

CLIENT ALERT

# The FTC Issues New Strategic Plan to Increase Antitrust Enforcement

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## AUTHORS

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The Federal Trade Commission (“FTC”) recently published its Fiscal Years 2022–2026 Strategic Plan (“Strategic Plan”).<sup>1</sup> The Strategic Plan reflects the ongoing shift in the FTC’s vision toward a more aggressive approach to enforcement, especially with respect to mergers.<sup>2</sup> This aligns with the revision, currently underway, by the Commission and the Department of Justice Antitrust Division’s (“DOJ”) of the merger guidelines that will be designed to place more mergers in more contexts within the FTC target zone.<sup>3</sup>

The new Strategic Plan thus highlights the FTC’s plans to “[i]ncrease the use of structural remedies,” “decrease the use of behavioral remedies,” and “[e]ncourage parties to propose standalone operating businesses as settlements.”<sup>4</sup> The FTC

<sup>1</sup> *Federal Trade Commission Strategic Plan For Fiscal Years 2022–2026*, FEDERAL TRADE COMMISSION (Aug. 26, 2022), [here](#) (hereinafter, “Strategic Plan”).

<sup>2</sup> *Id.* at 14.

<sup>3</sup> For instance, in January 2022, the DOJ and FTC announced a comprehensive revision of the horizontal and vertical merger guidelines with the goal of seemingly finding more mergers anticompetitive. We issued a [memorandum](#) discussing the request for information to the general public used to inform the agencies’ revision. Furthermore, in December 2021, the FTC implemented new antitrust merger policies designed to encumber the process for obtaining HSR clearance and completing divestitures. We also issued a [memorandum](#) regarding navigating these new developments.

<sup>4</sup> *Id.* This approach comports with the DOJ’s priority of promoting structural remedies when concluding that a merger will likely lessen competition, such as seeking injunctions to block transactions. See *Assistant Attorney General Jonathan Kanter of the Antitrust Division Delivers Remarks to the New York State Bar Association Antitrust Section*, DEPARTMENT OF JUSTICE (Jan. 24, 2022), [here](#).

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further intends to restrict the use of non-compete agreements, seek higher penalties for violations of FTC orders and Hart-Scott-Rodino (“HSR”) requirements, and increase the use of prior approval provisions.<sup>5</sup>

The FTC will also increase attention on mergers *not subject to HSR notification requirements* by way of “referrals, the trade press, consumer and competitor complaints, and other means” that identify potential harm to competition.<sup>6</sup>

The above emphasis on stricter and broader enforcement is also consistent with a recent FTC omnibus resolution that would permit the FTC “to expeditiously investigate even those deals that would otherwise fly under [its] radar,” such as mergers that “sidestep the HSR reporting process.”<sup>7</sup>

The new Strategic Plan also emphasizes broader societal goals, such as supporting workers and prioritizing labor initiatives.<sup>8</sup> Likewise, the Strategic Plan states that the Commission intends to “[s]tudy and investigate the impact on worker wages and benefits from merger and nonmerger conduct, as well as non-compete and other potentially unfair contractual terms.”<sup>9</sup>

In addition to its ongoing focus on labor issues, the Commission’s Strategic Plan seeks to “[s]upport equity for historically underserved communities through the FTC’s competition mission.”<sup>10</sup> To that end, the FTC intends to seek information in merger and anticompetitive conduct cases “about the impact of transactions and conduct on historically underserved communities,”<sup>11</sup> including “communities within specific geographic areas that are affected” by anticompetitive conduct.<sup>12</sup> Merger analysis will now “include[] effects on workers and restrictive covenants.”<sup>13</sup>

Not all FTC Commissioners supported the goals of the new Strategic Plan. Commissioner Christine S. Wilson dissented strongly, stating that “[t]he agency lacks the expertise (and, in some cases, the jurisdiction) to pursue the additional

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<sup>5</sup> Strategic Plan at 14. In December 2021, the FTC reinstated its practice of seeking “prior approval rights” in all settlement agreements with merging parties and parties purchasing divested assets. We issued a [memorandum](#) regarding navigating M&A deals in connection with the new requirements for prior approval provisions.

<sup>6</sup> Strategic Plan at 14.

<sup>7</sup> *Statement of Commissioner Alvaro M. Bedoya, Joined by Chair Lina M. Khan and Commissioner Rebecca Kelly Slaughter Regarding Omnibus Resolutions Approved by the Federal Trade Commission*, FEDERAL TRADE COMMISSION (Aug. 17, 2022), [here](#).

<sup>8</sup> Strategic Plan at 14.

<sup>9</sup> *Id.* at 16.

<sup>10</sup> *Id.* at 19.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

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societal goals embodied in the Strategic Plan” and argued that the “pivot from a consumer welfare standard” will result in higher prices, particularly during this period of “record inflation.”<sup>14</sup>

Willkie’s antitrust team would be happy to advise on the specific facts of your transaction and transactional strategies in light of this new Strategic Plan.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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<sup>14</sup> *Dissenting Statement of Commissioner Christine S. Wilson Regarding the Federal Trade Commission Strategic Plan for Fiscal Years 2022-2026*, FEDERAL TRADE COMMISSION (Aug. 26, 2022), [here](#).