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

Office of the Chair

September 10, 2024

Alex Khlopin
Legislative Clerk
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, DC 20515

Re: FTC Chair Khan's Responses to Additional Questions for the Record

Dear Mr. Khlopin,

I appreciated the opportunity to testify on July 9, 2024, at the Subcommittee on Innovation, Data, and Commerce hearing titled "The Fiscal Year 2025 Federal Trade Commission Budget." Pursuant to the Rules of the Committee on Energy and Commerce, I am attaching my answers to the additional questions for the record, in the required format.

Thank you again, and please let us know if you have any questions.

Sincerely,

Lina Khan

Lina M. Khan
Chair, Federal Trade Commission

Attachment —Additional Questions for the Record

The Honorable Cathy McMorris Rodgers

1. **Chair Khan, do you believe the FTC staff are experts in the areas of competition and consumer protection? And throughout the history of the agency, staff conduct investigations and inquiries based on their expertise, without political intervention, correct? Would you also agree that having Attorney Advisors from the Chair's office run agency investigations or inquiries would undermine staff efforts to run objective investigations? If so, why do attorneys from your office actively engage in staff investigations and inquiries?**

   FTC staff are experts in competition and consumer protection. They are also remarkably talented and hard-working public servants, who continue to succeed against companies with dramatically more resources. The unfortunate reality is that the FTC anticipates that it will have to continue to reduce staff levels unless Congress fully funds the President's FY2025 budget request. In 1980, the agency had 1,700 FTEs, even though the American economy has grown sixfold since then – leaving fewer devoted and talented staff to ensure that consumers, workers, and small businesses can benefit from the opportunity and freedom that free and honest competition provides. Further, the staff's excellent work is evident from how active we are in law enforcement, advocacy, and research. It's an honor to serve alongside the talented and dedicated employees of the FTC.

2. **Your 2025 Budget Request included $98 million for "advisory and assistance services." If enacted, that $98 million allocation would be the second largest line item in the Commission's budget, second only to the compensation for the FTC workforce.**

   a. **What are these "advisory and assistance services"? Provide us with a couple examples.**

      Examples of the agency's advisory and assistance services include expert witness services, information technology services (e.g. helpdesk, cloud services operations and maintenance, etc.), and staffing the Consumer Sentinel call center for consumer protection complaints.

   b. **Who decides when and how the services are required?**

      When the agency lacks sufficient expertise or specific skills, it may seek assistance and advisory skills to address those gaps. The relevant program office evaluates and determines the most efficient way to accomplish the mission.

   c. **Is there a transparent process for awarding contracts for these services?**

      Whenever possible, contracts are awarded subsequent to issuance of publicly announced solicitations. Program offices conduct market research and refer potential sources to the contracting officers, who supplement that with further

exploration via public requests for expressions of interest and capability statements. Open market solicitations are posted to the SAM.gov Opportunities website and sent to invitees that FTC research may identify as particularly complementary to needs, with respect to lines of business, experience and expertise. However, the FTC can use the authority under 48 C.F.R. § 6.302-3 to obtain expert witnesses for litigation on a sole source basis.

d. Why aren't FTC employees themselves performing these services?

We always consider whether FTC employees can perform these services in lieu of external contractors. In the case of expert witnesses, the agency may lack specific industry or technical experience necessitating contracted functions. In addition, services performed may be short term in duration, making contracted services more efficient.

3. I also noticed that your budget request included $32 million for "Land and structures." This is up from an actual $1 million in 2023 and was not requested at all for FY2024. What is the reason for such a drastically high request? What does the Commission have planned with those taxpayer dollars?

The $32 million requested in FY 2025 is for costs related to the FTC's satellite building, the 10-year lease on which expired this year. The FTC continues to work with the General Services Administration to receive Congressional approval on the FTC Prospectus for the move. The $32 million estimate reflects guidance from GSA and represents year one of a multi-year effort to obtain funding to relocate. The $1 million spent in FY 2023 was for routine structural improvements. We did not request funding in FY 2024 because we anticipate the move funding will be needed beginning in FY 2025, not FY 2024.

4. In 2023, an FTC attorney published a blog post entitled "Keep Your AI Claims in Check," where an FTC attorney reinforces a warning for "businesses to avoid using automated tools that have biased or discriminatory impacts." Which standards are the FTC referencing, in the course of their routine work, to measure or quantify bias within an automated tool system?

The referenced blog post links back to an earlier blog post that discusses unlawful discrimination and refers to the FTC's enforcement of relevant standards found in the FTC Act, the Fair Credit Reporting Act, and the Equal Credit Opportunity Act.

5. Chair Khan, over the course of your tenure, we have heard reports that you have not provided fellow Commissioners adequate opportunity to review staff recommendations before votes. We have also heard that you have failed to give Commissioners access to agency and party records. With a complete set of commissioners once again, will you commit to a fresh start to give FTC Commissioners at least 30 days to review proposals before taking votes? https://insidesources.com/the-wrath-of-khan/; https://mlexmarketinsight.com/news-hub/editors-picks/area-of-expertise/antitrust/ftcs- wilson-expands-on-scathing-critique-of-khan-calling-agencys-direction-appalling-and- gut-wrenching

Each FTC Commissioner receives FTC staff recommendations and analysis regarding law enforcement actions, rulemakings, or other matters. It is routine for FTC staff to brief Commissioners on specific matters, giving them a chance to ask questions and form their views.

As a law enforcement agency, the Commission must have operational flexibility to act swiftly when needed to comply with statutory deadlines or to otherwise protect the public. For example, the Commission must act quickly to shut down ongoing frauds and scams and protect people from ongoing harm. As a general matter, Commissioners usually have ample time to review the proposals on which they ultimately vote.

6. **Chair Khan, FTC alumni submitted a letter to the FTC General Counsel expressing concern that "agency personnel may have leaked confidential information, or their analyses of confidential information, to the media about ongoing investigations." What specific steps have you taken to instruct staff not to disclose non-public information?**

   Maintaining the confidentiality of nonpublic information is vital to the FTC's law enforcement mission; businesses, consumers, and other affected parties trust that the FTC will not improperly disclose nonpublic information. I take seriously the FTC's responsibility to protect confidential law enforcement, business, and other nonpublic information. Ensuring the integrity and security of non-public information is paramount. Commissioners' offices and Commission staff are given regular reminders about the importance of not disclosing nonpublic information. In addition, Commission employees receive training on the disclosure of nonpublic and/or confidential information, and the proper ways to protect that information, on an ongoing basis.

7. **Chair Khan, a recent Inspector General's Report found that you failed to follow required ethical hiring requirements for unpaid consultants, https://www.bloomberg.com/news/articles/2022-08-03/ftc-under-khan-faulted-by-watchdog-on-hiring-unpaid-experts. What specific steps is the agency taking to solve these failures?**

   The Office of the Inspector General (OIG) conducted a performance audit to determine whether the FTC's program used to hire and oversee unpaid consultants and experts was managed in accordance with federal and agency requirements and issued their report on August 1, 2022. The IG found no violations of law, but identifies areas for improvement to mitigate risk relating to the recruitment of unpaid consultants. The IG identified three recommendations in the report to address its findings, and by April of 2023, the FTC had implemented corrective actions and the IG closed all recommendations.

8. **Chair Khan, do you think it is appropriate to hire employees from think tanks to work on matters on which they previously lobbied the agency?**

   The Commission has a long history of hiring top experts who have relevant expertise gained from previous positions held outside the federal government. Accordingly, it is not unusual for some FTC employees to be recused from participating in certain FTC matters based on their prior work. Public service is a public trust, and preserving

confidence in the integrity of the FTC is important to me as Chair. All FTC employees must uphold the highest standards of ethical behavior. New employees are required to attend a live federal ethics orientation and encouraged to seek guidance from the FTC's Ethics Team as often as needed to ensure they understand and comply with federal ethics requirements.

9. **Chair Khan, you frequently talk of fair competition and fair markets. Do you think it is fair that some companies are required to go through FTC administrative litigation, while other companies under DOJ review go to federal court?**

   Congress created the FTC in 1914 as a specialized body of competition experts charged with adjudicating cases involving complex and novel issues. In creating the FTC, Congress sought to address concerns about the way the federal judiciary and generalist judges were handling antitrust cases. Accordingly, Congress in the FTC Act gave the Commission express authority to pursue enforcement actions administratively, not just in federal court. Consistent with our statutory mandate, the Commission has designed processes and procedures to vindicate this authority granted by Congress and to ensure that our administrative practices accord with the institutional design crafted by Congress.

10. **The FTC's mandate is to protect consumers, correct? And in fact, Congress has been quite clear — such as when Congress amended the FTC Act in 1994 to require the FTC to focus on things that cause "substantial injury to consumers" — that FTC's job is to protect consumers, correct, in case of substantial injury? has that been the governing principle in all cases that have been brought?**

    The FTC's mission is to protect the public from unfair or deceptive acts or practices and from unfair methods of competition through law enforcement, advocacy, research, and education. Section 5(a) of the FTC Act prohibits "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. §45(a). In 1994, Congress amended the FTC Act regarding the FTC's authority to prohibit "unfair . . . acts or practices." *See* PL 103–312, August 26, 1994, 108 Stat 1691. Thus, Section 5(n) of the FTC Act limits such authority to acts or practices that are "likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. §45(n). The standard of proof set forth in Section 5(n) has governed all unfairness cases brought by the Commission since 1994. The language of Section 5(n) does not, on the other hand, apply to deception claims brought under the FTC Act. The FTC Policy Statement on Deception, available at https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf and appended to *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174 (1984), sets forth the elements and governing principles for deception cases brought by the Commission.

11. **In April, the FTC moved to block fashion firms Tapestry and Capri from merging, claiming that it would give Tapestry a "dominant share of the 'accessible luxury' handbag market" and would negatively impact workers.**

On this move, the Wall Street Journal wrote, "The [FTC] describes handbags that retail for several hundred dollars as 'affordable,' which they may be for antitrust attorneys in Washington. Most middle-class Americans would consider them a genuine luxury."

a. **I am concerned by how precious resources at the commission can be used going after the luxury handbag market. What resources were drawn from the consumer protection bureau to focus on this effort? Is this a matter where there would be substantial injury to consumers?**

On April 22, 2024, the FTC unanimously voted to authorize an administrative complaint and lawsuit in in federal court to block Tapestry, Inc.'s $8.5 billion acquisition of Capri Holdings Limited. The complaint alleges that the deal seeks to combine close competitors – Tapestry's Coach and Kate Spade brands and Capri's Michael Kors brand – and that the deal would eliminate direct head-to-head competition between Tapestry's and Capri's brands if it is allowed to proceed.

This matter was investigated by our Bureau of Competition, not our Bureau of Consumer Protection. Because the Tapestry/Capri case is now in administrative adjudication, I cannot comment on that specific matter.

12. **The FTC has consistently made the claim that it is under resourced, and this year alone requested a 25% increase in funding compared to last year's budget request.**

However, it is hard not to question how the FTC is spending the funds it has already been appropriated. You ask for additional funding, even though your enforcement numbers overall are well below the final year of the Trump Administration.

a. **Can you provide more details on your budget, specifically on where your priorities are now and why you think they warrant additional funding?**

The FY 2025 budget seeks additional funding for the unprecedented 5.2% pay raise in FY 2024, an anticipated 2% pay raise in FY 2025, and inflationary increases in FY 2024 and FY 2025 to critical infrastructure costs ($34 million). Additionally, the FTC was required to request $32 million in move funding due to the expiring lease at the agency's Constitution Center location. This funding is separate from general salaries and expenses.

The Supreme Court's 2021 *AMG Capital Management* decision has made it much more resource intensive to obtain redress for victims of fraud. Now to obtain redress (except in cases involving certain rule violations), the agency must bring an administrative case, litigate it and all appeals, and then bring a district court case. Litigating cases twice to obtain redress is not only resource-intensive, it delays our ability to get redress funds to harmed consumers.

The FTC is extraordinarily active and has a strong record of success over these last few years. On the antitrust side, FY 2024 is looking to be a big year for the

agency's law enforcement. Right now, we estimate that our antitrust enforcement, particularly on mergers, will generate the highest level of consumer savings in many years.

13. Chair Khan, how many total employees has the agency hired (or offer to hire, whether on a paid or unpaid basis) from, since July 2021?

a. Open Markets

b. American Economic Liberties Project

c. The Capitol Forum

While the FTC does not maintain human resources records in a form that would enable it to identify and compile that type of information, I will note that the FTC is fortunate to recruit top talent from across a variety of workplaces, including from the private sector, the public sector, and nonprofit organizations.

14. What are the recusal rules for individuals from these entities who previously lobbied the FTC to pursue any actions? What are these individuals' post-employment restrictions as to future FTC-related activities?

While the FTC does not maintain human resources records in a form that would enable it to identify and compile that type of information, recusal rules apply to FTC employees based on their appointment or position. Some recusal rules apply to all FTC employees. *See, e.g.*, 18 U.S.C. § 208 (financial conflicts); 5 C.F.R. § 2635.502 (relationship conflicts). Other rules apply to a subset of FTC employees. *See, e.g.,* Exec. Order 13989, sec. 1, paras. 2-3 (Jan. 20, 2021) (Biden Ethics Pledge). Further, attorneys are subject to recusal requirements under their state bar rules of professional conduct.

As with the recusal rules, some post-employment restrictions apply to all former FTC employees. *See, e.g.*, 18 U.S.C. § 207(a)(1); 16 C.F.R. §§ 4.1(b)(1)(i), (iii) (expanding the restriction under 18 U.S.C. § 207(a)(1)), (b)(2) (requiring FTC clearance to participate in certain matters). Other post-employment restrictions apply to a subset of former FTC employees. *See, e.g.*, 18 U.S.C. §§ 207(a)(2), (c); 16 C.F.R. §§ 4.1(b)(1)(ii), (iv); Exec. Order 13989, sec. 1, paras. 4-6. Further, attorneys are subject to post-employment restrictions under their state bar rules of professional conduct.

All new FTC employees must receive live ethics orientation and a written summary covering recusal, post-employment, and other ethics rules. All GS-14, GS-15, and senior FTC employees and certain other employees must also receive annual ethics training covering these topics. Further, all FTC employees must receive a live, post-employment ethics briefing and additional written guidance before leaving the agency.

15. Chair Khan, the FTC's new strategic plan states the FTC will "maintain strong relationships with Washington-based, regional and trade reporters, while continuously seeking new outlets and reporters to maximize the agency's media outreach." Please identify all such relationships. The new strategic plan also states the agency will: "send all FTC press releases and other information to

targeted lists of reporters, follow up individually with key reporters as needed and work to make staff available for interviews." Please identify all reporters on FTC's "targeted lists." Please identify the "key reporters."

FTC's public affairs office has established relationships with reporters in specialized fields such as tech, fraud and scams, retail, healthcare, and business journalists at outlets including the Wall Street Journal and Fox News. Strong relationships with local newspapers and community journalists also ensures staff can effectively leverage these channels to ensure Americans are informed about current scams and their rights.

16. **Chair Khan, do you think it is appropriate for any FTC employees or officials to attend closed-door meetings with lobbyists during the pendency of open rulemakings? If so, why did FTC management attend a closed-door meeting with AELP concerning junk fees, an issue on which they have lobbied the FTC?**

For rulemaking proceedings under Section 18 of the FTC Act, such as the proposed rule on unfair or deceptive fees, Congress required the Commission to promulgate a rule on *ex parte* communications and specified certain provisions that needed to be in the *ex parte* rule. *See* 15 U.S.C. § 57a(i) (specifying that the *ex parte* rule "shall authorize the Commission or any Commissioner to meet with any outside party concerning any rulemaking proceeding of the Commission," subject to certain transparency requirements). The Commission duly promulgated a rule governing *ex parte* communications in Section 18 rulemaking proceedings, which is codified at 16 C.F.R. § 1.18(c). To address Congress's concern about outside parties meeting with "the Commission or any Commissioner," Rule 1.18(c)(1) imposes transparency requirements whenever an outside party meets with "any Commissioner or any Commissioner's adviser."

Rule 1.18(c)(1) does not apply when an outside party meets with FTC employees other than Commissioners or Commissioners' personal staffs. However, such meetings cannot be used as a *sub rosa* attempt to introduce new facts into the rulemaking record and thereby secretly influence the Commissioners' decisionmaking about the rule. Under 15 U.S.C. § 57a(j) and 16 C.F.R. § 1.18(c)(2), FTC employees with "investigative or other responsibility relating to any rulemaking proceeding within any operating bureau of the Commission" are prohibited from communicating to Commissioners or Commissioners' personal staff "any fact which is relevant to the merits of such proceeding and which is not on the rulemaking record of such proceeding, unless such communication is made available to the public and is included in the rulemaking record.

The Honorable Gus Bilirakis

1. **Many consumers see advertisements across social media and the internet for various direct-to-consumer medical products that may provide incomplete and misleading information. For example, certain companies sell direct-to-consumer products to assist people in straightening their teeth, leading consumers to believe that the clear aligner treatment is offered under the care of dentists and orthodontists, and is "doctor-directed," when in reality, consumers do not meet a doctor, dentist, or orthodontist and do not even know the name of a dentist providing care. When patients find themselves with a problem, they do not know where to turn and ultimately need to find a dentist or orthodontist to help them remedy new problems. In some cases, the damage of this minimally supervised treatment is irreversible.**

    a. **What are the tools available to the FTC to ensure that misleading advertising is not permitted by these companies and to provide appropriate warnings to consumers that they may not have access to medical professionals during their treatment when working directly with a company like this?"**

    The FTC has a long history of taking action against deceptive health advertising. Firms should not mislead people about the prerequisites for obtaining medical care.

    The FTC can use a number of possible tools in this area, including formal actions through nonpublic investigations, consent orders (settlements), or litigation under Sections 5 and 12 of the FTC Act; informal actions such as warning letters; business education to promote compliance and truthful advertising; and consumer education to prevent consumers from being scammed.

2. **The Federal Trade Commission has written warning letters to several drug innovators and notified the FDA that it disputes the accuracy or relevance of more than 300 Orange Book Patent listings. See FTC Expands Patent Listing Challenges, Targeting More Than 300 Junk Listings for Diabetes, Weight Loss, Asthma and COPD Drugs (Apr. 30, 2024). Dr. Califf is quoted in your press release as saying "It is the responsibility of branded drug manufacturers to ensure that Orange Book submissions contain information only on the types of patents for which information should be submitted to FDA. The FDA will continue to engage with the FTC to identify and address potential efforts to impede competition so that consumers can get access to the medicines they need."**

    Yet for nearly 20 years, both the brand and the generics industry have repeatedly sought guidance from FDA about precisely which of their patents they are required to by law to list and which ones they would face enforcement actions if they do include in the Orange Book. FDA has maintained that it lacks expertise in patent law and its role in this scheme is "ministerial." Do you believe that a regulated entity is entitled to clear notice of the requirements of the law?

    a. **Do you disagree with the industry, including the generics manufacturers**

and GAO, that further clarification of this requirement is necessary?

For the patent-listings that staff has disputed using the FDA's regulatory process, the law is already clear that these listings violate the statutory requirements set forth in the Hatch Waxman Act, longstanding FDA regulations,[1] and case law. The statutory listing provisions and related regulations require that, to be properly listed in the Orange Book, a patent must "claim[] the drug for which the applicant submitted the [NDA]" and also be either "a drug substance (active ingredient) patent or a drug product (formulation or composition) patent."[2] Alternatively, the patent may claim a "method of using such drug for which approval is sought or has been granted in the application."[3] The patent-listings that FTC staff has disputed are device and device component patents that staff believe do not satisfy these requirements. Several federal courts have held that device and device component patent listings that do not claim any particular drug substance are improper under the terms of the statute.[4]

b. Failure to list a patent in the Orange Book is a violation of law and that innovators are now in the position of having to decide whether to risk a violation of law by not listing a patent and enforcement action by your agency if they do. If the FDA insists it is not equipped to provide this guidance, which entity should be responsible for providing additional guidance? Who benefits from this lack of clarity?

There is nothing innovative about listing patents to delay generic competition when those patents should not be listed under applicable law.

c. FTC has identified more than 300 patents as not belonging in the Orange Book. How did FTC make this determination? Could you identify which of these patents fall into that category? If FDA could not approve a generic product that failed to include these patented inventions anyway, what is the justification for excluding them from the Orange Book?

The FDA can—and routinely does—approve generic products that do not include patented packaging, dose counters, or cap straps. But such patents if listed in the Orange Book may give rise to a 30-month stay of generic approval anyway, even if the generic does not infringe these patents. These are the patents FTC staff has disputed through the FDA's regulatory process.

Although I cannot disclose staff's non-public decision-making process related to the regulatory disputes, I note that the Commission addressed some of these

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[1] *See* 21 C.F.R. § 314.53(b)(1); 21 C.F.R. § 314.3.

[2] 21 U.S.C. § 355(b)(1)(A)(viii). *See also* 21 C.F.R. § 314.53(b)(1).

[3] *Id.*

[4] *See In re Lantus Direct Purchaser Antitrust Litig.*, 950 F.3d 1, 8 (1st Cir. 2020) (quoting 21 U.S.C. § 355(b)(1)(A)(viii)) ("Under the plain wording of the statute" the listed patent must "claim[] the drug for which the applicant submitted" the new drug approval application) (emphasis in original); *Teva Branded Pharm. Prod. R&D, Inc. v. Amneal Pharms. of New York, LLC*, No. CV 23-20964 (SRC), 2024 WL 2923018, at *9 (D.N.J. June 10, 2024), *stayed pending appeal,* 2024-1936, No. 32 (3d Cir. July 10, 2024) (per curiam).

products in a recent amicus brief. In that brief, the Commission explained that improper Orange Book listings harm competition by deterring and delaying entry of lower-cost generics, and it explained that FTC staff had determined that the listed patents concerned only device and device components that did not meet the statutory listing criteria. In *Teva v. Amneal*, Amneal indicated that it could bring its generic inhaler product to market during the summer of 2024 if not for Teva's Orange Book suit triggering a 30-month stay of approval on Amneal's ANDA product until February 2026.[5] When generic drugs enter a market, prices tend to fall dramatically.[6] Delayed generic entry harms patients.[7] The patents that were the subjects of staff's regulatory disputes are listed in the letters to the manufacturers notifying them of the dispute, which are available here: Warning Letters by Press Release | Federal Trade Commission (ftc.gov)

d. The purpose of the Orange Book has been to provide potential generic competitors with clear notice of the patents they would have to copy in order to make an exact copy of a product and resolve any disputes over the scope of patent protection in an orderly and expedited manner. Does removing valid patents from the Orange Book serve this legislative policy? If not, why not?

Generic applicants are not required to make an exact copy of the reference listed drug. They are usually allowed to design around certain aspects of the reference product—i.e., packaging, dose counters, cap straps, and the like—as long as they demonstrate bioequivalence. In addition, the Orange Book listing statute intentionally and expressly did not require or allow listing of every patent related to the reference product. And for good reason. Claims that a generic competitor infringed a patent's packaging, a dose counter, or a cap strap should not delay generic approval for 2.5 years. Thus, the statute does not authorize listing of these types of patents. In the most recent amendments to the relevant statute, the Orange Book Transparency Act, Congress unanimously clarified that for drug products, only drug "formulation or composition" patents may be listed.[8] Nevertheless, pharma companies have persisted in listing other patents and using them to delay generic competition. As noted in our policy statement, improper listings can harm competition and can increase prices for important drugs.

e. You have repeatedly referred to these patents as "junk" or "bogus" patents, going so far as to do so on nighttime comedy shows. These are patents that have been reviewed by the Patent and Trademark Office, usually after several years of investigation and review, and have not been successfully challenged. Do you think the PTO, under President Biden's leadership, is in the business of awarding junk and bogus patents?

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[5] FTC amicus brief, Teva v. Amneal, at 27.

[6] *See id.* at 26.

[7] *See id.* at 28.

[8] 21 U.S.C. § 355(b)(1)(A)(viii).

Our discussions of patent listings pertain to staff notification letters on the *improper listing in the Orange Book*, which is a distinct issue from whether the patent was properly issued by the Patent Office.

3. **Chair Khan, now having served for a while at the FTC, can you tell us your process for complying with FOIA requests? What FOIA requests are still pending, and for how long?**

The FTC's compliance with FOIA is governed by the FOIA statute, 5 U.S.C. § 552, as well as the FTC FOIA Regulations, 16 C.F.R. §§ 4.8 - 4.11.

FTC FOIA staff process most requests within 20 working days following the receipt of a request, without need for an extension. If staff need to invoke a formal extension of the response time, as permitted under the FOIA, they will notify the requester in writing by the 20th working day after receiving the request to give the requester an opportunity to modify the request in order to reduce the necessary processing time. When staff cannot process a request within the extended time limit (i.e., 20 working days + 10-day extension), they give the requester another opportunity to limit the scope of the request so that it may be processed within this time limit, or to arrange an alternative time frame for processing the request.

Once a request is processed, staff sends a letter to respond to the FOIA requester. The responsive documents that qualify for release will be included with this letter. Some documents that staff release may contain both exempt and releasable information. When staff release documents that contain information subject to a FOIA exemption, they redact the exempt material and label it with the exemption that applies. If staff do not locate any responsive records, they will state this in the response letter. If staff locate responsive records but determine to withhold the records based on one or more FOIA exemptions, the response letter will list and explain the applicable FOIA exemptions, describe the categories of documents being withheld, and give an estimate of the quantity of documents withheld. The response letter concludes with an explanation of the procedure for appealing a decision, information about the FTC's FOIA Public Liaison, notification about services provided by the Office of Government Information Services (OGIS), and the name and telephone number of someone who can answer questions about how staff handled the request.

As of August 2, 2024, the FOIA office has 173 pending FOIA requests. The FTC is receiving, responding to, and closing requests on a daily basis, so this number is constantly changing. In Fiscal Year 2023, the agency processed 1,812 requests – an increase of more than 233 from the prior fiscal year – as well as 39 administrative appeals. During FY 2023, the median response time for a FOIA request was three days for a simple request, and 14 days for a complex request.

4. **Chair Khan, is economic analysis important to FTC's work? I find it very odd then that the FTC is seeking to add 3 FTE to the Bureau of Economics, but 9 FTE to the Bureau of Technology. I have heard concerns from many stakeholders that the FTC has not conducted thorough economic analysis in producing rulemakings. To me, that sends a bad message. Do you believe the Bureau of Economics is sufficiently staffed in order to keep up with the vast number of economic altering rulemakings the Commission is moving forward with?**

The Bureau of Economics ("BE") staff has recently grown to 120 FTEs and is currently led by Aviv Nevo, a prominent academic economist visiting (under an IPA) from the University of Pennsylvania. That compares with 101 FTEs at the beginning of 2020. With 94 PhD Economists, BE is the largest group of PhD microeconomists in the Federal Government. These hires include several employees who have significant rulemaking experience.

I am also proud to have launched a new Office of Technology and to have recruited talented data scientists, AI experts, and other technologists to the FTC. Given the continued digitization across the economy, ensuring that we have the in-house expertise needed to rigorously investigate the algorithms and data practices deployed by businesses in digital markets is critical. The Office of Technology has fewer than 20 people and is less than a fifth of the size of the Bureau of Economics.

5. **Chair Khan, the FTC is pursuing a historic number of consumer protection rules, including on negative option and junk fees. Indeed, your budget request seeks 10 FTE relating to CP Rulemaking efforts. I hear numerous concerns that your proposed rules are way too broad, would cause enormous consumer confusion, and would impose significant costs on consumers and industry. Indeed, the Administrative Law Judge overturned your decision concerning burdens related to the Negative Option Rule, finding that the proposed rule would be economically significant, costing the economy in excess of $100 million. What specific steps are you taking in instructing staff to craft narrowly tailored consumer protection rules, that do not impose enormous costs and burdens?**

   For consumer protection trade regulation rules, the Commission adheres to the rulemaking procedures in Section 18 of the FTC Act, 15 U.S.C. Sec. 57a, and Section 22 of the FTC Act, 15 U.S.C. 57b-3(b)(1). Among other things, these statutory provisions require that the Commission identify specific unfair and deceptive practices, consider alternatives to the proposed rulemaking, and analyze the projected benefits and costs of any final rule. I am committed to full compliance with these requirements.

6. **Chair Khan, turning to the Junk Fee Rule, what efforts are you taking to ensure that industries subject to sector-specific rules (like DOT or FCC) are not faced with duplicative or conflicting regulations? I would imagine you would defer to the expert sector-specific regulator that has the most experience in the industries at issue?**

   In the Unfair and Deceptive Fees Notice of Proposed Rulemaking, the Commission invited comment on other Federal, State, and local laws and regulations that may interact with the proposed rule. Commission staff is carefully reviewing and considering thousands of comments, including comments from stakeholders on this issue, to ensure that any final rule appropriately considers other laws and regulations, while also protecting consumers from unfair and deceptive fees.

7. **Chair Khan, I assume you'll agree that the junk fee rule could be interpreted to prevent variable pricing where the amount of a fee is based on choices that consumers make during the ordering process. Shouldn't the rule allow for these kinds of pricing structures that are designed to give consumers choice and match**

prices with consumer preferences?

In the Unfair and Deceptive Fees Notice of Proposed Rulemaking, the Commission invited comment on existing industry practices such as variable pricing and similar pricing structures. As noted, Commission staff is carefully reviewing and considering thousands of comments, including from firms that use a variety of pricing structures, to ensure that any final rule appropriately considers existing industry practices, while also protecting consumers from unfair or deceptive fees.

8. **Chair Khan, California has recently adopted an economy-wide all-in pricing rule and has already had significant problems, for example, the legislature had to pass last-minute legislation to fix key definitional flaws. What lessons is the FTC learning from the CA experience? Is it not better to follow the direction of Congress that is actively engaged on this topic?**

   The Commission is aware of state efforts to address certain unfair and deceptive fee practices and will carefully consider these efforts in any final rule related to similar practices. I am also aware of Congressional efforts to address certain unfair and deceptive fee practices and would welcome legislation in this area.

9. **During the pendency of the NPRM on negative option contracts the FTC conducted an informal hearing on the proposal. A neutral factfinder hired by the FTC took testimony from the public and concluded that the FTC erred when it found that the proposed rule would not have more than a $100 billion impact on the economy. As you are aware, the FTC is required to perform a preliminary regulatory analysis when a proposed rule exceeds that threshold and put such analysis out for public comment. In this rulemaking, the FTC did not do so. Does the FTC intend to remedy its error in this rulemaking in light of its own factfinder's opinion?**

   The FTC is still evaluating public comments received regarding the proposed rule amending the Rule Concerning Subscriptions and Other Negative Option Programs. During the rulemaking process, Commission staff will comply with applicable requirements, including Section 22(a) of the FTC Act, 15 U.S.C. § 57b-3(a).

10. **Many are concerned about this Commission's abuse of Section 5 authority as it relates to rule by enforcement. Several examples in recent history demonstrate a disturbing pattern. First, the FTC brings a questionable enforcement case on an unforeseeable and aggressive theory. Second, the Commission releases a "guidance" document saying the law already prohibits the same conduct, citing no authority. Third, they issue a rulemaking to codify this new idea, even though the Commission already said it is illegal. Some examples of this predatory behavior include non-compete cases where the FTC sued glass container manufacturers, and cases in the negative options field.**

    a. **Chair Khan, why is the Commission putting out guidance claiming activities are illegal, but then starting rulemaking proceedings?**

       In Section 5, Congress directed the Commission to prevent unfair methods of competition and unfair or deceptive acts or practices. I am focused on ensuring

the FTC is faithfully executing on its statutory mandate. The Commission has a long history of periodically issuing guidance to provide the public—consumers, the business community, and practitioners—with information about existing legal requirements or agency enforcement priorities under Section 5 of the FTC Act. For example, the FTC has published guidance related to artificial intelligence, noting that there is no AI exemption from existing laws and firms that use algorithms or models to engage in unlawful collusion, deception, or unfair practices are violating existing laws.

b. If the activity really was illegal, as the guidance claims, then why is rulemaking needed?

It is black-letter administrative law that agencies have discretion to choose between precedential adjudication and rulemaking, *see NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974), and the FTC Act expressly authorizes the Commission to use either tool to address unfair or deceptive acts or practices and unfair methods of competition. Rulemaking is a particularly useful tool when violations are pervasive. It has significant procedural benefits over a party-specific precedential adjudication, as it affords the opportunity for notice and public comment, among the APA's other procedural protections.

11. Chair Khan, for decades the FTC's mission was to protect consumers and preserve competition "without unduly burdening legitimate business activity." In 2022, the FTC deleted "without burdening legitimate business activity" from its mission statement even though there were no public comments in support of such removal. In fact, public comments asked the FTC to keep this longstanding and bipartisan mission statement. https://www.wlf.org/2021/12/07/wlf-legal-pulse/ftc-proposes-astounding-change-to-the- agencys-mission-statement/ Why did the FTC remove this clause from its mission statement? Does that action not convey the FTC should burden legitimate business activity?

Our agency strategic plan still contains the phrase "without unduly burdening legitimate business activity." The change to the mission statement was not a change in policy. Rather, it was an attempt to simplify and streamline a 24-word mission statement. An agency mission statement should be a simple statement of statutory authority, stating the primary function of the agency. Other comparative mission statements do not explicitly state what the organization does not do. One public comment supported the change, and a number opposed it, but the opposition were largely under the impression that this change reflected a change in agency policy and practice. This is not the case, as the document itself reveals.

12. Chair Khan, would you agree with me that FTC staff are experts on consumer protection and competition issues? And do staff have decades of experience at the agency? If that is the case, why have you routinely overruled staff to pursue losing cases in court?

FTC staff are experts in competition and consumer protection. They are also remarkably talented and hard-working public servants, who continue to succeed against companies with dramatically more resources. The unfortunate reality is that the

FTC anticipates that it will have to continue to reduce staff levels unless Congress fully funds the President's FY2025 budget request. In 1980, the agency had 1,700 FTEs, even though the American economy has grown sixfold since then – leaving fewer devoted and talented staff to ensure that consumers, workers, and small businesses can benefit from the opportunity and freedom that free and honest competition provides. Further, the staff's excellent work is evident from how active we are in law enforcement, advocacy, and research. It's an honor to serve alongside the talented and dedicated employees of the FTC.

Since I became Chair, the agency has brought 60 total merger enforcement actions, securing 37 abandonments, 3 preliminary injunctions, 18 consent orders, and 16 merger litigations, with 4 matters in ongoing litigation. We count 1 loss, excluding ongoing matters. The agency also has brought 10 conduct enforcement matters related to unfair methods of competition or anticompetitive conduct since I took office, including 3 federal court litigations that remain ongoing. Overall, the FTC is litigating a record number of cases and has enjoyed significant success in court—securing key victories in blocking a vertical merger, the first time in close to 50 years that the government has won a litigated vertical merger challenge.

13. Chair Khan, what total percentage of your consumer protection and competition budget (not including administrative budget) is spent on rulemaking? How many FTEs are currently working on proposed rules? And how do these statistics compare to resources spent on enforcement?

We estimate that fewer than 25 people, which is less than 2% of the agency's overall workforce, do the majority of the work on the following proposed rules (rules for which NPRMs have been issued). Contributions may be made by others throughout the agency:

- Rule on Unfair or Deceptive Fees
- Rule on Impersonation of Government and Businesses
- Telemarketing Sales Rule
- Rule Concerning Recurring Subscriptions and Other Negative Option Programs
- COPPA Rule
- Labeling Requirements for Alternative Fuels and Alternative Fueled Vehicles
- Energy Labeling Rule
- HSR Form Rule

The FTC continues to aggressively bring enforcement actions, but the *AMG* decision has made it increasingly hard to return money to defrauded consumers. Rules like the Telemarketing Sales Rule and the Impersonator Rule are therefore an important part of the Commission's toolkit. Rulemaking is a fair, efficient, and effective way to protect against fraud and other illegal business practices. Rules can have an extraordinarily high return on investment for the public, while also creating greater clarity in the marketplace.

14. Chair Khan, can you please send us data showing the number of consumer protection and competition cases you have brought this year, and how that has compared to the last 5 years?

As of September 10, the Commission has brought in FY24 48 consumer protection actions and 20 competition actions, including merger and non-merger enforcement and including both litigations and settlements. Between FY20 and FY23, the Commission brought an average of 58 consumer protection and 26 competition actions per fiscal year.

15. **Chair Khan, you have indicated that you win by losing. Losing, however, wastes scarce resources, hurts employee morale, and creates bad precedent, when is winning by losing justified under these principles?**

The Commission's litigation record under the Biden administration (1/21/21- Present) is no less impressive than the record under the previous Trump and Obama administrations, respectively. Excluding pending matters, the Commission has a 93%+ win percentage in merger enforcement alone. This includes PIs, mid-litigation settlements, and abandonments.

That is despite the fact that antirust litigation is inherently difficult with many fact-bound elements of proof and the ever-increasing expectations to provide expert testimony on a number of issues before the court. Moreover, the outcome is often uncertain given the long periods of fact discovery, especially in our complex monopolization cases with multiple plaintiffs. This is particularly true in instances where existing law might be applied to novel or uncommon factual situations having no close precedent. By contrast, cases that address more typical fact patterns having similar existing precedent can often be favorably settled or quickly tried using fewer (but still significant) resources.

When the Commission has reason to believe that an entity is violating the law, we have an obligation to enforce the law without fear or favor. We must weigh the risk of action against the risk of inaction, including the harm to consumers and competition that result from corporate lawbreaking.

16. **Chair Khan, you have been very aggressive with enforcement and rulemaking for the sake of "fair competition." Your Section 5 policy statement takes "I know it when I see it approach," you have proposed rules that would transform the entire economy, and you have deemed yourself to be the regulator of all things from environmental law to labor and employment. However, you take these strides even though the Supreme Court has made unequivocally clear in West Virginia and AMG that agency powers are not limitless. Do you worry that your activities may risk the very existence of the agency? https://www.wsj.com/articles/ftc-may-test-the-courts-limits-meta-lina-khan-roberts- nondelegation-major-questions-enforcement-authority-humphreys-executor- administrative-law-noncompete-11659979935; *see also,* https://www.wsj.com/articles/why-im-resigning-from-the-ftc-commissioner-ftc-lina- khan-regulation-rule-violation-antitrust-339f115d**

My focus has been on ensuring that the FTC is faithfully discharging its statutory obligations. I believe this requires actively enforcing the laws that Congress has charged us with administering, rather than ignoring certain laws or provisions, or allowing academic analysis to override what the law says.

The activities of the FTC under my leadership are within the Commission's Congressional mandate and its statutory jurisdiction.

In *West Virginia* v. *EPA,* the Supreme Court held that in extraordinary cases,

"something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to clear congressional authorization for the power it claims." *See* 587 U.S. 697, 723 (2022) (cleaned up). The Commission has considered this decision and follows all applicable Supreme Court precedent.

In *AMG v. FTC*, the Supreme Court held that federal courts may not order equitable monetary relief under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b). This decision, which upended decades of lower court rulings, eliminated the FTC's ability to seek equitable monetary relief, including disgorgement of ill-gotten gains, in federal court under Section 13(b) of the FTC Act. The FTC can and does, however, still seek federal court ordered monetary redress under Section 19 of the FTC Act, 15 U.S.C. § 57b, to redress injury to consumers or other persons or entities stemming from violations of agency consumer protection rules or after the conclusion of an administrative proceeding in which the defendant has engaged in unfair or deceptive conduct that is objectively dishonest or fraudulent.

Finally, the Commission's statement on "unfair methods of competition" is deeply informed by the text, structure, and history of the statute, as well as decades of case law. Consistent with the statutory text, structure, history, and legal precedent, the statement makes clear that Section 5 reaches beyond the Sherman and Clayton Acts. One of the goals of the statement is to assist the public, business community, antitrust practitioners, and courts by laying out the framework the FTC will use to identify business practices that constitute unfair methods of competition. Inasmuch as the policy statement does not neatly set out a bounded list of prohibited practices, this follows Congress's design. Lawmakers opted against a pre-specified list of proscribed tactics because they knew that such a list would quickly become outdated. Congress instead tasked the FTC with making concrete the meaning of "unfair methods of competition" through litigation and rulemaking, informed by the agency's expertise and ability to do rigorous research into real-world markets and evolving business practices. The policy statement outlines the framework and factors the Commission will use to do so, guided by many decades of agency experience and judicial precedent.

17. Chair Khan, we both believe there should be a fix to Section 13(b) and that defrauded consumers should get money returned to them. However, I am concerned about the opaque nature of how the FTC's pursues monetary relief in its consumer protection cases. I think some clarity will go a long way in furthering the 13(b) dialogue. Would you commit to working with the Bureau of Economics to issue a Monetary Policy Statement to shed more light on how the FTC calculates monetary relief and civil penalties in consumer protection matters?

Prior to the Supreme Court's decision in *AMG Capital Management, LLC v. FTC*, 141 S. Ct. 1341 (2021), Section 13(b) was understood to authorize federal courts to award equitable monetary relief. In such cases, a neutral federal judge always made the final decision whether to order monetary relief under Section 13(b) and, if so, how much. Courts calculated monetary relief awards under Section 13(b) as restitution or disgorgement depending on the evidence that the Commission presented to the court. Our consumer protection and competition staff routinely worked closely with staff from the Bureau of Economics in developing and presenting to the court a framework, grounded in economics, for calculating an appropriate amount of monetary relief based on the evidence in the record. Restitution is measured by the amount of consumer

losses that resulted from the defendant's violation of the law. The Commission typically sought restitution under Section 13(b) with the goal of providing full refunds to harmed consumers. In some Section 13(b) cases, however, calculating monetary relief based on consumer losses was not practical or possible. In such cases, courts awarded disgorgement—a long-standing form of equitable monetary relief that the Supreme Court re-affirmed in *Liu v. SEC*, 140 S. Ct. 1936 (2020). As the Supreme Court explained in *Liu*, disgorgement of unjust gains is a traditional form of equitable monetary relief based on the foundational principle that it is inequitable for a wrongdoer to profit from his wrongdoing. *Id.* at 1943.

To further assist them in evaluating the appropriate amount of monetary relief to award, courts required the FTC to make several evidentiary showings to establish a causal connection between the defendant's unlawful conduct and consumer losses. To obtain monetary relief under Section 13(b) for deceptive misrepresentations, the FTC had to demonstrate that: (1) the defendant made "material" misrepresentations (i.e., representations that a reasonably prudent consumer would rely upon); (2) the misrepresentations were "widely disseminated"; and (3) consumers actually purchased the defendant's products. *See, e.g., FTC v. BlueHippo Funding*, 762 F.3d 238, 244 (2d Cir. 2014). In addition, the FTC was required to provide evidence to support a "reasonable approximation" of the amount of losses caused by the defendant's unlawful conduct. *See FTC v. Bronson Partners*, *LLC*, 654 F.3d 359, 368 (2d Cir. 2011). Once the FTC provided a reasonable approximation supported by evidence, the defendant had the opportunity to contest the approximation by providing evidence that the FTC's calculation was inaccurate or unreasonable. *Id.* And courts took steps to ensure that monetary relief awards were supported by the evidence, did not provide windfalls to harmed consumers, or did not require disgorgement of funds that defendants never received. *See, e.g., FTC v. Verity Int'l, Ltd.,* 443 F.3d 48, 68-69 (2d Cir. 2006); *FTC v. Vylah Tec, LLC*, 378 F. Supp. 3d 1134, 1139-42 (M.D. Fla. 2019); *FTC v. Commerce Planet, Inc.*, 878 F. Supp. 2d 1048 (C.D. Cal. 2012); *FTC v. John Beck Amazing Profits, LLC*, 865 F. Supp. 2d 1052, 1083 (C.D. Cal. 2012).

Your question also asks about calculation of civil penalties. The FTC Act authorizes the FTC to seek civil penalties in federal court in certain circumstances. *See* 15 U.S.C. §§ 45(l), 45(m)(1)(A), 45(m)(1)(B). In such cases, a federal court, rather than the Commission, is responsible for adjudicating the merits of the matter and determining whether to order a civil penalty. In cases seeking civil penalties under Section 5(m) of the FTC Act, courts calculate the appropriate civil penalty amount by applying the factors Congress set forth in Section 5(m)(1)(C) of the FTC Act. *See* 15 U.S.C. § 45(m)(1)(C) (directing courts to "take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require"). For cases seeking civil penalties under Section 5(l), the FTC Act does not list any civil penalty factors, but courts have applied the factors set forth in *United States v. Reader's Digest Association*, 662 F.2d 955, 967 (3d Cir. 1981) ("(1) the good or bad faith of the defendants; (2) the injury to the public; (3) the defendant's ability to pay; (4) the desire to eliminate the benefits derived by a violation; and (5) the necessity of vindicating the authority of the FTC").

18. The FTC's budget request for FY2025 is $535 million and 1,443 FTEs, a $105 million increase from the current enacted level and 55 new FTEs. I'm concerned that any increases in funding or FTEs may be misused. There's been a significant

focus in the media and recent policy discussions around the FTC's unnecessary rulemaking processes, disregard for the law, and track record of losing cases. At the same time, the Commission under its current leadership has struggled with staff turnover and mismanagement. I worry that the agency, under your leadership, will continue to use any additional resources in this manner.

a. **Chair Khan, is it correct that your tenure has produced 15 Policy Statements in roughly 3 years? Do you know your agency has issued more policy statements than the total amount issued during the Trump-Pence Administration (8) and has eclipsed the entirety of the Obama-Biden Administration's eight years (12).**

b. **Approximately how many FTEs are generally needed to develop policy statements?**

Please see response below to question 21.

19. **Recent actions taken by the FTC have shed a bright light on the broken litigation process within the Commission. Because of the arbitrary clearance process by which the FTC and DOJ divide up the market for antitrust enforcement, companies are subjected to very different rules and risks depending on whether you or the DOJ decide to review their merger. Unlike the DOJ, which brings its cases in federal court, the FTC forces companies to go to trial twice—in both administrative and federal court.**

    a. **Would it make more sense for just our federal court system to adjudicate these cases?**

    When Congress created the FTC in 1914, it sought to establish a specialized body of competition experts charged with adjudicating cases involving complex and novel issues. Through the creation of this expert body and its adjudicative process, Congress aimed to address concerns about the way the federal judiciary and generalist judges were handling antitrust cases. Therefore, in the FTC Act, Congress gave the Commission the authority to pursue enforcement actions administratively, not just in federal court. Consistent with our statutory mandate, the Commission has designed processes and procedures to vindicate this authority granted by Congress and to ensure that our institutional practices accord with the institutional design crafted by Congress.

20. **The FTC appears to prefer going after American companies that face increasing competition from China and European competitors. We see cases like Microsoft/Activision brought where the main beneficiary of the FTC's effort is Sony. In the handbag case, the FTC is suing to stop a merger of three American brands that are already struggling in the face of competition from dominant European conglomerates like LVMH.**

    a. **Have you reviewed what the international marketplace looks like when conducting these matters? Have you and your staff consulted with the Department of Commerce or the USTR on these issues to gain their**

perspective?

I am committed to enforcing the law without fear or favor. The FTC, alongside the Antitrust Division of the Department of Justice, is charged with enforcing U.S. antitrust laws for the benefit of the American public, including entrepreneurs, founders, and start-ups. America's economic strength and innovative edge stems from its commitment to free enterprise and fair competition. Turning a blind eye to illegal actions by monopolies to roll up markets or stifle competition could block innovative upstarts.

In the past, when there have been calls for America to protect its domestic monopolies to stay ahead on the global stage, we have rejected that path and chosen to double down on promoting free and fair competition rather than permit "national champions" to dominate domestic markets in pursuit of a stronger global presence. History shows that countries that forego competition at home often lose out to companies whose countries support competitive markets, including through vigorous antitrust enforcement.[9]

As part of a whole-of-government approach to addressing competition policy issues, the FTC consults with other executive branch agencies, including the USTR and the Department of Commerce, as appropriate. The FTC is an independent agency and makes enforcement decisions based on the facts and the law.

21. Chair Khan, you testified that the agency would be in a dire position if we did not increase your budget by more than 30%. However, I am concerned that you are wasting scarce resources on policy making rather than law enforcement. Since your arrival to the FTC, the agency has issued the following policy statements:

- **Policy Statement of the Federal Trade Commission on Repair Restrictions Imposed by Manufacturers and Sellers (July 21, 2021)**
- **Statement of the DOJ Antitrust Division and FTC on Preserving Competition in the Wake of Hurricane Ida (September 14, 2021)**
- **Statement of the Commission on Breaches by Health Apps and Other Connected Devices (September 15, 2021)**
- **Statement of the Commission on the Use of Prior Approval Provisions in Merger Orders (October 25, 2021)**
- **Enforcement Policy Statement Regarding Negative Option Marketing (October 28, 2021)**
- **Policy Statement of the Federal Trade Commission on Education Technology and the Children's Online Privacy Protection Act (May 19, 2022)**

[9] Remarks by Chair Lina M. Khan As Prepared for Delivery Carnegie Endowment for International Peace March 13, 2024, https://www.ftc.gov/system/files/ftc_gov/pdf/2024.03.13-chair-khan-remarks-at-the-carnegie-endowment-for-intl-peace.pdf.

- **Policy Statement of the Federal Trade Commission on Rebates and Fees in Exchange for Excluding Lower Cost Drug Products (June 16, 2022)**

- **Policy Statement on Enforcement Related to Gig Work (September 15, 2022)**

- **Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (November 10, 2022)**

- **Policy Statement of the Federal Trade Commission on Biometric Information and Section 5 of the Federal Trade Commission Act (May 18, 2023)**

- **FTC-DOJ Merger Guidelines (Draft for Public Comment (July 19, 2023)**

- **Federal Trade Commission Statement Concerning Brand Drug Manufacturers' Improper Listing of Patents in the Orange Book (September 14, 2023)**

- **Statement of Interest of the United States (March 28, 2024)**

- **Policy Statement of the Federal Trade Commission on Franchisors' Use of Contract Provisions, Including Non-Disparagement, Goodwill, and Confidentiality Clauses (July 12, 2024)**

- **Joint Statement on Competition in Generative AI Foundation Models and AI Products (July 23, 2024)**

a. For each Federal Trade Commission (FTC) policy statement issued since July 21, 2021, please provide the following information:

i. Stated separately, the number of FTC employees, detailees, or contractors, including their title and GS level, who contributed to each policy statement;

ii. The number of calendar days it took to draft each policy statement from inception to issuance;

iii. An approximation of the number of hours spent on each policy statement prior to issuance; and

iv. The number of meetings held on each policy statement by FTC staff before and after issuance.

v. The identification of all outside (non-governmental) groups with whom the FTC staff, management or Commissioners/Chair consulted with between the first draft of the policy statement and

the final issued draft of the policy statement.

1. **Meeting logs for such outside meetings with outside non-governmental groups.**

b. For each FTC policy statement issued since July 21, 2021, please provide the committee with a list of federal agencies the FTC consulted with or received technical guidance on each policy statement.

c. Were any of the FTC policy statements issued since July 21, 2021, altered or amended due to overlapping or duplicative efforts at another federal agency? If so, please provide a list of which policy statements were altered with the rationale for the alteration.

d. Were any FTC policy statements issued since July 21, 2021, delayed due to concerns from other federal agencies? If so, please provide a list of which policy statements were delayed and the rationale for the delay.

The majority of FTC personnel work on enforcement actions. A small percentage of FTC personnel work on policy statements, and for even those personnel policy statements are not the majority of their work. Moreover, policy statements complement enforcement by creating more clarity for market participants about enforcement priorities and legal interpretations. As such, Congress fully funding the FTC's FY2025 budget request would only enhance FTC workforce's capacity to more aggressively bring enforcement actions and fulfill other missions to protect consumers.

FTC policy statements reflect deliberations by the Commissioners based on consultation with staff from throughout the agency, which may include staff from the Bureaus of Competition, Consumer Protection, Economics, and the Offices of Policy Planning, General Counsel, and Technology. Before issuing statements, Commissioners and Commission staff may also consult with outside parties, at times very extensively and over a long period of time. For example, the FTC and DoJ jointly issued the 2023 Merger Guidelines after a nearly two-year process to solicit and obtain extensive public feedback on a draft proposal thorough written comments, meetings, and workshops. As another example, following the FTC Report to Congress, *Nixing the Fix: An FTC Report to Congress on Repair Restriction*, which found "scant evidence" to support manufacturers' justifications for repair restrictions, the FTC has issued an enforcement policy statement and brought three major actions against companies for allegedly imposing unlawful repair restrictions on consumers.

As a whole, the statements reflect the Commission's interpretations of its legal authority to address specific competition or consumer protection concerns. They provide clarity and identify specific provisions of law that the Commission would rely on if it were to use law enforcement to address the problems discussed. Any enforcement action taken by the Commission would require a Commission vote and would be based on the facts necessary to support a finding that the law has been violated.

22. Chair Khan, the FTC is primarily a law enforcer and I'd expect the agency hire attorneys and economists to investigate and litigate alleged violations of consumer protection and competition laws. However, I understand that the agency has

instead hired a significant number of people in policy (rather than in investigations/litigation roles). Please identify the total number of FTEs the FTC has hired in 2021, 2022, 2023, and 2024 for policy functions.

Under Reorganization Plan No. 8 of 1950, 64 Stat. 1264, the right to set the agency's general policies is reserved for the Commission as a body. Accordingly, FTC staff provide advice and recommendations to Commissioners, but do not themselves determine the FTC's general policies.

FTC staff throughout the agency are responsible for assisting the Commission with its policymaking functions, which can include adjudication, enforcement, rulemaking, studies, international cooperation, consumer and business education, and other functions. In addition, because the Commission has a broad statutory mandate and limited resources, FTC staff are often called upon to apply their expertise to a variety of Commission activities. For example, many attorneys and economists in the bureaus who work on litigations and investigations also assist with studies, rulemakings, and other non-litigation assignments. *See* 16 C.F.R. §§ 0.16, 0.17, 0.18.

23. **Chair Khan, you testified that the FTC faithfully follows all procedural requirements of the Magnuson-Moss Act. As you know, the Act requires the Commission to send the House Energy & Commerce Committee a copy of proposed Mag Moss rulemakings 30 days before publication. ("The Commission shall, 30 days before the publication of a notice of proposed rulemaking pursuant to paragraph (1)(A), submit such notice to the Committee on Commerce, Science, and Transportation of the Senate and to the Committee on Energy and Commerce of the House of Representatives." https://www.law.cornell.edu/uscode/text/15/57a);**

    a. **Please state:**

        i. **The date on which the FTC sent the House Energy & Commerce Committee a copy of the Notice of Proposed Rulemaking concerning Negative Option Marketing and the date on which the FTC published the notice.**

        FTC staff notified House Energy & Commerce Committee staff of the Notice of Proposed Rulemaking (NPRM) concerning amendments to the Negative Option Rule on March 23, 2023. The NPRM was published in the Federal Register on April 24, 2023.

        ii. **The date on which the FTC sent the House Energy & Commerce Committee a copy of the Notice of Proposed Rulemaking concerning Deceptive and Unfair Fees (Junk Fees) and the date on which the FTC published the notice?**

        FTC staff notified House Energy & Commerce Committee staff of the NPRM concerning deceptive and unfair fees on October 11, 2023. The NPRM was published in the Federal Register on November 9, 2023.

b. Will you provide this Committee with a copy of FTC's Notice of Proposed Rulemaking on Commercial Surveillance 30 days in advance of publication?

If the Commission decides to issue an NPRM in the commercial surveillance rulemaking proceeding, FTC staff will notify Committee staff of the NPRM 30 days before publication of the NPRM in the Federal Register.

24. Chair Khan, you changed the FTC Mag Moss rulemaking process shortly after arriving at the Commission. In part, "the amendments provide that the Commission will establish the time and location of informal hearings, select participants who shall provide oral presentations, and designate disputed issues of material fact, if any, that are to be resolved in the rulemaking proceedings." Why did the Commission vest itself rather than an independent law judges this power?

As the Commission noted when revising the rules of practice in 2021, the changes were designed to bring our procedures in greater alignment with Section 18 of the FTC Act. Under the revised rules, the presiding officer retains all powers necessary or useful to ensure the orderly conduct of the informal hearing. *See* 16 C.F.R. § 1.13(a)(2).

For example, allowing the Commission to designate disputed issues of material fact earlier in the rulemaking proceeding avoids delaying proceedings with unrelated matters late in the process. 86 Fed. Reg. at 38552. Earlier designation of disputed issues of material fact allows interested persons to make informed decisions about whether to request cross-examination or rebuttal, which are only available to address such issues. *See* 16 C.F.R. § 1.13(b). Although the Commission makes the initial determination about whether to designate disputed issues of material fact, the presiding officer nonetheless retains the authority under the revised rules to add or modify disputed issues of material fact. *See id.* § 1.13(b)(1)(ii).

Similarly, the revised rules require the Commission's initial notice of informal hearing to designate the list of interested persons who will provide oral presentations. *See id.* § 1.12(a)(4). This helps minimize delay and ensure that the presenters have adequate time to prepare.

Finally, with respect to the time and location of informal hearings, the presiding officer retains the authority to "modify the location, format, or time limits prescribed for the informal hearing" up to a maximum of five hearing days over the course of a thirty-day period (and the Commission can extend the number of hearing days for good cause shown). *Id.* § 1.13(a)(2)(ii).

25. The Federal Trade Commission's proposed Trade Regulation Rule on Unfair or Deceptive Fees (FTC-2023-0064-0001) would make it unlawful for businesses that "offer, display, or advertise an amount a consumer may pay without Clearly and Conspicuously disclosing the Total Price." Total Price is defined in the proposed rule as including "all charges that a consumer must pay for a good or service, including any mandatory Ancillary Good or Service."

The proposed rule states, "The prohibition on hidden fees applies to amounts "offered, displayed, or advertised" by a Business even if a different entity

provides the good or service. For example, if an online travel agent advertises a price for a hotel room provided by a hotel chain, the online travel agent must display the Total Price, inclusive of mandatory fees charged by the hotel chain." (see *V. B. § 464.2 Hidden Fees Prohibited*)

However, the proposed rule does not consider situations where a hotel chain fails to provide accurate pricing information to an online travel agent or other intermediaries, who then pass this information directly or indirectly to consumers. Millions of hotel price points regularly move to and among intermediaries to support consumer choice wherever they shop for travel. Under the proposed rule, each intermediary receiving inaccurate pricing information could unfairly be held liable for failing to provide an accurate Total Price to consumers.

a. **Will the Federal Trade Commission recognize in its final rule that intermediaries should not be held liable when hotels or upstream intermediaries fail to provide accurate pricing information?**

   In the Unfair and Deceptive Fees Notice of Proposed Rulemaking, the Commission invited comment on whether or not the proposed rule adequately addressed the two practices it identified as prevalent, misrepresenting the total costs of goods and services by omitting mandatory fees from advertised prices and misrepresenting the nature and purpose of fees. As noted, Commission staff is carefully reviewing and considering thousands of comments, including regarding the liability of intermediaries.

The Honorable Larry Bucshon

1. **Consumers are used to seeing government fees, such as taxes, as a line item that adds to the price. Therefore, I was pleased that your "junk fees" proposal allowed businesses to exclude government charges from total price. I am concerned, however, that the proposed definition of government charges was so narrow that some government fees will have to be included as part of the total price. In turn, that may end up forcing companies to be less transparent about their prices as they will need to know where a potential customer lives to know what state and local charges must be included in the price to that consumer, which seems in conflict with the intent of the rule to create more transparency. Is that an issue that the FTC has examined as it moves to a final rule?**

   Commission staff is currently reviewing comments received in response to the Notice of Proposed Rulemaking. Any final rule, and accompanying Statement of Basis and Purpose, would consider comments raised in response to the proposed rule's definition of government charges and its impact on price transparency.

2. **The FTC has proposed to apply the so-called "junk fees" rule to all of the economy, including sectors that are heavily regulated by other agencies – often at our explicit direction as the United States Congress. How is the FTC considering how the proposed junk fee rule will impact or even conflict with existing regulation from other agencies?**

   In the Unfair and Deceptive Fees Notice of Proposed Rulemaking, the Commission invited comment on other Federal, State, and local laws and regulations that may interact with the proposed rule. As noted, Commission staff is carefully reviewing and considering thousands of comments, including comments from stakeholders on this issue,to ensure that any final rule appropriately considers other laws and regulations.

3. **My former colleague, Arkansas Attorney General Tim Griffin, filed suit[1] against the online platform Temu's parent, Shanghai based PDD Holdings, for malware, deceptive practices and harvesting the data of millions of Americans. According to the Attorney**

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[1] **https://arkansasag.gov/news_releases/attorney-general-griffin-sues-chinese-e-commerce-company-temu-for- deceiving-arkansans-illegally-accessing-their-personal-information/#:~:text=Apple%20suspended%20Temu%20from%20its,conducted%20by%20the%20U.S.%20Congres s.**

General's office, *"Temu is not an online marketplace like Amazon or Walmart. It is a data-theft business that sells goods online as a means to an end."* Has the FTC investigated or found similar deceptive data practices alleged by the Arkansas suit committed by Temu? If so, what is being done to protect consumers from such deceptive practices?

I share your concerns regarding deceptive and unfair data practices, especially where data may be accessed by entities or individuals whose interests may be at odds with the interests of American consumers.

Through its enforcement actions, the Commission has been addressing harmful and deceptive privacy practices where American consumers' data has been transferred to third parties, including to entities based in China. Last year, the Commission brought an enforcement action against Easy Healthcare Corporation alleging that its app Premom engaged in unfair and deceptive practices by sharing users' sensitive personal information without adequate encryption with two China-based firms.[10] Moreover, the Commission in 2018 brought an enforcement action against BLU Products, Inc. and its co-owner, alleging that the company deceptively allowed a China-based third-party service provider to collect detailed personal information about consumers, when BLU had claimed that they limited third-party collection of data from users of BLU's devices to only information needed to perform requested services.[11]

The Commission has also been addressing deceptive practices where American consumers' data has been potentially exposed to entities based in China. In 2020, the Commission alleged that Zoom misled consumers by touting its "end-to-end, 256-bit encryption." In particular, according to the allegations, Zoom's encryption was not "end-to-end," as Zoom's servers—including some located in China—maintained the cryptographic keys that could allow Zoom to access the content of its customers' meetings.[12]

As you know, statutory and regulatory provisions prevent me from disclosing the existence or details of nonpublic Commission investigations. I can assure you, however, that we are aware of these issues, and as our track record reflects, we take these types of concerns very seriously.

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[10] Press Release, Fed. Trade Comm'n, Ovulation Tracking App Premom Will be Barred from Sharing Health Data for Advertising Under Proposed FTC Order (May 17, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/05/ovulation-tracking-app-premom-will-be-barred-sharing-health-data-advertising-under-proposed-ftc.

[11] Press Release, Fed. Trade Comm'n, Mobile Phone Maker BLU Reaches Settlement with FTC over Deceptive Privacy and Data Security Claims (April 30, 2018), https://www.ftc.gov/news-events/news/press-releases/2018/04/mobile-phone-maker-blu-reaches-settlement-ftc-over-deceptive-privacy-data-security-claims.

[12] Press Release, Fed. Trade Comm'n, FTC Requires Zoom to Enhance its Security Practices as Part of Settlement (Nov. 9, 2020), https://www.ftc.gov/news-events/news/press-releases/2020/11/ftc-requires-zoom-enhance-its-security-practices-part-settlement.

The Honorable Tim Walberg

1. **Your tenure has been notable for a focus on competition, specifically consolidation and the impact of increasing entry barriers and a resulting contraction of options for consumers. In the supermarket category, for example, just six companies control half the market. The Commission has acted to push diffusion in that industry, including suing to block a large supermarket acquisition. To what extent do you perceive consumer harm from a heightened barrier to entry for the supply of household goods, home care products, and the ever-broadening scope of products sold through traditional marketplaces?**

   As is evidenced by the actions the FTC has taken and reports we have issued, the FTC is paying close attention to promoting fair competition in consumer goods and services. For example, in February 2024, the FTC along with a bipartisan coalition of 9 state or district attorneys general sued to block the largest proposed supermarket merger in U.S. history—Kroger Company's $24.6 billion acquisition of Albertsons Companies, Inc. Kroger operates thousands of grocery stores and retail pharmacies in 36 states under various regional banners including Fred Meyer, Fry's, Harris Teeter, Kroger, and QFC. Albertsons also operates thousands of stores in 35 states under regional names including Albertsons, Safeway, and Vons, among others. The Commission's complaint charges that the proposed deal would eliminate fierce competition between Kroger and Albertsons, leading to higher prices for groceries and other essential household items for millions of Americans, who have already seen the cost of groceries rise steadily over the past few years.

   The FTC has also issued two reports highlighting what we have learned about the supply chain disruptions. In March 2024, the FTC issued a report on the causes behind the grocery supply chain disruptions resulting from the COVID-19 pandemic. The report revealed that large market participants accelerated and distorted the negative effects associated with supply chain disruptions. The report's findings stem from orders the FTC issued in 2021 under Section 6(b) of the FTC Act to Walmart Inc., Amazon.com, Inc., Kroger Co., C&S Wholesale Grocers, Inc., Associated Wholesale Grocers, Inc., McLane Co, Inc. Procter & Gamble Co., Tyson Foods, Inc., and Kraft Heinz Co. The findings also draw from publicly available data on industry costs and revenues. Also in March 2024, the Commission issued a report on market factors relevant to infant formula disruptions, which details aspects of the U.S. infant formula market that rendered it vulnerable to supply disruptions in 2022. The report also outlines considerations for policymakers to help create a more resilient infant formula market going forward.

2. **MGM Resorts was a victim of a cyberattack in September 2023, which shut down their operations across half of the Las Vegas Strip and eight U.S. states. Following the advice of cybersecurity experts and law enforcement, including the FBI and the Department of Homeland Security, MGM chose not to pay the ransom to hackers actively shutting down their systems to significantly limit the information hackers could access and protect the information of their patrons and employees. Following the cyberattack, the FTC issued a Civil Investigative Demand centered around MGM's handling of the incident.**

   a. **Why did the FTC issue a Civil Investigate Demand after MGM stated its**

willingness to work with the Commission – as they continue to work with the FBI, Department of Homeland Security, and law enforcement to bring the bad actors to justice?

Cyberattacks can have cascading, and sometimes devastating, consequences on businesses and consumers across industries and states. The FTC is committed to using the full scope of its tools to prevent cyberattacks, and to hold companies accountable when they do not meet their data security obligations. Speaking generally about investigations, Congress authorized the Commission to issue civil investigative demands ("CIDs") in its investigations, and it is the most common information-gathering method the Commission uses in its consumer protection investigations. The Commission is authorized to issue a CID whenever it has reason to believe that any person may be in possession of information relevant to violations of the laws the FTC enforces. 15 U.S.C. § 57b-1(c)(1). The Commission issued such a CID to MGM based on this authority.

b. **Does the FTC have a history of issuing a Civil Investigative Demand to companies who are victims of cyberattacks? If so, did those companies pay or not pay the ransom?**

Statutory and regulatory provisions prevent me from disclosing the existence, nonexistence, or details of nonpublic Commission investigations. The FTC has a long history of enforcing laws to promote robust data security practices, and the Commission routinely investigates major data security breaches and cyberattacks to determine whether they resulted from lax data security practices. The Commission has not brought an enforcement action against any company based on whether the company chose to pay, or not to pay, a ransom in response to a cyberattack. The Commission recently brought a data security action against a company that the Commission alleged did pay a ransom. The complaint alleges that the company, Blackbaud, a data services and software provider, failed to implement appropriate safeguards to secure the personal data it maintained. This includes failing to put in place a list of well-known security controls to protect the data, as well as retaining data (including information belonging to former customers) for far longer than needed, leading to the theft of the data by a hacker. The FTC also alleges the company paid a ransom to stop exposure of the stolen data, but did not verify that the hacker actually deleted it. This action, like other Commission actions applying Section 5 of the FTC Act in the data security area, considered whether the company's failure to secure consumers' information was deceptive or unfair, not whether a ransom was paid.

3. **I understand the FTC's Civil Investigative Demand is centered around MGM's handling of the cyberattack, but it seems quite broad, requesting vast amounts of documents spanning multiple years and without relevance to the attack; it also invokes the Safeguards Rule and Red Flags Rule, authority reserved for financial institutions.**

    a. **What is the basis of the FTC's request for such documents.**

The vast majority of the specifications in the CID to MGM are relevant to determining whether MGM's data security practices and representations were deceptive or unfair in violation of Section 5 of the FTC Act. However, a few specifications in the CID pertain to assessing whether the company's activities subject it to the Red Flags Rule and the FTC Safeguards Rule. The FTC's authority to investigate necessarily includes the authority to obtain the requisite facts to determine whether it has jurisdiction over the matter being investigated.

b. Has the FTC previously applied the Safeguards Rule or the Red Flags Rule to gaming or hospitality companies?

Statutory and regulatory provisions prevent me from disclosing the existence, nonexistence, or details of nonpublic Commission investigations.

4. Does the FTC consult with other federal agencies in developing their approach to dealing with cyberattacks and ransoms? I have concerns that your position here seems contrary to the recommendations of other federal agencies and experts of not paying a ransom.

The Commission regularly consults and works with other federal agencies on issues of cybersecurity, including ransomware. For example, the FTC has participated in dozens of events on cybersecurity in collaboration with federal partners, including the U.S. Small Business Administration ("SBA"), National Institute for Standards and Technology ("NIST"), and the Cybersecurity and Infrastructure Security Agency. The FTC has also published a set of cybersecurity resources for small businesses in conjunction with NIST, the SBA, and the U.S. Department of Homeland Security ("DHS"), including one on the topic of ransomware. And the FTC is a member and past chair of the Cybersecurity Forum for Independent and Executive Branch Regulators, which includes the Federal Communications Commission, the Federal Energy Regulatory Commission, the Food and Drug Administration, DHS, U.S. Coast Guard, Department of Transportation/Federal Aviation Administration, Department of Treasury, National Association of Insurance Commissioners, and NIST, among others.

a. What message does the FTC's Civil Investigate Demand send to companies facing a cyberattack in the future?

I will not speculate as to what message companies facing hypothetical, future cyberattacks glean from its Civil Investigative Demand to MGM. As noted above, cyberattacks can have cascading, and sometimes devastating, consequences on businesses and consumers across industries and states. The goal of the FTC's data security program is to hold companies accountable when they do not meet their data security obligations in violation of Section 5 of the FTC Act or other laws.

b. By burdening a company with a CID after they chose the more expensive, government-recommended approach to dealing with a cyberattack, is the FTC making it more attractive for companies to just pay the ransom?

No. The Commission has advised companies not to pay ransom to thieves who have stolen their personal information. See, e.g., Ransomware Prevention: An

Update for Businesses (Dec. 11, 2020). Among other reasons, paying ransom to thieves does not guarantee that you will get your data back, and paying a ransom may violate OFAC regulations that prohibit financial support of sanctioned countries or regions. The Commission's decision to investigate a company does not depend on whether the company chose to pay, or not to pay, a ransom in response to a cyberattack.

5. **The FTC's proposed rule to prohibit junk fees and require total price transparency for consumers would exclude government fees and taxes. This does not keep with the spirit of informing consumers of "total price". Why is the FTC excluding government fees and taxes when other federal agencies and departments have issued price transparency rules that include government fees and taxes?**

   Commission staff is currently reviewing comments received in response to the Notice of Proposed Rulemaking. Any final rule, and accompanying Statement of Basis and Purpose, would consider comments raised in response to the proposed rule's definition of government charges and its impact on price transparency.

6. **Would the FTC's proposed rule to prohibit junk fees and require total price transparency for consumers preempt state laws or regulations on price transparency?**

   The Unfair and Deceptive Fees Notice of Proposed Rulemaking stated that the proposed rule "will be construed as superseding, altering, or affecting any State statute, regulation, order or interpretation relating to unfair or deceptive fees or charges, except to the extent that such statute, regulation, order, or interpretation is inconsistent with the provisions of [the proposed rule] and then only to the extent of the inconsistency." Additionally, the proposed rule stated that "a State statute, regulation, order, or interpretation is not inconsistent with [the proposed rule] if the protection [provided by] such statute, regulation, order, or interpretation affords any consumer is greater than the protection provided under [the proposed rule]." The Commission invited comment on this provision as well as on other Federal, State, and local laws and regulations that may interact with the proposed rule. As noted, Commission staff is carefully reviewing and considering thousands of comments to ensure that any final rule appropriately considers other laws and regulations.

The Honorable Jeff Duncan

1. **Chair Khan, the FTC received over 60,000 comments in relation to its proposed rule to prohibit junk fees and require total price transparency for consumers, but as of April of this year, had only published 3,000.**

    a. **Will the FTC publish all comments submitted by stakeholders in this proceeding?**

    Commission staff is currently reviewing all comments received in response to the Notice of Proposed Rulemaking. Currently, around 3,000 of the comments are published while the notice received just over 60,000 comments. Most of the comments received in response to the notice were part of mass mailing campaigns with near identical language and thus are duplicative. The posted comments contain representative samples from those campaigns. Additionally, in some cases, comments may not be published as they may be incomplete in some way or unrelated to the rulemaking.

2. **Chair Khan, the FTC received over 60,000 comments in relation to its proposed rule to prohibit junk fees and require total price transparency for consumers. What is the FTC doing to address concerns raised by stakeholders with different aspects of the proposed rule. Specifically, how will the FTC respond to concerns regarding:**

    a. **Overlapping and conflicting regulations between the proposed rule at the FTC and existing rules (or proposed rules) from sector-specific regulators.**

    In the Unfair and Deceptive Fees Notice of Proposed Rulemaking, the Commission invited comment on other Federal, State, and local laws and regulations that may interact with the proposed rule. As noted, Commission staff is carefully reviewing and considering thousands of comments to ensure that any final rule appropriately considers other laws and regulations, while also protecting consumers from unfair and deceptive fees.

    b. **Treatment of government fees and taxes, be they, state, or federal.**

    Commission staff is currently reviewing comments received in response to the Notice of Proposed Rulemaking and preparing recommendations for the Commission. Any final rule, and accompanying Statement of Basis and Purpose, would consider comments raised in response to the proposed rule's definition of government charges and its impact on price transparency.

    c. **Inconsistencies with case law.**

    In the Unfair and Deceptive Fees Notice of Proposed Rulemaking, the Commission invited comment the impact of the proposed rule on existing laws and norms. As noted, Commission staff is carefully reviewing and considering thousands of comments to ensure that any final rule appropriately considers other laws, regulations, and norms.

d. Inconsistencies with state laws.

In the Unfair and Deceptive Fees Notice of Proposed Rulemaking, the Commission invited comment on other Federal, State, and local laws and regulations that may interact with the proposed rule. As noted, Commission staff is carefully reviewing and considering thousands of comments, to ensure that any final rule appropriately considers other laws and regulations.

e. Lack of data on specific industries to which the proposed rule would be applicable.

In the Unfair and Deceptive Fees Notice of Proposed Rulemaking, the Commission invited comment regarding industries other than live-event ticketing and short-term lodging where the proposed rule would have an impact. As noted, Commission staff is carefully reviewing and considering thousands of comments, including comments from stakeholders on this issue.

f. Vague definitions in the proposed rule.

In the Unfair and Deceptive Fees Notice of Proposed Rulemaking, the Commission invited comment on the clarity of the proposed language of the rule. As noted, Commission staff is carefully reviewing and considering thousands of comments, including comments about any ambiguities in the proposed rule language.

g. The need for a more comprehensive cost-benefit analysis of every industry to which the proposed rule would be applicable.

In the Unfair and Deceptive Fees Notice of Proposed Rulemaking, the Commission invited comment on the benefits and costs of the proposed rule and invited submission of additional sources and data to support the Commission in creating a comprehensive cost-benefit analysis. As noted, Commission staff, including economists, are carefully reviewing and considering thousands of comments, including comments from stakeholders on this issue.

3. I ask to enter into the record a May 2, 2024, Wall Street Journal article titled "Former Pioneer CEO Is Accused of Trying to Collude With OPEC: FTC alleges Scott Sheffield attempted to coordinate on oil production and prices; agency refers the case for potential criminal probe." This article states that "Officials at the Federal Trade Commission have decided to refer the allegations against Scott Sheffield to the Justice Department for a potential criminal investigation, according to people familiar with the matter."

a. Is there evidence to suggest the FTC uncovered criminal activity or anticompetitive behavior in its investigation?

I cannot comment on the existence of or details about any non-public investigation.

b. Did the FTC refer this matter to the Department of Justice for potential criminal prosecution?

I am not aware of the Wall Street Journal's source.

c. Did you direct your staff to share any and all resources with Republican Commissioners?

Yes.

d. Does the FTC have a policy of keeping investigation results confidential?

Long-standing Commission policy prohibits the public disclosure of investigational or pre-decisional materials, as such materials prepared for and used by the Commission in its deliberations are protected by deliberative process privilege. The Commission may vote to publicize the results of an investigation, as it does when it files a complaint.

e. Who told the Wall Street Journal about the potential criminal referral?

I did not leak this information and do not know who did.

f. What is the FTC's policy about whether to confirm the existence of a criminal referral?

Our policy is to confirm the existence of a criminal referral only if public criminal filings are made as a result of the referral.

g. Rule 1-7.310 of the Department of Justice' "Justice Manual" indicates that "DOJ generally will not confirm the existence of or otherwise comment about ongoing investigations. Except as provided in subparagraph C of this section, [which relates to public releases to protect the public safety] DOJ personnel shall not respond to questions about the existence of an ongoing investigation or comment on its nature or progress before charges are publicly filed.

i. **If it is inappropriate for DOJ officials to comment on ongoing investigations, when would it ever be appropriate for the FTC to publicize that it is making a criminal referral to the Department of Justice?**

I believe that confirming such referrals in individual cases is appropriate when criminal charging documents are made public by prosecutors. We regularly see conduct that violates not only the civil laws we enforce but may also violate the criminal laws.

ii. **Was the leak to the Wall Street Journal necessary to protect public safety?**

No.

h. In your view, was the leak to the Wall Street Journal about a criminal referral appropriate?

No. Unlawful disclosure of FTC nonpublic and confidential information is contrary to Commission policy and undermines the agency's enforcement mission.

i. Was there a referral to the Inspector General in this case?

The FTC's Inspector General, in response to learning about this question, encouraged me to direct you and your staff to contact him, akatsaros@ftc.gov, and his staff, oig@ftc.gov, to discuss matters under his purview.

4. The FTC's Consent Order also prohibits all Pioneer employees and Directors from serving on Exxon's board.

a. Aside from Mr. Sheffield, did the FTC adduce any evidence that any other employee engaged in inappropriate anticompetitive conduct?

b. What is the factual basis for barring Pioneer employees from serving on the Board of Exxon?

c. Aside from Mr. Sheffield, is there any evidence that any other employee poses some kind of alleged threat to competition in the global market for crude oil if they had a Board seat?

The FTC recently took action with respect to Exxon Mobil Corporation's acquisition of Pioneer Natural Resources.[13] The FTC's complaint alleges that former Pioneer CEO Scott Sheffield had, through public statements and private communications, attempted to coordinate with representatives of OPEC and a related cartel of other oil-producing countries known as OPEC+ to reduce output of oil and gas, which would result in Americans paying higher prices at the pump. The proposed consent order prevents Mr. Sheffield as well as other Pioneer officers and directors from gaining a seat on Exxon's board of directors or serving in an advisory capacity at Exxon. Although I cannot comment on the existence of or details about any non-public investigations, the FTC continues to diligently pursue its statutory mandate to protect Americans from anticompetitive mergers and conduct in any market, including oil and gas markets.

[13] *See* Press Release, Fed. Trade Comm'n, FTC Order Bans Former Pioneer CEO from Exxon Board Seat in Exxon-Pioneer Deal (May 2,2024) https://www.ftc.gov/news-events/news/press-releases/2024/05/ftc-order-bans-former-pioneer-ceo-exxon-board-seat-exxon-pioneer-deal.

The Honorable Debbie Lesko

1. **In 2017 the FTC successfully blocked the attempted merger of FanDuel and DraftKings, who held a combined 90% market share at the time. I have heard concerns that, despite failing to combine legally, these firms have continued to work together, potentially in anticompetitive ways. If true, they may be coordinating efforts to stifle new, smaller competitors in the fantasy sports business. Will the FTC look into these concerns?**

   Thank you for your interest in the Agency's enforcement work. I am happy to refer your concerns to appropriate Agency staff for further review.

2. **The FTC has a mandate of protecting consumers and their privacy. Under that mandate, do you think it's appropriate for the FTC to compel a company to collect and retain consumer data including their Personal Identifiable Information (PII)?**

   We are not aware of any enforcement actions the FTC has taken that would require businesses to collect and retain consumer data that they do not already collect and maintain. FTC orders against businesses that have violated laws the FTC enforces typically include recordkeeping requirements so that the FTC can adequately enforce the orders – for example, a company may be required to retain copies of consumer complaints the company has received about its practices – but those requirements apply only to the businesses under order.

3. **If the FTC has in the past compelled companies to collect and retain PII, and that PII serves no further value to the company or the FTC, do you think it is appropriate to suspend the collection of this data in the name of protecting consumer data?**

   Please see the response to QFR number 2, above.

4. **Please provide a list of any such practice, mandate, administrative order or court order endorsed by the FTC that requires the collection and retention of consumer data.**

   Please see the response to QFR number 2, above.

The Honorable Russ Fulcher

1. **Chair Khan, in your response to my question on the scope of the CARS rule, you mentioned that while the rule applies to consumer auto vehicles, you wanted to check with your team to clarify as to whether it applied to heavy-duty truck dealers who sell heavy-duty trucks in a business-to-business context and not to consumers. I am particularly interested in heavy-duty trucks as defined in the EPA's Greenhouse Gas Phase-3 rule that I raised in the hearing. I appreciate hearing your clarification, noting that if the CARS rule does indeed apply to heavy-duty truck dealers, then I reiterate my second point that if such heavy-duty trucks were to be included in the CARS rule, the FTC should have provided an estimate of the potential regulatory costs to these dealers. I appreciate learning the FTC's intended scope of this rule.**

   The CARS Rule does not contain an exclusion based on truck size, so dealers that otherwise meet the Rule's definition of "Covered Motor Vehicle Dealer" would be covered by the Rule. The Commission initially proposed dealer[14] and vehicle[15] coverage that mirrored the terms of the authorizing statute, and despite comments from industry participants representing commercial truck dealers, we did not receive comments that proposed treating vehicle dealers differently based on truck size. The Commission carefully evaluated the Rule's impact in a detailed, data-driven final regulatory analysis, which cataloged and quantified the incremental benefits and costs of the Rule's provisions and concluded that the estimated benefits to the public from the Rule would outweigh the costs to dealers.[16] The Commission reviewed more than 27,000 public comments on the Commission's NPRM, which included a preliminary regulatory analysis of the benefits and adverse effects of the proposed rule, and made changes in response to comments. The Commission provided a step-by-step explanation of the methodology, data sources, and assumptions underlying the final regulatory analysis. In addition, the Commission included several stress-tests of its conclusions: a sensitivity analyses of modest departures from the Commission's "base-case" (i.e., most likely) estimates of time savings and labor costs, including an

[14] *See* Fed. Trade Comm'n, Notice of Proposed Rulemaking, Motor Vehicle Dealers Trade Regulation Rule, 87 Fed. Reg. 42012, 42045 (July 13, 2022) (definition of "Motor Vehicle Dealer, at proposed section 463.2(e)); 12 U.S.C. § 5519(a) (discussing authority over "motor vehicle dealer[s] that [are] predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both"), (f)(2) (defining "motor vehicle dealer" as "any person or resident in the United States, or any territory of the United States, who—(A) is licensed by a State, a territory of the United States, or the District of Columbia to engage in the sale of motor vehicles; and (B) takes title to, holds an ownership in, or takes physical custody of motor vehicles."). Parts (1) and (2) of the definition of "Dealer" in both the proposed rule and the final CARS Rule are drawn from subparagraphs (A) and (B) of 12 U.S.C. § 5519(f)(2); Part (3) of the definition of "Dealer" in both the proposed rule and in the final CARS Rule is drawn from paragraph (a) of § 5519. *See* Fed. Trade Comm'n, Final Rule, Combating Auto Retail Scams Trade Regulation Rule, 89 Fed. Reg. 590, 608, 693-94, nn. 146-47 & accompanying text (Jan. 4, 2024).

[15] *See* 87 Fed. Reg. at 42045 (definition of "Motor Vehicle," at proposed section 463.2(j)); 12 U.S.C. § 5519(f)(1) (defining "motor vehicle" as "(A) any self-propelled vehicle designed for transporting persons or property on a street, highway, or other road; (B) recreational boats and marine equipment; (C) motorcycles; (D) motor homes, recreational vehicle trailers, and slide-in campers, as those terms are defined in sections 571.3 and 575.103(d) of title 49, Code of Federal Regulations, or any successor thereto; and (E) other vehicles that are titled and sold through dealers."). Parts (1) through (5) of the proposed definition of "Dealer" were drawn from subparagraphs (A) through (B) of 12 U.S.C. § 5519(f)(1); the final CARS Rule excluded from coverage elements from Parts (2) through (4) of the proposed definition of "Dealer" *See* Fed. Trade Comm'n, Final Rule, Combating Auto Retail Scams Trade Regulation Rule, 89 Fed. Reg. at 607, 693.

[16] *See* 89 Fed. Reg. at 672-93.

alternative that combined higher costs and lower benefits assumptions; a sensitivity analysis that considered the possibility of significantly higher labor costs than were assumed in the base analysis; and a simulation analysis where, in each scenario, both costs and benefits varied randomly around the base case assumptions. Under each scenario, the Commission found the Rule would result in benefits to the public that outweigh the Rule's costs. In fact, the Rule does not impose substantial costs, if any, on dealers that presently comply with the law, and to the extent there are costs, those are outweighed by the benefits to consumers, to law-abiding dealers, and to fair competition—as honest dealers will not be at a competitive disadvantage relative to dishonest dealers.

2. **Chair Khan, I would like to have my staff talk more with the FTC when it comes to approaches in market definition. For example, the FTC raised concerns over market concentration in the case of Albertsons and Kroger merging. However, I am not clear the FTC is considering how the grocery market has changed, and thus should be redefined. Grocery is now heavily part of the larger national discount chain stores' product line, including companies like Amazon, Walmart / Sam's Club, Costco, and Target. For these national discount stores, grocery sales are a bigger portion of their sales than traditional supermarket grocery stores like Albertsons, Publix, Wegmans, and many others. Grocery sales by these grocery stores are lower than the grocery sales portion of the national discount stores. In this environment, it is inevitable a company like Albertsons would look to merge with a company like Kroger, which brings some of the very discount scale to survive in this market.**

    a. **My point is that these stores which sell everything are redefining what it means to be a "grocery store," a "hardware store," and so on. Would you work with my staff to help us figure out a way to address how we can make market definitions more reflective of what is going on in the market?**

    I would be happy to discuss approaches to market definition with your staff. Last year, the Federal Trade Commission and Department of Justice jointly issued the 2023 Merger Guidelines, which describe the factors and frameworks the agencies use when reviewing mergers and acquisitions. With regard to market definition, the Merger Guidelines reflect modern market realities, advances in economics and law, and the lived experiences of a diverse array of market participants. These market realities reflect how firms do business in the modern economy as understood by American workers, consumers, entrepreneurs, farmers, business owners, and other members of the public.

The Honorable Diana Harshbarger

1. **The recent Supreme Court decision in *Loper Bright Enterprises v. Raimondo* overturned the pre-existing precedent of *Chevron* deference to agency interpretations of their authorizing statutes. In doing so, the Supreme Court appears to heighten the burden on agency rulemakings to ensure that they are more in line with Congressional intent.**

    a. **Given the FTC's past reliance on *Chevron* to define "unfair methods of competition" under Section 5 of the FTC Act, how can the Commission justify its authority to issue substantive competition rules under *Loper*?**

    The *Chevron* doctrine, which the Court overruled in *Loper Bright*, provided federal courts with a methodology for interpreting ambiguous statutes administered by federal agencies. Historically, federal courts typically have not relied upon *Chevron*, a 1984 Supreme Court decision, to define "unfair methods of competition" under Section 5 of the FTC Act. *See Atl. Ref. Co. v. FTC*, 381 U.S. 357, 368 (1965) ("While the final word is left to the courts, necessarily 'we give great weight to the Commission's conclusion[.]'" (quoting *FTC v. Cement Institute*, 333 U.S. 683, 720 (1948))); *FTC v. R. F. Keppel & Bro., Inc.*, 291 U.S. 304, 314 (1934) ("While … it is for the courts to determine what practices or methods of competition are to be deemed unfair . . . in passing on that question the determination of the Commission is of weight."). In keeping with those decisions, the FTC has not typically asked federal courts to defer under *Chevron* to the agency's interpretation of "unfair methods of competition."

    Chevron did not provide the FTC or any other federal agency with independent authority to promulgate rules. Instead, when the FTC issues rules, it acts pursuant to statutory authority that Congress has conferred upon the agency in the FTC Act or in other statutes. Indeed, Congress has charged the FTC with enforcing or administering the provisions of more than 80 statutes. Many of these statutes contain directives or authorizations from Congress to promulgate rules in certain areas. In carrying out these statutory mandates, the Commission follows the laws that Congress has enacted.

    For a discussion of the Commission's legal authority to promulgate legislative rules prohibiting unfair methods of competition, please see the statement of basis and purpose accompanying the Commission's final Non-Compete Clause Rule. 89 Fed. Reg. 38342, 38348-60 (May 7, 2024). The Commission's legal authority to issue the rule is also being actively litigated in multiple federal courts, and beyond what the Commission said in the final rule, the Commission speaks to the issues in that litigation only through the Commission's court filings. Notably, the FTC has not relied on *Chevron* in either the statement of basis and purpose accompanying the final Non-Compete Clause Rule or in the ongoing litigation concerning that rule.

    b. **Historically, the statutory rulemaking authority granted through Section 6(g) of the FTC Act has been considered to give the Commission only the authority to issue procedural rules, not substantive ones. How can the FTC**

justify its self- granted authority to issue substantive competition rules without relying on *Chevron*?

Please see the response to question 1.a.

c. **In light of the decision in *Loper*, will the Commission commit to revoking the "Non-compete Clause Rule" published on May 7, 2024, which stifles competition across the board for businesses of all sizes seeking to compete in the market?**

Please see the response to question 1.a. In addition, when the Commission promulgated the Non-Compete Clause Rule, it estimated that the rule will boost workers' wages, create more than 8,500 new businesses each year, and reduce healthcare costs by $74-$194 billion over the next decade. The rule would also promote Americans' economic liberty, freeing them from contractual restrictions that keep people trapped in jobs and unable to launch their own businesses.

2. **Recently, it was uncovered through several Freedom of Information Act Requests (FOIA) that you and your office have been pressing the Office of the U.S. Trade Representative (USTR) to back down on negotiating strong digital trade rules on the global stage. Further, in a series of highly-redacted letters, me and my office are piecing together that you expressed concerns with protecting cross-border data flows and the source code of U.S. companies, through, at worst, a pressure campaign designed to steer the USTR towards discriminatory treatment of U.S. digital products.**

   a. **Will you commit to releasing the full unredacted copies of the emails your office sent the USTR, seeking to undermine digital trade rules?**

      i. **Do you think that Congress does not need access to these documents to ensure that FTC is not engaging in collusive activities with the USTR?**

USTR is charged by statute with leading trade negotiations on behalf of the US government and informing Congress as appropriate with respect to developments. USTR, like many other federal agencies, may seek the FTC's expertise on consumer protection, privacy, or competition issues.

FTC input can be important because trade agreements often contain chapters implicating important aspects of our mission. USTR may confer with the FTC to avoid taking positions in trade agreements that could undermine the FTC's ability to fulfill its Congressionally-mandated mission on behalf of the American public. USTR has final authority regarding the proposed text of trade agreements and U.S. negotiating strategy, and we defer to USTR on decisions relating to those agreements.

Regarding the FTC's communications with the USTR referenced in your question, they include interagency analyses and recommendations, which are predecisional, deliberative materials. I understand that the FTC previously produced, in camera, a related communication in response to an official request of the Committee. This

communication and the documents referenced in the question do not suggest any impropriety, nor do they reflect any effort by me or the FTC to undermine digital trade rules.

As always, I take seriously Congress's oversight responsibilities and remain committed to working with this Committee and its staff to provide information responsive to the Committee's oversight requests.

b. What are the specific actions that are under your and the FTC's remit that you believed would be precluded by these digital trade agreements?

The FTC is unable to comment on trade negotiations that are underway. However, for context, during prior trade agreement negotiations, such as those related to the USMCA, the FTC weighed in to ensure that any agreement would permit our crucial communications with foreign counterparts related to efforts to stop cross-border fraud that harms the American public. Additionally, the FTC has also provided input, along with other U.S. agencies, on cross-border data transfer mechanisms given the potential for privacy legislation and our role as a backstop enforcer in the US-EU Data Protection Framework (formerly Privacy Shield) and the Global Cooperation Arrangement for Privacy Enforcement.

c. Why did you believe that sacrificing these commitments, and putting a key pillar of the U.S. economy at risk, was necessary to you effectively doing the job that you were confirmed by Congress to do?

USG agencies may seek the FTC's expertise on consumer protection, privacy, or competition, which we routinely provide. USTR has final authority regarding the proposed text of trade agreements and U.S. negotiating strategy, and we defer to USTR on decisions relating to trade agreements.

3. Economists generally agree that fostering an environment where *more* companies can compete improves competition, brings down prices, and increases consumer-friendly behavior by industry. International trade increases the number of firms, particularly subject matter experts (SMEs), able to access a market, which in turn generally leads to more competitive markets.

Digital trade rules constrain restrictions that large firms may be able to absorb as a cost of doing business, but which can be fatal for an SME. Digital trade has the dual benefit of providing the digital sector—one of the best performing in the United States—with consumer bases around the world, while also improving competition in those markets and allowing for the opportunity for foreign competitors to compete here.

a. Why, then, has your office been interfering with the work of the USTR to strike new digital trade agreements that would increase the reach of digital services providers both to and from this country?

As it has for decades, USTR invites the FTC, along with many other USG agencies whose interests are also implicated, to participate in discussions

related to the negotiation of trade agreements.

4. **To Chair Khan on June 27th the Supreme Court decided in SEC vs. Jarkesy that the SEC cannot rely solely on their administrative law judges when it is seeking civil penalties. This precedent should instruct the FTC that, as a fellow independent agency, that defendants facing civil penalties can seek a jury trial outside of your ALJ process. Does the FTC plan to keep using its ALJs as the only venue for defendants facing civil penalties?**

   Unlike applicable SEC statutes, the FTC Act does not authorize the FTC to impose civil penalties using its administrative process. The only way to obtain a civil penalty under the FTC Act is for the Commission (or the Department of Justice acting on the Commission's behalf) to file an enforcement action in federal court. *See* 15 U.S.C. §§ 45(l), 45(m)(1)(A), 45(m)(1)(B). In such cases, a federal judge – not the Commission or an FTC ALJ – is responsible for adjudicating the merits of the matter. If the court determines that the defendant violated the law, the judge determines whether to impose a civil penalty and, if so, the amount of the penalty.

5. **Chair Khan, the FTC's October 11, 2023, press release on its proposed rule to prohibit junk fees acknowledges other federal departments and agencies are developing and implementing rules in their specific sectors, including the Consumer Financial Protection Bureau, the Federal Communications Commission, and the Department of Transportation.**

   a. **How does the FTC's proposed rule compare and contrast with every sector- specific federal department or agency that has acted, or is considering acting, on consumer price transparency?**

      In the Unfair and Deceptive Fees Notice of Proposed Rulemaking, the Commission invited comment on other Federal, State, and local laws and regulations that may interact with the proposed rule. As noted, Commission staff is carefully reviewing and considering thousands of comments, to ensure that any final rule appropriately considers other laws and regulations, while also protecting consumers from unfair and deceptive fees.

The Honorable Kathy Castor

1. **Chair Khan, as the Commission has undergone the rulemaking process and comment period in updating the COPPA Rule, can you please share some of your findings?**

   Because of rapid changes in technology, the FTC announced in July 2019 that it was undertaking a review of the COPPA Rule. Based on the written comments received in this regulatory review process, input received during a public workshop, and the Commission's experience enforcing COPPA, the Commission issued a Notice of Proposed Rulemaking on December 20, 2023. The Notice of Proposed Rulemaking proposed numerous COPPA Rule revisions, including requiring website and online service operators covered by COPPA to obtain separate verifiable parental consent to disclose children's personal information to third parties unless the disclosure is integral to the nature of the website or online service; increasing the transparency and accountability of COPPA Safe Harbor programs by requiring the programs to disclose publicly their membership lists and report additional information to the Commission; strengthening the COPPA Rule's data security requirements by mandating that operators covered by COPPA establish, implement, and maintain a written children's personal information security program that contains safeguards that are appropriate to the sensitivity of the personal information they collect from children; and strengthening the COPPA Rule's data retention limits by permitting children's personal information to be retained only for as long as necessary to fulfill the specific purpose for which it was collected, prohibiting operators from using retained information for any secondary purpose, and stating explicitly that operators cannot retain the information indefinitely. The public comment period on the Notice of Proposed Rulemaking closed on March 11, 2024. Staff is currently reviewing the comments received.

2. **Chair Khan, why is it important for children and teens to have expanded protections through an updated COPPA?**

   Children and teens should be able to play and learn online without facing unchecked surveillance. As you know, the COPPA Rule, in conformity with the COPPA statute, applies only to children under 13. The COPPA Rule revisions the Commission proposed in its December 2023 Notice of Proposed Rulemaking address evolving ways in which children's personal information is being collected, used, disclosed, and monetized. The proposed revisions seek to shift further from parents and children to providers the burden of ensuring that websites and online services are safe and secure for children. The proposed revisions also seek to make the COPPA Rule's existing requirements clearer.

3. **Chair Khan, what is at risk if the Congress does not pass a youth privacy bill this year?**

   New youth privacy legislation, such as the Kids Online Safety and Privacy Act that the Senate recently passed, could enable the Commission to apply COPPA's specific protections or similar privacy protections to teenagers or to additional websites or online services that COPPA does not cover. I expect the Commission to vigorously use any new authority that Congress provides the Commission in new youth privacy legislation. In the meantime, I am committed to ensuring that the Commission uses all

the tools we already have when it comes to youth privacy.

For example, in December 2022, the Commission brought a law enforcement action against Epic Games, Inc., creator of the popular video game "Fortnite," related to its privacy practices for both children under the age of 13 and teenagers. The Commission's complaint alleged that Epic Games both violated COPPA and committed an unfair practice in violation of Section 5 of the Federal Trade Commission Act by employing default settings that exposed children and teenagers to bullying, harassment, and other harms by connecting them to strangers via voice and text chat. The case resulted in a federal court order securing substantial and novel relief, requiring Epic Games to adopt strong default privacy settings for children and teenagers, implement a privacy program subject to outside assessments, and pay a $275 million civil penalty, the largest ever civil penalty under COPPA.

4. **During the last hearing, I asked about the FTC's 6(b) report on Big Tech's consumer data and privacy practices—a study that started in late 2020 and gave companies 45 days to respond.**

    a. **Chair Khan, can you please tell the Committee when you will be releasing the results of those 6(b) studies?**

    I share your concerns regarding the privacy practices of social media platforms. In December 2020, the Commission issued 6(b) orders to nine of the largest social media and video streaming companies, requiring them to provide information and data on various topics, including their: (1) data practices; (2) advertising; (3) use of automated decision-making technologies; (4) practices with respect to children and teens; and (5) competition practices. Staff has worked hard since the issuance of these orders to obtain and review the requested information and data, and I hope the findings will become public soon.

The Honorable Debbie Dingell

1. **Junk fees are a real problem for consumers and my constituents. The Commission is promulgating rules to make clear to consumers the price they will pay for services offered by service providers and address junk fees.**

   I'm very supportive of transparency and your efforts to protect consumers. Of course, other agencies, including the Federal Communications Commission (FCC) are working on industry-specific proposals to address junk fees.

   So, it is important that as federal agencies finalize regulations that they coordinate and harmonize their rules, to avoid creating consumer confusion and unintended regulatory conflict. We saw how agencies coordinated with EPA's vehicle emissions standards and DOT's CAFE rules. And I know that the FTC works closely with the FCC on anti- robocall and other consumer protection work, so I know you can do the same here.

   a. **Chair Khan, will you work with industry-specific regulatory agencies, including the FCC to ensure that your rules are harmonized with the rules of other federal agencies?**

      In the Unfair and Deceptive Fees Notice of Proposed Rulemaking, the Commission invited comment on other Federal, State, and local laws and regulations that may interact with the proposed rule. As noted, Commission staff is carefully reviewing and considering thousands of comments, to ensure that any final rule appropriately considers other laws and regulations, while also protecting consumers from unfair and deceptive fees. The Commission continues to work closely with agencies such as DOE (on the Energy Labeling Rule - appliance labeling), USDA (on the Made in USA Rule - country-of-origin labeling for agricultural products), and EPA (Alternative Fuels Rule - vehicle labeling requirements), to ensure its Rules are consistent with other agencies' requirements.