Senator Josh Hawley
Questions for the Record

Hearing on the Oversight of the Antitrust Laws
Subcommittee on Antitrust, Competition Policy, and Consumer Rights

Questions for both witnesses

1. **Aluminum end-users like those who manufacture canned beverages are concerned that the Midwest Premium paid by American purchasers may be inflated above its appropriate rate. Despite the lifting of the aluminum tariffs imposed on Canadian and Mexican aluminum supply, and despite reductions in transportation and storage costs, the Midwest Premium remains well above its pre-tariff level. Currently, the Midwest Premium is set based on data compiled by a single ratings agency, data that end-users fear may be subject to manipulation that forces these end users to pay monopoly prices for aluminum.**

   You received a request last Congress from members of the House to examine this market to determine whether anticompetitive conduct has inflated the Midwest Premium. Please provide an update about any preliminary inquiries the Department of Justice has undertaken on this matter, your office's response to any recent submissions of new information by aluminum end-users to your staff, and the basis for any decision not to pursue a formal inquiry.

   Response: The Department of Justice has expertise in this industry and generally handles its competitive issues. We defer to the DOJ.

2. **Are you aware of any claims by large tech companies that section 230 creates an immunity from liability for violations of the Children's Online Privacy Protection Act, rules promulgated under that Act, any other federal privacy regulation, or section 5 of the FTC Act?**

   Has the federal government sought to impose weaker fines or penalties of any kind than it otherwise would have when enforcing competition and consumer protection laws because of a concern that a company might have immunity from liability because of section 230?

   Response: While the Commission's rules prevent me from discussing nonpublic deliberations and negotiations regarding civil penalty amounts in specific investigations, the FTC has been vigorous about enforcing the COPPA Rule. The Commission has not shied away, on the basis of Section 230 or for any other reason, from imposing liability and large fines on tech companies that host the content of others. For example, as part of its settlement earlier this year, Musical.ly agreed to pay a $5.7 million civil penalty, at the

time the largest civil penalty ever paid for a COPPA violation.[1] And in August, the FTC announced its settlement with Google and YouTube, in which the companies agreed to pay a $170 million penalty and to make fundamental changes to the YouTube platform by requiring YouTube channel owners to designate whether their content is directed to children.[2]

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[1] *See* FTC Press Release, *Video Social Networking App Musical.ly Agrees to Settle FTC Allegations That it Violated Children's Privacy Law* (Feb. 27, 2019), https://www.ftc.gov/news-events/press-releases/2019/02/video-social-networking-app-musically-agrees-settle-ftc.

[2] *See* FTC Press Release, *Google and YouTube Will Pay Record $170 Million for Alleged Violations of Children's Privacy Law* (Sept. 4, 2019), https://www.ftc.gov/news-events/press-releases/2019/09/google-youtube-will-pay-record-170-million-alleged-violations.

Senator Ted Cruz
Question for the Record for Hon. Joseph Simons and Hon. Makan Delrahim

I understand that manufacturers purchasing aluminum wholesale for manufacture into aluminum products—particularly those purchasing aluminum for manufacture into cans—are currently experiencing significant cost increases due to an increase in one particular index of shipping costs. The "Midwest Premium," an industry-wide index for the cost of storage and transportation of aluminum, has increased significantly since January 2018, despite no significant underlying cost increases in the actual costs for either storing or shipping aluminum. These increases cannot be wholly explained by tariffs, given that they began before the most recent aluminum tariffs were implemented. Some industry watchers believe that upstream market participants, including aluminum rolling mills, have conspired in violation of Section 1 of the Sherman Act to require downstream manufacturers to adhere to one particular Midwest Premium index, the Platts index, because it is reliably substantially higher than other indices, and because it is subject to manipulation by unverified claims related to storage and transportation costs.

Is either the Department of Justice or Federal Trade Commission investigating these concerns? If so, what have you determined so far, and when do you expect to be able to report your findings? If not, will you commit to investigating them?

Response: The Department of Justice has expertise in this industry and generally handles its competitive issues. We defer to the DOJ.

Written Questions for Joseph Simons
Chairman, Federal Trade Commission
Submitted by Senator Patrick Leahy
September 24, 2019

1. **In response to a letter from Senator Blumenthal, the FTC stated that while the Commission was interested in conducting retrospective merger reviews, the Bureau of Economics had not found mergers with adequate data to conduct the review. At the hearing, you added that the FTC is now considering retrospective reviews of hospital mergers.**

   (a.) Can you provide an estimated timeline for when the first retrospective review may be completed?

   Response: The Commission's merger retrospective program is an ongoing effort to evaluate the competitive effects of past mergers and acquisitions. The Commission's Bureau of Economics ("BE") regularly performs these retrospective analyses. In the ten years between March 2008 and July 2018, BE staff completed and released twenty merger retrospective studies. These retrospectives are often published in peer-reviewed economic journals after initially being released as BE working papers.[3] At any given time (including now), BE typically has a number of merger retrospectives ongoing. The timing of completion of these important studies is influenced by various factors, including the economists' caseload of enforcement matters.

   (b.) What can be done to better ensure that mergers in other industries have adequate data to review?

   Response: When data are not publicly available, the Commission may be able to purchase data to conduct studies, including retrospectives. We may also be able to issue 6(b) orders to acquire the necessary data. But merger retrospectives generally require the identification of a control group to compare to the market with the merged firm in order to separate out competitive effects caused by the merger as opposed to other factors. For many mergers, no proper control group is available, and this limits the universe of mergers that are good candidates for retrospectives.

2. **You stated during the oversight hearing that the Pharmacy Benefit Managers (PBM) market has become even more consolidated since the FTC's last study on pharmaceutical intermediaries in 2005 and that you would be happy to conduct another study.**

   (a.) Regardless of whether the mandate to conduct a new PBM study in the Prescription Pricing for the People Act becomes law, will the FTC commit to conducting the study?

[3] The Bureau of Economics' working paper series is available at https://www.ftc.gov/policy/reports/policy-reports/economics-research/working-papers.

Response: As I noted during the hearing, the PBM industry is even more concentrated than when the FTC last conducted a study, and I would like to understand what effect rising concentration may have had on conduct by PBMs. Our ability to conduct such a study would be limited by available resources. We have estimated that it would require at least nine FTEs working for a full year to conduct the PBM study outlined in pending legislation, and that timeline is very optimistic. (GAO's recent PBM study, which was focused on the role of PBMs in Medicare Part D, took a little over two years to complete.) Any study, whether mandatory or voluntary, would consume resources that would not be available for other matters, including law enforcement. If Congress does not act, we will consider whether aspects of the study could be done with fewer resources.

3. **Recently, Taiwan Semiconductor Manufacturing Company (TSMC) has been accused of using its dominant position in the electronic chip manufacturing market to hurt competition through unfair usage of loyalty rebates, exclusivity clauses, and penalties designed to discourage customers from switching to competitors. GlobalFoundries, one of TSMC's largest competitors, employs a large number of Vermonters.**

    (a.) Is the FTC aware of these allegations against TSMC? If so, is the Commission investigating or considering investigating whether TSMC's practices are harmful to competition?

Response: I cannot comment on whether the agency has a pending investigation. In general, the FTC has authority to challenge certain unilateral conduct by a firm that impedes rivals from competing on the merits and that enables the firm to maintain or attain a monopoly position.

Joseph Simons
Chairman
Federal Trade Commission
Questions for the Record
Submitted October 1, 2019

QUESTIONS FROM SENATOR BOOKER

1. **As we navigate the contours of crafting federal privacy legislation, one of the most intense and recurring debates centers around interoperability provisions, i.e., the ability of consumers to control the use of the information they provide on one service within another service.**

   a. **What kinds of data should be portable?**

   Response: As I have noted in previous testimony, I believe that Congress should make the value judgments as to the scope of specific consumer privacy rights, including data portability. Should Congress enact a law describing what data must be portable, the FTC will enforce it vigorously.

   b. **Who should bear the burden of protecting information as it moves from one service to another?**

   Response: Companies that collect, store, use, or share data should protect it. In connection with a data transfer, both the sending entity and the recipient entity have obligations. For example, the sending entity has the obligation to train its employees on secure sending techniques, to ensure that the data is protected in transit, and to enter into appropriate arrangements with the recipient entity to refrain from using the data for impermissible purposes. The recipient entity should abide by any use limitations and protect the received data in storage.

   c. **Is there a downside to interoperability provisions? For example, Facebook is reportedly rushing to integrate all of its services (Facebook, WhatsApp, Instagram, and Messenger) in order to make a potential break-up impractical and inordinately expensive.[4]**

   d. **Are you at all concerned about this reported behavior by Facebook? Would a more tightly integrated Facebook present additional challenges for remedying anticompetitive conduct?**

   Response to 1.c. and d.: Without commenting specifically on Facebook's conduct due to our pending antitrust investigation, I am confident in the Commission's ability to design effective remedies for anticompetitive conduct. Courts have routinely

[4] *E.g.*, Mike Isaac, *Zuckerberg Plans To Integrate WhatsApp, Instagram and Facebook Messenger*, N.Y. TIMES (Jan. 25, 2019), https://www.nytimes.com/2019/01/25/technology/facebook-instagram-whatsapp-messenger.html.

found that the Commission's remedial powers are broad and well-suited to deal with a broad range of harmful conduct.[5] The goal of non-merger remedies is to stop or prevent behavior that lessens or restricts competition, primarily by means of "cease and desist" or injunctive requirements. The FTC may also seek to remedy harm from anticompetitive conduct, and prevent recurrence of behavior that reduces consumer choices, increases prices, or slows innovation. The Commission has required structural and behavioral relief even when the company's operations are highly integrated.

2. **The Federal Trade Commission's (FTC) $5 billion fine for Facebook's consent decree violations was record breaking. However, Facebook has roughly $45.2 billion in cash and securities on hand.[6] Meanwhile, Apple and Alphabet (Google) each reportedly have well over $100 billion in cash on hand.[7]**

   As massive as the Facebook fine was, the company had the resources to pay it and then some. What do you make of the argument that fines in the billions or even tens of billions of dollars actually entrench the dominance of incumbent platforms while doing little to deter illegal activity?

   I do not agree with that argument.

   First, it is important to note that the recent Facebook enforcement action settled alleged violations of an FTC consumer protection order, and did not involve any antitrust allegations or remedies. The FTC has initiated a separate competition investigation into Facebook, as the company has reported.

   Second, fines need not wipe out a company's reserves to be effective. The $5 billion penalty imposed on Facebook was nearly a quarter of the company's 2018 profits—providing a significant disincentive to violate an FTC order again. Even more importantly, the penalty significantly exceeded what the agency was likely to obtain in court, and therefore was clearly our best option. The only other recourse for the FTC would have been to expend resources in time-consuming litigation to achieve a less effective remedy, with a delayed result. The negotiated settlement will go into effect much sooner than a remedy imposed after litigation, and if the negotiated order is violated, we will then be in a position to argue to a court that $5 billion and the significant injunctive relief we negotiated were not sufficient. If we litigate, we will likely get much less relief years in the future, and if an order after litigation is violated, we would likely still not get anything approaching the relief we have already negotiated.

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[5] When a violation of Section 5 is established, the Commission can enter an appropriate order to prevent a recurrence of the violation. *In re Polygram*, 136 F.T.C. 310, 379 (2003) (Commission order remedying price and advertising restraints). The Commission has wide discretion in its choice of remedy, *FTC v. National Lead Co*., 352 U.S. 419, 428 (1957), and "is not limited to prohibiting the illegal practice in the precise form in which it is found to have existing in the past," but "must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity." *FTC v. Ruberoid Co*., 343 U.S. 470, 473 (1952).

[6] *E.g.*, Josh Constine, *Facebook Reserves $3B for FTC Fine, but Keeps Growing with 2.38B Users in Q1*, TECHCRUNCH (Apr. 24, 2019), https://techcrunch.com/2019/04/24/facebook-earnings-q1-2019/.

[7] Jon Porter, *Alphabet Overtakes Apple To Become Most Cash-Rich Company*, VERGE (Aug. 1, 2019), https://www.theverge.com/2019/8/1/20749831/alphabet-google-apple-cash-reserves-richest-company.

Third, in addition to the hefty fine, the new order imposes extensive conduct relief on Facebook, which is a critical aspect of the overall relief obtained by the FTC. The new order will subject the company to dozens of additional fencing-in requirements. For example, Facebook's CEO must certify compliance with the new order quarterly for the next 20 years. Failure to certify compliance, or misrepresenting compliance, would subject the CEO to both civil and criminal penalties. The order also requires Facebook to establish a privacy board committee, which must be comprised of independent directors. The Committee must meet quarterly, outside the presence of Facebook management, with a new, more powerful independent assessor. Together with other relief, these injunctive provisions provide significant specific and general deterrence against future violations.

3. **My home state of New Jersey has led the way on consumer protection issues when it comes to online event ticketing. My New Jersey colleagues in the House have been outspoken and written to your agencies several times about our shared concerns with the Live Nation Entertainment monopoly (from the 2010 merger of Live Nation and Ticketmaster) and the anticompetitive practices the company continues to utilize to stifle competition and harm consumers.**[8]
4.
    a. **Why has Live Nation Entertainment's dominance grown so much?**

    b. **What remedies do you propose would bring back competition to the industry?**

Response: The Commission takes a strong interest in protecting consumer confidence in the online event tickets market and ensuring that consumers receive clear, complete, and truthful information about what they are buying. A key purpose of the FTC's online tickets workshop, held this past June, was to address ways to increase transparency and improve the consumer experience in the tickets market.[9]

Given the Department of Justice's 2010 consent order settling its investigation of the merger of Ticketmaster and Live Nation, and DOJ's continuing enforcement authority over that order, I will defer to that agency on the competition issues raised by your question.

5. **A potentially anticompetitive practice known as the "rebate wall" can harm patients and prevent doctors from providing the best possible care. Rebate walls occur when a market leader pairs volume-based rebates with retaliatory measures. These measures can include rescinding rebates for all of a drug's approved indications if a payer refuses to comply with the market leader's formulary placement demands.**

    My understanding is that rebate walls greatly influence which drugs are covered on a patient's prescription drug formulary. Market leaders in certain therapeutic areas, including those competing in the immunology and biosimilars markets, use conditional

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[8] *E.g.*, Letter from Rep. Bill Pascrell, Jr., to Att'y Gen. Jeff Sessions (Oct. 5, 2018), https://pascrell.house.gov/news/documentsingle.aspx?DocumentID=2429; Letter from Reps. Frank Pallone, Jr. & Bill Pascrell, Jr., to Joseph J. Simons, Chairman, Fed. Trade Comm'n (July 20, 2018), https://pascrell.house.gov/news/documentsingle.aspx?DocumentID=2355.

[9] *See* FTC Press Release, FTC to Hold Workshop Examining Online Event Ticket Sales (Oct. 4, 2018), https://www.ftc.gov/news-events/press-releases/2018/10/ftc-hold-workshop-examining-online-event-ticket-sales.

rebates to require payers to limit patient access to new, innovative products. These limits can include placing innovative therapies in higher tiers, requiring patients to undergo onerous step therapy (or "fail first") procedures prior to receiving access to an innovator product, and in some cases blocking an innovator product from the formulary altogether. Innovator products are often subject to these limitations *even when they are more clinically effective at treating a specific disease compared with the established product*.

Allowing established manufacturers to dictate patient access to innovator drugs is wrong. It can lead to ineffective care and adverse health outcomes, it interferes with a physician's ability to treat patients with the most appropriate medications, and it has serious implications for innovation and competition.

a. **Can you please elaborate on how the FTC reviews potentially anticompetitive practices such as the rebate wall, and how the FTC measures and addresses the consumer/ patient harms caused by such practices?**

b. **How can the FTC and Congress work together to address potentially anticompetitive practices including the rebate wall to ensure that patients and providers have appropriate access to innovative products?**

c. **How does the FTC evaluate the impact potentially anticompetitive practices such as the rebate wall have on innovation and competition in the pharmaceutical market?**

Response: For over 20 years and on a bipartisan basis, one of the Commission's top priorities has been combatting anticompetitive conduct by pharmaceutical companies. We have challenged anticompetitive reverse payment agreements, sham litigation, and most recently, product hopping behavior that illegally suppresses competition from new products entering pharmaceutical markets. As tactics continue to evolve, and especially for high-cost biologic treatments, the Commission will remain vigilant to investigate and challenge conduct by pharmaceutical firms that delays new entry, keeps prices high, and denies patients access to life-saving treatments.

In general, the FTC has authority to challenge certain unilateral conduct by a firm that impedes rivals from competing on the merits and that enables the firm to maintain or attain a monopoly position. Pricing practices such as volume-based rebates may be part of an illegal exclusionary scheme that helps a firm attain or maintain a monopoly in violation of antitrust law. For instance, the Commission found that McWane, Inc. illegally maintained its monopoly by adopting a "Full Support Program" that denied unpaid rebates to customers who purchased products from its competitors.[10] Recently, the Commission filed an action in federal court alleging that healthcare technology company Surescripts, Inc. structured its contracts to lock customers into exclusive arrangements, providing loyalty discounts that would make it unattractive for buyers to shift their business away to

[10] McWane, Inc. v. FTC, 783 F.3d 814, 821 (11th Cir. 2015).

Surescripts' rivals.[11] The FTC's complaint alleges that through a web of exclusive arrangements and other exclusionary conduct, Surescripts was able to protect its dominant position in two e-prescription markets, to the detriment of U.S. consumers.

I look forward to working with those in Congress interested in deterring anticompetitive conduct by pharmaceutical companies. Over the past year, Commission staff has provided technical assistance on a number of legislative proposals directed at these concerns. In addition, I support legislation that would more effectively deter anticompetitive behavior that delays entry of new treatments, including new biologic products.

6. **Today, we received reports that Mark Zuckerberg said his company's approach to antitrust litigation would be to "go the mat and fight."[12] This has not been the modern FTC or Department of Justice approach, primarily because of the history of such litigation. Specifically, the Microsoft, IBM, and AT&T antitrust cases each took the better part of a decade and were prohibitively expensive. However, Professor Tim Wu of Columbia Law School has argued that the IBM case was worth bringing because—despite the costs and delays—the litigation immediately caused IBM to change some of its anticompetitive conduct.[13] Others have made similar claims about Microsoft.[14] Indeed, late last year, Facebook reportedly ended its acquisition talks with Houseparty, a video-centered social network popular with consumers under 25, fearing the acquisition would invite too much additional antitrust scrutiny.[15] This suggests that the very specter of antitrust probes, investigations, and litigation can cause powerful corporations to think twice before abusing their market power.**

    a. **Do you have any data establishing that the scrutiny being brought to bear on social media platforms has created a deterrent effect as far as acquisitions?**

Response: I am not aware of any data that suggests that the potential for antitrust scrutiny is deterring procompetitive acquisitions in the tech or other sectors. In fact, the number of acquisitions reported to the enforcement agencies under the Hart-Scott-Rodino Act continues to increase year-over-year, including among technology firms.[16] While it is not possible to fully measure the deterrent effect of an effective antitrust enforcement program, I am confident, that the Commission's recent success in blocking harmful mergers in court has reduced the number of potentially *harmful* mergers—which, in the face of less antitrust

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[11] FTC Press Release, FTC Charges Surescripts with Illegal Monopolization of E-Prescription Markets (Apr. 24, 2019), https://www.ftc.gov/news-events/press-releases/2019/04/ftc-charges-surescripts-illegal-monopolization-eprescription.

[12] Casey Newton, *All Hands on Deck*, VERGE (Oct. 1, 2019), https://www.theverge.com/2019/10/1/20756701/mark-zuckerberg-facebook-leak-audio-ftc-antitrust-elizabeth-warren-tiktok-comments.

[13] Tim Wu, *Tech Dominance and the Policeman at the Elbow* (Columbia Pub. Law Research Paper No. 14- 623, 2019), https://scholarship.law.columbia.edu/faculty_scholarship/2289.

[14] Matthew Yglesias, *The Justice Department Was Absolutely Right To Go After Microsoft in the 1990s*, SLATE (Aug. 26, 2013), https://slate.com/business/2013/08/microsoft-antitrust-suit-the-vindication-of-the-justice-department.html.

[15] Mike Isaac, *How Facebook Is Changing To Deal With Scrutiny of Its Power*, N.Y. TIMES (Aug. 12, 2019), https://www.nytimes.com/2019/08/12/technology/facebook-antitrust.html.

[16] The agencies received 2,100 HSR filings in FY 2018, a slight increase from FY 2017, where we received 2,052. Apart from these two years, the last time HSR filings exceeded 2,000 was in FY 2007.

scrutiny, would otherwise move forward. Given the unprecedented level of antitrust litigation by the Commission over the past two years, it should be clear that the Commission does not hesitate to initiate litigation when necessary to prevent a merger that is likely to reduce competition in any market.

b. The risks of failed enforcement actions are well known. However, do you feel your agency has appropriately considered the costs of failing to even commence antitrust litigation?

Response: Yes, the FTC appropriately and carefully considers all litigation decisions. In general, when considering whether to commence litigation in a competition matter, I consider the following criteria:

1. Does the conduct pose a substantial threat to consumers?

2. Does the conduct involve a significant economic sector of the economy?

3. Does the FTC have experience that will allow it to make an impact quickly and efficiently?

4. Does the conduct present a legal issue that would benefit from further study, and potentially have a significant effect on antitrust jurisprudence?

5. Does the matter involve unilateral conduct by a dominant firm in industries with substantial network effects where such conduct may impede entry or fringe expansion?

6. What remedies might be available, and likely could be obtained, by pursuing litigation versus obtaining a settlement?

7. Today the D.C. Circuit upheld the vast majority of the Federal Communications Commission's (FCC) 2017 decision to reverse the 2015 Open Internet Order.[17]

FCC Commissioner Brendan Carr has said that the 2017 decision "return[ed] the FTC to its role as a steady cop on the beat an empower it to take enforcement action against any ISP that engages in unfair and deceptive practices" and that "federal antitrust laws will apply" if an ISP engaged in anticompetitive practices.[18]

However, in March of this year you stated the exact opposite: "The FTC is, principally,

[17] *Mozilla Corp. v. FCC*, No. 18-1051 (D.C. Cir. Oct. 1, 2019), https://www.cadc.uscourts.gov/internet/opinions.nsf/FA43C305E2B9A35485258486004F6D0F/$file/18-1051-1808766.pdf.
[18] Brendan Carr, *No, The FCC Is Not Killing the Internet*, WASH. POST (Nov. 30, 2017), https://www.washingtonpost.com/opinions/no-the-fcc-is-not-killing-the-internet/2017/11/30/9205ac88-d457-11e7-a986-d0a9770d9a3e_story.html.

a law enforcement agency. It is not a sector regulator like the FCC."[19] You then added that behavior like "blocking, throttling, or paid prioritization would not be per se antitrust violations."[20] These comments concern me, as it appears that, at least for the time being, the FTC is the federal protector of an open and free internet.

Has your thinking on the FTC's role in the open internet debate changed at all?

Response: My thinking has not changed. I welcome this opportunity to clarify my views.

As I stated in March, Congress has charged the FTC with investigating and, when warranted, bringing cases for violations of the FTC Act. Under Section 5 of the FTC Act, the Commission has broad authority over much of the economy to protect consumers from unfair or deceptive acts or practices and unfair methods of competition. The FTC does not, however, have jurisdiction over common carrier activities. When the FCC reclassified Broadband Internet Access Service ("BIAS") as a common carrier activity, the FTC lost any ability to protect consumers in this space. Now that the reclassification has been reversed,[21] as upheld by the D.C. Circuit's recent opinion,[22] the FTC again has authority to sue internet service providers ("ISPs") and others for alleged anticompetitive conduct or unfair or deceptive practices that may violate the laws we enforce.

With respect to *deceptive* practices, the FTC's authority under Section 5 allows it to take action against an ISP whose advertising claims mislead consumers about its actual practices. To determine whether an act or practice is deceptive, the FTC considers whether it is likely to mislead reasonable consumers and whether it is material to consumers, meaning likely to affect a consumer's purchase or use decisions. For example, pursuant to its Section 5 authority, the FTC charged prepaid mobile service provider TracFone Wireless, Inc. with deceptive advertising for promising unlimited data to consumers but not disclosing that it slowed down their service—by between 60-90%—after exceeding certain data limits.[23] The company agreed to pay $40 million in consumer redress to settle those charges.[24] Likewise, the FTC would also have the authority to take action against ISPs if they were to block applications without adequately disclosing those practices to consumers, or if they misled consumers about which applications they block or how.

Section 5 of the FTC Act also prohibits *unfair* acts or practices, which are defined as those

[19] Joseph J. Simons, Chairman, Fed. Trade Comm'n, Remarks at the Eleventh Annual Telecom Policy Conference 2 (Mar. 26, 2019), https://www.ftc.gov/system/files/documents/public_statements/1508991/free_state_foundation_speech_march_26.pdf.

[20] *Id.* at 3.

[21] Restoring Internet Freedom, 33 FCC Rcd. 311 (2018), https://www.fcc.gov/document/fcc-releases-restoring-internet-freedom-order.

[22] *Mozilla Corp. v. FCC*, No. 18-1051, 2019 U.S. App. LEXIS 29480 (D.C. Cir. Oct. 1, 2019) (per curiam).

[23] *FTC v. TracFone Wireless, Inc.*, No. 15-cv-392 EMC (N.D. Cal. Jan. 28, 2015) (complaint), https://www.ftc.gov/system/files/documents/cases/150128tracfonecmpt.pdf. *See also Juno Online Servs., Inc.*, No. C-4016 (F.T.C. June 25, 2001), (complaint) (alleging the service provider made false and deceptive claims for its "free" and fee-based online services), https://www.ftc.gov/sites/default/files/documents/cases/2001/06/junocmp.pdf.

[24] *FTC v. TracFone Wireless, Inc.*, No. 15-cv-392 EMC (N.D. Cal. Feb 20, 2015) (consent order), https://www.ftc.gov/system/files/documents/cases/150223tracfoneorder.pdf.

that cause or are likely to cause substantial consumer injury that consumers cannot reasonably avoid and that is not outweighed by countervailing benefits to consumers or competition.[25] For example, the Commission sued AT&T Mobility LLC, alleging that the company unfairly locked consumers into long-term contracts based on promises of unlimited service and charged early termination fees if the consumers canceled their plans.[26] The FTC also alleged that AT&T Mobility deceptively promised consumers unlimited data but then reduced speeds, in some instances by nearly 90%, without telling consumers. The litigation in that case is currently stayed so that the Commission can consider a proposed settlement.

The FTC can also use its privacy and data security expertise to take action against unfair or deceptive privacy and data security practices by ISPs. For example, in one action against an ISP, the FTC alleged that the company caused substantial consumer injury when it distributed spam, child pornography, malware, and other harmful electronic content.[27] We have also investigated whether Verizon Communications unreasonably failed to secure its routers and issued a closing letter in 2014.[28] In addition, the Commission can conduct industry studies under Section 6(b) of the FTC Act, including those related to privacy and data security.[29] This year, the FTC issued orders to several ISPs to learn more about their privacy practices.[30] We will use that information to better inform our policy and enforcement work.

With respect to *unfair methods of competition*, I still believe that blocking, throttling, or paid prioritization would not necessarily constitute per se violations of Section 5. If presented with allegations of such conduct, we would need to conduct a fact-intensive analysis that would account for not only any harm to competition, but also any countervailing procompetitive justifications. In fact, many forms of "paid prioritization" (i.e., price discrimination) that takes place in our economy such as couponing, loyalty discounts, and early bird specials can be procompetitive. We will remain vigilant for conduct that might,

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[25] *See* FTC Policy Statement on Unfairness, *appended to Int'l Harvester Co.*, 104 F.T.C. 949, 1070 (1984), https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness.

[26] *FTC v. AT&T Mobility LLC*, No. 3:14-cv-04785-EMC (N.D. Cal. Oct. 28, 2014) (complaint), https://www.ftc.gov/system/files/documents/cases/141028attcmpt.pdf. The Ninth Circuit subsequently affirmed that the FTC Act's exemption for common carriers does not bar FTC from regulating such carriers' non-common-carriage activities. 883 F.3d 848 (9th Cir. 2018) (*en banc*), https://www.ftc.gov/system/files/documents/cases/att_enbanc_5-16585.pdf. *See also America Online, Inc.*, No. C-4105 (F.T.C. Jan. 28, 2004) (complaint) (alleging that service provider unfairly failed to honor customer cancellation requests and continued to charge them monthly service fees, and unfairly failed to timely pay rebates), https://www.ftc.gov/sites/default/files/documents/cases/2004/02/040203aolcscomp.pdf.

[27] *See* FTC Press Release, *FTC Shuts Down Notorious Rogue Internet Service Provider, 3FN Service Specializes in Hosting Spam-Spewing Botnets, Phishing Web sites, Child Pornography, and Other Illegal, Malicious Web Content* (Jun. 4, 2009), https://www.ftc.gov/news-events/press-releases/2009/06/ftc-shuts-down-notorious-rogue-internetservice-provider-3fn.

[28] *See* Closing Letter to Dana Rosenfeld, Counsel for Verizon Communications, Inc. (Nov. 12, 2014), https://www.ftc.gov/system/files/documents/closing_letters/verizon-communicationsinc./141112verizonclosingletter.pdf.

[29] 15 U.S.C. § 46(b).

[30] *See* FTC Press Release, *FTC Seeks to Examine the Privacy Practices of Broadband Providers* (Mar. 26, 2019), https://www.ftc.gov/news-events/press-releases/2019/03/ftc-seeks-examine-privacy-practices-broadband-providers; FTC Press Release, *FTC Revises List of Companies Subject to Broadband Privacy Study* (Aug. 29, 2019), https://www.ftc.gov/news-events/press-releases/2019/08/ftc-revises-list-companies-subject-broadband-privacy-study.

on balance, constitute unfair methods of competition under Section 5.

The Commission continues to consider how broadband activities affect consumers and competition. A recent Commission hearing examined developments in U.S. broadband markets, technology, and law.[31] The hearing included a panel focused on speed advertising claims, substantiation of such claims, and the potential for FTC consumer protection actions if such claims are unsubstantiated.

[31] *Hearings on Competition and Consumer Protection in the 21st Century, FTC Hearing #10: Competition and Consumer Protection Issues in U.S. Broadband Markets* (Mar. 20, 2019), https://www.ftc.gov/news-events/events-calendar/ftc-hearing-10-competition-consumer-protection-21st-century.

SENATOR GRASSLEY'S QUESTIONS FOR JUDICIARY ANTITRUST SUBCOMMITTEE HEARING, "OVERSIGHT OF THE ENFORCEMENT OF THE ANTITRUST LAWS," SEPTEMBER 17, 2019

TO CHAIRMAN SIMONS

1. I'm increasingly concerned by reports of major players in the pharmaceutical supply chain engaging in practices that seem to prevent competition. For example, some manufacturers have used so-called rebate walls or rebate traps to bundle together rebates and block a competitor's access to a PBM's formulary. This could have the effect of keeping drug prices high, even though competitors are trying to enter the market with lower cost alternatives.

- **Are you familiar with rebate walls or rebate traps? Has the FTC looked at these practices? Does the FTC have any concerns about potential anticompetitive impacts of these practices?**

Response: Yes, I share your concerns about the rebating practices of pharmaceutical manufacturers where they are part of exclusionary scheme to gain or maintain a monopoly. In general, the FTC has authority to challenge unilateral conduct by a firm that impedes rivals from competing on the merits and that enables the firm to attain or maintain a monopoly position. Pricing practices such as volume-based rebates may be part of an illegal exclusionary scheme that helps a firm attain or maintain a monopoly in violation of antitrust law. For instance, the Commission ruled that McWane, Inc. illegally maintained its monopoly by adopting a "Full Support Program" that denied unpaid rebates to customers who purchased products from its competitors.[32] Recently, the Commission filed an action in federal court alleging that healthcare technology company Surescripts, Inc. structured its contracts to lock customers into exclusive arrangements, providing loyalty discounts that would make it unattractive for buyers to shift their business away to Surescripts' rivals.[33] The FTC's complaint alleges that through a web of exclusive arrangements and other exclusionary conduct, Surescripts was able to protect its dominant position in two e-prescription markets, to the detriment of U.S. consumers.

I look forward to working with those in Congress interested in deterring anticompetitive conduct by pharmaceutical companies. Over the past year, Commission staff has provided technical assistance on a number of legislative proposals directed at these concerns. In addition, I support legislation that would more effectively deter anticompetitive behavior that delays entry of new treatments, including high-cost biologic products.

2. In November 2017, the FTC held a roundtable titled "Understanding Competition in Prescription Drug Markets: Entry and Supply Chain Dynamics." Attendees were invited to

[32] McWane, Inc. v. FTC, 783 F.3d 814, 821 (11th Cir. 2015).
[33] FTC Press Release, FTC Charges Surescripts with Illegal Monopolization of E-Prescription Markets (Apr. 24, 2019), https://www.ftc.gov/news-events/press-releases/2019/04/ftc-charges-surescripts-illegal-monopolization-eprescription.

comment on the roles and practices of intermediaries, like PBMs and GPOs. I sent a letter to the FTC about this last year, but the FTC's response didn't completely answer my questions.

- **What specifically did the FTC learn from this roundtable? Did it help the FTC identify any specific concerns about anticompetitive behavior by PBMs, GPOs, or other intermediaries?**
- **What is the FTC doing, or intending to do, to directly address these issues?**

Response: The November 2017 roundtable, "Understanding Competition in Prescription Drug Markets," was one example of the FTC's continual efforts to study competitive dynamics in healthcare markets. In my September 27, 2018 letter, I mentioned that the FTC relied on the November 2017 roundtable when drafting the Commission's comments on the Department of Health and Human Services's Blueprint to Lower Drug Prices and Reduce Out-of-Pocket Costs.[34] Although the 2017 roundtable has not contributed directly to other public output, the FTC has integrated roundtable participant comments into our non-public enforcement efforts, and we continue to evaluate the unique structures of drug distribution markets.

Promoting competition in healthcare markets remains a top FTC priority. Where appropriate, the FTC will use its enforcement authority to address harmful behavior by intermediaries and other market actors. The FTC's pending action against Surescripts, Inc. is an example. Surescripts is a health information technology company with monopolies in two markets: electronic prescription routing and eligibility. Routing is the transmission of prescription and prescription-related information from a prescriber (via the prescriber's electronic health record system) to a pharmacy. Eligibility is the transmission of a patient's formulary and benefit information from a payer (usually the patient's PBM) to a prescriber's system. Through a web of exclusive arrangements and other exclusionary conduct, the complaint alleges, Surescripts was able to protect its dominant position in these markets and keep other health information technology companies from threatening its monopolies. In addition, intermediary behavior is a suitable focus for continued Commission policy studies and advocacy, and the FTC will continue to file advocacy comments where it can share its collective expertise in healthcare markets. Finally, the FTC will continue to work with the Food and Drug Administration and others—as it did for the November 2017 roundtable—to promote effective competition in U.S. pharmaceutical markets.

3. Many discussions in Congress about protecting consumers from skyrocketing healthcare costs focus on the manufacturers, intermediaries, insurers, and care providers. It's also important to recognize that patients' own electronic healthcare information and prescription histories are a key part of this complex supply chain. As is often the case, information is power—and an entity's control of information can ultimately impact the prices that consumers pay.

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[34] *See* STATEMENT OF THE FEDERAL TRADE COMMISSION TO THE DEPARTMENT OF HEALTH AND HUMAN SERVICES REGARDING THE HHS BLUEPRINT TO LOWER DRUG PRICES AND REDUCE OUT-OF-POCKET COSTS, https://www.ftc.gov/system/files/documents/advocacy_documents/statement-federal-trade-commission-department-health-human-services-regarding-hhs-blueprint-lower/v180008_commission_comment_to_hhs_re_blueprint_for_lower_drug_prices_and_costs.pdf.

- **Has the FTC observed any anticompetitive activities in the realm of patient information and data? Do PBMs or other intermediaries play a role in these activities? If so, please explain.**
- **Does the FTC have the tools it needs to investigate and protect consumers against abuses in the patient health and prescription information marketplace?**

Response: I agree that the expansion of patient-specific healthcare information, including electronic health records and prescription histories, has implications for how some healthcare firms compete. In certain circumstances, firms with access to this type of data may be able to exclude rivals that do not have access to similar data in order to attain or maintain a monopoly in violation of antitrust law. For instance, as discussed in the response above, the FTC's pending action against Surescripts, Inc. alleges that Surescripts employed a web of exclusive arrangements and other exclusionary conduct to protect its dominant position in the electronic prescription routing and eligibility markets and to keep other health information technology companies from threatening its monopolies.

I believe the Commission has sufficient tools to continue to vigorously protect consumers and their personal health information, relying on both its competition and consumer protection authority.

4. It's no secret that the healthcare supply chain is growing increasingly concentrated. Last year, for example, mergers were announced between Cigna Corp. and Express Scripts, and CVS Health and Aetna. According to the Kaiser Family Foundation, these two combined entities cover 71% of all Medicare Part D enrollees and 86% of all stand-alone drug plan enrollees. We're also witnessing mergers of pharmaceutical manufacturers, like the recently proposed AbbVie and Allergan deal, and the Bristol-Myers Squibb and Celgene deal. Some of these actors have engaged in anticompetitive practices before, such as Allergan's sham transfer of a patent and Celgene's abuse of the REMS process.

- **Are Americans right to be concerned about increased concentration in the healthcare marketplace?**
- **What can you say to the American people to reassure us that your agency is conducting *robust* analyses of these and other mergers in the healthcare marketplace?**

Response: I agree that there is evidence that many healthcare markets have become more concentrated over the last decade. We also know that healthcare providers, including hospitals, with significant market power are able to charge higher prices.[35] That is why it is critically important to preserve existing competition through rigorous antitrust enforcement, and to look for ways to encourage new providers to enter concentrated markets by reducing barriers to entry, such as unnecessarily burdensome state licensing requirements.

[35] *See, e.g.*, Martin Gaynor, Kate Ho, and Robert J. Town (2015), "The Industrial Organization of Health-Care Markets," J. OF ECON. LIT. 53 (2), 235-84; Paul B. Ginsburg, "Wide variation in hospital and physician payment rates evidence of provider market Power," Center for Studying Health System Change, Research Brief No. 16 (Nov. 2010), http://www.hschange.org/CONTENT/1162/; Martin Gaynor, Competition policy in healthcare markets: navigating the enforcement and policy maze, 33 HEALTH AFF. 1088 (June 2014).

I assure you that promoting vigorous competition in healthcare markets is one of the Commission's top priorities. Our testimony details the breadth and impact of our enforcement actions to prevent anticompetitive mergers and conduct by healthcare firms. I cannot comment in detail on the Cigna/ESI or CVS/Aetna mergers as the Department of Justice reviewed those transactions, nor can I comment on ongoing investigations. But I can assure you that every year, the FTC challenges a number of mergers to maintain competition in healthcare markets. We continue to bring difficult conduct cases, devoting significant resources to combat anticompetitive conduct by pharmaceutical companies such as reverse payment agreements and product hopping. As a result, we have seen a significant reduction in the number of patent settlements with harmful anticompetitive reverse payments.[36] We also advocate for policies that reduce barriers to entry for healthcare providers so as to infuse more markets with new sources of competition. We study the effects of state regulatory requirements such as certificates of public advantage ("COPAs"). There is always more to do, and the FTC will continue to use enforcement, advocacy, and research to prevent anticompetitive mergers and conduct and to improve outcomes in healthcare markets.

[36] *See* Fed. Trade Comm'n, Agreements Filed With the Federal Trade Commission Under the Medicare Prescription Drug, Improvement, and Modernization Act of 2003: Overview of Agreements Filed In Fiscal Year 2016: A Report By the Bureau of Competition, https://www.ftc.gov/reports/agreements-filed-federal-trade-commission-under-medicare-prescription-drug-improvement-fy2016.

Questions for the Record

"Oversight of the Enforcement of the Antitrust Laws"
Senator Mike Lee
September 17, 2019

1. **Chairman Simons testified that the FTC could benefit from additional resources to enforce the antitrust laws. As I noted in my opening statement, "there's no analytical basis for splitting a monopolization investigation between the FTC and DOJ. Doing so simply looks like both agencies want to have the same slice of the same pie at the same time." AAG Delrahim, however, testified that it would be possible to divide a monopolization investigation of the same company if each agency investigated different conduct.**

    a. **Explain how taxpayers and consumers will benefit by the FTC and Antitrust Division simultaneously investigating different conduct by the same company under a monopolization or attempted monopolization theory of harm.**

    b. **Explain how the FTC and Antitrust Division can conduct such a simultaneous investigation without duplicating efforts, wasting government resources, and burdening the company under investigation or third parties.**

    c. **Explain any additional litigation risks the FTC may face if the FTC and Antitrust Division simultaneously attempt to challenge in court different conduct by the same company under a monopolization or attempted monopolization theory of harm.**

    d. **Describe any potential opportunity costs involved in splitting what is in essence a single monopolization investigation between the FTC and Antitrust Division.**

    Response: I agree that having two federal enforcement agencies investigate the same conduct is bad policy and bad practice. In addition to wasting scarce taxpayer resources that could be put to use on other enforcement matters, it would be confusing and burdensome for companies—targets and third parties—trying to navigate each agency's investigative demands. It is undesirable to have separate FTC and DOJ litigation efforts targeting the same or related conduct. The agencies developed the clearance process specifically to avoid any duplication of effort in civil antitrust enforcement. For many years and through several changes in leadership, that process has worked well. I would like to see us return to the normal course.

2. **Having two antitrust agencies responsible for civil antitrust enforcement requires a process to determine which agency will investigate which matter to avoid duplicative efforts. Both Chairman Simons and AAG Delrahim acknowledged at the hearing that the clearance process, at least in some instances, is not currently working well.**

a. **Besides moving all civil antitrust enforcement to a single agency, what can be done in the short term to improve the clearance process?**

Response: For the vast majority of matters, and certainly for our important merger review work, the clearance process continues to work well. Even beyond our enforcement work, we collaborate with our colleagues at the Department of Justice every day on many projects, and are united in our effort to enforce the antitrust laws for the benefit of consumers and our economy. As I have said, this past year the clearance process did not work well for a small number of potential conduct investigations involving technology companies. While each agency has developed expertise in different technology markets, technology is now a pervasive factor in many sectors of the economy, so there needs to be a mechanism for making a decision. I am committed to getting the clearance process back on track for all matters, and I will continue to work to minimize the impact of any disagreements on effective law enforcement at the federal level.

3. **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.**

Twelve months ago, when asked at the October 2018 oversight hearing whether an efficiencies defense should be codified, Chairman Simons stated that he would want to think more about that question. In response to a follow-up question for the record on that topic, Chairman Simons responded that he was "still considering whether a codified efficiencies defense would improve the predictability of merger outcomes."

a. **Should an efficiencies defense be codified given the apparent confusion in the courts about whether such a defense may be unlawful under Supreme Court precedent?**

Response: As a matter of practice, our merger reviews always consider efficiencies to determine whether the likely overall effect of a proposed merger would be to substantially reduce competition in any relevant market. Following Section 10 of the Horizontal Merger Guidelines, we credit cognizable merger-specific efficiencies that can be verified. When those efficiencies are of sufficient magnitude that the merger is not likely to be anticompetitive in any market, the Commission is unlikely to challenge that merger, either in a court action or through a Commission order that requires divestitures. When the Commission does challenge a merger and the defendants proffer efficiencies as a justification for the merger, courts assess those arguments, typically relying on the Horizontal Merger Guidelines. However, as courts have recognized, the greater the potential for harm from a merger, the larger the efficiencies need to be in order to overcome the predicted anticompetitive effects.

Written Questions from Senator Dick Durbin
Hearing on "Oversight of the Enforcement of the Antitrust Laws"
September 24, 2019

For questions with subparts, please answer each subpart.

<u>Questions for Chairman Simons</u>

1. **Recently, the FTC announced a settlement with predatory for-profit college operator, Career Education Corporation (CEC). According to the FTC's findings, CEC used illegal and deceptive telemarketing scheme to lure consumers; used lead generators that posed as U.S. military recruiters or job-finding services to gain access to student contact and personal information; has used the false impression that the military, independent education advisors, or employers recommend or endorse its schools to lure students; and had CEC telemarketers use high-pressure sales tactics to pressure students into enrolling.**

   According to reports, the settlement does not include any admission of wrongdoing by CEC, and the company has agreed to pay a mere $30 million—a relatively small amount compared to the billions it was taking in annually and far less than a $100 million settlement the FTC reached with DeVry a few years ago.

   a. **Can you explain how the FTC arrived at $30 million in this case?**

   <u>Response:</u> The $30 million consumer redress figure estimates consumer injury resulting from the specific illegal practices alleged in the complaint. One of the Commission's priorities is to return money to harmed consumers whenever possible.

   In addition to returning money to consumers, this settlement also requires a complete overhaul of CEC's lead generation practices. Notably, CEC must review its lead generators' marketing materials in advance and is prohibited from purchasing any leads generated using deception or other unlawful tactics. This action demonstrates that companies like CEC cannot turn a blind eye to their lead generators' practices.

   b. **The FTC's probe reportedly dates back to 2015. From 2010 to 2015, now-Department of Education Principal Deputy Undersecretary Diane Auer Jones worked in high-level positions at CEC. This is troubling considering what we know was going on at the company during this time. A June 2019 *New York Times* article reported that Ms. Jones claimed that she was the one who reported improprieties. Is there any evidence that you're aware of that Ms. Jones reported any potential misconduct by CEC to the FTC?**

   <u>Response:</u> We are unable to comment on the sources of any particular FTC investigation, including the investigation of CEC, as this information is non-public. As a general matter, Commission investigations may rely on a wide variety of sources, such as consumer complaints, referrals from other agencies or Congress, news reports, and information uncovered from prior investigations and enforcement actions.

2. **I have often spoken about my concerns that internet companies are increasingly using programs that are tailored to and marketed for pre-teens, such as Facebook Messenger and YouTube Kids. I have previously asked you to commit to working with me on my bill, the *Clean Slate for Kids Online Act*, that would ensure Americans have a right to request the deletion of online information collected from or about them before they were 13.**

   But beyond social networking and online games, countless students across the country are now using Education Technology (EdTech) products and applications, which use machine learning and predictive analytics to individualize student learning based on data that captures student progress.

   While these programs can be helpful in facilitating collaboration and allowing teachers to track student progress, they also put our nation's students, teachers, and parents at risk of having substantial amounts of personal data used and collected without their permission or understanding.

   I'm not the only one who is concerned about making sure that students' personal data is being secured and protected. In 2018, the Federal Bureau of Investigation issued a Public Service Announcement warning that malicious use of data collected by EdTech could result in "social engineering, bullying, tracking, identity theft, or other means for targeting children".

   And despite improvements over previous years, Common Sense Media's 2019 State of EdTech Privacy Report found "a widespread lack of transparency and inconsistent privacy and security practices for products intended for children and students".

   In August, I sent letters to more than 50 EdTech companies and data brokers asking for more information about their student data collection practices. Based on the responses I have received so far, it is clear that parents and students deserve to have more direct control over their data, including stronger transparency around the personal data being used and retained.

   a. **What is the FTC doing to ensure that children's privacy is protected for students using EdTech, and how is the FTC working to ensure that the Children's Online Privacy Protection Act of 1998 (COPPA) is fully enforced with regards to EdTech companies?**

      Response: The FTC shares your concerns regarding the importance of safeguarding students' privacy when using EdTech products. As the use of these products in the classroom has exploded over the last several years, the Commission has engaged in extensive outreach to vendors, schools, parents, and consumer advocates on this important issue.

In 2015, we updated our COPPA FAQs to emphasize that when an EdTech vendor relies on the consent of the school, it may only use the personal information collected for an educational purpose, and for no other commercial purpose.[37] In 2017, the FTC held a joint workshop with the Department of Education, *Student Privacy and Ed Tech*, to explore how COPPA works in the EdTech context, and whether further guidance is needed.[38] And recently, as part of our ongoing COPPA Rule review, we have requested comment on whether the Rule should be amended to specifically address school consent for the use of EdTech, including any potential use restrictions.[39]

Commission staff regularly engage in outreach on the COPPA Rule and its application to EdTech. For example, staff has presented to EdTech vendors and schools at the Future of Privacy Forum's Student Privacy Bootcamp and at the Consortium of School Networking (CoSN), highlighting the importance that EdTech vendors comply with the COPPA Rule and Section 5 of the FTC Act.

b. **Without revealing any identifying information, can you confirm whether the FTC currently has any open investigations into EdTech data collection practices?**

Response: While the Commission's rules prevent me from revealing whether the FTC has opened an investigation into any specific matter, I can say that we do have ongoing investigations into EdTech companies.

c. **I believe that any federal data privacy legislation must prioritize stronger protection for children and students. What more can the federal government do to ensure that EdTech companies are providing robust privacy protections for students and their parents?**

Response: As discussed in detail above, the FTC is committed to ensuring that EdTech companies provide robust privacy protections to students. Although the Commission is actively considering whether amendments to the COPPA Rule can improve privacy protections for students and parents, any such changes would only apply to students under age 13. As you know, the Commission has urged Congress to enact federal privacy legislation. This legislation would help ensure privacy protections for students and parents not covered by the COPPA Rule.

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[37] *See* FTC, *Complying with COPPA: Frequently Asked Questions, A Guide for Business and Parents and Small Entity Compliance Guide*, https://www.ftc.gov/tips-advice/business-center/guidance/complying-coppa-frequently-asked-questions.

[38] *See* FTC Press Release, *Student Privacy and Ed Tech* (Dec. 1, 2017), https://www.ftc.gov/news-events/events-calendar/2017/12/student-privacy-ed-tech.

[39] *See* Federal Register, *Request for Public Comment on the Federal Trade Commission's Implementation of the Children's Online Privacy Protection Rule*, 84 FR 35842 (July 25, 2019), https://www.federalregister.gov/documents/2019/07/25/2019-15754/request-for-public-comment-on-the-federal-trade-commissions-implementation-of-the-childrens-online.

<u>The Honorable Amy Klobuchar (D-MN)</u>

<u>Questions for Joseph Simons, Federal Trade Commission</u>

1. **Consumers have been charged excessive fees in the online ticketing market for years. I recently sent a letter to the Antitrust Division with Senator Blumenthal raising competition concerns in connection with the Ticketmaster/Live Nation merger consent decree. As a result of that merger, Live Nation Entertainment has established market dominance in primary ticketing, event promotion, and venue operation.**

   In your view, to what extent does the dominance of Live Nation Entertainment in ticketing and related markets contribute to the public's consumer protection concerns regarding ticket availability, pricing and transaction disclosures?

   <u>Response:</u> The Commission takes a strong interest in protecting consumer confidence in the online event tickets marketplace and ensuring that consumers receive clear, complete, and truthful information about what they are buying. A key purpose of the FTC's online tickets workshop, held this past June, was to address ways to increase transparency and improve the consumer experience in the tickets marketplace.

   Given the Department of Justice's 2010 consent order settling its investigation of the merger of Ticketmaster and Live Nation, and DOJ's continuing enforcement authority over that order, I defer to that agency on the competition issues raised by your question.

2. **Reports have highlighted how certain technology companies have been using humans to review what consumers say to their voice-activated smart speakers—without the knowledge of users, who did not expect that other people would be listening to or seeing transcripts of what they said to devices like Alexa, Google Home, or Siri.**

   What can the FTC do to ensure that consumers are aware of what will be done to the audio information that they provide to use these services? And how can consumers protect their privacy going forward?

   I share your concern about the privacy of information consumers provide through their voice-activated smart speakers. Consumers who are concerned about the privacy of their home assistants and other devices generally can take advantage of tools available through their accounts, such as deleting their recording history or muting their devices. We are drafting consumer education materials on this important topic, which we will make public soon.

United States Senate Judiciary
Subcommittee on Antitrust, Competition Policy, and Consumer Rights

"Oversight of the Enforcement of the Antitrust Laws"
October 1, 2019

Questions for Chairman Joseph Simons
Submitted by Senator Richard Blumenthal

1. **Public reports indicate that the Federal Trade Commission (FTC) and Department of Justice (DOJ) are investigating Amazon, Facebook, Google and Apple (sometimes referred to as the "Big Tech" companies). The *Wall Street Journal* reported earlier this year that the FTC has jurisdiction over Facebook and Amazon while DOJ is investigating Google and Amazon. However, recent reports suggest that this agreement has frayed, if not disintegrated entirely. In July, despite the negotiated agreement, the Department announced a broad investigation into the digital platforms. Just a few weeks ago, the FTC reportedly sent a letter to DOJ raising concerns about the Department's behavior with respect to these cases.**

    a. **Is the FTC operating under a negotiated clearance agreement with DOJ regarding its investigations of the digital technology companies?**

The two federal antitrust agencies developed and have long maintained the clearance process to minimize duplication of effort in civil antitrust enforcement. For the vast majority of matters, and certainly for merger review, the clearance process continues to work well. This past year, the clearance process has not worked well with respect to a small number of potential investigations involving conduct by technology companies. Both agencies are very interested in ensuring that potential anticompetitive conduct is investigated and, if necessary, prosecuted. I am committed to getting the clearance process back on track for all matters. In the meantime, we will continue to work with our colleagues at the Department of Justice to minimize the impact of any duplication on effective law enforcement at the federal level.

    b. **What is the timeline for the investigation into the digital technology companies?**

I cannot comment on any nonpublic investigations, but I assure you that promoting vigorous competition in the technology sector is one of the Commission's top priorities. In addition, as a small agency with very limited resources, we seek to resolve matters promptly so we can most efficiently deploy our resources to promote competition and protect consumers.

    c. **How many full-time FTC employees are working on the Technology Task Force?**

    d. **How many of those employees are technologists or have a background in technology?**

When the now-renamed Technology Enforcement Division of the Bureau of Competition was announced in February 2019, we stated that 17 attorneys would move to this unit from other divisions within the Bureau of Competition. The Division has since hired two additional attorneys who will be joining the agency soon. The Division is also in the process of hiring two technologists who will be dedicated to the work of the Division.

In addition, the FTC's existing technologists play a critical role in helping all FTC attorneys and economists, including staff in the Technology Enforcement Division, understand technical issues relevant to their investigations and in interpreting technical information provided by companies. It is also worth noting that a number of investigators and attorneys have developed significant in-house technical expertise through their enforcement and policy work in the digital space, including big data and related fields.

In particular, the Technology Enforcement Division is consulting with the staff in the Office of Technology Research and Investigation (OTech) within the Bureau of Consumer Protection. OTech focuses on issues at the intersection of technology with the FTC's consumer protection mission, including fraud, privacy, data security, online and mobile advertising, payment systems, and malware. More generally, the leadership of the Bureau of Competition and Bureau of Consumer Protection are in regular contact to ensure consistency in enforcement and to flag relevant issues discovered by one Bureau that may implicate the other Bureau's enforcement priorities.

e. Were any of the employees on the Task Force previously employed by Apple, Amazon, Google, or Facebook? If so, how many?

Almost all of the Technology Enforcement Division's current employees were transferred from other divisions within the FTC's Bureau of Competition. One attorney recently joined from the DOJ Antitrust Division. No one in the Technology Enforcement Division was previously employed by Apple, Amazon, Google, or Facebook. As we hire new employees, they will be subject to government conflict of interest and ethics laws.

f. Without identifying any of the companies under investigation, have those companies been fully cooperative in your investigate efforts so far?

g. Will you commit to informing Congress if, at any point, they are not cooperative?

I am unable to comment on any nonpublic investigation. If any concerns arise, I will share them to the extent allowed. As a general matter, the Commission has the authority to compel the production of information if parties do not comply with Commission-issued compulsory process for documents or information in law enforcement investigations. Legal efforts to enforce or quash Commission subpoenas and civil investigative demands are public events. For example, the Commission recently issued a decision denying Johnson & Johnson's petition to limit compulsory process.[1]

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[1] Order Denying Petition to Limit Civil Investigative Demand and Subpoena Duces Tecum, In the Matters of Civil Investigative Demand to Johnson & Johnson and Subpoenas Duces Tecum to Johnson & Johnson, No. 191-0152

h. If you find anticompetitive conduct in your investigation, are you prepared to engage in litigation and take these companies to court?

Yes. As noted above, anticompetitive conduct in the technology sector is a significant priority. If the Commission finds or is presented with evidence that a company within our jurisdiction is engaging in conduct that harms competition and may violate the antitrust laws, the Commission will review that information for potential law enforcement action, including litigation. For example, we are presently in litigation against a technology platform in which we allege that Surescripts, Inc., a multi-sided platform providing e-prescription services, violated the antitrust laws by employing exclusive agreements to monopolize two double-sided platform markets.[2]

2. **In approving the Facebook-WhatsApp acquisition, the FTC issued a letter stating that the Commission would hold WhatsApp to their privacy commitments in connection with the acquisition, namely, to honor WhatsApp's privacy policies, which were stricter than Facebook's at the time. Unlike Facebook Messenger and Instagram, WhatsApp does not store messages, keeps minimal user data, and is the only text messaging service to currently use end-to-end encryption by default. Has WhatsApp honored the privacy commitments it made to you in connection with this acquisition?**

Prior to my joining the Commission, at the time of the Facebook-WhatsApp acquisition, FTC staff sent a letter to the companies reminding them of WhatsApp's promises to its users about the limited nature of its data collection, use, and sharing practices. Staff warned the companies that, if the companies failed to honor these promises, they could be in violation of Section 5 and/or the FTC's 2012 order against Facebook.[3] Staff has continued to monitor WhatsApp's practices. The FTC's 2019 order against Facebook gives the agency additional tools to monitor and take action against WhatsApp if it misrepresents its privacy promises. Under the FTC's 2012 order with Facebook, the requirement to create a comprehensive privacy program did not apply to WhatsApp. Under the 2019 order, however, an expanded requirement to create such a program does apply to WhatsApp. As a result, for example, going forward we will receive compliance reports, assessments, and other documentation about WhatsApp's compliance with its privacy commitments.

3. **The FTC's recent settlement with Facebook over its blatant and inexcusable privacy violations was a slap on the wrist that actually benefited Facebook's shareholders: The company's market value rose by about $10 billion after the settlement was announced, double the $5 billion fine.**

(Oct. 18, 2019), https://www.ftc.gov/system/files/documents/petitions-quash/johnson-johnson/1910152jjpetitiontoquash.pdf.

[2] FTC Press Release, FTC Charges Surescripts with Illegal Monopolization of E-Prescription Markets (Apr. 24, 2019), https://www.ftc.gov/news-events/press-releases/2019/04/ftc-charges-surescripts-illegal-monopolization-e-prescription.

[3] *See* Letter from Jessica Rich, Director of the Bureau of Consumer Protection, to Erin Egan, Chief Privacy Officer of Facebook and Anne Hoge, General Counsel of WhatsApp (April 10, 2014), https://www.ftc.gov/system/files/documents/public_statements/297701/140410facebookwhatappltr.pdf.

a. Did the FTC conduct a specific analysis of Facebook's unjust enrichment from these privacy violations?

Yes. FTC staff carefully considered this approach. See additional details below.

b. If so, how much was Facebook unjustly enriched through these violations?

See below.

c. If not, why not?

It was not feasible to accurately analyze Facebook's financial gain from the order violations due to the complexity of its business model and the nature of its violations.

For example, the FTC's complaint charged that Facebook violated the order by giving app developers access to the data of the "friends" of app users without adequately disclosing that fact. Although this conduct benefited Facebook, the company did not charge app developers to use its platform or to access this "friend" data, or charge a fee for each app installation. Instead, Facebook made money by connecting audiences to advertisers for a price. A larger, more active user base allows Facebook to serve more targeted ads. To maximize user engagement, Facebook offered a number of ostensibly free services, including third-party apps and, more significantly, its social networking services.

The more information Facebook made available to app developers, the more appealing it was for developers to build on Facebook's platform. Increasing the number of available apps could attract users and increase their engagement, enhancing Facebook's ability to provide advertisers with more robust, targeted audiences for their paid marketing campaigns.

This multivariable causal chain approach makes tracing revenue to violations essentially impossible. First, we would have to determine how many additional apps Facebook garnered by offering developers more information about the installing users' friends—an extremely difficult counter-factual universe to construct. Next, we would have to determine how many fewer users would have joined Facebook, and how much less active they would have been, if Facebook offered fewer apps. Given that people joined and used Facebook for a mix of reasons and utilized various services, it would not be possible to make these calculations in any meaningful way.

d. When the Commission negotiates such penalties, what metrics does it use in reaching a fair and accurate estimate?

The Commission and courts consider a number of factors to determine an appropriate civil penalty for order violations.[4] When the Commission considers a negotiated outcome, the primary question is always whether the Commission could obtain a better result through further

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[4] These factors include "(1) the good or bad faith of the defendants; (2) the injury to the public; (3) the defendant's ability to pay; (4) the desire to eliminate the benefits derived by a violation; and (5) the necessity of vindicating the authority of the FTC." *United States v. Reader's Digest Ass'n, Inc.*, 494 F. Supp. 770, 772 (D. Del. 1980), *aff'd*, 662 F.2d 955 (3d Cir. 1981).

litigation.

In the Facebook matter, given the range of past civil penalties, and the unanimous assessment of experienced litigators at the FTC and the Department of Justice, we determined that litigation would have yielded not only far less money, but also far less comprehensive conduct relief than the settlement negotiated by staff. Importantly, even if we had litigated and eventually won, Facebook would not have been required to make any changes to its practices or pay any penalty for years. Under the circumstances, the best and most appropriate outcome for consumers was to settle the matter under the historic terms the agency obtained.

e. **The 2019 Facebook order "resolves all consumer-protection claims known by the FTC prior to June 12, 2019, that Defendant, its officers, and directors violated Section 5 of the FTC Act." In your statement on the settlement, you stated, "all potential Section 5 and 2012 order violations the Commission currently knows about are address in this Order."**

    i. **Based on your statement, then, any Section 5 claims that are not included in the order are preserved. Is that accurate?**

Yes. The release would not preclude the FTC from addressing any subsequently discovered consumer protection violation of Section 5 of the FTC Act by Facebook that occurred prior to June 12, 2019, including any claims against individuals relating to such violations. In addition, known and unknown antitrust claims are explicitly preserved.

    ii. **In Commissioner Chopra's dissent, he stated, "I have not been able to find a single Commission order – certainly not one against a repeat offender – that contains a release as broad as this one." Commissioner Slaughter, in her dissent, likewise noted that the liability releases in other recent settlements – Deepwater Horizon, Wells Fargo, CitiMortgage, Ocwen, and others – were far more limited. Do you agree with their interpretations that the liability release was broader than the FTC typically agrees to?**

I do not agree with their interpretations. There has been considerable misunderstanding of the release clause in the 2019 order. I appreciate the opportunity to clarify the 2019 order's terms.

First, the 2019 order only releases claims for consumer protection violations of Section 5 of the FTC Act (*i.e.*, unfair or deceptive acts or practices) *known* by the FTC prior to June 12, 2019. FTC staff investigated all such potential violations, including allegations received from interest groups and issues reported by the press, and determined that the 2019 order addressed all *known* valid claims as of June 12, 2019. The release would not preclude the FTC from addressing any subsequently discovered violation of Section 5 of the FTC Act by Facebook that occurred prior to June 12, 2019, including any claims against individuals relating to such violations.

Second, the release of known and unknown claims for violation of the 2012 order is much less significant than some have suggested. It mirrors the legal standard governing *res judicata* for

order violations that has long been applicable to most FTC enforcement matters. Even in the absence of a release, a court likely would determine that the doctrine of *res judicata* (or claim preclusion) releases all claims, known and unknown, that could have been brought in the order enforcement action.[5] For this reason, all FTC order enforcement actions—including both settlements and victories in court—effectively release all known and unknown claims for violations of that order that arose prior to the enforcement action, including claims against individuals resulting from the same transaction or occurrence.[6]

f. **In negotiating the agreement, did the Bureau of Consumer Protection engage with the Bureau of Competition?**

g. **If so, did the Bureau of Competition provide any advice, feedback, or help to the Bureau of Consumer Protection with regards to the 2019 Facebook order?**

The Bureau of Competition provided feedback on the terms of the 2019 order prior to it being finalized. In addition, the Bureau of Competition is engaged in a separate investigation under a wholly separate analytical framework. As noted above, the 2019 order preserves known and unknown antitrust claims.

4. **I am also concerned about the FTC's recent settlement with YouTube over its violations of the Children's Online Privacy Protection Act (COPPA). YouTube profited from capturing the personal information of young children watching Barbie, Hot Wheels, and Thomas and Friends.**

   a. **Did the FTC conduct an analysis of YouTube's unjust enrichment from these privacy violations?**

   b. **If so, how much was YouTube unjustly enriched through these violations?**

   c. **If not, why not?**

Yes, Commission staff analyzed YouTube's and Google's (collectively, "Defendants") unjust enrichment from the COPPA violations alleged in the FTC's complaint. Defendants' unjust enrichment is the amount they earned from collecting personal information from, and serving online behavioral ads to, users of those YouTube channels Defendants knew were child-directed, less the amount they would have earned from serving COPPA-compliant contextual

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[5] *See United States v. ITT Continental Baking Co.*, 420 U.S. 223, 238 (1975) (noting that "a consent decree or order is to be construed for enforcement purposes basically as a contract"); *see also, e.g., Int'l Union of Operating Eng'rs v. Karr*, 994 F.2d 1426, 1429-30 (9th Cir. 1993) (holding claims for breach of the same contract barred by *res judicata*) (citing *McClain v. Apodaca*, 793 F.2d 1031, 1034 (9th Cir. 1986)); *May v. Parker-Abbott Transfer & Storage, Inc.*, 899 F.2d 1007, 1009-11 (10th Cir. 1990) (same); *TechnoMarine SA v. Giftports, Inc.*, 758 F.3d 493, 499-501 (2d Cir. 2013). While the legal analysis in the D.C. Circuit is somewhat more complex, it appears to lead to the same result. *See United States Indus. v. Blake Constr. Co.*, 765 F.2d 195, 205-210 (D.C. Cir. 1985).

[6] *See Ananiev v. Freitas*, 37 F. Supp. 3d 297, 310 (D.D.C. 2014). Specifically, to hold an individual liable in an order enforcement action, we would have to establish that the individual was in active concert or participation with Facebook in violating the order, or that they controlled Facebook's actions. *See Wash. Metro. Area Transit Comm'n v. Reliable Limousine Serv., LLC*, 776 F.3d 1, 9-10 (D.C. Cir. 2015). Thus, *res judicata* would likely bar subsequently suing the individual for an order violation, since such a claim would entail the proof of related facts.

ads.

In the course of its investigation, FTC staff sought information relating to child-directed content and behavioral advertising on the YouTube platform. Defendants provided their revenue information pursuant to compulsory process, and it is therefore confidential. Similarly, FTC staff's specific calculations as to the civil penalty amount are also confidential. However, the Commission believes that analysis of the relevant statutory factors for calculating civil penalties supports the $136 million amount, which is almost 30 times greater than the largest COPPA civil penalty the FTC has ever obtained.[7]

d. The order prohibits YouTube from using, disclosing or benefiting from the personal information previously collected from users of child-directed websites covered by the order. However, that prohibition does not apply until 90 days after the Compliance Date, which is four months after the order. In other words, YouTube appears to be able to continue profiting off the personal information for seven months after the order.

i. Why did FTC permit the FTC to use or benefit from this data for seven months after the order?

With respect to the timing of the injunctive relief, the consent order requires Defendants, within four months of the order's entry, to develop a mechanism that requires content creators to identify which of their content is directed to children. The four-month period is necessary so that Defendants have time to engineer and implement significant changes to the YouTube platform to conform to the order, including the creation of the content-designation system and changes to the content displayed to users. Additionally, this gives Defendants time to educate channel owners about their new designation obligations and to explain to YouTube users the effect of changes to the user experience. For example, after the compliance date, logged-in users will no longer be able to post comments or otherwise interact with child-directed content without verifiable parental consent. The Commission has allowed for a delay of compliance with provisions in other orders that similarly required companies to undertake significant technical engineering changes.[8]

Once Defendants have implemented the designation mechanism and channel owners are able to identify their child-directed content, Defendants will have to comply with COPPA as to new content by the compliance date.

For content on the platform that predates the existence of the designation mechanism required by the order, channel owners have 60 additional days to review such content, determine whether it is child-directed, and designate it as such. Defendants then have an additional 30

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[7] In addition to the $136 million civil penalty, the Commission's consent order requires Defendants to pay the State of New York $34 million, for a total monetary judgement of $170 million.

[8] *See* FTC, Decision & Order, *In the Matter of PayPal, Inc.* (May 24, 2018) (allowing 150 days from entry of order to make required disclosures within user interface), https://www.ftc.gov/system/files/documents/cases/1623102-c4651_paypal_venmo_decision_and_order_final_5-24-18.pdf; FTC, Decision & Order, *In the Matter of Lenovo (United States) Inc.* (Jan. 2, 2018) (allowing 120 days from entry of order to implement software changes), https://www.ftc.gov/system/files/documents/cases/1523134_lenovo_united_states_agreement_and_do.pdf.

days to implement the technical measures necessary to effectuate the channel owners' designations for that content. This sequence takes into account the time it will take creators, many of whom are small businesses, to look backward at their body of content to determine whether it is child-directed, along with time for Defendants to ensure that it turns off the comment functionality and behavioral advertising for that content.

e. **In negotiating the order, did the Bureau of Consumer Protection engage with the Bureau of Competition?**

f. **If so, did the Bureau of Competition provide any advice, feedback, or help to the Bureau of Consumer Protection with regards to the YouTube order?**

The Bureau of Competition knew about the investigation into whether YouTube and Google's conduct violated COPPA. The Bureau of Competition was not involved in the negotiations and did not provide any feedback on the order. As with all Commission investigations and cases, staff from the Bureau of Consumer Protection engaged and worked collaboratively with staff from the FTC's Bureau of Economics, as well as the Commissioner offices, all of whom have focused on intersections between privacy and competition.

5. **Under the Hart-Scott-Rodino Act (HSR Act), merging companies are only required to report their merger to the FTC and DOJ if they reach certain thresholds. Currently, if the size of the transaction is below $90 million, they do not need to report the merger to the agencies.**

a. **Is the FTC missing any anticompetitive mergers due to the current HSR thresholds?**

In passing the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Congress decided not to require premerger notification for all acquisitions, believing that the burden of complying with file-and-wait requirements was not justified for small parties or small deals.[9] Unreportable transactions are still subject to the antitrust laws. The FTC and DOJ can and do investigate and bring complaints against mergers that are below the HSR reporting thresholds, even if those transactions have already closed. For example, the Commission ordered the unwinding of the consummated acquisition of Freedom Innovations by Otto Bock HealthCare North America because the merger resulted in anticompetitive harm in the microprocessor knee market.[10] The

[9] In December 2000, Congress amended the HSR statute "to address concerns about the growing scope and burden of the Act." AMERICAN MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS, 157 (2007) (citing Department of Commerce, Justice, State, and the Judiciary, and Related Agencies Appropriations Act, FY 2001, Pub. L. No. 106-553, § 630, 114 Stat. 2762, 2762A-108 to 111 (2000) (codified as amended at 15 U.S.C. §§ 18a & 181a note)), https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf. Among other things, the amendments additionally exempted transactions valued at less than $50 million (the previous size-of-transaction threshold was $15 million) and provided that the Commission would adjust the reporting thresholds annually based on changes in gross national product beginning in 2005. FTC Press Release, Major Changes to Hart-Scott-Rodino Premerger Notification Requirements to Take Effect February 1, 2001 (Jan. 25, 2001), https://www.ftc.gov/news-events/press-releases/2001/01/major-changes-hart-scott-rodino-premerger-notification.
[10] The Commission's order requires Otto Bock to divest the Freedom Innovation assets to an FTC-approved buyer. FTC Press Release, FTC Commissioners Unanimously Find that Consummated Merger of Microprocessor

two medical device manufacturers closed their nonreportable transaction in September 2017, and the FTC acted quickly to stop the merger, filing its complaint three months later.[11] The Commission's order in the Johnson & Johnson matter referenced above also involves a nonreportable transaction that is under investigation by the FTC's Bureau of Competition.

As part of its mandate, the FTC's Technology Enforcement Division will investigate consummated transactions. The FTC does not hesitate to undo consummated mergers that cause harm, regardless of whether those mergers were reported under the HSR Act.[12]

If we were to identify a particular type of transaction structure designed to evade HSR requirements, or sectors where there was a pattern of competitive harm from transactions that are not reportable, we would consider amending the HSR rules to provide for additional premerger reporting.[13]

b. How does the agency learn of potentially anticompetitive mergers that fall beneath the reporting thresholds?

FTC investigative staff rely on trade press and other news articles (which are regularly monitored), consumer and competitor complaints, hearings, economic studies, evidence uncovered in an existing investigation or litigation, publicly available evidence of suspicious market behavior, referrals from other agencies or Congress, and other means to identify practices that threaten competition, including potentially anticompetitive mergers. The FTC also solicits leads on its public website, inviting contacts by email, letter, and telephone.

c. Does the FTC support any changes that could enable the agency to discover mergers that are currently falling beneath the reporting thresholds?

We are actively exploring this issue. In administering the HSR premerger notification program,

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Prosthetic Knee Companies Was Anticompetitive; Assets Must be Unwound (Nov. 6, 2019), https://www.ftc.gov/news-events/press-releases/2019/11/ftc-commissioners-unanimously-find-consummated-merger.

[11] Compl., In the Matter of Otto Bock HealthCare N.A., Dkt. No. 9378 (Dec. 20, 2017), https://www.ftc.gov/system/files/documents/cases/otto_bock_part_3_complaint_redacted_public_version.pdf.

[12] Expiration of the HSR waiting period does not immunize a transaction from antitrust scrutiny. The FTC and Department of Justice continue to have jurisdiction to investigate and challenge a merger after its closing if they believe that the acquisition substantially lessens competition. *See, e.g.*, *Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410 (5th Cir. 2008) (denying petition for review of FTC decision that found consummated acquisition unlawful and FTC order that required acquiring firm to create two separate, standalone competitors).

[13] For example, in 2013, the FTC amended the HSR rules to clarify when the transfer of pharmaceutical (including biological) patent rights is reportable as an asset sale under the HSR Act. The rule change, which was largely prompted by the evolving licensing structure within the pharmaceutical industry, closed a perceived loophole that applied when a licensor or transferor retained manufacturing rights. The rule change also facilitated the FTC's preclosing review of developmental-stage pharmaceutical product collaborations that may involve potential competitors. Premerger Notification; Reporting and Waiting Period Requirements, 78 Fed. Reg. 68706 (Nov. 15, 2013) (amending 16 CFR pt. 801), https://www.ftc.gov/sites/default/files/documents/federal_register_notices/2013/11/131115premergerfrn.pdf. *See also* FTC Press Release, Federal Appeals Court Rules in Favor of FTC: Pharmaceutical Industry Patent Rights Reportable under Hart-Scott-Rodino Act (June 10, 2015), https://www.ftc.gov/news-events/press-releases/2015/06/federal-appeals-court-rules-favor-ftc-pharmaceutical-industry.

the FTC is responsible for ensuring that the HSR rules are clear and serve the interest of effective merger enforcement. One of the topics discussed at the Commission's *Hearings on Competition and Consumer Protection in the 21st Century* was whether changes in investment behavior and deal construction warrant a reassessment of current HSR reporting requirements. We are considering the use of our Section 6(b) authority to examine past acquisitions by large technology platforms. We continue to evaluate the impact of HSR reporting requirements, including whether premerger review of certain currently nonreportable transactions would be beneficial.[14]

d. Apple CEO Tim Cook said earlier this year that Apple purchases a company every two-to-three weeks and had purchased 20-25 companies in the previous six months.[15] Furthermore, Cook said that Apple often does not announce these deals because they are small and Apple is "primarily looking for talent and intellectual property."

i. Was the FTC aware of more than 20 acquisitions by Apple between October 1, 2018 and May 1, 2019?

ii. If so, how did the FTC become aware of the 20-plus acquisitions? Please break down this number into categories by source (HSR filing, media, public notice, etc.).

iii. If not, how many acquisitions by Apple was the FTC aware occurred between October 1, 2018 and May 1, 2019?

iv. Outside of any ongoing investigation into Big Tech companies, did the FTC investigate any of these acquisitions for potential competition issues?

v. If so, how many acquisitions by Apple during that period did the FTC investigate?

vi. Is the FTC concerned that it is missing "killer acquisitions" due to the current HSR thresholds?

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[14] For example, the FTC recently published a notice of proposed rulemaking that would clarify whether a transaction is exempt from premerger notification because the entity involved is foreign. Premerger Notification; Reporting and Waiting Period Requirements, 84 Fed. Reg. 58348 (Oct. 31, 2019) (amending 16 CFR pts. 801 & 803), https://www.federalregister.gov/documents/2019/10/31/2019-23560/premerger-notification-reporting-and-waiting-period-requirements. In general, acquisitions of foreign assets and voting securities of foreign issuers may be exempt from HSR requirements if there is only a limited nexus with U.S. commerce. Under the current HSR rules, determination of whether an entity qualifies as "foreign" depends in part on the location of its "principal offices," a term that is not defined in the rules. The proposed amendments would introduce a "principal offices" definition based on the residency of officers and directors and the location of the entity's assets. Specifically, under the proposed rule, if 50 percent or more of an entity's officers, directors, or assets reside in the United States, that entity would be considered a U.S. entity for premerger notification purposes. FTC Press Release, *FTC and DOJ Approve Procedural Amendments to HSR Rules for Foreign Entities* (Nov. 8, 2019), https://www.ftc.gov/news-events/press-releases/2019/11/ftc-doj-approve-procedural-amendments-hsr-rules-foreign-entities.

[15] https://www.cnbc.com/2019/05/06/apple-buys-a-company-every-few-weeks-says-ceo-tim-cook.html.

vii. **Does the FTC support any changes that could enable the agency to discover potential "killer acquisitions"?**

I cannot discuss our nonpublic investigations or disclose the source of any particular FTC investigation. As a general matter, if an acquisition by a large technology firm was reported in the press or otherwise made public, we are very likely aware of it.

We are aware of concerns that certain firms may be engaging in "killer acquisitions" that have the effect of eliminating nascent or potential competitors, and we are taking this issue very seriously. As noted above, we are considering the use of our Section 6(b) authority to examine past acquisitions by large technology platforms. Any proposal to change the HSR rules would be subject to public notice and comment, a process through which we typically receive useful feedback that we integrate into our analysis.

6. **Chairman Simons stated at the hearing in response to my question about anticompetitive practices in the healthcare industry that the Commission is looking into the use of "rebate walls" – a practice in which pharmaceutical companies leverage their market power to use volume-based rebates to block a competitor's access to formularies.**

   a. **Does the FTC believe that "rebate walls" are harming market competition and preventing lower-priced biosimilars from gaining market share?**

I share your concerns about the rebating practices of pharmaceutical manufacturers when these practices are part of an exclusionary scheme to gain or maintain a monopoly. In general, the FTC has authority to challenge unilateral conduct by a firm that impedes rivals from competing on the merits and that enables the firm to attain or maintain a monopoly position. Pricing practices such as market share rebates, rebates based on formulary access, and rebate clawbacks may be part of an illegal exclusionary scheme that helps a firm attain or maintain a monopoly in violation of the antitrust laws. For example, the Commission ruled that McWane, Inc. illegally maintained its monopoly by adopting a "Full Support Program" that denied unpaid rebates to customers who purchased products from its competitors.[16] More recently, the Commission filed an action in federal court alleging that healthcare technology company Surescripts, Inc. structured its contracts to lock customers into exclusive arrangements, conditioning discounts on exclusivity to make it impossible for buyers to shift their business to Surescripts' rivals. The FTC's complaint alleges that through a web of exclusive arrangements and other exclusionary conduct, Surescripts was able to protect its dominant position in two e-prescription markets, to the detriment of U.S. consumers.

   b. **What is the FTC doing to address such behaviors?**

For over 20 years and on a bipartisan basis, one of the Commission's top priorities has been combatting anticompetitive conduct by pharmaceutical companies. We have challenged anticompetitive reverse payment agreements, sham litigation, and most recently, product-hopping behavior that illegally suppresses competition from new products entering

[16] *McWane, Inc. v. FTC*, 783 F.3d 814, 820-21 (11th Cir. 2015).

pharmaceutical markets. As tactics continue to evolve, the Commission will remain vigilant to investigate and challenge conduct by pharmaceutical firms that delays new entry, keeps prices artificially high, and denies patients access to life-saving treatments.

I look forward to working with you and others in Congress who are interested in deterring anticompetitive conduct by pharmaceutical companies. Over the past year, Commission staff has provided technical assistance on a number of legislative proposals directed at these concerns. In addition, I support legislation that would more effectively deter anticompetitive behavior that delays entry of new treatments, including lower-cost biosimilar products.

c. **Without identifying any companies, you stated at the hearing that you would look into whether the FTC has an active investigation concerning rebate walls. Upon review, does the FTC have any investigation(s) ongoing?**

d. **If so, how many investigations does the FTC have ongoing regarding rebate walls?**

The Commission's rules prevent me from revealing whether the FTC has opened an investigation into any specific matter. I can confirm that we do have ongoing investigations into pharmaceutical contracting practices, including rebate walls.

7. **I was pleased to learn at the hearing that the FTC is planning to conduct a retrospective analysis of the labor market effects of hospital mergers.**

a. **What is the timeline for conducting that merger retrospective?**

Last month, the Commission issued orders to five health insurance companies and two health systems to provide information that will help the agency conduct retrospective analyses of the effects of so-called "Certificates of Public Advantage" (COPAs) recently granted for two different hospital mergers.[17] The FTC intends to collect information over the next several years as part of this effort. The retrospectives will examine not only the effects of the certificates of advantage on price, quality, access, and innovation for healthcare services, but also the impact of hospital consolidation on employee wages. Once this multiyear study is complete, the FTC plans to publicly report its findings.

b. **In questions for the record after the 2018 Senate Judiciary Committee oversight hearing on antitrust, you stated that the agency did not have sufficient data to enable a retrospective analysis of the labor market effects of a consummated merger.**

i. **What changed over the past year to allow the FTC to conduct such a retrospective analysis for hospital mergers?**

In June 2019, the FTC held a public workshop to assess the impact of COPAs on hospital

[17] FTC Press Release, FTC to Study the Impact of COPAs (Oct. 21, 2019), https://www.ftc.gov/news-events/press-releases/2019/10/ftc-study-impact-copas.

merger consolidation.[18] Academics, health policy experts, healthcare industry stakeholders, state regulators and law enforcers, and staff from the FTC's Bureau of Economics discussed research regarding the effects of certificates of public advantage and the impact of hospital mergers on employee wages. Workshop testimony and public comments informed the current study design. The orders issued last month will assist the agency in compiling its study.

ii. Does the FTC have sufficient data to conduct a retrospective analysis of the labor market effects of mergers in other industries?

Beyond the COPA hospital merger retrospective studies that we discussed above, we continue to look for candidate merger retrospective studies to evaluate labor market effects.

iii. If not, why not? Can Congress provide any help in ensuring that the FTC has the necessary data to conduct these analyses?

The FTC is very interested in conducting research on the impact of mergers on labor markets, but currently does not have access to the appropriate data to perform such a study. To determine if a merger caused wages to decline (or increase), we need access to data describing how the employees' wages at the merged firm changed following the merger and data describing how workers performing similar tasks at other firms (both in the same geographic area and in other geographic areas) changed during the same time period.

Although the FTC does not possess such data, we believe other U.S. government agencies may already collect the information necessary to conduct this study. For instance, the U.S Treasury possesses tax-filing data and the Census Bureau collects matched employee-employer survey data, which some researchers have recently used to explore market power in labor markets. Nevertheless, we believe researchers using confidential Treasury or Census data cannot report findings at a level where the firms being studied can be identified, or even where relatively specific information about the characteristics of markets being studied can be revealed. These restrictions could seriously impede the FTC's ability to report the results of a study of a merger's labor market effects in a way that would shed light on what types of mergers harm workers. As a result, in addition to gaining access to the data, we would need a waiver from the disclosure rules in order to provide meaningful insight into the labor market effects of a merger.

8. While non-compete agreements can help protect employers and incentivize investments in workers, too often they are used to stifle competition. I was disappointed to hear that the Commission found insufficient evidence in its literature review to justify a rulemaking. Nevertheless, I am glad that the FTC is hosting a workshop on this issue in October and is seeking additional evidence to support a rulemaking.

Please provide a list of each study that the FTC reviewed in its literature review of non-competes. For each study, please include: (i) names of the author(s); (ii) title of

[18] FTC Workshop, A Health Check on COPAs: Assessing the Impact of Certificates of Public Advantage in Healthcare Markets (June 19, 2019), https://www.ftc.gov/news-events/events-calendar/health-check-copas-assessing-impact-certificates-public-advantage.

the study; (iii) date of publication; and (iv) name of publication.

I share your concern that non-compete agreements may sometimes be used to stifle competition, without sufficient countervailing benefits. I appreciate your interest in our upcoming workshop, which we expect to hold in early 2020. This summer, I asked the Commission's Bureau of Economics to conduct a literature review of non-compete agreements. Below are the materials reviewed by staff in connection with their review of the then-current literature. Some of these materials do not directly address non-compete agreements, but were included because they were part of staff's literature review, providing helpful background on methodology and theory.

Staff's review continues, in anticipation of the upcoming workshop on the effects of non-compete agreements on workers.

<u>Literature on Non-Compete Agreements</u>

- Natarajan Balasubramanian, Jin Woo Chang, Mariko Sakakibara, Jagadeesh Sivadasan & Evan Starr, *Locked In? The Enforceability of Covenants Not to Compete and the Careers of High-Tech Workers* (U.S. Census Bureau, Ctr. for Economic Studies Paper No. CES-WP-17-09, 2018).

- Norman Bishara, *Fifty Ways to Leave Your Employer: Relative Enforcement of Noncompete Agreements, Trends, and Implications for Employee Mobility Policy*, 13 U. PA. J. BUS. L. 751 (2011).

- Gerald Carlino, *Do Non-Compete Covenants Influence State Startup Activity? Evidence from the Michigan Experiment* (Fed. Res. Bank Phila., Working Paper No. 17-30, 2017).

- Raffaele Conti, *Do Non-Competition Agreements Lead Firms to Pursue Risky R&D Projects?*, 35 STRATEGIC MGMT. J. 1230 (2014).

- Bruce Fallick, Charles A. Fleischman & James B. Rebitzer, *Job-Hopping in Silicon Valley: Some Evidence Concerning the Microfoundations of a High-Technology Cluster*, 88 REV. ECON. & STAT. 472 (2006).

- Mark J. Garmaise, *Ties that Truly Bind: Noncompetition Agreements, Executive Compensation, and Firm Investment*, 27 J.L. ECON. & ORG. 376 (2011).

- Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 NYU L. REV. 575 (1999).

- Matthew S. Johnson & Michael Lipsitz, *Why are Low-Wage Workers Signing Noncompete Agreements?* (Working Paper, 2017).

- Kurt Lavetti, Carol Simon & William D. White, *The Impacts of Restricting Mobility of Skilled Service Workers: Evidence from Physicians* (Working Paper, 2018).

- Brian M. Malsberger, Samuel M. Brock & Arnold H. Pedowitz, COVENANTS NOT TO COMPETE: A STATE-BY-STATE SURVEY (A.B.A. SEC. PUB., 2012).

- Matt Marx, Deborah Strumsky & Lee Fleming, *Mobility, Skills, and the Michigan Non-Compete Experiment*, 55 MGMT. SCI. 875 (2009).

- Paul H. Rubin & Peter Shedd, *Human Capital and Covenants Not to Compete*, 10 J. LEGAL STUD. 93 (1981).

- Sampsa Samila & Olav Sorenson, *Noncompete Covenants: Incentives to Innovate or Impediments to Growth*, 57 MGMT. SCI. 425 (2011).

- Toby E. Stuart & Olav Sorenson, *Liquidity Events and the Geographic Distribution of Entrepreneurial Activity*, 48 ADMIN. SCI. Q. 175 (2003).

- Evan Starr, *Consider This: Wages, Training, and the Enforceability of Covenants Not to Compete*, 72 INDUS. & LAB. REL. REV. 783 (2019).

- Evan Starr, Natarajan Balasubramanian & Mariko Sakakibara, *Screening Spinouts? How Noncompete Enforceability Affects the Creation, Growth, and Survival of New Firms*, 64 MGMT. SCI. 552 (2017).

- Evan Starr, Justin Frake & Rajshree Agarwal, *Mobility Constraint Externalities*, ORG. SCI. (forthcoming).

- Evan Starr, J.J. Prescott & Norman Bishara, *The in terrorem Effects of (Unenforceable) Contracts* (U. Mich. L. & Econ. Res. Paper No. 16-032, 2019).

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