Commissioner Rebecca Kelly Slaughter's Answers to Additional Questions for the Record

Posed by Members of the Committee on Energy and Commerce's

Subcommittee on Innovation, Data, and Commerce

Following its Hearing Held on July 9, 2024

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?

I cannot discuss any non-public information, but in general the Commission has a long history of taking action against deceptive health advertising. The Commission can use many possible tools in this area, including formal actions through nonpublic investigations, consent orders (settlements), or litigation under sections 5 and 12 of the Federal Trade Commission Act; informal actions such as warning letters; business education to promote compliance and truthful advertising; and consumer education to prevent consumers from being scammed.

On a personal note, my brother is a medical doctor. He regularly bemoans the consequences for patients who have attempted to treat serious medical conditions with cures they saw promoted on social media only to become worse off because they delay seeking actual medical advice or even abandon medically indicated treatments. My brother's experience reminds me that policing deceptive health claims is one of the most important ways the Commission can protect Americans.

2. Commissioner Slaughter, 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?

My office's paralegal coordinates with the career FOIA staff in the Office of the General Counsel to ensure that all requests are processed timely and in compliance with FOIA itself, 5 U.S.C. § 552, and our FOIA rules, 16 C.F.R. §§ 4.8–.11. No FOIA requests are still pending with my office.

3. Commissioner Slaughter- 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?

It is absolutely the case that economy-wide standards have different implications than industry specific standards. The FTC Act is, of course, a generally economy-wide statute that broadly proscribes unfair or deceptive acts and practices. While there are benefits to a level statutory playing field, we must be mindful of the different ways the FTC Act can be violated in different industries. I agree that, depending on the rule, economy-wide rules can have a more complex set of costs and benefits than industry-specific rules. In the Unfair or Deceptive Fees Trade Regulation Rule proceeding, we have received comments from many participants in a variety of industries, and we held an informal hearing on April 24 of this year before Administrative Law Judge Jay L. Himes, the substance of which the staff and I and my Commissioner colleagues are all carefully considering. I disagree that discussion and debate are the only point of informal hearings under section 18 of the FTC Act; instead, the unique feature of such hearings is that they conclusively resolve "disputed issues of material fact it is necessary to resolve" for the Commission to decide whether to issue and how to formulate a final rule. 15 U.S.C. § 57a(c)(2)(B). Ample discussion and debate on the overall merits and details of a proposed rule also occur in the helpful comments that we receive from the public and with the Commission's staff and my Commissioner colleagues.

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 Slaughter, why is the Commission putting out guidance claiming activities are illegal, but then starting rulemaking proceedings?

I respectfully disagree with the question's characterization of the Commission's activities. The Commission's guidance explains the law; it does not change it. The Commission cannot, for example, cite a guidance document in a complaint as a source of law that a defendant allegedly violated. To the contrary, guidance documents are intended to provide the kind of clarity and predictability industry routinely requests from the Commission as to its enforcement agenda. Rulemakings, by contrast, can create enforceable regulations that come with attendant

consequences, and therefore rulemakings must follow a specific, legally defined process and can be subject to legal challenge.

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

Rulemaking creates binding law and attendant consequences. For example, before April of this year, it was already clearly established that impersonating a business or a government was deceptive, in violation of section 5 of the FTC Act's prohibition against "unfair or deceptive acts or practices." 15 U.S.C. § 45(a). Last year, a defendant caught impersonating a business or government and found liable could become subject to an administrative cease-and-desist order and might, after a second lawsuit in federal court under section 19, be required to return the money to scammed consumers. Now, because the Commission issued a final rule under section 18 of the FTC Act codifying an explicit prohibition against impersonating businesses or government, *see* 16 C.F.R. pt. 461 (effective Apr. 1, 2024), a defendant caught violating the rule can be required not only to return the money (far more efficiently than without a rule because a second lawsuit is not required) but also to pay civil penalties a court imposes. These consequences help protect American consumers by making them whole when they are scammed and by deterring would-be scammers with the threat of civil penalties; they also protect honest businesses whose reputations are impugned by imposter scams.

Rulemaking is a process that is more collaborative and inclusive of public input than case-by-case enforcement, because we can hear from a broad swath of the public and not just one defendant's lawyers. It is also useful to regulated entities, because rules are typically easier to read and to follow than the opinions of a court and, under the Small Business Regulatory Enforcement Fairness Act, agencies must produce small-business compliance guides for certain rules. Rulemaking and enforcement actions complement each other, and each tool is useful in different circumstances.

5. Commissioner Slaughter, 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?

When Congress enacted the FTC Act in 1914, it charged the Commission with stamping out unfair methods of competition. In 1938, Congress added unfair or deceptive acts or practices to our charge. These twin goals are the core of why the FTC exists and what it does—our mission. In striving to achieve this mission, we seek to do it the right way, which means following the law, cooperating with state partners, not unduly burdening honest businesses, and being responsive to Congress and to the public. These are important values, but these important values are not our mission. Our Strategic Plan, which is far more detailed than a 24-word mission

statement, continues to state that we seek to achieve our mission "without unduly burdening legitimate business activity." 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. Accordingly, I disagree that our mission conveys that the FTC should burden legitimate business activity.

6. Commissioner Slaughter, your written statement stated, "whether or not there is another pay raise in 2025, the practical reality is that a 1% bump and much more would be consumed by increased payroll costs, even with limited hiring and some attrition." You also stated that if FTC's budget were cut, "we will absolutely have to furlough large cohorts of our staff." I would therefore expect the agency to proceed cautiously with any new hiring practices. Please state the number of job offers the agency has extended each month in 2023 and 2024 and describe the categories of personnel you are seeking to hire.

I have hiring authority only for the small staff of my office, but my understanding is that your expectation is correct and that the Commission is proceeding with great caution for any new hiring within the three Bureaus and various other offices, such as the Office of General Counsel and Office of the Executive Director.

7. Commissioner Slaughter, your written statement discusses the dire consequences of a budget cut. You stated, "Under this scenario, some anticompetitive deals and conduct would proceed unchallenged, and our ability to tackle cutting edge issues such as AI-fueled fraud, to fight scams that target veterans, to protect children and teens online, and to combat illegal robocalls would be limited." Couldn't the agency reallocate resources instead, to for example, transfer FTEs from policy-making or non-enforcement functions to these areas?

The allocation of resources falls under the purview of the Chair, and I am confident that she and all the agency's managers would all do their best to strive to accomplish our mission even if facing severe budget cuts. During the historic merger wave of 2021, for example, I know that staff who ordinarily focused on other matters were re-assigned to merger work. In the ordinary course, many staff with deep expertise in particular markets are called on to work on investigations and litigations during certain periods and public workshops or studies during others. In general, our staff's work on non-enforcement functions is vital to achieving our mission. Consider the tremendous contribution of the staff of the Division of Consumer and Business Education, who help seniors spot and avoid scams and advise businesses about how to comply with the law. Also helping achieve our mission are the economists and policy staff who conduct cutting-edge studies that inform agency leaders, Congress, and the public about important developments in our nation's markets. Dropping all this important work in favor of exclusively law enforcement would, I fear, cause the agency to fail to live up to the important mission the American people depend on us to execute.

<u>The Honorable Jeff Duncan</u>

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?

Yes. 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 did not share this information and do not know who did.

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

To avoid potential interference with ongoing criminal investigations, the Commission does not disclose its criminal referrals unless public criminal filings are made as a result of the referral or the agency to whom it makes the referral consents to disclosure.

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 only when criminal charging documents are made public by prosecutors. We regularly see conduct that violates not only the civil laws we enforce but also the criminal laws; I do believe that making and publicly confirming criminal referrals in appropriate cases is an important part of deterring unlawful conduct that harms Americans. Our criminal law-enforcement partners often make such disclosures when thanking the Commission for its referral when announcing an indictment; in the rare case in which the Commission on its own initiative discloses a criminal referral, such public confirmations can and should only be made after a formal Commission vote to do so.

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?

In my view, it was inappropriate. Such leaks undermine our ability to achieve our mission on behalf of the American people.

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

The Commission's Inspector General, in response to learning about this question, encouraged me 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.

<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.

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. Refin. 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 Inst.*, 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 Commission or any other federal agency with independent authority to promulgate rules. Instead, when the Commission 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 Commission 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 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 the text of the final rule, the Commission speaks to the issues in that litigation only through its court filings. Notably, the Commission has not relied on *Chevron* in either the statement of basis and purpose accompanying the final Non-Compete Clause Rule or in ongoing litigation concerning that rule.