**Questions for the Record from Mr. Darrell Issa for FTC Chair Lina Khan**
**Hearing on Oversight of the Federal Trade Commission**
**July 13, 2023**

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1. **Last year, Congress rejected legislation aimed at restructuring competition policy in the United States, along with granting the FTC broad new authority to intervene in our economy. My concern lies in whether the FTC intends to circumvent Congress's decision and potentially outsource competition policy to foreign regulators. The press release issued by your office on March 30th celebrated the FTC's collaboration with foreign regulators, particularly regarding the European Union's Digital Markets Act F(DMA). This act seems to be inherently prejudiced against American companies while favoring Chinese companies. Is the Biden administration's stance to collaborate with foreign regulators for policies that target U.S. companies? Given that the Biden administration has allowed the European Union to open an office in San Francisco for the sole purpose of enforcing European laws against American companies, is the FTC coordinating in any way with the European Union to enforce European laws against American companies?**

   **It appears that your actions in targeting U.S. companies may inadvertently benefit the Chinese Communist Party and Chinese state-sponsored companies, which are spreading potentially dangerous technology worldwide. Do you believe it is appropriate to empower Chinese companies in foreign markets through the implementation of policies that indirectly support them?**
   **Given the administration's stated goal of "de-risking" from China and working closely with our allies, does your approach not contradict this objective, as it seems to indirectly assist Chinese companies and their interests?**

   It is longstanding practice for the FTC to cooperate with foreign counterparts on matters under parallel review. During the Bush administration, FTC Chairman Deborah Majoras established the Office of International Affairs, strengthening the agency's international cooperation and engagement. The FTC's international work has long garnered widespread support, including from the business community.

   This type of cooperation allows the agencies to identify issues of common interest, gain a better understanding of relevant facts, and promote efficient and effective enforcement for both the agencies and the subjects of an investigation. Given these benefits, parties routinely support the agencies' cooperation, including by voluntarily providing agencies with waivers of confidentiality to facilitate more in-depth interagency discussions.

   Each agency always carries out its own independent investigation pursuant to its own legal authorities and in light of the particular markets and facts specific to its jurisdiction. Accordingly, the answer to each of the questions posed above is "no."

2. **Did you know you would be appointed Chair when the Senate confirmed your nomination?**

In deference to the President's Executive Privilege, I refer this question to the White House.

3. **What implications of China IP theft did you examine prior to your rulemaking on noncompetes?**

   Our proposed non-compete rule asks a series of questions relating to intellectual property. We have received over 20,000 comments in response to this rulemaking, and our team is diligently reviewing them.

4. **Did you speak to any cancer patients or doctors before making your decision on the Illumina/Grail merger?**

   The FTC's challenge to the Illumina/Grail merger was voted out unanimously before I arrived at the Commission. I am not familiar with what meetings the Commission or any Commissioner had prior to making their decision on voting out that matter. I understand that the Bureau of Competition (BC) staff spoke with multiple doctors involved in cancer research and treatment before the Commission voted out a complaint. Grail's multi-cancer early detection (MCED) test is intended for use as a screening test for asymptomatic individuals in the general population instead of individuals who have already been diagnosed with cancer. Therefore, BC staff spoke with multiple cancer patient advocacy groups and organizations.

   Since becoming chair of the Federal Trade Commission, I have prioritized ensuring that we are hearing about the prospective impact of mergers from a variety of market participants, including consumers, workers, and businesses.

**Questions for the Record from Mr. Scott Fitzgerald for FTC Chair Lina Khan Hearing on Oversight of the Federal Trade Commission July 13, 2023**

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1. **The availability of accurate information is critical to promoting robust transaction activities and fair competition in the commercial real estate (CRE) industry. We are hearing about a legacy incumbent in the CRE data industry obscuring basic data ownership and abusing the copyright system to prevent their customers who are brokers and sellers from using their competitors' sites and products to promote their CRE transactions. Chair Khan, what is FTC doing about this situation, and how is the Commission working to protect competition in the CRE market?**

   Lawmakers have written to the FTC about these issues, and so we are aware of concerns regarding competition in the CRE data industry.

   I am fully committed to ensuring that the FTC vigorously enforces the statutes it is charged with administering, including the laws prohibiting unfair methods of competition and monopolization. Unfortunately, there are many more markets requiring our attention than we can possibly prioritize, given our scarce resources. Additional funding from Congress would boost our ability to scrutinize a greater range of business practices by dominance firms across markets.

2. **For several years, Congress has considered addressing an actual or perceived difference in standards between the FTC and DOJ for obtaining an injunction in federal district court to prevent closing a merger. The bipartisan Standard Merger and Acquisition Reviews Through Equal Rules (SMARTER) Act proposed that the FTC exercise the same authority and procedure as the DOJ for mergers. Notably, the SMARTER Act passed the House in 2018, HR 5645 (2017-18 / Handel - R-GA) and was most recently reintroduced in the 116th Congress as S. 4876.**

   **Former Chairwoman of the FTC Edith Ramirez testified in 2013:**
   **Although some in the antitrust community perceive that the FTC and Department of Justice Antitrust Division face different preliminary injunction standards to enjoin pending mergers, as Assistant Attorney General Baer and I both testified, this has not been our experience. While the wording may differ, there appears to be no evidence that the substantive standard varies, or that any perceived difference has influenced the outcome of any specific case.**

   **Chair Khan, do you believe that the same standard applies when the FTC and DOJ seek an injunction in federal district court to prevent closing a merger?**

   Although the agencies rely on different statutory provisions when seeking a preliminary injunction against a proposed merger in federal court, the success of either matter turns on whether the merger may substantially lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act. That determination is very fact-intensive.

3. **In cases seeking to block mergers in court during your tenure, how many times has the Commission voted to issue a complaint after career staff in either the Bureau of Competition or Bureau of Economics recommended not challenging the merger in court?**

   **Which matters were those?**

   In enacting Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), Congress charged the Commission with, *inter alia*, deciding (1) whether there is "reason to believe" that defendants are violating or about to violate the law, and (2) whether seeking to enjoin the defendants' conduct pending the outcome of an administrative adjudication would be "in the interest of the public." These decisions are made by the Commission, not career staff.

**Questions for the Record from Mr. Nathaniel Moran for FTC Chair Lina Khan Hearing on Oversight of the Federal Trade Commission July 13, 2023**

1. **Merger guidelines inform companies how the FTC and DOJ will analyze transactions for anticompetitive effects. This helps companies understand whether a transaction will be viewed as illegal by antitrust enforcers. Good guidelines, therefore, discuss the law and then help companies understand the parameters of the law so as to avoid even attempting illegal mergers. Good guidelines can also save resources by preventing anticompetitive mergers from even being proposed while also guiding the FTC away from making unwise decisions to challenge otherwise pro-competitive mergers. You released draft new proposed Merger Guidelines on July 19, 2023 ("new proposed Merger Guidelines") and are seeking public comment.**

    a. **The new proposed Merger Guidelines cite to several cases for legal authority, but relatively few that show reliance on recent case law and how courts evaluate mergers. To be clear, the new proposed Merger Guidelines cite approvingly recent merger enforcement cases such as *United States v. AT&T,* 916 F.2d, 1029 (D.C. Cir. 2019) and *United States v. U.S. Sugar Corp.,* No. 22-2806 (3d Cir., July 13, 2023). However, the new proposed Merger Guidelines cite to no cases that this administration has won, and do not cite to significant body of cases from the past four decades that informed the Agencies in prior revisions of the Merger Guidelines starting in 1992. Please explain why the new proposed Merger Guidelines rely extensively on merger cases predating the 1992 merger guidelines revisions, and seemingly ignore developments in the law since that time.**

    The new proposed Merger Guidelines are clearly and firmly anchored in the laws that Congress has passed and decades of prevailing case law. Accordingly, the proposed guidelines cite to cases decided by the Supreme Court and the Courts of Appeals and seek to accurately represent that case law. The Supreme Court has not decided a merger challenge since 1990.[1] Accordingly, the most authoritative statements of the law predate the 1992 Guidelines. These include seminal antitrust cases that lower courts continue to cite and heavily rely on today.

    Nevertheless, the proposed Merger Guidelines also seek to reflect more recent antitrust decisions. As noted in the question, the Guidelines cite to *United States v. AT&T*, 916 F.3d 1029 (D.C. Cir. 2019) and *United States v. U.S. Sugar Corp.,* No. 22-2806 (3d Cir., July 13, 2023). In addition, the proposed Merger Guidelines cite the following cases decided after issuance of the 1992 Merger Guidelines:

    1. *NCAA v. Alston*, 141 S.Ct. 2141 (2021)
    2. *FTC v. Sanford Health*, 926 F.3d 959 (8th Cir. 2019)
    3. *Ohio v. American Express*, 138 S.Ct. 2274 (2018)

[1] *See California v. American Stores Co*., 495 U.S. 271 (1990).

4. *FTC v. Penn State Hershey Medical Center*, 838 F.3d 327 (3d Cir. 2016)
5. *McWane v. FTC*, 783 F.3d 814 (11th Cir. 2015)
6. *ProMedica Health System v. FTC*, 749 F.3d 559 (6th Cir. 2014)
7. *US v. Dairy Farmers of Am.*, 426 F.3d 850 (6th Cir. 2005)
8. *FTC v. HJ Heinz*, 246 F.3d 708 (D.C. Cir. 2001)
9. *US v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001)
10. *Brooke Group v Brown and Williamson*, 509 U.S. 209 (1993)

These cases represent roughly one quarter of all unique cases cited in the proposed Merger Guidelines.

The agencies are currently accepting comments on the proposed Merger Guidelines and will carefully consider this input.

b. **In your recent defeat in the Microsoft/Activision matter, the Court held that your reliance on your in-house decision in *Illumina/Grail* was misplaced, and that your argument that you were only required to show that post-merger a company would have the incentive to grow monopoly power, even if it did not have the foreseeable ability to do so. The 9th Circuit subsequently decided that it was unlikely that you would succeed on appeal, allowing the parties to consummate the transaction (despite the potential risk of "unscrambling the eggs" in the event that the FTC wins on appeal). Given this resounding recent rejection of the FTC's approach, will you modify the new proposed Merger Guidelines to reflect the Court's finding in this holding? If not, why not?**

Our goal in pursuing the current revision of the Merger Guidelines is to ensure that they accurately reflect modern commercial realities, are faithful to the laws that Congress has passed and prevailing case law, and are administrable and predictable.

The comment period on the draft update of the Merger Guidelines remains open, and the FTC will closely review the public comments and identify any needed modifications before finalizing the guidelines.

c. **The Court held in the *Meta/Within* case that you failed to demonstrate a factual predicate for potential competition theory. What factual predicate is required in such a case, and how do you anticipate incorporating what you learned from your loss in *Meta/Within* into the new proposed Merger Guidelines?**

The Court in *Meta/Within* held that the FTC had sufficiently pled its potential competition case and denied Meta/Within's motion to dismiss the complaint. The actual and perceived potential competition theories that the FTC relied on in the *Meta/Within* case are addressed in Guideline 4 of the new draft proposed Merger Guidelines. As set forth in the draft Guidelines, in actual potential competition cases, the FTC will consider whether the market is concentrated, whether there is a reasonable probability of alternative entry, and whether alternative entry would

likely deconcentrate the market or have other significant pro-competitive effects. In perceived potential competition cases, the FTC will consider whether current market participants could perceive one of the merging parties outside the relevant market to be a potential entrant into that market, and whether that potential entry has a likely influence on existing rivals.

We are currently accepting public comments on the proposed guidelines and will review any input on whether Guideline 4 reflects prevailing law and adequately safeguards against mergers that eliminate a potential competitor.

d. **You are pursuing the Amgen/Horizon case right now on a debunked "conglomerate" theory of harm. If you lose that case, will you commit to updating the new proposed Merger Guidelines to reflect that loss and its holding if it rejects the "conglomerate" theory of harm?**

The FTC only votes out cases in instances where we have determined that there is a law violation. One of my key goals has been to ensure the FTC is being faithful to the text of the statutes Congress has passed and to prevailing case law. Our close review of controlling legal precedent revealed that prior guidelines had departed from the law, including by jettisoning theories relating to entrenchment.[2]

I do not believe that the FTC can ignore the text of the statutes Congress has written or judicial interpretations of those laws. The FTC's fidelity to Congress and the courts helps ensure we are promoting and protecting the rule of law.

[2] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 38 (2010), https://www.justice.gov/atr/horizontal-merger-guidelines-08192010.

e. **In your public statement announcing the new proposed Merger Guidelines, you said that "the proposed guidelines are designed to reflect how businesses compete in today's economy." However, with respect to assessing market power, the new proposed Merger Guidelines state, "[t]he Agencies generally focus their [hypothetical monopolist test] assessment on the constraints from competition, rather than on constraints from regulation, entry, or other market changes." The Merger Guidelines also say the Agencies consider how post-merger avoidance of regulatory constraints may counsel *against* approving such mergers. Federal and state regulations are ubiquitous throughout the U.S. economy, and yet it seems that the new proposed Merger Guidelines give scant consideration to the effects of regulation on different markets and the ability for companies to compete effectively in today's economy. Please explain the inconsistency with your statement that the guidelines are designed to reflect how businesses compete in today's economy with the fact that the new proposed Merger Guidelines offer no information on how the Agencies factor regulations into their analysis.**

The FTC is focused on understanding the dimensions on which firms are competing in a market. If regulations are relevant to competition in a market, then the agencies will certainly consider that impact. Indeed, regulations may be relevant to assessing several aspects of competition, including barriers to entry, prices or wages, product or job quality, and innovation. One reason regulations may be relevant to competition analysis is that a merger may enable firms to evade regulation in a way that facilitates the exercise of market power, a potential concern that was first explained in the Merger Guidelines in 1982.[3]

Because the Merger Guidelines are not specific to any one industry and regulations vary enormously, we do not cite to any one methodology for understanding the impact of regulations across industries. Instead, each merger's impact on competition is reviewed based on its individual facts.

f. **Small business is the backbone of the American economy. Likewise, startups built around innovation and entrepreneurship set the American economy apart from any other. In fact, those economies that dampen competition with over-regulation and industrial planning face dampening of innovation. Part of that innovation is being able to build businesses around technology that becomes better and stronger through mergers. The new proposed Merger Guidelines appear hostile to entrepreneurs and innovators who aspire to build and innovate with the hopes of joining with other companies to access scale efficiencies. How do you address the criticism that the proposed Merger Guidelines will have a chilling effect on small businesses and startups built around innovation and entrepreneurship, and in so doing degrade these factors that have set the American economy above the rest of the world?**

[3] U.S. DEP'T OF JUSTICE, 1982 MERGER GUIDELINES § IV.3 (1982) ("Evasion of Rate Regulation. Non-horizontal mergers may be used by monopoly public utilities subject to rate regulation as a tool for circumventing that regulation.")

The proposed Merger Guidelines are focused on preserving competition, including competition from innovative small businesses. The Guidelines ensure that a dominant firm cannot use mergers to increase barriers to entry or expansion that could cripple a small business's opportunity to come to market and win customers. By preserving these opportunities for small businesses, the proposed Guidelines are intended to foster the innovation and entrepreneurship that are critical to the American economy's dynamism.

Since joining the FTC, I have made it a priority to ensure we are hearing from market participants across the board, not just dominant firms. At our regular open Commission meetings, we often hear from small businesses and entrepreneurs about the challenges they face when dominant firms can use their muscle to capture markets and block rivals. We are currently accepting comments on the proposed Merger Guidelines, and I look forward to reviewing the feedback, including from small businesses and entrepreneurs.

2. **You implemented the use of omnibus resolutions in antitrust investigations instead of the procedural guardrails that were a hallmark of FTC enforcement for more than a century, and gave credibility to enforcement decisions undertaken by the agency. These omnibus resolutions, approved by you, Commissioner Chopra and Commissioner Slaughter, in effect give the Chair of the FTC sole control over FTC investigations. That is, the Chair could direct staff to investigate a transaction and sign all subpoenas without a Commission vote, which was previously necessary in investigations of almost all mergers and business conduct. Former Commissioners Phillips and Wilson said that this power grab eliminated the only layer of Commission oversight.**

    a. **Do you agree that the use of omnibus resolutions in this manner undermines the bipartisan nature of the Commission model? If not, why not?**

    Omnibus resolutions allow FTC staff to seek compulsory process over categories of potentially illegal conduct. These resolutions streamline investigative processes, removing time-consuming barriers and promoting efficiency in government processes. For example, one of the resolutions we announced will help staff obtain evidence in connection with investigations of potentially unlawful collusive and coordinated conduct where competitors work together rather than compete against one another.

    Use of omnibus resolutions by the Commission's Bureaus of Competition and Consumer Protection is not new. For decades, the Commission has used this tool to expeditiously and effectively initiate investigations into alleged illegal conduct. The Commission's longstanding omnibus resolutions cover wide swaths of the Commission's authorities, including, for example, enforcement under the Equal Credit Opportunity Act, the Fair Credit Reporting Act, the Fair Debt Collection Act, the Franchise Rule, the Gramm-Leach-Bliley Act, and the Truth in Lending Act. Significantly, the overwhelming majority of the Commission's omnibus resolutions were enacted before 2021.

b. **A year after you put in place the first set of omnibus resolutions, on a party line 3- 2 vote, you put in place three additional omnibus resolutions. Former Commissioners Phillips and Wilson said in their dissent that one of the resolutions resembled a hastily adopted resolution on the same topic from a year earlier. Commissioner Phillips and Wilson also noted that the language of your initial resolution allowed recipients of a subpoena to infer information that should be kept confidential. Do you acknowledge that your use of your original merger omnibus resolution was inadvertently disclosing confidential information?**

The 2022 omnibus resolution for merger investigations amended the 2021 omnibus resolution by deleting language stating that the transactions at issue were those "subject to any federal premerger notification requirements." One possible reading of the 2021 resolution was that the transaction being investigated had been notified to the antitrust agencies pursuant to the Hart-Scott-Rodino (HSR) Act. Under this reading, third parties receiving the resolution in connection with a subpoena or civil investigative demand might have inferred that the transaction at issue was the subject of a nonpublic HSR filing. However, another possible reading of the 2021 resolution was that it encompassed not just proposed transactions that resulted in an HSR filing, but also transactions that should have been notified pursuant to HSR but were not. Under this reading, third parties receiving the resolution would not have been able to infer the existence of a nonpublic HSR filing. The 2022 resolution eliminated both the ambiguity and the possibility that third parties would draw any inferences about the existence of a nonpublic HSR filing.

c. **How many times did you send out the resolution that could have been disclosing confidential information?**

As noted above, the 2022 resolution eliminated both the ambiguity and the possibility that third parties would draw any inferences about the existence of a nonpublic HSR filing.

d. **Who drafted the omnibus resolution with the error?**

As explained in the response to question 2.b, the 2021 omnibus resolution contained an ambiguity, not an error. The Commission voted out the revised resolution out of an abundance of caution.

3. **On August 3, 2021, the FTC announced that it will send warning letters in connection with transactions it cannot fully investigate within the time provided by statute before the deal closes. These letters alert parties that their transactions remain under investigation and warn that closing occurs at the parties' own risk.**

a. **How many of these so-called "pre-consummation warning letters" have been sent by the FTC?**

b. **Of the transactions that received warning letters, how many of those investigations remain open?**

c. **Does the FTC inform third parties who have received requests for information that such letters have been sent to merging parties and instruct third parties that no further compliance is necessary? If so, how soon after the warning letters are sent do you inform third parties?**

d. **Of the transactions that received warning letters, how many currently have FTC actively investigating those transactions?**

e. **Of the transactions that received warning letters, do you inform the companies to the transaction when you ultimately close the investigation?**

f. **Is it reasonable to conclude that these letters, especially at the volume you have reportedly sent them, appear to be empty threats meant predominantly to scare companies? If not, why not?**

The Hart-Scott-Rodino (HSR) Antitrust Improvements Act of 1976 requires parties to certain mergers to file notice with the FTC and DOJ and to wait to consummate their merger until after the waiting period expires. To prevent the parties from consummating an illegal merger, the FTC can ask a federal court to enjoin the merger before the waiting period expires. A decision not to take enforcement action against a proposed merger does not constitute an "approval" or "clearance" of the transaction. The FTC has the authority to challenge a consummated deal as the public interest may require, regardless of whether it was initially investigated as part of the HSR Act review process.

Unfortunately, firms sometimes represent that the FTC's decision not to take enforcement action against a proposed merger means that the agency has "approved" or "blessed" the deal. In order to remove any ambiguity and provide fair notice to market participants, the FTC's pre-consummation warning letters alert parties to the fact that the FTC's investigation remains open.

In 2021, a substantial increase in merger filings put significant pressure on the FTC's resources, making it difficult to thoroughly investigate potentially unlawful deals ahead of the HSR Act deadlines. From October 2021 to the present, the FTC sent letters in approximately four percent of the transactions reviewed during this period.

4. **In your Senate Questionnaire, you said that "In my prior role at the FTC, I focused on exploring how the agency could use its existing authorities to promote predictability, efficiency and transparency." For the two years you have been in your position, the FTC has made merger enforcement far less predictable, is reportedly making merger enforcement less efficient, and is far from making the process transparent.**

a. **Explain what you learned during your summer of 2018 work for Rohit Chopra that led you to tell the Senate that you could use the FTC's "authorities to promote predictability, efficiency and transparency," why you have failed to achieve that promise, and why you have made things worse.**

The pre-consummation warning letters that we instituted have promoted transparency, putting market participants on notice when the FTC has not concluded its investigation ahead of the waiting period expiration date.

The proposed Merger Guidelines are also designed to promote predictability, efficiency, and transparency. They identify the analytical frameworks and tools the FTC will use to assess whether a merger may violate the antitrust laws. For the first time in the history of this enforcement manual, the proposed Merger Guidelines are specifically anchored in prevailing case law, and by citing to these decisions we explain clearly to market participants how we will be assessing their deals.

b. **You told the Senate that "The FTC was designed to serve as a key guardian of fair competition and to protect consumers…" What did you mean by "fair" as a modifier to competition?**

When writing the FTC Act, Congress prohibited "unfair methods of competition." By writing "unfair methods of competition" into the text of our statute, lawmakers charged us with distinguishing between "fair" and "unfair" methods of competition. A top priority of mine has been ensuring the FTC is being faithful to its statutory mandate. I do not believe it is the role of enforcers to ignore the text of the laws that Congress has written. Accordingly, in October 2021, the FTC published a policy statement on Section 5, laying out the framework we will use to assess whether a practice violates this provision of the law. The policy statement is faithful to the text, structure, and purpose of the FTC Act. It also reflects over a century of judicial precedent. Our team reviewed closely over a century of litigated decisions to ensure our policy statement is reflective of and consistent with this case law.

5. **On June 27, 2023, the FTC published a proposal that included changes to the merger filing requirements. The new proposed filing, as required under the Merger Filing Fee Modernization Act of 2022, changes the filing to collect information on subsidies received from certain foreign governments. But the changes you are proposing are much broader than those required by Congress. The FTC's own calculation claim that your new rules increase the work for each filing from 37 hours to 144 hours. For just fiscal year 2023 this would impact over 7,000 filings for a total increase of legal costs to business equaling $350 million per year. These 7,000 filings are not all mega mergers, but transactions that allow our economy to function – the vast majority of transactions are procompetitive or have no impact on competition. The FTC only opened in depth investigations in 65 transactions in fiscal year 2021, which is the most recent data available.**

a. **Do you believe that these added costs will deter companies from even attempting transactions? If so, is that the goal of these changes?**

The Commission, with the concurrence of the Assistant Attorney General in charge of the Antitrust Division, has proposed to reorganize the information currently required with a Hart-Scott-Rodino premerger notification filing and to require additional information critical to the agencies' initial antitrust review of the proposed transaction.[4] This is the first time the agencies have proposed a significant revision of the HSR form since the 1970s, even though the size, volume, and complexity of dealmaking has transformed since that time.

As stated in the Notice of Proposed Rulemaking, the proposed changes "would improve the efficiency and effectiveness of that initial review by providing the information the Agencies need to identify during the initial 30-day waiting period any transaction that may pose competition concerns and potentially narrow the scope of any investigation or reduce the need to conduct a more in-depth investigation of the proposed transaction." The NPRM also proposes changes to implement the collection of information mandated by the Merger Filing Fee Modernization Act of 2022 related to subsidies from foreign countries or entities that are strategic or economic threats to the United States. For each proposal, the NPRM identifies why the agencies need the information and asks for comment on other sources for that information that would require less burden.

As detailed in the burden analysis required by the Paperwork Reduction Act, some of the proposed changes will reduce the burden of filing, some changes offer clarifications that are unlikely to change the existing burden of filing, and many proposals will increase the burden of filing to varying degrees, especially for complex transactions with wide-ranging competitive issues.[5] The NPRM seeks public comments on: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the agencies, including whether the information will have practical utility; (2) the accuracy of the agencies' estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of these information collections on respondents.[6]

We extended the public comment period to receive input on this proposal, and I look forward to reviewing any feedback.

b. **This proposal will increase the paperwork burden on companies seeking merger approval. Prior to issuing this proposed change, did you seek approval from the Office of Management and Budget as to how these**

[4] Premerger Notification; Reporting and Waiting Period Requirements, 88 FR 42178 (Jun. 29, 2023), https://www.regulations.gov/document/FTC-2023-0040-0001.
[55] 88 FR 42207-08.
[6] 88 FR 42208.

**changes will comport with the Paperwork Reduction Act, 44 USC §35021, et seq.?**

The Paperwork Reduction Act, 44 U.S.C. §§ 3501-3518, and its implementing regulations, 5 C.F.R. pt. 1320, require that agencies submit collections of information contained in proposed rules to OMB.[7] In compliance with 5 C.F.R. § 1320.11(b), the FTC sent its PRA submission to OMB on the same day that the Notice of Proposed Rulemaking was published in the Federal Register.[8] As provided in 5 C.F.R. § 1320.11(c), within 60 days of publication of the proposed rule, OMB may file public comments on the collection of information provisions. Because the FTC's Notice of Proposed Rulemaking was published in the Federal Register on June 29, 2023, OMB's 60-day period runs until August 28, 2023. On August 4, 2023, the Commission granted a 30-day extension of the comment period to September 27, 2023.

i. **If not, why not?**

See the response above.

ii. **If yes, what advice did the Office of Management and Budget provide?**

See the response above.

c. **Explain how your proposed changes to HSR filings, where you propose adding burdens to merging parties beyond what Congress anticipated incorporates, how this comports with your work at the FTC in 2018, where you told the Senate: "In my prior role at the FTC, I focused on exploring how the agency could use its existing authorities to promote predictability, efficiency and transparency."**

I believe that the proposed revisions to the HSR Form, together with the draft Merger Guidelines, would vastly improve the predictability, efficiency, and transparency of federal merger enforcement. As proposed, these two projects provide clear guidance on the theories of harm currently under investigation at the antitrust agencies and identify the information that is critical to our assessing whether a merger requires an in-depth investigation to determine if it is likely to violate federal antitrust laws.

[7] *See* 5 C.F.R. § 1320.11.
[8] *See* https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202306-3084-001.

**Questions for the Record from Ms. Laurel Lee for FTC Chair Lina Khan**
**Hearing on Oversight of the Federal Trade Commission**
**July 13, 2023**

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1. **The CFPB, led by your former boss and former FTC Commissioner Rohit Chopra, sent an employee as a detailee to the FTC to lead the noncompete rulemaking effort. Congress has appropriated funds to the FTC to be staffed with expert lawyers and economists in antitrust, consumer protection, and administrative law and policy – but in the entire agency, you did not find a single person better suited to lead the rulemaking other than the employee from Director Chopra's CFPB.**

    a. **Is it your position then that this CFPB employee possessed superior knowledge of FTC rulemaking and competition law than FTC employees?**

    As you know, detailing employees is common practice across the federal government. These types of details can allow agencies to provide and exchange expertise, while providing career staff with opportunities.

    The FTC's non-compete rulemaking team was comprised of FTC competition attorneys, economists, and staff from the Office of General Counsel. One member of this team was a detail from the CFPB who had expertise on rulemakings. Overseeing and directing this team was Elizabeth Wilkins, Director of the Office of Policy Planning.

    b. **Did any FTC employees raise concerns that the noncompete rulemaking will be found to be illegal if challenged in court?**

    As explained in the Non-compete NPRM, the Commission has authority under Sections 5 and 6(g) of the FTC Act to propose the Non-Compete Clause Rule.

    c. **Did you choose a CFPB employee to lead the noncompete rulemaking team on a daily basis because you did not have support from FTC staff for the rulemaking?**

    No.

    d. **What role did Rohit Chopra play in selecting the CFPB employee who sent to the FTC to lead and supervise the Non-Compete Proposed Rulemaking effort?**

    Elizabeth Wilkins, Director of OPP directed and oversaw the proposed rulemaking.

    e. **Which agency paid the CFPB during the detail: the FTC or the CFPB?**

The CFPB detailee began as a non-reimbursable detail and later converted to a reimbursable detail.

f. **Did the CFPB employee possess a particular skillset in addressing the major questions doctrine, as explained in *West Virginia v. EPA*, 142 S. Ct. 2587, 2608–09 (2022)?**

The members of the team working on the Non-compete NPRM have expertise in reviewing and analyzing case law. Our teams always closely review all relevant court decisions to ensure the FTC's work is consistent with relevant legal precedent.

g. **On March 30, 2023, Rohit Chopra said, at the American Bar Association Antitrust Section Annual Spring Meeting that, "The CFPB is closely analyzing employer-driven debt, including so called 'training repayment agreements.' These provisions may harm people by coercing individuals into debt and limiting their ability to change jobs. In many ways, this complements broader efforts, such as those being undertaken by the Federal Trade Commission, to address non-compete agreements that limit worker mobility."**

i. **Did the Rohit Chopra's staff member who led and supervised the FTC's proposed non-compete rulemaking, or any other CFPB employee, incorporate these themes related to training repayments into the proposed rulemaking?**

The Non-compete NPRM discusses a number of provisions, including some training repayment agreements, that may rise to *de facto* non-compete clauses that employers use to restrict worker mobility.[9] It also discusses methods for employers to retain workers after they have received valuable training.

ii. **Did you communicate personally with Rohit Chopra regarding the FTC's proposed non-compete rulemaking. If so, describe such communications including, but not limited the method of such communications, the topics discussed, the people who participated in such discussions, and anything else that will elucidate the CFPB's role and influence on the FTC's non-compete rulemaking?**

The FTC regularly consults with other agencies on matters of mutual concern. Interagency discussions are a common and longstanding government practice.

[9] Notice of Proposed Rulemaking for the Non-Compete Clause Rule, 88 FR 3482, § 910.1(b)(2), (Jan. 19, 2023), (describing the functional test for whether a contractual term is a non-compete clause) and Part V (in the section-by-section analysis for proposed § 910.1(b)).

h. **Since you sought an employee from outside the FTC to lead and supervise the noncompete rulemaking, do FTC staff lack specific subject knowledge or skillsets required for FTC rulemaking? If so, do you expect to implement rulemaking training so that the staff at the FTC will be able to lead and supervise the FTC's own rulemaking efforts?**

Elizabeth Wilkins, Director of OPP directed and oversaw the Non-compete NPRM. Many of the current staff members working on the proposed rule have either taken training related to rulemakings or have participated in other rulemaking efforts.

i. **As of February 28, 2023, according to information you provided, 47 FTC employees spent 6,272 hours working on the noncompete rulemaking matter. You have continued to work on the rule since February and there is still more work to be done. With the rule likely to falter under legal challenge, and the FTC's enforcement numbers in decline under your leadership, do you think it is wise to spend so many resources on this idea?**

The FTC is spending resources on the proposed rule because, if adopted, the rule would deliver significant benefits to the American public, including a more open, vibrant, dynamic, and competitive economy. If adopted as proposed, the proposed rule would increase workers' earnings workforce-wide by $250-$296 billion annually. *See* 88 Fed. Reg. 3482, 3522-23 (Jan. 19, 2023). Just in health care alone, the NPRM estimates that, if the rule is adopted, Americans could annually save $148 billion. See *id.* at 3527. In addition, the proposed rule discusses potential long-run effects, like improvements in innovation and technological growth rates.

j. **If FTC staff advised you that a rulemaking is illegal, would you stop pursuing the rulemaking?**

FTC staff considered, and continues analyzing, the legal risks associated with all of our rulemakings. The Commission only promulgates rules that it believes it has the authority to pursue. Given the authority Congress granted the FTC in Sections 5 and 6(g) of the FTC Act, I do not believe enforcers can ignore the statutory mandate lawmakers have given us.

**Questions for the Record from Ms. Harriet Hageman for FTC Chair Lina Khan Hearing on Oversight of the Federal Trade Commission July 13, 2023**

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1. **The FTC uses a process which permits the votes of departing commissioners to be counted after they have left their role as a commissioner, a process sometimes referred to as "Zombie Voting."**

    a. **This procedure appears to be in direct conflict with the Supreme Court's decision in *Yovino v. Rizo*, 139 S. Ct. 706 (2019) (per curiam) which determined that a former judge "was without power to participate in [a court's] decision at the time it was rendered." Will you commit to eliminating this *ultra vires* practice?**

    The *Yovino* decision was based on judicial practice, federal statutory law in 28 U.S.C. § 46(c)-(d) establishing requirements for judges to participate as a member of an en banc court and to form a quorum, and judicial precedent interpreting 28 U.S.C. § 46(c)-(d).

    The considerations are different for an administrative agency like the FTC. *See Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 525 (1978) (cautioning courts "against engrafting their own notions of proper procedures upon agencies entrusted with substantive functions by Congress"). Although Congress established specific participation limitations and quorum requirements for judges in 28 U.S.C. § 46(c)-(d), Congress did not enact similar restrictions for FTC Commissioners. Instead, in 15 U.S.C. § 46(g), Congress authorized the Commission "to make rules and regulations for the purpose of carrying out the provisions of" the FTC Act – authorization that includes the authority to create internal procedures and rules. *See Falcon Trading Group, Ltd. v. SEC*, 102 F.3d 579 (D.C. Cir. 1996) (holding that a similar grant of authority "to make such rules and regulations as may be necessary or appropriate to implement the provisions of this chapter for which they are responsible or for the execution of the functions vested in them by this chapter" authorized the SEC to create its own quorum rule).

    The Interstate Commerce Commission, which had similar authority to prescribe "rules, regulations, and procedure" for administering the Interstate Commerce Act, also adopted a policy of counting the votes of departing Commissioners. In *State of Idaho v. ICC*, 939 F.2d 784 (9th Cir. 1991), the court rejected a challenge to the ICC's policy: "The Commission has consistently applied the same policy. Moreover, it was within the sound discretion of the Commission to adopt that policy. We decline to substitute our judgment for that of the Commission."

b. **Will you commit to reviewing all enforcement matters which suffer from procedurally invalid Commission votes taken using this procedure?**

The Commission's policy of counting the votes of a departing Commissioner, except in instances where they are displaced by the votes of his or her successor, dates back to March 1984. This policy was adopted during the Reagan administration under the leadership of then-Chairman Jim Miller, as indicated in the minutes available on the FTC's webpage for records frequently requested under FOIA.[10] As noted in the response to Hageman question #1.a, the Ninth Circuit upheld a similar policy adopted by the Interstate Commerce Commission.

2. **In April of 2023, the FTC issued a blanket Notice of Penalty Offenses Concerning Substantiation of Product Claims to almost 700 companies purporting to fulfill Section 5's, 15 U.S.C. § 45(m)(1)(B), pre-enforcement notice requirements.**

a. **This notice appears to circumvent due process and the FTC Act, as well as convert the FTC's sub-regulatory guidance regarding substantiation into the law. Will you commit to rescinding these nonspecific notices and acting within the confines of the law and the Constitution?**

Congress gave the FTC the authority under 15 U.S.C. § 45(m)(1)(B) to seek civil penalties in certain circumstances. The agency's use of these procedures, including sending copies of Notices of Penalty Offenses to advertisers to provide them with notice of potential violations, is fully consistent with our statutory authority.

Section 5(m)(1)(B) of the FTC Act, 15 U.S.C. § 45(m)(1)(B), provides that a marketer that engages in certain acts or practices may be subject to civil penalties if the marketer has actual knowledge that the acts or practices in question are unfair or deceptive and unlawful, and the Commission has issued a final cease and desist order (other than a consent order) determining that those acts or practices are unfair or deceptive. Advertisers who receive copies of the Notice of Penalty Offenses Concerning Substantiation of Product Claims gain actual knowledge of specific practices the Commission has determined in prior litigated administrative cases to be unfair or deceptive. The Notice also includes citations to the specific FTC case decisions where the determinations were made.

The FTC Act explicitly states that when the requirements of Section 5(m)(1)(B) are met, the Commission may seek civil penalties against advertisers even if they were not a party to the prior final cease and desist

[10] *See* Fed. Trade Comm'n, In re Policy with Respect to Counting Votes of Departing (and Arriving) Commissioners (Mar. 27, 1984), https://www.ftc.gov/system/files/documents/foia_requests/policy-with-respect_to-counting-votes-of-departing-arriving-commissioners.pdf.

order issued after the Commission determined an act or practice to be unfair or deceptive. However, if the Commission files a federal court action seeking civil penalties against such an advertiser, the statute also provides advertisers strong procedural protections. For example, a federal district court must independently determine the facts at issue, as well as potentially the validity of the Commission's prior legal determinations.

3. **The FTC's in-house adjudications are inherently unfair. The Commission effectively acts as prosecutor, judge, and jury, by authorizing the action, its staff arguing the action before its own ALJs, and then sitting as appellate judges—all before an administrative action can be heard by a neutral Article III judge.**

    a. **How does the FTC decide who gets charged in federal court proceedings with the full panoply of constitutional protections, while other respondents are charged before the agency which serves as charging authority, prosecutor, judge, and first court of appeal?**

    In the FTC Act, Congress gave the Commission the authority to pursue enforcement actions administratively, not just in federal court. I do not believe it is my role to second-guess the wisdom of Congress. Indeed, permitting agencies to pursue actions administratively or in federal court is common practice. Consistent with our statutory mandate, 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.

    During review of an ALJ's decision in a Part 3 proceeding, the Commission receives briefs, holds oral argument, and thereafter issues its own final decision and order. The Administrative Procedure Act[11] and the Commission's rules of practice[12] provide parties with a variety of procedural protections—including prohibitions on ex parte communications and "a reasonable opportunity" for the parties to submit proposed findings and conclusions, exceptions to the ALJ's decision, and supporting reasons for their exceptions or proposed findings or conclusions.

    The Commission's final decision is appealable by any respondent against which an order is issued. The respondent—but not FTC Complaint Counsel—may file a petition for review with any United States court of appeals within whose jurisdiction the respondent resides or carries on business or where the challenged practice was used.[13] If the court of appeals affirms the Commission's order, the court enters its own order of enforcement. The party losing in the court of appeals may seek review by the Supreme Court.

[11] *See, e.g.*, 5 U.S.C. §§ 554-557.
[12] *See, e.g.*, 16 C.F.R. §§ 3.52, 3.54-3.56.
[13] 15 U.S.C. § 45(c).

The Commission decides on a case-by-case basis whether it would be more appropriate to bring a case in federal court or to proceed via administrative adjudication. 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.

b. **Do you believe that an agency that investigates and prosecutes a case can be a neutral factfinder and adjudicator of that same case? Isn't there, at minimum, a confirmation bias problem with these combined functions?**

In the FTC Act, Congress gave the Commission the authority to pursue enforcement actions administratively, not just in federal court. I do not believe it is my role to second-guess the wisdom of Congress. Indeed, permitting agencies to pursue actions administratively or in federal court is common practice. Consistent with our statutory mandate, 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.

The Supreme Court has squarely rejected the proposition that the combination of investigative and adjudicative functions in and of itself creates an unconstitutional risk of bias. *Withrow v. Larkin*, 421 U.S. 35, 47, 56 (1975). To the contrary, adjudicators such as the Commissioners are presumed to be unbiased. *Schweiker v. McClure*, 456 U.S. 188, 195 (1982). As the Court explained, it is "very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings. This mode of procedure . . . does not violate due process of law." *Withrow*, 421 U.S. at 56. Accordingly, "[t]he combination of investigative and judicial functions within an agency has been upheld against due process challenges, both in the context of the FTC and other agencies." *Gibson v. FTC*, 682 F.2d 554, 560 (5th Cir. 1982).

c. **What percentage of FTC administrative adjudications end in consent decrees?**

Of the 150 administrative adjudications that the FTC has initiated pursuant to Part 3 of its Rules of Practice within the last 25 years (i.e., since January 1, 1998), 52 of those (or 34.6%) resulted in the issuance of a final consent order pursuant to 16 CFR 2.34. Please note that the 150 administrative adjudications referenced include all actions in which an administrative complaint was issued pursuant to 16 CFR 3.11, regardless of whether that action was fully adjudicated.

4. **Is it true that for the past 25 years every single time the FTC's ALJ rules in favor of respondents in antitrust cases, the Commission reverses him? Meaning that the FTC has a 100% win rate? If not, list and explain each instance in which the FTC has not "won."**

Since January 1998, the FTC's administrative law judges have issued 20 initial decisions in antitrust-related administrative adjudications pursuant to Part 3 of the FTC's Rules of Practice, 16 CFR 3.1, *et seq*.

The Commission reviews the evidence entered during the administrative adjudication *de novo* and independently determines whether a preponderance of evidence exists to affirm or reverse all or a portion of the ALJ's recommended decision. As the Commission serves as adjudicator in such circumstances, neither outcome is considered a "win" or a "loss."

The ALJ has ruled in favor of the respondent(s) on all, or a portion of, the counts alleged in 11 of these adjudications. The Commission has affirmed the ALJ's decision in favor of respondents in nearly half (i.e., 5 out of 11) of these actions, following a *de novo* review of the evidence presented. A table listing those antitrust-related adjudications where the ALJ has ruled in favor of the respondent(s) is below:

| **Part 3 Administrative Adjudications Since 1998 in Which the ALJ Has Dismissed All or Some of the Counts, in Favor of Respondent(s)** | | | |
|---|---|---|---|
| **Case Name** | **ALJ (All/Some Counts)** | **Commission (Affirm/Reverse ALJ)** | **Circuit Court of Appeals (Affirm/Reverse Commission)** |
| *Altria/JUUL* | All | Affirm ALJ | N/A |
| *Benco Dental Supply Co.* | All (Schein)<br>Some (Benco/Patterson) | Affirm ALJ | N/A |
| *Evanston Northwestern Healthcare* | Some | Affirm ALJ | N/A |
| *Illumina/Grail* | All | Reverse ALJ | N/A |
| *Impax Laboratories* | All | Reverse ALJ | Affirm Commission |
| *McWane/Star Pipe* | Some | Affirm ALJ (*dismissed six counts, as opposed to three counts by ALJ) | Affirm Commission |
| *Polypore* | Some | Affirm ALJ | Affirm Commission |
| *Rambus* | All | Reverse ALJ | Reverse Commission |
| *Realcomp II Ltd.* | All | Reverse ALJ | Affirm Commission |
| *Schering-Plough* | All | Reverse ALJ | Reverse Commission |
| *Union Oil Co. of California* | All | Reverse ALJ | N/A |

a. **What is the average time from initiation of an investigation to resolution of FTC administrative enforcement actions? What is the average time from filing a complaint to resolution of FTC administrative enforcement actions?**

The average time from initiation of an investigation to the resolution of an administrative adjudication is 800 days, and the average time from the issuance of an administrative complaint to the resolution of an administrative

adjudication is 388 days. This average applies to antitrust-related administrative adjudications that commenced after January 1, 1998 and that are no longer pending before an ALJ or the Commission, regardless of outcome or method of resolution.

b. **What is the average duration, from investigation to resolution, of FTC enforcement actions in Federal Court?**

For those antitrust enforcement actions that the FTC brings in federal court, the average time from initiation of an investigation to resolution (in the form of granting or denying injunctive relief) is 1,811 days.

5. **In many instances, FTC and DOJ share enforcement authority. But the agency that investigates each matter and decides where to challenge an action can have profound effects on a party's constitutional rights, including due process and the right to a trial by jury.**

a. **To seek civil penalties under the FTC Act, the Commission must undertake a consultative process with DOJ, 15 U.S. Code § 56(a)(1). What advantage is there to having the FTC consult with the DOJ in making its own enforcement decisions?**

Congress decided that the FTC must consult with the DOJ when seeking civil penalties. It is not my role to second-guess the wisdom of Congress.

Specifically, Section 16 of the FTC Act, 15 U.S.C. § 56, requires, among other things, that the Commission refer federal court enforcement actions seeking civil penalties to the DOJ. The DOJ has 45 days from the Commission's referral to initiate the action. If the DOJ does not file the action within that period, then Section 16 authorizes the Commission to file and litigate the enforcement action in its own name. As such, Section 16 does not grant DOJ the authority to make enforcement decisions for the FTC; rather, once the Commission votes to initiate an enforcement action seeking civil penalties, Section 16 lays out the process for determining whether the FTC or the DOJ will litigate the action in federal court.

b. **Is there a Memorandum of Understanding (MOU) between the FTC and DOJ that guides the process by which FTC and DOJ determine which agency takes which cases? And, if so, is that MOU public?**

Because DOJ and FTC largely share jurisdiction over civil antitrust cases, the two agencies have developed a clearance process to determine which agency is to investigate a specific transaction or conduct matter. The clearance process is designed to avoid subjecting market participants to antitrust investigations from both agencies for the same conduct or transaction. The FTC and DOJ have a nonpublic clearance agreement to guide the clearance process, and this agreement is modified over time to

address new markets.

c. **Do you agree that the FTC's win rate in its own administrative court is substantially higher than that achieved by the DOJ in federal court?**

A 2016 report representing "the most comprehensive study to date" of the FTC's administrative adjudication process concluded that the agency's recent success rate is likely "a function of improved case selection, aided by effective factual, economic, and legal analysis by staff and the Commissioners before they authorize a complaint."[14]

Notably, all of the FTC's and DOJ's cases—whether brought by the FTC or DOJ in federal court, or adjudicated administratively by the Commission—are subject to appellate review by the circuit courts of appeal. The Commission's appellate success rate for administrative antitrust decisions is approximately 80 percent.

I defer to the DOJ on providing information about its win rate.

d. **Do you agree American businesses are subjected to different rules, rights, and standards depending on whether the FTC or DOJ challenges a merger as anticompetitive?**

No. Both agencies apply the same substantive standards embodied in Section 7 of the Clayton Act when seeking a preliminary injunction in federal court against a proposed merger that violates Section 7. Since 1968, the agencies have issued joint Merger Guidelines, revising them over time to reflect new learning and commercial realities, including new business models. These guidelines provide transparency and predictability to the agencies' risk assessment framework for analyzing mergers, regardless of which agency does that assessment.

6. **It is not unusual for the FTC to seek onerous provisions in its consent decrees, many of which are not found in the FTC Act. For example, the FTC has sought that parties consent to 20-year monitoring provisions, engage in government-mandated speech (through required reporting), and divest from their intellectual property. As Justice Gorsuch recently observed in his concurrence in *Axon v. FTC*, "agencies … extract settlement terms they could not lawfully obtain any other way."**

a. **What authority supports an FTC demand that a company license its own independently developed intellectual property to a competitor as part of a divestiture?**

The Commission's authority to issue administrative orders to prevent unfair

[14] Maureen K. Ohlhausen, Administrative Litigation at the FTC: Effective Tool for Developing the Law or Rubber Stamp?, 12 J. Comp. Law & Econ. 623, 624 (2016).

methods of competition and unfair or deceptive acts or practices derives from Section 5(b) of the FTC Act.[15] Commission orders are not limited to simply stopping past violations or bringing specific ongoing conduct to an end.[16] By contrast, the Supreme Court has recognized that the FTC is an expert body with wide latitude to design remedies.[17]

b. **What authority supports an FTC demand that a CEO who leaves a company under a consent order be forced to implement the FTC's preferred data security practices and monitoring at any company that individual works at in the future, even if the FTC has never brought an action against it?**

It is well established that an individual may be held liable under the FTC Act where he or she: (1) participated directly in the unlawful practice or deceptive statement; or (2) had authority to control the corporate entity liable for the violation.[18] In such situations, the individual himself, and not just the company, can be subject to a consent order. For example, the facts gathered during the FTC's investigation of Drizly supported an allegation that, at all relevant times, Drizly's CEO had knowledge and the authority to control Drizly's information security practices. Accordingly, the parties agreed to a 10-year order requiring the CEO to ensure that for any business that he majority owns—or where he is employed or functions as CEO or other senior officer with responsibility for information security—the business has established and implements an information security program.

7. **Regarding the representation made to the House Committee on Energy and Commerce on April 18, 2023, regarding following the FTC's Designated Agency Ethics Official's (DAEO) advice:**

a. **Rep. McMorris Rodgers asked if there was an instance when you did not follow the DAEO's advice, and you said "no." We now know that the DAEO's advice was that you should recuse, and that you did not follow that advice. You submitted a letter dated July 12, 2023, with attachments to the House Judiciary Committee on the eve of your testimony where you sought to explain that following the ethics advice was optional, and that you did not receive the written advice until after the Commission decided along a party-line vote 2-1 to allow your participation. Regardless, you could have recused at any time after you received oral or written advice, even after the Commission decided to allow your participation. That said, you still did not answer my question from the July 13 hearing: Did the**

[15] 15 U.S.C. § 45(b).
[16] FTC v. Ruberoid Co., 343 U.S. 470, 473 (1952) ("If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity.").
[17] Jacob Siegel Co. v. FTC, 327 U.S. 608, 613 (1946); FTC v. Nat'l Lead Co., 352 U.S. at 428.
[18] FTC v. Freecom Communications, Inc., 401 F.3d 1192, 1203 (10th Cir. 2005); FTC v. Publishing Clearing House, 104 F.3d 1168, 1170 (9th Cir. 1997).

**DAEO give you advice that was different than what was written in the memoranda?**

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). I do not have any financial conflict of interest, nor do I have a covered relationship.

Meta did not allege that I had a conflict of interest arising from a financial interest or covered relationship. Instead, Meta claimed that my prior work as an academic and advocate at a nonprofit raised "an appearance of impropriety." In this type of situation, federal ethics rules state that the employee rather than the DAEO makes the decision about whether to recuse. Accordingly, I consulted with the DAEO to understand the legal framework that I needed to apply in order to make a decision on recusal. Following that discussion, I reviewed closely the relevant legal precedent and made a decision not to recuse from the matter.

b. **Do you agree that a reasonable person could find your testimony before the Committee on Energy and Commerce on April 18, 2023, where you told the Committee that there were no instances when you did not follow the advice of the DAEO when in fact there was, to be false, deceptive, misleading or some combination of all three? If not, why not?**

No. To the contrary, it is misleading to suggest that the DAEO made the legal determination that I must recuse myself from the Meta matter. As I stated in my April 18, 2023 testimony, I consulted with the DAEO and have taken actions that are consistent with the legal statements that the DAEO has made. As noted above in the response to Hageman question #7.a, in situations where employees have no financial conflicts of interest and no covered relationships, employees themselves determine whether they should or should not recuse.

c. **How do you suggest we answer a constituent inquiry as to the truthfulness of the Chair of the FTC with respect to the inconsistent answer you gave to Chair McMorris Rodgers and your subsequent testimony, and whether we hold government senior executive branch leadership to the highest standards of ethics with respect to truthfulness in testimony pursuant to the Code of Federal Regulations?**

As I stated in my April 18, 2023 testimony and repeated in my July 13, 2023 testimony, I have consulted with the DAEO. The actions I have taken are consistent with the legal statements that the DAEO has made.

d. **At the Oversight hearing you could have simply answered Chair McMorris Rodgers question as "yes" and then provided the explanation of why you did not follow the DAEO's advice. Why did you not answer Chair McMorris Rodgers question in the affirmative?**

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). I do not have any financial conflict of interest, nor do I have a covered relationship.

Meta did not allege that I had a conflict of interest arising from a financial interest or covered relationship. Instead, Meta claimed that my prior work as an academic and advocate at a nonprofit raised "an appearance of impropriety." In this type of situation, federal ethics rules state that the employee rather than the DAEO makes the decision about whether to recuse. Accordingly, I consulted with the DAEO to understand the legal framework that I needed to apply in order to make a decision on recusal. Following that discussion, I reviewed closely the relevant legal precedent and made a decision not to recuse from the matter.

8. **Regarding government ethics and your non-recusal in the *Meta/Within* matter:**

   a. **Please explain why in the first instance you did not seek written advice from the DAEO regarding recusal from adjudication.**

   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). I do not have any financial conflict of interest, nor do I have a covered relationship.

   Meta did not allege that I had a conflict of interest arising from a financial interest or covered relationship. Instead, Meta claimed that my prior work as an academic and advocate at a nonprofit raised "an appearance of impropriety." In this type of situation, federal ethics rules state that the employee rather than the DAEO makes the decision about whether to recuse. Accordingly, I consulted with the DAEO to understand the legal framework that I needed to apply in order to make a decision on recusal. Following that discussion, I reviewed closely the relevant legal precedent and made a decision not to recuse from the matter.

   b. **Did you seek any additional ethics advice from any government agency as to whether you should recuse yourself? If so, from whom did you seek such advice?**

   Interagency discussions generally are protected under various exemptions, including the deliberative process privilege, attorney-client privilege, and attorney work product privilege.

   c. **In relying on your own analysis as to whether you should recuse yourself, did you ever consider all the ways your objectivity in the analysis could be skewed, and if so, what steps did you take to address that?**

   I considered all relevant legal factors in conducting my analysis.

d. **You provided the Committee an analysis by your Office of General Counsel as it relates to prejudgment in adjudication. Prejudgment is a different issue with a different standard than the appearance of partiality of government employees under the Code of Federal Regulations. Why did you think the Office of General Counsel's advice on prejudgment would matter for Congressional oversight into your adherence to the rules governing executive branch employees?**

Because Meta's recusal petition alleged that I had prejudged the propriety of the pending merger and should be recused as an adjudicator, the Office of General Counsel's memorandum appropriately analyzed the issue of prejudgment in adjudication. The Committee sought a broad range of documents and information, including "all documents and communications referring or relating to [my] ethics analysis"; the OGC memorandum informed my ethics analysis.

e. **Do you admit that you could have recused yourself as an adjudicator at any time, including after the Commission decision related to whether you should be recused?**

Employees can recuse at any time.

9. **Regarding Unauthorized Practice of Law:**

a. **According to Black's Law, "Counsel" is a term given to a lawyer, attorney or counsellor (i.e. person authorized to represent others in court). In the District of Columbia people are prohibited from holding themselves out as engaged in the practice of law without first obtaining a license to do so. Rule 49(b)(4) of the District of Columbia Court of Appeals Rules of Practice, entitled Unauthorized Practice of Law, explains: "Hold out as authorized or competent to practice law in the District of Columbia" means to indicate in any manner to any other person that one is competent, authorized, or available to practice law from an office or location in the District of Columbia, and lists, among other titles, "counselor of law." You held yourself out as "Majority Counsel" while working for the House Judiciary Committee from 2019 until July 16, 2020, without possessing a law license. This appears to be a violation of District of Columbia law. To make certain, did you possess a law license in any jurisdiction when you were hired to serve as Majority Counsel of the House Committee on the Judiciary Subcommittee on Antitrust, Commercial and Administrative Law?**

I passed the New York Bar exam in July 2017 but did not complete the process of obtaining full admission to the New York Bar until July 2020. During that time, I did not seek admission to practice law in any other jurisdiction. While serving as Majority Counsel to the House Committee on the Judiciary Subcommittee on Antitrust, Commercial and Administrative Law, I followed all applicable D.C. Court of Appeals Rules and the D.C. Rules of Professional Conduct. Specifically, D.C. Court of Appeals Rule 49 authorizes a person to practice law in DC, and hold themselves out as authorized to do so, if they are either: 1) a member of the D.C. Bar, or 2) their conduct is otherwise permitted through one of several exceptions. One of these exceptions states that a person who is not a D.C. Bar Member may "provide legal services to the United States as an employee of the United States and may hold themselves out as authorized to provide those services." D.C. App. R.49(c)(1). Rule 49 defines "hold out as authorized" as "to indicate in any manner to any other person that one is competent, authorized, or available to practice law in the District of Columbia" and explicitly states that "[a]mong the terms that ordinarily give that indication are … 'counsel.'" D.C. App. R. 49(b)(4). There is no further requirement under the D.C. Court of Appeals Rules or the D.C. Rules of Professional Conduct that a person providing legal services to the federal government be a member of any Bar, including the D.C. Bar.

b. **In your testimony on July 13, 2023, you indicated that you followed all guidance by human resources in House Judiciary. Is it the responsibility of human resources professionals to prevent you from holding yourself out as counsel when you do not have a law license?**

Please see the response to Question 9a above.

c. **Your bar record from the New York State Unified Court System website**

**discussed at the July 13, 2023, hearing says that you were admitted to practice on July 16, 2020, while the same website shows that you passed the bar in July 2017. Why did you not complete the process of obtaining your license to practice law after you passed the New York Bar exam in 2017 until July 16, 2020? In your response, please include any details as they pertain to your gaining character and fitness approval.**

An applicant for admission in New York must also take and complete a course in New York-specific law, known as the New York Law Course (NYLC), and must take and pass an examination, known as the New York Law Exam (NYLE). The NYLE is offered four times a year. For various scheduling reasons I was unable to take the NYLE until 2020.

d. **An article appearing in Wired online dated October 15, 2019, entitled "WIRED25: Stories of People Who are Racing to Save Us," identified you as "Majority Counsel" for the Subcommittee on Antitrust, Commercial and Administrative Law. At that time, you did not possess a law license. Did you take any steps to clarify this representation so that you would not be seen to the public as licensed lawyer? If not, why not?**

Please see the response to Question 9a above.

e. **Was your holding a Majority Counsel position prior to having a license to practice law in New York addressed during your character and fitness review undertaken in advance of your obtaining your license to practice law on July 20, 2020?**

I provided the New York State Supreme Court Appellate Division with detailed information for every employment and position held within the previous 10 years preceding my application as part of my application for admission to practice as an attorney in the State of New York. This included my position as Majority Counsel to the House Committee on the Judiciary Subcommittee on Antitrust, Commercial and Administrative Law.

f. **Did you disclose to the New York Bar that you had held yourself out as Majority Counsel in the District of Columbia prior to having a law license?**

Please see the response to Question 9e above.

g. **Did you disclose to Columbia University prior to being hired as a professor of law that you had been holding yourself out as a lawyer for Congress even though you did not possess a law license?**

I received my job offer from Columbia in February 2019. I joined the House as a congressional staffer starting in March 2019.

h. **Prior to hiring you as a professor of law, did Columbia University ever inquire if**

**there was any instance when you engaged in the unauthorized practice of law or held yourself out as a Counsel without first possessing a license to practice law?**

I received my job offer from Columbia in February 2019. I joined the House as a congressional staffer starting in March 2019.

10. **According to material released by the FTC through FOIA, you were hired by the FTC as a "Law Clerk" in the summer of 2018, and your supervisor was Commissioner Rohit Chopra. According to the FOIA materials, two days after you were hired your title was changed to Special Government Employee. The FOIA response contained redacted material that may shed light on why this change was made to your title.**

    a. **Explain why your title was changed from Law Clerk to Special Government Employee by the FTC in 2018.**

    I remained a Law Clerk throughout my time at the FTC from July 9, 2018, to September 7, 2018. "Special Government Employee" (SGE) was not my job title.

    Rather, "special government employee" is defined in 18 U.S.C. § 202(a) as "an officer or employee . . . who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days, temporary duties either on a full-time or intermittent basis." Because I only intended to serve at the FTC for 10-12 weeks and did not have arrangements with another federal agency, the FTC Ethics team determined that I was an SGE for federal ethics purposes. I did not participate in and was not aware of these discussions or determinations.

    b. **The FOIA materials list Rohit Chopra as your supervisor while you worked as a Law Clerk for the FTC. According to the job description contained in the FOIA materials, FTC law clerks must be supervised by lawyers. Was Commissioner Chopra a lawyer at the time you were hired as a Law Clerk?**

    The position description for FTC Law Clerks states, "Work is performed under the general supervision of one or more of the Assistant Directors or an attorney of higher grade." Commissioner Chopra is not a lawyer. My legal work was performed under the general supervision of the attorneys in his office.

    c. **Your Senate Questionnaire submitted prior to your confirmation as a commissioner says that you held the position of "Legal Fellow" at the FTC. The FOIA materials make no reference to this title while at the FTC. Explain why you chose to use the term "Legal Fellow" in your Senate Questionnaire when you did not possess that title?**

    "Legal Fellow" is the title I was given by Commissioner Chopra's office while I served there. I was not aware of any discussions between his office and the FTC relating to my title.

d. **The biography that you submitted for the hearing on July 13, 2023, says you were a "legal advisor" to Commissioner Rohit Chopra when you were at the FTC in 2018. Why did you choose this title to represent your position at the FTC for the July 13, 2023, hearing, instead of Law Clerk, Special Government Employee or Legal Fellow, as indicated in different places in the FTC FOIA materials and your Senate Questionnaire?**

As part of my duties, I reviewed case law, undertook analysis, and offered advice.

e. **When you said in your biography submitted for the July 13, 2023, hearing that you were a "legal advisor" to Rohit Chopra at the FTC, were you being truthful about the title you held in 2018?**

Please see response to Question 10d above.

11. **Regarding the accuracy of other representations you have made to Congress:**

a. **Your Senate questionnaire says that you were Counsel to the House Subcommittee on Antitrust, Commercial and Administrative Law from March 2019 to October 2020. We now know you did not possess a law license for nearly all that time. Why did you not disclose this to the Senate?**

Please see the response to Question 9a above.

b. **Why did you omit the date you became a licensed member of the New York State Bar from your Senate Questionnaire?**

Please see the response to Question 9a above.

c. **Why did you tell the Senate in your Questionnaire your position at the FTC was "Legal Fellow," when you were hired as a "Law Clerk" and then switched to "Special Government Employee"?**

"Legal Fellow" is the title I was given by Commissioner Chopra's office while I served there. I was not aware of any discussions between his office and the FTC relating to my title.

12. **Regarding your license to practice law:**

a. **The report from the New York Unified Court System which we discussed during your hearing lists Columbia Law School as the business name affiliated with your license to practice law. Are you currently employed by Columbia Law School? Have you notified the New York Unified Court System that you are employed by the Federal Trade Commission? If not, why not?**

I am currently on a leave of absence from my employment at Columbia Law School

while I serve as Chair of the Federal Trade Commission. I have notified the New York Unified Court System of my employment by the Federal Trade Commission.

b. **The report from the New York Unified Court System which we discussed during your hearing lists your registration as "delinquent." Do you intend to take action to change this status? If so, please describe the steps required to bring your registration to be in good standing with the New York Unified Court System.**

Yes, I have already taken action to change this status, including updating all relevant contact information, filing all past-due registrations, and paying all outstanding registration fees with the Office of Court Administration Attorney Registration Unit.

**Questions for the Record from Mr. Wesley Hunt for FTC Chair Lina Khan Hearing on Oversight of the Federal Trade Commission July 13, 2023**

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**Chair Khan, during your appearance before the Committee, you testified that "We received over 100,000 complaints from consumers over the last few years relating to some of these deceptive practices in the auto purchasing context."**

**As you cited "over 100,000 complaints" as a rationale for issuing the proposed "Motor Vehicle Dealers Trade Regulation Rule," please respond to the following questions:**

1. **The FTC maintains a consumer database, publishes an annual Consumer Data Book, and has cited this database as evidence of more than 100,000 complaints annually for three recent years as a part of the rationale to issue the proposed rule. Please answer the following questions to determine the accuracy of the statements in the rule and your testimony before this committee.**

    a. **Are the consumer complaints in the FTC consumer database verified?**

    No.

    b. **It is my understanding that the "auto-related" complaints in the FTC consumer database comprise of only between 3-4% of all complaints. Is this figure accurate?**

    In the years 2019-2022, Auto-Related complaints comprised 2.4% to 3.6% of the total number of complaints received, which includes identity theft reports. Excluding identity theft reports, Auto-Related complaints comprised 3.2% to 4.5%, and were consistently among the top complaint categories.[19]

    c. **It is my understanding that nearly 30% of the "auto-related" complaints that comprise the 100,000 figure you cite include complaints related to the service and repair of vehicles and are unrelated to the proposed rule. Please explain why you are including these complaints as a justification for the proposed rule when the rule does not address service and repair issues?**

    In its Notice of Proposed Rulemaking for the Motor Vehicle Dealers Trade Regulation Rule, the Commission noted that it received more than 100,000 complaints each year over three years (2019- 2021) regarding new and used

[19] See, e.g., Consumer Sentinel Network Data Book 2022, at 7, https://www.ftc.gov/system/files/ftc_gov/pdf/CSN-Data-Book-2022.pdf, and Consumer Sentinel Network Data Book 2021, at 7, https://www.ftc.gov/system/files/ftc_gov/pdf/CSN%20Annual%20Data%20Book%202021%20Final%20PDF.pdf (listing the number of complaints and ranking the most common report categories, including auto complaints as the sixth and eighth most common report categories, in 2022 and 2021 respectively).

motor vehicle sales, financing, services & warranties, and rentals & leasing. Since publication of that NPRM, the Commission released Sentinel data from the year 2022, in which complaints on these topics again totaled more than 100,000.

The Commission's 100,000 estimate does not include complaints that fall into the subcategory of "Auto Parts & Repair." It does include the subcategory "Service & Warranty." This category includes complaints related to sales of warranties and other add-ons.

d. **What percentage of auto-related complaints you cite are complaints:**

i. **concerning gas stations?**

The Commission did not include complaints coded as relating to "gasoline" in its estimate of 100,000 complaints per annum. Consumer Sentinel does not specifically code complaints pertaining to "gas stations."[20]

ii. **against auto finance companies?**

Complaints relating to auto financing comprise 9% - 10% of the estimated 100,000 complaints each year. The Sentinel data codes do not indicate the specific type of entity complained about; complaints can include those against auto dealers, auto finance companies, or both.

iii. **against other "auto-related" entities that would not be covered by the proposed rule?**

The Sentinel data does not code for the type of entity.

e. **Are used car dealers that do not have service facilities covered by the proposed rule?**

A used car dealer would be covered under the proposed rule if it meets the three criteria of the proposed definition of a "dealer": (1) is licensed by a state, a territory of the U.S., or the District of Columbia to engage in the sale of motor vehicles; (2) takes title to, holds an ownership interest in, or takes physical custody of motor vehicles; and (3) is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both. The Commission is currently considering the thousands of comments submitted by the public in response to the proposed rule, including comments regarding the definition of dealer. In connection with the Commission's Used Car Rule, the FTC has stated that the plain meaning of "servicing" encompasses "activities such as 'repair, refurbishment, [or]

[20] *See* Consumer Sentinel Network Subcategory Definitions May 2023, https://www.ftc.gov/system/files/ftc_gov/pdf/CSNPSCFullDescriptions.pdf; Consumer Sentinel Network, Descriptions of Report Categories, https://www.ftc.gov/system/files/attachments/data-sets/category_definitions.pdf/.

maintenance,' as well as other services" and "captures activities undertaken by essentially all used car dealers." See Used Motor Vehicle Trade Regulation Rule ("Used Car Rule"), 81 FR 81664, 81668.

f. **It is my understanding that the Australian Competition and Consumer Commission was in 2021 the third largest data contributor of consumer complaint data. Is this correct?**

Yes.

g. **If "yes," please explain the relevance of Australian data to justify the proposed rule.**

Australian data is not being used to justify the proposed rule. The Australian Competition and Consumer Commission shares certain categories of complaints, and Auto-Related complaints are not amongst those categories.

h. **It is my understanding that ten of the Better Business Bureau contributors to the FTC consumer database are located in Canada and Mexico. Is this correct?**

There are 10 Canadian BBB Offices contributing data to the Consumer Sentinel Network. BBB Mexico was an unsuccessful BBB pilot program; the FTC does not receive consumer complaints from BBB Mexico.

i. **If "yes," please explain the relevance of Canadian and Mexican data to justify the proposed rule.**

The Canadian BBB Offices submitted approximately 2,100 to 2,600 complaints related to the relevant auto topics in each of the four years noted (2019-2022). The NPRM does not state that it relied on Canadian or Mexican data to justify the proposed rule. Instead, the NPRM accurately states that the FTC received more than 100,000 complaints regarding new and used motor vehicle sales, financing, service & warranties, and rentals & leasing, and that complaints about motor vehicle transactions are regularly in the top ten complaint categories tracked by the agency. The NPRM also cites to Commission enforcement, education, and other initiatives, as well as others' work in this area, and describes the key consumer protection concerns it has observed.

2. **The proposed rule cites an "FTC Study" conducted six years ago more than 30 times to justify the additional regulation outlined in the proposed rule. Are you aware that:**

a. **The FTC Study used to support a major proposed rule that would cover 45 million consumer transaction each year was based only on interviews with 38 consumers in a single retail market?**

The FTC Study was based on interviews with 38 consumers. In addition to the FTC Study, the Commission's Notice of Proposed Rulemaking discusses the agency's significant law enforcement experience, outreach, research, and consumer complaints in the motor vehicle area.

b. **The FTC Study was a qualitative, not a quantitative, study?**

Yes.

c. **Page 4 of the FTC Study states, "Because this is a qualitative study of a small, non-representative sample of consumers, the data generated are <u>not useful in</u> <u>forming quantitative or generalizable conclusions</u>." (Emphasis added)?**

Yes, that is what the study says.

3. **Did Congress mandate the issuance of the proposed rule?**

No.

4. **Has any court directed the FTC to issue the proposed rule?**

No.

5. **The proposed rule applies to "motor vehicle dealers," but excludes from some of its most significant requirements manufacturers which sell their products and services directly to the public (i.e., manufacturers which do not utilize franchised motor vehicle dealers to sell their products and services). Several requirements of the proposed rule apply to "add- on products and services," but the definition of this term does not cover "add-ons" sold by factory direct sellers. Consequently, franchised motor vehicle dealers would have to comply with the new "add-on" requirement but factory direct sellers – which offer competing products in the same market – would not. This would create two sets of regulatory standards and undermines the Commission's claim that the proposed rule would create a "level playing field." With regard to this concern, please answer and provide a full explanation in response to the following questions:**

a. **Section 463.2(a) of the proposed rule defines an "Add-on Product or Service" as "…any product(s) or service(s) *not provided to the consumer or installed on the vehicle by the motor vehicle manufacturer* and for which the Motor Vehicle Dealer, directly or indirectly, charges a consumer in connection with a vehicle sale, lease, or financing transaction." (Emphasis added). Under this definition, can a factory direct seller sell an "add-on product or service" to a consumer in connection with a vehicle sale, lease, or financing transaction?**

The definition of "add-ons" under the proposed rule provides that add-on

products or services do not include those installed in the vehicle or provided by the manufacturer. Consequently, products or services that a manufacturer installs on the vehicle or provides to the consumer would not be considered "add-ons" under the definition in the proposed rule.

b. **If "yes," please provide examples of such products or services that factory direct sellers can sell and explain how they are covered by this definition.**

If a direct seller is a covered dealer and offers products or services that are installed or provided by a third-party, such as GAP agreements provided by a third- party seller, the proposed rule would apply to the seller.

c. **If the answer is "no," is a factory direct seller subject to the following requirements proposed in the proposed rule –**

Whether a direct seller would be subject to the proposed rule depends on whether it meets the definition of a "dealer." If so and the direct seller sells products or services provided or installed by third parties, the direct seller would be covered by the provisions below.

i. **Section 463.3(b)?;**

Please see response to Question 3, above.

ii. **Section 463.4(b)?;**

Please see response to Question 3, above.

iii. **Section 463.4(c)?;**

Please see response to Question 3, above.

iv. **Section 463.5(a)?;**

Please see response to Question 3, above.

v. **Section 463.5(b)?;**

Please see response to Question 3, above.

vi. **Section 463.6(a)(2), (4), (5), and Section 463.6(b) as it relates to these three sets of records?;**

Please see response to Question 3, above.

vii. **Section 463.3(p) as it relates to the "Add-on" disclosure**

**requirements in sections 463.4 and 463.5?**

Please see response to Question 3, above.

6. **If a factory direct seller is not subject to each of the foregoing requirements, explain how the proposed rule ensures a "level playing field" between motor vehicle dealers which are factory direct sellers and those which are part of a franchised motor vehicle dealer network?**

   The proposed add-on specific provisions address harms associated with products or services not provided to the consumer or installed by the manufacturer. The Commission has observed harmful conduct related to the sale of add-on products and services by auto dealers. The add-on specific provisions were proposed to address those harms. A number of other proposed provisions would cover products and services provided by manufacturers: the prohibition against misrepresentations, including about "costs or terms of purchasing, financing, or leasing a vehicle" (§ 463.3(a)); the required disclosure of a vehicle's "Offering Price," which includes any amounts dealers charge for items already installed or provided by the manufacturer (§§ 463.2(k) and 463.4(a)); and the requirement to obtain "Express, Informed Consent" for charges for any item (§ 4634.5(c)).

**Questions for the Record from Mr. Ted Lieu for FTC Chair Lina Khan Hearing on Oversight of the Federal Trade Commission July 13, 2023**

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1. **In February 2023, Tesla recalled over 360,00 vehicles because its Full Self-Driving (FSD) system can cause the car to rush through intersections, traffic lights, and stop signs.[21] How is the FTC working with the National Highway Traffic Safety Administration (NHTSA) to ensure that vehicles on the road are safe for consumers?**

   Where appropriate, the FTC regularly collaborates with other agencies, including NHTSA, to further our mission of protecting Americans from unlawful business practices.

2. **Tesla describes its "Autopilot" software as "an advanced driver assistance system…[that is] intended for use with a fully attentive driver, who has their hands on the wheel and is prepared to take over at any moment"[22]. However, in its marketing materials, Tesla and Mr. Musk have implied – if not outright promoted – their vehicles as fully autonomous.**

   **In October 2016, Mr. Musk tweeted a link to a video and claimed that the "Tesla drives itself (no human input at all) thru urban streets to highway to streets, then finds a parking spot."[23] The video itself begins with the caption "The person in the driver's seat is only there for legal reasons. He is not doing anything. The car is driving itself."[24]**

   **However, reports later emerged that the video was staged. The car's route had been previously mapped out with software unavailable to consumers. In fact, in one take of filming, the vehicle even collided with a fence in the Tesla parking lot.**

   **Deceptive marketing practices can have grave consequences for consumer safety. Since 2019, Tesla "Autopilot" has been involved in 736 crashes and 17 deaths.[25]**

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[21] National Highway Traffic Safety Administration. "2023 Tesla Model 3." *NHTSA*, www.nhtsa.gov/vehicle/2023/TESLA/MODEL%203#recalls (accessed July 18, 2023).
[22] Tesla, "Autopilot and Full Self-Driving Capability: Tesla Support," *Tesla*, www.tesla.com/support/autopilot (accessed July 18, 2023).
[23] Elon Musk, *Tesla Drives Itself (No Human Input at All) Thru Urban Streets to Highway to Streets, Then Finds a Parking Spot Https://T.Co/V2t7kgmpbo*, (Oct. 20, 2016), twitter.com/elonmusk/status/789019145853513729.
[24] Tesla, *Full Self-Driving Hardware on All Teslas*, Vimeo (Oct. 2016), https://vimeo.com/188105076 (accessed July 18, 2023).
[25] Faiz Siddiqui and Jeremy B. Merrill, "17 Fatalities, 736 Crashes: The Shocking Toll of Tesla's Autopilot," The Washington Post (June 10, 2023), https://www.washingtonpost.com/technology/2023/06/10/tesla-autopilot-crashes-elon-musk/ (accessed July 18, 2023).

**The FTC has acknowledged that, under Section 5 of the Federal Trade Commission Act, the agency is empowered to stop automakers from engaging in false or misleading marketing practices.[26]**

**Is the FTC investigating Tesla for potentially deceptive marketing practices? If so, what is the status of the FTC's investigation?**

Although I cannot reveal information regarding any non-public matters, nor confirm the existence of any non-public investigation, I can share general insight into how the Commission would examine these issues. As you know, the FTC generally evaluates consumer protection issues using its authority under Section 5 of the FTC Act, which prohibits unfair or deceptive acts or practices. Under Section 5, a representation or omission is deceptive if it is material and would likely mislead consumers acting reasonably under the circumstances. An act or practice is unfair if it causes or is likely to cause substantial injury to consumers that is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or competition.

**Is the FTC investigating any other automakers for potentially deceptive marketing practices as it relates to driver assistance technology in their vehicles? If so, what is the status of the FTC's investigation?**

I am unable to reveal information regarding any non-public matters, nor confirm the existence of any non-public investigation. For further insight into how the Commission would examine these issues, please refer to my response to Question #2a.

3. **A related issue is Mr. Musk's repeated claims that an autonomous Tesla vehicle is right around the corner. For years, he has claimed that the cars rolling off Tesla production lines are already equipped with the hardware necessary for autonomous driving, meaning that some consumer believed a fully autonomous Tesla was simply a software update away.**

   **In 2016, Mr. Musk told the press that "we'll be able to do a demonstration guide of full autonomy all the way from LA to New York. And then have the car go and park itself by the end of next year."[27] In 2020, Mr. Musk claimed that Tesla vehicles would achieve Level 5 autonomy that year, noting that "I think there are no fundamental challenges remaining for Level 5 autonomy."[28]**

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[26] "Statement of the Federal Trade Commission Concerning Auto Recall Advertising Cases," Fed. Trade Comm'n (Dec. 15, 2016). www.ftc.gov/system/files/documents/cases/161216_six_auto_recall_cases_statement_of_the_commission_1_1.pdf

[27] Russell Brandom, "Tesla Wants New Self-Driving Tech to Autonomously Road Trip from LA to New York," The Verge (Oct. 19, 2016), https://www.theverge.com/2016/10/19/13341100/tesla-self-driving-autonomous-road-trip-la-nyc (accessed July 18, 2023).

[28] John Koetsier, "Elon Musk: Tesla Will Have Level 5 Self-Driving Cars This Year," Forbes (Jul. 9, 2020), https://www.forbes.com/sites/johnkoetsier/2020/07/09/elon-musk-tesla-will-have-level-5-self-driving-cars- this-year/?sh=12c3329f2d1d.

**As defined by the Society of Automotive Engineers, a vehicle at Level 5 autonomy is entirely capable of driving itself in all conditions, with no one in the driver's seat.[29] Clearly, Tesla cars on the road right now are far short of these capabilities.**

**Is the FTC investigating whether Mr. Musk's persistent claims that Tesla vehicles will soon reach Level 5 autonomy constitute a deceptive marketing practice?**

I am unable to reveal information regarding any non-public matters, nor confirm the existence of any non-public investigation. For further insight into how the Commission would examine these issues, please refer to my response to Question 2a.

[29] Society of Automotive Engineer, "SAE Levels of Driving Automation Refined for Clarity and International Audience," SAE International (May 3, 2021), www.sae.org/blog/sae-j3016-update.

**Questions for the Record from Ms. Zoe Lofgren for FTC Chair Lina Khan Hearing on Oversight of the Federal Trade Commission July 13, 2023**

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1. **The Durbin Amendment mandates merchants to have the ability to process debit card transactions via at least two independent networks. The FTC found that Mastercard had contravened this provision and the corresponding Regulation II, compelling them to stop practices that forced merchants to process debit card payments solely through its network.**
    a. **Could you elaborate on the specific strategies used by Mastercard related to competition in the debit card payment networks?**
    b. **Has the FTC detected similar issues in the credit card payment networks?**
    c. **Can you elaborate on how the FTC's order will positively impact consumers and small businesses?**
    d. **How does the FTC plan to use this legislative mandate to stimulate competition and offer merchants and consumers more flexibility in processing debit card transactions?**

    The FTC's complaint against Mastercard alleged that the company used its control over a process called "tokenization" to block the use by merchants of competing payment card networks.[30] 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's complaint, 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.

    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 thwarting competition.

    The Commission's order against Mastercard requires the company to provide competing debit card networks with the account number that corresponds to the

[30] Press Release, "FTC Orders an End to Illegal Mastercard Business Tactics and Requires it to Stop Blocking Competing Debit Card Payment Networks," Fed. Trade Comm'n (Dec. 23, 2022), https://www.ftc.gov/newsevents/ news/press-releases/2022/12/ftc-orders-end-illegal-mastercard-business-tactics-requires-it-stop-blockingcompeting-debit-card.

token used in a debit card transaction. The order also bans Mastercard from taking any action to prevent competitors from providing their own payment token service or offering tokens on Mastercard-branded debit cards and requires Mastercard to comply with provisions of Regulation II.[31] I am committed to using available tools to enforce the Durbin Amendment which provides merchants, including small businesses, with routing choice for processing debit card payments.

2. **The Durbin Amendment provision applies solely to debit cards, with a requirement that debit card transactions be processed through at least two unrelated networks. Visa and Mastercard dominate the U.S. market, issuing 83% of all credit cards.**

    a. **Has the FTC found that Visa and Mastercard use their market dominance to discourage competitors? Has the FTC determined whether this lack of competition adversely affects both consumers and merchants?**

    b. **Does the FTC consider requiring credit cards issued by the largest banks to be processed through at least two unrelated networks (independent of Visa and Mastercard) as a means to boost competition within the credit card sector?**

    c. **What is the impact of high swipe fees on small businesses?**

    When it passed the Durbin Amendment in 2011, Congress recognized the burden that high debit card swipe fees place on consumer-facing small businesses and other merchants and required that these fees be reasonable and proportional to issuers' transaction costs.[32] Because the Durbin Amendment is limited to debit card transactions, the FTC has not investigated the impact of exclusivity provisions or similar contract terms or network rules that apply to credit card transactions. That said, I have not seen evidence showing that credit card swipe fees impact merchants differently from debit card fees.

3. **In competitive markets, companies often aim to continually enhance their products and services, including security features. Do you believe that fostering competition in the credit card payments market would stimulate innovation beneficial to consumers?**

    Yes. I strongly believe that customers and businesses benefit from fair competition, including through better choices, competitive prices, and innovative new products and services. One of the greatest long-term risks from the unfair maintenance and exploitation of monopoly positions is the threat to innovation which may result from

[31] Press Release, "FTC Approves Final Order Requiring Mastercard to Stop Blocking the Use of Competing Debit Payment Networks," Fed. Trade Comm'n (May 30, 2023).
[32] 15 U.S.C. § 1693o–2(a).

elimination of competition to create new and better products and services.

4. **Merchants often incur some of the highest credit card swipe fees globally, which are passed onto consumers through higher prices. Do you think increasing competition in the credit card industry could lead to lower swipe fees, and how would this benefit consumers and small businesses?**

   Yes. Open, competitive markets can produce lower prices, higher quality, greater innovation, and other benefits for consumers and businesses. The credit card industry is no exception. I am particularly concerned about how unlawful conduct by gatekeepers and dominant middlemen could hike costs for customers and businesses alike.

5. **The growing consolidation within the grocery sector is concerning, with dominant chains leveraging their power to secure preferential pricing and treatment from suppliers. It's heartening to see the FTC considering renewed enforcement of the Robinson-Patman Act.**

   a. **Could you provide an in-depth explanation of the FTC's plans to boost the enforcement of the Robinson-Patman Act? Specifically, how will you ensure that small businesses, like grocers, can access the same goods and prices typically reserved for larger, dominant chains?**

      Under certain conditions, the Robinson-Patman Act prohibits a dominant business, including a dominant grocery chain, from leveraging its power to secure preferential pricing from suppliers. One of my top priorities has been ensuring the FTC is faithfully enforcing the laws that Congress has charged us with administering. This includes the Robinson Patman Act. Although enforcement of this statute has been dormant for some decades, the FTC is in the process of reactivating this authority.

6. **What parts of the European Commission's recent draft standard essential patent regulation does the FTC support, and how do you think the European Commission's draft regulation should inform the FTC's future actions?**

   I understand that the EC's recent proposed regulation on standard-essential patent (SEP) licensing aims to address certain aspects of SEP licensing that have been the subject of worldwide concern. Because the proposal implicates the interests of various United States federal agencies, the FTC will participate in any executive branch dialogue about the issues raised by the proposal.

7. **The FTC recently closed a request for information period on business practices of cloud service providers in which a range of questions were raised as to their potential impact on customers, competitors, security, and the future of AI. There have been allegations of certain anti-competitive strategies in the cloud industry that could negatively affect the software ecosystem and promoting consolidation. These include: 1) Insisting on separate contracts for cloud services and productivity**

**suites, to complicate the process of switching cloud providers; 2) Tying collaboration software with specific cloud services, to make it costly to use other collaboration tools; 3) Implementing high data egress fees, to create financial barriers for customers wanting to switch cloud providers. Would these practices create challenges for other software companies trying to compete effectively?**

a. **Is the FTC currently investigating these practices in the cloud industry?**

b. **What is the Commission's stance with respect to alleged anti-competitive mechanisms observed in the cloud services industry?**

c. **Could you provide insight into potential regulatory proposals or measures the Commission might contemplate to promote robust competition?**

One of my top priorities has been ensuring that the FTC is staying nimble and identifying potential competition issues early. Our decision to launch the RFI into cloud computing further advances this goal. Both the public comments received in response to the RFI and the related panel discussion yielded insightful contributions. Our staff is still in in the process of reviewing these comments. If we identify potentially unlawful conduct, we will not hesitate to pursue an investigation and harness our law enforcement tools, resources permitting.

**Questions for the Record from Ms. Mary Gay Scanlon for FTC Chair Lina Khan Hearing on Oversight of the Federal Trade Commission July 13, 2023**

1. **The FTC imposes a variety of civil penalties to enforce the laws in its jurisdiction.**
   a. **Do any of these penalties need to be increased to better deter misconduct or produce fairer outcomes to its enforcement actions?**

      With one narrow exception,[33] the FTC has no authority to issue fines or to impose civil penalties independently. For federal settlements approved by the Commission, courts must approve the civil penalty amount before it takes 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 civil penalty amount that the court should impose.

      Granting the FTC independent authority to pursue civil penalties would allow us to activate civil penalties more nimbly, helping promote deterrence. Additionally, amending the law so that first-time violators of the FTC Act are subject to civil penalties would also deter lawbreaking and misconduct.

   b. **Would enforcement be improved by new civil penalties, whether through novel authorities or authorities like those of the SEC, FDIC, or other financial regulators?**

      Granting the FTC independent authority to pursue civil penalties would allow us to activate civil penalties more nimbly, helping promote deterrence. Additionally, amending the law so that first-time violators of the FTC Act are subject to civil penalties would also deter lawbreaking and misconduct.

      Enabling the FTC to seek refunds and disgorgement under Section 13(b) of the FTC Act would also ensure that (a) we can return money to those harmed by unlawful conduct, and (b) we can prevent lawbreakers from profiting off their lawbreaking and keeping their ill-gotten profits.

2. **A recently released Senate report provided extensive evidence that tax preparation companies have shared taxpayers' personal information with multiple big tech firms. Is the FTC investigating the claims advanced in that report, or will the FTC open an investigation into these claims?**

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

The Commission received the report with great interest, and I share your goal of vigorous enforcement against any company that engages in unlawful privacy practices. The Commission has particular expertise in examining and prosecuting the illegal use of advertising technologies similar to those referenced in the Senate report, including in the context of categories of sensitive information, such as health information.[34] The FTC will continue to use all available tools to promote privacy in this area especially when sensitive information, such as taxpayers' financial information, is at issue.

[34] *See, e.g.*, *BetterHelp, Inc.*, File No. 2023169 (Mar. 2, 2023) (alleging online mental health provider used and disclosed personal health information for advertising purposes); *GoodRx Holdings, Inc.*, File No. 2023090 (Feb. 17, 2023) (alleging prescription drug discount provider disclosed personal health information for advertising purposes).

## Rep. Gooden QFRs to Hearing "Oversight of the FTC"

***All questions directed to Chair Khan…***

**FTC Rulemaking and Oversight of HISA**

1. **When the FTC reviews rules that are first proposed to it by the Authority, does the FTC continue to review those rules for consistency or does it use its independent policy judgment on that initial review?**

   I and my colleagues on the Commission as well as the Authority are currently defendants in litigation seeking both to block the adoption and enforcement of rules under the Act and to have the Act itself declared unconstitutional. This question, as well as questions 2, 3, 5, 6, 7, and 8 that follow, touch on issues related to that litigation. In that litigation, I and my colleagues are represented by Department of Justice counsel and speak to the issues in those litigations only through our DOJ counsel. Consequently, I am constrained in my response to this question and the above questions. Nevertheless, I will generally note that the Horseracing Integrity and Safety Act ("HISA") requires the Commission to approve a rule, or a modification to a rule, proposed by the Authority if the Commission "finds that the proposed rule or modification is consistent with [the Act]" and with "applicable rules approved by the Commission," *i.e.*, the FTC's procedural rules governing submissions from the Authority. 15 U.S.C. § 3053(c)(2); 16 C.F.R. §§ 1.140 – 1.144.

2. **When the FTC reviews rules that are first proposed to it by the Authority, can it amend those rules on its initial review?**

   Under HISA, when the Authority submits a proposed rule or modification of a rule to the Commission, the Commission must publish the proposal in the Federal Register for public comment, and then the Commission must either "approve" or "disapprove" the proposed rule or modification. 15 U.S.C. § 3053(c)(1). If the Commission approves the proposed rule or modification, then the rule or modification takes effect. *Id.* § 3053(b)(2). If the Commission disapproves the proposed rule or modification, then the Commission "shall make recommendations to the Authority to modify the proposed rule or modification." *Id.* § 3053(c)(3)(A). The Authority can then "resubmit for approval by the Commission a proposed rule or modification that incorporates the modifications" recommended by the Commission. *Id.* § 3053(c)(3)(B).

3. **What is the average period of time it takes for the FTC to compete a rulemaking start to finish?**

   In the context of HISA, the statute and Commission rules provide deadlines in connection with Commission approval (or disapproval) of rules or modifications proposed by the Authority. For example, 16 C.F.R. § 1.142(d) requires the

Authority to provide pertinent information relating to the proposed rule or modification at least 90 days before publication of the proposed rule or modification in the Federal Register. After a public comment period and within 60 days of publication in the Federal Register, the Commission must either approve or disapprove the proposed rule or modification. 15 U.S.C. § 3053(c)(1). If the Commission disapproves a rule or modification, it will make recommendations to the Authority to modify the proposed rule or modification within 30 days of the disapproval. *Id.* § 3053(c)(3(A).

4. **What are the salaries of the highest paid officers of the HISA Authority? What is the compensation for the highest paid officer of the HISA Authority?**

   According to HISA's 2022 IRS Form 990 (available here), HISA's CEO received total reportable compensation of $442,307 in calendar year 2022. The CEO began her employment in February 2022. HISA's CFO received total reportable compensation of $190,185 in calendar year 2022. The CFO began his employment in August 2022.

5. **In 2021, the U.S. District Court for the Northern District of Texas stated in a court document stated the "FTC lacks independent expertise in horseracing." How many staff members have you hired, how much money have you spent, and what other steps, if any, have you taken to gain expertise in horseracing?**

   The Commission continues to implement HISA in accordance with its statutory obligation. The Commission has drawn and continues to draw on relevant expertise from staff throughout the agency to implement HISA and supervise the Authority. The agency has also consulted with other federal agencies with specialized expertise in relevant areas. That said, I agree that the FTC has not traditionally had expertise in horseracing. We conduct this work pursuant to instructions from Congress. If Congress chose to revisit this assignment, I would welcome those discussions.

6. **The HISA Authority has a budget of $66 million. Chairwoman Khan… Does the FTC monitor how these funds are spent and who is the recipient of these funds? Does the FTC raise questions regarding the necessity, prudence, legality, or ethics of these expenditures?**

   In March 2023, the Commission published in the Federal Register a Commission rule setting forth the process whereby the agency reviews and approves the Authority's budget. The overarching criterion that the Commission applies in deciding to approve or disapprove the proposed budget is whether, on balance, the proposed budget "serves the goals of [the Act] in a prudent and cost-effective manner, utilizing commercially reasonable terms with all outside vendors, and whether anticipated revenues are sufficient to meet the Authority's anticipated expenditures." 16 C.F.R. § 1.151(c). With respect to the Authority's revenues and expenditures, the Commission may also modify the amount of any line item. *Id.* § 1.151(d).

   Once a budget is approved, the Authority must notify the Commission immediately if

its costs are anticipated to exceed its overall budget by any amount, or to exceed its budget for any line item by ten percent or more. 16 C.F.R. § 1.152(a). In such scenarios, the Authority must submit a proposal indicating by what means it intends to make up the difference. 16 C.F.R. § 1.152(a)-(c). The Commission has authority to approve or disapprove the Authority's proposals. *Id*.

7. **If the FTC had some evidence that a company was engaging in illegal, anti-competitive behavior, could the FTC issue an order immediately barring that company from operating, or would it first need to have some sort of due process or ALJ or federal court review before issuing such an order?**

   The FTC cannot issue an order immediately barring a company from operating. Following an investigation, the Commission may initiate an enforcement action using either an administrative or judicial process if it has "reason to believe" that the law is being or has been violated.

   In the administrative process, the Commission will issue a complaint setting forth its charges. If the respondent elects to contest the charges, the complaint is adjudicated before an administrative law judge ("ALJ") in a trial-type proceeding conducted under the Commission's Rules of Practice. Upon conclusion of the hearing, the ALJ issues a decision setting forth his or her recommendation. Upon review of the ALJ's decision, the Commission receives briefs, holds oral argument, and thereafter issues its own final decision and order. The Commission's final decision is appealable by any respondent against which an order is issued, but not by FTC Complaint Counsel. If the court of appeals affirms the Commission's order, the court enters its own order of enforcement. The party losing in the court of appeals may seek review by the Supreme Court.

   Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), separately authorizes the Commission to seek preliminary and permanent injunctions in federal district court to remedy "any provision of law enforced by the Federal Trade Commission." In the competition context, the Commission has used Section 13(b) primarily to obtain preliminary injunctive relief against corporate mergers or acquisitions pending completion of an FTC administrative proceeding. In addition, in some circumstances, the Commission may obtain permanent injunctive relief. Any injunction granted by the district court is appealable to the court of appeals. The party losing in the court of appeals may seek review by the Supreme Court.

8. **If the FTC enforcement staff was investigating an anti-trust case, and thought it needed to conduct a search of a business's premise, would the FTC need a search warrant for that search? What if FTC investigators wanted to seize evidence found during a search? Would that require a warrant?**

   As a general matter, the FTC's compulsory process authorities are not the same as a search warrant. The Commission's specific investigative powers are defined in

Sections 6, 9, and 20 of the FTC Act, 15 U.S.C. Secs. 46, 49, and 57b-1, which authorize investigations and various forms of compulsory process. Section 9 of the FTC Act, 15 U.S.C. § 49, states that the Commission "shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any person, partnership, or corporation being investigated or proceeded against."

**Regulating the Housing Sector**

9. **The FTC continues to aggressively assert authority over entire sectors of the American economy and recently signaled intent to step into the heavily regulated housing sector with its joint request for information with the CFPB on resident screening practices in the rental marketplace despite myriad statutory and regulatory structures at federal, state, and local levels controlling the actions of housing providers across the country. Where does the FTC find its statutory authority to regulate the housing sector, specifically the standard business practice of resident screening including criminal records checks that constitutes necessary due diligence in the housing industry as a risk mitigation tool?**

We issued the Tenant Screening Request for Information with our colleagues at the CFPB as a fact-finding initiative to learn more about how tenant screening affects all the different parts of the rental housing industry, including housing providers, prospective tenants, and the consumer reporting agencies that provide tenant screening reports. Tenant screening has long been a priority for the FTC, and our statutory authority stems in part from the Fair Credit Reporting Act, which lays out a number of requirements for consumer reporting agencies who provide tenant screening reports as well as landlords who use the screening reports in rental decisions. For example, the FCRA requires that consumer reporting agencies have reasonable procedures to assure maximum possible accuracy of the information they report about prospective tenants, and we investigate and bring cases against companies who violate those requirements. Section 5 of the FTC Act also authorizes the FTC to investigate unfair or deceptive acts or practices in or affecting commerce, and there is no carveout for landlords or property managers.