The Honorable Cathy McMorris Rodgers

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

   No, I did not review the FTC's budget request prior to being sworn into office.

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?**

      Speaking generally, the FTC has a long history of taking action against deceptive advertising. The FTC can use a number of possible tools, which include investigations that may lead to litigation. The FTC can also use less formal tools, such as business education to promote truthful advertising consistent with firms' legal obligations, as well as consumer education.

2. **Commissioner Holyoak, I read with interest your dissent in the Health Breach Notification Rulemaking. You stated the majority's interpretation both exceeded FTC authority and would put enormous costs on industry, can you please elaborate?**

   Yes, my dissent argued that the Commission's final rule exceeded the FTC's authority and would put significant costs on industry.[1] As background, the American Recovery and Reinvestment Act of 2009 ("Recovery Act") authorized the Commission to issue a rule requiring vendors of "personal health records" ("PHRs") and related entities

[1] *See generally* Statement of Commissioner Melissa Holyoak, Joined by Commissioner Andrew Ferguson, *Health Breach Notification Rule*, File No. P205405 (Apr. 26, 2024), https://www ftc.gov/system/files/ftc_gov/pdf/p205405_hbnr_mhstmt_0.pdf.

that are not covered by HIPAA to notify individuals and the FTC of a "breach of security" of "unsecured PHR identifiable health information." The FTC issued the Health Breach Notification Rule in 2009; issued a Notice of Proposed Rulemaking on amendments to the Rule in June, 2023; and finalized the amendments in April, 2024.

The Recovery Act incorporated relevant language from the Social Security Act, which defined "health care provider" in a limited way. But in its final rule, the FTC adopted new definitions that swept a large swath of apps and app developers under the purview of the final rule. Those expansive definitions were inconsistent with the limits Congress set. In addition, the final rule wrongly took liberties with the definition of "personal health record," finding that—contrary to what the Recovery Act contemplates—a PHR need not actually draw health information from multiple sources. As a result of the final rule's expansive approach, any retailer offering an app that tracks health-related purchases—such as bandages, vitamins, dandruff shampoo—may be a vendor of a PHR that the final rule covers if the app draws health information, such as purchasing information, from the consumer and the app has the technical capacity to draw any information from any other source.

Because of the final rule's expansive approach, most companies that offer health-related apps or similar products would be treated as vendors of PHRs, even if their app is merely health-adjacent. I argued that the extraordinary breadth of the final rule went unaccounted for in the Commission's economic analysis. That means that the final rule likely dramatically underestimated the numbers of regulated entities, number of breaches, and expected costs to businesses that flow from the final rule's requirements. I support vigorous enforcement of laws protecting sensitive personal information. But because I cannot support a rule that exceeds the bounds Congress clearly established, I voted against the final rule.

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.**

In general—and outside the context of the FTC's ongoing attempt to regulate unfair or deceptive fees[2]—under Section 5 of the FTC Act, "deceptive acts or practices in or affecting commerce" are unlawful.[3] In enforcement proceedings under Section 5 relating to potential deception, the Commission would need to investigate thoroughly based on the facts. Assessing whether deception occurred would require examining whether any given representation, omission, or practice was likely to mislead

[2] *See* Press Release, *FTC Proposes Rule to Ban Junk Fees* (Oct. 11, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/10/ftc-proposes-rule-ban-junk-fees; Trade Regulation Rule on Unfair or Deceptive Fees, 88 Fed. Reg. 77420 (Nov. 9, 2023), https://www.govinfo.gov/content/pkg/FR-2023-11-09/pdf/2023-24234.pdf.
[3] 15 U.S.C. § 45(a)(1).

consumers acting reasonably under the circumstances, and was material to their decision.[4] Applying this standard to representations related to any given surcharge or fee, for example, would require considering the relevant facts and circumstances, as your question suggests.

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?**

    In general, I refer back to my strong disagreement with, and public statement condemning, the Commission's approach in this case.[5] In that joint dissent, I disagreed with the current Majority's conclusions in the matter. I explained that, under relevant law, the Commission's Complaint had not given me reason to believe that the transaction at issue violated Section 7 of the Clayton Act.[6]

    Instead, I believed "the Commission [was] leveraging its merger enforcement authority to extract a consent from Exxon" in a way that abused its enforcement authority.[7] As I said at that time, "[t]he Commission should not leverage its merger enforcement authority—or any authority—the way it does today."[8] I continue to condemn the Commission's approach in that case and its wrongful abuse of its authorities.

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

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[4] *See generally In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 45 (1984) ("Certain elements undergird all deception cases. *First*, there must be a representation, omission or practice that is likely to mislead the consumer. . . . *Second*, we examine the practice from the perspective of a consumer acting reasonably in the circumstances. . . . *Third*, the representation, omission, or practice must be a 'material' one. The basic question is whether the act or practice is likely to affect the consumer's conduct or decision with regard to a product or service.") (quoting the Commission's 1983 policy statement on deception).

[5] Joint Dissenting Statement of Commissioner Melissa Holyoak and Commissioner Andrew N. Ferguson, *In the Matter of ExxonMobil Corporation,* Commission File No. 241-0004 (May 2, 2024), https://www ftc.gov/system/files/ftc_gov/pdf/2410004exxonpioneermh-afstmt.pdf.

[6] *Id.* at 1.

[7] *See id.*

[8] *Id.* at 3.

At this time, I cannot comment on the potential existence of a nonpublic criminal referral.

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

My understanding is that the Commission's policy is to generally keep investigation results confidential.

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

I do not know who told the Wall Street Journal about the potential criminal referral.

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

Generally, my understanding is that the Commission will not confirm a non-public criminal 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 it could be appropriate for the Commission to make public a criminal referral where the Commission has voted to release that information and where the other agency has consented to releasing that information.

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

No, based on my understanding, such a leak would not have been to protect public safety.

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

Without more information about how the Wall Street Journal learned what it did, I cannot answer this question at this time.

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

I do not know whether there was a referral to the Inspector General in this case.

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?

As described above, I voted against the Commission's approach in this case. Because such information, to the extent it exists, would be non-public, I cannot answer this question at this time.

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

As described above, I voted against the Commission's approach in this case. Because such information, to the extent it exists, would be non-public, I cannot answer this question at this time.

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 described above, I voted against the Commission's approach in this case. Because such information, to the extent it exists, would be non-public, I cannot answer this question at this time.

<u>The Honorable Diana Harshbarger</u>

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*?

In my opinion, the Commission cannot justify its authority to issue substantive competition rules, under *Loper* or otherwise. Indeed, a federal district court has permanently enjoined the Commission's recent effort at competition rulemaking,[9] an effort from which I vigorously dissented.[10] As I wrote in dissent, while the modern administrative state may be accustomed to the ease and breadth of legislative rulemaking, an agency should not lose sight of what the Constitution requires, and should approach legislative rulemaking circumspectly.[11] Lawmaking is an extraordinary power, and agency lawmaking tests the delicate balance of separation of powers.[12] As I argued in my dissent—which was published the same day the Supreme Court decided *Loper*—I do not believe the Commission has authority to promulgate legislative rules for unfair methods of competition.[13]

The Honorable Lori Trahan

1. **Commissioner Holyoak, as a part of your confirmation hearing you were questioned about former FTC Commissioner Joshua Wright, who has been credibly accused of numerous examples of sexual misconduct and was the subject of an internal investigation by the FTC inspector general which concluded that Wright had violated federal law dealing with conflict-of-interest restrictions and recommended prosecution. Comprehensive reporting by the Wall Street Journal details conduct by Wright that raises significant ethical concerns, and improper use of his position as FTC Commissioner to better his clients.**

    a. **Commissioner Holyoak, you responded to the Senate Commerce Committee in questions for the record that you have not spoken with former Commissioner Wright since the allegations of sexual misconduct were raised in the media. Have you communicated with him since then?**

    No I have not.

    b. **One of your attorney advisors is closely connected with former Commissioner Wright, as he was at various times an intern, research assistant, and attorney under Wright during and after Wright's tenure at**

[9] *See generally Ryan, LLC v. Fed. Trade Comm'n*, No. 3:24-CV-00986-E, 2024 WL 3879954 (N.D. Tex. Aug. 20, 2024).
[10] Dissenting Statement of Commissioner Melissa Holyoak, Joined by Commissioner Andrew N. Ferguson, *In the Matter of the Non-Compete Clause Rule*, Matter Number P201200 (June 28, 2024), https://www ftc.gov/system/files/ftc_gov/pdf/2024-6-28-commissioner-holyoak-nc.pdf.
[11] *See id.* at 1.
[12] *See id.*
[13] *Id.* at 1-2. I note that the Commission's legal authority to issue the rule is also being actively litigated in multiple federal courts. Accordingly, the Commission speaks to the issues in that litigation only through the Commission's court filings.

the FTC and in both the public and private sectors. Did you speak to Commissioner Wright about this, or any other individuals', hiring?

No I did not speak to Wright about any of my staff.

c. Did you ask this individual, or any other individuals connected to former Commissioner Wright in your staff during the hiring process whether they have or have had any knowledge or involvement in any of former Commissioner Wright's unethical behaviors? If not, why not?

Yes, given the nature of the conduct I did discuss the issue with my staff during the hiring process.

d. Did you ask this individual, or any other individuals connected to former Commissioner Wright in your staff about the allegations around Commissioner Wright's sexual misconduct? If not, why not?

Yes, because of the nature of the conduct I did discuss the issue with my staff.

e. Did former Commissioner Wright provide any recommendations, suggestions, or references for candidates for your staff?

Yes, Wright did offer one recommendation before his conduct became public. I did not hire the person he recommended.

f. Are you confident that your staff will hold themselves to the highest standard with regards to unethical behavior and conflicts of interest and will keep the FTC a workplace free from sexual misconduct?

Yes.