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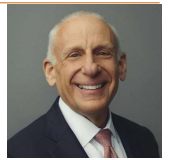
# Insights

## What In-House Lawyers Need to Know About the Federal Trade Commission’s Current Initiatives, Ranging from Merger Enforcement Practices to Artificial Intelligence\*

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\*This article is adopted from remarks given by Nate Eimer and Vanessa Jacobsen, assisted by research from John Adams and Florence Liu, at a Chicago legal conference attended by hundreds of in-house lawyers.



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## INTRODUCTION

In February 2023, Commissioner Christine Wilson broke up with the Federal Trade Commission on Valentine’s Day in an opinion piece for the Wall Street Journal entitled *Why I’m Resigning as an FTC Commissioner*.<sup>1</sup> In the blunt breakup letter, Commissioner Wilson accused Chair Khan of overreaching and violating bedrock legal principles of due process. As Commissioner Wilson wrote in the byline: “Lina Khan’s disregard for the rule of law and due process make it impossible for me to continue serving.”<sup>2</sup> Commissioner Noah Phillips also stepped down before his term expired, and he has joined Commissioner Wilson in challenging Chair Khan, stating that her ambitions exceed the agency’s legal authority.<sup>3</sup> Culturally, Commissioner Phillips stated that there have been diminished discussions and compromises at the FTC since Chair Khan took over.

The exit of these two commissioners signals a new chapter for the FTC that we analyze in this article—one that operates more aggressively in certain spheres of typical enforcement and regulation, including: (1) Mergers, (2) Collusive Practices, (3) Robinson-Patman Act, (4) Artificial Intelligence, and (5) Robocalls. The FTC has also moved to reinvigorate use of its authority under Section 5 of the FTC Act to pursue conduct that “violates the spirit of the antitrust laws” and to depart from the “rule of reason.”<sup>4</sup> This policy has given rise to the FTC’s proposed rule to ban non-competes, which proposal is outside the scope of this article and has been analyzed in other Eimer Stahl Insights.<sup>5</sup>

## CURRENT INITIATIVES

### I. Mergers

To begin, and under Chair Khan, the FTC has taken an aggressive approach to merger enforcement. Even before she arrived at the Commission, Chair Khan made repeated statements concerning her views on mergers, specifically in Big Tech. In a 2020 interview with The New York Times, for example, she claimed that Facebook had engaged in “killer acquisition[s] . . . in several cases” when it “acquire[d] a company for the purpose of shutting it down, for

<sup>1</sup> Christine Wilson, *Why I’m Resigning as an FTC Commissioner*, Wall St. J. (Feb. 14, 2023), available at <https://www.wsj.com/articles/why-im-resigning-from-the-ftc-commissioner-ftc-lina-khan-regulation-rule-violation-antitrust-339f115d>.

<sup>2</sup> *Id.*

<sup>3</sup> Andrew Ross Sorkin, et al., *A Big Breakup at the Federal Trade Commission*, The New York Times (Feb. 15, 2023), available at <https://www.nytimes.com/2023/02/15/business/dealbook/lina-khan-federal-trade-commission-wilson-resignation.html>.

<sup>4</sup> *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act*, FTC at 12 and 2 (Nov. 10, 2022), available at [https://www.ftc.gov/system/files/ftc\\_gov/pdf/P221202Section5PolicyStatement.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf).

<sup>5</sup> See Daniel Birk, John Adams, Jordan Hill, *The Legal Challenges Ahead and the Practical Steps Employers Might Consider in Light of the Federal Trade Commission’s Proposal to Ban Non-Competes*, Eimer Stahl Insights (January 2023).



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the purpose of killing it because [Facebook] recognize[d] that a product could be a threat.”<sup>6</sup> She then stated that “Facebook’s acquisition strategy was basically a land grab to . . . lock up the market” and, in particular, that its “purchase of Instagram was an effort to really neutralize . . . competitive threats.”<sup>7</sup>

More recently, Chair Khan has reaffirmed her views that the FTC should aggressively police mergers. Last September, she noted that the FTC was “re-orienting [its] enforcement efforts to better capture harm from mergers involving firms at different levels of the supply chain (*i.e.*, non-horizontal mergers) and to better anticipate future competition concerns before markets are dominated by only a few firms,” an “approach [that] is being incorporated into FTC merger review generally and has been reflected in several recent merger challenges.”<sup>8</sup> Chair Khan has also directed attention towards “[m]ergers” as the reason for a “reduction of competition” in “many areas of our economy, including agriculture, airlines, [and] healthcare.”<sup>9</sup>

In other press releases, Chair Khan has suggested that mergers may lead to lower wages, excessive aggregation of data, or other conglomerate effects that harm competition.<sup>10</sup> This economic concentration, she alleged, has caused several companies to “[break] the law,” and she cited a \$ 5 billion penalty imposed against Facebook in 2019 as an example.<sup>11</sup> Chair Khan has promised that the FTC will “not . . . back down” against so-called “big business.”<sup>12</sup>

In so doing, she has asserted that the FTC “strongly disfavor[s] behavioral remedies”—in other words, requirements that the merged firm commits to take post transaction—and will not hesitate to reject proposed divestitures

<sup>6</sup> *In re Petition for Recusal of Chair Lina M. Khan From Involvement in the Pending Antitrust Case Against Facebook, Inc.*, FTC at 14 (July 14, 2021), available at <https://about.fb.com/wp-content/uploads/2021/07/Facebook-Inc.s-Petition-to-Recuse-Chair-Khan.pdf>.

<sup>7</sup> *Id.* at 4.

<sup>8</sup> Lina M. Khan, Chairwoman, Federal Trade Commission, *Prepared Statement of the Federal Trade Commission Before the United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights: Oversight of the Enforcement of the Antitrust Laws*, at 2 and 5 (Sept. 20, 2022), available at [https://www.ftc.gov/system/files/ftc\\_gov/pdf/P210100SenateAntitrustTestimony09202022.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/P210100SenateAntitrustTestimony09202022.pdf).

<sup>9</sup> Dave Michaels and Ryan Tracy, *Wall Street Deal Making Faces Greater Scrutiny, Delays Under FTC’s Lina Khan*, Wall St. J. at ¶ 3 (Aug. 15, 2022), available at <https://www.wsj.com/articles/bidens-regulators-take-a-harder-look-at-wall-street-deals-11660555801>.

<sup>10</sup> Press Release, FTC, *Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers* (Jan. 18, 2022), available at <https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers>.

<sup>11</sup> Lina Khan, *We Must Regulate A.I. Here’s How*, The New York Times (May, 3, 2023) (citing *FTC Imposes \$5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook*, FTC (July 24, 2019), available at <https://www.ftc.gov/news-events/news/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions-facebook>).

<sup>12</sup> Lauren Feiner, *FTC Chair Lina Khan says agency won’t back down in the face of intimidation from Big Tech*, CNBC at ¶ 3-4 (Jan. 19, 2022), available at <https://www.cnbc.com/2022/01/19/ftc-chair-lina-khan-says-agency-wont-back-down-in-the-face-of-intimidation.html>.

that cannot fully cure the underlying harm.”<sup>13</sup> As a result, the FTC has recently favored injunctive relief over other merger remedies, and aggressive vertical merger enforcement has become a central tenant of current FTC (and DOJ) leadership.

## A. Merger Enforcement

The FTC’s current merger enforcement policy is exemplified by its decision to rewrite the vertical merger guidelines. In September 2021, the FTC voted in a split decision to withdraw its 2020 Vertical Merger Guidelines and Commentary.<sup>14</sup> The majority stated that these guidelines included a “flawed discussion of the purported procompetitive benefits (*i.e.*, efficiencies) of vertical mergers, especially [their] treatment of the elimination of double marginalization,” and failed to address “increasing levels of consolidation across the economy.”<sup>15</sup> The majority also criticized prior FTC merger reviews for being overly deferential to efficiency claims for vertical mergers, stating that “[m]any ‘efficiencies’ simply make the merged firm more profitable.”<sup>16</sup> Subsequently, on January 18, 2022, the FTC and the DOJ Antitrust Division jointly announced a process to develop new merger guidelines, which are still pending.<sup>17</sup>

Under its rationale that mergers “simply make the merged firm more profitable” without attendant efficiencies for consumers, the FTC has been more aggressive in challenging vertical mergers that before might not have been scrutinized as heavily. The FTC’s, together with the DOJ’s, willingness to litigate cases—even on novel theories of competitive harm—has resulted in a mixed record. But the agencies have mostly lost their cases. We detail several examples below.

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<sup>13</sup> Lina M. Khan, Chairwoman, Federal Trade Commission, *Prepared Statement of the Federal Trade Commission Before the United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights: Oversight of the Enforcement of the Antitrust Laws*, at 6 (Sept. 20, 2022), available at [https://www.ftc.gov/system/files/ftc\\_gov/pdf/P210100SenateAntitrustTestimony09202022.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/P210100SenateAntitrustTestimony09202022.pdf).

<sup>14</sup> See Press Release, FTC, *Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary* (Sept. 15, 2021), available at <https://www.ftc.gov/news-events/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines>.

<sup>15</sup> *Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines*, FTC at 1 and 2 (Sept. 15, 2021), available at [https://www.ftc.gov/system/files/documents/public\\_statements/1596396/statement\\_of\\_chair\\_lina\\_m\\_khan\\_commissioner\\_rohit\\_chopra\\_and\\_commissioner\\_rebecca\\_kelly\\_slaughter\\_on.pdf](https://www.ftc.gov/system/files/documents/public_statements/1596396/statement_of_chair_lina_m_khan_commissioner_rohit_chopra_and_commissioner_rebecca_kelly_slaughter_on.pdf).

<sup>16</sup> *Id.* at 3.

<sup>17</sup> Press Release, FTC, *Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers* (Jan. 18, 2022), available at <https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers>; Press Release, DOJ, *Justice Department and Federal Trade Commission Seek to Strengthen Enforcement Against Illegal Mergers* (Jan. 18, 2022), available at <https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-seek-strengthen-enforcement-against-illegal>.

## 1. Illumina-GRAIL

Illumina, which sells next-generation sequencing instruments and consumables, sought to acquire GRAIL, which develops a blood-based multi-cancer detection test that relies upon Illumina’s technology, for \$7 billion. The FTC sued to block the transaction based upon a theory of vertical foreclosure; in other words, because Illumina is the dominant provider of a necessary input for multicancer tests, the merged company would have the ability and incentive to harm GRAIL’s rivals by withholding Illumina’s technology. Before undertaking the transaction, Illumina publicized its intent to offer a supply agreement to all existing and new oncology customers who purchase its products. The offer included provisions requiring Illumina to provide customers equivalent, and even superior, access to products and services that GRAIL receives, among other things. Illumina also agreed to enter into a consent order with the FTC binding it to the terms of its offer. The FTC rejected the offer—known as a “behavioral remedy”—and filed a complaint against Illumina seeking to enjoin the merger.

The FTC’s complaint focused on the theoretical incentives that the vertically merged companies might have post-transaction. An FTC Administrative Law Judge (ALJ), however, dismissed the complaint in a nearly 200-page decision, concluding that the FTC’s theory is inconsistent with real-world evidence.<sup>18</sup> The ALJ held that the Commission’s “[e]conomic theories about incentive are largely irrelevant absent a meaningful ability to act upon it,” and that “theory and speculation cannot trump facts.”<sup>19</sup> The ALJ thus found that the FTC failed to prove its *prima facie* case of vertical foreclosure, and, beyond that failure, its theories of vertical foreclosure are not supported by legal precedent. The ALJ concluded that the FTC had not established that harm to *rivals* equals harm to *competition*, as required by antitrust law.

Dissatisfied with the result, the FTC staff appealed for a full review by the Commission.<sup>20</sup> The FTC then reversed the ruling of the ALJ and ordered Illumina to unwind the merger, which the company had promised would usher in a new frontier of diagnostic medicine, but the Commission argued on appeal that it would actually stifle innovation. On April 18, 2023, the Fifth Circuit agreed to hear the case on an expedited proceeding.<sup>21</sup> The case is currently being briefed in that court.

## 2. Meta-Within Unlimited

Next, the FTC sought to block Meta’s acquisition of Within Unlimited under a theory of antitrust law called the “actual potential competition” or “actual

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<sup>18</sup> *In the Matter of Illumina, Inc., and GRAIL, Inc.*, No. 9401 (Sept. 9, 2022), available at [https://www.ftc.gov/system/files/ftc\\_gov/pdf/D09401InitialDecisionPublic.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/D09401InitialDecisionPublic.pdf).

<sup>19</sup> *Id.* at 197.

<sup>20</sup> *In the Matter of Illumina, Inc., and GRAIL, Inc.*, No. 9401 (Sept. 2, 2022), Complaint Counsel’s Notice of Appeal, available at [https://www.ftc.gov/system/files/ftc\\_gov/pdf/D09401CCNoticeofAppeal.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/D09401CCNoticeofAppeal.pdf).

<sup>21</sup> *Grail, LLC v. FTC*, No. 23-60167 (5th Cir. 2023).

potential entrant” doctrine. This doctrine occurs when an acquisition “would substantially lessen competition” in a market because it deprives that market “of the competition that would have arisen from [a company’s] independent entry into the market.”<sup>22</sup> Put differently, the market would be more competitive through the impending entry of the party making the acquisition but for its merger.

As applied to the Meta case, and according to the Commission, “Meta sells the most widely used [virtual reality] headset, operates a widely used [virtual reality] app store, and already owns many popular [virtual reality] apps.”<sup>23</sup> Because Meta is so active in the broader market for virtual reality, the FTC alleged, it would inevitably enter the specific market of virtual reality for studio fitness. In the FTC’s view, then, it need not acquire Within, which had a sizeable market share of the virtual reality studio for fitness.<sup>24</sup> The FTC alleged that the acquisition would “harm competition and dampen innovation in the U.S. markets for fitness and dedicated-fitness [virtual reality] apps.”<sup>25</sup>

A federal district court disagreed with the FTC after a seven-day trial.<sup>26</sup> Although the court did not reject the “actual potential competition” theory outright as Meta had requested,<sup>27</sup> it concluded that, on the facts of the case, the “theory to be impermissibly speculative.”<sup>28</sup> The federal court used a “reasonably probability” standard of whether Meta would have entered the market independently and, under that standard, which required a likelihood of greater than 50%, the court determined that FTC had failed to meet its burden.<sup>29</sup>

### 3. Amgen-Horizon Therapeutics

More recently, the FTC launched another attempt to stop a vertical merger. On May 16, 2023, the FTC moved to block Amgen’s \$27.8 billion deal for Horizon Therapeutics.<sup>30</sup> This move is the first in at least some decades that the FTC is seeking to enjoin a merger between pharma companies. In its moving papers, the FTC said that the deal would allow Amgen to “entrench the monopoly positions” of Horizon’s eye and gout drugs, which don’t face any com-

<sup>22</sup> *Federal Trade Commission v. Meta Platforms Inc.*, No. 5:22-cv-04325-EJD, 2023 WL 2346238, at \*20 (N.D. Cal. Feb. 3, 2023).

<sup>23</sup> *In the Matter of Meta/Zuckerberg/Within*, No. 221 0040, FTC (Feb. 24, 2023), available at <https://www.ftc.gov/legal-library/browse/cases-proceedings/221-0040-metazuckerbergwithin-matter>.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Meta Platforms Inc.*, 2023 WL 2346238.

<sup>27</sup> *Id.* at \*21.

<sup>28</sup> *Id.* at \*27.

<sup>29</sup> *Id.* at \*22.

<sup>30</sup> Dave Michaels and Joseph Walker, *FTC Moves to Block Amgen’s \$27.8 Billion Deal for Horizon Therapeutics*, Wall St. J. (May 16, 2023), available at <https://www.wsj.com/articles/ftc-poised-to-block-amgens-27-8-billion-deal-for-horizon-therapeutics-a9c1b499>.

petition today, but “Amgen would have a strong incentive to prevent any potential rivals from introducing similar drugs.”<sup>31</sup> The FTC also concluded that Amgen would harm competition through the merger by offering higher rebates to companies that manage drug benefits in exchange for giving Horizon’s drugs a preferred position on lists of covered medicine, a practice the law-enforcement agency called “cross-market bundling.”

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Despite the aggressive merger policing just described, companies are pushing back using theories found in the Supreme Court’s *Axon* opinion. For example, Intercontinental Exchange and Black Knight—the nation’s two largest providers of home mortgage loan origination systems and other key lender software tools—are seeking a \$11.7 billion merger, which the agency is seeking to block with a preliminary injunction.<sup>32</sup> In their opposition papers, the companies accuse the FTC of violating their constitutional rights under the due process and equal protection clauses of Fifth Amendment by requiring them to go through the agency’s in-house merger adjudication process.<sup>33</sup> The companies also invoke the non-delegation doctrine, the Takings Clause, and their Seventh Amendment right to a jury trial to attack the FTC’s merger process. We anticipate more companies pushing back against the FTC so long as it maintains its aggressive merger enforcement policy.

## II. Collusive Practices

It would not be surprising to expect more investigatory subpoenas from the FTC. In August 2022, the FTC issued an omnibus resolution directing the use of compulsory process in investigations of so-called “collusive practices.”<sup>34</sup> This allows the FTC to “investigate” anyone for engaging in “collusion or coordination in any way . . . , whether through private communications, **public statements**, sharing information, or other actions,” for unfair trade practices.<sup>35</sup> “This conduct [also] involves competitors working together against consumer or worker interests rather than competing against one another.”<sup>36</sup>

<sup>31</sup> *Id.*

<sup>32</sup> Nadia Dreid, *FTC Slams InterContinental’s Defense of \$11.7B Merger*, Law360 (May 17, 2023), available at <https://www.law360.com/articles/1678659/ftc-slams-intercontinental-s-defense-of-11-7b-merger>.

<sup>33</sup> See *Federal Trade Commission v. Intercontinental Exchange, Inc. & Black Knight, Inc.*, Plaintiff Federal Trade Commission’s Motion to Strike Defendants’ Affirmative Defenses, Case No. 3:23-cv-01710, Dkt. 95 (N.D. Cal.).

<sup>34</sup> *Resolution Directing Use of Compulsory Process in Nonpublic Investigations of Collusive Practices*, FTC (2022), available at [https://www.ftc.gov/system/files/ftc\\_gov/pdf/P859910%20Collusion%20--%20Omnibus.pdf?utm\\_source=govdelivery](https://www.ftc.gov/system/files/ftc_gov/pdf/P859910%20Collusion%20--%20Omnibus.pdf?utm_source=govdelivery).

<sup>35</sup> *Id.* (emphasis added).

<sup>36</sup> *Statement of Commissioner Alvaro M. Bedoya, Joined by Chair Lina M. Khan and Commissioner Rebecca Kelly Slaughter*, FTC at ¶ 4 (Aug. 17, 2022), available at [https://www.ftc.gov/system/files/ftc\\_gov/pdf/Majority%20Omnibus%20Res.%20Statement.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/Majority%20Omnibus%20Res.%20Statement.pdf).

The FTC plans to use this process in so-called “concentrated markets,” such as “mobile phone networks, soft drinks, and meat packing.”<sup>37</sup> The policy to use “public statements” as a potential means to begin proceedings against companies creates entire new categories of conduct that put businesses at significant investigatory and legal risk.

### III. Robinson-Patman Act

The FTC also has signaled that it would pick up enforcement of the Robinson-Patman Act to tamp down on pricing schemes that allegedly hurt consumers.<sup>38</sup> The agency’s last case under this law was a settlement with McCormick Spices in 2000.<sup>39</sup> Prior to that its most recent case was from 1988 against book publishers including Simon & Schuster and Random House.<sup>40</sup> At this year’s ABA annual spring meeting, however, Commissioner Bedoya announced that the FTC has a renewed interest in its enforcement.<sup>41</sup> Chair Khan, for her part, said last June that the Robinson-Patman Act will be used to “prohibit[] commercial bribery.”<sup>42</sup> For example, the FTC is probing possible anti-competitive behavior under the Robinson-Patman Act by Southern Glazer’s Wine and Spirits LLC.<sup>43</sup> The probe includes questions about pricing and benefits that Southern Glazer offers to retailers, including quantity-based discounts, rebates, promotions, as well as marketing, warehousing, merchandising, and other services.<sup>44</sup>

This is in keeping with the FTC’s policy statement from last June that further warns drug companies and pharmacy benefit managers that enforcers are looking to go after rebates and other pricing schemes that the Commission

<sup>37</sup> *Id.* at ¶ 5.

<sup>38</sup> See *Policy Statement of the Federal Trade Commission on Rebates and Fees in Exchange for Excluding Lower-Cost Drug Products*, FTC (June 2022), available at [https://www.ftc.gov/system/files/ftc\\_gov/pdf/Policy%20Statement%20of%20the%20Federal%20Trade%20Commission%20on%20Rebates%20and%20Fees%20in%20Exchange%20for%20Excluding%20Lower-Cost%20Drug%20Products.near%20final.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/Policy%20Statement%20of%20the%20Federal%20Trade%20Commission%20on%20Rebates%20and%20Fees%20in%20Exchange%20for%20Excluding%20Lower-Cost%20Drug%20Products.near%20final.pdf)

<sup>39</sup> *World’s Largest Manufacturer of Spice and Seasoning Products Agrees to Settle Price Discrimination Charges*, FTC (Mar. 8, 2000), available at <https://www.ftc.gov/news-events/news/press-releases/2000/03/worlds-largest-manufacturer-spice-seasoning-products-agrees-settle-price-discrimination-charges>.

<sup>40</sup> Josh Sisco, *Feds Target Alcohol Pricing in New Antitrust Probe*, Politico (Mar. 30, 2023), available at <https://www.politico.com/news/2023/03/30/feds-target-alcohol-pricing-in-new-antitrust-probe-00089676>.

<sup>41</sup> Matthew Perlman, *FTC’s Bedoya Says Oft-Ignored Pricing Statute Still Good Law*, Law360 (Mar. 29, 2023), available at <https://www.law360.com/articles/1591487/ftc-s-bedoya-says-oft-ignored-pricing-statute-still-good-law>.

<sup>42</sup> Matthew Perlman, *FTC Warns Drugmakers, Middleman Over Rebates*, Law360 (June 16, 2022), available at <https://www.law360.com/articles/1503616>.

<sup>43</sup> Piper Hudspeth Blackburn, *Total Wine Says FTC Probe of Rival Co. Too Expensive*, Law360 (May 8, 2023), available at <https://www.law360.com/articles/1605297/total-wine-says-ftc-probe-of-rival-co-too-expensive>.

<sup>44</sup> Josh Sisco, *Feds Target Alcohol Pricing in New Antitrust Probe*, Politico (Mar. 30, 2023), available at <https://www.politico.com/news/2023/03/30/feds-target-alcohol-pricing-in-new-antitrust-probe-00089676>.



believes blocks patient access to cheaper medications.<sup>45</sup> The Commission cited the Robinson-Patman Act as one of its legal authorities to do so. Recently, the FTC expanded its probe into our nation’s six largest pharmacy benefit managers to include group purchasing organizations that negotiate drug rebates on behalf of drugmakers and insurers.<sup>46</sup> Chair Khan has stated that these organizations “exercise wide power behind the scenes as they negotiate rebates and fees with drug manufacturers, create drug lists for insurers and reimburse pharmacies for patients’ prescriptions.”<sup>47</sup>

#### IV. Artificial Intelligence

Chair Khan recently published an essay in the New York Times discussing how the FTC “must regulate” artificial intelligence.<sup>48</sup> “As companies race to deploy and monetize A.I.,” she wrote, “the Federal Trade Commission is taking a close look at how [it] can best achieve [its] dual mandate to promote fair competition and to protect Americans from unfair or deceptive practices” by preventing A.I. “business models or practices” that “exploit[]” their users.<sup>49</sup> Her essay then offers a few examples of A.I. that both “risks further locking in the market dominance of large incumbent technology firms” and other harms to consumers.<sup>50</sup>

First, according to Chair Khan, “[a] handful of powerful businesses control the necessary raw materials that start-ups and other companies rely on to develop and deploy A.I. tools. This includes cloud services and computing power, as well as vast stores of data.” Second, “the A.I. tools that firms use to set prices for everything from laundry detergent to bowling lane reservations can facilitate collusive behavior that unfairly inflates prices—as well as forms of precisely target price discrimination.” Next, “generative A.I. risks turbocharging fraud . . . [and] [c]hatbots are already being used to generate spear-phishing emails designed to scam people, fake websites and fake consumer reviews—bots are even being instructed to use words or phrases targeted at specific groups and communities.” Lastly, “A.I. tools are being trained on huge troves of data” that could lead to “automating discrimination” that “unfairly lock[s] out people from jobs, housing or key services.”<sup>51</sup>

<sup>45</sup> *Policy Statement of the Federal Trade Commission on Rebates and Fees in Exchange for Excluding Lower-Cost Drug Products*, FTC (June 2022), available at <https://www.law360.com/articles/1503616/attachments/0>.

<sup>46</sup> Bryan Koenig, *FTC Adds CVS Unit, Another Group Purchaser to PBM Probe*, Law360 (May 17, 2023), available at <https://www.law360.com/articles/1678931/ftc-adds-cvs-unit-another-group-purchaser-to-pbm-probe>.

<sup>47</sup> *Id.*

<sup>48</sup> Lina Khan, *We Must Regulate A.I. Here’s How*, The New York Times (May, 3, 2023), available at <https://www.nytimes.com/2023/05/03/opinion/ai-lina-khan-ftc-technology.html?smid=nytcore-ios-share&referringSource=articleShare>.

<sup>49</sup> *Id.* at ¶ 6.

<sup>50</sup> *Id.* at ¶ 7.

<sup>51</sup> *Id.*

Accordingly, the FTC—together with the DOJ, CFPB, and EEOC—has released a joint statement on A.I. just last month.<sup>52</sup> Those agencies warn about unlawful discrimination and consumer harm resulting from A.I. as it relates to (1) data and datasets, (2) model opacity and access, and (3) design and use.<sup>53</sup> For its part, the FTC has issued a report that “outlines significant concerns that AI tools can be inaccurate, biased, and discriminatory by design.”<sup>54</sup> The FTC has also warned market participants that it might be a violation of the FTC Act to use automated tools that have discriminatory impacts, to make claims about AI that are not substantiated, or to deploy AI before taking steps to assess and mitigate risks. Finally, “the FTC has required firms to destroy algorithms or other work product that were trained on data that should not have been collected.”<sup>55</sup>

## V. Robocalls

Lastly, the FTC is working hard to ban robocalls. Chair Khan has stated that robocalls are a “significant source of consumer reports to the FTC.”<sup>56</sup> And that the FTC had received “more than 5 million complaints about unwanted calls.”<sup>57</sup> The FTC, she continued, will “use[] every tool at its disposal to combat these calls: aggressive law enforcement, initiatives to spur technological solutions, and robust consumer and business outreach.”<sup>58</sup> Accordingly, the “FTC has filed 154 enforcement actions against 520 companies and 418 individuals alleged to be responsible for . . . telemarketing calls.”<sup>59</sup> The FTC has also “collected over \$293 million in civil penalties and equitable monetary relief from these violators.”<sup>60</sup>

## CONCLUSION

It is clear that the FTC has entered into a new era of enforcement that is aggressive about its sphere of authority. Firms engaging in merger activity or operating in concentrated industries should be mindful of these developments. Eimer Stahl will continue to monitor the FTC’s activities and provide updates on developments of note.

<sup>52</sup> *Joint Statement on Enforcement Efforts Against Discrimination and Bias in Automated Systems*, FTC (Apr. 25, 2023), available at [https://www.ftc.gov/system/files/ftc\\_gov/pdf/EEOC-CRT-FTC-CFPB-AI-Joint-Statement%28final%29.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/EEOC-CRT-FTC-CFPB-AI-Joint-Statement%28final%29.pdf).

<sup>53</sup> *Id.* at 3.

<sup>54</sup> *Id.* at 2.

<sup>55</sup> *Id.* at 3.

<sup>56</sup> *Testimony of Chair Lina M. Khan Before the House Appropriations Subcommittee on Financial Services and General Government*, FTC at 30 (May 18, 2022), available at <https://docs.house.gov/meetings/AP/AP23/20220518/114778/HHRG-117-AP23-Wstate-KhanL-20220518.pdf>.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 31.

<sup>60</sup> *Id.*