Responses of Maureen Ohlhausen, Esq., Partner, Baker Botts L.L.P. to Questions for the Record from Subcommittee Ranking Member F. James Sensenbrenner

1. *Some say that the tech sector is particularly vulnerable to anticompetitive conduct because of high network effects and switching costs in the sector and the advantages existing market players' data holdings give them over new entrants. Are those issues that just mean antitrust violations may crop up more in this sector and enforcement agencies need more resources to keep up with them? Or, are those issues that mean antitrust law itself needs to be changed to better address the tech sector?*

It is certainly true that some portions of the tech sector are characterized by high network effects (because an abundance of users tends to make any given platform more valuable) and that access to consumer data is an increasingly important factor for competition in some products and services. On the other hand, the tech sector often exhibits low switching costs for consumers due to a lack of long-term contracts, the availability of free services, and many consumers who multi-home between different services when they perceive value in each. Thus, the tech sector, like many other industries, has a variety of characteristics that make any competitive analysis complex.

The key factor is that the antitrust agencies have been successful in the past in taking action against anticompetitive mergers and conduct where there are strong network effects and other incumbent advantages, both in and out of the tech sector. However, I believe additional resources for antitrust enforcement is necessary, particularly given the fact that the FTC has not had a budget increase in several years while its costs have risen and the U.S. economy has grown. I would caution against expanding the antitrust statutes in an effort to loosen evidentiary standards, forgo judicial review, or move away from the focus on consumers. Current antitrust law has the flexibility and breadth necessary to capture mergers that substantially increase market power for tech companies, and anticompetitive or monopolistic conduct by those same companies. Expanding the scope of antitrust law generally risks generating significantly more "false positives" (enforcement against mergers or activity that are actually procompetitive), and attempting a "carved-out" expansion of antitrust in the tech sector alone raises many line-drawing problems, including how exactly to define what the "tech sector" is – not a simple question give the degree to which technology has expanded to touch on many aspects of modern life.

2. *What is your view of the opinion that tech sector companies have been able to get away more easily with anti-competitive conduct simply by purchasing rivals, rather than trying to wound them through predatory pricing, exclusionary conduct or other traditional antitrust violations?*

Current antitrust provides the agencies the tools necessary to evaluate and enforce the law against anticompetitive mergers as well as anticompetitive or exclusionary conduct by tech sector companies. In some ways, it is easier to block a merger than it is to challenge conduct, given that the agencies benefit from a "market share presumption" of anticompetitive harm when merging companies' market share exceeds certain percentages in a relevant market. Even for acquisitions of nascent or emerging competitors, the market share of the acquirer provides at least some evidence of market power. On the hand, an exclusionary conduct (monopolization) case requires a higher showing of market share, typically well in excess of 50%.

I also agree with former FTC Bureau of Competition Director Bruce Hoffman, when he stated this past May that "I am not aware of good economic evidence that there is a unique and widespread 'nascent' or 'start-up' acquisition issue in the tech industry."[1] Recent FTC action against CDK and Auto/Mate (mentioned in my testimony), against Mallinckrodt (formerly Questcor) for purchasing an up-and-coming pharmaceutical competitor[2], and the challenge just announced to Illumina's purchase of nascent DNA sequencing system competitor Pacific Biosciences,[3] all demonstrate that the agencies can and do take action to preserve nascent competition in high-tech and complex industries. It is important to be sure we ground any decision to amend the antitrust laws or alter course in enforcement priorities in sound evidence that such changes are needed.

3. *You raise a note of caution about retrospective review of consummated mergers, saying that while they can be helpful in limited doses, they should not be more routine. Can you explain that in more detail?*

My concern with dramatically expanding retrospective merger reviews rests primarily on the significant resources consumed by such reviews. Undertaking a retrospective review that is thorough and comprehensive is likely to consume nearly as many resources as the prospective review that the agencies currently undertake for any acquisition that raises concerns, given that it would involve the same kinds of fact-gathering, economic analysis, and canvassing of opinions from relevant industry players. My concern is also based on my first-hand experience overseeing the FTC's update of its merger divestiture study that, while resulting in useful information that informed FTC's practices going forward, consumed substantial resources despite focusing on a discrete subset of previously-cleared transactions.

4. *It has been argued that, were the United States antitrust agencies to launch a policy of unwinding significantly more consummated mergers, that would create a great deal of regulatory uncertainty for companies contemplating new mergers and have chilling effects on merger-and-acquisitions investment. What is your view?*

I agree with this assessment. The agencies can and do step in to unwind anticompetitive mergers post-consummation, particularly those that are below the HSR reporting threshold and so represent a "first bite at the apple" for antitrust enforcers. The FTC's recent decision unwinding prosthetic manufacturer Otto Bock's acquisition of Freedom Innovations—upholding a complaint that I brought during my tenure as Acting FTC Chairman—is a good example.[4] But altering current enforcement policy by pursuing widespread agency"second bites" at already-cleared transactions

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[1] Bruce D. Hoffman, "Antitrust in the Digital Economy: A Snapshot of FTC Isues", *GCR Live: Antitrust in the Digital Economy*, at 5 (May 2019), available at https://www.ftc.gov/system/files/documents/public_statements/1522327/ hoffman_-_gcr_live_san_francisco_2019_speech_5-22-19.pdf.

[2] Mallinckrodt Will Pay $100 Million to Settle FTC, State Charges It Illegally Maintained its Monopoly of Specialty Drug Used to Treat Infants (Jan. 18, 2017), available at https://www.ftc.gov/news-events/press-releases/2017/01/mallinckrodt-will-pay-100-million-settle-ftc-state-charges-it.

[3] FTC Challenges Illumina's Proposed Acquisition of PacBio (Dec. 17, 2019), available at https://www.ftc.gov/news-events/press-releases/2019/12/ftc-challenges-illuminas-proposed-acquisition-pacbio.

[4] *In re Otto Bock HealthCare N.A., Inc.*, FTC No. 9378 (Nov. 1, 2019), available at https://www.ftc.gov/system/files/documents/cases/d09378commissionfinalopinion.pdf.

would result in market uncertainty and likely chill business activity, including pro-competitive mergers.

5. *It also has been argued that launching a policy of unwinding more past mergers to help manage the U.S. economy would complicate the ability of U.S. antitrust regulators to take on foreign countries like China for their abuse of their antitrust laws to advance their own industrial policies. What is your view of that assertion?*

As discussed in my testimony, U.S. antitrust law focuses on the value of market competition to benefit American consumers and the U.S. has been a leader is resisting antitrust enforcement in the pursuit of industrial policy. If U.S. changes policy and brings challenges (either retrospective or prospective) to pursue other industrial policy values, such as fairness, consumer privacy, or protection of small businesses at the expense of efficiency, that will undermine U.S. leadership and encourage other countries to pursue industrial policies in their competition enforcement, which will likely harm U.S. business and consumer interests.

6. *Would it be a better approach to merger issues if Congress amended the Hart-Scott-Rodino Act to require more pre-merger review of smaller-value mergers, rather than just the larger ones the Act now covers?*

FTC Bureau of Competition Director Bruce Hoffman raised "several cautionary flags" about the idea of lowering HSR reporting thresholds. The thresholds were raised in 2001 to address a flood of HSR filings that was overburdening the enforcement agencies and distracting from their work on mergers that raised actual competitive concerns.[5] Also, "more recent evidence suggests that reducing the HSR thresholds would not likely generate many good cases,"[6] because bigger deals tend to be the ones raising the most significant concerns. I agree with Director Hoffman's concerns and add that any drop in the HSR thresholds would need to be accompanied by a very substantial increase in agency funding to avoid prejudicing their in-depth reviews of problematic transactions.

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[5] *See* Hoffman, footnote 1, at 7.

[6] *Id*.