

Is the FTC a “Regulator”? It Sure Seems to be Moving in that Direction

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For the 26+ years I served at the FTC, the agency always described itself as a “law enforcement agency,” not a “regulator.” That’s because the FTC spent most of its resources on enforcing the FTC Act and other laws passed by Congress, not creating new regulations on its own. While it would be an exaggeration to say that the FTC has become a regulator in the mold of the federal banking agencies or CFPB, Chair Khan is certainly pushing the FTC in that direction. Indeed, the agency’s rulemaking activity has dramatically increased under her tenure.

From “Whack-a-Mole” to “Rule-a-Palooza”

What explains the change? For one thing, the FTC majority believes that the FTC’s former way of operating (which it often describes as “case-by-case enforcement” or even “[whack-a-mole](#)”) hasn’t adequately protected consumers and competition, warranting the creation of stricter, broader rules for the entire marketplace. For another, in the wake of the Supreme Court’s decision in AMG (holding that the FTC can’t obtain monetary relief under Section 13(b)), the FTC is increasingly relying on other legal tools to get money – notably, alleging rule violations wherever possible, which enables the FTC to seek civil penalties and/or consumer redress. Hence the desire for more rulemaking, or what Commissioner Wilson has described (in strongly worded dissents) as a “[Rule-a-Palooza](#).”

Wide Variety (New vs. Amended Rules, Mag-Moss vs. APA)

Some of the FTC’s rulemakings would create brand new rules using the FTC’s authority (under Section 18 of the FTC Act) to define and prohibit “unfair or deceptive” practices. In the past, as we discuss [here](#), this type of rulemaking (often called “Mag-Moss” rulemaking) has proved to be lengthy and cumbersome due to the multiple steps that Congress added in the 70s and 80s to reign in perceived overreach by the FTC. Such steps include two rounds of comments (an Advance Notice of Public Rulemaking or ANPRM and a Notice of Public Rulemaking or NPRM) and, in many cases, public hearings. In addition, because Mag-Moss rulemakings are initiated by the FTC without specific direction from Congress, they also tend to be controversial – especially when they are as broad and ambitious as some of the FTC’s current proposals are.

Other rulemakings would amend existing rules, using Mag-Moss (for rules originally developed that way) or the more streamlined procedures of the Administrative Procedures Act (APA) (for rulemakings specifically authorized by Congress). Notably, in many of the FTC’s pending proceedings, there’s still time to submit comments and potentially shape the final rule.

Key Rulemakings to Watch

Below, I provide a list of some of the FTC’s more significant pending rulemakings. This is by no means a complete list of the FTC’s regulatory activity, but it highlights the FTC’s most prominent

and/or broad-ranging proposals. This list also omits the FTC's many guidance documents (such as the "Green Guides" and Health Claims Guidance, discussed [here](#) and [here](#)), which provide interpretations of existing law but don't carry the enforcement weight of a rule. For a more complete list of the FTC's rulemakings and related activity, consult the FTC's [regulatory review calendar](#) (showing the FTC's schedule for reviewing existing rules), as well as its list of [federal register notices](#) (which includes new rulemaking proposals).

- **GLB Safeguards - Breach Notification Proposal (APA update).** In December 2021, the FTC proposed to [amend the GLB Safeguards Rule](#) to add a requirement that covered entities provide notice to the FTC of security breaches that meet certain criteria. The comment period closed in February 2022, so the FTC could finalize this proposal soon. See our earlier commentary [here](#).
- **Impersonation of Government and Businesses (new Mag-Moss rule).** In October 2022, following an ANPRM and initial round of comments, the FTC proposed a new rule to ban [impersonation fraud](#). This was/is Chair Khan's first Mag-Moss rulemaking - normally a lengthy process, as noted above, but proceeding apace here, given the seemingly non-controversial nature of the subject matter. One twist is that the rule would cover, not just those directly perpetrating the fraud, but those that provide the "means and instrumentalities" for others to engage in fraud, as we discuss [here](#). The comment period for the NPRM closed in December 2022, so, unless the FTC plans to hold a public hearing here, it could finalize this rule soon.
- **Motor Vehicle Dealers (new APA rule).** This proposal would ban deceptive pricing and surprise add-on products in the [auto dealer industry](#). Many of the rule's provisions track the FTC's prior law enforcement in this area, but the rule would also ban charging for any add-on product that "would not benefit" the consumer. The comment period closed in September 2022, so a final rule could come soon.
- **Earnings Claims (new Mag-Moss rule).** Here, the FTC is exploring whether to issue a rule governing earnings claims, potentially across multiple topic areas and industries. Indeed, as we discussed [here](#) and [here](#), the ANPRM sought information about whether to issue a rule prohibiting deceptive earnings claims (and potentially creating new disclosure, substantiation, and recordkeeping requirements) applicable to coaching and mentoring; work-from-home and "gig" work; multi-level marketing and direct selling; franchise and other business opportunities; investment offers; and other areas. The comment period for the ANPRM closed in May 2022, so the NPRM could come at any time.
- **Commercial Surveillance and Data Security (new Mag-Moss rule).** Among the FTC's most closely watched rulemakings is its proposal to regulate "[commercial surveillance](#)," data security, and other privacy issues. As we discussed [here](#), the ANPRM in this matter was remarkably sweeping in scope - covering virtually every form of data collection across the economy, posing 95 questions, and raising issues that stretch the bounds of the FTC's legal authority. The initial comment period closed in November 2022 (netting over 11,000 comments) and the FTC's next step is to issue an NPRM with rule text. With Congress still stalled on general privacy legislation, we expect the FTC to forge ahead aggressively here.
- **Reviews and Endorsements (new Mag Moss rule).** The idea behind this [rulemaking](#), launched in November 2022, is to potentially replace the longstanding [Endorsement Guides](#) with an enforceable rule. (Confusingly, though, the FTC sought [comment on the Guides](#) just months before proposing this rule.) Like the Guides, a rulemaking here could extend to

deceptive endorsements, testimonials, and reviews across the marketplace – but with the threat of penalties and possibly more stringent requirements. The initial comment period just closed in January, and the next step is an NPRM.

- **Funeral Industry Practices (Mag-Moss update).** Also in November 2022, the FTC issued an ANPRM exploring whether to [update its Funeral Rule](#) to require that prices for funeral services be posted online and distributed electronically. Like the motor vehicle dealer proposed rule (above), this update would impact one industry but in a potentially big way. The comment period just closed in January, and the next step is a proposed rule.
- **Business Opportunities (Mag-Moss update).** In yet another November 2022 announcement, the FTC issued an ANPRM seeking comments on its existing [Business Opportunity \(Biz-Op\) rule](#). As we discussed [here](#), the ANPRM asked whether the rule should be expanded to cover offers related to coaching, mentoring, e-commerce, and/or investment opportunities (also mentioned in the Earnings Claims proposal above) and says that it will consider comments from the Earnings Claim proceeding in tandem. This suggests that the FTC may be considering the two rules to be alternatives – i.e., weighing whether it should create a new rule or expand the existing one. The initial comment period here just closed in January.
- **Unfair or Deceptive Fees (“Junk Fees”) (new Mag-Moss rule).** In keeping with the FTC’s longstanding focus on hidden fees, as well as more recent attention from the CFPB and even the President in his [State of the Union](#) speech, the FTC issued an [ANPRM](#) (again in November 2022) to explore whether to ban “unnecessary, unavoidable, or surprise charges that inflate costs while adding little to no value.” As we explained [here](#), the FTC appears to be considering a sweeping regulation that covers multiple industries, prescribes the timing and placement of fee disclosures, and potentially requires one overall price or even prohibits certain types of fees. The initial comment period here just closed on February 8.
- **Noncompete Clauses (new “Unfair Methods of Competition” rule.)** Although this blogpost focus mostly on consumer protection rules, I would be remiss if I didn’t highlight the FTC’s recent proposal to [ban noncompete clauses](#) as an “unfair method of competition.” As we explain [here](#), [here](#), and [here](#), the FTC’s proposal would regulate virtually every labor relationship in the US and raises a host of legal and compliance questions. Still, because it’s proceeding under the APA, it could move fairly quickly, at least in theory. The comment period closes on March 20 (though multiple parties have requested an extension) and the FTC is holding a [public hearing](#) on February 16.
- **On the back burner?** Finally, it’s worth a reminder that the FTC’s [review of the COPPA Rule](#) (pending since 2019 and netting over 176,000 comments) appears to be on ice, likely because the FTC (1) has been able to bring aggressive enforcement actions (e.g., [EPIC](#) and [Google/YouTube](#)) and issue [policy interpretations](#) without the need for a resource-intensive rulemaking; and (2) is waiting to see whether Congress passes kids’ privacy legislation (a real possibility), which could significantly affect COPPA’s requirements. Recent remarks by Commissioners [Slaughter](#) and [Bedoya](#) seem to confirm that updating COPPA isn’t a top priority.

Similarly, the FTC hasn’t taken action on its 2020 review of the [Health Breach Notification Rule](#), likely because it has found it easier to advance a broad interpretation of the rule through a [policy statement](#), [business guidance](#), and a recent [high-profile settlement](#).

As noted above, there’s still time to affect the outcome of some of these rulemakings by submitting a comment to the FTC. In the meantime, we’ll be tracking these proceedings and highlighting key

developments here.