

**SENATE COMMITTEE ON COMMERCE, SCIENCE, AND
TRANSPORTATION**

Full Committee
Wednesday, September 20, 2023, at 10:00 A.M.

DEMOCRATIC QUESTIONS FOR THE RECORD

COVER PAGE
Rebecca Slaughter

SENATOR TAMMY DUCKWORTH (D-IL)

Topic: Infant Formula Shortage

Since the February 2022 recall of Abbott formula, many families around the country are still feeling the impact of the infant formula shortage. While some progress has been made, it is difficult to say whether we have taken the necessary steps to ensure a similar crisis does not happen again in the future. I appreciate FTC moving forward with its investigation and issuing three Civil Investigative Demand (CID) requests to three infant formula manufacturers.

1. Commissioner Slaughter, can you please provide an update on the FTC's efforts to root out potential anticompetitive behavior in this highly concentrated marketplace so families across the country have access to and can afford the formula they need to feed their babies?

Response:

While I cannot comment on any nonpublic investigation, the Commission did issue a public ruling on April 25, 2023, enforcing a civil investigative demand against an infant formula manufacturer.

In addition, in May 2022, the Commission issued a Request for Information to the public on the infant formula market. I am hopeful that the Commission will be able to publish the results of this RFI in the near future to bring additional transparency to this critically important market.

SENATOR KYRSTEN SINEMA (I-AZ)

Questions for the Record from Hon. SINEMA to Hon. Ms. Slaughter

Agency Authority / Artificial Intelligence. Both the threats and potential benefits of artificial intelligence are far-reaching, a phenomenon reflected in various government agencies and Congressional committees learning and addressing these issues from their particular vantage points. Some members have already raised concerns with the steps taken thus far by the Federal Trade Commission (FTC) and there is no doubt that the agency will play a significant role going forward.

Question 1. Under its current authorities – including but not limited to enforcement actions – what role do you believe the FTC is to play in the regulation of artificial intelligence? What roles do you believe different parts of the FTC should play for the agency to best address these evolving issues?

Answer.

The statutes that the FTC enforces—primarily, the FTC Act’s prohibitions on unfair and deceptive acts or practices and unfair methods of competition—were drafted broadly to apply to markets and technologies across the economy. There is no statutory exemption in the FTC Act or any other statute we enforce for artificial intelligence. Accordingly, we should address artificial intelligence as we would any new technology: by seeking to understand its use in the markets, identifying and investigating any possible law violations as they occur, and pursuing appropriate remedies consistent with our statutory mandate.

Investigating and addressing these challenges will necessarily require a collaborative effort across the agency, leveraging the expertise of our technologists, our economists, our investigators, and our competition and consumer protection attorneys. We also must work closely with those outside the agency, including academics, industry, advocates, and peer regulators domestically and internationally.

Question 2. In your view, where should Congress best concentrate its attention to ensure that the FTC has the proper resources and authorities to fulfill its statutory mandates for the American people in the AI space?

Our obligation is to enforce the statutes as they exist today; artificial intelligence is likely to impose a substantial demand on the agency in terms of the staff hours and technological resources necessary to properly investigate the law violations it may generate. We are grateful for any and all resources Congress provides us to undertake this work; it is critically important that our funding levels keep pace with the demands on the agency.

It may be the case that addressing the challenges of AI requires additional tools beyond what our existing statutes provide; it is for Congress to decide whether and how to provide new authorities to the Commission. I should note that Congress is uniquely well positioned to act because, among other reasons, it can do so proactively. The Commission's strongest tools, by contrast, are mostly reactive, such as enforcement actions as well as rulemaking under section 18, which requires that the act or practice being regulated already be prevalent in the economy before the Commission can propose a rule.

Question 3. As Acting Chair you established a rulemaking group in the general counsel's office intended to allow the FTC to take a strategic and harmonized approach to rulemaking across its different authorities and mission areas. How do you believe this and other kinds of similar initiatives could help the FTC as AI issues evolve?

The statutory tools Congress provided to the FTC allow us to pursue law violations through individual enforcement actions and through rulemaking; however, we can only address in a rule conduct that is already prohibited under the FTC Act. In the case of unfair or deceptive acts or practices, the conduct must also be prevalent in the market to be the topic of a proposed rule.

Rulemaking can be helpful to establish clear guidance for the markets and facilitate compliance, especially as compared to case-by-case enforcement. All of our rules have to be the product of an open and participatory public record, and are subject to judicial review once finalized. Rules can and should be amended as market conditions evolve. These facets of rulemaking are true generally, and may be particularly useful for technologies such as AI that are being deployed rapidly in the markets.

Section 13(b) Authority and Congressional Action. The FTC's loss of its 13(b) authority has certainly altered how the agency operates.

Question 4. Now that the agency has operated without the 13(b) authority it employed for four decades prior to the Supreme Court ruling in April 2022 could you please explain the immediate and the downstream impacts this had on the agency and provide

Answer.

The Supreme Court's ruling has been highly detrimental to the Commission's ability to return money to consumers who were harmed by law violations. That ability still exists in certain contexts, such as when we can plead a consumer-protection rule violation (or a violation of a statute such as the Restore Online Shoppers' Confidence Act that operates as a rule). But our ability to return money to consumers harmed by competition-law violations has vanished; for example, the Commission had prevailed in court and secured \$448 million in monetary relief for consumers who were overcharged for the drug Androgel as a result of AbbVie's conduct, but that judgment was wiped out to \$0 as a result of the Supreme Court's

ruling. In certain cases, the Commission can partner with a state enforcer whose office has substantial state-law redress authority. Finally, there is a narrow ability to seek redress under section 19 of the FTC Act for consumer-protection violations that are fraudulent or dishonest through a second lawsuit once a cease-and-desist order has been achieved in a first lawsuit. This process has substantial drawbacks, including that it caps redress at three years no matter how long the scam lasted, and it requires the expenditure of substantially more agency resources than a section 13(b) case would have.

In summary, the Supreme Court's ruling immediately made it much less likely that consumers get their money back and much more likely that scammers get to keep their ill-gotten gains. Downstream, the agency cannot bring as many cases because each case now requires more resources, and the cases we can bring are not as successful.

Question 5. In your view, based on the results since the ruling, what should Congress do to address this problem and protect consumers?

I strongly encourage Congress to pass a section 13(b) fix that empowers the Commission to seek redress for Americans who have been harmed by violations of the laws we enforce.

SENATOR RAPHAEL WARNOCK (D-GA)

Antitrust Enforcement. The Federal Trade Commission (FTC) plays a critical role in antitrust enforcement across many sectors, including in the defense industry. Unlike in other sectors, however, defense industry contractors are often federal government entities that derive their revenue from taxpayer dollars. This creates a special responsibility for the government to ensure competition in these markets, especially considering the essential role of the defense industrial base in our national security.

Question: How do you view the significance of enforcing antitrust laws in ensuring fair competition, innovation, and cost-effectiveness in defense procurement?

Answer:

Ensuring that the defense industry is competitively healthy helps protect not only taxpayer dollars but also national security. We are vulnerable when there is monopoly in our defense supply chains: vulnerable to bloated costs, limited innovation, and security risks when there is a disruption to a monopoly supplier.

Question: How would you prioritize and approach this issue?

Answer:

Because of the risk that defense industry consolidation poses to national security, the Commission must be vigilant in identifying and investigating potentially illegal mergers and anticompetitive conduct. It is also critically important that we work constructively with our partners at DOD to carry out our shared goal of promoting competition.

I was especially proud of the FTC's unanimous, bipartisan vote to challenge Lockheed's acquisition of Aerojet in 2022. This challenge was the culmination of a thorough investigation by FTC staff in collaboration with the Office of the Undersecretary of Defense for Acquisition and Sustainment. The agency's complaint alleged that, if the deal were allowed to proceed, Lockheed would use its control of Aerojet to harm rival defense contractors and further consolidate multiple markets critical to national security and defense. The case would have been the agency's first litigated defense merger challenge in decades, but the parties abandoned the transaction before it went to trial.

Frauds and Scams. According to the FTC's Consumer Sentinel report for 2022, Georgia had the highest per-capita rate of fraud reports in the nation.¹

Question: How would you prioritize and approach the issue of combatting frauds and scams?

Answer:

¹ https://www.ftc.gov/system/files/ftc_gov/pdf/CSN-Data-Book-2022.pdf at 20.

Addressing frauds and scams is the bread and butter of the FTC's enforcement work, as my former colleague Commissioner Phillips has said. This is a critical part of our enforcement agenda.

However, it is not lost on me that many fraudsters are, in fact, criminals, and they are unlikely to be effectively deterred by civil enforcement actions. That is why I have worked to ensure that our criminal referral program is as effective as possible and that we are working closely with federal and local authorities so that, when scammers belong in jail, they are sent there. In addition, I believe we need to continuously review and evaluate our fraud program to ensure that we are adapting our enforcement to scams as they evolve in the market and working hard to prevent them from succeeding in the first place. This includes both effective deterrence and community education efforts. Finally, I strongly support Congress's passing a fix to the Supreme Court decision in *AMG Capital*, a decision that made it substantially harder for us to return money to those who have had it wrongfully taken in frauds and scams.

Question: What steps you believe the FTC should take to combat frauds and scams as new technologies, including generative artificial intelligence, may enable bad actors to create more sophisticated scams while using fewer resources?

Answer:

I was proud to support the creation of the FTC's new Office of Technology, a central hub of technological prowess to bolster the ability of our case teams to tackle increasingly sophisticated bad actors. Generative AI poses serious risks in its potential ability to supercharge scams, and our first task is to understand those risks. One step we have taken that may prove useful in this effort is a proposed rule that would ban the impersonation of government, businesses, or their officers. Such impersonation scams are already a scourge on Americans, and I worry that generative AI could make them orders of magnitude worse. If the record supports its finalization, a rule against impersonation that allows us to seek both civil penalties against bad actors and redress for the consumers who are harmed could prove a potent if partial solution.

Consumer Data Sales. Last year, the FTC brought a lawsuit against a data broker alleging that the company acquired consumers' precise geolocation data and then marketed it in a form that allowed both current and prospective clients to track consumers' movements to and from sensitive locations like places of worship and health clinics.² The complaint charged that this conduct represents an unfair trade practice, in violation of the FTC Act. Part of the FTC's consumer protection authority is educating consumers and businesses about their rights and responsibilities, especially in relation to the security of their data.

Question: What steps can the FTC take within its statutory authority to protect and educate consumers about the sale of precise geolocation data?

² <https://www.ftc.gov/legal-library/browse/cases-proceedings/ftc-v-kochava-inc>.

Answer:

Through its 6(b) authority, the FTC can conduct industry studies and publish results to educate the public about the practices of data brokers, as it did with an important report in 2014. But nearly a decade later, the data broker business has only grown, as has the threat to the privacy and security of every American.

Consumer education is a critically important part of the FTC's work, and I share the view that most Americans would be horrified to know just how much personal data about them is collected and sold by data brokers.

Education is not likely to solve this problem, however, because the reality is that, in today's economy, Americans are forced to give up troves of data to participate in society, and they have little control about what happens to that data once they have relinquished it.

That is why we must bring appropriate enforcement action and consider rulemaking proceedings to address unfair or deceptive uses of data.

Question: What can Congress do to better inform consumers about the business-to-business sale of their data?

Answer:

I support efforts to bring not only transparency but also substantive guardrails to this industry. A national privacy law is a great place to start.

Question: What can the FTC do to minimize the consumer geolocation data that is available to businesses to be shared and sold?

Answer:

In addition to consumer education, the FTC must bring appropriate enforcement action and consider rulemaking proceedings to address unfair or deceptive uses of data.

Civil Rights and Privacy. In August 2021, a coalition of civil rights organizations sent a letter to the FTC urging the Commission to establish an Office of Civil Rights in light of the need for the FTC to protect "protect civil rights and privacy in data-driven commerce."³

Question: Do you believe the FTC should establish an Office of Civil Rights?

Answer:

I believe that the FTC has an obligation to ensure that all Americans get the equal protection of the laws we enforce. That necessarily involves transparency into which communities are

³ <https://www.lawyerscommittee.org/wp-content/uploads/2021/08/FTC-civil-rights-and-privacy-letter-Final-1.pdf>.

affected by the illegal practices we investigate. I am less focused on the structure of that work, but I believe the substance is very important.

Question: Do you believe existing authorities are sufficient for the FTC to address automated decision-making and their potential to reproduce patterns of discrimination?⁴ What additional authorities could assist the FTC in conducting or expanding its work in this space?

Answer:

I am committed to using the tools we have to address problems in the markets, including with new technologies, and also to respecting the limits of those tools. The application of automated decision-making and artificial intelligence tools has the potential to cause substantial injury to Americans in ways that reproduce patterns of discrimination. The FTC can address these practices only if they violate the FTC Act or other statutes we enforce, such as the Equal Credit Opportunity Act. Congress may determine that some of these market practices require specific prohibitions because they do not constitute violations of the FTC Act as it exists today. I welcome the opportunity to continue to discuss with members of the Committee whether particular patterns of behavior in the market are outside the scope of the laws we enforce and would require additional action from Congress.

Question: Do you believe that commercial adoption of robust data minimization standards can help protect consumers' civil rights and privacy? If so, what steps should Congress or the FTC take to encourage such adoption?

Answer:

Yes. I believe that data minimization is an important, longstanding principle that protects both security and privacy and that is more effective than the outdated notice-and-choice model. The FTC has been implementing data minimization provisions in its data security and privacy orders, consistent with our statutory mandate, and will continue to do so. I welcome any attention from Congress on this important and fundamental data security principle.

⁴ See, e.g., <https://www.ftc.gov/business-guidance/blog/2020/04/using-artificial-intelligence-and-algorithms>.