

September 7, 2016

The Honorable Edith Ramirez, Chairwoman
The Honorable Maureen K. Ohlhausen, Commissioner
The Honorable Terrell McSweeney, Commissioner
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Dear Commissioners:

We write to urge an investigation by the Federal Trade Commission into Mylan's recently reported five-fold hike in the price charged to consumers for a life-saving product, the EpiPen.¹ Because our review of the facts has produced no legitimate justification for this inordinate price hike with regard to EpiPens, this appears to be a calculated decision by Mylan to exploit the monopoly power that the company holds to enrich itself and its corporate executives² at the expense of the millions of consumers—including families and children dealing with serious allergies and the possibility of life-threatening anaphylaxis—who use this life-saving drug and delivery system as a failsafe.

Moreover, there are indications that a further marketplace abuse may also be at work here, an anticompetitive abuse within the Commission's authority to investigate and prosecute under the antitrust laws. Although a company's exploitation of monopoly power, even to the extent that may be involved here by Mylan, may not by itself violate antitrust laws, it *is* a violation for a company to *maintain* monopoly power by sabotaging or undercutting efforts by competitors to provide consumers more choice.

There are a number of troubling reports that Mylan may have engaged in such anticompetitive conduct. These include:

- Reports that Mylan attempted to influence the FDA to derail approval of Teva's competing delivery system.³

¹ See, e.g., Solving the Problem of High Drug Costs, Consumer Reports, June 21, 2016, <http://www.consumerreports.org/drugs/solving-the-problem-of-high-drug-costs/>.

² See, e.g., EpiPen Price Rises Could Mean More Riches for Mylan Executives, NY Times, Sept. 1, 2016, <http://www.nytimes.com/2016/09/04/business/at-mylan-lets-pretend-is-more-than-a-game.html>

³ See, e.g., I-Team: Company Behind EpiPen Fought to Keep Cheaper Generic off Market, <http://www.nbcnewyork.com/investigations/EpiPen-Cheap-Generic-Teva-Product-Mylan-Investigation-Drug-Cost-391758871.html>.

- Reports that Mylan had earlier persuaded the same competitor, Teva, to delay its application for FDA approval, perhaps in an anticompetitive “pay for delay” scheme. In fact, Mylan reportedly began its campaign to derail the application only as this delay was set to expire.⁴
- Reports that Mylan included restrictions in its contracts with schools purchasing the EpiPen at a discount under its EpiPen4Schools program, requiring these schools to agree not to purchase competing delivery systems.⁵

Any of these practices to maintain a monopoly by blocking competition could very well run afoul of the antitrust laws, and deserves an examination by the FTC in light of the significance of this product for public health.

Finally, we note that a year ago, Teva was seeking to acquire Mylan. The acquisition was abandoned in the midst of active investigation by the Commission, with a number of serious concerns being raised about the harms to competition that would result. It may be that material previously examined by the FTC is relevant to an examination now into Mylan’s possible efforts to maintain its monopoly power, as suggested above. The implications of a combined Teva/Mylan corporation also highlight the critical importance of vigorous merger enforcement in the health care marketplace—both to protect existing competition and the possibility of even greater competition—so that consumers have meaningful choices and can access life-saving drugs and devices.

Senators Amy Klobuchar (D.-Minn.) and Richard Blumenthal (D.-Conn.) are calling on the Commission to investigate, and that New York Attorney General Eric Schneiderman yesterday announced his own investigation. We believe such an investigation is warranted. We urge you to investigate this matter thoroughly, and to take the enforcement actions supported by the facts.

Respectfully,

George P. Slover
Senior Policy Counsel

Laura MacCleery
Vice President, Consumer Policy and Mobilization

⁴ See, e.g., *id.*

⁵ See, e.g., Mylan May Have Violated Antitrust Law in Its EpiPen Sales to Schools, Legal Experts Say, <http://www.pbs.org/newshour/rundown/mylan-may-violated-antitrust-law-epipen-sales-schools-legal-experts-say/>.