

**Senate Committee on the Judiciary  
“Oversight of the Enforcement of the Antitrust Laws”**

**October 3, 2018**

**Questions for Joseph Simons, Chairman, Federal Trade Commission**

**The Honorable Mike Lee**

- 1. The Supreme Court hasn’t issued a decision on a merger challenge since 1974. It’s been more than 50 years since the Court specifically addressed whether efficiencies resulting from a merger can be considered when judging its legality. In the meantime, antitrust analysis has evolved considerably, and now embraces an approach that is grounded in economics. In analyzing non-merger antitrust issues, the Supreme Court has followed this modern economic approach. However, while the trend among lower courts has been to entertain merging parties’ efficiency claims, no court has ever held that an otherwise illegal merger could proceed given the likely large efficiencies.**

**The legitimacy of an efficiencies defense in the courts was recently an issue in the Antitrust Division’s effort to block Anthem’s merger with Humana. In that case, the majority opinion for the DC Circuit Court of Appeals criticized a dissent for embracing the proffered efficiencies defense, stating that “it is not at all clear that [efficiencies] offer a viable legal defense to illegality under Section 7.”**

- a) Do you believe that language in some earlier Supreme Court decisions on efficiencies is dicta or is it Supreme Court precedent that efficiencies cannot be considered a defense to an otherwise illegal merger?**

**Response:** I have no opinion as to whether the Supreme Court language is dicta, but note that the antitrust agencies have long considered efficiencies in both merger and non-merger cases. Section 10 of the *Horizontal Merger Guidelines* explains the agencies’ efficiencies analysis.<sup>1</sup> Under Section 10, efficiencies must meet several criteria to be credited. First, they must be merger-specific in that they could not likely be accomplished in the absence of the merger. Second, they must not be vague or speculative, and must enhance the merged firm’s ability and incentive to compete. Finally, they must be cognizable, which means the efficiencies are verified and do not arise from anticompetitive reductions in output.

The agencies’ 2006 *Commentary on the Merger Guidelines* offers further guidance on how the agencies consider efficiencies when reviewing a merger.<sup>2</sup> For example, the Commentary provides several examples of cases in which the agencies assessed whether proffered

---

<sup>1</sup> U.S. Dep’t of Justice & Fed. Trade Comm’n *Horizontal Merger Guidelines* § 10 (2010), <https://www.ftc.gov/public-statements/2010/08/horizontal-merger-guidelines-untied-states-department-justice-federal>.

<sup>2</sup> U.S. Dep’t of Justice & Fed. Trade Comm’n *Commentary on the Horizontal Merger Guidelines* (2006) <https://www.ftc.gov/sites/default/files/attachments/merger-review/commentaryonthehorizontalmergerguidelinesmarch2006.pdf>.

efficiencies were verifiable, cognizable, and merger-specific, including cases in which the agency determined not to challenge the merger.<sup>3</sup>

I also believe that focusing solely on litigated cases may not provide a complete picture of how the agencies evaluate merger efficiency claims. The agencies challenge only a very small number of mergers that we investigate each year, and those challenged mergers tend to involve very high levels of concentration. For the more marginal cases, efficiencies can play and have played a role in persuading the agencies not to challenge a merger.

**b) At the hearing, you indicated that you would like to give more thought to whether the efficiencies defense should be codified. Should an efficiencies defense be codified, particularly given the apparent confusion in the courts about whether such a defense may be unlawful under Supreme Court precedent?**

Response: I am still considering whether a codified efficiencies defense would improve the predictability of merger outcomes. I believe the agencies' *Horizontal Merger Guidelines*, 2006 *Commentary*, and various speeches and other statements over the years provide valuable information to the antitrust community on how to present efficiencies claims to the agencies and the courts.

**2. Unlike the agencies' joint *Horizontal Merger Guidelines*, which have gone through several revisions over the past thirty years, no formal effort has been made to update the agencies' guidance on their approach to vertical merger enforcement.**

**a) Would the business community, the agencies, and the courts all benefit from a formal revision to the non-horizontal merger guidelines?**

Response: Guidelines could be beneficial if they reflect current thinking on vertical merger enforcement and are based on the practical learning and experience of past merger challenges and investigations. Over the years, the agencies have provided substantial insight on vertical merger analysis through speeches and other policy work,<sup>4</sup> and through rigorous case selection.<sup>5</sup> Today, the Commission is considering whether the agencies should publish formal vertical merger guidelines as part of its ambitious program of *Hearings on Competition and Consumer Protection in the 21<sup>st</sup> Century*.<sup>6</sup> Two panel discussions on vertical mergers were held on November 1st, and the Commission has invited public

---

<sup>3</sup> *Id.* at 50-59.

<sup>4</sup> See, e.g., Bruce Hoffman, *Vertical Merger Enforcement at the FTC*, Remarks at Credit Suisse 2018 Washington Perspectives Conference (Jan. 10, 2018), <https://www.ftc.gov/public-statements/2018/01/vertical-merger-enforcement-ftc> (explaining the FTC's current analysis of proposed vertical mergers and highlighting the extent to which that analysis has moved beyond the 1984 Non-Horizontal Merger Guidelines).

<sup>5</sup> The Commission, for example, recently challenged a vertical merger between Northrop Grumman, a leading provider of missile systems to the Department of Defense, and Orbital ATK, a key supplier of solid rocket motors. *In re Northrop Grumman*, Dkt. C-4652 (June 5, 2018), <https://www.ftc.gov/enforcement/cases-proceedings/181-0005-c-4652/northrop-grumman-orbital-atk>.

<sup>6</sup> FTC, *Hearings on Competition and Consumer Protection in the 21<sup>st</sup> Century*, <https://www.ftc.gov/policy/hearings-competition-consumer-protection>; see also FTC Workshop, *FTC Hearing #5: Competition and Consumer Protection in the 21<sup>st</sup> Century*, <https://www.ftc.gov/news-events/events-calendar/ftc-hearing-5-competition-consumer-protection-21st-century>.

commentary on the topic. We will keep you apprised of any vertical merger initiatives that come out of our hearings project.

**b) Is there a risk that formal vertical merger guidelines would lead to over-enforcement, and if so, why?**

Response: In principle, there should be no reason that guidelines would lead to over- or under-enforcement. Thoughtful, practical, and well-explained guidelines should be helpful both to antitrust enforcers and to the business community, supplementing guidance from court decisions and informal agency guidance. Merger analysis is very fact-specific, and any form of guidance may still leave open questions relevant to analyzing the likely effects of any particular merger.

**3. Some markets, particularly those characterized by strong network effects, can be subject to winner-take-all scenarios in which a company reaches a point where it is temporarily secure from competition, at least until a new technology develops. In such situations, competition often is not simply within the market but for the market itself.**

**a) In markets subject to winner-take-all dynamics, should we be concerned about the leading firm acquiring a start-up or small firm that could develop into a potential competitor?**

Response: We should always be concerned when a dominant firm, particularly in a market characterized by strong network effects, acquires a potential competitor. But we need to be cautious about intervening without evidence that the merger is likely to lead to anticompetitive effects. In a fast-growing market with network effects, we expect to see first-movers, often technological innovators, with large market shares. We want to be careful not to short-circuit competitive market forces and risk slowing the discovery and implementation of new technologies.

That said, the possibility that large firms buying start-ups might foreclose the development of emerging rivals that might ultimately unseat them is a legitimate and real theory of competitive harm (and not unique to the technology industry). In fact, this issue was a driving concern behind the Commission's recent decision to challenge the merger of two auto dealer software platforms, CDK Global, Inc. and Auto/Mate, Inc.<sup>7</sup> According to the complaint, Auto/Mate, the firm being acquired, had a small share of the market, but was having an outsized impact on competition with other platforms, especially CDK. It also was poised to become an even more effective competitor in the near future. The proposed merger would have eliminated that nascent competition, which played a role in the Commission's decision to file a complaint to block the merger.<sup>8</sup>

**b) What information would lead you to challenge this kind of acquisition?**

---

<sup>7</sup> *In re CDK Global, Inc.*, Dkt. 9382 (Mar. 20, 2018), <https://www.ftc.gov/enforcement/cases-proceedings/171-0156/cdk-global-automate-matter>.

<sup>8</sup> Shortly after the Commission issued its administrative complaint, the parties abandoned the merger.

Response: In analyzing this type of acquisition, the FTC would be especially attentive to evidence that the acquired firm has been a particularly innovative or disruptive competitor, and that entry or repositioning would be unlikely to restore the competition lost due to the merger.

**4. Concerns have been raised that foreign competition authorities are using their antitrust laws as a form of industry policy to benefit national champions.**

**a) Is this a concern you share? If so, what is your agency doing to address this kind of abuse?**

Response: This is a very important issue for the FTC. We have long advocated internationally that the goal of competition law is to maximize consumer welfare and that enforcement decisions should be made in a non-discriminatory manner. We advocate for these principles directly with our foreign agency counterparts through speeches, and in multilateral bodies such as the International Competition Network and the OECD. Using competition law for protectionist purposes or to advance a country's industrial policies undermines the consumer benefits from competition law enforcement as well as the legitimacy of the competition law system globally.

**b) What more could Congress do to prevent foreign countries from using their antitrust policies to advantage national champions rather than ensure competitive markets?**

Response: It can be difficult to determine whether particular enforcement actions are motivated by protectionist concerns as opposed to legitimate competition policies. When the FTC suspects that a foreign competition agency is using its antitrust laws to benefit national champions, we raise this with the foreign agency and engage with other U.S. agencies to address the concern as appropriate.

We appreciate the support from Congress for the FTC's international engagement, including our ongoing efforts to address these issues.

**5. The Economic Liberty Task Force recently released a report on interstate portability of occupational licenses. As you know, irrational and over-burdensome occupational licensing have been identified by economists and politicians on both sides of the aisle as a barrier to competition, innovation, and economic opportunity.**

**a) Do you expect to support the work of the Economic Liberty Task Force on this critical issue?**

Response: I support the important work of the Economic Liberty Task Force to promote enhanced interstate portability of occupational licenses, and I pledge my continued support of the Task Force more generally. American workers, employers, consumers, and our economy as a whole will benefit from eliminating overbroad licensing requirements that impose costs

and unduly limit competition, but are not needed to protect consumer health and safety.

**b) Do you view restrictive occupational licensing regimes principally as an antitrust problem or a regulatory problem?**

Response: Excessive occupational licensing can be an antitrust problem, in addition to a regulatory problem. Occupational licensing can offer important benefits, especially when it protects consumers from credible health and safety risks. But some occupational licensing may not be warranted, and certain restrictions may yield more harms than benefits. Antitrust law and competition policy may be implicated when licensing restrictions impede competition and create barriers to entry and mobility for workers while offering few, if any, significant consumer benefits. Occupational licensing can be particularly problematic when regulatory authority is delegated to incumbent market participants, who stand to benefit from overly restrictive licensing requirements that exclude rivals and raise prices.

Historically, the FTC has addressed these concerns in two ways. First, as part of the FTC's competition advocacy program, FTC staff respond to calls for public comment and invitations from legislatures and regulators, who ask staff to identify and analyze specific restrictions that may harm competition without offering countervailing consumer benefits. Second, the FTC has used its enforcement authority to challenge anticompetitive conduct by regulatory boards that falls outside of the scope of the state action doctrine.<sup>9</sup> Through these efforts, the agency's research and analyses have focused on the potential competitive effects of specific licensing restrictions, rather than the broader question of whether the U.S. economy is characterized by excessive occupational licensing.

**6. As we discussed at the hearing, the SMARTER Act would require the FTC to litigate the merits of a non-consummated merger challenge in federal district court rather than before an FTC administrative law judge.**

**a) Do you agree that passage of the SMARTER Act would avoid duplicative litigation and lower the cost to taxpayers of antitrust enforcement, particularly in avoiding situations where the FTC can proceed to administrative litigation without filing for a preliminary injunction in federal court due to the merging parties' inability to close their transaction while they await regulatory approval in other jurisdictions?**

Response: There are significant benefits to the Commission's administrative litigation path, including providing the Commission an opportunity to develop important aspects of competition law. But if the FTC is denied a preliminary injunction in a merger matter, I do not believe the Commission should pursue that matter in administrative litigation. The Commission has not pursued an administrative proceeding following the denial of a

---

<sup>9</sup> See, e.g., *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101 (2015) (ruling that the conduct of a state regulatory board controlled by practicing members of the occupation may violate the antitrust laws unless it is actively supervised by the state itself). Previous Commission testimony provides additional details on the history and scope of the state action exemption. See *License to Compete: Occupational Licensing and the State Action Doctrine*, Hearing Before the S. Comm. on the Judiciary, Subcomm. on Antitrust, Competition Policy and Consumer Rights, 114<sup>th</sup> Cong. (Feb. 2, 2016), [https://www.ftc.gov/system/files/documents/public\\_statements/912743/160202occupationallicensing.pdf](https://www.ftc.gov/system/files/documents/public_statements/912743/160202occupationallicensing.pdf).

preliminary injunction in federal court for over twenty years. I agree with this approach.

Many transactions are subject to multijurisdictional reviews, whether by foreign competition authorities or state regulators. Under current law (and the proposed SMARTER Act), both the FTC and Department of Justice can delay commencing an injunction action in federal court until other review processes are completed and the merger is imminent.

It is not clear to me whether it would be beneficial to include a prohibition on the FTC from conducting an administrative proceeding while the parties to a merger remain unable to close their transaction for a significant period of time. In the *Tronox* case, the FTC was able to complete an administrative trial while the parties waited for foreign approvals. Once those approvals were granted and the parties would soon be able to close their transaction, the FTC filed suit in federal court seeking a preliminary injunction. The existence of the administrative record from the FTC administrative proceeding allowed the parties to avoid a substantial discovery period in the federal proceeding, enabled the district court judge to substantially expedite the preliminary injunction hearing, and very likely reduced the overall time for the court to reach a decision. In this case, the injunction was granted. If the injunction had not been granted, the parties likely would have been able to close their transaction faster than if there had been no FTC administrative proceeding. To the extent there was duplication between the two proceedings, it appears to have been minor, and the matter was very likely resolved faster as a result. Certainly, it reduced cost and resource burdens on the federal district court.

**7. Several panelists at the recent FTC hearings have recommended that the agencies produce merger retrospectives to help refine and improve their understanding and analysis of antitrust issues relating to mergers.**

**a) What are your thoughts on your agency creating merger retrospectives?**

Response: I agree with the panelists that evaluation of our past choices can provide valuable guidance for our future decisions. For that reason, FTC staff have conducted a number of merger retrospective studies over the years in a variety of industries, most notably petroleum, consumer products, and hospitals.<sup>10</sup> FTC staff also evaluated fixes for problematic mergers with retrospective studies of divestitures in 1999<sup>11</sup> and merger remedies in 2017.<sup>12</sup>

Staff in the Bureau of Economics have analyzed the effects of a number of other consummated mergers, but their ability to do so is subject to data availability and resource

---

<sup>10</sup> For a summary of many of these studies, see Joseph Farrell et al., *Economics at the FTC: Retrospective Merger Analysis with a Focus on Hospitals* (2009), [https://www.ftc.gov/sites/default/files/documents/reports/economics-ftc-retrospective-merger-analysis-focus-hospitals/farrelletal\\_rio2009.pdf](https://www.ftc.gov/sites/default/files/documents/reports/economics-ftc-retrospective-merger-analysis-focus-hospitals/farrelletal_rio2009.pdf).

<sup>11</sup> FTC STAFF REPORT, A STUDY OF THE COMMISSION'S DIVESTITURE PROCESS (1999), <https://www.ftc.gov/reports/study-commissions-divestiture-process>.

<sup>12</sup> FTC STAFF Report, THE FTC'S MERGER REMEDIES 2006-2012: A REPORT OF THE BUREAU OF COMPETITION AND ECONOMICS (2017), <https://www.ftc.gov/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics>.

constraints.<sup>13</sup> I believe we have obtained valuable knowledge from this research, and I support continuing and expanding this research agenda.

**b) If you support creating such retrospectives, what resources would be required to do so?**

Response: Unless we receive additional funding to hire more economists and acquire market data, conducting merger retrospectives could consume resources that would otherwise be available for enforcement and other important work of the Commission. We are exploring ways to leverage our resources through the use of outside researchers to minimize the burden on our internal resources.

---

<sup>13</sup> See, e.g., Thomas Koch & Shawn W. Ulrick, *Price Effects of a Merger: Evidence from a Physicians' Market* (2017) (Bureau of Economics Working Paper No. 333), [https://www.ftc.gov/system/files/documents/reports/price-effects-merger-evidence-physicians-market/working\\_paper\\_333.pdf](https://www.ftc.gov/system/files/documents/reports/price-effects-merger-evidence-physicians-market/working_paper_333.pdf) (physicians); Daniel Hosken et al., *Do Retail Mergers Affect Competition? Evidence from Grocery Retailing* (2012) (Bureau of Economics Working Paper No. 313), <https://www.ftc.gov/sites/default/files/documents/reports/do-retail-mergers-affect-competition%2%A0-evidence-grocery-retailing/wp313.pdf> (grocery stores); Steven Tenn & John M. Yun, *The Success of Divestitures in Merger Enforcement: Evidence from the J&J – Pfizer Transaction* (2009) (Bureau of Economics Working Paper No. 296) [https://www.ftc.gov/sites/default/files/documents/reports/success-divestitures-merger-enforcement%2%A0-evidence-jampj-pfizer-transaction/wp296\\_0.pdf](https://www.ftc.gov/sites/default/files/documents/reports/success-divestitures-merger-enforcement%2%A0-evidence-jampj-pfizer-transaction/wp296_0.pdf) (consumer health products).

**The Honorable Chuck Grassley**

1. **There is uniform consensus that drug prices are unnecessarily high, often as a result of anticompetitive practices by both brand and generic companies. I'm a lead sponsor on both the Creating and Restoring Equal Access to Equivalent Samples (CREATES) Act and the Preserve Access to Affordable Generics Act. Earlier this year, this Committee approved the CREATES Act, which currently has thirty cosponsors, split evenly between Democrats and Republicans. What has been the FTC's ability to curb abuses of the REMS system? Would the CREATES Act help?**

Response: The Commission is concerned about Risk Evaluation Mitigation Strategies (“REMS”) abuse by branded pharmaceutical firms that unreasonably impede generic competition.<sup>14</sup> When drug companies use such tactics to delay generic entry, American consumers pay higher prices for prescription drugs.

As you know, branded firms have invoked REMS-mandated distribution restrictions or voluntarily adopted closed distribution systems to deny would-be generic competitors the samples they need to conduct bioequivalence tests, even when the drug is sold on commercial terms to others. Without samples, a generic firm cannot complete the bioequivalency testing required by the FDA to obtain approval for a generic drug product.

Even if a generic firm overcomes this hurdle, another opportunity for delay arises later in the FDA approval process because the statute governing REMS drugs requires a single, shared REMS distribution system. If the branded and generic firms cannot reach agreement over the terms of the shared REMS system, the generic cannot be approved unless the FDA grants a waiver allowing the generic firm to establish its own REMS distribution system. In practice, the FDA has rarely granted a waiver of the shared REMS requirement. Branded drug firms have an apparent incentive to refuse to cooperate with the generic applicant, since lack of cooperation can delay generic entry.

The FTC filed two amicus briefs in private antitrust litigation arguing that the denial of samples for testing undermines the careful balance created by the Hatch-Waxman Act to encourage generic entry, and may amount to illegal monopolization.<sup>15</sup> In addition, the FTC filed comments with the Department of Health and Human Services in July 2018, in response to their call for public comments on the Blueprint to Lower Drug Prices and Reduce Out-of-

---

<sup>14</sup> See Markus H. Meier, Prepared Statement Before the U.S. House of Representatives, Judiciary Committee, Subcommittee on Regulatory Reform, Commercial and Antitrust Law on “Antitrust Concerns and the FDA Approval Process” (Jul. 27, 2017), <https://www.ftc.gov/public-statements/2017/07/prepared-statement-federal-trade-commission-antitrust-concerns-fda>.

<sup>15</sup> Brief of the Fed. Trade Comm’n as Amicus Curiae, *Mylan Pharms. v. Celgene Corp.*, No. 2:14-cv-2094 (D. N.J. June 17, 2014), <https://www.ftc.gov/policy/advocacy/amicus-briefs/2014/06/mylan-pharmaceuticals-inc-v-celgene-corporation>; Brief of the Fed. Trade Comm’n as Amicus Curiae, *Actelion Pharms. Ltd. v. Apotex Inc.*, No. 1:12-cv-05743 (D. N.J. Mar. 11, 2013), <https://www.ftc.gov/policy/advocacy/amicus-briefs/2013/03/actelion-pharmaceuticals-ltd-et-al-v-apotex-inc>.

Pocket Costs.<sup>16</sup> The comments identified how branded pharmaceutical manufacturers' misuse of REMS may impede pharmaceutical competition, and supported regulatory and legislative action to correct REMS misuse.

Antitrust enforcement is an imperfect tool to address the problem of anticompetitive misuse of restricted distribution programs. Generally, the antitrust laws do not impose a duty on firms to cooperate or share resources with competitors.<sup>17</sup> Under some circumstances, courts have found firms with market power liable under the antitrust laws for refusing to deal with competitors, such as when a monopolist refuses to sell a product to a competitor that it makes available to others. This is an unsettled area of law, however, which limits the ability of antitrust enforcement to address these situations. We note that at least one court has dismissed allegations that a branded firm violated the antitrust laws by failing to cooperate with generic firms seeking to distribute their product in a shared REMS.<sup>18</sup> In that court's view, recent Supreme Court decisions support a distinction between a refusal to supply samples—which can violate the antitrust laws—and a refusal to cooperate in a shared REMS—which the court thought likely would not violate the antitrust laws. The court relied on the technical existence of a regulatory option for the generic firms to obtain a waiver from the FDA, which would allow them to establish their own shared REMS program.

Given the limits of antitrust law, Congressional action to curb misuse of REMS would be helpful. I believe the CREATES Act would help protect the competitive process by eliminating incentives for branded manufacturers to engage in manipulation of the REMS process to delay generic entry. I greatly appreciate your work to obtain effective legislation in this important area.

**2. I've heard complaints from Iowans about potentially anticompetitive behavior in the drug supply chain, including pharmacy benefit managers, or "PBMs". In August I sent you a letter, requesting scrutiny and feedback on the behaviors of this industry.**

**a) Can you tell me what the FTC is doing to combat rising drug prices and is there anything Congress can do to assist you?**

Response: I appreciate your concern. As discussed below, the FTC maintains a robust program to identify and investigate potential anticompetitive conduct in the pharmaceutical

---

<sup>16</sup> Press Release, FTC Submits Statement to HHS on Its Blueprint to Lower Drug Prices (Jul. 17, 2018), <https://www.ftc.gov/news-events/press-releases/2018/07/ftc-submits-statement-hhs-its-blueprint-lower-drug-prices>.

<sup>17</sup> See *Verizon Comm. Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 408 (2009) (“[A]s a general matter, the Sherman Act does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.” (internal citations and quotation marks omitted); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 600 (1985) (“[E]ven a firm with monopoly power has no general duty to engage in a joint marketing program with a competitor.”).

<sup>18</sup> *In re Suboxone Antitrust Litig.*, 64 F. Supp. 3d 665, 685-88 (E.D. Pa. 2014). Relying on *Trinko* and *Pacific Bell Telephone v. linkLine Comm., Inc.*, 555 U.S. 438 (2009), the court determined that the “antitrust laws do not create a duty for competitors to work together. Statutes and regulations requiring cooperation between rivals do not alter this analysis; in fact, regulation indicates that antitrust scrutiny is not necessary or prudent.”

industry.<sup>19</sup> The FTC also reviews mergers between pharmaceutical companies to ensure that they do not result in elimination of a competitor or a potential competitor for any product on the market or in development. There are limits, however, on the FTC's ability to counter rising drug prices. The FTC is not a sector regulator; our authority is limited to trying to stop or prevent certain business practices that harm competition. Charging high prices, even exorbitant prices, for a drug, without more, is not a violation of any law the FTC enforces. With respect to what Congress can do to assist the FTC in combating rising drug prices, I appreciate your work to address REMS abuses and the recently enacted measure to require that certain agreements involving biologics drugs be filed with the antitrust agencies.

The FTC can use its antitrust authority to prevent anticompetitive conduct or mergers, and has pursued numerous enforcement actions involving both branded and generic pharmaceutical firms. For example, for over twenty years and on a bipartisan basis, the FTC has prioritized ending anticompetitive reverse payment agreements in which a brand-name drug firm pays its potential generic rival to give up its patent challenge and agree not to launch a lower cost generic product. Following the U.S. Supreme Court's 2013 decision in *FTC v. Actavis, Inc.*,<sup>20</sup> the FTC is in a much stronger position to challenge agreements of this type; recently, the district court on remand denied the defendants' motion for summary judgment in that case, clearing it for trial.<sup>21</sup> In addition, since *Actavis*, the FTC obtained a landmark \$1.2 billion settlement from the maker of sleep disorder drug Provigil,<sup>22</sup> and other manufacturers have agreed to abandon anticompetitive agreements of this type.<sup>23</sup>

The FTC has brought enforcement actions against drug companies that have abused the patent and regulatory process. The FTC recently had a major victory when a federal court ruled that AbbVie Inc. filed baseless patent infringement lawsuits against potential generic competitors to illegally maintain its monopoly over the testosterone replacement drug AndroGel, and ordered \$493.7 million in monetary relief to those who were overcharged for AndroGel as a result of Abbvie's conduct.<sup>24</sup> The FTC's pending case against Shire ViroPharma Inc. alleges that the company engaged in a series of filings before the Food and Drug Administration as a means of preventing generic entry and maintaining a monopoly.<sup>25</sup>

---

<sup>19</sup> For a summary of the FTC's antitrust actions in the pharmaceutical industry, see FED. TRADE COMM'N HEALTH CARE DIV. STAFF, OVERVIEW OF FTC ACTIONS IN PHARM. PRODS. AND DISTRIB. (Aug. 2018),

[https://www.ftc.gov/system/files/attachments/competition-policy-guidance/overview\\_pharma\\_august\\_2018.pdf](https://www.ftc.gov/system/files/attachments/competition-policy-guidance/overview_pharma_august_2018.pdf).

<sup>20</sup> 570 U.S. 756 (2013).

<sup>21</sup> *FTC v. Actavis, Inc.*, No. 1:09-MD-2084 (N.D. Ga. Jun. 14, 2018).

<sup>22</sup> Press Release, 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 Tactics (May 28, 2015),

<https://www.ftc.gov/news-events/press-releases/2015/05/ftc-settlement-cephalon-pay-delay-case-ensures-12-billion-ill>.

<sup>23</sup> Joint Mot. for Entry of Stipulated Order for Permanent Inj., *FTC v. Allergan plc*, No. 17-cv-00312 (N.D. Cal. Jan. 23, 2017), <https://www.ftc.gov/enforcement/cases-proceedings/141-0004/allergan-plc-watson-laboratories-inc-et-al>; Stipulated Order for Permanent Inj., *FTC v. Teikoku Pharma USA, Inc.*, No. 16-cv-01440 (E.D. Pa. Apr. 6, 2016), <https://www.ftc.gov/enforcement/cases-proceedings/141-0004/endo-pharmaceuticals-impax-labs>.

<sup>24</sup> Statement of FTC Chairman Joe Simons Regarding Federal Court Ruling in *FTC v. AbbVie* (June 29, 2018), <https://www.ftc.gov/news-events/press-releases/2018/06/statement-ftc-chairman-joe-simons-regarding-federal-court-ruling>.

<sup>25</sup> *FTC v. Shire ViroPharma Inc.*, No. 17-cv-00131 (D. Del. Feb. 7, 2017), <https://www.ftc.gov/enforcement/cases-proceedings/121-0062/shire-viropharma>.

The district court ruled that Shire ViroPharma’s conduct was not shielded as legitimate petitioning activity under the *Noerr-Pennington* doctrine, but nonetheless dismissed the complaint because the alleged violation ended before the FTC sued.<sup>26</sup> The court held that the FTC cannot bring suit in federal court under Section 13(b) of the FTC Act absent allegations that the defendant’s unlawful conduct is ongoing or imminent at the time the complaint is filed. The agency has appealed this ruling to the Third Circuit.<sup>27</sup>

In addition to our active litigations, the FTC continues to monitor private actions involving possible pay-for-delay deals and other anticompetitive agreements. These can provide opportunities for the Commission to file amicus briefs on a variety of issues raised by pay-for-delay settlements, REMS abuse, and other issues.

The FTC reviews mergers between pharmaceutical companies to ensure that they do not eliminate a competitor or potential competitor for any product on the market or in development. For instance, in the last two years, the Commission required divestitures in six pharmaceutical mergers to preserve competition, including the FTC’s largest divestiture order ever in Teva/Allergan, which required the divestiture of 79 drugs.<sup>28</sup>

In addition to its enforcement work, the Commission has devoted significant resources to examining the health care industry by sponsoring workshops and studies on topics such as generic drug entry prior to patent expiration, the impact of authorized generic drugs, and the proper role of competition in addressing challenges in health care markets.<sup>29</sup> Most recently, in 2017, the FTC collaborated with the FDA on two public events: one examining regulatory barriers in pharmaceutical markets,<sup>30</sup> and the other on the role of intermediaries in the distribution of pharmaceuticals.<sup>31</sup>

---

<sup>26</sup> The *Noerr-Pennington* doctrine is a judicially created limitation on the reach of the Sherman Act and is grounded in the right to petition government protected by the First Amendment. *E.R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

<sup>27</sup> Brief of the Fed. Trade Comm’n and Appendix Vol. 1, *FTC v. Shire ViroPharma Inc.*, No. 18-1807 (3d Cir. June 19, 2018), [https://www.ftc.gov/system/files/documents/cases/shire\\_viropharma\\_inc\\_ftc\\_opening\\_brief\\_and\\_appendix\\_vol\\_1\\_6-19-18.pdf](https://www.ftc.gov/system/files/documents/cases/shire_viropharma_inc_ftc_opening_brief_and_appendix_vol_1_6-19-18.pdf).

<sup>28</sup> *In re Teva Pharm. Indus. Ltd.*, Dkt. No. C-4589 (Sept. 15, 2016), <https://www.ftc.gov/enforcement/cases-proceedings/151-0196/teva-allergan-matter>.

<sup>29</sup> See, e.g., U.S. Dep’t of Justice & Fed. Trade Comm’n Workshop Series, *Examining Health Care Competition* (Mar. 20-21, 2014 & Feb. 24-25, 2015), <https://www.ftc.gov/news-events/events-calendar/2014/03/examining-health-care-competition>, <https://www.ftc.gov/news-events/events-calendar/2015/02/examining-health-care-competition>.

<sup>30</sup> FDA, Public Meeting, The Hatch-Waxman Amendments: Ensuring a Balance Between Innovation and Access (Jul. 18, 2017), <https://www.gpo.gov/fdsys/pkg/FR-2017-06-22/pdf/2017-12641.pdf>.

<sup>31</sup> FTC Workshop, *Understanding Competition in Prescription Drug Markets: Entry and Supply Chain Dynamics* (Nov. 8, 2017), <https://www.ftc.gov/news-events/events-calendar/2017/11/understanding-competition-prescription-drug-markets-entry-supply>. As explained by former Acting Chairman Ohlhausen during her opening remarks at this event, “[c]ompetition is key to containing prescription drug prices . . . . In light of concerns about rising drug prices, it’s critical we identify barriers that may prevent drugs from entering the market, even after applicable patent protections have expired.”

**b) Do you have concerns about consolidation in the health care industry and whether such consolidation could lead to leverage that can be abused to negotiate anticompetitive agreements?**

Response: I appreciate your concerns about consolidation and the potential for anticompetitive conduct in the health care industry, and I share those concerns. As I stated at the October 3rd hearing, the best place to look for anticompetitive conduct is where there is likely to be significant market power. This is where we will first look for anticompetitive conduct, and we will continue to assess health care mergers carefully for all potential harms, including whether the merger may lead to increased market power or monopsony purchasing power in a given relevant market.

**c) How do you respond to anticompetitive concerns that have been voiced by many consumers and the press regarding the behavior of PBMs?**

Response: Scrutiny of competitive issues relating to PBMs is part of the FTC's ongoing mission to promote competition in health care. The FTC has examined the conduct of PBMs in various contexts, including during merger investigations, and as part of broad-based hearings on health care competition. As mentioned above, last fall the FTC hosted a workshop with the FDA to examine pharmaceutical distribution practices, including the role of intermediaries such as PBMs and Group Purchasing Organizations. We held the workshop to deepen our understanding of various players in the pharmaceutical industry. In addition to presentations by experts in health care policy and economics, we also received over 300 public comments as part of the workshop, which identified additional areas of concern. Materials related to the workshop can be found on the FTC's website.<sup>32</sup>

We understand that there are concerns about PBM practices. We are exploring the feasibility of conducting merger retrospectives of a number of industries, including PBMs, and we are committed to bringing enforcement actions against any company, including a PBM, that violates the laws we enforce.

**3. I've heard concerns regarding data privacy, specifically with respect to social media and technology companies. In other industries, if a customer does not like the policies of one product, they substitute it with another.**

**a) Do you have concerns that there is not enough competition in the social media and technology market to allow customers to choose the data privacy policy they want?**

Response: The widespread use of technology and data is not only changing the way we live, but also the way firms operate. While many of these changes offer consumer benefits, they also raise complex and sometimes novel competition issues. Given the important role that technology companies play in the American economy, it is critical that the Commission—in furthering its mission to protect consumers and promote competition—understand the current and developing business models and scrutinize incumbents' conduct to ensure that they abide by the same competition rules that apply to any other company. When appropriate, the

---

<sup>32</sup> *Id.*

Commission will take action to counter the harmful effects of coordinated or unilateral conduct by technology firms.

In June, I announced a new public hearings project—*Hearings on Competition and Consumer Protection in the 21st Century*—to consider whether broad-based changes in the economy, evolving business practices, new technologies, and international developments warrant adjustments to competition and consumer protection law, enforcement priorities, and policy.<sup>33</sup> One of the topics to be discussed at these hearings is the unique competition and consumer protection issues associated with internet and online commerce. We are also inviting public comment on this and other issues related to communication, information, and media technology networks. Through the upcoming series of hearings, the Commission will devote significant resources to refresh and, if warranted, renew its thinking on a wide range of cutting-edge competition and consumer protection issues.

**b) Do we need to set a minimum standard for data privacy policies or is there another solution?**

Response: Companies should be transparent about their privacy practices. Some surveys suggest that consumers are willing to share their information with companies to personalize experiences as long as companies are transparent about their information practices.<sup>34</sup> In other surveys, respondents report a willingness to leave brands that use their personal data without their knowledge.<sup>35</sup> Regardless of the impact of privacy policies on consumers, a disclosure-oriented approach also provides an important accountability function. Within an organization, drafting privacy policies helps companies understand their information practices. Outside the organization, disclosures give the press, advocacy organizations, and regulators information about a company's practices and enable them to hold companies to their promises.

**c) What would be the impact if we set a too stringent standard?**

Response: Although the collection and use of consumer data poses risks, any approach to privacy must also consider how consumer data fuels innovation and competition. The digital economy has provided enormous benefits for consumers in all aspects of their lives. For example, health apps and wearables allow for better health outcomes,<sup>36</sup> and big data analytics allow for better

---

<sup>33</sup> FTC, *Hearings on Competition and Consumer Protection in the 21st Century*, <https://www.ftc.gov/policy/hearings-competition-consumer-protection>; see also Press Release, FTC Announces Hearings On Competition and Consumer Protection in the 21st Century (June 20, 2018), <https://www.ftc.gov/news-events/press-releases/2018/06/ftc-announces-hearings-competition-consumer-protection-21st>.

<sup>34</sup> John Hall, *What You Should Know About Privacy That Will Help Consumers Trust Your Brand*, Forbes, Apr. 4, 2018, <https://www.forbes.com/sites/johnhall/2018/04/25/what-you-should-know-about-privacy-that-will-help-consumers-trust-your-brand/#472a4bf3135a> (describing research).

<sup>35</sup> Kevin Cochrane, *To Regain Consumers' Trust, Marketers Need Transparent Data Practices*, Harvard Business Review, June 13, 2018, <https://hbr.org/2018/06/to-regain-consumers-trust-marketers-need-transparent-data-practices> (describing research showing that 79% of consumers will leave a brand if their personal data is used without their knowledge).

<sup>36</sup> Peter H. Diamandis, M.D., *Three Huge Ways Tech Is Overhauling Healthcare*, SINGULARITY HUB, July 6, 2018, <https://singularityhub.com/2018/07/06/three-huge-ways-tech-is-overhauling-healthcare/>. Indeed, despite potential

traffic, weather, and emergency response information. If privacy standards focus too much on the potential harm from data-driven practices, consumers might lose out on the benefits from innovation and competition. Thus, any approach to privacy must balance the very real harms that arise from the misuse of consumer data with the benefits of data and use on the economy as a whole.

---

patient privacy risks that collecting health data on wearable devices could pose, the number of U.S. consumers tracking their health data with wearables has more than doubled since 2013. See Fred Donovan, *Despite Patient Privacy Risks, More People Use Wearables for Health*, HEALTH IT SECURITY, Oct. 1, 2018, <https://healthitsecurity.com/news/despite-patient-privacy-risks-more-people-use-wearables-for-health>.

**The Honorable Orrin Hatch**

1. **Under Former Commissioner Ohlhausen, one focus of the FTC was examining occupational licensing issues. The FTC’s work advocating against unnecessary and anticompetitive occupational licensing requirements has been an important step towards greater freedom in the marketplace and benefits the American people. Will this continue to be a priority of the Commission going forward?**

Response: I appreciate your concerns and can assure you that occupational licensing issues will continue to be a priority of the Commission.

2. **Antitrust experts have raised concerns that some foreign competition authorities are using their antitrust laws to protect home companies and markets from foreign competition rather than applying those laws in a non-discriminatory manner. For example, a March 2017 report found that, “[c]ertain of our major trading partners appear to have used their laws to actually harm competition by U.S. companies, protecting their own markets from foreign competition, promoting national champions, forcing technology transfers and, in some cases, denying U.S. companies fundamental due process.” When concerns are raised that a foreign competition authority is using antitrust laws to protect domestic companies from foreign competition or to advance an industrial or trade policy, how does the FTC address the issue?**

Response: This is a very important issue for the FTC. Using competition law for protectionist purposes or to advance a country’s industrial policies undermines the consumer benefits from competition law enforcement as well as the legitimacy of the competition law system globally. Internationally, the FTC has long advocated that competition law should be focused on maximizing consumer welfare and applied in a non-discriminatory manner. We have also been a leading advocate for due process in competition enforcement around the world; we engage on this issue directly with our foreign agency counterparts through speeches, and in multilateral bodies such as the International Competition Network and the OECD. Notably, the FTC led an ICN project that resulted in the adoption of standards for fair investigative procedures, which are the only internationally adopted benchmarks in this sensitive area, and we remain actively engaged in promoting implementation of these standards.

It can be difficult to determine whether particular enforcement actions are motivated by protectionist concerns as opposed to legitimate competition policies. When the FTC suspects that a foreign competition agency is using its antitrust laws to protect home markets and competitors, we raise this with the foreign agency and engage with other U.S. agencies to address the concern as appropriate.

**The Honorable Thom Tillis**

1. **The Department of Justice and the Federal Trade Commission have overlapping jurisdiction when it comes to enforcement of the antitrust laws. I am concerned that differing views of the meaning of the antitrust laws among those two agencies can create confusion in the marketplace, stifle innovation and delay marketplace improvements to the consumer.**
  - a) **Do you agree that it is essential for FTC and DOJ to have consistent interpretations of the antitrust laws? What steps can you take to assure innovators that DOJ and FTC's views of the application of antitrust are in accord?**

Response: Consistent interpretations of the antitrust laws can promote consistency in enforcement, legal precedents, and the ability of businesses to comply with the antitrust laws. This has been true for more than 100 years, since Congress created the FTC to be an additional enforcer of the federal antitrust laws. At the same time, debate and discussion between the agencies and in the antitrust bar, particularly regarding novel or evolving issues, can be helpful to work towards consensus understandings of antitrust law and enforcement practices.

Agency research, joint guidance statements, public workshops on current topics, and periodic self-assessment can promote a consensus understanding of the antitrust laws, where appropriate, and identify additional areas for future consideration.

2. **Many antitrust experts expressed concern that during the last Administration the FTC brought several overbroad enforcement actions under its standalone Section 5 unfair methods of competition authority, particularly against companies exercising their intellectual property rights. Mr. Simons, what are you doing to review ongoing FTC cases brought by the previous Administration to ensure they do not carry forward overly expansive theories of Section 5 liability?**

Response: As Chairman, I continually review all ongoing Commission cases. Aside from one case in which I am recused and thus cannot comment, I am confident that none of our current cases rely on overly expansive theories of Section 5 liability.

3. **Mr. Simons in your opening remarks at the FTC's hearings on competition and consumer protection you said you approach calls to change mainstream antitrust law with an open mind. Can you explain in more detail what you mean by that?**
  - a) **Are you implying you would support changing the consumer welfare standard to some new standard that incorporates other factors, such as labor issues or political power, into antitrust analysis?**

Response: The consumer welfare standard works well in antitrust. It is well established in Supreme Court precedent and has bipartisan support in the antitrust bar. There is a strong

consensus in both law and economics that focusing on consumer welfare makes for efficient and effective antitrust enforcement.

That said, a number of recent critiques of the consumer welfare standard have raised important issues. As I noted at the October 3, 2018 hearing, “one of the most serious concerns about those proposals . . . at least in a broad sense is that they are difficult to administer, and to some extent inconsistent with each other. But this is a different time, and perhaps there are different facts, there are different arguments, and there’s different evidence, and that’s what we want to see.” The FTC will continue to examine the role of the consumer welfare standard as part of its *Hearings on Competition and Consumer Protection in the 21<sup>st</sup> Century*, and has invited public comment on this issue.<sup>37</sup>

- 4. I know there are some companies that are worried foreign competition authorities are using their antitrust laws to benefit national champions. Likewise, I know some companies believe these global antitrust regulations are necessary for a modern economy. Can you talk very briefly about international antitrust issues, specifically the increased regulation from foreign competition authorities?**

Response: International antitrust has been one of the most dynamic areas of antitrust law over the past three decades. During this period, over 130 jurisdictions have adopted or expanded competition legislation, often with U.S. encouragement and assistance. Properly applied, competition laws can promote open markets, enhance consumer welfare, and prevent conduct that impedes competition. Given the multiplicity of competition enforcers, it is crucial that antitrust agencies work together to ensure that the international competition law system functions coherently and effectively. The FTC has developed strong relations with our foreign counterparts, and works through multilateral organizations to promote cooperation and convergence toward sound competition policy. In particular, we focus on promoting substantive enforcement standards that seek to advance consumer welfare based on sound economics, procedural fairness, transparency, and non-discriminatory treatment of parties.

We are aware of concerns that some foreign competition agencies use their antitrust laws to benefit national champions. Using competition law for protectionist purposes or to advance a country’s industrial policies undermines the consumer benefits from competition law enforcement, as well as the legitimacy of the competition law system globally. When the FTC suspects that this is occurring, we raise this with the foreign agency and engage with other U.S. agencies to address the concern as appropriate.

---

<sup>37</sup> See FTC Workshop, *FTC Hearing #5: Competition and Consumer Protection in the 21st Century* (Nov. 1, 2018), <https://www.ftc.gov/news-events/events-calendar/ftc-hearing-5-competition-consumer-protection-21st-century>.

**The Honorable Amy Klobuchar**

- 1. Your agency's budget has remained flat for the past several years despite the significant rise in merger filings and other increasing demands on your agency's resources. If additional resources were made available to your agency, how would you deploy those resources to advance its mission?**

Response: We appreciate your attention to the agency's resource needs. As I mentioned in my October 3rd testimony, the FTC is committed to maximizing its resources to enhance its effectiveness in protecting consumers and promoting competition, to anticipate and respond to changes in the marketplace, and to meet current and future challenges. In the past, we have requested additional resources for experts, information technology, and more full-time employees in support of our mission to protect consumers and promote competition. These continue to be critical areas of need for our agency. If we were to receive additional resources, they likely would be applied to these areas as needed.

**The Honorable Richard Blumenthal**

1. **I am concerned that our antitrust laws simply are not working for workers. Increasingly powerful companies are able to force workers to accept lower wages and poor working standards. One way this happens is through noncompete clauses. According to the Economic Policy Institute, roughly 30 million workers – including one in six workers without a college degree – are now covered by noncompete clauses. As FTC Commissioner Chopra has said, these clauses “deter workers from switching employers, weakening workers’ credible threat of exit and diminishing their bargaining power.” Workers subject to noncompete clauses are typically barred by arbitration provisions from challenging their contracts in court. Since workers cannot act on their own, the FTC should act on their behalf.**

- a) **Mr. Simons: What could the FTC be doing in order to protect workers from the harms of noncompete clauses?**

Response: The Commission takes very seriously the potential for monopsony power among employers to affect workers’ wages and mobility. If we find or are presented with evidence that a firm within our jurisdiction is engaging in conduct that harms competition and may violate the antitrust laws, we will review that information for potential law enforcement action.

In addition to enforcement, the Commission’s advocacy program provides written comments regarding competition and consumer protection policies in response to specific requests from federal, state, and local policymakers and other open comment opportunities. To the extent there may be opportunities to provide useful, well-researched comments about labor issues as they relate to competition or consumer protection, FTC staff will respond appropriately.

- b) **Mr. Simons: More generally, what principles does the FTC use for defining the relevant labor market when challenging anticompetitive conduct in labor markets?**

Response: In defining a labor market, we would evaluate an employee’s ability and willingness to substitute from one employer to another in response to a change in wages or another term or condition of employment (such as a change in benefits). The responsive actions of employers also would be important in this analysis. This is a fact-specific inquiry, and highly skilled workers or those in remote locations may face fewer options for employment.

2. **American workers are looking to you, our antitrust enforcers, to protect them from powerful companies colluding to keep down their wages. I am concerned that our antitrust enforcers are not imposing stiff enough penalties when they discover wrongdoing by employers. In July of this year, the FTC entered into a consent order with Your Therapy Source and other therapist staffing companies in Texas that prevented them from further colluding to keep wages down for the therapists that they employed. This settlement did not require the companies to provide any restitution to**

**affected employees, nor did it require the employers to admit facts or liability.**

- a) Mr. Simons: When the FTC finds that employers have colluded to keep workers' wages down, shouldn't those employers have to compensate affected workers?**

Response: Regarding the *Your Therapy Source* matter, Respondents are small business owners of two therapist staffing companies. They operate in the Dallas/Fort Worth area where there are many other therapist staffing companies who did not participate in the agreement, and where it is common for therapists to choose among and contract with multiple staffing companies. Although the evidence showed that there was distortion of the normal competitive process through the alleged per se illegal agreement, the evidence did not show that wages were, in fact, reduced below competitive levels.

As you highlight, the Commission has a duty to enforce the antitrust laws and to seek remedies commensurate with the level of harm and injury. With respect to equitable monetary remedies—including disgorgement and restitution—the Commission may, and does, seek such relief to compensate victims for losses resulting from unlawful conduct. As stated above, the Commission takes very seriously the potential for monopsony power among employers to affect workers' wages and mobility. We will continue to investigate this type of behavior and, where appropriate, will seek equitable monetary remedies in such cases.

- 4. I was encouraged to hear Chairman Simons state that FTC staff have been instructed to “look for potential effects on the labor market with every merger they review.” It is vital that both the DOJ and FTC examine the labor markets effect of any merger.**

- a) How do DOJ and FTC staff define the labor market when conducting merger review? What methods do they use and how did they select these methods?**

Response: As explained in Section 4 of the Horizontal Merger Guidelines, “[m]arket definition focuses solely on demand substitution factors; i.e., on customers’ ability and willingness to substitute away from one product to another in response to a price increase or a corresponding non-price change such as a reduction in product quality or service. The responsive actions of suppliers are also important in competitive analysis.”<sup>38</sup>

In defining a labor market, we would apply these same principles. Thus, we would evaluate an employee’s ability and willingness to substitute from one employer to another in response to a change in wages or another term or condition of employment (such as a change in benefits). The responsive actions of employers also would be important in this analysis.

- b) What resources, including labor market specialists, does the DOJ and FTC currently have to analyze the labor market effects of mergers? What additional**

---

<sup>38</sup> *U.S. Dep’t of Justice & Fed. Trade Comm’n Horizontal Merger Guidelines* § 4 (2010), [https://www.ftc.gov/system/files/documents/public\\_statements/804291/100819hmg.pdf](https://www.ftc.gov/system/files/documents/public_statements/804291/100819hmg.pdf).

**resources does the DOJ or FTC require?**

Response: We appreciate your attention to the agency's resource needs. From a competition perspective, the FTC generally views labor services as we would any other product or service. Thus, as in all merger reviews, the Commission relies on its expert staff of attorneys, economists, and other professionals to investigate a merger and assess its likely competitive effects.

The FTC's Bureau of Economics has historically hired economists from a broad range of subfields of microeconomics, and continues to do so. This approach provides two main benefits. First, by not focusing on a narrow field such as industrial organization, the Bureau can recruit from a larger talent pool. Second, by employing microeconomists with diverse backgrounds, the Bureau can provide analysis informed by the knowledge and methodologies developed in the various fields of microeconomics that are best suited to the issues at hand.

The Bureau of Economics already employs many economists with labor economics backgrounds, and we believe we benefit from their perspective. For example, Bureau economists, some with labor economics backgrounds, have applied their experience evaluating marketplace competition, as well as their study of labor markets, to assess the recent research on labor market concentration.

One area of concern, however, is the increased number of complex investigations and litigations in competition matters, which are resource-intensive. In the past, we have requested additional resources for experts, information technology, and full-time employment in support of our mission to protect consumers and promote competition. These continue to be critical areas of need for our agency. If we were to receive additional resources, they would likely be applied to these areas as needed.

**c) It is common practice for antitrust officials to review the effect of a merger on both the price and output (i.e. quantity) of a given product. When DOJ and FTC staff look at the labor market effects of a merger, do they consider the effect that a merger will have on hiring (i.e. quantity effects) in the relevant market?**

Response: In examining whether a merger threatens substantially to lessen competition in a labor market, we generally would consider all potential harms, including whether the merger may lead to monopsony purchasing power in that market and thereby potentially harm competition among employers in hiring workers. At the October 3rd hearing, I provided this relatively simple example: a merger between the only two auto manufacturing facilities proximately located in a rural area, but competing in a broader geographic market that includes auto manufacturers located in other areas of the country. Although the auto manufacturers' merger might not affect competition in the output market for the sale of automobiles, it may nonetheless substantially lessen competition in the input market for labor services, if the two firms' employees would have few post-merger employment opportunities should the merged firm seek to reduce their wages post-merger.

**d) In which merger reviews to date have FTC staff considered the effects of the merger on labor markets?**

Response: I am unaware of any instance in which the FTC has challenged a merger specifically over concerns relating to labor market competition. I also cannot comment on nonpublic merger investigations. But I can assure you that, as a routine part of our merger investigations, we continually look for instances in which monopsony power might be used to drive down input prices. For example, the FTC recently required global health care company Grifols S.A. to divest blood plasma collection centers in three U.S. cities, among other conditions, to resolve charges that Grifols' acquisition of Biotest US Corporation would be anticompetitive.<sup>39</sup> The FTC's administrative complaint alleged that Grifols and Biotest were the only two buyers of human source plasma in three U.S. cities, and that these three cities constituted relevant geographic markets because plasma donors typically do not travel more than 25 minutes to donate plasma. Without the divestitures, Grifols likely would have been able to exercise market power by unilaterally decreasing the donor fees in the three cities.

In addition to the Grifols/Biotest merger, the FTC has successfully blocked other mergers based on product or service market overlaps, and thereby likely has preserved competition in labor markets as well. In particular, in a number of hospital merger cases, blocking the deal likely prevented adverse effects in associated labor markets for doctors, nurses, and other health care professionals in those geographic areas.

Prior FTC actions also have addressed labor market competition. For example, the FTC previously secured a settlement with a trade association that represented most of the nation's best-known fashion designers and an organization that produced the two major fashion shows for the industry each year. The Commission's consent order prohibited the two groups from attempting to fix or reduce modeling fees, and required them to take steps to educate fashion designers that price-fixing is illegal. The Commission thus made it clear that antitrust laws prohibiting price fixing apply to modeling services just as they do to other products or services.<sup>40</sup>

**e) Is the DOJ or FTC reviewing past mergers for ex-post harms to competition in the labor markets?**

Response: We are exploring the feasibility of conducting merger retrospectives in a number of industries, and are committed to bringing enforcement actions against any company that violates the laws that we enforce. Staff in the Bureau of Economics have analyzed the effects of a number of consummated mergers, but their ability to do so is subject to research time and available data.<sup>41</sup> To date, Bureau of Economics staff have not found a good candidate

---

<sup>39</sup> *In re Grifols, S.A.*, Dkt. No. C-4654 (Sept. 17, 2018), <https://www.ftc.gov/enforcement/cases-proceedings/181-0081/grifols-sa-grifols-shared-services-north-america-inc-matter>.

<sup>40</sup> Press Release, FYI: FTC Approves Consent Agreement with The Council of Fashion Designers of America and 7<sup>th</sup> on Sixth, Inc. (Oct. 20, 1995), <https://www.ftc.gov/news-events/press-releases/1995/10/fyi-ftc-approves-consent-agreement-council-fashion-designers>.

<sup>41</sup> See, e.g., Thomas Koch & Shawn W. Ulrick, *Price Effects of a Merger: Evidence from a Physicians' Market* (2017) (Bureau of Economics Working Paper No. 333), <https://www.ftc.gov/system/files/documents/reports/price->

merger that we previously reviewed with data robust enough to enable a retrospective evaluation of the labor market effects.

- 6. The level of economic inequality in America today is reaching crisis proportions. At the same time, a small number of private corporations have a huge amount of market share. An equal, democratic society requires a more equal and democratic distribution of power. Taking on corporate power will require reexamining many areas of the law – our labor laws, our tax code, our housing laws, our healthcare laws, and our environmental protections.**

**One area that may need to be rethought is antitrust. Millions of Americans – workers, consumers, and ordinary families – do not feel our antitrust laws are working for them. There has been particular attention to the question of whether the “consumer welfare” standard is still up to the task of protecting Americans from corporate concentration. I believe any effective antitrust regime should account for a few different factors, and I would like to know if you agree.**

- a) **Should antitrust enforcement be concerned with prices and output?**

Response: Yes, antitrust enforcement should be concerned with prices and output. Recognizing this, the antitrust agencies and courts have long analyzed likely effects on price and output in deciding whether to challenge a transaction. The agencies have challenged transactions that would provide the merging firms the ability and incentive to raise price, reduce output, reduce innovation, or otherwise harm customers. The Horizontal Merger Guidelines describe how the agencies analyze transactions, and discuss the analysis in terms of price and non-price effects.<sup>42</sup>

- b) **Should antitrust enforcement be concerned with innovation?**

Response: Yes, antitrust enforcement should be concerned with innovation. Many innovations benefit consumers even more than incremental reductions in price and expansions of output. For example, the smartphone, and related software applications, allowed consumers to perform numerous tasks while mobile, which in many instances may have benefitted consumers beyond incremental improvements in more traditional forms of cellular or wireline telephone service.

The importance of innovation in merger analysis is set forth in Section 6.4 of the Horizontal Merger Guidelines, which state: “Competition often spurs firms to innovate. The Agencies

---

[effects-merger-evidence-physicians-market/working\\_paper\\_333.pdf](#) (physicians); Daniel Hosken et al., *Do Retail Mergers Affect Competition? Evidence from Grocery Retailing* (2012) (Bureau of Economics Working Paper No. 313), <https://www.ftc.gov/sites/default/files/documents/reports/do-retail-mergers-affect-competition%2%A0-evidence-grocery-retailing/wp313.pdf> (grocery stores); and Steven Tenn & John M. Yun, *The Success of Divestitures in Merger Enforcement: Evidence from the J&J – Pfizer Transaction* (2009) (Bureau of Economics Working Paper No. 296) [https://www.ftc.gov/sites/default/files/documents/reports/success-divestitures-merger-enforcement%2%A0-evidence-jampj-pfizer-transaction/wp296\\_0.pdf](https://www.ftc.gov/sites/default/files/documents/reports/success-divestitures-merger-enforcement%2%A0-evidence-jampj-pfizer-transaction/wp296_0.pdf) (consumer health products).

<sup>42</sup> U.S. Dep’t of Justice & Fed. Trade Comm’n *Horizontal Merger Guidelines* (2010), <https://www.ftc.gov/public-statements/2010/08/horizontal-merger-guidelines-united-states-department-justice-federal>.

may consider whether a merger is likely to diminish innovation competition by encouraging the merged firm to curtail its innovative efforts below the level that would prevail in the absence of the merger.”<sup>43</sup>

**c) In practice, do you believe the “consumer welfare” standard accounts for threats to innovation?**

Response: Yes, I believe the consumer welfare standard accounts for threats to innovation. As noted above, consumers tend to benefit from innovative products and services that come about as a result of the competitive process. Thus, issues regarding innovation, including threats to innovation, are incorporated into the concept of consumer welfare.

The FTC is presently studying issues relating to innovation and its implication for competition and consumers. The Commission has long been committed to self-examination, and there has been increasing interest in examining the efficacy of antitrust oversight and enforcement in certain sectors, including labor markets. To that end, I announced in June that the Commission would engage in an extensive program of public hearings designed to seek input on whether broad-based changes in the economy, business practices, and technology, as well as international developments, require any adjustments to competition and consumer protection enforcement and policy.

As part of our *Hearings on Competition and Consumer Protection in the 21st Century* initiative (“*21st Century Hearings*”), the Commission is inviting public comment on a wide range of antitrust and consumer protection topics, including this topic.<sup>44</sup> The hearings began earlier this fall, and we have been soliciting a diverse group of academics, consumer group representatives, business leaders, legal and economic practitioners, and technologists to participate in our moderated panels and discussions.

**d) Should antitrust enforcement be concerned with labor market effects, such as monopsony power and its impact on wages and working conditions?**

Response: Yes, antitrust enforcement should be concerned with labor market effects, in addition to markets for goods and services. Monopsony power and its impact on wages and working conditions can have anticompetitive effects. Antitrust enforcement protects the competitive process in labor markets, as it does for other markets. The Commission is continuing to study issues relating to monopsony power as part of our *21st Century Hearings*.

**e) In practice, do you believe the “consumer welfare” standard accounts for labor market concerns?**

Response: Yes. Antitrust enforcement protects the competitive process, which benefits consumers, in labor markets as it does for other markets.

---

<sup>43</sup> *Id.* at § 6.4.

<sup>44</sup> Press Release, FTC Announces Hearings on Competition and Consumer Protection in the 21<sup>st</sup> Century (June 20, 2018), <https://www.ftc.gov/news-events/press-releases/2018/06/ftc-announces-hearings-competition-consumer-protection-21st>.

f) **Should antitrust enforcement be concerned with rising wealth and growing inequality?**

Response: The competitive process, which antitrust law enforcement protects, tends to make new, better, and less expensive products and services more attainable to a greater number of consumers over time. For example, many innovative products, such as personal computers and smartphones, which were relatively expensive for many consumers around the time of their introduction, are now widely affordable to the broad public. Protecting the competitive process through vigorous antitrust enforcement tends to promote such economic benefits to consumers across a wide range of socioeconomic backgrounds. Many products and services that were once cutting edge are now commonplace.

Antitrust law enforcement practice and controlling case precedent has generally focused on competition between particular businesses, operating in particular product and geographic markets, and identifiable, legally cognizable effects on consumers, such as effects relating to prices, output, quality, service, and innovation. Absolute and relative levels of wealth are not factors that the courts have recognized as being protected by the antitrust laws.

Antitrust enforcement, as a law enforcement activity, is easiest to administer when it is directed at specific competitive issues in a “relevant market.” Going beyond this focus potentially raises challenges regarding the need to balance multiple inconsistent goals, agency administrability, legal predictability, and the ability to secure enforceable remedies. These are some of the issues under consideration at our hearings.

g) **In practice, do you believe the “consumer welfare” standard accounts for wealth and inequality?**

Response: As noted above, the competitive process, which antitrust law enforcement protects, tends to promote economic benefits to consumers across a wide range of socioeconomic backgrounds. Furthermore, the consumer welfare standard does protect consumers and competition from the risk that accumulated wealth may be used collusively to transfer assets from consumers in the form of higher prices and reduced output. Broad issues of wealth and inequality, however, are not factors that the courts have recognized as being protected by the antitrust laws.

7. **Most Favored Nations clauses require that providers offer their goods and services to all buyers on the same terms. For example, sometimes doctors and dentists might want to charge some of their patients lower fees but are prevented from doing so by Most Favored Nations clauses in their contracts with insurance companies. While Most Favored Nations clauses sometimes encourage a more efficient marketplace, an emerging body of literature has highlighted that these contract provisions can harm competition and raise overall prices. A 2012 workshop by the DOJ and FTC found that Most Favored Nations clauses can be anticompetitive because they help distributors collude to stifle innovation and increase prices.**

**a) Do you believe one-sided Most Favored Nations clauses pose a risk to competition in the healthcare industry?**

Response: Most Favored Nation causes are contract terms found in a variety of industries and used by large companies and smaller rivals. In many cases, MFNs are competitively benign because they offer pricing protection—reducing uncertainty about potential price fluctuation—and may reduce transaction costs. Nonetheless, as you note, MFNs can harm competition in some specific situations by excluding rivals or facilitating coordination.

The FTC has previously challenged the use of MFNs in the health care industry. In *RxCare of Tennessee, Inc.*, the FTC negotiated a consent order with RxCare, a dominant pharmacy group that included nearly all pharmacies in Tennessee and provided the pharmacy network for more than 50 percent of Tennessee residents with third-party pharmacy benefits.<sup>45</sup> The FTC alleged that because of RxCare’s clause and its market power, some pharmacies in RxCare’s network were unwilling to accept lower reimbursement rates for prescriptions they filled for patients covered by other health plans. In addition, some third-party payers paid higher pharmacy reimbursement rates in Tennessee than other states, and other firms were unable to establish lower-priced pharmacy networks in Tennessee. The Commission’s consent order prohibited RxCare from maintaining or enforcing an MFN clause, and required RxCare to remove the clause from its existing contracts.

Anticompetitive conduct in the health care industry remains a significant priority, and we will continue to look to firms with significant market power for evidence of anticompetitive activity, including enforcement of MFN clauses.

**8. Too often, drug companies find ways to prolong the lives of their patents and keep generic drugs out of the market. This allows them to push their profit margins higher and higher. Take the example of Gleevec, a leukemia cancer drug. Gleevec’s price has risen from \$26,000 per year in 2001 to \$140,000 per year in 2017.**

**The patent for this drug is owned by Novartis. A case before the First Circuit alleges that Novartis fraudulently obtained a patent from the patent office. A key question at issue in the case is whether an obscure legal doctrine – the *Noerr-Pennington* doctrine – protects fraudulent filings before the Patent and Trademark Office. Mr. Simons spoke about some of his actions to protect health care consumers in his own opening remarks.**

**a) Without commenting on the merits of pending litigation, what are you doing to prevent drug companies from fraudulently obtaining patents?**

Response: The FTC has actively sought to protect the application of the antitrust laws against expansive interpretations of the *Noerr-Pennington* doctrine that do not comport with the doctrine’s foundational principles.<sup>46</sup> (The *Noerr-Pennington* doctrine is a judicially created

---

<sup>45</sup> 121 F.T.C. 762 (1996).

<sup>46</sup> See generally FED. TRADE COMM’N, ENFORCEMENT PERSPECTIVES ON THE *NOERR-PENNINGTON DOCTRINE: AN FTC STAFF REPORT* (2006), <https://www.ftc.gov/sites/default/files/documents/reports/ftc-staff-report-concerning-enforcement-perspectives-noerr-pennington-doctrine/p013518enfperspectnoerr-penningtondoctrine.pdf>.

limitation on the reach of the Sherman Act and is grounded in the protected First Amendment right to petition government.) The FTC also has brought enforcement actions against drug companies that have abused the patent and regulatory process. The FTC recently had a major victory when a federal court ruled that AbbVie Inc. filed baseless patent infringement lawsuits against potential generic competitors to illegally maintain its monopoly over the testosterone replacement drug AndroGel, and ordered \$493.7 million in monetary relief to those who were overcharged for AndroGel as a result of Abbvie's conduct.<sup>47</sup> The FTC's pending case against Shire ViroPharma Inc. alleges that the company engaged in a series of filings before the Food and Drug Administration as a means of preventing generic entry and maintaining a monopoly.<sup>48</sup> The district court ruled that Shire ViroPharma's conduct was not shielded by the *Noerr-Pennington* doctrine, but nonetheless dismissed the complaint because the alleged violation ended before the FTC sued. The court held that the FTC cannot bring suit in federal court under Section 13(b) of the FTC Act absent allegations that the defendant's unlawful conduct is ongoing or imminent at the time the complaint is filed. The agency has appealed this ruling to the Third Circuit.<sup>49</sup> Finally, the FTC expressed concerns about the abuse of the patent and FDA regulatory systems in a 2015 amicus brief addressing the possible antitrust implications of "product hopping," whereby a branded pharmaceutical company allegedly obtains patents on insignificant reformulations of a drug to maintain its monopoly and suppress generic competition.<sup>50</sup>

**b) Is there anything Congress could be doing to assist in this area?**

Response: I do not have any particular suggestions for Congress at this time.

- 9. Over-concentration in the airline industry is harming consumers. Airline prices are higher today than they would otherwise be if there were greater competition in the sector. Recent studies indicate that airlines do not pass on price savings to consumers when oil prices decline, instead using their market power to protect their profits. Furthermore, customer service remains consistently poor in the airline industry. Unfortunately, I am concerned that our antitrust enforcers are being lax in policing the airline industry.**

**a) What steps are you currently taking, or will you be taking, to address concentration in the airline industry?**

---

<sup>47</sup> Statement of FTC Chairman Joe Simons Regarding Federal Court Ruling in *FTC v. AbbVie* (June 29, 2018), <https://www.ftc.gov/news-events/press-releases/2018/06/statement-ftc-chairman-joe-simons-regarding-federal-court-ruling>.

<sup>48</sup> *FTC v. Shire ViroPharma Inc.*, No. 17-cv-131 (D. Del. Feb. 7, 2017), <https://www.ftc.gov/enforcement/cases-proceedings/121-0062/shire-viopharma>.

<sup>49</sup> Brief of the Fed. Trade Comm'n and Appendix Vol. 1, *FTC v. Shire ViroPharma Inc.*, No. 18-1807 (3d Cir. June 19, 2018), [https://www.ftc.gov/system/files/documents/cases/shire\\_viopharma\\_inc\\_ftc\\_opening\\_brief\\_and\\_appendix\\_vol\\_1\\_6-19-18.pdf](https://www.ftc.gov/system/files/documents/cases/shire_viopharma_inc_ftc_opening_brief_and_appendix_vol_1_6-19-18.pdf).

<sup>50</sup> Brief of the Fed. Trade Comm'n as Amicus Curiae, *Mylan Pharms., Inc. v. Warner Chilcott plc.*, No. 2:12-cv-03824-PD (3d Cir. Sept. 30, 2015), <https://www.ftc.gov/policy/advocacy/amicus-briefs/2015/09/mylan-pharmaceuticals-inc-v-warner-chilcott-plc-et-al>.

Response: By statute, the FTC lacks jurisdiction over airlines, and thus would refer any information regarding anticompetitive conduct in that industry to the Department of Justice.

**10. On October 3, 2018, both Mr. Simons and Mr. Delrahim indicated that they were unsure whether the FTC or the DOJ's Antitrust Division had been consulted prior to the Federal Communications Commission's (FCC) decision to roll back its net neutrality rules. Both Mr. Simons and Mr. Delrahim promised that they would report back to the Committee on this point.**

**a) Was either the FTC or the DOJ's Antitrust Division consulted prior to the FCC's decision to undo its net neutrality rules? If so, what input did you provide to the FCC?**

Response: In response to the FCC's Notice of Proposed Rulemaking on Restoring Internet Freedom, the FTC's Bureau of Consumer Protection, Bureau of Competition, and Bureau of Economics submitted a joint comment. Then-Acting Chairman Maureen Ohlhausen and then-Commissioner Terrell McSweeney submitted separate comments.<sup>51</sup>

**b) Was either the FTC or the DOJ's Antitrust Division consulted before the DOJ initiated legal action to block California's net neutrality rules? If so, what input did you provide?**

Response: Neither the staff of the Bureau of Consumer Protection nor the staff of the Bureau of Competition were consulted before the Department of Justice filed its Complaint and Motion for a Preliminary Injunction in the Eastern District of California. I was not aware prior to filing.

**11. A vibrant internet requires an innovative internet. But that innovation is at risk because of the ways that powerful companies like Amazon and Facebook are able to monitor their users' behavior and identify potential competition. These large companies buy up potential competitors before they pose a real risk. For example, according to the Wall Street Journal, in 2016, Facebook employees used their access to data on user activity to monitor the popularity of their rival Snapchat. Based on this data, Facebook knew that Snapchat's growth had slowed months before the fact was publicly disclosed.**

**b) How can you ensure that technology platforms do not use customers' data to identify and buy out or kill early stage competition?**

Response: We consider all potential theories of harm in our merger reviews. If we find evidence that data is being used anticompetitively in violation of the antitrust laws, we will take enforcement action.

**c) Do the DOJ and the FTC have the appropriate resources to keep up with the way**

---

<sup>51</sup> Available at <https://www.ftc.gov/news-events/press-releases/2017/07/ftc-staff-offers-comment-fccs-network-neutrality-proceeding>

**our economy is being changed by technology?**

Response: We appreciate your support in ensuring the FTC has the resources to effectively pursue its mission. In recent years, technology has facilitated the development of new products and services, and new ways of doing business. We are aware of concerns about the size and reach of large technology companies and their growing importance in consumers' daily lives. The emergence of new and disruptive business models, however, is not a novel phenomenon. The antitrust laws are sufficiently flexible to address anticompetitive conduct in these new and dynamic markets, and effective enforcement of the antitrust laws can ensure that market incumbents compete on the merits.

Earlier this fall, the Commission launched the *21<sup>st</sup> Century Hearings* to consider whether the FTC's enforcement and policy efforts are keeping pace with changes in the economy, including advancements in technology and new business models made possible by those developments. Although we expect we already have the resources necessary to evaluate and challenge technology mergers and conduct by technology firms, these hearings should help inform our assessment of our future resource needs.

- 12. Even though the mergers that tend to make headlines are those that raise antitrust concerns on a national level, many smaller mergers that do not make news still have significant monopoly effects on the local level. For example, in 2012, the Connecticut Attorney General worked with the FTC to review the merger of two hospitals in Connecticut. These sorts of merger reviews can be labor and resource intensive. Still, they are vital to preserving free and efficient local markets.**

- a) Do federal antitrust enforcement agencies have the necessary resources to adequately review mergers that only affect state or local markets?**

Response: Additional resources would always be helpful to monitor local markets. For example, some local mergers may be too small to require Hart-Scott-Rodino premerger notification, but may still have anticompetitive effects. The state Attorneys General may have advantages in investigating certain mergers in local markets by being more familiar with potential witnesses, proximately located to the markets under investigation, and generally closer to the available evidence. The FTC does, however, have jurisdiction over any anticompetitive merger in "any section of the country," and we do not hesitate to bring enforcement actions where appropriate.

- b) What can Congress do to better support coordination between federal and state antitrust officials, or otherwise support state antitrust officials in their work?**

Response: The FTC works cooperatively with state antitrust officials, and we consult regularly to ensure our respective efforts are efficient and successful.

- 13. In addition to federal and state antitrust officials, private consumers are able to bring antitrust actions. Private consumers successfully initiated antitrust actions against the four major airlines, for example. However, because mandatory arbitration**

**agreements often prevent private litigation, many consumers cannot stand up for their rights on their own.**

**a) Do you agree with me that private antitrust actions play a vital role in policing the anticompetitive effects of mergers and the unfair practices of companies?**

Response: Yes. Private actions play a key role in finding and policing anticompetitive actions. The use of private damages, tripled under the antitrust laws, has a substantial deterrent effect on unlawful conduct.

**The Honorable Cory Booker**

- 1. When employers don't face competition for labor, people looking for work have to simply accept whatever terms are offered—fair or not. Employers with monopsony power can generate higher profits by employing fewer workers and paying them less, effectively converting the value of their labor into cash for its shareholders.**

**Recent studies suggest that declining competition for workers among dominant firms has helped create a labor market in which fewer workers are able to bid up their own wages.**

**This isn't the first time in our history when we've seen large firms use their dominance to squeeze workers and suppliers. In response to the "trusts" that dominated many industries back at the turn of the century, Congress passed an ambitious set of antitrust laws—the same ones that still protect us today.**

**As a legal matter, these antitrust laws apply to reductions in competition for employees as a result of mergers as readily as they do to reductions in product market competition. But at some point in the years since Congress created these protections, I'm concerned that the antitrust agencies in charge of enforcing these laws—your agencies—have forgotten about this part of their mandate. That's been true for too long, under Democratic and Republican administrations.**

**In a response to my November 2017 letter to the FTC and DOJ on this topic, then-Acting Chair Maureen Ohlhausen noted that "the Commission seeks to prevent mergers that would substantially lessen competition among buyers of labor services, and to stop collusion and exclusionary conduct by buyers in labor markets."**

- a) In analyzing proposed mergers and acquisitions, does the FTC regularly consider the prospective impacts on wages and other terms of employment, or the bargaining position of workers employed in the affected labor markets or supply chains?**

**Response:** Yes. The staff has been specifically instructed to look at each merger for potential anticompetitive impacts on labor.

- b) As far as I can tell, your agencies have never challenged a merger specifically over concerns relating to labor market competition. Is that correct?**

**Response:** I am unaware of any instance in which the FTC has challenged a merger specifically over concerns relating to labor market competition. But we continually look for instances in which monopsony power may be used to drive down input prices.

For example, the FTC recently required global health care company Grifols S.A. to divest blood plasma collection centers in three U.S. cities, among other conditions, to resolve

charges that Grifols' acquisition of Biotest US Corporation would be anticompetitive.<sup>52</sup> The FTC's administrative complaint alleged that Grifols and Biotest were the only two buyers of human source plasma in three U.S. cities, and that these three cities constituted relevant geographic markets because plasma donors typically do not travel more than 25 minutes to donate plasma. Without the divestitures, Grifols likely would have been able to exercise market power by unilaterally decreasing donor fees in the three cities.

In addition to the Grifols/Biotest merger, the FTC has successfully blocked other mergers based on product or service market overlaps, and thereby likely has preserved competition in labor markets as well. In particular, in a number of hospital merger cases, blocking the deal likely prevented adverse effects in associated labor markets for doctors, nurses, and other health care professionals in those geographic areas.

Prior FTC actions also have addressed labor market competition. For example, the FTC previously secured a settlement with a trade association that represented most of the nation's best-known fashion designers and an organization that produced the two major fashion shows for the industry each year. The Commission's consent order prohibited the two groups from attempting to fix or reduce modeling fees, and required them to take steps to educate fashion designers that price-fixing is illegal. The Commission thus made it clear that antitrust laws prohibiting price fixing apply to modeling services just as they do to other products or services.<sup>53</sup>

**c) Beyond budgetary resources (which I consistently fight for), are there any legal or administrative authorities that you lack that will allow you to better consider labor market impact in merger review and potential enforcement action?**

Response: I am not aware of any particular legal or administrative authorities that will allow the FTC to better consider labor market impact (or other monopsony issues) in merger review and potential enforcement action. The Commission, however, is currently considering the antitrust evaluation of labor markets as part of its *Hearings on Competition and Consumer Protection in the 21<sup>st</sup> Century*.<sup>54</sup> Panel discussions on economic evidence of labor market monopsony, and labor markets and antitrust policy, were held on October 16, and the Commission has invited public comments on these and other labor market-related topics.<sup>55</sup> We will keep you apprised if we determine that we require additional authority to investigate and challenge mergers that substantially lessen competition in labor markets.

**2. Recent data privacy scandals are reflective of a much more pervasive set of problems**

---

<sup>52</sup> *In re Grifols, S.A.*, Dkt. No. C-4654 (Sept. 17, 2018), <https://www.ftc.gov/enforcement/cases-proceedings/181-0081/grifols-sa-grifols-shared-services-north-america-inc-matter>.

<sup>53</sup> Press Release, FYI: FTC Approves Consent Agreement with The Council of Fashion Designers of America and 7<sup>th</sup> on Sixth, Inc. (Oct. 20, 1995), <https://www.ftc.gov/news-events/press-releases/1995/10/fyi-ftc-approves-consent-agreement-council-fashion-designers>.

<sup>54</sup> FTC, *Hearings on Competition and Consumer Protection in the 21<sup>st</sup> Century*, <https://www.ftc.gov/policy/hearings-competition-consumer-protection>.

<sup>55</sup> FTC Workshop, *FTC Hearing #3: Competition and Consumer Protection in the 21<sup>st</sup> Century*, <https://www.ftc.gov/news-events/events-calendar/2018/10/ftc-hearing-3-competition-consumer-protection-21st-century>.

**social media and other online services present—the manipulation and misuse of user information, the distribution of misleading or even illegal content, and the ability to engage in criminal activity with relative anonymity, to name just a few.**

- a) **Access to data is increasingly become essential to companies’ market position, particularly in the tech industry. Given this reality, do you believe that a company’s privacy standards, including the protection of personal data and data security, should be a factor when evaluating that company for the purpose of determining how competitive a market is? If so, should the FTC develop guidance on this?**

Response: Consumer privacy is a very serious issue, and the FTC devotes significant resources to protecting consumer privacy as part of its consumer protection mission. Ideally, competition and consumer protection policies and enforcement practices should complement and reinforce each other, as more firms compete to provide better privacy protections. As I stated at the October 3rd hearing, however, we must take steps to ensure that new privacy laws strike a proper balance for consumers and competition.

Consumer preferences, including privacy, may depend on the particular tradeoffs with price, quality, or other competitive factors. Effective antitrust policy should account for such variances.

Accounting for the dynamic nature of an industry requires solid grounding in facts and the careful application of tested antitrust analysis.<sup>56</sup> We will continue to closely follow privacy issues and act quickly in the case of any anticompetitive conduct.

- b) **The Children’s Online Privacy Protection Act of 1998 (COPPA) is supposed to prevent the personal data of children under 13 from falling into the wrong hands. But a number of recent reports, including an analysis published a few weeks ago in the *New York Times*, have found that many apps intended for children track and share data with outside companies. What is the FTC doing to ensure that COPPA is duly enforced, and that children’s privacy is protected, when young kids are using apps on phones and tablets?**

Response: Since Congress enacted COPPA in 1998, the FTC has vigorously enforced the law and the COPPA Rule that implements it. To date, the Commission has brought 28 COPPA cases against a wide variety of commercial entities, which include over \$10 million in civil penalties as well as strong injunctive relief. Several of these cases involved the improper collection of children’s personal information through mobile apps. For example, in 2016 the Commission sued InMobi, a mobile advertising company that allegedly collected geolocation data from users of child-directed apps without obtaining the necessary parental consent.<sup>57</sup> The FTC also sued two developers of child-directed apps—Retro Dreamer and LAI

---

<sup>56</sup> See FTC, Statement of the Federal Trade Commission Concerning Google/DoubleClick (Dec. 20, 2017), <https://www.ftc.gov/public-statements/2007/12/statement-federal-trade-commission-concerning-googledoubleclick> (explaining the agency’s antitrust review of the proposed acquisition, which included investigating whether the proposed acquisition would adversely affect non-price attributes of competition, such as consumer privacy).

<sup>57</sup> *United States v. InMobi Pte. Ltd.*, Case No. 3:16-CV-3474 (N.D. Cal. June 22, 2016) (COPPA Consent Decree).

Systems—for allegedly allowing third parties to collect personal information, in the form of persistent identifiers used to deliver targeted advertising, from users without complying with COPPA’s notice and consent requirements.<sup>58</sup> The Commission has also brought actions against the online review site Yelp and the app developer TinyCo, alleging COPPA violations related to each company’s mobile apps.<sup>59</sup> Most recently, the Commission brought its first COPPA action involving connected toys against VTech (including collection through an app),<sup>60</sup> and sent warning letters to two foreign companies that marketed smart watches and companion apps that appeared to collect children’s geolocation information without obtaining parental consent.<sup>61</sup>

The Commission also takes steps to ensure that the Rule keeps pace with changing technology and business models. In 2013, the Commission updated and strengthened the Rule by expanding the definition of personal information to include persistent identifiers used for behavioral advertising as well as photographs, video, or audio files containing a child’s image or voice.<sup>62</sup> The 2013 amendments also extended COPPA liability to third parties, such as network advertisers, that knowingly collect personal information from users of first-party child-directed websites and online services.<sup>63</sup> Indeed, the Commission enforced these new requirements in the RetroDreamer, LAI Systems, and VTech cases, as well as in the third-party context against InMobi, cited above.

3. **An estimated 30 million workers are limited in their ability to switch jobs by what are known as “noncompete” agreements. These are contractual provisions that forbid employees from leaving their job, and working for a competitor or starting their own business. One in seven American workers earning under \$40,000 a year reports having signed a noncompete agreement.**

**These agreements have been shown to reduce employee motivation, entrepreneurship, and sharing of knowledge, which are all critical to fostering innovation and growth. More fundamentally, they often serve to keep lower-wage workers from pursuing higher-paying jobs.**

- a) **What enforcement, rulemaking, or advocacy does the FTC intend to do around this important issue?**

Response: The Commission takes very seriously the potential for monopsony power among employers to affect workers’ wages and mobility. If we find or are presented with evidence

---

<sup>58</sup> *United States v. Retro Dreamer*, Case No. 5:15-CV-2529 (C.D. Cal. Dec. 17, 2015) (COPPA Consent Decree); *United States v. LAI Systems*, Case No. 2:15-CV-9691 (C.D. Ca. Dec. 17, 2015) (COPPA Consent Decree).

<sup>59</sup> *United States v. Yelp Inc.*, Case No. 3:14-CV-04163 (N.D. Cal. Sept. 17, 2014) (COPPA Consent Decree); *United States v. TinyCo, Inc.*, Case No. 3:14-CV-04164 (N.D. Cal. Sept. 17, 2014) (COPPA Consent Decree).

<sup>60</sup> *United States v. VTech Electronics Limited*, Case No. 1:18-cv-00114 (N.D. Ill. Jan. 8, 2018) (COPPA Consent Decree).

<sup>61</sup> See Press Release, FTC Warns Gator Group, Tinitell that Online Services Might Violate COPPA (April 27, 2018), <https://www.ftc.gov/news-events/press-releases/2018/04/ftc-warns-gator-group-tinitell-online-services-might-violate>.

<sup>62</sup> 16 C.F.R. § 312.2.

<sup>63</sup> *Id.*

that a firm within our jurisdiction is engaging in conduct that harms competition and may violate the antitrust laws, we will review that information for potential law enforcement action.

Beyond enforcement, the FTC's advocacy program provides written comments regarding competition and consumer protection policies in response to specific requests from federal, state, and local policymakers and other open comment opportunities. To the extent there may be opportunities to provide useful, well-researched comments about labor issues as they relate to competition or consumer protection, FTC staff will respond appropriately.

- b) I'm sure you are familiar with how Jimmy John's, the sandwich chain, used to include noncompete clauses in the contracts of workers who were making \$8.15 an hour. Jimmy John's finally started dropping these provisions a couple of years ago. These clauses keep American workers from pursuing a better-paying job somewhere else. They hold wages down and keep Americans from getting ahead. They make labor markets *less* competitive, not more competitive. In your view, what possible pro-competitive purpose do noncompete agreements serve?**

Response: In certain circumstances, narrowly tailored noncompete clauses can benefit competition. For example, noncompete clauses can protect against the disclosure or use of competitively sensitive information outside of an employer's organization. Noncompete clauses also can encourage organizations to invest in employee training by reducing the risk that employees will take their new skills to a competitor. That said, several private suits have alleged that overly broad employee restrictions can violate the antitrust laws. In addition, agreements among competitors not to compete for workers, or not to solicit one another's employees, can be clear violations of the antitrust laws.<sup>64</sup>

- c) Noncompete agreements seem to *restrain* competition in the labor market for lower-wage workers, without a clear business justification. We're talking about home health aides, janitors, cleaners, cooks, hotel employees, cleaners, and many, many other kinds of jobs. Why aren't more enforcement actions warranted to ensure that large corporations aren't overusing, misusing, or even abusing noncompete agreements for lower-wage workers?**

Response: An employment noncompete agreement may be challenged as an unreasonable vertical restraint under the antitrust laws. Relevant factors include the type of employment, the scope and duration of the restrictions, as well as whether the employer possesses market power, when assessing whether to bring an enforcement action.

- 4. A recent study by Princeton economists found that 58% of major franchisors' franchise agreements include a no-poach provision that prohibits their franchisees from hiring or**

---

<sup>64</sup> See, e.g., *In re Tecnica Group SpA*, Dkt. No. C-4475 (July 3, 2014), <https://www.ftc.gov/enforcement/cases-proceedings/121-0004/tecnica-group-matter> (consent order settling FTC charges that Tecnica and Marker Volkl illegally agreed not to compete for one another's ski endorsers or employees; *In re Marker Volkl (Int'l) GmbH*, Dkt. No. C-4476 (July 3, 2014), <https://www.ftc.gov/enforcement/cases-proceedings/121-0004/marker-volkl-matter> (same).

**recruiting each other's workers. Use of these provisions is up 20% from two decades ago, and now covers approximately 340,000 franchise units and millions of low-wage workers. In effect, the provisions allow employers to collude to restrict worker mobility, suppress wages, and generally constrain the labor market.**

**Senator Warren and I have introduced legislation prohibiting no-poach language in franchise agreements, and, in the last several months, dozens of large companies including McDonald's, H&R Block, and others, announced they will remove these restrictive clauses from their contracts.**

- a) There is a very strong case to be made that no-poaching agreements are unfair trade practices in violation of Section 5 of the FTC Act. Has the commission considered issuing a rule banning these agreements?**

Response: In October 2016, the FTC and Department of Justice released joint Antitrust Guidance for Human Resource Professionals.<sup>65</sup> This guidance explains that the Department of Justice intends to criminally investigate companies that enter into no-poaching agreements that prevent companies from recruiting each other's employees. The guidance also explains that agreements that do not constitute criminal violations may still lead to civil liability under statutes enforced by both agencies. I believe this guidance is sufficiently clear that rulemaking is not required at this time.

- 5. In a speech last month, you said that one of your interests at the FTC will be on the mergers between high-tech platforms and nascent competitors, noting that these types of transactions are difficult to review because "the acquired firm is by definition not a full-fledged competitor, and the likely level of future competition with the acquiring firm often is not apparent. But the harm to competition can nonetheless be significant. We are going to be spending some time and resources thinking about these difficult and important issues."**

**It appears both you and Mr. Delrahim acknowledge that limiting the consumer welfare standard to only consider price effects will cause us to miss current and future anticompetitive harm.**

- a) Many have suggested replacing the consumer welfare standard by amending the Sherman and Clayton Acts to *explicitly* detail the competitive standard in ways that account for additional stakeholders and values (labor, privacy, innovation, etc.). Is a legislative fix necessary?**

Response: I do not believe legislative change is necessary. The consumer welfare standard works well in antitrust. It is well-established in Supreme Court precedent and has bipartisan support in the antitrust bar. There is a strong consensus in both law and economics that

---

<sup>65</sup> U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidance for Human Resource Professionals* (Oct. 2016), <https://www.ftc.gov/public-statements/2016/10/antitrust-guidance-human-resource-professionals-department-justice>. The agencies also published a list of red flags for employment practices to help identify potential antitrust law violations.

focusing on consumer welfare makes for efficient and effective antitrust enforcement.

That said, a number of recent critiques of the consumer welfare standard have raised important issues. This agency routinely reconsiders the basis of all of our enforcement activities and the consumer welfare standard is no exception. As I stated at the October 3rd hearing, “one of the most serious concerns about those proposals . . . at least in a broad sense is that they are difficult to administer, and to some extent inconsistent with each other. But this is a different time, and perhaps there are different facts, there are different arguments, and there’s different evidence, and that’s what we want to see.” The Commission will continue to examine the role of the consumer welfare standard as part of our *Hearings on Competition and Consumer Protection in the 21<sup>st</sup> Century* and has invited public comment on this issue.<sup>66</sup>

**6. You have previously said that “substantially increased expert costs” are causing budget difficulties at the Commission.**

**a) What types of hard choices do you have to make when deciding whether to bring litigation?**

Response: When the available evidence gives the Commission reason to believe that a business practice is or would likely be anticompetitive, the Commission intervenes. I am not aware of any instance in which the Commission has declined to bring an enforcement action due to costs or resource constraints. The agency’s high level of enforcement activity, however, has brought us closer to potentially having to confront such a decision. More resources would be helpful.

**b) Does the FTC need more funding in order to effectively achieve its mission to protect consumers and promote competition?**

Response: We appreciate your attention to the agency’s resource needs. As I mentioned in my October 3rd testimony, the FTC is committed to maximizing its resources to enhance its effectiveness in protecting consumers and promoting competition, to anticipate and respond to changes in the marketplace, and to meet current and future challenges. In the past, we have requested additional resources for experts, information technology, and more full-time employees in support of our mission to protect consumers and promote competition. These continue to be critical areas of need for our agency. If we were to receive additional resources, they likely would be applied to these areas as needed.

**7. At the first day of the FTC Hearings on Competition and Consumer Protection in the 21st Century, David Vladeck, the former Director of the Bureau of Consumer Protection, called for the FTC to hire more technologists, perhaps through a new Bureau of Technology.**

**a) Would having more technologists on staff help the FTC move more quickly on**

---

<sup>66</sup> See FTC Workshop, *FTC Hearing #5: Competition and Consumer Protection in the 21st Century* (Nov. 1, 2018), <https://www.ftc.gov/news-events/events-calendar/ftc-hearing-5-competition-consumer-protection-21st-century>.

**investigations relating to new technologies?**

Response: Much of the FTC's work intersects with technology. Having additional technologists on staff would assist the agency in fulfilling its mission. The FTC's existing technologists play a critical role in helping FTC attorneys and economists understand technical issues relevant to their investigations, and in interpreting technical information provided by companies. Our technologists also assist in identifying, improving, or developing tools that allow FTC staff to more effectively investigate cases and capture evidence. Additional technological staff would support a larger number of investigations and assist the FTC in protecting consumers and promoting competition in an increasingly tech-centric economy.

- 8. Historically, EU regulators have been much tougher with enforcing anticompetitive practices than U.S. regulators. For example, last year the EU fined Google \$2.7 billion for search engine abuses. Meanwhile, in 2013, the FTC closed a similar investigation into Google's search engine without levying any financial penalties.**

**a) What accounts for this vast difference in regulatory approach?**

Response: I was not in office when the Commission considered the Google matter to which you refer, but refer you to the Commission's unanimous statement accompanying the closure of the investigation, available at

[https://www.ftc.gov/sites/default/files/documents/public\\_statements/statement-commission-regarding-googles-search-practices/130103brillgooglesearchstmt.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commission-regarding-googles-search-practices/130103brillgooglesearchstmt.pdf).

More generally, while the U.S. and EU approaches to competition have converged in many areas of competition law and policy, there are differences in our approaches to single firm conduct, driven by differences in our statutes, jurisprudence, history, and perspectives. For example, unlawful acquisition of monopoly power and attempted monopolization violate Section 2 of the Sherman Act but are not covered by the EU's Article 102, which prohibits abusive conduct by dominant firms. On the other hand, excessive pricing and other exploitative abuses violate Article 102 but not the Sherman Act. The European courts have also mandated a more expansive definition of illegal anticompetitive conduct than is recognized by U.S. courts. Regarding historical background, EU competition law was designed to help break down trade barriers, discipline state monopolies, and promote integration in postwar Europe, while the U.S. regime evolved to serve different objectives. Fortunately, we maintain a strong cooperative relationship with the European Commission, which enables us to reach consistent outcomes in the vast majority of trans-Atlantic matters under concurrent review. We engage in regular dialogue aimed at understanding and narrowing our remaining differences.

- b) Does the FTC, under its current budget, have enough resources to effectively regulate markets and investigate anticompetitive, deceptive, or unfair business practices?**

Response: As noted above, it is critical that the FTC have sufficient resources to support

November 6, 2018

expert work in competition and consumer protection litigation cases. More resources would be helpful, and once again I appreciate your attention to the agency's needs.

**The Honorable Dianne Feinstein**

**I intend to introduce legislation that would enable the Federal Trade Commission to crack down on the growing nuisance of illegal robocalling. The legislation does so by carving telecoms out of the common carrier exemption in the FTC Act.**

**1. How would eliminating the common carrier exemption, either in part or as a whole, improve the FTC’s enforcement ability, both with respect to illegal robocalling and other illegal activity?**

Response: The FTC has long advocated for the repeal of the common carrier exemption. The exemption prevents effective enforcement in three areas:

- *Illegal robocall traffic.* Eliminating the common carrier exemption would assist the Commission in combatting illegal robocall traffic at its source: the VoIP providers that bring the illegal robocalls into the telecommunications network. The vast majority of illegal robocalls are dialed using VoIP telephony services. Many VoIP carriers advertise that they offer “dialer/short duration termination.” This is a euphemism for carrying robocalls.

Uncertainty about the FTC’s ability to sue and regulate VoIP providers has impaired the FTC’s ability to counter fraudulent and abusive robocalls. In a recent case, the FTC sued an individual who knowingly assisted billions of illegal robocalls. He provided this assistance through three companies: a VoIP provider, a software licensing company, and a server hosting company. The FTC did not sue the VoIP provider because of the legal uncertainty surrounding application of the common carrier exemption.<sup>67</sup>

- *Privacy and data security.* The common carrier exemption prevents the FTC from enforcing a level playing field for entities that are not subject to our jurisdiction. For example, providers of wireline and wireless telephone services collect and maintain sensitive consumer information, including names, addresses, SSNs, customer proprietary network information (i.e., call information, charges, usage data, services). For example, in August 2018, T-Mobile reported a breach of 2 million customers’ names, billing zip codes, and account numbers.<sup>68</sup> The common carrier exemption prevents the FTC from investigating this and similar breaches.
- *National advertising.* Consumers often buy telecommunications access as a “bundle” that includes common carrier phone service as well as non-common carrier services such as broadband Internet (for example, a bundle of phone, Internet, and TV). Whether for residential or mobile use, these bundles are often the most prominently advertised offerings on a carrier’s site, and are appealing to consumers because they offer more

---

<sup>67</sup> See *FTC v. Christiano et al.*, No. 8:18-cv-00936 (C.D. Cal., filed May 31, 2018). Links to pleadings and a press release are available at: <https://www.ftc.gov/enforcement/cases-proceedings/162-3124/james-christiano-et-al-netdotsolutions-inc>.

<sup>68</sup> Jennifer Calfas, *T-Mobile Says a Data Breach Is Affecting Millions of Its Customers. Here’s What You Need to Know*, TIME, Aug. 24, 2018, <http://time.com/money/5377773/tmobile-data-breach-august-2018/>.

value for their money. The common carrier exemption creates legal uncertainty about the FTC's jurisdiction or practical ability to challenge potentially deceptive advertising claims for these bundles, for example regarding price.

**2. What types of investigations and cases could you bring that you can't currently bring with the common carrier exemption in place?**

Response: As noted above in response to Question 1, without the common carrier exemption, the FTC could use its authority under the Telemarketing Sales Rule to investigate and bring enforcement actions against telecommunications carriers that assist illegal robocallers. The FTC would also be able to investigate the privacy and data security practices of wireless and wireline telephone service providers. Finally, elimination of the common carrier exemption would eliminate legal uncertainty surrounding the FTC's jurisdiction or practical ability to challenge potentially deceptive advertising claims for service bundles that include phone service, for example regarding price.

**3. How would you respond to arguments that eliminating the common carrier exemption with respect to telecoms would now subject telecoms to a dual enforcement regime (FTC and the FCC)?**

Response: As an agency with broad general jurisdiction, the FTC often must coordinate with other regulatory agencies to avoid creating a dual enforcement regime, and has been highly successful in doing so. For example, we have long worked successfully with the FDA pursuant to our MOU regarding the marketing and advertising of dietary supplements, and with the Department of Justice through the clearance process for mergers and other antitrust matters. We do not anticipate any difficulty engaging in similar coordination with the FCC, especially given the long history of successful cooperation between our agencies.

**In your testimony, you mentioned that you have instructed Bureau of Competition staff to consider labor impact in every merger investigation. I am aware that labor effects have not always been prioritized in antitrust analysis, or worse, the elimination of labor and lowering of wages have been credited as "efficiencies" that weigh in favor of merger approval. I commend your leadership in encouraging staff to carefully examine this issue in every merger.**

**Recent scholarship by labor economists suggests that traditional antitrust enforcement, dominated by industrial organization economists, has missed the harmful effects of market consolidation on labor.**

**4. In what ways would the Commission's analyses of mergers and anticompetitive behavior benefit from the hiring of a) labor economists and b) behavioral economists into the Bureau of Economics?**

Response: The Bureau of Economics has historically hired economists from a broad range of subfields of microeconomics, and continues to do so. This approach provides two main benefits. First, by not focusing on a narrow field such as industrial organization, the Bureau

can recruit from a larger talent pool. Second, by employing microeconomists with diverse backgrounds, the Bureau can provide analysis informed by the knowledge and methodologies developed in the various fields of microeconomics that are best suited to the issues at hand.

To answer your question more directly, the Bureau already employs many economists with labor economics and behavioral economics backgrounds, and we believe we benefit from their perspective. For example, Bureau economists, some with labor economics backgrounds, have applied their experience evaluating marketplace competition, as well as their study of labor markets to assess the recent research on labor market concentration.

**5. Please list the merger challenges in the past 20 years in which the FTC has pled a labor harm.**

Response: I am unaware of any instance where the FTC has challenged a merger specifically over concerns relating to labor market competition. But we continually look for instances in which monopsony power may be used to drive down input prices.

For example, the FTC recently required global health care company Grifols S.A. to divest blood plasma collection centers in three U.S. cities, among other conditions, to resolve charges that Grifols' acquisition of Biotest US Corporation would be anticompetitive.<sup>69</sup> The FTC's administrative complaint alleged that Grifols and Biotest were the only two buyers of human source plasma in three U.S. cities, and that these three cities constituted relevant geographic markets because plasma donors typically do not travel more than 25 minutes to donate plasma. Without the divestitures, Grifols likely would have been able to exercise market power by unilaterally decreasing donor fees in the three cities.

In addition to the Grifols/Biotest merger, the FTC has successfully blocked other mergers based on product or service market overlaps, and thereby likely has preserved competition in labor markets as well. In particular, in a number of hospital merger cases, blocking the deal likely prevented adverse effects in associated labor markets for doctors, nurses, and other health care professionals in those geographic areas.

Prior FTC actions also have addressed labor market competition. For example, the FTC previously secured a settlement with a trade association that represented most of the nation's best-known fashion designers and an organization that produced the two major fashion shows for the industry each year. The Commission's consent order prohibited the two groups from attempting to fix or reduce modeling fees and required them to take steps to educate fashion designers that price-fixing is illegal. The Commission thus made it clear that antitrust laws prohibiting price fixing apply to the fashion industry just as they do to other products or services.<sup>70</sup>

---

<sup>69</sup> *In re Grifols, S.A.*, Dkt. No. C-4654 (Sept. 17, 2018), <https://www.ftc.gov/enforcement/cases-proceedings/181-0081/grifols-sa-grifols-shared-services-north-america-inc-matter>.

<sup>70</sup> Press Release, FYI: FTC Approves Consent Agreement with The Council of Fashion Designers of America and 7<sup>th</sup> on Sixth, Inc. (Oct. 20, 1995) <https://www.ftc.gov/news-events/press-releases/1995/10/fyi-ftc-approves-consent-agreement-council-fashion-designers>.

**The Honorable Dick Durbin**

- 1. I want to discuss the FTC's consumer protection role when it comes to protecting students from unscrupulous for-profit colleges.**

**It is very important that prospective students not be tricked or deceived into taking out loans or giving their precious federal student aid dollars to an unscrupulous for-profit college. These schools enroll just 9 percent of all post-secondary students, but account for 34 percent of all student loan defaults.**

**In 2016, the FTC reached a landmark \$100 million settlement with DeVry over deceptive ads. But misleading and deceptive advertising seems to be the standard in the for-profit college industry with schools like those owned by Dream Center Education Holdings, Bridgepoint Education, Center for Excellence in Higher Education, and others being accused of similar practices.**

- a) Without naming names, dose the FTC currently have any open investigations into for-profit colleges?**

Response: Although we do not comment on our nonpublic law enforcement efforts, it has been made public elsewhere that the Commission is investigating the conduct of other for-profit post-secondary schools. We will continue to monitor this marketplace for unlawful conduct that harms consumers.

- b) When students or prospective students at for-profit colleges think they are being subjected to unfair or deceptive practices by these companies, can they turn to the FTC to blow the whistle on these practices?**

Response: Yes. We encourage any consumers who believe they have been subjected to deceptive or otherwise unlawful practices to submit a complaint to the Commission—either at our website (<https://www.ftccomplaintassistant.gov/>) or toll-free number (1-877-FTC-HELP or 1-877-382-4357). The FTC compiles complaint data that it receives, along with data from other agencies and organizations, into a database called Consumer Sentinel. This complaint information can help the FTC and other agencies in our efforts to investigate and, when necessary, take enforcement actions against companies engaged in deceptive or unfair conduct.

- c) Will the FTC commit to vigorously protect students from deceptions and abuses by this industry?**

Response: Yes. The FTC has been active in this area and plans to continue its work to protect consumers seeking post-secondary education and other related products and services, both by bringing enforcement actions where needed and by seeking additional opportunities to engage in relevant outreach and education. For example, just last month, we brought an action against Sunkey Publishing, a lead generation operation that falsely claimed to be affiliated with the military and promised to use consumers' information only for military

recruitment purposes. Instead, we alleged that this operation used the information it collected to make millions of illegal telemarketing calls and sold the information to post-secondary schools.<sup>71</sup>

Furthermore, we obtained a \$100 million order against DeVry and have already sent 173,000 refund checks totaling more than \$49 million to students. Additionally, in 2015, the Commission brought an action against Ashworth College for allegedly making misrepresentations about its career training programs and the transferability of credits. We also issued a final order against Victory Media earlier this year, resolving our allegations that the company's materials and tools deceptively promoted specific schools to military consumers without disclosing that the schools had paid the company for those promotions.

Beyond our work curbing deceptive claims by post-secondary schools and related marketers, we have also aggressively pursued outright frauds, like student loan debt relief scams, that target consumers in the education marketplace. Late last year, for example, the Commission announced "Operation Game of Loans," a federal-state law enforcement sweep that included 36 enforcement actions against these sorts of scams.

- 2. Earlier this year, we learned that Facebook was collecting and sharing data about children through the Facebook Messenger Kids app. This troubles me, because kids don't understand how every click they make helps create a data profile of them that could last a lifetime.**

**In introduced a bill, the Clean Slate for Kids Online Act, to give Americans the ability to request a clean slate for the online activities they engaged in before they were old enough to appreciate how using the internet leaves a trail of data.**

**My bill would modify the Children's Online Privacy Protection Act (COPPA), a law that governs the collection of children's personal information by operators or internet websites and online services. My bill would amend COPPA to give every American the right to request the deletion of online information collected from them or about them before they turned 13.**

**My bill would task the FTC to issue a new regulation, similar to the FTC's existing COPPA regulation, to require internet companies to post a notice on how people can request the deletion of such information, and to promptly delete the information when requested.**

**Chairman Simons, I hope to work with you and your team at the FTC to advance this important issue of allowing Americans to get a clean slate for their childhood online activity. Will you commit to work with me on this issue?**

---

<sup>71</sup> See Press Release, FTC Takes Action Against the Operators of Copycat Military Websites (Sept. 6, 2018), available at <https://www.ftc.gov/news-events/press-releases/2018/09/ftc-takes-action-against-operators-copycat-military-websites>.

Response: I am happy to work with you on ways to ensure that children’s privacy is protected. As you recognize, COPPA currently provides parents with an opportunity to review personal information that has been collected from their children, and companies must delete such information upon request.<sup>72</sup> In addition to these parental rights, companies have an independent obligation to dispose of personal information collected from a child if it is no longer reasonably necessary to fulfill the purpose for which the information was collected.<sup>73</sup>

Your proposed legislation would provide the individual herself—not just the parent—with the right to delete information provided by the individual when she was under 13. It also extends the deletion right to information *about* the individual when she was under 13, even if someone else posted it. This approach thus expands the protections for children’s information in significant ways, while at the same time introducing new issues, such as how to balance the speech rights of the poster of the information—which could include a parent, relative, school, or classmate—with the privacy rights of the child requesting deletion. I appreciate your efforts to address children’s privacy issues, and the FTC would be happy to provide advice as you move forward.

**3. What is the FTC doing to ensure that Visa and MasterCard are not using their dominant position in the electronic payments industry to impose anticompetitive restraints in the standard-setting process?**

Response: As you know, the FTC shares jurisdiction over enforcement of the antitrust laws with the Department of Justice. The agencies coordinate investigative and enforcement activities to avoid costly and inefficient overlaps. Over the years, each agency has developed expertise in certain industries. The Department of Justice has pursued important and effective antitrust enforcement for many years in the payment card industry, and the FTC would refer any evidence of anticompetitive conduct involving these firms to our sister agency.

**4. Each year, the pharmaceutical industry spends \$6 billion in direct-to-consumer (DTC) prescription drug advertising—resulting in the average American seeing an average of nine such ads each day. Pharmaceutical manufacturers engage in DTC advertising because patients are more likely to ask their doctor for a specific drug (and are more likely to receive a prescription for it) when they have seen an advertisement for it—regardless of whether they need that medication or not, or if a generic may be available. This pads the profit margins of pharmaceutical companies while unnecessarily driving up health care costs. The American Medical Association has said that, “DTC advertising inflates demand for new and more expensive drugs, even when those drugs may not be appropriate.” That’s why most countries have banned DTC prescription drug advertising—only the United States and New Zealand permit this practice.**

**With billions in targeted spending on drug advertisements, patients are bombarded with all sorts of information in these ads (such as side effects), but are kept in the dark on one crucial factor—price. Too often, when a patient sees an advertisement for a**

---

<sup>72</sup> 16 C.F.R. § 312.6.

<sup>73</sup> 16 C.F.R. § 312.10.

**drug like Xarelto, and his or her doctor writes a prescription for it, the “moment of truth” about what the medication actually costs does not occur until the patient is checking out at the pharmacy.**

**Senator Grassley and I have worked on legislation to require drug companies to simply level with the American public and put a price tag on these ads. It’s a simple step for transparency and consumer empowerment so patients and their doctors can make informed health care choices.**

**Our measure passed the Senate unanimously, as part of the FY 19 Labor-HHS/DoD appropriations package. It was supported by President Trump, Department of Health and Human Services (HHS), Secretary Azar, AARP, the American Hospital Association, the American Medical Association, and 76 percent of Americans. Unfortunately, the provision was stripped from the final package. However, HHS is moving ahead, and will be issuing regulations to require price disclosure in direct-to-consumer drug ads.**

**a) Chairman Simons, do you believe price transparency is an important principle in health care decisionmaking for consumers?**

Response: In general, I support laws (such as those that exist in many states) that increase consumer access to relevant, actionable information about health care products and services they may buy. But laws that require the public disclosure of competitively sensitive information, including information related to price and cost, may chill competition by facilitating or increasing the likelihood of unlawful collusion among competitors, without actually giving consumers useful information to guide their purchasing decisions.<sup>74</sup> In addition, disclosure laws may undermine the effectiveness of selective contracting by health plans, an approach that generally reduces health care costs and improves overall value in the delivery of health care. The competitive risks are especially great if information is available to competing health care providers, especially in highly concentrated markets where competition among providers is already limited.

**b) Do you support bipartisan efforts to require a form of price disclosure in direct-to-consumer prescription drug advertising? How can FTC work with Congress and other federal agencies to accomplish this common-sense policy goal?**

Response: I am a strong proponent of finding ways to allow market forces to work better in the pharmaceutical sector. I believe that markets work best when buyers can fully assess their options, including an awareness of the associated costs, when selecting the option that best suits their needs. Patients typically do not know how much a drug will cost them when their doctor first prescribes it. This makes it very difficult for a patient to have an informed conversation with her doctor about the recommended drug and any lower-cost alternative

---

<sup>74</sup> See FTC Staff Comment Regarding Amendments to the Minnesota Government Data Practices Act Regarding Health Care Contract Data, Which Would Classify Health Plan Provider Contracts as Public Data (June 29, 2015), <https://www.ftc.gov/policy/advocacy/advocacy-filings/2015/06/ftc-staff-comment-regarding-amendments-minnesota-government>.

treatments. I would support policies, business practices, and consumer education efforts that would give patients useful and actionable information regarding health and financial consequences of a particular drug choice, particularly out-of-pocket costs.

**c) What additional policy recommendations do you have for how FTC could help lower prescription drug costs and spending for patients, as well as local, state, and federal government?**

Response: I applaud the recently enacted measure to require that certain agreements involving biologics drugs be filed with the antitrust agencies. Health care competition has long been a Commission priority because of its critical importance to consumers and the economy. In particular, the FTC has engaged in aggressive enforcement, study, and advocacy to promote competition in drug markets. For example, the FTC maintains a robust program to identify and investigate potential anticompetitive conduct in the pharmaceutical industry. The FTC also reviews mergers between pharmaceutical companies to ensure that they do not result in elimination of a competitor or a potential competitor for any product on the market or in development. There are limits, however, on the FTC's ability to counter rising drug prices. The FTC is not a sector regulator; our authority is limited to trying to stop or prevent certain business practices that harm competition. Charging high prices, even exorbitant prices, for a drug, without more, is not a violation of any law the FTC enforces.