



Nov. 30, 2021
Federal Trade Commission

Comment on the Federal Trade Commission's draft Strategic Plan for Fiscal Years 2022-2026

National Taxpayers Union Foundation (NTUF) appreciates the opportunity to comment on the draft of the newest 5-year Strategic Plan to guide the Federal Trade Commission's (FTC) consumer protection and antitrust enforcement mission.

Although the FTC's announcement of this new draft strategic plan claims that "the current draft tracks closely to" the previous plan authored by former acting FTC Chair Margeret Ohlhausen in 2018,¹ in fact a number of both semantic and substantive changes have been made that signal a profound shift in the Commission's operations. This comes as no surprise given both Chair Khan's own stated intentions to pursue a much more aggressive antitrust enforcement and regulatory agenda,² as well as the requests made of the Commission in President Biden's Executive Order on Competition earlier this year.³ To claim that this draft agenda represents merely a minor adjustment to the status quo seems disingenuous.

Right from the beginning, the 2022 draft's summary mission statement is altered to eliminate "without unduly burdening legitimate business activity" and to replace "consumers" with "the public." Each of these revisions is significant.

The removal of the goal of enforcing antitrust "without unduly burdening legitimate business activity" is alarming within the context of the actions of the Commission's majority over the past several months. One of the key attributes of effective antitrust enforcement is that it should be reasonably predictable; that is, that businesses that operate on the level should have a good idea of what practices they ought to avoid to remain within the boundaries of competition law.

Instead, the new regime at the FTC has rescinded many standards and guidelines, especially those relating to mergers and acquisitions (M&As), in a manner that seems intended to slow these transactions by creating maximum uncertainty. For example, the Commission has been

¹ Federal Trade Commission, "Draft Strategic Plan for FY2022-2026." Regulations.gov, posted Nov. 12, 2021. <https://www.ftc.gov/news-events/press-releases/2021/11/ftc-invites-public-comment-draft-strategic-plan>. See also, "Strategic Plan for Fiscal Years 2018-2022," available at https://www.ftc.gov/system/files/documents/reports/2018-2022-strategic-plan/ftc_fy18-22_strategic_plan.pdf

² Lina M. Khan, "Vision and Priorities for the FTC," memo to Federal Trade Commission staff and commissioners, Sept. 22, 2021. https://www.ftc.gov/system/files/documents/public_statements/1596664/agency_priorities_memo_from_chair_lina_m_khan_9-22-21.pdf

³ "Executive Order 14036 of July 9, 2021, Promoting Competition in the American Economy," <https://www.govinfo.gov/content/pkg/FR-2021-07-14/pdf/2021-15069.pdf>

sending aggressively worded letters to warn companies that M&A activity can be policed at any time after the ordinary review period has passed, language which Commissioner Noah Phillips has worried could be read as “intended to chill legal M&A across the board.”⁴ The Commission has also rescinded its 2020 vertical merger guidelines, and its 1995 policy guidelines on prior approval requests for M&As, and has suspended most early terminations of merger review since February 2021.

While the 2022-2026 proposed guidelines continue to tout the Hart-Scott-Rodino (HSR) Premerger Notification act as its “primary tool” for evaluating whether to challenge mergers, in fact the Commission has consistently eroded the HSR process in what Commissioner Christine Wilson has likened to “death by a thousand cuts.”⁵

The merger review changes, in particular, create maximum uncertainty at a time when M&A activity is particularly necessary, as companies continue to adjust in an economy recovering from unprecedented and lasting shocks due to government responses to the Covid-19 pandemic and the supply chain disruptions, social changes, and labor shortages that have followed. M&As are transactions that often stand to benefit consumers by increasing efficiencies in markets, and are a natural way for startups to cash in and for failing firms to be repurposed or liquidated.

In all cases, these recensions of prior FTC policy were done via partisan 3-2 votes, steamrolling the Republican minority commissioners, even though most were adopted along bipartisan lines in years prior. Most of these changes were done via the new “Open Meetings,” which have been held with scarce time for comments to be filed and in which public comments have been heard *after* commissioners’ votes have been tallied.⁶ The many, sudden changes from prior FTC policies have left it an open question how the Commission will enforce the existing laws, from merger reviews to determining “unfair methods of competition.”

Meanwhile, the replacement of “consumers” with “the public” appears to echo the Neo-Brandesian school of antitrust reform in its desire to eliminate the consumer welfare standard that has defined antitrust enforcement for four decades, in order to broaden the scope of antitrust enforcement to further social policy goals. This is in keeping with Chair Khan’s scholarly writings,⁷ and is echoed by the removal of both of the references to “consumer welfare” that were present in the 2018 plan.

It bears remembering that the consumer welfare framework for antitrust enforcement was arrived at in response to an FTC that was widely considered — by legal scholars and

⁴ “U.S. antitrust enforcer says merger wave means slower vetting,” *MSN.com*, Aug. 3, 2021

<https://www.msn.com/en-us/money/companies/us-antitrust-enforcer-says-merger-wave-means-slower-vetting/ar-AAMTCfk>

⁵ Christine S. Wilson, “The Neo-Brandesian Revolution: Unforced Errors and the Diminution of the FTC,” U.S. Federal Trade Commission, Nov. 9, 2021.

https://www.ftc.gov/system/files/documents/public_statements/1598399/ftc_2021_fall_forum_wilson_final_the_neo_brandesian_revolution_unforced_errors_and_the_diminution.pdf

⁶ Note that NTU Foundation has filed multiple comments protesting this lack of real public input and transparency in Commission proceedings, see <https://www.ntu.org/library/doclib/2021/06/NTUF-FTC-7-1-2021-Open-Meeting-Comment.pdf> and

<https://www.ntu.org/library/doclib/2021/09/NTUF-FTC-9-15-2021-Open-Meeting-Comment.pdf>

⁷ For example, Khan wrote in 2017 that “the rise of dominant internet platforms freshly reveals the shortcomings of the consumer welfare framework and that it should be abandoned.” in “Amazon’s Antitrust Paradox,” *The Yale Law Journal*, 126:710, 2017.

https://www.yalelawjournal.org/pdf/e.710.Khan.805_zuvfyeh.pdf

economists across a wide ideological spectrum — to be out of control and overstepping its authority.⁸ The new consumer focus helped align antitrust closer to due process of law, by requiring that the government be able to demonstrate that a given business practice or transaction would likely result in genuine harm to consumers in order to bring a costly enforcement action against a firm. Requiring a more data-driven approach to antitrust, one backed by both economic and legal analysis, has helped render enforcement more predictable, while the enforcement agencies have continued to maintain a decisive win rate when pursuing antitrust cases.

In contrast, this new 2022-2026 draft strategic plan not only excises any mention of consumer welfare, it explicitly sets new social goals for the FTC to pursue via antitrust, such as advancing “racial equity, and all forms of equity” and supporting “underserved and marginalized communities.”⁹ However meritorious these social welfare goals may be in their own right, antitrust law is a powerful, blunt instrument, the purpose of which is and ought to be solely to prevent anticompetitive harms from disrupting the free market. Incorporating evaluations of economic inequality, and the disparate impacts of business practices upon underserved communities, would distort any attempt at objectivity in antitrust enforcement, and may likely be found by the courts to exceed the FTC’s mandate under existing law.

In sum, this new draft Strategic Plan, though merely an aspirational document, appears to affirm the majority’s intent to continue a rapid and radical departure from prior theory and practice in enforcing the Commission’s consumer protection and antitrust enforcement missions. We would urge the Commission not to abandon the consumer welfare standard that has ably guided antitrust enforcement for nearly four decades, and to return to the more deliberative, transparent, and bipartisan approach to internal decision-making that has made the FTC such a respected institution. Rapid policy shifts that create uncertainty about competition policy enforcement among legitimate businesses will merely inhibit economic growth and threaten U.S. global economic competitiveness.

Respectfully,

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⁸ U.S. Supreme Court Justice Potter Stewart famously wrote in a dissent to a grocery store merger case that “The sole consistency that I can find is that, in litigation under § 7, the Government always wins.” *United States vs. Von’s Grocery*, 384 U.S. 270 (1966). <https://supreme.justia.com/cases/federal/us/384/270/>

⁹ Objectives 1.4 and 2.4 in FTC 2022-2026 Draft Strategic Plan