FTC Consumer Protection Enforcement Trends Under Biden Administration

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The Federal Trade Commission has continued to be an aggressive regulator under the Biden administration, even in the face of recent obstacles. These include increasing headwinds from Congress, in particular the US House of Representatives, and ongoing repercussions from the Supreme Court's 2021 decision in *AMG Capital Management, LLC v. FTC* prohibiting monetary penalties under **Section 13(b) of the FTC Act**.

A review of the FTC enforcement matters brought or settled under the Biden administration through June 2023 shows the Commission remains highly focused on financial services, web services and telecom, health care, and retail industries, with approximately 90% of its consumer protection actions in these areas. In doing so, the agency prioritizes the protection of vulnerable populations, including the elderly, students, military families, and non-native English speakers. While many of the FTC-related headlines have focused on anti-trust issues, the FTC has aggressively pursued a robust consumer protection agenda under the Biden administration.

This article addresses the impact of the *AMG Capital Management* decision on FTC rulemaking, recent enforcement trends, and what practitioners can expect for the remainder of the Biden administration.

Federal Trade Commission Leadership

Along with new Chair Lina Khan, Commissioners Alvaro Bedova and Rebecca Kelly Slaughter (the lone holdover from the Trump administration) fill the Democratic seats on the Commission. Andrew Ferguson and Melissa Holyoak, the solicitors general of Virginia and Utah, respectively, have been nominated for the Republican minority seats.

The Republican House has appeared eager to engage with the Commission's new leadership. For example, the House Judiciary Committee held an oversight hearing at which Chair Khan was called to **testify** about the “mismanagement of the FTC and its disregard for ethics and congressional oversight” and launched targeted investigations of FTC matters, some of which Chair Khan has **described** as “a campaign to intimidate and harass” FTC staff. Such discord between the Republican-led House committees and the FTC is unlikely to abate as the Presidential campaign season approaches.

Impact of *AMG Capital Management* Decision

In *AMG Capital Management, LLC v. FTC*, **141 S. Ct. 1341** (2021), the Supreme Court held that the FTC can no longer obtain equitable monetary relief, such as restitution or disgorgement, in federal courts under **Section 13(b) of the FTC Act**—a provision the Commission had frequently employed to seek monetary recovery concurrently with enjoining a defendant from an actual or potential violation of the FTC Act. In FY **2019** and FY **2020**, the FTC filed a combined 112 complaints in federal court, leading to more than $1.5 billion in consumer redress and disgorgement. Following *AMG Capital Management*, those numbers dropped to a combined 60 complaints and $340.5 million in FY **2021** and FY **2022**. Congress has yet to pass legislation restoring the FTC's Section 13(b) authority, leading FTC Chair Khan to **testify** that, “some companies that profited by deceiving the consumers are now able to keep that money.”

In the meantime, the FTC is exploring other tools for monetary penalties in federal court. One avenue has been to operate under various FTC trade regulation authority, including civil penalties under **15 U.S.C. § 45** (m)(1)(A) and a patchwork of trade regulation rules pursuant to Section 19, including the Telemarking Sales Rule (TSR), Restore Online Shoppers Confidence Act (ROSCA), Children's Online Privacy Protection Rule (**COPPA**), and Made in the USA Labeling Rule. The FTC also has proposed a number of new rules or amendments to existing rules that will expand the areas for monetary penalties under these provisions.

In addition, **15 U.S.C. § 45(m)(1)(B)** permits civil penalties where (1) the company knew that the conduct was a violation of the FTC Act, and (2) the FTC had previously determined that the conduct or practice was unfair or deceptive. The FTC recently sent **notices** to more than 700 companies on the basis that, among other things, it was an unfair or deceptive practice for “an advertiser to make an objective product claim without having a reasonable basis, at the time the claim is made, consisting of competent and reliable evidence.” Having received the notice, if one of the recipient companies were to engage in the prohibited practice, the FTC could seek civil penalties in federal court without having to navigate the administrative process.

Finalized Rules & Proposed Rulemaking

Under the Biden administration, the FTC has sought to reinvigorate its rulemaking efforts and enforcement opportunities. Expanding the scope of activity covered by trade regulation rules will allow the FTC to seek immediate civil penalties for a broader spectrum of behavior and will help the FTC to reclaim some of the enforcement power it lost in the wake of *AMG Capital Management*.

- **Made in USA Labeling Rule (16 C.F.R.§ 323).** Prohibiting “made in the USA” labeling unless the product and its components are produced and processed domestically.

• **Health Breach Notification Rule (16 C.F.R.§ 318) (HBNR).** Proposed amendment clarifying the rule applies to health apps and expanding the disclosure requirements for breach notifications.

• **Negative Option Rule (16 C.F.R.§ 425).** Proposed amendment to cover all forms of negative option marketing and increase consumer protections, including requiring express informed customer consent and simple cancellation mechanisms.

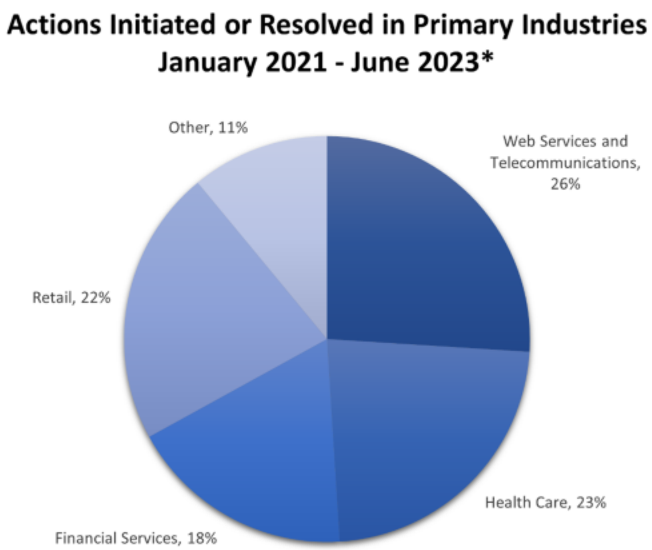
• **Trade Regulation Rule on the Use of Reviews and Endorsements (16 C.F.R.§ 465).** Proposed rule to address the use of fake reviews and endorsements.

• **Unfair or Deceptive Fees Trade Regulation Rule (14 C.F.R.§ 464).** Proposed rule to address junk fees and other hidden fees across all industries.

• **Trade Regulations on Impersonation of Government and Business (16 C.F.R.§ 461).** Rulemaking to prohibit impersonation of government entities, businesses, or their officials.

• **Commercial Surveillance & Data Security Rulemaking.** Proposed rule to address harmful commercial surveillance and data security practices.

Biden-Era FTC Consumer Protection Actions



Click here to view chart

**Analysis was based on a review of enforcement actions identified as consumer protection actions on the FTC's website from Jan. 20, 2021 - June 30, 2023.*

Web Services & Telecom

Under the Biden administration, the FTC has initiated or resolved 30 enforcement matters in the web services and telecom sector, the most among the four main areas discussed in this article. The prohibited conduct covers a range of activities, including illegal telemarketing, deficient or deceptive data security practices, tricking users into online subscriptions or purchases, deceptive practices regarding user reviews, and violating **COPPA**. Settlements have ranged from $100,000 to settle a matter involving fake reviews to more than $660 million for a telemarketing scheme. See *FTC v. Roomster Corp.*, No. 1:22-cv-7389 (S.D.N.Y.); *FTC v. Associated Community Servs.*, No. 2:21-cv-10174-DML-CI (E.D. Mich.).

The FTC has continued its crackdown on telemarketers, announcing multiple initiatives to go after robocallers and illegal telemarketing. In July 2023, the FTC and more than 100 federal and state law partners **announced** “Operation Stop Scam Calls,” which targets both telemarketers and lead generators who are alleged to be deceptively collecting and sharing consumer telephone numbers. The initiative builds on the FTC's earlier **Project Point of No Entry** (PoNe) to address voice over internet providers (VoIP) who allow foreign robocalls to enter the US.

Online retailer subscription services and “negative option” features also have become a priority, with the FTC targeting “dark patterns” tricking customers into signing up for unwanted products or difficult-to-cancel recurring charges. The FTC recently brought significant enforcement actions related to dark patterns and plans to update its rules to require simple cancellation mechanisms. For example, in *Epic Games*, No. C-4790 (Mar. 13, 2023), the company agreed to a $245 million settlement for using dark patterns to lure video gamers into unwanted purchases, impede requests to challenge or refund charges, and block accounts if customers disputed charges. In 2020, the FTC obtained a settlement for $10 million from children's education company Age of Learning (ABCmouse) for dark patterns related to its negative option feature. The FTC **alleged** that the company tricked users into signing up for subscriptions and intentionally made it difficult to cancel the recurring charges.

The FTC also has been very active in the **COPPA** space. For example, Epic Games agreed to a record $275 million **settlement** related to collecting information from children who played Fortnite and were exposed to default live text and voice communications settings without parental consent. *United States of America v. Epic Games, Inc.*, Docket No. 5:22-cv-00518 (E.D.N.C. Dec 19, 2022). Epic was required to adopt strong default privacy settings for children and teens and implement a comprehensive privacy protection program. The FTC also recently obtained a $6 million **penalty** from the education company Edmodo for collecting personal data from children without first obtaining parental consent in violation of **COPPA**.

Financial Services

The FTC initiated or resolved approximately 20 enforcement actions involving companies in the financial services sector during the first two and a half years of the Biden administration. The prohibited conduct in these matters includes fraudulent debt collection, deceptive claims regarding debt relief and credit repair, hidden fees in loan applications, overcharging consumers for payday loans, and deceptive marketing of investment-related services or business coaching. Settlements in the sector ranged from around $500,000 to more than $114 million.

Among the FTC's priorities have been companies trying to defraud financially insecure individuals around debt relief, including credit repair and mortgage debt assistance. In *FTC v. National Landmark Logistics LLC et al*, Docket No. 20-cv-02592-JMC (D.S.C. Jul. 13, 2020), the FTC obtained a settlement for $12 million and a ban on debt collection activities against a group of phantom debt collectors using deceptive robocalls warning consumers of legal action for non-existent debts.

The FTC has also worked with the Department of Education on student loan debt relief fraud, obtaining three individual $25 million settlements. Additional actions against two companies alleged to have lured students into fake debt relief services also are pending. See *FTC v. SL Finance LLC*, No. 8:23-cv-0068-JWH (C.D. Cal. Apr. 24, 2023); *FTC v. BCO Consulting Servs., Inc.*, No. 8:23-00699-JWH (C.D. Cal. Apr. 24, 2023). With the resumption of payments on student loans this fall, we expect the FTC to continue to aggressively go after student loan debt fraud.

Health Care

The FTC has brought or settled approximately 26 enforcement matters in the health care sector during the Biden administration. These include claims regarding deceptive marketing of supplements and treatment options, deficient or deceptive practices regarding health data privacy, as well as the FTC's first actions under the Opioid Addiction Recovery Fraud Prevention Act (OARFPA). While most settlements in the sector were below $10 million, the *Benefytt Technologies* matter—which involved **allegations** Benefytt sold sham health care insurance and charged junk fees for unwanted products—resulted in a $100 million settlement.

New developments in the FTC's consumer health care space include first-time actions for CBD products, with six companies **settling** FTC complaints for unsupported statements about the health benefits of their products in 2021. The FTC also brought its first action under OARFPA, which prohibits deceptive practices related to opioid and other substance abuse treatment services or products, with R360 LLC agreeing to a $3.8 million penalty for misleading individuals about treatment centers in their network. *FTC v. R360 LLC*, No. 22-cv-60924 (S.D. Fla., May 16, 2022). The FTC has filed a subsequent OARFPA action against Smoke Away USA, claiming the company deceptively marketed smoking cessation products, including through fake testimonials from actors. *United States v. Connors*, No. 2:23-cv-475 (M.D. Fla., June 29, 2023)

In addition, the FTC brought its first actions under the Health Breach Notification Rule, which requires vendors of personal health records to notify consumers and the FTC of a breach involving unsecured information. In February 2023, GoodRx Holdings, Inc. entered into a $1.5 million settlement for allegations that the provider shared personal health data with third parties for targeted health care-related advertisements and the third parties' own purposes. *United States v. GoodRX Holdings, Inc.*, No. 3:23-cv-460 (N.D. Cal., Feb. 17, 2023).

Retail

The Commission filed or resolved approximately 25 retail enforcement matters, involving issues of deceptive labeling or marketing of products, deceptive or fraudulent endorsements, restricting consumer's right to repair, and deficient or deceptive data privacy practices. Settlements ranged from $15,000 to $24 million, with the two largest settlements related to accusations of retailers helping unqualified buyers obtain financing to purchase retailer products.

The 2021 Made in the USA Labeling Rule has been an effective new tool for retail matters, making up seven of the FTC's 25 retail enforcement actions. For example, in *Instant Brands*, the FTC took action against the maker of Pyrex kitchen products for claiming certain goods imported from China were instead made in the US. The **final order** required Instant Brands to cease its "made in the USA" claims and pay a $129,416 penalty. Security for consumer data has also become an important focus for the Commission. In 2023, the FTC brought an **action** against alcohol retailer Drizly and its CEO for security failures that led to a data breach affecting the personal information of over 2.5 million consumers.

The retail space especially is one in which the FTC continues to prioritize vulnerable populations, particularly the elderly. In 2023, Publishers Clearing House agreed to pay $18.5 million to settle claims the company tricked consumers, specifically including the elderly and low-income, into believing purchases from its online marketplace were necessary to win the contest and with charging individuals surprise fees on its products. *FTC v. Publishers Clearing House LLC*, No. 23-cv-4735 (E.D.N.Y., June 26, 2023).

Expectations for Remainder of the Biden Administration

Practitioners can expect the FTC to continue focusing on the four core sectors of web services and telecom, financial services, health care, and retail, with a continued special emphasis on protecting vulnerable populations. Practitioners should be prepared, however, for new industries and policy areas to emerge as increasing Commission priorities in the remaining years of the Biden administration and beyond.

Practitioners, for example, will want to be ready for more attention and focus on Artificial Intelligence (AI)-related consumer issues. Chair Khan highlighted the FTC's concerns in testimony before Congress, previewing Commission concerns that "AI misuse can violate consumers' privacy, automate discrimination and bias, and turbocharge imposter schemes and other types of scams," and that the FTC "is poised to move aggressively against businesses that engage in deceptive or unfair acts involving AI." In a **joint statement** with the Department of Justice and other agencies, the Commission stressed that the agency's current authority extends to AI, for example under the FTC Act when companies make unsubstantiated claims about AI capabilities or otherwise use AI in ways leading to discriminatory impacts. President Biden likewise has **urged** the FTC to use its available powers to protect consumers against the risks of AI in his sweeping Executive Order on AI.

The Biden administration also has very publicly **promoted** its fight against junk fees, encouraging the FTC and other agencies to further regulate the practice. The FTC is moving forward on the issue with a recently proposed rule that would require businesses to display the total price a consumer must pay for a good and service. The FTC has also proposed expanding the Negative Option Rule, which the FTC claims will prevent consumers from being tricked into unwanted recurring charges.

Practitioners should keep an eye on a few other areas that may see increased FTC activity. Enforcement of social media influencers is one space to watch in light of recent FTC **guidance** about the use of endorsements and testimonials in advertising. Another area is health data privacy. The FTC's proposed amendments to the HBNR make clear that the rule extends to medical apps. Practitioners should also be aware that Chair Khan has stated her intention for the Commission to serve as a gap-filler for where the Health Insurance Portability and Accountability Act (HIPAA) does not apply.

Conclusion

Throughout the Biden administration, the FTC has shown it can execute its consumer protection goals, even in the face of significant obstacles. While acknowledging the setback from the *AMG Capital* decision and lack of immediate congressional action, the FTC is continuing to explore various enforcement mechanisms, examining ways new and old rules may be utilized for this purpose. How the Commission adapts these procedures and what areas in addition to the four key enforcement sectors catch the FTC's enforcement focus will be worth watching through and beyond the current administration.

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