

United States Senate

WASHINGTON, DC 20510-1304

February 13, 2023

Jonathan Kanter
Assistant Attorney General for Antitrust
Department of Justice
950 Pennsylvania Avenue NW
Washington, D.C. 20530

Lina Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Assistant Attorney General Kanter and Chair Khan:

I write to request that the Department of Justice Antitrust Division and the Federal Trade Commission (FTC) investigate troubling evidence that anticompetitive interlocking directorates are pervasive throughout the life science industry. The proliferation of interlocking directorates may have profound effects on consumers, including diminishing the extent to which companies conduct innovative research, reducing patient access to medications, and making prescription drug prices even more unaffordable.

Interlocking directorates occur when individual directors concurrently serve on competing firms' boards. The practice can have significant negative consequences. Firms with common directors are more likely to coordinate on price, product, and other decisions, leading to less competition in the market and harm to consumers. For this reason, Louis Brandeis, then serving as advisor to President Woodrow Wilson, referred to interlocking directorates as "the root of many evils."¹

In light of the likelihood of competitive harm, Section 8 of the Clayton Antitrust Act has long made interlocking directorates among companies of sufficient size *per se* illegal.² The FTC also recently emphasized that "interlocking directors . . . of competing firms not covered by the literal language of the Clayton Act" may run afoul of Section 5 of the Federal Trade Commission Act (FTC Act).³

I am encouraged by your respective agencies' recent efforts to crack down on interlocking directorates. In April 2022, Assistant Attorney General Kanter stated that the Justice Department was "ramping up efforts to identify violations across the broader economy"

¹ Louis D. Brandeis, Chapter III, Other People's Money (1914), <https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/other-peoples-money-chapter-iii>.

² 15 U.S.C. § 19. In 2022, this prohibition applied if each corporation had capital, surplus, and undivided profits aggregating more than \$41,034,000. *See* Revised Jurisdictional Thresholds for Section 8 of the Clayton Act, 87 Fed. Reg. 3540 (Jan. 24, 2022).

³ Fed. Trade Comm'n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022) ("FTC Section 5 Policy Statement"), https://www.ftc.gov/system/files/ftc_gov/pdf/p221202sec5enforcementpolicystatement_002.pdf.

and would “not hesitate to bring Section 8 cases to break up interlocking directorates.”⁴ This statement was followed by the Department’s October 2022 announcement that seven directors had resigned from corporate boards “in response to concerns by the Antitrust Division that their roles violated the Clayton Act’s prohibition on interlocking directorates.”⁵ Likewise, the FTC passed a resolution directing the use of compulsory process to investigate common officers and directors of competing corporations⁶ and issued the policy statement referenced above making clear that interlocking directorates could violate Section 5 of the FTC Act.⁷ Your agencies’ increased emphasis on combatting interlocking directorates is long overdue after decades of lax enforcement in this area.⁸

Despite the legislative prohibitions against interlocking directorates, recent research by Anoop Manjunath and others at Stanford University found that “[a]t any given time, a significant proportion of all life science companies . . . are interlocked with actual or likely competitors.”⁹ The researchers studied 2,241 public life science companies over the period 2000 to 2020. Their research showed that nearly 20 percent of all such firms had interlocking boards in 2020. This number rose to over 50 percent for high revenue firms (those with over \$5 million in lifetime revenue). Even narrowly focusing on only those companies pursuing clinical trials to address the same disease indication—far stricter than the statutory threshold for illegal conduct—the researchers found “hundreds of instances of companies producing directly competitive drugs that share board members.”¹⁰ And, the problem appears to be getting worse, as the average number of interlocking directors per company more than tripled from 2000 to 2020 (from 0.5 to 1.7).

It should go without saying that these findings are troubling. Prices for prescription drugs are already higher in the United States than in any peer nation,¹¹ with the median price for

⁴ Jonathan Kanter, Assistant Att’y Gen. for the Antitrust Div., Dep’t of Just., Opening Remarks at 2022 Spring Enforcers Summit (April 4, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-2022-spring-enforcers>.

⁵ Press Release, Dep’t of Just., Directors Resign from the Boards of Five Companies in Response to Justice Department Concerns about Potentially Illegal Interlocking Directorates (Oct. 19, 2022), <https://www.justice.gov/opa/pr/directors-resign-boards-five-companies-response-justice-department-concerns-about-potentially>.

⁶ FED. TRADE COMM’N, FILE NO. 211 0161, RESOLUTION DIRECTING USE OF COMPULSORY PROCESS REGARDING COMMON DIRECTORS AND OFFICERS AND COMMON OWNERSHIP (Sept. 2, 2021), https://www.ftc.gov/system/files/attachments/press-releases/ftc-streamlines-consumer-protection-competition-investigations-eight-key-enforcement-areas-enable/omnibus_resolutions_p859900.pdf.

⁷ FTC Section 5 Policy Statement, *supra* note 3.

⁸ Thomas Panoff, et al, *Time For A New Look At Interlocking Board Directorate History*, LAW360 (Dec. 8, 2022), https://www.law360.com/consumerprotection/articles/1556504?nl_pk=fb086f4d-9678-47df-a0bf-2ecfba0767d7&utm_source=newsletter&utm_medium=email&utm_campaign=consumerprotection&utm_content=2022-12-09&nlidx=0&nlaidx=21 (“Since the early 1990s, Section 8 has gone largely unenforced despite its prohibition remaining the same.”).

⁹ Anoop Manjunath, et al, *Analysis of Over 2,200 Life Science Companies Reveals a Network of Potentially Illegal Interlocked Boards* (Stan. L. and Econ., Olin Working Paper No. 578, Oct. 19, 2022), <https://ssrn.com/abstract=4253144>.

¹⁰ *Id.* at 3-4.

¹¹ ANDREW M. MULCAHY, ET AL, OFFICE OF THE ASSISTANT SEC’Y FOR PLANNING AND EVALUATION, DEP’T OF HEALTH AND HUMAN SERVS., INTERNATIONAL PRESCRIPTION DRUG PRICE COMPARISONS: CURRENT EMPIRICAL ESTIMATES AND COMPARISONS WITH PREVIOUS STUDIES (July 1, 2022), <https://aspe.hhs.gov/reports/international-prescription-drug-price-comparisons#:~:text=U.S.%20prices%20were%2025%20percent,for%20brand%2Dname%20originator%20drugs>.

a new drug launched last year coming in at a staggering \$222,000.¹² Companies in the life science industry have frequently resorted to anticompetitive practices, such as pay-for-delay patent settlements,¹³ patent thickets,¹⁴ and illegal rebate schemes,¹⁵ to maintain those high prices. Interlocking directorates will only exacerbate the problem, with the potential for “fewer therapeutic avenues available to patients, increased drug prices, and fewer efficacious drugs developed.”¹⁶

While your agencies have undertaken efforts to address some of the competition problems in the life science industry,¹⁷ more must be done. In particular, I encourage your agencies to use the authorities granted them under the Clayton and FTC Acts to investigate interlocking boards in the life science industry and take all necessary steps to combat this anticompetitive practice.

I appreciate your prompt attention to this matter.

Sincerely,



Richard J. Durbin
Chair
United States Senate Committee on the Judiciary

cc: The Honorable Lindsey Graham, Ranking Member, United States Senate Committee on the Judiciary

¹² Deena Beasley, *U.S. new drug price exceeds \$200,000 median in 2022*, REUTERS (Jan. 5, 2023), <https://www.reuters.com/business/healthcare-pharmaceuticals/us-new-drug-price-exceeds-200000-median-2022-2023-01-05/>.

¹³ FED. TRADE COMM’N, PAY FOR DELAY (2023), <https://www.ftc.gov/news-events/topics/competition-enforcement/pay-delay>.

¹⁴ Ahmed Aboulenein, *Consumer group says drugmakers abuse U.S. patent system to keep prices high*, REUTERS (Sept. 16, 2022), <https://www.reuters.com/business/healthcare-pharmaceuticals/consumer-group-says-drugmakers-abuse-us-patent-system-keep-prices-high-2022-09-16/>.

¹⁵ Press Release, Fed. Trade Comm’n, FTC to Ramp Up Enforcement Against Any Illegal Rebate Schemes, Bribes to Prescription Drug Middleman That Block Cheaper Drugs (June 16, 2022) (“FTC June 16, 2022 Press Release”), <https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-ramp-up-enforcement-against-illegal-rebate-schemes>.

¹⁶ Manjunath, et al, *supra* note 9 at 5.

¹⁷ *See, e.g.*, FTC June 16, 2022 Press Release, *supra* note 15.