



UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of Commissioner
Alvaro M. Bedoya

July 5, 2023

Jessica Herron
Legislative Clerk
Subcommittee on Innovation, Data, and Commerce
House Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, DC 20515-6115

Re: FTC Commissioner Bedoya's Responses to Additional Questions for the Record

Dear Ms. Herron:

Thanks to you, the other staff, and especially the Members of the Subcommittee on Innovation, Data, and Commerce for inviting me to testify before it on April 18, 2023, for its hearing, "Fiscal Year 2024 Federal Trade Commission Budget."

In accordance with the Rules of the Committee on Energy and Commerce, I am attaching here my responses to Chairman Bilirakis's additional questions for the record. These responses supplement my June 6, 2023, responses, and complete my responses to the Members' additional questions for the record.

Thanks again for the opportunity to testify. Please let me know if you have any questions.

Sincerely,

Alvaro M. Bedoya
Commissioner
Federal Trade Commission

**Supplemental Responses of Federal Trade Commissioner Alvaro M. Bedoya to
Additional Questions for the Record from the Honorable Gus M. Bilirakis,
Chairman of the Subcommittee on Innovation, Data, and Commerce
of the U.S. House of Representatives Committee on Energy and Commerce
following its April 18, 2023, hearing,
“Fiscal Year 2024 Federal Trade Commission Budget”**

The Honorable Gus M. Bilirakis

1. Who at the FTC has authority to initiate an investigation of a business?

By regulation, the Commission has delegated limited authority to initiate investigations to the following officials, without power of redelegation: the Director, Deputy Directors, and Assistant Directors of the Bureau of Competition; the Director, Deputy Directors, and Associate Directors of the Bureau of Consumer Protection; and the Regional Directors and Assistant Regional Directors of the Commission's regional offices. 16 C.F.R. § 2.1; *see also* 36 Fed. Reg. 9044 (May 18, 1971) (delegating to the specified officials "the authority to initiate investigations of alleged or suspected violations of any law, or provision thereof, which the Commission is empowered or directed to enforce; or the manner and form of compliance with final orders issued by the Commission"). Also, 16 C.F.R. § 2.1 separately delegates to the Director of the Bureau of Competition, without power of redelegation, authority to open investigations in response to requests pursuant to an agreement under the International Antitrust Enforcement Assistance Act, 15 U.S.C. 6201 *et seq.*, if the requests do not ask the Commission to use process.

2. Do commissioners have to vote to initiate an investigation of a business?

No. Please see the response to 1.

3. Do you know how many investigations of a business are currently underway?

I understand that the FTC has approximately 1,600 investigations currently underway.

4. Do you know how many investigations of a business have been initiated since the beginning of the year?

I believe the FTC has initiated roughly 100 investigations since the beginning of the year.

5. Is there a periodic list prepared to inform each commissioner of the specific investigations under way?

Yes. The Bureaus prepare weekly reports of their investigations, and these reports are circulated to each Commissioner's office.

i. If not, why not?

6. How would a commissioner discover which businesses are under investigation?

I often ask bureau directors about new and ongoing investigations. In addition, the Bureau of Competition and Bureau of Consumer Protection generate weekly update reports for the Commission. These reports contain updates about ongoing investigations.

7. Is there information controlled by a bureau that a commissioner may not review?

The right to set the agency's general policies belongs to the Commission as a body. *See* Reorganization Plan No. 8 of 1950, 64 Stat. 1264. I believe that each individual Commissioner is entitled to information that he or she deems necessary to fulfill his or her responsibility. Accordingly, each FTC Commissioner participates in regular meetings with bureau leadership to receive updates on ongoing cases or other areas of interest to the Commissioner. If a Commissioner requests a briefing on a specific matter, career FTC staff also often assist in providing that briefing. However, the FTC's *ex parte* rules prohibit certain communications between FTC staff and Commissioners regarding pending administrative adjudications or rulemaking proceedings under Section 18 of the FTC Act. 16 C.F.R. §§ 4.7, 1.18(c)(2). In addition, if a Commissioner is recused from participating in a matter, FTC staff does not share information regarding that matter with the recused Commissioner.

8. What types of information are not shared with commissioners?

Please see response to 7.

9. Who at the FTC has authority to seek a court order against a business?

When the FTC seeks to obtain a federal court judgment against a business for violating a law enforced by the FTC, the Commission votes to file a complaint against that business in federal court or, in certain cases, to refer the matter to the Department of Justice ("DOJ") for litigation on the Commission's behalf. 16 C.F.R. § 4.14; *see also* 15 U.S.C. § 56(a). The complaint filed in federal court specifies, *inter alia*, the relief the Commission is seeking. Although the Commission has delegated limited authority to initiate investigations to certain FTC personnel, *see* 16 C.F.R. § 2.1, the authority to file a federal court complaint on behalf of the Commission rests with the Commission itself and, in certain cases, DOJ.

In cases of a failure to comply with an FTC subpoena or other compulsory process, however, the Commission has delegated to the FTC General Counsel, without power of redelegation, the authority to initiate an enforcement proceeding in federal court. *See* 16 C.F.R. § 2.13(b). The purpose of such proceedings is to seek a federal court order enforcing compliance with the FTC's compulsory process or, in cases where a court order enforcing compulsory process has been violated, to seek an order of civil contempt.

10. Do commissioners have to vote to seek a court order against a business?

Yes, please see the response to 9.

11. Do you know how many court orders the FTC has sought against businesses in the past year?

Since June 2022, the FTC has sought court orders against businesses in roughly 40 cases.

12. Do you know how many court orders against businesses have been sought since the beginning of the year?

The FTC has sought court orders against businesses in approximately 20 cases since the beginning of the year.

13. Is there a periodic list prepared to inform each commissioner of the specific court orders sought against businesses?

a) If not, why not?

Because the Commissioners are responsible for voting out FTC complaints to be filed in federal court, the Commissioners are aware of the federal court judgments sought in such complaints. The Bureaus and the Office of General Counsel prepare weekly and semi-annual reports that inform each Commissioner of all pending court cases. In addition, each FTC Commissioner participates in regular meetings with bureau leadership to receive updates on ongoing cases or other areas of interest to the Commissioner.

14. In each instance when the FTC seeks a court order against a business, is there a public record of the court order, or are they sometimes granted under seal?

In most enforcement cases, when the FTC seeks a court order against a business, the FTC's complaint requesting the court order is filed on the public case docket. Concurrently, the FTC posts its complaint and a press release announcing its action on its website.

In cases involving frauds or scams, the Commission sometimes files the action initially under seal along with a request for a temporary restraining order pursuant to Federal Rule of Civil Procedure 65(b). If the court grants the FTC's request, the defendant is provided notice of the FTC's action once the business records have been secured and an asset freeze has been implemented. This usually occurs within a few days of the court issuing the temporary restraining order. Once notice is provided, assets are frozen, and documents secured, the FTC promptly moves to lift the seal, making all case filings visible to the public. The FTC also posts the case documents on its public website and issues a press release announcing the case to the public. In no case does the FTC obtain a final judgment against a defendant in an action filed under seal.

In addition, some cases involve trade secrets or other confidential business information that would cause concrete business harm if disclosed publicly. In such cases, the FTC initially files under seal to give the business an opportunity to seek a protective order to prevent disclosure of such information publicly. If the business does not seek to prevent public disclosure of the information or is unable to convince the court that there are "compelling reasons" to justify non-disclosure, *see, e.g., FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410 (1st Cir.1987), then the FTC promptly moves to lift the seal, consistent with its approach of making all its law enforcement work known to the public.

In short, the FTC only seeks to keep enforcement actions under seal for short periods of time and only when necessary.

15. How would a commissioner discover which court orders the FTC has sought and the outcome of those requests?

Please see the answer to 13.

16. Does the FTC ever seek to appoint a receiver for the assets of a business?

Yes.

17. How does the FTC decide whom to appoint as a receiver?

The FTC does not appoint receivers—the court does. Some courts and individual judges strictly prohibit government agencies seeking the appointment of a receiver from recommending any candidate—the court selects on its own. Most courts and judges, however, welcome a government agency’s recommendations of one or more potential receiver candidates for the court’s consideration.

If the court allows or asks for receiver recommendations, the FTC provides them. Unless directed otherwise by the court, the FTC will recommend one candidate. The candidate that the FTC recommends is the product of a thorough internal vetting process conducted by the FTC staff prior to filing the case. That process includes, among other things, interviewing at least three candidates to identify those who: do not have any conflicts; have the relevant skills, experience, and expertise to serve as an effective receiver in the case; can serve as a receiver without incurring unnecessary costs (e.g., travel); and will charge fair rates that will maximize potential recovery for harmed consumers. Staff also contact references provided by the candidate as well as any staff members who previously worked on a case with the receiver. At the end of the vetting process, staff, in consultation with their front-line management, selects one candidate to recommend to the court. The court does not always choose the candidate recommended by the FTC.

18. Must commissioners approve the appointment of a receiver?

No.

19. Is there an approved list of potential receivers at the FTC?

No.

20. Please provide the Committee with a list of all receivers the FTC has appointed since January 2021.

Please see the answer to 17. No such list exists.

21. Please provide the Committee with a list of all receivers the FTC has approved since January 2021.

Please see the answer to 19.

22. Please provide the Committee with every contract used to retain a receiver since January 2021.

Please see the answer to 17. The FTC does not retain receivers.

23. Please provide the Committee with the compensation received by each receiver as a result of its FTC approved receiver status since January 2021.

Please see the answer to 19. The FTC does not approve the appointment of receivers.

24. Please provide all FTC documents explaining how the FTC has statutory authority to seek in federal court disgorgements from businesses.

In *AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (Apr. 2021), the Supreme Court held that federal courts may not order equitable monetary relief under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b). This decision, which upended decades of lower court rulings, eliminated the FTC's ability to seek equitable monetary relief, including disgorgement of ill-gotten gains, in federal court under Section 13(b) of the FTC Act.

The FTC can seek monetary redress under Section 19 of the FTC Act, 15 U.S.C. § 57b. Section 19 authorizes courts to grant relief necessary to redress injuries to consumers or other persons or entities stemming from the unlawful conduct at issue. It does not, however, expressly authorize courts to order defendants to disgorge the unjust gains or assets they earned by violating the law. Accordingly, the FTC has never invoked Section 19 to seek a federal court order requiring a defendant to disgorge assets. Consistent with the statute, the FTC has obtained court orders in numerous cases requiring defendants to provide redress, which typically takes the form of refunds that the FTC distributes to harmed consumers.

If the Commission issues a final administrative order against a business and that business subsequently violates that order, Section 5(l) of the FTC Act, 15 U.S.C. § 45(l) authorizes the FTC to bring a federal court action to address such violations. In such an action, the FTC can obtain, among other things, equitable monetary relief, which includes disgorgement of unjust gains.

25. Please provide all FTC documents explaining how the FTC has statutory authority to seek in federal court disgorgements from a specific business without representation of that business in court.

The FTC does not seek final judgments from a court ordering any relief (injunctive, monetary relief, disgorgement, or civil penalties) from a defendant without giving the defendant an opportunity to be represented by counsel and contest the FTC's claims, nor does it have the statutory authority to do so. In some cases, defendants elect not to retain counsel or contest the charges, in which case the FTC asks the court to enter a default judgment pursuant to Rule 55 of the Federal Rules of Civil Procedure.

26. Please provide all FTC documents explaining how the FTC has statutory authority to seek disgorgements from businesses under Section 19.

Please see the response to 24.

27. Please provide all FTC documents explaining how the FTC has statutory authority to seek disgorgements from businesses under Section 13.

Please see the response to 24.

28. Please provide all FTC documents explaining how the FTC has statutory authority to seek in federal court the appointment of a receiver for a business.

In cases involving frauds or scams, the Commission sometimes files the action initially under seal along with an *ex parte* request for a temporary restraining order pursuant to Federal Rule of Civil Procedure 65(b). The FTC's request for a temporary restraining order often asks the court to impose a receiver over the business because historically fraudsters and scammers have shown a propensity to destroy business records or dissipate assets upon notice of law enforcement action. A court-appointed receiver serves as a neutral party, directly answerable to the court, who can secure the business's records and assets and make sure that the business owners comply with the court's orders. Courts are authorized to appoint a receiver under Sections 5(l), 13(b), and 19 of the FTC Act, 15 U.S.C. §§ 45(l), 53(b), and 57b; Federal Rule of Civil Procedure 65; and the All Writs Act, 28 U.S.C. § 1651. *See, e.g., FTC v. Simple Health Plans LLC*, 58 F.5th 1322, 1329-30 (11th Cir. 2023) (holding that Section 19 of the FTC Act authorizes a court to appoint a receiver).

If the court grants the FTC's *ex parte* request for appointment of a receiver, the defendant is provided notice of the FTC's action once the receiver is in place and has secured the business's records and assets. This usually occurs within a few days of the court appointing the receiver. Once notice is provided, the defendants are always given the opportunity to contest the appointment of the receiver in court.

29. Please provide all FTC documents explaining how the FTC has statutory authority under Section 19 to seek in federal court the appointment of a receiver for a business.

Please see the response to 28.

30. Please provide all FTC documents explaining how the FTC has statutory authority under Section 19 to seek in federal court the appointment of a receiver for a business without representation of that business in court.

Please see the response to 28.

31. Please provide a list since January 2021 of each instance in which the FTC has employed Section 19 in federal court to seek the appointment of a receiver for a business.

- *FTC v. Inmate Magazine Service, Inc.* (N.D. Fla.) (filed Feb. 16, 2021)
- *FTC v. Fin. Educ. Servs. Inc.* (E.D. Mich.) (filed May 23, 2022)
- *FTC v. Graham* (M.D. Fla.) (filed June 13, 2022)
- *FTC v. Green Equitable Sols.* (C.D. Cal.) (filed Sept. 12, 2022)
- *FTC v. ACRO Servs. LLC* (M.D. Tenn.) (filed Nov. 7, 2022)
- *FTC v. BCO Consulting Servs., Inc.* (C.D. Cal.) (filed Apr. 24, 2023)
- *FTC v. SL Finance LLC* (C.D. Cal.) (filed Apr. 24, 2023)

32. Please provide a list since January 2021 of each instance in which the FTC has in federal court sought the appointment of a receiver for a business without reference to Section 19.

The FTC has not filed any cases since January 2021 in which it has sought the appointment of a receiver without reference to Section 19.

33. Please provide a list since January 2021 of each instance in which the FTC has employed Section 19 in federal court to seek the disgorgement of assets from a business.

Section 19 only authorizes courts to grant relief necessary to redress injuries to consumers or other persons or entities stemming from the unlawful conduct at issue. Section 19, however, does not authorize courts to order defendants to disgorge the unjust gains or assets they earned by violating the law. Accordingly, the FTC has never invoked Section 19 to seek a federal court order requiring a defendant to disgorge assets. Consistent with the statute, the FTC has obtained court orders in numerous cases requiring defendants to provide redress, which typically takes the form of refunds that the FTC distributes to harmed consumers.

34. Please provide a list since January 2021 of each instance in which the FTC has in federal court sought the disgorgement of assets from a business without reference to Section 19.

From January 2021 until the Supreme Court's April 2021 ruling in *AMG*, the FTC (or the Department of Justice, on behalf of the FTC) filed the following three federal court actions that sought equitable monetary relief (which includes restitution and disgorgement) without reference to Section 19:

- *FTC v. Endo Pharmaceuticals Inc.* (D.D.C.) (filed Jan. 25, 2021)
- *FTC v. Wellco, Inc., et al.* (S.D.N.Y.) (filed Mar. 12, 2021)
- *United States v. Vivint Smart Home, Inc.* (D. Utah Apr. 29, 2021).¹

The *Wellco* and *Vivint* actions were filed as settlements, and the equitable monetary relief the defendants paid in those cases represented restitution for consumer losses.

¹ The Commission referred the *Vivint* action to the Department of Justice for filing prior to the Supreme Court's April 22, 2021, ruling in *AMG*.

Since the *AMG* ruling, the FTC has not asked a court to order any defendant to disgorge unjust gains or assets earned by breaking the law, nor has the FTC sought restitution in any case that did not reference Section 19.

35. Please provide a list of each case in which Section 19 by the FTC was referenced in court cases from 2015-2020. Please indicate in which of those cases Section 19 was cited as the only basis for (a) appointment of a receiver for a business; and (b) for disgorgement of assets from a business.

From 2015 to 2020, the FTC filed over 300 consumer protection cases in federal court, most of which referenced Section 19. The FTC did not cite Section 19 as the sole basis for appointment of a receiver or the disgorgement of unjust gains or assets in any case filed between 2015 and 2020.

36. Commissioner Bedoya, if conduct helps consumers by lowering prices but harms competitors, who prevails – consumers or competitors, and what specific factors do you use to balance these interests?

This question assumes that consumer and competitor interests are in conflict, but this is not necessarily the case. Competitors in a market are necessary for the benefits of competition to flow to consumers. What has been cast as “protecting competitors” should more accurately be described as “protecting competition,” which is certainly to the benefit of consumers.

It is difficult, however, to answer this question in the abstract. For example, the law recognizes a violation of section 2 of the Sherman Act when a company engages in predatory pricing – setting prices below cost and in a way that makes future recoupment unlikely. The effect of predatory pricing may be beneficial to consumers in the short-term, but the long-term harm to competition is substantial. When I am analyzing Sherman Act claims, Robinson-Patman Act discriminatory pricing claims, or any other alleged antitrust violation, statutory text, congressional intent and caselaw will guide my analysis.