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

Office of the Chair

June 21, 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 Chair Khan's Responses to Additional Questions for the Record

Dear Ms. Herron,

I appreciated the opportunity to testify on April 18, 2023, at the Subcommittee hearing titled "Fiscal Year 2024 Federal Trade Commission Budget." Pursuant to the Rules of the Committee on Energy and Commerce, I am attaching my answers to the additional questions for the record, in the required format.

Thank you again, and please let us know if you have any questions.

Sincerely,

Lina Khan

Lina M. Khan
Chair, Federal Trade Commission

Attachment 1—Additional Questions for the Record

The Honorable Cathy McMorris Rodgers

1. **Recently, a large retailer settled a class action lawsuit over sheet thread count marketing claims. We also know that the Texas Agricultural Commissioner has referred multiple cases to the FTC, and there have also been class action lawsuits against retailers, claiming that marketing related to thread count is false and deceptive. It is important that consumers are getting the items they are thinking they are, especially when such claims are made.**

   a) **Has the FTC examined thread count claims in circumstances referenced above?**

   The Commission has not examined these claims. We have pursued enforcement action in related areas, such as deceptive marketing claims around textiles. For example, last year the FTC took action against national retailers for falsely marketing dozens of rayon textile products as bamboo. The companies were required to pay $5.5 million as a result.

   b) **What actions has the FTC taken to date regarding such thread count claims?**

   The FTC has not taken any legal action based on thread counts. We have pursued enforcement action in related areas, such as deceptive marketing claims around textiles. For example, last year the FTC took action against national retailers for falsely marketing dozens of rayon textile products as bamboo. The companies were required to pay $5.5 million as a result.

   c) **Are any staff and resources being pulled away from false and deceptive marketing claims to focus on competition orders before the FTC?**

   No. In addition to our work targeting deceptive marketing claims in textiles, we are vigorously policing false Made in USA claims. One of the first initiatives under my tenure was finalizing the Made in USA rule, and we have followed-on with several enforcement actions since.

2. **Has your level of inquiry been consistent with previous Twitter CEOs, and the current one, on enforcement of the consent decree related to questions, breadth of questions, document and communications requests?**

   The FTC has had a consent decree with Twitter since 2010, when Twitter entered into a settlement with the FTC to resolve allegations that Twitter failed to maintain reasonable practices to prevent unauthorized access to users' non-public information. The level of compliance review undertaken by the Enforcement Division is consistent with its normal procedures. The review in each case is necessarily tied directly to the potential issues that need to be addressed. Previously, an incident in 2019 and two incidents in the summer of 2020 raised a number of issues and questions that needed to be addressed to conduct an appropriate, professional compliance review.

a) Please specify which CEO it was addressed to, the number of inquiries, and the substance of each inquiry related to the consent decree.

Compliance review has been ongoing since well before Twitter's current CEO took over. In connection with one of the security incidents that occurred in July 2020, staff issued two requests for communications involving CEO Jack Dorsey over a five-year period concerning specified topics, in addition to a request seeking presentations to the Board of Directors over the same period and a broad request for all non-privileged communications relating to the incident. The Commission later brought and settled an order violation action in 2022.

b) What personnel and resources are currently being used to focus on this inquiry as opposed to previous leadership of Twitter? Please specify week by week since becoming chair of the FTC.

The Twitter order compliance review is being conducted by three attorneys (two in the Enforcement Division and one in the Division of Privacy and Identity Protection). All of those attorneys have multiple ongoing investigations, and thus spend only a fraction of their time on Twitter compliance. This use of resources is comparable to the resources the FTC has deployed when investigating previous leadership of Twitter.

c) What consumer protection fraud matters were deprioritized to allow commissioners and staff to work on this activity?

None.

d) What external guidance did the FTC solicit to focus on this matter? Please specify subject matter experts and meeting dates.

None. The FTC neither solicited nor received external guidance to focus its investigation. However, staff has spoken with Twitter's independent third-party assessor (selected under Part VI of the Order) on several occasions.

e) What external guidance did the FTC receive to focus on this matter? Please specify subject matter experts and meeting dates.

Please see above response.

3. How would the FTC standardize fee disclosure obligations across the accommodations sector?

The FTC has made no determinations on this issue at this time. The Unfair or Deceptive Fees Advance Notice of Proposed Rulemaking (ANPR) asked a number of questions related to the disclosure of fees, including whether the practices of misrepresenting or failing to disclose the total cost for a good or service (Question 1) or the existence of any mandatory fees (e.g. resort fees) (Question 2) is widespread. The ANPR also asked for comment about how a rule

should be crafted (Questions 14-18). The FTC is carefully considering the comments from individual consumers, consumer groups, industry members, and others that responded to these questions, including in relation to the accommodations sector, to determine next steps.

a) Would entities like Online Travel Agencies (OTAs) receive timely, complete, and accurate fee information from accommodations so they are able to comply with such disclosure obligations?

The FTC has made no determinations on this issue at this time. The Unfair or Deceptive Fees ANPR asked a number of questions to determine the impact a potential rulemaking related to unfair and deceptive fees might have on specific industries or businesses. Specifically, Question 15 sought comment regarding how a rule could be crafted to minimize the costs to legitimate businesses; Question 18 sought comment regarding whether a rule focused on disclosures should only apply to certain industries; and Question 19 sought comment regarding how a proposed rule might intersect with existing industry practices and norms. The FTC is carefully considering comments regarding how any proposed rule in this area might affect specific industries, including OTAs, as it determines next steps.

4. In March 2022, Sen. Elizabeth Warren (D-Mass.) sent you a letter urging the FTC to "immediately begin a review of the laws regulating automobile sales and begin the rulemaking process to improve consumer protections and pricing practices in this industry." Is the Motor Vehicle Dealers Trade Regulation Rule in response to the Senator's request?

No. The FTC's proposed rule for motor vehicle dealers followed many years of enforcement actions, outreach, and research in this area. In 2010, Congress authorized the FTC to prescribe rules with respect to unfair or deceptive practices by motor vehicle dealers. For more than a decade since this grant of authority, the FTC has continued its robust enforcement work with more than 50 vehicle-related cases. The FTC also conducted information-gathering efforts such as a series of three agency roundtables held in 2011 and industry research, including a qualitative study of consumer auto buying experiences discussed in two 2020 staff reports, and engaged in consumer education and business guidance—work that was undertaken in the years prior to my tenure. Despite the Commission's efforts and the efforts of its federal and state partners, chronic unlawful practices persist in the marketplace, suggesting the need for additional measures to deter deceptive and unfair practices. The proposed rule continues the FTC's sustained effort to protect consumers and law-abiding dealers, independent of Senator Warren's letter.

a) What personnel and resources are being drawn away from the work of the consumer protection bureau to focus on this activity?

Combatting unfair or deceptive practices in the sale and leasing of motor vehicles has long been an integral part of the FTC's law enforcement mission. Motor vehicles are typically the second most expensive purchase that Americans make, and the sale or lease transaction is time-consuming, arduous, and the source of tens of thousands of consumer complaints. For over a decade, the FTC has dedicated personnel hours and resources to

enforcement in this area. The proposed rule is an important step in the Commission's longstanding effort to prevent harm to consumers in the motor vehicle marketplace. Rulemaking is an important part of our agency's enforcement toolkit. Through rulemaking, we seek to clarify companies' obligations, make compliance more certain, and reduce the resources required for enforcement actions. This proposed rule also is expected to benefit honest businesses that already avoid deceptive practices, putting all dealers on a more equal playing field. Less than 1% of Bureau of Consumer Protection FTE are engaged in this important rulemaking effort.

b) What consumer protection matters were deprioritized to allow staff to work on this activity?

The FTC's work to protect consumers from unfair and deceptive dealership practices has long been a high priority, as demonstrated through its history of activity in this space. The rulemaking effort has not led to changes in the work the Commission prioritizes.

5. Please provide a copy of the FTC's response to Sen. Warren's March letter and/or provide details regarding any briefing you provided Sen. Warren's office for the record.

As you note, the Commission received a letter from Senator Warren in March 2022 expressing her concerns about predatory pricing and deceptive practices by automobile dealers. FTC staff offered to provide a briefing to Sen. Warren's office, but a briefing was not scheduled, and no written responses were provided.

6. The FTC estimates that the Motor Vehicle Dealers Trade Regulation Rule will cost $1.4 billion. Some of these costs will be borne by business, and some will be passed along to consumers in the form of higher prices for a new vehicle. While the regulatory costs are real, as discussed during the hearing, the benefits from this rule might be entirely illusory, as they are based on consumers saving 3 hours in shopping time. This "3 hour" figure, however, is not supported by any data or documentation.

a) The Commission cites a report from Cox Automotive to support the assertion that the average consumer spends a total 15 hours to shop for a car, but the Cox study provides no support for the assumption that the proposed rule would reduce shopping time by 3 hours. The text of the proposed rule states that the Commission has just assumed three hours of savings. Please provide to the committee no later than May 16, 2023, all empirical data in support of this assumption.

The Notice of Proposed Rulemaking (NPRM) sets forth the basis for the FTC's estimates, cites to data where available, and where data is not available, lays out the FTC's assumptions and asks the public to comment. The public did so, and the Commission is carefully reviewing comments as it considers next steps.

To calculate one aspect of the benefits of the proposal, the FTC quantified time savings for consumers who ultimately purchase a vehicle. To conduct this calculation, the FTC

used data from: 2020 Cox Automotive Car Buyer Journey (2020); Bur. of Trans. Stats., National Transportation Statistics, Table 1-17; and Bureau of Lab. Stats., May 2020 National Occupational Employment and Wage Estimates, United States. The Commission also relied on scholarly literature to compute the value of consumers' non-work time (Daniel S. Hamermesh, What's to Know About Time Use?, 30 J. Econ. Survs. 198, 203 (2016)). The NPRM stated that the FTC assumed that consumers would save 3 hours per motor vehicle transaction under the proposal, which the Commission expects to improve information flows and consumer search efficiency, including curbing the influence of deception on consumer search and shopping behavior. The NPRM noted that 3 hours corresponds to just 20% of an average consumer's time spent on researching, shopping, and visiting dealerships, based on a Cox study that found consumers spend 15 hours on such activities.

Notably, as discussed in the NPRM, the Commission did not quantify other important benefits of the proposed rule, including time saved by consumers who visit a dealership but then abandon the transaction once they learn of deception, and money saved by consumers who would avoid hidden add-on charges under the proposed rule.

b) How much will the FTC's Motor Vehicle Dealers Trade Regulation Rule increase the price of a new vehicle to consumers?

While the regulatory analysis of the proposed rule does contemplate some additional costs for dealers, the NPRM anticipates that requiring dealers to disclose the actual price for which a dealer will sell an advertised vehicle will increase price competition amongst dealers—thereby likely lowering costs for American car buyers. The Commission solicited comments on the potential costs and benefits of the proposed rule and is carefully reviewing comments as it considers next steps.

c) How many working Americans will the Motor Vehicle Dealers Trade Regulation Rule price entirely out of the new car market because some consumers will no longer qualify for an auto loan?

While the regulatory analysis of the proposed rule does contemplate some additional costs for dealers, the NPRM anticipates that requiring dealers to disclose the actual price for which a dealer will sell an advertised vehicle will increase price competition amongst dealers—thereby likely lowering costs for American car buyers. The Commission solicited comments on the potential costs and benefits of the proposed rule and is carefully reviewing comments as it considers next steps.

7. How much of the proposed increase that is being requested by the Commission in its Fiscal Year 2024 budget will be devoted to merger review and enforcement?

	FY23		FY24		Increase	
	FTE	Dollars (In thousands)	FTE	Dollars (In thousands)	FTE	Dollars (In thousands)
Premerger Notification	23	5,810	29	8,376	6	2,566
Merger and Joint Venture Enforcement	265	65,337	338	93,754	73	28,417
Merger and Joint Venture Compliance	15	3,757	19	5,433	4	1,676
Total	303	74,904	386	107,563	83	32,659
Total Increase Request					310	160,000
Percentage of Total Increase Request					27%	20%

a) Do you view the resources allocated from Congress as fungible to use across commission activities?

Yes.

8. Chair Khan, you have stated publicly that merger cases that are likely to lose in court are still worth pursuing because they send a signal.

a) Are you saying that forcing merging parties to court when the law and the facts are not on your side would translate as Congress needing to change current law?

No. A core pillar of my work at the FTC is ensuring we are being faithful to the text, history, purpose, and structure of the laws that Congress has charged us with administering.

For over a century, Congress has codified a policy in favor of competition over consolidation. In 1890, as trusts captured the sugar, steel, oil, and railroad industries, lawmakers passed the Sherman Act, prohibiting, among other practices, monopolization, attempted monopolization, and conspiracies to monopolize.[1] When it became clear that this statute was failing to prevent monopolization through acquisition, Congress in 1914 passed the Clayton Act, prohibiting mergers whose effect "may be substantially to lessen competition, or to tend to create a monopoly."[2] When businesses began exploiting loopholes in the Clayton Act, Congress once again stepped in, passing the 1950 Celler-Kefauver Antimerger Act to ensure the law

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

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

captured vertical and conglomerate deals as well as acquisitions of assets.[3] With each of these efforts, Congress redoubled its commitment to open markets and free and fair competition.

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

b) Given the FTC is barred from lobbying Congress, is this a cause of concern it could be interpreted as such an action?

No. The Commission is not barred from asking Congress directly to change the law to more effectively promote fair competition and combat monopolization.

c) What personnel and resources are being drawn away from the work of the consumer protection bureau to focus on this activity?

Enforcing the antitrust laws as Congress intended is a priority, as is the FTC's consumer protection work, as demonstrated by our record of enforcement actions, rulemakings, and consumer outreach. In addition, to improve cross-agency coordination and give staff the opportunity to gain experience with a broader variety of work, the agency has a longstanding history of providing opportunities for details within the agency. The Bureau of Consumer Protection (BCP) currently has three full-time FTEs and one part-time (once a week) FTE on detail to the Bureau of Competition (BC). Of those, 1.2 BCP FTEs are assigned to merger work. BC also has an FTE on full-time detail to BCP.

d) What consumer protection matters were deprioritized to allow staff to work on this activity?

Please see the answer to 8(c).

9. We understand the Commission no longer grants early terminations to small, competitively inconsequential mergers, forcing them to wait at least thirty days before closing. And even after that waiting period has expired, we understand the Commission in some cases has taken the step of informing merging parties that they are still under investigation—effectively telling the merging parties they can close at their own risk, even if there is no apparent basis for the merger to be unlawful. This would seem to be a resource drain for both the Commission and the merging parties.

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

a) What is the rationale for no longer opting for early termination in cases that are more than likely to not be unlawful?

The Clayton Act, as amended by the HSR Act, requires that a party wishing to complete an acquisition must delay consummating the transaction for at least 30 days (15 days in the case of a pure cash tender offer) following the submission of a premerger notification to give the FTC and DOJ an opportunity to review the transaction and determine whether to investigate the transaction further. The statute gives the FTC and DOJ the ability to grant, in individual cases, exemptions from this statutorily defined waiting period. Specifically, the statute states that the FTC and DOJ have the option to grant early terminations "in their discretion."[4] Granting early termination consumes agency resources. Given our ongoing heavy workload, I will continue to prioritize devoting resources to the agency's statutory obligations over discretionary functions. We will consider reinstating early termination grants as agency resources permit.

b) Can you assure us that as a matter of good government, and to prevent unnecessary resource drain within the FTC, it is the policy of the FTC to clear non-problematic mergers as quickly and efficiently as possible?

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

c) What personnel and resources are being drawn away from the work of the consumer protection bureau to focus on this activity?

Please see the answer to 8(c).

d) What consumer protection matters were deprioritized to allow staff to work on this activity?

[4] 16 C.F.R. § 803.11(c) (HSR Act: "The Federal Trade Commission and the Assistant Attorney General ***may, in their discretion***, terminate a waiting period upon the written request of any person filing notification or … sua sponte.") (emphasis added); 15 U.S.C. § 18a(b)(2) (Clayton Act: "The Federal Trade Commission and the Assistant Attorney General ***may***, in individual cases, terminate the waiting period specified in paragraph (1) and allow any person to proceed with any acquisition subject to this section, and promptly shall cause to be published in the Federal Register a notice that neither intends to take any action within such period with respect to such acquisition.") (emphasis added); see also "FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination," Federal Trade Commission (Feb. 4, 2021), https://www ftc.gov/news-events/news/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early-termination; "HSR Early Termination After a Second Request Issues," Federal Trade Commission (Mar. 12, 2021), https://www.ftc.gov/enforcement/competition-matters/2021/03/hsr-early-termination-after-second-request-issues ("Typically, when an investigation resolves competition concerns, the agencies ***use their discretion*** to grant early termination of the second waiting period, and the grant of ET allows the parties to close their transaction.") (emphasis added).

Please see the answer to 8(c).

10. We have seen the time taken to review transactions under a Second Request almost double from roughly 6 months to almost a year. In some cases, we have seen it extend to 16 months. What are the reasons for this?

Second Requests are an investigative tool—specifically authorized by the HSR Act—that empowers the Commission to obtain additional information about potentially unlawful deals and ensure that our analysis of a transaction is sufficiently robust and rigorous to fulfill our mandate. In instances where additional information and documents are required for the Commission to fully assess a transaction, staff will issue Second Requests. The length of review under a Second Request depends on many factors specific to each investigation, including factors outside of the Commission's control.

a) What personnel and resources are being drawn away from the work of the consumer protection bureau to focus on this activity?

Please see the answer to 8(c).

b) What consumer protection matters were deprioritized to allow staff to work on this activity?

Please see the answer to 8(c).

11. We have heard reports that the Commission has issued extensive, burdensome, second requests in cases where the antitrust issues are more limited. And that the FTC staff has been instructed not to negotiate these requests back unless parties agree to waive rights provided by statute. Can you assure us that this will no longer be the case going forward?

Prolonged investigations of complex acquisitions impose costs not only on the merging parties but also on the antitrust agencies. While resource scarcity compels us to streamline investigations and pursue efficient enforcement, we cannot shirk our statutory obligation to stop any merger that may substantially lessen competition. Companies that conduct a robust and thorough antitrust compliance review prior to negotiating a merger deal can save time and resources by fully understanding their potential legal liability and avoiding deals that raise legal concerns.

a) What personnel and resources are being drawn away from the work of the consumer protection bureau to focus on this activity?

Please see the answer to 8(c).

b) What consumer protection matters were deprioritized to allow staff to work on this activity?

Please see the answer to 8(c).

12. A recent study from the U.S. Chamber of Commerce found "a strong and statistically significant relationship between merger activity and industry-level innovative activity." The report found that "over a three- to four-year cycle, a given merger is associated with an average increase in industry-level R&D expenditure of between $299 million and $436 million in R&D intensive industries."

a) Does the Commission's abandonment of principled enforcement risk undermining U.S. innovation at a time when American competitiveness and leadership in the global marketplace has never been more important?

For over a century, Congress has codified a policy in favor of competition over consolidation. Empirical evidence and experience show that robust competition is more likely to favor breakthrough innovation. The FTC's work to block unlawful mergers has safeguarded competition in sectors that are key to American competitiveness as leadership, including semiconductor chips and military equipment.

13. The FTC has abandoned the consumer welfare standard and failed to release new merger review guidelines.

a) Could you outline the factors and/or metrics that are being considered by the Commission when reviewing a proposed transaction?

For every Commission enforcement action, the Commission issues a public statement that links to core documents—such as the complaint and (in the case of settlements) the analysis to aid public comment—that explain its reasoning for bringing a case.[5] Speaking for myself, when assessing whether any proposed transaction is likely to violate the antitrust laws, I consider all of the stakeholders who benefit from existing competition—including consumers, businesses, and workers—and whether any of them will be harmed by the reduction of competition caused by the merger. The Clayton Act prohibits any merger whose effect may be to substantially lessen competition or tend to create a monopoly in any line of business. I believe the FTC must faithfully enforce the law as written by Congress in order to promote the rule of law and ensure the democratic legitimacy of our work.[6]

b) Could you highlight which factors and/or metrics would best serve the interests of consumers, advance investments in innovation, and promote competitiveness? What personnel and resources are being drawn away from the work of the consumer protection bureau to focus on this activity to supplement merger reviews?

Please see the answers to 13(a), and 8(c)

[5] The press release section of our website is at https://www ftc.gov/news-events/news/press-releases.
[6] *See* Remarks of Lina M. Khan, Fordham Annual Conference on International Antitrust Law & Policy (Sept. 16, 2022), https://www ftc.gov/system/files/ftc_gov/pdf/KhanRemarksFordhamAntitrust20220916.pdf.

c) What consumer protection matters were deprioritized to allow staff to work on this activity?

Please see the answer to 8(c).

14. Seven states (CA, CO, CT, IA, VA, UT, and IN) have already enacted broad consumer data privacy laws. Laws in two of those states (CA and VA) have already taken effect, and laws in three more states (CO, CT, and UT) are set to take effect later this year. How does this expanding legal patchwork impact small and medium-sized businesses and individual consumers?

a) What benefits would a broad federal consumer data privacy law have for legitimate businesses, especially small and medium-sized businesses, who will need to comply with multiple differing regimes, and individual consumers?

A federal consumer data privacy law could provide much-needed privacy protections for Americans, especially those who are not currently covered under comprehensive privacy regimes at the state level. The specific benefits to small and medium-sized businesses would depend upon the provisions included within the law.

b) To what extent are you concerned with dormant commerce clause vacating state laws as they impact interstate commerce?

A state consumer data privacy law that treats in-state and out-of-state economic interests equally, and does not impose burdens that are excessive in relation to the putative local benefits, generally should not raise dormant Commerce Clause concerns, even if such a law could have impacts beyond the state. The Supreme Court recently reaffirmed these principles in *National Pork Producers Council et al. v. Ross*, No. 21-468 (May 11, 2023).

c) Relative to the state of California, if there were one state enforcement authority with which to confer on its state privacy law, who would that be?

As part of the legislative process to develop these comprehensive privacy laws, each state legislature has also determined which state agencies are best positioned to enforce the laws and promulgate any related rules within their respective states. In California, the California Department of Justice and California Privacy Protection Agency have dual enforcement authority and are best positioned to enforce that state's privacy laws.

15. In addition to the broad consumer data privacy laws, states have been considering (while some have passed laws including Washington and Illinois) and enacting sectoral legislation that ranges from quite narrow to quite broad and covers a variety of data, including health-related data, biometric data, and data pertaining to children's and teens' online activities.

a) What challenges does this state-level sectoral privacy patchwork pose to organizations and individuals?

In the absence of federal privacy legislation, the states have acted in their traditional roles as laboratories of democracy to address privacy concerns raised by rapidly evolving technology. I am encouraged by state legislative efforts in this space, and hope that there will be more progress on the federal level towards a comprehensive privacy law, which could provide important baseline privacy protections for all Americans.

b) How would enacting broad federal consumer data privacy legislation help address these challenges?

Ideally, federal consumer data privacy legislation will be informed by and supplement the protections implemented at the state level. Broad federal legislation will certainly be welcome to establish baseline consumer protections for all Americans. State legislators continue to be well positioned to understand the needs and preferences of the people and organizations they represent, and thus will likely continue to act where they have the authority to do so.

Given the global nature of the internet and the digital economy, enabling safe, secure, efficient, and privacy protective cross-border data flows is crucial.

c) To what extent are you consulting with Secretary of Commerce Raimondo on the ramifications of balkanization of state laws and what is means for our international standing?

I have not consulted with Secretary Raimondo on the international implications of having differing state laws on privacy.

d) How would federal consumer data privacy legislation help facilitate safe, secure, efficient, and privacy protective cross-border data flows?

A federal consumer privacy law with effective FTC enforcement powers can facilitate safe, privacy-protective data flows. In deciding whether their citizens' information can safely flow to the United States, one consideration that foreign nations or organizations like the European Union take into account is whether their citizens' privacy is adequately protected under U.S. law. Enactment of robust data privacy legislation at the federal level would provide strong assurance on that point. Moreover, mechanisms such as the new EU-U.S. Data Privacy Framework (DPF) rely on FTC enforcement of participants' commitments to follow the framework. Thus, improving our enforcement power will help promote privacy-protective data flows. The U.S. SAFE WEB Act confirms that the FTC can act against conduct in the U.S. that causes harm abroad, and a federal privacy law that made the U.S. SAFE WEB Act permanent would also facilitate privacy-protecting data flows.

16. Chair Khan, in July of last year the FTC issued a proposed rulemaking that would dramatically change the ways motor vehicles are sold. The rule was proposed without any prior notice or opportunity for public engagement.

a) Why did the FTC violate its own rulemaking procedures and go straight to proposing the vehicle shopping rule without first soliciting public comment or input through an RFI or ANPR?

The Commission did not violate any rulemaking procedures by publishing the NPRM. The FTC published the NPRM in accordance with Section 553 of the APA, under statutory authority granted by Congress under Section 1029 of the Dodd-Frank Act. See 12 U.S.C. § 5519; 87 FR 42012, 42031 (July 13, 2022). Section 1029 authorizes the FTC to promulgate rules governing certain motor vehicle dealers using APA rulemaking procedures rather than procedures described in Section 18 of the FTC Act. Rulemaking under the APA is covered by subpart C of part 1 of the Commission's Rules of Practice, see 16 C.F.R. § 1.21, and the FTC adhered to subpart C in issuing the NPRM. Neither the APA nor subpart C of the Commission's Rules of Practice require an RFI or an ANPR. The Commission has also gone beyond the APA requirements for seeking public comment and input on the issues addressed by the proposed rule. For example, the Commission has hosted public events to engage in a dialogue with consumer and dealer groups and other stakeholders, gather information, and spotlight many of the misleading practices addressed by the proposed rule.

17. Last year, a bipartisan letter led by Rep. Chris Pappas (D-N.H.) that was signed by 29 House members was sent to you requesting that the 60-day comment period be reopened for an additional 60 to 90 days. The Small Business Administration's Office of Small Business Advocacy supported extending the comment period. This request was denied.

a) Can you provide the subcommittee with a list of all the rulemakings where the comment period was extended and another list of all the rules where extending the comment period was denied and designating whether they were ANPRMs or NPRMs during your tenure?

The Commission generally tries to afford public commenters 60 days for rulemakings. This is usually more than sufficient for public commenters to put comments in. With respect to the Motor Vehicle Dealers Trade Regulation Rule, which was a Notice of Proposed Rulemaking ("NPRM"), the Commission received comments both supporting and opposing an extension of time, and there were no exigent circumstances such as religious holidays that might have conflicted with filing public comments. Given the opposition to an extension and the fact that, with respect to this rule, commenters actually had had 80 days from the public announcement of the NPRM to comment, the Commission determined to decline this request for an extension. In other situations where the Commission granted an extension, it did so where there was no public comment opposing an extension of time and/or exigent circumstances such as the public comment period ending shortly

before or after a significant religious holiday observance. For example, in the Funeral Rule NPRM, the Commission extended the public comment period for 14 days out of 60 requested, because the public comment ended shortly after the Christmas/New Year holiday break. The same was true in the Unfair or Deceptive Fees Trade Regulation Rule Advanced Notice of Proposed Rulemaking ("ANPRM"), where the Commission extended the public comment period deadline 30 days out of 45 requested because of the holiday period. The Business Opportunity ANPRM was extended for 7 days (out of 21 requested), again because of the holiday season. Also, the Energy Labeling ANPRM was extended a month because, otherwise, the due date would have fallen between Christmas and New Year's. In the Non-Compete Clause NPRM and the Commercial Surveillance and Data Security ANPRM, the Commission extended the deadline for 30 out of 60 days requested. In the first, the public comment period was extended and then fell after the Easter holiday period, and, in the second, there were no public commenters opposed to the extension.

18. The FTC's proposed rulemaking purports to help consumers, yet none of the new paperwork requirements it foists on car buyers have been tested. Basic due diligence would suggest that when a federal agency is going to mandate marketplace changes that affect consumers, the agency would beta test those changes to ensure that they are beneficial. For example, the FTC was part of a multiagency, multiyear effort that concluded in 2009 to create model privacy disclosures under Gramm-Leach-Bliley. That effort involved quantitative testing of consumers. Additionally, in 2008, the Federal Reserve Board conducted extensive consumer testing to review the effectiveness of consumer disclosures about mortgage broker fees.

a) Wouldn't it have been prudent to consumer test the FTC's proposed paperwork requirements on consumers before proposing them, to see if they work as intended?

The proposal would require disclosures regarding just three critical areas: prices, add-ons, and payment totals. The proposal would require that these disclosures be clear and conspicuous, which, for example, means that a written disclosure would have to be in a size that stands out. The proposal would not, however, mandate a specific font or font size, the specific terms or format of such disclosures, or any particular use of capitalization, punctuation, ink color, or paper color or size. Further, the proposed disclosures would not mandate specific language. Thus, there were no specific formatting or language requirements for the Commission to test. I believe that this approach would provide motor vehicle dealers with flexibility, within the bounds of the law, to provide this essential information, including so that dealers already conveying such information in a non-deceptive manner may continue to do so.

Of course, this proposal has not been finalized yet, and the Commission is carefully considering the comments it received on its proposal, including comments from stakeholders regarding the proposed disclosures.

19. What consultations, communications, or other coordination did FTC employees or its consultants have with the Consumer Financial Protection Bureau related to the

Motor Vehicle Dealers Trade Regulation Rule before it was proposed on July 13, 2022? And if so, please provide the dates of such consultations.

The FTC regularly consults with other agencies on matters of mutual concern. Interagency discussions generally are protected under various exemptions, including the deliberative-process privilege, attorney-client privilege, and attorney work product privilege.

With respect to the Consumer Financial Protection Bureau ("CFPB") specifically, Congress expressly directed the CFPB and FTC to cooperate with each other. *See, e.g.*, 12 U.S.C. § 5495 ("The Bureau shall coordinate with the [Securities and Exchange] Commission, the Commodity Futures Trading Commission, the Federal Trade Commission, and other Federal agencies and State regulators, as appropriate, to promote consistent regulatory treatment of consumer financial and investment products and services"); 12 U.S.C. § 5514(c)(3)(A) (directing the CFPB and FTC to "negotiate an agreement for coordinating with respect to enforcement actions by each agency"); 12 U.S.C. § 5581(b)(5)(D) (directing the CFPB and FTC to "negotiate an agreement with respect to rulemaking by each agency, including consultation with the other agency prior to proposing a rule and during the comment period"). The FTC and CFPB reauthorized their memorandum of understanding in February 2019.[7]

[7] See Press Release, Fed. Trade Comm'n, FTC and CFPB Reauthorize Memorandum of Understanding (Feb. 26, 2019), https://www ftc.gov/news-events/press-releases/2019/02/ftc-cfpb-reauthorize-memorandum-understanding.

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"). In addition, 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 compulsory 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?**

   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?**

   The FTC has initiated approximately 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? If not, why not?**

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

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

   The Bureau of Competition and Bureau of Consumer Protection generate weekly update reports for the Commissioners. These reports contain updates about ongoing investigations. In addition, the offices of the Chair and Commissioners have access to the agency's Matter Record Search (MaRs) database, which contains information regarding use of compulsory process in its 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. 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. In addition, if a Commissioner requests a briefing on a specific matter, career FTC staff 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 approximately 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? 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). The FTC's sealed request for a temporary restraining order typically asks the court to enter an asset freeze and impose a receiver over the business to take custody of the fraudulent business's records. The FTC seeks this relief because historically fraudsters and scammers have shown a propensity to destroy documents or dissipate assets upon notice of law enforcement action. 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 of its law enforcement work known to the public.

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

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 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.

21. 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.

22. 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 20.

23. 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 20.

24. 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.

25. 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 24.

26. 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 24.

27. Please provide a list since January 2021 of each instance in which the FTC has invoked 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)

28. 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.

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

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.

30. 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)[8]

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.

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.

31. 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.

32. In November, 47 bipartisan Members of the U.S. Senate and House of Representatives asked you in letter to withdraw the vehicle shopping rule – citing the lack of process leading up to the proposed rule. Given this lack of process, will the FTC withdraw the

[8] 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*.

rule in favor of a Request for Information or an Advanced Notice of Proposed Rulemaking?

The Commission has published the proposed rule in accordance with appropriate process. Section 1029 of the Dodd-Frank Act authorizes the FTC to promulgate rules governing certain motor vehicle dealers using APA rulemaking procedures set forth in section 553 of Title 5, rather than procedures described in section 18 of the FTC Act. Subpart C of part 1 of the Commission's Rules of Practice apply to the rulemaking, and the FTC has adhered to those procedures. *See* 16 C.F.R. § 1.21.

33. A point we often hear from the industry is the number of rebates franchisors are receiving based on franchisee purchases. While franchising often promises group purchasing power, there seems to be a disconnect here. What do you hope to find from the Request for Information about how franchisors limit suppliers while driving up the price?

Your question raises one of the potential franchise issues that the Request for Information (RFI) hopes to learn more about. In many franchise systems, franchisors mandate suppliers from which franchisees must purchase their input goods and services. In theory, this should allow the franchisor to ensure consistency and brand quality while allowing franchisees to benefit from group purchasing power's lower prices. Rebates and kickbacks to the franchisor, however, may not necessarily result in the lowest final costs for their franchisees. I hope the RFI provides us deeper insight into this topic and the effects that these provisions have on franchisees, franchisors, franchise workers, and consumers.

34. What is the process for the FTC to communicate any future updates to this Subcommittee regarding actions it has taken regarding the Illumina-GRAIL merger?

On April 3, 2023, the Commission issued a unanimous Opinion and Order requiring Illumina, Inc. to divest GRAIL, Inc., finding that the merger would stifle competition and innovation in the U.S. market for life-saving cancer tests.[9] Illumina has filed an appeal of the Commission's decision in the Fifth Circuit, and the Commission has stayed its order until that appeal is complete. All updates related to the Commission's actions in this matter will be posted publicly on the FTC website at https://www.ftc.gov/legal-library/browse/cases-proceedings/201-0144-illumina-inc-grail-inc-matter.

35. Has the FTC ever successfully challenged a vertical integration?

[9] See Press Release, Fed. Trade Comm'n, FTC Orders Illumina to Divest Cancer Detection Test Maker GRAIL to Protect Competition in Life-Saving Technology Market (Apr. 3, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/04/ftc-orders-illumina-divest-cancer-detection-test-maker-grail-protect-competition-life-saving.

Yes. Over the years, the Commission has challenged one or two vertical mergers a year, settling most of them without litigation.[10] For instance, since January 1, 2019, the FTC has challenged nine mergers over concerns related to vertical integration. In addition to the Illumina/GRAIL matter, these include mergers involving home loan origination systems,[11] video gaming consoles and subscription services,[12] missile defense systems,[13] semiconductors,[14] industrial chemicals,[15] health care services,[16] plastic resin,[17] and office supplies.[18] Three of these cases are still pending final adjudication on the merits, but three of the deals were abandoned after the Commission authorized staff to seek to block them.

36. When was the last time that the FTC successfully blocked a vertical merger?

In February 2022, the Commission unanimously authorized a lawsuit to block Lockheed's proposed acquisition of Aerojet, a $4.4 billion defense merger that would have eliminated the country's only remaining independent supplier of key missile propulsion inputs and given Lockheed the ability to cut off its competitors' access to these critical components. The

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[10] See, e.g., Press Release, Fed. Trade Comm'n, Statement Regarding Termination of Lockheed Martin Corporation's
Attempted Acquisition of Aerojet Rocketdyne Holdings Inc. (Feb. 15, 2022), https://www ftc.gov/news-events/news/press-releases/2022/02/statement-regarding-termination-lockheed-martin-corporations-attempted-acquisition-aerojet; Press Release, Fed. Trade Comm'n, Statement Regarding Termination of Nvidia Corp.'s Attempted Acquisition of Arm Ltd. (Feb. 14, 2022), https://www ftc.gov/news-events/news/press-releases/2022/02/statement-regarding-termination-nvidia-corps-attempted-acquisition-arm-ltd; See also Fed. Trade Comm'n, Commentary on Vertical Merger Enforcement (Dec. 2020), https://www.ftc.gov/system/files/documents/reports/federal-trade-commissions-commentary-vertical-merger-enforcement/p180101verticalmergercommentary_1.pdf.

[11] Press Release, FTC Acts to Block Deal Combining the Two Top Mortgage Loan Technology Providers (Mar. 9, 2023), https://www ftc.gov/news-events/news/press-releases/2023/03/ftc-acts-block-deal-combining-two-top-mortgage-loan-technology-providers.

[12] Press Release, Fed. Trade Comm'n, FTC Seeks to Block Microsoft Corp.'s Acquisition of Activision Blizzard, Inc. (Dec. 8, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/12/ftc-seeks-block-microsoft-corps-acquisition-activision-blizzard-inc.

[13] Press Release, Fed. Trade Comm'n, Statement Regarding Termination of Lockheed Martin Corporation's Attempted Acquisition of Aerojet Rocketdyne Holdings Inc. (Feb. 15, 2022), https://www ftc.gov/news-events/news/press-releases/2022/02/statement-regarding-termination-lockheed-martin-corporations-attempted-acquisition-aerojet.

[14] Press Release, Fed. Trade Comm'n, Statement Regarding Termination of Nvidia Corp.'s Attempted Acquisition of Arm Ltd. (Feb. 14, 2022), https://www ftc.gov/news-events/news/press-releases/2022/02/statement-regarding-termination-nvidia-corps-attempted-acquisition-arm-ltd.

[15] Press Release, Fed. Trade Comm'n, Following Federal Trade Commission Staff Recommendation to Challenge Transaction, Tronox Holding plc Abandons Proposed Acquisition of TiZir Titanium and Iron (Jan. 29, 2021), https://www ftc.gov/news-events/news/press-releases/2021/01/following-federal-trade-commission-staff-recommendation-challenge-transaction-tronox-holding-plc.

[16] Press Release, Fed. Trade Comm'n, FTC Imposes Conditions on UnitedHealth Group's Proposed Acquisition of DaVita Medical Group (Jun. 19, 2019), https://www ftc.gov/news-events/news/press-releases/2019/06/ftc-imposes-conditions-unitedhealth-groups-proposed-acquisition-davita-medical-group.

[17] Press Release, Fed. Trade Comm'n, FTC Approves Final Order Imposing Conditions on Joint Venture Among Three Producers of PET Resin (Feb. 25, 2019), https://www ftc.gov/news-events/news/press-releases/2019/02/ftc-approves-final-order-imposing-conditions-joint-venture-among-three-producers-pet-resin.

[18] Press Release, Fed. Trade Comm'n, FTC Imposes Conditions on Staples' Acquisition of Office Supply Wholesaler Essendant Inc. (Jan. 28, 2019), https://www.ftc.gov/news-events/news/press-releases/2019/01/ftc-imposes-conditions-staples-acquisition-office-supply-wholesaler-essendant-inc.

FTC's investigation, conducted in close collaboration with the Department of Defense (DoD), determined that the deal would have resulted in higher prices and diminished quality and innovation for programs critical to our national security. This challenge dovetailed with a DoD report indicating that consolidation within the defense-industrial base poses a risk to national defense and identifying strong merger enforcement as a key tool to address it.[19] The parties abandoned their plans, and the Commission ended its litigation to stop the deal.[20]

Since that time, the Commission has moved to block two other vertical mergers (Microsoft/Activision and ICE/Black Knight), and these cases are pending.[21]

37. President Biden has compared the effort to end cancer to America's race to the moon. America won that race. What would have happened if a regulatory body sought to hamstring America's only rocket manufacturer on perceived competition grounds? Isn't that precisely what FTC is doing here regarding the only multi-cancer early detection test on the market?

While I cannot comment on the specifics of any pending adjudicative proceeding, the aim of Commission antitrust enforcement actions is to fulfill its statutory obligation and prevent mergers that may substantially lessen competition or tend to create a monopoly.

38. Isn't it true that the FTC has positioned itself as an obstacle to President Biden's cancer moonshot by blocking a merger between two American companies which can accelerate cancer screening for more than 50 different cancers in asymptomatic patients?

Please see the answer to 37.

39. Is it inherently unfair or deceptive that a business that can provide goods or services across a state or the country decides to advertise to consumers outside its local area? If so, on what law or precedent are you relying on to support this position?

That conduct, standing alone, would not satisfy the elements of unfairness set forth in Section 5(n) of the FTC Act, 15 U.S.C. § 45(n).

a) How do you define "local" area?

Not applicable.

b) If the business can actually supply that good or service to the non-local customer, where is the harm?

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[19] DEP'T OF DEFENSE, OFF. OF THE UNDER SECRETARY OF DEFENSE FOR ACQUISITION AND SUSTAINMENT, STATE OF COMPETITION WITHIN THE DEFENSE INDUSTRIAL BASE 4 (2022).
[20] Press Release, Fed. Trade Comm'n, Statement Regarding Termination of Lockheed Martin Corporation's Attempted Acquisition of Aerojet Rocketdyne Holdings Inc. (Feb. 15, 2022), https://www ftc.gov/news-events/news/press-releases/2022/02/statement-regarding-termination-lockheed-martin-corporations-attempted-acquisition-aerojet.
[21] In re Microsoft Corp., Dkt. 9412 (complaint Dec. 9, 2022); FTC v. Intercontinental Exchange, Inc., 3:23-cv-01710 (N.D. Cal. Apr. 10, 2023).

Not applicable.

c) Are there any circumstances under which you would consider such action unfair or deceptive? What are those circumstances?

If additional facts indicated that a company's advertisement to consumers outside its local area causes or is likely to cause substantial injury to consumers; such injury is not reasonably avoidable by consumers themselves; and such injury is not outweighed by countervailing benefits to consumers or to competition, then the conduct would be unfair under Section 5(n) of the FTC Act, 15 U.S.C. § 45(n). Likewise, if additional facts indicated that a company made misrepresentations as to where it was placing its advertisements or failed to disclose where it was advertising and the misrepresentation or failure to disclose was material and likely to mislead consumers acting reasonably under the circumstances, then the conduct would be deceptive under the principles set forth in the Commission's 1983 Policy Statement.

40. Is it inherently unfair or deceptive for a business to use subcontractors to aid the business in providing goods or services to its customers without disclosing that subcontractors are being used? If so, on what law or precedent are you relying on to support this position?

That conduct standing alone would not satisfy the elements of unfairness set forth in Section 5(n) of the FTC Act, 15 U.S.C. § 45(n), nor would it satisfy the well-established elements of deception set forth in the Commission's 1983 Policy Statement.

a) Does failing to disclose that a business is using a subcontractor make that action somehow unfair or deceptive?

That conduct standing alone would not satisfy the elements of unfairness set forth in Section 5(n) of the FTC Act, 15 U.S.C. § 45(n), nor would it satisfy the well-established elements of deception set forth in the Commission's 1983 Policy Statement.

b) Under what circumstances would you consider a business not disclosing to its customers that it is using a subcontractor as being unfair or deceptive?

If additional facts indicated that a company's failure to disclose that it is using subcontractors to aid in providing goods or services to customers causes or is likely to cause substantial injury to consumers; such injury is not reasonably avoidable by consumers themselves; and such injury is not outweighed by countervailing benefits to consumers or to competition, then the conduct would be unfair under Section 5(n) of the FTC Act, 15 U.S.C. § 45(n). Likewise, if additional facts indicated that a company's failure to disclose that it is using subcontractors to aid in providing goods or services to customers was material and likely to mislead consumers acting reasonably under the circumstances, then the conduct would be deceptive under the principles set forth in the Commission's 1983 Policy Statement.

41. Do you believe it is the FTC's role to regulate prices?

No.

a) Do you believe that just because one good or service costs more from one provider than from another, that the provider that charges more is being unfair or deceptive?

Charging more for a good or service, standing alone, would not satisfy the elements of unfairness set forth in Section 5(n) of the FTC Act, 15 U.S.C. § 45(n), or the well-established elements of deception set forth in the Commission's 1983 Policy Statement.

b) Do you think that because a Cadillac costs more than a Kia, that Cadillac is being unfair or deceptive?

Charging more for a Cadillac than for a Kia, standing alone, would not satisfy the elements of unfairness set forth in Section 5(n) of the FTC Act, 15 U.S.C. § 45(n), or the well-established elements of deception set forth in the Commission's 1983 Policy Statement.

c) Do you think that businesses have a right to increase costs to keep pace with inflation over time?

Increasing prices to keep pace with inflation and higher costs, standing alone, is not unlawful under the FTC Act or any of the laws enforced by the Commission.

d) If a business failed to increase its prices to keep pace with inflation over a five year period, with all other things being equal, what would that mean for the business's bottom line?

Determining the effects on a business's bottom line would require more facts.

42. On February 17, 2022, the FTC held an open meeting and conducted a vote on a proposed 6(b) study entitled "Pharmacy Benefit Managers' (PBMs) Relationship with Affiliated and Independent Pharmacies." The Commission split along partisan lines and the proposal fell on a 2-2 vote with Commissioners Wilson and Phillips voting "No" out of concern the proposed study was biased and the fact that Wilson and Phillips had received a substantially rewritten 6(b) proposal the night before the vote. At the time Commissioner Wilson stated: "I have observed previously that stakeholders frequently attempt to co-opt the government in their battle against rivals. I am wary of having the FTC used as a pawn to boost the profitability of certain sectors or insulate them from competition." There are concerns about process abuse and bias in this case, since FTC debated and voted on the proposed 6(b) study without ever disclosing the actual language of the 6(b) study that was debated and voted on. The high cost of prescription drugs affects many Americans and I appreciate the FTC looking into it. At the same time, it is concerning the Commission would conduct a public meeting and vote on a 6(b) study without ever making public the actual language of the study in question. In an effort to bring transparency, public awareness and understanding of the activities of

the Commission, will you provide to the Committee an unedited, exact copy of the 6(b) study entitled "Pharmacy Benefit Managers' (PBMs) Relationship with Affiliated and Independent Pharmacies?"

The draft proposed study, which the Commission did not adopt, is protected by the deliberative process privilege. As you are aware, the Commission later voted out a 6(b) study to examine the practices of PBMs. This study is available on the FTC's website.[22]

43. Chair Khan, for decades the FTC's mission was to protect consumers and preserve competition "without unduly burdening legitimate business activity." Last year, the FTC deleted "without burdening legitimate business activity" from its mission statement. No public comments supported this change. Yet, several public comments opposed this change. Why specifically did the FTC remove this clause from its mission statement given there were no public comments that supported such removal?

The FTC continues to believe that its work should not unduly burden legitimate business activity, which is why we retained those exact words in the new agency strategic plan.[23] We did, however, remove those words from the agency Mission Statement, because we believe the Mission Statement should be succinct and briefly describe our fundamental purpose, which is to enforce the law that Congress has charged us with administering.

44. Chair Khan, why did you change FTC rules of practice to authorize yourself (rather than an independent arbiter) to serve as the Chief Presiding Officer over all FTC rulemakings?

The changes to the rules of practice brought agency procedures back in line with the statutory requirements governing the FTC's rulemaking authority under Section 18 of the FTC Act to declare practices unfair or deceptive, 15 U.S.C. § 57a. Because the Commission's old procedural rules imposed requirements beyond what Congress laid out in the FTC Act, some rulemakings took more than eight years from start to finish. Eliminating the Commission's self-imposed red tape will better enable the Commission to issue timely rules regarding unfair or deceptive acts or practices that are prevalent in our economy. Such trade regulation rules give market participants clear and concrete guidance.

Section 18(c)(1)(B), 15 U.S.C. § 57a(c)(1)(B), provides for two separate roles: (1) a Chief Presiding Officer "who shall not be responsible to any other officer or employee of the Commission" and (2) a Presiding Officer who is responsible to the Chief Presiding Officer. The Presiding Officer is the person who actually "presides over the rulemaking proceeding"; the Presiding Officer is also responsible for making a "recommended

[22] Press Release, Fed. Trade Comm'n, FTC Launches Inquiry Into Prescription Drug Middlemen Industry (June 7, 2022), https://www ftc.gov/news-events/news/press-releases/2022/06/ftc-launches-inquiry-prescription-drug-middlemen-industry.

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

decision based upon the findings and conclusions of such officer as to all relevant and material evidence." *Id.*

Under the revised rules of practice, the Chair can serve as the Chief Presiding Officer or can designate to serve as Chief Presiding Officer another person who is not responsible to any other official or employee of the Commission. 16 C.F.R. § 0.8. Previously, the Chief Administrative Law Judge was designated as the Chief Presiding Officer, which reinforced inaccurate perceptions that Section 18 rulemakings required elaborate judicial processes instead of straightforward public participation.

45. How many resources (number of staff and total number of hours), has the FTC expended on each of the following rulemakings, separately for 2022 and YTD 2023:

- **Earnings claims**

The team working on the earnings claims rulemaking announced in March 2022 – for which comments were due in mid-May – has included staff from across the agency and in particular, the Bureau of Consumer Protection and the Bureau of Economics. BCP's efforts related to this rulemaking at the Division of Marketing Practices staff level are primarily conducted by two FTC attorneys who each spend roughly 40 – 50% of their work time on the project, with oversight by an assistant director and an associate director. Those attorneys are simultaneously handling other enforcement work or other projects. All told, we estimate that Division of Marketing Practices staff has spent approximately 2,000 hours – the equivalent of approximately one FTE – on this project in the 2022 fiscal year, and 1,000 hours (or 0.5 FTE) in the 2023 fiscal year. In addition, BE spent about 80 hours in FY 2022 and 544 hours in FY 2023 YTD across two staff economists and a manager.

- **Junk fees**

The team working on the Fees ANPR announced in October 2022 – for which comments were due, after an extension, in February 2023 – has included staff from across the agency and in particular, the Bureau of Consumer Protection, the Bureau of Economics, and the Office of General Counsel. For much of the time from approximately July 2022 through November 2022 (including all of Fiscal Year 2022) staffing for this matter was primarily in the Office of General Counsel and involved approximately 140 hours of OGC staff time. During that time, BCP's efforts related to this rulemaking at the Division of Advertising Practices staff level were primarily conducted by two FTC attorneys who each spent less than one-fifth of their work time on the project, with oversight by an assistant director and an associate director. Beginning in approximately January 2023, staffing for this matter shifted from the Office of General Counsel to BCP's Division of Advertising Practices where one FTC attorney from the Division was added to the project. Two paralegals also worked on the project temporarily for project-specific tasks. The Division staff team working on the rulemaking currently consists of a total of three attorneys, with oversight by an assistant director and an associate director. Those attorneys are simultaneously handling other enforcement work or other projects. We estimate that Division of Advertising Practices staff has spent a total of 0.63 FTE

(approximately 1,312 hours) on this project from the start of 2023 to the present date. BE estimates that one staff economist and a manager worked approximately 676 hours in FY 2023 YTD (and a de minimis amount of time in FY 2022).

- **Commercial surveillance**

  The team working on the commercial surveillance/data security rulemaking announced in August 2022 – for which comments were due, after an extension, in late November – has included staff from across the agency and in particular, the Bureau of Consumer Protection and the Bureau of Economics. From October 1, 2021 until approximately June 2022, BCP's efforts related to this rulemaking at the Division of Privacy and Identity Protection staff level were primarily conducted by two FTC attorneys who each spent roughly one-third of their work time on the project, with oversight by an assistant director and an associate director. Beginning in June 2022, more attorneys were added over time, most recently in January 2023. The Division staff team working on the rulemaking currently consists of a total of six attorneys. Those attorneys are simultaneously handling other enforcement work or other projects. Most of these attorneys devote more than half (or in most cases, substantially more than half) of their time to other projects; one attorney works primarily, but not exclusively, on the project. All told, we estimate that Division staff has spent a total of 3.25 FTE to 3.75 (6,760 hours to 7,800 hours) on this project since October 1, 2021, with approximately 1.25 FTE (2,600 hours) spent in the 2022 fiscal year and 2 to 2.5 FTE since (4,160 to 5,200 hours). The Division has added additional staff through details and other hiring since 2021 to support the Division's continued enforcement efforts. BE estimates that two staff economists and a manager worked approximately 1,400 hours in FY 2022 and 1,459 hours in FY 2023 YTD.

- **Non-compete rule**

  Our best estimate is that for January 2022 through February 2023, the FTC has spent 6,272 hours on the notice of proposed rulemaking and rulemaking process, including hours spent by a non-reimbursable detailee and an unpaid consultant. Between March 1, 2023 through May 10, 2023, our best estimate is the FTC spent 3,678 hours on this rulemaking, including hours spent by contract employees helping with reviewing public comments.

46. Chair Khan, please detail how the FTC undertakes the cost-benefit analysis in Magnuson-Moss rulemakings.

For Magnuson-Moss rulemakings, the Bureau of Economics at the FTC uses cost-benefit analysis as the main tool for its regulatory analysis of proposed and final rules when applicable. The process involves a prospective evaluation and systematic organization of the likely effects of a rule relative to a no-action baseline. Using tools and methods from economics and statistics and empirical literature, the analysis attempts to predict the extent to which the proposed action would be effective in addressing the objectives of the rule and the costs associated with those actions. The level of granularity and the extent to which it is feasible to quantify and monetize important costs and benefits can vary widely across

rulemakings. The practicality of quantification largely depends on the magnitude and scope of the impacts and the availability of relevant data and empirical literature. A regulatory analysis will attempt to describe and characterize any important anticipated effects qualitatively if they can't be quantified, as well as highlight areas of uncertainty. The FTC considers the public review and comment process to be an important component of developing and informing the cost-benefit analysis. In response to public submission of any data or relevant information, including feedback and critique of the preliminary analysis, the FTC may make further refinements or other revisions to the cost-benefit analysis as appropriate for a final rule.

47. Rep. Harshbarger asked a question during the hearing regarding the FTC's Policy Statement on Enforcement Related to Gig Work, specifically noting the agency's creation of a new term, "working consumers". You responded with, "I'm not specifically familiar with that phrase", but the term is listed on Page 7 of the Policy Statement.

a) Is it the agency's position that as long as it slaps the label "consumers" onto industry participants - whether the gig economy or any other industry -- then the FTC now has the authority to regulate those industries' business practices?

No, the FTC's position is not that specific terms the agency uses give it authority. The agency's position is that specific statutes give the FTC authority. For example, Section 5 of the FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a). The FTC has long exercised this authority to protect gig workers, franchisees, small businesses, and others from unfair or deceptive acts or practices in or affecting commerce, including through decades of enforcement actions targeting deceptive claims about work opportunities. *See, e.g.*, Deceptive or Unfair Earnings Claims: Advance Notice of Proposed Rulemaking, 87 Fed. Reg. 13,951 (Mar. 11, 2022) (describing the Commission's extensive law enforcement experience challenging deceptive earnings claims in a wide variety of economic sectors).

48. Chair Khan, you testified at the hearing that you will work with the Bureau of Economics to provide more guidance on how the FTC calculates monetary relief and civil penalties in consumer protection matters.

a) Has that work started and when should we expect more guidance?

As I noted in my testimony, our monetary calculations are grounded in our statutory authority. 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. Section 5(m) authorizes courts to impose civil penalties for violations of most consumer protection rules after taking into account the factors laid out in the statute, which include: degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require. 15 U.S.C. § 45(m)(1)(C). With one narrow exception,[24] the Commission has no authority to issue

[24] See 42 U.S.C. § 6303(a) (authorizing civil penalties for knowing violations of certain provisions of the Energy Policy and Conservation Act).

fines or impose civil penalties on its own. For federal settlements approved by the Commission, courts must approve the amount of monetary relief or civil penalties before they take effect. And in civil penalty matters that the Department of Justice elects to file on behalf of the Commission, the Department of Justice is also involved in recommending the appropriate amount of monetary relief and civil penalties that the court should impose.

Starting from the investigatory stage, staff from the Bureau of Economics work closely with Bureau of Consumer Protection staff throughout the entirety of a matter and play a critical role in calculating the appropriate amount of monetary relief or civil penalties. That calculation typically includes an analysis of the amount necessary to redress injuries attributable to the law violations at issue and the amount of civil penalties that will provide effective specific and general deterrence, while being consistent with the defendant's ability to pay.

49. The practice of trying merger cases within the FTC administrative courts—where the FTC almost always wins—has been reinstituted, even though administrative litigation is longer and costlier than the prior practice of trying matters in U.S. District Courts, which is where the Antitrust Division tries its cases. Even more perplexing is that in several key cases, notably Illumina/Grail and Altria/Juul, the Commission not only overturned the administrative judge, but in the case of Illumina/Grail, the Commission disregarded the factual findings.

a) How is this an effective use of Commission resources?

In the FTC Act, Congress gave the Commission the authority to adjudicate matters administratively, not just litigate them in federal court. Accordingly, the Commission has designed processes and procedures to vindicate this authority granted by Congress and to ensure that our institutional practices accord with the institutional design crafted by Congress. Upon appeal of an initial decision in a Part 3 proceeding, or upon review of a recommended decision in a Part 3 proceeding, the Commission receives briefs, holds oral argument, and thereafter issues its own final decision and order.[25] The Commission's role in reviewing an administrative law judge's decision is designed to allow the agency to apply its substantive expertise for the development of antitrust law in complex settings.

When reviewing an initial decision in a Part 3 proceeding, the Commission reviews the Administrative Law Judge's (ALJ) findings of fact and conclusions of law *de novo*, considering "such parts of the record as are cited or as may be necessary to resolve the issues presented."[26] The Commission may "exercise all the powers which it could have exercised if it had made the initial decision."[27] The *de novo* standard of review with regard to findings of facts and inferences drawn from those facts, as well as conclusions

[25] The Supreme Court held in *Withrow v. Larkin*, 421 U.S. 35, 46-55 (1975) that the combination of investigative and adjudicative functions does not, without more, constitute a due process violation.
[26] 16 C.F.R. § 3.54(a) (version in effect before rule changes announced by the Commission on June 2, 2023).
[27] *Id.*; *see also* 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.").

of law, has been authorized by Congress in the Administrative Procedure Act[28] and the FTC Act.[29] The *de novo* standard of review is not unique to the FTC.[30] Consistently, the Supreme Court has confirmed that, unlike the standard that applies to courts of appeals reviewing district courts' factual decisions, an agency has plenary authority to reverse ALJ decisions on factual as well as legal issues.[31]

In terms of timing, the Commission operates under rules that establish deadlines for each phase of its Part 3 proceedings.[32] The rules specify an expeditious schedule that balances "the need for fair process and quality decision making, the desire for efficient and speedy resolution of matters, and the potential costs imposed on the Commission and the parties."[33]

Regarding the specific examples cited, the Commission's opinion in *Illumina/GRAIL* reviewed the ALJ's findings of fact, adopted those it found relevant and agreed with, and explained, with citations to the record, its reasons for disagreeing with the ALJ when it departed from his positions. The Commission has not offered an opinion on the ALJ's Initial Decision in *Altria/JUUL*; the appeal from the ALJ's Initial Decision was still pending when the Commission withdrew the matter from adjudication at the request of the respondents, Altria Group, Inc. and Juul Labs, Inc.

50. In implementing the INFORM Consumers Act, would online marketplaces be permitted to restrict public disclosure of seller names and contact information (and instead maintain a written record of the information) when that information is confidential or a trade secret of the online marketplace?

There is no confidential information or trade secrets exemption to the seller name and contact information disclosure requirement in the INFORM Consumers Act that Congress passed. *See* § 301(b).

51. In implementing the INFORM Consumers Act, would the "online marketplace" definition be understood to exclude marketplaces that have contractual agreements with sellers to provide customer service or be the initial point of contact for customer service?

The definition of "online marketplace" would not exclude marketplaces that serve these functions if the other elements of the definition are met. *See* § 301(f)(4).

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[28] 5 U.S.C. § 557(b).
[29] 15 U.S.C. § 45(b)-(c).
[30] *See, e.g., JCC, Inc. v. CFTC*, 63 F.3d 1557, 1566 (11th Cir. 1995) ("the Commission is empowered by the Administrative Procedure Act . . . to conduct an independent review of the factual record before it"); *Mr. Sprout, Inc. v. United States*, 8 F.3d 118, 123 (2d Cir. 1993) ("under the APA, all issues raised by a party's administrative appeal of an ALJ's initial decision are considered de novo by the [Interstate Commerce] Commission").
[31] *FCC v. Allentown Broad. Corp.*, 349 U.S. 358, 364 (1955).
[32] 16 C.F.R. §§ 3.11, 3.41, 3.46, 3.51, & 3.52.
[33] Federal Trade Commission, Proposed Rule Amendments, 73 Fed. Reg. 58831, 58833 (Oct. 7, 2008).

52. In implementing the INFORM Consumers Act, would the definition of the term "seller" understood to only apply to those companies or individuals who sell directly to consumers on the online marketplace?

The definition of "seller" does not contain such a restriction – it is defined as "a person who sells, offers to sell, or contracts to sell a consumer product through an online marketplace's platform." § 301(f)(5).

However, some business entities may not fall within the definition of "third party seller." For example, a "third party seller" does not include a business entity that (1) has an ongoing contractual relationship with the online marketplace to provide it with manufacture, distribution, wholesaling, or fulfillment of shipments, and (2) has made its business name, address, and working contact information available to the general public. *See* § 301(f)(6)(B)(ii). Those business entities are exempt from the disclosure requirements, but not the collection and verification requirements. *See* § 301(f)(6)(B)(ii)(III).

The Honorable Jeff Duncan

1. **Do you agree that agency guidance should reflect agency thinking in the context of the law, not the law itself?**

   The FTC's guidance to consumers and businesses is guided by the law.

2. **For every FTC rulemaking since 1990, please identify the number of enforcement actions that the agency had taken on the subject prior to the initiation of rulemaking proceedings?**

   The table below provides data about new rulemakings since 1990 where the Commission exercised discretionary authority to issue a NPRM (as opposed to rulemakings that were mandated by Congress). The table lists the number of enforcement actions taken between 1980 and issuance of the NPRM. Gathering data about every enforcement action since 1914 (the year of the agency's inception) would be unduly burdensome: the FTC does not have ready access to data about enforcement actions taken prior to 1980, because much of that data is in hard copy and in the possession of the National Archives.

Initiation of rulemaking proceedings (NPRMs)	**Number of prior FTC enforcement actions since 1980**
Non-Compete Clause Rule (01/19/2023)	8
Trade Regulation Rule on Impersonation of Government and Businesses (10/17/2022)	56
Motor Vehicle Dealers Trade Regulation Rule (07/13/2022)	86
Made in USA Labeling Rule (07/16/2020)	28
Prohibitions On Market Manipulation and False Information in Subtitle B of Title VIII of The Energy Independence and Security Act of 2007 (08/19/2008)	None*
Business Opportunity Rule (04/12/2006)	338

   * The Commission promulgated the Market Manipulation Rule pursuant to a statute, enacted in 2007, that gave the FTC new authority to prevent market manipulation and the reporting of false or misleading information in the petroleum industry.

3. **You received a letter, dated April 12, 2023, from former FTC officials who express concern about leaks that may have come from current FTC employees.**

   a) **What steps are you taking to address these concerns?**

      Preventing the unlawful disclosure of FTC nonpublic and confidential information is important. Consistent with this view, I have taken a number of steps to further prevent unauthorized disclosure of nonpublic information at the FTC, including working to implement changes recommended in the OIG's Management Advisory on Controlling

and Protecting Sensitive FTC Information.[34] This includes several actions to address concerns regarding employee training about sensitive information and staff access to nonpublic information, including agency updates to the following:

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

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

b) Will you commit to referring the issue to OIG?

As discussed above, the Commission has worked to implement changes recommended in the OIG's Management Advisory on Controlling and Protecting Sensitive FTC Information.

4. **Do you believe in equal protection under the law? Assuming so, is the FTC not at risk of violating merging parties' constitutional rights by subjecting HSR notified mergers that go before the FTC to the agencies administrative process, when under the law those transaction could have easily gone to the DOJ and would be challenged without delay before the courts.**

The Commission is committed to the principle of equal protection under the law, as required by the Fifth Amendment Due Process Clause, but the fact that some merger cases are heard in administrative proceedings before the Commission while other cases are prosecuted in court by the Department of Justice does not violate equal protection. The division of responsibility between the agencies is a consequence of policy choices made by Congress. When it enacted the Clayton Act in 1914, Congress gave the FTC and the Department of Justice concurrent enforcement authority, though it "expected the FTC to take the leading role in enforcing the Clayton Act." *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1386 (7th Cir. 1986). Congress reaffirmed its intention for the FTC and the DOJ to share responsibility in 1976 when it enacted the Hart-Scott-Rodino Act, which requires parties to certain mergers to submit premerger notifications to both agencies. In light of this shared responsibility, the agencies have developed a clearance process, in which merger investigations are assigned to one agency or the other, so as to conserve government resources, avoid duplicative

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

investigations (which would be a burden to merging parties), and to enable each agency to develop and utilize its industry specific expertise.

5. **As part of the White House Blueprint for a Renters Bill of Rights, FTC committed to explore ways to expand the use of its authority to take action against acts and practices it deems unfairly prevent tenants, as consumers, from obtaining and retaining housing. Do you believe the Agency has the authority to regulate operational aspects of housing such as eviction which historically are regulated by the states? If so, where does that authority come from?**

   The Commission is charged by Congress with combatting deceptive, unfair, and otherwise unlawful practices regarding the collection of debts and the furnishing, collection, and reporting of consumer credit information, including under the Fair Credit Reporting Act (FCRA), the Fair Debt Collection Practices Act (FDCPA), the Federal Trade Commission Act (FTC Act), and implementing regulations. The FTC has used its FCRA enforcement authority in recent actions against tenant screening companies RealPage, Inc. and AppFolio, Inc. In 2018, RealPage paid $3 million to settle the FTC's allegations that RealPage violated the FCRA. The FTC alleged that RealPage used broad criteria and limited filters to match applicants to criminal records, and that RealPage did not have procedures in place to assess the accuracy of those results. In 2020, in a stipulated order filed by the Department of Justice on behalf of the Commission, AppFolio agreed to pay $4.25 million to settle allegations that the company violated the FCRA by unlawfully including certain obsolete records in its reports, and by failing to implement reasonable procedures to ensure that criminal and eviction records it received from a third-party vendor were accurate before including such information in its tenant screening reports.

   The Commission also notified persons and entities who may be "debt collectors" as defined by the FDCPA, including attorneys who engage in eviction proceedings on behalf of landlords or residential property owners to collect unpaid residential rent, of their obligations to refrain from deceptive or unfair collection practices.

   The FTC has also exercised its authority under the FTC Act to protect tenants and prospective tenants from unfair and deceptive practices in or affecting commerce. In its recent *Roomster Corp.* enforcement action, the Commission and six States filed suit against a rental listing platform and its owners for allegedly duping consumers seeking affordable housing by paying for fake reviews and then charging for access to phony listings. The Commission has also used its authority under the FTC Act to prohibit companies and individuals from presenting false or unsubstantiated claims in the marketing of online rental listings, including in the *WeTakeSection8.com* matter, where the Commission alleged that four companies and two individuals presented consumers with false or unsubstantiated claims that their website had accurate, up-to-date, and available listings that are approved for Section 8 housing vouchers.

   In addition, the Commission recently issued, in conjunction with the Consumer Financial Protection Bureau (CFPB), a Request for Information (RFI) to obtain comments from current and prospective tenants, advocacy groups, commercial and individual landlords, property managers, background screening companies, and other members of the public about tenant screening issues in the rental housing industry. The RFI asks questions about various housing

application and screening practices that may prevent consumers from obtaining and retaining rental housing, and also seeks information about the harms and benefits of those practices. The comments received in response to the RFI are publicly available at https://www.regulations.gov/docket/FTC-2023-0024. The FTC may use the information provided for policy development, law enforcement initiatives, and consumer and business education.

6. **Many towns in small rural communities have become food deserts after the local grocery store went out of business. Similarly, independent pharmacies have struggled to stay alive in these remote areas as well. The grocers and pharmacists tell us its due to Big Box Stores and PBMs that have forced them out of business. Can antitrust enforcement be used to stop this trend? If so, why aren't we doing it?**

Given the high stakes for the American public, local communities of all sizes, and the nation's economy, the agency continues to be especially active in policing anticompetitive activity of providers of food, pharmaceuticals and other household necessities. The FTC continues its commitment to thoroughly investigate potentially anticompetitive conduct in all relevant markets, vigorously bring law enforcement actions as appropriate, and carefully fashion effective relief to protect the American public in all affected communities.

I am fully committed to ensuring that the FTC is using all of the tools it is statutorily authorized to employ. That includes conducting studies to help reveal and combat anticompetitive conduct, and reinvigorating the Robinson Patman Act to protect small and honest businesses from unlawful price discrimination. Commission-launched initiatives to examine competition include inquiries into certain practices of Pharmacy Benefit Managers (PBMs),[35] disruptions in the U.S. supply chain,[36] and infant formula shortages.[37] For example, the supply chain inquiry ordered Walmart, Amazon, Kroger and other large wholesalers and suppliers to turn over information to help study causes of empty shelves and sky-high prices during the pandemic and uncover any facilitating anticompetitive practices.

In June 2022, the Commission issued Compulsory Orders for data and documents to the six largest PBMs: CVS Caremark; Express Scripts, Inc.; OptumRx, Inc.; Humana Pharmacy Services, Inc.; Prime Therapeutics LLC; and MedImpact Healthcare Systems, Inc. This inquiry builds on the significant public record developed in response to the request for

[35] Press Release, Fed. Trade Comm'n, FTC Launches Inquiry Into Prescription Drug Middlemen Industry (June 7, 2022), https://www ftc.gov/news-events/news/press-releases/2022/06/ftc-launches-inquiry-prescription-drug-middlemen-industry.
[36] Press Release, Fed. Trade Comm'n, FTC Launches Inquiry into Supply Chain Disruptions (Nov. 29, 2021), https://www ftc.gov/news-events/news/press-releases/2021/11/ftc-launches-inquiry-supply-chain-disruptions.
[37] Regulations.gov, Solicitation for Public Comments on Factors that May Have Contributed to the Infant Formula Shortage and Its Impact on Families and Retailers, FTC-2022-0031 (May 24, 2022), https://www.regulations.gov/docket/FTC-2022-0031; *see also* Press Release, Fed. Trade Comm'n, Federal Trade Commission Launches Inquiry Into Infant Formula Crisis (May 24, 2022), https://www ftc.gov/news-events/news/press-releases/2022/05/federal-trade-commission-launches-inquiry-infant-formula-crisis.

information about PBMs that the agency launched in February 2022.[38] The agency has received more than 24,000 public comments to date.[39]

We have received complaints about PBM practices from patients and professionals across the healthcare system. Those who own competing pharmacies—especially independent and community pharmacies—have complained that PBMs impose unfair fees and claw backs, impose byzantine contracts that often reimburse pharmacies less than their costs of acquisition, and steer patients to PBM-owned pharmacies. PBMs have also been accused of harming patients by extracting rebates and fees in exchange for refusing to cover generic and biosimilar drug products, ultimately raising the price that consumers pay for medicines.

The PBM inquiry is examining several of the most common complaints about PBMs and will seek to assist policymakers in determining whether Americans would benefit from reforms to this critical industry. Many of the key questions the agency hopes to be able to answer by completion of the study relate to how PBM practices impact the cost of prescription drugs. Specifically, the study is aimed at shedding light on several practices that have drawn scrutiny in recent years including:

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

I view this inquiry as a critical step in more closely scrutinizing business practices across the pharmaceutical supply chain that can raise drug prices and limit access for patients, and that may contribute to the shuttering of independent pharmacies across the country. Given that PBMs' practices can have life-and-death consequences for Americans, the FTC has a moral imperative to act with urgency in this realm. If we find evidence of any illegal practices—be it unfair methods of competition or unfair or deceptive practices—I will strive to ensure that the FTC vigorously brings our full authorities to bear in response.[40]

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[38] Press Release, Fed. Trade Comm'n, FTC Requests Public Comments on the Impact of Pharmacy Benefit Managers' Practices (Feb. 24, 2022), https://www ftc.gov/news-events/news/press-releases/2022/02/ftc-requests-public-comments-impact-pharmacy-benefit-managers-practices.

[39] *See* Regulations.gov, Solicitation for Public Comments on the Business Practices of Pharmacy Benefit Managers and Their Impact on Independent Pharmacies and Consumers, FTC-2022-0015 (Feb. 24, 2022), https://www.regulations.gov/docket/FTC-2022-0015.

[40] See, e.g., Press Release, Fed. Trade Comm'n, FTC to Ramp Up Enforcement Against Any Illegal Rebate Schemes, Bribes to Prescription Drug Middleman That Block Cheaper Drugs (Jun. 16, 2022), https://www ftc.gov/news-events/news/press-releases/2022/06/ftc-ramp-up-enforcement-against-illegal-rebate-schemes.

Finally, given the high stakes for the American public, farmers, growers, local communities, and the nation's economy, the agency continues to be especially active in policing merger activity and other forms of anticompetitive conduct in food industries. While I cannot comment on nonpublic matters, I note that we continue our vigilance against unlawful consolidation. For example, the Commission announced an enforcement action last year that protects modest-size communities and honest businesses from anticompetitive supermarket consolidation,[41] and our publicly disclosed review of the proposed merger of Kroger and Albertsons is ongoing.[42]

7. **Is the Commission planning additional rulemaking related to "unfair methods of competition"?**

On November 10, 2022, the Commission issued a "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act"[43] ("Policy Statement") that brings the agency back into alignment with its congressionally mandated statutory obligation to enforce the ban on "unfair methods of competition." As I noted in my statement upon its adoption, the Policy Statement is "firmly rooted in statutory text, history, purpose, and judicial precedent."[44]

Inasmuch as the Policy Statement does not neatly set out a bounded list of prohibited practices, this follows Congress's design. Lawmakers opted against a pre-specified list of proscribed tactics because they knew that such a list would quickly become outdated. Congress instead tasked the FTC with concretizing the meaning of "unfair methods of competition" through litigation and rulemaking, informed by the agency's expertise and ability to do rigorous research into real-world markets and evolving business practices.[45] The Policy Statement outlines the framework and factors the Commission will use to do so, guided by many decades of agency experience and judicial precedent.

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[41] Press Release, Fed. Trade Comm'n, FTC Approves Final Order Requiring Northeast Supermarkets Price Chopper and Tops Market Corp. to Sell 12 Stores as a Condition of Merger (Jan. 24, 2022), https://www ftc.gov/news-events/news/press-releases/2022/01/ftc-approves-final-order-requiring-northeast-supermarkets-price-chopper-tops-market-corp-sell-12.

[42] Given that Kroger disclosed in a press release that the Federal Trade Commission is conducting a review of the proposed transaction, I am able to confirm that the FTC is investigating the proposed merger. Press Release, Kroger, Kroger Comments On Second Request from Federal Trade Commission (Dec. 6, 2022), https://ir kroger.com/CorporateProfile/press-releases/press-release/2022/Kroger-Comments-On-Second-Request-From-Federal-Trade-Commission/default.aspx; Notice of Policy of Disclosing Investigations of Announced Mergers: Notice of Revised Policy, 62 Fed. Reg. 18,630 (Apr. 16, 1997), https://www.ftc.gov/sites/default/files/documents/federal_register_notices/notice-policy-disclosing-investigations-announced-mergers/970416investigationsofannounced.pdf.

[43] Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

[44] Statement of Chair Lina Khan, joined by Commissioner Rebecca Slaughter and Commissioner Alvaro Bedoya on the adoption of the Statement of Enforcement Policy Regarding Unfair Methods of Competition Under Section 5 of the FTC Act (Nov. 10, 2022), https://www ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-of-chair-khan-commissioners-slaughter-bedoya-on-policy-statement-regarding-section-5.

[45] *FTC v. Texaco, Inc.*, 393 U.S. 223, 223, 226 (1968) ("While the ultimate responsibility for the construction of this statute rests with the courts, we have held on many occasions that the determinations of the Commission, an expert body charged with the practical application of the statute, are entitled to great weight.").

The Commission will consider whether to issue new guidance or to propose rules that will further clarify the types of practices that warrant scrutiny under Section 5.

8. **Has the Commission ever adopted a rule that proscribed only an "unfair method of competition"?**

The FTC promulgated a rule on men's and boys' tailored clothing in 1968.[46] The rule was repealed in 1994. The FTC has promulgated other rules, but they were both UDAP and UMC rules.

9. **Please explain, in detail, how your proposed ban on non-competes is both going to raise the price of labor by approximately $300 billion and reduce health care costs by approximately $148 billion, as those predictions appear to be inconsistent.**

The Notice of Proposed Rulemaking for the Non-Compete Clause Rule ("NPRM") explains the basis for the Commission's estimate that the proposed rule would increase workers' earnings workforce-wide by $250-$296 billion annually. *See* 88 Fed. Reg. 3482, 3522-23 (Jan. 19, 2023). The NPRM also explains that the Commission's estimated $148 billion annual decrease in health spending is based on a large (linear) extrapolation from a study estimating the impact of non-compete clause enforceability on consumer prices in the market for physician services. *See* 88 Fed. Reg. at 3527. The NPRM explains several reasons why worker earnings may increase while health care costs simultaneously decrease. 88 Fed. Reg. 3482, 3489-90. One plausible explanation is that the proposed ban would reduce concentration in product markets. For example, the authors of the study from which the $148 billion decrease is estimated hypothesize that non-compete clause enforceability increases the incentives for firms to merge by reducing the threat of spinoffs.[47] All else being equal, economic theory predicts that reduced concentration in product markets would decrease prices. The proposed ban would also reduce concentration in labor markets, which, all else equal, economic theory predicts would increase earnings. Another plausible explanation is that non-competes prevent workers from finding the firm that best matches their abilities, described as friction in the labor market. This poor matching between workers and firms may cause workers to be less productive, which may simultaneously lead to lower pay and higher prices. The proposed rule would reduce this friction. Finally, longer-run effects like improvements in innovation may countervail any pressure for prices to increase due to higher labor costs.

The estimates referenced in the question were produced using available evidence in the economic literature on the effects of non-competes.[48] In one study, as non-competes became

[46] 16 C.F.R. pt. 412 (1968)
[47] Hausman, Naomi, and Kurt Lavetti "Physician practice organization and negotiated prices: evidence from state law changes" *American Economic Journal: Applied Economics* 13.2 (2021): 258-296.
[48] Starr, Evan "Consider this: Training, wages, and the enforceability of covenants not to compete" *ILR Review* 72.4 (2019): 783-817; Johnson, Matthew S., Kurt Lavetti, and Michael Lipsitz "The labor market effects of legal restrictions on worker mobility" *available at SSRN 3455381* (2020); Hausman, Naomi, and Kurt Lavetti "Physician practice organization and negotiated prices: evidence from state law changes" *American Economic Journal: Applied Economics* 13.2 (2021): 258-296.

less enforceable, healthcare prices went down.[49] That study considered the issue of labor costs and found that prices went down regardless of whether a particular service was more or less labor intensive.

10. **Do you agree that some worker noncompetes promote investments in the workforce? If so, are any of those agreements procompetitive?**

The NPRM summarizes the economic literature on the relationship between non-compete clauses and investments in the workforce. 88 Fed. Reg. 3482, 3493. The NPRM describes two studies which causally link the enforceability of non-compete clauses to investment.[50] One implies that the proposed rule would decrease firm-sponsored worker training; another implies that the proposed rule would decrease investment in capital equipment. The NPRM considers the studies on potential effects on investments in the workforce together with all empirical evidence on the multifaceted impacts of non-compete clauses on the economy and preliminarily finds that non-compete clauses are an unfair method of competition. 88 Fed. Reg. at 3500-08. The NPRM preliminarily finds that employers have alternatives to non-compete clauses for protecting valuable investments, and that these alternatives reasonably accomplish the same purposes as non-compete clauses while burdening competition to a less significant degree. 88 Fed. Reg. at 3505-07.

11. **Does the Commission believe the proposed rule will harm small businesses? If not, does the Commission dispute the arguments raised by the SBA Office of Advocacy?**

The NPRM preliminarily finds that there are substantial benefits from the proposed rule, which extend to small businesses. For example, under the proposed rule, small businesses (like all businesses) will have greater access to experienced and talented workers. 88 Fed. Reg. 3490-91. Small businesses may benefit from worker mobility, which the NPRM preliminarily finds may increase the strength of matches between workers and businesses, causing greater productivity. 88 Fed. Reg. 3484-85. Additionally, the small business community may grow due to increased rates of entrepreneurship, which the Commission preliminarily finds would result from the proposed rule. 88 Fed. Reg. 3491-92, 3526. The NPRM also preliminarily finds there are other nonquantifiable and nonmonetizable costs *and* benefits. 88 Fed. Reg. at 3521-30. Finally, the NPRM recognizes that small businesses would bear compliance costs associated with the proposed rule. 88 Fed. Reg. 3531-33.

The Commission is currently in the process of reviewing public comments, including the letter submitted by the SBA Office of Advocacy. The Commission has received comments from small businesses and entrepreneurs related to their experiences with and the effects of non-compete clauses. We have also received comments from organizations representing

[49] Hausman, Naomi, and Kurt Lavetti "Physician practice organization and negotiated prices: evidence from state law changes" *American Economic Journal: Applied Economics* 13.2 (2021): 258-296.
[50] Starr, Evan "Consider this: Training, wages, and the enforceability of covenants not to compete." *ILR Review* 72.4 (2019): 783-817. Jeffers, Jessica "The impact of restricting labor mobility on corporate investment and entrepreneurship" *available at SSRN 3040393* (2023).

small businesses. We will consider all of the arguments raised within the public record as required by law.

12. **If the Commission concludes that any of the alternatives discussed in the proposed rule are preferable to its initial proposal, will it seek public comment on the revised rule?**

As always, the Commission will comply with the requirements of the law, including the Administrative Procedure Act, in finalizing any rule. This includes seeking public comment when required by law.

13. **When does the Commission intend to finalize its noncompete rulemaking?**

The Commission is working diligently to review and consider comments consistent with the law. At this time, I am not certain when the Commission will be able to finalize the noncompete rulemaking.

14. **Small businesses in rural communities, like the ones I represent, have been crushed by dominant players. Instead of stretching its authority to ban noncompete clauses and to rewrite privacy rules, what tools does the FTC have to support small businesses?**

The FTC's work supports small businesses through law enforcement activities, market studies, and education and outreach efforts.

First, the FTC has long engaged in both federal court and administrative law enforcement focused on those who use deceptive or unfair tactics against small, medium-sized, and large businesses. *E.g.*, *Indep. Directory Corp. v. FTC*, 188 F.2d 468 (2d Cir. 1951) (deceptive practices in selling directory advertisements to businesses); *FTC v. RCG Advances*, 20-cv-4432 (S.D.N.Y. 2020)[51] (deceptive practices in selling equipment leases to small businesses and religious and other non-profit organizations).

Recently, in *In re Dun & Bradstreet, Inc.*, Dkt C-4761,[52] the Commission reached an administrative settlement resolving allegations that Dun & Bradstreet (D&B), a leading provider of small business credit reports, had harmed small businesses by engaging in unfair and deceptive business practices. The Commission alleged that many businesses had complained of errors in their D&B credit reports that had cost them time, expense, and opportunities, and that D&B failed to give these businesses a clear, consistent, and reliable process to get these errors fixed. The Commission further alleged that D&B profited from small businesses' pain by offering a line of products that D&B deceptively claimed would let businesses add their payment history to their D&B business credit report and improve their credit scores and ratings. The Commission settled the matter and ordered D&B to make substantial changes to its processes to help ensure that it responds promptly and fully to businesses' complaints about incorrect information in their D&B credit reports; make a

[51] *See* https://www ftc.gov/legal-library/browse/cases-proceedings/192-3252-rcg-advances-llc (last visited 5/22/2023).

[52] https://www ftc.gov/system/files/ftc_gov/pdf/172%203196%20Dunn%20and%20Bradstreet%20combined%20package%20unsigned_0.pdf (last visited 5/22/23).

number of up-front disclosures to businesses about the nature of its products; and provide refunds to many businesses that were harmed by the company's deceptive practices.

Second, in addition to law enforcement efforts, the FTC seeks to understand market dynamics that can create obstacles for small businesses. In March of this year, following the Dun & Bradstreet matter, the Commission used its authority under Section 6(b) of the FTC Act to launch a broader study of the small business credit reporting industry. The Commission issued 6(b) orders to five firms in that industry to provide detailed information about their products and processes.[53] Unlike credit reports for individual consumers, which are governed by the Fair Credit Reporting Act, there is no federal law that specifically outlines processes and protections available to businesses when it comes to credit reporting. This can make business credit reporting hard to understand, and it can be very difficult for small businesses to correct errors or omissions in their credit reports. These reports can significantly affect small businesses, potentially impacting terms on which they can obtain the goods, services, and equipment they need to stay in business. Yet small business owners may not even be aware a report about them exists, sometimes only discovering they have a credit report when they are denied credit by a supplier.

The Commission's study will examine multiple aspects of how information is collected and processed for business credit reports, how the reports are marketed, and how and whether the credit reporting companies address factual errors in the reports. In addition to information about these topics, the orders also require the companies to provide information on services they provide to businesses to monitor or enhance their own credit reports.

Third, outreach to small business is an important part of how the FTC accomplishes its protection mission. At business.ftc.gov, businesses of all sizes can find plain language guidance to help them both avoid the scams that target them and ensure they know how to comply with the law. Nearly 130,000 subscribers also get the FTC's Business Blog,[54] where they receive regular updates on FTC-related cases and warnings of scams that target businesses of all sizes. In addition, the FTC supplements these resources with significant outreach to the small business community nationwide. FTC attorneys and staff regularly talk with small business audiences at local association meetings, regional conferences, and national trade shows, among other gatherings. The agency also provides key materials in print, with small businesses particularly in mind. Among the most in-demand materials for small businesses are those covering cybersecurity for small business, scams that target small businesses, lessons from FTC privacy cases, a guide on responses to a data breach, and disclosures for social media influencers. In fact, several banks, financial consultants, companies, police departments, and the South Carolina Empowerment Center in South Carolina's 3rd Congressional district have ordered the FTC's print materials for small business over the past three years, including: Cybersecurity and Your Small Business; Start

[53] https://www ftc.gov/news-events/news/press-releases/2023/03/ftc-launches-inquiry-small-business-credit-reports (last visited 5/22/23). The five firms are Dun & Bradstreet, Experian Information Solutions, Equifax, Ansonia Credit Data, and Creditsafe USA.
[54] *See* https://www ftc.gov/business-guidance/blog.

With Security (English and Spanish); Scams and Your Small Business; and Protecting Personal Information: A Guide for Business.[55]

15. **On what date did you first consult with the DAEO on whether you needed to recuse yourself from the Meta-Within matter?**

Federal ethics rules give the DAEO the authority to make binding decisions to disqualify an employee from matters involving a financial conflict of interest or a covered relationship, *see* 5 C.F.R. §§ 2638.104(c)(6), 2635.502(c), but not from matters presenting other potential types of conflicts, *see id.* §§ 2635.501(a), 2635.502(a)(2). For matters presenting potential types of conflicts *other than* conflicts arising from financial interests or covered relationships, the employee rather than the DAEO makes the decision about whether to recuse. *See id*. The employee can ask the DAEO for nonbinding advice, but the employee can also make her own assessment regarding recusal without consulting the DAEO. The DAEO may advise an employee, but any such advice simply informs the employee's own decision.

Meta did not allege that I had a conflict of interest arising from a financial interest or covered relationship. Instead, Meta raised issues about the appearance of impropriety under 5 C.F.R. § 2635.501(a), the ethics provision that applies when "other circumstances" may raise a question concerning the employee's impartiality. Because Meta was only raising issues under the "other circumstances" provision, the consultations I had with the DAEO are protected by deliberative process privilege.

16. **At the conclusion of those consultations did the DAEO issue a recommendation, and if so, what was that date?**

Please see the answer to 15.

17. **What specifically did the DAEO recommend?**

Please see the answer to 15.

18. **Are you aware of any instance in the history of the FTC where a chair, commissioner, or FTC staff member chose to go against the recommendation of the DAEO?**

I would have no way of knowing whether other FTC employees have followed or not followed DAEO recommendations.

[55] *See* https://www.bulkorder.ftc.gov/publications/cybersecurity-and-your-small-business; https://www.bulkorder ftc.gov/publications/start-security-guide-business; https://www.bulkorder ftc.gov/publications/start-security-guide-business-spanish; https://www.bulkorder ftc.gov/publications/scams-and-your-small-business; and https://www.bulkorder ftc.gov/publications/protecting-personal-information-guide-business.

19. **Do you believe the Congress and the general public should know when a recommendation to recuse oneself is issued by the DAEO and then not followed? If not, why?**

Courts have recognized that recommendations provided by ethics officials should be protected by deliberative process privilege, because public disclosure of such recommendations could chill communications between agency employees and ethics officials. *See, e.g.*, *Judicial Watch v. U.S. Dep't of State*, 306 F. Supp. 3d 97, 114 (D.D.C. 2018) (finding that deliberative process privilege protected ethics recommendations made by State Department officials, and noting that "release of documents of this sort would chill communications within an agency about how to ensure that nominees for high-level agency positions are identifying and managing potential conflicts of interest before any failure to do so erodes the public's confidence in the agency and agency officials"); *Broderick v. Shad*, 117 F.R.D. 306, 310-11 (D.D.C. 1987) (finding that deliberative process privilege protected the "recommendations, opinions, or conclusions" of ethics officials, and that the "'honest and frank communication'" needed for agency ethics work "might be stifled by public disclosure").

20. **Do you believe there is a difference between international cooperation and international coordination? If so, what is that difference?**

Cooperation with other agencies can include a broad range of practices, from informal discussions to more formal cooperation activities based on legal instruments, to ensure efficient and effective investigations of anticompetitive practices and mergers with anticompetitive effects in one or more jurisdictions. In this way, cooperation and coordination can be used interchangeably. However, as noted in the OECD Recommendation of the Council Concerning International Cooperation on Competition Investigations and Proceedings,[56] cooperation may also encompass more general discussions relating to competition policy and enforcement practices.

21. **Is it appropriate to coordinate with a foreign jurisdiction during the investigation phase of a merger or a unilateral conduct case? If so, what rationale justifies such coordination given market dynamics are different, legal standards across jurisdictions vary, etc?**

Cooperation with foreign counterparts on matters under parallel review enables the agencies to identify issues of common interest, gain a better understanding of relevant facts, and—where possible—achieve consistent outcomes with cooperating agencies. Those outcomes help to promote efficient and effective enforcement for both cooperating agencies and the subjects of an investigation.

Parties routinely waive confidentiality protections voluntarily to facilitate cooperation. Waivers allow for deeper engagement, discussion, and analysis among the cooperating

[56] https://www.oecd.org/daf/competition/2014-rec-internat-coop-competition.pdf

agencies, which can lead to more informed decisions, expedite the merger review, and help minimize the risk of conflicting outcomes. Waivers can further benefit parties by reducing information production burdens and avoiding incompatible remedies.

Our enforcement cooperation has remained consistent throughout the years. In FY 2022, the FTC reported cooperating on 33 competition cases of mutual concern with counterpart agencies from 16 jurisdictions. This included 28 merger matters and 5 non-merger investigations. Over the previous decade (FY 2012-2021), the FTC cooperated each year, on average, in 34 cases, including 29 merger and 6 non-merger matters.

22. **Is it appropriate to coordinate with a foreign agency to run out the clock on a proposed merger?**

Notwithstanding our cooperation with foreign counterparts, each agency carries out its own investigation independently, according to its own legal frameworks and in light of the particular markets and facts at issue in the jurisdiction.

23. **Is it appropriate to avoid seeking a preliminary injunction to prevent a merger because the FTC believes a foreign agency is holding up the transaction?**

The FTC seeks preliminary relief in federal court to prevent merging parties from consummating a transaction. When a bar on closing exists, whether that is through an agreement with the FTC, a state, or as a result of foreign agency action, the Commission may not need to secure a temporary restraining order or preliminary injunction in federal court, which conserves FTC and judicial resources.

24. **Does the FTC have a duty to persuade foreign jurisdictions from engaging in extraterritorial activity?**

The FTC acts within the scope of its legal authority and assesses business conduct pursuant to applicable laws, as do enforcers in other jurisdictions. The extraterritorial application of those laws is determined by domestic law. Enforcement agencies in other jurisdictions interpret the extraterritorial application of their own laws and assess business conduct within the context of their own legal system.

25. **The FTC seems proud of its cooperation agreements with foreign judications. If that is the case, why are the comity arrangements not enforced and routinely ignored?**

Our bilateral and multilateral cooperation agreements provide the legal framework for enforcement cooperation to occur, and provide, for example, confidentiality safeguards. We have opted not to employ formal positive comity because positive relationships with other enforcers allow us to focus on informal and practical approaches to limiting duplication or inconsistency, particularly in the area of potential remedies, through cooperation. In certain matters, this may include taking into account the remedies obtained by other agencies, which

can allow a reviewing agency to complete its investigation without requiring additional remedies.

26. **In your appearance before the House Appropriations subcommittee, in response to a question about cooperation with foreign jurisdictions, you suggested that each enforcer needed to follow its own laws and make its own decisions. If this is the case, how do you justify the level of coordination on pending investigations.**

Cooperation with international colleagues on mergers under concurrent review is critical to ensure that the international system functions coherently and effectively to the benefit of both reviewing agencies and the parties.

27. **What role is the FTC trying to play in international trade discussions? How do its positions support U.S. companies?**

The FTC has a long and consistent history of participating in Executive Branch discussions relating to the negotiations of trade agreements, particularly to the extent they implicate the FTC's missions to protect and promote fair competition and protect Americans from unfair or deceptive practices. The FTC is continuing that role in the Biden Administration and has participated in discussions to develop the Administration's negotiating position in the Indo-Pacific Economic Framework. The FTC has brought to those discussions its expertise on competition, consumer protection, and data privacy that help to inform the Administration's negotiating position.

28. **The FTC is asking for a large increase in budget and staffing. Why is the agency seconding employees to help implement foreign regulations such as the Digital Markets Act, that explicitly target U.S. companies and do not align with U.S. law?**

For decades, the FTC has consistently had an active program of staff exchanges on both the competition and consumer protection side. The FTC's upcoming detail to the European Commission is part of—and wholly consistent with—this longstanding FTC practice. These exchanges help the FTC cooperate more effectively in order to tackle conduct that spans jurisdictions.[57] They give agency officials a first-hand understanding of the practices and methods of the other agency and provide an opportunity to share insights into each other's approaches.

The current detail of an FTC official to the European Commission will allow the FTC to further our understanding of the EC's new Digital Markets Act and to share FTC practices and approaches with the EC. This heightened understanding will deepen cooperation between our agencies to the benefit of U.S. consumers, workers, and honest businesses as

[57] Indeed, recognizing the many benefits of staff exchanges, Congress provided specific authority to the FTC to engage in these exchanges through the U.S. SAFE WEB Act (FTC Act, 15 USC § 57c-1). The Act allows the FTC to employ officers or employees of foreign government agencies on a temporary basis. Likewise, the Act allows the FTC to detail officers or employees of the FTC to work on a temporary basis for appropriate foreign government agencies.

governments on both sides of the Atlantic tackle pressing competition issues arising in digital markets.

In your engagements with European competition authorities about the DMA:

29. **Have you had any conversations about an enforcement approach by them that only targets U.S. companies? If so, can you discuss what official U.S. government position you shared with them?**

    No.

30. **Have any of your discussions specifically covered the issue of potential enforcement against Chinese companies?**

    No.

31. **If so, can you please share a list of any specific Chinese companies that were discussed in these conversations?**

    Please see the answer to 30.

32. **Do you believe a DMA enforcement approach that only targets U.S. companies - and/or gives Chinese companies a pass - will result in Chinese companies gaining a competitive advantage?**

    The European Commission will not formally designate the companies subject to the DMA until September 2023, and the identity of the companies subject to the DMA requirements has not been disclosed.

33. **The Biden Administration has made it a priority to stand up against authoritarian regimes and promote democracy. Rule of law, due process, and procedural fairness are core American values that are enshrined in our Constitution. You took an oath when you were sworn in that reflects these very same commitments. Further the USMCA has a chapter to ensure competition proceeding abide by due process norms. That agreement was ratified by the US Congress on a bipartisan basis. That agreement is now the law. Why then have you been trying to block USTR from tabling due process and procedural fairness provisions in future trade negotiations, seek to disregard the sorts of USMCA congressional approved commitments, and undermine the Constitution?**

    One of my core priorities at the FTC is ensuring the agency's work adheres to and advances the rule of law. Accordingly, we have taken several steps to bring the agency's work in closer alignment with the statutes that Congress has passed. I have also prioritized public participation—for example, by regularly holding open Commission meetings, something not done in over 40 years.

While I am not able to get into the specifics of Executive Branch discussions, the FTC is working with USTR to develop a competition text for IPEF that reflects both the Biden Administration's priorities in this area and lawmakers' efforts to ensure dominant digital platforms are not squelching competition.

34. **Yes or no: in the letter you sent to USTR back in late March raising objections to provisions in IPEF, did you suggest that the provisions of the competition chapter somehow are an obstacle to FTC competition investigations?**

It is my understanding that the Committee has a copy of the letter, and I believe the text of the letter speaks for itself.

35. **Yes or no, do you agree with the following statement: Due process may be inconvenient to an agency, but it's the law.**

I do not consider due process to be "inconvenient" but rather an important constitutional principle.

36. **The law requires the DOJ and the FTC to "fish or cut bait" when reviewing an HSR merger. When will you return to following the law and reinstate "early terminations" for mergers that agency chooses not to issue a second request?**

The Clayton Act, as amended by the HSR Act, requires that a party wishing to complete an acquisition must delay consummating the transaction for at least 30 days (15 days in the case of a pure cash tender offer) following the submission of a premerger notification to give the FTC and DOJ an opportunity to review the transaction and determine whether to investigate the transaction further. The statute gives the FTC and DOJ the ability to grant, in individual cases, exemptions from this statutorily defined waiting period. Specifically, the statute states that FTC and DOJ have the option to grant early terminations "in their discretion."[58] Granting early termination consumes agency resources. Given our ongoing heavy workload, I will continue to prioritize devoting resources to the agency's statutory obligations over discretionary functions. We will consider reinstating early termination grants as agency resources permit.

[58] 16 C.F.R. § 803.11(c) ("The Federal Trade Commission and the Assistant Attorney General ***may, in their discretion***, terminate a waiting period upon the written request of any person filing notification or … sua sponte.") (emphasis added); 15 U.S.C.A. § 18a(b)(2) (HSR Act: "The Federal Trade Commission and the Assistant Attorney General ***may***, in individual cases, terminate the waiting period specified in paragraph (1) and allow any person to proceed with any acquisition subject to this section, and promptly shall cause to be published in the Federal Register a notice that neither intends to take any action within such period with respect to such acquisition.") (emphasis added); see also "FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination," Federal Trade Commission (Feb. 4, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/02/ftc-doj- temporarily-suspend-discretionary-practice-early-termination; "HSR Early Termination After a Second Request Issues," Federal Trade Commission (Mar. 12, 2021), https://www ftc.gov/enforcement/competition-matters/2021/03/hsr-early-termination-after-second-request-issues ("Typically, when an investigation resolves competition concerns, the agencies ***use their discretion*** to grant early termination of the second waiting period, and the grant of ET allows the parties to close their transaction.") (emphasis added).

Additionally, over the past couple of years, the FTC has been hit by a tidal wave of merger filings that is straining the agency's capacity to rigorously investigate deals ahead of the statutory deadlines. We believe it is important to be upfront about these capacity constraints. For deals that we cannot fully investigate within the requisite timelines, we have begun to send standard form letters alerting companies that the FTC's investigation remains open and reminding companies that the agency may subsequently determine that the deal was unlawful. Companies that choose to proceed with transactions that have not been fully investigated are doing so at their own risk. Of course, this action should not be construed as a determination that the deal is unlawful, just as the fact that we have not issued such a letter with respect to a filing under the Hart-Scott-Rodino Act should not be construed as a determination that a deal is lawful.[59]

37. **Do you agree that, for merger guidelines to be effective, they must not ignore judicial precedents? Will the revised guidelines avoid cherry picking out of date cases that fail to capture economic understanding that have been developed in the past few decades?**

I agree that the merger guidelines must be faithful to the law and to judicial precedents, especially those from the Supreme Court that interpret the reach of Section 7 of the Clayton Act. Our goal in pursuing the current revision of the merger guidelines is to ensure that our guidelines accurately reflect modern commercial realities, are faithful to our statutory mandate, and are administrable and predictable. Merger analysis is highly fact-intensive, and the analytical tools the agencies employ must reflect not only the most recent learning but also the commercial realities faced by the firms in the market under review. In response to changes in business models and tactics, it is essential that we update our techniques for determining whether a merger may create or enhance market power or otherwise may result in a substantial lessening of competition in violation of Section 7. This is consistent with the Supreme Court's guidance that Congress prescribed a pragmatic factual approach to merger analysis, not a formal legalistic one.[60]

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

We engaged in broad stakeholder outreach in connection with the revision, including receiving over 5,000 public comments in response to our Request For Information on this

[59] 15 U.S.C. 18a(i)(1) ("Any action taken by the Federal Trade Commission or the Assistant Attorney General or any failure of the Federal Trade Commission or the Assistant Attorney General to take any action under this section shall not bar any proceeding or any action with respect to such acquisition at any time under any other section of this Act or any other provision of law.").
[60] *Brown Shoe Co. v. United States*, 370 U.S. 294, 337 (1962).

project[61] and holding several public listening sessions to hear directly from individuals and businesses affected by mergers.[62] Those comments raise many diverse issues, which are currently under consideration.

38. **Based on the U.S. Department of Commerce economic census data, recent studies have found that economic concentration in the U.S. has largely remained flat or even declined over the past two decades. How does this empirical evidence support your narrative that the U.S. economy is overconcentrated or that concentration is even a reliable measure of competition? After all, you can have highly concentrated industries that are highly competitive, and you can have industries that are not concentrated but stagnant.**

Research has documented how concentration has undermined open and competitive markets, significantly harming the American public and our economy.[63] For over a century, Congress has codified a policy in favor of competition over consolidation. In 1890, as trusts captured the sugar, steel, oil, and railroad industries, lawmakers passed the Sherman Act, prohibiting, among other practices, monopolization, attempted monopolization, and conspiracies to monopolize.[64] When it became clear that this statute was failing to prevent monopolization through acquisition, Congress in 1914 passed the Clayton Act, prohibiting mergers whose

[61] Press Release, Dep't. of Justice, Justice Department and Federal Trade Commission Seek to Strengthen Enforcement Against Illegal Mergers (Jan.18, 2022), https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-seek-strengthen-enforcement-against-illegal.

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

[63] *See, e.g*., Jan De Loecker et al., *The Rise of Market Power and the Macroeconomic Implications*, 135 Q.J. ECON. 561, 644 (2020); Germán Gutiérrez & Thomas Philippon, *Investmentless Growth: An Empirical Investigation*, BROOKINGS PAPER ON ECON. ACTIVITY 89, 95–97 (2017); Germán Gutiérrez & Thomas Philippon, *Ownership, Concentration, and Investment*, 108 AM. ECON. ASSOC. PAPERS AND PROCEEDINGS 432, 437 (2018); Germán Gutiérrez & Thomas Philippon, *Declining Competition and Investment in the U.S*. 2 (Nat'l Bureau of Econ. Res., Working Paper No. 23583, 2017); José A. Azar et al., *Concentration in US Labor Markets: Evidence from Online Vacancy Data* 13 (Nat'l Bureau of Econ. Res., Working Paper No. 24395, 2018); José A. Azar et al., *Labor Market Concentration* 12 (Nat'l Bureau of Econ. Res., Working Paper No. 24147, 2017); Simcha Barkai, *Declining Labor and Capital Shares*, 75 J. Fin. 2421, 2422 - 45, 48 (2020); IAN HATHAWAY & ROBERT E. LITAN, WHAT'S DRIVING THE DECLINE IN THE FIRM FORMATION RATE? A PARTIAL EXPLANATION, 1 - 9 (Econ. Studies at Brookings Inst., 2014); Joshua Gans et al., *Inequality and Market Concentration, When Shareholding Is More Skewed than Consumption* (Nat'l Bureau of Econ. Res., Working Paper No. 25395, 2018); Leemore S. Dafny, *Estimation and Identification of Merger Effects: An Application to Hospital Mergers*, 52 J. L. Econ. 523–550 (2009); Deborah Haas-Wilson & Christopher Garmon, *Hospital Mergers and Competitive Effects: Two Retrospective Analyses*, 18 Int'l J. Econ. Bus., 17-32 (2011); Gautam Gowrisankaran et al., *Mergers When Prices Are Negotiated: Evidence from the Hospital Industry*, 105 Am. Econ. Rev., 172-203 (2015); Simcha Barkai, *Declining Labor and Capital Shares*, 75 J. Fin. 2421, 2422 - 45, 48 (2020).

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

effect "may be substantially to lessen competition, or to tend to create a monopoly."[65] When businesses began exploiting loopholes in the Clayton Act, Congress once again stepped in, passing the 1950 Celler-Kefauver Antimerger Act to ensure the law captured vertical and conglomerate deals as well as acquisitions of assets.[66] With each of these efforts, Congress redoubled its commitment to open markets and free and fair competition.

For decades, FTC leaders across administrations operated under a framework that recommended enforcers err on the side of inaction, on the assumption that monopoly power would be disciplined by the free market.[67] This framework prompted FTC leadership to adopt policies that narrowed the agency's legal authorities, contravening Congress. In recent years, economic learning and empirical evidence have revealed that this approach was unduly permissive as concentration significantly and broadly increased.[68] Public reporting now routinely documents how market power abuses by dominant firms are precluding businesses and entrepreneurs from being able to compete, particularly in digital markets.[69] Lawmakers from both parties have responded by strongly urging the Commission to turn the page on its hands-off approach and to fully deploy its law enforcement authorities to promote open markets, entrepreneurship, and innovation.[70]

Vigorous antitrust enforcement is critical to the growth and dynamism of our economy, and its absence limits opportunities for honest businesses, including small businesses that struggle to compete against larger incumbents. The Commission continues to take action to

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[65] Clayton Act, 15 U.S.C. § 12 et seq. (1914). Congress in 1914 also passed the Federal Trade Commission Act, supplementing the Sherman and Clayton Acts by creating the Federal Trade Commission and assigning it with checking "unfair methods of competition." Federal Trade Commission Act, 15 U.S.C. § 41 et seq. (1914).
[66] *See* Act of Dec. 29, 1950, Pub. L. No. 81-899, 64 Stat. 1225 (codified as amended at 15 U.S.C. § 18 (1994)).
[67] *See, e.g.*, William Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 1 COLUM. BUS. L. REV. 1, 80 (2007); Daniel Crane, *Has the Obama Justice Department Reinvigorated Antitrust Enforcement?*, 65 STAN. L. REV. 13 (2012) ("[M]edia reports frequently suggested that antitrust enforcement is significantly tougher under President Obama. For better or worse, the Administration's enforcement record does not bear out this impression. With only a few exceptions, current enforcement looks much like enforcement under the Bush Administration.").
[68] *See* note 63.
[69] *See, e.g.*, Christopher Mims, *As Apple and Facebook Clash Over Ads, Mom-and-Pop Shops Fear They'll Be the Victims*, WALL ST. J. (Apr. 10, 2021), https://www.wsj.com/articles/apple-facebook-clash-over-ads-small-businesses-fear-theyll-be-impacted-11618009627; Kim Hart, *Big Tech's small biz squeeze*, AXIOS (July 12, 2021), https://www.axios.com/big-techs-small-biz-squeeze-0eb6c49b-0db4-46ed-9cb4-936e49c333d6html; *see also* REP. JIM JORDAN ET AL., REPUBLICAN STAFF OF H. COMM. ON THE JUDICIARY, REP. ON REINING IN BIG TECH'S CENSORSHIP OF CONSERVATIVES 2 (noting "Big Tech companies are large, powerful, and pivotal for much that occurs in America's economic and civic marketplaces.").
[70] *See* Oversight of the Enforcement of the Antitrust Laws Before the Subcomm. on Antitrust, Competition Pol'y and Consumer Rights of the Senate Comm. on the Judiciary, 116 Cong. at 1:02 (2019), https://www.c-span.org/video/?464378-1/antitrust-enforcement-oversight (Sen. Josh Hawley noting he sees a "culture of paralysis" when it comes to the agency's lack of vigor in enforcing the antitrust laws); Letter from U.S. Senator Amy Klobuchar, U.S. Senator Mike Lee, U.S. Congressman David Cicilline, and U.S. Congressman Ken Buck to Lina M. Khan., Chair, Federal Trade Commission (July 1, 2021) (on file with U.S. Senate) (urging the agency to continue to pursue enforcement action against Facebook even after the U.S. District Court for the District of Columbia dismissed our complaint); Letter from U.S. Senator Josh Hawley et al. to Rebecca Kelly Slaughter, Acting Chairwoman, Federal Trade Commission (Mar. 18, 2021) (on file with U.S. Senate) (requesting cooperation with congressional efforts to investigate Google).

prevent further consolidation that leads to higher prices, lower wages, and more fragile markets.

39. **In an August 2021 letter to Senator Elizabeth Warren, you said that you were skeptical of behavioral remedies to mergers, suggesting that rules governing the conduct of a company subject to a consent order "pose significant administrability problems and have often failed to prevent the merged entity from engaging in anticompetitive tactics".**

40. **Isn't it in consumers' best interest for the FTC to accept behavioral remedies to allow the procompetitive benefits of the merger to be realized, while protecting competition through a behavioral restriction?**

In passing the antitrust laws, Congress has made clear that robust, faithful, and effective enforcement of those laws is paramount to protect Americans and the growth and dynamism of our economy. Both research and experience suggest that behavioral remedies for anticompetitive mergers can pose significant administrability problems and have often failed to prevent the merged entity from engaging in anticompetitive tactics enabled by the transaction.[71]

While the antitrust agencies have at times relied on behavioral remedies, both the Commission and the Department of Justice have a stated preference for structural remedies, even for vertical mergers.[72] This preference is consistent with what Congress expects.[73] Courts have also widely acknowledged that injunction or divestiture is the presumptive remedy for an acquisition found to be illegal under Section 7 of the Clayton Act.[74] The Supreme Court in *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316 (1961) described divestiture as "the most important of antitrust remedies. It is simple, relatively easy to administer, and sure."[75]

41. **Isn't there a risk that if the FTC is too categorical in its opposition to behavioral remedies some transactions that help consumers may not happen?**

Please see the answer to 40.

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[71] See, e.g., John E. Kwoka & Diana L. Moss, Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement, 57 ANTITRUST BULL. 1, 24 (2012).
[72] U.S. DEP'T OF JUST., MERGER REMEDIES MANUAL, 16 (Sept. 2020) ("Structural remedies are strongly preferred in horizontal and vertical merger cases because they are clean and certain, effective, and avoid ongoing government regulation of the market.").
[73] California v. American Stores Co., 495 U.S. 271, 284-85, n. 11 (1990) ("As the Supreme Court has explained, Congress "made express its view that divestiture was the most suitable remedy in a suit for relief from a §7 violation: In §11 of the [Clayton] Act, Congress directed the FTC to issue orders requiring that a violator of §7 'cease and desist from the violation,' and, specifically, that the violator 'divest itself of the stock, or other share capital, or assets, held' in violation of the Act.").
[74] See, e.g., United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 326-27 (1961); United States v. Greater Buffalo Press, 402 U.S. 549, 556 (1971); Ford Motor Co. v. United States, 405 U.S. 562, 573 (1972).
[75] 366 U.S. at 330-31.

42. **The FTC's Policy Statement on Prior Approval Provisions in Merger Orders says that the FTC will "routinely require merging parties subject to a Commission order to obtain prior approval from the FTC before closing any future transaction affecting each relevant market for which a violation was alleged" and potentially other markets for a period of ten years. Congress could have provided the FTC prior approval authority when it passed the Hart-Scott-Rodino Act, but it did not. Under what authority does the FTC claim the ability to demand prior approvals?**

Requiring prior approvals was a longstanding FTC practice until 1995. Our efforts have brought the agency back in line with its prior practice of requiring prior approvals for certain future acquisitions by parties subject to an FTC consent order.

The Commission's authority to write its own orders derives from Section 5(b) of the FTC Act.[76] This includes the authority to issue "cease and desist" orders to stop unlawful practices now and in the future, but FTC orders frequently do more than stop ongoing conduct or demand that past conduct not be repeated. The Supreme Court has confirmed that the Commission's authority is not limited to stopping past violations of law: "If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its roadblock to the narrow lane the transgressor has traveled; it must be allowed to effectively close all roads to the prohibited goal, so that the order may not be by-passed with impunity."[77]

The agency's action in July 2021 returned the FTC to its longstanding practice of requiring prior approval in certain merger enforcement actions—an approach that the agency discarded in the 1990s. Since then, the agency had encountered numerous examples of companies repeatedly proposing the same or similar deals in the same market, despite the fact that the Commission had earlier determined that those deals were problematic. Companies have proposed the same transaction that the Commission previously rejected, and had even sought to buy back assets that the Commission required them to divest.

As the Commission explained when it issued its new Statement on the Use of Prior Approval Provisions in Merger Orders in October 2021, requiring merging parties to obtain prior approval before closing any future transaction serves several Commission interests: preventing facially anticompetitive deals; preserving Commission resources; and detecting anticompetitive deals that are not reportable under the HSR Act.[78] This statement put parties on notice that, going forward, Commission merger orders would, when warranted, contain prior approval and prior notice requirements for future acquisitions by the same company.[79]

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[76] 15 U.S.C. § 45(b).
[77] FTC v. Ruberoid Co., 345 U.S. 470, 473 (1952).
[78] FTC Press Release, "FTC to Restrict Future Acquisitions for Firms that Pursue Anticompetitive Mergers," (Oct. 25, 2021), https://www ftc.gov/news-events/news/press-releases/2021/10/ftc-restrict-future-acquisitions-firms-pursue-anticompetitive-mergers.
[79] *See* Press Release, Fed. Trade Comm'n, FTC to Restrict Future Acquisitions for Firms that Pursue Anticompetitive Mergers (Oct. 25, 2021), https://www ftc.gov/news-events/news/press-releases/2021/10/ftc-restrict-future-acquisitions-firms-pursue-anticompetitive-mergers.

This new policy is necessary to deter unlawful mergers and acquisitions by the same company and is part of the FTC's effort to best use its scarce resources and avoid creating incentives for a company to repeatedly attempt illegal deals.[80] This is especially important in industries where firms can engage in small acquisitions or roll-up strategies that do not require premerger notification, such as dialysis clinics,[81] supermarkets,[82] gas stations,[83] or specialty veterinary hospitals.[84]

43. **Competition law isn't supposed to protect an industry's dominant player. In light of that, I find it curious that the FTC is taking action to protect Sony—which has 68 percent of the global market for high-end video gaming consoles—from competition by attempting to block Microsoft's proposed acquisition of Activision-Blizzard-King. As you know, the Japanese company Sony has been the most vocal opponent of that deal, and, remarkably, the FTC has sided with Sony. Can you explain why the FTC thinks it is a good idea to use its resources to protect the market share of an industry's dominant player? Especially when that dominant player is a foreign company?**

I appreciate your concern about this acquisition. While I cannot address the specifics of any ongoing litigation, I note that the FTC is focusing its enforcement efforts and resources on targeting mergers that pose the greatest threats to open, competitive, and fair markets. I further note that the FTC is charged with scrutinizing any merger that threatens to violate U.S. antitrust law, including those involving foreign companies. Mergers whose effect may be to substantially lessen competition or tend to create a monopoly may harm American customers owing to their effects on product quality, price, and innovation. We apply the merger laws without regard to the nationality of either the parties or even third parties.

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

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

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

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

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

The Honorable Debbie Lesko

1. **Do you acknowledge that with government enforcement as a backstop, industry self-regulation promotes robust competition, can be more efficient than law enforcement and provides boost to legitimate commerce?**

   Whether or not industry self-regulation can be more efficient than law enforcement depends on the specific facts and circumstances.

2. **Effective self-regulation programs also should have "teeth", including referrals to the FTC, correct?**

   Referrals to the FTC can be one type of enforcement mechanism to ensure "teeth," but are far from the only such mechanism.

3. **Referrals from self-regulatory entities can actually save limited FTC staff resources and should be prioritized, correct?**

   The FTC receives valuable information and referrals from many different sources, including self-regulatory entities. Whether referrals from self-regulatory entities ultimately help conserve limited FTC staff resources is a highly fact-specific question that depends on many factors.

4. **The Direct Selling Self-Regulatory Council was launched at the recommendation of the Commission in 2019 to proactively monitor the direct selling marketplace for income and product claims. The DSSRC has referred 22 cases to the FTC in its four years—although Commission staff privately acknowledges receipt of the referrals, there is no further visibility to the public nor industry into FTC actions on the referrals despite undertaking other enforcement actions within the industry. Will you work with us and FTC staff to publicly acknowledge and provide an update on these referrals if they are not subject to ongoing enforcement actions?**

   The FTC can acknowledge publicly that we have received these referrals from the DSSRC. As you know, FTC policy "is to hold confidential the existence and targets of law enforcement investigations until the Commission issues an administrative complaint, authorizes or files a judicial complaint, announces a proposed settlement, or closes a matter," which prevents the Commission from publicly answering questions whether we have, or do not have, ongoing investigations. 63 Fed. Reg. 63477 (1998). The agency determines what law enforcement actions to pursue based on a number of factors, such as the nature and scope of the misconduct and estimated harm.

The Honorable Larry Bucshon

1. **Chair Khan, one FTC product I am particularly concerned with is the Advance Notice of Proposed Rulemaking on so-called "junk fees," as its scope is quite broad. Would you consider an optional product, like a life insurance policy or an unemployment policy on a personal installment loan, a "junk fee"?**

   The FTC has made no determinations on this issue at this time. In October of 2022, the FTC announced an Advance Notice of Proposed Rulemaking regarding deceptive or unfair acts or practices involving hidden or "junk" fees ("Fees ANPR"). The FTC's ANPR is a preliminary step in our multi-step rulemaking process set forth in Section 18 of the FTC Act, 15 U.S.C. § 57a, and is designed to help gather information about the prevalence of deceptive or unfair practices in a particular area and whether and how the FTC should consider using its rulemaking authority to address such practices. The ANPR process seeks to generate input from all stakeholders before the Commission determines whether it is appropriate to progress to a Notice of Proposed Rulemaking. Accordingly, the Fees ANPR asked a series of questions seeking comment on, among other things, the prevalence of unfair or deceptive practices related to hidden or "junk" fees, the costs and benefits of a rule that would require upfront inclusion of any mandatory fees whenever consumers are quoted a price for a good or service and other potential rule requirements to curtail unfair or deceptive fees, and alternative or additional action to such a rulemaking.

   In response to the Fees ANPR, the FTC received over 12,000 comments in connection with potentially unfair or deceptive practices relating to fee disclosures from individual consumers as well as from consumer and industry groups. These comments are available at Regulations.gov (Docket #FTC-2022-0069). The Fees ANPR specifically asked questions seeking comments relevant to optional products. For example, Question 3 sought comments regarding optional products, services or fees, including to what extent optional or required fees are related to the product or service that is the primary purpose of the transaction. In addition, Question 7 sought comments on fees that have little or no added value to consumers, including how to define or determine the value of such fees, goods or services. We are carefully considering the issues, including whether, and to what extent, a proposed rule should cover optional fees, based on the record.

The Honorable Kelly Armstrong

1. **The Commission has brought a minimal number of enforcement actions under the authority granted in the Better Online Ticket Sales (BOTS) Act. What circumstances have limited the Commission's enforcement actions related to the BOTS Act? Are there pending enforcement actions related to the BOTS Act? What additional enforcement authority would assist the Commission's enforcement of the BOTS Act?**

   The primary challenge to enforcing the BOTS Act is the difficulty of identifying targets. Given that the act is violated by circumventing ticket purchase rules imposed by the "primary market" ticket sellers, such as Ticketmaster, the FTC generally must rely on such primary market ticket sellers to report potential violations of the BOTS Act and provide evidence sufficient to support a case in federal court against a target.

   As you know, FTC policy "is to hold confidential the existence and targets of law enforcement investigations until the Commission issues an administrative complaint, authorizes or files a judicial complaint, announces a proposed settlement, or closes a matter," which prevents the Commission from publicly answering questions whether we have, or do not have, ongoing investigations. 63 Fed. Reg. 63477 (1998). Further, as the Commission has requested, additional resources would assist in the Commission's enforcement of the BOTS Act and other critical areas.

2. **News reports indicate that the Commission may bring first enforcement actions in decades under the Robinson Patman Act. Courts and the Commission have held the position that the Act should be interpreted and applied in a manner consistent with other antitrust laws when possible. What are the Commission's views on the Robinson Patman Act? What are the Commission's views how the Robinson Patman Act fits with other antitrust laws? Are there legislative changes to the Robinson Patman Act that would address inconsistencies with other antitrust laws?**

   Antitrust laws, as a whole, aim to promote fair competition and prevent abuse of market power. I am fully committed to deploying the full set of statutory authorities and tools Congress has granted to us to combat unlawful practices, including the Robinson Patman Act ("RPA"). The RPA, among other things, complements other antitrust laws by addressing and targeting price discrimination practices—i.e., a seller charging different prices to different buyers for the same product or services, without a legitimate justification. RPA thus fits in the broader antitrust enforcement toolbox because, when enforced, it promotes fair competition by prohibiting practices that could lead to unfair advantages for certain buyers or hinder the ability of smaller businesses to compete.

3. **The Commission's policy statement on Section 5 states that determining whether alleged conduct is an unfair method of competition "does not require a separate showing of market power or market definition," and that "the inquiry will not focus on the 'rule of reason' inquiries" to distinguish between procompetitive and anticompetitive conduct. How will the Commission decide what constitutes an unfair method of competition if it can avoid defining markets and showing actual market power, and if it is not guided by rule of reason analysis? How does the policy statement**

provide guidance to the business community when the standard does not require a separate showing of market power or market definition"?

The Commission's statement on "unfair methods of competition" serves as a guide to the FTC's interpretation of the scope of its authority under Section 5. Consistent with the statutory text, structure, history, and legal precedent, the statement makes clear that Section 5 reaches beyond the Sherman and Clayton Acts. One of the goals of the statement is to assist the public, business community, antitrust practitioners, and courts by laying out the framework the FTC will use to identify business practices that constitute unfair methods of competition.

Congress passed the FTC Act to prohibit "unfair methods of competition"—language that marked a clear distinction from the Sherman Act. With this text, Congress distinguished between fair and unfair methods of competition and charged the FTC with fleshing out that distinction based on expertise it developed through its unique institutional tools, such as the ability to conduct industry-wide studies. The crucial point is that lawmakers deliberately avoided borrowing language from the Sherman Act or from judicial interpretations of it. They wanted Section 5 to apply to conduct that threatened open and competitive markets even if it did not fall within the four corners of the Sherman Act.

The policy statement identifies the framework and factors the Commission will consider when determining whether a business practice constitutes an "unfair method of competition." The statement has important guardrails built into the definitions of "methods of competition," "unfair," and the "tendency to harm competitive conditions." It also identifies the types of justifications the Commission will and will not consider, in accordance with the relevant case law.

Inasmuch as the policy statement does not neatly set out a bounded list of prohibited practices, this follows Congress's design. Lawmakers opted against a pre-specified list of proscribed tactics because they knew that such a list would quickly become outdated. Congress instead tasked the FTC with concretizing the meaning of "unfair methods of competition" through litigation and rulemaking, informed by the agency's expertise and ability to do rigorous research into real-world markets and evolving business practices.[85] The

[85] FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 242 (1972) (holding that "the Commission has broad powers to declare trade practices unfair."); FTC v. Texaco, Inc., 393 U.S. 223, 262 (1968) (holding that "[i]n large measure the task of defining 'unfair methods of competition' was left to the [FTC]. . . and that the legislative history shows that Congress concluded that the best check on unfair competition would be [a practical and expert administrative body] . . . [that applies] the rule enacted by Congress to particular business situations"); FTC v. Brown Shoe, 384 U.S. 316, 321 (1966) (holding that the FTC "has broad powers to declare trade practices unfair[,] particularly . . . with regard to trade practices which conflict with the basic policies of the Sherman and Clayton Acts"); Atl. Refin. Co. v. FTC, 381 U.S. 357, 369 (1965) (holding that all that is necessary is to discover conduct that runs counter to the public policy declared in the Act. . ." and that "there are many unfair methods of competition that do not assume the proportions of antitrust violations"); FTC v. Colgate-Palmolive et al., 380 U.S. 377, 384–85 (1965) (noting that the proscriptions in section 5 are flexible); Pan Am. World Airways v. United States, 371 U.S. 296, 306–308 (1963) ("[Section 5] was designed to bolster and strengthen antitrust enforcement[,] and the definitions are not limited to precise practices that can readily be catalogued. They take their meaning from the facts of each case and the impact of particular practices on competition and monopoly"); FTC v. Nat'l Lead Co., 352 U.S. 419, 428–29 (1957) (affirming past rulings finding that the commission is clothed with "wide discretion in. . . [bringing] an end to the

policy statement outlines the framework and factors the Commission will use to do so, guided by many decades of agency experience and judicial precedent.

4. What sources or documentation is the Commission relying on for claims that consumers will spend three fewer hour shopping for a vehicle if the Motor Vehicle Dealers Trade Regulation Rule is promulgated? Why did the Commission fail to identify any such sources or documentation in the Notice of Proposed Rulemaking (NPRM)?

The NPRM sets forth the basis for the FTC's estimates, cites to data where available, and where data is not available, lays out the FTC's assumptions and asks the public to comment. The public did so, and the Commission is carefully reviewing comments as it considers next steps.

To calculate one aspect of the benefits of the proposal, the FTC quantified time savings for consumers who ultimately purchase a vehicle. To conduct this calculation, the FTC used data from: *2020 Cox Automotive Car Buyer Journey* (2020); Bur. of Trans. Stats., *National Transportation Statistics*, Table 1-17; and Bureau of Lab. Stats., *May 2020 National Occupational Employment and Wage Estimates, United States*. The Commission also relied on scholarly literature to compute the value of consumers' non-work time (Daniel S. Hamermesh, *What's to Know About Time Use?*, 30 J. Econ. Survs. 198, 203 (2016)). The NPRM stated that the FTC assumed that consumers would save 3 hours per motor vehicle transaction under the proposal, which addresses bait and switch tactics and hidden charges—practices that cause consumers to waste time and incur additional charges in what is already the second most expensive purchase most consumers will make and take business from law abiding dealerships. The NPRM noted that 3 hours corresponds to just 20% of an average consumer's time spent on researching, shopping, and visiting dealerships, based on a Cox study that found consumers spend 15 hours on such activities.

Notably, as discussed in the NPRM, the Commission did not quantify other important benefits of the proposed rule, including time saved by consumers who visit a dealership but then abandon the transaction once they learn of deception, and money saved by consumers who would avoid hidden add-on charges under the proposed rule.

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unfair practices found to exist[;]. . . [is] 'the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed[;] . . . has wide latitude for judgment and'[;]. . . [that] 'to attain the objectives Congress envisioned, [the FTC] cannot be required to confine its road block to the narrow lane the transgressor has traveled'"); Am. Airlines, Inc. v. N. Am. Airlines, Inc., 351 U.S. 79, 85 (1956) (finding that "'[u]nfair or deceptive practices or unfair methods of competition'. . . are broader concepts than the common-law idea of unfair competition"); FTC v. Motion Picture Advert. Serv. Co., 344 U.S. 392, 394–95 (1953) (noting that "Congress advisedly left the concept [of unfair methods of competition] flexible . . . [and] designed it to supplement and bolster the Sherman Act and the Clayton Act[,] [so as] to stop . . . acts and practices [in their incipiency] which, when full blown, would violate those Acts[,]. . . as well as to condemn as 'unfair methods of competition' existing violations of them"); FTC v. Cement Inst., 333 U.S. 683, 708 (1948) (holding that conduct that falls short of violating the Sherman Act may violate Section 5); FTC v. R.F. Keppel & Bro., Inc., 291 U.S. 304, 310 (1934) (finding that unfair methods of competition not limited to those "which are forbidden at common law or which are likely to grow into violations of the Sherman Act"); FTC v. Texaco, Inc., 393 U.S. 223, 226 ("While the ultimate responsibility for the construction of this statute rests with the courts, we have held on many occasions that the determinations of the Commission, an expert body charged with the practical application of the statute, are entitled to great weight.").

5. Regarding the Motor Vehicle Dealers Trade Regulation Rule, the Commission states that there were 62.1 million vehicle transactions in 2019. It is true that this figure includes fleet sales (i.e., business-to-business sales) as well as private sales, both of which do not typically involve a motor vehicle dealer? If so, does that alter the Commission's estimates that the rule would save consumers $31 billion annually?

The FTC relied on the table "New and Used Passenger Car and Light Truck Sales and Leases," published by the Bureau of Transportation Statistics in its report National Transportation Statistics (Table 1-17), to determine the number of vehicle transactions. The NPRM cited the table in the Preliminary Regulatory Analysis.

The Commission is carefully reviewing comments received about the proposed rule, including comments regarding its Preliminary Regulatory Analysis, as it considers next steps.

6. Does the Commission's cost-savings analysis on the Motor Vehicle Dealers Trade Regulation Rule account for time and resources necessary to comply with the several disclosures required for "add on" products? Please provide an estimate of the additional time would be required for consumers to review and consider each disclosure.

The NPRM addressed both costs and benefits associated with provisions relating to Add-ons in the Preliminary Regulatory Analysis. The benefits associated with these provisions were addressed in Section XII(B) and the costs in Section XII(C). These analyses accounted for the time and resources necessary to comply with the proposed Add-on disclosure requirements in the NPRM.

7. Section 1.10 of the Commission's procedural rules states: "Prior to the commencement of any trade regulation rule proceeding, the Commission must publish in the Federal Register an advance notice of such proposed proceeding." Since the Motor Vehicle Dealers Trade Regulation Rule is a "trade regulation rule", why did the Commission fail to issue an Announced Notice of Proposed Rulemaking (ANPRM)? Please explain how the issuance of a Notice of Proposed Rulemaking (NRPM) is consistent with Section 1.10?

Subpart B of part 1 of the Commission's Rules of Practice, which contains section 1.10, does not apply to this rulemaking. The FTC published the proposed rule under statutory authority granted by section 1029 of the Dodd-Frank Act, which authorizes the Commission to promulgate rules governing certain motor vehicle dealers in accordance with section 553 of the APA. *See* 12 U.S.C. § 5519 (section 1029 of Dodd-Frank); 5 U.S.C. § 553 (section 553 of the APA). Rulemaking under the APA is covered by subpart C of part 1 of the Commission's Rules of Practice. *See* 16 C.F.R. § 1.21.

8. Did any employee, Commissioner, or consultant engage or communicate with the Consumer Financial Protection Bureau on the Motor Vehicle Dealers Trade Regulation Rule prior to it being proposed on July 13, 2022? If so, please provide the dates.

The FTC regularly consults with other agencies on matters of mutual concern. Interagency discussions generally are protected under various exemptions, including the deliberative-process privilege, attorney-client privilege, and attorney work product privilege.

With respect to the Consumer Financial Protection Bureau ("CFPB") specifically, Congress expressly directed the CFPB and FTC to cooperate with each other. *See, e.g.*, 12 U.S.C. § 5495 ("The Bureau shall coordinate with the [Securities and Exchange] Commission, the Commodity Futures Trading Commission, the Federal Trade Commission, and other Federal agencies and State regulators, as appropriate, to promote consistent regulatory treatment of consumer financial and investment products and services"); 12 U.S.C. § 5514(c)(3)(A) (directing the CFPB and FTC to "negotiate an agreement for coordinating with respect to enforcement actions by each agency"); 12 U.S.C. § 5581(b)(5)(D) (directing the CFPB and FTC to "negotiate an agreement with respect to rulemaking by each agency, including consultation with the other agency prior to proposing a rule and during the comment period"). The FTC and CFPB reauthorized their memorandum of understanding in February 2019.[86]

9. In March 2022, Sen. Warren sent a letter urging the Commission to "immediately begin a review of the laws regulating automobile sales and begin the rulemaking process to improve consumer protections and pricing practices in this industry." Please provide a copy of the Commission's response to Sen. Warren's March letter and/or provide details regarding any briefing provided Sen. Warren's office for the record.

As you note, the Commission received a letter from Senator Warren in March 2022 expressing her concerns about predatory pricing and deceptive practices by automobile dealers. FTC staff offered to provide a briefing to Sen. Warren's office, but a briefing was not scheduled and no written responses were provided.

[86] See Press Release, Fed. Trade Comm'n, FTC and CFPB Reauthorize Memorandum of Understanding (Feb. 26, 2019), https://www ftc.gov/news-events/press-releases/2019/02/ftc-cfpb-reauthorize-memorandum-understanding.

The Honorable Rick W. Allen

1. **Cleaning products are essential to public health and quality of life and consumers have a right to know, understand, and trust the ingredients in the products they bring into their homes.**

2. **However, the lack of a federal labeling standard for cleaning products makes it challenging for consumers to access ingredient information important to their families.**

3. **How would a uniform labeling standard on cleaning product's ingredient communication benefit consumers in terms of the ability to access clear, reliable information regardless of where they live or how they purchase cleaning products?**

   Cleaning products must be labeled under the Cleaning Product Labeling Act of 2017, administered by the EPA. While the FTC does not mandate ingredient labels if advertisers misrepresent the ingredients in their products, the efficacy of those ingredients, or any other material attribute, the Commission has the ability to sue under Sections 5 and 13(b) of the FTC Act.

The Honorable Russ Fulcher

The proposed "Motor Vehicle Dealers Trade Regulation Rule" claims it will save consumers $31 billion, while only imposing $1.4 billion in regulatory costs.

The entirety of these savings is based on FTC's claim that consumers will spend 3 fewer hours shopping for a vehicle. The Commission arrives at that figure by taking the number of vehicle transactions in 2019, which it states is 62.1 million, multiplying it by three, and then multiplying that sum by $22.20, which is the value of non-work time for the average U.S. worker.

The three hours of savings is based on the Commission's "assumption" that the proposed rule will save consumers 3 hours. The rule cites no support for this assumption. If your assumption is wrong, the entirety of your savings would be illusory.

1. Chair Khan: What sources or documentation does the Commission have for this assumption?

The NPRM sets forth the basis for the FTC's estimates, cites to data where available, and where data is not available, lays out the FTC's assumptions and asks the public to comment. The public did so, and the Commission is carefully reviewing comments as it considers next steps.

To calculate one aspect of the benefits of the proposal, the FTC quantified time savings for consumers who ultimately purchase a vehicle. To conduct this calculation, the FTC used data from: *2020 Cox Automotive Car Buyer Journey* (2020); Bur. of Trans. Stats., *National Transportation Statistics*, Table 1-17; and Bureau of Lab. Stats., *May 2020 National Occupational Employment and Wage Estimates, United States*. The Commission also relied on scholarly literature to compute the value of consumers' non-work time (Daniel S. Hamermesh, *What's to Know About Time Use?*, 30 J. Econ. Survs. 198, 203 (2016)). The NPRM stated that the FTC assumed that consumers would save 3 hours per motor vehicle transaction under the proposal, which addresses bait and switch tactics and hidden charges—practices that cause consumers to waste time and incur additional charges in what is already the second most expensive purchase most consumers will make and take business from law abiding dealerships. The NPRM noted that 3 hours corresponds to just 20% of an average consumer's time spent on researching, shopping, and visiting dealerships, based on a Cox study that found consumers spend 15 hours on such activities.

Notably, as discussed in the NPRM, the Commission did not quantify other important benefits of the proposed rule, including time saved by consumers who visit a dealership but then abandon the transaction once they learn of deception, and money saved by consumers who would avoid hidden add-on charges under the proposed rule**.**

2. Chair Khan: Why did the Commission fail to identify any such sources or documentation in the Notice of Proposed Rulemaking (NPRM)?

The data considered by the Commission is cited in the NPRM.

The 62.1 million vehicle transaction figure includes fleet sales (i.e., business-to-business sales) as well as private sales that do not involve motor vehicle dealers. The actual number of vehicle deliveries for the period upon which the Commission based this figure (2019) is less than 43 million. Consequently, the consumer savings figure the Commission touts to the public is overstated.

3. **Chair Khan: Why did the Commission include in its cost savings calculation millions of transactions that have no relationship to the proposed rule?**

   The FTC relied on the table "New and Used Passenger Car and Light Truck Sales and Leases," published by the Bureau of Transportation Statistics in its report National Transportation Statistics (Table 1-17), to determine the number of vehicle transactions. The NPRM cited the table in the Preliminary Regulatory Analysis.

   The Commission is carefully reviewing comments received about the proposed rule, including comments regarding its Preliminary Regulatory Analysis, as it considers next steps.

Your rule also mandates up to four new disclosures for car buyers to sign related to "add-on" products. As we all know, burdening consumers with more government paperwork adds time.

4. **Chair Khan: Did your "assumption" factor in that your own rule will cost consumers more time in the showroom?**

   The NPRM addressed both costs and benefits associated with provisions relating to Add-ons in the Preliminary Regulatory Analysis. The benefits associated with these provisions were addressed in Section XII(B) and the costs in Section XII(C). These analyses accounted for the time and resources necessary to comply with the proposed Add-on disclosure requirements in the NPRM**.**

5. **Chair Khan: Using the Commission's calculation of the value of a consumer's nonwork time, can you provide an estimate of how much the added paperwork mandated under the proposed rule will cost consumers?**

   The NPRM addressed both costs and benefits associated with provisions relating to Add-ons in the Preliminary Regulatory Analysis. The benefits associated with these provisions were addressed in Section XII(B) and the costs in Section XII(C). These analyses accounted for the time and resources necessary to comply with the proposed Add-on disclosure requirements in the NPRM.

In response to a question for the record by Sen. Cruz last year, you stated, "*For a recent and exceptionally well-done example of an economic analysis that FTC economists played a leading role in formulating, I recommend to you the notice of proposed rulemaking concerning a Motor Vehicle Dealers Trade Regulation Rule*." The billion dollar-plus regulatory cost of this rule is real.

Your economic analysis of the proposed rule is based on inflated figures and an unsupported "assumption" of consumer savings, which may or may not materialize.

6. **Chair Khan: Is this what passes in the FTC now for an "exceptionally well-done example of an economic analysis" – an analysis based on inflated data and an assumption, supported by no economic data?**

   The Preliminary Regulatory Analysis in the NPRM integrates relevant empirical data, econometric modeling, and scholarly analysis to assess the benefits and costs of the proposed rule. Where the analysis makes assumptions, it clearly identifies those assumptions, and invited the public to comment.

   The Commission is carefully reviewing those comments, including those addressing the data and assumptions in the Preliminary Regulatory Analysis, as it considers next steps.

Section 1.10 of the FTC's procedural rules states: "Prior to the commencement of any trade regulation rule proceeding, the Commission must publish in the Federal Register an advance notice of such proposed proceeding."[3]

7. **Chair Khan: Since the proposed "Motor Vehicle Dealers Trade Regulation Rule" is a "trade regulation rule", why didn't the FTC first issue an Announced Notice of Proposed Rulemaking (ANPRM)?**

   The Commission has adhered to applicable rulemaking procedures. The FTC published the proposed rule under statutory authority granted by Congress under section 1029 of the Dodd-Frank Act, which authorizes the Commission to promulgate rules governing certain motor vehicle dealers in accordance with section 553 of the APA. *See* 12 U.S.C. § 5519 (section 1029 of Dodd-Frank); 5 U.S.C. § 553 (section 553 of the APA). Rulemaking under the APA is covered by subpart C of part 1 of the Commission's Rules of Practice. *See* 16 C.F.R. § 1.21. Under these applicable procedures, the Commission is permitted to publish the proposed rule in the manner it has, with issuance of an NPRM. *See* 16 C.F.R. § 1.26. Section 1.10 of the Commission's Rules of Practice appears in subpart B, which does not apply to this APA rulemaking, but applies instead to procedures described in section 18 of the FTC Act.

8. **Chair Khan: Did the FTC violate its own rules by not issuing an ANPRM?**

   a) **If not, explain how the Commission's issuance of an NPRM in this matter is consistent with Section 1.10 of the FTC's procedural rules.**

      Please see the answer to 7.

Last year, a bipartisan letter led by my colleague Chris Pappas of New Hampshire signed by 29 House members was sent to you asking that the 60-day comment period be reopened for an additional 60 to 90 days. Even the Small Business Administration's Office of Small Business Advocacy supported extending the comment period. This request was denied.

9. Chair Khan: Can you provide me with a list of all the rulemakings where the comment period was extended and another list of all the rules where extending the comment period was denied and designating whether they were ANPRMs or NPRMs ("Notice of Proposed Rule-making") during your tenure?

The Commission generally tries to afford public commenters 60 days for rulemakings. This is usually more than sufficient for public commenters to put comments in. With respect to the Motor Vehicle Dealers Trade Regulation Rule, which was a Notice of Proposed Rulemaking ("NPRM"), the Commission received comments both supporting and opposing an extension of time, and there were no exigent circumstances such as religious holidays that might have conflicted with filing public comments. Given the opposition to an extension and the fact that, with respect to this rule, commenters actually had had 80 days from the public announcement of the NPRM to comment, the Commission determined to decline this request for an extension. In other situations where the Commission granted an extension, it did so where there was no public comment opposing an extension of time and/or exigent circumstances such as the public comment period ending shortly before or after a significant religious holiday observance. For example, in the Funeral Rule NPRM, the Commission extended the public comment period for 14 days out of 60 requested, because the public comment ended shortly after the Christmas/New Year holiday break. The same was true in the Unfair or Deceptive Fees Trade Regulation Rule Advanced Notice of Proposed Rulemaking ("ANPRM"), where the Commission extended the public comment period deadline 30 days out of 45 requested because of the holiday period. The Business Opportunity ANPRM was extended for 7 days (out of 21 requested), again because of the holiday season. Also, the Energy Labeling ANPRM was extended a month because, otherwise, the due date would have fallen between Christmas and New Year's. In the Non-Compete Clause NPRM and the Commercial Surveillance and Data Security ANPRM, the Commission extended the deadline for 30 out of 60 days requested. In the first, the public comment period was extended and then fell after the Easter holiday period, and

Your proposed rulemaking purports to help consumers, yet none of the new paperwork requirements it foists on car buyers has been tested. It is my understanding – and basic due diligence would suggest – that when a federal agency is going to mandate marketplace changes that affect consumers, the agency will beta test those changes to ensure that they are beneficial.

For example, the FTC was part of a multiagency, multiyear effort that concluded in 2009 to create model privacy disclosures under Gramm-Leach-Bliley. That effort involved quantitative testing of consumers.

Additionally, in 2008, the Federal Reserve Board conducted extensive consumer testing to review the effectiveness of consumer disclosures about mortgage broker fees.

10. Chair Khan: Wouldn't it have been prudent to consumer test the FTC's proposed paperwork requirements before proposing them, to see if they work as intended?

The proposal would require disclosures regarding just three critical areas: prices, add-ons, and payment totals. The proposal would require that these disclosures be clear and conspicuous, which, for example, means that a written disclosure would have to be in a size that stands out. A specific font or font size, however, would not be mandated, nor would the specific terms or format used, nor would any particular use of capitalization, punctuation, ink color, or paper color or size. Further, the proposed disclosures would not mandate specific language. Thus, there were no specific formatting or language requirements for the Commission to test. The Commission's proposal refrained from such additional formal mandates in an effort to provide motor vehicle dealers with flexibility, within the bounds of the law, to provide this essential information, including so that dealers already conveying such information in a non-deceptive manner may continue to do so.

The Commission is carefully considering the comments it received on its proposal, including comments from stakeholders regarding the proposed disclosures.

11. Chair Khan: Since you don't know whether your new government paperwork requirements will work, if these new paperwork requirements wind up confusing customers, what contingency plan has the FTC developed to correct its mistake?

The Commission is continuing to evaluate the best course of action to protect consumers in these vital transactions, and is carefully considering all stakeholder perspectives it received in the course of public comment.

The current head of the Consumer Financial Protection Bureau, Rohit Chopra, took that post after resigning from the FTC in 2021.

12. Chair Khan: What consultations, communications, or other coordination did the FTC's employees, or its consultants have with the Consumer Financial Protection Bureau related to the Motor Vehicle Dealers Trade Regulation Rule before it was proposed on July 13, 2022? And if so, please provide the dates.

Generally speaking, the FTC does consult with our partner agencies such as the Federal Reserve and the Consumer Financial Protection Bureau about areas of shared jurisdiction and responsibility, including regarding motor vehicle sales and financing.

In March 2022, Sen. Warren sent you a letter urging the FTC to "immediately begin a review of the laws regulating automobile sales and begin the rulemaking process to improve consumer protections and pricing practices in this industry."

13. Chair Khan: Is this proposed rulemaking in response to the Senator's request?

No. The FTC's proposed rule for motor vehicle dealers followed many years of enforcement actions, outreach, and research in this area. In 2010, Congress authorized the FTC to prescribe rules with respect to unfair or deceptive practices by motor vehicle dealers. For more than a decade since this grant of authority, the FTC has continued its robust enforcement work with more than 50 vehicle-related cases. The FTC also conducted information-gathering efforts such as a series of three agency roundtables held in 2011 and

industry research, including a qualitative study of consumer auto buying experiences discussed in two 2020 staff reports, and engaged in consumer education and business guidance—work that was undertaken in the years prior to my tenure. Despite the Commission's efforts and the efforts of its federal and state partners, chronic unlawful practices persist in the marketplace, suggesting the need for additional measures to deter deceptive and unfair practices. The proposed rule continues the FTC's sustained effort to protect consumers and law-abiding dealers, independent of Senator Warren's letter.

14. Chair Khan: Can you provide a copy of the FTC's response to Sen. Warren's March letter and/or provide details regarding any briefing you provided Sen. Warren's office for the record?

As you note, the Commission received a letter from Senator Warren in March 2022 expressing her concerns about predatory pricing and deceptive practices by automobile dealers. FTC staff offered to provide a briefing to Sen. Warren's office, but a briefing was not scheduled and no written responses were provided.

This proposed regulation will cost $1.4 billion, and these costs will be borne primarily by the consumer in the form of high prices for vehicles. This cost is made worse particularly for consumers in rural areas where dealerships are less available, and choice is harder to provide.

Last week, the Biden administration put out a rule that would "gas stove" affordable vehicles, by raising the average upfront per-vehicle cost by $1,400 in model year 2032[4].

15. Is the FTC mindful of what impact the proposed Motor Vehicle Dealer Trade Regulation Rule will have on inflation, or how taken together the costs of these rules will price millions of working Americans entirely out of the new car market?

Car prices have indeed contributed significantly to inflation over the past several years. A recent BLS study found that auto dealers contributed significantly to new-vehicle consumer inflation by marking up car prices during the country's recovery from the COVID-19 pandemic. The mark ups included substantial increases in the price of add-on products like insurance and extended warranties – increases that are not attributable to supply chain issues. The proposed rule would require dealers to compete on the prices they are actually offering, allowing working Americans to compare across dealerships and seek a price they can actually afford, and choose law-abiding dealerships over ones that advertise prices deceptively. The Commission is carefully considering all comments it received in response to the proposed rule as it considers next steps.

The Honorable Diana Harshbarger

1. **The financial survival of independent grocers and pharmacies is often tied to the health of rural communities, which often rely on family-owned grocers and pharmacies for basic necessities like food and medicine. What has the FTC studied, and concluded, in terms of allegations of conflicts of interest, anti-competitive conduct, and marketplace distortions, which disproportionately impact our constituents and these essential businesses in our rural communities?**

   The agency has heard concerns from independent grocers in particular, including those in rural areas, about how price discrimination, particularly by the big wholesalers or big retailers, could be coming at the expense of independent grocers and exacerbating supply shortages. This is an area the FTC takes seriously, and we are looking closely at how the Robinson-Patman Act could be reactivated.

   The FTC has several tools available that are relevant to these issues. This includes the FTC's authority under § 6(b) of the FTC Act to compel companies to provide information regarding their organization, business practices, management, and business relationships.[87] This authority allows the FTC to study important markets and market developments, and is the basis for the FTC's ongoing study of the impact of supply chain disruptions. In November 2021, the FTC issued compulsory orders to nine companies requiring information and documents about the causes and competitive effects of supply chain disruptions in consumer-packaged goods and grocery products.[88] FTC staff are analyzing the information and documents provided by the order recipients, but the Commission has not yet reached any conclusions in this inquiry.

   In addition, the FTC is studying how pharmacy benefit managers (PBMs) affect the market. On June 7, 2022, the Commission authorized staff to issue compulsory orders for data and documents to the six largest PBMs.[89] These PBMs negotiate prices, access, rebates and fees with drug manufacturers, create drug formularies and surrounding policies, and create pharmacy networks and reimburse pharmacies for patients' prescriptions. The largest pharmacy benefits managers are now vertically integrated with the largest health plans as well as with GPOs (or group purchasing organizations), clinics, and retail pharmacies. Many of these contractual relationships are non-public.

   As part of its ongoing inquiry into PBMs and their impact on the accessibility and affordability of prescription drugs, on May 17, 2023, the FTC issued compulsory orders to two GPOs.[90] GPOs, sometimes also called rebate aggregators, negotiate rebates with drug manufacturers on behalf of the PBMs and hold the contracts that govern those rebates.

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[87] 15 U.S.C. § 46(b).
[88] Press Release, Fed. Trade Comm'n, FTC Launches Inquiry Into Supply Chain Disruptions (Nov. 29, 2021), https://www ftc.gov/news-events/news/press-releases/2021/11/ftc-launches-inquiry-supply-chain-disruptions.
[89] Press Release, Fed. Trade Comm'n, FTC Launches Inquiry Into Prescription Drug Middlemen Industry (June 7, 2022), https://www ftc.gov/news-events/news/press-releases/2022/06/ftc-launches-inquiry-prescription-drug-middlemen-industry.
[90] Press Release, Fed. Trade Comm'n, FTC Deepens Inquiry into Prescription Drug Middlemen (May 17, 2023), https://www ftc.gov/news-events/news/press-releases/2023/05/ftc-deepens-inquiry-prescription-drug-middlemen.

Many of the key questions the agency hopes to be able to answer by completion of the PBM 6(b) study relate to how PBM practices impact the cost of prescription drugs. Specifically, the study is aimed at shedding light on several practices that have drawn scrutiny in recent years including, but not limited to: potentially unfair audits of independent pharmacies; fees and clawbacks charged to unaffiliated pharmacies; and the costs of prescription drugs to payers and patients.

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

2. **It's been over a year since the FTC initiated its study of supply chain issues in the grocery markets and the study of PBMs. I certainly hope the study will address whether consolidation with PBMs and in the food retail sector make it impossible for smaller independent competitors to survive. We know that many rural communities rely on small independent grocers and pharmacies to get access to basic necessities. When do you expect to complete that report?**

As described more fully above in the answer to your Question #1, in November 2021, the FTC began the supply chain study requiring nine companies to provide information and documents about the causes and competitive effects of supply chain disruptions in consumer-packaged goods and grocery products.[91]

On June 7, 2022, the Commission began the PBM study when it authorized staff to issue compulsory orders for data and documents to the six largest PBMs;[92] on May 17, 2023, the Commission authorized staff to issue two additional Orders for data and documents to two GPOs.[93] With this study, the FTC is analyzing the impact of vertically integrated PBMs on the access and affordability of medicine.

Staff is working diligently to review and synthesize the companies' responses to the Supply Chain 6(b) study, and working diligently on the PBM 6(b) study to collect the companies' responses and study their data. We are working on both studies with the intent of releasing public reports.

Bloomberg recently reported, based on data obtained through a FOIA request, that 71 FTC "line staff" attorneys at the GS-15 pay level left between 2021 and 2022, the highest number of such departures in 20 years.

[91] Press Release, Fed. Trade Comm'n, FTC Launches Inquiry Into Supply Chain Disruptions (Nov. 29, 2021), https://www ftc.gov/news-events/news/press-releases/2021/11/ftc-launches-inquiry-supply-chain-disruptions.
[92] Press Release, Fed. Trade Comm'n, FTC Launches Inquiry Into Prescription Drug Middlemen Industry (June 7, 2022), https://www ftc.gov/news-events/news/press-releases/2022/06/ftc-launches-inquiry-prescription-drug-middlemen-industry.
[93] Press Release, Fed. Trade Comm'n, FTC Deepens Inquiry into Prescription Drug Middlemen (May 17, 2023), https://www ftc.gov/news-events/news/press-releases/2023/05/ftc-deepens-inquiry-prescription-drug-middlemen.

3. What is the role of your front office in the hiring decisions for replacement of these career positions?

Please see the answers to 3(a) and (b).

a) Are there ideological litmus tests, or a requirement to come from certain prior jobs -- at plaintiffs' firms, or having worked in private practice with current Antitrust Division leadership?

No. Attorney and law clerk positions at the FTC are in the excepted service under the regulatory provisions of 5 CFR § 213.3102 (d) and (e), respectively. Agencies may make appointments for these positions which are other than those of a confidential or policy-determining character using the Schedule A authority. FTC applies the U.S. Office of Personnel Management (OPM) GS-905 General Attorney Series Classification Standards (OPM Classification Standards) to classify and grade attorney positions. OPM does not publish qualification standards for attorney positions but allows agencies to set their own qualification requirements; generally, a Juris Doctor (J.D.) degree from an accredited institution and applicable bar membership is required. An example of FTC qualification standards used in vacancies is listed below:

Minimum Requirements

Applicants must have attained the first professional law degree (LL.B. or J.D.) from an accredited law school and be an active member in good standing of the bar of a state, the District of Columbia, Puerto Rico, or a U.S. territory. Applicants must demonstrate excellent writing skills and be able to work effectively with other people, exercise sound judgment, and exhibit a strong interest in the work of the agency.

Additional Requirements

GS-12 Positions

For appointments to attorney positions: active member of the bar in good standing and 12 months of legal experience after graduation from law school.

GS-13 Positions

For appointments to attorney positions: active member of the bar in good standing and 24 months of legal experience after graduation from law school.

GS-14 Positions

For appointments to attorney positions: active member of the bar in good standing and 42 months of legal experience after graduation from law school.

GS-15 Positions

For attorney appointments: active member of the bar in good standing and 60 months of legal experience after graduation from law school.

Note: Legal and nonlegal experience gained in the Federal Government before completing law school does not satisfy post law school experience requirements.

Experience refers to paid and unpaid experience, including volunteer work done through National Service programs (e.g., Peace Corps, AmeriCorps) and other organizations (e.g., professional; philanthropic; religious; spiritual; community, student, social). Volunteer work helps build critical competencies, knowledge, and skills and can provide valuable

training and experience that translates directly to paid employment. You will receive credit for all qualifying experience, including volunteer experience.

Only experience and education obtained by the closing date of this announcement will be considered.

Ideal candidates will have excellent legal research and writing abilities, strong organizational and analytical skills in presenting written arguments and excellent oral communication skills. Candidates also would be able to work effectively with other people, exercise sound judgment, and exhibit a strong interest in the work of the agency. Litigation and antitrust experience involving the work of the Health Care, Mergers I, Mergers II, Mergers III, Mergers IV, Anticompetitive Practices Divisions is highly desired.

b) Has your front office ever consulted with Capitol Hill when determining whether to hire a career staffer?

No. Bureau and Office selecting officials have the authority to select a candidate, and final appointing authority rests with the Human Capital Management Office. While the Chair has official appointing authority for all positions within the FTC, this authority has been delegated to the Chief Human Capital Officer and redelegated to the Director of Human Capital Operations. As a result, the Chair is not involved in the day-to-day hiring actions of permanent General Schedule employees.

c) Has your office ever consulted with the White House Office of Presidential Personnel when determining whether to hire a career staffer?

No. Please see the answer to 3(b).

4. Would you please share all correspondence related to hiring of FTC personnel between your current and prior Chief's of Staff and:

a) Any House or Senate Member and/or House or Senate staffer?

Please see the answer to 3(b).

b) The White House Office of Presidential Personnel?

Please see the answer to 3(b).

c) Any hiring authority within the Federal Trade Commission?

Please see the answer to 3.

5. Rulemakings on privacy and non-competes tread on what should be legislative turf and will leave gaps where the FTC lacks jurisdiction. What is the rationale for the FTC to act as a quasi-legislature, instead of as an expert agency advising Congress?

Congress authorized the FTC to enforce prohibitions against unfair methods of competition and unfair or deceptive acts or practices through rulemaking as well as through case-by-case adjudication. Although the Commission has primarily pursued antitrust enforcement through adjudication, exercise of the Commission's rulemaking authority can deliver several benefits—including greater legal clarity and predictability, greater administrability and efficiency of enforcement, and greater public participation and airing of a maximally broad range of viewpoints and criticisms.

Because of the procedural steps required in rulemaking proceedings, the Commission will have ample opportunity to review our efforts in light of any new developments. If Congress passes legislation on privacy or non-competes, or if there is any other significant change in applicable law, the Commission will be able to reassess the value-add of our rulemaking efforts and whether continuing with the rulemaking proceeding is a sound use of resources. The recent steps taken by lawmakers to advance federal privacy legislation are highly encouraging, and FTC staff stands ready to continue aiding that process through technical assistance or otherwise sharing expertise. At minimum, the record we will build through issuing ANPRs and NPRMs and seeking public comment can serve as a resource to policymakers across the board as legislative efforts continue.

Commissioner Wilson's resignation expressed concern with the FTC's "willful disregard of congressionally imposed limits on agency jurisdiction" and abuse of power.

The FTC's Policy Statement on Prior Approval Provisions in Merger Orders is simultaneously an end run around congressionally imposed limits on the FTC's authority and an abuse of power.

The statement says that the FTC will "routinely require merging parties subject to a Commission order to obtain prior approval from the FTC before closing any future transaction affecting each relevant market for which a violation was alleged" and potentially other markets for a period of ten years.

Congress could have provided the FTC prior approval authority when it passed the Hart-Scott-Rodino Act, but it did not.

6. Am I correct that the HSR Act provides the FTC with an opportunity to review mergers before they close, and if appropriate, seek a court order to enjoin a merger that would substantially lessen competition?

That is correct. The HSR Act requires parties to certain mergers to file notice with the FTC and DOJ and wait to consummate their merger until the waiting period in the Act expires. To prevent the parties from consummating an illegal merger after the waiting period expires, the FTC can ask a federal court to enjoin the merger.

7. The HSR Act does not grant the FTC the ability preapprove mergers, correct?

A decision not to take enforcement action against a proposed merger does not constitute an "approval" or "clearance" of the deal. The FTC always has the right to challenge a

consummated deal as the public interest may require, regardless of whether it was initially investigated as part of the HSR review process.

8. Under what authority does the FTC claim the ability to demand prior approvals?

Requiring prior approvals was a longstanding FTC practice until 1995. Our efforts have brought the agency back in line with its prior practice of requiring prior approvals for certain future acquisitions by parties subject to an FTC consent order.

The Commission's authority to write its own orders derives from Section 5(b) of the FTC Act.[94] This includes the authority to issue "cease and desist" orders to stop unlawful practices, but FTC orders frequently do more than stop ongoing conduct or demand that past conduct not be repeated. The Supreme Court has confirmed that the Commission's authority is not limited to stopping past violations of law: "If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its roadblock to the narrow lane the transgressor has traveled; it must be allowed to effectively close all roads to the prohibited goal, so that the order may not be by-passed with impunity."[95]

Under the Commission's prior approach to requiring prior approvals, which was rescinded in July 2021,[96] the agency encountered numerous examples of companies repeatedly proposing the same or similar deals in the same market, despite the fact that the Commission had earlier determined that those deals were problematic. For example, companies have proposed the same transaction that the Commission previously rejected and have even sought to buy back assets that the Commission required them to divest.

As the Commission explained when it issued its new Statement on the Use of Prior Approval Provisions in Merger Orders in October 2021, requiring merging parties to obtain prior approval before closing any future transaction serves several Commission interests: preventing facially anticompetitive deals; preserving Commission resources; and detecting anticompetitive deals that are not reportable under the HSR Act.[97] This statement put parties on notice that, going forward, Commission merger orders would, when warranted, contain prior approval and prior notice requirements for future acquisitions by the same company.[98] This new policy is necessary to deter unlawful mergers and acquisitions by the same company and is part of the FTC's effort to best use its scarce resources and avoid creating incentives for a company to repeatedly attempt illegal deals.[99] This is especially important in

[94] 15 U.S.C. § 45(b).
[95] FTC v. Ruberoid Co., 345 U.S. 470, 473 (1952).
[96] FTC Press Release, "FTC Rescinds 1995 Policy Statement that Limited the Agency's Ability to Deter Problematic Mergers" (Jul. 21, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/07/ftc-rescinds-1995-policy-statement-limited-agencys-ability-deter-problematic-mergers.
[97] FTC Press Release, "FTC to Restrict Future Acquisitions for Firms that Pursue Anticompetitive Mergers," (Oct. 25, 2021), https://www ftc.gov/news-events/news/press-releases/2021/10/ftc-restrict-future-acquisitions-firms-pursue-anticompetitive-mergers.
[98] *See* Press Release, Fed. Trade Comm'n, FTC to Restrict Future Acquisitions for Firms that Pursue Anticompetitive Mergers (Oct. 25, 2021), https://www ftc.gov/news-events/news/press-releases/2021/10/ftc-restrict-future-acquisitions-firms-pursue-anticompetitive-mergers.
[99] *See* Remarks of Chair Lina M. Khan Regarding the Proposed Recission of the 1995 Policy Statement Concerning Prior Approval and Prior Notice Provisions (July 21, 2021),

industries where firms can engage in small acquisitions or roll-up strategies that do not require premerger notification, such as dialysis clinics,[100] supermarkets,[101] gas stations,[102] or specialty veterinary hospitals.[103]

9. Beyond reviewing and updating the FTC Franchise Rule, do you intend to pursue a rule governing the franchise relationship?

The Franchise Rule regulatory review is ongoing. At this time, it is premature to say if the FTC will pursue a rule governing the franchise relationship, but the agency is committed to using its full breadth of statutory authority to protect consumers and competition.

10. How does the FTC-NLRB memorandum of understanding affect the FTC's review of franchise issues, particularly at a time when the NLRB is finalizing a rule to upend the franchise relationship?

The Memorandum of Understanding does not affect the Commission's independent review of franchise issues. Rather, the purpose of the MOU is to facilitate information sharing, training, outreach, and education.

11. Does the Commission have authority to grant a private right of action to franchisees under the FTC Act?

No, there is no private right of action in the FTC Act, and the Commission cannot create a private right of action under the FTC Act.

https://www.ftc.gov/system/files/documents/public_statements/1592338/lk_remarks_for_1995_rescission_-_final_-_1230pm.pdf.

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

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

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

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

The Honorable Janice Schakowsky

1. **Chair Khan, you have been vocal about the need for the FTC to broaden its review of mergers and acquisitions to focus not just on how a deal affects consumer welfare, but also how it affects the overall competitive landscape of an industry. What about how deals affect employees? Does the FTC consider the impact that mergers or acquisitions have upon employees when deciding whether to take enforcement action?**

   At the beginning of my tenure, I reaffirmed the agency's commitment to vigorously scrutinizing mergers that may substantially lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act, including when the harm would occur in labor markets. As part of this effort, the FTC is working with the Department of Justice to update the agencies' merger guidelines. As part of the revision process, we are considering potential updates to directly address labor markets and the potential for a merger to harm workers in the form of lower wages, fewer benefits, worse working conditions, or fewer job opportunities. We have also invited members of the public to identify specific examples of mergers that have harmed competition, including through worsening outcomes for workers.

   More broadly, I am committed to using all the FTC's available tools to ensure that workers are protected from harmful mergers, and soon after becoming Chair, I instructed staff to investigate any merger that potentially harms workers. This is important in light of a growing body of empirical research showing the potential for competitive harm to labor markets from consolidation and concentration.[104] For instance, in the FTC's challenge to Meta's proposed acquisition of Within Unlimited, the Commission alleged that, among other harms, the merger would reduce incentives to "attract and keep employees."[105] The FTC continues to prioritize and investigate allegations that employer conduct is harming workers. For instance, prior to my arrival, the FTC charged Amazon with misleading its Flex drivers by diverting their tips and cheating workers out of income. Amazon agreed to return over $61 million in tips that were withheld from its drivers.[106] Last September, the Commission issued a policy

[104] *See* José Azar, Ioana Marinescu, Marshall Steinbaum & Bledi Taska, *Concentration in US Labor Markets: Evidence from Online Vacancy Data*, 66 LAB. ECON. 101886 (2020); Ioana Marinescu & Herbert J. Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 IND. L. J. 1031 (2019)https://www.repository.law.indiana.edu/ilj/vol94/iss3/5/; Yue Qiu & Aaron J. Sojourner, *Labor-Market Concentration and Labor Compensation* (2019), https://ssrn.com/abstract=3312197; COUNCIL OF ECON. ADVISORS, LABOR MARKET MONOPSONY: TRENDS, CONSEQUENCES, AND POLICY RESPONSES (Oct. 25 2016), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20161025_monopsony_labor_mrkt_cea.pdf.

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

[106] Press Release, Fed. Trade Comm'n, Amazon To Pay $61.7 Million to Settle FTC Charges It Withheld Some Customer Tips from Amazon Flex Drivers (Feb. 2, 2021), https://www ftc.gov/news-events/news/press-releases/2021/02/amazon-pay-617-million-settle-ftc-charges-it-withheld-some-customer-tips-amazon-flex-driversthttps://www.ftc.gov/news-events/pressreleases/021/02/amazon-pay-617-million-settle-ftc-charges-it-withheld-some.

statement announcing new enforcement priorities to protect workers participating in the gig economy. Areas of interest include deception about pay and hours, unfair contract terms, and anticompetitive wage fixing and coordination between gig economy companies.[107]

The FTC also has a number of policy projects aimed at strengthening our efforts to protect workers. In July 2022, we announced a new partnership with the National Labor Relations Board that will enhance coordination between our agencies. Key issues of collaboration will include labor market concentration, one-sided contract terms, and labor developments in the "gig economy."[108] This reflects a whole-of-government approach to tackling the most pressing problems workers face in today's economy. In January, the Commission reactivated its competition rulemaking authority to address concerns about the effects of non-compete restrictions on workers' post-employment opportunities. The Commission proposed a rule that would ban employers from imposing noncompete restrictions on workers in all but a limited set of circumstances.[109] Substantial evidence shows that noncompete restrictions are reducing the competitiveness of labor markets and depriving businesses of a talent pool that they need to enter, build and/or expand. Moreover, the FTC estimates that the new proposed rule could increase wages by nearly $300 billion per year and expand career opportunities for about 30 million Americans. The Commission actively encouraged public comments to ensure that all viewpoints are heard, and the results were overwhelming: we received over 21,000 public comments.[110] The Commission will consider these comments as part of the public record and determine how to proceed.

2. Rebate walls create de facto exclusivity, similar to one of the counts alleged in FTC v. Qualcomm, which forecloses biosimilars from market access. Given that the FTC is investigating pharmacy benefit managers (PBMs), are there specific areas you feel Congress should direct the FTC to investigate? Should Congress advocate for immediate action under Section 5 of the FTC Act?

a) If a PBM demands a larger rebate, pharmaceutical companies often proceed to offset this demand by increasing the price of their drugs. What impact do high drug

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

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

[109] Press Release, Fed. Trade Comm'n, FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition (Jan. 5, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposesruleban-noncompete-clauses-which-hurt-workers-harm-competition.

[110] Public comments are posted at https://www.regulations.gov/document/FTC-2023-0007-0001.

rebates have on patient costs - specifically as it relates to insurance premiums and copayments?

The FTC is currently conducting an expansive study under Section 6(b) of the FTC Act that intends to address to what extent PBM rebates and associated fees encourage drug companies to increase list prices and the impact of such practices on competition, including payers' and patients' spending on prescription drugs. The FTC is particularly concerned about the impact of PBM rebates on drugs' list prices because patients' copays, deductibles, and co-insurance are ordinarily based on the list price at the point-of-sale without the benefit of any substantial PBM rebates. We do not believe any further direction is needed by Congress with regard to this study.

On June 7, 2022, the Commission authorized staff to issue Compulsory Orders for data and documents to the six largest PBMs: CVS Caremark; Express Scripts, Inc.; OptumRx, Inc.; Humana Pharmacy Services, Inc.; Prime Therapeutics LLC; and MedImpact Healthcare Systems, Inc. The agency also solicited public comment on the business practices of PBMs and has received more than 24,000 public comments to date.[111] Most recently, on May 17, 2023, the Commission issued Compulsory Orders to two group purchasing organizations (GPOs) that negotiate drug rebates on behalf of other PBMs. The two additional Compulsory Orders, which were issued to Zinc Health Services, LLC, and Ascent Health Services, LLC, will require these entities to provide information and records on their business practices. These Orders are part of the Commission's ongoing inquiry into PBMs and their impact on the accessibility and affordability of prescription drugs.

These PBMs negotiate prices, access, rebates and fees with drug manufacturers, create drug formularies and surrounding policies, and create pharmacy networks and reimburse pharmacies for patients' prescriptions. The largest pharmacy benefit managers are now vertically integrated with the largest health plans as well as with GPOs, clinics, and retail pharmacies. Many of these contractual relationships are non-public. This study is aimed at shedding light on several practices that have drawn scrutiny in recent years including:

- fees and clawbacks charged to unaffiliated pharmacies,
- methods to steer patients towards pharmacy benefit manager-owned pharmacies,
- potentially unfair audits of independent pharmacies,
- complicated and opaque methods to determine pharmacy reimbursement,
- the prevalence of prior authorizations and other administrative restrictions,
- the use of specialty drug lists and surrounding specialty drug policies,

[111] *See* Regulations.gov, Solicitation for Public Comments on the Business Practices of Pharmacy Benefit Managers and Their Impact on Independent Pharmacies and Consumers, FTC-2022-0015 (Feb. 24, 2022), https://www.regulations.gov/docket/FTC-2022-0015.

- the impact of rebates and fees from drug manufacturers on formulary design, and
- the costs of prescription drugs to payers and patients.

To summarize, we are collecting data and documents from these entities which should allow us to study how contracting practices and formulary policies can impact patient access to medications. In 2020, the FTC and FDA issued a Joint Statement Regarding a Collaboration to Advance Competition in the Biologic Marketplace, which noted that both agencies have "serious concerns about false or misleading statements and their negative impacts on public health and competition."[112]

b) How can PBMs prioritize patients over profits and get Humira biosimilars on formulary tiers that are affordable and unrestricted for patients to achieve maximum cost-savings for patients, instead of using them as leverage for larger rebates? For example, brands may have an opaque agreement that guarantees volume in exchange for a retroactive rebate at the end of the year, taking decision-making away from patients and providers, and disallowing multiple points of competition from biosimilars.

The FTC staff is aware of allegations that PBMs and payers are entering into rebate agreements with Abbvie, the maker of Humira, to favor brand Humira over lower-cost biosimilar alternatives. In our most recent 6(b) Orders to Zinc and Ascent, the PBM affiliated rebate aggregators (also called GPOs), we have included requests for information relating to rebates on Humira. We are exploring whether these rebates may create disincentives to use lower priced biosimilars.

Recently, the Commission moved to block Amgen's $27.8 billion acquisition of Horizon Therapeutics plc over concerns that the deal would allow Amgen to leverage its portfolio of blockbuster drugs to entrench the monopoly positions of Horizon's medications to treat thyroid eye disease and chronic refractory gout.[113] The FTC's complaint, which was filed in federal court, alleges that Amgen uses a negotiating strategy with PBMs to leverage its broad drug portfolio, including through the use of cross-market bundles or bundled rebates. The complaint alleges that due to Amgen's enormous sales volume, it is able to provide substantial rebates in exchange for favorable formulary positions at the expense of drugs offered by its rivals. The Commission alleges that Amgen's proposed acquisition violates Section 7 of the Clayton Act and is asking the federal court to enjoin the merger pending an administrative trial to determine if the merger is illegal.

Please also see the answer to 2a.

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[112] Joint Statement of the Food & Drug Administration and Federal Trade Commission Regarding a Collaboration to Advance Competition in the Biologic Marketplace (Feb. 3, 2020), https://www.ftc.gov/system/files/documents/public statements/1565273/v190003fdaftcbiologicsstatement.pdf.

[113] Press Release, Fed. Trade Comm'n, FTC Sues to Block Biopharmaceutical Giant Amgen from Acquisition That Would Entrench Monopoly Drugs Used to Treat Two Serious Illnesses (May 16, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/05/ftc-sues-block-biopharmaceutical-giant-amgen-acquisition-would-entrench-monopoly-drugs-used-treat.

3. In the past year, two biosimilars have launched with dual pricing strategies, both with a low wholesale acquisition cost (WAC) and a high WAC. (Biocon Semglee Biosimilar Insulin and Amgen Amjevita Biosimilar Humira). Why is that? What happens to the employer and patient costs between a low WAC and a high WAC product?

Please see the answer to 2(a).

a) Recent data shows that some plans actually require patients to step through the high-priced version of the biosimilar to get to the lower-priced biosimilar. There's no clinical benefit for the patient under this setup, so what would be the reasoning behind this?

Please see the answer to 2(a). Biosimilars are as safe and effective as the reference biologic according to the FDA. Therefore, I am not aware of a clinical benefit for repeating the same biologic therapy with a biosimilar after a patient has failed a comparable reference product. As part of the PBM 6(b) study, staff is exploring whether this type of "fail first" or "step through" restriction is being used by PBMs and payers to drive patients towards brand biologics that come with larger rebates and fees for these intermediaries.

b) What should be done to ensure the PBMs adopt the lower-cost biosimilar? If patients are driven to the higher-priced option, they lose out on the true savings associated with biosimilar options.

Policymakers at all levels should consider further defining the duties of PBMs, payers, and employers towards covered patients.

The Honorable Debbie Dingell

In addition to geolocation data, the testimony at the TikTok hearing also caused me to be very concerned about another way some platforms are collecting sensitive consumer data that could jeopardize privacy: collecting users' keystroke and browser history. It's horrifying to think that if someone searches in a social media app for reproductive health care information, social media companies might be sharing that search history with third parties.

1. **Chairwoman Khan, has the FTC brought cases or investigated how companies collect, process, and transfer consumer's keystroke and browser history?**

   Yes, the FTC has investigated and brought cases against companies that have unfairly or deceptively collected, processed, and transferred consumers' keystroke and browser history. In 2021, the FTC settled the *Support King, LLC (SpyFone.com)* matter, which involved allegations that the company sold real-time access to smartphones, including users' keystrokes. The FTC's order required SpyFone to delete the illegally harvested information and notify device owners that the app had been installed. The order also banned the company and its CEO Scott Zuckerman from the surveillance business. In 2012, the FTC settled the *Epic Marketplace, Inc.* matter, which involved allegations that the company collected users' browser history and used and sold such information for advertising and marketing purposes. The FTC's order required Epic to delete users' browsing history.

2. **Chairwoman Khan, do you know if it is possible for data brokers to buy or otherwise obtain this keystroke and browser history from social media platforms?**

   The FTC is not aware of data brokers purchasing or obtaining keystroke information or non-public browser history from social media platforms.

Mega-corporations like Amazon wield tremendous power over vast networks of contractors and subcontractors, while maintaining the illusion that these are "independent" entities. Companies exert this control without bearing the direct responsibilities of a formal employer, driving down wages and working conditions, through contracts known in as "vertical restraints."

3. **Chairwoman Khan, does the FTC have any plans to study, investigate, and address the potential harms posed by these types of vertical restraint arrangements throughout the economy?**

   The FTC has extensive experience examining, investigating, and challenging vertical restraints throughout various industries in the American economy. The FTC is particularly concerned about a business with market power potentially using vertical arrangements to prevent smaller competitors from succeeding in the marketplace. For instance, a platform having market power may use vertical restraints to prevent competitors from making sales sufficient for a competitor's viability. Importantly, the FTC engages in continuous learning to

update its understanding of new business models and methods of doing business, and related technologies, to detect unlawful vertical restraints.[114]

4. **Chairwoman Khan, would you agree that when a company like Amazon self-preferences and forces sellers on its platform to use Amazon's or its contractors' logistics services, like warehousing and delivery—which are not unionized—this can undermine the ability of independent and unionized companies like UPS to compete? Does the FTC have any legal tools to combat this sort of self-preferencing? Would a new statutory prohibition on such self-preferencing help to clarify and strengthen current law in this area?**

The FTC is grappling daily with key questions about how to update our tools to detect, analyze, and remedy harmful anticompetitive conduct. At the same time, the FTC continues to emphasize investigating methods of competition that may be unfairly harming workers. In July, we announced a new partnership with the National Labor Relations Board to enhance coordination between our agencies.[115] This reflects our belief in and enthusiasm for a whole-of-government approach to tackling the most pressing problems workers face in today's economy. And while the FTC will continue to actively use its existing enforcement tools, I welcome efforts by Congress to further bolster our agency's authority to combat unfair methods of competition that harm workers.

[114] https://www ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/dealings-supply-chain/exclusive-dealing-or-requirements-contracts

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

The Honorable Robin Kelly

Thank you for taking the time to testify at the U.S. House of Representatives Committee on Energy and Commerce Subcommittee on Innovation, Data, and Commerce hearing entitled, "Fiscal Year 2024 Federal Trade Commission Budget". Please accept these questions for the record.

At the end of President Trump's term in December 2020, the Federal Trade Commission (FTC) asked several tech and video streaming companies, including Facebook, Twitter and TikTok, to answer questions about how they collect and use personal information, about their advertising practices, and about how their apps affect children and teens.

Since then, several of these companies have had controversies – including a Facebook whistleblower warning us about the dangers of Facebook and Instagram to children and efforts to restrict access to TikTok – but the FTC still has not released a report on its findings more than two years later.

While Congress has held its own hearings on these topics, the benefit of an FTC report into how these companies treat the privacy of its users would be greatly beneficial to efforts to enact legislation that will protect Americans of all ages.

1. **Chair Khan, I realize this began prior to your term but can we expect a report from the FTC soon?**

   FTC staff is in the process of analyzing the documents and information provided in response to the 6(b) orders relating to social media and video streaming services in order to produce a report that will be useful to the agency, legislators, and the public. It is difficult to provide a specific timeline for completion of the report, but our goal is to issue it as soon as possible.

2. **Can you commit to a specific date by which the FTC will release its report?**

   It is difficult to provide a specific timeline for completion of the report, but our goal is to issue it as soon as possible. Because the time required to draft and review a report often varies depending on several factors, including the complexity of the issues and the number and size of the respondents, I would not want to commit to a specific date for release at this time.

The Honorable Lori Trahan

1. Chair Khan, in January 2022, the FTC in partnership with the DOJ, launched a Joint Public Inquiry Aimed at Modernizing Merger Guidelines to Better Detect and Prevent Anticompetitive Deals. It is expected that the merger guidelines will consider the impact of mergers in labor markets. How is the agency thinking through the important role that collective bargaining agreements or labor peace agreements play in improving wages and working conditions in labor markets?

At the beginning of my tenure, I reaffirmed the agency's commitment to vigorously scrutinize mergers that may substantially lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act, including when the harm would occur in labor markets. As part of this effort, the FTC is working with the Department of Justice to update the agencies' merger guidelines. As part of the revision process, we are considering potential updates to directly address labor markets and the potential for a merger to harm workers in the form of lower wages, fewer benefits, worse working conditions, or fewer job opportunities. We have also invited members of the public to identify specific examples of mergers that have harmed competition, including through worsening outcomes for workers. The FTC has also signed an MOU with the National Labor Relations Board (NLRB) so that our staffs can learn from one another, ensuring our work is sensitive to the dynamics and power asymmetries that are unique to labor markets.[116]

There are important aspects of the labor market that if left unchecked can have – and are having – serious consequences for workers. By any measure, worker power has declined starkly from the 1970s.[117] From wage stagnation – which has impacted our low wage workers most – to union membership rates,[118] workers are not doing well. And one of the contributing factors to declining worker power is labor market concentration. Nationally, labor market concentration has increased since the 1980s, and local labor markets remain stubbornly concentrated.[119] And mergers that significantly increase labor market concentration have been shown to lead to lower wages and slower wage growth.[120]

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

[117] Ioana Marinescu & Jake Rosenfeld, Worker Power and Economic Mobility, WorkRise, at 1 (2022), https://www.workrisenetwork.org/sites/default/files/2022-08/correctedworker-power-economic-mobility-landscapereport.pdf.

[118] Id.; see also Madison Hoff, This chart shows how union membership has declined over the years, Bus. Insider (Sept. 5, 2022), https://www.businessinsider.com/chart-union-membership-changes-decline-over-the-years-2022-9.

[119] U.S. Dep't of Treasury, The State of Labor Market Competition, at 25 (2022), https://home.treasury.gov/system/files/136/State-of-Labor-Market-Competition-2022.pdf.

[120] See, e.g., José A. Azar et al., Concentration in US Labor Markets 13 (Nat'l Bureau of Econ. Res., Working Paper No. 24395, 2018); Simcha Barkai, Declining Labor and Capital Shares, 75 J. Fin. 2421, 2422 - 45, 48 (2020); see, e.g., Elena Prager & Matt Schmitt, Employer Consolidation and Wages: Evidence from Hospitals, 111 Am. Econ. Rev. 397, 423-24; see also Remarks of Chair Lina M. Khan Regarding the Request for Information on Merger Enforcement, Docket No. 2022-0003, at 2 (Jan. 18, 2022), https://www.ftc.gov/legal-library/browse/casesproceedings/public-statements/statement-chair-lina-m-khan-regarding-request-information-merger-enforcement (noting that "evidence suggests that many Americans historically have lost out, with diminished opportunity, higher prices, lower wages, and lagging innovation.").

In general, collective bargaining agreements or other contracts affecting workers reflect the relative bargaining power of an employer and its workers. But a merger may affect these dynamics in ways that result in worse outcomes for the workers. Collective bargaining agreements and labor peace agreements may enable workers to improve wages and working conditions in labor markets and are part of the market realities the Agencies consider when evaluating competition in a market. However, such agreements do not prevent merging firms from accumulating market power via merger. When unions negotiate with a firm that has acquired market power through a merger, that power reduces the effectiveness of future collective bargaining. In addition, not all categories of workers are able to engage in collective bargaining without the threat of private antitrust suits, despite Congress's efforts to exempt workers from the antitrust laws.[121]

I am committed to using all the FTC's available tools to ensure that workers are protected from harmful mergers, and soon after becoming Chair, I instructed staff to investigate any merger that potentially harms workers. For instance, in the FTC's challenge to Meta's proposed acquisition of Within Unlimited, the Commission alleged that, among other harms, the merger would reduce incentives to "attract and keep employees."[122] While agreements of the type you reference can provide protections for some workers, mergers can cause harm that is not addressed by those agreements (including after they end or upon renegotiation) or to workers that are not covered by those agreements. I am committed to ensuring that mergers do not result in short- or long-term harm to any type of worker, regardless of whether they are protected by a labor agreement.

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[121] Although Section 6 of the Clayton Act exempts labor organizing from the Act's purview, federal courts have held that these protections apply only to workers formally classified as employees. See 15 U.S.C. § 17; *L.A. Meat & Provision Drivers Union, Local 626 v. United States*, 371 U.S. 94 (1962); *United States v. Women's Sportswear Mfg. Ass'n*, 336 U.S. 460 (1949); *Columbia River Packers Ass'n v. Hinton*, 315 U.S. 143 (1942). *See also* Robert Pitofsky, Chairman, Fed. Trade Comm'n, Concerning H.R. 1304: The "Quality Health-Care Coalition Act of 1999," Prepared Statement of the Federal Trade Commission Before the Committee on the Judiciary, United States House of Representatives 3 (June 22, 1999), https://www.ftc.gov/sites/default/files/documents/public_statements/preparedstatementfederal-trade-commission-quality-health-care-coalition-act/healthcaretestimony.pdf ("[P]hysicians who are employees (for example, of hospitals) are already covered by the labor exemption under current law. The labor exemption, however, is limited to the employer-employee context, and it does not protect combinations of independent business people.")

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

The Honorable Yvette Clarke

1. **Chair Khan, last year, the Appropriations Committee directed the FTC to brief their Committee on recommendations for programs or initiatives that could help educate consumers about the potential harm caused by disinformation, misinformation, and deepfakes, and help certify the authenticity and origin of online content. Have you provided that briefing, and if not, can you commit to providing my office, and any members of this Committee that wish to join, the briefing?**

   FTC staff, including representatives from the Bureau of Consumer Protection's Division of Advertising Practices and Division of Consumer and Business Education, have provided a briefing to staff from the House and Senate Appropriations Committees on "Online Misinformation", as directed by H. Rept. 117-393. However, FTC staff would be happy to also provide a briefing to your office – along with any other member of the Committee – at your convenience.

Chair Khan, a large part of your tenure as Chair has been dedicated to combatting unlawful power imbalances, where corporations have monopoly or monopsony power in a market. One of the power imbalances I'm highly concerned about is in workers' ability to organize and form unions. Our current labor law is clearly not up to the task to protect workers' rights when over 70 percent of Americans approve of unions, but only 10 percent of workers are actually union members.

2. **Would you agree that unionizing can strengthen workers' ability to combat monopsony power?**

   I agree that workers are at a significant disadvantage when they are unable to negotiate on their own or collectively to improve the terms and conditions of their employment. That is why I support Congressional action to pursue legislative reforms that grant workers greater protections under the antitrust laws.[123] Section 6 of the Clayton Act exempts labor organizing from the Act's purview, but federal courts have extended that protection only to workers who are formally classified as employees.[124] Legislation clarifying that labor organizing by workers regarding the terms and conditions of their work is outside the scope of the federal antitrust statutes, regardless of whether the worker is classified as an employee, would remove the threat of antitrust liability resulting from such coordination. This type of

[123] See Letter from Lina M. Khan, Chair of the Fed. Trade Comm'n to The Honorable David Cicilline and Ken Buck (Sept. 28, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596916/letter_to_cicilline_and_buck_for_sept_28_2021_hearing_on_labor_antitrust.pdf.

[124] L.A. Meat & Provision Drivers Union, Local 626 v. United States, 371 U.S. 94 (1962); United States v. Women's Sportswear Mfg. Ass'n, 336 U.S. 460 (1949); Columbia River Packers Ass'n v. Hinton, 315 U.S. 143 (1942). See also Robert Pitofsky, Chairman, Fed. Trade Comm'n, Concerning H.R. 1304: The "Quality Health-Care Coalition Act of 1999," Prepared Statement of the Federal Trade Commission Before the Committee on the Judiciary, United States House of Representatives 3 (June 22, 1999), https://www.ftc.gov/sites/default/files/documents/public_statements/preparedstatementfederal-trade-commission-quality-health-care-coalition-act/healthcaretestimony.pdf ("[P]hysicians who are employees (for example, of hospitals) are already covered by the labor exemption under current law. The labor exemption, however, is limited to the employer-employee context, and it does not protect combinations of independent business people.").

clarification could have far-reaching effects, especially given the prevalence and expansion of "gig economy" firms that rely heavily on workers classified as non-employees. I am heartened by the ruling in a recent First Circuit case, *Confederación Hípica de Puerto Rico, Inc. v. Confederación de Jinetes Puertorriqueños, Inc*., which found that the collective activity of horseracing jockeys, though independent contractors, fell within the labor exemption for antitrust because they were agitating for better pay.[125] As federal lawmakers consider antitrust legislation to better protect labor, state efforts with similar aims could also provide a useful model.[126]

3. **Does the FTC consider legally binding contractual obligations that would better protect workers' ability to organize free from employer interference--like those agreed to by Microsoft and the Communications Workers of America--in reviews of mergers and acquisitions?**

   Without commenting on any ongoing litigation cases, in general, the FTC considers a wide range of evidence in reviews of mergers and acquisitions, including contractual arrangements. In its review of mergers and acquisitions under Section 7 of the Clayton Act, the FTC considers whether transactions may substantially lessen competition or tend to create a monopoly in any relevant antitrust market, including relevant antitrust markets for products and services as well as markets for labor. The FTC may challenge a transaction if it has reason to believe that the transaction would be unlawful in any relevant antitrust market.

4. **Commissioners, the FTC announced a draft agreement with Mastercard on its refusal to deal fairly with competitors on debit card transactions. With the comment period now closed, can you provide us some perspective on what the FTC found regarding Mastercard's actions and when a final decree might be published in that matter?**

   The FTC's complaint alleged that Mastercard used its control over a process called "tokenization" to block the use of competing payment card networks.[127] Mastercard's policy requires use of a token when a cardholder loads a Mastercard-branded debit card into an ewallet, while banks issuing Mastercard-branded debit cards nearly universally use Mastercard to generate the tokens and store the corresponding primary account numbers in its Mastercard "token vault." Since competing networks do not have access to Mastercard's token vault, merchants are dependent on Mastercard's converting the token to process ewallet transactions using Mastercard-branded debit cards. According to the FTC, Mastercard refused to provide conversion services to competing networks for remote ewallet debit transactions (i.e., online and in-app transactions, as opposed to in-person transactions made by the customer in a store), thereby making it impossible for merchants to route their ewallet transactions on a network other than Mastercard.

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[125] 30 F.4th 306 (1st Cir.), cert denied S. Ct., 22-327 (2023).
[126] See, e.g., Twenty-First Century Anti-Trust Act, S. 933, Reg. Sess. (N.Y. 2021).
[127] Press Release, Fed. Trade Comm'n, "FTC Orders an End to Illegal Mastercard Business Tactics and Requires it to Stop Blocking Competing Debit Card Payment Networks" (Dec. 23, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/12/ftc-orders-end-illegal-mastercard-business-tactics-requires-it-stop-blocking-competing-debit-card.

With more than 80 percent of American adults carrying at least one debit card and over $4 trillion in debit card purchases made every year, it is important that the Commission enforce the Durbin Amendment and Regulation II to stop payment card networks from resurrecting exclusivity requirements for routing debit card transactions. Congress was clear that merchants should have a choice in routing debit card transactions, and that the policies of the payment card networks cannot inhibit that choice.

Our enforcement action against Mastercard is part of the FTC's broader effort to prevent gatekeepers and dominant middlemen in critical parts of the economy from abusing their market positions to unfairly hinder competitors and harm competition and consumers. On May 30, the Commission finalized its order against Mastercard.[128]

5. There are similar concerns regarding Visa's actions to block debit card competition. It has been publicly reported that the Department of Justice was investigating Visa on antitrust grounds for those activities. Has the FTC looked into those claims or do you have plans to do so?

Without disclosing any non-public information, the Commission will continue to enforce provisions of the Durbin Amendment and Regulation II related to the conduct of payment card networks and work with the Department of Justice in the e-payment industry.

6. Commissioners, smart assistants, like Alexa and Google Home, are now common in our homes and can be integrated with third-party smart devices such as thermostats, light and audio, and home security systems. For example, a consumer may want to use Alexa to control their smart thermostat. However, consumers are often unaware of what information or even how much information may be shared by their third-party smart device with their voice assistant/smart home hub.

Reliance exclusively on "notice" and "consent" to safeguard consumers' privacy rights, with respect to smart devices—or any collection of consumers' personal information—has not served consumers well. All too often, "notice" takes the form of dense legalese buried in a lengthy privacy policy and "consent" is a fiction derived from checking a box. Through enforcement, policy, and education efforts, the Commission has been working to safeguard the privacy of consumers' personal information through substantive limits on data practices, rather than imposing the burden on consumers to understand myriad complex data practices. Through cases like *Premom, BetterHelp,* and *GoodRx,* we have made clear that companies must carefully consider the privacy implications of their data sharing practices. Cases like *Amazon* (Alexa) and *Ring,* which focused on voice assistants and home security cameras, illustrate the Commission's approach to privacy issues related to smart devices: strong substantive protections for consumers in addition to greater transparency.

7. Would you agree that changing what data is required to be shared for integration without consumer consent unreasonably jeopardizes consumers' privacy and has the potential to be deemed an unfair or deceptive practice?

[128] Press Release, Fed. Trade Comm'n, "FTC Approves Final Order Requiring Mastercard to Stop Blocking the Use of Competing Debit Payment Networks" (May 30, 2023)

Yes, we have alleged that material retroactive changes to privacy practices without affirmative express consent from the consumer from whom the data was initially collected are unfair.

Attachment 2—Member Requests for the Record

During the hearing, Members asked you to provide additional information for the record, and you indicated that you would provide that information. For your convenience, descriptions of the requested information are provided below.

The Honorable Jeff Duncan

1. **During your testimony, you promised me a letter that you and DOJ Assistant Attorney General for Antitrust Jonathan Kanter sent to USTR objecting to the Competition and Digital Trade Chapters of the Indo-Pacific Economic Framework for Prosperity (IPEF). I still await a copy of that letter.**

   It is my understanding that the Committee has a copy of the letter.

The Honorable Gus M. Bilirakis

1. **When asked if you would commit to working with the Bureau of Economics to issue a monetary policy statement to shed more light on how the FTC calculates monetary relief and civil penalties in consumer protection matters, you stated that you would provide more information about how the FTC makes those calculations.**

   Please see answer to Bilirakis 48.

The Honorable Kat Cammack

1. **According to the Inspector General's report titled, "Audit of the Federal Trade Commission's Unpaid Consultant and Expert Programs," you expanded the agency's use of unpaid consultants and experts. How many consultants were added to the FTC after your confirmation?**

   Since June 15, 2021, the FTC has appointed thirteen unpaid experts or unpaid consultants. Nine of these individuals have already left the agency; one onboarded as a Compliance and Risk Strategist, a paid position; and three are currently serving as unpaid experts or unpaid consultants.

2. **Please provide copies of the communications from these consultants to you, your office, and your staff.**

   The unpaid experts and consultants were appointed to carry out duties such as supporting case teams by summarizing technical research that is relevant to the case or issue and asking questions directly to engineers at target companies; providing an outside point of view that will help broaden the FTC's judgment on administrative, economic, and technical issues; collaborating closely with staff and leadership to provide insights on emerging tech issues and market development trends that could lead to enforcement; and providing technical

subject matter expertise and technical assistance as a resource to agency staff on markets and technologies. The work performed by the unpaid experts and consultants was and is integrated into existing projects at the FTC. For example, one unpaid expert is working with FTC staff on the agency's social media and streaming video 6(b) study, and another unpaid consultant provided limited assistance to the Meta/Within investigative team on technology matters – *e.g.*, by providing technological input to the team on topics such as software creation engines as well as public source research assistance.

I regularly receive updates on the agency's work from staff and leadership across the agency, and these updates encompass projects on which the unpaid experts or consultants are or were working. Specific communications from the unpaid experts and consultants to me and my office are protected under various privileges, including the deliberative-process privilege, and are also exempt from disclosure under FOIA Exemption 7(A), 5 U.S.C. § 552(b)(7)(A), because disclosure of that material could reasonably be expected to interfere with the conduct of the Commission's law enforcement activities.

3. During questioning, you indicated that the agency would have initiated contact with prospective unpaid consultants since these were specific needs that the FTC was looking to fill. You indicated that you received approval from the FTC's Office of General Counsel ethics team to do this. Please provide the written approval.

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

The FTC's consultants and experts appointed under 5 U.S.C. § 3109 are federal government employees (or special government employees), so they are subject to federal ethics laws and obligations.[129] Accordingly, the FTC's experts and consultants are prohibited from participating personally and substantially in particular matters that directly and predictably affect "their" financial interests, which for these purposes includes the financial interests of anyone they serve as an employee.[130] Each of the FTC's consultants and experts is reviewed by the FTC's Ethics Team before onboarding to screen for and address any federal ethics concerns. More specifically, each consultant or expert is required to complete a confidential disclosure report (OGE Form 450) and, based on the disclosures, the FTC Ethics Team provides tailored guidance about potential conflicts of interest and restrictions on outside activities/non-federal employment. Moreover, like other employees, each consultant or

[129] See 5 C.F.R. § 304.101.
[130] See 18 U.S.C. § 208.

expert attends ethics orientation once they start at the FTC. Each consultant or expert also receives annual ethics training.