NetChoice Comments on the Federal Trade Commission’s Draft Strategic Plan 2022 to 2026

About NetChoice

NetChoice is a trade association of leading internet businesses that promotes the value, convenience, and choice internet-business models provide American consumers. Our mission is to make the internet safe for free enterprise and for free expression. We also work to promote the integrity and availability of the internet on a global stage, and are engaged on issues in the states, in Washington, D.C., and in international internet governance organizations.

Introduction

NetChoice welcomes the opportunity to supply feedback on the Federal Trade Commission’s draft Strategic Plan for FY 2022-26.

In sum, NetChoice recommends the Commission revise its Strategic Plan as follows:

1. Return the agency to its roots by
    a. committing to bipartisan, consensus-driven policy statements, enforcement decisions, and official agency actions;
    b. focusing on the agency’s core competencies and explicit statutory authorizations;
    c. restoring the agency’s independence and reputation by distancing itself from the White House; and
    d. depoliticizing the agency’s work.
2. Get back to the basics of the Commission's fundamentals by
    a. recommitting the agency to the bipartisan, broadly supported consumer welfare standard;
    b. aligning the agency’s work—across all divisions—with the consumer welfare standard; and
    c. working within the consumer welfare standard’s framework to accommodate, as best as possible, Chair Khan’s vision of antitrust enforcement.

Return the Agency to Its Roots

First and foremost, the FTC must return to its roots. When Congress created the FTC in 1914, it sought to staff the agency with independent experts and to insulate them from political pressure. As the Supreme Court long ago put it, the FTC was designed to be "non-partisan" and to "act with entire impartiality." To be sure, the agency is not entirely separate from politics—presidents appoint commissioners based on their expertise *and* their political affiliation. At any given time, the Commission can have no more than three commissioners of the same political party. But even that small nod to politics underscores the Commission's apolitical nature. Rather than let any party command the agency unfettered, Congress instead elevated bipartisanship and consensus.

Congress also double-downed on the agency's independence. Commissioners serve for staggered seven-year terms and can be removed only for cause. And Congress chose to make the FTC a multi-member Commission, not a unitary body like the CFPB. Had Congress wanted commissioners and the agency's staff to act unilaterally or without consensus, it would not have gone through the trouble of structuring the agency this way. Whatever costs this multi-member, consensus-driven structure may impose on the Commission's speed, it more than makes up for in strengthening the Commission's reputation and insulating it from politics.

This is especially important given the agency's significant remedial powers. It is not an exaggeration to say that the FTC could abuse its statutory enforcement powers to remold most of the U.S. economy in its leadership's preferred image. As the draft Strategic Plan suggests, this is exactly what the agency may have in mind. According to the current version, for example, the agency seems to think it has the statutory power to use the FTC to pursue social and economic "equity." The document fails to explain what that means in practice, or how the agency's expertise lends itself to such a weighty and bedeviling issue—one that the people's elected representatives are still struggling with themselves, despite operating with a unified government.

Unfortunately, the FTC has not always lived up to Congress's vision of an apolitical agency committed to empirical evidence and impartial enforcement. Indeed, in recent months, for example, the agency has received much press attention not because of its expertise, but because of its perceived politics. Whether fair or not, Chair Khan's elevation and leadership has coincided with widespread concerns that the agency is yet another instrument of the White House for restructuring the U.S. economy in the President's vision. It's important to note that when the FTC last acted in this manner it resulted in Congress taking significant steps to curtail its authority -- signaling bi-partisan displeasure with an abusive and political Commission.

While President Biden is certainly free to pursue his preferred economic policies, and even influence the Department of Justice's antitrust agenda, he should not be working hand in glove with the FTC. The President's executive order on competition expressly directs the FTC to take certain actions, casting doubt on the agency's independence. And Chair Khan was present at the President's signing ceremony and was featured prominently in news coverage of the order.

Even worse, matters inside the FTC reek of politics. As reports have exposed, the agency's leadership has sidelined fellow commissioners—coincidentally enough, the two commissioners most likely to disagree with Chair Khan's policy agenda—and silenced Commission staff of all stripes. Again, there is no denying that Congress's decision to structure the agency as a bipartisan Commission has its costs. Chief among them: the agency is hamstrung—or at least was —from implementing radical policy changes or pursuing a single Commissioner's pet causes without adequate deliberation. Troubling though that may be to some critics, it's a blessing. When followed faithfully, the structure fosters a workplace environment dedicated to consensus, empirical evidence, and objective enforcement decisions.

That has long been the FTC's reputation, too. But not so much these days. Instead, the agency has torn up bipartisan policy statements by 3-2 votes, relied on "zombie" voting procedures that defy federal law, gutted statutory processes related to merger review, and supplanted the agency's mission with a progressive vision unmoored from explicit statutory authorization or even internal consensus. And the agency, led by the Chair, has attacked the Supreme Court in unusually personal and political terms, arguing, for example, that the Court *unanimously* sided with crooked businessmen over defenseless consumers. Not only is such rhetoric inappropriate on its own, it's factually wrong, as the agency surely knows (or should know). And recent news reports indicate the Commission is once again stretching its statutory powers beyond recognition, inviting further judicial scrutiny. This blatant disrespect for the rule of law and for a separate and coequal branch of government is politics in form and substance and is damaging to the agency's stature.

All this spells doom in the long run and risks transforming the agency into one driven by politics and diminishing its ability to act in ways that truly benefit consumers. To prevent further erosion, the agency's Strategic Plan must include:

- Procedures to promote consensus by, among other things, granting all Commissioners equal access to the same documents;
- Procedures for considering public input on agency actions *well in advance* of the agency's actual vote on such actions;
- A robust commitment to due process and equal protection by, among other things, spelling out explicitly when a Commissioner should recuse

themself and reversing the Commission's effective block on mergers and requiring parties to seek prior approval even if not required by law;

- A reversal of the Chair's ban on agency staff from contributing to public debate and discussion of the agency's work;
- Policies and procedures emphasizing and enshrining the agency's independence from the White House and Congress—no matter the party in power; and
- Policies that strengthen, rather than detract from, the agency's roots—e.g., a policy against counting "zombie" votes cast by commissioners who, under law, may not hold more than one job at a time.

Getting Back to Basics

As the current draft plan signals, the agency sees itself in grand terms. From addressing inequity across the country to rebalancing the relationship between employer and employee, the FTC leaves no part of the economy untouched. Setting aside the merits of such goals, the problem with this approach is clear: the FTC does not have the statutory power to pursue them. Indeed, the current FTC seems intent on exceeding any limits on its power.

But the FTC is not a "Junior-Varsity Congress." It has a clear mission and a long history that reflects the agency's true purpose: to protect American consumers from business practices that have harmed or will likely harm them. While this mission isn't always as clear cut as one would like—sometimes the empirical evidence is mixed—it is narrow and specific. That is why the consumer welfare standard (CWS) is so essential to guiding the agency's work. Rather than micromanage the entire economy, or reshape markets based on the Commission's independent policy views, the consumer welfare standard forces the Commission to pursue its work in light of its mission and to do so objectively and based on evidence, not gut instincts.

That is no longer the case, however. From rescinding the 2015 UMC Policy Statement to adopting new merger review procedures, a staunchly divided FTC has abandoned not just the consumer welfare standard but also its mission.

The dangers of this approach are manifold. First, by abandoning the objective consumer welfare standard, the agency is returning to its darkest days—when "antitrust enforcement" meant whatever a few Commissioners wanted it to mean; when big was viewed as inherently bad, even when consumers benefited; when gut instincts mattered more than empirical evidence. Second, all the above listed results in uncertainty. So much so that the business community is unlikely to pursue deals or growth strategies that benefit consumers and the economy but that might draw the Chair's ire. And third, it risks politicizing an agency with so much power in ways that will forever damage its independence and that will inevitably invite backlash.

To mitigate further damage, the Commission's Strategic Plan must:

- Recommit to the consumer welfare standard;
- Reissue the Policy Statements revoked in recent months; and
- Abandon the agency's recent flirtation with expansive rulemaking.

To be sure, NetChoice understands that Chair Khan and likeminded staffers see the consumer welfare standard as a toothless. But that's far from true. To the contrary, the consumer welfare standard is flexible enough to address new developments in markets. This original statement was adopted in a bipartisan manner and clarified the existing consumer-focus principles that were driving FTC enforcement. For example, the consumer welfare standard explicitly calls for consideration of a business practice's effect on innovation.

Rather than abandon the standard altogether, the agency should explore ways to work within the standard's framework to develop new theories of harm that address the Chair's concerns while still remaining objective and evidence-based.

Appendix: Excerpts from Previous NetChoice Comments to Consider While Revising the Strategic Plan

Readopt the FTC's Policy Statement on Prior Approval and Prior Notice Provisions in Merger Cases

The FTC's policy statement was the result of an extensive investigation into the efficacy of the premerger notification and waiting period requirements of Section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino Act, and the burdens imposed by prior approval requirements on mergers and acquisitions by businesses subject to a previous order. The outcome was not a complete abandonment of prior approval requirements for businesses found to have engaged in or attempted to engage in an illegal merger. Instead, the FTC retains the ability to impose these requirements in situations where it deems them appropriate. The policy statement specifically provides that "[t]he Commission reserves its equitable power to fashion remedies needed to protect the public interest, including by ordering limited prior approval and/or notification in certain limited circumstances."

The statement was simply a recognition that in the majority of these cases, the Hart-Scott-Rodino procedures strike a better balance between the benefits and burdens of premerger notification and approval requirements. In circumstances where the FTC feels it is warranted, they retain the ability to impose prior approval requirements when issuing an order regarding a completed or attempted merger that is illegal under the United States' antitrust laws. In fact, the policy statement goes out of its way to describe the situations in which these requirements are most likely warranted. These include when:

1. "there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for the provision, attempt the same or approximately the same merger"; or
2. "there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order, engage in an otherwise unreportable anticompetitive merger."[1]

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[1] Notice and Request for Comment Regarding Statement of Policy Concerning Prior Approval and Prior Notice Provisions in Merger Cases, 60 Fed. Reg. 39,745 (Aug. 3, 1995).

The statement also explains that the need for prior approval requirements will "depend on circumstances such as the structural characteristics of the relevant markets, the size and other characteristics of the market participants, and other relevant factors (including whether the challenged transaction itself was not reportable)."[2]

The statement is nothing more than a modest attempt to weigh the benefits of prior approval requirements with the costs they impose. It does not prevent the FTC from imposing these requirements, it only limits their use to situations where they are appropriate and likely to create more benefits than they are costs. This is important because, as discussed below, the costs of prior approval requirements for mergers and acquisitions can be significant and can ultimately end up harming those that the FTC is trying to protect.

Moreover, reimposing these requirements in a significant number of additional cases would waste taxpayer money when it could be better spent in many of the other core functions of the FTC. By forcing the FTC to engage in unnecessary prior approval procedures in a significant number of additional cases, the Commission will have to bear costs that limit its ability to expend resources in more important areas that pose a greater threat of anticompetitive harm to consumers, such as cases of intentional fraud and COVID scams.

Prior Approval Requirements Can Harm Innovation, Small Businesses, and Consumers

The economy constantly finds new and better ways to serve the needs of consumers. A core component of this dynamism is the ability of businesses to merge with one another or acquire entities to provide innovative products and services that take advantage of each companies' comparative advantage in a way that could not be achieved in a premerger world. This innovation is possible only because of gained efficiencies and the development of capabilities that did not exist previously. Acquisitions and mergers are about far more than just acquiring another business, they're about gaining infrastructure, talent, intellectual property, and a variety of other capabilities that can help both businesses provide better products and services to consumers going forward.

Take the Amazon-Whole Foods acquisition, for example. This partnership sparked incredible innovation, much of which has been particularly important during the ongoing COVID-19 pandemic. From at-home delivery to pick-up lockers that minimize the need for interpersonal contact, Whole Foods was able to develop and integrate a number of new services that would have been unthinkable just five years

[2] Id.

ago. In addition, many consumers have seen fairly significant price decreases since the acquisition, as a result of continuous pricing cutting and Whole Food's post-merger Amazon Prime discounting program.

By imposing cumbersome prior approval requirements, the FTC risks deterring these kinds of consumer-welfare enhancing mergers and undermining the enormous potential for innovation that comes with them. Decisions regarding mergers and acquisitions are made on the margin and an increase in the cost of these transactions or the risk that they will not be approved even after the expense of significant administrative costs can have the effect of killing them before they ever even have the chance to be reviewed by the FTC. As such, many of these transactions that would spur innovation and promote economic growth will never see the light of day, regardless of whether the FTC would have ultimately approved them. By artificially deterring what would be procompetitive transactions, the FTC risks not only undermining innovation but also weakening the United States' economic position in the global community.

Unnecessary and overly burdensome prior approval requirements also threaten to harm small businesses and forward-thinking entrepreneurial endeavors. The potential of being purchased by a larger, more well-established business provides a major financial incentive for up-and-coming entrepreneurs to engage in innovative activities.[3] It allows for greater specialization and creates incentives for entrepreneurs to invest in narrowly focused, but ultimately value-enhancing, ventures without having to stand up an entire corporate infrastructure to bring their innovative product or service to fruition. In fact, many entrepreneurs now begin innovative undertakings with the explicit goal of being acquired by one of the larger players, and venture capitalists often invest with an eye toward this possibility.[4] It is important to remember that businesses only agree to merge or sell if they and their stakeholders feel it will ultimately be beneficial. By raising the costs and increasing the difficulty of these mergers and acquisitions, the FTC risks harming small businesses and cutting off a core incentive to invest in these enterprises, which can also serve to hinder innovation in and of itself.

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[3] Michael Mandel & Diana G. Carew, *Innovation by Acquisition: New Dynamics of High-Tech Competition*, Progressive Policy Institute (Nov. 2011), https://www.progressivepolicy.org/wp-content/uploads/2011/11/11.2011-Mandel_Carew-Innovation_by_Acquisition-New_Dynamics_of_Hightech_Competition.pdf.

[4] Gordon Phillips & Alexei Zhdanov, *Venture Capital Investments and Merger and Acquisition Activity around the World*, Harvard Law School Forum on Corporate Governance (Dec. 29, 2017), https://corpgov.law.harvard.edu/2017/12/29/venture-capital-investments-and-merger-and-acquisition-activity-around-the-world/#:~:text=Most%20venture%20capital%20investments%20are,strategy%2C%20but%20increasingly%20less%20so.

Finally, and most importantly, imposing excessive prior approval requirements on a substantial number of additional mergers will ultimately harm consumers, which should be the primary focus of any action taken by the FTC. Not only will these requirements hinder innovation, as discussed above, they will also likely lead to higher prices and lower quality goods and services. Mergers and acquisitions do not just allow businesses to develop new and innovative products and services, they provide businesses with the tools necessary to both improve and lower the prices of their currently existing products and services. The purchase of a company with superior data security capabilities allows an existing firm to improve their offerings by providing their customers greater privacy protections in the services they already supply. The purchase of a company with superior manufacturing capabilities allows an existing firm to make their production capabilities far more efficient, leading to lower prices for their customers. By raising the cost of these types of procompetitive transactions, the FTC risks harming consumers when it comes to innovation, price, and quality.

Moreover, the requirements jeopardize other core values of the FTC and undermine the agency's reputation for apolitical expertise. For example, without the consistency provided by the consumer welfare standard, and without objective criteria to replace it, the FTC's discretion over merger and acquisition approval will be even more concerning as this subjective approach allows the Commission to hinder what would otherwise be procompetitive transactions. In essence, the more deals the FTC gets to review and approve before they commence, the more likely it is to abuse its new ad-hoc, politicized approach to enforcement.

The Considerations Involved in Adopting a Proposed Policy Statement on Repair Restrictions Imposed by Manufacturers and Sellers

The Commission is voting on whether to issue a new policy statement on Repair Restrictions Imposed by Manufacturers and Sellers, which would likely include restrictions on the use of adhesives that make parts difficult to replace, limiting the availability of spare parts for third-party repairers and users, and making diagnostic software unavailable to third-party repairers and users.

The Commission should consider the potential unintended consequences of such restrictions. For example, limiting the use of adhesives on electronic devices could end up making the products less safe and harming consumers, particularly as an increasing number of children are using these types of devices.

Moreover, it will also be important for the FTC to consider the equity of such restrictions, as forcing manufacturers to provide their diagnostic software and replacement parts indiscriminately would harm authorized third-party repairers who have expended the time and resources necessary to earn the trust of these manufacturers. Their investment would be all but wiped out by such requirements. However, if the FTC is intent on imposing these restrictions on manufacturers, it

should also adopt companion rules that serve to protect consumers from third-party actors and promote trust throughout the economy.

If the FTC is going to force businesses to provide replacement parts and diagnostic equipment to third-party repairers, it should:

- Require repairers to **clearly and conspicuously disclose** to consumers whether they are authorized by the manufacturer as an official repairer and whether they have undergone training from the manufacturer on the proper process for repairs to their devices or products.

These requirements will help provide necessary transparency for consumers. At the same time it helps businesses avoid engaging in deceptive or unfair practices.

In addition, such disclosures can help prevent physical and material harm to unwitting consumers who thought their repair was authorized by the manufacturer and would be performed properly. They will also prevent the erosion of trust between manufacturers and downstream customers that can result from improperly performed repairs by third parties that reflect adversely on the original manufacturer in the minds of consumers.

We think that the FTC should refrain from issuing a policy statement on Repair Restrictions Imposed by Manufacturers and Sellers. However, if the FTC is going to issue such a statement, it should include companion rules mandating clear and conspicuous notices of authorization and training that protect consumers and manufacturers from the harm that can result from negligent repairs done by third-party repairers.

The Problems with Adopting Major Policy Changes without Providing Adequate Opportunity for Meaningful Public Comment

In May 2020, Chair Khan and Commissioner Chopra published a law review article themselves arguing that FTC rules should be established through:

> "a transparent and participatory process, ensuring that everyone who may be affected by a new rule has the opportunity to weigh in on it, granting the rule greater legitimacy"

and that the agency should

> "consider and address all submitted comments before issuing the final rule."[5]

We agree. Such opportunities for public input and opportunities for FTC staff to speak about proposed and past decisions with the public help to ensure public trust in the Commission. As an agency designated to protect consumers, it's critical to recognize that trust is a two-way street -- as Chair Khan and Commissioner Chopra suggested in their May 2020 article.

It is hard to square these assertions with the Commission's recent behavior unless it is to be believed that public input is invaluable for the making of a rule, but not for decisions to fundamentally overhaul the rulemaking process itself. Public input is important not just for rulemaking, but for any major decision made by the FTC that substantially impacts its approach to regulation and enforcement.

This is the second open meeting held by the FTC since Commissioner Khan was appointed as the Chair shortly after her confirmation. The first open meeting was announced on June 24th and took place on July 1st. Comments were due on July 1st at 12:00PM and the meeting started on July 1st at 12:00PM. This means that the *public was given fewer than 8 days to consider* and respond to the FTC's proposals.

Moreover, the public's comments were due at the exact same time as the meeting commenced, where the FTC ultimately voted to adopt each of the proposals up for consideration. And all oral public comments were only heard *after* the Commission had voted. This would be like allowing the defense to plead its case only after the judge issued their ruling. These actions are such an abridgement of due process, fairness, and openness that it is sure to erode consumer trust in the FTC.

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[5] Rohit Chopra and Lina M. Khan, *The case for "unfair methods of competition" rulemaking*, 87(2) University of Chicago Law Review 357, 368-69 (2020).

To describe this time period for public comment as inadequate would be an understatement and the FTC's consideration of the public comments was clearly not meaningful given the Commission quite literally took no time to actually read or contemplate the comments. Even more concerning, the proposals adopted at this meeting were some of the most significant proposals that the FTC has adopted in decades. They involved rescinding a policy statement that tied the FTC's enforcement principles to the lodestar of American antitrust analysis: consumer welfare. They also involved gutting the reasonable restrictions imposed on the FTC's rulemaking procedures and removing requirements that ensured the public had a role to play in such a process.

These are major changes that the FTC should have wanted to make only after receiving meaningful input from the public. In fact, these are changes that make the need for public comment all the more necessary, as they remove reasonable restraints on the FTC's broad and potentially devastating power. As Commissioner Wilson and Commission Phillips argue in one of their dissents to these decisions, "What the changes – adopted without public input – in fact do is fast-track regulation at the expense of public input, objectivity, and a full evidentiary record."[6]

Unfortunately, rather than changing course, the Commission provided *even less time for public comment* for its second open meeting that will occur on July 21st. The FTC announced its meeting on the 12th and provided that comments would be due on the 18th. This provides fewer than 7 days for public comment, two of which are over the weekend.

While we are grateful that the FTC decided to include at least some period between when the comments are due and when the voting will actually take place this time around, we are skeptical that three days is sufficient to meaningfully consider the significant amount of public commentary it receives on these important issues.

Going forward, we ask that the Commission provide adequate time for public comments and meaningfully consider such comments before adopting major policy changes that will impact the entire United States economy.

Obey "Mag-Moss" Rulemaking Requirements

Section 18 of the FTC Act provides the Federal Trade Commission with the authority to prescribe "rules which define with specificity acts or practices which are unfair or

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[6] Federal Trade Commission, Dissenting Statement of Commissioners Christine S. Wilson and Noah Joshua Phillips Regarding the Commission Statement On the Adoption of Revised Section 18 Rulemaking Procedures (Jul. 9, 2021), https://www.ftc.gov/public-statements/2021/07/dissenting-statement-commissioners-noah-joshua-phillips-christine-s-wilson.

deceptive acts or practices in or affecting commerce" within the meaning of Section 5(a)(1) of the Act.

Unlike traditional agency rulemaking under the Administrative Procedures Act (APA), rulemaking under Section 18, often referred to as "Magnuson-Moss" rulemaking after the Magnuson-Moss Warranty Act, comes with additional statutory requirements meant to curb the FTC's discretion. Those include requirements to provide interested parties with limited cross-examination rights during informal hearings and show that the practices the proposed rule seeks to regulate are "prevalent" before the rulemaking occurs.[7]

These procedural safeguards are a benefit, not a drawback. The FTC should continue to adhere to them.

History Shows that Magnuson-Moss Rulemaking Authority is not Supposed to be "Streamlined."

To begin, the FTC likely does not have the authority to "streamline" Section 18 rulemaking procedures. Congress imposed these rulemaking requirements through explicit statutory text and intentionally curbed the FTC's discretion. While some may oppose the additional procedures, only Congress can substantively "streamline" or change them.

During the 1960s and 70s, the FTC's rulemaking activity became the subject of considerable controversy and debate. Many felt the Commission had become overzealous in its promulgation of rules. Consider the (in)famous example of the "Kid Vid" rule that would have basically prohibited any television advertising aimed at children.[8] This decision and the circumstances surrounding it resulted in the *Washington Post* dubbing the FTC the United States' "National Nanny."[9] As subsequent commentators have explained, "the FTC adopted the reformers' cause uncritically, seeing itself self-appointed champion of American children" such that "even its supporters acknowledge that the FTC made a serious political miscalculation."[10]

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[7] 15 U.S.C. § 57a(b)(3).

[8] Robert H. Mnookin & Susan Bartlett Foote, *The "kid vid" Crusade*, 61 The Public Interest 90 (1980).

[9] *The FTC as National Nanny*, Wash. Post (Mar. 1, 1978), https://www.washingtonpost.com/archive/politics/1978/03/01/the-ftc-as-national-nanny/69f778f5-8407-4df0-b0e9-7f1f8e826b3b/.

[10] Robert H. Mnookin & Susan Bartlett Foote, *The "kid vid" Crusade*, 61 The Public Interest 90, 91-105 (1980).

Congress passed the Magnuson-Moss Warranty of 1975 and the FTC Improvements Act of 1980 to curb the FTC's excessive rulemaking activity. Congress did not hide its justification for limiting the Commission's powers. In a series of hearings held in the late 1970s, "Congress publicly lambasted the Commission for its activist programs branding these as 'regulatory abuse' by a 'runaway, controllable bureaucracy.'"[11] Together, these Acts greatly limited the Commission's ability to promulgate rules at will.

The Commission Cannot Supersede Statutory Limits & Even if it Could, It Shouldn't.

With such clear congressional intent and statutory language supporting the goal of erecting, not lowering, barriers to agency rulemaking, at best the Commission has only limited ability to "streamline" such procedures through its own internal processes. And even if the Commission can, it shouldn't.

First, the concerns that motivated Congress to impose the requirements are no less prevalent today than they were in the late 20th Century. In fact, with a clearly expressed desire on the part of some commissioners to divorce FTC enforcement from the guide of consumer welfare and to use its enforcement power to promote vague and often ill-defined social goals, these procedural safeguards and restrictions will likely be more important than ever.[12]

Second, the market is a dynamic and ever-evolving process that brings with it incredible, consumer-benefiting innovation that is difficult, and often impossible, to predict before it occurs. By artificially locking in *per se* rules that prohibit specific types of conduct, the Commission risks chilling consumer-welfare-enhancing innovation. In contrast, since the Section 18 rulemaking requirements took effect, the FTC has focused primarily on adjudicating cases against specific defendants based on particularized allegations of consumer harm. This has allowed the FTC to address instances of consumer harm without undermining market-driven innovation. The FTC should therefore continue to focus on its adjudicative approach,

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[11] Mark J. Moran & Barry R. Weingast, Congress as the source of regulatory decisions: The case of the Federal Trade Commission, 72 American Economic Review 109 (1982).

[12] *FTC Announces Agenda for July 1 Open Commission Meeting*, Federal Trade Commission (Jun. 24, 2021), https://www.ftc.gov/news-events/press-releases/2021/06/ftc-announces-agenda-july-1-open-commission-meeting; Lina M. Khan, *Amazon's Antitrust Paradox*, 126 Yale Law Journal 564 (Jan. 2017), https://www.yalelawjournal.org/note/amazons-antitrust-paradox; Lauren Feiner, *How FTC Commissioner Slaughter wants to make antitrust enforcement antiracist*, CNBC (Sept. 26, 2020), https://www.cnbc.com/2020/09/26/ftc-commissioner-slaughter-on-making-antitrust-enforcement-antiracist.html.

which maximizes consumer benefits without kneecapping American innovation and the United States' competitiveness in the global arena.

Third, the FTC should consider that an increase in rulemaking would likely hurt small businesses and up-and-coming entrepreneurs.

More Rulemaking—Streamlined or Not—Will Hurt Small Businesses & the Economy.

Market entrants are already faced with an onslaught of overly restrictive rules and regulations. As of November 2019, for example, there were over 1 million regulatory restrictions in the U.S. Code of Federal Regulations.[13] Add to this the thousands of state regulations businesses must comply with: California and New York alone have over 695,000 regulatory restrictions.[14]

Small businesses and entrepreneurs have already taken a particularly tough hit as a result of the COVID-19 pandemic. Not only does the accumulation of rules hinder their ability to succeed, it strengthens the position of the dominant players by erecting artificial barriers to competition. The FTC's rulemaking ability is particularly threatening because it is not limited to one sector of the economy or confined to a particular social issue. Instead, the FTC has broad jurisdiction over the entire United States' economy. While the FTC's adjudicative approach focuses primarily on the largest players and those that pose the greatest risk of harm, rulemaking applies to all participants equally without regard to their particular needs or the context of their conduct.

The Proposal Discards the FTC's Consumer-First Focus.

As mentioned above, removing the restrictions on FTC rulemaking would open the door to a regulatory approach that focuses less on the welfare of consumers and more on the preferred policy considerations of a given commission. Rather than having to justify particular enforcement decisions or prove consumer harm in specific cases, the Commission could instead impose bright-line rules that govern commercial activity for the foreseeable future—whether or not consumers actually benefit.

Indeed, rules could be enacted because they advance unrelated social goals rather than out of some desire to protect consumers from anticompetitive conduct. While

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[13] James Broughel, Patrick McLaughlin & Michael Kotrous, *Quantifying Regulation in US States*, Mercatus Center (Nov. 13, 2019), https://www.mercatus.org/publications/regulation/quantifying-regulation-us-states.

[14] *Id.*

some social goals may be worthy of government attention, it is for Congress—not the FTC—to advance those goals.

For these reasons, we ask that you do not amend the statutorily-required procedures for Section 18 rulemaking.

Readopt the FTC's UMC Policy Statement

When the FTC approved its UMC Policy Statement in 2015, it saved itself (from itself). While the statement is flexible—it allows the FTC to use its Section 5 authority for standalone claims, for example—it provides necessary guidance to both the FTC and the public. As the Commission surely knows, its authority under Section 5 has been controversial for decades. To be sure, most recognize that it encompasses the agency's antitrust authority under federal statutes like the Sherman Act. But whether it extends beyond those statutes was and is an open question.

> When the FTC approved its UMC Policy Statement in 2015, it saved itself (from itself).

But even confining Section 5 authority to the antitrust statutes is legally murky. The agency's organic statute—the FTC Act—fails to define "unfair," for example. Without statutory guidance, and without the UMC Policy Statement, "unfair" will mean whatever at least three commissioners want it to mean.

The FTC Shouldn't Abandon Clear, Uniform, Predictable, & Objective Standards that Protect Consumers & Promote Innovation.

The movement away from clear guidance is a cause for concern. ***For starters***, it is unclear whether today's Supreme Court, which is far more skeptical of agencies than earlier courts, would countenance Section 5 agency action without such guidance. Indeed, the Policy Statement seems to be the agency's own effort to ward off constitutional and legal attack. Repealing or broadening it risks invalidation or judicially constructed limitations. At least for now, the Statement aligns with the Supreme Court's antitrust doctrines and thus stands a decent chance of surviving judicial review.

Second, it is unclear whether Congress would countenance such open-ended authority. Even if the current Congress is poised to support the agency's actions, future Congresses are likely to take issue with it. And if history is any indicator, the FTC's abuse of broad statutory language will spur hearings, condemnations, and reforms.

In the meantime, businesses and consumers will be left guessing. Even if the courts and Congress turn a blind eye, the rest of the country will be vulnerable to

unexpected and open-ended regulation. This regulatory environment will likely dampen investment and chill innovation—which will be even worse if the agency also "streamlines" its Section 18 rulemaking processes. Even worse, without the Statement, the agency could return to the past, when it used vague enforcement actions to coerce private parties into settling even when the alleged "harm" was far from clear.

It is against this backdrop that the FTC adopted the UMC Policy Statement in 2015. And it is for these reasons that the agency should maintain—and even *strengthen*—the Statement.

The Existing Policy is Flexible Enough to Respond to New Market Realities & Even Critics Should Support It.

Consider also that the Statement is flexible enough to adapt to new market realities. In brief, it simply notes that when the agency decides to use its Section 5 authority, it will do so based on the consumer welfare standard and will use the rule of reason to evaluate potential action. None of this is radical. As the Commission knows, the consumer welfare standard has been the guiding light of antitrust enforcement for decades. The rule of reason, even longer. That these standards are so established in federal law and so familiar to interested parties is a plus, not a minus.

Even critics of the consumer welfare standard should rejoice: the Statement accommodates a more "aggressive" approach to enforcement.[15] For example, the Statement does not include former-Commissioner Joshua Wright's idea to create a "safe harbor" from UMC enforcement if any business efficiency is shown. By rejecting this proposal (sensible as it may be) and by adopting a balancing method instead, the Commission left wiggle room to exercise its UMC enforcement power even when defendant businesses provide evidence of procompetitive effects. Under this balancing approach, the Commission retains the ability to weigh in on many business practices. The sole limitation is simply that the Commission must identify *some* consumer harm. That is, by any objective standard, not asking much.

Nor does the Policy Statement tie the FTC's hands in defining "consumer harm." Far from being limited to prices, the consumer welfare standard—and the Statement's use of it—leaves the Commission free to enforce actions against businesses that harm quality, innovation, and inflict other harms on consumers identified by the Commission and economic literature. In other words, all the Statement does is require the Commission to make its decisions based on *consumers*—not

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[15] N.B. We disagree with critics who claim the agency's enforcement has been "lax" for the last decade or more. As evidence shows, that's far from true. But because "lax" has a subjective meaning and its meaning does not change our argument above, we'll assume the criticism matters.

competitors, not lofty social goals (no matter how well-meaning), and not individual policy preferences. This objective standard developed over decades and represents the accumulated wisdom of the courts, agencies, economists, and lawyers. It shouldn't be abandoned simply because it requires the FTC to shift through evidence using an objective measure to guide (and sometimes abandon) its enforcement actions.

The Existing Policy Supports the Rule of Law.

By conforming its Section 5 powers to its antitrust enforcement powers, the FTC in 2015 promoted clarity, predictability, and uniformity. These benefits should not be taken for granted. By promoting clarity and predictability, the Policy Statement insulates the FTC—to a degree—from legal challenges. And it gives businesses and consumers insight into what behavior may or may not be permissible. This, of course, helps businesses grow and innovate. Likewise, by promoting uniformity and predictability, the Statement protects against arbitrary or politicized enforcement. This supports the rule of law and fairness. Without guardrails that align with the agency's enforcement policies elsewhere, the Commission threatens to destabilize the law and raise questions about whether its Section 5 authority is even constitutionally or statutorily sound.

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Aside from those benefits, the 2015 Statement is good on its own merits. Because the FTC's authority extends so broadly, its actions can reshape entire markets and industries. As the old adage goes, with great power comes great responsibility. The Statement recognizes this, and reaches an appropriate balance between acting when necessary to protect consumers and leaving businesses free to innovate. And it appropriately situates the Commission's Section 5 powers: Instead of viewing "unfair methods of competition" as a standalone grant of power, the Statement treats it as a gapfiller to cover conduct that is not expressly prohibited by other federal antitrust statutes but that would, left unchecked, undermine the purposes of those statutes.