Oral Remarks of Commissioner Christine S. Wilson

Open Commission Meeting on September 15, 2021

Proposed Policy Statement on the Health Breach Notification Rule

Paradoxes are a repeating theme in antitrust law. In 1978, Judge Bork published his book, The Antitrust Paradox. In 2017, our Chair published her law review note titled "Amazon's Antitrust Paradox." And now, in 2021, we have the FTC's Transparency Paradox.

importance to every American consumer and there are preliminary reasons to believe that non-reportable acquisitions are preventing Americans from receiving quality healthcare services at

In fact, the FTC is issuing warning letters that threaten merging parties to close at their peril because we are so resource-constrained that we can't fully investigate deals within statutorily-mandated timelines.[14]

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system by allowing special interests cloaked in dark money to lobby for laws and regulations that tip the scales in their favor. The ability to pay for access to Congressional and agency leadership disadvantages rivals, skewing the playing field and harming consumers. This phenomenon is particularly pernicious in the American health care sector.[19]

The Chair recently issued a Request for Public Comment Regarding Contract Terms that May Harm Fair Competition.[20] That solicitation for public comment holds up as examples two previously submitted petitions.[21] I agree that these two petitions make good examples. They demonstrate the need for a disclosure-of-funding rule here at the FTC that protects the agency's work against petition-lobbying secretly bankrolled by powerful special interests.

The Chair's example petitions demonstrate how unworkable it would be to leave to Commissioners and staff the task of scrutinizing the petition docket and IRS filings to uncover conflicts of interest that could undermine the legitimacy of the agency's work. The two example petitions were submitted by dozens of organizations and individuals.

- Twenty organizations and 46 individuals submitted the first petition for non-compete clauses.
- Thirty-one organizations and five individuals submitted the second petition on exclusionary contracts.

There is *zero* disclosure of who paid for these petitions.

The Chair's example petitions also demonstrate the importance of understanding who is paying for petition-lobbying of the agency. Of the dozens of organizations and individuals disclosed by the two petitions, the same non-profit is named first in both cases, so it presumably played a major role in the preparation of both petitions. According to both petitions, that lead named petitioner "does not accept any funding or donations from for-profit corporations." So who is writing the six-figure checks implied by publicly available data submitted to the IRS?[22] Who paid for these petitions? I do not know.

I have read online that one "proud" supporter of the lead named petitioner is a philanthropic enterprise established by the billionaire founder and major shareholder of a large tech

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Fence: Understanding Modern Antitrust Law 18 (Nov. 19, 2020), https://www.ftc.gov/system/files/documents/public_statements/1587210/remarks_of_commissioner_christine_s_wilson_at_kings_college_london.pdf.

[19] *See generally* Charles Silver and David A. Hyman, OVERCHARGED: WHY AMERICANS PAY TOO MUCH FOR HEALTH CARE (2018).

[20] FED. TRADE COMM'N, SOLICITATION FOR PUBLIC COMMENT, DOCKET NO. FTC-2021-0036 (Aug. 5, 2021), https://www.regulations.gov/document/FTC-2021-0036-0022.

[21] OPEN MARKETS INSTITUTE ET AL., PETITION FOR RULEMAKING TO PROHIBIT WORKER NON-COMPETE CLAUSES, (posted by the Fed. Trade Comm'n on July 21, 2021), https://www.regulations.gov/document/FTC-2021-0036-0001; OPEN MARKETS INSTITUTE ET AL., PETITION FOR RULEMAKING TO PROHIBIT EXCLUSIONARY CONTRACTS, (posted by the Fed. Trade Comm'n on July 21, 2021), https://www.regulations.gov/document/FTC-2021-0036-0002.

[22] Open Markets Institute, Form 990 (2019), Schedule A, Part II (disclosing public support data).

company.[23] I

Yet the Vertical Merger Guidelines recognize that there are often efficiencies and beneficial effects that arise from vertical transactions.[32] Those procompetitive effects may result in lower prices for consumers, so merger analysis should take them into account. Most notable in the vertical context is the elimination of double marginalization, which occurs when a firm does not charge itself a margin on inputs it supplies to itself. The Guidelines note that those efficiencies should be considered, but make clear that the inquiry is fact-specific. And the Commentary identifies circumstances where those procompetitive effects would be unlikely.[33]

If the Vertical Merger Guidelines are withdrawn because they are deemed by the current majority to be overly permissive, we can expect more vertical deals to be challenged. But it is worth emphasizing that vertical integration is common and less likely to harm consumers than horizontal deals. The difference in impact arises because vertical mergers between companies in a buyer-seller relationship do not eliminate a competitor.

When considering a vertical transaction, the company is deciding whether it is going to produce an inpu2 (do)-29loducu(de)4 2a6 (c)4 (i)-2 (ke)4 (l)-1.24 Td punquipr tfCID /P 6 (fnn-29.54 -1.25 0 Tw