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

Office of the Chair

September 6, 2023

The Honorable James Comer
Chairman
Committee on Oversight and Accountability
United States House of Representatives
Washington, DC 20515

Dear Chairman Comer:

I write in response to your August 21, 2023 letter concerning the Federal Trade Commission's engagement with certain counterpart agencies. This initial production includes documents, which are Bates stamped FTC-DM00000001 –FTC-DM00000090. The Commission will submit additional productions on a rolling basis as we locate responsive documents.

As a general matter, I'm proud to continue the FTC's strong bipartisan tradition of international engagement and cooperation. This engagement spans the full range of FTC work and continues to provide significant benefit to the American public. Former Republican FTC Chairman Deborah Platt Majoras established the FTC's Office of International Affairs in 2007, declaring that "competition and consumer protection . . . . both have gone global. The FTC's new Office of International Affairs will more effectively support our investigations and litigation, coordinate with our international counterparts, and strengthen our efforts to promote competition and stop consumer fraud that crosses international borders."[1]

OIA's founding followed on significant efforts by former Republican Chairman Tim Muris to enhance the FTC's international capability. He noted that "because competition increasingly takes place in a worldwide market, cooperation with competition agencies in the world's major economies is a key component of the FTC's enforcement program."[2] Notable international efforts championed by former Chairman Muris include the founding of the International Competition Network (ICN) in October 2001 to provide a forum for antitrust officials worldwide to work toward consensus on best practices in antitrust enforcement and

[1] *Id.*
[2] Fed. Trade Comm'n, Prepared Statement of The Federal Trade Commission Before the Subcommittee on Commerce, Justice, State, the Judiciary and Related Agencies of the Committee on Appropriations United States House of Representatives (April 9, 2003), https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-fiscal-year-2004-appropriations/030409testimony.pdf.

policy.[3] He often cited "collaboration" among national enforcers as a key to that effort,[4] and stated that "[a]chieving convergence is no easy task, but we are fortunate to know something from past experience about how to get there."

From its original 14 members, ICN today has grown to include 140 competition agencies and, building on former Chairman Muris's legacy, the FTC continues to play a leading role in the organization. Reflecting on the FTC's role in the 21st century, former Republican Chairman William Kovacic emphasized that "effective cooperation with agencies outside the United States is a necessity."[5] Further developing this work, former Republican Chairman Joseph Simons held hearings on various aspects of the FTC's mission and activities, including on international cooperation. The report from the international hearings stated that "[p]anelists from foreign competition agencies and the private bar offered perspectives on enforcement cooperation among competition agencies. Panelists were unanimous in emphasizing that competition agencies must prioritize international case cooperation, especially given today's global economy."[6]

Notably, these longstanding FTC efforts have consistently enjoyed strong support from the business and legal communities, including the United States Chamber of Commerce, American Bar Association, and International Bar Association.[7] Several of these groups have

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[3] *See, e.g.*, Timothy J. Muris, Chairman, Fed. Trade Comm'n, Competition Agencies in a Market-Based Global Economy, Address at the Annual Lecture of the European Foreign Affairs Review (July 23, 2002), https://www.ftc.gov/news-events/news/speeches/competition-agencies-market-based-global-economy [hereinafter Muris Address]; *see also* Hugh M. Hollman & William E. Kovacic, *The International Competition Network: Its Past, Current and Future Role*, 20 MINN. J. INT'L L 274, 281 n.15, https://www.ftc.gov/sites/default/files/documents/public_statements/international-competition-network-its-past-current-and-future-role-hugh-hollman/1106internationalcompnetwork.pdf (noting that Chairman Muris was one of two agency heads who "stand out" for their support of ICN and that he "committed substantial FTC resources to the ICN's development….").

[4] Muris Address at 5, *supra* note 3.

[5] Fed. Trade Comm'n, FTC AT 100: INTO OUR 2ND CENTURY: THE CONTINUING PURSUIT OF BETTER PRACTICES 70, https://www.ftc.gov/sites/default/files/documents/public_statements/federal-trade-commission-100-our-second-century/ftc100rpt.pdf (underscoring the value of staff exchanges as "an extremely effective tool to share best practices, solidify bilateral relationships, and strengthen enforcement cooperation with foreign counterparts").

[6] Fed. Trade Comm'n, Hearings on Competition and Consumer Protection in the 21st Century: The FTC's Role in a Changing World (Oct. 2020) at 23.

[7] *See, e.g.*, U.S. Dep't of Justice and Fed. Trade Comm'n, Antitrust Guidelines for International Enforcement and Cooperation, Issued Jan. 13, 2017, Comments of the U.S. Chamber of Commerce at 3 (Dec. 1, 2016), https://www.justice.gov/media/868566/dl?inline (welcoming that the updated international antitrust guidelines "extend beyond enforcement and now include cooperation," and observing that "[a]ntitrust cooperation between jurisdictions is increasingly important, particularly with regard to merger review"); U.S. Dep't of Justice and Fed. Trade Comm'n, Antitrust Guidelines for International Enforcement and Cooperation, Issued Jan. 13, 2017, Comments of the Am. Bar Ass'n Antitrust and Int'l Law Sections (Dec. 1, 2016), https://www.justice.gov/media/868561/dl?inline ("The Sections welcome the addition of Chapter 5 [addressing international cooperation]. The International Competition Network ("ICN") Merger Working Group has highlighted that effective international cooperation depends on mutual understanding of frameworks, timetables, procedures and confidentiality rules and investigative processes between jurisdictions. The Agencies could consider also referring in the Proposed Update to the importance of ensuring that such mutual understanding exists."); U.S. Dep't of Justice and Fed. Trade Comm'n, Antitrust Guidelines for International Enforcement and Cooperation, Issued Jan. 13, 2017, Comments of the International Bar Ass'n at 4 (Nov. 30, 2016), https://www.justice.gov/media/868481/dl?inline ("welcom[ing] the Agencies' initiative to discuss at great length the scope of international cooperation" and noting "that effective international cooperation depends on mutual understanding of frameworks, timetables, procedures

often urged the FTC to cooperate and work closely with international enforcers. In 2016 the Chamber of Commerce wrote that it "welcomes the fact that the guidelines extend beyond enforcement and now include cooperation," observing that "[a]ntitrust cooperation between jurisdictions is increasingly important, particularly with regard to merger review."[8]

You express concern regarding the detail of an FTC staff attorney to the European Union's Directorate General for Competition ("DG Competition"). The FTC detailed its staff attorney responsible for the agency's engagement with the EU to DG Competition for a period of 12 weeks.

For more than two decades, the FTC has benefitted from an active program of staff exchanges on both the competition and consumer protection missions. The detail to DG Competition was part of and wholly consistent with this longstanding bipartisan FTC practice. Recognizing the many benefits of staff exchanges, Congress provided the FTC with specific authority to engage in these exchanges through the U.S. SAFE WEB Act, a bipartisan bill that was signed into law by President George W. Bush.[9]

Over the last 15 years, the FTC has regularly sent staff on detail to foreign counterpart agencies, including to key allies and trading partners like the European Union, the United Kingdom, Canada, and Mexico. Over that same period, the FTC has also hosted more than 130 international colleagues from over 40 jurisdictions. I am confident that the recent detail of an FTC staff attorney to DG Competition is wholly consistent with past FTC practices as well as Congressional intent and will prove beneficial to the FTC's competition mission.

You also raise concerns regarding FTC cooperation with the EU related to the Illumina/GRAIL merger. The Commission voted out this matter several months before I joined the agency, and thus the concerns you raise involve events that preceded my arrival. As is publicly documented, the Commission in March 2021 voted unanimously and on a bipartisan basis to issue an administrative complaint, alleging that the merger would violate Section 7 of the Clayton Act, 15 U.S.C. § 18, which forbids mergers "the effect of [which] may be to substantially lessen competition."[10] The Commission also authorized its staff to seek a preliminary injunction if needed to prevent the merger from going forward during the pendency of the administrative proceedings. The sole objective of this antitrust enforcement action was to protect the American public from an unlawful merger that the Commission determined would lead to higher prices, lower output, and less innovation, among other harms.

Following referrals from several member states, the European Commission ("EC") initiated its own law enforcement action to stop the acquisition in May 2021. Because the FTC understood that under EU law, Illumina could not complete the merger while the EC action was

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and confidentiality rules and investigative processes between the jurisdictions. Therefore, the Agencies could consider including reference in this section to the importance that such mutual understanding of investigative practices and procedures are in place, so as to increase transparency and effectiveness.").

[8] Comments of the U.S. Chamber of Commerce, *supra* note 7.

[9] 15 U.S.C. § 57c-1.

[10] The Commission votes to issue an administrative complaint when it finds "reason to believe" that the respondents are violating the law. 15 U.S.C. § 45(b).

pending, the Commission moved to dismiss the preliminary injunction action in federal court to conserve FTC and judicial resources.[11] However, the FTC continued its administrative action.[12]

After the Administrative Law Judge provided his initial decision, dismissing the FTC's challenge of Illumina's acquisition of GRAIL, FTC staff appealed the ALJ's decision to the full Commission.[13] The Commission received briefs, held oral argument, and on April 3, 2023 the Commission issued a unanimous and bipartisan Opinion and Order requiring Illumina to divest GRAIL, finding that the merger would stifle competition and innovation in the U.S. market for life-saving cancer tests.[14] Illumina has filed an appeal of the Commission's decision in the Fifth Circuit, and the Commission has stayed its order while the appeal is pending.

Cross-border communication is a longstanding best practice since mergers like this one have cross-border effects. The FTC undertakes its cooperative engagement in accordance with the following international agreements:

- 1991 Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws;
- 1998 Agreement Between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws; and

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[11] Illumina and GRAIL did not object to the dismissal, although they argued it should be with prejudice, preventing the FTC from filing another motion for a preliminary injunction at another time. The court agreed with the FTC and dismissed the preliminary injunction without prejudice.

[12] Despite being prohibited from consummating the transaction under European law, Illumina nonetheless closed on its purchase of GRAIL in August 2021. After conducting an investigation, the EC found that Illumina and GRAIL intentionally breached the EU Merger Regulation by implementing the transaction while the EC's merger review was pending. Press Release, European Commission, Commission Fines Illumina and GRAIL For Implementing Their Acquisition Without Prior Merger Control Approval (July 12, 2023), https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3773. Additionally, after Illumina consummated the transaction, the EC issued an order requiring Illumina to hold GRAIL as a separate entity during the pendency of its proceedings. *See* Press Release, European Commission, Commission Alleges that Illumina and GRAIL Breached EU Merger Rules by Early Implementation of Their Transaction (July 19, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_4604; Press Release, European Commission, The Commission Adopts a Statement of Objections Outlining Measures to Unwind Illumina's Blocked Acquisition of GRAIL (Dec. 5, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7403.

[13] Once the administrative complaint is issued, responsibility for prosecution is assigned to FTC staff known as Complaint Counsel, who are walled off from the Commissioners and the Administrative Law Judge, in accordance with the requirements of the Administrative Procedure Act and the Commission's own regulations. *See* 5 U.S.C. § 554(d)(2); 16 C.F.R. § 4.7(b). FTC administrative proceedings provide analogous due process protections to a trial in federal court, including an entitlement to take discovery; present facts, expert witnesses, and documentary evidence; and cross-examine the other side's witnesses. The ALJ renders a decision that is reviewed by the Commission *de novo.* If the Commission issues a cease-and-desist order, judicial review is available via a petition for review in the federal courts of appeals.

[14] *See* Press Release, Fed. Trade Comm'n, FTC Orders Illumina to Divest Cancer Detection Test Maker GRAIL to Protect Competition in Life-Saving Technology Market (Apr. 3, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/04/ftc-orders-illumina-divest-cancer-detection-test-maker-grail-protect-competition-life-saving.

- 2011 US-EU Merger Working Group Best Practices on Cooperation in Merger Investigations.[15]

Given that international cooperation can promote efficient and effective enforcement, the business community has long supported and encouraged the U.S. antitrust agencies to engage closely with international enforcement partners.[16] Merging firms routinely support the agencies' cooperation, including by voluntarily providing agencies with waivers to facilitate interagency discussions, as was the case in the Illumina/GRAIL matter.

Specifically, the DOJ-FTC Antitrust Guidelines for International Enforcement and Cooperation § 5.1.4 states, "[w]hile confidentiality obligations generally prohibit the Agencies from disclosing to foreign authorities confidential information submitted by a person, that person can enable the Agencies to engage in more meaningful cooperation with foreign authorities by granting the Agencies a waiver of confidentiality as to information that may be otherwise protected from disclosure."[17] Recognizing the value of that cooperation, Illumina and GRAIL voluntarily granted the FTC a waiver to share such confidential information related to the proposed transaction with the EC.[18] No company is ever required to grant this type of waiver, yet Illumina and GRAIL chose to do so.

Notwithstanding our cooperation, each agency carries out its own investigation independently, according to its own laws and considering the specific facts at issue in the jurisdiction. Thus, for example, the timing for the adoption of the EC's decision in Illumina/GRAIL was based on the EC's investigative timelines and procedures as set out in the EU Merger Regulation and was independent of the timing of any FTC decision in the matter.

The allegation that FTC worked with foreign regulators to deny U.S. companies due process is categorically false. The FTC never outsources its authority. The EC independently analyzed the merger consistent with its own laws and practices before concluding that the merger raised serious competition concerns and deciding to file a lawsuit blocking the merger. The FTC does not have the ability to control or direct the actions of the EC or its member states. Communications at the staff level are not evidence of bias by the Commissioners, who are walled off from Complaint Counsel once an administrative complaint is filed. The only Commissioner-level communications with foreign authorities that Illumina has cited are with officials of the United Kingdom, which is no longer part of the European Union, and those predated the filing of the FTC's administrative complaint.

As you note, the FTC has previously produced redacted versions of communications between FTC staff and EU regulators in response to a Freedom of Information Act ("FOIA") request made by the Chamber of Commerce regarding this same matter. The redactions in those materials are a result of the protections afforded to inter-agency communications by laws such as

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[15] The agreements and related best practices document are available at: https://www.ftc.gov/policy/international/international-cooperation-agreements.
[16] *See, e.g.*, Comments of the U.S. Chamber of Commerce at 3 (Dec. 1, 2016), *supra* note 7.
[17] *See* DOJ & FTC, Antitrust Guidelines for International Enforcement and Cooperation (Jan. 13, 2017), https://www.ftc.gov/system/files/documents/public_statements/1049863/international_guidelines_2017.pdf.
[18] Resp. Mot. to Reopen the Record ("Resp. Mot.") at 3 n.1, 5 n.4 (Mar. 4, 2023).

the U.S. SAFE WEB Act, a bill that was signed into law by former President George W. Bush.[19] None of these communications suggest any impropriety, much less any effort to deny Illumina and GRAIL their rights under U.S. law.

I hope this clarifies the routine nature of the cooperation between the EC and the FTC regarding our respective law enforcement actions pertaining to the Illumina-GRAIL merger.

Sincerely,

Lina Khan

Lina Khan
Chair
Federal Trade Commission

cc: The Honorable Jamie Raskin
Ranking Member
Committee on Oversight and Accountability

[19] These documents were appropriately redacted in part under FOIA Exemptions 3, 5, 6, 7(A), and 7(D), 5 U.S.C. § 552(b)(3), (5), (6), (7)(A) & (7)(D), and Section 21(f) of the FTC Act, 15 U.S.C. § 57b-2(f).

Digital Market Outcomes Workshop – Agenda

Attendees

- **CMA:** Sarah Cardell, Marcus Bokkerink, Will Hayter
- **US FTC:** Lina Khan, Maria Coppola, Andrew Heimert
- **US DoJ:** Dave Lawrence
- **ACCC:** Gina Cass-Gottlieb (Virtual), Mick Keogh, Marcus Bezzi, Kate Reader (Virtual), Anna Barker

Date: Friday 2 December 2022, 9.00 – 13.00

Location: Competition and Markets Authority, The Cabot, 25 Cabot Square, London, E14 4QZ. Virtual option also available.

Please refer to the associated slide pack for additional information.

Time (all GMT)	Session	Additional Info
9.00 – 9.30	Arrive from 9am. Guests to report to CMA Reception upon arrival where CMA officials can meet them. Key contacts for the day: Will Hayter - [redacted] Darren Montgomery - [redacted] Rosie Richardson – [redacted] Oli Clifford - [redacted]	Coffee, tea, and pastries served Room: HR11
9.30 – 9.35	**Welcome** Lead: Sarah Cardell, Interim Chief Executive, CMA	Room: HR12, plus virtual option
9.35 – 10.45	**Digital markets: achieving optimal outcomes and anticipating future risks** Lead: Marcus Bokkerink, Chair, CMA	

	This will be an open discussion, and detailed slides are included to aid the discussion. Please refer to **slide 5** for the objective of this session and the questions to be discussed.	
10.45 – 11.00	*Break*	Coffee, tea, and juice served Room: HR 11
11.00 – 12.30	**Market outcomes deep dive: mobile ecosystems** Lead: Will Hayter, Senior Director of the Digital Markets Unit, CMA This will be an open discussion, and detailed slides are included to aid the discussion. Please refer to **slide 13** for the objective of this session and the questions to be discussed.	Room: HR12, plus virtual option
12.30 – 12.55	**Possible future plans** Lead: Sarah Cardell, Interim Chief Executive, CMA The session will consider options for follow-ups to the workshop. Please refer to **slide 20** for the possible plans to be discussed.	
12.55 – 13.00	Close Lead: Sarah Cardell, Interim Chief Executive, CMA	
13.00 onwards	*Lunch*	Lunch served for those able to stay Room: HR11

June 29, 2022

Welcome

09:45 **LIANOS, Ioannis**, President of the Hellenic Competition Commission
BENETATOU, Kelly, Vice-President of the Hellenic Competition Commission

Greening Competition Law: Competition Law Enforcement, Climate Change and Sustainability

Moderator: **SNOEP, Martijn**, Chairman, Netherlands Authority for Consumers and Markets (ACM)

10:00 - 11:20 Panelists (in alphabetical order):

- **INDERST, Roman**, Goethe University Frankfurt
- **ROSENBOOM, Nicole**, Oxera
- **SCHINKEL, Maarten-Pieter**, University of Amsterdam

11:20 - 11:40 Break

The global regulation of digital ecosystems: ex ante v. ex post approaches/institutional architecture implications – The next steps

Moderator: **GUERSENT, Olivier**, Director General, DG Competition, European Commission

11:40 - 13:00 Panelists (in alphabetical order):

- **CAFFARRA, Christina**, CRA
- **JACOBIDES, Michael**, London Business School
- **PETROPOULOS, George**, MIT Sloan School of Management & Bruegel
- **SCWEITZER, Heike**, Humboldt University, Berlin
- **NEWMAN, John,** Deputy Director, US Federal Trade Commission

13:00 - 14:20 Lunch

14:20 - 14:40 **Keynote**

KELLY SLAUGHTER, Rebecca, Commissioner, US Federal Trade Commission

14:40 - 16:00 **Macroeconomic conditions, macroeconomic tools and competition law: developing a "macro" perspective for competition law enforcement?**

Moderator: **BONAKELE, Tembinkosi**, Commissioner, Competition Committee of South Africa

Panelists (in alphabetical order):

- **ANDREONI, Antonio**, University College London
- **JENNY, Frederic**, President, Competition Committee, OECD
- **PELLEGRINO, Bruno**, University of Maryland's Smith School of Business
- **PITELIS, Chris**, University of Leeds

16:00 - 16:10 Break

Food price hikes, global food value chains and the resilience of the global food system: implications for competition law enforcement

Moderator: **JENNY, Frederic,** President, Competition Committee, OECD

16:10 - 17:30

Panelists (in alphabetical order):

- **FOX, Eleanor**, New York University School of Law
- **MOREIRA, Teresa, UNCTAD**
- **REY, Patrick**, Toulouse School of Economics
- **ROBERTS, Simon**, University of Johannesburg

17:30 - 17:40 Break

The Limits of Collusion in Competition Law: Invitations to Collude, Price Signaling, Algorithmic Collusion

Moderator: **DOSHI, Hetal**, Deputy, Assistant Attorney General, US Department of Justice

17:40 - 19:00

Panelists (in alphabetical order):

- **ECONOMIDES, Nick**, Leonard N. Stern School of Business
- **FIRST, Harry**, New York University School of Law
- **HARRINGTON, Joseph**, University of Pennsylvania
- **WAGNER VON PAPP, Florian**, Helmut Schmidt University, Hamburg

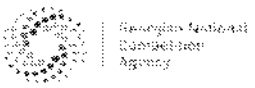
K S A P Lech Kaczyński National School of Public Administration

Office of Competition and Consumer Protection

Competition enforcement - best practices and tools based on the experience of the Polish Office of Competition and Consumer Protection and partners

October 17-21, 2022

Warsaw



Seminar within the project:

Eastern Partnership Academy of Public Administration

The program is financed by the funds of Polish development program of the Ministry of Foreign Affairs of the Republic of Poland

DAY 1 (MONDAY, OCTOBER 17, 2022)	
08:45-09:00	**Registration and morning coffee**
09:00-09:25	**Welcome and introduction to the training** • *Wojciech Federczyk, Director, Lech Kaczyński National School of Public Administration* • *Representative of the Ministry of Foreign Affairs* • *Tomasz Chróstny, President, Office of Competition and Consumer Protection (UOKIK)* • *Martyna Derszniak-Noirjean, Director, International Cooperation UOKIK*
09.25-09.45	**Introduction of participants** **Family photo**
09.45-11.15	**Investigation process of cases of anti-competitive concerted actions** • *Márk Péli-Bencze (GVH – Hungary)* • *Russel Damtoft (FTC – USA)* • *Pierre Horna (UNCTAD) – remotely* *Moderation – Martyna Derszniak-Noirjean*
11.15-11.30	Q&A
11.30-11.45	**Break**
11.45-13.30	**Leniency programs and confidentiality guarantees for the applicant** • *Márk Péli-Bencze (GVH – Hungary)* • *Bryan Serino (US DOJ) – remotely* • *Timea Palos (DG COMP) – remotely* • *Pierre Horna (UNCTAD) - remotely* *Moderation – Martyna Derszniak-Noirjean*
13.30-13.45	Q&A, discussion
13.45-14.30	**Lunch** *KSAP cafeteria*
14.30-15.30	**First case study of the investigation process (or leniency): Examination of actual cases as examples of the investigation process** • *Jan Polański, Counsellor, Department of Competition Protection, UOKiK* ➢ *Case «Truck Dealer Cartel»*
15.30-15.45	Q&A, discussion

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15.45-16.45	**Second case study of the investigation process (or leniency): Examination of actual cases as examples of the investigation process** • *Kamil Nejezchleb, Vice-chair, Office for the Protection of Competition, Czech Republic - remotely* ➢ *Case «Bid Rigging in Tender for the Study of High-Speed Railway»;* *or* ➢ *Case «Bid Rigging in the Area of Electrical Installation Public Contracts»*
16.45-17.00	Q&A, discussion
17.00-17.10	**Conclusions on the first day** • *Martyna Derszniak-Noirjean, Director, International Cooperation Office of the Office of Competition and Consumer Protection*
DAY 2 (TUESDAY, OCTOBER 18, 2022)	
9.00-10.30	**Dawn-raids at entrepreneurs – UOKiK experience** • *Anna Janowska-Kupidurska, Head, Division of the Department of Competition Protection of UOKiK*
10.30-10.45	Q&A: Discussions
10.45-11.00	**Break**
11.00-12.00	**Keeping electronic documents secure during inspections** • *Janusz Wójcicki, Advisor of the Department of Competition Protection of UOKiK*
12.00-12.15	Q&A: Discussions
12.15-13.00	**Lunch** *KSAP cafeteria*
13.00-15.00	**Inspections' training** • *Timea Palos, DG Competition, European Commission - remotely*
15.00-15.15	Q&A: Discussions
15.15-15.30	**Conclusions on the second day** *Representative of UOKIK*
17.00-21.00	**Sightseeing trip around Warsaw** *Start from the hotel*
DAY 3 (WEDNESDAY, OCTOBER 19, 2022)	
9.30-10.45	**Anti-competitive agreements in the agricultural sector – contractual advantage/UTP Overview and legal provisions** • *Piotr Adamczewski, Director, Bydgoszcz Branch Office, UOKiK*
10.45-11.00	Q&A
11.15-11.30	**Break**

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11.30-12.30	**Anti-competitive agreements in the agricultural sector – contractual advantage/UTP cases – Jeronimo Martins Polska** • *Agnieszka Szafran, Counsellor, Bydgoszcz Branch Office, UOKiK*
12.30-13.00	Q&A
13.00-13.45	**Lunch** *KSAP cafeteria*
13.45-14.45	**Anti-competitive agreements in the agricultural sector – contractual advantage/UTP – procedure overview** • *Paweł Kuźma, Director, Contractual Advantage Department, UOKiK*
14.45-15.15	Q&A
15.15-15.30	**Conclusions on the third day** *representative of UOKIK*
19.00-21.00	**Dinner reception** [HYPERLINK "https://www.cafe-zamek.pl/index.php?leng=eng"]
DAY 4 (THURSDAY, OCTOBER 20, 2022)	
9.00-10.30	**Investigations in digital markets – introduction and overview of challenges and approaches** • *Introduction on digital markets, Renato Ferrandi - Senior Competition Expert, Coordinator of the OECD-GVH Regional Centre for Competition*
10.30-10.45	Q&A: Discussions
10.45-11.00	**Break**
11.00-12.30	**Investigations and cases in the digital markets: introduction, overview and cases.** • *Brice Allibert, DG Competition, European Commission - remotely* ➢ *Case «Google shopping»; Case «Qualcomm».*
12.30-12.45	Q&A: Discussions
12.45-13.45	**Lunch** *KSAP cafeteria*
13.45-15.00	**Investigations and cases in the digital markets** • *Mr Márk Pánczél - head of Antitrust Section (GVH – Hungary)*
15.00-15.15	Q&A
15.15-15.30	**Conclusions on the fourth day** *Representative of UOKIK*
DAY 5 (FRIDAY, OCTOBER 21, 2022)	
9.00 – 10.00	**Investigations and cases in the digital markets – Spanish experience** • *María Pilar Canedo – Commissioner, National Markets and Competition Commission (CNMC - Spain)*
10.00-10.15	Q&A
10.15-11.15	**Investigations in the digital markets**

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- *Istvan Hantosi - Deputy Head of Section/International Relations (GVH-Hungary)*

11.15-11.30 **Break**

11.30-13.00 **Practical exercises in digital markets**
- *Renato Ferrandi - Senior Competition Expert, Coordinator of the OECD-GVH Regional Centre for Competition*

13.00-13.45 **Lunch**

KSAP cafeteria

13.45-15.15 **Fines assigned by the competition authorities**
- *Jan Ulański, Legal Department, UOKiK*
- *María Pilar Canedo – Commissioner, National Markets and Competition Commission (CNMC - Spain)*

15.15-15.30 Q&A: Discussions

15.30-16.00 **Evaluation questionnaire**

16.00-16.30 **Handing out certificates, conclusions and closure of the event**
- *Wojciech Federczyk, Director of the Lech Kaczyński National School of Public Administration*
- *Representative of the Ministry of Foreign Affairs*
- *Martyna Derszniak-Noirjean, Director, International Cooperation Office of the Office of Competition and Consumer Protection*

Remarks

The stationary classes at KSAP, ul. Wawelska, 56, Warsaw, room 305

The online meeting at KSAP, ul. Wawelska, 56, Warsaw

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Visit by Kristina Mulligan to Bundeskartellamt Schedule for June 19-20, 2023

Date	Time	Contact Person	Department
19 June	3-4pm	International Unit	
	4-5pm	Kay Weidner	Head of Press, Public Relations
	5-6pm	Markus Lange	Head of Organization
	6pm onwards	International Unit	**dinner**
20 June	9.30-10am	Sebastian Wismer	Head of Digital Economy
	10-10.45am	Irene Sewczyk	Head of competition protection and consumer protection
	10.45-11.15am	Sabine Sabir	competition protection and consumer protection
	11.15-12pm	Frederike Finke	German and European Merger Control
	12pm onwards	International Unit	**BKartA Summer Party**

FINAL *FINAL* PROGRAMME

2 March 2023

KEYSTONE

Antitrust, Regulation & the Political Economy

Cristina Caffarra
Chair

REGISTER HERE

Steigenberger Wiltcher's Hotel in Brussels
In-Person & Live Streamed

8:30-8:35CET Opening & Welcome
Cristina Caffarra, Chair

8:35-9:00CET Keynote
Margrethe Vestager, Executive Vice President and Commissioner for Competition, European Commission

9:00-9:40CET Rethinking Industrial Policy, Competition & Consumer Protection in the Global Polycrisis
In Conversation:
Rana Foroohar, FT Columnist and Associate Editor
Rohit Chopra, Director, U.S. Consumer Financial Protection Bureau
René Repasi, Member, European Parliament

9:40-11:05CET Fireside Chat: Expanding the Antitrust Agenda: Do we Need New Law, or just New Posture?
Tim Wu, Former Special Advisor on Tech and Competition Policy, White House
Joined by:
Andreas Mundt, President, Bundeskartellamt
Andrea Coscelli, Partner Keystone and Former Chief Executive, Competition and Markets Authority
Tommaso Valletti, Professor of Economics, Imperial College Business School, London
Barry Lynn, Executive Director, Open Markets Institute
John Newman, Deputy Director, Bureau of Competition, U.S. Federal Trade Commission
Rod Sims, Professor, Crawford School of Public Policy, The Australian National University and former Chair, Australian Competition and Consumer Commission

11:05-11:20CET *Coffee break*

11:20-12:30CET "Plugging Gaps" in Antitrust Enforcement
Rebecca Slaughter, Commissioner, U.S. Federal Trade Commission
Doha Mekki, Principal Deputy Assistant Attorney General, U.S. Department of Justice Antitrust Division
Benoît Coeuré, President, Autorité de la Concurrence
Martijn Snoep, Chairman of the Netherlands Authority for Consumers and Markets (ACM)
Margarida Matos Rosa, President, Portuguese Competition Authority

12:30-12:50CET Keynote/Fireside Chat: Addressing Market Power: The Role of The European Courts
Advocate General Kokott, Court of Justice of the European Union

12:50-13:35CET *Lunch*

13:35-14:00CET Keynote
Jonathan Kanter, Assistant Attorney General, U.S. Department of Justice Antitrust Division

14:00-15:10CET Market Power in a Post-Neoliberal World
Dani Rodrik, Ford Foundation Professor of International Political Economy, Harvard Kennedy School
Luigi Zingales, Professor of Entrepreneurship and Finance, University of Chicago Booth School of Business
Jan Eeckhout, ICREA Research Professor of Economics, UPF Barcelona
Thomas Philippon, Max L. Heine Professor of Finance, Stern School of Business, New York University
John Van Reenen, Ronald Coase Chair in Economics and School Professor and Director, London School of Economics
Silvana Tenreyro, Professor of Economics, London School of Economics
Natalia Fabra, Professor of Economics, Universidad Carlos III de Madrid

15:10-16:20CET New Challenges in Merger Control
Sarah Cardell, Chief Executive, Competition and Markets Authority
Susan Athey, Chief Economist, U.S. Department of Justice Antitrust Division and Economics of Technology Professor, Stanford University
Pierre Régibeau, Chief Competition Economist, DG Competition at the European Commission
Aviv Nevo, Director of the Bureau of Economics, U.S. Federal Trade Commission
Chiara Fumagalli, Associate Professor of Economics, Bocconi University, Milan
Bruno Pellegrino, Assistant Professor of Finance, University of Maryland's Smith School of Business

16:20-16:30CET *Coffee break*

16:30-16:50CET Online Harms, AI & Democracy
In Conversation:
Representative Ken Buck, U.S. Congress, Representative for Colorado
Marco Iansiti, David Sarnoff Professor of Business Administration, Harvard Business School
Joined by Panel

16:50-18:00CET Making Big Tech Better vs Making it Smaller: Will Antitrust or Regulation Get There First?
Ken Paxton, Attorney General of Texas
Stéphanie Yon-Courtin, Member, European Parliament
Cory Doctorow, Journalist & Author
Alberto Bacchiega, Director, Information, Communication and Media, DG Competition, European Commission
Ariel Ezrachi, Slaughter and May Professor of Competition Law and a Fellow of Pembroke College, University of Oxford
Filomena Chirico, Head of Unit, DG Connect, DMA Task Force

18:00-18:20CET Concluding Fireside
Olivier Guersent, Director General DG Competition, European Commission

18:20CET *Champagne Reception*

There is no registration fee to attend this conference. Final programme, subject to changes. The conference will be livestreamed, therefore photos and recordings of in-person attendees may be captured during the event and be posted to Keystone's website.

www.brusselsconference.com

Organisation for Economic Co-operation and Development

DAF/COMP/GF/A(2022)1

Unclassified

English - Or. English

14 November 2022

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Cancels & replaces the same document of 12 November 2022

Global Forum on Competition

Draft Agenda: Global Forum on Competition

1-2 December 2022 9h30
Paris, France

The 21st meeting of the Global Forum on Competition will be held on 1-2 December 2022 in Room 1 of the OECD Conference Centre, 2 rue André Pascal, 75116 Paris.

Ms. Lynn Robertson, Manager GFC, Competition Expert, OECD Competition Division.
E-mail address: Lynn.Robertson@oecd.org, Tel.: +(33-1) 45 24 18 77.

JT03507493

DRAFT Agenda for the 21st OECD Global Forum for Competition

Chair: Frédéric Jenny, Chairman of the OECD Competition Committee

Thursday 1 December 2022
OPENING SESSION

9:30 10:10 CET

- **Introductory Remarks by Carmine Di Noia**, Director, Directorate for Financial and Enterprise Affairs, OECD
- **Opening Remarks by Mathias Cormann,** OECD Secretary-General
- **Keynote Address by Margrethe Vestager**, Executive Vice President for A Europe Fit for the Digital Age and Commissioner for Competition, European Commission
- **Special Remarks by Rebeca Grynspan**, Secretary-General, UNCTAD
- **Introductory Comments by Frédéric Jenny**, Chair, OECD Competition Committee

SESSION 1: THE GOALS OF COMPETITION POLICY

10:10 - 12:30 CET

Most jurisdictions have embraced some form of the consumer welfare standard to achieve the basic goals of competition: to maintain and encourage the process of competition in order to promote efficient use of resources while protecting the freedom of economic action of various market participants. Some also consider competition policy as a tool to contribute to a number of other objectives: pluralism, decentralisation of economic decision-making, preventing abuses of economic power, promoting small business, fairness and equity and other socio-political values. These "supplementary" objectives tend to vary across jurisdictions and over time. The latter reflects the changing nature and adaptability of competition policy so as to address current concerns of society while remaining steadfast to the basic objectives.

The OECD Global Forum on Competition will include a pragmatic session that will question whether competition law and policy needs to adapt as a policy instrument to better accommodate socio-economic trends such as the rising importance of sustainability. Is the current consumer welfare focus sufficient? Is the instrument of competition law enforcement still effective or does it need to be complemented by other instruments, or new legislation?

Chair: Frédéric Jenny, Chair, OECD Competition Committee

Speakers:

- **Spencer Weber Waller**, Justice John Paul Stevens Chair in Competition Law and Professor, Loyola University Chicago School of Law
- **Esteban Greco**, Director, Gamescecon and former President, CNDC

Agency Representatives:

- **Johannes B. R. Bernabe**, OIC Chairperson and Commissioner, Philippine Competition Commission, Philippines
- **Tembinkosi Bonakele**, Former Commissioner, Competition Commission South Africa
- **Gina Cass-Gottlieb**, Chair, Australian Competition and Consumer Commission
- **Lina Khan**, Chair, Federal Trade Commission, United States

Contributions from:

Consumers International – DAF/COMP/GF/WD(2022)1

Pakistan - DAF/COMP/GF/WD(2022)3

Uzbekistan - DAF/COMP/GF/WD(2022)2

Documentation is also available at: oe.cd/gcp.

12.30 - 14:30: Official photo & Lunch break

SESSION II: SUBSIDIES, COMPETITION AND TRADE

14:30 - 18:00 CET

The role of subsidies in distorting trade and in un-levelling the playing field in antitrust markets has been well analysed over the years. However, less attention has been given to the role that subsidies may have in antitrust analysis and how competition authorities integrate (or not) the fact that a market player involved in a competition investigation benefits from domestic or foreign subsidies that grants it a competitive advantage over its competitors. While this question seems to be less relevant in cartel enforcement, recent policy discussion has focussed on the role of subsidies in monopolisation/abuse of dominance cases as well as in merger control. It is still an open question whether competition authorities should have any role in assessing the impact of subsidies when applying competition law or whether the issues should be left to international law.

Against this background, the session will explore the role that competition authorities can play in the interplay between subsidies, competition and trade. More specifically, the Roundtable will investigate the extent to which, and how, subsidies should be part of the competition analysis of competition authorities. Questions include:

- To what extent are subsidies currently incorporated by competition authorities in competition analysis?
- Should subsidies be incorporated (more or differently) into the competition analysis, and if so, why and how?
- What theories of harm may apply to subsidies, and what is the economic basis for these theories?
- What analytical techniques can be used to assess these theories, and what types of evidence are needed to use them?
- Is there (or should there be) a difference in how domestic subsidies and foreign subsidies should be assessed when dealing with a competition enforcement case?

Chair: Frédéric Jenny, Chair, OECD Competition Committee

Speakers:

- **Alicia García-Herrero**, Senior Fellow, European think-tank BRUEGEL and Chief Economist for Asia Pacific, Natixis
- **Anabel González**, Deputy Director-General, World Trade Organisation
- **Miguel de la Mano**, Partner, RBB Economics

Documentation:

Call for contributions: DAF/COMP/GF(2022)3

Note by the Secretariat DAF/COMP/GF(2022)6

Contributions from:

Bangladesh - DAF/COMP/GF/WD(2022)39

Dominican Republic - DAF/COMP/GF/WD(2022)55

European Commission - DAF/COMP/GF/WD(2022)40

Kazakhstan - DAF/COMP/GF/WD(2022)41

Poland - DAF/COMP/GF/WD(2022)42

UNCTAD - DAF/COMP/GF/WD(2022)44

Summaries of contributions - DAF/COMP/GF/WD(2022)43

Documentation is also available at: oe.cd/setr.

18.30 - 21:00: Cocktail (tbc)

Friday 2 December 2022
SESSION III: INTERACTIONS BETWEEN COMPETITION AUTHORITIES AND SECTOR REGULATORS

10:00 13:00 CET

Effective co-operation with sector regulators is an important element to promote competition in regulated sectors. While the objectives pursued by competition authorities and sector regulators are often aligned, differences in the substantive rules they apply and different perspective on the same matters may lead to diverging outcomes. In addition, even when competition authorities and sector regulators pursue the same objective of promoting competition in a sector, there are situations when the respective mandates are not clear and the institutional set-up does not foster co-operation between different authorities. In order to address challenges and improve co-operation on enforcement cases, the session will provide a platform for sharing good practices and learning from the experience of other jurisdictions.

This roundtable discussion will seek to provide practical insights into the co-operation between competition authorities and sector regulators, in particular:

- What are the key points covered by formal agreements between competition authorities and sector regulators or in legal provisions about co-operation?
- How do competition authorities and sector regulators co-operate in practice? What are the most effective tools?
- Is co-operation more fruitful with certain sector regulators and more complex with others? What are the factors affecting the quality of co-operation?

Chair: Alexandre Cordeiro Macedo, President, Administrative Council for Economic Defense (CADE), Brazil

Speakers:

- **Martin Cave**, Chair, UK Gas & Electricity Markets Authority (GEMA), United Kingdom
- **Pablo Márquez**, Partner, ECIJA and former Chairman, Colombia's Commission for Communications Regulation (CRC) and former Superintendent, Superintendence for Protection of Competition (SIC), Colombia

- **Nomfundo Maseti**, Full-Time Regulator Member, National Energy Regulator of South Africa (NERSA), South Africa

Documentation:

Call for contributions: DAF/COMP/GF(2022)2

Note by the Secretariat DAF/COMP/GF(2022)4

Contributions from:

Albania - DAF/COMP/GF/WD(2022)4

Argentina - DAF/COMP/GF/WD(2022)5

Belgium - DAF/COMP/GF/WD(2022)57

Brazil - DAF/COMP/GF/WD(2022)6

Bulgaria - DAF/COMP/GF/WD(2022)7

Colombia DAF/COMP/GF/WD(2022)53

Consumers International - DAF/COMP/GF/WD(2022)8

Costa Rica - DAF/COMP/GF/WD(2022)9

CUTS - DAF/COMP/GF/WD(2022)46

Egypt - DAF/COMP/GF/WD(2022)10

El Salvador - DAF/COMP/GF/WD(2022)11

Estonia - DAF/COMP/GF/WD(2022)12

European Commission - DAF/COMP/GF/WD(2022)13

Georgia - DAF/COMP/GF/WD(2022)14

Greece - DAF/COMP/GF/WD(2022)15

India - DAF/COMP/GF/WD(2022)16

Kenya - DAF/COMP/GF/WD(2022)17

Latvia - DAF/COMP/GF/WD(2022)18

Malaysia - DAF/COMP/GF/WD(2022)19

Mexico - DAF/COMP/GF/WD(2022)20

Moldova - DAF/COMP/GF/WD(2022)21

Paraguay - DAF/COMP/GF/WD(2022)23

Serbia – DAF/COMP/GF/WD(2022)51

Chinese Taipei - DAF/COMP/GF/WD(2022)56

Turkey – DAF/COMP/GF/WD(2022)52

Ukraine - DAF/COMP/GF/WD(2022)24

United Kingdom - DAF/COMP/GF/WD(2022)25

United States - DAF/COMP/GF/WD(2022)26

Uzbekistan - DAF/COMP/GF/WD(2022)27

Summaries of contributions - DAF/COMP/GF/WD(2022)28

Documentation is also available at: oe.cd/icar.

13.00 - 14:45: Lunch break

SESSION IV: REMEDIES AND COMMITMENTS IN ABUSE CASES

14:45 - 17:45 CET

When an abusive conduct of dominant undertakings is found, this will often require competition authorities, in addition to sanctions and/or cease and desist orders, or as an alternative way of case resolution, to impose remedies or accept commitments by the dominant undertakings. The aim is to effectively stop the abusive conduct, and to create conditions that allow to restore or enable competition. To avoid further damage to the markets in question, such remedies and commitments need to be timely, effective, and proportionate.

In December 2022, the Global Forum on Competition will hold a roundtable to revisit the options available to competition authorities in designing such remedies and commitments, and to discuss practical insights and experiences, in particular:

- What criteria guide competition authorities when using remedies and commitments in addition or as an alternative to sanctions?
- Which cases are suitable for structural remedies, and in which cases are behavioural remedies more adequate?
- Which lessons can be drawn from the monitoring of the compliance with remedies and commitments that were imposed or accepted? Can sector regulators assist competition authorities in this task?
- What are insights gained from an ex-post evaluation of previously applied remedies and commitments?

Chair: Frédéric Jenny, Chair, OECD Competition Committee

Speakers:

- **Lucía Ojeda Cárdenas**, Partner, SAI Law & Economics
- **Gwen Grecia-De Vera**, Director, Competition Law and Policy Program, University of the Philippines Law Centre
- **Frank Maier-Rigaud**, Managing Director, ABC Economics
- **Anna Pisarkiewicz**, Research Fellow, EUI Centre for a Digital Society (CDS)

Documentation:

Call for contributions: DAF/COMP/GF(2022)1

Note by the Secretariat – DAF/COMP/GF(2022)5

Contributions from:

Argentina - DAF/COMP/GF/WD(2022)48

BEUC - DAF/COMP/GF/WD(2022)29

Bulgaria - DAF/COMP/GF/WD(2022)30

Costa Rica - DAF/COMP/GF/WD(2022)31

Croatia - DAF/COMP/GF/WD(2022)32

Ecuador - DAF/COMP/GF/WD(2022)61

European Commission - DAF/COMP/GF/WD(2022)33

Fiji - DAF/COMP/GF/WD(2022)50

Hungary - DAF/COMP/GF/WD(2022)58

Japan - DAF/COMP/GF/WD(2022)34

Korea - DAF/COMP/GF/WD(2022)35

Latvia - DAF/COMP/GF/WD(2022)36

Mexico - DAF/COMP/GF/WD(2022)59

Slovenia - DAF/COMP/GF/WD(2022)47

Chinese Taipei DAF/COMP/GF/WD(2022)54

Turkey - DAF/COMP/GF/WD(2022)49

United States - DAF/COMP/GF/WD(2022)37

Summaries of contributions - DAF/COMP/GF/WD(2022)38

Documentation is also available at: oe.cd/rcac.

FINAL SESSION: OTHER BUSINESS AND PROPOSALS FOR FUTURE WORK

17:45-18:00 CET

Chair: Frédéric Jenny, Chair, OECD Competition Committee

https://cmadataconference.co.uk

CMA Competition & Markets Authority

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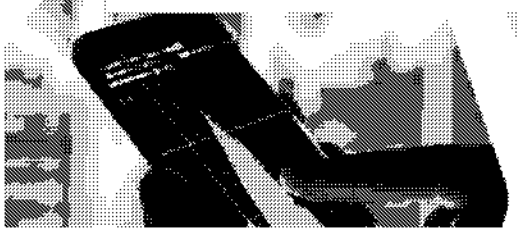
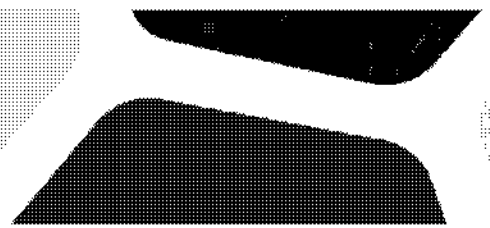
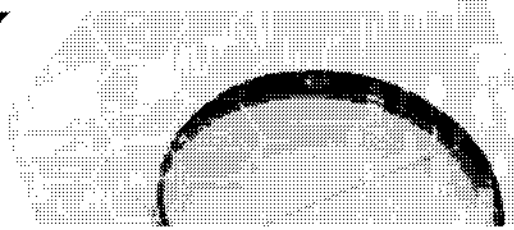




AGENDA

Consultations on competition law reform for Ukraine
U.S. Federal Trade Commission; EU Twinning Program; Antimonopoly Committee of Ukraine
December 13-16, 2022
Hotel Radisson Blu Astorija
Vilnius, Lithuania

OBJECTIVE. To identify unresolved issues, to discuss and facilitate decisions on them, and to identify any work still needed and who will do it. The following are potential unresolved issues. Those which have been resolved, or which may be resolved before the meeting, may be removed from the agenda.

*[*Brackets after items refer back to the numbers on the tracking spreadsheet that has been shared between USAID, AMCU, and Twinning.]

Tuesday, 13 December

9:00 am **INTRODUCTORY REMARKS**

U.S. Ambassador to Lithuania Robert S. Gilchrist

Sarunas Keserauskas, Chair, Lithuanian Competition Council (by video link)

Anzhelika Konoplianko,, Deputy Chair, Antimonopoly Committee of Ukraine

9:10 am **BLOCK ONE: PRIORITIES AND COURTS**

1. Ability of AMCU to set its own priorities [28]

   CURRENT STATUS: USAID and Twinning recommend that AMCU be able to set its own priorities, as required by EU Acquis and as originally included in DL 5431 first version. The proposal gives AMCU this authority but allows private parties whose complaints are declined to seek *limited* review in the administrative court.

   ISSUES FOR DISCUSSION: Does the AMCU accept this proposal? Is the overall structure of the proposal broad enough and specific enough? Is the standard of judicial review of a decision that a complaint does not meet AMCU's priorities narrow enough to prevent courts from undermining the ability of AMCU to set its own priorities?

   INTRODUCTION: Pavel (USAID lead: Dan)

2. Role of the Courts in Antimonopoly Enforcement and private right of actions for damages [22, 26, 29]

   CURRENT STATUS: If AMCU is authorized to decline to consider some incoming complaints, those complaining parties need to have a forum to pursue their allegations. The EU Acquis requires, and USAID and EU Twinning experts recommend, creating a private right of action for

violating the competition laws. However, the creation of a private right of action creates a risk of inconsistency should different courts handle review of AMCU decisions and private rights of action. There is also an issue with lack of judicial expertise in competition law enforcement. The proposal is that a chamber specializing in competition law will be created within the Economic Court, which would hear both AMCU and private cases. To ensure consistency, parties would have to notify AMCU of private actions, and AMCU would have the right to take up the case itself or to make its views known to the court. Awaiting input from judicial project.

ISSUES FOR DISCUSSION: Can we find a way to implement this that will be consistent with judicial reform issues? A related question will be whether this court would also be empowered to authorize dawn raids (discussed later).

INTRODUCTION: Russ (USAID Justice for All Program participants by video link)

3. Possible interim arrangements if judicial reform is delayed. (What existing court might be stood up to handle this?)

CURRENT STATUS: New Topic.

ISSUES FOR DISCUSSION: If an arrangement is proposed that the judiciary is not presently capable of implementing, what interim measures might be appropriate?

INTRODUCTION: None. Continuation of previous topic.

12:00 N LUNCH

Lunch will be provided offsite by the Lithuanian Competition Council, location to be announced.

2:00 PM BLOCK TWO: ENFORCEMENT TOOLS

1. Inspection in homes and other premises [relates to 29 and 32]

CURRENT STATUS: USAID has drafted a position paper but legislative language has to wait for input from judicial project. Twinning and USAID agree that dawn raids of both private and business premises would need to be approved by the judiciary. Twinning objected to the delay in implementation. AMCU objects for implementing the need to obtain court permission for dawn raids of business premises. Awaiting input from judicial project.

ISSUES FOR DISCUSSION: What should be the approach to business and private inspections? Is the implementation delay acceptable? What court would be competent to issue such approvals?

INTRODUCTION: Bryan

2. Interviews [33]

CURRENT STATUS: Twinning has drafted a proposal. AMCU indicates that the proposals do not cover the issue of dividing responsibility between individuals and business entities. USAID will submit comments.

ISSUES FOR DISCUSSION: Separation of liability of between individuals and business entities.

INTRODUCTION: Jolanta. (USAID lead: Russ)

Wednesday, 14 December

9:00 AM **BLOCK THREE: SUBSTANTIVE COMPETITION LAW**

1. Dominance

   a. Review of the Definition of Dominant Position [7]; [10-15] also implicated.

   CURRENT STATUS: AMCU and Twinning have produced a document that makes recommendations about the definition of dominance USAID will provide comments shortly.

   ISSUES FOR DISCUSSION: Are specific definitions needed for concepts such as network effects, multisided markets, and countervailing buyer power? hould collective dominance be retained, or should it be addressed as an agreement proved by circumstantial evidence? Should there be presumptions of dominance?

   INTRODUCTION: Jolanta (USAID: Dan, Russ & John; Twinning: Thorsten Kaeseberg)

   b. Review of the Notion of Abuse [8] and Objective Justifications for Abuse of Dominance [9]

   CURRENT STATUS: AMCU and Twinning have produced a document that makes recommendations about the definitions of abuse of dominance and justifications. USAID is providing comments.

   ISSUES FOR DISCUSSION: Should there be a single standard for abuse of dominance or definitions of particular types of conduct? If yes, there should be discussion of abusive pricing, price discrimination, imposing restrictions on access. Discussion is also needed about how this provision would interact with abuse of superior bargaining position.

   INTRODUCTION: Jolanta

   c. Abuse of Superior Bargaining Position [37]

   CURRENT STATUS: Documents have been exchanged between USAID, Twinning, and AMCU, still resolving issues for determination.

   ISSUES FOR DISCUSSION: The definition of dependence and the relation between that concept and dominance and how to address objective justifications for the conduct. To what degree should the several categories of specific ASBP topics mentioned in legislation from the original AMCU list be included at this point rather than in guidelines or secondary legislation? How to avoid an excessive volume of complaints and disputes (criteria for selecting cases for consideration and filters for complaints)?

   INTRODUCTION: John

***12*:00 N** **LUNCH. P**rovided at the hotel by the USAID Competitive Market Project

1:00 PM

1. Definition of undertaking [30]

   CURRENT STATUS: Twinning sent a first draft to AMCU and AMCU considered the draft and sent a consolidated TW-AMCU version. USAID is waiting for the translation. This topic can be omitted if there are no open issues.

   ISSUES FOR DISCUSSION: Discussion of the linguistical issue: undertaking vs economic entity.

   INTRODUCTION: Jolanta

2. Agreements [10-15; 17]

   CURRENT STATUS: Twinning has sent a first draft to AMCU and to USAID, which has made comments.

   ISSUES FOR DISCUSSION: Introduction and disclosure of the concept of restrictions "by object restrictions" and "by consequence". The possibility of assigning the entire scope of responsibility for anti-competitive concerted actions to only one participant of concerted actions. SME concerted action - should it be removed?

   INTRODUCTION: Irma (by video link)

3. Guidelines on concentration [3]

   CURRENT STATUS: Twinning has sent a first draft to AMCU. AMCU considered the draft and sent feedback to Twinning and USAID. Twinning sent a second draft on 30 November

   ISSUES FOR DISCUSSION: General presentation of the by-law drafted and is there need for additional changes to the law?

   INTRODUCTION: Ieva

Thursday, 15 December

9:00 AM BLOCK THREE: AGENCY INDEPENDENCE AND STRUCTURE

INSTITUTIONAL DESIGN

1. Number, Method of appointment and Removal of AMCU Chair and State Commissioners [27, part]

   CURRENT STATUS: USAID and Twinning have recommended harmonizing procedures for appointment and removal for the Chair and State Commissioners. In addition, we have recommended additional qualifications for Commissioners and some restrictions on outside employment. There seems to be agreement that the best number of State Commissioners is five or seven.

   ISSUES FOR DISCUSSION: Is AMCU in agreement with proposal? To be determined is which will be the appointing body, the mechanism employed, and whether constitutional or other legal changes will be required.

INTRODUCTION: Danica (Twinning: Irma)

2. Verification Committee [27, part]

CURRENT STATUS: Twinning and USAID have proposed that a neutral and independent body review nominated candidates for Chair or State Commissioner to verify they meet the qualification requirements.

ISSUES FOR DISCUSSION: Is the AMCU in agreement with this proposal? Who should make up this board, how should it be described in the law?

INTRODUCTION: Danica

12:00 N **LUNCH** (Participants make their own arrangements)

1:00 PM **BLOCK FOUR: AUTHORITY OF STAFF AND BODIES**

1. Independence (Competition Superintendent) [27]

CURRENT STATUS: USAID and Twinning also endorse a structural separation at the AMCU between investigation and decision-making. We recommend introducing the role of Competition Supervisor, who would report to the Chair, but would make day-to-day case investigation decisions for all AMCU cases. The Committee's approval is still required for opening or closing a formal investigation. And only the Committee will determine when a law violation has occurred.

ISSUES FOR DISCUSSION: Is AMCU in agreement with proposal? Decisions need to be made about how to build this position within the structure of the AMCU as well as agreement on clear definitions of the roles of the investigators, the Chair, and the State Commissioners under this structure.

INTRODUCTION: Danica

2. Administrative review of decisions [22]

CURRENT STATUS: Twinning has sent a first draft to AMCU, and is awaiting a response. USAID has submitted comments.

ISSUES FOR DISCUSSION: Discussion of the need to change current AMCU system of decision review (Article 57). This will depend in part on whether the competition supervisor provision is adopted, which could moot the issue if territorial offices no longer make their own decisions..

INTRODUCTION: Russ

4:30 PM **BLOCK FIVE: REMEDIAL MEASURES AND TOOLS TO ADDRESS OLIGARCHIC ENTRENCHMENT AND CRITICAL AND PERSISTENT MARKET FAILURES**

1. Periodic Penalties [16] and Interim Measures [19]

CURRENT STATUS: A consolidated Twinning – AMCU variant on fines, periodic penalties, and interim measures was sent to USAID on 7 Nov. USAID has provided comments.

ISSUES FOR DISCUSSION: TBD depending on USAID comments.

INTRODUCTION: Pavel (USAID: Dan & Mariya)

Friday, 16 December

9:00 AM **BLOCK FIVE, CONTINUED**

2. Economic Successors [34]

   CURRENT STATUS: A draft has been prepared that is intended to capture the rules set forth in EU jurisprudence and that will solve the problems that AMCU has faced. USAID and AMCU are in agreement, awaiting Twinning comments.

   ISSUES FOR DISCUSSION: Does the draft language capture the point completely and resolve this issue?

   INTRODUCTION: Dan

3. Commitments [20]/Structural Remedies including Divestiture [39]

   CURRENT STATUS: Twinning provided a draft to AMCU, which was forwarded to USAID on November 2. USAID is preparing comments and a draft on compulsory divestiture.

   ISSUES FOR DISCUSSION: Are the rules workable in the Ukrainian legal system? Does the draft language make clear that AMCU can order *any* remedies (structural and behavioral) for <u>any</u> LPEC infringement (including ASBP and results from Market Investigations)? Is language clear that "commitments" are mandatory, and is that acceptable even though EU does not treat commitments that way? Are the differences compatible with EU process. (Note that this section will also impact market investigations, discussed previously).

   INTRODUCTION: Pavel (USAID: Dan)

12:00 N **LUNCH** (Participants make their own arrangements)

1:00 PM

4. Market Investigations [34]

   CURRENT STATUS: USAID, Twinning, and AMCU are in agreement in concept. Legislative language is currently being drafted.

   ISSUES FOR DISCUSSION: Consideration of the concept - the essence of the procedure and procedural requirements. Is there a need to distinguish between market investigations and market research? If so, what should be the requirements for the procedure and purpose of market research? How will this power interact with other remedial powers?

   INTRODUCTION: Russ

Visit by Andrew Heimert to the Cabot

Wednesday 30th November – Thursday 1st December

Wednesday

14.30 – 15.00: Meeting with Daniel Gordon *[Cabot HR03]*

15.00 – 15.30: Meeting with Colin Raftery *[Cabot MR7.02]*

16.00 – 16.30: Meeting with [redacted]: *[Cabot HR08]*

[redacted]

Thursday

09.30 – 10.00: Meeting with Stuart Hudson *[Cabot MR7.08]*

11.30 – 12.30: Meeting with the DMU (Will Hayter, Darren Montgomery, Rosie Richardson) *[Cabot MR7.04]*

13.30 - 14.00: Meeting with Colin Raftery, Sorcha O'Carroll & Eleni Gouliou (Mergers) *[Cabot MR7.08]*

DIGITAL MERGERS WORKSHOP
13 DECEMBER 2022
The International Auditorium
Bd. Du Roi Albert II, 5 – 1210 Brussels

Registration & Lunch
(13:00-14:30)

Keynote speech: Olivier Guersent | Director General, DG Competition
(14:30-15:00)

Panel 1: From conglomerate effects to ecosystems competition: a discussion on the applicable framework
(15:00-16:30)

Speakers:

- Annemiek Wilpshaar | DG Competition, Head of Unit C.5
- John Newman | US Federal Trade Commission, Deputy Director of the Bureau of Competition
- Kay Jebelli | Computer & Communications Industry Association Europe, Competition & Regulatory Counsel
- Fiona Scott Morton | Yale School of Management

Moderator: Angeline Woods | Uber, Legal Director (Antitrust and EU Affaires)

Break: 20 min

Panel 2: Digital merger review in a post-Illumina world: when do small targets play a significant competitive role?
(16:50-18:20)

Speakers:

- Julia Brockhoff | DG Competition, Head of Unit A.2
- Martijn Snoep | Netherlands Authority for Consumers and Markets, Chairman
- John Wilcur | Latham & Watkins, Partner
- Justus Haucap | University of Düsseldorf, Director of the Institute for Competition Economics

Moderator: Nelson Jung | Clifford Chance, Partner

Closing remarks: Guillaume Loriot | Deputy Director General for Mergers, DG Competition
(18:20-18:50)

Reception
(19:00-19:30)

K S A P Leon Kaczyński National School of Public Administration

Office of Competition and Consumer Protection

MERGER CONTROL (ISSUES AND SELECTED SECTORS)

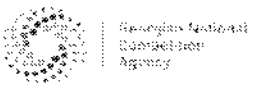
BEST PRACTICES AND TOOLS BASED ON THE EXPERIENCE OF THE POLISH OFFICE OF COMPETITION AND CONSUMER PROTECTION AND PARTNERS

November 21-25, 2022

Warsaw

Seminar within the project:

Eastern Partnership Academy of Public Administration



Polish aid

The program is financed by the funds of Polish development program of the Ministry of Foreign Affairs of the Republic of Poland

DAY 1 (MONDAY, 21 NOVEMBER 2022) WARSAW
INTRODUCTION TO MERGER REVIEWS

08:45 - 09:00 **Registration and morning coffee.**

09:00 - 09:20 **Welcome and introduction to the training.**

- *Wojciech Federczyk, Director, Lech Kaczyński National School of Public Administration (KSAP);*
- *Representative of the Ministry of Foreign Affairs;*
- *Tomasz Chróstny, President, Office of Competition and Consumer Protection (UOKIK);*
- *Martyna Derszniak-Noirjean, Director, International Cooperation Office, UOKIK.*

09:20 - 09:40 **Self-introduction of participants.**
Family photo.

09:40 - 09:45 **Break**

09:45 - 11:30 **Introduction to mergers: importance of merger review.**

- *Renato Ferrandi, Senior Competition Expert, Coordinator of the OECD-GVH Regional Centre for Competition – remotely;*
- *Danica Noble, Attorney, US FTC.*

Q&A, discussions.

11:30 - 11:45 **Break**

11:45 - 13:00 **Introduction to mergers and acquisitions, comprehensive review of European legislation, process and implementation.**

- *Stephan Simon, DG COMP, European Commission.*

Q&A, discussions.

13:00 - 13:45 ***Lunch***

KSAP cafeteria

13:45 - 15:15 **General review of mergers and investment control Poland.**

- *Mateusz Błachucki, counsellor, Department of Concentration Control, UOKiK.*

Q&A, discussions.

15:15 - 15:30 **Break**

15:30 - 16:45 **General review of mergers and acquisitions in France.**
Notification system for Mergers.

- *Henri Piffaut, Vice-president, Autorite de la Concurrence.*

Q&A, discussions.

16:45 - 17:00 **Conclusions on the first day.**

- *Martyna Derszniak-Noirjean, Director of the International Cooperation Office of the Office of Competition and Consumer Protection.*

Polish aid

The program is financed by the funds of Polish development program of the Ministry of Foreign Affairs of the Republic of Poland

DAY 2 (TUESDAY, 22 NOVEMBER 2022) WARSAW DIGITAL MARKETS	
09:00 - 10:45	**Mergers in the digital markets – overview + DMA + impact on countries beyond EU (special focus on Ukraine, Georgia, Moldova).** • *Álvaro Garcia-Delgado, DG COMP, European Commission.* **Q&A, discussions.**
10:45 - 11:00	**Break**
11:00 - 12:00	**Mergers in the digital markets.** • *Nikodem Szadkowski, Deputy Director of the Department of Market Analyses (UOKiK);* ➢ *Case: NFI Empik/Merlin.* **Q&A, discussions.**
12:00 - 12:45	***Lunch*** *KSAP cafeteria*
12:45 - 14:30	**Hypothetical case exercise.** • *Stephan Simon, DG COMP, European Commission.*
14:30 - 14:45	**Break**
14:45 - 16:00	**Mergers in the digital markets.** • *Henri Piffaut, Vice-president, Autorite de la Concurrence;* ➢ *Case: LogicImmo/SeLoger merger.* **Q&A, discussions.**
16:00 - 16:15	**Conclusions on the second day.** • Representative of UOKIK.
18:00 - 21:00	**Sightseeing trip around Warsaw.** Start from the hotel.
DAY 3 (WEDNESDAY, 23 NOVEMBER 2022) WARSAW MERGERS AND SECTORS	
9:00 - 10:30	**Market Definition Notice.** • *Álvaro Garcia-Delgado, DG COMP, European Commission.* **Q&A, discussions.**
10:30 - 10:45	**Break**
10:45 - 12:15	**Merger in retail sector.** • *Danica Noble, Attorney, US FTC;* ➢ *Case: Staples/Office depot.* **Q&A, discussions.**
12:15 - 13:15	***Lunch*** *KSAP cafeteria*

Polish aid

The program is financed by the funds of Polish development program of the Ministry of Foreign Affairs of the Republic of Poland

13:15 - 14:15	**Mergers in the energy sector.** • *Mateusz Błachucki, counsellor, Department of Concentration Control, UOKiK;* ➢ *Case PGE/EdF.* **Q&A, discussions.**
14:15 - 14:30	**Break**
14:30 - 16:00	**Start-ups, Killer Acquisitions and Merger control.** • *Danica Noble, Attorney, US FTC .* **Q&A, discussions.**
16:00 - 16:15	**Conclusions on the third day.** • *Representative of UOKIK.*
19:00 - 21:00	**Dinner reception.** CAFÉ ZAMEK
DAY 4 (THURSDAY, 24 NOVEMBER 2022) WARSAW PHARMACEUTICAL, HEALTH SECTORS	
09:00 - 10:30	**Market definition in the pharmaceutical sector by the European Commission: ATC4, ATC5: EC practice and cases.** • *Rieke Knaup, DG COMP, European Commission – remotely;* • *Vasiliki Dolka, DG COMP, European Commission – remotely;* • *Luc Wijffels, DG COMP, European Commission – remotely.* **Q&A, discussions.**
10:30 - 10:45	**Break**
10:45 - 12:15	**Mergers in the pharmaceutical sector: UOKIK experience.** • *Julita Bujanowska-Gutt, counsellor, Department of Concentration Control, UOKiK;* ➢ *Cases: «Neuca/Intra»; Polfarma/Polfa, Apteki.* **Q&A, discussions.**
12:15 - 13:15	***Lunch*** *KSAP cafeteria*
13:15 - 14:45	**Mergers in the pharmaceutical sector: experience of Lithuania.** • *Jurgita Brėskytė, Competition Council of Lithuania* ➢ *Case: «InMedica,MediCA klinika, Kardiolita, Bendrosios medicinos praktika, Svalbono klinika/INVL Baltic Sea Growth Fund, companies Litgaja and RP PHARMA».* **Q&A, discussions.**
14:45 - 15:00	**Break**
15:00 - 15:45	**Good Practices Guide on Gun-Jumping: experience of Portugal.** • *Fernando Ricardo, Portuguese Competition Authority (AdC)–remotely.* **Q&A, discussions.**

Polish aid

The program is financed by the funds of Polish development program of the Ministry of Foreign Affairs of the Republic of Poland

15:45 - 16:00	**Conclusions on the fourth day.** • *Representative of UOKIK.*
	DAY 5 (FRIDAY, 25 NOVEMBER 2022) WARSAW NON-NOTIFIED MERGERS AND GUN-JUMPING
09:00 - 10:30	**Non-notified concentration.** • *Grzegorz Czaja, Magdalena Zubernik, Central Register of Beneficial Owners – Ministry of Finance.* **Q&A, discussions.**
10:30 - 10:45	**Break**
10:45 - 12:15	**Non-notified concentration.** • *Grzegorz Czaja, Magdalena Zubernik, Central Register of Beneficial Owners – Ministry of Finance.* **Q&A, discussions.**
12:15 - 13:15	***Lunch*** *KSAP cafeteria*
13:15 - 14:45	**Regulation of «ex post» merger control.** **Gun jumping cases: experience of Lithuania.** • *Lorena Nomeikaite, Adviser, Mergers Supervision Group, Competition Council of Lithuania;* ➢ *Cases: «Two Lukoil Baltija»; «Kauno grūdai case».* **Q&A, discussions.**
14:45 - 15:00	**Break**
15:00 - 15:30	**Evaluation questionnaire.** *Room 308*
15:30 - 16:00	**Handing out certificates, conclusions and closure of the event.** • *Wojciech Federczyk, Director of the Lech Kaczyński National School of Public Administration;* • *Daniel Mańkowski, Director of the Department of Legal Affairs, Office of Competition and Consumer Protection (UOKIK).* **Participants' comments.**

Remarks

Language of the meeting: English with simultaneous translation to Russian.

The stationary classes at KSAP, ul. Wawelska, 56, Warsaw, room 305.

The online meeting at KSAP, ul. Wawelska, 56, Warsaw.

Polish aid

The program is financed by the funds of Polish development program of the Ministry of Foreign Affairs of the Republic of Poland

Organisation for Economic Co-operation and Development

DAF/COMP/A(2022)3/REV4

For Official Use

English - Or. English

24 November 2022

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Draft Agenda: 139th meeting of the Competition Committee

29-30 November 2022
Paris, France

The 139th Meeting of the Competition Committee will be held on 29-30 November 2022 in Room CC1 of the OECD Conference Centre, 2 rue André Pascal, 75116 Paris.

Antonio CAPOBIANCO
Antonio.Capobianco@oecd.org, +(33-1) 45 24 98 08

JT03508512

Tuesday 29 November 2022

10:00-10:05

Item 1. Adoption of the draft agenda

DAF/COMP/A(2022)3/REV4

10:05-10:10

Item 2. Approval of the draft summary record of the last meeting

For approval:

Summary record of the 138th Competition Committee meeting - DAF/COMP/M(2022)2

For information:

List of participants of the 138th Competition Committee meeting - DAF/COMP/PL(2022)2

Summary of Discussion of the Hearing on Sustainability and Competition DAF/COMP/M(2020)2/ANN1/FINAL

Executive Summary of the Hearing on Sustainability and Competition – DAF/COMP/M(2020)2/ANN2/FINAL

Summary of Discussion of the Hearing on Methodologies to measure market competition – DAF/COMP/M(2021)1/ANN5/FINAL

Executive Summary of the Hearing on Methodologies to measure market competition DAF/COMP/M(2021)1/ANN6/FINAL

Summary of Discussion of the Hearing on Ex Ante Regulation and Competition in Digital Markets DAF/COMP/M(2021)2/ANN3/FINAL

Executive Summary of the Hearing on Ex Ante Regulation and Competition in Digital Markets - DAF/COMP/M(2021)2/ANN4/FINAL

Summary of Discussion of the roundtable on Competition Issues in News Media and Digital Platforms – DAF/COMP/M(2021)2/ANN5/FINAL

Executive Summary of the roundtable on Competition Issues in News Media and Digital Platforms - DAF/COMP/M(2021)2/ANN6/FINAL

Summary of Discussion of the roundtable on Disentangling Consummated Mergers: Experiences and Challenges – DAF/COMP/M(2022)2/ANN5/FINAL

Executive Summary of the roundtable on Disentangling Consummated Mergers: Experiences and Challenges - DAF/COMP/M(2022)2/ANN6/FINAL

10:10-10:20

Item 3. Opening remarks by DSG Yoshiki Takeuchi

10:20-13:00

Item 4. Roundtable on Director Disqualification and Bidder Exclusion

Director disqualification and bidder exclusion, in the context of competition law and enforcement, are different types of debarment sanctions that may be imposed by contracting authorities, judicial bodies, or competition agencies against competition law infringers. These sanctions may be imposed on companies found guilty of bid rigging, for instance, or on the involved individuals, who may be banned from the exercise of their corporate functions. They are aimed at preserving the integrity of the tender and ensuring that the

violating company or involved directors do not carry out such practices in the future. As such, they may also function as a powerful deterrence mechanism, adding to the financial and social cost of monetary fines the opportunity cost of the exclusion from future tenders, and affecting the individual reputation of the firm or the individual.

This roundtable will focus on the role of director disqualification and bidder exclusion in competition enforcement and on providing practical insights on their effectiveness and interaction with other existing competition enforcement mechanisms. Delegates will discuss a number of questions including: 1) what are the objectives, criteria, and scope of application of director disqualification and bidder exclusion in different jurisdictions; 2) what are the factors determining their effectiveness, also in relation to other types of competition sanctions; 3) what are the ways in which they can be best coordinated with other existing detection, evidence-gathering and enforcement tools to ensure their fairness and effectiveness. Insights in these three areas may be also drawn from other policy areas where debarment sanctions are applied.

The roundtable discussion will benefit from a Background Note by the Secretariat, country contributions and interventions by expert panellists, including Amanda Athayde (Professor, University of Brasilia), Emmanuelle Auriol (Professor of Economics, Toulouse 1 Capitole University) and Peter Whelan (Professor, University of Leeds).

For discussion:

Background Note by the Secretariat - DAF/COMP(2022)14

Note by Amanda Athayde and Renan Cruvinel - DAF/COMP/WD(2022)109

Notes by delegations:

Canada - DAF/COMP/WD(2022)68

Colombia - DAF/COMP/WD(2022)69

Germany - DAF/COMP/WD(2022)70

Greece DAF/COMP/WD(2022)114

Hungary - DAF/COMP/WD(2022)71

Ireland - DAF/COMP/WD(2022)72

Israel - DAF/COMP/WD(2022)73

Italy - DAF/COMP/WD(2022)107

Japan - DAF/COMP/WD(2022)74

Latvia - DAF/COMP/WD(2022)75

Lithuania - DAF/COMP/WD(2022)76

Mexico - DAF/COMP/WD(2022)77

Slovak Republic - DAF/COMP/WD(2022)78

Spain - DAF/COMP/WD(2022)79

United Kingdom - DAF/COMP/WD(2022)108

EU - DAF/COMP/WD(2022)80

Brazil - DAF/COMP/WD(2022)81

Egypt - DAF/COMP/WD(2022)82

Indonesia - DAF/COMP/WD(2022)83

Ukraine - DAF/COMP/WD(2022)84

BIAC - DAF/COMP/WD(2022)85

Summaries of contributions - DAF/COMP/WD(2022)86

Lunch break 13:00-14:30

14:30-14:45

Item 5. Report by Working Party Chairmen and Co-ordinators

The Chairmen of Working Party No. 2 and of Working Party No. 3 will report on the meetings of the Working Parties held on 28 November on any issue that would require a decision by the Committee (e.g. decisions related to instruments or best practices) or any suggestions that a Working Party may have for the Committee and which requires the Committee consideration, as could be for example the case of suggestions on the allocation of future work.

The UNCTAD co-ordinator will report on UNCTAD related developments.

The ICN co-ordinator will report on recent work and projects by the ICN.

14:45-15:30

Item 6. Presentations on US Merger Guidelines and Merger Analysis in Germany

Under this agenda item, competition delegates will hear presentations on recent development in the US and Germany in the area of merger control. Both delegations have been exploring how best to adjust their merger enforcement policies to new challenges. The US, in particular, is in the process of considering revisions to modernise its Merger Guidelines and will present the results of the Joint Public Inquiry launched early this year by the U.S. Federal Trade Commission (FTC) and the U.S. Justice Department's Antitrust Division.

Other delegations are welcome to contact the Secretariat if they also wish to make an oral presentation at this session. The Secretariat will collect these expressions of interest and co-ordinate with the Chair of the Competition Committee. It will subsequently contact Delegations to ensure a consistent approach to such presentations.

15:30-16:30

Item 7. Principles for Competition Enforcement and Policy in the Digital Sector and Database of ex Ante Regulatory Initiatives

The Competition Committee has been active for many years in identifying emerging competition issues related to the digital economy, providing evidence to better understand the issues raised by digitalisation, developing potential policy responses and outlining actions that competition authorities can take to address the practical, theoretical and evidentiary challenges from digitalisation. To capitalise on this extensive work, the Bureau asked the Secretariat prepare a Scoping Note for discussion by the Membership considering the usefulness of working on broad principles for competition enforcement and policy in light of digitalisation, which could then potentially be endorsed at the OECD Council level in the form of an OECD Recommendation.

Such principles, while non-binding, could highlight common views and further advance international policy discussions in venues including the OECD. The principles could inter alia address the adaptation of enforcement tools and enforcement practices to digital markets, and they could guide any revision to competition enforcement frameworks in response to digitalisation. These digital enforcement principles could build on ongoing discussions to date at the OECD Competition Committee.

The Secretariat will also present to the Membership a database of regulatory initiatives in a selected number of OECD jurisdictions. A first version of the database, limited to G7 jurisdictions, was submitted in October for the summit of the G7 on digitalisation, under the German G7 Presidency. Such a tool may

result useful for other OECD jurisdictions and delegates might consider the opportunity to expand it to other jurisdictions, regularly update it and then make it publicly available on the OECD website.

For discussion:

Note by the Secretariat DAF/COMP(2022)17

16:30-17:00

Item 8. Presentation of the Gender Inclusive Competition Policy Toolkit

Looking at competition enforcement and policy through a gender lens is part of a long-standing effort by the OECD and its Competition Committee to explore the links between competition and the many aspects of inclusiveness, such as poverty and sustainability. The research on gender began in 2018, when the OECD first considered if a gender lens might help deliver a more effective competition policy. Since then, several events and discussions boosted interest in the topic. This led to further research and the developments funded by a voluntary contributions by the Government of Canada. As part of this project the Secretariat was asked to prepare for Canada a Gender Inclusive Competition Policy Toolkit. The Toolkit is designed to help the Competition Bureau of Canada to apply gender-inclusive considerations to their work.

Under this agenda item, the Secretariat will present the Toolkit to the Committee to seek views and comments on its scope and content, with the aim of having the final version of the Toolkit endorsed by the Competition Committee, hoping that it will become another OECD reference document for authorities around the world. The Toolkit builds on discussions and research carried out in the context of the OECD Gender Inclusive Competition Policy project (more information is available here). It provides a practical approach that competition officials can apply in their everyday work. The Toolkit builds on, and benefits from, gender mainstreaming efforts in related policy areas, like corporate governance and anticorruption. The approaches in this Toolkit help authorities to better understand market dynamics and whether they affect men and women differently.

For discussion:

Note by the Secretariat DAF/COMP(2022)18

17:00-18:00

Item 9. Annual Reports

All delegations have been invited to submit their annual report for 2021. Following a recommendation by the Bureau, only some Delegations will be allocated time to make presentations on a key development that has taken place during the relevant period (e.g. a legal reform, a new policy approach, an important decision, etc.). Delegations are welcome to contact the Secretariat to suggest a topic for an oral presentation at this session if they wish to do so. The Secretariat will collect these expressions of interest and co-ordinate with the Chair of the Competition Committee. It will subsequently contact Delegations to ensure a consistent approach to such presentations.

Wednesday 30 November

9:30-9:40

Item 10. Election of the Chairman and Vice Chairmen for 2023

The Competition Committee will be called to elect the Chairman of the Competition Committee and the Bureau members who will serve as Vice-Chairmen for 2023.

9:40-9:50

Item 11. Accession Work Plan [CONFIDENTIAL]

This agenda item will be discussed in a confidential session. Only Members and the European Union are invited to attend.

For discussion:

Agenda - DAF/COMP/ACS(2022)7

9:50-10:00

Item 12. Global Relations Strategic Direction [CONFIDENTIAL]

This agenda item will be discussed in a confidential session. Only Members, Associates and the European Union are invited to attend.

For discussion:

Agenda – DAF/COMP(2022)21

10:00-13:00

Item 13. Roundtable on Competition and Inflation

The relationship between prices and competition is uncontroversial, with low levels of competition contributing to higher price levels. However, the link between competition and price increases (inflation) appears less clear cut. The current inflationary trends have seen these debates resurface, including the extent to which inflation has its roots in competition problems and whether competition authorities should respond to these pressures. Traditionally, inflation has been the near exclusive concern of central banks and not competition authorities. However, in periods of high inflation, it is natural to consider the extent to which competition is to blame. Such questions are the subject of much debate, including whether any such a link would be short-term or purely long-term in nature. There is an increasing literature suggesting that levels of concentration and firm margins have increased over time, at least in some countries, yet how much this can explain of current inflationary pressures is debateable.

Under this agenda item, delegates will discuss the links between competition and inflation, both in the short-term and long-term. The discussion will also touch on the risks to competition that authorities should be aware of in the current inflationary environment. Finally, and perhaps most importantly, the roundtable will explore how competition authorities should react, if at all, to the current challenges, including how to navigate pressures faced from the public and governments. More specifically, the OECD Competition Committee will address a number policy questions, including: 1) How strong are the links between competition and inflation? Does this differ over the short-term and long-term? 2) To what extent should competition policy be considered an anti-inflationary tool? 3) What does a high-inflationary period mean for competition authorities? Should competition authorities focus on sectors featuring high inflation? and 4) Do high-inflationary periods present particular risks to competition that authorities should be aware of?

The roundtable discussion will benefit from a Background Note by the Secretariat, country contributions and interventions by expert panellists, including Hal Singer (Professor, Georgetown University and Managing Director, Econ One Research), Natalie Chen (Professor of Economics, University of Warwick) and Professor Jan De Loecker (Professor, KU Leuven).

For discussion:

Background Note by the Secretariat - DAF/COMP(2022)15

Note by Natalie Chen DAF/COMP/WD(2022)116

Note by Hal Singer - DAF/COMP/WD(2022)117

Notes by delegations:

Austria - DAF/COMP/WD(2022)87

France - DAF/COMP/WD(2022)89

Germany - DAF/COMP/WD(2022)90

Hungary - DAF/COMP/WD(2022)91

Lithuania - DAF/COMP/WD(2022)92

Portugal - DAF/COMP/WD(2022)94

Spain - DAF/COMP/WD(2022)95

Türkiye- DAF/COMP/WD(2022)96

EU - DAF/COMP/WD(2022)97

Argentina – DAF/COMP/WD(2022)110

BIAC - DAF/COMP/WD(2022)88

Brazil - DAF/COMP/WD(2022)98

Indonesia - DAF/COMP/WD(2022)99

Romania - DAF/COMP/WD(2022)100

South Africa DAF/COMP/WD(2022)111

Chinese Taipei - DAF/COMP/WD(2022)101

Consumers International – DAF/COMP/WD(2022)93

Summaries of contributions - DAF/COMP/WD(2022)102

Lunch break 13:00-14:30

14:30-17:00

Item 14. Hearing on the Relationship between Foreign Investment Screening Reviews and Merger Control Reviews

This session will be organised in the form of a Hearing together with the OECD Investment Committee and it will offer an opportunity to exchange views with the investment delegates on the relationships between merger control reviews and Foreign Direct Investment (FDI) screening mechanisms to which the same transaction may be subject for national security purposes. The purpose of the Hearing is to explore similarities and differences between these two procedures, identify potential trade-offs and discuss whether and how co-ordination shall be ensured.

The Hearing will offer an opportunity to delegates from different policy communities to review (i) how competition law affects inward FDI and vice versa: (ii) how competition and investment policies contribute to the same long-term goals (i.e. economic growth, efficiency, providing incentives for firms to be more productive) but can also be in conflict. Delegates will discuss the goals and scope of each review, what transactions are subject to both reviews, who conducts the review and how transactions are brought before the relevant authorities. The Hearing will also consider overlaps and common concerns in merger reviews and national security reviews. It will consider institutional aspects as well as explore how transactions are assessed, what circumstances raise concerns across the two reviews, judicial review, principles that are applicable across the two mechanisms as well as issues related to the design and implementation of remedies and their impact on businesses.

The roundtable discussion will benefit from a Background Note by the Secretariat and interventions by expert panellists, including Felipe Irarrázabal (Adolfo Ibáñez University), Ashley Lenihan (Georgetown University), Ignacio Mezquita Pérez-Andújar (MINCOTUR Secretary of State for Commerce), Edouard

Sarrazin (DLA Piper) and Ethan Thornton (NSI Review & Analysis, UK's Department for Business, Energy & Industrial Strategy).

For discussion:

Background Note by the Secretariat - DAF/COMP(2022)16

Note by Felipe Irarrazabal - DAF/COMP/WD(2022)118

Notes by delegations:

Australia - DAF/COMP/WD(2022)103

Hungary - DAF/COMP/WD(2022)104

Poland DAF/COMP/WD(2022)112

BIAC - DAF/COMP/WD(2022)115

Romania - DAF/COMP/WD(2022)105

Consumers International – DAF/COMP/WD(2022)113

17:00-17:30

Item 15. OECD Recommendation on Competition and Intellectual Property Rights

Following the discussion under Item 7 of the agenda of the 138th meeting of the Competition Committee and the consultation by written procedure that followed, the Secretariat will present a revised version of the draft Recommendation on Competition and Intellectual Property Rights. Delegates will discuss the revised draft of the Recommendation.

For discussion:

Note by the Secretariat DAF/COMP/WD(2022)106

17:30-18:00

Item 16. Other Business

Competition Delegates will be called to decide on future work. Delegates should feel free to send to the Secretariat as soon as possible any suggestion that they would like to submit to the Committee's consideration.

For information:

Future Roundtable Topics - DAF/COMP/WD(2022)4

OECD Competition Division

Briefing Note for permanent delegations

4 May 2023, 14h00 CEST (Paris time)

Hybrid meeting

Room D in the Chateau and Zoom

Registration link
https://meetoecd1.zoom.us/meeting/register/tJUrf-ChqDwoH9Z9JffeeTbmecYGW7wPAn-

Monday, 12 June 2023
Working Party No. 2 on Competition and Regulation
10.00 am – 5.15 pm CEST
OECD Conference Centre CC15

Presentation of the Competition Assessment Review of Brazil

10.10 am – 10.30 am

The Secretariat will present the findings of the Competition Assessment Review of the civil aviation and ports sectors in Brazil, conducted by the OECD Competition Division in co operation with CADE.

Discussion on the Competitive Neutrality Toolkit

10.30 am – 11.15 am

Building on the discussion on 28 November 2022, the Secretariat will provide an update on the work to draft the Toolkit.

Presentations on Trials and Natural Experiments in Competition and Regulation

11.15 am – 12.45 pm

Trialling consumer remedies before introducing them allows competition authorities and regulators to test whether they would be effective in practice and to fine tune their design. Compared with experiments held in artificial environments, Randomised Controlled Trials (RCTs) and natural experiments are considered especially reliable because they take place in real life settings and their results tend to be reliable to draw conclusions on the real world. RCTs or field trials have been in use for a while, for example to test whether sending notices to consumers whose insurance was due for renewal would encourage those consumers to take action and switch supplier. However, they tend to be expensive and time-consuming to run.

These disadvantages can be overcome in digital markets, where it is possible to test alternatives quickly and at negligible cost. The use of trials has expanded from its initial application to the development of remedies, imposed by competition authorities and regulators, to the provision of evidence in competition enforcement cases. For example, apps can test the effects of certain practices by platforms (e.g. changes in functionalities limiting users' options) by comparing the behaviour of users affected by the new practice and users not affected by the new practice, for instance because they use the app on an alternative platform that does not restrict users' options.

The session will include presentations by speakers including John Davies, Executive Vice President, Compass Lexecon, and delegations to share their experiences in competition and regulation and discuss advantages and disadvantages of field trials.

Monday, 12 June 2023
Working Party No. 2 on Competition and Regulation
10.00 am – 5.15 pm CEST
OECD Conference Centre CC15

Roundtable on Assessment and Communication of the Benefits of Competition Interventions

2.30 pm 5.30 pm

This Roundtable will cover how competition authorities evaluate the impact of their activities and how they communicate to stakeholders both the benefits of competition interventions and the benefits of competition more generally.

A growing number of competition authorities report details of their activities and assess the impact of their interventions. Competition authorities reports include a range of measures, such as the number of interventions and the fines imposed, as well as an assessment of the expected benefits for consumers arising from merger control activity and / or decisions on antitrust infringements. The evaluation of consumer benefits helps authorities justify their use of resources thus supporting accountability and transparency and is even a statutory obligation in some jurisdictions.

By demonstrating the benefits of competition interventions, evaluation enhances the credibility of the authority, supporting more widely the authority's advocacy of the benefits of competition. Competition authorities can usefully leverage the assessment of consumer benefits arising from competition interventions, as part of a wider communication strategy about the authority's role and its contribution to the economy and the society.

The roundtable will be structured in two main parts:

In the first part, competition authorities will share their experience on designing a communication strategy, the objectives they pursue in their communication and the tools that they find more effective.

In the second part, delegates will share experiences on whether and how they evaluate the benefits, both qualitative and quantitative, of their activities. The session will be an opportunity to discuss the 2014 methodology published by the OECD and the experience of competition authorities in this area, including ways in which they have expanded the methodology and have amended its assumptions.

This roundtable will benefit from a Background Note on communication, an Issues Note on assessing the benefits of competition interventions and written country contributions. It will feature presentations by Fabienne Ilzkovitz (Professor of Economics, Université Libre de Bruxelles) and William Kovacic (Professor of Law and Director, Competition Law Center, George Washington University).

Future Work and Other Business

5.30 pm 5.40 pm

Delegates will be called to decide topics for the substantive discussion to be held in December 2023. By way of reminder, the letter of the Chair of the Competition Committee dated 9 January 2023 proposed, among other topics, a roundtable on "Competition and Sport". No comments or objections were received as of end of January 2023.

In addition, delegates should feel free to send the Secretariat their views and propose topics for future work that they would like to submit to the consideration of the Working Party.

Tuesday, 13 June 2023
Working Party No. 3 on Co-operation and Enforcement
10.00 am – 6.00 pm CEST
OECD Conference Centre CC15

Country experience with reassessing merger review frameworks 10.05 am 11.00 am	A topic of critical importance to many agencies is the re evaluation of merger review to account for the realities of markets where competition plays out in ways not captured by simple horizontal and vertical frameworks. Following a detailed presentation by the U.S. agencies on their work over the past year in revising their merger guidelines to account for the realities of modern markets, other delegations will have the opportunity to make similar presentations. The particular focus of the session will be on how agencies are reviewing their merger frameworks to revise current paradigms and develop new taxonomies to address platform mergers, multisided markets, and non price effects. Delegations interested in making such a presentation should inform the Secretariat.
Discussion on the 2005 OECD Recommendation on Merger Review 11.00 am 12.00 pm	Delegates will be called to consider the continued relevance of the 2005 Council Recommendation on Merger Review. In 2013, the Competition Committee adopted a report for the Council that reviewed the experience of Adherents to the Recommendation, concluding that the Recommendation was still "important and relevant," but without recommending any changes to the instrument. Delegates will review the conclusions of the 2013 Report, with an eye to determining if the 2005 Recommendation needs to be amended or expanded.
Secretariat report on status of discussions on co-operation decision-recommendation 12.00 pm – 12.30 pm	Following the discussion under item 2 of the agenda of 136th meeting of Working Party 3 on the Secretariat's proposal to convert the 2014 Recommendation on International Enforcement Co operation into a Decision-Recommendation, delegates were invited to provide comments on the proposal by the end of March 2023. Under this agenda item, the Secretariat will give a short report on the comments received for consideration by the Working Party.
Roundtable on the Future of Effective Leniency Programmes: Advancing detection and deterrence 2.00 pm – 4.30 pm	Leniency programmes can be a powerful tool to detect cartels and support cartel enforcement, facilitating agencies' efforts to prosecute anticompetitive conduct. However, their effectiveness depends, amongst others, on firms' perception of the likely threat of being detected and heavily sanctioned even when no leniency application is filed. Overreliance on leniency programmes comparatively to other (proactive) detection tools may negatively affect their effectiveness, while the strength of non-leniency detection tools is of utmost importance to support leniency. The Roundtable will explore recent trends and reforms of leniency programmes and their relationship with effective detection and deterrence. With a view to preserving the effectiveness of leniency, delegates will discuss the importance of developing modern and effective detection tools and investigative approaches and the full range of new, innovative, and proactive detection tools and investigative approaches (e.g., cartel screening, whistleblowing). The Roundtable will also cover the ways in which increasing effective international co-operation can aide in the detection of cartels and/or possibly affect leniency programmes in the lack of co-ordination. The session will be supported by a Secretariat background paper.

Tuesday, 13 June 2023
Working Party No. 3 on Co-operation and Enforcement
10.00 am – 6.00 pm CEST
OECD Conference Centre CC15

Horizon Scanning – Country Reports 4.30 pm – 5.45 pm	It is critical for agencies to identify in advance the new technologies, services, and activities that are at risk of hardening into monopolistic ecosystems, through consolidation or incorporation into existing dominant platforms. Under this agenda item, delegates will be called to share experience in this area with brief accounts of their agency work. Delegations who are interested in taking an active part in this session should reach out to the Secretariat.
Other Business 5.45 pm 6.00 pm	Delegates will be asked to discuss and suggest substantive topics for future WP3 agendas

Wednesday, 14 June 2023
Competition Committee
10.00 am – 6.00 pm CEST
OECD Conference Centre CC1

Hearing on the Relationship between competition and innovation

10.30 am 1.30 pm

While there is long standing view that competition drives innovation and that innovation, in turn, drives higher welfare and economic growth, there is no theoretical consensus on the precise relationship between these two important components of a market economy. The Hearing will offer the opportunity to hear from experts on such relationship, to understand what we mean by innovation and what types of innovation matters for competition. Delegates will also discuss what are they key drivers for innovation and what is the role of competition policy in generating incentives to innovate or spreading innovation across industries.

As there are many other factors that drive innovation, such as the role of financing agents (venture capitalists or governments themselves), as well as geographical considerations (regulatory differences, location of clusters, characteristics of the geographical markets), network effects, among others, at the Hearing, delegates will also have an opportunity to explore how these factors interact with competition and what effects they have on competitive dynamics in those markets.

The Hearing will benefit from interventions from invited experts, including Philippe Aghion (Professor at the College de France and at the London School of Economics), Wolfgang Kerber (Professor of Economic Policy, Marburg University), Alvaro Parra (Assistant Professor, UBC Sauder School of Business), Carl Shapiro (Professor, University of California, Berkeley), Eva Sørensen (Professor at Roskilde University), and Chiara Criscuolo (Head of the Productivity and Business Dynamics (PBD) Division in the Science Technology and Innovation (STI) Directorate at the OECD), as well as from a Background Note from the Secretariat.

Roundtable on Algorithmic competition

3.00 pm 6.00 pm

This roundtable will consider the role of algorithms on competition and what harms they may pose, with regards to both coordinated conduct (such as algorithmic collusion) and unilateral conduct (such as algorithmic exclusionary and exploitative abuses). The Roundtable will identify the different types of algorithms and present any available information regarding their prevalence. It will identify the various potential theories of harm. It will also discuss how competition authorities can investigate these potential algorithmic harms. For example, whether it is feasible for competition authorities to perform an audit or review of an algorithm to identify harm to competition. And if so, whether and to what extent competition authorities should engage in algorithmic monitoring. Finally, it will consider whether existing competition law and/or digital regulation are sufficient to address these algorithmic harms.

The Roundtable will benefit from interventions from invited experts, Emilio Calvano (Professor, University of Rome and Associate Faculty, Toulouse School of Economics), Michal Gal (Senior Fellow and Professor of Law, University of Haifa), Cathy O'Neil (Data Scientist and CEO of ORCAA), as well as a Background Note from the Secretariat and country contributions.

Thursday, 15 June 2023
Competition Committee
10.00 am – 6.00 pm CEST
OECD Conference Centre CC1

Roundtable on the consumer welfare standard - Advantages and disadvantages compared to alternative standards

10.00 am 1.00 pm

Standards in competition policy, sometimes called welfare standards or enforcement standards, have been the subject of much debate. Often these discussions focus on a jurisdiction's legislative history and what this infers the prevailing standard to be. However, the goals of competition policy are worthy of in depth first principles consideration, and the standard that applies flows naturally from this. Rather than seeking to address the question of what welfare standard should apply in competition law enforcement, this Roundtable seeks to highlight the trade-offs that any particular standard requires.

Many competition regimes apply what is notionally considered a consumer welfare standard, although exactly what this means is not always clear and is the subject of much debate. As calls to reconsider the appropriate standard grow, now is an opportune time to consider the relative advantages and disadvantages of alternative standards. An important part of this exercise is to consider the attributes or properties that an ideal standard would possess, such as its predictability, ability to maximise the welfare of all and its broader credibility. The discussion must also define the boundaries for alternative standards to the consumer welfare standard, such as total welfare, modified total welfare, citizen standards or protecting competition standards.

The Roundtable will benefit from interventions from invited experts, Carl Shapiro (Professor, University of California, Berkeley), Nicolas Petit (Professor, European University Institute) and Anna Gerbrandy (Professor, Utrecht University) as well as a Background Note from the Secretariat and country contributions.

Roundtable on Competition in the Circular Economy

3.00 pm 6.00 pm

The Roundtable will focus on the relationship between competition and the circular economy and on the incentives and dynamics that the circular economy creates in the market that are relevant to competition analyses. The circular economy typically refers to an economic system based on the "3Rs": reduction, reusing and recycling of resources and materials to the maximum extent possible. The United Nations Climate Change has defined it as "a regenerative system in which resource input and waste, emission, and energy leakage are minimized by slowing, closing, and narrowing energy and material loops".

As the circular economy is increasingly recognised to be a fundamental approach to reach carbon neutrality and climate positivity goals (i.e. not only a less harmful but also a positive impact on the planet), the question arises whether competition laws and policies as currently designed and applied are compatible with the paradigm of the circular economy. The Roundtable will offer an opportunity to discuss whether i) the goals of competition law and the conceptual foundations of the circular economy are consistent; ii) in which industries and cases competition law might be an obstacle to the shift to a circular economy; and iii) what are the advocacy and enforcement activities that competition authorities can take to pro actively support the transition to a circular economy. The Roundtable will also allow delegations to discuss methodologies for the assessment of competition harm and effects in competition cases in the circular economy.

The Roundtable discussion will benefit from interventions from invited experts, including Herbert Hovenkamp (James G. Dinan Professor, Penn Law & The Wharton School, University of Pennsylvania) and Benoit Durand (Partner at RBB Economics and

Thursday, 15 June 2023
Competition Committee
10.00 am – 6.00 pm CEST
OECD Conference Centre CC1

Visiting Lecturer at Brussels School of Competition and Barcelona Graduate School of Economics), as well as a Background Note from the Secretariat and country contributions.

Friday, 16 June 2023
Competition Committee
10.00 am – 5.30 pm CEST
OECD Conference Centre CC1

Roundtable on Theories of Harm for Digital Mergers

10.00 am – 1.00 pm

Mergers in digital markets have been much discussed in recent years, following the growing concerns around the acquisition strategies of major tech platforms. In parallel to the well-known debate on killer acquisitions and notification thresholds, new questions started to emerge on the suitability of existing theories of harm for an effective assessment of mergers in digital markets. Specific features of digital mergers, such as the prominent role of platform ecosystems relying on strong network effects, high quality algorithms, economies of scale and data-driven economies of scope, might bring into question the ability of traditional theories of harm to reflect the real competitive harm that may result from the merger. Therefore, in order to ensure that anticompetitive transactions can be captured under the current standards for merger review, competition authorities might need to fine tune their theories of harm or develop new ones. On the other hand, calls to modify the existing legal framework have also been made in recent years, signalling the need for a profound reflection around merger control in digital markets.

The Roundtable will offer an opportunity to discuss the theories of harm currently used in the analysis of digital mergers and the potential need for new ones, that could better allow competition authorities to meet the standard of proof when assessing anticompetitive mergers. More specifically, delegates will discuss to what extent merger policy in digital markets differs from merger policy in traditional markets and if there is a need to fine-tune merger control to reflect the specific features of digital markets. They will also discuss the challenges of traditional theories of harm when applied in digital markets, especially in light of the role of ecosystems and what theories of harm specific to digital mergers have been introduced in merger control.

The Roundtable will benefit from interventions from invited experts, Luís Cabral (Paganelli Bull Professor of Economics, New York University Stern School of Business), Annabelle Gawer (Professor in Digital Economy & Director, Centre of Digital Economy, University of Surrey), Viktoria Robertson (Professor, University of Vienna), as well as a Background Note from the Secretariat and country contributions.

Post-Accession Monitoring Review of Costa Rica [CONFIDENTIAL]

2.30 pm – 3.30 pm

This agenda item will be discussed in a confidential session. Only Members and the European Union are invited to attend.

Report of the Competition Division Activities and Global Relations

3.30 pm 4.00 pm

A Secretariat Note will present to the Committee an overview of the Competition Division's activities in 2022 as well as global relations activities undertaken by the Division. It will include: (i) Overview of the work accomplished by the Division; (ii) an update on OECD global relations; (iii) the activities in the three Regional Competition Centres (Hungary, Peru and Korea) ; and (iv) the results of the evaluation by participants of the 2022 Global Forum on Competition (GFC) and the 2022 OECD/IDB Latin American and Caribbean Forum (LACCF) as well as the topics for the 2023 GFC and LACCF.

Annual Reports on Competition Policy

4.00 pm 5.30 pm

All delegations are invited to submit their annual report for 2022. Following a recommendation by the Bureau, only some Delegations will be allocated time to make presentations on a key development that has taken place during the relevant period (e.g. a legal reform, a new policy approach, an important decision, etc.). Delegations are welcome to contact the Secretariat to suggest a topic for an oral presentation at this session if they wish to do so. The Secretariat will collect these expressions of interest and co ordinate with the

Chair of the Competition Committee. It will subsequently contact Delegations to ensure a consistent approach to such presentations.

Other business and future work

5.30 pm 6.00 pm

Competition Delegates will be called to decide topics for substantive discussions to be held in December 2023 based on the letter sent by the Chair on 11 January 2023 [COMP/2023.001]. Delegates should feel free to send to the Secretariat as soon as possible any other suggestion that they would like to submit to the Committee's consideration.

G7 and Guest Digital Competition Enforcers Summit Agenda

Date: Monday 29 and Tuesday 30th November 2021 (All times are in GMT).

Locations: The Cabot (CMA Offices), Canary Wharf / Science Museum (Future Tech Forum Venue), South Kensington / Portcullis House (meeting with Darren Jones MP), Westminster / The 10 Cases (Dinner Venue)

Day 1 – Monday 29th November

Time	Details	Location
10:00-10:50	**Breakfast and networking** - Provided by CMA for in-person attendees	The Cabot
10:50 - 11:00	**Welcome from Andrea Coscelli** - We will use this time for an internal CMA photographer to take a small number of shots of the group for use in press materials.	The Cabot
11:00 – 12:30	**Enforcers Summit Session 1 – Roundtable: Agency Effectiveness** - Session for authority heads only - This session is intended to serve as a valuable exchange to better understand the approaches agencies have taken or are taking, to deal with the challenges of digital markets, their effectiveness, and any relevant learnings.	The Cabot
12:30 – 13:15	**Lunch and networking** - Lunch provided by CMA - Open areas for networking with additional rooms available for bilateral or smaller group meetings	The Cabot
13:15-14:15	**Breakout Session 1 – Presentation: Building the CMA's DaTA Unit**	The Cabot

	- Stefan Hunt, the CMA's Chief Data and Technology Insight Officer will present to the group. - This session is open to both heads of agencies and plus ones, both in person and virtually. - This session will be optional and if attendees wish to use this time for urgent agency work we can make arrangements for a private space. Please confirm if you plan to attend this session	
14:15-14:30	**Spare time before travel**	
14:30 –15:30	**Travel and check in to the Future Tech Forum** - Travel from the Cabot to Science Museum. - We anticipate that this will be via the London Underground. However, if there is a preference to travel by taxi we can make appropriate arrangements.	
16:00-17:00	**Future Tech Forum Day 1 – Panel Session: Digital Regulation Panel Session** - Panel session on the future of digital regulation organised by the UK Department for Digital, Culture, Media and Sport (DCMS) - For those attending the Enforcers Summit in person, attendance to this session is available upon request. - Per DCMS, this event is in-person and by invitation only. Registration is required for this event.	Science Museum
17:00 –20:00	Free time	N/A

17: 00 – 18:30	Travel to Westminster	
18:30 –19:00	**Side Meeting 1 – Informal Discussion: BEIS Select Committee State aid and competition policy inquiry** - This will be an informal discussion, requested by Darren Jones MP.	Portcullis House Bridge Street, London SW1A 2LW
20:00 onwards	**Heads of Agency Dinner** - The CMA will arrange a dinner in central London for in-person attendees. - Andrea will be joined for the dinner by Jonathan Scott, CMA Chairman.	The 10 Cases 16 Endell St, Covent Garden, London WC2H 9BD
End of Day		

Day 2 - Tuesday 30th November

Time	Details	Location
9:00 – 9:30	**Breakfast and networking** - Provided by CMA for in-person attendees	The Cabot
9:30 – 11:00	**Enforcers Summit Session 2 - Policy priorities, horizon scanning and ongoing collaboration.** - Session for authority heads only - The first part of this discussion is intended to be an exchange of views to share best practice on agencies' approach to horizon scanning and policy prioritisation. - As part of this discussion we would also like to explore opportunities for collaboration on areas of mutual interest, albeit no specific commitments will be sought. - The second part of the discussion will consider how best to continue these conversations beyond this Summit.	The Cabot
11:00 – 11:15	**Break**	
11:15 – 12:15	**Breakout Session 2 – Roundtable Discussion: Reform to regulatory powers** - Rod Sims, Chair of the ACCC will lead a discussion on need for digital platform specific regulation and principles to guide regulatory design - This will be a roundtable discussion, with the invite extended to both heads of agencies and plus ones - This session will be optional and if attendees wish to use this time for urgent agency work we can make arrangements for a private space. Please confirm if you plan to attend this session.	The Cabot

12:15 – 13:15	**Lunch, networking, and media opportunities** - Lunch provided by the CMA - Open areas for networking with additional rooms available for bilateral or smaller group meetings	The Cabot
13:15 – 14:30	**Travel and check in to Future Tech Forum** - We anticipate that this will be via the London Underground. However, if there is a preference to travel by taxi we can make appropriate arrangements.	
14:30 – 15:45	**Future Tech Forum Day 2 – Ministerial Roundtable: How can governance frameworks keep pace with tech?** - Two parallel roundtables each chaired by a senior political figure, with a vice chair providing technical expertise. - Per DCMS, this event is in-person and by invitation only. Registration is required for this event. Please ensure you have registered for this event.	Science Museum
Close		

Attendees

In Person

Andrea Coscelli – Chief Executive Officer, UK Competition and Markets Authority

Henri Piffaut – Vice President, Authorité de la Concurrence

Andreas Mundt – President, Bundeskartellamt

Accompanied by: Silke Hossenfelder, Head of Policy Division

Lina Khan – Chair, US Federal Trade Commission

Accompanied by: Maria Coppola, Assistant Director of Policy and Coordination

Jonathan Kanter – Assistant Attorney General, Antitrust, US Department of Justice

Accompanied by: Mark Niefer, International Adviser

Olivier Guersent – Director General, Directorate General for Competition, European Commission

Accompanied by: Inge Bernaerts, Director of Policy and Strategy

Virtual

Andrea Pezzoli – Competition Director General, Autoritá Garante della Concorrenza e del Mercato

Matthew Boswell – Commissioner, Competition Bureau Canada

Kazuyaki Furuya – Chairperson, Japan Fair Trade Commission

Rod Sims – Chair, Australian Competition and Consumer Commission

Joh Songwook – Chairperson, Korea Fair Trade Commission

Tembinkosi Bonakele – Commissioner, Competition Commission South Africa

Ashok Kumar Gupta – Chairperson, Competition Commission of India

Introduction

Keeping pace with digital markets and staying ahead of the curve on emerging technologies and their implications is no easy challenge. In many cases we are still building our understanding of these markets, and we will need to continue to work hard to ensure we can remain effective. Closer working with domestic and international counterparts will be key to achieving this aim. Across the Summit we will explore how agencies are approaching the challenges digital markets pose. Further details on the sessions are set out below.

The meetings in this agenda are confidential and external media will not attend. Please do not make sound recordings of the meeting.

29 November – Day 1

Heads of Agency Session 1

Time: 10:30am – 12:00 GMT

Duration: 90 mins

Topic of the session: Building the effectiveness of competition authorities.

Format

The format of the session is a roundtable discussion. As this meeting will be in hybrid format, the chair will make sure that the virtual attendees are involved. The session will be chaired by Andrea Coscelli. Virtual attendees are asked to use the 'raise hand' function if they wish to make an intervention. Please notify us in advance if you would like to come in at any specific point.

A series of questions, set out below, will serve as a general guide for the session.

Summary

The contributions from each agency to the compendium highlight that all agencies are pursuing action to strengthen their capability, build knowledge and increase their effectiveness. While there is clear overlap in the approaches pursued, there is also a lot we can learn from each other. Actions include upskilling staff, creating new units, undertaking research and studies, working with experts and building capacity to identify, monitor and understand markets and the issues that emerge.

Key to building knowledge is accessing information and evidence to inform our work. This relies on us being able to use strong information gathering powers and knowing where to look in using them. Furthermore, given the huge information asymmetries which exist, we may often be reliant on market participants to provide us with information both on current conduct, as well as to advise on remedies and how issues might best be addressed. Agencies will need to build effective relationships with these groups, including with challenger firms, users and their representatives, as well as investors and tech community.

Lastly, key to affecting change in the conduct of the big platforms will be ensuring their compliance, both with existing and new competition laws and regulations. This means moving from a litigious adversarial relationship focused around enforcement action, to a more collaborative productive 'supervisory' relationship. This is going to require a significant shift, both for the firms themselves but also for agencies.

Objective

This session is intended to serve as a valuable exchange to better understand the approaches agencies have taken or are taking, to deal with the challenges of digital markets, their effectiveness, and any relevant learnings. No formal commitments or agreements are sought.

Points for discussion

Digital Markets Expertise

- What is the current gap between where we are now and where we need to get to in order to understand key digital markets and to stay across current and emerging issues?

- What is the structure and staffing of your agency's digital markets work and do they cover multiple missions?

- What types of staff expertise do you have or want and how is such expertise organised and deployed? What is your approach to recruiting, training, and the retention of talented and competent digital markets experts?

- How do we partner with domestic agencies and institutions with expertise across digital markets, including for example to build talent pipelines?

Gathering information and evidence

- How readily have you been able to gather evidence and information necessary to support your digital markets work?

- How should we be engaging with the external stakeholders, both to build our understanding and to ensure that their views are heard?

Building relationships

- How are you approaching your engagement with the big platforms? Have you made any changes to your agency's approach in order to try and foster a more productive relationship?

Breakout Session 1 – Presentation: Building the CMA's DaTA Unit

Time: 13:15 – 14:15

Duration: 60 mins

Presenter: Stefan Hunt, Chief Data and Technology Insight Officer, CMA

Topic of the session: Building the CMA's DaTA Unit, and using data in competition work

Format: Presentation, with scope for discussion

Summary

The CMA launched its Data, Technology and Analytics (DaTA) unit nearly three years ago. The unit has grown from scratch to roughly 50 professionals with skills in data science, engineering, technology insight, behavioural science, eDiscovery and digital forensics.

DaTA works directly on cases across the competition and consumer portfolio. This presentation will provide examples of how DaTA has inputted into key cases, e.g., the digital advertising market study (Google and Facebook), fake and misleading online reviews (Facebook, eBay, Amazon and Google), the Google Privacy Sandbox antitrust case, the Facebook/Giphy merger and more.

The presentation will also provide examples of DaTA-led initiatives to build and deploy bespoke technology (e.g. for ingesting and reviewing documents or for monitoring markets) or develop new analytical capability (e.g. algorithmic analysis, online choice architecture, or testing and trialling remedies).

Future Tech Forum Day 1 – Panel Session: Digital Regulation

Time: 16:00 – 17:00

Duration: 60 mins

Format: Panel discussion

Panellists: Dame Melanie Dawes, (Ofcom Chair - will also moderate the session), Andrea Coscelli (CEO, UK Competition and Markets Authority), Lina Khan (Chair, US Federal Trade Commission), Andrea Renda (Senior Research Fellow and Head of Global Governance, Regulation, Innovation & Digital Economy at the Centre for European Policy Studies (CEPS))

Topic of the session: Digital Regulation: Preparing for the Future

Summary

The panel objective is to discuss the emerging and future digital developments that regulators should be ready for, explore the new regulatory concerns these developments may bring about, as well as consider how they might test institutional boundaries.

There will be a short intervention from each of the panellists followed by a number of pre-agreed audience interventions.

For further information, please refer to the document attached to the final agenda email.

Side Meeting 1 – Informal Discussion: BEIS Select Committee State aid and competition policy inquiry

Time: 18:30 – 19:00

Duration: 30 mins

Summary

Darren Jones MP, the Chair of the BEIS Select Committee has asked for an informal discussion on the recent inquiry the Select Committee have launched. The scope of the inquiry is:

- UK Competition Policy and the Competition & Markets Authority (CMA)
- State Aid and the Subsidy Control Bill
- Competition in Digital Markets

More detail on the inquiry can be found here.

In particular, Darren Jones is interested in discussing:

- Possibilities surrounding collaboration on the scrutiny of digital markets (EU/US/UK).
- Issues surrounding national security and the intervention of competition authorities.

As this meeting is not a formal part of the G7 agenda, the attendance will be limited to Andrea Coscelli, Lina Khan, Andreas Mundt and Henri Piffaut.

Day 2 – 30 November

Heads of Agency Session 2

Time: 9:30am – 11:00am GMT

Duration: 90 mins

Topic of the session: Horizon scanning, policy priorities and future collaboration.

Format

The format of the session is a roundtable discussion. As this meeting will be in hybrid format, the chair will make sure that the virtual attendees are involved. The session will be chaired by Andrea Coscelli. Virtual attendees are asked to use the 'raise hand' function if they wish to make an intervention. Please notify us in advance if you would like to come in at any specific point.

A series of questions, set out below, will serve as a general guide for the session.

Summary

Over the last few months, the G7 agencies, along with this year's guests, have come together to discuss the digital policy priorities of each agency, both in the short and longer-term, informed by each agency's own horizon scanning work.

As set out in the introduction, keeping pace with digital markets and staying ahead of the curve on emerging technologies and their implications is no easy challenge. Horizon-scanning is key to helping us better understand new and emerging digital markets and technologies, and feeds each agency's pipeline, prioritisation decisions and informs case selection.

There is clear commonality across many of the policy priorities identified by agencies and with this comes the opportunity for collaboration. There are many areas in which agencies are looking to develop their understanding, creating the opportunity for potential collaboration either to build knowledge together, or for agencies to learn from others who are more advanced.

Furthermore, collaboration across policy priorities can also support greater coordination across our enforcement work – a coalition of the willing, leveraging collective action to prevent harm and address issues more effectively.

Objective

The first part of this discussion is intended to be an exchange of views to share best practice on agencies' approach to horizon scanning and policy prioritisation. As part of this discussion we would also like to explore opportunities for collaboration on areas of mutual interest, albeit no specific commitments will be sought.

The second part of the discussion will seek agreement to convening again next year to share and discuss each agency's policy priorities, in order to help identify where there might be opportunities for future cooperation and coordination.

Points for Discussion

Horizon scanning and Policy prioritisation

- How do you monitor and identify new and emerging topics? Do you have a formal system for doing this?

- How do you consider which new and emerging issues to undertake further work on, and how are the issues and policies prioritised? How do you determine use of tools (for example enforcement, rulemaking, policy etc?)

- How do you balance policy continuity and flexibility to react to new areas?

Collaboration

- What do you see as the most fertile priority policy areas for collaboration for your authority?

- Noting the levels of overlap, should we be more proactive in reaching out to international partners with opportunities for collaboration? What is the best mechanism for this?

- As we move towards solutions and remedies that will be implemented, and monitored, globally, how to we ensure this is done collaboratively and coherently.

- Longer term, can we reach a position where our priorities and actions are taken forward on an international level? What are the benefits and risks to doing this?

Next steps

- How do we best identify opportunities for collaboration and continue these conversations going forward?

Breakout session 2: ACCC Session on Reform to Existing Powers

Time: 11:15am – 12:15pm GMT

Duration: 60 mins

Moderator: Rod Sims, Chair of the Australian Competition and Consumer Commission

Plan of the session

1. Opening comments from ACCC Chair

2. Discussion

(a) Potential areas of consensus regarding the need for digital platform specific regulation and principles to guide regulatory design, including alignment

- Is current competition law adequately addressing competition issues in digital markets?
- How can digital platform regulatory regimes or specific competition or other laws best align with each other, and how might this be achieved?
- How will the various schemes/laws be enforced? Will they be subject to judicial or also merits review?

(b) Scope of potential digital platforms regulation

- Are there a core set of platforms we think ex ante market power directed regulation should cover?
    - What specific services demonstrate the characteristics we are most concerned with?
    - What are the thresholds for determining which platforms should be covered?
- What issues or behaviours should ex ante regulation cover? What are the common areas of focus within proposed ex ante regimes?
- Are any potential divergences between regulatory regimes manageable, or are there issues that we should seek to resolve?

(c) Collaboration going forward, including the value of future meetings

- How can we learn from each other over the next 6-9 months in relation to this topic?
- What is the best way we can collaborate and meet in future on digital platforms regulation?

(d) Signalling these discussions to governments and the platforms including the benefit in issuing a joint statement

- How should we communicate to governments and digital platforms that we are collaborating on ex ante regulation and holding these important discussions?

Future Tech Forum Day 2 – Ministerial Roundtable: Digital Governance

Time: 14:30 – 15:45

Duration: 75 mins

Chairs and vice-chairs

Chair 1: Anders Fogh Rasmussen, Founder of Alliance of Democracies, former NATO Secretary General and Danish PM.

- Vice-Chair 1: Jonathan Black, G7/G20 Sherpa, UK Cabinet Office

Chair 2: Baroness Martha Lane Fox, Founder of Doteveryone.org.uk and crossbench peer in the House of Lords.

- Vice-Chair 2: Susannah Storey, Director General, Department for Digital, Culture Media and Sport

Format

Roundtable discussion - the roundtables will divide ministers into two groups of c.10-15 participants who will both discuss the same topic in parallel. Each roundtable will be led by a prominent politician or academic in the sector, who together with an expert vice-chair, will guide a ministerial discussion to explore common challenges, areas for improved cooperation, areas where government should and should not intervene, and the levers available to do so.

Topic of the session: How can governance frameworks keep pace with tech?

Summary

As digital technologies underpin ever more aspects of our lives, how we choose to govern them will have huge implications for our prosperity, safety and society. Digital technologies are an incredible force for change across the world, and are essential to our future prosperity. However, in the digital age, where technologies are rapidly transforming our economies and everyday lives, responsible governance is critical to reaping their benefits while managing potential risks. In this context, it is increasingly challenging for existing governance regimes to deal with the pace of digital innovation while addressing societal and economic concerns such as safety and security, privacy or misinformation.

Our domestic and international responses need to work together to meet these challenges and realise the opportunities. Across multiple sessions on the first day, participants will explore new mechanisms for the governance of digital technologies, for example, regulatory cooperation, anticipatory governance and regulatory sandboxes. With the intention of developing a strong and actionable agenda for policymakers, Day 2 discussions will cover the biggest questions in tech governance as we look to the future.

- How can technology governance foster innovation whilst also protecting citizens?
    - What emerging and future digital developments represent the biggest challenges and opportunities?

- What regulatory concerns might these digital developments raise, and how should we address them?

- Are governments and regulators agile enough to govern new technologies effectively?
  - What practical approaches might be used to facilitate agile regulation?
  - What sort of institutional arrangements are required to enable agile regulation?

- How can we best agree norms and principles in technology governance?
  - What role should norms and principles play vs. other kinds of governance (e.g. legislation)?
  - What values should underpin these norms and principles?
  - Are there any barriers to agreement, either domestically or internationally?

- Is international cooperation on governance fit for the digital age?

Additional Information for in-person attendees

Covid-19

As the Future Tech Forum will require a lateral flow before the event we suggest taking them before arriving at The Cabot, however we will have spare test available in the building for those who require them. Further details on the requirements for the Future Tech Forum are in the Administrative Circular attached to the final agenda email.

Further information on attendance to The Cabot is included in the visitor's pack attached to the final agenda email.

Dress Code

The dress code for the Future Tech Forum is business attire.

WiFi

There is a dedicated WiFi network for visitors to the offices.

CMA-Guest is for staff to use on personal devices and is available to any visitors on CMA premises. Non CMA staff are required to use a normal password - these will change on a regular basis. The current username and password is:

Username: cmaguest
Password: [redacted]

Cards with the connection details will also be available for guests from the 7th floor, CMA Reception.

Travel and Location

For information on the CMA offices and travel, please refer to the document attached to the final agenda email.

21st International Conference on Competition

4 May 2022

The Berlin Conference

www.ikk2022.de

#ikk2022

Bundeskartellamt
open markets | fair competition

Tuesday, 3 May 2022

Steigenberger Hotel am Kanzleramt, Berlin
from 17.00 h *Registration*

Evening programme
19.00 h *Reception and buffet dinner at restaurant "Nolle", Berlin*

Wednesday, 4 May 2022

Steigenberger Hotel am Kanzleramt, Berlin
from 08.00 h *Registration*

21st International Conference on Competition

09.00 h	*Opening address*	**Andreas Mundt,** President of the Bundeskartellamt, Bonn
09.15 h	*Greeting*	**Dr. Robert Habeck**, Federal Minister for Economic Affairs and Climate Action, Berlin
09.20 h	*Speech*	**Sven Giegold**, State Secretary at the Federal Ministry for Economic Affairs and Climate Action, Berlin
	Q&A	**Andreas Mundt** (Moderator), President of the Bundeskartellamt, Bonn
		Fiona Scott Morton, Professor of Economics, Yale School of Management, New Haven
09.45 h	*Speech*	**André Schwämmlein**, CEO, Flix SE, Munich
	Q&A	**Andreas Mundt** (Moderator), President of the Bundeskartellamt, Bonn
10.15 h	*Coffee Break*	

10.45 – 12.15 h **Panel:** **Competition Law and Politics – Complementary, Confusing, Contradictory?**

Moderator	**Andrea Coscelli**, Chief Executive, Competition and Markets Authority, London
Panelists	**Ingo Brinker**, Partner at GleissLutz, and Chairman of the Competition Lawyers' Association, Munich/Brussels
	Cristina Caffarra, Senior Consultant at Charles River Associates, London
	Benoît Coeuré, President of the Autorité de la Concurrence, Paris
	Olivier Guersent, Director-General for Competition at the European Commission, Brussels
	Jonathan Kanter, Assistant Attorney General of the U.S. Department of Justice, Washington D.C.
	Fiona Scott Morton, Professor of Economics, Yale School of Management, New Haven
Discussion	*Competition authorities are confronted with increasing demands that politicians place on competition law, as well as with the complex interaction between competition law and other areas of law such as consumer protection and data protection, which play a role in the competitive assessment of platform markets, for example. Do these requirements threaten to become a gateway for a far-reaching politicization of competition law?*

12.15 h *Closing* **Andreas Mundt**, President of the Bundeskartellamt, Bonn

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Lunch programme
12.30 h *Lunch buffet at Steigenberger Hotel, Berlin*

Conference hotel

Steigenberger Hotel am Kanzleramt
Ella-Trebe-Straße 5
10557 Berlin
Phone: +49 (0)30 740743-0
E-Mail: kanzleramt-berlin@steigenberger.de
www.kanzleramt-berlin.steigenberger.de

Evening programme on 3 May 2022

Restaurant Nolle
Georgenstraße/S-Bahn-Bogen 203
10117 Berlin
Phone: +49 (0)30 208 26 45
http://www.restaurant-nolle.de/

Please Note:

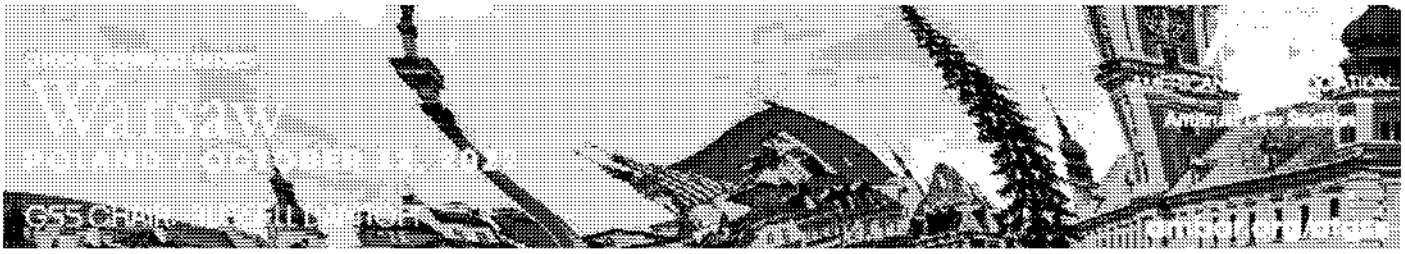
Participation is by personal invitation only.
Registrations will be processed
in the order of receipt.

The number of conference participants will be limited.

We recommend that you register as early as possible at
www.ikk2022.de

For further questions about the organisation of the conference please contact

Barbara Schulze
Head of International Unit
Phone: +49 (0)228 9499-240
E-Mail: barbara.schulze@bundeskartellamt.bund.de



as of 10.07.??

On Wednesday, October 12, the ABA Antitrust Law Section will bring together government officials and private bar experts for its first Global Seminar Series (GSS) held in Central and Eastern Europe, fittingly in the country that helped launch the political and economic transition that brought new life to the region.

The GSS will feature three segments of general interest to all competition practitioners, on leading-edge issues, with ample opportunities for sharing thoughts, questions, and networking. Each panel will have time for interactive discussions:

14:00 Opening Remarks

- Tomasz CHRÓSTNY, President, Office of Competition and Consumer Protection, Warsaw
- Thomas F. ZYCH, ABA Antitrust Law Section Chair, Thompson Hine LLP, Cleveland, OH

14:10-14:40 Keynote Discussion: Antitrust on the Front Lines

- Russell W. DAMTOFT, Associate Director, Office of International Affairs, Federal Trade Commission, Washington, DC
- Olha PISHCHANSKA, Chair, Antimonopoly Committee of Ukraine, Kyiv
- Vladimir SAYENKO, Sayenko Kharenko, Kyiv
- Serhiy SHERSHUN, State Commissioner, Antimonopoly Committee of Ukraine, Kyiv

14:45-15:45 Panel 1: The Shifting Lines of Vertical Agreements

Vertical agreements are a regular staple of an antitrust practitioner's life, whether it involves a distributional arrangement or the acquisition of a supplier or distributor. Historically, European authorities have been quicker to rely on presumptions and form-based laws, while the American approach has been more deferential by requiring more rigid proof of anticompetitive effects. Questions are now being raised about whether vertical arrangement have led to an excessive degree of dominance, while Europe is now adjusting to a new block exemption and vertical guidelines. This panel will explore current national, European, and global trends affecting vertical enforcement.

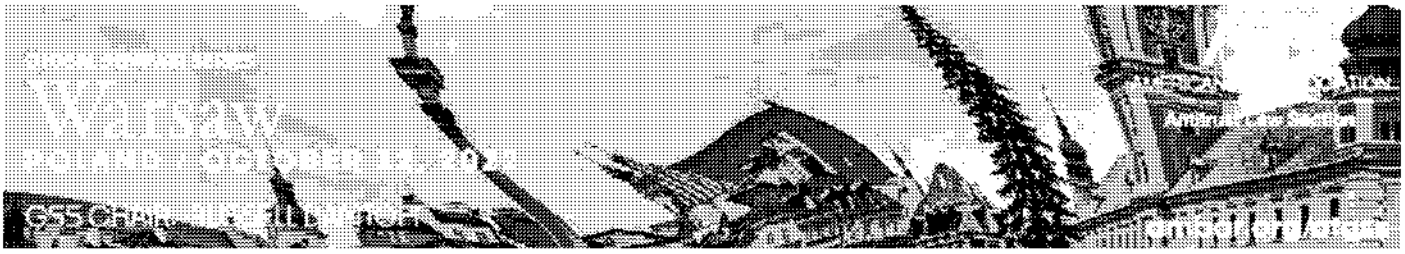
Moderator:

- Dorothy HANSBERRY-BIEGUŃSKA, Hansberry Tomkiel, Warsaw

Panelists:

- Joanna AFFRE, Affre & Wspólnicy, Warsaw
- David ANDERSON, Bryan Cave Leighton Paisner, Brussels
- Robert NERUDA, Havel & Partners, Prague
- Aleksander STAWICKI, WKB Lawyers, Warsaw

15:45-16:00 Break



16:00-17:00 Panel 2: Enforcers Roundtable

Competition agencies in the region are facing a host of new issues, including recovery from the COVID-19 pandemic; whether the introduction of competition law into the region in the 1990s has fulfilled its objectives; the ongoing relevance of the consumer welfare standard; whether non-competition issues should be considered in merger review and antitrust enforcement; the relationship between competition, consumer protection, and privacy enforcement; and the role private rights of action have played in the region since they were introduced across the EU.

Moderator:

- Anna FORNALCZYK, COMPER Fornalczyk i Wspólnicy, Lodz

Panelists:

- Cosmin BELACURENCU, Member of the Board, Romanian Competition Council, Bucharest
- Tomasz CHRÓSTNY, President, Office of Competition and Consumer Protection, Warsaw
- Šarūnas KESERAUSKAS, Chair, Lithuanian Competition Council, Vilnius
- Serhiy SHERSHUN, State Commissioner, Antimonopoly Committee of Ukraine, Kyiv

17:00 Conference Wrap-Up

- Thomas F. ZYCH, Thompson Hine LLP, Cleveland, OH

17:05-18:15 "The Drink" Cocktail Reception

REGISTRATION

Complimentary delegate registration is available online at ambar.org/atevents until Oct 11, or when capacity has been reached. Advanced registration is necessary.

Press should contact Bill Choyke at Bill.Choyke@americanbar.org to register.

COMMITTEES

Please learn more about our Federal Civil Enforcement & International Committees online at ABA Antitrust Law Committees

ABA IN-PERSON MEETING DISCLAIMER

The ABA takes the health and safety of our members, guests, and staff seriously. We know that the decision whether to attend a meeting is based upon a variety of personal and business considerations. We will continue to monitor a variety of sources, including the U.S. Center for Disease Control and Prevention (CDC) and U.S. state and local health authorities for the latest public health updates, as well as applicable restrictions on events and gatherings. The ABA plans to hold this meeting in person but reserves the right to cancel or reschedule this event or convert it to a virtual event if health and safety restrictions require it. We will update the registrants and the website should the plans for this event change. As part of the registration process to host this ABA meeting in person, every attendee is required to affirm his/her commitment to comply with the in-person meeting guidelines.

QUESTIONS? Please contact ABA Antitrust Meetings at-meeting@americanbar.org

G7 GERMANY
2022

G7 Joint Competition Enforcers & Policy Makers Summit, 11 & 12 October 2022, Berlin

Exchange on enforcement and policy approaches regarding competition in digital markets

11 October 2022		
17.45	*Guided tour of the Reichstag Building*	
19.00	*Dinner*	
12 October 2022		
9.00 – 9.30	Opening addresses	*Sven Giegold, State Secretary at the Federal Ministry for Economic Affairs and Climate Action* *Andreas Mundt, President of the Bundeskartellamt*
9.30 – 11.00	**Session 1**	**Legal Reforms around the Globe – Common Goals and Crossroads** *Moderator: Sven Giegold, State Secretary at the Federal Ministry for Economic Affairs and Climate Action* *Input on the G7 Digital Competition Inventory by the OECD*
11.00 - 11.30	*Morning Coffee*	
11.30 - 13.00	**Session 2**	**Enforcement at the intersection of competition law and other fields of law and policy – Necessity and Friction** *Moderator: Silke Hossenfelder, Head of the General Policy Division, Bundeskartellamt and Philipp Steinberg, Director General at the Federal Ministry for Economic Affairs and Climate Action*
13.00 – 14.30	*Lunch*	
14.30 – 16.00	**Session 3**	**Digital Enforcement – Successes, Gaps, New Tools** *Moderator: Andreas Mundt, President of the Bundeskartellamt*
16.00-16.15	**Wrap-up**	*Andreas Mundt, President of the Bundeskartellamt* *Philipp Steinberg, Director General at the Federal Ministry for Economic Affairs and Climate Action*

DAY 1 - 04 MAY

AGENDA

All times in Berlin-Time (UTC +2)

Time/Location	Event
from 08:00	**Registration**
Foyer	We encourage participants to register the day before, from 5 pm until 7 pm, at the Steigenberger Hotel.
08:00 – 09:00	**ICN Co-chairs Meeting**
Salon 1	Closed Session **Cynthia Lagdameo**, International Counsel, U.S. Federal Trade Commission **Olaf Wrede**, Deputy Head International Unit, Bundeskartellamt, Germany
13:00 – 13:45	**Introduction to ICN**
Salon 4	**Nigel Caesar**, Competition Law Officer, Competition Bureau Canada **Paul O'Brien**, International Counsel, U.S. Federal Trade Commission
14:00 – 14:15	**Opening address**
Saal A+B	**Andreas Mundt**, President Bundeskartellamt and ICN Chair
14:15 – 14:45	**Powertalk: The Standard of Proof**
Saal A+B	**Wolfgang Kirchhoff**, Deputy Chairman, Federal Court of Justice, Germany **Marc van der Woude**, President, General Court of the EU, Luxembourg **Andreas Mundt (Moderator)**, President, Bundeskartellamt, Germany
14:45 – 15:00	**Cartel Keynote**
Saal A+B	**Jonathan Kanter**, Assistant Attorney General, U.S. Department of Justice
15:00 – 16:00	**Anti-Cartel enforcement in the next decade: priorities and new trends looking beyond the pandemic**
Saal A+B	Cartel Working Group Moderator: **Ricardo Riesco**, President, Fiscalía Nacional Económica, Chile Speakers: **Elisabetta Iossa**, Commissioner, Autorità Garante della Concorrenza e del Mercato, Italy **Margarida Matos Rosa**, President, Portuguese Competition Authority **Teresa Moreira**, Head of Competition & Consumer Policies, UNCTAD **Richard Powers**, Deputy Assistant Attorney General for Criminal Enforcement, U.S. Department of Justice **Johan Ysewyn**, Partner, Covington & Burling LLP, European Union
16:00 – 16:30	**Implementation in the ICN**
Saal A+B	Promotion & Implementation Group Moderator: **Randy Tritell**, Director International Affairs, U.S. Federal Trade Commission Speakers: **Viviana Blanco Barboza**, President, COPROCOM, Costa Rica **Mary Catherine Lucey**, Associate Professor, UCD Sutherland School of Law, Ireland **David Miller**, Executive Director, Fair Trading Commission, Jamaica **Parret Muteto**, Chief Analyst, Competition & Consumer Protection Commission, Zambia
16:30 – 17:00	**Afternoon Coffee**
17:00 – 18:15	**Breakout Session Round 1:**

DAY 1 - 04 MAY

AGENDA

All times in Berlin-Time (UTC +2)

Salon 10

Frenemies – when a regulator's objectives conflict with those of a competition agency

Avocacy Working Group

Moderator:
Rafael Alleandesalazar, Managing Partner, MLAB Abogados, Spain
Speakers:
Alexandre Barreto, Superintendent General, President, Administrative Council for Economic Defence, Brazil
Huy Do, Partner, Fasken, Canada
Osamu Igarashi, Deputy Director of Coordination Division, Japan Fair Trade Commission
David Miller, Executive Director, Jamaica Fair Trading Commission
Irene Picciano, Counsel, Portolano Cavallo, European Commission

Salon 6+7

Tools competition agencies have used to better understand markets affected by the pandemic

Agency Effectiveness Working Group

Moderator:
Fernando Carreño, Partner, Von Wobeser, Mexico
Speakers:
Zombor Berczvai, Head of Competation Policy and Market Research, Hungarian Competition Authority
Gudmundur Haukur Gudmundsson, International Coordinator, Icelandic Competition Authority
Parret Muteto, Chief Analyst, Competition and Consumer Protection Commission, Zambia
David Stewart, Executive Director, Mergers and Markets, Competition and Markets Authority, U.K.

Salon 1

How to fight and prove bid-rigging in public procurement

Cartel Working Group

Moderator:
Michele Pacillo, International Affairs Officer, Italian Competition Authority
Speakers:
Haim Abriv, Head, Investigations & Intelligence Department, Israel Competition Authority
Subrata Bhattacharjee, Partner, Borden Ladner Gervais LLP, Canada
Pamela Hansson, Partner, Kastell Advokatbyrå AB, Sweden
Manuel Haro, Head of the Investigative Authority, Federal Economic Competition Commission, Mexico
Marisa Tierno Centella, Director General for Competition, National Markets and Competition Commission, Spain

Salon 5

Killer acquisition and reverse killer acquisitions

Merger Working Group

Moderator:
Melanie Aitken, Managing Principal, Bennett Jones, Canada
Speakers:
Anna Barker, Director Digital Platforms, Australian Competition and Consumer Commission
Patty Brink, Senior Counsel, International and Intergovernmental Engagement, U.S. Department of Justice
Guillaume Loriot, Deputy Director General, DG Competition, European Commission
Mahmoud Momtaz, Chairman, Egyptian Competition Authority
Fiona M. Scott Morton, Professor of Economics, Yale School of Management, U.S.

Salon 4

Urgency procedural tools in unilateral conduct

Unilateral Conduct Working Group

Moderator:
Luiz Augusto Hoffmann, Commissioner, Administrative Council for Economic Defence, Brazil
Speakers:
Andy Chen, Vice Chairperson, Taiwan Fair Trade Commission
Grégoire Comet Daage, Autorité de la concurrence, France
Massimiliano Kadar, Deputy Head of Unit, DG Competition, European Commission
Katharina Voss, Competition Counsel, Swedish Competition Authority

Salon 8+9

Third Decade Review

Moderator: **Paul O'Brien**, International Counsel, U.S. Federal Trade Commission

DAY 2 – 05 MAY

AGENDA

All times in Berlin-Time (UTC +2)

Time/Location	Event
09:00 – 09:30	**Keynote and Q&A**
Saal A+B	**Margrethe Vestager**, Executive Vice-President, European Commission **Cani Fernández**, President, National Markets and Competition Commission, Spain (Moderator)
09:30 – 09:45	**Unilateral Conduct Keynote and Q&A**
Saal A+B	**Gina Cass-Gottlieb**, Chairwoman, Australian Competition and Consumer Commission **Martijn Snoep**, Chairman, Netherlands Authority for Consumers and Markets (Moderator)
09:45 – 10:45	**Unilateral Conduct Plenary Session: Regulatory and competition law tools in digital markets**
Saal A+B	Moderator: **Holly Vedova**, Director, Bureau of Competition, U.S. Federal Trade Commission Speakers: **Bhagwant Bishnoi**, Member, Competition Commission of India **Benoît Cœuré**, Président, Autorité de la concurrence, France **Olivier Guersent**, Director General, DG Competition, European Commission **Andreas Mundt**, President, Bundeskartellamt, Germany **Yoon Soohyun**, Commissioner, Korea Fair Trade Commission
10:45 – 11:15	Morning Coffee
11:15 – 12:30	**Break Out Session Round 2:**
Salon 1	**Heads of Agencies Session** (Agencies-only session) Moderator: **Tembinkosi Bonakele**, Commissioner, Competition Commmission South Africa, and ICN Vice Chair, **Margarida Matos Rosa**, President, Portuguese Competition Authority, and ICN Vice Chair
Salon 10	**Advocating competition principles for the provision of digital services: how to set competition expectations in dynamic markets?** Advocacy Working Group Moderator: **Eleanor Fox**, Professor of Law, New York University, U.S. Speakers: **Sarah Cardell**, General Counsel, Competition and Markets Authority, U.K. **Joaquín López Vallés**, Director Advocacy Department, National Markets and Competition Commission, Spain **Heidi Sada Correa**, Executive Director for International Affairs, Federal Economic Competition Commission, Mexico **Ubaldo Stecconi**, DG Competition, European Commission **Bilge Yılmaz**, Turkish Competition Authority
Salon 6+7	**Review of the ICN Recommended Practices (Chapter on entry and expansion)** Merger Working Group Moderator: **Kjell Jostein Sunnevåg**, Director, External Relations, Norwegian Competition Authority Speakers: **Julia Brockhoff**, Merger Case and Support Head of Unit, European Commission **Maria Coppola**, Assistant Director, Policy and Coordination, U.S. Federal Trade Commission **Melissa Fisher**, Deputy Commissioner, Competition Bureau, Canada **Eleni Gouliou**, Director of Mergers, Competition and Markets Authority, U.K. **Adano Wario Roba**, Director Policy & Research, Competition Authority of Kenya

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Salon 5

Theories of harm in digital markets

Unilateral Conduct Working Group

Moderator:
Antonio Capobianco, Senior Competition Expert, OECD
Speakers:
Merve Biroğlu, Case Handler, Turkish Competition Authority
Bhawana Gulati, Joint Director (Law), Competition Commission of India
Katharina Krauß, Bundeskartellamt, Germany
Maria João Melícias, Board Member, Portuguese Competition Authority
Bart Noé, Senior Strategy Advisor, Netherlands Authority for Consumers and Markets

Salon 8+9

ICN Framework for Competition Agency Procedures (ICN CAP)

Moderator:
Dave Anderson, Partner, BCLP, Brussels, Belgium
Speakers:
Andriani Kalintiri, Lecturer in Competition Law, King's College London, Greece
Lynda Marshall, International Section Chief, U.S. Department of Justice
Barbara Schulze, Head of International Unit, Bundeskartellamt, Germany

Salon 4

Special Session on Sustainability

Moderator:
Csaba Balázs Rigó, President, Hungarian Competition Authority
Speakers:
Georg Boettcher, Chief Counsel, Siemens, Germany
Marcela Mattiuzzo, Partner, VMCA Abvogados, Brazil
Hardin Ratshisusu, Deputy Commissioner, Competition Commission South Africa
Ori Schwartz, Head of the Competition Division, OECD

12:30 – 14:00 Lunch

12:30 – 14:00

ICN Open House

Event

14:00 – 15:15

Break Out Session Round 3:

Salon 10

Gathering and using information for effective strategic planning

Agency Effectiveness Working Group

Moderator:
Raymond Ng, Senior Assistant Director, Competition and Consumer Commission of Singapore
Speakers:
Jesus Espinoza, Director, Investigation and Promotion of Free Competition, Indecopi, Peru
Baethan Mullen, General Manager, Economics & International Branch, Australia Competition and Consumer Commission
Aurélie Zoude-Le Berre, President, Autorité de la concurrence, New Caladonia

Salon 6+7

International Cooperation in cross-border cartels

Cartel Working Group

Moderator:
Marcus Bezzi, Executive General Manager, Australia Competition and Consumer Commission
Speakers:
Kala Anandarajah, Head of Competition, Rajah & Tann LLP, Singapore
Natalie Harsdorf-Borsch, Acting Director-General, Austrian Federal Competition Authority
Eksteen Maritz, Director, Criminal Enforcement and Digital Investigations, Ireland Competition and Consumer Protection Commission
Marek Martyniszyn, Senior Lecturer, Queen's University Belfast
Sabine Zigelski, Senior Competition Expert, Competition Division, OECD

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Saal 8+9 **NGA Engagement**

Moderator:
Alexandre Cordeiro, President, Administrative Council for Economic Defence, Brazil
Speakers:
Fernando Carrenó, Partner, Von Wobeser, Mexico
Shweta Shroff Chopra, Partner, Shardul Amarchand Mangaldas & Co , India
Derek Lotter, Co-Head of Competition, Bowmans, South Africa
Álvaro Ramos, Head of Global Antitrust & Chief Antitrust Compliance Officer at Qualcomm, Spain

Salon 1 **Regional Competition Cooperation - Experience Sharing and Opportunities for Further Expansion**

Moderator:
Elizabeth Kraus, Deputy Director for International Antitrust, U.S. Federal Trade Commission
Speakers:
Alexandre Barreto, General Superintendent, Administrative Council for Economic Defense, Brazil
Graeme Jarvie, International Affairs Director, Swedish Competition Authority
Mahmoud Momtaz, Chairman, Egyptian Competition Authority

Salon 5 **Digital platforms: thinking about theories of harm through incentives and business models**

Moderator:
Jan Yngve Sand, Chief Economist, Norwegian Competition Authority
Speakers:
Cristina Caffarra, Senior Consultant Charles River Associates, U.K.
James Hodge, Deputy Commissioner, Competition Commission South Africa
Ana Sofia Rodrigues, Chief Economist, Portuguese Competition Authority

Salon 4 **BOS by Younger Agencies for Younger Agencies - Tips and Experiences**

Moderator:
Viviana Blanco Barboza, Chairwoman, Coprocom Costa Rica
Speakers:
Denar Biba, Chairman, Albanian Competition Authority, Albania
Heidi Sada Correa, Executive Director International Affairs, Federal Economic Competition Commission, Mexico
Bevan Narinesingh, Executive Director, Fair Trading Commission, Trinidad and Tobago
Adano Wario Roba, Director Policy, Research and Quality Assurance, Competition Authority of Kenya
Kenneth V. Tanate, Executive Director, Philippine Competition Commission

15:15 – 15:45 Afternoon Coffee

15:45 – 16:15 Saal A+B **Competition law enforcement at the intersection between competition, consumer protection, and privacy**

Moderator:
Matthew Boswell, Commissioner, Competition Bureau Canada
Speakers:
Tembinkosi Bonakele, Commissioner, Competition Commmission of South Africa
William E. Kovacic, Professor, George Washington University Law School, U.S.
Rupprecht Podszun, Professor, Heinrich Heine University, Germany

16:15 – 17:15 Saal A+B **Advocacy Plenary Session: Enabling effective international enforcement co-operation through advocacy**

Moderator:
Johannes Benjamin Bernabe, Commissioner, Philippine Competition Commission
Speakers:
Andrés Barreto, Superintendent of Industry and Commerce, SIC, Colombia
Antonio Gomes, Deputy Director at the Directorate for Financial and Enterprise Affairs, OECD
Francis W. Kariuki, Director General, Competition Authority of Kenya
Ioannis Lianos, President, Hellenic Competition Commission
Olha Pishchanska, Chairperson, Antimonopoly Committee of Ukraine

All times in Berlin-Time (UTC +2)

17:15 – 17:45	**Competition Advocacy Contest Awards Ceremony**
Saal A+B	ICN and World Bank Group Welcome and Introduction Andreas Mundt, ICN Chair Presentation of the Awards **Alessandra Tonazzi**, Director of International and EU relations, Italian Competition Authority **Graciela Miralles**, Senior Economist, Markets & Technology Global Unit, World Bank Group
19:00	**ICN Conference Dinner**
Hotel Oderberger	(Conference Atendees only)

DAY 3 - 06 MAY

AGENDA

ICN 2022 BERLIN

All times in Berlin-Time (UTC +2)

Time/Location	Event
09:00 – 09:15	**Keynote**
Saal A+B	**Andreas Schwab**, Member, European Parliament
09:15 – 10:15	**How the pandemic has changed agencies' investigative processes**
Saal A+B	Agency Effectiveness Working Group Moderator: **Anton Dinev**, Counsel, Grimaldi Studio Legale (Brussles), Belgium Speakers: **Brenda Gisela Hernández**, Acting Chairwoman, Federal Economic Competition Commission, Mexico **Rikard Jermsten**, Director General, Swedish Competition Authority **Dato' Jagjit Singh**, Commissioner, Malaysia Competition Commission
10:15 – 10:30	**Merger Keynote**
Saal A+B	**Lina M. Khan**, Chair, U.S. Federal Trade Commission
10:30 – 11:00	**Morning Coffee**
11:00 – 12:00	**Break Out Session Round 4:**
Salon 6+7	**How to advocate for a Gender-Inclusive Competition Policy?** Advocacy Working Group Moderator: **Ori Schwartz**, Head of the Competition Division, OECD Speakers: **Claudia Lemus**, Research Fellow, Queen Mary University of London **Mary Catherine Lucey**, Associate Professor, UCD Sutherland School of Law, Ireland **Patrick Krauskopf**, Chairman, Agon Partners Legal AG, Switzerland
Salon 5	**Digital transformation of competition agencies – Practical tips and challenges** Agency Effectiveness Working Group Moderator: **Gustavo Freitas**, Commissioner, Administrative Council for Economic Defence, Brazil Speakers: **Iskandar Ismail**, Chief Executive Officer, Malaysia Competition Commission **Konrad Ost**, Vice-President, Bundeskartellamt, Germany **Naif Samandar**, Head of IT Department, General Authority of Competition Saudi Arabia **Irma Urmonaitė**, Deputy Chairwomen, Lithuanian Competition Council
Salon 4	**Leniency and beyond: enforcement strategies for the near future** Cartel Working Group Moderator: **Alessandra Tonazzi**, Director of International and EU relations, Italian Competition Authority Speakers: **Emircan Aksakal**, Competition Expert, Turkey Competition Authority **Tsuyoshi Ikeda**, Lawyer, IKEDA & SOMEYA, Japan **Anne Krenzer**, Leniency Officer and Advisor to the Rapporteur Général, Autorité de la concurrence, France **Chris Mayock**, Leniency Task Force, DG Competition, European Commission

DAY 3 - 06 MAY

AGENDA

All times in Berlin-Time (UTC +2)

Salon 1

Big M&A deals: Economic tools to help authorities analyze large volumes of data

Merger Working Group

Moderator:
Sergio Sinovas, Head of Industry and Energy Unit, National Markets and Competition Commission, Spain
Speakers:
Alexandre Cordeiro, President, Administrative Council for Economic Defence, Brazil
Eviatar Guttman, Economist at Research Division, Israel Competition Authority
Kim Kyoungyeon, Attorney, Kim&Chang, Korea
Jan Svitak, Economist, Netherlands Authority for Consumers and Markets

Salon 2.0

Efficient remedies for unilateral conduct

Unilateral Conduct Working Group

Moderator:
Dina Kallay, Head of Antitrust, Ericsson, Sweden
Speakers:
Osman Can Aydoğdu, Competition Authority, Turkey
Silke Hossenfelder, Head of General Policy, Bundeskartellamt, Germany
James Musgrove, Partner, McMillan LLP, Canada
David Sevy, Executive Vice President, Compass Lexecon, France

Salon 8+9

African Competition Forum, Steering Committee Meeting

Closed Session

12:00 – 12:15

Room change break

12:15 – 13:15

Challenges in merger control: Prohibitions and effective remedies

Saal A+B

Merger Working Group

Moderator:
Andrea Coscelli, Chief Executive, Competition and Markets Authority, U.K.
Speakers:
Reiko Aoki, Commissioner, Japan Fair Trade Commission
Cani Fernández, President, National Markets and Competition Commission, Spain
Alexandre Cordeiro Macedo, President, Administrative Council for Economic Defence, Brazil
Tina Søreide, Director General, Norwegian Competition Authority

13:15 – 13:45

Closing Session

Saal A+B

Andreas Mundt, President, Bundeskartellamt, Germany

13:45 – 15:00

Lunch

13:45 – 14:45

Meeting of the Steering Group

Salon 6+7

15:00 – 17:15

Spree River Cruise

Meeting point: Lobby, Steigenberger Hotel
15:30 Departure Spree River Cruise Ships at Pier Kanzleramt/Haus der Kulturen der Welt

All itineraries of FTC officials traveling abroad on official business in the United Kingdom and the European Union

Maria Coppola Competition and Markets Authority	5/1/21 – 11/17/2021	London, UK	detail to UK
Lina Khan Enforcers Summit	11/27/2021 – 12/2/2021	London, UK	G7 Competition
Maria Coppola Enforcers Summit	11/27/2021 – 12/2/2021	London, UK	G7 Competition
Lina Khan Conference and meetings with EU officials	3/29/2022 – 4/1/2022	Brussels, Belgium	CRA Annual Brussels
Maria Coppola Conference and meetings with EU officials	3/29/2022 – 4/1/2022	Brussels, Belgium	CRA Annual Brussels
Rebecca Slaughter	5/2/2022 – 5/7/2022	Berlin, Germany	Bundeskartellamt International Competition Conference and International Competition Network Annual Conference
Adam Cella International Competition Conference	5/2/2022 – 5/5/2022	Berlin, Germany	Bundeskartellamt
Lina Khan Competition Network Annual Conference	5/2/2022 – 5/7/2022	Berlin, Germany	International
Holly Vedova Competition Network Annual Conference	5/2/2022 – 5/7/2022	Berlin, Germany	International
Maria Coppola Competition Network Annual Conference	5/2/2022 – 5/7/2022	Berlin, Germany	International
Cynthia Lagdameo Competition Network Annual Conference	5/2/2022 – 5/7/2022	Berlin, Germany	International
Paul O'Brien Competition Network Annual Conference	5/2/2022 – 5/7/2022	Berlin, Germany	International
Randolph Tritell Competition Network Annual Conference	5/2/2022 – 5/7/2022	Berlin, Germany	International
Elizabeth Kraus Competition Network Annual Conference	5/2/2022 – 5/7/2022	Berlin, Germany	International

Elizabeth Kraus Committee Meetings	6/18/2022 – 6/25/2022	Paris, France	OECD Competition
Geoffrey Green Committee Meetings	6/18/2022 – 6/25/2022	Paris, France	OECD Competition
Randolph Tritell Committee Meetings	6/18/2022 – 6/25/2022	Paris, France	OECD Competition
Stephanie Nguyen	6/12/2022 – 6/17/2022	Liverpool, UK	CMA Data Conference
Alexander Gaynor	6/12/2022 – 6/17/2022	Liverpool, UK	CMA Data Conference
John Newman Conference	6/27/2022 – 7/5/2022	Athens, Greece	"Athena" Enforcers
Russell Damtoft Assistance Program with Ukraine	10/9/2022 – 10/18/2022	Warsaw, Poland	USAID Technical
Program			ABA Eastern Europe
Lina Khan Enforcers Summit	10/10/2022 – 10/12/2022	Berlin, Germany	G7 Competition
Maria Coppola Enforcers Summit	10/10/2022 – 10/12/2022	Berlin, Germany	G7 Competition
Jon Nathan Technology Competition Policy Dialogue	10/11/2022 – 10/15/2022	Brussels, Belgium	U.S.- EU Joint
Shaoul Sussman Technology Competition Policy Dialogue	10/11/2022 – 10/15/2022	Brussels, Belgium	U.S.- EU Joint
Holly Vedova Technology Competition Policy Dialogue	10/11/2022 – 10/15/2022	Brussels, Belgium	U.S.- EU Joint
Lina Khan Technology Competition Policy Dialogue	10/13/2022 – 10/15/2022	Brussels, Belgium	U.S.- EU Joint
Maria Coppola Technology Competition Policy Dialogue	10/13/2022 – 10/15/2022	Brussels, Belgium	U.S.- EU Joint
Danica Noble Assistance Program with Ukraine	11/18/2022 – 11/24/2022	Warsaw, Poland	USAID Technical
Elizabeth Kraus Committee Meetings	11/26/2022 – 12/3/2022	Paris, France	OECD Competition
Maria Coppola Committee Meetings	11/28/2022 – 12/1/2022	Paris, France	OECD Competition

Lina Khan Committee Meetings	11/28/2022 – 12/1/2022	Paris, France	OECD Competition
Lina Khan competition agency meetings	12/1/2022 – 12/2/2022	London, UK	UK-US-Australia
Maria Coppola competition agency meetings	12/1/2022 – 12/2/2022	London, UK	UK-US-Australia
Andrew Heimert Competition and Markets Authority	11/30/2022 – 12/2/2022	London, UK	Meetings with UK
John Newman Workshop	12/11/2022 – 12/13/2022	Brussels, Belgium	EU Digital Mergers
Russell Damtoft Assistance Program with Ukraine	12/11/2022 – 12/18/2022	Vilnius, Lithuania	USAID Technical
Danica Noble Assistance Program with Ukraine	12/11/2022 – 12/18/2022	Vilnius, Lithuania	USAID Technical
Aviv Nevo Conference on Antitrust and Regulation	3/21/2023 – 3/23/2023	Brussels, Belgium	Keystone's Brussels
Rebecca Slaughter Conference on Antitrust and Regulation	3/21/2023 – 3/23/2023	Brussels, Belgium	Keystone's Brussels
John Newman Conference on Antitrust and Regulation	3/21/2023 – 3/23/2023	Brussels, Belgium	Keystone's Brussels
Jon Nathan Competition	5/20/2023 – 8/09/2023	Brussels, Belgium	detail to EU's DG
Kristina Mulligan Germany's Bundeskartellamt	6/18/2023 – 6/21/2023	Bonn, Germany	Meetings with
Maria Coppola Committee Meetings	6/11/2023 – 6/16/2023	Paris, France	OECD Competition
Holly Vedova Committee Meetings	6/11/2023 – 6/16/2023	Paris, France	OECD Competition
Kelly Signs Committee Meetings	6/11/2023 – 6/16/2023	Paris, France	OECD Competition
Cynthia Lagdameo Committee Meetings	6/11/2023 – 6/16/2023	Paris, France	OECD Competition
Susan Musser Committee Meetings	6/15/2023 – 6/16/2023	Paris, France	OECD Competition

Overview of Chair Khan's Brussels Trip
March 29 – April 1, 2022

Tuesday, March 29

6:35pm UA 999 departs EWR Terminal C

Wednesday, March 30

7:45 UA 999 arrives BRU
Maria will be waiting for you. If her flight (UA 950, arr. BRU 7:15am) is delayed, exit the airport to taxi queue

Check-in Hotel Steigenberger Wiltchers, Av. Louise 71, 1050 Brussels, Belgium

11:30 Travel to DG Competition, Place Madou, 1, 1210 -Saint-Josse-Ten-Noode
Contact: Sylvie Lefevre [redacted]

12:00-12:40 Fireside Chat with Olivier Guersent, DG COMP

13:00-14:00 Lunch with EVP Vestager and AG Kanter, Berlaymont

14:30-15:00 Meeting with TACD and [redacted]
contact: Oriana Henry [redacted]
BEUC, Rue d'Arlon, 80 Bte 1 (cross: Rue Belliard)

15:15-15:45 Launch of FTC-EC Consumer Dialogue, meeting with Commissioner Reynders
Berlaymont. Contact: Lucie Rousselle, [redacted]

15:45-18:00 Free

18:00-18:30 Meeting with Commissioner Thierry Breton, Berlaymont

19:00 Speakers Dinner at BELvue Museum, 7 Place des Palais, 1000 Brussels
(Entrance on the same side as the Royal Palace)

Thursday, March 31

8:45-18:00 CRA Conference ([HYPERLINK "https://www.cra-brusselsconference.com/home/Programme" \h])

10:55-11:15 Meeting with Ioana Marinescu [redacted]
Hermitage Room

17:00 Meeting with Ambassador Gitenstein (with DOJ and Tim Wu) at US Mission

19:00 Dinner at Villa Lorainne

Friday, April 1

10:10 UA 998 departs BRU (only one terminal)
(Maria leaves BRU at 12:00 on UA 950 to IAD)

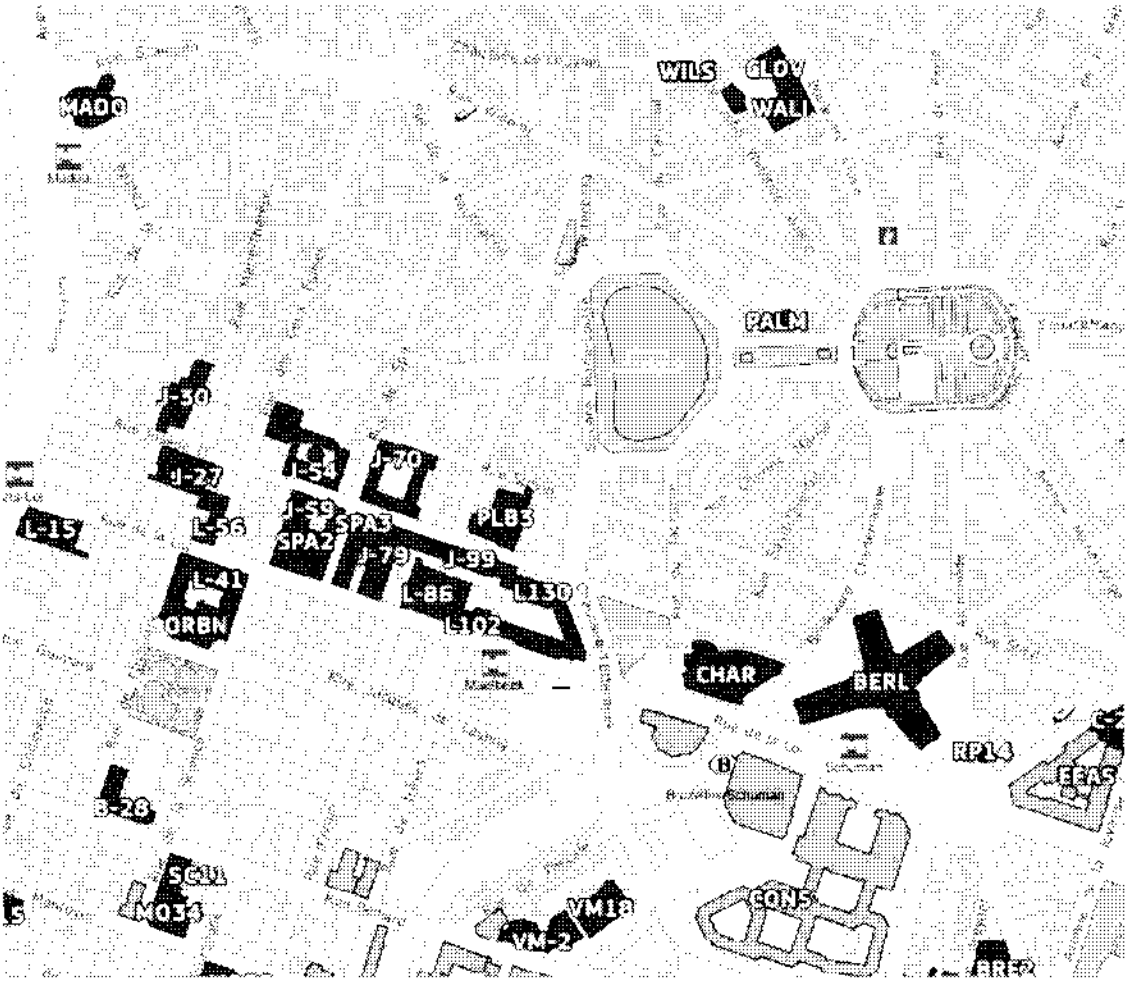
Hotel
Steigenberger Wiltcher's
71, Avenue Louise
1050 Brussels Belgium
Phone +32 2 542-4242

US Mission
United States Mission to the European Union
Rue Zinner 13
Contact: [redacted]

DG Competition
Place Madou, 1
1210 -Saint-Josse-Ten-Noode

Berlaymont
Avenue de la Loi 200

CRA Contact
[redacted]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UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of the Chair

September 25, 2023

The Honorable James Comer
Chairman
Committee on Oversight and Accountability
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Comer:

Please find enclosed the Commission's fourth production in response to your June 1, 2023, letter to the Federal Trade Commission. This fourth production includes documents Bates stamped FTC-CW000000426-FTC-CW000000612. This production is being made in response to requests number 3, 4, 6 and 7 of that letter.

The Commission is devoting significant time and resources to respond to this request, including taking the necessary consultative steps to produce this correspondence. To get you the information you seek in a timely manner, the Commission is submitting productions on a rolling basis as it collects and reviews responsive documents and information. While we do not believe the materials produced today implicate deliberative process considerations, we reserve the right to protect deliberative materials in future productions.

On the issue of confidentiality, we are concerned that the Committee appears to have shared a confidential document that was provided by the Commission to the Committee, and that the confidential document was ultimately made public. On September 20, 2023, at a public hearing, a Senator produced a posterboard image of, and read portions into the public record of, a confidential Commission document provided to the Committee; the document bore identifying marks that made it clear the document was confidential and was part of a production that the Commission had made to your Committee. The Commission document contained deliberative Commission information and was provided to the Committee in an effort to accommodate the Committee's informational needs.

I want to reiterate the importance of protecting deliberative materials provided by the Commission. For example, maintaining the confidentiality of internal staff analyses is crucial to ensuring that the Commission can receive candid advice from staff; thrusting staff into the middle of policy debates risks exposing them to harassment and chilling the Commission's ability to benefit from robust debate and a variety of viewpoints. At the time of production to your Committee, the Commission explained the sensitivity of the information and requested that the Committee not share the Commission's nonpublic information. This apparent breach of confidentiality raises serious concerns about the Committee's willingness to provide necessary protections to the Commission's nonpublic information.

Thank you for that consideration and for your understanding as we continue to be responsive to this and other Committee information and document requests.

Sincerely,

Lina M. Khan
Chair
Federal Trade Commission

cc: The Honorable Jerrold Nadler
Ranking Member
House Committee on the Judiciary

Congress of the United States

U.S. House of Representatives

Committee on Small Business

2361 Rayburn House Office Building

Washington, DC 20515-6315

May 15, 2023

The Honorable Lina M. Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Ms. Khan:

The House Committee on Small Business (the Committee) writes to inquire about the recent rule change to the Ophthalmic Practice Rules (Eyeglass Rule). The rule requires optometrists and ophthalmologists to provide patients with a signed copy and acknowledgement of their eyeglass prescription and concurrently, requires that the acknowledgements be kept by the practice for at least three years.[1] The Committee fears that this rule will have a disproportionate impact on small businesses by adding redundant requirements to already understaffed practices.[2] It appears that the Federal Trade Commission (FTC) may not have properly considered small entities during this rulemaking process.

It is important for agencies to properly consider small businesses interests, which make up 99.9 percent of all businesses in the United States, when passing any new rule. America's small businesses deserve to have their voices heard and considered. We therefore request the following information as soon as possible but no later than May 29th, 2023.

1. What are your statutory requirements to examine this rule's impact on small businesses?

2. How many small businesses will be impacted by this rule?

3. What additional compliance costs on small businesses are associated with this new rule?

4. Where can small businesses go to examine your analysis on the impacts this rule will have on their operations?

5. What alternatives have been considered to lessen the impacts on small businesses?

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[1] Ophthalmic Practice Rules (Eyeglass Rule), 16 C.F.R. 456 (2023).
[2] *AOA makes robust rebuttal to FTC over proposed changes to Eyeglass Rule*. AM. OPTOMETRIC ASSOC. (Mar. 16, 2023).

MICHAEL C. BURGESS, M.D.
26TH DISTRICT, TEXAS

COMMITTEE ON ENERGY AND COMMERCE
HEALTH
ENERGY
OVERSIGHT AND INVESTIGATIONS

COMMITTEE ON RULES

COMMITTEE ON BUDGET

Congress of the United States
House of Representatives

2161 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
(202) 225-7772
(202) 225-2919 FAX

2000 SOUTH STEMMONS FREEWAY
SUITE 200
LAKE DALLAS, TX 75065
(940) 497-5031
(940) 497-5067 FAX

www.house.gov/burgess

May 15th, 2023

The Honorable Lina Khan
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Chair Khan,

I write to you today to raise the grave concerns I have regarding the Federal Trade Commission's "Motor Vehicle Dealers Trade Regulation Rule." In addition to the concerns I have regarding the negative effects that the proposed rulemaking would have on small businesses and dealerships across our nation, the process the Federal Trade Commission pursued in promulgating this rulemaking has been seriously and fundamentally flawed since its inception. The process could be significantly improved if the relevant stakeholders are solicited for their expertise as to how consumers and dealerships could be adversely impacted from a rulemaking that is unconcerned with successful implementation. Consumers, dealerships, and small businesses would be better served if the Federal Trade Commission were to rescind the proposed rule and instead issue a Request for Information ("RFI") or an Advanced Notice of Proposed Rulemaking ("ANPRM').

I fear that the Federal Trade Commission's Proposed Rule would make the car purchasing process more opaque, more redundant, and strand consumers at dealerships for extended periods of time. The Federal Trade Commission has not demonstrated empirically that this Proposed Rule would, in fact, be beneficial to consumers. Moreover, it has come to my attention that the Federal Trade Commission has not undertaken comprehensive consumer testing of any kind to discern whether these additional regulations would improve a consumer's car purchasing experience. It has been my impression that the Biden Administration has stated repeatedly that any executive action would be guided by scientific data and empirical evidence. It is bewildering that this proposed Rule Making was pursued without either.

MICHAEL C. BURGESS, M.D.
26TH DISTRICT, TEXAS

COMMITTEE ON ENERGY AND COMMERCE
HEALTH
ENERGY
OVERSIGHT AND INVESTIGATIONS

COMMITTEE ON RULES

COMMITTEE ON BUDGET

Congress of the United States
House of Representatives

2161 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
(202) 225-7772
(202) 225-2919 FAX

2030 SOUTH STEMMONS FREEWAY
SUITE 200
LAKE DALLAS, TX 75065
(940) 497-5031
(940) 497-5067 FAX

www.house.gov/burgess

It is standard protocol for any Executive Agency to solicit the expertise and comments from affected parties before a Rule Making is drafted, it is a dereliction of duty that the Federal Trade Commission undertook neither for this proposed rule which will have a significant adverse impact on consumers and the American economy.

It is my hope that the Federal Trade Commission will undertake a more collaborative approach to this Proposed Rule Making by issuing an RFI or ANPRM that would allow both consumers and dealerships to improve the Rule Making by highlighting unworkable provisions and addressing issues that the FTC has overlooked.

I appreciate your prompt attention to this important matter.

Sincerely,

Michael C. Burgess, M.D.

Member of Congress

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

May 17, 2023

The Honorable Michael C. Burgess, M.D.
United States House of Representatives
Washington, D.C. 20515

Dear Rep. Burgess,

Thank you for your May 15, 2023, letter providing your views regarding the Commission's Motor Vehicle Dealers rulemaking proceeding.[1] Your letter will be placed on the public record.

We appreciate your interest in the rulemaking proceeding, and I can assure you that the information you have provided will be carefully considered. Please let us know whenever we can be of service with respect to any other matter.

Sincerely,

April J. Tabor
Secretary

[1] Motor Vehicle Dealers Trade Regulation Rule, 16 C.F.R. Part 463: Notice of proposed rulemaking, 87 Fed. Reg. 42,012 (Jul. 13, 2022), *available at* https://www.federalregister.gov/documents/2022/07/13/2022-14214/motor-vehicle-dealers-trade-regulation-rule.

To schedule the delivery of your response or ask any related follow-up questions, please contact Committee on Small Business Majority Staff at (202) 225-5821. The Committee on Small Business has broad authority to investigate "problems of all types of small business" under House Rule X. Thank you in advance for your cooperation with this inquiry."

Sincerely,

Roger Williams
Chairman
Committee on Small Business

cc: The Honorable Nydia M. Velasquez, Ranking Member
Committee on Small Business

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

Office of the Chair

May 26, 2023

The Honorable Roger Williams
Chair
Committee on Small Business
United States House of Representatives
Washington, D.C. 20510

Dear Chair Williams:

Thank you for your May 15, 2023 letter providing input on the Ophthalmic Practice Rules (Eyeglass Rule) and requesting additional information. We appreciate your interest in the Rule and concern about its impact on small businesses.

As an initial matter, we wanted to clarify that the Eyeglass Rule has not recently been changed,[1] though the Commission is currently considering making changes to the Rule. The Eyeglass Rule has always required that optometrists and ophthalmologists provide patients with a copy of their eyeglass prescription. Despite this requirement, consumer surveys have consistently demonstrated that large numbers of prescribers fail to comply with prescription-release, making it difficult or even impossible for many consumers to comparison-shop for eyeglasses.[2]

In response to this compliance issue, the Commission, in a January 2023 Notice of Proposed Rulemaking, proposed—but has not yet decided whether to implement—an amendment that would add a confirmation-of-prescription-release requirement in order to increase the number of patients who actually receive a copy of their prescription as long required by the rule.[3] The confirmation proposal would, in some instances, require patients to sign an acknowledgment confirming receipt of their prescription, and in other instances would require that eye doctors retain verifiable proof that the prescription had been provided (such as electronically uploaded to a patient portal, or sent via email).

The FTC crafted its proposal after considering information and comments submitted in response to the Commission's 2015 Advance Notice of Proposed Rulemaking,[4] along with comments and evidentiary material considered during the FTC's extensive 2015-2020 review of

[1] The Rule has existed in its current form since 2004, and the Rule's prescription-release requirements have remained relatively unchanged since 1978.
[2] For instance, some consumer surveys have found that more than half of eyeglass wearers did not automatically receive their prescription after an examination. *See* Ophthalmic Practice Rules (Eyeglass Rule), Notice of Proposed Rulemaking; Request for Comment, 88 Fed. Reg. 248, 259-260 (Jan. 3, 2023) (hereinafter "2023 NPRM").
[3] 2023 NPRM, 88 Fed. Reg. at 257-266.
[4] Ophthalmic Practice Rules (Eyeglass Rule), Advance Notice of Proposed Rulemaking; Request for Comment, 80 Fed. Reg. 53274 (Sept. 3, 2015).

the Contact Lens Rule, which has a confirmation-of-release requirement similar to that now proposed for the Eyeglass Rule.[5]

The Commission has not yet made a final determination on the Eyeglass Rule confirmation proposal and is still evaluating the possible benefits and burdens of such a requirement, including the impact on small businesses. In the NPRM, the Commission specifically sought public comment about the impact on small businesses of the proposed changes to the Rule.[6] On May 18, 2023, the FTC held a public workshop, "A Clear Look at the Eyeglass Rule," at which that issue, and others pertaining to the Rule, were examined and discussed with small business owners, members of the ophthalmic, optometric, and optical community, and consumer representatives, among others.[7] The comment period to submit additional information about the confirmation proposal (and other issues discussed at the workshop) remains open until June 20, 2023.[8] Your comment has been placed on the rulemaking record.[9]

As you noted, it is important for agencies to properly consider small business interests when passing any new rule, or amending an existing one. To that end, the 2023 Notice of Proposed Rulemaking provided information relevant to the questions you have raised, which we summarize below.

1. What are your statutory requirements to examine this rule's impact on small businesses?

Under section 22 of the FTC Act, 15 U.S.C. § 57b-3, the Commission must issue a preliminary regulatory analysis for a proceeding to amend a rule when it: (1) estimates that the amendment will have an annual effect on the national economy of $100,000,000 or more; (2) estimates that the amendment will cause a substantial change in the cost or price of certain categories of goods or services; or (3) otherwise determines that the amendment will have a significant effect upon covered entities or upon consumers. After a preliminary analysis based on estimated additional labor and capital costs of a confirmation-of-prescription release proposal (and other proposed changes to the Rule), the Commission determined that the proposed amendments would not have such effects on the national economy; on the cost of eye examinations or prescription eyeglasses; or on covered parties or consumers.[10] In order to be certain it had not overlooked anything, however, the Commission requested additional comment on the economic effects of the proposed amendments.

In addition, the Regulatory Flexibility Act ("RFA"), 5 U.S.C. §§ 601 *et seq.*, requires the

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[5] 16 C.F.R. § 315.3(c).

[6] *See, e.g.*, 2023 NPRM, 88 Fed. Reg. at 280, 285-86.

[7] *See* FTC, *A Clear Look at the Eyeglass Rule*, *available at* https://www.ftc.gov/news-events/events/2023/05/clear-look-eyeglass-rule.

[8] *See* Public Workshop Examining Proposed Changes to the Ophthalmic Practice Rules (Eyeglass Rule), Public Workshop and Request for Public Comment, 88 Fed. Reg. 18266, 18268 (March 28, 2023).

[9] *See* 16 C.F.R. § 1.18(c)(1)(i).

[10] Based on wage statistics from the Bureau of Labor Statistics, and estimates of the number of eyeglass prescriptions written per year, the total burden from the confirmation-of-prescription-release requirement was estimated at approximately $39.6 million for the approximately 62,000 prescribers in the United States. 2023 NPRM, 88 Fed. Reg. at 284.

Commission to conduct an analysis of the anticipated economic impact of proposed amendments on small entities. The purpose of a regulatory flexibility analysis is to ensure the agency considers the impacts on small entities and examines alternatives that could achieve the regulatory purpose while minimizing burdens on small entities. Section 605 of the RFA provides that such an analysis is not required if the agency head certifies that the regulatory action will not have a significant economic impact on a substantial number of small entities.

After examining the impact of its proposed amendments, the Commission determined that while the amendments might affect a substantial *number* of small businesses, they would not have a significant economic impact on such entities. An analysis of the proposed confirmation-of-prescription-release requirement, in particular, found that it would impose a relatively small burden on prescribers (optometrists and ophthalmologists), and should not have a significant or disproportionate impact on their costs. The Commission therefore certified that amending the Rule as proposed would not have a significant economic impact on a substantial number of small businesses.[11]

Despite such certification, the Commission nonetheless felt it appropriate to conduct an Initial Regulatory Flexibility Analysis about the impact of the proposed amendments, and did so in its 2023 NPRM, discussing (a) the reasons the agency was proposing taking action, (b) the objectives of, and legal basis for, the proposed amendments, (c) the small entities to which the proposed amendments would apply, (d) duplicative, overlapping, or conflicting federal rules, and (e) any significant alternatives to the proposed amendments.[12]

2. How many small business will be impacted by this rule?

The proposed amendments apply to prescribers of eyeglasses, primarily optometrists and ophthalmologists. The Commission believes that many prescribers fall into the category of small entities (*e.g.*, offices of optometrists and ophthalmologists less than $8 million in size).[13] It is estimated that there are approximately 62,000 eyeglass prescribers in the United States,[14] but determining a precise estimate as to how many of these are small entities covered by the Rule's prescription release requirements is not readily feasible because most prescribers' offices are privately owned and do not release underlying revenue information necessary to make such a determination.[15] Based on its knowledge of the eye care industry, including meetings with industry members and a review of industry publications, staff believes that a substantial number of these entities likely qualify as small businesses.[16] The Commission requested additional comment with regard to the estimated number or nature of small business entities for which the

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[11] *Id.* at 281-286.
[12] *Id.* at 284-286.
[13] *See* 13 C.F.R. § 121.201 (Small Business Size Regulations).
[14] 2023 NPRM, 88 Fed. Reg. at 251—52.
[15] 5 U.S.C. § 601(6).
[16] According to one publication, 65 percent of optometrists work in a practice owned by an optometrist or ophthalmologist, practices that are likely small businesses. *See* AOA, "An Action-Oriented Analysis of the State of the Optometric Profession: 2013," at 7, https://documents.aoa.org/Documents/news/state_of_optometry.pdf. This publication also reported that although it could not ascertain the precise number of independent optometric practices, it estimated that as of 2012, there were 14,000 to 16,000 optometric businesses with no corporate or institutional affiliation. *Id.*

proposed amendments would have a significant impact.

3. What additional compliance costs on small businesses are associated with this new rule?

The proposed amendments to the Rule primarily require that prescribers obtain from patients, and maintain for a period of not less than three years (in paper or electronic form), a signed confirmation of prescription release that confirms (or "acknowledges") that patients received their eyeglass prescriptions at the completion of their refractive eye examination. The amendments would also permit prescribers, in certain circumstances, to comply with automatic prescription release, and with the confirmation-of-release requirement, via electronic delivery of prescriptions, which would likely reduce compliance costs.

Basing its estimates on public comments, consumer surveys, and an existing HIPAA signed acknowledgment burden estimate, the Commission calculated that it would take each consumer ten seconds to read and sign an acknowledgment, and approximately one minute for a prescriber's office to store and maintain each such document in their records.[17] Relying on estimates that prescribers issue approximately 82.5 million eyeglass prescriptions per year, the Commission estimated the total new burden from the confirmation-of-prescription-release requirement at 1,604,167 hours, or $39,602,312 based on average hourly wages for prescribers and their staff.[18]

While not insubstantial, this new burden from the proposed amendment is relatively small when divided among the total number of eyeglass prescribers who would have to comply with the confirmation-of-release requirement. It also represents a very small percentage of the overall $24 billion-plus eyeglass market in the United States.[19] Moreover, the FTC concluded that the benefits of the amendment would be substantial in that it would increase the number of patients who receive their prescriptions, inform more patients about the right to their prescription, reduce the number of third-party seller requests to prescribers for eyeglass prescriptions, improve the Commission's ability to monitor overall compliance and target enforcement actions, reduce evidentiary issues, complaints, and disputes between prescribers and consumers, and bring the Eyeglass Rule into congruence with the Contact Lens Rule.[20]

4. Where can small business go to examine your analysis on the impacts this rule will have on their operations?

We would direct small businesses to our 2023 NPRM, available to the public in the Federal Register at 88 Fed. Reg. 248 (Jan. 3, 2023), which discusses the need for, and anticipated impacts of, the proposed Rule changes in some detail.

5. What alternatives have been considered to lessen the impacts on small businesses?

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[17] 2023 NPRM, 88 Fed. Reg. at 282-83.
[18] *Id.* at 283.
[19] *Id.* at 284.
[20] *Id.* at 266.

The Commission has not proposed any specific small entity exemption or other significant alternatives, as the proposed amendments update the Rule in light of marketplace practices to ensure that patients are receiving a copy of their eyeglass prescription at the completion of an eye examination. Under these limited circumstances, the Commission does not believe a special exemption for small entities or significant compliance alternatives are necessary or appropriate to minimize the compliance burden, if any, on small entities while achieving the intended purposes of the proposed amendments. As discussed previously, the proposed recordkeeping requirement likely involves minimal burden and prescribers would be permitted to maintain records in either paper or electronic format. This recordkeeping burden could be reduced to the extent that prescribers have adopted electronic medical record systems, especially those where patient signatures can be recorded electronically and inputted automatically into the electronic record. Furthermore, prescribers also could scan signed paper copies of the confirmation and store those confirmations electronically to lower the costs of this recordkeeping requirement. Similarly, when using a text message, electronic mail, or an online patient portal to satisfy the prescription release requirement, prescribers may provide the required copy of the prescription electronically (*i.e.*, digital format), thus lowering a pre-existing cost. Given the existence of a similar confirmation-of-release requirement in the Contact Lens Rule, it is likely that prescribers already have systems in place for obtaining and storing prescription confirmations, which should reduce any burden from extending this requirement to eyeglass prescriptions.

Nonetheless, the Commission asked for comment on the need, if any, for alternative compliance methods to reduce the economic impact of the Rule on small entities, and the Commission will consider the feasibility of any such alternatives and determine whether they should be incorporated into the final rule.

As noted above, the rulemaking in this matter is ongoing and the Commission is still accepting public comments. The FTC will review these comments closely as it considers next steps. We appreciate your interest in the rulemaking proceeding, and I can assure you that the information you have provided will be carefully considered. Please let us know whenever we can be of service with respect to any other matter.

Sincerely,

April J. Tabor
Secretary

Congress of the United States
Washington, DC 20515

June 8, 2022

Chairwoman Lina Khan
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dear Chair Khan,

As Chair of the House Subcommittee on Consumer Protection and Commerce, I write to bring to your attention a matter of concern regarding the protection of franchisees from deceptive business practices, including improper disclosures by franchisors.

I continue to hear accounts of franchisees harmed by the improper disclosures by franchisors. In many cases, this omission or misrepresentation of important financial or contractual information in the legally required Franchise Disclosure Document (FDD) has convinced potential franchisees to pursue a disadvantageous, injurious franchise agreement. We must protect the right of small business owners to honest and informative disclosures by franchisors, as required by law.

I have long advocated for the Federal Trade Commission to devote more resources to protecting franchisees from unfair and deceptive business practices. It is clear that the FTC has taken recent steps to proactively prioritize franchisee issues, and I applaud the FTC for pursuing the case against Burgerim earlier this year for egregious improper disclosures to franchisees. To further ensure franchisees' access to relief, I have introduced H.R. 6551, the *Franchisee Freedom Act*, which would provide for a private right of action for FTC Franchise Rule violations. This legislation clarifies that franchisees do, in fact, have a private right of action under the FTC Franchise Rule.

I would like to know whether anything in the FTC Act or the Franchise Rule would preclude consumers from challenging alleged violations of the Franchise Rule as unfair or deceptive practices under state law. I look forward to your response and to working with you to protect small business owners.

Sincerely,

Jan Schakowsky
Chair, Subcommittee on Consumer Protection and Commerce

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

Office of the Chair

September 20, 2022

The Honorable Jan Schakowsky
Chair
Subcommittee on Consumer Protection and Commerce
Energy and Commerce Committee
United States House of Representatives
Washington, DC 20515

Dear Chair Schakowsky,

Thank you for your letter regarding accounts that franchisees continue to be harmed by franchisors' improper disclosures. You refer to instances in which franchisees are induced to enter into a franchise agreement by a franchisor's misrepresentation or omission of financial or other important information in a Franchise Disclosure Document. You ask whether anything in the FTC Act or the Franchise Rule would preclude consumers from challenging alleged violations of the Franchise Rule as unfair or deceptive practices under state law.

Although the Franchise Rule itself does not create a private right of action, neither the FTC Act nor the Franchise Rule precludes consumers from challenging violations of the Franchise Rule as unfair or deceptive practices under state law if the applicable state law provides for such cause of action. State law will determine whether a franchisee may bring a claim for a franchisor's misrepresentations or omissions in connection with the sale or marketing of a franchise.

Thank you again for sharing your concerns about franchisors engaged in potentially unfair and deceptive practices. If you or your staff have additional questions or comments, please do not hesitate to contact Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2195.

Sincerely,

Lina Khan

Lina M. Khan
Chair, Federal Trade Commission

Congress of the United States
Washington, DC 20515

November 17, 2022

The Honorable Jerome Powell
Chair
Board of Governors of the Federal Reserve System
Washington, DC

Dear Chairman Powell:

We are writing to express our concern with the recent "Motor Vehicle Dealers Trade Regulation Rule" (Proposed Rule) released by the Federal Trade Commission (FTC) on July 13, 2022 [87 FR 42012][1]. This broad proposal includes several new and untested consumer disclosures that, if adopted, would come into conflict with existing Truth in Lending Act (TILA) requirements as implemented by Regulation Z (Reg Z). Given the complex nature of auto-dealer disclosure obligations, we also believe the Proposed Rule will create further confusion for tens of millions of consumers each year as they shop for new and used vehicles.

While the FTC has the power to enforce violations under TILA and Reg Z, it does not have the authority to implement or interpret TILA or Reg Z. As you know, that responsibility rests with the Federal Reserve Board.[2] The Proposed Rule contains numerous duplicative disclosures that are in direct conflict with Reg Z disclosures promulgated by the Fed. For example, the Proposed Rule would require several new "cash price" disclosures[3] that differ from the TILA/Reg Z "cash price" disclosures—creating conflicting "cash prices" for the same vehicle. Similarly, the Proposed Rule would impose new disclosures related to the "total amount a customer would pay"[4] and cash down payments[5] that are conflicting and inconsistent with the well-established Reg Z disclosures.

In promulgating Reg Z, the Federal Reserve Board correctly relied on extensive consumer testing to ensure specific TILA disclosures worked during the sales process. This testing focused on the *timing and the content* of key disclosure terms, including studies to assess consumers' understanding of specific disclosure forms. This approach is necessary to compare the existing TILA disclosures to the new disclosures in the Proposed Rule to better facilitate compliance and avoid confusing consumers in general.

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[1] Federal Trade Commission, Federal Register Notice, "Motor Vehicle Dealers Trade Regulation Rule," July 13, 2022. https://www.federalregister.gov/documents/2022/07/13/2022-14214/motor-vehicle-dealers-trade-regulation-rule.

[2] Sections 1029(a), 1029(e), and 1100A(7) of the Dodd-Frank Act. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 124 Stat. 1376 (2010).

[3] 16 C.F.R. Part 463.2(e)

[4] 16 C.F.R. Part 463.4(d)(1)

[5] 16 C.F.R. Part 463.4(d)(2)

Unfortunately, the FTC relied upon a small, qualitative study from 38 Washington D.C. residents as a justification for the Proposed Rule and without considering any specific quantitative data. The FTC's limited exposure to data is evident in the Proposed Rule which itself states "the costs of the proposed rule provisions as enumerated . . . provide preliminary quantitative estimates where possible and describe costs that we can only assess qualitatively."[6]

Furthermore, we believe the FTC's rulemaking process regarding the Proposed Rule may have violated the agency's own procedures for issuing Unfair or Deceptive Acts or Practices (UDAP) rules pursuant to Section 5 of the Federal Trade Commission Act. The FTC published the Proposed Rule without an Advanced Notice of Proposed Rulemaking (NPRM), which is unusual given the magnitude of this rule. The FTC also failed to include this Proposed Rule in the Spring 2022 Regulatory Agenda and only allowed for a 60-day comment period. We believe this speaks to the rushed process undertaken by the FTC to issue this Proposed Rule without the necessary data points and industry feedback.

To mitigate the potential unintended consequences for consumers arising from the conflicts between the Proposed Rule and TILA, we ask that you please respond to the following questions:

1. Does the FTC have the authority to promulgate a rule under Reg Z?

2. Is it the Federal Reserve's view that the Proposed Rule would in any way alter, conflict with, or change the disclosures currently required in Reg Z?

3. Has the FTC consulted the Federal Reserve Board to assess the impact of the Proposed Rule on the current efficacy of TILA/Reg Z/Reg M disclosures?

4. If yes, please provide the related communications from, and to, the FTC.

5. If no, will you commit to consulting with the FTC regarding the effect of the Proposed Rule on existing TILA/Reg Z disclosures in auto retailing, and the need for quantitative consumer testing in the design and implementation of the Proposed Rule? And will you report to us the outcome of that consultation?

We would appreciate your response to these questions by November XX, 2022. Thank you again for your attention to this critical issue.

Respectfully,

Blaine Luetkemeyer
Member of Congress

David Scott
Member of Congress

[6] 87 Fed. Reg. at 42039

CC The Hon. Lina Khan
Office of the Chairwoman
Federal Trade Commission

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

September 13, 2022

Senator Shelley Moore Capito
United States Senate
Washington, D.C. 20510

Dear Sen. Capito,

Thank you for your September 12, 2022, letter providing your views regarding the Commission's Motor Vehicle Dealers rulemaking proceeding.[1] Your letter will be treated as a public comment in the rulemaking proceeding, and will be placed on the public comments page for that proceeding on regulations.gov.[2]

We appreciate your interest in the rulemaking proceeding, and I can assure you that the information you have provided will be carefully considered. Please let us know whenever we can be of service with respect to any other matter.

Sincerely,

April J. Tabor
Secretary

[1] Motor Vehicle Dealers Trade Regulation Rule, 16 C.F.R. Part 463: Notice of proposed rulemaking, 87 Fed. Reg. 42,012 (Jul. 13, 2022), *available at* https://www.federalregister.gov/documents/2022/07/13/2022-14214/motor-vehicle-dealers-trade-regulation-rule.

[2] Public comments in the Motor Vehicle Dealers rulemaking proceeding, *available at* https://www.regulations.gov/document/FTC-2022-0046-0001.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

September 13, 2022

Senator John Thune
United States Senate
Washington, D.C. 20510

Dear Sen. Thune,

Thank you for your September 12, 2022, letter providing your views regarding the Commission's Motor Vehicle Dealers rulemaking proceeding.[1] Your letter will be treated as a public comment in the rulemaking proceeding, and will be placed on the public comments page for that proceeding on regulations.gov.[2]

We appreciate your interest in the rulemaking proceeding, and I can assure you that the information you have provided will be carefully considered. Please let us know whenever we can be of service with respect to any other matter.

Sincerely,

April J. Tabor
Secretary

[1] Motor Vehicle Dealers Trade Regulation Rule, 16 C.F.R. Part 463: Notice of proposed rulemaking, 87 Fed. Reg. 42,012 (Jul. 13, 2022), *available at* https://www.federalregister.gov/documents/2022/07/13/2022-14214/motor-vehicle-dealers-trade-regulation-rule.

[2] Public comments in the Motor Vehicle Dealers rulemaking proceeding, *available at* https://www.regulations.gov/document/FTC-2022-0046-0001.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

September 13, 2022

Senator Dan Sullivan
United States Senate
Washington, D.C. 20510

Dear Sen. Sullivan,

Thank you for your September 12, 2022, letter providing your views regarding the Commission's Motor Vehicle Dealers rulemaking proceeding.[1] Your letter will be treated as a public comment in the rulemaking proceeding, and will be placed on the public comments page for that proceeding on regulations.gov.[2]

We appreciate your interest in the rulemaking proceeding, and I can assure you that the information you have provided will be carefully considered. Please let us know whenever we can be of service with respect to any other matter.

Sincerely,

April J. Tabor
Secretary

[1] Motor Vehicle Dealers Trade Regulation Rule, 16 C.F.R. Part 463: Notice of proposed rulemaking, 87 Fed. Reg. 42,012 (Jul. 13, 2022), *available at* https://www.federalregister.gov/documents/2022/07/13/2022-14214/motor-vehicle-dealers-trade-regulation-rule.

[2] Public comments in the Motor Vehicle Dealers rulemaking proceeding, *available at* https://www.regulations.gov/document/FTC-2022-0046-0001.

United States Senate

WASHINGTON, DC 20510

September 12, 2022

The Hon. Lina M. Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Chairwoman Khan:

We are writing in opposition to the Federal Trade Commission's (FTC) "Motor Vehicle Dealers Trade Regulation Rule," published in the Federal Register on July 13, 2022. This proposed rule would fundamentally change the way that vehicles are retailed in America. If implemented, this proposal would confuse customers, lengthen the transaction time to purchase a vehicle, limit consumer choice, increase paperwork, and mandate burdensome new recordkeeping requirements on small businesses. More troubling, the FTC appears not to have done any consumer testing to ascertain whether its new regulatory regime would work in practice.

Given the extensive reach of this proposed rule, we seek responses to the following requests for information in order to better understand both the scope of this proposed rule and the FTC's rationale for its proposal:

1. The proposed rule lists 49 questions for which it seeks comment from the public. Some questions (e.g., "What economic burdens would be imposed on dealers if the Rule proposal were adopted?") ask for basic information that ordinarily would be gathered by issuing an Advance Notice of Proposed Rulemaking.
    a. Why did the FTC choose not to first issue an Advanced Notice of Proposed Rulemaking to gather basic data before issuing a Notice of Proposed Rulemaking (NPRM)?
    b. Is it the FTC's position that the comments received during this period to these numerous questions will be able to be fully addressed in the final rule without fundamentally changing the scope of the rule?
2. The FTC Act states: "The Commission shall not propose or promulgate a rule which was not listed on a regulatory agenda unless the Commission publishes with the rule an explanation of the reasons the rule was omitted from such agenda."[1] In footnote 153 of the pre-publication version of this proposed rule posted on the FTC's website on June 23, the Commission states that the NPRM was not included in the FTC's *Fall 2021* Regulatory Agenda "because the Commission first considered this notice after the publication deadline for the Regulatory Agenda." However, in footnote 153 of the Federal Register version of this proposal published less than a month later, it states that the NPRM was not included in the FTC's *Spring 2022* Regulatory Agenda "because the Commission first considered this

[1] 29 U.S.C. §57b-3(d)(4)

notice after the publication deadline for the Regulatory Agenda."[2] The *Spring 2022* regulatory agenda was announced on June 21 by the White House,[3] and the FTC's Regulatory Review Schedule was published by the Federal Register on August 5.[4]

   a. Please explain how a proposed rule of this magnitude could miss two consecutive Regulatory Agenda publication deadlines.
   b. How many other contemplated rules in the last ten years has the FTC omitted from its Regulatory Agenda because of missed publication deadlines?
   c. Is it the FTC's view that 29 U.S.C. §57b-3(d)(4) is complied with as long as the FTC states *any* reason for an omission from the Regulatory Agenda – including one that contradicts a previous reason – or does the reason have to be valid to comply with the statute?
   d. Given there is only a two-day difference between the pre-publication of the *Spring 2022* regulatory agenda and the FTC's pre-publication of this proposed rule, was any new evidence presented to the FTC during that two-day window to prompt the pre-publication of this proposal? If not, how long had this proposal been under consideration prior to pre-publication?
   e. The FTC's Regulatory Review Schedule from August 5 does not list this proposed rule as "currently under review" despite this proposed rule being published in the Federal Register on July 13. Please explain the decision to omit this proposed rule from the Regulatory Review Schedule.

3. Did the FTC consult with the Federal Reserve Board, which has rule writing authority regarding automotive financing under the Truth in Lending Act, or any other agency or department with regulatory or enforcement authority over motor vehicle dealers before issuing this proposal? If not, why not?
4. What consultations did the FTC have with the Consumer Financial Protection Bureau before issuing this proposal?
5. Please provide a list of acts this proposed rule seeks to address that are not already illegal, or that the FTC is powerless to bring an enforcement action on.
6. The proposed rule relies extensively on the record from the Motor Vehicle Roundtables that the FTC conducted in 2011-12 as a justification for this proposal. However, no regulations were proposed by the FTC using these roundtables as a basis until now, a decade later. As the automotive market has changed dramatically since that time, and especially since the onset of the pandemic—
   a. What new facts were recently uncovered in the record of the 2011-12 roundtables that your predecessors missed which justify this proposal?
   b. Does the FTC believe any of the information for which this proposal is now based on is outdated based on shifting business practices?
7. The proposed rule also relies extensively on a qualitative study conducted by the FTC in 2017 of 38 Washington, D.C. area participants that was published in 2020.

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[2] https://www.federalregister.gov/documents/2022/07/13/2022-14214/motor-vehicle-dealers-trade-regulation-rule#footnote-153-p42031

[3] https://www.whitehouse.gov/omb/briefing-room/2022/06/21/the-spring-regulatory-agenda/

[4] https://www.federalregister.gov/documents/2022/08/05/2022-16863/regulatory-review-schedule

a. Why did the FTC not perform a quantitative study instead of relying on a qualitative study?
b. Does the FTC believe that 38 D.C.-area participants are representative of the entire nation's automotive market?
c. This study explicitly stated that it should not be used to draw quantitative, market-wide conclusions. Please explain why the FTC is ignoring its own admonition and using this study to draw quantitative, market-wide conclusions in this proposal.

8. The proposed rule seeks to regulate automobile dealers exclusively. However, the press release accompanying the proposal proclaimed that this regulation is necessary because of "over 50 motor vehicle-related" enforcement actions. Almost one-third of these enforcement actions involved entities that do not retail vehicles. Please explain why enforcement actions against entities that are not auto dealers, such as transportation network companies, are being used to justify a rule to further regulate auto dealers.
9. The proposed rule also relies on the FTC's consumer complaints database. How many of these complaints—
    a. were verified?
    b. are related to conduct by motor vehicle dealers that would be covered under this proposal?
10. Many provisions of this proposed rule impose requirements and limitations on the sale of "Add-on" products and services. "Add-on" products and services supposedly include items that dealers physically add to the vehicle after the dealer obtains it from the manufacturer (such as floor mats, towing packages, etc.) and products and services the dealer offers to protect a consumer's investment in the vehicle (such as extended service contracts, maintenance programs, GAP waiver, and the like). But the definition of "Add-ons" states that the term means any product for which the dealer charges in connection with a vehicle sales, leasing, or financing transaction and that is "not provided to the consumer or installed on the vehicle by the motor vehicle manufacturer." Factory direct sellers appear to be dealers under this proposal since they are licensed by a state to sell cars and meet the other requirements set described in the proposal.
    a. If a direct seller adds (and charges for) an item such as a towing package to a vehicle at the request of a buyer or sells that buyer an extended service contract, would the FTC consider those products and services to be either installed or provided by the manufacturer, thereby taking them out of the definition of an "Add-on"?
    b. If the answer is "yes", what is the public policy reason to allow the sale of these products and services by direct sellers to be outside the coverage of this proposed rule, but not when they are sold by franchised dealers?
    c. Are there any other aspects of the proposed rule where direct sellers would be regulated differently than franchised dealers? If so, please explain.
11. The proposed rule assumes that it would save consumers 3 hours per transaction, saving consumers upwards of $31 billion. The proposed rule also contains several new disclosure requirements that must be presented to consumers during the car buying process. Since the cost savings this proposal claims are primarily from the reduced time it will take for consumers to complete the process, does the FTC have estimates of how long these new disclosure requirements will add to the average transaction?

By the FTC's own analysis, the proposed rule would impose nearly $1.4 billion in costs on dealers. At least part of these costs will be passed along to consumers in the form of higher prices, further adding to inflation, which is at its highest levels since 1982. Moreover, while the myriad of new duties and paperwork requirements along with their attendant costs mandated by this proposed rule are real, the savings, especially in absence of any consumer testing, may prove illusory.

We request that you send us complete responses to our questions by September 16. Additionally, we request a Senate Commerce, Science and Transportation staff briefing on the proposed rule this month. Thank you for your consideration.

Sincerely,

Cynthia M. Lummis
U.S. Senator

John Thune
U.S. Senator

Todd Young
U.S. Senator

Shelley Moore Capito
U.S. Senator

Mike Lee
U.S. Senator

Dan Sullivan
U.S. Senator

cc. Commissioner Noah Joshua Phillips
cc. Commissioner Rebecca Kelly Slaughter
cc. Commissioner Christine S. Wilson
cc. Commissioner Alvaro Bedoya

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

September 13, 2022

Senator Cynthia M. Lummis
United States Senate
Washington, D.C. 20510

Dear Sen. Lummis,

Thank you for your September 12, 2022, letter providing your views regarding the Commission's Motor Vehicle Dealers rulemaking proceeding.[1] Your letter will be treated as a public comment in the rulemaking proceeding, and will be placed on the public comments page for that proceeding on regulations.gov.[2]

We appreciate your interest in the rulemaking proceeding, and I can assure you that the information you have provided will be carefully considered. Please let us know whenever we can be of service with respect to any other matter.

Sincerely,

April J. Tabor
Secretary

[1] Motor Vehicle Dealers Trade Regulation Rule, 16 C.F.R. Part 463: Notice of proposed rulemaking, 87 Fed. Reg. 42,012 (Jul. 13, 2022), *available at* https://www.federalregister.gov/documents/2022/07/13/2022-14214/motor-vehicle-dealers-trade-regulation-rule.

[2] Public comments in the Motor Vehicle Dealers rulemaking proceeding, *available at* https://www.regulations.gov/document/FTC-2022-0046-0001.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

September 13, 2022

Senator Mike Lee
United States Senate
Washington, D.C. 20510

Dear Sen. Lee,

Thank you for your September 12, 2022, letter providing your views regarding the Commission's Motor Vehicle Dealers rulemaking proceeding.[1] Your letter will be treated as a public comment in the rulemaking proceeding, and will be placed on the public comments page for that proceeding on regulations.gov.[2]

We appreciate your interest in the rulemaking proceeding, and I can assure you that the information you have provided will be carefully considered. Please let us know whenever we can be of service with respect to any other matter.

Sincerely,

April J. Tabor
Secretary

[1] Motor Vehicle Dealers Trade Regulation Rule, 16 C.F.R. Part 463: Notice of proposed rulemaking, 87 Fed. Reg. 42,012 (Jul. 13, 2022), *available at* https://www.federalregister.gov/documents/2022/07/13/2022-14214/motor-vehicle-dealers-trade-regulation-rule.

[2] Public comments in the Motor Vehicle Dealers rulemaking proceeding, *available at* https://www.regulations.gov/document/FTC-2022-0046-0001.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

September 13, 2022

Senator Todd Young
United States Senate
Washington, D.C. 20510

Dear Sen. Young,

Thank you for your September 12, 2022, letter providing your views regarding the Commission's Motor Vehicle Dealers rulemaking proceeding.[1] Your letter will be treated as a public comment in the rulemaking proceeding, and will be placed on the public comments page for that proceeding on regulations.gov.[2]

We appreciate your interest in the rulemaking proceeding, and I can assure you that the information you have provided will be carefully considered. Please let us know whenever we can be of service with respect to any other matter.

Sincerely,

April J. Tabor
Secretary

[1] Motor Vehicle Dealers Trade Regulation Rule, 16 C.F.R. Part 463: Notice of proposed rulemaking, 87 Fed. Reg. 42,012 (Jul. 13, 2022), *available at* https://www.federalregister.gov/documents/2022/07/13/2022-14214/motor-vehicle-dealers-trade-regulation-rule.

[2] Public comments in the Motor Vehicle Dealers rulemaking proceeding, *available at* https://www.regulations.gov/document/FTC-2022-0046-0001.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON. D.C. 20580

Office of the Secretary

September 12, 2022

The Honorable Glenn "GT" Thompson
United States House of Representatives
Washington, D.C. 20515

Dear Rep. Thompson,

Thank you for the September 12, 2022, letter providing your views regarding the Commission's Motor Vehicle Dealers rulemaking proceeding.[1] Your letter will be treated as a public comment in the rulemaking proceeding, and will be placed on the public comments page for that proceeding on regulations.gov.[2]

We appreciate your interest in the rulemaking proceeding, and I can assure you that the information you have provided will be carefully considered. Please let us know whenever we can be of service with respect to any other matter.

Sincerely,

April J. Tabor
Secretary

[1] Motor Vehicle Dealers Trade Regulation Rule, 16 C.F.R. Part 463: Notice of proposed rulemaking, 87 Fed. Reg. 42,012 (Jul. 13, 2022), *available at* https://www.federalregister.gov/documents/2022/07/13/2022-14214/motor-vehicle-dealers-trade-regulation-rule.

[2] Public comments in the Motor Vehicle Dealers rulemaking proceeding, *available at* https://www.regulations.gov/document/FTC-2022-0046-0001.

United States Senate

WASHINGTON, DC 20510

October 21, 2022

Via Electronic Submission

Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

RE: Comment on Commercial Surveillance ANPR, R111004

We the undersigned are members of the United States Senate with an oversight responsibility to ensure the Federal Trade Commission (Commission) is appropriately acting within the delegated authority granted to it by Congress.

While we each recognize the importance of national rules for consumer data privacy and security, we believe that Congress is the appropriate body to deliberate such consequential issues. It is thus deeply disturbing that while Congress is, in fact, debating data privacy legislation the Commission would consider the unilateral pursuit of data privacy and security rules and requirements. To make matters worse, if advanced, the rules will carry significant consequences for and costs to our economy and American consumers without the deliberate debate and consideration of elected officials.

As explained more fully below, we request that the Commission cease further consideration of this ANPR because it: (1) is a policy consideration for Congress – not the Commission – to consider, (2) arguably violates Section 18 of the Federal Trade Commission Act, and (3) contemplates use of unfair methods of competition rulemaking, which Congress has not granted the Commission.

I. Congress – Not the FTC – Should Institute Comprehensive Data Privacy Requirements

There is no question that the internet has revolutionized our world. For around 30 years, we have been in the midst of a "virtual renaissance" with the internet being the primary driver of technological advancement, including dramatic changes to how we communicate; deliver health care and education; engage in agricultural production and general transportation; and buy and sell goods, to name just a few. It cannot be overstated how much the internet has transformed our society – both for good and for ill.

There is no doubt that with the amazing developments that internet technology has brought to our society so too emerge substantive issues and challenges, like questions over the use, limits, privacy, and security of internet data.

We already know from the European Union's General Data Protection Regulation (GDPR) that imposing privacy and security requirements for internet data will have substantial economic impacts, and will also substantially shift the practices of countless businesses across the globe. In the United States, our digital economy in 2020 comprised at least 10.2% (or $2.1 trillion) of U.S. Gross Domestic Product and 7.8 million American jobs.[1]

Any regulatory requirements in the data privacy and security context, considered by the Commission or by Congress, would likely impact hundreds of billions of dollars, thousands of jobs, millions of consumers, and competition within the internet economy. Such consequential questions are not for the Commission – an independent agency comprised of unelected officials – but for the Congress to consider.

Article 1, Section 1 of the United States Constitution states, "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Justice Gorsuch put it well when he noted that, "Admittedly, lawmaking under our Constitution can be difficult. But that is nothing particular to our time nor any accident. The framers believed that the power to make new laws regulating private conduct was a grave one that could if not properly checked, pose a serious threat to individual liberty."[2] That's ultimately why our Constitution splits the legislative power between a House and Senate with the Presidential power of the veto.

In vesting legislative powers in Congress, the "people" give authority to enact law to their elected Representatives and Senators, and only powers expressly delegated by the body of these elected individuals may the Commission act upon. This is why it is particularly troubling that in announcing this ANPR, Chair Khan acknowledges that Congress is currently deliberating substantial legislative questions for data privacy and security requirements. Within the ANPR, she notes:

> "If Congress passes strong federal privacy legislation – as I hope it does – or if there is any other significant change in applicable law, then the Commission would be able to reassess the value-add of this effort and whether continuing it is a sound use of resources. The recent steps taken by lawmakers to advance federal privacy legislation are highly encouraging, and our agency stands ready to continue aiding that process through technical assistance or otherwise sharing our staff's expertise. At minimum, the record we will build through issuing this ANPR and seeking public comment can serve as a resource to policymakers across the board as legislative efforts continue."[3]

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[1] See, Tina Highfill and Christopher Surfield, Bureau of Economic Analysis, U.S. Department of Commerce, "New and Revised Statistics of the U.S. Digital Economy, 2005-2020"; https://www.bea.gov/system/files/2022-05/New%20and%20Revised%20Statistics%20of%20the%20U.S.%20Digital%20Economy%202005-2020.pdf

[2] See West Virginia v. Environmental Protection Agency, 597 U.S. ___ (2022) (Gorsuch J., Concurring) https://www.supremecourt.gov/opinions/21pdf/20-1530_n758.pdf

[3] FTC Chair Lina Khan, Federal Trade Commission, August 11, 2022, "Statement of Chair Lina M. Khan Regarding the Commercial Surveillance and Data Security Advanced Notice of Proposed Rulemaking Commission File No.

But if the Commission only wanted to aid Congress rather than unilaterally enact policy changes, then why initiate a process of such broad rulemaking to consider requirements that carry the force of law, particularly at the exact same time Congress is actively debating such consequential legislative questions? We suspect the Commission's action is really to usurp the legislative authority of Congress or force Congress's hand to swiftly pass legislation that largely mirrors the Commission's proposal.

The following, non-exhaustive list of questions asked within the ANPR expressly demonstrates that the Commission is seeking to be a legislative body contemplating binding rules outside of the scope of its statutorily provided authority under Section 5:

> 14. What types of commercial surveillance practices involving children and teens' data are most concerning? For instance, given the reputational harms that teenagers may be characteristically less capable of anticipating than adults, to what extent should new trade regulation rules provide teenagers with an erasure mechanism in a similar way that COPPA provides for children under 13? Which measures beyond those required under COPPA would best protect children, including teenagers, from harmful commercial surveillance practices?
>
> 19. Given the lack of clarity about the workings of commercial surveillance behind the screen or display, is parental consent an efficacious way of ensuring child online privacy? Which other protections or mechanisms, if any, should the Commission consider?
>
> 35. Should the Commission take into account other laws at the state and federal level (e.g. COPPA) that already include data security requirements. If so, how? Should the Commission take into account other governments' requirements as to data security (e.g. GDPR). If so, how?
>
> 69. Should the Commission consider new rules on algorithmic discrimination in areas where Congress has already explicitly legislated, such as housing, employment, labor, and consumer finance? Or should the Commission consider such rules addressing all sectors?[4]

While this type of unilateral action has become more common, the tides are changing. Not only do we believe Congress wishes to re-assert its Article I authority and stop the encroachment of Article II agencies into lawmaking; but the Supreme Court has also sought to halt agency overreach. In *West Virginia v. EPA*, the Supreme Court recently struck down overreach by the Environmental Protection Agency using the "major questions" doctrine, noting that there is a "particular and recurring problem: agencies asserting highly consequential power beyond what

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R111004:https://www.ftc.gov/system/files/ftc_gov/pdf/Statement%20of%20Chair%20Lina%20M.%20Khan%20on%20Commercial%20Surveillance%20ANPR%20081122.pdf

[4] *See ANPR for Trade Regulation Rule on Commercial Surveillance and Data Security, 87 FR 51273, August 22, 2022 at Q. 14, 19, 35, and 69: https://www.federalregister.gov/documents/2022/08/22/2022-17752/trade-regulation-rule-on-commercial-surveillance-and-data-security. Cited below as ANPR.*

Congress could reasonably be understood to have granted."[5] Arguably, the proposed actions of the Commission would be highly suspect under the reinforced "major questions" doctrine in which Chief Justice Roberts notes that the Court: "'typically greet[s]' assertions of 'extravagant statutory power over the national economy' with 'skepticism'" unless there is "clear congressional authorization."[6]

Simply stating within the ANPR that within Section 18 of the FTC Act, "Congress authorized the Commission to propose a rule defining unfair or deceptive acts or practices with specificity when the Commission 'has reason to believe that the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are prevalent'" is hardly the clear Congressional authorization necessary to contemplate an agency rule that could regulate more than 10% of U.S. GDP ($2.1 trillion) and impact millions of U.S. consumers (if not the entire world).

To operate within its Congressionally authorized parameters, the Federal Trade Commission should cease any action on this ANPR.

II. The ANPR Violates Section 18 of the Federal Trade Commission Act

Even if the Commission could prove that Congress did provide clear Congressional authorization for the Commission to consider a rule of this magnitude, the rule(s) contemplated would likely violate the statutory text of Section 18 of the Federal Trade Commission Act, which is its stated basis of its authority.

Within section (a)(1)(B) of Section 18, Congress granted the Commission the authority to prescribe, "rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce...." Further, subsection (b)(2)(A) requires the Commission to publish an Advanced Notice of Proposed Rulemaking that:

> (i) Contains a brief description of the area of inquiry under consideration, the objectives which the Commission seeks to achieve, and possible regulatory alternatives under consideration by the Commission; and
> (ii) Invite the response of interested parties with respect to such proposed rulemaking, including any suggestions or alternative methods for achieving such objects.

While the Commission has published an ANPR as required, the notice fails to describe the area of inquiry or the objectives of the Commission with any specificity. Instead, the Commission asks a series of 95 broad data privacy and security questions that cover vast topics with an amorphous purpose of protecting consumers from "harmful commercial surveillance and lax data security practices." In addition to unsuccessfully meeting the requirements of clause (i) of Section 18(b)(2)(A), the ANPR's ambiguity and broad topics of inquiry all but guarantees that clause (ii) will not adequately or properly generate helpful public comments and alternatives as interested parties have little understanding what the Commission's specific objectives are.

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[5] *West Virginia v. Environmental Protection Agency*, 597 U.S. __, 2022 WL 234727 (June 30, 2022) (slip op. at 19)
[6] Id. At 19-20.

But putting this aside, Congress also specifically placed limits on what rules could be proposed. Specifically, subsection (b)(3) of Section 18 notes:

> (3) The Commission shall issue a notice of proposed rulemaking pursuant to paragraph (1)(A) only where it has reason to believe that the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are prevalent. The Commission shall make a determination that unfair or deceptive acts or practices are prevalent under this paragraph only if –
>
> (A) It has issued cease and desist orders regarding such acts or practices, or
>
> (B) Any other information available to the Commission indicates a widespread pattern of unfair or deceptive acts or practices.

Not only has the Commission not taken major enforcement action in this area, but it also has little to no information or data regarding the extent or magnitude of the consumer harm – let alone whether it is prevalent. Within the ANPR, the Commission notes:

> "Here, in this Item, the Commission invites public comment on (a) the nature and prevalence of harmful commercial surveillance and lax data security practices, (b) the balance of costs and countervailing benefits of such practices for consumers and competition, as well as the costs and benefits of any given potential trade regulation rule, and (c) proposals for protecting consumers from harmful and prevalent commercial surveillance and lax data security practices."[7]

Further, Commissioner Phillips writes in his dissent to this ANPR:

> The ANPR colors well outside the lines of conduct that has been the subject of many (or, in a number of prominent cases, any) enforcement actions, where real world experience provides a guide.…This ANPR, meanwhile, attempts to establish the prevalence necessary to justify broad commercial surveillance rulemaking by citing an amalgam of cases concerning very different business models and conduct.…The ANPR aims for regulation without even any experience, to say nothing of court decisions ratifying the application of Section 5 to the business conduct in question."[8]

The following, non-exhaustive list of questions asked within the ANPR expressly demonstrates that the Commission has little or no information that an act or practice identified in the ANPR is (1) unfair or deceptive, (2) harmful to consumers, or (3) prevalent. Each of these are key requirements undergirding any Section 18 rulemaking.[9]

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[7] See ANPR at 51281.

[8] FTC Commissioner Noah Joshua Phillips, Dissenting Statement of Commissioner Noah Joshua Phillips Regarding the Commercial Surveillance and Data Security Advance Notice of Proposed Rulemaking, August 11, 2022; https://www.ftc.gov/system/files/ftc_gov/pdf/Commissioner%20Phillips%20Dissent%20to%20Commercial%20Surveillance%20ANPR%2008112022.pdf at 5.

[9] See ANPR at Q. 3, 4, 8, 10, 13, 53, 65, and 71.

3. Which of these measures or practices [to surveil consumers] are prevalent? Are some practices more prevalent in some sectors than in others?

4. How, if at all, do these commercial surveillance practices harm consumers or increase the risk of harms to consumers?

8. Which areas or kinds of harm, if any, has the Commission failed to address through its enforcement actions?

10. Which kinds of data should be subject to a potential trade regulation rule? Should it be limited to, for example, personally identifiable data, sensitive data, data about protected categories and their proxies, data that is linkable to a device, or non-aggregated data? Or should a potential rule be agnostic about kinds of data?

13. The Commission here invites comments on commercial surveillance practices or lax data security measures that affect children, including teenagers. Are there practices or measures to which children or teenagers are particularly vulnerable or susceptible?

53. How prevalent is algorithmic error? To what extent is algorithmic error inevitable?...

65. How prevalent is algorithmic discrimination based on protected categories such as race, sex, and age?...

71. To what extent, if at all, may the Commission rely on its unfairness authority under Section 5 to promulgate antidiscrimination rules? Should it? How, if at all, should antidiscrimination doctrine in other sectors or federal statutes relate to new rules?

III. The Commission Does Not Have Unfair Methods of Competition Rulemaking Authority

Finally, we took special note of the Commission's claim that it could propose rules outside of the Section 18 process by invoking its alleged "unfair methods of competition rulemaking." Specifically, embedded within footnote 47 of the ANPR, the Commission notes:

> "Accordingly, Item IV, below invites comments on the way in which existing and emergent commercial surveillance practices harm competition and on any new trade regulation rules that would address such practices. Such rules could arise from the Commission's authority to protect against unfair methods of competition, so they may be proposed directly without first being subject of an advance notice of proposed rulemaking..."[10]

[10] See ANPR at 51276.

While some may argue Section 6(g) of the FTC Act provides the Commission with unfair methods of competition (UMC) rulemaking authority, we reject such views.[11] The statutory structure of Section 6(g) within the FTC Act casts substantial doubt on its expansive interpretation. Not only is it located within the "investigative" authorities of the FTC Act (rather than within rulemaking authorities), it also (unlike unfairness or deception) does not contain any penalties or sanctions to enforce such rules. This should indicate that Section 6(g) is not referring to rules that carry the force of law, but to procedural or interpretive rules.

In the Supreme Court's recent decision in *AMG Capital Management, LLC v. FTC*, the Court ruled that Section 13(b) of the FTC Act did not authorize the Commission to seek "equitable monetary relief" striking down decades of prior federal court precedent. The Court, in part, concluded, "The language and structure of 13(b), taken as a whole, indicate that the words 'permanent injunction' have a limited purpose – a purpose that does not extend to the grant of monetary relief."[12]

If the Court were to apply similar reasoning and analysis to Section 6(g), we believe the Court would equally find that the structure and language of 6(g) does not carry with it such sweeping powers despite some limited prior federal precedent.[13]

Furthermore, Congress is not permitted to delegate its exclusive lawmaking functions to a federal agency. Attempting to turn an amorphous phrase into broad powers to regulate potentially vast swaths of the economy with no Congressional policy judgments would be unconstitutional. Commissioner Phillips rightly pointed out that the term "unfair methods of competition" is almost the exact same wording as "codes of fair competition" which was struck down under the nondelegation doctrine in *A.L.A. Schecter Poultry Corp. v. United States.*[14]

Relatedly, UMC rulemaking would unlikely pass a "major questions" doctrine test since a court would expect Congress to speak clearly if it wishes to assign to an agency an issue of "vast economic and political significance."[15] In the 108-year history of the FTC, the question of UMC rulemaking is undoubtedly not an area that Congress has clearly spoken to.

For these reasons, we are alarmed that the Commission would even contemplate the use of such controversial authority outside the will of Congress. We urge the Commission to stop its pursuit of this dangerous and inappropriate use of power.

Conclusion

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[11] See, Rohit Chopra & Lina M. Khan, *The University of Chicago Law Review: The Case for "Unfair Methods of Competition" Rulemaking*, March 5, 2020; https://www.ftc.gov/news-events/news/public-statements/university-chicago-law-review-case-unfair-methods-competition-rulemaking

[12] See AMG Capital Management, LLC v. FTC, 593 U.S. ___ (2021).

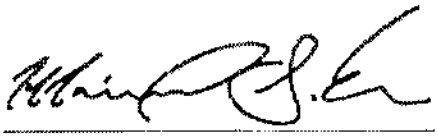
[13] See National Petroleum Refiners Association v. FTC, 482 F.2d 672 (D.C. Cir. 1973).

[14] Commissioner Noah Joshua Phillips Prepared Remarks, Federal Trade Commission, Non-Compete Clauses in the Workplace: Examining Antitrust and Consumer Protection Issues; January 9, 2020. https://www.ftc.gov/system/files/documents/public_statements/1561697/phillips_-_remarks_at_ftc_nca_workshop_1-9-20.pdf

[15] See Utility Air Regulation Group v. EPA, 537 U.S. 302, 324 (2014)

We appreciate the opportunity to submit our views on this matter; and for the foregoing reasons, we hope that the Commission will cease consideration of this ANPR.

Sincerely,



Michael S. Lee
United States Senator

Marsha Blackburn
United States Senator

James Lankford
United States Senator

Marco Rubio
United States Senator

Ted Cruz
United States Senator

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

October 24, 2022

Senator Michael S. Lee
United States Senate
Washington, D.C. 20510

Dear Sen. Lee,

Thank you for the October 21, 2022, letter from you and other Senators providing your views regarding the Commission's Advance Notice of Proposed Rulemaking on Commercial Surveillance and Data Security.[1] Your letter will be treated as a public comment in the rulemaking proceeding, and will be placed on the public comments page for that proceeding on regulations.gov.[2]

We appreciate your interest in the rulemaking proceeding, and I can assure you that the information you have provided will be carefully considered. Please let us know whenever we can be of service with respect to any other matter.

Sincerely,

April J. Tabor
Secretary

[1] Trade Regulation Rule on Commercial Surveillance and Data Security: Advance notice of proposed rulemaking; request for public comment; public forum, 87 Fed. Reg. 51,271 (Aug. 22, 2022), *available at* https://www.federalregister.gov/documents/2022/08/22/2022-17752/trade-regulation-rule-on-commercial-surveillance-and-data-security.

[2] Public comments in the Trade Regulation Rule on Commercial Surveillance and Data Security proceeding, *available at* https://www.regulations.gov/document/FTC-2022-0053-0001.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

October 24, 2022

Senator Marsha Blackburn
United States Senate
Washington, D.C. 20510

Dear Sen. Blackburn,

Thank you for the October 21, 2022, letter from you and other Senators providing your views regarding the Commission's Advance Notice of Proposed Rulemaking on Commercial Surveillance and Data Security.[1] Your letter will be treated as a public comment in the rulemaking proceeding, and will be placed on the public comments page for that proceeding on regulations.gov.[2]

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Sincerely,

April J. Tabor
Secretary

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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

October 24, 2022

Senator Marco Rubio
United States Senate
Washington, D.C. 20510

Dear Sen. Rubio.

Thank you for the October 21, 2022, letter from you and other Senators providing your views regarding the Commission's Advance Notice of Proposed Rulemaking on Commercial Surveillance and Data Security.[1] Your letter will be treated as a public comment in the rulemaking proceeding, and will be placed on the public comments page for that proceeding on regulations.gov.[2]

We appreciate your interest in the rulemaking proceeding, and I can assure you that the information you have provided will be carefully considered. Please let us know whenever we can be of service with respect to any other matter.

Sincerely,

April J. Tabor
Secretary

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[2] Public comments in the Trade Regulation Rule on Commercial Surveillance and Data Security proceeding, *available at* https://www.regulations.gov/document/FTC-2022-0053-0001.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

October 24, 2022

Senator Ted Cruz
United States Senate
Washington, D.C. 20510

Dear Sen. Cruz,

Thank you for the October 21, 2022, letter from you and other Senators providing your views regarding the Commission's Advance Notice of Proposed Rulemaking on Commercial Surveillance and Data Security.[1] Your letter will be treated as a public comment in the rulemaking proceeding, and will be placed on the public comments page for that proceeding on regulations.gov.[2]

We appreciate your interest in the rulemaking proceeding, and I can assure you that the information you have provided will be carefully considered. Please let us know whenever we can be of service with respect to any other matter.

Sincerely,

April J. Tabor
Secretary

[1] Trade Regulation Rule on Commercial Surveillance and Data Security: Advance notice of proposed rulemaking; request for public comment; public forum, 87 Fed. Reg. 51,271 (Aug. 22, 2022), *available at* https://www.federalregister.gov/documents/2022/08/22/2022-17752/trade-regulation-rule-on-commercial-surveillance-and-data-security.

[2] Public comments in the Trade Regulation Rule on Commercial Surveillance and Data Security proceeding, *available at* https://www.regulations.gov/document/FTC-2022-0053-0001.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

October 24, 2022

Senator James Lankford
United States Senate
Washington, D.C. 20510

Dear Sen. Lankford,

Thank you for the October 21, 2022, letter from you and other Senators providing your views regarding the Commission's Advance Notice of Proposed Rulemaking on Commercial Surveillance and Data Security.[1] Your letter will be treated as a public comment in the rulemaking proceeding, and will be placed on the public comments page for that proceeding on regulations.gov.[2]

We appreciate your interest in the rulemaking proceeding, and I can assure you that the information you have provided will be carefully considered. Please let us know whenever we can be of service with respect to any other matter.

Sincerely,

April J. Tabor
Secretary

[1] Trade Regulation Rule on Commercial Surveillance and Data Security: Advance notice of proposed rulemaking; request for public comment; public forum, 87 Fed. Reg. 51,271 (Aug. 22, 2022), *available at* https://www.federalregister.gov/documents/2022/08/22/2022-17752/trade-regulation-rule-on-commercial-surveillance-and-data-security.

[2] Public comments in the Trade Regulation Rule on Commercial Surveillance and Data Security proceeding, *available at* https://www.regulations.gov/document/FTC-2022-0053-0001.

VICTORIA SPARTZ
[illegible]

[illegible]

Congress of the United States

House of Representatives

Washington, DC 20515-1405

January 13, 2023

The Honorable Lina Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Dear Commissioner Khan,

I do share your frustrations with the lack of competition in many sectors of our economy, although I might have a different rationale for its causes. However, I would like to express my concerns and raise an issue of constitutionality of the proposed Non-Compete Clause Rule to ban all non-compete clauses and preempt state law.

The government does have a function to provide a proper legal framework to prevent coercion, including to address unreasonable in duration and scope agreements due to non-equal bargaining powers, there could be some legitimate reasons for reasonable restrictions. A blanket approach should not be applied. Also, these contracts have been generally governed by states for a very long time. As a former state senator, I personally authored legislation to address egregious contract terms in some physician non-compete agreements.

I appreciate your efforts, especially in the area of hospital monopoly, which had a significant adverse effect on price and value of medical care in the state of Indiana, which I represent. I truly believe an issue of such vast economic and political significance should have explicit congressional authorization and would be glad to discuss as a member of the House Judiciary Committee and Antitrust Subcommittee.

Sincerely,

Victoria Spartz

Victoria Spartz
Member of Congress (IN-05)

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

March 6, 2023

The Honorable Victoria Spartz
United States House of Representatives
Washington, D.C. 20515

Dear Representative Spartz,

Thank you for the January 13, 2023, letter providing your views regarding the Commission's Notice of Proposed Rulemaking on the Non-Compete Clause Rule.[1] Your letter will be treated as a public comment in the rulemaking proceeding and will be placed on the public comments page for that proceeding on regulations.gov.[2]

We appreciate your interest in the rulemaking proceeding, and I can assure you that the information you have provided will be carefully considered. Please let us know whenever we can be of service with respect to any other matter.

Sincerely,

April J. Tabor
Secretary

[1] Notice of proposed rulemaking, 88 Fed. Reg. 3482 (Jan. 19, 2023), *available at* https://www.federalregister.gov/documents/2023/01/19/2023-00414/non-compete-clause-rule.

[2] Public comments on Non-Compete Clause Rule NPRM, *available at* https://www.regulations.gov/document/FTC-2023-0007-0001.

United States Senate

WASHINGTON, DC 20510

July 30, 2021

Hon. Lina Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580

Dear Chair Khan,

Congratulations on your recent appointment to lead the Federal Trade Commission. As you know, this is a critical time for the country's most important industries, from health care to transportation and logistics to manufacturing and technology.

We write to share concerns about the level of openness and transparency at the FTC. In particular, it appears that unprecedented steps have been taken to empower the office of the FTC chair at the expense of the bipartisan, consensus-based decision-making that characterized the FTC under prior administrations. At the Commission's July 1, 2021, open meeting – its first in decades – you noted the importance of transparency to inform the agency's work and create a "robust participatory process." We agree these are goals the FTC should strive to meet. That said, several changes made at the agency in recent weeks raise questions about your commitment to these ideals.

We ask that you provide more information about the following by August 30, 2021:

1. The FTC recently voted 3-2 on party lines to rescind its policy statement on unfair methods of competition under the FTC Act.
    a. Why did you choose to proceed with this change without first providing notice and an opportunity for public comment?
    b. As a general matter, when can the FTC proceed with impactful policy changes outside of the notice-and-comment process in the Administrative Procedure Act?
    c. In the absence of guidance, how will the agency provide predictability and transparency to businesses on what conduct constitutes an unfair method of competition?
    d. Is it the agency's intent to discard the "consumer welfare standard" that it previously used to guide antitrust enforcement cases? If so, what will replace it?

2. The FTC voted 3-2 on party lines to eliminate procedural rules related to its Section 18 ("Magnuson-Moss") rulemaking authority. Many of these rules were implemented in response to congressional action stemming from concerns about unfettered FTC authority.
    a. Why did you decide these changes were necessary? Are there specific instances where these procedures prevented the FTC from achieving effective results for consumers?

b. Were these changes intended to make it easier for the FTC to institute new rulemaking proceedings, specifically in the area of consumer privacy?
c. Do you believe these changes accord with the limits Congress put on Section 18 rulemaking in the Federal Trade Commission Improvements Act of 1980?

3. As part of the FTC's new open meeting process, you offer members of the public a chance to speak for one minute after all voting is complete. Going forward, will the public have an opportunity to comment on issues the FTC considers prior to votes?

4. According to a July 6, 2021, press report, FTC Chief of Staff Jen Howard put a "moratorium on public events and press outreach."[1]
   a. Why was that ban imposed and to what, specifically, does it extend?
   b. Are agency staff permitted to meet with outside parties on rulemaking proceedings or other matters of public interest?

5. Do you plan to recuse yourself from participating in cases where you have expressed public opinions about the specific companies at issue?

We appreciate your attention to these important issues.

Sincerely,

Marsha Blackburn
Ranking Member, Subcommittee on Consumer Protection, Product Safety, and Data Security

John Cornyn
United States Senator

Thom Tillis
United States Senator

Cynthia M. Lummis
United States Senator

Bill Hagerty
United States Senator

[1] Leah Nylen and Betsy Woodruff Swan, "FTC Staffers told to back out of public appearances," Politico (July 6, 2021), https://www.politico.com/news/2021/07/06/ftc-staffers-public-appearances-498386.

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

Office of the Chair

September 8, 2021

The Honorable Marsha Blackburn
United States Senate
Washington, D.C. 20510

Dear Ranking Member Blackburn:

Thank you for your letter requesting information about recent actions and changes at the Federal Trade Commission. I appreciate the opportunity to address the concerns you raised and to clarify some misunderstandings.

Before discussing some of the specifics, it is worth noting that the FTC is at a crossroads. For decades, FTC leaders across administrations operated under a framework that recommended enforcers err on the side of inaction, on the assumption that monopoly power would be disciplined by the free market.[1] This framework prompted FTC leadership to adopt policies that narrowed the agency's legal authorities, contravening Congress. In recent years, economic learning and empirical evidence have revealed that this approach was unduly permissive and enabled significant consolidation across markets.[2] Public reporting now routinely documents how market power abuses by dominant firms are precluding businesses and entrepreneurs from being able to compete, particularly in digital markets—a concern that I understand you also share.[3] Lawmakers from both parties have responded by strongly urging the Commission to turn

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[1] *See, e.g.*, William Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 1 COLUM. BUS. L. REV. 1, 80 (2007); Daniel Crane, *Has the Obama Justice Department Reinvigorated Antitrust Enforcement?*, 65 STAN. L. REV. 13 (2012) ("[M]edia reports frequently suggested that antitrust enforcement is significantly tougher under President Obama. For better or worse, the Administration's enforcement record does not bear out this impression. With only a few exceptions, current enforcement looks much like enforcement under the Bush Administration.").

[2] *See, e.g.*, Jan De Loecker et al., *The Rise of Market Power and the Macroeconomic Implications*, 135 Q.J. ECON. 561, 644 (2020); Germán Gutiérrez & Thomas Philippon, *Investmentless Growth: An Empirical Investigation*, BROOKINGS PAPER ON ECON. ACTIVITY 89, 95–97 (2017); Germán Gutiérrez & Thomas Philippon, *Ownership, Concentration, and Investment*, 108 AM. ECON. ASSOC. PAPERS AND PROCEEDINGS 432, 437 (2018); Germán Gutiérrez & Thomas Philippon, *Declining Competition and Investment in the U.S.* 2 (Nat'l Bureau of Econ. Res., Working Paper No. 23583, 2017); José A. Azar et al., *Concentration in US Labor Markets: Evidence from Online Vacancy Data* 13 (Nat'l Bureau of Econ. Res., Working Paper No. 24395, 2018); José A. Azar et al., *Labor Market Concentration* 12 (Nat'l Bureau of Econ. Res., Working Paper No. 24147, 2017); Simcha Barkai, *Declining Labor and Capital Shares*, 75 J. Fin. 2421, 2422 - 45, 48 (2020); IAN HATHAWAY & ROBERT E. LITAN, WHAT'S DRIVING THE DECLINE IN THE FIRM FORMATION RATE? A PARTIAL EXPLANATION, 1 - 9 (Econ. Studies at Brookings Inst., 2014); Joshua Gans et al., *Inequality and Market Concentration, When Shareholding Is More Skewed than Consumption* (Nat'l Bureau of Econ. Res., Working Paper No. 25395, 2018).

[3] *See, e.g.*, Christopher Mims, *As Apple and Facebook Clash Over Ads, Mom-and-Pop Shops Fear They'll Be the Victims*, WALL ST. J. (Apr. 10, 2021), https://www.wsj.com/articles/apple-facebook-clash-over-ad-small-businesses-fear-they-ll-be-impacted-11618050627; Kim Hart, *Big Tech's small biz squeeze*, AXIOS (July 12, 2021), https://www.axios.com/big-tech-small-biz-squeeze-0cb6e40e-0db4-46cd-9e54-936c40e333d6.html; *see also* REP. JIM JORDAN ET AL., REPUBLICAN STAFF OF H. COMM. ON THE JUDICIARY, REP. ON REINING IN BIG TECH'S CENSORSHIP OF CONSERVATIVES 2 (noting "Big Tech companies are large, powerful, and pivotal for much that occurs in America's economic and civic marketplaces.").

the page on its hands-off approach and to fully deploy its law enforcement authorities to promote open markets, entrepreneurship, and innovation.[4]

The task before the Commission today is to learn from this new evidence and to ensure that our efforts are responding to market realities. We must approach this work in a clear-eyed manner, candidly learning from the past. I am committed to doing so, recognizing both the bipartisan nature of the prior approach and the bipartisan nature of the current call for reform. Indeed, a close look at the policy actions that have received a split Commission vote suggests that the current divide at the agency is not rooted in partisanship.[5] Viewing current disagreements at the Commission through a traditional partisan lens risks overlooking the serious bipartisan concern about the costs of FTC inaction and the strong bipartisan support for the new approach.

With this general overview, I now turn to your specific inquiries:

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UNITED STATES OF AMERICA
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Office of the Chair

September 8, 2021

The Honorable Cynthia M. Lummis
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Dear Senator Lummis:

Thank you for your letter requesting information about recent actions and changes at the Federal Trade Commission. I appreciate the opportunity to address the concerns you raised and to clarify some misunderstandings.

Before discussing some of the specifics, it is worth noting that the FTC is at a crossroads. For decades, FTC leaders across administrations operated under a framework that recommended enforcers err on the side of inaction, on the assumption that monopoly power would be disciplined by the free market.[1] This framework prompted FTC leadership to adopt policies that narrowed the agency's legal authorities, contravening Congress. In recent years, economic learning and empirical evidence have revealed that this approach was unduly permissive and enabled significant consolidation across markets.[2] Public reporting now routinely documents how market power abuses by dominant firms are precluding businesses and entrepreneurs from being able to compete, particularly in digital markets—a concern that I understand you also share.[3] Lawmakers from both parties have responded by strongly urging the Commission to turn

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Chair, Federal Trade Commission

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

Office of the Chair

September 8, 2021

The Honorable John Cornyn
United States Senate
Washington, D.C. 20510

Dear Senator Cornyn:

Thank you for your letter requesting information about recent actions and changes at the Federal Trade Commission. I appreciate the opportunity to address the concerns you raised and to clarify some misunderstandings.

Before discussing some of the specifics, it is worth noting that the FTC is at a crossroads. For decades, FTC leaders across administrations operated under a framework that recommended enforcers err on the side of inaction, on the assumption that monopoly power would be disciplined by the free market.[1] This framework prompted FTC leadership to adopt policies that narrowed the agency's legal authorities, contravening Congress. In recent years, economic learning and empirical evidence have revealed that this approach was unduly permissive and enabled significant consolidation across markets.[2] Public reporting now routinely documents how market power abuses by dominant firms are precluding businesses and entrepreneurs from being able to compete, particularly in digital markets—a concern that I understand you also share.[3] Lawmakers from both parties have responded by strongly urging the Commission to turn

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the page on its hands-off approach and to fully deploy its law enforcement authorities to promote open markets, entrepreneurship, and innovation.[4]

The task before the Commission today is to learn from this new evidence and to ensure that our efforts are responding to market realities. We must approach this work in a clear-eyed manner, candidly learning from the past. I am committed to doing so, recognizing both the bipartisan nature of the prior approach and the bipartisan nature of the current call for reform. Indeed, a close look at the policy actions that have received a split Commission vote suggests that the current divide at the agency is not rooted in partisanship.[5] Viewing current disagreements at the Commission through a traditional partisan lens risks overlooking the serious bipartisan concern about the costs of FTC inaction and the strong bipartisan support for the new approach.

With this general overview, I now turn to your specific inquiries:

1. Rescission of the 2015 policy statement concerning unfair methods of competition. As explained in the Commission statement that accompanied rescission of the 2015 policy statement, the 2015 policy statement abrogated the Commission's congressionally mandated duty to use its expertise to identify and combat unfair methods of competition even if they do not violate a separate antitrust statute.[6] Section 5 of the FTC Act is one of the Commission's core statutory authorities; the agency must enforce it to fulfill Congress's prohibition on unfair methods of competition.

The Administrative Procedure Act's notice-and-comment requirements expressly do not apply to "general statements of policy."[7] Accordingly, the Commission in 2015 adopted the Section 5 policy statement without first providing notice and an opportunity for public comment, and our rescission of this statement matched this prior approach.

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In the coming months, the Commission will consider whether to issue new guidance or to propose rules that will further clarify the types of practices that warrant scrutiny under Section 5. In the meantime, the Commission will exercise responsibly its prosecutorial discretion in determining which cases are appropriate under Section 5, consistent with legal precedent.

2. Revisions to the procedural rules for Section 18 rulemaking. These changes bring agency procedures back in line with the statutory requirements governing the FTC's rulemaking authority to declare practices unfair and deceptive pursuant to Section 18 of the FTC Act, 15 U.S.C. § 57a (1976). Because the Commission's procedural rules imposed requirements beyond what Congress provided for in the FTC Act, some rulemakings took more than eight years from start to finish. Eliminating this self-imposed red tape will enable the Commission to issue timely rules on issues widespread in our economy, including data surveillance and associated abuses. In addition, trade regulation rules give businesses and consumers concrete guidance about their responsibilities and rights.

The streamlined procedural rules provide greater transparency, process, and opportunity for the public and businesses to be heard than notice-and-comment rulemaking procedures under the Administrative Procedure Act. They also accord with the statutory requirements placed on Section 18 rulemaking by Congress in the Federal Trade Commission Improvements Act of 1980 and other relevant statutes. The requirements for Section 18 rulemaking include the publication of an Advance Notice of Proposed Rulemaking (ANPRM) for public comment; the advance submission of the ANPRM to the FTC's congressional oversight committees; the publication of a notice of proposed rulemaking (NPRM) for public comment; the advance submission of the NPRM to the congressional oversight committees; the publication of a preliminary regulatory analysis; an opportunity for interested persons to present their positions orally at an informal hearing; an opportunity for cross-examination and rebuttal submissions to resolve any disputed issue of material fact; the publication of the presiding officer's proposed resolution of any disputed issue of material fact; and the publication of a Final Rule accompanied by a statement of basis and purpose, as well as a final regulatory analysis.

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Thank you again for your interest in the Commission's activities. If you have any questions, please feel free to have your staff call Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2195.

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

Office of the Chair

September 8, 2021

The Honorable Bill Hagerty
United States Senate
Washington, D.C. 20510

Dear Senator Hagerty:

Thank you for your letter requesting information about recent actions and changes at the Federal Trade Commission. I appreciate the opportunity to address the concerns you raised and to clarify some misunderstandings.

Before discussing some of the specifics, it is worth noting that the FTC is at a crossroads. For decades, FTC leaders across administrations operated under a framework that recommended enforcers err on the side of inaction, on the assumption that monopoly power would be disciplined by the free market.[1] This framework prompted FTC leadership to adopt policies that narrowed the agency's legal authorities, contravening Congress. In recent years, economic learning and empirical evidence have revealed that this approach was unduly permissive and enabled significant consolidation across markets.[2] Public reporting now routinely documents how market power abuses by dominant firms are precluding businesses and entrepreneurs from being able to compete, particularly in digital markets—a concern that I understand you also share.[3] Lawmakers from both parties have responded by strongly urging the Commission to turn

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

Office of the Chair

November 3, 2021

The Honorable Charles Grassley
Ranking Member
Judiciary Committee
United States Senate
Washington, D.C. 20510

Dear Ranking Member Grassley:

Thank you for sharing your concerns that the Antitrust Division of the Department of Justice ("DOJ" or the "Division") and the Bureau of Competition at the Federal Trade Commission ("FTC" or the "Bureau") are applying increasingly different standards of merger enforcement review. I am happy to respond to the questions posed in your letter, including those regarding the Commission's recent withdrawal of its approval of the Vertical Merger Guidelines issued in 2020 ("2020 VMGs").[1]

The FTC and the DOJ are continuing their long-standing history of cooperation and collaboration in antitrust enforcement. In July, I joined DOJ's Acting Assistant Attorney General in a commitment to collaborate on an update of our merger guidance.[2] This effort is in line with President Biden's Executive Order on Promoting Competition in the American Economy, which encouraged the agencies to review the horizontal and vertical merger guidelines and consider whether to revise those guidelines. I anticipate that our public consultation on this project will begin soon and assure you that we will seek input that reflects a diversity of views as well as sound economic analysis reflecting the modern economy.

1. *To what extent did Division and Bureau staff consult with each other prior to the FTC's withdrawal of approval for the VMGs?*

DOJ and FTC managers regularly consult on matters of mutual concern, including the 2020 VMGs. Discussions between the DOJ and the FTC generally are protected under various exemptions, including the deliberative-process privilege, attorney-client privilege, and attorney work product privilege.

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[1] FTC Withdraws Vertical Merger Guidelines and Commentary (Sep. 15, 2021), https://www.ftc.gov/news-events/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines.

[2] Statement of FTC Chair Lina Khan and Antitrust Division Acting Assistant Attorney General Richard A. Powers on Competition Executive Order's Call to Consider Revisions to Merger Guidelines (Jul. 9, 2021), https://www.ftc.gov/news-events/press-releases/2021/07/statement-ftc-chair-lina-m-khan-antitrust-division-acting.

2. ***To what extent did DOJ and FTC leadership consult with each other prior to the FTC's withdrawal of approval for the VMGs?***

Please see my response to question 1.

2.a. ***To what extent was staff input taken into consideration?***

Although I cannot describe staff communications protected under the deliberative process privilege, I can assure you that FTC staff would be consulted for identifying areas of the law, including merger law, that would benefit from new or revised guidance.

3. Was there any discussion of waiting to evaluate the VMGs until after political leadership had been appointed and confirmed for the Division?

Please see my response to question 1.

3.a. ***For FTC only: Why did the FTC proceed with voting to withdraw approval for the VMGs without concurrence from DOJ?***

Based on statutory text and empirical evidence, the FTC believes that the now-withdrawn VMGs include unsound economic theories that are inconsistent with the law and unsupported by market realities. When the Commission withdrew the 2020 VMGs, it released a statement that details the FTC's concerns with the 2020 VMGs and highlighted the need to withdraw them before courts relied on their flawed elements.[3]

3.b. ***For FTC only: Why didn't the FTC wait to withdraw approval for the VMGs until replacement guidelines had been prepared?***

As explained in the statement released concurrently with the withdrawal of the VMGs, the withdrawal was a necessary intermediate step to prevent industry or judicial reliance on flawed approaches while we undertake an effort to provide guidance that reflects a more rigorous framework for assessing the ways in which acquisitions may substantially lessen competition.[4]

4. To what extent have DOJ or FTC personnel consulted with each other regarding asking merging parties about their proposed transaction's effects on labor issues or Environmental, Social, and Governance ("ESG") policies?

Enforcement to protect American workers from antitrust violations in labor markets is one of my top priorities, as detailed in my recent letter to the U.S. House Subcommittee on

[3] Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines, at 8 (Sep. 15, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596396/statement_of_chair_lina_m_khan_commissioner_rohit_chopra_and_commissioner_rebecca_kelly_slaughter_on.pdf.

[4] *Id.* at 2, 3-5.

Antitrust, Commercial, and Administrative Law.[5] In recent years, the FTC has worked with DOJ to provide clear guidance on how the antitrust laws apply to employment and labor markets, beginning with joint DOJ/FTC guidance in 2016.[6] Consultation on potential revisions to the merger guidelines will consider whether to include in any revised guidelines an analysis of how mergers may undermine competition in labor markets. Both the FTC and DOJ are committed to challenging mergers that harm free and fair competition for workers.[7]

5. ***Redacting only to avoid divulging party names or confidential business information, please share each and every question that has been posed to a merging party, whether in writing or orally, relating to labor issues or ESG policies. If your agency has not posed any such questions, please state so.***

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The FTC will continue to enforce prevailing legal standards and to challenge any acquisition that may substantially lessen competition or tend to create a monopoly. Ultimately, enforcement decisions by both agencies are subject to judicial review under the processes set out by Congress. As both agencies announced, we will closely coordinate in reviewing the merger guidelines to ensure that they accurately reflect market realities and provide a well-founded guide for courts.

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Thank you again for your interest in effective antitrust enforcement. If you have any questions, please feel free to have your staff call Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2195.

Sincerely,

Lina Khan

Lina M. Khan
Chair, Federal Trade Commission

cc: The Honorable Richard Powers
Acting Assistant Attorney General
Antitrust Division
U.S. Department of Justice

Congress of the United States
Washington, DC 20515

October 4, 2021

Mr. Richard Powers
Acting Assistant Attorney General, Antitrust Division
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

The Honorable Lina Khan
Chairwoman
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dear Mr. Powers and Chairwoman Khan,

We write to express our shared concern that the Department of Justice's Antitrust Division ("DOJ" or the "Division") and the Federal Trade Commission's Bureau of Competition ("FTC" or the "Bureau") are applying increasingly divergent standards of review to mergers and acquisitions under their shared jurisdiction.

On September 15, 2021, the FTC voted to withdraw its approval of the 2020 Vertical Merger Guidelines ("VMGs").[1] However, on the same day the Division issued a public statement noting that the VMGs would remain in place at the Department of Justice.[2]

At the same meeting at which the FTC withdrew its approval for the VMGs, it also heard public comments.[3] One commenter noted that,

> In an increasing number of FTC merger investigations, agency staff have requested information regarding how the proposed transaction will affect unionization, ESG [Environmental, Social, and Governance] policies, or franchising. Staff have been unable to articulate how these issues relate to the agency's mission to promote competition, leaving the outside world guessing as to the role they play in agency decision making. Adding to this concern, these types of considerations are not topics in which agency staff have expertise, and devoting time to these issues has the potential to delay agency review of transactions. To the extent that these considerations are playing the role in enforcement

[1] https://www.ftc.gov/news-events/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines
[2] https://www.justice.gov/opa/pr/justice-department-issues-statement-vertical-merger-guidelines
[3] https://www.ftc.gov/system/files/documents/public_events/1596052/transcript_open_commission_meeting_9-15-21.pdf

decisions, I hope the Commission will give serious consideration to promptly explaining their role and how to square this with decades of Supreme Court precedent, that the impact on competition is the only proper consideration in the antitrust case.

Further reporting on this subject has revealed that this concern is shared by other members of the antitrust bar,[4] and is consistent with the complaints that concerned parties have been sharing privately with some of our offices for months. Notably, there have been no reports that Department of Justice Antitrust Division staff are asking these types of questions.

We are worried that your agencies appear to be applying the law unequally to similarly situated respondents, raising serious concerns about the fairness of America's antitrust enforcement regime. A lack of alignment between DOJ and FTC in antitrust enforcement already has been a problem during previous administrations. We are disappointed to see that trend accelerating under President Biden's leadership.

To assist us in our exercise of Congressional oversight over the enforcement of our antitrust laws and federal competition policy, we request that each of you respond, separately, to the questions below by October 15, 2021.

1. To what extent did Division and Bureau staff consult with each other prior to the FTC's withdrawal of approval for the VMGs?

2. To what extent did DOJ and FTC leadership consult with each other prior to the FTC's withdrawal of approval for the VMGs?

    a. To what extent was staff input taken into consideration?

3. Was there any discussion of waiting to evaluate the VMGs until after political leadership had been appointed and confirmed for the Division?

    a. For FTC only: Why did the FTC proceed with voting to withdraw approval for the VMGs without concurrence from DOJ?

    b. For FTC only: Why didn't the FTC wait to withdraw approval for the VMGs until replacement guidelines had been prepared?

4. To what extent have DOJ or FTC personnel consulted with each other regarding asking merging parties about their proposed transaction's effects on labor issues or Environmental, Social, and Governance ("ESG") policies?

5. Redacting only to avoid divulging party names or confidential business information, please share each and every question that has been posed to a merging party, whether in writing or orally, relating to labor issues or ESG policies. If your agency has not posed

[4] *See, e.g.*, Bryan Koenig, "'Nontraditional Questions' Appearing In FTC Merger Probes," Law360 (Sept. 24, 2021), https://www.law360.com/mergers-acquisitions/articles/1425218/-nontraditional-questions-appearing-in-ftc-merger-probes.

any such questions, please state so.

6. Please share any changes whether official or unofficial, permanent or temporary your agency or staff have made to the Model Second Request since January 20, 2021.

7. What steps are you taking to ensure that merger enforcement policy and the legal standards applied at your agency do not substantively differ from those of your sister agency?

We look forward to receiving and reviewing your answers.

Sincerely,

Sen. Michael S. Lee
Ranking Member
Senate Judiciary Subcommittee on
Competition Policy, Antitrust, and
Consumer Rights

Rep. Ken Buck
Ranking Member
House Judiciary Subcommittee on
Antitrust, Commercial, and
Administrative Law

Sen. Charles Grassley
Ranking Member
Senate Judiciary Committee

Rep. Jim Jordan
Ranking Member
House Judiciary Committee

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

Office of the Chair

November 3, 2021

The Honorable Ken Buck
Ranking Member
Judiciary Subcommittee on Antitrust,
Commercial, and Administrative Law
United States House of Representatives
Washington, D.C. 20515

Dear Ranking Member Buck:

Thank you for sharing your concerns that the Antitrust Division of the Department of Justice ("DOJ" or the "Division") and the Bureau of Competition at the Federal Trade Commission ("FTC" or the "Bureau") are applying increasingly different standards of merger enforcement review. I am happy to respond to the questions posed in your letter, including those regarding the Commission's recent withdrawal of its approval of the Vertical Merger Guidelines issued in 2020 ("2020 VMGs").[1]

The FTC and the DOJ are continuing their long-standing history of cooperation and collaboration in antitrust enforcement. In July, I joined DOJ's Acting Assistant Attorney General in a commitment to collaborate on an update of our merger guidance.[2] This effort is in line with President Biden's Executive Order on Promoting Competition in the American Economy, which encouraged the agencies to review the horizontal and vertical merger guidelines and consider whether to revise those guidelines. I anticipate that our public consultation on this project will begin soon and assure you that we will seek input that reflects a diversity of views as well as sound economic analysis reflecting the modern economy.

1. ***To what extent did Division and Bureau staff consult with each other prior to the FTC's withdrawal of approval for the VMGs?***

DOJ and FTC managers regularly consult on matters of mutual concern, including the 2020 VMGs. Discussions between the DOJ and the FTC generally are protected under various exemptions, including the deliberative-process privilege, attorney-client privilege, and attorney work product privilege.

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2. ***To what extent did DOJ and FTC leadership consult with each other prior to the FTC's withdrawal of approval for the VMGs?***

Please see my response to question 1.

2.a. ***To what extent was staff input taken into consideration?***

Although I cannot describe staff communications protected under the deliberative process privilege, I can assure you that FTC staff would be consulted for identifying areas of the law, including merger law, that would benefit from new or revised guidance.

3. ***Was there any discussion of waiting to evaluate the VMGs until after political leadership had been appointed and confirmed for the Division?***

Please see my response to question 1.

3.a. ***For FTC only: Why did the FTC proceed with voting to withdraw approval for the VMGs without concurrence from DOJ?***

Based on statutory text and empirical evidence, the FTC believes that the now-withdrawn VMGs include unsound economic theories that are inconsistent with the law and unsupported by market realities. When the Commission withdrew the 2020 VMGs, it released a statement that details the FTC's concerns with the 2020 VMGs and highlighted the need to withdraw them before courts relied on their flawed elements.[3]

3.b. ***For FTC only: Why didn't the FTC wait to withdraw approval for the VMGs until replacement guidelines had been prepared?***

As explained in the statement released concurrently with the withdrawal of the VMGs, the withdrawal was a necessary intermediate step to prevent industry or judicial reliance on flawed approaches while we undertake an effort to provide guidance that reflects a more rigorous framework for assessing the ways in which acquisitions may substantially lessen competition.[4]

4. ***To what extent have DOJ or FTC personnel consulted with each other regarding asking merging parties about their proposed transaction's effects on labor issues or Environmental, Social, and Governance ("ESG") policies?***

Enforcement to protect American workers from antitrust violations in labor markets is one of my top priorities, as detailed in my recent letter to the U.S. House Subcommittee on

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5. ***Redacting only to avoid divulging party names or confidential business information, please share each and every question that has been posed to a merging party, whether in writing or orally, relating to labor issues or ESG policies. If your agency has not posed any such questions, please state so.***

When appropriate, FTC staff has requested information and documents relating to potential labor market effects arising from a merger. This effort to assess potential anticompetitive effects not only in output markets but also in input markets (such as labor) began before I became Chair. I believe it is critical that the FTC consider the potential for how transactions may substantially lessen competition in labor markets. While I cannot disclose information protected under the HSR Act or the contents of these requests in open investigations,[8] this is the type of specification that would seek documents related to competition for workers:

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Lina M. Khan
Chair, Federal Trade Commission

cc: The Honorable Richard Powers
Acting Assistant Attorney General
Antitrust Division
U.S. Department of Justice

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

Office of the Chair

November 3, 2021

The Honorable Michael S. Lee
Ranking Member
Judiciary Subcommittee on Competition Policy,
Antitrust, and Consumer Rights
United States Senate
Washington, D.C. 20510

Dear Ranking Member Lee:

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In addition, I am concerned about the potential for misuse of non-compete clauses across the economy.[9] To assess the potential for these contract terms to reduce competition for workers, FTC staff has requested information related to companies' use of non-compete clauses.

As far as I am aware, the FTC has not asked merging parties about their ESG policies during my tenure.[10]

6. Please share any changes – whether official or unofficial, permanent or temporary – your agency or staff have made to the Model Second Request since January 20, 2021.

The FTC published a new Model Second Request on October 6.[11] The newly published model incorporates three changes. First, it clarifies that staff will consider requests for modifications only after the parties submit certain foundational information such as information about the business responsibilities of employees or agents relevant to the transaction and data maintenance practices. Second, it now requires parties to provide information in advance on how they intend to use e-discovery tools—such as culling technologies and Technology Assisted Review workflows—before they apply those tools to identify responsive materials. Third, parties must now provide complete privilege logs rather than partial or abbreviated privilege logs to enable staff to assess all assertions of privilege. These changes bring the FTC's approach into alignment with the DOJ's approach to e-discovery and privilege logs.

7. What steps are you taking to ensure that merger enforcement policy and the legal standards applied at your agency do not substantively differ from those of your sister agency?

The FTC will continue to enforce prevailing legal standards and to challenge any acquisition that may substantially lessen competition or tend to create a monopoly. Ultimately, enforcement decisions by both agencies are subject to judicial review under the processes set out by Congress. As both agencies announced, we will closely coordinate in reviewing the merger guidelines to ensure that they accurately reflect market realities and provide a well-founded guide for courts.

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[9] See Remarks of Chair Lina M. Khan Regarding Non-HSR Reported Acquisitions by Select Technology Platforms (Sep. 15, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596332/remarks_of_chair_lina_m_khan_regarding_non-hsr_reported_acquisitions_by_select_technology_platforms.pdf. The Commission's study revealed that over 76% of the acquisitions in the study included non-compete clauses for founders and key employees of the acquired entities. See Fed. Trade Comm'n, Non-HSR Reported Acquisitions By Select Technology Platforms, 2010-2019: An FTC Study, at 11 (Sep. 2021), https://www.ftc.gov/system/files/documents/reports/non-hsr-reported-acquisitions-select-technology-platforms-2010-2019-ftc-study/p201201technologyplatformstudy2021.pdf.

[10] In response to the claims made in the public comment cited in your letter, FTC staff reached out to the commenter. The commenter was unwilling to identify any specific investigations in which the FTC allegedly sought information relating to a company's ESG policies.

[11] Fed. Trade Comm'n, Model Second Request (revised Oct. 2021), https://www.ftc.gov/system/files/attachments/hsr-resources/model_second_request_-_final_-_october_2021.pdf; FTC Premerger Notification Office, Introductory Guide III: Model Request for Additional Information and Documentary Material (revised Oct. 2021), https://www.ftc.gov/system/files/attachments/premerger-introductory-guides/introductory_guide_iii_oct2021modelsecondrequest.pdf.

Thank you again for your interest in effective antitrust enforcement. If you have any questions, please feel free to have your staff call Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2195.

Sincerely,

Lina Khan

Lina M. Khan
Chair, Federal Trade Commission

cc: The Honorable Richard Powers
Acting Assistant Attorney General
Antitrust Division
U.S. Department of Justice

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

Office of the Chair

November 3, 2021

The Honorable Jim Jordan
Ranking Member
Judiciary Committee
United States House of Representatives
Washington, D.C. 20515

Dear Ranking Member Jordan:

Thank you for sharing your concerns that the Antitrust Division of the Department of Justice ("DOJ" or the "Division") and the Bureau of Competition at the Federal Trade Commission ("FTC" or the "Bureau") are applying increasingly different standards of merger enforcement review. I am happy to respond to the questions posed in your letter, including those regarding the Commission's recent withdrawal of its approval of the Vertical Merger Guidelines issued in 2020 ("2020 VMGs").[1]

The FTC and the DOJ are continuing their long-standing history of cooperation and collaboration in antitrust enforcement. In July, I joined DOJ's Acting Assistant Attorney General in a commitment to collaborate on an update of our merger guidance.[2] This effort is in line with President Biden's Executive Order on Promoting Competition in the American Economy, which encouraged the agencies to review the horizontal and vertical merger guidelines and consider whether to revise those guidelines. I anticipate that our public consultation on this project will begin soon and assure you that we will seek input that reflects a diversity of views as well as sound economic analysis reflecting the modern economy.

1. *To what extent did Division and Bureau staff consult with each other prior to the FTC's withdrawal of approval for the VMGs?*

DOJ and FTC managers regularly consult on matters of mutual concern, including the 2020 VMGs. Discussions between the DOJ and the FTC generally are protected under various exemptions, including the deliberative-process privilege, attorney-client privilege, and attorney work product privilege.

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[1] FTC Withdraws Vertical Merger Guidelines and Commentary (Sep. 15, 2021), https://www.ftc.gov/news-events/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines.

[2] Statement of FTC Chair Lina Khan and Antitrust Division Acting Assistant Attorney General Richard A. Powers on Competition Executive Order's Call to Consider Revisions to Merger Guidelines (Jul. 9, 2021), https://www.ftc.gov/news-events/press-releases/2021/07/statement-ftc-chair-lina-m-khan-antitrust-division-acting.

2. ***To what extent did DOJ and FTC leadership consult with each other prior to the FTC's withdrawal of approval for the VMGs?***

Please see my response to question 1.

2.a. ***To what extent was staff input taken into consideration?***

Although I cannot describe staff communications protected under the deliberative process privilege, I can assure you that FTC staff would be consulted for identifying areas of the law, including merger law, that would benefit from new or revised guidance.

3. Was there any discussion of waiting to evaluate the VMGs until after political leadership had been appointed and confirmed for the Division?

Please see my response to question 1.

3.a. ***For FTC only: Why did the FTC proceed with voting to withdraw approval for the VMGs without concurrence from DOJ?***

Based on statutory text and empirical evidence, the FTC believes that the now-withdrawn VMGs include unsound economic theories that are inconsistent with the law and unsupported by market realities. When the Commission withdrew the 2020 VMGs, it released a statement that details the FTC's concerns with the 2020 VMGs and highlighted the need to withdraw them before courts relied on their flawed elements.[3]

3.b. ***For FTC only: Why didn't the FTC wait to withdraw approval for the VMGs until replacement guidelines had been prepared?***

As explained in the statement released concurrently with the withdrawal of the VMGs, the withdrawal was a necessary intermediate step to prevent industry or judicial reliance on flawed approaches while we undertake an effort to provide guidance that reflects a more rigorous framework for assessing the ways in which acquisitions may substantially lessen competition.[4]

4. To what extent have DOJ or FTC personnel consulted with each other regarding asking merging parties about their proposed transaction's effects on labor issues or Environmental, Social, and Governance ("ESG") policies?

Enforcement to protect American workers from antitrust violations in labor markets is one of my top priorities, as detailed in my recent letter to the U.S. House Subcommittee on

[3] Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines, at 8 (Sep. 15, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596396/statement_of_chair_lina_m_khan_commissioner_rohit_chopra_and_commissioner_rebecca_kelly_slaughter_on.pdf.

[4] *Id.* at 2, 3-5.

Antitrust, Commercial, and Administrative Law.[5] In recent years, the FTC has worked with DOJ to provide clear guidance on how the antitrust laws apply to employment and labor markets, beginning with joint DOJ/FTC guidance in 2016.[6] Consultation on potential revisions to the merger guidelines will consider whether to include in any revised guidelines an analysis of how mergers may undermine competition in labor markets. Both the FTC and DOJ are committed to challenging mergers that harm free and fair competition for workers.[7]

5. ***Redacting only to avoid divulging party names or confidential business information, please share each and every question that has been posed to a merging party, whether in writing or orally, relating to labor issues or ESG policies. If your agency has not posed any such questions, please state so.***

When appropriate, FTC staff has requested information and documents relating to potential labor market effects arising from a merger. This effort to assess potential anticompetitive effects not only in output markets but also in input markets (such as labor) began before I became Chair. I believe it is critical that the FTC consider the potential for how transactions may substantially lessen competition in labor markets. While I cannot disclose information protected under the HSR Act or the contents of these requests in open investigations,[8] this is the type of specification that would seek documents related to competition for workers:

> Submit all documents relating to the Company's plans, strategies, policies, analyses, studies, or surveys with respect to the Company's efforts to hire, recruit, compete for, or retain production level employees to provide any product supplied by the Company in the United States from [relevant time period] to the present, including but not limited to matters affecting production level employee compensation (e.g., signing bonuses, promotions) work schedule flexibility, or other terms of engagement, or labor market conditions.

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[5] Letter from Chair Lina M. Khan to The Honorable David Cicilline and The Honorable Ken Buck (Sept. 28, 2021), https: www.ftc.gov system files/documents/public_statements/1596916/letter_to_cicilline_and_buck_for_sept_28_2021_hearing_on_labor_antitrust.pdf.

[6] U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidance for Human Resource Professionals (Oct.2016), https: www.ftc.gov system files/documents/public_statements/992623/ftc-doj_hr_guidance_final_10-20-16.pdf.

[7] Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines, at 8 (Sep. 15, 2021), https: www.ftc.gov system files/documents/public_statements/1596396/statement_of_chair_lina_m_khan_commissioner_rohit_chopra_and_commissioner_rebecca_kelly_slaughter_on.pdf; Prepared Remarks of Acting Assistant Attorney General Richard A. Powers of the Antitrust Division at Fordham's 48th Annual Conference on International Antitrust Law and Policy (Oct. 1, 2021), https://www.justice.gov/opa/speech/acting-assistant-attorney-general-richard-powers-antitrust-division-delivers-remarks.

[8] Section 7A(h) of the Clayton Act, 15 U.S.C. § 18a(h), provides that "[a]ny information or documentary material" filed with the Division or the FTC pursuant to the HSR Act may not be made public except "as may be relevant to any administrative or judicial action or proceeding." The confidentiality constraints apply not only to HSR information contained in HSR filings and second request responses, but also to the fact that an HSR filing has been made or that a second request has been issued, and the date the waiting period expires.

In addition, I am concerned about the potential for misuse of non-compete clauses across the economy.[9] To assess the potential for these contract terms to reduce competition for workers, FTC staff has requested information related to companies' use of non-compete clauses.

As far as I am aware, the FTC has not asked merging parties about their ESG policies during my tenure.[10]

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7. What steps are you taking to ensure that merger enforcement policy and the legal standards applied at your agency do not substantively differ from those of your sister agency?

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[11] Fed. Trade Comm'n, Model Second Request (revised Oct. 2021), https://www.ftc.gov/system/files/attachments/hsr-resources/model_second_request_-_final_-_october_2021.pdf; FTC Premerger Notification Office, Introductory Guide III: Model Request for Additional Information and Documentary Material (revised Oct. 2021), https://www.ftc.gov/system/files/attachments/premerger-introductory-guides/introductory_guide_iii_oct2021modelsecondrequest.pdf.

Thank you again for your interest in effective antitrust enforcement. If you have any questions, please feel free to have your staff call Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2195.

Sincerely,

Lina Khan

Lina M. Khan
Chair, Federal Trade Commission

cc: The Honorable Richard Powers
Acting Assistant Attorney General
Antitrust Division
U.S. Department of Justice

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Congress of the United States
House of Representatives
Washington, DC 20515–4319

COMMITTEE ON
WAYS AND MEANS
SUBCOMMITTEES:
SELECT REVENUE
SOCIAL SECURITY
TRADE

JOINT ECONOMIC
COMMITTEE

May 28, 2021

The Honorable Rebecca Kelly Slaughter
Acting Chairwoman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Illumina-GRAIL Acquisition and Other Mismanagement

Dear Acting Chair Slaughter:

We are deeply concerned by the abrupt announcement on May 20 that the Federal Trade Commission (FTC) is terminating legal action in the U.S. in order to outsource a merger decision involving two American companies to the European Commission.

On March 30, the FTC initiated a federal court action to obtain an injunction to prevent the acquisition of GRAIL, Inc., a developer of multi-cancer early-detection blood tests, by Illumina, Inc., a maker of gene-sequencing technology. That acquisition had been announced six months earlier by the two firms.[1] Then, two months after filing the court action, the FTC asked the court to dismiss the case without prejudice and let the Europeans make the determination, all the while holding the threat of further action.[2]

This maneuver will have significant consequences, not just for Illumina and GRAIL, but for many other U.S. firms. This same process can be replicated by delaying in the courts a merger that U.S. law is unlikely to overturn, then hand it over to the European Commission to tangle it in a mire of bureaucracy to delay it further or kill it. Faced with these prospects, American entrepreneurs, who often seek mergers with larger firms as they go to market, will be more reluctant to take new risks, develop new products, and grow their businesses.

[1] https://investor.illumina.com/news/press-release-details/2020/Illumina-to-Acquire-GRAIL-to-Launch-New-Era-of-Cancer-Detection/default.aspx
[2] https://www.ftc.gov/news-events/press-releases/2021/05/statement-ftc-acting-bureau-competition-director-maribeth

We must ask, Madam Acting Chair, is it your intention to deploy antitrust regulators in the European Union, a significant competitor of the United States, to make decisions regarding the welfare of our citizens and the success of our economy?

As you know, the proposed Illumina-GRAIL acquisition is a vertical merger, that is, the combination of firms in the same supply chain—non-competitors. In the 40 previous years, the FTC only once litigated, unsuccessfully, such a merger.[3] In addition, the liquid biopsy that GRAIL has developed can detected more than 50 types of cancer in a single blood draw. It could become a "paradigm shift"[4] in cancer treatment with the potential to save countless lives by detecting cancer early, when treatment is far more successful.

The Illumina-GRAIL matter is only the latest example in what Senator Michael S. Lee, the Ranking Member of the Senate Judiciary Subcommittee on Competition Policy, Antitrust, and Consumer Rights, termed a *"growing trend of mismanagement in the Federal Trade Commission's handling of merger enforcement,"* in a separate letter to you on May 18.[5] Senator Lee specifically referenced your dilatory approach concerning the acquisition by 7-Eleven of Speedway. He said your actions constituted *"a grave failure on the government's part."*

Unfortunately, for these two American companies, we have adequate tools through our own administrative and judicial processes to settle this matter without tossing it to Europe, which has its own regulatory system and its own interests. As you know, on March 30 Illumina offered to provide all oncology customers the same contract terms.[6]

Even if this were a case involving two conventional businesses, the mismanagement would be unconscionable. But one in two men and one in three women will contract cancer in their lifetimes. Millions of lives may be at stake. Eight months of delay is enough without suddenly ceding American merger law to the Europeans and establishing a terrible precedent, whereby the FTC can deny U.S. companies their day in our courts.

Sincerely,

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[3] https://www.wsj.com/articles/ftc-challenges-illuminas-proposed-acquisition-of-liquid-biopsy-firm-grail-11617131491

[4] https://www.morningstar.com/articles/1022370/a-new-frontier-in-cancer-screening-and-treatment

[5] https://www.lee.senate.gov/public/_cache/files/394620bf-0342-4949-8abb-7b1cf70de39b/sen.-lee-letter-to-acting-chairwoman-slaughter-05.18.21.pdf

[6] https://www.illumina.com/areas-of-interest/cancer/test-terms.html

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

June 22, 2021

The Honorable Jodey C. Arrington
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative Arrington:

Thank you for your letter presenting your concerns about the Federal Trade Commission's ("FTC" or "Commission") recent decision authorizing staff to dismiss its federal court complaint for preliminary relief against Illumina's proposed acquisition of GRAIL. I assure you that the FTC is not relying upon the European Commission to decide the substance of this matter. When the European Commission announced that it is investigating the proposed acquisition, it became clear that, purely with respect to timing, Illumina and GRAIL cannot consummate the transaction prior to obtaining clearance from the European Commission. Therefore, the FTC no longer needs to seek *preliminary* relief, so the Commission decided to end pursuit of a preliminary injunction and a temporary restraining order in federal court.[1] The FTC is proceeding with a full administrative trial on the merits; that trial is scheduled to begin on August 24, 2021.

This case involves a critical innovation that could be a game changer for cancer patients and their loved ones. GRAIL is one of several competitors racing to develop non-invasive multi-cancer early detection liquid biopsy ("MCED") tests. MCED tests can screen for many types of cancer in asymptomatic patients at very early stages using DNA sequencing, potentially saving millions of lives around the world. The vast majority of cancers, which account for about 80 percent of cancer deaths, currently are detected only after patients exhibit symptoms. That is often too late to treat effectively.

On March 30, the Commission filed an administrative complaint to block Illumina's $7.1 billion proposed acquisition of GRAIL and authorized staff to bring a federal court action to seek preliminary relief.[2] The complaint, issued by the FTC upon a 4-0 vote, alleges the proposed acquisition will diminish innovation in the U.S. market for MCED tests, diminish the quality of MCED tests, and make them more expensive. The

[1] Press Release, Statement of FTC Acting Bureau of Competition Director Maribeth Petrizzi on Bureau's Motion to Dismiss Request for Preliminary Relief in Illumina/GRAIL Case (May 20, 2021), https://www.ftc.gov/news-events/press-releases/2021/05/statement-ftc-acting-bureau-competition-director-maribeth.
[2] Press Release, FTC Challenges Illumina's Proposed Acquisition of Cancer Detection Test Maker GRAIL (Mar. 30, 2021), https://www.ftc.gov/news-events/press-releases/2021/03/ftc-challenges-illuminas-proposed-acquisition-cancer-detection.

complaint alleges that even if a viable substitute to Illumina's next-generation sequencing ("NGS") platform entered the market, it would take years for MCED test developers to switch to a platform other than Illumina's because they would have to reconfigure their tests to work with the new NGS platform, and in some situations, conduct new clinical trials. As the only viable supplier of a critical input, Illumina allegedly could raise prices charged to GRAIL competitors for NGS instruments and consumables; impede GRAIL competitors' research and development efforts; or refuse or delay executing license agreements that all MCED test developers need to distribute their tests to third-party laboratories.

Thank you again for contacting us about the Illumina/GRAIL matter. If you have any questions, please feel free to have your staff call Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2195.

Sincerely,

April J. Tabor
Secretary

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Chair

December 20, 2021

The Honorable Victoria Spartz
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative Spartz:

Thank you for your letter regarding the Federal Trade Commission ("FTC" or "Commission") law enforcement action challenging Illumina's proposed acquisition of GRAIL, and the FTC's recent withdrawal of its approval of the Vertical Merger Guidelines issued in 2020 ("2020 VMGs").[1] The Commission appreciates receiving your views, including your concerns about the appropriateness of the Commission's administrative proceeding on the merits of the Illumina/GRAIL transaction, the Commission withdrawal of the 2020 VMGs, your request for a speedy resolution of the administrative proceeding, and your concern about the Commission's decision to drop its federal court action to preliminarily enjoin the Illumina/GRAIL merger. And I am happy to respond to the questions posed in your letter.

Although I cannot comment on any pending adjudicative proceeding, I have enclosed publicly available information (the public redacted version of the administrative complaint and related Commission press releases) that describes the Commission's concern that the transaction may harm competition in violation of antitrust law. Section 7 of the Clayton Act prohibits mergers and acquisitions when the effect may be to substantially lessen competition. The sole objective of Commission antitrust enforcement actions against mergers and acquisitions of any type is to protect Americans from anticompetitive consequences that may result from the transaction, and to reach an appropriate result as expeditiously as possible.

The FTC's full administrative trial in the Illumina/GRAIL matter began on August 24, 2021.[2] The FTC generally seeks preliminary relief in federal court to prevent companies from merging while the case is being decided on the merits in administrative court. But, after the European Commission announced its own law enforcement action to stop the Illumina/GRAIL acquisition, the Commission dropped the pursuit of a temporary restraining order and preliminary injunction in federal court to conserve FTC and judicial resources.[3]

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[1] Press Release, Fed. Trade Comm'n, FTC Withdraws Vertical Merger Guidelines and Commentary (Sep. 15, 2021), https://www.ftc.gov/news-events/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines.

[2] All publicly available information regarding the matter is posted on the Commission's website at https://www.ftc.gov/enforcement/cases-proceedings/201-0144/illumina-inc-grail-inc-matter.

[3] Press Release, Fed. Trade Comm'n, Statement of FTC Acting Bureau of Competition Director Maribeth Petrizzi on Bureau's Motion to Dismiss Request for Preliminary Relief in Illumina/GRAIL Case (May 20, 2021), https://www.ftc.gov/news-events/press-releases/2021/05/statement-ftc-acting-bureau-competition-director-maribeth.

The President's July 9 Executive Order on Promoting Competition in the American Economy encouraged the federal antitrust agencies to review the horizontal and vertical merger guidelines and consider whether to revise those guidelines.[4] Chair Khan joined the Department of Justice Antitrust Division ("DOJ") leadership in a commitment to collaborate on an update of our merger guidance.[5] Our upcoming public consultation on this project will seek input that reflects a diversity of views as well as sound economic analysis reflecting the modern economy.

Based on statutory text and empirical evidence, the FTC believes that the now-withdrawn VMGs include unsound economic theories that are inconsistent with the law and unsupported by market realities. When the Commission withdrew the 2020 VMGs, it released a statement that detailed the FTC's concerns with the 2020 VMGs and highlighted the need to withdraw them before courts relied on their flawed elements. As explained in that statement, the withdrawal was a necessary intermediate step to prevent industry or judicial reliance on flawed approaches while we undertake an effort to provide guidance that reflects a more rigorous framework for assessing the ways in which mergers may substantially lessen competition.[6]

I now turn to the questions presented in your letter.

1. ***In a hypothetical situation of a vertical merger where the acquired company has no competitors, what are the potential immediate economic harms would consumers suffer as a result of the merger?***

Although merger analysis requires full factual context, federal antitrust enforcement actions generally seek to protect the American public from higher prices, lower output, less innovation, or other anticompetitive consequences that may result from the transaction. The FTC continues to enforce prevailing legal standards in challenging mergers that may substantially lessen competition or tend to create a monopoly in any market, including harm in any relevant upstream or downstream market. Ultimately, enforcement decisions by both agencies are subject to judicial review under the processes set out by Congress.

2. ***Going forward, is it the FTC's position that the possibility of future theoretical harm is sufficient to enjoin a vertical merger?***

As stated above, the FTC will continue to enforce prevailing legal merger standards set by judicial precedents and interpretations of Section 7 of the Clayton Act.

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[4] The White House, Exec. Order No. 14036, Promoting Competition in the American Economy § 5 (Jul. 9, 2021). https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy.

[5] Statement of FTC Chair Lina Khan and Antitrust Division Acting Assistant Attorney General Richard A. Powers on Competition Executive Order's Call to Consider Revisions to Merger Guidelines (Jul. 9, 2021). https://www.ftc.gov/news-events/press-releases/2021/07/statement-ftc-chair-lina-m-khan-antitrust-division-acting.

[6] Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines, at 2 (Sep. 15, 2021). https://www.ftc.gov/system/files/documents/public_statements/1596396/statement_of_chair_lina_m_khan_commissioner_rohit_chopra_and_commissioner_rebecca_kelly_slaughter_on.pdf.

3. ***Produce all documents and communications regarding the FTC's decision to withdraw its support for the Vertical Merger Guidelines, including any documents relating to the purpose and effect of withdrawing the FTC's support.***

As discussed above, the Commission statement issued concurrently with the decision to withdraw the 2020 VMGs presents the basis for that decision. Internal agency discussions generally are protected under various exemptions, including the deliberative-process privilege, attorney-client privilege, and attorney work product privilege.

4. ***Did the FTC withdraw its support for the Vertical Merger Guidelines, in part, to justify its failure to comply with those guidelines in relation to the Illumina-GRAIL merger?***

The Commission statement discussed above presents a complete explanation for its decision to withdraw the 2020 VMGs.

5. ***Given that the FTC has withdrawn its support for the Vertical Merger Guidelines and failed to promulgate new guidelines, what insights do companies have into how the FTC will apply the law going forward?***

Please see my response to question number 2.

6. ***The DOJ has not withdrawn its support for the Vertical Merger Guidelines, creating confusion and uncertainty in the market. For the period of January 20, 2021 to present, produce all communications between the FTC and DOJ regarding the Vertical Merger Guidelines.***

DOJ and FTC managers regularly consult on matters of mutual concern, including the 2020 VMGs. Discussions between the DOJ and the FTC generally are protected non-public information. As both agencies announced, the DOJ and the FTC will engage the public along the way as we jointly endeavor to update merger guidelines to ensure that they accurately reflect market realities and provide a well-founded guide for courts.

Thank you again for raising this topic. If you have any questions, please feel free to have your staff call Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2195.

Sincerely,

April Tabor
Secretary of the Commission

Enclosures

FEDERAL TRADE COMMISSION

Public Access to Illumina/Grail Trial Provided via Teleconference Due to ongoing COVID-19 Concerns

August 18, 2021

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The administrative trial in the matter of *Illumina, Inc., and GRAIL, Inc.* (D- 9401) is scheduled to begin on Tuesday, Aug. 24, 2021 at 10 a.m. ET, following a prehearing conference on Monday, Aug. 23, 2021 at 2 p.m. ET. This type of proceeding usually takes place at the Federal Trade Commission's headquarters in Washington, D.C., but this trial will be completely virtual in light of ongoing public health concerns. The trial will be open to the public, except for those sessions that the Chief Administrative Law Judge orders to be closed, or held *in camera*. The public will be able to access the proceeding via telephone conference, as follows:

Dialing instructions for pretrial conference and administrative trial:

Toll-Free: 877-226-8189

Access Code: 4302283

In March 2021, the FTC filed an administrative complaint alleging that Illumina's $7.1 billion proposed acquisition of Grail will diminish innovation in the U.S. market for MCED, or multi-cancer early detection, tests. MCED tests could be used to detect up to 50 types of cancer, most of which are not screened for at all today, saving millions of lives around the world. Grail is one of several competitors racing to develop these liquid biopsy tests, which analyze a sample of a patient's blood or other fluid through DNA sequencing.

The Federal Trade Commission works to promote competition, and protect and educate consumers. You can learn more about how competition benefits consumers or file an antitrust complaint. For the latest news and resources, follow the FTC on social media, subscribe to press releases and read our blog.

PRESS RELEASE REFERENCE:
FTC Challenges Illumina's Proposed Acquisition of Cancer Detection Test Maker Grail

Contact Information

MEDIA CONTACT:
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April J. Tabor
Secretary, Federal Trade Commission
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ftc.gov

FEDERAL TRADE COMMISSION

FTC Challenges Illumina's Proposed Acquisition of Cancer Detection Test Maker Grail

March 30, 2021

Agency alleges vertical merger would harm competition in the U.S. market for life-saving Multi-Cancer Early Detection tests

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TAGS: Health Care | Technology | Bureau of Competition | Competition | Merger | Vertical

The Federal Trade Commission has filed an administrative complaint and authorized a federal court lawsuit to block Illumina's $7.1 billion proposed acquisition of Grail—a maker of a non-invasive, early detection liquid biopsy test that can screen for multiple types of cancer in asymptomatic patients at very early stages using DNA sequencing. Illumina is the only provider of DNA sequencing that is a viable option for these multi-cancer early detection, or MCED, tests in the United States.

The complaint alleges the proposed acquisition will diminish innovation in the U.S. market for MCED tests. MCED tests could be used to detect up to 50 types of cancer, most of which are not screened for at all today, saving millions of lives around the world. Grail is one of several competitors racing to develop these liquid biopsy tests, which analyze a sample of a patient's blood or other fluid through DNA sequencing.

"The vast majority of cancers, which account for about 80 percent of cancer deaths, are only detected after patients exhibit symptoms. That is often too late to treat effectively," said FTC Acting Chairwoman Rebecca Kelly Slaughter. "The MCED test is a game changer for cancer patients and their loved ones. If this acquisition is consummated, it would likely reduce innovation in this critical area of healthcare, diminish the quality of MCED tests, and make them more expensive."

As the only viable supplier of a critical input, Illumina can raise prices charged to Grail competitors for NGS instruments and consumables; impede Grail competitors' research and development efforts; or refuse or delay executing license agreements that all MCED test developers need to distribute their tests to third-party laboratories. For the specific application at issue in this matter—MCED tests—developers have no choice but to use Illumina NGS instruments and consumables. In December 2019, the FTC challenged Illumina's proposed acquisition of Pacific Biosciences of California.

The complaint alleges that even if a viable substitute to Illumina's NGS platform entered the market, it would take years for MCED test developers to switch to a platform other than Illumina's because they would have to reconfigure their tests to work with the new NGS platform, and in some situations, conduct new clinical trials.

The Commission vote to issue the administrative complaint and to authorize staff to seek a temporary restraining order and preliminary injunction was 4-0. The FTC will file a complaint in the U.S. District Court for the District of Columbia seeking a Temporary Restraining Order and Preliminary Injunction to stop the deal pending an administrative trial. The trial is scheduled to begin on Aug. 24, 2021.

The Federal Trade Commission works to promote competition, and protect and educate consumers. You can learn more about how competition benefits consumers or file an antitrust complaint. For the latest news and resources, follow the FTC on social media, subscribe to press releases and read our blog.

PRESS RELEASE REFERENCE:
Statement of FTC Acting Bureau of Competition Director Maribeth Petrizzi on Bureau's Motion to Dismiss Request for Preliminary Relief in Illumina/GRAIL Case

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The Honorable Lina Khan
Chairperson
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

November 12, 2021

Dear Chairperson Khan:

We write to address the Federal Trade Commission's (FTC's) troubling and unprecedented campaign to challenge the merger of Illumina and GRAIL. Illumina founded and then spun off GRAIL to develop a multi-cancer liquid biopsy test that could detect cancer at an early stage. Within four years, the company's moonshot was successful: it developed a test capable of detecting fifty types of cancer, forty-five of which currently have no recommended screening.[1] The importance of this innovation is unquestionable: Cancers responsible for nearly 71% of cancer deaths currently have no recommended early detection screening test[2] and early detection lowers cancer mortality from 79% to 11%.[3] Accordingly, GRAIL's early-detection technology has the potential to significantly reduce the 600,000 cancer deaths that the United States experiences every year.[4] In order to quickly bring this life-saving technology to market, Illumina and GRAIL announced their intent to merge. Ever since, however, the FTC has engaged in an unprecedented campaign to challenge this vertical merger, thereby threatening life-saving innovation and chilling harmless business activity.

[1] Press Release, RAIL Presents Interventional PATHFINDER Study Data at 2021 ASCO Annual Meeting and Introduces Galleri, a Groundbreaking Multi-Cancer Early Detection Blood Test, GRAIL (June 4, 2021), https://grail.com/press-releases/grail-presents-interventional-pathfinder-study-data-at-2021-asco-annual-meeting-and-introduces-galleri-a-groundbreaking-multi-cancer-early-detection-blood-test/.

[2] Press Release, New Research Suggests Multi-Cancer Early Detection Blood Test Could Reduce Late-Stage Cancer Diagnoses by More Than Half, GRAIL (Dec. 16, 2020), https://grail.com/press-releases/new-research-suggests-multi-cancer-early-detection-blood-test-could-reduce-late-stage-cancer-diagnoses-by-more-than-half/.

[3] https://transformingcancerdetection.com/.

[4] National Cancer Institute, Facts & Figures 2021 Reports Another Record-Breaking 1-Year Drop in Cancer Deaths (Jan. 12, 2021), https://www.cancer.org/latest-news/facts-and-figures-2021.html.

The FTC has claimed that it wants to block the merger in order to preserve competition. However, GRAIL has no competitors.[5] GRAIL's product is the first on the market. Accordingly, the FTC seeks to block a merger and delay life-saving cancer tests based on a fear that some unknown future competitors may suffer unknown harms at an unknown date. The FTC has not blocked a vertical merger in decades. Yet, it decided to try to do so in a situation where: (1) a company was trying to re-acquire its own former subsidiary; (2) the merger has the potential to save millions of lives; and (3) blocking the merger could give foreign companies a competitive advantage. The FTC has not articulated any legitimate rationale for its unprecedented actions.

Vertical mergers entail incentives to both decrease and increase prices. The FTC's recently repealed Vertical Merger Guidelines require that both of these opposing incentives be considered. With regard to the Illumina-GRAIL merger, "there is considerable evidence of the former, but only speculative evidence of the latter, which would, in any event, only occur in the future and involve hypothetical products."[6] The FTC's opposition to the merger "is built on theoretical fear of future price increases, ignoring the requirement to consider the possibility of a price decrease at the same time. In other words, [according to the FTC] the possibility of theoretical harm suffices to stop a vertical merger."[7] There does not appear to be a "limiting principle to prevent the FTC or any antitrust plaintiff [in the future] from asserting the possibility of theoretical future harm unsupported by evidence as a sufficient basis for enjoining a vertical

[5] Government Race Against a Cure, WALL ST. J. (June 2, 2021), https://www.wsj.com/articles/government-race-against-a-cure-11622069124 ("But this test market currently doesn't exist. Grail would be the first entrant if the Food and Drug Administration approves its test and health-care providers adopt it.").
[6] Bruce H. Kobayashi and Timothy J. Muris, *A Key FTC Case Goes Down the Regulatory Rabbit Hole*, Barron's (Oct. 1, 2021) https://www.barrons.com/articles/grail-illumina-ftc-case-misguided-51633096615.
[7] *Id.*

merger."[8] In effect, going forward, vertical mergers and their attendant innovations can be held hostage by nothing more than the subjective whims of any given FTC commissioner.

The FTC's decision to withdraw from Federal court and hand this case over to the European Commission smacks of bureaucratic politics at its worst. Grail has no business in Europe. The deal is between two American companies. It should not need to be reviewed by the European Commission. For this reason, we strongly urge the FTC to either quickly review this merger on its merits or move on and approve this deal.

In order to help Congress investigate the FTC's unprecedented actions and policies, we ask that you respond to the following questions and requests:

1. In a hypothetical situation of a vertical merger where the acquired company has no competitors, what are the potential immediate economic harms would consumers suffer as a result of the merger?

2. Going forward, is it the FTC's position that the possibility of future theoretical harm is sufficient to enjoin a vertical merger?

3. Produce all documents and communications regarding the FTC's decision to withdraw its support for the Vertical Merger Guidelines, including any documents relating to the purpose and effect of withdrawing the FTC's support.

4. Did the FTC withdraw its support for the Vertical Merger Guidelines, in part, to justify its failure to comply with those guidelines in relation to the Illumina-GRAIL merger?

5. Given that the FTC has withdrawn its support for the Vertical Merger Guidelines and failed to promulgate new guidelines, what insights do companies have into how the FTC will apply the law going forward?

6. The DOJ has not withdrawn its support for the Vertical Merger Guidelines, creating confusion and uncertainty in the market. For the period of January 20, 2021 to present, produce all communications between the FTC and DOJ regarding the Vertical Merger Guidelines.

---

[8] Bruce H. Kobayashi and Timothy J. Muris, *Screening Out Innovation: Vertical Merger Principles and the FTC's Misapplication in the Illumina-GRAIL Case*, Competitive Enterprise Institute (Aug. 26, 2021) https://cei.org/studies/screening-out-innovation/ .

Please provide responses to these questions and requests by December 10, 2021.

Sincerely,

Scott Fitzgerald
Member of Congress

Victoria Spartz
Member of Congress

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Chair

December 22, 2021

The Honorable Scott Fitzgerald
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative Fitzgerald:

Thank you for your letter regarding the Federal Trade Commission ("FTC" or "Commission") law enforcement action challenging Illumina's proposed acquisition of GRAIL, and the FTC's recent withdrawal of its approval of the Vertical Merger Guidelines issued in 2020 ("2020 VMGs").[1] The Commission appreciates receiving your views, including your concerns about the appropriateness of the Commission's administrative proceeding on the merits of the Illumina/GRAIL transaction, the Commission withdrawal of the 2020 VMGs, your request for a speedy resolution of the administrative proceeding, and your concern about the Commission's decision to drop its federal court action to preliminarily enjoin the Illumina/GRAIL merger. And I am happy to respond to the questions posed in your letter.

Although I cannot comment on any pending adjudicative proceeding, I have enclosed publicly available information (the public redacted version of the administrative complaint and related Commission press releases) that describes the Commission's concern that the transaction may harm competition in violation of antitrust law. Section 7 of the Clayton Act prohibits mergers and acquisitions when the effect may be to substantially lessen competition. The sole objective of Commission antitrust enforcement actions against mergers and acquisitions of any type is to protect Americans from anticompetitive consequences that may result from the transaction, and to reach an appropriate result as expeditiously as possible.

The FTC's full administrative trial in the Illumina/GRAIL matter began on August 24, 2021.[2] The FTC generally seeks preliminary relief in federal court to prevent companies from merging while the case is being decided on the merits in administrative court. But, after the European Commission announced its own law enforcement action to stop the Illumina/GRAIL acquisition, the Commission dropped the pursuit of a temporary restraining order and preliminary injunction in federal court to conserve FTC and judicial resources.[3]

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[1] Press Release, Fed. Trade Comm'n, FTC Withdraws Vertical Merger Guidelines and Commentary (Sep. 15, 2021), https://www.ftc.gov/news-events/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines.

[2] All publicly available information regarding the matter is posted on the Commission's website at https://www.ftc.gov/enforcement/cases-proceedings/201-0144/illumina-inc-grail-inc-matter.

[3] Press Release, Fed. Trade Comm'n, Statement of FTC Acting Bureau of Competition Director Maribeth Petrizzi on Bureau's Motion to Dismiss Request for Preliminary Relief in Illumina/GRAIL Case (May 20, 2021), https://www.ftc.gov/news-events/press-releases/2021/05/statement-ftc-acting-bureau-competition-director-maribeth.

The President's July 9 Executive Order on Promoting Competition in the American Economy encouraged the federal antitrust agencies to review the horizontal and vertical merger guidelines and consider whether to revise those guidelines.[4] Chair Khan joined the Department of Justice Antitrust Division ("DOJ") leadership in a commitment to collaborate on an update of our merger guidance.[5] Our upcoming public consultation on this project will seek input that reflects a diversity of views as well as sound economic analysis reflecting the modern economy.

Based on statutory text and empirical evidence, the FTC believes that the now-withdrawn VMGs include unsound economic theories that are inconsistent with the law and unsupported by market realities. When the Commission withdrew the 2020 VMGs, it released a statement that detailed the FTC's concerns with the 2020 VMGs and highlighted the need to withdraw them before courts relied on their flawed elements. As explained in that statement, the withdrawal was a necessary intermediate step to prevent industry or judicial reliance on flawed approaches while we undertake an effort to provide guidance that reflects a more rigorous framework for assessing the ways in which mergers may substantially lessen competition.[6]

I now turn to the questions presented in your letter.

1. ***In a hypothetical situation of a vertical merger where the acquired company has no competitors, what are the potential immediate economic harms would consumers suffer as a result of the merger?***

Although merger analysis requires full factual context, federal antitrust enforcement actions generally seek to protect the American public from higher prices, lower output, less innovation, or other anticompetitive consequences that may result from the transaction. The FTC continues to enforce prevailing legal standards in challenging mergers that may substantially lessen competition or tend to create a monopoly in any market, including harm in any relevant upstream or downstream market. Ultimately, enforcement decisions by both agencies are subject to judicial review under the processes set out by Congress.

2. ***Going forward, is it the FTC's position that the possibility of future theoretical harm is sufficient to enjoin a vertical merger?***

As stated above, the FTC will continue to enforce prevailing legal merger standards set by judicial precedents and interpretations of Section 7 of the Clayton Act.

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[4] The White House, Exec. Order No. 14036, Promoting Competition in the American Economy § 5 (Jul. 9, 2021). https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy.

[5] Statement of FTC Chair Lina Khan and Antitrust Division Acting Assistant Attorney General Richard A. Powers on Competition Executive Order's Call to Consider Revisions to Merger Guidelines (Jul. 9, 2021). https://www.ftc.gov/news-events/press-releases/2021/07/statement-ftc-chair-lina-m-khan-antitrust-division-acting.

[6] Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines, at 2 (Sep. 15, 2021). https://www.ftc.gov/system/files/documents/public_statements/1596396/statement_of_chair_lina_m_khan_commissioner_rohit_chopra_and_commissioner_rebecca_kelly_slaughter_on.pdf.

3. ***Produce all documents and communications regarding the FTC's decision to withdraw its support for the Vertical Merger Guidelines, including any documents relating to the purpose and effect of withdrawing the FTC's support.***

As discussed above, the Commission statement issued concurrently with the decision to withdraw the 2020 VMGs presents the basis for that decision. Internal agency discussions generally are protected under various exemptions, including the deliberative-process privilege, attorney-client privilege, and attorney work product privilege.

4. ***Did the FTC withdraw its support for the Vertical Merger Guidelines, in part, to justify its failure to comply with those guidelines in relation to the Illumina-GRAIL merger?***

The Commission statement discussed above presents a complete explanation for its decision to withdraw the 2020 VMGs.

5. ***Given that the FTC has withdrawn its support for the Vertical Merger Guidelines and failed to promulgate new guidelines, what insights do companies have into how the FTC will apply the law going forward?***

Please see my response to question number 2.

6. ***The DOJ has not withdrawn its support for the Vertical Merger Guidelines, creating confusion and uncertainty in the market. For the period of January 20, 2021 to present, produce all communications between the FTC and DOJ regarding the Vertical Merger Guidelines.***

DOJ and FTC managers regularly consult on matters of mutual concern, including the 2020 VMGs. Discussions between the DOJ and the FTC generally are protected non-public information. As both agencies announced, the DOJ and the FTC will engage the public along the way as we jointly endeavor to update merger guidelines to ensure that they accurately reflect market realities and provide a well-founded guide for courts.

Thank you again for raising this topic. If you have any questions, please feel free to have your staff call Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2195.

Sincerely,

April Tabor
Secretary of the Commission

Enclosures

United States Senate

COMMITTEE ON COMMERCE, SCIENCE,
AND TRANSPORTATION

WASHINGTON, DC 20510-6125

Website: https://commerce.senate.gov

August 22, 2023

The Honorable Lina M. Khan
Chairwoman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Dear Chairwoman Khan:

I write regarding the Federal Trade Commission's ("FTC") use of taxpayer resources to directly coordinate with foreign lawmakers to create new regulations in overseas jurisdictions that target American businesses. Your agency's collusion with foreign governments not only undermines U.S. sovereignty and Congress's constitutional lawmaking authority, but also damages the competitiveness of U.S. firms and could negatively affect the savings of millions of Americans who hold stock in those companies via retirement savings accounts and pension plans.

As you know, the European Union ("EU") recently approved two laws expressly designed to weaken American companies and boost the EU's revenue under the guise of consumer protection and competition. First, the EU passed the Digital Markets Act ("DMA"), which requires certain "gatekeeper"[1] companies to comply with extremely prescriptive obligations, like sharing customer data with third parties, or else risk a fine of up to twenty percent of their annual global revenue.[2] By virtue of how the law defines "gatekeeper" companies, the DMA targets ***American firms***; European and Chinese companies can for the most part operate as usual, if not better, with their competition effectively weakened. Second, the EU approved the Digital Services Act ("DSA"), which imposes certain requirements on all online service platforms. However, it forces heightened requirements like mandatory participation in external audits and data sharing with government authorities—on so-called "very large online platforms" ("VLOPs"), which are defined as platforms with more than 45 million monthly active EU users.[3] U.S. companies own sixteen of the nineteen online platforms

[1] The DMA imposes "gatekeeper" status on a company if it meets three criteria: (1) "has a significant impact on the internal market" (presumed to be met if it is valued at €75 billion or greater); (2) "provides a core platform service" (presumed to be met if the platform has at least 45 million monthly active end users in the EU); and (3) "enjoys an entrenched and durable position, in its operations" (presumed if it has provided a "core platform service" for at least three years). *See* Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), 2022 O.J. (L 265) 1.

[2] *See id.*; *The Digital Markets Act (DMA)*, European Union (accessed on Jun. 29, 2023), https://www.eu-digital-markets-act.com/.

[3] *The Digital Services Act: Ensuring a Safe and Accountable Online Environment*, European Commission (accessed on Jun. 29, 2023), https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_en.

subject to the DSA's heightened requirements and would face fines of up to six percent of annual global revenue for violations.[4] Again, ***non-U.S. companies are largely off the hook***.

Taken together, the DMA and DSA objectively discriminate against U.S. companies by imposing enormous regulatory compliance costs and penalties on them, while handing companies from other countries—especially China—a competitive edge. These concerns are real: a recent study determined that "new compliance and operational costs" resulting from the DMA on U.S. companies could range from $22 billion to $50 billion.[5] It also found that 16 percent of European companies surveyed would switch from an American tech provider to a Chinese tech provider because of those anticipated costs.

It is one thing for the EU to target U.S. businesses, however misguided such efforts may be. But it is altogether unthinkable that an agency of the U.S. government would actively help the EU do so. Even the Biden administration has "been clear" that the U.S. government "opposes efforts specifically designed to target only U.S. companies," like the DMA and DSA.[6]

Yet your agency jumped into these efforts. In March of this year, the FTC announced that it would send agency officials to Brussels to assist the EU in implementing the DMA.[7] At the time, you said "it is especially critical that we deepen our cooperation with key enforcement partners," like the EU.[8] Since then, however, the FTC has provided no detail on what its work in Europe entails. When asked about the announcement during a recent hearing of the House Energy and Commerce Committee, you did not provide any information about your decision to join forces with the EU against U.S. interests, but instead stated that you are "proud of the international cooperation that the FTC has long pursued."[9] Indeed, several coincidences indicate that the FTC has long been cooperating with foreign governments to accomplish abroad what it cannot achieve domestically. For example, about a week and a half after you met with the head of the UK's Competition and Markets authority, the UK blocked Microsoft's acquisition of Activision Blizzard.[10] And in a 2021 interview, you lamented that "the U.S. has been behind the curve, especially with regards to the

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[4] *Digital Services Act: Commission Designates First Set of Very Large Online Platforms and Search Engines*, European Commission (Apr. 25, 2023), https://ec.europa.eu/commission/presscorner/detail/en/IP_23_2413.
[5] Kati Suominen, *Implications of the European Union's Digital Regulations on U.S. and EU Economic and Strategic Interests*, Center for Strategic and International Studies (Nov. 2022), https://csis-website-prod.s3.amazonaws.com/s3fs-public/2023-02/221122_EU_DigitalRegulations-3.pdf?VersionId=04r7zBzS2kHNhslSAqn4NkC6lGNgip7S.
[6] Foo Yun Chee, *Exclusive U.S. Warns Against IP, Trade Secret Risks in Draft EU Tech Rules – Paper*, REUTERS (Nov. 10, 2021), https://www.reuters.com/technology/exclusive-us-warns-against-ip-trade-secret-risks-draft-eu-tech-rules-paper-2021-11-10/.
[7] *Justice Department, Federal Trade Commission and European Commission Hold Third U.S.-EU Joint Technology Competition Policy Dialogue*, U.S. Department of Justice (Mar. 30, 2023), https://www.justice.gov/opa/pr/justice-department-federal-trade-commission-and-european-commission-hold-third-us-eu-joint-0.
[8] *Id.*
[9] *Innovation, Data, and Commerce Subcommittee Hearings: "Fiscal Year 2024 Federal Trade Commission Budget,"* (Apr. 18, 2023), https://energycommerce.house.gov/events/innovation-data-and-commerce-subcommittee-hearing-fiscal-year-2024-federal-trade-commission-budget.
[10] *First on CNBC: CNBC Transcript: Activision Blizzard CEO Bobby Kotick Speaks with CNBC's "Squawk Box" Today*, CNBC (Apr. 27, 2023), https://www.cnbc.com/2023/04/27/first-on-cnbc-cnbc-transcript-activision-blizzard-ceo-bobby-kotick-speaks-with-cnbcs-squawk-box-today.html.

European Commission" and stated that you have been "in close touch" with the European Commission.[11]

Even worse, the FTC is asking ***American taxpayers*** for $590 million in funding—$160 million more than last year—so the agency can do things like send staff abroad to enforce ***European regulations*** targeting ***American companies***.[12] Even the FTC's 2024 budget request acknowledges that FTC staff has "participated in outbound exchanges" with the EU's "competition agenc[y]."[13]

To better understand the FTC's cooperation with the EU's efforts to regulate U.S. businesses, please provide written responses and documents responsive to the following questions no later than September 5, 2023.

1. How many ***total*** FTC employees, contractors, and agents has the FTC has sent to Europe since June 2021?

    a. Indicate the number of FTC employees, contractors, and agents that have performed any FTC-related work in Europe ***each month*** since June 2021.

    b. Provide the titles of all FTC employees, contractors, and agents whom the FTC has sent to Europe since June 2021.

    c. Indicate the number of FTC employees, contractors, and agents the FTC has designated as a "detailee" to any government office or agency in Europe since June 2021.

    d. Provide the titles of all FTC employees, contractors, and agents whom the FTC has designated as a detailee to any government office or agency in Europe since June 2021.

    e. Provide the specific locations in Europe (including offices and agencies, where applicable) to which each of the FTC employees, contractors, and agents identified in (b) and (d) were sent.

    f. Describe the purpose of sending those employees, contractors, detailees, and/or agents to Europe, and to Brussels in particular. In doing so, please describe, as specifically as possible, the project(s) that each employee, contractor, detailee and agent worked on, is working on, or intends to work on, while in Europe, and Brussels specifically.

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[11] *Lina Khan: US Antitrust Takes Big Steps — How to Read That in Europe*, Concurrences (Feb. 2021), https://www.concurrences.com/en/review/numeros/no-1-2021/interview/98400.
[12] *Federal Trade Commission, Congressional Budget Justification Fiscal Year 2024*, FTC (Mar. 13, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p859900fy24cbj.pdf.
[13] *Id.*

g. Describe, in detail, any work that FTC employees, contractors, detailees, and/or agents are performing in Europe, and Brussels in particular, that concerns the DMA or DSA.

2. Provide the monthly expenses the FTC has incurred to send FTC employees, contractors, detailees, and/or agents to Europe, and Brussels in particular, since June 2021.

    a. What is the average nightly hotel cost for an FTC employee, contractor, detailee, or agent to stay in Brussels?

3. In September 2022, the EU opened an office in San Francisco, California to "reinforce the EU's cooperation with the United States on digital diplomacy and strengthen the EU's capacity to reach out to key public and private stakeholders, including policy makers, the business community, and civil society in the digital technology sector."[14] How many total FTC employees, contractors, and agents have visited the EU's office in San Francisco since September 2022?

    a. Indicate the number of FTC employees, contractors, and agents that have visited the EU's office in San Francisco ***each month*** since September 2022.

    b. Provide the titles of all FTC employees, contractors, and agents who have visited the EU's office in San Francisco since September 2022.

    c. Describe in detail the purpose of each visit by an FTC employee, contractor, or agent to the EU's office in San Francisco since September 2022.

4. Produce all documents and communications between any FTC employee, contractor, detailee, and/or agent and any official of the EU or any foreign country regarding the DMA or DSA.

Thank you for your attention to this matter.

Sincerely,

Ted Cruz
Ranking Member

[14] EEAS Press Team, *US/Digital: EU Opens New Office in San Francisco to Reinforce Its Digital Diplomacy*, European Union External Action (Jan. 9, 2022), https://www.eeas.europa.eu/eeas/usdigital-eu-opens-new-office-san-francisco-reinforce-its-digital-diplomacy_en.

Non Delivery Report

From: Microsoft Outlook [MicrosoftExchange329e71ec88ae4615bbc36ab6ce41109e@ftcprod.onmicrosoft.com]
Sent: 1/5/2023 4:10:22 PM
To: Mark Jamison [(b)(6)]
Subject: Undeliverable: Non-compete Clause Rulemaking and Cases
Attachments: Non-compete Clause Rulemaking and Cases

Your message did not reach some or all of the intended recipients.

Subject:Non-compete Clause Rulemaking and Cases
Sent:1/5/2023 4:10:24 PM

The following recipient(s) cannot be reached:

Mark Jamison on 1/5/2023 4:10:24 PM
Diagnostic code = MtsCongested; Reason code = TransferFailed; Status code = 540
< #5.4.310 smtp;550 5.4.310 DNS domain warriongton.ufl.edu does not exist
[Message=InfoDomainNonexistent] [LastAttemptedServerName=warriongton.ufl.edu] [BL0GCC02FT048.cop-gcc02.prod.protection.outlook.com]>

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Mark Jamison (b)(6)
Your message couldn't be delivered. The Domain Name System (DNS) reported that the recipient's domain does not exist.

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For more information and tips to fix this issue see this article:
https://go.microsoft.com/fwlink/?LinkId=389361.

Message

From: Wilson, Christine [cwilson3@ftc.gov]
Sent: 1/5/2023 4:10:14 PM
Subject: Non-compete Clause Rulemaking and Cases
Attachments: Wilson non-compete rulemaking dissent - FINAL - 1-4-23.pdf; Wilson dissenting statement - glass container cases - FINAL - 1-3-23.pdf; Wilson dissenting statement - Prudential Security - FINAL - 1-3-23.pdf

Dear friends and colleagues,

Today, the Commission announced a Notice of Proposed Rulemaking ("NPRM") for a new Non-Compete Clause Rule that would ban nearly all non-compete clauses in employment settings. The announcement comes one day after the Commission rushed out three consent agreements that addressed challenges of non-compete clauses. For the many reasons explained in my dissenting statement (attached), I opposed issuing this NPRM.

Both the proposed rule and the complaints addressed by the consent agreements illustrate the way the Commission majority will exploit the flawed approach of the new Section 5 Policy Statement to condemn conduct that it disfavors. Under this approach, the Commission can simply label the conduct with nefarious-sounding but legally nebulous adjectives — in the case of non-compete clauses, "exploitive and coercive" — to establish liability, even when precedent finds the conduct to be legal. Under this approach to finding liability, no showing of anticompetitive effects is necessary.

This shortcut approach describes the Commission's challenge of Prudential Security, Inc. and provides two of the three independent bases for finding that non-compete clauses violate Section 5 of the FTC Act to justify the proposed new rule. When the Commission does *not* rely solely on adjectives, under the Section 5 Policy Statement, it need only show a "tendency" for the conduct to harm competition. The Commission employed that approach in the Commission's challenges to the non-compete clauses of O-I Glass and Ardagh Glass Group S.A., where the complaints offered only theory and conclusory allegations, not hard evidence of harm to labor markets and competition. My dissents in those three cases are also attached.

Without cases demonstrating that non-compete clauses harm competition, the NPRM turns to academic literature. But the studies in the current record yield results that often conflict and cannot support this sweeping proposal that bans nearly all non-compete clauses. Currently, all employees are treated alike, including senior executives. The literature also fails to support the Rule's dismissal of business justifications for non-competes.

Setting aside the substance of the rule, the Commission's competition rulemaking authority itself certainly will be challenged. The NPRM is vulnerable to meritorious challenges that (1) the Commission lacks authority to engage in "unfair methods of competition" rulemaking, (2) the major questions doctrine addressed in West Virginia v. EPA applies, and the Commission lacks clear Congressional authorization to undertake this initiative; and (3) assuming the agency does possess the authority to engage in this rulemaking, it is an impermissible delegation of legislative authority under the non-delegation doctrine, particularly because the Commission has replaced the consumer welfare standard with one of multiple goals.

Defending these challenges will entail lengthy litigation that will consume substantial staff resources. I anticipate that the Rule will not withstand these challenges, so the Commission majority essentially is directing staff to embark on a demanding and futile effort. In the face of finite and scarce resources, this NPRM is hardly the best use of FTC bandwidth.

Today's announcement also suggests possible alternatives to the proposed ban that covers nearly all workers. The NPRM solicits public comments on the proposed rule and the possible alternatives. This is the only chance to comment on the current Rule, its support (or lack thereof), its implications for competition and innovation, and the alternatives. I encourage all interested parties to comment fully.

As always, I look forward to hearing your comments and reactions.

All best,
Christine

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Dissenting Statement of Commissioner Christine S. Wilson
Regarding the Notice of Proposed Rulemaking for the Non-Compete Clause Rule

Commission File No. P201200-1

January 5, 2023

Today, the Commission announced a notice of proposed rulemaking ("NPRM") for a Non-Compete Clause Rule. "The proposed rule would provide that it is an unfair method of competition – and therefore a violation of Section 5 – for an employer to enter into or attempt to enter into a non-compete clause with a worker; [or to] maintain with a worker a non-compete clause . . ."[1] For the many reasons described below, on the current record, I do not support initiating the proposed rulemaking and consequently dissent.

The proposed Non-Compete Clause Rule represents a radical departure from hundreds of years of legal precedent that employs a fact-specific inquiry into whether a non-compete clause is unreasonable in duration and scope, given the business justification for the restriction. The Commission undertakes this radical departure despite what appears at this time to be a lack of clear evidence to support the proposed rule. What little enforcement experience the agency has with employee non-compete provisions is very recent (within the last week) and fails to demonstrate harm to consumers and competition. Lacking enforcement experience, the Commission turns to academic literature – but the current record shows that studies in this area are scant, contain mixed results, and provide insufficient support for the scope of the proposed rule. And one study illustrates clearly, in the financial services sector, the negative unintended consequences of suspending non-compete provisions, including higher fees and broker misconduct. The suspension of non-competes across all industry sectors in the U.S. undoubtedly will impose a much larger raft of unintended consequences.

Setting aside the substance of the rule, the Commission's competition rulemaking authority itself certainly will be challenged. The NPRM is vulnerable to meritorious challenges that (1) the Commission lacks authority to engage in "unfair methods of competition" rulemaking, (2) the major questions doctrine addressed in *West Virginia v. EPA* applies, and the Commission lacks clear Congressional authorization to undertake this initiative; and (3) assuming the agency does possess the authority to engage in this rulemaking, it is an impermissible delegation of legislative authority under the non-delegation doctrine, particularly because the Commission has replaced

[1] Notice of Proposed Rulemaking for Non-Compete Clause Rule ("NPRM") Part I (Jan. 5, 2023).

the consumer welfare standard with one of multiple goals. In short, today's proposed rule will lead to protracted litigation in which the Commission is unlikely to prevail.

The NPRM invites public comment on both a sweeping ban on non-competes and various alternatives pursuant to the Administrative Procedure Act, not the Magnuson-Moss Act. Stakeholders should note that ***this solicitation for public comment is likely the only opportunity they will have to provide input not just on the proposed ban, but also on the proposed alternatives***. For this reason, I encourage all interested parties to respond fully to all parts of the NPRM's solicitation of public comments.

Non-Compete Clauses Merit Fact-Specific Inquiry

Based on the current record, non-compete clauses constitute an inappropriate subject for rulemaking. The competitive effects of a non-compete agreement depend heavily on the context of the agreement, including the business justification that prompted its adoption. But don't take my word for it – the need for fact-specific inquiry aligns with hundreds of years of precedent. When assessing the legality of challenged non-compete agreements, state and federal courts (and English courts before them) have examined the duration and scope of non-compete clauses, as well as the asserted business justifications, to determine whether non-compete clauses are unreasonable and therefore unenforceable.[2]

The NPRM itself acknowledges, at least implicitly, the relevance of the circumstances surrounding adoption of non-compete clauses. For example, the NPRM proposes an exception to the ban on non-compete clauses for provisions associated with the sale of a business, acknowledging that these non-compete clauses help protect the value of the business acquired by the buyer.[3] Recognizing that senior executives typically negotiate many facets of their employment agreements, the NPRM distinguishes situations in which senior executives are subject to non-compete provisions.[4] And to stave off potential legal challenges, the NPRM proposes more carefully tailored alternatives to a sweeping ban on non-compete clauses that instead would vary by employee category.

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[2] *See, e.g.*, United States v. Addyston Pipe & Steel Co., 85 F. 271, 281 (6th Cir. 1898) (Taft, J.), *aff'd in relevant part*, 175 U.S. 211 (1899); Mitchel v. Reynolds, 1 P. Wms. 181 (1711).

[3] NPRM Part V, Section 910.3.

[4] Accordingly, the Commission seeks comments on whether senior executives should be treated differently from the proposed ban on non-compete clauses. *See* NPRM Parts IV.A.1.b, IV.A.1.c. In a similar vein, recent consent agreements issued for public comment that prohibit the use of non-compete agreements in the glass container industry do not prohibit non-compete clauses for senior executives and employees involved in research and development. *See* O-I Glass, Inc., File No. 211-0182, https://www.ftc.gov/system/files/ftc_gov/pdf/2110182o-iglassdraftdecorderappa.pdf (Jan. 4, 2023) (Decision and Order Appendix A); Ardagh Glass Group S.A., File No. 211-0182, https://www.ftc.gov/system/files/ftc_gov/pdf/2110182ardaghdraftdecorderappa.pdf (Jan. 4, 2023) (Decision and Order Appendix A); Christine S. Wilson, Comm'r, Fed. Trade Comm'n, Dissenting Statement regarding In the Matter of O-I Glass, Inc. and In the Matter of Ardagh Group S.A. (Jan. 4, 2023), https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/dissenting-statement-commissioner-christine-s-wilson-regarding-matter-o-i-glass-inc-ardagh-group-sa.

Despite the importance of context and the need for fact-specific inquiries, the Commission instead applies the approach of the newly issued Section 5 Policy Statement[5] to propose a near-complete ban on the use of non-compete clauses. Pursuant to this approach, the Commission invokes nefarious-sounding adjectives – here, "exploitive and coercive" – and replaces the evaluation of actual or likely competitive effects with an unsubstantiated conclusion about the "tendency" for the conduct to generate negative consequences by "affecting consumers, workers or other market participants."[6]

Using the approach of the Section 5 Policy Statement that enables the majority summarily to condemn conduct it finds distasteful, the Commission today proposes a rule that prohibits conduct that 47 states have chosen to allow.[7] Similarly, the Commission's proposed rule bans conduct that courts have found to be legal,[8] a concern the Commission dismisses with a claim that the Section 5 prohibition on "unfair methods of competition" extends beyond the antitrust laws. But the majority's conclusions and today's proposed rule forbid conduct previously found lawful under Section 5 of the FTC Act. Specifically, applying FTC Act Section 5, the Seventh Circuit found that "[r]estrictive [non-compete] clauses . . . are legal unless they are unreasonable as to time or geographic scope[.]"[9] In other words, the Seventh Circuit found that a fact-specific inquiry is required under Section 5.

The NPRM announced today conflicts not only with the Seventh Circuit's holding, but also with several hundred years of precedent. With all due respect to the majority, I am dubious that three unelected technocrats[10] have somehow hit upon the right way to think about non-competes, and that all the preceding legal minds to examine this issue have gotten it wrong. The current rulemaking record does not convince me otherwise.

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[5] Fed. Trade Comm'n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/p221202sec5enforcementpolicystatement_002.pdf.

[6] *Id.* at 9.

[7] NPRM Part II.C.1. Further, the NPRM explains "[s]tates have been particularly active in restricting non-compete clauses in recent years." *Id.* The Commission's rulemaking will end states' varying approaches to address non-compete agreements. The Commission's preemption of states' approaches is premature to the extent that the Commission admits that it does not know where to draw lines regarding the treatment of non-compete provisions (i.e., the Commission seeks comments on alternatives to the proposed ban based on earnings levels, job classifications, or presumptions). The Commission ignores the advice of Justice Brandeis and instead proposes to end states' experimentation to determine the optimal treatment of non-compete clauses. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) ("To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

[8] *See* United States v. Empire Gas Corp., 537 F.2d 296, 307-08 (8th Cir. 1976); Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 267 (7th Cir. 1981); Newburger, Loeb & Co., Inc. v. Gross, 563 F.2d 1057, 1081-83 (2d Cir. 1977); Bradford v. New York Times Co., 501 F.2d 51, 57-59 (2d Cir. 1974).

[9] Snap-On Tools Corp. v. Fed. Trade Comm'n, 321 F.2d 825, 837 (7th Cir. 1963).

[10] This characterization is not an insult, but a fact. I, too, am an unelected technocrat.

I. Non-Compete Agreements – the First Application of the Section 5 Policy Statement

The proposed Non-Compete Clause Rule "would provide that it is an unfair method of competition – and therefore a violation of Section 5 – for an employer to enter into or attempt to enter into a non-compete clause with a worker; [or] to maintain with a worker a non-compete clause . . .".[11] The proposed ban on non-compete clauses is based only on alleged violations of Section 5 of the FTC Act; it is not premised on the illegality of non-compete clauses under the Sherman or Clayton Acts.

When the Commission issued the Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act ("Policy Statement") in November 2022, I warned that the approach described by the Policy Statement would enable the Commission majority to condemn conduct it disfavors, even when that conduct repeatedly has been found lawful.[12] I predicted that the approach to Section 5 enforcement contained in the Policy Statement would facilitate expansive enforcement, often without requiring evidence of anticompetitive effects. And I cautioned that subjects of investigations would not be able to defend their conduct because procompetitive justifications would not be credited. The Non-Compete Clause Rule NPRM provides a graphic illustration of these concerns.

A. The NPRM's Determination that Non-Compete Clauses are Unfair

The NPRM states that there are 3 *independent* ways for classifying non-compete clauses as an "unfair" method of competition.[13] In November, I objected to the enforcement approach described in the Section 5 Policy Statement – specifically, permitting the Commission majority to condemn conduct merely by selecting and assigning to disfavored conduct one or more adjectives from a nefarious-sounding list.[14] Here, two of the three explanations the Commission provides for concluding that non-compete clauses are unfair rely on invocation of the adjectives "exploitive and coercive."[15] The third explanation for the illegality of non-compete clauses demonstrates how little evidence the majority requires to conclude that conduct causes harm.

According to the NPRM, "non-compete clauses are exploitive and coercive at the time of contracting."[16] The NPRM explains that the "clauses for workers other than senior executives

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[11] NPRM Part I.

[12] *See* Christine S. Wilson, Comm'r, Fed. Trade Comm'n, Dissenting Statement Regarding the "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act" (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyWilsonDissent5.pdf.

[13] NPRM Part IV.A.1.

[14] *See* Wilson, *supra* note 12.

[15] The Policy Statement claimed that determinations of unfairness would be based on a sliding scale. Here, the NPRM identifies independent ways to determine that non-compete clauses are unfair; no sliding scale is applied.

[16] NPRM Part IV.A.1.b The NPRM explains that this conclusion does not apply to senior executives and also seeks comment on whether there is a broader category of highly paid or highly skilled employees for whom the conclusion is inappropriate. *Id.*

are exploitive and coercive because they take advantage of unequal bargaining power[.]".[17] The business community will be surprised to learn that "unequal bargaining power" can lead to a conclusion that any negotiated outcome may be condemned as "exploitive and coercive," which then can be parlayed into a finding that the conduct violates Section 5. Indeed, this assertion is particularly troubling not merely because it presages an approach that is literally limitless, but also because the imbalance of bargaining power, as in this setting, arises wholly apart from any conduct by the business..[18] The reader may note that the NPRM cites legal decisions to support the assignment of adjectives. Yet, a careful reading of the courts' discussions of the imbalance of bargaining power between employers and employees reveals that while the imbalance may provide a reason to scrutinize non-compete clauses, it is not used to condemn or invalidate them..[19] Remarkably, in each case cited in footnote 253 of the NPRM, the court found the non-compete clauses to be enforceable.

Next, the NPRM finds that "non-compete clauses are exploitive and coercive at the time of the worker's potential departure from the employer[.]".[20] The NPRM reaches this conclusion regardless of whether the clauses are enforced. This conclusion is contrary to legal precedent, which requires enforcement of non-compete provisions before finding harm..[21]

Finally, the NPRM finds that "non-compete clauses are restrictive conduct that negatively affects competitive conditions."[22] Although this basis for concluding that non-compete provisions are unfair does not rely solely on the selection of an adjective, here, the NPRM demonstrates how little evidence the majority requires before finding that conduct is unfair pursuant to the Section 5 Policy Statement.

Until yesterday, the Commission had announced no cases (and therefore had no experience and no evidence) to conclude that non-compete clauses harm competition in labor markets. In fact, the only litigated FTC case challenging a non-compete clause found that a non-compete

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[17] *Id.*

[18] According to the NPRM, unequal bargaining power arises because employees depend on job income to pay bills, job searches entail significant transaction costs, the prevalence of unions has declined, employers outsource firm functions, employers have more experience negotiating because they have multiple employees, employees typically do not hire lawyers to negotiate agreements, and employees may not focus on the terms of their contracts. *Id.*

[19] *See* Alexander & Alexander, Inc. v. Danahy, 488 N.E.2d 22, 29 (Mass. App. Ct. 1986) (finding injunction to enforce non-compete agreement proper); Diepholz v. Rutledge, 659 N.E. 989, 991 (Ill. Ct. App. 1995) (finding non-compete agreement enforceable, but also finding no violation of terms of non-compete agreement); Palmetto Mortuary Transp., Inc. v. Knight Sys., Inc., 818 S.E.2d 724, 731 (S.C. 2018) (finding non-compete agreement enforceable).

[20] NPRM Part IV.A.1.c. Again, the NPRM explains that this conclusion does not apply to senior executives and also invites comments on whether there is a broader category of highly paid or highly skilled employees for whom the conclusion is inappropriate. *Id.*

[21] *See, e.g.*, O'Regan v. Arbitration Forums, Inc., 121 F.3d 1060, 1065-66 (7th Cir. 1997) ("to apply antitrust laws to restrictive employment covenants, there must be some attempted enforcement of an arguably overbroad portion of the covenant in order for there to be a federal antitrust violation."); Lektro–Vend Corp. v. Vendo Co., 660 F.2d 255, 267 (7th Cir.1981) ("a section 1 violation requires proof that the defendant knowingly enforced the arguably overbroad section of the ancillary noncompetition covenant").

[22] NPRM Part IV.A.1.a.

provision covering franchise dealers did *not* violate Section 5 of the FTC Act.[23] Notably, the NPRM omits any reference to this case. The Commission has accepted settlements regarding non-compete clauses in contracts between businesses,[24] but the majority itself has distinguished those cases from non-compete clauses in labor contracts.[25] And in those B2B cases, the non-compete clauses were associated with the sale of a business, a situation that falls within the narrow exception to the ban provided in the proposed Non-Compete Clause Rule.

Just yesterday, though, the Commission rushed out the announcement of three consent agreements that resolve allegations that non-compete provisions constitute an unfair method of competition.[26] The first consent involves security guard services, and the other two involve the manufacturing of glass containers. These consents undoubtedly were designed to support assertions that the FTC now has experience with non-compete agreements in employee contracts. But even a cursory read of the complaints reveals the diaphanous nature of this "experience."

Remarkably, none of these cases provides evidence showing the anticompetitive effects of non-compete clauses beyond the conclusory allegations in the complaints. The complaints in the glass container industry assert that non-compete provisions may prevent entry or expansion by competitors, but contain no allegations regarding firms that have tried unsuccessfully to obtain personnel with industry-specific skills and experience.[27] Regarding the effects on employees, the complaints make no allegations that the non-compete clauses were enforced by respondents[28] and the Analysis to Aid Public Comment accompanying the consent agreements points only to studies not tied to the glass container industry. These cases provide no evidence that the non-compete provisions limited competition for employees with industry-specific expertise, thereby lowering wages or impacting job quality. Similarly, in the case against Prudential Security,

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[23] *See* Snap-On Tools Corp. v. Fed. Trade Comm'n, 321 F.2d at 837.

[24] *See* ARKO Corp., FTC File No. 211-0187, https://www.ftc.gov/system/files/ftc_gov/pdf/2110087C4773ArkoExpressComplaint.pdf (Aug. 5, 2022); DTE Energy Co., FTC File No. 191-0068, https://www.ftc.gov/system/files/documents/cases/191_0068_c-4691_dte-enbridge_complaint.pdf, (Dec. 13, 2019).

[25] *See* Lina M. Khan, Chair, Fed. Trade Comm'n, Joined by Rebecca Kelly Slaughter and Alvaro M. Bedoya, Comm'rs, Fed. Trade Comm'n, Statement regarding In the Matter of ARKO Corp./Express Stop, https://www.ftc.gov/system/files/ftc_gov/pdf/2110187StatementKhanArkoExpress.pdf (June 10, 2022) (distinguishing non-compete clauses in labor contracts and effects on workers from non-compete clause in merger agreement where both parties remain in market).

[26] On December 28, 2022, the Commission voted to accept for public comment three consent agreements involving non-compete agreements. For two of those matters, the Commission vote occurred less than a week after the Commission received the papers. *See* Ardagh Glass Group S.A., File No. 211-0182, https://www.ftc.gov/system/files/ftc_gov/pdf/2110182ardaghaccepdf (Jan. 4, 2023) (Agreement Containing Consent Order (signatures dated Dec. 21, 2022)).

[27] *See* O-I Glass, Inc., File No. 211-0182, https://www.ftc.gov/system/files/ftc_gov/pdf/2110182o-iglasscomplaint.pdf (Jan. 4, 2023) (complaint ¶¶ 6, 8); Ardagh Glass Group S.A., File No. 211-0182, https://www.ftc.gov/system/files/ftc_gov/pdf/2110182ardaghcomplaint.pdf (Jan. 4, 2023) (complaint ¶¶ 6, 8).

[28] *See* Wilson, Dissenting Statement regarding In the Matter of O-I Glass, Inc. and In the Matter of Ardagh Glass Group S.A., *supra* note 4.

Inc.,[29] the complaint alleges that individual former employees were limited in their ability to work for other firms in the security guard industry,[30] but contain no allegations that the firm's non-compete provisions had market effects on wages or effects in a properly defined market for security guard services.

The NPRM also asserts FTC experience with non-compete provisions by pointing to Commission merger consent agreements that restrict the use of non-compete agreements. The complaints in those cases did not allege harm from non-compete clauses and the provisions in the consent agreements were included to ensure that the buyers of divestiture assets could obtain employees familiar with the assets and necessary for the success of the divestitures at issue.

Finally, the NPRM claims Commission experience with non-compete agreements to support the Non-Compete Clause Rule from a Commission workshop in January 2020.[31] But the NPRM fails to reflect the variety of views expressed during that workshop, including testimony that the economic literature is "[s]till far from reaching a scientific standard for concluding [that non-compete agreements] are bad for overall welfare . . . Also [we] don't yet fully understand the distribution of effects on workers . . . Welfare tradeoffs are likely context-specific, and may be heterogeneous."[32]

Indeed, the NPRM ignores that testimony and instead focuses on economic literature that purportedly demonstrates that non-compete clauses are unfair because they negatively affect competitive conditions. But an objective review of that literature reveals a mixed bag. For example, the first study described in the NPRM[33] finds that "decreasing non-compete clause enforceability from the approximate enforceability level of the fifth-strictest state to that of the fifth-most-lax state would increase workers' earnings by 3-4%." Yet, this study also finds that these effects vary strongly across different groups of individuals. For example, the authors find that "enforceability has little to no effect on earnings for non-college educated workers" and instead find that enforceability primarily impacts college-educated workers. Similarly, it finds that strict non-compete clause enforceability has very different effects for different demographic groups: it has little to no effect on men, and much larger effects on women and Black men and women. The NPRM interprets these differential effects as facts in favor of the Non-Compete Clause Rule, as it would diminish race and gender wage gaps, but there is no corresponding discussion of the Rule's effect on the wage gap based on education. An alternative interpretation

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[29] Prudential Security, Inc., File No. 221-0026, https://www.ftc.gov/system/files/ftc_gov/pdf/2210026prudentialsecurityscomplaint.pdf (Dec. 28, 2022) (consent agreement accepted for public comment).

[30] *Id.* (complaint at ¶¶ 23, 25).

[31] Fed. Trade Comm'n, *Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues*, https://www.ftc.gov/news-events/events/2020/01/non-compete-clauses-workplace-examining-antitrust-consumer-protection-issues

[32] Kurt Lavetti, *Economic Welfare Aspects of Non-Compete Agreements*, Remarks at the Fed. Trade Comm'n Workshop on Non-Compete Clauses in the Workplace (Jan. 9, 2020), https://www.ftc.gov/system/files/documents/public_events/1556256/non-compete_workshop-slides.pdf.

[33] Matthew S. Johnson, Kurt Lavetti, & Michael Lipsitz, *The Labor Market Effects of Legal Restrictions on Worker Mobility* 2, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3455381 (2020).

of these findings is that the scientific literature is still muddled as to who is helped and who is harmed by non-compete clauses, and that it would be better for the Commission to tailor a rule to those settings where a scientific consensus exists.

Similarly, the NPRM often bases its conclusions about the effects of non-compete clauses on limited support. For example, the NPRM contends that increased enforceability of non-compete clauses increases consumer prices. Yet, under the current record, this conclusion is based on only one study in healthcare markets and another study that considers the relationship between non-compete clauses and concentration..[34] The NPRM does not provide a basis to conclude that findings with respect to the market for physicians and healthcare are generalizable, instead acknowledging that no comparable evidence exists for other markets..[35] Also, the study that considers the effects of non-compete clauses on concentration does not draw conclusions about prices; the NPRM's conclusion that non-compete provisions lead to higher prices requires assumptions about a relationship between concentration and prices. Moreover, the NPRM omits studies showing that reducing the enforceability of non-compete restrictions leads to higher prices for consumers. A study by Gurun, Stoffman, and Yonker finds that an agreement not to enforce post-employment restrictions among financial advisory firms that were members of the Broker Protocol led brokers to depart their firms, and consumers to follow their brokers, at high rates. The study found, however, that clients of firms in the Broker Protocol paid higher fees and experienced higher levels of broker misconduct..[36] In other words, suspending non-competes resulted in higher prices and a decrease in the quality of service provided. These unintended consequences illustrate the inevitably far-reaching and unintended consequences that today's NPRM will visit upon employees, employers, competition, and the economy.

B. The NPRM's Treatment of Business Justifications

The NPRM explains that "the additional incentive to invest (in assets like physical capital, human capital, or customer attraction, or in the sharing of trade secrets and confidential commercial information) is the primary justification for use of non-compete clauses."[37] It acknowledges that "there is evidence that non-compete clauses increase employee training and other forms of investment,"[38] and describes two studies demonstrating that increased non-compete clause enforceability increased firm-provided training and investment..[39] It also

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[34] NPRM Part II.B.2.a.

[35] NPRM Part VII.B.2.c.

[36] Umit G. Gurun, Noah Stoffman, & Scott E. Yonker. *Unlocking Clients: The Importance of Relationships in the Financial Advisory Industry*, 141 J. Fin. Econ. 1218 (2021)

[37] NPRM Part II.B.2.e.

[38] *Id.*

[39] Evan Starr, *Consider This: Training, Wages, and the Enforceability of Non-Compete Clauses*, 72 I.L.R. Rev. 783, 799 (2019) (moving from mean non-compete enforceability to no non-compete clause enforceability would decrease the number of workers receiving training by 14.7% in occupations that use non-compete clauses at a high rate); Jessica Jeffers, *The Impact of Restricting Labor Mobility on Corporate Investment and Entrepreneurship* 22 (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3940393 (knowledge-intensive firms invest 32% less in capital equipment following decreases in the enforceability of non-compete clauses).

describes studies that examine non-compete clause use and investment.[40] Despite the studies, the NPRM concludes, "the evidence that non-compete clauses benefit workers or consumers is scant."[41] In other words, the NPRM treats asymmetrically the evidence of harms (mixed evidence given great credence) and benefits (robust evidence given no credence). These early examples of cherry-picking evidence that conforms to the narrative provide little confidence in the integrity of the rulemaking process or the ultimate outcome.

Implicitly, though, the NPRM credits some business justifications for non-compete provisions. It excludes from the ban those non-compete clauses associated with the sale of a business, implicitly acknowledging that these non-compete clauses are necessary to protect the goodwill of the transferred business. Also, the NPRM likely credits business justifications when it seeks comment on whether senior executives should be covered by the rule. Nonetheless, on its face, the NPRM expressly discounts business justifications and makes no effort to distinguish and determine circumstances where investment incentives are important.

The NPRM also discounts procompetitive business justifications by asserting that trade secret law, non-disclosure agreements, and other mechanisms can be used to protect firm investments. While the NPRM explains that these mechanisms may protect investments, the existing record provides no evidence that these mechanisms are effective substitutes for non-compete agreements.[42] The NPRM cites no instances where these mechanisms have been used effectively in lieu of non-compete clauses, even though natural experiments exist and could be studied (*e.g.*, when states have changed the enforceability of non-compete clauses). "[M]erely identifying alternative mechanisms to solve a potential employee investment problem does not provide . . . guidance as to which mechanism achieves the objective at the lowest social cost."[43] Moreover, the NPRM's observation that firms successfully operate in states where non-compete clauses are not enforceable is unpersuasive; the NPRM offers no meaningful cross-state comparisons and the observation does not show that firms and competition are equally or even more successful in those states than in states where non-compete clauses are permissible.

II. The Proposed Non-Compete Clause Rule Will Trigger Numerous And Likely Successful Legal Challenges Regarding the Commission's Authority to Issue the Rule

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[40] Matthew S. Johnson & Michael Lipsitz, *Why Are Low-Wage Workers Signing Noncompete Agreements?*, 57 J. Hum. Res. 689, 700 (2022) (finding firms that use non-compete clauses in hair salon industry train employees at 11% higher rate and increase investment in particular customer-attraction device by 11%); Evan P. Starr, James J. Prescott, & Norman D. Bishara, *Noncompete Agreements in the U.S. Labor Force*, 64 J. L. & Econ. 53, 53 (2021) (finding no statistically significant impact on training and trade secrets from use of non-compete clauses, but unable to examine other types of investments).

[41] NPRM Part IV.B.3.

[42] There is a limited literature regarding the efficacy of trade secret protection and non-disclosure agreements. *See* Jie Gong & I.P.L. Png, *Trade Secrets Law and Inventory Efficiency: Empirical Evidence from U.S. Manufacturing*, https://ssrn.com/abstract=2102304 (July 8, 2012) (investigating effects of operational know-how information spillovers under various levels of enforcement of trade secret law).

[43] Camila Ringeling, Joshua D. Wright, et. al, Noncompete Clauses Used in Employment Contracts, Comment of the Global Antitrust Institute 6 (Feb. 7, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3534374.

This section describes the numerous, and meritorious, legal challenges that undoubtedly will be launched against the Non-Compete Clause Rule. Defending these challenges will entail lengthy litigation that will consume substantial staff resources. I anticipate that the Rule will not withstand these challenges, so the Commission majority essentially is directing staff to embark on a demanding and futile effort. In the face of finite and scarce resources, this NPRM is hardly the best use of FTC bandwidth.

There are numerous paths for opponents to challenge the Commission's authority to promulgate the Non-Compete Clause Rule. First, I question whether the FTC Act provides authority for competition rulemaking. The NPRM states that the Commission proposes the Non-Compete Clause Rule pursuant to Sections 5 and 6(g) of the FTC Act. Section 6(g) of the FTC Act authorizes the Commission to "make rules and regulations for the purpose of carrying out the provisions of the subchapter" where Section 6(g) otherwise provides that the Commission may "from time to time classify corporations."[44] Section 6(g) was believed to provide authority only for the Commission to adopt the Commission's procedural rules. For decades, consistent with the statements in the FTC Act's legislative history, Commission leadership testified before Congress that the Commission lacked substantive competition rulemaking authority.[45]

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[44] 15 U.S.C. § 46(g). Section 6 of the FTC Act provides

> **§46. Additional powers of Commission**
>
> The Commission shall also have power . . .
>
> **(g) Classification of corporations; regulations**
>
> From time to time classify corporations and (except as provided in section 57a(a)(2) of this title) to make rules and regulations for the purpose of carrying out the provisions of this subchapter.

[45] *See* Nat'l Petroleum Ref'rs Ass'n v. FTC, 482 F.2d 672, 696 nn. 38, 39 (D.C. Cir. 1973). *See also* Noah Joshua Phillips, *Against Antitrust Regulation*, American Enterprise Institute Report 3, https://www.aei.org/research-products/report/against-antitrust-regulation/ (Oct. 13, 2022) ("[T]he Conference Committee [considering legislation that created the Federal Trade Commission] was between two bills, neither of which contemplated substantive rulemaking. . . . The legislative history does not demonstrate congressional intent to give the FTC substantive rulemaking power: The House considered and rejected it, the Senate never proposed it, and neither the Conference Committee's report nor the final debates mentioned it."); 51 Cong. Rec. 12916 (1914), reprinted in THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 4368 (Earl W. Kintner ed., 1982) statement of Sen. Cummins) ("[I]f we were to attempt to go further in this act and to give the commission the authority to prescribe a code of rules governing the conduct of the business men of this country for the future, we would clash with the principle that we can not confer upon the commission in that respect legislative authority; but we have not made any such attempt as that, and no one proposes any attempt of that sort."); *id.* at 14932, reprinted in THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 4732 (Earl W. Kintner ed., 1982) (statement of Rep. Covington) ("The Federal trade commission will have no power to prescribe the methods of competition to be used in the future. In issuing orders it will not be exercising power of a legislative nature . . . The function of the Federal trade commission will be to determine whether an existing method of competition is unfair, and, it is finds it to be unfair, to order the discontinuance of its use. In doing this it will exercise power of a judicial nature."); *id.* at 13317, reprinted in THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 4675 (Earl W. Kintner ed., 1982) (statement of Sen Walsh) ("We are not going to give to the trade commission the general power to regulate and prescribe rules under which the business of this country shall in the future be conducted; we propose simply to give it the power to denounce as unlawful a particular practice that is pursued by that business.").

Ignoring this history, the Commission embarked on a substantive rulemaking binge in the 1960s and 1970s.[46] The vast majority of these substantive rules pertained to consumer protection issues. Only one substantive rule was grounded solely in competition;[47] that rule was not enforced and subsequently was withdrawn.[48] Another substantive rule was grounded in both competition and consumer protection principles, and prompted a federal court challenge. There, the D.C. Circuit in 1973 held in *National Petroleum Refiners*[49] that the FTC did have the power to promulgate substantive rules.

Two years later, however, Congress enacted the Magnuson-Moss Act,[50] which required substantive consumer protection rules to be promulgated with heightened procedural safeguards under a new Section 18 of the FTC Act. Notably, the Magnuson-Moss Act expressly excluded rulemaking for unfair methods of competition from Section 18. FTC Chairman Miles Kirkpatrick (1970-73) explained that it was not clear whether Congress in the Magnuson-Moss Act sought to clarify existing rulemaking authority or to grant substantive rulemaking authority to the FTC for the first time.[51] If the latter, then the FTC only has substantive *consumer protection* rulemaking power, and lacks the authority to engage in substantive *competition* rulemaking. This uncertainty about the language of the statute will be a starting point for challenges of the Non-Compete Clause Rule.

Second, the Commission's authority for the Rule likely will be challenged under the major questions doctrine, which the Supreme Court recently applied in *West Virginia v. EPA*.[52] Under the major questions doctrine, "where a statute . . . confers authority upon an administrative agency," a court asks "whether Congress in fact meant to confer the power the agency has asserted."[53] The Supreme Court explained in *West Virginia v. EPA* that an agency's exercise of statutory authority involved a major question where the "history and the breadth of the authority that the agency has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority."[54]

Challengers will ask a court to determine whether today's NPRM constitutes a major question. Using Justice Gorsuch's concurrence as a guide, agency action will trigger the application of the major questions doctrine if the agency claims, among other things, the power to (1) resolve a

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[46] *See* TIMOTHY J. MURIS & HOWARD BEALES, III, THE LIMITS OF UNFAIRNESS UNDER THE FEDERAL TRADE COMMISSION ACT 13 (1991).

[47] FTC Men's and Boy's Tailored Clothing Rule, 16 C.F.R. § 412 (1968).

[48] Notice of Rule Repeal, 59 Fed. Reg. 8527 (1994).

[49] Nat'l Petroleum Ref'rs Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973).

[50] Magnuson-Moss Warranty – Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975).

[51] *See* Miles W. Kirkpatrick, *FTC Rulemaking in Historical Perspective* 48 Antitrust L.J. 1561, 1561 (1979) ("One of the most important aspects of the Magnuson-Moss Act was its granting, or confirmation, depending upon your reading of the law at that time, of the FTC's rulemaking powers.").

[52] West Virginia v. EPA, 142 S. Ct. 2587 (2022).

[53] *Id.* at 2608.

[54] *Id.*

matter of great political significance, (2) regulate a significant portion of the American economy, or (3) intrude in an area that is the particular domain of state law.[55] First, the regulation of non-compete clauses is a question of political significance; Congress has considered and rejected bills significantly limiting or banning non-competes on numerous occasions,[56] a strong indication that the Commission is trying to "work around" the legislative process to resolve a question of political significance.[57] Second, the Rule proposes to regulate a significant portion of the American economy through a ban on non-competes. According to the NPRM, the "Commission estimates that approximately one in five American workers – or approximately 30 million workers – is bound by a non-compete clause."[58] Thus, the Non-Compete Clause Rule indisputably will negate millions of private contractual agreements and impact employer/employee relationships in a wide variety of industries across the United States. Third, regulation of non-compete agreements has been the particular domain of state law. As the NPRM explains, 47 states permit non-competes in some capacity, while three states have chosen to prohibit them entirely, and state legislatures have been active in this area recently.[59]

If a court were to conclude that the Non-Compete Clause Rule is a major question, the FTC would be required to identify clear Congressional authorization to impose a regulation banning non-compete clauses. Yet, as discussed above, that clear authorization is unavailable. The language in Section 6(b) is far from clear, and largely discusses the Commission's classification of corporations. I do not believe that Congress gave the FTC authority to enact substantive rules related to any provision of the FTC Act using this "oblique" and unclear language. In addition, the decision by Congress to omit unfair methods of *competition* rulemaking in the Magnuson-Moss Act, which immediately followed the decision in *National Petroleum Refiners*, is additional evidence that Congress has not clearly authorized the FTC to make competition rules that may have significant political or economic consequences. Moreover, Congress did not remove the known ambiguity when it enacted the FTC Improvements Act of 1980.[60]

Third, the authority for the Non-Compete Clause Rule may be challenged under the non-delegation doctrine. The doctrine is based on the principle that Congress cannot delegate its legislative power to another branch of government, including independent agencies.[61]

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[55] *Id.* at 2600-01 (Gorsuch, J. concurring).

[56] Russell Beck, A *Brief History of Noncompete Regulation*, FAIR COMPETITION LAW (Oct. 11, 2021), https://faircompetitionlaw.com/2021/10/11/a-brief-history-of-noncompete-regulation/.

[57] West Virginia v. EPA, 142 S.Ct. at 2600 (Gorsuch, J. concurring).

[58] NPRM Part II.B.1.a.

[59] *Id.* Part II.C.1.

[60] *See* H.R. Rep. No. 96-917, 96th Cong., 2d sess. 29-30 (1980), reprinted in THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 5862 (Earl W. Kintner ed., 1982) (conference report on FTC Improvements Act of 1980 explaining that when adopting a restriction on standards and certification rulemaking brought as an unfair or deceptive act or practice, conferees were not taking a position on the Commission's authority to issue a trade regulation rule defining 'unfair methods of competition' pursuant to section 6(g). "The substitute leaves unaffected whatever authority the Commission might have under any other provision of the FTC Act to issue rules with respect to 'unfair methods of competition.'").

[61] Five Supreme Court justices have expressed interest in reconsidering the Court's prior thinking on the doctrine, which increases the risk that a challenge may be successful. *See Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Alito, J. concurring) (stating with respect to the nondelegation doctrine that "[i]f a majority of this Court

Since the 1920s, the Supreme Court has found that Congress has not made an improper delegation of legislative power so long as Congress has set out "an intelligible principle to which the person or body authorized to fix [rules] is directed to conform."[62] Applying this principle in *Schechter Poultry*,[63] the Supreme Court approved Congressional authorization for the FTC to prohibit unfair methods of competition, relying on the Commission's administrative enforcement proceedings where the Commission acts as "a quasi judicial body" and that "[p]rovision was made for formal complaint, for notice and hearing, for appropriate findings of fact supported by adequate evidence, and for judicial review . . .".[64] The Court simultaneously found that provisions of the National Industrial Recovery Act to issue "codes of fair competition" were *improper* delegations of legislative power, distinguishing the impermissibly broad fair competition codes from the FTC Act's approach to address unfair methods of competition that are "determined in particular instances, upon evidence, in light of particular competitive conditions[.]".[65]

Notably, the Commission's proposed ban on non-compete clauses abandons the Commission's procedures that led the Supreme Court in *Schechter Poultry* to find that the Commission's enforcement of "unfair methods of competition" does not constitute an improper delegation of legislative power. In addition, to the extent that the Commission's Section 5 Policy Statement (which provides the basis for determining that non-compete clauses are an unfair method of competition) abandons the consumer welfare standard to pursue multiple goals, including protecting labor, the Commission's action more closely resembles the National Industrial Recovery Act codes that also sought to implement multiple goals under the guise of codes of fair competition.

IV. Comments are Encouraged

The NPRM invites public comment on many issues. I strongly encourage the submission of comments from all interested stakeholders. After all, unlike rulemaking for consumer protection rules under the Magnuson-Moss process, ***this is likely the only opportunity for public input before the Commission issues a final rule. For this reason, it is important for commenters to address the proposed alternatives to the near-complete ban on non-compete provisions.*** To the extent that the NPRM proposes alternatives to the current proposed rule, if the Commission were subsequently to adopt one of the alternatives, which would be a logical outgrowth of the current

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were willing to reconsider the approach we have taken for the past 84 years. I would support that effort"); *id.* at 2131 (Gorsuch, J., dissenting, joined by Chief Justice Roberts and Justice Thomas) (expressing desire to "revisit" the Court's approach to the nondelegation doctrine); *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (statement of Kavanaugh, J. respecting the denial of certiorari); Amy Coney Barrett, *Suspension and Delegation*, 99 Cornell L. Rev. 251, 318 (2014).

[62] J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

[63] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[64] *Id.* at 533.

[65] *Id.*

proposed rulemaking,[66] there would be no further opportunity for public comment. Moreover, the Commission believes that if it were to adopt alternatives that differentiate among categories of workers, the various rule provisions would be severable if a court were to invalidate one provision. Consequently, it is important for the public to address each of the alternatives proposed in the NPRM because the comment period on the proposed rule is the only opportunity for public input on those alternatives.

In addition to the issues for which the NPRM invites comments, I encourage stakeholders to address the following points:

- The NPRM references some academic studies regarding non-competes. What other academic literature addresses the issues in the NPRM, including the procompetitive justifications for non-compete provisions?

- The NPRM describes papers that exploit natural experiments to estimate the effects of enforcing non-compete clauses. While this approach ensures that the estimates are internally valid, it reflects the causal effects of non-compete agreements only in the contexts within which they are estimated. What should the Commission consider to understand whether and when these estimates are externally valid? How can the Commission know that the estimates calculated from the contexts of the literature are representative of the contexts outside of the literature?

- The NPRM draws conclusions based on "the weight of the literature," but the literature on the effects of non-compete agreements is limited, contains mixed results, and is sometimes industry-specific. Which conclusions in the NPRM are supported by the weight of the literature? Which conclusions in the NPRM contradict the weight of the literature? Which conclusions in the NPRM require additional evidence before they can be considered substantiated?

- Where the evidence provided in the NPRM is limited, is the evidence sufficient to support either the proposed ban on non-compete clauses or the proffered alternative approaches to the proposed ban?

- What are the benefits and drawbacks of the currently proposed ban compared to the proposed alternative rule that would find a presumption of unlawfulness, including the role of procompetitive justifications in rebutting a presumption?

[66] *See* Owner-Operator Indep. Drivers Ass'n v. Fed. Motor Carrier Safety Admin., 494 F.3d 188, 210 (D.C. Cir. 2007); *see also* Agape Church, Inc. v. FCC, 738 F.3d 397, 412 (2013) (holding that FCC "sunset" rule was a logical outgrowth when proposed rule gave public notice that a viewability rule was in danger of being phased out, *i.e.*, a sunset provision).

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Dissenting Statement of Commissioner Christine S. Wilson

In the Matter of O-I Glass, Inc. and
In the Matter of Ardagh Group S.A.
File No. 211-0182

January 4, 2023

Today, the Commission announced that it has accepted, subject to final approval, consent agreements with two companies in the glass container industry. The consents resolve allegations that the use of non-compete agreements in employee contracts constitutes an unfair method of competition that violates Section 5 of the FTC Act. These cases, which allege stand-alone violations of Section 5, are among the first to employ the approach that the recently issued Section 5 Policy Statement[1] describes. For the reasons explained below, I dissent.

Context is important. Under current leadership, the Commission has demanded significant volumes of information from parties under investigation, but not all requested information is related to traditional competition analysis.[2] In addition, this Commission has declared its willingness to take losing cases to court.[3] When faced with the expense of complying with expansive demands for documents and other material, and the possibility of an enforcement

[1] Fed. Trade Comm'n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/p221202sec5enforcementpolicystatement_002.pdf.

[2] *See* Christine S. Wilson, Comm'r, Fed. Trade Comm'n, *There's Nothing New Under the Sun: Reviewing Our History to Foresee the Future*, Keynote Address at GCR Live Merger Control 8-9, Virtually and Brussels, Belgium (October 7, 2021), https://www.ftc.gov/system/files/documents/public_statements/1597798/gcr_merger_control_keynote_final.pdf.

[3] *See* Lina M. Kahn, Chair, Fed. Trade Comm'n, *How FTC Chair Lina Khan wants to modernize the watchdog agency*, Marketplace interview with Kimberly Adams, https://www.marketplace.org/shows/marketplace-tech/how-ftc-chair-lina-khan-wants-to-modernize-the-watchdog-agency/, (June 17, 2022) ("We always want to win the cases that we're bringing. That said, it's no secret that in certain areas, you know, there's still work to be done to fully explain to courts how our existing laws and existing authorities, which go back over 100 years, apply in new context. . . . And I think there can be a serious cost of inaction. So we really have a bias in favor of action."); David McCabe, *Why Losing to Meta in Court May Still Be a Win for Regulators*, New York Times, https://www.nytimes.com/2022/12/07/technology/meta-vr-antitrust-ftc.html (Dec. 7, 2022) ("In April, Ms. Khan said at a conference that if 'there's a law violation" and agencies "think that current law might make it difficult to reach, there's huge benefit to still trying.' She added that any courtroom losses would signal to Congress that lawmakers needed to update antitrust laws to better suit the modern economy. 'I'm certainly not somebody who thinks that success is marked by a 100 percent court record,' she said.").

action regardless of the merits, parties under investigation rationally may express a willingness to settle. Under these circumstances, staff's investigation typically is quite limited.

Noteworthy Aspects of the Complaints

There are several noteworthy aspects of the Complaints issued against O-I Glass and Ardagh. The first is the brevity of these documents; each Complaint runs three pages, with a large percentage of the text devoted to boilerplate language. Given how brief they are, it is not surprising that the complaints are woefully devoid of details that would support the Commission's allegations. In short, I have seen no evidence of anticompetitive effects that would give me reason to believe that respondents have violated Section 5 of the FTC Act.

The second noteworthy aspect of these complaints is their omission of any allegations that the non-compete provisions at issue are unreasonable, a significant departure from hundreds of years of legal precedent. The first complaint alleges that O-I Glass entered into non-compete agreements with employees that prohibited them from working for competitors of O-I in the United States for one year following the conclusion of their employment with O-I.[4] And the second complaint alleges that Ardagh's contracts typically prohibited employees from performing the same or substantially similar services to those the employee performed for Ardagh for any glass container competitor of Ardagh in the United States, Canada, or Mexico for two years following the conclusion of their employment with Ardagh.[5]

Courts have long analyzed the temporal length, subject matter, and geographic scope of non-compete agreements to determine whether those agreements are unreasonable; when non-compete agreements are not found to be unreasonable, courts repeatedly have held that they do not violate the antitrust laws.[6] In the cases before us, the Commission makes no reasonableness assessment regarding the duration or scope of the non-compete clauses. Instead, it seems to treat the non-compete clauses as per se unlawful under Section 5 of the FTC Act. But the Seventh Circuit held that under Section 5, "[r]estrictive [non-compete] clauses . . . are legal unless they are unreasonable as to time or geographic scope[.]".[7] Notably, the Seventh Circuit further found that "even if [the non-compete] restriction is unreasonable as to geographic scope," it was "not prepared to say that it is a per se violation of the antitrust laws."[8]

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[4] O-I Glass, Inc. Complaint ¶ 7.

[5] Ardagh Group S.A. Complaint ¶ 7.

[6] *See* United States v. Empire Gas Corp., 537 F.2d 296, 307-08 (8th Cir. 1976); Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 267 (7th Cir. 1981); Newburger, Loeb & Co., Inc. v. Gross, 563 F.2d 1057, 1081-83 (2d Cir. 1977); Bradford v. New York Times Co., 501 F.2d 51, 57-59 (2d Cir. 1974).

[7] Snap-On Tools Corp. v. Fed. Trade Comm'n, 321 F.2d 825, 837 (7th Cir. 1963).

[8] *Id.*

A third noteworthy aspect of the complaints concerns the absence of allegations that the non-compete clauses in the O-I Glass and Ardagh contracts were enforced.[9] Absent efforts to enforce a non-compete provision, courts have been unwilling to find a violation of the antitrust laws.[10]

Fourth, the complaints assert that the non-compete clauses impede entry or expansion of rivals in the glass container industry, based on a claim that barriers to entry in the glass container industry include "the ability to identify and employ personnel with skills and experience in glass container manufacturing."[11] But the Commission makes no factual allegations regarding the inability of any rival to enter or expand. Moreover, this asserted barrier to entry and expansion in the industry is newly alleged by the Commission; in 2013, the Commission challenged the proposed merger of Ardagh Group S.A. and Saint-Gobain Containers, Inc. following a lengthy and thorough investigation. The complaint described in detail the barriers to entry in the glass container industry but did not reference the difficulty of obtaining experienced employees.[12]

Continuing in this vein, the complaints here also assert that the non-compete provisions reduce employee mobility and "caus[e] lower wages and salaries, reduced benefits, less favorable working conditions, and personal hardships to employees."[13] But the complaints do not identify a relevant market for skilled labor as an input to glass container manufacturing, and fail to allege a market effect on wages or other terms of employment. Even the Analysis to Aid Public Comment relies only on academic literature that discusses the effects of non-competes, albeit not in the glass container industry.

Similarly, the complaints allege that more than 1,000 employees at O-I and more than 700 employees at Ardagh were subject to non-compete agreements when the Commission opened the investigation, and that some of those employees were essential to a rival's entry or expansion.[14]

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[9] *Compare* O-I Glass, Inc. Complaint and Ardagh Group S.A. Complaint *with* Prudential Security, Inc. Complaint ¶¶ 18-21.

[10] O-Regan v. Arbitration Forums, Inc., 121 F.3d 1060, 1065-66 (7th Cir. 1997) ("to apply antitrust laws to restrictive employment covenants, there must be some attempted enforcement of an arguably overbroad portion of the covenant in order for there to be a federal antitrust violation."); Lektro-Vend Corp. v. Vendo Co., 660 F.2d at 267.

[11] O-I Glass, Inc. Complaint ¶ 6; Ardagh Group S.A. Complaint ¶ 6.

[12] The complaint in that merger challenge alleged that:

> "Effective entry or expansion into the relevant markets would neither be timely, likely, or sufficient to counteract the Acquisition's likely anticompetitive effects. The barriers facing potential entrants include the large capital investment necessary to build a glass plant, the need to obtain environmental permits, the high fixed costs of operating a glass plant, existing long-term contracts that foreclose much of the market, the need for specific manufacturing knowledge that is not easily transferred from other industries, and the molding technologies and extensive mold libraries already in place at existing manufacturers."

In the Matter of Ardagh Group S.A. and Saint-Gobain Containers, Inc., File No. 131-0087, https://www.ftc.gov/sites/default/files/documents/cases/2013/07/130701ardaghcmpt.pdf (2013) (Complaint ¶ 42.

[13] O-I Glass, Inc. Complaint ¶ 8; Ardagh Group S.A. Complaint ¶ 8.

[14] O-I Glass, Inc. Complaint ¶ 7; Ardagh Group S.A. Complaint ¶ 7.

The allegations imply that, conversely, many employees that were subject to non-compete agreements did *not* have industry-specific skills.[15] Consider, for example, employees in the glass container industry who worked in the fields of human resources or accounting, with skills sets that are easily transferable across industries. If they were subject to non-competes following their departure from O-I or Ardagh, these employees easily could seek employment in other industries, including retailing and the services sector. It is implausible that precluding employees with easily transferable skill sets from working for rivals in glass container manufacturing would have an impact on competition in any appropriately defined relevant market.

Absent any evidence, the Commission adopts the approach of the Section 5 Policy Statement and baldly alleges that the use of non-compete agreements "has a tendency or likely effect of harming competition, consumers, and workers," offering only a hypothesized outcome.

Business Justifications

The complaints improperly discount business justifications for the non-compete provisions. First, they allege in conclusory fashion that "[a]ny legitimate objectives . . . could have been achieved through significantly less restrictive means, including . . . confidentiality agreements that prohibit employees and former employees from disclosing company trade secrets and other confidential information."[16] This assertion is unsubstantiated.

Second, the complaints do not address the business justification and procompetitive benefit of employer-provided training. The complaints allege that identifying and employing personnel with skills and experience in glass container manufacturing is a barrier to entry, which implies that employee training and experience is essential and that the desired training is not available from sources other than industry incumbents. Firm-provided training is an accepted and documented business justification for non-compete clauses; firms are less willing to invest in employee training if employees leave the firm after receiving training.[17] The complaints do not allege that there is a less restrictive alternative for non-compete provisions regarding firm-provided training. Moreover, it is ironic that the orders issued in these matters may lead to reduced firm-sponsored training, which may (1) reduce the available trained labor that would allow entry or expansion of competing firms and (2) harm the same employees at O-I Glass and Ardagh that the cases claim to help.

Although the complaints are dismissive of business justifications, the relief obtained implicitly acknowledges the existence of legitimate business justifications for non-compete clauses. Specifically, the Agreements Containing Consent Orders prohibit the use of non-compete clauses for covered employees, which are described by a list of positions in Appendix A. Careful review

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[15] *See also* O-I Glass, Inc. Decision and Order Appendix A and Ardagh Group S.A. Decision and Order Appendix A (listing positions for which the use of non-compete agreements is prohibited, which includes positions that have general skills).

[16] O-I Glass, Inc. Complaint ¶ 9; Ardagh Group S.A. Complaint ¶ 9.

[17] *See* Evan Starr, *Consider This: Training, Wages, and the Enforceability of Non-Compete Clauses*, 72 I.L.R. Rev 783, 796-97 (2019); Matthew S. Johnson & Michael Lipsitz, *Why Are Low-Wage Workers Signing Noncompete Agreements?*, 57 J. Hum. Res. 689, 711 (2022).

of those lists reveals that senior executives and employees involved in research and development are not included. Although not acknowledged in the Analysis to Aid Public Comment, the Commission here implicitly has credited at least some business justifications for non-compete clauses.

Concerns for Due Process

I am concerned whether the respondents had notice that their conduct would be viewed as unlawful. As noted above, the allegations here depart from a centuries-long line of precedent regarding the appropriate analysis of the legality of non-compete provisions, and conflict with a Seventh Circuit holding specific to Section 5 of the FTC Act. The allegations are premised on the Section 5 Policy Statement issued in November 2022, which also represents a radical departure from precedent. But the complaints in these matters challenge conduct of O-I Glass and Ardagh that predates the November 2022 Section 5 Policy Statement. The Second Circuit explained in *Ethyl* that "the Commission owes a duty to define the conditions under which conduct . . . would be unfair so that businesses will have an inkling as to what they can lawfully do rather than be left in a state of complete unpredictability."[18] Given the state of the law for hundreds of years prior to this enforcement challenge, I believe notice was lacking.

[18] E.I. du Pont de Nemours & Co. v. F.T.C., 729 F.2d 128, 139 (2d Cir. 1984). *See also id.* at 136 ("Review by the courts was essential to assure that the Commission would not act arbitrarily or without explication but according to definable standards that would be properly applied.").

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Dissenting Statement of Commissioner Christine S. Wilson

In the Matter of Prudential Security
File No. 211-0026

January 4, 2023

Today, the Commission announced that it has accepted, subject to final approval, a consent agreement with Prudential Security, Inc. The consent resolves allegations that the use of non-compete agreements in employee contracts constitutes an unfair method of competition that violates Section 5 of the FTC Act. This case, which alleges a stand-alone violation of Section 5, is one of the first to employ the approach that the recently issued Section 5 Policy Statement[1] describes. For the reasons explained below, I dissent.

One point is worth emphasizing: my vote to oppose issuance of the complaint does *not* mean that I endorse or condone the conduct of Prudential Security. The company required its security guards to sign non-compete agreements that prohibited employees from accepting employment with a competing business for two years following conclusion of their employment with Prudential. Moreover, a liquidated damages provision required employees to pay Prudential $100,000 for violations of the non-compete agreement. Based on these facts, it seems appropriate that a Michigan state court found that the non-compete agreements were unreasonable and unenforceable under state law.[2]

Instead, my vote reflects my continuing disagreement with the new Section 5 Policy Statement and its application to these facts. When it was issued, I expressed concern that the Policy Statement would be used to condemn conduct summarily as an unfair method of competition based on little more than the assignment of adjectives.[3] Unfortunately, that is the approach taken in this case.

The Complaint offers no evidence of anticompetitive effect in any relevant market. According to the Complaint, Prudential's use of non-compete agreements "has harmed employees" by limiting

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[1] Fed. Trade Comm'n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/p221202sec5enforcementpolicystatement_002.pdf.

[2] Complaint ¶ 22.

[3] *See* Christine S. Wilson, Comm'r, Fed. Trade Comm'n, Dissenting Statement Regarding the "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act" (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyWilsonDissentStmt.pdf.

their ability to work for other firms in the security guard industry."[4] It asserts that Prudential's use of non-compete agreements is "coercive and exploitative" and "tends to negatively affect competition conditions"[5] – but it appears that those "competition conditions" pertain only to individual employees. Similarly, the Complaint offers only a conclusory assertion that "[a]ny possible legitimate objectives . . . could have been achieved through significantly less restrictive means, including . . . confidentiality agreements that prohibited disclosure of any confidential information."[6] This assertion is unsubstantiated.

Another aspect of the case also concerns me. This enforcement action is designed not to provide effective relief but instead to signal activity with respect to non-compete agreements in the employment arena. As the Complaint describes, Prudential sold the bulk of its security guard business to another security guard company, Titan Security Group. The former Prudential security guards who now work for Titan are not subject to non-compete agreements.[7] Moreover, now that Prudential no longer provides security guard services, there is no reason for the company to seek to enforce non-compete agreements against former Prudential security guards who did not move to Titan.

I wish it were accurate to say that this case (with apologies to Shakespeare) is a tale of sound and fury, signifying nothing. Unfortunately, it has great significance: it foreshadows how the Commission will apply the new Section 5 Policy Statement. Practices that three unelected bureaucrats find distasteful will be labeled with nefarious adjectives and summarily condemned, with little to no evidence of harm to competition. I fear the consequences for our economy, and for the FTC as an institution.

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[4] Complaint ¶¶ 23, 25.

[5] Complaint ¶ 29.

[6] Complaint ¶ 26.

[7] Complaint ¶ 16.

Non Delivery Report

From: Microsoft Outlook [MicrosoftExchange329e71ec88ae4615bbc36ab6ce41109e@ftcprod.onmicrosoft.com]
Sent: 1/5/2023 4:10:23 PM
To: Ilya Shapiro (b)(6)
Subject: Undeliverable: Non-compete Clause Rulemaking and Cases
Attachments: Non-compete Clause Rulemaking and Cases

Your message did not reach some or all of the intended recipients.

Subject:Non-compete Clause Rulemaking and Cases
Sent:1/5/2023 4:10:26 PM

The following recipient(s) cannot be reached:

Ilya Shapiro on 1/5/2023 4:10:26 PM
Diagnostic code = MtsCongested; Reason code = TransferFailed; Status code = 541
< #5.4.1 smtp;550 5.4.1 Recipient address rejected: Access denied. AS(201806281) [BN8NAM11FT084.eop-nam11.prod.protection.outlook.com]>

Office 365

Your message to (b)(6) couldn't be delivered.

(b)(6)

cwilson3 **Office 365** (b)(6)
Action Required Recipient

Unknown To address

How to Fix It

The address might be misspelled or might not exist. Try one or more of the following:

- **Retype the recipient's address, then resend the message** - If you're using Outlook, open this non-delivery report message and click **Send Again** from the menu or ribbon. In Outlook on the web, select this message, and then click the "**To send this message again, click here.**" link located just above the message preview window. In the To or Cc line, delete and then retype the entire recipient's address (ignore any address suggestions). After typing the complete address, click **Send** to resend the message. If you're using an email program other than Outlook or Outlook on the web, follow its standard way for resending a message. Just be sure to delete and retype the recipient's entire address before resending it.
- **Remove the recipient from the recipient Auto-Complete List, then resend the message** - If you're using Outlook or Outlook on the web, follow the steps in the "Remove the recipient from the recipient Auto-Complete List" section of this article. Then resend the message. Be sure to delete and retype the recipient's entire address before clicking **Send**.

- **Contact the recipient by some other means,** (by phone, for example) to confirm you're using the right address. Ask them if they've set up an email forwarding rule that could be forwarding your message to an incorrect address.

  If the problem continues, ask the recipient to tell their email admin about the problem, and give them the error (and the name of the server that reported it) shown below. It's likely that only the recipient's email admin can fix this problem.

Was this helpful? Send feedback to Microsoft.

More Info for Email Admins

Status code: 550 5.4.1

This error occurred because a message was sent to an email address hosted by Office 365, but the address doesn't exist in the receiving organization's Office 365 directory. Directory Based Edge Blocking (DBEB) is enabled for cato.org, and DBEB rejects messages addressed to recipients who don't exist in the receiving organization's Office 365 directory. This error is reported by the recipient domain's email server, but most often it can be fixed by the person who sent the message. If the steps in the **How to Fix It** section above don't fix the problem, and you're the email admin for the recipient, try one or more of the following:

Check that the email address exists and is correct - Confirm that the recipient address exists in your Office 365 directory, is correct, and is accepting messages.

Synchronize your directories - Make sure directory synchronization is working correctly, and that the recipient's email address exists in both Office 365 and in your on-premises directory.

Check for errant forwarding rules - Check for forwarding rules for the original recipient that might be trying to forward the message to an invalid address. Forwarding can be set up by an admin via mail flow rules or mailbox forwarding address settings, or by the recipient via the Forwarding or Inbox Rules features.

Make sure the recipient has a valid license - Make sure the recipient has an Office 365 license assigned to them. The recipient's email admin can use the Office 365 admin center to assign a license to them (Users > Active Users > Select the recipient > Assigned License > Edit).

Make sure that mail flow settings and MX records are correct - Misconfigured mail flow or MX record settings can cause this error. Check your Office 365 mail flow settings to make sure your domain and any mail flow connectors are set up correctly. Also, work with your domain registrar to make sure the MX records for your domain are set up correctly.

For more information and additional tips to fix this issue, see this article.

Original Message Details

Created Date:	1/5/2023 9:10:14 PM
Sender Address:	cwilson3@ftc.gov
Recipient Address:	ishapiro@cato.org
Subject:	Non-compete Clause Rulemaking and Cases

Error Details

Reported error: *550 5.4.1 Recipient address rejected: Access denied. AS(201806281) [BN8NAM11FT084.eop-nam11.prod.protection.outlook.com]*

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Original Message Headers


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Message

From: Wilson, Christine [cwilson3@ftc.gov]
Sent: 1/5/2023 4:10:14 PM
Subject: Non-compete Clause Rulemaking and Cases
Attachments: Wilson non-compete rulemaking dissent - FINAL - 1-4-23.pdf; Wilson dissenting statement - glass container cases - FINAL - 1-3-23.pdf; Wilson dissenting statement - Prudential Security - FINAL - 1-3-23.pdf

Dear friends and colleagues,

Today, the Commission announced a Notice of Proposed Rulemaking ("NPRM") for a new Non-Compete Clause Rule that would ban nearly all non-compete clauses in employment settings. The announcement comes one day after the Commission rushed out three consent agreements that addressed challenges of non-compete clauses. For the many reasons explained in my dissenting statement (attached), I opposed issuing this NPRM.

Both the proposed rule and the complaints addressed by the consent agreements illustrate the way the Commission majority will exploit the flawed approach of the new Section 5 Policy Statement to condemn conduct that it disfavors. Under this approach, the Commission can simply label the conduct with nefarious-sounding but legally nebulous adjectives — in the case of non-compete clauses, "exploitive and coercive" — to establish liability, even when precedent finds the conduct to be legal. Under this approach to finding liability, no showing of anticompetitive effects is necessary.

This shortcut approach describes the Commission's challenge of Prudential Security, Inc. and provides two of the three independent bases for finding that non-compete clauses violate Section 5 of the FTC Act to justify the proposed new rule. When the Commission does *not* rely solely on adjectives, under the Section 5 Policy Statement, it need only show a "tendency" for the conduct to harm competition. The Commission employed that approach in the Commission's challenges to the non-compete clauses of O-I Glass and Ardagh Glass Group S.A., where the complaints offered only theory and conclusory allegations, not hard evidence of harm to labor markets and competition. My dissents in those three cases are also attached.

Without cases demonstrating that non-compete clauses harm competition, the NPRM turns to academic literature. But the studies in the current record yield results that often conflict and cannot support this sweeping proposal that bans nearly all non-compete clauses. Currently, all employees are treated alike, including senior executives. The literature also fails to support the Rule's dismissal of business justifications for non-competes.

Setting aside the substance of the rule, the Commission's competition rulemaking authority itself certainly will be challenged. The NPRM is vulnerable to meritorious challenges that (1) the Commission lacks authority to engage in "unfair methods of competition" rulemaking, (2) the major questions doctrine addressed in West Virginia v. EPA applies, and the Commission lacks clear Congressional authorization to undertake this initiative; and (3) assuming the agency does possess the authority to engage in this rulemaking, it is an impermissible delegation of legislative authority under the non-delegation doctrine, particularly because the Commission has replaced the consumer welfare standard with one of multiple goals.

Defending these challenges will entail lengthy litigation that will consume substantial staff resources. I anticipate that the Rule will not withstand these challenges, so the Commission majority essentially is directing staff to embark on a demanding and futile effort. In the face of finite and scarce resources, this NPRM is hardly the best use of FTC bandwidth.

Today's announcement also suggests possible alternatives to the proposed ban that covers nearly all workers. The NPRM solicits public comments on the proposed rule and the possible alternatives. This is the only chance to comment on the current Rule, its support (or lack thereof), its implications for competition and innovation, and the alternatives. I encourage all interested parties to comment fully.

As always, I look forward to hearing your comments and reactions.

All best,
Christine

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Dissenting Statement of Commissioner Christine S. Wilson
Regarding the Notice of Proposed Rulemaking for the Non-Compete Clause Rule

Commission File No. P201200-1

January 5, 2023

Today, the Commission announced a notice of proposed rulemaking ("NPRM") for a Non-Compete Clause Rule. "The proposed rule would provide that it is an unfair method of competition – and therefore a violation of Section 5 – for an employer to enter into or attempt to enter into a non-compete clause with a worker; [or to] maintain with a worker a non-compete clause . . ."[1] For the many reasons described below, on the current record, I do not support initiating the proposed rulemaking and consequently dissent.

The proposed Non-Compete Clause Rule represents a radical departure from hundreds of years of legal precedent that employs a fact-specific inquiry into whether a non-compete clause is unreasonable in duration and scope, given the business justification for the restriction. The Commission undertakes this radical departure despite what appears at this time to be a lack of clear evidence to support the proposed rule. What little enforcement experience the agency has with employee non-compete provisions is very recent (within the last week) and fails to demonstrate harm to consumers and competition. Lacking enforcement experience, the Commission turns to academic literature – but the current record shows that studies in this area are scant, contain mixed results, and provide insufficient support for the scope of the proposed rule. And one study illustrates clearly, in the financial services sector, the negative unintended consequences of suspending non-compete provisions, including higher fees and broker misconduct. The suspension of non-competes across all industry sectors in the U.S. undoubtedly will impose a much larger raft of unintended consequences.

Setting aside the substance of the rule, the Commission's competition rulemaking authority itself certainly will be challenged. The NPRM is vulnerable to meritorious challenges that (1) the Commission lacks authority to engage in "unfair methods of competition" rulemaking, (2) the major questions doctrine addressed in *West Virginia v. EPA* applies, and the Commission lacks clear Congressional authorization to undertake this initiative; and (3) assuming the agency does possess the authority to engage in this rulemaking, it is an impermissible delegation of legislative authority under the non-delegation doctrine, particularly because the Commission has replaced

[1] Notice of Proposed Rulemaking for Non-Compete Clause Rule ("NPRM") Part I (Jan. 5, 2023).

the consumer welfare standard with one of multiple goals. In short, today's proposed rule will lead to protracted litigation in which the Commission is unlikely to prevail.

The NPRM invites public comment on both a sweeping ban on non-competes and various alternatives pursuant to the Administrative Procedure Act, not the Magnuson-Moss Act. Stakeholders should note that ***this solicitation for public comment is likely the only opportunity they will have to provide input not just on the proposed ban, but also on the proposed alternatives***. For this reason, I encourage all interested parties to respond fully to all parts of the NPRM's solicitation of public comments.

Non-Compete Clauses Merit Fact-Specific Inquiry

Based on the current record, non-compete clauses constitute an inappropriate subject for rulemaking. The competitive effects of a non-compete agreement depend heavily on the context of the agreement, including the business justification that prompted its adoption. But don't take my word for it – the need for fact-specific inquiry aligns with hundreds of years of precedent. When assessing the legality of challenged non-compete agreements, state and federal courts (and English courts before them) have examined the duration and scope of non-compete clauses, as well as the asserted business justifications, to determine whether non-compete clauses are unreasonable and therefore unenforceable.[2]

The NPRM itself acknowledges, at least implicitly, the relevance of the circumstances surrounding adoption of non-compete clauses. For example, the NPRM proposes an exception to the ban on non-compete clauses for provisions associated with the sale of a business, acknowledging that these non-compete clauses help protect the value of the business acquired by the buyer.[3] Recognizing that senior executives typically negotiate many facets of their employment agreements, the NPRM distinguishes situations in which senior executives are subject to non-compete provisions.[4] And to stave off potential legal challenges, the NPRM proposes more carefully tailored alternatives to a sweeping ban on non-compete clauses that instead would vary by employee category.

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[2] *See, e.g.*, United States v. Addyston Pipe & Steel Co., 85 F. 271, 281 (6th Cir. 1898) (Taft, J.), *aff'd in relevant part*, 175 U.S. 211 (1899); Mitchel v. Reynolds, 1 P. Wms. 181 (1711).

[3] NPRM Part V, Section 910.3.

[4] Accordingly, the Commission seeks comments on whether senior executives should be treated differently from the proposed ban on non-compete clauses. *See* NPRM Parts IV.A.1.b, IV.A.1.c. In a similar vein, recent consent agreements issued for public comment that prohibit the use of non-compete agreements in the glass container industry do not prohibit non-compete clauses for senior executives and employees involved in research and development. *See* O-I Glass, Inc., File No. 211-0182, https://www.ftc.gov/system/files/ftc_gov/pdf/2110182o-iglassdraftorderappx.a.pdf (Jan. 4, 2023) (Decision and Order Appendix A); Ardagh Glass Group S.A., File No. 211-0182, https://www.ftc.gov/system/files/ftc_gov/pdf/2110182ardaghdraftorderappx.a.pdf (Jan. 4, 2023) (Decision and Order Appendix A); Christine S. Wilson, Comm'r, Fed. Trade Comm'n, Dissenting Statement regarding In the Matter of O-I Glass, Inc. and In the Matter of Ardagh Group S.A. (Jan. 4, 2023), https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/dissenting-statement-commissioner-christine-s-wilson-regarding-matter-o-i-glass-inc-ardagh-group-sa.

Despite the importance of context and the need for fact-specific inquiries, the Commission instead applies the approach of the newly issued Section 5 Policy Statement[5] to propose a near-complete ban on the use of non-compete clauses. Pursuant to this approach, the Commission invokes nefarious-sounding adjectives – here, "exploitive and coercive" – and replaces the evaluation of actual or likely competitive effects with an unsubstantiated conclusion about the "tendency" for the conduct to generate negative consequences by "affecting consumers, workers or other market participants."[6]

Using the approach of the Section 5 Policy Statement that enables the majority summarily to condemn conduct it finds distasteful, the Commission today proposes a rule that prohibits conduct that 47 states have chosen to allow.[7] Similarly, the Commission's proposed rule bans conduct that courts have found to be legal,[8] a concern the Commission dismisses with a claim that the Section 5 prohibition on "unfair methods of competition" extends beyond the antitrust laws. But the majority's conclusions and today's proposed rule forbid conduct previously found lawful under Section 5 of the FTC Act. Specifically, applying FTC Act Section 5, the Seventh Circuit found that "[r]estrictive [non-compete] clauses . . . are legal unless they are unreasonable as to time or geographic scope[.]"[9] In other words, the Seventh Circuit found that a fact-specific inquiry is required under Section 5.

The NPRM announced today conflicts not only with the Seventh Circuit's holding, but also with several hundred years of precedent. With all due respect to the majority, I am dubious that three unelected technocrats[10] have somehow hit upon the right way to think about non-competes, and that all the preceding legal minds to examine this issue have gotten it wrong. The current rulemaking record does not convince me otherwise.

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[5] Fed. Trade Comm'n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/p221202sec5enforcementpolicystatement_002.pdf.

[6] *Id.* at 9.

[7] NPRM Part II.C.1. Further, the NPRM explains "[s]tates have been particularly active in restricting non-compete clauses in recent years." *Id.* The Commission's rulemaking will end states' varying approaches to address non-compete agreements. The Commission's preemption of states' approaches is premature to the extent that the Commission admits that it does not know where to draw lines regarding the treatment of non-compete provisions (i.e., the Commission seeks comments on alternatives to the proposed ban based on earnings levels, job classifications, or presumptions). The Commission ignores the advice of Justice Brandeis and instead proposes to end states' experimentation to determine the optimal treatment of non-compete clauses. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) ("To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

[8] *See* United States v. Empire Gas Corp., 537 F.2d 296, 307-08 (8th Cir. 1976); Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 267 (7th Cir. 1981); Newburger, Loeb & Co., Inc. v. Gross, 563 F.2d 1057, 1081-83 (2d Cir. 1977); Bradford v. New York Times Co., 501 F.2d 51, 57-59 (2d Cir. 1974).

[9] Snap-On Tools Corp. v. Fed. Trade Comm'n, 321 F.2d 825, 837 (7th Cir. 1963).

[10] This characterization is not an insult, but a fact. I, too, am an unelected technocrat.

I. Non-Compete Agreements – the First Application of the Section 5 Policy Statement

The proposed Non-Compete Clause Rule "would provide that it is an unfair method of competition – and therefore a violation of Section 5 – for an employer to enter into or attempt to enter into a non-compete clause with a worker; [or] to maintain with a worker a non-compete clause . . .".[11] The proposed ban on non-compete clauses is based only on alleged violations of Section 5 of the FTC Act; it is not premised on the illegality of non-compete clauses under the Sherman or Clayton Acts.

When the Commission issued the Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act ("Policy Statement") in November 2022, I warned that the approach described by the Policy Statement would enable the Commission majority to condemn conduct it disfavors, even when that conduct repeatedly has been found lawful.[12] I predicted that the approach to Section 5 enforcement contained in the Policy Statement would facilitate expansive enforcement, often without requiring evidence of anticompetitive effects. And I cautioned that subjects of investigations would not be able to defend their conduct because procompetitive justifications would not be credited. The Non-Compete Clause Rule NPRM provides a graphic illustration of these concerns.

A. The NPRM's Determination that Non-Compete Clauses are Unfair

The NPRM states that there are 3 *independent* ways for classifying non-compete clauses as an "unfair" method of competition.[13] In November, I objected to the enforcement approach described in the Section 5 Policy Statement – specifically, permitting the Commission majority to condemn conduct merely by selecting and assigning to disfavored conduct one or more adjectives from a nefarious-sounding list.[14] Here, two of the three explanations the Commission provides for concluding that non-compete clauses are unfair rely on invocation of the adjectives "exploitive and coercive."[15] The third explanation for the illegality of non-compete clauses demonstrates how little evidence the majority requires to conclude that conduct causes harm.

According to the NPRM, "non-compete clauses are exploitive and coercive at the time of contracting."[16] The NPRM explains that the "clauses for workers other than senior executives

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[11] NPRM Part I.

[12] *See* Christine S. Wilson, Comm'r, Fed. Trade Comm'n, Dissenting Statement Regarding the "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act" (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyWilsonDissent5.pdf.

[13] NPRM Part IV.A.1.

[14] *See* Wilson, *supra* note 12.

[15] The Policy Statement claimed that determinations of unfairness would be based on a sliding scale. Here, the NPRM identifies independent ways to determine that non-compete clauses are unfair; no sliding scale is applied.

[16] NPRM Part IV.A.1.b The NPRM explains that this conclusion does not apply to senior executives and also seeks comment on whether there is a broader category of highly paid or highly skilled employees for whom the conclusion is inappropriate. *Id.*

are exploitive and coercive because they take advantage of unequal bargaining power[.]".[17] The business community will be surprised to learn that "unequal bargaining power" can lead to a conclusion that any negotiated outcome may be condemned as "exploitive and coercive," which then can be parlayed into a finding that the conduct violates Section 5. Indeed, this assertion is particularly troubling not merely because it presages an approach that is literally limitless, but also because the imbalance of bargaining power, as in this setting, arises wholly apart from any conduct by the business..[18] The reader may note that the NPRM cites legal decisions to support the assignment of adjectives. Yet, a careful reading of the courts' discussions of the imbalance of bargaining power between employers and employees reveals that while the imbalance may provide a reason to scrutinize non-compete clauses, it is not used to condemn or invalidate them..[19] Remarkably, in each case cited in footnote 253 of the NPRM, the court found the non-compete clauses to be enforceable.

Next, the NPRM finds that "non-compete clauses are exploitive and coercive at the time of the worker's potential departure from the employer[.]".[20] The NPRM reaches this conclusion regardless of whether the clauses are enforced. This conclusion is contrary to legal precedent, which requires enforcement of non-compete provisions before finding harm..[21]

Finally, the NPRM finds that "non-compete clauses are restrictive conduct that negatively affects competitive conditions."[22] Although this basis for concluding that non-compete provisions are unfair does not rely solely on the selection of an adjective, here, the NPRM demonstrates how little evidence the majority requires before finding that conduct is unfair pursuant to the Section 5 Policy Statement.

Until yesterday, the Commission had announced no cases (and therefore had no experience and no evidence) to conclude that non-compete clauses harm competition in labor markets. In fact, the only litigated FTC case challenging a non-compete clause found that a non-compete

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[17] *Id.*

[18] According to the NPRM, unequal bargaining power arises because employees depend on job income to pay bills, job searches entail significant transaction costs, the prevalence of unions has declined, employers outsource firm functions, employers have more experience negotiating because they have multiple employees, employees typically do not hire lawyers to negotiate agreements, and employees may not focus on the terms of their contracts. *Id.*

[19] *See* Alexander & Alexander, Inc. v. Danahy, 488 N.E.2d 22, 29 (Mass. App. Ct. 1986) (finding injunction to enforce non-compete agreement proper); Diepholz v. Rutledge, 659 N.E. 989, 991 (Ill. Ct. App. 1995) (finding non-compete agreement enforceable, but also finding no violation of terms of non-compete agreement); Palmetto Mortuary Transp., Inc. v. Knight Sys., Inc., 818 S.E.2d 724, 731 (S.C. 2018) (finding non-compete agreement enforceable).

[20] NPRM Part IV.A.1.c. Again, the NPRM explains that this conclusion does not apply to senior executives and also invites comments on whether there is a broader category of highly paid or highly skilled employees for whom the conclusion is inappropriate. *Id.*

[21] *See, e.g.*, O'Regan v. Arbitration Forums, Inc., 121 F.3d 1060, 1065-66 (7th Cir. 1997) ("to apply antitrust laws to restrictive employment covenants, there must be some attempted enforcement of an arguably overbroad portion of the covenant in order for there to be a federal antitrust violation."); Lektro–Vend Corp. v. Vendo Co., 660 F.2d 255, 267 (7th Cir.1981) ("a section 1 violation requires proof that the defendant knowingly enforced the arguably overbroad section of the ancillary noncompetition covenant").

[22] NPRM Part IV.A.1.a.

provision covering franchise dealers did *not* violate Section 5 of the FTC Act.[23] Notably, the NPRM omits any reference to this case. The Commission has accepted settlements regarding non-compete clauses in contracts between businesses,[24] but the majority itself has distinguished those cases from non-compete clauses in labor contracts.[25] And in those B2B cases, the non-compete clauses were associated with the sale of a business, a situation that falls within the narrow exception to the ban provided in the proposed Non-Compete Clause Rule.

Just yesterday, though, the Commission rushed out the announcement of three consent agreements that resolve allegations that non-compete provisions constitute an unfair method of competition.[26] The first consent involves security guard services, and the other two involve the manufacturing of glass containers. These consents undoubtedly were designed to support assertions that the FTC now has experience with non-compete agreements in employee contracts. But even a cursory read of the complaints reveals the diaphanous nature of this "experience."

Remarkably, none of these cases provides evidence showing the anticompetitive effects of non-compete clauses beyond the conclusory allegations in the complaints. The complaints in the glass container industry assert that non-compete provisions may prevent entry or expansion by competitors, but contain no allegations regarding firms that have tried unsuccessfully to obtain personnel with industry-specific skills and experience.[27] Regarding the effects on employees, the complaints make no allegations that the non-compete clauses were enforced by respondents[28] and the Analysis to Aid Public Comment accompanying the consent agreements points only to studies not tied to the glass container industry. These cases provide no evidence that the non-compete provisions limited competition for employees with industry-specific expertise, thereby lowering wages or impacting job quality. Similarly, in the case against Prudential Security,

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[23] *See* Snap-On Tools Corp. v. Fed. Trade Comm'n, 321 F.2d at 837.

[24] *See* ARKO Corp., FTC File No. 211-0187, https://www.ftc.gov/system/files/ftc_gov/pdf/2110087C4773ArkoExpressComplaint.pdf (Aug. 5, 2022); DTE Energy Co., FTC File No. 191-0068, https://www.ftc.gov/system/files/documents/cases/191_0068_c-4691_dte-enbridge_complaint.pdf, (Dec. 13, 2019).

[25] *See* Lina M. Khan, Chair, Fed. Trade Comm'n, Joined by Rebecca Kelly Slaughter and Alvaro M. Bedoya, Comm'rs, Fed. Trade Comm'n, Statement regarding In the Matter of ARKO Corp./Express Stop, https://www.ftc.gov/system/files/ftc_gov/pdf/2110187StPMExpressKhanStatement.pdf (June 10, 2022) (distinguishing non-compete clauses in labor contracts and effects on workers from non-compete clause in merger agreement where both parties remain in market).

[26] On December 28, 2022, the Commission voted to accept for public comment three consent agreements involving non-compete agreements. For two of those matters, the Commission vote occurred less than a week after the Commission received the papers. *See* Ardagh Glass Group S.A., File No. 211-0182, https://www.ftc.gov/system/files/ftc_gov/pdf/2110182ardaghaco.pdf (Jan. 4, 2023) (Agreement Containing Consent Order (signatures dated Dec. 21, 2022)).

[27] *See* O-I Glass, Inc., File No. 211-0182, https://www.ftc.gov/system/files/ftc_gov/pdf/2110182o-iglasscomplaint.pdf (Jan. 4, 2023) (complaint ¶¶ 6, 8); Ardagh Glass Group S.A., File No. 211-0182, https://www.ftc.gov/system/files/ftc_gov/pdf/2110182ardaghcomplaint.pdf (Jan. 4, 2023) (complaint ¶¶ 6, 8).

[28] *See* Wilson, Dissenting Statement regarding In the Matter of O-I Glass, Inc. and In the Matter of Ardagh Glass Group S.A., *supra* note 4.

Inc.,[29] the complaint alleges that individual former employees were limited in their ability to work for other firms in the security guard industry,[30] but contain no allegations that the firm's non-compete provisions had market effects on wages or effects in a properly defined market for security guard services.

The NPRM also asserts FTC experience with non-compete provisions by pointing to Commission merger consent agreements that restrict the use of non-compete agreements. The complaints in those cases did not allege harm from non-compete clauses and the provisions in the consent agreements were included to ensure that the buyers of divestiture assets could obtain employees familiar with the assets and necessary for the success of the divestitures at issue.

Finally, the NPRM claims Commission experience with non-compete agreements to support the Non-Compete Clause Rule from a Commission workshop in January 2020.[31] But the NPRM fails to reflect the variety of views expressed during that workshop, including testimony that the economic literature is "[s]till far from reaching a scientific standard for concluding [that non-compete agreements] are bad for overall welfare . . . Also [we] don't yet fully understand the distribution of effects on workers . . . Welfare tradeoffs are likely context-specific, and may be heterogeneous."[32]

Indeed, the NPRM ignores that testimony and instead focuses on economic literature that purportedly demonstrates that non-compete clauses are unfair because they negatively affect competitive conditions. But an objective review of that literature reveals a mixed bag. For example, the first study described in the NPRM[33] finds that "decreasing non-compete clause enforceability from the approximate enforceability level of the fifth-strictest state to that of the fifth-most-lax state would increase workers' earnings by 3-4%." Yet, this study also finds that these effects vary strongly across different groups of individuals. For example, the authors find that "enforceability has little to no effect on earnings for non-college educated workers" and instead find that enforceability primarily impacts college-educated workers. Similarly, it finds that strict non-compete clause enforceability has very different effects for different demographic groups: it has little to no effect on men, and much larger effects on women and Black men and women. The NPRM interprets these differential effects as facts in favor of the Non-Compete Clause Rule, as it would diminish race and gender wage gaps, but there is no corresponding discussion of the Rule's effect on the wage gap based on education. An alternative interpretation

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[29] Prudential Security, Inc., File No. 221-0026, https://www.ftc.gov/system/files/ftc_gov/pdf/2210026prudentialsecurityscomplaint.pdf (Dec. 28, 2022) (consent agreement accepted for public comment).

[30] *Id.* (complaint at ¶¶ 23, 25).

[31] Fed. Trade Comm'n, *Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues*, https://www.ftc.gov/news-events/events/2020/01/non-compete-clauses-workplace-examining-antitrust-consumer-protection-issues

[32] Kurt Lavetti, *Economic Welfare Aspects of Non-Compete Agreements*, Remarks at the Fed. Trade Comm'n Workshop on Non-Compete Clauses in the Workplace (Jan. 9, 2020), https://www.ftc.gov/system/files/documents/public_events/1556256/non-compete_workshop-slides.pdf.

[33] Matthew S. Johnson, Kurt Lavetti, & Michael Lipsitz, *The Labor Market Effects of Legal Restrictions on Worker Mobility* 2, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3455381 (2020).

of these findings is that the scientific literature is still muddled as to who is helped and who is harmed by non-compete clauses, and that it would be better for the Commission to tailor a rule to those settings where a scientific consensus exists.

Similarly, the NPRM often bases its conclusions about the effects of non-compete clauses on limited support. For example, the NPRM contends that increased enforceability of non-compete clauses increases consumer prices. Yet, under the current record, this conclusion is based on only one study in healthcare markets and another study that considers the relationship between non-compete clauses and concentration..[34] The NPRM does not provide a basis to conclude that findings with respect to the market for physicians and healthcare are generalizable, instead acknowledging that no comparable evidence exists for other markets..[35] Also, the study that considers the effects of non-compete clauses on concentration does not draw conclusions about prices; the NPRM's conclusion that non-compete provisions lead to higher prices requires assumptions about a relationship between concentration and prices. Moreover, the NPRM omits studies showing that reducing the enforceability of non-compete restrictions leads to higher prices for consumers. A study by Gurun, Stoffman, and Yonker finds that an agreement not to enforce post-employment restrictions among financial advisory firms that were members of the Broker Protocol led brokers to depart their firms, and consumers to follow their brokers, at high rates. The study found, however, that clients of firms in the Broker Protocol paid higher fees and experienced higher levels of broker misconduct..[36] In other words, suspending non-competes resulted in higher prices and a decrease in the quality of service provided. These unintended consequences illustrate the inevitably far-reaching and unintended consequences that today's NPRM will visit upon employees, employers, competition, and the economy.

B. The NPRM's Treatment of Business Justifications

The NPRM explains that "the additional incentive to invest (in assets like physical capital, human capital, or customer attraction, or in the sharing of trade secrets and confidential commercial information) is the primary justification for use of non-compete clauses."[37] It acknowledges that "there is evidence that non-compete clauses increase employee training and other forms of investment,"[38] and describes two studies demonstrating that increased non-compete clause enforceability increased firm-provided training and investment..[39] It also

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[34] NPRM Part II.B.2.a.

[35] NPRM Part VII.B.2.c.

[36] Umit G. Gurun, Noah Stoffman, & Scott E. Yonker. *Unlocking Clients: The Importance of Relationships in the Financial Advisory Industry*, 141 J. Fin. Econ. 1218 (2021)

[37] NPRM Part II.B.2.e.

[38] *Id.*

[39] Evan Starr, *Consider This: Training, Wages, and the Enforceability of Non-Compete Clauses*, 72 I.L.R. Rev. 783, 799 (2019) (moving from mean non-compete enforceability to no non-compete clause enforceability would decrease the number of workers receiving training by 14.7% in occupations that use non-compete clauses at a high rate); Jessica Jeffers, *The Impact of Restricting Labor Mobility on Corporate Investment and Entrepreneurship* 22 (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3940393 (knowledge-intensive firms invest 32% less in capital equipment following decreases in the enforceability of non-compete clauses).

describes studies that examine non-compete clause use and investment.[40] Despite the studies, the NPRM concludes, "the evidence that non-compete clauses benefit workers or consumers is scant."[41] In other words, the NPRM treats asymmetrically the evidence of harms (mixed evidence given great credence) and benefits (robust evidence given no credence). These early examples of cherry-picking evidence that conforms to the narrative provide little confidence in the integrity of the rulemaking process or the ultimate outcome.

Implicitly, though, the NPRM credits some business justifications for non-compete provisions. It excludes from the ban those non-compete clauses associated with the sale of a business, implicitly acknowledging that these non-compete clauses are necessary to protect the goodwill of the transferred business. Also, the NPRM likely credits business justifications when it seeks comment on whether senior executives should be covered by the rule. Nonetheless, on its face, the NPRM expressly discounts business justifications and makes no effort to distinguish and determine circumstances where investment incentives are important.

The NPRM also discounts procompetitive business justifications by asserting that trade secret law, non-disclosure agreements, and other mechanisms can be used to protect firm investments. While the NPRM explains that these mechanisms may protect investments, the existing record provides no evidence that these mechanisms are effective substitutes for non-compete agreements.[42] The NPRM cites no instances where these mechanisms have been used effectively in lieu of non-compete clauses, even though natural experiments exist and could be studied (*e.g.*, when states have changed the enforceability of non-compete clauses). "[M]erely identifying alternative mechanisms to solve a potential employee investment problem does not provide . . . guidance as to which mechanism achieves the objective at the lowest social cost."[43] Moreover, the NPRM's observation that firms successfully operate in states where non-compete clauses are not enforceable is unpersuasive; the NPRM offers no meaningful cross-state comparisons and the observation does not show that firms and competition are equally or even more successful in those states than in states where non-compete clauses are permissible.

II. The Proposed Non-Compete Clause Rule Will Trigger Numerous And Likely Successful Legal Challenges Regarding the Commission's Authority to Issue the Rule

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[40] Matthew S. Johnson & Michael Lipsitz, *Why Are Low-Wage Workers Signing Noncompete Agreements?*, 57 J. Hum. Res. 689, 700 (2022) (finding firms that use non-compete clauses in hair salon industry train employees at 11% higher rate and increase investment in particular customer-attraction device by 11%); Evan P. Starr, James J. Prescott, & Norman D. Bishara, *Noncompete Agreements in the U.S. Labor Force*, 64 J. L. & Econ. 53, 53 (2021) (finding no statistically significant impact on training and trade secrets from use of non-compete clauses, but unable to examine other types of investments).

[41] NPRM Part IV.B.3.

[42] There is a limited literature regarding the efficacy of trade secret protection and non-disclosure agreements. *See* Jie Gong & I.P.L. Png, *Trade Secrets Law and Inventory Efficiency: Empirical Evidence from U.S. Manufacturing*, https://ssrn.com/abstract=2102304 (July 8, 2012) (investigating effects of operational know-how information spillovers under various levels of enforcement of trade secret law).

[43] Camila Ringeling, Joshua D. Wright, et. al, Noncompete Clauses Used in Employment Contracts, Comment of the Global Antitrust Institute 6 (Feb. 7, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3534374.

This section describes the numerous, and meritorious, legal challenges that undoubtedly will be launched against the Non-Compete Clause Rule. Defending these challenges will entail lengthy litigation that will consume substantial staff resources. I anticipate that the Rule will not withstand these challenges, so the Commission majority essentially is directing staff to embark on a demanding and futile effort. In the face of finite and scarce resources, this NPRM is hardly the best use of FTC bandwidth.

There are numerous paths for opponents to challenge the Commission's authority to promulgate the Non-Compete Clause Rule. First, I question whether the FTC Act provides authority for competition rulemaking. The NPRM states that the Commission proposes the Non-Compete Clause Rule pursuant to Sections 5 and 6(g) of the FTC Act. Section 6(g) of the FTC Act authorizes the Commission to "make rules and regulations for the purpose of carrying out the provisions of the subchapter" where Section 6(g) otherwise provides that the Commission may "from time to time classify corporations."[44] Section 6(g) was believed to provide authority only for the Commission to adopt the Commission's procedural rules. For decades, consistent with the statements in the FTC Act's legislative history, Commission leadership testified before Congress that the Commission lacked substantive competition rulemaking authority.[45]

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[44] 15 U.S.C. § 46(g). Section 6 of the FTC Act provides

> **§46. Additional powers of Commission**
>
> The Commission shall also have power . . .
>
> **(g) Classification of corporations; regulations**
>
> From time to time classify corporations and (except as provided in section 57a(a)(2) of this title) to make rules and regulations for the purpose of carrying out the provisions of this subchapter.

[45] *See* Nat'l Petroleum Ref'rs Ass'n v. FTC, 482 F.2d 672, 696 nn. 38, 39 (D.C. Cir. 1973). *See also* Noah Joshua Phillips, *Against Antitrust Regulation*, American Enterprise Institute Report 3, https://www.aei.org/research-products/report/against-antitrust-regulation/ (Oct. 13, 2022) ("[T]he Conference Committee [considering legislation that created the Federal Trade Commission] was between two bills, neither of which contemplated substantive rulemaking. . . . The legislative history does not demonstrate congressional intent to give the FTC substantive rulemaking power: The House considered and rejected it, the Senate never proposed it, and neither the Conference Committee's report nor the final debates mentioned it."); 51 Cong. Rec. 12916 (1914), reprinted in THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 4368 (Earl W. Kintner ed., 1982) statement of Sen. Cummins) ("[I]f we were to attempt to go further in this act and to give the commission the authority to prescribe a code of rules governing the conduct of the business men of this country for the future, we would clash with the principle that we can not confer upon the commission in that respect legislative authority; but we have not made any such attempt as that, and no one proposes any attempt of that sort."); *id.* at 14932, reprinted in THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 4732 (Earl W. Kintner ed., 1982) (statement of Rep. Covington) ("The Federal trade commission will have no power to prescribe the methods of competition to be used in the future. In issuing orders it will not be exercising power of a legislative nature . . . The function of the Federal trade commission will be to determine whether an existing method of competition is unfair, and, it is finds it to be unfair, to order the discontinuance of its use. In doing this it will exercise power of a judicial nature."); *id.* at 13317, reprinted in THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 4675 (Earl W. Kintner ed., 1982) (statement of Sen Walsh) ("We are not going to give to the trade commission the general power to regulate and prescribe rules under which the business of this country shall in the future be conducted; we propose simply to give it the power to denounce as unlawful a particular practice that is pursued by that business.").

Ignoring this history, the Commission embarked on a substantive rulemaking binge in the 1960s and 1970s.[46] The vast majority of these substantive rules pertained to consumer protection issues. Only one substantive rule was grounded solely in competition;[47] that rule was not enforced and subsequently was withdrawn.[48] Another substantive rule was grounded in both competition and consumer protection principles, and prompted a federal court challenge. There, the D.C. Circuit in 1973 held in *National Petroleum Refiners*[49] that the FTC did have the power to promulgate substantive rules.

Two years later, however, Congress enacted the Magnuson-Moss Act,[50] which required substantive consumer protection rules to be promulgated with heightened procedural safeguards under a new Section 18 of the FTC Act. Notably, the Magnuson-Moss Act expressly excluded rulemaking for unfair methods of competition from Section 18. FTC Chairman Miles Kirkpatrick (1970-73) explained that it was not clear whether Congress in the Magnuson-Moss Act sought to clarify existing rulemaking authority or to grant substantive rulemaking authority to the FTC for the first time.[51] If the latter, then the FTC only has substantive *consumer protection* rulemaking power, and lacks the authority to engage in substantive *competition* rulemaking. This uncertainty about the language of the statute will be a starting point for challenges of the Non-Compete Clause Rule.

Second, the Commission's authority for the Rule likely will be challenged under the major questions doctrine, which the Supreme Court recently applied in *West Virginia v. EPA*.[52] Under the major questions doctrine, "where a statute . . . confers authority upon an administrative agency," a court asks "whether Congress in fact meant to confer the power the agency has asserted."[53] The Supreme Court explained in *West Virginia v. EPA* that an agency's exercise of statutory authority involved a major question where the "history and the breadth of the authority that the agency has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority."[54]

Challengers will ask a court to determine whether today's NPRM constitutes a major question. Using Justice Gorsuch's concurrence as a guide, agency action will trigger the application of the major questions doctrine if the agency claims, among other things, the power to (1) resolve a

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[46] *See* TIMOTHY J. MURIS & HOWARD BEALES, III, THE LIMITS OF UNFAIRNESS UNDER THE FEDERAL TRADE COMMISSION ACT 13 (1991).

[47] FTC Men's and Boy's Tailored Clothing Rule, 16 C.F.R. § 412 (1968).

[48] Notice of Rule Repeal, 59 Fed. Reg. 8527 (1994).

[49] Nat'l Petroleum Ref'rs Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973).

[50] Magnuson-Moss Warranty – Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975).

[51] *See* Miles W. Kirkpatrick, *FTC Rulemaking in Historical Perspective* 48 Antitrust L.J. 1561, 1561 (1979) ("One of the most important aspects of the Magnuson-Moss Act was its granting, or confirmation, depending upon your reading of the law at that time, of the FTC's rulemaking powers.").

[52] West Virginia v. EPA, 142 S. Ct. 2587 (2022).

[53] *Id.* at 2608.

[54] *Id.*

matter of great political significance, (2) regulate a significant portion of the American economy, or (3) intrude in an area that is the particular domain of state law.[55] First, the regulation of non-compete clauses is a question of political significance; Congress has considered and rejected bills significantly limiting or banning non-competes on numerous occasions,[56] a strong indication that the Commission is trying to "work around" the legislative process to resolve a question of political significance.[57] Second, the Rule proposes to regulate a significant portion of the American economy through a ban on non-competes. According to the NPRM, the "Commission estimates that approximately one in five American workers – or approximately 30 million workers – is bound by a non-compete clause."[58] Thus, the Non-Compete Clause Rule indisputably will negate millions of private contractual agreements and impact employer/employee relationships in a wide variety of industries across the United States. Third, regulation of non-compete agreements has been the particular domain of state law. As the NPRM explains, 47 states permit non-competes in some capacity, while three states have chosen to prohibit them entirely, and state legislatures have been active in this area recently.[59]

If a court were to conclude that the Non-Compete Clause Rule is a major question, the FTC would be required to identify clear Congressional authorization to impose a regulation banning non-compete clauses. Yet, as discussed above, that clear authorization is unavailable. The language in Section 6(b) is far from clear, and largely discusses the Commission's classification of corporations. I do not believe that Congress gave the FTC authority to enact substantive rules related to any provision of the FTC Act using this "oblique" and unclear language. In addition, the decision by Congress to omit unfair methods of *competition* rulemaking in the Magnuson-Moss Act, which immediately followed the decision in *National Petroleum Refiners*, is additional evidence that Congress has not clearly authorized the FTC to make competition rules that may have significant political or economic consequences. Moreover, Congress did not remove the known ambiguity when it enacted the FTC Improvements Act of 1980.[60]

Third, the authority for the Non-Compete Clause Rule may be challenged under the non-delegation doctrine. The doctrine is based on the principle that Congress cannot delegate its legislative power to another branch of government, including independent agencies.[61]

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[55] *Id.* at 2600-01 (Gorsuch, J. concurring).

[56] Russell Beck, A *Brief History of Noncompete Regulation*, FAIR COMPETITION LAW (Oct. 11, 2021), https://faircompetitionlaw.com/2021/10/11/a-brief-history-of-noncompete-regulation/.

[57] West Virginia v. EPA, 142 S.Ct. at 2600 (Gorsuch, J. concurring).

[58] NPRM Part II.B.1.a.

[59] *Id.* Part II.C.1.

[60] *See* H.R. Rep. No. 96-917, 96th Cong., 2d sess. 29-30 (1980), reprinted in THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 5862 (Earl W. Kintner ed., 1982) (conference report on FTC Improvements Act of 1980 explaining that when adopting a restriction on standards and certification rulemaking brought as an unfair or deceptive act or practice, conferees were not taking a position on the Commission's authority to issue a trade regulation rule defining 'unfair methods of competition' pursuant to section 6(g). "The substitute leaves unaffected whatever authority the Commission might have under any other provision of the FTC Act to issue rules with respect to 'unfair methods of competition.'").

[61] Five Supreme Court justices have expressed interest in reconsidering the Court's prior thinking on the doctrine, which increases the risk that a challenge may be successful. *See Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Alito, J. concurring) (stating with respect to the nondelegation doctrine that "[i]f a majority of this Court

Since the 1920s, the Supreme Court has found that Congress has not made an improper delegation of legislative power so long as Congress has set out "an intelligible principle to which the person or body authorized to fix [rules] is directed to conform."[62] Applying this principle in *Schechter Poultry*,[63] the Supreme Court approved Congressional authorization for the FTC to prohibit unfair methods of competition, relying on the Commission's administrative enforcement proceedings where the Commission acts as "a quasi judicial body" and that "[p]rovision was made for formal complaint, for notice and hearing, for appropriate findings of fact supported by adequate evidence, and for judicial review . . .".[64] The Court simultaneously found that provisions of the National Industrial Recovery Act to issue "codes of fair competition" were *improper* delegations of legislative power, distinguishing the impermissibly broad fair competition codes from the FTC Act's approach to address unfair methods of competition that are "determined in particular instances, upon evidence, in light of particular competitive conditions[.]".[65]

Notably, the Commission's proposed ban on non-compete clauses abandons the Commission's procedures that led the Supreme Court in *Schechter Poultry* to find that the Commission's enforcement of "unfair methods of competition" does not constitute an improper delegation of legislative power. In addition, to the extent that the Commission's Section 5 Policy Statement (which provides the basis for determining that non-compete clauses are an unfair method of competition) abandons the consumer welfare standard to pursue multiple goals, including protecting labor, the Commission's action more closely resembles the National Industrial Recovery Act codes that also sought to implement multiple goals under the guise of codes of fair competition.

IV. Comments are Encouraged

The NPRM invites public comment on many issues. I strongly encourage the submission of comments from all interested stakeholders. After all, unlike rulemaking for consumer protection rules under the Magnuson-Moss process, ***this is likely the only opportunity for public input before the Commission issues a final rule. For this reason, it is important for commenters to address the proposed alternatives to the near-complete ban on non-compete provisions.*** To the extent that the NPRM proposes alternatives to the current proposed rule, if the Commission were subsequently to adopt one of the alternatives, which would be a logical outgrowth of the current

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were willing to reconsider the approach we have taken for the past 84 years. I would support that effort"); *id.* at 2131 (Gorsuch, J., dissenting, joined by Chief Justice Roberts and Justice Thomas) (expressing desire to "revisit" the Court's approach to the nondelegation doctrine); *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (statement of Kavanaugh, J. respecting the denial of certiorari); Amy Coney Barrett, *Suspension and Delegation*, 99 Cornell L. Rev. 251, 318 (2014).

[62] J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

[63] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[64] *Id.* at 533.

[65] *Id.*

proposed rulemaking,[66] there would be no further opportunity for public comment. Moreover, the Commission believes that if it were to adopt alternatives that differentiate among categories of workers, the various rule provisions would be severable if a court were to invalidate one provision. Consequently, it is important for the public to address each of the alternatives proposed in the NPRM because the comment period on the proposed rule is the only opportunity for public input on those alternatives.

In addition to the issues for which the NPRM invites comments, I encourage stakeholders to address the following points:

- The NPRM references some academic studies regarding non-competes. What other academic literature addresses the issues in the NPRM, including the procompetitive justifications for non-compete provisions?

- The NPRM describes papers that exploit natural experiments to estimate the effects of enforcing non-compete clauses. While this approach ensures that the estimates are internally valid, it reflects the causal effects of non-compete agreements only in the contexts within which they are estimated. What should the Commission consider to understand whether and when these estimates are externally valid? How can the Commission know that the estimates calculated from the contexts of the literature are representative of the contexts outside of the literature?

- The NPRM draws conclusions based on "the weight of the literature," but the literature on the effects of non-compete agreements is limited, contains mixed results, and is sometimes industry-specific. Which conclusions in the NPRM are supported by the weight of the literature? Which conclusions in the NPRM contradict the weight of the literature? Which conclusions in the NPRM require additional evidence before they can be considered substantiated?

- Where the evidence provided in the NPRM is limited, is the evidence sufficient to support either the proposed ban on non-compete clauses or the proffered alternative approaches to the proposed ban?

- What are the benefits and drawbacks of the currently proposed ban compared to the proposed alternative rule that would find a presumption of unlawfulness, including the role of procompetitive justifications in rebutting a presumption?

[66] *See* Owner-Operator Indep. Drivers Ass'n v. Fed. Motor Carrier Safety Admin., 494 F.3d 188, 210 (D.C. Cir. 2007); *see also* Agape Church, Inc. v. FCC, 738 F.3d 397, 412 (2013) (holding that FCC "sunset" rule was a logical outgrowth when proposed rule gave public notice that a viewability rule was in danger of being phased out, *i.e.*, a sunset provision).

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Dissenting Statement of Commissioner Christine S. Wilson

In the Matter of O-I Glass, Inc. and
In the Matter of Ardagh Group S.A.
File No. 211-0182

January 4, 2023

Today, the Commission announced that it has accepted, subject to final approval, consent agreements with two companies in the glass container industry. The consents resolve allegations that the use of non-compete agreements in employee contracts constitutes an unfair method of competition that violates Section 5 of the FTC Act. These cases, which allege stand-alone violations of Section 5, are among the first to employ the approach that the recently issued Section 5 Policy Statement[1] describes. For the reasons explained below, I dissent.

Context is important. Under current leadership, the Commission has demanded significant volumes of information from parties under investigation, but not all requested information is related to traditional competition analysis.[2] In addition, this Commission has declared its willingness to take losing cases to court.[3] When faced with the expense of complying with expansive demands for documents and other material, and the possibility of an enforcement

[1] Fed. Trade Comm'n. Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/p221202sec5enforcementpolicystatement_002.pdf.

[2] *See* Christine S. Wilson, Comm'r, Fed. Trade Comm'n, *There's Nothing New Under the Sun: Reviewing Our History to Foresee the Future*, Keynote Address at GCR Live Merger Control 8-9, Virtually and Brussels, Belgium (October 7, 2021), https://www.ftc.gov/system/files/documents/public_statements/1597798/gcr_merger_control_keynote_final.pdf.

[3] *See* Lina M. Kahn, Chair, Fed. Trade Comm'n, *How FTC Chair Lina Khan wants to modernize the watchdog agency*, Marketplace interview with Kimberly Adams, https://www.marketplace.org/shows/marketplace-tech/how-ftc-chair-lina-khan-wants-to-modernize-the-watchdog-agency/, (June 17, 2022) ("We always want to win the cases that we're bringing. That said, it's no secret that in certain areas, you know, there's still work to be done to fully explain to courts how our existing laws and existing authorities, which go back over 100 years, apply in new context. . . . And I think there can be a serious cost of inaction. So we really have a bias in favor of action."); David McCabe, *Why Losing to Meta in Court May Still Be a Win for Regulators*, New York Times, https://www.nytimes.com/2022/12/07/technology/meta-vr-antitrust-ftc.html (Dec. 7, 2022) ("In April, Ms. Khan said at a conference that if 'there's a law violation" and agencies "think that current law might make it difficult to reach, there's huge benefit to still trying.' She added that any courtroom losses would signal to Congress that lawmakers needed to update antitrust laws to better suit the modern economy. 'I'm certainly not somebody who thinks that success is marked by a 100 percent court record,' she said.").

action regardless of the merits, parties under investigation rationally may express a willingness to settle. Under these circumstances, staff's investigation typically is quite limited.

Noteworthy Aspects of the Complaints

There are several noteworthy aspects of the Complaints issued against O-I Glass and Ardagh. The first is the brevity of these documents; each Complaint runs three pages, with a large percentage of the text devoted to boilerplate language. Given how brief they are, it is not surprising that the complaints are woefully devoid of details that would support the Commission's allegations. In short, I have seen no evidence of anticompetitive effects that would give me reason to believe that respondents have violated Section 5 of the FTC Act.

The second noteworthy aspect of these complaints is their omission of any allegations that the non-compete provisions at issue are unreasonable, a significant departure from hundreds of years of legal precedent. The first complaint alleges that O-I Glass entered into non-compete agreements with employees that prohibited them from working for competitors of O-I in the United States for one year following the conclusion of their employment with O-I.[4] And the second complaint alleges that Ardagh's contracts typically prohibited employees from performing the same or substantially similar services to those the employee performed for Ardagh for any glass container competitor of Ardagh in the United States, Canada, or Mexico for two years following the conclusion of their employment with Ardagh.[5]

Courts have long analyzed the temporal length, subject matter, and geographic scope of non-compete agreements to determine whether those agreements are unreasonable; when non-compete agreements are not found to be unreasonable, courts repeatedly have held that they do not violate the antitrust laws.[6] In the cases before us, the Commission makes no reasonableness assessment regarding the duration or scope of the non-compete clauses. Instead, it seems to treat the non-compete clauses as per se unlawful under Section 5 of the FTC Act. But the Seventh Circuit held that under Section 5, "[r]estrictive [non-compete] clauses . . . are legal unless they are unreasonable as to time or geographic scope[.]".[7] Notably, the Seventh Circuit further found that "even if [the non-compete] restriction is unreasonable as to geographic scope," it was "not prepared to say that it is a per se violation of the antitrust laws."[8]

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[4] O-I Glass, Inc. Complaint ¶ 7.

[5] Ardagh Group S.A. Complaint ¶ 7.

[6] *See* United States v. Empire Gas Corp., 537 F.2d 296, 307-08 (8th Cir. 1976); Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 267 (7th Cir. 1981); Newburger, Loeb & Co., Inc. v. Gross, 563 F.2d 1057, 1081-83 (2d Cir. 1977); Bradford v. New York Times Co., 501 F.2d 51, 57-59 (2d Cir. 1974).

[7] Snap-On Tools Corp. v. Fed. Trade Comm'n, 321 F.2d 825, 837 (7th Cir. 1963).

[8] *Id.*

A third noteworthy aspect of the complaints concerns the absence of allegations that the non-compete clauses in the O-I Glass and Ardagh contracts were enforced.[9] Absent efforts to enforce a non-compete provision, courts have been unwilling to find a violation of the antitrust laws.[10]

Fourth, the complaints assert that the non-compete clauses impede entry or expansion of rivals in the glass container industry, based on a claim that barriers to entry in the glass container industry include "the ability to identify and employ personnel with skills and experience in glass container manufacturing."[11] But the Commission makes no factual allegations regarding the inability of any rival to enter or expand. Moreover, this asserted barrier to entry and expansion in the industry is newly alleged by the Commission; in 2013, the Commission challenged the proposed merger of Ardagh Group S.A. and Saint-Gobain Containers, Inc. following a lengthy and thorough investigation. The complaint described in detail the barriers to entry in the glass container industry but did not reference the difficulty of obtaining experienced employees.[12]

Continuing in this vein, the complaints here also assert that the non-compete provisions reduce employee mobility and "caus[e] lower wages and salaries, reduced benefits, less favorable working conditions, and personal hardships to employees."[13] But the complaints do not identify a relevant market for skilled labor as an input to glass container manufacturing, and fail to allege a market effect on wages or other terms of employment. Even the Analysis to Aid Public Comment relies only on academic literature that discusses the effects of non-competes, albeit not in the glass container industry.

Similarly, the complaints allege that more than 1,000 employees at O-I and more than 700 employees at Ardagh were subject to non-compete agreements when the Commission opened the investigation, and that some of those employees were essential to a rival's entry or expansion.[14]

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[9] *Compare* O-I Glass, Inc. Complaint and Ardagh Group S.A. Complaint *with* Prudential Security, Inc. Complaint ¶¶ 18-21.

[10] O-Regan v. Arbitration Forums, Inc., 121 F.3d 1060, 1065-66 (7th Cir. 1997) ("to apply antitrust laws to restrictive employment covenants, there must be some attempted enforcement of an arguably overbroad portion of the covenant in order for there to be a federal antitrust violation."); Lektro-Vend Corp. v. Vendo Co., 660 F.2d at 267.

[11] O-I Glass, Inc. Complaint ¶ 6; Ardagh Group S.A. Complaint ¶ 6.

[12] The complaint in that merger challenge alleged that:

> "Effective entry or expansion into the relevant markets would neither be timely, likely, or sufficient to counteract the Acquisition's likely anticompetitive effects. The barriers facing potential entrants include the large capital investment necessary to build a glass plant, the need to obtain environmental permits, the high fixed costs of operating a glass plant, existing long-term contracts that foreclose much of the market, the need for specific manufacturing knowledge that is not easily transferred from other industries, and the molding technologies and extensive mold libraries already in place at existing manufacturers."

In the Matter of Ardagh Group S.A. and Saint-Gobain Containers, Inc., File No. 131-0087, https://www.ftc.gov/sites/default/files/documents/cases/2013/07/130701ardaghcmpt.pdf (2013) (Complaint ¶ 42.

[13] O-I Glass, Inc. Complaint ¶ 8; Ardagh Group S.A. Complaint ¶ 8.

[14] O-I Glass, Inc. Complaint ¶ 7; Ardagh Group S.A. Complaint ¶ 7.

The allegations imply that, conversely, many employees that were subject to non-compete agreements did *not* have industry-specific skills.[15] Consider, for example, employees in the glass container industry who worked in the fields of human resources or accounting, with skills sets that are easily transferable across industries. If they were subject to non-competes following their departure from O-I or Ardagh, these employees easily could seek employment in other industries, including retailing and the services sector. It is implausible that precluding employees with easily transferable skill sets from working for rivals in glass container manufacturing would have an impact on competition in any appropriately defined relevant market.

Absent any evidence, the Commission adopts the approach of the Section 5 Policy Statement and baldly alleges that the use of non-compete agreements "has a tendency or likely effect of harming competition, consumers, and workers," offering only a hypothesized outcome.

Business Justifications

The complaints improperly discount business justifications for the non-compete provisions. First, they allege in conclusory fashion that "[a]ny legitimate objectives . . . could have been achieved through significantly less restrictive means, including . . . confidentiality agreements that prohibit employees and former employees from disclosing company trade secrets and other confidential information."[16] This assertion is unsubstantiated.

Second, the complaints do not address the business justification and procompetitive benefit of employer-provided training. The complaints allege that identifying and employing personnel with skills and experience in glass container manufacturing is a barrier to entry, which implies that employee training and experience is essential and that the desired training is not available from sources other than industry incumbents. Firm-provided training is an accepted and documented business justification for non-compete clauses; firms are less willing to invest in employee training if employees leave the firm after receiving training.[17] The complaints do not allege that there is a less restrictive alternative for non-compete provisions regarding firm-provided training. Moreover, it is ironic that the orders issued in these matters may lead to reduced firm-sponsored training, which may (1) reduce the available trained labor that would allow entry or expansion of competing firms and (2) harm the same employees at O-I Glass and Ardagh that the cases claim to help.

Although the complaints are dismissive of business justifications, the relief obtained implicitly acknowledges the existence of legitimate business justifications for non-compete clauses. Specifically, the Agreements Containing Consent Orders prohibit the use of non-compete clauses for covered employees, which are described by a list of positions in Appendix A. Careful review

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[15] *See also* O-I Glass, Inc. Decision and Order Appendix A and Ardagh Group S.A. Decision and Order Appendix A (listing positions for which the use of non-compete agreements is prohibited, which includes positions that have general skills).

[16] O-I Glass, Inc. Complaint ¶ 9; Ardagh Group S.A. Complaint ¶ 9.

[17] *See* Evan Starr, *Consider This: Training, Wages, and the Enforceability of Non-Compete Clauses*, 72 I.L.R. Rev 783, 796-97 (2019); Matthew S. Johnson & Michael Lipsitz, *Why Are Low-Wage Workers Signing Noncompete Agreements?*, 57 J. Hum. Res. 689, 711 (2022).

of those lists reveals that senior executives and employees involved in research and development are not included. Although not acknowledged in the Analysis to Aid Public Comment, the Commission here implicitly has credited at least some business justifications for non-compete clauses.

Concerns for Due Process

I am concerned whether the respondents had notice that their conduct would be viewed as unlawful. As noted above, the allegations here depart from a centuries-long line of precedent regarding the appropriate analysis of the legality of non-compete provisions, and conflict with a Seventh Circuit holding specific to Section 5 of the FTC Act. The allegations are premised on the Section 5 Policy Statement issued in November 2022, which also represents a radical departure from precedent. But the complaints in these matters challenge conduct of O-I Glass and Ardagh that predates the November 2022 Section 5 Policy Statement. The Second Circuit explained in *Ethyl* that "the Commission owes a duty to define the conditions under which conduct . . . would be unfair so that businesses will have an inkling as to what they can lawfully do rather than be left in a state of complete unpredictability."[18] Given the state of the law for hundreds of years prior to this enforcement challenge, I believe notice was lacking.

[18] E.I. du Pont de Nemours & Co. v. F.T.C., 729 F.2d 128, 139 (2d Cir. 1984). *See also id.* at 136 ("Review by the courts was essential to assure that the Commission would not act arbitrarily or without explication but according to definable standards that would be properly applied.").

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Dissenting Statement of Commissioner Christine S. Wilson

In the Matter of Prudential Security
File No. 211-0026

January 4, 2023

Today, the Commission announced that it has accepted, subject to final approval, a consent agreement with Prudential Security, Inc. The consent resolves allegations that the use of non-compete agreements in employee contracts constitutes an unfair method of competition that violates Section 5 of the FTC Act. This case, which alleges a stand-alone violation of Section 5, is one of the first to employ the approach that the recently issued Section 5 Policy Statement[1] describes. For the reasons explained below, I dissent.

One point is worth emphasizing: my vote to oppose issuance of the complaint does *not* mean that I endorse or condone the conduct of Prudential Security. The company required its security guards to sign non-compete agreements that prohibited employees from accepting employment with a competing business for two years following conclusion of their employment with Prudential. Moreover, a liquidated damages provision required employees to pay Prudential $100,000 for violations of the non-compete agreement. Based on these facts, it seems appropriate that a Michigan state court found that the non-compete agreements were unreasonable and unenforceable under state law.[2]

Instead, my vote reflects my continuing disagreement with the new Section 5 Policy Statement and its application to these facts. When it was issued, I expressed concern that the Policy Statement would be used to condemn conduct summarily as an unfair method of competition based on little more than the assignment of adjectives.[3] Unfortunately, that is the approach taken in this case.

The Complaint offers no evidence of anticompetitive effect in any relevant market. According to the Complaint, Prudential's use of non-compete agreements "has harmed employees" by limiting

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[1] Fed. Trade Comm'n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/p221202sec5enforcementpolicystatement_002.pdf.

[2] Complaint ¶ 22.

[3] *See* Christine S. Wilson, Comm'r, Fed. Trade Comm'n, Dissenting Statement Regarding the "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act" (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyWilsonDissentStmt.pdf.

their ability to work for other firms in the security guard industry."[4] It asserts that Prudential's use of non-compete agreements is "coercive and exploitative" and "tends to negatively affect competition conditions"[5] – but it appears that those "competition conditions" pertain only to individual employees. Similarly, the Complaint offers only a conclusory assertion that "[a]ny possible legitimate objectives . . . could have been achieved through significantly less restrictive means, including . . . confidentiality agreements that prohibited disclosure of any confidential information."[6] This assertion is unsubstantiated.

Another aspect of the case also concerns me. This enforcement action is designed not to provide effective relief but instead to signal activity with respect to non-compete agreements in the employment arena. As the Complaint describes, Prudential sold the bulk of its security guard business to another security guard company, Titan Security Group. The former Prudential security guards who now work for Titan are not subject to non-compete agreements.[7] Moreover, now that Prudential no longer provides security guard services, there is no reason for the company to seek to enforce non-compete agreements against former Prudential security guards who did not move to Titan.

I wish it were accurate to say that this case (with apologies to Shakespeare) is a tale of sound and fury, signifying nothing. Unfortunately, it has great significance: it foreshadows how the Commission will apply the new Section 5 Policy Statement. Practices that three unelected bureaucrats find distasteful will be labeled with nefarious adjectives and summarily condemned, with little to no evidence of harm to competition. I fear the consequences for our economy, and for the FTC as an institution.

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[4] Complaint ¶¶ 23, 25.

[5] Complaint ¶ 29.

[6] Complaint ¶ 26.

[7] Complaint ¶ 16.

Non Delivery Report

From: Mail Delivery System [MAILER-DAEMON@mgcp4.bloomberg.com]
Sent: 1/5/2023 4:10:25 PM
To: (b)(6)
Subject: Undeliverable: Non-compete Clause Rulemaking and Cases
Attachments: Non-compete Clause Rulemaking and Cases

Your message did not reach some or all of the intended recipients.

Subject:Non-compete Clause Rulemaking and Cases
Sent:1/5/2023 4:10:31 PM

The following recipient(s) cannot be reached:

(b)(6) on 1/5/2023 4:10:31 PM
Diagnostic code = NoDiagnostic; Reason code = TransferFailed; Status code = 500
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Delivery has failed to these recipients or groups:

(b)(6)
A problem occurred while delivering your message to this email address. Try sending your message again.

The following organization rejected your message: [104.47.57.110].

Diagnostic information for administrators:

Generating server: mgcp4.bloomberg.com
(b)(6)
[104.47.57.110]
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Original message headers:

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From: "Wilson, Christine" <cwilson3@ftc.gov>
Subject: Non-compete Clause Rulemaking and Cases
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Thread-Index: Adkh3TtPyH1AA8bAT7yoS/X53+Z2kw==
Date: Thu, 5 Jan 2023 21:10:14 +0000
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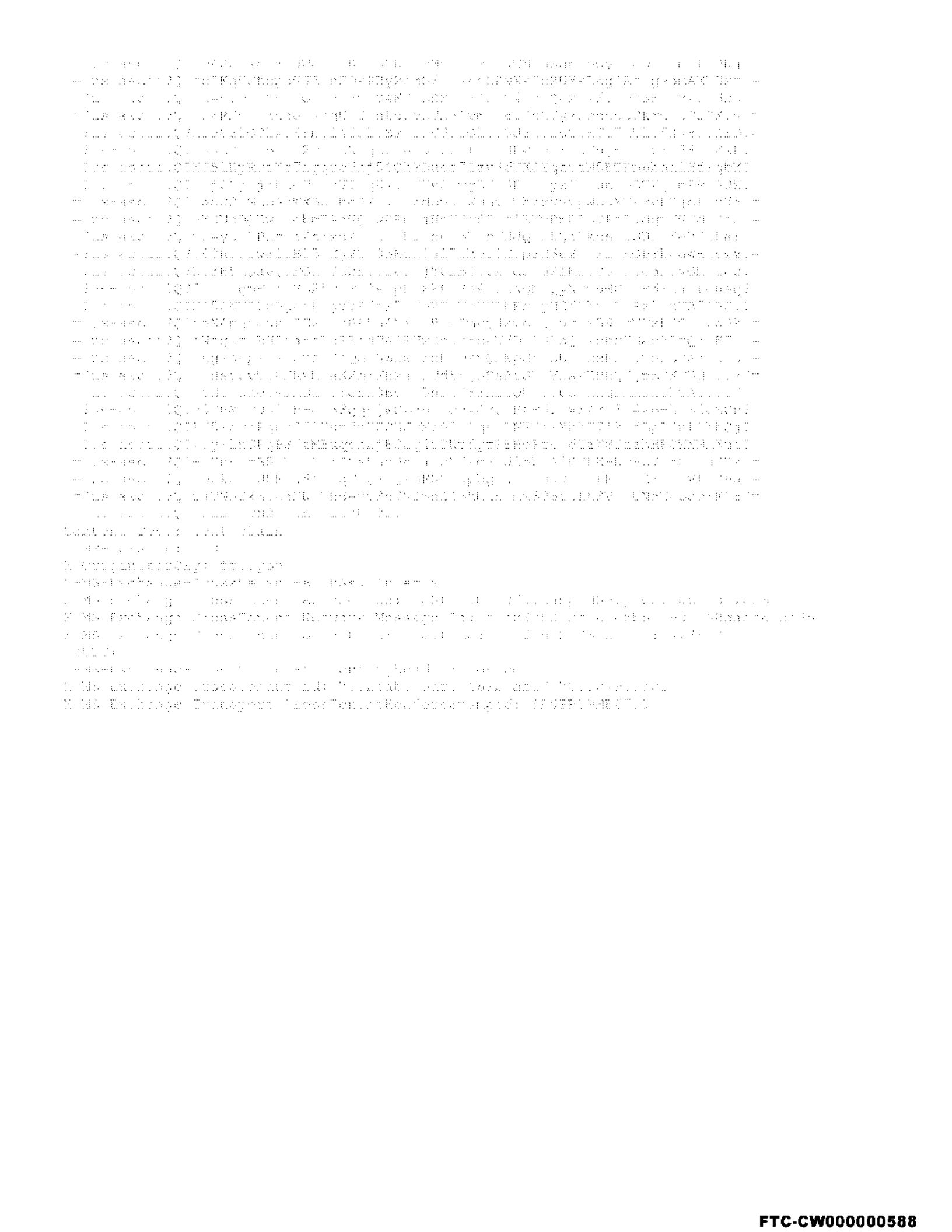

Message

From: Wilson, Christine [cwilson3@ftc.gov]
Sent: 1/5/2023 4:10:14 PM
Subject: Non-compete Clause Rulemaking and Cases

Non Delivery Report

From: Microsoft Outlook [MicrosoftExchange329e71ec88ae4615bbc36ab6ce41109e@ftcprod.onmicrosoft.com]
Sent: 1/6/2023 4:12:13 PM
To: (b)(6)
Subject: Undeliverable: Non-compete Clause Rulemaking and Cases
Attachments: Non-compete Clause Rulemaking and Cases

Your message did not reach some or all of the intended recipients.

Subject:Non-compete Clause Rulemaking and Cases
Sent:1/6/2023 4:12:18 PM

The following recipient(s) cannot be reached:

(b)(6) on 1/6/2023 4:12:18 PM
Diagnostic code = MtsCongested; Reason code = TransferFailed; Status code = 540
< #5.4.316 smtp;550 5.4.316 Message expired, connection refused>

Delivery has failed to these recipients or groups:

(b)(6)
Your message wasn't delivered. Despite repeated attempts to deliver your message, the recipient's email system refused to accept a connection from your email system.

Contact the recipient by some other means (by phone, for example) and ask them to tell their email admin that it appears that their email system is refusing connections from your email server. Give them the error details shown below. It's likely that the recipient's email admin is the only one who can fix this problem.

For Email Admins
No connection could be made because the target computer actively refused it. This usually results from trying to connect to a service that is inactive on the remote host - that is, one with no server application running. For more information and tips to fix this issue see this article: https://go.microsoft.com/fwlink/?LinkId=389361

Message

From: Wilson, Christine [cwilson3@ftc.gov]
Sent: 1/5/2023 4:10:14 PM
Subject: Non-compete Clause Rulemaking and Cases
Attachments: Wilson non-compete rulemaking dissent - FINAL - 1-4-23.pdf; Wilson dissenting statement - glass container cases - FINAL - 1-3-23.pdf; Wilson dissenting statement - Prudential Security - FINAL - 1-3-23.pdf

Dear friends and colleagues,

Today, the Commission announced a Notice of Proposed Rulemaking ("NPRM") for a new Non-Compete Clause Rule that would ban nearly all non-compete clauses in employment settings. The announcement comes one day after the Commission rushed out three consent agreements that addressed challenges of non-compete clauses. For the many reasons explained in my dissenting statement (attached), I opposed issuing this NPRM.

Both the proposed rule and the complaints addressed by the consent agreements illustrate the way the Commission majority will exploit the flawed approach of the new Section 5 Policy Statement to condemn conduct that it disfavors. Under this approach, the Commission can simply label the conduct with nefarious-sounding but legally nebulous adjectives — in the case of non-compete clauses, "exploitive and coercive" — to establish liability, even when precedent finds the conduct to be legal. Under this approach to finding liability, no showing of anticompetitive effects is necessary.

This shortcut approach describes the Commission's challenge of Prudential Security, Inc. and provides two of the three independent bases for finding that non-compete clauses violate Section 5 of the FTC Act to justify the proposed new rule. When the Commission does *not* rely solely on adjectives, under the Section 5 Policy Statement, it need only show a "tendency" for the conduct to harm competition. The Commission employed that approach in the Commission's challenges to the non-compete clauses of O-I Glass and Ardagh Glass Group S.A., where the complaints offered only theory and conclusory allegations, not hard evidence of harm to labor markets and competition. My dissents in those three cases are also attached.

Without cases demonstrating that non-compete clauses harm competition, the NPRM turns to academic literature. But the studies in the current record yield results that often conflict and cannot support this sweeping proposal that bans nearly all non-compete clauses. Currently, all employees are treated alike, including senior executives. The literature also fails to support the Rule's dismissal of business justifications for non-competes.

Setting aside the substance of the rule, the Commission's competition rulemaking authority itself certainly will be challenged. The NPRM is vulnerable to meritorious challenges that (1) the Commission lacks authority to engage in "unfair methods of competition" rulemaking, (2) the major questions doctrine addressed in West Virginia v. EPA applies, and the Commission lacks clear Congressional authorization to undertake this initiative; and (3) assuming the agency does possess the authority to engage in this rulemaking, it is an impermissible delegation of legislative authority under the non-delegation doctrine, particularly because the Commission has replaced the consumer welfare standard with one of multiple goals.

Defending these challenges will entail lengthy litigation that will consume substantial staff resources. I anticipate that the Rule will not withstand these challenges, so the Commission majority essentially is directing staff to embark on a demanding and futile effort. In the face of finite and scarce resources, this NPRM is hardly the best use of FTC bandwidth.

Today's announcement also suggests possible alternatives to the proposed ban that covers nearly all workers. The NPRM solicits public comments on the proposed rule and the possible alternatives. This is the only chance to comment on the current Rule, its support (or lack thereof), its implications for competition and innovation, and the alternatives. I encourage all interested parties to comment fully.

As always, I look forward to hearing your comments and reactions.

All best,
Christine

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Dissenting Statement of Commissioner Christine S. Wilson
Regarding the Notice of Proposed Rulemaking for the Non-Compete Clause Rule

Commission File No. P201200-1

January 5, 2023

Today, the Commission announced a notice of proposed rulemaking ("NPRM") for a Non-Compete Clause Rule. "The proposed rule would provide that it is an unfair method of competition – and therefore a violation of Section 5 – for an employer to enter into or attempt to enter into a non-compete clause with a worker; [or to] maintain with a worker a non-compete clause . . ."[1] For the many reasons described below, on the current record, I do not support initiating the proposed rulemaking and consequently dissent.

The proposed Non-Compete Clause Rule represents a radical departure from hundreds of years of legal precedent that employs a fact-specific inquiry into whether a non-compete clause is unreasonable in duration and scope, given the business justification for the restriction. The Commission undertakes this radical departure despite what appears at this time to be a lack of clear evidence to support the proposed rule. What little enforcement experience the agency has with employee non-compete provisions is very recent (within the last week) and fails to demonstrate harm to consumers and competition. Lacking enforcement experience, the Commission turns to academic literature – but the current record shows that studies in this area are scant, contain mixed results, and provide insufficient support for the scope of the proposed rule. And one study illustrates clearly, in the financial services sector, the negative unintended consequences of suspending non-compete provisions, including higher fees and broker misconduct. The suspension of non-competes across all industry sectors in the U.S. undoubtedly will impose a much larger raft of unintended consequences.

Setting aside the substance of the rule, the Commission's competition rulemaking authority itself certainly will be challenged. The NPRM is vulnerable to meritorious challenges that (1) the Commission lacks authority to engage in "unfair methods of competition" rulemaking, (2) the major questions doctrine addressed in *West Virginia v. EPA* applies, and the Commission lacks clear Congressional authorization to undertake this initiative; and (3) assuming the agency does possess the authority to engage in this rulemaking, it is an impermissible delegation of legislative authority under the non-delegation doctrine, particularly because the Commission has replaced

[1] Notice of Proposed Rulemaking for Non-Compete Clause Rule ("NPRM") Part I (Jan. 5, 2023).

the consumer welfare standard with one of multiple goals. In short, today's proposed rule will lead to protracted litigation in which the Commission is unlikely to prevail.

The NPRM invites public comment on both a sweeping ban on non-competes and various alternatives pursuant to the Administrative Procedure Act, not the Magnuson-Moss Act. Stakeholders should note that ***this solicitation for public comment is likely the only opportunity they will have to provide input not just on the proposed ban, but also on the proposed alternatives***. For this reason, I encourage all interested parties to respond fully to all parts of the NPRM's solicitation of public comments.

Non-Compete Clauses Merit Fact-Specific Inquiry

Based on the current record, non-compete clauses constitute an inappropriate subject for rulemaking. The competitive effects of a non-compete agreement depend heavily on the context of the agreement, including the business justification that prompted its adoption. But don't take my word for it – the need for fact-specific inquiry aligns with hundreds of years of precedent. When assessing the legality of challenged non-compete agreements, state and federal courts (and English courts before them) have examined the duration and scope of non-compete clauses, as well as the asserted business justifications, to determine whether non-compete clauses are unreasonable and therefore unenforceable.[2]

The NPRM itself acknowledges, at least implicitly, the relevance of the circumstances surrounding adoption of non-compete clauses. For example, the NPRM proposes an exception to the ban on non-compete clauses for provisions associated with the sale of a business, acknowledging that these non-compete clauses help protect the value of the business acquired by the buyer.[3] Recognizing that senior executives typically negotiate many facets of their employment agreements, the NPRM distinguishes situations in which senior executives are subject to non-compete provisions.[4] And to stave off potential legal challenges, the NPRM proposes more carefully tailored alternatives to a sweeping ban on non-compete clauses that instead would vary by employee category.

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[2] *See, e.g.*, United States v. Addyston Pipe & Steel Co., 85 F. 271, 281 (6th Cir. 1898) (Taft, J.), *aff'd in relevant part*, 175 U.S. 211 (1899); Mitchel v. Reynolds, 1 P. Wms. 181 (1711).

[3] NPRM Part V, Section 910.3.

[4] Accordingly, the Commission seeks comments on whether senior executives should be treated differently from the proposed ban on non-compete clauses. *See* NPRM Parts IV.A.1.b, IV.A.1.c. In a similar vein, recent consent agreements issued for public comment that prohibit the use of non-compete agreements in the glass container industry do not prohibit non-compete clauses for senior executives and employees involved in research and development. *See* O-I Glass, Inc., File No. 211-0182, https://www.ftc.gov/system/files/ftc_gov/pdf/2110182o-iglassdraftorderappx.a.pdf (Jan. 4, 2023) (Decision and Order Appendix A); Ardagh Glass Group S.A., File No. 211-0182, https://www.ftc.gov/system/files/ftc_gov/pdf/2110182ardaghdraftorderappx.a.pdf (Jan. 4, 2023) (Decision and Order Appendix A); Christine S. Wilson, Comm'r, Fed. Trade Comm'n, Dissenting Statement regarding In the Matter of O-I Glass, Inc. and In the Matter of Ardagh Group S.A. (Jan. 4, 2023), https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/dissenting-statement-commissioner-christine-s-wilson-regarding-matter-o-i-glass-inc-ardagh-group-sa.

Despite the importance of context and the need for fact-specific inquiries, the Commission instead applies the approach of the newly issued Section 5 Policy Statement[5] to propose a near-complete ban on the use of non-compete clauses. Pursuant to this approach, the Commission invokes nefarious-sounding adjectives – here, "exploitive and coercive" – and replaces the evaluation of actual or likely competitive effects with an unsubstantiated conclusion about the "tendency" for the conduct to generate negative consequences by "affecting consumers, workers or other market participants."[6]

Using the approach of the Section 5 Policy Statement that enables the majority summarily to condemn conduct it finds distasteful, the Commission today proposes a rule that prohibits conduct that 47 states have chosen to allow.[7] Similarly, the Commission's proposed rule bans conduct that courts have found to be legal,[8] a concern the Commission dismisses with a claim that the Section 5 prohibition on "unfair methods of competition" extends beyond the antitrust laws. But the majority's conclusions and today's proposed rule forbid conduct previously found lawful under Section 5 of the FTC Act. Specifically, applying FTC Act Section 5, the Seventh Circuit found that "[r]estrictive [non-compete] clauses . . . are legal unless they are unreasonable as to time or geographic scope[.]"[9] In other words, the Seventh Circuit found that a fact-specific inquiry is required under Section 5.

The NPRM announced today conflicts not only with the Seventh Circuit's holding, but also with several hundred years of precedent. With all due respect to the majority, I am dubious that three unelected technocrats[10] have somehow hit upon the right way to think about non-competes, and that all the preceding legal minds to examine this issue have gotten it wrong. The current rulemaking record does not convince me otherwise.

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[5] Fed. Trade Comm'n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/p221202sec5enforcementpolicystatement_002.pdf.

[6] *Id.* at 9.

[7] NPRM Part II.C.1. Further, the NPRM explains "[s]tates have been particularly active in restricting non-compete clauses in recent years." *Id.* The Commission's rulemaking will end states' varying approaches to address non-compete agreements. The Commission's preemption of states' approaches is premature to the extent that the Commission admits that it does not know where to draw lines regarding the treatment of non-compete provisions (i.e., the Commission seeks comments on alternatives to the proposed ban based on earnings levels, job classifications, or presumptions). The Commission ignores the advice of Justice Brandeis and instead proposes to end states' experimentation to determine the optimal treatment of non-compete clauses. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) ("To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

[8] *See* United States v. Empire Gas Corp., 537 F.2d 296, 307-08 (8th Cir. 1976); Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 267 (7th Cir. 1981); Newburger, Loeb & Co., Inc. v. Gross, 563 F.2d 1057, 1081-83 (2d Cir. 1977); Bradford v. New York Times Co., 501 F.2d 51, 57-59 (2d Cir. 1974).

[9] Snap-On Tools Corp. v. Fed. Trade Comm'n, 321 F.2d 825, 837 (7th Cir. 1963).

[10] This characterization is not an insult, but a fact. I, too, am an unelected technocrat.

I. Non-Compete Agreements – the First Application of the Section 5 Policy Statement

The proposed Non-Compete Clause Rule "would provide that it is an unfair method of competition – and therefore a violation of Section 5 – for an employer to enter into or attempt to enter into a non-compete clause with a worker; [or] to maintain with a worker a non-compete clause . . .".[11] The proposed ban on non-compete clauses is based only on alleged violations of Section 5 of the FTC Act; it is not premised on the illegality of non-compete clauses under the Sherman or Clayton Acts.

When the Commission issued the Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act ("Policy Statement") in November 2022, I warned that the approach described by the Policy Statement would enable the Commission majority to condemn conduct it disfavors, even when that conduct repeatedly has been found lawful.[12] I predicted that the approach to Section 5 enforcement contained in the Policy Statement would facilitate expansive enforcement, often without requiring evidence of anticompetitive effects. And I cautioned that subjects of investigations would not be able to defend their conduct because procompetitive justifications would not be credited. The Non-Compete Clause Rule NPRM provides a graphic illustration of these concerns.

A. The NPRM's Determination that Non-Compete Clauses are Unfair

The NPRM states that there are 3 *independent* ways for classifying non-compete clauses as an "unfair" method of competition.[13] In November, I objected to the enforcement approach described in the Section 5 Policy Statement – specifically, permitting the Commission majority to condemn conduct merely by selecting and assigning to disfavored conduct one or more adjectives from a nefarious-sounding list.[14] Here, two of the three explanations the Commission provides for concluding that non-compete clauses are unfair rely on invocation of the adjectives "exploitive and coercive."[15] The third explanation for the illegality of non-compete clauses demonstrates how little evidence the majority requires to conclude that conduct causes harm.

According to the NPRM, "non-compete clauses are exploitive and coercive at the time of contracting."[16] The NPRM explains that the "clauses for workers other than senior executives

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[11] NPRM Part I.

[12] *See* Christine S. Wilson, Comm'r, Fed. Trade Comm'n, Dissenting Statement Regarding the "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act" (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyWilsonDissent5.pdf.

[13] NPRM Part IV.A.1.

[14] *See* Wilson, *supra* note 12.

[15] The Policy Statement claimed that determinations of unfairness would be based on a sliding scale. Here, the NPRM identifies independent ways to determine that non-compete clauses are unfair; no sliding scale is applied.

[16] NPRM Part IV.A.1.b The NPRM explains that this conclusion does not apply to senior executives and also seeks comment on whether there is a broader category of highly paid or highly skilled employees for whom the conclusion is inappropriate. *Id.*

are exploitive and coercive because they take advantage of unequal bargaining power[.]".[17] The business community will be surprised to learn that "unequal bargaining power" can lead to a conclusion that any negotiated outcome may be condemned as "exploitive and coercive," which then can be parlayed into a finding that the conduct violates Section 5. Indeed, this assertion is particularly troubling not merely because it presages an approach that is literally limitless, but also because the imbalance of bargaining power, as in this setting, arises wholly apart from any conduct by the business..[18] The reader may note that the NPRM cites legal decisions to support the assignment of adjectives. Yet, a careful reading of the courts' discussions of the imbalance of bargaining power between employers and employees reveals that while the imbalance may provide a reason to scrutinize non-compete clauses, it is not used to condemn or invalidate them..[19] Remarkably, in each case cited in footnote 253 of the NPRM, the court found the non-compete clauses to be enforceable.

Next, the NPRM finds that "non-compete clauses are exploitive and coercive at the time of the worker's potential departure from the employer[.]".[20] The NPRM reaches this conclusion regardless of whether the clauses are enforced. This conclusion is contrary to legal precedent, which requires enforcement of non-compete provisions before finding harm..[21]

Finally, the NPRM finds that "non-compete clauses are restrictive conduct that negatively affects competitive conditions."[22] Although this basis for concluding that non-compete provisions are unfair does not rely solely on the selection of an adjective, here, the NPRM demonstrates how little evidence the majority requires before finding that conduct is unfair pursuant to the Section 5 Policy Statement.

Until yesterday, the Commission had announced no cases (and therefore had no experience and no evidence) to conclude that non-compete clauses harm competition in labor markets. In fact, the only litigated FTC case challenging a non-compete clause found that a non-compete

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[17] *Id.*

[18] According to the NPRM, unequal bargaining power arises because employees depend on job income to pay bills, job searches entail significant transaction costs, the prevalence of unions has declined, employers outsource firm functions, employers have more experience negotiating because they have multiple employees, employees typically do not hire lawyers to negotiate agreements, and employees may not focus on the terms of their contracts. *Id.*

[19] *See* Alexander & Alexander, Inc. v. Danahy, 488 N.E.2d 22, 29 (Mass. App. Ct. 1986) (finding injunction to enforce non-compete agreement proper); Diepholz v. Rutledge, 659 N.E. 989, 991 (Ill. Ct. App. 1995) (finding non-compete agreement enforceable, but also finding no violation of terms of non-compete agreement); Palmetto Mortuary Transp., Inc. v. Knight Sys., Inc., 818 S.E.2d 724, 731 (S.C. 2018) (finding non-compete agreement enforceable).

[20] NPRM Part IV.A.1.c. Again, the NPRM explains that this conclusion does not apply to senior executives and also invites comments on whether there is a broader category of highly paid or highly skilled employees for whom the conclusion is inappropriate. *Id.*

[21] *See, e.g.*, O'Regan v. Arbitration Forums, Inc., 121 F.3d 1060, 1065-66 (7th Cir. 1997) ("to apply antitrust laws to restrictive employment covenants, there must be some attempted enforcement of an arguably overbroad portion of the covenant in order for there to be a federal antitrust violation."); Lektro–Vend Corp. v. Vendo Co., 660 F.2d 255, 267 (7th Cir.1981) ("a section 1 violation requires proof that the defendant knowingly enforced the arguably overbroad section of the ancillary noncompetition covenant").

[22] NPRM Part IV.A.1.a.

provision covering franchise dealers did *not* violate Section 5 of the FTC Act.[23] Notably, the NPRM omits any reference to this case. The Commission has accepted settlements regarding non-compete clauses in contracts between businesses,[24] but the majority itself has distinguished those cases from non-compete clauses in labor contracts.[25] And in those B2B cases, the non-compete clauses were associated with the sale of a business, a situation that falls within the narrow exception to the ban provided in the proposed Non-Compete Clause Rule.

Just yesterday, though, the Commission rushed out the announcement of three consent agreements that resolve allegations that non-compete provisions constitute an unfair method of competition.[26] The first consent involves security guard services, and the other two involve the manufacturing of glass containers. These consents undoubtedly were designed to support assertions that the FTC now has experience with non-compete agreements in employee contracts. But even a cursory read of the complaints reveals the diaphanous nature of this "experience."

Remarkably, none of these cases provides evidence showing the anticompetitive effects of non-compete clauses beyond the conclusory allegations in the complaints. The complaints in the glass container industry assert that non-compete provisions may prevent entry or expansion by competitors, but contain no allegations regarding firms that have tried unsuccessfully to obtain personnel with industry-specific skills and experience.[27] Regarding the effects on employees, the complaints make no allegations that the non-compete clauses were enforced by respondents[28] and the Analysis to Aid Public Comment accompanying the consent agreements points only to studies not tied to the glass container industry. These cases provide no evidence that the non-compete provisions limited competition for employees with industry-specific expertise, thereby lowering wages or impacting job quality. Similarly, in the case against Prudential Security,

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[23] *See* Snap-On Tools Corp. v. Fed. Trade Comm'n, 321 F.2d at 837.

[24] *See* ARKO Corp., FTC File No. 211-0187, https://www.ftc.gov/system/files/ftc_gov/pdf/2110087C4773ArkoExpressComplaint.pdf (Aug. 5, 2022); DTE Energy Co., FTC File No. 191-0068, https://www.ftc.gov/system/files/documents/cases/191_0068_c-4691_dte-enbridge_complaint.pdf, (Dec. 13, 2019).

[25] *See* Lina M. Khan, Chair, Fed. Trade Comm'n, Joined by Rebecca Kelly Slaughter and Alvaro M. Bedoya, Comm'rs, Fed. Trade Comm'n, Statement regarding In the Matter of ARKO Corp./Express Stop, https://www.ftc.gov/system/files/ftc_gov/pdf/2110187StatementKhanArkoExpress.pdf (June 10, 2022) (distinguishing non-compete clauses in labor contracts and effects on workers from non-compete clause in merger agreement where both parties remain in market).

[26] On December 28, 2022, the Commission voted to accept for public comment three consent agreements involving non-compete agreements. For two of those matters, the Commission vote occurred less than a week after the Commission received the papers. *See* Ardagh Glass Group S.A., File No. 211-0182, https://www.ftc.gov/system/files/ftc_gov/pdf/2110182ardaghjan23.pdf (Jan. 4, 2023) (Agreement Containing Consent Order (signatures dated Dec. 21, 2022)).

[27] *See* O-I Glass, Inc., File No. 211-0182, https://www.ftc.gov/system/files/ftc_gov/pdf/2110182o-iglasscomplaint.pdf (Jan. 4, 2023) (complaint ¶¶ 6, 8); Ardagh Glass Group S.A., File No. 211-0182, https://www.ftc.gov/system/files/ftc_gov/pdf/2110182ardaghcomplaint.pdf (Jan. 4, 2023) (complaint ¶¶ 6, 8).

[28] *See* Wilson, Dissenting Statement regarding In the Matter of O-I Glass, Inc. and In the Matter of Ardagh Glass Group S.A., *supra* note 4.

Inc.,[29] the complaint alleges that individual former employees were limited in their ability to work for other firms in the security guard industry,[30] but contain no allegations that the firm's non-compete provisions had market effects on wages or effects in a properly defined market for security guard services.

The NPRM also asserts FTC experience with non-compete provisions by pointing to Commission merger consent agreements that restrict the use of non-compete agreements. The complaints in those cases did not allege harm from non-compete clauses and the provisions in the consent agreements were included to ensure that the buyers of divestiture assets could obtain employees familiar with the assets and necessary for the success of the divestitures at issue.

Finally, the NPRM claims Commission experience with non-compete agreements to support the Non-Compete Clause Rule from a Commission workshop in January 2020.[31] But the NPRM fails to reflect the variety of views expressed during that workshop, including testimony that the economic literature is "[s]till far from reaching a scientific standard for concluding [that non-compete agreements] are bad for overall welfare . . . Also [we] don't yet fully understand the distribution of effects on workers . . . Welfare tradeoffs are likely context-specific, and may be heterogeneous."[32]

Indeed, the NPRM ignores that testimony and instead focuses on economic literature that purportedly demonstrates that non-compete clauses are unfair because they negatively affect competitive conditions. But an objective review of that literature reveals a mixed bag. For example, the first study described in the NPRM[33] finds that "decreasing non-compete clause enforceability from the approximate enforceability level of the fifth-strictest state to that of the fifth-most-lax state would increase workers' earnings by 3-4%." Yet, this study also finds that these effects vary strongly across different groups of individuals. For example, the authors find that "enforceability has little to no effect on earnings for non-college educated workers" and instead find that enforceability primarily impacts college-educated workers. Similarly, it finds that strict non-compete clause enforceability has very different effects for different demographic groups: it has little to no effect on men, and much larger effects on women and Black men and women. The NPRM interprets these differential effects as facts in favor of the Non-Compete Clause Rule, as it would diminish race and gender wage gaps, but there is no corresponding discussion of the Rule's effect on the wage gap based on education. An alternative interpretation

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[29] Prudential Security, Inc., File No. 221-0026, https://www.ftc.gov/system/files/ftc_gov/pdf/2210026prudentialsecurityscomplaint.pdf (Dec. 28, 2022) (consent agreement accepted for public comment).

[30] *Id.* (complaint at ¶¶ 23, 25).

[31] Fed. Trade Comm'n, *Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues*, https://www.ftc.gov/news-events/events/2020/01/non-compete-clauses-workplace-examining-antitrust-consumer-protection-issues

[32] Kurt Lavetti, *Economic Welfare Aspects of Non-Compete Agreements*, Remarks at the Fed. Trade Comm'n Workshop on Non-Compete Clauses in the Workplace (Jan. 9, 2020), https://www.ftc.gov/system/files/documents/public_events/1556256/non-compete_workshop-slides.pdf.

[33] Matthew S. Johnson, Kurt Lavetti, & Michael Lipsitz, *The Labor Market Effects of Legal Restrictions on Worker Mobility* 2, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3455381 (2020).

of these findings is that the scientific literature is still muddled as to who is helped and who is harmed by non-compete clauses, and that it would be better for the Commission to tailor a rule to those settings where a scientific consensus exists.

Similarly, the NPRM often bases its conclusions about the effects of non-compete clauses on limited support. For example, the NPRM contends that increased enforceability of non-compete clauses increases consumer prices. Yet, under the current record, this conclusion is based on only one study in healthcare markets and another study that considers the relationship between non-compete clauses and concentration..[34] The NPRM does not provide a basis to conclude that findings with respect to the market for physicians and healthcare are generalizable, instead acknowledging that no comparable evidence exists for other markets..[35] Also, the study that considers the effects of non-compete clauses on concentration does not draw conclusions about prices; the NPRM's conclusion that non-compete provisions lead to higher prices requires assumptions about a relationship between concentration and prices. Moreover, the NPRM omits studies showing that reducing the enforceability of non-compete restrictions leads to higher prices for consumers. A study by Gurun, Stoffman, and Yonker finds that an agreement not to enforce post-employment restrictions among financial advisory firms that were members of the Broker Protocol led brokers to depart their firms, and consumers to follow their brokers, at high rates. The study found, however, that clients of firms in the Broker Protocol paid higher fees and experienced higher levels of broker misconduct..[36] In other words, suspending non-competes resulted in higher prices and a decrease in the quality of service provided. These unintended consequences illustrate the inevitably far-reaching and unintended consequences that today's NPRM will visit upon employees, employers, competition, and the economy.

B. The NPRM's Treatment of Business Justifications

The NPRM explains that "the additional incentive to invest (in assets like physical capital, human capital, or customer attraction, or in the sharing of trade secrets and confidential commercial information) is the primary justification for use of non-compete clauses."[37] It acknowledges that "there is evidence that non-compete clauses increase employee training and other forms of investment,"[38] and describes two studies demonstrating that increased non-compete clause enforceability increased firm-provided training and investment..[39] It also

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[34] NPRM Part II.B.2.a.

[35] NPRM Part VII.B.2.c.

[36] Umit G. Gurun, Noah Stoffman, & Scott E. Yonker. *Unlocking Clients: The Importance of Relationships in the Financial Advisory Industry*, 141 J. Fin. Econ. 1218 (2021)

[37] NPRM Part II.B.2.e.

[38] *Id.*

[39] Evan Starr, *Consider This: Training, Wages, and the Enforceability of Non-Compete Clauses*, 72 I.L.R. Rev. 783, 799 (2019) (moving from mean non-compete enforceability to no non-compete clause enforceability would decrease the number of workers receiving training by 14.7% in occupations that use non-compete clauses at a high rate); Jessica Jeffers, *The Impact of Restricting Labor Mobility on Corporate Investment and Entrepreneurship* 22 (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3940393 (knowledge-intensive firms invest 32% less in capital equipment following decreases in the enforceability of non-compete clauses).

describes studies that examine non-compete clause use and investment.[40] Despite the studies, the NPRM concludes, "the evidence that non-compete clauses benefit workers or consumers is scant."[41] In other words, the NPRM treats asymmetrically the evidence of harms (mixed evidence given great credence) and benefits (robust evidence given no credence). These early examples of cherry-picking evidence that conforms to the narrative provide little confidence in the integrity of the rulemaking process or the ultimate outcome.

Implicitly, though, the NPRM credits some business justifications for non-compete provisions. It excludes from the ban those non-compete clauses associated with the sale of a business, implicitly acknowledging that these non-compete clauses are necessary to protect the goodwill of the transferred business. Also, the NPRM likely credits business justifications when it seeks comment on whether senior executives should be covered by the rule. Nonetheless, on its face, the NPRM expressly discounts business justifications and makes no effort to distinguish and determine circumstances where investment incentives are important.

The NPRM also discounts procompetitive business justifications by asserting that trade secret law, non-disclosure agreements, and other mechanisms can be used to protect firm investments. While the NPRM explains that these mechanisms may protect investments, the existing record provides no evidence that these mechanisms are effective substitutes for non-compete agreements.[42] The NPRM cites no instances where these mechanisms have been used effectively in lieu of non-compete clauses, even though natural experiments exist and could be studied (*e.g.*, when states have changed the enforceability of non-compete clauses). "[M]erely identifying alternative mechanisms to solve a potential employee investment problem does not provide . . . guidance as to which mechanism achieves the objective at the lowest social cost."[43] Moreover, the NPRM's observation that firms successfully operate in states where non-compete clauses are not enforceable is unpersuasive; the NPRM offers no meaningful cross-state comparisons and the observation does not show that firms and competition are equally or even more successful in those states than in states where non-compete clauses are permissible.

II. The Proposed Non-Compete Clause Rule Will Trigger Numerous And Likely Successful Legal Challenges Regarding the Commission's Authority to Issue the Rule

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[40] Matthew S. Johnson & Michael Lipsitz, *Why Are Low-Wage Workers Signing Noncompete Agreements?*, 57 J. Hum. Res. 689, 700 (2022) (finding firms that use non-compete clauses in hair salon industry train employees at 11% higher rate and increase investment in particular customer-attraction device by 11%); Evan P. Starr, James J. Prescott, & Norman D. Bishara, *Noncompete Agreements in the U.S. Labor Force*, 64 J. L. & Econ. 53, 53 (2021) (finding no statistically significant impact on training and trade secrets from use of non-compete clauses, but unable to examine other types of investments).

[41] NPRM Part IV.B.3.

[42] There is a limited literature regarding the efficacy of trade secret protection and non-disclosure agreements. *See* Jie Gong & I.P.L. Png, *Trade Secrets Law and Inventory Efficiency: Empirical Evidence from U.S. Manufacturing*, https://ssrn.com/abstract=2102304 (July 8, 2012) (investigating effects of operational know-how information spillovers under various levels of enforcement of trade secret law).

[43] Camila Ringeling, Joshua D. Wright, et. al, Noncompete Clauses Used in Employment Contracts, Comment of the Global Antitrust Institute 6 (Feb. 7, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3534374.

This section describes the numerous, and meritorious, legal challenges that undoubtedly will be launched against the Non-Compete Clause Rule. Defending these challenges will entail lengthy litigation that will consume substantial staff resources. I anticipate that the Rule will not withstand these challenges, so the Commission majority essentially is directing staff to embark on a demanding and futile effort. In the face of finite and scarce resources, this NPRM is hardly the best use of FTC bandwidth.

There are numerous paths for opponents to challenge the Commission's authority to promulgate the Non-Compete Clause Rule. First, I question whether the FTC Act provides authority for competition rulemaking. The NPRM states that the Commission proposes the Non-Compete Clause Rule pursuant to Sections 5 and 6(g) of the FTC Act. Section 6(g) of the FTC Act authorizes the Commission to "make rules and regulations for the purpose of carrying out the provisions of the subchapter" where Section 6(g) otherwise provides that the Commission may "from time to time classify corporations."[44] Section 6(g) was believed to provide authority only for the Commission to adopt the Commission's procedural rules. For decades, consistent with the statements in the FTC Act's legislative history, Commission leadership testified before Congress that the Commission lacked substantive competition rulemaking authority.[45]

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[44] 15 U.S.C. § 46(g). Section 6 of the FTC Act provides

> **§46. Additional powers of Commission**
>
> The Commission shall also have power . . .
>
> **(g) Classification of corporations; regulations**
>
> From time to time classify corporations and (except as provided in section 57a(a)(2) of this title) to make rules and regulations for the purpose of carrying out the provisions of this subchapter.

[45] *See* Nat'l Petroleum Ref'rs Ass'n v. FTC, 482 F.2d 672, 696 nn. 38, 39 (D.C. Cir. 1973). *See also* Noah Joshua Phillips, *Against Antitrust Regulation*, American Enterprise Institute Report 3, https://www.aei.org/research-products/report/against-antitrust-regulation/ (Oct. 13, 2022) ("[T]he Conference Committee [considering legislation that created the Federal Trade Commission] was between two bills, neither of which contemplated substantive rulemaking. . . . The legislative history does not demonstrate congressional intent to give the FTC substantive rulemaking power: The House considered and rejected it, the Senate never proposed it, and neither the Conference Committee's report nor the final debates mentioned it."); 51 Cong. Rec. 12916 (1914), reprinted in THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 4368 (Earl W. Kintner ed., 1982) statement of Sen. Cummins) ("[I]f we were to attempt to go further in this act and to give the commission the authority to prescribe a code of rules governing the conduct of the business men of this country for the future, we would clash with the principle that we can not confer upon the commission in that respect legislative authority; but we have not made any such attempt as that, and no one proposes any attempt of that sort."); *id.* at 14932, reprinted in THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 4732 (Earl W. Kintner ed., 1982) (statement of Rep. Covington) ("The Federal trade commission will have no power to prescribe the methods of competition to be used in the future. In issuing orders it will not be exercising power of a legislative nature . . . The function of the Federal trade commission will be to determine whether an existing method of competition is unfair, and, it is finds it to be unfair, to order the discontinuance of its use. In doing this it will exercise power of a judicial nature."); *id.* at 13317, reprinted in THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 4675 (Earl W. Kintner ed., 1982) (statement of Sen Walsh) ("We are not going to give to the trade commission the general power to regulate and prescribe rules under which the business of this country shall in the future be conducted; we propose simply to give it the power to denounce as unlawful a particular practice that is pursued by that business.").

Ignoring this history, the Commission embarked on a substantive rulemaking binge in the 1960s and 1970s.[46] The vast majority of these substantive rules pertained to consumer protection issues. Only one substantive rule was grounded solely in competition;[47] that rule was not enforced and subsequently was withdrawn.[48] Another substantive rule was grounded in both competition and consumer protection principles, and prompted a federal court challenge. There, the D.C. Circuit in 1973 held in *National Petroleum Refiners*[49] that the FTC did have the power to promulgate substantive rules.

Two years later, however, Congress enacted the Magnuson-Moss Act,[50] which required substantive consumer protection rules to be promulgated with heightened procedural safeguards under a new Section 18 of the FTC Act. Notably, the Magnuson-Moss Act expressly excluded rulemaking for unfair methods of competition from Section 18. FTC Chairman Miles Kirkpatrick (1970-73) explained that it was not clear whether Congress in the Magnuson-Moss Act sought to clarify existing rulemaking authority or to grant substantive rulemaking authority to the FTC for the first time.[51] If the latter, then the FTC only has substantive *consumer protection* rulemaking power, and lacks the authority to engage in substantive *competition* rulemaking. This uncertainty about the language of the statute will be a starting point for challenges of the Non-Compete Clause Rule.

Second, the Commission's authority for the Rule likely will be challenged under the major questions doctrine, which the Supreme Court recently applied in *West Virginia v. EPA*.[52] Under the major questions doctrine, "where a statute . . . confers authority upon an administrative agency," a court asks "whether Congress in fact meant to confer the power the agency has asserted."[53] The Supreme Court explained in *West Virginia v. EPA* that an agency's exercise of statutory authority involved a major question where the "history and the breadth of the authority that the agency has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority."[54]

Challengers will ask a court to determine whether today's NPRM constitutes a major question. Using Justice Gorsuch's concurrence as a guide, agency action will trigger the application of the major questions doctrine if the agency claims, among other things, the power to (1) resolve a

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[46] *See* TIMOTHY J. MURIS & HOWARD BEALES, III, THE LIMITS OF UNFAIRNESS UNDER THE FEDERAL TRADE COMMISSION ACT 13 (1991).

[47] FTC Men's and Boy's Tailored Clothing Rule, 16 C.F.R. § 412 (1968).

[48] Notice of Rule Repeal, 59 Fed. Reg. 8527 (1994).

[49] Nat'l Petroleum Ref'rs Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973).

[50] Magnuson-Moss Warranty – Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975).

[51] *See* Miles W. Kirkpatrick, *FTC Rulemaking in Historical Perspective* 48 Antitrust L.J. 1561, 1561 (1979) ("One of the most important aspects of the Magnuson-Moss Act was its granting, or confirmation, depending upon your reading of the law at that time, of the FTC's rulemaking powers.").

[52] West Virginia v. EPA, 142 S. Ct. 2587 (2022).

[53] *Id.* at 2608.

[54] *Id.*

matter of great political significance, (2) regulate a significant portion of the American economy, or (3) intrude in an area that is the particular domain of state law.[55] First, the regulation of non-compete clauses is a question of political significance; Congress has considered and rejected bills significantly limiting or banning non-competes on numerous occasions,[56] a strong indication that the Commission is trying to "work around" the legislative process to resolve a question of political significance.[57] Second, the Rule proposes to regulate a significant portion of the American economy through a ban on non-competes. According to the NPRM, the "Commission estimates that approximately one in five American workers – or approximately 30 million workers – is bound by a non-compete clause."[58] Thus, the Non-Compete Clause Rule indisputably will negate millions of private contractual agreements and impact employer/employee relationships in a wide variety of industries across the United States. Third, regulation of non-compete agreements has been the particular domain of state law. As the NPRM explains, 47 states permit non-competes in some capacity, while three states have chosen to prohibit them entirely, and state legislatures have been active in this area recently.[59]

If a court were to conclude that the Non-Compete Clause Rule is a major question, the FTC would be required to identify clear Congressional authorization to impose a regulation banning non-compete clauses. Yet, as discussed above, that clear authorization is unavailable. The language in Section 6(b) is far from clear, and largely discusses the Commission's classification of corporations. I do not believe that Congress gave the FTC authority to enact substantive rules related to any provision of the FTC Act using this "oblique" and unclear language. In addition, the decision by Congress to omit unfair methods of *competition* rulemaking in the Magnuson-Moss Act, which immediately followed the decision in *National Petroleum Refiners*, is additional evidence that Congress has not clearly authorized the FTC to make competition rules that may have significant political or economic consequences. Moreover, Congress did not remove the known ambiguity when it enacted the FTC Improvements Act of 1980.[60]

Third, the authority for the Non-Compete Clause Rule may be challenged under the non-delegation doctrine. The doctrine is based on the principle that Congress cannot delegate its legislative power to another branch of government, including independent agencies.[61]

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[55] *Id.* at 2600-01 (Gorsuch, J. concurring).

[56] Russell Beck, A *Brief History of Noncompete Regulation*, FAIR COMPETITION LAW (Oct. 11, 2021), https://faircompetitionlaw.com/2021/10/11/a-brief-history-of-noncompete-regulation/.

[57] West Virginia v. EPA, 142 S.Ct. at 2600 (Gorsuch, J. concurring).

[58] NPRM Part II.B.1.a.

[59] *Id.* Part II.C.1.

[60] *See* H.R. Rep. No. 96-917, 96th Cong., 2d sess. 29-30 (1980), reprinted in THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 5862 (Earl W. Kintner ed., 1982) (conference report on FTC Improvements Act of 1980 explaining that when adopting a restriction on standards and certification rulemaking brought as an unfair or deceptive act or practice, conferees were not taking a position on the Commission's authority to issue a trade regulation rule defining 'unfair methods of competition' pursuant to section 6(g). "The substitute leaves unaffected whatever authority the Commission might have under any other provision of the FTC Act to issue rules with respect to 'unfair methods of competition.'").

[61] Five Supreme Court justices have expressed interest in reconsidering the Court's prior thinking on the doctrine, which increases the risk that a challenge may be successful. *See Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Alito, J. concurring) (stating with respect to the nondelegation doctrine that "[i]f a majority of this Court

Since the 1920s, the Supreme Court has found that Congress has not made an improper delegation of legislative power so long as Congress has set out "an intelligible principle to which the person or body authorized to fix [rules] is directed to conform."[62] Applying this principle in *Schechter Poultry*,[63] the Supreme Court approved Congressional authorization for the FTC to prohibit unfair methods of competition, relying on the Commission's administrative enforcement proceedings where the Commission acts as "a quasi judicial body" and that "[p]rovision was made for formal complaint, for notice and hearing, for appropriate findings of fact supported by adequate evidence, and for judicial review . . .".[64] The Court simultaneously found that provisions of the National Industrial Recovery Act to issue "codes of fair competition" were *improper* delegations of legislative power, distinguishing the impermissibly broad fair competition codes from the FTC Act's approach to address unfair methods of competition that are "determined in particular instances, upon evidence, in light of particular competitive conditions[.]".[65]

Notably, the Commission's proposed ban on non-compete clauses abandons the Commission's procedures that led the Supreme Court in *Schechter Poultry* to find that the Commission's enforcement of "unfair methods of competition" does not constitute an improper delegation of legislative power. In addition, to the extent that the Commission's Section 5 Policy Statement (which provides the basis for determining that non-compete clauses are an unfair method of competition) abandons the consumer welfare standard to pursue multiple goals, including protecting labor, the Commission's action more closely resembles the National Industrial Recovery Act codes that also sought to implement multiple goals under the guise of codes of fair competition.

IV. Comments are Encouraged

The NPRM invites public comment on many issues. I strongly encourage the submission of comments from all interested stakeholders. After all, unlike rulemaking for consumer protection rules under the Magnuson-Moss process, ***this is likely the only opportunity for public input before the Commission issues a final rule. For this reason, it is important for commenters to address the proposed alternatives to the near-complete ban on non-compete provisions.*** To the extent that the NPRM proposes alternatives to the current proposed rule, if the Commission were subsequently to adopt one of the alternatives, which would be a logical outgrowth of the current

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were willing to reconsider the approach we have taken for the past 84 years. I would support that effort"); *id.* at 2131 (Gorsuch, J., dissenting, joined by Chief Justice Roberts and Justice Thomas) (expressing desire to "revisit" the Court's approach to the nondelegation doctrine); *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (statement of Kavanaugh, J. respecting the denial of certiorari); Amy Coney Barrett, *Suspension and Delegation*, 99 Cornell L. Rev. 251, 318 (2014).

[62] J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

[63] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[64] *Id.* at 533.

[65] *Id.*

proposed rulemaking,[66] there would be no further opportunity for public comment. Moreover, the Commission believes that if it were to adopt alternatives that differentiate among categories of workers, the various rule provisions would be severable if a court were to invalidate one provision. Consequently, it is important for the public to address each of the alternatives proposed in the NPRM because the comment period on the proposed rule is the only opportunity for public input on those alternatives.

In addition to the issues for which the NPRM invites comments, I encourage stakeholders to address the following points:

- The NPRM references some academic studies regarding non-competes. What other academic literature addresses the issues in the NPRM, including the procompetitive justifications for non-compete provisions?

- The NPRM describes papers that exploit natural experiments to estimate the effects of enforcing non-compete clauses. While this approach ensures that the estimates are internally valid, it reflects the causal effects of non-compete agreements only in the contexts within which they are estimated. What should the Commission consider to understand whether and when these estimates are externally valid? How can the Commission know that the estimates calculated from the contexts of the literature are representative of the contexts outside of the literature?

- The NPRM draws conclusions based on "the weight of the literature," but the literature on the effects of non-compete agreements is limited, contains mixed results, and is sometimes industry-specific. Which conclusions in the NPRM are supported by the weight of the literature? Which conclusions in the NPRM contradict the weight of the literature? Which conclusions in the NPRM require additional evidence before they can be considered substantiated?

- Where the evidence provided in the NPRM is limited, is the evidence sufficient to support either the proposed ban on non-compete clauses or the proffered alternative approaches to the proposed ban?

- What are the benefits and drawbacks of the currently proposed ban compared to the proposed alternative rule that would find a presumption of unlawfulness, including the role of procompetitive justifications in rebutting a presumption?

[66] *See* Owner-Operator Indep. Drivers Ass'n v. Fed. Motor Carrier Safety Admin., 494 F.3d 188, 210 (D.C. Cir. 2007); *see also* Agape Church, Inc. v. FCC, 738 F.3d 397, 412 (2013) (holding that FCC "sunset" rule was a logical outgrowth when proposed rule gave public notice that a viewability rule was in danger of being phased out, *i.e.*, a sunset provision).

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Dissenting Statement of Commissioner Christine S. Wilson

In the Matter of O-I Glass, Inc. and
In the Matter of Ardagh Group S.A.
File No. 211-0182

January 4, 2023

Today, the Commission announced that it has accepted, subject to final approval, consent agreements with two companies in the glass container industry. The consents resolve allegations that the use of non-compete agreements in employee contracts constitutes an unfair method of competition that violates Section 5 of the FTC Act. These cases, which allege stand-alone violations of Section 5, are among the first to employ the approach that the recently issued Section 5 Policy Statement[1] describes. For the reasons explained below, I dissent.

Context is important. Under current leadership, the Commission has demanded significant volumes of information from parties under investigation, but not all requested information is related to traditional competition analysis.[2] In addition, this Commission has declared its willingness to take losing cases to court.[3] When faced with the expense of complying with expansive demands for documents and other material, and the possibility of an enforcement

[1] Fed. Trade Comm'n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/p221202sec5enforcementpolicystatement_002.pdf.

[2] *See* Christine S. Wilson, Comm'r, Fed. Trade Comm'n, *There's Nothing New Under the Sun: Reviewing Our History to Foresee the Future*, Keynote Address at GCR Live Merger Control 8-9, Virtually and Brussels, Belgium (October 7, 2021), https://www.ftc.gov/system/files/documents/public_statements/1597798/gcr_merger_control_keynote_final.pdf.

[3] *See* Lina M. Kahn, Chair, Fed. Trade Comm'n, *How FTC Chair Lina Khan wants to modernize the watchdog agency*, Marketplace interview with Kimberly Adams, https://www.marketplace.org/shows/marketplace-tech/how-ftc-chair-lina-khan-wants-to-modernize-the-watchdog-agency/, (June 17, 2022) ("We always want to win the cases that we're bringing. That said, it's no secret that in certain areas, you know, there's still work to be done to fully explain to courts how our existing laws and existing authorities, which go back over 100 years, apply in new context. . . . And I think there can be a serious cost of inaction. So we really have a bias in favor of action."); David McCabe, *Why Losing to Meta in Court May Still Be a Win for Regulators*, New York Times, https://www.nytimes.com/2022/12/07/technology/meta-vr-antitrust-ftc.html (Dec. 7, 2022) ("In April, Ms. Khan said at a conference that if 'there's a law violation" and agencies "think that current law might make it difficult to reach, there's huge benefit to still trying.' She added that any courtroom losses would signal to Congress that lawmakers needed to update antitrust laws to better suit the modern economy. 'I'm certainly not somebody who thinks that success is marked by a 100 percent court record,' she said.").

action regardless of the merits, parties under investigation rationally may express a willingness to settle. Under these circumstances, staff's investigation typically is quite limited.

Noteworthy Aspects of the Complaints

There are several noteworthy aspects of the Complaints issued against O-I Glass and Ardagh. The first is the brevity of these documents; each Complaint runs three pages, with a large percentage of the text devoted to boilerplate language. Given how brief they are, it is not surprising that the complaints are woefully devoid of details that would support the Commission's allegations. In short, I have seen no evidence of anticompetitive effects that would give me reason to believe that respondents have violated Section 5 of the FTC Act.

The second noteworthy aspect of these complaints is their omission of any allegations that the non-compete provisions at issue are unreasonable, a significant departure from hundreds of years of legal precedent. The first complaint alleges that O-I Glass entered into non-compete agreements with employees that prohibited them from working for competitors of O-I in the United States for one year following the conclusion of their employment with O-I.[4] And the second complaint alleges that Ardagh's contracts typically prohibited employees from performing the same or substantially similar services to those the employee performed for Ardagh for any glass container competitor of Ardagh in the United States, Canada, or Mexico for two years following the conclusion of their employment with Ardagh.[5]

Courts have long analyzed the temporal length, subject matter, and geographic scope of non-compete agreements to determine whether those agreements are unreasonable; when non-compete agreements are not found to be unreasonable, courts repeatedly have held that they do not violate the antitrust laws.[6] In the cases before us, the Commission makes no reasonableness assessment regarding the duration or scope of the non-compete clauses. Instead, it seems to treat the non-compete clauses as per se unlawful under Section 5 of the FTC Act. But the Seventh Circuit held that under Section 5, "[r]estrictive [non-compete] clauses . . . are legal unless they are unreasonable as to time or geographic scope[.]".[7] Notably, the Seventh Circuit further found that "even if [the non-compete] restriction is unreasonable as to geographic scope," it was "not prepared to say that it is a per se violation of the antitrust laws."[8]

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[4] O-I Glass, Inc. Complaint ¶ 7.

[5] Ardagh Group S.A. Complaint ¶ 7.

[6] *See* United States v. Empire Gas Corp., 537 F.2d 296, 307-08 (8th Cir. 1976); Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 267 (7th Cir. 1981); Newburger, Loeb & Co., Inc. v. Gross, 563 F.2d 1057, 1081-83 (2d Cir. 1977); Bradford v. New York Times Co., 501 F.2d 51, 57-59 (2d Cir. 1974).

[7] Snap-On Tools Corp. v. Fed. Trade Comm'n, 321 F.2d 825, 837 (7th Cir. 1963).

[8] *Id.*

A third noteworthy aspect of the complaints concerns the absence of allegations that the non-compete clauses in the O-I Glass and Ardagh contracts were enforced.[9] Absent efforts to enforce a non-compete provision, courts have been unwilling to find a violation of the antitrust laws.[10]

Fourth, the complaints assert that the non-compete clauses impede entry or expansion of rivals in the glass container industry, based on a claim that barriers to entry in the glass container industry include "the ability to identify and employ personnel with skills and experience in glass container manufacturing."[11] But the Commission makes no factual allegations regarding the inability of any rival to enter or expand. Moreover, this asserted barrier to entry and expansion in the industry is newly alleged by the Commission; in 2013, the Commission challenged the proposed merger of Ardagh Group S.A. and Saint-Gobain Containers, Inc. following a lengthy and thorough investigation. The complaint described in detail the barriers to entry in the glass container industry but did not reference the difficulty of obtaining experienced employees.[12]

Continuing in this vein, the complaints here also assert that the non-compete provisions reduce employee mobility and "caus[e] lower wages and salaries, reduced benefits, less favorable working conditions, and personal hardships to employees."[13] But the complaints do not identify a relevant market for skilled labor as an input to glass container manufacturing, and fail to allege a market effect on wages or other terms of employment. Even the Analysis to Aid Public Comment relies only on academic literature that discusses the effects of non-competes, albeit not in the glass container industry.

Similarly, the complaints allege that more than 1,000 employees at O-I and more than 700 employees at Ardagh were subject to non-compete agreements when the Commission opened the investigation, and that some of those employees were essential to a rival's entry or expansion.[14]

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[9] *Compare* O-I Glass, Inc. Complaint and Ardagh Group S.A. Complaint *with* Prudential Security, Inc. Complaint ¶¶ 18-21.

[10] O-Regan v. Arbitration Forums, Inc., 121 F.3d 1060, 1065-66 (7th Cir. 1997) ("to apply antitrust laws to restrictive employment covenants, there must be some attempted enforcement of an arguably overbroad portion of the covenant in order for there to be a federal antitrust violation."); Lektro-Vend Corp. v. Vendo Co., 660 F.2d at 267.

[11] O-I Glass, Inc. Complaint ¶ 6; Ardagh Group S.A. Complaint ¶ 6.

[12] The complaint in that merger challenge alleged that:

> "Effective entry or expansion into the relevant markets would neither be timely, likely, or sufficient to counteract the Acquisition's likely anticompetitive effects. The barriers facing potential entrants include the large capital investment necessary to build a glass plant, the need to obtain environmental permits, the high fixed costs of operating a glass plant, existing long-term contracts that foreclose much of the market, the need for specific manufacturing knowledge that is not easily transferred from other industries, and the molding technologies and extensive mold libraries already in place at existing manufacturers."

In the Matter of Ardagh Group S.A. and Saint-Gobain Containers, Inc., File No. 131-0087, https://www.ftc.gov/sites/default/files/documents/cases/2013/07/130701ardaghcmpt.pdf (2013) (Complaint ¶ 42.

[13] O-I Glass, Inc. Complaint ¶ 8; Ardagh Group S.A. Complaint ¶ 8.

[14] O-I Glass, Inc. Complaint ¶ 7; Ardagh Group S.A. Complaint ¶ 7.

The allegations imply that, conversely, many employees that were subject to non-compete agreements did *not* have industry-specific skills.[15] Consider, for example, employees in the glass container industry who worked in the fields of human resources or accounting, with skills sets that are easily transferable across industries. If they were subject to non-competes following their departure from O-I or Ardagh, these employees easily could seek employment in other industries, including retailing and the services sector. It is implausible that precluding employees with easily transferable skill sets from working for rivals in glass container manufacturing would have an impact on competition in any appropriately defined relevant market.

Absent any evidence, the Commission adopts the approach of the Section 5 Policy Statement and baldly alleges that the use of non-compete agreements "has a tendency or likely effect of harming competition, consumers, and workers," offering only a hypothesized outcome.

Business Justifications

The complaints improperly discount business justifications for the non-compete provisions. First, they allege in conclusory fashion that "[a]ny legitimate objectives . . . could have been achieved through significantly less restrictive means, including . . . confidentiality agreements that prohibit employees and former employees from disclosing company trade secrets and other confidential information."[16] This assertion is unsubstantiated.

Second, the complaints do not address the business justification and procompetitive benefit of employer-provided training. The complaints allege that identifying and employing personnel with skills and experience in glass container manufacturing is a barrier to entry, which implies that employee training and experience is essential and that the desired training is not available from sources other than industry incumbents. Firm-provided training is an accepted and documented business justification for non-compete clauses; firms are less willing to invest in employee training if employees leave the firm after receiving training.[17] The complaints do not allege that there is a less restrictive alternative for non-compete provisions regarding firm-provided training. Moreover, it is ironic that the orders issued in these matters may lead to reduced firm-sponsored training, which may (1) reduce the available trained labor that would allow entry or expansion of competing firms and (2) harm the same employees at O-I Glass and Ardagh that the cases claim to help.

Although the complaints are dismissive of business justifications, the relief obtained implicitly acknowledges the existence of legitimate business justifications for non-compete clauses. Specifically, the Agreements Containing Consent Orders prohibit the use of non-compete clauses for covered employees, which are described by a list of positions in Appendix A. Careful review

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[15] *See also* O-I Glass, Inc. Decision and Order Appendix A and Ardagh Group S.A. Decision and Order Appendix A (listing positions for which the use of non-compete agreements is prohibited, which includes positions that have general skills).

[16] O-I Glass, Inc. Complaint ¶ 9; Ardagh Group S.A. Complaint ¶ 9.

[17] *See* Evan Starr, *Consider This: Training, Wages, and the Enforceability of Non-Compete Clauses*, 72 I.L.R. Rev 783, 796-97 (2019); Matthew S. Johnson & Michael Lipsitz, *Why Are Low-Wage Workers Signing Noncompete Agreements?*, 57 J. Hum. Res. 689, 711 (2022).

of those lists reveals that senior executives and employees involved in research and development are not included. Although not acknowledged in the Analysis to Aid Public Comment, the Commission here implicitly has credited at least some business justifications for non-compete clauses.

Concerns for Due Process

I am concerned whether the respondents had notice that their conduct would be viewed as unlawful. As noted above, the allegations here depart from a centuries-long line of precedent regarding the appropriate analysis of the legality of non-compete provisions, and conflict with a Seventh Circuit holding specific to Section 5 of the FTC Act. The allegations are premised on the Section 5 Policy Statement issued in November 2022, which also represents a radical departure from precedent. But the complaints in these matters challenge conduct of O-I Glass and Ardagh that predates the November 2022 Section 5 Policy Statement. The Second Circuit explained in *Ethyl* that "the Commission owes a duty to define the conditions under which conduct . . . would be unfair so that businesses will have an inkling as to what they can lawfully do rather than be left in a state of complete unpredictability."[18] Given the state of the law for hundreds of years prior to this enforcement challenge, I believe notice was lacking.

[18] E.I. du Pont de Nemours & Co. v. F.T.C., 729 F.2d 128, 139 (2d Cir. 1984). *See also id.* at 136 ("Review by the courts was essential to assure that the Commission would not act arbitrarily or without explication but according to definable standards that would be properly applied.").

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Dissenting Statement of Commissioner Christine S. Wilson

In the Matter of Prudential Security
File No. 211-0026

January 4, 2023

Today, the Commission announced that it has accepted, subject to final approval, a consent agreement with Prudential Security, Inc. The consent resolves allegations that the use of non-compete agreements in employee contracts constitutes an unfair method of competition that violates Section 5 of the FTC Act. This case, which alleges a stand-alone violation of Section 5, is one of the first to employ the approach that the recently issued Section 5 Policy Statement[1] describes. For the reasons explained below, I dissent.

One point is worth emphasizing: my vote to oppose issuance of the complaint does *not* mean that I endorse or condone the conduct of Prudential Security. The company required its security guards to sign non-compete agreements that prohibited employees from accepting employment with a competing business for two years following conclusion of their employment with Prudential. Moreover, a liquidated damages provision required employees to pay Prudential $100,000 for violations of the non-compete agreement. Based on these facts, it seems appropriate that a Michigan state court found that the non-compete agreements were unreasonable and unenforceable under state law.[2]

Instead, my vote reflects my continuing disagreement with the new Section 5 Policy Statement and its application to these facts. When it was issued, I expressed concern that the Policy Statement would be used to condemn conduct summarily as an unfair method of competition based on little more than the assignment of adjectives.[3] Unfortunately, that is the approach taken in this case.

The Complaint offers no evidence of anticompetitive effect in any relevant market. According to the Complaint, Prudential's use of non-compete agreements "has harmed employees" by limiting

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[1] Fed. Trade Comm'n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/p221202sec5enforcementpolicystatement_002.pdf.

[2] Complaint ¶ 22.

[3] *See* Christine S. Wilson, Comm'r, Fed. Trade Comm'n, Dissenting Statement Regarding the "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act" (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyWilsonDissentStmt.pdf.

their ability to work for other firms in the security guard industry."[4] It asserts that Prudential's use of non-compete agreements is "coercive and exploitative" and "tends to negatively affect competition conditions"[5] – but it appears that those "competition conditions" pertain only to individual employees. Similarly, the Complaint offers only a conclusory assertion that "[a]ny possible legitimate objectives . . . could have been achieved through significantly less restrictive means, including . . . confidentiality agreements that prohibited disclosure of any confidential information."[6] This assertion is unsubstantiated.

Another aspect of the case also concerns me. This enforcement action is designed not to provide effective relief but instead to signal activity with respect to non-compete agreements in the employment arena. As the Complaint describes, Prudential sold the bulk of its security guard business to another security guard company, Titan Security Group. The former Prudential security guards who now work for Titan are not subject to non-compete agreements.[7] Moreover, now that Prudential no longer provides security guard services, there is no reason for the company to seek to enforce non-compete agreements against former Prudential security guards who did not move to Titan.

I wish it were accurate to say that this case (with apologies to Shakespeare) is a tale of sound and fury, signifying nothing. Unfortunately, it has great significance: it foreshadows how the Commission will apply the new Section 5 Policy Statement. Practices that three unelected bureaucrats find distasteful will be labeled with nefarious adjectives and summarily condemned, with little to no evidence of harm to competition. I fear the consequences for our economy, and for the FTC as an institution.

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[4] Complaint ¶¶ 23, 25.

[5] Complaint ¶ 29.

[6] Complaint ¶ 26.

[7] Complaint ¶ 16.

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

Office of the Chair

September 25, 2023

The Honorable Jim Jordan
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Jordan:

I am writing to share with the Committee additional information concerning its request for documents relating to the Commission's investigation of Twitter. As explained in my April 26, 2023, letter to the Committee, the Committee's request concerns an ongoing law enforcement investigation, which limits the Commission's ability to share documents. However, as an accommodation, the Commission has provided to the Committee a nonpublic briefing on the matter, as well as two substantive, confidential letter responses discussing information that specifically addressed the Committee's questions. Commission staff is available if you would like to schedule an additional nonpublic briefing. This production includes documents Bates stamped FTC-TW000000001-FTC-TW000000032.

Moreover, in a further effort to be responsive to your request, I would like to provide you with additional, previously non-public, information regarding the Commission's Twitter investigation that the Commission is now in a position to share based on developments in *United States of America v. Twitter, Inc.*[1] Specifically, Twitter (now called X) filed a motion seeking relief from the May 2022 Commission Consent Order to which Twitter is a signatory. On September 11, 2023, the Department of Justice filed a brief in opposition to X's request that described with specific references to deposition transcripts why the Commission was justified in investigating whether Twitter was in compliance with the May 2022 Consent Order.[2] Pursuant to Civil Local Rules 7-11 and 79-5(c) for the U.S. District Court in the Northern District of California, X Corp. had seven days to respond and state whether the government's proposed redactions should be left in place and whether any additional content in the filing and the attachments should be sealed. X has now filed a statement setting out its position on what redactions should be maintained or added. A copy of the redacted Department of Justice Opposition to X Corp.'s Motion for Protective Order & Relief from Consent Order is attached to this letter. See particularly Section II, pages 5-11, which directly address the issue you raised regarding why the Commission was looking into the issue of media access to the personal and nonpublic files of Twitter users.

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[1] *United States v. Twitter, Inc.*, No. 3:22-cv-03070-TSH (N.D. Cal. May 25, 2022).
[2] Opposition to X Corp's Motion for Protective Order & Relief from Consent Order, *United States v. Twitter, Inc.*, No. 3:22-cv-03070-TSH (Sept. 11, 2023).

I hope this newly public information will shed light on many of the questions you had regarding our investigation.

Sincerely,

Lina Khan

Lina M. Khan
Chair
Federal Trade Commission

cc: The Honorable Jerrold Nadler
Ranking Member
House Committee on the Judiciary

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

TWITTER, INC., a corporation,

Defendant.

Case No. 3:22-cv-3070-TSH

OPPOSITION TO X CORP.'S MOTION FOR PROTECTIVE ORDER & RELIEF FROM CONSENT ORDER

Hearing Date: November 16, 2023
Hearing Time: 11:00 AM

The Hon. Thomas S. Hixson

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INTRODUCTION

After agreeing last year to settle charges that it once again misled consumers about the privacy and security of their information, X Corp. (formerly Twitter, Inc.)[1] now seeks to jettison that agreement and limit further scrutiny of its data practices. X Corp.'s motion is meritless and should be denied.

In 2011, the Federal Trade Commission ("FTC" or "Commission") accused X Corp. of deceptively misrepresenting its data privacy and security practices to users. X Corp. agreed to resolve those allegations through an FTC administrative order ("2011 Administrative Order"), which barred it from making similar misrepresentations in the future. In 2022, the FTC referred this lawsuit for civil penalties and injunctive relief to the U.S. Department of Justice, alleging X Corp. had again misrepresented its data practices, violating the 2011 Administrative Order. The parties resolved these new allegations through a Stipulated Order by which X Corp. agreed to pay a $150 million civil penalty and consented to modifying the 2011 Administrative Order. After the Court entered the Stipulated Order, the Commission modified the administrative order to reflect the terms to which X Corp. consented ("2022 Administrative Order").

The 2022 Administrative Order was designed to ensure X Corp. protects its users' privacy and secures their data. For example, the order requires X Corp. to implement and maintain a privacy and data security program. It also requires the company to provide information about its compliance to the FTC upon request. In seeking "relief" from these obligations, X Corp. does not argue that the safeguards to which it consented have become unnecessary or unworkable. Rather, it complains the FTC asked too many questions after Elon Musk acquired the company. But the FTC asked questions because of sudden, radical changes at the company: within weeks of the acquisition, half of X Corp.'s employees were terminated or resigned, including key executives in privacy, data security, and compliance roles. At Musk's urging, the company hastily released a new version of a product that it abruptly pulled back within days of its release. And numerous reports detailed alarming site outages, product malfunctions, and issues with data access controls. The FTC had every reason to seek information about whether these developments signaled a lapse in X Corp.'s compliance. X Corp.'s motion does not credibly argue otherwise; in fact, it largely fails to acknowledge the circumstances that catalyzed the FTC's requests.

[1] The name of the company was changed in April 2023. For ease of reference, this Opposition uses the name "X Corp." to refer to the company both before and after the name change.

Instead, the company's motion rests on hyperbolic allegations of "witness tampering" and an investigation "tainted by bias." It supports these accusations by mischaracterizing cherry-picked excerpts from the deposition of a partner at Ernst & Young ("EY"), the firm X Corp. initially retained to assess its privacy and data security program pursuant to the 2022 Administrative Order. Yet X Corp. fails to mention that EY chose to terminate its engagement in February 2023 due to the extensive departures within, and a lack of support from, X Corp. Nor does X Corp. acknowledge that it has since retained a new independent assessor, which renders immaterial the company's allegations regarding EY, since EY never produced a report of X Corp.'s program or submitted one to the FTC.

X Corp.'s motion now seeks to use Federal Rule of Civil Procedure 60(b) to discard the entire framework to which it agreed in 2022. This drastic remedy must be denied for multiple reasons. *First*, as a threshold matter, the requested relief—termination of this Court's Stipulated Order—would have no effect on the company's ongoing obligations under the FTC's separate 2022 Administrative Order. And even if the Court construed the motion as a request to terminate the FTC's administrative order, the Court would lack authority to grant it because X Corp. did not first seek that relief from the Commission itself.

Second, even if the compliance obligations to which X Corp. objects were part of the Stipulated Order, relief would be unwarranted because the company's motion does not meet the standard for modification of a judicial decree under Rule 60(b)(5). The company has not identified a change in circumstances that renders the order's safeguards unworkable or contrary to the public interest. Nor has X Corp. offered any argument that its sole proposed modification—outright termination—is suitably tailored to address its complaints. The company also fails to identify extraordinary circumstances warranting relief under Rule 60(b)(6) because, even if true, X Corp.'s accusations fall far short of showing complete frustration of the parties' settlement agreement. The Court should likewise reject X Corp.'s attempt to interfere in the FTC's investigation through premature discovery.

Finally, X Corp. is not entitled to a protective order staying the deposition of Musk. Contrary to X Corp.'s assertions, Musk has unique, first-hand knowledge about the current state and direction of the company's data practices and efforts to comply with the 2022 Administrative Order.

For these reasons, X Corp.'s Motion for Protective Order and Relief from Consent Order, ECF No. 17, should be denied.

STATEMENT OF THE ISSUES TO BE DECIDED

1. Whether Rule 60(b) authorizes the district court to terminate obligations imposed by the FTC via a valid FTC administrative order, contrary to Congress's express statutory determination that the Commission shall decide whether to terminate an FTC administrative order in the first instance.

2. Whether a judicial decree should be terminated under Rule 60(b)(5) where the movant has neither shown a significant change in circumstances rendering compliance more onerous, unworkable, or against the public interest, nor that termination is tailored to address the movant's complaints.

3. Whether a settlement should be set aside under Rule 60(b)(6) where the movant has not shown a complete frustration of the parties' agreement.

4. Whether this Court should grant a protective order staying the deposition of a corporate executive who has first-hand knowledge of his company's compliance with an FTC administrative order.

BACKGROUND

I. Procedural Background

The instant motion arises out of binding agreements that X Corp. made with the FTC, in 2011 and again in 2022, to resolve charges that X Corp. deceptively misrepresented the extent to which it protected the data of its users. The first resulted in the 2011 Administrative Order, and the second in this Court's Stipulated Order and the 2022 Administrative Order. The FTC's current investigation into X Corp. is occurring pursuant to the agency's compliance monitoring authority under the 2022 Administrative Order.

A. The 2011 Administrative Order

X Corp. operates a social media network that is used by hundreds of millions of users around the world. In 2011, the Commission issued an administrative complaint alleging X Corp. was engaging in deceptive practices that violated the FTC Act, 15 U.S.C. § 45(a). *See* 2011 Complaint, ECF No. 1-2 at 6.[2] The heart of that deception was X Corp.'s statements to those users about its data security practices. *Id.* Specifically, the complaint alleged that X Corp. misled its users by claiming it had adopted appropriate measures to protect their nonpublic information and honor their privacy choices, when in fact X Corp. had failed to do so. *Id.* at 4-6. Multiple intruders exploited these lapses to access users' information. *Id.*

[2] Except where otherwise noted, in all quotations, emphases have been added, and internal alteration marks, citations, and footnotes have been omitted.

X Corp. settled those allegations in 2011 by agreeing to an administrative cease-and-desist order, 15 U.S.C. § 45(b). *See* 2011 Administrative Order, ECF No. 1-1. Among other things, that order prohibited X Corp. from misrepresenting the extent to which it maintained and protected the confidentiality, security, privacy, or integrity of nonpublic consumer information. *Id.* at 3. It also required X Corp. to establish and maintain a comprehensive data security program to protect users' nonpublic information, and to obtain periodic third-party assessments of that program. *Id.* at 4-5.

B. The 2022 Administrative Order And Stipulated Order

In 2022, the Commission referred a new complaint against X Corp. to the U.S. Department of Justice, alleging that the company had engaged in multiple violations of the 2011 Administrative Order and the FTC Act by again misrepresenting its measures to protect the privacy and security of nonpublic consumer information. *See* 2022 Complaint, ECF No. 1. Specifically, the complaint alleged X Corp. told users it was collecting their telephone numbers and email addresses to enable certain security features, when in fact that information was also used to target users with advertisements. *Id.* at 14-18. Moreover, certain international privacy standards prohibit companies from processing users' personal information in a manner incompatible with the stated purposes for which it was collected. The complaint alleged that X Corp. claimed to adhere to those standards, but its practices plainly violated them. *See id.*

The Department of Justice accepted the Commission's referral and filed this lawsuit for civil penalties and injunctive relief under the FTC Act. X Corp. agreed to resolve the allegations against it according to the terms set forth in the Stipulated Order. *See* Stipulated Order, ECF No. 11. As part of that settlement, X Corp. agreed to pay a $150 million civil penalty under 15 U.S.C. § 45(*l*). *Id.* The company also consented to reopening the Commission's administrative proceeding against X Corp. and modifying the FTC's 2011 Administrative Order, as set forth in an attachment to the Stipulated Order. *Id.*

The Court entered the Stipulated Order on May 26, 2022. *See id.* Shortly thereafter, the Commission exercised its statutory authority to reopen and modify the 2011 Administrative Order on the terms to which X Corp. had agreed by signing the Stipulated Order. *See* Modification Order, Ex. A; *see also* 15 U.S.C. § 45(b). X Corp. did not object to the reopening or modification.

The 2022 Administrative Order expanded the safeguards required by the 2011 Administrative Order. Among other things, the modified administrative order imposed more robust requirements for X

Corp. to implement and maintain a comprehensive privacy and data security program. *See* 2022 Administrative Order, Ex. B at 4-8. The program provisions required X Corp. to conduct risk assessments of any new or modified product, service, or practice, and implement appropriate safeguards to mitigate identified risks prior to launch. *Id.* at 5-7. They also required X Corp. to maintain access controls for databases storing consumer information, as well as for systems and software that either provided access to users' accounts or contained information enabling access to the company's systems. *Id.* at 7. Additionally, X Corp. was required to obtain periodic assessments of its privacy and data security program from a third-party professional who would assess the effectiveness of X Corp.'s program and identify any gaps or weaknesses. *Id.* at 8-9. Finally, X Corp. agreed to provide information, produce records, and appear for depositions at the FTC's request for compliance-monitoring purposes. *Id.* at 13.

II. FTC Staff's Compliance Monitoring Efforts

On October 27, 2022, Elon Musk acquired X Corp. *See* X Corp. Ltr. to FTC (Dec. 14, 2022), Def. Ex. 5 at 1. In the company's own words, what followed was a "fundamental transformation," including "a significant reduction in headcount" and "a substantial overhaul of its organizational structure, budgeting, revenue-generation priorities, and other fundamental aspects of the business." *Id.*

Given these developments—many of which were reported publicly, *see, e.g.*, FTC Ltr. to X Corp. (Nov. 10, 2022), Def. Ex. 7 at 1—the FTC exercised its discovery rights under the 2022 Administrative Order, requesting records and other information to determine whether X Corp. was properly protecting user data during this transformation. Also, the FTC deposed five former X Corp. employees, including a former Chief Privacy Officer, Chief Information Security Officer, Director of Threat Management and Operations, Director of Security Engineering, and a senior privacy engineering manager. The information obtained revealed a chaotic environment at the company that raised serious questions about whether and how Musk and other leaders were ensuring X Corp.'s compliance with the 2022 Administrative Order.

A. X Corp.'s Numerous Layoffs, Terminations, And Resignations

According to X Corp., from October 27 to December 14, 2022, Musk directed at least five rounds of terminations, layoffs, or other reductions in X Corp.'s workforce. *See* Def. Ex. 5 at 10. The initial layoffs occurred on November 4, 2022, reducing the company's workforce by about 50%. *See* Deposition of Seth Wilson ("Wilson Tr."), Ex. C at 132:15-133:22. Then, in mid-November, Musk rescinded the

company's remote work policy and demanded that every employee confirm in writing that they wanted to opt into the "hardcore" version of "Twitter 2.0." *Id.* at 33:13-35:16. Employees who failed to reply were deemed to have "opted out." *Id.* at 34:20-35:16. Musk's ultimatum prompted numerous employees to leave X Corp. *See* Deposition of Andrew Sayler ("Sayler Tr."), Ex. D at 63:1-16. These reductions affected the teams charged with protecting user data. *See* Deposition of Damien Kieran ("Kieran Tr."), Ex. E at 35:4-13. For example, nearly half of the security, governance, risk, and compliance team left the company. *See id.* at 75:6-77:2; Deposition of Lea Kissner ("Kissner Tr."), Ex. F at 101:17-21.

Within days of the initial layoffs, three key data privacy and security executives all resigned: Chief Privacy Officer Damien Kieran, Chief Information Security Officer Lea Kissner, and Chief Compliance Officer Marianne Fogarty. *See* Kieran Tr. at 87:13-88:5. These three had been the sole remaining members of the company's Data Governance Committee, which was tasked with interpreting and modifying data policies and practices to ensure X Corp. complied with the 2022 Administrative Order. *See* Def. Ex. 5 at 24-25; Kieran Tr. at 89:15-23, 93:20-94:23, 104:22-105:12, 138:24-139:19.

[redacted]

[redacted]

At a deposition, Kissner testified that decisions by Musk and others—including layoffs and other "cost-cutting pressure and decisions"—impaired X Corp.'s ability to "put technical restrictions and controls in place . . . around the company's use of contact data to make sure that it was being used . . . for the purpose that the particular contact data was collected." Kissner Tr. at 80:5-81:3, 84:15-85:16, 113:21-114:10. Notably, the misuse of contact data had been a basis for the government's 2022 lawsuit. *See supra* pp. 4-5. Kissner also testified that X Corp. was impaired from completing improvements in its data management, access, and deletion practices. *See* Kissner Tr. 80:5-84:8, 87:3-25, 91:3-13, 130:8-21, 237:4-

239:9. And Kissner testified that certain programmatic protections relating to product launch reviews, data access controls, and other ongoing security controls were effectively dismantled. *See id.* at 115:14-116:10.

Finally, Kissner testified that, due to the mass employee exodus, about half of the controls in X Corp.'s information security program did not have a designated "owner" responsible for their operation. *Id.* at 104:21-105:18. Similarly, at his deposition, Kieran testified that the firings and layoffs meant no one was responsible for about 37% of X Corp.'s privacy program controls. *See* Kieran Tr. at 85:17-86:7.

B. Musk's Conduct

After the acquisition, Musk became X Corp.'s Chief Executive Officer as well as its sole director, President, Treasurer, and Secretary. Def. Ex. 5 at 2, 9. Musk also personally assumed supervisory authority over X Corp.'s privacy and information security program under the 2022 Administrative Order. *Id.* at 9. During his deposition, former Director of Threat Management and Operations Seth Wilson described a meeting with Musk and others on or about November 10, 2022, concerning possible security incidents and compliance with the 2022 Administrative Order. *See* Wilson Tr. at 74:14-24. Wilson testified he was concerned about compliance since X Corp. had lost both its Chief Information Security Officer and Chief Privacy Officer, and thus sought clarity from Musk on the "escalation point" for incidents. *Id.* at 72:10-23, 77:12-24. At this meeting, Musk gave assurances that he was "the single person responsible" and that liability "falls on him." *Id.* at 75:20-76:7. In terms of reporting security incidents, Musk told Wilson, "just go straight to me." *Id.* at 76:8-15. Elsewhere, Musk's conduct reflected a similar understanding of his active oversight responsibilities over X Corp. For example, Musk instructed engineers and others to "send a weekly update of everything [that they] were working on." *Id.* at 120:23-122:4.

Former X Corp. employees testified about several concerning incidents involving Musk. For example, in early December 2022, Musk reportedly directed staff to grant an outside third-party journalist "full access to everything at Twitter. . . . No limits at all."[3] *See* Sayler Tr. at 216:19-217:10; Wilson Tr. at 60:22-61:11. Consistent with Musk's direction, the journalist was initially assigned a company laptop and internal account, with the intent that they be given "elevated privileges beyond just what a[n] average employee might have." Wilson Tr. at 61:21-63:3; *see* Sayler Tr. at 216:19-218:17. But, concerned such

[3] F. Siddiqui, Twitter Brings Elon Musk's Genius Reputation Crashing Down to Earth (Dec. 24, 2022), *The Washington Post*, https://perma.cc/7HLF-ELH9.

an arrangement could expose nonpublic user information in potential violation of the 2022 Administrative Order, longtime information security employees intervened and implemented safeguards to mitigate the risks. *See* Sayler Tr. at 216:19-217:10; Wilson Tr. 63:23-64:3. Ultimately, the journalist did not receive "direct access" to X Corp. systems, but instead "was working with some other individuals within [the company] who were potentially accessing such services on [their] behalf." Sayler Tr. at 218:10-17.

Wilson also received a screenshot of "a text message from Elon" directing that an executive assistant was to receive access to certain systems "immediately. and anybody standing in the way [was] to be fired." Wilson Tr. at 64:4-65:10. Wilson thought the access was inconsistent with the assistant's position. *Id.* at 66:16-22. To him, this "raised some concerns" that employees would "get pressure from an access standpoint to do things" and "be given access" to systems that "weren't commensurate with their job responsibility." *Id.* at 64:4-65:10. Former Director of Security Engineering Andrew Sayler similarly testified he had "ongoing questions about Elon's commitment to the overall security and privacy of the organization" because "the manner in which Elon was requesting us to grant access to third parties that had not undergone our regular vetting process struck" Sayler as "having some degree of disregard for the overall sensitivity and security at that level of access." Sayler Tr. at 264:22-265:24.

Also in December 2022, Musk directed that X Corp. servers be moved from one data center to another. Wilson Tr. at 152:8-21, 153:22-154:16. X Corp. policy was that "data cannot leave the data center unless it's been wiped." *Id.* at 152:8-153:12. But because employees only had "a matter of days and weeks, not, like months or quarters" to conduct the move, they did not have "enough time to put together a process that [] would be in compliance with [their] own policies." *Id.* In fact, the relocated servers were not only unwiped, but they also contained [redacted]

In another example, Musk insisted on launching the new Twitter Blue user verification service on an accelerated basis, despite staffing limitations. According to Kissner, Musk insisted the service "ha[d] to launch right now," even though X Corp. was "so reduced in size that [teams were] struggling to keep the service up." Kissner Tr. 130:22-132:12. Kieran recalled Twitter Blue was implemented so quickly that, "to ensure the speed that the product and engineering team was trying to work at," the security and privacy review was not conducted in accordance with the company's process for software development.

See Kieran Tr. at 146:13-21. Sayler described how some of the security team's recommendations went unheeded, including measures for mitigating the risk that people would purchase verification to impersonate other accounts. Sayler Tr. at 155:13-156:3. These concerns were well-founded: Twitter Blue was suspended the day after it was launched, after reports of fake accounts and impersonations. *See id.*[4]

C. Resignation Of X Corp.'s Assessor

X Corp. retained EY to conduct the third-party assessment required by the 2022 Administrative Order. *See* Deposition of David Roque ("Roque Tr."), Def. Ex. 14 at 19:18-20:1, 23:3-8, 24:15-20. The administrative order required the initial third-party assessment to be completed by July 25, 2023. *See* 2022 Administrative Order at 8-9. But on February 27, 2023, EY informed X Corp. it was terminating its engagement as the company's assessor before this work was completed. After EY resigned, X Corp. selected another assessor to take its place. *See* Roque Tr. at 187:21-189:11.

During a deposition, EY partner David Roque testified that EY chose to resign because of concerns "with the timing of the engagement . . .[,] the resource availability of the client to support and execute the engagement, [and] the ongoing changes amid the executive management team to be able to represent compliance with the order." *Id.* at 24:21-25:11. Because the "order has a very specific timeline for the end of the assessment period," EY and X Corp. had agreed that EY would "be onsite starting in January of 2023." *Id.* at 25:15-25, 26:8-13. However, when EY reached out in December 2022, they were informed that X Corp. "did not have the resources to facilitate [EY] beginning [its] procedures." *Id.* at 26:17-27:6. At least weekly thereafter, EY followed up on its request, but X Corp. continued pleading insufficient resources. *Id.* at 27:18-25. Finally, in February 2023, X Corp. proposed that EY begin field work procedures on March 15, 2023. *Id.* at 27:7-11. EY was concerned, however, that this truncated period was insufficient to "actually . . . complete or assess all of the controls that [it was] going to be required to look at" under the 2022 Administrative Order. *Id.* at 25:15-25.

Moreover, Roque explained that the "significant amount of turnover and departure of employees from the company" meant that there was "a very limited set of individuals that had been identified to facilitate [EY's] audit." *Id.* at 28:3-15. Indeed, EY's primary X Corp. contact changed six times in two

[4] *See also, e.g.*, B. Lee, Fake Eli Lilly Twitter Account Claims Insulin Is Free, Stock Falls 4.37% (Nov. 12, 2022), *Forbes*, https://perma.cc/CJB3-E2TG.

months, including a two-week period in late 2022 when EY was redirected to three different people in rapid succession. *See id.* at 29:5-32:16. Moreover, "[t]he large number of departures that occurred at [X Corp.] in November and through early December just left holes operationally," including in terms of who could serve as the designated "owners" responsible for the various controls that made up the company's privacy and information security program. *Id.* at 33:9-34:24. These holes remained apparent to EY from information that X Corp. provided in December 2022 and January 2023. *Id.* at 34:25-35:9.

Finally, Roque testified there was "constant turnover" in "the executives that were . . . familiar with the [privacy and information security] programs that had been implemented." *Id.* at 38:15-23. As part of its assessment, EY "need[ed] to obtain a representation letter" from an X Corp. manager or executive who could "convey they have accurately represented and truthfully shared the operation of the program." *Id.* at 38:24-39:12. But by February 2023, EY was "wondering if [X Corp.] would be able to have somebody in a role that could make those types of attestations or representations to us." *Id*

Roque also testified about two meetings he recalled having with FTC staff in connection with the assessment. *See id.* at 198:24-199:12. In a December 2022 meeting, consistent with the FTC's decision to approve EY as the assessor, FTC staff conveyed its expectation that EY would issue an assessment report by the deadline required under the 2022 Administrative Order. Roque thought this was "[s]urprising from the standpoint of there was so much change going on," and X Corp. was "firing a variety of providers on a variety of fronts." *Id.* at 202:15-203:6. Roque did not otherwise understand the FTC to be conveying other expectations from "a conclusion standpoint" at that meeting. *Id.* at 203:7-12. Consistent with EY's duty to identify and report on gaps and weaknesses in X Corp.'s program, and not to rely primarily on X Corp.'s assertions or attestations for its findings, *see* 2022 Administrative Order at 8-9, Roque stated that the FTC requested "specific types of procedures that they expected to be performed." *Id.* at 203:13-21; *see* 2022 Administrative Order at 9 (explaining the assessor must identify specific evidence examined to make its determinations—such as documents reviewed, sampling and testing performed, and interviews conducted—and explain why such evidence is appropriate and sufficient to justify the assessor's findings).

FTC staff met again with EY in January 2023 after learning of numerous troubling developments at the company, including the persistence of numerous gaps in the ownership of controls that made up X Corp.'s privacy and data security program. *See supra* p. 7. During that meeting, Roque had the impression

that the FTC expected the assessment to identify issues with X Corp.'s program. Roque Tr. at 200:14-202:1. According to Roque, FTC staff indicated that, if there were not "negative results in certain areas based on what they already understood from an operational standpoint, based on information [X Corp.] had provided, . . . they would be surprised, and they would be definitely following up with [EY] to understand why [EY] . . . reached the conclusions [it] did if they were sort of not reflecting gaps in the controls." *Id.*; *see id.* at 124:10-21 (similar). During that meeting, FTC staff also gave a list of "the types of procedures they were expecting [EY] to execute" as part of the assessment. *Id.* at 200:14-202:1.

While Roque thought some of FTC staff's expectations regarding the assessment were unusual, he noted that the conversations were all "focus[ed] on getting appropriate information to make sure the program mandated under the order was operating effectively." *Id.* at 121:4-8. He also acknowledged he had never been involved in an assessment that was "similar to the [X Corp.] order assessment engagement." *Id.* at 211:1-4. And he noted he had relatively limited experience working with government regulators. *See id.* at 210:2-25. Roque did *not* indicate that the meetings with FTC staff led EY to resign. *See generally id.* at 118:20-124:21, 196:19-212:12. To the contrary, Roque testified that EY's reasons for resigning were memorialized in an internal memorandum, *see id.* at 40:22-41:1, which [redacted]

[redacted]

Shortly after Roque's deposition, X Corp. filed this motion, seeking to terminate or modify the Stipulated Order and prevent FTC staff from deposing Musk.

ARGUMENT

X Corp.'s motion should be denied for multiple reasons. *First*, terminating the Stipulated Order would have no effect on X Corp.'s discovery and assessment obligations because those obligations flow from the 2022 Administrative Order, which is not properly before the Court. *Second*, X Corp. has failed to satisfy the standards for relief under Federal Rule of Civil Procedure 60(b)(5) and (6). *Finally*, X Corp. is not entitled to a protective order against the deposition of Musk, who has first-hand knowledge of conduct that is the subject of the FTC's investigation.

I. X Corp.'s Prospective Obligations Cannot Be Terminated Under Rule 60(b) Because They Flow From The FTC's Administrative Order And Not The Court's Stipulated Order

Hoping to limit the FTC's investigation into alarming developments related to its data privacy and

security practices. X Corp. "requests that the Court enter an order terminating or modifying the *Stipulated Order*" under Federal Rule of Civil Procedure 60(b). Def. Mem. at ii. But the assessment and discovery requests X Corp. complains about flow from the Commission's *2022 Administrative Order*, which is distinct from this Court's Stipulated Order. *See* Def. Mem. at 3-4 (recognizing the Commission entered the 2022 Administrative Order after the Court entered the Stipulated Order). Thus, terminating or modifying the Stipulated Order would have no effect on the assessment and discovery obligations to which X Corp. now objects. This alone is a sufficient basis to deny X Corp.'s motion. *See United States v. Asarco Inc.*, 430 F.3d 972, 979 (9th Cir. 2005) (explaining that a proposed modification must be "suitably tailored to resolve the problems created by the changed factual . . . conditions"); *see also infra* pp. 20-21.

Moreover, to the extent X Corp. is seeking modification or termination of the 2022 Administrative Order, a district court lacks the statutory authority to grant such relief. The FTC Act provides that such requests must be filed with the Commission in the first instance, not with a district court through a Rule 60(b) motion. Rule 60(b) "regulates the procedures by which a party may obtain relief from a final judgment." *Delay v. Gordon*, 475 F.3d 1039, 1044 (9th Cir. 2007). The rule codified various writs allowing litigants to seek relief from *court* orders. *See Banister v. Davis*, 140 S. Ct. 1698, 1709 (2020). But Rule 60(b) says nothing about modifying or terminating the FTC's *administrative* orders. For good reason: the FTC Act instead sets forth the standards and procedures for reevaluating administrative orders.

Under the FTC Act, Congress charged the Commission with protecting the public from "unfair or deceptive acts or practices in or affecting commerce," and it empowered the agency to issue administrative orders commanding corporations to "cease and desist from using" such acts or practices. 15 U.S.C. § 45(a), (b). Congress also understood that the public interest may change over time, and an administrative order may also need to change. *See Elmo Co. v. FTC*, 389 F.2d 550, 552 (D.C. Cir. 1967). To that end, the FTC Act provides that "the Commission may at any time . . . reopen and alter, modify, or set aside, in whole or in part," an administrative order if it finds that "conditions of fact or of law have so changed as to require such action or if the public interest shall so require." 15 U.S.C. § 45(b). Moreover, the subject of an order may "file[] a request with the Commission" seeking relief from an administrative order, which must "make[] a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside." *Id.* Only after the Commission has an opportunity to consider such a request may

the subject seek appropriate judicial review. *See id.* § 45(b), (c); *United States v. Louisiana-Pac. Corp.*, 754 F.2d 1445, 1450 (9th Cir. 1985) (directing that the *Commission* shall make "specific findings" on whether to reopen and modify an administrative order); *see also United States v. Louisiana-Pac. Corp.*, 967 F.2d 1372, 1377 (9th Cir. 1992) (limiting judicial review of the Commission's decision "not to modify" an administrative order to whether that determination "was arbitrary and capricious"); *Rettinger v. FTC*, 392 F.2d 454, 457 (2d Cir. 1968) (holding that the Commission's modification of an administrative order is a "necessary prerequisite to [judicial] review" under the FTC Act).

Through the FTC Act, Congress thus determined that the Commission should decide "in the first instance" whether and when to "reopen and modify its orders." *Atl. Ref. Co. v. FTC*, 381 U.S. 357, 377 (1965); *see Mohr v. FTC*, 272 F.2d 401, 406 (9th Cir. 1959) (explaining the "Commission [is] entitled to change its mind . . . as to the kind of a cease and desist order which [is] necessary to protect the public interest"); *see also Axon Enter., Inc. v FTC*, 143 S. Ct. 890, 898 (2023) (noting the FTC Act "provide[s] for review of a *final* Commission decision"). X Corp. has filed no request with the Commission seeking relief from the 2022 Administrative Order. Having failed to pursue this administrative prerequisite, X Corp. cannot use Rule 60(b) to circumvent the review process that Congress established.

In sum, X Corp. did not—and, at this time, cannot—seek judicial relief from the 2022 Administrative Order. Therefore, X Corp.'s request to modify or terminate should be denied.

II. X Corp.'s Allegations Also Fail To Meet The Standards for Relief Under Rule 60(b)

Even if the compliance reporting obligations of which X Corp. complains were part of the Court's Stipulated Order, its request for relief still would not satisfy the relevant standards under Rule 60(b).

A. X Corp. Has Not Met The Standard For Modification Or Termination Under Rule 60(b)(5)

To obtain modification of a judicial consent decree under Rule 60(b)(5)—which permits relief from a judgment if its prospective application "is no longer equitable"—X Corp. "must satisfy the initial burden of showing a significant change either in factual conditions or in the law warranting modification of the decree." *Asarco Inc.*, 430 F.3d at 979 (citing *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 384 (1992)). And because X Corp. "cites significantly changed factual conditions," it must "additionally show that the changed conditions make compliance with the consent decree more onerous, unworkable,

or detrimental to the public interest." *Id.* Finally, the Court "must then determine whether [X Corp.'s] proposed modification is suitably tailored to resolve the problems created by the changed factual . . . conditions." *Id.* X Corp.'s request fails on all three fronts.

1. X Corp. Has Not Shown That A Significant Change Warrants Modification

X Corp. contends the FTC's alleged "harassment campaign" against it "constitutes a 'changed circumstance' rendering continued enforcement" of the Court's Stipulated Order inequitable. Def. Mem. at 9, 14. Specifically, the company claims the FTC "impos[ed] new and burdensome [discovery] demands" and made "improper attempts to influence [EY's] independent assessment," *id.* at 14, and that those actions demonstrate "bias and prejudgment," *id.* at 18. This argument fails for multiple reasons.

First, X Corp. has offered "no evidence to support [its] contention that the [FTC] has used the consent decree to conduct bad-faith, harassing investigations" that would warrant modification. *SEC v. Musk*, No. 22-1291, 2023 WL 3451402, at *2 (2d Cir. 2023) (unpublished).[5] Rather, the actions of which X Corp. complains were all taken to "investigate [X Corp.'s] compliance with the decree, as provided for in the parties' agreement." *Id.*

By claiming that the FTC's investigation "has lost any plausible connection to lawful purposes," Def. Mem. at 2, X Corp. ignores the obvious: under the 2022 Administrative Order, the FTC had ample authority to investigate X Corp.'s compliance, and the "fundamental transformation" within X Corp. gave it every reason to do so. To name just a few such reasons: shortly after the Musk acquisition, X Corp. laid off or fired at least half of its workforce, *supra* p. 5, and by April 2023 the company had reportedly lost about 80% of its workforce through subsequent rounds of terminations and resignations.[6] This exodus significantly impacted X Corp.'s privacy, data security, governance, risk, and compliance functions. *Supra* p. 6. Key compliance officers resigned—including the company's entire Data Governance Committee—

[5] In 2022, Musk offered very similar arguments in support of a motion to modify or terminate a consent decree entered into with the Securities and Exchange Commission in the U.S. District Court for the Southern District of New York. The district court rejected that motion—and the Second Circuit affirmed that judgment—for many of the same reasons articulated in this opposition. *See Musk*, 2023 WL 3451402, at *1-3.

[6] *See* M. Toh & J. Liu, Elon Musk Says He's Cut About 80% of Twitter's Staff (Apr. 12, 2023), *CNN Business*, https://perma.cc/UB6E-K4XM.

and the company's former Chief Information Security Officer issued dire warnings about X Corp.'s data security and privacy practices under new leadership. *Id.* X Corp.'s independent assessor, EY, abruptly resigned due to a perceived lack of timely support from, and dramatic changes within, X Corp. *See supra* pp. 9-10. And sworn testimony demonstrates that Musk had at least once ordered employees to provide an outside journalist with full access to X Corp. systems that could expose nonpublic user data, and did so without regard for the company's existing order-mandated safeguards. *See supra* pp. 7-8. "It is unsurprising that," under these circumstances, the FTC "would have some questions." *SEC v. Musk*, No. 18-cv-8865, 2022 WL 1239252, *9 (S.D.N.Y. Apr. 27, 2022), *aff'd sub nom. Musk*, 2023 WL 3451402.[7]

While X Corp. claims "the only possible purpose" of the FTC's post-acquisition investigation has been to harass, it "reach[es] this conclusion . . . by concentrating only on" the fact that the agency's demands post-date Musk's acquisition while omitting why the FTC took the actions it did. *FTC v. Rockefeller*, 591 F.2d 182, 189 (2d Cir. 1979) (upholding enforcement of FTC subpoenas because they flowed "reasonably and logically" from lawful investigatory goals). X Corp.'s argument "embod[ies] the post hoc ergo propter hoc fallacy." *United States v. Gallegos-Curiel*, 681 F.2d 1164, 1168 (9th Cir. 1982) (recognizing that "vindictiveness cannot be inferred simply because" the government's actions followed some "act by the defendant."). The company's contention that the FTC "misused" the 2022 Administrative Order to "launch endless, boundless investigations" motivated by "bias" and "a desire to harass" is therefore "meritless." *Musk*, 2022 WL 1239252, at *4, 7.

X Corp.'s allegation of "witness tampering," Def. Mem. at 1, likewise has no merit. Even taking its cherry-picked quotations from Roque's testimony in isolation, *see id.* at 9-11, 16-17, the company has offered no evidence to support its accusation that the FTC "engage[d] in misleading conduct toward" EY, that it "falsif[ied] evidence," or that it "interfere[d] with [EY's] free and unhampered determination to testify," *id.* at 15. And while X Corp.'s motion recites professional standards for certified public accountants, *id.* at 16, it offers no evidence that the FTC pressured EY to breach those standards, nor that

[7] Accordingly, the Court should be skeptical of how X Corp. characterizes the FTC's investigational demands. For example, X Corp. complains that a request regarding the sale of "office equipment" had no rational connection to "privacy and security of user data." Def. Mem. at 7. But X Corp. omits that this request was tailored to whether and how computing equipment was "sanitized clean of its [private user] data," reflecting a concern about unauthorized access and disclosure. Def. Ex. 9 at 5.

the agency "bull[ied]" EY in any way, *id.* at 17. Nor has the company even explained how it will be harmed by the FTC's communications with EY, given that X Corp. replaced EY with a new independent assessor after EY resigned due to X Corp.'s conduct. *see supra* p. 9.

Instead, X Corp. offers hyperbolic rhetoric about benign communications. For example, X Corp. mischaracterizes a December 2022 meeting as a "heavy-handed" effort by the FTC "to ensure EY would generate evidence damaging Twitter." Def. Mem. at 10 (discussing Roque Tr. at 200:2-12, 124:14-21). But Roque testified that, in that meeting, FTC staff simply communicated an expectation that EY would issue an assessment (indeed, it had previously approved EY to do just that), without conveying other expectations from "a conclusion standpoint." *See* Roque Tr. at 200:2-12, 203:7-12.

X Corp. also makes much (Def. Mem. at 9, 16) of a January 2023 meeting in which FTC staff allegedly stated that, if EY's assessment lacked "negative results in certain areas . . . based on information [X Corp.] had provided, . . . they would be surprised, and they would be definitely following up with [EY] to understand," *id.* at 200:14-202:1. But X Corp. ignores that this exchange was informed by alarming developments from the company that had been surfacing on a near-weekly basis since the acquisition, *see supra* pp. 5-9, and that FTC staff were entitled to "convey concerns about the level of change at" X Corp. and "make sure that EY examined [those developments] in its assessment of [X Corp.'s] program," Roque Tr. at 122:25-123:18 (confirming Roque's understanding that these were the FTC's aims).

As for Roque's comment that he was "trying to make sure . . . we didn't have an adverse threat from an independent interest . . . trying to influence the outcome," *id.* at 120:24-121:2, he went on to explain that, more broadly, he was "concerned that there was this adversarial situation occurring where you had *two competing parties* that, stepping back, *both* had a desire for a certain outcome that may not have always been aligned," *id.* at 121:21-122:14; *see also id.* at 89:20-90:3 (expressing a concern that X Corp. "might be upset with the results" if EY generated an unfavorable report). This adversarial dynamic was unremarkable: after all, the 2022 Administrative Order was part of a settlement that resolved an *adversarial proceeding*. Consequently, if EY had discovered problems in X Corp.'s data privacy and security program, the FTC naturally would have had an interest in learning more and seeing such issues documented in the assessor's report, whereas X Corp. might have preferred for those problems to remain hidden. And while Roque was concerned about the involvement of "somebody outside of the arrangement

we had with [X Corp.]," *id.* at 121:1, he cautioned that he had only interacted with government regulators in contexts "very different from this particular engagement," *id.* at 210:1-25, and he noted that having a third party involved at all was "unusual" for him, *id.* at 203:24-204:25. X Corp. thus creates an illusion of impropriety only by depriving the testimony of its essential context.[8]

X Corp. cites no authority, nor any provision in the 2022 Administrative Order, that precluded FTC staff from conveying their views and expectations to Roque as outlined above. Rather, because the parties had not "negotiated" any "condition[s]" on communications with the independent assessor in their agreement, it is unsurprising that FTC staff sought to raise questions with EY concerning X Corp.'s compliance. *T.Y. v. Bd. of Cnty. Comm'rs of Cnty. of Shawnee*, 912 F. Supp. 1424, 1427 (D. Kan. 1996) (holding that attempt to forbid *ex parte* communications with independent monitor to "[e]nsure [the monitor's] impartiality" was inconsistent with the parties' consent decree, which contained no such prohibition); *see also* Roque Tr. at 114:16-115:12 (noting X Corp. had informed EY that it had "latitude" to "talk to the FTC" without "hav[ing] [X Corp.] present"). Indeed, courts are reticent even to *disqualify* a monitor—let alone terminate a consent decree—based on communications that allegedly threatened the monitor's impartiality. *See United States v. City of Albuquerque*, 1:14-cv-1025, 2017 WL 5508519, *5-6 (D.N.M. Nov. 16, 2017) (rejecting defendant's "dumbfound[ing]" argument that federal agency's communications undermined monitor's impartiality because "the parties [had] not prohibited" such communications); *Cobell v. Norton*, 237 F. Supp. 2d 71, 81-82 (D.D.C. 2003) (noting that a compliance monitor's need for *ex parte* communications with the parties "cannot rationally be disputed" and "has been explicitly recognized by virtually all circuits" (collecting cases)); *United States v. Apple Inc.*, 787 F.3d 131, 138-39 (2d Cir. 2015) (upholding denial of request to disqualify even where the monitor took the "remarkable" step of "litigat[ing] on the side of a party"). Thus, X Corp.'s argument that the parties'

[8] X Corp. also mischaracterizes an email in which Roque considered whether the FTC might "create 'other' challenges for EY over time," Def. Mem. 11 (citing Def. Ex. 17 at 1). X Corp. combines this quotation with its own narration to hint at a coercive threat tied to a specific conclusion. *See* Def. Mem. 1, 16. But Roque's email [redacted] Def. Ex. 17 at 1. And X Corp. omits that, [redacted] *Id.* Nor does X Corp. acknowledge the broader concern within EY that "*both* [X Corp.] *and* the FTC would not be happy with [EY]" if the firm withdrew. Roque Tr. at 95:25-96:7.

agreement should be terminated due to alleged "witness tampering" is factually and legally baseless.

Second, even if X Corp. had established a significant change in circumstances, it would not warrant relief because "modification should [ordinarily] not be granted where [the movant] relies upon events that actually were anticipated" by the parties. *Rufo*, 502 U.S. at 385. Courts look "within [the] four corners" of the decree to ascertain the parties' expectations. *Asarco*, 430 F.3d at 980. Here, the circumstances to which X Corp. now objects flow from the parties' agreement.

To begin, X Corp. agreed to the investigation of which it now complains. The company characterizes FTC's investigative demands as a "changed circumstance," Def. Mem. 14, but "the plain terms of the [2022 Administrative Order] reveal the parties' expectation that" such demands "might occur during the lifetime of" its enforcement. *Asarco*, 430 F.3d at 982. The 2022 Administrative Order expressly authorized the FTC to pursue discovery "without further leave of court," and to pursue "all other lawful means" to investigate compliance. 2022 Administrative Order § XIII; *see also Asarco*, 430 F.3d at 982 (noting a reservation of the government's "rights to take any and all response actions authorized by law" evidenced parties' anticipation that the government might take such action). X Corp. consented to these terms as part of the settlement, so it "could hardly have thought that at the time [it] entered into [that settlement] that [it] would have been immune from [FTC compliance] investigations." *Musk*, 2022 WL 1239252, at *8. It is therefore "particularly ironic" that X Corp. now expresses surprise at one. *Id.*

Moreover, FTC staff's alleged communications with the independent assessor were in line with what the parties contemplated. The 2022 Administrative Order contains no "commitment . . . that would prohibit the [FTC] from" communicating its views to the assessor. *Asarco*, 430 F.3d at 989. The absence of such a prohibition is significant, as X Corp. "had ample opportunity to propose incorporation in the decree of any protection it may have felt necessary, and to object to procedures it deemed contrary to its understanding of the decree's terms." *Id.*; *see also T.Y.*, *City of Albuquerque*, and *Cobell*, discussed *supra* p. 17. X Corp. now complains that the FTC violated the agreement by sharing its concerns and expectations with EY, *see supra* pp. 10-11, even though nothing prohibited the agency from doing so. This Court should decline X Corp.'s invitation to read new proscriptions into the decree.

Third, X Corp. also fully expected the perceived "bias," Def. Mem. at 18-19, that it now alleges. The 2022 Administrative Order's requirement for an "objective, independent *third-party*" assessment

reveals that neither party considered the other to be an objective, independent observer. 2022 Administrative Order § VI. Again, the 2022 Administrative Order resolved the parties' *adversarial* proceeding. It should come as no surprise, then, that the FTC might take actions and make statements with which X Corp. disagrees. If allegations of bias sufficed under Rule 60(b)(5), no consent decree—and no third-party monitorship—would be safe.

Because the circumstances cited by X Corp. were anticipated, to obtain modification, it must "satisfy a heavy burden to convince a court that it agreed to the decree in good faith, made a reasonable effort to comply with the decree, and should be relieved of the undertaking under Rule 60(b)." *Asarco*, 430 F.3d at 984. X Corp. has not even attempted to meet that burden, so its motion should be denied.

2. X Corp. Has Not Shown That Compliance With The Decree Is More Onerous, Unworkable, Or Detrimental To The Public Interest

X Corp.'s argument fails for yet another reason: even if the 2022 Administrative Order's prospective requirements were part of the Stipulated Order (they are not), and even if the Court were to accept the company's misleading factual narrative (it should not), X Corp. has not shown that those facts make compliance *with the order's requirements* "more onerous, unworkable, or detrimental to the public interest." *Asarco*, 430 F.3d at 979. Contrary to X Corp.'s framing, *see* Def. Mem. 12 (suggesting "*[a]ny* showing of a significant change . . . would justify a modification"), to warrant modification, the proffered change must relate to the purposes underlying the decree, and to the feasibility of carrying out its requirements, *see Asarco*, 430 F.3d at 979; *see also Moon v. GMAC Mortgage Corp.*, C08969Z, 2008 WL 4741492 (W.D. Wash. Oct. 24, 2008); *United States v. Swift & Co.*, 189 F. Supp. 885, 905 (N.D. Ill. 1960) ("Change is inevitable, but it is only change that reaches the underlying reasons for the decree that is relevant."). Thus, even allegations of governmental harassment do not warrant modification of a decree that remains feasible. *See Bldg. & Const. Trades Council of Philadelphia & Vicinity, AFL-CIO v. NLRB*, 64 F.3d 880, 890-91 (3d Cir. 1995) (holding alleged "harassing" agency adjudications are not "changed circumstances [rendering] adherence to the [consent decree's] compliance procedure substantially more onerous" or "unworkable").

Far from demonstrating that the 2022 Administrative Order's substantive requirements are now more onerous or unworkable, X Corp.'s motion largely ignores them. And while X Corp. does claim the

FTC rendered the decree "unworkable" by allegedly "tamper[ing] with an independent assessment," Def. Mem. at 19-21, this argument fails for multiple reasons. *First*, X Corp. has not shown that, by merely communicating expectations and concerns, *supra* pp. 10-11, the FTC rendered EY incapable of providing an independent assessment. In fact, it was *X Corp.'s* conduct that led to EY's resignation. *Supra* pp. 9-10. *Second*, even if the FTC had "irremediably tainted" EY's assessment, Def. Mem. at 21, X Corp. has not explained why this would have any prospective relevance, as X Corp. has since retained a new independent assessor, *see supra* p. 9, and there is no suggestion that the new assessor's work has been compromised in any way. *Third*, the 2022 Administrative Order imposes various requirements that have nothing to do with the assessor's independence, including the prohibition against lying to consumers (§ I), the requirement to maintain a comprehensive program that protects consumers' information (§ V), and the requirement to offer enhanced account security features in a non-deceptive manner (§ III). X Corp. does not suggest that these obligations have become "more onerous" or "unworkable." *Asarco*, 430 F.3d at 979.

X Corp. also contends that enforcing the parties' settlement would be "detrimental to the public interest." Def. Mem. at 18. But "any argument that the continued enforcement of the decree would be detrimental to the public interest would seem most unlikely given [X Corp.'s] purely private interest in wanting to be free of the decree" to which it agreed. *NLRB v. Harris Teeter Supermarkets*, 215 F.3d 32, 36 (D.C. Cir. 2000); *see also SEC v. Coldicutt*, 258 F.3d 939, 944 (9th Cir. 2001) (citing *Harris Teeter*). By contrast, the *public's* interest in maintaining the decree's safeguards is as strong as ever, particularly given the alarming post-acquisition developments within X Corp. *See Musk*, 2023 WL 3451402, at *2.

3. X Corp. Has Not Shown That Its Proposed Modification Is Suitably Tailored

Nor is X Corp.'s proposed relief "suitably tailored to resolve the problems created by the changed factual . . . conditions" it cites. *Asarco Inc.*, 430 F.3d at 979. Indeed, the company offers no argument whatsoever that its sole proposed modification—outright termination of the parties' agreement—is suitably tailored to redress the company's complaints. This omission confers yet another independent basis to deny X Corp.'s request for relief under Ruel 60(b)(5).

Nor could X Corp. show that its proposed modification is suitably tailored even if it tried. To obtain complete dissolution of a judicial consent decree under Rule 60(b)(5), a movant must generally show that the decree's "objective . . . has been achieved." *Horne v. Flores*, 557 U.S. 433, 450 (2009); *see*

Patterson v. Newspaper & Mail Deliverers' Union of New York & Vicinity, 13 F.3d 33, 39 (2d Cir. 1993) (explaining that a court is entitled to "terminate the entire decree once [its dominant] objective has been reached" and it "has served its purpose"); *Stewart v. General Motors Corp.*, 756 F.2d 1285, 1291-93 (7th Cir. 1983) (granting dissolution because "the decree's provisions are now redundant"). X Corp. "makes no showing that the objective of the consent decree has been achieved"—nor could it, given the post-acquisition developments discussed above—so its request "to terminate the decree altogether" should be denied. *Musk*, 2023 WL 3451402, at *2, n.2. Indeed, even if the FTC had breached the parties' agreement as X Corp. suggests (it did not), *see* Def. Mem. at 21, then the proper relief, at most, would be to "simply order the [FTC] to follow" it. *W. Watersheds Project v. Bennett*, No. 04-cv-181, 2008 WL 2003114, at *6 (D. Idaho May 8, 2008) (declining to modify a consent decree where an agency deviated from it).

X Corp. fails even to explain how its sole proposed modification (termination) would "resolve the problems created by the changed factual . . . conditions" of which it complains. *Asarco*, 430 F.3d at 979. Even if the 2022 Administrative Order's requirements were part of the Stipulated Order, and even if that order was terminated, the agency would retain authority to continue investigating X Corp.'s potential violations of the FTC Act, including the allegations underlying this litigation. *See, e.g.*, 15 U.S.C. § 49 (granting the FTC broad investigative authority); *see also United States v. Turner*, No. 3:13-cv-1827, 2022 WL 1570741, at *2 (S.D. Cal. May 17, 2022) (modification was not suitably tailored where it was "not clear" that such relief would alleviate the issues of which the movant complained).

In applying Rule 60(b)(5), courts "promote[] adherence to settlement agreements voluntarily entered into by parties to a litigation and ensure[] that consent decrees are not so easily modifiable as to discourage parties from reaching constructive settlements." *United States v. Eastman Kodak Co.*, 63 F.3d 95, 102 (2d Cir. 1995). The Court should therefore hold X Corp. to the terms of the parties' agreement.

4. X Corp.'s Alternative Request For Discovery Is Meritless.

Because X Corp.'s allegations of bad faith are meritless, *see supra* pp. 14-18, its alternative request for discovery regarding a supposed "abuse of process," Def. Mem. at 20, should be denied.[9] X Corp.'s

[9] X Corp. recognizes that this Court's "authoriz[ation]" is required before it may "obtain discovery," Def. Mem. 20, but it has nonetheless forged ahead by issuing subpoenas to third parties, one of which it now seeks to enforce in another court, *see* Motion to Compel, *X Corp. v. Ernst & Young, LLP*,

request constitutes an attempt to disrupt the agency's active, pre-enforcement investigation—something courts do not permit. *See, e.g., Genuine Parts Co. v. FTC*, 445 F.2d 1382, 1387-88 (5th Cir. 1971) (affirming denial of a motion for discovery concerning an FTC pre-enforcement investigation). Indeed, "grave policy considerations . . . militate against allowing" what X Corp. seeks. *Id.* at 1388.

The authorities X Corp. cites, *see* Def. Mem. at 20-21, do not suggest otherwise. Instead, they illustrate only that, in "extraordinary circumstances," courts have permitted limited discovery concerning credible allegations of bad faith in an agency's *subpoena enforcement* action. *SEC v. McGoff*, 647 F.2d 185, 193 (D.C. Cir. 1981) (Ginsburg, J.) (discussing the limited reach of *United States v. Fensterwald*, 553 F.2d 231 (D.C. Cir. 1977), on which X Corp. relies). X Corp. offers no basis to import that principle into this dispute, which stems from X Corp.'s preemptive effort to halt the FTC's compliance investigation pursuant to an administrative order to which X Corp. consented. The Court should refuse X Corp.'s request to intrude upon an ongoing investigation into the company's compliance with its administrative order.[10]

B. X Corp. Is Not Entitled To Relief Under Rule 60(b)(6)

X Corp.'s remaining argument—that the Court should grant relief under Rule 60(b)(6) because the FTC supposedly "repudiated" the parties' agreement, Def. Mem. at 21—also fails. Rule 60(b)(6) only applies in "extraordinary circumstances," and it is to be "used sparingly" by courts. *United States v. Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993). To justify setting aside a settlement under Rule 60(b)(6), a party's "repudiation must amount to a *complete* frustration of the settlement agreement." *Joe Hand Promotions, Inc. v. Rangee*, No. 2:13-cv-00939, 2013 WL 6859001, *3 (E.D. Cal. Dec. 24, 2013); *see Hermetic Order of Golden Dawn, Inc. v. Griffin*, No. 08-16904, 400 Fed. App'x. 166, 167 (9th Cir. 2010) (unpublished) (similar). For example, in *Keeling v. Sheet Metal Workers International*

No. 1:23-mc-82 (D.D.C. Aug. 25, 2023); ECF No. 35. Because the parties in this case have never "conferred as required by [Federal] Rule [of Civil Procedure] 26(f)" and no "court order" or "stipulation" has authorized X Corp. to obtain discovery, the company's third-party subpoenas were issued in patent violation of Rule 26(d)(1), which prohibits discovery "from any source" unless and until authorized. *See, e.g., Deuss v. Siso*, No. 14-cv-00710-YGR (JSC), 2014 WL 4275715, at *4 (N.D. Cal. Aug. 29, 2014).

[10] Even if the principle X Corp. cites applied here, discovery would still be improper. Such "discovery . . . is the exception rather than the rule," and it requires "more than alleg[ations of] an improper purpose . . . such as to harass." *United States v. Church of Scientology of California*, 520 F.2d 818, 824 (9th Cir. 1975). X Corp.'s "diffuse speculations concerning possible misuse of administrative authority do not establish . . . exceptional circumstances." *McGoff*, 647 F.3d at 194.

Association, Local Union 162, "complete frustration" justified setting aside a settlement where one party committed multiple acts of "bad faith noncompliance," including repeated, defiant refusals to comply with express obligations imposed by the parties' agreement. 937 F.2d 408, 411 (9th Cir. 1991).

Here, as evidence of repudiation, X Corp. cites only the FTC's alleged communications with EY. *See* Def. Mem. at 21-22. But as discussed above, *see supra* pp. 14-20, X Corp. has not shown that these communications violated the parties' agreement, that they prevented EY's performance of an independent assessment, or that they were improper. Nor has X Corp. alleged that the FTC interfered with the *current* independent assessor's work. *See supra* p. 20. Nor, for that matter, has X Corp. argued that its performance of the 2022 Administrative Order's substantive requirements—which include many obligations separate from retaining a third-party assessor—has been frustrated in any way. *Id.* X Corp.'s argument that the FTC's conduct "hind[ered]" the company's "performance" or otherwise "complete[ly] frustrat[ed]" the parties' agreement, Def. Mem. at 21, is therefore wholly conclusory.

Even if X Corp. had established a breach of the agreement by the FTC, wholesale termination would be unwarranted. "In the usual course upon repudiation of a settlement agreement, the frustrated party may" seek "specific performance," but it "may not . . . reopen the underlying litigation" by setting aside that agreement under Rule 60(b)(6). *Keeling*, 937 F.2d at 410; *see Sawka v. Healtheast, Inc.*, 989 F.2d 138, 140-41 (3d. Cir. 1993) (recognizing that mere breach of a settlement is insufficient to terminate agreement under Rule 60(b)(6)); *Joe Hand Promotions, Inc.*, 2013 WL 6859001, at *3 (similar). As explained, if the FTC had breached the parties' agreement, the Court could "simply order [the FTC] to follow" it. *W. Watersheds Project*, 2008 WL 2003114, at *6. The absence of a request for such relief from X Corp. suggests that the company's true aim is to avoid the 2022 Administrative Order's substantive requirements. The Court should "promote[] adherence to settlement agreements voluntarily entered into" by denying X Corp.'s efforts to undermine one. *Eastman Kodak Co.*, 63 F.3d at 102.

III. X Corp. Is Not Entitled To A Protective Order To Prevent Musk From Testifying

Finally, the Court should deny X Corp.'s alternative request for a protective order staying the deposition of Musk. *See* Def. Mem. at 23. As a threshold matter, this Court should deny X Corp.'s motion because discovery is occurring under the 2022 Administrative Order—the FTC has not invoked judicial "process." Def. Mem. 23; *see supra* pp. 11-13. Regardless, X Corp.'s two arguments in support of a

protective order are both meritless. *First*, X Corp. contends that "[t]he timeline of FTC action compels the conclusion that its quest to depose Musk is baseless, politically motivated, and made in bad faith." *Id.* The Court should reject this assertion for the reasons discussed above: there is no evidence to support X Corp.'s allegations that the FTC acted in bad faith or with an improper motive. *See supra* pp. 14-18.

Second, X Corp. also asserts that "deposing Mr. Musk at this time violates the so-called apex doctrine," *id.* at 24, which is a discretionary tool to protect "high-level executive[s]" from "harassment" during "discovery," *Apple Inc. v. Samsung Elecs. Co., Ltd.*, 282 F.R.D. 259, 263 (N.D. Cal. 2012). But X Corp. fails to identify any instance where the apex doctrine was applied to an FTC investigation as opposed to an ongoing lawsuit. *See FTC v. Bisaro*, 757 F. Supp. 2d 1, 9 (D.D.C. 2010) (similarly recognizing that a party failed to identify instances where this "limited" doctrine was "applied in an administrative investigation"). Nor should the apex doctrine apply here, as the "standard for judging relevancy in an investigatory proceeding is more relaxed than in an adjudicatory one." *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1090 (D.C. Cir. 1992). "At the investigatory stage, the Commission does not seek information necessary to prove specific charges; it merely has a suspicion that the law is being violated in some way and wants to determine whether or not" it is necessary to respond. *Id.*; *see Civ. Investigative Demands Dated June 30, 2022, to Amazon.com, Inc. & Certain Current & Former Amazon Emps.*, No. 212-3050, 2022 WL 4483142, at *14 (FTC Sept. 21, 2022) (similar).

Even if the apex doctrine did apply to FTC investigations as a general matter (it does not), X Corp. has failed to carry its "heavy burden" of showing why the Court should take the "unusual" step of halting this particular deposition. *Apple Inc.*, 282 F.R.D. at 263. Contrary to X Corp.'s assertion that Musk occupies "merely a high-level supervisory role," Def. Mem. at 24, evidence the FTC uncovered during its investigation reveals that Musk has been deeply involved in the "fundamental transformation" of X Corp., which has created a serious concern that the company may not be adhering to the 2022 Administrative Order. Musk plainly has "unique first-hand, non-repetitive knowledge of the facts at issue" in the FTC's investigation, *Apple, Inc.*, 282 F.R.D. at 263.

As set forth above, several former employees testified about how Musk exercised granular control of X Corp., at times directing employees in a manner that may have jeopardized data privacy and security. Among other things, those individuals testified about Musk's personal involvement in: (1) massive

reductions in workforce, resulting in numerous gaps in ownership for privacy and security controls; (2) a hasty transport of unencrypted company servers without adherence to X Corp. data security policies; (3) a hurried release and retraction of a Twitter Blue product re-launch; and (4) individuals, including a third-party journalist not employed by the company, receiving broad and apparently unjustified access to X Corp. systems. *See supra* pp. 7-9. Moreover, Musk has apparently declared that he is the "single person responsible" for ensuring compliance with the 2022 Administrative Order. Wilson Tr. at 75:20-76:7. The evidence belies X Corp.'s characterization that Musk is merely a high-level supervisor without firsthand knowledge of the privacy and security issues at hand.

X Corp. has also failed to carry its heavy burden of showing there are "less intrusive discovery methods" than deposing Musk. *Apple, Inc.*, 282 F.R.D. at 263. While X Corp. asserts that Musk would be the "very first *current* employee of X Corp. deposed by the FTC in this investigation," Def. Mem at 24, that is because so many other employees with relevant information were fired or quit during X Corp.'s "fundamental transformation." For example, X Corp. admitted that *all remaining members* of its Data Governance Committee—which was charged with ensuring the company's data practices complied with the 2022 Administrative Order—left the company in the two weeks after Musk formally acquired X Corp. *See* Def. Ex. 5 at 25. Moreover, when Kieran was asked to identify the "most senior" employee with "long-standing knowledge" about the information security team, he responded there was "nobody left." Kieran Tr. at 39:7-40:17. The FTC has had to focus its prior depositions on former employees because nearly every employee who has been identified as a point person for privacy or data security either resigned or was terminated before the FTC could talk to them.

Neither X Corp.'s contrived allegations of bad faith nor the apex doctrine support granting a protective order here. The Court should deny Defendants' request to stay the deposition of Musk.

CONCLUSION

For the foregoing reasons, the United States respectfully asks this Court to deny X Corp.'s Motion for Protective Order & Relief from Consent Order, ECF No. 17.

Dated: September 11, 2023

Respectfully submitted,

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

Office of the Chair

August 31, 2023

The Honorable Ted Cruz
Ranking Member
Committee on Commerce, Science, and Transportation
United States Senate
Washington, D.C. 20510

The Honorable Jim Jordan
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

The Honorable James Comer
Chairman
Committee on Oversight and Accountability
U.S. House of Representatives
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Dear Ranking Member Cruz, Chairman Jordan, and Chairman Comer:

I am writing in response to your August 17, 2023, letter concerning the Federal Trade Commission's records management processes. This production's documents are Bates stamped FTC_RM000000001--FTC_RM000000017.

With respect to the first and second requests in your August 17, 2023, letter, I am unaware of the destruction of any records in a manner that does not comply with National Archives and Records Administration (NARA) or Commission policies, the General Records Schedules, or the Commission's agency-specific records schedules. The Commission maintains records in accordance with federal law and specific instructions from NARA. Under the agency's records management policy, employees receive pre-employment, annual refresher, and pre-departure training on preserving materials in their possession that qualify as records under federal law and NARA guidance.

NARA recommends disposing of documents that do not qualify as records.[1] Examples include convenience copies, drafts, notes, working files, and copies of final documents routed or circulated to Commission Bureaus, Offices, or the Commission for action, barring no litigation, FOIA, or other legal or congressional hold. If there is a FOIA hold, a litigation hold, or a hold

[1] *See* 36 C.F.R. 1222.16(b)(3) ("Nonrecords materials should be purged when no longer needed for reference. NARA's approval is not required to destroy such materials.").

relating to a congressional request, employees preserve all responsive documents, whether or not those constitute records. Per NARA, disposing of non-records is a best practice that improves efficiency and productivity, manages costs, and promotes information security.

As a reminder, not all documents are records. Therefore, not all emails are records. An agency is required to distinguish between records and non-records and to dispose of non-records.[2] At the Commission, employees address each document, including an email, individually. Each employee is responsible for moving each document determined to be record (including an email) into shared folders on an ongoing basis. Commission staff may, in the course of Commission business, delete non-records as needed, without approval.

A routine, longstanding practice at the Commission is to delete the accounts of employees who leave the Commission. Any records from these accounts are saved separately, and any accounts subject to a litigation, FOIA, or congressional hold are not deleted. NARA has been fully aware of and consistently updated on these practices.

Three employees who worked on the noncompete rulemaking left on August 31, 2022, December 9, 2022, and December 23, 2022. Following the longstanding and NARA-approved practices, the FTC subsequently deleted their accounts. On February 14, 2023, the Commission received a request from the Judiciary Committee regarding the noncompete rulemaking. Accordingly, and in an abundance of transparency, the Commission on its own accord alerted House Judiciary staff that, prior to receiving its congressional request regarding the noncompete rulemaking and in accordance with longstanding and NARA-approved FTC practices, the email accounts of three former employees who worked on that rulemaking were properly and appropriately deleted. At the time of deletion, none of these accounts were subject to a litigation, FOIA, or congressional hold, and I am not aware that any records were improperly deleted. Because the Commission uses cloud-based email, there are no backup files for email accounts. Unlike in an on-premises email system, cloud-based email is governed by a contractual arrangement with a vendor. The Commission's agreement with the vendor *does not include* the ability to recover data of a deleted account, including information regarding the number of deleted emails. Indeed, the vendor does not offer a service to restore deleted accounts.

With respect to the third request in your August 17, 2023, letter, the Secretary, as the Commission's Senior Agency Official for Records Management, is responsible for issuing agency directives, policies, and initiatives; setting in place policies, procedures, and systems to protect records against unauthorized removal or loss; and providing the agency with vision and strategic direction to modernize the agency's records and information management program. The Secretary ensures that the Chair and Commissioners remain informed of efforts to maintain the Commission's compliance with NARA requirements. Though the Office of the Secretary solicits feedback on such efforts from stakeholders across the Commission as a matter of course, the Secretary generally does not create proposals for the Chair or the Commission's approval. The agency's records management policy is attached.[3]

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[2] *See* 36 C.F.R. 1222.12(a).

[3] Chapter 5: Section 500 - Records Management (Updated July 2019).

With respect to the fourth, fifth, and sixth requests in your August 17, 2023, letter, as stated previously, the Commission is unaware of the destruction of any records in a manner that does not comply with NARA or FTC policies, the General Records Schedules, or the Commission's agency-specific records schedules. Therefore, no notification to NARA, recovery, or other steps are necessary. As explained previously, the deleted materials you discuss in connection with Chairman Jordan's February 14, 2023, request were non-records and not subject to any litigation or other legal hold at the time they were deleted; therefore, those materials were properly destroyed in accordance with Commission policy prior to the Commission's having received Chairman Jordan's request. The Commission continues to comply with NARA and other applicable regulations and guidelines in properly disposing of its non-records.

With respect to request 7a. in your August 17, 2023, letter, all incoming staff must complete privacy and information security training, which includes training on records management. Staff must retake this training annually. Incoming bureau and office heads, as well as individual Commissioners and their offices, receive an additional briefing on records management. Upon departure from the Commission, all staff must complete an exit briefing that includes instructions for ensuring any records in the departing employee's possession are properly preserved or are transferred to a supervisor for preservation prior to departure. Departing Commissioners and their offices receive supplementary briefings that focus on the process for preserving records and any information subject to legal hold. Additionally, each bureau, office, and region has designated records liaisons that assist in providing guidance to staff on the disposition of records and non-records as prescribed in the agency's records schedules. Records Liaisons receive quarterly briefings and disseminate information from these briefings to staff.

To the extent that staff wish to retrieve paper documents stored in offsite storage (a portion of which may be records), there are procedures governing the retrieval, tracking, and refiling of this information. Tipsheets and guidance documents on preserving records and complying with records schedules are also disseminated to staff periodically and made available through the Commission's Intranet. This includes the Commission's e-discovery guidelines, which include procedures for preserving any records after a litigation hold is lifted.

A temporary procedure was put in place beginning in September 2022 to assist staff in transitioning from use of individual H: drives for drafts and working files to the use of individual OneDrive storage in the cloud. Staff were notified numerous times and provided instructions, reinforcing longstanding procedures, to use OneDrive (previously H: drive) for drafts and working files; and to transfer any records that inadvertently were preserved on the H: drive to the appropriate repository for preservation. H: drives were officially decommissioned on May 26, 2023, and that procedure is no longer in effect.

With respect to request 7b. in your August 17, 2023, letter, the Commission's current e-Discovery guidelines were developed in 2013, and the records management guidance and procedures have been routinely reviewed and updated since 2015.

With respect to request 7c. in your August 17, 2023, letter, for case-related documents and files not managed by a General Records Schedule approved by the Archivist of the United

States, the Commission uses SharePoint to preserve and maintain copies of case-related memos or circulations, statements by the Commission or individual Commissioners, and filings or other submissions in adjudications pending before the Administrative Law Judge or the Commission.

With respect to request 7d. in your August 17, 2023, letter, the Commission has been moving information into cloud storage since FY20 and continues to move shared network drives and network storage into cloud storage. The Commission expects to complete the transition to cloud storage of information from shared network drives and network storage in FY24. That said, the FTC continues to maintain a considerable volume of information, most of which are nonrecords, in paper form in offsite storage. The paper records and non-records predate 2019.

With respect to request 7e. in your August 17, 2023, letter, the Secretary is responsible for ensuring that the Commission's records are accurate, reliable, and complete. Further, all Directors, Deputies, Associate and Assistant Directors, and other supervisory and management officials in the Bureaus, Offices, and regions are responsible for supervising staff compliance with the Commission's records management policy, as well as agency-mandated procedures for the secure handling of records. As mentioned previously, a copy of our records management policy is attached.

With respect to request 7f. in your August 17, 2023, letter, the Commission issued a request for information to conduct market research for the express purposes of acquiring additional staff for up to five years to assist with writing new agency-specific records schedules, inventorying federal records, creating file plans, evaluating records maintenance and disposition, as well as implementing Microsoft 365 tools that will directly assist with federal records maintenance.

The Office of the Secretary works closely with the Office of the Chief Information Officer on changes to records management processes, procedures, and policies at the Commission, including the recent decommissioning of the H: drive, the push to cloud storage with OneDrive and SharePoint, the transition to Microsoft Teams, a new Controlled Unclassified Information (CUI) program, and the new Capstone retention policy and its implementation. Further, the two offices are working together to determine the feasibility of expanding the Commission's Microsoft license to include Purview, a records management tool.

Over the course of the 2023 fiscal year, the Records Management Division has created and deployed an agency-specific RIMcert survey to collect information about which systems hold federal records and how those records are stored, accessed, and removed for disposition. This survey is built into the CSAM (Cyber Security Assessment and Management) application, a Department of Justice product adapted for use at the FTC, and directly addresses an OIG recommendation.

With respect to the eighth request in your August 17, 2023, letter, please see the attachments for the OIG Memorandum and the Commission's response memorandum committing to ensuring appropriate management controls are in place.[4]

With respect to the ninth request in your August 17, 2023, letter, all of the Commission's past inactive and current approved record schedules are public and can be found on the National Archives' website at this link: FTC Record Schedules. The Commission currently has ten approved and active agency specific schedules, including the Capstone email schedule. The NARA-created General Record Schedules, which apply to all agencies, can be found publicly on the National Archives' website at this link: Current GRS. As per NARA guidelines, any unscheduled federal records are treated as permanent records and fall under the freeze order.

I hope this clarifies the Commission's record retention policies and procedures.

Sincerely,

Lina Khan

Lina M. Khan
Chair, Federal Trade Commission

cc: Maria Cantwell
Chair
Senate Committee on Commerce, Science, and Transportation

Jerrold Nadler
Ranking Member
House Committee on the Judiciary

Jamie Raskin
Ranking Member
House Committee on Oversight and Accountability

[4] Memorandum from A. Katsaros to Chair Khan, Management Advisory for Records Management (M-22-05), February 28, 2022; Memorandum from Chair Khan to A. Katsaros, Management's Response to Draft Management Advisory on FTC Records Management).

RECORDS AND INFORMATION MANAGEMENT

1. Purpose

To provide for the systematic and efficient identification, organization, maintenance, use, and legal disposition of all records and non-records received or created by the Commission, regardless of format, as defined in 44 U.S.C. 3301. Requirements include:

A. Ensuring legal and regulatory requirements are fulfilled throughout the life cycle (creation, maintenance, use, and disposition) of FTC records;

B. Ensuring FTC records are retained long enough to meet programmatic, administrative, fiscal, legal, and historical needs as authorized in FTCs record disposition schedules;

C. Assigning records and information management responsibilities within each FTC component, including designation of the officials that are responsible for maintenance and disposition of electronic records, and management of automated systems used for recordkeeping

D. Issuing appropriate instructions to staff on handling and protecting records and information; and

E. Conducting formal evaluations to measure the effectiveness of the agency's records and information management program and practices.

2. Authorities

A. 5 U.S.C. § 552 Freedom of Information Act

B. 5 U.S.C. § 552a – Privacy Act of 1974 as amended

C. 18 U.S.C. § 2071 Concealment, Removal, or Mutilation of Records

D. 44 U.S.C. Chapter 31 – Records Management by Federal Agencies (Federal Records Act)

E. 44 U.S.C. Chapter 33 Disposal of Records

F. 16 CFR 0.12 – Office of the Secretary

G. 16 CFR 4.11 Disclosure Requests

H. 16 CFR 4.12 Disposition of documents submitted to the Commission

I. 36 CFR 1220-1239 – Records Management

J. Executive Order (EO) 13526 – Classified National Security Information

K. Executive Order (EO) 13556 Controlled Unclassified Information

L. Office of Management and Budget (OMB) Circular No. A-130 - Management of Federal Information Resources

M. Presidential Memorandum Managing Government Records, November 28, 2011

N. Managing Government Records Directive – M-12-18 ("Directive"), August 24, 2012

O. NARA Bulletin 2017-02, Guidance on Senior Agency Officials for Records Management, September 28, 2017

P. U.S. Department of Homeland Security, Federal Continuity Directive 1 (FCD 1), Annex F, January 17, 2017

Q. Federal Trade Commission (FTC) Litigation Hold and E-Discovery Guidelines for Managing Attorneys (Revised Third Edition), June 2013

R. Federal Trade Commission Record Schedule N1-122-09-01

S. National Archives and Records Administration (NARA) General Records Schedules (GRS)

3. Applicability

This policy applies to all FTC employees and contractors who create, use, maintain and appropriately dispose of FTC records. This policy also applies to all records and systems of records and non-records received or created by the Commission regardless of format, as defined in 44 U.S.C. 3301.

4. Definitions

A. *Essential Records.* Records that an organization needs to meet operational responsibilities under national security emergencies or other emergency conditions (emergency operating records) or to protect the legal and financial rights of the government and those affected by government activities (legal and financial rights records).

B. *National Archives and Records Administration.* NARA is the federal government agency responsible for administering a government-wide records management program to identify records of permanent value, assure the timely disposal of Temporary Records, and provide agencies with guidance on managing their current records.

C. *Non-records.* Non-records include:

(1) Information made or acquired and preserved solely for reference or exhibition purposes;

(2) Duplicate copies of records preserved only for convenience; and

(3) Rough notes, calculations, or drafts assembled or created and used to prepare or analyze other documents.

D. *Permanent Records.* Permanent Records are those electronic records identified as having sufficient value for historical or other purposes to warrant continued preservation by the National Archives of the United States.

E. *Personal Papers.* Documentary materials belonging to an individual that are not used to conduct agency business. Personal materials are excluded from the definition of records and are not owned by the Government.

F. *Records.* All recorded information, regardless of form or characteristics, made or received by a Federal agency under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government or because of the informational value of data in them, pursuant to 44 U.S.C. §3303. Records may refer to Essential Records, Permanent Records, and Temporary Records, individually or collectively.

G. *Records Schedules.* Consists of the NARA-approved mandatory instructions for the disposition of agency records, including the transfer of Permanent Records to the National Archives and the disposal of Temporary Records and non-records. The FTC records schedule, N1-122-09-1, is the NARA-approved legal authority for the disposition of the mission and policy records of the Commission. The NARA General Records Schedules are issued by the Archivist of the United States to provide records disposition authority for administrative/housekeeping records common to most federal agencies.

H. *Temporary Records.* Temporary Records are those records that NARA approves for either immediate disposal or for disposal after a specified time or event.

5. Roles and Responsibilities

A. *FTC Chairman.* The FTC Chairman is responsible for establishing and maintaining an active, continuing program for the economical and efficient management of the Commission's records ("RIM Program"). The FTC Chairman shall notify, or shall direct staff to notify, the Archivist of any actual, impending, or threatened unlawful removal, defacing, alteration, corruption, deletion, erasure, or other destruction of records in the custody of the agency, pursuant to 44 U.S.C. § 3106. The FTC Chairman shall notify staff annually of their responsibility to safeguard against the wrongful

destruction of federal records and shall remind all staff of FTC's recordkeeping policies and the sanctions for the unlawful removal or destruction of records (18 U.S.C. § 2071).

B. *The Secretary.* The Secretary is responsible for ensuring that the FTC's Records are accurate, reliable, and complete, and for retaining legal custody of such records in accordance with the agency's Records Schedules. The Secretary shall work with the RO to identify those Permanent Records that are eligible for transfer to the custody of the National Archives of the United States.

C. *Senior Agency Official for Records Management (SAORM).* The SAORM is FTC's senior executive with direct responsibility for ensuring the agency efficiently and appropriately complies with all applicable records and information management statutes, regulations, NARA policy, and OMB policy. The SAORM works with the RIM Director, the RO, and other appropriate officials to promote the FTC's RIM Program and ensure its successful implementation. Duties include:

(1) Providing the agency with a clear vision and strategic direction to modernize the FTC's RIM program;

(2) Ensuring adequate records management resources are embedded into the agency's Information Resources Management (IRM) Plan;

(3) Providing adequate budgetary and personnel resources to implement an efficient and effective RIM Program;

(4) Establishing, where appropriate, agency-level records management program offices to ensure adequate management of routine mission support functions;

(5) Ensuring the designation of records management responsibilities in each program (mission area) and administrative area to ensure the incorporation of record-keeping requirements and records maintenance, storage, and disposition practices into agency programs, processes, systems, and procedures;

(6) Ensuring agency staff are informed of and receive training on their records management responsibilities;

(7) Issuing agency directives, policies, and initiatives supporting OMB and NARA Directive goals and subsequent guidance for transitioning towards a fully electronic government;

(8) Ensuring agency compliance with NARA requirements for electronic records, including the electronic management of all permanent electronic records to the fullest extent possible for eventual transfer and accessioning by NARA;

(9) Directing agency efforts across program areas to ensure email records are managed electronically and retained in an appropriate electronic information

system that supports records management and litigation requirements, including the capability to identify, retrieve, and retain the records consistent with NARA-approved disposition authorities and regulatory exceptions;

(10) Ensuring policies, procedures, and systems are in place and configured to protects records against unauthorized removal or loss;

(11) Directing the use of agency-wide records management internal controls, self-assessments, and remediation plans;

(12) Reviewing NARA's annual Records Management Self-Assessment analysis and risk ratings to determine vulnerabilities and identify plans for improvement; and

(13) Serving as the authorizing official for the system of record for the FTC's Permanent Records.

D. *Chief Information Officer (CIO).* The CIO oversees the agency's information infrastructure, including agency modernization efforts and federal electronic information management requirements. Duties related to records management include:

(1) Coordinating with the SAORM to ensure that the implementation of the agency's information systems incorporates federal and agency records management requirements; and

(2) Ensuring that records management functionality, including the capture, retrieval, and retention of records according to agency business needs and the Records Schedules, is incorporated into the design, development, and implementation of its electronic information systems.

E. *Director of Records and Information Management (RIM Director).* The RIM Director is accountable to the SAORM and leads the agency's RIM Program. The RIM Director establishes and maintains plans, goals, objectives, and milestones to fulfill the agency's records and information management requirements and ensures that the roles and responsibilities of the Records Officer as described herein are appropriately delegated and fulfilled. Duties include:

(1) Ensuring that the Chairman notifies staff annually of their responsibility to safeguard against the wrongful destruction of federal records, reminding all staff of FTC's recordkeeping policies and the sanctions for the unlawful removal or destruction of records, and coordinating the reporting to agency and NARA authorities of any unlawful removal or destruction of records;

(2) Ensuring the agency protects Records against unauthorized removal or loss and that all staff are informed of their records management responsibilities as defined in NARA regulations and guidance;

(3) Working with internal stakeholders to identify budgetary, personnel, and system requirements to build and maintain an efficient and effective records management program;

(4) Overseeing the RIM Program's initiatives with the FTC's Bureaus, Offices, and Regions;

(5) Implementing records management modernization initiatives resulting from new records management directives, policies, or standards;

(6) Developing and implementing policies, guidance, and training that are consistent with this policy and Federal requirements and action plans in response to management or third party reviews and recommendations; and

(7) Ensuring that agency records management staff participate in the design, development, and implementation of new electronic information systems.

F. *Records Officer (RO).* The Records Officer (RO) is accountable to the SAORM and the RIM Director and has day-to-day responsibility for FTC programs governing Records and Non-records. Duties include:

(1) Providing leadership, program guidance, staff training, and technical advice concerning the creation, maintenance, and disposition of records and non-records; developing and updating Records Schedules; and issuing guidance when new or revised Records Schedules and instructions are issued;

(2) Assisting FTC Bureaus, Offices, and Regions to incorporate records management requirements into information technology systems development and enhancements;

(3) Oversees the creation and management of a program of trained Records and Information Liaisons (RIL);

(4) Conducting internal assessments of the RIM Program, as well as audits, inspections, self-evaluations, and other studies of records-related programs as required by NARA and other oversight agencies, and setting priorities for RIM Program improvements;

(5) Monitoring and reporting compliance with NARA and agency-specific requirements for the management and transfer of Permanent Records;

(6) Serving as the FTC primary point of contact with other government agencies for records program management, and disseminating records-related program information from those entities to the FTC;

(7) Collaborating with the Continuity of Operations (COOP) program to ensure Essential Records are identified and protected; and

(8) Transferring, with the concurrence of the Secretary, eligible Permanent Records to the custody of the National Archives of the United States.

G. *Directors, Deputies, Associate and Assistant Directors, and other supervisory and management officials in the Bureaus, Offices, and Regions.* Responsible for:

(1) Supervising staff compliance with this policy, as well as agency-mandated procedures for the secure handling of records, in order to protect the legal and financial rights of the government and persons affected by government activities; and

(2) As appropriate, designating one or more RILs to coordinate records matters within the Bureaus, Offices, and Regions and notifying the RIM Program of any updates or changes to the list of RILs.

H. *Record and Information Liaisons.* Each Bureau, Office and Region shall designate at least one RIL as a liaison to the RIM Program. One RIL may cover multiple components; for example, one RIL can represent all of the Regions. Each Bureau, Office, or Region may choose to designate secondary RILs depending on planned work. Duties include:

(1) Serving as a RIM Program liaison between their component(s) and the RO to discuss records-related risks and issues and disseminate information;

(2) Based on consultation with and guidance from the RIM Director and the RO, identifying and coordinating staff's maintenance of Records and Non-records in all formats as defined in this policy, regardless of where they are stored;

(3) Based on consultation with and guidance from the RIM Director and the RO, assisting in providing guidance to staff on the disposition of records and non-records as prescribed in the agency's Records Schedules;

(4) Optionally, managing and coordinating responses to requests from the agency's Freedom of Information Act (FOIA) officer for records within their component(s);

(5) Attending training to support RIL responsibilities as defined in this policy.

I. *Staff.* All FTC employees and contractors shall be responsible for:

(1) Creating, managing, and protecting the records necessary to document the agency's official activities and actions, including records and information generated by FTC contractors, in accordance with FTC recordkeeping requirements;

(2) Disposing of records and non-records in accordance with the agency's Records Schedules;

(3) Participating in periodic audits and spot-checks requested by a third party, the RIM Program, or RILs; and

(4) Recognizing that agency records are government property and that the removal, defacing, alteration, corruption, deletion, erasure, or other destruction of agency records is unlawful and could result in fine or incarceration.

6. Policy

This policy establishes the agency's obligations under the RIM Program. The RIM Program shall manage information, including records, non-records, Temporary Records, Permanent Records, and Essential Records, in all formats and in accordance with the FTC Records Schedules, as well as all prescribed laws, regulations, directives, and agency systems and processes, to ensure adequate and proper documentation of the agency's organizations, missions, functions, policies, and decisions. The implementation of all appropriate program elements within FTC Bureaus, Offices, and Regions as specified by the RIM Program is supported through a network of RILs.

A. Records Management

(1) It is the policy of the FTC to maintain records in accordance with federal law and specific instructions from NARA.

(2) Agency records shall be maintained separately from non-records and personal papers. Records are the property of the federal government and not the property of individual employees. The unauthorized use, alteration, alienation, or deletion of records, regardless of format, is unlawful and could result in a fine or incarceration.

a. Departing officials and employees may not remove records from the agency without the authorization and approval of that individual's supervisor. Non-record materials, including extra copies of unclassified or formally declassified agency records kept only for convenience of reference, may be removed by departing employees from Government agency custody only with the approval of the head of the agency or the SAORM. National security classified information may not be removed from Government custody, except for a removal of custody taken in accordance with the requirements of the National Industrial Security Program established under Executive Order 12829, as amended, or a successor Order. Information which is restricted from release under the Privacy Act of 1974, as amended, or other statutes may not be removed from Government custody except as permitted under those statutes. This section does not apply to use of Records and non-records materials in the course of conducting official agency business, including telework and authorized dissemination of information.

(3) Agency Bureaus, Offices, and Regions shall maintain records file plans that have been developed with support from the RIM Program.

(4) Staff shall work with their RIL and the RIM Program to ensure records that are sufficient to document the organization, functions, policies, decisions, procedures, and the essential transactions of the agency are properly maintained.

(5) The agency shall transfer its Permanent Records to NARA, and shall destroy its Temporary Records, in accordance with the agency's Records Schedules and subject to litigation hold requirements.

B. Electronic Records

(1) The agency shall manage and preserve its Permanent Records in an electronic format for eventual transfer to NARA, within an information system that includes the records management controls for reliability, authenticity, integrity, usability, content, and structure required under 36 C.F.R. §1236.10.

(2) The RIM Program shall maintain an inventory of electronic systems, reviewed periodically, that indicates whether each system is covered by an approved NARA disposition authority.

(3) The RIM Program shall partner with OCIO to support the agency's transition to electronic information resource management and electronic recordkeeping. This effort includes the implementation of tools, systems, and processes allowing the identification, removal, or destruction of non-record and Temporary Record data and the transfer of Permanent Record data to the custody of NARA, in accordance with agency Records Schedules and subject to litigation hold requirements.

(4) In the event that an individual employee has more than one agency-administered email account, that employee shall be responsible for complying with all agency recordkeeping requirements for each such account.

C. Training

(1) Staff shall receive records management training and shall be required to maintain records in accordance with federal recordkeeping requirements, the agency's Records Schedules, and NARA instructions.

(2) All senior and appointed officials, including those incoming and newly promoted, shall receive training on the importance of appropriately managing records under their immediate control, in accordance with 36 C.F.R. 1220.34, including the appropriate disposition of records and the use of personal and unofficial email accounts.

(3) The RIM Program shall conduct exit briefings for departing senior officials on the appropriate disposition of records under their immediate control.

D. Monitoring

The RIM Program shall periodically conduct or request inspections, audits, and/or reviews to evaluate its records management program and to ensure that it is efficient, effective, and compliant with all applicable records management laws and regulations.

7. Relationship to Other Agency Resources

A. *Classified Information Security:* The RIM Program works with other components in the Office of the Executive Director to assist in the records management aspects of Classified National Security Information (CNSI), which is information that has been determined pursuant to Executive Order 13526 or any preceding order to require protection against unauthorized disclosure and is marked to indicate its classified status when in documentary form. FTC's Classified Information Security Policy is here.

B. *Controlled Unclassified Information (CUI):* CUI is information that requires safeguarding or dissemination controls pursuant to and consistent with applicable law, regulations, and government-wide policies, but is not classified under Executive Order 13526 or the Atomic Energy Act, as amended. FTC's CUI policy is here.

C. *E-Discovery:* FTC's E-Discovery page is here, and includes guidelines and FAQs. The E-Discovery Steering Committee addresses evolving e-discovery issues and advises on the agency's compliance with the amended Federal Rules and case law.

D. *Freedom of Information Act:* FTC's FOIA intranet resources are here. The Freedom of Information Act (FOIA), 5 U.S.C. § 552, requires each federal agency, including the Commission: to publish certain information in the *Federal Register*, § 552(a)(1); to make additional information available for routine inspection and copying (i.e., the "public record"), § 552(a)(2); and to adopt procedures for the public to obtain access to so-called non-public records, i.e., materials not published in the *Federal Register* or placed on the public record, § 552(a)(3).

E. *Use of Personal Devices for Agency Business and Texting on FTC Mobile Devices:* The policy governing the use of personal devices to conduct agency business and texting on agency-provided mobile devices is here.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of Inspector General

February 28, 2022

MEMORANDUM

FROM: Andrew Katsaros
Inspector General

TO: Lina M. Khan, Chair

SUBJECT: Management Advisory on FTC Records Management (M-22-05)

This memorandum alerts FTC leadership to certain records management conditions that we identified in the course of our oversight and review work.[1] We discussed these conditions with various program officials and managers, who understood that the FTC's ability to improve records management is integral to the agency's future success and effectiveness.

Summary

While the FTC recently has made significant progress in some areas of records management, such as shifting to all-electronic recordkeeping, the FTC still faces challenges in (1) complying with National Archives and Records Administration (NARA) records schedule requirements[2] and (2) setting up automated practices for properly storing and timely disposing of records in a uniform manner across the agency. The FTC must assess whether its current personnel and technology are capable of meeting these challenges in advance of fiscal year 2023.

I. Background

A. Applicable Authorities

The Federal Records Act (as amended) requires federal agencies to engage in *records scheduling*, the process of identifying all of their records—as well as how long each type of record is valuable—and requesting legal authority either to destroy the records or transfer them to the National Archives when there is no longer a need for them at the creating agencies.[3] NARA manages the records scheduling process, which includes the requirement that NARA "approve all records schedules before they can

[1] On July 21, 2021, we met with Office of the Secretary officials to discuss an informal review of the FTC's records management program.

[2] Records schedules were in draft as of the date of this memorandum.

[3] NARA, *FAQs About Records Scheduling & Appraisal*, https://www.archives.gov/records-mgmt/faqs/records-mgmt/faqs/scheduling-appraisal; 36 C.F.R. Part 1225.

be used [by the agency] to either destroy records or transfer records to the National Archives."[4] NARA regulations further outline the requirements for *records maintenance*, which places on the creating agencies certain responsibilities such as identification, recordkeeping, scheduling, and disposition.[5]

In response to the FTC's first 2019 submission of records accompanying its comprehensive records disposition schedule, N1-122-09-1, NARA expressed concerns over the FTC's agency-wide records maintenance. NARA's May 4, 2020, response letter to the FTC requested that the agency halt the destruction and deletion of records covered by two schedules within its comprehensive plan (mission records, as well as policy and special collections records) while continuing to act on the disposition of other records covered by NARA's General Records Schedules (GRS). With its request to the FTC to halt disposition of those specific non-GRS records categories, NARA provided the agency an opportunity to submit new draft records dispositions schedules for NARA approval. According to management within the FTC's Office of the Secretary (OS) Records Management Branch, the agency has made the following progress in its response to NARA's May 2020 request:[6]

- *FTC operating units with* ***new/completed NARA-approved records schedules*** the Chair's office (tweets), the Commissioners' office (tweets), Premerger Notification Office (PNO), OIG

- *FTC operating units* ***currently drafting new records schedules for NARA approval*** Office of International Affairs (OIA), the Consumer Sentinel System, OS

B. Prior Oversight of the FTC Records Management Program

The FTC currently has several open recommendations related to oversight of its agency records management program.

In FY 2020, the U.S. Government Accountability Office (GAO) evaluated 17 agencies, including the FTC, on their implementation of the Federal Records Act and subsequent directives. GAO's objectives were to determine whether (1) policies and procedures address the electronic recordkeeping requirements in the Managing Government Records Directive and the Presidential and FRA Amendments of 2014 and (2) NARA assisted in managing their electronic records.[7] As part of the evaluation, GAO recommended that the FTC establish a timeframe to update the agency's electronic information system inventory.[8] As of the date of this advisory, the NARA-ordered records disposition halt is still in effect and FTC management

[4] *Id. (based on* 36 C.F.R. § 1225.18).

[5] 36 C.F.R. Parts 1220 26.

[6] FTC OS management has noted, per the agency's progress in responding to NARA's request for updated records schedules, that NARA may take 1 year or longer to approve a records schedule after agency submission.

[7] GAO, *Information Management: Selected Agencies Need to Fully Address Federal Electronic Recordkeeping Requirements*, [illegible] (February 27, 2020).

[8] GAO made recommendations to most (14 of 17) of the agencies.

awaits NARA approval of its new records schedules. As a result, the recommendation is still open.

In 2018, FTC's Internal Control and Enterprise Risk Management (ICRM) Program also performed a review of the Records and Filings Office (RFO).[9] The review identified five conditions, along with 20 associated recommendations to improve records management. Fourteen recommendations from three conditions remain open and completion of these recommendations is contingent upon the FTC's submission and NARA's approval of new records schedules.

Finally, as part of its responsibility for overseeing and reporting to Congress on the state of records management across the federal government, NARA required agencies to submit three separate reports to its Office of the Chief Records Officer, in preparation for its annual Federal Agency Records Management (FARM) report.[10] For FY 2020, this included (1) a Senior Agency Official for Records Management (SAORM) Annual Report,[11] (2) a Federal Electronic Records and Email Management Maturity Model Report,[12] and (3) an annual Records Management Self-Assessment (RMSA).[13] With respect to the RMSA, an OIG analysis of 60 agencies shows the FTC with the 9th lowest records management self-assessment score.[14] Further, in its Email Maturity Model report, the FTC ranked as the 3rd lowest of 60 agencies included in the report.[15]

II. Observations

As coordinated by the Office of the Secretary (OS), the FTC's records management personnel are in the process of preparing records schedules for each of its bureaus and offices.[16] During this process, OS has held detailed discussions with the FTC's operating units about each of their business processes to determine record ownership and make decisions on file maintenance.

[9] FTC, *FTC FY 17 A-123 Program Review Records and Filings Office,* (April 30, 2018).

[10] NARA, Records Management Self-Assessment, https://www.archives.gov/records-mgmt/resources/self-assessment.html.

[11] NARA provided a template to those agencies with a SAORM to elicit information from a senior management perspective. The focus is on agency progress towards full electronic recordkeeping.

[12] NARA provided a two-part maturity model template based on the Universal Electronic Records Management (ERM) Requirements and the Criteria for Managing Email Records in Compliance with the Managing Government Records Directive (M-12-18).

[13] Agency records officers provided an evaluation of their individual agency's compliance with federal records management statutes, regulations and program functions.

[14] The FTC scored 2.11 out of a possible 4.00 in its RMSA. The median score for 60 agencies the OIG compared against was 2.89.

[15] The FTC scored 0.40 out of a possible 4.00 in its Email Maturity Model Report. The median score for 60 agencies the OIG compared against was 3.00.

[16] The FTC is comprised of three bureaus, ten functional offices (not including the OIG) and eight regional offices.

The FTC's records scheduling process has revealed certain challenges that are unique to the agency. While all federal agencies are required to review their files to determine whether they contain records that need to be preserved, the FTC's business processes and evolving culture make this requirement even more burdensome.

First, inefficient records management overall—and lack of coordination across the agency—may be limiting agency efforts to modernize. Currently, the FTC stores files in shared drives, with each operating unit (and, to some extent, each group within each unit) having its own unique method for housing information. As a result, the FTC does not use any uniform method to store files, and the records that they contain—nor can it easily and consistently search for files across the agency. Further, by storing files in its various shared drive folders, the FTC is also limited in its ability to automate the storage and disposal of records in accordance with the new records schedules it intends to issue. The FTC's transition of its files to the cloud platform,[17] in theory, could be an opportunity to shift its current approach to records management, but management has communicated to us that it does not plan to do so.

Particularly noteworthy, the Bureau of Competition and the Bureau of Consumer Protection do not use a comprehensive case management system for their case files—and have delayed moving to such a system for many years, either due to budget constraints or other competing priorities. Such a system could be set up for automatic and proper record storage and disposal, bring some consistency to the management of case files, and assist the bureaus in managing large sets of records.

In addition to the lack of a comprehensive file management system, the FTC has not prioritized records management nor embedded it as a value in the agency's culture. As of FY 2022, current staffing levels and technological support are viewed as insufficient to meet records management challenges—more specifically, to address a need for (a) additional staff not just for records scheduling, but also developing the subsequent plans for executing approved schedules, as well as (b) updated capabilities to identify related records, lock down records against user edits, and track records usage. As a result, the FTC risks falling out of compliance with NARA records schedule requirements to be met in calendar year 2022, as well as Office of Management and Budget milestones to be met by the start of calendar year 2023.[18]

Likewise, the FTC's culture contributes to the difficulty of complying with NARA's requirements. According to one official, the FTC has many case files (some likely up to 30 years old) that staff do not want to delete, based on the possibility that they contain information that could be useful for a future matter. The official expressed concern that continued resistance to disposing of these records pursuant to an updated records schedule could cause increased risk to the FTC if it decides to move forward with a plan

[17] The FTC expects to finish the movement to the cloud platform by the end of calendar year 2022.

[18] On June 28, 2019, OMB issued M-19-21, *Transition to Electronic Records*, to set "consistent, government-wide policy and practices," directing all federal agencies to "[e]nsure that all Federal records are created, retained, and managed in electronic formats, with appropriate metadata." It further called on federal agencies to develop plans to close agency-operated storage facilities for paper and other analog records and transfer records to NARA centers or commercial storage facilities by December 31, 2022. By January 1, 2023, all other legal transfers of permanent records must be in electronic format, to the fullest extent possible, whether the records were "born electronic" or not. After that date, agencies will be required to digitize permanent records in analog formats before transfer to NARA.

to become a more decentralized agency—with much of its staff working throughout the country and without access to these hard-copy records.

III. Conclusion

The FTC faces complex challenges in complying with OMB and NARA records schedule requirements (including its submission of the remaining records schedules that still await NARA approval since May 2020)—as well as setting up an automated records management system that properly stores and timely disposes of records in a uniform manner across the agency. Tackling these challenges now and making records management progressively more integral to its operations will, in the long term, significantly ease the burden of records management and compliance with NARA requirements on the FTC. We therefore recommend the following:

Recommendations

We recommend that the FTC Chair and the appropriate agency senior leadership—in coordination with the Office of the Secretary and the Office of the Chief Information Officer, and in accordance with NARA and OMB directives develop requirements for

1. acquiring the necessary staff and technology resources for managing records scheduling, disposition, access, and storage; and

2. incorporating records management function, retention, and disposition requirements into information life cycle processes and stages.

Subsequent to issuing the draft advisory, we worked with FTC management to revise the second recommendation, preserving the emphasis on the connection between records management and information lifecycle processes. Please see the attachment for the agency's concurrence.

Please submit to us an action plan that addresses the recommendations contained in this advisory within 60 calendar days. This advisory will be posted on our public website pursuant to section 8M of the Inspector General Act of 1978, as amended (5 U.S.C App., § 8M).

We thank the Office of the Secretary and FTC leadership for the cooperation and consideration given to the OIG in the development of this product. If you have any questions, please contact me at (202) 326-2457.

Attachment

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

February 23, 2022

MEMORANDUM

FROM: Lina Khan
Chair
LINA M. KHAN

TO: Andrew Katsaros
Inspector General

SUBJECT: Management's Response to Draft Management Advisory on FTC Records Management

The Federal Trade Commission (FTC) appreciates the Office of the Inspector General's (OIG) continued work to identify potential risks to the FTC.

The draft Management Advisory describes potential control risks identified during OIG's review of the FTC's records management program. The draft Management Advisory recommends the FTC Chair and the appropriate agency senior leadership—in coordination with the Office of the Secretary (OS) and the Office of the Chief Information Officer (OCIO), and in accordance with NARA and OMB directives—develop requirements for:

1. Acquiring the necessary staff and technology resources for managing records scheduling, disposition, access, and storage; and

2. Incorporating records management function, retention, and disposition requirements into information life cycle processes and stages—including the design, development, implementation, and decommissioning of information systems.

The FTC agrees with these recommendations and is committed to ensuring appropriate management controls are in place and operating as intended.

OIG Recommendation 1: OS has issued a request for information for acquiring the staffing needed to manage records scheduling, disposition, access, and storage. OS will provide OCIO with technological requirements for managing records scheduling, disposition, access, and storage electronically.

OIG Recommendation 2: OCIO will implement a policy to collaborate with OS in ensuring that records management function, retention, and disposition requirements are incorporated into information life cycle processes and stages, including the design, development, implementation, and decommissioning of information systems.

United States Senate

COMMITTEE ON COMMERCE, SCIENCE,
AND TRANSPORTATION

WASHINGTON, DC 20510–6125

WEBSITE: https://commerce.senate.gov

August 31, 2023

The Honorable Lina Khan
Chairwoman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Dear Chairwoman Khan,

On June 29, the Federal Trade Commission ("FTC") published a Notice of Proposed Rulemaking ("NPRM") that would dramatically expand the premerger notification requirements.[1] No doubt these rules will impose a significant burden on businesses across all industries. The FTC claims that the burden will not be ***that*** great: it will only take companies ***four times longer*** to complete the requisite filings under the new rules, costing industry $350 million annually. Yet the real cost may be much higher if the FTC underestimated the additional hours of labor that the new rules demand. It very well may have done so: the FTC bases its estimation on nothing other than an internal survey of its own staff. What is more, the FTC does not provide any detail into this survey. The FTC should show its work.

The current FTC regulations already impose numerous requirements on companies seeking to merge with, or acquire, other companies. Under the Hart-Scott-Rodino ("HSR") Act, parties to transactions that exceed a certain monetary threshold must notify the FTC by submitting an HSR filing and certain documents before they can move forward.[2] If the FTC is concerned that the transaction may violate antitrust laws, then it can issue what is called a Second Request for additional information and documents. Moreover, under the current rules, the FTC has recently been extremely active—albeit unsuccessful—in seeking to block mergers based on alleged anticompetitive effects. The agency keeps losing because of the legal theories it is pursuing, not because it lacks sufficient information in the premerger notification process.[3]

Nevertheless, through this recent rulemaking, the FTC seeks to drastically change the premerger notification process. For example, under the proposed rules, parties would be required to

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[1] NPRM, Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. 42178 (Jun. 29, 2023).
[2] *See* 18 U.S.C. § 18a; 16 C.F.R. §§ 801, 803.
[3] *See, e.g.*, *FTC v. Microsoft Corp.*, 2023 WL 4443412, at *12–13 (N.D. Cal. Jul. 10, 2023) (rejecting the FTC's arguments that it "need only show the transaction is 'likely to increase the ability and/or incentive of the merged firm to foreclose rivals'" or that "the combined firm would have a greater ability and incentive to foreclose" competition); *FTC v. Meta Platforms*, 2023 WL 2346238, at *27 (N.D. Cal. Feb. 3, 2023) ("To the extent the FTC implies that—based solely on the objective evidence of Meta's resources and its excitement for VR fitness—it would have inevitably found and implemented some unspecified means to enter the market, the Court finds such a theory to be impermissibly speculative.").

b. The average number of years the surveyed FTC employees worked in private practice;
c. The question(s) asked of FTC employees;
d. The optional response(s) for FTC employees;
e. The date range during which the survey was conducted;
f. The method by which the questions were asked and responses submitted.

2. Please provide the full results of the survey, including all responses.

3. Please provide all communications to and from members of the premerger notification office regarding the survey.

4. Please provide any instructions given by an FTC Commissioner's office and/or a Director or Deputy Director of the Bureau of Competition to a member of the premerger notification office regarding the survey.

5. Please provide support for the following projections and assumptions in the NPRM[10]:

   a. Non-index filings "will total 7,096" in FY 2023;
   b. "[E]xecutive and attorney compensation" is $460 hourly;
   c. The new rules "are expected to impose either minimal or no additional capital or other non-labor costs, as businesses subject to the HSR Rules generally have or obtain necessary for other businesses purposes;"
   d. The "ongoing, regular training" necessitated by the new rules "would be a small portion of and subsumed within the ordinary training that employees receive apart from that associated with the information collected under the HSR Rules and the corresponding Instructions."

Thank you for your attention to this matter.

Sincerely,

Ted Cruz
Ranking Member

[10] *Id.*

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

Office of the Chair

September 19, 2023

The Honorable Jim Jordan
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Jordan:

I am writing in response to your September 5, 2023, letter regarding the Commission's responsiveness to your Congressional requests, among other matters. The Commission continues to work closely with Members and Committees to accommodate and respond to information requests from Congress while abiding by our obligation to protect confidential information and other interests core to the FTC's ability to carry out its mission. The FTC has been thorough, diligent, and steadfast in these efforts.

We have established our clear responsiveness to your wide range of oversight requests through our extensive letters, testimony, and briefings. In this calendar year, the Commission has received 15 letters with 76 specific requests from your Committee, and we have responded with 26 letters, 17 productions, over 6,000 pages of documents, and my testimony at a five-hour hearing in July. The voluminous production made on September 1, 2023, for example, demonstrates the Commission's continued commitment to working with and accommodating Congress and your Committee. Moreover, since your letter of September 5, 2023, two of the Commission's career staffers have sat before your Committee for hours of transcribed interviews, and more interviews are scheduled in the coming month.

Given the Commission's extensive cooperation and good faith production in response to your Committee's information requests, your mention of compulsory process is surprising and unnecessary. As I noted in my last correspondence, threats of any kind from the Committee are inappropriate and unwarranted. As we work diligently to accommodate your information requests, ensuring that needless hostility from the Committee does not undermine the important work of the FTC is critical.

We continue to believe we will be able to satisfy appropriate information requests from the Committee while also safeguarding the independence, integrity, and effectiveness of the Commission's vital law enforcement work.

Sincerely,

Lina M. Khan
Chair
Federal Trade Commission

cc: The Honorable Jerrold Nadler
Ranking Member
House Committee on the Judiciary

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

Office of the Chair

September 21, 2023

The Honorable Donald Norcross
United States House of Representatives
Washington, D.C. 20515

Dear Representative Norcross:

Thank you for your letter to the Federal Trade Commission ("Commission" or "FTC") regarding the important protections for workers provided by union organizing efforts, and the value of labor neutrality agreements to facilitating those efforts. Protecting competitive labor markets complements union organizing efforts because workers, including unionized workers, have more bargaining power when they have more options of where to work.

I am fully committed to protecting workers from mergers that may reduce competition for their services. As you know, the Agencies recently proposed new Merger Guidelines that, for the first time, expressly address the need to investigate a merger's effects on labor market competition.[1] These proposed Guidelines recognize that a merger between employers may reduce worker bargaining power by limiting their options of where to work. To guard against that risk, the Guidelines identify important factors to consider when assessing whether the merging firms compete in any labor markets. Importantly, the proposed Guidelines recognize that a merger that may substantially lessen competition in a labor market may be illegal on that basis alone.

The Commission is also considering additional changes to ensure merger enforcement protects competition in labor markets. The Commission recently proposed changes to the information that certain merging parties must provide to the FTC and Antitrust Division of the Department of Justice prior to completing their mergers.[2] The proposed requirements, if adopted, would give staff information about labor markets at the outset of their investigations, so that any competition concerns can be considered and addressed effectively.

[1] Press Release, Fed. Trade Comm'n, FTC and DOJ Seek Comment on Draft Merger Guidelines (July 19, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-doj-seek-comment-draft-merger-guidelines.
[2] Press Release, Fed. Trade Comm'n, FTC and DOJ Propose Changes to HSR Form for More Effective, Efficient Merger Review (June 27, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-doj-propose-changes-hsr-form-more-effective-efficient-merger-review.

Thank you again for raising this topic. If you or your staff have any questions, please contact Jeanne Bumpus, the Director of the FTC's Office of Congressional Relations, at (202) 326-2195.

Sincerely,

Lina Khan

Lina M. Khan
Chair, Federal Trade Commission

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

Office of the Chair

September 26, 2023

The Honorable Ruben Gallego
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative Gallego:

Thank you for your letter regarding Kroger's proposed acquisition of Albertsons. Because Kroger has disclosed in a press release that the Federal Trade Commission ("FTC" or "Commission") is conducting a review of the proposed transaction,[1] I am able to confirm that the FTC is investigating the proposed merger.[2]

Although I cannot discuss any details of the investigation, the FTC diligently pursues its statutory mandate to protect Americans from mergers that may substantially lessen competition or tend to create a monopoly in any market.

Given the high stakes for American consumers, workers, farmers, growers, honest businesses, local communities, and the nation's economy, policing merger activity and other forms of potentially anticompetitive conduct in food industries continues to be a top Commission priority.

Thank you again for your letter. If you have any questions, please feel free to have your staff call Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2195.

Sincerely,

Lina Khan

Lina M. Khan
Chair, Federal Trade Commission

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[1] Press Release, Kroger, Kroger Comments On Second Request from Federal Trade Commission (Dec. 6, 2022), https://ir.kroger.com/CorporateProfile/press-releases/press-release/2022/Kroger-Comments-On-Second-Request-From-Federal-Trade-Commission/default.aspx.

[2] Notice of Policy of Disclosing Investigations of Announced Mergers: Notice of Revised Policy, 62 Fed. Reg. 18,630 (Apr. 16, 1997), https://www.ftc.gov/sites/default/files/documents/federal_register_notices/notice-policy-disclosing-investigations-announced-mergers/970416investigationsofannounced.pdf.

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

Office of the Chair

September 26, 2023

The Honorable Paul A. Gosar, D.D.S.
United States House of Representatives
Washington, D.C. 20510

Dear Representative Gosar:

Thank you for your August 30, 2023, letter in which you express your concern about the lawsuit the Department of Justice filed on behalf of the Federal Trade Commission against Xlear, Inc.[1] You ask that the FTC provide: 1) information on how the FTC determined that Xlear's claims were deceptive, and whether the FTC evaluated scientific literature in making this determination; 2) information on how the FTC evaluates whether a representation is deceptive generally; 3) documents and communications from the FTC and FDA relating to the litigation; and 4) why the FTC has not filed a lawsuit against Moderna, Johnson & Johnson, or Pfizer for claims regarding the safety and efficacy of their vaccines.

Because the case is still in litigation, I am not able to address any questions related to Xlear specifically. I am also unable to reveal information regarding any other non-public matters. However, I can share general insight into how the Commission generally examines these issues. As you know, the FTC generally evaluates consumer protection issues using its authority under Section 5 of the FTC Act, which prohibits unfair or deceptive acts or practices. Under Section 5, a representation or omission is deceptive if it is material and would likely mislead consumers acting reasonably under the circumstances.[2] An act or practice is unfair if it causes or is likely to cause substantial injury to consumers that is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or competition.[3]

I can also tell you that the FTC regularly consults with other agencies on matters of mutual concern. Interagency discussions generally are protected under various exemptions,

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[1] Complaint for Civil Penalties, Permanent Injunction and Other Relief, *United States v. Xlear, Inc.*, No. 2:21-cv-00640 (D. Utah Oct. 28, 2021), https://www.ftc.gov/system/files/documents/cases/filed_complaint_xlear_v_jones_v.1.pdf. *See* Press Release, Fed. Trade Comm'n, *FTC Sues Utah-Based Company for Falsely Claiming Its Nasal Sprays Can Prevent and Treat COVID-19* (Oct. 28, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-sues-utah-based-company-falsely-claiming-its-nasal-sprays-can-prevent-treat-covid-19.

[2] *See* Fed. Trade Comm'n, Policy Statement on Deception, appended to *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174–83 (1984); *see also FTC v. Gill*, 265 F.3d 944, 950 (9th Cir. 2001); *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095 (9th Cir. 1994) (citing *Cliffdale Assocs.*, 103 F.T.C. at 164–65). To be material, a claim must convey information that is important to consumers and thus be likely to affect their choice of a product. *See FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1201 (9th Cir. 2006).

[3] FTC Act § 5(n), 15 U.S.C. § 45(n).

including the deliberative-process privilege, attorney-client privilege, and attorney work product privilege.

Thank you again for sharing your concerns with us. If you or your staff has any additional questions or comments, please contact Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2195.

Sincerely,

Lina Khan

Lina M. Khan
Chair
Federal Trade Commission

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

Office of the Chair

September 26, 2023

The Honorable Greg Landsman
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative Landsman:

Thank you for your letter regarding Kroger's proposed acquisition of Albertsons. Because Kroger has disclosed in a press release that the Federal Trade Commission ("FTC" or "Commission") is conducting a review of the proposed transaction,[1] I am able to confirm that the FTC is investigating the proposed merger.[2]

Although I cannot discuss the details of non-public investigations, the FTC hews closely to judicial standards in pursuit of its statutory mandate to protect Americans from mergers that may substantially lessen competition or tend to create a monopoly in any market. In that regard, our proposed merger guideline revisions are an effort to further ensure that our enforcement manual fully conforms to judicial precedents and the text of our statutes.[3]

Given the high stakes for American consumers, farmers, growers, workers, honest businesses, local communities, and the nation's economy, policing merger activity and other forms of potentially anticompetitive conduct in food industries continues to be a top Commission priority.

Thank you again for your letter. If you have any questions, please feel free to have your staff call Jeanne Bumpus, Director of our Office of Congressional Relations, at (202) 326-2195.

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[1] Press Release, Kroger, Kroger Comments On Second Request from Federal Trade Commission (Dec. 6, 2022), https://ir.kroger.com/CorporateProfile/press-releases/press-release/2022/Kroger-Comments-On-Second-Request-From-Federal-Trade-Commission/default.aspx.

[2] Notice of Policy of Disclosing Investigations of Announced Mergers: Notice of Revised Policy, 62 Fed. Reg. 18,630 (Apr. 16, 1997), https://www.ftc.gov/sites/default/files/documents/federal_register_notices/notice-policy-disclosing-investigations-announced-mergers/970416investigationsofannounced.pdf.

[3] Press Release, Fed. Trade Comm'n, FTC and DOJ Seek Comment on Draft Merger Guidelines (July 19, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-doj-seek-comment-draft-merger-guidelines; Fed. Trade Comm'n Matter No. P859910, FTC-DOJ Merger Guidelines (Draft for Public Comment) (July 19, 2023), https://www.ftc.gov/legal-library/browse/ftc-doj-merger-guidelines-draft-public-comment.

Sincerely,

Lina M. Khan
Chair
Federal Trade Commission

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

Office of the Chair

September 26, 2023

The Honorable Seth Moulton
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative Moulton:

Thank you for your letter regarding Amazon's proposed acquisition of iRobot and sharing your views about the long-term challenges iRobot faces and potential benefits of the merger. Because iRobot has disclosed in an SEC filing that the Federal Trade Commission ("FTC" or "Commission") is conducting a review of the proposed transaction,[1] I am able to confirm that the FTC is investigating the proposed merger.[2]

Although I cannot discuss any details of the investigation, the FTC diligently pursues its statutory mandate to protect Americans from mergers that may substantially lessen competition or tend to create a monopoly in any market. Given the high stakes for American consumers, our mandate includes evaluating the effects of mergers on innovation and labor markets.

Thank you again for your letter. If you have any questions, please feel free to have your staff call Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2195.

Sincerely,

Lina Khan

Lina M. Khan
Chair
Federal Trade Commission

[1] iRobot Corp., Current Report (Form 8-K) (Sept. 20, 2022) at §8.01, https://www.sec.gov/Archives/edgar/data/1159167/000119312522247428/d402973d8k.htm.
[2] Notice of Policy of Disclosing Investigations of Announced Mergers: Notice of Revised Policy, 62 Fed. Reg. 18,630 (Apr. 16, 1997), https://www.ftc.gov/sites/default/files/documents/federal_register_notices/notice-policy-disclosing-investigations-announced-mergers/970416investigationsofannounced.pdf.

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

Office of the Chair

September 26, 2023

The Honorable Mary Sattler Peltola
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative Peltola:

Thank you for your letter regarding Kroger's proposed acquisition of Albertsons. Because Kroger has disclosed in a press release that the Federal Trade Commission ("FTC" or "Commission") is conducting a review of the proposed transaction,[1] I am able to confirm that the FTC is investigating the proposed merger.[2]

Although I cannot discuss any details of the investigation, the FTC diligently pursues its statutory mandate to protect Americans from mergers that may substantially lessen competition or tend to create a monopoly in any market, including labor markets. In that regard, our recently announced proposed merger guidelines revisions address relevant market impacts to protect competition for goods, services, and workers' labor.[3]

Given the high stakes for American consumers, workers, farmers, growers, honest businesses, local communities, and the nation's economy, policing merger activity and other forms of potentially anticompetitive conduct in food industries continues to be a top Commission priority.

Thank you again for your letter. If you have any questions, please feel free to have your staff call Jeanne Bumpus, Director of our Office of Congressional Relations, at (202) 326-2195.

Sincerely,

Lina Khan

Lina M. Khan
Chair, Federal Trade Commission

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[1] Press Release, Kroger, Kroger Comments On Second Request from Federal Trade Commission (Dec. 6, 2022), https://ir.kroger.com/CorporateProfile/press-releases/press-release/2022/Kroger-Comments-On-Second-Request-From-Federal-Trade-Commission/default.aspx.

[2] Notice of Policy of Disclosing Investigations of Announced Mergers: Notice of Revised Policy, 62 Fed. Reg. 18,630 (Apr. 16, 1997), https://www.ftc.gov/sites/default/files/documents/federal_register_notices/notice-policy-disclosing-investigations-announced-mergers/970416investigationsofannounced.pdf.

[3] Press Release, Fed. Trade Comm'n, FTC and DOJ Seek Comment on Draft Merger Guidelines (July 19, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-doj-seek-comment-draft-merger-guidelines; Fed. Trade Comm'n Matter No. P859910, FTC-DOJ Merger Guidelines (Draft for Public Comment) (July 19, 2023), https://www.ftc.gov/legal-library/browse/ftc-doj-merger-guidelines-draft-public-comment.

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

Office of the Chair

September 26, 2023

The Honorable Adam B. Schiff
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative Schiff:

Thank you for your letter regarding Kroger's proposed acquisition of Albertsons. Because Kroger has disclosed in a press release that the Federal Trade Commission ("FTC" or "Commission") is conducting a review of the proposed transaction,[1] I am able to confirm that the FTC is investigating the proposed merger.[2]

Although I cannot discuss the details of non-public investigations, the FTC diligently pursues its statutory mandate to protect Americans from mergers that may substantially lessen competition or tend to create a monopoly in any market, including labor markets. In that regard, our proposed merger guideline revisions address relevant market impacts to protect competition for goods, services, and workers' labor.[3]

Given the high stakes for American consumers, workers, farmers, growers, honest businesses, local communities, and the nation's economy, policing merger activity and other forms of potentially anticompetitive conduct in food industries continues to be a top Commission priority.

Thank you again for your letter. If you have any questions, please feel free to have your staff call Jeanne Bumpus, Director of our Office of Congressional Relations, at (202) 326-2195.

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[1] Press Release, Kroger, Kroger Comments On Second Request from Federal Trade Commission (Dec. 6, 2022), https://ir.kroger.com/CorporateProfile/press-releases/press-release/2022/Kroger-Comments-On-Second-Request-From-Federal-Trade-Commission/default.aspx.

[2] Notice of Policy of Disclosing Investigations of Announced Mergers: Notice of Revised Policy, 62 Fed. Reg. 18,630 (Apr. 16, 1997), https://www.ftc.gov/sites/default/files/documents/federal_register_notices/notice-policy-disclosing-investigations-announced-mergers/970416investigationsofannounced.pdf.

[3] Press Release, Fed. Trade Comm'n, FTC and DOJ Seek Comment on Draft Merger Guidelines (July 19, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-doj-seek-comment-draft-merger-guidelines; Fed. Trade Comm'n Matter No. P859910, FTC-DOJ Merger Guidelines (Draft for Public Comment) (July 19, 2023), https://www.ftc.gov/legal-library/browse/ftc-doj-merger-guidelines-draft-public-comment.

Sincerely,

Lina M. Khan
Chair

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

Office of the Chair

September 26, 2023

The Honorable Tammy Baldwin
United States Senate
Washington, D.C. 20510

Dear Senator Baldwin:

Thank you for your letter regarding the effects of the ten acquisitions made by Fortune Brands since 2011, the closure of its acquired Milwaukee Master Lock manufacturing facility, and your support for the new draft merger guidelines. We will defer to the Department of Justice and its proposed final judgment in *United States v. ASSA ABLOY AB et al.*

As President Biden stated in his Executive Order on Promoting Competition, industry consolidation and weakened competition have "den[ied] Americans the benefits of an open economy," with "workers, farmers, small businesses, and consumers paying the price."[1] This reinvigorated focus on competition policy and antitrust enforcement comes against the backdrop of a broader reassessment of the effects of mergers across the U.S. economy, not only on consumer prices but also on labor markets, local and regional economic dynamism, and resilience.

At the beginning of my tenure, I reaffirmed the agency's commitment to vigorously scrutinizing mergers that may substantially lessen competition. As part of this effort, the FTC has worked with the Department of Justice to update the agencies' merger guidelines. Released on July 19, 2023, the draft guidelines build upon, expand, and clarify frameworks set out in previous versions of merger guidelines and include potential updates designed to directly address labor markets and non-price elements of competition.[2] We also invited members of the public to identify specific examples of mergers that have harmed competition, including worsening outcomes for workers, customers, or suppliers. The agencies will use public comments to evaluate and update the draft before finalizing the guidelines.

[1] Exec. Order No. 14036, Promoting Competition in the American Economy, §1 (July 9, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.
[2] See Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro Bedoya Regarding FTC-DOJ Proposed Merger Guidelines (July 19, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p234000_chair_statement_re_draft_merger_guidelines.pdf.

Thank you again for bringing these issues to my attention, and for your vigilance in promoting fair competition. If you or your staff have any questions, please contact Jeanne Bumpus, the Director of the FTC's Office of Congressional Relations, at (202) 326-2195.

Sincerely,

Lina M. Khan
Chair, Federal Trade Commission

cc: Attorney General Merrick Garland
U.S. Department of Justice
950 Pennsylvania Ave.
Washington, D.C. 20530

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

Office of the Chair

September 26, 2023

The Honorable Amy Klobuchar
United States Senate
Washington, D.C. 20510

Dear Senator Klobuchar:

Thank you for your June 29, 2023, letter to the Federal Trade Commission and the Department of Justice.

I agree that federal antitrust enforcers must closely scrutinize dominant technology companies' expansion into emerging industries. Ensuring that our law enforcement keeps pace with new market realities is a top priority, and I have directed our teams to remain especially vigilant in the context of next-generation platforms. Timely action to halt unlawful conduct in digital markets is critical, given the high stakes for technological development and innovation across the economy.

Thank you again for raising this subject on behalf of the American public. If you have any questions, please don't hesitate to have your staff call Jeanne Bumpus, Director of the Office of Congressional Relations, at (202) 326-2195.

Sincerely,

Lina Khan

Lina M. Khan
Chair, Federal Trade Commission

cc: The Honorable Jonathan Kanter
Assistant Attorney General, Antitrust Division
U.S. Department of Justice

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

Office of the Chair

September 26, 2023

The Honorable Michael Lee
United States Senate
Washington, D.C. 20510

Dear Senator Lee:

Thank you for your June 29, 2023, letter to the Federal Trade Commission and the Department of Justice.

I agree that federal antitrust enforcers must closely scrutinize dominant technology companies' expansion into emerging industries. Ensuring that our law enforcement keeps pace with new market realities is a top priority, and I have directed our teams to remain especially vigilant in the context of next-generation platforms. Timely action to halt unlawful conduct in digital markets is critical, given the high stakes for technological development and innovation across the economy.

Thank you again for raising this subject on behalf of the American public. If you have any questions, please don't hesitate to have your staff call Jeanne Bumpus, Director of the Office of Congressional Relations, at (202) 326-2195.

Sincerely,

Lina Khan

Lina M. Khan
Chair, Federal Trade Commission

cc: The Honorable Jonathan Kanter
Assistant Attorney General, Antitrust Division
U.S. Department of Justice

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

Office of the Chair

September 26, 2023

The Honorable JD Vance
United States Senate
Washington, D.C. 20510

Dear Senator Vance:

Thank you for your letter and suggestion that the FTC conduct a 6(b) study into potentially collusive behavior by colleges and universities, particularly as they relate to new admissions policies in the aftermath of *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*. 143 S. Ct. 2141 (2023). The realities of constrained agency resources and significant law enforcement demands require our careful assessment of what 6(b) studies we can initiate and pursue. The FTC has several resource-intensive 6(b) studies underway.

To avoid duplication and maximize the effectiveness of concurrent federal antitrust jurisdiction, the Commission and the Department of Justice's Antitrust Division have long maintained a liaison arrangement through which we divide responsibility for antitrust review based on statutory authority and other factors. Pursuant to that arrangement, the FTC will defer to the Antitrust Division with respect to any potential investigation. I have forwarded your letter accordingly.

Thank you again for bringing these issues to my attention, and for your vigilance in promoting fair competition. If you or your staff have any questions, please contact Jeanne Bumpus, the Director of the FTC's Office of Congressional Relations, at (202) 326-2195.

Sincerely,

Lina Khan

Lina M. Khan
Chair, Federal Trade Commission

cc: The Honorable Jonathan Kanter
Assistant Attorney General
Antitrust Division
U.S. Department of Justice

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

September 26, 2023

The Honorable Kelly Armstrong
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative Armstrong:

Thank you for your letter regarding the Federal Trade Commission's administrative proceeding on the merits of Microsoft's proposed acquisition of Activision Blizzard. The Commission appreciates receiving your views. Although the Commission cannot comment on any pending adjudicative proceeding, please feel free to have your staff call Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2195, with any questions you may have.

Sincerely,

April J. Tabor
Secretary

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

September 26, 2023

The Honorable Troy Balderson
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative Balderson:

Thank you for your letter regarding the Federal Trade Commission's administrative proceeding on the merits of Microsoft's proposed acquisition of Activision Blizzard. The Commission appreciates receiving your views. Although the Commission cannot comment on any pending adjudicative proceeding, please feel free to have your staff call Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2195, with any questions you may have.

Sincerely,

April J. Tabor
Secretary

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

September 26, 2023

The Honorable Larry Bucshon
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative Bucshon:

Thank you for your letter regarding the Federal Trade Commission's administrative proceeding on the merits of Microsoft's proposed acquisition of Activision Blizzard. The Commission appreciates receiving your views. Although the Commission cannot comment on any pending adjudicative proceeding, please feel free to have your staff call Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2195, with any questions you may have.

Sincerely,

April J. Tabor
Secretary

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

September 26, 2023

The Honorable Earl Carter
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative Carter:

Thank you for your letter regarding the Federal Trade Commission's administrative proceeding on the merits of Microsoft's proposed acquisition of Activision Blizzard. The Commission appreciates receiving your views. Although the Commission cannot comment on any pending adjudicative proceeding, please feel free to have your staff call Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2195, with any questions you may have.

Sincerely,

April J. Tabor
Secretary

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

September 26, 2023

The Honorable Ben Cline
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative Cine:

Thank you for your letter regarding the Federal Trade Commission's administrative proceeding on the merits of Microsoft's proposed acquisition of Activision Blizzard. The Commission appreciates receiving your views. Although the Commission cannot comment on any pending adjudicative proceeding, please feel free to have your staff call Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2195, with any questions you may have.

Sincerely,

April J. Tabor
Secretary

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

September 26, 2023

The Honorable James Comer
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative Comer:

Thank you for your letter regarding the Federal Trade Commission's administrative proceeding on the merits of Microsoft's proposed acquisition of Activision Blizzard. The Commission appreciates receiving your views. Although the Commission cannot comment on any pending adjudicative proceeding, please feel free to have your staff call Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2195, with any questions you may have.

Sincerely,

April J. Tabor
Secretary

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

September 26, 2023

The Honorable John Curtis
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative Curtis:

Thank you for your letter regarding the Federal Trade Commission's administrative proceeding on the merits of Microsoft's proposed acquisition of Activision Blizzard. The Commission appreciates receiving your views. Although the Commission cannot comment on any pending adjudicative proceeding, please feel free to have your staff call Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2195, with any questions you may have.

Sincerely,

April J. Tabor
Secretary

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

September 26, 2023

The Honorable Byron Donalds
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative Donalds:

Thank you for your letter regarding the Federal Trade Commission's administrative proceeding on the merits of Microsoft's proposed acquisition of Activision Blizzard. The Commission appreciates receiving your views. Although the Commission cannot comment on any pending adjudicative proceeding, please feel free to have your staff call Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2195, with any questions you may have.

Sincerely,

April J. Tabor
Secretary

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

September 26, 2023

The Honorable Jeff Duncan
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative Duncan:

Thank you for your letter regarding the Federal Trade Commission's administrative proceeding on the merits of Microsoft's proposed acquisition of Activision Blizzard. The Commission appreciates receiving your views. Although the Commission cannot comment on any pending adjudicative proceeding, please feel free to have your staff call Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2195, with any questions you may have.

Sincerely,

April J. Tabor
Secretary

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

September 26, 2023

The Honorable Brian Fitzpatrick
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative Fitzpatrick:

Thank you for your letter regarding the Federal Trade Commission's administrative proceeding on the merits of Microsoft's proposed acquisition of Activision Blizzard. The Commission appreciates receiving your views. Although the Commission cannot comment on any pending adjudicative proceeding, please feel free to have your staff call Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2195, with any questions you may have.

Sincerely,

April J. Tabor
Secretary

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

September 26, 2023

The Honorable Diana Harshbarger
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative Harshbarger:

Thank you for your letter regarding the Federal Trade Commission's administrative proceeding on the merits of Microsoft's proposed acquisition of Activision Blizzard. The Commission appreciates receiving your views. Although the Commission cannot comment on any pending adjudicative proceeding, please feel free to have your staff call Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2195, with any questions you may have.

Sincerely,

April J. Tabor
Secretary

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

September 26, 2023

The Honorable Kevin Hern
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative Hern:

Thank you for your letter regarding the Federal Trade Commission's administrative proceeding on the merits of Microsoft's proposed acquisition of Activision Blizzard. The Commission appreciates receiving your views. Although the Commission cannot comment on any pending adjudicative proceeding, please feel free to have your staff call Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2195, with any questions you may have.

Sincerely,

April J. Tabor
Secretary

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

September 26, 2023

The Honorable Richard Hudson
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative Hudson:

Thank you for your letter regarding the Federal Trade Commission's administrative proceeding on the merits of Microsoft's proposed acquisition of Activision Blizzard. The Commission appreciates receiving your views. Although the Commission cannot comment on any pending adjudicative proceeding, please feel free to have your staff call Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2195, with any questions you may have.

Sincerely,

April J. Tabor
Secretary

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

September 26, 2023

The Honorable Welsey Hunt
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative Hunt:

Thank you for your letter regarding the Federal Trade Commission's administrative proceeding on the merits of Microsoft's proposed acquisition of Activision Blizzard. The Commission appreciates receiving your views. Although the Commission cannot comment on any pending adjudicative proceeding, please feel free to have your staff call Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2195, with any questions you may have.

Sincerely,

April J. Tabor
Secretary

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

September 26, 2023

The Honorable Jim Jordan
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative Jordan:

Thank you for your letter regarding the Federal Trade Commission's administrative proceeding on the merits of Microsoft's proposed acquisition of Activision Blizzard. The Commission appreciates receiving your views. Although the Commission cannot comment on any pending adjudicative proceeding, please feel free to have your staff call Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2195, with any questions you may have.

Sincerely,

April J. Tabor
Secretary

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

September 26, 2023

The Honorable John Joyce
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative Joyce:

Thank you for your letter regarding the Federal Trade Commission's administrative proceeding on the merits of Microsoft's proposed acquisition of Activision Blizzard. The Commission appreciates receiving your views. Although the Commission cannot comment on any pending adjudicative proceeding, please feel free to have your staff call Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2195, with any questions you may have.

Sincerely,

April J. Tabor
Secretary

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

September 26, 2023

The Honorable Lisa McClain
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative McClain:

Thank you for your letter regarding the Federal Trade Commission's administrative proceeding on the merits of Microsoft's proposed acquisition of Activision Blizzard. The Commission appreciates receiving your views. Although the Commission cannot comment on any pending adjudicative proceeding, please feel free to have your staff call Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2195, with any questions you may have.

Sincerely,

April J. Tabor
Secretary

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

September 26, 2023

The Honorable Carol D. Miller
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative Miller:

Thank you for your letter regarding the Federal Trade Commission's administrative proceeding on the merits of Microsoft's proposed acquisition of Activision Blizzard. The Commission appreciates receiving your views. Although the Commission cannot comment on any pending adjudicative proceeding, please feel free to have your staff call Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2195, with any questions you may have.

Sincerely,

April J. Tabor
Secretary

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

September 26, 2023

The Honorable Nathaniel Moran
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative Moran:

Thank you for your letter regarding the Federal Trade Commission's administrative proceeding on the merits of Microsoft's proposed acquisition of Activision Blizzard. The Commission appreciates receiving your views. Although the Commission cannot comment on any pending adjudicative proceeding, please feel free to have your staff call Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2195, with any questions you may have.

Sincerely,

April J. Tabor
Secretary

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

September 26, 2023

The Honorable August Pfluger
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative Pfluger:

Thank you for your letter regarding the Federal Trade Commission's administrative proceeding on the merits of Microsoft's proposed acquisition of Activision Blizzard. The Commission appreciates receiving your views. Although the Commission cannot comment on any pending adjudicative proceeding, please feel free to have your staff call Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2195, with any questions you may have.

Sincerely,

April J. Tabor
Secretary

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

September 26, 2023

The Honorable Pete Stauber
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative Stauber:

Thank you for your letter regarding the Federal Trade Commission's administrative proceeding on the merits of Microsoft's proposed acquisition of Activision Blizzard. The Commission appreciates receiving your views. Although the Commission cannot comment on any pending adjudicative proceeding, please feel free to have your staff call Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2195, with any questions you may have.

Sincerely,

April J. Tabor
Secretary

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

September 26, 2023

The Honorable David G. Valadao
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative Valadao:

Thank you for your letter regarding the Federal Trade Commission's administrative proceeding on the merits of Microsoft's proposed acquisition of Activision Blizzard. The Commission appreciates receiving your views. Although the Commission cannot comment on any pending adjudicative proceeding, please feel free to have your staff call Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2195, with any questions you may have.

Sincerely,

April J. Tabor
Secretary

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

Office of the Chair

September 21, 2023

The Honorable Adam Schiff
United States House of Representatives
Washington, D.C. 20515

Dear Representative Schiff:

Thank you for your July 12, 2023, letter regarding claims that Meta Platforms, Inc., ("Meta") is systematically engaging in gender discrimination in targeted health and wellness advertising on its platform. You ask that the FTC review a complaint filed by the Center for Intimacy Justice, which alleges that Meta's rejection of this advertising constitutes an unfair or deceptive trade practice, and take appropriate action.

I share your concerns about protecting the public from discriminatory, unfair, and deceptive advertising practices.

Although I cannot reveal information regarding any non-public matters, I can share general insight into how the Commission would examine these issues. As you know, the FTC generally evaluates consumer protection issues using its authority under Section 5 of the FTC Act, which prohibits unfair or deceptive acts or practices. Under Section 5, a representation or omission is deceptive if it is material and would likely mislead consumers acting reasonably under the circumstances.[1] An act or practice is unfair if it causes or is likely to cause substantial injury to consumers that is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or competition.[2]

You may also be interested to know that, in March 2023, the Commission issued orders under Section 6(b) of the FTC Act[3] to eight social media and video streaming platforms (including Meta), requiring these companies to produce information about their advertising standards and policies, and certain data related to advertising published on the platforms.[4]

---

[1] *See* Federal Trade Commission Policy Statement on Deception, appended to *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174–83 (1984)); *see also FTC v. Gill*, 265 F.3d 944, 950 (9th Cir. 2001); *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095 (9th Cir. 1994) (citing *Cliffdale Assocs.*, 103 F.T.C. at 164–65). To be material, a claim must convey information that is important to consumers and thus be likely to affect their choice of a product. *See FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1201 (9th Cir. 2006).

[2] FTC Act § 5(n), 15 U.S.C. § 45(n).

[3] Under Section 6(b), the FTC may require a company to file "reports or answers in writing to specific questions" about its business practices.

[4] Press Release, Federal Trade Commission, FTC Issues Orders to Social Media and Video Streaming Platforms Regarding Efforts to Address Surge in Advertising for Fraudulent Products and Scams (May 16, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/03/ftc-issues-orders-social-media-video-streaming-platforms-regarding-efforts-address-surge-advertising.

Thank you again for sharing your concerns regarding this important consumer protection issue. If you or your staff has any additional questions or comments, please contact Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2195.

Sincerely,

Lina Khan

Lina M. Khan
Chair, Federal Trade Commission

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

Office of the Chair

September 21, 2023

The Honorable Mazie K. Hirono
United States Senate
Washington, D.C. 20510

Dear Senator Hirono:

Thank you for your July 12, 2023, letter regarding claims that Meta Platforms, Inc., ("Meta") is systematically engaging in gender discrimination in targeted health and wellness advertising on its platform. You ask that the FTC review a complaint filed by the Center for Intimacy Justice, which alleges that Meta's rejection of this advertising constitutes an unfair or deceptive trade practice, and take appropriate action.

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Thank you again for sharing your concerns regarding this important consumer protection issue. If you or your staff has any additional questions or comments, please contact Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2195.

Sincerely,

Lina Khan

Lina M. Khan
Chair, Federal Trade Commission

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

Office of the Chair

September 21, 2023

The Honorable Amy Klobuchar
United States Senate
Washington, D.C. 20510

Dear Senator Klobuchar:

Thank you for your July 12, 2023, letter regarding claims that Meta Platforms, Inc., ("Meta") is systematically engaging in gender discrimination in targeted health and wellness advertising on its platform. You ask that the FTC review a complaint filed by the Center for Intimacy Justice, which alleges that Meta's rejection of this advertising constitutes an unfair or deceptive trade practice, and take appropriate action.

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Thank you again for sharing your concerns regarding this important consumer protection issue. If you or your staff has any additional questions or comments, please contact Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2195.

Sincerely,

Lina Khan

Lina M. Khan
Chair, Federal Trade Commission

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

Office of the Chair

September 21, 2023

The Honorable Elizabeth Warren
United States Senate
Washington, D.C. 20510

Dear Senator Warren:

Thank you for your July 12, 2023, letter regarding claims that Meta Platforms, Inc., ("Meta") is systematically engaging in gender discrimination in targeted health and wellness advertising on its platform. You ask that the FTC review a complaint filed by the Center for Intimacy Justice, which alleges that Meta's rejection of this advertising constitutes an unfair or deceptive trade practice, and take appropriate action.

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Sincerely,

Lina Khan

Lina M. Khan
Chair, Federal Trade Commission

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

Office of the Chair

September 21, 2023

The Honorable Peter Welch
United States Senate
Washington, D.C. 20510

Dear Senator Welch:

Thank you for your July 12, 2023, letter regarding claims that Meta Platforms, Inc., ("Meta") is systematically engaging in gender discrimination in targeted health and wellness advertising on its platform. You ask that the FTC review a complaint filed by the Center for Intimacy Justice, which alleges that Meta's rejection of this advertising constitutes an unfair or deceptive trade practice, and take appropriate action.

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Sincerely,

Lina Khan

Lina M. Khan
Chair, Federal Trade Commission

submit a written submission describing all strategic rationales for the transaction, identifying horizontal and vertical relationships between the parties, and providing information about their workers and the labor market.[4] In addition, they will need to submit all agreements related to the transaction, prior agreements between the parties, and documents (including drafts) prepared by or for the supervisory deal team leads, among other items. Much of this information is of the sort that the FTC would typically ask of the parties to the two percent of transactions that proceed to the Second Review stage.[5] Yet these new rules will apply to one hundred percent of transactions for which an HSR filing is necessary.

The critical question is how much the FTC's proposed changes will cost. The FTC estimates that parties currently spend, on average, 37 hours per filing and will spend an additional 107 hours per filing if the FTC adopts its proposed rules.[6] From that estimate, the FTC makes several more assumptions and does some basic math, ultimately concluding that in FY 2023 (the FTC does not look beyond that), the proposed changes to the premerger notification process will "yield[] approximately $350,000,000" in compliance costs.[7] That enormous amount, however, may be an underestimate, due to the assumptions on which the FTC's math depends.

The method by which the FTC reached the 107 hours estimate underlying its calculations is questionable at best. In the NPRM, the FTC reveals that premerger notification office staff "canvassed current Agency staff who had previously prepared HSR filings while in private practice to estimate the projected change in burden due to the proposed amendments."[8] Besides stating that the FTC staff "were asked to estimate the incremental increase in time to prepare HSR Filings … taking into account that transactions range in complexity," and that "[t]he ranges from canvassed [staff] estimated that the proposed changes would result in approximately 12 to 222 additional hours per filing, depending on the complexity," the NPRM provides no insight into how this survey was conducted or the results.[9] There is therefore no way to examine whether the FTC's estimate captures the regulation's actual cost.

The FTC should provide the details that will allow the public to understand the true costs of the proposed rules. Please provide written responses and documents in response to the questions below no later than September 14, 2023.

1. Please explain how the survey of FTC employees regarding the estimated time it would take parties to prepare HSR filings under the new rules was conducted. In answering this question, please identify:

    a. The number of FTC employees that were surveyed;

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[4] *See* NPRM, *supra* note 1.
[5] *See* FTC and DOJ, *Hart-Scott-Rodino Annual Report Fiscal Year 2021*, FTC.gov (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p110014fy2021hsrannualreport.pdf; FTC, *Model Second Request* (Rev. Oct. 2021), https://www.ftc.gov/system/files/attachments/hsr-resources/model_second_request_-_final_-_october_2021.pdf.
[6] NPRM, *supra* note 1, p. 42208.
[7] *Id.*
[8] *Id.*
[9] *Id.*

b. The average number of years the surveyed FTC employees worked in private practice;
c. The question(s) asked of FTC employees;
d. The optional response(s) for FTC employees;
e. The date range during which the survey was conducted;
f. The method by which the questions were asked and responses submitted.

2. Please provide the full results of the survey, including all responses.

3. Please provide all communications to and from members of the premerger notification office regarding the survey.

4. Please provide any instructions given by an FTC Commissioner's office and/or a Director or Deputy Director of the Bureau of Competition to a member of the premerger notification office regarding the survey.

5. Please provide support for the following projections and assumptions in the NPRM[10]:

   a. Non-index filings "will total 7,096" in FY 2023;
   b. "[E]xecutive and attorney compensation" is $460 hourly;
   c. The new rules "are expected to impose either minimal or no additional capital or other non-labor costs, as businesses subject to the HSR Rules generally have or obtain necessary for other businesses purposes;"
   d. The "ongoing, regular training" necessitated by the new rules "would be a small portion of and subsumed within the ordinary training that employees receive apart from that associated with the information collected under the HSR Rules and the corresponding Instructions."

Thank you for your attention to this matter.

Sincerely,

Ted Cruz
Ranking Member

[10] *Id.*

United States Senate
WASHINGTON, DC 20510

September 10, 2023

The Honorable Lina M. Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Chair Khan,

As Americans are inundated with telemarketing calls and online scams that prey on their goodwill and civic engagement, I am writing on the steps the Federal Trade Commission and its partners are taking to crack down on fraudulent schemes that use political and charitable causes for private enrichment, and solicit necessary changes to the law to hold these scammers accountable.

While telemarketing for fraudulent causes is not new, the rampant increase of robocalls and the growth of social media have supercharged schemes that deceive or mislead Americans about how their hard-earned donations are directed and used. The known losses are staggering: two recent fundraising networks alone deceived donors out of over $150 million intended for charity.[1] Another network of scam political action committees (PACs) took in $140 million over two election cycles.[2] These entities purported to raise money for political causes, veterans, firefighters, and cancer patients but spent most or all of their donations on fundraising, benefitting their ringleaders and the telemarketing companies they collaborated with.[3]

Despite some recent prosecutions, the problem of fraudulent charitable scams and deceptive PAC fundraising has persisted and even grown more pernicious. Telemarketers and scammers have begun hiding under the cover of established nonprofit organizations and PACs, allowing them to avoid many of the regulations that would otherwise shed light on their frauds.[4]

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[1] https://www.ftc.gov/news-events/news/press-releases/2021/03/ftc-38-states-dc-act-shut-down-massive-charity-fraud-telefunding-operation;
https://www.ftc.gov/news-events/news/press-releases/2020/09/ftc-joins-four-states-action-shut-down-alleged-sham-charity-funding-operation-bilked-millions.
[2] https://www.thedailybeast.com/the-secret-website-behind-a-dollar140-million-scam-pac-network
[3] https://www.reuters.com/investigates/special-report/usa-fundraisers-scampacs/
[4] https://www.reuters.com/investigates/special-report/usa-fundraisers-scampacs/#sidebar-scampacs
https://www.nytimes.com/interactive/2023/05/14/us/politics/scam-robocalls-donations-policing-veterans.html

For example, when the Commission shut down the Civic Development Group (CDG) for deceptively fundraising for law enforcement organizations, it disclosed that "charities received only 10 to 15 percent of the donations" and the CDG used its role as a consult to evade FTC enforcement.[5] A recent *New York Times* investigation found one network of telemarketers had raised $89 million in political donations on behalf of law enforcement, firefighters, and veterans, but had only spent 1% on actual campaign activities and contributions. As the *Times* notes, the group of operatives behind the robocalls used PACs to evade federal and state scrutiny as they directed the majority of funds raised to their own consulting companies and private expenditures.

In order to ensure our laws are robust and vigorously enforced, I am engaged in an oversight and legislative effort to ensure that agencies have sufficient legal tools and resources to stop these deceptive telemarketing schemes. I am considering changes to the law to allow the Federal Trade Commission to enforce consumer protection statutes against nonprofit organizations that enable or benefit from fraud or the violation of telemarketing rules. I am also exploring updates to the rules and penalties for telecom providers and call centers who are complicit in transmitting illegal robocalls.[6] Finally, I am interested in any barriers to enforcing wire fraud statutes, transparency requirements, and other laws against the perpetrators of charity scams.

As new technologies continue to make scams and robocalls easier, charity and PAC scams are likely to escalate, especially as we approach the upcoming Presidential elections. I therefore urge your agency to use every tool available to fight scam PACs, charity fraud, and other telemarketing scams that prey on Americans' generosity and political passions. I request your answers to the following questions and a staff-level briefing by September 22, 2023, as I explore legislative solutions to this problem.

1.) What is the scope of your agency's jurisdiction as it relates to charity fraud and scam PACs — including the exploitation of legitimate charities and charitable purposes for private enrichment — and what steps are you taking to address these problems?

2.) What issues or limits have you faced, if any, in holding nonprofit organizations or PACs accountable for knowingly enabling or benefiting from donation scams?

3.) What statutory or resource constraints, if any, are preventing your agency from more effectively countering these scams?

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[5] https://www.ftc.gov/news-events/news/press-releases/2010/03/new-jersey-based-telephone-fundraisers-banned-soliciting-donations-will-pay-188-million-violating
https://www.ftc.gov/sites/default/files/documents/cases/2007/09/070921cmpc3810.pdf
[6] https://www.nclc.org/wp-content/uploads/2022/09/Rpt_Scam_Robocalls.pdf.

4.) What changes to the law would enable your agency to bring more enforcement actions or enable more transparency against charitable fraud schemes?

Thank you for your attention to these important issues. I look forward to your response.

Sincerely,

RICHARD BLUMENTHAL
United States Senate

CC: Chair Rosenworcel, Federal Communications Commission
Attorney General Garland, Department of Justice

United States Senate
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION
WASHINGTON, DC 20510–6125
WEBSITE: https://commerce.senate.gov

September 11, 2023

The Honorable Lina M. Khan
Chairwoman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Dear Chairwoman Khan:

I am writing to request information about the stance of the Federal Trade Commission ("FTC" or "Commission") on the regulation of artificial intelligence ("AI"). Your public comments, as well as comments made to this Committee by senior FTC staff,[1] suggest the FTC intends to play a role in aggressively policing AI despite receiving no explicit statutory authorization to do so from Congress. As further evidence of the FTC's intent, on July 13, 2023, a leaked Civil Investigative Demand ("CID") sent by the FTC to OpenAI—the California-based company best known for its development of ChatGPT—shows the FTC is pursuing AI regulation under legal theories that exceed the agency's statutory authority and would entail regulation of constitutionally protected speech.[2]

Like many computer applications, AI is a productivity tool that is useless without human guidance. In fact, ChatGPT assisted in drafting this letter. But AI computer code, apart from its use by a consumer, has no inherent ability to violate the Civil Rights Act or Section 5 of the FTC Act as your May 3rd op-ed in the *New York Times,* titled "We Must Regulate A.I. Here's How," implies. You wrote that "A.I. tools are being trained on huge troves of data in ways that are largely unchecked. Because they may be fed information riddled with errors and bias, these technologies risk automating discrimination—unfairly locking out people from jobs, housing, or key services."[3]

For the FTC to undertake new regulation or an investigation, more than fearmongering and fanciful speculation are required by law. The FTC Act requires that the Commission have a "reason to believe" that a party possesses evidence of an unfair or deceptive act or practice in

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[1] Briefing by FTC Staff to Committee Staff (June 2, 2023).
[2] *See* Sam Altman (@sama), X (July 13, 2023, 5:24 PM), https://twitter.com/sama/status/1679602638562918405; Cat Zakrzewski, *FTC investigates OpenAI over data leak and ChatGPT's inaccuracy*, WASH. POST (July 13, 2023), https://www.washingtonpost.com/technology/2023/07/13/ftc-openai-chatgpt-sam-altman-lina-khan/.
[3] Lina Khan, *We Must Regulate A.I. Here's How*, N.Y. TIMES (May 3, 2023), https://www.nytimes.com/2023/05/03/opinion/ai-lina-khan-ftc-technology.html.

order to issue a CID.[4] Your op-ed argues for going after "not just the fly-by-night scammers" but also "the upstream firms that are enabling them" by producing problematic AI "tools."[5] This approach is a stark departure from past FTC practice, as the Commission has traditionally focused on the harm caused by a product's use—not its design—in its enforcement actions. Furthermore, such regulation would represent an astonishing expansion of power over otherwise-benign products. It would be akin to the FTC regulating a cell phone's design in order to enforce the do-not-call registry.

Your comments were reinforced by FTC staff during a subsequent briefing to the Committee about AI on June 2, 2023.[6] During the briefing, FTC staff made clear that the agency is looking for ways to determine if data sets used to train AI models are biased, discriminatory, or contain "misinformation," suggesting the FTC was considering an expansive regulatory approach to AI to crack down on non-commercial speech. Your staff's response to concerns that the FTC would, in assessing bias or misinformation, be operating outside its statutory authority and acting as "speech police" for broad swaths of data were vague and unsatisfactory.

While the FTC undoubtedly has the statutory authority to initiate enforcement actions against companies engaged in "unfair or deceptive acts or practices," the FTC may not launch a preemptive regulatory approach against code underlying AI systems in order to prevent "bias" or preclude the use of undefined "discriminatory" datasets. Such an extralegal approach would inevitably involve the policing of constitutionally protected speech, including the internet or user-derived data used to train AI models. This is well beyond FTC's statutory mandate. The FTC has no authority or business attempting to regulate constitutionally protected speech.

Given this context, the CID that the FTC sent to OpenAI is particularly troubling, as is the fact that the CID was leaked. As Sam Altman, CEO of OpenAI, noted, such a leak "does not help build trust" between the company and government regulators.[7] Moreover, the questions and document requests within the CID suggest that the FTC is now implementing many of the alarming legal theories that senior agency leaders told Committee staff that they were contemplating. The CID seeks information on the training data for OpenAI's Large Language Model, such as the content categories and languages incorporated.[8] The CID also asks about instances where ChatGPT has led to the "safety challenges" identified in OpenAI's GPT-4 System Card, which include "harms of representation" and "disinformation."[9] To the extent it is even constitutional for Congress to prohibit such speech-based harms, Congress has not done so here nor authorized FTC to pursue these issues. Finally, the CID directs OpenAI to snitch on users of ChatGPT who engineered prompts to circumvent ChatGPT filters and rules, a new form of surveillance with the disturbing potential to chill free speech.

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[4] 15 U.S.C. § 57b–1(c)(1).
[5] Khan, *supra* note 3.
[6] Briefing, *supra* note 1.
[7] Altman, *supra* note 2.
[8] Civil Investigative Demand, FTC File No. 232-3044 at 5.
[9] *Id.* at 12; OpenAI, *GPT-4 System Card*, 4 (Mar. 23, 2023), https://cdn.openai.com/papers/gpt-4-system-card.pdf.

So that I may better understand the FTC's views on its regulatory and enforcement authority with respect to AI, please provide written answers and documents responsive to the following questions no later than September 25, 2023.

1. What factors do you believe should prompt the FTC to shift from reviewing AI outputs to analyzing data inputs for algorithmic bias, discrimination, or misinformation?

2. Does the FTC plan to evaluate either data used for training Large Language Models or the sources of such data for bias, discrimination, or misinformation?

3. How does the FTC plan to identify and address bias, discrimination, or misinformation within diverse training datasets that incorporate content from both commercial and non-commercial speech sources, as well as from user interactions with AI models? Detail the FTC's specific technical and legal approach.

4. Does the FTC have statutory authority to review prompts submitted by users to generative AI systems? If so, please describe the statutory basis for that authority and how FTC intends to or can use those data.

5. How did the FTC's CID to OpenAI leak? In answering, identify the source of the apparent leak, if known, and detail the steps you are taking to investigate and address the leak.

6. Detail the approval process for the CID issued to OpenAI, identifying the signatory, clarifying whether it received a Commission vote, and confirming if it falls within the scope of an adopted omnibus resolution; if the latter is the case, provide the resolution.

7. Did the FTC possess evidence before issuing the CID warranting a reason to believe that OpenAI violated Section 5? If so, provide documentation sufficient to show FTC's reason to believe there was a violation.

8. The CID demands that OpenAI detail measures related to filtering or blocking inputs and outputs of its Large Language Models.[10]

    a. How do OpenAI's efforts to control model inputs or outputs relate to an alleged Section 5 violation?

    b. Does the FTC expect OpenAI to implement input/output filtering to comply with Section 5, and if so, what would such measures entail?

[10] Civil Investigative Demand, *supra* note 7 at 9.

c. In light of the FTC's discussion of "inoculation theory" in a June 2022 report,[11] will the agency apply this theory in evaluating OpenAI's Large Language Models, specifically by assessing the use of measures, such as "prebunking" or "debunking," designed to counteract "online misinformation?"

Thank you for your attention to this matter.

Sincerely,

Ted Cruz
Ranking Member

[11] FED. TRADE COMM'N, COMBATTING ONLINE HARMS THROUGH INNOVATION: REPORT TO CONGRESS (June 16, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Combatting Online Harms Through Innovation%3B Federal Trade Commission Report to Congress.pdf.

Congress of the United States

Washington, DC 20515

September 13, 2023

The Honorable Lina M. Khan
Chair
U.S. Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Chair Khan:

We are writing ahead of the Federal Trade Commission's (FTC's) open meeting tomorrow, on September 14, 2023, to strongly urge the Commission to issue a policy statement concerning the improper listing of drug-related patents in the Food and Drug Administration's (FDA's) Orange Book.[1] Brand-name pharmaceutical companies have routinely abused the U.S. patent system, violated antitrust law, and hiked the prices of prescription drugs to widen their own profit margins.[2] We urge the FTC to take steps to end Big Pharma's routine exploitation of the Orange Book and hold drug companies accountable for their anti-competitive business practices that are "imposing costs on individuals and society alike."[3]

The FDA's Orange Book contains a list of FDA-approved drugs and their related patent and exclusivity information, which are considered some of the "most valuable patents in the world."[4] Brand-name drug companies are required to list patent information in the Orange Book that cover drug substances, drug products, and method of use.[5] But Big Pharma regularly lists patents outside of these categories, even when courts have ruled that they are outside the scope of the Orange Book. For example, pharmaceutical companies have intentionally submitted patents for

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[1] U.S. Federal Trade Commission, "FTC Announces Tentative Agenda for September 14 Open Meeting," press release, September 7, 2023, https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-announces-tentative-agenda-september-14-open-meeting

[2] American Economic Liberties Project and Initiative for Medicines, Access, and Knowledge (I-MAK), "The Costs of Pharma Cheating," May 2023, https://www.economicliberties.us/wp-content/uploads/2023/05/AELP_052023_PharmaCheats_Report_FINAL.pdf; Center for American Progress, "How Big Pharma Reaps Profits While Hurting Everyday Americans," Abbey Meller and Hauwa Ahmed, August 30, 2019, https://www.americanprogress.org/article/big-pharma-reaps-profits-hurting-everyday-americans/

[3] U.S. Federal Trade Commission, "FTC Announces Tentative Agenda for September 14 Open Meeting," press release, September 7, 2023, https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-announces-tentative-agenda-september-14-open-meeting

[4] U.S. Food and Drug Administration, "Approved Drug Products with Therapeutic Equivalence Evaluations | Orange Book," June 9, 2023, https://www.fda.gov/drugs/drug-approvals-and-databases/approved-drug-products-therapeutic-equivalence-evaluations-orange-book;Washington Law Review, "What Litigators Can Teach the Patent Office About Pharmaceutical Patents," S. Sean Tu and Mark A. Lemley, August 5, 2022, p. 1673, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3903513

[5] U.S. Government Accountability Office, "Generic Drugs," March 2023, p. 6, https://www.gao.gov/products/gao-23-105477

devices without an active ingredient, such as inhalers,[6] and for distribution methods, such as the Risk Evaluation and Mitigation Strategies (REMS) for Jazz Pharmaceutical's narcolepsy drug.[7]

Improper 'sham' patents serve the primary purpose of blocking competitors from introducing lower-costs generic drugs.[8] That's because FDA is automatically barred from approving a generic drug for 30 months if a brand-name drug company sues a generic competitor for infringing on an Orange Book-listed patent.[9] Pharmaceutical companies are therefore incentivized to list more patents in the Orange Book, whether they're valid or not, to hold off generic competition for multiple years and extend their own monopolies regardless of the outcome of any litigation. FTC has previously raised concerns about these activities, filing an amicus brief "highlight[ing] the significant harm to consumers when a brand company improperly lists a patent on a distribution system in the Food and Drug Administration's 'Orange Book' of approved drugs and thereby blocks generic or follow-on competition."[10]

The median price for a year's supply of prescription drugs went from $2,000 in 2008 to $180,000 last year.[11] Meanwhile, three in ten patients were forced to forgo their medications due to cost.[12] U.S. patients spent an estimated additional amount of $40.7 billion on pharmaceuticals in 2019 "as a result of antitrust violations by the pharmaceutical industry."[13] Without competition – which Big Pharma is strategically blocking – to lower drug costs, more and more patients will be forced to choose between taking care of their financial health and their physical health. One FDA study found that the introduction of even a single generic drug can lower a drug's price by almost 40 percent. With two generic options available, prices drop by over half.[14] Unjustified delays in generic competition are costing patients and taxpayers billions of dollars, just to pad Big Pharma's profits.

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[6] Health Affairs, "From Health Affairs: Inhaler Patents Focus On Devices, Not Ingredients," May 17, 2022, https://www.healthaffairs.org/content/forefront/i-health-affairs-i-inhaler-patents-focus-devices-not-ingredients

[7] U.S. Federal Trade Commission, "FTC Amicus Brief Challenges Abuse of FDA 'Orange Book' Listing Procedures to Block Drug Competition," press release, November 10, 2022, https://www.ftc.gov/news-events/news/press-releases/2022/11/ftc-amicus-brief-challenges-abuse-fda-orange-book-listing-procedures-block-drug-competition; New York Times, "A Drug Company Exploited a Safety Requirement to Make Money," Rebecca Robbins, February 28, 2023, https://www.nytimes.com/2023/02/28/business/jazz-narcolepsy-avadel-patents.html

[8] American Economic Liberties Project and Initiative for Medicines, Access, and Knowledge (I-MAK), "The Costs of Pharma Cheating," May 2023, p. 9, https://www.economicliberties.us/wp-content/uploads/2023/05/AELP_052023_PharmaCheats_Report_FINAL.pdf

[9] U.S. Food and Drug Administration, "Patent Certifications and Suitability Petitions," September 8, 2023, https://www.fda.gov/drugs/abbreviated-new-drug-application-anda/patent-certifications-and-suitability-petitions

[10] U.S. Federal Trade Commission, Amicus Brief filed in Jazz Pharmaceuticals, Inc. v. Avadel CNS Pharmaceuticals, LLC, November 10, 2022, https://www.ftc.gov/legal-library/browse/amicus-briefs/jazz-pharmaceuticals-inc-v-avadel-cns-pharmaceuticals-llc

[11] Patients for Affordable Drugs, "July 2022 Price Hikes Report," July 19, 2022, https://patientsforaffordabledrugs.org/2022/07/19/july-2022-price-hikes-report/

[12] *Id.*

[13] American Economic Liberties Project and Initiative for Medicines, Access, and Knowledge (I-MAK), "The Costs of Pharma Cheating," May 2023, p. 2, https://www.economicliberties.us/wp-content/uploads/2023/05/AELP_052023_PharmaCheats_Report_FINAL.pdf

[14] *Id.*, p. 4; U.S. Food and Drug Administration, "Generic Competition and Drug Prices: New Evidence Linking Greater Generic Competition and Lower Generic Drug Prices," Ryan Conrad and Randall Lutter, December 2019, pp. 2-3, https://www.fda.gov/media/133509/download

Last month, we sent a letter to FDA Commissioner Robert Califf urging the agency to take steps to enforce their Orange Book guidelines, strengthen oversight of proper listings, and prevent further abuses of the drug patent system.[15] The FTC now has the chance to hold Big Pharma accountable for these anti-competitive business tactics. We support your decision to discuss this critical issue at tomorrow's open meeting and encourage you to release a strong policy statement declaring that the listing of sham patents in the Orange Book is an unfair method of competition that is reducing access to essential drugs and hurting patients.[16]

Sincerely,

Elizabeth Warren
United States Senator

Pramila Jayapal
Member of Congress

CC: Dr. Robert M. Califf, Commissioner of Food and Drugs, U.S. Food and Drug Administration

[15] Letter from Senator Warren and Representative Jayapal to the U.S. Food and Drug Administration, August 28, 2023, https://www.warren.senate.gov/imo/media/doc/2023.08.28%20Letter%20to%20FDA%20re%20drug%20patents.pdf

[16] U.S. Federal Trade Commission, "FTC Announces Tentative Agenda for September 14 Open Meeting," press release, September 7, 2023, https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-announces-tentative-agenda-september-14-open-meeting

United States Senate

COMMITTEE ON COMMERCE, SCIENCE,
AND TRANSPORTATION

WASHINGTON, DC 20510–6125

WEBSITE: https://commerce.senate.gov

September 18, 2023

The Honorable Lina M. Khan
Chairwoman
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dear Chairwoman Khan:

I write regarding the Federal Trade Commission's ("FTC" or "Commission") troubling use of consent decrees[1] to impose regulatory requirements outside the statutory rulemaking process, a topic on which I wrote to you earlier this year.[2] A consent decree, which involves settling out of court, often with a judge's stamp of approval, can be an efficient way for an agency to enforce the law while avoiding protracted and expensive litigation. But Congress's authorization for agencies to enter into settlements and obtain consent decrees is not a delegation of power to the FTC to rewrite the law or to skirt statutorily required, public protections like notice and comment when amending regulations. Only Congress can change the law and agencies may only amend regulations through congressionally authorized, statutory rulemaking processes.

The FTC has often used consent decrees to bypass the legally authorized process of agency rulemaking under Section 18 of the FTC Act.[3] By settling with respondents, the FTC not only avoids agency or judicial clarification of broad statutory provisions, but it also sets its own precedent for future cases.[4] In practice, consent decrees have often become the benchmark for what are considered "unfair or deceptive" acts or practices under Section 5 of the FTC Act.[5] The

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[1] *See generally* 16 C.F.R. §§ 2.31 to 2.34.
[2] Bicameral Letter to FTC Chairwoman Khan re FTC Investigation of Twitter (Mar. 10, 2023), https://www.commerce.senate.gov/services/files/30E86E04-CE81-4C66-B699-CA640E22C31B.
[3] Administratively codified at 15 U.S.C. § 57a. *See, e.g.*, *Mulford v. Altria Grp., Inc.*, 506 F. Supp. 2d 733, 762 (D.N.M. 2007) ("The history of FTC involvement in cigarette advertising demonstrates that the FTC used consent orders such as these to regulate the cigarette industry, make general rules, and express FTC policies for the industry in lieu of formal rulemaking.").
[4] *See* Dune Lawrence, *A Leak Wounded This Company. Fighting the Feds Finished It Off*, BLOOMBERG (Apr. 25, 2016), https://www.bloomberg.com/features/2016-labmd-ftc-tiversa/ ("A settlement usually doesn't require an admission of wrongdoing, but the FTC publishes consent decrees online and trumpets them in press releases. This is, in fact, as close as the agency gets to publishing clear rules. The consent decrees form a body of precedent, showing what practices were considered unfair or deceptive in a particular instance.").
[5] 15 U.S.C. § 45.

FTC knows that companies look to previous consent decrees to determine what conduct is acceptable, so it uses them in a pseudo-regulatory manner to transform the law.

Consent decrees are meant to operate as contracts,[6] but they are rarely the FTC's final say on a matter, especially when a new administration feels that modification of a decree is in the public interest. In 2012, for example, the FTC approved a final settlement with Facebook resolving allegations that the company had deceived users about its privacy policy and shared their personal information without consent.[7] Facebook denied the charges but agreed to a comprehensive privacy program and periodic audits. Several years later, the FTC accused Facebook of violating the terms of the consent decree by failing to protect personal data and collecting user phone numbers.[8] The parties agreed to a revised consent decree in which the FTC imposed a $5 billion penalty and new privacy and data security obligations.[9] Then, in May 2023, the FTC proposed reopening the decree yet again to add new data requirements largely unrelated to curing the original, alleged violation from 2012.[10]

Similarly, in May 2022, the FTC approved modifications to a 2011 consent decree with Twitter and subjected the company to a new compliance program.[11] Later that same year, the FTC began issuing demand letters ostensibly to ensure compliance with the consent decree. As one FTC official put it, "We are tracking recent developments at Twitter with deep concern. . . . Our revised consent order gives us new tools to ensure compliance, and we are prepared to use them."[12] The "recent developments" that the FTC apparently found so concerning were that Twitter had been acquired by Elon Musk, who has criticized Democrats and the efforts of the federal government to suppress free speech on Twitter. In the wake of this official's statement, the FTC's actions belied its claim to be enforcing the terms of the settlement. According to a partner at Ernst & Young, the independent auditor designated under the consent decree to evaluate Twitter's compliance, the FTC expected the auditor to find that Twitter was not adhering to its conditions.[13] And the agency sent letters to Twitter regarding potential violations before the

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[6] *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 238 (1975) ("[A] consent decree or order is to be construed for enforcement purposes basically as a contract…").
[7] Press Release, *FTC approves final settlement with Facebook*, Federal Trade Commission (August 10, 2012), https://www.ftc.gov/news-events/news/press-releases/2012/08/ftc-approves-final-settlement-facebook.
[8] Complaint, *United States of America v. Facebook Inc,* No. 19-cv-2184 (D.D.C. July 24, 2019), https://www.ftc.gov/system/files/documents/cases/182_3109_facebook_complaint_filed_7-24-19.pdf.
[9] Order Modifying Prior Decision and Decree, *In the Matter of Facebook Inc.,* FTC Docket No. C-4365 (April 27, 2020), https://www.ftc.gov/system/files/documents/cases/c4365facebookmodifyingdecree.pdf.
[10] Press Release, *FTC proposes blanket prohibition preventing Facebook from monetizing youth data,* Federal Trade Commission (May 3, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/05/ftc-proposes-blanket-prohibition-preventing-facebook-monetizing-youth-data.
[11] Decision and Order, *In the Matter of Twitter, Inc.*, FTC Docket No. C-4365 (May 26, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/2023062C4316TwitterModifiedOrder.pdf.
[12] Brad Dress, *FTC says it's 'tracking the developments at Twitter with deep concern'*, THE HILL (Nov. 10, 2022), https://thehill.com/policy/technology/3729355-ftc-says-its-tracking-the-developments-at-twitter-with-deep-concern/.
[13] X Corp.'s Motion for Protection Order & Relief from Consent Order, *United States of America v. Twitter, Inc.*, No. 22-3070, 9–11 (N.D. Ca. Aug. 17, 2023), https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/file_3300.pdf.

mandated compliance program was even required to be implemented.[14]

The FTC's actions against Meta and Twitter are but the latest examples of how the Commission exploits the consent decree process. Let me make clear that I have serious concerns about some of Meta and Twitter's past behavior and have been conducting vigorous oversight of it.[15] My concern here is with the FTC's abuse of the consent decree process. Even one of your fellow Democrat FTC commissioners has noted how consent decrees can be abused. When the FTC ordered Meta to show cause for why the FTC should not revisit the 2020 decree, Commissioner Alvaro Bedoya expressed hesitation, explaining that "[t]here are limits to the Commission's decree modification authority" and that "it must identify a nexus between the original order, the intervening violations, and the modified order."[16] Even though Commissioner Bedoya supported the order, his statement prompted a vitriolic response from liberals, who sent unsolicited *ex parte* communications to him in an apparent attempt to influence the proceedings.[17] Dan Geldon, former chief of staff to Senator Elizabeth Warren, texted Commissioner Bedoya, writing, "Your statement today is insanely at odds with the representations you made to me about backing Lina on Facebook matters prior to your confirmation. Very very disappointing."[18] Such comments expose the enormous pressure—both within and outside the agency—to use the consent decree process to enact a left-wing agenda, regardless of the law.

It appears that, under your leadership, the FTC is reneging on its agreements and abusing the consent decree process to move the regulatory goalposts.[19] The recent re-opening of the complaint against Meta and your actions against Twitter suggest an intention to construe consent decree requirements broadly. While you have professed a desire to focus resources on litigating

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[14] Interim Staff Report of the Committee on the Judiciary and the Select Subcommittee on the Weaponization of the Federal Government, *The Weaponization of the Federal Trade Commission: An Agency's Overreach to Harass Elon Musk's Twitter*, 13 (March 7, 2023), https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/Weaponization_Select_Subcommittee_Report_on_FTC_Harrassment_of_Twitter_3.7.2023.pdf.

[15] *See, e.g.*, Letters to Meta & Twitter re Recommendation Algorithms (Feb. 13, 2023), https://www.commerce.senate.gov/2023/2/sen-cruz-launches-sweeping-big-tech-oversight-investigation.

[16] *Statement of Commissioner Alvaro M. Bedoya in the matter of Facebook Inc. Commission Docket No. C-4365,* Office of Commissioner Alvaro M. Bedoya, Federal Trade Commission (May 3, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2023-05-02-Bedoya-Facebook-Order-Statement-FINAL.pdf.

[17] Josh Sisco, *Progressives blast FTC's Bedoya or 'unforgivable' stance in Meta privacy case,* POLITICO (June 20, 2023), https://www.politico.com/news/2023/06/20/progressives-blast-ftcs-bedoya-for-unforgivable-stance-in-meta-privacy-case-00102646; *see also* Editorial Board, *Progressives attack their own at the FTC,* WALL STREET JOURNAL (June 27, 2023), https://www.wsj.com/articles/ftc-lina-khan-meta-commissioner-alvaro-bedoya-dan-geldon-f6f4b7b9.

[18] *Ex Parte Communication between Staff of Commissioner Bedoya and Members of the Public*, Office of Commissioner Alvaro M. Bedoya, Federal Trade Commission (June 16, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/bedoya_comm_combinedpdf.pdf.

[19] *Cf.* Thomas Germain, *The FTC is rewriting the rules of the internet, just in time for the AI sea change,* GIZMODO (June 16, 2023), https://gizmodo.com/ftc-complaint-ai-rewriting-privacy-rules-interview-1850545756 ("The FTC does have some rule making authority, but it's a slow, arduous process. In the meantime, it is changing tech policy by stretching existing regulations to places no one believed they could go.")

rather than settling cases,[20] I worry that the FTC may soon take an even more creative approach to interpreting consent decrees due to the agency's recent setbacks in federal court.

I previously wrote to you regarding FTC's misuse of consent decrees in the context of Twitter on March 10, 2023. Your responses to date have failed to resolve important questions. Accordingly, I am reviewing FTC's use of consent decrees more broadly to determine whether legislative changes are necessary to prevent their abuse. To that end, please provide written answers and documents in response to the following questions and document requests no later than October 2, 2023.

1. Must decree provisions be limited to remedying alleged violations of the FTC Act?

2. When does the FTC consider a consent decree with one party as a legally binding interpretation of Section 5 of the FTC Act that other parties are obliged to follow?

3. Describe and provide copies of all formal or informal reviews of the FTC's consent decree processes or procedures on or after January 20, 2021.

4. Provide all documents or communications by or for, or sent to or from, any current or former FTC commissioner that were created on or after January 20, 2021, and refer or relate to the effect of any consent decree on a non-party to the agreement.

5. For each of the following North American Industry Classification System (NAICS) sectors, provide the ten most recent consent decrees with a company within the sector and identify the nexus between alleged violations of the FTC Act and the remedial provisions in each respective decree.

    a. Wholesale Trade (42)
    b. Retail Trade (44-45)
    c. Finance and Insurance (52)
    d. Accommodation and Food Services (72)

6. For each of the following NAICS industry groups, provide the five most recent consent decrees with a company within the industry group and identify the nexus between alleged violations of the FTC Act and the remedial provisions in each respective decree.

    a. Information (51)
        i. Software Publishers (5132)
        ii. Media Streaming Distribution Services, Social Networks and Other Media Networks and Content Providers (5162)

[20] Margaret Harding McGill, *FTC's new stance: Litigate, don't negotiate*, AXIOS (June 8, 2022), https://www.axios.com/2022/06/09/ftcs-new-stance-litigate-dont-negotiate-lina-khan.

iii. Computing Infrastructure Providers, Data Processing, Web Hosting, and Related Services (5182)
iv. Web Search Portals, Libraries, Archives, and Other Information Services (5192)

b. Professional, Scientific, and Technical Services (54)
   i. Computer Systems Design and Related Services (5415)
   ii. Management, Scientific, and Technical Consulting Services (5416)
   iii. Scientific Research and Development Services (5417)
   iv. Advertising, Public Relations, and Related Services (5418)
   v. Other Professional, Scientific, and Technical Services (5419)

Thank you for your attention to this matter.

Sincerely,

Ted Cruz
Ranking Member

RAND PAUL
KENTUCKY

United States Senate

WASHINGTON, DC 20510

September 29, 2023

The Honorable Lina Khan
Chair
Federal Trade Commission
600 Pennsylvania Ave NW
Rm 404
Washington, DC 20580

Dear Chair Khan:

I write to request information regarding the Federal Trade Commission's operations in the event of a lapse in federal appropriations.

According to Office of Personnel Management (OPM) guidance, federal employees are typically designated as either "exempt", "excepted", a "Presidential appointee not subject to furlough," or "non-exempt" during a lapse in federal funding. OPM has defined each of these terms. An "exempt" employee is an employee whose pay is not funded by annual appropriations.[1] An "excepted" employee is an employee who shall continue to work in the absence of an appropriation.[2] A "Presidential appointee not subject to appropriations" are a limited class of political appointees whose salary is not held subject to the appropriations.[3] Finally, a "non-exempt" employee is any other employee who does not fit in one of the three previous categories and who shall not work during a lapse in appropriations.[4]

The Committee on Homeland Security and Governmental Affairs is authorized by Rule XXV of the Standing Rules of the Senate and Senate Resolution 59 of the 118th Congress to investigate matters that aid the Committee in "studying the efficiency, economy, and effectiveness of all agencies and departments of the Government."[5]

To better understand the Federal Trade Commission's operations during a lapse in federal appropriations, please provide my office with the following information no later than October 13, 2023:

1. The total number of employees as of the date of this letter, broken down by component, office, and/or sub-agency.

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[1] OFFICE OF PERSONNEL MANAGEMENT, GUIDANCE FOR SHUTDOWN FURLOUGHS 2 (2021), https://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/guidance-for-shutdown-furloughs.pdf ("Who are 'exempt' employees?").
[2] *Id*. at 1 ("Who are 'excepted' employees?").
[3] *Id*. at 3-4 ("Why are leave-exempt Presidential appointees not subject to furlough?").
[4] *Id*. at 3 ("What about employees whose work is neither 'excepted' nor 'exempt'?").
[5] S. Rule XXV(k)(2)(B); S. Res. 59, Sec. 12(e)(1)(A).

RAND PAUL
KENTUCKY

United States Senate
WASHINGTON, DC 20510

2. The total number of employees designated as "exempt" and will continue to perform their job duties, broken down by component, office, and/or sub-agency.

3. The total number of employees designated as "excepted" and will continue to perform their job duties, broken down by component, office, and/or sub-agency.

4. The total number of employees designated as "non-exempt" and will be furloughed, broken down by component, office, and/or sub-agency.

5. The total number of employees designated as Presidential appointees not subject to furlough, broken down by component, office, and/or sub-agency.

6. A comprehensive list of all Federal Trade Commission's activities and/or functions considered to be "exempt" or "excepted" and are authorized to continue during the lapse of appropriations, broken down by component, office, and/or sub-agency and specific program.

7. A comprehensive list of all Federal Trade Commission's "non-exempt" activities/functions that will not be carried out during the lapse of appropriations, broken down by component, office, and/or sub-agency and specific program.

8. A copy of the Federal Trade Commission's lapse in appropriations policy and/or guidance.

Sincerely,

Rand Paul

Rand Paul, M.D.
United States Senator

JIM JORDAN, Ohio
CHAIRMAN

JERROLD NADLER, New York
RANKING MEMBER

ONE HUNDRED EIGHTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6216

(202) 225–6906
judiciary.house.gov

September 5, 2023

The Honorable Lina Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Chair Khan:

We received your August 11, 2023, letter.[1] Let us be clear. The Committee sees your allegations of supposed ethical improprieties as nothing more than spurious and defamatory attacks on a member of the Committee's professional staff who has an impeccable reputation for honesty and integrity and who at all relevant times has acted professionally and ethically in carrying out the Committee's work. Your continued attacks on the staff member's integrity and character, which you maliciously leaked to the media last month,[2] have no merit and the Committee rejects them wholesale. You have offered no actual evidence to support any of your allegations, and your shifting explanations as to the precise ethical improprieties demonstrate that they are merely pretexts to intimidate our staff and chill our oversight work. Your attacks on the Committee's professional staff must stop immediately. Any further effort to advance these meritless allegations in any setting or any continued action to harass our staff with frivolous allegations will be seen for what it is—a desperate attempt to deliberately obstruct the Committee's oversight—and we will hold you responsible.

The accusations in your August 11 letter, like the other ethical allegations you have leveled previously, are vague, conclusory, and baseless. Your August 11 letter generally alleges without evidence that a Committee staff member has misused, or will in the future misuse, certain information in violation of professional obligations. There is no merit to this allegation. The only specific instance you cite—a non-public briefing given by FTC staff to Committee staff—concerned a topic the FTC affirmatively voted to disclose and the questions posed at that the briefing were based on information presented during the briefing and drawn from general

[1] *See* Letter from Lina Khan, Chair, Federal Trade Commission, to Jim Jordan, Chair, House Judiciary Committee (August 11, 2023).
[2] *See* Letter from Jim Jordan, Chair, House Judiciary Committee, to Lina Khan, Chair, FTC, 1 (July 28, 2023).

litigation experience and knowledge of the FTC's operations.[3] You have provided no real evidence of any misuse of confidential information during that interaction or any other. In fact, although the Committee has engaged with the FTC on a number of occasions, including a phone conversation with your director of congressional relations to obtain more information about the FTC's basis for these allegations,[4] at no time has the FTC provided any substantive examples of misuse of confidential information.

Your August 11 letter also suggests that "identifying topics for Commission document and interview requests, names of Commission employees to be interviewed, or questions to ask those employees" would all involve using nonpublic information to which Rule of Professional Conduct 1.6 applies.[5] Curiously, despite writing previously to level ethical allegations, this letter is the first time you have raised Rule 1.6 and made this argument—perhaps because your position is nonsensical. While the Committee has identified issues of interest, and individuals for transcribed interviews, relating to various topics of concern at the FTC,[6] the Committee developed interest in and identified these and other topics based on public reporting and its investigative work to date, not through improper access to any particular information. Some of the Committee's requests on these topics even predate the tenure on the Committee of the staff member you are targeting for harassment.

In short, none of the topics of interest to the Committee are predicated on nonpublic information, and the Committee's requests for documents and information are based on publicly available information. Similarly, the identities of individuals the Committee has asked to interview are all publicly available.[7] As one example, FTC managers' involvement in merger-related enforcement makes them natural fits for interviews on topics concerning your mismanagement of the agency and the resulting decline in staff morale as well as merger review.[8] The same is true of all other employees who the Committee seeks to interview, given public information or reporting about them. Although the Committee has not yet begun transcribed interviews of FTC employees, questions can be developed without special access to nonpublic information. In short, even if Rule 1.6 applied here as you allege, the Committee's oversight of the FTC is not reliant on nonpublic information that would implicate the Rule.

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[3] Although you also allege that the Committee's staff member declined to recuse from matters in which you believe he possesses nonpublic information, you have provided no specific evidence whatsoever of any breach of confidentiality with respect to those matters.

[4] During this phone conversation, the FTC's director of congressional relations surprisingly stated she had no awareness of the FTC's allegations of ethical improprieties leveled against Committee staff or the basis for the allegations. As a result, the Committee asked that the FTC stop making baseless accusations and indicated an openness to discussing the matter further. The FTC's director of congressional relations never followed up.

[5] Letter from Lina Khan, Chair, FTC to Jim Jordan, Chair, House Judiciary Committee, 1 (August 11, 2023).

[6] *See, e.g.*, Letter from Jim Jordan, Chair, House Judiciary Committee, to Lina Khan, Chair, FTC (July 17, 2023) (outlining "Topics of Oversight" for each interviewee).

[7] *See, e.g.*, *Inside the Bureau of Competition*, FTC, https://www.ftc.gov/about-ftc/bureaus-offices/bureau-competition/inside-bureau-competition (listing attorneys employed in Merger Divisions I-IV that the Committee has requested for transcribed interviews).

[8] Letter from Jim Jordan, Chair, House Judiciary Committee, to Lina Khan, Chair, FTC (July 17, 2023).

It is telling that your August 11 letter's reference to Rule 1.6 is new. In prior communications you referenced 5 C.F.R. § 2635.703(a)—a provision that is clearly inapt here. Even if applied to a former FTC employee, the provision would not make it an "improper" use of nonpublic information to aid a Congressional committee in its oversight of the FTC.[9] Relatedly, such use of nonpublic information—even had it occurred here—would not be a disclosure "made for the purpose of furthering a *private* interest."[10] The Committee's oversight of the FTC advances a *public* interest. That your precise explanation for this supposed ethical violation has shifted over time speaks loudly to its pretextual nature.

Finally, if the position you are effectively taking—that a recent FTC employee now working for Congress is generally ethically barred from conducting oversight of the FTC—is correct, then you also have violated the relevant ethical standards. Before working at the Committee, you served as an advisor to then-Commissioner Rohit Chopra at the FTC. At the FTC, according to public information, you worked on issues concerning FTC policy and enforcement—relevant to specific companies and industries—and you would have had access to confidential FTC material related to those issues. During your subsequent employment with the Committee, you investigated and criticized the FTC's work regarding those same types of issues—presumably armed with confidential information you obtained from your time at the FTC. As a Committee staff member, you were part of a team that requested and accessed troves of information from the FTC and then wrote a report criticizing the FTC's conduct based on the information you received.[11] If we applied your own standard to your actions, it leads to the conclusion that you too have misused confidential information and violated Rule 1.6.

* * *

Based on your conduct to date, it appears as though you fundamentally misunderstand the relationship between the Committee and the FTC. The FTC does not oversee the Committee. Rather, as we have repeatedly explained, the Committee has the authority and the jurisdiction to conduct oversight of the FTC, and your suggestion that some of the Committee's oversight is not "legitimate" is unfounded.[12] The Supreme Court has explained that Congress has a "broad and indispensable" power to conduct oversight, which "encompasses inquiries into the administration of existing laws, studies of proposed laws, and surveys in our social, economic or political system for the purpose of enabling Congress to remedy them."[13] Rule X of the Rules of the House of Representatives authorizes the Committee to conduct oversight on matters relating to the "[p]rotection of trade and commerce against unlawful restraints and monopolies" to inform potential legislative reforms.[14] The matters on which the Committee is conducting oversight are indisputably "subject[s] on which legislation could be had."[15]

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[9] *See* 5 C.F.R. § 2635.703(a).
[10] *See* 5 C.F.R. § 2635.703 (Example 4) (emphasis added).
[11] *See generally H. Subcomm. on Antitrust, Commercial, and Administrative Law of the H. Comm. On the Judiciary,* Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations (Oct. 2020).
[12] Letter from Lina Khan, Chair, FTC to Jim Jordan, Chair, House Judiciary Committee, 1 (August 11, 2023).
[13] *See, e.g.*, *Trump v. Mazars LLP*, No. 19-715 at 11 (U.S. slip op. July 9, 2020) (internal quotation marks and citations omitted).
[14] Rules of the U.S. House of Representatives, R. X (2023).
[15] *See, e.g.*, *Mazars*, No. 19-715 at 12 (internal quotation marks and citations omitted).

The remarkably hostile nature of your response to our oversight is extremely concerning and gives rise to the perception that you are attempting to shirk from oversight of the FTC. You have to date defied a subpoena to produce material relating to the FTC's harassment of Twitter in wake of Elon Musk's acquisition of the company. In addition, your August 11 letter ignored the Committee's requests for documents or communications concerning your responsiveness to congressional oversight. Please provide the documents and communications requested in our July 28 letter as soon as possible, but no later than 5:00 p.m. on September 19, 2023. If you do not produce all responsive material by that time, the Committee may be forced to consider compulsory process.

In addition, given your continuing escalation of frivolous allegations against the Committee, please identify every FTC employee who drafted, edited, reviewed, commented, or otherwise handled your correspondence dated June 14, July 26, and August 11, and preserve all of their documents and communications relevant to these employees' work on each letter or on the FTC's responses to the Committee's requests for transcribed interviews. Obstructing a congressional investigation is a crime. Any person who "corruptly . . . or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede . . . due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress . . . [s]hall be fined under this title, [and] imprisoned not more than 5 years."[16] If you do not cease your efforts to harass and intimidate our staff with spurious and pretextual ethics allegations, the committee will refer you to the Department of Justice for criminal prosecution. The statute of limitations for prosecuting violations of this statute is five years.[17]

Sincerely,

Jim Jordan
Chairman

cc: The Honorable Jerrold Nadler, Ranking Member

[16] 18 U.S.C. § 1505. *See also* 18 U.S.C. 1515(b) ("As used in section 1505, the term 'corruptly' means acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information.").
[17] 18 U.S.C. § 3282.

Congress of the United States

Washington, DC 20515

The Honorable Lina M. Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

September 29, 2023

Dear Chair Khan:

We write to express our concerns regarding the significant rise in gasoline prices across California over recent weeks. Given these gas price increases, which far exceed increases in other states, we urge you to investigate potential market-distorting behavior between traders and refiners, as well how the current market structure may spur volatility to the detriment of California consumers.

According to the U.S. Energy Information Administration, as of September 25, 2023, the gasoline prices in California were $5.699 per gallon, which is $1.862 above the U.S. average.[1] The gas prices in some areas of California have now surpassed $6.00 per gallon, having risen quickly over the past week, and significantly over the past month.[2] This spike follows a period of relative stability from March 1 through August 1, 2023.[3]

We are pleased that Governor Newsom and the California State Legislature have taken a number of actions throughout the past year to reduce pain at the pump for Californians, including by creating the new Division of Petroleum Market Oversight (DPMO). The DPMO is an independent agency within the California Energy Commission that monitors petroleum markets, increases transparency, and highlights potential market manipulation.

On September 22, 2023, the DPMO released an interim update in their independent market oversight capacity regarding these price increases. The DPMO found that the recent price spike is attributable to three main factors: an increase in global crude oil prices, refinery maintenance events over the summer, and an unusual spot market transaction.[4] We write today with particular concern about the third factor.

The DPMO notes that on Friday, September 15, 2023, an unusual transaction took place, which caused the price of gasoline to increase by nearly 50 cents per gallon on the California spot market.[5] Since many gasoline supply transactions are pegged to the most recent prices reported

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[1] U.S. Energy Information Administration, https://www.eia.gov/petroleum/gasdiesel/
[2] American Automobile Association, https://gasprices.aaa.com/?state=CA
[3] California Energy Commission, https://www.energy.ca.gov/sites/default/files/2023-09/DPMO_Interim_Update_on_California%E2%80%99s_Gasoline_Market_September_2023_ada.pdf
[4] *Ibid.*
[5] *Ibid.*

to the Oil Price Information Service (OPIS), and there were no other trades reported to the OPIS over the next two trading days, that single trade led to price increases into the following week. These elevated costs have been passed onto California drivers, likely costing them millions of dollars at the pump.

We are concerned that this spot market transaction may represent market-distorting behavior between traders and refiners under the Federal Trade Commission's (FTC) "Prohibition of Energy Market Manipulation Rule."[6] We urge you to work with the California DPMO to investigate this transaction further.

Additionally, we appreciate the FTC's commitment to close oversight of fuel markets in California and across the country. This work is critical to ensuring that market participants are not acting unlawfully at the expense of the American people. This transaction and its outsized impact have highlighted the continued need for federal oversight over these markets. They also elicit concerns about how the current market structure has allowed for a single trade in a volatile and illiquid spot market to increase costs for Californians. We urge the FTC to continue to investigate and monitor the business practices of traders and refiners to ensure that these companies do not engage in any anti-consumer behavior.

We thank you for your consideration of this request.

Sincerely,

Mike Levin
Member of Congress

Barbara Lee
Member of Congress

Jared Huffman
Member of Congress

[6] 16 CFR Part 317

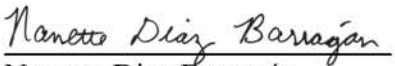
Katie Porter
Member of Congress

Mike Thompson
Member of Congress

Zoe Lofgren
Member of Congress

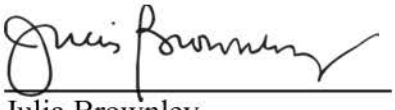
Mark Takano
Member of Congress

Pete Aguilar
Member of Congress

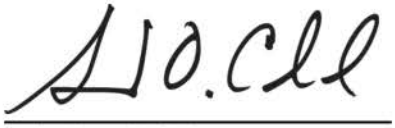


Nanette Diaz Barragán
Member of Congress

Ami Bera, M.D.
Member of Congress

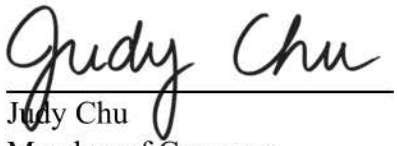


Julia Brownley
Member of Congress



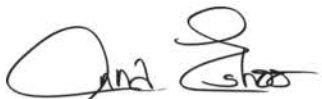
Salud Carbajal
Member of Congress

Tony Cárdenas
Member of Congress



Judy Chu
Member of Congress

Mark DeSaulnier
Member of Congress



Anna G. Eshoo
Member of Congress

John Garamendi
Member of Congress

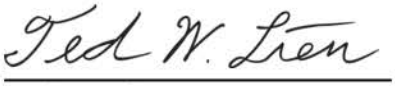
Robert Garcia
Member of Congress

Jimmy Gomez
Member of Congress

Josh Harder
Member of Congress

Sara Jacobs
Member of Congress

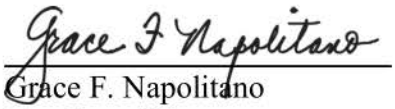
Ro Khanna
Member of Congress



Ted W. Lieu
Member of Congress

Doris Matsui
Member of Congress

Kevin Mullin
Member of Congress



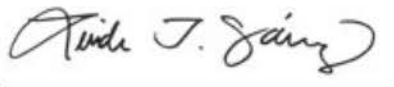
Grace F. Napolitano
Member of Congress

Jimmy Panetta
Member of Congress

Nancy Pelosi
Member of Congress

Scott H. Peters
Member of Congress

Raul Ruiz, M.D.
Member of Congress



Linda T. Sánchez
Member of Congress

Adam B. Schiff
Member of Congress

Brad Sherman
Member of Congress

Eric Swalwell
Member of Congress

Norma J. Torres
Member of Congress

Juan Vargas
Member of Congress

Maxine Waters
Member of Congress

cc: Attorney General Merrick B. Garland
Secretary of Energy Jennifer M. Granholm
California Attorney General Rob Bonta
Division of Petroleum Market Oversight Director Tai Milder

United States Senate

September 22, 2023

The Honorable Lina Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue, NW Washington, DC 20580

Dear Chair Khan:

Since Kroger announced on October 14, 2022, that it would acquire Albertsons for $24.6 billion, we have been closely monitoring the situation, listening to Alaskans, reviewing the history of similar mergers in Alaska, and waiting for Kroger to share its divesture plan. We can say with great confidence that this potential merger has Alaskans justifiably on edge and that the track record of grocery store consolidation in our state does not bode well for Alaskans' food security, affordability, and our dedicated workforce.

On September 8, 2023, Kroger announced a $1.9 billion divesture agreement with C&S Wholesale Grocers, LLC (C&S). The agreement proposes to sell 14 of 35 existing Carrs-Safeway stores currently owned by Albertsons to C&S. Based on this news, we write to express our deep concerns about the agreement and the potential impacts the proposed merger will have on Alaskans. There are simply too many unanswered questions and unforeseen consequences over the horizon should this merger be approved. When reviewing this proposed merger, we ask that you and the Federal Trade Commission (FTC) set a very high approval bar and consider the following issues that are essential to Alaskans' well-being.

First, Alaskans already face higher prices than the average American consumer due to higher transportation costs. The FTC's review of this merger must include a rigorous assessment of consumer price and competition impacts. As my colleagues in the Alaska State Legislature have noted in their correspondence to you, across Alaska's five largest jurisdictions, Fred Meyer and Safeway/Carrs are each other's primary competitors. Although Kroger's divesture announcement does not specify where the 14 transfers of ownership will take place, the sales will likely occur where stores are near one another. The likely result is that in Alaska's most populous markets, Kroger would lose its largest and most sophisticated competitor, which in time would be subsumed by a new and unproven operator in the Alaskan market. On its face, the proposal appears to violate the FTC's longstanding merger guidelines regarding market competition and concentration.

In testimony to the Senate Judiciary Committee on November 29, 2022, Kroger's CEO, Mr. Rodney McMullen, stated, "As part of this merger, we made an additional commitment to invest $500 million to lower prices and $1.3 billion to improve the customer experience. … We will begin these investments on day one after the merger closes." While we appreciate the promises made, we are concerned there is no way to enforce Mr. McMullen's commitment to lowering prices once the merger

is approved and it appears to us that such a commitment is only possible because of Kroger's impending market dominance. Perhaps the FTC should require that the pledged price reductions take place as a condition of the merger. We look forward to reviewing the FTC's analysis of the proposed merger's competition and price impacts on Alaskans.

In addition to the likelihood that higher prices will result even though lower prices have been promised, food security is an extremely relevant consideration for the FTC's merger review process. Each year, Alaska imports 95% of its food, primarily through the Port of Alaska in Anchorage. Alaska's supply chain is complicated and relies on the carefully choreographed movement of goods between that particular port, distribution centers, and stores in oftentimes adverse weather conditions. C&S does not currently operate in Alaska and has no history of operating in Alaska. The company currently operates stores only in the Midwest and the Carolinas, and we are concerned it lacks the expertise and the commitment to do what it takes to operate in Alaska. While Mr. McMullen is adamant about C&S' financial health and has promised Congress that there will be no store closures, there is no way to enforce Kroger's pre-merger words after a merger has been approved. Should Kroger be required to or decide to close existing stores or should C&S choose to close any of the 14 stores following the merger, Alaskans may lose access to their grocery store. As a result, we ask that the FTC conduct a rigorous analysis of C&S' fitness to operate in Alaska and the impacts that potential store closures would have on Alaskans' food security, including accessibility, nutritional access, and pharmacy services.

Today, Fred Meyer and Safeway/Carrs are the third and fourth largest employers by number of employees in the state of Alaska. The FTC's review of this merger must ensure that Alaskan employees and union contracts are protected. Despite Kroger's assertion that it will honor all existing employment agreements and contracts, the history of grocery store consolidation in Alaska tells a different story. In 1999, when Safeway purchased Carrs for $330 million, six of the stores that were required to be sold off as part of the merger closed shortly after they were acquired by Alaska Marketplace. In addition to this cautionary tale, we echo the concerns that my colleagues Senators Cantwell and Murray have relayed to the FTC regarding Washington's history with the Safeway-Albertsons merger and the closure of hundreds of stores there. To date, no adequate evidence shows how this proposed merger will ultimately benefit Alaskan consumers. Instead, recent history points to consumer and employee harm, so we ask that the FTC consider enforceable measures to prevent a similar circumstance in Alaska.

In closing, we believe there is much work to do between now and early 2024 when Kroger has suggested the FTC will approve this merger. Now that the entire Alaska Congressional Delegation has weighed in on this matter, we ask that you and your fellow Commissioners consider the issues we have raised and respond appropriately, given that this merger, if approved, appears to go against the interests of Alaska and Alaskans.

Sincerely,

Senator Lisa Murkowski

Senator Dan Sullivan

Congress of the United States

Washington, DC 20510

September 1, 2023

Chair Lina M. Khan
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Chair Khan,

We write to urge swift adoption and implementation of a finalized Trade Regulation Rule on Impersonation of Government and Businesses (R207000, Docket No. FTC-2022-0064). This rule is critical to protecting small businesses, especially those associated with the business events industry, from the harmful effects of impersonation fraud.

Too many businesses in Nevada and other states across the country have felt the economic and reputational damage impersonation fraud can cause. As you know, business impersonation fraud exposes unsuspecting customers and businesses at in-person events to significant financial harm far too frequently. In 2022, a report published by the Federal Trade Commission (FTC) indicated that impersonator scams were the most reported type of scam in 2022, with an estimated $2.6 billion in losses. Business impersonators, specifically, caused $660 million in losses in 2022—a nearly 50-percent increase over 2021.[1]

The proliferation of impersonation fraud has proven especially damaging to the face-to-face business events industry, as impersonators have more and more regularly sought financial gain by advertising for fake exhibitions, tradeshows, and other business events. This targeted fraud threatens to put a damper on an industry that has long been a driving force for economic growth—for event organizers, host venues, and surrounding communities. Recent studies suggest that the global business events industry represents $1.6 trillion in GDP,[2] with 1.5 billion people participating in events at destinations around the world.[3] The industry is an especially important one for small business owners, with 99 percent of business events companies, and 80 percent of exhibitors, classified as small businesses.[4]

We are concerned that if left unchecked impersonation fraud will inflict significant economic damage on cities like Las Vegas, which has been the top tradeshow destination in the U.S. for over 25 consecutive years.[5] The business event industry in Las Vegas has spurred the development of new venues and fostered small business growth across the 14 million square feet

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[1] https://consumer.ftc.gov/consumer-alerts/2023/02/top-scams-2022
[2] https://www.eventscouncil.org/Leadership/Economic-Significance-Study
[3] https://www.forbes.com/sites/forbescommunicationscouncil/2022/02/15/great-to-see-you-again-face-to-face-events-gaining-a-renewed-importance/?sh=44d5d33c4ebf
[4] https://www.regulations.gov/comment/FTC-2021-0077-0009
[5] https://www.vegasmeansbusiness.com/why-choose-vegas/business-beat/post/las-vegas-resumes-live-events-with-new-venues-and-meeting-space-options/

of possible event space in the city.[6] The industry has supported thousands of jobs and boosted the local economy in its recovery from the COVID-19 pandemic. Across Nevada, business events are directly responsible for over 230,000 jobs and generate over $29 billion for the state.[7]

According to the Consumer Technology Association (CTA), which owns and produces the annual CES event in Las Vegas, their customers reported at least 70 incidents of fraud, via email solicitations alone, in 2021, 2022, and the month leading up to CES 2023.[8] CTA identified impersonation scams ranging from the sale of false discounted badges to fraudulent websites offering hotel bookings for CES, all of which put CTA customers and others involved in the event at significant risk.[9]

CTA's account drives home impersonation fraud's far-reaching impact on business events and their participants, and this fraud not at all isolated to CES. Given the business events industry's importance to Las Vegas and other tourism-heavy cities, and in view of the threat posed by impersonation scams, you can appreciate the urgency for putting in place a serious action plan to combat the threat of this widespread, damaging fraud.

In order to protect this critical industry that's under great threat, as well as to support associated small businesses and consumers in Las Vegas and beyond, there can be no delay at the FTC in rolling out a strong rule to stem this economic damage. We encourage you to act with all due haste to adopt and implement a finalized rule and to lead the Commission in moving swiftly to combat impersonation fraud and to provide relief to small business owners nationally.

We applaud the Commission's efforts to address this serious threat and its commitment to providing relief to affected small businesses. Thank you for doing all you can to ensure that this rule is finalized and rolled out as soon as possible.

Sincerely,

Susie Lee	Catherine Cortez Masto	Jacky Rosen
Member of Congress	United States Senator	United States Senator

[6] https://www.vegasmeansbusiness.com/why-choose-vegas/business-beat/post/las-vegas-resumes-live-events-with-new-venues-and-meeting-space-options/

[7] https://cdn.asp.events/CLIENT_Exhibiti_99AF30E7_F04A_5B33_ADE14E496EBB90DC/sites/ECA/media/libraries/state-impact/HCJRA_NV.png

[8] https://www.ftc.gov/system/files/ftc_gov/pdf/impersonationruleinformalhearingtranscript.pdf

[9] https://www.nahb.org/-/media/NAHB/advocacy/docs/coalition-letter-to-ftc-on-impersonation-fraud-033123.pdf

Steven Horsford

Member of Congress

Dina Titus

Member of Congress

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

Office of the Chair

September 5, 2023

The Honorable James Comer
Chairman
Committee on Oversight and Accountability
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Comer:

I write in response to your August 22, 2023, letter concerning the Federal Trade Commission's (FTC) role in the Indo-Pacific Economic Framework (IPEF). To respond to your request for the letter sent from me and AAG Jonathan Kanter to Ambassador Tai on March 22, 2023, enclosed please find the document Bates stamped (FTC_IPEF000000001 – FTC_IPEF000000002).

The FTC routinely participates in U.S. government discussions relating to trade, a practice that is longstanding and extends back decades. As trade agreements often contain chapters implicating the FTC's mission, the agency's engagement on these agreements is critical.[1] Our partners at USTR have welcomed input from the FTC given our deep expertise in competition, consumer protection, and privacy. Ensuring that the U.S. government not take positions abroad that conflict with or could constrict the FTC's ability to fully enforce U.S. law is vital. Failing to do so would allow trade agreements to sidestep legislation that Congress has passed, subverting the will of lawmakers, threatening the democratic process, and undermining the rule of law.

Over the last two decades, the FTC's trade-related competition activities have included: participating and helping lead U.S. delegations negotiating competition provisions of trade agreements (e.g., USMCA, KORUS); co-leading with USTR the U.S. delegation to the WTO Working Group on the Interaction between Trade and Competition Policy (1997-2003); participating in discussions of competition-related policies toward China (e.g., Strategic and Economic Dialogue and Joint Committee on Commerce and Trade); helping craft the U.S. response to concerns about Korea's implementation of due process provisions of KORUS; and, most recently, working with USTR and other agencies on IPEF.

The letter is confidential, and the Commission requests that the Committee and its staff not disclose it. Specifically, the letter includes interagency analyses and recommendations, which are predecisional, deliberative materials exempt from mandatory public disclosure under FOIA Exemption 5, 5 U.S.C. § 552(b)(5).[2] Although FOIA exemptions do not provide authority to withhold such information

[1] For example, nearly half of all U.S. FTAs have included a chapter on competition enforcement, including the original North American Free Trade Agreement in 1992, US-Singapore in 2003, US-Chile in 2004, the US-Australia agreement in 2005, US-Korea and US-Peru in 2007, US-Colombia in 2011, and United States – Mexico – Canada Agreement in 2020.

[2] *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 188 (1975); *Wolfe v. HHS*, 839 F.2d 768, 773 (D.C. Cir. 1988) (en banc).

from your Congressional Committee,[3] because the information would not be available to the public under the FOIA or otherwise, the Commission requests that the Committee maintain its confidentiality.

Sincerely,

Lina Khan

Lina M. Khan
Chair, Federal Trade Commission

cc: The Honorable Jamie Raskin
Ranking Member
Committee on Oversight and Accountability

[3] *See* 5 U.S.C. § 552(d).

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Congress of the United States
House of Representatives
Washington, DC 20515

September 26, 2023

The Honorable Lina M. Khan
Chair, Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Dear Chair Khan,

I write to voice serious concerns related to unlawful activities on two prominent online platforms, namely Instagram, a subsidiary of Meta, and OnlyFans.com. The gravity of these concerns, underscored by a combination of reports from concerned constituents, law enforcement, and recent media investigations, necessitates immediate attention.

In 2022, the National Center for Missing and Exploited Children received 31.9 million reports of child pornography, with 5 million of those reports originating from Instagram alone.[1] Recent investigations by the *Wall Street Journal* and a collaborative study by the University of Massachusetts and Stanford University have revealed how Instagram's features, such as its hashtag system, algorithms, and search options, are facilitating the process of locating and purchasing child sexual abuse material ("CSAM").[2][3] Regrettably, even users who inadvertently encounter such material, and rightfully report it to the platform, are often suggested similar content by the platform's algorithms.[4] Meta is aware that Instagram's features are promoting CSAM in this manner.[5]

OnlyFans.com has transformed the pornography industry by creating a subscription-based business model—emulating Uber and other gig-economy apps—which requires users to subscribe to individual creator accounts where most content is concealed behind a paywall. According to a report issued by the Anti-Human Trafficking Intelligence Initiative and the Center for Forensic Investigation of Trafficking in Persons, included in the Congressional Record pursuant to hearings held last year on the topic, "…it is relatively easy to identify significant 'red flags' indicating the likelihood of criminal activity occurring on OnlyFans.com through open source investigations, the paywall enables traffickers, rapists, and other criminal elements to better evade detection. To investigate and pursue these criminals at scale is extremely cumbersome for law enforcement, both in terms of direct financial commitment incurred by the paywall as well as the additional time required to investigate each paywall-enabled case of suspected criminal activity."[6]

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[1] https://www.missingkids.org/blog/2023/ncmec-verisign-partnership#:~:text=In%202022%2C%20NCMEC's%20CyberTipline%20received,image%20or%20video%20is%20located.
[2] https://www.wsj.com/articles/instagram-vast-pedophile-network-4ab7189
[3] https://cyber.fsi.stanford.edu/news/addressing-distribution-illicit-sexual-content-minors-online
[4] *Id.* at 2.
[5] *Id.*
[6] https://followmoneyfightslavery.org/expert-analysis-ofbropen-source-material-relating-to-child-sexual-abuse-material-and-sex-trafficking-occurring-on-onlyfans-com/

The unique structure of the OnlyFans.com platform, employing a paywall system for accessing its user-generated content poses significant investigative challenges to law enforcement. This structure interferes with the task of law enforcement officers who are responsible for identifying and pursuing cases of illicit content distribution, rendering existing tools broadly ineffective.

This structure also directly implicates credit card companies, which are intermediating and facilitating sex-trafficking transactions between OnlyFans "channels" publishing child exploitation or non-consensual content and their subscribers. In fact, credit card operators are facilitating the ability of subscribers to "tip" electronically to induce certain acts to be performed in real-time. There need to be effective guardrails to protect consumers from these services being used to perpetuate a black market in illicit content, which lacks First Amendment protection.

Such cases raise obvious concerns about the ineffectiveness of anti-money laundering ("AML") compliance programs in the financial services sector, especially as regards credit card associations like Mastercard and Visa (in addition to their partner banks that issue their branded cards and use their payment networks).[7]

Your agency, as the premier agency to enhance consumer protection and protect against fraud, has had notable successes working with the Treasury Department's Financial Crimes Enforcement Network ("FinCEN") and the Department of Justice ("DOJ") under a Title 31 approach to ensure the effectiveness of well-established AML regulatory requirements in the financial services industry.[8] These requirements clearly extend to ensuring that the industry, and especially the credit card associations like Mastercard and Visa take effective steps to protect against their products and services serving as the financial gateway to accessing illicit CSAM and content produced by victims of sex trafficking. By following a well-established regulatory approach, your agency can address the monetization of CSAM and content depicting victims of sex trafficking.

I respectfully ask the Federal Trade Commission to initiate comprehensive investigations into these alarming issues on both Instagram and OnlyFans.com. Consideration must be given to appropriate regulatory or legislative remedies that can harmonize user privacy, platform business models, and the necessity for robust law enforcement mechanisms to stem the tide of horrific online child abuse and other illegal material. Given the urgency and gravity of these issues, the FTC must prioritize these investigations, ensuring that all necessary steps are taken to protect vulnerable individuals who may become victims of the criminal enterprises perpetuated on these platforms.

Thank you for your attention to these critical matters. I eagerly await your response and anticipate diligent action by the FTC in resolving these concerns.

Sincerely,

Troy E. Nehls
Member of Congress

cc: Andrea Gacki, Director of FinCEN; Ryan McInerney, CEO of VISA; and Michael Miebach, CEO of Mastercard.

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[7] *Id.*

[8] https://www.ftc.gov/news-events/news/press-releases/2017/01/western-union-admits-anti-money-laundering-violations-settles-consumer-fraud-charges-forfeits-586; https://www.ftc.gov/news-events/news/press-releases/2023/02/more-115-million-refunds-sent-consumers-result-ftc-doj-charges-moneygram-failed-crack-down-scams; https://www.justice.gov/opa/pr/moneygram-international-inc-agrees-extend-deferred-prosecution-agreement-forfeits-125-million