

Comments of Consumers Union FTC Draft Strategic Plan for 2018-2022

December 5, 2017

Consumers Union, the policy and mobilization division of Consumer Reports,¹ appreciates the opportunity to comment on the Federal Trade Commission's Draft Strategic Plan for 2018-2022, and to highlight certain FTC enforcement and rulemaking efforts that have also been among our advocacy priorities.

Consumers Union has been a strong and longtime supporter of the FTC's important work and mission, in protecting consumers and the marketplace against anticompetitive mergers and schemes, and against unfair and deceptive acts and practices, that deny consumers the benefits of competition and honest dealings or that undermine or endanger their health, safety, or personal privacy. We are pleased that the Draft Agenda reaffirms the FTC's continued commitment to this work, through all avenues – enforcement, rulemaking, policy advice, education, outreach, and research.

The FTC's broad jurisdiction, encompassing virtually all sectors of the economy, is an essential factor in its ability to play such a key role in protecting us. In the face of ongoing technological and marketplace changes, it is all the more important that this jurisdiction not only be preserved but, where possible, be clarified and expanded so as to be comprehensive, and that the FTC maintain and reinvigorate its vigilance, enforcement, and presence, and actively seek the resources to enable it to do so effectively.

While Consumers Union strongly supports the totality of the FTC's mission, as reflected in the Draft Strategic Plan, we highlight below a number of areas that have been priorities in our advocacy and that we urge you to maintain among your priorities as well.

¹ Consumers Union is the policy and mobilization division of Consumer Reports, an expert, independent, nonprofit organization whose mission is to work for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves. It conducts its policy work in the areas of food and product safety, financial reform, privacy and data security, telecommunications reform, health care reform, antitrust and competition policy, and other areas. Consumer Reports is the world's largest independent product-testing organization. Using its more than 60 labs, auto test center, and survey research center, the nonprofit organization rates thousands of products and services annually. Founded in 1936, Consumer Reports has over 7 million subscribers to its magazine, website, and other publications.

Antitrust and Competition

Our antitrust laws are instrumental in helping make the free marketplace work for consumers, by empowering them with the leverage that comes with having choices. That leverage creates incentive for businesses to try harder to give consumers what they want – a selection of high-quality, innovative products and services at affordable prices. More broadly, effective competition at all levels of the economy creates more and better choices for consumers, as well as more and better opportunities for businesses and workers to provide those choices – including new entry by smaller and start-up businesses, and new jobs – benefitting the overall economy.

Consumers Union has been a steadfast supporter of the antitrust laws, from our earliest years, advocating for ensuring that those laws are kept strong and are vigorously enforced. With the growing recognition that many market sectors have become highly concentrated, to levels that raise significant concerns about whether competition can operate effectively, we urge the FTC to maintain and increase its investigative and enforcement efforts, so as to ensure that antitrust lives up to its promise.

Importantly, this includes closely monitoring new competition concerns presented by technological and market relationship changes, such as the move to more online shopping and the related amassing of vast amounts of consumer data in the hands of internet platforms.

Among the antitrust and competition policy matters before the FTC in which Consumers Union has been engaged are the following:

Competition in generic drugs – We have strongly supported the FTC’s efforts to stop brand-name drug makers from blocking or delaying competitive entry of more affordable generics. These schemes have included buying off generics with “pay-for-delay” agreements, making minor “product hopping” changes to a drug to re-start its patent, denying access to product samples and safety protocols needed for testing and Food and Drug Administration approval, and raising dubious concerns in the FDA review that delay the approval process. As drug makers continue to look for creative ways to block competition and prolong monopoly profits, it is important that the FTC remain active in this area.

Hospital and group medical practice competition – Health care markets have become increasingly concentrated. The FTC has historical enforcement responsibility for protecting competition in the hospital and medical practice sectors. (The Justice Department has responsibility as to health insurance.) In recent years, the FTC has stepped up its enforcement, successfully challenging proposed mergers and agreements among hospitals and medical

practices that it determined were harmful to competition.² It is important that these enforcement efforts continue, as new mergers that would consolidate these markets even further are proposed, such as the proposed merger of CVS Health and Aetna announced December 3.

Professional licensing and qualifications restrictions – As the FTC has recognized, although professional licensing and qualifications requirements can be important for ensuring competency and safety for consumers, they can also be subject to abuse by the profession to block different and more affordable options. The FTC has brought enforcement action against this anticompetitive use of licensing restrictions by industry-run licensing boards.³ It has also on occasions advised state legislatures and regulatory bodies considering such requirements, guiding their focus to ensuring that the requirements are legitimately tied to safety and competency and do not needlessly limit competition. These efforts can help bring consumers more affordable options for quality health care and other professional services, and we urge the FTC to continue them.

Contact Lens Rule – We strongly supported the Fairness to Contact Lens Consumers Act of 2003, and the FTC rule implementing it, to require eye doctors to give patients a copy of the contact lens prescription so they could choose where to purchase lenses. The FTC is now considering revisions to the rule, and we have submitted comments.⁴ We urge the FTC to finalize the revisions consistent with our recommendations, and to ensure that the rule's requirements are complied with so that consumers can conveniently purchase contact lenses in a competitive marketplace, at affordable prices.

Net neutrality – We have strongly supported efforts in the Federal Communications Commission to establish effective protections against internet service providers harming consumers and competition by discriminating in the terms under which they provide internet access. We have cautioned both the FCC and Congress that the antitrust laws cannot be a complete substitute for FCC regulation. Nonetheless, if the FCC proceeds with its plans to scale back or eliminate its Open Internet Rule, it will become essential for the FTC to be active and forceful in promoting a competitive marketplace for internet access, to the full extent of its authority. In this regard, the FTC should continue its efforts to reverse the Ninth Circuit panel's incorrect ruling in *FTC v. AT&T Mobility*, regarding the common carrier exemption in section 5 of the FTC Act, and should support efforts in Congress to remove that exemption from the statute.

² See, e.g., <https://www.ftc.gov/news-events/press-releases/2014/04/federal-appeals-court-upholds-ftc-order-finding-ohio-hospital>; <https://www.ftc.gov/system/files/documents/cases/160927pinnacledecision.pdf>; <https://www.ftc.gov/news-events/press-releases/2017/03/after-two-chicago-area-hospital-systems-abandon-proposed-merger>.

³ E.g., *North Carolina State Board of Dental Examiners v. FTC*, 574 U.S. ____ (2015), <https://supreme.justia.com/cases/federal/us/574/13-534/>.

⁴ <https://consumersunion.org/research/comments-on-revisions-to-contact-lens-rule/>.

Unfair and Deceptive Acts and Practices

Financial technology – We urge the FTC to continue and increase its efforts to protect consumers in the financial marketplace as innovations in financial technology proliferate. The FTC can draw on its expertise in the Office of Technology Research and Investigation to identify risks and benefits of new technologies, including payment technologies. We have participated in FTC forums examining potential consumer protection concerns in peer-to-peer payment applications,⁵ and we support the FTC’s efforts to identify deceptive or unfair practices for appropriate enforcement action.⁶ In this regard, we recommend that the FTC examine dispute resolution practices of payment apps. Consumers who have been defrauded out of goods or services when making payments through these apps have frequently found themselves without effective redress.⁷

Hidden fees – Hidden, deceptive, and unfair fees prevent consumers from understanding the full price of what they are seeking to purchase, make comparison shopping difficult if not impossible, and limit consumer power. The January 2017 report⁸ from the FTC’s Bureau of Economics, for example, described these harms in the context of failure by hotels to promptly and openly disclose separate mandatory resort fees. Consumers Union continues to support efforts at the FTC to ensure that prices are transparent and clearly disclosed. For example, we have supported the FTC’s enforcement action charging DirecTV with deceptive advertising for failing to adequately disclose subscription prices;⁹ its enforcement action against T-Mobile and AT&T for “cramming” unauthorized third-party charges onto consumers’ phone bills;¹⁰ and against payday lender AMG Services for fraudulently charging consumers multiple undisclosed and inflated fees.¹¹ We urge the FTC to continue and increase its investigation and enforcement efforts against misleading pricing, including efforts to identify hidden and deceptive fees in travel, telecommunications and internet service, auto sales, and elsewhere. In this regard, we urge the FTC to revisit its 2012 letters against hotel operators.

⁵ See e.g., FinTech Series: Crowdfunding & Peer-to-Peer Payments (Oct. 26, 2016), *available at* <https://www.ftc.gov/news-events/events-calendar/2016/10/fintech-series-crowdfunding-peer-peer-payments>.

⁶ See, e.g., PayPal Holdings Form 10-Q at 23 (Apr. 22, 2016), “On March 28, 2016, we received a Civil Investigative Demand (“CID”) from the Federal Trade Commission (“FTC”) as part of its investigation to determine whether we, through our Venmo service, have been or are engaged in deceptive or unfair practices in violation of the Federal Trade Commission Act”, *available at* <https://investor.paypal-corp.com/secfiling.cfm?filingID=1633917-16-161&CIK=1633917>.

⁷ See e.g., Russell Brandom, A Venmo Scammer has Stolen \$25,000 in Expensive Camera Gear in LA (Jul. 19, 2017), *The Verge*, *available at* <https://www.theverge.com/2017/7/19/15997768/venmo-scam-fake-payment-merchant-clause-fraud>.

⁸ <https://www.ftc.gov/reports/economic-analysis-hotel-resort-fees>.

⁹ <https://bits.blogs.nytimes.com/2015/03/11/f-t-c-sues-directv-saying-it-misled-consumers-about-costs/>.

¹⁰ <https://www.ftc.gov/enforcement/cases-proceedings/refunds/t-mobile-refunds>; <https://www.ftc.gov/news-events/press-releases/2016/12/ftc-providing-over-88-million-refunds-att-customers-who-were>.

¹¹ <https://www.ftc.gov/news-events/press-releases/2016/10/us-court-finds-ftcs-favor-imposes-record-13-billion-judgment>.

Education Debt – For-profit schools have rightly come under fire in recent years for falsifying data about graduates’ outcomes. The FTC notably secured a \$100 million settlement with DeVry University based on allegations of misleading ads touting high employment success rates and income levels upon graduation. We urge the FTC to continue its efforts to ensure that for-profit colleges provide transparent post-graduate employment data.

In addition, we have worked closely with federal regulators and provided hundreds of stories of consumers frustrated with loan servicers who fail to maintain accurate records. Both the FTC and the Consumer Financial Protection Bureau have taken several enforcement actions against student loan servicers for violating the Fair Debt Collection Practices Act (“FDCPA”). We urge the FTC to maintain and increase these enforcement efforts, with respect to student loans and other unfair or harassing debt collection practices.

Preservation of consumer claims and defenses as against creditor – For more than 40 years, the so-called “Holder Rule” has provided fundamental protection to consumers when a seller arranges financing for a product or service from a lender, or initially provides financing itself but then sells the debt to another lender.¹² The Holder Rule provides that, whatever legal rights the consumer would have against the seller, it also has those rights against the lender. Without this rule, the consumer could be left legally obligated to pay when the seller has committed misconduct or fraud that materially impairs the value of the product or service – or even renders it worthless, or utterly fails to deliver it – but is now insolvent, or has absconded, or is unresponsive to the consumer. At this point, the consumer’s only ongoing relationship is likely to be with the lender demanding payment.

In December 2015, the FTC solicited comments on the Holder Rule as part of the periodic reviews it undertakes for all its rules. We joined other consumer organizations in recommending that the FTC not only reaffirm the rule, but clarify and strengthen it in a number of respects.¹³ We urge the FTC to maintain and, as appropriate, strengthen the rule in accordance with our recommendations, and to ensure that it is being effectively enforced.

Data security and privacy – Consumers Union has strongly supported the FTC’s efforts to protect consumer privacy, including its implementation of the Do Not Call Registry, its continuing work to protect consumers from the harassment of unwanted telemarketing calls, its implementation of the Children's Online Privacy Protection Act, and its use of the FTC Act to address a broad range of privacy and security violations across the marketplace. We urge the FTC to continue enforcing these fundamental protections aggressively.

The numerous revelations in recent years, of data breaches exposing massive amounts of sensitive personal consumer information, highlight the importance of the FTC maintaining and

¹² See <https://www.gpo.gov/fdsys/pkg/FR-2015-12-01/pdf/2015-30359.pdf>.

¹³ https://www.nclc.org/images/pdf/car_sales/comments-ftc-holder-2016.pdf.

increasing its enforcement efforts against unfair and deceptive data security practices that put consumers at risk, combined with its education efforts to encourage developers and entrepreneurs to make data security and privacy a top consideration during all stages of product development. The FTC should make full use of both its unfairness authority,¹⁴ against data collection practices that are contrary to reasonable consumer expectations, and difficult to avoid, and also its deceptive practices authority. In this regard, there should be no proof requirement of measurable harm from deceptive statements, and the presumption of materiality should be maintained for statements in privacy policies. These written privacy policies are an important means of holding companies accountable in the marketplace, as they can be examined not only by interested consumers, but also by researchers, business partners, and reporters who have greater specialized expertise. FTC enforcement and education efforts go hand in hand with marketplace efforts, including our own examination of privacy policies under our Digital Standard.¹⁵

Cars – We have long supported the FTC’s efforts to ensure that consumers are treated fairly and receive complete and honest information regarding the cars they purchase or lease, including in claims about safety, cost, and other attributes. We urge the FTC to maintain and strengthen these efforts. This includes aggressive enforcement against misleading claims that any recalled but unrepaired motor vehicle offered for sale (or lease) is safe; against unfair and discriminatory pricing; and against deceptive dealer practices. It includes requiring accurate information on fuel economy, so consumers have the option to purchase or lease cleaner and more efficient cars. It includes strengthening and enforcement of the Used Car Rule.¹⁶ And it includes vigorous enforcement against other unfair or deceptive acts or practices with respect to new or used cars. We commend the FTC for its work to hold Volkswagen accountable and ensure full consumer compensation for the company’s false “clean diesel” marketing, and we urge the FTC to continue taking appropriate action against other companies in the auto marketplace that unlawfully deceive or mistreat consumers.

Consumer products – Consumers Union works to ensure that products sold to consumers are safe and honestly marketed. We urge the FTC to use its enforcement authority against misleading safety claims that can lead to an increased risk of harm, as it has, for example, against companies deceptively claiming that their athletic mouthguards have special features that provide increased protection against concussions.¹⁷ We have also supported the FTC’s enforcement of the EnergyGuide labels on major home appliances, which give consumers clear

¹⁴ See, e.g., FTC v. Vizio, <https://www.ftc.gov/enforcement/cases-proceedings/162-3024/vizio-inc-vizio-inscape-services-llc>.

¹⁵ <https://www.thedigitalstandard.org/>.

¹⁶ See <http://consumersunion.org/research/cu-comments-to-the-ftc-on-proposed-rulemaking-to-strengthen-the-used-car-rule/>.

¹⁷ <https://www.ftc.gov/news-events/press-releases/2014/08/ftc-alerts-major-retailers-concerns-about-concussion-protection>; <https://www.ftc.gov/news-events/press-releases/2012/11/ftc-approves-final-order-settling-charges-against-marketer-brain>.

information to help them purchase cleaner and more efficient appliances and reduce energy use in the home, where they spend approximately \$15 billion every month on residential electricity.¹⁸ We urge the FTC to maintain and increase these efforts.

Food – Consumers Union advocates for a safe, sustainable, healthful, affordable, and transparent food marketplace. The FTC plays an important role in taking action against companies that engage in unfair or deceptive acts or practices as they market food to consumers, including misleading or unsubstantiated claims regarding safety, healthfulness, sustainability, or antibiotic use, in addition to pricing. Food marketing, including any claims made on food labels, should be clear, honest, and transparent, and should meet reasonable consumer expectations.

Specifically with regard to certification seals or similar claims, it is important to ensure that the standards underlying a claim are clearly and meaningfully substantiated, and applied objectively. And it is important that the claim conveys information that is truthful and not misleading to consumers. Furthermore, a company or industry should not falsely represent a claim or seal as coming from an independent third-party or from the government.

Dietary supplements – Consumers Union commends the FTC for its work – often in partnership with other federal agencies or with state attorneys general – to crack down on deceptive behavior in the marketing of dietary supplements. Continued aggressive enforcement is warranted. About half of U.S. adults take dietary supplements, and annual nationwide dietary supplement sales total \$37 billion.¹⁹ Consumers sometimes view dietary supplements as cheap and natural alternatives to, or substitutes for, prescription drugs.²⁰ Unfortunately, many consumers do not realize that supplement manufacturers routinely sell their products without first demonstrating their safety and effectiveness.²¹

As part of a 2016 investigation into consumers’ experiences in the marketplace for dietary supplements,²² Consumer Reports sent 43 secret shoppers – informed consumers we deployed across the country to serve as our eyes and ears – to major chain drug stores and other retailers in 17 states, where they asked store employees about products containing several ingredients that Consumer Reports had already identified as unsafe. Most of the employees did not warn the consumer about risks, or ask about pre-existing conditions or other medications the consumer might be taking. Many employees gave information that was either misleading or flat-out wrong.

¹⁸ https://www.eia.gov/electricity/sales_revenue_price/pdf/table5_a.pdf.

¹⁹ Weeks, J. (2015, Oct. 30), Dietary Supplements. CQ Researcher, 25, 913-936, *available at* library.cqpress.com/cqresearcher/document.php?id=cqresrre2015103000.

²⁰ See “Alternative Therapies,” Consumer Reports (Sept. 2011), *available at* www.consumerreports.org/cro/magazine-archive/2011/september/health/alternative-treatments/overview/index.htm.

²¹ See Jeneen Interlandi, “Supplements Can Make You Sick,” Consumer Reports (July 27, 2016), *available at* www.consumerreports.org/vitamins-supplements/supplements-can-make-you-sick.

²² See *id.*

We urge the FTC, along with the FDA and other appropriate officials, to step in and protect consumers when supplements are marketed and sold on the basis of safety or effectiveness claims that are not backed by science.

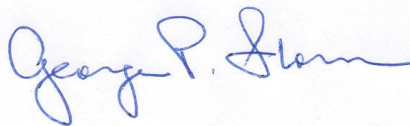
Pyramid schemes – Consumers Union strongly supports the FTC’s enforcement efforts against pyramid schemes that deceptively lure consumers into becoming “distributors” of a product in hopes of earning a high income, and into purchasing and accumulating unrealistically large amounts of the product for inventory. We believe the legal standards for what honest and transparent disclosures are required in multi-level marketing offers are correctly set out in the FTC case law and decrees, such as the recent *Herbalife* decree.²³ We oppose pending legislation to weaken these standards, and we urge the FTC to ensure that any new guidance it might provide reaffirms these standards.

Consumer reviews – We strongly supported the recently enacted Consumer Review Fairness Act, clarifying the FTC’s authority to protect consumers against being forced to surrender their right to provide others with honest reviews about shoddy products, services, and treatment in the marketplace. We look forward to the FTC’s vigorous enforcement of this fundamental protection for the consumer voice in the marketplace.

Conclusion

Throughout its 103-year history, the Federal Trade Commission has served as a champion for consumers – protecting them against anticompetitive mergers and schemes that deprive them of meaningful choice and other benefits of a healthy competitive marketplace, and protecting them against unfair and deceptive acts and practices that deprive them of an honest bargain and reliably safe, healthful, and functional products and services. In providing these protections to consumers, the FTC has also served as a champion for honest businesses, by ensuring that they are not disadvantaged by playing fairly and by the rules. It is essential that the FTC re-dedicate itself to this vital mission, and that the agency have the resources it needs to perform its work effectively across the entire marketplace.

Respectfully submitted,



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²³ <https://www.ftc.gov/enforcement/cases-proceedings/142-3037/herbalife-international-america-inc-et-al>.