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

Office of Commissioner
Alvaro M. Bedoya

September 6, 2024

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

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

Dear Mr. Khlopin:

Thanks to you, the other staff, and especially the Members of the Subcommittee on Innovation, Data, and Commerce for inviting me to testify before it on July 9, 2024, for its hearing, "The Fiscal Year 2025 Federal Trade Commission Budget."

In accordance with the Rules of the Committee on Energy and Commerce, I am attaching here my responses to Members' additional questions for the record.

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

Sincerely,

Alvaro M. Bedoya
Commissioner
Federal Trade Commission

The Honorable Gus Bilirakis

1. **Many consumers see advertisements across social media and the internet for various direct-to-consumer medical products that may provide incomplete and misleading information. For example, certain companies sell direct-to-consumer products to assist people in straightening their teeth, leading consumers to believe that the clear aligner treatment is offered under the care of dentists and orthodontists, and is "doctor-directed," when in reality, consumers do not meet a doctor, dentist, or orthodontist and do not even know the name of a dentist providing care. When patients find themselves with a problem, they do not know where to turn and ultimately need to find a dentist or orthodontist to help them remedy new problems. In some cases, the damage of this minimally supervised treatment is irreversible.**

    a. **What are the tools available to the FTC to ensure that misleading advertising is not permitted by these companies and to provide appropriate warnings to consumers that they may not have access to medical professionals during their treatment when working directly with a company like this?**

    The FTC has a long history of acting against deceptive health advertising. Its tools include formal actions through nonpublic investigations, consent orders (settlements), litigation under Sections 5 and 12 of the FTC Act, informal actions such as warning letters, business education, and consumer education.

2. **Commissioner Bedoya, as now having served for a while at the FTC, can you tell us your compliance process for complying with FOIA requests? What FOIA requests are still pending, and for how long?**

    The FTC's compliance with FOIA is governed by the FOIA statute, 5 U.S.C. § 552, as well as the FTC FOIA Regulations, 16 C.F.R. §§ 4.8 - 4.11.

    FTC FOIA staff process most requests within 20 working days following the receipt of a request, without need for an extension. If staff need to invoke a formal extension of the response time, as permitted under the FOIA, they will notify the requester in writing by the 20th working day after receiving the request to give the requester an opportunity to modify the request to reduce the necessary processing time. When staff cannot process a request within the extended time limit (*i.e.*, 20 working days plus a 10-day extension), they give the requester another opportunity to limit the scope of the request so that it may be processed within this time limit, or to arrange an alternative time frame for processing the request.

    Once a request is processed, staff sends a letter to respond to the FOIA requester. The responsive documents that qualify for release will be included with this letter. Some documents that staff release may contain both exempt and releasable

information. When staff release documents that contain information subject to a FOIA exemption, they redact the exempt material and label it with the exemption that applies. If staff do not locate any responsive records, they will state this in the response letter. If staff locate responsive records but determine to withhold the records based on one or more FOIA exemptions, the response letter will list and explain the applicable FOIA exemptions, describe the categories of documents being withheld, and give an estimate of the quantity of documents withheld. The response letter concludes with an explanation of the procedure for appealing a decision, information about the FTC's FOIA Public Liaison, notification about services provided by the Office of Government Information Services (OGIS), and the name and telephone number of someone who can answer questions about how staff handled the request.

As of August 2, 2024, the FOIA office has 173 pending FOIA requests and the longest standing FOIA request has been pending for 228 days. However, the FTC is receiving, responding to, and closing requests daily, so these numbers are constantly changing. In Fiscal Year 2023, the agency processed 1,812 requests – an increase of more than 233 from the prior fiscal year – as well as 39 administrative appeals. During FY 2023, the median response time for a FOIA request was three days for a simple request, and 14 days for a complex request.

3. **Commissioner Bedoya, based on your work in Congress, wouldn't you agree that economy-wide rules are complex because industries are all uniquely situated? And wouldn't you want to see robust discussion on how certain industries would be impacted by economy-wide rules because there may be differences between various industries? And would you agree with me that how different industries are impacted by economy-wide rules raise various factual questions that the FTC should seriously consider? And wouldn't you agree that this is one of the benefits of the FTC's Mag Moss Rulemaking process, that is allows for stakeholder discussion and debate at informal hearings? Why did the Commission reject stakeholders' request for such debate at the recent Junk Fee hearing?**

I agree that economy-wide rules can be complex, and that, depending on the rule, there may be important factual differences between industries.

One benefit of the Mag Moss Rulemaking process is that it allows for stakeholder input including through discussion and debate at informal hearings. On the topic you've mentioned, the Commission published an Initial Notice of Informal Hearing on March 27, 2024, which also served as the Final Notice of Informal Hearing ("Informal Hearing Notice"). The Informal Hearing Notice was published in accordance with section 18(b)(1) of the FTC Act, 15 U.S.C. 57a(b)(1), which requires the Commission to provide an opportunity for an informal hearing in section 18 rulemaking proceedings. The Informal Hearing Notice identified eight commenters to the NPRM that requested an informal hearing in accordance with the requirements of 16 CFR 1.11(e), as well as nine additional commenters that requested the opportunity to make an oral presentation

if the Commission was to hold an informal hearing at others' requests. Several commenters proposed potential disputed issues of material fact for the Commission's consideration. The Commission reviewed these potential issues and concluded in its Informal Hearing Notice that there were no disputed issues of material fact to resolve at the hearing.

On April 24, 2024, the Commission conducted an informal public hearing that captured a range of viewpoints on multiple issues, including discussion of the impact of the potential rule on several specific industries. The Commission's Chief Presiding Officer, the Chair, appointed an Administrative Law Judge for the Federal Trade Commission, the Honorable Jay L. Himes, to serve as the presiding officer of the informal hearing. Judge Himes did not identify any disputed issues of material fact necessary to be resolved at the informal hearing.

4. **Many are concerned about this Commission's abuse of Section 5 authority as it relates to rule by enforcement. Several examples in recent history demonstrate a disturbing pattern. First, the FTC brings a questionable enforcement case on an unforeseeable and aggressive theory. Second, the Commission releases a "guidance" document saying the law already prohibits the same conduct, citing no authority. Third, they issue a rulemaking to codify this new idea, even though the Commission already said it is illegal. Some examples of this predatory behavior include non-compete cases where the FTC sued glass container manufacturers, and cases in the negative options field.**

    a. **Commissioner Bedoya, why is the Commission putting out guidance claiming activities are illegal, but then starting rulemaking proceedings?**

    Congress has directed the Commission to prevent unfair methods of competition and unfair or deceptive acts or practices. To this end, the Commission periodically issues guidance to provide the public—consumers, the business community, and practitioners—with information about existing legal requirements or agency enforcement priorities under Section 5 of the FTC Act. This non-binding guidance typically summarizes the text and history of the FTC Act and caselaw interpreting the Act.

    b. **If the activity really was illegal, as the guidance claims, then why is rulemaking needed?**

    Agencies have discretion to choose between precedential adjudication and rulemaking, *see NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974), and the FTC Act expressly authorizes the Commission to use either to address unfair or deceptive acts or practices and unfair methods of competition. Rulemaking is a particularly useful tool when violations are pervasive. It has significant procedural benefits over a party-specific

precedential adjudication, as it affords the opportunity for notice and public comment, among the APA's other procedural protections.

5. **Commissioner Bedoya, for decades the FTC's mission was to protect consumers and preserve competition "without unduly burdening legitimate business activity." In 2022, the FTC deleted "without burdening legitimate business activity" from its mission statement even though there were no public comments in support of such removal. In fact, public comments asked the FTC to keep this longstanding and bipartisan mission statement. https://www.wlf.org/2021/12/07/wlf-legal-pulse/ftc-proposes-astoundingchange-to-the-agencys-mission-statement/ Why did the FTC remove this clause from its mission statement? Does that action not convey the FTC should burden legitimate business activity?**

   It is my understanding that this modification, which preceded my tenure as a Commissioner, was not intended to be a change in policy. The "without unduly burdening legitimate business activity" language remains in the agency's strategic plan.

6. **Commissioner Bedoya, I take it you believe it is important to be impartial and unbiased in your decision-making, correct? And it is important to actually show that you are impartial by what you say, how you say it, and who you say it to. Correct? Given that, I am troubled by your headlining conferences and events of entities who have lobbied the agency to investigate their rivals, during the pendency of actual investigations. Do you agree with me that it could be seen as not impartial?**

   I agree that Commissioners should be impartial and unbiased decisionmakers. I pride myself on meeting with a range of stakeholders—especially people and small business owners who lack a powerful lobbying presence in Washington. I never discuss the substance of pending investigations outside of the Commission.

The Honorable Jeff Duncan

1. **I ask to enter into the record a May 2, 2024, Wall Street Journal article titled "Former Pioneer CEO Is Accused of Trying to Collude With OPEC: FTC alleges Scott Sheffield attempted to coordinate on oil production and prices; agency refers the case for potential criminal probe." This article states that "Officials at the Federal Trade Commission have decided to refer the allegations against Scott Sheffield to the Justice Department for a potential criminal investigation, according to people familiar with the matter."**

   a. **Is there evidence to suggest the FTC uncovered criminal activity or anticompetitive behavior in its investigation?**

I cannot comment on the existence of or details about any non-public investigation.

b. Did the FTC refer this matter to the Department of Justice for potential criminal prosecution?

I cannot comment on the existence of or details about any non-public investigation.

c. Does the FTC have a policy of keeping investigation results confidential?

Long-standing Commission policy prohibits the public disclosure of investigational or pre-decisional materials, as such materials prepared for and used by the Commission in its deliberations are protected by deliberative process privilege. The Commission may vote to publicize the results of an investigation, as it does when it files a complaint.

d. Who told the Wall Street Journal about the potential criminal referral?

I am not aware of the Wall Street Journal's source.

e. What is the FTC's policy about whether to confirm the existence of a criminal referral?

Our policy is to confirm the existence of a criminal referral only if public criminal filings are made as a result of the referral.

f. Rule 1-7.310 of the Department of Justice' "Justice Manual" indicates that "DOJ generally will not confirm the existence of or otherwise comment about ongoing investigations. Except as provided in subparagraph C of this section, [which relates to public releases to protect the public safety] DOJ personnel shall not respond to questions about the existence of an ongoing investigation or comment on its nature or progress before charges are publicly filed.

i. If it is inappropriate for DOJ officials to comment on ongoing investigations, when would it ever be appropriate for the FTC to publicize that it is making a criminal referral to the Department of Justice?

I believe that confirming such referrals in individual cases is appropriate when criminal charging documents are made public by prosecutors. We regularly see conduct that violates

not only the civil laws we enforce but may also violate criminal laws.

ii. **Was the leak to the Wall Street Journal necessary to protect public safety?**

No.

g. **In your view, was the leak to the Wall Street Journal about a criminal referral appropriate?**

No. Unlawful disclosure of FTC nonpublic and confidential information is contrary to Commission policy and undermines the agency's enforcement mission.

h. **Was there a referral to the Inspector General in this case?**

The FTC's Inspector General, in response to learning about this question, encouraged the Chair to direct you and your staff to contact him, akatsaros@ftc.gov, and his staff, oig@ftc.gov, to discuss matters under his purview.

2. **The FTC's Consent Order also prohibits all Pioneer employees and Directors from serving on Exxon's board.**

a. **Aside from Mr. Sheffield, did the FTC adduce any evidence that any other employee engaged in inappropriate anticompetitive conduct?**

I cannot comment on the existence of or details about any non-public investigation.

b. **What is the factual basis for barring Pioneer employees from serving on the Board of Exxon?**

The Commission's complaint alleges that former Pioneer CEO Scott Sheffield had, through public statements and private communications attempted to coordinate with representatives of OPEC and a related cartel of other oil-producing countries known as OPEC+ to reduce output of oil and gas, which would result in Americans paying higher prices at the pump.

c. **Aside from Mr. Sheffield, is there any evidence that any other employee poses some kind of alleged threat to competition in the global market for crude oil if they had a Board seat?**

I cannot comment on the existence of or details about any non-public investigation.

The Honorable Diana Harshbarger

1. **The recent Supreme Court decision in *Loper Bright Enterprises v. Raimondo* overturned the pre-existing precedent of *Chevron* deference to agency interpretations of their authorizing statutes. In doing so, the Supreme Court appears to heighten the burden on agency rulemakings to ensure that they are more in line with Congressional intent.**

    a. **Given the FTC's past reliance on *Chevron* to define "unfair methods of competition" under Section 5 of the FTC Act, how can the Commission justify its authority to issue substantive competition rules under *Loper*?**

    The *Chevron* doctrine, which the Court overruled in *Loper Bright*, provided federal courts with a methodology for interpreting ambiguous statutes administered by federal agencies. Historically, federal courts typically have not relied upon *Chevron*, a 1984 Supreme Court decision, to define "unfair methods of competition" under Section 5 of the FTC Act. *See Atl. Ref. Co. v. FTC*, 381 U.S. 357, 368 (1965) ("While the final word is left to the courts, necessarily 'we give great weight to the Commission's conclusion[.]'" (quoting *FTC v. Cement Institute*, 333 U.S. 683, 720 (1948))); *FTC v. R. F. Keppel & Bro., Inc.*, 291 U.S. 304, 314 (1934) ("While … it is for the courts to determine what practices or methods of competition are to be deemed unfair . . . in passing on that question the determination of the Commission is of weight."). In keeping with those decisions, the FTC has not typically asked federal courts to defer under *Chevron* to the agency's interpretation of "unfair methods of competition."

    Chevron did not provide the FTC or any other federal agency with independent authority to promulgate rules. Instead, when the FTC issues rules, it acts pursuant to statutory authority that Congress has conferred upon the agency in the FTC Act or in other statutes. Indeed, Congress has charged the FTC with enforcing or administering the provisions of more than 80 statutes. Many of these statutes contain directives or authorizations from Congress to promulgate rules in certain areas. In carrying out these statutory mandates, the Commission follows the laws that Congress has enacted.

    For a discussion of the Commission's legal authority to promulgate legislative rules prohibiting unfair methods of competition, please see the statement of basis and purpose accompanying the Commission's final Non-Compete Clause Rule. 89 Fed. Reg. 38342, 38348-60 (May 7,

2024). The Commission's legal authority to issue the rule is also being actively litigated in multiple federal courts, and beyond what the Commission said in the final rule, the Commission speaks to the issues in that litigation only through the Commission's court filings. Notably, the FTC has not relied on *Chevron* in either the statement of basis and purpose accompanying the final Non-Compete Clause Rule or in the ongoing litigation concerning that rule.