



# What To Expect From The Most Active FTC In A Generation

How To Engage With It, And How To Stay Out of Its Enforcement  
Crosshairs



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# Agenda

- **Introduction**
- **FTC Commissioners**
- **AMG Capital Management v. FTC**
- **Remedies**
- **Open Commission Meeting**
- **The Anatomy of an FTC Investigation**
- **New Legislation**



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# The FTC Commissioners

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# Lina Khan (D)



- Lina Khan was sworn in as Chair of the Federal Trade Commission on June 15, 2021.
- Prior to becoming head of the FTC, Khan was an Associate Professor of Law at Columbia Law School. She also previously served as counsel to the U.S. House Judiciary Committee's Subcommittee on Antitrust, Commercial, and Administrative Law, legal adviser to FTC Commissioner Rohit Chopra, and legal director at the Open Markets Institute.
- Khan has written extensively in the antitrust space
- She's has been described as a "privacy hawk" who has called for "clear prohibitions and economic disincentives, rather than morally laden standards" to address online privacy protections.

## Lina Khan (D)



While at Columbia Law School, Chair Khan co-authored a paper stating that it was “implausible” that a big tech company that makes money from online behavioral advertising could ever put users’ privacy first.

“As long as such companies make most of their money through personally targeted advertisements, they will be economically motivated to extract as much data from their users as they can,” they wrote, “a motivation that runs headfirst into users’ privacy interests, as well as any interests users might have in exercising behavioral autonomy or ensuring that their personal data is not stolen, sold, mined, or otherwise monetized down the line.”

## Noah Phillips (R)



- Noah Phillips was unanimously confirmed to the Senate on April 26, 2018.
- Before coming to the FTC, Phillips served as Chief Counsel to U.S. Sen. John Cornyn, of Texas, on the Senate Judiciary Committee.
- From 2011 to 2018, he advised Senator Cornyn on legal and policy matters including antitrust, constitutional law, consumer privacy, fraud, and intellectual property. Prior to his Senate service, Phillips worked as a litigator at large law firms in both New York and DC. Phillips began his career at an investment bank in New York.
- Phillips promotes competition and consumer choice.
- When asked how regulators should supervise innovative technology he responded, “only if necessary and then very carefully.”

## Rebecca Slaughter (D)



- Rebecca Slaughter was sworn in as a Commissioner on May 2, 2018.
- Slaughter brings to the Commission more than a decade of experience in competition, privacy, and consumer protection. Before joining the FTC, Slaughter served as Chief Counsel to Senator Charles Schumer of New York. Before that she worked in a DC law firm.
- Slaughter says that she “believes that the FTC’s dual missions of promoting competition and protecting consumers are interconnected and complementary, and she is mindful that enforcement or rulemaking in one arena can have far-reaching implications for the other.”
- She describes herself as a “proponent of greater resources, transparency, and comprehensive use of the FTC’s authorities” and “is outspoken about the growing threats to competition and the broad abuse of consumers’ data.”

# Christine Wilson (R)



- Christine Wilson was sworn in as a Commissioner on September 26, 2018.
- Wilson previously served at the FTC as Chairman Tim Muris’s Chief of Staff during the George W. Bush Administration.
- In between her periods of service at the FTC, Wilson practiced competition and consumer protection law both at law firms and as in-house counsel.
- When nominated, Wilson was serving as Senior Vice President — Legal, Regulatory & International for Delta Air Lines.
- Wilson views privacy and data security issues as distinct from competition law.
- She is an advocate for federal privacy legislation.

## Alvaro Bedoya (D) – Nominee

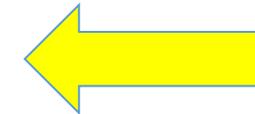
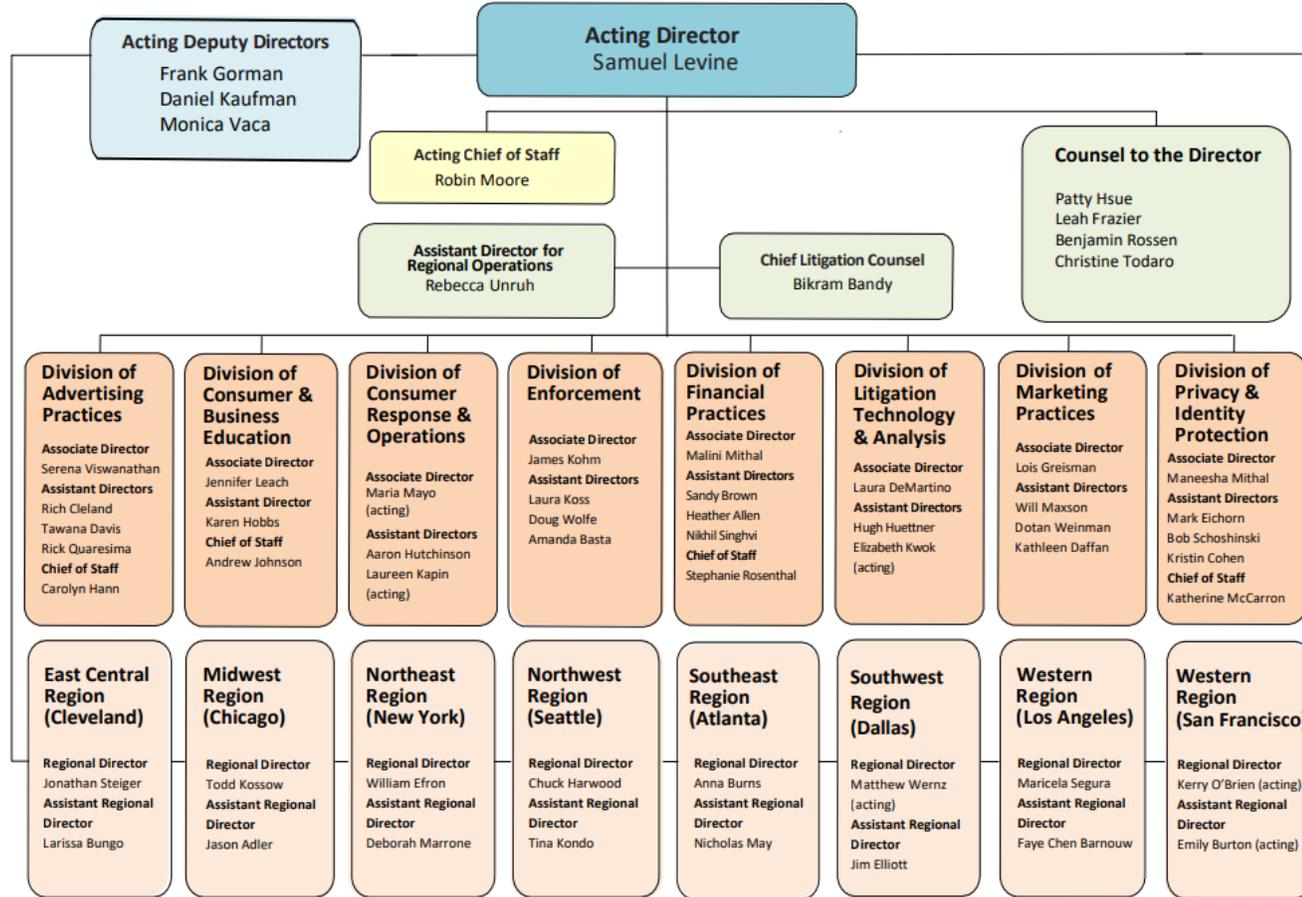


- Alvaro Bedoya has been nominated to take Rohit Chopra’s spot on the FTC.
- Bedoya is a founding director of the Center on Privacy and Technology at Georgetown and has extensive experience on tech privacy issues.
- Before founding the Center, Alvaro served as Chief Counsel of the U.S. Senate Judiciary Subcommittee on Privacy, Technology and the Law, where he conducted oversight on mobile location privacy and biometrics, drafted bipartisan legislation to protect victims of sexual assault, and drafted portions of the bipartisan NSA reform law, the USA FREEDOM Act.
- Bedoya is a critic of surveillance software. In 2016 he co-authored a publication that discusses, among other things, the race and gender bias in face scanning software.

Federal Trade Commission  
Bureau of Consumer Protection

Updated 7/7/2021

File a Complaint  
ftc.gov/complaint  
877-FTC-HELP



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# **AMG Capital Management v. FTC**

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# AMG Capital Management v. FTC

- In a unanimous opinion on April 22, 2021, the United States Supreme Court held in *AMG Capital Management, LLC v. Federal Trade Commission* that Congress did not authorize the FTC to obtain equitable monetary relief pursuant to its authority under Section 13(b) of the Federal Trade Commission Act (FTCA) to obtain an injunction.
- The FTC has traditionally used Section 13(b) to seek large sums of money in restitution and disgorgement in all types of cases including privacy and data security cases.
- For most of its history, the FTC could only enforce actions as administrative proceedings. In 1973, Congress passed Section 13(b) of the FTC Act empowering the FTC to bring suit in court in “proper cases,” to seek “a permanent injunction.”
- Courts took this provision and interpreted it broadly. It became the tool to implicitly authorize the FTC to seek monetary relief such as restitution, redress, and disgorgement of ill-gotten gains.

# AMG Capital Management v. FTC

- The AMG case came about through a circuit split over whether Section 13(b)'s provision for permanent injunctions allowed the FTC to obtain monetary relief in federal court.
- The Supreme Court unanimously agreed that considering Section 13(b)'s exclusive reference to “permanent injunction[s],” it cannot be construed as authorizing monetary equitable remedies.
- The change may be short-lived as Congress is expected to enact legislation authorizing the FTC to seek monetary relief in federal courts.
- On November 3, 2021, the Republicans on the House Energy & Commerce Committee introduced new legislation that would restore the FTC's 13(b) authority. The bill is substantially different from the legislation that passed the House earlier this year in that the Republican bill has a scienter standard similar to Section 19 and does not apply retroactively.

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# Remedies at the FTC

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# Monetary Remedies Post-AMG Capital Management v. FTC

- Notably, this change does not affect the FTC's ability to seek monetary penalties for violations of:
  - Prior cease-and-desist orders or consent orders;
  - Trade Regulation Rules issued under Section 18(a)(1)(B) of the FTC Act defining unfair and deceptive practices; or
  - Through the process authorized by Section 19 of the FTC Act.
    - *See, e.g.,* Nadia Dreid, *Judge Revives FTC's \$5M Restitution Win Against Credit Co.*, Law360 (Sept. 14, 2021, 9:18PM), <https://www.law360.com/consumerprotection/articles/1421419/judge-revives-ftc-s-5m-restitution-win-against-credit-co-> (reporting that a U.S. District Court reimposed \$5.2 million in damages under Section 19 of the FTC Act after the award had previously been denied under Section 13).

# Monetary Remedies Post-AMG Capital Management v. FTC

- Section 19 of the FT Act:
- **(a) SUITS BY COMMISSION AGAINST PERSONS, PARTNERSHIPS, OR CORPORATIONS; JURISDICTION; RELIEF FOR DISHONEST OR FRAUDULENT ACTS**
  - **(1)** If any person, partnership, or corporation **violates any** rule under this subchapter respecting unfair or deceptive acts or practices (other than an interpretive rule, or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of [section 45\(a\) of this title](#)), then the Commission may commence a civil action against such person, partnership, or corporation for relief under subsection (b) in a United States district court or in any court of competent jurisdiction of a State.
  - **(2)** If any person, partnership, or corporation engages in any unfair or deceptive act or practice (within the meaning of [section 45\(a\)\(1\) of this title](#)) **with respect to which the Commission has issued a final cease and desist order which is applicable to such person, partnership, or corporation**, then the Commission may commence a civil action against such person, partnership, or corporation in a United States district court or in any court of competent jurisdiction of a State. **If the Commission satisfies the court that the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent, the court may grant relief under subsection (b).**

# Monetary Remedies Post-AMG Capital Management v. FTC

- Section 19 of the FT Act:
  - **(b)NATURE OF RELIEF AVAILABLE**
    - The court in an action under subsection (a) shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers or other persons, partnerships, and corporations resulting from the rule violation or the unfair or deceptive act or practice, as the case may be. Such relief may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice, as the case may be; except that nothing in this subsection is intended to authorize the imposition of any exemplary or punitive damages.

# Injunctive Remedies

- The FTC has been issuing new tougher injunctive remedies on offenders in recent years, and this trend is likely to continue under the current commission.
- This has been mostly commonly observed over the last 2 years.
- For example:
  - Naming individuals
    - *In the Matter of Fleetcor Technologies- named CEO*
  - Notice to consumers
    - *“On or before fourteen (14) days after the date of the filing of this Order, Respondent must post Clearly and Conspicuously on Respondent’s website, an exact copy of the notice attached hereto as Exhibit A (“Notice”) and email the Notice to all Covered App Users...” In the Matter of Flo Health Inc., c-4747.*

# Remedies

- Data security orders
  - The FTC has changed the provisions required in data security orders.
  - New provisions include:
    - **Specific Safeguards**
      - Employee training, access controls, monitoring systems for data security incidents, patch management systems, and encryption.
    - **Third-Party Accountability**
      - More rigorous assessments
    - **Elevated Security Considerations to the C-Suite/Board**
      - Annual certifications, presentation to Boards

## Other Observations

- Increased attention to Facial Recognition, AI, Algorithmic bias
  - [FTC Report: Big Data: A Tool for Inclusion or Exclusion? Understanding the Issues](#)
  - [FTC Hearing: The Competition and Consumer Protection Issues of Algorithms, Artificial Intelligence, and Predictive Analytics](#)
  - [Business Guidance - Using Artificial Intelligence and Algorithms](#)
  - [FTC blog post “Facing the Facts About Facial Recognition”](#)



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# FTC Open Commission Meetings

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## Open Commission Meetings

- The Federal Trade Commission held its first [open meeting](#) of the Commission virtually on Thursday, July 1, 2021.
- The Commission considered four items of business:
  - Made in the USA Rule
  - Section 18 Rulemaking Procedures
  - Rescindment of Policy Statement
  - Enforcement Investigations
    - Priority targets include repeat offenders; technology companies and digital platforms; and healthcare businesses such as pharmaceutical companies, pharmacy benefits managers, and hospitals.

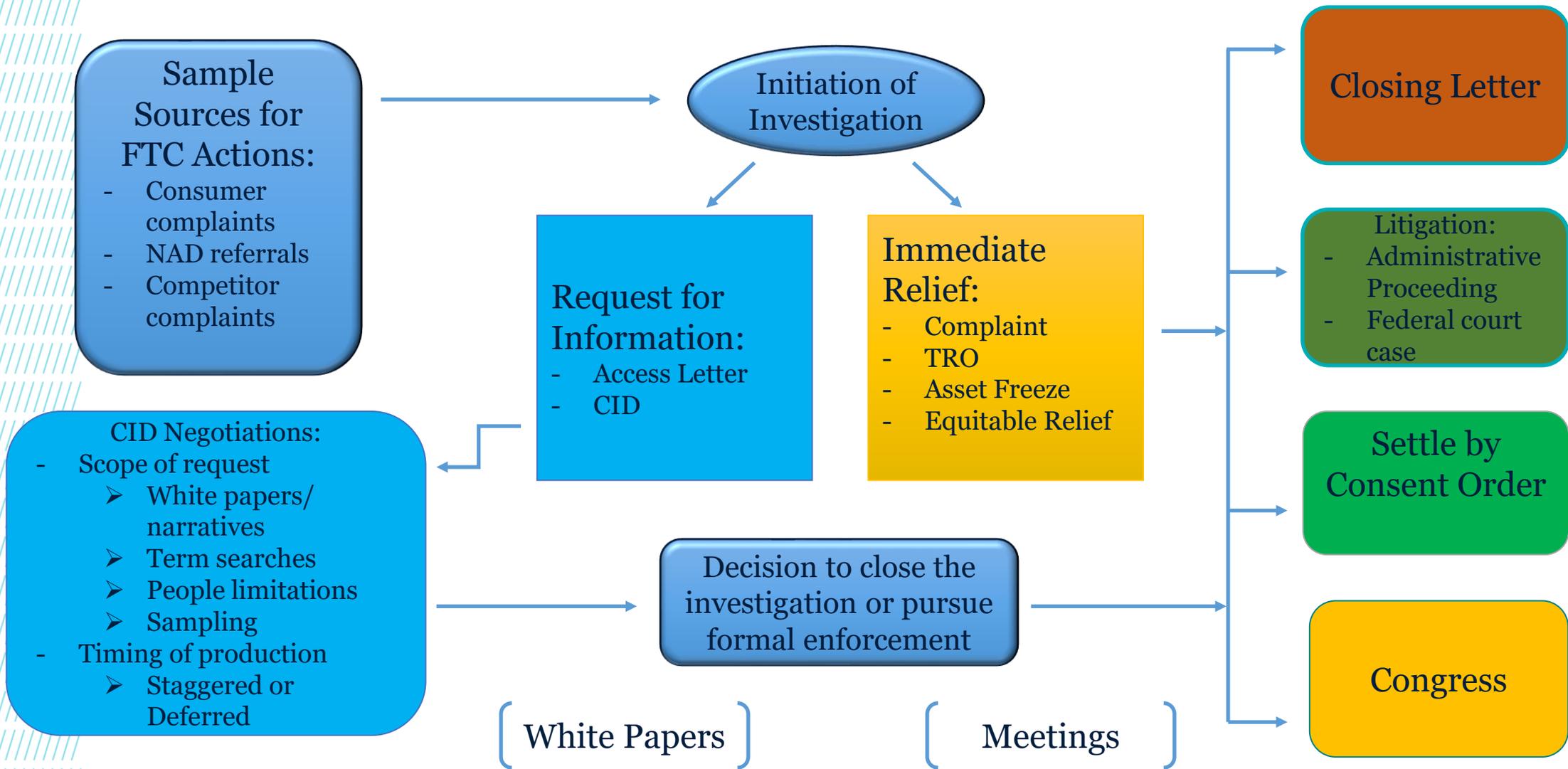
## Open Commission Meetings

- The Federal Trade Commission held two additional open meetings.
  - July 21, 2021
    - No decisions related to privacy and data security.
  - September 15, 2021
    - The Commission voted to issue a [policy statement on the importance of protecting the public from privacy breaches by health apps and other connected devices.](#)

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# The Anatomy of an FTC Investigation

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# Civil Investigative Demand (CID)

- Akin to a Subpoena – Formal Administrative Process, Returnable within 30 days of Receipt
  - Includes electronic discovery.
- Call for Responses to Interrogatories and Requests for Documents
  - These tend to be very inclusive calling for massive amounts of material.
- Mandatory Meet-And-Confer within 14 Days of Receipt of CID:
  - This is your chance to try to narrow the CID's scope and to extend the timing of the response.
  - TIP: Meet with the client early:
    - What do we have?
    - What do we not have?
    - What are we unsure about?
    - How hard is it to access the information and documents?
    - How many stakeholders need to be interviewed to answer the interrogatories and find and pull the documents?

# Civil Investigative Demand (CID) – Meet-And Confer

- Mandatory Meet-And-Confer within 14 Days of Receipt of CID:
  - This is your chance to try to narrow the CID's scope and to extend the timing of the response.
  - TIP: Meet with the client early: What do we have? What do we not have? What are we unsure about? How hard is it to access the information and documents? How many stakeholders need to be interviewed to answer the interrogatories and find and pull the documents?
  - TIP: Create a chart with the information you have learned and propose how the CID can be modified to get the FTC what it needs at the least burden and cost to the company; leave-behind with staff.

## e-Discovery

- This is very expensive given the FTC's multiple pages of instructions on how to produce electronic materials and the number of communications used by your client. This alone has increased the cost of responding to FTC investigations by 3X.
- TIP: Try to identify all electronic documents and communications before the meet-and-confer so you know the burden and cost of the CID as written, then try to get document requests changed from "All document/communications relating to ..." to documents and communications sufficient to show..."
- TIP: Identify all Stakeholders and, if numerous, try to get the FTC to agree at the meet-and-confer to producing documents and communications from only the stakeholders most likely to have the documents and communications called for.

## Rolling Productions/Advocate

- TIP: Your productions must be accurate and complete, but that does not mean you cannot advocate in them. Put information from interviews, documents and communications into context in response to interrogatories in a way that is favorable to your client.
- TIP: At the conclusion of your production, consider a White Paper that pulls all of the information and documents you have produced, puts them in context, and argues that there was no violation of the law or Trade Regulation Rule at issue.

# Pre-Litigation Investigational Hearings

- These are akin to depositions in the course of an investigation, but fewer rights to object.
- The FTC used to use them sparingly, but is increasingly relying on them as part of their investigation and asking for large numbers of them.
- TIP: Prepare for these like a deposition. Make sure your witness knows the documents and information at issue and is ready for difficult questions.
- TIP: Try to limit the number of Investigational Hearings based on knowledge or relevant material or duplicative knowledge with others served with an investigative subpoena.
- TIP: Keep in mind that the witness is entitled to their own counsel of choice; beware of conflicts.

# Negotiating an Order

- Find all (relatively recent) prior orders that would apply to your matter.
- To the extent injunctive provisions are onerous or the money the FTC is seeking is too much, distinguish them in another white paper or meeting(s) with the FTC Staff.

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# New Legislation

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## New Legislation

- H.R. 2668, the “Consumer Protection and Recovery Act”
  - Would expressly authorize the Federal Trade Commission. to seek monetary relief in federal court including restitution.
  - Supported by the White House.
  - Passed the House on July 20, 2021
- Build Back Better
  - As part of the proposed economic package, the Energy and Commerce Committee has proposed \$1 billion in funding for the FTC to create a division for privacy enforcement.



# Questions?

# Questions + Contact

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