UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of Acting Chairwoman
Rebecca Kelly Slaughter

STATEMENT OF ACTING CHAIRWOMAN REBECCA KELLY SLAUGHTER

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

The problem of high prescription drug prices is clear to all Americans,[1] but what isn't clear is how prescription drugs and associated payments flow through the system—from the manufacturer, to the distributor, to the retail pharmacy, and ultimately to the patient. Different patients pay different amounts for the same medication at the same pharmacy, and different pharmacies charge the same patient different amounts for the same drug. Fairness in drug pricing is undermined by a complex system of rebates, which manufacturers offer to middlemen in order to increase the use of their products. But these secretive rebates—which are sometimes quite large and represent a significant source of revenue for drug middlemen—favor larger competitors who can offer or demand bigger rebates and incumbents because of the challenges with switching patients to different drugs. This is not the way competition is supposed to work. And the system is particularly, and disproportionately, punishing for patients on high deductible health plans or without insurance at all—they pay the list price for some or all of their prescriptions, without receiving any benefit from rebates.[2]

For decades, the FTC has challenged a number of illegal anticompetitive practices in the pharmaceutical industry that can lead to high drug prices. The Commission should consider ways to build on this work by addressing emerging and evolving practices that have the potential to harm consumers. We must carefully scrutinize anticompetitive exploitation of market power throughout the pharmaceutical supply and payment chains, including the rebating practices discussed in the Commission report.

The Commission must also be ready to deploy all of its statutory authority to stop competitive harm. First, when investigating potentially anticompetitive conduct, we should consider the full breadth of the FTC Act's prohibition on unfair methods of competition under Section 5 and deploy it against conduct that, in the words of the Supreme Court, extends beyond the traditional antitrust laws.[3] Section 5 also includes a broad prohibition on unfair or deceptive acts or practices. As I have previously written, we should determine whether any problematic

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[1] *See* Kaiser Family Foundation, *Public Opinion on Prescription Drugs and Their Prices* (October 16, 2020), https://www.kff.org/slideshow/public-opinion-on-prescription-drugs-and-their-prices/.
[2] *See* Stephanie Talmadge, *Sticker Shock in the Pharmacy*, N.Y. Times (Sept. 23, 2020), https://www.nytimes.com/2020/09/23/well/live/sticker-shock-in-the-pharmacy.html; *see also* Testimony Before the U.S. Senate Special Comm. on Aging, Statement of John E. Dicken, U.S. Gov't Accountability Office (2010), GAO-10-529T Medicare Part D: Spending, Beneficiary Out-of-Pocket Costs, and Efforts to Obtain Price Concessions for Certain High-Cost Drugs.
[3] *Fed. Trade Comm'n v. Indiana Fed. of Dentists*, 476 U.S. 447, 454 (1986).

conduct we find in the pharmaceutical industry or along the supply chain could also be addressed using this authority.[4] In addition to case-by-case investigation and enforcement, the Commission should consider whether to issue rules to address unfair methods of competition.[5] Finally, the Commission must prevent anticompetitive concentration of the pharmaceutical supply chain. For pharmaceutical mergers specifically, the FTC has joined together in a task force with several international partners, state attorneys general, and the Department of Justice to retool our approach to ensure that we investigate and fully address the full panoply of potential harm from consolidation.

I look forward to working with Congress to help address concerns about anticompetitive practices throughout the pharmaceutical supply and payment chain, including to identify any gaps in antitrust law that Congress could fill, as was the case with abuse of the REMS program and enactment of the CREATES Act.[6] The FTC also stands ready to continue to work with the FDA and other agencies that play a crucial role in protecting and promoting the competition that facilitates lower prices, better quality, and more innovation.

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[4] *Concurring Statement of Commissioner Rebecca Kelly Slaughter in the Matter of Fed. Trade Comm'n and State of New York v. Vyera Pharmaceuticals, LLC; Phoenixus AG; Martin Shkreli; and Kevin Mulleady*, Fed. Trade Comm'n (Jan. 27, 2020), https://www.ftc.gov/system/files/documents/public_statements/1564517/2020_01_27_final_rks_daraprim_concurring_statement.pdf; *Statement of Comm'rs Rohit Chopra and Rebecca Kelly Slaughter Regarding the Fed. Trade Comm'n Report on the Use of Section 5 to Address Off-Patent Pharmaceutical Price Spikes*, Fed. Trade Comm'n (June 27, 2019), https://www.ftc.gov/system/files/documents/reports/ftc-report-standalone-section-5-address-high-pharmaceutical-drug-biologic-prices/p180101_section_5_report_dissenting_statement_by_chopra_and_slaughter_6-27-19.pdf ("In a situation where the maker of an off-patent drug dramatically raises prices, the facts and circumstances might meet the criteria Congress enumerated for an unfair practice: (1) substantial consumer injury, (2) without offsetting benefits, and (3) one that consumers cannot reasonably avoid.").

[5] As the report notes, I recently launched a new rulemaking group in the Office of the General Counsel to centralize the agency's rulemaking functions. *See* Press Release, Fed. Trade Comm'n, *FTC Acting Chairwoman Slaughter Announces New Rulemaking Group* (Mar. 25, 2021), https://www.ftc.gov/news-events/press-releases/2021/03/ftc-acting-chairwoman-slaughter-announces-new-rulemaking-group.

[6] *See* Hearing on Antitrust Concerns and the FDA Approval Process: Before the H. Comm. on the Judiciary, Subcomm. on Regulatory Reform, Commercial and Antitrust Law, Prepared Statement of Markus H. Meier, Acting Dir., Bureau of Competition, Fed. Trade Comm'n (July 27, 2017), https://www.ftc.gov/system/files/documents/public_statements/1234663/p859900_commission_testimony_re_at_concerns_and_the_fda_approval_process_house_7-27-17.pdf (noting some strategies that branded firms can use to delay generic entry may be difficult to reach effectively under the antitrust laws and "even if there is a successful antitrust challenge to this conduct, it is "unlikely to provide immediate redress."); *see also* Further Consolidated Appropriations Act, 2020, Pub. L. 116-94, 133 Stat. 2534 (incorporating the CREATES Act of 2019, originally sponsored by Sen. Patrick Leahy and Rep. David Cicilline).