

## FTC Chair's Plan: What We Know, And What We Don't Know

By **Jessica Rich** (September 28, 2021, 1:46 PM EDT)

Last week, Federal Trade Commission Chair Lina Khan sent a memo to FTC staff and commissioners making her acting bureau directors permanent and outlining her vision and priorities for the FTC.

The memo provides much-anticipated guidance to both the FTC and the public regarding the direction she will take to running the agency and fulfilling its mission. It also hints at structural changes we may see in the coming months.

The memo called for a fundamental shift in how the FTC approaches its work. Recognizing that the FTC has "navigated various periods of change and transformation" during its 107-year history, it stated that "[a]t its best, the agency has focused on tackling urgent problems, learning from new evidence, and course-correcting where needed."

Khan expressed confidence that "American consumers, workers, and honest businesses [can] depend on the Commission to champion a fair and thriving economy for all," but said that achieving these goals will require the FTC to adjust its approach and "focus on key strategic priorities and operational objectives."

Although the memo is divided into multiple sections (strategic approach, policy priorities and operational objectives), it boils down to five key takeaways.

First, the FTC will take a "holistic" approach to competition and consumer protection, focusing on the greatest harms to consumers, workers, and businesses, moving away from existing silos between Bureaus of Competition and Consumer Protection, and applying an integrated approach to cases, rules, research, and other efforts.

Second, the FTC will focus on the "root causes" of harm, including "gatekeepers" that use their critical market position to "hike fees, dictate terms, and protect and extend their market power," contract terms (such as noncompetes and repair restrictions) that perpetuate market abuses, and harms directed at marginalized communities. It will avoid a "one-off ... whack-a-mole" approach that imposes "significant enforcement burden with few long term benefits." Merger enforcement will be a major focus and is already drawing on resources from other parts of the agency.

Third, the agency will incorporate a "greater range of analytical tools and skillsets" into its work — focusing not just on enforcement but on research and rulemaking to understand the marketplace and



Jessica Rich

target harmful practices before they occur. To accomplish this work, the agency will bring on additional technologists, data and financial analysts, and experts from "outside disciplines" (the suggestion being that there will be fewer attorneys, as well as perhaps more short-term employment arrangements).

Fifth, to "democratize" the agency and ensure that it is reaching communities across the country, the agency will "expand [its] regional footprint" and "fill out [its] ranks by "taking advantage of a national pool of qualified candidates." In other words, more personnel will be allocated to the agency's existing regional offices (and potentially new ones).

The memo provides more detail as to the chair's ambitious agenda than anything she has said or written since her appointment in June. It also builds on themes — strategic use of resources, focus on root causes of harm, breaking down silos — that have long been important priorities at the agency, given its small size and vast mission.

However, her plans and proposals leave many questions unanswered. For example:

The memo does not even mention the new \$1 billion privacy bureau that the U.S. House of Representatives just voted to create for the agency. Does she support this idea, which would give the agency triple its current budget for its signature privacy program?

Khan's call for greater coordination between the bureaus has been a refrain among agency leaders for decades, but it is difficult to fix this problem under the current agency structure. Is she planning to make any organizational and structural changes to break down the walls between the bureaus?

The memo suggests that Khan will significantly reshape the FTC's workforce by allocating more staff to the regional offices and increasing the proportion of nonlawyers (technologists, analysts, outside experts) at the agency. Will she make these changes incrementally or through reassignments and buyouts, and how will this affect the agency's expertise, morale and productivity?

In shifting more resources toward rulemaking and research, Khan seems to want to transform the FTC from an enforcement agency into a regulatory one. However, one major obstacle is that the FTC's inherent rulemaking authority (so-called Magnuson-Moss rulemaking) is highly cumbersome, taking as long as nine years to produce rules. While the agency recently amended its rules to expedite certain steps, rulemakings under this process will still take years to complete. Will the FTC really be able to regulate effectively under these procedures?

Finally, the memo contains some references that clearly have significance but are puzzling. For example, it refers to "the growing role of private equity and other investment vehicles" that may distort ordinary incentives and facilitate abuses that harm marginalized communities. Is private equity and investment really within the ambit of the FTC, and is Khan coordinating with the U.S. Securities and Exchange Commission and other financial regulators?

Also, her pointed reference to protecting "workers and independent businesses as well as consumers" requires more explanation than is given in the memo. Is she signaling a fundamental shift in the agency's focus or merely underscoring the need to examine and understand the marketplace as a whole?

In addition, it's not clear what exactly she means by "one off ... whack-a-mole" enforcement. If she means that the FTC should stop bringing cases against smaller entities as opposed to "gatekeepers," that will leave consumers exposed to considerable fraud and deception.

For attorneys trying to figure out how this will affect their clients in the short term, the key messages are that the FTC plans to delve into entirely new areas, that studies and rules are coming, and that there may be chaos and confusion for a while as Khan reshapes the workforce and the way the FTC does business.

Further, amid all this change, FTC staff may not have clear marching orders or, alternatively, may not have much flexibility to negotiate and make decisions. Therefore, at least for the next several months, it may be necessary to escalate matters up the chain to ensure that your arguments are fully considered by agency decision-makers — and to set clients' expectations accordingly.

---

*Jessica L. Rich is of counsel at Kelley Drye & Warren LLP and former director of the FTC Bureau of Consumer Protection.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*