



**United States of America
Federal Trade Commission**

**Governing is Hard:
Antitrust Enforcement in the
First Year of the Biden Administration**

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I have long been fascinated by politics and government. Growing up in South Florida, dinner topics at my friends' houses included the Cuban Revolution, the merits of statehood for Puerto Rico, and our country's relationship with Israel. To learn more about our ancestry, my mother and I traveled behind the Iron Curtain while I was in high school – a formative experience that I have discussed elsewhere.¹ And when I drew topics out of a hat during my extemporaneous speaking career on the high school debate team, those little strips of paper frequently referenced the civil wars in Latin America and the feared Domino Effect.

As an undergraduate student, I majored in political science. I studied the rise and fall of dynasties in China, the rise and fall of the Third Reich in Germany, warring religious factions in the Middle East, and colonialism in Africa. I moved to Washington D.C. to attend law school at Georgetown. Living inside the Beltway for roughly 25 years, I've been blessed (or cursed?) with the opportunity to analyze political campaigns and presidential administrations and the workings of Congress.

I served as Chief of Staff to Chairman Tim Muris at the Federal Trade Commission. Going into that job, I knew I would learn an immense amount about antitrust and consumer protection. But I had not contemplated the budget cycle, or the constant attention required to maintain the right level of FTEs,² or the need to rebuild a sense of security and safety within the FTC community in the wake of 9/11. There are many in attendance who are older and wiser – and younger and wiser – than I am. But after more life experience than I'd care to admit, what have I learned? Governing is hard.

You may wonder what this has to do with the FTC and antitrust. Let me connect the dots. During Joe Simons' tenure as FTC Chair, critics threw rotten tomatoes at the FTC. They routinely called the agency lax and feckless.³ On issue after issue, they argued that the FTC had been ineffective. The folks attending this program are familiar with the criticisms about failed

¹ Prepared Statement of Christine S. Wilson, Nominee for Commissioner, Fed. Trade Comm'n (Feb. 14, 2018), <https://www.commerce.senate.gov/services/files/702e3e69-db95-4b8f-8b50-152ca06c2221>.

² Full time equivalent. Reflects the total number of regular straight-time hours (i.e., not including overtime or holiday hours) worked by employees divided by the number of compensable hours applicable to each fiscal year. Annual leave, sick leave, and compensatory time off and other approved leave categories are considered to be "hours worked" for purposes of defining FTE employment. GAO, A GLOSSARY OF TERMS USED IN THE FEDERAL BUDGET PROCESS (Sept. 2005), <https://www.gao.gov/assets/gao-05-734sp.pdf>.

³ See Prepared Opening Statement of Commissioner Rohit Chopra, U.S. House of Representatives, Committee on Energy and Commerce, Subcommittee on Consumer Protection and Commerce (July 28, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592970/prepared_opening_statement_of_commissioner_rohit_chopra_transforming_the_ftc_legislation_to.pdf ("And when Big Tech companies egregiously violate our privacy and the law, the FTC has shown it is willing to be lax and forgiving."); Jesse Eisinger, *New Commissioner Says FTC Should Get Tough on Companies like Facebook and Google*, PROPUBLICA (May 14, 2018), <https://www.propublica.org/article/rohit-chopra-ftc-commissioner-ftc-should-get-tough-on-companies-like-facebook-and-google> ("Declaring that 'the credibility of law enforcement and regulatory agencies has been undermined by the real or perceived lax treatment of repeat offenders,' newly installed Democratic Federal Trade Commissioner Rohit Chopra is calling for much more serious penalties for repeat corporate offenders."); Mary Harris, *Trust-Busting is Back: Could 'the Simone Biles of antitrust' break up Amazon?*, SLATE (Jun. 22, 2021), <https://slate.com/business/2021/06/lena-khan-biden-ftc-amazon-big-tech-monopoly-antitrust.html> ("There simply is lawlessness in our economy writ large, and the FTC is a big part of it, though it's not the only agency that's proved to be feckless.").

antitrust enforcement – an analytical framework that gives too much credit to efficiencies, too few enforcement actions, too many settlements and too little litigation. But the criticisms didn’t stop there.

On the consumer protection front, critics characterized thirty years of Made in USA enforcement as toothless because consent decrees with injunctive relief – but not monetary relief – were common.⁴ Never mind that recidivism is rare, and identifying – not to mention demonstrating – harm is difficult.⁵ Critics and Congress called our \$5 billion civil penalty for Facebook’s order violations a slap on the wrist.⁶ Never mind the massive injunctive relief we achieved, and the fact that \$5 billion is the second-largest civil penalty ever imposed in any field

⁴ See, e.g., Kate Kaye, *Kill Your Algorithm: Listen to the new podcase featuring tales from a more fearsome FTC*, DIGIDAY (Oct. 22, 2021), <https://digiday.com/media/kill-your-algorithm-listen-to-the-new-podcast-featuring-tales-from-a-more-fearsome-ftc/> (“Sometimes referred to as weak and toothless in past years, the FTC is sharpening its fangs under the tough new leadership of Chairwoman Lina Khan, who has already guided policy changes that could have a big impact on how the agency addresses privacy and antitrust abuses of data-hungry tech.”); Lucas Manfield, *FTC Approves Toothless Settlement with DFW Staffing Agencies over Wage Fixing Allegations*, DALLAS OBSERVER (Nov. 12, 2019), <https://www.dallasobserver.com/news/ftc-approves-toothless-settlement-with-dfw-staffing-agencies-over-wage-fixing-allegations-11800222> (quoting Commissioner Chopra’s dissent “Commissioners should avoid entering into weak, no-consequences settlements that fail to hold a bad actor accountable or provide meaningful deterrence in the marketplace.”); Makena Kelly, *Facebook could create new privacy positions as part of FTC settlement*, THE VERGE (May 2, 2019), <https://www.theverge.com/2019/4/24/18514805/facebook-q1-2019-earnings-ftc-record-fine-privacy-violations-3-billion> (stating that Matt Stoller, a fellow at the Open Markets Institute, sees the proposed positions as toothless, a sign that the current FTC isn’t capable of reining in Facebook. “It’s a joke,” Stoller said. “The FTC’s budget should be cut to match the scale of its sloth.”); Statement of Commissioner Rohit Chopra in the Matters of Nectar Sleep, Sandpiper/PiperGear USA and Patriot Puck (Sept. 12, 2018), https://www.ftc.gov/system/files/documents/public_statements/1407380/rchopra_musa_statement_sept_12.pdf (arguing that no-money, no fault settlements for deceptive Made in USA claims were inadequate).

⁵ See Concurring Statement of Chairman Joe Simons, Regarding the Matters of Sandpiper/Piper Gear and Patriot Puck (Apr. 17, 2019), https://www.ftc.gov/system/files/documents/public_statements/1514773/sandpiper_patriot_puck_simons_concurring_statement_4-17-19.pdf (discussing the benefits of the Commission’s historical approach in Made in USA cases for administrative consents and the challenges associated with determining harm).

⁶ See Nancy Scola & Steven Overly, *FTC strikes \$5B Facebook settlement against fierce Democratic objection*, POLITICO (July 24, 2019), <https://www.politico.com/story/2019/07/24/ftc-facebook-settlement-1428432> (quoting Senator Blumenthal referring to the settlement as a “tap on the wrist, not even a slap”); Dissenting Statement of Commissioner Rohit Chopra in re Facebook, Inc. (July 24, 2019); @matthewstoller, Twitter (Jul. 24, 2019, 9:00AM), <https://twitter.com/matthewstoller/status/1154013543076966400> (“Thread from a dissenting FTC commissioner on the FB settlement. The Trump FTC is weak and feckless.”); Cathalijne Adams, Blog: *“FTC Commissioner Calls for Tougher Penalties Against False Made in USA Claims*, UNITED STEEL WORKERS (Apr. 24, 2019), <https://m.usw.org/blog/2019/ftc-commissioner-calls-for-tougher-penalties-against-false-made-in-usa-claims> (stating that in Made in USA cases “the Federal Trade Commission (FTC) has been letting these companies off the hook with little more than a slap on the wrist for decades” and displaying a Commissioner Chopra tweet that states that “the agency voted to essentially let them off scot-free.”); Lucas Manfield, *Rent-a-Center Gets Nailed for Suppressing Competition Walks Away With a Slap on the Wrist*, DALLAS OBSERVER (Mar. 6, 2020), <https://www.dallasobserver.com/news/ftc-plano-based-rent-a-center-suppressing-competition-11884287> (noting that Commissioner “Chopra has repeatedly slammed his own agency for failing to go after wrongdoers. Last year, the FTC declined to seek meaningful penalties after it uncovered evidence of wage-fixing by a local temp agency. Then, as now, Chopra argued that declining to pursue a financial penalty and not requiring an admission of wrongdoing rendered the FTC’s enforcement toothless.”).

of law in the U.S. And we were accused of currying favor with future employers each time we declined to hold senior management individually liable for law violations.⁷

Now, those critics control the agency. More than a year has passed since President Biden's inauguration. Acting Chair Slaughter took the reins on January 29, 2021; now-Chair Khan was sworn in on June 15, 2021. Today, I'd like to reflect on how this first year of governing has gone. Spoiler alert – governing is hard.

One of my favorite management books is *Good to Great*. In this book, author Jim Collins talks about the importance of identifying the “brutal facts of reality” that impact each company’s potential path to greatness. In the private sector, these brutal facts may include evolving technologies, changing consumer preferences, or rising input costs. In the public sector, those brutal facts are present, but they take a different form.

So, what are the brutal facts that confront each Chairman who runs the FTC? First, the agency has limited jurisdiction. The cases we bring must fall within the boundaries of our statutory authority and judicial precedent. Second, a finite budget creates opportunity costs – every good thing the agency pursues leaves fewer resources for the countless other good things the agency could do. Third, leadership faces limited bandwidth. Call it triage, call it prosecutorial discretion – but hard choices must be made.

In the first year of governing, FTC critics have run headlong into these brutal facts. For our discussion today, I’d first like to describe these brutal facts in more detail. Second, I will discuss how enforcement decisions undertaken by the agency in the past year mirror decisions and approaches that previously drew heavy criticism from those now in charge. There is no doubt that, under Chairman Simons, these same types of actions would have drawn fierce opposition from my Democrat colleagues, as well as progressives and politicians. In deed, if not in word, new leadership is coming to grips with the “brutal facts” and recognizing the benefits of the FTC’s tried and true approaches. And third, following years of calling the FTC lax and feckless and accusing the agency of under-enforcement, cases brought by new leadership in each mission declined by more than half. Comparing calendar year 2020 of the Trump Administration to calendar year 2021 of the Biden Administration, merger enforcement actions fell from 31 to 12 and consumer protection actions fell from 79 to 31. Let me be swift to assure you that staff’s

⁷ See Prepared Opening Statement of Commissioner Rohit Chopra, U.S. House of Representatives, Committee on Energy and Commerce, Subcommittee on Consumer Protection and Commerce (July 28, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592970/prepared_opening_statement_of_commissioner_rohit_chopra_transforming_the_ftc_legislation_to.pdf (“Congress should explore whether our laws should be amended to reduce favoritism toward dominant market actors, crack down on financial conflicts of interest, and increase responsiveness to local businesses and startups. First, Congress should examine whether to revisit laws regarding post-employment restrictions for senior FTC officials. While senior officials cannot immediately appear before the agency on behalf of clients, many are able to quickly work behind the scenes, leveraging their intimate knowledge of non-public agency deliberations on law and policy. This gives them an enormous advantage on how to help large firms escape meaningful accountability when they break the law and how to advise large firms seeking specific FTC actions. Small businesses and startups simply do not have the resources or ability to hire former FTC Commissioners and Bureau Directors, who regularly appear before the agency on behalf of dominant firms. This creates an unlevel playing field for small businesses engaging with the FTC seeking action or a fair resolution.”).

productivity did not decline by more than 50% in 2021. And while 2021 was indeed a transition year for the agency, the precipitous drop is nevertheless noteworthy.

1. Running the FTC is Difficult

Before the United States entered World War II, Britain's future looked bleak. But Winston Churchill maintained the unwavering conviction that Britain would prevail. This unwavering conviction was not blind, though. In fact, as author Jim Collins describes, Churchill was so concerned that others would fail to share bad news with him that he created a department called the Statistical Office, outside the chain of command, with the express purpose of feeding Churchill the worst facts about the war.⁸

So let's imagine for a few minutes that Winston Churchill is running the FTC. What brutal facts would his Statistical Office feed him?

First, the FTC faces resource constraints. One analysis that studied FTC funding from 2010 to 2016 showed that real appropriations decreased at the FTC when adjusted for inflation.⁹ While our budget remains essentially constant, each year our task grows. The economy has grown – the U.S. GDP in 2000 was just over \$10 trillion, but totaled almost \$21 trillion in 2020.¹⁰ And the number of consumers has also grown – the U.S. population in 2000 was 282 million, and grew to 329 million in 2020.¹¹ But in the face of this growth, the level of FTEs and funding at the FTC has remained relatively constant for many years.¹² As I have stated before, I am incredibly proud of what the FTC accomplishes with so few resources at its disposal.¹³ But it

⁸ Jim Collins, Confront the Brutal Facts, <https://www.jimcollins.com/concepts/confront-the-brutal-facts.html> (“Churchill never failed, however, to confront the most brutal facts. He feared that his towering, charismatic personality might deter bad news from reaching him in its starker form. So, early in the war, he created an entirely separate department outside the normal chain of command, called the Statistical Office, with the principal function of feeding him—continuously updated and completely unfiltered—the most brutal facts of reality. He relied heavily on this special unit throughout the war, repeatedly asking for facts, just the facts. As the Nazi panzers swept across Europe, Churchill went to bed and slept soundly: ‘I... had no need for cheering dreams,’ he wrote. ‘Facts are better than dreams.’”).

⁹ Michael Kades, Director of Markets and Competition Policy, Washington Center for Equitable Growth, Presentation to Congressional Antitrust Caucus on Merger Enforcement Statistics (Jan. 19, 2018), <https://equitablegrowth.org/presentation-merger-enforcement-statistics/>.

¹⁰ THE WORLD BANK, GDP (CURRENT US\$) – UNITED STATES, <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=US>.

¹¹ THE WORLD BANK, POPULATION, TOTAL, UNITED STATES, <https://data.worldbank.org/indicator/SP.POP.TOTL?locations=US>.

¹² FED. TRADE COMM’N, FISCAL YEAR 2020 AGENCY FINANCIAL REPORT 50 (2020), https://www.ftc.gov/system/files/documents/reports/agency-financial-reportfy2020/ftc_fy2020_agency_financial_report.pdf.

¹³ Remarks of Christine S. Wilson, Commissioner, Fed. Trade Comm’n, at the ABA Antitrust Law Section’s 2021 Fall Forum, The Neo-Brandeisian Revolution: Unforced Errors and the Diminution of the FTC (Nov. 9, 2021), <https://www.ftc.gov/public-statements/2021/11/neo-brandeisian-revolution-unforced-errors-diminution-ftc> (“The agency is a community of good people united by the shared goal of protecting consumers. We are more than the sum of our parts, and we accomplish so much with so little – I am proud of this ‘little engine that could.’”).

isn't easy – FTC lawyers, economists, investigators, paralegals, and other staff work long days, nights, and weekends to get the job done.

The breadth of the agency's mandate is sweeping. The FTC is called to enforce many laws and rules covering virtually every segment of the U.S. economy. This audience is quite familiar with our enforcement on the competition front. As you know, we challenge practices that violate the Clayton Act, the Sherman Act, and the “unfair methods of competition” provision of Section 5 of the FTC Act.

But we also have a host of mandates on the consumer protection front, where we enforce the “unfair and deceptive acts or practices” provision of Section 5. You may hear about the high-profile actions that make front page news, like our \$5 billion order violation settlement with Facebook. But we regularly bring actions to protect deceived or defrauded consumers that never make the headlines. This work continued even as the pandemic hit the U.S. and the agency transitioned essentially overnight to telework. In fact, our consumer protection work expanded to cover new scams related to Covid.¹⁴

Beyond Section 5, the FTC enforces more than 70 other laws.¹⁵ You might recognize some of these other laws, like the Children’s Online Privacy Protection Act (COPPA),¹⁶ the Fair Credit Reporting Act (FCRA),¹⁷ and Gramm-Leach-Bliley (GLB).¹⁸ But there are dozens of lesser-known laws to enforce, and the list continues to grow. Following reports of contracts that blocked consumers from posting truthful negative reviews about products or services, Congress passed the Consumer Review Fairness Act and vested enforcement with the FTC.¹⁹ Similarly, Congress passed the Better Online Ticket Sales Act (BOTS Act) after reports that BOTS were buying up popular concert and sporting event tickets and precluding consumers from purchasing individual tickets.²⁰ Again, the FTC was charged with enforcement.²¹ More recently, Congress passed the Horseracing Integrity and Safety Act, which requires the FTC to review and approve rules proposed by the Horseracing Authority related to anti-doping and racetrack safety.²² In

¹⁴ See, e.g., FTC Coronavirus Warning Letters to Companies, <https://www.ftc.gov/coronavirus/enforcement/warning-letters> (detailing the over 400 letters the FTC has sent regarding potentially deceptive Covid-related claims); FTC Press Release, FTC Sues Utah-based Company for Falsely Claiming its Nasal Sprays Can Prevent and Treat Covid-19 (Oct. 28, 2021), <https://www.ftc.gov/news-events/press-releases/2021/10/ftc-sues-utah-based-company-falsely-claiming-its-nasal-sprays-can>.

¹⁵ See Statutes Enforced or Administered by the Commission, <https://www.ftc.gov/enforcement/statutes>.

¹⁶ 15 U.S.C. §§ 6501-6506.

¹⁷ 15 U.S.C. §§ 1681-1681x.

¹⁸ 15 U.S.C. §§ 6801-6809, §§ 6821-6827.

¹⁹ 15 U.S.C. § 45b.

²⁰ 15 U.S.C. § 45c.

²¹ See FTC Press Release, FTC Brings First-Ever Cases Under BOTS Act (Jan. 22, 2021), <https://www.ftc.gov/news-events/press-releases/2021/01/ftc-brings-first-ever-cases-under-bots-act>.

²² Horseracing Integrity and Safety Act of the 2021 Consolidated Appropriations Act, 134 Stat. 1182, <https://www.congress.gov/116/bills/hr133/BILLS-116hr133enr.pdf>.

short, the scope of the FTC’s jurisdiction is broad and continually expanding, well outpacing the growth of our funding.

Second, the FTC faces jurisdictional constraints that place sound limits on antitrust enforcement. Our Clayton Act²³ and Sherman Act²⁴ authorities are limited to actions that may substantially lessen competition and restrain trade, respectively. And judicial precedent further narrows the scope of our jurisdiction. The Supreme Court quickly realized that all contracts technically restrain trade, so by the time *Standard Oil* was decided in 1911, the Supreme Court made clear that only *unreasonable* restraints of trade are prohibited.²⁵ Another familiar example can be found in the Section 5 “unfair methods of competition” arena. In the 1980s, the FTC lost three cases at the Circuit level when it attempted to push Section 5 beyond accepted antitrust principles.²⁶ Many modern antitrust cases have refined and clarified antitrust law, and the FTC must respect this body of precedent to successfully enforce the antitrust laws. You may disagree with the touchstone of the consumer welfare standard, but both the law and judicial precedent focus on competition and consumers. The FTC simply does not have jurisdiction to cure all of society’s ills.

Another example of limited jurisdiction can be found in the privacy and data security arena. The FTC has creatively used its jurisdiction under Section 5 to create a “common law of privacy” – but Section 5 has limitations.²⁷ The majority was lambasted for abiding by these limitations in our order violation settlement with Facebook. But jurisdictional boundaries are meaningful and cannot be ignored. If consumers are being harmed in ways that we cannot reach with our current authority, the best recourse is to ask Congress to give us additional authority. I have followed this path when asking Congress to pass federal privacy legislation. Until Congress

²³ Clayton Antitrust Act of 1914 § 7, 15 U.S.C. § 18 (“may be substantially to lessen competition, or to tend to create a monopoly.”).

²⁴ Sherman Antitrust Act of 1890, 15 U.S.C. §§ 1-2 (The Sherman Act outlaws “every contract, combination, or conspiracy in restraint of trade,” and any “monopolization, attempted monopolization, or conspiracy or combination to monopolize.”).

²⁵ See, e.g., *Arizona v. Maricopa Cty. Med. Soc.*, 457 U.S. 332, 342–43 (1982) (citing *United States v. Joint Traffic Assn.*, 171 U.S. 505, 569 (1898) and *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911)) (“Section 1 of the Sherman Act of 1890 literally prohibits every agreement ‘in restraint of trade.’ In [*Joint Traffic Assn.*], we recognized that Congress could not have intended a literal interpretation of the word ‘every’; since [*Standard Oil*], we have analyzed most restraints under the so-called ‘rule of reason.’ As its name suggests, the rule of reason requires the factfinder to decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition.”); see also *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (citing *Arizona v. Maricopa County Medical Soc.*, 457 U.S. 332, 342–343 (1982)) (“Although the Sherman Act, by its terms, prohibits every agreement ‘in restraint of trade,’ this Court has long recognized that Congress intended to outlaw only unreasonable restraints.”).

²⁶ *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 139 (2d Cir. 1984); *Boise Cascade Corp. v. FTC*, 637 F.2d 573, 582 (9th Cir. 1980); *Official Airline Guides, Inc. v. FTC*, 630 F.2d 920, 927 (2d Cir. 1980).

²⁷ Notably, the FTC must show that the company either engaged in deception with respect to its privacy or data security representations or practices or that the conduct was unfair. In addition, we do not have authority to obtain monetary relief for first-time violations. See Christine S. Wilson, Privacy and Public/Private Partnerships in a Pandemic, Remarks at Privacy + Security Academy (May 7, 2020), https://www.ftc.gov/system/files/documents/public_statements/1574938/wilson_remarks_at_privacy_security_academy_5-7-20.pdf.

acts, the FTC must respect the limits of its existing authority, including the statutory divide between consumer protection and competition.²⁸

When the agency exceeds its jurisdictional boundaries, it faces repercussions – as it should. I’ve touched on the lessons learned from the 1980s with respect to Section 5. But we have a recent and striking example in *AMG*, arising from the FTC’s use of 13(b) to obtain equitable monetary relief in federal court cases.²⁹ Some commentators have argued that the fuse for the *AMG* decision was lit when the agency expanded its use of 13(b) beyond the fraud program.³⁰ I have asked Congress to restore the FTC’s ability to use Section 13(b) to pursue wrongdoers in appropriate cases.³¹ Until Congress acts, the *AMG* decision will limit the kinds of cases the FTC can bring. Unfortunately, the Commission has already attempted to push the bounds of what the law permits to compensate for the limitations imposed by *AMG*. For example, in a recent Made in USA case, the Commission agreed to a settlement imposing monetary relief under Section 19 that, in our view, exceeded the statutory authority we possess to seek monetary damages.³²

Balancing these concerns, and countless others, is a difficult task. The Commission must exercise prosecutorial discretion, which can take many forms. It shows up in case selection – the FTC typically has chosen to litigate cases that have a strong probability of winning in court. Of

²⁸ Statement of Commissioner Christine S. Wilson Concurring in Part and Dissenting in Part Regarding the Report to Congress on Privacy and Security (Oct. 1, 2021),
https://www.ftc.gov/system/files/documents/public_statements/1597008/statement_of_commissioner_christine_s_wilson_concurring_in_part_and_dissenting_in_part REGARDING_the.pdf (“To the extent the Privacy Report announces this Commission’s intention to engage in sound, vigorous privacy and data security enforcement within our jurisdictional boundaries, I concur. That said, the FTC must respect both the mandates that Congress bestowed on the agency and the statutory divide between its competition and consumer protection authorities. The FTC’s antitrust and consumer protection authorities are based upon distinct statutory provisions enacted at different times and for different reasons. Cases may present both competition and privacy issues; some cases may involve competition among firms on the basis of privacy or data security policies to attract customers, which we might properly view as aspects of non-price competition. But as we pursue investigations, we must respect the differing grants of statutory authority that guide our mission.”) (internal citation omitted).

²⁹ *AMG Capital Management, LLC v. Federal Trade Commission*, 141 S. Ct. 1341, 1350-51 (2021).

³⁰ See Howard Beales, et al., Section 13(b) of the FTC Act at the Supreme Court: The Middle Ground, George Mason Law & Economics Research Paper No. 20-34 (Dec. 2020),
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=375078; Howard Beales and Timothy J. Muris, Striking the Proper Balance: Redress Under Section 13(B) of the FTC, Act, 79 Antitrust Law Journal 1-45 (2013).

³¹ Oral Statement of Commissioner Christine S. Wilson, FTC Before the U.S. Senate Committee on Commerce, Science and Transportation (April 20, 2021),
https://www.ftc.gov/system/files/documents/public_statements/1589180/opening_statement_final_for_postingrevd.pdf (“The bottom line is that the legitimate concerns of stakeholders can be addressed while also restoring the ability of the FTC to use Section 13(b) to pursue wrongdoers. The FTC would be pleased to provide technical assistance with draft language.”).

³² See Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson, In the Matter of Resident Home LLC (Oct. 7, 2021),
https://www.ftc.gov/system/files/documents/public_statements/1597270/resident_home_dissenting_statement_wilson_and_phillips_final_0.pdf.

course, assessing litigation risk requires an acknowledgement of governing precedent.³³ In a similar vein, the agency may choose to conserve resources and time by quickly moving mergers with easily-identified harms in well-understood industries onto a consent path. This approach protects competition and frees staff resources for even more investigations. Every choice to commit resources to one project means that another worthy project must get set aside, at least for now. Make no mistake – prosecutorial discretion requires hard choices. If I were in the driver’s seat, I would choose to focus resources on conduct that clearly violates the law.

So far, we have discussed resource constraints, jurisdictional boundaries, and the need for prosecutorial discretion. But there is a fourth brutal fact that must be considered. Agency leadership does not have the luxury of focusing only on substance. As I mentioned earlier, I learned this lesson as Chief of Staff for Chairman Muris. In addition to implementing Tim’s positive agenda, I had an array of less pleasant but equally demanding jobs. We were constructing a new building on New Jersey Avenue when 9/11 hit. In the aftermath, we had to harden the building and redesign the entry to accommodate improved security features. And after a wave of anthrax attacks at government buildings, our filtration systems needed to be upgraded.

Today, agency management is navigating a pandemic that has turned our homes into offices and schools, with all of the attendant complexities. Our IT team has done a great job of ensuring that we can work and meet from afar, and our human resources team has crafted telework policies that have given our employees flexibility and peace of mind. These initiatives take time, but we must be sure our staff is well-positioned to continue the work of the agency. And always, in the background, the trains must be made to run on time — cases, testimony, competition advocacy, amicus briefs, and other policy initiatives must be moved forward on a timely basis.

2. Criticizing the FTC is Easy

Given the brutal facts I just outlined, you may have experienced a wave of sympathy for those tasked with running the agency. But the magnitude of the job has not prevented progressives, politicians in Congress, and even my current and former colleagues on the Commission from accusing the agency and its staff of being lax, feckless, and complacent. Given the mounting vitriol about the status quo, one would expect to see a very different agency track record under new leadership. And the last year has, indeed, produced some provocative news coverage. You witnessed the withdrawal of the newly minted Vertical Merger Guidelines by the FTC – but not the DOJ.³⁴ You saw the abrupt rescission of the Section 5 policy statement.³⁵

³³ Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson Regarding the Request for Information on Merger Enforcement (Jan. 18, 2022), https://www.ftc.gov/system/files/documents/public_statements/1599775/phillips_wilson_rfi_statement_final_1-18-22.pdf (“[W]e observe that much of the legal authority cited in the RFI is nearly or more than half a century old. Courts have decided quite a few antitrust cases in the intervening years, merger and non-merger alike, which further elucidate the Sherman, Clayton, and FTC Acts.”) (citations omitted).

³⁴ Carl Shapiro & Herbert Hovenkamp, *How Will the FTC Evaluate Vertical Mergers?*, PROMARKET (Sept. 23, 2021), <https://promarket.org/2021/09/23/ftc-vertical-mergers-antitrust-shapiro-hovenkamp/>.

³⁵ Dissenting Statement of Commissioner Christine S. Wilson Open Commission Meeting on July 1, 2021, https://www.ftc.gov/system/files/documents/public_statements/1591554/p210100wilsoncommnmeetingdissent.pdf (“The Policy Statement provides that (1) the Commission will be guided by the public policy of promoting

(Even I had only one week of notice.)³⁶ And the withdrawal of the 1995 Prior Approval statement, accomplished with a “zombie vote,” certainly attracted a great deal of attention.³⁷

But what have we witnessed in terms of concrete enforcement actions? In fact, many enforcement actions undertaken by the agency in the last year mirror approaches that previously drew heavy criticism from those now in charge. There is no doubt that, under Chairman Simons, these same types of actions would have drawn fierce opposition from my Democrat colleagues. But with President Biden’s appointees at the helm, these actions were subject to unanimous votes.

One notable set of examples concerns pharmaceutical mergers. Commissioners Chopra and Slaughter criticized both the agency and staff for settlements in this industry. For example, in Bristol-Myers Squibb Company’s \$74 billion acquisition of Celgene, the parties agreed to divest Celgene’s Otezla – the most popular oral treatment in the United States for moderate-to-severe psoriasis.³⁸ The divestiture, valued at \$13.4 billion, was the largest that the FTC or DOJ had ever required in any merger enforcement matter.³⁹ But, at the time, my colleagues did not believe this settlement was enough. One colleague accused the FTC of not taking an “expansive approach to analyzing” pharmaceutical mergers, but instead using a limited analytical framework that “does not fully capture the competitive consequences” of pharmaceutical transactions.⁴⁰ My other dissenting colleague claimed that the FTC’s “approach to pharmaceutical mergers … has focused primarily on reaching settlements, rather than litigation or in-depth merger studies” and

consumer welfare, (2) conduct will be evaluated considering both likely harm to competition and procompetitive justifications, and (3) a standalone Section 5 case would be less likely when the competitive harm could be addressed by the Sherman and Clayton Acts. When these Enforcement Principles were issued, most people in the antitrust community concluded that the Policy Statement imposed very few limits on the use of Section 5. But today’s vote to rescind the 2015 Policy Statement appears to be an effort to remove even the modest constraint that the Commission will be guided by the public policy of promoting consumer welfare and that the full effects of conduct will be considered.”).

³⁶ *Id.* (“I only learned last Thursday of the Chair’s intention to hold this meeting. At the same time, I was informed of her intention to hold votes to rescind the Section 5 Policy Statement and to pass several Omnibus Resolutions that would remove from Commission oversight large swaths of Commission business.”).

³⁷ Dissenting Statement of Commissioners Christine S. Wilson and Noah Joshua Phillips Regarding the Statement of the Commission on Use of Prior Approval Provisions in Merger Orders (Oct. 29, 2021), https://www.ftc.gov/system/files/documents/public_statements/1598095/wilson_phillips_prior_approval_dissenting_statement_102921.pdf.

³⁸ Press Release, Fed. Trade Comm’n, FTC Requires Bristol-Myers Squibb Company and Celgene Corporation to Divest Psoriasis Drug Otezla as a Condition of Acquisition (Nov. 15, 2019), <https://www.ftc.gov/news-events/press-releases/2019/11/ftc-requires-bristol-myers-squibb-company-celgene-corporation>.

³⁹ *Id.*

⁴⁰ Dissenting Statement of Commissioner Rebecca Kelly Slaughter in the Matter of Bristol-Myers Squibb and Celgene, File No. 191-0061 (Nov. 15, 2019), https://www.ftc.gov/system/files/documents/public_statements/1554283/17_-_final_rks_bms-celgene_statement.pdf.

said he was “skeptical that the status quo approach will uncover the range of potential harms to American patients.”⁴¹

The criticism continued in other pharma mergers. The FTC’s settlement with AbbVie in its \$63 billion acquisition of Allergan required a divesture of Allergan’s assets related to exocrine pancreatic insufficiency (EPI) drugs Zenpep and Viokace.⁴² The settlement also required transfer to AstraZeneca of Allergan’s rights and assets related to brazikumab – an IL-23 inhibitor in development to treat moderate-to-severe Crohn’s disease and ulcerative colitis.⁴³ The terms of the settlement ended an agreement between Allergan and AstraZeneca by returning the rights and product to AstraZeneca under terms that incentivize AstraZeneca to bring the product to market.⁴⁴

But again, this resolution was not enough to escape criticism. In dissenting on this settlement, former Commissioner Chopra claimed the FTC made decisions based on “superficial evidence, rather than a close examination of the underlying dynamics in an industry.”⁴⁵ The criticism stated that staff’s approach of simply “focusing on whether pharmaceutical companies have any overlaps in their drug product lineup is narrow, flawed, and ineffective.”⁴⁶ Commissioner Chopra claimed this approach “fails to account for how … how larger portfolios can suppress new entry, and how companies use portfolios to increase bargaining leverage across the supply chain.” He asserted that the FTC’s enforcement approach contributes to a lack of innovation by allowing companies to “maintain[] patent monopolies over discovering new

⁴¹ Dissenting Statement of Commissioner Rohit Chopra In the Matter of Bristol-Myers Squibb/Celgene, File No. 1910061 (Nov. 15, 2019), https://www.ftc.gov/system/files/documents/public_statements/1554293/dissenting_statement_of_commissioner_chopra_in_the_matter_of_bristol-myers-celgene_1910061.pdf.

⁴² Press Release, Fed. Trade Comm’n, FTC Imposes Conditions on AbbVie Inc.’s Acquisition of Allergan plc (May 5, 2020), <https://www.ftc.gov/news-events/press-releases/2020/05/ftc-imposes-conditions-abbvie-incs-acquisition-allergan-plc>.

⁴³ *Id.*

⁴⁴ *Id.* (“Because ulcerative colitis and Crohn’s disease are both conditions that cause chronic inflammation of the digestive tract, a variety of drugs are approved by the U.S. Food and Drug Administration to treat either condition; however, their effectiveness is limited, the complaint states. A small group of companies sells or is developing a class of drugs known as IL-23 inhibitors, which treats both conditions. Johnson & Johnson sells Stelara, the only FDA-approved IL-23 inhibitor treatment for both conditions. Only three other companies—AbbVie, Allergan, and Eli Lilly and Company—have IL-23 inhibitors in late-stage development. Astra Zeneca was the initial developer of the brazikumab IL-23 inhibitor and had entered into a licensing agreement with Allergan for the product in 2016. The proposed consent ends this agreement and returns to the product to Astra Zeneca under terms that incentivize Astra Zeneca to bring the product to market.”).

⁴⁵ Dissenting Statement of Commissioner Rohit Chopra in the Matter of AbbVie, Inc. / Allergan plc at 19, File No. 1910169 (May 5, 2020), https://www.ftc.gov/system/files/documents/public_statements/1574583/191-0169_dissenting_statement_of_commissioner_rohit_chopra_in_the_matter_of_abbvie-allergan_redacted.pdf (“During my two years as a Commissioner, I have expressed concerns that the FTC makes many of its decisions based on superficial evidence, rather than a close examination of the underlying dynamics in an industry.”).

⁴⁶ *Id.* at 1.

medicine.”⁴⁷ The dissent insisted that the inspector general must step in to examine FTC investigations in the space.⁴⁸

As an aside, let me assure you that the approach of Mergers I staff to pharma mergers is anything but superficial. And it is demonstrably inaccurate to say that staff limits its analysis of these deals to product overlaps. Given my experience both as a Commissioner and as outside counsel for pharma deals while in private practice, I know for a fact that staff investigates a wide array of potential harms to competition when evaluating these deals.⁴⁹ But, nonetheless, there were promises made to change the status quo. The first step was the formation of an international task force on pharmaceutical mergers.⁵⁰ Antitrust is not supposed to be static,⁵¹ so I support steps that critically examine past enforcement with the goal of improving future decisions.⁵²

But what happened to the status quo when it came to pharma merger enforcement under the new administration? AstraZeneca’s \$39 billion acquisition of Alexion closed with no action by the FTC, as did Merck’s \$11.5 billion purchase of Acceleron.⁵³ And the Commission

⁴⁷ *Id.*

⁴⁸ *Id.* at 3 (“Commissioners and FTC officials have questioned whether this fully remedies competitive harms. However, the agency continues to defend its work, and, in my view, largely believes the status quo is working just fine. But, it isn’t. The FTC’s strategy of focusing on whether pharmaceutical companies have any overlaps in their drug product lineup is narrow, flawed, and ineffective.”); *id.* at 18 (“Request that the Inspector General conduct a programmatic review of our merger investigations in biomedical, consumer technology, and other innovation markets.”).

⁴⁹ See Statement of Commissioner Christine S. Wilson in the Matter of Bristol-Myers Squibb Company / Celgene Corporation, File No. 191-0061 (Nov. 15, 2019), https://www.ftc.gov/system/files/documents/public_statements/1554278/bms-celgene_-wilson_statement.pdf.

⁵⁰ Press Release, Fed. Trade Comm’n, FTC Announces Multilateral Working Group to Build a New Approach to Pharmaceutical Mergers (March 16, 2021), <https://www.ftc.gov/news-events/press-releases/2021/03/ftc-announces-multilateral-working-group-build-new-approach>.

⁵¹ See *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 461 (2015).

⁵² Remarks of Christine S. Wilson, Commissioner, Fed. Trade Comm’n, at the ABA Antitrust Law Section’s 2021 Fall Forum, The Neo-Brandeisian Revolution: Unforced Errors and the Diminution of the FTC (Nov. 9, 2021), <https://www.ftc.gov/public-statements/2021/11/neo-brandeisian-revolution-unforced-errors-diminution-ftc> (“And I am not opposing change. Antitrust is not meant to be static – as industries and economics evolve, so too does antitrust. I am a big fan of 6(b) studies and merger retrospectives to inform how we refine our approach. But policy shifts must be informed by robust dialogue and due regard for the past.”).

⁵³ Noah Higgins-Dunn, *AstraZeneca closes mega \$39B Alexion buyout despite antitrust fears, making a splash in rare diseases*, FIERCE PHARMA (July 21, 2021), <https://www.fiercepharma.com/pharma/astrazeneca-closes-mega-39b-alexion-buyout-despite-antitrust-fears-making-a-splash-rare>; Charley Grant, *Post Covid-19, Don’t Forget About Healthcare Stocks*, WALL ST. J. (April 19, 2021), https://www.wsj.com/articles/post-covid-19-dont-forget-about-healthcare-stocks-11618830180?mod=searchresults_pos1&page=1 (“U.S. regulators gave the green light to drugmaker AstraZeneca’s AZN 1.29% planned acquisition of Alexion Pharmaceuticals, which was earlier than investors had expected. Alexion shares shot higher in response.). See also CNBC, *Merck to buy Acceleron for about \$11.5 billion in rare-disease drugs push* (Sept. 30, 2021), <https://www.cnbc.com/2021/09/30/merck-to-buy-drugmaker-acceleron-for-about-11point5-billion.html> (“Merck is buying Acceleron Pharma for about \$11.5 billion, broadening its portfolio beyond aging cancer drug Keytruda with potential treatments that could bring in fresh revenue. The deal gives Merck access to Acceleron’s rare disease drug candidate, sotatercept, which the company expects to be a multi-billion dollar peak sales opportunity, and comes as Keytruda moves toward the loss of market

accepted a consent in ANI Pharmaceuticals, Inc.’s acquisition of Novitium Pharma LLC that required the divestiture of two products to address overlaps between the two merging parties.⁵⁴ Two aspects of this settlement are noteworthy. First, the fact of a settlement itself flies in the face of prior criticisms that we should litigate problematic pharma mergers, not settle them. And second, the ANI/Novitium settlement looks strikingly similar to every prior settlement in the pharma merger space. In other words, the review of pharma deals and the settlement of potentially problematic pharma deals look strikingly similar to the treatment of pharma deals under other administrations.

This trend is also evident in retail gas station mergers. In September, Commission leadership twice publicly criticized past merger enforcement efforts in this area.⁵⁵ Specifically, these statements criticized the FTC’s practice of “resolv[ing] anticompetitive deals by requiring merging companies to divest fuel stations in overlapping local markets.”⁵⁶ Moreover, these statements asserted that this approach “create[ed] conditions ripe for price coordination and other collusive practices.”⁵⁷ Consequently, new leadership asserted that “a new approach and a wider

exclusivity in 2028.”); Press Release, Merck, Merck Completes Acquisition of Acceleron Pharma Inc. (Nov. 22, 2021), <https://www.merck.com/news/merck-completes-acquisition-of-acceleron-pharma-inc/>.

⁵⁴ Press Release, Fed. Trade Comm’n, FTC Approves Final Order Requiring Generic Drug Marketers ANI Pharmaceuticals, Inc. and Novitium Pharma LLC to Divest Rights and Assets to Generic Sulfamethoxazole-Trimethoprim Oral Suspension and Generic Dexamethasone Tablets (Jan 12, 2022), <https://www.ftc.gov/news-events/press-releases/2022/01/ftc-approves-final-order-requiring-generic-drug-marketers-ani>.

⁵⁵ Lina M. Khan, Chair, Fed. Trade Comm’n, to Brian Deese, Director, National Economic Council (Aug. 25, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/08/Letter-to-Director-Deese-National-Economic-Council.pdf> (“I am concerned that the Commission’s approach to merger review in recent years has enabled significant consolidation, particularly when it comes to retail fuel outlets.”); Holly Vedova, Protecting Americans at the gas pump through aggressive antitrust enforcement, FED. TRADE COMM’N, COMPETITION MATTERS BLOG (Sept. 21, 2021 10:54AM), <https://www.ftc.gov/news-events/blogs/competition-matters/2021/09/protecting-americans-gas-pump-through-aggressive> (“[T]he Bureau of Competition plans to seek tougher relief to remedy illegal retail fuel station mergers. In its last nine merger cases involving retail fuel outlets, the Commission has ordered the divestiture of approximately 450 individual retail stations around the country to resolve concerns with illegal merger activity – seemingly tough relief. Yet we continue to see more and more illegal retail fuel station merger proposals. This suggests that the agency’s approach has not deterred firms from proposing anticompetitive transactions in the first place.”).

⁵⁶ Lina M. Khan, Chair, Fed. Trade Comm’n, to Brian Deese, Director, National Economic Council (Aug. 25, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/08/Letter-to-Director-Deese-National-Economic-Council.pdf>. See also Holly Vedova, Protecting Americans at the gas pump through aggressive antitrust enforcement, FED. TRADE COMM’N, COMPETITION MATTERS BLOG (Sept. 21, 2021 10:54AM), <https://www.ftc.gov/news-events/blogs/competition-matters/2021/09/protecting-americans-gas-pump-through-aggressive> (“Under existing law, the FTC has typically sought to resolve anticompetitive deals by requiring merging companies to divest fuel stations in overlapping local markets.”).

⁵⁷ Lina M. Khan, Chair, Fed. Trade Comm’n, to Brian Deese, Director, National Economic Council (Aug. 25, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/08/Letter-to-Director-Deese-National-Economic-Council.pdf>. See also Holly Vedova, Protecting Americans at the gas pump through aggressive antitrust enforcement, FED. TRADE COMM’N, COMPETITION MATTERS BLOG (Sept. 21, 2021 10:54AM), <https://www.ftc.gov/news-events/blogs/competition-matters/2021/09/protecting-americans-gas-pump-through-aggressive> (“Chair Khan is concerned that this policy may have increased consolidation more broadly, at the metro, regional, or national level, creating conditions ripe for price coordination and other collusive practices.”).

lens [are warranted] during our merger review.”⁵⁸ But when it came time to review an actual retail gas station merger, the Commission voted 4-0 to accept a settlement involving limited divestitures to address competitive concerns in narrow geographic markets.⁵⁹

The settlement involving Global Partners LP’s acquisition of Wheels looks remarkably similar to countless previous settlements of retail gas station mergers investigated by Mergers III. Leadership claims that the previously problematic approach to gas station mergers has been fixed by the utilization of prior approval provisions in consents.⁶⁰ I have made my concerns with the new prior approval policy known,⁶¹ but I have also been clear that prior approval can be appropriate in certain circumstances.⁶² In the case of retail gas station mergers, adding prior

⁵⁸ Holly Vedova, Protecting Americans at the gas pump through aggressive antitrust enforcement, FED. TRADE COMM’N, COMPETITION MATTERS BLOG (Sept. 21, 2021 10:54AM), <https://www.ftc.gov/news-events/blogs/competition-matters/2021/09/protecting-americans-gas-pump-through-aggressive>.

⁵⁹ See, e.g., Press Release, Fed. Trade Comm’n, FTC Order Protects Retail Fuel Customers Following Global Partners LP’s Acquisition of Wheels (Dec. 20, 2021), <https://www.ftc.gov/news-events/press-releases/2021/12/ftc-order-protects-retail-fuel-customers-following-global>.

⁶⁰ Lina M. Khan, Chair, Fed. Trade Comm’n, to Brian Deese, Director, National Economic Council (Aug. 25, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/08/Letter-to-Director-Deese-National-Economic-Council.pdf> (“In July, the Commission rescinded a 1995 policy that allowed companies to propose facially anticompetitive mergers with impunity. Accordingly, we will impose ‘prior approval’ requirements to deter those who propose illegal mergers, including in retail gas markets.”); Holly Vedova, Protecting Americans at the gas pump through aggressive antitrust enforcement, FED. TRADE COMM’N, COMPETITION MATTERS BLOG (Sept. 21, 2021 10:54AM), <https://www.ftc.gov/news-events/blogs/competition-matters/2021/09/protecting-americans-gas-pump-through-aggressive> (“One likely explanation for this state of affairs, at least in part, is the Commission’s recently rescinded 1995 policy on prior approval. Now that the policy is no longer in effect, the Bureau of Competition intends to require merging parties to obtain prior approval from the Commission for any future proposed merger in the overlapping product and geographic markets.”).

⁶¹ Dissenting Statement of Commissioners Christine S. Wilson and Noah Joshua Phillips Regarding the Statement of the Commission on Use of Prior Approval Provisions in Merger Orders (Oct. 29, 2021), https://www.ftc.gov/system/files/documents/public_statements/1598095/wilson_phillips_prior_approval_dissenting_statement_102921.pdf. See also Oral Remarks of Commissioner Christine S. Wilson Open Commission Meeting on July 21, 2021, https://www.ftc.gov/system/files/documents/public_statements/1592366/commissioner_christine_s_wilson_oral_remarks_at_open_comm_mtg_final.pdf (discussing rescission of 1995 policy).

⁶² Concurring Statement of Commissioner Christine S. Wilson in the Matter of DaVita Inc., and Total Renal Care, Inc., File No. 211-0013 (Oct. 25, 2021), https://www.ftc.gov/system/files/documents/public_statements/1597906/concurring_statement_of_commissioner_christine_s_wilson_in_the_matter_of_davita_inc_and_total_renal.pdf (“DaVita has engaged in a pattern of acquiring independent dialysis facilities; many of these acquisitions fall below HSR thresholds and consequently escape premerger review, including this proposed acquisition. There is some evidence that this pattern of sub-HSR acquisitions has led to higher prices and lower service levels in the dialysis field. It is for this reason that I have encouraged the Commission on previous occasions to study this industry. Against this backdrop, I believe a prior approval provision is appropriate here. Specifically, there is a credible risk that DaVita will attempt to acquire additional dialysis facilities in the same general area in which divestiture has been ordered. But to be clear, my vote in favor of this consent should not be construed as support for the liberal use of prior approval provisions foreshadowed by the Commission’s majority when it rescinded the 1995 Policy.”) (internal citations omitted).

approval provisions in the narrow geographic and product markets where the FTC found harm to competition is hardly a revolutionary change in merger enforcement.⁶³

Under Chairman Simons, the agency was also criticized for its selection of divestiture buyers. For example, the FTC’s settlement with AbbVie in its \$63 billion acquisition of Allergan (as discussed earlier) required a divestiture of Allergan’s assets related to exocrine pancreatic insufficiency (“EPI”) drugs Zenpep and Viokace.⁶⁴ After a lengthy vetting process to ensure competition would be preserved, Nestlé was approved as a divestiture buyer.⁶⁵ One of my colleagues criticized this choice on the premise that Nestlé’s core business is selling packaged consumer products like candy and cat litter.⁶⁶ This description ignored the fact that Nestlé operates a multi-billion dollar health company that focuses on nutrition products, “including medical nutrition products that physicians order or recommend for patients who have certain digestive health conditions,” “[m]any of [whom] use Zenpep,” one of the divested products.⁶⁷

In the Price Chopper merger with Tops, however, current FTC leadership allowed a divestiture of retail grocery stores to C&S Wholesale Grocers.⁶⁸ As its name implies, C&S

⁶³ Decision and Order § X, Global Partners and Richard Wiehl (File No. 2110050), https://www.ftc.gov/system/files/documents/cases/final_global_wiehl_order.pdf (“...Respondent Global shall not, without prior approval of the Commission, acquire directly or indirectly, through subsidiaries or otherwise, any leasehold, ownership interest, commission franchise interest, or any other interest, in whole or in part, in any Retail Fuel Business in any Prior Approval Location.”); *id.* at I.Z. (“‘Prior Approval Location’ means a Retail Fuel Business within a 2-mile driving distance from a Divestiture Location.”).

⁶⁴ Press Release, Fed. Trade Comm’n, FTC Imposes Conditions on AbbVie Inc.’s Acquisition of Allergan plc (May 5, 2020), <https://www.ftc.gov/news-events/press-releases/2020/05/ftc-imposes-conditions-abbvie-incs-acquisition-allergan-plc>.

⁶⁵ *Id.* (“Under the proposed consent agreement, AbbVie and Allergan are required to divest to Nestlé, S.A. Allergan’s assets related to EPI drugs Zenpep and Viokace. ... The Bureau of Competition conducted a lengthy vetting process to ensure the ability and incentive of the proposed divestiture buyers to preserve competition that would otherwise be lost under the proposed acquisition.”).

⁶⁶ Dissenting Statement of Commissioner Rohit Chopra, In the Matter of AbbVie, Inc. / Allergan plc, File No. 1910169 (May 5, 2020), https://www.ftc.gov/system/files/documents/public_statements/1574583/191-0169_dissenting_statement_of_commissioner_rohit_chopra_in_the_matter_of_abbvie-allergan_redacted.pdf (“The settlement requires Allergan to divest drugs used to treat patients with pancreatic cancer, cystic fibrosis, and other serious pancreatic disorders. The Commission is putting its full faith in Nestlé (SIX: NESN), the maker of KitKats and Tidy Cats, to take Allergan’s place in the market. The Commission is confident it can restore competition by divesting essential medicine to a company whose core business is selling packaged consumer products like candy and cat litter. Without a doubt, Nestlé is a large company with many capabilities – in food and beverages. Currently, the company does not offer a single prescription drug product. It strains the bounds of credibility that the Commission feels so certain that this company will be a formidable, committed competitor for a drug that patients with pancreatic cancer, cystic fibrosis, and other serious conditions depend on.”).

⁶⁷ Statement of Chairman Joseph J. Simons, Commissioner Noah Joshua Phillips, and Commissioner Christine S. Wilson Concerning the Proposed Acquisition of Allergan plc by AbbVie Inc. (May 5, 2020), https://www.ftc.gov/system/files/documents/public_statements/1574619/abbvie-allergan_majority_statement_5-5-20.pdf.

⁶⁸ Press Release, Fed. Trade Comm’n, FTC Requires Northeast Supermarkets Price Chopper and Tops Market Corp. to Sell 12 Stores as a Condition of Merger (Nov. 9, 2021), <https://www.ftc.gov/news-events/press-releases/2021/11/ftc-requires-northeast-supermarkets-price-chopper-to-sell-12-stores>.

Wholesale Grocers is primarily a wholesaler, not a retail grocer.⁶⁹ I voted to approve the consent; my point is not to criticize the prosecutorial discretion that we exercised in accepting the settlement. Neither am I criticizing the work of Mergers IV or Compliance – both are exceptional. My point is merely that a divestiture approach that drew a virulent dissent under Chairman Simons was implemented unanimously under Chair Khan.

Similar patterns are occurring on the consumer protection side of the house. For decades, under both Democrat and Republican majorities, the Commission has settled cases with orders that entail injunctive relief but not monetary relief. These settlements halt the deceptive or unfair conduct, impose liability on the company (and in some cases on individuals), constrain future behavior, and sometimes require fundamental changes in the way companies do business.⁷⁰

My Democrat colleagues under Chairman Simons excoriated the Commission for entering so-called “no money, no fault” orders that, they asserted, do little to deter unlawful conduct. For example, in the Commission’s Zoom case, the Commission reached a settlement that resolved allegations of deceptive security representations. Then-Commissioner Chopra argued that the settlement was “weak,” the injunctive relief constituted “paperwork requirements” with no real accountability, and the FTC was not a credible enforcement agency.⁷¹ Similar criticisms were levied against the Commission in several Made in USA cases, an action against makeup company Sunday Riley for fake reviews, and numerous other matters.⁷² But

⁶⁹ Press Release, C&S Wholesale Grocers, C&S Wholesale Grocers Enters into a Definitive Purchase Agreement for 12 Tops Markets Stores (Nov. 9, 2021), <https://www.cswg.com/news/cs-wholesale-grocers-enters-into-a-definitive-purchase-agreement-for-12-tops-markets-stores/> (“C&S Wholesale Grocers, Inc. is an industry leader in supply chain solutions and wholesale grocery supply in the United States.”).

⁷⁰ See Christine S. Wilson, Remarks at NAD, One Step Forward, Two Steps Back: Sound Policy on Consumer Protection, at 11-12 (Oct. 5, 2020), https://www.ftc.gov/system/files/documents/public_statements/1581434/wilson_remarks_at_nad_100520.pdf; see also Statement of Chairman Joseph J. Simons and Commissioners Noah Joshua Phillips and Christine S. Wilson, In re Sunday Riley, LLC (Nov. 6, 2020), https://www.ftc.gov/system/files/documents/cases/2020.11.6_sunday_riley_majority_statement_final.pdf (discussing the impact of non-monetary settlements).

⁷¹ Dissenting Statement of Commissioner Rohit Chopra Regarding Zoom Video Communications, Inc. (Feb. 1, 2021), https://www.ftc.gov/system/files/documents/public_statements/1586865/20210129_final_chopra_zoom_statement_0.pdf (asserting that the final order is “weak,” provides “no money” and that the injunctive relief constitutes “paperwork requirements” with no real accountability); Dissenting Statement of Commissioner Rohit Chopra Regarding Zoom Video Communications, Inc. (Nov. 9, 2020), https://www.ftc.gov/system/files/documents/public_statements/1582914/final_commissioner_chopra_dissenting_statement_on_zoom.pdf (stating that the proposed consent, a no-money settlement, does not provide meaningful accountability and that the FTC is not a credible enforcement agency).

⁷² See, e.g., Statement of Commissioner Rohit Chopra in the Matters of Nectar Sleep, Sandpiper/Pipergear USA and Patriot Puck (Sept. 12, 2018), https://www.ftc.gov/system/files/documents/public_statements/1407380/rchopra_musa_statement-sept_12.pdf (arguing that no-money, no fault settlements for deceptive Made in USA claims were inadequate); Statement of Commissioner Rohit Chopra in the Matter of Aromaflage (Sept. 27, 2018), https://www.ftc.gov/system/files/documents/public_statements/1413088/162_3234_c4655_-aromaflage_rc_statement_9-27-18.pdf (asserting that a settlement with no redress for consumers or disgorgement of profits is too lenient); Statement of Commissioner Rohit Chopra in the Matter of Social Finance, Inc. (Oct. 29, 2018),

quantifying harm, let alone being able to prove it in court, is challenging. For example, if review platforms preclude fake reviews from being posted, would those fake reviews cause harm? If a commodity product is falsely labeled “Made in USA” but is priced the same as other products in the market, how do we calculate harm?

In any event, I challenge the contention that settlements involving only injunctive relief have no deterrent effect. The conduct relief we can obtain through a non-monetary settlement often provides full and meaningful relief, together with both specific and general deterrence. We know that just because a settlement is non-monetary does not mean the respondent does not incur significant costs. Consent decrees can impose significant compliance costs on the parties – including staffing or procedural changes to ensure compliance; additional legal fees; substantiation expenses; costs to execute consumer notices; and expensive third-party audits in privacy and data security orders.⁷³ In addition to these compliance costs, non-monetary settlements impose reputational harm and other intangible costs.⁷⁴

Despite routinely drawing criticism under Chairman Simons, the Commission in 2021 entered into several orders that contain solely injunctive relief. For example, a recent case involved allegations that the defendants offered fake calling plans for unlimited minutes and falsely claimed to be affiliated with companies authorized to provide calling services to people who are incarcerated. Although the defendants raked in at least \$1 million with this scheme, the Commission unanimously approved a settlement containing only injunctive relief.⁷⁵ Another case against a mobile advertising company alleged that the respondents misled consumers

https://www.ftc.gov/system/files/documents/public_statements/1418711/162_3197_statement_of_commissioner_chopra_on_sofi_10-29-18.pdf (stating that a settlement requiring SoFi to pay “no money whatsoever” does not deter bad actors); Statement of Commissioner Rohit Chopra Joined by Commissioner Rebecca Kelly Slaughter in the Matter of Sunday Riley (Oct. 21, 2019), https://www.ftc.gov/system/files/documents/public_statements/1550127/192_3008_final_rc_statement_on_sunday_riley.pdf (asserting that the “no money, no fault” settlement is “unlikely to deter future wrongdoers” and “sends the wrong message to the marketplace”); Statement of Commissioner Rohit Chopra regarding Midwest Recovery Systems (Nov. 30, 2020), https://www.ftc.gov/system/files/documents/public_statements/1583802/chopra_statement_for_midwest_recovery_systems.pdf (arguing that even though the Commission obtained a monetary settlement it was insufficient to make consumers whole).

⁷³ See Christine S. Wilson, Remarks at NAD, One Step Forward, Two Steps Back: Sound Policy on Consumer Protection, at 11-12 (Oct. 5, 2020),

https://www.ftc.gov/system/files/documents/public_statements/1581434/wilson_remarks_at_nad_100520.pdf; see also Statement of Chairman Joseph J. Simons and Commissioners Noah Joshua Phillips and Christine S. Wilson, In re Sunday Riley, LLC (Nov. 6, 2020),

https://www.ftc.gov/system/files/documents/cases/2020.11.6_sunday_riley_majority_statement_final.pdf (discussing the impact of non-monetary settlements).

⁷⁴ Wilson, Remarks at NAD, *supra* n. 73; Statement of Simons, Phillips and Wilson, In re Sunday Riley, *supra* n. 73.

⁷⁵ See FTC v. Disruption Theory, LLC, No. 3:20-cv-06919-VC (N.D. Ca. Oct. 14, 2021), https://www.ftc.gov/system/files/documents/cases/complaint_-inmate_call.pdf (complaint); https://www.ftc.gov/system/files/documents/cases/dkt_108_stipulated_settlement_and_final_order.pdf; (stipulated settlement). This settlement includes strong injunctive relief that prohibits the company from making misrepresentations, requires notice to consumers, and includes compliance and monitoring provisions.

regarding in-game rewards; those charges were resolved with an administrative consent that also does not include any monetary relief.⁷⁶

I understand that, in part, current leadership likely is agreeing to these settlements in the wake of the *AMG* ruling.⁷⁷ But I submit to you that this pivot is broader. The Commission retains the ability to obtain monetary relief under Section 19 of our statute.⁷⁸ The process is lengthy and convoluted, but it is a viable avenue for monetary relief.⁷⁹ In the last year, though, the Commission has chosen to accept settlements rather than litigate administratively and then seek monetary relief in federal court, the process required to obtain monetary relief under Section 19. I cannot reveal whether the Commission considered pursuing the Section 19 route in these matters. I can say, however, that my support for these settlements was rooted in an appreciation of the value of injunctive relief. If current leadership believed that injunctive relief was “mere paperwork” and that entering into these agreements failed to have a deterrent effect, it likely would have taken a different approach.⁸⁰ I hope that the approval of these settlements represents a recognition that injunctive relief is meaningful and provides a good result for consumers.

Another apparent evolution in perspective involves individual liability. During Chairman Simons’ tenure, my Democrat colleagues argued that the failure to name corporate CEOs in Commission orders led to insufficient accountability.⁸¹ This week, however, the FTC entered

⁷⁶ See *In the Matter of Tapjoy*, C-4740 (Mar. 10, 2021) https://www.ftc.gov/system/files/documents/cases/tapjoy_order_final_signed.pdf (final administrative order against mobile advertising company).

⁷⁷ *AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021) (finding that Section 13(b) of the FTC Act does not authorize the Commission to seek equitable monetary relief in district court).

⁷⁸ Section 19 permits the Commission to secure certain monetary relief, including, *inter alia*, “the refund of money” and “the payment of damages” 15 U.S.C. 57b(b); *see also* *FTC v. Figgie Int’l, Inc.*, 994 F.2d 595 (9th Cir. 1993) (awarding consumer redress under Section 19).

⁷⁹ For example, the Commission recently filed an administrative complaint in a matter that initially was filed in federal court seeking injunctive and monetary relief. *See In the Matter of FleetCor Technologies*, D-9403 (Aug. 11, 2021) <https://www.ftc.gov/enforcement/cases-proceedings/182-3000/fleetcor-technologies-matter> (administrative complaint); FTC Press Release, <https://www.ftc.gov/news-events/press-releases/2019/12/ftc-alleges-fuel-card-marketer-fleetcor-charged-hundreds-millions>.

⁸⁰ It was particularly unfortunate when injunctive relief was likened to “mere paperwork” even in matters including significant monetary relief, such as the Facebook settlement that included a \$5 billion civil penalty, a requirement to establish both a comprehensive privacy and data security program, the creation of an independent board committee, heightened security for products targeting minors, among other stringent requirements. *See Dissenting Statement of Commissioner Rohit Chopra in re Facebook, Inc.* (July 24, 2019), https://www.ftc.gov/system/files/documents/public_statements/1536911/chopra_dissenting_statement_on_facebook_7-24-19.pdf (criticizing the settlement’s injunctive provisions that require a comprehensive privacy and data security program and the creation of an independent board committee as “paperwork requirements” that do not provide meaningful accountability).

⁸¹ *See Dissenting Statement of Commissioner Rebecca Kelly Slaughter Regarding FTC v. Progressive Leasing* (April 20, 2020), https://www.ftc.gov/system/files/documents/public_statements/1571915/182_3127_prog_leasing_dissenting_statement_of_commissioner_rebecca_kelly_slaughter_0.pdf (stating that the settlement falls short because it does not name the individual and does not make consumers whole); *Dissenting Statement of Commissioner Rebecca Kelly Slaughter In the Matter of Facebook* (July 24, 2019), https://www.ftc.gov/system/files/documents/public_statements/1536918/182_3109_slaughter_statement_on_facebook_7-24-19.pdf; (*asserting that not naming Mr. Zuckerberg did not ensure the accountability needed for compliance*); *Dissenting Statement of Commissioner Rohit Chopra in re Facebook, Inc.* (July 24, 2019),

into a consent with a fashion company to settle allegations that the company prevented legitimate negative reviews from being posted. Notably, the Commission’s settlement does not name the CEO or other senior executives.⁸² Again, I cannot say whether the Commission considered naming individuals in this matter.

One could accuse the progressives of hypocrisy. But here is what I think. The FTC’s leadership in the last year has come face to face with limited resources, jurisdictional boundaries, judicial precedent, and the attendant litigation risk. I believe that FTC leadership is coming to appreciate the need for prosecutorial discretion and careful case selection. They may not admit it, but in deed, if not in word, new leadership is recognizing the benefits of the Commission’s tried and true enforcement approaches. I find this turn of events heartening, but then again, I am an eternal optimist.

3. Running the FTC is Difficult: Exhibit A

Listening to the critiques of the last forty years,⁸³ one might expect a doubling or even a tripling of cases with the progressives at the helm. In fact, though, enforcement numbers for both of the FTC’s missions have declined in the last year.

Let’s begin with mergers. In the final calendar year under President Trump, merger enforcement at the FTC was at a two-decade high. In 2020, the FTC sought to block or undo nine mergers in a broad variety of markets.⁸⁴ In addition, the FTC settled 12 merger enforcement actions to resolve competitive concerns; another ten mergers were abandoned after the FTC opened investigations.⁸⁵ All in all, there were 31 actions against mergers in 2020.

Let’s compare the 2020 numbers to the 2021 numbers. Under President Biden, only three suits were brought to challenge mergers, compared to nine in 2020.⁸⁶ The FTC entered into five

https://www.ftc.gov/system/files/documents/public_statements/1536911/chopra_dissenting_statement_on_facebook_7-24-19.pdf (arguing, among other criticisms, that the failure to name Mr. Zuckerberg and other executives “lets them off the hook” completely).

⁸² FTC Press Release, Fashion Nova will Pay \$4.2 Million as part of Settlement of FTC Allegations it Blocked Negative Reviews of Products (Jan. 25, 2022), <https://www.ftc.gov/news-events/press-releases/2022/01/fashion-nova-will-pay-42-million-part-settlement-ftc-allegations>.

⁸³ See e.g., Cat Zakrzewski, *Lina Khan’s nomination hearing signals a new era of tough antitrust enforcement for the tech industry*, WASH. POST (April 21, 2021), <https://www.washingtonpost.com/technology/2021/04/21/lin-a-khan-ftc-nomination-hearing/> (“Khan told senators that in the past few years, new evidence has come to light showing there were ‘missed opportunities’ for enforcement actions under the last Democratic administration.”).

⁸⁴ Ian Conner, 2020: Remote work with real results, FED. TRADE COMM’N, COMPETITION MATTERS BLOG (Jan. 5, 2020 9:42AM), <https://www.ftc.gov/news-events/blogs/competition-matters/2021/01/2020-remote-work-real-results> (“From our first merger challenge on January 3 to our most recent one on December 8, the Commission authorized the Bureau to seek to block or undo an unprecedented nine mergers.”).

⁸⁵ *Id.* (“On top of these nine litigation matters, we settled even more – twelve – and another ten mergers were abandoned after we started our investigation. All in all, a banner year for merger enforcement.”).

⁸⁶ HeidelbergCement AG, et al., File No. 201-0006, <https://www.ftc.gov/enforcement/cases-proceedings/2010006/heidelbergcement-ag-et-al-matter> (abandoned after complaint); Illumina, Inc., and GRAIL, Inc., File No. 201-0144 <https://www.ftc.gov/enforcement/cases-proceedings/201-0144/illumina-inc-grail-inc-matter>

consents to remedy anticompetitive transactions, down from 12 in 2020.⁸⁷ And four transactions were abandoned in 2021 after the FTC opened investigations, compared to 10 in 2020.⁸⁸ Bottom line: the FTC had 12 merger actions in 2021, compared to 31 in 2020. And this decline in enforcement numbers is not attributable to obstructionist Republicans – neither Commissioner Phillips nor I issued a single dissent in a merger enforcement action in 2021.

FTC Merger Challenges	2020	2021
Suits	9	3
Consents	12	5
Abandoned	10	4
Total	31	12

This decline in Section 7 enforcement occurred despite HSR filed transactions more than doubling – from 1,965 transactions in 2020 to 4,130 transactions in 2021, according to preliminary numbers.⁸⁹ But perhaps the numbers I provided are incomplete – maybe we should count the number of mergers that have received pre-consummation warning letters? For those of

(complaint filed); Nvidia/Arm, File No. 211-0015, <https://www.ftc.gov/enforcement/cases-proceedings/2110015/nvidiaarm-matter> (complaint filed).

⁸⁷ Casey's General Stores, File No. 221-0028, <https://www.ftc.gov/enforcement/cases-proceedings/221-0028/caseys-general-stores-matter>; Seven & i Holdings Co., Ltd., File No. 201-0108, <https://www.ftc.gov/enforcement/cases-proceedings/201-0108/seven-i-holdings-co-ltd-matter>; ANI/Novitium, File No. 211-0101, <https://www.ftc.gov/enforcement/cases-proceedings/211-0101/animovitium-matter>; DaVita Inc. and Total Renal Care, Inc., File No. 211-0013, <https://www.ftc.gov/enforcement/cases-proceedings/2110013/davita-inc-total-renal-care-inc-matter>; Global Partners and Richard Wiehl, File No. 211-0050, <https://www.ftc.gov/enforcement/cases-proceedings/2110050/global-partners-richard-wiehl-matter>.

⁸⁸ Press Release, Fed. Trade Comm'n, Statement Regarding Berkshire Hathaway Energy's Termination of Acquisition of Dominion Energy, Inc.'s Questar Pipeline in Central Utah (July 13, 2021), <https://www.ftc.gov/news-events/press-releases/2021/07/statement-regarding-berkshire-hathaway-energy-s-termination>; Press Release, Fed. Trade Comm'n, Expected Federal Trade Commission Opposition to Transaction Leads Great Outdoors Group, LLC and Rival Sportsman's Warehouse Holdings, Inc. to Abandon Plans for Proposed Merger (Dec. 3, 2021), <https://www.ftc.gov/news-events/press-releases/2021/12/expected-federal-trade-commission-opposition-transaction-leads>; Press Release, Fed. Trade Comm'n, Following Federal Trade Commission Staff Recommendation to Challenge Transaction, Two Health Care Systems in Central Georgia Abandon Proposed Merger (March 3, 2021), <https://www.ftc.gov/news-events/press-releases/2021/03/following-federal-trade-commission-staff-recommendation-challenge>; Press Release, Fed. Trade Comm'n, Following Federal Trade Commission Staff Recommendation to Challenge Transaction, Tronox Holding plc. Abandons Proposed Acquisition of TiZir Titanium and Iron (Jan. 29, 2021), <https://www.ftc.gov/news-events/press-releases/2021/01/following-federal-trade-commission-staff-recommendation-challenge>.

⁸⁹ According to preliminary numbers for 2021, transactions that were filed through the HSR process more than doubled in 2021 to 4130 transactions from only 1965 transactions in 2020. See Premerger Notification Program, Fed. Trade Comm'n, <https://www.ftc.gov/enforcement/premerger-notification-program> (HSR transactions by month for October 2020 to December 2020); U.S. DEP'T OF JUST. & FED. TRADE COMM'N, HART-SCOTT-RODINO ANNUAL REPORT: FISCAL YEAR 2020 at app. B, tbl. 1 (2020), https://www.ftc.gov/system/files/documents/reports/hart-scott-rodino-annual-report-fiscal-year-2020/fy2020_-hsr_annual_report_-final.pdf (HSR transactions by month for January 2020 to September 2020).

you unfamiliar with this practice, the agency has begun allowing statutory merger review periods to lapse while simultaneously sending letters to merger parties warning them that they close at their own peril. In other words, transactions that remain at least nominally under investigation are being permitted to close.⁹⁰ If transactions close, but remain under investigation, the expectation is that at least some of these transactions will be challenged post-consummation. And the FTC does in fact have the power to review and challenge consummated deals.⁹¹ But this strategy would have the FTC undertake resource-intensive litigation to unwind consummated deals, a process that enforcers found to be “a costly exercise in futility” and the very reason Hart-Scott-Rodino was enacted in the first place.⁹²

I have noted before that I suspect policy changes are a larger driver of why the FTC is admittedly unable to review and, if needed, challenge mergers within statutory timeframes.⁹³ We know that the Bureau of Competition, under current leadership, has expanded the scope of

⁹⁰ See Holly Vedova, Adjusting merger review to deal with the surge in merger filings, FED. TRADE COMM’N, COMPETITION MATTERS BLOG (Aug. 3, 2021 12:28PM), <https://www.ftc.gov/news-events/blogs/competition-matters/2021/08/adjusting-merger-review-deal-surge-merger-filings> (“We believe it is important to be upfront about these capacity constraints. For deals that we cannot fully investigate within the requisite timelines, we have begun to send standard form letters alerting companies that the FTC’s investigation remains open and reminding companies that the agency may subsequently determine that the deal was unlawful. Companies that choose to proceed with transactions that have not been fully investigated are doing so at their own risk.”).

⁹¹ Opinion of the Commission, Evanston Northwestern Healthcare Corporation, Docket No. 9315 (Aug. 6, 2007), <https://www.ftc.gov/sites/default/files/documents/cases/2008/04/080428commopiniononremedy.pdf>; Chicago Bridge & Iron Co. v. FTC, 515 F.3d 447 (5th Cir. 2008).

⁹² Kelly Signs, Milestones in FTC history: HSR Act launches effective premerger review, FED. TRADE COMMISSION, COMPETITION MATTERS BLOG (March 16, 2015 *:00AM), <https://www.ftc.gov/news-events/blogs/competition-matters/2015/03/milestones-ftc-history-hsr-act-launches-effective> (“In the words of Congressman Rodino, the wisdom of premerger notification was a lesson learned the hard way: ‘The problem this bill cures is startlingly simple, but it goes to the very foundations of our merger law. Under present law, companies need not give advance notification of a planned merger to the Federal Trade Commission and the Department of Justice. But if the merger is later judged to be anticompetitive, and divestiture is ordered, that remedy is usually a costly exercise in futility—untangling the merged assets and management of the two firms is like trying to unscramble an omelet.’”) (citing 122 Cong. Rec. 25051 (1976)). See also Statement of Commissioner Christine S. Wilson Regarding the Announcement of Pre-Consummation Warning Letters (August 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1593969/pre-consummation_warning_letters_statement_v11.pdf (“Under the HSR Act, the FTC and the Antitrust Division of the Department of Justice receive premerger notifications for deals that meet certain criteria. The agencies are afforded time and empowered with investigative tools to determine whether notified transactions may harm competition.”); *id.* (“Before the HSR Act was passed in 1976, parties to a transaction could merge at will, but bore the burden of uncertainty: would the government subsequently conclude the deal was anticompetitive and seek to unwind it? From the merging parties’ perspective, the time and resources required to negotiate and implement the merger, and to integrate the two entities, would have been for naught. The pre-HSR landscape was sub-optimal for enforcers, too. With no advance notice of transactions, enforcers had to undertake lengthy and resource-intensive litigation to unwind anticompetitive deals after they were consummated.”).

⁹³ Statement of Commissioner Christine S. Wilson Regarding the Announcement of Pre-Consummation Warning Letters (Aug. 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1593969/pre-consummation_warning_letters_statement_v11.pdf (“Merger filings have increased, and dedicated FTC staff are working hard to assess the deals notified in those filings. But one plausibly could wonder if the FTC is struggling to review transactions in a timely manner not only because of filing volume, but also because something else is afoot”).

merger review to include factors not relevant in mainstream antitrust analysis.⁹⁴ Although litigated challenges premised on some of these factors would be doomed to failure, the agency’s leadership has been clear that government overreach is not a concern.⁹⁵ So to be clear: as merger filings have increased, current leadership has expanded investigations to include issues that would not support litigated challenges. One could understand this approach if we were living in a world of infinite resources – but that is decidedly *not* the world in which the FTC lives. The end result is to stretch staff even more thinly. (Perhaps new leadership has not yet fully embraced the brutal facts after all.)

On the consumer protection side, enforcement numbers have also declined. In 2021, one study found that the Commission filed 31 complaints (including settlements) and new contempt actions. In comparison, 79 cases were filed in 2020.⁹⁶ Let me assure you that staff’s productivity did not decline by more than 50 percent in 2021. To be fair, it is not uncommon for outgoing administrations to push matters out the door before leaving. Moreover, the FTC had not one, but two, leadership transitions in 2021 – first to Acting Chairwoman Slaughter and then to Chair Khan. Understandably, each new chair requires time to adjust to the position and communicate priorities to staff. Thus, some percentage of the decline in enforcement actions may be attributable to these issues. But to fall from 79 to 31 cases year over year is striking.

* * *

Criticizing the work of others is easy, but governing is hard. I believe this is a lesson that the agency’s current leadership is coming to understand. As Jim Collins taught, the path from good to great requires acknowledging and embracing the brutal facts of reality. At the FTC, these brutal facts include limited resources, limited statutory authority, and limited bandwidth. Hard choices must be made. These hard choices are showing up in the cases that are brought – FTC actions in 2021 look remarkably similar to those that were subject to vitriol in prior years. But

⁹⁴ See Holly Vedova, *Making the Second Request Process Both More Streamlined and More Rigorous During this Unprecedented Merger Wave*, FED. TRADE COMM’N, COMPETITION MATTERS BLOG (Sept. 28, 2021 8:08AM), <https://www.ftc.gov/news-events/blogs/competition-matters/2021/09/making-second-request-process-both-more-streamlined> (“Cognizant of how an unduly narrow approach to merger review may have created blind spots and enabled unlawful consolidation, we are examining a set of factors that may help us determine whether a proposed transaction would violate the antitrust laws. Providing heightened scrutiny to a broader range of relevant market realities is core to fulfilling our statutory obligations under the law. To better identify and challenge the deals that will illegally harm competition, our second requests may factor in additional facets of market competition that may be impacted.”).

⁹⁵ Nancy Scola, *Lina Khan Isn’t Worried About Going Too Far*, INTELLIGENCER (Oct. 25, 2021), <https://nymag.com/intelligencer/article/linna-khan-ftc-profile.html> (“Khan worries about the ‘existential stakes of underreaching.’ Going too far? Doing too much? ‘When identifying the top ten threats to this agency, that’s not on the list.’”).

⁹⁶ See Daniel Kaufman, Blog Post: Tallying Complaints: Don’t Count Your FTC Chickens Before They Hatch (Dec. 1, 2021), <https://www.adtorneyslawblog.com/ftc/tallying-complaints-dont-count-your-ftc-chickens-before-they-hatch/>. The analysis described in this blog counted all consumer protection complaints (and new contempt actions) issued regardless of whether the case went into litigation or was settled. It did not count amended complaints, and it did not count settlements of complaints that were filed before 2020. If a federal or administrative consumer protection complaint was issued for the first time in 2020 or 2021, the study counted it. This blog was posted in the beginning of December but the author updated the numbers at the close of the year to add one additional case.

the cases that *were* brought are not the only source of surprise. Following years of accusations regarding the FTC’s enforcement levels, cases brought under new leadership in each mission declined by more than half.

So what can we expect in 2022? Even with their new appreciation of the brutal facts, I doubt that those who have harshly (and wrongly) criticized the agency and its dedicated personnel will apologize. But here is what I hope: a year spent confronting the brutal facts and working with our talented FTC staff will bring a change in tone and a new appreciation for the work of the agency I frequently characterize as “small but mighty.”