

FTC Bureau of Consumer Protection Creates New Mechanism for Industry Input on FTC Rules

The Federal Trade Commission's Bureau of Consumer Protection has created a new process that could provide businesses and other stakeholders with a meaningful avenue for raising concerns about the FTC's consumer protection rules.

The premise is straightforward. If an FTC rule is unclear, conflicts with another legal requirement, or otherwise presents a significant problem, the agency should know about it. The new BCP Rule Guidance Program provides a formal mechanism for bringing those issues to the Bureau's attention.

The program is unusual because the Bureau is not merely inviting questions about how to comply with its rules. It is inviting stakeholders to identify potential problems with the rules themselves.

The Bureau says it wants to hear about genuine ambiguities, substantive conflicts with existing statutes or other FTC rules, and other significant issues. It also expressly says that stakeholder input can help it identify rules that are unnecessary or confusing or that do not benefit consumers or the marketplace.

That could make the program particularly interesting to consumer financial services companies and trade associations that routinely encounter regulatory provisions whose application is uncertain or whose requirements may have become difficult to reconcile with subsequent developments in the law or marketplace.

How the Program Works

The process is relatively simple. A stakeholder uses the Bureau's online "[Submit an Issue for Consideration](#)" form, identifies the particular Commission rule involved, and explains the issue. The Bureau asks the submitter to identify specific portions of the rule and provide the context in which the problem arises.

The Bureau will then decide whether the issue warrants a response. If it determines that a rule contains a genuine ambiguity, creates a substantive conflict with an existing statute or another rule, or presents some other significant issue, the Bureau may issue guidance. The Bureau retains discretion over whether and when to address a submitted issue.

The resulting guidance will be made public. The Bureau explains that publishing its responses will enable the entire public to benefit from them and will enhance transparency and understanding of FTC requirements.

What the Program Is and Is Not

The program should not be viewed as a substitute for a formal FTC advisory opinion, governed by FTC Rules 1.1-1.4, 16 C.F.R. 1.1-1.4, or as a way for a company to obtain an FTC blessing for a particular compliance practice.

The Bureau will not respond to questions that can be answered simply by reviewing the text of the rule, existing plain-language FTC guidance, or a formal advisory opinion. It also will not interpret performance-based standards such as “clear and conspicuous,” which the Bureau says have established meanings in case law that businesses and their counsel must apply themselves.

Nor will Bureau guidance relieve a business of its own legal or compliance responsibilities. The Bureau expressly states that guidance issued through the program is not binding on the Commission or the public. The distinction is important. The strongest submission under this program is clearly not:

“Here is what our company wants to do. Is it permissible under the rule?”

Instead, it is more likely to be:

“Here is a specific problem with the rule itself. The language is ambiguous, for the following reasons [specify the reasons]. The rule conflicts with a statute or another rule as follows. [Identify the other statute and rule and elaborate on the nature of the conflict]. Or the rule creates a significant problem that cannot reasonably be resolved by existing guidance, as follows [elaborate on the problem and why it cannot be resolved].”

Why the Program Could Be Significant

The most interesting aspect of the announcement may be the Bureau’s willingness to hear arguments that the problem lies with the regulation rather than with the regulated entity’s compliance efforts.

The Bureau expressly acknowledges that some Commission rules may be unnecessary or confusing and may not benefit consumers or the marketplace. That creates an opportunity for industry to raise issues that otherwise might never reach the agency in a formal proceeding. For example, a stakeholder might identify a situation in which:

- An FTC rule appears to conflict with a subsequent statutory amendment;
- Two FTC rules impose requirements that are difficult or impossible to reconcile;
- The language of a rule is susceptible to materially different interpretations;
- Technological or marketplace developments have rendered an existing requirement ambiguous or impractical; or
- A provision has consequences that appear inconsistent with the statutory purpose underlying the rule.

These are fundamentally different questions from asking the FTC to explain what a familiar regulatory standard means.

An agency response to such a submission could potentially benefit an entire industry.

Will the Submission Be Public?

The FTC's announcement raises an important question that businesses should consider before using the Program: What happens to the submission itself?

The Bureau clearly states that guidance it issues in response to a submission will be made public. But the announcement does not say that every submission will automatically be posted publicly.

That distinction matters. A company could submit a question and receive no response. It could submit a question that the Bureau determines does not meet the criteria for the Program or the Bureau could decide to issue guidance based on the submission.

The FTC has not said that all of those underlying submissions will automatically be placed on a public website or even that submissions that elicit guidance will automatically be made public, as is the case under FTC Rule 1.4. 16 C.F.R. 1.4. with requests for formal advisory opinions. But that should not lead companies to assume that submissions are automatically confidential.

While Section 6(f) of the FTC Act, 15 U.S.C. 46(f), protects trade secrets and confidential commercial or financial information that the FTC obtains from businesses when conducting investigations or requiring the submission of reports or written answers to specific questions, and when investigating compliance with antitrust decrees and violations of antitrust statutes, it may not be applicable here.

Moreover, the FTC is subject to the Federal Freedom of Information Act (FOIA), and FTC materials explain that agency records generally must be disclosed unless a statutory exemption applies. Among the exemptions is FOIA Exemption 4, which protects trade secrets and confidential commercial or financial information obtained from a person.

Thus, a prospective submitter should consider carefully what information it provides and what confidentiality protections, if any, may apply. It should take a close look at FTC Rule 4.9(c), 16 C.F.R. 4.9(c), the FTC's general rule for confidentiality, as well as FTC Rule 4.11(b), 16 C.F.R. 4.11(b), the FTC's rule for disclosure to Congress, FTC Rule 4.11(c), 16 C.F.R. 4.11(c), the FTC's rule for disclosure to federal and state law enforcement agencies, and FTC Rule 4.11(d), 16 C.F.R. 4.11(d), the FTC's rule for disclosure to federal and state agencies for purposes other than law enforcement.

In that regard, the FTC advises persons providing confidential information to identify the information as confidential at the time of submission and to identify the protected material as precisely as possible.

Thus, the better conclusion is not that a Program submission is automatically public or automatically confidential. Rather, a prospective submitter should assume that the submission becomes part of an FTC record and should determine in advance what confidentiality protections are available for the particular information being submitted. That is an issue that the FTC might want to address more explicitly as the Program develops.

Why Might a Company Decide Not to Use the Program?

The potential benefits of the Program are substantial, but there are also several reasons why a company might decide not to submit an issue.

First, a submission could give the FTC a roadmap to a company's compliance practices. To explain why a rule is ambiguous or problematic, a company may have to describe how the rule applies to its business model. That explanation could reveal products, practices, contractual arrangements, marketing approaches, or compliance positions that the FTC or its competitors otherwise would not know about.

Second, the company could receive an answer it does not want. A company may believe that a rule reasonably permits two different interpretations and submit the issue hoping that the Bureau will endorse its preferred interpretation. The Bureau could instead conclude that the less favorable interpretation is correct.

The problem becomes more significant because the Bureau intends to make its guidance public. An unfavorable interpretation will therefore become available not only to the submitter but also to competitors, plaintiffs' lawyers, state regulators, and other interested parties.

Third, a submission could cause the Bureau to focus on an issue that it had not previously considered. Sometimes regulatory ambiguity can be managed without attracting regulatory attention. By submitting the issue to the FTC, a company may transform a relatively quiet compliance question into an issue being actively considered by federal regulators.

Fourth, the Bureau has not promised that it will answer every submission. The Bureau retains discretion to determine whether and when an issue warrants a response. A company therefore could assume the potential risks associated with explaining its position to the FTC without receiving a definitive answer in return.

Fifth, the resulting guidance will not provide a safe harbor. The Bureau expressly states that its guidance is not binding on the Commission or the public. A company should therefore not assume that obtaining a favorable response eliminates all potential enforcement or litigation risk.

A Particularly Important Consideration for Trade Associations

The program may therefore be more attractive in some circumstances to trade associations than to individual companies.

A trade association may be able to identify an issue affecting a large number of members without revealing the compliance practices of any particular member. It also may be able to demonstrate that the problem is systemic rather than peculiar to one company's business model.

That could produce a better submission and reduce some of the risks associated with a company-specific disclosure. For example, instead of describing one member's particular product and asking whether its practices comply with an FTC rule, an association could identify a structural ambiguity in the rule that affects an entire category of businesses. The distinction could be important.

A company-specific question can look like a request for an advisory opinion. An industry-wide question about a defect in a regulation is much closer to what the new Program appears designed to address.

The Program Could Become a Valuable Regulatory Tool

Despite these concerns, the Program is potentially significant. Regulated businesses frequently encounter regulatory requirements that are difficult to reconcile with other requirements, statutes, technological developments, or actual marketplace practices. Until now, the available mechanisms for addressing those problems have often required a company to seek an advisory opinion, petition for a rulemaking, participate in a formal rulemaking proceeding, or simply accept the uncertainty. The new program provides another option.

It also represents an important change in tone. The Bureau is expressly inviting the regulated community to identify rules that may themselves be problematic. That reflects an approach to regulation in which the agency recognizes that listening to regulated parties can improve the regulatory system.

But the program should be approached strategically. Before submitting an issue, a company should consider at least four questions:

1. Can the problem be described without revealing sensitive information about the company's business or compliance practices?
2. Is the issue genuinely a problem with the rule rather than simply a question about how the company should comply?
3. What happens if the Bureau adopts an interpretation that is unfavorable to the company or industry?
4. What confidentiality protections will apply to the information being submitted?

Those questions should be considered before, not after, the submission is made.

Conclusion

The Program is an intriguing development in the FTC's approach to regulation. It gives industry a formal channel for telling the Bureau that a rule may be ambiguous, internally inconsistent, inconsistent with another FTC rule or federal statute, or otherwise problematic. The program's ultimate value will depend on how the Bureau uses it and how willing businesses and trade associations are to use it.

As noted, businesses should view the Program as an additional regulatory tool, not as a risk-free opportunity to obtain free legal advice from the FTC.

In appropriate circumstances, a carefully framed industry-wide submission could produce valuable clarification for an entire marketplace. In other circumstances, however, the better

course may be to resolve the issue internally and avoid giving the FTC information that could result in an unfavorable public interpretation or unwanted regulatory scrutiny.

The new program is therefore potentially valuable, but companies should think carefully before pressing the “[Submit](#)” button.