

**Federal Trade Commission
Office of Inspector General**



**Most Serious Management Challenges Facing
the Federal Trade Commission**

OIG Report No. OIG-18-04 September 27, 2018





Office of Inspector General

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

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MEMORANDUM

FROM: Andrew Katsaros
Acting Inspector General

TO: Joseph J. Simons, Chairman

SUBJECT: FY 2018 OIG Report on the FTC's Most Serious Management Challenges

The *Reports Consolidation Act of 2000* requires that each agency's Inspector General provide an annual summary perspective on the most serious management and performance challenges facing the agency, and a brief assessment of the agency's progress in addressing those challenges. The challenges summarized in this document are based on work conducted by the Office of Inspector General (OIG) along with observations and discussions with senior leaders at the Federal Trade Commission (FTC).

In Section I, the OIG has identified the following issues as the most serious management challenges currently facing the FTC.

1. Securing Information Systems and Networks from Destruction, Data Loss, or Compromise
2. Addressing the Escalating Costs of Expert Witnesses

Section II is a "Watch List" of the following issue areas that do not rise to the level of serious management and performance challenges, but nonetheless require management's continued attention.

1. Development of a Risk Management Framework in Support of FISMA (formerly Maturity of the Agency's Information Technology Governance Process)
2. Acquisition Planning and Contract Management
3. Improper Influences by Former Officials and Employees

We provided a draft of this report to FTC management, whose comments have been incorporated into this final version.

We appreciate FTC leadership's ongoing support for the OIG, and we will continue to work with you in addressing these and other challenges the FTC faces in achieving its vital mission.

Attachment

I. FTC's Most Serious Management Challenges

1. Securing Information Systems and Networks from Destruction, Data Loss, or Compromise

The ability to protect its information assets is a complex challenge for the FTC. Technology is advancing at an increasing rate, introducing different vulnerabilities as the FTC integrates new technologies (e.g., cloud and mobile computing) into its Information Technology (IT) infrastructure.

As reported in our fiscal year (FY) 2017 Federal Information Security Modernization Act of 2014 (FISMA) evaluation,¹ the OIG assessed that legacy systems remained effective in providing protection for FTC information assets; however, our assessment showed vulnerabilities in each of the five Cybersecurity Framework Function areas. As a result, the OIG continues to report on securing the FTC's information systems as a management challenge, as we have for more than a decade.

The FTC is continuing to address two significant areas of risk – legacy IT and availability of cybersecurity personnel. These risks are both identified in the May 2018 Office of Management and Budget's (OMB) [*Federal Cybersecurity Risk Determination Report and Action Plan*](#). The report recognized that “[t]wo of the most significant areas of risk that were identified in agency assessments were the abundance of legacy information technology (IT), which is difficult and expensive to protect, as well as shortages of experienced and capable cybersecurity personnel.” The agency must maintain the integrity and availability of its information assets as it modernizes its systems, reorganizes its information technology support staff, responds to new security requirements, and provides reliable mission support. Successfully addressing these areas of risk will require the continued attention of senior and executive management.

The FTC will also need to mitigate its IT risks by fully integrating privacy controls into security controls, thereby creating a consolidated and unified set of controls. This will include incorporating new, state-of-the-practice controls based on threat intelligence and empirical data, including controls to strengthen cybersecurity and privacy governance and accountability, as identified in National Institute of Standards Technology (NIST) Special Publication 800-53, *Security and Privacy Controls for Information Systems and Organizations*.²

Agency Progress in Addressing the Challenge

At a high level, the FTC is currently executing its Information Resources Management (IRM) Strategic Plan for Fiscal Years 2018 – 2022. This plan collectively supports the strategies outlined in the FTC's Strategic Plan for the same period and includes migrating to services received through commercial cloud offerings or a federal shared service provider. Once services are migrated, the FTC will decommission the associated legacy infrastructure.

¹ *OIG Independent Evaluation of the Federal Trade Commission's Information Security Program and Practices For Fiscal Year 2017*, dated Feb. 27, 2018, p.2.

² Draft NIST SP 800-53 Revision 5.

In FY 2018, the FTC awarded a blanket purchase agreement to continue its IT modernization and upgrade and enhance on-premise services. The FTC has informed the OIG that it monitors these activities on at least a monthly basis and shares summaries of progress on high priority activities with the agency's Senior Management Council and Enterprise Risk Management teams. The agency also deployed a litigation review service to perform mission critical litigation activity with a cloud vendor. Further, the FTC has informed us that it has migrated its security and network services to a shared service provider and, in preparation for its cloud services implementation, upgraded (1) userid security practices, (2) end user equipment (laptops), and (3) email and storage.

2. Addressing the Escalating Costs of Expert Witnesses

The FTC is challenged with rising costs for expert witness ("expert") contracts and must actively manage its investigative and litigation resources. Overcoming this challenge will be critical as the agency pursues larger and more complex cases.

With respect to the Bureau of Competition, it has seen a 14 percent increase in the annual number of Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR) merger transactions since FY 2015.³ In performing the dual missions of competition and consumer protection, the FTC utilizes the services of expert witnesses when required skillsets are not readily available within the agency.

Many FTC cases involve complex facts and well-financed defendants, requiring outside experts, which can be costly. As a result, the FTC faces higher costs to obtain the kinds of outside experts needed to support these cases. In recent years, the FTC has experienced a significant increase in expert witness costs. According to the FTC, funds spent on expert witnesses from FY 2012 to FY 2014 averaged \$6.5 million annually. From FY 2015 to FY 2017, the average annual cost for expert witness spending averaged \$16.9 million annually. Through the 3rd quarter of FY 2018, the FTC had already obligated \$17.7 million.

A portion of the increase relates to current economic conditions that drive an increase in the number of HSR merger transactions. In FY 2017, 2,052 merger transactions were reported to the FTC, representing about a 12 percent increase from the 1,832 transactions reported in FY 2016.⁴ The number of merger transactions is estimated to exceed 2,000 again in FY 2018. Evolving technologies, automation, and intellectual property issues continue to increase the complexity of antitrust investigations and litigation. This complexity, coupled with significant complaints of harmful business practices and fluctuations in merger activity, makes it hard to anticipate future FTC investigative and litigation requirements, adding to the even greater difficulty of projecting costs to specific cases.

Expert witness spending is greatly affected by the scope and disposition of federal and administrative court challenges. For example, according to the FTC, the Commission issued eight federal and administrative court complaints in FY 2017, seven in FY 2016, and four in FY 2015. Nevertheless, all

³ HSR, together with Section 13(b) of the Federal Trade Commission Act and Section 15 of the Clayton Act, enables the FTC and the Antitrust Division of the Department of Justice to obtain effective preliminary relief against anticompetitive mergers, and to prevent interim harm to competition and consumers.

⁴ The term "transaction" does not refer only to individual mergers or acquisitions. A particular merger or acquisition may be structured such that it involves more than one filing that must be made under HSR.

three years generated substantial expert witness spending, driven by the scope of the individual litigations and the fact that several litigations continued through federal or administrative hearings. In the FTC's estimation, the unpredictability of this mix of scope and disposition presents the greatest challenge to projecting costs for the expert witness program.

The uncertainty provided by the economic environment, other aspects driving HSR merger transactions, and the unpredictable course of FTC cases make the management of litigation costs complicated. In order to meet the strategic objectives of the FTC, it will be critical that investigative and litigation resources are effectively managed. The increasing costs of litigation associated with investigations and cases may influence the number of HSR antitrust enforcement and consumer protection cases pursued.

FTC leadership continues to identify practices and other efficiencies to alleviate these potential resource limitations. FTC leadership is exploring a combination of options, including requests for additional funding. In its FY 2019 Congressional Budget Justification, the FTC identified needs for an additional \$3.4 million to cover the increasing costs of expert witnesses associated with investigations and litigation.⁵

The Commission has examined the use of different contract vehicles or funding structures. This includes options to acquire expert services later in the process or adjusting the negotiating strategy. The FTC has explored the possibility of using firm-fixed price contracts to limit contracting costs. Currently, the Commission awards expert contracts using time and material pricing, which places all the risk on the government and does not promote the efficient use of contract funds. The FTC is also developing capabilities to provide enhanced projections of expert witness costs. This involves examining the nature of ongoing cases and gathering data to anticipate costs (e.g., heavy data driven cases or cases requiring large teams of experts).

The Commission utilizes internal personnel as expert witnesses when practical. However, the opportunities to use internal personnel as experts are limited. The knowledge required is often highly specialized, and it takes years of education and professional practice to develop the unique skillsets required. Additionally, due to the nature of the work, it is imperative that experts remain clear of the perception of bias or other conflicts. Due to these and other concerns, the FTC would potentially have a limited pool of internal personnel that could serve in an expert witness role. To develop the unique expert witness qualifications on a wide basis would be administratively burdensome and would stress the limited bandwidth of the Commission.

Agency Progress in Addressing the Challenge

The FTC's Senior Management Council has identified the escalating costs of expert witnesses as one of the top risks to the agency and has included it on the FTC's Risk Portfolio. In light of this complex management challenge, the FTC continues to identify and implement strategies and controls to mitigate the risk to the agency without sacrificing the quality of expert testimony or reducing the number of enforcement actions. These strategies focus on:

- more effective competitive bidding;

⁵ *Federal Trade Commission Fiscal Year 2019 Congressional Budget Justification*, p.3.

- exploring opportunities for greater use of in-house economists as experts in enforcement actions;
- working with less expensive outside experts and consulting firms, while still obtaining quality work to support its enforcement actions;
- alternative contract structures to incentivize outside experts and consulting firms to complete their work in a more cost-effective manner; and
- closer monitoring of the work performed by outside experts and consulting firms.

These efforts are expected to work alongside a stringent approval process for when expert witness funding requirements exceed base budgetary funds. FTC management also continues to pursue additional resources through the budget process.

II. Agency Watch List

The OIG has established a Watch List, which incorporates issues that do not meet the threshold of a serious management or performance challenge. These issues, in the OIG's view, still warrant attention and vigilance by agency officials.

1. Development of a Risk Management Framework in Support of FISMA (formerly Maturity of the Agency's Information Technology Governance Process)

The FTC directly recognizes the importance of a risk management framework in aligning IT services with agency priorities, and in ensuring that risk-based decisions are managed at the appropriate level, as communicated in Goal 4 of the FTC's IRM Strategic Plan - *Improve the IT environment through the maturation of IT governance and accountability*. Effective use of the framework is necessary to ensure that IT activities support agency strategies and objectives.

In our FY 2017 FISMA evaluation, using a model established by the Council of Inspectors General for Integrity and Efficiency with five levels of maturity⁶ for each functional area,⁷ we assessed four of the five functional areas as Defined (level 2) and only one as Consistently Implemented (level 3). This demonstrated a decline in two of the five functional areas (Identify and Respond) and no improvement in the other three (Protect, Detect, and Recover). The OIG identified vulnerabilities and areas of weakness in the FTC's information security program and developed recommendations for their mitigation, with nine recommendations within three of the five CyberScope cybersecurity functions. FTC has begun to address these conditions as noted below.

Agency Status

FTC Management has given attention to documenting its implementation of the Risk Management Framework. Resulting activities include the designation of Policy Management Authorities, the

⁶ The five levels of maturity (Level 1: Ad-hoc, Level 2: Defined, Level 3: Consistently Implemented, Level 4: Managed and Measurable, and Level 5: Optimized) are identified in the *FY 2017 Inspector General Federal Information Security Modernization Act of 2014 (FISMA) Reporting Metrics, V 1.0*, dated Apr. 17, 2017.

⁷ The five functional areas (Identify, Protect, Detect, Respond, and Recover) are identified in Version 1 of the National Institute of Standard and Technology's *Framework For Improving Critical Infrastructure Cybersecurity*, dated Feb. 12, 2014.

creation of IT advisory councils, and the development of an IT risk register. This contributed to a three-tiered governance structure through which IT risks and decisions are filtered. This structure was presented to and vetted by stakeholders throughout the agency, including the Chairman and IT Governance Board members.

In the past year, the Office of the Chief Information Officer (OCIO) has also made several specific improvements within its IT governance program. For example, it updated and replaced the *FTC IT Governance Program Charter* with the *Information Technology Governance Administration Policy*. The office also updated its Business Case Analysis template to align with requirements set in applicable Federal guidance, including OMB Circular A-130 and OMB Circular A-11. OCIO further updated several key policies and procedures, including the IT Program Plan Procedure, to better manage, identify, and escalate project risks and issues.

The FTC is also moving toward a risk-based model as it improves its information security and privacy programs. It initiated a project in November 2017 to revise its policies, procedures, and related documentation to reflect a risk-based approach to decision-making in accordance with updated guidance for A-130 and A-123. The agency also: provided a Senior Management Council Charter that describes both the scope and purpose of the governance program and the roles and responsibilities of the members; revised the Information Technology Governance Administration Policy of the Administrative Manual; issued the FTC Information Technology Modernization Risk Assessment; and issued the FTC Enterprise Risk Management Profile.

Because of the continuing work required in this important area, we will maintain the agency's risk management framework on the OIG watch list as an issue that warrants continued attention from agency officials.

2. Acquisition Planning and Contract Management

It is necessary for FTC leadership to prioritize resources in support of the acquisition function to meet many of the Commission's most critical needs. The FTC obtains contract support for a wide array of agency needs. Contractors contribute many essential services, playing vital roles in the maintenance of databases, legal research, and expert witness services. On an annual basis, the Commission obligates approximately 20% of the total fiscal year budget on contracted services. In FY 2017, the FTC obligated about \$70.1 million for contracted good and services. In FY 2016, the FTC obligated \$81 million on contracts.

Given the current economic and budgetary environment, the FTC cannot expect substantial increases in funding. The Commission must ensure effective acquisition of goods and services to meet mission needs. Implicit in accomplishing this objective is having consistent, flexible acquisition practices that ensure that goods and services are available when needed. The FTC's dependence on contractor support will continue to grow as the need for expert witnesses expands with an anticipated increase in economic activity. Ever-increasing IT requirements will also contribute to budgetary angst as the FTC seeks to enhance capacity with more resilient systems and services.

A shortage of key acquisition officials, namely Contracting Officers, combined with a demanding

volume of procurements and tight-deadlines, creates the potential for acquisition delays or contracts with material flaws. The lack of a stable cadre of acquisition professionals with strong institutional knowledge and a nuanced understanding of the FTC's contracting needs will likely be the most formidable challenge facing management in the contracting arena.

Currently, the FTC does not have existing policy or a documented process addressing the legal review of contract acquisitions. As a result, although legal reviews may be performed on relevant acquisitions, the FTC has no assurance that these will be done routinely and consistently. This can leave the Commission open to costly disputes, protests, delays, and litigation arising from procurement actions. It is common for federal agencies to establish and implement a process of legal review with documented policies, including policies addressing conditions that would require a legal review to be conducted on a contract procurement. Examples of these conditions include high dollar value procurements (e.g., all awards exceeding \$100,000), contract termination actions, and pre- or post-contract award issues in bids or offers. The Commission has not communicated a practicable business purpose (e.g., costs outweigh the benefits) for the absence of a systematic process of legal review.

The Acquisitions Division has made vast improvements in the development and implementation of a system that supports compliant acquisition practices. Over the past three years, the Acquisitions Branch has made significant advancements to the overall acquisition planning, procurement support, and available guidance to program offices. The Acquisitions Division has updated its policies and procedures to ensure compliance with the Federal Acquisition Regulation ("FAR"), provided tools and templates to guide program offices throughout the procurement process, and made enhancements to its website to support the needs of FTC bureaus and offices.

Agency Status

The FTC is exploring several avenues to meet resource demands that are unique to small federal entity acquisition organizations. This includes evaluating the mix of federal and contractor resources while leveraging relationships with other federal agencies to obtain additional support (through detailees) when needed. The agency is also pursuing a shared service provider relationship, through which it could obtain "surge" acquisition support to address changing workload demands.

In addition, in response to a finding in an OIG audit of acquisition planning and contract management processes, the Financial Management Office is working with the Office of the General Counsel to implement a corrective action plan that will include policy, process, and review criteria for legal reviews of contracting actions.

3. Improper Influences by Former Officials and Employees

The FTC plays a vital oversight role in protecting consumers and maintaining competition in commerce. This important work can be impeded by outsiders, including former officials and employees, who attempt to unduly influence the Commission's investigative and policymaking processes and outcomes. Such influences can violate 18 U.S.C. § 207 and its guiding regulation (5 CFR Part 2641), which generally prescribe the following restrictions for former officers and

employees of the executive branch with respect to their representation of others before the Commission: (1) a permanent restriction on matters on which they participated personally and substantially; (2) a 2-year restriction on particular matters under their official responsibility; and (3) a one-year restriction for certain “Senior Personnel” on matters on which they seek official action.

The OIG wants the FTC to maintain a continued awareness of the risk of potential violations of the post-employment restrictions. This risk is highlighted in a recently completed criminal investigation involving a former senior FTC official. The former official contacted an FTC employee approximately eight months after resigning and proposed a meeting at the FTC on behalf of a client of the law firm with which the former official was then affiliated. The former official’s conduct potentially violated 18 U.S.C. § 207(c) and was referred to the Department of Justice, which ultimately declined prosecution.⁸

Each year, many talented FTC professionals depart the Commission for employment in the private sector, thereby creating the need for officials and employees to be mindful of their post-employment restrictions as enumerated in section 207 and its guiding regulation. We recognize that some of these individuals will conduct future business that could involve engagement with the Commission. In recognition of this fact, the FTC has developed guidelines applicable to former officials and employees that subsequently appear before the Commission. *See* 16 CFR 4.1. Among other provisions, subsection (b)(1) of the regulation details the restrictions for communicating to or appearing before the commission as attorney or counsel or otherwise assisting/advising behind-the-scenes. In order for the process to work, it is vital that former officials and employees maintain an awareness of the matters on which they worked while at the FTC.

The FTC’s dedicated team of professional and support staff serve as the agency’s first line of defense against improper influence by non-employees. Therefore, it is important for current employees to be mindful of the restrictions of section 207 and its guiding regulation in the event they receive any communications from former officials or employees. Any inappropriate communications should be reported to the OIG. The Office of the General Counsel Ethics Team is available as a resource to current and former officials/employees alike for guidance on various matters involving the post-employment restrictions and other ethics issues. The Ethics Team also provides entry, refresher, and exit ethics trainings to current officials/employees, as well as ethics advice via *The FTC Ethicist* newsletter.

Agency Status

The FTC Ethics Team agrees it is imperative for current and former agency employees⁹ to understand and comply with post-government employment federal ethics requirements. The FTC deploys various methods are used to ensure FTC employee awareness of post-government employment federal ethics restrictions, including the provision of written and oral advice at multiple stages of an employee’s tenure at the agency. The FTC requires former employees to

⁸ The investigation is summarized in the OIG’s *Semiannual Report to Congress* for the period ending March 31, 2017, p.16.

⁹ Generic references to FTC “employees” include all staff (*e.g.*, senior officials, GS-level employees, and intern volunteers) but do not include contractors.

obtain formal approval to participate (even “behind-the-scenes”) in most agency matters and proceedings pending, or directly resulting from matters pending, during their tenure at the agency.

The FTC Ethics Team’s protocols to promote employee awareness of post-government employment federal ethics restrictions are as follows:

- Senior Officials:¹⁰ Prior to each senior official’s appointment, an attorney on the FTC Ethics Team provides individualized counseling (orally and in writing) about federal ethics restrictions, including post-government employment constraints. An attorney on the FTC Ethics Team also provides an in-person, private briefing for each senior official upon entry into service at the agency. This briefing typically occurs on a senior official’s first day of work at the FTC, and includes an in-depth discussion of post-government employment federal ethics constraints. If the senior official is also a political appointee, s/he signs the Ethics Pledge. Each senior official also receives a tabbed pocket guide that addresses post-government employment and other federal ethics concerns. In addition, the agency’s Designated or Alternate Designated Agency Ethics Official issues a formal letter to the senior official that solely addresses post-government employment federal ethics concerns.¹¹ FTC senior officials receive 60 minutes of in-person federal ethics training each year, which includes a review of post-government employment restrictions. Senior officials must notify an FTC ethics official when negotiating for employment outside of the federal government. In this situation, the senior official receives individualized counseling from an ethics attorney on seeking-employment and post-government employment restrictions. The agency’s Designated or Alternate Designated Agency Ethics Official again issues a formal letter to the senior official that solely addresses post-government employment federal ethics concerns.¹² Senior officials also receive a private briefing from an ethics attorney on post-government employment restrictions before leaving the FTC.
- All Employees: Before a prospective hire accepts an offer of employment, the FTC’s Human Capital Management Office (HCMO) issues a letter alerting the prospective hire to federal ethics requirements. The letter includes an express reference to post-government employment constraints and contact information for FTC ethics officials. HCMO issues each new employee a “Welcome to the FTC! Ethics Guide” that addresses post-government employment constraints as well as other ethics topics. New employees receive 30 minutes of federal ethics orientation in a group setting during their first week of FTC employment, which always includes an overview of post-government federal ethics restrictions. Employees at the GS-14 and GS-15 levels receive a copy of the same tabbed pocket guide given to senior officials.¹³ Employees at the GS-14 and GS-15 levels, along with those at the GS-13 level and below who have been designated by management, must attend 60 minutes

¹⁰ Unless otherwise specified, the term “senior official” includes Commissioners, career and non-career Senior Executive Service staff, employees paid at the Senior Level rate, Schedule C employees with confidential and/or policymaking duties, and Intergovernmental Personnel Act detailees.

¹¹ This letter is only provided to senior officials making at least 86.5 percent of the rate of basic pay for level II of the Executive Schedule (as of January 7, 2018, the threshold was \$164,004) as they are subject to additional post-federal-employment constraints.

¹² Senior officials paid at or above a particular rate of pay receive this notification.

¹³ The FTC Ethics Team works with administrative professionals throughout the agency to disseminate the pocket guides.

of live training by an FTC ethics attorney in a group setting once every three years. In the interim, these employees must complete online federal ethics training each year. The annual training addresses post-government employment federal ethics restrictions. All employees must receive counseling on post-government employment restrictions by a member of the FTC Ethics Team before leaving the agency. All departing employees also receive written guidance from the FTC's Designated Agency Ethics Official about post-government employment ethics restrictions.

As stated above, former FTC employees must obtain formal approval to participate (even “behind-the-scenes”) in most FTC matters and proceedings pending, or directly resulting from matters pending, during their tenure at the agency. Further, if a former employee is unable to participate in an FTC-specific party matter (such as litigation, an investigation, or a contract) due to personal and substantial participation in that matter, the former employee's disqualification is imputed to his or her new employer and colleagues, unless an appropriate firewall is established and a corresponding screening affidavit is submitted to the FTC.¹⁴ Even when no formal approval to participate is required, the FTC Ethics Team routinely counsels former employees on post-government employment federal ethics constraints.

The Ethics Team is considering other ways to use the agency's matter data to better inform current and former employees as to the scope of potential post-employment restrictions.

¹⁴ State bar rules of professional conduct often impose similar restrictions on former FTC employees who are attorneys.