

## FTC Open Commission Meeting

Chair Khan:

Good morning, this meeting will come to order. We are meeting in open session today to consider several items before the commission. Though we will be voting on these items, please note that this will not be a deliberated meeting. Once the meeting has concluded, we will remain online for an open forum during which we will hear from members of the public on their thoughts regarding the work of the commission generally and any relevant matters that they wish to bring to the commission's attention.

Turning now to the business of the commission. The first item on the agenda is a proposed policy statement on the Health Breach Notification Rule. The global pandemic has hastened the adoption of virtual health assistance, with Americans placing their trust in various technologies to track and manage their personal health. As we have seen however, digital apps are routinely caught playing fast and loose with user data, leaving user sensitive health information susceptible to hacks and breaches.

Given the rising prevalence of these practices, it is critical that the FTC use its full set of tools to protect Americans. In 2009, Congress instructed the FTC to issue a rule protecting the public from breaches of personal health data. This Health Breach Notification Rule is among a small set of privacy laws covering users' health information and requires vendors of unsecured identifying health information to notify users, the FTC, and in some cases, the media if there is an unauthorized disclosure. Although the rule was first issued over a decade ago, the commission has not yet brought any enforcement actions under it.

While users have been adopting health apps at a rapid rate, the commercial owners of these apps too often fail to invest in adequate privacy and data security, leaving users exposed. For example, one recent peer reviewed study found that these health apps suffer from serious problems ranging from insecure transmission of user data, including geolocation, to unauthorized dissemination of data to advertisers and other third parties in violation of the app's own privacy policies. In my view, these problems stem in part from a gap. Health apps are generally not covered by HIPAA, and some may mistakenly believe that they are not covered by the commission's rule.

Today, we are hoping to clarify that the Health Breach Notification Rule applies to connected health apps and similar technologies. Notably, the rule does not just apply to cybersecurity, intrusions or other nefarious behavior. Incidences of unauthorized access also trigger notification obligations under the rule. It is particularly important to note that the rule extends to evolving technologies, an interpretation that I believe is a logical reading of its language. Contrary to some suggestions, today's statement is entirely consistent with, and in fact serves to clarify the FTC's earlier guidance. Consistent with that guidance, health apps that are capable only of collecting data from users directly, in other words, apps that are not capable of drawing data from multiple sources, are not covered by the rule.

I will also note that there is no notice of proposed rule making pending on this rule. We have solicited comments as part of our general periodic review and have reviewed those comments as part of our analysis here. Violations of the rule carry civil penalties of \$43,792 per violation per day, and the commission should not hesitate to seek significant penalties against developers of health apps and other technologies that ignore its requirements.

Lastly, I believe that our efforts to protect Americans from abusive data practices must extend beyond this rule. While this rule imposes some measure of accountability on technology firms that

abuse our personal information, a more fundamental problem is the commodification of sensitive health information where companies can use this data to feed behavioral ads or power user analytics. Given the growing prevalence of surveillance based advertising, the commission should be scrutinizing what data is being collected in the first place and whether particular types of business models create incentives that necessarily place users at risk. In the meantime, I believe it's vital that the commission used the full suite of its authorities to protect Americans from abusive data practices.

Accordingly, I move that the commission issue the policy statement on Health Breach Notification Rule as circulated by the office of the secretary on September 1st in matter number P205405. Is there a second?

Speaker 1:

I second.

Chair Khan:

I will now turn to my other fellow commissioners to share any remarks before this item is moved for a vote. Commissioner Phillips. Commissioner Phillip, you're on mute.

Commissioner Phillips:

My apologies to everyone for that. Can you hear me now? Can you nod? Thank you. Thank you, Madam Chair. This is our third public meeting in as many months. Those watching carefully over the course of these three meetings may have heard from members of this commission about our interest in getting input from the public about what we do. Those same people may have seen however that the majority repeatedly voted against submitting our proposals to the public for their consideration. The public may have noticed that in our meetings, we make decisions first and then hear from people, so that we cannot consider what they say in making our decisions. Today's consideration of the policy statement on health apps is a new variation on this troubling theme, of saying one thing about valuing public input but doing another.

This comes in the context of an administrative process, a rulemaking process which we are end running with this policy statement. In May 2020, the commission initiated a review of the Health Breach Notification Rule, a regulation that requires healthcare providers to notify patients, and sometimes the public, if they suffer a breach. The goal of our review, consistent with our legal obligation, is to hear from the public and then determine whether and how to amend the rule. One set of questions we considered in that May 2020 public notice was whether the rule could or should be amended to apply to health apps like those that allow you to track your running, your diet, your sleep, and so forth.

That process of hearing from the public and considering what they have said remains ongoing. Indeed, one of our sister agencies, the Department of Health and Human Services is considering a similar issue in another rule making process that also has not been completed. We are not announcing a proposed regulation today or an NPRM. Instead, not having done our jobs to take and consider the input we ask for from the public, we are announcing a policy that simply decides important questions. This too is not taking public input seriously.

But there is another problem as well. The interpretation of the Health Breach Notification Rule that a majority of the commission adopts today in this policy statement is far from clear. It is a Rube Goldberg reading of statutes and regulations that, among other things, appears to run counter to published guidance on the FTC website today. The policy statement is inconsistent with the statute and would apply the rule far beyond what people talked about when the underlying law was passed or the rule was adopted. Earlier this year, the commission did not include an HBNR count in a case involving a

health app. Instead, we sought stakeholder input and public comment and to analyze carefully the regulatory regime. That was the better path. I dissent from this end run around a normal rule making process, and my views are set forth in greater detail in my dissenting statement, which I will publish. Thank you.

Chair Khan:

Thank you, Commissioner Phillips. Commissioner Chopra.

Commissioner Chopra:

Thank you. You know, when Congress passes a law to punish abuse and misuse of personal data, the Federal Trade Commission should actually enforce it. But there are too many examples where Congress has armed the FTC with specific authorities and our predecessors on the commission, on a bipartisan basis, chose to do almost nothing at all. For example, in 2005, President George W. Bush signed legislation authorizing the FTC to protect the privacy of our energy use, given the rise of a smart grid and the resulting risk to both privacy and our national security. In 2017, the US Department of Energy even warned of imminent danger of attacks on our grid and highlighted the national security and economic vulnerabilities associated with interconnectedness and the growing proliferation of unhardened consumer devices. However, commissioners serving before us haven't even bothered to solicit comment on whether and how to use this tool.

This is just one of many examples where commissioners coming before us have decided that our statutory responsibilities are optional, a concept that I find deeply inappropriate. In 2009, Congress authorized the FTC to finalize a Health Breach Notification Rule to protect the public against more digitized personal health data breaches. This would complement some of the protections in the Health Insurance Portability and Accountability Act, or HIPAA. The public would get notice of unauthorized disclosures of their health information and violators would be subject to stiff penalties. The protections were not simply intended to help the public when a company was hacked. They also sought to deter unauthorized sharing. Fortunately, Congress put in place a deadline for the rule to be put in place so commissioners couldn't easily wiggle out of it. Since February, 2010, when the rule took full effect requiring notification for unauthorized disclosures of covered information, the FTC and the public have been notified exactly four times about breaches, four times.

It is impossible that there have only been four covered incidents in our country during this time period. On top of that, the FTC has not collected a single penny in penalties. It is worth underscoring that this covers a period of time when our country experienced a health crisis in which technology became even more central to our healthcare. It is clear that something was not working with our administration of the rule. Last year, I was grateful that commissioners started thinking more about collecting input and hearing more about our policies. But unfortunately, we also created confusion in a law enforcement action against Flow, the popular menstrual tracking app. Flow is improperly sharing extremely sensitive data with Facebook, Google and others. And rather than sending a clear message that the text of the Health Breach Notification Rule covers this activity, we demonstrated again that we would be unwilling to enforce this law as written.

But today, commissioners can change course. Last year's review, we learned a lot of insights about our policies, and this was not the launch of a new proposed rule or an advanced notice of proposed rule making, but a chance for us to learn about what was working and what wasn't with an open mind. I appreciated the many conversations I had on this topic. The proposed policy guidance being considered today is consistent with the existing rule, but more clearly articulates which types of apps and services are covered given changes in the marketplace when it comes to the collection of

health information that may not be covered by HIPAA. This is especially useful for investors and honest businesses looking to make sure they're compliant with the law. I support this effort and I look forward to continuing our work with the department of health and human services to safeguard our most sensitive health data, and I'm pleased we'll be taking steps to ensure that data protection laws passed by Congress are faithfully administered and actually enforced. Thank you, Madam Chair.

Chair Khan:

Thank you, Commissioner Chopra. Commissioner Slaughter.

Commissioner Slaughter:

Thank you, Madam Chair. As the chair noted earlier and my colleagues have recognized, health apps have been gaining a foothold in the market for years, but they have exploded in popularity during the course of the pandemic, offering services ranging from diet and fitness to mindfulness and sleep. These apps collect and track sensitive, personal information across multiple aspects of our lives. Mental health apps have been one area of particular growth during the pandemic. One UK digital provider reported a 7500% increase in searches for health apps related to the prevention of self harm arm, 176% increase for apps dedicated to the management of depression and an 86% increase in searches for mental health apps for the treatment of anxiety. While digital mental health tools can be promising if they connect users with evidence-based resources, they also present high risks because you users seeking mental health resources are often sharing information that is especially sensitive and personal. The same can be said for other health apps helping people grapple with deeply personal health concerns like fertility, weight loss, and cancer treatment, to name just a few.

In this changing landscape, it is especially critical that the FTC do all it can to ensure that people entrusting their personal information to digital health apps can do so safely and securely. Accordingly, I strongly support the commission issuing the policy statement on privacy breaches by connected health apps. The policy statement sends a clear signal to providers of digital health technologies that they must fully comply with their legal obligations, including the Health Breach Notification Rule. The Health Breach Notification Rule requires vendors of unsecured health information, including mobile health apps, to notify users and the FTC if there has been an unauthorized disclosure of user information, including improper sharing of covered information without valid user consent. In the FTC's action earlier this year against Flow, a fertility tracker, I made the point that the FTC must more effectively deploy the Health Breach Notification Rule against providers of digital health tools. I'm gratified to see a majority of the commission echo this message to providers now. If you are offering digital health services, the FTC will hold you accountable for accurate evidence based claims and fully compliant data privacy practices.

While this policy statement is a welcome step, it isn't the same as rule making. Commissioner Phillips referenced it as an end run around the rule making process and I think it's really important to notice the difference. We have not changed the Health Breach Notification Rule. That is something that we can do through the formal rule making process, but as Commissioner Chopra noted, this policy statement is entirely consistent with the existing Health Breach Notification Rule, which may merit updating and changing, but as it exists now, this policy statement is consistent and just makes clear for the market that we intend to enforce the Health Breach Notification Rule.

And on top of that, the commission's efforts to protect consumers' data from misuse and abuse must continue. I look forward to the commission taking more action to limit the unfair collection use of data, especially through rule making. Rules are helpful in incentivizing companies to take better care of the data they collect, but we all know that too many digital services collect more data than they need,

keep it way too long, share it far too widely and use it in problematic ways. The FTC must lead a market shift toward data minimalism. Thank you, Madam Chair.

Chair Khan:

Thank you, Commissioner Slaughter. Commissioner Wilson.

Commissioner Wilson:

Thank you, Madam Chair. Sp paradox is a repeating theme in antitrust law. In 1978, Judge Bork published his book, *The Antitrust Paradox*. In 2017, our chair published her law review note titled *Amazon's Antitrust Paradox*. And now, in 2021, we have the FTC's transparency paradox. We are told that our new leadership values transparency and public input. Unfortunately, the majority repeatedly has chosen to undermine transparency and limit public input. At our open commission meeting in July, the majority voted to revise our rules of practice so that in rule making going forward, public input will be more limited. The majority has withdrawn important enforcement guidance without telling the business community what the new rules are. Traditionally, FTC staff have participated in a variety of public speaking opportunities to keep the public informed about our activities, but one of our new chair's first acts was to ban public speaking. And for each open commission meeting that we hold, the public is given the minimum required amount of notice and we hear real time public comments only after we have voted.

Today, the majority is poised to add three more items to the growing list of transparency paradox examples. The first example concerns the policy statement on breaches by health apps and other connected devices. The statement asserts that it serves to clarify the scope of the Health Breach Notification Rule. Understand what the term clarify means here. This policy statement in fact expands the rule while contradicting existing FTC business guidance. You can read about this discrepancy in my dissent that will be posted later today. Moreover, the majority advances this policy U-turn while the agency has an open rule making that covers not just this rule, but precisely the topics addressed by their policy statement. Specifically, at least three of the questions in our federal register notice asked the public for their thoughts on the topics in the policy statement. Rather than taking public input into account though, the majority today apparently will take the matter into its own hands.

Unfortunately, this isn't the first time that our new leadership has made a policy U-turn during the pendency of a directly relevant rule making. Last month, the FTC withdrew guidance on a specific aspect of our merger notification requirements, but we have an open rule making on our merger notification requirements and we solicited public comment on that very aspect of our reporting regime. It's a nuanced issue that we posed two questions with 11 sub parts. The public's input on that issue though is apparently irrelevant.

Another troubling aspect of today's policy statement concerns the majority's decision to announce this sweeping policy change to the Health Breach Notification Rule unilaterally. Given the cross referencing in the relevance statute, the interpretation adopted by the FTC could have implications for the Social Security Administration and Health and Human Services. These agencies possess both significant expertise in the healthcare arena and authority for enforcing related regulatory frameworks, and our unilateral actions may impact entities otherwise subject to our sister agency's jurisdiction.

Let me step back for a minute. I am sympathetic to the majority's goals of providing higher levels of protection to sensitive consumer health data. During my tenure as a commissioner, I have been an ardent advocate for federal privacy legislation. In fact, for months last year after the outbreak of the pandemic, that was essentially my sole focus in my speaking and writing activities. One compelling

rationale for comprehensive privacy legislation that I have cited repeatedly is the emerging gaps in sector specific approaches created by a evolving technologies. I've used that language before Congress on multiple occasions.

In other words, yes, HIPAA applies to patient info maintained by doctor's offices and hospitals and insurance companies, but not wearables or apps or websites like WebMD. And as I mentioned, the COVID 19 pandemic has further underscored concerns about the privacy of sensitive health data. To the extent the commission possesses authority to address consumer health data provided to mobile health apps through its Health Breach Notification Rule, I support employing that authority. But as I have said on other occasions, process matters, the ends do not justify the means. The policy statement issued by the majority today short circuits our ongoing rule making and seeks to improperly expand our statutory authority and to do so unilaterally rather than in concert with other federal agencies with shared jurisdiction like HHS and the Social Security Administration, and for these reasons, I will dissent.

Chair Khan:

Thank you, Commissioner Wilson. The motion being seconded, I am calling for a vote. Commissioner Wilson?

Commissioner Wilson:

I vote no.

Chair Khan:

Commissioner Slaughter?

Commissioner Slaughter:

Yes.

Chair Khan:

Commissioner Chopra?

Commissioner Chopra:

Yes.

Chair Khan:

And commissioner Phillips?

Commissioner Phillips:

I vote no.

Chair Khan:

And I vote yes. The motion passes by a vote of three to two.

The next item on the agenda is a staff presentation on an FTC study of unreported acquisitions by select technology platforms. In February, 2020, the commission under section 6B of the FTC Act issued special orders to five technology firms, requiring them to provide information about previous acquisitions that they did not report to the antitrust agencies under the Hart-Scott-Rodino Act. The

orders required Alphabet, Amazon, Apple, Facebook and Microsoft to submit data on the deals each company consummated between January 1st, 2010 through December 31st, 2019. Since then, our staff has been diligently collecting and analyzing this data and the commission unanimously voted to approve the public release of staff's findings. I'm delighted that we'll get to hear the staff present some initial findings from this study. I'd like to introduce [Leon Wagman 00:23:25] who helped lead this project in our office of policy planning and will present the findings. I'd also like thank the whole team for their terrific work on this study, including Jacob Hamburger, Robin Moore, Elizabeth [Jex], Jim [Harumji], and Jean [Yun Kim]. So take it away, Leon.

Leon:

Thank you, Chair Khan. In February, 2020, the Federal Trade Commission issued special orders under section 6B of the FTC Act to Alphabet, including Google, Amazon, Apple, Facebook and Microsoft, requiring them to provide information about prior acquisitions not reported to the Federal US Antitrust Agencies under the Hart-Scott-Rodino Act between January 1st, 2010 and December 31st, 2019. Staff in the FTC's office of policy planning collected and analyzed the material presented in this report, which adds to existing empirical research on transactions by large technology companies by analyzing a number of trends and patterns. As an overview, for today's purposes, I'd like to discuss a few of the top level findings covered in the report. Due to section 6F and 21D 1B of the FTC Act prohibiting the commission from disclosing trade secrets or commercial or financial information that is privileged, the data discussed today and in the report is provided on an aggregated basis. The data pertained to information regarding the types, counts, size and pace of acquisitions and other transaction attributes.

The five respondents identified 616 non HSR reportable transactions above \$1 million, in addition to other transactions such as hiring events, that is bringing in a team without acquiring voting securities, acquisitions of patents, smaller transactions below \$1 million and other financial investments. Combined, majority acquisitions of voting securities and asset acquisitions comprise 65% of the transactions. When focusing on the afore mentioned subset of 616 transactions, those two categories, majority acquisitions of voting securities and asset acquisitions together comprise 85% of this subset.

Focusing on this subset, here are a number of additional observations. The total number of transactions per calendar year across the five respondents ranged from 43 at its lowest in 2012, to 79 at its highest in 2014, and remained relatively higher in the later years, 2015 through 2019, than earlier in the decade. Considering dollar size ranges for acquisition purchase amounts such as one to 5 million, five to 10 million and 10 to 25 million, et cetera, the number of transactions in each size range fluctuated but generally trended up over the decade. As you read the report, you'll see that the pace of transactions in these ranges over time and how transaction counts are distributed across them. But of this core subset of transactions, the majority, 65%, were between 1 million and \$25 million. In addition, 94 transactions were above the Hart-Scott-Rodino's size of transaction threshold at the time of their consummation. This could have happened because either the transaction did not meet the size of person test or one of the number of statutory or regulatory exemptions applied.

As far as the locations of the target entities, the majority of transactions involve target entities based in the United States. This also applied in each transaction range individually with roughly two thirds of the acquired entities being domestic. The report has information on a number of other transaction attributes. In particular, in 36% of the transactions, the acquirer assumed some amount of the target entity's debts or liabilities. At least 39% of the transactions where the target company's age was available were for firms that, as of the time of the consummation of the transaction, were less than five years old.

More than 79% of the transactions also included deferred or contingent compensation to the target entities' founders and key employees. As the value of the transaction rose, the use of deferred or contingent compensation was more likely. Of the transactions reported, nine additional acquisitions at the time of their consummation would've exceeded the Hart-Scott-Rodino's size of transaction threshold when incorporating the deferred or contingent compensation into their purchase price, in other words, in addition to the 94 transactions already above the size of transaction threshold. Also, more than 75% of the transactions included non-compete clauses for the founders and key employees of the acquired entities. Higher value transactions were more likely to use non-compete clauses, similar to what we observed with deferred or contingent compensation.

Finally, in over 50% of the transactions where the number of the target's full-time non sales employees that was hired by the acquirer was reported, the number of target employees hired by the acquirer, that is by one of the five respondents, was between one and 10 non sales employees. The report provides additional information about these and other findings. Thank you very much.

Chair Khan:

Thanks so much, Leon. And I should note that I also wanted to give a shout out to

Chair Khan:

To Kate Ambrosie for her work on this project as well. So I wanted to share a few brief reactions and then we'll turn it over to my fellow commissioners for the same. So in recent years, the significance of acquisitions by large technology platforms has emerged as a key area of interest for policymakers and scholars. But the analysis has suffered from a key blind spot. The FTC study of over 800 unreported acquisitions by some of the most significant players in digital markets, sheds light on key trends and patterns. I want to thank former chairman Joe Simons for initiating this critical study and acting chairwoman Slaughter for helping steward it as well as our staff for their careful and comprehensive work, analyzing this data and gathering these results.

While the commission's enforcement actions have already focused on how digital platforms can buy their way out of competing, this study highlights the systemic nature of their acquisition strategies. It captures the extent to which these firms have devoted tremendous resources to acquiring startup patent portfolios and entire teams of technologists and how they were able to do so largely outside of the purview of the antitrust agencies. In my view, these findings should focus our attention on a few critical policy areas. First, the study underscores the need for us to closely examine reporting requirements under the Hart-Scott-Rodino act, and to identify areas where the FTC may have created loopholes that are unjustifiably enabling deals to fly under the radar. While broader reforms to HSR may be overdue, the antitrust agencies must also guard against unduly permissive interpretations that handicap us. The bureau of competition has recently taken useful steps to start closing certain loopholes. And we must continue this important work.

Second it's notable that less than two thirds of the non-reported transactions involve the acquisition of domestic assets or firms. This figure underscores the importance of close collaboration in cooperation with our international counterparts, several of whom have developed significant expertise in scrutinizing digital markets. I am especially keen to ensure that the FTC is learning from partners who have excelled at institutionalizing a broader range of tools and skillsets, helping mitigate information asymmetry and ensuring greater analytical rigor.

Third, the data showed that non-competes played a significant role in how firms design transactions with over 76% of the acquisitions captured including non-compete clauses for founders and key employees of the acquired entities. As the commission considers the use and misuse of non-

compete clauses across the economy, further scrutinizing the use of non-competes and merger agreements will aid this broader work, exploring how firms and digital markets may be using acquisitions to lock up key talents alongside key assets will be a worthy area of study. While the commission should ensure that we use these findings to plug gaps in our existing work, I hope that the study also proves useful to lawmakers as they consider reforms to the antitrust statutes. While the existing law uses deal size as a rough proxy for the potential competitive significance of an acquisition, digital markets in particular reveal how even smaller transactions invite vigilance. So thank you again to the agency staff for their terrific work on this project, which I hope can serve as a model for future 6B studies. I will now turn to my other fellow commissioners to share any remarks on this agenda item, starting with Commissioner Wilson.

Commissioner Wilson:

Thank you, Madam Chair. I want to echo your thanks to commission staff for their great work on this 6B study. Their work exemplifies the FTC's ability to strengthen its policy initiatives and enforcement actions through its 6B research powers. I hope today's presentation is only the beginning of the commission's analysis of the information collected on non-reportable technology, mergers and acquisitions. The commission will continue to benefit from understanding these transactions and their competitive impacts. Technology companies garners significant antitrust attention, but this is not the only industry that raises questions about the HSR notification process. When this study was announced, I called for the FTC to conduct similar studies in other industries. Commissioner Chopra joined me in that call. And today I want to publicly reiterate my call for the FTC to analyze non-reportable HSR deals in additional industries.

For starters, the health healthcare industry is of vital importance to every American consumer. The FTC has developed significant expertise in the healthcare industry, and this study should be the next target of non-reportable transaction studies. There are preliminary reasons to believe that non-reportable acquisitions are preventing Americans from receiving quality healthcare service and competitive prices. For example, the share of independent dialysis facilities has shrunk drastically over the last three decades and two national chains now own the majority of these facilities. However, most acquisitions occur below the HSR thresholds and consequently escape pre-merger review.

Similar have been observed in pharmaceutical and hospital markets. Additional 6B studies across other industries will ensure that the FTC has a more complete understanding of the competitive effects of non-reportable mergers across industries. With that enhanced understanding, we can determine whether there are legal changes that need to be made either through legislative changes in Congress or rule changes here at the agency. We constantly ask FTC staff to do more work with fewer resources, and they have never failed to rise to the challenge. It is with this awareness that I believe the FTC can rise to the challenge of researching and studying additional practices and industries to better inform the commission's decisions. The challenge of diving into ignored or unexplored areas plays into the FTC strength. I encourage the commission to continue and to expand this pursuit.

Chair Khan:

Thank you, Commissioner Wilson. Commissioner Slaughter.

Commissioner Slaughter:

Thank you, Madam Chair. I will first join my colleagues in giving a huge note of thanks to the staff in our office of policy planning for the tremendous amount of work put into this project, particularly Leon and Katie, and to Leah for that excellent presentation. There was an extraordinary amount of data and

documents to call and review. And our staff got through all of that information very efficiently. Second, the commission's undertaking this 6B study was an important step in addressing the general problem that the commission does not always know about all of the transactions that it should. That lack of information often has negative consequences for our enforcement mission. When the commission voted unanimously to study non-reportable acquisitions by large tech platforms, it was in attempt to fill some of that information gap and to better understand the number and scope of acquisitions and transactions that were not large enough to meet the reporting threshold at the time they happened and therefore were consummated without any X anti-review.

I think the staff's report reveal how much information the commission had not previously been able to capture. I know that there was some speculation about whether this study would've revealed specific transactions the commission would've liked to know about in order to challenge, but I think that's the wrong question. To my mind, the more significant contribution the study provides is the window into the overall pattern of these firms' acquisitions. My concern has always been that when we simply review acquisitions serially, we may miss the bigger picture patterns of any competitive roll up strategies. I think of serial acquisitions as a Pacman strategy. Each individual merger viewed independently may not seem to have significant impact, but the collective impact of hundreds of smaller acquisitions can lead to a monopolistic behemoth. The study released today helps us understand the bigger picture patterns among the largest tech platforms.

This perspective will help us to better target our enforcement efforts. In addition, the reports we're able to publish about the data we collect provide the public with a better understanding of market patterns and practices. And I would just say, I agree with Commissioner Wilson that this is not the only area where non-reportable transactions can merit examination and could reveal patterns of any competitive rollups that really require our enforcement attention. Finally, I just want to note that I wish we could publish company specific data to help the public better understand specific acquisition strategies and conduct among the different companies in our study, but we're prohibited by statute from releasing that granular information. Still the synthesis of the data we're releasing today is important for researchers, stakeholders and the public. I look forward to the commission further considering how it can deploy its existing authority to address anti competitive patterns of acquisitions. Thank you, Madam Chair.

Chair Khan:

Thank you, Commissioner Slaughter. Commissioner Chopra.

Commissioner Chopra:

Thank you, Madam Chair. And thank you, Leon and the entire team for this presentation on the industry. And I echo my colleagues thanks and commissioner Wilson's comments about the lessons we can draw for other industries as well. When large dominant firms are unable to innovate on their own, it's common for them to focus more attention on how to find those ideas from their smallest competitors. Today's report begins to shed light on how the biggest tech giants, Facebook, Google, Amazon, Microsoft and Apple engage in acquisitions to lock up assets and intellectual property that may someday threaten their dominance. Importantly, the mergers and acquisitions analyzed in the report were not subject to pre-merger notification under our nation's antitrust laws. And more and more of us believe there's a growing case to be made that the Hart-Scott-Rodino act should be amended to ensure that the very largest firms in the economy report more of their M and A activity to the antitrust agencies, including those transactions that may fall below today's existing HSR reporting thresholds.

However, the report and the presentation we just heard as well as the underlying confidential data underscore a critical policy issue for me that the commission can address through formal HSR guidance or rule making, and that's avoidance devices. Avoidance devices are tricks that buyers can use to disguise a transaction, so the transaction doesn't trigger HSR reporting requirements. And this happens all the time. The implementing regulations of the HSR act forbid avoidance devices, but for many years of across multiple administrations commissioners have decided not to meaningfully enforce this prohibition.

Take the example of aqui-hire. An aqui-hire is a merger strategy that provides a payout to a startup and its employees in exchange for the target's assets and crucially key employees staying on to work at the acquiring firm often locked up with a non-compete agreement. It's a common way for dominant firms to take over potential innovators and competitors, but it's easy to structure an aqui-hire agreement so that the takeover looks more like an employment agreement than an acquisition by locking up assets at an undervalued basis and disguising the real purchase price in the form of future stock grants and options in an employment agreement. The companies don't report the deal, but in many cases it can be a classic example of an anti-competitive transaction or even collusion where the acquiring and selling companies benefit, but the rest of us lose out on the valuable benefits that future competition would bring.

Or take the of special dividends. A dominant firm can orchestrate a merger agreement where the target firm pays off investors with a special dividend, leaving the buyer free to take over the target at a price below the HSR reporting thresholds, a clear abusive avoidance device. But rather than take on these issues through formal guidance and rule making, I have been deeply concerned that our predecessors on the commission decided to create loopholes through a trove of so-called informal interpretations. These documents provide a roadmap for dominant firms on how they can avoid reporting. Many of these so-called informal interpretations are not even grounded in business reality. And most concerning, these documents are not formally voted on by commissioners, allowing political leadership to completely evade all accountability. That's why I commend our staff in the bureau of competition for recently reversing one of the most egregious interpretations related to the exclusion of debt payoffs that has been often abused by emerging companies.

And it is critical that commissioners continue this change in course. We've been learning a lot through our comment period on the Hart-Scott-Rodino act, and we must hold ourselves accountable for the guidance and rules issued under that law by actually voting on them rather than directing FTC staff to send up signal flares on how to sidestep the law. We also have to toughen our rules on avoidance devices, rather than assuming we're powerless to do anything about what's happening in the market. And we need to go to court to seek all appropriate relief as authorized by the HSR act when companies violate the law. I want to thank everyone again, who has helped to analyze the data from our study on big tech platform acquisitions. And I look forward to taking steps that we can meaningfully enforce our pre-merger notification laws against those who engage in avoidance devices and for commissioners to hold ourselves accountable for our policies on HSR rules and guidances. Thank you, Madam Chair.

Chair Khan:

Thank you, Commissioner Chopra. Commissioner Phillips.

Commissioner Phillips:

Thank you. Madam Chair. And I'll join everybody else by thanking Leon and Katie and all the staff who worked on this project. I was proud to support it when we voted it out in February 2020, and I'm really proud of the work that they have done. This is a good example of one of the kind of special powers of

the FTC as originally conceived that we could go and we could use [inaudible] study what was going on in market that we should continue to use. I hope that the document that we have produced today does contribute to some extent, to a broader debate that we are having on merger policy generally and specifically on mergers by technology companies. That's what the data describes. But I do think as we approach the policy debate, it's important to be frank about what these data show and what they don't show.

We examined, as you've heard, acquisitions by five, very large technology companies sometimes described colloquially as big tech. There are other large technology companies as well. And what the report does as you've seen in addition to describing its scope in methodology, is it presents aggregate statistics about the transactions in our sample, grouped by various characteristics. I think the public will benefit from seeing some of these transactions and some of their aspects like how they use deferred compensation, how they use non-compete agreements and so forth. But the study did not examine other companies. You've heard this from Commissioner Wilson and Commissioner Slaughter among others. There are other large companies in the economy too. And this study doesn't tell us about the kind of acquisitions that they are making. So it is limited in scope. It also doesn't tell us whether the types that we see in the five companies that we studied are representative of technology, more broadly, or representative of mergers more broadly.

It also, as Commissioner Slaughter aptly noted, does not take a view on the competitive effects of the particular transaction. I don't disagree with her at all that we should look for patterns. I think that's very important, but this report doesn't weigh in one way or the other on the transactions at which we looked. Finally, the report does not offer recommendations with respect to modifying either the rule or the statute, or even as Commissioner Chopra was discussing the administrative implementation of the Hart-Scott-Rodino merger review law. So we don't have recommendations there that we have ongoing rule makings on this. I imagine that will be a matter of discussion. I will just say my view is at least with respect to level, we should be thinking about smart targeting because there are may be some things we want to see that we don't.

There are also a lot of things that we see that we probably don't care a lot about. And I think it's important to target what we see and what we think is most useful for doing what we're supposed to be doing with HSR, and that is enforcing the antitrust. So readers should be suitably cautious about the conclusions that they, but I still think, as I said at the outset, this report is valuable in sharing, and I hope that it lends greater public understanding to transactions in a number of markets or one market, depending on how you view it. It's very interesting to everybody and I hope it contributes in a positive way to the policy debate going forward. So thank you.

Chair Khan:

Thanks so much, Commissioner Phillips, and thanks again, Leah to you and the whole team for the terrific work. So moving on to the next item. The next item on the agenda is to vote on new processes to open up rule making petitions to the public. One priority of mine has been ensuring that the FTC is regularly hearing and learning from the broader public, including the consumers, workers, honest businesses that we strive to protect. Guarding against insularity is a constant challenge for virtually all federal agencies and ensuring that the FTC is accessible even to those who lack well-heeled counsel or personal connections is essential to our institutional credibility. Introducing these open meetings and inviting public comments on a monthly basis has been part of a broader effort to democratize our work in this way. And today we're looking to take this effort one step further by implementing changes to our procedures around rulemaking.

So Congress granted the FTC the power to issue rules equipping us with the vital tool to protect the public from harmful business practices. Interested members of the public would be able to petition and seek to invoke the FTC's rule-making authorities and recommend actions. The new procedures we're considering would provide clearer guidance to the public on how to file a petition with the commission and what steps the commission will take after receiving a petition. These revised procedure procedures will also help ensure that all interested parties will have effective and meaningful access to the petition process. Each petition for rule making will be publicly made available. Petitioners will be provided an agency point of contact to assist petitioners throughout the process. And petitions will be put out for comment so that others can comment on them.

Finally, the new procedures will ensure the petitioners are notified of a commission decision on the petition one way or another. I believe these changes will be beneficial to our agency and accordingly I move that the commission publish the notice in the federal register, amending the commission's rules of practice governing petitions for rule making as circulated by the office of the secretary on August 11th as issue 124 in matter number P072104. Is there a second?

Commissioner Chopra:

I second.

Chair Khan:

I will now turn to my other fellow commissioners to share any remarks before this item is moved for a vote. Commissioner Phillips.

Commissioner Phillips:

Thank you, Madam Chair. I support efforts aimed at creating real transparency and soliciting more public input on the work of the agency. As I noted before, I wish we did a better job of living up to those values. With regard to our process for rule making petitions, I think our current process does accord with ACUS recommendations on deciding on a case by case basis whether to docket petitions, but I am certainly comfortable with the change we are making to that practice and to put all petitions for rule making out for comment that is also consistent with ACUS recommendations. ACUS, for those who are listening, is like a body that advises on administrative law within the federal government. So we take their view into account in thinking about how we administer things.

As the chair laid out, these procedures will provide more guidance for petitioners on how to craft a petition. That's especially useful for people who, like she said, don't have lawyers well-heeled, I think was the word, that expensive lawyers to help them with the process. And that includes information about how to give us the right kind of evidence to support the kind of consideration that we do.

Chair Khan:

Thanks Commissioner Phillips. Commissioner Chopra.

Commissioner Chopra:

The Constitution of the United States guarantees the right to petition the government. The administrative procedure act also require that "agencies shall give an interested person the right to petition for the issuance amendment or repeal of a rule." Federal agencies across the government have moved toward more transparent procedures to allow the public to file petitions for rule making.

Unfortunately, commissioners coming before us pursued a more secretive and less accountable policy when it comes to individuals exercising their first amendment rights. The FTC used to routinely publish the petitions it received to allow for public inspection. Those petitions came on a wide range of concerns. For example, on our website, you can see some of these filed petitions. Commissioners receive petitions on everything from the labeling of cage free eggs, health benefit claims, immigration consulting and more, but in 2011 commissioners largely abandoned the practice of publishing these petitions.

And while we have resumed publication of some of them, we have not done so consistently or in an orderly fashion. In 2019, the new Civil Liberties Alliance, a conservative legal advocacy group petitioned the FTC to pursue a rule making regarding the procedures for defending agency guidance when challenged in court. I remember looking at it. My initial review suggested that the actions requested in the petition may not be the best use of resources, but I thought we should have a consistent policy on how to collect input. At the time I unsuccessfully argued to my colleagues that we should post the petition and solicit comment on it, as well as others that we received consist with the best practices published by the Administrative Conference of the United States, that Commissioner Phillips referenced, rather than what amounted to pretending we never received it at all. And even if we disagree, we shouldn't silence or pretend that something doesn't exist.

The proposed rule changes will reverse the inappropriate practices implemented by our predecessors and allow interested persons to submit petitions for rulemaking. And those that are properly submitted will be posted for public inspection and the public will be allowed to come in. Now, this system is not perfect. Dark money groups funded by regulated entity may submit petitions to undermine us. They may manufacture fake comments as federal agencies have seen in other regulatory proceedings, but that's something we can deal with or we should work on dealing with. But at the end of the day, we need to pursue initiatives like these to loosen the grip that large dominant firms have held at this agency to secretly influence and dictate our agenda.

Small businesses and community groups can't afford to hire high priced FTC alumni with special access and connections to push the agenda of their clients, making every properly filed petition for rulemaking public will level the playing field. This is another important step for the commission to be more transparent, to promote democratic debate and to rebuild trust in this agency. I strongly support this motion and I hope we pass it immediately. We should not delay on this and we can follow up this action with other work to implement other procedures, to enhance transparency. Thank you, Madam Chair. And I look forward to voting in support.

Chair Khan:

Thank you, Commissioner Chopra. Commissioner Slaughter.

Commissioner Slaughter:

Thank you, Madam Chair. I also support this motion and share the thoughts that you and, or echo the thoughts that you and Commissioner Chopra have already articulated. I just want to make two additional points. The first is that I'm really sympathetic to the amount of work that goes into filing petitions for rule making, and the fact that it can feel like that goes into a black box is frustrating to the people who do the work for those filings. And it's frustrating, I think to me as well, and to other folks at the commission. So I love that we're making changes to move in that direction. And I think figuring out how we can increase transparency across the board is a great idea.

And the only other point I would make on this is in addition to really thoughtful petitions for rule making, we often get thoughtful whole what I think of as well-pleaded complaints about conduct for

enforcement. And I have heard from many folks that it is very frustrating when they put the time together to develop a complaint that really documents problematic conduct, that it goes into a black box and we have no idea what happens to it. So that's something I would like to offer to my colleagues that I think we should also consider going forward, making sure that we are engaging as thoughtfully and constructively and directly as possible with all of the members of the public who put the time and effort and attention into bringing issues to the agency's attention and creating opportunities for us to do our jobs better. So thank you.

Chair Khan:

Thank you, Commissioner Slaughter. Commissioner Wilson.

Commissioner Wilson:

Thank you, Madam Chair. I am always receptive to hearing from stakeholders. My decisions are more informed when I engage with diverse viewpoints. So I support transparency that fosters opportunities for stakeholders to participate in commission business, but creating a petition machine in which every petition for rule making is automatically posted is a different matter entirely. First, I don't understand why we're spending staff and commission resources on this

Commissioner Wilson:

... project while the chair repeatedly notes the resource constraints we face. In fact, the FTC is issuing warning letters that threaten merging parties to close out their peril because we are so resource constrained that we can't fully investigate deals within statutorily mandated timelines. Second, records show that FTC received 1.44 petitions on average each year during the period covered by a survey response that we prepared for [ACIST]. And the agency's approach to public petitions already aligns with recommendations from ACIST. Third, I would be much more comfortable with this enterprise if we were to build in a requirement that obligated petitioners to disclose who is funding rule making petitions. I don't want the FTC unwittingly to be used as a weapon against rivals.

When I was in private practice, I saw first hand how the citizens petition process at the Food and Drug Administration was abused by branded drug companies to delay and exclude competition from generic drug companies. For years, I represented the generic drug companies as they fought against those tactics. The problem got so bad that in 2018, with input from the FTC, the FDA overhauled its citizen petition process, and I'm concerned about creating similar opportunities for regulatory gamesmanship here. In the face of growing discontent with capitalism, I have maintained and continue to maintain that Crony capitalism, not capitalism, is the true source of the problem. Crony capitalism perverts the free enterprise system by allowing special interests, cloaked in dark money, to lobby for laws and regulations that tip the scales in their favor. The ability to pay for access to congressional and agency leadership disadvantages rivals, skewing the playing field and harming consumers. And the impact is particularly pernicious in the healthcare sector.

The Chair recently issued a request for public comment regard contract terms that may harm fair competition. That solicitation for public comment holds up as examples two previously submitted petitions. I agree that these two petitions make good examples. They demonstrate the need for a disclosure of funding role here at the FTC that protects the agency's work against petition lobbying, secretly bankrolled by powerful special interests. The Chair's example petitions demonstrate how unworkable it would be to leave to commissioners and staff the task of scrutinizing the petition docket and IRS filings to uncover conflicts of interest that could undermine the legitimacy of the agency's work. The two example petitions were to submitted by dozens of organizations and individuals. 20

organizations and 46 individuals submitted the first petition for non-compete clauses. 31 organizations and five individuals submitted the second petition on exclusionary contract. There is zero disclosure of who paid for those petitions. The Chair's example petitions also demonstrate the importance of understanding who is paying for petition lobbying of the agency.

Of the dozens of organizations and individuals disclosed by the two petitions, the same nonprofit is named first in both cases. So it presumably played a major role in the preparation of both petitions. According to both petitions, that lead named petitioner does not accept any funding or donations from for-profit corporations. Well, who is writing the six figure checks implied by publicly available data submitted to the IRS? Who paid for these petitions? I do not know, but I have read online that one "proud supporter" of the lead named petitioner is a philanthropic enterprise established by the billionaire founder and major shareholder of a large tech company. I have no idea how much financial support is flowing from that tech billion through his foundation to the lead name petitioner, but the foundation itself [inaudible] it supported the lead name petitioner with its own goal of "curbing the power of dominant platforms."

If the nonprofit corporate interest behind the nonprofit veil were Amazon or Facebook, I suspect that everyone would find that fact relevant, and rightly so. Without funding disclosures, the FTC and the public will be left in the dark about who is seeking to influence our rule making efforts, compromising the FTC's independence. The FDA has a disclosure of funding rule, and so should we. So to facilitate transparency and to avoid having the FTC used as a weapon in disputes between large businesses, I offer the following topping motion. I move that publication of the proposed amendments governing petitions for rule making to the commission's rules of practice be postponed until such time that the general counsel can add appropriate disclosure of funding provisions approved by the commission that are consistent with constitutional protections of speech and association.

Chair Khan:

Thank you, Commissioner Wilson. Is there a second on the topping motion?

Commissioner Phillips:

Madam Chair, I don't have a second at this time, because I'm learning a lot from Commissioner Wilson and what she's saying and I think it's a really important issue. I learned, for instance, about the FDA's rule, which I did not know about. So I would like to continue working on that with her, if that's amenable. But I think for now in terms of what we're voting on, I'm not going to second. I hope that's okay.

Chair Khan:

Okay. Is there a second?

Commissioner Slaughter:

Madam Chair, I also do not have a second, but wanted to express sympathy in agreement for the notion that transparency about funding is absolutely a valuable thing for the agency to get. Whomever is funding requests that come before us, I want to know, and I will reflect that in the years I've been working at the commission, and before that when I worked on Capitol Hill, the first question I would always ask somebody when they came in purporting to represent some small collection of independent individuals was, who is your bills? So I think it is a really important question. I think it is worth knowing. I do not think we should delay adopting the proposed changes today to make this, but I'd be happy to

work with my colleagues on figuring out a way that the commission can move towards more transparency around funding. I think it's a good idea.

Commissioner Wilson:

So moving forward today without a disclosure of funding provision in this matter gives us our second example of the transparency paradox today.

Chair Khan:

Thanks, Commissioner-

Commissioner Chopra:

Oh, sorry. I appreciate the substantive sentiment. I realize it's for whatever reason. I'm happy to constructively work on the substance, but I do think we should implement this immediately.

Chair Khan:

Thank you, Commissioner Chopra. And I'll say I share the overarching goal of ensuring greater transparency and identifying sources of funding. I understand that recent case law may make this path problematic in certain ways, but I'm committed to continuing the conversation and thinking through how we might pursue this going forward. So hearing no commissioner second the motion, the topping motion fails for a lack of second. Commissioner Wilson, do you have anything further to add at this point? And if not, then we'll resume a vote on the underlying motion.

Commissioner Wilson:

So because today's proposal does not include procedural safeguards to protect the FTC from the influence of dark money, I will vote no.

Chair Khan:

Okay. I will resume the vote on the underlying motion. In the underlying motion being seconded, I'm calling for a vote. Commissioner Wilson?

Commissioner Wilson:

I vote no.

Chair Khan:

Commissioner Slader.

Commissioner Slaughter:

Yes.

Chair Khan:

Commissioner Chopra?

Commissioner Chopra:

Yes.

Chair Khan:

Commissioner Phillips?

Commissioner Phillips:

I vote yes.

Chair Khan:

And I vote yes. The motion passes by a vote of four to one. Last on the agenda is a proposed provision of the 2020 FTC-DOJ vertical merger guidelines. Last year, the FTC and DOJ jointly issued guidelines outlining a framework for reviewing vertical mergers. This was the first update to the agency's vertical merger guidance since 1984, and that older guidance has become outdated and inconsistent with agency practice. The 2020 guidelines took some positive steps towards updating the FTC's approach to merger review, and recognized important ways that non-horizontal mergers can harm competition, including through foreclosing rivals, raising rivals costs, increasing entry barriers, and giving the merged firm access to competitively sensitive information. Despite some improvements, the 2020 guidelines suffered from serious deficiencies. In particular, they contravene statutory text improperly suggesting that efficiencies, or a pro-competitive effect, may rescue an otherwise unlawful transaction.

The 2020 guidelines also posit the elimination of double marginalization as a likely feature of vertical mergers, despite extensive economic learning and empirical evidence noting the highly limited set of circumstances under which EDM may transpire. In order to prevent industry or judicial reliance on these flawed provisions, we are proposing that the FTC withdraw its approval of the vertical merger guidelines issued in 2020. I'm worried that the 2020 guideline's misguided discussion of the purported pro-competitive benefits of vertical mergers could become difficult to correct if relied on by courts. Going forward, the FTC looks forward to working closely with the DOJ to pursue a comprehensive review of our merger guidelines, considering a holistic approach that moves beyond outdated categories that no longer fit or correspond to market realities. A key goal of this review process will be to ensure that our framework for assessing transactions is [inaudible] to empirical evidence over speculative theories, and I look forward to working closely with the Justice Department on this critical project. Accordingly, I moved that the commission rescinded its approval of the June, 2020 FTC-DOJ vertical merger guidelines in matter number P810034. Is there a second?

Commissioner Chopra:

I second.

Chair Khan:

I will now open it up to my fellow commissioners to share our new remarks before I call for a vote.  
Commissioner Wilson.

Commissioner Wilson:

Thank you, Madam Chair. So once again, we are withdrawing a sound policy based on economic analysis, agency experience, and substantial public input, unilaterally, with little notice to the public, and with no opportunity for public input, and the commission is not explaining the agency's new approach to vertical mergers. So we have no guidance on the rules of the road for vertical mergers at precisely the point in time when businesses are attempting to address the supply chain vulnerabilities that COVID exposed. To compound matters, the commission is so in confusion as the majority

simultaneously proposes to impose punitive measures on companies that bring to our doorstep what the majority views as anti-competitive deals. Although today the focus is on vertical merger guidelines, the problem is broader. [inaudible] and the Department of Justice acting assistant attorney general Richard Powers have announced that they are taking a hard look at the horizontal merger guidelines to determine if they are too permissive. So the proposal to withdraw the vertical merger guidelines in a company in commentary provides today's third example of the transparency paradox.

Apart from procedural concerns, I also have substantive concerns. The 2020 vertical merger guidelines reflect accepted economic analysis. The guidelines identify theories of competitive harm that are supported by sound economics. Some commentators have advocated other possible theories, but they were not included in the 2020 guidelines if they were contradicted by empirical evidence. As we were reminded by the district court's opinion addressing the motion to dismiss in Facebook, bald allegations of harm that are not supported will not carry the day. In fact, as a matter of good government, we should not expect them to carry the day. Similarly, the 2020 guidelines in the commentary reflect agency experience. The commentary on vertical merger enforcement cites 40 commission cases from the past 15 years that demonstrate how the analysis described in the vertical merger guidelines is applied.

The vertical merger guidelines also reflect substantial public input. In 2019, the commission held a hearing on vertical mergers. In 2020, the FTC and DOJ published draft guidelines and invited public comment. Then the agencies held a workshop, and substantial changes to the draft guidelines were made in response to both the public comments and input from the workshop. Contrary to assertions, the vertical merger guidelines do not shield vertical deals from antitrust enforcement. In fact, the guidelines identify many ways in which those deals may harm competition. And the 40 cases contained in the vertical merger enforcement commentary demonstrate there's no free path for vertical mergers. But the vertical merger guidelines recognize that there are often efficiencies and beneficial effects that arise from vertical transactions. Those pro-competitive effects may result in lower prices for consumers, so merger analysis should take them into account. Most notable in the vertical context is the elimination of double marginalization, which occurs when a firm does not charge itself a margin on inputs it supplies to itself.

The guidelines note that these efficiencies and pro-competitive effects should be considered, but they make clear the inquiry is fact specific. And the commentary identifies circumstances where those pro-competitive effects would be unlikely. If the vertical merger guidelines are withdrawn because they are deemed by the current majority to be overly permissive, we can expect more vertical deals to be challenged. But it's worth emphasizing, vertical integration is common and less likely to harm consumers in horizontal deals. That's because vertical mergers between companies in a buyer-seller relationship do not eliminate a competitor. When considering a vertical transaction, that company is deciding whether it's going to produce an input internally or purchase the input from someone else. These decisions are common for individuals in households as well. Every night, households decide whether they will order takeout, go to a restaurant, or make their own dinner. This simple example hopefully makes clear that moving production inside the household or company rather than buying in the market is not inherently anti-competitive. And we should be wary of characterizations that vertical mergers are always or nearly always a problem. Sound economics just doesn't support at that characterization.

As I noted at the outset, the majority is proposing to withdraw the vertical merger guidelines and commentary with little notice to the public, essentially no opportunity to comment, and no replacement guidance. The same approach may soon be taken with the horizontal merger guidelines. In an effort to promote transparency and provide guide to the business community as it attempts to address supply chain vulnerabilities exposed by the COVID-19 pandemic, I offer the following topping

motion. I moved that the commission instructs staff to conduct merger investigations in a manner that is consistent with the principles described in the 2010 horizontal merger guidelines and the 2020 vertical merger guidelines until new guidelines are issued.

Chair Khan:

Thank you, Commissioner Wilson. Is there a second on the topping motion?

Commissioner Phillips:

I second the motion.

Chair Khan:

Okay. Having heard a second on the topping motion, I will call for a vote on it. Commissioner Wilson?

Commissioner Wilson:

I vote yes.

Chair Khan:

Commissioner Slader?

Commissioner Slaughter:

No.

Chair Khan:

Commissioner Chopra? Commissioner Chopra, you're on mute.

Commissioner Chopra:

No.

Chair Khan:

And commissioner Phillips?

Commissioner Phillips:

Yes.

Chair Khan:

And I vote no. The topping motion has failed. Commissioner Wilson, did you have anything else to add? Otherwise, we'll resume with discussion on the underlying motion.

Commissioner Wilson:

No, thank you, Madam Chair.

Chair Khan:

Thank you, Commissioner Wilson. Commissioner Slader.

Commissioner Slaughter:

Thank you. Madam Chair. I have been beating the drum about the FTC substantial under enforcement of vertical mergers for years now, beginning with my dissent in staples ascendant and [inaudible] next stage and continuing through my dissents to the promulgation and adoption of the 2020 vertical merger guidelines. So it's no surprise that I support rescinding those guidelines which took a dangerous and incorrect approach toward the consideration of the purported benefits of vertical mergers. As Professor Steve Salop has written, the 2020 guidelines provide myriad opportunities for gamesmanship by merging parties that could result in the clearing of harmful mergers or justification for weak remedies. Today's rescission is the right thing to do, and in particular should put to rest the notion that the agency will rely on the 2020 guidelines analysis of purported benefits of vertical mergers.

Nonetheless, I will confess anxiety about rescinding the 2020 guidelines without a replacement proposed jointly by the commission and DOJ. I do not want to give the impression that we intend to return to, or be governed by, the dead letter of the 1984 guidelines. Instead, as the Chair has made clear, the commission will be guided by the law, expressed in the statute and jurisprudence as we investigate vertical transactions. And I want to be very clear to the markets that I believe the catalog of harms in the 2020 guidelines continues to be valid, though non-exhaustive, and that this understanding of harms continues to be critical to our analysis of vertical merger. Our enforcement efforts and any future guidelines must build on that. Candidly, I weighed whether the agency should simply propose improved vertical guidelines based on the record that was developed during the consideration of the 2020 guidelines. I think that record supports improved vertical guidelines that reflect a broader understanding of the range of harms these transactions can pose and a more skeptical eye toward claim benefits. And such guidelines would be relatively easy to draft on that record.

However, I am also mindful and supportive of the announcement the Chair and DOJ made earlier this summer that they intend for both agencies to review both the vertical and the horizontal merger guidelines. This is a good idea, particularly because I am not convinced that it continues to make sense to have separate guidelines for horizontal and vertical transactions. In my experience, few transactions are purely horizontal or purely vertical. Some include components of both relationships. Many also involve adjacent markets or other patterns that cannot not be cabined into narrow, geometric relationships. By myopically treating transactions as either vertical or horizontal, we may miss important details that a broader perspective can provide. It's my hope that the agencies can work together quickly to develop and consider a single set of merger guidelines that accurately reflect contemporary market realities and economic literature.

To be clear, I am not wed to this approach. My priority is that we have guidelines that provide clear guidance to both courts and markets and reflect both our statutory obligations and market realities. But single guidelines certainly merit consideration, and I look forward to ongoing dialogue and public input on the topic. Thank you, Madam chair.

Chair Khan:

Thank you. Commissioner Slader. Commissioner Chopra.

Commissioner Chopra:

Thank you, and also wanted to thank Commissioner Slader for her comments and all the work over the years she has done on this important issue. One of the ways that the FTC can regain credibility is to be more analytically rigorous and draw upon a richer set of quantitative and qualitative data to better inform our decisions, rather than relying on discredit theoretical models about the economy or input from a narrow set of insiders. Last year, FTC commissioners voted three to two to implement new

vertical merger guidelines that I think relied on a series of unproven or even disproven assumptions. This was disappointing because we received a rich set of comments in our record, but I believe the majority at the time was too quick to dismiss many of the serious concerns raised, especially by small businesses like pharmacists, musicians, and more.

Instead, while there was some helpful elements of the 2020 guidelines, I worry that the document also gave a blueprint to companies seeking to engage in an illegal vertical merger. In some ways, issuing those guidelines last year may have been worse than doing nothing at all. From agriculture to automobile's, COVID-19 has provided us with real world examples of how excessive concentration and bottlenecks can be detrimental to families, businesses, and our national resilience. One of the effects we are seeing of the growing concentration in our economy is supply shortages. Since the pandemic began, we have seen shortages of critical goods and manufacturing inputs affecting vast segments of the economy. These shortages are not merely inconvenient. They are slowing the economic recovery from the pandemic. The Federal Reserve board reports in the recent beige book that economic growth has been frustrated by supply chain disruptions. Automobile sales are down, for example, because car makers can't find chips. And businesses report "widespread concern about ongoing supply disruptions and resource shortages."

Small businesses and new businesses are particularly harmed by these shortages, since dominant firms have the market power to demand that their suppliers fill their orders first. And when they control those suppliers, it's even more devastating. Unfortunately, merger analysis has increasingly come to focus on efficiencies. Efficiencies sound good. No one wants to be inefficient. And companies seeking to avoid prosecution of illegal mergers constantly stress them. But what do we mean by them? In some instances, it means cost cutting that reduces productive capacity and resilience. For example, cost cuts sometimes come through the "rationalization of so-called excess capacity." In plain language, sometimes a firm shuts down a production line or a manufacturing asset. But what makes that capacity excess? The competitiveness of the market is a critical factor. For a firm in a competitive market, that capacity can actually be in an opportunity for more capital in investment and an incentive to compete for new customers. But for a dominant firm, when there are few new customers to win and no short term incentive to raise capital and maintain that extra capacity or build capacity, it gets cut.

But markets change, demand may quickly increase, or one competitor may be suddenly taken offline. Perhaps its raw materials are wedged in the Suez Canal or are hit by a natural disaster. The competitive market is resilient. All those competitors who had incentives to maintain the capacity to win more businesses can step up to meet the demand shock. But the dominant firm, having spent years rationalizing production and trying to control the vertical supply chain, cannot. Today, we are voting to withdraw the vertical merger guidelines. Vertical integration, as we have all recognized, can lead to foreclosure of rivals and increased barriers to entry, and I've been deeply concerned about how it can chill the entry of new competitors. But when old rivals are pushed out and new rivals are kept out, you get rising concentration potentially in multiple markets.

In any type of merger that we might challenge, the result is less competition, less diversity of options, and less resilience. Going forward, we need to take a hard look at our approach to so-called efficiencies in our merger review. We cannot ignore situations where firms in many sectors are becoming too big to fail and their short term rationalization and cost cutting creates systemic risks of widespread shortages and outages. And we certainly shouldn't trade off the many benefits of a competitive market that we sometimes will not even begin to be able to predict, including supply chain resilience, for a theoretical short term price cut that sometimes never materializes. I look forward to a broad examination of the policies of the past, and instead move forward to a more rigorous analysis of business realities in the modern economy to chart a new path forward. I want to thank the Chair and

Commissioner Slader and so many others who will be ready to chart this new path. Thank you, Madam Chair.

Chair Khan:

Thank you, Commissioner Chopra. And Commissioner Phillips.

Commissioner Phillips:

Thank you, Madam Chair. Just a couple of notes in reply to some things my colleagues said. First of all, in response to my friend, Commissioner Slader, neither the guidelines nor agency practice myopically sorts things into either a vertical or horizontal bucket. We routinely review transactions and look at both the horizontal and the vertical aspects. I just want to comment on that. My second brief rejoinder is to Commissioner Chopra, who talks a lot about rigor and market realities. If he believes that efficiencies are not part of how markets develop, I really disagree with that. Firms getting more efficient is how economies grow. It's how they change. It's how they develop. I don't think we should be blind to those market realities either. Okay.

I regret that, once again, a majority of FTC commissioners is pulling the rug out from under honest businesses and the lawyers who wish to advise them, with no real explanation and no sound basis. First, the section five statement, then the policy on prior approval and notice in merger consents, and now the vertical merger guidelines incumbent rate. Once again, with the minimum notice required by law, virtually no public input, and no analysis or guidance, this agency is removing guidance and failing to replace it, reducing clarity in the application of the law. At least as of this morning, as far as I know, the Department of Justice antitrust division is not yet removing the vertical merger guidelines. So now we have two agencies apparently applying different standards. This is bad government. It is bad policy.

I want to explain a few things to members of the public who may not spend their time thinking about antitrust or mergers. Mergers, like the vertical mergers we're discussing today, are one way that companies grow and compete. This agency's congressional mandate is to stop mergers where the effect may be substantially to lessen competition. Vertical mergers, by definition, are not mergers of competitors. They do not eliminate a competitor. They do not increase concentration, which you just heard about from Commissioner Chopra. Rather, they combine firms that are in a buyer-seller relationship. As they are not mergers of competitors, vertical mergers are, on the whole, more likely to improve efficiency, bolster competition, and benefit consumers. Take Disney's 2006 acquisition of Pixar. Prior to the merger, Disney was partially financing and distributing Pixar's films. But once combined,

Commissioner Phillips:

Pixar revitalized Disney's animation department, and while Disney used its resources to expand Pixar's production and distribution, resulting in many beloved movies, if you or your children watched a Pixar film on Disney Plus during the pandemic, you benefited from vertical integration.

But not all vertical mergers are benign, some may harm competition and consumers. The vertical merger guidelines describe how such harm can occur, and the framework that the DOJ and FTC have developed, over decades of experience, to analyze both the anti-competitive and the pro-competitive effects of these mergers. The guide headlines are well founded. They reflect precedent from courts and agencies, they are based on widely accepted economic principles, and they were the result of robust public comment. You heard so much about that earlier today. The majority discards those guidelines today with zero public input, and I will have a motion on that shortly.

The guidelines serve as a useful guidepost for businesses that seek to ensure their conduct is lawful. Withdrawing them leaves the business community without clarity as to how we will carry out vertical merger enforcement, which we are doing today. The majority could have waited to rescind the guidelines until they had something to replace them with. My colleagues have yet to articulate any new proposals or guidance as to the new approach to vertical merger enforcement. We do not know yet whether the majority intends to issue new guidance or when, although I do expect that they will. The majority apparently prefers, for now, to sow uncertainty in the market, and to condemn mergers with no standards announced, little or no reference to law, agency practice, economic, or market realities.

But public and Congress should be very concerned by the disturbing trend at this agency of withdrawing guidance, again and again and again. I will continue to raise my concerns that we are knocking over guardrails that are intended to keep us from politicizing antitrust and throwing up roadblocks to the much needed job creation, economic growth, and innovation that Commissioner Wilson described. So I have a topping motion. Madam Chair, is that okay? Can I do that now?

Chair Khan:

Yes, please proceed.

Commissioner Phillips:

Okay. So I move that the Commission direct staff to prepare a federal register notice seeking comment on the proposal to rescind the vertical merger guidelines.

Chair Khan:

Okay. Is there a second on the topping motion?

Commissioner Slaughter:

I second the motion.

Chair Khan:

Okay. The motion having been seconded, I will call for a vote on the topping motion. Commissioner Wilson?

Commissioner Wilson:

I vote yes.

Chair Khan:

Commissioner Slaughter?

Commissioner Slaughter:

No.

Chair Khan:

Commissioner Chopra?

Commissioner Chopra:

No.

Chair Khan:

Commissioner Phillips?

Commissioner Phillips:

I vote yes.

Chair Khan:

And I vote no, the topping motion has failed.

Commissioner Phillips, do you have anything further to share? And if not, we'll proceed to a vote on the underlying motion.

Commissioner Phillips:

No, thank you, Madam Chair.

Chair Khan:

Okay. Thank you, Commissioner Phillips. I will now call for a vote on the underlying motion.  
Commissioner Phillips.

Commissioner Phillips:

I vote no.

Chair Khan:

Commissioner Chopra.

Commissioner Chopra:

Yes.

Chair Khan:

Commissioner Slaughter?

Commissioner Slaughter:

Yes.

Chair Khan:

And Commissioner Wilson?

Commissioner Wilson:

I vote. No.

Chair Khan:

And I vote yes, the motion passes by a vote of three to two. With that final vote, this concludes the official agency business of the Commission that we are disposing of today, under the Sunshine Act. The meeting is adjourned. I'd like to thank my fellow Commissioners for joining, and I'd like to thank the invited members of the public for their patience and sharing their feedback. The Commission values your input. Today around 17 people have signed up to address the Commission. To ensure that each person has a chance to be heard, we've asked each person to limit their remarks to one minute. And with that, I will turn it over to [Lindsay Krysak] to open it up to the public.

Lyndsay Krysak:

Thank you, Chair Khan. Before we begin, please note that the FTC is recording this event, which may be maintained, used, and disclosed to the extent authorized or required by applicable law, regulation, or order. And it may be made available in whole or part in the public record, in accordance with the Commission's rules. Each memo of the public will be given one minute to address the Commission. Our first speaker is Darren Tucker. Darren?

Darren Tucker:

Good afternoon. I'm a Partner and Chair of the antitrust practice group, Vincent Elkins, and a former FTC attorney. I welcome the Commission's effort to increase transparency through these open meetings.

As some of the Commissioners have expressed today, I do have concerns that other aspects of the FTC's interactions with the public are becoming less transparent. In an increasing number of FTC merger investigations, agency staff have requested information regarding how the proposed transaction will affect unionization, ESG 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 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. Thank you.

Lyndsay Krysak:

Thank you, Darren. Our next speaker is Douglas Brooks. Douglas?

Douglas Brooks:

Thank you. I'm a lawyer, and my practice includes representing victims of multilevel marketing scams. Earlier this year, Commissioner Chopra questioned the wisdom of exempting MLM from the business opportunity rule. Commissioner Chopra is absolutely correct, MLMs should be required to provide presale disclosures to perspective participants. The BizOp rule, however, is inadequate to the task, would have to be modified. In particular, it permits business opportunity sellers to disclaim that they make earnings claims. That, to my mind, is an invitation to commit fraud. Business opportunities are not sold without earnings claims being made.

I also think the Commission should prohibit certain aspects of multi level marketing compensation plans, including the use of inventory purchase qualifications for rising in the ranks or for earning commissions. There's no functional justification for imposing purchase requirements on MLM distributors. I have also submitted-

Lyndsay Krysak:

Thank you, Douglas.

Douglas Brooks:

Thank you.

Lyndsay Krysak:

Our next speaker is Andrew Crawford. Andrew?

Andrew Crawford:

Thank you. Chair Khan, Commissioners Phillips, Chopra, Slaughter, and Wilson. My name is Andrew Crawford. I'm a council on the Privacy and Data Project here at the Center for Democracy and Technology. We commend the Commission for highlighting the importance of protecting the public from privacy breaches associated with health apps, along with recent Commission actions taken against the mobile health app that inappropriately shared health information of its users. We believe additional safeguards must be in place to better protect consumer health data, particularly when such data is not subject to HIPAA. To that end, with generous support from the Robert Wood Johnson Foundation, CDT and our partners of the eHealth initiative have collaborated on a consumer privacy framework for health data that we released earlier this year.

Our framework consists of detailed use access disclosure principles and controls for health data that are designed to address data in current legal protections. As a follow-up, we are now focused on how health data privacy protections can address practices that give rise to inequities in treatment and access. Later this fall, we plan to release a new report that discusses these issues and considers ways to improve our existing framework. We hope the standards we've developed and continue to refine will serve as benchmarks to shape industry conduct, influence policymakers and regulators approaches to best protect health data. Thank you.

Lyndsay Krysak:

Thank you, Andrew. Our next speaker is Nicholas Geraldo. Nicholas?

Nicholas Geraldo:

Thank you, and thank you Madam Chair, Commissioners. My name is Nicholas Geraldo and I am a Market Researcher with the Wyoming Small Business Development Center. Through my work helping small business owners throughout the state, I've heard from several of them about shortages of products and materials they need to run their business. For instance, one business owner I spoke with, who makes sauces, cannot find 16 ounce glass jars or metal lids. I spoke with his distributor and discovered that this is not a regional issue, but a national shortage of commercial grade glass models. The client I spoke with was concerned that he may have to shut down his operations because of lack of supply.

I ask that the Commission investigate the supply chain disruption issue, figure out what's happening, and hopefully find a solution so that our small business can remain open, keep workers employed, and contribute to the local economy. Thank you very much.

Lyndsay Krysak:

Thank you, Nicholas. Our next speaker is Laura Marsten. Laura?

Laura Marsten:

Good afternoon, and thank you to the Commission. I'm Laura Marten, a 39 year old DC resident and a patient with Type 1 diabetes. I was diagnosed with Type 1 diabetes 25 years ago in 1996, at 14 years old. Since that time, I've used Humalog insulin by Eli Lilly. The price of one vial of my insulin has gone from \$21 to \$300 during the past 25 years, the insulin itself is wholly unchanged. The competing insulin by Novo Nordisk, NovoLog, is priced identically to Humalog. In fact, between 2001 and 2016, 22 of 28 price increases on Humalog and NovoLog insulins were by the exact same percentage on the same day and at the same time, leading to the 1,200% increase on my Humalog insulin since 1996.

Please, on behalf of seven million Americans who need insulin to survive, investigate insulin price fixing. Subpoena Eli Lilly, Novo Nordisk, and Sanofi for their unlawful conspiracy to raise the price of insulin to the point where one in four American diabetics now ration insulin to survive. Thank you.

Lyndsay Krysak:

Thank you, Laura. Our next speaker is Michael Rattray. Michael?

Michael Rattray:

Thanks Commissioners for letting me speak today. I'm largely going to echo what Laura just said. I'm also a Type 1 diabetic and I also have asthma, and our current regime for pricing drugs is harmful to patients, and for that matter, for all Americans. PBMs, as wholly owned components of insurance companies, results in perverse incentives for all companies in the healthcare marketplace. To reduce out of pocket prices at the pharmacy counter, the FCC should investigate staff to help eliminate far pharmacy counter sticker shock, which results in prescriptions not being filled or their use to be rationed, which creates poor outcomes for patients who are desperately trying to use drugs and maintain their health. Thank you.

Lyndsay Krysak:

Thank you, Michael. Our next speaker is Pam Dixon. Pam?

Pam Dixon:

Thank you Chair Khan and members of the Commission, thank you for the opportunity to provide feedback. First, just three quick points. First, we have visualized the health and human services data breach data from 2010 to September of 2021. You can see this behind me right here, and you can also see this red line, which is packing data, which is literally going off the charts. The HHS data reveals this, but we do not have commensurate data from the FTC which illuminates what's happening in the non-HIPPA covered data. We would love to see this remedied.

Second, we will read the FTC's new policy document on health breach very carefully and provide feedback, but overall, we support forward movement in this important area.

And then finally, health data governance is a nuanced field with very diverse stakeholders. We urge and request that the FTC convene a stakeholder meeting or a workshop of the stakeholders to encourage dialogue, up to date information, and cooperation. Thank you to the Commission and to Chair Khan for all of your work in this area.

Lyndsay Krysak:

Thank you, Pam.

Pam Dixon:

Thank you.

Lyndsay Krysak:

Our next speaker is Vimal Patel. Vimal?

Vimal Patel:

Hi, thank you for having me. My name is Vimal Patel and I represent Q Hotels, with some branded hotels in south Louisiana. I want to bring about the issue regarding the franchisers and the vendor kickbacks, which the brand mandates in one sided, unfair business practices, to the point that we had got frustrated that I, myself, had filed a lawsuit against IHG, which the information I have shared with Mr. Chopra's office.

Now with the hurricane and seven hotels that are down and will have to be rebuilt, once again we face challenges again dealing with the franchisors, in regards to vendors and brand mandates, which are going to increase cost, which, with the substandard products, unfair business practices, and dealing with the higher cost, which is going to affect our bottom line more and more. I humbly request the FTC, if they will look into this matter, subpoena the brand, especially like IHG, and open the records of their dealings and brand mandates with the franchisee regarding the vendors. Thank you.

Lyndsay Krysak:

Thank you, Vimal. Our next speaker is John Davidson. John?

John Davidson:

Good afternoon Chair Khan and members of the Commission. The Commission is well aware of the privacy and civil rights harms that data driven commerce has caused, and continues to cause, to millions of individuals across the United States. Today, on behalf of the Electronic Privacy Information Center, I'm urging the Commission to move as quickly as practicable to use its trade regulation rulemaking authority to address abusive data practices.

EPIC applauds the Commission's initiative in forming a rulemaking group, and the steps it has taken to improve its rulemaking procedures, including today's changes. But even with these changes, [inaudible] rulemaking remains a lengthy undertaking. And if the Commission is to make timely use of its rulemaking authority, which EPIC strongly believes that it should, the Commission must act soon to initiate that process. Time is of the essence. We urge the Commission to begin the rulemaking process by issuing one, or even several, advanced notices of proposed rulemaking, and soliciting feedback from the public about the best regulatory approaches to reign in unfair and deceptive data practices. Thank you.

Lyndsay Krysak:

Thank you, John. Our next speaker is Eric Migicovsky. Eric?

Eric Migicovsky:

Thank you. My name is Eric, I'm the founder of Beeper. We make an all in one chat app that lets you chat with anyone on 15 different apps, like iMessage, WhatsApp, and Slack. Instead of all these different chat apps on your phone, we let you use just one. Over three billion people use chat every day, but each chat network is separate. If you are on WhatsApp, you can't chat with someone on iMessage. It's very

similar to how, in early 2000, you could only send SMS text messages to someone if they were on the same cell carrier as you. But it's 2021, why are we living in such a backward world?

At Beeper, we're trying to fix this by building interoperability into chat. Our vision is simple, people should be able to chat with each other across chat networks. Users should have the freedom to own and control all of their own data. Today, we're worried the big tech companies who run major chat services will oppose this and block our efforts to provide interoperability. That's why we're in support of things like access and the Open App Markets Act. We also care deeply about data portability, delvability, and equitable interoperability. I'm excited to meet with anyone interested in this topic and to support a regulatory framework for big tech that promotes a more open internet. Thank you.

Lyndsay Krysak:

Thank you, Eric. Our next is John Wickizar. John?

John Wickizar:

Yes, thank you. Can you hear me?

Lyndsay Krysak:

Yes, we can.

John Wickizar:

My name is John Kaiser, and I'm with a company called Acknology. Actually, I'm just an average person with an idea, and an inventor. As we have seen the rapid progression in technological invention, it is brought to light an area of invention that is monopolized by the largest enterprises. They state claim to this more accessible frontier invention, and the entrepreneur is boxed out. It's called social invention. Health safety, emergency notification, trusted communications, critical information sharing, and numerous other critical resources for a healthy society cannot be treated with the same lack of urgency and limited accountability that has been demonstrated in the past with other historical technological advances, again, a big difference between technological invention and societal invention. That demands more priority and attention.

How will the FTC establish a cure and protective way for the individual consumer and entrepreneur to embark on consumption and improvement ideas in this more recognized area of social invention? Some of the other concerns that have been brought up with the non-reportable mergers and under the radar thing, there is a process in place that would help reduce the amount of confusion and difficulty, by identifying existing patented properties and inventors and visionaries, and going to and asking them, "Is your process-"

Lyndsay Krysak:

Thank you, John. Our next speaker is Tomaso Falchetta. Tomaso?

Tomaso Falchetta:

Thank you. Good morning Chair Khan and members of the Commission. My name is Tomaso Falchetta, I'm Global Policy Lead at Privacy International, a UK registered charity that works internationally at the intersection of modern technologies and rights. Increasingly, the digital economy is characterized by few companies in dominant positions. Because of their dominance, big tech companies are able to collect and analyze vast amounts of data. The value of personal data increases as more data is combined, so

companies pursue business strategies aimed at collecting as much data as possible across many jurisdictions. In 2021, we are seeing some challenges to the power of big US based platform, like Alphabet, Amazon, Facebook, and Apple. We believe that your role is key to challenge anti-competitive and data abusive practices of US based companies, which affect consumers in the US and around the world. Privacy International is ready to support you in this endeavor. Thank you very much.

Lyndsay Krysak:

Thank you, Tomaso. Our next speaker is Scott Knorr. Scott?

Scott Knorr:

I'm Scott Knorr, CEO of the American Pharmacists Association. We represent pharmacists in all practice settings. I want to thank the FTC for its recent approval of resolutions authorizing priority investigations into vertically merged PBMs as a key enforcement priority, and for voting today to rescind the 2020 vertical merger guidance.

Anti-competitive PBM practices are putting pharmacies out of business and creating pharmacy deserts in minority and underserved communities where the neighborhood pharmacy may be the only healthcare provider for miles. PBMs use fake list prices to reimburse medications, which represents a harmful deceptive trade practice to stakeholders. PBMs also target patients with chronic conditions and force them to use PBM-owned specialty pharmacy, mail order, and community pharmacies.

To address these stark abuses to competition, we recommend the FTC, one, require the three largest PBMs divest from their insurer, pharmacy, specialty pharmacy, and provider services to ensure competition in each of these marketplaces. In short, be bold, take action, and break them up.

And second, conduct a retrospective analysis of consolidation among PBMs to measure the effectiveness of past enforcements and the impact on downstream healthcare costs. Thank you, we're here to help.

Lyndsay Krysak:

Thank you, Scott. Our next speaker is Marca Peterson. Marca?

Marca Peterson:

Thank you. Our Federation, the Strategic Organizing Center, encompasses unions representing more than four million working men and women. We urge the FTC to block the Amazon MGM merger for three reasons. Amazon is already unfairly leveraging its power vertically in streaming markets through Prime, streaming devices, and cloud computing, so its behavior here mirrors its wider, well-documented anti-competitive practices.

Two, given Amazon's track record in books and eBooks, Amazon's growth threatens the vitality of the film industry as a key avenue of artistic and political content.

Three, the new streaming services challenge the rights and autonomy of filmmakers and others in the film industry, but Amazon presents special dangers because it is not a movie company at all, but a retail eCommerce company intent on expanding sales. Amazon and other big tech companies have expanded through hundreds of mergers like this one, we hope you will take this opportunity to finally slow Amazon's dominance. Thank you very much.

Lyndsay Krysak:

Thank you, Marca. Our next speaker is Brian Caswell. Brian?

Brian Caswell:

Thank you Madam Chair and Commissioners. Good afternoon, my name is Brian Caswell. I am President of Walker Drug in Baxter Springs, Kansas, a small rural community of little over 4,000 in population. Over the past many years, I've watched a steady increase of patients being forced or coerced into mail order, which more often than not is owned by the PBM. Also, a growing number of restricted medications which are classified as specialty, with no clear clinical definition of why it is a specialty, are contractually not allowed to be filled by the patient's preferred pharmacist. Again, the prescription is steered towards the PBMs own mail order. Some of my colleagues see steering to PB-owned retail pharmacies too.

Both of these situations create a fragmented healthcare system that leads to revenue generation for the PBM, and not to positive patient outcomes. I would like to see the FTC work with the DOJ to do a comprehensive review of the impact of health plan PBM pharmacy consolidation and PBM steering practices. Thank you for this opportunity [inaudible].

Lyndsay Krysak:

Thank you, Brian. Our next speaker is Harold Feld. Harold?

Harold Feld:

Chair Khan, Commissioners, thank you for allowing me to speak today. I am Senior Vice President of Public Knowledge. Today's item on receiving petitions for rulemaking from the public and holding regular open meetings such as this are excellent examples of how the Commission is expanding opportunity for meaningful public input. Public Knowledge asks the Commission to make the next step, reform of the complaint process. We ask the Commission to adopt rules to make it easy to file complaints and track their progress.

Public knowledge agrees with Commissioner Slaughter's assessment of the complaint process as a black box. Unfortunately, there is a reason why Google search autofill for file an FTC complaint generates, "Does filing an FTC complaint do anything?" In 2016, Public Knowledge filed a complaint with the FTC. Five years later, we still have no idea what has happened. If lawyers who specialize in consumer protection can't determine the fate of their complaints, how can the average American be expected to do so? Public Knowledge urges the FTC to examine how it can make its consumer complaint process more effective and transparent. Thank you and have an easy fast.

Lyndsay Krysak:

Thank you. I believe Harold was the final speaker, this concludes the open forum in today's meeting. I'd like to give a special shout out to the talented artists responsible for Commissioner Phillips' background, which significantly upped the color at our meeting today. Thank you so much for joining us, everyone, and we look forward to hearing more at future events. Bye.

Commissioner Phillips:

On behalf of the talented artists, thank you.

Commissioner Chopra:

Thank you.