

Responses to Written Questions Submitted by Honorable John Thune to Joseph J. Simons

Question 1. You recently attended the Second Annual Privacy Shield Review. Did the European regulators raise any concerns about the effectiveness of the program? Do you think Privacy Shield is operating effectively and will continue to be a valid means for businesses to transfer personal data to the United States from Europe?

Response. The European Commission (EC) issued its report on the Annual Review in December 2018. I agree with the ultimate conclusion of the EC report: Privacy Shield remains a robust program for protecting privacy and enabling transatlantic data flows. The report found that U.S. authorities continue to improve the program, highlighting the proactive approach to enforcement by the FTC. The EC raised concerns with the national security aspects of the program, specifically requesting the nomination of an Ombudsperson within the State Department. The Administration has since created and filled a Privacy Shield Ombudsperson position.

Question 2. Vertical mergers such as the merger between AT&T and Time Warner have garnered some attention lately. The Federal Trade Commission (FTC) and the Department of Justice (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 Non-Horizontal Merger Guidelines do not reflect current scholarship and thinking on vertical merger enforcement.¹ They are significantly out of date. If we were to attempt to draft new guidelines, we would probably have to start from scratch, based on the practical learning and experience of more recent merger challenges and investigations.

Over the years, the Commission and its staff have provided substantial insight on vertical merger analysis through speeches and other policy work,² and through rigorous case selection.³ The Commission is actively considering whether we – along with our sister agency, the Antitrust Division of the Department of Justice – should formally publish vertical merger guidelines. This topic is a key focus of the FTC’s ambitious program of *Hearings on Competition and Consumer*

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 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).

³ 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. *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>. See also *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> (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).

Protection in the 21st Century.⁴ Two panel discussions on vertical mergers were held in November 2018, and the Commission has invited public commentary on the topic.

Question 3. 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. While I have no opinion as to whether Congress should take action, I note that there are significant benefits to the Commission's administrative litigation path; in particular, it provides the Commission an opportunity to develop important aspects of competition law. But if the FTC is denied a preliminary injunction in a merger matter in federal court, I do not believe the Commission should pursue that matter in administrative litigation. The Commission has not pursued an administrative proceeding following the denial of a preliminary injunction in federal court for over twenty years. I agree with this approach.

Separately, it is not clear to me whether it would be beneficial to prohibit the FTC from conducting an administrative proceeding while the parties to a merger remain unable to close their transaction for a significant period of time. Many transactions are subject to multijurisdictional reviews, whether by foreign competition authorities or state regulators. Under current law, the FTC can commence an administrative action while other reviews are pending. The FTC may delay an injunction action in federal court until other review processes are completed and the merger is imminent. This approach could have certain advantages that I believe are worth discussing when thinking about making changes to the Commission's process for challenging mergers.

In the recent *Tronox* case, the FTC was able to complete an administrative trial while the parties waited for foreign approvals.⁵ 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 existence of the record from the FTC administrative proceeding allowed the parties to avoid a substantial discovery period in the federal proceeding, enabled the district court judge to substantially expedite the preliminary injunction hearing, and very likely reduced the overall time for the court to reach a decision. In this case, the injunction was granted. If the injunction had not been granted, the parties likely would have been able to close their transaction faster than if there had been no FTC administrative proceeding. To the extent there was duplication between the two proceedings, it appears to have been minor, and the matter was very likely resolved faster as a result. Certainly, it reduced cost and resource burdens on the federal district court.

⁴ 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>.

⁵ *FTC v. Tronox Ltd. and Nat'l Titanium Dioxide Co. Ltd. (Cristal)*, No. 1:18-cv-01622 (D.D.C. Sept. 12, 2018), <https://www.ftc.gov/enforcement/cases-proceedings/171-0085/tronox-limited-et-al-ftc-v>.

Question 4. 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 that have ruled on this issue, have struggled to interpret that element of Section 5(n). 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.⁶ Physical injuries include risks to individuals’ health or safety, including the risks of stalking and harassment.⁷ Reputational injury involves disclosure of private facts about an individual, which damages the individual’s reputation. Tort law recognizes reputational injury.⁸ The FTC has brought cases involving this type of injury, for example, in a case involving public disclosure of individuals’ Prozac use⁹ and public disclosure of individuals’ membership on an infidelity-promoting website.¹⁰ 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,¹¹ an adult-dating website,¹² and companies spying on people in their bedrooms through remotely-activated webcams fall into this category.¹³ The second category involves unwanted commercial intrusions, such as telemarketing, spam, and harassing debt collection calls.

Question 5. 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 determine 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.*¹⁴ Those factors included the type of claim, type of product, consequences of a false claim, benefits of a truthful claim, cost of developing substantiation for the claim, and

⁶ See, e.g., *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).

⁷ See, e.g., *FTC v. Accusearch, Inc.*, No. 06-CV-0105 (D. Wyo. May 3, 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).

⁸ 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).

⁹ *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>.

¹⁰ *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>.

¹¹ *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>.

¹² *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>.

¹³ 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.*, C-4442 (F.T.C. Mar. 10, 2014), <https://www.ftc.gov/enforcement/cases-proceedings/122-3256/aarons-inc-matter>.

¹⁴ 81 F.T.C. 23 (1972)

amount of substantiation experts in the field believe is reasonable. The Commission and the courts have reaffirmed this standard many times since 1972.¹⁵ In addition, the FTC also has provided extensive guidance through Guides and staff guidance documents.¹⁶ FTC staff regularly provide further guidance through speeches and presentations to industry trade groups and industry attorneys.

The Commission's precedent and subsequent guidance set forth flexible principles that can be applied to multiple products and claims. These materials do 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, they seek to strike the right balance: specific enough to be helpful, but not so granular as to overlook some important factor that might arise, and thereby chill useful speech.

Question 6. 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. 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 to use our existing tools to implement remedies that better deter future misconduct.

Question 7. 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 would 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, would allow the FTC to keep up with technological developments. For example, in 2013, the FTC used its APA rulemaking authority to amend the COPPA Rule to address new business models, including social media and collection of geolocation information, that did not exist 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.

¹⁵ 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)).

¹⁶ See, e.g., *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>.

Question 8. 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 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. I agree with you that the FTC’s section 6(b) authority could be used to provide some much needed transparency to consumers about the data practices of large technology companies. We are developing plans to issue 6(b) orders in the technology area.

Responses to Written Questions Submitted by Honorable Roy Blunt to Joseph J. Simons

Question 1. The Food and Drug Administration (FDA) cataloged reports that patients have foregone or discontinued their doctor prescribed medications, in some cases resulting in serious injury and death, after seeing lawsuit advertisements making claims about certain FDA-approved medications.

It is incumbent upon the Federal Trade Commission (FTC) to examine and curb false and misleading advertising practices, particularly when such practices result in serious injury and death.

What is the FTC doing to stop these false and misleading lawsuit advertising practices?

Response. Some of these advertisements could be unfair or deceptive in violation of the FTC Act. The FTC is monitoring attorney advertising that solicits people who may have been harmed by prescription drugs or medical devices to determine whether such advertising is likely to cause physical or financial harm to consumers. We also are consulting with the FDA to determine how we may assist each other in protecting consumers. In particular, among other requests, we are seeking FDA input as to whether particular ads contain misleading statements concerning the risks associated with specific drugs and the potential risk to patients of discontinuing the drugs without a doctor's consultation. In addition, we are seeking information from the FDA concerning adverse event reports suggesting a patient stopped taking his or her medication after viewing such advertising. However, it should be noted that adverse event reports do not establish causation, and an enforcement action would have to be based on more than a reported incident.

Responses to Written Questions Submitted by Honorable Jerry Moran to Joseph J. Simons

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 sector-specific privacy statutes, 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?

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. As I mentioned in my November 27 testimony, 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 necessary 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 were to receive additional resources, they likely would be applied to these areas as needed. Qualified experts are an essential resource in all of the FTC’s competition cases heading toward litigation (including some cases that ultimately are resolved via consent orders, through which

we obtain effective relief without litigation). For example, the services of expert witnesses are critical to the successful investigation and litigation of merger cases; experts 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. Under my direction, the FTC will continue 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 follows closely 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 any 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.¹⁷ Under my leadership, the FTC will continue to scrutinize technology

¹⁷ 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: 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*

mergers 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. Our recent announcement of a new Technology Task Force within the Bureau of Competition demonstrates our commitment to monitoring competition in U.S. technology markets, investigating any potential anticompetitive conduct in those markets, and taking enforcement actions when warranted.

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, I agree, and your question fully aligns with the FTC’s work in this area. 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, are increasingly vital. Based on consumer research, the FTC developed its *Pass It On* campaign to share preventative information about frauds and scams with older adults.¹⁸ This popular campaign, used by many of our partners, engages active older adults to share these educational materials with others in their communities, including people in their lives who may particularly benefit from this information. The FTC stands ready to work with industry and government partners to create additional materials for industry, such as retailers, financial institutions, and wire transfer companies, 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.¹⁹ Physical injuries include risks to individuals’ health or safety, including the risks of stalking and harassment.²⁰ Reputational injury involves disclosure of private facts about an

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>.

¹⁸ *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).

¹⁹ See, e.g., *TaxSlayer, LLC*, No. C-4626 (Oct. 20, 2017), <https://www.ftc.gov/enforcement/cases-proceedings/162-3063/taxslayer> (alleging delayed benefits, expended time, and risk of identity theft).

²⁰ See, e.g., *FTC v. Accusearch, Inc.*, No. 06-CV-0105 (D. Wyo. May 3, 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).

individual, which damages the individual's reputation. Tort law recognizes reputational injury.²¹ The FTC has brought cases involving this type of injury, for example, in a case involving public disclosure of individuals' Prozac use²² and public disclosure of individuals' membership on an infidelity-promoting website.²³ 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,²⁴ an adult-dating website,²⁵ and companies spying on people in their bedrooms through remotely-activated webcams fall into this category.²⁶ 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 legitimate 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. 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?

²¹ 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).

²² *Eli Lilly and Co.*, No. C-4047 (May 8, 2002), <https://www.ftc.gov/enforcement/cases-proceedings/012-3214/eli-lilly-company-matter>.

²³ *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>.

²⁴ *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>.

²⁵ *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>.

²⁶ 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. 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.²⁷ 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. 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.²⁸ 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 to 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 in beta-testing mode. We will monitor this industry initiative and, assuming the results are as expected, continue to encourage its implementation.

²⁷ FTC Report, *Protecting Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers* (Mar. 2012), <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf>

²⁸ *Details About the FTC's Robocall Initiatives*, <https://www.consumer.ftc.gov/features/feature-0025-robocalls>.

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, 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.²⁹

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 problem³⁰ and a public expo that allowed companies to showcase their call blocking and call labeling products for the public.³¹ 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 [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 obtain civil penalties for first-time data security violations. I believe this lack of civil penalty authority under-deters problematic data security practices. If Congress were to give the FTC 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 would be achieved. Additionally, should Congress enact specific data security legislation, it would be important for the FTC to have associated APA rulemaking authority³² so that the Commission 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

²⁹ 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.

³⁰ 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>.

³¹ 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>.

³² The FTC is not seeking general APA rulemaking authority for a broad statute like Section 5.

Protection Act to address new business models, including social media and collection of geolocation information, that did not exist 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) but the FTC does not currently have jurisdiction over them. Giving the FTC jurisdiction over these entities to enforce data security laws would create a level playing field and ensure that these entities would be subject to the same rules as other entities that collect similar types of data.