I mentioned, which included 4 days
522 of panels that specifically addressed consumer privacy and
523 data security, we recently issued 6(b) orders to several
524 internet service providers to evaluate their privacy
525 practices. We will use the information we learned from this
526 study to better inform our policy and our enforcement work.

527 Finally, many of our privacy and data security
528 investigations in cases involve complex facts and
529 technologies and well-financed defendants. And as we told
530 you in response to Chairman Pallone and Schakowsky's resource
531 letter, it is critical that the FTC have sufficient resources
532 to support its investigative and litigation needs
533 particularly as demand for enforcement in this area continues
534 to grow. We are committed to using every resource
535 effectively to protect consumers and to promote competition,
536 to anticipate and respond to changes in the marketplace, and
537 to meet current and future challenges.

538 We look forward to working with the subcommittee and the
539 Congress and I am very happy to answer your questions. Thank

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540 you so much.

541 [The prepared statement of Mr. Simons follows:]

542

543 *****INSERT 1*****

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544 Ms. Schakowsky. And thank you, Mr. Chairman, sticking
545 within the time, too, appreciate that.

546 And now, Commissioner Wilson, you are recognized for 5
547 minutes.

548

549 STATEMENT OF CHRISTINE WILSON

550

551 Ms. Wilson. Chairman Schakowsky, Ranking Member
552 Rodgers, Chairman Pallone, and Ranking Member Walden, thank
553 you for the opportunity to testify. It is an honor to appear
554 before you and the distinguished members of the subcommittee
555 for the first time since I joined the Commission 8 months
556 ago. Today I would like to highlight two areas where I
557 respectfully believe Congress could assist the FTC in
558 fulfilling its mission to protect consumers. First,
559 enactment of privacy legislation, and second, clarification
560 of the FTC's authority under Section 13(b) of the FTC Act.

561 With respect to privacy legislation, I agree with
562 Chairman Simons' opening statement on this topic. I too
563 encourage Congress to enact privacy legislation to be
564 enforced by the FTC. Businesses need clarity and certainty
565 regarding rules of the road in this important area. The
566 passage of the California Consumer Privacy Act and the
567 prospect of potentially conflicting bills in myriad states

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568 have created confusion and uncertainty in the business
569 community. And in light of the fact that online commerce is
570 not just national, but international in scope, I encourage
571 Congress to include preemption in any federal privacy
572 legislation. Even more importantly, consumers need clarity
573 regarding how their data is collected, used, and shared.
574 Privacy legislation should address these concerns and could
575 help build public trust around data collection and use.

576 Privacy legislation is also necessary to address the
577 emerging gaps and sector-specific approaches created by
578 evolving technologies. For example, HIPAA applies to medical
579 offices but not wearables, apps, or websites like WebMD.
580 Data protections should be based on the sensitivity of the
581 data, not the entity or mechanism through which it is
582 collected.

583 And while privacy is important, so is competition.
584 Federal privacy legislation must be carefully crafted to
585 maintain competition and foster innovation. GDPR may have
586 lessons to teach us in this regard. Preliminary research
587 indicates that GDPR may have created unintended consequences,
588 including a decrease in investment and startups and
589 entrenchment of dominant players in the digital advertising
590 market. Reports also indicate that compliance with GDPR is
591 costly and difficult for small businesses and new entrants.

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592 U.S. legislation should seek to avoid these negative
593 consequences. There are three other elements I believe
594 should also be included in federal privacy legislation: civil
595 monetary penalties, which Congress has provided for in other
596 statutes that are enforced by the FTC including COPPA and the
597 Telemarketing Sales Rule; jurisdiction over nonprofits and
598 carriers which collect, common carriers which collect
599 significant volumes of sensitive information; and targeted,
600 narrow APA rulemaking authority so the FTC can enact rules to
601 supplement legislation and to permit adjustments in response
602 to technological developments.

603 Turning to section 13(b) of the FTC Act, I think it is
604 important for Congress to provide assistance through
605 clarification of the FTC's authority under section 13(b) of
606 our statute. Decades of cases have established two key
607 principles. First, the FTC may bring actions in federal
608 district court to obtain injunctive relief, and second, the
609 authority to grant injunctive relief confers upon courts the
610 full panoply of equitable remedies including equitable
611 monetary relief.

612 Our ability to protect consumers relies heavily on this
613 authority, but recent decisions have raised questions about
614 the scope of our authority that conflict not only with long-
615 established case law, but also with the clear intent of

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616 Congress. Earlier this year, a case in the Third Circuit
617 held the FTC can't seek injunctive relief when the challenged
618 conduct is not ongoing or imminent, but fraudsters frequently
619 cease their unlawful conduct when they learn of impending law
620 enforcement actions. The Third Circuit standard could
621 prevent us from seeking relief in federal district court in
622 these circumstances, even if we can show the conduct is
623 likely to recur based on past practices.

624 And another concerning development arose in the Ninth
625 Circuit where a judge questioned the FTC's authority to
626 obtain equitable monetary relief under section 13(b). But
627 courts have long held that granting the FTC authority to seek
628 injunctive relief also gives courts the authority to grant
629 the full range of equitable relief. We believe this
630 interpretation more accurately reflects congressional intent.

631 We thank you for your assistance and I look forward to
632 answering your questions.

633 [The prepared statement of Ms. Wilson follows:]

634

635 *****COMMITTEE INSERT 2*****

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636 Ms. Schakowsky. Thank you. And now we recognize
637 Commissioner Slaughter for 5 minutes.

638

639 STATEMENT OF REBECCA KELLY SLAUGHTER

640

641 Ms. Slaughter. Thank you Chair Schakowsky, Ranking
642 Member Rodgers, Chairman Pallone and Ranking Member Walden,
643 and distinguished members of the subcommittee for inviting us
644 here today. I am Rebecca Kelly Slaughter and I am so pleased
645 to be here with my colleagues on behalf of the FTC.

646 I want to begin by echoing Chairman Simons and most of
647 my fellow commissioners, and ask Congress to pass a
648 comprehensive federal privacy law that would give the FTC
649 civil penalty authority, targeted APA rulemaking authority,
650 and jurisdiction over nonprofits and common carriers. We
651 have some of these powers in limited degree already and where
652 we have them, we use them responsibly.

653 In particular, where Congress has granted us privacy
654 related rulemaking authority, the Commission has used to put
655 out clear rules, engage in meaningful, participatory notice
656 and comment, and amend our rules to keep up with
657 technological developments. For example, the FTC has
658 rulemaking authority under COPPA. We put out an initial rule
659 and have since adapted it to address innovations that affect

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660 children's privacy, social networking, online access via
661 smart phone, and the availability of geolocation information.

662 As we have made these changes, we have conducted workshops
663 and sought input through formal notice and comment.

664 The rule provides clear guidance to firms on how they
665 can comply with the law and then we enforce the law
666 consistent with the rule, for example, in our settlement with
667 Musical.ly that the chairman referenced, a company that is
668 now known as TikTok, earlier this year. The Graham-Leach-
669 Bliley Act also gives us some limited privacy related
670 rulemaking authority for information held by certain
671 financial institutions.

672 In March, the Commission sought comment on proposed
673 amendments to the safeguards and privacy rules under this
674 law. Based on our experience, we determined that the rules
675 could benefit from modernization. We analyzed different
676 models for strengthening them and we sought input from
677 stakeholders regarding the best way to implement new
678 requirements.

679 Just as you in Congress are doing, we at the Commission
680 are reflecting carefully on the types of substantive privacy
681 provisions that might best protect consumers today and in the
682 future. The public hearings initiated by Chairman Simons
683 have been a showcase for these debates.

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684 I want to briefly highlight one of my own observations
685 for your consideration. Much of our Section 5 authority and
686 some of our privacy rules up to this point have been grounded
687 in the principles of notice and consent. The notice and
688 consent framework began as a sensible application of basic
689 consumer protection principles to privacy. Tell consumers
690 what you are doing with their data, secure consent, and keep
691 your promises.

692 But in order for a notice and consent regime to be
693 effective each element must be meaningful. Notice must give
694 consumers information they need and can understand, and
695 consumers must have a choice about whether to consent.
696 Today, notice is mostly in the form of lengthy, click-through
697 contracts. Few consumers have the time and legal training
698 required to understand them and consumers often have no
699 choice but to say yes to these contracts.

700 They must cede all control over their data to access
701 services critical to their everyday lives. They don't have
702 the option to turn to a competing, more privacy-protective
703 service. In other words, when it comes to our digital lives,
704 neither notice nor consent feels particularly meaningful
705 today. As you consider better protections for consumer
706 privacy, I want to encourage solutions that don't place all
707 the burden on consumers as much as the existing framework

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708 does.

709 Finally, amidst the important ongoing discussions of the
710 resources allocated to our agency, I want to conclude by
711 highlighting what a good return on investment the FTC is for
712 the American consumer. In fiscal year 2018, the Commission's
713 budget was \$306 million and our actions returned over \$1.6
714 billion to consumers. So, for every dollar the American
715 taxpayer gave to the FTC, staff returned five. We welcomed
716 the recent letters from Chairs Schakowsky and Pallone asking
717 what the Commission could do with more resources and the
718 Commission's response illustrated the good use to which we
719 could put additional funding.

720 Approximately two-thirds of our budget goes to our
721 greatest asset, staff pay and benefits. Unfortunately, our
722 headcount has declined over the past decade even as demands
723 on the agency have increased. The letters that we sent
724 illustrated what we could do with an additional 50 or 75 or
725 100 million dollars, some of which would allow us to bring
726 our staffing levels up to where they were in 1982, well
727 before the internet, and still below where they were in the
728 1970s.

729 So I look forward to working with the committee on both
730 sides of the aisle as you think about this important
731 legislation and I look forward to taking your questions.

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732 Thank you.

733 [The prepared statement of Ms. Slaughter follows:]

734

735 *****COMMITTEE INSERT 3*****

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736 Ms. Schakowsky. Thank you very much, and now
737 Commissioner Phillips is recognized for his 5 minutes.

738

739 STATEMENT OF NOAH PHILLIPS

740

741 Mr. Phillips. Thank you. Chair Schakowsky, Ranking
742 Member Rodgers, Chairman Pallone, Ranking Member Walden,
743 distinguished members of the subcommittee, thank you for the
744 opportunity to appear before you today. I am honored to be
745 back here with my fellow commissioners to highlight the
746 important work that the FTC and its talented staff do on
747 behalf of American consumers. I realize that privacy is one
748 of the main topics that we are going to talk about today and
749 I look forward to answering any questions that you have.

750 But, first, I want to highlight what the FTC has been
751 doing in an area that is critical to all Americans, health
752 care. Americans are concerned about their health care. All
753 of us spend more time than we should trying to find a doctor
754 who takes our insurance, shopping for the best prescription
755 prices, dealing with insurers, and so on. And all too often
756 we pay more than we should with the annual cost of health
757 care accounting for nearly 18 percent of annual GDP. The FTC
758 has focused on health care for decades. In my nomination
759 process, I called for this Commission to continue that

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760 essential work and I am pleased today to report that we have.

761 On the competition side, the Commission has been very
762 busy. Following the FTC's Supreme Court victory in the
763 Actavis case, which subjected pay-for-delay settlements to
764 antitrust scrutiny, we have worked hard to rid the market of
765 this anticompetitive conduct. Pay-for-delay settlements
766 delay generic entry, preventing earlier consumer access to
767 cheaper pharmaceuticals, and forcing Americans to pay higher
768 prices for the drugs they need. The Commission has obtained
769 several orders prohibiting such settlements, including two
770 this year that included the final remaining Actavis
771 defendants.

772 Just weeks ago, this Commission reached a decision in
773 its case against the generic manufacturer Impax which entered
774 into a pay-for-delay settlement with Endo, a brand
775 manufacturer. On a unanimous basis, we rendered the first
776 FTC opinion on pay-for-delay settlements since the Actavis
777 case, banning Impax from engaging in this harmful conduct. I
778 know that stopping anticompetitive conduct and pay-for-delay
779 settlements has also been a focus of this committee, and I
780 appreciate the chairman, ranking member, and Congressman
781 Rush's recognition of this important issue.

782 This Commission is fighting anticompetitive conduct in
783 court. We recently obtained a federal court judgment

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784 ordering AbbVie to pay nearly \$500 million in relief to
785 consumers overcharged for AndroGel, as a result of AbbVie's
786 anticompetitive manipulation of our civil justice system.
787 And as the chairman mentioned, just weeks ago we sued
788 Surescripts, a monopolist we allege employed illegal vertical
789 and horizontal restraints to maintain its monopolies over two
790 e-prescription markets. In addition to targeting the cost of
791 health care, this case addresses important competition issues
792 like two-sided markets, network effects, and innovation
793 harms.

794 Our consumer protection work on health care also
795 provides results to consumers who too often get duped into
796 buying bogus products and services, sometimes even foregoing
797 needed care. Stopping deceptive health claims, providing
798 guidance to business, and educating consumers continue to be
799 top priorities for this Commission. Last month, the FTC
800 settled with defendants charged with deceptively marketing
801 cognitive improvement supplements using sham websites and
802 fake clinical studies and endorsements. Our actions stopped
803 the scam which reaped over \$14 million from unsuspecting
804 consumers.

805 The FTC also recently cracked down on deceptively
806 advertised amniotic stem cell therapy which its promoters
807 claimed could treat serious diseases including Parkinson's,

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808 MS, and heart attacks. The FTC just mailed checks over half
809 a million dollars to victims. We also recently brought
810 charges against defendants who claimed that their Nobetes
811 pill could treat diabetes even after the FDA and FTC warned
812 them that they needed scientific evidence which they didn't
813 have. The list goes on.

814 We are focused on protecting consumers in the opioid
815 crisis and have brought several actions to return money to
816 consumers who were duped into treatments that weren't real.
817 And as our work on the opioid crisis shows, the FTC leverages
818 our resources and partners with other agencies to maximize
819 our impact. Working with the FDA as we did on opioids, we
820 jointly issued 13 warning letters to companies marketing e-
821 liquids used in e-cigarettes in packaging that resembled kid-
822 friendly food products like juice boxes, candy, or cookies.
823 Like yours, our goal is to protect kids.

824 I hope this testimony has been helpful to you in showing
825 how the FTC makes a daily impact on the lives of American
826 consumers both by protecting their wallets and their health.

827 Thank you and I look forward to your questions.

828 [The prepared statement of Mr. Phillips follows:]

829

830 *****COMMITTEE INSERT 4*****

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831 Ms. Schakowsky. Thank you very much. And last, but not
832 least, Commissioner Chopra, it is your 5 minutes.

833

834 STATEMENT OF ROHIT CHOPRA

835

836 Mr. Chopra. Thank you. Chair Schakowsky, Ranking
837 Member Rodgers, and members of the committee, thank you for
838 holding this hearing to examine the Federal Trade
839 Commission's role in policing digital markets against misuse
840 and abuse of data.

841 Today, I want to talk about a market failure affecting
842 families, businesses, and the labor force: terms of service,
843 the contracts that we theoretically read and evaluate online.

844 The FTC and Congress need to confront these take-it-or-
845 leave-it contracts particularly when it comes to potentially
846 unfair terms. Many terms of service consist of thousands and
847 thousands of words written in legal jargon. According to
848 some estimates, if Americans had to read all of these
849 contracts it would take them approximately 250 hours per
850 year.

851 Studies overwhelmingly confirm that we just don't read
852 these terms and we are now becoming numb to companies
853 imposing regulations that make us cede our rights and even
854 our property. For example, terms of service for streaming

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855 music apps have given companies access to your contacts and
856 photos, even though it is a music app. To use certain,
857 quote, free photo sharing apps, the maker of the apps
858 reserves the right to use your name, likeness, and image even
859 for commercial purposes. Other terms of service slip in
860 language that says the company will absolutely ignore "do not
861 track" settings in your browser.

862 These non-negotiable contracts are giving firms the
863 right to fingerprint your device, often allowing them to
864 create a dossier on you even if you don't register for an
865 account. These contracts aren't just claiming the right to
866 monetize your personal information and property, they also
867 revoke many of your legal rights and can even allow firms to
868 change terms at any time whenever they want.

869 Contracts are and should be a critical foundation of
870 commerce. They help parties bargain and put their promises
871 on paper. But when contracts aren't negotiated, they can
872 easily become riddled with one-sided terms, and both dominant
873 players and unscrupulous firms can exploit their position to
874 the detriment of fair competition.

875 Now the FTC has a strong tradition of restricting unfair
876 contract terms. In the 1980s, during the Reagan
877 administration, the FTC banned a slew of terms and consumer
878 credit contracts including confessions of judgment where

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879 consumers waived all of their defenses in court if they were
880 sued. The FTC found that terms like these were the product
881 of an unequal bargain where consumers could not protect their
882 interests.

883 More recently, both the FTC and Congress have cracked
884 down on gag clauses on a bipartisan basis. Non-disparagement
885 provisions in take-it-or-leave-it contracts that forbid us
886 from posting truthful reviews online for products and
887 services are now banned. This is a boon for consumers and
888 competition. Buyers will be able to find out what others
889 have experienced, and sellers that invest in quality in
890 customer service will be rewarded in the market. It is time
891 for us to own up to the fact that today's digital contracts
892 can lead to a race to the bottom.

893 In addition to making use of the FTC's existing
894 authorities, Congress should also look for ways to stop
895 companies from exploiting their bargaining position through
896 these contracts. For example, we can look to reforms enacted
897 by other developed countries, such as the 2010 law in
898 Australia that allowed consumer protection and competition
899 authorities to enforce laws on more unfair contract terms.

900 I would suggest that there are two aspects that warrant
901 our attention. First, we need to look at the circumstances
902 that these contracts are imposed and whether one side has

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903 more power, information, or leverage. Second, we need to
904 look at the terms themselves, particularly any one-sided
905 terms that unreasonably favor the drafting party. It will be
906 especially critical to closely scrutinize the terms imposed
907 in take-it-or-leave-it contracts on entrepreneurs and small
908 businesses like app developers and online merchants,
909 especially when they can see their data taken away or their
910 rights removed. This can impede fair competition and we
911 should look closely at it.

912 Thank you and I look forward to all of your questions.

913 [The prepared statement of Mr. Chopra follows:]

914

915 *****COMMITTEE INSERT 5*****

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916 Ms. Schakowsky. Thank you all. We have now concluded
917 witness opening statements for our panel. We will now move
918 to member questions. Each member will have 5 minutes to ask
919 questions of our witnesses and I will start by recognizing
920 myself for 5 minutes.

921 So we know the FTC does not have enough resources to
922 devote to privacy and data security enforcement. The FTC has
923 only about a thousand employees altogether to fulfill the
924 dual mission of competition and consumer protection which is
925 less than what the agency had, as we heard earlier, in 1983.

926 Of those, only about 40 people are charged with protection
927 of privacy and security of American consumers. I can find
928 that pretty shocking. The American people deserve more and
929 better.

930 So my question is for Chairman Simons. You have said
931 before that you believe the FTC must, quote, vigorously
932 enforce, unquote, the laws entrusted to it. How can the FTC
933 vigorously protect consumer privacy when it has only 30
934 lawyers working on behalf of the whole country?

935 Mr. Simons. Thank you, Chairman. So like you have said
936 before, we are a small agency but we fight above our weight.

937 So we are very aggressive with the resources that we have,
938 but if we had more resources I guarantee that we would put
939 those to very good use.

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940 In terms of -- one thing to keep in mind, I think
941 particularly with respect to the legislation that you are
942 considering, is that would significantly, no matter who you
943 talk to, really, that would significantly expand our
944 authority. And in particular, if that legislation is passed,
945 there is no question that we would need very substantial
946 increases in our resources.

947 And as you said in your opening statement, Madam
948 Chairman, the U.K. authority has 500 employees dedicated to
949 privacy and even the Irish authority has about 140. So us
950 starting at 40 and then trying to enforce something similar
951 to what they are enforcing with their authority, obviously,
952 you know, shows a gap.

953 Ms. Schakowsky. Okay, thank you.

954 As you had mentioned, Mr. Chairman, earlier this year we
955 sent a letter to the FTC to get more information about how
956 the Commission would use additional resources and I ask
957 unanimous consent to put that in the record. Hearing none,
958 so ordered.

959 [The information follows:]

960

961 *****COMMITTEE INSERT 6*****

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962 Ms. Schakowsky. Your response indicated that the
963 Commission could hire 160 more staff with \$50 million in
964 additional funding or 360 more staff with an additional \$100
965 million funding. You also said that a hundred new attorneys
966 focused on privacy and security would allow the FTC
967 significantly to boost its enforcement activity and also
968 improve the agency's ability to monitor compliance of
969 companies already under the order.

970 So I am concerned about this issue of monitoring
971 compliance with existing orders because we have all seen how,
972 for example, Facebook continues to rampantly abuse consumer
973 privacy despite being under an order with the Federal Trade
974 Commission. So the question, Chairman Simons, is how does
975 the FTC make sure that companies comply with orders that
976 require a comprehensive program to protect privacy and
977 security?

978 Mr. Simons. Yes, so thank you, Chairman. One of the
979 really great things about the FTC as an institution is that
980 it has a history of engaging in self-critical examination.
981 And the privacy program, looking back at the FTC as a whole,
982 is a relatively young program. So we are seeing what is
983 happening with some of these orders.

984 And this also was explored at our hearings and we are
985 taking that to heart and increasing the provisions in our

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986 model orders to beef up, for example, assessor provisions so
987 the assessors actually have a much more fulsome role and we
988 can get the benefit of their investigation. And also, we are
989 creating a provision that requires certification by a senior
990 officer in the company. And in order to make that
991 certification, the officer is under an obligation to actually
992 conduct an investigation and gather evidence regarding their
993 compliance with the order.

994 Ms. Schakowsky. Let me ask Commissioner Chopra, does
995 the FTC have the resources and authority necessary to
996 effectively monitor compliance and enforce its existing
997 orders? I am concerned that the FTC doesn't even require
998 anyone to submit assessments to the agency after the first
999 one.

1000 Mr. Chopra. Well, of course we are using a century-old
1001 law to do much of our privacy and data security work, so
1002 obviously authority and resources will help. Of course, we
1003 are all aware no amount of resources is really going to -- we
1004 don't know how much we will actually be able to tackle the
1005 vast problem that we have at hand.

1006 So, in addition to resources, you know, bright line
1007 rules that really give clear guidance and have real teeth and
1008 accountability and especially penalties will also help us
1009 advance that mission. The more blurry it is, the more it is

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1010 going to be harder to enforce, the more some firms will be
1011 able to get through loopholes and small firms will suffer.

1012 So I also encourage you to think about not just having
1013 the FTC enforce some of these rules, but other parties as
1014 well. We need those force multipliers.

1015 Ms. Schakowsky. Thank you. Now I yield to the ranking
1016 member of our subcommittee.

1017 Mrs. McMorris Rodgers. Thank you, Madam Chair. And
1018 again, thank you, everyone, for your testimony here.

1019 Chairman Simons, last month the FTC held a hearing on
1020 the FTC's approach to consumer privacy. Your remarks focused
1021 on the fact that privacy violations can cause a range of
1022 harms. I believe any federal privacy bill should focus on
1023 protecting consumers from concrete harms. What did you learn
1024 from the hearing about specific harms that can help us craft
1025 an enforceable privacy bill?

1026 Mr. Simons. Thank you, Representative. What I would
1027 say is that we learned quite a bit at those hearings. We
1028 learned that there is a widespread consensus among
1029 stakeholders in the privacy community to support the federal
1030 privacy legislation that you are talking about, you know, you
1031 as a committee.

1032 And they are also talking about how to -- notice and
1033 comment, notice and choice has been a primary vehicle as we

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1034 discussed and folks in the hearings emphasized that it really
1035 should also turn on assessments and accountability. And so,
1036 we are focused on that as well and also de-identification of
1037 data. Those are the things that came up at the hearing and
1038 that were most recommended by a broad group of people.

1039 Mrs. McMorris Rodgers. Great, thank you.

1040 Commissioner Phillips, can you explain why it is
1041 important for a federal privacy approach to be risk-based and
1042 what harms we should as Congress be protecting against?

1043 Mr. Phillips. Congressman Ranking Member, thank you for
1044 that question. The tradition of the United States since 1970
1045 with respect to privacy has been a risk-based one. We have
1046 chosen to look at particular areas where risk is heightened,
1047 like information about kids or health information, and single
1048 out those areas for special and heightened treatment. That
1049 to me makes all the sense in the world.

1050 This conversation that we are having about a broader
1051 consumer privacy law because it reaches broader and because
1052 it potentially applies to a far broader swath of data, some
1053 of which may raise similar kinds of risk, some of which may
1054 make less, to me means that we have to have a really serious
1055 conversation, and in particular that Congress needs to have
1056 really a serious conversation what the problems are we want
1057 to solve, what the wrongs are that we want to right.

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1058 So one of the things that I have heard today is a
1059 concern about, let's say, transparency, right. Consumers
1060 don't have the time to look over a long policy. Maybe they
1061 don't understand the legal jargon. Are there things that we
1062 can do to increase that level of awareness and maybe also
1063 provide more clarity for business? That could be a good
1064 outcome.

1065 But I think what is critical to this debate is two
1066 things. The first, leaving aside the tools of how we solve
1067 the problem, let's agree on the problems we want to solve,
1068 say, transparency, or at least do our best to solve, and then
1069 let's think about how to build a scheme around that.

1070 Mrs. McMorris Rodgers. As a follow up, is there a risk
1071 of delegating too much rulemaking authority to the FTC that
1072 creates uncertainty for industry, particularly the small
1073 businesses and startups?

1074 Mr. Simons. Thank you again for that question. I think
1075 there is and to me the risk exists on two levels. The first
1076 is really a basic constitutional one, which is the privacy
1077 debate is really interesting because it is one where there is
1078 a lot of general agreement on the need for something, but a
1079 lot of disagreement on the specifics.

1080 So let me take as an example, two consumers both pushed
1081 ads as they walk by a Starbucks. One consumer might

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1082 experience that as, "Great, that reminds me I want the latte
1083 and I want to get a dollar off." But the other consumer
1084 might say, "Hey, that is really creepy. How did you know I
1085 was there?" Those are both very reasonable interpretations
1086 of the same facts, but what they demonstrate is that
1087 different people have different tastes for privacy. So in
1088 this context when you give broad rulemaking authority, you
1089 ask five of us or maybe even just three of us to decide what
1090 we want. That is no substitute for the democratic process.

1091 So that is the first thing. The second thing, which you
1092 mentioned and which is really important, is that whatever the
1093 rules are they ought to basically remain over time. And
1094 there is a chance that, you know, issues get politicized or
1095 people have very earnest disagreements and over time the
1096 rules shift. Whether you like more restrictive rules or less
1097 restrictive rules, we should all agree that having consistent
1098 rules over time makes sense.

1099 Mrs. McMorris Rodgers. Okay, thank you. I have more
1100 questions but my time is expired. I will yield back.

1101 Ms. Schakowsky. I now recognize Ms. Castro -- Castor
1102 for 5 minutes, sorry.

1103 Ms. Castor. Thank you, Madam Chair.

1104 Chairman Simons in his testimony mentioned the recent
1105 FTC fine of \$5.7 million against the video social networking

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1106 app Musical.ly -- it is now known as TikTok -- to settle
1107 allegations that the company illegally collected information
1108 on children in violation of the Children's Online Privacy
1109 Protection Act. You said this is the largest civil penalty
1110 obtained by the FTC in a children's privacy case, but in
1111 actuality there really haven't been very many. And when you
1112 look at the circumstances here, I don't think the fine fits
1113 the crime.

1114 You had reports that they were collecting location data
1115 on children that was discernible to people in the
1116 neighborhood. They made it very difficult to close accounts.
1117 They made it practically impossible to complain. They would
1118 not delete profiles after someone did close an account.

1119 So, and by the way do you all know the valuation of the
1120 Chinese company that owns TikTok? ByteDance, as of November
1121 2018, ByteDance was valued at \$75 billion. That means the
1122 FTC's record-setting fine was 0.0076 percent of ByteDance's
1123 value. No CEO is going to blink an eye at a fine that
1124 inconsequential. Companies will just see small FTC fines as
1125 the cost of doing business and will continue to elevate
1126 profits over privacy, especially when it comes to our kids.

1127 Commissioner Chopra and Commissioner Slaughter, you
1128 issued a joint statement in responses. You said, "Executives
1129 of big companies who call the shots at companies that break

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1130 the law should be held accountable," I guess personally
1131 accountable, and the FTC has gone after executives when they
1132 have direct control and are calling the shots here.

1133 Commissioner Chopra, why was it important to make that
1134 statement and is it clear the FTC has the authority to go
1135 after executives of tech companies for violating privacy
1136 laws?

1137 Mr. Chopra. Well, let me just say that the FTC goes
1138 after individuals all the time, especially when it comes to
1139 small-time scammers. I do think we need to level the playing
1140 field a bit and make sure that in our investigations when it
1141 comes to privacy we are also looking at the role of
1142 individuals who made the decision that it was worth violating
1143 the law in order to profit.

1144 So, I want to make sure that in our investigations we
1145 are investigating that and we are holding them accountable
1146 when we have clear evidence of a violation, because you are
1147 right. For some firms fines are a parking ticket and a cost
1148 of doing business and we cannot change behavior unless those
1149 penalties are painful and often that means finding out who at
1150 the top called the shots.

1151 Ms. Castor. Commissioner Slaughter, I want you to
1152 answer that but I also heard you loud and clear on the
1153 privacy policies. Everyone knows that these notice and

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1154 consent and privacy policies, they are simply not working,
1155 and it is particularly egregious when it comes to children
1156 and parents.

1157 In COPPA, they are completely inadequate to protect
1158 children's privacy, and I am worried no matter how much that
1159 we revise those notice and choice provisions it will not be
1160 sufficient and companies will find ways to around it to get
1161 to our children's data without parents fully understanding
1162 what their children are agreeing to share.

1163 The one answer was contained maybe in the FTC's 2012
1164 privacy report that discussed reasonable collection
1165 limitations, which I understand to mean that companies only
1166 collect data that is consistent with the context of a
1167 particular transaction or the consumer's relationship with
1168 the business. It could also include limitations on sharing,
1169 sale, retention, and usage.

1170 Should Congress include a reasonable collection
1171 limitation section in privacy legislation going forward?

1172 Ms. Slaughter. Thank you for the question,
1173 Congresswoman. Let me try to take both of those points
1174 quickly, mindful of your time. The first is, I agree with
1175 your point and my colleague's point that fines can't be
1176 meaningless to companies. If we care about them, they need
1177 to be enough to effectively both deter specific wrongdoing by

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1178 that company in the future and effectuate general deterrence.

1179 I would like to make a clarifying point because I have
1180 heard a couple of members talk about fines the FTC can levy.

1181 And just to be very clear, unlike some of our counterparts
1182 in Europe, we can't independently assess fines. Where we
1183 find a violation of an order or a rule, we can go to court
1184 and seek civil penalties and a court could assess penalties
1185 and then in order to avoid that process, we can negotiate
1186 with a company to reach an outcome that we think is fair and
1187 just. But those are negotiated penalties they are not levied
1188 fines, and I think that is a meaningful distinction.

1189 And, secondly, the statement that my colleague and I
1190 released in the TikTok case did go to the question of
1191 individual accountability, making sure our investigations
1192 effectively assess where it lies if enforcement is proper,
1193 and I think we also have to think about the injunctive relief
1194 that we provide in any particular case. I think about it as
1195 sort of a multi-legged stool, again how to best effectuate
1196 specific enforcement making sure this company doesn't violate
1197 the law again, and general deterrence, making sure other
1198 companies know that if they don't follow the law, the
1199 consequences will be meaningful to them.

1200 And then --

1201 Ms. Schakowsky. We are going to have to wrap. We are

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1202 going to have to wrap it up there.

1203 Ms. Slaughter. Okay, then the short version of your
1204 question about purpose limitations, I agree. I think they
1205 are really important.

1206 Ms. Castor. Thank you.

1207 Ms. Schakowsky. Thank you. The chair now recognizes
1208 Mr. Burgess for 5 minutes.

1209 Mr. Burgess. Thank you. And thank you all for being
1210 here for this hearing. This is important. You are an
1211 important agency and this subcommittee does have an important
1212 role to fulfill as far as oversight of the important agency
1213 that you represent.

1214 So, some other members have done a good job of
1215 articulating how for a very large company a fine simply is a
1216 cost of doing business and it is of no consequence and they
1217 are able to pick up and move on. I would like to focus just
1218 a little bit on smaller companies where the ability of the
1219 Federal Trade Commission to require compliance or even
1220 consent decrees may be a death knell for that company.

1221 And a company that comes to mind, a case that has
1222 interested me for some time, is LabMD. Most of you were
1223 probably not on the Commission when LabMD became a thing back
1224 in the -- a decade ago. And it has worked its way through
1225 the courts and, if I understand correctly, the most recent

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1226 was an Eleventh Circuit Court decision that actually put some
1227 of onus back on the FTC saying you have actually got to
1228 define these things that you want with what you want a
1229 company to comply.

1230 But, you know, LabMD that case stands out to me as the
1231 object lesson. Here was a viable business providing a great
1232 service to the urologic practices that depended upon the
1233 handling of lab tests and pathologic specimens and now that
1234 company is gone and it is gone because of a relatively
1235 arbitrary FTC decision. And then, ultimately, the guy that
1236 pushed it all the way to the Eleventh Circuit, really, LabMD
1237 was not the one that was at fault.

1238 So, Commissioner Phillips, you have talked about the
1239 healthcare issue, so assuming that you have some knowledge
1240 of, even though none of you were on the Commission when LabMD
1241 started, Chairman Simons said, you know, that the FTC -- what
1242 was the -- that you engage in self-critical examination, so
1243 what does your self-critical examination tell you as far as
1244 the LabMD case is concerned?

1245 Mr. Simons. Congressman, thank you for the question.
1246 As you noted earlier, none of the five of us were here when
1247 the LabMD case was brought and I do want to reserve judgment
1248 on the work that others did. But I think your fundamental
1249 point is absolutely right, which is we need to think and, in

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1250 fact, the statutes that we enforce command us to think very
1251 critically about remedies and the impact that they have.

1252 Sometimes more are warranted. Sometimes less are
1253 warranted. Sometimes injunctive relief may be more
1254 important. Sometimes fines are more important. We have case
1255 law to guide us and we also have the benefit of experience.
1256 And I think critically that we need to learn from our
1257 experiences and sometimes that may militate in favor of
1258 changing what we are doing.

1259 The chairman mentioned earlier what we are doing on our
1260 model orders with respect to testing how well they are
1261 working. But it can cut both ways and I think that is
1262 something we always really need to take into account.

1263 Mr. Burgess. Well, it is just -- and when Mr. Walden
1264 was chairman of the full committee and we did have -- he
1265 referenced we had representatives from Facebook here
1266 discussing things with them, a consent decree for a company
1267 the size of Facebook is inconsequential. It doesn't affect
1268 them one way or the other. The fine that Ms. Castor
1269 referenced to the company with a bottom line of 67 billion or
1270 whatever it was, that fine is inconsequential.

1271 But for small businesses, the heavy hand of the Federal
1272 Trade Commission basically can spell the end of their
1273 business and in this case, unfortunately, it did. But even a

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1274 consent decree, which your consent decrees run a number of
1275 years, for a company to have to disclose that "Yeah, I want
1276 to handle your lab specimens. I want to handle your
1277 confidential medical data. Just so you know, I am under a
1278 consent decree from the Federal Trade Commission until 2032,"
1279 that probably ends that company's ability to render that
1280 service. Would you agree?

1281 Mr. Phillips. I absolutely think that issues like the
1282 length of consent decrees need to be considered.
1283 Commissioner Wilson and I recently wrote in a case where the
1284 party had violated a consent decree in a really bad way, so
1285 we agreed with the penalty. But one of the things that we
1286 said together is that experience and law and the facts of the
1287 case, not necessarily by the way how it is publicly
1288 perceived, but the facts of the case and the applicable law
1289 and our experience as the agency ought to guide us in how we
1290 apply remedies.

1291 Mr. Chopra. Dr. Burgess, can I add?

1292 Mr. Burgess. Sure.

1293 Mr. Chopra. I want to agree with your sentiment on
1294 this, which is we need to avoid ever appearing that we are
1295 strong-arming small defendants and letting large ones kind of
1296 off the hook. I think there needs to be an evenness in this,
1297 because you are right that even a subpoena can be very, very

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1298 costly for small firms.

1299 So I take also away that we need to think hard about
1300 where we are allocating our resources. Are we allocating our
1301 resources to a lot of small firms or are we really thinking
1302 and gaining credibility by challenging larger firms who
1303 commit harm on a wide scale and who have the resources to
1304 litigate? Because litigation, actually, also gives much more
1305 credibility to the outcome rather than just sometimes
1306 settlements.

1307 Mr. Burgess. Great. I have a number of other
1308 questions. I will submit those for the record. I yield back
1309 my time.

1310 Ms. Schakowsky. Thank you. The chair now recognizes
1311 Representative Kelly for 5 minutes.

1312 Ms. Kelly. Thank you, Madam Chair.

1313 One of the key tools that FTC has used in enforcing
1314 privacy cases is deception authority, particularly when a
1315 company hasn't told the truth in its privacy policy. But
1316 there is no national law that requires companies to have a
1317 privacy policy in the first place. For instance, a recent
1318 report found that 85 percent of the apps and browser
1319 extensions in the Google Chrome Web Store didn't have a
1320 privacy policy at all.

1321 Chairman Simons, do you believe it would be helpful to

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1322 the FTC's ability to enforce the law companies were required
1323 to disclose their privacy practices?

1324 Mr. Simons. I think this is something that the Congress
1325 should definitely consider in its consideration of new
1326 federal privacy legislation. And what you have just said
1327 illustrates the imperfect nature and the lack of authority
1328 that we have, which is that our privacy program is based in
1329 large part on this deception authority that we have under
1330 Section 5, a hundred-year-old statute which was never
1331 designed or legislated with any intent toward privacy issues
1332 that we see today obviously, so thank you for that.

1333 Ms. Kelly. You are welcome. Even when a company has
1334 privacy policies, it practically takes a law degree to
1335 understand it or is so vague that it is meaningless to
1336 consumers. Some have suggested that it would be useful to
1337 provide consumers with clear, concise, and consistent
1338 disclosures that would make it easy to understand how
1339 companies use and share personal information.

1340 Commissioner Chopra, do you think it would be helpful if
1341 a law required companies to label their privacy practices in
1342 a way that provided clear and consistent disclosures to
1343 consumers with wording and pictorial depictions like a 3 and
1344 a dollar sign if data was sold to a third party?

1345 Mr. Chopra. Yes. I think better disclosure that is

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1346 clear is always good, but on top of disclosure we have to
1347 sometimes recognize that users sometimes actually have no
1348 choice, you know, when it comes to filling out their job
1349 application, when it comes to enrolling in school, they may
1350 not have a choice.

1351 So I want us to also think about, you know, what are the
1352 types of terms that maybe should be presumptively unlawful or
1353 where there is a higher burden to bear or where some data is
1354 just off limits, because we don't want to disguise ourselves
1355 into thinking people can meaningfully compare all the time.

1356 Ms. Kelly. And my next question, is there something
1357 else that Congress can do to help consumers better understand
1358 how their data is used? And anyone can answer.

1359 Mr. Chopra. Yeah. Well, I will just add too that when
1360 it comes to deception we need to also think about dark
1361 patterns and other tactics that are being used to trick
1362 consumers into handing over their data. They use complex
1363 testing in order to nudge you. Often it is almost impossible
1364 to figure out how to close your account or delete your data
1365 and it raises very serious questions about whether it may be
1366 a violation of our deception standard, but more clarity would
1367 help.

1368 Ms. Kelly. Okay. Turning to a different subject, I
1369 wanted to talk about the interception of privacy rights and

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1370 civil rights. Algorithms that profile users and target
1371 content to specific groups can too easily result in
1372 discriminatory practices against marginalized communities.
1373 For example, investigative journalists have found that
1374 employers advertise jobs exclusively to men on Facebook and
1375 also build internal algorithms that negatively ranked women
1376 for job placement.

1377 Nearly 2 years ago, the Tech Accountability Caucus,
1378 which I chair, wrote a letter to Facebook about their
1379 discriminatory ads that allowed people to exclude housing
1380 applicants based on protected characteristics like race,
1381 gender, and sexuality. I am glad that HUD finally took
1382 action on this case and that Facebook has ceased its practice
1383 of racial affinity advertising.

1384 Again, Commissioner Chopra, would it be helpful if
1385 Congress explicitly applied existing civil rights laws to
1386 data privacy by, for example, prohibiting discriminatory uses
1387 of personal information?

1388 Mr. Chopra. Yeah, this is really serious because with
1389 algorithms and machine learning they essentially allow some
1390 firms to either knowingly or unknowingly evade our
1391 antidiscrimination laws. It reinforces biases against rural
1392 Americans, against people of color, so us to attack what is
1393 going on behind those scenes is absolutely critical. And,

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1394 you know, no algorithm is going to be free of bias and we
1395 need to make sure that the digital economy is not reinforcing
1396 biases.

1397 Ms. Kelly. Thank you.

1398 And, Madam Chair, I just wanted to let you know that
1399 joining me today are two young people very interested in
1400 privacy. One is from Tuesday's Children. Her father was a
1401 retired major in the Army who is now deceased. So they are
1402 listening in the back attentively to what we are going to do,
1403 so thank you and I yield back my time.

1404 Ms. Schakowsky. Thank you. The chair now recognizes
1405 Mr. Latta. No, is he not here? Oh, I am sorry. Mr. Walden
1406 showed up again and I am happy to recognize you for 5
1407 minutes.

1408 Mr. Walden. Thank you. I sort of snuck in from the
1409 other hearing. But thank you, Madam Chair.

1410 And, Chairman Simons, it has been a few decades, but
1411 there was a time when the FTC, as we heard, was given broad
1412 rulemaking authority but stepped past bounds of what Congress
1413 and the public supported. This required further
1414 congressional action and new restrictions on the Commission.

1415 In testimony submitted for this hearing, the FTC
1416 supports APA rulemaking authority for privacy legislation.
1417 Do you have any concerns with Congress delegating broad

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1418 rulemaking authority to the FTC and would you support
1419 limiting that rulemaking authority to issues that cannot be
1420 foreseen by this Congress?

1421 Mr. Simons. I have substantial concerns and please do
1422 not do it. Do not give us broad rulemaking authority, give
1423 us targeted rulemaking authority. Just as -- because we are
1424 worried about what exactly what you have described happening
1425 again and the agency becoming politicized and we want it, so
1426 what we really want to have is we want to have the Congress -
1427 -

1428 Mr. Walden. Very specific.

1429 Mr. Simons. -- come up with bipartisan federal privacy
1430 legislation, have it fairly well defined, COPPA is a good
1431 model, and give us targeted rulemaking authority so that we
1432 can keep it up to date, make technical changes for
1433 developments in technology or in business methods. But
1434 please do not give us broad-based authority.

1435 Mr. Walden. All right.

1436 Mr. Simons. The last thing that we want to have is to
1437 have you dump that question on us, the big, broad question.

1438 Mr. Walden. Yeah.

1439 Mr. Simons. We would rather have elected officials do
1440 that.

1441 Mr. Walden. You know and too often when we face a tough

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1442 problem we do that to agencies. We say, "Yeah, we can't
1443 really figure this out, so we are just going to give you
1444 rulemaking authority. You go figure it out."

1445 Mr. Simons. Yeah.

1446 Mr. Walden. And then when you do, we object.

1447 Mr. Simons. Right. Please don't do that.

1448 Mr. Walden. Because you didn't get it right, even
1449 though we couldn't figure it out. And so, I think it is, the
1450 obligation is on our shoulders to be as refined and targeted
1451 as possible.

1452 I guess I have sort of a yes or no question for all of
1453 you. One of the issues we are wrestling with as the Energy
1454 and Commerce Committee and looking at something nationwide,
1455 do you all support a federal preemption of existing state
1456 laws or can privacy work on a state-by-state patchwork basis?

1457 It strikes me the internet, this, you know, some of them
1458 described with tubes and all that, right?

1459 Mr. Simons. Right.

1460 Mr. Walden. It actually crosses borders -- who knew?
1461 And so, I am trying to figure out how it works if we don't do
1462 it a nationwide law. Do you, I mean --

1463 Mr. Simons. Yeah, I share your concerns about the
1464 patchwork. And I think, you know, the sense of it would be
1465 that if the legislation is substantial enough --

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1466 Mr. Walden. Right.

1467 Mr. Simons. -- then I think it makes sense to preempt.

1468 But having said that, I also think that even if you preempt,
1469 you should give enforcement authority to the state Attorneys
1470 General.

1471 Mr. Walden. All right.

1472 Ms. Wilson, what is your guidance on this?

1473 Ms. Wilson. I agree that preemption is necessary. As
1474 you note, there are state boundaries that get crossed. There
1475 are national boundaries that get crossed. Consumers are
1476 looking for a seamless experience and, frankly, businesses
1477 need guidance. We have heard examples of bills that have
1478 conflicting provisions. For example, one state will say this
1479 is opt-in and another says it is opt-out. And businesses,
1480 literally, cannot comply with both of those state laws. And
1481 so, I believe that we do need federal privacy legislation
1482 that contains preemption.

1483 And I agree with Chairman Simons that the state AGs --

1484 Mr. Walden. Has to be robust.

1485 Ms. Wilson. -- who can assist in enforcing will act as
1486 a force multiplier as Commissioner Chopra noted.

1487 Mr. Walden. Yeah.

1488 Mr. Chopra. Mr. Walden, can I --

1489 Mr. Walden. Well, if I could just --

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1490 Mr. Chopra. Sorry. Well, go ahead.

1491 Mr. Walden. Yeah, we will get to you, but Ms.

1492 Slaughter?

1493 Ms. Slaughter. I am sympathetic to the desire for
1494 uniformity, consistency, clarity, and predictability in a
1495 national law. I would be concerned about a federal law that
1496 lowered standards that already exist in the states, so I
1497 think the appropriateness of preemption is best evaluated in
1498 terms of whether a federal law meets or exceeds the level of
1499 protections that states can provide and whether it allows
1500 them the opportunity to fill any gaps that may remain after a
1501 federal law is developed.

1502 Mr. Walden. Okay.

1503 Mr. Phillips?

1504 Mr. Phillips. Thank you, Congressman, or thank you,
1505 Chairman -- Ranking Member.

1506 Mr. Walden. Chairman in exile.

1507 Mr. Phillips. Yep. No, no, no. I hope I pulled that
1508 one back quickly enough.

1509 Mr. Walden. You are all right.

1510 Mr. Phillips. I think preemption is essential for a few
1511 reasons. The first is to give businesses the clarity that
1512 they need and the second is to meet the expectation that we
1513 have all been talking about, about aligning consumer

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1514 understanding with what is going on. The more variability
1515 that you have, the less transparency, the less consumer
1516 power.

1517 Mr. Walden. Right.

1518 Mr. Phillips. The other thing we need to keep in mind
1519 is competition. Having multiple laws means multiple
1520 different compliance costs.

1521 Mr. Walden. Right.

1522 Mr. Phillips. That is harder for smaller firms, easier
1523 for big ones. Another thing to keep in mind -- I will finish
1524 very quickly -- is international interoperability. We have
1525 to consider our national interests in cross-border data
1526 flows. And, finally, with respect to establishing just a
1527 floor that is a model that we have in HIPAA, and I think
1528 Congress ought to take a very careful look at how the HIPAA
1529 model works because the studies show that state HIPAA laws
1530 have inhibited the roll-out of electronic medical record use.

1531 They have inhibited innovation, and reduction of costs in
1532 the medical field, and startups are struggling with this.

1533 I may be wrong, I may be right. People can take
1534 different views. But I think that is a very good area to
1535 look at the data, see what is going on, and see how it would
1536 apply here.

1537 Mr. Walden. Madam Chair, with your indulgence, could

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1538 our final commissioner weigh in? My time is expired.

1539 Mr. Chopra. Yeah, I just want to make sure I caution
1540 you that preemption can also have a lot of unintended
1541 consequences. In Illinois, for example, there is a biometric
1542 law. There are other laws that may not, may complement and
1543 not conflict. My own experience in this relates to the
1544 mortgage meltdown where broad preemption of state mortgage
1545 laws clearly wreaked more havoc because states that wanted to
1546 provide certain safeguards to their homeowners had that
1547 robbed of them.

1548 So I think it is important that we just make sure we are
1549 not making things worse and at the same time --

1550 Mr. Walden. That is a good point.

1551 Mr. Chopra. -- promoting lots of beneficial entry into
1552 the marketplace.

1553 Mr. Walden. Yeah, I go back to my Jamie Dimon quote
1554 that said you can overregulate to the point only the bigs can
1555 afford to comply, and now you have snuffed out competition.
1556 So this is why it is hard. We want to get it right for our
1557 consumers, we don't want to snuff out innovation. So thanks
1558 for all the work you are doing there in helping us.

1559 And, Madam Chair, thanks for your indulgence in this and
1560 for having this hearing.

1561 Ms. Schakowsky. I now recognize the chairman of the

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1562 full committee, Mr. Pallone.

1563 The Chairman. Thank you, Madam Chair.

1564 Companies are collecting more data than ever and using
1565 it in ways that most consumers would never imagine. If I
1566 download a flashlight app, for example, it shouldn't need my
1567 precise location and it definitely shouldn't then go and sell
1568 that information to the highest bidder, all without my
1569 permission. Yet the FTC does not have the authority to enact
1570 rules that could establish reasonable limits on uses of data
1571 and no comprehensive federal law currently exists.

1572 So I want to start with Chairman Simons. In your
1573 testimony you support federal privacy and data security
1574 legislation, which I appreciate, but some have argued that
1575 the FTC has not done enough with the authority it has been
1576 given. How can Congress be sure that the FTC will
1577 aggressively protect consumers if given new authority?

1578 Mr. Simons. My mantra is vigorous enforcement, so as
1579 long as I am the chairman we are going to vigorously enforce.

1580 I will have to say also that we have brought lots of cases
1581 in this area where we can. We have brought about, when you
1582 consider the full range of privacy authority that we have
1583 ranging from Section 5 to the FCRA to COPPA to Do Not Call to
1584 CAN-SPAM, we have brought over 500 cases.

1585 So I would say we have been pretty active, but our

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1586 authority is limited as you describe and so if we get more
1587 authority, we will need more resources.

1588 The Chairman. Okay. Let me go to Commissioner Chopra.

1589 How important is it that comprehensive privacy
1590 legislation set reasonable limits on the way the data can be
1591 used such as through data minimization and restrictions on
1592 selling or sharing data beyond the consumers' reasonable
1593 expectations?

1594 Mr. Chopra. Yeah, these bright line standards will also
1595 be easier to enforce. We will not have to go through as much
1596 extended investigation and also it will make it easier for
1597 businesses. So I think when you are being affirmative about
1598 what is inbounds and out of bounds, that is better.

1599 The Chairman. Okay. I am going to go back to the
1600 chairman again. Although privacy is an important issue, it
1601 is obviously not the only critical consumer protection issue
1602 within the FTC's jurisdiction. And topping the list of the
1603 FTC's nearly three million complaints were imposter scams,
1604 where a scammer pretends to be from the IRS or the Social
1605 Security Administration or another trusted organization to
1606 get people to turn over money or personal information.

1607 Consumers reported losing nearly \$488 million in these
1608 kinds of scams last year. So let me ask you, Chairman,
1609 consumer education is important but the burden should not

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1610 fall on consumers to stop fraud. So what is the FTC doing to
1611 stop these scams and prevent them from becoming even more
1612 common? I mean these are the things that I hear about on
1613 regular basis from constituents, particularly seniors.

1614 Mr. Simons. Right. Thank you for that question. There
1615 is no single fix to this pernicious scam, but so we try to
1616 implement a multi-pronged approach. We have substantial law
1617 enforcement to stop these things from occurring where we can
1618 find and sue the perpetrators. But we really do think that
1619 enforcement along with consumer and business education,
1620 consumer guidance and business guidance are important and so
1621 we tackle this on a two-front basis.

1622 The Chairman. All right.

1623 Mr. Phillips. Chairman, may I just add briefly to that?

1624 The Chairman. Sure, go ahead.

1625 Mr. Phillips. I really want to thank you for that
1626 question, in particular for the following reason. You have
1627 been talking recently a lot about the need for resources. It
1628 is important, especially as the headlines focus on particular
1629 issues with which we deal also to consider the ones like
1630 scams that don't always grab the headlines. That work has
1631 always been and should remain really important work that we
1632 do.

1633 So when you think about resource questions, I would

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1634 encourage you to consider all the work that all the different
1635 bureaus at that FTC does and how important they collectively
1636 are to the national interest.

1637 Mr. Simons. Yeah, can I just say one other thing? The
1638 FTC is a very busy place. People generally are not sitting
1639 down and doing nothing. They are all very highly active.
1640 They are all very highly productive. And so, if we are going
1641 to devote more resources, for example, to privacy, we would
1642 probably have to take them away from something like
1643 potentially going after some of these scams.

1644 The Chairman. Unless we have more resources, but,
1645 believe me, I am the last person who thinks that federal
1646 agencies or the people that work there don't do anything. I
1647 am constantly reminding people that they work very hard
1648 because oftentimes people think that government and
1649 politicians don't do anything, but, in fact, we all work very
1650 hard or most of us do.

1651 So thank you again. Thank you, Madam Chair.

1652 Ms. Schakowsky. Thank you, the gentleman yields back.
1653 And now I recognize Mr. Guthrie.

1654 Mr. Guthrie. Thank you, Madam Chair, for the
1655 recognition. Thank you all for being here. And I will agree
1656 with my friend, The Chairman, that people in our agencies do
1657 work very hard and sometimes we need to make sure we give

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1658 them the right direction and how we as the policymakers would
1659 like for them to work.

1660 And one thing that I have been concerned about as we
1661 move forward and we need to move forward on a privacy bill, I
1662 am for that, but the one thing I am concerned, I think Mr.
1663 Phillips mentioned that some of the smaller companies can't
1664 deal with it as much as some of the bigger companies.

1665 And so, I have talked about innovation and whatever the
1666 health care or anything here, kind of my common theme is how
1667 do we keep this innovation that is moving forward. And so,
1668 Chairman Simons, I believe any federal bill must ensure all
1669 companies no matter the size of their compliance department
1670 can continue to innovate and compete. And what do you think
1671 about this concern and how should we consider this drafting
1672 legislation?

1673 Mr. Simons. So this is a really critical concern, thank
1674 you for raising it.

1675 Mr. Guthrie. And any of the others can answer too. I
1676 called and said your name, but others can answer if they
1677 would like to, to how we can make sure people can compete,
1678 but go ahead.

1679 Mr. Simons. Yeah, so what I was going to say is, so we
1680 have a dual mission, consumer protection including privacy
1681 and competition, so we are sensitive, really, to both. And

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1682 the thing that -- one of the things that we are very
1683 concerned about is the situation where, so, for example, if
1684 you require opt-in for certain kinds of information or maybe
1685 even all the information, that makes it much easier for high-
1686 tech platforms that are consumer-facing to get that opt-in.
1687 And so, for a new company or a small company, it is very
1688 difficult to get that kind of opt-in and access to that data.

1689 So that might constitute a very significant disadvantage
1690 for the small companies and the new entrants and cause a huge
1691 advantage for the existing high-tech platforms. And, in
1692 fact, I understand that a high-level competition official
1693 from the European Union is concerned about this because he
1694 thinks that business is being pushed by the GDPR to Google
1695 and Facebook.

1696 Mr. Guthrie. That was my next question. So concerned
1697 about what GDPR, what I have heard what you just said and how
1698 we guard against that. So I mean, just what you just kind of
1699 said, if Mr. Phillips or anybody else would like to talk
1700 about that because that was my next question in light of what
1701 we know about GDPR what should we be concerned about. And
1702 you just started going into that, so I wanted to make sure we
1703 finish that and if some others would like to talk to it as
1704 well.

1705 Mr. Phillips. Thank you. Congressman, I think this is

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1706 such a critical question. The important thing to remember,
1707 while a lot of this debate focuses on a few very large firms,
1708 the use, the collection, the monetization of data is endemic
1709 in the economy. It is everywhere. It is lots of little
1710 firms too. And I think the most essential thing to do is to
1711 go and consult with those firms and ask them, "Hey, how would
1712 this look for you?" You know, we want the small businesses
1713 to higher coders not lawyers. If you have five people and
1714 one of them is a lawyer, maybe that is not good for
1715 innovation and competition. So I think consulting with them,
1716 asking how the rules apply to them, not just the big firms,
1717 is critical.

1718 Mr. Chopra. Yeah, I would love to add just two points
1719 here. I think you are right that we have to think hard about
1720 competition. And one of the things I worry a lot about it is
1721 we are seeing a real slowdown in small business/new business
1722 formation even in the digital economy.

1723 You know, many venture capitalists, many new firms that
1724 are starting are saying, you know, "The big guys actually
1725 have already taken all the key data. We are never going to
1726 catch up. We now have to create our business maybe just to
1727 sell to them." That can really distort innovation in our
1728 country and I am really, I am increasingly worried that our
1729 lack of attention to this issue is deterring lots of

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1730 entrepreneurs from wanting to challenge those incumbents. So
1731 we need to think hard about that.

1732 With respect to GDPR, GDPR uses essentially a
1733 principles-based regulatory scheme. So on one hand that
1734 might create some flexibility. On the other hand, it can
1735 also lead to uncertainty. And with bright line rules that
1736 actually is easier for everyone to comply with rather than
1737 huge complexity that only the largest firms can lawyer up to
1738 figure out.

1739 Mr. Guthrie. Okay. I am going to switch gears real
1740 quick about something in my home, one of my home industries
1741 which is Kentucky bourbon. And we have heard from a lot of
1742 our distillers and people who ship that counterfeiting
1743 distilled spirits is on the rise both domestically and
1744 abroad. I only have a few seconds. So this is a problem
1745 because consumers aren't getting the goods they purchased and
1746 counterfeit spirits can pose a serious hazard.

1747 Chairman Simons, can you speak to the FTC's ability to
1748 monitor and regulate these sales? I know they are through
1749 websites and it is difficult to do.

1750 Mr. Simons. Yeah, so this type of thing is obviously of
1751 concern to us. It is a deception. You know, it is
1752 counterfeiting, like you said. The primary agencies that
1753 have jurisdiction over this, I think, are actually the

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1754 Treasury Department and the DOJ who actually has criminal
1755 authority. So I think this is more of an issue for those
1756 agencies.

1757 Mr. Guthrie. Okay. Well, thank you very much and my
1758 time is expired and I yield back.

1759 Ms. Schakowsky. Now the chair recognizes Mr. O'Halleran
1760 for 5 minutes.

1761 Mr. O'Halleran. Thank you, Madam Chair.

1762 Good afternoon. Now I see it is afternoon and thank you
1763 for appearing before us today. Your role in protecting
1764 consumers and competition is critical, particularly in a
1765 world where innovation and technology is rapidly advancing
1766 and consumers are faced with navigating the maze of new
1767 technological developments and regulations. Like my
1768 colleagues on this committee, I look forward to learning more
1769 from all of you about this work.

1770 This week, the FTC is celebrating National Small
1771 Business Week -- I thank you for doing that -- acknowledging
1772 the important contributions of small businesses, their
1773 owners, and in our communities. As you may know, the 1st
1774 district of Arizona is home to many small businesses, it is
1775 mostly a rural district, including mom and pop shops. Many
1776 of these business owners are located in those types of rural
1777 areas throughout the country.

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1778 A critical role of the FTC is to provide consumer
1779 education and conduct and outreach. These efforts include
1780 providing practical and plain language guidance on many
1781 issues for small business owners, many of whom are not up to
1782 the speed that the larger businesses are. In fact, the FTC
1783 has conducted several roundtables over the past couple of
1784 years to educate small business owners on various matters
1785 including cybersecurity.

1786 It is my understanding that the Commission heard many
1787 concerns from small business owners about data security
1788 including concerns pertaining to the mobile phones and cloud
1789 devices. I would like to hear more about these initiatives
1790 and programs for small business owners and specifically how
1791 the FTC is tailoring its educational and outreach campaigns
1792 to those small businesses in rural areas and how to expand it
1793 also as you move forward.

1794 I have two questions. I want to start with Mr. Simons
1795 and then anybody can jump in. I believe these small business
1796 outreach initiatives are important for the FTC to continue.
1797 In your view, what more can the FTC do to build upon the work
1798 of these small businesses' initiatives moving forward?

1799 And the second question is, as you know, Congress is
1800 currently considering proposals to include in legislation on
1801 a range of issues impacting consumer privacy and data

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1802 security. As the FTC considers enforcement actions against
1803 corporations who violate privacy laws, how does the FTC
1804 consider enforcement actions against small businesses versus
1805 those against larger companies? Mr. Simons?

1806 Mr. Simons. Thank you, Congressman. So let me start
1807 the last question first. So we have a standard for data
1808 security that is a reasonableness standard. It is not a one-
1809 size-fits-all and we are very nervous about anyone who would
1810 suggest a one-size-fits-all standard, because as you can
1811 imagine a huge company can afford to spend hundreds of
1812 millions of dollars on its data security because it has so
1813 much volume over which to spread it and the cost per unit is
1814 going to be trivial, right. But if you make small businesses
1815 do those same types of data security measures, they will be
1816 out of business. They wouldn't even come close to making
1817 money.

1818 So it is really important that we do this reasonableness
1819 standard, we consider how small the business is, how costly
1820 it is to provide data security, and what kind of data the
1821 company has. If it is not very sensitive then you don't
1822 worry so much about the security, or you don't worry as much
1823 and what you would expect them to do in terms of data
1824 security measures would be a lot smaller.

1825 In terms of the outreach to businesses and consumers,

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1826 this is a critical thing that we do. And people suggest to
1827 me sometimes that maybe you should divert some resources from
1828 that to doing more law enforcement, more litigation, for
1829 example, and I think that is a mistake. We really need to
1830 have this consumer outreach and outreach to the business
1831 community and we could do more of it if we had more
1832 resources.

1833 Mr. O'Halleran. Thank you, anybody else?

1834 Ms. Slaughter. Thank you, Congressman. I would just
1835 add that I think there are elements of what are in the rules
1836 and the laws that are important; there are also important
1837 questions about the application of prosecutorial discretion.

1838 When we see particular cases, I think it is incumbent upon
1839 us to consider what is the company that we are considering.
1840 How big is it? What is its compliance opportunities or
1841 costs, and take that seriously in making sure that our cases
1842 and, more importantly, our remedies are carefully tailored to
1843 the particular defendants we have in front of us; it is not a
1844 one-size-fits-all approach.

1845 Mr. O'Halleran. Thank you. And, you know, talking
1846 about smaller businesses for a second, I appreciate what you
1847 said about the issue, but they also fit into the entire
1848 security chain and privacy chain and how they blend into that
1849 is important for the overall security of the process. So it

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1850 is kind of, I worry about both ways, so.

1851 Mr. Simons. It is a balance you have to strike. You
1852 know, it is like most things in life, there are tradeoffs.

1853 Mr. O'Halleran. Thank you, Madam Chair, and I yield.

1854 Ms. Schakowsky. The chair now recognizes Mr. Bucshon
1855 for 5 minutes.

1856 Mr. Bucshon. Thank you, Madam Chairwoman.

1857 Health information is some of the most valuable data
1858 that is out there. It is very private, very personal, but
1859 also very valuable to people. And I was a healthcare
1860 provider before. So, Chairman Simons, one of the focuses
1861 that I will have on a privacy bill, how we address health
1862 information not covered by HIPAA and how does the Commission
1863 deal with this type of health information now and how should
1864 we be thinking through this issue when fitness trackers and
1865 other health apps are very popular and becoming more popular?

1866 Mr. Simons. Yeah, I mean if you are talking about the
1867 same data that is covered by HIPAA and you are talking about,
1868 you know, it is really, it is sensitive data, you have to
1869 think about treating it in a similar manner. And one of the
1870 things that I think is the real advantage of the federal
1871 privacy legislation that you were considering is that it
1872 would be broad-based and not cabined to particular types of
1873 information. And so, I think that makes things easier to

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1874 deal with.

1875 Mr. Bucshon. Yeah, because, you know, there is going to
1876 -- I mean there is real-time glucose monitoring for
1877 diabetics, and people may not want people to know that they
1878 are diabetic and that information could be out there, or your
1879 blood pressure could be high and people may not know. I mean
1880 it is going to be real important that we figure how we
1881 protect that type of information, I think.

1882 Mr. Simons. Yes, I agree.

1883 Mr. Bucshon. Yeah.

1884 Ms. Wilson, do you have any comments? Commissioner
1885 Wilson?

1886 Ms. Wilson. I agree that the Federal Trade Commission
1887 has long applied a risk-based approach to the evaluation of
1888 privacy and the more sensitive the information, the greater
1889 the protections it deserves. We have taken the same approach
1890 with federal legislation, children's information in COPPA,
1891 health information in HIPAA.

1892 The gaps that you are mentioning concern me. Emerging
1893 technologies change the landscape and some of this very
1894 sensitive information is not currently covered under federal
1895 legislation. We can get at it through our Section 5
1896 authority, but having guidance at the federal level would be
1897 very useful, and so greater authority in that area would help

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1898 protect this information more.

1899 Mr. Bucshon. Yeah, because I mean we have been talking
1900 about, you know, how you have to click "agree" if you want to
1901 get a certain account, right, and that is probably true with
1902 devices that now monitor your health, right. And so that
1903 will be an area we have to look at too. People, you know,
1904 broadly as you mentioned that people should know if they put
1905 on a certain device that it may very well transmit health
1906 information to someone, and it may be in the paperwork and
1907 you may just not know.

1908 I will give you a second.

1909 Ms. Wilson. So I completely agree. I think consumers
1910 are able to make decisions that are in their own best
1911 interest if they have information about the choices that they
1912 have. But there is a lot of consumer confusion right now.
1913 There is a lack of clarity about what is being done with
1914 their data. Greater transparency is an imperative.

1915 Mr. Bucshon. Yeah, and even when they know maybe that
1916 their health information is going to be transmitted, they
1917 still should have some coverage for the privacy of that like
1918 under HIPAA.

1919 Mr. Chopra. I just wanted to add, something that makes
1920 this even harder is with artificial intelligence and machine
1921 learning. Even if we don't hand over our health information,

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1922 companies may know our health information based on what we
1923 are searching in terms of our symptoms, geolocation of where
1924 we are going. So that is going to make it really difficult
1925 when formulas and algorithms are determined and it may even
1926 know our health conditions even if they have not been
1927 formally diagnosed.

1928 Mr. Bucshon. Yeah, I mean if you have your phone on you
1929 and you show up at an oncologist's office that tells people
1930 kind of --

1931 Mr. Chopra. You have cancer.

1932 Mr. Bucshon. Yeah, and I don't know how we protect
1933 that.

1934 Commissioner Phillips, do you have any comments on this?

1935 Mr. Phillips. I said earlier that one of the things
1936 that Congress has done over time is it has looked at areas of
1937 greater levels of risk and I think this is an area that
1938 deserves strong consideration, and I think I agree with all
1939 my colleagues when I say that. The one thing I would add is
1940 that I do think it is important not just to consider the what
1941 in terms of HIPAA, but how HIPAA has worked. HIPAA, the
1942 studies show, has sometimes prevented what can be really pro-
1943 competitive and pro-consumer technology.

1944 Mr. Bucshon. Yeah, yeah.

1945 Mr. Phillips. You know, you fill out a form every time

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1946 you go to the doctor's office, every single doctor, and the
1947 doctors can't talk to each other so you have to repeat your
1948 symptoms to --

1949 Mr. Bucshon. Oh, I am very well aware of that problem.

1950 Mr. Phillips. And so, I do think when we talk about
1951 HIPAA we ought to think about how it is working and how it is
1952 not working.

1953 Mr. Bucshon. Okay, thank you all, I yield back.

1954 Ms. Schakowsky. I now recognize Congresswoman Blunt
1955 Rochester.

1956 Ms. Blunt Rochester. Thank you, Madam Chairwoman, and
1957 thank you all for your testimonies. First, before I get into
1958 my questions about privacy and data security, I want to ask
1959 you about our seniors who face scams especially through
1960 exploited practices like gift cards. And today I am
1961 introducing the Stop Senior Scams Act with my friend and
1962 colleague, Mr. Walberg of Michigan, who is across the aisle.

1963 And this bill is a House companion to a bill introduced by
1964 Senators Casey and Moran earlier this year.

1965 I know you and your staff are working with the Senators
1966 and I look forward to working with you further as we consider
1967 this bill on the House side. And, Commissioners, I just
1968 wanted to ask briefly if you are seeing a lot of this like on
1969 the rise in terms of the scams for seniors with these gift

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1970 cards? If you could just briefly and then we will jump into
1971 the other questions.

1972 Mr. Simons. This is a big issue for us. You know, we
1973 are focused very much and have a high priority for scams
1974 dealing with the senior community. And we put out, we do a
1975 whole bunch of different things in terms of education. We
1976 put out guidance that, you know, if it is a gift card it is
1977 only supposed to be for gifts, right.

1978 We have a program what we call Pass it On, which is an
1979 effort to, as one of my colleagues said, be a force
1980 multiplier. It is to get people in the seniors' community to
1981 help other people in the seniors community avoid these types
1982 of things. So this is something we are very focused on and
1983 outreach is very important in this regard.

1984 Ms. Blunt Rochester. Great. I look forward to working
1985 with you on this. I want to shift to the privacy and data
1986 questions and I want to turn our attention to something that
1987 came up earlier when Representative Kelly was speaking. I
1988 think it was Commissioner Chopra who talked about dark
1989 patterns and that it is gaining a lot of notoriety.

1990 And I really wanted to kind of focus on this, because
1991 for those who don't know what it is, and I am going to ask
1992 you, Commissioner Chopra, to actually share how you would
1993 describe this. How I have it is, it is a pattern, or for --

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1994 a dark pattern is a website or app design that is
1995 intentionally deceptive in order to push users into content,
1996 products, or even participate in data collection activities
1997 without their informed consent. And I can bet everybody in
1998 this room has been a victim to this. And even, ironically,
1999 if you Google dark patterns, later you will probably be
2000 affected by this. In the privacy space, many of my
2001 colleagues have touched on similar issues as it impacts
2002 consumers, children, and social media, but most recently even
2003 the IRS Free File had a connection to dark patterns. People
2004 seeking income-based assistance in filing their taxes were
2005 potentially steered unsuspectingly to products that were
2006 neither part of the IRS program or were free. And entities
2007 like Facebook we hear are -- that they are affected by it,
2008 but there are even more out there.

2009 So if you could talk a little bit about this practice.
2010 And then if you could also talk about what we in Congress
2011 should be doing to address it.

2012 Mr. Chopra. Sure. And, Congresswoman, I am not an
2013 expert on it, but my general understanding is that using
2014 various sorts of testing and tactics, firms can nudge
2015 consumers into choosing certain things or deterring them.
2016 And one of the, I believe the researcher who coined the term
2017 also uses the term "roach motel," --

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2018 Ms. Blunt Rochester. Yes.

2019 Mr. Chopra. -- which is that you can check in, create
2020 an account but it is impossible to get out. And one of the
2021 things that I hope that we can really modernize some of our
2022 analytical tools, use different types of economics including
2023 behavioral economics, to understand how consumers actually
2024 can be harmed by this.

2025 I am not positive, to be honest I am happy to answer
2026 questions for the record about whether our deception
2027 authority here is enough, but it is very troubling.

2028 Ms. Blunt Rochester. Yeah, I was actually going to ask
2029 about deception authority, but you said you are not sure.

2030 One of the other questions, as the more that you all
2031 talked, when you talked about artificial intelligence,
2032 machine learning, geolearning, one of the questions I really
2033 have is from a workforce perspective. Are we in government,
2034 do we have the skills, the capabilities, the training to be
2035 able to be a step ahead of what is upon us now? I would love
2036 to -- yes, Commissioner Wilson?

2037 Ms. Wilson. So I think this is one of the great things
2038 about the Federal Trade Commission. We do have a history of
2039 engaging in competition and consumer protection R&D. And
2040 Chairman Simons, last summer, announced the competition and
2041 consumer protection hearings for the 21st century, and we

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2042 have held hearings with dozens and dozens and hundreds of
2043 participants and comments focusing on things like AI and
2044 machine learning and algorithms and how these affect
2045 consumers and the kinds of harms that can be created.

2046 And so, I think we are continuing to learn and to move
2047 up the learning curve and I think with that learning we can
2048 begin to identify precisely the resources that we need to
2049 fulfill our mission of protecting consumers.

2050 Ms. Blunt Rochester. My time has run out, but I had so
2051 many questions as well about behavioral research and study,
2052 but thank you so much for your testimony.

2053 Ms. Schakowsky. And of course all of the questions can
2054 be submitted for the record. We hope our witnesses will
2055 reply.

2056 And now let me recognize -- oh, Mr. Hudson has arrived.
2057 You have 5 minutes.

2058 Mr. Hudson. I thank the chairwoman and thank you to all
2059 the commissioners for your time today.

2060 Chairman Simons, as you have heard today, we are
2061 committed to protecting small businesses and promoting
2062 innovation. Some other agencies are using or considering
2063 regulatory sandboxes for new innovations. Can you explain
2064 this concept and whether you believe we should consider a
2065 similar approach for privacy regulations?

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2066 Mr. Simons. So the regulatory sandbox as I understand
2067 it -- and thank you for the question, Congressman -- is a
2068 situation where small businesses would be able to -- play is
2069 not the right, I mean that is the analogy -- but to get
2070 started. And so, for example, people have proposed that for
2071 small businesses that they wouldn't have to comply with like,
2072 for example, maybe a federal privacy legislation that you
2073 pass in the coming months until they get to a certain size.

2074 And to be honest, I have thoughts positive and negative
2075 about that. So the positive is it cuts down, clearly, on the
2076 cost of getting into business and maybe allows people to grow
2077 that would never get off the ground. On the other hand, if
2078 the privacy legislation you pass really is protecting people,
2079 you know, small businesses can get a lot of sensitive
2080 information and you really worry about that.

2081 Mr. Hudson. I appreciate that answer.

2082 Mr. Phillips. Congressman.

2083 Mr. Hudson. Commissioner Phillips, do you support the
2084 use of regulatory sandboxes and what are the barriers you see
2085 to doing something similar like this?

2086 Mr. Phillips. So I think it is something very much
2087 worthy of consideration, but I want to add something and this
2088 may be my mistake, but I have a slightly different
2089 understanding of how at least internationally some of these

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2090 regulatory sandboxes at working.

2091 My understanding is and it may be how you structure it,
2092 it isn't necessarily just a shield for liability for small
2093 businesses, it is an opportunity maybe where the law is gray
2094 or something that is close to the line where under the
2095 supervision of the regulator the business can undertake an
2096 innovative thing that might be legally questionable. This is
2097 something they are pioneering in the United Kingdom right now
2098 on privacy. It has been utilized in the financial space.

2099 I do think consistent with and as a parent of small
2100 children allowing your kids to play in the sandbox that
2101 supervision is key, but I do think it is an opportunity to
2102 test, you know, where are there maybe some pro-competitive
2103 impacts to the conduct. The chairman is a hundred percent
2104 right that small businesses can present risks just like big
2105 businesses can. It is a question of how you structure it.
2106 But there is some, really, examples out there that I think
2107 you should consider.

2108 Mr. Hudson. Great. I appreciate that.

2109 Chairman Simons, as you know there are many other
2110 industries across the United States that are subject to
2111 various privacy laws. Some of the most familiar are the
2112 Health Insurance Portability and Accountability Act for the
2113 healthcare industry; Graham-Leach-Bliley for financial

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2114 services. Do you believe the FTC would have to exercise
2115 concurrent jurisdiction with the other federal agencies to
2116 implement a national privacy law and, if so, how would you
2117 recommend we do that?

2118 Mr. Simons. Well, I think it depends on what you pass,
2119 right, so you could pass a law that says yes or says no to
2120 that question. And also I think it depends on, you know, how
2121 much, you know, what you put in the law in terms of whether
2122 as a result of that whether you want to make, you know, what
2123 is now covered by HIPAA covered by your new privacy
2124 legislation or some of these other things, whether you want
2125 to fold that in or not. So it is kind of hard to say in a
2126 vacuum.

2127 Mr. Hudson. But if we follow that example, you know,
2128 how would we implement that, the HIPAA example?

2129 Mr. Simons. Oh, so you mean if you had these
2130 jurisdictions?

2131 Mr. Hudson. As far as agencies going to work together.

2132 Mr. Simons. We would just have to coordinate to make
2133 sure we don't step on each other. I mean we have lots of
2134 that. Like, for example, the FDA and the FTC are regulating,
2135 you know, drugs in different ways, but it is the same drug,
2136 you know, so that kind of coordination is common.

2137 Mr. Hudson. Got you.

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2138 Bouncing back to Commissioner Phillips, a difficult
2139 piece of this privacy discussion is the sharing of consumer
2140 data and downstream misuse. We know sharing information
2141 offers great benefits, but once a company shares that
2142 information, we see misuse from companies two or three steps
2143 down the supply chain.

2144 How does the Commission approach this issue and do you
2145 have any recommendations on this point for a federal bill?

2146 Mr. Simons. I think looking at the supply chain and
2147 understanding the full scope of companies involved in the use
2148 of data, which is breathtaking, right, in its scope, is
2149 critical. We need to understand how the data are being used.

2150 We also though need to understand that the point at which
2151 the consumer interacts with the company is a very critical
2152 point for transparency and things like that.

2153 Mr. Hudson. Thank you.

2154 And, Madam Chairman, my time is about up, so I will
2155 yield back. I thank the commissioners.

2156 Ms. Schakowsky. The gentleman yields back.

2157 I understand there is some desire by the panel of
2158 witnesses for a short break. I understand that so let's make
2159 a maximum of 5 minutes and let -- and then they will come
2160 back, okay. Or maybe members as well would like to take that
2161 moment.

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2162 [Whereupon, at 12:29 p.m., the subcommittee recessed, to
2163 reconvene at 12:37 p.m., the same day.]

2164 Ms. Schakowsky. The committee hearing will resume and I
2165 will recognize for 5 minutes, Mr. Lujan.

2166 Mr. Lujan. Thank you, Madam Chair.

2167 Commissioner Slaughter, rapid advancements in technology
2168 have transformed the way that companies use personal data.
2169 In just over a decade, we have moved from a world of desktop
2170 computers to one where each of us has devices always on, it
2171 seems always collecting data about everything we do and
2172 everywhere that we go. It is vital that the FTC keep current
2173 on new technology and train its staff on emerging consumer
2174 protection issues.

2175 Despite the often-technical nature of privacy and
2176 security matters, the FTC has only five full-time staffers
2177 classified as technologists. How do technologists help the
2178 staff attorneys on privacy and data security cases?

2179 Ms. Slaughter. Thank you for the question, Congressman.
2180 Technologists are extremely important. When we need to
2181 understand the material with which we are working in any
2182 particular case, and the more highly technical the field, the
2183 more highly technical the practices that we are
2184 investigating, the more we can benefit from the experience of
2185 a technologist. I think, I routinely try to rack my brain to

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2186 think of cases we have encountered not just in the privacy
2187 and data security area, but across our mission in competition
2188 and consumer protection that don't involve some technological
2189 element and it is very difficult for me to think of any.

2190 Mr. Lujan. What role do technologists play in helping
2191 identify cases where someone might have violated the law?

2192 Ms. Slaughter. I think they can play an extremely
2193 valuable role. I mean we, our case identification comes from
2194 consumer complaints, it comes from press stories, it comes
2195 from experience of staff who identify issues, and
2196 technologists can apply a level of expertise to picking out
2197 technological-specific issues that might not necessarily
2198 occur to an attorney independently.

2199 Mr. Lujan. Commissioner Slaughter, do you know how many
2200 of the five technologists the FTC has work on privacy and
2201 data security enforcement?

2202 Ms. Slaughter. I am not actually entirely sure how to
2203 answer that direct question, but to the extent that you are
2204 suggesting that five technologists is not a lot for the scope
2205 of the work that we are obligated to do in privacy and data
2206 security, I agree that we could benefit from a lot more
2207 technological expertise.

2208 Mr. Lujan. Chairman Simons, do you know how many of the
2209 five technologists work on privacy and data security

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2210 enforcement?

2211 Mr. Simons. My understanding is that one --

2212 Mr. Lujan. Your microphone, please.

2213 Mr. Simons. My understanding is that at one point or
2214 another they all do.

2215 Mr. Lujan. Are there enough technologists for the FTC
2216 to do their work?

2217 Mr. Simons. We could certainly use more. And what we
2218 do with them, actually, is so they do original research.
2219 They also educate our lawyers, so it is kind of a bit of a
2220 force multiplier. And in addition, they serve another very
2221 important function is where we don't have internal resources
2222 sufficient to help us with our cases, they identify experts
2223 for us outside the agency who we can then hire on a contract
2224 basis.

2225 Mr. Lujan. And one specific question to all the
2226 commissioners, do you agree that it would help the FTC's
2227 enforcement activities if there were more technologists
2228 working directly with staff attorneys?

2229 Mr. Simons. Yes.

2230 Mr. Lujan. Yes?

2231 Ms. Wilson. Yes.

2232 Ms. Slaughter. Yes. We put an economist on every case
2233 that we consider both competition and consumer protection. I

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2234 think we could benefit from technologists too.

2235 Mr. Phillips. Congressman, yes. But I just want to
2236 reiterate a point that the chairman made which is the use of
2237 outside experts. The thing about technology is there is a
2238 lot of it and a lot of it is different. If you bring someone
2239 on permanently, they may have expertise in a given area, but
2240 if you use the money to hire on a case-by-case basis, you can
2241 be more tailored, more efficient, and look at more different
2242 kinds of technology.

2243 Mr. Lujan. Just as long as those experts don't have a
2244 conflict of interest with the space you are playing in?

2245 Mr. Phillips. Oh, of course you want to avoid conflict
2246 of interest in hiring outside folks.

2247 Mr. Long. Commissioner Chopra?

2248 Mr. Chopra. Yes, I agree with Commissioner Slaughter
2249 completely.

2250 Mr. Lujan. Appreciate that.

2251 Mr. Chairman, the last several FTC chairs have appointed
2252 a chief technologist to advise the commissioners on
2253 significant policy issues involving new technologies. You
2254 have now been in charge of the agency for more than a year at
2255 a time when the FTC is addressing some of the most
2256 significant privacy and data security issues in the agency's
2257 history, and yet you have chosen not to appoint a chief

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2258 technologist to assist you on the Commission. Why not?

2259 Mr. Simons. Well, that was one of the first things I
2260 looked at upon becoming chairman. And what struck me right
2261 out of the box was that the chief technologist is appended to
2262 the Chairman's Office in a kind of unusual way in the
2263 organizational chart. The chief technologist had no direct
2264 reports, no infrastructure for him or her, no staff. They
2265 weren't directly connected to the staff of the Bureau of
2266 Consumer Protection or the Bureau of Competition, and so that
2267 struck me as an odd organizational structure.

2268 And so, I talked to people in the Bureau of Competition
2269 and Bureau of Consumer Protection. The Bureau of Consumer
2270 Protection has its own technologist staff called the Office
2271 of Technology Research and Investigation. That is where the
2272 five technologists are housed. That group works extremely
2273 well with the people in the Bureau of Consumer Protection and
2274 they were going to be very upset if I moved those people out.

2275 I was thinking about creating a Bureau of Technology.
2276 So rather than do that we created a technology task force in
2277 the Bureau of Competition which is going to have a technology
2278 fellow. And I have transferred the FTE from the chief
2279 technology officer to the technology task force in the Bureau
2280 of Competition so we have more boots on the ground in terms
2281 of dealing with these investigations that we are conducting.

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2282 Mr. Lujan. But still very clear that more technologists
2283 would be of beneficiary, especially with the numbers that I
2284 shared earlier, 500 million, 148 million, 87 million just to
2285 name three examples.

2286 Mr. Simons. Yes.

2287 Mr. Lujan. Thank you for the time, Madam Chair.

2288 Ms. Schakowsky. Thank you and now I recognize Mr.
2289 Gianforte.

2290 Mr. Gianforte. Thank you, Madam Chair.

2291 And thank you for being here for this important topic.
2292 Last week, we had another subcommittee hearing on robocalls.
2293 And Montanans are getting bombarded with robocalls and they
2294 are sick and tired of them. One constituent in my district
2295 got a call from her little brother. Unfortunately, her
2296 little brother had died of a heroin overdose a couple of
2297 months earlier. This was a terrible situation for her and
2298 nobody should really have to go through this. This has to
2299 end.

2300 I am just curious, Mr. Chairman, what is the Commission
2301 doing to stop robocalls like these?

2302 Mr. Simons. Yeah, thank you for that question. And,
2303 first of all, this is an issue for domestic tranquility in my
2304 own household. This is, to me, when I was coming into office
2305 this was probably the most important thing at least in that

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2306 my wife was telling me about and then lots of other people
2307 too, and it is such an incredible inconvenience. And worse
2308 than that it is not just an inconvenience, it often leads to
2309 fraud.

2310 So our Do Not Call rule has been overcome by
2311 technological advances and so we have to find other ways to
2312 do it and we are proceeding on multiple fronts. We still
2313 continue to bring significant enforcement actions to shut
2314 these people down who are doing these robocalls; we
2315 coordinate with the FCC. And the other thing that we would
2316 really like help from you in the Congress is to give us
2317 jurisdiction over common carriers, because there are some
2318 common carriers that cater to this robocall traffic,
2319 particularly the traffic that originates from overseas. And
2320 if we had the ability to go after these common carriers, we
2321 could, I think, put a significant dent in these robocalls.

2322 Mr. Gianforte. Okay. We have the situation where these
2323 robocallers, if that is a noun, masquerade as local numbers.

2324 Mr. Simons. Yes.

2325 Mr. Gianforte. Would this common carrier authority
2326 allow you to go after those individuals and that behavior?

2327 Mr. Simons. Yes, in the sense that we could identify
2328 the carriers that are facilitating the robocallers and just
2329 stop them from, like in the case of the foreign ones stop

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2330 them from entering the U.S. telephone network at the outset.

2331 Ms. Slaughter. Can I just jump in there, Congressman,
2332 and add that --

2333 Mr. Gianforte. Yes, Commissioner.

2334 Ms. Slaughter. -- I think the chairman referenced how
2335 technological innovations have overtaken us and you mentioned
2336 this neighborhood spoofing problem. I think it is also worth
2337 Congress considering whether not just enforcement should be
2338 applicable to common carriers, but whether there should be
2339 more onus placed on the cell phone carriers in the first
2340 place and more responsibility placed on them to stop some of
2341 this traffic that goes over their network, I think, in the
2342 first instance even before you consider the enforcement on
2343 the back end.

2344 Mr. Gianforte. Okay, thank you.

2345 Commissioner Phillips, my understanding is that when the
2346 FTC seeks to recover ill-gotten gains from any entity that
2347 has violated FTC competition rules, the Commission seeks to
2348 recover the profits from the unlawful act. Is that correct
2349 and can you briefly explain how the Commission calculates
2350 ill-gotten gains?

2351 Mr. Phillips. Do you mean in the competition context?

2352 Mr. Gianforte. Yes.

2353 Mr. Phillips. Yes, and thank you for that

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2354 clarification. So let me give a little context and then give
2355 you the answer. The, traditionally, three things that we
2356 have considered in the context of whether to pursue ill-
2357 gotten gains disgorgement in a competition case include
2358 whether the rule is clear, so whether it is serving that
2359 deterrent function that we want it to; second, we consider is
2360 there a reasonable basis to calculate it, and I will talk
2361 about how we have and, in fact, how it applied in a case that
2362 I mentioned earlier; and third, we consider whether there are
2363 other ways of remediating the issue, so civil lawsuits and
2364 things like that also being out there.

2365 In the AbbVie case, which is a good example, what we did
2366 a lot of, you know, hard economic or like a lot of
2367 measurement to determine what they were making relative to
2368 what they would have been making without the anticompetitive
2369 conduct. In that case it was a sham litigation keeping drugs
2370 off the market. And so that is the differential at which we
2371 look, you know, what you made and what you would have made
2372 without doing the thing you weren't supposed to do.

2373 Mr. Gianforte. Okay, thank you.

2374 Chairman Simons, I am concerned with legislating for the
2375 sake of legislating and seeking to solve a problem that may
2376 not exist. I believe any federal privacy bill must focus on
2377 specific harms. You talked to this earlier. Can you

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2378 elaborate a little bit on why it is so important we focus on
2379 privacy harms to consumers in our attempt to legislate in
2380 this area?

2381 Mr. Simons. I mean I agree with you completely. Thank
2382 you for that question that if it ain't broke, don't fix it.
2383 And if you are going to, you know, you only want to create
2384 legislation for things that are causing problems and you have
2385 a fix for it. So in the privacy sector, however, the harm, I
2386 think, is very tricky and that is one of the reasons that we
2387 -- and also with data security one of the reasons we need
2388 civil penalty authority, because it is hard to measure in any
2389 kind of precise, quantitative way if you are talking about,
2390 you know, a monetary relief.

2391 And so, because of that factor you really need to do
2392 civil penalties and you need to think about is there a harm
2393 like a privacy invasion or something like that which is not
2394 monetarily -- you can't -- it is hard to quantify but it is
2395 still a harm. People, it still bothers people. It still, it
2396 can lead to other problems.

2397 Mr. Gianforte. Okay, thank you.

2398 On that I yield back, Madam Chair.

2399 Ms. Schakowsky. Thank you and I now recognize Mr. Soto
2400 for 5 minutes.

2401 Mr. Soto. Thank you, Chairwoman.

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2402 I think it is safe to say at this point that the
2403 internet is integral to our daily lives and has been for over
2404 20 years, which is why it is so shocking that there hasn't
2405 been a single law to regulate internet privacy directly
2406 during that time and beforehand. So it is my belief that the
2407 biggest threat to internet integrity is congressional
2408 inaction. We see a patchwork of statutes, 1914, FTC Act
2409 creating your Commission, who would have thought that
2410 President Woodrow Wilson would have such an influence on the
2411 internet? 1986, Electronic Communications Privacy Act to
2412 protect communications; also 1986, Computer Fraud and Abuse
2413 Act. 1998, Children's Online Privacy Act which was
2414 referenced by Congresswoman Castor. 2003, the CAN-SPAM Act
2415 to protect us against unsolicited emails.

2416 Most of these predate the internet and pretty much all
2417 of them were created when dial-up was still the form of
2418 getting on the internet. So I just want to make a statement
2419 to say that you know, you all are charged with a really
2420 impossible task. You have to interpret these isolated
2421 moonstones to come up with this comprehensive privacy regime
2422 because Congress hasn't given you direction on it.

2423 So thank you for doing what is nearly impossible to do,
2424 which is regulate privacy without laws to directly do that.
2425 Even the courts have filled in the gap with Carpenter v. U.S.

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2426 establishing cell phone privacy.

2427 So, Madam Chairwoman, I hope that we will out of this
2428 committee be able to develop some key protections, making
2429 sure that companies have a duty of care, a duty to protect
2430 civil rights, and a duty to protect privacy. And that the
2431 penalties will be sufficient so it is more costly to pay for
2432 a breach than it is to pay for sufficient cybersecurity
2433 investments.

2434 Second, I hope that we establish that Americans have a
2435 right to control their information, a right to stop the use
2436 of their information if they choose so, and if they do,
2437 companies should have a right to charge for their services.
2438 And third, waivers should be put in plain language. I want
2439 to get out how we are determining damages. We heard a little
2440 bit of that discussion before.

2441 I have read in the paper that there may be a fine
2442 against Facebook between three to five billion dollars.
2443 Chairman Simon, what is the total amount of that fine?

2444 Mr. Simons. Oh, I am sorry, Congressman, but I can't
2445 talk about it an ongoing nonpublic investigation.

2446 Mr. Soto. What factors do you generally utilize in
2447 determining those types of damages?

2448 Mr. Simons. So you would look at the prior conduct, the
2449 culpability, the ability to pay, and the deterrent effect.

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2450 Mr. Soto. Commissioner Chopra, if it was at the upper
2451 end of \$5 billion, do you think that would be a sufficient
2452 deterrent for the activities complained of?

2453 Mr. Chopra. I think it is not appropriate to comment on
2454 that. Obviously, deterrence is important. When it comes to
2455 violations of our rules, violations of our orders, nothing
2456 can be the cost of doing business.

2457 Mr. Soto. Turning to the TikTok settlement that
2458 Congresswoman Castor talked about, Chairman Simon, what were
2459 the factors utilized in determining that fine?

2460 Mr. Simons. I believe the ones I articulated.

2461 Mr. Soto. And --

2462 Mr. Simons. And the other thing too is that you know,
2463 this is a negotiation that resulted in a settlement. And we
2464 also have to take into account what the likely outcome would
2465 have been in court and if we couldn't have done better in
2466 court, then it makes sense to settle. And that is one of the
2467 issues that we face kind of generally is that historically
2468 the civil penalty awards have been quite low and so one of
2469 the things we are thinking about is a way to get them
2470 generally raised on average.

2471 Mr. Soto. So that is something else this committee has
2472 to work on then is to make sure that the civil penalties are
2473 a sufficient deterrent.

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2474 Commissioner Slaughter, was the TikTok settlement a
2475 sufficient deterrent for on the behavior complained of?

2476 Ms. Slaughter. The statement that Commissioner Chopra
2477 and I put out in connection with that settlement explained
2478 that the investigation and, really, most of the negotiation
2479 of how to resolve that case took place before this slate of
2480 commissioners was constituted. And it is very difficult for
2481 us, I think as a general matter, to look back without having
2482 been part of a conversation to discuss it, so we were
2483 focusing on in the future whether it is -- not whether --
2484 that it is important that our investigations, including of
2485 large companies, really ask all the questions that we need to
2486 determine where liability properly lies.

2487 Mr. Soto. Thank you for that. I want to turn to
2488 identity theft. We see in our notes 444,000 complaints of
2489 identity theft. Chairman Simons, do you know the cost to the
2490 economy or the loss to the economy that identity theft on the
2491 internet poses currently?

2492 Mr. Simons. I think the average is about \$150 per
2493 person.

2494 Mr. Soto. And so, do you have an overall figure for
2495 that or do we have to multiply it by 330 million?

2496 Mr. Simons. I don't other than it is quite large.

2497 Mr. Soto. Okay, thanks. And I yield back.

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2498 Ms. Schakowsky. The gentleman yields back and now I ask
2499 Mr. Carter for his 5 minutes.

2500 Mr. Carter. Thank you, Madam Chair.

2501 And, Mr. Simons and Commissioners, thank you for being
2502 here. This is an extremely important subject as you well
2503 know and we in Congress are depending on you and we are
2504 relying on you to help us through this because it is
2505 something that we want to get right. And it is certainly
2506 something that our constituents and the citizens of our
2507 country need to have right and to be done by right.

2508 Mr. Simons, I want to ask you, where in the current law,
2509 where does the FTC's ability to enforce privacy or where does
2510 it end? I mean, you know, I have heard you say before that
2511 the FTC is the cop on the beat when it comes to privacy and I
2512 understand that. But, you know, where does your authority
2513 end at this point or under current law?

2514 Mr. Simons. Right. Thank you for that question,
2515 Congressman. So, our general Section 5 authority comes from
2516 that hundred-year old statute which was not designed, for
2517 sure, to deal with this kind of issue, so I credit my
2518 predecessors at the FTC for basically inventing a privacy
2519 program out of Section 5. I think they did a terrific job
2520 with the material they had available on them and it is based
2521 largely on a deception authority.

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2522 So we started out by saying you should have a privacy
2523 policy at your company and then if you divert from it then
2524 that is a deception and we can hold you accountable. And
2525 then we expanded that to include, for example, things that
2526 look like privacy torts at common law and we cover those
2527 under unfairness. But in terms of the general privacy
2528 authority, not including FCRA or COPPA or whatever, this is
2529 really it and it is pretty narrow.

2530 Mr. Carter. So you would agree that something more
2531 would help?

2532 Mr. Simons. Yeah. I mean that is why we are
2533 encouraging the Congress to adopt privacy legislation.

2534 Mr. Carter. Okay, and not only for that reason, but I
2535 mean, if we look at the other laws that are being proposed
2536 like in California and Europe, you know, here we have a
2537 situation where we really need something to be preemptive
2538 particularly in the case of what is being offered in
2539 California.

2540 I mean it is very important that the Private Right of
2541 Action that is being proposed in California that that would
2542 be an additional punishment on top of the FTC action as I
2543 understand it. And certainly, we don't need plaintiffs'
2544 attorneys to be involved in this. We need the FTC to be the
2545 cop on the beat as you describe them.

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2546 Mr. Simons. Yeah. I think what I have said before is
2547 that we should be the enforcer of that legislation that you
2548 are considering and you should allow the state Attorneys
2549 General to enforce as well, just as they do in lots of other
2550 areas in conjunction with us. They are a terrific partner
2551 and I would strongly recommend that.

2552 Mr. Carter. So you have the ability and you do take
2553 action on fining certain -- and posing financial penalties.
2554 How do you come about -- how do you come up with that? I
2555 mean how do you determine how much that is?

2556 Mr. Simons. Well, it depends on the case that is
2557 involved. And just to be clear, we don't actually have any
2558 fining authority ourselves like our counterparts do in
2559 Europe. We would have to go to court, actually, to get a
2560 fine paid unless it was pursuant to a consent settlement.

2561 Mr. Carter. Okay, so you have to go to court, so you
2562 have to justify it in court as to why you think it should be
2563 that much?

2564 Mr. Simons. Yes, so that is the limiting factor in all
2565 of this. Anytime you are thinking about a settlement, if the
2566 settlement gets to a point where you say to yourself, "Gee,
2567 we probably cannot do nearly as well as this, or maybe we
2568 could do just about as well as this in litigation, but the
2569 litigation has lots of risks," so when you get to that point

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2570 then you really should settle. I mean that is the
2571 appropriate thing to do. Otherwise, if you are just going to
2572 go to court and irrespective of the settlement, then that
2573 really becomes almost unethical or potentially harassment.

2574 Mr. Carter. So when the financial penalty is imposed
2575 where does it go?

2576 Mr. Simons. So specifically for a civil penalty that
2577 would go to the Treasury, so that would be for an order
2578 violation or like in COPPA we have civil penalty authority.
2579 That would apply there. With respect to our 13(b) authority
2580 where we go in and get injunctive relief and we get consumer
2581 redress that gets disbursed to the consumers.

2582 Mr. Carter. Okay. Well, you know, again I would look
2583 at this as being a tremendous opportunity for us as Members
2584 of Congress to work in a bipartisan fashion to come up with
2585 something that would benefit everyone and certainly, you
2586 know, would benefit citizens. And if I get input of any
2587 kind, certainly privacy is one of the things that is on top
2588 of the list. I mean constituents are consistently telling
2589 me, you know, we need this. We need this. And this is
2590 something, you know, we don't want to stifle innovation or
2591 anything, but we do need our privacy protected.

2592 So thank you very much and thank all of you for your
2593 work on this, and I yield back.

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2594 Ms. Schakowsky. The gentleman yields back and now I
2595 recognize Mr. McNerney, patient Mr. McNerney, for 5 minutes.

2596 Mr. McNerney. Well, I thank the chairlady. And one of
2597 the problems of being last is that all the questions I wanted
2598 to ask have already been asked, so forgive me if I am
2599 repetitive here.

2600 But Pete Olson, my Republican colleague Pete Olson, and
2601 I are co-chairs of the AI Caucus, and one of the areas that I
2602 am interested in is algorithmic biasing and data biasing.
2603 And we have discussed that a little bit already, but I know
2604 that the FTC has had a couple of hearings focused on AI and
2605 there was a report entitled, "Big Data: A Tool for Inclusion
2606 or Exclusion."

2607 Chairman, what steps is the FTC taking today to protect
2608 consumers from potential harm and bias in AI algorithms and -
2609 -

2610 Mr. Simons. This is something we look at carefully and
2611 is a priority for us. We had a recent case, actually,
2612 involving a company that does background screening using
2613 algorithms and the algorithms improperly associated people
2614 with criminal records. So we got them to fix their
2615 algorithms, this is a form of AI. So this is something we
2616 are looking at. It is real.

2617 Mr. McNerney. Well, you don't have any authority over

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2618 algorithms and decision making on lethal use of force, say,
2619 in law enforcement, do you?

2620 Mr. Simons. I don't think so. I mean anything that is
2621 criminal we wouldn't have jurisdiction over.

2622 Mr. McNerney. Okay. Is the agency developing any
2623 guidance or educational tools to help address the problem?

2624 Mr. Simons. I think we have business outreach that
2625 suggests that businesses think about these types of issues as
2626 they are, you know, and they look for biases and the results
2627 of their algorithms in AI.

2628 Mr. McNerney. Well, I know that Mr. Lujan asked a
2629 similar question regarding the importance of technologists.
2630 Is the Commission planning on hiring technologists in the AI
2631 field of specifically for bias?

2632 Mr. Simons. We don't have a specific plan to do that
2633 unless we get more resources. But what we do in the interim
2634 is we use our existing technologists on our staff to do
2635 outreach to the technology community and to talk to experts,
2636 to have conferences, and to help them educate our staff.

2637 Mr. McNerney. But are there any other AI potential
2638 harms that the FTC is considering besides biasing?

2639 Mr. Simons. There probably are, but I just, you know, I
2640 can't think of it, as I said.

2641 Mr. McNerney. Anyone else on the Commission?

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2642 Mr. Chopra. Sure, Congressman. One other area we think
2643 about with respect to artificial intelligence is in our work
2644 to enforce laws against anticompetitive conduct. Sometimes
2645 algorithms and AI can help online sellers collude on price.
2646 It can lead to, you know, other anticompetitive conduct, and
2647 we are thinking about this across the agency.

2648 Mr. Simons. Yeah, one thing about that that is
2649 interesting is if AI allows companies to tacitly collude more
2650 easily that might be a justification for more aggressive
2651 merger enforcement in industries where that is occurring.

2652 Mr. McNerney. Chairman, does the Commission have the
2653 authority to structure civil penalties to be meaningful to
2654 large companies without devastating small companies? Do you
2655 have that authority?

2656 Mr. Simons. Yes. We have flexibility in that regard.

2657 Mr. McNerney. Okay, so you don't need any congressional
2658 legislation or anything like that.

2659 Mr. Simons. Not to deal with the flexibility issue.

2660 Mr. McNerney. Thank you. I understand the agency held
2661 13 hearings to evaluate practices of both Competition and
2662 Consumer Protection Bureaus. I know you are still in the
2663 process of receiving comments, but I do have a series of
2664 questions about these hearings especially because I know
2665 these hearings took up a significant amount of the resources

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2666 and the Commission has limited resources.

2667 Can you give me the top three takeaways from these
2668 hearings? What is the basis of what you have learned?

2669 Mr. Simons. So one of the things we learned is that
2670 merger retrospectives are really important and we got a lot
2671 of good testimony on that and that is something we really
2672 need. And if we got more resources that is one of the things
2673 we would do, and in particular merger retrospectives as
2674 relate to vertical mergers. That was highly recommended.
2675 I don't think really that is the literature, the literature
2676 on merger retrospectives is much greater on horizontal and is
2677 much less on the vertical merger side. So that was one.

2678 With respect to privacy and data security, we got a lot
2679 of feedback that we really do need civil penalty authority,
2680 that we need targeted rulemaking, and that we need
2681 jurisdiction over common carriers and nonprofits.

2682 Mr. McNerney. I mean a little schizophrenic about
2683 rulemaking, I mean you want the rulemaking to be targeted --

2684 Mr. Simons. Yes.

2685 Mr. McNerney. -- but you don't want it to put you in a
2686 bind as well, so I understand that.

2687 Mr. Simons. No, so we would like -- at least my view is
2688 that these privacy issues involve very serious and
2689 significant societal and cultural value judgments, and those

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2690 should be made to the greatest extent possible by elected
2691 officials and not people who are unelected. So our view is
2692 that -- my view is that you should make those judgments.

2693 And we are happy to help you make them. We are happy to
2694 work with you. We are happy to provide analysis of the
2695 tradeoffs that any particular piece of legislation may
2696 present. But, you know, at the end of the day, our view is
2697 that Congress should do that and we should have authority to
2698 do rulemaking that allows us to keep the whatever you pass
2699 up-to-date and consistent with new technology and new
2700 business methods.

2701 Mr. McNerney. Thank you. Thank you, Chairwoman.

2702 Ms. Schakowsky. The gentleman yields back. And, Mr.
2703 Cardenas, you are recognized for 5 minutes.

2704 Mr. Cardenas. Thank you very much. Thank you very
2705 much, Madam Chairwoman, for having this important hearing
2706 with the FTC. My question to the FTC is that in 2018 FTC
2707 cases resulted in a total of about \$2.3 billion in refunds
2708 for consumers who lost money to frauds and other unfair or
2709 deceptive practices. I commend you for doing that especially
2710 when you look in light of the overall budget for FTC is about
2711 \$300 million per annum. But recent federal court decisions
2712 put the FTC's power to get compensation for consumers at a
2713 serious risk, particularly in cases where the company has

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2714 stopped violating the law. For example, my question is can
2715 one of you explain how these decisions limit the FTC's
2716 authority under Section 13(b) of the FTC Act?

2717 Ms. Wilson. Sure, so this is a critical issue, thank
2718 you for raising it, and it is why I addressed it in my
2719 opening statement that the issue is that the Third Circuit
2720 has recently put in place a standard that would enable us to
2721 go after conduct in courts only if the conduct is ongoing or
2722 imminent.

2723 And so, if in the course of an investigation a defendant
2724 halts the conduct that we are challenging, say, a fraudster
2725 stops defrauding people or an advertiser suspends dubious
2726 advertising claims, then we are unable to go after that
2727 conduct under the Third Circuit standard unless we are able
2728 to show that it is imminent. So even if the fraudster has
2729 engaged in fraud in the past but is not doing it at this
2730 moment, unless we can prove that it is imminent, we can't
2731 reach it.

2732 And this is a serious question that has been raised
2733 about the scope of our authority. We believe that this flies
2734 against a long line of cases saying otherwise, but we would
2735 appreciate clarification from Congress on the scope of our
2736 13(b) authority.

2737 Mr. Cardenas. Okay, thank you.

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2738 Chairman Simons, how serious of an issue are these
2739 decisions for the FTC's enforcement of Section 5?

2740 Mr. Simons. So if they were to become the law of the
2741 land, so to speak, this would be highly problematic for us.
2742 I think it would basically destroy our fraud program. We
2743 wouldn't be able to recover consumer redress --

2744 Mr. Cardenas. Fraud as in protecting the consumers,
2745 protecting the people of America.

2746 Mr. Simons. Yeah, like you referenced to whatever it
2747 was, the 2.3 billion or whatever, we wouldn't be able to
2748 recover that if these cases became law.

2749 Mr. Cardenas. Okay. What do these cases do to the
2750 FTC's ability to make consumers whole?

2751 Mr. Simons. They really just take it away.

2752 Mr. Cardenas. Okay, so basically the FTC in this as
2753 what we are talking about at the moment is actually helping
2754 the American people set something right, so the FTC is
2755 actually a part of that.

2756 Mr. Simons. Yes, absolutely.

2757 Mr. Cardenas. Okay, so Congress could write clarifying
2758 law, right, that that is what Congress hopefully should and
2759 will do.

2760 Mr. Simons. Yes, we would love for you to do that.

2761 Mr. Cardenas. Yeah. Hopefully I can talk to some

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2762 congressional members and we will do that.

2763 Mr. Phillips. Congressman, could I add just one thing
2764 to that?

2765 Mr. Cardenas. Yes, please.

2766 Mr. Phillips. And I absolutely agree with my colleagues
2767 that clarifying longstanding precedent on the impact of 13(b)
2768 is essential. I want to add another thing. Next year the
2769 SAFE WEB Act is going to expire. This is an essential tool
2770 that we use to work with our partners abroad to do cross-
2771 border consumer protection including privacy enforcement. I
2772 think it is a no-brainer and you ought to consider that as
2773 well.

2774 Mr. Cardenas. Thank you.

2775 Mr. Chopra, do you have anything to add to that?

2776 Mr. Chopra. I agree with my colleagues completely.

2777 Mr. Cardenas. Good. That is great. Appointed by
2778 Democrat and Republicans and you all agree on this issue.
2779 Good, good, good, good.

2780 So when it comes to made in the USA, my time is limited
2781 so I will cut to the point and the question. I am concerned
2782 that the FTC settled on some cases for no money without so
2783 much as an admission of liability and some defendants
2784 effectively cheated consumers and got away with little more
2785 than lying about products being made in America. That

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2786 obviously has a value on the streets of America. I

2787 personally love to buy made in America products.

2788 But for someone to actually lie about it when they make
2789 the product, put it out to market, and then for there not to
2790 be any way of them having to pay a price for doing that for
2791 duping the American people, Chairman Simons, where are we at
2792 with that?

2793 Mr. Simons. Yeah, so historically for decades that has
2794 been the approach that the Commission has pursued in these
2795 made in the USA cases. They have only got injunctive relief.

2796 But we are now going to hold a workshop and look at what we
2797 need to do in terms of beefing up our remedies.

2798 Mr. Cardenas. So hopefully FTC will come out with a
2799 more aggressive, appropriately aggressive stance when it
2800 comes to people lying about made in America.

2801 Mr. Simons. That may very well be the outcome of the
2802 workshop.

2803 Mr. Chopra. Just like in privacy legislation where you
2804 are thinking about civil penalties to deter this conduct,
2805 Congress gave the FTC the power to activate penalties for
2806 made in USA violations 25 years ago. We have not yet turned
2807 that switch on and I hope that we can explore and potentially
2808 turn that switch on, because we need to deter this and put a
2809 stop to it, because this absolutely harms every single honest

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2810 manufacturer in America who makes goods here at home.

2811 Mr. Cardenas. Yes.

2812 Ms. Wilson. If I could add one point, the cases that
2813 have been reported on this issue were decided and settled
2814 between staff and the parties before this slate of
2815 commissioners arrived, and as Chairman Simons noted in his
2816 statement, when the settlements were first announced. We do
2817 intend to look at this policy going forward, but the decision
2818 of many of the commissioners was to not upset the work that
2819 had already been done by staff in the previous slate of
2820 commissioners, but to look at this going forward.

2821 Mr. Cardenas. Madam Chair, if I can have 5 seconds.

2822 If someone is willing to lie boldface about made in
2823 America, I as a grandparent am afraid that that product might
2824 have cheated on other things such as chemicals and other
2825 matters that might be involved in the net product that might
2826 end up in the hands of my grandchildren or any other American
2827 family. Thank you very much, Madam Chair, yield back.

2828 Ms. Schakowsky. Mr. Walberg, I am going to call on you,
2829 1 second.

2830 Let me just point out to the committee that every single
2831 member on both sides of the aisle have shown up to this
2832 hearing. That doesn't happen all the time and I think it is
2833 a tribute to the issue, but also to our commissioners. So I

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2834 want to thank you.

2835 Mr. Walberg is waiving on to our committee. We are
2836 happy to have you and you have 5 minutes.

2837 Mr. Walberg. Thank you, Madam Chairwoman, and thank you
2838 for consenting to waiving me on this subcommittee. And while
2839 I am not on the subcommittee, certainly I have an interest in
2840 being a member of the Energy and Commerce Committee. I
2841 appreciate you allowing me this opportunity. Thank you,
2842 each of you, for being here today as well. You have a big
2843 job and we wish you well and we hope that we can be
2844 supporters and fellow laborers in making the difference.

2845 I wanted to come here today to ask questions about a
2846 topic very important to me and my constituents and that is
2847 scams against targeting our nation's seniors. Michigan
2848 seniors in my case have spent a lifetime working to save for
2849 financially secure retirements. In the digital age, scams
2850 targeting seniors and their hard-earned money are growing in
2851 number and sophistication and safeguarding vulnerable seniors
2852 needs to be a top priority. I am one. It is important to
2853 me. Today, Representative Blunt Rochester, who I believe
2854 mentioned this already, she and I will be introducing
2855 legislation, the Stop Senior Scams Act, to help prevent
2856 fraudsters from targeting seniors with prepaid or gift card
2857 scams.

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2858 While the committee is working on legislation to address
2859 annoying robocalls and that scam our seniors into giving away
2860 their savings or personal information, gift card scams are
2861 another way fraudsters target seniors. Companies like Target
2862 or Wal-Mart are on the front lines against these scams, and
2863 their ability to educate their employees with best practices
2864 and training to recognize the signs of scam can make a huge
2865 difference in stopping a scammer. The Stop Senior Scams Act
2866 would create a forum at the Federal Trade Commission to
2867 communicate about best practices like this.

2868 And so, Chairman Simons, I would like to ask you if you
2869 could please talk about what the Commission is doing to
2870 prevent frauds and scams against seniors and how legislation
2871 like this Stop Senior Scams Act would align with the FTC's
2872 consumer protection mission.

2873 Mr. Simons. Thank you, Congressman. So this is a
2874 multipronged approach at the FTC. We engage in strenuous
2875 efforts going after these specific scams that target seniors.
2876 We have what is very important, I think, and very effective
2877 is a program of outreach to the senior community and we have
2878 a specific program that was designed called Pass It On, where
2879 we try to kind of essentially deputize senior citizens to
2880 help their fellow senior citizens avoid scams. So they are
2881 talking about it in their local communities and it is on top

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2882 of mind and they know what to watch out for. And your
2883 legislation, you know, it sounds like I couldn't agree more
2884 with the goals of it and I would be happy to work with you on
2885 it.

2886 Mr. Phillips. Congressman.

2887 Mr. Walberg. Yes.

2888 Mr. Phillips. If I could just add one thing, since we
2889 are here in a public hearing and hopefully the public is
2890 paying attention. What I want to say to American consumers
2891 about this critical issue to which you and Congresswoman
2892 Rochester have devoted such important attention, if a
2893 business tells you that you need to pay with a gift card, it
2894 could very well be a scam and people need to be on the
2895 lookout for that. We are going to be doing our jobs, but it
2896 is also important that we communicate to the public.

2897 Mr. Simons. Yeah, the real thing here is if somebody
2898 wants you to pay with a gift card and that is what you are
2899 telling you, it is probably a scam. Gift cards are for
2900 gifts, they are not for forms of payment.

2901 Mr. Walberg. From your lips to seniors' ears then.

2902 Mr. Simons. Yeah.

2903 Mr. Walberg. What developments, Chairman Simons, have
2904 there been in financial scams affecting seniors and how can
2905 the Commission help stop these scams from spreading to larger

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2906 groups of seniors?

2907 Mr. Simons. So these things are just evolving
2908 continually and it is, you know, you stop one type of scam
2909 and another type of scam arises. And so, the trick for us is
2910 to stay on our toes, pay attention to what is going on, and
2911 move to each succeeding new scam.

2912 And one of the things that enables us to do that is our
2913 Consumer Sentinel database which is an incredible tool for
2914 law enforcement and particularly for dealing with scams. It
2915 has an enormous number of complaints in it and shared by us
2916 with the local state authorities across the country and it is
2917 a great asset.

2918 Mr. Walberg. Okay, any other comments?

2919 Mr. Chopra. I hope that we also start paying closer
2920 attention to how seniors are scammed online. More and more
2921 seniors are also participating in the digital economy, also
2922 connecting with family, and many, especially those who suffer
2923 from diminished capacity can be particularly at risk.

2924 Mr. Walberg. Well, I appreciate that. It is a big
2925 issue and it is not going away and it is expanding. So our
2926 efforts together will be very helpful for the constituents I
2927 represent and those all over this great country.

2928 So, Madam Chairwoman, thank you for allowing me this
2929 time.

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2930 Ms. Schakowsky. Thank you, Mr. Walberg.

2931 I just want to -- I am surprised none of you mentioned
2932 that the FTC does do these scam workshops. I don't know if
2933 they are everywhere, but we really have this amazing one in
2934 the Chicago area, Brad Schneider and I. And the FTC
2935 organized it, but brought in a representative of the Attorney
2936 General, various other state agencies, and it was
2937 spectacular. It was chaired by the Federal Trade Commission.

2938 So I don't know if it is in Mr. Walberg's district, but
2939 I would suggest that you ask for one of those. It was really
2940 good.

2941 Mr. Simons. And we would be thrilled to do it.

2942 Ms. Schakowsky. Okay. And so, Mr. Rush was here
2943 earlier, but we welcome him back for his 5 minutes of
2944 questions. Mr. Rush?

2945 Mr. Rush. Yeah, I want to thank you, Madam Chair.

2946 It has been one of the -- the means of committees that -
2947 - those that pull us in a different direction, and some of
2948 them when they come in, they come in right before it is over.

2949 So I know those who sit patiently were not overwhelmed with
2950 enthusiasm when they saw me walk through the door, but it is
2951 the way this place operates.

2952 So I want to thank you, Madam Chair, for holding this
2953 hearing. And I want to begin by asking unanimous consent to

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2954 offer into the record an October 2018 letter from the AMA.

2955 So I ask unanimous consent.

2956 Ms. Schakowsky. Without objection, so ordered.

2957 [The information follows:]

2958

2959 *****COMMITTEE INSERT 7*****

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2960 Mr. Rush. All right. I want to begin by saying that the FTC
2961 is one of my most favorite agencies in the federal
2962 government. I worked very closely with the FTC particularly
2963 when I chaired this subcommittee some years ago and did some
2964 really good work with the FTC.

2965 But I want to -- Chairman Simons, on October 26, '18,
2966 the AMA sent you a letter encouraging the FTC to monitor
2967 insulin pricing and market competition out of increasing
2968 concerns that the rapid rise on the price of insulin may be
2969 attributed to anti-competitiveness rather than research and
2970 development. If, Mr. Chairman, as the letter alleges, if
2971 this is true, how would the FTC respond? And the second part
2972 on the question is have you investigated the claims made in
2973 the AMA letter?

2974 Mr. Simons. Thank you for the question, Congressman.
2975 So I can't respond specifically to any non-public
2976 investigation that is going on, but I will say this. We are
2977 very focused on pricing in the pharmaceutical sector. We
2978 monitor pricing on a monthly basis over a wide range of drugs
2979 to see if there are any anomalies like the one you just
2980 described, and we look specifically to see if they are caused
2981 by anticompetitive activity. And if they are, this is a
2982 source of case generation for us, so these are a source of
2983 investigations. So that is the type of, exactly the type of

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2984 thing that we could look at.

2985 Mr. Rush. Is there any one of the commissioners that
2986 might want to respond?

2987 Mr. Chopra. Yeah. I think the situation we see with
2988 insulin is it is not isolated. It really, we see it all
2989 over. I believe in the case of insulin it is really only
2990 three players, Eli Lilly, Nova Nordisk, Sanofi, who really
2991 have all the volume. The original patent was sold for three
2992 dollars generations ago.

2993 We see a lot of challenges across the pharmaceutical
2994 market with respect to abuse of intellectual property. My
2995 colleagues talked about some of the work there. But we have
2996 to use all of our tools to crack down on anticompetitive
2997 conduct and the fewer and fewer players we have in the market
2998 that raises more concerns.

2999 And it just bugs me that some of these treatments are
3000 old. Insulin is not dramatically different than it used to
3001 be and the fact that people can't get it affordably and are
3002 skipping out on it --

3003 Mr. Rush. Right.

3004 Mr. Chopra. -- it is literally killing them.

3005 Mr. Rush. Anybody else?

3006 Mr. Phillips, I understand you had some nice things to
3007 say about me earlier. I really appreciate it. It came

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3008 across my desk.

3009 Mr. Phillips. Absolutely, Congressman. In my opening
3010 statement I talked about the work that we are doing on a
3011 bipartisan basis at the FTC to help deal with the cost of
3012 health care, on the competition side included a lot of really
3013 good work over the last year, a half a billion judgment, an
3014 important antitrust case filed weeks ago, a decision on pay-
3015 for-delay settlements which I know have been very important
3016 to you that we issued 5-nothing, just a few weeks ago. So I
3017 want you to know from me that the cost of health care and
3018 rooting out anticompetitive conduct in the healthcare
3019 industry is and will remain a focus for all of us.

3020 Mr. Rush. Well, thank you.

3021 Madam Chair, thank you so very much for your indulgence
3022 and I yield back the balance of my time.

3023 Ms. Schakowsky. Thank you, Mr. Rush.

3024 Just a little bit of business left. I request unanimous
3025 consent to enter the following testimony or letters, other
3026 information into the record. Without objection, so ordered.

3027 [The information follows:]

3028

3029 *****COMMITTEE INSERT 8*****

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3030 Ms. Schakowsky. A letter for the record, Oversight of
3031 the Federal Trade Commission: Strengthening Protection for --
3032 oh, okay. A letter from the Electronic Privacy Information
3033 Center; a letter from Consumer Bankers Association; a letter
3034 from the Internet Association; a letter from the National
3035 Association of Federally Insured Credit Unions; and a letter
3036 from the Confidentiality Coalition.

3037 And, finally, I want to thank our ranking member. I
3038 want to thank the staff on both sides of the aisle. And I
3039 especially want to thank our witnesses, members of the
3040 Federal Trade Commission, for coming here today.

3041 I remind members that pursuant to committee rules they
3042 have 10 business days to submit additional questions for the
3043 record to be answered by the witnesses who have appeared. I
3044 would ask each witness to respond promptly to any such
3045 requests that you may receive.

3046 And at this time, the subcommittee is adjourned.

3047 [Whereupon, at 1:26 p.m., the subcommittee was
3048 adjourned.]