

Questions for the Record from the Honorable David N. Cicilline, Chairman, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary

Questions for the Honorable Joseph Simons, Chairman, Federal Trade Commission

Merger Enforcement

1. Please provide the performance objectives for managers in merger shops.
2. Are any merger shop managers evaluated based on the number of settlements they reach? If so, do you believe that this incentivizes reaching settlements over litigation?
3. How does the Commission incentivize staff to recommend and litigate cases where it finds there has been—or is likely to be—harm to competition, even where that litigation may end in a loss?
4. Is litigation risk a factor that the Commission considers when deciding whether to challenge a merger?
5. Is it appropriate for the Commission to consider litigation risk when deciding whether to vote out a complaint in a merger or case of anti-competitive conduct if the Commission otherwise believes the transaction or conduct violated the antitrust laws?
6. When was the last time that the Commission voted to file a complaint in a case that involved a new or novel theory of harm? Please provide a description of that case.
7. According to a September report by the Washington Center for Equitable Growth, non-merger enforcement has been at historic lows over the past two years.¹ What is your response to this report?
8. How do you think the Commission should analyze transactions involving a private equity buyer? Do these transactions raise any unique issues?
9. According to Columbia Law School Professor Tim Wu, dominant technology platforms have completed more than 350 mergers and acquisitions to date. Many of these involved Facebook and Google acquiring actual and nascent competitors. Professor Wu observed, “As with a basketball referee who never calls a foul, the question is whether the players have really been faultless—or whether the referee is missing something.” How do you respond to the Professor Wu’s concern that the agency has been missing something when it comes to merger enforcement in digital markets?

¹ Michael Kades, *The state of U.S. federal antitrust enforcement*, Washington Center for Eq. Growth (Sept. 2019), <https://equitablegrowth.org/wp-content/uploads/2019/09/091719-antitrust-enforcement-report.pdf>.

10. You have repeatedly stated that you are committed to blocking “killer acquisitions.” Has the Commission challenged any killer acquisitions under your leadership, or developed policies for doing so? If so, please describe the relevant transactions or policies.
11. In November, the FTC published a proposed consent order approving Bristol-Myers Squibb’s \$74 billion acquisition of Celgene, subject to the divestiture of Celgene’s Otezla for \$13.4 billion. Although the proposed divestiture is the largest that a U.S. antitrust agency has required in a merger enforcement matter, two commissioners dissented from the order, arguing that the Commission’s analysis of pharmaceutical mergers remains narrowly focused on questions of product overlap and neglects critical questions about whether the transaction is likely to facilitate anti-competitive conduct or hamper innovation.
 - a. Do you believe that an analytic approach that focuses on product overlap is sufficient to capture all potential anti-competitive effects of pharmaceutical mergers?
 - b. Please identify all pharmaceutical mergers reviewed by the FTC during your tenure as Chairman where the Commission’s analysis extended beyond product overlap concerns.
 - c. Please identify all pharmaceutical mergers blocked by the FTC where the Commission’s theory of harm extended beyond product overlap concerns.
12. At the time of your nomination, you submitted responses to a questionnaire from the Senate Committee on Commerce, Science, and Transportation. In one of your answers, you wrote:

The FTC needs to devote substantial resources to determine whether its merger enforcement has been too lax, and if that’s the case, the agency needs to determine the reason for such failure and to fix it. Even if the evidence shows no such failure, it would be good practice to evaluate more systematically the Commission’s merger enforcement program through the regular use of retrospective studies to prevent potential problems in the future. It would also be good practice to extend the retrospectives to non-merger matters as well.²

 - a. Please identify the number of merger retrospectives studies the Commission has pursued during the course of your tenure as Chairman and describe the scope and subject of each study.
 - b. Please describe the finding of each study.

² Joe Simons, Questionnaire Response, Senate Committee on Commerce, Science, and Transportation (Jan. 31, 2018), <https://www.commerce.senate.gov/services/files/6c4149af-3023-4825-90f1-3c38e279fd0d>.

- c. Please describe what these studies revealed about the efficacy of the Commission’s merger review and enforcement efforts and about how they can be improved.
- d. Please identify all steps the Commission has taken to evaluate more systematically the Commission’s merger enforcement program.

Settlement Policy

- 13. The FTC’s recent settlement with Facebook contained an extremely broad release from legal liability. Since violations of many consumer protection statutes—such as the Children’s Online Privacy Protection Act (COPPA)—also constitute violations of the FTC Act, it would appear that the proposed settlement releases Facebook from claims under COPPA and other consumer protection statutes. Is that correct?
- 14. What other Commission orders have contained a comparably broad release of known and unknown order violation claims, as well as all known Section 5 claims?
- 15. Does the FTC complaint list the full universe of known order violations and known Section 5 violations for which the FTC has granted Facebook release?
- 16. Did the FTC record a full list of conduct that it investigated as potential order violations but ultimately determined did not violate the order?
- 17. Did the FTC record a full list of conduct that it investigated as potential Section 5 violations but ultimately determined did not violate Section 5?
- 18. Last year, the FTC uncovered a wage fixing scheme among several health staffing companies in *Integrity Home Therapy*. Although wage fixing is a clear violation of the antitrust laws, the FTC decided against securing any meaningful relief, declining to secure a finding or admission of liability or to issue formal notification to third parties. In other words, upon discovering that companies were clearly violating the law, the FTC’s response was to tell the companies not to break the law. FTC Commissioner Chopra has described this as a “no-consequence” settlement. Under what conditions—if any—do you think “no-consequence” settlements that solely order a respondent to cease and desist are appropriate?
- 19. In October, the Commission filed a complaint charging the high-end cosmetics company Sunday Riley for posting fake reviews at the CEO’s direction. These fake reviews deceived consumers and distorted fair competition. Yet the FTC’s proposed settlement includes no monetary relief, no notice to consumers, and no admission of wrongdoing. In other words, this company was found clearly breaking the law—and the FTC’s remedy is to tell them not to break the law again. This appears to be part of a pattern of “no-consequence” settlements at the FTC. As Commissioner Chopra pointed out in his dissent, honest companies may wonder if they are losing out by *following* the law. Does failing to penalize lawbreakers incentivize law-abiding companies to break the law?

Investigative Process

20. In November, California's Attorney General filed a petition in California State Court to enforce a subpoena against Facebook. According to the filing, Facebook has broadly refused to comply with the subpoena by, among other things, refusing to search communications among Facebook's senior executives. Did Facebook try to thwart the FTC's investigation in similar ways? If so, did the FTC take actions in court or otherwise to ensure compliance with FTC discovery requests?
21. What is the Commission doing to make sure that FTC staff have the support it needs to obtain information from all levels of the companies that they are investigating, up to and including the CEOs?
22. Is the agency's Office of General Counsel prepared to fully and aggressively support staff if and when they need it to enforce FTC-issued subpoenas against any company that may decide they want to ignore such requests, including Facebook?
23. How does the number of subpoena enforcement actions in antitrust matters compare to the number in consumer protection matters? If there is a difference, what accounts for the disparity?

Executive Accountability

24. In your view, when it is appropriate for the FTC to hold individual executives accountable for order violations in which they participated?
25. Please describe what steps the FTC takes to investigate the involvement of individual executives in corporate order violations.
26. Please identify all instances since January 2015 in which the FTC held individual executives accountable for order violations.
27. The Commission has been criticized for not holding Facebook CEO Mark Zuckerberg personally liable in its \$5 billion settlement with Facebook over extensive privacy violations and, furthermore, in not requiring Zuckerberg's appearance as the company's ultimate decision-maker for a deposition during the investigation. What is the Commission doing to ensure that CEOs of large companies are held accountable when their companies violate antitrust law with the CEOs' knowledge or at his or her direction?

28. The Department of Justice's *Justice Manual* states: "In instances where the Department reaches a resolution with a company before resolving matters with responsible individuals, Department attorneys should take care to preserve the ability to pursue the individuals. A Department attorney seeking to allow the release of civil claims related to the liability of individuals based on a corporate settlement must document the basis for the determination that further action against the individuals is not necessary or warranted, and must obtain written supervisory approval of the decision to allow the release of civil claims in the case."³ Did the FTC follow the *Justice Manual's* recommended approach and document the basis for determining that further action against Mark Zuckerberg or other individuals at Facebook was not necessary or warranted? If not, why not?
29. In their statement, the Commissioners who voted in favor of the proposed settlement with Facebook stated: "Here, we have made the determination that, in light of the meaningful relief we have achieved, retaining the ability to sue Mr. Zuckerberg for past order violations we did not find and for which he may have been personally liable would not serve the public interest." How did the Majority Commissioners reach this conclusion?
30. When assessing whether to hold individual executives accountable for order violations, what role does a firm's size play in the Commission's analysis?
31. Are there any factors that differentiate the FTC's analysis of individual liability for executives at large companies versus at small companies?

Technological Capabilities

32. Earlier this year, the Commission established the Tech Task Force, which later became the Technology Enforcement Division (TED) when it was converted into a permanent Division within the Bureau of Competition.
 - a. What are the biggest obstacles to enforcement, if any, that the TED currently faces?
 - b. How many attorneys are on the TED's staff who work exclusively on the TED's caseload and when was each of them hired?
 - c. How many full-time technologists are on the TED's staff who work exclusively on the TED's caseload and when was each of them hired?
 - d. How many full-time economists are on TED's staff who work exclusively on the TED's caseload and when was each of them hired?
33. Several FTC consent orders have required firms to engage independent third-party assessors to perform security assessments. What processes does the FTC have in place to ensure third-party security assessments are trustworthy and accurate?

³ Department of Justice, 4-3.100: Pursuit of Claims Against Individuals, <https://www.justice.gov/jm/jm-4-3000-compromising-and-closing>.

34. Some commentators have suggested that the FTC’s decisions to allow Facebook to acquire Instagram and WhatsApp resulted from a lack of understanding of the relevant technology markets. What are you doing to ensure that the TED—as well as other divisions reviewing mergers in technology markets—do not make erroneous decisions due to a lack of understanding of the relevant markets?

FTC Hearings

35. In September 2018, the FTC launched a series of public hearings to examine “whether broad-based changes in the economy, evolving business practices, new technologies, or international developments may require adjustments to competition and consumer protection law, enforcement priorities, and policy.” Has the FTC produced any summaries, findings, or reports following the hearings? If yes, please describe these materials and whether they have been made available to all of the relevant divisions at the agency and Commissioner offices.
36. Does the FTC plan to make public any work product that is a result of the hearings? If so, what process will the FTC have in place to identify whether this work product has support among Commissioners?
37. How much did the FTC spend on its public hearings?
38. What types of data did the FTC collect through its public hearings?
39. In what specific ways have the FTC’s hearings on digital platforms and the relationship between privacy, big data, and competition helped TED better investigate potential violations in the tech sector and, when they find violations, bring and win these cases?
40. In September, the head of the FTC’s Office of Policy Planning (OPP), Bilal Sayyed, stated in a speech that his office is planning to release a guidance document on the application of the antitrust laws to conduct by technology platforms. What are you doing to ensure that OPP’s work will complement the work and mission of the Bureau of Competition?
41. Is OPP working with the attorneys in TED to craft these guidelines? If yes, please describe how.
42. Is OPP coordinating closely with the Department of Justice to craft these guidelines? If yes, please describe how.
43. What are you doing to ensure that the various parts of the agency are working to support each other in the agency’s efforts to promote competition and aggressively enforce the antitrust laws?

44. What steps does the FTC take to ensure that outside interests do not improperly influence the agency's policy and enforcement decisions?
45. Have you ever received or sent communications from a non-government email or phone number to an executive at a firm under investigation or with a pending merger?

Conflicts of Interest

46. The Commission's rules require former FTC employees to obtain clearance for working on matters that may have been pending while they were employed by the Commission. Please identify how many of these requests the Commission received for each month since January 2017.
47. Since January 2017, how many FTC enforcement actions or investigations had a respondent or defendant represented by a former director of the Bureau of Competition, Bureau of Economics, or Bureau of Consumer Protection, or by a former FTC Commissioner?

Expert Costs

48. The FTC Office of the Inspector General (OIG) identified the escalating costs of expert witnesses as one of the two top "management challenges" facing the FTC in 2019. Please describe each step of the process by which the Commission selects an economic expert or consulting firm to retain, including any processes for setting up competitive bidding, for negotiating fees, and for determining fees.
49. Please describe how contracts for outside experts and consulting firms are structured.
50. Please identify any features of the current contract structure that might incentivize outside experts and consulting firms to complete their work in a more or less cost-effective manner.
51. Please identify what processes the Commission has in place to monitor and review the work performed by outside economic experts and consulting firms.
52. In its November 2019 report, the OIG identified several instances where the FTC failed to fully document the process by which it selects experts. Please identify what steps the Commission is taking to rectify this shortcoming.

40 U.S.C. § 559

53. 40 U.S.C. § 559 states: "An executive agency shall not dispose of property to a private interest until the agency has received the advice of the Attorney General on whether the disposal to a private interest would tend to create or maintain a situation inconsistent with antitrust law." Please provide a full list of matters on which the FTC has consulted with the Attorney General pursuant to this statutory provision.

Political Influence

54. Please identify all officials from the Office of Policy Planning, the Office of General Counsel, the Bureau of Competition, the Bureau of Consumer Protection, and the Bureau of Economics that have attended meetings in the White House complex since January 2017 and describe the circumstances of each meeting.

Statutory Authority

55. Under current law the Commission has the authority to obtain equitable monetary relief under Section 13(b) of the FTC Act. Do you have concerns about the Commission's continued ability to do so? If so, what are your recommendations for actions Congress could take, or should refrain from taking, in support of the Commission's existing authority to obtain equitable monetary relief as a means of holding violators of the FTC Act accountable and providing redress to their victims?
56. Section 19 of the FTC Act authorizes the Commission to seek remedies that are broader than those available under Section 13(b), including damages. Specifically, Section 19 authorizes the Commission to seek this additional relief from a party that is subject to a final FTC order involving an unfair or deceptive act or practice if a "reasonable man" would have known that the act or practice was dishonest or fraudulent.
 - a. Please identify any cases where the FTC has pursued damages under Section 19 during your leadership.
 - b. Commissioner Chopra has noted that deceptive acts can undermine competition by disfavoring honest businesses. Do you agree that the FTC should assert claims of deception in competition cases where the deceptive act or practice appears to have harmed competition and fair business rivalry?