

# FTC enforcement trends in consumer protection under the Biden administration

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## Key points

- After the Supreme Court limited the FTC's authority to collect monetary penalties under the FTC Act, the agency has increasingly relied on trade regulations as enforcement tools.
- The agency has been very active on various fronts to protect consumers, enforcing standards for everything from advertising to data privacy, social media influencers and consumer fees.
- About 90% of its consumer protection actions have involved financial services, web services and telecoms, health care or the retail sector.

The Federal Trade Commission (FTC or the Commission) has continued aggressive regulation in the consumer protection space under the Biden administration. This persistent approach has occurred even in the face of recent obstacles — most notably the U.S. Supreme Court's 2021 decision prohibiting monetary penalties under Section 13(b) of the FTC Act.

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Through October 2023, the Commission has remained focused on financial services, web services and telecommunications, health care and retail industries, with approximately 90% of its consumer protection actions in these areas. Within those categories, however, there are clues to shifting priorities expected for the remainder of the Biden administration's current term.

## Impact of Supreme Court's decision in *AMG Capital Management*

The Supreme Court's decision in *AMG Capital Management, LLC v. FTC* has significantly affected FTC enforcement. In that case, the 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 and injunctive relief.

While awaiting a congressional fix, the FTC is employing tools like trade regulations allowing for civil penalties, including the Telemarketing Sales Rule (TSR), the Restore Online Shoppers' Confidence Act (ROSCA), the Children's Online Privacy Protection Rule (COPPA) and the Made in USA Labeling Rule.

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The FTC also has proposed new rules or amendments that will expand its ability to seek penalties, shedding light on potential areas of focus by the Commission in 2024. In addition, the FTC appears to be expanding its notice practices under the FTC Act, alerting companies that it has found certain practices unfair or deceptive, which could allow it to seek monetary penalties if those companies continue those activities.

## Biden-era FTC consumer protection actions and priorities

**Web services and telecoms:** Under the Biden administration, the FTC has initiated or resolved 34 enforcement matters regarding web services and telecoms, the most of any sector discussed in this article. This includes illegal telemarketing, data security practices, online subscriptions or purchases, deceptive practices regarding user reviews and COPPA violations. Settlements have ranged from \$100,000 to \$660 million.

Looking ahead, FTC rulemaking and other activity appear to target the following:

- **Robocalls:** The FTC has multiple initiatives targeting robocallers and illegal telemarketing under the TSR. It appears

to be expanding its efforts to include voice-over-internet protocol (VoIP) providers, which allow foreign robocalls to enter the United States, as well as “lead generators” that obtain and sell purported consent from consumers to telemarketers.

- **Negative option features:** Online retailers’ subscription services and “negative option” features also have become a priority, with enforcement increasing against “dark patterns” that trick customers into difficult-to-cancel recurring charges. The FTC also proposes amending the Negative Option Rule to expand coverage to all forms of negative option marketing and increase consumer protections.
- **COPPA:** The FTC has been very active against and extracted large settlements for COPPA violations involving children’s data. Because the rule allows for immediate recovery of monetary penalties, rigorous enforcement of COPPA is likely to continue.

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**Financial services:** The FTC has initiated or resolved approximately 24 financial services enforcement actions since the start of the Biden administration, addressing debt collection, debt relief and credit repair, hidden loan application fees, payday loan overcharges and deceptive marketing of investment-related services. Settlements have ranged from \$500,000 to more than \$114 million. Further priorities will likely include the following:

- **Cryptocurrency:** Under both the FTC Act and the Gramm-Leach-Bliley Act, the FTC has stepped into the cryptocurrency area, recently settling allegations that an exchange convinced consumers to move assets onto it through false claims about its security.
- **Student loan debt relief:** The FTC has homed in on student loan debt relief scams, working with the Department of Education to obtain settlements from alleged scammers. With student loan repayments resuming, we expect student loan debt fraud to continue as an enforcement priority.

**Health care:** The FTC has brought or settled approximately 27 health care enforcement matters during the Biden administration, including claims regarding deceptive marketing and health data privacy. While most settlements were below \$10 million, one company accused of selling sham health care insurance and charging junk fees for unwanted products settled for over \$100 million.

The FTC also has signaled interest in other new health care areas:

- **Health breach notification:** The FTC recently brought its first action under the Health Breach Notification Rule (HBNR), which requires vendors to notify consumers of a breach

involving unsecured information. The Commission is proposing amendments to clarify that the rule applies to health apps and to expand breach notification requirements.

- **Cannabidiol (CBD) products:** In 2021, the FTC resolved its first CBD-related enforcement actions, settling with six companies concerning statements about CBD product health benefits.
- **OARFPA:** The FTC brought its first actions under the Opioid Addiction Recovery Fraud Prevention Act, which prohibits deceptive practices related to opioid and other substance abuse treatments. In one case, the conduct concerned deceptive marketing by a smoking cessation products company, signaling enforcement beyond opioid treatments.

**Retail:** The Commission filed or resolved around 26 retail enforcement matters, involving issues of labeling or marketing of products, deceptive or fraudulent endorsements, consumers’ right to repair and data privacy practices. Settlements ranged from \$15,000 to \$24 million, with the two largest settlements coming where retailers allegedly helped unqualified buyers obtain financing to purchase retailer products. Further FTC priorities include:

- **Made in USA labeling:** Promulgated in 2021, the Made in USA Labeling Rule has already led to seven enforcement actions, for deceptive or misleading claims, under the Biden administration.
- **Protecting consumer data:** In 2023, the FTC brought multiple actions against companies for failing to properly protect consumer data. The FTC has also proposed a rule to address harmful commercial surveillance and data security practices.

**Additional priorities:** The FTC also has announced priorities that likely will apply across all industries:

- **Artificial intelligence:** FTC Chair Lina Khan testified before Congress<sup>1</sup> that “AI misuse can violate consumers’ privacy, automate discrimination and bias, and turbocharge imposter schemes and other types of scams.” She added that the FTC “is poised to move aggressively against businesses that engage in deceptive or unfair acts involving AI.” President Joe Biden also recently urged the FTC to use its available powers to protect consumers from the risks of AI in an executive order.<sup>2</sup>
- **Junk fees:** Combating junk or hidden fees has been a focus of President Biden’s consumer protection platform.<sup>3</sup> The FTC has proposed a rule for these fees across all industries, which we expect to be vigorously enforced once finalized.
- **Consumer reviews and endorsements:** The FTC updated its Guides Concerning the Use of Endorsements and Testimonials in Advertising<sup>4</sup> in July 2023 and proposed a trade rule to address the use of reviews and endorsements. The FTC has also published guidance for social media influencers<sup>5</sup> on how to stay compliant when promoting products.

## In sum

Throughout the Biden administration, the FTC has shown it can execute on its consumer protection goals, even in the face of significant obstacles. The FTC is continuing to explore various

enforcement mechanisms, examining ways new and old rules may be utilized for this purpose.

## Notes

<sup>1</sup> <https://bit.ly/3vqkpo>

<sup>2</sup> <https://bit.ly/49rDjN2>. See our November 3, 2023, client alert “Biden Administration Passes Sweeping Executive Order on Artificial Intelligence,” <https://bit.ly/3TS3ZRN>.

See also “AI in 2024: Monitoring New Regulation and Staying in Compliance With Existing Laws,” <https://bit.ly/3NQ3RhQ>.

<sup>3</sup> <https://bit.ly/3S3r2HY>

<sup>4</sup> <https://bit.ly/48ZMDXJ>

<sup>5</sup> <https://bit.ly/3NQaVnj>

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