



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

**Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson,
Federal Trade Commission**

**Before the Subcommittee on Competition Policy, Antitrust, and Consumer Rights
of the U.S. Senate Committee on the Judiciary**

Hearing on “*Oversight of Federal Enforcement of the Antitrust Laws*”

September 20, 2022

Chairwoman Klobuchar, Ranking Member Lee, and distinguished members of the Subcommittee, thank you for the opportunity to submit this statement to you. Over the course of our tenures, under Democratic and Republican Administrations, the Federal Trade Commission has submitted consensus testimony in 24 hearings concerning antitrust and consumer protection. We regret that, today, the Commission is not speaking with one voice in its written testimony for an oversight hearing.¹ This is an unfortunate departure from the agency’s tradition of working towards bipartisan consensus, and we are disappointed that our colleagues declined the opportunity.

We agree with them on critical points. We share their support for vigorous enforcement of the antitrust laws. Where enforcement is supported by the law and the facts and would further antitrust’s goal of protecting competition and consumers, we have joined our colleagues in challenging anticompetitive conduct and mergers, including the recent vertical mergers that take

¹ Submitting consensus written testimony in no way hampers the Chair or other commissioners from expressing their views in testimony, or Members of Congress from hearing them.

a prominent role in the submitted testimony.² We support the Commission's long tradition of examining markets for potentially anticompetitive business practices,³ as well as its tradition of self-examination.⁴ We also welcome congressional efforts to amend Section 13(b) of the Federal Trade Commission Act, following the Supreme Court's decision in *AMG Capital Management, LLC v. FTC*.⁵ Our 13(b) enforcement program enabled the Commission to remedy wrongs visited on American consumers, especially money taken from them through fraud. Under the *AMG* decision, 13(b) cannot be used to secure monetary relief. We agree that Congress can and should help.

But we cannot agree on the testimony submitted, which represents a dramatic departure from predecessor testimony in several material ways. For example, the testimony paints the FTC's merger enforcement program as once moribund but now revitalized. The data tell a different story. Today, the agency is challenging fewer mergers and entering into fewer consents than during the prior Administration. In fiscal year 2020, the FTC brought 28 merger

² See e.g., Press Release, Fed. Trade Comm'n, *FTC Sues to Block Lockheed Martin Corporation's \$4.4 Billion Vertical Acquisition of Aerojet Rocketdyne Holdings Inc.* (Jan. 25, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/01/ftc-sues-block-lockheed-martin-corporations-44-billion-vertical-acquisition-aerojet-rocketdyne>; Press Release, Fed. Trade Comm'n, *FTC Sues to Block \$40 Billion Semiconductor Chip Merger* (Dec. 2, 2021), <https://www.ftc.gov/news-events/news/press-releases/2022/02/statement-regarding-termination-nvidia-corps-attempted-acquisition-arm-ltd>; Press Release, Fed. Trade Comm'n, *FTC Challenges Illumina's Proposed Acquisition of Cancer Detection Test Maker Grail* (Mar. 30, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/03/ftc-challenges-illumina-proposed-acquisition-cancer-detection-test-maker-grail>.

³ See e.g., Press Release, Fed. Trade Comm'n, *FTC Launches Inquiry Into Prescription Drug Middlemen Industry* (June 7, 2022) <https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-launches-inquiry-prescription-drug-middlemen-industry>; Press Release, Fed. Trade Comm'n, *FTC Launches Inquiry into Supply Chain Disruptions* (Nov. 29, 2021) <https://www.ftc.gov/news-events/news/press-releases/2021/11/ftc-launches-inquiry-supply-chain-disruptions>.

⁴ See e.g., Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson Regarding the Request for Information on Merger Enforcement (Jan. 18, 2022) https://www.ftc.gov/system/files/documents/public_statements/1599775/phillips_wilson_rfi_statement_final_1-18-22.pdf.

⁵ 141 S. Ct. 1341 (2021).

enforcement actions.⁶ In fiscal year 2021, that number dropped by nearly half, and a majority of those 15 challenges were filed before the Biden Administration came into office.⁷ Fiscal year 2022 witnessed only a slight uptick, bringing 19 challenges with just two weeks of the fiscal year remaining.⁸ This total falls short of the 2020 total and does not exceed the number of enforcement actions brought in any prior fiscal year going back to 2015. These data are even more striking when considering that the number of merger filings in 2021 and in 2022 was significantly higher than in any of those prior years.⁹

The story on antitrust conduct enforcement is similar. Since January 2021, the FTC has brought only two new conduct cases, both settlements;¹⁰ and the testimony touts conduct enforcement actions brought under the prior Administration as a demonstration of a change in course.¹¹ The pace of antitrust enforcement, including merger challenges, can ebb and flow; and not all of the decline is necessarily attributable either to some of the policy decisions we have

⁶ Fed. Trade Comm'n, *Hart-Scott-Rodino Annual Report Fiscal Year 2020*, https://www.ftc.gov/system/files/documents/reports/hart-scott-rodino-annual-report-fiscal-year-2020/fy2020_hsr_annual_report_final.pdf.

⁷ Compiled based on a review of FTC press releases announcing merger enforcement actions in fiscal year 2021.

⁸ Compiled based on a review of FTC press releases announcing merger enforcement actions in fiscal year 2022.

⁹ See generally Fed. Trade Comm'n Premerger Notification Program, *HSR Transactions by Month*, <https://www.ftc.gov/enforcement/premerger-notification-program>; Fed. Trade Comm'n, *Annual Competition Reports*, <https://www.ftc.gov/policy/reports/annual-competition-reports>.

¹⁰ See Press Release, Fed. Trade Comm'n, *Alabama Board of Dental Examiners Agrees to Settle FTC Charges that It Unreasonably Excluded Lower Cost Online and Teledentistry Providers from Competition* (Sep. 28, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/09/alabama-board-dental-examiners-agrees-settle-ftc-charges-it-unreasonably-excluded-lower-cost-online>; Press Release, Fed. Trade Comm'n, *FTC Charges Broadcom with Illegal Monopolization and Orders the Semiconductor Supplier to Cease its Anticompetitive Conduct* (July 2, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/07/ftc-charges-broadcom-illegal-monopolization-orders-semiconductor-supplier-cease-its-anticompetitive>.

¹¹ The Commission is an independent agency overseen by commissioners with staggered terms not tied to elections, and so new leadership can and should tout important work done under prior Administrations. Our quibble is with the factually inaccurate portrayal of enforcement having previously been sclerotic and now being active because of new leadership.

highlighted as not conducive to effective and efficient enforcement,¹² or to the management challenges the Commission faces.¹³ But sound policy and effective management of antitrust enforcement are conducive to, not detractive from, vigorous enforcement; and the picture painted in the testimony is inaccurate.

We also cannot endorse the testimony's support for utilizing Section 6(g) of the Federal Trade Commission Act to convert antitrust law from 132 years of statutes and adjudicated court decisions to regulations promulgated by the FTC. We have no such authority under the statute, and if we did it would violate the separation of powers embedded in the U.S. Constitution.

Finally, the testimony is replete with unsupported factual assertions. For example, it echoes recent majority claims and agency press that mischaracterized dramatically the basis for liability determinations in recent enforcement.¹⁴ It alleges consolidation in labor markets, where empirical data show the opposite;¹⁵ and it relies on claims of increasing concentration throughout

¹² See, e.g., Noah Joshua Phillips, Comm'r, Fed. Trade Comm'n, *Disparate Impact: Winners and Losers from the New M&A Policy* (Apr. 27, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Phillips_Keynote-Berkeley_Forum_on_MA_FINAL.pdf; Christine S. Wilson, Comm'r, Fed. Trade Comm'n, *There's Nothing New Under the Sun: Reviewing Our History to Foresee the Future* (Oct. 7, 2021), at 1-4, https://www.ftc.gov/system/files/documents/public_statements/1597798/gcr_merger_control_keynote_final.pdf.

¹³ A recent report by the agency's Inspector General noted staff complaints about lower efficiency, unclear or contradictory agency priorities, and declining staff morale. Fed. Trade Comm'n Office of Inspector General, *OIG Survey of BC Attorneys on Their Merger Transactions Work* (May 2, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/2022-05-02_OIG%20HSR%20survey_final.pdf. See also Office of Personnel Management Data Reports, *2021 Federal Employee Viewpoint Survey Data*, <https://www.opm.gov/fevs/reports/data-reports> (revealing a stunning drop in staff's morale and trust in senior leadership across the agency).

¹⁴ See e.g., Concurring Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson regarding JAB Consumer Partners SCA SICAR/SAGE Veterinary Partners, LLC, File No. 211-0140, https://www.ftc.gov/system/files/ftc_gov/pdf/2110140C4766NVASAGEPhillipsWilsonConcurringStatement.pdf (noting that although the Commission majority called for additional remediation due to JAB being a private equity firm, the Complaint did not indicate any reason why this fact about JAB makes this or any other private equity transaction more likely to raise competition concerns).

¹⁵ See e.g., Kevin Runz, U.S. Census Bureau CARRA Working Paper Series, *Labor Market Concentration, Earnings Inequality, and Earnings Mobility* (Sep. 2018), <https://www.census.gov/content/dam/Census/library/working-papers/2018/adrm/carra-wp-2018-10.pdf>.

the U.S. economy that are neither based on markets within which competition takes place, nor on their own indicative of lessened competition.¹⁶ The list goes on.

The FTC is designed to support differing views on law and policy, and has managed over time also to represent areas of consensus for Congress to evaluate. We believe that remains possible, and regret that the Commission did not achieve that today.

¹⁶ See e.g., OECD Competition Committee, *Market concentration – Note by the United States*, (June 7, 2018), https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/market_concentration_united_states.pdf.