

## The FTC's Commercial Surveillance and Data Security Rulemaking: The Long and Winding Road Toward a New Federal Privacy and Data Security Rule



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### Agenda

- A Look at the Current FTC Commissioners
- Summary of the Advance Notice of Proposed Rulemaking (ANPR) on Commercial Surveillance and Data Security
- Why Did the Commission Do This?
- What, Exactly, Is the FTC Trying to Accomplish?
- How Does the ANPR Affect Federal and State Legislative Efforts to Regulate Privacy and Data Security?
- What Is the Process the FTC Must Go Through under Section 18 of the FTC Act to Promulgate a New Rule?
- How Long Does the Rulemaking Process Take?
- How Do You or Your Business or Trade Association Engage with the FTC?
- Questions

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## A Look at the Current 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 advisor to FTC Commissioner Rohit Chopra, and legal director at the Open Markets Institute.
- 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," she and her co-author 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."

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## Rebecca Slaughter (D)



- Rebecca Slaughter was sworn in as a commissioner on May 2, 2018.
- Slaughter brought to the Commission more than a decade of experience in competition, privacy, and consumer protection. Before joining the FTC, she served as chief counsel to Senator Charles Schumer of New York. Before that, she worked in a DC law firm.
- 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.”

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## Alvaro Bedoya (D)



- Alvaro Bedoya was sworn in as a commissioner on May 16, 2022.
- Upon taking his seat on the Commission, the Democrats assumed a 3-2 majority.
- 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, Bedoya served as chief counsel of the U.S. Senate Judiciary Subcommittee on Privacy, Technology and the Law, where he focused on mobile location privacy and biometrics.
- In 2016, he co-authored a publication that discusses, among other things, the race and gender bias in face-scanning software.

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## Noah Phillips (R)



- Noah Phillips was unanimously confirmed to the Commission on April 26, 2018.
- In August, Phillips announced he is stepping down upon the nomination of his replacement (another Republican).
- Before coming to the FTC, Phillips served as chief counsel to Senator John Cornyn of Texas on the Senate Judiciary Committee from 2011 to 2018, where he advised on legal and policy matters, including antitrust, constitutional law, consumer privacy, fraud, and intellectual property.
- When asked how regulators should supervise innovative technology, he responded, "Only if necessary and then very carefully."

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## 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.
- She is an advocate for federal privacy legislation but voted against the release of the FTC's Commercial Surveillance and Data Security ANPR.

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## 2022-2026 Mission Statement

- On August 31, 2022, the FTC finalized a [new mission statement](#) for 2022-26:
  - “Protecting the **public** from deceptive or unfair business practices and from unfair methods of competition through law enforcement, advocacy, research, and education.” (emphasis added)

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## Summary of the Advance Notice of Proposed Rulemaking (ANPR) on Commercial Surveillance and Data Security

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## Background of the ANPR (Continued)

- In July 2021, President Biden issued [Executive Order 14036](#), urging the FTC to exercise its Section 18 rulemaking authority to address “unfair data collection and surveillance practices.”
- Also in July 2021, the FTC voted out updates to its [Rules of Practice](#), by 3-2, along party lines, to “streamline” the Section 18 rulemaking process. Commissioner Wilson criticized the changes in a dissenting statement, arguing that they:
  - Pared down procedural safeguards imposed by Congress;
  - Limited independence of the chief presiding officer;
  - Reduced opportunities for public input; and
  - Did away with the final staff report highlighting key issues and formulating recommendations based on the rulemaking record.
- The ANPR was also voted out along party lines, by 3-2.

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## Background of the ANPR

- On August 11, 2022, the FTC published an [Advance Notice of Proposed Rulemaking \(ANPR\)](#) on “commercial surveillance” and data security.
  - The ANPR broadly defines “commercial surveillance” as “the collection, aggregation, analysis, retention, transfer, or monetization of consumer data and the direct derivatives of that information.”
    - This definition was the subject of debate at the September 8 Public Forum: Some industry representatives argued that this definition is too broad, and assumes that commercial data collection and use is inherently bad, while some industry representatives urged the FTC to proceed with this definition.
- The FTC relies on its Section 18 Magnuson-Moss (“Mag-Moss”) rulemaking authority. Publishing the ANPR is the first step in this process.
  - Mag-Moss rulemaking imposes significant substantive and procedural requirements. The FTC has rarely pursued this type of rulemaking in the 50 years since Congress granted the authority to the Commission.
- The ANPR was published in the *Federal Register* on August 22, 2022, and comments will be accepted until October 21, 2022.

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## Overview of the ANPR

- Section I discusses the Commission's reasoning for starting rulemaking:
  - Considering whether rules on “commercial surveillance” and “lax data practices” are necessary;
  - Generating a public record of relevant practices and regulatory responses; and
  - Creating more predictability for consumers and businesses.
- The Overview also claims that “commercial surveillance” and “lax data security practices” may be prevalent and unavoidable, citing specific concerns regarding:
  - Data collection and monetization, asserting consumers have to “surrender” personal information to participate;
  - Information asymmetries, alleging consumer consent is not necessarily “meaningful or informed”; and
  - Harms to consumers, claiming a broad range of harms (financial, safety or physical, mental health, discrimination, and more) flow from data practices.

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## The Commission's Authority

- Section 18 of the FTC Act grants the FTC the authority to promulgate rules regarding unfair or deceptive acts and practices when the Commission “has reason to believe that the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are prevalent.”
- “Prevalence” is determined by:
  - Prior FTC cease-and-desist orders; or
  - When the FTC has “any other information” that “indicates a widespread pattern of unfair or deceptive acts or practices” (here, the rulemaking record).

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## The Commission's Authority (Continued)

- "Unfairness" means an act or practice:
  - Causes or is likely to cause substantial injury to consumers;
  - Which consumers cannot reasonably avoid;
  - And is not outweighed by countervailing benefits to consumers or competition.

[\(FTC Policy Statement on Unfairness, Appended to International Harvester Co., 104 F.T.C. 949, 1070 \(1984\). See 15 U.S.C. § 45\(n\)\).](#)
- "Deception" means an act or practice:
  - Misleads or is likely to mislead a consumer;
  - Acting reasonably under the circumstances;
  - When the misleading practice, representation, or omission is material.

[\(FTC Policy Statement on Deception, Appended to Cliffdale Associates, Inc., 103 F.T.C. 110, 174 \(1984\)\).](#)

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## The Commission's Current Approach to Privacy and Data Security

- The ANPR summarizes a long line of FTC enforcement actions alleging violations of Section 5 of the FTC Act (i.e., unfair or deceptive acts and practices) or of other statutes and various related harms, as well as remedies obtained in these matters
- The ANPR notes that "enforcement alone without rulemaking may be insufficient to protect consumers from significant harms," citing three key reasons for rulemaking:
  - Limited remedies in the FTC Act;
  - Current remedies that allegedly fall short regarding providing consumer relief or addressing harm that has occurred or is likely to occur; and
  - Challenges applying currently-available forms of relief to "harmful commercial surveillance or lax data security practices that may not cause direct financial injury or, in any given individual case, do not lend themselves to broadly accepted ways of quantifying harm."

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## Questions

- The ANPR asks the public to comment on:
  - The nature and prevalence of “harmful commercial surveillance and lax data security practices”;
  - The balance of costs and countervailing benefits of such practices and of any potential trade regulation rule; and
  - Proposals for protecting consumers.
- However, the FTC states the ANPR does not encompass the “full scope” of potential regulatory interventions the Commission may consider and invites input on rules in force in U.S. states, foreign jurisdictions, and other legal jurisdictions.
  - Several participants in the FTC’s September 8<sup>th</sup> Public Forum urged the FTC to take account of laws and enforcement experience in Europe, including with respect to online advertising.

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## Questions (Continued)

- The ANPR includes 95 questions total, grouping them into four categories for public comment:
  - To what extent do commercial surveillance practices or lax data security measures harm consumers?
  - To what extent do commercial surveillance practices or lax data security measures harm children, including teenagers?
  - How should the Commission balance costs and benefits?
  - How, if at all, should the Commission regulate harmful commercial surveillance or data security practices that are prevalent?

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## Questions (Continued)

Topics addressed by questions in the ANPR include:

- “Surveillance” of consumers
- Data security
- Privacy of children and teenagers
- Targeted advertising
- Biometrics
- Dark patterns
- Algorithmic decision-making
- Civil rights
- Notice and consent frameworks
- Employee monitoring.

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## Commissioners’ Supporting Statements – Democrats

- **Chair Lina M. Khan** discussed building a “rich public record” and documenting particular business practices and their prevalence.
  - Her priorities within the ANPR include: procedural protections versus substantive limits; administrability; business models and incentives; discrimination based on protected categories; and workplace surveillance.
- **Commissioner Alvaro Bedoya** remarked that the breadth of questions in the ANPR would generate diverse public comments on “whether and how” rulemaking continues.
  - His priorities within the ANPR include: emerging discrimination issues; kids’ and teens’ mental health; how to protect non-English-speaking communities from fraud and other abusive data practices; and how to protect against unfair or deceptive practices related to biometrics.
  - In a speech on September 20<sup>th</sup>, he added his concern over data tracking and tactics to keep users, especially children, online and engaged in ways that may be harmful.
- **Commissioner Rebecca Kelly Slaughter** commented on the importance of the FTC using tools available to it to address unlawful practices and “data abuses.”
  - Her priorities within the ANPR include: minimization and purpose and use specifications; civil rights, vulnerable populations, and discriminatory algorithms; and kids and teens.

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## Commissioners' Dissenting Statements – Republicans

- **Commissioner Noah Phillips** dissented and described the ANPR as a “naked power grab” that would restructure the Internet economy without a clear congressional mandate. He stated he would prefer congressional action on consumer privacy.
- Commissioner Phillips criticized the ANPR for not meeting the FTC Act’s requirement to briefly describe the Commission’s intended area of inquiry and objective. He added that the ANPR seeks to regulate conduct outside the scope of historical FTC enforcement.
- **Commissioner Christine Wilson** dissented and commented that she hopes the rulemaking will not derail the American Data Privacy Protection Act (ADPPA) in Congress, adding that she believes federal privacy legislation is the best and appropriate solution.
- She noted procedural reservations, too: “streamlined” changes to Section 18 rulemaking; the difference between the FTC’s enforcement history and the practices in the ANPR; the Supreme Court’s distaste for regulatory overreach; and a lack of faith that Chair Khan would limit a potential rule to the FTC’s congressionally defined authority.

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## FTC’s Public Forum – September 8, 2022

- The FTC held a [Virtual Public Forum](#) on September 8, 2022
- Two panels and public comments
- Panel 1: Industry Perspectives
  - Allow for responsible use of data
  - Allow Congress to legislate on privacy and data security
  - Focus on areas on general consensus, such as widely-accepted security safeguards
  - Invoking 1970’s “Kid-Vid” debacle

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## A Very Brief Background on “KidVid”

- In 1978, at the urging of child advocates, the FTC initiated a rulemaking proceeding to protect children from exploitation by television advertising. The FTC staff proposed rules that would have resulted in a ban of most children’s television advertising.
- This was the culmination of years of rulemakings by the Commission, led by then-chair Michael Pertschuk, including the Funeral Rule and the Used Car Rule.
- The media and Congressional reaction was forceful.
  - The Washington Post published an editorial calling the FTC “the national nanny.”
  - At one point, Congress allowed the FTC’s funding to lapse, closing the agency for several days. In addition, Congress shut down the Children’s Advertising Rulemaking, and stripped FTC’s authority to write rules about “unfair” advertising.

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## A Very Brief Background on “KidVid” (Continued)

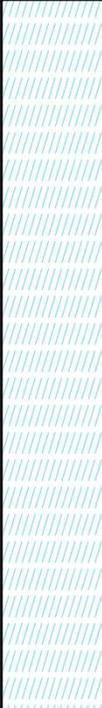
The media and Congressional reaction was forceful (Continued).

- Congress added new restrictions on rulemaking in the 1980 FTC Improvements Act, including a requirement for the text of a rule to be published for comment, an independent presiding officer, a preliminary and final regulatory impact analysis, and a two-house legislative veto (later ruled unconstitutional).
- The Commission was not reauthorized for more than a decade after the children’s rulemaking was terminated.

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## Why Did the Commission Publish the ANPR and Pursue This Rulemaking?

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## Why?

- **Long-standing and present intent.** Commissioner Slaughter noted that she has wanted to pursue a privacy rulemaking [since at least 2019](#).
- **Votes.** The Democratic members of the Commission have the majority and intend to use it.
- **Prophylactic rule.** The FTC wants to set a prophylactic rule to prevent harms, not just react to them.
- **“Efficient” enforcement.** The Commission wants to set a standard via rulemaking that would take a long time to establish through case-by-case enforcement alone.
- **Another route to civil penalties.** The FTC lost its civil penalty authority in the first instance in *AMG Capital Management, LLC v. FTC*.

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## What Is the FTC Trying to Accomplish?

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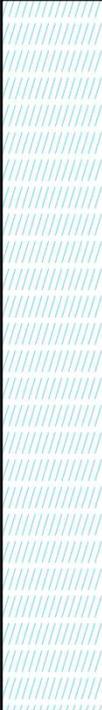
### What?

- **A prophylactic rule...** The FTC wants to set a prophylactic rule to prevent harms and not resign itself to more reactive case-by-case enforcement.
  - **Chair Khan:** “As the country’s *de facto* law enforcer in this domain, the FTC is charged with ensuring that our approach to enforcement and policy keeps pace with these new market realities . . . Yet the growing digitization of our economy . . . means that potentially unlawful practices may be prevalent, with case-by-case enforcement failing to adequately deter lawbreaking or remedy the resulting harms.”
  - **Commissioner Slaughter:** “It is up to the Commission to use the tools Congress explicitly gave us, however rusty we are at wielding them, to prevent these unlawful practices. That is why I have consistently, for years, called for the Commission to begin the process to consider clear, bright-line rules against unfair or deceptive data practices pursuant to our Section 18 authority.”
- **...With civil penalties available as a remedy in the first instance.** Unlike Section 5 cases, the FTC can obtain civil penalties for violations of trade regulation rules in the first instance.
- However, **Commissioner Phillips** issued a statement saying that the ANPR lacks clear signals of the specifics of a potential rule(s): “It is impossible to discern from this sprawling document—which meanders in and out of the jurisdiction of the FTC and goes far afield from traditional data privacy and security—the number and scope of rules the Commission envisions.”

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## How Does the ANPR Affect Federal and State Legislative Efforts to Regulate Privacy and Data Security?

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### May Take Urgency Out of Federal Efforts, but States Persist

- Despite the Commissioners uniformly stating their support for federal privacy legislation and the ADPPA, the FTC's ANPR on privacy and data security could reduce the urgency associated with federal legislative efforts.
  - The **ADPPA** has progressed further in the federal legislative process than other comprehensive privacy proposals.
- The FTC's ANPR seems unlikely to affect state legislative and regulatory efforts.
  - **California, Virginia, Colorado, Utah, and Connecticut** have each passed comprehensive privacy legislation, and California and Colorado are working on new regulations.

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## What Is the Process the FTC Must Go Through under Section 18 of the FTC Act to Promulgate a New Rule?

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## Procedures for Promulgating a Trade Regulation Rule Under Section 18 of the FTC Act – 16 CFR

Petitions to commence trade regulation rule proceedings.

Advance notice of proposed rulemaking.

- Written comments.

Commencement of a rulemaking proceeding.

- Notice of proposed rulemaking.
- Preliminary regulatory analysis.
- Written comments, rebuttal comments, list of disputed issues of material fact.
- Opportunity for an informal hearing.

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## Procedures for Promulgating a Trade Regulation Rule Under Section 18 of the FTC Act – 16 CFR (Continued)

### Notice of informal hearing and designations.

- Initial notice of informal hearing.
- Requests to conduct cross-examination or present rebuttal submissions regarding disputed issues of material fact.
- Final notice of informal hearing.
- Designation of group representatives for cross-examination.

### Conduct of informal hearing by the presiding officer.

- Presiding officer (FTC Chair or her designee).
- Additional procedures when there are disputed issues of material fact.
- Cross-examination of oral presentations and rebuttal submissions by interested persons.
  - Written transcript.
  - Recommended decision on disputed issues of material fact.

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## Procedures for Promulgating a Trade Regulation Rule Under Section 18 of the FTC Act – 16 CFR (Continued)

### Promulgation.

- Statement of basis and purpose.
- Final regulatory analysis.

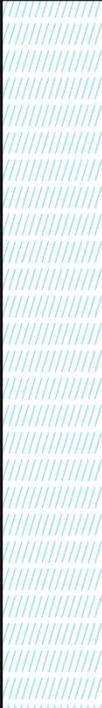
### Rulemaking record.

- Communications to Commissioners and Commissioners' personal staffs.

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## How Long Does the Rulemaking Process Take? How Do You or Your Business or Trade Association Engage with the FTC?

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## Rulemaking Process and Engagement

- How Long Does the Rulemaking Process Take?
  - Can take from 5 to 7 years.
  - This already lengthy timeline could be further disrupted by electoral shifts that change the political composition of the FTC's commissioners, changing the then-existing Commission's priorities.
- How to Engage with the FTC
  - **Early and often**
    - Comments on ANPR and NPRM.
    - Participate in any hearings.
    - Meet with Commissioners and staff.
      - Special rules for *ex parte* meetings.

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**Questions + Contact**



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