



Understanding and Navigating the Most Aggressive FTC in Over 40 Years



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Agenda

- **FTC Commissioners**
- **Current FTC Agenda/Areas of Focus**
- **Enforcement**
- **Lessons Learned from Ultra-Aggressive FTC in the 1970's**
- **Questions**



The FTC Commissioners

Lina Khan (D)



- Lina Khan was sworn in as Chair of the Federal Trade Commission on June 15, 2021.
- Prior to becoming head of the FTC, Khan was an Associate Professor of Law at Columbia Law School. She also previously served as counsel to the U.S. House Judiciary Committee's Subcommittee on Antitrust, Commercial, and Administrative Law, legal adviser to FTC Commissioner Rohit Chopra, and legal director at the Open Markets Institute.
- Khan has written extensively in the antitrust space
- She's has been described as a "privacy hawk" who has called for "clear prohibitions and economic disincentives, rather than morally laden standards" to address online privacy protections.

Lina Khan (D)



While at Columbia Law School, Chair Khan co-authored a paper stating that it was “implausible” that a big tech company that makes money from online behavioral advertising could ever put users’ privacy first.

“As long as such companies make most of their money through personally targeted advertisements, they will be economically motivated to extract as much data from their users as they can,” they wrote, “a motivation that runs headfirst into users’ privacy interests, as well as any interests users might have in exercising behavioral autonomy or ensuring that their personal data is not stolen, sold, mined, or otherwise monetized down the line.”

Noah Phillips (R)



- Noah Phillips was unanimously confirmed to the Senate on April 26, 2018.
- Before coming to the FTC, Phillips served as Chief Counsel to U.S. Sen. John Cornyn, of Texas, on the Senate Judiciary Committee.
- From 2011 to 2018, he advised Senator Cornyn on legal and policy matters including antitrust, constitutional law, consumer privacy, fraud, and intellectual property. Prior to his Senate service, Phillips worked as a litigator at large law firms in both New York and DC. Phillips began his career at an investment bank in New York.
- Phillips promotes competition and consumer choice.
- When asked how regulators should supervise innovative technology he responded, “only if necessary and then very carefully.”

Rebecca Slaughter (D)



- Rebecca Slaughter was sworn in as a Commissioner on May 2, 2018.
- Slaughter brings to the Commission more than a decade of experience in competition, privacy, and consumer protection. Before joining the FTC, Slaughter served as Chief Counsel to Senator Charles Schumer of New York. Before that she worked in a DC law firm.
- Slaughter says that she “believes that the FTC’s dual missions of promoting competition and protecting consumers are interconnected and complementary, and she is mindful that enforcement or rulemaking in one arena can have far-reaching implications for the other.”
- She describes herself as a “proponent of greater resources, transparency, and comprehensive use of the FTC’s authorities” and “is outspoken about the growing threats to competition and the broad abuse of consumers’ data.”

Christine Wilson (R)



- Christine Wilson was sworn in as a Commissioner on September 26, 2018.
- Wilson previously served at the FTC as Chairman Tim Muris's Chief of Staff during the George W. Bush Administration.
- In between her periods of service at the FTC, Wilson practiced competition and consumer protection law both at law firms and as in-house counsel.
- When nominated, Wilson was serving as Senior Vice President — Legal, Regulatory & International for Delta Air Lines.
- Wilson views privacy and data security issues as distinct from competition law.
- She is an advocate for federal privacy legislation.

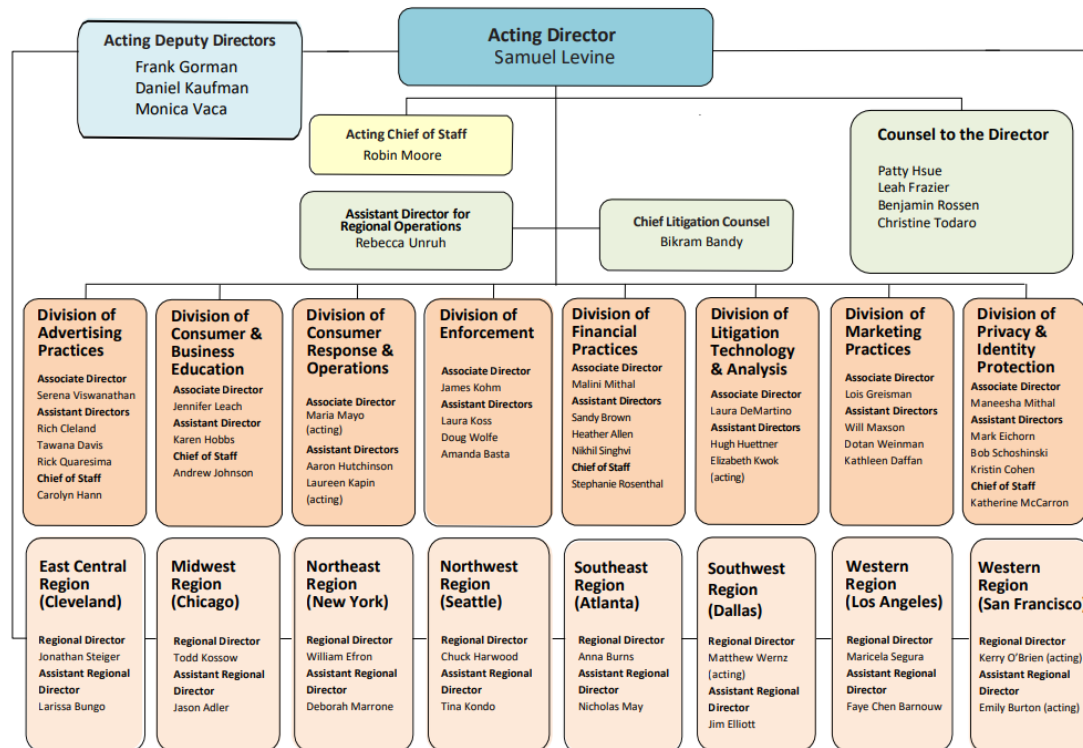
Alvaro Bedoya (D) – Nominee – Renominated on 1/4



- Alvaro Bedoya has been nominated to take Rohit Chopra's spot on the FTC.
- Bedoya is a founding director of the Center on Privacy and Technology at Georgetown and has extensive experience on tech privacy issues.
- Before founding the Center, Alvaro served as Chief Counsel of the U.S. Senate Judiciary Subcommittee on Privacy, Technology and the Law, where he conducted oversight on mobile location privacy and biometrics, drafted bipartisan legislation to protect victims of sexual assault, and drafted portions of the bipartisan NSA reform law, the USA FREEDOM Act.
- Bedoya is a critic of surveillance software. In 2016 he co-authored a publication that discusses, among other things, the race and gender bias in face scanning software.

**Federal Trade Commission
Bureau of Consumer Protection**
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FTC Agenda

July 1, 2021: FTC Authorizes Investigations Into Key Enforcement Priorities

The resolutions direct agency staff to use “compulsory process,” such as subpoenas, to investigate seven specific enforcement priorities.

Priority targets include:

- Repeat offenders;
- Technology companies and digital platforms; and
- Healthcare businesses such as pharmaceutical companies, pharmacy benefits managers, and hospitals.
- See <https://www.ftc.gov/news-events/press-releases/2021/07/ftc-authorizes-investigations-key-enforcement-priorities>
- FTC Also voted to “streamline” [Section 18 Rulemaking Procedures](#) for Section 18 rules prohibiting unfair or deceptive acts or practices.

Changes Adopted in FTC Rulemaking Process

The FTC also voted to “streamline” [Section 18 Rulemaking Procedures](#) for Section 18 rules prohibiting unfair or deceptive acts or practices.

- The only rationale offered is expediency, ignoring any effects of the quality of the rulemaking record or the public’s opportunity to participate in the process.
 - A recipe for greater political control and less public input in rules.

Changes Adopted in FTC Rulemaking Process (Continued)

Key Changes

- Eliminating the statutory requirement for the Commission to explain the reasons for the proposed rule “with particularity.”
- Limiting the statutory requirements for an independence of the Presiding Officer who recommends a decision based on “all relevant and material evidence.”
 - The Chair is now the Chief Presiding Officer, and the recommended decision is limited to answering specific questions that the Commission will ask.
- Reduced opportunity for public input in identifying the key factual issues that must be resolved.
 - The Commission itself will now identify the key issues, *before* it publishes a proposed rule.
- No final staff report, and no opportunity for public comment on the rule as recommended by the staff or the Presiding Officer.

September 14, 2021: Resolutions Authorizing Eight Investigations Into “Core FTC Priority Areas” For The Coming Decade

The resolutions will enable staff to investigate:

1. Harmful business practices directed at service members and veterans;
2. Harmful conduct towards children;
3. Potential algorithmic and biometric bias;
4. Deceptive and manipulative online conduct;
5. Repair restrictions;
6. Abuse of intellectual property;
7. Alleged anticompetitive common director and officers and common ownership; and
8. Alleged monopolistic behavior.

December 10, 2021: Notice of Potential Comprehensive Privacy Rulemaking

- On December 10, 2021, the FTC published a Statement of Regulatory Priorities outlining actions from 2021 and points of focus for 2022.
- Among other topics, the statement announced that the FTC is considering whether to initiate Section 18 of the FTC Act rulemaking procedures to “*curb lax [data] security practices, limit privacy abuses, and ensure that algorithmic decision-making does not result in unlawful discrimination.*” It’s unclear when this potential rulemaking may be released.

Other Areas of FTC Focus

Testimony before the House Energy and Commerce Committee:

“Transforming the FTC: Legislation to Modernize Consumer Protection” (July 28).

All five FTC Commissioners, including newly confirmed Chair Khan, testified before House Energy and Commerce’s Consumer Protection and Commerce Subcommittee in the first panel of a legislative hearing on numerous FTC reform bills.

In the hearing, Commissioner Slaughter noted that the FTC is working on an approach to regulate “data abuses.” The hearing participants also discussed, among other subjects:

(1) data privacy; (2) children’s privacy; (3) online platforms; (4) FTC rulemaking; (5) enforcement; (6) civil authorities; (7) FTC transparency; (8) FTC resources; (9) Section 230; (10) FTC guidance; (11) FTC politicization and consolidation of power; (12) fraud enforcement; (13) right to repair; (14) emerging technologies; and (15) cybersecurity.

Other Areas of FTC Focus

Among other topics, the FTC's 2021 Open Meetings, conferences, and workshops explored topics such as:

1. Data Privacy;
2. Data Security;
3. Digital advertising;
4. Algorithms; and
5. Digital competition.

Additional Areas of FTC Interest:

“Dark Patterns”: Deceptive and Manipulative conduct on the Internet

Privacy: Data Minimization

Made In the USA Rule

Deceptive Endorsements

Negative Options

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FTC Enforcement

Federal Trade Commission Enforcement

- The FTC is a law enforcement agency that enforces Section 5 of the FTC Act along with other sector specific laws and rules (Children's Online Privacy Protection Act, Health Breach Notification Rule, Gramm-Leach-Bliley Act, enforcing data security standards etc.). Using this authority, the FTC has brought hundreds of privacy and data security cases.
- Section 5 of the FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce."
- Engaging in practices that the FTC deems as unfair or deceptive can result in a large-scale investigation of the company.
- As part of an investigation, a company may receive a Civil Investigative Demand (CID). An investigation can take years and settlements can cost millions of dollars, excluding the cost of litigation.

Recent Cases

Data Security: [In the Matter of CafePress](#) – March 2022: The FTC alleged that CafePress failed to implement reasonable security measures to protect sensitive information stored on its network, including plain text Social Security numbers, inadequately encrypted passwords, and answers to password reset questions and covered-up their breaches. As part of the proposed settlement, [Residual Pumpkin](#) and [PlanetArt](#) will be required to implement comprehensive information security programs that will address the problems that led to the data breaches at CafePress. This includes replacing inadequate authentication measures such as security questions with multi-factor authentication methods; minimizing the amount of data they collect and retain; and encrypting Social Security numbers.

In addition, the proposed settlement requires Residual Pumpkin (the former owner of Café Press) to pay \$500,000 in redress to victims of the data breaches. PlanetArt will be required to notify consumers whose personal information was accessed as a result of CafePress's data breaches and provide specific information about how consumers can protect themselves. Both companies will be required to have a third party assess their information security programs and provide the Commission with a redacted copy of that assessment suitable for public disclosure.

Recent Cases (Continued)

COPPA: [Weight Watchers/Kurbo](#) – 2022: DOJ filed a complaint on behalf of the FTC alleging that the company marketed a weight loss app for use by children as young as eight and then collected their personal information without parental permission. \$1.5 million Judgment and deletion of data allegedly illegally collected **and any models or algorithms developed in whole or in part using Personal Information Collected from Children through the app.**

Secondary Liability: [Hornbeam Special Situations, LLC, et al.](#) – 2022: Payment processing company that allegedly helped a bogus discount club scheme debit tens of millions of dollars from consumers without authorization will be required to pay \$2.3 million and face a permanent ban from working with high-risk clients as a result of a Federal Trade Commission lawsuit.



AMG Capital Management v. FTC

AMG Capital Management v. FTC

- In a unanimous opinion on April 22, 2021, the United States Supreme Court held in *AMG Capital Management, LLC v. Federal Trade Commission* that Congress did not authorize the FTC to obtain equitable monetary relief pursuant to its authority under Section 13(b) of the Federal Trade Commission Act (FTCA) to obtain an injunction.
- The FTC has traditionally used Section 13(b) to seek large sums of money in restitution and disgorgement in all types of cases including privacy and data security cases.
- For most of its history, the FTC could only enforce actions as administrative proceedings. In 1973, Congress passed Section 13(b) of the FTC Act empowering the FTC to bring suit in court in “proper cases,” to seek “a permanent injunction.”
- Courts took this provision and interpreted it broadly. It became the tool to implicitly authorize the FTC to seek monetary relief such as restitution, redress, and disgorgement of ill-gotten gains.

AMG Capital Management v. FTC

- The AMG case came about through a circuit split over whether Section 13(b)'s provision for permanent injunctions allowed the FTC to obtain monetary relief in federal court.
- The Supreme Court unanimously agreed that considering Section 13(b)'s exclusive reference to "permanent injunction[s]," it cannot be construed as authorizing monetary equitable remedies.
- The change may be short-lived as Congress has expressed interest in enacting legislation authorizing the FTC to seek monetary relief in federal courts under its Section 5 authority.



Remedies at the FTC

Monetary Remedies Post-AMG Capital Management v. FTC

- Notably, this change does not affect the FTC's ability to seek monetary penalties for violations of:
 - Prior cease-and-desist orders or consent orders;
 - Trade Regulation Rules issued under Section 18(a)(1)(B) of the FTC Act defining unfair and deceptive practices; or
 - Through the process authorized by Section 19 of the FTC Act.
 - See, e.g., Nadia Dreid, *Judge Revives FTC's \$5M Restitution Win Against Credit Co.*, Law360 (Sept. 14, 2021, 9:18PM), <https://www.law360.com/consumerprotection/articles/1421419/judge-revives-ftc-s-5m-restitution-win-against-credit-co-> (reporting that a U.S. District Court reimposed \$5.2 million in damages under Section 19 of the FTC Act after the award had previously been denied under Section 13).

Monetary Remedies Post-AMG Capital Management v. FTC

- Section 19 of the FTC Act:
- **(a)SUITS BY COMMISSION AGAINST PERSONS, PARTNERSHIPS, OR CORPORATIONS; JURISDICTION; RELIEF FOR DISHONEST OR FRAUDULENT ACTS**
 - (1)If any person, partnership, or corporation **violates any** rule under this subchapter respecting unfair or deceptive acts or practices (other than an interpretive rule, or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of [section 45\(a\) of this title](#)), then the Commission may commence a civil action against such person, partnership, or corporation for relief under subsection (b) in a United States district court or in any court of competent jurisdiction of a State.
 - (2)If any person, partnership, or corporation engages in any unfair or deceptive act or practice (within the meaning of [section 45\(a\)\(1\) of this title](#)) **with respect to which the Commission has issued a final cease and desist order which is applicable to such person, partnership, or corporation**, then the Commission may commence a civil action against such person, partnership, or corporation in a United States district court or in any court of competent jurisdiction of a State. **If the Commission satisfies the court that the act or practice to which the cease-and-desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent, the court may grant relief under subsection (b).**

Monetary Remedies Post-AMG Capital Management v. FTC

- Section 19 of the FT Act:
 - (b)NATURE OF RELIEF AVAILABLE
 - The court in an action under subsection (a) shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers or other persons, partnerships, and corporations resulting from the rule violation or the unfair or deceptive act or practice, as the case may be. Such relief may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice, as the case may be; except that nothing in this subsection is intended to authorize the imposition of any exemplary or punitive damages.

Notice of Penalty Offence Letters

Under its Penalty Offense authority, the FTC can seek civil penalties if it proves that:

- The company had actual knowledge that the conduct was unfair or deceptive in violation of the FTC Act; and
- The FTC had already issued a written decision that conduct is unfair or deceptive under Section 5(m)(1)(b) of the FTC Act.
 - For 2022, the civil penalty is \$46,517 per violation.
- Notice of Penalty Offense letters.
- Notice's purpose: to prove that recipients had actual knowledge that certain acts or practices previously found by the FTC constitute unfair or deceptive ones.

Notice of Penalty Offense Letters So Far

[Penalty Offenses Concerning Money-Making Opportunities](#)

The FTC issued a Notice that it has determined that certain acts or practices used to attract participants to money-making opportunities are unfair or deceptive and violate the FTC Act.

[Penalty Offenses Concerning Endorsements](#)

The FTC issued a Notice that it has determined that certain acts or practices in the use of endorsements and testimonials are deceptive or unfair and violate the FTC Act.

[Penalty Offenses Concerning Education](#)

The FTC issued a Notice that it has determined that certain acts or practices in the education marketplace are deceptive or unfair and violate the FTC Act.

More to come...



Ultra-Aggressive FTC and Lessons Learned from the 70's

Ultra-Aggressive FTC and Lessons Learned from the 70's

"Kid-Vid" and Congressional Response

- In 1978, at the urging of child advocates, the Federal Trade Commission (FTC) spearheaded a crusade to protect children from exploitation by television advertising. The FTC staff proposed rules that would have resulted in a ban of most children's television advertising.
- This was the culmination of years of rulemakings by the Commission, led by then-chair Michael Pertschuk.
- Early in 1978, an FTC reauthorization bill supported by the House leadership was rejected on the floor, because it did not include sufficient controls over the agency.

Ultra-Aggressive FTC and Lessons Learned from the 70's

The reaction was swift and severe:

- The Washington Post published an editorial calling the FTC “the national nanny.”
- At one point, Congress refused to provide funding and shut down the agency for several days. Congress shut down the Children's Advertising Rulemaking, and stripped FTC's authority to write rules about "unfair" advertising. It added new restrictions on rulemaking in the 1980 FTC Improvements Act, including a requirement for the text of a rule, an independent presiding officer, a preliminary and final regulatory impact analysis, and a two-house legislative veto (later ruled unconstitutional). The agency was not reauthorized until 1994.
- The FTC's new agenda rings familiar, and if it is not careful, it may run the risk of the types of consequences that resulted from “Kid-Vid.”
- Chris Hoofnagle, a professor, has said that KidVid is routinely invoked by commission critics who oppose the Agency's privacy efforts. KidVid also offers a cautionary lesson, as regulation of online advertising too has broad effects on businesses, advertisers, and the news media itself. These factions could unite and develop an anti-FTC narrative and political campaign if they feel threatened by the Agency's privacy actions.



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