

FTC Chair Lina Khan Issues “Priorities” Memo

SEPTEMBER 29, 2021

On September 22, Lina Khan, the recently confirmed chair of the Federal Trade Commission (FTC), released a memo to FTC staff and her fellow commissioners outlining her “Vision and Priorities for the FTC.” The memo does not have binding policy effects; however, it is a much-anticipated look into the mind of the new FTC chair for FTC employees and antitrust practitioners, as well as the general public. The memo is divided into five “strategic approaches,” three “policy priorities,” and three “operational objectives” with the overarching theme of pushing for the new school of antitrust regulation that includes a decreased focus on historical antitrust harms to consumer welfare generally in the form of higher prices, reduced output, or reduced innovation, in exchange for seeking to address harms to workers and competitors. See more on this growing divide in antitrust theory in [this presentation](#). The memo outlines goals that will implicate companies across all American industries.

The strategic approaches Khan identifies are:

1. Holistic approach to identifying harms to include workers and competitors
2. Focus enforcement efforts to target root causes of incentives for unlawful conduct
3. Empiricism-driven approach to understanding market behaviors and practices
4. Forward-looking approach to anticipate problems and react swiftly
5. “Democratize the agency” by making it more in tune with real problems

The policy priorities Khan focuses on are:

1. Address market consolidation and focus greater scrutiny on dominant firms, including by revising the merger guidelines in coordination with the Department of Justice (DOJ)
2. Scrutinize “gatekeeper” dominant intermediaries and their extractive business practices
3. Focus on contract terms, especially take-it-or-leave-it contracts with non-competes, repair restrictions, and exclusions hurting competition or constituting unfair trade practices

The Operational Objectives Khan targets are:

1. Improve cross-bureau coordination so issues are not siloed into only the Bureau of Consumer Protection or the Bureau of Competition
2. Expand regional footprint to increase diversity of FTC talent and experiences
3. Hire additional staff to broaden agency competencies, including technologists, data analysts, financial analysts, and other experts from outside disciplines

Many of these stated goals are in line with the recent Executive Order on Competition issued by President Biden (see our coverage [here](#)), especially the focus on significant merger activity; new types of markets and quasi-economic conduct, like providing services in exchange for data; and “gatekeeper” intermediaries, which are commonly found in the form of Internet platforms.

The FTC’s new “holistic approach” and targeting of “root causes” are prominent goals for moving antitrust regulation and enforcement in the U.S. away from a pure consumer-welfare calculation and toward redefining anticompetitive conduct. The memo is clear that Khan does not discredit harms to the consumer but expects that by looking at conduct harmful to other players in the process, namely employees and competing or coordinating businesses, the FTC will be better able to act in defense of competition, which will benefit consumers and the economy in turn. To do this, Khan notes the FTC should look at power asymmetries and harms directed at already-marginalized communities and spend less time and effort on one-off “whack-a-mole” enforcement when the agency could be improving the macro effects of its policy decisions.

One of the major focuses of this memo is the anticipatory focus, where Khan wants the agency to get ahead of problems by investing in the people and resources that will help the agency understand markets and harmful practices as they occur and not only in hindsight. This focus on research and knowledge-gathering will likely result in a new set of vertical and horizontal merger guidelines (see our coverage of the FTC’s unilateral withdrawal from the 2020 Vertical Merger Guidelines [here](#)), as well as new rulemaking that the agency can use to target facially unlawful conduct with less work. Similarly, the week before Khan issued this memo, the FTC made public eight omnibus [resolutions](#) designed to reduce the bureaucratic slow-down of the FTC investigative process (and discussed in more detail [here](#)).

The memo also discusses ways in which Khan would like to “democratize the agency,” including by expanding its footprint and then hiring more staff from these broader geographical regions. While the agency already has over half a dozen regional offices outside of Washington D.C., we may see a more active role for the regional offices in future investigations. This broader reach would serve multiple goals outlined in the memo, beyond diversity of experiences and skillsets; practically, it can be expected to result in more agency understanding of competitive harms to consumers, employees, and businesses across the country.

Finally, Khan states in the memo that she will be nominating Holly Vedova to be the director of the FTC’s Bureau of Competition and Samuel Levine to be the director of the FTC’s Bureau of Consumer Protection. Both have been serving in those roles in an interim capacity since Khan was appointed chair in June 2021, and they have been with the FTC for 31 and five years, respectively, according to their online profiles.

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