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# Regulatory Rents: An Agency-Cost Analysis of the FTC Rulemaking Initiative

(Forthcoming in *FTC's Rulemaking Authority* (Concurrences 2022))

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**Center for Law and Social Science**
**Research Paper Series No. CLASS22-4**

**Legal Studies Research Paper Series No. 22-4**

March 28, 2022

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ABSTRACT

The Federal Trade Commission's initiative to use rulemaking powers to target "unfair methods of competition" under the FTC Act is part of a broader package of dramatic recent changes in antitrust enforcement policy and practice by FTC leadership. These changes, which have rejected the consumer-welfare standard and rule-of-reason balancing tests, represent a strategic effort to bypass the rigorous standards of federal antitrust case law and qualify for the deference generally accorded agency rulemaking by federal courts. Principal-agent analysis suggests that these changes, by detaching antitrust enforcement from antitrust case law and substituting regulatory discretion for structured guidelines, raise a significant risk that the agency will undertake actions that depart from its statutory mandate by targeting practices that do not pose any credible threat of competitive harm.

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## INTRODUCTION

It has long been recognized that administrative agencies are exposed to capture by firms in the industries that they regulate.[1] Regulated firms are repeat players that often have lobbying resources to secure favorable treatment while individual regulators may have incentives to accrue goodwill among regulated firms to secure favorable employment positions after public service. Capture generally leads regulators to underenforce relative to their statutory mandate. Less attention has been paid, however, to the risk that regulators may overenforce relative to their statutory mandate. This may occur due to ideological commitments that override rule-of-law commitments or reputational incentives to secure "headline" monetary judgments or other dramatic remedies, which accrue goodwill for the agency in securing funding from the legislature and for individual regulators in securing other positions in public service or the private sector.[2] This scenario can be called regulatory *self*-capture.

Both the regulatory capture and self-capture scenarios can be analyzed within a principal-agent framework, which has been widely applied in the corporate governance literature to analyze the relationship between shareholders and managers. I apply this framework to assess the extent to which the proposed rulemaking initiative by the Federal Trade Commission (FTC), in which the agency seeks to pursue "unfair methods of competition" (UMC) outside the traditional avenue of case-by-case adjudication, increases agency-cost risks by facilitating enforcement actions against practices that do not pose any credible threat of competitive harm.

These concerns over regulatory self-capture are grounded in a sequence of actions and statements by FTC leadership[3] leading up to the announcement of the UMC rulemaking initiative in December 2021.[4] Those policy changes decoupled UMC enforcement from well-established case-law understandings of the Sherman and Clayton Acts, rejected the consumer welfare standard as a guiding enforcement principle, and adopted an unusually expansive understanding of the breadth of discretion accorded the agency to enforce Section 5 of the FTC Act. Moreover, the agency has declined to provide any substitute definition of UMCs, leaving prosecutorial discretion largely unbounded by any constraining principle. Together these policy steps confer unprecedented authority to intervene in market transactions on the basis of an open-ended definition of "unfair" business practices. This conflation of law-making and law-enforcement in an administrative entity raises significant concerns that regulators will take enforcement actions that do not conform to the agency's targeted statutory mandate to preserve competitive markets.

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[1] For the classic treatment, see George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).
[2] On the reputational incentives that drive prosecutors to seek to maximize financial awards, see Margaret H. Lemos and Max Minzner, *For-Profit Public Enforcement*, 127 HARV. L. REV. 854, , 856-57 (2014).
[3] "FTC leadership" refers to the Chair and the majority Commissioners, given that almost all actions described in this contribution were publicly opposed by the minority Commissioners. At the time of this writing, the composition of the Commission is as follows, with party affiliation designated as "D" (Democrat) or "R" (Republican) in parentheses: Chair Lina M. Khan (D); Commissioner Rebecca Kelly Slaughter (D); Commissioner Noah Joshua Phillips (R); Commissioner Christine S. Wilson (R). Until October 12, 2021, Rohit Chopra (D) served as a Commissioner.
[4] Federal Trade Commission, Statement of Regulatory Priorities (Dec 10, 2021), https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202110/Statement_3084_FTC.pdf [hereinafter FTC 2021].

This chapter is organized as follows. In Section I, I apply the principal-agent framework to the antitrust context. In Section II, I describe recent policy changes by FTC leadership that expand the agency's ability to target purported UMC practices through litigation or rulemaking. In Section III, I provide a strategic account of the agency's rulemaking initiative and related policy changes and apply the principal-agent model to assess the extent to which this policy shift is likely to increase agency-cost risks. A brief conclusion follows.

## I. The Principal-Agent Model in the Antitrust Context

In this Section, I apply a principal-agent model to the regulatory institutions mandated to enforce the federal antitrust laws. This exercise suggests that antitrust enforcement by regulatory authorities poses high agency-costs risks due to the inherent difficulty in anticipating and specifying business practices that have a "net" anticompetitive effect. Accordingly, it is expected that antitrust law designed in the public interest would favor high evidentiary standards and robust judicial scrutiny to minimize the risk that the regulator will deviate from its statutory mandate.

### A. *The Principal-Agent Model*

The principal-agent model is a widely applied tool for evaluating any relationship in which a principal delegates authority to an agent to execute a particular action or set of actions. The classic example is the relationship between shareholders in a public corporation and the managers that run the corporation on a day-to-day basis[5], but it can be applied more broadly. In business, governmental, and other organizations, principals delegate authority to agents for a variety of reasons that make it more efficient for the principal to retain the agent to perform a particular action or set of actions.

Following the principal-agent model, any potential efficiencies that arise as a result of any such delegation of authority must be offset against potential inefficiencies that arise as a result of failure by the agent to act in conformity with the principal's instructions. This may arise due to a variety of factors, including self-enrichment, shirking, or incompletely specified instructions. The principal's ability to deter deviations by the agent is inherently limited by transaction costs that limit the principal's ability to draft perfectly specified instructions to govern the agent's behavior or to perfectly monitor the agent's conformity to those instructions.

This framework can be applied to evaluate the relationship between the legislature, construed as the principal, and a regulator, construed as the agent. Just as dispersed shareholders in a public corporation accrue efficiency gains by delegating operational authority to managers, the members of the legislature (who are in turn agents of the voters) accrue efficiency gains by delegating implementation of a statute to the regulator. As the corporate governance literature recognizes, shareholders also incur a cost when delegating power to managers. Given the inability to specify managers' behavior in all circumstances or to monitor managers' behavior continuously, shareholders are exposed to the risk that managers will take actions that benefit themselves at the expense of the shareholders. Much of corporate law reflects an attempt to institute safeguards to align the interests of managers

[5] For the classic source, see Michael C. Jensen and William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure,* 3 J. FIN. ECON. 305 (1976).

with shareholders, but without unduly impinging upon the managers' freedom of action, which would undercut the efficiency gains that arise from delegating authority to the managers in the first place.

The same logic applies in the political context. When establishing an administrative agency, legislators (and, by extension, the public represented by legislators) enjoy efficiency gains by empowering specialized regulators to implement the relevant statute. Yet this gain comes at a price. Regulators may deviate from the intent behind the statute in a manner that benefits themselves at the expense of the principal. Even setting aside outright corruption, regulators can benefit from deviations that satisfy their ideological preferences, preference for leisure, or pursuit of favorable positions in the private or public sector. This can lead to both under- and overenforcement relative to statutory intent. Much of administrative law is designed to minimize these deviations through various mechanisms, such as requiring that regulators provide notice and opportunity for public comment, undertake cost-benefit or other objective analysis of proposed regulations, make timely disclosures to the public, and provide parties targeted by regulatory action with a meaningful opportunity to challenge such action. At the same time, excessive safeguards would risk eliminating the efficiency gains that arise from delegating implementation to the regulator in the first place.

### B. *Using Legal Standards and Process to Minimize Agency Costs*

While the principal-agent model anticipates that the agent will attempt to pursue its own interests at the expense of the principal, this risk varies in severity in different principal-agent relationships. In particular, this risk will tend to be higher as the principal's instructions decrease in specificity, which creates a "specification gap" that enables the agent to act in a manner that favors its interests over the principal. This relationship is reversed when the principal provides the agent with more specified instructions and is able to monitor compliance with those instructions.

The level of specification is not entirely a function of the investments made by the principal; rather, certain types of instructions are subject to an inherent "specification limit." That limit will vary depending on the type of action that is being specified. To illustrate, the motor vehicle code can specify with precision the obligation to drive a motor vehicle up to a certain maximum speed. However, the motor vehicle code cannot specify with precision the obligation to drive a motor vehicle "responsibly," the interpretation of which can vary depending on particular circumstances. In general, rule-like obligations will tend to be situated at the higher end of the specification continuum, which gives rise to lower agency costs, while standard-like obligations will tend to be situated at the lower end of the specification continuum, which gives rise to higher agency costs.

The relationship between obligation type, specification costs, and agency-cost risks is important in the regulatory context because legislatures can use this relationship to manage the tradeoff between regulatory independence, which enhances the efficiency gains from delegating authority, and constraints on regulatory action, which limit the efficiency costs from delegating authority. In the case of legal obligations that have more rule-like characteristics and can be specified at a lower cost, those constraints can be relaxed; whereas the opposite policy should be followed in the case of legal obligations that have more standard-like characteristics and therefore exhibit higher specification costs. Constraints on regulatory action can be calibrated both through evidentiary standards and the mechanisms through which regulatory action is subject to external scrutiny and review.

In the antitrust context, these principles recommend that constraints on regulatory action should probably be high in most cases. That is because antitrust statutes mostly exhibit standard-like characteristics: there is no feasible objective definition of "restraints of trade" (Section 1 of the Sherman Act), "monopolization" or "attempted monopolization" (Section 2 of the Sherman Act) or "unfair methods of competition" (Section 5 of the FTC Act)[6], in each case as distinguished from the large set of business practices that pose no material risk of competitive harm. Everything else being equal, a legislature that delegated authority to a regulator to implement these standard-like legal obligations but sought to minimize agency costs would constrain regulatory independence given the difficulty of drafting highly specified legislative instructions. In practice, this has been accomplished in antitrust law through judicial development of the various forms of rule-of-reason analysis, which anchor the identification of most antitrust violations in an evidence-intensive framework that balances benefits and harms to competition[7], subjecting a regulatory agency's assertions to review by a disinterested party in a forum in which the defendant is entitled to the highest levels of due process. As I will show, FTC leadership has taken steps designed to remove or mitigate these constraints on the agency's scope of action and minimize its exposure to external scrutiny.

### C. *Summing Up*

This discussion has applied the agency-cost framework to derive general principles that a publicly-minded legislature would be expected to follow in designing the constraints—specifically, the evidentiary standard and review mechanism—under which a regulator operates when implementing a particular statute. In the antitrust context, it is expected that those constraints—both substantive and procedural—would tend to be significant since most offenses under the antitrust statutes have a standard-like quality, which implies that the "instructions" delivered to the agent will not be well-specified. The UMC offenses targeted in the FTC Act have an especially strong standard-like quality, in light of statutory language that refers to "unfair methods of competition," a phrase that lacks any well-developed interpretation in regulatory guidance or case-law interpretation. Hence, an efficient institutional design would seek to minimize agency-cost risks, without unduly restricting the agency's enforcement capacities, by adopting a reasonably high evidentiary burden and requiring that the regulator demonstrate to an independent decisionmaker that it has met this burden in any particular enforcement action.

## II. Regulatory Shift at the FTC

The FTC's rulemaking initiative is part of a broader package of procedural and substantive changes that have been undertaken by FTC leadership since the start of the Biden Administration in January 2021. In this Section, I describe how the significant changes made by FTC leadership to certain long-standing enforcement principles and procedures work

[6] For the statutory sources, see 15 U.S.C. §§ 1, 2, 45(a).
[7] On the rule of reason, see Herbert Hovenkamp, *The Rule of Reason,* 70 FLORIDA L. REV. 81 (2018).

together with the agency's initiative to expand use of its purported rulemaking powers concerning UMCs under Section 5 of the FTC Act.

A. *Legal Roadblocks to Populist Antitrust*

The FTC's rulemaking initiative did not emerge in a vacuum. It reflects support across large swaths of the political spectrum, as reflected in the 2020 report issued by the majority members of the U.S. House of Representatives Committee on the Judiciary[8], proposed legislation at the federal and state levels, and litigation by federal and state enforcers, for expansive application of the antitrust laws to target reportedly excessive concentration levels and anticompetitive practices in markets dominated by leading technology companies. Populist arguments in favor of dramatic structural remedies against digital platforms often pay little attention to well-established antitrust principles that require in most cases a showing of actual or likely competitive harm to support such remedies. This generally requires a specific definition of the relevant market followed by a fact-intensive demonstration that the defendant exerts market power and uses such power for anticompetitive purposes. Policymakers who seek to constrain digital platforms through antitrust litigation but cannot show market power and competitive harm might face a legal dead-end since, outside cases involving horizontal collusion, courts generally insist on these evidentiary predicates. This is illustrated by the FTC's ongoing suit against Meta Platforms (Facebook's parent company), which was initially dismissed in June 2021 due to the agency's failure to provide evidence showing that it would be able to demonstrate with a reasonable likelihood that the defendant had market power.[9]

There are potential detours around this judicial roadblock through legislative or regulatory action. Congress may intervene by enacting legislation that obligates courts to issue certain remedies against digital platforms and other companies that exceed certain size thresholds or prohibits certain practices that are deemed inherently to pose a high risk of anti-competitive harm.[10] This same objective may be achieved by federal antitrust agencies that deploy rulemaking powers to issue regulations to the same effect, provided that the governing statute grants such powers to the agency.

There are two critical differences between legislative and regulatory detours around the case law's evidentiary predicates for bringing a cause of action under the antitrust statutes. The first difference favors regulatory action; the second favors legislative action.

Legislative action usually has high transaction costs and, as a result, often has a low likelihood of enactment. Legislative action involves a deliberative process that requires assembling support from elected representatives who may have only somewhat overlapping policy preferences. This may either block legislative action or result in a statute that is heavily modified to secure sufficient support. By contrast, regulatory action does not require gaining support through the voting process and, in certain cases, may be executed without the

[8] Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, Majority Staff Report and Recommendations, Investigation of Competition in Digital Markets (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519 [hereinafter Subcommittee Report].

[9] Cat Zakrzewski and Rachel Lerman, *Court says FTC hasn't provided evidence Facebook is a monopoly, dismisses lawsuit*, WASH. POST (June 28, 2021), https://www.washingtonpost.com/technology/2021/06/28/ftc-facebook-antitrust-complaint-dismissed/

[10] On legislation of this type that has been proposed, see Congressional Research Service, The Big Tech Antitrust Bills (Aug 13, 2021), https://sgp.fas.org/crs/misc/R46875.pdf.

delays associated with extensive public deliberation. Nonetheless, the costs and delays associated with notice-and comment and other process requirements under federal administrative law can be considerable and, as discussed subsequently[11], it is not clear that rulemaking is always faster or less costly compared to adjudication.

Second, the legal scope of legislative action is far broader than the legal scope of administrative action by a particular agency. While the scope of legislative action at the federal level is only constrained by constitutional limitations, the scope of administrative action is limited to the specific powers delegated to the agency by statute and is therefore exposed to legal challenges that the agency has acted beyond its statutory mandate. Illustrating this risk, the Supreme Court in *AMG Capital Management, LLC v. FTC,* a 2021 decision, narrowly construed the FTC's statutory powers to seek injunctive relief under Section 13(b) of the FTC Act[12], holding that those powers did not clearly specify, and therefore did not encompass, the FTC's historical practice of seeking monetary disgorgement remedies under that provision.[13]

B. *The Regulatory Shift*

In 2021, FTC leadership took actions that depart from the incremental process through which antitrust law, both through case law and regulatory guidelines, has generally developed. In short order, FTC leadership abrogated long-standing enforcement principles and policies, often without providing meaningful opportunities for public comment as has been the agency's settled practice, especially when making major changes in agency policy.[14] In particular, FTC leadership withdrew certain foundational guidelines of antitrust enforcement but declined to issue new guidelines, leaving regulatory discretion substantially unconstrained by any clearly stated decisionmaking framework.

The agency's swift expansion of the scope of its regulatory powers and blanket dismissal of decades of federal antitrust case law and agency guidelines runs counter to the view that administrative action is a practically expedient exception to Congress' constitutional monopoly on law-making powers and, as reflected in the procedural requirements of the Administrative Procedure Act (APA)[15], should therefore be used in a manner that makes a special effort to preserve due process, notice, and transparency principles.[16] In particular, this form of regulatory unilateralism pays no heed to the concerns over administrative overreach expressed by the Supreme Court in several recent decisions. This includes not only *AMG Capital Management,* as discussed immediately above, but also *National Federation of Independent Business et al. v Department of Labor et al.,* a 2022 decision in

[11] *See infra* note 66 and accompanying discussion.
[12] 15 U.S.C. § 57(a).
[13] *AMG Capital Management, LLC v FTC*, 593 U.S. (Apr 22, 2021).
[14] Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson on the "Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act, at 1 (July 9, 2021), https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/dissenting-statement-commissioners-noah-joshua-phillips-and-christine-s-wilson-statement-commission (noting that the Commission withdrew the 2015 Statement "with next to no notice or public input").
[15] 60 Stat 237 (1946) (codified as amended in various sections of Title 5).
[16] On this view, see PETER H. SCHUCK, FOUNDATIONS OF ADMINISTRATIVE LAW 53 (Foundation Press 1994); Evan J. Criddle, *When Delegation Begets Domination: Due Process of Administrative Lawmaking*, 46 GEORGIA L. REV. 117, 121-24 (2011). For extensive related discussion, see PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (University of Chicago Press 2013).

which the Court struck down a vaccine mandate issued by the Occupational Safety & Health Administration, on grounds of lack of specific statutory authority.[17] In a 2016 decision that upheld a statutory provision that immunizes certain decisions by a U.S. patent office tribunal from judicial appeal, these same concerns were expressed in a dissenting opinion by Justices Gorsuch and Sotomayor, who stated that the Court's decision "carries us another step down the road of ceding core judicial powers to agency officials and leaving the disposition of private rights and liberties to bureaucratic mercy."[18] Continuing to show concern over these issues, the Court in January 2022 granted *certiorari* in *Axon Enterprise, Inc. v. FTC*, a pending case that raises the question whether a defendant in an FTC administrative litigation can bring a declaratory judgment action in federal court to contest the constitutionality of the agency's internal litigation process.

The Table below lists chronologically certain actions and statements by FTC leadership since January 2021 that culminated in the announced rulemaking initiative at the end of the year. For the sake of brevity, the Table omits changes specific to the merger review process.

Table 1. Significant Changes in FTC Antitrust Policy (2021)

| Date | Action or Statement | Expands Agency Powers? | Dissenting Commissioners |
|---|---|---|---|
| Mar. 25, 2021 | Forms new rulemaking group. | Yes | N/a |
| July 1, 2021 | Withdrawal of Statement of Enforcement Principles | Yes | Phillips, Wilson |
| July 1, 2021 | Issues "omnibus" enforcement resolutions | Yes | Phillips, Wilson |
| July 1, 2021 | Modifies Rules of Practice | Yes | Phillips, Wilson |
| Sept. 15, 2021 | Withdrawal of Vertical Merger Guidelines | Yes | Phillips, Wilson |
| Dec. 10, 2021 | Announces intention to expand UMC rulemaking activities. | Yes | Phillips, Wilson |

*Note*: Commissioner is deemed to dissent if Commissioner votes against the action or, in the absence of a vote, makes an official public statement expressing disagreement with the relevant action.

### C. *July 1, 2021: The "New" FTC Emerges*

The agency's policy changes seek to minimize constraints on its freedom to undertake enforcement actions under applicable antitrust statutes, comprised by the Sherman Act, the Clayton Act, and the FTC Act. Out of all the recent changes made by FTC leadership, the most significant is almost certainly the statement on July 1, 2021 (the July 2021 Statement) announcing the withdrawal of the FTC's 2015 statement concerning the principles that guide

[17] *National Federation of Independent Business et al. v Department of Labor et al.,* 595 U.S. (Jan 13, 2022).
[18] *Thryvv Inc. v Click-to-Call Technologies, LP,* 140 S. Ct. 1367, 1378 (2020) (Gorsuch, J, dissenting).

the agency's actions against UMCs under Section 5 of the FTC Act (the 2015 Statement).[19] FTC leadership announced the policy change only one week prior to voting on and adopting it[20], which is the minimum required by law[21] but inconsistent with historical practice concerning such a significant change in agency policy.

The July 2021 statement, from which two Commissioners dissented, has two important elements that undermine foundational elements of modern antitrust law and practice. These changes were accompanied by significant modifications to the agency's Rules of Practice and sweeping "omnibus" resolutions authorizing investigations into substantial portions of the U.S. economy. Together these steps led up to the rulemaking initiative announced in December 2021.

First, the July 2021 statement rejected the consumer welfare standard that remains the bedrock principle behind the federal courts' application of the antitrust statutes and has occupied that position at least since the late 1970s.[22] The July 2021 statement also rejected the applicability in Section 5 enforcement actions of the rule of reason, which has been a core element of antitrust jurisprudence since at least the Supreme Court's 1911 decision in *U.S. v Standard Oil*.[23] Removing these two foundational principles eliminates the two most significant constraints on prosecutorial discretion in taking action against alleged UMCs.

These policy changes substantially expand the scope of the FTC's enforcement powers and, by lowering its evidentiary burden, enhance the agency's ability to prevail in internal administrative proceedings or litigation in federal court. Under the consumer welfare standard, a plaintiff must generally show that a challenged practice actually has, or is likely to have, a substantial adverse effect on competition, as distinguished from an adverse effect solely on a particular competitor. Applying this principle to the Section 5 context, former FTC Chair Leibowitz had stated that the FTC should only bring standalone Section 5 actions in "cases where there is clear harm to the competitive process and to consumers."[24] Under the rule of reason, a plaintiff must further show that any adverse competitive effect outweighs countervailing efficiencies reasonably attributable to the challenged practice, which is necessary to avoid erroneously prohibiting a practice that is "on net" procompetitive.[25]

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[19] Statement of Chair Lina M. Khan, Joined by Commissioner Rohit Chopra and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (July 1, 2021), https/:www.ftc.gov/system/files/documents/public_statements/1591498/final_statement_of_chair_khan_joined_by_rc_and_rks_on_section_5_0.pdf [hereinafter Statement of Chair July 2021]. For the 2015 Statement, see Federal Trade Commission, Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (Aug 13, 2015), https/:www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf [hereinafter FTC 2015].

[20] Dissenting Remarks of Commissioner Noah Joshua Phillips Regarding the Commission's Withdrawal of the Section 5 Policy Statement (July 1, 2021), https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/dissenting-remarks-commissioner-noah-joshua-phillips-regarding-commissions-withdrawal-section-5-0.

[21] 5 U.S.C. § 552b(e)(1).

[22] *See, e.g.*, National Collegiate Athletic Ass'n v. Board of Regents of Univ of Okla., 468 U.S. 85, 107 (1984), *citing* Reiter v. Sonotone Corp., 442 U.S. 330, 344 (1979) (characterizing the Sherman Act as a "consumer welfare prescription").

[23] 221 U.S. 1, 61-62 (1911).

[24] Oversight of the Federal Trade Commission Bureau of Competition and the Department of Justice Antitrust Division: Hearing Before the H. Comm. on the Judiciary, 111th Cong., at 13 (2010), https://www.ftc/gov/testimony/100727antitrustoversight.pdf

[25] *See* Hovenkamp, *supra* note 7.

Second, the July 2021 statement expanded substantially the set of practices that could be deemed UMCs by the agency in undertaking enforcement action. The 2015 Statement had reiterated a long-held understanding that the FTC, even when bringing standalone Section 5 cases against alleged UMCs, would be "guided by" the consumer welfare principle and rule-of-reason standard that the case law had developed under the Sherman and Clayton Acts.[26] The rationale behind this nuanced approach was three-fold: to avoid divergent treatment of business practices across the various antitrust laws, to take advantage of the decades of learning embodied in antitrust case law, and to recognize the limited additional latitude provided to the FTC under Section 5 as a "gap-filler" to address certain practices that raise competition concerns but are not clearly captured by the Sherman or Clayton Acts.[27] In contrast, the July 2021 statement held that UMCs encompassed a broader set of "unfair" business practices that could not be targeted under other antitrust statutes, with the explicit aim of decoupling Section 5 from Sherman Act case law.[28] Additionally, FTC leadership expressed the view that Congress "chose to leave it to the Commission to determine which practices fell into the category of 'unfair methods of competition' . . ."[29] The July 2021's expansive interpretation of the agency's Section 5 enforcement powers would seem to be precisely the type of strained statutory reading that the Supreme Court had unanimously rejected less than three months earlier when it had rejected the agency's position that its injunctive powers under the FTC Act encompassed disgorgement remedies despite the absence of any specific statutory language to that effect.[30]

On the same day that FTC leadership abandoned the consumer welfare standard and the rule of reason as guiding principles in pursuing UMCs, it also adopted resolutions that enable individual Commissioners to authorize the use of "compulsory process" (such as the use of subpoenas) in support of investigations into possible UMC violations in large industry sectors, including "technology platforms, health care, and pharmaceuticals" and mergers and acquisitions.[31] This departs from historical practice at the agency, which had required consideration by the full Commission to initiate the use of compulsory process in support of an investigation (although approval by an individual Commissioner was sufficient to approve subsequent subpoena requests within the context of the same investigation), supplemented by issuance of a resolution explaining the purpose and scope of the investigation.[32] By

[26] FTC 2015, *supra* note 19.

[27] Former Commissioner Ohlhausen raises the important point that the "gap-filler" justification may no longer be especially applicable since the scope of the Sherman Act has expanded significantly under case-law interpretations since 1914, the year in which the FTC Act was enacted. It may therefore be reasonable to view Section 5 as being largely "coextensive" with the Sherman and Clayton Acts, with a possible exception for invitations to collude and certain exchanges of sensitive information among competitors. *See* Section 5: Principles of Navigation, Remarks of Maureen K. Ohlhausen, Commissioner, Federal Trade Commission, U.S. Chamber of Commerce, Washington, D.C., at 16 (July 25, 2013), https://www.ftc.gov/sites/default/files/documents/public_statements/section-5-principles-navigation/130725section5spe

[28] Statement of Chair July 2021, *supra* note 19.

[29] Id., at 3.

[30] *AMG Capital Management, LLC v FTC*, 593 U.S. (Apr 22, 2021).

[31] Statement of Commissioner Rebecca Kelly Slaughter Joined by Chair Lina Khan and Commissioner Rohit Chopra Regarding the Adoption of Revised Section 18 Rulemaking Practices (July 1, 2021), https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-commissioner-rebecca-kelly-slaughter-joined-chair-lina-m-khan-commissioner-rohit-chopra

[32] Debbie Feinstein, C. Scott Lent, Matthew Tabas, and Samantha Shulman, *FTC Open Meeting Announces Expansion of FTC's Antitrust Enforcement Focus* (Arnold & Porter, July 8, 2021), https://www.arnoldporter.com/en/perspectives/2021/07/ftc-open-meeting-announces-expansion

discarding these procedural safeguards, the omnibus resolutions reduce transaction costs but increase the risk that the agency could use its investigative powers in a manner that departs from legislative intent, since use of those powers only requires approval by a single Commissioner, apparently without any requirement to provide a publicly available explanation for granting such approval.

### D. *Summing Up*

The FTC's rejection of the consumer welfare standard for Section 5 purposes enables the agency to take action against purported UMCs that stand outside the reasonably understood purview of the antitrust laws and the agency's mandate to preserve competitive markets. The rejection of the rule of reason and its balancing-test methodology implies that the agency is willfully assuming the risk of false-positive enforcement errors by potentially prohibiting practices that make consumers better off. Moreover, given the failure to adopt new principles and methodologies to guide enforcement action, Section 5 has effectively been converted into a legislative blank check to target practices deemed to be "unfair" by regulatory fiat. While FTC leadership stated in its July 2021 statement that, even in the absence of clearly defined enforcement principles, "the Commission will exercise responsibly its prosecutorial discretion . . . consistent with legal precedent,"[33] these changes enable regulators to take enforcement actions that appear to be subject to few constraints other than the Commissioners' subjective determination of what constitutes an "unfair" business practice and equally subjective determination of what constitutes a "responsible" exercise of prosecutorial discretion. It is hard to see how this "just trust us" approach reflects a meaningful commitment to minimize the agency-cost risks that are inherent to any delegation of enforcement power by legislators to regulators.

## III. Assessing the Agency Costs of the FTC Rulemaking Initiative

This Section comprises two components. First, I provide a strategic account of the strategic objectives reflected in the FTC's rulemaking initiative and accompanying policy changes during the preceding 12-month period. Second, I assess the extent to which the proposed rulemaking initiative is likely to give rise to agency costs in the form of regulatory capture or self-capture, with a focus placed on the latter contingency.

### A. *A Strategic Account of the Rulemaking Initiative*

The policy changes undertaken by FTC leadership reflect a strategic effort to bolster the agency's regulatory authority by adopting a generous interpretation of Section 5 that expands the set of practices that can be deemed a UMC while concurrently dismissing the rule of reason's demanding balancing-test methodology. Yet even these significant policy shifts do not provide a secure detour around the roadblock posed by case law's commitment to the consumer welfare standard and, outside the limited set of "per se" illegal practice, the rule of reason, in interpreting and applying the antitrust laws. Any particular cause of action brought by the agency under its broad interpretation of Section 5 may not survive a challenge in court, which may adhere to case law that tends to treat even standlone Section 5 claims using the

[33] Statement of Chair July 2021, *supra* note 19, at 7.

standards that would apply to similar claims under the Sherman or Clayton Acts. When the agency has sought to bring standalone Section 5 claims that venture substantially beyond the contours set forth in case law under the Sherman or Clayton Acts, the courts have not been persuaded that this conformed to rational legislative design. [34] A federal court explained its concerns on this point: "[S]ome workable standard must exist for what is or is not to be considered an unfair method of competition under § 5. Otherwise, companies subject to FTC prosecution would be the victims of 'uncertain guesswork rather than workable rules of law.'"[35] Recognizing the agency-cost risks inherent to the delegation of regulatory power, another court had observed that an expansive understanding of Section 5 might lead to enforcement actions that reflect "social, political, or personal reasons" rather than objective assessment of competitive harm.[36]

The failures of past UMC litigations to pass muster under judicial review might explain why FTC leadership seeks to shift at least some Section 5 enforcement from adjudication to rulemaking, which, for reasons explained below, would likely enable the agency to operate under a relaxed level of judicial scrutiny.

In March 2021, the agency announced the formation of a rulemaking group to "streamline" the rulemaking process.[37] In December 2021, the agency published its Annual Regulatory Plan for 2022, in which it stated its intentions to expand its UMC-related rulemaking activity, in part on the ground that a case-by-case adjudicative approach had resulted in a "hyper-concentrated economy."[38] In announcing its rulemaking initiative, the agency specifically explained that the shift to enforcement through rulemaking was motivated in part by the Court's decision in *AMG Capital Management* (which, as noted previously, had rejected the agency's view that its explicit authority under the FTC Act to seek injunctive relief implicitly encompassed the authority to seek monetary disgorgement).[39] However, *AMG Capital Management* does not necessarily preclude the agency from making a rule prohibiting certain practices as UMCs (so long as the agency in fact has such statutory authority), providing for monetary damages, and then enforcing the rule against entities that are deemed to have engaged in such practices. According to views expressed previously by FTC Chair Khan and former Commissioner Chopra[40], the agency purportedly has UMC rulemaking authority under Section 6(g) of the FTC Act, which refers generally to the power "to make rules or regulations for the purpose of carrying out the provisions of" the FTC Act.[41] Given the scope of this contribution, I note that this interpretation of the statute has

[34] *See, e.g.*, FTC v. Abbott Labs, 853 F.Supp. 526, 535-36 (D.D.C. 1994); Boise Cascade Corp. v. FTC, 637 F.2d 573, 577-82 (9th Cir. 1980); E.I. du Pont de Nemours & Co. v. FTC, 729 F.2d 128, 136-40 (2d Cir. 1984); Official Airlines Guides, Inc v. FTC, 630 F.2d 920, 927-28 (2d Cir. 1980). *But see* FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972) (holding that the FTC can take into account "public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws").
[35] *FTC v. Abbott Labs*, 853 F.Supp. 526, 535-36 (D.D.C. 1994), *quoting* E. I. du Pont de Nemours & Co. v. FTC, 729 F.2d 128, 139 (2d Cir. 1984).
[36] *Official Airlines Guides, Inc. v. FTC*, 630 F.2d 920, 927 (2d Cir. 1980).
[37] Federal Trade Commission, Acting Chairwoman Slaughter Announces New Rulemaking Group (Mar. 25, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/03/ftc-acting-chairwoman-slaughter-announces-new-rulemaking-group
[38] FTC 2021, *supra* note 4.
[39] *AMG Capital Management, LLC,* 593 U.S.
[40] Rohit Chopra and Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking,* 87 U. CHI. L. REV. 356, 375-79 (2020).
[41] 15 U.S.C. § 46(g). FTC leadership relies as well on *National Petroleum Refiners Association v. FTC,* 482 F.2d 672, 698 (D.C. Cir. 1973) ("We hold that, under the terms of its governing statute . . . and under Section 6(g) . . . in particular, the Federal Trade Commission is authorized to promulgate rules defining the meaning of

been contested by other commentators (who observe that the statute *does* specifically provide for rulemaking authority concerning "unfair or deceptive acts or practices" or UDAPs)[42], without addressing whether this interpretation is persuasive as a matter of statutory construction.

Enforcement through rulemaking rather than litigation achieves three key strategic objectives. First, rulemaking allows the agency to set "the rules of the game," which compares favorably with the inherently unpredictable outcome of an enforcement litigation (exacerbated in the antitrust context by the demanding pleading standards in a cause of action governed by the rule of reason). Second, rulemaking can be used to prohibit certain practices on a per se basis, relieving the agency in future enforcement actions from any probative burden other than showing that the defendant had engaged in the prohibited practice. This would detour around the strong presumption in federal antitrust case law against using rules of per se illegality except in the case of conduct that is "manifestly anticompetitive."[43] Third, so long as a court agreed that the agency had such rulemaking authority under the FTC Act, any rule adopted by the agency under such authority would then likely enjoy the deference accorded to regulatory interpretations of ambiguous statutes under the *Chevron* doctrine.[44] Importantly, *Chevron* deference applies so long as the agency has "a reasonable interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed most reasonable by the courts."[45] By using Section 6(g) rulemaking as an alternative mechanism for Section 5 enforcement (and including sufficiently formal rulemaking procedures that courts often demand to grant *Chevron* deference[46]), the agency increases the likelihood that it will defeat legal challenges to any UMC-targeted rule it promulgates under

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the statutory standards of the illegality the Commission is empowered to prevent"). However, as observed by Maureen Ohlhausen and James Rill, the decision appears to have been qualified by enactment of the Magnuson-Moss Warranty Act in 1975 (*see* Maureen K. Ohlhausen and James Rill, *Pushing the Limits? A Primer on FTC Competition Rulemaking* 10-11 (U.S. Chamber of Commerce, Aug 12, 2021), https://www.uschamber.com/assets/archived/images/ftc_rulemaking_white_paper_aug12.pdf), which provides extensive notice-and comment and related procedures for formulating rules concerning specified "unfair or deceptive acts or practices" (see 15 U.S.C. § 57a(1)(A)). Moreover, the statute appears to take an agnostic position concerning any potential rulemaking authority the FTC may retain concerning UMCs, see 15 U.S.C. § 57(a)(2) (stating that the Commission's authority to prescribe rules concerning "unfair or deceptive acts or practices . . . shall not affect *any* authority of the Commission to prescribe rules . . . with respect to unfair methods of competition . . .") (emphasis added). The use of the article, "any" rather than "the", suggests an affirmative drafting choice not to resolve this question.

[42] See, e.g., Aurelien Portuese, American Precautionary Antitrust: Unrestrained FTC Rulemaking Authority (Information Technology & Innovation Foundation, Jan. 31, 2022), https://itif.org/publications/2022/01/31/american-precautionary-antitrust-unrestrained-ftc-rulemaking-authority; Ohlhausen and Rill, *supra* note 41, at 10-14.

[43] *Continental TV, Inc v. GTE Sylvania Inc*., 433 U.S. 36, 49-50 (1977).

[44] *Chevron U.S.A, Inc v. Natural Resources Defense Council, Inc*, 467 U.S. 837 (1983). On this point specifically, see *U.S. v. Mead Corp,* 53 U.S. 221, 226-27 (2001) (holding that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated by the exercise of real authority"). There is one potentially important qualification: as discussed subsequently, *see infra* notes 74-75, the Supreme Court's 2015 decision in *Michigan v. Environment Protection Agency,* 576 U.S. (2015), suggests that, in certain contexts, *Chevron* deference might not apply if a court determines that agency rulemaking was not supported by a sufficient cost-benefit analysis.

[45] *Entergy Corp. v. Riverkeeper, Inc.,* 556 U.S. 208, 218 (2009).

[46] *Christensen v. Harris County,* 529 U.S. 576, 587 (2000) (suggesting that *Chevron* deference is appropriate when an agency reaches a legally binding interpretation through formal procedures, such as notice-and-comment rulemaking).

such authority or any action it subsequently takes to enforce such a rule against specific business practices.

It is now possible to appreciate the three-party strategy undertaken by FTC leadership to substantially expand its regulatory powers without seeking any specific legislative mandate. First, FTC leadership jettisoned established principles that had largely aligned standalone Section 5 causes of action with the case law, and demanding evidentiary standards, that govern analogous causes of action under the Sherman and Clayton Acts. Second, FTC leadership declined to specify a substitute set of enforcement principles but rather, took the view that the agency enjoys broad discretion to identify UMCs for purposes of Section 5. Third, FTC leadership indicated an intention to shift some UMC enforcement activity from litigation to rulemaking under its expansive interpretation of Section 6(g) of the FTC Act. If that interpretation is upheld, then any UMC rules promulgated by the FTC may qualify for the deferential treatment federal courts typically accord agency rulemaking. In the aggregate, this three-step strategy would expand the set of practices that can be pursued as a UMC, empower the agency to prescribe rules that prohibit specified practices as per se antitrust violations, and deploy the "umbrella" of *Chevron* deference to shield from legal challenge any exercise of this rulemaking authority.

B. *The Agency Costs of UMC Rulemaking*

For purposes of the following discussion, I will set aside whether FTC leadership's expansive understanding of Section 5 of the FTC Act and the rulemaking powers granted under Section 6(g) of the FTC Act would survive judicial scrutiny, either as a matter of statutory or constitutional interpretation (both being far from theoretical questions given the concerns about administrative overreach expressed by the Court in several recent decisions[47]). Rather, I will discuss the extent to which this policy shift is likely to exacerbate agency-cost risks through regulatory deviations from statutory intent and, specifically, through overenforcement relative to the agency's targeted mission to preserve competitive markets. Following the analytical framework developed in Section I, it would be expected that antitrust enforcers would operate under significant constraints on regulatory independence and a high level of judicial scrutiny since the governing statute sets forth legal obligations that are difficult to specify fully, which inherently gives rise to agency-cost risks when enforcement powers are delegated by the legislature to a regulatory entity. These expectations are largely confirmed by the historical development of antitrust case-law and agency guidelines, which has developed a rigorous framework for evaluating enforcement actions under the Sherman and Clayton Acts, and the consensus view that had anchored application of Section 5 of the FTC Act in that same framework. Recent policy changes by FTC leadership remove these constraints on regulatory action and select an implementation mechanism—rulemaking rather than litigation—that is likely to qualify for a low level of judicial scrutiny. Given the standard-like language of Section 5 of the FTC Act, these changes restore the agency-cost risks that courts and agencies had sought to minimize by refinement over several decades of a nuanced and evidence-based framework to guide regulatory action and judicial review. Having largely rejected this analytical toolset, FTC leadership offers no assurance against regulatory departures from its statutory mandate other

[47] *See supra* note 17.

than a precatory statement that the agency will use its largely unbounded discretion "responsibly."[48]

These agency-cost concerns are not merely theoretical. As Commissioner Wilson has noted, the agency's previous significant attempt to expand substantially exercise of its rulemaking authority, following enactment of the Magnuson-Mass Warranty Act in 1975[49], elicited a public outcry that resulted in legislative intervention (the Federal Trade Commission Improvements Act of 1980[50]) that "stripped [the FTC] of funding, stripped [the FTC] of legal authorities, and required [the FTC] to institute new and substantial rulemaking steps to foster public trust . . ."[51] There are four reasons that support a significant risk that the agency is heading again in the same direction (although, in the current political climate, a similar legislative counterreaction seems unlikely at present).

1. *Rulemaking by Fiat*

UMCs are defined in the FTC Act using vague language and there is no well-developed body of case law or regulatory guidance that has specifically refined that definition. As a matter of historical practice, courts and the agency (for example, in the 2015 Statement[52]) had sought to address this "specification gap" by anchoring Section 5 in the rich body of case law under the Sherman and Clayton Acts, which provides a well-structured framework for assessing the potential competitive gains and harms attributable to certain business practices. The agency's policy shift untethers UMCs from that body of case law and, in doing so, restores the specification gap in the statutory language. Following the analytical framework presented in Section I, this linguistic vacuum restores a high level of agency-cost risk since the vague statutory language provides regulators with opportunities to depart from imperfectly specified, standard-like instructions from the legislature. That risk is compounded by the fact that FTC leadership has declined to provide any substitute guidelines to structure future UMC enforcement, other than asserting that the statute provides regulators with "responsibly" exercised discretion to make that determination.[53] This effectively substitutes regulatory preferences for enforcement principles that had been grounded in a well-developed body of legal and economic principles to guide regulatory action, judicial review, and market expectations.

Confirming these concerns, FTC leadership has already taken actions and made statements suggesting that it seeks to use the agency's enforcement powers to pursue policy objectives that are not clearly encompassed by, and in some cases would appear to be inconsistent with, its statutory mandate to preserve market competition.

In July 2021, the FTC approved a modification to its "Rules of Practice" that omitted the following language from the description of the FTC's Bureau of Competition: "The Bureau's work aims to preserve the free market system and assure the unfettered operation of the

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[48] *See supra* note 33.
[49] Pub. L. No. 93-637 (codified at 15 U.S.C. § 57a).
[50] Pub. L. No. 96-252, 94 Stat. 374.
[51] Dissenting Statement of Commissioner Christine S. Wilson Regarding the Open Commission Meeting 5 (July 1, 2021), https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/dissenting-statement-commissioner-christine-s-wilson-0
[52] FTC 2015, *supra* note 19.
[53] *See supra* note 29.

forces of supply and demand."[54] In a memo distributed to FTC staff in September 2021, the FTC Chair advanced the view that the agency's mission lies in targeting generalized harms that impact workers and independent businesses, rather than only consumers.[55] More specifically, the memo expressed the view that the agency's work "shapes the distribution of power and opportunity,"[56] which suggests that the agency's mission encompasses redistributive objectives rather than, as has long been understood, preserving conditions in which competitive forces determine market outcomes (while other bodies of law, especially the tax system, may be used for redistributive purposes through the legislative process). In a draft strategic plan released in October 2021, the agency's mission statement is described as preserving "fair competition" for the "benefit of the public", which differs from the last such plan through use of the qualifier, "fair," in conjunction with "competition" and making reference to the "public" rather than consumers specifically as the beneficiaries of the agency's actions.[57] Additionally, the new strategic plan omits language that had appeared in the last such plan stating that the agency would seek to accomplish its mission "without unduly burdening legitimate business activity"[58] (an omission that most likely reflects the agency's dismissal of rule-of-reason balancing analysis). In the merger review process, at least one Commissioner and several practitioners have observed that agency staff has been using its investigatory powers to seek information from merging parties on matters that do not have a plausible relationship to competitive harm as that concept is generally understood in federal case law and agency guidelines.[59] Any such practice would arguably constitute an abuse of regulatory power since it implies that the agency is gathering proprietary information that, in the event of a legal challenge by the transacting parties, could not be the basis for a legally defensible case against the transaction being investigated.

2. *Rulemaking Without Scrutiny*

The FTC Chair has called for taking steps to "democratize" the agency.[60] In the rulemaking context, however, the agency has taken actions that point in the opposite direction. In July 2021, the FTC made preemptive changes to its "Rules of Practice." While these changes relate to the agency's rulemaking powers concerning UDAPs under Section 18 of the FTC Act, it raises concerns that any attempted rulemaking concerning UMCs under Section 6(g) of the FTC Act would be accompanied by similar procedural changes to limit

[54] Dissenting Statement of Commissioners Christine S. Wilson and Noah Joshua Phillips Regarding the Commission Statement on the Adoption of Revised Section 18 Rulemaking Procedures, at 1 (July 9, 2021), https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/dissenting-statement-commissioners-christine-s-wilson-noah-joshua-phillips-regarding-commission.
[55] Memorandum from Chair Lina M. Khan to Commission Staff and Commissioners, Vision, and Priorities for the FTC (Sept. 22, 2021), https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/memo-chair-lina-m-khan-commission-staff-commissioners-regarding-vision-priorities-ftc [hereinafter Memorandum].
[56] Id., at 2.
[57] For the draft 2021 plan, see Federal Trade Commission, Strategic Plan for Fiscal Years 2022-2026 (Oct. 2021), https://www.regulations.gov/document/FTC-2021-0061-0001. For the earlier plan, see Federal Trade Commission, Strategic Plan for Fiscal Years 2014 to 2018, https://www.ftc.gov/system/files/documents/reports/2014-2018-strategic-plan/spfy14-fy18.pdf.
[58] *See supra* note 57.
[59] Commissioner Christine S. Wilson, Governing is Hard: Antitrust Enforcement in the First Year of the Biden Administration, at 22 (Jan. 26, 2022), https://www.ftc.gov/news-events/news/speeches/governing-hard-antitrust-enforcement-first-year-biden-administration; Bryan Koenig, *'Nontraditional Questions' Appearing in FTC Merger Probes*, LAW360 (Sept. 24, 2021), https://www.law360.com/articles/1425218.
[60] Memorandum, *supra* note 55, at 2.

external and internal comment and review. The changes to the Rules of Practice indicate an intent to dilute due process protections, and to limit opportunities for outside parties and even internal specialized staff to provide input, in the rulemaking process. In particular, the revisions substitute the FTC Chair for the administrative law judge as the "presiding officer" in any UDAP rulemaking procedure[61], which provides the Chair with authority to run the rulemaking hearing process.[62] This is an inherently conflicted arrangement since the Chair would be supervising a hearing process concerning a rule that the Chair had likely initiated or supported. Additionally, the revisions eliminate the standard practice in UDAP rulemaking of issuing a staff report that provides an objective analysis of the rulemaking record and recommendations on the final rule[63], which similarly limits the opportunity for public comment or internal review. While streamlining the rulemaking process could in general reflect a sensible interest in reducing bureaucratic delays, it is hard to fathom any credible argument for adopting specific changes that create a conflict of interest and deprive the Commission of the benefits of an objective analysis of proposed rules.

3. *Rulemaking Promotes Arbitrary Treatment and Facilitates Regulatory Capture*

Advocates of UMC rulemaking (including members of current FTC leadership) argue that, as compared to governance by adjudication, governance by rulemaking would deliver more uniform and therefore "fairer" enforcement outcomes.[64] For two reasons, precisely the opposite outcome may result. First, insofar as FTC leadership has explicitly advocated detaching the agency's UMC rulemaking and enforcement from federal antitrust case law under the Sherman and Clayton Acts[65], it *intentionally* seeks to create a lack of uniformity in the treatment of different firms or industries, based arbitrarily on the agency (FTC or Department of Justice) that happens to be the regulating entity. Second, the rulemaking process is more prone than litigation to regulatory capture that results in disparate treatment of certain industries or even individual firms. Federal judges serve life terms whereas FTC Commissioners have limited terms and inherent motivations to accrue goodwill for purposes of securing post-employment positions in the public or private sector. Moreover, well-resourced interest groups can more easily influence the rulemaking process through lobbying, participating in the notice-and-comment process, or initiating litigation to challenge a proposed rule. Even after a rule has been issued, impacted firms may be able to influence application of the rule, either by lobbying for modifications or, more typically, seeking waivers or "clearance" through mechanisms such as business review letters. There is no comparable opportunity for exerting continuing influence in the litigation process, which is typically a "one-off" event (aside from appellate decisions that have precedential or persuasive authority in future litigations).

[61] 15 U.S.C. § 57(a)(1)(B); 16 CFR Subpart B.
[62] Statement of the Commission Regarding the Adoption of Revised Section 18 Rulemaking Procedures (July 1, 2021), https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-commission-regarding-the-adoption-revised-section-18-rulemaking-procedures
[63] Id.
[64] See, e.g., Chopra and Khan, *supra* note 40, at 359-63.
[65] Statement of Chair July 2021, *supra* note 19, at 5-6.

4. *Rulemaking Increases Total Governance and Compliance Costs*

Advocates of UMC rulemaking argue that it will avoid the high costs of antitrust litigation.[66] While it is true these costs are significant, this observation does not support a persuasive case for rulemaking over adjudication without considering the *total* additional governance and compliance costs associated with the rulemaking process. Those costs are substantial and could easily exceed the costs generated by an adjudicative regime.

Administrative rulemaking is far from a costless exercise, at the point of both issuance and implementation. The regulator must incur costs to comply with the internal review, notice-and-comment, and other procedures required under the APA[67] and, if necessary, to defend the proposed rule against any legal challenges. While antitrust litigation necessitates paying economic experts[68], this is also often true of administrative rulemaking. Federal regulations[69] and executive orders[70] require that agencies execute an analysis of the economic effects of any regulation that imposes significant costs on the economy.[71] In fact, the executive order requires a weighing of costs and benefits, including consideration of regulatory alternatives[72], that resembles the rule-of-reason standard that FTC leadership has dismissed as being inapplicable to UMC enforcement under the agency's standalone Section 5 authority.[73] These regulatory practices are consistent with the Supreme Court's 2015 decision in *Michigan v. EPA*[74], which suggests that, even when *Chevron* deference applies, some form of cost-benefit analysis may still be necessary to pass judicial muster in the case of a legal challenge under APA requirements and principles.[75]

There are two additional cost categories. First, after issuance of a rule, regulators must incur additional costs in enforcing the rule, issuing interpretations, modifying the rule and granting waivers, or defending legally challenged applications of the rule. This is standard practice in any administrative agency. For example, the accumulated body of rules, regulations, no-action letters, and guidance issued by the Securities and Exchange Commission under its authorizing statutes are so voluminous that only a specialized practitioner can master it. Second, the private sector must incur compliance costs. Regulated firms and industries bear substantial costs under a rulemaking regime, including lobbying costs at the time the rule is formulated and, more significantly, ongoing costs to monitor and implement compliance, to seek agency interpretations or waivers, and to challenge certain applications of the rule. While estimates of private-sector compliance costs vary across

[66] Chopra and Khan, *supra* note 40, at 361-62
[67] *See supra* note 40 and accompanying discussion.
[68] *See id.*
[69] 2 U.S.C. § 1532. The regulation applies to any proposed regulation that would result in the expenditure by the public or private sector of $100 million or more.
[70] Executive Order 12866, 58 Fed. Reg. 51,735 (Sept. 30, 1993) [hereinafter Executive Order].
[71] Cary Coglianese, *Empirical Analysis and Administrative Law,* 2002 U. ILL. L. REV. 1111, 1119-1120 (2002).
[72] Executive Order, *supra* note 70, at § 1. The order makes an exception for "a statute that requires another regulatory approach."
[73] Statement of Chair July 2021, *supra* note 19.
[74] *Michigan v. Environmental Protection Agency*, 576 U.S. (2015).
[75] On this point, see Eugene Scalia, *Concluding Thoughts on Cost-Benefit Analysis and the Public's Impact on Rulemaking,* REGULATORY REVIEW (Sept. 27, 2017), https://www.theregreview.org/2017/09/27/scalia-public-impact-rulemaking/; Congressional Research Service, Chevron *Deference: A Primer* 21 (Sept. 19, 2017), https://www.sgp.fas.org/crs/misc/R44954.pdf.

industries, total costs incurred to comply with federal regulations amount to hundreds of billions of dollars each year.[76]

Taking into account the rulemaking, enforcement, and compliance costs incurred by the public and private sectors, the *total* costs generated through a rulemaking regime could easily exceed, and possibly by a significant margin, the total costs imposed by an adjudicative regime that relies on enforcement through periodic litigation against selected firms. These costs are indirectly borne by taxpayers, who fund the agency, and consumers, who purchase the regulated firms' products and services. Critically, these are the constituencies—in fact, the *ultimate* principals—on behalf of which the FTC is the statutorily designated agent.

#### 5. *Summing Up*

The substantive and procedural elements of the FTC's rulemaking initiative raise significant concern that this initiative, together with the larger set of policy changes of which it is a part, will expand regulatory intervention in a manner that results in overenforcement outcomes relative to the agency's statutory mission to preserve competitive markets. Building on the policy shifts undertaken by the agency starting in July 2021 (in particular, the dismissal of the consumer-welfare principle and rule-of-reason standard), this initiative seeks to target a broadly defined set of UMCs through preemptive rulemaking, which (if upheld by courts as a legitimate exercise of statutory authority) would likely enjoy a deferential standard of judicial review. This represents a fundamental shift in the objectives and scope of the agency's regulatory activities, which would shift from periodic intervention through litigation to correct well-evidenced competitive harms to continuous intervention through rulemaking to preempt potential competitive harms or to promote a loosely-defined set of social goals that may lack any plausible relationship to competitive markets.

## CONCLUSION

Any delegation of power from legislators to regulators raises the prospect that the agent will deviate from the principal's instructions as expressed in the governing statute, resulting in regulatory capture in the form of underenforcement or, as is currently more relevant, self-capture in the form of overenforcement. The FTC's rulemaking initiative, and associated substantive and procedural changes, represent a strategic effort by the agent to remove constraints that were designed to align its actions with the interests of the principal and appropriately reflected the standard-like quality of the antitrust statutes. These changes provide a license for the agency to undertake enforcement actions that venture beyond its targeted mandate to deter practices that pose a credible threat to competitive markets. Through the shift from adjudication to rulemaking, it appears that FTC leadership seeks to put in place a legal regime of per se antitrust violations in which regulators can intervene in market transactions absent evidence of competitive harm, while being substantially shielded from legal challenge as a result of judicial deference for agency action. Making these dramatic changes in the agency's scope of action departs from decades of historical practice at the federal antitrust agencies, is not clearly supported by statutory language and intent, and, without legislative action, is inconsistent with a meaningful commitment to the rule of law.

[76] Coglianese, *supra* note 71, at 1112.