

**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 Record for the Honorable Joseph Simons, Chairman,  
Federal Trade Commission**

**Merger Enforcement**

**1. Please provide the performance objectives for managers in merger shops.**

The Bureau of Competition (BC) comprises several merger enforcement divisions, each led by an Assistant Director (AD) and one or more Deputy Assistant Directors (DADs). The ADs and DADs are responsible for carrying out the FTC's competition mission by executing the merger enforcement-related strategies identified in the FTC's annual performance plan.<sup>1</sup> These strategies include, among other things:

- Investigating potentially anticompetitive mergers using rigorous, economically sound, and fact-based analyses that enhance enforcement outcomes and minimize burdens on business; and
- Negotiating merger consent orders and winning litigated orders that have significant remedial, precedential, and deterrent effects.

**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?**

No, the number of settlements reached is not an element of performance management for merger shop managers.

The FTC's annual performance plan identifies the agency's performance metrics and goals, which are designed to ensure that the FTC—including its managers and senior leaders—effectively and efficiently uses its limited resources in areas where the agency can achieve the most positive change.<sup>2</sup> The metrics for merger enforcement treat litigated victories the same as settlements or abandoned or restructured transactions.<sup>3</sup> Likewise, we compute consumer savings across all merger enforcement actions (whether resolved through litigation or settlement), and total consumer savings compared to the amount of resources allocated to our merger program.<sup>4</sup>

---

<sup>1</sup> FTC, FISCAL YEAR 2018 PERFORMANCE REPORT AND ANNUAL PERFORMANCE PLAN FOR FISCAL YEARS 2019 AND 2020 at 36-37, <https://www.ftc.gov/system/files/documents/reports/fy-2019-20-performance-plan-fy-2018-performance-report/2020-app-apr.pdf>.

<sup>2</sup> *Id.* at 42.

<sup>3</sup> *Id.* at 38 (Key Performance Goal 2.1.1).

<sup>4</sup> *Id.* at 39-40 (Key Performance Goals 2.1.2 & 2.1.3).

**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?**

The FTC does not shy away from litigating difficult cases, and this message is consistently conveyed to staff. Of course, the Commission must consider litigation risks when it determines how best to use its limited resources—but staff knows the Commission does not expect a 100 percent “win” rate. For example, the Commission has brought and prevailed in Supreme Court cases addressing reverse payment pharmaceutical agreements and the state-action doctrine, even after losing at the lower court level.<sup>5</sup> In the last few years, the agency tried and lost two hospital merger challenges in federal district court, only to prevail at the appellate level.<sup>6</sup> And just a couple of weeks ago, the agency lost a preliminary injunction action in federal district court regarding an industrial chemical merger.<sup>7</sup> When the Commission votes to bring these and other challenging cases and to devote considerable resources to them, even after exhaustive discussions of litigation risk, the Commission clearly signals to staff that the Commission has their backs when they seek to vigorously enforce the antitrust laws.

**4. Is litigation a risk factor that the Commission considers when deciding whether to challenge a merger?**

Yes, the Commission must consider litigation risk as part of our responsibility to be effective stewards of the resources entrusted to us. Antitrust merger litigation is a fast-paced, labor-intensive process, and we are always mindful of resource constraints when weighing enforcement options. But when we determine that a merger poses competitive harm, we do not let concerns over litigation risk dictate our decision to litigate. In assessing when and how to bring an enforcement action in the public interest, we consider multiple factors, but arguably the most important factor is the strength of the evidence. In evaluating the case, we look at the three legs of the stool of any good antitrust case: documents, witnesses, and economic analysis. We try to build merger challenges that have all three legs, but we very often bring cases that have only two—maybe even one—of the three legs.

---

<sup>5</sup> *FTC v. Actavis, Inc.*, 570 U.S. 136 (2013) (rejecting lower courts’ rulings immunizing reverse-payment settlements that were within the “scope of patent” and allowing antitrust scrutiny under a rule of reason analysis); *FTC v. Phoebe Putney Health Sys.*, 568 U.S. 216 (2013) (rejecting lower courts’ rulings that state action doctrine immunized hospital acquisition from antitrust laws because state did not clearly and affirmatively express a policy allowing the special-purpose entity hospital authorities to make acquisitions that substantially lessened competition).

<sup>6</sup> *FTC v. Advocate Health Care Network*, 841 F.3d 460 (7th Cir. 2016); *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327 (3d Cir. 2016). In each case, the FTC alleged that the proposed merger would substantially reduce competition for general acute care inpatient hospital services sold to commercial health plans, leading to higher healthcare costs and lower quality service in local communities, but the district court rejected the FTC’s proffered geographic market. On appeal, both circuit courts overturned the district court’s decision and validated the FTC’s geographic market analysis. The decisions acknowledged the commercial reality of U.S. hospital competition: that because patients prefer to receive hospital services close to home, employers require—and commercial health plans must offer—access to in-network hospitals close to where their employees live. This dynamic—rather than where patients living in the market might travel for healthcare if the cost of hospital services were to rise—determines the relevant geographic market.

<sup>7</sup> *FTC v. Rag-Stiftung*, No. 1:19-cv-02337-TJK (D.D.C. Feb. 3, 2020), [https://ecf.dcd.uscourts.gov/cgi-bin/show\\_public\\_doc?2019cv2337-150](https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2019cv2337-150).

Of course, we entertain proffered settlement offers that we believe will restore competition, especially when we are confident that the settlement outcome will rival what we might obtain via protracted litigation.

**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 anticompetitive conduct if the Commission otherwise believes the transaction or conduct violated the antitrust laws?**

Yes, consideration of litigation risk is always appropriate and necessary. Antitrust litigation is incredibly resource intensive, and we have an obligation to be good stewards of the resources that Congress has allocated to carry out our dual competition and consumer protection missions. When we decide whether to pursue litigation, we evaluate the likelihood that our enforcement efforts will result in relief to consumers. For the same reason, we also consider whether accepting a well-crafted settlement could resolve the alleged harm much faster, and without expending resources to litigate the case.

Nevertheless, lawsuits are central to effective antitrust enforcement, and the Commission does not hesitate to litigate when necessary. The unprecedented level of antitrust litigation by the Commission over the last two years—including four merger challenges approved unanimously by the Commission and filed in the last two months—shows this.<sup>8</sup>

Litigation risk is just one of many factors that inform the agency's enforcement priorities. Early in my term as Chairman, I identified five factors that I use in prioritizing our enforcement efforts:

- i. Does the conduct pose a substantial threat to consumers?
- ii. Does the conduct involve a significant sector of the economy?
- iii. Does the FTC have experience that will allow it to make an impact quickly and efficiently?
- iv. Does the conduct present a legal issue that would benefit from further study, and potentially have a significant effect on antitrust jurisprudence?
- v. Does the conduct involve unilateral conduct by dominant firms in industries with substantial network effects?<sup>9</sup>

---

<sup>8</sup> See, e.g., FTC Press Release, *FTC Files Suit to Block Edgewell Personal Care Company's Acquisition of Harry's, Inc.* (Feb. 3, 2020), <https://www.ftc.gov/news-events/press-releases/2020/02/ftc-files-suit-block-edgewell-personal-care-companys-acquisition>; FTC Press Release, *FTC Challenges Consummated Merger of Companies that Market Body-Worn Camera Systems to Large Metropolitan Police Departments* (Jan. 3, 2020), <https://www.ftc.gov/news-events/press-releases/2020/01/ftc-challenges-consummated-merger-companies-market-body-worn>; FTC Press Release, *FTC Alleges Post Holdings, Inc.'s Proposed Acquisition of TreeHouse Foods, Inc.'s Private Label Ready-to-Eat Cereal Business will Harm Competition* (Dec. 19, 2019), <https://www.ftc.gov/news-events/press-releases/2019/12/ftc-alleges-post-holdings-incs-proposed-acquisition-treehouse>; FTC Press Release, *FTC Challenges Illumina's Proposed Acquisition of PacBio* (Dec. 17, 2019), <https://www.ftc.gov/news-events/press-releases/2019/12/ftc-challenges-illumina-proposed-acquisition-pacbio>.

<sup>9</sup> Prepared Remarks of Chairman Joseph Simons, Georgetown Law Global Antitrust Enforcement Symposium at 4-5 (Sept. 25, 2018),

Following these principles, I believe that the agency is able to deliver the most bang for its buck in bringing litigation cases.

**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.**

On December 17, 2019, the Commission, by unanimous vote, authorized an action to challenge Illumina, Inc.'s proposed acquisition of Pacific Biosciences of California under Section 2 of the Sherman Act and Section 7 of the Clayton Act.<sup>10</sup> The complaint alleged that Illumina violated Section 2 of the Sherman Act by seeking to acquire and therefore extinguish PacBio, a nascent competitive threat to Illumina's 90-percent share monopoly in the U.S. market for next-generation DNA sequencing systems. The complaint also alleged that the proposed acquisition would eliminate current competition and prevent increased future competition between Illumina and PacBio.<sup>11</sup> Two weeks after the Commission issued its complaint, the parties abandoned their transaction.

I note this is not an isolated example. There have been other firsts in the past year, including our first case to preserve competition in private label foods.<sup>12</sup>

**7. According to a September report by the Washington Center for Equitable Growth, non-merger enforcement has been at historical lows over the past two years.<sup>13</sup> What is your response to this report?**

As the report itself noted, "numbers do not tell the entire story." I am proud of the Commission's substantial record on non-merger enforcement during my time as Chairman. The Commission unanimously supported the agency's first action involving a multi-sided

---

[https://www.ftc.gov/system/files/documents/public\\_statements/1413340/simons\\_georgetown\\_lunch\\_address\\_9-25-18.pdf](https://www.ftc.gov/system/files/documents/public_statements/1413340/simons_georgetown_lunch_address_9-25-18.pdf)

<sup>10</sup> FTC Press Release, *FTC Challenges Illumina's Proposed Acquisition of PacBio* (Dec. 17, 2019), <https://www.ftc.gov/news-events/press-releases/2019/12/ftc-challenges-illuminas-proposed-acquisition-pacbio>.

<sup>11</sup> In addition to issuing an administrative complaint, the Commission authorized staff to seek a temporary restraining order and a preliminary injunction in federal court, if necessary, to maintain the status quo pending the administrative proceeding. *Id.*

<sup>12</sup> FTC Press Release, *FTC Alleges Post Holdings, Inc.'s Proposed Acquisition of TreeHouse Foods, Inc.'s Private Label Ready-to-Eat Cereal Business will Harm Competition* (Dec. 19, 2019), <https://www.ftc.gov/news-events/press-releases/2019/12/ftc-alleges-post-holdings-incs-proposed-acquisition-treehouse>. Outside the merger context, the Commission also brought its first pharmaceutical product-hopping case this year. The Commission's complaint alleged that the pharmaceutical company made knowingly false statements to the FDA while engaging in a "product hopping" scheme to shift existing patients away from the tablet product about to face generic competition and onto another, more lucrative film product that enjoyed patent protection and provided no legitimate incremental benefits. FTC Press Release, *Reckitt Benckiser Group plc to Pay \$50 Million to Consumers, Settling FTC Charges that the Company Illegally Maintained a Monopoly over the Opioid Addiction Treatment Suboxone* (July 11, 2019), <https://www.ftc.gov/news-events/press-releases/2019/07/reckitt-benckiser-group-plc-pay-50-million-consumerssettling-ftc>.

<sup>13</sup> Michael Kades, *The State of U.S. Federal Antitrust Enforcement*, Washington Center for Equitable Growth (Sept. 2019), <https://equitablegrowth.org/wp-content/uploads/2019/09/091719-antitrust-enforcement-report.pdf>.

health information platform,<sup>14</sup> the first case alleging pharmaceutical product hopping as an illegal method of maintaining a monopoly,<sup>15</sup> and most recently, a case filed with the New York Attorney General alleging an illegal course of conduct to maintain high prices for off-patent drugs.<sup>16</sup> In addition, we have many investigations underway.

While there is more variation in the number of competition conduct cases brought from year to year as compared to the FTC's merger enforcement numbers, rest assured that conduct cases are a priority. During the two years that I was the Director of the FTC's Bureau of Competition from 2001-2003, the Commission filed 25 non-merger cases and opened 100 investigations. My commitment to challenging anticompetitive conduct continues today.

Three points are worth noting to provide context regarding the Commission's approach to conduct cases. First, although conduct enforcement is often targeted at the most harmful conduct, our case selection is also about helping to evolve the law. For example, the *Actavis* matter was just one case, but it has been the lynchpin of the Commission's bipartisan, decades-long effort to push back against anticompetitive reverse-payment patent settlements that deter generic drug competition.<sup>17</sup> Second, conduct enforcement matters are particularly time-consuming and often require significant resources to see through to the end. Again, *Actavis* was finally settled last year with broad injunctive relief—a full ten years after the Commission filed its complaint in federal court. Finally, done well, conduct enforcement can have deterrent effects beyond a single case. Again using *Actavis* as an example, one reason for a significant drop off in civil non-merger cases is that the Commission has prioritized challenging reverse-payment pharmaceutical settlements. As a result, there are far fewer problematic settlements.<sup>18</sup>

## **8. How do you think the Commission should analyze transactions involving a private equity buyer? Do these transactions raise any unique issues?**

The Commission applies the same methods and analysis to mergers involving all types of investors and owners, including acquisitions made by private equity buyers. I joined a Commission statement in *Staples/Essendant* that addressed concerns that private equity buyers

---

<sup>14</sup> FTC Press Release, *FTC Charges Surescripts with Illegal Monopolization of E-Prescription Markets* (Apr. 24, 2019), <https://www.ftc.gov/news-events/press-releases/2019/04/ftc-charges-surescripts-illegal-monopolization-e-prescription>.

<sup>15</sup> FTC Press Release, *Reckitt Benckiser Group plc to Pay \$50 Million to Consumers, Settling FTC Charges that the Company Illegally Maintained a Monopoly over the Opioid Addiction Treatment Suboxone* (July 11, 2019), <https://www.ftc.gov/news-events/press-releases/2019/07/reckitt-benckiser-group-plc-pay-50-million-consumerssettling-ftc>.

<sup>16</sup> FTC Press Release, *FTC and NY Attorney General Charge Vyera Pharmaceuticals, Martin Shkreli, and Other Defendants with Anticompetitive Scheme to Protect a List-Price Increase of More Than 4,000 Percent for Life-Saving Drug Daraprim* (Jan. 27, 2020), <https://www.ftc.gov/news-events/press-releases/2020/01/ftc-ny-attorney-general-charge-vyera-pharmaceuticals-martin>.

<sup>17</sup> *FTC v. Actavis, Inc.*, 570 U.S. 136 (2013).

<sup>18</sup> The data show that the FTC's *Actavis* litigation has had a substantial deterrent effect in significantly reducing the kinds of reverse-payment agreements that are most likely to impede generic entry and harm consumers. See FTC BUREAU OF COMPETITION, AGREEMENTS FILED WITH THE FEDERAL TRADE COMMISSION UNDER THE MEDICARE PRESCRIPTION DRUG, IMPROVEMENT, AND MODERNIZATION ACT OF 2003: OVERVIEW OF AGREEMENTS FILED IN FY 2016 (May 2019), <https://www.ftc.gov/reports/agreements-filed-federal-trade-commission-under-medicare-prescription-drug-improvement-fy2016>.

require additional scrutiny.<sup>19</sup> As explained in that statement, the antitrust laws focus on curbing harm to the competitive process. Concerns about the motivations of the private equity buyer in that case were unrelated to an analysis of how the acquiring company might use the acquired business to harm the competitive process.

I will keep an open mind when assessing the facts presented in each merger case, but in general, I do not believe acquisitions by private equity buyers require unique scrutiny.

**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?**

I was not at the Commission when many of these mergers were reviewed, and therefore do not have first-hand knowledge of how those decisions were reached. But I am sensitive to concerns that the Commission might have missed something. To that end, the Commission is considering whether to use its Section 6(b) authority to examine past mergers and acquisitions by large technology platforms.

Addressing anticompetitive conduct in the technology sector is one of my top priorities. I created the Bureau of Competition’s new Technology Enforcement Division to take a fresh look at the markets in which technology platforms compete. If appropriate, the Commission will take action to counter any harmful effects of coordinated or unilateral conduct by technology firms. As we demonstrated in our complaint challenging the Illumina/PacBio merger, acquisitions can be a method of monopolization and so are actionable under a monopolization theory.

**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.**

We are aware of concerns that certain firms may be engaging in so-called “killer acquisitions” that have the effect of eliminating nascent or potential competitors, and we are taking this issue very seriously. On the enforcement front, we continue to scrutinize mergers between large incumbents and smaller rivals for potential harm to innovation competition.<sup>20</sup> For example:

---

<sup>19</sup> Statement of Chairman Joseph J. Simons, Commissioner Noah Joshua Phillips, and Commissioner Christine S. Wilson Concerning the Proposed Acquisition of Essendant, Inc. by Staples, Inc., File No. 181-0180 (Jan. 28, 2019), [https://www.ftc.gov/system/files/documents/public\\_statements/1448328/181\\_0180\\_staples\\_essendant\\_majority\\_statement\\_1-28-19.pdf](https://www.ftc.gov/system/files/documents/public_statements/1448328/181_0180_staples_essendant_majority_statement_1-28-19.pdf).

<sup>20</sup> This is consistent with the FTC’s past practice. *See, e.g.*, FTC Press Release, FTC, Mallinckrodt Will Pay \$100 Million to Settle FTC, State Charges It Illegally Maintained its Monopoly of Specialty Drug Used to Treat Infants

- The Commission recently successfully challenged Illumina’s proposed acquisition of PacBio, preserving competition in the U.S. market for next-generation DNA sequencing systems.<sup>21</sup>
- The Commission challenged a consummated acquisition in which the market leader in microprocessor prosthetic knees, Otto Bock, eliminated a primary competitive threat, Freedom Innovations.<sup>22</sup>
- As recently as a few weeks ago, the Commission, by unanimous vote, challenged the consummated acquisition of VieVu, LLC by Axon Enterprise, Inc., the largest provider of body-worn camera systems to large, metropolitan police departments in the United States.<sup>23</sup>

As a complement to our enforcement work, the Commission is considering the use of its Section 6(b) authority to examine past acquisitions by large technology platforms to better understand what was done with the acquired assets.

**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 anticompetitive conduct or hamper innovation.**

- a. Do you believe that an analytical approach that focuses on product overlap is sufficient to capture all potential anticompetitive effects of pharmaceutical mergers?**

---

(Jan. 18, 2017), <https://www.ftc.gov/news-events/press-releases/2017/01/mallinckrodt-will-pay-100-million-settle-ftc-state-charges-it> (blocking acquisition because Questcor “acquired the rights to its greatest competitive threat, a synthetic version of Acthar, to forestall future competition”).

<sup>21</sup> FTC Press Release, *Statement of Gail Levine, Deputy Director of FTC Bureau of Competition, Regarding the Announcement that Illumina Inc. has Abandoned Its Proposed Acquisition of Pacific Biosciences of California* (Jan. 2, 2020), <https://www.ftc.gov/news-events/press-releases/2020/01/statement-gail-levine-deputy-director-ftc-bureau-competition>.

<sup>22</sup> FTC Press Release, *FTC Commissioners Unanimously Find that Consummated Merger of Microprocessor Prosthetic Knee Companies was Anticompetitive; Assets Must Be Unwound* (Nov. 6, 2019), <https://www.ftc.gov/news-events/press-releases/2019/11/ftc-commissioners-unanimously-find-consummated-merger>.

<sup>23</sup> FTC Press Release, *FTC Challenges Consummated Merger of Companies that Market Body-Worn Camera Systems to Large Metropolitan Police Departments* (Jan. 3, 2020), <https://www.ftc.gov/news-events/press-releases/2020/01/ftc-challenges-consummated-merger-companies-market-body-worn>.

No, and our analysis is not so limited. In every merger investigation during my tenure, the Commission has evaluated a wide range of theories of competitive harm.<sup>24</sup> For example, in every pharmaceutical merger investigation during my tenure, including *Bristol-Myers Squibb/Celgene*, the Commission has analyzed whether the merger would likely result in harm to innovation competition. We evaluate whether each merger would result in a meaningful decline in the number of firms capable of innovating in specific therapeutic areas (including for generic drugs) and the number of drug manufacturers overall.

Section 6.4 of the *Horizontal Merger Guidelines* explains the FTC's innovation effects analysis.<sup>25</sup> Under Section 6.4, the agencies will consider whether a merger is likely to diminish innovation competition by reducing the merged firm's incentive to continue with an existing product-development effort, or by reducing the merged firm's incentive to initiate development of new products.

As the *Guidelines* instruct, the first type of harm to innovation is most likely to occur if at least one of the merging firms is engaging in efforts to introduce new products that would capture substantial revenue from the other merging firm. In the *BMS/Celgene* matter, the Commission determined the acquisition would result in this type of harm to innovation, and ordered BMS to divest Otezla in order to preserve BMS's incentive to continue developing its own oral product for treating moderate-to-severe psoriasis.<sup>26</sup>

When evaluating whether a merger will reduce the merged firm's incentive to develop new products in the future, we look to whether the merger will diminish innovation competition by combining two of a small number of firms with the strongest capabilities to successfully innovate in a specific direction.<sup>27</sup> The Commission evaluated this theory in *BMS/Celgene*, as it does in every pharmaceutical merger investigation, but the evidence developed in *BMS/Celgene* indicated that this type of harm to innovation competition was unlikely to occur.

**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.**

As stated above, the Commission evaluates a wide range of theories of competitive harm in every pharmaceutical merger investigation. In every case, staff considers each relevant theory

---

<sup>24</sup> This is consistent with past Commission practice. For example, in the *Teva/Allergan* matter, the Commission evaluated three additional potential theories of harm beyond individual product overlaps: whether the transaction would likely lead to anticompetitive effects from the bundling of generic products; whether it would likely decrease incentives to challenge the patents held by brand-name pharmaceutical companies and bring new generic drugs to market; and whether it might dampen incentives to develop new generic products. Statement of the Federal Trade Commission In the Matter of Teva Pharm. Indus. Ltd. and Allergan plc, No. C-4589 (July 27, 2016), [https://www.ftc.gov/system/files/documents/public\\_statements/973673/160727tevaallergan-statement.pdf](https://www.ftc.gov/system/files/documents/public_statements/973673/160727tevaallergan-statement.pdf).

<sup>25</sup> U.S. Dep't of Justice & FTC, *Horizontal Merger Guidelines* (2020), [https://www.ftc.gov/system/files/documents/public\\_statements/804291/100819hmg.pdf](https://www.ftc.gov/system/files/documents/public_statements/804291/100819hmg.pdf).

<sup>26</sup> FTC Press Release, *FTC Requires Bristol-Myers Squibb Company and Celgene Corporation to Divest Psoriasis Drug Otezla as a Condition of Acquisition* (Nov. 15, 2019), <https://www.ftc.gov/news-events/press-releases/2019/11/ftc-requires-bristol-myers-squibb-company-celgene-corporation>.

<sup>27</sup> *Horizontal Merger Guidelines* § 6.4.

of harm and, based on the evidence gathered during the investigation, evaluates whether each theory supports a challenge to the transaction.<sup>28</sup>

I appreciate that the price of pharmaceutical products has a significant impact on American consumers' health care costs. I believe that the Commission's rigorous scrutiny of pharmaceutical mergers and anticompetitive conduct<sup>29</sup> is a critical component of fulfilling our mission to protect American consumers, and is one of the agency's most lasting legacies.

**c. Please identify all pharmaceutical mergers blocked by the FTC where the Commission's theory of harm extended beyond product overlap concerns.**

The Commission has challenged numerous pharmaceutical mergers based on concerns other than product overlaps. For example, the Commission has challenged numerous pharmaceutical mergers to protect innovation competition.<sup>30</sup> The Commission has also challenged pharmaceutical mergers to protect vertical competition. For example, in the *Teva/Allergan* matter, the Commission issued a consent order that required Teva Pharmaceuticals Industries Ltd. to offer its active pharmaceutical ingredient (API) customers the option of entering into long-term API supply contracts.<sup>31</sup> The order resolved concerns that Teva's acquisition of the

---

<sup>28</sup> See, e.g., Statement of the Federal Trade Commission In the Matter of Roche Holding and Spark Therapeutics, File No. 191-0086 (Dec. 16, 2019), [https://www.ftc.gov/system/files/documents/public\\_statements/1558049/1910086\\_roche-spark\\_commission\\_statement\\_12-16-19.pdf](https://www.ftc.gov/system/files/documents/public_statements/1558049/1910086_roche-spark_commission_statement_12-16-19.pdf) (noting that “[m]erger investigations are highly fact-specific, and the determination of whether a transaction will result in potential competitive harm requiring an enforcement action is driven by evidence.”).

<sup>29</sup> The Commission recently filed a complaint against Vyera Pharmaceuticals, LLC, alleging an anticompetitive scheme to preserve a monopoly for the life-saving drug, Daraprim. FTC Press Release, *FTC and NY Attorney General Charge Vyera Pharmaceuticals, Martin Shkreli, and Other Defendants with Anticompetitive Scheme to Protect a List-Price Increase of More than 4,000 Percent for Life-Saving Drug Daraprim* (Jan. 27, 2020), <https://www.ftc.gov/news-events/press-releases/2020/01/ftc-ny-attorney-general-charge-vyera-pharmaceuticals-martin>.

<sup>30</sup> See, e.g., FTC Press Release, *FTC, 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), <https://www.ftc.gov/news-events/press-releases/2017/01/mallinckrodt-will-pay-100-million-settle-ftc-state-charges-it> (blocking acquisition because Questcor “acquired the rights to its greatest competitive threat, a synthetic version of Acthar, to forestall future competition”); FTC Press Release, *FTC Puts Conditions on Novartis AG's Proposed Acquisition of GlaxoSmithKline's Oncology Drugs* (Feb. 23, 2015), <https://www.ftc.gov/news-events/press-releases/2015/02/ftc-puts-conditions-novartis-ags-proposed-acquisition> (requiring divestitures of in-development BRAF and MEK inhibitor drugs to ensure development of the BRAF and MEK inhibitors continues uninterrupted, and competition in BRAF and MEK inhibitor markets is not reduced); FTC Press Release, *FTC Puts Conditions on Generic Drug Maker Lupin Ltd.'s Proposed Acquisition of Gavis Pharmaceuticals LLC* (Feb. 19, 2016), <https://www.ftc.gov/news-events/press-releases/2016/02/ftc-puts-conditions-generic-drug-marketer-lupin-ltds-proposed> (requiring divestitures to ensure continued development of generic mesalimine ER capsules, which Lupin and Gavis were developing independently at the time of the merger). For a brief overview of the many other pharmaceutical mergers the Commission has blocked to protect innovation competition, see FTC HEALTH CARE DIVISION STAFF, OVERVIEW OF FTC ACTIONS IN PHARMACEUTICAL PRODUCTS AND DISTRIBUTION (Sept. 2019), [https://www.ftc.gov/system/files/attachments/competition-policy-guidance/20190930\\_overview\\_pharma\\_final.pdf](https://www.ftc.gov/system/files/attachments/competition-policy-guidance/20190930_overview_pharma_final.pdf).

<sup>31</sup> FTC Press Release, *FTC Requires Teva to Divest Over 75 Generic Drugs to Settle Competition Concerns Related to its Acquisition of Allergan's Generic Business* (July 27, 2016), <https://www.ftc.gov/news-events/press-releases/2016/07/ftc-requires-teva-divest-over-75-generic-drugs-rival-firms-settle>.

generic pharmaceutical business of Allergan plc would increase Teva's incentive to withhold eight APIs from other manufacturers, to benefit newly acquired Allergan products.<sup>32</sup>

In most pharmaceutical mergers, the companies have been willing to divest products and intellectual property sufficient to resolve the Commission's concerns without litigation.

**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.**<sup>33</sup>

**a. Please identify the number of merger retrospective 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.**

The Commission's merger retrospective program is an ongoing effort to evaluate the competitive effects of past mergers and acquisitions. Merger retrospectives are an important part of the Bureau of Economics (BE) research program, a significant goal of which is to improve the economic analysis performed to support the Commission's enforcement activities. BE typically has a number of merger retrospectives ongoing at any point in time, including now. The time required to complete these important studies may vary based on a number of factors—not the least of which includes our economists' caseload of enforcement matters, which has been particularly demanding given current staffing levels.

Since the start of my tenure, we have completed several merger retrospectives and have made significant progress on several more. A recently completed study addresses the important question of how the acquisition of the physician practices by hospital systems can affect quality

---

<sup>32</sup> APIs are central inputs in manufacturing finished dose form pharmaceutical products. API supply sources must be designated in a drug's FDA marketing application. Switching to a non-designated API source requires a generic drug maker to supplement its Abbreviated New Drug Application (ANDA), a process that can take as long as two years or even more. Consequently, a generic drug manufacturer's API supply options are limited to the sources qualified under its ANDA. Analysis of Agreement Containing Consent Orders to Aid Public Comment, In the Matter of Teva Pharm. Indus. Ltd. and Allergan, plc, No. C-4589 (July 27, 2016), <https://www.ftc.gov/system/files/documents/cases/160727tevaallergananalysis.pdf>; see also Statement of the Federal Trade Commission In the Matter of Teva Pharm. Indus. Ltd. and Allergan plc, No. C-4589 (July 27, 2016), [https://www.ftc.gov/system/files/documents/public\\_statements/973673/160727tevaallergan-statement.pdf](https://www.ftc.gov/system/files/documents/public_statements/973673/160727tevaallergan-statement.pdf).

<sup>33</sup> Joseph 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>.

of care.<sup>34</sup> The outcomes studied represent the progression of hypertension and diabetes patients into worse health states. These outcomes were selected because they are common but serious health problems experienced by the subject population, Medicare beneficiaries. The results indicate that hospital acquisitions of existing physician practices have no statistically significant clinical benefits for the health outcomes considered. This is particularly interesting because the same researchers found in an earlier study that expenditures increased following these mergers.<sup>35</sup> A related, nearly completed study looks at the impact of mergers between physician practices on health outcomes and finds mixed results, depending on the types of practices and the health outcomes considered.

BE staff presented initial results from retrospective studies of two hospital mergers at a June 2019 FTC workshop on certificates of public advantage (COPAs).<sup>36</sup> One study looked at the 1998 hospital merger in Asheville, North Carolina, which the study found resulted in estimated price increases of approximately 20 percent relative to control hospitals.<sup>37</sup> The second study focused on a 1997 hospital merger in Columbia, South Carolina, and found no significant price effects.<sup>38</sup> One possible explanation for the different results is that there were more competitors in the South Carolina case than there were in the North Carolina case.

In order to continue investigating the impact of mergers that are shielded from antitrust scrutiny by COPAs, in October 2019, the Commission issued orders to five health insurance companies and two health systems to provide information that will help the agency conduct retrospective analyses of the effects of two more recent hospital mergers that proceeded subject to COPAs. The FTC intends to collect information over the next several years as part of this effort. The retrospective studies will examine the effects of the COPAs on price, quality, access, and innovation for healthcare services, but also the impact of hospital consolidation on employee wages. Once this multiyear study is complete, the FTC plans to report publicly on its findings.

In addition to our ongoing studies, we currently are working on developing a protocol that will provide the agency with a more systematic framework for identifying and carrying out merger retrospective studies. We also are exploring the possibility of hiring additional economists to increase our capacity for carrying out these studies—something that is possible because of the additional resources that are available to us. As always, we thank the Committee for its continuing support for the FTC’s mission.

---

<sup>34</sup> This paper followed the usual progression of economic research, which is to release a draft of the paper once the results have largely been obtained, but for the analysis to continue to undergo revision as the authors receive feedback. A draft of this research was released as a Bureau of Economics working paper in 2018,

<https://www.ftc.gov/reports/effects-physician-hospital-integration-medicare-beneficiaries-health-outcomes>.

<sup>35</sup> Thomas G. Koch, Brett W. Wendling & Nathan E. Wilson, *How Vertical Integration Affects the Quantity and Cost of Care for Medicare Beneficiaries*, 52 J. HEALTH ECON. 19 (2017).

<sup>36</sup> FTC Workshop, *A Health Check on COPAs: Assessing the Impact of Certificates of Public Advantage in Healthcare Markets* (June 18, 2018), <https://www.ftc.gov/news-events/events-calendar/health-check-copas-assessing-impact-certificates-public-advantage>.

<sup>37</sup> See slides for *The Mission Health COPA: Evidence on Price Effects from CMS HCRIS Data*, Lien Tran & Rena Schwarz (at 37-53), [https://www.ftc.gov/system/files/documents/public\\_events/1508753/slides-copa-jun\\_19.pdf](https://www.ftc.gov/system/files/documents/public_events/1508753/slides-copa-jun_19.pdf).

<sup>38</sup> See slides for *Palmetto Health COPA: Evidence on Price Effects*, Kishan Bhatt (at 18-36), [https://www.ftc.gov/system/files/documents/public\\_events/1508753/slides-copa-jun\\_19.pdf](https://www.ftc.gov/system/files/documents/public_events/1508753/slides-copa-jun_19.pdf).

**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.**

Although dozens of merger retrospectives have been published, that still is a relatively small sample size. Moreover, the mergers studied are not necessarily representative of the population of mergers. For instance, the studies tend to be concentrated, out of necessity, in industries where relevant data are readily available. As a result, these studies should be interpreted as measuring the effectiveness of specific (non-)enforcement decisions and not as the average price effect of a representative sample of consummated mergers.

Nevertheless, the main implication of this research is that mergers in concentrated markets can lead to price increases, which is consistent with standard economic theory. Given our limited knowledge, it is impossible to draw either broader conclusions about the effectiveness of enforcement or specific guidance as to what market characteristics are more likely to result in anticompetitive mergers. Nevertheless, we hope to address this problem by developing a more systematic merger retrospectives program.

**d. Please identify all steps the Commission has taken to evaluate more systematically the Commission’s merger enforcement program.**

I believe merger retrospectives are critical to ensuring the success of our merger enforcement program. Evaluation of our past choices can provide valuable guidance for our future decisions. The FTC has long been at the forefront of conducting retrospective studies. FTC economists have authored or coauthored more than twenty-five studies that have estimated the effects of mergers on competition.<sup>39</sup> FTC staff have also authored retrospective studies of Commission-ordered divestitures and merger remedies.<sup>40</sup> For example, the most recent study looked back at Commission orders issued between 2006 and 2012. The report found that the agency’s process for designing and implementing merger remedies is generally effective and in most cases resulted in remedies that preserved or restored competition that would have been lost due to the merger. The study also identified certain areas in which improvements could be made, particularly for divestitures of limited asset packages in horizontal, non-consummated mergers.

The Commission’s *Hearings on Competition and Consumer Protection in the 21st Century* are another important component of our merger retrospective efforts. I announced the *Hearings* with the intention that they would stimulate internal and external evaluation of and commentary on the Commission’s law enforcement program. I believe the *Hearings* sessions, including the full day session on merger retrospectives, and public commentary have already done this, and we

---

<sup>39</sup> FTC Bureau of Economics, List of FTC Bureau of Economics Merger Retrospective Studies (Apr. 2019), [https://www.ftc.gov/system/files/attachments/press-releases/ftc-announces-agenda-14th-session-its-hearings-competition-consumer-protection-21st-century/list\\_of\\_be\\_retrospective\\_studies.pdf](https://www.ftc.gov/system/files/attachments/press-releases/ftc-announces-agenda-14th-session-its-hearings-competition-consumer-protection-21st-century/list_of_be_retrospective_studies.pdf).

<sup>40</sup> FTC Staff Report, THE FTC’S MERGER REMEDIES 2006-2012: A REPORT OF THE BUREAUS OF COMPETITION AND ECONOMICS (2017), <https://www.ftc.gov/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics>; FTC Staff Report, A STUDY OF THE COMMISSION’S DIVESTITURE PROCESS (1999), <https://www.ftc.gov/reports/study-commissions-divestiture-process>.

continue to think critically about these issues.<sup>41</sup> In fact, we currently are working on developing our protocols for identifying viable candidates for future merger retrospective studies. As noted above, the additional resources allocated by Congress will allow us to make developing a more systematic program more feasible, but we still need additional resources in order to build a robust retrospectives program.

The Commission also engages in less formal retrospective learning. As part of its regular antitrust work, staff often investigates mergers and other business activity in the same industries, often in the same geographic market. These subsequent investigations can reveal the effects of earlier transactions and provide some insight into prior enforcement decisions.

### **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?**

There has been considerable misunderstanding of the release clause in the 2019 order, which, in fact, is not extremely broad. First, the order only releases claims for known violations of the FTC Act. FTC staff investigated all such potential violations, including allegations received from interest groups and issues reported by the press. Based on these investigations, staff determined there were no known valid claims as of June 12, 2019, other than those addressed in the 2019 order. Thus, the release would not preclude the FTC from addressing any subsequently discovered violation of law by Facebook that occurred prior to or after June 12, 2019. This would include direct violations of the FTC Act, or of any rule or statute the FTC enforces, including the COPPA Rule.

Second, the release of known and unknown claims for violation of the 2012 order is much less dramatic than commonly portrayed. The law in most jurisdictions is very clear that the doctrine of *res judicata* (or claim preclusion) releases all claims, known and unknown, that could have been brought in an order enforcement action.<sup>42</sup> Thus, all the FTC’s order enforcement actions, both settlements and victories in court, effectively release all known and unknown claims for order violations. Because preclusion law is different for violations of law (*e.g.*, the FTC Act), the FTC’s *de novo* consumer protection settlements (the vast majority of the agency’s orders) are

---

<sup>41</sup> FTC, *Hearings on Competition and Consumer Protection in the 21st Century: Merger Retrospectives* (Apr. 12, 2019), <https://www.ftc.gov/news-events/events-calendar/ftc-hearing-14-merger-retrospectives>.

<sup>42</sup> *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 238 (1975) (“[A] consent decree or order is to be construed for enforcement purposes basically as a contract.”); *see also Int’l Union of Operating Eng’rs-Emp’rs Constr. Indus. Pension, Welfare, and Training Trust Funds v. Karr*, 994 F.2d 1426, 1429-30 (9th Cir. 1993) (holding claims for breach of the same contract barred by *res judicata*) (citing *McClain v. Apodaca*, 793 F.2d 1031, 1034 (9th Cir. 1986)); *May v. Parker-Abbott Transfer & Storage, Inc.*, 899 F.2d 1007, 1009-11 (10th Cir. 1990) (same); *TechnoMarine SA v. Giftports, Inc.*, 758 F.3d 493, 499-501 (2d Cir. (2013)). The legal analysis in the D.C. Circuit is more complex, but appears to lead to the same result. *See United States Indus. v. Blake Constr. Co.*, 765 F.2d 195 (D.C. Cir. 1985).

simply irrelevant. The fact that the provision is explicit in the 2019 order does not change the legal reality that such a release is not only common, but also automatically prescribed by law.

**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?**

No other Commission order explicitly contains the same provision. However, as indicated above, all of the FTC's settlement orders addressing order violations, both administrative and federal court orders, effectively contain the same release for known and unknown claims for order violations under the doctrine of *res judicata*.

**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?**

The complaint in the Facebook matter alleges all violations that were known to the FTC prior to June 12, 2012.

**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?**

FTC investigations are non-public, but staff keeps records of what it investigates.

**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?**

See response to QFR 16, above.

**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 of admission or 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 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?**

I disagree that the Commission's order in the *Your Therapy Source* matter is of "no consequence." The Commission's order not only requires respondents to stop engaging in the anticompetitive conduct, but also allows the Commission to seek civil penalties for order violations, which can be a powerful deterrent against recidivism.<sup>43</sup>

---

<sup>43</sup> See Statement of the Federal Trade Commission Concerning the Commission's Consent Order, In the Matter of Your Therapy Source, LLC, Neeraj Jindal, and Sheri Yarbray, C- 4689 (Oct. 31, 2019), [https://www.ftc.gov/system/files/documents/public\\_statements/1552414/171\\_0134\\_your\\_therapy\\_source\\_commission\\_statement.pdf](https://www.ftc.gov/system/files/documents/public_statements/1552414/171_0134_your_therapy_source_commission_statement.pdf).

When appropriate, the Commission seeks equitable monetary remedies to compensate victims for losses resulting from unlawful conduct. But our investigation in the *Your Therapy Source* matter did not yield evidence that any therapists' wages were actually reduced as a result of the illegal agreement to fix wages.<sup>44</sup> The lack of such evidence may be explained by the fact that FTC staff launched an investigation very quickly after learning of the invitation to collude, and stopped the conduct before it had an effect.

I also disagree that Commission enforcement actions ever impose “no consequences” for the wrongdoer. Whenever the Commission charges a company with violating a statute it enforces, we are affirming that we have collected evidence sufficient to give a majority of the Commission a reason to believe that the defendant has violated the law. This public action is a statement of what the law requires and how the company has failed to comply with it. The defendant must agree to stop the illegal conduct, and the Commission may seek additional relief, including monetary equitable remedies, when appropriate. And if the defendant violates the Commission's order, for instance by engaging in the illegal conduct again, it will be subject to civil penalties for each day and for each violation of the order.

**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 incentive law-abiding companies to break the law?**

I disagree that this was a “no consequence” settlement, or that the proposed relief in the Sunday Riley case incentivizes companies to break the law.

As a general matter, it is important to note that over the years the Commission has obtained thousands of no-money orders, and we believe these orders impose both specific and general deterrence. In the *Sunday Riley* case, the Commission's proposed complaint alleges violations of Section 5 of the FTC Act relating to Sunday Riley employees having deceptively posted reviews of Sunday Riley products on a third-party website. The Commission's proposed cease and desist order names the company CEO individually and has strong injunctive provisions. It prohibits misrepresenting the status of any endorser or person reviewing a product and failing to disclose any endorser's unexpected material connection; and it requires the company to instruct all employees, agents, and representatives as to their disclosure responsibilities and to get signed

---

<sup>44</sup> The lack of evidence indicating that any therapists' wages were reduced as a result of the illegal conduct also weighed against requiring respondents to provide notice of the Commission's action to individual therapists targeted by the unlawful conduct. Individual notice would have been unlikely to facilitate recovery in private civil litigation. The Commission will, however, take steps to ensure that the order and facts of the *Your Therapy Source* matter are disseminated as widely as possible in order to educate staffing firms, home healthcare workers, and small businesses about the illegality of wage fixing. *See id.* at 2-3.

acknowledgements from them. If Sunday Riley or its CEO violate this order, the U.S. Department of Justice (DOJ) can sue them in federal court and seek large civil penalties. The FTC investigation and resulting negotiations likely cost Sunday Riley significant attorney fees, and the case resulted in considerable negative publicity. Other companies do not want to be subjected to investigations, legal fees, injunctive provisions, compliance costs, reputational costs, and possible future civil penalties—all of which are serious consequences.

### **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?**

I am unable to comment on our nonpublic investigations. As a general matter, the Commission has authority to compel the production of documents and information if parties do not comply with Commission-issued compulsory process for documents and information in law enforcement investigations. When recipients of process requests move to quash or limit, the Commission makes public its ruling on such a motion.<sup>45</sup>

**21. What is the Commission doing to make sure that FTC staff have the support it needs to obtain information from all levels of companies that they are investigating, up to and including the CEOs?**

The Office of General Counsel (OGC) has a vigorous program to obtain judicial enforcement of FTC compulsory process. Commission staff is encouraged to contact OGC whenever staff experiences, or even anticipates, a problem with obtaining compliance with a Commission subpoena or civil investigative demand. OGC litigation attorneys then work closely with staff to determine the best course of action to achieve compliance. Early involvement by OGC staff serves to put the process recipient on notice that FTC staff is serious about possible enforcement, which often is sufficient to motivate compliance. However, if a recipient continues to stonewall a Commission investigation, OGC staff are more than willing to file a process enforcement action in federal district court to obtain full compliance.

**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?**

Yes.

---

<sup>45</sup> See, e.g., Order Denying Petition to Limit Civil Investigative Demand and Subpoena Duces Tecum, In the Matter of Civil Investigative Demand to Johnson & Johnson and Subpoena Duces Tecum to Johnson & Johnson, No. 191-0152 (Oct. 18, 2019), <https://www.ftc.gov/system/files/documents/petitions-quash/johnson-johnson/1910152jipetitiontoquash.pdf>.

**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?**

Since 2008, the Commission has commenced 41 process enforcement proceedings. These include proceedings to enforce FTC-issued subpoenas, civil investigative demands, and orders to file reports under 15 U.S.C. § 46. Of these 41 proceedings, 27 related to matters investigated by the Bureau of Consumer Protection, and 14 related to matters investigated by the Bureau of Competition or other projects involving competition. When comparing these numbers it is important to keep in mind that a significant portion of the Commission's competition docket involves review of proposed mergers notified under the Hart-Scott-Rodino (HSR) Amendments to the Clayton Act.<sup>46</sup> Under the HSR Act, parties to certain mergers and acquisitions must file premerger notification and wait for government review. After an initial waiting period, if the agency needs additional information, it often issues compulsory process that solicits broad information about the parties' transaction. The parties are prohibited from closing their deal until the waiting period outlined in the HSR Act has passed or the government has granted early termination of the waiting period. As a result, the HSR review process provides a powerful incentive for parties to submit the information that the agencies requested, which allows the Commission to obtain necessary information without resorting to judicial enforcement.

**Executive Accountability**

**24. In your view, when is it appropriate for the FTC to hold individual executives accountable for order violations in which they participated?**

This is necessarily a very fact-specific analysis. The Commission first must determine whether we can prove the elements necessary to obtain relief under controlling legal precedent and the provisions of the underlying injunction. Second, the Commission considers whether naming the individual would result in more effective final relief, whether it would better protect consumers, and whether it would be appropriate given the level of the individual's involvement.

**25. Please describe what steps the FTC takes to investigate the involvement of individual executives in corporate order violations.**

We tailor investigations to the underlying facts and order provisions. That said, in undercover investigations, our attorneys and investigators look for corporate filings, registrations, bank accounts, insider information, consumer complaints, and accounts of former employees. We also share and obtain information, where permissible, with/from our criminal and state law enforcement partners. In open investigations, we look to the same evidence, but also send specific discovery demands to the defendants pursuant to the monitoring provisions in the order. In addition to sending discovery to the investigation's targets, we often send subpoenas to third parties who have relevant information. We craft these demands, among other things, to determine which individuals in the company have responsibility for, and knowledge of, the

---

<sup>46</sup> 15 U.S.C. § 18a.

practices under investigation. Our standard order provisions also allow us to depose individuals in the target company, and we take that step in appropriate circumstances.

**26. Please identify all instances since January 2015 in which the FTC held individual executives accountable for order violations.**

The FTC enforces its orders through civil penalty and contempt actions. The Commission currently has pending contempt actions naming individuals as defendants in the *Sanctuary Belize*<sup>47</sup> matter, which went to trial on January 20, 2020; the *Health Research Labs*<sup>48</sup> matter filed in December 2019; and the *Netforce*<sup>49</sup> matter filed in January 2020. The Commission also charged two executives in a recent antitrust filing.<sup>50</sup> Since 2015, we won cases against individuals who were already under FTC order in the following matters: *Blue Hippo*,<sup>51</sup> *GM Funding*,<sup>52</sup> *Lakhany*,<sup>53</sup> *iSpring*,<sup>54</sup> *Capital Home Advocacy*,<sup>55</sup> *Daniel Chapter One*,<sup>56</sup> *Cedarcide*,<sup>57</sup> and *Hi-Tech*.<sup>58</sup> Additionally, for strategic reasons, the FTC will occasionally choose to address an individual's order violations through a *de novo* case. The *CD Capital*,<sup>59</sup> *F9 Advertising*,<sup>60</sup> and *Debtpro 12*<sup>61</sup> matters are examples of this strategy.

---

<sup>47</sup> *In re Sanctuary Belize Litig.*, No. 1:18-cv-03309 (D. Md.), <https://www.ftc.gov/enforcement/cases-proceedings/0223171/ameridebt-inc>.

<sup>48</sup> *FTC and State of Maine v. Health Research Labs., Inc.*, No. 2:17-cv-00467 (D. Me.), [https://www.ftc.gov/system/files/documents/cases/netforce\\_amended\\_complaint.pdf](https://www.ftc.gov/system/files/documents/cases/netforce_amended_complaint.pdf).

<sup>49</sup> *FTC v. Noland et al.*, No. cv-20-0047 (D. Ariz.), [https://www.ftc.gov/system/files/documents/cases/netforce\\_amended\\_complaint.pdf](https://www.ftc.gov/system/files/documents/cases/netforce_amended_complaint.pdf).

<sup>50</sup> FTC Press Release, *FTC and NY Attorney General Charge Vyera Pharmaceuticals, Martin Shkreli, and Other Defendants with Anticompetitive Scheme to Protect a List-Price Increase of More than 4,000 Percent for Life-Saving Drug Daraprim* (Jan. 27, 2020), <https://www.ftc.gov/news-events/press-releases/2020/01/ftc-ny-attorney-general-charge-vyera-pharmaceuticals-martin>.

<sup>51</sup> *FTC v. Bluehippo Funding*, No. 08-Civ-1819 (S.D.N.Y.) (contempt entered 2016), <https://www.ftc.gov/enforcement/cases-proceedings/052-3092/bluehippo-funding-llc-bluehippo-capital-llc>.

<sup>52</sup> *FTC v. Damian Kutzner*, No. 8:16-cv-00999 (C.D. Cal. 2017), <https://www.ftc.gov/enforcement/cases-proceedings/x030002/damian-kutzner-0>.

<sup>53</sup> *FTC v. Sameer Lakhany*, No. 8:12-cv-337 (C.D. Cal.) (contempt order entered 2015), <https://www.ftc.gov/enforcement/cases-proceedings/112-3136/lakhany-sameer-credit-shop-llc-fidelity-legal-services-llc>.

<sup>54</sup> *US v. iSpring Water Sys.*, No. 1:19-cv-01620 (N.D. Ga. 2019) (civil penalties for violation of FTC Order), <https://www.ftc.gov/enforcement/cases-proceedings/172-3033-c4611/ispring-water-systems-llc-federal>.

<sup>55</sup> *FTC v. American Home Servicing Ctr. et al.*, No. 8:18-cv-00597 (C.D. Cal. 2018), at <https://www.ftc.gov/enforcement/cases-proceedings/172-3138/capital-home-advocacy-center>.

<sup>56</sup> *US v. Daniel Chapter One*, No. 1:10-cv-01362 (D.D.C. 2015) (civil penalties for violation of FTC Order), <https://www.ftc.gov/enforcement/cases-proceedings/082-3085/daniel-chapter-one>.

<sup>57</sup> *FTC v. Dave Glassel*, No. 4:12-cv-4631 (N.D. Cal. 2018), <https://www.ftc.gov/enforcement/cases-proceedings/112-3128/springtech-77376-llc-also-dba-cedarcidecom-et-al/>

<sup>58</sup> *FTC v. Hi-Tech Pharm., Inc. et al.*, 1:04-cv-03294 (N.D. Ga. 2017), at <https://www.ftc.gov/enforcement/cases-proceedings/022-3165/national-urolological-group-inc-et-al>.

<sup>59</sup> *FTC v. CD Capital Inv.*, No. 8:14-cv-01033 (C.D. Cal. final order 2019), at <https://www.ftc.gov/enforcement/cases-proceedings/132-3289/cd-capital-investments-llc>.

<sup>60</sup> *FTC v. F9 Advert.*, No. 3:19-cv-01174 (D. P.R. 2019), <https://www.ftc.gov/enforcement/cases-proceedings/1723164/f9-advertising-llc>.

<sup>61</sup> *FTC v. DebtPro123*, No. SACV:14-00693 (C.D. Cal. final order 2015), <https://www.ftc.gov/enforcement/cases-proceedings/132-3112/debtpro-123-llc>.

**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 CEO’s knowledge or at his or her direction?**

As you indicate, the Commission and the DOJ did not sue Mr. Zuckerberg personally. However, it is totally inaccurate to suggest that the FTC failed to investigate his role in Facebook’s violation or that the 2019 order does not hold him accountable. The FTC thoroughly investigated Facebook, including a review of Mr. Zuckerberg’s role in the alleged violations. Among other things, staff carefully reviewed tens of thousands of documents, including emails between key decision makers. The settlement is based upon a careful analysis of the facts uncovered in that review, as well as the law. Significantly, Mr. Zuckerberg’s primary asset, Facebook, agreed to pay a massive fine. Had the FTC named Mr. Zuckerberg, any fine assessed against him likely would have been paid by Facebook. Furthermore, as I have noted before, it was highly unlikely that any court would have levied fines approaching the \$5 billion we obtained via settlement. Finally, and most importantly, under the settlement, Mr. Zuckerberg must now personally certify compliance with the 2019 order four times every year. That certification is subject to both civil and criminal penalties. This relief represents significantly more accountability than could reasonably have been achieved with the legal tools at the Commission’s disposal through continued litigation.

**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 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.”<sup>62</sup> 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?**

The FTC is an independent agency and is not bound by the *Justice Manual*. However, the Commission’s procedures for settlement are even stricter than those set forth in the DOJ’s *Justice Manual*. No attorney at the Commission, neither a trial attorney nor any manager in their supervisory chain, can settle any matter without approval from the Commission, effectuated by a majority vote on the record. To obtain such permission, staff needs to write a detailed memorandum justifying all the relief they propose. That reasoning is reviewed by the relevant Bureau front office (Consumer Protection or Competition) and the Bureau of Economics.

---

<sup>62</sup> U.S. Dep’t of Justice, 4-3.100: Pursuit of Claims Against Individuals, <https://www.justice.gov/jm/jm-4-3000-compromising-and-closing>.

Moreover, Commissioners and their advisors have every opportunity to seek additional information or clarification from staff. The Commission follows this procedure in all cases, including the Facebook order enforcement matter.

**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 have been personally liable would not serve the public interest.” How did the Majority Commissioners reach this conclusion?**

See response to QFR 27, above.

**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?**

See response to QFR 31, below.

**31. Are there any factors that differentiate the FTC’s analysis of individual liability for executives at large companies versus at small companies?**

The FTC conducts the same analysis, regardless of the size of a firm, to determine whether to hold an individual liable for violations of the FTC Act. First, we determine whether we can prove the elements necessary to obtain individual injunctive and monetary relief under controlling legal precedent. Second, we consider whether naming the individual is necessary and appropriate to obtain effective final relief and protect consumers.

When determining whether to name an individual officer liable for the acts of a corporation, the Commission considers whether the person’s conduct demonstrates a need to have the person under order to protect the public in the future, and whether the person has assets that could contribute to consumer redress or should be disgorged to prevent unjust enrichment. To obtain effective relief, particularly in fraud cases, it is often necessary to name the principles of closely held companies because those individuals can avoid the injunctive requirements of a court order simply by setting up a new corporate entity. Similarly, the principals of closely held companies engaged in fraud often are more directly involved in the unlawful conduct and more likely to pay themselves an outsized share of the proceeds. For these reasons, as a practical matter, it is often more likely to be necessary to name the executives of small, transient companies, especially those engaged in fraud, to protect consumers from future injury, and to get money back to consumers.<sup>63</sup>

---

<sup>63</sup> The Commission recently, by unanimous vote, authorized a federal court action against Vyera Pharmaceuticals, LLC, alleging an elaborate anticompetitive scheme to preserve a monopoly for the life-saving drug, Daraprim. The complaint seeks remedial injunctive relief as well as equitable monetary relief to provide redress to purchasers who have overpaid for the drug. The complaint also names Martin Shkreli and Kevin Mulleady, who allegedly were directly responsible for orchestrating the anticompetitive scheme, as well as Phoenixus AG, Vyera’s parent company. FTC Press Release, *FTC and NY Attorney General Charge Vyera Pharmaceuticals, Martin Shkreli, and Other Defendants with Anticompetitive Scheme to Protect a List-Price Increase of More than 4,000 Percent for Life-*

## **Technological Capabilities**

**32. Earlier this year, the Commission established a 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 TED currently faces?**

The largest obstacle to enforcement remains resources. We created the now-renamed TED using existing resources, which meant reallocating personnel from other enforcement Divisions in BC to TED. Since it became a permanent Division, we have expanded TED's leadership to mirror the structure in other permanent Divisions in BC. We have also supplemented its initial staffing with technologists, detailees from within the Commission, and additional newly-hired attorneys in order to address some of these resource challenges.

I am not aware of any legal obstacles to enforcement at this time. As outlined in the Commission testimony, current law provides the Commission with several potential avenues to counter anticompetitive conduct in technology markets, including conduct by technology firms that seek to thwart nascent and potential threats by acquisition or other means.<sup>64</sup>

Combatting anticompetitive conduct in the technology sector is one of my top priorities and we are devoting significant resources to this effort. I greatly appreciate your support for additional resources for the FTC's competition mission.

**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?**

As of today, TED has 20 attorneys, and we expect one attorney to join soon. As a result of the additional funding provided in the most recent budget, we intend to add four more attorneys to the Division. When the now-renamed TED was launched, the Bureau of Competition moved 15 attorneys to this unit from other Divisions within the Bureau. That realignment was completed in April 2019. TED has since hired three additional attorneys, who started their positions in the last two months. Additional attorneys have been detailed from other parts of the Commission and are now working full time on TED matters. Division leadership consists of an Assistant Director and two Deputy Assistant Directors. In addition, the Compliance Division of the Bureau of Competition has designated an attorney to work with TED on remedy issues that may arise in the context of investigations and potential enforcement actions.

---

*Saving Drug Daraprim* (Jan. 27, 2020), <https://www.ftc.gov/news-events/press-releases/2020/01/ftc-ny-attorney-general-charge-vyera-pharmaceuticals-martin>.

<sup>64</sup> Prepared Statement of the Federal Trade Commission before the H. Comm. on the Judiciary, Subcommittee on Antitrust, Commercial and Administrative Law (Nov. 13, 2019), [https://www.ftc.gov/system/files/documents/public\\_statements/1553856/p180101\\_house\\_competition\\_oversight\\_testimony\\_-\\_platforms\\_part\\_4\\_11-13-2019.pdf](https://www.ftc.gov/system/files/documents/public_statements/1553856/p180101_house_competition_oversight_testimony_-_platforms_part_4_11-13-2019.pdf).

**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?**

TED has two technologists on staff: one started work in January 2020, and the other will start in early February 2020. Both are dedicated to the work of the Division.

**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?**

TED does not have any economists on staff. The FTC has a separate Bureau of Economics, which helps the FTC evaluate the economic impact of its actions by, among other things, providing economic analysis for competition investigations. BE economists are not permanently assigned to work with specific BC or BCP divisions, but are assigned to investigations on a case-by-case basis, taking into consideration not only industry knowledge but also the types of economic expertise each case is likely to require.

Seven economists are currently heavily involved in the work of TED. These economists have tenures at the FTC ranging from around three years to over a decade, and in total represent approximately fifty years of merger enforcement experience at the FTC.

**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?**

The FTC insists on third-party assessors in situations that demand significant levels of expertise. The FTC's orders allow us to refuse to approve an assessment from an assessor who lacks that expertise, or who has shown any indication of not being trustworthy or accurate. Compliance attorneys within the Division of Enforcement, working with attorneys and others from the relevant Division, review all assessors' reports and ask follow-up questions to enhance our understanding of the assessors' processes and conclusions, as well as address any apparent inconsistencies or holes in the assessment. We require companies under order to carry the cost of retaining assessors rather than bear the extremely high cost with our limited budget.

**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?**

I agree that it is important that the FTC have sufficient technical, policy, and economic expertise to consider whether mergers in technology markets could harm competition. That is why I created TED within BC: to marshal resources and expertise to tackle competition issues in the technology sector. I am confident in our ability to understand the relevant industry practices and markets and evaluate mergers and other business conduct.

The recent public *Hearings* were designed to further our knowledge.<sup>65</sup> They included sessions on a number of issues relating to technology and digital markets, including: the identification and analysis of collusive, exclusionary, and predatory conduct by digital and technology-based platform businesses; the antitrust framework for evaluating acquisitions of potential or nascent competitors in digital marketplaces; innovation and intellectual property policy; privacy, big data, and competition; and algorithms, artificial intelligence, and predictive analytics. We received over 900 public comments, which we have reviewed.

TED is hard at work and they are pursuing all leads. The Division has an open-door policy and encourages those with concerns about competition in technology markets to contact them.<sup>66</sup> Likewise, a number of other BC Divisions focus on technology sectors and are carefully considering technological changes and related antitrust implications.

### **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.**

The Office of Policy Planning (OPP) has worked closely with all the relevant Bureaus, Divisions, and Offices at the Commission following the hearings, and has provided numerous briefings and resource material to the Commissioners and their offices.

On January 10, 2020, the FTC and DOJ released for public comment draft 2020 *Vertical Merger Guidelines* that would, if adopted, replace the DOJ’s 1984 *Non-Horizontal Merger Guidelines*.<sup>67</sup> A number of public comments on the *Hearings* suggested that the agencies should provide updated guidelines and additional guidance on how the agencies evaluate vertical mergers. These Guidelines were prepared and released as part of the Commission’s follow-on work product from the *Hearings*.

The FTC expects to release a report on the international hearings, which took place over two days in late March 2019.<sup>68</sup>

---

<sup>65</sup> FTC, *Hearings on Competition and Consumer Protection in the 21st Century*, <https://www.ftc.gov/policy/hearingscompetition-consumer-protection>.

<sup>66</sup> FTC, Inside the Bureau of Competition: Technology Enforcement Division, <https://www.ftc.gov/about-ftc/bureaus-offices/bureau-competition/inside-bureau-competition/technology-enforcement-division>.

<sup>67</sup> FTC Press Release, *FTC and DOJ Announce Draft Vertical Merger Guidelines for Public Comment* (Jan. 10, 2020), <https://www.ftc.gov/news-events/press-releases/2020/01/ftc-doj-announce-draft-vertical-merger-guidelines-public-comment>.

<sup>68</sup> FTC, *Hearings on Competition and Consumer Protection in the 21st Century: The FTC’s Role in a Changing World* (Mar. 25-26, 2019), <https://www.ftc.gov/news-events/events-calendar/ftc-hearing-11-competition-consumer-protection-21st-century>.

In addition, OPP staff are preparing several guidance documents and staff papers as *Hearings* follow-on projects.

**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?**

As noted above, the FTC and DOJ recently released for public comment draft 2020 *Vertical Merger Guidelines*, and we hope to release a report on the international hearings as well. The Commissioners review and vote to release all formal staff reports, Commission reports, and guidelines; we plan to follow that process for other *Hearings* output.

**37. How much did the FTC spend on its public hearings?**

The costs directly attributable to the *Hearings* were \$562,956.27.

The vast majority of the costs expended related to providing audio/visual services to the public. This amount included onsite video and live webcast hosting, as well as creating a video archive. This provided the public with the greatest transparency into the Commission’s hearings. Another significant area of costs included travel and room rentals so that the agency could obtain a wider diversity of views by holding several of the hearings outside the Washington, D.C. area.

**38. What type of data did the FTC collect through its public hearings?**

The Chairman’s announcement of the *Hearings* and the call for comments indicated that “[t]he Commission is especially interested in new empirical research that indicates (or contraindicates) a causal relationship with respect to any of the topics identified for comment.”<sup>69</sup> Unfortunately, we have not received this type of information to date.

We are exploring what additional research the agency can do with its limited resources to achieve this goal.

**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?**

The agency does not publicly comment on any pending law enforcement investigation.

---

<sup>69</sup> Prepared Remarks of FTC Chairman Simons Announcing the Competition and Consumer Protection Hearings at 2 (June 20, 2018), [https://www.ftc.gov/system/files/documents/public\\_statements/1385308/prepared\\_remarks\\_of\\_joe\\_simons\\_announcing\\_the\\_hearings\\_6-20-18\\_0.pdf](https://www.ftc.gov/system/files/documents/public_statements/1385308/prepared_remarks_of_joe_simons_announcing_the_hearings_6-20-18_0.pdf); FTC, *Hearings on Competition and Consumer Protection: Public Comment Topics and Process*, <https://www.ftc.gov/policy/advocacy/public-comment-topics-process>.

TED is actively investigating conduct, including consummated mergers, in the technology sector. The *Hearings* covered a number of topics relevant to these ongoing investigations, and the learning and thinking from the *Hearings* is informing that investigative work.

**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?**

As noted above, the OPP is working closely with all relevant components of the agency on all work product resulting from the *Hearings*. Any formal guidance documents would be voted on by the Commission for public release.

**41. Is OPP working with the attorneys in TED to craft these guidelines? If yes, please describe how.**

Yes. OPP is preparing the draft in conjunction with BC personnel, including managers and staff from TED.

**42. Is OPP coordinating closely with the Department of Justice to craft these guidelines? If yes, please describe how.**

The FTC is keeping DOJ informed of our work on this possible guidance document and will welcome their input.

**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?**

The dual mission of the agency, and the support that BE provides for both missions, helps to ensure that the FTC continues to leverage its resources and expertise to vigorously enforce the antitrust laws. TED, in particular, is receiving support for its work from throughout the agency. TED is consulting with staff from BCP’s Office of Technology Research and Investigation, which focuses on issues at the intersection of technology with the FTC’s consumer protection mission, including fraud, privacy, data security, online and mobile advertising, payment systems, and malware. More generally, BC and BCP leadership are in regular contact and hold regularly-scheduled meetings to ensure consistency in enforcement, and also to flag relevant issues discovered by one Bureau that may implicate the other Bureau’s enforcement priorities.

**44. What steps does the FTC take to ensure that outside interests do not improperly influence the agency’s policy and enforcement decisions?**

We took significant steps to ensure that a wide variety of views were reflected during the *Hearings*. We invited legal and economic academics, legal and economic consultants, public interest groups, public advocacy groups, and representatives of businesses and industries to our

hearing sessions. Overall, we hosted over 350 unique non-FTC participants over 24 days of public hearings. We sought public input and, to the greatest extent possible, facilitated informed comments from a wide range of interested parties. For example, before each hearing, we released an agenda, a list of participants, and a list of specific questions for public comment. The comment period also extended well beyond the date of each specific hearing, to allow interested parties to comment on the discussion at the public session. We streamed each hearing session live, and posted a video of the hearing session on our website as a resource for those who could neither attend nor watch live. We also released a transcript of each hearing session shortly after it concluded.

We have received over 900 unique comments on our hearings topics. The FTC posted all germane comments on our website shortly after we received them, allowing the public to comment on points raised.

More generally, the Commission and its staff regularly review arguments and advocacy of parties, persons, and interest groups who comment to us or appear before us on enforcement and policy matters. We always carefully evaluate the information and arguments on the merits.

**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?**

No, I have had no such communications with an executive. I was once contacted via text, on my personal phone, by counsel for one of the parties in an ongoing merger investigation. Counsel was seeking a meeting prior to a Commission vote to authorize an enforcement action, to which I agreed. The Commission subsequently voted to initiate an enforcement action. The matter is now in litigation.

**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.**

A former Commission employee must seek and receive clearance before appearing before a current Commission official or providing behind-the-scenes assistance on a matter that was pending during his or her Commission service, or that “directly resulted from” such a matter.<sup>70</sup> Many “clearance matters” are resolved informally. Such informal resolutions may result in former employees not filing for clearance at all—either because they have been advised that clearance would not be granted, or because a request for clearance is not necessary (*e.g.*, a matter was initiated after the former employee’s departure). Thus, the number of reported clearance

---

<sup>70</sup> 16 C.F.R. § 4.1(b)(2). This rule also requires a former employee to seek and receive clearance before participating in a Commission matter (even if the matter had not yet been initiated formally) if non-public documents or information pertaining to that matter likely would have come to the former employee’s attention during the course of his or her official duties, and the employee left the Commission within the previous three years.

requests may be under- and/or over-inclusive. Having said that, the FTC’s ethics officials received the following number of clearance requests covering the period of January 1, 2017 to January 10, 2020, broken out by month.

<b>Month/Year</b>	<b>Number of Requests Received</b>	<b>Notes</b>
1/17	1	
2/17	4	
3/17	2	
4/17	2	
5/17	0	
6/17	1	
7/17	3	This number includes one request withdrawn after employee was advised by an FTC ethics official that clearance was not required.
8/17	5	This number includes three requests withdrawn after employees were advised by FTC ethics officials that clearance was not required.
9/17	0	
10/17	0	
11/17	1	
12/17	0	
1/18	0	
2/18	1	
3/18	2	
4/18	2	This number includes one request withdrawn after employee was advised by an FTC ethics official that clearance was not required.
5/18	1	This number includes one request withdrawn after employee was advised by an FTC ethics official that the request would be denied.
6/18	0	
7/18	0	
8/18	0	
9/18	0	
10/18	0	
11/18	1	
12/18	1	
1/19	1	
2/19	4	
3/19	2	
4/19	3	
5/19	1	
6/19	2	

7/19	5	
8/19	5	
9/19	7	
10/19	1	
11/19	1	
12/19	5	
1/2020	2	This number reflects requests received as of February 4, 2020.
<b>TOTAL</b>	<b>66</b>	

**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?**

Apart from clearance requests, the FTC does not track the participation of former Commission employees in FTC enforcement actions or investigations. Based on the clearance requests received and identified above, a former FTC Commissioner or Director represented a respondent or defendant in eight enforcement actions or investigations. This number excludes one request to participate in a matter submitted by a former Director. The excluded request, submitted in May 2018 and identified above, was withdrawn after a former Director received guidance from an FTC ethics official that the request would be denied.

**Expert Costs**

**48. The FTC Office of 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.**

In October 2019, I instructed staff to adopt several changes in expert acquisition and contract management practices, across both the competition and consumer protection missions. The goal of these changes, which are broadly outlined below, is to reduce expert costs.

- Enhance competition in the expert retention process.
- Use internal experts whenever feasible and consider lower-cost outside expert and support team options.
- Document the processes and considerations involved with expert contracting decisions, including the use of internal experts and support teams.
- Rigorously manage contracts to ensure efficient use of expert resources.

**49. Please describe how contracts for outside experts and consulting firms are structured.**

The FTC has historically awarded time and materials contracts for outside experts and consulting firms.<sup>71</sup> However, staff also may consider using alternative expert contract structures to manage costs.

**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.**

Termination for cause is the ultimate incentive for any outside expert to perform his or her obligations in an appropriate manner. Staff may also consider using alternative expert contract structures to align incentives and manage costs.

In addition, staff is to maintain detailed data on expert expenditures for each matter. I expect these data will help staff obtain better terms in contract negotiations, select more cost-effective expert teams, and more effectively manage future expert engagements.

**51. Please identify what processes the Commission has in place to monitor and review the work performed by outside economic experts and consulting firms.**

BC litigating teams work with BE staff to monitor expert and consulting firm performance under engagement contracts.

In addition, the FTC has a series of controls in place such that every dollar added to expert contracts must first proceed through a multistage review. This ensures that decision-makers at all levels are continually aware of expert spending and agree with any allocation of additional funds.

**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.**

If staff determines that using an internal expert and/or support team is not feasible for a particular enforcement action, staff must document why an outside expert and/or support team are necessary, and why internal resources are not a viable option.

**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**

---

<sup>71</sup> Time and materials contracts are indefinite quantity contracts with fixed hourly rates for each labor category that may be required during the engagement with a not-to-exceed amount beyond which the contractor is not authorized to work. These contracts allow for direct expenses (*e.g.*, travel costs, data purchases) incurred as a result of the engagement. Because of the indefinite nature of time and materials contracts, the FTC may fund the work in increments.

**which the FTC has consulted with the Attorney General pursuant to this statutory provision.**

The cited provision relates to the disposition of Federal property by Federal agencies. The FTC does not dispose of Federal properties subject to this 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.**

The FTC does not keep a log of its interactions with the White House complex. In consultation with relevant staff, I have attempted to provide the most complete response possible. Many SES-level officials have left the agency between January 2017 and the present, so I cannot state that this is a definitive list of meetings attended by the listed FTC officials at the White House complex during the time in question for the Offices and Bureaus requested.

<b>Month/Year</b>	<b>Bureau/Office</b>	<b>Official</b>	<b>Subject Matter</b>
5/17	Bureau of Economics (BE) Office of Policy Planning (OPP)	David Schmidt, Assistant Director Tara Isa Koslov, Acting Director	Interagency Drug Pricing and Innovation Task Force meeting to discuss drug pricing policies and related anticompetitive practices
6/17	BE	David Schmidt, Assistant Director	Interagency Drug Pricing and Innovation Task Force meeting to discuss drug pricing policies and a meeting to discuss the drug supply chain
7/17	BE	David Schmidt, Assistant Director	Interagency meeting to discuss pharmacy benefits managers
9/17	Bureau of Consumer Protection (BCP)	Daniel Kaufman, Deputy Director	Interagency meeting with National Economic Council staff to discuss Privacy and Data Security
10/17	Bureau of Competition (BC), OPP	Ian Conner, Former Deputy Director (now Director) Tara Isa Koslov, Acting Director	Interagency meeting with National Economic Council staff to discuss Healthcare Competition Executive Order
11/17 (two occasions)	OPP	Tara Isa Koslov, Acting Director	Interagency meeting to discuss report required by Executive Order on Healthcare Competition
11/17	OPP	Tara Isa Koslov, Acting	Discussion with National

		Director	Security Council staff regarding licensure portability for military spouses
11/17	BCP	James Kohm, Associate Director	Meeting with Domestic Policy Council staff to discuss Made in USA labeling matters
12/17	BE, OPP	David Schmidt, Assistant Director Tara Isa Koslov, Acting Director	Interagency Healthcare Competition Executive Order Report Working Group meeting to discuss drafting report
12/17	OPP	Tara Isa Koslov, Acting Director	Interagency Healthcare Competition Executive Order Report Working Group meeting to discuss drafting report
12/17	OPP	Tara Isa Koslov, Acting Director	Meeting with Brookings Institution representatives and Interagency Healthcare Competition Executive Order Report Working Group
1/18	BE, OPP	David Schmidt, Assistant Director Tara Isa Koslov, Acting Director	Interagency Healthcare Competition Executive Order Report Working Group meeting to discuss drafting report
2/18	OPP	Tara Isa Koslov, Acting Director	Meeting of report working group for Executive Order on Healthcare Competition and Choice
2/18	OPP	Tara Isa Koslov, Acting Director	Meeting with Hoover Institution representatives and Interagency Healthcare Competition Executive Order Report Working Group
4/18	BCP	James Kohm Associate Director	Meeting with Domestic Policy Council staff to discuss Made in USA labeling matters
6/18	OPP	Bilal Sayyed, Director	Interagency meeting with Privacy Policy staff to discuss Privacy Issues
7/18	BCP	James Kohm, Associate Director	Meeting with Domestic Policy Council staff to discuss Made in USA labeling matters
8/18	OPP	Bilal Sayyed, Director	Interagency meeting with the National Economic Council

			staff to discuss Healthcare Competition Executive Order
8/18	OPP	Bilal Sayyed, Director	Lunch with Kathleen Kraninger
9/18	BCP	Andrew Smith, Director	Interagency meeting with Privacy Policy staff to discuss Privacy issues
10/18	BE	David Schmidt, Assistant Director	Interagency Healthcare Competition Executive Order Report Working Group meeting to discuss health care provider laws
12/18	BCP	Andrew Smith, Director	Meeting with Privacy Policy staff to discuss Privacy issues
1/19	BCP	Mary Engle, Associate Director	Interagency meeting with National Economic Council staff to discuss transparency and surprise medical billing
2/19	OPP	Bilal Sayyed, Director	Interagency meeting with National Economic Council staff to discuss transparency and surprise Medical billing
3/19	OPP	Bilal Sayyed, Director	Interagency meeting with Domestic Policy Council staff to discuss transparency and surprise Medical billing
3/19	BE	Aileen Thompson, Assistant Director	Interagency meeting with National Economic Council staff to discuss antitrust and healthcare.
3/19	BCP	Jennifer Leach, Associate Director	Interagency meeting with Director of Policy staff to discuss the First Lady's Policy for Youth Programs Executive Order
5/19	BCP	Andrew Smith, Director	Interagency meeting with Privacy Policy staff to discuss Privacy issues
5/19	OPP	Bilal Sayyed, Director	Interagency meeting with National Economic Council staff to discuss State Health Care Competitiveness Index
6/19	BCP	Andrew Smith, Director	Interagency meeting with Privacy Policy staff to discuss Privacy issues

6/19	OPP	Bilal Sayyed, Director	Interagency meeting with National Economic Council staff to discuss State Health Care Competitiveness Index
7/19	BCP	Andrew Smith, Director Mary Engle, Associate Director	Interagency meeting with Domestic Policy Council to discuss the use of algorithms in the distribution of social media content
7/19	OPP	Bilal Sayyed, Director	Interagency meeting with National Economic Council staff to discuss State Health Care Competitiveness Index
8/19	Office of General Counsel (OGC)	Reilly Dolan, Principal Deputy General Counsel Alden Abbott, General Counsel	Interagency meeting with Domestic Policy Council to discuss the use of algorithms in the distribution of social media content
8/19	BE, OPP	David Schmidt, Assistant Director Bilal Sayyed, Director	Interagency meeting with National Economic Council staff to discuss healthcare price transparency and State Healthcare Competitiveness Index
9/19	BCP, OGC	Andrew Smith, Director Reilly Dolan, Principal Deputy General Counsel Alden Abbott, General Counsel	Interagency meeting with Domestic Policy Council to discuss the use of algorithms in the distribution of social media content
9/19	BCP	James Kohm, Associate Director	Meeting with Domestic Policy Council staff to discuss Made in USA labeling matters
9/19	OPP	Bilal Sayyed, Director	Interagency meeting with National Economic Council staff to discuss Healthcare Competition Executive Order
10/19	BCP	Andrew Smith, Director	Interagency meeting with Automated Vehicle Fast Track Action Committee to discuss drafting strategy for automated vehicles
10/19	BCP	Daniel Kaufman, Deputy Director	Meeting with National Economic Council staff to discuss BCP issues
10/19	BC	Bruce Hoffman, Former Director; Ian Conner,	Interagency meeting with National Economic Council

		Former Deputy Director (now Director)	staff to discuss Healthcare Competition Executive Order
12/19	BCP	Jennifer Leach, Associate Director	Interagency FLOTUS Be Best Ambassadors celebration

**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?**

I am gravely concerned that recent judicial decisions have substantially threatened the Commission’s ability to use Section 13(b). Congress should clarify the Commission’s remedial authority under Section 13(b) to ensure the FTC can continue to get meaningful monetary relief for American consumers.

Section 13(b) of the FTC Act is the FTC’s primary, and most efficient and effective, way of providing redress to injured consumers.<sup>72</sup> The relevant portion of Section 13(b), often referred to as the “final proviso,” authorizes the FTC to sue in federal court and states as follows: “in proper cases, the Commission may seek, and after proper proof, the court may issue, a permanent injunction.” Since the 1980s, courts across the country have held that Section 13(b) allows all types of equitable relief, including money judgments to remedy consumer injuries. In 1994, Congress acknowledged and strengthened the Commission’s ability to use Section 13(b) to obtain full monetary relief when it added language to the final proviso of Section 13(b) expanding venue and service of process.<sup>73</sup>

Over the years, the Commission has secured billions of dollars in relief in a wide variety of cases using its Section 13(b) authority, including telemarketing fraud, anticompetitive pharmaceutical practices, data security and privacy, scams that target seniors and veterans, and deceptive business practices, just to name a few.

But the Seventh Circuit’s recent *Credit Bureau Center* opinion effectively eliminated the FTC’s ability to obtain equitable monetary relief in Illinois, Indiana, and Wisconsin, and it may tempt other courts to follow suit. The court, overruling decades of its own precedent holding otherwise, held that the word “injunction” in the statute allows only behavioral restrictions and not

<sup>72</sup> 15 U.S.C. §53(b).

<sup>73</sup> Federal Trade Commission Act Amendments of 1994, S. Rep. No. 103-130, at 15-16, *as reprinted in* 1994 U.S.C.C.A.N. 1776, 1790-91. As the Senate Report noted, “Section 13 of the FTC Act authorizes the FTC to file suit to enjoin any violation of the FTC Act. The FTC can go into court ex parte to obtain an order freezing assets, and is also able to obtain consumer redress...The FTC has used its section 13(b) injunction authority to counteract consumer fraud, and the Committee believes that the expansion of venue and service of process in the reported bill should assist the FTC in its overall efforts.” *Id.*

monetary remedies.<sup>74</sup> In addition, the Third Circuit’s *ViroPharma* decision held that the FTC may sue under Section 13(b) only when a violation is either ongoing or “impending” at the time the suit is filed, which puts an unnecessary limitation on the Commission’s ability to obtain relief for consumers who have been harmed by unlawful conduct that occurred in the past but is not ongoing.<sup>75</sup>

The issue in *Credit Bureau Center* is pending in the courts of appeals for the Third and Eleventh Circuits and is also pending before the Supreme Court in three separate petitions. The Supreme Court is looking at a related question in *Liu v. SEC*, and it is possible that the Court’s ruling could adversely affect the FTC’s monetary redress authority. The ambiguity created by these cases increases defendants’ incentive to litigate instead of settle with the FTC, and increases the agency’s costs.

To restore the status quo, Congress should clarify Section 13(b) to reaffirm the Commission’s longstanding authority to secure all types of equitable relief, including restitution and disgorgement. In addition, Congress should revise Section 13(b) to clarify that the Commission may sue in federal court to obtain equitable relief even if conduct is no longer ongoing or impending when the suit is filed.

**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.**

During my leadership, the FTC has brought many cases under Section 19(a)(1) for violations of rules governing unfair or deceptive acts or practices (UDAP), and we have sought equitable monetary remedies under both 19(a)(1) and Section 13(b), such as disgorgement and restitution.<sup>76</sup> When making awards in these cases, courts do not specify which section of the FTC Act they are relying on. Although “damages” can technically be broader than disgorgement and restitution, as a practical matter they are often equivalent. Moreover, defendants often do not have enough assets to cover restitution judgments, so there is little to gain by seeking the potentially broader scope of damages relief.

---

<sup>74</sup> *FTC v. Credit Bureau Center, LLC*, 937 F.3d 764 (7th Cir. 2019).

<sup>75</sup> *FTC v. Shire ViroPharma Inc.*, 917 F.3d 147 (3d Cir. 2019).

<sup>76</sup> Recent examples where we have sought relief under both Section 13(b) and 19(a)(1) include: *FTC v. James Noland, et al.*, No. 2:20-cv-00047 (D.Az. 2020), at <https://www.ftc.gov/enforcement/cases-proceedings/x0100166/james-d-noland-jr-success-health>; *FTC v. Educare Centre Services, Inc. et al.*, No. 3:19-cv-00196 (W.D.Tx. 2019), at <https://www.ftc.gov/enforcement/cases-proceedings/192-3033/educare-centre-services-inc>; *FTC and Utah v. Nudge, LLC et al.*, No. 2:19-cv-00867 (D.Utah 2019), at <https://www.ftc.gov/enforcement/cases-proceedings/182-3016/nudge-llc>.

As for Section 19(a)(2), we have not pursued damages or any other monetary remedies under this section for UDAP violations during my tenure for a number of reasons. Most importantly, we can sue for damages or other relief under Section 19(a)(2) only at the conclusion of an administrative case and all subsequent judicial proceedings, which can take years. In the meantime, there is a significant risk that defendants will dissipate assets, and there is no practical way of preserving them. Moreover, to get any monetary relief in such cases, we have to cross the high hurdle of showing that a “reasonable man would have known under the circumstances” that the conduct was “dishonest or fraudulent.”

As a practical matter, consumers are much better served if the FTC brings cases in federal court for injunctive remedies and equitable monetary relief under Section 13(b). In Section 13(b) cases, unlike those that could be brought under Section 19(a)(2), the FTC can readily obtain asset freezes; does not have to complete an adjudicative process before seeking restitution in a separate proceeding; does not face a 3-year statute of limitations; and does not have to prove that in addition to being deceptive or unfair, that a practice was also “dishonest or fraudulent.” In addition, the only court to consider the issue has held that Section 19 does not allow disgorgement of ill-gotten gains.

At bottom, I—like other Chairmen and Commissioners before me—seek to use the most efficient tool at my disposal to achieve the best outcome for consumers, and that is what I have done in my tenure. As you know, however, the Commission’s ability to use Section 13(b) is facing significant challenges now, and I ask that you clarify the statute to permit the Commission to use this critical tool as courts, for decades, have allowed.

**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?**

I agree that it is important for the Commission to combat conduct not only because it harms consumers, but also because it undermines competition. I also agree that deception can be the basis of an anticompetitive act. In fact, when I was the Director for the Bureau of Competition, we brought two cases where we alleged that deceptive practices were at the heart of the anticompetitive scheme: *Rambus* and *Unocal*.<sup>77</sup> And if similar conduct appeared in future cases, I still would support alleging that the company behaved deceptively.

---

<sup>77</sup> Compl. at ¶ 1, *In re Union Oil Comp. of Cal.*, Dkt. No. 9305 (Mar. 4, 2003), <https://www.ftc.gov/sites/default/files/documents/cases/2003/03/030304unocaladmincmplt.pdf>; (“Unocal actively participated in the CARB RFG rulemaking proceedings and engaged in a pattern of bad-faith, deceptive conduct, exclusionary in nature, that enabled it to undermine competition and harm consumers.”); Compl. at ¶ 2, *In re Rambus Inc.*, Dkt. No. 9302 (June 18, 2002), <https://www.ftc.gov/sites/default/files/documents/cases/2002/06/020618admincmp.pdf> (“By concealing this information—in violation of JEDEC’s own operating rules and procedures—and through other bad-faith, deceptive conduct, Rambus purposefully sought to and did convey to JEDEC the materially false and misleading impression that it possessed no relevant intellectual property rights.”).

**Questions for the Record from Representative Hank Johnson  
Hearing on Online Platforms and Market Power, Part 4:  
Perspectives of the Antitrust Agencies  
November 13, 2019**

- 1. Chairman Simons, it's my understanding that the FTC's Bureau of Competition as well as its Consumer Protection Bureau have recently been involved in examining the cybersecurity practices of automobile dealer management software systems. In fact, not long ago, the Consumer Protection Bureau brought and settled an action against one software provider for failing to take reasonable steps to secure consumers' data, which resulted in a breach of data affecting approximately 12.5 million individuals. Meanwhile, the Competition Bureau has been engaged in the investigation of a different software provider under the auspices that its utilization of strong data security protocols could implicate antitrust concerns. Can you please provide some insight into whether the two bureaus are coordinating on important policy issues like the impact of antitrust laws on data security?**

The Commission's organizational structure, at all levels, contributes to its ability to effectively investigate conduct and consider policy issues that implicate both competition and consumer protection missions. For example, at the staff level, Bureau of Competition (BC) and Bureau of Consumer Protection (BCP) staff consult with one another to share expertise gained from recent investigations. Similarly, BC and BCP leadership communicate regularly to ensure consistency in enforcement and to flag relevant issues discovered by one Bureau that may implicate the other Bureau's enforcement priorities. Importantly, the Commissioners themselves ensure that both missions are taken into account: we and our staff see all case-related materials generated by each Bureau, which allows us to directly synthesize competition and consumer protection issues. The agency's five-member bipartisan membership also ensures that critical issues are fully explored during Commission deliberations.

**Subcommittee on Antitrust, Commercial and Administrative Law  
Hearing on Online Platforms and Market Power, Part 4:  
Perspectives of the Antitrust Agencies  
Questions for the Record**

**Question submitted by Representative Buck**

- 1. In recent months, several issues concerning Apple have raised attention. These include Apple's practices involving its App Store, as discussed in a July 2019 Wall Street Journal article.<sup>78</sup> Other issues include Apple's practices involving the online provision of news, Apple's expansion into audiovisual services, and European authorities' increased focus on and criticism of Apple's payment system. Finally, there may be questions concerning Apple's use of data. Will you consider these issues as you examine whether large online platforms are engaging in practices to consolidate dominant market power?**

I will keep an open mind when assessing the facts presented in each investigation and enforcement action.

Vigorous enforcement in the technology sector is a top priority for me. I created the Bureau of Competition's new Technology Enforcement Division to monitor competition in technology markets, investigate any potential anticompetitive conduct in those markets, and take enforcement actions when warranted.

---

<sup>78</sup> Tripp Mickle, *Apple Dominates App Store Search Results, Thwarting Competitors*, Wall. St. Journal (July 23, 2019), <https://www.wsj.com/articles/apple-dominates-app-store-search-results-thwarting-competitors-11563897221>.

**Questions for the Record from Representative Pramila Jayapal  
Online Platforms and Market Power, Part 4: Perspectives of the Antitrust Agencies  
November 11, 2019**

**Questions for FTC Chairman Joe Simons:**

**1. What decision-making process does the FTC utilize to determine the appropriate consequences to impose on lawbreaking companies?**

The Commission uses its enforcement authority to impose consequences for law violators, to reverse the harm caused by the defendant's illegal conduct, and to deter illegal conduct in the future. Choosing the right remedy will depend on the type of violation and the defendant's role in the violation. When staff recommends that the Commission initiate a legal challenge, the recommendation will often include remedial options for the Commission to consider.

Remedies available to the Commission under a variety of statutes fall into three general categories: conduct, structural, and monetary. When the Commission deliberates, it chooses the remedy that is most likely to stop or prevent harm to consumers and, when appropriate, return money to those harmed by the defendant's illegal behavior. In some cases, the defendant is willing to negotiate a settlement of charges in lieu of litigation, and the Commission will issue a consent order along with a complaint that outlines what the defendant has done to violate the law. These negotiated settlements have the force of law, and if the defendant violates the terms of a Commission order, the defendant may be subject to civil penalties. In other cases, the Commission will prosecute its allegations in federal court or in an administrative proceeding to obtain an enforceable injunction against the conduct, as well as other fencing-in relief. In appropriate cases, the Commission may also seek monetary relief in federal court. The Commission does not have the authority to impose monetary relief in an administrative proceeding.

**2. What factors does the FTC rely on to determine whether debarment is an appropriate consequence to impose on defendants that have engaged in anticompetitive behaviors?**

The Commission has never used debarment in a competition case.<sup>79</sup> Because anticompetitive conduct cases typically occur in markets with few competitors, debarment would limit competition, which potentially would exacerbate the competition problem. As a result, we would only consider debarment in the rarest—if any—competition cases.

---

<sup>79</sup> I am aware that certain commentators have advocated for using debarment in addition to jail time and fines in order to more effectively deter criminal violations of the antitrust laws. *See* Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Sanctions*, 6(2) COMPETITION POLICY INT'L at 3-39 (2010), <https://www.competitionpolicyinternational.com/assets/0d358061e11f2708ad9d62634c6c40ad/CPIAutumn2010eBook.pdf>. Because the FTC does not have criminal authority to enforce the antitrust laws, I do not have a view on whether debarment would be an appropriate deterrent to criminal conduct. It is my understanding that debarment is not used anywhere for civil antitrust violations.

**3. What factors does the FTC rely on to determine whether defendant companies should be required to inform affected parties that they have been harmed?**

In many consumer protection cases, the FTC disburses the funds collected from defendants directly to consumers; in these cases, the FTC notifies consumers that they may have been harmed by illegal conduct and are entitled to a refund.<sup>80</sup> In some circumstances, the Commission may require the defendant to notify those affected by its illegal conduct so they can take steps to avoid monetary harm or a threat to their health or safety in the future. When deciding whether to require notice, factors that we consider include: whether those harmed have an ongoing relationship with the defendant; whether they are forgoing other treatments in reliance on defendant's deceptive claims; whether they would otherwise learn about the defendant's illegal conduct on their own; and whether they need notice in order to seek relief available to them under other laws, including state law.<sup>81</sup> The Commission has an interest in making sure the public is aware of our enforcement actions, and in providing sufficient relief to those harmed so that the defendant is unlikely to violate the law again.

**4. What factors does the FTC rely on to determine whether defendants should be required to inform affected workers that they have been harmed by anticompetitive behaviors?**

I would rely on the factors listed above. Just as consumers are entitled to robust competition for the products and services they buy, workers are entitled to robust competition among employers when they seek employment. Wage-fixing agreements among competing employers are *per se* illegal under the antitrust laws, and the Commission is committed to promoting competition in labor markets for the benefit of all workers.

**5. Where the FTC determines that companies made agreements that undermined competition in the labor market and harmed workers, why is the FTC not requiring that those companies provide notice to impacted workers?**

Wage-fixing agreements among employers are *per se* illegal, and companies must have programs in place to avoid forming agreements with competing employers that harm workers.<sup>82</sup> When the FTC discovers such an agreement, we will act quickly to stop the illegal behavior, as we did in

---

<sup>80</sup> Once an FTC lawsuit or settlement is final and the defendants have paid the money the court orders, the Office of Claims and Refunds in the Bureau of Consumer Protection develops a plan for returning that money to the right people. If there is money left over at the conclusion of the refund program, or if there is not enough money to provide meaningful refund amounts, then the FTC sends the money to the U.S. Treasury, where it is deposited into the General Fund. According to the most recent report on the FTC's refund program, FTC cases resulted in more than \$2.3 billion in refunds for consumers between July 2017 and July 2018. FTC OFFICE OF CLAIMS AND REFUNDS, 2018 FTC ANNUAL REPORT ON REFUNDS TO CONSUMERS (Feb. 2019),

[https://www.ftc.gov/system/files/documents/reports/2018-annual-report-refunds-consumers/annual\\_redress\\_report\\_2018.pdf](https://www.ftc.gov/system/files/documents/reports/2018-annual-report-refunds-consumers/annual_redress_report_2018.pdf).

<sup>81</sup> We also consider whether notice is practicable; for example, whether there is a viable means to identify and contact consumers who may have been affected by the conduct.

<sup>82</sup> See U.S. Dep't of Justice & FTC, Antitrust Guidance for Human Resource Professionals at 3 (Oct. 2016), [https://www.ftc.gov/system/files/documents/public\\_statements/992623/ftc-doj\\_hr\\_guidance\\_final\\_10-20-16.pdf](https://www.ftc.gov/system/files/documents/public_statements/992623/ftc-doj_hr_guidance_final_10-20-16.pdf) (explaining that "naked wage-fixing or no-poaching agreements among employers, whether entered into directly or through a third-party intermediary, are *per se* illegal under the antitrust laws").

the Your Therapy Source case, before the agreement has any effect on wages. In the right circumstances—such as when the illegal agreement has actually depressed wages paid to workers—the Commission will consider notifying affected workers or seeking other relief to make them whole.

**6. In the case of *Your Therapy Source*, the FTC found clear evidence that Texas staffing agencies broke the law by secretly making agreements to set low wages for the hard- working therapists they employed and even inviting more agencies to engage in this illegal practice. However, the FTC did not require the defendant agencies to provide notice to impacted workers. Why did the FTC decline to require that affected parties be notified?**

I joined the Commission’s statement finalizing the order in this case because, after reviewing all the facts uncovered in our investigation and considering over 100 public comments, I did not believe the order needed to include a requirement to provide notice of the Commission’s action to individual therapists targeted by the unlawful conduct.<sup>83</sup> Our investigation did not indicate that any therapists’ wages were reduced as a result of the illegal wage-fixing agreement, so individual notice would have been unlikely to facilitate recovery in private civil litigation.<sup>84</sup> The Commission will take steps to ensure that the order and the facts of this case are disseminated as widely as possible in order to educate staffing firms, home healthcare workers, and small businesses about the illegality of wage fixing.

**7. What criteria does the FTC use to determine that an admonishment alone is an appropriate consequences to impose on lawbreaking companies?**

If your question implies that the Commission’s cease-and-desist orders are mere admonishments, I strongly disagree with that characterization. The Commission will issue a cease-and-desist order to stop the illegal conduct alleged in a complaint and to prevent it from happening again. Commission cease-and-desist orders routinely require respondents to submit periodic reports on their efforts to comply with the order. If the Commission determines that a respondent is not fulfilling its legal obligations, the Commission may seek enforcement of the order and the imposition of civil penalties.<sup>85</sup>

**8. Does the FTC consider admonishments to be a sufficient deterrent to stop companies from engaging in anticompetitive behavior? On what basis has the FTC made that determination?**

---

<sup>83</sup> Statement of the Federal Trade Commission Concerning the Commission’s Consent Order, In the Matter of Your Therapy Source, LLC, Neeraj Jindal, and Sheri Yarbray, C-4689 (Oct. 31, 2019), [https://www.ftc.gov/system/files/documents/public\\_statements/1552414/171\\_0134\\_your\\_therapy\\_source\\_commission\\_statement.pdf](https://www.ftc.gov/system/files/documents/public_statements/1552414/171_0134_your_therapy_source_commission_statement.pdf).

<sup>84</sup> Notice of the illegal wage-fixing agreement also might have caused consumer confusion, given that none of the therapists’ wages were reduced as a result of the illegal agreement.

<sup>85</sup> Failing to submit a complete compliance report can violate Section 10 of the FTC Act, 15 U.S.C. § 50, and lead to civil penalties even in the absence of any violation of the order’s other terms.

To reiterate, I do not believe the Commission's cease-and-desist orders are mere admonishments. The Commission's ability to seek civil monetary penalties for cease-and-desist order violations, and to order compliance reporting and monitor compliance, deters respondents from engaging in the prohibited conduct in the future. The possibility of a subsequent private action for treble damages also may have a deterrent effect.

**9. Where the FTC has imposed the power to impose broader consequences on lawbreaking companies, when does the FTC find it appropriate to impose only an admonishment?**

Again, the Commission's orders are not admonishments; they are legally enforceable injunctions. The Commission will continue to seek relief commensurate with the facts and circumstances of each case, including, where appropriate, disgorgement, notice to those affected, and admissions of liability for individuals involved.

**10. Does the FTC commit to carefully scrutinizing each negotiated settlement to determine what remedy would best make the workers who have been harmed by anticompetitive behavior whole?**

Yes, absolutely.

**11. Does the FTC commit to carefully scrutinizing each negotiated settlement to determine what remedy would most effectively deter illegal and anticompetitive conduct by corporations?**

I commit that we will consider all available options for stopping anticompetitive and other illegal conduct, obtaining redress for those harmed, and deterring future violations in every negotiated order.