Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW
Suite CC-5610 (Annex D) W
Washington, D.C. 20580

Re: Pfizer Inc. and Mylan N.V.; File No. 191-0182

Dear Secretary:

The American Antitrust Institute (AAI) files this comment in opposition to the Federal Trade Commission's (FTC's) proposed Consent Agreement in the Matter of Pfizer Inc., Upjohn Inc., Viatris Inc., Mylan N.V., Utah Acquisition Sub Inc., File No. 191-0182, Docket No. C-4727 ("Consent Agreement" and "Pfizer-Mylan"). The AAI is an independent, nonprofit organization whose mission is to promote competition that protects consumers, businesses, and society.[1] The AAI believes that the remedies contained in the Consent Agreement will not fully restore competition lost by the proposed merger of Pfizer and Mylan. The AAI therefore urges the Commission to withdraw the Consent Agreement and move instead to enjoin the proposed merger in order to protect competition and consumers, who depend on access to affordable, live-saving medications. These medications include those designed to treat a wide range of conditions, including hypertension, high cholesterol, congestive heart failure, bacterial conjunctivitis, uterine bleeding, seizures, hypothyroidism, intestinal ulcers, and smoking cessation.[2]

The AAI submits its recent White Paper, From Competition to Conspiracy: Assessing the Federal Trade Commission's Merger Policy in the Pharmaceutical Sector, as part of its comment in this matter.[3] The White Paper provides empirical evidence of the harmful effects of the FTC's 25-year policy of settling virtually all highly concentrative horizontal pharmaceutical mergers with consent orders containing divestitures, rather than seeking full-stop injunctions. The effect of the Commission's policy has been to create a pharmaceutical industry landscape that includes: (1) highly

[1] AAI serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. The AAI has provided legal and economic analysis, commentary, and testimony on mergers and competition policy involving the healthcare and pharmaceutical markets since the organization's founding over two decades ago. For more information, please visit www.antitrustinstitute.org.

[2] Analysis of Agreement Containing Consent Orders to Aid Public Comment, *In the Matter of Pfizer Inc., Upjohn Inc., Viatris Inc., Mylan N.V., Utah Acquisition Sub Inc.* File No. 191-1082, Docket No. C-4727, FED. TRADE COMM'N (Oct. 30, 2020).

[3] Diana L. Moss, *From Competition to Conspiracy: Assessing the Federal Trade Commission's Merger Policy in the Pharmaceutical Sector*, AM. ANTITRUST INST. (Sept. 3, 2020), https://www.antitrustinstitute.org/wpcontent/uploads/2020/09/AAI_PharmaReport2020_9-11-20.pdf.

concentrated pharmaceutical markets; (2) the "swapping" of assets within a relatively small group of large and increasingly powerful firms that have engaged in serial M&A and purchases of divested assets in other mergers; (3) failed divestitures in past generic pharmaceutical mergers, as the FTC's own evidence shows; and (4) conspiracies to fix generic drug prices or allocate customers that are the subject of ongoing federal, state, and private civil litigation and federal criminal indictments.

The Commission's action in the proposed merger of Pfizer-Mylan follows, lockstep, its failed historical policy. The Consent Agreement, if approved, will add another data point to the burgeoning body of evidence that the FTC's "industrial planning" approach to merger-control in the pharmaceutical industry has worked to the detriment of competition and consumers.[4] The Consent Agreement requires divestitures in seven generic product markets in the U.S. to address loss of actual competition and in three generic product markets in the U.S. to address loss of potential competition.[5] Five of the seven relevant markets in which the proposed merger of Pfizer and Mylan will eliminate an actual competitor involve reductions in the number of rivals from four to three, and from three to two. The AAI White Paper reveals that over 60% of relevant markets reported on in 67 previous FTC pharmaceutical merger complaints have also been highly concentrative, 4-3 and 3-2 mergers.

The Commission's action in Pfizer-Mylan is another example of settling a highly concentrative merger with divestitures instead of moving to enjoin it. Indeed, the FTC's own studies of past pharmaceutical divestitures highlights systemic problems with pharmaceutical divestitures. In its most recent analysis (2006-2012), for example, the Commission reviewed 24 consent orders involving 60 on-market generic drugs, finding that only 75% of buyers of divestiture assets actually sold the drug, post-divestiture.[6] For the 25% of buyers that did not sell the drug post-divestiture, the failure rate on oral solid generics divestitures was 18% and the rate on complex generics divestitures was 36%.[7]

Moreover, the Consent Agreement includes conduct remedies, which have proven time and again to be ineffective in fully restoring competition.[8] Conduct remedies are rules and requirements that prevent firms from acting on powerful strategic competitive incentives to exercise market power.[9] They invite "workarounds" and non-compliance by the merged company, made easier by the fact that smaller firms fear retaliation from more powerful rivals if they report violation of the remedy.

In Pfizer-Mylan, conduct remedies include the myriad requirements that: (1) Pfizer serve as a contract manufacturer for the purchaser of divestiture assets (Prasco); (2) to the extent that Pfizer

---

[4] *Supra* note 3.
[5] *Supra* note 2, at 4-5.
[6] Fed. Trade Comm'n Bureaus of Competition and Econ., FTC's Merger Remedies 2006-2012, (2017), www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-reportbureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf.
[7] *Id.* Because the FTC's assessment of pharmaceutical divestitures in its most recent study contains flaws, and is incomplete, it is likely that the rate of failure of those divestitures is even higher.
[8] *See, e.g.*, Letter from AAI to Makan Delrahim, Assistant Attorney General, U.S. Department of Justice, Antitrust Division Re: Amended Final Judgment: U.S v. Ticketmaster Entertainment, Inc., and Live Nation Entertainment, Inc. (Feb. 4, 2020), https://www.antitrustinstitute.org/wp-content/uploads/2020/02/AAI_Ltr-to-DOJ_LN-TM_F.pdf.
[9] *See*, John E. Kwoka and Diana L. Moss, *Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement*, 57 ANTITRUST BULL. 979 (2012).

serves as contract manufacturer to both Prasco *and* the newly formed company (Viatris), Pfizer's supply to Prasco is provided at a pre-determined cost and is prioritized over supply to Viatris; (3) Viatris provide Prasco with the active pharmaceutical ingredient (API) used in Prasco's amlodipine besylate/atorvastatin calcium tablet product at pre-determined cost and with priority over Viatris' own use; and (4) Viatris erect a firewall between its API business and its commercial business to prevent the sharing of commercially sensitive information.[10] These regulatory-style remedies could easily be violated by Pfizer or Viatris when they find themselves in rivalrous opposition to each other or Prasco, creating a "fox guarding the henhouse" dynamic that serves neither competition nor consumers.

In light of the above, the AAI maintains that the Commission's Consent Agreement in Pfizer-Mylan represents both a clear abandonment of the structural presumption and is contrary to the well-established tenet that the more concentrative a merger, the commensurately higher is the risk that the remedy will fail to restore lost competition. This stands in stark contrast to the most effective remedy, a full stop injunction, that would ensure that the Commission fully deters future anticompetitive conduct and protects consumers.

Respectfully submitted,

/s/Diana L. Moss

Diana L. Moss
President
American Antitrust Institute
1025 Connecticut Ave. NW
Suite 1000
Washington DC 20036
202-828-1226

December 14, 2020

[10] *Supra* note 2, at 4-5.