



THE FTC AND FRANCHISING

By David Koch and Lee Plave, Plave Koch PLC



Lina Khan (D)
Federal Trade Commission,
Chair



Alvaro Bedoya (D)
Federal Trade Commission,
Commissioner



Andrew Ferguson (R)
Federal Trade Commission,
Commissioner



Melissa Holyoak (R)
Federal Trade Commission,
Commissioner



Rebecca Kelly Slaughter (D)
Federal Trade Commission,
Commissioner

The past few years have seen a surge of activity at the Federal Trade Commission, the federal regulator of franchising.

The activity has not yet translated into anything specific to the franchise sector, but there are reasons to remain on alert.

In March 2024, the U.S. Senate confirmed President Biden's nomination of Republicans Andrew Ferguson and Melissa Holyoak to serve as commissioners. They will serve together with Chair Lina Khan, Commissioner Alvaro Bedoya, and Commissioner Rebecca Kelly Slaughter, who was simultaneously approved for a new term. By law, no more than three of the five FTC

commissioners can be from the same party. After operating with three Democratic commissioners and two empty seats for nearly a year, the FTC now has a full complement of five Commissioners. This may change the pace of FTC deliberations, but it is unlikely to change the agency's policy direction.

By and large, the policy direction since Chair Khan's appointment in the summer of 2021 has followed "key principles" she laid out in a memo to the FTC staff in September 2021. These principles included

"recognizing that antitrust and consumer protection violations harm workers and independent businesses as well as consumers," "focusing on power asymmetries and the unlawful practices those imbalances enable," and "focusing on structural incentives that enable unlawful conduct — be it certain conflicts of interest, business models, or structural dominance — as well as looking upstream at the firms that are enabling and profiting from this conduct."

On the consumer protection side, the FTC has vastly ramped up its rulemaking efforts. By virtue of a U.S. Supreme Court decision in April 2021, the FTC lost what had been its primary tool to recover money in enforcement actions in court. To fill the vacuum, the FTC has been busy proposing new trade regulation rules — because the FTC has clear authority to recover money for rule violations.

In areas of special interest to the franchise sector, several matters are before the FTC:

- **The RFI.** The FTC's "Request for Information" (RFI), initiated in 2023, asked for a volume of information about franchising and resulted in the submission of over 5,000 comments. We understand that the FTC staff is reviewing those comments and may ultimately issue a report. The question is whether the report would lead to proposed changes in the Franchise Rule — or maybe even to the proposal of a new regulation governing the franchise relationship. If the FTC used its rulemaking authority to adopt limitations on the franchisor-franchisee relationship, that position would likely be challenged in court with the allegation that the FTC overstepped its authority.
- **The Non-Compete Rule.** In January 2023, the Commission proposed adopting this far-reaching regulation, which would apply in the employer-employee context. In doing so, the FTC took the controversial position that it has the power to make rules under the "unfair methods of competition" part of the FTC Act. As proposed, the Non-Compete Rule would not apply to franchise agreements, but the FTC specifically sought comment on whether it should expand the proposal to cover the franchisor-franchisee relationship. If the FTC were to do so, it would be unprecedented and undoubtedly provoke a vigorous challenge in court from the IFA and others. But even if the Non-Compete Rule remains limited to employer-employee relationships, the franchising community should pay close attention to how the FTC fares with its claim of "unfair methods of competition" rulemaking

power. If the FTC succeeds, the Non-Compete Rule surely will not be the last use of that power.

- **The Franchise Rule.** By its own calendar, the FTC is supposed to periodically review and consider revisions to all of its regulations on a ten-year cycle. The purpose of that review is to consider whether there have been changes in the industry, the economy, the law, or other factors that bear on whether to amend, retain, or even rescind a regulation. The Franchise Rule was last amended in March 2007, and so the once-a-decade review should have been completed years ago.

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The Commission conducted online public workshops in November 2020 to explore various issues relating to the Franchise Rule. There were three such workshops held at that time, followed by the public submission of comments to the FTC.

These steps produced no detectable momentum toward updating the Franchise Rule. The process for amending the Rule would require following the standards set by the Magnuson-Moss Warranty — Federal Trade Commission Improvement Act of 1975, and that process requires patience. Under that process (usually called a "Magnuson Moss Rulemaking"), the Commission would have to start by issuing a staff report, then issuing an Advance Notice of

Proposed Rulemaking (followed by a public comment period), a review of those comments, then issuing a Notice of Proposed Rulemaking (and a public comment period), a review of those comments, and then the final issuance of amendments to the Franchise Rule. Given these hurdles, the FTC's interest in "unfair methods of competition" rulemaking — a different path — is probably no coincidence.

The NLRB Collaboration. Finally, consider the FTC's 2022 Memorandum of Understanding with the National Labor Relations Board, the agency chiefly responsible for launching the "joint employer" debate. Although the MOU does not identify the joint employer issue as an "area of mutual interest" for the two agencies, it names several others, such as "the imposition of one-sided and restrictive contract provisions, such as noncompete and nondisclosure provisions" and "the ability of workers to act collectively" and "the classification and treatment of workers." This not only verifies Chair Khan's 2021 policy objectives, but also makes it easy to predict how the current commission would view joint employer and employee/independent contractor issues in the context of franchising.

Time will tell whether the FTC will play a more active role in regulating the franchise sector over the next few years. Stay tuned: in Washington, nothing should be taken for granted. ☞



Dave Koch and Lee Plave are co-founders of the law firm Plave Koch PLC,

just outside of Washington, DC. Dave and Lee both began their careers at the Federal Trade Commission. Dave served in the Bureau of Competition and as an Attorney Advisor to Chairman Daniel Oliver. Lee worked as an enforcement attorney in the Bureau of Consumer Protection on the Funeral Practices Rule and as Rule Coordinator for the Used Car Rule. For more information about IFA supplier member Plave Koch, please visit franchise.org/suppliers/plave-koch-plt.