

Statement of Commissioners Christine S. Wilson and Noah Joshua Phillips

Regarding the Federal Trade Commission's Report to Congress on Rebate Walls

June 2, 2021

We write in response to our Democrat colleagues' statements issued in connection with the Commission's Rebate Wall Report.¹ The Commission can – and does – pursue a comprehensive agenda to address anticompetitive mergers and unlawful conduct in the pharmaceutical industry,² the net effect of which is to lower prices for consumers. Specifically, the Commission carefully reviews pharmaceutical mergers, challenges anticompetitive patent litigation settlements, challenges abuses of FDA regulatory processes, and advocates for the reform of misused regulations.

Commission staff continually seek to identify new forms of anticompetitive conduct and new sources of consumer harm in this industry. Mustering proof and applying the law, they have brought and won cases addressing a wide variety of issues, including illegal patent litigation settlements,³ product hopping,⁴ sham patent litigation,⁵ and exclusive dealing arrangements that result in foreclosure.⁶ That approach – not sweeping rhetorical condemnations of industry practices, or even industries – drives results that protect consumers.

As the Report states, “rebate walls” – discounts from pharmaceutical manufacturers to pharmacy benefit managers for preferred formulary placement – may work to limit competition.

¹ See Statement of Acting Chairwoman Rebecca Kelly Slaughter Regarding the Federal Trade Commission's Report to Congress on Rebate Walls (May 28, 2021), https://www.ftc.gov/system/files/documents/public_statements/1590532/statement_of_acting_chairwoman_slaughter_regarding_the_ftc_rebate_wall_report_to_congress.pdf; See Statement of Commissioner Rohit Chopra Regarding the Commission's Report on Pharmacy Benefit Manager Rebate Walls (May 28, 2021), https://www.ftc.gov/system/files/documents/public_statements/1590528/statement_of_commissioner_rohit_chopra_regarding_the_commissions_report_on_pharmacy_benefit_manager.pdf.

² See Statement of Commissioner Christine S. Wilson, In the Matter of Bristol-Myers Squibb Company/Celgene Corporation, File No. 191-0061 (November 15, 2019).

³ See, e.g. Impax Labs., Inc., File No. 1410004 (March 29, 2019) (<https://www.ftc.gov/enforcement/cases-proceedings/141-0004/impax-laboratories-inc>) (final order), *aff'd*, Impax Labs, Inc. v. FTC, 994 F.3d 484 (5th Cir. 2021); Federal Trade Commission v. Cephalon, Inc., 551 F. Supp. 2d 21 (D.D.C. 2008) (stipulated order for permanent injunction and equitable relief filed June 17, 2015), 2015) (<https://www.ftc.gov/enforcement/casesproceedings/061-0182/cephalon-inc>).

⁴ See, e.g., Federal Trade Commission v. Reckitt Benckiser Group plc, FTC File No. 1310036, Dkt. 1:19-cv-00028 (W.D. Va.) (stipulated order for permanent injunction and equitable monetary relief); Federal Trade Commission v. Indivior, Inc., Dkt. 1:20-cv-00036 (W.D. Va.) (stipulated order for permanent injunction and equitable monetary relief).

⁵ See Federal Trade Commission v. AbbVie Inc., et al., Case No. 2:14-cv-05151-HB, FTC File No. 121-0028 (Feb. 19, 2019) (global settlement entered with Teva), <https://www.ftc.gov/enforcement/cases-proceedings/121-0028/abbvie-inc-et-al>.

⁶ See Federal Trade Commission, et al. v. Vyera Pharmaceuticals, LLC, et al., No. 20-cv-00706, FTC File No. 161-0001 (complaint issued January 27, 2020; amended complaint filed on April 14, 2020); Federal Trade Commission v. Mylan Laboratories et al., 62 F. Supp. 2d 25 (D.D.C. 2001) (order and stipulated permanent injunction approved).

We are confident that staff will recommend to the Commission viable challenges to anticompetitive conduct that falls within the Commission’s jurisdiction not only with respect to such rebates, but with respect to all forms of anticompetitive conduct in this sector.

But just as not every rebate is anticompetitive, not every reason for high drug prices is a violation of the antitrust laws. Other legal regimes also apply. For example, intellectual property protections encourage innovation by permitting innovators to exclude competition for a set amount of time. In addition, regulatory regimes prescribed by law create barriers to entry. Abuse of these systems may violate the antitrust laws – but even absent violations, prices may still exceed prevailing prices absent regulation.

Our colleagues’ answer to the rules today is more rules.⁷ But they decline to explain in any detail what rules they are proposing. (Do they want to bar *all* drug price discounts? That approach might very well raise drug prices, and no one wants that.) Our colleagues do not even identify whether their desired rules are competition or consumer protection rules; Commissioner Chopra writes about both.⁸ We question our legal authority to engage in competition rulemaking.⁹ But leaving that issue aside, especially without clarity as to the substance of proposed rules, we have grave concerns that a “regulate first, ask questions later” path will inhibit innovation, lessen competition further, and drive prices even higher.

⁷ See Statement of Acting Chairwoman Rebecca Kelly Slaughter Regarding the Federal Trade Commission’s Report to Congress on Rebate Walls, *supra* note 1; See Statement of Commissioner Rohit Chopra Regarding the Commission’s Report on Pharmacy Benefit Manager Rebate Walls, *supra* note 1.

⁸ See Statement of Commissioner Rohit Chopra Regarding the Commission’s Report on Pharmacy Benefit Manager Rebate Walls, *supra* note 1 at 2.

⁹ See Noah Joshua Phillips, Non-Compete Clauses in the Workplace: Examining Antitrust and Consumer Protection Issues, Prepared Remarks at FTC Workshop on Non-Compete Clauses in the Workplace, Washington, DC (Jan. 9, 2020), https://www.ftc.gov/system/files/documents/public_statements/1561697/phillips_-_remarks_at_ftc_nca_workshop_1-9-20.pdf; Christine S. Wilson, Antitrust on the Antiques Roadshow: Appraising U.S. Antitrust Laws in a Modern Economy, Remarks for NetChoice “Defining the Digital Market” Event (April 27, 2021), https://www.ftc.gov/system/files/documents/public_statements/1589480/wilson-netchoice-keynote.pdf.