

Flurry of New FTC Rules and Policies Signals Era of Aggressive Enforcement Despite Recent Supreme Court Defeat

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On July 1, 2021, the Federal Trade Commission (“FTC”) instituted a flurry of unprecedented changes that presage the arrival of a new era of aggressive FTC enforcement. In fact, possibly anticipating an immediate need for maximum personnel to pursue aggressive enforcement, it has been reported that the FTC ordered staff to cancel all public appearances and imposed a moratorium on public events and press outreach.¹ This was followed by President Biden’s July 9, 2021 Executive Order on “Promoting Competition in the American Economy” that further empowers the FTC to more aggressively apply its legal authorities, targeting a number of industry sectors including healthcare (particularly hospitals, health insurers, and companies selling prescription drugs and hearing aids) and technology.²

The FTC’s recent actions have been led by the newly confirmed FTC Chair, Lina Khan, a former Associate Professor of Law at Columbia Law School. Chair Khan was nominated by President Biden to lead the FTC, which previously operated under a 2-2 Commissioner split across political lines. Chair Khan’s confirmation by the Senate on June 15, 2021 gave the Democratic Commissioners a 3-2 majority.

Shortly after Chair Khan’s confirmation, with only one week’s notice to their two Republican colleagues, the three Democratic Commissioners voted to implement dramatic changes to a number of FTC rules and policies, including a new rule governing “Made in USA” claims (“MUSA claims”) and changes to the traditional Magnuson-Moss rulemaking procedure that could expedite future rulemaking efforts—particularly targeting privacy, cybersecurity, and other priorities outlined in the President’s July 9 Executive Order.³

¹ Leah Nysten & Betsy Woodruff Swan, *FTC Staffers Told to Back Out of Public Appearances*, POLITICO (July 6, 2021, 6:36 PM EDT), <https://www.politico.com/news/2021/07/06/ftc-staffers-public-appearances-498386>.

² *Executive Order on Promoting Competition in the American Economy*, WHITE HOUSE (July 9, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

³ On June 23, 2021, Republican FTC Commissioner Christine Wilson signaled that despite significant reservations, she is now prepared to join with her fellow Democratic Commissioners to explore the promulgation of an FTC privacy rule.

More specifically, by a 3-2 vote, the FTC:

- finalized a broad administrative rule imposing civil penalties on violative MUSA claims;
- removed certain internal safeguards from rulemaking proceedings;
- rescinded the 2015 bipartisan enforcement policy on unfair competition; and
- granted broad authority to FTC staff to open legally binding investigations with authorization from only a single commissioner.

These broad partisan changes arise in the context of another FTC development we recently reported on,⁴ a major judicial defeat where the Supreme Court held that the FTC cannot seek equitable monetary remedies under Section 13(b) of the Federal Trade Commission Act (the “FTCA”).⁵ As one of the FTC’s primary enforcement methods for decades, this loss was expected to be a significant roadblock to future enforcement efforts.

Given that these changes came so soon after the FTC’s Supreme Court loss in *AMG Capital*, and while the FTC is simultaneously lobbying Congress to grant the FTC the same authority denied by the Supreme Court, the FTC’s actions from July 1 suggest that the FTC under Chair Khan will not be cowed. Instead, the FTC is poised to pursue aggressive enforcement—including by broadly interpreting its own statutory authority. The new MUSA claim rule, for example, suggests the FTC may begin to test the limits of its rulemaking power, if needed, to circumvent unfavorable Supreme Court decisions and absence of congressional action.

Also of note is the speed at which the FTC’s actions came after Chair Khan’s confirmation, which may reflect the need to implement the changes prior to Commissioner Rohit Chopra’s anticipated exit from the FTC. In January 2021, President Biden nominated Commissioner Chopra to head the Consumer Financial Protection

⁴ Debevoise In Depth: Unanimous Supreme Court Curtails the Federal Trade Commission’s Authority to Obtain Monetary Remedies in Federal Court (Apr. 26, 2021), <https://www.debevoise.com/insights/publications/2021/04/unanimous-supreme-court-curtails-the-federal-trade>. For previous Debevoise updates on FTC activity, see, e.g., Debevoise In Depth: Destruction Emerges as a Powerful Enforcement Measure for AI: FTC Requires Company to Delete Models Trained with Improperly Utilized Consumer Data (Jan. 19, 2021), <https://www.debevoise.com/insights/publications/2021/01/destruction-emerges-as-a-powerful-enforcement>; Debevoise In Depth: The FTC Proposes Amendments to the HSR Rules That Would Redefine “Person” to Include “Associates” and Create a New “de Minimis” Exemption (Oct. 14, 2020), <https://www.debevoise.com/insights/publications/2020/10/the-ftc-proposes-amendments-to-the-hsr-rules>.

⁵ *AMG Cap. Mgmt., LLC v. FTC*, No. 19-508 slip op. (S. Ct. Apr. 22, 2021).

Bureau (“CFPB”). If, as expected, Commissioner Chopra (one of the three Democratic Commissioners) is soon confirmed by the Senate, his departure would result in a 2-2 party-line split—preventing partisan policy changes. Even though President Biden will ultimately nominate another Democratic Commissioner, the nomination process and Senate confirmation could take many months. Rather than waiting, the FTC under Chair Khan took full advantage of the current (and potentially fleeting) 3-2 majority.

Overview of New Policies Implemented by the FTC on July 1, 2021: MUSA Civil Penalties, Magnuson-Moss Procedural Changes, 2015 Enforcement Policy Rescission, and Staff Authority to Open Civil Investigations

MUSA Rulemaking

To assert its rulemaking authority, the FTC typically must go through a process mandated by Congress under the Magnuson-Moss Act (“Mag-Moss”). The Mag-Moss rulemaking process is notably arduous in comparison to the notice-and-comment rulemaking process stipulated by the Administrative Procedure Act. Since 1975, only seven FTC rulemaking efforts under the Mag-Moss process have been completed, taking an average of nearly six years each.

Congress, however, carved out an exception to the Mag-Moss process in 15 U.S.C. 45a (“Section 45a”) for rules purporting to govern MUSA labeling claims. This rulemaking power includes authorization for the FTC to levy civil penalties for violative MUSA claims. As part of its unprecedented exercise of power on July 1, the FTC utilized this carve-out to create a new rule that imposes stricter sanctions on deceptive MUSA claims on product “labels.”⁶

The rule memorializes the following three established requirements for companies seeking to make a MUSA claim on product labels:

- The final assembly or processing of the product must have occurred in the United States;
- all significant product processing must have occurred in the United States; and

⁶ FTC Press Release, FTC Issues Rule to Deter Rampant Made in USA Fraud, (July 1, 2021), <https://www.ftc.gov/news-events/press-releases/2021/07/ftc-issues-rule-deter-rampant-made-usa-fraud>.

- all or virtually all of the product's ingredients or components must have been made or sourced in the United States.⁷

The new MUSA rule also authorizes the FTC to pursue civil penalties up to \$43,280 for each rule violation.

The final rule's most controversial component is the definition of "label." The FTC expanded the "label" definition to include digital labels, arguing they are the "functional equivalent" of physical labels and are therefore subject to FTC regulation under Section 45a.⁸ Commissioner Chopra justified this drastic expansion based on what he believes is the absence of congressional intent to limit labels to physical labels.

The dissenting Commissioners, Commissioners Wilson and Phillips, indicated that they believe the new MUSA rule is beyond the scope of the FTC's rulemaking authority under Section 45a and regulates advertising generally.⁹ In her written dissent, Commissioner Wilson raised serious concerns about the breadth of the "label" definition, which will include all:

materials, used in the direct sale or direct offerings for sale of any product or service, that are disseminated in print or by electronic means, and that solicit the purchase of such product or service by mail, telephone, electronic mail, or some other method without examining the actual product purchased.¹⁰

Commissioner Wilson believes that such a broad definition could reasonably be construed to cover all advertising, even advertising marks like hashtags that contain MUSA or MUSA-like claims. Commissioner Wilson suggests this rule should have gone through the Mag-Moss procedure, but she was unable to meaningfully engage in this discussion with the other Commissioners due to the brevity of the July 1 meeting and unusually short notice.

⁷ FTC Press Release, Proposed Text of Made in USA Labeling Rule (July 1, 2021), <https://www.ftc.gov/policy/federal-register-notices/proposed-text-made-usa-labeling-rule>.

⁸ *Id.*

⁹ FTC Press Release, Dissenting Statement of Commissioner Christine S. Wilson Regarding Final Rule Related to Made in USA Claims (July 1, 2021), <https://www.ftc.gov/public-statements/2021/07/dissenting-statement-commissioner-christine-s-wilson-regarding-final-rule>.

¹⁰ FTC Press Release, Proposed Text of Made in USA Labeling Rule (July 1, 2021), https://www.ftc.gov/system/files/documents/federal_register_notices/2021/07/2021-07-01_clean_musa_finalrule.pdf (see § 323.1(b) on page 41 and § 323.3 on pages 41-21).

Changes to Mag-Moss Rulemaking Procedures

Given the limited scope of the Section 45a exception, the FTC also voted on July 1 to remove internal roadblocks to the Mag-Moss rulemaking procedure. In a motion passing 3-2 on a party-line vote, the Democratic Commissioners removed the Chief Administrative Law Judge (“ALJ”) from the role of Presiding Officer in Section 18 rulemaking; Chair Khan or her designee will instead assume the role of Presiding Officer, giving Chair Khan even greater control over future rulemaking efforts.¹¹

The motion also removed the requirement to have a staff report accompany rule recommendations.¹² Commissioner Slaughter stated the requirement was an unnecessary restraint.¹³ The dissenting Commissioners argue that these changes both threaten the independence of FTC rulemaking and lend legitimacy to public criticisms that the FTC is a politically motivated agency—increasing the risk of congressional backlash.

Rescission of Antitrust Policy Statement Regarding “Unfair” Practices

In a separate motion, the FTC majority rescinded a 2015 bipartisan antitrust policy statement that established a framework for when the FTC would use its Section 5 “unfair methods of competition” powers.¹⁴ Chair Khan said that the policy statement contributed to the FTC’s “longstanding failure to investigate and pursue” unfair competition.¹⁵ She and the other Democratic Commissioners believe the FTCA was meant to circumvent the Supreme Court’s “Rule of Reason” analysis that has long dominated judicial review of antitrust litigation.

¹¹ FTC Press Release, Statement of Commissioner Rebecca Kelly Slaughter Joined by Chair Lina Khan and Commissioner Rohit Chopra: Regarding the Adoption of Revised Section 18 Rulemaking Procedures (July 1, 2021), <https://www.ftc.gov/public-statements/2021/07/statement-commissioner-rebecca-kelly-slaughter-joined-chair-lina-khan>.

¹² FTC Press Release, Dissenting Statement of Commissioner Christine S. Wilson: Open Commission Meeting on July 1, 2021 (July 1, 2021), <https://www.ftc.gov/public-statements/2021/07/dissenting-statement-commissioner-christine-s-wilson>.

¹³ FTC Press Release, Statement of Commissioner Rebecca Kelly Slaughter Joined by Chair Lina Khan and Commissioner Rohit Chopra: Regarding the Adoption of Revised Section 18 Rulemaking Procedures (July 1, 2021), <https://www.ftc.gov/public-statements/2021/07/statement-commissioner-rebecca-kelly-slaughter-joined-chair-lina-khan>.

¹⁴ FTC Press Release, Remarks of Commissioner Noah Joshua Phillips Regarding the Commission’s Withdrawal of the Section 5 Policy Statement (July 1, 2021), <https://www.ftc.gov/public-statements/2021/07/dissenting-remarks-commissioner-noah-joshua-phillips-regarding-commissions>.

¹⁵ FTC Press Release, Remarks of Chair Lina M. Khan on the Withdrawal of the Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act (July 1, 2021), <https://www.ftc.gov/public-statements/2021/07/remarks-chair-lina-m-khan-withdrawal-statement-enforcement-principles>.

Dissenting Commissioner Wilson believes that the removal of the “modest constraint” will lead to FTC enforcement based upon political motivations rather than the prevailing consumer welfare standard of antitrust law.¹⁶ The language used by the Democratic Commissioners suggests that increased antitrust enforcement, aided in part by this repeal, is forthcoming. In fact, on July 12, 2021, the FTC announced the agenda for its forthcoming open hearing on July 21, 2021 that will consider the rescission of its 1995 policy statement regarding “prior approval” and “prior notice” remedies in merger cases.

Authorization to More Easily Permit FTC Staff to Open Enforcement Investigations

The FTC voted to approve seven omnibus resolutions, as a package, that authorize FTC staff to use compulsory processes with the approval of only a single Commissioner. The Democratic Commissioners believe that technology companies, pharmaceutical companies, pharmacy benefits managers and hospitals, among others, are a priority for investigation and enforcement and voted 3-2 to approve the omnibus resolutions.¹⁷

This is a stark departure from previous FTC practice, where approval from a majority of the commissioners was required. Chair Khan may have a particularly strong influence over this process due to her ability to appoint senior staff members, resulting in profound implications for a number of industry sectors including the healthcare, pharmaceutical, and technology sectors, which are expected to be a major target for future FTC enforcement.¹⁸ Moreover, the anticipated departure of Commissioner Chopra would not impact enforcement resolutions as only a single commissioner would be required to authorize an investigation.

Implications for Pending and Future FTC Enforcement

The President’s Executive Order and the FTC rules and motions passed on July 1, 2021 all point toward a more aggressive FTC. Under Chair Khan, the FTC has enhanced its

¹⁶ FTC Press Release, Dissenting Statement of Commissioner Christine S. Wilson: Open Commission Meeting on July 1, 2021 (July 1, 2021), <https://www.ftc.gov/public-statements/2021/07/dissenting-statement-commissioner-christine-s-wilson>. In his dissenting remarks, Commissioner Phillips points to the recent *NCAA v. Alston* case as an example of how the Rule of Reason framework is not overly restrictive for successful enforcement. FTC Press Release, Remarks of Commissioner Noah Joshua Phillips Regarding the Commission’s Withdrawal of the Section 5 Policy Statement (July 1, 2021), <https://www.ftc.gov/public-statements/2021/07/dissenting-remarks-commissioner-noah-joshua-phillips-regarding-commissions>.

¹⁷ The seven omnibus resolutions also target repeat offenders, harm against workers and small businesses, and harm related to the COVID-19 pandemic.

¹⁸ In addition to identifying the pharmaceutical industry more broadly as a target for investigation, pharmaceutical companies have come under FTC scrutiny recently based upon use of so-called “rebate walls.”

rulemaking authority, removed internal roadblocks for future rulemaking, and decreased Commission oversight while increasing individual Commissioner and staff power over investigatory actions.

The enforcement implications are exceedingly broad but for now we highlight the following:

- **Antitrust Enforcement:** Withdrawing the Section 5 statement likely presages the Commission bringing actions against unfair competition that would not be found to violate existing antitrust law. It is unclear how far the FTC will push those boundaries and in any event a crop of new bills seeking to expand the existing antitrust laws are making their way through Congress.
- **MUSA Rule Enforcement:** Companies making violative MUSA claims are now subject to extensive civil penalties. In recent years the FTC has often closed investigations addressing MUSA claims as long as companies agreed to cease making the violative claims. Finalization of the MUSA rule may result in more aggressive, routine enforcement by the FTC.
- **Privacy Rule:** The FTC commissioners have signaled their interest in developing a privacy rule establishing legally binding requirements addressing privacy and cybersecurity. Mag-Moss rulemaking procedures have historically created an impediment to implementation of a privacy rule, but the FTC's rule changes on July 1 should increase the likelihood such rulemaking will proceed.
- **Increased Oversight of the Pharmaceutical Industry:** The Executive Order directs the FTC to more aggressively police drug industry mergers, write regulations that prohibit "pay-for-delay" settlements between brand and generic drug companies that delay generic competition, and work with the FDA to enforce against false, misleading, or otherwise deceptive statements about generic drug and biosimilar products and their safety or effectiveness.
- **Increased Number of Investigations, Particularly Targeting Healthcare and Technology Companies:** This may be the most significant change as now only a single commissioner is required to authorize certain FTC investigations.

Despite the expected exit of Commissioner Chopra to the CFPB, the Democratic Commissioners have taken full advantage of their current majority to situate the FTC to efficiently operate and pursue investigations even after Chopra's departure. Companies should expect a significant increase in FTC enforcement and investigations, especially in the seven areas covered by the omnibus resolutions.

We will continue to monitor any updates related to the FTC and future enforcement activities. Please do not hesitate to contact us with any questions.

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