The Regulatory Road Ahead

Payments Law Virtual Bootcamp

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VENABLE LLP

The Electronic Transactions Association

7 Guiding Principles for CBDC

ETA believes there is a common set of principles against which any proposed CBDC should be measured. As the federal government assesses a potential CBDC, it should carefully consider these principles and ensure that any proposal best serves the needs of consumers, furthers financial inclusion, preserves and strengthens the financial system, and ensures that consumers continue to have access to a robust and innovative array of secure banking and payment options.

Although various benefits are cited as reasons for adoption of a CBDC, the federal government should also consider the inherent costs and risks, which vary depending on the design and structure of the CBDC.

1. **Innovation:** Continual investment in innovation is at the heart of past, present, and future improvements to the financial ecosystem — enabling new capabilities, strengthening cybersecurity and consumer protection, increasing efficiencies, and expanding access to financial services. Any public sector engagement with the financial sector, including the deployment of a CBDC, should serve as a catalyst and a platform for continued innovation.

2. **The Right Tool for the Job:** Policymakers should compare the suitability of a CBDC with existing systems and other ongoing improvements to payments infrastructure — such as real-time payments systems — to find the approach that best fits their country's transactions needs.

3. **Private Sector Participation:** Expanded financial inclusion, ongoing payments innovation, and the efficiency of national and international payment flows all depend on vibrant private sector competition in payments. A CBDC should seek to preserve those functions and minimize effects on the broader financial system through a two-tiered ecosystem that includes the private sector in its design, piloting, and distribution.

4. **Interoperability:** Any CBDC would be introduced into an established, robust, well-functioning payments ecosystem. Ensuring interoperability between a CBDC and other forms of national and international payments systems is necessary to avoid weakening existing mechanisms and harming consumers and businesses. Any CBDC must be able to interoperate seamlessly across the existing landscape.

5. **Open Acceptance:** Consumers will be more likely to adopt a CBDC if it can be used on existing acceptance infrastructure and is supported by known and identifiable payment methods (e.g., in-person and online) that are linked to the user's existing devices and accounts. To be useful to consumers, any CBDC would need to take advantage of existing acceptance networks and acceptance infrastructure to allow any merchant that accepts cards to also accept the CBDC.

6. **Consumer Protection:** A CBDC should require a framework of standards and rules that safeguards the privacy and security of every transaction, protects consumers' interests, and gives consumers the confidence necessary for in-person and online transactions. It should also

ensure that consumers understand those protections and how they may differ from those offered by other payment methods.

7. **Regulation Tailored to the Risk Profile of the Participant:** Entities engaging with a CBDC should be subject to regulation that is tailored to the activities and risks that they pose due to their position in the payments ecosystem. Appropriate regulation should consider potential harm to consumers as well as safety, soundness, and financial stability risks.

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Disgorgement [Supremely] Denied: Supreme Court Unanimously Curtails the FTC's Authority in *AMG Capital Management v. FTC*

By Leonard L. Gordon, Mary M. Gardner, Michael A. Munoz & Joshua Nace on April 22, 2021

Earlier today, the United States Supreme Court issued a **unanimous opinion** in *AMG Capital Management v. Federal Trade Commission*, holding that Congress, by enacting Section 13(b) of the Federal Trade Commission Act, did not grant the Commission authority to obtain equitable monetary relief when it proceeds in federal district courts under that section.

Specifically, Section 13(b) of the Federal Trade Commission Act gives the Commission authority to bring suit in federal district court against those it believes are "violating" or "about to violate" the FTC Act, in order to "enjoin any such act or practice." In such cases, Section 13(b) further provides courts with the authority to issue a "permanent injunction." Since the late 1970s, the FTC has taken the position, accepted by courts, that this grant of authority included the ability to obtain equitable monetary relief. The Supreme Court today said not so.

In reaching its conclusion, the Court first looked to the plain language of 13(b). It recognized that the statute only allows for injunctions. The Court stated, plainly, that "an injunction is not the same as an award of equitable monetary relief."

Next, the Court analyzed the purpose of Section 13(b). Relying on the words "is violating" and "is about to violate," the Court found that Section 13(b) focuses on prospective rather than retrospective harm the FTC seeks to remedy. The Court concluded that the prospective

nature of Section 13(b) suggests that only an injunction (and not monetary relief) addresses the specific problem of halting unfair practices.

The Court then conducted a structural analysis of the FTC Act, comparing Section 13(b) with Sections 5(*l*) and 19. It reasoned that Congress, in enacting Sections 5(*l*) and 19, authorized district courts to impose monetary penalties and award monetary relief in cases where the FTC has already engaged in administrative proceedings. The Court opined that, since Congress ***explicitly*** provided for equitable monetary relief through these other provisions, Congress did not intend for Section 13(b) – with its narrower "permanent injunction" language – to have a similarly broad scope.

Last, the Court concluded that interpreting Section 13(b) as authorizing only injunctive relief illuminates the "coherent enforcement scheme" of the FTC Act. Simply put, the FTC Act allows the Commission to obtain limited monetary relief first through its administrative procedures and then through Section 19's redress provisions. The purpose of Section 13(b) is for the Commission to obtain injunctive relief while administrative proceedings are foreseen or in progress, or when it seeks only injunctive relief. The Court determined that a broad reading of Section 13(b), allowing it to be used as a substitute for Sections 5 and 19, "would allow a small statutory tail to wag a very large dog."

What happens next? We **have written about options available to the FTC** if it lost this case. As the Supreme Court noted, the Commission is free to ask Congress for further authority to seek equitable monetary relief. Indeed, as we have **previously written**, congressional hearings on the scope of the Commission's authority under Section 13(b) are already under way. Following this Supreme Court decision, if Congress wants to authorize the FTC to pursue equitable monetary relief (without first using administrative procedures or more limiting provisions of the Act like Section 19), it will have to pass legislation amending the Federal Trade Commission Act to provide such authority.

As always, Venable continues to monitor this regulatory and legislative landscape, to meet its clients' needs.

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So…What If the FTC Loses *AMG Capital Management v. FTC*?

By Leonard L. Gordon & Mary M. Gardner on January 19, 2021

Last week, the Supreme Court heard oral argument in *AMG Capital Management v. FTC*. As we've previously **discussed**, the Supreme Court is set to decide whether Section 13(b) of the FTC Act, which expressly grants the FTC the right to obtain "a permanent injunction," also grants the FTC the authority to obtain "equitable monetary relief." During oral argument, certain Justices expressed doubt that the plain language of Section 13(b), when viewed in the context of the entirety of the FTC Act, authorized the FTC to obtain "equitable monetary relief" when proceeding under Section 13(b). While none of us can predict the future, after last Wednesday's oral argument, we can't help but wonder: What will happen if the FTC loses? Below, we have outlined the potential avenues for the FTC if the decision doesn't go its way.

First, Congress could revise the language of Section 13(b) to allow the FTC to seek equitable monetary relief, a request the FTC made in **October 2020**. There's precedent for such a move. After the Supreme Court significantly curtailed the SEC's calculation of equitable monetary relief in ***Liu***, Congress codified the SEC's authority to seek disgorgement in federal district court as part of the 60th annual National Defense Authorization Act in January 2021, by amending the Securities Exchange Act of 1934. Congress could pass a similar amendment to the FTC Act to unambiguously allow the FTC to obtain equitable monetary relief under Section 13(b) or otherwise. Whether that potential authority would come with a statute of limitations, allow for joint and several liability, or be subject to other restrictions will be important in assessing any potential legislation.

Second, the FTC could bring more cases in administrative litigation obtaining cease and desist orders. After obtaining, and defending on appeal, an administrative order, the FTC could then pursue monetary relief in federal court, using Section 19 of the FTC Act. However, the Commission must demonstrate that "a reasonable man would have known under the circumstances [that the conduct] was dishonest or fraudulent."

Third, the FTC could refer more cases involving alleged wrongful conduct in the consumer financial space to the CFPB. Commissioner Chopra—who Biden recently tapped to lead the CFPB—has **previously advocated** for precisely that approach. His rationale is that, particularly in cases where there are little funds to distribute from defendants, victims could qualify for redress through the CFPB's Civil Penalty Fund. Whether these recommendations become a reality will likely be a question for the new Chair, but it could be one avenue by which the FTC could continue to obtain redress for consumers—albeit indirectly.

Fourth, Section 19 of the FTC Act also authorizes the FTC to go directly to federal court to obtain restitution and redress for violations of rules enforced by the FTC (such as the Telemarketing Sales Rule (TSR)) and some statutes (such as the Restore Online Shoppers Confidence Act (ROSCA)).

Fifth, the FTC could refer more cases to the Department of Justice (DOJ) to pursue civil penalties for rule violations and certain statutory violations that provide for civil penalties. The FTC's core statute, Section 5 of the FTC Act, does not provide for civil penalties. Those penalties vary depending on the statute or rule involved and go all the way **up to $43,792 per violation**.

Finally, the FTC could utilize a somewhat unused avenue for obtaining redress—the Penalty Offense Authority, which we've previously discussed **here**. This Authority authorizes the FTC to seek civil penalties (directly not through the DOJ) against a defendant in federal court where (1) the FTC has obtained a litigated cease and desist order against another party through an administrative proceeding pursuant to Section 5(b) of the FTC Act; (2) the cease and desist order identifies a specific practice as unfair or deceptive; and (3) a party on notice of the order (i.e., someone with actual knowledge that the practice is unfair or deceptive) then engages in that same violating conduct after the order is final.

The Supreme Court should issue its decision in *AMG Capital Management* prior to the end of its term on June 28, 2021. If the Supreme Court does close the door on the FTC's ability to

seek equitable monetary relief through Section 13(b) in federal court, the FTC will not be defunct. Its response will be interesting to watch.

Interested in an in-depth discussion of the Supreme Court's oral argument in *AMG* and its potential impact on the FTC? Register for our February 11 webinar: **Reading Tea Leaves: Breaking Down Oral Argument in *AMG Capital Management v. FTC***.

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The Uncertainty Continues: Compromised Section 13(b) Authority, COVID-19 Scams, and the FTC's Plans for Consumer Protection

By Leonard L. Gordon & Nikita Bhojani on April 21, 2021

On April 20, 2021, Acting Chairwoman Rebecca Kelly Slaughter and Commissioners Rohit Chopra, Noah Phillips, and Christine Wilson testified before the Senate Committee on Commerce, Science, and Transportation and provided an overview of the FTC's consumer protection priorities. In addition, the hearing addressed the Commission's imperiled consumer redress authority under Section 13(b) of the FTC Act and the agency's continuous efforts to combat COVID-19-related scams.

As we have **previously written**, the Supreme Court is set to decide the scope of FTC's Section 13(b) authority to obtain a permanent injunction and equitable monetary relief. At the hearing, the Commission emphasized that Section 13(b) authority is the FTC's "bread and butter" and requested that Congress clarify that authority. Chair Maria Cantwell (D-WA) and Ranking Member Roger Wicker (R-MS) showed an interest to move quickly with a legislative fix if the Supreme Court decides against the FTC. Specifically, Senator Cantwell gave two examples of how the FTC has used its Section 13(b) power to get consumer redress. In 2019, the FTC returned more than $34 million to consumers who were allegedly tricked into buying computer repair products and services, and the FTC sent settlement payments of nearly $50 million to students allegedly lured by a university's deceptive advertisements that it worked with reputable companies to create job opportunities.

Acting Chairwoman Slaughter reiterated the FTC's reliance on Section 13(b) authority to provide monetary relief to consumers, including $11.2 billion in refunds during just the past five years. Most importantly, she discussed how the current uncertainty is hurting ongoing

enforcement efforts and the understandable reluctance of many defendants to settle, given the uncertainty regarding the FTC's authority. Commissioner Phillips focused on the use of Section 13(b) to seek restitution to provide consumer redress rather than inappropriately punish businesses in the guise of disgorgement. Commissioner Chopra also recognized that additional penalties and remedies are needed to stop repeat offenders and that deterrence is undermined when companies, especially big tech players, are merely asked not to break the law again without suffering a financial penalty. Overall, the Commission requested Congress to clarify Section 13(b) authority, preserve the FTC's ability to enjoin illegal conduct, and return money to consumers.

Next, the hearing highlighted that combating COVID-19-related scams will remain a top priority for the Commission, including through law enforcement efforts, consumer education and outreach, and seeking civil penalties for COVID-19-related cases under the newly enacted COVID-19 Consumer Protection Act, as we recently **discussed**. The Commission plans to use the recent $30.4 million funding provided in the **American Rescue Plan Act** for consumer protection matters, including processing and monitoring COVID-19-related consumer complaints.

In deciding to pursue COVID-19-related scams, especially those used against vulnerable populations, the FTC plans to work closely with state attorneys general and community legal aid organizations through its **Community Advocate Center initiative** to encourage consumers to report more fraud.

Acting Chairwoman Slaughter pointed to the role social media platforms play in the spread of COVID-19 scams, such as the recent selling of fake vaccine cards or a bogus vaccine survey that offered consumers a "free reward" and how platforms should be held more accountable. Commissioner Wilson noted that the FTC is not equipped to police speech, but whether this possible difference in approach is real and will manifest itself in disagreements over cases remains to be seen.

A decision in the *AMG* case should be rendered before the end of the Supreme Court's term in June. A victory for the defendant there might have short-lived benefits, given the apparent bipartisan support at the Commission and on Capitol Hill for restoring any authority the Court finds the Commission lacks. Stay tuned.

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Setting Some Ground Rules: Commissioner Nominee and a New Working Group May Steer the FTC Down a New (Actually an Old) Road

By Leonard L. Gordon, Michael A. Munoz & Nikita Bhojani on March 26, 2021

For those who follow the Federal Trade Commission and are anxiously awaiting the Supreme Court's decision in *AMG Capital Management v. FTC*, several recent developments at the Commission may foreshadow the enforcement road that lies ahead. In many ways, the future may look a lot like the past, especially the 1960s and 1970s, when the FTC pumped out rules regulating many aspects of economic activity, including **frosted cocktail glasses**.

First, earlier this month, President Biden nominated Lina Khan, an associate professor of law at Columbia Law School, to replace departing Commissioner Rohit Chopra, who has been nominated to lead the CFPB. At 32 years of age, Khan would be the youngest FTC commissioner in the agency's history.

Acting Chairwoman Rebecca Kelly Slaughter has **lauded** Khan's "creative energy, groundbreaking antitrust work, and passion for the FTC's mission," which includes her previous role as counsel to the House Antitrust Committee, where she assisted in producing a **400-page report** on antitrust enforcement against tech companies. Prior to that role, she served as a legal advisor to Commissioner Chopra, with whom she **authored an article** arguing for expanded use of the FTC's Section 5 rulemaking authority to supplement antitrust adjudication.

Given Khan's relevant experience and publications, it is likely that, as an FTC commissioner, she will seamlessly transition into Commissioner Chopra's role in advocating for creative and

aggressive enforcement efforts, on both the antitrust and consumer protection sides of the FTC.

Second, Acting Chairwoman Slaughter seemingly acted on Khan's and Chopra's calls for reinvigorating the FTC's rulemaking authority when she **announced on Thursday** that the FTC will now have a dedicated "rulemaking group" in the Office of the General Counsel. Currently, the FTC's bureaus and divisions maintain decentralized authority over the periodic review of existing rules. According to the announcement, the creation of the rulemaking group will not only assist in strengthening existing rules, but will undertake new rulemaking to prohibit unfair or deceptive practices and unfair methods of competition.

The consolidation of rulemaking in one office is interesting on multiple levels. In their article, Chopra and Khan argued that the FTC could use Section 5 of the FTC and the Administrative Procedures Act to engage in notice and comment rulemaking to regulate unfair methods of competition. Suffice it to say that the subjects of that regulation may take the view that the FTC must follow the far more onerous requirements of the Magnuson-Moss Warranty Federal Trade Commission Improvements Act, which requires the FTC to (1) show that the conduct at issue is "prevalent" and (2) conduct informal hearings that allow interested parties to cross-examine. Chopra and Kahn argue that the FTC only needs to follow Magnuson-Moss rulemaking in regulating unfair or deceptive acts or practices, not unfair methods of competition. If Chopra and Khan are correct, the new office will be promulgating rules under two different standards.

Furthermore, the FTC frequently touts its status as an expert agency and would certainly do so in defending any regulations it issued. That expertise would seem to be diminished if rules are pumped out by one office for the entire agency rather than by the specific "shops" within the FTC with subject matter expertise.

As Acting Chairwoman Slaughter alludes to in the press release, the rulemaking group's creation gets out in front of an adverse ruling in *AMG Capital Management*. The acting commissioner has **previously voiced concerns to Congress** about the FTC's need for more enforcement authority, and the rulemaking group is a step in that direction that the Commission can take on its own.

Venable has the experience needed to help clients navigate these issues as the FTC transitions to new enforcement priorities and procedures. We will continue to monitor

developments relevant to the FTC's enforcement authority on this blog.