

**ALERT**

# FTC Adopts Policy Statement on Consumer Device Repairs and Announces That Enforcement Approach Will Be a Priority

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July 22, 2021

On Wednesday, July 21, the Federal Trade Commission (FTC) unanimously adopted a Policy Statement to combat practices that the agency characterizes as “repair restrictions” for consumer devices and other products. The Policy Statement signals that the FTC will take a closer look at manufacturers’ policies that impact consumer product repair options and prioritize an enforcement approach against limitations that it believes to be unlawful. Specifically, the Policy Statement notes that the FTC “will devote more enforcement resources to combat these [repair] practices” and “will now prioritize investigations into unlawful repair restrictions under relevant statutes” including the FTC Act.

## **The Development of the Policy Statement: the “Nixing the Fix” Workshop and Report**

Wednesday’s Policy Statement is the product of continued FTC scrutiny, combined with federal policymaking initiatives and state-level efforts to pass “right to repair” laws. In 2019, the FTC held the “Nixing the Fix” Workshop to address “repair restrictions,” which was framed at the outset as skeptical of industry practices. After soliciting public comment at the workshop and researching the issue, the agency submitted the “Nixing the Fix” Report to Congress on May 6, 2021. The report largely criticized industry practices that it understood as limiting consumer repair options, either by independent repair providers or by consumers themselves. Ultimately, the report concluded by noting that “[t]he Commission will consider reinvigorated regulatory and law enforcement options, as well as consumer education.” Additionally, the Biden Administration

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promulgated an Executive Order on July 9 encouraging the FTC to take action on repair issues, further prompting the development of the Policy Statement.

Throughout the workshop, Congressional report, and Policy Statement, the FTC has scrutinized a wide range of industry practices involving repairability of devices, including limits on certain software and tools outside of authorized repair networks, physical product design decisions, and using digital rights management and technical protection measures. Industry stakeholders have argued that these measures are important to protect consumer safety, security, and privacy, as well as important intellectual property (IP) rights, among other points.

### **What is Next for Device Repairs?**

The Policy Statement identifies different types of repair-related policies that the FTC will scrutinize.

*First*, the Policy Statement indicates that the FTC will look more closely at consumer warranties for compliance with the Magnusson-Moss Warranty Act (MMWA).<sup>[1]</sup> The anti-tying provision of the MMWA, Section 102(c), prohibits a consumer product warrantor from conditioning its warranty on the consumer using any article or service which is identified by brand name, unless the article or service is provided for free or the warrantor obtains a waiver from the Commission.<sup>[2]</sup> The FTC has previously sent out warning letters to companies regarding potential violations, and taken one recent enforcement action.

*Second*, the Policy Statement indicates that the FTC will scrutinize repair restrictions for violations of antitrust laws. Scrutinized practices in this area could include limitations on the availability of parts, manuals, diagnostic software, and tools, as well as the use of digital rights management and other IP protection measures. Notably, the “Nixing the Fix” Report to Congress recognized that there were significant IP concerns behind manufacturers’ repair policies, but did not fully evaluate their impact.

*Third*, the Statement indicates that the FTC will investigate whether any practices constitute unfair or deceptive acts or practices under the FTC Act,<sup>[3]</sup> including evaluating any claims made about repair limitations.

In each of these cases, the FTC will need to deal with arguments from manufacturers and sellers that these measures protect consumers, including by enhancing the safety and security of repairs and protecting consumer privacy, that consumers already have ample choices for repairing devices, and that measures are necessary for IP protection. The agency may also face questions about its authority to obtain relief and suggestions that it is attempting to effectively regulate the market through enforcement.

Policy Statements signaling Commission enforcement priorities are not common, and indicate that examination of repair-related practices will be a priority for the agency in the coming months.

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.

[1] 15 U.S.C. §§ 2301 *et seq.*

[2] *Id.* § 2302(c).

[3] *Id.* § 45.