

U.S. Senate Committee on the Judiciary
Subcommittee on Competition Policy, Antitrust, and Consumer Rights

Hearing on September 20, 2022
Oversight of Federal Enforcement of the Antitrust Laws
Questions for the Record – Senator Marsha Blackburn

Chair Lina Khan

- 1. Do you believe it is appropriate to hire outside consultants to work at the FTC who are employed in the industry the FTC is purporting to regulate? Or at competitors of the companies against whom the FTC intends to take enforcement actions?**

Under 5 U.S.C. § 3109, federal agencies are permitted to retain consultants and experts. The work performed by the agency’s consultants and experts is consistent with all applicable statutes, regulations, and agency guidance. Like many other federal agencies, the FTC uses 5 U.S.C. § 3109 to bring on outside consultants or experts—paid, unpaid, or detailed from other agencies—to bridge gaps in areas where the agency lacks sufficient in-house expertise or to provide valuable and pertinent advice generally drawn from a high degree of broad administrative, professional, or technical knowledge or experience. For example, a significant number of the consultants the FTC has retained are technologists with expertise in artificial intelligence, computing, and related subject areas. This type of expertise enables the agency to better grasp new and emerging technologies and to better ensure that our work accounts for new market realities.

The FTC’s consultants and experts appointed under 5 U.S.C. § 3109 are federal government employees (or special government employees), so they are subject to federal ethics laws and obligations.¹ Accordingly, the FTC’s experts and consultants are prohibited from participating personally and substantially in particular matters that directly and predictably affect “their” financial interests, which for these purposes includes the financial interests of anyone they serve as an employee.² Each of the FTC’s consultants and experts is reviewed by the FTC’s Ethics Team before onboarding to screen for and address any federal ethics concerns. More specifically, each consultant or expert is required to complete a confidential disclosure report (OGE Form 450) and, based on the disclosures, the FTC Ethics Team provides tailored guidance about potential conflicts of interest and restrictions on outside activities/non-federal employment. Moreover, like other employees, each consultant or expert attends ethics orientation once they start at the FTC. Each consultant or expert also receives annual ethics training.

In addition, under Reorganization Plan No. 8 of 1950, 64 Stat. 1264, the right to set the agency’s general policies is reserved for the Commission as a body. Accordingly, the experts and consultants provide advice and opinions, but do not themselves determine the FTC’s enforcement policies or other general policies. Moreover, the FTC’s consultants and experts

¹ See 5 C.F.R. § 304.101.

² See 18 U.S.C. § 208.

report to managers within the FTC. All FTC managers are federal employees, as defined in 5 C.F.R. § 2641.104, and they provide oversight of the consultants' and experts' work.

- 2. Earlier this month, the European Commission blocked a merger of Illumina and GRAIL—two U.S. companies—in direct contravention of a ruling five days prior by the FTC's own Chief Administrative Law Judge. We now have a ruling from a foreign entity that could not only functionally negate the ALJ's ruling, but also circumvent the entire appeals process. How do you intend to ensure that neither Brussels nor any other foreign government has effective veto power in U.S. competition cases as they seem to be exercising in the case of Illumina and GRAIL?**

While I must limit comments on the specifics of any ongoing litigation, the European Commission's decision does not circumvent the Federal Trade Commission process. The ALJ's decision is not final agency action. Pursuant to Federal Trade Commission rules, the ALJ's decision has been appealed to the full Commission here in the United States, and the Commission will rule on the matter consistent with the law and evidence. The Commission's decision is then potentially subject to review by a federal court of appeals.

The FTC maintains strong cooperative relationships with the EC and other competition authorities globally, which enables us to reach consistent outcomes in the vast majority of matters under concurrent review. Each agency carries out its own investigation according to its own legal frameworks and in light of the specific markets at issue in the jurisdiction.

- 3. During the August recess, I had the opportunity to visit with an independent grocer in a small town in Tennessee. described to me the challenges he faces in the marketplace to source product competitively in the wholesale market, particularly as he faces inflation and supply chain disruptions. My understanding is you commissioned a 6(b)-study looking at the competitive impacts of pandemic supply chain disruptions, including discriminatory treatment against independent businesses. Have you made any conclusions from that report? What tools does the FTC have to look at issues such as these?**

The FTC has issued orders to nine companies requiring information and documents about the causes and competitive effects of supply chain disruptions in consumerpackaged goods and grocery products.³ FTC staff are analyzing the information and documents provided by the order recipients, but the Commission has not yet reached any conclusions in this inquiry.

The FTC has several tools available that are relevant to these issues. This includes the FTC's authority under 15 U.S.C. § 46(b) to compel companies⁴ to provide information regarding their organization, business practices, management, and business relationships. This authority allows the FTC to study important markets and market developments, and is the basis for the FTC's ongoing study of the impact of supply chain disruptions. Second, the FTC's enforcement

³ Press Release, Fed. Trade Comm'n, FTC Launches Inquiry Into Supply Chain Disruptions (Nov. 29, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/11/ftc-launches-inquiry-supply-chain-disruptions>.

⁴ The FTC Act excludes certain entities from the FTC's § 6(b) authority. 15 U.S.C. § 46(b). Most relevant here, the FTC's authority does not extend to common carrier activity by common carriers subject to certain Acts.

of the antitrust laws provides a basis to investigate any anticompetitive conduct that may have contributed to or stemmed from supply chain disruptions.⁵

- 4. The FTC issued 6(b) orders in December 2020 to nine social media and video streaming companies, requiring them to provide data on how they collect, use, share, and monetize personal information, including their use of algorithms and data analytics; their advertising and user engagement practices; and how their practices affect children and teens. What have you learned from that inquiry? When can we read the accompanying report? And how do you see that report informing your recent privacy rulemaking for which comments by interested parties are due next month?**

The FTC's authority under § 6(b) of the FTC Act is a valuable tool, and the Commission staff can gain valuable insight into industry practices by reviewing the material produced by companies that receive 6(b) orders. The Commission then typically makes that learning publicly available, often through a public report.⁶ Staff is working diligently to review and synthesize the companies' responses.

Commission staff expect to apply knowledge gained from a wide variety of sources to inform our privacy rulemaking. In particular, this includes the comments received in the rulemaking process as well as experience gained from the Commission's law enforcement activity and policy work, such as the 6(b) studies.

- 5. Last week, the FTC issued a policy statement to outline the FTC's enforcement priorities for the gig economy. I joined several other senators in sending you a letter on this issue a few months ago, due to my concerns about how the FTC failed to capture the benefits of the gig economy and the steps these industries have taken to self-police.**

- a. Is it the FTC's jurisdiction to ensure "fair, honest, and competitive labor markets," as cited in the policy statement?**

Yes. Policing unfair, deceptive, and anticompetitive practices that affect workers is within the FTC's jurisdiction.⁷ Just as we seek to ensure that companies do not engage in unfair, deceptive, and anticompetitive practices with customers, when warranted, we will seek to ensure that employers do the same when it comes to their workers.

⁵ The FTC Act excludes certain entities from the FTC's enforcement authority. 15 U.S.C. § 45(a)(2). Most relevant here, the FTC's authority does not extend to common carrier activity by common carriers or air carriers subject to certain Acts, or corporations subject to the Packers & Stockyards Act. *Id.* In addition, as you know, the FTC shares responsibility with the Department of Justice for enforcing the antitrust laws. To avoid duplication and maximize the effectiveness of concurrent federal antitrust jurisdiction, the Commission and the DOJ have long maintained a liaison arrangement through which we divide responsibility for antitrust review based on industry expertise and other factors.

⁶ See, e.g., FED. TRADE COMM'N, WHAT ISPS KNOW ABOUT YOU: EXAMINING THE PRIVACY PRACTICES OF SIX MAJOR INTERNET SERVICE PROVIDERS (Oct. 21, 2021), https://www.ftc.gov/system/files/documents/reports/look-what-isps-know-about-you-examining-privacy-practices-six-major-internet-service-providers/p195402_isp_6b_staff_report.pdf.

⁷ See 15 U.S.C. § 45(a) (authorizing the FTC to "prevent unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce").

b. Is the right to organize, overtime pay, and health and safety protections within the FTC's statutory mandate?

Congress charged the FTC with enforcing an array of consumer protection and competition statutes. In enforcing those statutes, the FTC evaluates each case on its facts. To the extent practices related to the right to organize, overtime pay, or health and safety protections are unfair or deceptive, are unfair methods of competition, or otherwise implicate the authorities the FTC is responsible for enforcing, they may fall within the FTC's statutory mandate.

c. Is the FTC appropriately resourced to work on these extra-jurisdictional issues?

The FTC would welcome resources from Congress to aid it in protecting consumers and promoting fair competition, but the FTC does not anticipate working on extra-jurisdictional issues.

d. I understand that bodies such as the Direct Selling Self-Regulatory Council have referred many cases to the FTC for enforcement. Has the FTC acted on these referrals?

The FTC routinely receives referrals from self-regulatory bodies such as the Direct Selling Self-Regulatory Council (DSSRC), the National Advertising Division (NAD), and the Children's Advertising Review Unit (CARU). Bureau of Consumer Protection staff reviews each referral carefully and exercises its enforcement discretion to determine, on a case-by-case basis, what actions may be warranted.

6. Since the passage of the Biologics Price Competition and Innovation Act, biosimilars have offered patients new treatment options for chronic and serious diseases. The number of available biosimilars is poised to grow, especially as 2023 presents itself as a big leap forward for biosimilars in the Medicare Part D space. However, biosimilars are only effective at increasing competition and lowering drug costs if patients have access to them. One concern I have is a lack of access to formularies to make that option a reality.

- a. With the launch of the FTC investigation into PBM practices earlier this year, will you commit to reviewing how some formulary policies can impact patient access?**
- b. As you progress through this investigation, will you be reviewing different aspects impacting the spread of misinformation or the use of contracting policies that will impact formulary access?**

On June 7, 2022, the Commission authorized staff to issue Compulsory Orders for data and documents to the six largest Pharmacy Benefit Managers (PBMs): CVS Caremark; Express Scripts, Inc.; OptumRx, Inc.; Humana Pharmacy Services, Inc.; Prime Therapeutics LLC; and MedImpact Healthcare Systems, Inc. These PBMs negotiate prices, access, rebates and fees with drug manufacturers, create drug formularies and surrounding policies, and create pharmacy networks and reimburse pharmacies for patients' prescriptions. The largest pharmacy benefits

managers are now vertically integrated with the largest health plans as well as with GPOs (or group purchasing organizations), clinics, and retail pharmacies. Many of these contractual relationships are non-public.

This study is aimed at shedding light on several practices that have drawn scrutiny in recent years including:

- fees and clawbacks charged to unaffiliated pharmacies,
- methods to steer patients towards pharmacy benefit manager-owned pharmacies,
- potentially unfair audits of independent pharmacies,
- complicated and opaque methods to determine pharmacy reimbursement,
- the prevalence of prior authorizations and other administrative restrictions, the use of specialty drug lists and surrounding specialty drug policies,
- the impact of rebates and fees from drug manufacturers on formulary design, and
- the costs of prescription drugs to payers and patients.

To summarize, we are collecting data and documents from these entities which should allow us to study how contracting practices and formulary policies can impact patient access to medications.

In 2020, the FTC and FDA issued a Joint Statement Regarding a Collaboration to Advance Competition in the Biologic Marketplace, which noted that both agencies have “serious concerns about false or misleading statements and their negative impacts on public health and competition.”⁸

7. Stakeholders have raised the issue of alternative funding vendors or specialty carve-out programs in which PBMs are excluding coverage of certain specialty drugs and directing patients to manufacturer assistance programs. The alternative funding vendor, PBM/plan then share in the cost savings from denying coverage of the drug. These practices delay insured patient’s access to lifesaving therapies and deplete resources needed for underinsured or uninsured patients.

a. Is the FTC generally aware of these practices?

Yes, the FTC is aware of recent reports regarding the increasing use of “specialty carve out” programs that allow commercially insured patients to access drug manufacturers’ patient assistance programs that have traditionally only been available to uninsured patients. Please also see answer to Blackburn #6.

⁸ Joint Statement of the Food & Drug Administration and Federal Trade Commission Regarding a Collaboration to Advance Competition in the Biologic Marketplace (Feb. 3, 2020), https://www.ftc.gov/system/files/documents/public_statements/1565273/v190003fdafcbiologicsstatement.pdf.

b. Is the FTC collecting information related to alternative funding vendors or specialty care-out programs in its ongoing investigation into the impact of PBMs on access and affordability of medicine?

Yes, the FTC's 6(b) study is collecting various information regarding various specialty policies and trends and intends to address the many ways the specialty drug reimbursement system has changed in recent years. Please also see answer to Blackburn #6.

Senator Richard Blumenthal
Written Questions for Lina Khan
Chair of the Federal Trade Commission
September 27, 2022

Antitrust and Labor –

Big Tech firms, especially Amazon, have significant power over both the seller and buyer sides of the market – monopsony power. That monopsony power has a significant impact on labor markets. This is especially concerning given that Big Tech has fought unionization efforts and used their vertical integration to undermine unionized competitors.

- You both referenced in remarks the DOJ and FTC’s forthcoming merger guidelines and other efforts to bolster our antitrust enforcement through guidelines and enforcement. How do you expect that labor markets will factor in, and be a priority, in these guidelines and enforcement actions?**

As part of our joint initiative to revise the agencies’ merger guidelines, the FTC and DOJ solicited comments on whether our current enforcement approach is fully accounting for relevant harms to workers and labor market competition. We are in the process of drafting proposed guidelines based on those comments as well as input from our listening sessions and from our expert staff. Any new guidance will reflect the analysis staff employs when examining labor markets during a merger review.

More broadly, I am committed to using all of the FTC’s available tools to ensure that workers are protected from harmful mergers, and soon after becoming Chair, I instructed staff to investigate any merger that potentially harms workers. This is important in light of a growing body of empirical research showing the potential for competitive harm to labor markets from consolidation and concentration.⁹ In the FTC’s recent challenge to Meta’s proposed acquisition of Within Unlimited, the Commission alleged that, among other harms, the merger would reduce incentives to “attract and keep employees.”¹⁰ The FTC continues to prioritize and investigate allegations that employer conduct is harming workers. For instance, prior to my arrival, the FTC

⁹ See José Azar, Ioana Marinescu, Marshall Steinbaum & Bledi Taska, *Concentration in US Labor Markets: Evidence from Online Vacancy Data*, 66 LAB. ECON. 101886 (2020); Ioana Marinescu & Herbert J. Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 IND. L. J. 1031 (2019); Yue Qiu & Aaron J. Sojourner, *Labor-Market Concentration and Labor Compensation* (2019), <https://ssrn.com/abstract=3312197>; COUNCIL OF ECON. ADVISORS, LABOR MARKET MONOPSONY: TRENDS, CONSEQUENCES, AND POLICY RESPONSES (Oct. 25 2016), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20161025_monopsony_labor_mrkt_cea.pdf.

¹⁰ Compl., *FTC v. Meta Platforms, Inc.*, 3:22-cv-04325 (N.D. Cal. July 27, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/221%200040%20Meta%20Within%20TRO%20Complaint.pdf. Additionally, Commissioner Slaughter and I issued a statement in connection with the Commission’s successful challenge to a proposed hospital merger in Rhode Island where we explained that we would have supported including allegations of competitive harm to the labor market as a harmful effect of the merger. Concurring Statement of Commissioner Rebecca Kelly Slaughter and Chair Lina M. Khan Regarding FTC and State of Rhode Island v. Lifespan Corporation and Care New England Health System (Feb. 17, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/public_statement_of_commr_slaughter_chair_khan_re_lifespan-cne_redacted.pdf.

charged Amazon with misleading its Flex drivers by diverting their tips and cheating workers out of income. Amazon agreed to return over \$61 million in tips that were withheld from its drivers.¹¹ In September, the Commission issued a policy statement announcing new enforcement priorities to protect workers participating in the gig economy. Areas of interest include deception about pay and hours, unfair contract terms, and anticompetitive wage fixing and coordination between gig economy companies.¹²

The FTC also has a number of policy projects aimed at strengthening our efforts to protect workers. In July, we announced a new partnership with the National Labor Relations Board that will enhance coordination between our agencies. Key issues of collaboration will include labor market concentration, one-sided contract terms, and labor developments in the “gig economy.”¹³ This reflects a whole-of-government approach to tackling the most pressing problems workers face in today’s economy. The Commission is also considering whether to use its rulemaking authority to address concerns about the effects of non-compete restrictions on workers’ post-employment opportunities.

Worker Privacy and FTC Rulemaking –

I have previously raised concerns about Amazon and other companies’ collection of data from workers, such as the installation of cameras and tracking apps in delivery vans. While community and automobile safety are of the utmost importance, they do not need to come at the expense of workers and the public’s safety, privacy, and wellbeing. I am especially concerned that this data could be used to interfere with efforts to organize unions and to protect workers’ safety.

- Is the issue of the misuse of worker data something the FTC is looking into as part of its ongoing rulemaking efforts on commercial surveillance?**

¹¹ Press Release, Fed. Trade Comm’n, Amazon To Pay \$61.7 Million to Settle FTC Charges It Withheld Some Customer Tips from Amazon Flex Drivers (Feb. 2, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/02/amazon-pay-617-million-settle-ftc-charges-it-withheld-some-customer-tips-amazon-flex-drivers>.

¹² Press Release, Fed. Trade Comm’n, FTC to Crack Down on Companies Taking Advantage of Gig Workers (Sept. 15, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/09/ftc-crack-down-companies-taking-advantage-gig-workers>. The FTC has a longstanding interest regarding work terms, including deception regarding pay and fixing work terms. See Press Release, Fed. Trade Comm’n, Uber Agrees to Pay \$20 Million to Settle FTC Charges That It Recruited Prospective Drivers with Exaggerated Earnings Claims (Jan. 19, 2017), <https://www.ftc.gov/news-events/news/press-releases/2017/01/uber-agrees-pay-20-million-settle-ftc-charges-it-recruited-prospective-drivers-exaggerated-earnings>; Press Release, Fed. Trade Comm’n, FTC to Send Refund Checks to Uber Drivers as Part of FTC Settlement (July 16, 2018), <https://www.ftc.gov/news-events/news/press-releases/2018/07/ftc-send-refund-checks-uber-drivers-part-ftc-settlement>; Press Release, Fed. Trade Comm’n, FYI: FTC Approves Consent Agreement with The Council of Fashion Designers of America and 7th on Sixth, Inc. (Oct. 20, 1995), <https://www.ftc.gov/news-events/news/press-releases/1995/10/fyi-ftc-approves-consent-agreement-council-fashion-designers-america-7th-sixth-inc>.

¹³ Press Release, Fed. Trade Comm’n, Federal Trade Commission and National Labor Relations Board Forge New Partnership to Protect Workers from Anticompetitive, Unfair, and Deceptive Practices (July 19, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/07/federal-trade-commission-national-labor-relations-board-forge-new-partnership-protect-workers>.

Yes. The Commission’s Advance Notice of Proposed Rulemaking (ANPR) seeks public comment on all aspects of commercial surveillance involving consumers, and notes that “the term ‘consumer’ as used in this ANPR includes businesses and workers, not just individuals who buy or exchange data for retail goods and services.”¹⁴

The comment period remains open, and it is too soon to say how the rulemaking proceeding might or might not address misuse of worker data, but I agree that it is an important issue, and I look forward to reviewing any public comments on the issue.

Browser Competition –

Last week, Mozilla published a report outlining how dominant tech firms that offer operating systems (Apple, Google, Microsoft) can use that control to preference their own web browsers and browser engines (the core software responsible for rendering web pages). As the report notes, tech firms have often made it essentially impossible to provide an alternative browser, as with Apple’s restrictions on iOS, or frustrated competitors through self-preferencing.

Web browsers and the standards adopted by web browsers are the heart of the open internet, and vital to the economic and culture benefits the internet has brought. Consumers benefit from competition between web browsers, especially when that competition prevents dominant firms from using their control of browsers to set the rules for the internet (for example, by weakening standards to disadvantage efforts to protect privacy). Attempts to undermine competitive web browsers were also at the heart of the Microsoft antitrust case, where Microsoft sought to use its control over Windows to undermine Internet Explorer’s chief rival, Netscape.

- Do you share these concerns that control over operating systems, web browsers, browser engines, and web standards could be used by dominant firms to disadvantage rival web browsers and rival web platforms? What types of conduct in the web browser market could be indicators of the abuse of dominance and what type of remedies may be appropriate for such abuse?**

I share concerns that control over operating systems, web browsers, browser engines, and web standards could be used by dominant firms to disadvantage rival web browsers and rival web platforms (among other harms). Across markets, dominant digital platforms have captured control over key arteries of communications.

Firms that achieve a gatekeeper position can exercise their dominance in a number of ways. This includes exploiting their leverage over dependent users by increasing the price of access, such as by hiking fees, demanding valuable data, or imposing oppressive contractual terms. Gatekeepers can also engage in a set of defensive tactics to protect their dominance,

¹⁴ Advance Notice of Proposed Rulemaking: Trade Regulation Rule on Commercial Surveillance and Data Security, 87 Fed. Reg. 51273, 51277 (Aug. 22, 2022); *id.* at 51281 (seeking public comment on how “lax data security measures and harmful commercial surveillance injure different kinds of consumers (e.g., young people, workers, franchisees, small businesses, women, victims of stalking or domestic violence, racial minorities, the elderly) in different sectors (e.g., health, finance, employment) or in different segments or ‘stacks’ of the internet economy”).

including by acquiring actual or potential rivals or by taking steps to undermine a rival's business. Gatekeepers may also use their position to benefit their own business, including through self-preferencing, tying, or a range of other tactics.

Promoting competition in digital markets requires that the agency vigorously enforce the competition laws and, when illegal conduct is identified, design remedies that directly account for the business strategies and incentives present in these markets. By accounting for those tactics, the FTC can focus on promoting both contestability and fair access. This is crucial because innovation in high-tech markets often derives from upstarts whose services may rely on the very platforms they threaten to displace. I also recognize that remedies may do little to restore competition to what it would have been absent the anticompetitive conduct if the dominant firms are likely to continue to benefit from the fruits of their illegal conduct. To address this, I have directed staff to look at ways to design remedies that would restore competition and pave the way for entry.

SENATOR TED CRUZ

U.S. Senate Committee on the Judiciary

Questions for the Record for Lina Khan, Chair, Federal Trade Commission

1. In August, the FTC’s Inspector General highlighted the growing use of consultants and unpaid experts at the FTC. Senator Lee, myself, and other Senators sent an August 18, 2022 letter to you expressing concern over the FTC’s use of unpaid consultants. The very existence of “unpaid consultants” is concerning. The FTC does not pay these employees but retains employment by non-government entities. Because their income depends on outside interest groups, they cannot be objective in their work for the government, which is why it is ordinarily forbidden.

a. How were these individuals selected?

Under 5 U.S.C. § 3109, federal agencies are permitted to retain consultants and experts, including in an unpaid capacity. The work performed by the agency’s consultants and experts is consistent with all applicable statutes, regulations, and agency guidance. Like many other federal agencies, the FTC uses 5 U.S.C. § 3109 to bring on outside consultants or experts—paid, unpaid, or detailed from other agencies—to bridge gaps in areas where the agency lacks sufficient in-house expertise or to provide valuable and pertinent advice generally drawn from a high degree of broad administrative, professional, or technical knowledge or experience. For example, a significant number of the consultants the FTC has retained are technologists with expertise in artificial intelligence, computing, and related subject areas. This type of expertise enables the agency to better grasp new and emerging technologies and to better ensure that our work accounts for new market realities.

FTC staff identified critical areas where the agency lacked sufficient in-house expertise and then reached out to people with known expertise in these areas. The FTC followed the criteria laid out in 5 C.F.R. § 304.102 to recruit consultants and experts – *i.e.*, the FTC contacted individuals based on their publicly known knowledge, experience, education, competence, or skill in a particular area.

b. What are these individuals’ current job responsibilities at FTC?

For a description of each individual’s job duties at the FTC, please see the “Summary of Duties” section in each individual’s Form 189 (“Justification and Approval of Employment of Expert/Consultant”), as amended, attached to my response to your August 18, 2022 letter.

c. Does the FTC currently employ unpaid consultants who rely on outside groups that engage in political activism for their income?

I am not aware of the partisan political activities, if any, of the organizations that currently employ the FTC’s unpaid consultants and experts.

d. Please provide a list of each company or organization that employs or has employed unpaid consultants working at the FTC since January 2021.

In my response to your August 18, 2022 letter, I provided information about ten unpaid consultants or experts the FTC retained pursuant to 5 U.S.C. § 3109 between January 2021 and August 2022. For a list of companies and organizations that employ or have employed these individuals, or that have affiliations with these individuals, please see the individuals' resumes or CVs attached to that letter. In addition, the FTC has retained additional unpaid consultants or experts since that time. I will send their CVs separately.

e. Do any of these unpaid outside consultants work at companies subject to the FTC's jurisdiction? If so, please explain how Congress and the American people can have faith that the advice they provide to the FTC is objective.

As indicated in the resumes or CVs attached to my response to your August 18, 2022 letter and the additional CVs I have provided separately, most of the entities that currently employ the FTC's unpaid consultants and experts retained pursuant to 5 U.S.C. § 3109 are educational institutions or other non-profit organizations. The FTC's jurisdiction over non-profits is limited.

The FTC's consultants and experts appointed under 5 U.S.C. § 3109 are federal government employees (or special government employees) so they are subject to ethics laws and obligations.¹⁵ Accordingly, the FTC's experts and consultants are prohibited from participating personally and substantially in particular matters that directly and predictably affect "their" financial interests, which for these purposes includes the financial interests of anyone they serve as an employee.¹⁶ Each of the FTC's consultants and experts is reviewed by the FTC's Ethics Team before onboarding to screen for and address any federal ethics concerns. More specifically, each consultant or expert is required to complete a confidential disclosure report (OGE Form 450). Based on those disclosures, the FTC Ethics Team then provides each individual with tailored guidance about potential conflicts of interest and restrictions on outside activities/non-federal employment. Moreover, like other employees, each consultant or expert attends ethics orientation once they start at the FTC. Each unpaid consultant or expert also receives annual ethics training.

In addition, under Reorganization Plan No. 8 of 1950, 64 Stat. 1264, the right to set the agency's general policies is reserved for the Commission as a body. Accordingly, the consultants and experts provide advice and opinions, but do not themselves determine the FTC's enforcement policies or other general policies. Moreover, the FTC's consultants and experts report to managers within the FTC. All FTC managers are federal employees, as defined in 5 C.F.R. § 2641.104, and they provide oversight of the consultants' and experts' work.

f. The use of unpaid consultants under your leadership would appear to set a precedent that future administrations might utilize. If the FTC took the same approach in hiring unpaid consultants from, for example, the oil industry, the coal industry, or defense contractors, do you think that would be appropriate? If not, please explain with as much detail as possible what differentiates that scenario from the current practice.

¹⁵ See 5 C.F.R. § 304.101.

¹⁶ See 18 U.S.C. § 208.

The same ethics laws and requirements apply to the scenario you pose above as the consultants and experts retained under 5 U.S.C. § 3109 would be subject to federal ethics laws, and each expert or consultant would be reviewed by the FTC's Ethics Team before onboarding to screen for and address any federal ethics concerns. More specifically, each consultant or expert would be required to complete a confidential disclosure report (OGE Form 450) and, based on the disclosures, the FTC Ethics Team would provide tailored guidance about potential conflicts of interest and restrictions on outside activities/non-federal employment.

2. On July 19, 2022, you spoke at an event hosted by radical leftist organizations Economic Security Project and the Law and Political Economy Project (LPE). At the event, you discussed how you “so respect and [have] learned so much from” those two organizations. Additionally, the Law and Political Economy Project held an academic symposium on “socialist constitutionalism,” featuring contributions from several academics defending socialist models of government and economy. LPE curiously displayed the Democratic Socialists of America’s rose logo at the head of each symposium article.¹⁷ Among other topics discussed during the event where you spoke were “anti-racist antitrust” and how the FTC can be used to “shape markets and economic outcomes.” You also called fellow FTC Commissioner Rebecca Slaughter your partner during those remarks. Commissioner Slaughter has been outspoken about her belief that antitrust laws can play a role in racial equity, tweeting that “[a]ntitrust can and should be anti-racist,”¹⁸ “race blindness ending racism is a myth,” and “[w]e need to think of using antitrust law and competition policy tool for combatting structural racism.”

- a. Please describe your understanding of the concept of “anti-racist antitrust.”**
- b. Is this a concept you personally adhere to?**
- c. Does anti-racist antitrust have any place in the discharge of the duties of the FTC?**
- d. If not, why are your fellow “partner” commissioners promoting this concept?**
- e. Do you believe that businesses should take racial, diversity, equity, or inclusion considerations into account when evaluating a merger or acquisition?**
- f. Is the FTC using any factors related to racial, diversity, equity, or inclusion when making enforcement decisions?**
- g. Has the FTC under your leadership ever asked merging parties about their**

¹⁷ *Symposia: Socialist Constitutionalism*, LAW & POL. ECON. PROJECT, <https://lpeproject.org/symposia/socialist-constitutionalism/>.

¹⁸ @RKSlaughterFTC, TWITTER (Sept. 9, 2020, 2:28 PM), <https://twitter.com/rkslaughterftc/status/1303762111433265153>.

company's environmental, social, and governance (ESG) policies? If so, please enclose the specific inquiry in its entirety.

As far as I am aware, the FTC has not asked parties about their ESG policies. Parties may themselves proactively raise their ESG policies and/or suggest that these policies can cure an otherwise illegal merger. I believe it is paramount in these instances to remind them that there is no ESG exemption to the antitrust laws.

h. Is antitrust a tool for imposing diversity, equity, and inclusion (DEI) or ESG requirements on companies?

As noted above, companies sometimes claim that their ESG or DEI commitments can cure otherwise unlawful conduct. I believe it is paramount in these instances to remind them that there is no ESG or DEI exemption to the antitrust laws.

3. In 2017, you penned an article in which you wrote that “orienting antitrust around “consumer welfare” has deeply enfeebled the regime, replacing concerns about how power is distributed across our political economy with a series of calculations to gather whether prices have gone up.”¹⁹

a. Is it the FTC's role to be concerned with how power is distributed across our political economy?

The FTC's mandate is to enforce the antitrust laws for the benefit of all Americans and to protect market participants from anticompetitive conduct or mergers. This requires a rigorous lens that considers not only the price effects from mergers and illegal conduct but also a range of nonprice harms, including chilling innovation and lower quality products or services, that can result from monopolistic, exclusionary, or otherwise unlawful behavior.

4. In a 2018 law review article, “*The Ideological Roots of America's Market Power Problem*,”²⁰ you wrote that “as a few technology platform companies mediate a rapidly growing share of our commerce and communications, the problem will only worsen. Since these gatekeeper firms have captured control over key distribution networks, they can squeeze the businesses reliant on their channels.”

a. What kind of powers can platform monopolists wield?

b. In your opinion, would a social media monopoly be capable of censoring disfavored voices?

c. To your knowledge, do any platform monopolists currently censor disfavored voices?

¹⁹ Lina Khan, *Will Trump's DOJ Crack Down on Massive Vertical Mergers?*, LAW AND POLITICAL ECONOMY PROJECT (Dec. 4, 2017), <https://lpeproject.org/blog/trumps-doj-crack-down-vertical-mergers/>.

²⁰ Lina Khan, *The Ideological Roots of America's Market Power Problem*, 127 YALE L. J. F. 960 (2018).

d. Can the FTC do anything to combat censorship by social media monopolists? Does the Commission plan to take a more active role in fighting censorship by these platform monopolists? Please explain.

The FTC is concerned about concentrated power in digital markets, and I believe that vigorous enforcement in these markets is critical. Firms that achieve a gatekeeper position in digital markets can exercise their dominance in a number of ways. This includes exploiting their leverage over dependent users by increasing the price of access, such as by hiking fees, demanding valuable data, or imposing oppressive contractual terms. Gatekeepers can also engage in a set of defensive tactics to protect their dominance, including by acquiring actual or potential rivals or by taking steps to undermine a rival's business. Gatekeepers may also use their position to benefit their own business, including through self-preferencing, tying, or a range of other tactics.

Given the increasingly central role that dominant digital platforms play in our economy, the Commission is closely scrutinizing their practices. We are also making greater use of technologists and computer scientists in order to increase our understanding of current and future technology markets. Given that technological transitions can be a critical moment for engendering greater competition, it is imperative that we remain vigilant to ensure incumbents are not engaging in illegal tactics to maintain their dominance as the market transitions to next-generation technologies.

Specific to your queries, online content moderation presents complex issues. Online content spans both noncommercial and commercial speech, but the FTC's jurisdiction is restricted to commercial activity and speech.

The Commission has been active, however, in tackling deceptive or unfair commercial content and practices online. For example, we have highlighted concerns about how fraudsters use social media platforms to pitch investment scams or fraudulent Covid-19 cures. In addition, the Commission recognizes that digital platforms collect, use and derive vast amounts of personal information about consumers—sometimes using dark patterns—and use this information, in part, to build sophisticated algorithms that play a significant role in determining what content is ultimately shown to consumers. As we detailed in our recent report, *Bringing Dark Patterns to Light*, some companies have used dark patterns to trick consumers into giving away their personal information, which is increasingly fed into sophisticated algorithms that play a key role in how we all obtain information.²¹ The FTC is committed to bringing these practices to light and to combatting any unlawful conduct associated with them.

We are currently conducting an industry study into social media and video streaming platforms through our 6(b) authority to learn more about how these companies use consumer data, including for building algorithms that help determine what ads and content are shown to consumers.²² Additionally, the Commission recently issued an Advance Notice of Proposed

²¹ Press Release, Fed. Trade Comm'n, FTC Report Shows Rise in Sophisticated Dark Patterns Designed to Trick and Trap Consumers, (Sept. 15, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/09/ftc-report-shows-rise-sophisticated-dark-patterns-designed-trick-trap-consumers>.

²² Press Release, Fed. Trade Comm'n, FTC Issues Orders to Nine Social Media and Video Streaming Services Seeking Data About How They Collect, Use and Present Information, (Dec. 14, 2020), <https://www.ftc.gov/news->

Rulemaking (ANPR) to request public input on a wide range of issues presented by commercial surveillance practices.²³ The ANPR specifically invited comment on whether the FTC “should implement new trade regulation rules or other regulatory alternatives concerning the ways in which companies collect, aggregate, protect, use, analyze, and retain consumer data, as well as transfer, share, sell, or otherwise monetize that data in ways that are unfair or deceptive.” The ANPR also specifically asked for comment on the extent to which new rules could “chill the distribution of lawful content.”

5. Before departing for his new role at the Consumer Financial Protection Bureau, Democratic Commissioner Rohit Chopra cast as many as twenty votes on his last day at the FTC. According to the FTC’s interpretation of its rules, these votes remained active *after* his departure. In other words, this interpretation allowed Chopra to depart the FTC, without depriving FTC Democrats a functional majority by counting his votes at the same time he was already serving in a new role in a different government agency. This practice was explicitly rebuked in the Senate Commerce Committee, which confirmed you. In a markup on providing the FTC with 13(b) authority, the committee incorporated by voice vote a bill to prohibit the practice.

- a. Beyond the 1984 policy guidance which you and the FTC have cited in response to questions about former Commissioner Chopra’s zombie votes, what other formal guidance—including memos, circulars, handbooks, etc.—exists regarding the use of zombie votes?**
- b. Given that the ongoing litigation exemption does not apply to Congress and that this body is charged with the oversight of the Commission, please enclose an unredacted copy of all responsive documents.**

The Commission’s voting practices have strictly followed longstanding FTC policies and guidance. Regarding guidance on votes of departing Commissioners, the 1984 policy guidance is the only formal guidance that I’m aware of, and it continues to be the primary guiding document for the Commission’s approach to these situations.²⁴ There are other agency documents that were written twenty-five years ago or more and are therefore no longer protected by deliberative process privilege that touch on this issue. I will provide these documents to you separately.

6. Between October 12, 2021, when Mr. Chopra was sworn in as the head of the CFPB, and May 16, 2022, when Mr. Bedoya was sworn in as the fifth FTC Commissioner, how many of former Commissioner Chopra’s zombie votes did you use?

- a. How many zombie votes did Commissioner Chopra cast prior to leaving**

[events/news/press-releases/2020/12/ftc-issues-orders-nine-social-media-video-streaming-services-seeking-data-about-how-they-collect-use](https://www.ftc.gov/news-events/news/press-releases/2020/12/ftc-issues-orders-nine-social-media-video-streaming-services-seeking-data-about-how-they-collect-use).

²³ Press Release, Fed. Trade Comm’n, FTC Explores Rules Cracking Down on Commercial Surveillance and Lax Data Security Practices, (Aug. 11, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/08/ftc-explores-rules-cracking-down-commercial-surveillance-lax-data-security-practices>.

²⁴ *Procedures at Commission Level - In re: Policy With Respect to Counting Votes of Departing (and Arriving) Commissioners* (March 27, 1984), https://www.ftc.gov/system/files/documents/foia_requests/policy-with-respect-to-counting-votes-of-departing-arriving-commissioners.pdf.

the FTC?

b. Of those, how many failed votes did you use Commissioner Chopra's zombie vote for?

At the time of Commissioner Chopra's departure from the Commission on October 12, 2021, 18 motions were pending on which Commissioner Chopra voted.

The seven matters of public record²⁵ Commissioner Chopra voted on before departing the agency, and for which the voting period closed after he left the agency, are as follows:

1. Motion to Accept, Subject to Final Approval, a Consent Agreement for Public Comment and Issue an Order to Maintain Assets in DaVita/University of Utah Health (5-0 vote).²⁶
2. Motion to Issue the Attached Commission Statement Regarding Prior Approvals Entitled "Commission Statement on Use of Prior Approval Provisions in Merger Orders" (3-2 vote).²⁷
3. Motion to Approve the Fiscal Year 2020 Hart-Scott-Rodino Annual Report for Transmittal to Congress (5-0 vote).²⁸
4. Motion to Approve the Annual Performance Report for Fiscal Year 2021 (3-2 vote).²⁹
5. Motion to Approve a Consent in Settlement of the Court Action as to Defendant Arlene Mahon in FTC v. On Point Global, LLC (5-0 vote).
6. Motion to Refer a Complaint to the Department of Justice and Approve a Consent in Settlement of the Court Action in Biglari Holdings (5-0 vote).³⁰

²⁵ Commissioner Chopra also cast some votes on motions that failed. Motions that fail are not a matter of public record.

²⁶ Press Release, Fed. Trade Comm'n, FTC Imposes Strict Limits on DaVita, Inc.'s Future Mergers Following Proposed Acquisition of Utah Dialysis Clinics (Oct. 25, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-imposes-strict-limits-davita-incs-future-mergers-following-proposed-acquisition-utah-dialysis>.

²⁷ Press Release, Fed. Trade Comm'n, FTC to Restrict Future Acquisitions for Firms that Pursue Anticompetitive Mergers (Oct. 25, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-restrict-future-acquisitions-firms-pursue-anticompetitive-mergers>.

²⁸ Press Release, Fed. Trade Comm'n, FTC Approves Fiscal Year 2020 Hart-Scott-Rodino Premerger Notification Report (Nov. 8, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/11/ftc-approves-fiscal-year-2020-hart-scott-rodino-premerger-notification-report>.

²⁹ Press Release, Fed. Trade Comm'n, FTC Issues Agency Financial Report for Fiscal Year 2021 (Nov. 15, 2021), <https://www.ftc.gov/news-events/press-releases/2021/11/ftc-issues-agency-financial-report-fiscal-year-2021>.

³⁰ Press Release, Fed. Trade Comm'n, FTC Fines Biglari Holdings Inc. for Repeatedly Violating Antitrust Laws (Dec. 22, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/12/ftc-fines-biglari-holdings-inc-repeatedly-violating-antitrust-laws>.

7. Motion to Authorize Staff to Refer a Complaint for Civil Penalties to the Department of Justice in WW International (5-0 vote).³¹

7. In your December letter responding to Senator Lee’s letter, you listed five items for which you used former Commissioner Chopra’s zombie vote and said two others, which were unanimous votes, would be made public soon. In that letter you also noted that “motions that fail are not a matter of public record” and so you would not be publicizing the failed votes where you used former Commissioner Chopra’s zombie vote.

a. Given that Congress is not the public, please enclose a comprehensive list of these votes.

Consistent with statutory authority and relevant legal precedent, the FTC will not provide nonpublic information to a congressional committee absent (1) a subpoena; or (2) a formal, official committee request, signed by the committee chair in their capacity as chair.³²

8. On January 18, 2022, you issued a joint announcement requesting more information on the merger guidelines. You said, “Just as we must revise our theories and models to fit new facts and evidence, we must ensure our merger guidelines accurately reflect the realities of the modern economy. Matching our analysis to contemporary business strategy requires that our tools be dynamic and holistic rather than static and atomistic.”

a. Please provide a comprehensive list of the specific tools you deem to be “dynamic and holistic.”

b. Please explain how a holistic approach to antitrust can be consistent with the rule of law and its fair and neutral application?

c. Is the FTC considering any DEI, ESG, or other political inputs in drafting new merger guidelines?

Our goal in pursuing the current revision of the merger guidelines is to ensure that our guidelines accurately reflect modern commercial realities, are faithful to our statutory mandate, and are administrable and predictable. Merger analysis is highly fact-intensive, and the analytical tools the agencies employ must reflect not only the most recent learning but also the commercial realities faced by the firms in the market under review. In response to changes in business models and tactics, it is essential that we update our techniques for determining whether a merger may create or enhance market power or otherwise may result in a substantial lessening of competition in violation of Section 7. This is consistent with the Supreme Court’s guidance that Congress prescribed a pragmatic, factual approach to merger analysis, not a formal, legalistic

³¹ Press Release, Fed. Trade Comm’n, FTC Takes Action Against Company Formerly Known as Weight Watchers for Illegally Collecting Kids’ Sensitive Health Data (Mar. 4, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/03/ftc-takes-action-against-company-formerly-known-weight-watchers-illegally-collecting-kids-sensitive>.

³² See, e.g., 16 C.F.R. § 4.11(b); *Ashland Oil v. FTC*, 548 F.2d 977 (D.C. Cir. 1976); *Exxon Corp. v. FTC*, 589 F.2d 582 (D.C. Cir. 1978); *FTC v. Owens-Corning Fiberglas Corp.*, 626 F.2d 966 (D.C. Cir. 1980).

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In particular, we intend that the revised merger guidelines will better account for key aspects of the modern economy, including those that often arise in digital markets, such as zero-price products, multi-sided markets, gatekeeper platforms, and data aggregation. Additionally, monopsony issues, including for labor, will be discussed more prominently than in prior agency guidance.

We engaged in broad stakeholder outreach in connection with the revision, including receiving over 5,000 public comments in response to our RFI on this project and also holding several public listening sessions to hear directly from individuals and businesses affected by mergers. Those comments raise many diverse issues, which are currently under consideration.

9. At the May 2022 International Competition Network Conference in Berlin, Germany, you gave a speech describing the “broad and sweeping reassessment” of U.S. competition law being undertaken. You also described how your desire to ensure the guidelines are faithful to the statutory standard that “merger enforcement is intended to stop, in its incipency, trends toward concentration.”

a. Please describe your understanding of the “incipency standard.”

As revealed by the statutory language, legislative intent, and judicial precedent, U.S. merger law is designed to prevent transactions that “may” substantially lessen competition or tend to create a monopoly, which should equip enforcers to protect competition against even incipient threats.³⁴ Experience also reveals that it is more effective and efficient to protect competition by preventing undue merger-driven consolidation in the first instance, rather than seek to redress it after the fact.

b. Additionally, please describe the approach to incipency enforcement the FTC is executing under your leadership regarding the green energy industry?

c. Does the FTC consider the energy market to include both traditional fossil fuel energy and renewable energy or does the FTC see traditional energy and renewable energy as separate markets?

Consistent with our statutory mandate, case law, and agency guidelines, our assessment of traditional and renewable energy markets depends very much on the facts presented and the specific products and geographies under consideration. As noted above, I believe it is much easier to promote competition in any market at the point when a market risks becoming less competitive rather than at a later time when a market is no longer competitive.

³³ *Brown Shoe Co. v. United States*, 370 U.S. 294, 337 (1962).

³⁴ Clayton Act, ch. 323, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53 (2012)). The Senate report on amendments to the Clayton Act stated that: “The intent here . . . is to cope with monopolistic tendencies in their incipency and well before they have attained such effects as would justify a Sherman Act proceeding.” S. REP. NO. 81-1775, at 4 (1950).

d. Will your enforcement of the renewable energy industry be as vigorous as enforcement of the traditional energy industry?

The energy sector has long been at the core of the FTC's mission and is committed to vigorous antitrust enforcement across all aspects of the energy sector, including renewable energy products and services.

e. Do you think the Biden Administration's approach to domestic energy production has contributed to higher gasoline prices, particularly during the time period prior to February 2022?

Retail gasoline prices are a critical concern for Americans, and for the FTC as well. As a law enforcement agency, we have engaged in a number of actions in this sector.³⁵ This includes restoring competition in gasoline and diesel markets in Michigan and Ohio by requiring ARKO Corp. and its subsidiary GPM to roll back allegedly anticompetitive provisions of their acquisition of 60 Express Stop retail fuel outlets from Corrigan Oil Company.³⁶ We also maintained retail gasoline competition in seven local markets in Nebraska and Iowa by requiring Casey's General Stores to divest six retail fuel outlets in connection with its acquisition of Buck's Intermediate Holdings.³⁷

10. The Major Questions Doctrine mandates administrative agencies must be able to point to "clear congressional authorization" when they claim the power to make decisions of vast "economic and political significance." As we saw in *West Virginia v. EPA* (2022), the current Supreme Court is likely to strike down unchecked rulemaking powers. In 2018, you penned a law review article arguing that rulemaking under § 5 of the Federal Trade Commission Act should supplement antitrust adjudication. This institutional shift would lower enforcement costs, reduce ambiguity, and facilitate greater democratic participation.³⁸

a. Please describe your understanding as to how the Major Questions Doctrine limits your rulemaking authority relating to competition affecting large sectors of the economy?

In *National Petroleum Refiners Association*, the D.C. Circuit confirmed the FTC's rulemaking authority, and the court's reasoning continues to apply.³⁹ The text of section 6(g) of the FTC Act expressly authorizes the Commission "to make rules and regulations for the purpose

³⁵ For a summary of FTC actions in the energy sector, please see <https://www.ftc.gov/advice-guidance/competition-guidance/industry-guidance/oil-gas-industry-initiatives>.

³⁶ Press Release, Fed. Trade Comm'n, FTC Acts to Restore Competitive Markets for Gasoline and Diesel in Michigan and Ohio (June 14, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-acts-restore-competitive-markets-gasoline-diesel-michigan-ohio>.

³⁷ Press Release, Fed. Trade Comm'n, FTC Requires Divestitures as Condition of Casey's General Stores, Inc.'s Acquisition of Buck's Intermediate Holdings, LLC. (Apr. 28, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/04/ftc-requires-divestitures-condition-caseys-general-stores-incs-acquisition-bucks-intermediate>.

³⁸ Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHICAGO L. REV. 357 (2020).

³⁹ *Nat'l Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672 (D.C. Cir. 1973).

of carrying out” the FTC Act,⁴⁰ which has always had as its principal lodestar the eradication of “[u]nfair methods of competition.”⁴¹ Accordingly, the FTC is authorized to pursue rulemaking to address unfair methods of competition in the economy.

11. In an August 25, 2021 letter to the National Economic Council Director Brian Deese, you wrote, “The Commission’s approach to merger review in recent years has enabled significant consolidation, particularly when it comes to retail fuel outlets.”

a. Are there trends of market concentration in the renewable energy industry?

As mentioned above, the FTC is committed to vigorous antitrust enforcement in the energy sector as a whole, including the renewable energy industry.⁴² The breadth and scope of what constitutes the renewable energy “industry” makes it difficult to characterize concentration trends within the sector or across the whole industry. However, the FTC is specifically tasked with annually reviewing concentration in one aspect of the renewable energy industry – domestic ethanol production. Our most recent ethanol report, issued in December 2021, found that domestic ethanol production remains unconcentrated, although we observed a slight increase in market concentration relative to 2020.⁴³ We continue to monitor changes in concentration in this sector, as we stand ready to vigilantly enforce the antitrust laws in this industry as warranted.

12. Do you view *National Petroleum Refiners Association v. FTC* (D.C. Cir. 1973) as a proper legal foundation to issue competition rules in light of recent Supreme Court precedent?

The Commission always seeks to ensure that any actions it takes are consistent with its statutory mandate, governing case law, and its own internal rules.

13. In the recent past, Presidents generally have identified an incoming prospective chair as such. Many were surprised by your elevation to Chair of the FTC, given that the Biden Administration was not forthcoming about their intention to do so.

a. When did you first hear that you were being considered as Chair of the FTC?

b. When did you first learn that you were going to be nominated as Chair?

c. Who first told you that you would be nominated to Chair?

In deference to the President’s Executive Privilege, I refer these questions to the White

⁴⁰ 15 U.S.C. § 46(g).

⁴¹ 15 U.S.C. § 45(a).

⁴² For a summary of FTC actions in the energy sector, please see <https://www.ftc.gov/advice-guidance/competition-guidance/industry-guidance/oil-gas-industry-initiatives>.

⁴³ Press Release, Fed. Trade Comm’n, FTC Issues Annual Report on Ethanol Market Concentration (Dec. 1, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/12/ftc-issues-annual-report-ethanol-market-concentration-2021>.

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14. In response to questioning regarding staff morale you testified that “my team and I have been aggressively identifying what the source is” and “we have been diligently identifying the source of some of these results.”

a. You have been looking at the issue of declining employee morale at the FTC for months. What do you think the problem is?

The 2021 FEVS took place during a time of significant change, including a recent leadership transition and the associated adjustments to new priorities and policies as well as the ongoing pandemic and uncertainty around future workplace policies. The survey results raised issues that I take seriously, and as a result, I implemented a process to solicit input from senior leaders, managers, and staff to better understand the specific issues and challenges. In doing so, we identified three key root causes: communication, processes, and certain internal workplace policies.

b. Please list the sources you and your staff have identified for the decline in the proportion of FTC staff that believe the agency’s senior leaders maintain high standards of honesty and integrity.

As noted above, we have identified communication, processes, and certain internal workplace policies as key root causes of the 2021 FEVS results.

c. Please list the sources you and your staff have identified for the decline in the proportion of FTC staff that have a high level of respect for the agency’s senior leadership.

As noted above, we have identified communication, processes, and certain internal workplace policies as key root causes of the 2021 FEVS results.

d. What specific steps are you taking to remedy the problem?

We are improving communication, including clarifying vision and priorities; streamlining processes for decision-making; and revisiting, clarifying, or changing some internal policies that unintentionally created confusion or concerns. We have also completed our office reentry and implemented our policy for the next phase of workplace flexibilities, giving staff clarity and certainty on key workplace issues that were still under development at the time of the 2021 and 2022 FEVS. Much of the implementation began just months before the 2022 survey, and the work is still ongoing. We continue to assess our internal communication, policies, processes, and personnel and to solicit feedback from staff and leaders in an effort to make the FTC a great place to work on behalf of the American people.

15. While evaluations of the agency’s senior leaders were resoundingly negative, FTC employee’s evaluations of their direct managers improved from the prior year. Why do you think FTC staff gave their direct managers a more positive evaluation than they gave you and your leadership team?

a. What steps will you take to learn from FTC employees in management positions who outperformed you in the FEVS survey?

We are extraordinarily lucky to have highly professional and skilled managers at the FTC, and it is no surprise that our staff evaluate them highly. They work tirelessly to ensure that our staff have the tools, resources, and support they need to successfully execute on the agency's important mission. I hold regular meetings with the senior leadership team in addition to one-on-one check-ins, and I greatly value their wisdom and insight as we work to address management challenges. During my first year, I was also able to meet separately with every office in the agency and hear feedback directly from staff and front-line managers. These conversations were immensely beneficial, and our lines of communication remain open.

16. An article in Politico on the decline in morale at the FTC included the detail that your Chief of Staff wears a necklace to work with only the word "Fuck" in cursive script hanging from it. Do you believe that this necklace is just one of example of the behavior that caused 35% of FTC staff to report that they do not have a high level of respect for the agency's senior leadership?

As noted above, we have identified communication, processes, and certain internal workplace policies as key root causes of the 2021 FEVS results.

17. The FTC recently removed the phrase "protecting competition" from its Mission Statement. Are you no longer concerned with ensuring markets are competitive? Are you concerned that removing "protecting competition" as a driving principle for the agency will allow it to instead protect favored competitors?

The FTC's mission statement emphasizes protecting the public, including consumers but also workers and businesses, from deceptive or unfair business practices and from unfair methods of competition through law enforcement, advocacy, research, and education. In my view, the statement better focuses our efforts on those who might be harmed if we fail to fulfill our mission and better reflects the importance of our work.

18. Do you believe that regulatory actions that unduly burden legitimate business activity hurt consumers?

The FTC continues to believe that its competition mission should not unduly burden legitimate business activity, which is why we kept those exact words in the new agency strategic plan (see page 14). We did remove those words from the Mission Statement, in an effort to streamline the Mission Statement in order to describe succinctly our fundamental purpose, which is to enforce the law. While the wording in the Mission Statement has changed, FTC policy has not.

19. Why did the FTC replace "consumers" with "public" in its mission statements?

a. What group or groups is now captured by "public" that was not captured

by “consumers”?

The change was made to better align our Mission Statement with the scope of the laws that we enforce. The term “public” more fully captures Congress’s intent that the focus of the FTC’s work should include protecting not only consumers but also workers and businesses from misconduct that falls within the purview of the FTC Act.

20. How has the lack of a Director of the Bureau of Economics hurt the agency’s work? When do you plan to fill this position?

The Commission continues to benefit from the expertise and experience of its 80 PhD economists in the Bureau of Economics. BE staff and managers are deeply involved in every aspect of the Commission’s work, and their advice is invaluable. We are far along in the process of evaluating candidates for the position of Director, and hope to make an announcement soon.

21. How can the agency claim to sincerely attempt to balance costs and benefits of its regulatory actions if its Bureau of Economics has no Director?

- a. **There is not an Assistant Director in the Bureau of Economics for Consumer protection. How can the agency analyze the responses requested in the “commercial surveillance” ANPRM if there is also no leader for the Consumer Protection Division of the Bureau of Economics?**

The Commission employs many PhD economists with specialized expertise in behavioral economics. In July 2022, I was pleased to hire Devesh Raval as Deputy Director in the Bureau of Economics, and he serves as the lead consumer protection economist at the agency. Input from the economists in the Bureau of Economics was invaluable in developing the ANPRM, and they will continue to support our review of the comments and the decision making about what additional steps the Commission might take related to commercial surveillance.

22. What do you believe is the appropriate role for the agency’s economists in the FTC’s rulemaking process?

The agency’s economists play an important role in all aspects of FTC rulemaking, ranging from formulating ideas about whether to promulgate, amend, or rescind rules to reviewing economic data submitted with public comments. Perhaps the most important role economists play in FTC rulemaking is in meeting the obligations of § 22 of the FTC Act, which requires a preliminary regulatory analysis in any notice of proposed rulemaking and a final regulatory analysis in the statement of basis and purpose for any final rule.⁴⁴ These analyses must include, among other things, “projected benefits and any adverse economic effects and any other effects,” which FTC economists are well positioned to describe and, where possible, quantify. So too for our obligations under other laws, including the Paperwork Reduction Act, Regulatory Flexibility Act, and Small Business Regulatory

⁴⁴ See 15 U.S.C. § 57b-3(b)(1), (2).

Enforcement Fairness Act. For a recent and exceptionally well-done example of an economic analysis that FTC economists played a leading role in formulating, I recommend to you the notice of proposed rulemaking concerning a Motor Vehicle Dealers Trade Regulation Rule.⁴⁵ Other forms of analysis and expertise, such as those provided by technologists, attorneys, and market experts, are also valuable in the rulemaking process.

23. In May 2022, the FTC published a blog asserting that “regardless of whether a breach notification law applies, a breached entity that fails to disclose information to help parties mitigate reasonably foreseeable harm may violate Section 5 of the FTC Act.”

- a. All 50 states have breach notification laws. Is it your position that there is a separate federal breach notification standard that is captured by Section 5 of the FTC Act? Yes or no?**
- b. If yes, please explain the specific details of the federal standard and how the requirements of the standard are different from each state breach notification law.**

As stated in the May 2022 blog post, “a breached entity that fails to disclose information to help parties mitigate reasonably foreseeable harm may violate Section 5 of the FTC Act.”⁴⁶ The blog post goes on to highlight cases where the Commission has alleged such conduct to be deceptive or unfair based on the facts of the particular case.⁴⁷ At the state level, law enforcers similarly recognize that companies have notice obligations under so-called “UDAP” statutes, separate and apart from their obligations under breach notification statutes.⁴⁸

24. The FTC recently adopted a Policy Statement on Enforcement Related to Gig Work by a partisan vote of 3-2. Please explain how the Commission’s enforcement actions related to gig work are part of the agency’s statutory mission to protect consumers from unfair or deceptive acts or practices and unfair methods of competition.

Americans deserve fair, honest, and competitive labor markets. Over the past decade, internet-enabled “gig” companies have grown exponentially, and gig work now composes a significant part of the United States economy. Protecting these Americans from unfair, deceptive, and anticompetitive practices is a priority, and the FTC will use its full authority to do so. For example, an enforcement action initiated under former Chairman Joe Simons targeted

⁴⁵ See Notice of Proposed Rulemaking, Motor Vehicle Dealers Trade Regulation Rule, 87 Fed. Reg. 42012, 42031–44 (July 13, 2022), <https://www.federalregister.gov/documents/2022/07/13/2022-14214/motor-vehicle-dealers-trade-regulation-rule>.

⁴⁶ Fed. Trade Comm’n, *Security Beyond Prevention: The Importance of Effective Breach Disclosures* (May 20, 2022), <https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2022/05/security-beyond-prevention-importance-effective-breach-disclosures>.

⁴⁷ *Id.* (collecting cases).

⁴⁸ See, e.g., *Massachusetts v. Briar Group LLC*, Civ. No. 11–1185B, Consent Judgment (Mass. Sup. Ct. Mar. 28, 2011) (alleging company engaged in an unfair or deceptive practice when, among other things, it continued to accept credit and debit cards from consumers when it knew of a data breach and failed to alert its patrons to the data breach while malware remained on its computer system).

deceptive practices by Amazon that allegedly harmed Amazon Flex drivers.⁴⁹ Our efforts are designed to build on this work.

As identified in the policy statement, the Commission will use the full portfolio of laws it enforces to prevent unfair, deceptive, anticompetitive, and otherwise unlawful practices affecting gig workers.

Specifically, the FTC policy statement outlined the FTC's approach to a number of issues facing gig workers, including deception about pay and hours, unfair contract terms, and anticompetitive wage fixing and coordination between gig economy companies. In the statement, the Commission identifies that it will focus on:

- Holding companies accountable for claims and conduct about costs and benefits: Gig companies must not be deceptive in their claims to prospective gig workers about potential earnings, and they must be transparent and truthful about costs borne by workers.
- Combating unlawful practices and constraints imposed on workers: Gig companies using artificial intelligence or other advanced technologies to govern workers' pay, performance, and work assignments are still required to keep promises they make to workers. Companies must also ensure that any restrictive contract terms, including those limiting workers from seeking other jobs (non-compete or other restrictions), do not violate the FTC Act or other laws.
- Policing unfair methods of competition that harm gig workers: The FTC will investigate evidence of agreements between gig companies to illegally fix wages, benefits, or fees for gig workers that should be open to competition. This includes examining any use by gig companies of technology-enabled methods of collusion or exclusion. Agreements among gig companies that anticompetitively harm workers violate Section 1 of the Sherman Act and may be challenged by the Commission directly, and, in the case of wage-fixing or no-poaching agreements, may be referred to the U.S. Department of Justice ("DOJ") for potential criminal prosecution.

25. As you know, the FTC and the DOJ are authorized to terminate the waiting period under the Hart-Scott-Rodino Antitrust Improvements Act, upon the request of the parties involved or at the agencies' discretion, after determining that no additional information is necessary and that the transaction does not pose significant competitive concerns. However, in February 2021, the FTC temporarily suspended the early termination process.

- a. When can Congress expect that the early termination process will be reinstituted? Please provide a specific date.**

⁴⁹ Press Release, Fed. Trade Comm'n, Amazon to Pay \$61.7 Million to Settle FTC Charges It Withheld Some Customer Tips from Amazon Flex Drivers (Feb. 2, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/02/amazon-pay-617-million-settle-ftc-charges-it-withheld-some-customer-tips-amazon-flex-drivers>

b. If it will not be reinstituted, please explain why not.

The agency still faces significant resource constraints and must make difficult choices about how to allocate staff time, especially when it comes to merger review. For now, our priority in reviewing merger filings is to determine which ones require more in-depth review, such as the issuance of a Second Request. Given that the HSR Act limits our initial review period to 30 days, the delay associated with the suspension of early termination is minimal, but the benefit to our core mission has been significant.

26. In August 2021, the FTC announced that “For [merger transaction] that [the Commission] cannot fully investigate within the requisite timelines, [the Commission has] begun to send standard form letters alerting companies that the FTC’s investigation remains open and reminding companies that the agency may subsequently determine that the deal was unlawful.”

- a. How many “pre-consummation warning letters” has the FTC issued since August 3, 2021?**
- b. How many letters, by comparison, did the FTC send each year in the five years preceding your becoming chair?**
- c. How many transactions are being investigated by the Commission where pre-consummation warning letters were issued? Please provide the exact number.**

Since August 3, 2021, the Bureau of Competition has issued warning letters in a number of transactions. Over the past couple of years, the FTC has been hit by a tidal wave of merger filings that is straining the agency’s capacity to rigorously investigate deals ahead of the statutory deadlines. We believe it is important to be upfront about these capacity constraints. For deals that we cannot fully investigate within the requisite timelines, we have begun to send standard form letters alerting companies that the FTC’s investigation remains open and reminding companies that the agency may subsequently determine that the deal was unlawful. Companies that choose to proceed with transactions that have not been fully investigated are doing so at their own risk. Of course, this action should not be construed as a determination that the deal is unlawful, just as the fact that we have not issued such a letter with respect to a filing under the Hart-Scott-Rodino Act (HSR) should not be construed as a determination that a deal is lawful. We do not, however, post pre-consummation warning letters on our website because disclosure of a premerger notification filing is prohibited under the HSR, 15 U.S.C. § 18a(h).

27. With respect to the pre-consummation warning letters sent to merging parties during your leadership, for how many of those letters did the FTC subsequently conduct investigational hearings or collect documents?

Without disclosing any non-public information, the Commission has several consummated mergers under investigation, and when appropriate, will issue document demands or take investigational hearings to collect information and testimony about the likely effects of those mergers.

28. This past April, FTC Commissioner Phillips gave a speech entitled “Disparate Impact: Winners and Losers from the New M&A Policy” in which he described how new merger and acquisition (M&A) policies at the FTC—for example, the suspension of early terminations for competitively innocuous deals; the new “prior approval” policy that gives the FTC veto power over merging parties’ future deals; and the practice of sending “close at your own peril” letters to parties—raise the cost of M&A across the board, rather than targeting anti-competitive deals. Moreover, Commissioner Phillips argues that these “gratuitous taxes on M&A” “are regressive, hitting smaller companies the hardest,” in turn making it harder for them to compete with their larger competitors.

a. Do you agree or disagree with Commissioner Phillips’ description of these new M&A policies?

While I disagree with this description, I fully support the spirited discussion around our new policies. The Commission has a long history of debate and disagreement, and it is a source of strength, not weakness, for the Commission to air all views. Each Commissioner brings his or her own experience and perspective to our deliberations, and I will miss Commissioner Phillips’ insights and his dedication to the mission of the FTC.

29. Are these new policies designed to target anti-competitive deals, or are they intended to slow M&A activity in general by driving up costs for companies and sowing uncertainty?

As law enforcers with limited resources, we must prioritize efficient and effective enforcement that promotes deterrence of anticompetitive mergers. Any new policies are designed to further these goals.

30. Are you concerned that these new M&A policies are creating a disparate impact for smaller players and weakening their competitive position with respect to their larger competitors?

No. I have prioritized ensuring that we are hearing about the prospective impact of mergers from a variety of market participants, including smaller players.

For instance, as part of the FTC/DOJ merger guidelines review project, AAG Kanter and I hosted five listening sessions to hear firsthand from those who have experienced the harmful effects of mergers.⁵⁰

31. When the FTC initially announced the policy of suspending early terminations, it stated that this suspension would be “temporary.” What is the justification for the continued application of the suspension?

The agency still faces significant resource constraints and must make difficult choices

⁵⁰ Press Release, Fed. Trade Comm’n, FTC and Justice Department Launch Listening Forums on Firsthand Effects of Mergers and Acquisitions, (Mar. 17, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/03/ftc-justice-department-launch-listening-forums-firsthand-effects-mergers-acquisitions>.

about how to allocate staff time, especially when it comes to merger review. Our priority in reviewing merger filings is to determine which ones require more in-depth review, such as the issuance of a Second Request. Given that the HSR Act limits our initial review period to 30 days, the delay associated with the suspension of early termination is minimal.

32. How are you working to eliminate unnecessary delays in the FTC’s review of smaller deals, such as Tractor Supply’s deal to purchase Orscheln Farm and Home?

The Commission has completed its review of this merger, and unanimously voted to issue a proposed order requiring the companies to divest assets to protect competition in 84 local markets.⁵¹ The investigation of this deal was extraordinarily complex and thorough, and the resolution prevented the merger from resulting in higher prices or reduced competition for farmers, ranchers and landowners shopping for products sold through farm stores.

Every merger investigation is fact-intensive, and the size of the deal does not necessarily reflect the analytical complexity of the antitrust review. In all cases, we strive to resolve the competitive issues quickly while ensuring that our resolution protects the public from any harmful effects that are likely to result from the merger.

33. Do you agree that the imposition of unnecessary delays and burdens on merging parties drives up companies’ legal costs, in turn diverting resources away from investment, innovation, and job creation?

Prolonged investigations of complex acquisitions impose costs not only on the merging parties but also on the antitrust agencies. It is not our goal to drive up legal costs for these companies; nonetheless, we cannot shirk our statutory obligation to stop any merger that may substantially lessen competition. Companies that conduct a robust and thorough antitrust compliance review prior to negotiating a merger deal or notifying a proposed transaction to the antitrust agencies can save time and resources by fully understanding their potential legal liability and avoiding deals that raise legal concerns.

34. Are you concerned about the opportunity costs of deterring mergers that would benefit consumers, including mergers between smaller firms that would enable them to compete more effectively against their larger rivals?

As the Commission testimony identifies, our nation is experiencing the impact of increasing market consolidation, with detrimental effects throughout the economy. Vigorous antitrust enforcement is critical to the growth and dynamism of our economy, and its absence limits opportunities for small businesses that struggle to compete against larger incumbents. The Commission continues to take action to prevent further consolidation that leads to higher prices, lower wages, and more fragile markets.

35. In response to Senator Lee’s letter on zombie voting last year, you pointed to the 1984

⁵¹ Press Release, Fed. Trade Comm’n, FTC Approves Consent Order Addressing Concerns Over Tractor Supply’s Acquisition of Orscheln Farm and Home (Oct. 11, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/10/ftc-approves-consent-order-addressing-concerns-over-tractor-supplys-acquisition-orscheln-farm-home>.

policy guidance from FTC “Procedures at Commission Level – In re: Policy With Respect to Counting Votes of Departing (and Arriving) Commissioners”

- a. Since that guidance was issued, how many zombie votes have been used to break a tie-vote? Please list each instance and to what each vote pertained.**

Since the 1984 policy guidance was issued, there have been several instances where a departing Commissioner voted on a motion and that motion passed by a margin of one after that Commissioner’s departure. Those motions are listed below. This list does not include any motions in which Commissioner Chopra voted, which are discussed separately in the response to Question 6.

1. Press Release, Fed. Trade Comm’n, NetSpend Settles FTC Charges (Mar. 31, 2017), <https://www.ftc.gov/news-events/press-releases/2017/03/netspend-settles-ftc-charges> (“Then-Commissioner (and former Chairwoman) Edith Ramirez registered a vote in the affirmative for the motion to approve this settlement before she left the Commission.”) (2-1 vote to approve a settlement of the federal court action)
 2. *In re Weight Watchers Int’l, Inc.*, 124 F.T.C. 610, 648 n.1 (1997) (“Prior to leaving the Commission, former Commissioner Starek registered his vote in the affirmative for issuing the decision and order in this matter.”) (2-1 vote to issue the final consent order, with one Commissioner not participating and one Commissioner recused)
 3. *In re Homecare Oxygen & Medical Equipment Co.*, 118 F.T.C. 706, 718 n.1 (1994) (“Prior to leaving the Commission, former Commissioner Owen and former Commissioner Yao registered their votes in the affirmative for the Complaint and the Decision and Order in this matter.”) (3-2 vote to issue the final consent order)
 4. *In re Certain Home Oxygen Pulmonologists*, 118 F.T.C. 685, 694 n.1 (1994) (“Prior to leaving the Commission, former Commissioner Owen and former Commissioner Yao registered their votes in the affirmative for the Complaint and the Decision and Order in this matter.”) (3-2 vote to issue the final consent order)
 5. *In re Home Oxygen & Medical Equipment Co.*, 118 F.T.C. 661, 673 n.1 (1994) (“Prior to leaving the Commission, former Commissioner Owen and former Commissioner Yao registered their votes in the affirmative for the Complaint and the Decision and Order in this matter.”) (3-2 vote to issue the final consent order)
 6. *In re Boise Cascade Corp.*, 113 F.T.C. 956 n.* (1990) (“Prior to leaving the Commission, former Commissioner Calvani registered his vote in the affirmative for the Final Order and Opinion of the Commission in this matter.”) (1-0 vote to issue the final order and opinion, with one Commissioner abstaining and one Commissioner not participating)
- 36. In your December letter responding to Senator Lee’s letter, you listed five items for which you used former Commissioner Chopra’s zombie vote. Of the five, two of them resulted in 3-2 votes. One of those two was a motion to approve the FTC’s annual performance report for FY 2021. Curiously, this same vote the year before was 5-0.**

a. What changed?

b. Did the 3-2 vote have anything to do with the substantial drop in employee morale?

The Commissioners' reasoning for their votes is protected by deliberative process privilege, except to the extent that the agency has chosen to waive the privilege.

37. The Federal Trade Commission recently announced a rulemaking on data privacy and security. In parts of it you ask if the Commission should regulate economy-wide.

a. Does the Commission in your opinion have the authority to make comprehensive privacy rules like those in the California Consumer Privacy Act or proposed in the American Data Privacy and Protection Act that impact all industries under your authority?

The Commission has the statutory authority to regulate specific unfair or deceptive acts or practices in or affecting interstate commerce. In particular, under 15 U.S.C. § 57a, Congress authorized the Commission to issue a notice of proposed rulemaking where it has reason to believe that the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are prevalent. The statute provides that the Commission shall make a determination that unfair or deceptive acts or practices are prevalent under this paragraph only if—

(A) it has issued cease and desist orders regarding such acts or practices, or

(B) any other information available to the Commission indicates a widespread pattern of unfair or deceptive acts or practices.

Through the Advance Notice of Proposed Rulemaking, the Commission is seeking comment on issues including the prevalence of deceptive or unfair practices and whether there is a need for a rule or rules. At this stage, the period for public comment is open through November 21, 2022, and the Commission has not evaluated whether to propose a rule or rules or what such a rule or rules could look like if proposed, including the potential breadth or scope of such a rule or rules.

38. California's privacy law was estimated to cost \$55 billion alone. If a privacy rule akin to CCPA or ADPPA were finalized do you believe it would have a vast economic impact?

As indicated above, the Commission has not proposed nor finalized any rule. Without having analyzed a specific regulatory regime in context, the Commission cannot speculate on what the costs and benefits of a particular regime might be. Any final rule promulgated by the Commission must be accompanied by "a statement as to the economic effect" of the rule, and such a statement must take "into account the effect on small business and consumers."⁵²

⁵² 15 U.S.C. § 57a.

39. Recently, the Supreme Court said that in the case of rules with a vest economic impact, Congress must clearly speak for an agency to act. Where in the FTC Act has Congress clearly spoken to make a comprehensive privacy rule?

See the response to Question 37.

Senator Dick Durbin
Chair, Senate Judiciary Committee
Written Questions for Lina Khan
Chair of the Federal Trade Commission
September 27, 2022

- 1. The payment card network market is dominated by Visa and Mastercard, which control approximately 80 percent of the market. These giants have enormous opportunity and incentive to take actions to stifle competitors and preserve their market dominance. In 2016, the FTC investigated Visa for using misleading touch-screens at cash registers in an effort to steer consumers away from competitor debit card networks. Visa agreed to change its network rules in response to the FTC’s investigation.**

Since 2016, what steps has the FTC taken to help safeguard against anticompetitive practices in the payment card network market?

The “Durbin Amendment,” Section 920 of the Electronic Funds Transfer Act (“EFTA”), 15 U.S.C. § 1693o-2, and its implementing regulation, Regulation II, 12 C.F.R. pt. 235, promote competition and the public interest by, among other things, prohibiting exclusive arrangements between payment card networks and debit card issuers and forbidding networks from inhibiting a merchant’s freedom to route debit transactions for processing over the network of its choice. The FTC is charged with enforcing the Durbin Amendment and Regulation II as to payment card networks, including Visa and Mastercard, an obligation the FTC takes seriously. Visa and Mastercard have each publicly reported that the FTC is conducting an investigation of their compliance with the routing provisions of the Durbin Amendment. While I cannot comment on this otherwise non-public investigation or provide any further details, our staff carefully and efficiently weighs relevant issues and evidence in all of our investigations. In addition, and consistent with the Administration’s “all-of-government” approach to promoting competition in the economy, FTC staff has consulted with government partners on how to promote the goals of and compliance with the Durbin Amendment. Along these lines, senior FTC staff submitted a public comment to the Board of Governors of the Federal Reserve System in connection with the Federal Reserve’s rulemaking to clarify aspects of Regulation II.⁵³ That rulemaking has since been completed.⁵⁴ The FTC will continue to use available tools to enforce the Durbin Amendment.

- 2. Transparency of prices and fees is important in a well-functioning and competitive market. Yet there is almost no transparency for consumers to know how much it costs their local business in interchange fees when a consumer pays with a Visa or Mastercard credit or debit card. If consumers had access to this information, consumers may choose, for example, to use lower-fee cards when shopping at local**

⁵³ FTC Staff Comment to Board of Governors of the Federal Reserve System (Aug. 11, 2021), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-board-governors-federal-reserve-system-docket-no-r-1748-rin-7100-ag15-debit-card/fed_board_staff_comment_p859910.pdf.

⁵⁴ See Press Release, Fed. Reserve Board, Federal Reserve Board finalizes updates to the Board’s rule concerning debit card transactions (Oct. 3, 2022), <https://www.federalreserve.gov/newsevents/pressreleases/bcreg20221003a.htm>.

businesses they want to support.

Do you think consumers and local businesses would benefit from the transparency of having monthly credit and debit card statements list how much was deducted in interchange on each card transaction?

I generally support efforts to provide consumers with more information so that they can make better-informed choices, provided any required disclosures are clear, conspicuous, and meaningful. Information of this type on monthly statements could well be one step toward promoting markets that offer credit and debit card users quality choices at reasonable costs. Other steps may also be necessary however. As one example, FTC staff has applauded the recent Federal Reserve rulemaking that seeks to ensure that the competition-enhancing goals of the Durbin Amendment are realized for all types of debit card transactions, including in particular e-commerce transactions.⁵⁵

- 3. Earlier this summer, the FTC announced that it was launching an inquiry into pharmacy benefit managers (PBMs). PBMs were supposed to be middlemen that would sit between drug manufacturers, pharmacies, and insurance plans to help negotiate and keep down the cost of prescription drugs.**

But now, one of the largest PBMs is owned by pharmacy chain CVS, and another is owned by insurer UnitedHealth.

There has also been massive consolidation in this market with the three largest PBMs controlling 71 percent of the Medicaid market and 86 percent of the private market.

a. What contribution do PBMs make to the high cost of prescription drugs?

Many of the key questions the agency hopes to be able to answer by completion of the 6(b) study relate to how PBM practices impact the cost of prescription drugs. On June 7, 2022, the Commission authorized staff to issue Compulsory Orders for data and documents to the six largest Pharmacy Benefit Managers (PBMs): CVS Caremark; Express Scripts, Inc.; OptumRx, Inc.; Humana Pharmacy Services, Inc.; Prime Therapeutics LLC; and MedImpact Healthcare Systems, Inc. These PBMs negotiate prices, access, rebates and fees with drug manufacturers, create drug formularies and surrounding policies, and create pharmacy networks and reimburse pharmacies for patients' prescriptions. The largest pharmacy benefits managers are now vertically integrated with the largest health plans as well as with GPOs (or group purchasing organizations), clinics, and retail pharmacies. Many of these contractual relationships are non-public.

Many of the key questions the agency hopes to be able to answer by completion of the 6(b) study relate to how PBM practices impact the cost of prescription drugs. Specifically, the

⁵⁵ See FTC Staff Comment to Board of Governors of the Federal Reserve System, at 2 (Aug. 11, 2021), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-board-governors-federal-reserve-system-docket-no-r-1748-rin-7100-ag15-debit-card/fed_board_staff_comment_p859910.pdf.

study is aimed at shedding light on several practices that have drawn scrutiny in recent years including:

- fees and clawbacks charged to unaffiliated pharmacies,
- methods to steer patients towards pharmacy benefit manager-owned pharmacies,
- potentially unfair audits of independent pharmacies,
- complicated and opaque methods to determine pharmacy reimbursement,
- the prevalence of prior authorizations and other administrative restrictions, the use of specialty drug lists and surrounding specialty drug policies,
- the impact of rebates and fees from drug manufacturers on formulary design, and
- the costs of prescription drugs to payers and patients.

b. What does the FTC hope to accomplish with its study?

Please see the answer to Durbin #3a.

- 4. Americans pay higher prices for prescription drugs than anyone else in the world. According to a recent report by the RAND Corporation, prescription drug prices in the United States were over 250 percent higher than in other OECD countries.**

The FTC recently put out a policy statement regarding the illegal use of rebates and fees by drug manufacturers to exclude lower-cost competitors from drug formularies.

Please discuss how this policy statement will impact the price of prescription drugs.

A policy statement by the FTC reflects agency interest and future priorities, including potential enforcement. By itself, such a statement will not directly alter the price of prescription drugs. However, such statements can potentially influence the future behavior of other regulators, legislators, and market participants by putting them on notice about the agency's priorities and heightened scrutiny of their conduct, and firms may adjust their practices accordingly. As the policy statement makes clear, the FTC has concerns that illegal bribes and rebate schemes may be blocking patient access to competing lower-cost generic and biosimilar alternatives. This is likely to be an area of continued interest and attention for the agency, given the high cost of prescription drugs.

- 5. Last year, the Judiciary Committee held a hearing on the increasing consolidation and lack of competition up and down the supply chain in the food industry. We heard, for example, that just four companies control over 80 percent of the beef processing market. We also heard how this consolidation disadvantages both small farmers on one end of the chain and consumers at the other end, because they are decentralized and do not have bargaining power to negotiate with the dominant companies.**

What steps is the FTC taking to ensure excessive concentration and anticompetitive practices in the food supply chain are stopped?

The FTC has several tools available that are relevant to these issues. First, the FTC has the authority under 15 U.S.C. § 46(b) to compel companies⁵⁶ to provide information as to their organization, business practices, management, and business relationships. This authority allows the FTC to study important markets and market developments, and is the basis for the ongoing study of the impact of supply chain disruptions. Second, the FTC's enforcement of the antitrust laws provides a basis to investigate any anticompetitive conduct that may have contributed to, or stemmed from, supply chain disruptions.⁵⁷

The FTC has issued orders to nine companies requiring information and documents about the causes and competitive effects of supply chain disruptions in consumer-packaged goods and grocery products.⁵⁸ FTC staff are analyzing the information and documents provided by the order recipients, but the Commission has not yet reached any conclusions in this inquiry.

- 6. The for-profit college industry has a history of misconduct. Some of the worst actors, such as Corinthian Colleges, ITT Tech, and Westwood College, have been found to mislead students about costs, employment and earnings outcomes, and the ability to transfer credits. In some cases, these institutions were so focused on lining their owners' and executives' pockets that they forged student signatures for federal student aid and other private predatory loans.**

Last fall, the FTC moved to deter for-profit colleges from making false promises, like misleading students about job prospects. The FTC sent notices to 70 of the largest for-profit college chains, outlining various practices that the FTC has previously found to be deceptive, and published the list of 70 for-profit colleges that received this warning.

Some of the worst actors on this list include University of Phoenix, Walden University, and DeVry University. In the case of DeVry, an FTC investigation found the school made deceptive claims about the likelihood graduates would find jobs and how much they would earn when they did. This work helped the Department of Education decide to grant \$71.1 million in student loan discharges for 1,800 former DeVry students. Relief, however, is not enough. While it helps struggling students with a worthless degree who are drowning in debt, relief won't stop bad actors in the future.

⁵⁶ The FTC Act excludes certain entities from the FTC's 6(b) authority. 15 U.S.C. § 46(b). Most relevant here, the FTC's authority does not extend to common carriers subject to certain Acts.

⁵⁷ The FTC Act excludes certain entities from the FTC's enforcement authority. 15 U.S.C. § 45(a)(2). Most relevant here, the FTC's authority does not extend to common carriers or air carriers subject to certain Acts, or corporations insofar as they are subject to the Packers & Stockyards Act. *Id.* In addition, as you know the FTC shares responsibility with the Department of Justice (DOJ) for enforcing the antitrust laws. To avoid duplication and maximize the effectiveness of concurrent federal antitrust jurisdiction, the Commission and the DOJ have long maintained a liaison arrangement through which we divide responsibility for antitrust review based on industry expertise and other factors.

⁵⁸ Press Release, Fed. Trade Comm'n, FTC Launches Inquiry Into Supply Chain Disruptions (Nov. 29, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/11/ftc-launches-inquiry-supply-chain-disruptions>.

How is the FTC working with other federal agencies, including the Departments of Justice and Education, to hold the for-profit industry accountable and prevent it from further defrauding and scamming students and taxpayers?

The FTC is committed to protecting consumers in the education marketplace from a variety of illegal practices, including deceptive advertising by for-profit colleges, unlawful lead generation, and deceptive student loan debt relief scams.⁵⁹

Given the great breadth of our enforcement authority, and the agency's small size, we use our tools strategically – in part, by coordinating regularly with our federal partners, including the Departments of Education (ED) and Justice (DOJ).

We have a strong working relationship with ED and coordinate with it on enforcement and education efforts. On the enforcement side, this coordination begins at the investigative stage, through frequent meetings with our counterparts to share strategies, discuss trends in the education marketplace, and exchange information about specific enforcement targets. It can continue as one agency's investigation uncovers facts that may be of use to another, such as ED's recent action against DeVry University, which, as noted in your question, was built on the FTC's prior investigation into the school.

The FTC's Division of Consumer and Business Education has worked with ED to craft messaging to educate federal student loan borrowers who attended for-profit schools about their loan discharge options. Just last month, we worked with ED's Office of Federal Student Aid to draft a Consumer Alert about the proposed *Sweet* settlement.⁶⁰ The alert referenced the list of for-profit schools associated with the settlement and urged borrowers to check their eligibility for loan discharge through ED's Borrower Defense to Repayment program.

The FTC is also reaching out to over 300,000 federal student loan borrowers who received refund checks from FTC's own student-loan related cases against University of Phoenix, DeVry, and the operators of American InterContinental University and Colorado Technical University. This outreach aims to ensure these borrowers are aware of the *Sweet* settlement and their eligibility for the multiple federal student loan discharge programs, all as recompense for the shady practices of such for-profit colleges.

⁵⁹ See e.g., Press Release, Fed Trade Comm'n, Federal Trade Commission Takes Action Against For-Profit Medical School for Using Deceptive Marketing to Lure Students (Apr. 25, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/04/federal-trade-commission-takes-action-against-profit-medical-school-using-deceptive-marketing-lure>; Press Release, Fed Trade Comm'n, FTC Takes Action against the Operators of Copycat Military Websites (Sept. 6, 2018), <https://www.ftc.gov/news-events/news/press-releases/2018/09/ftc-takes-action-against-operators-copycat-military-websites>; Press Release, Fed Trade Comm'n, Operators of Comparison Shopping Website Agree to Settle FTC Charges Alleging Deceptive Rankings of Financial Products and Fake Reviews (Feb. 3, 2020), <https://www.ftc.gov/news-events/news/press-releases/2020/02/operators-comparison-shopping-website-agree-settle-ftc-charges-alleging-deceptive-rankings-financial>; Press Release, Fed Trade Comm'n, Student Loan Debt Relief Companies Agree to Settle FTC Charges They Falsely Promised to Lower or Eliminate Consumers' Student Loans (Mar. 30, 2020), <https://www.ftc.gov/news-events/news/press-releases/2020/03/student-loan-debt-relief-companies-agree-settle-ftc-charges-they-falsely-promised-lower-or-eliminate>.

⁶⁰ See FTC Consumer Alert, GOT STUDENT LOANS? SPOT SCAMS RELATED TO THE SWEET LAWSUIT (Sept. 16, 2022), <https://consumer.ftc.gov/consumer-alerts/2022/09/got-student-loans-spot-scams-related-sweet-lawsuit>.

We also work with DOJ to combat illegal practices in the education marketplace, including through our Criminal Liaison Unit, which helps federal prosecutors build criminal fraud cases. For example, following the FTC's action against Brandon Frere for operating a student loan debt relief scam, criminal authorities brought an action against him resulting in a prison sentence of 42 months.⁶¹ In addition, in accordance with the FTC Act, whenever we seek civil penalties for violations of certain statutes and rules, we must refer the matter to DOJ. This process entails ongoing communication and collaboration between the agencies before and during the referral process.

The FTC will continue to harness its relationships with our federal and state law enforcement partners to protect consumers in the education marketplace. Where appropriate we will continue to take action against misconduct.

⁶¹ See Press Release, U.S. Dep't of Justice, U.S. Attorney's Office, Northern District of California, Sonoma County CEO Sentenced To Three And A Half Years In Prison On Charges Stemming From Multi-Million-Dollar Student Loan Repayment Services Scam (July 27, 2020), <https://www.justice.gov/usao-ndca/pr/sonoma-county-ceo-sentenced-three-and-half-years-prison-charges-stemming-multi-million>.

Senator Chuck Grassley
Ranking Member, Senate Judiciary Committee
Written Questions for Lina Khan
Chair of the Federal Trade Commission
September 27, 2022

1. What are the most pervasive problems you've seen in the health care and drug competition area?

I appreciate your leadership on these issues and your work with the FTC over many years on legislation to address pay for delay practices and drug companies' abuse of citizen petitions. In addition to those issues, below I identify other areas of FTC concern in healthcare and pharmaceutical markets.

As you know, the FTC investigates mergers and allegations of anticompetitive conduct by a wide range of businesses in the healthcare industry, including hospitals, pharmaceuticals (brand and generic), biologics and biosimilars, medical devices, consumer health products, life sciences products, pharmacy benefit managers, and dialysis.⁶² Because each of these areas involves unique market participants, regulatory overlays, and competitive dynamics, it is difficult to measure or quantify which types of competitive issues are the most pervasive. However, in the course of investigating mergers and conduct cases and pursuing law-enforcement actions in these industries, the FTC has repeatedly learned about or encountered the following competitive concerns:

- **Mergers and Conduct Impacting Innovation:** Competitive healthcare markets are driven by the incentive to innovate—to research and develop new and revolutionary treatments. Mergers and other anticompetitive conduct that reduce drug research and development can diminish the innovation competition that fuels scientific progress. When multiple companies are racing to develop new technology, that innovation race in and of itself produces tangible benefits that may be at risk from a merger. The FTC has alleged harm to innovation in a number of different healthcare cases recently, including complaints challenging the tie-ups of Illumina/PacBio (which was abandoned) and Illumina/Grail (which is pending in litigation).
- **Vertical Integration:** Numerous healthcare and drug-related industries, such as pharmaceutical distribution, involve complex supply chains and significant levels of vertical integration by market participants. A vertical merger or other vertical agreements can substantially lessen competition and result in harm by providing the parties to the merger or other agreement with (or increasing their) ability and incentive to foreclose or otherwise disadvantage rivals. Merger investigations involving vertical issues are often more complex and resource intensive than investigations of horizontal theories of harm.

⁶² For a list and description of the FTC's antitrust actions in the healthcare and pharmaceutical industries, see https://www.ftc.gov/system/files/ftc_gov/pdf/2022.07.12OverviewHealthcarefinalupdated.pdf and https://www.ftc.gov/system/files/ftc_gov/pdf/2022.07.12OverviewPharmafinalupdated.pdf, respectively.

- **Pharmacy Benefit Managers (PBMs):** You have long brought concerns about PBMs to the FTC’s attention, and we have also received complaints about PBM practices from patients and professionals across the healthcare system. Those who own competing pharmacies—especially independent and community pharmacies—have complained that PBMs impose unfair fees and claw backs, impose byzantine contracts that often reimburse pharmacies less than their costs of acquisition, and steer patients to PBM-owned pharmacies. PBMs have also been accused of harming patients by extracting rebates and fees in exchange for refusing to cover generic and biosimilar drug products, ultimately raising the price that consumers pay for medicines.
- **Consolidation via Non-Reportable Transactions:** Many healthcare and drug related markets have seen significant numbers of non-HSR reportable acquisitions, which frustrates the FTC’s ability to timely and effectively investigate and take enforcement action if necessary. For example, during the last three decades, the share of independent dialysis facilities has shrunk drastically, and two national chains now own the majority of dialysis facilities and earn a substantial portion of the industry’s revenue, with most acquisitions occurring below the HSR thresholds. Similarly, patterns of “stealth consolidation” have been observed in pharmaceutical and hospital markets. We have taken steps to address these concerns when possible.⁶³
- **Hospital Mergers:** The FTC has been highly active over the last two years in challenging healthcare provider mergers. Since the fall of 2020, the FTC has filed complaints challenging five hospital mergers. The parties abandoned four of those mergers soon after the Commission voted to sue. In the fifth case, the FTC successfully litigated the case, prevailing in a hearing in the District of New Jersey and on appeal at the Third Circuit. Parties abandoned an additional hospital merger after facing a likely FTC complaint. Despite this success, however, there continues to be a significant amount of merger activity among healthcare providers.

In addition to mergers between directly competing hospitals discussed above, other types of transactions involving combinations of healthcare providers may also raise competition concerns. Examples include mergers involving large, multi-regional systems that operate at different places along the continuum of care or at different levels of the healthcare supply chain. These large healthcare systems often also serve patients in a variety of geographic areas, and thus a variety of competitive landscapes. Mergers of this

⁶³ For example, we recently imposed limits on future mergers by DaVita, Inc., a dialysis service provider with a history of fueling consolidation, requiring that the company obtain the FTC’s approval before acquiring any new ownership interest in a dialysis clinic in Utah for a period of ten years. Press Release, Fed. Trade Comm’n, FTC Imposes Strict Limits on DaVita, Inc.’s Future Mergers Following Proposed Acquisition of Utah Dialysis Clinics (Oct. 25, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-imposes-strict-limits-davita-incs-future-mergers-following-proposed-acquisition-utah-dialysis>.

complexity are highly resource-intensive to investigate, and the competitive effects can be difficult to explain to a court.

Additionally, although FTC staff routinely and productively coordinates with the antitrust staffs of state attorneys general in healthcare provider merger investigations,⁶⁴ the tremendous local political influence often wielded by large healthcare systems can be an impediment to effective enforcement of the antitrust laws. The most direct result of this influence are certificates of public advantage (COPA), which can confer antitrust immunity on a hospital merger if certain state agencies approve (typically the state department of health). In August, the FTC issued a policy paper highlighting the pitfalls of using COPAs, detailing research showing that these COPAs are often detrimental for patient costs, patient care, and healthcare worker wages.⁶⁵

Is there any legislation you'd like to see enacted that would help you on these issues?

Legislation that would most significantly impact the FTC's enforcement efforts to stop anticompetitive conduct in healthcare markets would be to amend Section 13(b) of the FTC Act in two important ways. First, restoring the FTC's authority to seek equitable monetary remedies on behalf of American consumers would be highly beneficial. The ability to seek equitable monetary relief is critical to the FTC's efforts to combat unlawful conduct by pharmaceutical companies that result in high drug prices for patients, and we had used this authority in the past.⁶⁶ Second, it would be helpful to clarify that FTC actions in federal court are not limited to addressing conduct that is ongoing or about to recur, but also past conduct. Two recent court decisions have ruled that the FTC cannot use Section 13(b) in cases to address past conduct, even when such conduct could recur.⁶⁷ These rulings have unnecessarily restricted the FTC's ability to address unfair methods of competition and may allow violators to avoid FTC enforcement by simply stopping their unlawful conduct once they learn about an FTC investigation. Such a gaping loophole allows violators to easily escape consequences for their illegal conduct and hurts consumers.

2. Can you commit that the FTC will complete its 6(b) study on PBMs within one year?

We recognize that the agency's study of PBMs is of great interest to a number of parties. High prescription drug costs affect virtually every American, with particularly significant impacts on the most vulnerable. While the agency cannot commit to a particular timetable for

⁶⁴ Several state attorneys general have joined recent FTC challenges to hospital mergers, including Pennsylvania, Rhode Island, and Tennessee.

⁶⁵ Press Release, Fed. Trade Comm'n, FTC Policy Paper Warns About Pitfalls of COPA Agreements for Patient Care and Healthcare Workers (Aug. 15, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/08/ftc-policy-paper-warns-about-pitfalls-copa-agreements-patient-care-healthcare-workers>.

⁶⁶ See, e.g., Press Release, Fed. Trade Comm'n, FTC Settlement of Cephalon Pay for Delay Case Ensures \$1.2 Billion in Ill Gotten Gains Relinquished; Refunds Will Go To Purchasers Affected By Anticompetitive Tactic (May 28, 2015), <https://www.ftc.gov/news-events/news/press-releases/2015/05/ftc-settlement-cephalon-pay-delay-case-ensures-12-billion-ill-gotten-gains-relinquished-refunds-will>; Press Release, Fed. Trade Comm'n, Mallinckrodt Will Pay \$100 Million to Settle FTC, State Charges It Illegally Maintained its Monopoly of Specialty Drug Used to Treat Infants (Jan. 18, 2017), <https://www.ftc.gov/news-events/news/press-releases/2017/01/mallinckrodt-will-pay-100-million-settle-ftc-statecharges-it-illegally-maintained-its-monopoly>.

⁶⁷ See *FTC v. AbbVie Inc.*, 976 F.3d 327 (3d Cir. 2020); *FTC v. Shire ViroPharma, Inc.*, 917 F.3d 147 (3d Cir. 2019).

this important work, we take seriously the need to be thorough, accurate and as timely as our resources permit in our assessment of these issues, which are of such great importance to all Americans.

3. I worked closely with the FTC and Senators Leahy, Lee and Klobuchar to get the CREATES Act over the finish line a couple years ago. Could you tell us whether the CREATES legislation has produced any benefits so far?

The CREATES Act was signed into law in December 2019. While the FTC has not studied this issue directly, I note that third-party evidence suggests that the law is working as intended. For example, in what is believed to be the first lawsuit brought under the CREATES Act, generic manufacturer Teva successfully acquired drug samples from the brand company within months of filing a complaint. The *Pink Sheet*, a publication that follows the pharmaceutical industry, noted that “[t]he quick resolution of the complaint illustrates the success of the legislation in halting the drug supply dispute.”⁶⁸ Similarly, the Washington Center for Equitable Growth, in a report on the CREATES Act, found that the law’s effect “has been immediate,” and hails the legislation as an “early success.”⁶⁹ Finally, since the passage of CREATES, the FDA has not reported any complaints to the FTC from generic drug companies seeking brand samples. Indeed, in its *2021 Annual Report*, the FDA’s Office of Generic Drugs reports that it “issued 21 Covered Product Authorization Letters for generic drug developers to obtain samples of brand products that they needed to support their ANDAs.”⁷⁰

4. In your opinion, are the current laws on the books adequate or inadequate to deal with the competition issues we’re seeing in the tech industry?

I applaud your leadership and efforts by you and others in Congress to address competition issues raised by dominant digital platforms. This includes S. 2992 that you are leading along with Senator Klobuchar.

Recognizing that business tactics often shift with new technologies, Congress gave the FTC tools to keep pace with market trends and adjust its enforcement accordingly. And the FTC is grappling daily with key questions about how to update our tools to detect, analyze, and remedy unlawful conduct in digital markets. Major challenges, however, remain, and there is much work to be done.

Consistent with that, I welcome efforts by Congress to combat the new threats posed by dominant digital platforms and the heavy cost of inaction, after two decades during which we witnessed an open and dynamic internet morph into a set of fiefdoms controlled by a small number of digital giants. While the road ahead will be long, I am heartened by the remarkable

⁶⁸ Brenda Sandburg, *Amicus’ Acquiescence to Teva’s Drug Supply Request Reflects Power of CREATES Act*, PINK SHEET (Sept. 7, 2021), <https://pink.pharmaintelligence.informa.com/PS144906/Amicus-Acquiescence-To-Tevas-Drug-Supply-Request-Reflects-Power-Of-CREATES-Act>.

⁶⁹ Michael Kades, *The CREATES Act Shows Legislation Can Stop Anticompetitive Pharmaceutical Industry Practices*, WASH. CTR. FOR EQUITABLE GROWTH, (May 27, 2021), <https://equitablegrowth.org/the-creates-act-shows-legislation-can-stop-anticompetitive-pharmaceutical-industry-practices/>.

⁷⁰ U.S. FOOD & DRUG ADMIN., OFFICE OF GENERIC DRUGS, 2021 ANNUAL REPORT: ENSURING HIGH-QUALITY, AFFORDABLE GENERIC DRUGS ARE AVAILABLE TO THE AMERICAN PUBLIC 27 (Feb. 2022), <https://www.fda.gov/media/156066/download>.

degree of agreement we now see among lawmakers, who recognize the critical stakes of fighting monopoly power in the digital age, and I look forward to working closely with lawmakers to achieve our shared mission.

5. Hospitals and nursing homes are facing workforce challenges. To address gaps in workers, health care providers have recently utilized temporary traveling health care worker staffing agencies. Some Iowa providers have reported to me that these staffing agencies have driven up costs for providers and there is a lack of transparency. Is the FTC aware of price gouging by staffing agencies and will the FTC be taking any action?

Leaders throughout the healthcare industry have raised concerns about nursing shortages for years.⁷¹ These shortages reportedly have many causes, and the problem has been greatly exacerbated by the Covid-19 pandemic.⁷² In short, there does not appear to be a sufficient supply of nurses to meet current demand, whether in the United States or globally.⁷³

While the FTC does not have any authorities that can directly address the nursing shortages problem, the agency will investigate and, if warranted, prosecute unfair methods of competition or unfair or deceptive acts or practices by anyone seeking to exploit or take unfair advantage of the nursing shortage problem. For example, Commissioner Slaughter and I issued a statement in connection with the Commission's successful challenge to a proposed hospital merger in Rhode Island where we explained that we would have supported including allegations of competitive harm to the labor market as a harmful effect of the merger.⁷⁴

I have directed FTC staff to follow up with your office regarding these reports from Iowa healthcare providers.

6. The Federal Trade Commission published a NPRM related to "Motor Vehicle Dealers Trade Regulation Rule" in the Federal Register on July 13, 2022. The FTC assesses this rule will impose a regulatory cost of \$1.4 billion on U.S. auto dealers, a majority of which are defined by the Small Business Administration as small businesses. To me this seems like a significant economic impact on these small businesses:

- a. What data did the FTC rely on to determine that this proposed rule will not have a significant economic impact on small entities? Please provide a copy of any specific data or a link to where it is publicly published.**

⁷¹ See, e.g., Gretchen Berlin et al., *Assessing the Lingering Impact of COVID-19 on the Nursing Workforce*, MCKINSEY & COMPANY (May 11, 2022), <https://www.mckinsey.com/industries/healthcare-systems-and-services/our-insights/assessing-the-lingering-impact-of-covid-19-on-the-nursing-workforce>.

⁷² See, e.g., *id.*

⁷³ INTERNATIONAL COUNCIL OF NURSES, Policy Brief: The Global Nursing Shortage and Nurse Retention, https://www.icn.ch/sites/default/files/inline-files/ICN%20Policy%20Brief_Nurse%20Shortage%20and%20Retention_0.pdf.

⁷⁴ Concurring Statement of Commissioner Rebecca Kelly Slaughter and Chair Lina M. Khan Regarding FTC and State of Rhode Island v. Lifespan Corporation and Care New England Health System (Feb. 17, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/public_statement_of_commr_slaughter_chair_khan_re_lifespan-cne_redacted.pdf.

In its initial Regulatory Flexibility Act analysis, the Commission found that the proposed rule would not have a “significant economic impact” on a substantial number of small entities, even though it would “affect a substantial number of small entities.”⁷⁵

The FTC relied on a variety of data to estimate labor and other capital costs that may be incurred by covered entities complying with the proposed rule. For example, based on publicly available data regarding labor costs for managers, programmers, and administrators, the NPRM estimates how much time it would take to create paper and online systems to comply with the proposal, and how much time it will take to update the systems regularly, across all covered entities for ten years. Similarly, the NPRM uses publicly available data regarding hourly wage rates to calculate how much time consumers could save if they did not visit dealerships based on advertisements that offered terms that were not truly available.

Data relied upon by the Commission includes:

- U.S. Census Bureau, All Sectors: County Business Patterns, including ZIP Code Business Patterns, by Legal Form of Organization and Employment Size Class for the U.S., States, and Selected Geographies: 2019, <https://data.census.gov/cedsci/table?q=CBP2019.CB1900CBP&n=441111%3A44112&tid=CBP2019.CB1900CBP&hidePreview=true&nkd=EMPSZES~001,LFO~001>.
- Bureau of Lab. Stats., May 2020 National Occupational Employment and Wage Estimates, United States, https://www.bls.gov/oes/2020/may/oes_nat.htm.
- U.S. Dep’t of Trans., Bureau of Trans. Stats., New and Used Passenger Car and Light Truck Sales and Leases, <https://www.bts.gov/content/new-and-used-passenger-car-sales-and-leases-thousands-vehicles>.
- Melinda Zabritski, Experian Info. Solutions, Inc., State of the Automotive Finance Market Q4 2020 at 5, <https://www.experian.com/content/dam/marketing/na/automotive/quarterly-webinars/credit-trends/2020-quarterly-trends/v2-2020-q4-state-automotive-market.pdf>.
- Nat’l Auto. Dealers Ass’n, Average Dealership Profile at 1 (Aug. 2021), <https://www.nada.org/media/4129/download?inline>.
- Nat’l Consumer Law Ctr., Auto Add-ons Add Up: How Dealer Discretion Drives Excessive, Inconsistent, and Discriminatory Pricing 9 (Oct. 11, 2017), https://www.nclc.org/images/pdf/car_sales/report-auto-add-on.pdf.
- Fed. Trade Comm’n, Agency Information Collection Activities; Proposed Collection; Comment Request; Extension, 84 Fed. Reg. 38979, 38981 (Aug. 8, 2019).

⁷⁵ See Fed. Trade Comm’n, Notice of Proposed Rulemaking, Motor Vehicle Dealers Trade Regulation Rule, 87 Fed. Reg. 42012, 42035-36 (July 13, 2022), <https://www.federalregister.gov/documents/2022/07/13/2022-14214/motor-vehicle-dealers-trade-regulation-rule>.

- U.S. Small Business Admin. Table of Small Bus. Size Standards Matched to North American Indus. Classification System Codes (effective Aug. 19, 2019), https://www.sba.gov/sites/default/files/2022-05/Table%20of%20Size%20Standards_Effective%20May%202022_Final.pdf.
- Cox Automotive, 2020 Cox Automotive Car Buyer Journey 5–6 (2020), <https://b2b.autotrader.com/app/uploads/2020-Car-Buyer-Journey-Study.pdf>.
- Daniel S. Hamermesh, What’s to Know About Time Use?, 30 J. Econ. Survs. 198, 203 (2016).
- Consumer Action, Your opinion wanted: Paper vs. electronic bills, statements and other communications (Winter 2018-2019), https://www.consumer-action.org/downloads/Consumer_Action_Paper_v_electronic_survey.pdf.

The analysis and data relied upon for these calculations and other potential costs and savings are described in Section XII of the NPRM, available at <https://www.federalregister.gov/documents/2022/07/13/2022-14214/motor-vehicle-dealers-trade-regulation-rule>. This analysis generated an estimated cost of \$1.36 billion for all covered entities over ten years, and a savings of \$31 billion, for a net savings of \$29.7 billion. Broken down by year and by dealership, the proposed rule could cost the average dealership an estimated \$2,925 annually. The NPRM also includes several questions that ask about potential economic burdens or impact on small businesses. The FTC is carefully reviewing all comments filed in response to the NPRM, including those related to costs and benefits of the proposed rule, and it will evaluate all data submitted before making its final analysis required under the Regulatory Flexibility Act.

b. What groups or individuals, if any, did FTC staff engage with or make aware of the propose rule with?

While the FTC generally cannot discuss a non-public matter prior to its release, FTC staff engages regularly on a variety of issues, including auto financing, with other federal and state agencies, industry trade groups, and other stakeholders. For example, in 2011, the FTC issued a Federal Register Notice stating that the agency was conducting roundtables and seeking public comment on consumer protection issues in connection with motor vehicle sales and leasing.

Subsequently, the FTC hosted three roundtables with other agencies, industry groups such as the National Automobile Dealers Association, the National Independent Automobile Dealers Association, the Maryland Automobile Dealers Association, and the National Automotive Finance Association, individual dealerships, and other stakeholders participating. At these roundtables, stakeholders discussed a wide variety of consumer protection issues, including add-ons, deceptive pricing, spot delivery, privacy concerns, and fair lending; military consumers’ experiences in buying and financing motor vehicles; and possible next steps. Since then, in addition to bringing scores of auto finance actions, the FTC has held and participated in workshops discussing auto finance issues, participated in industry workshops and meetings, and met with stakeholders such as industry groups regularly.

7. Earlier this year I wrote to you expressing concerns about the implementation of the Horse Racing Integrity Act and its administration by the Horseracing Integrity and Safety Authority. Thank you for your prompt and detailed response.
- a. In your response, you said that the FTC does not have oversight of the Authority or the ability to ensure compliance with the statute. How would you describe the structure of the relationship between the Authority and the FTC.
 - b. Does the FTC have career staff with expertise and experience in horseracing industry to review proposed rules from the Authority? Please describe how the FTC evaluates rules proposed by the Authority, the individuals responsible for reviewing proposed rules by the Authority, and their experience and expertise with horseracing.
 - c. What records, in any form, were made of the Authority's promulgation of all current rules that have been approved by the FTC? Are these records available to the public? If so, please provide a link to these records. If not, please provide me with a copy of all records.
 - d. HISA recently rescinded some rules that were previously promulgated by the FTC. For example, according to public reports HISA considers its rule on the 4mm toe grab as a mistake and additionally that the agency's representatives mistook a low-toe front shoe for a hind shoe while writing the regulation. This seems like a significant error for supposed subject matter experts. What responsibility did the FTC have to prevent such an error from happening?
 - e. In your response to my letter you indicated you need more time to review proposed rules. Would extending the time FTC has to review rules promulgated by the Authority help ensure no more mistakes are made? You specifically noted how the short time to review rules affects the FTC's ability to consider comments. How long does the FTC need to effectively and fully review proposed rules? Do you think that extending the time the FTC has to review rules would better enable the FTC to consider public comments and prevent mistakes such as the one made with respect to toe grabs?
 - f. Do you agree that HISA has the authority to unilaterally delay enforcement dates that have been promulgated through rulemaking? Why isn't subsequent rulemaking subject to FTC approval required?
 - g. The FTC states "The Thoroughbred Horsemen raise many substantive objections to the proposed rule, but these objections sound in policy differences and none of the rules on which it commented are inconsistent with the Act." (pg. 2*). The FTC also states: "No commenter identified a provision of the Act that is inconsistent with any provision of proposed Rule 2120 et seq., even as many advanced policy arguments for a different composition of the Racetrack Safety and Welfare Committee." (pg. 16*). Finally, the Commission states: "Commenters did not address the Horseshoe rule's consistency with the Act.

Rather, the comments challenge certain details in the Authority's choice of permitted horseshoes, but these are essentially policy disagreements." (pg. 43*). Does the FTC have the authority to exercise any independent policy judgement?

- h. The Authority, in response to my letter sent to FTC and the Authority, stated that the Authority has the legal authority to promulgate rules after the deadline imposed in the statute because HISA did not impose a penalty for missing the deadline. Do you agree?**
- i. The Authority is controlled by a Board of Directors. When and how were these Directors selected? Are any of the directors appointed by the President or otherwise accountable to the general public? Please provide specific dates for each event in the process of selecting the Directors as well as any and all communication related to selecting the Directors.**

I am unable to comment further about the FTC's implementation of the Horseracing Integrity and Safety Act because of pending litigation. Please refer to the FTC's filings in the following cases: *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, --- F. Supp. 3d ---, 2022 WL 982464 (N.D. Tex. Mar. 31, 2022), slip op., No. 22-10387 (5th Cir. Nov. 18, 2022); *Louisiana v. Horseracing Integrity & Safety Auth., Inc.*, --- F. Supp. 3d ---, 2022 WL 2960031 (W.D. La. July 26, 2022), *appeal pending and stayed in part* by No. 22-30458 (5th Cir. Aug. 8, 2022); *Oklahoma v. United States*, No. 21-cv-104, 2022 WL 1913419 (E.D. Ky. June 3, 2022), *appeal pending* No. 22-5487 (6th Cir.), and *Gulf Coast Racing LLC v. Horseracing Integrity & Safety Auth., Inc.*, No. 22-CV-00146 (N.D. Tex., filed July 29, 2022).

Section 18 of the FTC Act allows the FTC to prescribe rules which define with specificity acts or practices which are unfair or deceptive acts or practices affecting commerce. The FTC Act defines a practice as unfair if the injury it causes is substantial, without offsetting benefits, and one that consumers cannot reasonably avoid.

- j. However, the FTC recently launched a so-called "commercial surveillance" Advanced Notice of Proposed Rulemaking that is not specific. The questions cover a broad range of topics that seek anecdotal input instead of specific evidence of the alleged harms.**

The ANPR is seeking specific evidence as to harm and as to the other issues on which comment is requested.⁷⁶

⁷⁶ See, e.g., 87 Fed. Reg. 51273, at 51281 ("Given the significant interest this proceeding is likely to generate, and in order to facilitate an efficient review of submissions, the Commission encourages but does not require commenters to (1) submit a short Executive Summary of no more than three single-spaced pages at the beginning of all comments, (2) provide supporting material, including empirical data, findings, and analysis in published reports or studies by established news organizations and research institutions, (3) consistent with the questions below, describe the relative benefits and costs of their recommended approach, (4) refer to the numbered question(s) to which the comment is addressed, and (5) tie their recommendations to specific commercial surveillance and lax data security practices").

k. What are the specific acts or practices that the FTC alleges are unfair or deceptive?

The ANPR is designed to solicit public comment from all sources as to the issues raised, including as to the specific acts or practices that could be the subject of a rule. The ANPR provides examples of the types of practices that the Commission has challenged as deceptive or unfair in the past in enforcement actions or in rulemakings, including cases involving the sharing of health-related data with third parties, the collection and sharing of sensitive television viewing data for targeted advertising, and the failure to implement reasonable security measures to protect sensitive personal data such as Social Security numbers.⁷⁷ If the Commission decides to propose a rule or rules in this rulemaking process, the Commission would identify in the notice of proposed rulemaking the specific types of acts or practices that the proposed rule would cover, and the proposed rule would be placed on the public record seeking comments on the specific requirements of the proposed rule.

l. Did the FTC identify any benefits to the practice in question, if so, what are they? What evidence led the FTC to conclude that the benefits don't offset the harm?

As noted above, through the ANPR, the Commission is seeking public comment on the costs and benefits of commercial surveillance practices.⁷⁸ The Commission will consider the public comments in assessing the costs and benefits of particular practices.

m. The ANPR raises questions about numerous industries including healthcare, children, and gender discrimination. Please explain what each of the questions the FTC seeks input on has to do with "commercial surveillance."

The ANPR raises questions about the impact of pervasive surveillance of individuals on the Internet, driven by business models that involve the collection, sharing, and retention of massive amounts of consumer data. The ANPR seeks information from the public about consumer issues arising from this type of surveillance, both the benefits and the harms. The ANPR notes that consumer harm can be dependent on the context, including the specific industry at issue. Taking healthcare as an example, "harms arising from data security breaches in finance or healthcare may be different from those concerning discriminatory advertising on social media which may be different from those involving education technology."⁷⁹ Harms from commercial use of health information have driven cases such as Flo Health.⁸⁰ In that case, the Commission alleged that Flo Health violated Section 5 of the FTC Act by sharing consumer health

⁷⁷ See, e.g., 87 Fed. Reg. at 51278-80.

⁷⁸ See, e.g., 87 Fed. Reg. at 51281 ("the Commission invites public comment on (a) the nature and prevalence of harmful commercial surveillance and lax data security practices, (b) the balance of costs and countervailing benefits of such practices for consumers and competition, as well as the costs and benefits of any given potential trade regulation rule, and (c) proposals for protecting consumers from harmful and prevalent commercial surveillance and lax data security practices"); *id.* (asking commenters to "describe the relative benefits and costs of their recommended approach").

⁷⁹ 87 Fed. Reg. at 51281.

⁸⁰ *In re Flo Health, Inc.*, FTC File No. 1923133 (2021), <https://www.ftc.gov/legal-library/browse/cases-proceedings/192-3133-flo-health-inc>.

information with data analytics providers, despite promising consumers that it would keep the data private.

- n. To meet the requirements of Section 18 of the FTC Act, an ANPR must identify possible alternatives to regulation. Can you please explain how the FTC complied with the requirement to identify alternatives to rulemaking? What alternatives were considered?**

Under Section 18 of the FTC Act, before proposing a rule, the Commission begins with an advance notice of proposed rulemaking (ANPR) that must: (1) “contain a brief description of the area of inquiry under consideration, the objectives which the Commission seeks to achieve, and possible regulatory alternatives under consideration by the Commission”; and (2) “invite the response of interested parties with respect to such proposed rulemaking, including any suggestions or alternative methods for achieving such objectives.”⁸¹ The commercial surveillance ANPR complies with this requirement. For example, the opening textual summary of the ANPR states: “Specifically, the Commission invites comment on whether it should implement new trade regulation rules *or other regulatory alternatives* concerning the ways in which companies collect, aggregate, protect, use, analyze, and retain consumer data, as well as transfer, share, sell, or otherwise monetize that data in ways that are unfair or deceptive.”⁸² Possible regulatory alternatives are discussed in Item IV of the ANPR.⁸³ Finally, not proposing a regulation is always an alternative to regulation. As the process remains underway, the Commission has not decided what, if any, rulemaking might be pursued at this point.

⁸¹ 15 U.S.C. § 57a(b)(2)(A)(i)–(ii).

⁸² 87 Fed. Reg. at 51273 (emphasis added).

⁸³ See *id.* at 51281 & n.127 (citing section 18 and directing readers to Item IV, where “this ANPR touches on a variety of potential regulatory interventions, including, among others, restrictions on certain practices in certain industries, disclosure, and notice requirements”).

Questions for Lina Khan
Submitted by Senator Patrick Leahy
September 27, 2022

- 1. The antitrust landscape is changing – the consumer welfare standard, which has been the prevalent legal theory, is being replaced by market concentration and size considerations. This approach makes sense in the tech age, where many platforms consumers use are free or much cheaper than smaller startup alternatives. The FTC must evolve with the times and look at antitrust through this new lens to ensure a truly free marketplace and fair competition.**
 - a. Ms. Khan, is the FTC looking at the antitrust landscape differently under the lens of market concentration?**
 - b. Is this different approach to competition policy something your Department has adopted? If so, what challenges have you encountered using this approach?**
 - c. How are the FTC and DOJ working together to sync your regulations and litigation strategies in the changing antitrust landscape? How are you working to standardize your antitrust policies between your agencies in general?**

For over a century, Congress has codified a policy in favor of competition over consolidation. In 1890, as trusts captured the sugar, steel, oil, and railroad industries, lawmakers passed the Sherman Act, prohibiting, among other practices, monopolization, attempted monopolization, and conspiracies to monopolize.⁸⁴ When it became clear that this statute was failing to prevent monopolization through acquisition, Congress in 1914 passed the Clayton Act, prohibiting mergers whose effect “may be substantially to lessen competition, or to tend to create a monopoly.”⁸⁵ When businesses began exploiting loopholes in the Clayton Act, Congress once again stepped in, passing the 1950 Celler-Kefauver Antimerger Act to ensure the law captured vertical and conglomerate deals as well as acquisitions of assets.⁸⁶ With each of these efforts, Congress redoubled its commitment to open markets and free and fair competition.

The durability and public legitimacy of our antitrust regime depends on the ability of enforcers and courts to adapt, remaining faithful to these legislative mandates even as markets and business practices shift and evolve. Given indications that our markets have become increasingly concentrated over the last several decades, I believe that antitrust enforcement is long overdue for a reorientation to more effectively and efficiently prevent anticompetitive conduct and mergers. Just as we must revise our theories and models to fit new facts and

⁸⁴ Sherman Antitrust Act, 15 U.S.C. § 1 et seq. (1890); *see also N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958) (“The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.”).

⁸⁵ Clayton Act, 15 U.S.C. § 12 et seq. (1914). Congress in 1914 also passed the Federal Trade Commission Act, supplementing the Sherman and Clayton Acts by creating the Federal Trade Commission and assigning it with checking “unfair methods of competition.” Federal Trade Commission Act, 15 U.S.C. § 41 et seq. (1914).

⁸⁶ *See* Act of Dec. 29, 1950, Pub. L. No. 81-899, 64 Stat. 1225 (codified as amended at 15 U.S.C. § 18 (1994)).

evidence, we must ensure our merger guidance accurately reflects the realities of the modern economy and contemporary business strategies.

The FTC is an independent federal agency. While we do share jurisdiction to enforce the federal antitrust laws with the DOJ, and in some respects, our authorities overlap, in practice, the two agencies are complementary. This results, in part, from the fact that each agency has developed expertise in particular industries or markets. For example, the FTC devotes most of its resources to certain segments of the economy, including those where consumer spending is high: healthcare, pharmaceuticals, professional services, food, energy, and certain high-tech industries like computer technology and Internet services. Additionally, DOJ has criminal authority while the FTC has the power to enforce the FTC Act, which includes competition authority that Congress intended to reach beyond the four corners of the Sherman and Clayton Acts.⁸⁷

In light of these complementarities, the FTC and its staff have a long history of collaborating with the DOJ on competition issues, and this engagement continues today. These efforts include regular interaction with each other regarding approaches on issues of mutual interest. Among recent examples, the agencies have held joint public workshops to discuss contemporary antitrust topics, and to examine how to continue to improve antitrust enforcement going forward.⁸⁸ We have also been closely engaged with DOJ to revise the merger guidelines, where we plan to ensure that our tools and frameworks more directly account for modern market realities.

⁸⁷ Press Release, Fed. Trade Comm'n, FTC Restores Rigorous Enforcement of Law Banning Unfair Methods of Competition (Nov. 10, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/11/ftc-restores-rigorous-enforcement-law-banning-unfair-methods-competition>.

⁸⁸ See, e.g., Fed. Trade Comm'n, The Future of Pharmaceuticals: Examining the Analysis of Pharmaceutical Mergers (June 14-15, 2022), <https://www.ftc.gov/news-events/events/2022/06/future-pharmaceuticals-examining-analysis-pharmaceutical-mergers>; Fed. Trade Comm'n, Making Competition Work: Promoting Competition in Labor Markets (Dec. 6-7, 2021), <https://www.ftc.gov/news-events/events/2021/12/making-competition-work-promoting-competition-labor-markets>.

Senator Mike Lee
Questions for the Record
Oversight of the Antitrust Enforcement Agencies
September 20, 2022

CHAIRWOMAN KHAN

- 1. When we spoke during your confirmation hearing about potential recusals, you committed to me that you would seek the guidance of the designated agency ethics official. Have you sought that guidance in any matter?**

- a. If so, did you follow it in each case?**

I take my ethics obligations seriously and consult with the Designated Agency Ethics Official (DAEO) whenever appropriate.

- 2. You recently announced that the FTC will be issuing a new guidance on the Commission’s interpretation of Section 5’s “unfair methods of competition.” As you know, the previous statement—which you rescinded last year—was issued on a bipartisan basis. Will you commit today to ensuring that the next statement is also bipartisan?**

The Commission issued new guidance on its interpretation of Section 5’s “unfair methods of competition” on November 2.⁸⁹ The statement serves as a guide to the FTC’s interpretation of the scope of its authority under Section 5. Consistent with the statutory text, structure, history, and legal precedent, the statement makes clear that Section 5 reaches beyond the Sherman and Clayton Acts. One of the goals of the statement is to assist the public, business community, antitrust practitioners, and courts by laying out the framework the FTC will use to identify business practices that constitute unfair methods of competition. While the vast majority of the agency’s enforcement and policy work is voted out on a bipartisan basis, individual commissioners decide how to cast their own votes, and there may be differences in views on specific matters, as there were in connection with the Section 5 guidance.

- a. If the new Section 5 guidance meaningfully departs from the application of the Sherman Act, how should that impact the allocation of enforcement efforts between the Antitrust Division and FTC? How will you avoid overlapping enforcement?**

Congress passed the FTC Act to prohibit “unfair methods of competition”—language that marked a clear distinction from the Sherman Act. With this text, Congress distinguished between fair and unfair methods of competition and charged the FTC with fleshing out that distinction based on expertise it developed through its unique institutional tools, such as the ability to conduct industry-wide studies. The crucial point is that lawmakers deliberately avoided

⁸⁹ Press Release, Fed. Trade Comm’n, FTC Restores Rigorous Enforcement of Law Banning Unfair Methods of Competition (Nov. 10, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/11/ftc-restores-rigorous-enforcement-law-banning-unfair-methods-competition>.

borrowing language from the Sherman Act or from judicial interpretations of it. They wanted Section 5 to apply to conduct that threatened open and competitive markets even if it did not fall within the four corners of the Sherman Act.⁹⁰

As we have done for decades, the FTC will continue to coordinate with DOJ to avoid duplicating efforts when enforcing the antitrust laws while, at the same time, taking into account differences in our authorities and expertise.

- 3. Last month I, along with seven other Republican senators, sent you a letter expressing concern about a recent FTC Inspector General report that revealed the FTC’s wide use of unpaid consultants. First, I want to thank you for responding to all of our questions and providing the information we requested. However, those responses and information only led to more concerns. For example, it turns out a large number of unpaid consultants are being used to staff the FTC’s Office of Policy Planning. Are you at all concerned that the staff members working on formulating FTC enforcement policy are concurrently being paid by outside interests—some of whom compete with companies over which the FTC has jurisdiction? In fact, instead of “unpaid consultants,” wouldn’t it be better to call them “privately funded consultants?”**
- a. I’m also concerned that so many of these unpaid consultants are still working for or are closely tied to organizations funded by left-wing activists. This runs the risk of only exacerbating partisanship at the FTC. What are you doing to ensure that your staff are providing objective advice, uncolored by political leanings and especially the financial influence of outside groups?**

Under 5 U.S.C. § 3109, federal agencies are permitted to retain consultants and experts. The work performed by the agency’s consultants and experts is consistent with all applicable statutes, regulations, and agency guidance. Like many other federal agencies, the FTC uses 5 U.S.C. § 3109 to bring on outside consultants or experts—paid, unpaid, or detailed from other agencies—to bridge gaps in areas where the agency lacks sufficient in-house expertise or to provide valuable and pertinent advice generally drawn from a high degree of broad administrative, professional, or technical knowledge or experience. For example, a significant number of the consultants and experts the FTC has retained are technologists with expertise in artificial intelligence, computing, and related subject areas. This type of expertise enables the agency to better grasp new and emerging technologies and to better ensure that our work accounts for new market realities.

The FTC’s consultants and experts appointed under 5 U.S.C. § 3109 are federal government employees (or special government employees), so they are subject to federal ethics laws and obligations.⁹¹ Accordingly, the FTC’s experts and consultants are prohibited from participating personally and substantially in particular matters that directly and predictably affect “their” financial interests, which for these purposes includes the financial interests of anyone

⁹⁰ Remarks of Chair Lina M. Khan As Prepared for Delivery, Fordham Annual Conference on International Antitrust Law & Policy (Sept. 16, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/KhanRemarksFordhamAntitrust20220916.pdf.

⁹¹ See 5 C.F.R. § 304.101.

they serve as an employee.⁹² Each of the FTC’s consultants and experts is reviewed by the FTC’s Ethics Team before onboarding to screen for and address any federal ethics concerns. More specifically, each consultant or expert is required to complete a confidential disclosure report (OGE Form 450) and, based on the disclosures, the FTC Ethics Team provides tailored guidance about potential conflicts of interest and restrictions on outside activities/non-federal employment. Moreover, like other employees, each consultant or expert attends ethics orientation once they start at the FTC. Each consultant or expert also receives annual ethics training.

In addition, as noted in 16 C.F.R. § 0.8(d), the FTC’s Office of Policy Planning (“OPP”) “assists the Commission to develop and implement long-range competition and consumer protection policy initiatives” (emphasis added). Under Reorganization Plan No. 8 of 1950, 64 Stat. 1264, the right to set the agency’s general policies is reserved for the Commission as a body. Accordingly, the experts and consultants provide advice and opinions, but do not themselves determine the FTC’s enforcement policies or other general policies. Moreover, the FTC’s consultants and experts report to managers within the FTC. All FTC managers are federal employees, as defined in 5 C.F.R. § 2641.104, and they provide oversight of the consultants’ and experts’ work.

4. If presented with the question of whether or not Congress granted the FTC rulemaking authority with respect to unfair methods of competition, do you believe that the current supreme court would uphold *National Petroleum Refiners Association v. FTC*, 482 F.2d 672 (D.C. Cir. 1973)?

- a. How would the FTC’s assertion of such authority survive challenge under the Major Question or Nondelegation doctrines?**
- b. Is it wise to expend agency resources on efforts that almost certainly to be held unconstitutional?**

In *National Petroleum Refiners Association*, the D.C. Circuit confirmed the FTC’s rulemaking authority, and the court’s reasoning continues to apply. The text of section 6(g) of the FTC Act expressly authorizes the Commission “to make rules and regulations for the purpose of carrying out” the FTC Act,⁹³ which has always had as its principal lodestar the eradication of “[u]nfair methods of competition.”⁹⁴ Accordingly, the FTC is authorized to pursue rulemaking to address unfair methods of competition in the economy.

5. You have recently made two appearances before the National Community Pharmacists Association. I applaud the FTC’s effort to review the pharmaceutical benefit management industry. However, I am concerned by reports that you have so far refused to meet with some PBMs. Do you plan on hearing from the companies you’re investigating, or only their competitors?

⁹² See 18 U.S.C. § 208.

⁹³ 15 U.S.C. § 46(g).

⁹⁴ 15 U.S.C. § 45(a).

The FTC staff conducting the PBM study are looking at a number of issues of interest to a wide variety of industry stakeholders and the public. The PBM study staff are in contact with the recipients of our 6(b) orders, including large PBMs, and I have placed no restrictions on who they can speak with or the content of those discussions.

6. Describe the nature of the Commission's efforts to organize citizen speakers at public Commission meetings, including any efforts to recruit speakers or coordinate speaker remarks.

- a. Please list every speaker whom a Commission employee recruited or encouraged to speak at a meeting.**
- b. Please list every speaker with whom a Commission employee has coordinated the speaker's remarks at a meeting.**

The FTC actively encourages people to participate in public Commission meetings and to interact with the agency more broadly. This is part of my effort to further democratize the agency, including by engaging with those who may not have been traditionally heard by the agency but are often those most directly affected by our work.

In July 2021, the Commission restored the practice of Open Commission Meetings after 20 years, and we have publicized them and encouraged participation. The FTC posts the agenda for each Open Commission Meeting on its website seven days in advance. Then, at each meeting, public speaking slots are allocated on a first-come, first-served basis, and we try to accommodate every speaker. We are proud of the diversity of views presented during the meetings.

For the identity of the speakers at Open Commission Meetings, please see the transcripts of these meetings, available on the FTC website.⁹⁵

7. The FTC recently entered into a consent decree with a growing Utah oil and gas company. Part of the agreement requires the company to seek prior approval for any future acquisition above a modest threshold. I am seriously concerned that this requirement will stifle the company's growth, the growth the Utah energy sector, and the Utah economy generally. Small companies often cannot afford to litigate against the federal government, and so they end up saddled with more onerous requirements because they have no other option—unlike their larger competitors who have the resources to fight government overreach. What is the Commission doing to ensure that its use of prior approval requirement will not unnecessarily burden small and medium businesses?

- a. For companies subject to a prior approval requirement, at what point in the acquisition process must the company seek approval from the FTC to proceed further?**

⁹⁵ Fed. Trade Comm'n, Open Meetings, <https://www.ftc.gov/news-events/events/open-meetings>.

- b. After a company subject to a prior approval requirement requests approval from the FTC, is the FTC obligated to respond? If so, by when?**
 - i. What standard will the FTC apply in evaluating such a request?**
- c. Can a company subject to a prior approval requirement appeal an unfavorable response to an approval request?**
- d. Can a company subject to a prior approval requirement petition the FTC to withdraw the prior approval requirement? If so, what standard must it meet to obtain such a withdrawal?**
- e. Will the FTC issue binding public guidance on the answers to the preceding questions so that firms subject to the agency's jurisdiction can have certainty in the conduct of their business?**

The Commission took action in the case you reference because XCL, through EnCap Investments, L.P. and EnCap Energy Capital Fund IX, L.P. (collectively, “EnCap”), sought to acquire EP Energy Corp.’s (“EP Energy”) Utah assets, which would have eliminated head-to-head competition between two of only four significant developers, producers and sellers of Uinta Basin waxy crude oil to Salt Lake City refiners.⁹⁶ XCL’s own documents revealed that it sought this deal to “try to take over . . . Utah” and stated that “. . . the Uinta is . . . largely controlled by three operators.” The Commission alleged that, if this deal had gone through, XCL would have been able to increase costs of waxy crude oil to Salt Lake City refiners, who would have been forced in turn to pass on those higher costs in the form of higher gasoline and diesel prices to Utahns. As a consequence, the Commission sought to remedy the anticompetitive effects of the proposed transaction by ordering XCL to divest EP Energy’s business and assets in Utah to Crescent Energy Company, a new competitor in that marketplace. Given the evidence in this investigation revealing XCL’s efforts to “dominate” this marketplace, the highly concentrated nature of this market, and concern that further deals in this marketplace could harm Utahns by further restricting competition for the sale of Uinta Basin waxy crude to Salt Lake City refiners, the Commission determined that XCL and EnCap would also have to gain prior approval of certain future acquisitions in this marketplace. Prior approval was warranted in this instance to ensure that any future acquisitions by XCL or EnCap do not lessen competition for the development, production or sale of waxy crude oil in Utah in violation of antitrust laws, thus protecting Utahns from anticompetitive price increases that could stifle its economic growth.⁹⁷

⁹⁶ Press Release, Fed. Trade Comm’n, FTC Requires ENCAP to Sell Off EP Energy Corp.’s Entire Utah Oil Business amid Concerns that Deal would Increase Pain at the Pump (Mar. 25, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/03/ftc-requires-encap-sell-ep-energy-corps-entire-utah-oil-business-amid-concerns-deal-would-increase>.

⁹⁷ See Press Release, Fed. Trade Comm’n, FTC to Restrict Future Acquisitions for Firms that Pursue Anticompetitive Mergers (Oct. 25, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-restrict-future-acquisitions-firms-pursue-anticompetitive-mergers>.

The Commission has a long-standing process in place to handle requests for prior approval.⁹⁸ Section 2.41(f) of the Commission’s Rules of Practice (16 C.F.R. § 2.41(f)) allows parties to petition the Commission for approval of an acquisition that is covered by the terms of an existing Commission order. That petition may be filed at any point when the company has sufficient information for the Commission to consider the potential competitive implications of the proposed acquisition. The Commission then places that petition on the public record and allows the public to provide comments for 30 days. After the Commission has considered both the petition and the comments, it will vote on whether to approve the acquisition because it is unlikely to substantially lessen competition in any market, at which time the parties may close their acquisition.

The process can move quickly while still ensuring time for a thorough FTC assessment of the competitive implications of the acquisition. For example, last year, the Commission granted a petition from a company subject to a prior approval requirement, Sartorius Stedium Biotech S.A., to acquire the chromatograph equipment business of Novasep Process SAS within three months.⁹⁹ Moreover, any respondent may challenge a denial of a petition for prior approval in federal court. Courts generally employ an “arbitrary and capricious” standard to review agency action.¹⁰⁰

There is also a process in place for parties to petition for modifications of Commission merger orders. Section 5(b) of the Federal Trade Commission Act provides that the Commission shall reopen an order to consider whether it should be modified if the respondent “makes a satisfactory showing that changed conditions of law or fact” so require.¹⁰¹ A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes either eliminate the need for the order or make continued application of it inequitable or harmful to competition.¹⁰²

Section 5(b) also provides that the Commission may reopen and modify an order when, the Commission determines that the public interest so requires, even if changed circumstances would not require reopening. Respondents are therefore invited in petitions to reopen to show

⁹⁸ See, e.g., Press Release, Fed. Trade Comm’n, FTC Approves Supervalu Inc.’s Application to Sell 2 Supermarkets Operating under the Shop ’n Save Banner in Virginia and West Virginia (Feb. 25, 2019), <https://www.ftc.gov/news-events/press-releases/2019/02/ftc-approves-supervalu-incs-application-sell-2-supermarkets>; Press Release, Fed. Trade Comm’n, FTC Approves Sycamore Partners II, L.P. Application to Sell 323 Family Dollar Stores to Dollar General (Apr. 27, 2017), <https://www.ftc.gov/news-events/press-releases/2017/04/ftc-approves-sycamore-partners-ii-lp-application-sell-323-family>.

⁹⁹ Sartorius filed its petition on October 28, 2021, and the Commission put the petition out for public comment on the same day. On February 1, 2022, the Commission approved the petition after completing its competitive assessment of the merger, and the parties were free to move ahead with their deal. Press Release, Fed. Trade Comm’n, FTC Approves Sartorius Stedium Biotech S.A.’s Petition for Prior Approval of its Acquisition of the Chromatography Equipment Business of Novasep Process SAS (Feb. 1, 2022), <https://www.ftc.gov/news-events/press-releases/2022/02/ftc-approves-sartorius-stedium-biotech-sas-petition-prior-approval-its-acquisition-chromatography>.

¹⁰⁰ See, e.g., *Dr Pepper/Seven-Up Cos. v. FTC*, 991 F.2d 859 (D.C. Cir. 1993).

¹⁰¹ 15 U.S.C. § 45(b); see also 65 Fed. Reg. 50636 (Aug. 21, 2000) (amending 16 C.F.R. § 2.51(b)).

¹⁰² S. REP. NO. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); *Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished) (“Hart Letter”). See also *United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376–77 (9th Cir. 1992).

how the public interest warrants the requested modification.¹⁰³ In the case of “public interest” requests, FTC Rule of Practice 2.51(b) requires an initial “satisfactory showing” of how modification would serve the public interest before the Commission determines whether to reopen an order.

In sum, the Commission has a robust and long-standing process in place that protects both the rights of companies that are subject to a Commission order resulting from a prior violation of a law as well as the American public.

8. Do you believe it is appropriate for the FTC to impose restrictions in a consent decree that the agency would be unable to obtain as relief from a court?

When the Commission has “reason to believe” that a law violation has occurred, the Commission may issue a complaint setting forth its charges. If the respondent elects to settle the charges, it may sign a consent agreement and agree to the entry of a final Commission order. A respondent who does not agree for any reason with the remedy sought by the agency can instead choose to litigate the matter.

9. When were you first told, officially or unofficially, by any person, that President Biden was considering appointing or intended to appoint you as Chair of the Federal Trade Commission?

a. Who told you this?

In deference to the President’s Executive Privilege, I refer this question to the White House.

10. When were you officially told that President Biden intended to appoint you as Chair of the Federal Trade Commission?

a. Who told you this?

In deference to the President’s Executive Privilege, I refer this question to the White House.

11. Do you believe that President Biden should have told the Senate that he intended to appoint you as FTC Chair at the time of your nomination? Why or why not?

In deference to the President’s Executive Privilege, I refer this question to the White House.

12. Is there such a thing as a good merger?

a. If so, what distinguishes a good merger from a bad merger?

¹⁰³ Hart Letter at 5; 16 C.F.R. § 2.51.

The FTC is tasked with reviewing a wide range of both consummated and proposed mergers and seeking to block or undo those that harm competition in violation of the Clayton Act or other applicable statutes. We are not tasked with determining whether a merger is “good” or “bad.”

13. Do you believe it is important to minimize the burdens placed on companies completing good mergers?

a. If so, what steps is FTC taking to minimize such burdens?

It is important that merger review be effective and efficient in targeting those mergers that violate the law. Merger review is a resource-intensive undertaking, and the initiatives adopted by the Commission since I have been Chair were motivated by the pressing need to streamline our process and deploy our limited resources to focus on those mergers that warrant thorough investigation.

14. Do you believe it is important to prevent the disclosure of nonpublic and confidential information at the FTC, including to the press?

a. What steps are you taking to investigate leaks to the press about nonpublic FTC investigations and confidential information?

Preventing the unlawful disclosure of FTC nonpublic and confidential information is important. Consistent with this view, I have taken a number of steps to further prevent unauthorized disclosure of nonpublic information at the FTC, including working to implement changes recommended in the OIG’s Management Advisory on Controlling and Protecting Sensitive FTC Information.¹⁰⁴ This includes several actions to address concerns regarding employee training about sensitive information and staff access to nonpublic information, including agency updates to the following:

- annual cybersecurity training and required staff agreement to protect nonpublic information and forwarding restrictions;
- Rule of Behavior on all FTC laptops and smartphones, to alert staff to treat all FTC information as nonpublic information unless otherwise authorized for release;
- annual ethics training for senior staff and their key staff advisors, to include reinforcement on the use of email forwarding restrictions and the use of nonpublic information; and
- requirements to restrict forwarding of weekly reports.

¹⁰⁴ Fed. Trade Comm’n, Office of Inspector General, Management Advisory on Controlling and Protecting Sensitive FTC Information (Sept. 29, 2021) https://www.ftc.gov/system/files/documents/reports/oig-management-advisory-controlling-protecting-sensitive-ftc-information-pdf/oig_advisory_on_sensitive_file_maintenance.pdf.

In addition, I have issued communications stressing the importance of protecting nonpublic information and reinforcing the renewed training efforts.

15. Have you, or to your knowledge has any member of your staff, used a non-FTC email account or non-FTC phone to communicate with parties outside the FTC about past, current, future, or potential matters or business before the FTC?

- a. If so, please identify the FTC employee(s) involved in the communication(s), the date(s) of the communication(s), and the subject matter discussed.**
- b. If so, what steps have been taken to ensure that these communications are being preserved pursuant to the Federal Records Act?**

I have not used non-FTC email accounts or non-FTC phones to communicate about FTC business, nor, to the best of my knowledge, have members of my staff.

16. In 2021, my office was provided a copy of an email sent by the American Economic Liberties Project, a left-wing antitrust advocacy group, to all five FTC commissioners and two senior FTC staff—Jen Howard, Chief of Staff; and Austin King, Associate General Counsel for Rulemaking. For each of the commissioners, the sender used their official @ftc.gov email address. However, for Howard and King the sender used their personal @gmail.com email addresses. The email itself was innocuous (it conveyed a letter requesting an investigation into food delivery services), but the presumably inadvertent use of personal email addresses for two senior FTC employees (likely caused by the sender's email client's auto-complete function) raised serious concerns that FTC employees may be using their personal email accounts to conduct FTC business. Such conduct would undermine the Freedom of Information Act and the Federal Records Act. In response to these concerns, I submitted a FOIA request to the FTC asking for any additional emails sent or received by Howard or King on their personal email accounts that relate to their official duties as FTC employees. After months of delay and attempts to evade its obligations under FOIA, the FTC finally claimed to have conducted a search and found no additional responsive documents. The FTC's reply to my concern that the search was not properly conducted was incredibly dismissive. I will be referring this matter to the FTC Office of the Inspector General. Will you support this investigation, and will you commit to taking any and all appropriate remedial actions in response to the IG's findings?

I am committed to responding appropriately to any OIG findings.

17. At the oversight hearing, you indicated that the FTC cooperates with the European Commission. The FTC recently refused to respond to a Freedom of Information Act request seeking communications between the FTC and the European Commission. The FTC claims that those records are exempt from disclosure on the grounds that those were essentially intra-agency communications, because the European Commission was functionally part of the FTC for purposes of those communications. Is it the position of the FTC that the European Commission is a consultant to the FTC and therefore is a neutral party not representing its own interests when cooperating or coordinating with

the United States government?

- a. **In considering potential antitrust enforcement actions, are foreign governments' interests identical to the interests of the FTC?**
- b. **Do you believe it is appropriate for the FTC to outsource its antitrust enforcement responsibilities to the European Commission?**
- c. **Did you, or to your knowledge any other past or present FTC employee, communicate with the European Commission to encourage it to open an investigation into Illumina's proposed acquisition of Grail?**

While I cannot address the specifics of any ongoing litigation, FTC competition cooperation with the European Commission is undertaken in conformity with the 1991 Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, the 1998 Agreement Between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws, and the US-EU Merger Working Group Best Practices on Cooperation in Merger Investigations.¹⁰⁵ It is standard practice that the FTC and EC cooperate in the investigation of mergers that are under review in both jurisdictions, with each agency carrying out its own investigation consistent with the applicable legal frameworks and in light of the specific markets at issue in the jurisdiction.

Through its merger cooperation, the FTC does not outsource its antitrust responsibilities, but rather seeks to identify issues of common interest, gain a better understanding of relevant facts, and—where possible—achieve consistent outcomes with cooperating agencies. Those outcomes help to promote efficient and effective enforcement for both cooperating agencies and the subjects of an investigation.

I have no knowledge of FTC employees (past or present) encouraging the European Commission to open an investigation into Illumina's proposed acquisition of Grail. The European Commission opened an investigation into the merger only after it received requests from six member states of the European Union to do so.¹⁰⁶

18. Your former colleague and American Economic Liberties Project director, Matt Stoller, described commission staff as “lazy,” and said the FTC “has been a place where you send political cronies who don’t have to do any work if they don’t want to.”¹⁰⁷ Do you agree with these remarks?

¹⁰⁵ The agreements and related best practices document are available at: <https://www.ftc.gov/policy/international/international-cooperation-agreements>.

¹⁰⁶ See Daily News, European Commission, *Mergers: Commission to Assess Proposed Acquisition of GRAIL by Illumina* (Apr. 20, 2021), https://ec.europa.eu/commission/presscorner/detail/en/mex_21_1846.

¹⁰⁷ See Kiran Stacey, *Washington vs Big Tech: Lina Khan's Battle to Transform US Antitrust*, FIN. TIMES (Aug. 10, 2021), <https://www.ft.com/content/e8a8d3d7-dba7-4389-858c-5406c31b413d>.

No, I strongly disagree with those comments. I have great respect for the skill and dedication consistently demonstrated by the FTC's talented staff in diligently advancing the agency's mission, especially in light of the many challenges the agency faces. Those challenges include an ever-increasing workload, defendants with seemingly endless resources, and legal challenges to our authority. It is a privilege to have the opportunity to work with them every day.

19. I have been alarmed by recent reports of Chinese companies buying up U.S. farmland near military bases.¹⁰⁸ What are you doing to scrutinize acquisitions by state-owned entities?

a. Do you believe that, for the purposes of assessing market share and market concentration, companies that compete against each other but which are owned or controlled by the same sovereign entity should be viewed as a single economic actor?

I appreciate your concern about these acquisitions. The FTC is charged with scrutinizing any merger that threatens to violate U.S. antitrust law, including those involving state-owned entities. Under long-standing precedent, two companies that are controlled by the same entity constitute a single actor for purposes of competition analysis.

20. The FTC recently began holding regular "open commission meetings." However, these meetings appear to be largely scripted. The Commissioners read prepared statements, and do not engage in dialogue with one another. Likewise, members of the public read prepared statements, but receive no feedback or response from the Commission. What benefit do such proceedings offer as compared to simply publishing the written remarks of Commissioners and members of the public?

a. Will you commit to allowing and facilitating interactive dialogue among FTC commissioners, and between commissioners and members of the public, at future open commission meetings?

As Chair, I have proudly participated in the Commission's open meetings, where members of the public can speak directly to Commissioners and Commissioners can respond and debate important topics before taking votes. Previously, the Commission conducted its deliberations in closed meetings and was often criticized for a lack of transparency. These open meetings are a source of information as well as accountability for the Commission. They further my goal of democratizing the agency by helping members of the public better understand the work of the Commission while also providing the public with an opportunity to bring concerns to the Commission's attention, including information that could lead to new investigations or influence ongoing ones, all without the need to retain costly counsel. I am committed to continuing to hold open meetings.

¹⁰⁸ Lars Erik Schönander and Geoffrey Cain, *China Is Buying the Farm: State-Owned Companies Have Bought Many Acres Near U.S. Military Bases. What is Beijing up to?*, WALL ST. J. (Sept. 8, 2022), <https://www.wsj.com/articles/the-chinese-are-buying-the-farm-north-dakota-hong-kong-land-food-shortage-supply-chain-usda-11662666515>.

21. What was the Commission vote to approve the testimony you submitted for this hearing?

- a. Why wasn't it bipartisan?**
- b. What steps did you take to attempt to secure support from the minority commissioners?**
- c. When was the last time the Commission submitted congressional testimony to an oversight hearing on a partisan basis?**

The vast majority of the FTC's enforcement and policy work is voted out on a bipartisan basis, and I strive to work across the Commission to achieve this. That said, the Commission vote to approve the testimony was 3 to 2. The Commissioners' reasoning for their vote is protected by deliberative process privilege, except to the extent that the agency has chosen to waive the privilege. Through the prepared testimony, the Commission sought to provide the Committee with a fulsome overview of its recent competition efforts.

The most recent instance that I am aware of where the Commission submitted congressional testimony that was not unanimous was a 2015 hearing on S. 2102, The "Standard Merger and Acquisition Reviews Through Equal Rules" Act.¹⁰⁹

22. The relative dearth of merger challenges during this administration as compared to recent years makes me worry that the FTC's focus on farfetched legal theories and particularly disfavored defendants has distracted the agency from its core mission. What are you doing to ensure anticompetitive mergers don't slip through the cracks?

I disagree with your assertion that the Commission has had a "dearth of merger challenges." In FY 2022 (October 1, 2021, to September 30, 2022), we tallied 21 merger enforcement actions, which is on par with prior fiscal year numbers: 18 (FY2021); 28 (FY2020); 21 (FY2019); 22 (FY2018); 23 (FY2017).

The relentless pace of consolidation has continued, and the Commission has many mergers currently under investigation. No one wants anticompetitive mergers to evade review or challenge, but without additional resources, we will continue to make difficult choices about how to best use the resources that Congress makes available to us.

To help capture some of these potentially problematic mergers, in October 2021, the Commission issued a new Statement on the Use of Prior Approval Provisions in Merger Orders. This statement put parties on notice that, going forward, Commission merger orders would, when warranted, contain prior approval and prior notice requirements for future acquisitions by the

¹⁰⁹ *Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015: Hearing on S. 2102 Before the S. Comm. on the Judiciary, Subcomm. on Antitrust, Competition Policy and Consumer Rights*, 114th Cong. (2015) (statement of the Fed. Trade Comm'n), https://www.ftc.gov/system/files/documents/public_statements/810871/151007smarteracttestimony.pdf.

same company.¹¹⁰ This new policy is necessary to deter unlawful mergers and acquisitions by the same company and is part of the FTC's effort to best use its scarce resources and avoid creating incentives for a company to repeatedly attempt illegal deals.¹¹¹ This is especially important in industries where firms can engage in small acquisitions or roll-up strategies that do not require premerger notification, such as dialysis clinics,¹¹² supermarkets,¹¹³ gas stations,¹¹⁴ or specialty veterinary hospitals.¹¹⁵

23. Under the Fourth Amendment to the Constitution, when a federal law enforcer wishes to search or seize the documents of a suspect, he must obtain a warrant and the warrant must particularly describe the things to be searched or seized. However, the FTC is increasingly making use of “omnibus” resolutions to authorize the use of compulsory process across a vast array of as-yet-undefined potential future investigations. How does this practice comply with the requirements of the Fourth Amendment?

a. Has the FTC endangered the validity of any investigation or litigation brought as a result of one of these omnibus resolutions?

Omnibus resolutions allow FTC staff to seek compulsory process over categories of potentially illegal conduct. Not individually authorizing compulsory process in each matter removes a time-consuming barrier to staff's pursuit of an investigation.

Use of omnibus resolutions by the Commission's Bureaus of Competition and Consumer Protection is not new. For decades, the Commission has used this tool to expeditiously and effectively initiate investigations into alleged illegal conduct. These omnibus resolutions cover wide swaths of the Commission's authorities, including, for example, enforcement under the Equal Credit Opportunity Act, the Fair Credit Reporting Act, the Fair Debt Collection Act, the Franchise Rule, the Gramm-Leach-Bliley Act, and the Truth in Lending Act—nearly all of the Commission's authorities focused on consumer finance.

¹¹⁰ See Press Release, Fed. Trade Comm'n, FTC to Restrict Future Acquisitions for Firms that Pursue Anticompetitive Mergers (Oct. 25, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-restrict-future-acquisitions-firms-pursue-anticompetitive-mergers>.

¹¹¹ See Remarks of Chair Lina M. Khan Regarding the Proposed Rescission of the 1995 Policy Statement Concerning Prior Approval and Prior Notice Provisions (July 21, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592338/lk_remarks_for_1995_rescission_-_final_-_1230pm.pdf.

¹¹² Press Release, Fed. Trade Comm'n, FTC Imposes Strict Limits on DaVita, Inc.'s Future Merger Following Proposed Acquisition of Utah Dialysis Clinics (Oct. 25, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-imposes-strict-limits-davita-incs-future-mergers-following-proposed-acquisition-utah-dialysis>.

¹¹³ Press Release, Fed. Trade Comm'n, FTC Requires Northeast Supermarkets Price Chopper and Tops Market Corp. to Sell 12 Stores as Condition of Merger (Nov. 9, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/11/ftc-requires-northeast-supermarkets-price-chopper-tops-market-corp-sell-12-stores-condition-merger>.

¹¹⁴ Press Release, Fed. Trade Comm'n, FTC Acts to Restore Competitive Markets for Gasoline and Diesel in Michigan and Ohio (June 14, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-acts-restore-competitive-markets-gasoline-diesel-michigan-ohio>.

¹¹⁵ Press Release, Fed. Trade Comm'n, FTC Takes Second Action Against JAB Consumer Partners to Protect Pet Owners from Private Equity Firm's Rollup of Veterinary Services Clinics (June 29, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-takes-second-action-against-jab-consumer-partners-protect-pet-owners-private-equity-firms-rollup-of-veterinary-services-clinics>.

Significantly, most of these omnibus resolutions were enacted before the currently-composed Commission took office, reflecting the broad recognition that omnibus resolutions are an effective tool.

Historically, though the Bureau of Consumer Protection has employed this power more often than the Bureau of Competition, its increasing use on competition matters enhances the Commission's ability to quickly investigate emerging threats of anticompetitive conduct in our economy. For example, one of the resolutions we announced will help staff obtain evidence, such as documents and testimony, in connection with investigations of potentially unlawful collusive and coordinated conduct where competitors work together against consumer interests rather than competing against one another.

24. Your mentor and current White House Special Assistant to the President for Technology and Competition Policy, Tim Wu, has written on the value of using “agency threats” to accomplish policy goals outside of the enforcement or adjudicative processes.¹¹⁶ Do you agree with this approach?

While I do not want to comment on what others may have meant in their writing, I note that the Commission has many tools available to investigate potentially unlawful conduct and to take action against those that violate the law. In light of those tools, the Commission has chosen to be as transparent as possible in order to put market participants on notice about the agency's enforcement authorities and priorities, including through a series of policy statements that were issued after a Commission vote.¹¹⁷ Additionally, our ongoing effort with DOJ to revise the merger guidelines will provide useful guidance to parties regarding the FTC's approach to merger review. These clear statements about how we intend to use our authorities help businesses ensure that their conduct complies with the law.

25. The FTC issued 6(b) orders in December 2020 to nine social media and video streaming companies, requiring them to provide data on how they collect, use, share, and monetize personal information, including their use of algorithms and data analytics; their advertising and user engagement practices; and how their practices affect children and teens. What have you learned from that inquiry?

a. When can we read the accompanying report?

¹¹⁶ Tim Wu, *Agency Threats*, 60 DUKE L. J. 1841 (2011), https://scholarship.law.columbia.edu/faculty_scholarship/840/.

¹¹⁷ See, e.g., Press Release, Fed. Trade Comm'n, FTC to Ramp Up Enforcement Against Any Illegal Rebate Schemes, Bribes to Prescription Drug Middlemen That Block Cheaper Drugs (June 16, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-ramp-up-enforcement-against-illegal-rebate-schemes>; Press Release, Fed. Trade Comm'n, FTC to Crack Down on Companies Taking Advantage of Gig Workers (Sept. 20, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/09/ftc-crack-down-companies-taking-advantage-gig-workers>; Press Release, Fed. Trade Comm'n, FTC to Ramp Up Enforcement against Illegal Dark Patterns that Trick or Trap Consumers into Subscriptions (Oct. 28, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-ramp-enforcement-against-illegal-dark-patterns-trick-or-trap-consumers-subscriptions>.

b. How do you see that report informing your recent privacy rulemaking for which comments by interested parties are due next month?

The FTC's authority under § 6(b) of the FTC Act is a valuable tool, and the Commission staff learn a lot about industry practices by reviewing the material produced by companies that receive 6(b) orders, and then typically pass along that learning in the form of the public report.¹¹⁸ Staff is working diligently to review and synthesize the companies' responses. Commission staff expect to apply knowledge gained from a wide variety of sources to inform the privacy rulemaking, most particularly the comments received in the rulemaking process but also experience gained from the Commission's law enforcement activity and policy work such as the 6(b) studies.

26. In the hearing I inquired about the due process implications of the FTC's Part III proceedings and want to follow up on my concerns. I see a fundamental distinction between enforcement actions brought by the Department of Justice in federal court and enforcement actions brought by the FTC under Part III. When the Department of Justice brings an action in federal court, it functions solely as a prosecutor and has no role in deciding the merits of the case. In a merger challenge in federal court, for example, an independent federal district court would issue a decision after hearing from witnesses and evaluating those witnesses' credibility. That judge's factual findings would then be accorded substantial deference on appeal, given that the judge had the opportunity to hear the witnesses live. By contrast, in a Part III proceeding, the Commission both makes the initial decision to bring the action and, as you noted in your refusal to answer my questions about your recent Meta complaint, then serve as an appellate court reviewing the decision of the administrative law judge. In other words, the Commission has the opportunity to decide the merits of the action that it chose to bring. And to make matters worse, the Commission purports to review the decision of the administrative law judge *de novo*, which suggests that it could make its own factual findings inconsistent with those of the administrative law judge, even though the Commission did not preside over the trial and did not have the opportunity to assess the live witness testimony. As the Ninth Circuit observed in its recent *Axon* decision, the FTC has not lost in a Part III proceeding in the last twenty-five years—a record that “[e]ven the 1972 Miami Dolphins would envy”—“raises legitimate questions about whether the FTC has stacked the deck.” Do you agree that the ability of the Commission to hear its own appeals in Part III proceedings is a material difference compared to an action brought in federal court?

a. What steps does the Commission undertake in hearing Part III appeals to ensure that parties' due process rights are not violated by the fact the Commission is hearing an appeal in an action that it decided to bring in the first instance?

¹¹⁸ See, e.g., Fed. Trade Comm'n, WHAT ISPS KNOW ABOUT YOU: EXAMINING THE PRIVACY PRACTICES OF SIX MAJOR INTERNET SERVICE PROVIDERS (Oct. 21, 2021), https://www.ftc.gov/system/files/documents/reports/look-what-isps-know-about-you-examining-privacy-practices-six-major-internet-service-providers/p195402_isp_6b_staff_report.pdf.

b. What deference does the Commission accord to the factual determinations of the administrative law judge who actually had the opportunity to hear live witness testimony?

In the FTC Act, Congress gave the Commission the authority to review matters administratively, not just in federal court. Accordingly, the Commission has designed processes and procedures to vindicate this authority granted by Congress and to ensure that our institutional practices accord with the institutional design crafted by Congress.

Upon appeal of an initial decision in a Part 3 proceeding, the Commission receives briefs, holds oral argument, and thereafter issues its own final decision and order.¹¹⁹ The Administrative Procedure Act¹²⁰ and the Commission's rules of practice¹²¹ provide parties with a variety of procedural protections—including prohibitions on ex parte communications and “a reasonable opportunity” for the parties to submit proposed findings and conclusions, exceptions to the ALJ's initial decision, and supporting reasons for their exceptions or proposed findings or conclusions. The Commission fully adheres to these procedural protections.

The Commission reviews the ALJ's findings of fact and conclusions of law *de novo*, considering “such parts of the record as are cited or as may be necessary to resolve the issues presented.”¹²² The Commission may “exercise all the powers which it could have exercised if it had made the initial decision.”¹²³ The *de novo* standard of review with regard to findings of facts and inferences drawn from those facts, as well as conclusions of law, is compelled by the Administrative Procedure Act¹²⁴ and the FTC Act.¹²⁵ Consistently, the Supreme Court has confirmed that, unlike the standard that applies to courts of appeals reviewing district courts' factual decisions, an agency has plenary authority to reverse ALJ decisions on factual as well as legal issues, including factual findings “based on the demeanor of a witness.”¹²⁶ Moreover, under the Administrative Procedure Act, the “highly deferential standard of review is not altered merely because the [agency] disagrees with the ALJ, and [the courts] defer to the inferences that the [agency] derives from the evidence, not to those of the ALJ.”¹²⁷

The Commission's final decision is appealable by any respondent against which an order is issued. The respondent may file a petition for review with any United States court of appeals within whose jurisdiction the respondent resides or carries on business or where the challenged practice was used.¹²⁸ If the court of appeals affirms the Commission's order, the court enters its

¹¹⁹ The Supreme Court held in *Withrow v. Larkin*, 421 U.S. 35, 46-55 (1975) that the combination of investigative and adjudicative functions does not, without more, constitute a due process violation.

¹²⁰ See, e.g., 5 U.S.C. §§ 554-557.

¹²¹ See, e.g., 16 C.F.R. §§ 3.52, 3.54-3.56.

¹²² 16 C.F.R. § 3.54(a).

¹²³ *Id.*; see also 5 U.S.C. § 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”).

¹²⁴ 5 U.S.C. § 557(b).

¹²⁵ 15 U.S.C. § 45(b)-(c).

¹²⁶ *FCC v. Allentown Broad. Corp.*, 349 U.S. 358, 364 (1955).

¹²⁷ *Varnadore v. Sec'y of Lab.*, 141 F.3d 625, 630 (6th Cir. 1998) (citations omitted); see also *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 494 (1951).

¹²⁸ 15 U.S.C. § 45(c).

own order of enforcement. The party losing in the court of appeals may seek review by the Supreme Court.

27. Do you agree that the antitrust agencies' ability to hold big tech monopolies accountable for anticompetitive conduct would be strengthened and enhanced by new legislation, like the Open App Markets Act, which this Committee advanced on a nearly unanimous and bipartisan basis in March of this year?

I am encouraged by and strongly welcome efforts by Congress to combat the threats to competition posed by the practices of dominant digital platforms. While the road ahead will be long, I am heartened by the remarkable degree of agreement we now see among lawmakers, who recognize the critical stakes of fighting monopoly power in the digital age, and I look forward to working closely with lawmakers to achieve our shared mission.

28. FTC's Strategic Plan for 2022-2026 revises the agency's mission statement to omit the phrase, "without unduly burdening legitimate business activity." Do you plan to no longer take into consideration whether the agency's action will unduly burden legitimate business activity?

a. Why was this phrase omitted?

The FTC continues to believe that its work should not unduly burden legitimate business activity, which is why we retained those exact words in the new agency strategic plan.¹²⁹ We did, however, remove those words from the agency Mission Statement, because we believe the Mission Statement should be succinct and briefly describe our fundamental purpose, which is to enforce the law. While the wording in the Mission Statement has changed, FTC policy has not.

b. The revised strategic plan also changed from protecting "consumers" to protecting "the public." Does the FTC believe it has statutory authority to address issues of broader political and societal concern?

i. If so, what are the limits to the FTC's jurisdiction and authority?

The FTC is a law enforcement agency, with authority under dozens of statutes to protect consumers and their privacy and promote fair competition. Our core mission is to use all of the laws and authorities within our mandate for the benefit of the public, including consumers, workers, and honest businesses.

c. The revised strategic plan also replaces "vigorous competition" with "fair competition." What is the difference between vigorous and fair competition?

Fair competition is competition that is both vigorous and necessarily consistent with the antitrust laws. The Federal Trade Commission Act specifically empowers the FTC to, among

¹²⁹ Fed. Trade Comm'n, Strategic Plan for Fiscal Years 2022-2026, at 14 (Aug. 26, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/fy-2022-2026-ftc-strategic-plan.pdf.

other things, prevent “unfair methods of competition,” and so this change increases consistency between the statutes we enforce and the agency strategic plan.

29. The FTC has suspended granting Early Termination for HSR filers since early in the Biden administration. At the time, the decision was described as temporary and necessitated by the “presidential transition.” The presidential transition has long been completed. When will the FTC resume granting early termination to filing parties whose transaction presents no competitive concerns?

a. Is there any reason not to grant early termination as soon as the agency determines that a transaction presents no competitive concerns?

The agency still faces significant resource constraints and, as a result, must make difficult choices about how to allocate staff time, especially when it comes to merger review. Our priority in reviewing merger filings is to identify those requiring more in-depth review, such as the issuance of a Second Request. Given that the HSR Act limits our initial review period to 30 days, the delay associated with the suspension of early termination is minimal.

30. The FTC has recently experienced a mass exodus of highly experienced antitrust litigators, possibly impairing the agency’s ability to bring and win cases. What are you doing to stem the losses and ensure that the FTC retains top talent?

Our current retention numbers are similar to those experienced in recent years. The agency relies on top-tier attorneys and economists, as well as countless other professionals, to execute on the agency’s mission. We must compete for this talent with law firms and other private-sector employers that can offer significantly higher compensation, as well as with other government agencies that employ a higher pay scale. We work hard to recruit these candidates to public service and to retain them by making the FTC a meaningful and engaging place to work. Throughout the FTC we are working to foster this kind of workplace by strengthening communication, clarifying vision and priorities, streamlining processes for decision-making, revisiting internal policies, and identifying additional resources to support case teams.

Questions from Senator Tillis
for Lina Khan

Witness for the Senate Committee on the Judiciary Subcommittee on Competition Policy,
Antitrust, and Consumer Rights Hearing “Oversight of Federal Enforcement of the
Antitrust Law”

1. Increasingly, large tech platforms are using their market dominance to infringe on the intellectual property rights of smaller entities that do not have the money to challenge the infringement.

a. What steps has your agency taken to ensure that monopolistic companies are not able to use their market power to infringe on the intellectual property rights of smaller entities without the resources to fight back?

I am fully committed to ensuring that the FTC vigorously enforces the statutes within its purview, including laws prohibiting anticompetitive, unfair, fraudulent, or deceptive business practices, and mergers that may substantially lessen competition or may tend to create a monopoly. Robust enforcement of these laws helps to ensure that dominant businesses compete fairly and do not abuse their power against independent or smaller businesses. Though different regimes, both intellectual property and antitrust share a common goal of promoting innovation. Endeavoring to combat market power abuses in any form, including those implicating intellectual property rights, is a top priority.

b. Do you believe that legislation is needed to assist you in your efforts to increase competition and protect intellectual property rights?

Congress created the FTC as a law enforcement agency, with authority under dozens of statutes to protect Americans from unlawful business practices. Congress has also charged the FTC with additional authorities that strongly complement our enforcement efforts (e.g., rulemaking authority, § 6(b) study function). I seek to work with Congress to ensure that the Commission has the resources and tools it needs to vigorously protect the American people from unlawful mergers and conduct, including that implicating intellectual property considerations.

2. The FTC issued 6(b) orders in December 2020 to nine social media and video streaming companies. It has been 21 months since the 6(b) orders were issued, but the public has learned nothing.

a. What has the FTC learned from this inquiry and when can we expect to see the FTC’s report?

b. How do you see that report informing the FTC’s recent privacy rulemaking for which comments by interested parties are due next month?

The FTC’s authority under § 6(b) of the FTC Act is a valuable tool, and the Commission staff learn a lot about industry practices by reviewing the material produced by companies that

receive 6(b) orders, and then typically pass along that learning in the form of the public report.¹³⁰ In this case, staff is working diligently to review and synthesize the companies' responses. Commission staff will look to apply knowledge gained from a wide variety of sources to inform the privacy rulemaking, including both the comments received in the rulemaking process as well as experience gained from the Commission's law enforcement activity and policy work, such as the 6(b) studies.

3. With the use of omnibus resolutions, a single commissioner can approve a Civil Investigative Demand (CID), which means that minority commissioners may not even be aware of investigations using compulsory process. What are your thoughts on this? Do you see this as an issue?

An omnibus resolution allows FTC staff to seek compulsory process to investigate categories of potentially illegal conduct. Not individually authorizing compulsory process in each matter removes a time-consuming barrier to staff's pursuit of an investigation. Notably, it does not affect the decision to bring an enforcement action, which continues to require a Commission vote.

Use of omnibus resolutions by the Commission's Bureaus of Competition and Consumer Protection is not new. For decades, the Commission has used this tool to effectively initiate investigations into alleged illegal conduct. These omnibus resolutions also cover wide swaths of the Commission's authorities, including, for example, enforcement under the Equal Credit Opportunity Act, the Fair Credit Reporting Act, the Fair Debt Collection Act, the Franchise Rule, the Gramm-Leach-Bliley Act, and the Truth in Lending Act—nearly all of the Commission's authorities focused on consumer finance. Significantly, most of these omnibus resolutions were enacted before the currently-composed Commission took office, reflecting the broad recognition that omnibus resolutions are an effective tool.

For example, one of the resolutions announced recently will help staff obtain evidence, such as documents and testimony, in connection with investigations of potentially unlawful collusive and coordinated conduct. This conduct involves competitors working together against consumer interests rather than competing against one another and moving more quickly may lead to a more rapid resolution of this harmful conduct.

4. Under your leadership, what is the FTC actively doing to address the concerns raised in the 2021 Federal Employee Viewpoint Survey regarding low morale and low confidence in management?

The survey results raised issues that I take seriously, and as a result, I implemented a process to solicit input from senior leaders, managers, and staff to better understand the specific issues and challenges flagged in the survey. In doing so, we identified three key root causes: communication, processes, and certain workplace policies. In response, we are actively working

¹³⁰ See, e.g., Fed. Trade Comm'n, WHAT ISPS KNOW ABOUT YOU: EXAMINING THE PRIVACY PRACTICES OF SIX MAJOR INTERNET SERVICE PROVIDERS (Oct. 21, 2021), https://www.ftc.gov/system/files/documents/reports/look-what-isps-know-about-you-examining-privacy-practices-six-major-internet-service-providers/p195402_isp_6b_staff_report.pdf.

to improve communication, including clarifying vision and priorities; streamline processes for decision-making; and revisit, clarify, or change some internal policies that unintentionally created confusion or concerns. We have also completed our office reentry and implemented our policy for the next phase of workplace flexibilities, giving staff clarity and certainty on key workplace issues that were still under development at the time of the 2021. We continue to assess our internal communication, policies, processes, and personnel and to solicit feedback from staff and leaders in an effort to make the FTC a great place to work on behalf of the American people.

5. Several of my colleagues and I have expressed concern regarding the FTC's use of unpaid consultants, whose income is based on outside interests, not public service, and so they cannot be as objective as a regular, paid government employee.

a. Can you provide any insight regarding why the FTC is relying on unpaid consultants?

Under 5 U.S.C. § 3109, federal agencies are permitted to retain consultants and experts. The work performed by the agency's consultants and experts is consistent with all applicable statutes, regulations, and agency guidance. Like many other federal agencies, the FTC uses 5 U.S.C. § 3109 to bring on outside consultants or experts—paid, unpaid, or detailed from other agencies—to bridge gaps in areas where the agency lacks sufficient in-house expertise or to provide valuable and pertinent advice generally drawn from a high degree of broad administrative, professional, or technical knowledge or experience. For example, a significant number of the consultants/experts the FTC has retained under 5 U.S.C. § 3109 are technologists with expertise in artificial intelligence, computing, and related subject areas. This type of expertise enables the agency to better grasp new and emerging technologies and to better ensure that our work accounts for new market realities.

b. Are you aware that 4 of the FTC's unpaid consultants are either current or former employees of the AI Now Institute?

I am aware that some of the FTC's unpaid experts/consultants retained under 5 U.S.C. § 3109 are or were affiliated with the AI Now Institute. The two unpaid experts/consultants who are currently at the FTC and have affiliations with the AI Now Institute are on leave from the AI Now Institute. All unpaid experts/consultants undergo ethics training and screening and must comply with all applicable ethics rules.

c. Are you aware that the AI Now Institute is funded by left-wing philanthropists and corporations?

I am aware of the AI Now Institute funders identified on the AI Now website at <https://ainowinstitute.org/about.html>. All experts/consultants retained under 5 U.S.C. § 3109 undergo ethics training and screening and must comply with all applicable ethics rules.

d. Are you aware that 3 of the FTC's unpaid consultants are currently executives in tech companies?

I am aware that two of the FTC's unpaid consultants/experts retained under 5 U.S.C. § 3109 currently hold positions at the Mozilla Foundation and that another unpaid consultant/expert (who has since left the FTC) held a position at the Signal Foundation. Both Mozilla and Signal are 501(c)(3) organizations. All unpaid experts/consultants undergo ethics training and screening and must comply with all applicable ethics rules.

e. Do you believe that any of prior points raise a conflict of interest?

The FTC's consultants and experts retained under 5 U.S.C. § 3109 are federal government employees (or special government employees), so they are subject to ethics laws and obligations.¹³¹ Accordingly, the FTC's experts and consultants are prohibited from participating personally and substantially in particular matters that directly and predictably affect "their" financial interests, which for these purposes includes the financial interests of anyone they serve as an employee.¹³² Each of the FTC's consultants and experts is reviewed by the FTC's Ethics Team before onboarding to screen for and address any federal ethics concerns. More specifically, each consultant or expert is required to complete a confidential disclosure report (OGE Form 450) and, based on the disclosures, the FTC Ethics Team provides tailored guidance about potential conflicts of interest and restrictions on outside activities/non-federal employment. Moreover, like other employees, each unpaid consultant or expert attends ethics orientation once they start at the FTC. Each unpaid consultant or expert also receives annual ethics training.

In addition, under Reorganization Plan No. 8 of 1950, 64 Stat. 1264, the right to set the agency's general policies is reserved for the Commission as a body. Accordingly, the experts and consultants provide advice and opinions, but do not themselves determine the FTC's enforcement policies or other general policies. Moreover, the FTC's consultants and experts report to managers within the FTC. All FTC managers are federal employees, as defined in 5 C.F.R. § 2641.104, and they provide oversight of the consultants' and experts' work.

4. The FTC voted 4-0 to block Illumina's acquisition of cancer test startup GRAIL, but lost in court. Just five days later, the European Commission blocked the merger. Some have suspected coordination between the FTC and the European Commission.

a. Do you communicate with or are you aware of FTC Commissioners coordinating with the European Commission on cases like this one?

b. Do you believe it is appropriate for the FTC to circumvent American courts to achieve a desired outcome in a foreign jurisdiction?

While I must limit comments on the specifics of any ongoing litigation, it is longstanding practice for the FTC and European Commission to cooperate in the investigation of mergers that undergo scrutiny in both jurisdictions. Such cooperation allows the agencies to identify issues of common interest, gain a better understanding of relevant facts, and—where possible—achieve consistent outcomes, which helps to promote efficient and effective enforcement for both the cooperating agencies and the subjects of an investigation. Given these benefits, merging parties routinely support the agencies' cooperation, including by voluntarily

¹³¹ See 5 C.F.R. § 304.101.

¹³² See 18 U.S.C. § 208.

providing agencies with waivers to facilitate interagency discussions, as was the case in this matter.

Notwithstanding our cooperation, each agency carries out its own investigation independently, according to its own legal frameworks and in light of the specific markets at issue in the jurisdiction. Thus, for example, the timing for the adoption of the European Commission's decision in Illumina/Grail was based on the EC's investigative timelines and procedures as set out in the EU Merger Regulation, and was independent of the timing of the FTC Administrative Law Judge's Initial Decision or any future Commission decision in the matter.

In the context of the FTC's competition case cooperation with the European Commission, the FTC is diligent to undertake its cooperative engagement in conformity with the 1991 Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, the 1998 Agreement Between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws, and the US-EU Merger Working Group Best Practices on Cooperation in Merger Investigations.¹³³

5. In July of last year you issued a statement withdrawing the 2015 Statement that defined the FTC's Section 5 authority under the Federal Trade Commission Act, saying that it undermined the text of the Act and the will of Congress. Since then, the FTC has not issued any new written guidance on Section 5 and is instead exercising prosecutorial discretion. When do you plan to issue new Section 5 guidance?

The Commission issued Section 5 guidance on November 10, 2022.¹³⁴

6. In terms of your priorities as Chair, how important are cases against Big Tech companies to you and the FTC?

The FTC is committed to vigorously enforcing the statutes it is charged with administering, particularly regarding dominant firms. For example, reporting and evidence suggests that dominant digital platforms have captured control over key arteries of commerce and communications in ways that can undermine competition. Consistent with this, keeping pace with the ways in which digital markets have ushered in new market dynamics and business strategies is a top priority.

The FTC has recently brought a number of enforcement actions involving incumbents in digital markets. These include the FTC's ongoing lawsuit against Facebook (now Meta) alleging that the company resorted to an illegal buy-or-bury scheme to crush competition in the wake of its own failed attempts to innovate¹³⁵ as well as the FTC's successful challenge to Nvidia's

¹³³ The agreements and related best practices document are available at: <https://www.ftc.gov/policy/international/international-cooperation-agreements>.

¹³⁴ Press Release, Fed. Trade Comm'n, FTC Restores Rigorous Enforcement of Law Banning Unfair Methods of Competition (Nov. 10, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/11/ftc-restores-rigorous-enforcement-law-banning-unfair-methods-competition>.

¹³⁵ *FTC v. Facebook, Inc.*, 581 F. Supp. 3d 34 (D.D.C. 2022). See generally, Press Release, Fed. Trade Comm'n, FTC Alleges Facebook Resorted to Illegal Buy-or-Bury Scheme to Crush Competition After String of Failed

proposed \$40 billion acquisition of Arm Ltd., which the FTC contended would have given one of the largest chip companies control over the computing technology and designs that rival firms rely on to develop their own competing chips.¹³⁶ Further, in July 2022, the FTC challenged Meta’s proposed acquisition of Within Unlimited, alleging that the merger would prevent future competition between the merging parties, reducing consumer choice, innovation, and competition to attract the best employees.¹³⁷

In addition to enforcement actions, the FTC has used its study function to conduct important research that deepens our understanding of large technology firms, including a report addressing large technology firms’ acquisition activity.¹³⁸ Additionally, in an effort to share agency expertise, I have filed a comment to the CFPB as it conducts its inquiry into Big Tech companies’ moves into payment and financial services markets.¹³⁹

7. The Committee on the Judiciary recently held a hearing concerning data issues within Twitter. There are a number of concerns that I have with commercial surveillance and the amount of personal data that is being collected, often without consent.

a. What does the FTC plan to do to help tackle this problem?

The FTC is taking a number of steps to address concerns about commercial surveillance. First, the FTC initiated an Advance Notice of Proposed Rulemaking (ANPR) to request public input on the wide range of issues presented by commercial surveillance.¹⁴⁰ The ANPR specifically invited comment on whether the FTC “should implement new trade regulation rules or other regulatory alternatives concerning the ways in which companies collect, aggregate, protect, use, analyze, and retain consumer data, as well as transfer, share, sell, or otherwise monetize that data in ways that are unfair or deceptive.”

Second, the Commission has brought numerous actions over many years to address unfair or deceptive practices relating to commercial surveillance. For example, in May, the FTC challenged Twitter’s use of consumers’ phone numbers and email addresses—information that

Attempts to Innovate (Aug. 19, 2021), <https://www.ftc.gov/newsevents/news/press-releases/2021/08/ftc-alleges-facebook-resorted-illegal-buy-or-bury-scheme-crush-competition-after-string-failed>.

¹³⁶ Press Release, Fed. Trade Comm’n, FTC Sues to Block \$40 Billion Semiconductor Chip Merger (Dec. 2, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/12/ftc-sues-block-40-billion-semiconductor-chip-merger>.

¹³⁷ Press Release, Fed. Trade Comm’n, FTC Seeks to Block Virtual Reality Giant Meta’s Acquisition of Popular App Creator Within (Jul. 27, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/07/ftc-seeks-block-virtual-reality-giant-metas-acquisition-popular-app-creator-within>.

¹³⁸ Press Release, Fed. Trade Comm’n, FTC Staff Presents Report on Nearly a Decade of Unreported Acquisitions by the Biggest Technology Companies (Sept. 15, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/09/ftc-staff-presents-report-nearly-decade-unreported-acquisitions-biggest-technology-companies>.

¹³⁹ Comment, Fed. Trade Comm’n, Submission of Chair Lina M. Khan on the CFPB’s Inquiry Into Big Tech Payment Platforms (Dec. 22, 2021), https://www.ftc.gov/system/files/documents/public_statements/1599099/cover_letter_and_comment_of_chair_lina_khan_re_cfpbs_inquiry_into_big_tech_payment_platforms.pdf.

¹⁴⁰ Fed. Trade Comm’n, Trade Regulation Rule on Commercial Surveillance and Data Security, 87 Fed. Reg. 51273, 51299 (Aug. 22, 2022), <https://www.govinfo.gov/content/pkg/FR-2022-08-22/pdf/2022-17752.pdf>.

had been collected for a security purpose—for advertising purposes.¹⁴¹ That order requires Twitter to, among other things, establish, implement, and maintain a comprehensive privacy and information security program that protects the privacy, security, confidentiality, and integrity of consumer information. The FTC is tracking recent developments at Twitter with deep concerns and is prepared to use all of the agency’s tools to ensure compliance. Last month, the Commission filed a lawsuit against data broker Kochava, Inc., for selling geolocation data from millions of mobile devices that can be used to trace the movements of individuals to and from sensitive locations.¹⁴² As alleged in the Commission’s complaint, data that Kochava collected can reveal people’s visits to reproductive health clinics, places of worship, homeless and domestic violence shelters, and addiction recovery facilities. The FTC alleged that by selling data that tracks people, Kochava is enabling others to identify individuals and exposing them to threats of stigma, stalking, discrimination, job loss, and even physical violence. The FTC’s lawsuit seeks to stop Kochava’s sale of sensitive geolocation data and require the company to delete the sensitive geolocation information it has collected.

b. Do you think that Congress needs to act or is the FTC’s authority enough?

At the time that the FTC issued the ANPR, each Commissioner made public comments welcoming Congressional legislation in this area. Under the FTC’s existing authority, for example, the agency lacks the authority to seek civil penalties for first-time violations of Section 5, and the Supreme Court in *AMG Capital Mgmt., LLC v. FTC* held that the FTC does not have the ability to obtain monetary relief under Section 13(b) of the FTC Act, limiting our ability to provide monetary redress to victims of unlawful business practices.¹⁴³

8. The FTC has suspended the practice of granting “Early Termination” to Hart-Scott-Rodino (HSR) filers, which the Agency justified as necessary to accommodate the “presidential transition.” It has been over 18 months since then.

a. Isn’t that just delaying procompetitive mergers?

The agency continues to face significant resource constraints, and thus, we must make difficult choices about how to allocate staff time, especially when it comes to merger review. Our priority in reviewing merger filings is to determine those requiring more in-depth review, such as the issuance of a Second Request. Given that the HSR Act limits the initial review period to 30 days, the delay associated with the suspension of early termination is minimal.

b. There have also been reports that the FTC are editing second requests to merging parties, cutting out staff, and asking the parties about their

¹⁴¹ See Press Release, Fed. Trade Comm’n, FTC Charges Twitter with Deceptively Using Account Security Data to Sell Targeted Ads (May 25, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/05/ftc-charges-twitter-deceptively-using-account-security-data-sell-targeted-ads>.

¹⁴² Press Release, Fed. Trade Comm’n, FTC Sues Kochava for Selling Data that Tracks People at Reproductive Health Clinics, Places of Worship, and Other Sensitive Locations (Aug. 29, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/08/ftc-sues-kochava-selling-data-tracks-people-reproductive-health-clinics-places-worship-other>.

¹⁴³ *AMG Capital Management, LLC v. FTC*, 141 S. Ct. 1341 (Apr. 2021).

Environmental, Social, and Governance (ESG) policies. Do companies' ESG policies play a role in how you make decisions?

No. As I testified, the FTC does not condition merger approval on the adoption of ESG policies. Parties may themselves proactively raise their ESG policies and/or suggest that these policies can cure an otherwise illegal merger. I believe it is paramount in these instances to remind them that there is no ESG exemption to the antitrust laws.

9. Earlier this month, FTC counsel suffered a defeat when the FTC's Chief Administrative Law Judge ruled against the Commission in the matter of Illumina and GRAIL. Understanding that the case is presently being appealed to you and your colleagues, what steps will you take to bring this case to a swift resolution, knowing that an untold number of American cancer patients' lives are at stake?

Under the Commission's Rules of Practice,¹⁴⁴ after the ALJ issues an "initial decision" setting forth his or her findings of fact and conclusions of law and recommending either entry of an order to cease and desist or dismissal of the complaint, either complaint counsel or respondent, or both, may appeal the initial decision to the full Commission.¹⁴⁵ As you indicate, here, Complaint Counsel has appealed the ALJ's decision to the full Commission.

Upon appeal of an initial decision, the Commission receives briefs, holds oral argument, and thereafter issues its own final decision and order, with timing determined by the Commission's Rules of Practice, which were modified to be consistent with the timeline in federal court proceedings. The Commission's final decision is then appealable by any respondent against which an order is issued. The respondent may file a petition for review with any United States court of appeals within whose jurisdiction the respondent resides or carries on business or where the challenged practice was used.¹⁴⁶ If the court of appeals affirms the Commission's order, the court enters its own order of enforcement. The party losing in the court of appeals may then seek review by the Supreme Court.

10. Earlier this month the European Commission blocked a merger of Illumina and GRAIL – two U.S. companies – in direct contravention of a ruling five days prior by the FTC's own Chief Administrative Law Judge. We now have a ruling from a foreign entity that could not only functionally negate the ALJ's ruling, but also circumvent the entire appeals process. Will you commit now to pushing for a stay of the European decision so as to ensure that our process is respected?

While I must limit comments on the specifics of any ongoing litigation, the European Commission's decision neither negates the ALJ's initial decision nor circumvents the Federal Trade Commission process. As noted in response to your previous question, the ALJ's initial decision is not final agency action. Pursuant to Federal Trade Commission rules, the ALJ's decision has been appealed to the full Commission here in the United States, and the Commission will rule on the matter consistent with the applicable law and evidence. If the

¹⁴⁴ 15 U.S.C. 46.

¹⁴⁵ In limited cases, including certain merger cases, the Commission's rules provide that the appeal is automatic.

¹⁴⁶ FTC Act § 5(c), 15 U.S.C. § 45(c).

Commission rules against the respondent, the Commission's decision is then subject to review by a federal court of appeals.

It is standard practice that the FTC and EC cooperate in the investigation of mergers that undergo scrutiny in both jurisdictions, with each agency carrying out its own investigation according to its own legal frameworks and in light of the specific markets at issue in the jurisdiction. Thus, for example, the timing for the adoption of the European Commission's decision in Illumina/Grail was based on the EC's investigative timelines and procedures as set out in the EU Merger Regulation, and was independent of the timing of the FTC ALJ's Initial Decision or any future Commission decision in the matter.

The FTC maintains strong cooperative relationships with the EC and other competition authorities globally, which enables us to reach consistent outcomes in the vast majority of matters under concurrent review. We engage in regular dialogue with counterparts, both bilaterally and through multilateral fora, to understand and narrow substantive differences that helps limit opportunities for conflicting decisions that could potentially impact independent U.S. decisions.

In the context of the FTC's competition case cooperation with the European Commission, the FTC undertakes its cooperative engagement in conformity with the 1991 Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, the 1998 Agreement Between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws, and the US-EU Merger Working Group Best Practices on Cooperation in Merger Investigations.¹⁴⁷

¹⁴⁷ The agreements and related best practices document are available at: <https://www.ftc.gov/policy/international/international-cooperation-agreements>.

**Senate Judiciary Committee
Subcommittee on Competition Policy, Antitrust, and Consumer Rights hearing
“Oversight of Federal Enforcement of the Antitrust Laws”**

**Questions for the Record
for Lina Khan, Chair, Federal Trade Commission
Submitted September 27, 2022**

QUESTIONS FROM SENATOR SHELDON WHITEHOUSE

- 1. Will the Department of Justice and Federal Trade Commission’s (FTC) forthcoming joint revised merger guidelines address labor markets as a priority focus of the agencies’ antitrust merger analysis and enforcement efforts?**

Yes.

- 2. When new mergers are announced, or otherwise made known to the agencies, does your agency, as a matter of practice, consult labor unions with respect to the potential impact of the proposed transaction on labor markets regardless of whether the acquiring firm or target is unionized or not?**

Pursuant to the FTC’s role as a law enforcement agency, staff follow the facts and reach out to relevant persons who might have useful information on a merger, as needed, to assess its legal implications. Thus, staff have contacted unions on either side of a transaction where relevant to the competitive assessment.

- 3. In its recent notice of proposed rulemaking, the FTC defined the term consumers to include workers and there were numerous references to workers in the FTC’s recently issued strategic plan for 2022-2026. Can you explain why it is both appropriate and critical to the FTC’s mission to view workers as consumers?**

The Federal Trade Commission is charged with rooting out unfair methods of competition and unfair or deceptive practices in the economy, a mandate that protects all Americans, including consumers, workers, and honest businesses. You are correct that in our Commercial Surveillance and Data Security ANPR we used the term “consumer” to include businesses and workers, not just individuals who buy or exchange data for retail goods and services. This approach is consistent with the Commission’s longstanding practice of bringing enforcement actions against firms that harm companies as well as workers of all kinds. The FTC has frequently used Section 5 of the FTC Act to protect small businesses or individuals in contexts involving their employment or independent contractor status. A recent example of the Commission’s efforts to protect workers is its action—first initiated under former Chairman Joe Simons—against Amazon for allegedly skimming tips from gig workers in the Amazon Flex program, to the tune of \$61.7 million.¹⁴⁸ I am committed to building on this work.

¹⁴⁸ See Press Release, Fed. Trade Comm’n, Amazon To Pay \$61.7 Million To Settle FTC Charges It Withheld Some Customer Tips From Amazon Flex Drivers (Feb. 2, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/02/amazon-pay-617-million-settle-ftc-charges-it-withheld-some-customer-tips-amazon-flex-drivers>.