

Deepening Fault Lines: Diverging Antitrust Enforcement at the DOJ and FTC

By Elyse Dorsey | Kirkland & Ellis



Edited by Justin Stewart-Teitelbaum & Angela Landry

Deepening Fault Lines: Diverging Antitrust Enforcement at the DOJ and FTC

By Elyse Dorsey¹

“A fault is a fracture or zone of fractures between two blocks of rock. Faults allow the blocks to move relative to each other. This movement may occur rapidly, in the form of an earthquake—or may occur slowly, in the form of creep.”²

The U.S. Department of Justice’s Antitrust Division (“Division”) and the Federal Trade Commission (“Commission”) (collectively, “Agencies”) have set their sights on revitalizing antitrust enforcement over the last few years, while simultaneously leaning into their disparate powers and authorities. As the FTC’s increasingly aggressive use of its purported authorities has prompted courts to scrutinize its actions more closely than ever, yet another enforcement-related question of whether dual enforcement is viable—long shunted to the backburner—becomes increasingly difficult to ignore. There are many reasons to question the wisdom of creating two separate agencies to enforce primarily the same laws. Notably, while each agency regularly advises foreign jurisdictions on best practices, establishing multiple competition agencies is conspicuously absent from their recommendations.

Authority to enforce the U.S. antitrust laws is vested in two distinct federal agencies: the Division and the Commission. Their powers are largely coextensive, but not entirely so. The duality has proven tenable, if imperfect, for decades.

But the fault lines between the Agencies risk becoming increasingly fractious, and the Supreme Court is simultaneously weighing

whether the very powers the Commission is now seeking to exploit are built upon faulty foundations—all of which serves to highlight the question of whether this dual-enforcement system is truly feasible in the modern world or whether the inherent and irreconcilable differences render the system no longer justifiable.

I. Existing Fault Lines

The U.S. antitrust regime has borne the risks and costs of dual enforcement since Congress first established the Commission in 1914.³ Previously, the Division served as the sole federal antitrust enforcement agency. In creating the Commission, Congress elected to vest the agency with powers and authorities both similar to the Division’s—including civil enforcement of the Sherman Act, and subsequently the Robinson-Patman and Clayton Acts—and different from those of the Division. Most notably, only the Division may prosecute violations criminally, while the Commission alone is empowered to enforce Section 5 of the FTC Act, which prohibits unfair methods of competition and unfair or deceptive acts and practices.

In the century since the Commission’s creation, the Agencies have steadfastly described their relationship with one another as amicable and their interpretations of the antitrust laws as generally aligned.⁴ After a fitful start to this Administration, the Agencies have taken measures in recent weeks to appear in lockstep,

¹ Elyse Dorsey is a partner in the Antitrust & Competition practice of Kirkland & Ellis LLP in Washington, DC. Ms. Dorsey’s practice encompasses a wide array of antitrust and competition matters across the globe. Prior to joining the firm, Ms. Dorsey served as an Attorney Advisor to FTC Commissioner Noah Phillips and as Counsel to Assistant Attorney General of the DOJ’s Antitrust Division Makan Delrahim.

² *What is a Fault and What are the Different Types?*, U.S. GEOLOGICAL SURVEY, <https://www.usgs.gov/faqs/what-a-fault-and-what-are-different-types> (last visited July 13, 2023).

³ See David L. Roll, *Dual Enforcement of the Antitrust Laws by the Department of Justice and the FTC: The Liaison Procedure*, 31 BUS. LAWYER 2075, 2082 (1976) (discussing the founding of the FTC to frame an inquiry about whether dual enforcement should continue).

⁴ See generally U.S. GOV’T ACCOUNTABILITY OFF., ANTITRUST: DOJ AND FTC JURISDICTIONS OVERLAP, BUT CONFLICTS ARE INFREQUENT, GAO-23-105790 (Jan. 3, 2023), <https://www.gao.gov/products/gao-23-105790> (describing how the agencies navigate the jurisdictional overlap).

including issuing joint draft Merger Guidelines and proposed rules to reshape the Hart-Scott-Rodino Act filing form. Such policy efforts are intended to signal that their enforcement approaches indeed overlap in many respects (even if more in concept than execution). Analyses of the risks and costs attendant to dual enforcement have, nevertheless, persistently risen to the surface, as past actions suggest divergence is inescapable. And concerned stakeholders have cited to various observed and potential differences in both processes and substantive outcomes.

With respect to procedural concerns, three common refrains have emerged. *First*, who gets what? Congress has not explicitly allocated jurisdiction between the Agencies (whether by sector or otherwise), meaning each has roughly equal claim to most potential matters.⁵ An Agency's history in certain spaces might weigh in favor of its continued purview, but this is a commonsense suggestion, not a mandate. And as new sectors emerge and more traditional sectors blend in novel ways, the arguments for precedent can—and in practice often do—fail to provide clear answers.

Second, the FTC Act prescribes a preliminary injunction standard for Commission matters that differs from the standard applied to cases brought by the Division.⁶ Despite clear textual differences, the Agencies have long taken the position that the “FTC, like DOJ, is required to make a robust evidentiary and legal showing

that the transaction would likely be anticompetitive” to obtain injunctive relief.⁷ The Commission has further argued that “there is no evidence to suggest that there is a difference in outcomes as between the FTC and the DOJ.” Yet it has opposed legislation that would align the language for the potentially disparate standards.⁸ And the Commission's federal court briefing in *Microsoft/Activision* focused on FTC Act § 13(b)'s public interest standard,⁹ prompting reports highlighting differences between this standard and the “higher” Clayton Act § 7 standard applicable to Division litigations.¹⁰

Third, the FTC has the option to proceed via its internal administrative proceedings, whereas the Division has no such corollary and must proceed to federal court for all its enforcement activities. Notably, this includes any formal settlements the Division wishes to enter regarding mergers and acquisitions—again contrasting Commission processes.¹¹ The Commission has (so far) held to its decades-long commitment to not continue merger challenges in its administrative process after losing in federal court—thereby avoiding the proverbial “two bites at the apple” that the Commission, alone, can lawfully take. Again, this remains a nonbinding, voluntary commitment whose bounds might yet be tested should the Commission change course.

Aside from procedural differences,¹² there is also a question of *substantive* differences in

⁵ Obvious exceptions include banks, savings and loan institutions and federal credit unions, and common carriers, which are excepted from FTC purview under 15 U.S.C. § 46(a).

⁶ 15 U.S.C. § 53(b).

⁷ *The “Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015”*: Hearing on S.2012 Before the Subcomm. on Antitrust, Competition Pol’y, & Consumer Rts. of the S. Comm. on the Judiciary, 114 Cong. 13 (2015) (statement of Edith Ramirez, Chairwoman, Fed. Trade Comm’n), <https://www.ftc.gov/legal-library/browse/prepared-statement-federal-trade-commission-s-2102-standard-merger-acquisition-reviews-through-equal>.

⁸ *Id.*

⁹ Plaintiff Federal Trade Commission's Initial Proposed Findings of Fact and Conclusions of Law, § V, ¶¶ 4-20, Fed. Trade Comm’n v. Microsoft Corp., No. 3:23-cv-02880 (N.D. Cal., June 22, 2023).

¹⁰ *Microsoft/Activision: FTC Could Argue in Appeal That Judge Followed Wrong Law in Assessing Agency's Case*, CAPITOL F. (July 13, 2023), <https://library.thecapitolforum.com/docs/6xagt2948cnh> (“Agency attorneys had asked Judge Jacqueline Scott Corley to use a standard described in Section 13(b) of the FTC Act . . . Instead, the just appears to have used the higher standard included in the Clayton Act's Section 7.”).

¹¹ Antitrust Procedures and Penalties Act (Tunney Act), 15 U.S.C. § 16.

¹² Remedial powers and choices are another potential point of conflict. James Cooper and Bruce Kobayashi note that the recent Supreme Court decision in *AMG Capital* might, “perhaps accidentally . . . be seen as a way to harmonize FTC and DOJ remedial powers for conduct that would violate the Sherman Act,” because it removed the FTC's ability to seek equitable monetary relief for conduct violating the Sherman Act, aligning it with the Division's authority in such matters. *AMG Cap. Mgmt. v. Fed. Trade Comm’n*, 141 S.Ct. 1341 (2021); James C. Cooper & Bruce H. Kobayashi, *The Limits of Antitrust Remedies: Brunswick v. Pueblo Bowl-O-Mat for the FTC*, NETWORK L.R. (June 5, 2023), <https://www.networklawreview.org/cooper-kobayashi/>.

interpretations and enforcement decisions. Critically, the Agencies have prosecutorial discretion to decide how (not) to proceed in matters cleared to them, whether the next step be to settle, file suit, or close an investigation. Whether these decisions diverge is generally difficult if not impossible to measure, as only one agency will review most matters. But exceptions demonstrate key differences.

The development of reverse payments cases in the mid-2000s and in the 2019 *FTC v. Qualcomm* matter provide striking examples. In both situations, the Agencies vocally and publicly disagreed with one another on critical issues of the day. The Division opposed the Commission's petition for a writ of certiorari to the U.S. Supreme Court in the reverse payments case *FTC v. Schering-Plough*, arguing among other things that the case did not present a good vehicle for analyzing the admittedly "important and complex issues" at stake.¹³ Similarly, 14 years later the Division submitted an amicus brief to the Ninth Circuit in *FTC v. Qualcomm*, taking positions contrary to the Commission's, and even successfully requested to participate at oral argument.¹⁴

A third example involves allegations that home small health agencies in Texas engaged in unlawful collusion and invitations to collude. The Commission initially investigated this matter, and subsequently voted out a complaint and settlement charging defendant Neeraj Jindal (and other defendants) under Section 5 of the FTC Act in 2019.¹⁵ Subsequently, the Division indicted Jindal for "participating in a conspiracy to fix prices."¹⁶ That is, the Division *criminally* prosecuted Jindal under Section 1 of the Sherman Act for the same conduct the FTC

previously investigated and charged as a civil Section 5 violation (though Jindal was ultimately acquitted by a jury). Each Agency leaned into its own unique authority in prosecuting the same conduct.

II. Creeps and Quakes

Fissures between the Agencies' enforcement approaches are, accordingly, beginning to show. A recent Government Accountability Office (GAO) report analyzing the extent of interagency conflicts concludes they are rare,¹⁷ but the report understates the *gravity* of the conflicts between the Agencies. The GAO Report examines the number of conflicts over clearance—which agency will review a given transaction—as well as the number of court filings in which the Division or the Commission commented on the other agency's matter without being a party to the case. On court filings, the GAO Report found no examples of the Commission commenting on a Division matter, and just six examples of the Division commenting on a Commission matter, with only two of those representing disagreements between the agencies: *Qualcomm* and *Schering-Plough*. What the report does not consider is that both cases were high profile and deeply significant to the modern enforcement landscape. The *Schering-Plough* decision ultimately reshaped analysis of reverse payments, and, in the years following, the FTC devoted tremendous efforts to studying these agreements and bringing enforcement actions.¹⁸ The *Qualcomm* matter similarly was a culmination of years of Commission work and one of its most notable recent forays into

¹³ Brief for the United States of America as Amicus Curiae, Fed. Trade Comm'n v. Schering-Plough Corp., 548 U.S. 919 (2006) (No. 05-273), <https://www.justice.gov/atr/case-document/brief-united-states-amicus-curiae-4>.

¹⁴ Brief of the United States of America as Amicus Curiae in Support of Appellant and Vacatur, Fed. Trade Comm'n v. Qualcomm, Inc., 969 F.3d 874 (2020) (No. 19-16122), <https://www.justice.gov/atr/case-document/file/1199191/download>.

¹⁵ Complaint, In the Matter of Your Therapy Source, LLC, et al., Docket No. C-4689 (FTC Oct. 26, 2019), <https://www.ftc.gov/legal-library/browse/cases-proceedings/171-0134-your-therapy-source-neeraj-jindal-sheri-yarbray-matter>; Decision & Order, In the Matter of Your Therapy Source, LLC et al., Docket No. C-4689 (F.T.C. Oct. 26, 2019), <https://www.ftc.gov/legal-library/browse/cases-proceedings/171-0134-your-therapy-source-neeraj-jindal-sheri-yarbray-matter>.

¹⁶ Press Release, Dep't of Justice, Former Owner of Health Care Staffing Company Indicted for Wage Fixing (Dec. 10, 2020), <https://www.justice.gov/opa/pr/former-owner-health-care-staffing-company-indicted-wage-fixing>.

¹⁷ U.S. GOV'T ACCOUNTABILITY OFF., ANTITRUST: DOJ AND FTC JURISDICTIONS OVERLAP, BUT CONFLICTS ARE INFREQUENT, GAO-23-105790 (Jan. 3, 2023), <https://www.gao.gov/products/gao-23-105790>.

¹⁸ See, e.g., *Pay-for-Delay: When Drug Companies Agree Not to Compete*, FED. TRADE COMM'N, [HTTPS://www.ftc.gov/news-events/topics/competition-enforcement/pay-delay](https://www.ftc.gov/news-events/topics/competition-enforcement/pay-delay) (last visited July 13, 2023) (providing a broad set of FTC resources on reverse payments).

cutting-edge tech issues. That the Agencies are disagreeing on these kinds of matters—where modern antitrust law is being actively shaped—is notable, to say the least.

On clearance conflicts, the report explains that between 2016 and 2020, the percent of contested clearances, as measured against the total number of HSR filings, rose above one percent only once, in 2019.¹⁹ And it further highlights that this percentage never exceeded 5.5 percent (which occurred in 2003) during the entire time period examined (2000–2020).²⁰ The raw numbers, again, do not account for the importance of the underlying matters. The clearance process is triggered only if an agency decides an investigation is warranted, which, in the HSR filing context, generally entails a Second Request, a request for more information from either Agency, which extends the HSR waiting period.²¹ While clearance fights can occur over matters in which a Second Request is not issued, it is far less likely. There’s a bit of selection bias: the more troublesome or potentially influential the Agencies perceive a matter to be, the more they will be willing to fight for it—which generally excludes matters that *won’t* warrant a Second Request. The percentage of transactions receiving a Second Request during the same time period *also* never rose above 5.5 percent; in fact, the percentage of Second Requests issued hovered between about 2.5 to 4.5 percent.²² Accordingly, of the matters deemed to warrant investigation, a likely far higher percentage led to a clearance conflict. In other words, meaningful tensions arise relatively frequently in cases of *import*.

Recent developments at the Agencies seem to threaten the uneasy balance of the dual-enforcement regime. For instance, when the Commission withdrew the jointly issued Vertical Merger Guidelines in 2021,²³ the Division instead reiterated its commitment to those same guidelines.²⁴ Though the Division and the Commission have now jointly issued new draft Merger Guidelines that replace previous Horizontal and Vertical Merger Guidelines, that the gulf existed—and may resurface at any moment—is undeniable. The fact that the Agencies can (and do) swing from alignment to divergence and back again based on the whim of current leadership illustrates their tenuous relationship in an increasingly politicized enforcement environment.

More fundamentally, the Agencies have signaled their intent to expand reliance on their unique enforcement powers. This will require building up case law and other guidance separately. With more matters uniquely within each Agency’s sphere, more opportunities for divergence between interpretations and outcomes necessarily emerge.

On the Division side, Assistant Attorney General Jonathan Kanter recently extolled that, “for the first time in nearly 50 years, [the Division is] bringing monopolization cases as both civil *and* criminal actions.”²⁵ This presents new opportunities for conflict between the Agencies. Both Agencies readily understand when criminal liability under Section 1 might lie, but Section 2 criminal enforcement is, as AAG Kanter’s remarks implicitly acknowledge, in quite a different position after a half century of obsolescence. This raises a very real question

¹⁹ While the clearance process is not limited to HSR filings and other investigations may also prompt clearance conflicts, HSR filings do comprise the bulk of the potential matters that might give rise to clearance conflicts in any given year.

²⁰ GOV’T ACCOUNTABILITY OFF., *supra* note 17, at 12.

²¹ Kathleen Y. Kim & Jacob D. Hopkins, *What Is a Second Request in Antitrust Law?*, AMER. BAR ASS’N (Mar. 16, 2022), https://www.americanbar.org/groups/young_lawyers/resources/tyl/practice-areas/what-is-a-second-request-antitrust-law/.

²² See Dep’t of Justice & Fed. Trade Comm’n, Annual Reports to Congress Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, <https://www.ftc.gov/policy/reports/annual-competition-reports> (linking reports that provide Second Request rates among eligible deals).

²³ Press Release, Fed. Trade Comm’n, Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary (Sept. 15, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines-commentary>.

²⁴ Press Release, Dep’t of Justice, Justice Department Issues Statement on the Vertical Merger Guidelines (Sept. 15, 2021), <https://www.justice.gov/opa/pr/justice-department-issues-statement-vertical-merger-guidelines>.

²⁵ Jonathan Kanter, U.S. Assistant Att’y Gen., Address to the Keystone Conference on Antitrust, Regulation and the Political Economy (Mar. 2, 2023), <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-keystone> (emphasis added).

of how and when defendants accused of Section 2 violations might be criminally charged—and reiterates that the clearance process might impact substantive outcomes.²⁶ As the Jindal matter demonstrates—it was resolved by consent decree with the Commission, but the Division prosecuted the same conduct criminally—the Commission might characterize as a Section 5 violation conduct that the Division might label as criminally unlawful under Section 1.²⁷

Meanwhile, the Commission has been focusing on its rulemaking authority, like its recently proposed rule on non-compete clauses²⁸ and its Section 5 enforcement authority and guidance—that is, those powers that make it more of a regulatory agency than a law enforcer. The more the Commission does so, the more likely it will be to face challenges at the Supreme Court. The Court has been actively considering—and severely curtailing—the authorities of independent regulatory agencies, including the Commission.²⁹ Further curtailment could fundamentally reshape the balance between the two Agencies, potentially fostering clear divergence—or, if the Commission were to lose some (or all) of its administrative authorities, necessitating more convergence.

In any event, the existing balance between the Agencies was built on the assumption that both behave primarily as law enforcement agencies.³⁰ As such, the implications of the

Commission's transition should not be underestimated. On this front, the Commission recently (among other steps) released a lengthy Policy Statement on the scope of its Section 5 authority regarding unfair methods of competition³¹ and issued a notice of proposed rulemaking under that authority for the first time this century.³² The Commission is considering (and, in the case of non-competes, actively attempting) to characterize large swathes of conduct unlawful under Section 5. This would subject certain conduct not only to typical antitrust lawsuits, but potentially to Commission rule violation enforcement actions, which are meaningfully different in terms of both the requisite factors and the available remedies. Would implementing such rules prompt changes to the clearance process—would the Commission decline to refer actions that might constitute rule violations but might also be per se Section 1 violations to the Divisions, as it traditionally has? Or would defendants be subject to both Commission and Division jurisdiction, given the fundamentally different laws and procedures at issue? In that case, who would ever settle first with the Commission only to be subsequently targeted by the Division?

The Commission has also increasingly pursued unconsummated merger challenges directly through its administrative trial process, rather than first seeking a preliminary injunction in federal court. In *Microsoft/Activision*, for

²⁶ Cf. Dan Papszun, *DaVita, Ex-CEO Found Not Guilty in DOJ's No-Poaching Case*, BLOOMBERG L. (Apr. 15, 2022, 6:19 PM), <https://news.bloomberglaw.com/antitrust/davita-ex-ceo-found-not-guilty-in-doj-s-no-poaching-case> (describing a DOJ criminal case resulting from a merger investigation).

²⁷ See Ben Penn, *DOJ's First Criminal Wage-Fixing Case Ends Mostly in Defeat*, BLOOMBERG L. (Apr. 14, 2022, 1:16 PM), https://www.bloomberglaw.com/bloomberglawnews/antitrust/X36KD1RO000000?bna_news_filter=antitrust#cite (describing the outcome of the DOJ criminal case against Jindal).

²⁸ Non-Compete Clause Rule, 88 Fed. Reg. 3482 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. 910), <https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking>.

²⁹ See, e.g., *AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021) (barring FTC from seeking court-ordered monetary relief under Section 13(b) of the FTC Act); *Axon Enterprise, Inc. v. FTC*, 143 S. Ct. 890 (2023) (permitting collateral district court suit challenging constitutionality of FTC administrative litigation); see also *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022), *cert. granted*, 2023 WL 4278448 (June 30, 2023) (holding in part that Congress's creation of SEC administrative law judges violated the nondelegation doctrine).

³⁰ See J. Thomas Rosch, Commissioner, Fed. Trade Comm'n, *The Federal Trade Commission as a Law Enforcement Agency*, Lecture Given to Class in Antitrust Economics, ECON 420, Spring 2012, University of Virginia 3 (Apr. 23, 2012), <https://www.ftc.gov/news-events/news/speeches/federal-trade-commission-law-enforcement-agency> ("First, and above all, the Commission is a law enforcement agency . . . If the Commission does otherwise, then it will be transformed from a law enforcement agency into a regulatory agency. That will not happen on my watch.").

³¹ Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act, Commission File No. P221202, FED. TRADE COMM'N (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

³² Non-Compete Clause Rule, 88 Fed. Reg. 3482 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. 910), <https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking>.

instance, the Commission initially filed a complaint solely in Part 3, and only recently filed in federal court following the parties' notice that they may elect to consummate the merger. Similarly, in *Illumina/Grail*, the Commission authorized staff to dismiss the federal court complaint and proceed solely through Part 3, arguing that because the European Commission was investigating the merger, the parties "cannot implement the transaction without obtaining clearance from the European Commission."³³ Such decisions raise yet another procedural question and distinction between the two agencies. The Division has yet to dismiss any federal complaints, to wait on filing federal complaints, or otherwise to argue that a preliminary injunction is not necessary because *another* jurisdiction is preventing the parties from closing their transaction. Presumably, the Commission is comfortable taking this stance because it may proceed internally despite a loss in Article III court. But what happens when defendants to a Division challenge argue that no preliminary injunction is necessary because a foreign jurisdiction is preventing their closing and cite to the Commission's public statements? Or when parties to a Part 3 challenge argue their due process rights are being violated because they are subjected, through an arbitrary and opaque clearance procedure, not to federal court trial process, but to the Commission's administrative trial process—which they may inevitably characterize as biased, citing to the Ninth Circuit's observation that "the FTC has not lost a single case in the past quarter-century"?³⁴ Observers may soon find out: Amgen and

Horizon Therapeutics have made just such an allegation in countersuit against the Commission's action to enjoin their combination.³⁵

III. Increasingly Fractured Ground and Future Enforcement

For years, the Agencies have operated on proverbial fault lines, with some creeps and general rumblings but no catastrophic quakes to date. The status quo may change as the Agencies adjust their fundamental approaches and develop precedent around their unique legal authorities. Meanwhile, the threat of Supreme Court action irrevocably restructuring this delicate balance has never been more present—it is, perhaps, the stick of dynamite in this analogy. With the Commission behaving more than ever as an antitrust regulatory agency (and in doing so, imperiling its very ability to do so)—and the Division simultaneously leaning into its criminal law enforcement powers—very real questions emerge as to what antitrust enforcement will look like in the coming years.

Such a fractious regime sitting on active faults threatens to undermine the coherency of the antitrust laws writ large and, along with it, the rule of law and basic principles of due process. And more, it threatens to undermine the U.S.'s role in global antitrust enforcement, at a time when international perception and prestige in this arena is more important than ever. Time will tell whether and how developments along the fault line between the Agencies will shake out.

³³ Press Release, Fed. Trade Comm'n, Statement of FTC Acting Bureau of Competition Director Maribeth Petrizzi on Bureau's Motion to Dismiss Request for Preliminary Relief in *Illumina/GRAIL* Case (May 20, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/05/statement-ftc-acting-bureau-competition-director-maribeth-petrizzi-bureaus-motion-dismiss-request>.

³⁴ *Axon Enterprise, Inc. v. FTC*, 986 F.3d 1173, 1187 (9th Cir. 2021). Moreover, on appeal from an internal administrative proceeding, courts apply a "deferential standard of review" as to the FTC's factual findings, under which "the mere fact that 'two inconsistent conclusions' could be drawn from the record 'does not prevent [the Commission's] finding from being supported by substantial evidence.'" *McWane, Inc. v. Fed. Trade Comm'n*, 783 F.3d 814 (11th Cir. 2015) (quoting *Consolo v. Fed. Maritime Comm'n*, 383 U.S. 607, 620 (1966)).

³⁵ Answer and Defenses for the Respondent, Amgen Inc., Dkt. No. 9414 (FTC July 7, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/608151.2023.07.07_-_answer_and_defenses_of_respondents_amgen_inc_and_horizon_therapeutics_plc.pdf.