

Commissioner Ferguson Responses to Additional Question for the Record

The Honorable Cathy McMorris Rodgers

- 1. Commissioner Ferguson, did you have the chance to review FTC's budget request in advance of its submission to Congress?**

The budget request was approved before I joined the Commission, so I did not have a chance to review it before submission. I believe that the FTC does critical work to ensure that the free-enterprise system works for all Americans by enforcing our competition laws and protecting consumers from unfair and deceptive practices. We rely on our talented staff to do this work, and there are unfortunately many cases of serious wrongdoing that we simply do not have the resources to investigate and litigate. As the Congress weighs how to fund the Commission, I hope it will keep in mind the importance of the Commission's mission in protecting the American economy from monopolists and fraudsters, and that we cannot fulfill this mission without our hardworking and devoted staff. Sadly, there is merit to concerns that, in recent years, the Commission has wasted its precious resources on politicized enforcement matters and rulemakings rather than its core mission. I have already voiced my strong opposition to these often-unlawful detours, and I hope that my colleagues will heed my call to get the FTC out of the business of legislating, whether by illegitimate rulemakings or aggressive enforcement matters advancing dubious legal theories.

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.**

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?"

Thank you for raising this issue. The FTC has a long history of taking action against deceptive health advertising. The FTC has a number of tools it can use to try to stem deceptive practices, including formal actions through nonpublic investigations, consent orders (settlements), litigation under Sections 5 and 12 of the FTC Act, and

rulemakings; informal actions such as warning letters; business education to promote compliance and truthful advertising; and consumer education to prevent consumers from being scammed. Please do not hesitate to reach out if you would like to further discuss this issue.

- 2. Commissioner Ferguson, 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-astounding-change-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?**

The change to the mission statement occurred prior to my tenure at the FTC. I therefore do not know why the Commission changed its statement. Protecting consumers and preserving competition are the foremost priorities for the FTC. Like the Congress which adopted the FTC Act in 1914, however, we must be mindful not to unduly burden legitimate business activity.

The Honorable Larry Bucshon

- 1. How is the FTC differentiating between actual “junk fees” that are truly deceptive and transparent and well-established practices such as restaurants including large party service fees on a customer’s bill? I do not think that all surcharges and fees are the same and should not be treated as such.**

Thank you for sharing your thoughts on “junk fees.” As this is subject to an open rulemaking, I do not want to be seen as prejudging the issue. That said, I welcome continued discussions on this issue.

The Honorable Jeff Duncan

- 3. 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?

My May 2, 2024 joint dissenting statement with Commissioner Holyoak made clear that the accusations against Mr. Sheffield “warrant scrutiny,” but the Commission’s accusations did not give rise to a violation of Section 7 of the Clayton Act. I cannot, however, discuss nonpublic information gathered during an investigation and therefore cannot comment on whether the available evidence corroborates the Commission’s accusations against Mr. Sheffield.

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

I cannot discuss the specifics of any potential nonpublic referrals to the Department of Justice. In general, the FTC cooperates with other agencies to advance shared interests, and, historically, this has included criminal referrals to the Department of Justice.

c. Did you direct your staff to share any and all resources with Republican Commissioners?

My staff regularly communicates with their counterparts in other commissioners’ offices, including my fellow Republican Commissioner, Melissa Holyoak. Commissioner Holyoak and I have collaborated on many matters, including a joint dissenting statement that we issued in response to the Complaint and Order that related to Exxon’s acquisition of Pioneer.

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

Yes. There are statutory and regulatory prohibitions on disclosing information gathered during an investigation.

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

Thank you for raising this issue. I take seriously the obligation to safeguard the Commission’s integrity, and I am troubled by any inappropriate leaks of nonpublic information. I do not know whether any Commission employees or officials spoke with the Wall Street Journal about any potential criminal referral.

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

The Commission should not confirm or deny the existence of a nonpublic criminal

referral.

g. [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?

The FTC should not publicize that it is making a criminal referral to the Department of Justice unless the Commission has voted to release the information and the other agency has consented to releasing the information.

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

No. Leaking nonpublic Commission information to the Wall Street Journal is not necessary to protect public safety.

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

No.

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

I cannot comment on the existence or status of any nonpublic investigation by the Inspector General.

4. 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?

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

Commissioner Holyoak and I issued a joint dissent on May 2, 2024 that disagreed with the Complaint and Order barring Pioneer employees from serving on the Board of Exxon, including the “Complaint’s focus on Sheffield’s past conduct at Pioneer as an indicator of Exxon’s future actions, without any discussion of whether Exxon has incentives to engage in the same behavior.” I cannot comment on additional nonpublic information.

- 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?**

As noted above, my joint dissent raised concerns with the Complaint’s lack of evidence on this point. I cannot comment on additional nonpublic information.

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*?**

As I said in my dissenting statement on the noncompete rule before *Loper-Bright* was decided, I do not believe that the Commission has the power to issue substantive rules governing private conduct regarding “unfair methods of competition.” *Loper-Bright* makes the Commission’s contrary view even more difficult to defend. Courts no longer must defer to reasonable agency resolutions of ambiguities in their governing statutes and must instead give statutes their best interpretation irrespective of the agencies’ views. I see the end of *Chevron* as a good development. We are supposed to govern ourselves through Congress, not be governed by unelected technocrats in Washington. *Loper-Bright* will discipline agency decision making and ensure that the text of statutes—which embodies the will of the American people through the action of their

elected representatives—determines the meaning of law, rather than bureaucratic prerogatives.