

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

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 (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?
2. Did you know you would be appointed Chair when the Senate confirmed your nomination?
3. What implications of China IP theft did you examine prior to your rulemaking on noncompetes?
4. Did you speak to any cancer patients or doctors before making your decision on the Illumina/Grail merger?

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

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?
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.
3. 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?

4. 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?

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

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? 2. When the FTC reviews rules that are first proposed to it by the Authority, can it amend those rules on its initial review?
2. What is the average period of time it takes for the FTC to complete a rulemaking start to finish?
3. 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?
4. 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?
5. 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?
6. 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?
7. 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?
8. 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?

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.
 - 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?
 - 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?
 - 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?

- 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.
 - 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?
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?
 - 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?

- c. How many times did you send out the resolution that could have been disclosing confidential information?
 - d. Who drafted the omnibus resolution with the error?
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?
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.

- 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?
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 subsidiaries 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?
 - 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 changes will comport with the Paperwork Reduction Act, 44 USC §35021, et seq.?
 - i. If not, why not?
 - ii. If yes, what advice did the Office of Management and Budget provide?
 - 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.”

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

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?
 - b. Did any FTC employees raise concerns that the noncompete rulemaking will be found to be illegal if challenged in court?
 - 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?
 - 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?
 - e. Which agency paid the CFPB during the detail: the FTC or the CFPB?
 - 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)?
 - 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?
 - 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?

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

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

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?
 - b. Will you commit to reviewing all enforcement matters which suffer from procedurally invalid Commission votes taken using this procedure?
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?
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?
 - 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?
 - c. What percentage of FTC administrative adjudications end in consent decrees?
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.”

- 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?
 - b. What is the average duration, from investigation to resolution, of FTC enforcement actions in Federal Court?
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?
 - 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?
 - 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?
 - 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?
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?
 - 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?
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 DAEO give you advice that was different than what was written in the memoranda?

- 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?
 - 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?
 - 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?
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.
 - 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?
 - 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?
 - 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?
 - 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?

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?
- 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?
- 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.
- 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?
- 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?
- 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?
- 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?

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

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?
- 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.

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

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?
 - 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?
 - 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?
 - d. What percentage of auto-related complaints you cite are complaints:
 - i. concerning gas stations?
 - ii. against auto finance companies?
 - iii. against other “auto-related” entities that would not be covered by the proposed rule?
 - e. Are used car dealers that do not have service facilities covered by the proposed rule?
 - 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?
 - g. If “yes,” please explain the relevance of Australian data to justify the proposed rule.
 - 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?

- i. If “yes,” please explain the relevance of Canadian and Mexican data to justify the proposed rule.
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:
 1. 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?
 2. The FTC Study was a qualitative, not a quantitative, study?
 3. 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 not useful in forming quantitative or generalizable conclusions.” (Emphasis added)?
3. Did Congress mandate the issuance of the proposed rule?
4. Has any court directed the FTC to issue the proposed rule?
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:
 1. 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?
 2. 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.
 3. If the answer is “no,” is a factory direct seller subject to the following requirements proposed in the proposed rule –
 - i. Section 463.3(b)?;
 - ii. Section 463.4(b)?;
 - iii. Section 463.4(c)?;
 - iv. Section 463.5(a)?;

- v. Section 463.5(b)?;
 - vi. Section 463.6(a)(2), (4), (5), and Section 463.6(b) as it relates to these three sets of records?;
 - vii. Section 463.3(p) as it relates to the “Add-on” disclosure requirements in sections 463.4 and 463.5?
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?

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

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.¹ **How is the FTC working with the National Highway Traffic Safety Administration (NHTSA) to ensure that vehicles on the road are safe for consumers?**
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”². 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.”³ 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.”⁴

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.

¹ National Highway Traffic Safety Administration. “2023 Tesla Model 3.” *NHTSA*, www.nhtsa.gov/vehicle/2023/TESLA/MODEL%203#recalls. Accessed 18 July 2023.

² Tesla. “Autopilot and Full Self-Driving Capability: Tesla Support.” *Tesla*, www.tesla.com/support/autopilot. Accessed 18 July 2023.

³ Musk, Elon. “Tesla Drives Itself (No Human Input at All) Thru Urban Streets to Highway to Streets, Then Finds a Parking Spot <https://t.co/V2t7kgmpbo>.” *Twitter*, 20 Oct. 2016, twitter.com/elonmusk/status/789019145853513729.

⁴ Tesla. *Full Self-Driving Hardware on All Teslas*. *Vimeo*, Oct. 2016, <https://vimeo.com/188105076>. Accessed 18 July 2023.

Deceptive marketing practices can have grave consequences for consumer safety. Since 2019, Tesla “Autopilot” has been involved in 736 crashes and 17 deaths.⁵

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.⁶

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

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?

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.”⁷ 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.”⁸

⁵ Siddiqui, Faiz, and Jeremy B. Merrill. “17 Fatalities, 736 Crashes: The Shocking Toll of Tesla’s Autopilot.” *The Washington Post*, 10 June 2023, <https://www.washingtonpost.com/technology/2023/06/10/tesla-autopilot-crashes-elon-musk/>. Accessed 18 July 2023.

⁶ Federal Trade Commission. “Statement of the Federal Trade Commission Concerning Auto Recall Advertising Cases.” *Federal Trade Commission*, 15 Dec. 2016, www.ftc.gov/system/files/documents/cases/161216_six_auto_recall_cases_statement_of_the_commission_1_1.pdf.

⁷ Bandom, Russell. “Tesla Wants New Self-Driving Tech to Autonomously Road Trip from LA to New York.” *The Verge*, 19 Oct. 2016, <https://www.theverge.com/2016/10/19/13341100/tesla-self-driving-autonomous-road-trip-la-nyc>. Accessed 18 July 2023.

⁸ Koetsier, John. “Elon Musk: Tesla Will Have Level 5 Self-Driving Cars This Year.” *Forbes*, 9 July 2020, <https://www.forbes.com/sites/johnkoetsier/2020/07/09/elon-musk-tesla-will-have-level-5-self-driving-cars-this-year/?sh=12c3329f2d1d>. Accessed 18 July 2023.

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.⁹ 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?

⁹ Society of Automotive Engineers. "SAE Levels of Driving Automation Refined for Clarity and International Audience." *SAE International*, 3 May 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

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?

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?

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?

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?

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?

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?

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?

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?
 - 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?
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?