CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

SEAN HEATHER
SENIOR VICE PRESIDENT
CENTER FOR GLOBAL REGULATORY COOPERATION

1615 H STREET, N.W.
WASHINGTON, D.C. 20062-2000
202/463-5368

September 29, 2021

Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Solicitation for Public Comments on Contract Terms that May Harm Competition, Relating to Exclusive Contracts

Dear Commissioners:

On behalf of the U.S. Chamber of Commerce ("the Chamber"), we are pleased to submit these comments to the Federal Trade Commission ("FTC") in response to its Solicitation for Public Comments on Contract Terms that May Harm Competition. These comments will focus on exclusive contracts, in reference to a Petition for Rulemaking to Prohibit Exclusionary Contracts. That petition asks the FTC to interpret the FTC Act's prohibition on unfair methods of competition (UMC) to "prohibit businesses from using exclusive dealing, exclusionary payments, and other similar practices … that substantially foreclose rivals from customers, distributors, or suppliers of critical inputs."

As explained more fully below, the FTC should combat potentially anticompetitive exclusive contracts through its traditional tools, such as case-by-case litigation, rather than through a rule for two principal reasons. First, the FTC lacks legal authority to promulgate a UMC rule that would prohibit or restrict exclusive contracts. Second, and in any event, such a rule would harm consumers by banning or discouraging the many pro-competitive aspects of such contracts.

The petition advocates for a "solution" in search of a problem. Should the FTC attempt to respond to the petition and initiate a rule making, it will face strong legal challenges that waste precious enforcement resources.

The FTC Lacks Statutory Authority to Promulgate a UMC Rule Prohibiting Exclusive Contracts

The FTC Act's text, structure, and history, as well as recent guidance from the Supreme Court, all point in the same direction: the FTC lacks statutory authority to promulgate a UMC rule banning or severely restricting exclusive contracts. Although Section 5 of the FTC Act prohibits "unfair methods of competition," and Section 6(g) states that the Commission "shall have power … [f]rom time to time to classify corporations and … to make rules or regulations for the purpose of carrying out the [Act's] provisions." 15 U.S.C. §§ 45, 46(g), nothing in the Act's text expressly gives the FTC rulemaking authority to prohibit business practices that the

FTC deems an unfair method of competition. Nowhere, for example, does the Act state that the FTC "shall or may" promulgate rules to determine whether certain types of business practices are per se fair or unfair, to supplant state law, or to invalidate or proscribe entire categories of business contracts. Indeed, such a broad grant of statutory authority would have been extraordinary, as it would have allowed a majority of commissioners (which can be made up of as few as two people), with little guidance from the President or Congress, to dictate commercial practices, and override state laws, across virtually the entire U.S. economy.

The FTC Act's structure confirms that the FTC lacks UMC rulemaking authority. In sharp contrast to the text's silence on such authority, Congress expressly granted the FTC authority to promulgate other rules. For example, statutes such as the Children's Online Privacy Protection Act and Telemarketing and Consumer Fraud and Abuse Prevention Act expressly grant the FTC the authority to engage in notice and comment rulemaking to enforce their provisions.[1] Congress also provided the FTC explicit rulemaking authority for unfair and deceptive acts and practices through the Magnuson-Moss Warranty – Federal Trade Commission Improvement Act of 1975. In these statutes, Congress clearly defined the scope of its delegation to the FTC, either in terms of a proposed rule's substantive scope or its procedural path, or both. The fact that Congress failed to set forth any similar guidance or guardrails for UMC rulemaking authority confirms that no such authority exists.

Moreover, this Congressional silence stands to the issue of remedies for any UMC rule violations: the FTC Act fails to provide for any sanctions for violations of rules promulgated pursuant to Section 6. This omission strongly reinforces the point that Congress never intended to give the FTC substantive, binding UMC rulemaking authority at all. As the American Bar Association explained, the Act's "fail[ure] to provide any sanctions for violating any rule adopted pursuant to Section 6(g) . . . strongly suggest[s] that Congress did not intend to give the agency substantive rulemaking powers when it passed the Federal Trade Commission Act."[2] By contrast, Congress clearly provided the FTC in Magnuson-Moss the authority to initiate civil actions for unfair or deceptive act or practice rule violations.

Perhaps recognizing these textual and structural shortfalls, the FTC has historically hesitated to assert that it has UMC rulemaking authority. Until 1962, and for nearly half a century since the enactment of Magnuson-Moss in 1975, the FTC never attempted to promulgate a UMC rule. The time period since 1975 spans eight presidential administrations, from both political parties, and FTC chairs and commissioners with widely differing philosophies and priorities. Indeed, even prior to 1975, only once had the FTC's authority to conduct rulemaking under Section 6(g) been tested in court. In *National Petroleum Refiners Association v. FTC*, 482 F.2d 672 (D.C. Cir. 1973), the FTC promulgated a rule defining the failure to post octane rating numbers on gasoline pumps at service stations as "an unfair method of competition and an unfair or deceptive act or practice." The D.C. Circuit found that Section 6(g) conferred such authority, which led Congress to enact Magnuson-Moss. Critically, Magnuson-Moss expressly confers rulemaking

---

[1] *See* Jeffrey Lubbers, *It's Time to Remove the 'Mossified' Procedures for FTC Rulemaking*, 83 GEO. WASH. L. REV. 1789, 1991-92 (Nov. 2015).

[2] ABA, *Comments of the Antitrust Law Section of the American Bar Association in Connection with the Federal Trade Commission Workshop on "Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues"* at 54.

authority for unfair and deceptive acts and practices, but not unfair methods of competition. Since that time, the FTC has never claimed UMC rulemaking authority. That silence speaks volumes.

The enactment of Magnuson-Moss led to the creation of Section 18 of the FTC Act, which provides the FTC with the power to "prescribe interpretive rules and general statements of policy with respect to unfair or deceptive acts or practices in or affecting commerce (within the meaning of Section (a)(1) of [the FTC] Act)." Even if the Commission determines there are situations in which exclusive contracts constitute "unfair or deceptive acts or practices" the hybrid treatment of such contracts as a both "unfair methods of competition" and "unfair or deceptive acts or practices" precludes the FTC from relying on Section 18 of the FTC Act to enact a rule governing exclusive contracts. The FTC already addresses "unfair methods of competition" appropriately through its enforcement proceedings.[3] The use of case-specific analysis in enforcement proceedings rather than a broad rulemaking to challenge unfair methods of competition ensures that decisions are narrowly tailored to address the competitive concerns while maintaining potentially pro-competitive business activity.

Recent court decisions confirm that the FTC cannot assert broad authority without an express grant from Congress. In *AMG Capital Management v. FTC*, 141 S. Ct. 1341 (2021), the Supreme Court unanimously rejected the FTC's claim that it could assert broad remedial powers without an express grant of authority from Congress. In its decision, the Court stressed that the Commission must operate within the strict confines of the statutory language: "to read those words [in Section 13(b)] as allowing what they do not say, namely, as allowing the Commission to dispense with administrative proceedings to obtain monetary relief as well, is to read the words as going well beyond the provision's subject matter." Even under the deferential standard of *Chevron U.S.A., Inc. v. Nat. Res. Defense Council, Inc., 467 U.S. 837 (1984)*, the Court requires the agency to rely on a "permissible construction" of the statute, and it is unlikely that the Supreme Court would see a broad assertion of substantive antitrust rulemaking as "permissible" under the vague language of Section 6(g). As the Court has explained, "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001). Applying these principles, Section 6(g) is best understood as granting the FTC ministerial, not legislative authority, to specify how it will carry out its adjudicative, investigative, and informative functions.

Exclusive Contracts Foster Legitimate, Pro-Competitive Interests

In the vast majority of cases, exclusive contracts foster competition and benefit consumers. Among other benefits, these types of contracts can encourage the contracting parties to invest in quality, ensure the stability of supply lines, guarantee financing, allocate risk, prevent free riding, foster efficiencies of scale, and enhance inter-brand competition. As the FTC itself states, for example, "Most exclusive dealing contracts are beneficial because they encourage

[3] *See generally*, Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act, adopted on August 13, 2015, rescinded on July 1, 2021. This bipartisan statement confirms the consumer welfare standard and promotes enforcement and rule of reason analysis for acts or practices that constitute unfair methods of competition. The FTC recently rescinded this statement in a 3-2 vote, with minority commissioners dissenting.

marketing support for the manufacturer's brand."[4] Exclusive contracts also benefit competition "by ensuring supply sources or sales outlets, reducing contracting costs, or creating dealer loyalty."[5] As another example, decades ago, Nobel laureate Ronald Coase explained that exclusive contracts and vertical integration can help manufacturers address "asset specificity problems," which arise when a firm's manufacturing process becomes so specialized that changing or redeploying that process would be extremely risky or costly.[6]

The Department of Justice's Antitrust Division agrees that exclusive contracts are "common" and usually benefit consumers. According to DOJ,

> Exclusive dealing is frequently procompetitive, as when it enables manufacturers and retailers to overcome free-rider issues misaligning the incentives for these vertically related firms to satisfy the demands of consumers most efficiently. For example, a manufacturer may be unwilling to train its distributors optimally if distributors can take that training and use it to sell products of the manufacturer's rivals. Other benefits can occur as well, as when an exclusivity arrangement assures a customer of a steady stream of a necessary input.[7]

Empirical studies confirm that exclusive contracts typically benefit consumers. As the Petition itself acknowledges, most economic studies have found that exclusive contracts enhance consumer welfare. Pet. 53 n. 382. In a meta-study of the empirical studies on vertical restraints, including exclusive dealing, exclusive territories, franchisee restrictions, and resale price maintenance, the authors found "a positive association between restraints and consumer welfare in most of the studies it reviews."[8] Indeed, one of the FTC's own economic studies found that "empirically, vertical restraints appear to reduce price and/or increase output. Thus, absent a good natural experiment to evaluate a particular restraint's effect, an optimal policy places a heavy burden on plaintiffs to show that a restraint is anticompetitive." [9]

Moreover, firms compete vigorously with one another to obtain exclusive contracts. That form of "competition for the contract" is pro-competitive and *favored* by the antitrust laws under leading appellate jurisprudence. *See, e.g., Race Tires America, Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 83 (11th Cir. 2010) ("It is well established that competition among businesses to serve as an exclusive supplier should actually be *encouraged*."); *Menasha Corp. v. News American Marketing In-Store, Inc.*, 354 F.3d 661, 666 (7th Cir. 2004) ("[C]ompetition for the contract is a vital form of rivalry, and often the most powerful one, which the antitrust laws encourage rather than suppress."); *Paddock Publications, Inc. v. Chicago Tribune Co.*, 103 F.3d

---

[4] FTC, *Exclusive Dealing or Requirements Contracts*, at https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-supply-chain/exclusive-dealing-or.

[5] FTC, *Exclusive Supply or Purchase Agreements*, at https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct/exclusive-supply-or.

[6] R. H. Coase, *The Acquisition of Fisher Body By General Motors*, 43 J. L. & ECON. 15, 20 (2000).

[7] DOJ, *Exclusive Dealing*, at https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-8.

[8] Francine LaFontaine and Margaret Slide, Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy, HANDBOOK OF ANTITRUST ECONOMICS (2008).

[9] Cooper, Froeb, O'Brien, and Vita, *Vertical Antitrust Policy as a Problem of Inference* (2005), at https://www.ftc.gov/sites/default/files/documents/public_statements/vertical-antitrust-policy-problem-inference/050218verticalecon.pdf.

42, 45 (7th Cir. 1996) ("Competition-for-the-contract is a form of competition that antitrust laws protect rather than proscribe, and it is common."). Any attempt by the FTC to prohibit exclusive contracts would diminish or eliminate this important form of competition and would be flatly inconsistent with established precedent.

Given the numerous pro-competitive benefits of exclusive contracting and the absence of any meaningful concerns that such issues are not properly understood and enforced, there is no basis to conclude that FTC rulemaking is appropriate, setting aside whether the FTC has the statutory authority to do so.

Because Exclusive Contracts Usually Foster Competition, the FTC Should Not Promulgate a Rule and Instead Adhere to Its Traditional Tools to Combat Anticompetitive Contracts

All of these statements and studies undermine the case for a blanket ban on exclusive contracts, or a rule that would limit the use of exclusive contracts based on arbitrary criteria. The FTC, Department of Justice, and robust academic studies have shown that exclusive contracts serve legitimate rationales and enhance consumer welfare. Only if exclusive contracts were always, or even almost always, anticompetitive, would grounds exist to consider a categorical ban or arbitrary limits. The contrary is true.

Because the costs and benefits of any particular exclusive arrangement is based on its specific details, agencies and courts must continue to evaluate them on an individual basis. In *United States v. Microsoft*, 253 F.3d 34, 58 (D.C. Cir. 2001), for example, the court explained that the same type of conduct can foster or hinder competition, depending on the context:

> Whether any particular act of a monopolist is exclusionary, rather than merely a form of vigorous competition, can be difficult to discern: the means of illicit exclusion, like the means of legitimate competition, are myriad. The challenge for an antitrust court lies in stating a general rule for distinguishing between exclusionary acts which reduce social welfare, and competitive acts, which increase it.

As a result, antitrust agencies should continue to adhere to individualized assessments under the rule of reason. In connection with the antitrust hearings before the House of Representatives, most surveyed scholars concluded that existing antitrust law is adequate to combat anticompetitive practices, including potentially exclusionary contracts. For example, one group of antitrust economists, scholars, and practitioners wrote that "[t]he antirust laws as written are adequate to prevent anticompetitive monopolization, exclusionary conduct, and other harmful vertical conduct."[10]

Accordingly, instead of adopting a rule, the FTC should continue to combat potentially anticompetitive exclusive agreements through its traditional tools such as case-by-case litigation, *amicus* briefs, speeches, reports, and perhaps even guidelines. All of these tools would inform

[10] Joint Submission of Antitrust Economists, Legal Scholars, and Practitioners to the House Judiciary Committee on the State of Antitrust Law and Implications for Protecting Competition in Digital Markets at 8 (May 15, 2020) ("The antirust laws as written are adequate to prevent anticompetitive monopolization, exclusionary conduct, and other harmful vertical conduct"). *See also* Comments of Thomas Lambert at 3-4 (April 17, 2020) (noting that exclusive contracts can benefit consumers and that the rule of reason is working well).

courts as to the costs and benefits of exclusive contracts and the general circumstances in which the costs of such contracts might potentially outweigh their benefits. Litigation and *amicus* briefs would help courts to identify specific instances in which exclusive contracts harm competition. Through these traditional tools, which adhere closely to the FTC's statutory authority, the FTC could effectively combat anticompetitive exclusive contracts while leaving reasonable ones in place.

In addition, if necessary, the FTC might consider a joint exercise with the Department of Justice to issue guidelines on exclusive contracts. The Chamber is not aware that the business community is in need of such clarity at this time. Nevertheless, the Chamber leaves open the possibility that, given complaints the FTC may have received of potentially anticompetitive exclusive contracts, such guidance might prove useful. Such guidelines, which fall well within the FTC's statutory authority and traditional practice, could delineate the circumstances in which the FTC believes that unreasonable exclusive contracts could harm competition.

Finally, if the FTC truly believes that exclusive contracts should be deemed anticompetitive, it is free to advocate for that position through competition advocacy filings, reports, and speeches. Through these tools of persuasion -- which, again, fall well within the FTC's statutory authority and traditional practice -- the FTC would have the opportunity to educate elected officials, as well as the business community and employees, about exclusive contracts. No doubt the public would benefit from such a robust discussion.

Conclusion

The Chamber agrees that, where an exclusive contract is used for illegitimate business purposes and harms the competitive process, the FTC should step in as a matter of case-by-case antitrust enforcement, as it has successfully for decades. Such power is clearly consistent with the FTC's existing statutory authority and traditional practice. It does not require rulemaking. The Chamber also encourages the FTC to use its full panoply of other traditional tools, such as *amicus* briefs, to educate courts and elected legislators.

By contrast, the FTC lacks legal authority to promulgate a rule that would ban or restrict exclusive contracts. And, in any event, such a rule would harm consumers by proscribing the many pro-competitive aspects of such arrangements. Moreover, any such rule would contravene the majority of studies finding that exclusive contracts typically foster competition and benefit consumers.

Sincerely,

Sean Heather
Senior Vice President
International Regulatory Affairs & Antitrust
U.S. Chamber of Commerce