



November 30, 2021

**Via Electronic Submission**

Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, D.C. 20580

**RE: FTC Draft Strategic Plan for FY 2022-2026 (FTC-2021-0061-0001)**

The U.S. Chamber of Commerce (“the Chamber”) appreciates the opportunity to submit these comments to the Federal Trade Commission (“FTC”) in response to its Solicitation for Public Comments on the FTC’s Draft Strategic Plan for Fiscal Years 2022 to 2026 (“Draft Plan”).<sup>1</sup> The Chamber applauds those portions of the Draft Plan that reflect continuity from the prior Strategic Plan and are committed to protecting underserved and marginalized communities.

Nevertheless, and as explained more fully below, the Chamber recommends that the FTC revise the Draft Plan to commit at least to: (1) working constructively with the private sector; (2) enforcing the law in a way that minimizes undue burden and costs; (3) tailoring proposed remedies to fit any alleged anticompetitive conduct; (4) protecting due process; (5) preventing worsening regulatory patchworks; (6) focusing on preventing and addressing harm and not revenue through penalties; and (7) modernizing systems and promoting transparency. Through these changes, the FTC could continue its robust law enforcement efforts in a way that reduces the costs to the business community and ultimately, to consumers.

**The FTC Should Maintain a Constructive Relationship with the Private Sector**

The Chamber urges the FTC to maintain a constructive, rather than hostile, relationship with the business community. In its Draft Plan for educating the public, the FTC proposes the following:

Engage with local community and grassroots organizations: Build a strategy to engage with and make connections with consumers *who are often adversely impacted by powerful companies*. Maintain strong relationships with community-based organizations and advocacy organizations nationwide, while continuously seeking new ways to build relationships with trusted community leaders (e.g. church leaders, teachers, community organizers, non-profit leaders, etc.). Follow up with all organizations to understand what materials were helpful or not and why, and build relationships to maximize the agency’s public consumer outreach.<sup>2</sup>

Unfortunately, this proposed strategy suggests an unwillingness to engage with the private sector. The FTC seeks to engage with “community-based organizations,” “advocacy organizations,” “church leaders,” “teachers,” “community organizers,” and “non-profit leaders” – a list that could serve as a catalogue of all entities exempt from the FTC Act. Notably absent from this list of organizations is any business that is subject to FTC regulation. Even worse, the FTC’s Draft Plan presumes, with no explanation or support, that consumers “are often adversely impacted by powerful companies.” To the contrary, hundreds of millions of U.S. consumers benefit profoundly from the goods and services sold at low prices by the Chamber’s largest and smallest members.

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<sup>1</sup> See <https://www.ftc.gov/news-events/press-releases/2021/11/ftc-invites-public-comment-draft-strategic-plan>.

<sup>2</sup> Draft Plan at 10 (emphasis added).

For these reasons, the Chamber encourages the FTC to engage fully with the business community and to remove unnecessary and unsupported verbiage.

### **The FTC Should Minimize Undue Burdens and Costs**

As it has in the past, the FTC should enforce the law in a manner that reduces unnecessary costs. The FTC’s Strategic Plan for Fiscal Years 2018 to 2022 (“Current Plan”) described the FTC’s mission as follows:

Protecting consumers and competition by preventing anticompetitive, deceptive, and unfair business practices through law enforcement, advocacy, and education *without unduly burdening legitimate business activity.*<sup>3</sup>

The Draft Plan, however, omits any mention of costs:

Protecting the public from deceptive and unfair business practices and policing unfair competition through law enforcement, advocacy, research, and education.<sup>4</sup>

Similarly, the Current Plan states that the agency will “[i]nvestigate potentially anticompetitive mergers and business conduct efficiently using rigorous, economically sound, and fact-based analyses that enhance enforcement outcomes *and minimize burdens on business.*” The Draft Plan deletes the italicized language.<sup>5</sup>

This omission suggests that the FTC no longer plans to consider the many burdens imposed on legitimate business activity. However, the Commission cannot impose unlimited costs on the private sector without expecting that businesses pass along those costs to consumers in the form of higher prices. Every subpoena and second request imposes costs on businesses, consumers, and ultimately, society. Of course, the FTC should impose those costs where necessary and appropriate to enforce the law. As it has in the past, it should do so without unduly burdening (or at least considering) legitimate activity.<sup>6</sup>

### **The FTC Should Not Conflate its Section 5 Enforcement of Unfair Methods of Competition (UMC) and Unfair and Deceptive Acts or Practices (UDAP)**

The Draft Plan says:

Congress recognized in 1938 that unfair and deceptive practices can distort a competitive marketplace as much as unfair methods of competition. It amended the FTC Act and granted the FTC authority to stop “unfair or deceptive acts or practices in or affecting commerce.”<sup>7</sup>

This mischaracterizes the reason Congress granted the FTC UDAP authority in the Wheeler-Lea Act, commits the same mistake that led the agency astray previously, and is inconsistent with Supreme Court precedent.

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<sup>3</sup> See [https://www.ftc.gov/system/files/documents/reports/2018-2022-strategic-plan/ftc\\_fy18-22\\_strategic\\_plan.pdf](https://www.ftc.gov/system/files/documents/reports/2018-2022-strategic-plan/ftc_fy18-22_strategic_plan.pdf) at 2 (emphasis added).

<sup>4</sup> Draft Plan at 4.

<sup>5</sup> Compare Current Plan at 13 with Draft Plan at 16.

<sup>6</sup> The Chamber notes that the Draft Plan often speaks of protecting “the public,” rather than “consumers,” and that not once does the Draft Plan use the term “consumer welfare.” The Chamber urges the Commission to adhere to the consumer welfare standard in its enforcement decisions.

<sup>7</sup> Draft Plan at 5

Section 5 of the FTC Act provides that “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.<sup>8</sup>” During the era between 1914 and 1938, the FTC could prevent and proscribe only UMC. In the early 1920s, the FTC began to test the boundary of its authority over UMC and attempted to reach consumer deception, arguing that this conduct constituted UMC because it distorted the market by diverting sales from honest rivals. The Court initially supported this interpretation in *FTC v. Winsted Hosiery Co.*, 258 U.S. 483 (1922).

However, the Supreme Court put a stop to this use of UMC in *FTC v. Raladam Co.*, 283 U.S. 643 (1931), holding that “[u]nfair trade methods [such as false advertising] are not per se unfair methods of competition. If broader powers be desirable, they must be conferred by Congress.” In response to *Raladam*, Congress passed the Wheeler Lea Act to give the FTC its UDAP authority to protect consumers, regardless of whether such acts or practices injure a competitor. Attempting to re-combine the separate powers of UMC and UDAP on the theory that deceptive acts distort competition conflicts with the Supreme Court’s interpretation of the FTC Act and congressional intent in the Wheeler-Lea Act.

Further, conflating the authorities granted to the Commission to prevent UMC with the separate authorities UDAP creates an even greater uncertainty around the merger and acquisition review process introducing the possibility that the Commission will use its authorities under one statute to achieve objectives that Congress intended to be governed by other statutory authorities, such as the Clayton Act. This will discourage legitimate business activity and likely lead to increased judicial scrutiny.

### **The FTC Should Tailor Proposed Remedies to Fit the Alleged Anticompetitive Conduct**

In discussing the agency’s proposed approach to merger review, the Draft Plan proposes to seek very aggressive remedies:

Increase the use of structural remedies in consent orders and seek increased use in litigated matters. Likewise, decrease the use of behavioral remedies in consent orders and seek them less often in litigated matters. Encourage parties to propose standalone, operating businesses as settlements. Increase use of provisions to improve worker mobility including restricting the use of non-compete provisions. Seek higher penalties for order violations and HSR violations. Increase use of prior approval provisions to prevent illegal transactions in the same markets as those already under order.<sup>9</sup>

Instead of this approach, the FTC should tailor its proposed remedies to address the purportedly anticompetitive behavior. Certainly, the FTC should seek structural relief and other serious penalties where appropriate. Yet, the Draft Plan suggests that the agency is prepared to seek penalties that may well be disproportionate to the conduct at issue. This raises significant concerns that the Commission will attempt to use merger review as means to impose quasi regulatory requirements on businesses in order to advance policy objectives beyond preserving market competition. This approach will discourage legitimate business activity, harm consumers, and likely lead the agency to significant judicial setbacks.

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<sup>8</sup> 15 U.S.C. § 45(a)(1). Section 5(a)’s first clause—proscribing UMC—appeared in the original FTC Act enacted in 1914. But Section 5(a)’s second clause—proscribing UDAP—was not added until 1938 when the Wheeler-Lea Act amended Section 5 to reach UDAP.

<sup>9</sup> Draft Plan at 16.

## **The FTC Should Follow Principles of Due Process in Consumer Protection Cases**

The Commission states that it seeks to:

Identify, investigate, take actions against, and deter unfair or deceptive acts or practices that harm the public.

The Chamber agrees that the Commission should appropriately use the tools Congress has given it to protect consumers against actual harm in the market caused by unfair and deceptive trade practices. The Strategic Plan must be informed by actual enforcement authority, which requires providing notice and due process before subjecting companies directly to civil penalties.<sup>10</sup>

## **The Commission Should Follow the Law and Not Exacerbate a Growing Patchwork of Data Laws**

The Chamber notes several concerns about the FTC's proposed approach to enforcing consumer protection laws:

Enforce the law to protect all segments of the population from fraud, deception, and unfair business practices by *safeguarding consumer privacy, monitoring national advertising and new technologies*, and suing entities that violate federal court and administrative orders by the FTC.

Protecting consumer privacy is vitally important in today's digital economy. Companies should make good on their claims about how they use, collect, process, and share consumer data. Enforcing transparency under the Commission's "unfair and deceptive practices" authority is preferable to any untested extension of the FTC's competition authority.

The business community has concerns about recent statements made by Commissioner Slaughter when the Commission voted to change its bipartisan Section 18 rulemaking procedures suggesting the changes could be used to regulate data.<sup>11</sup> A rulemaking that addresses comprehensive consumer privacy issues and other technologies, like artificial intelligence, would have a negative impact on the economy as a whole. It would exacerbate a confusing and costly patchwork of laws that is emerging across the country and would not help bring about the uniformity that consumers and businesses need. A rulemaking would negatively impact small business who are already incurring massive expenses to comply with the California Consumer Privacy Act. We urge the Commission to work in a bipartisan manner with all impacted stakeholders to pursue comprehensive national privacy legislation that protects all Americans equally.

## **Consumer Protection Enforcement Should Be About Discouraging Harm**

Though the Commission lists several metrics for determining success the Chamber offers caution on the following metric:

Amount of money return to the public or forwarded to the U.S. Treasury resulting from FTC enforcement actions.

The Commission should focus on its statutory mandate to enforce against "unfair and deceptive trade practices." Given the many procedural protections Congress required the Commission to give the businesses regarding required notice and safeguards to prevent the Commission from directly penalizing companies, it is clear that Congress did not intend the Commission to be a revenue-generating agency.

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<sup>10</sup> [https://www.uschamber.com/assets/documents/Penalty-Offense-Authority\\_FTC-PDF.pdf](https://www.uschamber.com/assets/documents/Penalty-Offense-Authority_FTC-PDF.pdf)

<sup>11</sup> [https://www.ftc.gov/system/files/documents/public\\_events/1591478/transcript\\_open\\_commission\\_meeting\\_7-1-21.pdf](https://www.ftc.gov/system/files/documents/public_events/1591478/transcript_open_commission_meeting_7-1-21.pdf) ("I hope that with these streamlined procedures we can tackle cutting edge issues like data abuses that underpin so many contemporary business models...")

Additionally, the Commission should assume the presumption of innocence of parties until it has been proven that a company is in violation. It should not forecast expected gains for the Treasury Department from project enforcement revenue. The Commission should focus on enforcing against unfair and deceptive practices that cause consumer harm in the market and should not mistakenly rely on using “generated revenue” as any metric of success.

Regarding the Commission’s ability to sue, the Chamber reminds the Commission of its November 19<sup>th</sup> letter notifying the agency that it should not attempt to sue companies based on outdated administrative orders or other orders pertaining to loosely related or dissimilar conduct.

Similarly, the Commission should work with *all* stakeholders to develop actual notice and ways to avoid practices considered to be harmful in the 21<sup>st</sup> century digital economy. This should be pursued as opposed to seeking “straight-to-penalty” authority, since Commission authority is broad and vague under Section 5 of the FTC Act.<sup>12</sup> Congress set up the Commission to be a collaborative, not combative, agency with informal guidance and rulemaking in appropriate circumstances with guardrails under Section 18. This approach will provide more durable and beneficial results for consumers and industry.

### **The Federal Trade Commission Should Create More Modernized and Transparent Engagement for the Public**

The Chamber offers the following observations about the agency’s Strategic Goal 3:

The FTC believes that advancing organizational effectiveness and performance at all levels creates a strong foundation for overall mission success. The agency’s work in Strategic Goal 3 highlights ongoing efforts to improve the management of agency staffing, finances, information, and physical assets, in order to create a more efficient and agile agency.

To achieve this goal, the agency should follow the longstanding, bipartisan example set by Federal Communications Commission and publicize draft orders three weeks in advance. Allowing the public to see orders in advance would encourage collaboration that would discourage any future legal challenge. Following FCC practice, drafts should also provide privacy protection for sensitive personal information and confidential proprietary information.

The failure to publish draft orders publicly in advance, the Commission’s refusal to publish its operations manual, and its recent use of votes of since departed commissioners on pending matters all contributes to the sense that the Commission operates as a sort of “black box,” obscured from public view and accountability.

Regarding the information management structure at the Federal Trade Commission, the Chamber agrees with President Biden that agencies should modernize information technology to more efficiently provide services to the public and reduce costs for agencies. We encourage collaboration with the private sector, which is best positioned to provide innovative software and analytics solutions to the agency.

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<sup>12</sup>[https://www.uschamber.com/assets/documents/211119\\_FTCFundingProvision\\_SenateHouseCommerce-SenateHouseJudiciary.pdf](https://www.uschamber.com/assets/documents/211119_FTCFundingProvision_SenateHouseCommerce-SenateHouseJudiciary.pdf)

**Conclusion**

The Chamber appreciates the opportunity to submit these comments and hopes that the Commission will adjust its Draft Plan accordingly.

Sincerely,



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