

November 8, 2023

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

The Honorable Alvaro Bedoya
Commissioner
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

The Honorable Rebecca Kelly Slaughter
Commissioner
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Chair Khan, Commissioner Slaughter, and Commissioner Bedoya:

I am writing to express my disappointment with the Federal Trade Commission's (FTC's) decision to allow pharmaceutical giant Amgen to move forward with its acquisition of Horizon Therapeutics (Horizon) pursuant to a consent order.¹ Amgen, which has a long history of employing anticompetitive business tactics,² completed its acquisition of Horizon, which has faced repeated criticisms for hiking its drug prices,³ in October 2023.⁴ The proposed consent order resolving the FTC's suit against Amgen aims to address antitrust issues present in the transaction through behavioral remedies, but I remain concerned regarding the effects of this deal on the price and availability of medicine. I urge the FTC to reject the use of remedies – both behavioral and structural – in merger review and to vigorously challenge consolidation and anticompetitive behavior in the health care industry, consistent with its proposed merger guidelines.

¹ U.S. Federal Trade Commission, "Biopharmaceutical Giant Amgen to Settle FTC and State Challenges to its Horizon Therapeutics Acquisition," press release, September 1, 2023, <https://www.ftc.gov/news-events/news/press-releases/2023/09/biopharmaceutical-giant-amgen-settle-ftc-state-challenges-its-horizon-therapeutics-acquisition>.

² U.S. House of Representatives Committee on Oversight and Reform, "Drug Pricing Investigation: Amgen – Enbrel and Sensipar," October 2020, pp. i-iii, <https://oversightdemocrats.house.gov/sites/democrats.oversight.house.gov/files/Amgen%20Staff%20Report%2010-1-20.pdf>.

³ FiercePharma, "Horizon's faced repeated price-hike criticism, but Vimovo just got its 11th raise—to almost \$3,000," Eric Sagonowsky, February 15, 2018, <https://www.fiercepharma.com/pharma/horizon-s-vimovo-gets-a-february-price-hike-its-11th-recent-years-report>.

⁴ Amgen, "Amgen Completes Acquisition of Horizon Therapeutics plc," press release, October 6, 2023, <https://www.amgen.com/newsroom/press-releases/2023/10/amgen-completes-acquisition-of-horizon-therapeutics-plc>.

The pharmaceutical industry has engaged in rampant consolidation in recent decades. Between 1995 and 2015, the 60 leading pharmaceutical companies merged down to only 10 firms.⁵ Innovation and access to affordable drugs has directly suffered as a result.⁶ Amgen has built patent thickets and made pricing decisions driven by aggressive revenue targets that resulted in exorbitant profits and executive payouts. Amgen’s \$27.8 billion acquisition of Horizon adds Horizon’s rare immune-disease drugs to Amgen’s already extremely profitable pharmaceutical lineup, giving Amgen even more opportunities and market power to continue jacking up prices and squeezing money out of patients.⁷

I wrote to you in January 2023 requesting that the FTC carefully scrutinize Big Pharma mergers, with a specific request to examine the proposed Amgen-Horizon merger.⁸ I was encouraged by the FTC’s decision in May 2023 to file suit to block Amgen’s acquisition of Horizon, citing concerns that the deal would “allow Amgen to leverage its portfolio of blockbuster drugs to entrench the monopoly positions of Horizon medications used to treat two serious conditions, thyroid eye disease and chronic refractory gout.”⁹ This action marked the FTC’s first litigated challenge to a pharmaceutical merger in over a decade, and it appeared to send a powerful signal to Big Pharma that they should not, and will not, be allowed to violate antitrust law and harm patients with no accountability.¹⁰ However, the subsequent settlement between FTC and Amgen clearing the way for the merger to proceed has led some Wall Street analysts to conclude that “review of other pending pharmaceutical deals could potentially pan out favorably for the companies involved,” allowing the sector to “breathe a sigh of relief.”¹¹

The settlement announced on September 1, 2023 contains a proposed consent order that imposes certain conditions on Amgen in exchange for allowing the merger to move forward. Among these conditions are prohibitions on bundling Amgen products with Horizon’s monopoly medications, and on using product rebates or contract terms to exclude or disadvantage any product that would

⁵ Washington Post, “Drug companies keep merging. Why that’s bad for consumers and innovation.” Robin Feldman, April 6, 2021, <https://www.washingtonpost.com/outlook/2021/04/06/drug-companies-keep-merging-why-thats-bad-consumers-innovation/>.

⁶ *Id.*; Harvard Business Review, “Research: Innovation Suffers When Drug Companies Merge,” Justus Haucap and Joel Stiebale, August 3, 2016, <https://hbr.org/2016/08/research-innovation-suffers-when-drug-companies-merge>.

⁷ Reuters, “Amgen dives deeper into rare disease drugs with \$27.8 billion Horizon deal,” Manas Mishra and Bhanvi Satija, December 12, 2022, <https://www.reuters.com/article/horizon-therapeu-m-a-amgen-idCAKBN2SW0J0>; Wall Street Journal, “Amgen Agrees to Acquire Horizon Therapeutics for \$27.8 Billion,” Ben Dummett, Dana Cimilluca, and Laura Cooper, December 12, 2022, <https://www.wsj.com/articles/amgen-in-advanced-talks-to-buy-horizon-therapeutics-11670785882>.

⁸ Letter from Senator Elizabeth Warren to U.S. Federal Trade Commissioners, January 25, 2023, <https://www.warren.senate.gov/imo/media/doc/2023.01.25%20Letter%20to%20FTC%20re%20Big%20Pharma%20Deals.pdf>.

⁹ U.S. Federal Trade Commission, “FTC Sues to Block Biopharmaceutical Giant Amgen from Acquisition That Would Entrench Monopoly Drugs Used to Treat Two Serious Illnesses,” press release, May 16, 2023, <https://www.ftc.gov/news-events/news/press-releases/2023/05/ftc-sues-block-biopharmaceutical-giant-amgen-acquisition-would-entrench-monopoly-drugs-used-treat>.

¹⁰ Axios, “FTC sues to block Amgen’s \$28 billion Horizon takeover,” Dan Primack, May 16, 2023, <https://www.axios.com/2023/05/16/ftc-amgen-horizon>.

¹¹ CNBC, “The FTC cleared Amgen’s \$27.8 billion Horizon buyout – here’s what it means for other massive pharma deals,” Annika Kim Constantino, September 5, 2023, <https://www.cnbc.com/2023/09/05/ftc-clears-amgen-horizon-buyout-what-it-means-for-other-pharma-deals.html>.

compete with these monopoly medications.¹² The consent order also requires Amgen to seek FTC approval prior to engaging in certain business opportunities or acquisitions related to these medications, and provides for the imposition of a monitor to report on Amgen’s behavior. Many of these behavioral remedies are set to be in place for 15 years, though others will expire in 2032.

As I previously submitted to the FTC and Department of Justice (DOJ),¹³ behavioral remedies, which require certain commitments from the merging parties,¹⁴ are difficult to administer and enforce and cease to be binding once the term of the agreement ends, though anticompetitive effects remain.¹⁵ Even structural remedies, which are thought to be easier to enforce, fail to maintain competitive conditions because companies have an incentive to ensure that the businesses they spin off do not succeed.¹⁶ We are concerned that Amgen will continue its pre-merger anticompetitive behavior on a larger scale, notwithstanding the consent order, and will abandon any restraint once the consent order expires.

Further, allowing behavioral and structural remedies encourages companies to “litigate the fix” by proposing remedies during ongoing litigation that force a judge’s focus to stray from the original antitrust violations of the merger.¹⁷ The FTC should not put itself in the position of having to continuously revisit old transactions in order to ensure parties are complying with their promises. Instead, the FTC should refuse to accept behavioral or structural remedies in order to strengthen antitrust enforcement and protect competition.

In addition, the FTC should finalize its proposed merger guidelines to strengthen antitrust enforcement in the health care industry.¹⁸ These draft merger guidelines – which are rooted in statutory text, the congressional intent of antitrust laws, and binding Supreme Court precedent – are a useful tool to fight rampant consolidation in health care and protect consumers from inflated prices. Specifically, proposed Guideline 7 provides that mergers should not entrench or extend a

¹² U.S. Federal Trade Commission, “Biopharmaceutical Giant Amgen to Settle FTC and State Challenges to its Horizon Therapeutics Acquisition,” press release, September 1, 2023, <https://www.ftc.gov/news-events/news/press-releases/2023/09/biopharmaceutical-giant-amgen-settle-ftc-state-challenges-its-horizon-therapeutics-acquisition>.

¹³ Public Comments filed by Senator Elizabeth Warren, et al. with the U.S. Federal Trade Commission and U.S. Department of Justice, September 18, 2023, <https://www.warren.senate.gov/imo/media/doc/2023.09.18%20Letter%20FTC%20and%20DOJ%20re%20Merger%20Guidelines.pdf>.

¹⁴ CPI Antitrust Chronicle, “Structural vs. Behavioral Remedies,” Frank Maier-Rigaud and Benjamin Loertscher, April 2020, p. 4, https://www.nera.com/content/dam/nera/publications/2020/PUB_CPI_Remedies.pdf.

¹⁵ U.S. Department of Justice, “Assistant Attorney General Makan Delrahim Delivers Remarks at the Federal Telecommunication Institute’s Conference in Mexico City,” November 7, 2018, <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-federal-institute>.

¹⁶ Institute for Local Self-Reliance, “Strengthening Enforcement Against Illegal Mergers: Updating the Merger Guidelines,” April 21, 2022, p. 29, <https://cdn.ilsr.org/wp-content/uploads/2022/04/ILSR-Merger-Guidelines-Comment-Letter.pdf>.


¹⁷ Bloomberg Law, “ANALYSIS: How ‘Litigating the Fix’ Is Upending Merger Review,” Eleanor Tyler, May 11, 2023, <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-how-litigating-the-fix-is-upending-merger-review>.

¹⁸ Public Comments filed by Senator Elizabeth Warren, et al. with the U.S. Federal Trade Commission and U.S. Department of Justice, September 18, 2023, <https://www.warren.senate.gov/imo/media/doc/2023.09.18%20Letter%20FTC%20and%20DOJ%20re%20Merger%20Guidelines.pdf>.

company's already-dominant position.¹⁹ Amgen's acquisition of Horizon is poised to entrench the monopoly positions of certain medications to the detriment of competition and consumers.²⁰ The FTC should urgently finalize the proposed guidelines and rely on them in challenging transactions that would further entrench a dominant company like Amgen.

The FTC has the power and responsibility to hold Big Pharma accountable and protect access to pharmaceutical products for millions of Americans that are struggling to pay for prescription drugs. We urge you to have confidence in the FTC's and DOJ's correct reading of antitrust statutes and Supreme Court precedent and, consistent with the proposed merger guidelines, block any pharmaceutical mergers that pose anticompetitive harms.

Sincerely,



Elizabeth Warren
United States Senator

¹⁹ U.S. Department of Justice and U.S. Federal Trade Commission, "Draft FTC-DOJ Merger Guidelines for Public Comment," July 2023, pp. 3, 18, https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf.

²⁰ U.S. Federal Trade Commission, "FTC Sues to Block Pharmaceutical Giant Amgen from Acquisition That Would Entrench Monopoly Drugs Used to Treat Two Serious Illnesses," press release, May 16, 2023, <https://www.ftc.gov/news-events/news/press-releases/2023/05/ftc-sues-block-biopharmaceutical-giant-amgen-acquisition-would-entrench-monopoly-drugs-used-treat>.