

BACK TO BASICS: ACTING CHAIRMAN MAUREEN K. OHLHAUSEN PRESENTS NEAR-TERM FTC REFORMS

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On February 2, 2017, President Donald Trump's newly-minted Acting Chairman of the Federal Trade Commission, Maureen Ohlhausen, provided the Opening Keynote at the American Bar Association's 2017 Consumer Protection Conference. In her remarks, Acting Chairman Ohlhausen proposed a trio of reforms for the FTC in relation to its protectionism. The full text of her remarks can be found on the [FTC's website](#).

Re-focusing on fraud enforcement. While acknowledging that fraud enforcement cases rarely forge new legal ground or make headlines, Acting Chairman Ohlhausen emphasized the continued importance of such "bread-and-butter" actions in defending consumers and assisting legitimate business owners harmed by fraudulent conduct.

Addressing concrete consumer injury in enforcement actions. Speculative injury and subjective harm should not inform the FTC's enforcement priorities. Rather, the FTC should focus enforcement on matters where consumers are actually injured or likely to be injured, or where companies fail to keep their promises, to the consumer's detriment. Specifically, cases with objective, concrete harms such as monetary injury and unwarranted health and safety risks should remain priority.

Acting Chairman Ohlhausen noted that, historically, focus on these sorts of cases has been important to the FTC's success in alleviating consumer harm without disrupting innovation. Citing the FTC's settlement with [Nomi](#) as an example of a recent decision in the privacy sphere that discouraged anything but minimal compliance by business, the Acting Chairman concluded that such compliance disincentives ultimately leave consumers worse off. Similarly, in a number of recent advertising substantiation cases, the FTC required substantiation standards more strict than necessary, thereby potentially banning truthful claims and harming consumers. "Hawkish" FTC advertising substantiation enforcement actions that "overprotect" consumers by depriving them of useful information, although well intentioned, in Acting Chairman Ohlhausen's view, ultimately harm consumers. Requiring appropriate levels of substantiation for advertising claims allows the FTC to protect consumers from deceptive advertising and ensures that consumers get the information they need to make purchasing decisions.

Acting Chairman Ohlhausen also observed that consumer protection cases must seek and obtain for consumers relief that is tied to consumer injury. In several recent cases, rather than seek to remedy consumer injury, the FTC has pursued disgorgement, even though the behavior in issue was not fraudulent. This departs from prior Commission practice and has subjected parties to threats of payments disproportionate to any consumer harm. Citing the FTC's recent US\$20 million monetary settlement with [Uber](#) as an example, the Acting Chairman noted that the settlement was not only untethered from consumer harm but was an order of magnitude higher than the FTC's best evidence of such harm.

Reducing regulatory burdens and increased transparency for businesses. Reviewing and streamlining information requests was identified by the Acting Chairman as a third important way to protect consumers while reducing burdens on legitimate business. Citing the [ABA Antitrust Section's Presidential Transition Report](#), Acting Chairman Ohlhausen noted a recent trend highlighted within the Report towards generic and overbroad document and other information requests. The Acting Chairman acknowledged that such requests impose large compliance costs on legitimate companies. While the FTC must remain able to collect the information needed to enforce the law, it must do so while reducing the burden on businesses, particularly third parties who are not under investigation.

These newly articulated FTC objectives in the consumer protection sphere – to avoid hindering market-generated consumer benefits; to better analyze the costs and benefits of using enforcement and other tools; and to consider the potential unintended consequences of regulatory actions – raise interesting questions from an enforcement trends perspective. If it rains in the United States, will it pour in Canada? What impact, if any, will the proposed FTC re-focus have on Canada's enforcement agencies such as the Competition Bureau and the CRTC?

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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