The subcommittee met, pursuant to call, at 10:30 a.m., in Room 2123 Rayburn House Office Building, Hon. Janice Schakowsky [chairwoman of the subcommittee] presiding.

Staff present: Billy Benjamin, Systems Administrator; Jeff Carroll, Staff Director; Evan Gilbert, Press Assistant; Lisa Goldman, Counsel; Waverly Gordon, Deputy Chief Counsel; Tiffany Guarascio, Deputy Staff Director; Alex Hoehn-Saric, Chief Counsel, C&T; Zach Kahan, Outreach and Member Service Coordinator; Meghan Mullon, Staff Assistant; Alivia Roberts, Press Assistant; Tim Robinson, Chief Counsel; Chloe Rodriguez, Policy Analyst; Ben Rossen, FTC Detailee; C.J. Young, Press Secretary; Jordan Davis, Minority Senior Advisor; Margaret Tucker Fogarty, Minority Staff Assistant; Melissa Froelich, Minority Chief Counsel, CPAC; Bijan Koohmaraie, Minority Counsel, CPAC; and Brannon Rains, Minority Staff Assistant.
Ms. Schakowsky. The Subcommittee on Consumer Protection and Commerce will now come to order. We will begin with member opening statements, and I will begin for 5 minutes.

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

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

And while I appreciate the Commission's work on and action on the Facebook case, I believe the reality is that a large fine in a single case does not meaningfully solve the problems that consumers face because of the FTC's lack of tools it needs to fulfill the mission to protect consumers in today's economy. The FTC needs increased funding and the APA, Administration Procedures Act -- I can't stand those acronyms, okay -- the rulemaking authority, at a minimum, to restore consumers' confidence in today's digital and brick and mortar marketplace, the FTC should be able to pursue
And, Chairman Simons, I want to thank you and offer my support for APA rulemaking that you said that you wanted to see. We know the American people are counting on us to act. According to a recent survey, 67 percent of American adults want the government to act to protect them and to protect their privacy. But as it stands right now, the FTC does not have authority to obtain civil penalties for initial violations for most unfair or deceptive practices, making matters much worse.

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

Energy and Commerce Democrats feel we have an obligation to provide a solid piece of legislation that protects consumer privacy. We have begun conversations now with the Republicans as well, and I am very hopeful that legislation will be bipartisan and I am looking forward to working with all of you on the Federal Trade Commission in designing this
legislation. We welcome the commissioners today to learn how we can assist them in fulfilling their mission, our joint mission. I want to yield the balance of my time to Congressman Lujan.

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

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

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

And most recently in 2017, when we discovered and learned about the breach with Equifax back in September of '17, there were hearings held in October of '17. It appeared...
that there were commitments made in this committee to the
American people that action would be taken before the holiday
season and here we are today, still where no action taken and
that is why this hearing matters so very much.

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

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

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

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

In America's 21st century economy, our days start and
end by exchanging our information with products that save us
time, keep us informed, connect us with our communities. Many of us start our day by asking Alexa or Siri, "What is the weather today?" Then we browse Facebook and Instagram, open some emails, read the news, check for traffic updates on our iPhones, and if the traffic doesn't look too bad there is time to order groceries to be picked up or delivered after work. And that is just before we walk out the door. All day long we are sharing our information with the internet marketplace. And for people who use health trackers and apps, it might not even stop when you go to sleep.

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

In a recent survey, 75 percent of respondents said privacy protections should be the same everywhere they go. The vast majority of Americans want the same protections whether they live in Eastern Washington, San Francisco, New Jersey, or Illinois. That is why I have been advocating and
leading for a national standard for data privacy that, one, doesn't leave our privacy vulnerable in a patchwork; two, increases transparency and targets harmful practices like Cambridge Analytica; three, improves data security practices; and four, is workable for our nation's innovators and small businesses.

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

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

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

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

Thank you, everyone, for being here and I look forward
to our discussion. Ms. Schakowsky. The gentlelady yields back. And now I recognize the chair of the full committee, Mr. Pallone, for 5 minutes.

The Chairman. Thank you, Madam Chair.

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

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

But that is not the only way fraudsters commit their
offenses and the FTC needs more support and more authority to prevent scams and enforce the law. The FTC is also the nation's primary enforcer in the area of privacy and data security. Talk about a daunting job. When you consider that companies today monitor every move we make, they are tracking where we go, who we are with, our private conversations, our health, the websites we visit, and increasingly what we do inside our homes. And as we have learned from the concerning privacy issues surrounding Cambridge Analytica and Facebook and from massive data breaches like the one at Equifax, there is little reason to believe that consumers can trust these companies with our personal data.

The FTC can and should be doing more to protect consumers and Congress needs to give the FTC the tools it needs to be more effective. That starts with resources. The FTC has fewer employees today than it did in the 1980s when the internet did not exist. It has just 40 employees responsible for protecting the data of 300 million Americans. I think that is just unacceptable, particularly when you consider that the United Kingdom, which has a much smaller population, has more than 500 people who protect the privacy and data of its residents.

So we have to give the FTC the resources it needs to become a global leader on privacy and data security. The FTC
also needs more authority to prevent privacy abuses from happening in the first place and to ensure that companies properly secure the personal data entrusted to them. Too often, the FTC can do little more than give a slap on the wrist to companies the first time they violate the law. That is because it lacks the authority to impose a monetary penalty for initial violations.

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

Companies should not be gathering consumer information without a good reason and should have clear consent when they use that information for purposes a consumer would not reasonably expect. When I search online about the side effects of a medicine, I don't expect that information to be shared with advertisers, data brokers, or insurance companies, and it shouldn't be shared unless I say so.
Companies also need to protect the data they collect so Americans are not as vulnerable to identity theft, scams, and other unfair and deceptive acts as they are today. So Congress should pass, or must pass strong, comprehensive privacy legislation, and this committee intends to take that action. The legislation that we pass should give consumers control over their personal data including giving consumers the ability to access, correct, and delete their personal information. And it should shift the burden to companies to ensure they only use the information consistent with reasonable consumer expectations.

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

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

And I just wanted to start out by saying that America needs a modern online privacy law and the Federal Trade Commission needs the tools and resources to effectively enforce law and hold bad actors accountable. And I think, I encourage you all today to also discuss the Children's Online Privacy Protection Act because I think it is in need of
substantial updates, especially looking at how we enforce it, the sham safe harbor provisions, and your opinions on adopting some reasonable collection parameters. So thank you and I yield back.

The Chairman. And I yield back, Madam Chair.

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

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

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

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

I want to echo the sentiments of my colleague, Representative Rodgers, who outlined the vast benefits consumers also get from the use of their information online. It is a goods for services exchange. We don't always know that but we do benefit from that. We cannot lose sight of the tremendous benefits consumers get from use of those data: access to top tier journalism, affordable and quickly delivered products, telehealth and research initiatives, and much, much more.

Here in the United States we have a thriving startup ecosystem and a regulatory environment that enables small businesses to grow and compete in no small part because the free flow of information. And as a result, companies
innovate, they create jobs in America, and offer consumers options and convenience that most of us never dreamed would be possible.

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

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

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

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

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

Every agency has challenges and recent court changes in
cases have changed the direction of some agency activity to refocus on due process. I am encouraged that these types of improvements would help small businesses understand their rights when faced with the full force of the FTC. I believe the FTC is the right agency to enforce new privacy law with appropriate safeguards and process improvements to ensure strong, consistent enforcement.

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

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

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

Next, I am going to introduce all of our witnesses, but
I want to tell all of you that I had a standing-room-only
FTC-sponsored scam workshop in my district along with
Congressman Brad Schneider, which was amazing, and I would
encourage all members to consider doing that. The turnout
was unprecedented and people really appreciated it. So thank
you.

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

And at this time, the chair will now recognize each
witness for 5 minutes to provide their opening statements.
Before we begin, I would like to explain the lighting system.
I think probably most of you know that the light will
initially be green at the start of your opening statement,
then it will go to yellow when you have 1 minute, and then it
will go to red. And we would appreciate it very much if you
would end in those 5 minutes. So, Chairman Simons, you are
recognized for your 5 minutes.
Mr. Simons. Chairman Schakowsky, Ranking Member Rodgers, and distinguished members of the subcommittee, it is an honor and a privilege to appear before you today, and especially with my esteemed colleagues, my fellow commissioners.

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

Ms. Schakowsky. If you could hold just for a minute. We got the message, and if you will put the signs down, appreciate it.

Thank you. Go ahead.
Mr. Simons. Yes. We successfully attacked anticompétitive conduct by pharmaceutical companies, achieving a $448 million judgment in the latter case. We also recently filed an important case against a company called Surescripts, a health IT company with a monopoly over e-prescribing that is maintaining and acquired that monopoly through exclusionary conduct.

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

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

Our primary legal authority in this space is Section 5
of the FTC Act, which prohibits deceptive or unfair commercial practices. But Section 5 is an imperfect tool -- imperfect tool. For example, Section 5 does not allow the Commission to seek civil penalties for first-time privacy violations. It does not allow us to reach nonprofits and common carriers even when their practices have serious implications for consumer privacy and data security.

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

We have aggressively pursued privacy and data security cases to date bringing more than 65 data security cases as well as more than 60 general privacy cases. For example, we recently brought cases against two companies whose alleged lax security practices resulted in a breach of eight million consumers' data. And in March, the FTC announced a record $5.7 million civil penalty as part of its settlement with
video social networking app Musical.ly for collecting
children's personal information online without first
obtaining parental consent.

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

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

We look forward to working with the subcommittee and the
Congress and I am very happy to answer your questions. Thank
you so much.

[The prepared statement of Mr. Simons follows:]

***********INSERT 1**********
Ms. Schakowsky. And thank you, Mr. Chairman, sticking within the time, too, appreciate that.

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

STATEMENT OF CHRISTINE WILSON

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

With respect to privacy legislation, I agree with Chairman Simons' opening statement on this topic. I too encourage Congress to enact privacy legislation to be enforced by the FTC. Businesses need clarity and certainty regarding rules of the road in this important area. The passage of the California Consumer Privacy Act and the prospect of potentially conflicting bills in myriad states
have created confusion and uncertainty in the business
community. And in light of the fact that online commerce is
not just national, but international in scope, I encourage
Congress to include preemption in any federal privacy
legislation. Even more importantly, consumers need clarity
regarding how their data is collected, used, and shared.
Privacy legislation should address these concerns and could
help build public trust around data collection and use.

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

And while privacy is important, so is competition.
Federal privacy legislation must be carefully crafted to
maintain competition and foster innovation. GDPR may have
lessons to teach us in this regard. Preliminary research
indicates that GDPR may have created unintended consequences,
including a decrease in investment and startups and
entrenchment of dominant players in the digital advertising
market. Reports also indicate that compliance with GDPR is
costly and difficult for small businesses and new entrants.
U.S. legislation should seek to avoid these negative consequences. There are three other elements I believe should also be included in federal privacy legislation: civil monetary penalties, which Congress has provided for in other statutes that are enforced by the FTC including COPPA and the Telemarketing Sales Rule; jurisdiction over nonprofits and carriers which collect, common carriers which collect significant volumes of sensitive information; and targeted, narrow APA rulemaking authority so the FTC can enact rules to supplement legislation and to permit adjustments in response to technological developments.

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

Our ability to protect consumers relies heavily on this authority, but recent decisions have raised questions about the scope of our authority that conflict not only with long-established case law, but also with the clear intent of
Congress. Earlier this year, a case in the Third Circuit held the FTC can't seek injunctive relief when the challenged conduct is not ongoing or imminent, but fraudsters frequently cease their unlawful conduct when they learn of impending law enforcement actions. The Third Circuit standard could prevent us from seeking relief in federal district court in these circumstances, even if we can show the conduct is likely to recur based on past practices.

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

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

[The prepared statement of Ms. Wilson follows:]

**********COMMITTEE INSERT 2**********
Ms. Schakowsky. Thank you. And now we recognize
Commissioner Slaughter for 5 minutes.

STATEMENT OF REBECCA KELLY SLAUGHTER

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

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

In particular, where Congress has granted us privacy
related rulemaking authority, the Commission has used to put
out clear rules, engage in meaningful, participatory notice
and comment, and amend our rules to keep up with
technological developments. For example, the FTC has
rulemaking authority under COPPA. We put out an initial rule
and have since adapted it to address innovations that affect
children's privacy, social networking, online access via smart phone, and the availability of geolocation information. As we have made these changes, we have conducted workshops and sought input through formal notice and comment.

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

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

Just as you in Congress are doing, we at the Commission are reflecting carefully on the types of substantive privacy provisions that might best protect consumers today and in the future. The public hearings initiated by Chairman Simons have been a showcase for these debates.
I want to briefly highlight one of my own observations for your consideration. Much of our Section 5 authority and some of our privacy rules up to this point have been grounded in the principles of notice and consent. The notice and consent framework began as a sensible application of basic consumer protection principles to privacy. Tell consumers what you are doing with their data, secure consent, and keep your promises.

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

They must cede all control over their data to access services critical to their everyday lives. They don't have the option to turn to a competing, more privacy-protective service. In other words, when it comes to our digital lives, neither notice nor consent feels particularly meaningful today. As you consider better protections for consumer privacy, I want to encourage solutions that don't place all the burden on consumers as much as the existing framework
Finally, amidst the important ongoing discussions of the resources allocated to our agency, I want to conclude by highlighting what a good return on investment the FTC is for the American consumer. In fiscal year 2018, the Commission's budget was $306 million and our actions returned over $1.6 billion to consumers. So, for every dollar the American taxpayer gave to the FTC, staff returned five. We welcomed the recent letters from Chairs Schakowsky and Pallone asking what the Commission could do with more resources and the Commission's response illustrated the good use to which we could put additional funding.

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

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

[The prepared statement of Ms. Slaughter follows:]

**********COMMITTEE INSERT 3**********
Ms. Schakowsky. Thank you very much, and now
Commissioner Phillips is recognized for his 5 minutes.

STATEMENT OF NOAH PHILLIPS

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

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

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

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

This Commission is fighting anticompetitive conduct in court. We recently obtained a federal court judgment
ordering AbbVie to pay nearly $500 million in relief to 
consumers overcharged for AndroGel, as a result of AbbVie's 
anticompetitive manipulation of our civil justice system. 
And as the chairman mentioned, just weeks ago we sued 
Surescripts, a monopolist we allege employed illegal vertical 
and horizontal restraints to maintain its monopolies over two 
e-prescription markets. In addition to targeting the cost of 
health care, this case addresses important competition issues 
like two-sided markets, network effects, and innovation 
harms.

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

The FTC also recently cracked down on deceptively 
advertised amniotic stem cell therapy which its promoters 
claimed could treat serious diseases including Parkinson's,
MS, and heart attacks. The FTC just mailed checks over half a million dollars to victims. We also recently brought charges against defendants who claimed that their Nobetes pill could treat diabetes even after the FDA and FTC warned them that they needed scientific evidence which they didn't have. The list goes on.

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

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

Thank you and I look forward to your questions.

[The prepared statement of Mr. Phillips follows:]
Ms. Schakowsky. Thank you very much. And last, but not least, Commissioner Chopra, it is your 5 minutes.

STATEMENT OF ROHIT CHOPRA

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

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

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

Studies overwhelmingly confirm that we just don't read these terms and we are now becoming numb to companies imposing regulations that make us cede our rights and even our property. For example, terms of service for streaming
music apps have given companies access to your contacts and photos, even though it is a music app. To use certain, quote, free photo sharing apps, the maker of the apps reserves the right to use your name, likeness, and image even for commercial purposes. Other terms of service slip in language that says the company will absolutely ignore "do not track" settings in your browser.

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

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

Now the FTC has a strong tradition of restricting unfair contract terms. In the 1980s, during the Reagan administration, the FTC banned a slew of terms and consumer credit contracts including confessions of judgment where...
consumers waived all of their defenses in court if they were sued. The FTC found that terms like these were the product of an unequal bargain where consumers could not protect their interests.

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

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

I would suggest that there are two aspects that warrant our attention. First, we need to look at the circumstances that these contracts are imposed and whether one side has
more power, information, or leverage. Second, we need to look at the terms themselves, particularly any one-sided terms that unreasonably favor the drafting party. It will be especially critical to closely scrutinize the terms imposed in take-it-or-leave-it contracts on entrepreneurs and small businesses like app developers and online merchants, especially when they can see their data taken away or their rights removed. This can impede fair competition and we should look closely at it.

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

[The prepared statement of Mr. Chopra follows:]

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

So we know the FTC does not have enough resources to devote to privacy and data security enforcement. The FTC has only about a thousand employees altogether to fulfill the dual mission of competition and consumer protection which is less than what the agency had, as we heard earlier, in 1983. Of those, only about 40 people are charged with protection of privacy and security of American consumers. I can find that pretty shocking. The American people deserve more and better.

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

Mr. Simons. Thank you, Chairman. So like you have said before, we are a small agency but we fight above our weight. So we are very aggressive with the resources that we have, but if we had more resources I guarantee that we would put those to very good use.
In terms of -- one thing to keep in mind, I think particularly with respect to the legislation that you are considering, is that would significantly, no matter who you talk to, really, that would significantly expand our authority. And in particular, if that legislation is passed, there is no question that we would need very substantial increases in our resources.

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

Ms. Schakowsky. Okay, thank you.

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

[The information follows:]

************COMMITTEE INSERT 6************
Ms. Schakowsky. Your response indicated that the Commission could hire 160 more staff with $50 million in additional funding or 360 more staff with an additional $100 million funding. You also said that a hundred new attorneys focused on privacy and security would allow the FTC significantly to boost its enforcement activity and also improve the agency's ability to monitor compliance of companies already under the order.

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

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

And this also was explored at our hearings and we are taking that to heart and increasing the provisions in our
model orders to beef up, for example, assessor provisions so
the assessors actually have a much more fulsome role and we
can get the benefit of their investigation. And also, we are
creating a provision that requires certification by a senior
officer in the company. And in order to make that
certification, the officer is under an obligation to actually
conduct an investigation and gather evidence regarding their
compliance with the order.

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

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

So, in addition to resources, you know, bright line
rules that really give clear guidance and have real teeth and
accountability and especially penalties will also help us
advance that mission. The more blurry it is, the more it is
going to be harder to enforce, the more some firms will be able to get through loopholes and small firms will suffer. So I also encourage you to think about not just having the FTC enforce some of these rules, but other parties as well. We need those force multipliers.

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

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

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

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

And they are also talking about how to -- notice and comment, notice and choice has been a primary vehicle as we
discussed and folks in the hearings emphasized that it really should also turn on assessments and accountability. And so, we are focused on that as well and also de-identification of data. Those are the things that came up at the hearing and that were most recommended by a broad group of people.

Mrs. McMorris Rodgers. Great, thank you.

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

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

This conversation that we are having about a broader consumer privacy law because it reaches broader and because it potentially applies to a far broader swath of data, some of which may raise similar kinds of risk, some of which may make less, to me means that we have to have a really serious conversation, and in particular that Congress needs to have really a serious conversation what the problems are we want to solve, what the wrongs are that we want to right.
So one of the things that I have heard today is a concern about, let's say, transparency, right. Consumers don't have the time to look over a long policy. Maybe they don't understand the legal jargon. Are there things that we can do to increase that level of awareness and maybe also provide more clarity for business? That could be a good outcome.

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

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

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

So let me take as an example, two consumers both pushed ads as they walk by a Starbucks. One consumer might
experience that as, "Great, that reminds me I want the latte and I want to get a dollar off." But the other consumer might say, "Hey, that is really creepy. How did you know I was there?" Those are both very reasonable interpretations of the same facts, but what they demonstrate is that different people have different tastes for privacy. So in this context when you give broad rulemaking authority, you ask five of us or maybe even just three of us to decide what we want. That is no substitute for the democratic process.

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

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

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

Ms. Castor. Thank you, Madam Chair.

Chairman Simons in his testimony mentioned the recent FTC fine of $5.7 million against the video social networking
app Musical.ly -- it is now known as TikTok -- to settle allegations that the company illegally collected information on children in violation of the Children's Online Privacy Protection Act. You said this is the largest civil penalty obtained by the FTC in a children's privacy case, but in actuality there really haven't been very many. And when you look at the circumstances here, I don't think the fine fits the crime.

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

So, and by the way do you all know the valuation of the Chinese company that owns TikTok? ByteDance, as of November 2018, ByteDance was valued at $75 billion. That means the FTC's record-setting fine was 0.0076 percent of ByteDance's value. No CEO is going to blink an eye at a fine that inconsequential. Companies will just see small FTC fines as the cost of doing business and will continue to elevate profits over privacy, especially when it comes to our kids. Commissioner Chopra and Commissioner Slaughter, you issued a joint statement in responses. You said, "Executives of big companies who call the shots at companies that break
the law should be held accountable," I guess personally accountable, and the FTC has gone after executives when they have direct control and are calling the shots here.

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

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

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

Ms. Castor. Commissioner Slaughter, I want you to answer that but I also heard you loud and clear on the privacy policies. Everyone knows that these notice and
consent and privacy policies, they are simply not working, and it is particularly egregious when it comes to children and parents.

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

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

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

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

I would like to make a clarifying point because I have
heard a couple of members talk about fines the FTC can levy.
And just to be very clear, unlike some of our counterparts
in Europe, we can't independently assess fines. Where we
find a violation of an order or a rule, we can go to court
and seek civil penalties and a court could assess penalties
and then in order to avoid that process, we can negotiate
with a company to reach an outcome that we think is fair and
just. But those are negotiated penalties they are not levied
fines, and I think that is a meaningful distinction.

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

And then --

Ms. Schakowsky. We are going to have to wrap. We are
going to have to wrap it up there.

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

Ms. Castor. Thank you.

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

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

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

And a company that comes to mind, a case that has interested me for some time, is LabMD. Most of you were probably not on the Commission when LabMD became a thing back in the -- a decade ago. And it has worked its way through the courts and, if I understand correctly, the most recent
was an Eleventh Circuit Court decision that actually put some
of onus back on the FTC saying you have actually got to
define these things that you want with what you want a
compny to comply.

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

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

Mr. Simons. Congressman, thank you for the question.

As you noted earlier, none of the five of us were here when
the LabMD case was brought and I do want to reserve judgment
on the work that others did. But I think your fundamental
point is absolutely right, which is we need to think and, in
fact, the statutes that we enforce command us to think very
critically about remedies and the impact that they have.

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

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

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

But for small businesses, the heavy hand of the Federal
Trade Commission basically can spell the end of their
business and in this case, unfortunately, it did. But even a
consent decree, which your consent decrees run a number of years, for a company to have to disclose that "Yeah, I want to handle your lab specimens. I want to handle your confidential medical data. Just so you know, I am under a consent decree from the Federal Trade Commission until 2032," that probably ends that company's ability to render that service. Would you agree?

Mr. Phillips. I absolutely think that issues like the length of consent decrees need to be considered.

Commissioner Wilson and I recently wrote in a case where the party had violated a consent decree in a really bad way, so we agreed with the penalty. But one of the things that we said together is that experience and law and the facts of the case, not necessarily by the way how it is publicly perceived, but the facts of the case and the applicable law and our experience as the agency ought to guide us in how we apply remedies.

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

Mr. Burgess. Sure.

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

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

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

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

Ms. Kelly. Thank you, Madam Chair.

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

Chairman Simons, do you believe it would be helpful to
the FTC's ability to enforce the law companies were required
to disclose their privacy practices?

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

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

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

Mr. Chopra. Yes. I think better disclosure that is
clear is always good, but on top of disclosure we have to sometimes recognize that users sometimes actually have no choice, you know, when it comes to filling out their job application, when it comes to enrolling in school, they may not have a choice.

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

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

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

Ms. Kelly. Okay. Turning to a different subject, I wanted to talk about the interception of privacy rights and
civil rights. Algorithms that profile users and target content to specific groups can too easily result in discriminatory practices against marginalized communities. For example, investigative journalists have found that employers advertise jobs exclusively to men on Facebook and also build internal algorithms that negatively ranked women for job placement.

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

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

Mr. Chopra. Yeah, this is really serious because with algorithms and machine learning they essentially allow some firms to either knowingly or unknowingly evade our antidiscrimination laws. It reinforces biases against rural Americans, against people of color, so us to attack what is going on behind those scenes is absolutely critical. And,
you know, no algorithm is going to be free of bias and we need to make sure that the digital economy is not reinforcing biases.

Ms. Kelly. Thank you.

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

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

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

And, Chairman Simons, it has been a few decades, but there was a time when the FTC, as we heard, was given broad rulemaking authority but stepped past bounds of what Congress and the public supported. This required further congressional action and new restrictions on the Commission. In testimony submitted for this hearing, the FTC supports APA rulemaking authority for privacy legislation. Do you have any concerns with Congress delegating broad
rulemaking authority to the FTC and would you support limiting that rulemaking authority to issues that cannot be foreseen by this Congress?

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

Mr. Walden. Very specific.

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

Mr. Walden. All right.

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

Mr. Walden. Yeah.

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

Mr. Walden. You know and too often when we face a tough
problem we do that to agencies. We say, "Yeah, we can't really figure this out, so we are just going to give you rulemaking authority. You go figure it out."

Mr. Simons. Yeah.

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

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

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

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

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

Mr. Simons. Right.

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

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

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

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

Mr. Walden. All right.

Ms. Wilson, what is your guidance on this?

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

And I agree with Chairman Simons that the state AGs -- Mr. Walden. Has to be robust.

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

Mr. Walden. Yeah.

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

Mr. Walden. Well, if I could just --
Mr. Chopra. Sorry. Well, go ahead.

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

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

Mr. Walden. Okay.

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

Mr. Walden. Chairman in exile.

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

Mr. Walden. You are all right.

Mr. Phillips. I think preemption is essential for a few reasons. The first is to give businesses the clarity that they need and the second is to meet the expectation that we have all been talking about, about aligning consumer
understanding with what is going on. The more variability that you have, the less transparency, the less consumer power.

Mr. Walden. Right.

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

Mr. Walden. Right.

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

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

Mr. Walden. Madam Chair, with your indulgence, could
our final commissioner weigh in? My time is expired.

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

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

Mr. Walden. That is a good point.

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

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

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

Ms. Schakowsky. I now recognize the chairman of the
full committee, Mr. Pallone.

The Chairman. Thank you, Madam Chair.

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

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

Mr. Simons. My mantra is vigorous enforcement, so as long as I am the chairman we are going to vigorously enforce. I will have to say also that we have brought lots of cases in this area where we can. We have brought about, when you consider the full range of privacy authority that we have ranging from Section 5 to the FCRA to COPPA to Do Not Call to CAN-SPAM, we have brought over 500 cases.

So I would say we have been pretty active, but our
authority is limited as you describe and so if we get more
authority, we will need more resources.

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

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

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

The Chairman. Okay. I am going to go back to the
chairman again. Although privacy is an important issue, it
is obviously not the only critical consumer protection issue
within the FTC's jurisdiction. And topping the list of the
FTC's nearly three million complaints were imposter scams,
where a scammer pretends to be from the IRS or the Social
Security Administration or another trusted organization to
get people to turn over money or personal information.
Consumers reported losing nearly $488 million in these
types of scams last year. So let me ask you, Chairman,
consumer education is important but the burden should not

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

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

The Chairman. All right.

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

The Chairman. Sure, go ahead.

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

So when you think about resource questions, I would
encourage you to consider all the work that all the different bureaus at that FTC does and how important they collectively are to the national interest.

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

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

So thank you again. Thank you, Madam Chair.

Ms. Schakowsky. Thank you, the gentleman yields back.

And now I recognize Mr. Guthrie.

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

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

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

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

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

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

Mr. Simons. Yeah, so what I was going to say is, so we have a dual mission, consumer protection including privacy and competition, so we are sensitive, really, to both. And
the thing that -- one of the things that we are very concerned about is the situation where, so, for example, if you require opt-in for certain kinds of information or maybe even all the information, that makes it much easier for high-tech platforms that are consumer-facing to get that opt-in. And so, for a new company or a small company, it is very difficult to get that kind of opt-in and access to that data. So that might constitute a very significant disadvantage for the small companies and the new entrants and cause a huge advantage for the existing high-tech platforms. And, in fact, I understand that a high-level competition official from the European Union is concerned about this because he thinks that business is being pushed by the GDPR to Google and Facebook.

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

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

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

You know, many venture capitalists, many new firms that are starting are saying, you know, "The big guys actually have already taken all the key data. We are never going to catch up. We now have to create our business maybe just to sell to them." That can really distort innovation in our country and I am really, I am increasingly worried that our lack of attention to this issue is deterring lots of
entrepreneurs from wanting to challenge those incumbents. So we need to think hard about that.

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

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

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

Mr. Simons. Yeah, so this type of thing is obviously of concern to us. It is a deception. You know, it is counterfeiting, like you said. The primary agencies that have jurisdiction over this, I think, are actually the
Mr. Guthrie. Okay. Well, thank you very much and my time is expired and I yield back.

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

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

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

This week, the FTC is celebrating National Small Business Week -- I thank you for doing that -- acknowledging the important contributions of small businesses, their owners, and in our communities. As you may know, the 1st district of Arizona is home to many small businesses, it is mostly a rural district, including mom and pop shops. Many of these business owners are located in those types of rural areas throughout the country.
A critical role of the FTC is to provide consumer education and conduct and outreach. These efforts include providing practical and plain language guidance on many issues for small business owners, many of whom are not up to the speed that the larger businesses are. In fact, the FTC has conducted several roundtables over the past couple of years to educate small business owners on various matters including cybersecurity.

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

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

And the second question is, as you know, Congress is currently considering proposals to include in legislation on a range of issues impacting consumer privacy and data...
security. As the FTC considers enforcement actions against corporations who violate privacy laws, how does the FTC consider enforcement actions against small businesses versus those against larger companies? Mr. Simons?

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

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

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

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

Ms. Slaughter. Thank you, Congressman. I would just add that I think there are elements of what are in the rules and the laws that are important; there are also important questions about the application of prosecutorial discretion. When we see particular cases, I think it is incumbent upon us to consider what is the company that we are considering. How big is it? What is its compliance opportunities or costs, and take that seriously in making sure that our cases and, more importantly, our remedies are carefully tailored to the particular defendants we have in front of us; it is not a one-size-fits-all approach.

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

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

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

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

Mr. Bucshon. Thank you, Madam Chairwoman.

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

Mr. Simons. Yeah, I mean if you are talking about the same data that is covered by HIPAA and you are talking about, you know, it is really, it is sensitive data, you have to think about treating it in a similar manner. And one of the things that I think is the real advantage of the federal privacy legislation that you were considering is that it would be broad-based and not cabined to particular types of information. And so, I think that makes things easier to
Mr. Bucshon. Yeah, because, you know, there is going to -- I mean there is real-time glucose monitoring for diabetics, and people may not want people to know that they are diabetic and that information could be out there, or your blood pressure could be high and people may not know. I mean it is going to be real important that we figure how we protect that type of information, I think.

Mr. Simons. Yes, I agree.

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

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

The gaps that you are mentioning concern me. Emerging technologies change the landscape and some of this very sensitive information is not currently covered under federal legislation. We can get at it through our Section 5 authority, but having guidance at the federal level would be very useful, and so greater authority in that area would help
Mr. Bucshon. Yeah, because I mean we have been talking about, you know, how you have to click "agree" if you want to get a certain account, right, and that is probably true with devices that now monitor your health, right. And so that will be an area we have to look at too. People, you know, broadly as you mentioned that people should know if they put on a certain device that it may very well transmit health information to someone, and it may be in the paperwork and you may just not know.

I will give you a second.

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

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

Mr. Chopra. I just wanted to add, something that makes this even harder is with artificial intelligence and machine learning. Even if we don't hand over our health information,
companies may know our health information based on what we are searching in terms of our symptoms, geolocation of where we are going. So that is going to make it really difficult when formulas and algorithms are determined and it may even know our health conditions even if they have not been formally diagnosed.

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

Mr. Chopra. You have cancer.

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

Commissioner Phillips, do you have any comments on this?

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

Mr. Bucshon. Yeah, yeah.

Mr. Phillips. You know, you fill out a form every time
you go to the doctor's office, every single doctor, and the
doctors can't talk to each other so you have to repeat your
symptoms to --
Mr. Bucshon. Oh, I am very well aware of that problem.
Mr. Phillips. And so, I do think when we talk about
HIPAA we ought to think about how it is working and how it is
not working.
Mr. Bucshon. Okay, thank you all, I yield back.
Ms. Schakowsky. I now recognize Congresswoman Blunt
Rochester.
Ms. Blunt Rochester. Thank you, Madam Chairwoman, and
thank you all for your testimonies. First, before I get into
my questions about privacy and data security, I want to ask
you about our seniors who face scams especially through
exploited practices like gift cards. And today I am
introducing the Stop Senior Scams Act with my friend and
colleague, Mr. Walberg of Michigan, who is across the aisle.
And this bill is a House companion to a bill introduced by
Senators Casey and Moran earlier this year.
I know you and your staff are working with the Senators
and I look forward to working with you further as we consider
this bill on the House side. And, Commissioners, I just
wanted to ask briefly if you are seeing a lot of this like on
the rise in terms of the scams for seniors with these gift
cards? If you could just briefly and then we will jump into
the other questions.

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

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

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

And I really wanted to kind of focus on this, because
for those who don't know what it is, and I am going to ask
you, Commissioner Chopra, to actually share how you would
describe this. How I have it, it is a pattern, or for --
a dark pattern is a website or app design that is intentionally deceptive in order to push users into content, products, or even participate in data collection activities without their informed consent. And I can bet everybody in this room has been a victim to this. And even, ironically, if you Google dark patterns, later you will probably be affected by this. In the privacy space, many of my colleagues have touched on similar issues as it impacts consumers, children, and social media, but most recently even the IRS Free File had a connection to dark patterns. People seeking income-based assistance in filing their taxes were potentially steered unsuspectingly to products that were neither part of the IRS program or were free. And entities like Facebook we hear are -- that they are affected by it, but there are even more out there.

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

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

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

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

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

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

Ms. Wilson. So I think this is one of the great things about the Federal Trade Commission. We do have a history of engaging in competition and consumer protection R&D. And Chairman Simons, last summer, announced the competition and consumer protection hearings for the 21st century, and we
have held hearings with dozens and dozens and hundreds of participants and comments focusing on things like AI and machine learning and algorithms and how these affect consumers and the kinds of harms that can be created.

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

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

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

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

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

Chairman Simons, as you have heard today, we are committed to protecting small businesses and promoting innovation. Some other agencies are using or considering regulatory sandboxes for new innovations. Can you explain this concept and whether you believe we should consider a similar approach for privacy regulations?
Mr. Simons. So the regulatory sandbox as I understand it -- and thank you for the question, Congressman -- is a situation where small businesses would be able to -- play is not the right, I mean that is the analogy -- but to get started. And so, for example, people have proposed that for small businesses that they wouldn't have to comply with like, for example, maybe a federal privacy legislation that you pass in the coming months until they get to a certain size. And to be honest, I have thoughts positive and negative about that. So the positive is it cuts down, clearly, on the cost of getting into business and maybe allows people to grow that would never get off the ground. On the other hand, if the privacy legislation you pass really is protecting people, you know, small businesses can get a lot of sensitive information and you really worry about that.

Mr. Hudson. I appreciate that answer.

Mr. Phillips. Congressman.

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

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

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

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

Mr. Hudson. Great. I appreciate that.

Chairman Simons, as you know there are many other industries across the United States that are subject to various privacy laws. Some of the most familiar are the Health Insurance Portability and Accountability Act for the healthcare industry; Graham-Leach-Bliley for financial
services. Do you believe the FTC would have to exercise concurrent jurisdiction with the other federal agencies to implement a national privacy law and, if so, how would you recommend we do that?

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

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

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

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

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

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

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

Mr. Simons. I think looking at the supply chain and understanding the full scope of companies involved in the use of data, which is breathtaking, right, in its scope, is critical. We need to understand how the data are being used. We also though need to understand that the point at which the consumer interacts with the company is a very critical point for transparency and things like that.

Mr. Hudson. Thank you.

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

Ms. Schakowsky. The gentleman yields back.

I understand there is some desire by the panel of witnesses for a short break. I understand that so let's make a maximum of 5 minutes and let -- and then they will come back, okay. Or maybe members as well would like to take that moment.
Ms. Schakowsky. The committee hearing will resume and I will recognize for 5 minutes, Mr. Lujan.

Mr. Lujan. Thank you, Madam Chair.

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

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

Ms. Slaughter. Thank you for the question, Congressman. Technologists are extremely important. When we need to understand the material with which we are working in any particular case, and the more highly technical the field, the more highly technical the practices that we are investigating, the more we can benefit from the experience of a technologist. I think, I routinely try to rack my brain to
think of cases we have encountered not just in the privacy and data security area, but across our mission in competition and consumer protection that don't involve some technological element and it is very difficult for me to think of any.

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

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

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

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

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

Mr. Simons. My understanding is that one --

Mr. Lujan. Your microphone, please.

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

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

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

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

Mr. Simons. Yes.

Mr. Lujan. Yes?

Ms. Wilson. Yes.

Ms. Slaughter. Yes. We put an economist on every case that we consider both competition and consumer protection. I
think we could benefit from technologists too.

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

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

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

Mr. Long. Commissioner Chopra?

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

Mr. Lujan. Appreciate that.

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

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

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

I was thinking about creating a Bureau of Technology. So rather than do that we created a technology task force in the Bureau of Competition which is going to have a technology fellow. And I have transferred the FTE from the chief technology officer to the technology task force in the Bureau of Competition so we have more boots on the ground in terms of dealing with these investigations that we are conducting.
Mr. Lujan. But still very clear that more technologists would be of beneficiary, especially with the numbers that I shared earlier, 500 million, 148 million, 87 million just to name three examples.

Mr. Simons. Yes.

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

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

Mr. Gianforte. Thank you, Madam Chair.

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

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

Mr. Simons. Yeah, thank you for that question. And, first of all, this is an issue for domestic tranquility in my own household. This is, to me, when I was coming into office this was probably the most important thing at least in that
my wife was telling me about and then lots of other people too, and it is such an incredible inconvenience. And worse than that it is not just an inconvenience, it often leads to fraud.

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

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

Mr. Simons. Yes.

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

Mr. Simons. Yes, in the sense that we could identify the carriers that are facilitating the robocallers and just stop them from, like in the case of the foreign ones stop
them from entering the U.S. telephone network at the outset.

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

Mr. Gianforte. Yes, Commissioner.

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

Mr. Gianforte. Okay, thank you.

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

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

Mr. Gianforte. Yes.

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

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

Mr. Gianforte. Okay, thank you.

Chairman Simons, I am concerned with legislating for the sake of legislating and seeking to solve a problem that may not exist. I believe any federal privacy bill must focus on specific harms. You talked to this earlier. Can you
elaborate a little bit on why it is so important we focus on privacy harms to consumers in our attempt to legislate in this area?

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

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

Mr. Gianforte. Okay, thank you.

On that I yield back, Madam Chair.

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

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

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

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

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

Second, I hope that we establish that Americans have a right to control their information, a right to stop the use of their information if they choose so, and if they do, companies should have a right to charge for their services.

And third, waivers should be put in plain language. I want to get out how we are determining damages. We heard a little bit of that discussion before.

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

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

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

Mr. Simons. So you would look at the prior conduct, the culpability, the ability to pay, and the deterrent effect.
Mr. Soto. Commissioner Chopra, if it was at the upper end of $5 billion, do you think that would be a sufficient deterrent for the activities complained of?

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

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

Mr. Simons. I believe the ones I articulated.

Mr. Soto. And --

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

Mr. Soto. So that is something else this committee has to work on then is to make sure that the civil penalties are a sufficient deterrent.
Commissioner Slaughter, was the TikTok settlement a sufficient deterrent for the behavior complained of?

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

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

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

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

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

Mr. Soto. Okay, thanks. And I yield back.
Ms. Schakowsky. The gentleman yields back and now I ask Mr. Carter for his 5 minutes.

Mr. Carter. Thank you, Madam Chair.

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

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

Mr. Simons. Right. Thank you for that question, Congressman. So, our general Section 5 authority comes from that hundred-year old statute which was not designed, for sure, to deal with this kind of issue, so I credit my predecessors at the FTC for basically inventing a privacy program out of Section 5. I think they did a terrific job with the material they had available on them and it is based largely on a deception authority.
So we started out by saying you should have a privacy policy at your company and then if you divert from it then that is a deception and we can hold you accountable. And then we expanded that to include, for example, things that look like privacy torts at common law and we cover those under unfairness. But in terms of the general privacy authority, not including FCRA or COPPA or whatever, this is really it and it is pretty narrow.

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

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

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

I mean it is very important that the Private Right of Action that is being proposed in California that that would be an additional punishment on top of the FTC action as I understand it. And certainly, we don't need plaintiffs' attorneys to be involved in this. We need the FTC to be the cop on the beat as you describe them.
Mr. Simons. Yeah. I think what I have said before is that we should be the enforcer of that legislation that you are considering and you should allow the state Attorneys General to enforce as well, just as they do in lots of other areas in conjunction with us. They are a terrific partner and I would strongly recommend that.

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

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

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

Mr. Simons. Yes, so that is the limiting factor in all of this. Anytime you are thinking about a settlement, if the settlement gets to a point where you say to yourself, "Gee, we probably cannot do nearly as well as this, or maybe we could do just about as well as this in litigation, but the litigation has lots of risks," so when you get to that point
then you really should settle. I mean that is the
appropriate thing to do. Otherwise, if you are just going to
go to court and irrespective of the settlement, then that
really becomes almost unethical or potentially harassment.

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

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

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

So thank you very much and thank all of you for your
work on this, and I yield back.
Ms. Schakowsky. The gentleman yields back and now I recognize Mr. McNerney, patient Mr. McNerney, for 5 minutes.

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

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

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

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

Mr. McNerney. Well, you don't have any authority over
algorithms and decision making on lethal use of force, say,
in law enforcement, do you?

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. McNerney. Thank you. I understand the agency held 13 hearings to evaluate practices of both Competition and Consumer Protection Bureaus. I know you are still in the process of receiving comments, but I do have a series of questions about these hearings especially because I know these hearings took up a significant amount of the resources
Can you give me the top three takeaways from these hearings? What is the basis of what you have learned?

Mr. Simons. So one of the things we learned is that merger retrospectives are really important and we got a lot of good testimony on that and that is something we really need. And if we got more resources that is one of the things we would do, and in particular merger retrospectives as relate to vertical mergers. That was highly recommended.

I don't think really that is the literature, the literature on merger retrospectives is much greater on horizontal and is much less on the vertical merger side. So that was one.

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

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

Mr. Simons. Yes.

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

Mr. Simons. No, so we would like -- at least my view is that these privacy issues involve very serious and significant societal and cultural value judgments, and those
should be made to the greatest extent possible by elected officials and not people who are unelected. So our view is that -- my view is that you should make those judgments.

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

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

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

Mr. Cardenas. Thank you very much. Thank you very much, Madam Chairwoman, for having this important hearing with the FTC. My question to the FTC is that in 2018 FTC cases resulted in a total of about $2.3 billion in refunds for consumers who lost money to frauds and other unfair or deceptive practices. I commend you for doing that especially when you look in light of the overall budget for FTC is about $300 million per annum. But recent federal court decisions put the FTC's power to get compensation for consumers at a serious risk, particularly in cases where the company has
stopped violating the law. For example, my question is can
one of you explain how these decisions limit the FTC's
authority under Section 13(b) of the FTC Act?

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

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

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

Mr. Cardenas. Okay, thank you.
Chairman Simons, how serious of an issue are these decisions for the FTC's enforcement of Section 5?

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

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

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

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

Mr. Simons. They really just take it away.

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

Mr. Simons. Yes, absolutely.

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

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

Mr. Cardenas. Yeah. Hopefully I can talk to some
congressional members and we will do that.

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

Mr. Cardenas. Yes, please.

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

Mr. Cardenas. Thank you.

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

Mr. Chopra. I agree with my colleagues completely.

Mr. Cardenas. Good. That is great. Appointed by Democrat and Republicans and you all agree on this issue.

Good, good, good, good.

So when it comes to made in the USA, my time is limited so I will cut to the point and the question. I am concerned that the FTC settled on some cases for no money without so much as an admission of liability and some defendants effectively cheated consumers and got away with little more than lying about products being made in America. That
obviously has a value on the streets of America. I personally love to buy made in America products. But for someone to actually lie about it when they make the product, put it out to market, and then for there not to be any way of them having to pay a price for doing that for duping the American people, Chairman Simons, where are we at with that?

Mr. Simons. Yeah, so historically for decades that has been the approach that the Commission has pursued in these made in the USA cases. They have only got injunctive relief. But we are now going to hold a workshop and look at what we need to do in terms of beefing up our remedies.

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

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

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

Mr. Cardenas. Yes.

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

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

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

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

Let me just point out to the committee that every single member on both sides of the aisle have shown up to this hearing. That doesn't happen all the time and I think it is a tribute to the issue, but also to our commissioners. So I
Mr. Walberg is waiving on to our committee. We are happy to have you and you have 5 minutes.

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

I wanted to come here today to ask questions about a topic very important to me and my constituents and that is scams against targeting our nation's seniors. Michigan seniors in my case have spent a lifetime working to save for financially secure retirements. In the digital age, scams targeting seniors and their hard-earned money are growing in number and sophistication and safeguarding vulnerable seniors needs to be a top priority. I am one. It is important to me. Today, Representative Blunt Rochester, who I believe mentioned this already, she and I will be introducing legislation, the Stop Senior Scams Act, to help prevent fraudsters from targeting seniors with prepaid or gift card scams.
While the committee is working on legislation to address annoying robocalls and that scam our seniors into giving away their savings or personal information, gift card scams are another way fraudsters target seniors. Companies like Target or Wal-Mart are on the front lines against these scams, and their ability to educate their employees with best practices and training to recognize the signs of scam can make a huge difference in stopping a scammer. The Stop Senior Scams Act would create a forum at the Federal Trade Commission to communicate about best practices like this.

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

Mr. Simons. Thank you, Congressman. So this is a multipronged approach at the FTC. We engage in strenuous efforts going after these specific scams that target seniors. We have what is very important, I think, and very effective is a program of outreach to the senior community and we have a specific program that was designed called Pass It On, where we try to kind of essentially deputize senior citizens to help their fellow senior citizens avoid scams. So they are talking about it in their local communities and it is on top
of mind and they know what to watch out for. And your legislation, you know, it sounds like I couldn't agree more with the goals of it and I would be happy to work with you on it.

Mr. Phillips. Congressman.

Mr. Walberg. Yes.

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

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

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

Mr. Simons. Yeah.

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

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

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

Mr. Walberg. Okay, any other comments?

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

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

So, Madam Chairwoman, thank you for allowing me this time.
Ms. Schakowsky. Thank you, Mr. Walberg.

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

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

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

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

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

It has been one of the -- the means of committees that -- those that pull us in a different direction, and some of them when they come in, they come in right before it is over. So I know those who sit patiently were not overwhelmed with enthusiasm when they saw me walk through the door, but it is the way this place operates.

So I want to thank you, Madam Chair, for holding this hearing. And I want to begin by asking unanimous consent to
offer into the record an October 2018 letter from the AMA.

So I ask unanimous consent.

Ms. Schakowsky. Without objection, so ordered.

[The information follows:]

************COMMITTEE INSERT 7************
Mr. Rush. All right. I want to begin by saying that the FTC is one of my most favorite agencies in the federal government. I worked very closely with the FTC particularly when I chaired this subcommittee some years ago and did some really good work with the FTC.

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

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

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

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

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

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

Mr. Rush. Right.

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

Mr. Rush. Anybody else?

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

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

Mr. Rush. Well, thank you.

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

Ms. Schakowsky. Thank you, Mr. Rush.

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

[The information follows:]

**********COMMITTEE INSERT 8**********
Ms. Schakowsky. A letter for the record, Oversight of the Federal Trade Commission: Strengthening Protection for -- oh, okay. A letter from the Electronic Privacy Information Center; a letter from Consumer Bankers Association; a letter from the Internet Association; a letter from the National Association of Federally Insured Credit Unions; and a letter from the Confidentiality Coalition.

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

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

And at this time, the subcommittee is adjourned.

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