

What Rulemaking is the FTC planning for 2022? Now We Know

December 14, 2021

After months of speculation, we now know what rules the FTC will launch or possibly amend in 2022, thanks to a [Statement of Regulatory Priorities](#) the FTC published December 9.

The headlines? In addition to reviewing or taking action on almost 20 existing rules and guides, the FTC plans to develop multiple *new* rules on surveillance, unfair methods of competition, and potentially a slew of other issues. And the Republican Commissioners are crying foul.

New rules

The new rules highlighted in the FTC's Statement pack a whole lot of punch, as they encompass multiple issues and could lead to multiple separate rules. They include:

- Rule(s) to halt “abuses stemming from surveillance-based business models,” which could curb “lax security practices” and “intrusive surveillance,” and “ensur[e] that algorithmic decision-making does not result in unlawful discrimination.” The FTC's Statement signals that these rule(s) will address both consumer protection and competition issues.
- Rules defining “unfair methods of competition,” which could include (citing the President's [Executive Order on Competition](#)) rules related to “non-compete clauses, 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.”
- Rules to “define with specificity unfair or deceptive acts or practices” – a potentially infinite category of issues and regulations.

As the FTC explains, the agency's renewed focus on rulemaking is a response to “changed circumstances,” including the Supreme Court's *AMG* ruling (limiting the FTC's redress authority), the insufficiency of the “case-by-case” approach to competition, and the FTC's removal of steps in its Section 18 (Mag-Moss) rulemaking process. Notably, when the FTC is enforcing a rule, it can seek consumer redress and/or civil penalties; this authority was not affected by *AMG*.

Existing rules

The list of existing rules and guides to be reviewed or amended in the coming year is similarly ambitious, and includes: the Business Opportunity Rule, Amplifier Rule, HSR Rules, Deceptive Pricing Guides, Guides Concerning the Word “Free,” “Green Guides,” Children's Online Privacy Protection Rule, Endorsement Guides, Franchise Rule, Funeral Rule, Health Breach Notification Rule, FACTA Identity Theft Rules (including the Red Flags and Card Issuer Rules), Leather Guides, Negative Option Rule, Telemarketing Sales Rule, Care Labeling Rule, Energy Labeling Rule, Eyeglasses Rule, and

Safeguards Rule (breach notification requirements).

Analyzing the significance of each of these rule reviews would require pages of commentary. Suffice to say, it's a very long list and includes some very high-profile, high-impact rules. Recall, too, that some of these rules have already been addressed in policy statements issued since Khan became Chair. (See, for example, our [blogpost](#) discussing the FTC's "clarification" that the Health Breach Notification Rule applies to a wide array of health apps, despite language to the contrary in the actual rule.) Presumably, the FTC intends to implement such policy pronouncements more formally and possibly add additional requirements too.

The Dissents

The two Republican Commissioners blasted the regulatory plan in forceful dissents. [Phillips' dissent](#) is short and sweet, stating that the FTC's plan would impose "substantial and counterproductive regulatory burdens across the economy" and "recast the FTC as a mini-Congress" without the accountability that comes with it. He concludes that this "will not end well" for consumers, competition, businesses, or the FTC.

[Wilson](#) contends that the plan "extends far beyond the systemic review of existing rules (many of which should be abolished in any event) and instead lays the foundation for an avalanche of problematic rulemakings." She assails the "fast-track regulation" made possible by the FTC revised rulemaking procedures; the decision to launch this effort even as the FTC can't meet its merger review obligations; and the failure to learn from past failed regulatory experiments (affecting railroads and airlines) that stifled innovation, increased prices, and limited choice.

Questions and Issues

- *More rules may be added.* The FTC's list is long as-is, but it may get even longer in the coming months. As noted above, the Statement refers to a potentially endless category of rules to define unfair or deceptive practices with specificity. Further, on the day the FTC published its regulatory agenda, it also announced that it's considering a [new rule](#) to address government and business impersonation fraud. Clearly, the FTC is actively exploring multiple rules to lay the foundation for consumer redress and civil penalties.
- *Resources and timing.* The FTC's lengthy plan will require many resources to pursue and complete. Among other things, the revised Section 18 procedures (hailed or mocked as "streamlined," depending on one's perspective) are still long and cumbersome – requiring multiple requests for comment, a demanding legal analysis, and many opportunities for opponents to slow down the process. Further, if the FTC attempts to use Section 6(g) to define "unfair methods of competition," as some have proposed, protracted legal challenges seem likely. As a result, even if the FTC receives the \$500 million proposed in the Build Back Better bill, it could take years to develop the proposed rules, with uncertain outcomes.
- *"Significant regulatory action."* The FTC states that none of its rules would meet the definition of a ["significant regulatory action"](#) warranting additional OMB scrutiny – meaning that none would impose annual costs of \$100 million or more, or have a material adverse impact on the economy or various economic sectors. Really? I suspect that stakeholders will challenge this assertion in many of the rulemakings the FTC plans to undertake.
- *Khan needs a majority.* Chair Khan was able to publish this agenda because it doesn't require a vote from the 2-2 divided Commission. However, she will need a majority in order to seek public

comment and take other critical steps in the rulemaking process. With confirmation of Alvaro Bedoya still stalled in the Senate, it could be several months (at least) before many of these rulemakings actually get off the ground.

Message for companies

So what are the key takeaways for companies that may be affected by this rulemaking blitz?

- Continue to push forward on your compliance plans, documentation, and implementation of best practices, especially in the areas of data privacy and security, clear and accurate marketing claims, and responsible use of algorithms.
- Get ready to file comments on potentially multiple rules affecting your business and your customers.
- Fasten your seatbelts, and reach out to us for help whenever you have questions or concerns about the FTC's statements or actions.

We will continue to monitor these issues closely and post updates as they occur.

The logo consists of the words "AD LAW" stacked above "ACCESS" in a bold, white, sans-serif font, set against a solid blue rectangular background.The logo features the name "Kelley" in a blue, sans-serif font above the name "Drye" in a green, sans-serif font.