



## Reforming the Federal Trade Commission

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The US Federal Trade Commission (FTC) and the Antitrust Division of the US Department of Justice (DOJ) are the two federal agencies charged with antitrust enforcement.<sup>1</sup> The FTC is also the primary federal consumer protection law enforcer. Under the Biden administration, the FTC has strayed well beyond its statutory antitrust and consumer protection mandates and has implemented problematic agency procedural changes. These changes undermine the rule of law and due process.<sup>2</sup> They also impose unwarranted costs on businesses and the American economy.

This policy brief identifies 12 specific actions that future FTC leadership can take to undo many of the bad policy changes implemented under the Biden administration. As the brief explains, however, while some reforms can be instituted by the FTC chair acting alone, others require a vote of the majority of the FTC's sitting commissioners.<sup>3</sup>

Thus, ideally, the next president should seek to nominate a new FTC chair as soon as feasible (and temporarily designate one of the two sitting Republican commissioners as acting chair). Prompt and decisive action will be needed to restore the rule of law and end costly administrative overreach at the FTC.

### **TWELVE PRIORITY FEDERAL TRADE COMMISSION REFORMS AT THE BEGINNING OF THE NEXT ADMINISTRATION**

Each reform statement is followed by an action, a vehicle, and a rationale for these proposed actions.

## **Withdraw the November 2022 Unfair Methods of Competition Policy Statement and all FTC resolutions invoking that statement, and prepare a new Unfair Methods of Competition Policy Statement.**

### Action

The new statement that would replace the 2022 statement would merely say that the term “unfair methods of competition” under section 5 of the FTC Act refers solely to violations of the Sherman and Clayton Antitrust Acts.

### Vehicle

The new FTC acting chair would publicly support the guidance embodied in the new statement and direct the FTC’s Bureau of Competition to apply it. The new statement would eventually have to be adopted by a majority of the FTC commissioners.

### Rationale

New FTC leadership should immediately withdraw the November 2022 Policy Statement Regarding the Scope of Unfair Methods of Competition under section 5.<sup>4</sup> It should replace that statement with a short statement that clearly defines an unfair method of competition as involving conduct that violates one of the two core antitrust statutes, the Sherman Act or the Clayton Act— no more, no less. This new statement properly recognizes the limited scope of the FTC’s statutory authority.

Section 5(a) of the FTC Act declares “unfair methods of competition [UMC] in or affecting commerce” to be unlawful.<sup>5</sup> Although the FTC Act does not define “unfair methods of competition,” courts have long recognized that the term encompasses violations of the Sherman and Clayton Acts. Fifty-year-old Supreme Court dicta indicate that the UMC term may also encompass certain “stand-alone” violations that fall outside the statutory boundaries but within the spirit of the antitrust laws. A trilogy of appellate cases in the early 1980s, however, cabined the FTC’s stand-alone authority, limiting it to conduct that would be similar to that addressed by the antitrust laws.<sup>6</sup>

Following those losses, the FTC all but abandoned its attempts to exercise stand-alone authority, and in 2015, the FTC issued a policy statement explaining that it was “less likely to challenge an act or practice as an unfair method of competition on a standalone basis if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm arising from the act or practice.”<sup>7</sup> The 2015 policy statement explained that when “deciding whether to challenge an act or practice as an unfair method of competition in violation of section 5 on a standalone basis,” the FTC would “be guided by the public policy underlying the antitrust laws, namely the promotion of consumer welfare” and would “evaluate” the challenged practice “under a framework similar to the rule of reason.”<sup>8</sup>

The FTC withdrew the 2015 policy statement in 2021 and later enacted the 2022 policy statement by a party-line vote. The 2022 policy statement advances a sweeping view of the FTC’s stand-alone authority as prohibiting conduct that is “coercive, exploitative, collusive, abusive, deceptive, predatory, or involve[s] the use of economic power of a similar nature,” and “negatively affect[s] competitive conditions.”<sup>9</sup>

Former commissioner Christine Wilson, the FTC’s then-sole Republican commissioner, observed in dissent that this nebulous expansion of the FTC’s stand-alone authority “abandons the rule of reason . . . repudiates the consumer welfare standard . . . and rejects a vast body of relevant preference that requires the [FTC] to demonstrate a likelihood of anticompetitive effects.”<sup>10</sup> She also condemned the 2022 policy statement for “not provid[ing] clear guidance,” failing to define “unfair,” and lacking a “framework that will result in credible enforcement.” Indeed, as Commissioner Wilson pithily put it, “the Policy Statement announces that the Commission has the authority summarily to condemn essentially any business conduct it finds distasteful.”<sup>11</sup>

By purporting to authorize essentially standardless and arbitrary UMC challenges, the policy statement offends the rule of law. It threatens to transform the FTC from a standards-based enforcement agency into a freewheeling unconstrained regulator of the entire American economy. Numerous legal scholars have explored the major legal and policy deficiencies of the statement.<sup>12</sup> In short, as administrative law expert Professor Gus Hurwitz has explained, the statement “is non-precedential and lacks the force of law.”<sup>13</sup>

For those reasons, new FTC leadership should promptly withdraw that policy statement and all FTC resolutions invoking that statement and craft a new statement that is consistent with law and sound economic policy. The new statement must achieve two goals. First, it must facilitate uniform enforcement and the compliance of businesses by clearly defining material terms to minimize uncertainty in applying the policy. To that end, the FTC should “clearly set forth its views on what constitutes an unfair method of competition.”<sup>14</sup> Second, a new statement should harmonize FTC stand-alone actions with the antitrust laws’ proconsumer welfare goal.<sup>15</sup>

The simplest way to achieve these goals is by having the FTC promulgate a short, clear statement, as follows:

The Federal Trade Commission will challenge conduct as constituting an “unfair method of competition” if and only if such conduct would also violate the Sherman or Clayton Antitrust Acts.

The withdrawal of the 2022 statement, the withdrawal of the FTC resolutions invoking it, and the enactment of the new proposed statement all would require a majority vote of the commission. This requirement should not, however, prevent new FTC leadership from immediately putting the proposed statement’s standard into effect. Specifically, the new president could immediately

designate one of the sitting FTC commissioners as acting chair. Upon designation, the new acting chair (and subsequently the new chair upon Senate confirmation) could state support for such a standard, and direct the Bureau of Competition to apply the statement's standard in deciding what investigations to pursue and what complaints to recommend. As such, the simple principle that the FTC will only pursue statutory antitrust violations under section 5 can effectively be put into place immediately after the inauguration of a new president.

The new policy statement would have three significant benefits, all advancing the rule of law.

First, the Sherman and Clayton Acts are undergirded by established (and generally sound) economic principles and case law, and, as such, the private sector would be well informed as to the standards to which it must adhere.

Second, potential differences in the enforcement of standards depending on whether the Justice Department or the FTC is investigating particular competitive conduct would be eliminated. This step would also do away with a source of unfairness for businesses.

Third, by promoting uniformity in the enforcement of competition law standards within the federal government, the new statement would advance sound principles of equal application of the law and thereby improve public administration. Relatedly, the FTC's recent tendency to go off on economically harmful bureaucratic "frolics of its own" would be curbed.<sup>16</sup>

### **Withdraw 2023 Merger Guidelines and issue new Merger Guidelines, in conjunction with the Department of Justice.**

#### Action

Issue new Merger Guidelines.

#### Vehicle

The new acting chair would issue a public statement, followed eventually by a majority vote of the commission.

#### Rationale

On July 19, 2023, the FTC and DOJ jointly issued new draft Merger Guidelines, open to public comment for two months. The two agencies adopted a substantially similar final version of the guidelines more than two months later. The 2023 Merger Guidelines replaced a set of guidelines released in 2010.

Merger Guidelines are influential statements of FTC and DOJ enforcement policies and guide practitioners, businesses, and courts in how they review mergers for anticompetitive effects. The Biden administration's new 2023 Merger Guidelines attempt to aggressively push the antitrust laws in a direction hostile to mergers across the board.<sup>17</sup> They adopt a policy of hostility toward large categories of mergers without considering their potential efficiencies, citing dated case law and ignoring modern economic thinking. Even if federal judges largely reject this guidance in reviewing FTC and DOJ challenges to mergers, the guidance will discourage many beneficial transactions, thereby harming the economy.

Moreover, by seeking to discourage merger proposals that should pass muster under current economic and legal thinking, the guidelines undermine the rule of law. Even short of actively bringing a case, Merger Guidelines can effect a stealth tax on a contemplated merger and possibly induce private parties not to pursue a merger that would be otherwise lawful for fear of steep compliance costs.

Given their aggressive, antimerger posture, the Biden administration guidelines should be immediately withdrawn and replaced. Although previous 2010 Horizontal Merger Guidelines and 2020 Vertical Merger Guidelines may be useful reference points, recent developments, particularly in high-tech antitrust analysis, mean that the DOJ and the FTC should do far more than reinstate old guidance.

Any new Merger Guidelines should follow the law as established by Congress, consistent with recent case law, instead of serving as an aspirational vehicle for attempting to push the antitrust laws in a far more interventionist direction. It is important that new guidelines clearly articulate, as a bare minimum, the following principles:

- **Make harm to consumer welfare the primary concern with merger enforcement.** Deemed by the Supreme Court to be the primary concern of antitrust law,<sup>18</sup> the consumer welfare standard is key to curbing abusive, overly interventionist merger challenges by an activist FTC and DOJ. The consumer welfare standard is a fairly simple principle, standing for the idea that the antitrust laws should be solely focused on promoting competition by advancing consumers' interests. The consumer welfare standard is the bulwark against using the antitrust laws for progressive activism. For example, progressive antitrust activists are pushing to ditch the consumer welfare standard to import competing policy goals, such as effects on climate change, diversity, and economic inequality. The removal of the consumer welfare standard would harm due process, leaving antitrust laws incoherent and ultimately up to the whims of the commission and the Justice Department.
- **Emphasize the importance of efficiencies in merger analysis, including static, dynamic, and organizational efficiencies, which could produce savings through the better utilization of scarce resources.**<sup>19</sup> Mergers, particularly vertical mergers (involv-

ing firms at different levels of the distribution chain), can often be procompetitive. As part of the current push to make antitrust law inherently antimerger, the Biden FTC and DOJ have taken a dim view of merger efficiencies. Recognizing the efficiencies that some mergers can bring and including appropriate standards by which to judge these efficiencies is an important part of securing the United States' competitive advantages compared with other jurisdictions.

- **Underscore the strong presumption that vertical mergers are efficient.** The vast majority of vertical mergers are procompetitive because of inherent structural benefits, such as the elimination of double marginalization. Double marginalization refers to the surcharge that accompanies having separate economic actors at various stages of a given product supply chain; because all actors in the chain seek their own profit margin, a supply chain without vertical integration will be more expensive compared with a vertically integrated supply chain, all else being equal. Thus, vertical integration reduces prices and improves economic efficiency in a given transaction by removing a middleman and the surcharges that come with it.

## **End ESG in merger reviews.**

### Action

Direct the Bureau of Competition, in Hart-Scott-Rodino (HSR) premerger second requests, not to make any inquiries relating to environmental, social, and corporate governance (ESG) matters, or any other matters not directly related to the potential competitive effects of a proposed merger. Publicly announce this new policy in a press release.

### Vehicle

The acting chair can issue a public guidance document to put this change into effect (to be implemented by the acting director of the Bureau of Competition). This action should be done in consultation with the assistant attorney general for the antitrust division, who should simultaneously issue similar guidance to the Justice Department's antitrust division staff.

### Rationale

Under the 1976 HSR Act, parties to certain large mergers and acquisitions must file premerger notification and wait for government review. The parties may not close their deal until the waiting period outlined in the HSR Act has passed or the government has granted early termination of the waiting period. The FTC administers the premerger notification program, and its staff members answer questions and maintain a website with helpful information about how and when to file. The FTC also provides daily updates of deals that receive early termination. The FTC and the Justice

Department receive premerger notifications under the terms of the HSR Act and the regulations promulgated pursuant to it.<sup>20</sup>

The second request process is a more intensive investigation ordered by the FTC or the DOJ for mergers that the agencies believe deserve further scrutiny beyond the typical statutory waiting period. Complying with a second request takes months and usually costs millions of dollars.

One of the ways that the Biden administration's FTC has overstepped its lawful jurisdiction in service of progressive policy goals has been to expand the scope of information sought in a second request to include ESG matters, labor issues, and other matters fundamentally unrelated to the antitrust laws.

These efforts leverage the FTC's power over the economy to inappropriately advance goals unrelated to the FTC's lawful mission, in a brazen misuse of the administrative state to advance unrelated policy goals through the antitrust laws.

To return the FTC to its proper lawful remit, a new administration should make a public statement that it will no longer attempt to pursue policies unrelated to the antitrust laws through the FTC's second request authority. Specifically, the acting FTC chair should state publicly that the agency is directing its Bureau of Competition not to issue any merger review requests to private parties relating to ESG or any other matters not fundamentally related to whether the merger threatens to substantially lessen competition.<sup>21</sup> The assistant attorney general for the antitrust division should issue analogous guidance to the Justice Department merger review staff.

## **Rescind the major amendment to HSR rules, and review HSR rules to reduce regulatory burdens.**

### Action

With the concurrence of the new assistant attorney general for the antitrust division, the FTC should rescind a rewrite of HSR premerger notification rules proposed in June 2023 and later finalized, temporarily restore preexisting HSR rules, assess the preexisting rules for excessive regulatory burdens, and issue a new set of HSR rules that incorporates an appropriate reduction in regulatory burdens.

### Vehicle

The FTC would vote to rescind the 2023 HSR rules and to adopt new, far less burdensome rules, followed by Justice Department concurrence (by the new assistant attorney general for antitrust).



## Rationale

In June 2023, the FTC, with the concurrence of the Justice Department, announced a notice of proposed rulemaking embodying a package of major changes to the HSR premerger notification rules.<sup>22</sup> This package, which the FTC adopted in substantially the same form after a 60-day public comment period, is the most significant rewrite of those rules since they were first promulgated in 1978. It greatly increases reporting burdens on private parties and requests new categories of information that may not be directly relevant to the impact on competition of a proposed merger. As a commentary by a major law firm that carries out many merger reviews explains,

If implemented, the proposed changes would massively expand the scope of data, documents and other information required by the filing, greatly increasing the disclosure burden, time required to prepare filings and expenses for the parties early on in the transaction—regardless of whether the transaction raises any competition issues. . . .

The NPRM suggests the Agencies want to use the HSR program to enhance enforcement in areas identified during the Biden administration as priorities or as having historically received underenforcement. For example, the collection of information about boards of directors and officers will support investigations of competitive interlocks, which the DOJ recently announced will be a focus going forward. Notably, this same information is now commonly requested in Second Requests as well. Similarly, the collection of labor data reflects the keen interest the Agencies have taken in competition for employees, with the DOJ recently seeking criminal convictions in no-poach cases (but so far losing four in a row) and the FTC announcing a separate proposed rulemaking to ban noncompete restrictions at the national level. The NPRM's inclusion of information regarding document retention policies and expanded nonreportable deal requirements also suggest the Agencies intend to use the HSR process to address Agency concerns related to document preservation habits and private equity roll-ups or serial transactions. Finally, it also is worth noting that Second Requests have become more burdensome under the Biden administration, and the proposed HSR rules seem to be another data point suggesting that the Agencies are deploying strategies to deter large strategic transactions.<sup>23</sup>

The highly intrusive and burdensome new HSR rules are at odds with the original congressional and agency understanding that the HSR process was intended solely to obtain targeted information bearing on the likely competitive effects of a merger. The new rules impose a new costly burden that serves to discourage mergers, without regard to their likely competitive effect. The new rules act as an implicit tax on mergers that imposes a particularly severe relative burden on small



and medium-sized enterprises. As such, the new rules impose harm on the market for corporate control, on the free market competitive process, and on the American economy.

The new FTC acting chair should immediately announce the intent to request that the commission repeal the costly 2023 HSR rules and temporarily reinstate the former version of the HSR rules. At the same time, the acting chair should unilaterally direct the FTC's Bureau of Economics to conduct a cost-benefit appraisal of appropriate HSR rules, designed to identify the least burdensome set of rules needed to obtain the information required to determine a proposed merger's competitive impact (and nothing more). An FTC public inquiry into premerger reporting costs aimed at informing the Bureau of Economics' analysis would be appropriate. The FTC should then vote to publish for 60 days of public comment a cost-effective set of new rules identified through this process. A final vote on new rules would occur after the public comment period. The new acting (or confirmed) Justice Department assistant attorney general would have to concur in the repeal and adoption of the rules.

### **Terminate preclearance requirements in merger settlements.**

#### Action

Terminate the Biden-era policy of routinely requiring FTC review of future proposed mergers in all settlements of merger matters.

#### Vehicle

The acting chair can make this change through a public statement (to be implemented by the acting director of the Bureau of Competition).

#### Rationale

Under the Biden administration, the FTC has made a routine practice of including preclearance conditions in the settlement of merger matters, requiring companies that settle a merger with the FTC to agree to monitoring and notification for all future mergers, including those that would not otherwise be subject to notification under the HSR Act.<sup>24</sup>

In the first instance, this requirement is an overreach and an abuse of the FTC's ability to settle mergers with remedies by including conditions that expand its merger review authority beyond the statutory scope authorized by Congress.

The use of these preclearance conditions is part of a shift under the Biden administration that seeks to position the FTC as a source of centralized industrial and economic planning, rather than just an enforcer of the antitrust laws.

This action is also part of the increased “stealth tax” that the Biden FTC has levied against mergers, putting additional costs and investigatory risk on mergers that would otherwise be legal and not require government approval. These actions expand the reach of the administrative state beyond its congressionally authorized boundaries, further centralizing authority over the economy in the FTC.

The new administration should firmly reject this overreach and publicly commit to not seek any settlement conditions beyond its statutory authority to enforce the antitrust laws.

**Rescind all proposed or final rules on unfair methods of competition enacted pursuant to section 6(g) of the FTC Act,<sup>25</sup> and withdraw from any litigation related to such rules. Relatedly, the FTC should disavow any substantive rulemaking authority under section 6(g).**

#### Action

Rescind all proposed or final “unfair method of competition” rules and withdraw from any related litigation. Issue an interpretive policy statement explaining that section 6(g) does not confer substantive rulemaking authority.

#### Vehicle

Rescission of proposed or final rules requires a vote by the commission. Withdrawal from any litigation that has reached the federal courts similarly would require a commission vote. A public statement by the acting chair would be sufficient to establish the acting chair’s position that section 6(g) does not confer substantive rulemaking authority upon the FTC. An interpretive policy statement subsequently adopted by the commission supporting that interpretation of section 6(g) would be advisable.

#### Rationale

Under Chair Lina Khan, the FTC has pursued proposed substantive competition rulemakings under section 6(g) of the FTC Act, a statutory subsection that, properly understood, confers authority only for internal FTC housekeeping rules. Section 6(g) rules not only lack legal authority,<sup>26</sup> but also would do great harm to the competitive process and to the American economy.<sup>27</sup> Antitrust litigation is based on case-specific factual reviews, which weigh the particular benefits of specific business conduct. In sharp contrast, competition rules would impose overly broad “one-size-fits-all” restrictions on business conduct, thereby harming many economically efficient and innovative commercial practices. One particularly egregious example of an economically inappropriate section 6(g) competition rule is embodied in the FTC’s January 2023 Notice of

Proposed Rulemaking on Noncompete Clauses.<sup>28</sup> That rule would prevent beneficial federalist experimentation among the states in developing noncompete rules. It would also prevent the use of noncompete clauses to protect business-property interests and investments in worker training. Furthermore, the rule would undermine the rule of law by creating a substantial new gap between FTC and Justice Department competition-enforcement regimes.

The new acting chair of the FTC should promptly announce an intention to seek commission votes as soon as feasible to repeal all enacted section 6(g) substantive rules, to withdraw proposed section 6(g) rulemaking that has not been finalized, and to withdraw from any ongoing federal court litigation in defense of section 6(g) rules.

The acting chair should also promptly take the opinion that section 6(g) does not confer substantive rulemaking authority upon the commission. Thus, the chair should state a lack of support for considering any substantive rulemakings pursuant to section 6(g). The acting chair should call on the general counsel to issue an advisory opinion to that effect. As soon as feasible, the acting chair (or new chair) should seek a vote of the commission adopting an interpretive policy statement explaining that section 6(g) does not authorize substantive rulemaking.

### **Rescind FTC Act section 18 “reforms.”**

#### Action

Rescind July 1, 2021, FTC action to streamline consumer protection rulemaking procedures applicable to section 18 of the FTC Act (Magnuson-Moss Act of 1974).

#### Vehicle

A public statement, requiring a majority vote of the commission, would serve to rescind the 2021 action.

#### Rationale

On July 1, 2021, the FTC voted to modify and streamline its rulemaking procedures under the Magnuson-Moss Act, which empowers the FTC to issue trade regulation rules.<sup>29</sup>

When Congress first passed the Magnuson-Moss Act, the FTC engaged in such a flurry of regulation that the *Washington Post* accused the agency of trying to become the “national nanny.”<sup>30</sup> As a result of the backlash to those rules, Congress passed the Federal Trade Commission Improvements Act of 1980, and the FTC imposed additional procedural requirements to section 18 rulemaking designed to improve the process and reduce the unfettered creation of economy-wide

dictates, which ultimately raise the cost of doing business, limit consumer choice, increase prices paid by consumers, and stifle innovation.

The July 1 vote rescinded these safeguards, including requirements that the chief administrative law judge serve as an independent presiding officer, ensuring objective management of the rule-making process, and requirements for additional public comments, publication of a staff report, and opportunities for the public to weigh in on disputed issues of fact.

These modifications are arguably in conflict with the Federal Trade Commission Improvements Act of 1980 and pave the way for the FTC to engage in far-reaching regulation of the economy with little oversight or input from the public. Rescinding the July 1 section 18 reforms would merely return the FTC to the status quo it operated under for four decades and conform its rulemaking under the Magnuson-Moss Act to Congress's limitations.

Upon appointment, a new acting chair of the FTC should announce plans to have the commission vote to rescind the July 2021 modifications and should direct Bureau of Consumer Protection staff to prepare to apply premodification section 18 rulemaking standards. Formal rescission of the modifications, however, would require a vote of the commission.

### **Perform a study of all proposed unfairness-based consumer protection rules.**

#### Action

The acting chair should announce publicly that the commission will study all proposed and recently promulgated unfairness-based “consumer protection” rules that are based on section 18 of the FTC Act (Magnuson-Moss Act), to determine whether, applying economic analysis, those rules and proposed rules clearly satisfy the cost-benefit analysis requirements of section 5(n) of the FTC Act (which defines unfairness).<sup>31</sup>

#### Vehicle

The acting chair can announce the plans for the study immediately, but any actions to withdraw or amend section 18 unfairness rules on the basis of cost-benefit analysis would require a majority vote of sitting commissioners.

#### Rationale

The FTC has broad authority to issue consumer protection regulations under section 18 of the FTC Act. With its July 1, 2021, “reforms” to section 18 rulemaking, the Biden administration has also removed many safeguards to make these rules easier to enact.

As such, it is highly likely that, by the end of the Biden administration, there will be a number of proposed or finally enacted section 18 rules that fail to meet FTC Act section 5(n) cost-benefit requirements.

The new acting chair should immediately direct that the Bureau of Consumer Protection staff, with the input of the Bureau of Economics, apply a cost-benefit analysis in reviewing all commission rules proposed or enacted under section 18 by the Biden administration. Many rules are unlikely to meet this standard, offering an early opportunity to eliminate regulations whose costs outweigh their benefits.

Armed with cost-benefit information, the acting chair (or new chair) should call for a commission vote to withdraw section 18 rulemaking proposals that are not cost-beneficial and to rescind those rules that fail to pass cost-benefit review.

### **Announce publicly that the FTC will not enforce the Robinson-Patman Act.**

#### Action

In the exercise of its prosecutorial discretion, the FTC should not enforce the Robinson-Patman Act (RPA). The FTC should also terminate any ongoing RPA investigations and end its pursuit of ongoing litigation involving enforcement of the RPA.

#### Vehicle

The acting chair would announce publicly that the FTC, in the exercise of prosecutorial discretion, will not enforce the RPA, because that act, if enforced, would tend to undermine consumer welfare. The acting chair would also direct the Bureau of Competition director not to pursue any investigations or proposed prosecutions involving the RPA. Any ongoing RPA litigation authorized by a prior commission vote would have to be terminated by a new commission vote.

#### Rationale

The 1936 RPA was enacted as a special interest statute primarily aimed at protecting small retailers from price competition by newly emerging chain stores by penalizing “discriminatory” discounting.<sup>32</sup> The FTC actively enforced the RPA until the Reagan administration ceased active enforcement. Thereafter, the Justice Department essentially ignored the act, with the exception of one minor 1990s settlement. Economic research has revealed that RPA enforcement undermined the competitive process, harmed consumer welfare, and even did a poor job of protecting the interests of small businesses. The general consensus view of law and economics scholars (a position also adopted by the bipartisan Antitrust Modernization Commission in its 2007 report to Congress) has long been that the RPA should be repealed.

Recently, however, the Biden administration FTC, under Chair Khan, signaled renewed enthusiasm about enforcing the RPA's mandates. Khan's FTC had the support of the Biden administration, which produced an executive order in July 2021 citing the RPA as a solution for improving "farmers' and smaller food processors' access to retail markets."<sup>33</sup>

The new acting chair should announce that, as a matter of prosecutorial discretion, the FTC will not enforce the RPA, because scarce FTC resources would be much better directed elsewhere. A major speech could announce this change. The acting chair should instruct the Bureau of Competition director not to pursue any RPA investigations or enforcement actions. If any RPA complaints have been issued by the commission, the acting chair should seek a commission vote to terminate all ongoing RPA litigation. If asked by Congress, the acting chair (or confirmed chair) should indicate that the FTC would enthusiastically support congressional efforts to repeal the RPA, given the harmful effects its enforcement would have on consumers and the American economy.

### **Identify all consultants, special assistants, and other personnel who worked at the FTC at the direction of Chair Lina Khan.**

#### Action

The acting chair should identify all consultants, special assistants, and other personnel working at the direction of Chair Khan.

#### Vehicle

The acting chair should direct the FTC executive director to provide a list of such personnel (which could highlight abuses of federal personnel law).

#### Rationale

During her tenure as FTC chair, Khan aggregated many of the commission's powers to the chair's office. As part of the cleaning house to be undertaken with the start of a new administration, the commission should identify all consultants, special assistants, or other personnel working at the direction of Khan, and, if appropriate, take steps to terminate their employment.

Reports indicate that the FTC's use of outside consultants has ballooned during Khan's time as chair.<sup>34</sup> The use of these outside consultants facilitated Khan's attempts to marginalize career staff at the agency, particularly in the Bureau of Economics, and in many cases may be an abuse of federal personnel law. Identifying and eliminating these outside hires is the first step to cleaning up the agency and improving its sinking morale.

### **Identify all FTC staff detailed to other agencies.**

#### Action

Identify all FTC staff detailed to other agencies and international enforcers.

#### Vehicle

The acting chair should ask the executive director for a list of staff detailed to other agencies.

#### Rationale

As part of the cleaning house to be undertaken with the start of a new administration, the commission should identify all personnel detailed to other agencies and international enforcers and, if appropriate, take steps to immediately terminate their details.

One of the hallmarks of Khan's tenure as chair has been the FTC's centralization of authority throughout the administrative state, acting as a vehicle for policy through the FTC's ostensibly broad authority. This has been facilitated in part by personnel detailed to other agencies. Unwinding these assignments will help return the FTC to its lawful role.

Similarly, the FTC has often sought to use international enforcers, particularly in Europe, to circumvent some of the limitations on the FTC's authority, including attempted end runs around article III courts by allowing international agencies to act as the FTC's proxy in challenging mergers.<sup>35</sup>

### **Lay the groundwork for possibly obtaining limited statutory disgorgement authority (that is, a monetary remedy) to address consumer fraud.**

#### Action

Issue FTC statements highlighting the case for new FTC statutory disgorgement authority narrowly limited to fraud.

#### Vehicle

The new chair should make speeches pointing to the consumer benefit of such a new authority and should seek an FTC majority statement supporting narrowly tailored legislation, if requested by Congress.



## Rationale

The FTC's Disgorgement Policy Statement was issued in 2003 on a five-to-zero bipartisan vote.<sup>36</sup> The statement provided a simple framework to guide when the FTC would seek an equitable monetary remedy under its section 13(b) powers. Specifically, the statement laid out a three-part test for when the FTC would seek disgorgement. First, the commission would ordinarily seek monetary relief only when the underlying violation is clear. Second, there must be a reasonable basis for calculating the amount of a remedial payment. Third, the commission would consider the value of seeking monetary relief in light of any other remedies available in the matter, including private actions and criminal proceedings.

Given the uncontroversial nature of the statement, its withdrawal in 2012<sup>37</sup> was cause for concern, as the only purpose of withdrawing the statement would be to facilitate extracting questionable disgorgement remedies.

This concern was confirmed with the Supreme Court's unanimous opinion in *AMG Capital Management, LLC v. Federal Trade Commission*,<sup>38</sup> which held that the FTC had no power to seek equitable monetary relief under section 13(b), such as restitution or disgorgement.

If Congress at some future point requests the FTC's views on whether it should be granted new disgorgement authority, the FTC should recommend (by a majority vote of the commission) that such authority be limited to recoveries for cases of clear hard-core fraud and deception, when the amount of an overcharge can reliably be measured.<sup>39</sup> Such a statutory limitation would preclude potential future FTC abuses of its disgorgement authority. The new FTC chair should lay the groundwork for such a recommendation by discussing (without specifically calling for legislation) the potential benefit to consumers of authorizing the FTC to seek disgorgement in cases of fraud, when consumer harm is readily measurable.

## CONCLUSION

Under Chair Khan, the Federal Trade Commission initiated major procedural and substantive policy changes that may run counter to the rule of law<sup>40</sup> and threaten to impose substantial harm on American businesses and consumers. These dramatic changes, many of them implemented abruptly without consultation at the direction of the chair, are at odds with a decades-long bipartisan tradition of incremental changes at the FTC.

The 12 specific reforms identified in this brief could, if implemented, repair much of the damage stemming from Chair Khan's program. New FTC leadership undoubtedly will want to closely scrutinize these and other possible reforms, as it determines the best course of action to restore the FTC as a respected deliberative body committed to economically sound, welfare-enhancing antitrust and consumer protection enforcement.<sup>41</sup>

## ABOUT THE AUTHOR

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## NOTES

1. The antitrust enforcement responsibilities of the FTC and the Department of Justice are summarized in Alden Abbott, “US Antitrust Laws: A Primer” (Mercatus Policy Brief, Mercatus Center at George Mason University, Arlington, VA, March 24, 2021).
2. In a February 2023 *Wall Street Journal* editorial announcing her plans to resign as FTC commissioner, Christine Wilson cited FTC Chair Lina Khan’s “willful disregard of congressionally imposed limits on agency jurisdiction, her defiance of legal precedent, and her abuse of power to achieve desired outcomes.” Also see House Committee on Oversight and Accountability, “Comer Probes Federal Trade Commission Chair Khan’s Abuses of Power,” press release, June 1, 2023.
3. Current law requires that no more than three of the five FTC commissioners (who are nominated by the president and confirmed by the Senate) be from the same political party; see 15 U.S.C. § 41. Commissioners serve seven-year statutory terms, “except that any person chosen to fill a vacancy [due to a Commissioner’s resignation] shall be appointed only for the unexpired term of the Commissioner whom he shall succeed: Provided, however, that upon the expiration of his term of office, a Commissioner shall continue to serve until his successor shall have been appointed and shall have qualified.” See 15 U.S.C. § 41. Under current Supreme Court precedent, the president may remove a commissioner only for cause. (See *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935).) As of December 2023, the FTC had only three commissioners, all Democrats (two Republicans resigned, one in 2022 and one in 2023). One current commissioner, Rebecca Kelly Slaughter, is a “holdover”; her term expired September 26, 2022, but she was renominated by President Biden. The other two commissioners, Chair Lina Khan and Commissioner Alvaro Bedoya, have terms that expire on September 25, 2024, and on September 25, 2026, respectively. On July 3, 2023, President Biden nominated Virginia Solicitor General Andrew Ferguson and Utah Solicitor General Melissa Holyoak to fill Republican commissioner slots at the FTC. On October 18, 2023, the Senate Committee on Commerce, Science, and Transportation voted to advance their nominations (and the nomination of Commissioner Slaughter to a second term) to the full Senate. See Senate Committee on Commerce, Science, and Transportation, “Commerce Committee Advances FAA Administrator, FTC Commissioners, CPSC Commissioner, and Amtrak Board of Directors,” press release, October 18, 2023. As such, it is expected that the FTC will have a full complement of five commissioners in early 2024.
4. FTC, “Policy Statement Regarding the Scope of Unfair Methods of Competition under Section 5 of the Federal Trade Commission Act,” Commission File No. P221202, November 10, 2022, [https://www.ftc.gov/system/files/ftc\\_gov/pdf/P221202Section5PolicyStatement.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf).
5. 15 U.S.C. § 45(A)(1).
6. See *Boise Cascade Corp. v. FTC*, 637 F.2d 573 (9th Cir. 1980); *Official Airline Guides, Inc. v. FTC*, 630 F.2d 920 (2d Cir. 1980); and *E.I. du Pont De Nemours & Co. v. FTC (Ethyl)*, 729 F.2d 128 (2d Cir. 1984). In recent decades, Supreme Court decisions upholding FTC findings of UMC violations involved conduct that fairly clearly transgressed Sherman Act principles.
7. FTC, “Statement of Enforcement Principles Regarding ‘Unfair Methods of Competition’ under Section 5 of the FTC Act,” August 13, 2015.
8. FTC, “Statement of Enforcement Principles.”
9. FTC, “Policy Statement Regarding the Scope,” note 1.
10. FTC, “Dissenting Statement of Commissioner Christine S. Wilson Regarding the ‘Policy Statement Regarding the Scope of Unfair Methods of Competition under Section 5 of the Federal Trade Commission Act,’” November 10, 2022.
11. FTC, “Dissenting Statement” at 1, 2.

12. See Alden Abbott, “The New FTC Section 5 Policy Statement: Full of Sound and Fury, Signifying Nothing?” *Truth on the Market*, November 22, 2022.
13. Gus Hurwitz, “A Policy Statement Is Still Only Worth the Electrons upon Which It Is Written,” *Truth on the Market*, November 11, 2022.
14. Joshua D. Wright, “What’s Your Agenda?” (Remarks at the ABA Spring Meetings, Washington, DC, April 11, 2013).
15. Since 1979, the US Supreme Court has confirmed that the promotion of consumer welfare is the guiding principle of antitrust law. See *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979). The 2022 policy statement, which is unmoored from the antitrust consumer welfare standard, is at odds with this judicial guidance.
16. As former FTC chair and George Mason University Foundation Professor of Law Timothy Muris succinctly put it: “Having witnessed firsthand the FTC’s overreaching in the 1970s, in both Antitrust and Consumer Protection, I have long thought that section 5 should be read coextensive with the Sherman and Clayton Acts. There is no need, especially with the maturity of the Antitrust Laws represented by the many 21st-century Supreme Court decisions, for separate, more expensive enforcement under section 5.” Timothy J. Muris, “Tim Muris on Joshua Wright,” *Truth on the Market*, August 26, 2015.
17. See Alden Abbott, “The New Merger Guideline Commandments: Thirteen Is an Unlucky Number,” *Truth on the Market*, July 19, 2023.
18. See *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979).
19. A 2007 Organisation for Economic Co-operation and Development (OECD) report describes the different nature of static and dynamic merger efficiencies. As the OECD explains:
 

Efficiencies may be static or dynamic. In general, dynamic efficiencies are synergies that enable firms to improve their performance, whether in terms of cost, quality, service, or new product development, on a potentially continuing basis. Efficiencies that enhance the ability or incentive to innovate, for example, are considered dynamic. Learning by doing, eliminating redundant research and development expenditures, and achieving economies of scale in R&D are all examples of dynamic efficiencies. Static efficiencies, in contrast, enable improvements that occur only once. Economies of scale in production, for instance, are a static efficiency. Over time, the benefits of dynamic efficiencies may outweigh those of static efficiencies even if the latter are initially larger.

OECD, *Dynamic Efficiencies in Merger Analysis* (Paris: OECD, 2007), 9.

I refer to “organizational efficiencies” as those that arise from the reallocation of underperforming assets to more productive uses through a merger. See, for example, Mert Demirel and Omer Karaduman, “Do Mergers and Acquisitions Improve Efficiency: Evidence from Power Plants,” Stanford Graduate School of Business, October 27, 2022.
20. See FTC, “Premerger Notification and the Merger Review Process,” accessed July 20, 2023, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/mergers/premerger-notification-merger-review-process>.
21. Section 7 of the Clayton Act prohibits mergers and acquisitions where the effect “may be substantially to lessen competition, or to tend to create a monopoly.” FTC, “The Antitrust Laws,” accessed July 20, 2023, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws>. There is no justification for requesting information that is not directed to that statutory standard.
22. See FTC, “FTC and DOJ Propose Changes to HSR Form for More Effective, Efficient Merger Review,” press release, June 27, 2023.
23. Joseph M. Rancour et al., “FTC and DOJ Propose Dramatic Expansion of HSR Filings’ Scope,” Skadden, Arps, Slate, Meagher & Flom LLP, July 6, 2023 (footnotes omitted), <https://www.skadden.com/insights/publications/2023/07/ftc-and-doj-propose-dramatic-expansion>.
24. See FTC, “FTC to Restrict Future Acquisitions for Firms That Pursue Anticompetitive Mergers,” press release, October 25, 2021).

25. Section 6(g) of the FTC Act authorizes the FTC “to make rules and regulations for the purpose of carrying out the provisions of this subchapter.” In a set of public comments filed with the FTC, the Antitrust Section of the American Bar Association stated:
 

The Commission’s [6(g)] rulemaking authority is buried within an enumerated list of investigative powers, such as the power to require reports from corporations and partnerships, for example. Furthermore, the [FTC] Act fails to provide any sanctions for violating any rule adopted pursuant to Section 6(g). These two features strongly suggest that Congress did not intend to give the agency substantive rulemaking powers when it passed the Federal Trade Commission Act.

American Bar Association Antitrust Law Section, 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,” April 24, 2020, at 54, [https://www.americanbar.org/content/dam/aba/administrative/antitrust\\_law/comments/april-2020/comment-42420-ftc.pdf](https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/april-2020/comment-42420-ftc.pdf). For a further explanation of why section 6(g) does not provide legal report for substantive rulemaking, see Alden Abbott, “FTC Competition Regulation: A Cost-Benefit Appraisal” (Mercatus Policy Brief, Mercatus Center at George Mason University, Arlington, VA, June 28, 2021).
26. See Alden Abbott, “Why FTC Competition Rulemaking Likely Will Fail,” *Truth on the Market*, July 5, 2022.
27. See Alden Abbott, “FTC Competition Regulation: A Cost-Benefit Appraisal” (Mercatus Policy Brief, Mercatus Center at George Mason University, Arlington, VA, June 28, 2021).
28. See Alden Abbott, “The FTC’s NPRM on Noncompete Clauses: Flirting with Institutional Crisis,” *Truth on the Market*, January 10, 2023.
29. See FTC, “FTC Votes to Update Rulemaking Procedures, Sets Stage for Stronger Deterrence of Corporate Misconduct,” press release, July 1, 2021.
30. “The FTC as National Nanny,” *Washington Post*, March 1, 1978.
31. For more on the section 5(n) cost-benefit requirement, see Alden Abbott, “Potential Rulemaking on Commercial Surveillance and Data Security: The FTC Must Use Cost-Benefit Analysis,” *Truth on the Market*, September 7, 2022.
32. See Alden Abbott and Satya Marar, “The Robinson-Patman Act: A Statute at Odds with Competition and Economic Welfare” (Mercatus Policy Brief, Mercatus Center at George Mason University, Arlington, VA, June 6, 2023). The following textual discussion draws on this policy brief.
33. The White House, “Executive Order on Promoting Competition in the American Economy,” July 9, 2021.
34. See House Committee on Oversight and Accountability, “Comer, Oversight Republicans Question FTC over Use of Unpaid Consultants,” press release, October 19, 2022, and Competitiveness Coalition, “Seven Key Questions Lina Khan Must Answer during House Judiciary Committee Testimony,” press release, July 12, 2023.
35. See Competitiveness Coalition, “Competitiveness Coalition Submits FOIA Request Regarding Suspected Collusion Between FTC and European Regulators,” press release, July 11, 2023.
36. FTC, “FTC Issues Policy Statement on Use of Monetary Remedies in Competition Cases,” press release, July 31, 2003.
37. FTC, “FTC Withdraws Agency’s Policy Statement on Monetary Remedies in Competition Cases; Will Rely on Existing Law,” press release, July 31, 2012.
38. 141 S. Ct. 1341, 1344 (2021).
39. Former FTC chair Timothy Muris and former director of the FTC’s Bureau of Consumer Protection Howard Beales endorsed such an approach in a highly discussed article. See J. Howard Beales III and Timothy J. Muris, “Striking the Proper Balance: Redress Under Section 13(b) of the FTC Act,” *Antitrust Law Journal* 79, no. 1 (2013): 1-45 (arguing that section 13(b) redress should be limited to cases in which “a reasonable person would have known that the conduct was dishonest or fraudulent”).

40. In a February 14, 2023, *Wall Street Journal* op-ed, former FTC commissioner Christine Wilson, in discussing her resignation from the FTC, severely criticized Chair Khan's management of the FTC. Wilson cited Chair Khan's "disregard for the rule of law and due process and the way senior FTC officials enable her." Wilson added that she had "failed repeatedly to persuade Ms. Khan and her enablers to do the right thing." See Rebecca Nelson, Philip Bartz, and Stephen Scannell, "A Noisy Exit by FTC Commissioner Wilson," *Insights* (blog), February 16, 2023, <https://www.bclplaw.com/en-US/events-insights-news/a-noisy-exit-by-ftc-commissioner-wilson.html>.
41. If the FTC fails to undertake significant reforms, particularly in its expansive approach to unfair methods of competition, it may at some point face congressional action to strip it of its antitrust enforcement authority. Notably, in recent years, congressional bills have been introduced that would transfer the FTC's competition-related funding, resources, and personnel to the Justice Department. See, for example, Joshua Fineman, "Senators Introduce Legislation That Would Strip FTC from Antitrust Enforcement," *Seeking Alpha*, June 14, 2021. Serious congressional consideration of a possible statutory reduction in the FTC's enforcement authority appears unlikely, however, in the near term, and thus is not discussed in this policy brief.