



Update from the FTC's Bureau of Competition

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Introduction

Thank you, Josh Soven, for that extraordinarily kind introduction, and thank you to Global Competition Review for inviting me to speak this morning. It's my great pleasure to speak with everyone, and it's so great to see so many familiar faces. Let me just quickly give the standard disclaimer that the views expressed here are my own and do not necessarily represent the views of the Federal Trade Commission or any Commissioner.

Josh, in your introduction, I'm so glad you mentioned the FTC's distinct culture—our strong commitment to ensuring competitive markets and getting the job done. What you described ties in very nicely to what I am planning to say. We have a lot going on right now on the competition side at the FTC, and it all demonstrates exactly what you said. We are bringing cases with big impact, and looking to chart a new course by using all of our authority to ensure competition is working for everyone, from consumers and workers to small businesses. And none of this would be possible without our incredibly talented and hard-working staff. The Bureau of Competition is full of some of the most talented antitrust attorneys around.

Before I get going on the topics I had planned, I thought I'd just go ahead and address the elephant in the room: our *Meta/Within* merger case.² At the moment I cannot say anything about its outcome, because the decision is still under seal.³ But I want to emphasize that there is tremendous value in our bringing difficult cases to ensure competitive markets. Even in situations where a court doesn't reach the conclusion we were hoping for, a court's opinion can have beneficial interpretations of the law that can help us in future cases down the road, and

¹ I would like to thank Hillary Greene, Special Counsel for Competition Policy, Office of Policy and Coordination, Bureau of Competition, Federal Trade Commission, for her invaluable assistance in preparing these remarks.

² Press Release, Fed. Trade Comm'n, FTC Seeks to Block Virtual Reality Giant Meta's Acquisition of Popular App Creator Within (July 27, 2023), <https://www.ftc.gov/news-events/news/press-releases/2022/07/ftc-seeks-block-virtual-reality-giant-metas-acquisition-popular-app-creator-within>.

³ The court's decision has since been released and is available here: <https://t.co/1F2YWc9c2z>.

really chart out a new course.⁴ In fact, that possibility is very much a part of what we consider when we think about which cases to bring. In any event, I can assure you that we will have much more to say about our *Meta/Within* case in due course.

Today I want to discuss several developments regarding unfair methods of competition: this includes the Commission’s recently released Section 5 Statement, some new consent agreements regarding noncompetes, and a proposed noncompete rule that has been issued for public comment. Then I’ll touch on our Durbin Amendment enforcement action, our merger guidelines review project, and our HSR Form revisions project. I’ll conclude with discussion our new approach to merger remedies.

Section 5—Unfair Methods of Competition

Let’s start at the beginning—and I think this really gets at what Josh said in his introduction—it explains why the FTC has its distinct culture and is so focused on ensuring competitive markets: our enabling legislation assigned to us a unique role in advancing competition policy. Section 5 of our law give us the flexible and open-ended power to prevent “unfair methods of competition.”⁵

As it turned out, before the FTC was created, in the first two dozen years after passage of the Sherman Act, Congress had grown increasingly dissatisfied with its common law development through a generalist court system.⁶ Congress responded by creating a new, independent and expert agency—the Federal Trade Commission—and gave it the job of policing “unfair methods of competition” in addition to enforcing the existing antitrust laws and the newly minted Clayton Act. According to the Supreme Court, it was the FTC that would provide “the best check on unfair competition.”⁷ In fact, the Supreme Court has time and again confirmed the Commission’s unique Section 5 authority. It has explicitly recognized:

- that the Commission’s mandate is to define unfair methods of competition and that those determinations deserve “great weight”;⁸
- that the Commission enjoys flexibility when defining unfair methods of competition, and that this flexibility includes not having to narrowly catalog precise practices;⁹ and

⁴ See Winston Cho, *Meta Won Approval to Buy a Virtual Reality App, But FTC Laid Groundwork to Halt Big Tech’s Next Deal*, THE HOLLYWOOD REPORTER, (Feb. 6, 2023), <https://www.hollywoodreporter.com/business/business-news/meta-within-ftc-challenge-legal-ruling-1235319297/>.

⁵ Federal Trade Commission Act, 15 U.S.C. § 45.

⁶ S. REP. NO. 62-1326, at 19 (1913).

⁷ *Fed. Trade Comm’n v. Texaco*, 393 U.S. 223, 262 (1968).

⁸ *Off. Airline Guides, Inc. v. Fed. Trade Comm’n*, 630 F.2d 920, 927 (2d Cir. 1980) (quoting *Fed. Trade Comm’n v. Cement Inst.*, 333 U.S. 683, 720 (1948)); *Atl. Refin. Co. v. Fed. Trade Comm’n*, 381 U.S. 357, 368 (1965); *Fed. Trade Comm’n v. R.F. Keppel & Bro., Inc.*, 291 U.S. 304, 314 (1934); see also *Fed. Trade Comm’n v. Ind. Fed’n of Dentists*, 476 U.S. 447, 455 (1986); *Texaco*, 393 U.S. at 226; *Fed. Trade Comm’n v. Motion Picture Advert. Serv. Co.*, 344 U.S. 392, 396 (1953).

⁹ *Fed. Trade Comm’n v. Colgate-Palmolive Co.*, 380 U.S. 374, 384-85 (1965) (noting that the proscriptions in section 5 are flexible); *Pan Am. World Airways, Inc. v. United States*, 371 U.S. 296, 306 -08 (1963) (“[Section 5] was designed to bolster and strengthen antitrust enforcement[,] and the definitions are not limited to precise practices that can readily be catalogued. They take their meaning from the facts of each case and the impact of particular practices on competition and monopoly.”).

- that conduct condemned as an unfair method of competition need not amount to a violation of the Sherman or Clayton Acts.¹⁰

And that last point bears repeating: Congress intended the FTC Act to address a broader range of anticompetitive conduct than can be reached under the other antitrust laws.

Unfortunately, there is a lengthy interlude, starting in the 1980s and running all the way until just a couple years ago, during which the agency adopted an increasingly cramped vision of Section 5 that culminated in it being treated as largely a carbon copy of the Sherman Act dominated by the Rule of Reason.¹¹ The agency made this decision even though lawmakers long ago outlawed “unfair methods of competition” to catch bad behavior that the Sherman Act was missing.¹²

This all changed in late 2022 when the Commission issued a new Section 5 policy statement.¹³ This Statement fully reflects the important and distinctive history and precedent of the FTC Act, while also reflecting upon its application for modern times, where I believe there is now a broad consensus that competition problems continue to elude antitrust enforcement rooted in the Rule of Reason.

The Commission’s policy statement regarding the scope of unfair methods of competition under Section 5 combines the text of the statute, along with its legislative history, judicial precedent, and prior agency experience, into a comprehensive explanation of how the FTC intends to combat “unfair methods of competition.” This statement was carefully crafted by an extraordinary cross-agency team that included lawyers all around the agency as well as economists.

When evaluating potential Section 5 violations, keeping in mind that the statement operates as a guide and not a cookbook, we ask two questions: first, is the conduct a method of competition? And, if so, is it unfair?

¹⁰ *Motion Picture Advertising*, 344 U.S. at 394-95 (noting that “Congress advisedly left the concept [of unfair methods of competition] flexible . . . [and] designed it to supplement and bolster the Sherman Act and the Clayton Act[,] [so as] to stop . . . acts and practices [in their incipiency] which, when full blown, would violate those Acts[,] . . . as well as to condemn as “unfair methods of competition” existing violations of them”); *Cement Institute*, 333 U.S. at 708 (holding that conduct that falls short of violating the Sherman Act may violate Section 5); *R. F. Keppel & Bro.*, 291 U.S. at 310 (finding that unfair methods of competition not limited to those “which are forbidden at common law or which are likely to grow into violations of the Sherman Act”).

¹¹ See FED. TRADE COMM’N, STATEMENT OF THE COMMISSION ON THE WITHDRAWAL OF THE STATEMENT OF ENFORCEMENT PRINCIPLES REGARDING “UNFAIR METHODS OF COMPETITION” UNDER SECTION 5 OF THE FTC ACT 2, 7 (2021).

¹² *E.I. du Pont de Nemours v. Fed. Trade Comm’n*, 729 F.2d 128, 136 (2d Cir. 1984) (“Congress’ aim was to protect society against oppressive anti-competitive conduct and thus assure that the conduct prohibited by the Sherman and Clayton Acts would be supplemented as necessary and any interstices filled”) (citing H.R. REP. NO. 63-1142, at 19 (1914) (Conf. Rep.)); 51 CONG. REC. 11236 (1914) (statement of Sen. Cummins) (stating that the purpose of Section 5 was “to make some things punishable, to prevent some things, that cannot be punished or prevented under the antitrust law”).

¹³ See FED. TRADE COMM’N, POLICY STATEMENT REGARDING THE SCOPE OF UNFAIR METHODS OF COMPETITION UNDER SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT (2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

A method of competition is conduct an actor undertakes in the marketplace that relates, directly or indirectly, to competition.¹⁴ In that way it's distinguishable from marketplace conditions not of the respondent's making, such as high concentration or barriers to entry.¹⁵

Conduct is unfair if it goes beyond competition on the merits.¹⁶ Based on past cases and Commission experience, this usually involves conduct that is facially unfair, particularly where coercive, deceptive, predatory or, in general, an abuse of one's economic power.¹⁷ And yes, that's a lot of adjectives. But that's because we need to respond in kind to the staggeringly diverse anticompetitive conduct we encounter. Of course, more is needed to be unfair under Section 5. The conduct can't just be abusive—it must also tend to negatively affect competitive conditions.¹⁸ For example, does the conduct tend to foreclose or impair the opportunities of market participants, reduce competition between rivals, limit choice or otherwise harm consumers or workers?

So how do we evaluate these two aspects of unfair methods of competition? Which, again, involve abuse and the negative impact on competitive conditions. Well, they're analyzed on a sliding scale. If the abuse or coercion is clear, less is needed to show a tendency to negatively affect competitive conditions.¹⁹ But, when conduct is not facially abusive, more information about the commercial setting may be necessary to determine whether there is a tendency to negatively affect competitive conditions.²⁰

What happens if conduct *prima facie* constitutes an unfair method of competition? Well, normally, liability will ensue absent adequate justifications.²¹ Well-established parameters of permissible defenses in non-Section 5 cases also apply under Section 5.²² For example, the party

¹⁴ *E.I. du Pont de Nemours*, 729 F.2d at 139.

¹⁵ *Id.* at 132, 135.

¹⁶ See *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966) (distinguishing unlawful acquisition or maintenance of monopoly power from consequences of “a superior product, business acumen, or historic accident”); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 430 (2d Cir. 1945) (distinguishing conduct based on “superior skill, foresight and industry”).

¹⁷ See, e.g., *Fed. Trade Comm'n v. Sperry & Hutchinson Co.*, 405 U.S. 233, 243 (1972) (citing *Fed. Trade Comm'n v. R.F. Keppel & Bro., Inc.*, 291 U.S. 304, 313 (1934) (construing Section 5 to reach conduct shown to exploit consumers); *Atl. Refin. Co. v. Fed. Trade Comm'n*, 381 U.S. 357, 369 (1965) (finding an unfair method of competition where the defendant “utilize[d] ... economic power in one market to curtail competition in another,” which was “bolstered by actual threats and coercive practices”); *Fed. Trade Comm'n v. Texaco*, 393 U.S. 223, 228-29 (1968) (finding an unfair method of competition where the defendant used its “dominant economic power ... in a manner which tended to foreclose competition”); *E.I. du Pont de Nemours*, 729 F.2d at 140 (finding that unfair methods of competition includes practices that are “collusive, coercive, predatory, restrictive, or deceitful” as well as “exclusionary”).

¹⁸ See POLICY STATEMENT, *supra* note 11, at 4; see also S. REP. NO. 1326, at 4 (1913) (stating that “Congress should maintain the policy established by the anti-trust law” to “[maintain] competitive conditions,” and that “every possible effort to create and preserve competitive conditions should be made”); H.R. Rep. No. 63-533, at 2 (1914) (reported by Rep. Covington) (“The administration idea, and the idea of businessmen, generally, is for the preservation of proper competitive conditions in our great interstate commerce.”).

¹⁹ *E.I. du Pont de Nemours*, 729 F.2d at 137-39.

²⁰ See POLICY STATEMENT, *supra* note 11, at 9.

²¹ *Id.* at 10.

²² *Id.* at 11.

asserting a justification for the conduct bears the burden of showing it is legally cognizable,²³ non-pretextual,²⁴ and that any restriction used to bring about the benefit is narrowly tailored to limit any adverse impact on competitive conditions.²⁵ On top of that, the asserted benefits must not accrue to parties outside the market where the asserted harm occurs.²⁶ And, finally, the party bears the burden of showing that given all the circumstances, the asserted benefits outweigh the harm.

It's fair to ask what does this renewed attention to Section 5 mean going forward? How will it be applied in practice? Those are good questions—and ones that the Commission has already begun to answer. We recently entered into three consent agreements and embarked on a public ruling making—all of which are rooted in the FTC's stand-alone Section 5 authority.

Noncompete Consent Agreements

The FTC has been interested in competition in labor markets for some time now, given its importance. Back in 2020 the Commission conducted a public workshop to examine the effects of non-compete restrictions.²⁷ These restrictions are contractual terms between an employer and a worker that typically block the worker from working for a competing employer, or starting a competing business, within a certain geographic area for a period of time after the worker's employment ends. Non-compete clauses limit competition by their express terms. As you can imagine, these clauses have certainly caught our attention.

Viewed through the lens of the new Section 5 Policy Statement, the Commission considered how non-compete restrictions could be used to exploit an employer's superior bargaining position to keep workers from leaving. For instance, last month, the Commission accepted a settlement with Prudential Security over its employment contracts with security guards.²⁸ These guards—who were earning at or slightly above minimum wage, and who received only minimal training from Prudential—were required to sign noncompetes as a condition of employment. These restrictions prevented these low-wage security guards from working for a competitor or creating a competing business within a 100-mile radius for two years after departing. And if they violated the noncompete—a clause about which very few, if any, security guards had consulted with an attorney when hired—they had to pay \$100,000 in

²³ See *Fed. Trade Comm'n v. Superior Ct. Trial Lawyers Ass'n*, 493 U.S. 411, 423-24 (1990); *Fed. Trade Comm'n v. Ind. Fed'n of Dentists*, 476 U.S. 447, 463-64 (1986); *NCAA v. Board of Regents*, 468 U.S. 85, 113-15 (1984); *United States v. Addyston Pipe Steel Co.* 85 F. 271 (6th Cir. 1898), *aff'd* 175 U.S. 211 (1899).

²⁴ Pretextual justifications include those that are not set forth in documents prior to, or contemporaneous with, the introduction of the conduct, or not plausibly based on the known facts. See, e.g., *Ind. Fed'n of Dentists*, 476 U.S. at 464 (affirming the Commission's finding that there was insufficient evidence that the restraint conferred the claimed benefit at all). See also *United States v. Microsoft Corp.*, 253 F.3d 35, 62-64, 72, 74, 76-77 (D.C. Cir. 2001); *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 541, 472, 484-85 (1992); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608-10 (1985); *Texas Specialty Physicians v. Fed. Trade Comm'n*, 528 F.3d 346, 368-70 (5th Cir. 2008); *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 196-97 (3d Cir. 2005).

²⁵ *NCAA v. Alston*, 141 S. Ct. 2141, 2162-64 (2021); *Polygram Holding, Inc. v. Fed. Trade Comm'n*, 416 F.3d 29, 38 (D.C. Cir. 2005).

²⁶ *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 370-71 (1963).

²⁷ *Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues*, FED. TRADE COMM'N, <https://www.ftc.gov/news-events/events/2020/01/non-competes-workplace-examining-antitrust-consumer-protection-issues>.

²⁸ Agreement Containing Consent Order, *Prudential Security, Inc.*, FTC File No. 221-0026 (F.T.C. Jan. 4, 2023), <https://www.ftc.gov/legal-library/browse/cases-proceedings/2210026-prudential-security-et-al-matter>.

liquidated damages. Nor did the employees receive any monetary compensation or job security in exchange for the noncompete restrictions. Importantly, even *after* a Michigan state court ruled that Prudential’s noncompetes were unreasonable and unenforceable under state common law, Prudential still included those onerous terms in its employment contracts with other workers.

The Commission also issued two separate complaints involving non-compete restrictions imposed by the two of the largest manufacturers of glass food and beverage containers, the firms Ardagh Glass.²⁹ and O-I Glass.³⁰ The glass container industry in the United States is highly concentrated and has substantial barriers to entry and expansion. Among those barriers is the need for personnel with skills and experience in glass container manufacturing. The non-compete restrictions prohibited employees across a wide variety of positions including engineering and quality assurance, from working for a competing business within the United States for one or two years after they leave either company.

The Commission alleged that these non-compete restrictions had the tendency or likely effect of harming competition, consumers, and workers by impeding entry and expansion of rivals in the glass container industry; reducing employee mobility; and causing lower pay, reduced benefits, less favorable working conditions, and personal hardship to employees.

In all three complaints, aligned with the Section 5 statement, the Commission found that the noncompete agreements constituted an unfair method of competition. As to the first prong of the Section 5 analysis, the noncompetes were found to constitute methods of competition. The employers knowingly imposed and enforced restrictions on employment options for affected workers and, therefore, implicated competition for labor. As to the second prong, that the methods were unfair—which meant they were abusive and tended to harm competition—we can look to their effects within the marketplace:

- The non-compete agreements were exploitative and coercive with regard to their workers because they impaired the workers’ ability to negotiate for better pay and working conditions. The coercive effect of the employers’ threats and lawsuits reflected workers’ relatively vulnerable economic positions.
- The noncompetes were restrictive with regard to rival companies because they impaired the rivals’ abilities to compete for the labor of the affected workers.
- Significantly, with the glass container manufacturing firms Ardagh Glass and O-I Glass, entry was impeded by the inability of entrants to gain access to needed skilled personnel.

In aggregate, these restrictions tended to harm competition because they prevented workers and employers from freely choosing their preferred jobs and candidates respectively. Research suggests that noncompetes measurably reduce worker mobility, lower workers’ earnings, yield less favorable working conditions, and increase racial and gender wage gaps.³¹

²⁹ Complaint, *Ardagh Group S.A.*, FTC File No. 200-0182 (F.T.C. Jan. 4, 2023), <https://www.ftc.gov/legal-library/browse/cases-proceedings/2110182-ardagh-group-et-al-matter>.

³⁰ Complaint, *O-I Glass, Inc.*, FTC File No. 211-0182 (F.T.C. Jan. 4, 2023), <https://www.ftc.gov/legal-library/browse/cases-proceedings/2110182-o-i-glass-inc-matter>.

³¹ Matthew Johnson et al., *The Labor Market Effects of Legal Restrictions on Worker Mobility* 1-5 (2019), available at papers.ssrn.com/sol3/papers.cfm?abstract_id=3455381.

The Commission also considered whether the companies had any legitimate objectives of such noncompete agreements—such as protection of trade secrets or other confidential information—and found to the extent they were meaningfully present at all, they could have been achieved through significantly less restrictive means, such as confidentiality agreements. In fact, both Ardagh Glass and O-I Glass nullified the challenged non-compete restrictions after learning of the Commission’s investigation, “apparently without incurring any notable impediment to their ability to achieve any legitimate business objectives.”³²

Noncompete Public Rulemaking

These three consent agreements are just the tip of the iceberg. Approximately one in five American workers are bound by noncompete agreements.³³ That’s about 30 million American workers restricted from pursuing better employment opportunities. That’s unacceptable and suggests that case-by-case enforcement in this area may not act as a sufficient deterrent.

It’s hard to think of something more foundational to an employee than the freedom to pursue a better job or better working conditions. As the Supreme Court has observed, workers have an inalienable right to quit their jobs.³⁴ And, while non-compete clauses do not—strictly speaking—prevent workers from quitting their jobs, they do limit their options in ways that impose a real burden on their ability to move on.

So what is the cost to workers from noncompetes? They lose up to an estimated \$300 billion per year in earnings in addition to reduced career opportunities.³⁵ Interestingly, it is both those who themselves labor under such contracts, as well as workers who are not directly subject to noncompetes, who pay the price. So how does that happen? When noncompetes are prevalent, workers are more likely to remain in jobs that do not maximize their productive capacity. This materially reduces wages for *all* workers, since jobs that would otherwise be better matched for an unconstrained worker are filled by workers subject to non-compete restrictions.

Relatedly, what do noncompetes cost consumers? In the health care sector alone, noncompetes are estimated to increase prices to consumers by up to \$150 billion per year.³⁶

Given the pervasiveness and importance of the problem, the Commission very recently issued a proposed rule that, in a nutshell, bans noncompete agreements.³⁷ Specifically, the FTC’s proposed rule would make it illegal for an employer to: (1) enter into or attempt to enter into a noncompete with a worker, (2) maintain a noncompete with a worker, or (3) represent to a

³² Glass Container Non-Compete Restrictions; Analysis of Agreements Containing Consent Orders to Aid Public Comment, 88 Fed. Reg. 2618, 2621 (Jan. 17, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2110182o-iglassardaghaapc.pdf.

³³ Evan P. Starr et al., *Noncompete Agreements in the U.S. Labor Force*, 64 J.L. & ECON. 53, 53 (2021).

³⁴ *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 256 (1939) (characterizing lawful strikes as “the exercise of the unquestioned right to quit work”).

³⁵ News Release, Fed. Trade Comm’n, *FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition* (Jan. 5, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition>.

³⁶ Non-Compete Clause Rule, 16 C.F.R. pt. 190, at 130 (proposed Jan. 5, 2023).

³⁷ *Id.*

worker, under certain circumstances, that the worker is subject to a noncompete. It would also rescind existing noncompete agreements.³⁸

The notice of public rulemaking identifies alternative rules for comment, noting possible differential treatment for senior executives and high-wage workers and for franchisees within a relationship with a franchisor. The rulemaking notice also asks for comments on the sufficiency of methods other than noncompetes to protect valuable investments in workers.

To me, it makes perfect sense for the FTC to address the noncompete problem through rulemaking. In contrast to case-by-case adjudication, a single rule results in greater legal clarity and predictability, greater administrability and efficiency of enforcement. A rule also has the benefit of treating rivals in the same way and at the same time. These advantages are huge, given the number of firms involved in the conduct.

The simplicity of the proposed rule also makes rulemaking more attractive because there is no ambiguity or variance. The rule can be easily understood and applied across different firms and industries. Other advantages of an FTC rule include ending different state-level treatments that impact cross-jurisdiction markets, and eliminating the need for employees to use private rights of action, which may be limited in some cases by other contractual provisions in an employee's labor contract.

The Commission has already received thousands of comments on the proposed rule, and we will continue to accept comments through March 20.

Durbin Amendment—*Mastercard* Settlement

Before I turn to the merger side of our competition work, I want to briefly mention our Mastercard settlement from late last year.³⁹ This was our first enforcement action under the Durbin Amendment and we're really excited about it. While not an antitrust case, it should nonetheless significantly improve competition and reduce the cost of using a debit card for online purchases.

As you may know, the FTC enforces some aspects of the Durbin Amendment to the 2010 Dodd-Frank Act.⁴⁰ Congress created this act in order to spur greater competition among payment card networks. Congress required debit card-issuing banks to enable at least two unaffiliated payment networks on every debit card, thereby giving merchants a choice of which network to use for their debit transactions. It also barred payment card networks from inhibiting merchants from using other networks. The Federal Reserve issued a rule setting out these obligations, and the FTC enforces the ban on exclusive agreements for the payment card networks.

Our consent agreement alleges that Mastercard was flouting the law by setting policies to block merchants from routing ecommerce transactions using Mastercard-branded debit cards saved in ewallets to alternative payment card networks. Specifically, we allege that Mastercard used its control over a process called "tokenization" to block the use of competing payment card networks and route those transactions over Mastercard's network instead. Given the rapid growth in ewallet transactions, which was accelerated during the pandemic, Mastercard's actions

³⁸ *Id.* at 1.

³⁹ Agreement Containing Consent Order, *Mastercard, Inc.*, FTC File No. 201-0011 (F.T.C. Dec. 23, 2020), <https://www.ftc.gov/legal-library/browse/cases-proceedings/mastercard-inc-matter>.

⁴⁰ 15 U.S.C. § 1693o-2.

resulted in higher processing fees for merchants. It's a matter of a few cents here and there, but given the popularity of ewallet transactions, the harm was real and widespread.

The Commission order, which is subject to final approval, would restore payment card network competition for remote ewallet payments involving Mastercard-branded debit cards, and represents an important victory for consumers and merchants who rely on debit card payments.

Merger Guidelines Revision Project

Finally, I'd like to address the merger side of our competition work, starting with our effort to revise the Merger Guidelines. The FTC, along with Department of Justice Antitrust Division, is in midst of revising our merger guidelines. We have engaged in broad stakeholder outreach in connection with this effort, including several public listening sessions and a request for information that received over 5,000 public comments.⁴¹ We are hoping to release guidelines for public comment in the coming months. I think it is fair to say that many of the general principles that are already guiding our BC merger enforcement efforts are likely to be reflected in the new guidelines.

At a very high level, what you can expect from of the revised guidelines is similar to what I described earlier about our new Section 5 policy statement—a recommitment to using the full statutory authority Congress has granted to us. This means that we will follow the text, structure, and history of all underlying statutes, as well as all controlling law and precedent. And similarly, you can expect an emphasis on how the Clayton Act Section 7 Anti-Merger Act, unlike the Sherman Act, applies an incipency standard, rather than an overarching focus on the rule of reason.

We are also exploring revisions that better account for key aspects of the modern economy, including those that arise in digital markets, such as zero-price products, multi-sided markets, gatekeeper platforms, and data aggregation. Additionally, I think you can expect monopsony issues, including labor, to be discussed more prominently than in prior agency guidance.

I think you will also see a correcting of past blind spots in merger review. We have today empirical evidence that shows that our past approach to merger enforcement has missed too many transactions that have resulted in substantially lessened competition and undue consolidation.

A good example of this empirical evidence is shown in what has happened in the online ad tech market, culminating in the Department of Justice Antitrust Division's lawsuit filed last week against Google for monopolizing the ad tech market.⁴² I think a lot of you may know that back in 2007, the FTC investigated an earlier merger involving this market where Google proposed to acquire DoubleClick, and we ended up closing the investigation.⁴³ I know there has

⁴¹ U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, REQUEST FOR INFORMATION ON MERGER ENFORCEMENT (Jan. 18, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-look-strengthen-enforcement-against-illegal-mergers>.

⁴² Complaint, United States v. Google, LLC, No. 1:23-cv-00108 (Jan. 24, 2023 E.D. Va.), <https://www.justice.gov/opa/pr/justice-department-sues-google-monopolizing-digital-advertising-technologies>.

⁴³ FED. TRADE COMM'N, STATEMENT CONCERNING GOOGLE/DOUBLECLICK, FTC FILE NO. 071-0170 (Dec. 20, 2007), <https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-federal-trade-commission-concerning-googledoubleclick>.

already been talk of this of late,⁴⁴ but I'd like to touch on it too, since I lived through it (perhaps there are some here in the audience who did as well). The FTC found that, using the standards spelled out in the 2010 Horizontal Merger Guidelines, the proposed acquisition was unlikely to substantially lessen competition. However, one of the FTC Commissioners disagreed—FTC Commissioner Pamela Jones Harbour. She wrote a dissenting statement, arguing that the combination of Google and DoubleClick likely would affect the evolution of the entire online advertising market, particularly in light of the network effects the transaction would generate.⁴⁵

It turns out Commissioner Jones Harbour predicted precisely what happened in that market, which ultimately necessitated the filing of the Department of Justice Antitrust Division's lawsuit last week. I don't mean to criticize the FTC in pointing this out—I think former Commissioner Jones Harbour was incredibly visionary and ahead of her time. The FTC was just being faithful to our existing practices in merger review. But clearly there was something going on that we did not catch, given what we know about the ad tech market today. So I think it's a real lesson learned that shows that we antitrust enforcers need to continually re-examine and fine tune our approach. The goal of our merger guideline revision project is to do just that and enable us to more effectively use our tools so we can make better predictions about the future effects of proposed mergers.

HSR Form Revisions

Related to the merger guidelines, we have another initiative underway that is designed to improve the agencies' efficiency and effectiveness in merger enforcement. FTC and DOJ staff have been conducting a top-to-bottom review of the information contained in the HSR Form with an eye towards getting the information we need from merging parties upfront to enable the most efficient and thorough initial review of their deals. This effort will result in a Commission rulemaking that modifies the merging parties' premerger notification obligations. The hope is that the new form will better equip our staff to more efficiently review merger filings.

Merger Remedies

I will now conclude with an update regarding our thinking about merger remedies. Over time, remedies have become increasingly complex and, our studies tell us, prone to implementation failures. We can't expect different results if we keep doing the same thing. So we are rethinking our practices and taking a different approach—one that limits the types of remedies that we will recommend the Commission accept. This means moving away from what Commissioner Slaughter and Chair Khan recently called remedies with “numerous, complicated, and long-standing entanglements.”⁴⁶ While this statement was recent, in many ways this change has been a long time coming.

⁴⁴ See Remarks of Principal Deputy Assistant Attorney General Doha Mekki of the Antitrust Division, Department of Justice, Mercatus Center Second Annual Antitrust Forum: Policy in Transition, at 3 (Jan. 26, 2023), <https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-doha-mekki-antitrust-division-delivers>.

⁴⁵ FED. TRADE COMM'N, DISSENTING STATEMENT OF COMMISSIONER PAMELA JONES HARBOUR CONCERNING GOOGLE/DOUBLECLICK, FTC FILE NO. 071-0170 (Dec. 20, 2007), <https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/dissenting-statement-commissioner-harbour-matter-googledoubleclick>.

⁴⁶ FED. TRADE COMM'N, NO. 1710068, STATEMENT OF COMMISSIONER REBECCA KELLY SLAUGHTER JOINED BY CHAIR LINA M. KHAN IN THE MATTER OF LINDE AG; PRAXAIR, INC.; AND LINDE PLC (2022), [HTTPS://WWW.FTC.GOV/SYSTEM/FILES/FTC_GOV/PDF/RKS-STATEMENT-ON-LINDE-PRAXAIR-%281710068%29-JOINED-BY-CHAIR-KHAN-FINAL.PDF](https://www.ftc.gov/system/files/ftc_gov/pdf/rks-statement-on-linde-praxair-%281710068%29-joined-by-chair-khan-final.pdf).

Over the years, the FTC, as well as independent researchers and scholars, have examined the effectiveness of FTC remedies that allowed otherwise illegal mergers to go forward.⁴⁷ Those deep dives revealed that divestitures have not worked nearly as well as we had hoped, and definitely not as well as was necessary to prevent the illegal mergers from undermining competition. For example, a 2017 FTC report noted that about one-third of FTC remedies either failed outright or took much too long to return the affected markets to their pre-merger state.⁴⁸ The study also found that divestitures of anything less than ongoing businesses were much more likely to fail.⁴⁹ A review of academic research on the adequacy of proposed remedies reveals concern and skepticism over efforts to fix—rather than block—anticompetitive mergers.⁵⁰ I would also note that various studies have also found that mergers themselves on average underperform relative to expectations of the parties and frequently do not even create value.⁵¹

Based on our own experience and study, there is a clear path to avoiding these well-documented pitfalls. The Bureau of Competition will only recommend acceptance of divestitures that allow the buyer to operate the divested business on a standalone basis quickly, effectively, and independently, and with the same incentives and comparable resources as the original owner. This type of remedy has a better track record of success and a low risk that it will not maintain or restore the intensity of premerger competition.⁵² We will no longer consider remedies where there is heightened risk of failure. These include proposals of less than standalone business units, or where there are forward-looking entanglements between the buyer and seller, such as supply agreements, or where there is no strong and independent buyer. We also very strongly disfavor behavioral remedies because not only are they very difficult to enforce, but also because they never seem to work.

⁴⁷ See, e.g., John E. Kwoka Jr., *Does Merger Control Work? A Retrospective on Enforcement Policy, Remedies, and Outcomes*, 78 *Antitrust L.J.* 619, 641 (2013); John E. Kwoka & Diana L. Moss, *Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement*, 57 *ANTITRUST BULL.* 979, 996 (2012).

⁴⁸ FED. TRADE COMM'N, *THE FTC'S MERGER REMEDIES 2006-2012: A REPORT OF THE BUREAU OF COMPETITION AND ECONOMICS* 18 (2017), [HTTPS://WWW.FTC.GOV/REPORTS/FTCS-MERGER-REMEDIES-2006-2012-REPORT-BUREAU-COMPETITION-ECONOMICS](https://www.ftc.gov/reports/ftcs-merger-remedies-2006-2012-report-bureau-competition-economics).

⁴⁹ *Id.* at 5.

⁵⁰ See, e.g., Steven C. Salop & Jennifer E. Sturiale, *Fixing "Litigating the Fix,"* (2022), <https://scholarship.law.georgetown.edu/facpub/2470>.

⁵¹ See, e.g., Michael A. Hitt, et al., *Creating Value Through Mergers and Acquisitions: Challenges and Opportunities*, in *THE HANDBOOK OF MERGERS AND ACQUISITIONS* 71, 71 (David Faulker, Satu Teerikanga, & Richard J. Joseph eds.) ("Several studies have shown that, on average, the value created by M&As varies closely around zero."), [https://epublications.marquette.edu/cgi/viewcontent.cgi?article=1123&context=mgmt_fac&httpsredir=1&referer=;How Mergers Go Wrong](https://epublications.marquette.edu/cgi/viewcontent.cgi?article=1123&context=mgmt_fac&httpsredir=1&referer=;How%20Mergers%20Go%20Wrong), *THE ECONOMIST* (July 20, 2000), https://www.economist.com/leaders/2000/07/20/how-mergers-go-wrong?utm_medium=cpc.adword.pd&utm_source=google&ppccampaignID=17210591673&ppcadID=&utm_campaign=a.22brand_pmax&utm_content=conversion.direct-response.anonymous&gclid=CjwKCAiAioifBhAXEiwApzCzto3RNb2HQs9xk9a-8TorYbv5bw_SAjccJV5gYdZgfOpSLWYq0jMGRoCUA8QAvD_BwE&gclsrc=aw.ds ("One report by KPMG, a consultancy, concluded that over half of them had destroyed shareholder value, and a further third had made no difference.").

⁵² See *THE FTC'S MERGER REMEDIES 2006-2012*, *supra* note 45, at 5.

What this means for the Bureau is that we are not going to engage in extended negotiations that sometimes drag on for months as the parties attempt to avoid a fulsome remedy involving a standalone business. When we do engage in settlement negotiations, staff will be setting and enforcing deadlines for the parties to respond with credible offers, and the Bureau will recommend that the Commission strictly enforce all terms in its remedial orders. And we are already doing that. Just last week we filed a contempt action against “Pharma Bro” Martin Shkreli for not complying with the requirements of the court order we got against him, banning him for life from the pharmaceutical industry.⁵³ While this involves a conduct matter and not a merger case, it still shows the aggressive approach we are taking when it comes to order enforcement.

This change in our approach to merger remedies is necessary so that the Agency does not saddle consumers with the harmful effects of a merger that goes forward with an ineffective remedy. Alternatively, the Commission may avoid this risk altogether and move to block a merger. This approach is consistent with purpose of Section 7: to protect consumers and the public from mergers whose effect “may be substantially to lessen competition or tend to create a monopoly.”

As one of my predecessors, Bill Baer (who is sitting with us right here in the audience) has said, *mergers that are illegal in any market should not make it out of the boardroom, period.*⁵⁴ This statement is just as correct today as it was when first coined. Companies interested in merging should assess their antitrust risk—including the risk that the agency will move to block the deal—before moving ahead with a proposed deal. Executives should not presume that the FTC will agree to piecemeal divestitures that would allow the remainder of the merger to proceed. The FTC has neither the resources nor the mandate to function as an industrial planner. Therefore, parties should expect the agency to be skeptical and risk averse when considering offers to settle in our merger investigations.

Thank you.

⁵³ Proposed Civil Contempt Order, *Fed. Trade Comm’n v. Vyera Pharms., LLC*, Case No. 1:20-cv-00706 (Jan. 20, 2023 S.D.N.Y.); Press Release, Fed. Trade Comm’n, FTC Asks Federal Court to Hold ‘Pharma Bro’ Martin Shkreli in Contempt (Jan. 20, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-asks-federal-court-hold-pharma-bro-martin-shkreli-contempt> (“The FTC will not hesitate to deploy the full scope of its authorities to enable a comprehensive investigation into potential misconduct.”).

⁵⁴ Bill Baer, Assistant Att’y Gen, U.S. Dep’t of Justice, Assistant Attorney General Bill Baer of the Antitrust Division Testifies Before Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights (Mar. 9, 2016), <https://www.judiciary.senate.gov/imo/media/doc/03-09-16%20Baer%20Testimony.pdf> (stating that in an effort to combat the “historic levels” of global mergers and acquisitions, the DOJ challenged the merger of “the nation’s two largest cinema advertising networks” which was “representative of an anticompetitive transaction that never should have made it out of the boardroom”).