



## FTC Merger Guidelines Listening Forum – June 21, 2022

Lina Khan:

Hello, everybody. Welcome to the Federal Trade Commission's listening session on the effects of mergers and acquisitions. My name is Lina Khan. I'm Chair of the FTC, and I'm joined today by my fellow commissioners. Together with the Department of Justice, the FTC is currently reviewing our merger guidelines, which set out the antitrust agency's approach to reviewing mergers. These guidelines were first issued in the 1960s, and they have been updated periodically over the years, most recently in 2010. Ensuring that the guidelines keep pace with new market realities is critical for ensuring that this enforcement manual is equipping us to identify unlawful mergers and acquisitions and gathering public input, as part of this review process has been critical. So in January, we launched a public docket seeking written comments, and we have received thousands of comments since then. Over the past few months, the commission has also hosted a series of listening sessions in tandem with the DOJ.

Lina Khan:

What we've heard from market participants across the country, including consumers, business owners, workers, investors, and entrepreneurs who have shared their experience around the effects of mergers and acquisitions, hearing directly from these market participants with their deep expertise has been critical. Today, we are continuing that process with the full commission. In today's session, members of the commission have identified speakers who've been invited to discuss their views, and once these participants have shared their views, we will hear from members of the public and open it up.

Lina Khan:

So thanks to everybody for participating, really looking forward to hearing from everybody. And with that, I will turn it over to my colleagues for their opening remarks beginning with Commissioner Phillips.

Noah Phillips:

Thank you, Chair Khan and my apologies to the public for the bad lighting, I'm grateful to the staff in our office of policy planning for organizing today's listening session as the commission and the Department of Justice Antitrust Division undertake revisions of the merger guidelines. Today's session is the last in a series with Chair Khan and assistant attorney general Kanter leading the earlier sessions. Neither the public nor I know how the presenters at those sessions were selected. Although they uniformly express negative views of M&A. Many of the remarks had nothing at all to do with M&A or the competition are antitrust laws exist to protect. If we want to give the public a greater voice in the merger guidelines,

vision process, curating speakers to support a particular outcome is the wrong approach. Historically, workshops and other FTC processes concerning merger guidelines, as well as other things, included input from all commissioners. This is the first in the new series of merger listening sessions to do so. That is regrettable, but it is something.

Noah Phillips:

Our nation is emerging from one crisis, the COVID-19 pandemic, and is well into another. As we face historic inflation, Americans are struggling to fill up their gas tanks and feed their families. We want to encourage companies, big and small, to enter and grow, to meet consumer demand during this time. We want them to be more efficient, so that they can drive down costs and pass the savings on to consumers. Competition enhancing mergers and acquisitions is one way. They do that M&A benefits consumers by spurring innovation, improving quality and lowering prices. Smaller firms can join forces to compete more effectively and efficiently against large arrivals. Combining can put financially struggling firms on firmer footing and lower their cost of capital. That's the amount of money they need to spend in order to grow.

Noah Phillips:

Traditional retail grocers, for example, have seen reduced investment store closures and bankruptcy as they face competition from the Amazons and Walmarts of the world. Combining, merging can help them compete. Much of the rhetorics surrounding this merger guidelines process appears to take the position that we should ignore these benefit. Some don't believe that merger policy should care about efficiency and they want a different legal regime, which does not put the consumer first. But one thing that discouraging efficiency and failing to put consumers first will mean is higher prices. That may be fine for wealthy lawyers, politicians, and editorialists and bloggers in places like Washington, D.C., but Americans across the country are witnessing every day, the horror of high prices. Our policy should recognize that. It should also recognize the importance of M&A in encouraging startups, one of the historic strengths of our economy. Startups and smaller companies need to attract capital, achieve scale, and bring products to consumers. Many biotech companies would never be able to bring their life saving technologies to patients without the R&D resources, marketing capability and scale that can come from being acquired. And the ability to sell a company, encourages people to innovate and start them and venture capitalists to fund them in tech, in biotech, consumer products, and elsewhere. We want to make it more, not less attractive, to start new businesses and to innovate.

Noah Phillips:

As I have said before, I remain open to exploring well-supported, administrable changes to the 2010 guidelines. Those guidelines owe their success to the fact that they are coherent, reflective of agency experience and practice, grounded and well established economics, and consistent with the current state of the law. Any revisions must also meet those criteria if they urge garner bipartisan support, and endure. I look forward to hearing from today's speakers and hope that, as in prior guidelines processes, the public has given ample time to consider proposed changes. With that, thank you, and I will turn it over to Commissioner Slaughter for her remarks.

Rebecca Slaughter:

Thank you, commissioner Phillips. And I want to thank the Chair for setting up this session, as well as the prior listening sessions, the commission and DOJ have had. I heard Commissioner Phillips' concerns about how the previous panels were assembled, but I would like to reflect that I think that the Chair and

the AAG did a great job pulling in voices that aren't traditionally heard, and aren't always represented by expensive and experienced Washington lobbyists and lawyers in prior sessions and making sure that we're really understanding the effect of our work on real people throughout the country. And then also when I understand, she heard concerns from my Republican colleagues that they wanted to see different voices represented in listening sessions. She set this one up to make that happen and I think that is great and I'm glad we're having this conversation today.

Rebecca Slaughter:

Listening to Commissioner Phillips, I was reflecting on the fact that one of my favorite things about the FTC is the opportunity to work with smart, thoughtful colleagues with whom I share some opinions, and with whom I disagree in some material respects. A lot of what Commissioner Phillips said are things that I agree with. I care a lot about making sure that we have markets in which new businesses can enter and innovate and grow. I care a lot about making sure that people have access to affordable, accessible food and drugs and all the products they need to interact with in the world. And I think that means it is important that as we consider M&A, we think not just about short term consequences, but long horizon in our economy. Because I think one of the lessons that we've learned in the last couple years is that increased consolidation and very concentrated markets can lead to supply chain shock and fragility that can perhaps create efficiencies and lower prices in the short term, but longer term, real harm, real scarcity and extreme price gouging throughout our economy. And that's something that we have to be really concerned about.

Rebecca Slaughter:

So I think making sure that our guidelines reflect, I agree with Commissioner Phillips, they should reflect market realities. They should reflect our real world experience. They should reflect input from market participants. They should be clear. They should be administrable. I think all of that is absolutely correct. And I think it is important in order to do that and make them grounded in market realities. We need to think not only about short term, but also long term costs and benefits of different transactions and different market structures that we're considering. So that's not an easy task. None of these issues are simple. They require thought and nuance and care and rigor and having input from invited speakers as well as the public is a really important way for us to build that experience and make sure that we are honing rules that really... Or honing guidelines that really reflect the rules that we enforce, the laws that we enforce and provide clarity and certainty to markets in order to make sure that we are operating in as competitive and environment as possible. So with that, I will turn it over to my colleague, Commissioner Wilson, and with thanks to all of our speakers today.

Christine Smith Wilson:

Thank you, Commissioner Slaughter. At the outset, I would like to thank the FTC's office of policy planning and the technical team for organizing today's listening forum, as well as the four earlier sessions. Laying the groundwork for these events requires substantial effort, so you have my appreciation. Thank you also to each of the speakers who will appear today. You have many demands on your time. It speaks volumes that you consider a revision of the merger of guidelines to be sufficiently important, to set aside the other demands that are competing for your attention.

Christine Smith Wilson:

I too consider a review of the merger guidelines to be a significant initiative that merits a sober and thoughtful approach. As I observed, when the commission issued the request for information on merger

guidelines, I support this inquiry. The Federal Trade Commission has a long history of engaging in critical self-examination to ensure that it is wisely and effectively implementing its mission of protecting consumers and competition, particularly as new industries and business practices emerge, and as economic learning advances.

Christine Smith Wilson:

During my professional career, I have served as outside counsel, in-house counsel, and as an enforcer at the FTC. In the private sector, I counsel clients in many industries on mergers, acquisitions and joint ventures. And during my three tours of duty at the FTC, I have analyzed the competitive effects of countless deals. I have seen mergers that would harm competition. I have also seen mergers that would benefit consumers, our society and our economy. The goal of antitrust enforcers should be to block mergers that would increase prices, decrease output, and stifle innovation while permitting beneficial mergers to proceed. Mergers can facilitate expansion into new geographies, they can provide a launching pad for innovations and they can drive down costs, making valued product and services affordable for a broader array of consumers.

Christine Smith Wilson:

The job of antitrust enforcers is to discern the difference between deals that are beneficial and those that are harmful. Mergers that substantially lessen competition run a foul of Section 7 of the Clayton Act, while competitively beneficial or even neutral mergers should be permitted to proceed. The merger guidelines provide the analytical framework the agencies use to analyze the likely competitive effects of proposed transactions and thus their legality under Section 7.

Christine Smith Wilson:

Until now, the merger guidelines have served as a common touchstone for judges merging parties and enforcers. When evaluating the legality of potential mergers, courts considering merger challenges routinely cite the merger guidelines as persuasive, even though they aren't binding precedent. Judges find them to be persuasive because the guidelines reflect the consensus view that the agencies have developed over decades to analyze the effects of mergers. Similarly, the guidelines provide clarity for businesses that seek to ensure their conduct is legal. Businesses rely on the transparency and predictability that the merger guidelines provide. But let's be clear, courts and other stakeholders find the merger guidelines persuasive only because they reflect current judicial precedent and accepted economic principles rather than seasonal political wins. Guidelines that depart from this tradition will lack credibility and soon fade.

Christine Smith Wilson:

Any recalibration of the merger guidelines in our current approach to merger enforcement should be driven by developments in legal and economic analysis. I hope that the proposed revisions remain faithful to this tradition, that I look forward to hearing the experiences and the diverse perspectives that today's speakers will provide. Thank you. And I will now turn it over to my fellow commissioner of Rob Bedoya for his remarks.

Rob Bedoya:

Thank you, Commissioner Wilson. Thank you, Chair Khan as well to my colleagues, Commissioner Phillips and Commissioner Slaughter. I'm joining you from Charleston, West Virginia, where I am joined by three of our invited speakers. Historically, antitrust authorities have given the most scrutiny to horizontal

mergers, mergers of actual or potential competitors. Vertical mergers on the other hand, have historically received much less scrutiny on the general theory that the companies being merged do not compete with each other. Now I'm thrilled that the commission has brought two critical vertical merger challenges in the last year, but historically speaking, the general rule has been clear: vertical mergers receive much less scrutiny.

Rob Bedoya:

The speakers I'm with today here in West Virginia, challenge us to change that. And they challenge us to change that based on years of providing healthcare or receiving healthcare in rural America at a time of unprecedented vertical integration. It used to be that in general, insurers were separate from the pharmacy middlemen who managed formularies and cut contracts with retail pharmacies. Recently, all of that has changed. Today, each of the three biggest pharmacy middlemen or PBMs, are part of the same corporate family as a major insurance company, and each of those PBMs have their own or have other commercial relationships with retail and mail-order pharmacies. As a result, the three major pharmacy middlemen combined now control access to over 80% of insured Americans. And when those Americans receive a prescription, each of those middlemen has an interest in steering those people to their own pharmacies, which are often mail-order pharmacies, not brick and mortar pharmacies. Is this better for patients? Is this better for pharmacists and physicians? Is this better for healthcare? These are the questions that these three invited speakers will address.

Rob Bedoya:

And specifically, I'm joined by a pharmacist, a physician and a patient are invited guests, Ms. Lynn Fruth, who's second generation president of Fruth Pharmacy, a family owned pharmacy serving the Appalachian regions of West Virginia, Ohio and Kentucky. I'm joined by Dr. Clay Marsh, West Virginia University's Chief Health Officer, who co-leads WVU Medicine, West Virginia's largest healthcare enterprise and employer and who is also the COVID czar of West Virginia. And finally, you'll hear from Mr. James Rossi, a retired CPA and lifelong West Virginian, who will speak to how mail-order pharmacy has impacted his own health and management of chronic health conditions. I submit that together, their account will form a powerful challenge to the established wisdom that vertical integration poses less of a threat to competition than horizontal mergers. Thank you Chair Khan, back to you.

Lina Khan:

Thanks so much Commissioner Bedoya. So we will now turn it over to our invited speakers and then we will open it up for public comment. So we will start off with our first speaker, Richard Anderson.

Richard Anderson:

Thank you very much and thanks to all the commissioners to allow me to appear today. I served as the CEO of Northwest Airlines, the CEO of Delta Airlines, the volunteer CEO and President of Amtrak, and have served on the boards of utility companies, healthcare companies, medical device companies, and agricultural companies.

Richard Anderson:

In 2009, the DOJ approved the merger of Delta in Northwest and it is a prime example of where our merger guidelines worked extraordinarily well in advancing the interests of our employees, our customers, our owners, and our communities. And in fact, the Delta Northwest merger, when completed for the very first time, since The Airline Deregulation Act of 1978, created the first viable and

successful U.S. flag carrier. We finally had the network, we had the scope, we had scale efficiencies, we had the indivisibilities in our network to cover the globe, and we could finally compete against all the global networks that were created with the advent of Open Skies in 1992.

Richard Anderson:

Prior to the merger of Delta and Northwest, like all U.S. carriers, had really struggled. In the post deregulation world, these networks were inadequate, we lacked scale, we lacked scope. And ultimately, and perhaps the most painful thing as someone that ran an airline was how it affected our employees. Our business was hampered by layoffs, we were constantly in the junk bond market and in suffering significant losses that result in bankruptcy. Both of the carriers prior to the merger Northwest, had a Pacific network, nothing on the east coast, very little in the Southeast, Delta, likewise had weak networks. We announced the merger and went through an incredibly rigorous process with DOJ.

Richard Anderson:

Ultimately, on October 29th, 2008, the DOJ approved the merger and found quote increases in consumer welfare significantly exceeded the feared harm to consumers. And I would submit to you that the evidence in the past decade has proven that not just that the synergies were right and that we overproduced versus our synergy model, but that the impact on consumers, our employees and our consumer base was incredibly positive.

Richard Anderson:

So the merger guidelines worked and in our instance, we ultimately produced over \$1.5 billion in run rate synergies. We had to produce those synergies because fuel prices were at one point around, then reached \$150 a barrel and the money market broke the buck. So it was a pretty distressing time as you may recall back in the '08, '09 timeframe. We obtained those synergies by giving up 175 gates. And ultimately in 2014, we had revenue up 20% on 20 fewer departures, 12%, fewer airplanes. We became the most trusted brand in the aviation industry and ultimately exceeded investment grade credit status.

Richard Anderson:

There are a few real important takeaways that I'll hope you'll keep in mind. The United States and what we learned from the Northwest Delta merger and what applies across the board really is, we're in a global environment, characterized by free trade agreements. We are only 5% of the world's population, but we have 25%, 26% of the global economy. That global economy with low barriers to trade creates an incredibly intensive competitive environment. Every corporation needs the ability to do M&A. Corporations grow by organic investment in their own facilities and business initiatives and they grow by inorganic investment. M&A is a crucial part of why we are 25% of the world economy by letting our firms take weaker firms consolidate into larger firms and ultimately create the strongest economy in the world.

Richard Anderson:

Thank you for the opportunity to speak today. And most importantly to each of the commissioners, thank you for your service to our country. I'm going to turn it over to Christin Evans. Thank you.

Christin Evans:

Thank you, Richard. Hello and good afternoon, Chair Khan and commissioners. My name is Christin Evans and I'm a small business owner of two small businesses in San Francisco, the Booksmith, an

independent bookstore, and Alembic, a craft cocktail bar and restaurant. For more than a decade, I have served as a board member of the Haight-Ashbury Merchants Association, representing over 150 storefronts along one of the most resilient, small business corridors in San Francisco.

Christin Evans:

Our neighborhood customers have remained largely loyal through the pandemic, and we're starting to see tourist return, but foot traffic isn't back to a hundred percent yet, but we're getting there. Today, I'm here to talk about a significant threat, particularly to our restaurant members, and that is the rise of third party food delivery applications or apps. As you might imagine, third party food delivery apps exploded during the pandemic when indoor dining was restricted and many residents began relying on them for food access.

Christin Evans:

But companies like Caviar, DoorDash, Postmates, and Ubereats had presented an existential threat to our local independent restaurants long before the pandemic began. Over the past several years, we have engaged with policy makers to address a number of predatory practices, which all of the companies seem to be engaging in and lockstep with one another. In the app's efforts to amass market share by reducing consumer fees, it was our restaurants and workers who really ended up paying the extra price out of our razor thin margins to the extent we had any leverage to negotiate better deals before the pandemic, all of that leverage went out the window when delivery became our only means of reaching consumers during the lockdown. Before the fairness and food delivery law passed in San Francisco, third party food delivery applications were charging 25% to 30% fees off of every order we received on the app.

Christin Evans:

On top of that, we were contractually prohibited from setting in app menu prices that were higher than dining prices, meaning we couldn't make up for any of the commission with a higher price to consumers who ordered through the apps. App companies were driving to amass more market share by charging consumers the lowest price possible, but as restaurant owners, we were the ones to make up those Commission costs on our own. On some occasions, apps would even list restaurants without their consent. This actually happened to my restaurant more than once. These so-called non-partner arrangements, often misrepresented menu items, creating surges and other operational hurdles for us, leading to negative reviews for delays or incorrect orders because the in-app menus were inaccurate. For example, for weeks, my restaurant kept getting app requests for bone marrow, which is a customer favorite dish, normally, but we had taken it temporarily off of our menu due to supplier issues. That led to many disappointed customers and unfulfilled orders.

Christin Evans:

And of course, it's important to mention that it wasn't just restaurants that were being punished when Uber, Instacart, Postmates, Lyft and DoorDash pulled together over \$192 million to pass prop 22, overturning the California Supreme Court's Dynamo decision and AB-5 California's Worker Misclassification Law. It was apparent that they were capable of consolidating their power to harm app-based drivers as well. And the aggressive tactics these companies employ has only gotten worse as the industry saw significant consolidation, including when DoorDash purchased Caviar from its parent company, Square, in a \$410 million deal in late 2019, and when Uber purchased Postmates for \$2.65 billion in December 2020.

Christin Evans:

According to Statista, as of 2022, just three third party food apps control 96% of the market. While conditions have improved somewhat in California and San Francisco where laws have been passed to prevent predatory behaviors, DoorDash and GrubHub have now sued in the Northern district of California to repeal these protections. Additionally, there are continued concerns about competition from so-called ghost kitchens or cloud kitchens that don't need a storefront to compete with local restaurants. In summary, the theme here is that as third party delivery apps have consolidated power and amassed market share, they have been able to do so by forcing workers and small businesses to pay the price of keeping consumer costs low. Thank you for your opportunity to speak today and for your attention to these issues. I'm now going to hand it off to Mark Gross.

Mark Gross:

Thanks, Kristen. So I'm the Chairman of the board of several large regional grocery chains and I'm the former CEO of Supervalu, a Fortune 250 company, and I have a 20-year history of working with the Commission staff and Commissioner Phillips, I'll also add on class of '85. Three conclusions. We have to fully update our definition of the grocery market to include all non-traditional grocers, whether they offer what we perceive as a full shop or not. We need to understand the economic dominance of these non-traditional grocers and how they assert that power. And to foster competition, we need to be more accommodating of regional grocers merger activity. Non-traditional grocers account for more grocery sales than traditional supermarkets. It's like 618 billion to 460 billion. And the past 25 years have seemed phenomenal growth of supercenters, club stores, hard discount, dollar stores. All of that growth is virtually all non-union.

Mark Gross:

And this growth in non-traditional grocers has its corollary in the shrinking of traditional groceries and non-traditional grocers are the primary store for most consumers who shop at multiple channels and banners every week, and that fact does not seem properly reflected when we measure the grocery market and market share. And it's not just that non-traditional grocers sell more groceries than traditional grocers, but the economic dominance of that market by a handful of companies. And if you think of those categories I just gave, it's Walmart, it's Target, it's Amazon, it's Costco, it's Sam's, it's Aldi, it's Dollar General, it's Dollar Trade. Of the top 15 grocery sellers, only five are traditional supermarkets. So the market has to be viewed in its entirety of who is competing in this space and who wields market power, how this power is used and the difficulty of competition law to constrain it.

Mark Gross:

So I'd like to just discuss cost of capital and online dominance and disproportionate technology investment to give you a sense of what these non-traditional grocers are bringing to the market. The largest non-traditional grocers have stellar credit ratings and the commensurate lower cost of capital. These players, in turn, have taken that to be able to dominate online grocery. And if I give you an example of technology spend, one of these large grocery sellers, Walmart, spent last year \$13 billion on CapEx, more than half of which \$7.2 billion was on technology. A regional grocer will spend at most \$200 million on CapEx, of which \$20 million is on technology. And that battle of that \$20 million spend versus \$7 billion is disproportionate. Second, large non-traditional grocery sellers compete and are advantaged in ways that aren't, let's say, transparent to the Commission. The battle for scale used to focus on price discrimination, but today traditional regional grocers face unequal competition on product availability,



retail media networks, which are supposed to be payment for access to a retailer's website, the loyalty program, but it's not a revenue stream open to all.

Mark Gross:

And a deeper look would show you product price discrimination hiding in advertising rates. I'd also point out favorite logistics channels, where a manufacturer operates for the very powerful, special eCommerce operations. All of that is to give you a sense of this unequal playing field is derived from scale and it makes the future difficult for even strong regionals. One of the companies where I sit as chairman of the board is Tops and we saw it to merge with Price Chopper. We decided our long term viability required us to become larger so we could afford more of these critical investments. We negotiated a merger with Price Chopper and the merged company has roughly \$6 billion in sales. It's significant, but still much, much smaller than these giant peers. In short, we desperately needed this combination to remain competitive and our transaction was pro-competitive.

Mark Gross:

It enabled our stores to offer a better choice for consumers vis-a-vis, the giants all around us. It enabled the merged company to generate various improvements and leverage our technology spend, which now helps us to operate more effectively and better serve our customers. 30,000 associates of which a large number are Teamsters and UFCW members and operate in over a hundred communities. But that all said, our team spent nine months working, explaining this to the staff and the compliance teams and we spent countless hours and millions of dollars demonstrating that Aldi and Dollar General are bonafide grocers who sell the same merchandise we do, and that Amazon and Walmart and Target are the largest American online grocers and they sell a lot of food in our markets. So hopefully, this will help expand our view of the market, how the largest non-traditional grocery sellers compete and our advantage, and I hope finally facilitate the need to help and not delay regional grocery mergers. With that, thank you so much for, for your time today. I turn this now to Stephanie Marks.

Stephanie Marks:

Thank you so much, Mark. I am Stephanie Marks. I'm the Chief Administrative Officer and General Counsel of the National Retail Federation. Thank you so much members of the Commission for hosting this and having me and all of the other speakers on this afternoon. We really appreciate your time. We, as a retail industry, are always concerned about competition and concentration, but as perhaps the most competitive industry in the country, we also value the efficiencies that can be gained by smart and well-considered mergers and acquisitions. As Mr. Gross's remark suggests, scale has become increasingly important and not just in the food sector. The challenge is to monitor scale in a globalized market where, first, inflationary pressures mean that the traditional harm to consumer viewpoint is more important than ever in terms of the cost of consumer goods. And second, the existence of global supply chains and enormous data sets mean that some amount of combination in the retail space is necessary to maintain competition.

Stephanie Marks:

We believe that the current merger guidelines vary view to the singular extent that regulators' and economists' thinking is evolving regarding digital markets. We also believe that basic anti-competitive acquisitions that are intended to kill nascent rivals, such as Visa's attempted acquisition of Plaid, should be challenged. It is not clear to us, however, that the tools do not currently exist to do so. NRF does not believe that any revision of the guidelines should occur with an inherent assumption, put perhaps

simplistically, that combinations are inherently bad for competition. We urge the Commission to allow acquisitions and mergers where they make sense and especially where they will allow the scale that is necessary to compete without losing stores, jeopardizing jobs, and causing higher prices. We also would like to observe specifically that the current horizontal merger guidelines are well suited to address competition in labor markets. NRF has some current concerns based on the Commission's HSR review process that the review of combinations has slowed or become convoluted in the analysis.

Stephanie Marks:

The number of significant investigations that were resolved in the first quarter of 2022 was relatively low, especially in light of the large number of major investigations pending. Most concerning, only one was resolved with the consent decree, the rest received complaints or were abandoned. And in 2021 record high numbers of transactions either received complaints or were abandoned. Recently, an investor advisory website warned that an otherwise rapidly growing specialty retailer might hit a wall soon because the FTC was likely to block it from making the acquisitions that it needs to keep growing. There are other examples from the last year of regional merchants whose acquisitions were abandoned or blocked or have been long, long delayed, but there is a history of successful divestitures in retail deals and NRF urges the Commission to keep divestitures on the table as a reasonable approach to allowing acquisitions, to move forward.

Stephanie Marks:

Again, now more than ever in this time of high inflation, we urge the Commission to help us do things that will bring prices down, including merging and acquiring other stores and businesses and appropriate circumstances. If it wishes to accurately evaluate the competitiveness of a given retail market, the FTC must also sufficiently credit eCommerce competitors in addition to traditional brick and mortar players. I cannot emphasize this enough. It seems inconsistent to express concern on the one hand, that some of these eCommerce players are too large, and on the other fail to account for their effect on individual market segments. Finally, I'd like to make a few points about the guidelines as they apply to monopsony power and labor markets. While further soft guidance and analysis might be useful here, we discourage the Commission from attaching rigid thresholds or safe harbors to the guidelines regarding labor markets, especially in industries such as retail, where labor is not specialized.

Stephanie Marks:

The ability for retail workers to switch jobs has been on full display recently. For example, a recent Federal Reserve of New York study showed that for those making less than \$60,000 a year, 4.3% of respondents receive four or more job offers in a four month period versus 1.7% for those making more than \$60,000 a year. The well known Herfindahl-Hirschman index for each US commuting zone indicates that the top five most concentrated occupations are all highly specialized. Less specialized jobs, such as retails, showed significantly lower average HHI. [inaudible 00:38:10] written comments have more data points, but the bottom line is this, any guidelines that specifically address the labor market are unnecessary. The guidelines already address input monopsony from a variety of markets. Anything more specific risks being too rigid and is unnecessary, especially for low skilled markets. Again, I thank the Commission for your time this afternoon, and now I am happy to turn it over to Sheila Mikhail.

Shiela Mikhail:

Thank you, Stephanie. And thank you to the Commission for allowing me to speak with this distinguished group today. I am the co-founder and CEO of AskBio. AskBio is a gene therapy company

focusing on the development of transformative therapeutics for devastating disease. Often, there is not a current standard of care for these diseases. We are developing therapeutics today for Parkinson's, Huntington's disease, Pompe, late stage heart failure, and multiple forms of muscular dystrophy. It is my position that there are many potential benefits arising from the acquisition of smaller biotech companies by larger pharmaceutical companies as Bio was acquired by Bayer Pharmaceuticals at the end of December 2020. Since that time, it's been run as an independently operated, wholly owned subsidiary of Bayer. We had made an S1 filing to go public, but decided to be acquired instead. Our assessment of the benefits of acquisition versus remaining a standalone public entity or multiple included the following: first, financial security. Being a public biotech company would have made us susceptible to the stock markets' ups and downs. In turbulent market conditions, we are able to count on a certain cash flow to ensure the continuation of our product development.

Shiela Mikhail:

Many other public companies are facing a liquidity crisis because investors are shying away from investment in public biotech. This liquidity challenge jeopardizes the advancement of innovative drugs for patients. Second, synergistic technologies. By uniting with Bayer, a larger pharmaceutical company, we are able to combine their medicinal chemistry competency with our own biology expertise. Through the combination of our technologies, we are able to improve the potency and safety of our drugs. We are able to turn on and off our gene therapy products through the delivery of small molecules. Finally, with the assistance of Bayer's medicinal chemistry group, we have identified a method for repeat dosing. This has been a significant hurdle for the gene therapy field, especially where drugs are used to treat children who may require re-dosing of the treatment as they grow.

Shiela Mikhail:

Third, leveraging clinical trial competencies. Like most gene therapy companies, the majority of our pipeline focus is on rare diseases. However, unlike other gene therapy companies, we are also developing treatment for diseases that affect larger populations, including heart failure and Parkinson's. It is a huge advantage to utilize Bayer's local trial networks for the latter stage clinical development of these drugs. While rare disease may require only several dozen patients to be treated for approval, pathway diseases such as heart failure and Parkinson's will require significant, larger clinical trials to be completed. Bayer has expertise managing trials with large clinical scope on a global basis.

Shiela Mikhail:

Fourth, leveraging disease expertise. Bayer is a leading cardiovascular company. Through the acquisition, we are able to access this expertise so that we can best understand patients' needs in the development of our drugs. Bayer also has a more complete understanding of the competitive landscape. Getting access to this knowledge allows us to better position our development efforts and resources to best meet patients' unmet needs.

Shiela Mikhail:

And finally, regulatory and pricing reimbursement issues. Bayer will help us with our understanding of the regulatory requirements on a global basis. In addition, Bayer helps us through the complex process relating to pricing and reimbursement. In closing, even if an IPO had gone forward, the challenge of operating a small biotech company would have remained. The acquisition by Bayer has allowed us to retain the entrepreneurial spirit of discovery and our vision for success while mitigating clinical risk, accelerating R and D, and enriching our overall scientific endeavors. Being part of the Bayer family has

significantly increased our ability to broaden our technology toolbox, expand our pipeline, and to bring therapeutics through the clinic with less risk in a more efficient manner, ultimately making hope a reality for those with unmet medical needs. Thank you very much for the opportunity to present today. And I now turn it over to Neil Patel.

Neil Patel:

Thank you very much. My name is Neil Patel. Can you hear me? Sorry. My name is Neil Patel. Thank you very much, Chair Khan, the Commission to allow me to speak and have a say in this input of M and A listening session. Why do mergers occur? To fill a void in a business or to get market share or so somebody else doesn't. We understand it's a financial transition. When it comes to franchising. It's a different story altogether. Franchisors, at most, do not have much financial liability. The risk in liability lies with a franchisee, the individual business model, to be able to use the name and business model.

Neil Patel:

We, as a franchisee, voluntarily signed the franchise disclosure documents and thereafter, the financial license agreement. However, the way the franchise disclosure documents and the agreements are structured, it is not a level plain field. And as time goes on, it gets worse because they are open-ended contracts. However, when there's a mergers or an acquisition, there are more changes. We, as licensees are handcuffed. We sign an agreement for 15, 20, or 30 years so we are stuck. Our financial livelihoods are at risk. We are the ones that sign a personal guarantee. We have no say in the way our businesses are run when the new mergers or acquisition occurs. There is never any input from people that are taking us over or the franchisor. During the dating period, they ask us and there's no input thereafter. Once the acquisition has been ratified by the FTC,

Neil Patel:

See, it's all clear and done. We are forgotten in fact. With my experience, this happened in 2018 and '19 when La Quinta was acquired by Wyndham. This was not very pretty. Even to this day, three years after, we are still not at the level of revenue as when we were purchased, despite the pandemic and minimal assistance. 2022 is supposed to be record years for the lodging industry. Not so for La Quinta under the Wyndham flag. There is a proposition of a Radisson takeover by choice, and most of the Radisson licensees will feel the same. However, we do not have a choice once we sign the agreement.

Neil Patel:

There is a licensing agreement that we are with them for 20 years. If we want to get out of that, we have to pay liquidated damages. Those liquidated damages are unfair. We have no say once we are acquired by another company. Commissioner Phillips outlined correctively in his opening remarks. He is to give the consumer a choice. The consumers do have a choice. When one brand with 19 sub brands takes over a single brand, we have no choice. We get married into a field with 20 others then. Thank you very much for your time. I'll hand over to Bettina Hein.

Bettina Hein:

Hello Chair Khan, commissioners. Thank you for the invitation to speak today. My name's Bettina Hein and I'm currently the founder and CEO of juli, a chronic condition care management platform and digital health. I'm a three time tech entrepreneur. I'm an immigrant. I started my first company right out of grad school, and I liked to brag that I've never had a real job. My companies, all of my career long have been built to go public or to be acquired because they are investor financed. They're financed by so-

called angel investors, private individuals that each invest equivalent of a new car, or maybe even a small starter house and also professional investors. My first company was acquired, even though it had been my childhood dream to take it public.

Bettina Hein:

I'm neither a policymaker nor an antitrust specialist, but I try very hard to make startups voice heard in Washington because we have no expensive lobbyists. Therefore, I am also a volunteer board member at the Center for American Entrepreneurship, which is a nonpartisan policy org. Thriving entrepreneurship is really critical to a strong and growing economy.

Bettina Hein:

Entrepreneurship is also very risky. A third of new businesses fail by their second year and half by their fifth. For fragile startups, there are three principle outcomes. Fail, go public, or as I mentioned, be acquired. Failure is unfortunately the most common outcome. Many entrepreneurs dream of taking their company public, but most startups never achieve that scale that going public requires. Therefore acquisitions are the most likely way for startup investors to reclaim their invested capital, take the equivalent of that new car and invest it in their grandkids college and education. Realize gains and recycle that capital. Maybe some college education, but hopefully recycle it into the next generation of startups.

Bettina Hein:

My principle concern regarding some new proposed acquisition restrictions, which are targeted at big tech, which I agree that they have monopoly power in many instances. They are really based on arbitrary, structural demarcations, such as market capitalization or perceived dominance. That is in my regard, a very slippery slope and could achieve counterintuitively the opposite of what policy makers and lawmakers want to achieve. They also profoundly undermine the incentives for entrepreneurs like me, who take very significant, personal and financial risks to launching a company. This is how I feed my family and I'm the principal breadwinner for my family.

Bettina Hein:

If startup investors are unable to reclaim their capital and gains, or if exiting investments is made overly complex or uncertain, they won't risk their capital in investing in companies like mine in the first place. Without investors, there is no juli, my current company. There is no startup ecosystem.

Bettina Hein:

I am concerned that restrictive or overly complicated guidelines will have the opposite effect of what they intended to accomplish by actually tilting regulatory circumstances in favor of larger companies, because they have so many resources to spend for M&As. This has happened before, that resources favor the people that are actually supposed to be punished or held back through legislation. Here I'm speaking about the Sarbanes-Oxley Act. In the six years following the enactment of Sarbanes-Oxley, the section 404, small companies IPOs valued at \$50 million or less plunged by 92%.

Bettina Hein:

As a result, our Sarbanes-Oxley deepen and widen the protective moat around those same corporations by undermining competitions from startups. This is why I had to, for my first company bury my girlhood dream because there was no way that I could raise the extra \$10 million that were needed to hire a

whole finance department to get through those regulations. We had a successful exit, thank goodness. What new restrictions around M&A would accomplish are also, I think, unintended consequences. The heavy handed guidelines would advantage large incumbent companies that, as I mentioned, have that money and have the teams of lawyers to navigate that landscape.

Bettina Hein:

Many small acquirers would be shut out. Therefore, the large acquirers will pay for the costs of dealing with those restrictions by simply reducing the value of the transactions because they're charging us as entrepreneurs then for that work. This directly feeds a negative feedback loop into the startup economy. I would like to urge you as a commission to consider this way, which startups function and want to thank you again for the opportunity to participate today. I'm handing over now to Jerry Swindell. Thank you very much.

Jerry Swindell:

Thank you Bettina. Thank you Chair Khan and associate commissioners for providing this opportunity to share my views concerning this significant consumer welfare benefits, of Mergers and Acquisitions. As a former attorney in the FTC's bureau of competition, I'm a strong supporter of the FTC's mission to protect consumers from any competitive conduct and from consolidations that may lead to reduced output in innovation and lead to higher prices. Currently, I'm the chief antitrust council at Johnson and Johnson.

Jerry Swindell:

As you consider revisions to the merger guidelines, it is important to continue to ground merger analysis and sound economic analysis and legal principles that are recognized and endorsed by the courts. Enforcement policy always should be based on the facts and the law. The fact is that the pharmaceutical industry is relatively unconcentrating. In 2019, the 10 largest pharmaceutical companies accounted for only 43% of pharmaceutical sales. That is true that occasionally my industry may see large mergers between large competitors. More frequently however, the industry is characterized by smaller transactions that result in significant consumer benefits.

Jerry Swindell:

As you've heard from some of the other speakers, you typically have a smaller firm that may have an invention with great potential, but lack the funding and regulatory expertise to successfully endure the years of work required to bring the product to market. Some inventors simply have no desire to build a commercial organization. They may be like Bettina, a serial entrepreneur, serial inventor. So even if they had the resources, they don't want to build a large commercial organization.

Jerry Swindell:

Bringing a drug or vaccine to market takes an average of 10 to 15 years and costs \$2.6 billion on average. Less than 10% of the compounds that enter phase one trials receive FDA approval. Thus remaining independent is a big role of the dice for startup firms. A great invention has limited significance if the owner is unable to bring it to patients. In 2011, J&J acquired a company called Crucell, a vaccine developer based in the Netherlands. At the time Crucell was a mid-size company that already marketed several important vaccines for childhood diseases like mumps and measles and those sorts of things.

Jerry Swindell:

They also had vaccines for some other common diseases. Prior to that time, J&J did not have a vaccine program at all. We saw great potential benefit in Crucell's cell technology to address diseases even more challenging than those childhood vaccines. Through years of development and substantial financial resources, we were able to develop a vaccine to combat the Ebola virus. As of December 2021 more than 260,000 people worldwide had received the first dose of our Ebola vaccine. More than 233,000 had been fully vaccinated.

Jerry Swindell:

More well known, of course, to you and to the public is that J&J and several of our peers stepped up to the plate for humanity during the current pandemic by bringing COVID-19 vaccines to market in record time. As has been publicly reported, J&J made the commitment early in the pandemic to invest in commercial scale manufacturing at risk. This means that if the vaccine was never authorized to go to market, J&J would have no way to recover those expenses. J&J also committed to providing the vaccine on a not for profit basis during the emergency pandemic. It is highly unlikely that an independent Crucell could have made either of those commitments, much less both.

Jerry Swindell:

In March of this year, we signed an agreement to permit our vaccine to be manufactured by a company in South Africa, in an effort to increase vaccination rates throughout the African continent. In addition, J&J's efforts to invest in the Crucell acquisition will continue well into the future. A potential HIV vaccine is currently in phase three trials in the US and South America. We don't know if this vaccine will actually reach the market ever, but these are the kinds of risks that companies like J&J are willing to make on promising, but unproven assets through M&A activity.

Jerry Swindell:

I urge you to consider making changes to the guidelines that do not stunt development and growth across industries. No one could have anticipated the current pandemic in 2011 or J&J's acquisition, or the role of J&J's acquisition of Crucell would play in the response. Challenging an acquisition like that based on unsound, rigid assumptions, untethered to sound economic theory could undermine the risk-taking that is at the heart of the economy. Thank you for this opportunity. And I'll turn it over to Lynn.

Lynne Fruth:

Hi, I'm Lynne Fruth. I'm the president of Fruth pharmacy, a regional chain. Why are prescription drugs getting more and more expensive? One part of the answer is simple. PBMs or pharmacy benefit managers, boast that they are responsible for reducing prescription drug costs. If that is true, then how can they explain that even though the last four years, the net cost of prescription drugs has gone down, the price that we pay at the pharmacy continues to soar?

Lynne Fruth:

Patients are paying more for medications. Pharmacies are reducing hours or closing, and PBM affiliated companies have seen record profits, placing the big three in the top 15 of the Fortune 500, the three biggest PBMs own, or are owned by large health insurers like Aetna, Cigna, and United health. These three vertically integrated companies also own some of the largest retail, mail order and specialty pharmacies and provide services to over 80% of all Americans with healthcare.

Lynne Fruth:

This oligopoly leaves pharmacies in the position to be held captive by bad contracts. That include provisions that allow PBMs to reimburse pharmacies below their cost, that force pharmacies to accept contract terms, which can be changed at any time with a deemed amendment or a change to the provider manual. This allows PBMs to reduce the amount they pay a pharmacy at their whim, and the only recourse for pharmacies is to drop out of their plan. Of course, this is not realistic or recourse for the pharmacy as they represent 30% of your total business. Contracts are presented in a take it or leave it manner.

Lynne Fruth:

When pharmacies ask a PBM to negotiate the price or put in writing that they refuse to negotiate, the PBMs quickly jump on the telephone because they do not want to put anything in a written format. Even if they agree to negotiate, they tell pharmacies that any recommendation or offer must be moving lower, meaning less money to the pharmacy and more money to the PBMs to even be considered.

Lynne Fruth:

If a pharmacy succeeds in getting a price concession, the PBM can ultimately unilaterally lower the price at any time through a deemed amendment. I don't understand why we refer to these documents as contracts at all, since the PBMs have all the power and the pharmacies have little to no protection. How are patients harmed? PBMs force patients to use their mail order, specialty or retail stores or suffer a financial hardship. PBMs refuse to obey state loss pass to regulate them.

Lynne Fruth:

The most egregious thing that PBMs do is manipulate formularies to achieve the highest profits for themselves. This can cause patients to be moved, to be forced to move to a brand drug with a higher copay, or to be moved from a medication that has worked well for them to a new medication that is more profitable for the PBM. In January, 2022, CVS Caremark removed Eliquis from their formulary and replaced it with Xarelto.

Lynne Fruth:

Both medications are next generation blood thinners, but they are not the same. Caremark patients could either switch to Xarelto, or pay the full cost of Eliquis. The National Blood Clot Alliance, physicians and patients spoke out so vigorously about the risks of being forced to make a change in therapy for a nonmedical reason. Changing stable patients to a new medication for the purpose of increased profit is dangerous, and it's an assault on patient care.

Lynne Fruth:

As a result, CVS Caremark will add Eliquis back to the formulary on July one, but it shows the links that PBMs will go to make more money while risking patient safety. These companies claim that vertical integration is lowering the cost of healthcare. The truth is that patients are paying higher premiums and higher out of pocket costs for medications and have fewer choices. How can anyone believe that this is saving money, let alone improving patient care. The FTC must immediately engage and examine the harmful and potentially antitrust behaviors of these PBMs through their unfair contracting. Now you're going to hear from West Virginia doctor, Clay Marsh.

Clay Marsh:



Thank you Lynn, for your comments. It's really my pleasure to also present to this esteemed panel and to the commissioners and to the chair. When you come down it, we could make a lot of discussion points about mergers and acquisitions and whether they're good or bad. Certainly there's a number of mergers and acquisitions that have certainly been good. But what we're talking about here is something that's much more foundational and much more important. It's really about the care of people in our communities.

Clay Marsh:

When we look at West Virginia as a state, we have the second lowest life expectancy in the country. We have the most overdose deaths by substance use disorder, by opioids and others. We have the highest smoking rate. One of the opportunities that I've had the privilege to be part of in the state of West Virginia is the state's COVID response.

Clay Marsh:

When we started to script our approach to COVID, particularly right when the vaccines became available, we looked internally and worked with our pharmacy board and worked with our long-term care association oversight group. We figured out that West Virginia had so many people at risk in small communities in communities that had no CVS had no Walgreens. We worked with Operation Warp Speed at the time, and we decided to not activate the Federal Pharmacy Program, but work directly with our family and private owned pharmacies in rural parts of West Virginia.

Clay Marsh:

Because of the preexisting, trusting relationships that they had with our long-term care places and assisted living places, West Virginia was the first state in the country to immunize all of our nursing home residents, was one of the first states in the country to immunize our residents over 50 years old. We know that COVID-19 is a disease

Clay Marsh:

-disease that most primarily affects people who are older. Over 95% of people who've died of COVID 19 have been over 50 years old. And the reason why we were able to do that is because of the existence of the caring people that lived and worked in communities that sometimes had populations of hundreds or perhaps 1000 or two. And we're able to deliver that in ways that became very personal.

Clay Marsh:

And having the lack of these pharmacists and these healthcare providers, and they're truly healthcare providers in rural parts of West Virginia, we would not have been able to accomplish that. And by doing that, we saved many, many lives. And so this is a very personal issue to many of us. It's not just a issue about antitrust or an issue about fair practices in the general sense of an argument. This is about people's lives.

Clay Marsh:

This is about folks like Lynne Fruth and others. Who've committed themselves and their family businesses to support the communities that they are from, the communities that they live in. And we know that these are places that people don't just get drugs, they get care and caring.

Clay Marsh:

And so these are places that oftentimes are the places where people go to ask, should I go to a doctor? Should I go to a hospital? And we know that in West Virginia, that many large corporations won't move into these same communities. And without these assets, we know that healthcare in West Virginia will suffer, healthcare and rural America will suffer, but also healthcare in general. Which as a local enterprise, is something that I believe that this commission will do very well to be able to look at in the larger picture of what we want to do for our fellow citizens and what we want to offer for all Americans. Thank you.

Clay Marsh:

I'd like to turn it over now to Jim Rossi and share his experience as a patient.

Rob Bedoya:

Good afternoon. My name is Jim Rossi. I'm here today to give my experience as a patient. I serve on the board of a local hospital and also on a pharmacy chain so I see some of the issues that have been discussed today from various perspectives and various sides of the table.

Rob Bedoya:

But what I want to do a little bit today is explain to you what my experience has been like as a patient. I suffer from a number of chronic diseases and chronic illness type conditions. I have three autoimmune diseases. I've recently had an issue with my heart, I have a heart condition, had a pacemaker implanted. I take 15 pills a day, nine different medications. These medications, for instance, one of the ones that controls one of my autoimmune diseases is so delicate that I have to take it so it's not in conjunction with any other medication. Can't be taken with food. Can't eat for at least 30 minutes before or after the medication. That's one of the medications that I have to get through a mail-order pharmacist.

Rob Bedoya:

I have another medication that I take for another autoimmune disease that I take 3000 milligrams a day. I have to take 1000 milligrams at three different times during the day to try to maintain a level amount of that drug in my bloodstream. So during the day I take medications at least five different times.

Rob Bedoya:

I take a medication for my heart that I actually had to be hospitalized just to get the medication started because of the negative side effects that it can have on your heart and your heart rhythm. So I work hard at trying to maintain my health. I work hard at trying to have some quality of life and all these medications that I get I'm required to get through Express Scripts through mail order.

Rob Bedoya:

Routinely I'll have issues with a prescriber, and there'll be some type of an issue. It's usually not a big deal, but it takes about a week to resolve any kind of a small issue with them. I can't get anybody on the phone, there are no professionals to speak to. It's all online and just very laborious.

Rob Bedoya:

So finally, after several days you get the issue resolved, then it takes them another week to fill the prescription. Then after that additional week wait, they ship the medication to me. And it takes anywhere from three days to another week. I have medications that are so delicate and I try so hard to

balance my medications across these various disease conditions that waiting two and three weeks to receive a medication is very dangerous for me.

Rob Bedoya:

Routinely, I will go into a local pharmacy and say, look, you don't have my prescriptions, you make no money off of me. I have a problem. They'll counsel me about my medications, even though somebody else fills the prescriptions.

Rob Bedoya:

There have been times when I'm stuck without any medication, because Express Scripts just can't get the job done. So I have to wait a week or two weeks to get medications that I have to have several times a day just to stay alive and to have any quality of life. So I go into a local pharmacy and they'll say, look, I can give you 10 day supply or whatever. So I get enough to get by until I get the 90 day fill from Express Scripts.

Rob Bedoya:

One of the particular drugs I take, I go to a specialist for, to try to get it balanced. And it's very difficult to do, I have a very brittle condition. One of the things they told me, he says, you should not be taking the generic drug and try to maintain this same manufacturer, same provider at all times. So I get the 90 day fill from Express Scripts, I open up the bottle, there are three different colors of pills in it which tells me there's three different manufacturers in that bottle. Apparently that's where they could get the best deals that time. But that's what I'm taking for various conditions that are very difficult to maintain.

Rob Bedoya:

When I can walk into a local pharmacy and I can ask questions, I have at least somebody that I could talk to that knows what these drugs are for. If I have to go to the emergency room or go to an urgent care, if I have some type of an acute condition that comes up that I needed medication for short term, who tells me if I could take that with the other nine medications I'm already on for these chronic conditions? It's usually a pharmacist that's not getting paid to dispense those drugs because the people that dispense my drugs are some anonymous people behind a computer that I never get to talk to.

Rob Bedoya:

So for me, and maybe my situation's unique, but for me using a mail order pharmacy is difficult, but it's also dangerous. I have no idea what the quality of those drugs are, where they came from. And the other thing that I find difficult, sometimes I can't get them to fill the prescriptions in time. And sometimes they like to fill, especially the one drug I take for Crohn's, they like to fill it really fast and fill it ahead of time. And sometimes I'll have at least nine months of that drug in a drawer waiting on me. May not even be effective by the time I get around to taking it, but that drug's over a thousand dollars a month and they really like to speed it up and send it to me quickly. Is it good for you to do it that way? I doubt it.

Rob Bedoya:

I'm looking at this and there's been some very distinguished speakers here today that talk about the various efficiencies and how this should work from one side or the other. I'm looking at it for how it works for me as a patient, and as a patient to try to get your drugs mail order when you have some acute conditions like I've got, it's very difficult.

Rob Bedoya:

And I try hard to maintain these conditions and try to have some quality of life, but it certainly is exacerbated by having to use Express Scripts and get my medications through a mail order provider.

Rob Bedoya:

I appreciate your time today, Chair Khan.

Lina Khan:

Thanks so much, Jim. And thank you so much to all of our invited speakers today. We really so appreciate that you took the time to prepare comments and come share your experiences and perspectives with us. This is exactly the type of input that we're looking to get during this process. And we're so, so grateful that you took the time.

Lina Khan:

I will now turn it over to Peter Kaplan to facilitate the public comment portion of our listening session.

Neil Patel:

Thank you, Chair Khan. Before we begin, I want to remind our next speakers 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 public record accordance with the commission's rules.

Neil Patel:

Each of our speakers will be given two minutes to address Chair Khan and her fellow commissioners. And our first public speaker is John Pramod. John?

Pramod John:

Thank you. I'm Pramod John CEO of VIVIO. Today we'd like to advocate for the 314 million Americans who don't work for the US healthcare system and who pay for the most inefficient healthcare system in the world.

Pramod John:

Americans are 4% of the world's population, but spend 49% of all global healthcare dollars. Said another way we spend as much in healthcare as 96% of the world's population. This is in stark contrast to the America that has been the lighthouse for free markets with the result being that we pay some of the lowest prices in the world for almost every good or service except healthcare, where we're the worst of the worst.

Pramod John:

This inefficiency has its root the belief that this is a market dysfunction problem, as insiders from the industry, we disagree with the notion that healthcare has a market. Instead, we've watched the chess game unfold over the past several decades between health plans whose customers were supposed to be consumers, but are providers and provider systems that are shielded from competition.

Pramod John:

The result has been the massive consolidation of health plans, PBMs and health systems. The repercussion has been vertical and horizontal monopolies of health plans and systems that now control the market. Of course, the nuance is that they aren't monopolies, but rather oligopolies.

Pramod John:

I previously worked for one of these oligopolies where the industry mantra was "don't do anything to start a pricing war, it would hurt us all." The scale and capital of these organizations allow them to influence laws that benefit their industries and prevent competition using laws, lobbies and dumping, which prevent any real competition or innovation. The issue isn't any of the individual entities themselves, but the business models themselves, which lead to less competition at scale, rather than the opposite.

Pramod John:

When the ACA required that every American have healthcare coverage without any regard for the cost of the services themselves, it effectively wrote a national one-sided market into law. For a market to function, the most important mechanism is the power to say no. Today we neither have a single payer system nor a free market, instead, we have the worst system possible.

Pramod John:

We implore the FTC, DOJ and lawmakers to consider deeply the actual dynamics of these one-sided markets and update our antiquated laws to reflect reality and break up the monopolies that prevent competition. Please do something on behalf of the 314 million Americans who aren't listening to this hearing, but are most impacted by it. Thank you.

Neil Patel:

Thank you. Pramod, I'm sorry I got your name wrong. Our next speaker is Emily Jenkins. Emily?

Lynne Fruth:

Afternoon commissioners. I am Emily Jenkins and I'm outside counsel for the National Community Pharmacist Association. NCPA's 19,000 members are invaluable healthcare providers in their communities. NCPA strongly supports the FTC and DOJ adoption of merger guidelines that consider a variety of impacts on competition, including non-price effects as contemplated by the Clayton and Sherman acts.

Lynne Fruth:

As you are well aware, there has been a great deal of consolidation in the pharmacy benefit manager market. In that market the three big PBMs consolidated upstream with Aetna, Cigna and United Health and downstream with their mail order, specialty and retail pharmacies. As a result of this consolidation, community pharmacies compete against behemoth entities that can access data from various markets within their vertical entity. These entities use data obtained from processing prescription claims through PBM systems and insurance claims to steer our members' patients to their own pharmacies.

Lynne Fruth:

Our member pharmacies compete at only one level of the vertical so they are particularly susceptible to this exclusionary conduct and our patients suffer both in terms of dollars paid for prescriptions,

increased copays, and by reduced choice. The siloed insurer, PBM pharmacies, also use data gathered from transactions between our members and their patients to exclude our members from serving their most vulnerable patients.

Lynne Fruth:

If the harm caused by these behaviors are not readily quantifiable in terms of the price that prescribers pay often the price patients pay comes in the form of higher copays, which aren't reflected in the cost to subscribers as well as in non-price effects of limited choice, higher risk, and poorer outcomes for patients.

Lynne Fruth:

Over the past 20 years, our members have experienced firsthand the failures of a merger enforcement posture that has boiled down to price effects on proxy consumers. NCPA urges the FTC to adopt guidelines that reflect an enforcement approach that accounts for harm to competition, inclusion of non-price competitive effects, such as diminished consumer choice and data aggregation. Thank you very much.

Neil Patel:

Thanks Emily. Our next speaker is Nancy Piwovar. Nancy?

Nancy Piwovar:

Yes. Thank you for this opportunity, FTC Chair Khan and commissioners. I'm a healthcare consumer and have tracked the hospital closure for 14 years. 131 year old nonprofit hospital Muhlenberg was acquired by a younger competing nearby hospital. The pooling of interest was misrepresented as a merger. There were no HSR filings found.

Nancy Piwovar:

Slowly, systematically, Muhlenberg was dismantled to eliminate medical competition. There were no legally required community needs assessment or forensic audits. Thirteen municipalities from three New Jersey counties were impacted. Muhlenberg was heavily endowed, Muhlenberg was sacrificed to save the competing hospital that was facing bankruptcy.

Nancy Piwovar:

Public policy engineered a healthcare desert and a sacrifice zone. Muhlenberg was nationally respected, highly rated 80 compared to 58 and had a commitment to compassionate care for disenfranchised populations. The closure was blamed on immigrants and uninsured medical services for different demographics should not have been prioritized. Muhlenberg property has a mortgage for 152.9 million and the money used to enhance the competing hospital.

Nancy Piwovar:

Later a portion of the Muhlenberg property was sold for 3 million dollars with the deed that restricts medical competition and included a medical non-compete agreement. Citizens protested the medical non-agreement, which is a discriminatory act of regulatory racism.

Nancy Piwovar:

The 2008 closure listed seven independent hospitals and one small merged hospital. In 2022 only one independent hospital remained, St. Peter's, which recently abandoned merger plans due to the FTC filing. The rest merged into three different healthcare systems. Choices went from eight to four systems. Independent hospitals need help.

Nancy Piwowar:

Consumers have more choices in veterinary care, car dealerships, hair and nail salons, automobile shops, et cetera than in healthcare competition. First, do no harm. Mergers do harm when they restrict competition and ultimately lead to hospital closures and a reduction in services. Some mergers and acquisitions are an economic weakness and hurt society as a whole. Thank you very much commissioner.

Neil Patel:

Thank you Nancy. Our next speaker is Stephan Prinsloo. Stephan?

Neil Patel:

(Silence)

Neil Patel:

Stephan, are you there?

Stephan Prinsloo:

Hello?

Neil Patel:

Yes. Hi Stephan. It's your turn to speak. Do you want to speak?

Stephan Prinsloo:

Yes, please. I'm a salon owner and I'm also a cosmetic salesperson, okay? My concern is that the hairdressing industry is falling very badly in terms of qualifications and areas in suburbs where people can't afford the services anymore.

Stephan Prinsloo:

And I'm actually going to tell you, I did register to speak about, it's not just about the industry as well as the safety of career search on search engines on Google, that I'm going to explain what happened to me now.

Stephan Prinsloo:

My mobile device was hacked through a US resident and that I ask out for help to help me with this. And I've got this Zoom meeting invitation, and I really want help with this because it's basically taking all my personal information and destroying it. And I don't know what else.

Stephan Prinsloo:

But I am a salon owner, as I said, so I was listening to everyone's conversations about the public medicine, the drugs, it's all true. And if I was capable or had the authority to change anything, I would.

Stephan Prinsloo:

I'm a very productive person. I would love to give an input and become part of the organization of fixing all of these problems that we are facing.

Stephan Prinsloo:

Hello?

Neil Patel:

Yes. Thanks Stephan. And that concludes our public speaker portion. And so I'll turn it back over to Chair Khan.

Lina Khan:

Great, thanks so much, Peter. And thanks so much to everybody who took the time to come speak in our public comment portion. These perspectives are so valuable for us to be hearing. Sometimes in these positions, we primarily hear about mergers in terms of abstractions. And so hearing about very concrete effects and impacts is always extremely helpful for us. And we really value all of your input.

Lina Khan:

This was the last of the listening sessions. Going forward we will be publishing in the coming months, a draft version of the merger guidelines, and there will be at that point an opportunity for additional public comment and input before we move forward with the final set of guidelines.

Lina Khan:

So we will look forward to additional engagement and participation in the coming months. Thanks so much again to everybody who participated. Thanks so much to our office of policy planning for all of the work that went into putting this event together and thanks also to the commissioners for joining and participating.

Lina Khan:

Great to see everybody, take care.