

What Businesses Need to Know About Anticipated FTC Leadership Changes

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Marketers and advertisers are contemplating potential changes in consumer protection regulations with the Trump administration at the helm in the year ahead.

Notwithstanding Trump's political campaign statements promising less government regulations for businesses, consumer protection will likely remain a top regulatory priority regarding new regulations and existing enforcement, particularly at the federal level. Both enforcement priorities and the means to accomplish them will likely look quite different under the next administration.

Continued Focus on Consumer Protection

While many insiders believed that the first Trump administration would lead to a significant relaxation of consumer protection enforcement at the federal level, the contrary proved to be the case. During Trump's first term, the Federal Trade Commission (FTC), the primary government consumer protection agency, maintained its primary "Strategic Goal" of protecting consumers from unfair or deceptive acts or practices in the marketplace.

Throughout Trump's first term, the FTC continued to enforce consumer protection against both large and small marketers. Key focus areas from 2017-2021 included health claims, "Made



Federal Trade Commission building in Washington, D.C, on January 12, 2022.

in USA" claims, fintech, small business scams, payment processors, rent-to-own schemes, debt collection abuse, and debt settlement practices.

The COVID-19 pandemic prompted a pivot in enforcement, with the FTC and the Food and Drug Administration (FDA) aggressively targeting unsupported treatment and prevention claims via warning letters and enforcement actions.

Under FTC Chair Lina Kahn, a President Biden appointee, the FTC seemed to focus instead on higher-profile consumer enforcement, such as actions against Amazon, Meta, and other big technology companies. The Kahn administration generated extensive rulemaking, some of which

was a thinly veiled attempt at recapturing the FTC's ability to obtain monetary relief to combat traditional consumer fraud without obtaining Congressional authorization.

This is due to the Supreme Court's limitation of the FTC's enforcement powers in the 2021 *AMG Capital Management v. FTC* decision, wherein the Court significantly reduced the agency's ability to seek consumer redress by barring it from pursuing disgorgement under ancillary equitable relief.

Anticipated Regulatory Priorities and Interpretation Under Commissioner Ferguson

The FTC under Commissioner Andrew N. Ferguson, the anticipated future Chair, will return to its focus on strong consumer protection enforcement within the lanes established by Congress.

Commissioner since April 2024, Ferguson's support for the FTC's consumer protection and privacy goals is well-documented; however, his approach to expansive regulation will differ. He is expected to advocate for Congressional approval of new regulatory standards, in contrast to Khan's preference for FTC-led rulemaking.

"The Commission under President Trump will focus primarily on our traditional role as a cop on the beat," Commissioner Ferguson made this clear in his recent dissent regarding the FTC's proposed regulatory priorities. "We will vigorously and faithfully enforce the laws that Congress has passed, rather than writing them."

The Commissioner's dissent is consistent with the position he has staked throughout his term. He has frequently spoken out against law violators and practices that utilize traditional and new technologies to deceive consumers. On the other hand, Commissioner Ferguson has dissented in terms of using regulations to expand the Commission's authority, and to otherwise overregulate innovative technology such as AI.

Commissioner Ferguson's dissents in two recent enforcement actions offer insight into his interpretation of FTC enforcement. One action involved a traditional advertising claim of "up to" while the other relates to AI.

The use of "up to" took center stage in the FTC's recent settlement with Lyft regarding allegedly deceptive driver earnings claims. As part of the case, the FTC challenged "up to" per-hour earnings claims that were based on the top 20% of its drivers. In its settlement, Lyft agreed to add a requirement stipulating that drivers' pay is based on typical earnings, not just that of the 20% of high earners.

Commissioner Ferguson issued a strong dissent on the FTC's reinterpretation of the standard applicable to "up to" claims, arguing that the FTC should be focused on enforcement against claims predicated on a few outliers rather than an appreciable number.

In addition, he challenged the idea of transforming "up to" as "likely." "The complaint's interpretation of 'up to' as meaning 'likely' is incorrect," Commissioner Andrew N. Ferguson noted in his official statement in October 2024. "'Up to' in the English language denotes the limit or boundary on the described item...The Commission's conflation of 'likely' and 'up to' makes the latter phrase meaningless and deprives the hearer of potentially useful information distinct from likelihoods or averages."

Semantics in Terms and Conditions:

What a Dissenting Opinion Could Mean from the FTC Commissioner

In connection with emerging technology, Commissioner Ferguson's dissent in the settlement with Rytr, an AI writing assistant and content generation company, provides further insight.

There, the FTC alleged that Rytr's AI services allowed marketers to generate and publish detailed reviews unrelated to the actual user's input. The settlement included a ban on advertising, promoting, marketing, or selling any service touted as generating consumer reviews or testimonials, not just restrictions on its use.

Here, Commissioner Ferguson (along with fellow Republican Commissioner Melissa Holyoak) dissented, taking the position that merely because a service could be used to generate false reviews

should not mean that the service needed to be banned entirely, noting that “Treating as categorically illegal a generative AI tool merely because of the possibility that someone might use it for fraud is inconsistent with our precedents and common sense. And it threatens to turn honest innovators into lawbreakers and risks strangling a potentially revolutionary technology in its cradle.”

In addition to the stated positions in these enforcement actions, two important sets of regulations were promulgated by the FTC towards the end of 2024 – both of which were enacted over Commissioner Ferguson’s dissent. These rules – focused on subscription/continuity marketing and transparent pricing – are supplemental to a growing body of state laws and will likely be featured at the outset of the Ferguson Commission.

The Negative Rule Option

The first, the overhaul of the FTC’s long-outdated Negative Option Rule (now known as the “Rule Concerning Recurring Subscriptions and Other Negative Option Programs”), is a prime example of the FTC seeking to expand its ability to obtain monetary relief for traditional Section 5 consumer fraud violations.

The revised rule updates the FTC’s long-standing negative option rule, which was focused on “book of the month club” type programs, with standards applicable to current online enrollment and cancellation paths requiring express informed consent. In addition, the rule prohibits misrepresenting any material fact made while marketing using a negative option feature, not just the negative option feature itself.

This is important because, by tying a regulatory violation to a marketing misrepresentation, the rule expands the FTC’s penalty powers (currently in excess of \$50K per violation) to what is typically a Section 5-type violation (under which, currently, no monetary relief is available). This

could mean that any material misrepresentation (whether as part of the negative option offer or any other part of the offer) is subject to significant penalties.

There are pending legal challenges to the rule, which will need to be closely monitored, particularly as it relates to the Commission’s positions in the lawsuits.

The even more recent rulemaking involves transparent pricing or anti-drip pricing. This regulation requires the upfront disclosure of the total cost to purchase tickets or hotel rooms, i.e., including service fees, resort fees, and any other mandatory fees (other than taxes and shipping).

The scope of the regulation is significantly narrower than the broad coverage that had been originally proposed, and it passed with bipartisan support.

However, Commissioner Ferguson again dissented from the agency’s approval. While the exact path of the FTC’s consumer protection efforts remains uncertain, the agency will likely continue to challenge unfair or deceptive advertising and marketing practices.

Despite anticipated changes in rulemaking authority and leadership, the core mission of safeguarding consumers is expected to persist. However, the path by which the FTC will carry out that mission under Trump’s second term will likely be different than during the past four years of the Biden administration.

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