A Respondent's Wishlist: 10 Changes Businesses Would Like to See From the New FTC Bureau of Consumer Protection

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With a Republican majority soon to be at the helm of the Federal Trade Commission, businesses are watching closely to see whether and how the regulatory landscape will shift. In this post, we break down ten things we, as counsel to the business community, would like to see from the agency under Chair Andrew Ferguson.

1. Reinstate the FTC's mission statement to reference the agency's duty to protect consumers *without burdening legitimate business activity*.

The italicized language above has appeared in the agency's strategic plans for decades, spanning both Democratic and Republican administrations. This language plainly signaled to the public that the FTC would tailor its actions—investigations, allegations, prohibitions, and remedies—to address *illegal* conduct, while safeguarding *legitimate* business practices that foster a vibrant, competitive economy where businesses are incentivized to innovate. But, as we explained in 2021, the Commission under Chair Lina Khan removed this clause from the FTC's Strategic Plan for Fiscal Years 2022 to 2026. The omission was provocative and concerning. Indeed, its removal presaged a troubling shift toward rulemaking, novel legal theories, and settlement provisions that disregarded costs to consumers, businesses, and/or the overall economy. Restoring this clause would rebalance the FTC's mission and reaffirm the agency's commitment to enforcing the law in a manner that considers the implications of its actions on honest business operations.

2. Return to focused investigations.

Civil Investigative Demands (CIDs) and access letters are crucial tools for the FTC to evaluate whether there has been a law violation and to assess the scope of any consumer injury. However, in the past few years, the agency's investigatory process has become bloated. CIDs and access letters have routinely included dozens of requests for "all documents and communications" that are not limited by timeframe, and investigatory hearings are frequently conducted as well. This expansive, open-ended approach to exploring whether there is evidence of law violations is extremely expensive and burdensome for businesses, and diverts finite resources from compliance efforts. Moving forward, the Commission should avoid fishing expeditions and prioritize focused investigations that are designed to elicit information relevant to specific concerns. It shouldn't cost millions of dollars for a business to comply with an FTC investigation.

3. Actively engage with respondents.

Although FTC investigations should be careful and deliberate, companies that are the target of an

investigation should not face years of requests or go months without receiving any contact from Commission staff. FTC staff should work to ensure that its investigations do not languish, that it regularly communicates with targets, and that it is transparent about its concerns and legal theories.

4. Rescind the 2,545 notices of penalty offense sent since 2021.

In an attempt to identify alternative pathways for monetary relief post-*AMG*, the Commission resurrected its dormant Penalty Offense Authority under Section 5(m)(1)(b) of the FTC Act, which allows the FTC to seek civil penalties where the agency has obtained a final cease-and-desist order in an administrative proceeding and the party has engaged in that same conduct and has actual knowledge that the practice is prohibited. Under Chair Khan, the Commission sent notices of penalty offense to 2,545 U.S. businesses relating to endorsements and testimonials, money-making claims, projected earnings claims, substantiation, and the misuse of information collected in a confidential context. This theory was off-base from the start, relying on orders that dated back as far as the 1940s and conduct dissimilar to the conduct of notice recipients, even though Congress intended the penalty offense authority to be limited to those cases where defendants have *actual* knowledge that the *specific conduct* in which they are engaged is illegal. Relying on broad cease-and-desist orders that do not establish the specifically targeted practices as unlawful exceeds the authority granted by Congress and violates due process rights embodied in the Constitution. Under its new leadership, the FTC should rescind the 2,545 notices that were sent to businesses between 2021 and 2023.

5. Engage in careful and thoughtful rulemaking.

Congress granted the FTC its Magnuson-Moss rulemaking authority so that the agency can target specific prevalent practices that violate Section 5 of the FTC Act. These rules are not meant to mirror the FTC's very broad Section 5 authority. Instead, rules provide much-needed clarity to industry and give the FTC the ability to obtain monetary redress for consumers. And while the Khan Commission's "rule-a-palooza" did not always carefully consider all costs and unintended consequences, this doesn't mean that the FTC should reject rulemaking. Careful, thoughtful rules that reflect the input of all stakeholders can benefit consumers and honest businesses, and we hope to see such rules under Chair Ferguson.

6. Require redress amounts—including in settlements—to be based on principled calculations of consumer harm.

When litigating matters in federal court—especially post-*AMG*—the FTC is required to present a reasonable approximation of consumer harm, based on principled calculations, to recover monetary relief. In consent agreements, however, the experience can sometimes feel less like applying consistent legal principles and more like haggling over a mattress. In recent years, Commission staff has refused to share calculations underlying proposed settlement amounts or staff has based negotiations on total company revenues. Companies face difficult decisions as they consider risking lengthy, costly litigation or accepting a total settlement amount with no explanation or grounding in harm. The rule of law is supported when redress is tied directly to harms.

7. Return to a standard of individual liability that is based on participation in the deceptive conduct, not merely authority to control.

Traditionally, the FTC has named individuals when dealing with small, closely-held companies, where the executive acted as an "alter ego" of the business or where the agency had clear evidence that an executive directly participated and/or directed the unlawful conduct in question. In the early 2020s, however, former Commissioner Chopra spearheaded the effort to hold more business

executives accountable for company activities using an "authority to control" rather than a "participation" theory. Former Chair Khan continued that trend. Such a blanket approach to individual liability is unfairly punitive and often an ineffective deterrent to corporate misconduct. CEOs and other senior executives are not typically involved in the minutia of day-to-day business decisions and thus, in many instances, have little to no knowledge or involvement in the challenged practices. As former Commissioner Wilson noted, "the currently popular (and populist) notion of routinely imposing individual liability appears more consistent with personal vindictiveness and vilification of successful businesspeople than with an objective desire to obtain effective relief and instill effective deterrence." An individual's participation in the challenged practices, balanced against their role in fostering compliance throughout the organization, rather than their "authority to control" the company, is a stronger basis for determining the propriety of individual liability. The question the Bureau should pose to staff should be "are you naming an individual and, if so, why?"—not "are you naming an individual and, if not, why not?"

8. Return to a totality of the evidence standard for health claims made in advertising for dietary supplements.

It is estimated that approximately 77% of Americans take some form of dietary supplement daily, which includes vitamins, minerals, herbal products, and other nutritional supplements. The FTC typically requires claims about the efficacy or safety of these supplements to be supported with "competent and reliable scientific evidence." Traditionally, the FTC's guidance on the issue was clear: there is no single form of evidence that is required to meet the competent and reliable scientific evidence standard. While the FTC has certainly acknowledged that randomized controlled trials (RCTs) are one way to meet the standard, it has also consistently said that "there is no fixed formula for the number or type of studies required." Likewise, the Food & Drug Administration has stated that, while the "gold standard" for substantiation is "randomized, double blind, placebo-controlled trial[s]... trials of this type may not always be possible, practical, or ethical." But, in its 2022 *Health Products Compliance Guidance*, issued without soliciting any public comment, the FTC staff departed from its historic flexible standard and stated, "As a general matter, substantiation of health-related benefits will need to be in the form of randomized, controlled human clinical testing to meet the competent and reliable scientific evidence standard." As we explained at the time, this not only conflicts with the Dietary Supplement Health and Education Act of 1994 (DSHEA), in which Congress intended to ease the regulatory burden on the marketing of dietary supplements, but undermines consumers' choice about their healthcare needs. When it comes to an assessment of health claims made by dietary supplements, the FTC should return to a totality of the evidence standard as contemplated by Congress.

9. Tone down the rhetoric and refrain from casually articulating new interpretations of law.

In recent years, the FTC's rhetoric has taken a turn for the dramatic, maligning lawful business practices in conclusory, critical 6(b) reports, issuing news releases with inflammatory headlines, and announcing new interpretations of the law in blog posts that have had far-reaching implications for businesses. This includes, for example, characterizing lawful interest-based advertising as "commercial surveillance," and, through a blog post, declaring, "Browsing and location data are sensitive. Full Stop." In such a casual manner, the agency seemingly rejected an important business practice and contributor to the economy (and a practice that often is vital for small and medium sized businesses). These informal pronouncements also created significant confusion for many businesses on which exact long-standing practices were now prohibited, and incentivized private litigation against businesses modeled after the FTC's inflammatory statements. We hope to see the

FTC revisit some of these prior pronouncements and clarify the agency's positions.

10. Sunset Commission Orders After 10 Years.

In the ABA's Antitrust Section's Presidential Transition Report: The State of Antitrust Enforcement, submitted prior to the first inauguration of President Trump, the Section commented that 20-year administrative orders "can create a severe burden on companies involved, given the breadth and vagueness of 'fencing in' order provisions as well as burdensome affirmative obligations." The report emphasized that, particularly in areas where technology is rapidly evolving, "order provisions that make sense when they are entered may no longer be appropriate in 10 years, let alone 20 years later, and may serve to chill innovative and useful corporate practices." The report further noted that CFPB orders typically sunset after five years and recommended that the Commission adopt a comparable sunset period for both administrative and district court orders, at least where no extenuating circumstances exist that would justify a longer duration. The FTC should adopt this sensible approach that protects consumers while also not unreasonably hampering innovation. It is not realistic to think that the Commission can draft injunctive relief that will remain relevant and continue benefitting consumers for two decades. This is especially true in today's dynamic marketplace where transformative business models and technology are constantly emerging.