

Responses to Written Questions Submitted by Honorable John Thune to Noah Phillips

Question 1. Vertical mergers such as the merger between AT&T and Time Warner have garnered some attention lately. The FTC and 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. Antitrust officials, practitioners, and scholars recognize that, in many respects, the 1984 Non-Horizontal Merger Guidelines¹ reflect neither current practice nor scholarship on vertical merger enforcement.² New guidelines should be based on modern caselaw, the practical experience of recent merger challenges and investigations, and insights from both theoretical and empirical scholarship.

Over the years, the agencies have provided substantial insight on vertical merger analysis through speeches and other policy work,³ and through rigorous case selection.⁴ I am open to drafting new guidelines, provided they reflect guidance from the courts, experience from agencies, and the weight of scholarship on the question.

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. There is no good reason for different standards for preliminary injunctive relief between the two antitrust enforcement agencies, and Congress adopting carefully crafted legislation to align standards could be beneficial. As a practical matter, courts typically interpret the standard to be applied when the FTC files for a preliminary injunction in pre-merger cases to be the same as for such DOJ filings. Making it clear via statute that the two standards are the

¹ U.S. Department of Justice, *Non-Horizontal Merger Guidelines* (1984), <https://www.justice.gov/sites/default/files/atr/legacy/2006/05/18/2614.pdf>.

² See, e.g., Aldrin Brown, *US DOJ Seeks to Issue New Vertical Merger Guidelines 'Within the Next Year,' Antitrust Chief Says*, PARR (Oct. 30, 2018) (quoting Assistant Attorney General Makan Delrahim as stating that these guidelines are “not used” and do not “[r]eflect new evidence or case law”); 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>.

³ See, e.g., 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).

⁴ For example, the Commission recently challenged several vertical mergers, including one between Northrop Grumman, a leading provider of missile systems to the Department of Defense, and Orbital ATK, a key supplier of solid rocket motors. *Northrop Grumman*, No. C-4652 (F.T.C. 2018), <https://www.ftc.gov/enforcement/cases-proceedings/181-0005-c-4652/northrop-grumman-orbital-atk>. See also *Sycamore Partners II, L.P.*, No. C-4667 (F.T.C. 2019), <https://www.ftc.gov/enforcement/cases-proceedings/181-0180/sycamore-partners-ii-lp-staples-inc-essendant-inc-matter> (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); *Fresenius Medical Care AG & Co. KGaA*, No. C-4671 (F.T.C. 2019), <https://www.ftc.gov/enforcement/cases-proceedings/171-0227/fresenius-medical-care-nxstage-medical-matter>.

same would, however, eliminate: (1) any potential for different standards to be erroneously adopted; and (2) the criticism that companies may face different standards depending on the happenstance of which agency reviews its transaction.

With respect to the FTC’s administrative litigation path, there are several additional considerations. The FTC has utilized administrative litigation to help develop antitrust doctrine in important ways—including in complex and critical areas like healthcare. The Commission’s reworking of its approach to hospital mergers is perhaps the most striking example of the FTC’s successful use of administrative litigation to advance antitrust enforcement.⁵ In contemplating legislation regarding the FTC’s use of administrative litigation, Congress should consider whether and to what extent it desires the Commission to continue using administrative litigation—as opposed to federal court litigation—to develop antitrust doctrine.

Congress should also consider whether and to what extent administrative litigation may make the ultimate resolution of cases more efficient. Whether a case is litigated in federal court or administratively may make a difference, particularly for unconsummated mergers. Merging parties remain unable to close their transaction for a significant period of time, for example when they are subject to review by multiple authorities. The FTC can commence an administrative action while other reviews are pending and delay an injunction action in federal court until other review processes are completed and the merger is imminent. In the recent *Tronox* case, the FTC filed its case in December 2017 and litigated it administratively while the parties waited for foreign approvals.⁶ In the summer of 2018, once those approvals were granted and the parties would have been able to close their transaction, the FTC filed suit in federal court, seeking a preliminary injunction. The pre-existing administrative record allowed the parties to avoid a substantial discovery period in the federal proceeding, enabled the district court judge to expedite its hearing and to issue a ruling in September 2018. However, the administrative litigation remains pending before the Commission. In other recent merger cases where the Commission has sought a preliminary injunction in federal court from the beginning, federal courts were able to issue rulings on the preliminary injunctions—which typically effectively end any litigation and obviate the need for any administrative trial—within six months.⁷

That said, the Commission’s use of administrative litigation for merger review has met with criticism. Some express concern that the FTC has “two bites at the apple” when it comes to

⁵ See, e.g., Edith Ramirez, Chairwoman, Fed. Trade Comm’n, *Retrospectives at the FTC: Promoting an Antitrust Agenda*, Remarks at ABA Retrospective Analysis of Agency Determinations in Merger Transactions Symposium (June 28, 2013), <https://www.ftc.gov/public-statements/2013/06/retrospectives-ftc-promoting-antitrust-agenda>; S. 2102: *the Standard Merger & Acquisition Review Through Equal Rules Act of 2015 Before the Subcomm. on Antitrust, Competition Policy & Consumer Rights of the S. Comm. on the Judiciary*, 114th Cong. 4 (2015) (statement of Jonathan M. Jacobson, Partner, Wilson Sonsini Goodrich & Rosati, PC), <https://www.judiciary.senate.gov/imo/media/doc/10-07-15%20Jacobson%20Testimony.pdf>.

⁶ *Tronox Ltd.*, No. 9377 (F.T.C. 2018), <https://www.ftc.gov/enforcement/cases-proceedings/171-0085/tronoxcrystal-usa>.

⁷ See, e.g., *Sysco Corporation*, No. 9364 (F.T.C. 2015), <https://www.ftc.gov/enforcement/cases-proceedings/141-0067/syscousf-holdingus-foods-matter>; *Staples, Inc.*, No. 9367 (F.T.C. 2016), <https://www.ftc.gov/enforcement/cases-proceedings/151-0065/staplesoffice-depot-matter>.

mergers: the Commission can seek a preliminary injunction in federal court, and if it loses, can continue to a full administrative trial before an ALJ (an option the DOJ does not have).⁸ The Commission has not continued to litigate a merger case after losing a preliminary injunction motion in federal court for over twenty years, and modern policy is to stop litigating after such a loss. I agree with that policy. That said, the policy could be changed by the Commission, while it would not be able to unilaterally deviate from legislation adopting this policy.

There also is a concern that, in administrative litigation, the Commission essentially serves as a check on itself—it votes to issue a complaint, and then is the factfinder and decision-maker as to the ultimate merits of that complaint before parties have any opportunity to go to federal court.⁹ The FTC ultimately finds liability (on one or more counts) in administrative litigation an overwhelming percent of the time, often overruling the Administrative Law Judge (who renders an initial decision, following an administrative trial) to do so.¹⁰ This has led some to question the administrative process and the use of the ALJ.

In considering whether to take action to align the approaches of the two federal antitrust agencies, Congress should keep in mind these benefits and potential drawbacks.

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?

⁸ See, e.g., ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS, ch. II.A (2007), https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

⁹ See Mark Leddy, Christopher Cook, James Abell & Georgina Eclair-Heath, *Transatlantic Merger Control: The Courts and the Agencies*, 43 CORNELL INT’L L.J. 25, 53 (2010) (“[T]he FTC’s recent proposals [] raise concerns about prosecutorial bias and lack of effective judicial oversight.”); Maureen K. Ohlhausen, *Administrative Litigation at the FTC: Effective Tool for Developing the Law or Rubber Stamp?*, 12(4) J. COMPETITION L. & ECON. 1 (2016) (describing and analyzing the concerns); David A. Balto, *The FTC at a Crossroads: Can It Be Both Prosecutor and Judge?*, 28 LEGAL BACKGROUNDER 1, 1 (2013); Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission, 58 ANTITRUST L.J. 43, 118 (1989) (“No thoughtful observer is entirely comfortable with the FTC’s (or other agencies’) combining of prosecutor and adjudicatory functions. Whenever the same people who issued a complaint later decide whether it should be dismissed, concern about at least the appearance of fairness is inevitable.”).

¹⁰ See, e.g., A. Douglas Melamed, Comments on Public Workshop Concerning the Prohibition of Unfair Methods of Competition In Section 5 of the Federal Trade Commission Act 14 (Oct. 14, 2008), <https://www.ftc.gov/policy/public-comments/comment-537633-00004> (“Over that 25-year period [from 1983-2007], respondents did not win a single [Sherman Act] case [before the ALJ]. The staff won 16 cases and lost none. That record now covers the 26-year period from 1983 to 2008. [¶] Notably, respondents had greater difficulty winning before the Commission than before the ALJs. Respondents actually won four of the sixteen cases before the ALJ.” (emphasis in original)); Joshua Wright, *Supreme Court Should Tell FTC To Listen To Economists, Not Competitors On Antitrust*, FORBES (Mar. 14, 2016), <https://www.forbes.com/sites/danielfisher/2016/03/14/supreme-court-should-tell-ftc-on-antitrust/#76b9fd647c16> (“[T]he FTC has ruled for itself in 100 percent of its cases over the past three decades—though it is reversed more often than the decisions of federal court judges.”)

I do not have a view at this time as to whether Congress should clarify the definition of “substantial injury” under Section 5(n). Historically, the Commission has interpreted substantial injury to include financial,¹¹ physical,¹² reputational,¹³ or unwanted intrusions.¹⁴

Some have raised questions as to the scope of injury appropriately covered by Section 5(n), including whether (and how) 5(n) should be applied to intangible injuries.¹⁵ In response to some of these questions, on December 12, 2017, the FTC hosted a workshop in Washington, DC to discuss “informational injuries”, which are injuries—both market-based and non-market¹⁶—that consumers may suffer from privacy and security incidents, such as data breaches or unauthorized disclosure of data. The workshop asked participants to discuss and develop analytical frameworks to help guide future application of the “substantial injury” prong in cases involving informational injury.

This work targets issues that Congress is now considering addressing through privacy legislation. I believe the discussion about the scope of Section 5(n) is relevant to that consideration.

¹¹ Financial injury can manifest in a variety of ways: fraudulent charges, delayed benefits, expended time, opportunity costs, fraud, and identity theft, among other things. *See, e.g.*, Complaint, *TaxSlayer, LLC*, No. C-4626 (F.T.C. Oct. 20, 2017), <https://www.ftc.gov/enforcement/cases-proceedings/162-3063/taxslayer> (alleging delayed benefits, expended time, and risk of identity theft).

¹² Physical injuries include risks to individuals’ health or safety, including the risks of stalking and harassment. *See, e.g.*, Complaint, *FTC v. Accusearch, Inc.*, No. 06-CV-0105 (D. Wyo. April 27, 2006), <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).

¹³ Reputational injury involves disclosure of private facts about an individual, which damages the individual’s reputation. Tort law recognizes reputational injury. The FTC has brought cases involving this type of injury, for example, in a case involving public disclosure of individuals’ Prozac use and public disclosure of individuals’ membership on an infidelity-promoting website. *Eli Lilly And Company*, No. C-4047 (F.T.C. May 8, 2002), <https://www.ftc.gov/enforcement/cases-proceedings/012-3214/eli-lilly-company-matter>; *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>.

¹⁴ 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, an adult-dating website, and companies spying on people through remotely-activated webcams fall into this category. The second category involves unwanted commercial intrusions, such as telemarketing, spam, and harassing debt collection calls.

¹⁵ *See, e.g.*, *Oversight of the Federal Trade Commission; Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 114th Cong. 74 (2016) (written question submitted by Sen. Thune, Chairman, S. *Comm. on Commerce, Science, and Transportation*) (asking about the use of the FTC’s unfairness doctrine to address intangible and non-economic harms, including whether “there a predictable limiting factor on the types of harm that will result in FTC enforcement actions”), <https://www.govinfo.gov/content/pkg/CHRG-114shrg25376/pdf/CHRG-114shrg25376.pdf>; *LabMD, Inc. v. FTC*, 678 F. App’x 816, 820 (11th Cir. 2016) (noting that “it is not clear that a reasonable interpretation of § 45(n) includes intangible harms like those that the FTC found in this case.”); Concurring Statement of Acting Chairman Maureen K. Ohlhausen in the Matter of Vizio, Inc. at 1, *FTC v. VIZIO, Inc.*, No. 2:17-cv-00758 (D.N.J. 2017) (noting “the need for the FTC to examine more rigorously what [type of harm] constitutes ‘substantial injury’ in the context of information about consumers.”), <https://www.ftc.gov/public-statements/2017/02/concurring-statement-acting-chairman-maureen-k-ohlhausen-matter-vizio-inc>.

¹⁶ “Market-based” injuries can be objectively measured—for example, credit card fraud and medical identity theft affect consumers’ finances in a directly measurable way. Alternatively, a “non-market” injury, such the embarrassment that comes from a breach of sensitive health information, cannot be objectively measured using available tools because there is no functioning market for it.

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, 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 1972.¹⁷ In addition, the FTC also has provided extensive guidance through Guides and staff guidance documents.¹⁸ In addition, FTC staff provide additional guidance through speeches and presentations to industry trade groups and industry attorneys.

The Commission's precedent and other 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?

Response. The U.S. Court of Appeals for the Eleventh Circuit determined that the mandated data security provision of the Commission's *LabMD* Order was insufficiently specific. That ruling effectively mandates that our data security orders be more prescriptive, which is not necessarily good from a policy perspective. The flexible approach we had applied, which both the Commission and defendants generally preferred, permitted firms to base their data security compliance on the particular risks and needs of individual firms. Congress should consider whether to address the ruling of the Eleventh Circuit through a statutory fix.

The Court having issued its order, however, we are now working to craft order language in data security cases that is consistent with the Eleventh Circuit's opinion.

¹⁷ 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)).

¹⁸ 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=bd96b2c2cd01f7620d43e50a9d1d8cec&mc=true&node=se16.1.260_12&rgn=div8; FTC, *Dietary Supplements: An Advertising Guide for Industry*, <https://www.ftc.gov/tips-advice/business-center/guidance/dietary-supplements-advertising-guide-industry>.

Question 6. If federal privacy legislation is passed, what enforcement tools would you like to be included for Federal Trade Commission?

The question of tools is a secondary one, which cannot and should not be considered in the abstract. Answering the question necessarily requires preliminary determinations first as to what harms Congress wishes to address and, second, what liability standards it adopts to address those harms. Civil penalties, for instance, are better tailored to conduct that is clearly-defined—for example, violations of specific rules set forth in FTC consent orders or regulations like COPPA. Otherwise, the prospect of paying them may chill innovation and other conduct that benefits consumers. The FTC has rulemaking authority today.¹⁹ It differs from APA rulemaking in several respects, following restraints imposed upon the Commission by Congress after attempts by the agency to ban certain types of advertising to children. Rulemaking authority raises important issues of delegation and democratic accountability. Congress, not an administrative agency, is the best place to make policy with a profound impact on a substantial portion of the economy. Congress should consider that the flexibility that rulemaking permits also allows for changes in rules over time, which—regardless of the underlying policy—can be terrifically difficult for businesses attempting to adapt.

Today, the FTC cannot take action against telecommunications common carriers and non-profits. I support removing those jurisdictional limitations.

Question 7. During the hearing, I asked the Chairman 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. I believe the FTC's section 6(b) authority could provide some much needed transparency to consumers about the data practices of large technology companies, and help identify areas that may require additional attention from lawmakers. What are your views with respect to the FTC potentially conducting 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 such as Google, Facebook, Amazon, and others?

Response. The Commission's 6(b) authority enables it to conduct economic studies that do not have a specific law enforcement purpose, but rather are for the purpose of obtaining information about "the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals" of the entities to whom the inquiry is addressed. As with subpoenas and CIDs, the recipient of a **6(b) order** may file a petition to limit or quash, and the Commission may seek a court order requiring compliance.²⁰

The FTC has used its 6(b) authority to study and answer discrete questions regarding industry practices, such as to gather information regarding the marketing practices of major alcoholic

¹⁹ 15 U.S.C. § 57a.

²⁰ In addition, the Commission may commence suit in Federal court under Section 10 of the FTC Act, 15 U.S.C. § 50, against any party who fails to comply with a 6(b) order after receiving a notice of default from the Commission. After expiration of a thirty-day grace period, the defaulting party is liable for a penalty for each day of noncompliance.

beverage advertisers to study whether voluntary industry guidelines for reducing advertising and marketing to underage audiences had been effective.²¹ Another example is the Commission's July 2002 report, *Generic Drug Entry Prior to Patent Expiration*,²² which was the product of a 6(b) study, and the results of which the Commission was able to publish publicly pursuant to 15 U.S.C. § 46(f).

For any 6(b) study of the wide-ranging tech sector to be effective, it should focus on areas where there is reason to suspect wrongdoing is occurring or where the Commission believes it lacks adequate understanding of the conduct, practice, or management in question. Casting too broad a net could easily incur costs in excess of the information's incremental benefit, as occurred with the Commission's Line of Business program, which was designed to compel annual reporting of financial and statistical data by hundreds of manufacturing firms but was discontinued after being plagued by recurring non-compliance and costly legal battles.²³ Congress (to the extent it seeks to direct such studies) and the Commission should develop clear and concise goals for such studies, to ensure that we have a concrete goal to work towards and to avoid, as much as possible, lengthy and expensive disputes over the scope or burden of such orders.

²¹ FTC Press Release, *FTC Orders Alcoholic Beverage Manufacturers to Provide Data for Agency's Fourth Major Study on Alcohol Advertising* (April 12, 2012), <https://www.ftc.gov/news-events/press-releases/2012/04/ftc-orders-alcoholic-beverage-manufacturers-provide-data-agencys>

²² FTC, *Generic Drug Entry Prior to Patent Expiration: An FTC Study* (July 2002), https://www.ftc.gov/sites/default/files/documents/reports/generic-drug-entry-prior-patent-expiration-ftc-study/genericdrugstudy_0.pdf.

²³ B.J. Linder & Allan H. Savage, *The Line of Business Program: The FTC's New Tool*, 21 CAL. MGMT. REV. 57 (1979).

Responses to Written Questions Submitted by Honorable Jerry Moran to Noah Phillips

Question 1. Set to expire on September 30, 2020, the U.S. SAFE WEB Act allows for increased cooperation with foreign law enforcement authorities through confidential information sharing and the provision of investigative assistance. Specifically, the law authorizes the FTC to provide assistance to foreign law enforcement agencies to support their investigations and enforcement actions. Your testimony requested that Congress reauthorize this authority while eliminating the sunset provision. Would you please explain how U.S. SAFE WEB Act will impact U.S. consumers?

Response. Our economy is increasingly globalized, digitized, and connected. These changes generate incredible opportunity, but also pose new problems for American consumers, such as traditional scams that now thrive online and new, Internet-enabled, frauds. They also raise law enforcement challenges, like the enhanced ability of scammers to act anonymously or move ill-gotten gains outside our jurisdiction; and roadblocks to international law enforcement cooperation.

Congress has been an essential ally in this fight. In 2006, it passed the U.S. SAFE WEB Act. SAFE WEB allows the FTC to share evidence with and provide investigative assistance to foreign authorities in cases involving issues including spam, spyware, privacy violations and data breach. It also confirms our authority to challenge foreign-based frauds that harm U.S. consumers or involve material conduct in the United States.

Using SAFE WEB, the FTC has worked with authorities abroad to stop illegal conduct and secure millions in judgements from fraudsters, sometimes even criminal convictions. The FTC uses SAFE WEB authority in important international privacy cases. We collaborated with Canadian and Australian privacy authorities on the massive data breach of the Toronto-based, adult dating website AshleyMadison.com,²⁴ and we worked again with Canadian authorities on the FTC's first children's privacy and security case involving connected toys, a settlement with electronic toy manufacturer VTech Electronics²⁵ under the Children's Online Privacy Protection Act.

In total, the FTC has responded to more than 130 SAFE WEB information-sharing requests from 30 foreign enforcement agencies. We have issued more than 115 civil investigative demands in more than 50 investigations on behalf of foreign agencies, civil and criminal. The FTC has collected millions of dollars in restitution for injured consumers, both foreign and domestic.

²⁴ FTC Press Release, *Operators of AshleyMadison.com Settle FTC, State Charges Resulting From 2015 Data Breach that Exposed 36 Million Users' Profile Information* (Dec. 14, 2016), <https://www.ftc.gov/news-events/press-releases/2016/12/operators-ashleymadisoncom-settle-ftc-state-charges-resulting>.

²⁵ FTC Press Release, *Electronic Toy Maker VTech Settles FTC Allegations That it Violated Children's Privacy Law and the FTC Act* (Jan. 8, 2018), <https://www.ftc.gov/news-events/press-releases/2018/01/electronic-toy-maker-vtech-settles-ftc-allegations-it-violated>.

SAFE WEB helps protect Americans by policing and instilling confidence in the digital economy, but it sunsets in 2020. I believe that American consumers will be best served if Congress reauthorizes this authority and eliminates the sunset provision.

Question 2. 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 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 at the same time promoting innovation and competition in the marketplace.

Question 3. 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. The FTC has developed substantial expertise in the area of data privacy and security and we are committed to working with Congress to help determine whether and what additional resources may be appropriate, commiserate with any new authorities.

Question 4. 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. As a threshold matter, it is well-recognized that the vast majority of premerger filings do not raise competitive concerns, and so the percentage of reviewed versus challenged mergers is not the result of a resource problem. Nor does a low incidence of full-phase investigations or merger challenges, relative to the total number of filings, indicate lax merger enforcement or the deterioration of competition. The ultimate antitrust question is whether a merger is likely to harm competition and consumers, and the FTC challenges far fewer mergers than it reviews because

most simply do not raise competitive issues. That said, I appreciate your attention to the agency's resource needs. As we mentioned in our November 27 testimony, the FTC works very hard to accomplish as much as possible with the resources we have. We are tasked with the important dual goals of protecting consumers and promoting competition, both which are of increasing importance in the changing economy. Resource constraints remain a significant challenge. Evolving technologies and intellectual property issues, among others, continue to increase the complexity of antitrust investigations and litigation. That 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. We also have heard the need for additional paralegals to help support our staff attorneys; paralegals can provide very valuable services and allow attorneys to devote more time to substantive issues, but they are a rare commodity at the Commission today. These all continue to be critical areas of need for our agency. If we receive additional resources, we plan to apply them to these areas.

Qualified experts are a critical resource in all of the FTC's competition cases heading toward litigation. For example, expert witness services are critical to merger cases, as they help the FTC satisfy key burdens such as defining product and geographic markets and estimating the likely harms (and countering defendants' estimation of any alleged procompetitive benefits).

Expert witness costs are highly dependent on the number, scope, duration, and disposition of our federal and administrative court challenges—increasing (often significantly) as these factors increase. To limit these costs, the FTC has continued to identify and implement 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.

As with other critical areas under our jurisdiction, the FTC closely follows activity and developments in the high-technology sector. Given the important role that technology companies play in the modern American economy, the Commission has prioritized understanding the competition and consumer protection issues that can arise in this space.

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, can be 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 strives to adapt to the dynamic markets we protect by leveraging the research, advocacy, and education tools at our disposal. For example, last fall, the Commission launched its *Hearings on Competition and Consumer Protection in the 21st Century* to understand better both the

advancements in technology and the new business models they support, and how to target enforcement efforts in these evolving spaces.²⁶

Question 5. 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. I agree that awareness and education are essential to protect our nation’s seniors. Indeed, protecting older Americans has long been a top priority, and it is increasingly important as that population grows. To this end, we engage in research, education, and enforcement actions focused on educating and protecting older Americans, including our *Pass It On* campaign,²⁷ to help both protect seniors and prosecute wrongdoers.

More generally, our anti-fraud activities are at the core of our law enforcement efforts, protecting not just seniors but a broad range of vulnerable consumer populations, including minorities and veterans. That includes efforts to stop fraudulent business opportunity schemes, police unsubstantiated health claims, and shut down sham charities that prey on unsuspecting consumers and target their hard-earned savings.

The Commission must and will keep a focus on these efforts, which protect consumers from immediate and tangible harms. We are ready and willing to work with additional partners—from government, civil society, academia, and industry—to identify and prevent harms to older consumers, as well as other vulnerable consumers.

²⁶ 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, *FTC Hearing on Competition and Consumer Protection in the 21st Century #3: Multi-Sided Platforms, Labor Markets, and Potential Competition* (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, *FTC Hearing on Competition and Consumer Protection in the 21st Century #6: Privacy, Big Data, and Competition* (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, *FTC Hearing on Competition and Consumer Protection in the 21st Century #7: The Competition and Consumer Protection Issues of Algorithms, Artificial Intelligence, and Predictive Analytics* (Nov. 13-14, 2018), <https://www.ftc.gov/news-events/events-calendar/ftc-hearing-7-competition-consumer-protection-21st-century>.

²⁷ FTC, *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).

Question 6. 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.²⁸ Physical injuries include risks to individuals’ health or safety, including the risks of stalking and harassment.²⁹ Reputational injury involves disclosure of private facts about an individual, which damages the individual’s reputation. Tort law recognizes reputational injury.³⁰ The FTC has brought cases involving this type of injury, for example, in a case involving public disclosure of individuals’ Prozac use³¹ and public disclosure of individuals’ membership on an infidelity-promoting website.³² 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,³³ an adult-dating website,³⁴ and companies spying on people in their bedrooms through remotely-activated webcams fall into this category.³⁵ 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.

I note additionally that the definition of “substantial injury” under Section 5(n) has been interpreted by the Commission in the past to reach these types of harms. “Privacy” harms often involve largely non-economic harms, potentially including harms not presently cognizable under

²⁸ See, e.g., Complaint, *TaxSlayer, LLC*, No. C-4626 (F.T.C. Oct. 20, 2017), <https://www.ftc.gov/enforcement/cases-proceedings/162-3063/taxslayer> (alleging delayed benefits, expended time, and risk of identity theft).

²⁹ See, e.g., Complaint, *FTC v. Accusearch, Inc.*, No. 06-CV-0105 (D. Wyo. April 27, 2006), <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).

³⁰ 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).

³¹ *Eli Lilly and Co.*, No. C-4047 (F.T.C. 2002), <https://www.ftc.gov/enforcement/cases-proceedings/012-3214/eli-lilly-company-matter>.

³² *FTC v. Ruby Corp., et al.*, No. 1:16-cv-02438 (D.D.C. 2016), <https://www.ftc.gov/enforcement/cases-proceedings/152-3284/ashley-madison>.

³³ *FTC v. EMP Media, Inc., et al.*, No. 2:18-cv-00035 (D. Nev. 2018), <https://www.ftc.gov/enforcement/cases-proceedings/162-3052/emp-media-inc-myexcom>.

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

³⁵ See FTC 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>.

the FTC Act. In considering privacy legislation, I urge Congress to study and understand the harms it wishes to address and craft remedies appropriate to them.

Question 7. 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. In its comments to NTIA, the Commission wrote that it “supports a balanced approach to privacy that weighs the risks of data misuse with the benefits of data to innovation and competition”, noting that striking that balance is “essential to protecting consumers and promoting competition and innovation.”³⁶ Recognizing the kinds of harms we have pursued in privacy enforcement matters—financial, physical, and reputational injury, and unwanted intrusions—we also recognized the many benefits and innovations that the sharing of data have achieved for American consumers. The Commission went on to warn that “privacy standards that give short shrift to the benefits of data-driven practices may negatively affect innovation and competition” and that “regulation can unreasonably impede market entry or expansion by existing companies.”

All of this means that, in thinking about regulation or law enforcement with respect to privacy, we must keep in mind that we are talking about one of the most dynamic aspects of the global economy, one where the U.S. is a leader in innovation and job growth. We should be clear about the harms we wish to stop, and weigh those against the benefits.

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.

As with any law enforcement agency, we should and do exercise our discretion when deciding whether to pursue matters and how to resolve them. In so doing, we should keep our guiding principles in mind and focus on deterring real and significant harms to consumers, providing the right incentives to the marketplace to take reasonable steps that will limit both consumer harm and liability, and avoiding the creation of a culture of uncertainty and fear that would impede consumer-friendly innovation.

³⁶ Federal Trade Commission Staff, Comment to the National Telecommunications and Information Administration on Developing the Administration’s Approach to Consumer Privacy (Nov. 9, 2018), <https://www.ftc.gov/policy/advocacy/advocacy-filings/2018/11/ftc-staff-comment-ntia-developing-administrations-approach>.

Question 8. 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?

Response. In our NTIA comment, we reference different types of privacy-related harms: financial, physical, reputational, and unwanted intrusion. All these types of harms are mitigated, or even eliminated, when data cannot be tracked to a consumer. As such, appropriately de-identified data does not raise the same risks and should be treated differently, especially considering the benefits of using such data for innovative, consumer-friendly purposes.

Question 9. 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.³⁷ 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 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. We will keep a close eye on this industry initiative and continue to encourage its implementation.

³⁷ See FTC, *Consumer Information – Robocalls*, <https://www.consumer.ftc.gov/features/feature-0025-robocalls>.

Question 10. Would you please describe the FTC’s coordination efforts with state, federal, and international partners to combat illegal robocalls?

Response. Robocalls are a pernicious problem, a fact of which the average American consumer is reminded several times a day.

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.³⁸

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 problem³⁹ and a public expo that allowed companies offering call blocking and call labeling services to showcase their products for the public.⁴⁰ 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 11. 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. Congress should consider all these tools in fashioning data security legislation. For good reason, the *FTC Act* does not give the Commission penalty authority for first-time violators. If Congress were to give the FTC the authority to seek civil penalties for first-time violators of data security rules specifically (subject to statutory limitations on the imposition of such penalties, such as ability to pay), we would have greater ability to deter potentially harmful conduct. Due to asymmetric information, interdependent systems, and difficulties in tracing ID

³⁸ FTC 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.

³⁹ FTC Press Release, *FTC and FCC to Host Joint Policy Forum on Illegal Robocalls* (Mar. 22, 2018), <https://www.ftc.gov/news-events/press-releases/2018/03/ftc-fcc-host-joint-policy-forum-illegal-robocalls>.

⁴⁰ FTC 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>.

theft to a particular firm, there are reasons to believe that in many circumstances firms may lack sufficient incentives to adequately invest in data security under current law.⁴¹ Correctly calibrated civil penalties would cause companies to internalize the full costs of inadequate data security, fostering proper incentives to protect consumer data.

As to APA rulemaking authority, were Congress to enact specific data security legislation, APA rulemaking authority would allow us more efficiently to adopt implementing rules. Such authority will ensure that the FTC can enact rules and amend them as necessary to keep up with technological developments. However, as I have stated in other contexts, the difficult judgments as to details and shape of data security legislation should be made in Congress, not at the agency level. This will provide for more certainty and consistency, and is the more appropriate democratic forum.

As to non-profits and common carriers, we are all well aware of the regular reports of breaches impacting these sectors. Indeed, the need for security in these sectors is not appreciably different from the need in many other sectors of the economy already under FTC jurisdiction. Giving us jurisdiction for data security in these sectors will create more consistency across the marketplace and allow for more certainty and clarity.

⁴¹ See, e.g., STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 244 (2004) (when victims cannot identify the injurer, injurers will lack adequate incentives to take care); George Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970); Howard Kunreuther & Geoffrey Heal, *Interdependent Security*, 26 J. RISK & UNCERTAINTY 231 (2003).