



Office of Commissioner
Rebecca Kelly Slaughter

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

Keynote Remarks of Commissioner Rebecca Kelly Slaughter¹
at the FTC/DOJ Pharmaceutical Task Force Workshop
As Prepared for Delivery

Washington, D.C.
Zoom
June 14, 2022

Thank you for your introduction, Viola. And thank you to Chair Khan and AAG Kanter for your remarks. The fact that we have both DOJ and the FTC working together on this project reflects something important about the priorities that Chair Khan and AAG Kanter have set and implemented. Pharmaceutical mergers are traditionally thought of as the FTC's domain, but our leadership today recognizes that in this—as in all areas of competition law—we should be substantively, directionally, and cooperatively aligned. DOJ's participation in the task force reflects exactly that priority. Thank you also to the leaders of our partner organizations, Andrea Coscelli at the CMA, Margrethe Vestager at the EC, Matthew Boswell at the CCB, and Gwendolyn Cooley, Chair of the NAAG Antitrust Task Force.

I especially want to extend my thanks and gratitude to staff at the Federal Trade Commission, the DOJ Antitrust Division, the Offices of State Attorneys General, Canada's Competition Bureau, the European Commission Directorate General for Competition, and the U.K.'s Competition and Markets Authority, as well as our panelists for the extraordinary work that has gone into making not only today's event but this entire project a reality. I want to express my deep gratitude to each of these partner agencies for deploying your time, effort, and expertise to participate in the Pharmaceutical Merger Task Force. Thank you as well to members of the public, academics, researchers, and others who submitted public comments and contributed to our learning and understanding of pharmaceutical mergers.

One of the byproducts of the COVID-19 pandemic has been the ability to connect with colleagues from around the world at the touch of a button. Being in the same virtual room allows us to connect and enhance collective learning with greater convenience and regularity than we could do with in-person meetings. Our newfound facility with video conferencing was a bonus that helped to strengthen relationships and enhance the Task Force's interactions.

For the past year, a group of incredibly smart thinkers have taken a fresh look at our approach to merger investigations and enforcement in the pharmaceutical industry and explored opportunities for growth. This collaborative project had several aims. First, we sought to gain a better understanding of the similarities and differences in the competitive environment in our home jurisdictions, and our real-world merger experiences, informed by our respective laws. Second,

¹ The views expressed in these remarks are my own and do not necessarily reflect the views of the Federal Trade Commission or any other commissioner.

we wanted to ensure that we were working together to strengthen enforcement and align on approaches to common questions with which we all are grappling. Finally, with the benefit of our collective exploration of market behavior, incentives, and business decision-making, we hoped that each agency would be better equipped to tackle the challenges posed by pharmaceutical mergers collaboratively, with fresh thinking and new strategies.

And we have achieved our aims. The Task Force has further strengthened our cooperation both on big picture and case-specific issues. Case work has always been a key to our inter-governmental relationships. But this task force was especially helpful in that its meetings created the time and space to jointly learn about, contemplate, and discuss each other's concerns and challenges outside of the context of specific cases. Enhancing these relationships through dialogue helps to focus our collective lenses on novel and emerging competition issues and enhances our cooperation on individual matters.

Our panelists over the next two days will highlight a variety of new learning about pharmaceutical consolidation and conduct that is relevant to our merger reviews. But before we dive into the first panel, I'd like to take a moment emphasize why the Task Force's work is so important for constituents across our jurisdictions—why pharma mergers matter so much.

First, pharma mergers matter because pharmaceuticals matter. While it's true that many of the industries with which our enforcement agencies engage on a daily basis are important to people's lives—food, housing, and gasoline, for example—pharmaceuticals are especially critical. After more than two years of a global pandemic, we have seen up close the miraculous scientific achievements that resulted in the COVID-19 vaccines and treatments that have saved countless lives. Every day, millions of people depend on pharmaceuticals to treat deadly and serious illnesses, to manage chronic diseases and conditions, and to provide preventative care. A competitively vibrant market protects access to existing drugs and promotes new innovations.

But access to medicine is already imperiled by untenable cost. In the U.S., spending on prescription drugs has increased from \$30 billion in 1980 to \$335 billion in 2018. Over that period, real per capita spending on prescription drugs increased more than sevenfold: from \$140 to \$1,073.² This is not only money from consumers' pockets, but a sizeable amount of that is taxpayer dollars spent on Medicaid and Medicare drug programs.

When mergers diminish competition in pharmaceutical markets, the result is higher prices which can have devastating effects for patients. Enforcement action is necessary to prevent such harms. The FTC has a long track record of investigating pharmaceutical mergers and resolving those investigations with consent agreements that require divestitures of particular products or pipeline products in order to replace the lost competition and prevent this harmful accumulation of market power.

But we must not limit our enforcement to existing products and pipeline products; competitively healthy pharmaceutical markets are driven by the incentive to innovate—to research and develop new and truly revolutionary treatments. Mergers that reduce drug research and development can

² Congressional Budget Office, *Prescription Drugs: Spending, Use, and Prices* (Jan. 2022), <https://www.cbo.gov/system/files/2022-01/57050-Rx-Spending.pdf>.

diminish the innovation competition that fuels scientific progress. When multiple companies are racing to develop new technology, that innovation race in and of itself produces tangible benefits that may be at risk from a merger. The EC's challenge to Dow/DuPont recognized this loss of R&D, specifically requiring divestitures of R&D assets specifically.³ The FTC has alleged harm to innovation in a number of different cases, including recently in complaints challenging the tie-ups of Lockheed/Aerojet and Illumina/PacBio, both abandoned, and Illumina/Grail, which is pending in litigation.⁴

In the pharmaceutical context, competition to innovate means competition to bring new drugs to market. It can also manifest as innovation more broadly, in how clinical trials are conducted or how drugs are delivered, for example. Competition to innovate can lead to discoveries around platform technologies, such as the mRNA COVID vaccine, which can have vast applicability across different medical indications.⁵ Even the awareness of efforts by other firms to innovate—information that is often in the public domain—pushes the pace of research and development faster and faster.

Protecting innovation requires us to consider the impact of mergers on both the incentives of the merging firms, as well as on non-merging firms. For example, the incentives of non-merging firms may be relevant if a merger reduces the number of large firms that are the target sales audience for a new innovation being developed by a pharmaceutical startup, which may affect availability of capital to those startups. Or the merged firm could gain an ability and incentive to foreclose other innovators, thus deterring investment in this space.

Finally, pharma mergers matter because we know that the pharmaceutical industry has a particularly checkered legacy of anticompetitive conduct. In fact, anticompetitive conduct in the pharmaceutical industry is so widespread that we have an entire division of our agency, Health Care, dedicated to investigating and halting it. I want to take a moment to acknowledge important developments led by the Health Care division in rooting out this anticompetitive conduct.

Most recently, the FTC in partnership with several states secured a verdict finding the Pharma Bro, Martin Shkreli, liable for jacking up the price of a life-saving drug for HIV patients more than 4,000 percent. The FTC has also made tremendous progress in its fight against branded pharma pay-offs to generic drug makers to delay their competition.⁶ And the DOJ and the states have brought groundbreaking cases around price fixing in drug markets.

³ Press Release, European Comm'n, *Mergers: Commission clears merger between Dow and DuPont, subject to conditions* (Mar. 27, 2017), https://ec.europa.eu/commission/presscorner/detail/pl/IP_17_772.

⁴ Compl., *In re. Lockheed Martin Corp.*, No. 9405 (filed Jan. 26, 2022), <https://www.ftc.gov/system/files/documents/cases/d09405lockheedaerojetp3complaintpublic.pdf>; Compl., *In re Illumina, Inc.*, No. 9387 (filed Dec. 17, 2019), https://www.ftc.gov/system/files/documents/cases/d9387_illumina_pacbio_administrative_part_3_complaint_public.pdf; Compl., *In re Illumina Inc.*, No. 9401 (filed Mar. 30, 2021), https://www.ftc.gov/system/files/documents/cases/redacted_administrative_part_3_complaint_redacted.pdf.

⁵ National Cancer Institute, *Can mRNA Vaccines Help Treat Cancer?* (Jan. 20, 2022), <https://www.cancer.gov/news-events/cancer-currents-blog/2022/mrna-vaccines-to-treat-cancer>.

⁶ Fed. Trade Comm'n, *Overview of FTC Actions in Health Care Services and Products* (Apr., 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/2022.04.08%20Overview%20Healthcare%20%28final%29.pdf.

We do not pretend this anticompetitive activity does not exist when we are considering parties proposing to acquire their competitors either in the first instance or as divestiture buyers. Instead, it is important to consider how mergers might affect the incentive or ability of the merging parties to engage in anticompetitive conduct going forward.

The workshop this week wraps up the immediate agenda of the Pharma Task Force, but it by no means represents the end of our work together. We will continue to work with this exceptional group of partners on both specific cases and general approaches, keeping our ideas fresh and reflective of market realities.

Going forward, our individual enforcement and policy work can also inform each other's agendas. For example, in the U.S., we are paying particular attention to the conduct of pharmacy benefit managers as the intermediaries between manufacturers and patients. Last week, the FTC issued 6(b) orders to study the PBM industry and a handful of critical drugs, like insulin.⁷ This will expand the FTC's knowledge and understanding of contracting practices and pharmaceutical firm pricing and incentives. The information the Commission uncovers in a 6(b) study can—and should—be presented to the public in a final report. This public facing work-product can help inform policy makers, other government agencies, academics, and the many market participants who are working to address punishing drug prices. And I have no doubt the knowledge the FTC will gain will help better inform our pharmaceutical merger investigations.

Finally, I'm excited about the FTC's work with DOJ to refresh the merger guidelines.⁸ Our deep dive into pharmaceutical mergers has been a useful exercise contributing to the update.

With that, thank you again to the Pharma Merger Task Force members, and especially to the FTC staff who have put so much time and effort into this project. I wanted to thank you each by name, but if I did that I would have had no time for remarks. But please know that I see you and your hard work, and I look forward to having the chance to thank you in person. And with that, I will turn it over to Thomas DeMatteo from the DOJ Antitrust Division, the moderator of today's first panel.

Thank you.

⁷ Press Release, Fed. Trade Comm'n, *FTC Launches Inquiry Into Prescription Drug Middlemen Industry* (June 7, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-launches-inquiry-prescription-drug-middlemen-industry>.

⁸ Press Release, Fed. Trade Comm'n, *Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers* (Jan. 18, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers>.