

# New at the FTC: Agency Forges Ahead Even As Supreme Court Curbs Authority

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*Privacy In Focus®*

The Federal Trade Commission (FTC) has been in the headlines this month, following a significant U.S. Supreme Court decision that curbs its authority to seek monetary relief in federal court cases. However, this setback is not likely to chill the agency's strong push – under new leadership – to expand its activities, including with plans to increase rulemaking activity and target the use of biased artificial intelligence (AI) algorithms. Below, we analyze recent highlights at the agency.

## **FTC Is Dealt a Setback by the Supreme Court on the Issue of Monetary Relief**

On April 22, 2021, the U.S. Supreme Court – in a unanimous decision – significantly limited the ability of the FTC to obtain monetary relief in federal court cases. Specifically, in *AMG Capital Management, LLC v. FTC*, the Court held that the FTC does not have the authority to seek equitable monetary relief when it files cases in federal court under Section 13(b) of the FTC Act. The FTC has historically relied on Section 13(b) to recover money in a wide range of cases. The decision will have an immediate impact on the FTC's current investigations and litigation.

The Court's ruling has sparked calls for Congress to pass legislation to give the FTC direct authority to seek monetary relief. The FTC has made these calls before, including in congressional testimony just two days before *AMG Capital Management* was decided. But in the wake of the Court's decision, these calls have intensified. In a statement released after the decision, Acting Chairwoman Slaughter stated that "[w]ith this ruling, the Court has deprived the FTC of the

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strongest tool we had to help consumers when they need it most,” and “[w]e urge Congress to act swiftly to restore and strengthen the powers of the agency so we can make wronged consumers whole.” And on April 27, 2021, Acting Chairwoman Slaughter delivered congressional testimony entitled “The Urgent Need to Fix Section 13(b) of the FTC Act.”

Looking ahead, the FTC is likely to continue to pursue enforcement, though it may change its tactics. First, it is likely to pursue rule violations, which allow it to seek civil penalties notwithstanding the Court’s decision. This may include privacy-related rules like the Children’s Online Privacy Protection Rule (COPPA) and the Health Breach Notification Rule. Second, it is likely to partner with state Attorneys General and the Consumer Financial Protection Bureau (where possible) to leverage their ability to obtain monetary relief. Third, it may bring more administrative litigation, in order to obtain enforceable orders. And fourth, the agency has signaled it will consider making new rules that it can enforce – as explained in more detail below.

### **FTC Announces Shift from Its Decades-Old Approach to Rulemaking**

As we detailed last month, the FTC recently announced the creation of a new rulemaking group within the FTC’s Office of the General Counsel, and signaled that the FTC will be much more active in proposing rules on high-profile issues like privacy. On May 5, Acting Chairwoman Slaughter announced that the group will be led by one her of former attorney-advisors, who will serve as the Associate General Counsel for Rulemaking.

The agency has indicated that the rules it is seeking to establish will cover both unfair and deceptive practices and unfair methods of competition. Acting Chairwoman Slaughter also previewed that the FTC may move forward on rulemakings about data use, including issues related to privacy, manipulation of data platforms, and competition.

This new approach to rulemaking will represent a significant shift for the FTC. Congress passed legislation over four decades ago that significantly constrained the FTC’s rulemaking authority and generally requires the agency to follow cumbersome rulemaking requirements in addressing unfair or deceptive practices (generally known as “Magnusson-Moss” rulemaking), which go well beyond normal agency Administrative Procedure Act (APA) procedures. As a result, in recent years, the FTC has relied much more heavily on enforcement actions than rulemaking in critical areas like privacy and data security. Now, with the newly announced rulemaking group, this trend will likely change.

### **FTC Foreshadows Potential Enforcement to Combat Discrimination in AI**

Even with the new approach to rulemaking, the FTC appears likely to continue to rely heavily on enforcement, and it has signaled that one priority area will be addressing harms from discriminatory algorithms in AI. On April 19, 2021, the FTC published a blog post that lays out the legal framework for evaluating AI bias, which includes the Fair Credit Reporting Act (FCRA), the Equal Credit Opportunity Act (ECOA), and Section 5 of the FTC Act. Both the FCRA and ECOA are applicable when AI is used for certain purposes, such as credit. The FTC Act has a broader sweep, and the blog post announced: “The FTC Act prohibits unfair or deceptive practices. That would include the sale or use of – for example – racially biased algorithms.” That would cover use of AI in a wide range of contexts, including advertising decisions.

In the post, the FTC suggests that enforcement could be on the horizon if use of AI results in discrimination, noting that companies should “keep in mind that if you don’t hold yourself accountable, the FTC may do it.” As one example, the FTC states that an algorithm practice could be “unfair” under the FTC Act if the model “pinpoints [] consumers by considering race, color, religion, and sex – and the result is digital redlining.” The post lays out a roadmap for compliance expectations for companies using AI and related algorithms, which include relying on inclusive data sets, testing algorithms, being truthful about how data are used and not exaggerating what the algorithm does; and being transparent and independent.

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Under the new Administration, the FTC is rethinking its priorities and approaches, which will have cascading impacts throughout industry, including in the areas of privacy, data security, and data-driven algorithms. Even though the Supreme Court’s recent decision in *AMG Capital Management* cut off – for the time being – a key way in which the agency seeks monetary relief, there is no sign that the agency will be deterred in driving its priorities, including through new rulemaking activity and continued enforcement activity.

Wiley’s FTC Regulation Practice counsels clients on FTC compliance, investigations, enforcement, and rulemaking, and regularly advocates before the agency. Contact the authors for additional information.

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