



April 14, 2023

TO: Members, Subcommittee on Innovation, Data, and Commerce
FROM: Committee Majority Staff
RE: Hearing Entitled “Fiscal Year 2024 Federal Trade Commission Budget”

I. INTRODUCTION

The Subcommittee on Innovation, Data, and Commerce will hold a hearing on April 18, 2023, at 10:00 a.m. in 2123 Rayburn House Office Building. The hearing is entitled “Fiscal Year 2024 Federal Trade Commission Budget.”

II. WITNESSES

- Witness 1 – The Honorable Lina M. Khan, Chair
- Witness 2 – The Honorable Rebecca Kelly Slaughter, Commissioner
- Witness 3 – The Honorable Alvaro Bedoya, Commissioner

III. BACKGROUND

The Federal Trade Commission [hereinafter “Commission” or “FTC”], is a five-member independent commission created in 1914, with Commissioners being nominated by the President with advice and consent of the Senate for a seven-year term.¹ The FTC’s mission is to protect “the public from deceptive or unfair business practices and from unfair methods of competition through law enforcement, advocacy, research, and education.”² The Commission meets its mission by using the following authorities: investigative, law enforcement, advocacy, education, consumer programs, and rulemaking.³ The FTC uses these authorities within the Bureaus of Consumer Protection, Competition, and Economics, along with the office of the general counsel and eight regional offices.⁴ The last time the full slate of FTC Commissioners appeared before the Energy and Commerce Committee was July 2021.

¹ 15 U.S.C. § 41.

² Federal Trade Commission, *About the FTC*, <https://www.ftc.gov/about-ftc>.

³ *Id.*

⁴ *Id.*

A. Overview of FTC Authorities and Limitations

These activities are authorized by a variety of antitrust and consumer protection statutes related to a wide cross section of the economy.⁵ Section 5 of the *FTC Act*, provides the primary consumer protection mandates that derive from “unfair or deceptive acts or practices in or affecting commerce, [which] are hereby declared unlawful.”⁶ The Commission has used the *FTC Act* to investigate and prosecute activity related to privacy and data security, internet fraud, robocall scams, deceptive claims in advertising and marketing, consumer financial products, and fraudulent schemes against vulnerable populations and small businesses, among other things.⁷ The FTC also enforces specific laws related to its consumer protection mission, including the *Fair Credit Reporting Act* (FCRA),⁸ *Gramm-Leach-Bliley Act* (GLB),⁹ and the *Children’s Online Privacy Protection Act of 1998* (COPPA).¹⁰ In total, the Commission is responsible for enforcing and carrying out more than 80 laws.¹¹

The FTC’s general rulemaking authority is limited by the 1975 *Magnuson-Moss Warranty-Federal Trade Commission Improvement Act* (Mag-Moss), unlike other agencies, which added steps to their rulemaking procedures.¹² These steps required the FTC to show, among other things, “substantial evidence in the rulemaking record: that practices are prevalent’ or ‘widespread’ before a practice can be declared an unfair and deceptive act of practice.”¹³ Usually, the FTC issues regulations, when Congress has granted such authority, under the *Administrative Procedures Act* (APA) for specific issues.¹⁴

The Commission does not have authority to issue civil penalties for initial violations for most unfair or deceptive acts or practices.¹⁵ Initial violations usually allow the FTC to obtain injunctive relief and an order prohibiting the volitive conduct.¹⁶ The FTC can seek civil penalties only after the final order has been issued.¹⁷ Under Chair Khan’s leadership, the FTC has taken the controversial step of sending some preemptive notices to more than 700 companies, putting them on notice that the Commission may seek injunctive relief and an order prohibiting the conduct they consider to be volitive.¹⁸

⁵ Federal Trade Commission, *What the FTC Does*, <https://www.ftc.gov/news-events/media-resources/what-ftc-does>.

⁶ 15 U.S.C. § 45.

⁷ Federal Trade Commission, *FY 24 Budget Justification*, https://www.ftc.gov/system/files/ftc_gov/pdf/p859900fy24cbj.pdf

⁸ 15 U.S.C. § 1681 et seq.

⁹ Pub. Law 106-10 (1999) (codified as amended in scattered sections of 12 and 15 U.S.C.).

¹⁰ 15 U.S.C. § 6501 et seq.

¹¹ Federal Trade Commission, *Legal Library*, <https://www.ftc.gov/legal-library/browse/statutes>.

¹² 15 U.S.C. § 57a(b)-(c); (e).

¹³ 15 U.S.C. § 57a(b)-(c); (e).

¹⁴ See, e.g., *Children’s Online Privacy Protection Rule*, 16 C.F.R. Part 312.

¹⁵ Government Accountability Office, *Internet Privacy: Additional Federal Authority Could Enhance Consumer Protection and Provide Flexibility*, GAO-19-52 (Jan. 15, 2019), <https://www.gao.gov/products/gao-19-52>, at 10.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Mark Brennan et. al., *FTC “Resurrects” Penalty Offense Authority for Unlawful Endorsements and testimonials*, JDSUPRA (Oct. 25, 2021), <https://www.jdsupra.com/legalnews/ftc-resurrects-penalty-offense-5428791/>.

Jurisdiction of the Commission is limited to exclude certain companies, including common carriers, banks, and air carriers.¹⁹ The *FTC Act* applies only to corporations “organized to carry on business for its own profit or that of its members.”²⁰ The FTC has also recently expressed support for privacy and data security legislation. Chair Simons, the previous Commission Chair, voiced support for such legislation too.²¹

B. Fiscal Year 2024 Budget Request

The FTC has requested \$590 million for Fiscal Year 2024 and 1,690 full-time equivalent positions, which would be a \$160 million increase from the \$430 million enacted level for FY 2022.²² Allocations for consumer protection and competition in FY 2024 are \$288.9 million and \$301.1 million, respectively. The request includes offsets from the *Hart-Scott-Rodino Act* pre-merger notification filing fees in the amount of \$323 million and Do-Not-Call fees in the amount of \$13 million.²³ The \$430 million increase would “permit the FTC to continue to meet the ongoing challenges of its mission to protect consumers and promote competition.”²⁴

C. 13(b) – Centralization of Rulemaking Authority

In March of 2021, the Commission announced that due to concerns it could lose its ability to seek monetary relief under Section 13(b) of the *FTC Act*, it would centralize rulemaking authority within the Office of the General Counsel (OGC).²⁵ Shortly before this announcement, the Supreme Court held unanimously, in *AMG Capital Management, LLC v. FTC*, that Section 13(b) of the *FTC Act* does not authorize the Commission to seek, or a court to award, equitable monetary relief.²⁶ Since the *AMG Capital Management, LLC* decision, the FTC has used Section 18 of the *FTC Act* to “stop widespread consumer harm and, promote robust competition.”²⁷

¹⁹ 15 U.S.C. § 45(a)(2).

²⁰ 15 U.S.C. § 44.

²¹ Letter from Hon. Joseph J. Simons, Chairman, Federal Trade Commission, to Rep. Frank Pallone, Jr., Chairman, House Committee on Energy and Commerce (Apr. 1, 2019).

²² Federal Trade Commission, *Congressional Budget Justification Fiscal Year 2024*, https://www.ftc.gov/system/files/ftc_gov/pdf/p859900fy24cbj.pdf, at 5.

²³ *Id.*, at 8.

²⁴ *Id.*, at 5.

²⁵ Federal Trade Commission, *FTC Votes to Update Rulemaking Procedures, Sets Stage for Stronger Deterrence of Corporate Misconduct*, (July 1, 2021) <https://www.ftc.gov/news-events/press-releases/2021/07/ftc-votes-update-rulemaking-procedures-sets-stage-stronger>.

²⁶ Supreme Court of the U.S., *AMG Capital Management, LLC v. Federal Trade Commission*, (Oct. Term 2020) https://www.supremecourt.gov/opinions/20pdf/19-508_l6gn.pdf.

²⁷ Federal Trade Commission, *FTC Votes to Update Rulemaking Procedures, Sets Stage for Stronger Deterrence of Corporate Misconduct*, (July 1, 2021) <https://www.ftc.gov/news-events/press-releases/2021/07/ftc-votes-update-rulemaking-procedures-sets-stage-stronger>.

D. Franchise Rule Request for Information

On March 10, 2023, the FTC posted a Request for Information related to franchise agreements and franchisor business practices, “including how franchisors may exert control over franchisees and their workers.”²⁸ Specifically, the FTC wants to learn about how franchisors disclose aspects and contractual terms in their relationship with franchisees, which include: scope, application, and effect of those aspects and contractual terms.²⁹ This activity, paired with the FTC’s proposed rule seeking to ban non-compete clauses and the FTC’s partnership with the National Labor Relations Board.³⁰ This partnership is a notable intervention into labor issues not traditionally within the jurisdiction of the Commission.

E. Advanced Notice of Proposed Rulemaking on “Unfair or Deceptive Fees”

In October of 2022, the Commission announced that it would be publishing an Advanced Notice of Proposed Rulemaking to seek information related to a potential rule to “crack down on junk fees proliferating throughout the economy.”³¹ Specifically, the FTC sought comment on: “[u]nnecessary charges for worthless, free, or fake products or services;” “[u]navoidable charges imposed on captive consumers;” and “[s]urprise charges that secretly push up the purchase price.”³² The vote to publish the ANPR was 3-1, with Commissioner Wilson dissenting, among other reasons, citing that the rule is duplicative.³³

F. Privacy Legislation and the Commercial Surveillance Rulemaking

The FTC announced a Commercial Surveillance and Data Security rulemaking in August of 2022.³⁴ The rulemaking is designed to write a regulation related to the collection, analysis, and monetization of data.³⁵ The Commission also cited concerns they would like to address, including: lax data security, harms to kids, retaliation, surveillance creep or changing terms after customers sign up, inaccuracy with data, bias and discrimination, and dark patterns.³⁶ Commissioner Bedoya has stated that if ADPPA becomes law, that he will not vote in favor of

²⁸ Federal Trade Commission, *FTC Seeks Public Comment on Franchisor Exerting Control Over Franchisees and Workers*, (March 10, 2023) https://www.ftc.gov/news-events/news/press-releases/2023/03/ftc-seeks-public-comment-franchisors-exerting-control-over-franchisees-workers?utm_source=govdelivery.

²⁹ *Id.*

³⁰ *Id.*; Federal Trade Commission, *Federal Trade Commission, National Labor Relations Board Forge New Partnership to Protect Workers From Anticompetitive, Unfair, and Deceptive Practices*, (July 19, 2022) <https://www.ftc.gov/news-events/news/press-releases/2022/07/federal-trade-commission-national-labor-relations-board-forge-new-partnership-protect-workers>.

³¹ Federal Trade Commission, *Federal Trade Commission Explores Rule Cracking Down on Junk Fees*, (Oct. 20, 2022) <https://www.ftc.gov/news-events/news/press-releases/2022/10/federal-trade-commission-explores-rule-cracking-down-junk-fees>.

³² *Id.*

³³ *Id.*; Hon. Christine S. Wilson, *Dissenting Statement Advance Notice of Proposed Rulemaking – Junk Fees*, (Oct. 20, 2022) https://www.ftc.gov/system/files/ftc_gov/pdf/commissioner-wilson-dissenting-statement-junk-fees-anpr.pdf.

³⁴ Federal Trade Commission, *Commercial Surveillance and Data Security Rulemaking*, (Aug. 11, 2022) <https://www.ftc.gov/legal-library/browse/federal-register-notices/commercial-surveillance-data-security-rulemaking>.

³⁵ *Id.*

³⁶ *Id.*

any rule that overlaps, in his statement related to the publication of the Commercial Surveillance and Data Security rulemaking.³⁷ Commissioner Slaughter said that she would “prefer Congressional action to strengthen” the FTC’s authority with relation to data privacy.³⁸ She also said that in the absence of congressional action, the Commission should move forward with the rulemaking.³⁹ Chair Khan stated that, “[i]f Congress passes strong federal privacy legislation—as I hope it does—or if there is any other significant change in applicable law, then the Commission would be able to reassess the value-add of this effort and whether continuing it is a sound use of resources.”⁴⁰

G. Staffing Issues and Morale at the FTC have Declined since 2021

Under Chair Khan’s leadership, the FTC has seen a precipitous decline in staff approval and the early departure of both Republican commissioners.⁴¹ In 2020, 87 percent of surveyed FTC employees agreed that senior agency officials maintained high standards of honesty and integrity.⁴² In 2021, that number plummeted to 53 percent,⁴³ and to 47 percent in 2022.⁴⁴ This dissatisfaction is not a statistical anomaly – in 2022, of the FTC’s 1,123 full time employees, 765 completed the survey. Recognizing this issue, political leadership took action to try to ease staff concerns by lifting the staff gag order, which limited public and private appearances by FTC staff, and took “concrete steps to address staff feedback,”⁴⁵ including a shift in senior leadership.⁴⁶ Even after making these changes, staff confidence in Chair Khan’s leadership has continued to decline.⁴⁷

³⁷ Hon. Alvaro M. Bedoya, *Statement Regarding the Commercial Surveillance Data Security Advance Notice of Proposed Rulemaking*, (Aug. 11, 2022)

https://www.ftc.gov/system/files/ftc_gov/pdf/Bedoya%20ANPR%20Statement%2008112022.pdf.

³⁸ Hon. Rebecca Kelly Slaughter, *Statement Regarding the Commercial Surveillance Rulemaking*, (Aug 11, 2022)

https://www.ftc.gov/system/files/ftc_gov/pdf/RKS%20ANPR%20Statement%2008112022.pdf.

³⁹ *Id.*

⁴⁰ Hon. Lina M. Khan, *Statement Regarding the Commercial Surveillance and Data Security Advance Notice of Proposed Rulemaking*, (Aug 11, 2022)

https://www.ftc.gov/system/files/ftc_gov/pdf/Statement%20of%20Chair%20Lina%20M.%20Khan%20on%20Commercial%20Surveillance%20ANPR%2008112022.pdf

⁴¹ Cat Zakrzewski, *Sinking FTC Workplace Rankings Threaten Chair Lina Khan’s Agenda*, WASHINGTON POST (July 13, 2022), <https://www.washingtonpost.com/technology/2022/07/13/ftc-lina-khan-rankings/>; Note from Commissioner Noah Joshua Philips to FTC Employees (Oct. 14, 2022),

https://www.ftc.gov/system/files/ftc_gov/pdf/phillips-resignation-statement.pdf; Christine Wilson, *Why I’m Resigning as an FTC Commissioner: Lina Khan’s disregard for the rule of law and due process make it impossible for me to continue serving*, WALL STREET JOURNAL (Feb. 14, 2023); <https://www.wsj.com/articles/why-im-resigning-from-the-ftc-commissioner-ftc-lina-khan-regulation-rule-violation-antitrust-339f115d>.

⁴² Office of Personnel Management, *2020 Federal Employee Viewpoint Survey: Report by Agency*.

<https://www.opm.gov/fevs/reports/data-reports/data-reports/report-by-agency/2020/2020-agency-report.pdf>.

⁴³ Office of Personnel Management, *2021 Federal Employee Viewpoint Survey: Report by Agency*.

<https://www.opm.gov/fevs/reports/data-reports/data-reports/report-by-agency/2021/2021-agency-report.pdf>.

⁴⁴ Office of Personnel Management, *2022 Federal Employee Viewpoint Survey: Report by Agency*.

<https://www.opm.gov/fevs/reports/data-reports/data-reports/report-by-agency/2022/2022-agency-report.pdf>.

⁴⁵ Theo Wagt and Josh Kosman, *FTC faces staff exodus, anger over Biden-appointed Big Tech foe’s leadership*, New York Post (June 12, 2022) <https://nypost.com/2022/06/12/ftc-faces-staff-exodus-anger-over-biden-appointed-big-tech-foes-leadership/>.

⁴⁶ David Dayen *Anti-monopoly Reformer Joins Department of Transportation*, The American Prospect (January 18, 2023). <https://prospect.org/infrastructure/transportation/2023-01-18-anti-monopoly-reformer-jen-howard/>.

⁴⁷ *Supra* note 45.

In a February 14, 2023 Wall Street Journal op-ed by then FTC Commissioner Christine Wilson, she announced and explained her resignation. As the sole Republican representative at the FTC,⁴⁸ Commissioner Wilson raised allegations relating to potential loss of integrity of the FTC, the jeopardizing of the independence and collegiality essential to the functioning of the FTC, and the increased risk of the public losing confidence in the FTC.⁴⁹ Commissioner Noah Phillips, the other Republican Commissioner, resigned on October 14, 2022.⁵⁰

IV. RELEVANT COMMITTEE ACTION

- [April 27, 2021](#) – House Committee on Energy and Commerce entitled “The Consumer Protection and Recovery Act: Returning Money to Defrauded Consumers.”
- [July 28, 2021](#) – House Committee on Energy and Commerce entitled “Transforming the FTC: Legislation to Modernize Consumer Protection.”

V. PREVIOUS LEGISLATION

117th Congress:

- [H.R. 8152](#) – American Data Privacy and Protection Act – Reps. Pallone and McMorris Rodgers
- [H.R. 2668](#) – Consumer Protection and Recovery Act – Rep. Cardenas
- [H.R. 2671](#) – the Solidifying Habitual and Institutional Explanations of Liability and Defenses (SHIELD) Act – Rep. Armstrong
- [H.R. 2672](#) – FTC Robust Elderly Protections and Organizational Requirements to Track Scams (FTC REPORTS) Act – Rep. Bilirakis
- [H.R. 2677](#) – Technological Innovation through Modernizing Enforcement (TIME) Act – Rep. Burgess
- [H.R. 2676](#) – Revealing Economic Conclusions for Suggestions (RECS) Act – Rep. Bucshon
- [H.R. 2690](#) – Clarifying Legality and Enforcement Action Reasoning (CLEAR) Act – Rep. Guthrie
- [H.R. 2702](#) – Statement on Unfairness Reinforcement and Emphasis (SURE Act) – Rep. Mullin
- [H.R. 3067](#) – Online Consumer Protection Act – Rep. Schakowsky
- [H.R. 3918](#) - a bill to amend the Federal Trade Commission Act to permit the Federal Trade Commission to enforce such Act against certain tax-exempt organizations – Rep. Rush
- [H.R. 4447](#) - 21st Century FTC Act – Rep. Castor

⁴⁸ Hon. Christine Wilson, *Why I’m Resigning as an FTC Commissioner: Lina Khan’s disregard for the rule of law and due process make it impossible for me to continue serving*, Wall Street Journal (Feb. 14, 2023), <https://www.wsj.com/articles/why-im-resigning-from-the-ftc-commissioner-ftc-lina-khan-regulation-rule-violation-antitrust-339f115d>.

⁴⁹ *Id.*

⁵⁰ Hon. Noah Joshua Phillips, *Note from Commissioner Noah Joshua Phillips to FTC Employees*, (Oct. 14, 2022) https://www.ftc.gov/system/files/ftc_gov/pdf/phillips-resignation-statement.pdf.

- [H.R. 4460](#) - Consumer Equity Protection Act of 2021 - Rep. Kelly
- [H.R. 4475](#) - Protecting Consumers in Commerce Act of 2021 – Rep. McNerney
- [H.R. 4483](#) - Veterans and Servicemember Consumer Protection Act of 2021 - Reprs. Rice and Upton
- [H.R. 4488](#) - FTC Autonomy Act – Rep. Schakowsky
- [H.R. 4530](#) - Federal Trade Commission Technologists Act of 2021 – Rep. McNerney
- [H.R. 4551](#) - Reporting Attacks from Nations Selected for Oversight and Monitoring Web Attacks and Ransomware from Enemies (RANSOMWARE) Act – Rep. Bilirakis
- [H.R. 4564](#) – Federal Trade Commission Transparency Act – Rep. Guthrie
- [H.R. 5502](#) – INFORM Consumers Act – Rep. Schakowsky
- [H.Res. 1261](#) - Of inquiry requesting the President to provide certain documents to the House of Representatives relating to communications and directives with the Federal Trade Commission – Rep. Bilirakis

VI. STAFF CONTACTS

- Tim Kurth, Chief Counsel
- Teddy Tanzer, Senior Counsel
- Brannon Rains, Professional Staff Member
- Michael Cameron, Professional Staff Member
- Lacey Strahm, Technology Fellow
- Jessica Herron, Clerk