



United States of America
FEDERAL TRADE COMMISSION
Washington, D.C. 20580

Office of Commissioner
Rebecca Kelly Slaughter

June 6, 2023

Richard L. Revesz
Administrator
Office of Information and Regulatory Affairs
725 17th St., NW
Washington, DC 20503

Re: Draft for public review
Circular A-4 Modernization Updates
Dkt. No. OMB-2022-0014

Dear Administrator Revesz:

I respectfully submit this comment¹ in response to the Office of Information and Regulatory Affairs's ("OIRA") April 6, 2023 Draft for Public Review titled "Circular A-4 Modernization Updates" ("Proposed Circular" or "Proposal"). I commend OIRA for explicitly recognizing the importance of considering distributional impacts of regulations and for providing guidance to agencies as to how to incorporate distributional considerations into our analyses of regulatory effects.

I am a Commissioner at the Federal Trade Commission ("FTC"). The FTC has a dual mandate to protect the public from deceptive or unfair business practices and from unfair methods of competition. We pursue our mission using a variety of tools, including law enforcement, research, advocacy, and rulemaking. It is vitally important, in my view, for the FTC to consider distributional impacts when setting enforcement priorities and developing the law, including through new rules and updates to existing rules. Although the FTC, as an independent agency, is not subject to OIRA review for rulemaking, the Commission's talented staff regularly conduct detailed economic analyses of estimated costs and benefits of potential Commission actions and reasonable alternatives in accordance with Circular A-4 guidance. I also believe that the incorporation of distributional concerns will greatly enhance the rulemaking of cabinet agencies that share our missions of protecting consumers and promoting competition, such as the Department of Transportation. Although my comment focuses on the additional of distributional considerations, I also encourage close collaboration with experts at the FTC and Department of

¹ The views expressed in this comment are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner.

Justice Antitrust Division to help inform the Proposed Circular’s consideration of competitive effects of regulations.

I am committed to utilizing the FTC’s consumer protection and competition tools to promote equity,² and I wholeheartedly support the Proposed Circular’s emphasis on taking up equity as a government-wide regulatory priority. The addition of “Promoting Distributional Fairness and Equity” as an explicit justification for regulation is a useful and overdue clarification. This consistent messaging throughout the Proposal will aid agencies’ staffs in writing regulations that promote equity while advancing other crucial statutory missions.

Further, the extended discussion of weighting benefit-cost analysis provides a useful framework for agencies to implement in analyzing the distributional impacts of their proposed regulatory actions. In many, if not most, cases, regulatory actions do not benefit all groups equally. It is essential for agencies to recognize that a regulatory choice that appears to be net-cost-justified may be harmful once the distributional impacts are sufficiently considered. It is my belief that regulatory action is not value-neutral—and that neither aspiring for it to be nor pretending that it is can make it so. I agree with the Proposed Circular’s characterization of benefit-cost analysis as always incorporating weights; that characterization recognizes that, in the absence of distributional analysis, the agency implicitly “adopts weights such that a dollar is equal in value for each person, regardless of income (or other economic status).”³ Such an assumption should not be the default. Instead, consistent with the Proposed Circular, agencies should be attuned to the differing impacts that their proposals and alternatives would have on different populations.

Distributional regulatory analysis will facilitate conversation among agencies about how areas of regulation that may not obviously or facially be linked to race may in fact either exacerbate existing racial disparities or, alternatively, affirmatively address problems faced by individuals who are disadvantaged because of centuries of racism. For instance, racism is not often discussed in conjunction with antitrust law, but in my view antitrust law can and should be antiracist: Antitrust enforcers (principally the FTC, the Department of Justice, and state attorneys general) can strategically deploy our existing tools to address mergers and conduct that contribute to the systematic disadvantages facing communities of color.

² See, e.g., Fed. Trade Comm’n, *Statement of Commissioner Rebecca Kelly Slaughter in the Matter of Liberty Chevrolet, Inc. d/b/a Bronx Honda* (May 27, 2020) (emphasizing the importance of rulemaking to eliminating persistent racial disparities in auto lending), <https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-commissioner-rebecca-kelly-slaughter-matter-liberty-chevrolet-inc-dba-bronx-honda>; Fed. Trade Comm’n, *Dissenting Statement of Commissioner Rebecca Kelly Slaughter Regarding FTC v. Progressive Leasing* (Apr. 20, 2020) (condemning the predatory and discriminatory practices of the rent-to-own industry), <https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/dissenting-statement-commissioner-rebecca-kelly-slaughter-regarding-ftc-v-progressive-leasing>; Rebecca Kelly Slaughter (@RKSlaughterFTC), Twitter (Sept. 9, 2020, 2:28PM) (calling for antiracist antitrust enforcement), <https://twitter.com/RKSlaughterFTC/status/1303762105431207947>.

³ Proposed Circular at 65.

For example, case selection case be positively informed by distributional analysis. Imagine two unlawful mergers of healthcare firms, one that would likely raise the price of dialysis by 20% in a low-income area and the other that would likely raise the price of liposuction by 25% in a high-income area. If the Commission had sufficient resources to litigate only one of the mergers and failed to consider the distributional impacts, it might choose to litigate the one with the larger price increase. Thoughtful consideration of distributional impacts, however, could militate toward litigating to protect the more cost-sensitive consumers of dialysis services. So too for equally unlawful and harmful mergers in communities with different resources: Because communities of color tend to be disproportionately lower income in the United States, it is more difficult for them to bear increased marginal costs of healthcare or to overcome lack of access to products and services caused by a lack of competition.⁴ These are simple hypotheticals to show the potential utility of analyzing distributional impacts in a law-enforcement context constrained by limited resources.

Similar principles apply when prioritizing subjects for rulemaking and making choices among reasonable alternatives to achieve regulatory objectives. The first new rule under section 18 of the FTC Act that the Commission has considered in forty years—a trade regulation rule to prohibit the impersonation of government and businesses—concerns a subject that affects every American community, but it does not affect every community equally. As the advance notice of proposed rulemaking notes, impersonation “scams often specifically target older consumers and communities of color.”⁵ This rather high-level distributional-impact information of the harm that we sought to address may be useful to the public in considering whether and how to comment, and it is certainly important to me as a decisionmaker who knows how arduous the rulemaking process can be and how stretched our staff are on other worthy endeavors. The FTC has insight into the likely distributional impacts of impersonation scams because of decades of law enforcement on the subject and the millions of reports of fraud we receive in our Consumer Sentinel Network database. More and better data will prove essential to fulfilling the promise of the Proposed Circular’s encouragement to agencies to seek out the distributional impacts of alternatives. The result will be better rules and a more just society.

In addition to my praise of the Proposal’s incorporation of distributional considerations, I would also like to sound a brief note of caution regarding the incorporation of in-depth competition analyses in rulemaking, especially without the consulting the FTC or the Department of Justice’s Antitrust Division. I encourage other government agencies to collaborate with specialized enforcers, such as the Commission, early and consistently so as to minimize the risk that the depth of competition analyses distracts from or burden pursuit of the substantive benefits of rulemaking or introduces confusion or divergence from the FTC’s work. In the spirit

⁴ See, e.g., U.S. Census Bureau, “Income in the United States: 2021,” fig. 2, “Real Median Household Income by Race and Hispanic Origin,” <https://www.census.gov/library/publications/2022/demo/p60-276.html> (Black households had a median average income of \$48,297 in 2021, while white, non-Hispanic households had a median average income of \$77,999).

⁵ Fed. Trade Comm’n, Advance Notice of Proposed Rulemaking on Impersonation of Government and Businesses, 86 Fed. Reg. 72901, 72901 (Dec. 21, 2021), <https://www.federalregister.gov/documents/2021/12/23/2021-27731/trade-regulation-rule-on-impersonation-of-government-and-businesses>.

of the importance of distributional considerations, the FTC's Bureau of Competition and Bureau of Economics are expert at determining the degree to which potentially anti-competitive actions disproportionately affect specific groups and are available to provide guidance to agency decisionmakers accordingly.

In closing, I thank OIRA for the opportunity to comment, and I encourage it to maintain the Proposed Circular's commitment to distributional considerations as it considers further changes based on the comments it receives. Affirmatively seeking to bolster equity and combat discrimination even in its latent forms must be a high priority for federal regulators, and the analysis explained and encouraged by the Proposed Circular is an excellent step toward progress.

Sincerely,

A handwritten signature in blue ink that reads "Rebecca Kelly Slaughter". The signature is written in a cursive, flowing style.

Commissioner Rebecca Kelly Slaughter