Responses to Written Questions Submitted by Honorable John Thune to Christine S. Wilson

Question 1. Vertical mergers such as the merger between AT&T and Time Warner have garnered some attention lately. The FTC and the DOJ have not updated vertical merger guidance since 1984. Do you believe that the FTC and DOJ should issue new guidance on vertical mergers?

Response. I believe that the 1984 Department of Justice Non-Horizontal Merger Guidelines[1] are out of date. As we heard during our hearing on the topic in November 2018, our understanding of the economics of vertical integration has changed over the past thirty-five years.[2] The law governing vertical relationships, and particularly vertical conduct such as resale price maintenance, has also changed since then.[3]

The agencies traditionally issue guidelines to promote transparent and predictable agency enforcement. This goal can be achieved in several different ways. For example, the agencies may use guidelines to summarize the current state of the law. Alternatively, when the law is not particularly clear, the agencies may use guidelines to clarify how they intend to approach topics on which there is no clear binding precedent. The agencies may also use guidelines either (a) to disclose and formalize an approach the agencies already use or (b) to advance new analytic techniques. For a variety of reasons, it is not clear to me that new vertical merger guidelines could meaningfully increase the transparency and predictability of our vertical merger decisions.

However, there is a range of alternatives between the two extremes of issuing guidelines and saying nothing. For example, the agencies already provide substantial insight on vertical merger analysis through speeches,[4] public statements,[5] and rigorous case selection.[6] I believe this approach is well worth considering as an alternative to issuing new formal guidelines.

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[1] *U.S. Dep't of Justice Non-Horizontal Merger Guidelines* (1984), https://www.justice.gov/sites/default/files/atr/legacy/2006/05/18/2614.pdf.

[2] FTC, *Hearings on Competition and Consumer Protection in the 21st Century*, https://www.ftc.gov/policy/hearings-competition-consumer-protection; *see also* FTC Workshop, *FTC Hearing #5: Competition and Consumer Protection in the 21st Century* (Nov. 1, 2018), https://www.ftc.gov/news-events/events-calendar/ftc-hearing-5-competition-consumer-protection-21st-century.

[3] *See, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 887 (2007) (minimum resale price maintenance must be analyzed under the rule of reason rather than the *per se* rule); State Oil Co. v. Khan, 552 U.S. 3 (1997) (same holding, but as applied to maximum resale price maintenance).

[4] *See, e.g.*, Christine S. Wilson, *Vertical Merger Policy: What Do We Know and Where Do We Go?*, Keynote Address at GCR Live 8th Annual Antitrust Law Leaders Forum (Feb. 1, 2019), https://www.ftc.gov/system/files/documents/public_statements/1455670/wilson_-_vertical_merger_speech_at_gcr_2-1-19.pdf; Bruce Hoffman, *Vertical Merger Enforcement at the FTC*, Remarks at Credit Suisse 2018 Washington Perspectives Conference (Jan. 10, 2018), https://www.ftc.gov/public-statements/2018/01/vertical-merger-enforcement-ftc (explaining the FTC's current analysis of proposed vertical mergers and highlighting the extent to which that analysis has moved beyond the 1984 Non-Horizontal Merger Guidelines).

[5] *See, e.g.*, *In re Fresenius Med. Care AG & Co.*, FTC File No. 171-0227 (Feb. 19, 2019), https://www.ftc.gov/enforcement/cases-proceedings/171-0227/fresenius-medical-care-nxstage-medical-matter (Statements of (i) Chairman Simons, Commissioner Phillips, and Commissioner Wilson; (ii) Commissioner Chopra; and (iii) Commissioner Slaughter); *In re Sycamore Partners II, L.P.*, FTC File No. 181-0180 (Jan. 28, 2019), https://www.ftc.gov/enforcement/cases-proceedings/181-0180/sycamore-partners-ii-lp-staples-inc-essendant-inc-matter (Statements of (i) Chairman Simons, Commissioner Phillips, and Commissioner Wilson; (ii) Commissioner Wilson; (iii) Commissioner Chopra; and (iv) Commissioner Slaughter).

[6] For example, the Commission recently challenged a vertical merger between Northrop Grumman, a leading provider of missile systems to the Department of Defense, and Orbital ATK, a key supplier of solid rocket motors.

Question 2. Government lawsuits to stop mergers are litigated using different procedures depending on which agency, the FTC or DOJ, handles the case. Do you think Congress should take action to ensure that agencies follow the same procedures, or do you support another approach?

Response. It is not clear to me why the use of different procedures, by itself, is problematic. Nor, apparently, was it clear to the legislators that enacted these different statutes. Absent strong evidence that these differences in procedure meaningfully affect the ultimate result, I see little reason to alter the machinery of antitrust enforcement.

One procedural difference between the two antitrust agencies is the Commission's unique authority to initiate administrative litigation, which we call "Part 3" litigation after the relevant portion of our Rules of Practice. In theory it could be problematic for the agency to file a merger case in Part 3 litigation *after* seeking a preliminary injunction in federal district court and having that request denied. I myself would not support proceeding in that circumstance. Yet the Commission has very rarely done so in practice, and indeed has over the years put in place several safeguards to ensure the practice remains very rare. For example, under Commission Rule 3.26,[7] the Commission automatically stays a pending Part 3 matter if a federal district court denies the staff's request for a preliminary injunction and the respondent makes a timely motion thereafter to withdraw the case from Part 3 adjudication.[8] Moreover, the Commission's stated policy is to proceed in such circumstances only when several conditions are met.[9] In practice these conditions obtain, and the Commission proceeds, only very rarely.[10]

In re Northrop Grumman, Dkt. C-4652 (June 5, 2018), https://www.ftc.gov/enforcement/cases-proceedings/181-0005-c-4652/northrop-grumman-orbital-atk. The Commission also accepted consent agreements to settle allegations that two other vertical mergers would, absent the remedies imposed, diminish competition. *See Fresenius Med. Care AG & Co.*, FTC File No. 171-0227 (Feb. 19, 2019), https://www.ftc.gov/system/files/documents/public_statements/1455719/171_0227_fresenius_nxstage_majority_statement_2-19-19.pdf (Statement of Chairman Simons, Commissioner Phillips, and Commissioner Wilson Concerning the Proposed Acquisition of NxStage Medical, Inc. by Fresenius Medical Care AG & Co. KGaA) (explaining consent agreement addresses horizontal concern regarding harm to competition in market for bloodline tubing sets for hemodialysis treatment but finding no evidence of competitive harm from vertical concerns); *In re Sycamore Partners II, L.P., Staples, Inc., and Essendant Inc.*, Dkt. C-4667 (Jan. 25, 2018), https://www.ftc.gov/enforcement/cases-proceedings/181-0180/sycamore-partners-ii-lp-staples-inc-essendant-inc-matter (Statement of Chairman Simons, Commissioner Phillips, and Commissioner Wilson) (consent agreement resolving charges that a merger between Staples, the world's largest retailer of office products and related services, and Essendant, a wholesale distributor of office products, was likely to harm competition in the market for office supply products sold to small- and mid-sized businesses).

[7] 16 C.F.R. § 3.26.

[8] *Id.* § 3.26(c).

[9] *See* Administrative Litigation Following the Denial of a Preliminary Injunction: Policy Statement, 60 Fed. Reg. 39,741 (Aug. 3, 1995), *available at* https://www.ftc.gov/sites/default/files/attachments/merger-review/950803administrativelitigation.pdf.

[10] *See, e.g.*, Press Release, FTC Withdraws Appeal Seeking a Preliminary Injunction to Stop LabCorp's Integration with Westcliff Medical Laboratories, Mar. 24, 2011, https://www.ftc.gov/news-events/press-releases/2011/03/ftc-withdraws-appeal-seeking-preliminary-injunction-stop-labcorps (noting the vote to withdraw the matter from litigation was 5-0); Statement of Commissioners Leibowitz, Kovacic, and Ramirez, *In re Laboratory Corp. of Am.*, FTC Docket No. 9345 (Apr. 21, 2011), *available at* https://www.ftc.gov/system/files/documents/public_statements/568671/110422labcorpcommstmt.pdf (concluding, under an earlier version of Rule 3.26 and after applying the factors listed in the Commission's 1995 policy

In contrast to the largely theoretical problems with Part 3 litigation, there is substantial evidence that this procedure can provide real benefits. A detailed analysis of every case the Commission brought in Part 3 since 1977 – more than one hundred cases in all – concluded that our administrative litigation authority provided "clear value" in complex antitrust cases that require the agency's "institutional expertise in law and economics."[11] This has been particularly true in "healthcare mergers, pay-for-delay agreements, and state-action immunity" cases.[12] The same analysis found scant evidence that the Part 3 process disfavors defendants.[13]

In summary, I am loathe to "fix" procedural differences between the two antitrust agencies without strong evidence both that there is a problem and that the proposed solution is meaningfully better. For example, there is scant evidence that one procedural difference, Part 3 administrative litigation, is problematic. There is instead substantial evidence that Part 3 litigation has helped us protect competition in key sectors of our economy, such as health care.

Question 3. Should Congress amend Section 5(n) of the FTC Act, which addresses unfair practices, to clarify what constitutes "substantial injury?" If so, how?

Response. No. Neither the Commission, nor the Courts who have ruled on this issue, have struggled to interpret that element. Substantial injury can be financial, physical, reputational, or unwanted intrusions. Financial injury can manifest in a variety of ways: fraudulent charges, delayed benefits, expended time, opportunity costs, fraud, and identity theft, among other things.[14] Physical injuries include risks to individuals' health or safety, including the risks of stalking and harassment.[15] Reputational injury involves disclosure of private facts about an individual, which damages the individual's reputation. Tort law recognizes reputational injury.[16] The FTC has brought cases involving this type of injury, for example, in a case involving public disclosure of individuals' Prozac use[17] and public disclosure of individuals' membership on an infidelity-promoting website.[18] Finally, unwanted intrusions involve two categories. The first includes activities that intrude on the sanctity of people's homes and their intimate lives. The FTC's cases involving a revenge porn website,[19] an adult-dating website,[20]

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statement, that the Commission should not proceed with administrative litigation following a federal district court's order denying a request for a preliminary injunction).

[11] Maureen K. Ohlhausen, *Administrative Litigation at the FTC: Effective Tool for Developing the Law or Rubber Stamp?*, 12 J. COMP. L. & ECON. 623, 656 (2016).

[12] *Id.*

[13] *Id.* at 656-57 (noting both due process protections afforded to defendants and the significant proportion of cases (40 percent) in which the Commission ultimately rejected antitrust liability).

[14] *See, e.g.*, *TaxSlayer, LLC*, No. C-4626 (F.T.C. Oct. 20, 2017) (Complaint), https://www.ftc.gov/enforcement/cases-proceedings/162-3063/taxslayer (alleging delayed benefits, expended time, and risk of identity theft).

[15] *See, e.g.*, *FTC v. Accusearch, Inc.*, No. 06-CV-0105 (D. Wyo. May 3, 2006) (Complaint), https://www.ftc.gov/enforcement/cases-proceedings/052-3126/accusearch-inc-dba-abikacom-jay-patel (alleging that telephone records pretexting endangered consumers' health and safety).

[16] Under the tort of public disclosure of private facts (or publicity given to private life), a plaintiff may recover where the defendant's conduct is highly offensive to a reasonable person. Restatement (Second) of Torts § 652D (1977).

[17] *Eli Lilly and Co.*, No. C-4047 (F.T.C. May 8, 2002), https://www.ftc.gov/enforcement/cases-proceedings/012-3214/eli-lilly-company-matter.

[18] *FTC v. Ruby Corp., et al.*, No. 1:16-cv-02438 (D.D.C. Dec. 14, 2016), https://www.ftc.gov/enforcement/cases-proceedings/152-3284/ashley-madison.

[19] *FTC v. EMP Media, Inc., et al.*, No. 2:18-cv-00035 (D. Nev. Jan. 9, 2018), https://www.ftc.gov/enforcement/cases-proceedings/162-3052/emp-media-inc-myexcom.

and companies spying on people in their bedrooms through remotely-activated webcams fall into this category.[21] The second category involves unwanted commercial intrusions, such as telemarketing, spam, and harassing debt collection calls.

Question 4. Should the FTC issue more guidance to marketers on the level of support needed to substantiate their claims? If so, when do you anticipate that such guidance could be issued?

Response. The FTC has issued extensive guidance over the years to help marketers in determining the level of support needed to substantiate claims. The Commission first articulated the relevant factors used to determine the level of evidence required to substantiate objective performance claims in *Pfizer, Inc.*, 81 F.T.C. 23 (1972). Those factors included the type of claim, the type of product, the consequences of a false claim, the benefits of a truthful claim, the cost of developing substantiation for the claim, and the amount of substantiation experts in the field believe is reasonable. The Commission and the courts have reaffirmed this standard many times since 1972.[22] The FTC also has provided extensive guidance through Guides, staff guidance documents, speeches, and presentations to industry trade groups and industry attorneys.[23]

As late as 2014, the Commission took a more stringent view on substantiation, requiring in orders that companies support challenged diet and health claims with two randomized, placebo-controlled, double blind clinical trials ("RCTs").[24] Recently, the D.C. Circuit correctly rejected the Commission's heightened requirements on First Amendment grounds, noting the Commission failed "to justify a categorical floor of two RCTs for any and all disease claims."[25] Today, the Commission has returned to its traditional, more flexible standard.[26] As noted above,

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[22] *See, e.g.*, *Thompson Med. Co.*, 104 F.T.C. 648, 813 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986); *Daniel Chapter One*, 2009 WL 5160000 at *25-26 (F.T.C. 2009), *aff'd*, 405 Fed. Appx. 505 (D.C. Cir. 2010) (unpublished opinion), *available at* 2011-1 Trade Cas. (CCH) ¶ 77,443 (D.C. Cir. 2010); *POM Wonderful, LLC*, 155 F.T.C. 1, 55-60 (2013), *aff'd*, 777 F.3d 478 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 1839, 194 L. Ed. 2d 839 (2016); *FTC Policy Statement Regarding Substantiation*, 104 F.T.C. 839, 840 (1984) (appended to *Thompson Med. Co.*, 104 F.T.C. 648 (1984)).

[23] *See Guides for the Use of Environmental Marketing Claims*, 16 C.F.R. § 260.2 (2019), https://www.ecfr.gov/cgi-bin/text-idx?SID=bd96b2cdcd01f7620d43e50a9d1d8cec&mc=true&node=se16.1.260_12&rgn=div8; *Dietary Supplements: An Advertising Guide for Industry*, https://www.ftc.gov/tips-advice/business-center/guidance/dietary-supplements-advertising-guide-industry.

[24] *See Applied Food Sciences, Inc.*, FTC File No. 142-3054 (Sept. 10, 2014) (stipulated final judgment and order), https://www.ftc.gov/system/files/documents/cases/140908afsstip1.pdf; *In re The Dannon Company, Inc.*, FTC File No. 082-3158 (Feb. 4, 2011) (decision and order), https://www.ftc.gov/sites/default/files/documents/cases/2011/02/110204dannondo.pdf; In re Nestle Healthcare Nutrition, Inc., FTC File No. 092-3087 (Jan. 18, 2011) (decision and order), https://www.ftc.gov/sites/default/files/documents/cases/2011/01/110118nestledo.pdf; FTC v. Iovate Health Sciences USA, Inc., Case. No. 10-CV-587 (W.D.N.Y. July 29, 2010) (stipulated final judgment and order), https://www.ftc.gov/sites/default/files/documents/cases/2010/07/100729iovatestip.pdf. This level of substantiation exceeds what is specified in the Commission's Dietary Supplements Guide. *Dietary Supplements: An Advertising Guide for Industry*, https://www.ftc.gov/tips-advice/business-center/guidance/dietary-supplements-advertising-guide-industry.

[25] *POM Wonderful, LLC v. FTC*, 777 F.3d 478, 502 (D.C. Cir. 2015) ("If there is a categorical bar against claims about the disease related benefits of a food product or dietary supplement in the absence of two RCTs, consumers may be denied useful, truthful information about products with a demonstrated capacity to treat or prevent serious disease. That would subvert rather than promote the objectives of the commercial speech doctrine.").

[26] *See e.g., Nobetes Corp.*, Case No. 2:18-cv-10068-KS (Dec. 13, 2018) (stipulated order) (requiring "competent and reliable scientific evidence shall consist of human clinical testing of the Covered Product, or of an Essentially Equivalent Product, that is sufficient in quality and quantity based on standards generally accepted by

this approach is encapsulated in the *Pfizer* opinion and reflects the central role of balancing the costs of prohibiting truthful claims against the benefits of prohibiting false claims.[27]
The Commission's guidance sets forth flexible principles that can be applied to multiple products and claims. It does not attempt to answer every question about substantiation, given the virtually limitless range of advertising claims, products, and services to which it could be applied. Instead, it seeks to strike the right balance between being specific enough to be helpful but not so granular that it would overlook some important factor that might arise under given circumstances and thereby actually chill useful speech.
Question 5. In June, the 11th Circuit vacated the Commission's data security order against LabMD. What effect, if any, will this have on the Commission's data security orders going forward?
The Eleventh Circuit determined that the mandated data security provision of the Commission's LabMD Order was insufficiently specific. The opinion did not have any effect on the FTC's use of Section 5 to protect consumers from deceptive or unfair data security practices. We are engaged in an ongoing process to craft appropriate order language in data security cases, based on the Eleventh Circuit opinion, feedback we received from our December hearing on data security, and our own internal discussion of how our orders can create better deterrence of future misconduct using our existing tools.
Question 6. If federal privacy legislation is passed, what enforcement tools would you like to be included for the FTC?
Response. First, I would recommend that Congress consider giving the FTC the authority to seek civil penalties for initial privacy violations, which will create an important deterrent effect. Second, while the process of enacting federal privacy legislation will involve difficult tradeoffs that are appropriately left to Congress, targeted APA rulemaking authority, similar to that in the Children's Online Privacy Protection Act, will allow the FTC to keep up with technological developments. For example, in 2013, the FTC was able to use its APA rulemaking authority to amend the COPPA Rule to address new business models, including social media and collection of geolocation information, that were not in place when the initial 2000 Rule was promulgated. Third, the FTC could use broader enforcement authority to take action against common carriers and nonprofits, which it cannot currently do under the FTC Act. I also believe that the promulgation of federal privacy legislation should be undertaken in conjunction with national data breach notification and data security legislation.
Question 7. During the hearing, I asked you whether the FTC would consider using its section 6(b) authority to study consumer information data flows, specifically sending requests to Google, Facebook, Amazon, and others in the tech industry to learn what information they collect from consumers and how that information is used, shared, and sold. You responded, "Sure, 6(b) is a really powerful tool and that's the type of thing that might very well make sense for us to use it for." I believe the FTC's section 6(b) authority could provide some much needed transparency

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experts in the relevant disease, condition, or function to which the representation relates, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true."), https://www.ftc.gov/system/files/documents/cases/nobetes_-_signed_stipulated_order.pdf.

[27] *See generally* J. Howard Beales, Timothy J. Muris & Robert Pitofsky, *In Defense of the Pfizer Factors*, *in* THE REGULATORY REVOLUTION AT THE FTC: A THIRTY-YEAR PERSPECTIVE ON COMPETITION AND CONSUMER PROTECTION 83 (James C. Cooper ed., 2013) (All three of the authors served as Director of the Bureau of Consumer Protection and two served as Chairman at the FTC. The article provides a comprehensive discussion of *Pfizer*).

to consumers about the data practices of large technology companies, and help identify areas that may require additional attention from lawmakers. Can you explain in more detail whether you believe the FTC should conduct a study pursuant to section 6(b) of the Federal Trade Commission Act on the data collection, use, filtering, sharing, and sale practices of large technology companies?

Response. The FTC's section 6(b) authority could be used to conduct a study about the data practices of large technology companies. The FTC has a comparative advantage in policy research and development through the use of 6(b) studies, which allows the Commission to proceed in measured and thoughtful ways on complicated policy questions. I will continue to encourage the Commission to issue 6(b) studies in the technology area.

Responses to Written Questions Submitted by Honorable Jerry Moran to Christine S. Wilson

Question 1. Section 5(a) of the *FTC Act*, which prohibits "unfair or deceptive acts or practices in or affecting commerce" is the legal basis for a body of consumer protection law that covers data privacy and security practices. The FTC has brought hundreds of cases to date to protect the privacy and security of consumer information held by companies of all sizes under this authority. The FTC staff recently submitted comments to the National Telecommunications and Information Administration (NTIA) that clearly indicate the FTC staff's view that the FTC would be the appropriate agency to enforce a new comprehensive privacy legislative framework. Do you agree with the staff's view?

Response. Absolutely. The FTC has developed a substantial body of expertise on privacy issues over the past several decades, by bringing hundreds of cases, hosting approximately 70 workshops, and conducting numerous policy initiatives. The FTC is committed to using all of its expertise, its existing tools under the FTC Act, and whatever additional authority Congress gives us, to protect consumer privacy while promoting innovation and competition in the marketplace.

Question 2. As Congress evaluates opportunities to create meaningful federal legislation to appropriately ensure privacy of consumers' data, there have been suggestions to increase the FTC's authorities to enforce in this space. Will you commit to working with this Committee in measuring what resources, if any, will be needed to allow the agency to enforce any additional authorities that may or may not be provided in federal legislation?

Response. Yes. We can certainly use additional resources, additional staff, and additional authorities including civil penalties, targeted APA rulemaking, and jurisdiction over non-profits and common carriers. We are committed to utilizing whatever additional tools Congress gives us efficiently and vigorously.

Question 3. Sharing responsibilities with the DOJ's Antitrust Division, the FTC enforces antitrust law in a variety of sectors as described by your testimony. While the vast majority of premerger filings submitted to enforcement agencies do not raise competition concerns, the FTC challenged 45 mergers since the beginning of 2017, and of those, the FTC only voted to initiate litigation to block five transactions. Would you please describe the resource needs of the agency associated with hiring qualified outside experts to support its litigation efforts? Please explain how developments in the high-technology sector are accounted for in the FTC's decision-making process related to antitrust enforcement.

Response. I appreciate your attention to the agency's resource needs. The FTC is committed to maximizing its resources to enhance its effectiveness in protecting consumers and promoting competition, to anticipate and respond to changes in the marketplace, and to meet current and future challenges. Resource constraints, however, remain a significant challenge. As discussed in more detail below, evolving technologies and intellectual property issues continue to increase the complexity of antitrust investigations and litigation. This complexity, coupled with the rising costs of critical expert witnesses and increases in caseload, sometimes leads to financial and personnel resource limitations. In the past, we have requested additional resources for experts, information technology, and more full-time employees in support of our mission to protect

consumers and promote competition. These continue to be critical areas of need for our agency. If we receive additional resources, they likely would be applied to these areas as needed.

Qualified experts are a critical resource in all of the FTC's competition cases heading toward litigation. For example, the services of these expert witnesses are critical to the successful investigation and litigation of merger cases, as they provide insight on proper definition of product and geographic markets, the likelihood of entry by new competitors, and the development of models to contrast merger efficiencies with potential competitive harm.

Expert witness costs are highly dependent on the number, scope, duration, and disposition of our federal and administrative court challenges. The cost of an expert, for example, increases if we require the expert to testify or produce a report. To limit these costs, the FTC has identified and implemented a variety of strategies, including using internal personnel from its Bureau of Economics as expert witnesses whenever practical. The opportunities to use internal experts as testifying experts are limited, however, by several factors, including staff availability, testifying experience, and the specialized expertise required for specific matters. I will continue to encourage the FTC to evaluate how to increase its use of internal experts and control expert costs without compromising case outcomes or reducing the number of enforcement actions.

In addition to expert witness costs, you asked about how developments in the high-technology sector factor into the FTC's decision-making process related to antitrust enforcement. The FTC closely follows activity in the high-technology sector. Given the important role that technology companies play in the American economy, it is critical that the Commission—in furthering its mission to protect consumers and promote competition—understand the current and developing business models and scrutinize incumbents' conduct to ensure that they abide by the same rules of competitive markets that apply to any company. When appropriate, the Commission will take action to counter the harmful effects of coordinated or unilateral conduct by technology firms.

The fundamental principles of antitrust do not differ when applied to high-technology industries, including those in which patents or other intellectual property are highly significant. The issues, however, are often more complex and require different expertise, which may necessitate the hiring of outside experts or consultants to help us develop and litigate our cases. The FTC also strives to adapt to the dynamic markets we protect by leveraging the research, advocacy, and education tools at our disposal to improve our understanding of significant antitrust issues and emerging trends in business practices, technology, and markets. For example, last fall, the Commission launched its *Hearings on Competition and Consumer Protection in the 21st Century* to consider whether the FTC's enforcement and policy efforts are keeping pace with changes in the economy, including advancements in technology and new business models made possible by those developments.[28] I will continue to encourage the agency to scrutinize technology mergers

[28] FTC, *Hearings on Competition and Consumer Protection in the 21st Century*, https://www.ftc.gov/policy/hearings-competition-consumer-protection. Recent hearings included a two-day workshop on the potential for collusive, exclusionary, and predatory conduct in multisided, technology-based platform industries. FTC Workshop, *FTC Hearing #3: Competition and Consumer Protection in the 21st Century* (Oct. 15-17, 2018), https://www.ftc.gov/news-events/events-calendar/2018/10/ftc-hearing-3-competition-consumer-protection-21st-century. Similarly, in early November, the Commission held a two-day workshop on the antitrust frameworks for evaluating acquisitions of nascent competitors in the technology and digital marketplace, and the antitrust analysis of mergers and conduct where data is a key asset or product. FTC Workshop, *FTC Hearing #6:*

and conduct by technology firms to ensure not only that consumers benefit from their innovative products, but also that competition thrives in this dynamic and highly influential sector.

Question 4. Earlier this year, I introduced legislation called the *Senior Scams Prevention Act* with Senator Bob Casey to combat continued and increasingly complex attempts to defraud one of the nation's most vulnerable populations, our senior community. This bill seeks to ensure retailers, financial institutions and wire transfer companies have the resources to train employees to help stop financial frauds and scams on seniors. Would you agree that awareness and education, guided by "best practices" established by industry and government partners, is a valuable tool in preventing consumer harms against our nation's seniors?

Response. Yes. Protecting older consumers is one of the agency's top priorities. As the population of older Americans grows, the FTC's efforts to identify scams affecting seniors and to bring aggressive law enforcement action, as well as provide awareness and useful advice to seniors, become increasingly vital. Using research, the FTC developed its *Pass It On* campaign to share preventative information about frauds and scams with older adults.[29] This popular campaign, used by many of our partners, engages active older adults to share the materials with people in their communities, including people in their lives who may need this information. The FTC stands ready to work with industry and our government partners to create additional material for industry, including retailers, financial institutions, wire transfer companies and others to help prevent harm to our nation's seniors.

Question 5. In its comments submitted to NTIA on "Developing the Administration's Approach to Consumer Privacy," the FTC discussed the various cases that it has taken up to address privacy-related harms to consumers, and it specifically noted four categories of harms: financial injury, physical injury, reputational injury, and unwanted intrusion. Could you please briefly describe each category while noting any FTC enforcement considerations specific to that type of harm?

Response. Certainly. Financial injury can manifest in a variety of ways: fraudulent charges, delayed benefits, expended time, opportunity costs, fraud, and identity theft, among other things.[30] Physical injuries include risks to individuals' health or safety, including the risks of stalking and harassment.[31] Reputational injury involves disclosure of private facts about an individual, which damages the individual's reputation. Tort law recognizes reputational

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Competition and Consumer Protection in the 21st Century (Nov. 6-8, 2018), https://www.ftc.gov/news-events/events-calendar/ftc-hearing-6-competition-consumer-protection-21st-century. Also in November, the Commission held a two-day workshop on the competition and consumer protection issues associated with algorithms, artificial intelligence, and predictive analysis in business decisions and conduct. FTC Workshop, *FTC Hearing #7: Competition and Consumer Protection in the 21st Century* (Nov. 13-14), https://www.ftc.gov/news-events/events-calendar/ftc-hearing-7-competition-consumer-protection-21st-century.

[29] FTC, FTC Website: *Consumer Information – Pass it on, https://www.consumer.ftc.gov/features/feature-0030-pass-it-on* (providing consumer information on identity theft, imposter scams, charity fraud, and other topics).

[30] *See, e.g.*, *TaxSlayer, LLC*, No. C-4626 (F.T.C. Oct. 20, 2017) (complaint), https://www.ftc.gov/enforcement/cases-proceedings/162-3063/taxslayer (alleging delayed benefits, expended time, and risk of identity theft).

[31] *See, e.g.*, *FTC v. Accusearch, Inc.*, No. 06-CV-0105 (D. Wyo. May 3, 2006) (complaint), https://www.ftc.gov/enforcement/cases-proceedings/052-3126/accusearch-inc-dba-abikacom-jay-patel (alleging that telephone records pretexting endangered consumers' health and safety).

injury.[32] The FTC has brought cases involving this type of injury, for example, in a case involving public disclosure of individuals' Prozac use[33] and public disclosure of individuals' membership on an infidelity-promoting website.[34] Finally, unwanted intrusions involve two categories. The first includes activities that intrude on the sanctity of people's homes and their intimate lives. The FTC's cases involving a revenge porn website,[35] an adult-dating website,[36] and companies spying on people in their bedrooms through remotely-activated webcams fall into this category.[37] The second category involves unwanted commercial intrusions, such as telemarketing, spam, and harassing debt collection calls. In terms of enforcement considerations, as noted above, the FTC is very mindful of ensuring that it addresses these harms, while not impeding the benefits of data collection and use practices.

Question 6. In the FTC's recent comments in NTIA's privacy proceeding, the FTC said that its "guiding principles" are based on "balancing risk of harm with the benefits of innovation and competition." Would you describe what this means, how you strike this balance, and how it is applied in practice under your Section 5 authority in the *FTC Act*?

Response. Regulations may impose significant costs on regulated companies, so new regulations must be handled with care to avoid stifling innovation or entrenching incumbents. The FTC has a longstanding history of weighing the countervailing benefits when determining if an injury to consumers justifies the imposition of a remedy. In unfairness cases, section 5(n) of the FTC Act requires us to strike this balance. It does not allow the FTC to bring a case alleging unfairness "unless the act or practice causes or is likely to cause substantial injury to consumers, which is not reasonably avoidable by consumers themselves and not outweighed by benefits to consumers or to competition." Thus, for example, in our data security complaints and orders, we often plead the specific harms that consumers are likely to suffer from a company's data security failures. We do not assert that companies need to spend unlimited amounts of money to address these harms; in many of our cases, we specifically allege that the company could have fixed the security vulnerabilities at low or no cost.

Question 7. The FTC's comments pertaining to "control" in NTIA's privacy proceeding stated, "Choice also may be unnecessary when companies collect and disclose de-identified data, which can power data analytics and research, while minimizing privacy concerns." How would the FTC suggest federal regulation account for de-identified data, if at all?

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[32] Under the tort of public disclosure of private facts (or publicity given to private life), a plaintiff may recover where the defendant's conduct is highly offensive to a reasonable person. Restatement (Second) of Torts § 652D (1977).

[33] *Eli Lilly and Co.*, No. C-4047 (F.T.C. May 8, 2002), https://www.ftc.gov/enforcement/cases-proceedings/012-3214/eli-lilly-company-matter.

[34] *FTC v. Ruby Corp., et al.*, No. 1:16-cv-02438 (D.D.C. Dec. 14, 2016), https://www.ftc.gov/enforcement/cases-proceedings/152-3284/ashley-madison.

[35] *FTC v. EMP Media, Inc., et al.*, No. 2:18-cv-00035 (D. Nev. Jan. 9, 2018), *https://www.ftc.gov/enforcement/cases-proceedings/162-3052/emp-media-inc-myexcom*.

[36] *FTC v. Ruby Corp., et al.*, No. 1:16-cv-02438 (D.D.C. Dec. 14, 2016), https://www.ftc.gov/enforcement/cases-proceedings/152-3284/ashley-madison.

[37] *See* Press Release, FTC Halts Computer Spying (Sept. 25, 2012), https://www.ftc.gov/news-events/press-releases/2012/09/ftc-halts-computer-spying; *see also Aaron's, Inc.*, No. C-4442 (F.T.C. Mar. 10, 2014), https://www.ftc.gov/enforcement/cases-proceedings/122-3256/aarons-inc-matter.

Response. This question is an excellent one, and pertains to an area in which I continue to listen to various perspectives and analyze policy ramifications. There are many potentially important uses for de-identified data. But protecting privacy using de-identified information is becoming more complex as new and powerful tools are able to combine data sets and extract information. One possible standard identified in the FTC's 2012 Privacy Report states that data is de-identified if it is not "reasonably linkable" to a consumer, computer, or device.[38] Data can be deemed to be de-identified to the extent that a company: (1) takes reasonable measures to ensure that the data is de-identified; (2) publicly commits not to try to re-identify the data; and (3) contractually prohibits downstream recipients from trying to re-identify the data. Additionally, I think that we must invest in research and education to ensure consumers and the market place understand the evolving risks associated with de-identified data. Although this language provides some general principles for de-identification, we would be happy to work with your staff on drafting more specific legislative language.

Question 8. Your testimony indicated that continued technological developments allow illegal robocallers to conceal their identities in "spoofing" caller IDs while exponentially increasing robocall volumes through automated dialing systems. These evolving technological changes mean that the critical law enforcement efforts of the FTC cannot be the only solution, and your testimony described the additional steps the FTC is taking to develop innovative solutions to these issues. Would you please describe the process and outcomes of the four public challenges that the FTC held from 2013 to 2015? Are there plans to incentivize innovators to combat robocalls in the future?

Response. The FTC's process for its robocall challenges included public announcements, committees with independent judges, and, in some cases, cash prizes awarded under the America COMPETES Reauthorization Act.[39] To maximize publicity, the FTC announced each of its four challenges in connection with public events. The FTC announced the first robocall challenge at the FTC's 2012 Robocall Summit. In 2014, the FTC conducted its second challenge, "Zapping Rachel" at DEF CON 22. The FTC conducted its third challenge, "DetectaRobo," in June 2015 in conjunction with the National Day of Civic Hacking. The final phase of the FTC's fourth public robocall challenge took place at DEF CON 23. When the FTC held its first public challenge, there were few, if any, call blocking or call labeling solutions available for consumers. Today, two FTC challenge winners, NomoRobo and Robokiller, offer call blocking applications, and there are hundreds of mobile apps offering call blocking and call labeling solutions for cell phones. Many home telephone service providers also now offer call blocking and call labeling solutions. The FTC will not hesitate to initiate additional innovation contests if it identifies further challenges that could meaningfully benefit consumers by reducing the harm caused by illegal robocalls.

In addition to developing call blocking and call labeling technology, the telecom industry has also developed call verification technology, called STIR/SHAKEN, to help consumers know whether a call is using a spoofed Caller ID number and assist call analytics companies in

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[38] *Available at* https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf.

[39] *See* "Details About the FTC's Robocall Initiatives" at https://www.consumer.ftc.gov/features/feature-0025-robocalls.

implementing call blocking and call labeling products. If widely implemented and made available to consumers, the STIR/SHAKEN protocol should minimize unwanted calls. Certain industry members have begun to roll out this technology and it is in beta testing mode. I understand Chairman Pai recently called on the nation's largest carriers to provide details about their caller ID authentication plans for 2019. I support this industry initiative.

Question 9. Would you please describe the FTC's coordination efforts with state, federal, and international partners to combat illegal robocalls?

Response. The FTC frequently coordinates its efforts with its state, federal, and international partners. The FTC often brings robocall enforcement actions with states as co-plaintiffs. For example, in the FTC's case against Dish Network, litigated for the FTC by the Department of Justice, the FTC brought the case jointly with California, Illinois, North Carolina, and Ohio. Collectively, the states and the FTC obtained a historic $280 million trial verdict.[40]

The FTC also coordinates outreach and education with the FCC. In 2018, the agencies co-hosted two robocall events—a policy forum that discussed technological and law enforcement solutions to the robocall problem[41] and a public expo that allowed companies offering call blocking and call labeling services to showcase their products for the public.[42] Additionally, the FTC and FCC hold quarterly calls, speak regularly on an informal basis, and coordinate on a monthly basis with our state partners through the National Association of Attorneys General. The FTC also engages with international partners through participation in international law enforcement groups such as the International Consumer Protection Enforcement Network, International Mass Marketing Fraud Working Group, and the Unsolicited Communications Network (formerly known as the London Action Plan).

Question 10. Your testimony described the limitations of the FTC's current data security enforcement authority provided by Section 5 of the *FTC Act* including: lacking civil penalty authority, lacking authority over non-profits and common carrier activity, and missing broad APA rulemaking authority. Please describe each of these limitations and how adjusted FTC authority to address these items would improve the protection of consumers from data security risks.

Response. Under current law, the FTC cannot obtained civil penalties for first-time security violations. I believe this under-deters problematic data security practices. If Congress were to give us the authority to seek civil penalties for first-time violators (subject to statutory limitations on the imposition of civil penalties, such as ability to pay and stay in business), better deterrence

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[40] Press Release, FTC and DOJ Case Results in Historic Decision Awarding $280 Million in Civil Penalties Against Dish Network and Strong Injunctive Relief for Do Not Call Violations (June 6, 2017), https://www.ftc.gov/news-events/press-releases/2017/06/ftc-doj-case-results-historic-decision-awarding-280-million-civil. The case is on appeal before the Seventh Circuit Court of Appeals.

[41] Press Release, FTC and FCC to Host Joint Policy Forum and Consumer Expo to Fight the Scourge of Illegal Robocalls (Mar. 22, 2018), https://www.ftc.gov/news-events/press-releases/2018/03/ftc-fcc-host-joint-policy-forum-illegal-robocalls.

[42] Press Release, FTC and FCC to Co-Host Expo on April 23 Featuring Technologies to Block Illegal Robocalls (Apr. 19, 2018), https://www.ftc.gov/news-events/press-releases/2018/04/ftc-fcc-co-host-expo-april-23-featuring-technologies-block-0.

would be achieved. As to APA rulemaking authority, though we are not seeking general APA rulemaking authority for a broad statute like Section 5, were Congress to enact specific data security legislation, it is important for the FTC to have APA rulemaking authority. Such authority will ensure that the FTC can enact rules and amend them as necessary to keep up with technological developments. For example, in 2013, the FTC was able to use its APA rulemaking authority to amend its Rule under the Children's Online Privacy Protection Act to address new business models, including social media and collection of geolocation information, that were not in place when the initial 2000 Rule was promulgated. As to nonprofits and common carriers, news reports are filled with breaches affecting these sectors (*e.g.*, the education sector) and the FTC does not currently have jurisdiction over them. Giving the FTC jurisdiction over these entities for purposes of enforcing data security laws will create a level playing field and ensure that these entities are subject to the same rules as other entities that collect similar types of data.