

'An Avalanche of Rulemakings' – The FTC Gears Up for an Active 2022

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On December 10, 2021, the Federal Trade Commission (FTC) published its Annual Regulatory Plan for 2022 – the first under FTC Chair Lina Khan – noting that it “will consider developing both unfair-methods-of-competition rulemakings as well as rulemakings to define with specificity unfair or deceptive acts or practices.”[1] Among other rulemakings, the Annual Regulatory Plan notes that the FTC is considering a Trade Regulation Rule on Commercial Surveillance to stop “lax security practices,” limit “intrusive surveillance,” and ensure “that algorithmic decision-making does not result in unlawful discrimination.”[2]

The release of an expansive agenda comes just months after the agency streamlined its Rules of Practice under Section 18 of the FTC Act and created a new rulemaking group within the FTC’s Office of General Counsel, to expedite otherwise cumbersome rulemaking requirements under the Magnusson-Moss Act. While these procedural maneuvers will allow the FTC to increase the pace of the rulemaking process, many of these measures will likely require the support of three Democratic Commissioners, and the agency is currently in a 2-2 partisan deadlock pending the confirmation of nominee Alvaro Bedoya.

The FTC Cites ‘Changed Circumstances’ as a Catalyst for Rulemaking

The FTC’s Annual Regulatory Plan identifies “changed circumstances” in 2021 as the impetus for the agency to promulgate new competition and consumer protection rules. Specifically, the FTC identifies the U.S.

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Supreme Court's decision in *AMG Capital Mgmt., LLC v. FTC* as a key turning point that has hampered the agency's enforcement capabilities. As we discussed in greater detail here, that decision interpreted Section 13(b) of the FTC Act to not provide the FTC with the authority to seek restitution or disgorgement in federal court. The agency had historically relied on Section 13(b) to seek monetary penalties in a wide range of cases involving unfair or deceptive practices. However, if the FTC adopts a rule outlawing certain practices, it can still seek monetary penalties for violations of the rule under a separate part of the FTC Act.

Another key catalyst mentioned by the FTC in the Annual Regulatory agenda was a "case-by-case approach to promoting competition," which has purportedly proven "insufficient."^[3] According to the FTC, this approach has resulted in "a hyper-concentrated economy whose harms to American workers, consumers, and small businesses demand new approaches."^[4]

FTC Plans to Initiate Consumer Protection and Competition Rulemakings

To address perceived market concentration across the economy, the FTC under Chair Khan plans to examine how to define "unfair methods of competition" under Section 5 of the FTC Act in an attempt to root out perceived anticompetitive practices. In addition to the proposed Trade Regulation Rule on Commercial Surveillance, the FTC is also actively seeking comment on the following:

- A rule targeting business and government impersonation fraud – as discussed in another article in this issue, the FTC recently released an Advanced Notice of Proposed Rulemaking (ANPRM) targeting rising government and business impersonation fraud committed via telephone calls, text messages, and other forms of communication. Comments on the ANPRM are due February 22.
- A rule requiring reporting of security incidents by covered financial institutions – as described in greater detail here, the FTC is seeking comment on a Supplemental Notice of Proposed Rulemaking (SNPRM) that would require covered financial institutions to report certain security incidents to the FTC within 30 days of the date of discovery. The rulemaking would further amend the FTC's Safeguards Rule under the Gramm-Leach-Bliley Act. Comments on the SNPRM are due February 7.
- A petition from Accountable Tech proposing that the FTC promulgate rules to prevent "surveillance advertising," or the practice of displaying ads to individual consumers based on inferences about their interests, demographics, or other characteristics inferred from their activities over time. Comments on the Accountable Tech Petition are due January 26.
- A petition from the Institute for Policy Integrity asking the FTC to regulate "drip pricing." The petition describes "drip pricing" as "the practice of advertising only part of a product's price upfront and revealing additional charges later as consumers go through the buying process."

Importantly, the Annual Regulatory Plan also took note of President Biden's Executive Order on Promoting Competition in the American Economy. As we discussed in greater detail here, the Executive Order encouraged the FTC to exercise its statutory authority to address a number of competition issues. In the Annual Regulatory Plan, the FTC stated that it will "explore the benefits and costs" of several of the Executive Order's rulemaking proposals for the agency, including "surveillance, the right to repair, pay-for-delay

pharmaceutical agreements, unfair competition in online marketplaces, occupational licensing, real-estate listing and brokerage, and industry-specific practices that substantially inhibit competition.”[5]

FTC Commissioner Christine Wilson dissented from the Annual Regulatory Plan, arguing that it “extends far beyond” the agency’s routine review of existing rules and that many of the existing rules “should be abolished in any event.”[6] She further characterized the Annual Regulatory Plan as ushering in “an avalanche of rulemakings” and rejected Chair Khan’s depiction of the economy as being “hyper-concentrated.”[7] Indeed, in a subsequent statement made at the agency’s December 16 Open Meeting, Commissioner Wilson referred to the FTC’s 2022 agenda as a “Rule-a-Palooza.”[8] Commissioner Wilson’s dissent signals likely uniform Republican Commissioner opposition to most of the agency’s planned rulemakings, leaving the body in a 2-2 Democrat-Republican split on many of the proposals. That said, proposals like the Safeguards Rule SNPRM have drawn some bipartisan support and may point to some additional rulemaking even without a fifth Commissioner.

Much of the FTC’s Expansive Rulemaking Agenda Likely Hinges on Confirmation of a Fifth Commissioner

President Biden originally nominated Alvaro Bedoya on September 13, 2021 to fill the FTC Commissioner seat vacated by former Commissioner Rohit Chopra upon his confirmation as Director of the Consumer Financial Protection Bureau on September 30. Bedoya is the founding director of the Center on Privacy & Technology at Georgetown Law and previously served as the first Chief Counsel to the U.S. Senate Judiciary Subcommittee on Privacy, Technology and the Law. He faced opposition from Republican senators on the U.S. Senate Committee on Commerce, Science, & Transportation (Committee) during his November 17, 2021 confirmation hearing, but President Biden renominated him to the FTC Commissioner spot on January 4, 2022. He appears likely to be the swing vote on many of these proposed rulemaking initiatives – not just whether they will go forward, but also their scope and ambition if they do so.

For decades, the FTC has tended to focus much more on enforcement than rulemaking – but in 2022, the agency is poised to shift gears and propose rules that could regulate practices throughout the economy.

Wiley’s FTC Regulation Practice counsels clients on FTC compliance, investigations, enforcement, and rulemaking, and regularly advocates before the agency. Contact the authors for additional information.

[1] Statement of Regulatory Priorities, Federal Trade Commission, at 1 (Dec. 10, 2021), https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202110/Statement_3084_FTC.pdf.

[2] Statement of Regulatory Priorities, Federal Trade Commission, at 2 (Dec. 10, 2021), https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202110/Statement_3084_FTC.pdf.

[3] Statement of Regulatory Priorities, Federal Trade Commission, at 1 (Dec. 10, 2021), https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202110/Statement_3084_FTC.pdf.

[4] Statement of Regulatory Priorities, Federal Trade Commission, at 1 (Dec. 10, 2021), https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202110/Statement_3084_FTC.pdf.

[5] Statement of Regulatory Priorities, Federal Trade Commission, at 2 (Dec. 10, 2021), https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202110/Statement_3084_FTC.pdf.

[6] Dissenting Statement of Commissioner Christine S. Wilson, Annual Regulatory Plan and Semi-Annual Regulatory Agenda, at 1 (Dec. 10, 2021), https://www.ftc.gov/system/files/documents/public_statements/1598839/annual_regulatory_plan_and_semi-annual_regulatory_agenda_wilson_final.pdf.

[7] Dissenting Statement of Commissioner Christine S. Wilson, Annual Regulatory Plan and Semi-Annual Regulatory Agenda, at 2, 4-5 (Dec. 10, 2021), https://www.ftc.gov/system/files/documents/public_statements/1598839/annual_regulatory_plan_and_semi-annual_regulatory_agenda_wilson_final.pdf.

[8] Oral Remarks of Commissioner Christine S. Wilson, Open Commission Meeting on December 16, 2021, Advance Notice of Proposed Rulemaking to Combat Government and Business Impersonation Fraud, at 2 (Dec. 16, 2021), https://www.ftc.gov/system/files/documents/public_statements/1598963/r207000wilsonremarksmeeting.pdf.

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