

**Questions for the Record**  
**U.S. Senate Committee on Commerce, Science, and Transportation**  
**Nomination Hearing**

*“Nomination of Ms. Lina Khan to be Commissioner, FTC”*

April 21, 2021

**Questions for the Record from the Hon. Richard Blumenthal to Ms. Lina Khan**

***Anticompetitive nature of pharmaceutical rebate walls.*** As a result of continued consolidation in the pharmaceutical industry, patients today face a number of hurdles in accessing innovative, affordable prescription drugs. In some circumstances, this access is foreclosed because of pharmaceutical “rebate walls” – a tactic that prevents healthcare plans from choosing the lowest cost and most efficacious drugs – leading to higher prices.

*Question 1:* How do rebate walls operate to limit patients’ choice and raise costs?

The rebating practices reportedly used by pharmaceutical companies and pharmacy benefit managers are extremely concerning. When rebate walls exclude new entrants, they tend to deprive patients of choice and result in higher drug prices. If confirmed, I look forward to using the FTC’s tools to combat any unlawful practices.

*Question 2:* What actions can the FTC take to address the problem of rebate walls as a barrier to competition?

The FTC has a broad range of authorities relevant to combatting anticompetitive practices, including law enforcement, market monitoring, and rulemaking. If confirmed, I look forward to working with my fellow Commissioners to take concrete steps on this issue.

*Question 3:* What specific tools are available to the FTC as part of its merger review process to ensure that merging companies will not leverage their market power to use volume-based rebates to block a competitor’s access to drug formularies?

The Hart-Scott-Rodino Act requires that merging parties notify the Commission and the Justice Department ahead of certain pending transactions. The Commission is empowered to collect data and other evidence from market participants to determine whether the merging parties would have the incentive and ability to use their newfound market power to engage in unlawful practices. If confirmed, I would seek to ensure that the agency is making full use of its authority.

*Question 4:* If confirmed as FTC Commissioner, will you commit to engaging with the Center for Medicaid and Medicare Services, the Food and Drug Administration, and other relevant agencies to address rebate walls and other anticompetitive practices in health care?

Yes.

***Implementation of the Horseracing Integrity and Safety Act.*** Late last year, Congress passed the Horseracing Integrity & Safety Act (HISA), which will improve track safety for our equine athletes and reduce medication and doping in horse racing nationwide. As part of HISA, the Federal Trade Commission (FTC) must review, publish, and provide opportunity for comment on proposed rules from the HISA Authority, and if appropriate, approve those rules. The FTC will also receive notice of sanctions by the HISA Authority, and if the sanctioned party petitions for review of the HISA Authority's decision, then the administrative law judge within FTC will conduct hearing and render decision.

*Question 5:* Will you commit to working closely with the Senate Committee on Commerce, Science, and Transportation on HISA's implementation and to providing the appropriate resources at the FTC to ensure HISA is ready to be the standard of the land by the implementation date of July 1, 2022?

The FTC must faithfully administer and enforce the statutes that Congress has assigned to it, and if confirmed I would seek to ensure the agency is fulfilling these statutory obligations across the board.

***Racial justice accountability for technology companies.*** Monopolies often harm workers, consumers, and small business owners: there have been numerous reports on the labor issues at Google, from firing whistleblowers to ignoring concerns about harassment; YouTube's algorithm leads users toward white nationalist content; and small business owners never know when changes to Google Search's algorithm could bury their company's website. These issues are exacerbated for Black people and other people of color who navigate them in addition to racial bias.

*Question 6:* Companies like Facebook point to their transparency reports, which give only a surface-level understanding of enforcement on the platform, as proof that they are being transparent. Can you speak more to how data disclosures from firms can help close those asymmetries?

Opaque business practices contribute significantly to information asymmetries, and data disclosures can be an important tool for mitigating these gaps and imbalances. Congress vested the FTC with significant authority to collect data from market participants, and, if confirmed, I would seek to ensure that the agency is making full use of these tools.

*Question 7:* How might robust antitrust enforcement create more competition and more options for workers, consumers, and small business owners of color?

Empirical research suggests that growing consolidation and the rise of market power has contributed to lower wages, higher prices, and declining rates of new business formation. Communities of color can be the hardest hit by some of these effects. Robust antitrust enforcement can reduce the unlawful exercise of market power and create more opportunities for workers, consumers, and small business owners across the board.

***Racial Justice.*** The FTC's Every Community program demonstrates the necessity to treat consumer protection as an issue of equity. The Commission found that Black and Latinx communities were least likely to report fraud despite experiencing it at higher rates. This program conducted education campaigns to raise awareness, expand research, and investigate fraud. Similarly, racial justice advocates are raising concerns about how monopolies and privacy violations disproportionately harm communities of color.

*Question 8: How might the consumer protection standard be expanded to include racial justice equities?*

The FTC should ensure its efforts vigorously protect victims of corporate abuse, including those who suffer the greatest harm. Given that communities of color are some of the worst hit by unfair and deceptive practices, effective enforcement by the FTC should help mitigate some of these inequities. Congress has also charged the FTC with enforcing the Equal Credit Opportunity Act, which prohibits credit discrimination on the basis of race, color, religion, national origin, sex, sexual orientation, gender identity, marital status, age, or receipt of public assistance. Although the FTC has brought only one ECOA enforcement action over the last decade, more robust enforcement could help prevent unlawful discrimination.

*Question 9: If confirmed as FTC Commissioner, can you commit to quickly meeting with relevant advocacy groups to learn how you can protect communities of color during your tenure?*

Yes, if confirmed I would be committed to soliciting input from relevant advocacy groups to learn how the FTC could better protect communities of color.

## **Questions for the Record**

### **U.S. Senate Committee on Commerce, Science, and Transportation**

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### **Questions for the Record from the Hon. Schatz to Ms. Lina Khan**

***Data Collection.*** In your testimony, you expressed concerns about the behavioral advertisement-based business models that are “reinforcing advantages of data collection” and the way these business models incentivize companies to collect more data from their consumers often to the consumers’ detriment.

*Question 1.* How should we ensure that companies do not use their customers’ data in a way that would harm them?

Recent history suggests that, as a general matter, the FTC has struggled to ensure that corporations are not misusing user data. When crafting remedies for unlawful data practices, enforcers should (1) scrutinize the underlying business incentives that are encouraging abusive data practices, and (2) use the full scope of the remedial toolkit to deter lawbreaking.

*Question 2.* Would including a duty of loyalty in federal privacy law enhance consumer protection?

Given the prevalence of behavioral ad-based business models, one basic question for any federal privacy law is whether it changes a firm’s underlying incentive or ability to engage in chronic user surveillance. Another important question is whether the law is administrable, or whether it instead presumes capacities that enforcers lack. The FTC’s experience suggests that any federal privacy law should be responsive to these factors. If confirmed, I look forward to continuing to consider ways that various legal frameworks—including those centered around a duty of loyalty—could enhance consumer protection.

***Internet Transparency.*** You emphasized the lessons we can learn from our history on “safeguarding core liberties”.

*Question 3.* How would requiring online platforms to provide more transparency and accountability about their content moderation practices benefit consumers?

Black-box algorithms and opaque decision-making processes can obscure from public view the realities of how certain products and services are functioning. Providing additional transparency could help mitigate some of these basic information gaps, aiding public research and accountability.

## **Questions for the Record**

### **U.S. Senate Committee on Commerce, Science, and Transportation**

*“Nomination of Lina Khan to be Commissioner, Federal Trade Commission”*

April 21, 2021

### **Questions for the Record from the Hon. Raphael Warnock to Ms. Lina Khan**

***Counterfeit Goods.*** Counterfeit goods are a pressing concern for Georgia’s businesses and consumers. Counterfeit products take advantage of consumer confidence and can endanger public health, especially when they are manufactured using faulty or illegal components and processes. Counterfeit products also harm businesses by abusing the name, brand, and value of trusted and well-known businesses in Georgia. The sale and purchase of counterfeit goods costs Georgia consumers and businesses millions of dollars each year, with many of these transactions taking place on online platforms that I know you have studied extensively.

*Question.* Ms. Khan, what steps would you take as FTC commissioner to protect Georgia’s consumers and businesses from counterfeit products?

Counterfeit products harm both consumers and honest businesses. Investigative reporting has suggested that e-commerce platforms may turn a blind eye to—or, in some cases, may even facilitate or encourage—counterfeit products. The FTC should ensure it understands the business incentives facing e-commerce platforms and should focus enforcement efforts on entities that are most profiting from the prevalence of counterfeits.