

Statements to the State AGs: CFPB and FTC Priorities for 2023

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At this week's National Association of Attorneys General Capital Forum, FTC Chair Lina Khan and CFPB Director Rohit Chopra addressed state AGs and their staff on a number of pressing issues, including antitrust, enforcement authority, privacy and other priorities. And most importantly to the state AG observers, both agency heads expressed the value of state enforcement authority and partnerships.

Antitrust

Chair Khan noted the FTC is in the process of revising its merger guidelines and ensuring antitrust enforcement is in line with day to day realities. She discussed efforts in hearing from communities through monthly open meetings and, particular to the merger guidelines, listening sessions. Chair Khan also noted both in terms of antitrust issues and echoed throughout her remarks that the FTC is evaluating its toolkit and statutory authority provided by Congress. Here, this included Section 5 in regard to unfair competition in addition to the Sherman and Clayton Acts. She also expressed appreciation for reinvigoration of antitrust enforcement generally, partially stemming from the states, and looking forward to working as "equal partners."

Director Chopra added that his office should reflect on merger settlements of the past and learn from agencies' potential mistakes. Both he and Chair Khan noted that the agencies need to look closely when businesses are proposing something that is problematic or unlawful and instead of working for months to try to fix it, find a different approach.

Enforcement Authority

Director Chopra began his remarks by expressing his feeling that the CFPB "do[es] not have a monopoly on consumer protection" and that the Bureau should be partners in protecting consumers. He especially emphasized concerns regarding recidivism, with fines acting as merely a cost of doing business for some players in the marketplace. He believes if states and federal agencies work together and use each other's authority, they can achieve more. He specifically noted that states have authority concurrent with the CFPB's, and the ability to achieve a good result is strengthened when they work together earlier in an investigation. Director Chopra also said states can access the CFPB's victim relief fund in certain cases, another incentive for states to work with the Bureau. Finally, he pointed out the typical benefits of collaborative efforts among states and agencies, namely that they can combine expertise and resources to tackle difficult issues.

Chair Khan discussed the FTC's renewed approach to looking into its toolkit, as noted above. One of these tools is looking upstream and aiming at the source of issues and facilitators, rather than solely

playing “whack-a-mole.” She also stated that the FTC has begun to focus on codifying rules and using rulemaking to obtain civil penalties and deter companies from unfair and deceptive practices, as well as applying notices of penalty offense authority. In addition, Chair Khan noted her desire to future-proof the FTC’s work, noting that with digital marketplaces in the past, the agency took a more hands-off approach to allow for innovation, while in her view innovation may actually require more nimble and intense scrutiny. She also stated that the FTC has been internally increasing its capacity for understanding complicated issues such as automated decision-making to help with their enforcement efforts. Chair Khan noted states are one of the important parts of the toolkit that the FTC is cultivating, and while there was already incentive to work together, the *AMG* decision underscored how state partnerships help maximize relief for Americans subject to unlawful behavior.

Both agency heads noted that they are increasingly naming individuals and executives as an additional deterrence against recidivism. Chair Khan emphasized codifying new rules in the areas of [earnings claims](#), [imposter scams](#), and [reviews](#) will give additional penalty authority for the agency and remediation for consumers. Similarly, Director Chopra shared concerns about “cracking down” on fake review fraud and limiting what he termed abuse of Section 230 by large review platforms claiming protection from enforcement.

Privacy

Both Chair Khan and Director Chopra expressed concerns about collection and use of data, including in automated decision-making.

Director Chopra noted concerns that the US could follow China in terms of payment systems being dominated by social media platforms, and that data use by the financial system is increasingly important as firms seek to obtain and use transactional data. He further warned that states should watch out for preemption, including in the role of data protection, and pointed out that the CFPB recently released an analysis showing the states are not preempted under the Truth in Lending Act.

Chair Khan, repeating the recidivism concerns, argued that firms are paying data breach fines as a cost of doing business and looks to promote data security practices and map out the whole ecosystem of harms. She expressed concern that behavioral advertising is “vacuuming up” consumer data and that data practices are harder to police, and is looking at the incentives leading to such practices. Chair Khan discussed that the FTC is taking a closer look at COPPA, currently revisiting an existing provision that prevents companies from blocking children’s access to services without providing certain data, if the data is not reasonably necessary. She looks forward to the future beyond notice and consent in privacy enforcement, and is interested in the strong proposals and statutes from a variety of states.

Other Priorities

Director Chopra noted a desire for technology to give consumers more rights to change their banking service and refinance loans, given rising costs and interest rates, including auto loans. He was concerned that “junk” fees are an issue where customers are not able to appreciate their full costs until they may be too late in a given transaction.

A Look Ahead

While many of the priorities are themes that Chair Khan and Director Chopra have expressed throughout 2022, their strong overall message that states should not only adopt those same priorities and work closely with these federal agencies was noteworthy. While there was certainly

collaboration throughout the past year, state AGs have historically partnered with those agencies in certain areas and undoubtedly will continue to do so. However, states are more likely to use their state law-based tools (such as unfair and deceptive trade practice or privacy-specific laws) in areas such as privacy enforcement. We will continue to monitor enforcement trends to see if the federal agencies' push for more collaboration (as well as the passage of the [FTC Collaboration Act of 2021](#)) will result in an uptick in joint state/federal enforcement.