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FTC Chair Lina Khan Outlines Agency Priorities and Objectives

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September 27, 2021 - On September 22, 2021, newly-appointed Chair Lina Khan released a statement outlining her strategic priorities and operational objectives for the Federal Trade Commission. Her initiative to strengthen merger enforcement and increase scrutiny of dominant firms comes in response to what she called “increasingly systemic” market power across the U.S. economy.

Chair Khan identified five key principles that she argues should animate the agency’s approach to its enforcement mission. They are:

- “Broadening” the FTC’s analytical “frame” by taking “a holistic approach to identifying harms, recognizing that antitrust and consumer protection violations harm workers and independent businesses as well as consumers.”
- Focusing enforcement efforts on structural incentives that enable unlawful conduct, in particular conflicts of interest, anticompetitive business models, and structural dominance.
- Investing in a more rigorous and empiricism-driven approach to assessing market behaviors and business practices, in particular by taking a more interdisciplinary approach and employing a greater range of analytical tools.
- Acting to forestall rather than rectify anticompetitive conduct by “tackling problems at their inception,” with particular attention to next-generation technologies, innovations, and nascent industries and by intervening

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thereby serves other progressive goals, such as reducing wealth inequality and the political influence of large companies.

It remains to be seen how the agency will apply this broader analytical framework in practice and what effect it will have on its review of proposed mergers and on the types of conduct it seeks to prohibit as “unfair methods of competition” under Section 5 of the FTC Act. Chair Khan did, however, identify four “policy priorities” she believes the FTC should focus on. They are:

- Revising the merger guidelines to rectify what she characterized as “a somewhat narrow and outdated framework for assessing mergers;”
- Deterring unlawful transactions to avoid wasting agency resources on facially illegal deals;
- Targeting abusive “gatekeepers and dominant middlemen,” terms that commonly refer to the entrenched Big Tech platforms, and private equity and investment vehicles that “strip productive capacity and facilitate unfair methods of competition,” particularly those that prey on marginalized communities; and
- Addressing restrictive contract provisions imposed by dominant firms, such as non-compete provisions in employment contracts, restrictions on a customer’s right to repair products, and exclusionary clauses that disadvantage consumers, workers, franchisees, and other market participants.

The first two priorities signal that under Chair Khan’s leadership, the FTC is likely to challenge mergers it might not have challenged in the past. The other two priorities help to identify the types of conduct on which the FTC is likely to focus its enforcement program. Companies that feel they are the victims of abusive conduct by Big Tech platforms that act as gatekeepers should, therefore, consider sharing their concerns with the FTC. Companies that use any of the types of restrictive contract provisions identified in the last priority should review those provisions with their antitrust counsel.

In addition to these general principles and priorities, Khan also established three operational goals for the FTC. They are:

- Improving coordination between the agency’s competition and consumer protection bureaus to shed light on the common causes of antitrust and consumer protection violations.
- Expanding the FTC’s regional footprint to take advantage of a larger pool of enforcement staff to increase diversity, improve local community ties, and develop greater expertise with certain local economies.
- Broadening the FTC’s institutional skillset by hiring additional technologists, data analysts, financial analysts, and experts from outside disciplines.

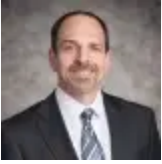
These three goals all seem to be sensible ways to improve the FTC’s operational capabilities. Expanding the FTC’s regional footprint and broadening its institutional skillset will both require, however, that Congress appropriate the additional necessary funds.

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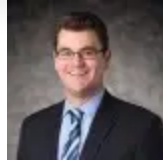
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